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THE ILLUSIVE MEANING OF THE TERM "PRODUCT" UNDER SECTION 402A OF THE *RESTATEMENT (SECOND) OF TORTS*

CHARLES E. CANTU*

I. Introduction

When the American Law Institute[1] published their final draft[2] of section 402A of the *Restatement (Second) of Torts* in 1965,[3] the resulting impact had far-reaching effects.[4] The most noticeable effect was that strict liability,

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1. The individual members in 1965 were: Francis M. Bird, Esq., Professor Laurence H. Eldredge, Professor James Fleming, Jr., Professor Robert E. Keeton, Dean W. Page Keeton, Judge Calvert Magruder, Professor Wex Smathers Malone, Professor Allan H. McCoid, Dean William L. Prosser, Dean Samuel D. Thurman, Jr., Chief Justice Roger J. Traynor, and Dean John W. Wade. RESTATEMENT (SECOND) OF TORTS III-IV (1965).

2. *See* Putnam v. Erie City Mfg. Co., 338 F.2d 911, 918-19 (5th Cir. 1964) (outlining progress and development of § 402A). The original *Restatement of Torts* did not include a provision imposing strict liability based upon a seller's implied warranty. *Id.* By the time the *Restatement (Second) of Torts* was published in 1965, many courts were imposing strict liability on the seller for injuries caused by defective goods regardless of the character of those goods. In 1961, the first draft of the new § 402A limited strict liability to claims for "food for human consumption." *Putnam*, 338 F.2d at 919 (quoting RESTATEMENT (SECOND) OF TORTS § 402(A) (Tentative Draft 1961)). However, by 1962 another tentative draft of § 402A expanded the coverage to "products intended for intimate bodily use" regardless of whether they have nutritional value. *Id.* By 1964, the scope of § 402A was again broadened and adopted as the final version which appears in the *Restatement (Second) of Torts. Id.* For the full text of § 402A, see *infra* note 3.

3. Section 402A provides that:

> (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 (SECOND) OF TORTS § 402A (1965).

4. Before the widespread adoption of § 402A of the *Restatement (Second) of Torts*, an injured plaintiff would generally have to recover under a theory of negligence or contract liability. *See* M. STUART MADDEN, PRODUCTS LIABILITY § 1.1, at 2-3 (2d ed. 1988) (negligence and contract liability precursor to strict tort liability). Under negligence and contract theories of recovery, however, a defendant could escape liability if the plaintiff was not in privity with

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which had previously been applicable only to injuries resulting from dangerous activities[5] and wild animals,[6] was accepted as a cause of action in

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the defendant. *See id.* § 1.2, at 7 (privity requirement means by which manufacturer avoided liability to indirect purchaser). As a response to such a harsh rule, courts created limited exceptions to the privity requirement. *See* Huset v. J.I. Case Threshing Mach. Co., 120 F. 865, 870-71 (8th Cir. 1903) (summarizing privity exceptions). In *Huset*, the court enumerated three established exceptions to the privity requirement:

> [1] [A]n act of negligence of a manufacturer or vendor which is imminently dangerous to the life or health of mankind, and which is committed in the preparation and sale of an article intended to preserve, destroy, or affect human life . . . .
>
> [2] . . . an owner's act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner's premises . . . .
>
> [3] . . . one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities . . . .

Id. at 870-71.

Ultimately, courts abolished the privity requirement altogether. *See* MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, 1053 (1916) ("We have to put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of the contract and nothing else."); *see also* McCormack v. Handscraft Co., 278 Minn. 322, 154 N.W.2d 488, 499-500 (1967) (traditional privity limitation does not appeal to sense of justice); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55, 58-63 (1967) (discussing evolution and policies involved in elimination of privity obstacle).

5. *See, e.g.*, Luthringer v. Moore, 31 Cal. 2d 489, 190 P.2d 1, 3-4 (1948) (escape of lethal gas into adjacent building); Green v. General Petroleum Corp., 205 Cal. 328, 270 P. 952, 953 (1928) (oil well blowout); Kall v. Caruthers, 211 P. 43, 43 (Cal. Ct. App. 1922) (water allowed to percolate); Colton v. Oderdonk, 69 Cal. 155, 10 P. 395, 396 (1886) (blasting); Caporale v. C.W. Blakeslee & Sons, Inc., 149 Conn. 79, 175 A.2d 561, 562 (1961) (vibrations resulting from piledriving operations); Berger v. Minneapolis Gaslight Co., 60 Minn. 296, 62 N.W. 336, 336 (1895) (seepage of inflammable liquids); Hannem v. Pence, 40 Minn. 127, 41 N.W. 657, 657 (1889) (construction of roof caused ice and snow to fall on passerby); French v. Center Creek Powder Mfg. Co., 173 Mo. App. 220, 158 S.W. 723, 723 (1913) (explosion of powder manufacturing plant); Defiance Water Co. v. Olinger, 54 Ohio St. 532, 44 N.E. 238, 238 (1896) (water collected in dangerous place); Young v. Darter, 363 P.2d 829, 830-31 (Okla. 1961) (crop dusting); Frost v. Berkeley Phosphate Co., 42 S.C. 402, 20 S.E. 280, 280 (1894) (factory emitting phosphate gas). The policy of imposing strict liability for dangerous activities is most often traced back to the English case of *Rylands v. Fletcher*, decided in 1868, in which water stored in a reservoir on Mr. Ryland's property flooded the plaintiff's coal mines. *See* Rylands v. Fletcher, L.R. 3 H.L. 330 (1868). The English court held that

> the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.

Id. at 339-40.

The *Restatement (Second) of Torts* enumerates the law of strict liability for dangerous activities which basically follows the *Rylands* rationale. *See* RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (1965).

6. *See, e.g.*, Hays v. Miller, 150 Ala. 621, 43 So. 818, 819 (1907) (owner of wolf liable for damages even without proof of negligence); Collins v. Otto, 149 Colo. 489, 369 P.2d 564, 566 (1962) (absolute liability is well-settled rule for harboring wild animals); Briley v. Mitchell, 238 La. 551, 115 So. 2d 851, 854 (1959) (owner of wild deer liable for injuries caused regardless of how deer escaped); Phillips v. Garner, 106 Miss. 828, 64 So. 735, 736 (1914) (owner of monkey liable because notice of danger presumed); Molloy v. Starin, 191 N.Y. 21, 83 N.E.

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almost all cases involving defective products.[7] As a result, there was an explosion of products liability litigation.[8] Suits involving strict liability for defective products soon outnumbered all other tort cases.[9]

Naturally, the vast number of lawsuits caused some confusion. Courts interpreted some terms of section 402A of the *Restatement* to include

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588, 589 (1908) (owner of bear strictly liable, but common carrier who transported bear not strictly liable); Moloney v. City of Colombus, 2 Ohio St. 2d 213, 208 N.E.2d 141, 146 (1965) (city zoo liable for injuries caused to patron by guano). *See generally* McNeely, *A Footnote on Dangerous Animals*, 37 MICH. L. REV. 1181, 1181-1208 (1939) (discussing contrasting rules of liability for wild animals). *But see* Hansen v. Brogan, 145 Mont. 224, 400 P.2d 265, 268 (1965) (negligence preferable to absolute liability where buffalo gored young child); King v. Blue Mountain Forest Assoc., 100 N.H. 212, 123 A.2d 151, 155 (1956) (rejected adoption of strict liability for injuries caused by wild boar).

7. *See, e.g.*, Brown v. Chapman, 304 F.2d 149, 150 (9th Cir. 1962) (hula skirt); Bowles v. Zimmer Mfg. Co., 277 F.2d 868, 875 (7th Cir. 1960) (surgical pin); B.F. Goodrich Co. v. Hammond, 269 F.2d 501, 504 (10th Cir. 1959) (automobile tire); Thompson v. Reedman, 199 F. Supp. 120, 121 (E.D. Penn. 1961) (automobile accelerator pedal); McQuaid v. Bridgeport Brass Co., 190 F. Supp. 252, 254 (D. Conn. 1960) (insecticide spray); Hinton v. Republic Aviation Corp., 180 F. Supp. 31, 33 (S.D.N.Y. 1959) (airplane); Peterson v. Lamb Rubber Co., 54 Cal. 2d 339, 5 Cal. Rptr. 863, 869, 353 P.2d 575, 576 (1960) (grinding wheel); Jones v. Burgermeister Brewing Corp., 198 Cal. App. 2d 198, 18 Cal. Rptr. 311, 313 (Ct. App. 1961) (beer bottle); Vallis v. Canada Dry Ginger Ale, Inc., 190 Cal. App. 2d 35, 11 Cal. Rptr. 823, 824 (1961) (club soda bottle); Gottsdanker v. Cutter Laboratories, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320, 321 (1960) (salk vaccine); Graham v. Bottenfield's, Inc., 176 Kan. 68, 269 P.2d 413, 418 (1954) (hair dye); Henningson v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69, 72 (1960) (automobile).

Generally, a plaintiff who is injured by a product will plead a claim not only for strict products liability, but also for negligence and U.C.C. breach of warranty. *See* W. KIMBLE & R. LESHER, PRODUCTS LIABILITY § 11, at 17 (1979).

8. *See* Bivins, *The Products Liability Crisis: Modest Proposals for Legislative Reform*, 11 AKRON L. REV. 595, 598 (1978) (products liability reform volatile area of law for many years). The pivotal case which "burst the dam" of products liability litigation was the Michigan Supreme Court case of *Spence v. Three Rivers Builders & Masonry Supply*. *See* Putnam v. Erie City Mfg. Co., 338 F.2d 911, 919 n.18 (5th Cir. 1964) (Prosser credits *Spence* with opening the floodgate of products liability); *see also* Spence v. Three Rivers Builders & Masonry Supp., 353 Mich. 120, 90 N.W.2d 873, 880 (1958) (no privity required to hold manufacturer of cinder blocks liable).

9. While statistical findings vary from sample to sample, products liability suits outnumber negligence and absolute liability lawsuits. *See* Viscusi, *The Determinants of the Disposition of Product Liability Claims and Compensation for Bodily Injury*, 15 J. LEGAL STUD. 321, 326-27 (1986). One sample taken in the United States District court system reports products liability suits escalated from 1,579 in 1974 to 8,994 in 1982. *Id.* at 321 n.1. In 1976 the United States Interagency Task Force on Products Liability estimated the number of products liability lawsuits at between 60,000 and 70,000 and rising dramatically. *See Hearing on Products Liability Reform Before the Senate Comm. on Commerce, Science and Transportation, Subcomm. on the Consumer*, 97th Cong., 2d Sess. 257 (1982) (statement of Sen. Kasten), *as reported in American Enterprise Institute for Public Policy Research Legislative Analysis Publication: Federal Products Liability Proposals 1984*, 98 Cong., 2d Sess. 5-6 (1984); *see also* Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Alleged Contentious and Litigious Society*, 31 UCLA L. REV. 4, 69 (1983) (increase in litigation caused by changing social conditions such as consumer's greater knowledge of injury causation and awareness of technology available to prevent injury).

