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Torts--Strict Liability for Services Chevron v. Sutton

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TORTS—STRICT LIABILITY FOR SERVICES
CHEVRON v. SUTTON

Plaintiff Sutton brought suit for wrongful death against the petitioner, Chevron Oil Company, service station lessee Lee Sharp and Sharp's employee, Herbert R. Buss. Sutton's wife died as a result of injuries sustained in an automobile accident which occurred when a wheel that Buss had repaired came off the auto. The District court granted Chevron's motion for a summary judgment. On appeal to the Court of Appeals, the summary judgment was reversed. One of the grounds for its decision was that the theory of strict liability was applicable:

> We hold that Chevron is strictly liable for the torts of Sharp and Buss regardless of the legal relationship created by Chevron. This responsibility is placed on Chevron for the protection of the motoring public who consumes the product or uses the services of the station operator.[1]

The Supreme Court reversed the Court of Appeals and remanded the cause to the District court for action consistent with its opinion that, depending on the facts, Chevron might be liable on two possible theories, neither of them being strict liability:

> One of the grounds upon which the Court of Appeals based its decision was that of strict liability. We discussed this doctrine at length in Stang v. Hertz Corporation, 83 N.M. 730, 497 P.2d 732 (1972). Nothing we said in our decision in that case can properly be enlarged or extended to embrace the factual situation here.[2]

On June 15, 1968, Standard Oil Company, the lessor, leased the service station and premises to Leland A. Sharp. On the same day, Standard Oil Co., as a seller, entered into a "sales agreement" with Sharp as "buyer," in which Standard agreed to sell and deliver gasoline, motor fuel, lubrication oil and petroleum products to Sharp, and Sharp agreed to purchase and sell. Should any of these parties be held liable for the sale of a defective service? To answer that question we must understand the history of the development of the strict liability concept to further aid us in the analysis of strict liability

1. Sutton v. Chevron Oil Co., 85 N.M. 604, 514 P.2d 1301 (1973).
2. Chevron Oil Co. v. Sutton, 85 N.M. 679, 515 P.2d 1283 (1973).

with regard to services rendered alone or services rendered in combination with the sale of a product.

Since the early days of the common law those engaged in the business of selling food intended for human consumption have been held to a high degree of responsibility for their products. As long ago as 1266 there were enacted special criminal statutes imposing penalties upon victualers, vintners, brewers, butchers, cooks, and other persons who supplied "corrupt" food and drink.[3] In the earlier part of this century this ancient attitude was reflected in a series of decisions in which the courts of a number of states sought to find some method of holding the seller of food liable to the ultimate consumer even though there was no showing of negligence on the part of the seller.[4] These decisions represented a departure from, and an exception to, the general rule that a supplier of chattels was not liable to third persons in the absence of negligence or privity of contract.

At first, these decisions displayed considerable ingenuity in evolving more or less fictional theories of liability to fit particular fact setting. The various devices included an agency of the intermediate dealer or another to purchase for the consumer, or to sell for the seller; a theoretical assignment of the seller's warranty to the intermediate dealer; a third party beneficiary contract; and an implied representation that the food was fit for consumption because it was placed on the market; as well as numerous others. Recently the courts have become more or less agreed upon the theory of a "warranty" from the seller to the consumer, either "running with the goods" by analogy to a covenant running with the land, or made directly to the consumer. Other decisions have indicated that the basis is merely one of strict liability in tort, which is not dependent upon either contract or negligence.[5]

Since 1950, the decisions have extended this special rule of strict liability beyond the seller of food for human consumption. The first extension was into the closely analogous cases of other products intended for intimate bodily use. Cosmetics, for example, where the application to the body of the consumer is external rather than internal. Beginning in 1958 with a Michigan case involving cinder building blocks, a number of decisions have discarded any limitation to intimate association with the body, and have extended the rule of strict liability to cover the sale of any product, which, if defective,

3. Restatement of Torts 2d, Explanatory Note 402A, comment b at 348-349 (1965).

4. *Id.*

5. Prosser, *The Fall of the Citadel,* 50 Minn. L. Rev. (1966), discussing the landmark case of Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

may be expected to cause physical harm to the consumer or his property.[6]

The courts have not allowed the expansion of the strict liability concept to persons rendering either professional or nonprofessional services,[7] but this disallowance has not been applied where defendant rendered ultrahazardous services[8] or where the transaction was in part a sale and in part the furnishing of services.[9] The expansion of the scope of strict liability with regard to services can be shown by the decisions in cases involving beauty parlors, one of the most widespread service industries in the United States.

