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Dubin v. Michael Reese Hospital and Medical Center - The Application of Strict Liability to Hospital-Supplied X-Radiation Treatment, 13 J. Marshall L. Rev. 485 (1980)

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*DUBIN V. MICHAEL REESE HOSPITAL & MEDICAL CENTER** THE APPLICATION OF STRICT LIABILITY TO HOSPITAL-SUPPLIED X-RADIATION TREATMENTS

In 1965, the Illinois Supreme Court in *Suvada v. White Motor Co.*[1] recognized that public policy called for the imposition of strict products liability on manufacturers of defective products. Since the adoption of strict liability in the field of products liability, courts have struggled with the problem of what constitutes the "sale of a product"[2] within the purview of section 402A of the Second Restatement of Torts.[3] It has been held that a literal "sale" of goods is not necessary for the application of strict liability.[4] Furthermore, the focus is not on sales by manufacturers but rather on the placing of articles into the stream of commerce.[5] Ultimately, it is social policy that determines what is a "sale" and what is a "product."[6] In Illinois, legislatively defined

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* 74 Ill. App. 3d 932, 393 N.E.2d 588 (1979).

1. 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

2. Immergluck v. Ridgeview House, Inc., 53 Ill. App. 3d 472, 368 N.E.2d 803 (1977) (held that sheltered-care facility was not a product because it had not been placed into stream of commerce); Lowrie v. City of Evanston, 50 Ill. App. 3d 376, 365 N.E.2d 923 (1977) (municipal parking garage found not to be a product because it was not marketed for consumption by the public).

3. Section 402A of the Second Restatement of Torts provides:

(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. *E.g.*, Petroski v. Northern Ind. Pub. Serv. Co., 354 N.E.2d 736, 747 (Ind. App. 1976).

5. Link v. Sun Oil Co., 160 Ind. App. 310, 316, 312 N.E.2d 126, 130 (1974) ("sells" is merely descriptive, product need not actually be sold if it has been injected into stream of commerce by other means).

6. *See* Lechuga, Inc. v. Montgomery, 12 Ariz. App. 32, 467 P.2d 256

social policy dictates that a product is any tangible object or good distributed in commerce, including any service provided in connection with the product.[7]

It is significant to note that the Illinois legislature included in the definition of "product," any service provided in connection with the product. There has been extensive litigation involving the application of strict products liability to transactions where a product has been provided incidentally to the rendering of a service.[8] This type of transaction is known as a hybrid transaction.[9] Generally, courts are hesitant to apply strict liabil-

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(1970). The Arizona court enumerated eight special policy considerations which favor the application of strict liability in tort:

(1) The manufacturer can anticipate some hazards and guard against their recurrence, which the consumer cannot do.
(2) The cost of injury may be overwhelming to the person injured while the risk of injury can be insured by the manufacturer and be distributed among the public as a cost of doing business.
(3) It is in the public interest to discourage the marketing of defective products.
(4) It is in the public interest to place responsibility for injury upon the manufacturer who was responsible for its reaching the market.
(5) That this responsibility should also be placed upon the retailer and wholesaler of the defective product in order that they may act as the conduit through which liability may flow to reach the manufacturer, where ultimate responsibility lies.
(6) That because of the complexity of present day manufacturing processes and their secretiveness, the ability to prove negligent conduct by the injured plaintiff is almost impossible.
(7) That the consumer does not have the ability to investigate for himself the soundness of the product.
(8) That this consumer's vigilance has been lulled by advertising, marketing devices and trademarks.

Id. at 39, 467 P.2d at 261-62.

7. In defining products liability terms, the Illinois legislature stated:

> "Product" means any tangible object or goods distributed in commerce including any service provided in connection with the product. Where the term "product unit" is used it refers to a single item or unit of a product;
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> "Seller" means one who, in the course of a business conducted for the purpose, sells, distributes, leases, assembles, installs, produces, manufactures, fabricates, prepares, constructs, packages, labels, markets, repairs, maintains, or otherwise is involved in placing a product in the stream of commerce.

Pub. Act No. 81-1054, (1979) Ill. Legis. Serv. 2750 (West Supp. VI 1979) (to be codified as ILL. REV. STAT. ch. 83, § 22.2 (1979)) (effective date Jan. 1, 1980).

8. *E.g.*, Newmark v. Gimbel's, Inc., 54 N.J. 585, 593, 258 A.2d 697, 701 (1969).