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individuals and events not originally mentioned,[10] while some terms, which at first were thought to be clear and concise, proved quite illusive. One such term is "product." If one is held strictly liable for placing a defective "product" into the stream of commerce, or conversely, if one may escape strict liability by showing that no "product" was introduced into the marketplace, it is imperative to define the meaning of this term.[11] For purposes of section 402A, courts generally reject the broad dictionary definition of the term "product."[12] Instead, courts use a policy-based approach to determine whether a particular transaction involves a product which deserves section 402A protection. In some cases, as illustrated below, this has proven to be a phantasmal objective.

II. Sales/Service Transactions

From the start, courts were adamant on two points. The first was that strict liability was not tantamount to absolute liability.[13] Defendants were

10. *See, e.g.*, Cantu, *Reflections on Section 402A of the Restatement (Second) of Torts: A Mirror Crack'd*, 25 GONZ. L. REV. 205 (1989/90) [hereinafter Cantu, *Reflections*]. The author makes it clear that the apparent intent of the drafters of § 402A has been extended to include events and individuals not mentioned in the original text. As a result § 402A should now read: (1) One who places into the stream of commerce any product which is defective in its manufacture, design, or marketing scheme and as such is in an unreasonably dangerous condition to the user, consumer, or innocent bystander, or to that person's property is subject to strict liability for physical harm and economic loss, and may be subject to liability for punitive damages thereby caused to the ultimate user, consumer, or innocent bystander, or to that person's property, if (a) the seller is engaged in the business of placing such product into the stream of commerce, and (b) it is expected to and does reach the user, consumer, or innocent bystander without substantial change. (2) The rule stated in Subsection (1) applies (a) although the defendant has exercised all possible care in the manufacture, design, or marketing scheme of the product, and (b) where there is total lack of privity between such parties. *Id.* at 236.

11. The word "product" has several general definitions. The American Heritage Dictionary defines a product as "[s]omething produced by human or mechanical effort or by a natural process . . . . A direct result; consequence . . . ." AMERICAN HERITAGE DICTIONARY 988 (2d ed. 1982). *Black's Law Dictionary* defines product as "[g]oods produced or manufactured, either by natural means, by hand, or with tools, machinery, chemicals, or the like. Something produced by physical labor or intellectual effort or something produced naturally or as a result of natural process as by generation or growth." BLACK'S LAW DICTIONARY 1209 (6th ed. 1990). "Product" is also defined as "any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce." 63 AM. JUR. 2D *Products Liability* § 3 (1984).

12. With regard to strict products liability, the courts have consistently rejected the dictionary definitions of "product" and instead use the policy reasons underlying strict liability. *E.g.*, Appleby v. Miller, 197 Ill. App. 3d 533, 554 N.E.2d 773, 775 (1990); Papp v. Rocky Mountain Oil & Minerals, 236 Mont. 330, 769 P.2d 1249, 1253 (1989); Jackson v. City of Franklin, 51 Ohio App. 3d 51, 554 N.E.2d 932, 938 (1988). *But cf.* Kolpin v. Pioneer Power & Light Co., 154 Wis. 2d 487, 453 N.W.2d 214, 219 (Ct. App. 1990) (product something marketed, sold and used by consumer).

13. *See, e.g.*, Helene Curtis Indus. v. Pruitt, 385 F.2d 841, 849 (5th Cir. 1967), *cert. denied*, 391 U.S. 913; Elk Corp. v. Jackson, 291 Ark. 448, 725 S.W.2d 829, 833 (1987); Readenour v. Marion Power Shovel, 149 Ariz. 442, 719 P.2d 1058, 1063 (1986); Barrett v. Superior Court, 222 Cal. App. 3d 1176, 272 Cal. Rptr. 304, 310 (Ct. App. 1990); Vannoy v.

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not held liable simply because an injury had occurred; instead, liability was imposed because injury was inflicted by a defective product.[14] Second, courts made it clear that strict liability was applicable only to products.[15] In other words, only transactions involving chattels were included within the purview of section 402A. Real estate transactions (discussed below) and the rendering of services were not proper objectives.[16]

The reason for the rule that negligence, and not strict liability, is the proper vehicle for recovery in a service transaction is that individuals practice inexact sciences[17] and, therefore, should only be expected to act as reasonable prudent persons.[18] Additionally, in a service transaction there is no "middle-

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Uniroyal Tire Co., 111 Idaho 536, 726 P.2d 648, 679 (1985); Prentis v. Yale Mfg. Co., 421 Mich. 670, 365 N.W.2d 176, 181 (1984); Badai v. Teagu, 212 N.J. Super. 522, 515 A.2d 822, 824 (Super. Ct. Law Div. 1986); Marchese v. Warner Communication, 100 N.M. 313, 670 P.2d 113, 116 (Ct. App. 1983) (quoting Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981); Day v. General Motors Corp., 345 N.W.2d 349, 357 (N.D. 1984); Ewen v. McLean Trucking Co., 70 Or. App. 595, 689 P.2d 1309, 1314 (1984) (quoting Phillips v. Kimwood Mach. Co., 269 Or. 485, 525 P.2d 1033 (1974)); Mignone v. Fieldcrest Mills, 556 A.2d 35, 41 (R.I. 1989); Jack Rouch - Bissonnet, Inc. v. Puskar, 417 S.W.2d 262, 275 (Tex. 1967); Baughn v. Honda Mtr. Co., 197 Wash. 2d 127, 727 P.2d 655, 662 (1986); Meunier v. Ogureck, 140 Wis. 2d 482, 412 N.W.2d 155, 156 (Ct. App. 1987); Williams v. Johnson, 781 P.2d 922, 930 (Wyo. 1989).

14. *See, e.g.*, Murphy v. E.R. Squibb & Sons, Inc., 40 Cal. 3d 672, 710 P.2d 247, 260, 221 Cal. Rptr. 447, 460 (1985); Colter v. Barber-Greene Co., 403 Mass. 50, 525 N.E.2d 1305, 1314 (1988); Lippard v. Houdaille Indus., 715 S.W.2d 491, 508 (Mo. 1986) (en banc); Wilkerson v. Porter Mach. Co., 237 N.J. Super. 282, 567 A.2d 598, 601 (Super. L. Div. 1989); White v. Wyeth Labs, 40 Ohio St. 3d 390, 533 N.E.2d 748, 751 (1988); Martin v. Johns-Manville Corp., 322 Pa. Super. 348, 469 A.2d 655, 664 n.14 (1983); Garcia v. Texas Instruments, 610 S.W.2d 456, 458 (Tex. 1980); Berry v. Beech Aircraft Corp., 717 P.2d 670, 673 (Utah 1985). *See generally* Brook, *Sales-Service Hybrid Transactions: A Policy Approach*, 28 Sw. L.J. 575, 575 (1974); Phipps, *When Does a "Sale" Become a "Service"?*, INS. COUNSEL J., July 1972, at 274.

15. *See, e.g.*, Tucson Indus. v. Schwartz, 108 Ariz. 464, 501 P.2d 936, 940 (1972); Greenway v. Peabody Int'l Corp., 294 S.W.2d 541, 547 (Ga. Ct. App. 1982); Poppell v. Waters, 126 Ga. App. 385, 190 S.E.2d 815, 817 (1972). All jurisdictions, except New Jersey, limit the applicability of § 402A to situations involving a product. Hoffman v. Simplot Aviation, 97 Idaho 32, 539 P.2d 584, 587 (1975); *see also* Newmark v. Gimbel's, Inc., 54 N.J. 585, 258 A.2d 697, 705 (1969) (no sound reason for restricting strict liability to sales of goods). *See generally* W. PROSSER, LAW OF TORTS 679 (4th ed. 1971); Cantu, *Reflections*, *supra* note 10, at 214.

16. *See* Allied Properties v. John A. Blume & Assocs. Eng'rs, 25 Cal. App. 3d 848, 102 Cal. Rptr. 259, 264 (Ct. App. 1972); *see also* Lemley v. J & B Tire Co., 426 F. Supp. 1378, 1379 (W.D. Pa. 1977) (§ 402A has not been expanded to apply to service transactions); Sales, *The Service-Sales Transaction: A Citadel Under Assault*, 10 ST. MARY'S L.J. 13, 13 (1978) (strict liability not promulgated to encompass services).

17. *See, e.g.*, Zontelli & Sons, Inc. v. City of Nashwauk, 353 N.W.2d 600, 605 (Minn. Ct. App. 1984) (quoting City of Mounds View v. Walijarvi, 263 N.W.2d 420, 424 (Minn. 1978) (professionals exercise reasonable judgment in analyzing random factors incapable of precise measurement); Chubb Group of Ins. Cos. v. C. F. Murphy & Assocs., 656 S.W.2d 766, 770 (Mo. Ct. App. 1983) (architect not strictly liable); Hoven v. Keble, 79 Wis. 2d 444, 256 N.W.2d 379, 385 (1977) (physicians do not practice exact science).

18. *See, e.g.*, Gagne v. Bertran, 43 Cal. 2d 481, 275 P.2d 15, 21 (1954) (experts not

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man." Plaintiffs deal directly with the person responsible; therefore, no one other than the provider should be judged.[19] Consequently, negligence, not strict liability, is the proper cause of action. Finally, services are not mass-produced, but rather they are rendered to the person requesting them; therefore, the policy reasons for strict liability do not apply.[20] As a result, efforts to extend strict liability to service transactions have failed in all jurisdictions[21] except New Jersey.[22]

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infallible, therefore, one can only expect reasonable care and competence); Burns v. Forsyth County Hosp. Auth., 81 N.C. App. 556, 344 S.E.2d 839, 846 (1986) (healthcare provider held to reasonable standard of care); Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144, 146 (1954) (attorneys should exercise best judgment). This rule of reasonableness with respect to professional services has been consistently followed. *See* Allied Properties v. John A. Blume & Assocs., Eng'rs, 25 Cal. App. 3d 848, 102 Cal. Rptr. 259, 264 (1972) (listing numerous cases where court held professionals to reasonableness standard). *See generally* Sales, *supra* note 16, at 18 (essence of service provider is performance of service with reasonable care); Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755, 760 (1959) (attorney liable only for negligence).

19. *See* Sales, *supra* note 16, at 18 (service provider deals face-to-face with consumer). In a service transaction, there is no distributive chain upon which to spread the risk of injury. *Id.* at 19. Risk distribution represents one of the fundamental underpinnings for the imposition of strict liability against sellers. *Id.*; *see also* Greenman v. Yuba Power Prod., 59 Cal. 2d 57, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962); Suvanda v. White Motor Co., 51 Ill App. 2d 318, 201 N.E.2d 313, 317 (Ct. App. 1965). *See generally* Brook, *supra* note 14, at 580 (discussing inability of risk distribution in service based transaction).