Newmark v. Gimbel's, Inc., supra, involved the liability of a beauty parlor operator for injury to a patron's hair and scalp resulting from a product used in giving a permanent wave. Alluding to *Magrine v. Krasnica,* the court stated:

> Defendants claim that to hold them to strict liability would be contrary to Magrine v. Krasnica, 94 N.J. Super. 228, 227 A2d 539 (Cty. Ct. 1967), aff'd sub nom. Magrine v. Spector, 100 N.J. Super. 223, 241, A2d 637 (App. Div. 1968), aff'd 53 N.J. 259, 250 A2d 129 (1969). We cannot agree. Magrine, a patient of the defendant–dentist, was injured when a hypodermic needle being used, concededly with due care, to administer a local anesthetic broke off in his gum or jaw. The parties agreed that the break resulted from a latent defect in the needle. It was held that the strict liability in tort doctrine was not applicable to the professional man, such as a dentist, because the essence of the relationship with his patient was the furnishing of professional skill and services. We accepted the view that a dentist's bill for services should be considered as representing pay for that alone. The use of instruments, or the administration of medicines or the providing of medicines for the patient's home consumption cannot give the ministrations the cast of a commercial transaction. Accordingly the liability of the dentist in cases involving

6. *Id.* at 804.

7. Magrine v. Krasnica, 94 N.J. Super 228, 227, A.2d 539, *affd sub nom* Magrine v. Spector, 100 N.J. Super 223, 241 A.2d 637, *affd without op.* 53 N.J. 259, 250 A.2d 129 (dentist not liable for personal injuries sustained by plaintiff when, because of defect, hypodermic needle broke off in plaintiff's gum); Barbee v. Rogers (Tex) 125 S.W.3d 342 (optometrist not strictly liable for improper fitting of contact lenses); La Rossa v. Scientific Design Co. (1968, Ch 3 N.J.) 402 F.2d 937, 29 A.L.R.3d 1416 (strict liability held inapplicable to services rendered by an engineering company in the construction of a chemical plant); Pepsi Cola Bottling Co. v. Superior Burner Service Co. (1967, Alaska, 427 P.2d 833 (strict liability not applicable to one who rendered boiler repair services).

8. Luthringer v. Moore 31 Cal.2d 489, 190 P.2d (1948).

9. A beauty parlor operator administering treatment with a defective product may be held strictly liable for injuries to a customer. Newmark v. Gimbel's, Inc. 54 N.J. 585, 258 A.2d 697 (1969) (where court considered the treatment both a service and a sale of the defective product).

> the ordinary relationship of doctor and patient must be tested by principles of negligence, i.e., lack of due care and not by application of the doctrine of strict liability in tort.[10]

A service station provides in part a sale of a product and in part the furnishing of a service. A mechanic is not a defined professional as is a dentist so the transaction portion of selling the product should not be eradicated. The court in *Newmark* went further to provide:

> Defendants suggest that there is no doctrinal basis for distinguishing the services rendered by a beauty parlor operator from those rendered by a dentist or a doctor, and that consequently the liability of all three should be tested by the same principles. On the contrary there is a vast difference in the relationships. The beautician is engaged in a commercial enterprise; the dentist and doctor in a profession. The former caters publicly not to a need but to a form of aesthetic convenience or luxury, involving the rendition of nonprofessional services and the application of products for which a charge is made. The dentist or doctor does not and cannot advertise for patients; the demand for his services stems from a felt necessity of the patient. In response to such a call the doctor, and to a somewhat lesser degree the dentist, exercises his best judgment in diagnosing the patient's ailment or disability, prescribing and sometimes furnishing medicines or other methods of treatment which he believes, and in some measure hopes, will relieve or cure the condition. His performance is not mechanical or routine because each patient requires individual study and formulation of an informed judgment as to the physical or mental disability or condition presented, and the course of treatment needed. Neither medicine nor dentistry is an exact science; there is no implied warranty of cure or relief. There is no representation of infallibility and such professional men should not be held to such a degree of perfection. There is no guaranty that the diagnosis is correct. Such men are not producers or sellers of property in any reasonably acceptable sense of the term.[11]

