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## Strict Liability Claims Against Hospitals Under 402A

Assume that you are a Pennsylvania resident, entering a Pennsylvania hospital for surgery. During the course of the operation, the bone plug cutter which the surgeon is using slips, cutting further than the depth to which it was set. Tests indicate that the mechanism itself failed, not the skill of the surgeon. As a result of the slip, you are rendered a quadriplegic.<sup>1</sup> What types of causes of action will the Pennsylvania courts recognize?

The claims that most readily come to mind are: negligence (against the doctor and hospital), and products liability (against the manufacturer). There exists a possible third basis of liability. Plaintiffs in several jurisdictions have brought strict liability actions under 402A of the Restatement (Second) of Torts against the hospital.<sup>2</sup> The Pennsylvania Supreme Court has never addressed this issue, even though the Pennsylvania Superior Court has decided this question on two occasions.<sup>3</sup> This comment will review various state court decisions and their rationales, then advocate a position for the Pennsylvania Supreme Court should it be faced with the issue of strict liability in this context.<sup>4</sup>

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1. These constitute the facts of *Grubb v Albert Einstein Medical Center*, 255 Pa Super 381, 387 A2d 480 (1978). The plaintiff in *Grubb* sought to recover under both strict liability and negligence theories. The court upheld the verdict for the plaintiff. However four judges would not have held the defendant strictly liable under 402A.

2. Section 402A of the Restatement (Second) of Torts reads:

(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.

3. *Podrat v Codman-Shurtleff, Inc.*, 384 Pa Super 404, 558 A2d 895 (1989), allocatur denied in \_\_\_ Pa \_\_\_, 569 A2d 1368, and *Grubb* (cited in note 1).

4. This comment will not address claims involving allegedly defective blood transfusions, since many state commercial codes exclude blood and blood products from strict liability claims. See *McDaniel v Baptist Memorial Hospital*, 469 F2d 230 (6th Cir 1972).

## TREATMENTS OF THE CLAIM

The most recent Pennsylvania Superior Court case succinctly illustrates the majority position on the question of whether a hospital may be held strictly liable under 402A. In *Podrat v Codman-Shurtleff, Inc.*,<sup>5</sup> the plaintiff suffered injury when the tip of a pair of forceps broke off during back surgery, and became lodged within the disc space.<sup>6</sup> The tip was subsequently removed from the patient.<sup>7</sup> The plaintiff sued the hospital under the strict liability theory of 402A.<sup>8</sup> The trial court granted a nonsuit, and the plaintiff appealed.<sup>9</sup>

The superior court, in affirming the trial court, relied primarily on the decisions of other jurisdictions, and agreed with these cases that the language of 402A was virtually dispositive of this issue.<sup>10</sup> Section 402A applies to a seller of any *product* in a defective condition unreasonably dangerous to the user or consumer, if the seller is "engaged in the business of selling such a product."<sup>11</sup> The court, reasoning that the hospital was providing a *service* rather than a *product* to the patient, stated:

Incidental to this service, the treatment of the patient, was the use of an instrument. The surgical forceps were merely employed by the hospital in performing its actual function of providing medical services. The hospital's relationship with the patient did not relate essentially to the use of this piece of equipment, but to the professional service it provided.<sup>12</sup>

This bifurcation of service/product sellers is the recurring theme of these strict liability cases. A case frequently cited for this bifur-

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5. See note 3.

6. *Podrat*, 558 A2d at 895.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 896-98. The court looked to *Silverhart v Mount Zion Hospital*, 20 Cal App 3d 1022, 98 Cal Rptr 187 (1971) (strict liability does not apply to provision of medical services because the hospital does not play an integral role in the overall production or marketing of the product); *Hector v Cedars-Sinai Medical Center*, 180 Cal App 3d 493, 225 Cal Rptr 595 (1986) (strict liability will not lie against the hospital since the patient enters the hospital to obtain medical treatment, not to purchase a product); *Thomas v St. Joseph Hospital*, 618 SW2d 791 (Tex Civ App 1981) (strict liability does not lie where there is no complaint that the product, per se, was defective apart from the professional services connected with its use); and, *Nevauex v Park Place Hospital*, 656 SW2d 923 (Tex Civ App 1983) (strict liability will not attach to a hospital when a patient is injured by radiation therapy even if it is a product because it is intimately and inseparably connected with the professional services provided).