20. *See* Hoffman v. Simplot Aviation, 97 Idaho 32, 539 P.2d 584, 588 (1975); Sales, *supra* note 16, at 21.

21. Hoffman v. Simplot Aviation, 97 Idaho 32, 539 P.2d 584, 587 (1975); Hoover v. Montgomery Ward & Co., 270 Or. 498, 528 P.2d 76, 77 (1974); Cantu, *Reflections*, *supra* note 10, at 214.

22. Newmark v. Gimbel's, Inc., 54 N.J. 585, 258 A.2d 697 (1969). In *Newmark*, a beauty parlor was sued for injuries resulting from the application of a permanent wave solution. *Id.*, 258 A.2d at 698. The product, marketed as a "Helene Curtis Candle Wave," was applied with cotton as the plaintiff's hair was rolled section by section. *Id.*, 258 A.2d at 699. Next, a cream was placed along the plaintiff's hair line and covered with cotton. Thereafter, plaintiff complained of a burning sensation along her scalp. After returning home, plaintiff's head reddened and eventually her entire head was red and blistered. Almost a week later, the plaintiff consulted her dermatologist, who diagnosed her condition as dermatitis. The doctor concluded that her injury resulted from the wave solution. *Id.*, 258 A.2d at 700.

The court explained the application of strict liability as:

> One, who in the regular course of a business sells or *applies a product* (in the sense of the sales-service hybrid transaction involved in the present case) which is in such a dangerously defective condition as to cause physical harm to the consumer-*patron*, is liable for the harm.

Id., 258 A.2d at 702 (emphasis added). The court adopted the approach that the "liability of a manufacturer or retail seller of a product should not be made to depend upon the intricacies of the law of sales." *Id.* Instead, the application of strict liability hinges on whether the policy reasons underlying the imposition of strict liability are satisfied. *Id.* Accordingly, the court stated that:

> A beauty parlor operator in soliciting patronage assures the public that he or she possesses adequate knowledge and skill to do the things and to apply the solution necessary to produce the permanent wave in the hair of the customer. When a patron responds to the solicitation she does so confident that any product

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In some cases, however, it became clear that the distinction between transactions involving the sale of a product and those involving the rendering of a service was not clearly delineated.[23] Although little doubt exists that traditional professionals such as doctors,[24] lawyers,[25] and architects,[26] as well as nonprofessional providers, such as plumbers,[27] bar-

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> used in the shop has come from a reliable origin and can be trusted not to injure her. She places herself in the hands of the operator relying upon his or her expertise both in the selection of the products to be used on her and in the method of using them. The ministrations and the products employed on her are under the control and selection of the operator; the patron is a mere passive recipient.

Id., 258 A.2d at 701.

In response to the application of strict liability to a service-predominated transaction, the defendants claimed there was no distinction between the services rendered by a doctor or dentist and those supplied by a beautician. *Id.*, 258 A.2d at 702. Therefore, all three occupations should be judged by the same principles. The court vehemently disagreed with this assertion and in a lengthy diatribe espoused the differences between a physician and beautician. *See infra* note 30.

Several years later, the Supreme Court of New Jersey reiterated the rule that was handed down by the *Newmark* case that strict liability could be imposed on service providers. *See* Michalko v. Cooke Color & Chem. Co., 91 N.J. 386, 451 A.2d 179, 186 (1982). In *Michalko*, the supreme court stated that the arguments for imposing strict liability on the providers of services are three-fold. *Id.*, 451 A.2d at 186. First, the risk of harm from defective repair services is great, and customers rely on the expertise of the providers of services as much as they rely on the expertise of the providers of products. Second, there is no reason to believe that providers of services are any less able to spread the cost of accidents than suppliers of products. Third, imposing strict liability would induce providers of services to invest in safety, leading to greater protection for the customers and reduced accident costs. *Id.*

23. *See, e.g.*, Sally Beauty Co. v. Nexxus Prods. Co., 801 F.2d 1001, 1006 (7th Cir. 1986) (applying Texas law) (analyzing problem of whether contract was for sale of goods or for sale of services); T-Birds, Inc. v. Thoroughbred Helicopter Serv., 540 F. Supp. 548, 551 (E.D. Ky. 1982) (claim under warranty theory against helicopter repairman for personal injuries dismissed because transaction involved rendition of services to which sale of goods was only incidental); Hector v. Cedars-Sinai Medical Center, 180 Cal. App. 3d 493, 225 Cal. Rptr. 595, 599 (1986) (hospital only providing medical services and not in business of selling pacemakers); Montgomery Ward & Co. v. Dalton, 665 S.W.2d 507, 511 (Tex. Ct. App. 1983) (analyzing whether roof installation involves sale or service). *See generally* Annotation, *Applicability of UCC Article 2 to Mixed Contracts for Sale of Goods and Services* 5 A.L.R. 4TH 501, 501 (1981) (detailing numerous cases where court wrestled with distinctions between sales and services).

24. *See, e.g.*, McDonald v. Sacramento Medical Found. Blood Bank, 62 Cal. App. 3d 866, 133 Cal. Rptr. 444, 446 (1976) (treating doctor provided services); Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539, 540 (Super. Ct. Law Div. 1967) (dentist provides service; therefore strict liability does not apply); Hoven v. Kelble, 79 Wis. 2d 444, 256 N.W.2d 379, 385 (Wis. 1977) (strict liability does not apply to surgeons).

25. *Cf.* Buford White Lumber Co. v. Octagon Properties, Ltd., 740 F. Supp. 1553, 1558 (W.D. Okla. 1989) (lawyers not exposed to strict liability under securities statute).

26. *See* Chubb Group of Ins. Cos. v. C.F. Murphy & Assoc., 656 S.W.2d 766, 780 (Mo. Ct. App. 1983) (service exception to § 402A generally applies to architects).

27. *See* Slayton v. Wright, 27 Cal. App. 2d 219, 76 Cal. Rptr. 494, 505 (1969) (plumbing contractor not strictly liable); *see also* Stevens-Salt Lake City, Inc. v. Wong, 123 Utah 309, 259 P.2d 586, 588 (1953) (strict liability not maintained on basis of leaking pipes). *See generally* Powers, *Distinguishing Between Product and Services in Strict Liability*, 62 N.C.L. REV. 415,

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bers,[28] and automobile repairmen,[29] provide services, there are other situations where the distinction is somewhat mixed.[30] For example, situations where the bargain involved air conditioning,[31] electrical,[32] heat-

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430 (1984) (strict liability not applicable to plumber-installed water heater that could have been purchased elsewhere).

28. *See* Epstein v. Giannattasio, 25 Conn. Supp. 109, 197 A.2d 342, 344 (C.P. 1963) (beautician provides services); Payne v. Saft Sheen Prods., 486 A.2d 712, 717 (D.C. 1985) (claim against beautician for strict liability was dismissed). *But see* Newmark v. Gimbel's, Inc., 94 N.J. Super. 228, 258 A.2d 697 (1969) (beautician held strictly liable).

29. *See* Hoover v. Montgomery Ward & Co., 270 Or. 498, 528 P.2d 76, 78 (1974) (strict liability does not apply to auto repair shop); *see also* Powers, *supra* note 27, at 415.

30. *See* Newmark v. Gimbel's, Inc. 54 N.J. 585, 258 A.2d 697, 702 (1969) (court distinguishes professionals from non-professional providers). In *Newmark*, the court explained why the same standard of liability should not be imposed on doctors and dentists as it is in New Jersey on a beautician. *See id.* The court stated:

> 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 lessor 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. In a primary sense they furnish services in the form of an opinion of the patient's condition based upon their experienced analysis of the objective and subjective complaints, and in the form of recommended and, at times, personally administered medicines and treatment. Practitioners of such callings, licensed by the State to practice after years of study and preparation, must be deemed to have a special and essential role in our society . . . . Thus their paramount function - the essence of their function - ought to be regarded as furnishing of opinions and services. Their unique status and the rendition of these sui generis services bear such a necessary and intimate relationship to public health and welfare that their obligation ought to be grounded and expressed in a duty to exercise reasonable competence and care toward their patients. In our judgment, the nature of the services, the utility of and the need for them, involving as they do, the health and even survival of many people, are so important to the general welfare as to outweigh in the policy scale any need for the imposition on dentists and doctors of the rules of strict liability in tort.

Id., 258 A.2d at 702-03 (citations omitted).

31. *Compare* Mingledorff's, Inc. v. Hicks, 133 Ga. App. 27, 209 S.E.2d 661, 662 (1974) (installer of air conditioning system provides service) *with* B & B Refrigeration & Air-Conditioning Serv., 25 U.C.C. Rep. Serv. (Callaghan) 635, 637 (D.C. 1978) (installation of air conditioning system constitutes sale of goods).

32. *Compare* Insurance Co. of N. Am. v. Radiant Elec. Co., 55 Mich. App. 410, 222 N.W.2d 323, 324 (Ct. App. 1974) (electrical wiring installed constituted sale of goods) *with*

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ing,[33] or plumbing systems,[34] concrete,[35] steel,[36] swimming pools,[37] and floor coverings[38] proved perplexing to the courts. Was the transaction one involving the sale of a product or the rendering of a service? Was the injury caused because the product was defective or because the service rendered was faulty? These threshold questions were very important because the applicability of section 402A depended upon the answer to these questions.

The dilemma was soon solved by applying the "predominant factor test."[39] This standard, which more often than not presents a question of fact for the jury,[40] is easy to apply. It simply asks what was the predominant factor

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Air Heaters, Inc. v. Johnson Elec., 258 N.W.2d 649, 652 (N.D. 1977) (discussing necessary analysis to determine whether contract for electrical installation is for goods or services).

33. *See* O'Laughlin v. Minnesota Natural Gas Co., 253 N.W.2d 826, 829 (Minn. 1977) (discussing whether strict liability can apply to installation of heating system); *see also* State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 123 (Miss. 1966), *cert. denied sub nom.* Yates v. Hodges, 386 U.S. 912 (1967) (strict liability applied to home builder who defectively installed water heater in home). In *Hodges*, the defendants were not only involved in installing the heater, but they also sold it to the plaintiff. *Hodges*, 189 So. 2d at 123. This fact aided in effectuating the policy reasons for imposing strict liability. *Id.*

In *Victor v. Barzaleski*, the court held that a handyman who merely installed a heating system and did not make a sale was not liable under the UCC. Victor v. Barzaleski, 1 U.C.C. Rep. Serv. (Callaghan) 104, 105 (Pa. 1959). Presumably, the contractor in *Victor* could not have been liable under 402A because he only provided a service.

34. *Accord* Semler v. Knowling, 325 N.W.2d 395, 399 (Iowa 1982) (installation of sewer pipes and fittings considered service predominated contract); *see* Cork Plumbing Co. v. Martin Bloom Assocs., 573 S.W.2d 947, 958 (Mo. Ct. App. 1978) (plumbing construction contract which included materials predominated by service). *See generally* Annotation, *Applicability of UCC Article 2 to Mixed Contracts for Sale of Goods and Services*, 5 A.L.R. 4TH 501, 508 (1981) (discussing numerous cases dealing with hybrid sales/service contracts).