The providing of services by an establishment such as a service station can be more readily analogyzed to the beauty parlor since: (1) the service station relies on advertising; (2) the service station is a commercial enterprise; (3) the parties involved do not "hope" the condition of the Toyota will be relieved, rather that it *will* be fixed; (4) the mechanic does not individually diagnose a customer to perform the service; (5) the mechanic's performance is usually mechanical and routine since he works on the same types of cars year after year; (6) there is a representation of infallibility by some service stations as to their repairs which might lead to the belief that the

10. 258 A.2d at 702.
11. 258 A.2d at 702-03.

infallibility is that of the major companies who finance and many times control these stations;[12] and (7) the stations are sellers of property in the accepted reasonable sense of the term.

In another line of cases involving hospitals, strict liability has been held not applicable in certain situations and applicable in other situations. In *Baptista v. Saint Barnabas Medical Center,*[13] strict tort or warranty liability was found inapplicable to the transfusion of incompatible blood. In so holding the court provided:

> Whatever may be the final policy decision to be reached in cases involving blood infected with viral hepatitis, we find no justification for extending the doctrine of strict liability to a case such as this *where the blood is not infected or defective.*
>
> To adopt such a rule would be to make a hospital an insurer of what are in essence *medical services* and opinions, the cross-matching and typing of blood. In our view, the same policy considerations which led the court in Newmark v. Gimbel's, Incorporated, 54 N.J. 585, 596-597, 258 A2d 697 (1969), to hold that the rules of strict liability in tort and implied warranty should not be imposed on dentists and doctors, apply to the services rendered by defendant hospital in this case. The obligation of hospital in cross-matching and typing blood in cases of blood tranfusions should continue to be as it is now, grounded and expressed in a duty to exercise reasonable competence and care. (emphasis supplied)

The same distinctions made by *Newmark* apply here, and, again we can distinguish the transfusion of blood from the servicing of an automobile in like manner. Much seems to hinge on the difficulty of

12. Sutton v. Chevron Oil Co., 85 N.M. 604, 514 P.2d 1301 (1973) where the facts included that:

> Prior to authorizing Chevron and Sharp to repair his Toyota, Sutton relied on statements made to him that Chevron had more skillful repairmen, was superior, and specialized in servicing and repair work on vehicles of his kind, the Toyota; that Sharp and Buss were agents and employees of Chevron. In addition to signs, uniforms, credit cards and credit privileges, Sutton relied on Chevron advertising in the classified section of the Albuquerque telephone directory. Here, Chevron states:
>
> > At the Sign of the Chevron, we take better care of your car with famous Chevron Gasolines and Motor Oils. Also Atlas Tires, Batteries, and Accessories sold on the Chevron Easy-Payment Plan.
> >
> > "WHERE TO GET SERVICE"
> >
> > Dealers (Emphasis added)
>
> Below are listed a large number of Chevron service station operations among which are included those which perform auto repairs, tune-ups, brakes, American and foreign car repair, and other forms of service. It advertises "A Mechanic on Duty." This advertising can lead the public to believe Chevron exercises control over its service stations; also, Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, aff'd on rehearing, 168 Wash. 465, 15 P.2d 1118 (1932), where the seller's strict liability was enlarged by express representations.

13. 109 N.J. Super 217, 262 A.2d 902, 906-907 (1970).

analyzing and diagnosing the ailments of a human being. The variables one deals with in analyzing an automobile are not as complex as the variables dealt with in analyzing a human being.