11. *Id.* at 895. (Emphasis added.)

12. *Id.* at 897. (Emphasis added.)

cation rationale is *Silverhart v Mount Zion Hospital*,<sup>13</sup> a California case. There, the plaintiff sued when a surgical needle broke and became permanently lodged inside her body.<sup>14</sup> The trial court refused to instruct the jury on the issue of strict liability; the plaintiff appealed.<sup>15</sup> The appellate court looked to strict liability cases involving defendants other than hospitals.<sup>16</sup> The court noted that:

[a] significant common element running through the cases is that each of the defendants against whom the standard of strict liability has been applied played an integral and vital part in the overall production or marketing enterprise. At the very least the defendant in each case was a link in the chain of getting goods from the manufacturer to the ultimate user or consumer. . . .

The essence of the relationship between a hospital and its patients does not relate essentially to any product or piece of equipment it uses but to the professional services it provides.<sup>17</sup>

The court, relying on the foregoing reasoning, concluded that the hospital, not the patient, was the end-user of the needle, so that the hospital did not fit within the strictures of a 402A defendant.<sup>18</sup>

A similar rationale was employed in another California case, *Hector v Cedars-Sinai Medical Center*.<sup>19</sup> In that case, the plaintiff brought a strict liability claim when the pacemaker installed at the Medical Center proved to be defective.<sup>20</sup> At the trial level, the hospital moved for partial summary judgment on the strict liability claim.<sup>21</sup> The plaintiff appealed the granting of this motion.<sup>22</sup> To support the argument that the hospital was a seller of a product, the plaintiff pointed to the "routine" 85% surcharge the hospital added to the pacemakers it ordered from the manufacturer.<sup>23</sup> The court rejected this reasoning.<sup>24</sup> The court instead accepted the argument of the hospital that, since it did not stock, recommend, distribute or sell pacemakers, and that it simply facilitated the im-

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13. 20 Cal App 3d 1022, 98 Cal Rptr 187 (1971).

14. *Silverhart*, 98 Cal Rptr at 188.

15. *Id.* at 189.

16. *Id.* at 189-90.

17. *Silverhart*, 98 Cal Rptr at 190-91.

18. *Id.*

19. 180 Cal App 3d 493, 225 Cal Rptr 595 (1986). See also, *Vergott v Deseret Pharmaceutical Co.*, 463 F2d 12 (5th Cir 1972) (hospital not a seller engaged in the business of selling a product).

20. *Hector*, 225 Cal Rptr at 595.

21. *Id.*

22. *Id.* at 596.

23. *Id.* at 599.

24. *Id.*

plantation by completing purchase requisitions, the hospital was not a seller of a product.<sup>25</sup> The court summarized:

The hospital does not order pacemakers for itself, but may fill out the purchase requisitions for surgeons who order the devices. The hospital does not stock or recommend pacemakers or provide them to the general public, dealing with pacemakers only in the context of the courses of treatment for particular patients. Even then, it is the surgeon who chooses or recommends the particular device to be implanted; the hospital merely provides administrative services in connection with the order and support services in connection with the implantation. . . .