35. *See* Port City Constr. Co. v. Henderson, 266 So. 2d 896, 899 (Ala. Civ. App. 1972) (concrete provided in construction contract constituted sale of goods); S.J. Groves & Sons Co. v. Warner Co., 576 F.2d 524, 528 (3d Cir. 1978) (contract for delivery of ready-mixed concrete was sale of goods). *But see* R. C. Freeman v. Shannon Constr. Co., 560 S.W.2d 732, 737 (Tex. Civ. App. 1977) (essence of contract between general contractor and subcontractor for concrete was service).

36. *See* Belmont Indus. v. Bechtel Corp., 425 F. Supp. 524, 527 (E.D. Pa. 1976) (fabricated structural steel constituted sale of product). *But see* United States v. Framen Steel Supply Co., 435 F. Supp. 681, 685 (S.D.N.Y. 1977) (contracts for supply of steel were financing agreements not sale of goods).

37. *Compare* Gulash v. Stylarama, Inc., 33 Conn. Supp. 108, 364 A.2d 1221, 1223 (C.P. 1975) (contract for installation of swimming pool predominately service) *with* Riffe v. Black, 548 S.W.2d 175, 177 (Ky. Ct. App. 1977) (installation of pool held to be sale of product).

38. *Compare* Colorado Carpet Installation Co. v. Palermo, 647 P.2d 686, 688 (Colo. Ct. App. 1982) (major component of contract price was cost of carpeting not installation labor charge) *with* Peltz Constr. Co. v. Dunham, 436 N.E.2d 892, 894 (Ind. Ct. App. 1982) (contract not for sale of goods just because cost of materials included in price).

39. *E.g.*, Hector v. Cedars-Sinai Medical Center, 180 Cal. App. 3d 493, 225 Cal. Rptr. 595, 597 (1986) (essence of relationship hospital provides while installing pacemaker is professional services); Trujillo v. Berry, 106 N.M. 86, 738 P.2d 1331, 1334 (Ct. App. 1987) (car wash supplier held strictly liable as product predominated service); Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792, 794 (1954) (hospital provides requisite human skill necessary to restore patient's health). *See generally* Cantu, *Reflections*, *supra* note 10, at 214.

40. *See* Thomas v. St. Joseph Hosp., 618 S.W.2d 791, 797 (Tex. Civ. App. 1981) (issue

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of the transaction.[41] If the injured plaintiff entered into the bargain because he wished to purchase a product, as opposed to the associated service, the transaction is considered to be for a product.

A good example would involve contact lenses.[42] When individuals are tested, examined, and fitted with such lenses, the question arises whether they purchased a product (the lenses) or whether they bargained for the attending services. What induced the individual to enter into the bargain? Would any lens suffice, or was the skill of the attending optometrist or ophthalmologist the main reason for the bargain?

As a rule, if it is established that the defendant's knowledge, expertise, or reputation was the prevailing reason for entering into the agreement, the transaction will be deemed a service.[43] If, however, such proficiency was incidental, the transaction will be considered the sale of a product.[44] After

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of whether hospital gown which caught fire was essential to professional relationship presented jury question).

41. *See, e.g.*, Anthony Pools v. Sheehan, 295 Md. 285, 455 A.2d 434, 441 (1983) (predominant nature test should not be applied mechanically). The court in *Sheehan* argued that the predominant factor test should be modified to a "gravamen" test. The court quoted Hawkland's treatise on the Uniform Commercial Code where he wrote:

> Unless uniformity would be impaired thereby, it might be more sensible and facilitate administration, at least in this grey area, to abandon the "predominant factor" test and focus instead on whether the *gravamen* of the action involves goods or services. For example, in *Worrell v. Barnes*, if the gas escaped because of a defective fitting or connector, the case might be characterized as one involving the sale of goods. On the other hand, if the gas escaped because of poor work by Barnes the case might be characterized as one involving services, outside the scope of the U.C.C.

Id., 455 A.2d at 440 (quoting W. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES art. 2, § 2-102:04 (1982) (emphasis added); *see also* Worrell v. Barnes, 87 Nev. 204, 484 P.2d 573, 574 (1971).

42. *See* Barbee v. Rogers, 425 S.W.2d 342, 342 (Tex. 1968) (strict liability does not apply to sale of contact lenses). The plaintiff in *Barbee* sued Rogers, who was doing business as Texas State Optical, for improperly fitting the plaintiff with contact lenses. *Id.* at 343. The plaintiff also alleged that he was given improper prescriptions and instructions for the use of the contacts. After pointing out the statutory definition of the practice of optometry, the court concluded that the defendant's business (i.e., optometry plus the sale of glasses) falls between the distinction separating the practice of optometry and the merchandizing of retail goods. *Id.* at 345. The court recognized that Texas State Optical had characteristics of both a professional service and a merchandising concern. The court based its decision on the fact that there was no evidence of a defect in the lenses themselves. *Id.* at 346. The court also pointed out that the contact lenses were not a finished product which the general public was solicited to purchase. *Id.*

This case signifies that whether or not a good is a product depends upon whether it was completely assembled and available to the general public before sold to a consumer. This logic is erroneous if applied to manufacturers who customize a product or operate on a zero inventory make-to-order business. Surely, they should not be exempt from strict liability.

43. *See* Hector v. Cedars-Sinai Medical Center, 180 Cal. App. 3d 493, 225 Cal. Rptr. 595, 599 (1986) (implantation of pacemaker involved in course of treatment not merely sale of product); Easterly v. HSP of Texas, Inc., 772 S.W.2d 211, 213 (Tex. Ct. App. 1989) (sale of epidural kit "integrally related" to services performed).

44. *See* Thomas v. St. Joseph Hosp., 618 S.W.2d 791, 796 (Tex. Ct. App. 1981) (hospital

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all, it would be fair to assume that if the principal reason for entering into the bargain was the subject matter, the transaction concerns the sale of a product. If not, the agreement must be viewed as one where a service was rendered. In other words, if any lens would suffice, then the plaintiff clearly entered into a sales transaction. If, however, the lenses were purchased as a result of the accompanying service, the converse would be true. As stated above, these questions are sometimes very complex. By definition[45] and necessity, juries must provide the solution.

The answer to the initial sales/service dilemma will determine whether the plaintiff's remedy will lie in negligence or strict liability.[46] If the transaction is a service, strict liability is generally not available.[47] If the transaction involves the sale of a product, strict liability is an available remedy.[48] In hybrid situations, the dilemma rests upon the scope of the term "product."

III. Real Estate Transaction

Nowhere is this dilemma better illustrated than in transactions involving real estate. Historically, houses have never been considered a product. Land and everything permanently attached thereto is considered real property,[49] and everything else is considered personal property.[50] If, therefore, one is to assume that a "product" is synonymous with a chattel or personal property, there would be little difficulty with a rule that section 402A never applies to real estate. It seems obvious that because land is the antithesis of personal property, strict liability would never be an issue when a house is allegedly defective. In fact, however, the opposite is true.

The application of section 402A to the sale of a house occurred gradually. In *Humber v. Morton*,[51] the Texas Supreme Court took the first step toward the rule that a house is a product by recognizing that the common law warranties of good workmanship and habitability[52] were implied in the

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gown involves sale of product). In *Thomas*, the plaintiff died after suffering from burns caused when plaintiff dropped a lighted match and ignited his hospital gown. *Id.* at 793. In holding that the trial court erred in refusing to submit a strict liability issue to the jury, the appellate court stated: "Where, as here, a hospital apparently supplies a product unrelated to the essential professional relationship, we hold that it cannot be said that as a matter of law the hospital did not introduce the harmful product into the stream of commerce." *Id.* at 796-97.

45. *See supra* note 40 and accompanying text.

46. *See supra* notes 17-20 and accompanying text.

47. *See supra* note 22 and accompanying text.

48. *See supra* note 15 and accompanying text.

49. BLACK'S LAW DICTIONARY 1096 (5th ed. 1979).

50. *See* Bismarck Tribune Co. v. Omdahl, 147 N.W.2d 903, 906 (N.D. 1966) (personal property is property other than real property).

51. Humber v. Morton, 426 S.W.2d 554 (Tex. 1968).

52. *Id.* at 555. By implying warranties from the sale of a home, the Texas Supreme Court expressly abolished the long-standing doctrine of caveat emptor. *Id.* at 562.

> The caveat emptor rule as applied to new houses is an anachronism patently out of harmony with modern home buying practices. It does a disservice not only to the ordinary prudent purchaser but to the industry itself by lending

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contract for the sale of a new home. While the court in *Humber* did not fully explain their holding with regards to implying these warranties, subsequent court decisions gave several reasons for this position. First, courts recognized that the purchase of a new house is one of the most important agreements that an individual will ever make.[53] Buying a house is not an everyday transaction; therefore, buyers are entitled to the protection offered to them by these legal principles.[54] In addition, the parties involved in this type of contract do not share equal bargaining power.[55] Typically, the builder has much more knowledge than the average home buyer.[56] Furthermore, because many defects in a house may be latent, or may go undetected to even the most vigilant of purchasers, the buyer must rely heavily upon the skill, knowledge, and expertise of the builder to provide a suitable abode.[57] Aside from this element of superior knowledge, the builder/vendor is also in a much better position to prevent the occurrence of any major problems.[58] For these reasons, builders should warrant the suitability of their work.

Additionally, standard-form contracts are generally used in this type of purchase, and because express warranties are seldom given, and almost impossible to negotiate, the unsuspecting buyer is again forced to rely upon the skills of the builder.[59] Finally, the applicability of implied warranties to the purchase of a house is further supported by the idea that contractors hold themselves out as possessing the necessary expertise in building houses.[60] Buyers would never encounter a contractor averring to the contrary; consequently, home buyers expect good workmanlike skills and a habitable home.[61] With such arguments, it was easy to extend the common law

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> encouragement to the unscrupulous, fly-by-night operator and purveyor of shoddy work.

Id. Several early commentators agree with the imposition of implied warranties in the sale of new homes. *See, e.g.*, Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633, 651 (1965); Bearman, *Caveat Emptor in Sales of Reality - Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541, 545-47 (1961); Dunham, *Vendor's Obligation as to Fitness of Land for a Particular Purpose*, 37 MINN. L. REV. 108, 112-13 (1953).

53. McDonald v. Mianecki, 79 N.J. 275, 398 A.2d 1283, 1289 (1979); *accord* Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698, 710 (1966); Tavares v. Horstman, 542 P.2d 1275, 1279 (Wyo. 1975).

54. *See McDonald*, 398 A.2d at 1289.