However, even in blood transfusion cases, it has been held that a hospital can be strictly liable where the patient contracted serum hepatitis from transfused blood. The court held in *Cunningham v. MacNeal Memorial Hospital*[14] that:

> The question before court was whether doctrine of strict tort liability applied in cases where plaintiff allegedly contracts serum hepatitis from transfused blood; court noted that basis of strict liability, even in earliest unwholesome food cases, was not implied warranty but public policy, and rejected defense contentions that blood was not a product and was not subject of a sale, citing numerous cases, including *Russell,* N 7 *supra* in text; court stated:
>
> We believe it is realistic and reasonable to hold that a sale is involved in the transaction whereby the patient comes into possession of blood. On oral argument in the case before us counsel for the hospital stated that a sale was not involved; that rather, there was an exchange of personal property for remuneration. That is an attempt to make a distinction without a difference. We agree with the opinion in Russell v. Community Blood Bank, Inc., *supra,* that to take a sale and twist into a service is a distortion.

Here the court is probably looking at a much more clear situation involving the control of the blood received by the hospital. When the blood is pure there is no way to tell how the deaths or complications occurred. When the blood is infected, one can tell very easily and be reasonably accurate in attaching the blame to the tranfusion. In *Brody v. Overlook Hospital,*[15] a 1972 case, the court held:

> Both a hospital and a blood bank could be liable to widow of deceased who was given blood which caused serum hepatitis. "The imposition of strict liability is predicated, not upon fault, but upon physical control over the defective product at a time when the product is in fact defective." The court also stated: "Since hospitals patronize the bank charging the lowest fee, there will be greater demand for blood from the bank with the better safety record. The incidence of hepatitis infection must thus be reduced."

With an auto part, someone in the "chain" has very good control over the variables that determine the effectiveness of the repair.

14. Personal Injury, Actions, Defenses, Damages, Vol. 4B, Supplement, p. 20, Matthew Bender, referring to Cunningham v. MacNeal Memorial Hospital at 113 Ill. App. 2d 74, 251 N.E.2d 733 (1969).

15. 296 A.2d 668 (N.J. Super 1972); *See also* Jackson v. Standard Oil Co. of Calif., 8 Wash. 83, 505 P.2d 139 (1972), on the issue of "control."

Again, establishments such as service stations are commercial enterprises, the product or service involved is fully visible and capable of being checked for defects. It is safe to say that a "sale" is involved any time mechanical services are performed.

From the history of strict liability throughout the United States we saw that it was adopted to meet changing conditions in the economy. Perhaps the law at times has lagged behind these changes, rather than preceding or arising concurrently, but public policy demands forced it to adjust. A need appeared, as in the "food sale" abuses; and the law responded. An example of this process in New Mexico came about in the leasing area, where it was impossible to meet public policy demands in favor of teaching lessors because of the intermediate lessee. The law responded and made the lessor strictly liable:

> We feel that the conditions and the needs of the times make it appropriate for the changes as we are here making. Most of the states who have adopted strict liability have done so through the judicial system.[16]

This leaves us at the frontier of deciding whether it is appropriate to extend the doctrine of strict liability to the area of services. Not only must the use of the strict liability doctrine in particular situations appear sound from a hypothetical viewpoint, but the appropriate fact situation must arise for the courts to initially extend the doctrine and be able to forecast the possible ramifications of that extension.

The amount and increase of service employment in New Mexico[17]

16. Stang v. Hertz, 83 N.M. 730, 735 P.2d 732 (1972).

17. New Mexico Estimated Civilian Work Force, Unemployment, and Employment, "New Mexico Bureau of Labor Statistics" shows that the number of employees engaged in manufacturing increased from 16,700 to 21,300 from 1960 to 1971 which is an increase of 27.5%. The increase from 1960 to 1971 of service employees was 49,400 to 62,400, an incrase of 26.3%. Furthermore, manufacturing has accounted for approximately 7% of total non-agricultural employment while services have accounted for about 21% of non-agricultural employment.