[T]he patient does not enter the hospital merely to purchase a pacemaker but to obtain a course of treatment which includes implantation of a pacemaker.<sup>26</sup>

Some courts do not accept the service/product rationale of the *Hector* court so readily. A good example is the Texas case of *Thomas v St. Joseph Hospital*.<sup>27</sup> The plaintiff there brought an action for wrongful death of her husband, a hospital patient whose hospital gown caught fire.<sup>28</sup> The trial court refused to submit strict liability instructions to the jury.<sup>29</sup> The court of appeals was faced with the issue of whether the hospital could be held strictly liable under 402A.<sup>30</sup> The court noted that the hospital furnished the gown to the plaintiff's decedent, Mr. Thomas, and that the gown's cost was considered in the recoupment of the hospital's overhead costs.<sup>31</sup> The court then considered the line of cases (including *Silverhart*<sup>32</sup> and *Vergott*<sup>33</sup>) which refused to impose strict liability for injuries caused by defective products that were intimately and inseparably connected with the professional services rendered.<sup>34</sup> The plaintiff in *Thomas* argued, however, that the *Silverhart* line of cases was distinguishable because the supplying of a defective gown was neither a professional service, nor was it necessarily involved or related to the rendering of professional services.<sup>35</sup> The court stated:

Where, as here, a hospital apparently supplies a product unrelated to the

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25. *Id.*

26. *Hector*, 225 Cal Rptr at 599.

27. 618 SW2d 791 (Tex Civ App 1981).

28. *Thomas*, 618 SW2d at 793.

29. *Id.*

30. *Id.* at 796.

31. *Id.*

32. *Silverhart* (cited in note 13).

33. *Vergott* (cited in note 19).

34. *Thomas*, 618 SW2d at 796.

35. *Id.*

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.<sup>36</sup>

The court found that the lower court erred in failing to submit the strict liability issue to the jury, and remanded to the trial court.<sup>37</sup>

Reasoning somewhat analogous to the *Thomas* rationale was applied in Wisconsin in *Johnson v Sears, Roebuck & Co.*<sup>38</sup> Johnson was injured in an automobile accident and sued Sears for improper installation of the tires.<sup>39</sup> Sears impleaded a third-party defendant, Columbia Hospital.<sup>40</sup> One claim against the hospital was strict liability.<sup>41</sup> The hospital moved to dismiss this claim.<sup>42</sup> In considering the strict liability issue, the court first analyzed cases in which a patient contracted serum hepatitis from a blood transfusion.<sup>43</sup> Those decisions categorized the transaction as a service rather than a sale, precluding claims of breach of implied warranties of sale.<sup>44</sup> The *Johnson* court stated:

My decision should not be based on a technical or artificial distinction between sales and services. Rather, I must determine if the policies which support the imposition of strict tort liability would be furthered by its imposition in this case. In the present context, the question is whether it is in the public interest for the consumer/patient or the supplier/hospital to bear the loss incurred by defective, though non-negligent, services.<sup>45</sup>

The court divided services provided by the hospital into professional medical services and mechanical/administrative services.<sup>46</sup> The court held that strict liability would not be imposed upon the former type of services, but may be imposed upon the latter.<sup>47</sup> The court reasoned that since medical science is not exact, all a doctor can be expected to provide is adequate treatment commensurate with the state of medical science.<sup>48</sup> "To hold medical professionals strictly liable under these circumstances would not promote any

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36. *Id.* at 796-97.

37. *Id.* at 797.

38. 355 F Supp 1065 (E D Wis 1973).

39. *Johnson*, 355 F Supp at 1065.

40. *Id.* The opinion does not state facts upon which Sears sought to implead the hospital, or facts underlying the strict liability claim.

41. *Id.*

42. *Id.*

43. *Id.* at 1066.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 1066-67.

48. *Id.* at 1067.

social benefit."<sup>49</sup>

As to mechanical/administrative services, however, the court set forth several reasons why these types of services should not be exempt from strict liability.<sup>50</sup> First, serious consequences can result when patients receive defective hospital services.<sup>51</sup> Second, laymen are virtually unable to recognize or control such defective services.<sup>52</sup> Finally, it is essential that doctors, already impeded by inexact science, receive accurate information in order to effectively treat patients.<sup>53</sup> "In short, it is in the public interest that those services which hospitals perform for both doctors and patients be performed properly."<sup>54</sup> The court acknowledged that this line is not always a bright one, and urged that decisions be made on an *ad hoc* basis.<sup>55</sup> The court expressly stated that the decision simply denied the motion to dismiss, and was not a decision on the merits.<sup>56</sup>

Clearly, there is a strong policy argument against approving strict liability claims against hospitals. It seems obvious that the addition of another area of liability to the health care industry would serve to increase the cost of health care.<sup>57</sup> Whether the service/product rationale seems technical to the point of being specious or not, the question becomes: Are most injured parties willing to pay higher insurance premiums and higher hospital costs in order to gain another cause of action against the medical field? A recent district court case, applying Pennsylvania law, concluded that the Pennsylvania Supreme Court would add this third claim to a plaintiff's arsenal, under specific circumstances.