55. *Id.*

56. *See id.* Most home buyers lack the skill and expertise to adequately inspect the house. Weeks v. Slavick Builders, 24 Mich. App. 621, 180 N.W.2d 503, 505, *aff'd*, 384 Mich. 257, 181 N.W.2d 271 (1970); *see also* Note, *Expansion of Consumer Protection in the Purchase of New Homes*, 3 W. ST. U.L. REV. 106, 109 (1975); Bearman, *supra* note 52, at 545-46.

57. *McDonald*, 398 A.2d at 1289.

58. *Id.*

59. *Id.*, 398 A.2d at 1290.

60. *Id.*

61. *See* Comment, *The Implied Warranty of Habitability Doctrine in Residential Property Conveyances: Policy-Backed Change Proposals*, 62 WASH. L. REV. 743, 747 (1987) (builder-vendor purposely creates expectation of quality home). The builder-vendor creates not only an expectation that the home is liveable but that the home is "truly wonderful." *Id.*; *accord*

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warranties of good workmanship and habitability, hybrids of tort and contract, to the arena of real estate transactions. New home buyers, as well as their subsequent purchasers, now have this protection, and as a result, the traditional rule that implied warranties never arose in real estate transactions became a historical fact.

The first case to hold that new houses were products and that strict liability under section 402A was applicable to defective houses was *Schipper v. Levitt & Sons, Inc.*[62] The court, faced with facts involving a sixteen-month-old child with extensive injuries resulting from a defective water heater,[63] reasoned that houses which are mass-produced are no different from automobiles because both are the end product of an assembly line technique.[64] Several policy considerations influenced the decision, but the most cogent were reminiscent of those used to justify the applicability of the common law warranties discussed above. The court specifically noted the unequal bargaining positions of the parties,[65] the buyer's reliance upon the skill, knowledge, and expertise of the contractor,[66] the builder's ability to spread the cost of liability,[67] and the corresponding inability of the buyers to protect themselves from the risk of probable loss.[68] By allowing a cause of action in strict liability, the court in *Schipper* established that a house could be a product. Therefore, strict liability will apply to a house which is proven defective and unreasonably dangerous.[69]

Dixon v. Mountain City Constr. Co., 632 S.W.2d 538, 540 (Tenn. 1982) (sales person represented home was "top-notch" and "'A' number one"). These representations by the builder-vendor create, in effect, contract rights. Sloat v. Matheny, 44 Colo. App. 1, 625 P.2d 1031, 1033 (1981).

62. 44 N.J. 70, 207 A.2d 314 (1965).

63. *Id.*, 207 A.2d at 316. The child was severely scalded by hot water from a bathroom faucet. *Id.* The heating system used to provide hot water for the house also served the purpose of heating the house by pumping the hot water through coils imbedded in the cement foundation of the house. *Id.*, 207 A.2d at 316-17. The instructions that accompanied the heating system acknowledged that the water was "hotter than that to which you are accustomed" and instructed the homeowners to use the cold water tap to mix the water to an appropriate temperature. *Id.*, 207 A.2d at 317. Despite these instructions, members of the plaintiff's family were mildly burned on several occasions. The only way to reduce the temperature of the water coming out of the tap, other than using the cold water tap, was the installation of a mixing valve at the heating system. *Id.*

64. *Id.*, 207 A.2d at 326. "Buyers of mass produced development homes are not on equal footing with the builder vendors and are no more able to protect themselves in the deed than are automobile purchasers in a position to protect themselves in the bill of sale." *Id.*

65. *Id.*

66. *Id.*, 207 A.2d at 325. With a mass-produced home, the buyer does not have an architect or other professional advisor under his or her employ. Also, the buyer usually can do no more than a superficial inspection of the home. *Id.*

67. *Id.*, 207 A.2d at 326.

68. *Id.*

69. *See id.*, 207 A.2d at 329-30. The court in *Schipper* found that the heating system itself was not defective; therefore, the manufacturer could not be held strictly liable. *Id.*, 207 A.2d at 329. The defect arose as a result of improper installation of the heating system due to the builder vendor's failure to install the mixing valve. *Id.*

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Interestingly, the *Schipper* decision, although refuted by some jurisdictions,[70] has been followed[71] and even extended by some courts to apply to the sale of custom homes.[72] The underlying problem in all of these cases, however, was the central question of whether or not a house is a product. Neither section 402A nor the accompanying comments offer any clue in answering this question. By necessity, therefore, in order to equate a house to a product, the courts, in each case since *Schipper*, have had to examine the rationale behind the applicability of section 402A.[73] One of the considerations specifically mentioned has been the public's right to health and safety.[74] It was this concern that originally encouraged the courts to hold a manufacturer of defective goods strictly liable.[75] If the product in question proved defective, and if that defect caused injury, the concept of strict liability applied. Therefore, it is logical to rely upon this same reasoning to extend the concept of strict liability to real estate transactions.

The courts have also relied upon the above discussed reasons for extending common law warranties to the construction of houses when applying strict liability to transactions involving real estate.[76] These reasons include the prospective buyer's inability to discover potential defects in the construction of the house,[77] reliance upon the expertise, skill, and knowledge of the

70. *E.g.*, McClanahan v. American Gilsonite Co., 494 F. Supp. 1334, 1348 (D. Colo. 1980); K-Mart Corp. v. Midcon Realty Group, Ltd., 489 F. Supp. 813, 817 (D. Conn. 1980); Wright v. Creative Corp., 30 Colo. App. 575, 498 P.2d 1179, 1182-83 (Ct. App. 1972); Green v. Green Acres Constr. Co., 36 Colo. App. 439, 543 P.2d 108, 110 (Colo. Ct. App. 1975); Coburn v. Lenox Homes, Inc., 173 Conn. 567, 378 A.2d 599, 602 (1977); Lowrie v. City of Evanston, 50 Ill. App. 3d 376, 365 N.E.2d 923, 928 (1977); Cree Coaches, Inc. v. Panel Suppliers, 384 Mich. 646, 186 N.W.2d 335, 336 (1971); Queensbury Union Free School Dist. v. Jim Walter Corp., 82 A.D.2d 204, 442 N.Y.S.2d 650, 651 (App. Div. 1981); Van Ornum v. Otter Tail Power Co., 210 N.W.2d 188, 201 (N.D. 1973); Cook v. Salishan Properties, 279 Or. 333, 569 P.2d 1033. 1035-36 (1977); Cox. V. Shaffer, 223 Pa. Super. 429, 302 A.2d 456, 457 (1973).

71. *E.g.*, Blagg v. Fred Hunt Co., 272 Ark. 185, 612 S.W.2d 321, 324 (1981); Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749, 752 (1969); Del Mar Beach Club Owners Assoc. v. Imperial Contracting Co., 123 Cal. App. 3d 898, 176 Cal. Rptr. 886, 893 (1981); Mike Bajalia, Inc. v. Amos Constr. Co., 142 Ga. App. 225, 235 S.E.2d 664, 666 (Ct. App. 1977); O'Laughlin v. Minnesota Natural Gas Co., 253 N.W.2d 826, 832 (Minn. 1977); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 118 (Miss. 1966); Hovenden v. Tenbush, 529 S.W.2d 302, 306 (Tex. Ct. App. 1975); Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152, 158 (Utah 1979); Gay v. Cornwall, 6 Wash. App. 595, 494 P.2d 1371, 1373 (Ct. App. 1972); City of La Crosse v. Schubert, Schroeder & Assocs., 72 Wis. 2d 38, 240 N.W.2d 124, 127 (1976).

72. *See* Pattitucci Drelich, 153 N.J. Super. 177, 379 A.2d 297, 298 (Super. Ct. Law Div. 1977) (strict liability applicable to builder of custom homes); *see also* Cross & Murray, *Liability for Toxic Radon Gas in Residential Home Sales*, 66 N.C.L. Rev. 687, 706-07 (1988).

73. *See* Cross & Murray, *supra* note 71, at 705.

74. *Id.*; *see also* Greenman v. Yuba Power Prods., 59 Cal. 2d 57, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (Cal. 1963) (manufacturer strictly liable when defective product causes personal injury).

75. *See supra* note 7.

76. *See* Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314, 325 (1965) (principles supporting warranty and strict liability carry over into real estate).

77. *Id.*

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contractor,[78] the ability of the builder to spread the cost of liability,[79] and, of course, the mass production technique of the builder/vendors in the construction of new houses.[80] The courts have also reasoned that houses are the equivalent of a product because they enter the marketplace in the condition intended by the contractor in much the same way as any other produced goods.[81] These decisions have all reached one common conclusion: a house is a product. While this proposition may run counter to what we may have originally learned, it carries a great deal of authority.[82] However, it is by no means a unanimous position.

Other jurisdictions, when faced with the exact same question, have arrived at the opposite conclusion.[83] These cases emphasized the fact that injured plaintiffs involved in real estate transactions have more than adequate relief offered to them by traditional tort and contract theories.[84] As such, there is no need to extend strict liability, and, therefore, it is not necessary to reach the conclusion that a house is a product.[85] In addition, these courts have maintained that extending this concept would provide a powerful cause of action to individuals with somewhat dubious claims.[86]

One of the original reasons for strict liability was to offer relief where none was available and to discourage litigation where there was no cause of action. Furthermore, allowing strict liability to apply to the sale of a new home would preclude a defendant/contractor from asserting defenses which have traditionally applied to the construction of houses.[87] In other words, the purchasing public, when buying a house, have never believed that they were acquiring a perfect building. As such contractors should only be held to the standard of the reasonable prudent person. These courts have also reasoned that to hold that a house is a product and apply strict liability to any damaging event resulting therefrom is surpassing the initial intent of the *Restatement*.[88] Specifically, buyers of homes were not within the class

78. Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749, 752 (1969); Cross & Murray, *supra* note 71, at 706.

79. *See Schipper*, 207 A.2d at 326 (risk of loss on developer in better economic position to bear loss); *Kriegler*, 74 Cal. Rptr. at 753 (developer who created danger in better economic position to bear loss than injured party); *see also* Cross & Murray, *supra* note 71, at 706 (deep pocket considerations).

80. Cross & Murray, *supra* note 71, at 706.

81. State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 123-24 (Miss. 1966).

82. *See supra* note 70.

83. *See supra* note 72.

84. Note, *Strict Liability in Tort for Builder-Vendors of Homes*, 24 TULSA L.J. 117, 118 (1988) [hereinafter Note, *Strict Liability*].

85. *See id.*

86. *Id.*; *accord* Milan v. Midland Corp., 282 Ark. 15, 665 S.W.2d 284, 284-85 (1984) (plaintiff alleged defendants caused motorcycle accident by designing street with too sharp a curve).

87. Note, *Strict Liability*, *supra* note 84, at 118. Some defenses that would be lost in a strict liability cause of action include disclaimer of implied warranties, lack of reliance on warranties, failure to notify defendant of breach of warranty, and lack of privity. *See* 63 AM. JUR. 2D *Products Liability* § 528 (1984).