9. There has been a wealth of litigation concerning the extension of strict liability into the realm of the hybrid transaction. *See* Bainter v. Lamoine L.P. Gas Co., 24 Ill. App. 3d 913, 321 N.E.2d 744 (1974) (court examined question of whether installer of liquid propane gas tank should be found strictly liable under products liability theory for damage caused by defective gas tank); Balkowitsch v. Minneapolis War Mem. Blood Bank, Inc., 270 Minn. 151, 132 N.W.2d 805 (1965) (refused to apply strict liability to blood bank supplying blood transfusion to recipient); Barbee v. Rodgers,

ity in tort to such transactions because of the difficulty in finding that a sale has occurred, or that a product has been placed into the stream of commerce.[10] However, there is a trend favoring the application of strict liability to the hybrid transaction.[11] For example, in *Newmark v. Gimbel's, Inc.*,[12] the plaintiff sought to recover from a beauty parlor for injuries she suffered when a defective permanent wave solution was applied to her hair by a beautician. The court decided that the beauty parlor could be held strictly liable for supplying the defective solution, even though the parlor argued that it was essentially in the business of rendering services.[13]

In 1970, the Illinois Supreme Court in *Cunningham v. MacNeal Memorial Hospital*[14] invoked the doctrine of strict liability against a hospital that supplied defective blood to a patient who subsequently contracted serum hepatitis.[15] The court reasoned that a hospital which supplied blood for human consumption was in the business of placing it into the stream of commerce.[16] Hence, regardless of the fact that the blood was supplied incidentally to the service rendered in the overall treatment of the patient, the hospital was held strictly liable for the injuries suffered by the unwitting patient.

Recently, the First District Illinois Appellate Court followed

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425 S.W.2d 342 (Tex. 1968) (refused to apply strict liability to fitting and sale of contact lenses, not in themselves defective).

10. *See* Raritian Trucking Corp. v. Aero Commander, Inc., 458 F.2d 1106 (3d Cir. 1972) (refused to invoke strict liability against airplane servicer when wing separated during aerobatic maneuvers, because only services were supplied); Hillas v. Westinghouse Elec. Corp., 120 N.J. Super. 105, 293 A.2d 419 (1972) (strict liability not applied to elevator maintenance company because company merely serviced articles supplied by another).

11. *See* Watchel v. Rossol, 159 Conn. 496, 271 A.2d 84 (1970) (strict liability invoked against restaurant owner for serving contaminated egg salad); Cunningham v. MacNeal Mem. Hosp., 47 Ill. 2d 443, 266 N.E.2d 897 (1970) (strict liability invoked against hospital supplying blood transfusion to recipient).

12. 54 N.J. 585, 258 A.2d 697 (1969).

13. *Id.* at 593-94, 258 A.2d at 701.

14. 47 Ill. 2d 443, 266 N.E.2d 897 (1970). *Contra*, Moore v. Underwood Mem. Hosp., 147 N.J. Super. 252, 371 A.2d 105 (1977) (found blood to be "unavoidably unsafe product," therefore, not proper subject of strict products liability). *See* Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792 (1955).

15. The Illinois legislature subsequently negated the effect of the *Cunningham* decision by enacting a statute which provides that the furnishing of blood for transfusion is the rendition of a service for purposes of products liability, therefore, it is not the proper subject for strict liability. *See* ILL. REV. STAT. ch. 91, § 182 (1971); *cf.* Glass v. Ingalls Mem. Hosp., 32 Ill. App. 3d 237, 336 N.E.2d 495 (1975) (statute held not violative of constitutional proscription against special legislation).

16. Cunningham v. MacNeal Mem. Hosp., 47 Ill. 2d 443, 266 N.E.2d 897 (1970).

the *Cunningham* rationale in applying the doctrine of strict liability to a hybrid transaction involving another hospital-patient relationship. In *Dubin v. Michael Reese Hospital & Medical Center*,[17] strict liability was imposed against a hospital for administering x-radiation treatments to patients without warning them of their carcinogenic effects. The hospital contended the x-radiation supplied to the patient was a service and therefore not subject to strict products liability. But the *Dubin* court found that by supplying x-radiation treatment the hospital had placed a product into the stream of commerce; therefore, the hospital was held strictly liable for the injuries caused by the defective nature of the product.[18]

FACTS AND PROCEDURAL HISTORY

In 1947, Richard Dubin entered Michael Reese Hospital for treatment of a throat ailment. The hospital administered x-radiation to Dubin in the course of that treatment.[19] In August of 1976, Dubin filed a complaint against the hospital, alleging that as a result of the x-radiation, he had incurred a malignancy.[20] Count I of the complaint claimed that the hospital was negligent in its use of x-radiation on Dubin. The hospital was granted summary judgment on this count. The second count sounded in strict products liability and alleged that the hospital supplied certain x-radiation, causing it to enter Richard Dubin's body. The plaintiff contended that the x-radiation administered to him was defective in that the hospital failed to warn him that it was a carcinogen.[21] The trial court dismissed Count II for failure to state a claim. Dubin appealed this order, and the Illinois Appellate Court reversed and remanded, holding that the plaintiff stated a cause of action predicated on strict products liability.

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17. 74 Ill. App. 3d 932, 393 N.E.2d 588 (1979).

18. *Id.* at 945, 393 N.E.2d at 597.

19. In the late 1940's, Michael Reese Medical Center employed an experimental x-radiation treatment procedure to the throat area of certain patients to shrink the inflammation of enlarged tonsils. These x-radiation treatments were discontinued in light of scientific evidence linking thyroid cancer with tonsil radiation. *See* Neuberg v. Michael Reese Hosp. & Medical Center, 60 Ill. App. 3d 679, 377 N.E.2d 215 (1978).