That case is *Karibjanian v Thomas Jefferson University Hospital*,<sup>58</sup> where the plaintiff alleged that an injection of thorotrast (a contrast medium) was inherently unsafe and caused her husband's death.<sup>59</sup> The hospital moved to dismiss the strict liability claim, relying on *Podrat*<sup>60</sup> and *Grubb*.<sup>61</sup> The court, rejecting this argu-

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49. *Id.*

50. *Id.*

51. *Id.*

52. *Johnson*, 355 F Supp at 1067.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. See *Hector v Cedars-Sinai Medical Center*, 180 Cal App 3d at 507-08, 225 Cal Rptr at 601.

58. 717 F Supp 1081 (E D Pa 1989).

59. *Karibjanian*, 717 F Supp at 1082-83.

60. *Podrat* (cited in note 3).

ment, quoted comment (f) of 402A,<sup>62</sup> which explains the "business of selling," and stated:

'[i]t is not necessary that the seller be engaged solely in the business of selling such products. Thus the rule applies to the owner of a motion picture theatre who sells popcorn or ice cream, either for consumption on the premises or in packages to be taken home.

The rule does not, however, apply to the occasional seller of food or other such products who is not engaged in that activity as a part of his business. Thus it does not apply to the housewife who, on one occasion, sells to her neighbor a jar of jam. . . .'

So long as a hospital *regularly* supplies contrast media to its patients, albeit as an incidental part of its service operations, it seems to fall within 402A as explained by comment (f).

The comment draws no distinction between suppliers of goods who also supply services, and those suppliers who simply supply goods.<sup>63</sup>

The court noted that the contrast medium allegedly came from the hospital's own inventory, implying that the hospital regularly supplied the medium to its patients.<sup>64</sup> Additionally, the court recognized that the Pennsylvania Supreme Court had cited comment

61. *Grubb* (cited in note 1).

62. The full text of Comment (f) of Section 402A of the Restatement (Second) of Torts reads as follows:

Business of selling. The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant. It is not necessary that the seller be engaged solely in the business of selling such products. Thus the rule applies to the owner of a motion picture theatre who sells popcorn or ice cream, either for consumption on the premises or in packages to be taken home.

The rule does not, however, apply to the occasional seller of food or other such products who is not engaged in that activity as a part of his business. Thus it does not apply to the housewife who, on one occasion, sells to her neighbor a jar of jam or a pound of sugar. Nor does it apply to the owner of an automobile who, on one occasion, sells it to his neighbor, or even sells it to a dealer in used cars, and this even though he is fully aware that the dealer plans to resell it. The basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods. This basis is lacking in the case of the ordinary individual who makes the isolated sale, and he is not liable to a third person, or even to his buyer, in the absence of his negligence. An analogy may be found in the provision of the Uniform Sales Act, section 15, which limits the implied warranty of merchantable quality to sellers who deal in such goods; and in the similar limitation of the Uniform Commercial Code, section 2-314, to a seller who is a merchant. This Section is also not intended to apply to sales of the stock of merchants out of the usual course of business, such as execution sales, bankruptcy sales, bulk sales, and the like.

63. *Karibjanian*, 717 F Supp at 1085. (Citation omitted.) (Emphasis in original.)

64. *Id* at 1086.