88. *See, e.g.*, Chandler v. Bunick, 279 Or. 353, 569 P.2d 1037, 1039 (1977). The court in

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of individuals that section 402A was designed to protect.[89] To hold otherwise violates the separation of powers doctrine in the Constitution.[90] Because legislatures, not courts, are the proper forums to extend a new concept of liability, a court should never decide that a house is a product in order to extend the concept of strict liability to an allegedly defective structure.

Both sides of this argument claim respectable authority for their positions.[91] What is interesting, however, is how a simple word like "product" can conjure so many meanings. In some jurisdictions, it includes houses which were traditionally thought of as real property and therefore immune from section 402A. Alternatively, several jurisdictions hold that items which are personal property are not products within the scope of section 402A.

IV. Blood

Unlike the discussion of sales and services or real estate transactions,[92] the applicability of the term "product" has been clearly established in the area involving blood. Forty-nine jurisdictions have enacted what can be collectively called "blood shield" statutes.[93] These statutes provide that such

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Chandler stated that "the imposition of strict liability is the response to some demonstrated public need where the traditional legal theories have been found inadequate to the task." *Id.*

89. *See id.*; *see also* Wright v. Creative Corp., 30 Colo. App. 575, 498 P.2d 1179, 1182-83 (Ct. App. 1972) (easier for buyer to make "meaningful inspection" of structure); Chapman v. Lily Cache Builders, 448 Ill. App. 3d 919, 362 N.E.2d 811, 813 (1977) (difference between manufacturer of homes and manufacturer of goods).

90. *See* Mike Bajalia, Inc. v. Amos Constr. Co., 142 Ga. App. 225, 235 S.E.2d 664, 665-66 (Ct. App. 1977) (court refused to allow strict liability cause of action in deference to state statute).

91. *See supra* notes 70, 72.

92. *See supra* notes 13-91 and accompanying text.

93. *See* ALA. CODE § 7-2-314 (1984) (providing blood is service); ALASKA STAT. § 45.02.316(e) (1986) (hospital provides blood as service not sale); ARIZ. REV. STAT. ANN. § 32-1481 (1986) (nonprofit blood bank cannot be strictly liable); ARK. STAT. ANN. § 20-9-802 (1987) (blood provider liable for negligence or wilful misconduct only); CAL. HEALTH & SAFETY CODE § 1606 (Deering 1990) (blood transfusion by law is service not sale); COLO. REV. STAT. § 13-22-104 (2) (1974) (providing blood constitutes service); CONN. GEN. STAT. ANN. § 19a-280 (West 1986) (blood is service not sale); DEL. CODE ANN. tit. 6 § 2-316(5) (1975) (blood is service not sale); D.C. CODE ANN. § 28:2-314 (1990) (against public policy to hold blood bank strictly liable); FLA. STAT. ANN. § 672.316(5) (West 1991) (providing blood is rendition of medical services); GA. CODE ANN. § 11-2-316(5) (1982) (providing blood is medical service); HAW. REV. STAT. § 325-91 (1985) (no implied warranty that blood is pure where no scientific test to detect disease is available); IDAHO CODE § 39-3702 (1985) (providing blood is service except if sold for profit); ILL. ANN. STAT. ch. 111 1/2 para. 5102(2) (Smith-Hurd 1988) (strict tort liability not applicable to blood providers); IND. CODE ANN. § 16-8-7-2 (West 1990) (procurement of blood is a medical service which does not give rise to strict liability); IOWA CODE ANN. § 142A.8 (West 1989) (providing blood is service not sale and strict liability not applicable); KAN. STAT. ANN. § 65-3701 (1985) (providing blood is rendition of service and not liability unless negligence proven); KY. REV. STAT. ANN. § 139.125 (Michie/Bobbs-Merrill 1991) (processing and distribution of blood deemed service not sale); LA. CIV. CODE ANN. art. 2322.1 (West Supp. 1991) (strict liability not applicable to nonprofit blood providers); ME. REV. STAT. ANN. tit. 11, § 2-108 (Supp. 1990) (providing blood is service regardless of whether any

transactions are the rendering of a service or provide explicitly[94] and/or implicitly[95] that strict liability shall not apply. Only one jurisdiction, New Jersey, might allow a strict liability action against a hospital or blood bank for damages arising out of a blood transfusion.[96] This liberal view follows

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remuneration is paid); MD. HEALTH-GEN. CODE ANN. § 18-402 (1990) (supplier of blood performs service and is not subject to strict liability); MASS. ANN. LAWS ch. 106, § 2-314 (Law. Co-Op. 1984) (annotation number seven surveys numerous other jurisdictions where blood suppliers are exempt from strict liability); MICH. STAT. ANN. § 14.15 (9121) (Callaghan Supp. 1990) (providing blood is service regardless of profit); MINN. STAT. ANN. § 336.2-315 (West 1966); Balkowitsch v. Minneapolis War Memorial Blood Bank, 270 Minn. 151, 132 N.W.2d 805, 810 (1965) (interprets statute to mean blood supplier provides service and thus strict liability inapplicable); MISS. CODE ANN. § 75-2-314 (1981) (judicial decision section seven annotates cases from other jurisdictions holding blood transfusion as service not sale); MO. STAT. ANN. § 431.069 (Vernon Supp. 1991) (procurement of blood rendition of medical service); MONT. CODE ANN. § 50-33-102 (1989) (furnishing blood not sale of product); NEB. REV. STAT. § 71-4001 (1990) (furnishment of blood constitutes medical service); NEV. REV. STAT. ANN. § 460.010 (Michie 1987) (no liability for providing blood other than negligence or willful misconduct); N.H. REV. STAT. ANN. § 507:8-b (1983) (no strict liability regarding blood products); N.M. STAT. ANN. § 24-10-5 (1986) (no liability for blood processing other than negligence or willful misconduct); N.Y. PUB. HEALTH LAW § 580(4) (McKinney 1990) (blood is service); N.C. GEN. STAT. § 130A-410 (1989) (blood is service not sale); N.D. CENT. CODE § 43-17-40 (1978) (no liability for blood except for negligence); OHIO REV. CODE ANN. § 2108.11 (Baldwin 1989) (sale of blood constitutes service not sale); 61 OKLA. STAT. ANN. § 2151 (West 1984); OR. REV. STAT. § 97.300 (1987) (sale of blood not sales transaction covered by implied warranty); PA. STAT. ANN. tit. 42, § 8333 (Purdon 1982) (no strict liability for blood transfusion); R.I. GEN. LAWS § 23-17-30 (1989) (no liability for blood transfusion other than negligence or willful misconduct); S.C. CODE ANN. § 44-33-10 (Law. Co-op. 1985) (sale of blood is medical service as matter of law); S.D. CODIFIED LAWS ANN. § 57A-2-315.1 (1988) (blood is medical service); TENN. CODE ANN. § 47-2-316(5) (1979) (implied warranty of merchantability not applicable to sale of blood); TEX. CIV. PRAC. & REM. CODE ANN. § 77.003 (Vernon 1986) (person not liable for blood transfusion except for negligence, gross negligence or intentional tort); UTAH CODE ANN. § 26-31-1 (1989) (person participating in sale of blood providing service); VA. CODE ANN. § 32.1-297 (1985) (no action for implied warranty in connection with transfer of blood or human tissue); WASH. REV. CODE ANN. § 70.54.120 (1975) (limiting liability of blood supplier to negligent or willful conduct except where fee paid, then strict liability possible); W. VA. CODE § 16-23-1 (1991) (procurement of human blood declared not to be sale); WIS. STAT. ANN. § 146.31 (West 1989) (blood transfer constitutes service, liability for negligence and willful misconduct only); WYO. STAT. § 34.1-2-316(c)(iv) (1990) (dispensing blood constitutes medical service not sale). No statute on limiting the liability for blood providers could be located in the jurisdiction of Vermont.

94. *E.g.*, ARIZ. REV. STAT. ANN. § 32-1481 (1986) (nonprofit blood bank cannot be strictly liable); ILL. ANN. STAT. ch. 111 1/2, para. 5102(2) (Smith-Hurd 1988) (strict tort liability not applicable to blood providers); IND. CODE ANN. § 16-8-7-2 (West 1990) (procurement of blood is a medical service which does not give rise to strict liability). These statutes, along with many others, expressly state that blood provider cannot be held strictly liable.

95. *E.g.*, ARK. Code Ann. § 20-9-802 (1987) (blood provider liable for negligence or willful misconduct only); KAN. STAT. ANN. § 65-3701 (1985) (providing blood is rendition of service and no liability unless negligence proven); NEV. REV. STAT. ANN. § 460.010 (Michie 1987) (no liability for providing blood other than negligence or willful misconduct). The wording of these types of statutes implies that strict liability is not an available remedy because the statutes only permit a cause of action for negligence or willful misconduct.

96. *See* Note, *New Jersey Court Applies Theory of Strict Liability to Hospitals and Blood*

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from New Jersey's interpretation that strict liability is an available remedy against a service provider.[97] Therefore, in most jurisdictions, blood is not considered the equivalent of a product under section 402A of the *Restatement*.[98]

V. *Electricity*

"What is electricity? Simply stated, it is a force, like the wind . . . ."[99] Is it a product? The answer to this question, as in those cases involving

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Banks for Transfusion-Related Hepatitis - Brody v. Overlook Hospital, 121 N.J. Super. 299, 296 A.2d 668 (L. Div. 1972), 4 SETON HALL L. REV. 730, 730 (1973); *see also* Pollock, *Liability of a Blood Bank or Hospital for a Hepatitis Associated Transfusion in New Jersey*, 2 SETON HALL L. REV. 47, 47 (1970). The Brody case was reversed on appeal on the basis that no reliable method existed for detecting a virus in blood. Brody v. Overlook Hosp., 127 N.J. Super. 331, 317 A.2d 392, 392 (Super. Ct. App. Div. 1974).

97. *See supra* note 22 and accompanying text.

98. *See supra* note 93 and accompanying text.

99. Pierce v. Pacific Gas & Elec. Co., 186 Cal. App. 3d 68, 212 Cal. Rptr. 283, 288 n.3 (1985) (holding that electricity is product under § 402A). Electricity has been defined as "a form of energy that can be made or produced by men, confined, controlled, transmitted and distributed to be used as an energy source for heat, power, and light and is distributed in the stream of commerce." Ransome v. Wisconsin Elec. Power Co., 87 Wis. 2d 605, 275 N.W.2d 641, 643 (1979).

In *Pierce*, a home consumer of electricity was injured due to the mechanical failure of a transformer that sent 7000 volts of electricity into her home. *Pierce*, 212 Cal. Rptr. at 285. The court noted: "Electricity alone cannot perform work. Electricity alone is useless from a consumer's point of view. Electricity is a stream of electrons that is created, transmitted, distributed, and converted to energy all within milliseconds. No California court has ever held that electricity is a product." *Id.*, 212 Cal. Rptr. at 288 n.3. In this case, a California court for the first time held that Pacific Gas & Electric as a commercial supplier of electricity could be held strictly liable for personal injuries. *Id.*, 212 Cal. Rptr. at 292. The basis of the court's decision was the numerous policy considerations underlying the imposition of strict liability. *Id.*, 212 Cal. Rptr. at 291. These policy considerations include:

> 1. That the defendant is in a much better position than a plaintiff to detect and correct any problems which inevitably occur in electrical supply.
> 2. The imposition of strict liability creates an incentive for defendants to avoid accidents before they occur by investing in safer equipment.
> 3. Imposing strict liability spreads the costs of personal injuries among millions of electricity consumers.
> 4. The defendant who profited from the sale of electricity should assume the associated costs involved.