	New Mexico	Manufacturing		Non-ag employment
7.1%	1960	16,700 = %	x	236,300
6.6%	1968	18,200 = %	x	276,700
7.1%	1971	21,300 = %	x	300,800

New Mexico Wholesale and Retail Trade which includes items such as General Merchandising, Food Stores, Auto Dealers and Service Stations, Eating and Drinking places:

	New Mexico	Wholesale-Retail Trade		Non-ag employment
21.%	1960	49,400 = %	x	236,300
21.%	1968	57,700 = %	x	276,700
21.%	1971	62,400 = %	x	300,800

and throughout the United States[18] is indication enough that the sheer volume of possible service-torts must have increased over the years, with a corresponding increase in litigation. In New Mexico for September 1, 1973, the number of employees engaged in the wholesale and retail trade of auto dealers and service stations alone accounted for approximately 16.0% of total retail and wholesale trade.[19] If strict liability were to include all retail and wholesale establishments, it would account for 22.0% of total non-agricultural employment,[20] while total manufacturing would account for 8.3% of total non-agricultural employment.[21] There is a greater need to simplify litigation in New Mexico, where services are predominant, than in many other states where manufacturing is a much greater proportion of the economic activity. Yet other states have used the strict liability concept to a much greater extent,[22] at least prior to the Court of Appeals' decision in *Chevron v. Sutton.*[23]

The Supreme Court of New Mexico set forth the historical development of strict liability in tort as applied to products liability cases

18. United States Bureau of Labor Statistics, Establishment Data—Historical Employment—Employees on non-agricultural payrolls by industry division, shows that the number of employees in manufacturing increased 17.8% from 1960 to 1968. The increase from 1960 to 1968 of service employees was 23.6%. Furthermore, manufacturing has accounted for approximately 30% of non-agricultural employment while service employment has accounted for approximately 21% of total non-agricultural employment.

	U.S.	Manufacturing		Non-ag employment
31.0%	1960	16,796,000 = %	x	54,234,000
29.1%	1968	19,781,000 = %	x	67,915,000

	U.S.	Wholesale and Retail Trade		Non-ag employment
21.0%	1960	11,391,000 = %	x	54,234,000
21.0%	1968	14,084,000 = %	x	67,915,000

19. Employees in the Wholesale and Retail Trade of Auto Dealers and Service Stations | | Total Wholesale and Retail Trade

12,300 = 16.0% 78,300

New Mexico Estimated Civilian Work Force, Unemployment, Employment, "New Mexico Bureau of Labor Statistics"

20. All Retail and Wholesale Establishments | | Total Non-Ag Employment

78,300 = 22.0% x 355,000

New Mexico Estimated Civilian Work Force, Unemployment, Employment, "New Mexico Bureau of Labor Statistics.

21. Total Manufacturing | | Total Non-Ag Employment

29,400 = 8.3% x 355,000

New Mexico Estimated Civilian Work Force, Unemployment, Employment, "New Mexico Bureau of Labor Statistics.

22. Prosser, *supra* note 5, at 794-798.

23. Sutton v. Chevron, 85 N.M. 604, 514 P.2d 1301 (1973).

and extended the doctrine to the lessor of an automobile in *Stang v. Hertz Corporation.*[24] In extending strict liability to lessors, the Court said:

> It is apparent from a reading of the Restatement, and the leading cases on this subject, that the doctrine of strict liability was evolved to place liability on the party primarily responsible for the injury occurring, that is, the manufacturer of the defective product. This is based on reasons of public policy. Inherent in these policy considerations is not the nature of the transaction by which the consumer obtained possession of the defective product, but the character of the defect itself; that is, one occurring in the manufacturing process and the unavailability of an adequate remedy on behalf of the injured plaintiff. For this reason, I find no logical basis for differentiating between the liability to an injured consumer of a dealer who is in the business of selling an automobile which is in a defective condition because of the manufacture thereof, and a dealer who is in the business of leasing the automobile.[25]

One justification for strict liability has been said to be that the seller, by marketing his product for use and consumption, has assumed a special responsibility toward all members of the consuming public who may be injured by it. The public has the right to and does expect that reputable sellers will stand behind their goods. Public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production.[26] The consumer is entitled to a maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.[27] There is no difference in principle between a lessor of cars and a service station that performs repairs faultily, thereby exposing the public to the same quantum of potential harm as a defectively produced or leased auto.