(f) with approval in *Musser v Vilsmeier Auction Co.*<sup>65</sup> The *Karibjanian* court concluded that there was

. . . significant data which suggest Pennsylvania's Supreme Court would in some circumstances hold a hospital liable under 402A as a seller of a product like [the medium], if it is the product itself rather than the procedure by which it was administered which is alleged to have been defective.<sup>66</sup>

After predicting that the Pennsylvania Supreme Court would impose strict liability in certain circumstances, *Karibjanian* acknowledged that some courts might absolutely refuse to hold hospitals strictly liable under 402A.<sup>67</sup> One case cited was the Pennsylvania district court opinion in *Flynn v Langfitt*.<sup>68</sup> *Flynn* was decided a mere three months prior to *Karibjanian*, and arrived at the opposite conclusion. *Flynn* was the recipient of a tissue graft which allegedly caused *Flynn* to contract staphylococcus meningitis.<sup>69</sup> The hospital moved for partial summary judgment on two theories. Under the first theory, the hospital contended that the plaintiff was statutorily precluded from making a strict liability claim under 42 Pennsylvania Consolidated Statutes, section 8333.<sup>70</sup> The court noted that this statute, a re-enactment of The Medical Transfusions and Transplants Act,<sup>71</sup> no longer specifically ex-

65. *Id.* at 1085. *Musser v Vilsmeier Auction Co.*, 522 Pa 367, 562 A2d 279 (1989). There, the Pennsylvania Supreme Court held that an auctioneer is not a "seller" for section 402A purposes unless he has a "direct continuous course of dealing with a manufacturer or sales organization for their specific products." *Musser*, 562 A2d at 283.

66. *Karibjanian*, 717 F Supp at 1085.

67. *Id.* at 1086 (citing *Carmichael v Reitz*, 17 Cal App 3d 958, 95 Cal Rptr 381 (1971) (prescription drug caused injury, but strict liability not applicable to a provider of professional services)).

68. 710 F Supp 150 (E D Pa 1989).

69. *Flynn*, 710 F Supp at 150.

70. 42 Pa Cons Stat section 8333 (1976) states:

(a) General Rule. - No person shall be held liable for death, disease or injury resulting from the lawful transfusion of blood, blood components or plasma derivatives, or from the lawful transplantation or insertion of tissue, bone or organs, except upon a showing of negligence on the part of such person. Specifically excluded hereunder is any liability by reason of any rule of strict liability or implied warranty or any warranty not expressly undertaken by the party to be charged.

71. 35 Pa Stat section 10021 (Purdon 1972) which stated:

Notwithstanding any other law, no hospital, blood bank or other entity or person shall be held liable for death or injury, resulting from the lawful transplantation or insertion of tissue, bone or organs, except upon a showing of negligence on the part of such hospital, blood bank, entity or person. For purposes of this act negligence shall include but not be limited to any failure to observe accepted standards in the collection, testing, processing, handling, storage, transportation, classification, labelling, preparation or use of any such blood, blood components, plasma derivatives, tissue, bone or organs. Specifically excluded hereunder is any liability by reason of implied warranty or any other warranty not expressly undertaken by the party to be charged.

cluded hospitals as liable parties.<sup>72</sup> Therefore, the court reasoned, the legislature no longer intended to exempt hospitals from strict liability under this statute.<sup>73</sup>

This threshold victory for the plaintiff turned out to be hollow, however, as the court agreed with the hospital's second argument (that, under Pennsylvania common law, hospitals cannot be held strictly liable under 402A). The court held that hospitals could not be strictly liable under section 402A.<sup>74</sup> The court looked to *Grubb*,<sup>75</sup> wherein the court stated that, under Pennsylvania case law, 402A is given wide berth and applies to all sellers in the distributive chain.<sup>76</sup> The *Grubb* court reasoned that to impose strict liability on a hospital was to make a reasonable extrapolation from the expanding interpretation of 402A.<sup>77</sup> The *Flynn* court noted that although four of the six judges in *Grubb* concurred in the result, they further opined that strict liability should not lie against the hospital.<sup>78</sup> The *Flynn* court recognized that *Grubb*'s superficial approval of strict liability had not been formally adopted by the Pennsylvania Supreme Court.<sup>79</sup> The *Flynn* court thus refused to recognize the strict liability claim, and granted partial summary judgment for the hospital.<sup>80</sup>