Id., 212 Cal. Rptr. at 291-92. The *Pierce* court was clear to distinguish the facts in their case from a situation involving injuries initiated by an act of god. The court noted that:

> Where electricity strikes a powerline and enters a consumer's home, causing damage, the utility is not strictly liable because it has not marketed a "product" at all. In such cases the utility has provided only a connecting medium through which the force of nature enters the consumer's home and causes injury.

Id., 212 Cal. Rptr. at 292 n.10. A judicial response to the aforementioned policy considerations justifying holding an electrical power company strictly liable was espoused by the Minnesota Supreme Court in Ferguson v. Northern States Power Co., 307 Minn. 26, 239 N.W.2d 190 (1976). In *Ferguson*, the court stated that while "spreading the cost of serious injury over all consumers of electricity is equitably more appealing . . . the court is persuaded by the amicus

blood,[100] depends upon the jurisdiction involved. In determining whether electricity is a product, courts have been much more creative in determining their particular position. For example, some courts hold that electricity is a service to which only the action of negligence is applicable.[101] These jurisdictions view electricity as a commodity which can not be packaged, labeled, and sold and, therefore, is not a fungible good. By definition, then, electricity is a service.[102] Other courts maintain that even though electricity constitutes a service, non-code implied warranties still apply.[103] The court in one case held that because other states applied implied warranties of fitness and merchantability to service transactions, electricity should not be excluded from these warranties.[104]

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briefs which detail the severe economic consequences which may be sustained by the many small electric utilities by the abrupt imposition of such a rule." *Id.*, 239 N.W.2d at 194. The *Ferguson* court continued by calling on the state legislature to resolve this economic problem. *Id.*

100. *See supra* note 93 and accompanying text.

101. *See, e.g.*, Mosby v. Southwestern Elec. Co., 659 F.2d 680, 681 (5th Cir. Oct. 1981) (plaintiff must prove electric company negligent for not reasonably anticipating injury); Rice v. Florida Power & Light Co., 363 So. 2d 834, 838 (Fla. Dist. Ct. App. 1978) (electric company should be held to reasonableness standard); Ford v. Georgia Power Co., 151 Ga. App. 748, 261 S.E.2d 474, 474 (Ct. App. 1979) (summary judgment granted because no actionable negligence shown); Hedges v. Public Serv. Co., 396 N.E.2d 933, 935 (Ind. Ct. App. 1979) (power company not strictly liable for injuries resulting from contact with high-voltage transmission wire); Williams v. Detroit Power Co., 63 Mich. App. 559, 234 N.W.2d 702, 709 (1975) (power company held to reasonable man standard); Vieths v. Ripley, 295 N.W.2d 659, 663 (Minn. 1980) (no absolute liability for electric company, plaintiff must show absence of care); Donovan v. Union Elec. Co., 454 S.W.2d 623, 626 (Mo. Ct. App. 1970) (electric company's liability determined upon negligence principles); Rodgers v. Chimney Rock Pub. Power Dist., 216 Neb. 666, 345 N.W.2d 12, 16 (1984) (power company is not insurer and not liable for damages unless negligence proved); Wood v. Public Serv. Co., 114 N.H. 182, 317 A.2d 576, 577 (1974) (company engaged in electric current distribution must exercise due care in maintenance of power lines); Bogle v. Duke Power Co., 27 N.C. App. 318, 219 S.E.2d 308, 310 (1975) (electric companies must exercise reasonable care); Bates v. Cleveland Elec. Illuminating Co., 171 N.E.2d 548, 552 (Ohio Ct. App. 1961) (companies that maintain electrical wires cannot anticipate every possible peril); Wray v. Benton Co. Pub. Util. Dist., 9 Wash. App. 456, 513 P.2d 99, 100 (1973) (electric company subject to common law standard of care). *See generally* Annotation, *Product Liability: Electricity*, 60 A.L.R. 4TH 732, 749 (1988) (detailing cases from various jurisdictions holding power companies not subject to strict liability).

102. *See, e.g.*, Buckeye Union Fire Ins. Co. v. Detroit Edison Co., 38 Mich. App. 325, 196 N.W.2d 316, 318 (1972) (electricity is service, not goods); Farina v. Niagara Mohawk Power Co., 81 A.D.2d 700, 438 N.Y.S.2d 645, 646 (App. Div. 1981) (cable not packaging for the electrical current); Navarro City Elec. Coop. v. Prince, 640 S.W.2d 398, 400 (Tex. Ct. App. 1982) (electrical energy cannot be classified as fungible goods nor can it be packaged).

103. *See* Buckeye Union Fire Ins. Co. v. Detroit Edison Co., 38 Mich. App. 325, 196 N.W.2d 316, 318 (1972). *But see* Wirth v. Mayrath Indus., 278 N.W.2d 789, 792 (N.D. 1979) (rejecting *Buckeye* case and holding that implied warranties do not apply to sale of electricity). The court in *Buckeye* held that non-code implied warranties still apply on the sale of electricity even though electricity is a service rather than a "product" or "good." *Buckeye*, 196 N.W.2d at 318.

104. Aversa v. Public Serv. Elec. & Gas Co., 186 N.J. Super. 130, 451 A.2d 976, 978 (Super. Ct. Law Div. 1982). The court notes that many of the cases that have held the liability

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In addition, some courts have held that electricity met the definition of goods under the Uniform Commercial Code in that it is a thing, existing and movable, and as such subject to the Code's implied warranties.[105] Other courts view electricity as a product subject not only to the Uniform Commercial Code but also to the ramifications of section 402A.[106] In this last instance, the courts have taken note of the fact that electricity is a substance which can be manufactured, distributed, and sold in the same manner as more tangible goods, and as a result should be considered a product.[107] Finally, other jurisdictions have adhered to the position that while electricity itself may constitute a product for purposes of applying the doctrine of strict liability, its distribution should be viewed as a service subject to theories of recovery allocated to that type of transaction.[108]

Even before the promulgation of section 402A, some courts held that electricity constituted a product.[109] In these instances, much attention was

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of electric companies is restricted to a negligence theory applied only to those situations wherein the electricity was transmitted over high tension wires for ultimate consumption by the public. *Id.*, 451 A.2d at 979.

105. *See* Helvey v. Wabash Co. REMC, 151 Ind. App. 176, 278 N.E.2d 608, 609 (Ct. App. 1972) (electricity is personal property subject to ownership and as such it may be stolen); Cincinnati Gas & Elec. Co. v. Goebel, 28 Ohio Misc. 2d 4, 502 N.E.2d 713, 715 (Mun. Ct. 1986) (electricity in metered amounts is good under UCC); *see also* Gardiner v. Philadelphia Gas Works, 413 Pa. 415, 197 A.2d 612, 614 (1964) (court applied UCC statute of limitations in breach of warranty suit against electric company).

106. *E.g.*, Elgin Airport Inn v. Commonwealth Edison Co., 88 Ill. App. 3d 477, 410 N.E.2d 620, 624 (App. Ct. 1980) (electricity can be "measured, bought and sold, changed in quantity or quality, delivered whenever desired" and, therefore, it is product subject to strict liability); Ransome v. Wisconsin Elec. Power Co., 87 Wis. 2d 605, 275 N.W.2d 641, 648 (Wis. 1979) (strict liability available remedy against electric company).

107. *See supra* note 106 and accompanying text.

108. *See* Smith v. Home Light & Power Co., 734 P.2d 1051, 1055 (Colo. 1987) (electricity not a product until it reaches place where it is consumable); Carbone v. Connecticut Light & Power Co., 40 Conn. Supp. 120, 482 A.2d 722, 723 (Super. Ct. 1984) (electricity may be product, but supply of product is service); Genaust v. Illinois Power Co., 62 Ill. 2d 466, 343 N.E.2d 465, 470 (1976) (power wires not packaging for electricity); Ransome v. Wisconsin Elec. Power Co., 87 Wis. 2d 605, 275 N.W.2d 641, 643 (1979) (distribution of electricity is service while electricity itself is consumable product); *see also* Annotation, *Product Liability: Electricity*, 60 A.L.R. 4TH 732, 742-43 (1988).

109. *See* State v. Interstate Power Co., 118 Neb. 756, 226 N.W. 427, 433 (1929) (electricity is type of commodity); *see also* Terrace Water Co. v. San Antonio Light & Power Co., 1 Cal. App. 511, 82 P. 562, 563 (1905) (defendant contracted to sell energy in which it had ownership as personal property); Seaton Mountain Elec. Light, Heat & Power Co. v. Idaho Spring Inv. Co., 49 Colo. 122, 111 P. 834, 835 (1910) (describing heating agents such as water and steam as merchantable products). In *Interstate Power Co.*, the court refused to recognize "raw products" and "manufactured products" as mutually exclusive terms. *Interstate Power Co.*, 226 N.W. at 433. The defendants proposed that by drawing a distinction between "raw" and "manufactured" products electricity in its "raw" form should not be deemed a product. *Id.* The court, however, stated that a "'product' is defined by authoritative lexicographers as a thing produced by nature or the natural processes; that which is produced by an action, operation or work; a production; the results; that which results from operation of a cause,

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given to the fact that electricity could be produced, stored, measured, moved, or transported from one place to another and bought and sold by a definite and well-understood standard.[110] Under these circumstances, it was logical to consider electricity in terms of a modern-day commodity.[111] Since 1965, however, in deciding the issue of whether or not electricity constituted a product, much attention has been given to the policy reasons for imposing strict liability.

These policy reasons include the fact that section 402A was adopted to make it easier for an injured individual to recover.[112] Section 402A is plaintiff-oriented[113] and better suited to a situation involving electricity where the vast and complex nature of an electrical power plant may be beyond the ken of the ordinary layman. In other words, even though negligence may be present, it may not be readily apparent. Therefore, strict liability should apply, and since it applies only to "products," electricity should be considered as such.

The second reason for imposing strict liability is that it provides an incentive for improved product safety.[114] If individuals or corporations know that they will have to pay if one of their defective products causes injury, they will attempt to avoid such damaging events in the future. Electricity is subject to improved handling, and, therefore, section 402A should apply.[115] Finally, strict liability reallocates resources. Stated differently, by imposing strict liability the risk of loss may be spread among all individuals

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consequence, or effect."

Id.