24. Stang v. Hertz, 83 N.M. 730, 497, P.2d 732 (1972).

25. Lechuga, Inc. v. Montgomery, 12 Ariz. App. 32. 467 P.2d 256, (1970).

26. It should be noted that strict liability covers not only specific damages such as medical expenses and lost income, but can also cover the less easily quanitified item of pain and suffering. Franklin, 24, *Tort Liability for Hepatitis: An Analysis and a Proposal,* Stan. L.R. 439 (1972).

27. A bailor for hire, such as a person in the U-drive-it business, puts motor vehicles in the stream of commerce in a fashion not unlike a manufacturer or retailer. * * * The very nature of the business is such that the bailee, his employees, passengers and the traveling public are exposed to a greater *quantum* of potential danger of harm from defective vehicles than usually arises out of sales by the manufacturer. We held in Santor the liability of the manufacturer might be expressed in terms of strict liability in tort. Santor v. A&M Karagheusian, Inc., 44 N.J. 52 66-67, 207 A.2d 305; * * * By analogy the same rule should be made applicable to the U-drive-it bailor-bailee relationship. Such a rental must be regarded as accompanied by a representation that the vehicle is fit for operation on the public highways.

What would be the practical result as far as service establishments such as gas stations are concerned if the concept of strict liability were expanded in New Mexico? Putting it in the scope of the free market system, Chevron and other companies might react, at worst, by disallowing stations to perform certain repairs. This policy would cause marginal stations to close, since they supplement their income through repair work in order to survive. However, one of the ideas behind strict liability is to eliminate processes which operate at "below par" standards or at least force improvement of standards. With the abundance of service stations already operating, the elimination of those operating "below par" would probably be negligible and the entry by those who could maintain adequate standards would soon replace those eliminated. This can be described as a resource allocation justification.[28]

Why did the Supreme Court reject the opportunity to utilize the concept of strict liability in *Chevron v. Sutton*? It has been said that the adoption of the doctrine of strict liability appears likely to involve a change in theory more than a change in the results which are reached under other theories of products liability [29] The reversal and remanding of *Sutton v. Chevron, supra,* to the District court will probably result in the same verdict that was reached by the New Mexico Court of Appeals using strict liability. However, the District court will most likely depend on apparent authority and agency by estoppel doctrines. The result is the use of much more time, money, and more complicated procedures[30] than would have been used had the District court in the initial proceedings relied on the strict liability doctrine, or had the litigation terminated at the Court of Appeals level where strict liability was adopted. The courts of New Mexico could reach similar decisions in the much more simple manner.

Utilizing the definition of strict liability in the Restatement of Torts[31] 2nd that was used for the New Mexico Appellate Court's

28. Consumers should be informed of the true costs of products in the marketplace, and the price charged by the producer should include not only the costs of labor and materials, but the social costs of the product as well. If social costs are not reflected in price, then there will be excessive demand for underpriced products and the overall allocation of resources throughout society will be distorted. In defective-product of service cases, this argument would require that if two products or services appear similar in function and cost of repair or manufacture, but onecauses users or bystanders many more personal injuries, their prices would reflect this differential so that consumers can be aware of the actual social costs of the products. Franklin, *Tort Liability for Hepatitis: An Analysis and a Proposal,* 24 Stan. L. Rev. (1972).

29. Prosser, *supra* note 5, at 804.

30. Prosser, *The Assault Upon the Citadel,* 69 Yale L.J. 1099, 1123-1124 (1960).

31. Restatement (2d) of Torts, § 402A, 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

adoption of the strict liability doctrine in *Chevron v. Sutton, supra,* and subsequent cases expanding the concept of strict liability, it is evident that the expansion of this theory to encompass services is feasible. Furthermore *Chevron v. Sutton* provides a fact situation which lends itself to the use of the strict liability theory in the area of services. It is no longer logical to restrict § 402A to products. In enunciating the general concept of strict liability, the courts have stripped away the vestigal remnants which rendered the warranty action so cumbersome and inadequate, and have restored simplicity and attention to substance (rather than form) in the field of products liability. Why not extend the theory to nonprofessional services, especially when the sale of a product is involved?

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or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his propety, 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.