### CONCLUSION

Distinguishing *Karibjanian* from the cases rejecting 402A liability is difficult. In *Podrat*<sup>81</sup> and *Hector*,<sup>82</sup> for example, the plaintiffs' claims of liability went to the product itself (forceps and a pace-maker, respectively), and not to the procedure involved in utilizing the products. Seemingly, the *Karibjanian* court implicitly rejected the service/product distinction, and thus predicted that the Pennsylvania Supreme Court would do the same. This is somewhat troubling, especially in the face of the strong expression of the

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This act was repealed in 1978 by Pub L No 202-53 section 2(a)[1450], effective June 27, 1978.

72. *Flynn*, 710 F Supp at 151.

73. *Flynn*, 710 F Supp at 151.

74. *Id* at 152.

75. *Grubb v Albert Einstein Medical Center*, 255 Pa Super 381, 387 A2d 480 (1978).

76. *Flynn*, 710 F Supp at 152.

77. *Id.*

78. *Id* at 151-52.

79. *Id* at 152.

80. *Id.*

81. *Podrat v Codman-Shurtleff, Inc.*, 384 Pa Super 404, 558 A2d 895 (1989), allocatur denied in \_\_\_ Pa \_\_\_, 569 A2d 1368.

82. *Hector* (cited in note 19).

*Podrat* court that 402A claims will not be permitted against a hospital defendant. Obviously, until the Pennsylvania Supreme Court grants allocatur on such a case, we cannot know what the outcome or rationale will be.

The question of the applicability of 402A to hospitals can be viewed as one of a decision of justice versus policy. Should the justice obtained by an injured party when he recovers from all tortious parties prevail over the policies of recognizing the inexactitude of medical science and keeping health care costs as low as possible? Policy should prevail here. Plaintiffs can and do suffer staggering injuries at the hands of medical professionals. These claims should be confined to the traditional ones of malpractice. When a surgical instrument or implant is defective to the point of causing injury, the plaintiffs should confine their strict liability claims to the manufacturer. A hospital has no control over the manufacturing process, and should thus not be held to that standard. A hospital may be guilty of negligence for failure to properly inspect or use surgical instruments - negligence is therefore the proper claim against the hospital.<sup>83</sup> In the face of ever-increasing health and insurance costs, the application of 402A is one area of tort law that should not be expanded.

Medical science truly is inexact. Neither physicians nor the hospitals in which they work are infallible. The policies underlying modern strict liability are not oriented toward the provision of medical services. The general basis of imposition of strict liability under 402A is that the defendant ought to have an obligation to pay for the costs attributable to injuries caused by defects of a kind that made the product more dangerous than it would otherwise be.<sup>84</sup> Three major theories have influenced courts in imposing strict liability on manufacturers. These theories may be stated as: 1) the costs of injuries due to defectively dangerous products is best borne by the manufacturers, who can shift these costs to the product's consumers by way of higher prices; 2) accident prevention can be encouraged by adopting a strict liability standard; and, 3) since fault or negligence is difficult to prove in a defective product context, proof of fault or negligence should not be required.<sup>85</sup>

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83. See *Tonsic v Wagner*, 458 Pa 246, 329 A2d 497 (1974) (hospital may be liable for negligence when surgical instrument is left in the patient's body).