The court continued by establishing electricity as a commodity. The court explained that

> in the language of everyday life in the strictly commercial sense of the term, "electricity" is "produced," "stored," "measured," "bought and sold." It is moved or transported from place to place in containers or by cable. It is something that one trades or deals in. We buy it and pay for it and determine the amount of the purchases by a definite and well-understood "standard." Brought into being as a product, it exists in modern life as a commodity.

Id.

110. State v. Interstate Power Co., 118 Neb. 756, 226 N.W. 427, 433 (1929).

111. *Id.*

112. Pierce v. Pacific Gas & Elec. Co., 166 Cal. App. 3d 68, 212 Cal. Rptr. 283, 291 (1985). According to the court, one of the main policy grounds for applying strict liability to electricity is to provide "a short-cut to liability where negligence may be present but is difficult to prove." *Id.* The court stated:

> Proof of negligence in cases such as this requires a plaintiff to present to a jury evidence of the inner workings of an electrical power system of vast and complex proportions. The technical operation of such systems and of electricity itself is far beyond the knowledge of the average juror. The expert witnesses who can explain such systems to the jury are concentrated within the industry itself and may be reluctant to serve as expert witnesses in plaintiffs' cases.

Id.

113. *Id.*

114. *Id.*

115. *Id.*, 212 Cal. Rptr. at 291-92.

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using the product instead of a few blameless victims.[116] This is especially true in situations involving electricity where the cost of tort liability would be spread among millions of consumers.[117] Because the basic policy reasons for imposing strict liability are present, it should apply even though it requires designating a "force like the wind"[118] as a product.

VI. Other Situations Where the Term "Product" Has Been Applied

The following cases illustrate the way in which ingenious advocates and willing courts have joined together and expanded the meaning of the term "product." Other than showing how exaggerated the meaning of a word can become, no clear consensus of the meaning of the term has emerged. For example, even though section 402A is silent on the subject of component parts, a majority of the jurisdictions have held that component parts may be considered products and that their manufacturers can be held strictly liable.[119] The only caveat to this rule is that the component part, even though incorporated into and part of another object, must reach the consuming public without substantial change.[120] This apparently means that if the component part is capable of being identified as a separate and individual entity of the total integral finished object, such as a windshield in an automobile, then it is a product.[121] If the component part is no longer distinguishable or capable of being identified on its own, it loses its status as a product. The courts thus far have differed as to how much change must take place in order for this transformation to take place.[122]

In addition, it has been held that when a commodity such as water is sold by a city and distributed by a water works system, it is a product, and if defective, the city is subject to strict liability.[123] In a situation where the water coming out of a kitchen tap had been intermingled with a flammable gas that was ignited by the plaintiff's cigarette, the court reasoned that the case was analogous to those cases in which food products had been contaminated by substances such as glass, rocks, or pieces of metal.[124] As a result, the court concluded that the product was defective and unreasonably dangerous,[125] and the city was subject to strict liability even though the injury did not occur as a result of drinking water.[126]

116. *Id.*, 212 Cal. Rptr. at 292.
117. *Id.*
118. *See supra* note 99 and accompanying text.
119. Night, *Products Liability: Component Part Manufacturer's Liability for Design and Warning Defects*, 54 J. AIR L. & COM. 215, 226 (1988).
120. *Id.*
121. *Id.*
122. *Id.* at 227.
123. Moody v. City of Galveston, 524 S.W.2d 583, 588 (Tex. Civ. App. 1975).
124. *Id.* at 589; *see also* Gladiola Biscuit Co. v. Southern Ice Co., 267 F.2d 138, 140 (5th Cir. 1959).
125. *Moody*, 524 S.W.2d at 589.
126. *Id.*

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Decisions which will have a lasting effect well into the next century are those involving computer software. In this day of advanced technology when complex activities such as diagnosing medical problems,[127] monitoring industrial robots,[128] determining architectural stress,[129] directing automatic airplane pilots,[130] and supervising chemical or nuclear plants[131] are all accomplished by giant, massive, and complex computers, some courts may hold that the software which guide them are products. The fact that the software can be owned, adjusted, repaired, and, in some cases, altered makes them resemble any other fungible goods.[132]

Finally, the most recent genre of cases to expand upon the meaning of the term "product" are those dealing with what can best be described as defective ideas. Examples of this type of case include erroneous information in a manual containing instructions for the operation and maintenance of a radial saw,[133] as well as erroneous information in an aircraft instrument approach chart.[134] In both cases, the court held that the falsity of information constituted a defective product.[135] In the aircraft approach situation, the court reasoned that because the chart was mass-produced,[136] the defendant fit into the traditional mold of an individual who could bear the cost

127. *See* Lawrence, *Strict Liability Computer Software and Medicine: Public Policy at the Crossroads*, 23 TORT INS. L.J. 1, 9 (1987); *Tort Liability for High Risk Computer Software* at 375-76; *see also* Neuman, *Risks to the Public in Computers and Related Systems*, SOFTWARE ENGINEERING NOTES, July 1987, at 7; *Software Bugs: A Matter of Life and Liability*, DATAMATION, May 15, 1987, at 88.

128. Neuman, *supra* note 127, at 7.

129. *Id.*; *see also Building Made Easy: Computer-Aided Design and Drafting (CADD) Systems Are Fueling a Revolution in the Architectural Field*, SKY, Feb. 1987, at 21.

130. Neuman, *supra* note 127, at 7-8; *see also CPU Fails, Two Jets Nearly Collide*, COMPUTERWORLD, July 9, 1979, at 1.

131. Neuman, *supra* note 127, at 2. *See generally Computer Error Closes Nuke Plants*, INDIANAN POLISSTAR, Mar. 16, 1979, at 1.

132. Lawrence, *supra* note 127, at 9; *see also* RRX Indus. v. Lab-Con, Inc. 772 F.2d 543, 546 (9th Cir. 1985).

133. Comment, *Strict Liability for Defective Ideas in Publications*, 42 VAND. L. REV. 557, 567 (1989); *see also* Sears, Roebuck & Co. v. Employer's Ins. of Wausau, 585 F. Supp. 739, 745 (N.D. Ill. 1983). In this case, the insurance company claimed they were not required to defend Sears because the insurance applied to the manual itself and not the words described within the manual. *Sears*, 585 F. Supp. at 745. The court held, however, that this was not a valid argument. *Id.* The court did acknowledge that a products liability action for "defective ideas" within the manual was inappropriate. *Id.*

134. Comment, *supra* note 133, at 570. In Aetna Casualty & Sur. Co. v. Jeppesen & Co., 642 F.2d 339, 342 (9th Cir. 1981), the court held that § 402A applied to aircraft instrument approach charts. In this case, the survivors of a plane crash claimed that the defective chart caused the crash. *Id.*

In Halstead v. United States, 535 F. Supp. 782, 783 (D. Conn. 1982), a small aircraft crashed while attempting a full instrument landing. In applying strict liability the court explained that the numerous policy justifications for imposing strict liability applied to the charts. *Id.* at 790-91. This case was later followed by the Ninth Circuit Court of Appeals in Brocklesby v. United States, 753 F.2d 794, 800 (9th Cir.), *amended on other grounds*, 767 F.2d 1288 (9th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986).

135. Comment, *supra* note 133, at 570-72.

136. Halstead v. United States, 535 F. Supp. 782, 783, 790-91 (D. Conn. 1982).

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of strict liability. This burden could be accomplished by distributing the risk of injury through insurance and higher prices spread out among the entire production, which was preferable to having the cost of injury borne by the individual injured plaintiff. It should be noted, however, that these cases have not been widely followed. In fact, more often than not, analogous fact situations have produced the opposite conclusion. For example, courts have held that credit reports,[137] a magazine article dealing with autoerotic asphyxiation,[138] a science experiment in a text book,[139] a recipe in a cook book,[140] as well as the lyrics in a song which allegedly influenced a teenager to commit suicide,[141] are not products. In all of these cases the courts, stressing the importance of the first amendment, took a strong position against imposing strict liability upon the expression of ideas.[142]

The cases cited above, however, should be taken into consideration when determining the emerging meaning of the term "product." The fact that such allegations have been made is indicative of the current thought. It also shows that inroads into the further expansion of the term "product" are being made. Once a new idea has been expressed in a dissenting opinion,[143] it is sometimes only a matter of time before a new cause of action emerges.[144]

VII. Conclusion

This article illustrates how far courts have come in interpreting the term "product" in section 402A of the *Restatement (Second) of Torts*. Courts have generally avoided the dictionary's definition and have instead utilized a strict liability policy approach in the interpretation of the term.[145] This has led to some unusual results. Today, transactions involving traditional

137. Comment, *supra* note 133, at 569; *see also* L. Cohen & Co. v. Dunn & Bradstreet, Inc., 629 F. Supp. 1425, 1430 (D. Conn. 1986).

138. Herceg v. Hustler Magazine, 565 F. Supp. 802, 803 (S.D. Tex. 1983), *modified on other grounds*, 814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988). In this case, the plaintiffs brought a wrongful death suit against *Hustler* magazine alleging that an article on autoerotic asphyxiation was an unreasonably dangerous and defective product which caused the death of the plaintiff's son and brother. The two men were attempting to duplicate the sexual technique described in the magazine, which was intended to increase erotic pleasure during masturbation.

139. Walter v. Bauer, 109 Misc. 2d 189, 439 N.Y.S.2d 821, 822 (Sup. Ct. 1981), *modified on other grounds*, 88 A.D.2d 787, 451 N.Y.S. 533 (App. Div. 1982). In this case a child suffered injuries after attempting to duplicate an experiment involving a ruler and rubber bands. The court rejected the strict liability claim on the basis that the plaintiff "was not injured by use of the book for the purpose for which it was designed, i.e., to be read." *Id.*, 439 N.Y.S.2d at 822.

140. Cardozo v. True, 342 So. 2d 1053, 1056 (Fla. Dist. Ct. App. 1977). The court concluded that strict liability did not apply to the recipe ideas contained within the book. *Id.*

141. McCollum v. CBS, Inc., 202 Cal. App. 3d 989, 249 Cal. Rptr. 187, 189 (1988).

142. *Id.*

143. Lewis v. Big Powderhorn Mountain, Ski Corp., 69 Mich. App. 437, 245 N.W.2d 81, 83 (1976). In the dissenting opinion Presiding Judge Burns stated that "the painter's 'product', if there must be one, is the performance of his work." *Id.*

144. *See, e.g.*, Cantu, *Privacy*, 7 ST. LOUIS U. PUB. L. REV. 313, 322 (1988).

145. *See supra* note 12 and accompanying text.

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services, houses, land, blood, electricity, component parts, water, computer software, and ideas have all been held in one form or another to constitute a product. How much further will we go? The answer to this question depends on the ingenuity of plaintiffs and the willingness of courts to extend the protection of section 402A to individuals injured by a commodity placed into the stream of commerce. The trend thus far has been to extend the meaning of the term beyond that originally contemplated in 1965 when section 402A was promulgated. This movement has met with little resistance as the courts have reached far in attempting to cloak injured plaintiffs with the protection offered by the concept of strict liability.

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