84. Prosser and Keeton, *The Law of Torts* at 692 (West, 5th ed 1984).

85. Prosser, *Torts* at 692 (cited in note 84). Consider that

(1) The costs of damaging events due to defectively dangerous products can best be borne by the enterprisers who make and sell these products. The assumption is that

The result of this judicial posture was the adoption of Section 402A of the Restatement (Second) of Torts by the American Law Institute.<sup>86</sup> It does not make sense to transfer the foregoing theories to the medical world. Strict liability does not promote social benefit in the same way (or in any way) when applied to hospitals and doctors. Unlike manufacturers, hospitals are not enterprisers who make or sell products, so that the first theory supporting strict liability does not apply. Hospitals are not normally in a position to prevent such incidents since they do not design or manufacture products that cause harm. Therefore, the second theory underlying strict liability is not appropriately applied to hospitals. Lastly, the difficulty in proving fault or negligence should be irrelevant in inquiries of a hospital's liability. Due to the inherent uncertainties of medicine, hospitals do not stand on the same footing as manufacturers, and are usually unable to control product defects. Thus, there are no institutional reasons to obviate proof of fault. The traditional malpractice standard is appropriate for professional medical services gone awry.

Although the professional versus mechanical and administrative distinction can be hazy, imposition of strict liability only on the latter type of service makes better sense. Mechanical or administrative services, such as supplying a hospital gown or a hospital bed, seem to be sufficiently within the scope of a hospital's control so that strict liability is a more appropriate cause of action. Liability for defects in these types of products is far removed from the inexactness of medicine. Quality control over these "support" items is more easily monitored by hospital administration than is the purchase of a tiny machine that is implanted into the human body in order to keep it alive. A defective hospital bed (a mechanical/administrative service) supplied by the hospital purchasing agent, is more akin to a defective bed supplied directly by the manufacturer to a consumer, than is the pacemaker (a medical product) supplied by the hospital to the patient.

There exists Pennsylvania case law rejecting the service/product

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the manufacturer can shift the costs of accidents to purchasers for use by charging higher prices for the costs of products. (2) The cause of accident prevention can be promoted by the adoption of strict liability and the elimination of the necessity for proving negligence. (3) Fault or negligence is often difficult to prove in this context, and for institutional reasons and because of the costs of litigation, proof of the existence of fault or negligence in the sale of a defective product should no longer be required, especially if product defect is properly defined and limited.

Id at 692-93 (cited in note 84).

86. Id.

distinction as a ground upon which to deny a strict liability claim. In *Hoffman v Misericordia Hospital of Philadelphia*,<sup>87</sup> a case decided well before *Podrat*, the court faced a breach of warranty claim when the plaintiff contracted and died from serum hepatitis as the result of a blood transfusion.<sup>88</sup> The court held that it did not

. . . feel obligated to hinge any resolution of the very important issue here raised on the technical existence of a sale. . . . 'It seems to us a distortion to take what is, at least arguably, a sale, twist it into the shape of a service, and then employ this transformed material in erecting the framework of a major policy decision.'<sup>89</sup>

The service/product distinction seems to be one without a difference. Strict liability should not be imposed on hospitals for medical/professional services, but not because this type of service is not a sale of a *product*. An open and honest admission by the court that neither public policy nor the origins of modern strict liability support this imposition of liability upon medical services is warranted. The Pennsylvania Supreme Court should also recognize that technical services and/or products provided by a hospital can and should be distinguished from medical services. Moreover, technical services and/or products are more readily within the administrative control of a hospital, so that traditional strict liability policies and applications should be imposed upon the party responsible for placing the defective service or product into the patient's hands.

Under the facts of *Grubb*,<sup>90</sup> given at the beginning of this comment, the bone plug cutter clearly constitutes a medical product, not a mechanical/administrative service. Therefore, under the foregoing analyses, no 402A liability should lie against the hospital. The Pennsylvania Supreme Court should follow the lead of the *Johnson* court, which divided hospital services into medical and mechanical/administrative, and decide these strict liability cases on an *ad hoc* basis. Granted, this approach does not lend itself to predictability in the courtroom. This approach does, however, protect plaintiffs and recompense their injuries by encouraging hospitals to carefully and responsibly scrutinize their purchasing practices with an eye towards the patient, not the bottom line.

Melissa Moore

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87. 439 Pa 501, 267 A2d 867 (1970).

88. *Hoffman*, 267 A2d at 868.

89. *Id* at 870. (Citation omitted.)

90. *Grubb* (cited in note 1).