20. The malignancy appeared in 1975. Dubin then filed his complaint in 1976 within the period of the two-year statute of limitations. The statute begins to run from the date when injury "occurs," and the injury "occurs" when it appears. *See* Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970).

21. A product may be defective under strict liability when it is not accompanied by an adequate warning of the danger attending its use. Lawson v. G.D. Searle & Co., 65 Ill. 2d 543, 356 N.E.2d 779 (1976).

THE *DUBIN* DECISION

Electricity as a Product

Much of the *Dubin* opinion was devoted to an attempt to define electricity as a product for strict products liability purposes. The court found that electricity was personal property within the scope of the Illinois larceny statute.[22] Attention was also given to an Indiana decision which found electricity to be a "good" as defined by the Uniform Commercial Code.[23] In *Helvey v. Wabash Co.*,[24] an Indiana court held that electricity qualified as a good within Section 2-105 of the Uniform Commercial Code because it was (1) a thing; (2) existing; and (3) movable, with (2) and (3) existing simultaneously.[25]

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22. 74 Ill. App. 3d at 940-41, 393 N.E.2d at 594-95. Here the court cited People v. Mengas, 367 Ill. 330, 11 N.E.2d 403 (1937). In *Mengas*, the defendant was charged with larceny of 70,601 kilowatt hours of electricity and argued that electricity was not the subject of larceny because it was not "personal property." But the court, relying on Woods v. People, 222 Ill. 293, 78 N.E. 607 (1906), found that electricity was indeed personal property despite its intangible nature. In *Woods*, the court found that illuminating gas was personal property within the larceny statute. Presently, the Illinois Criminal Code includes electricity and gas in its definition of property. ILL. REV. STAT. ch. 38, § 15-1 (1977).

23. Helvey v. Wabash Co., 151 Ind. App. 176, 278 N.E.2d 608 (1972). U.C.C. § 2-105 (1978) states in part:

> (1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).
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> (2) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are "future" goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

24. 151 Ind. App. 176, 278 N.E.2d 608 (1972).

25. *Contra*, Buckeye Union Fire Ins. Co. v. Detroit Edison Co., 38 Mich. App. 325, 330, 196 N.W.2d 316, 317 (1972) (although the court found electricity not to be a good within the U.C.C. definition, it still allowed recovery because products liability of sellers is not limited to situations covered by the U.C.C.); Pitlen v. Michael Reese Hosp. & Medical Center, No. 78-1462 (Ill. App. 1st Dist. Oct. 26, 1979) (held x-radiation not to be a sale of a product for purposes of U.C.C. application). Furthermore, the argument has been made that the Uniform Commercial Code has no place in the area of tort law.

In Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962), Justice Traynor, speaking of a seller's liability in the area of products liability stated, "[T]he liability is not one governed by the law of contract warranties but by the law of strict liability in tort. Accordingly, rules . . . developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by their defective products." *Id.* at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

Having concluded that electricity was personal property, and a "good," the court proceeded to define electricity as a product for purposes of strict products liability in tort. An Illinois Supreme Court decision, *Genaust v. Illinois Power Co.*,[26] was cited because it had assumed arguendo that electricity was a product, proceeding to state that "it does not logically follow that wires are its packaging . . . . The only product that was in the process of being sold was the electricity."[27] However, the *Dubin* court did not construe this language as expressly holding that electricity was a product within section 402A.

Two other cases were relied upon in defining electricity as a product under products liability law. In the first case, *Williams v. Detroit Edison Co.*,[28] a Michigan court found that although electricity supplied by a public utility was a service, the doctrine of strict liability was still applicable when the utility supplied defective electricity.[29] The Michigan court's reasoning was based on the fact that the doctrine of implied warranty had previously applied in tort when electricity was supplied for a charge.[30] However, strict liability was not invoked in *Williams*

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26. 62 Ill. 2d 456, 343 N.E.2d 465 (1976). Plaintiff was injured when electrical current arced from an uninsulated power line to the antenna he was installing on a tower. The court refused to hold the power company strictly liable because the electricity that injured the plaintiff was still in an unmarketable state and had not yet been released into the stream of commerce.

27. *Id.* at 463-64, 343 N.E.2d at 469.

28. 63 Mich. App. 559, 234 N.W.2d 702 (1975).

29. *Id.* at 564, 234 N.W.2d at 705.

30. *Id.* at 565, 234 N.W.2d at 706.

Implied warranty of merchantability is a basis for recovery in cases where products are so defective as to be unmerchantable. The major difference between the implied warranty of merchantability standard and the strict tort standard is that the latter is narrower. Strict tort liability applies only in situations where the goods are defective or unreasonably dangerous, whereas, U.C.C. § 2-314 covers situations where the goods are not necessarily dangerous but are not fit for the ordinary purpose for which they are used. § 2-314 will apply where there is merely an economic loss, while strict tort liability requires an injury for its application. *See* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 295 (1972).

The implied warranty concept is set forth in § 2-314 of the Uniform Commercial Code which states:

> (1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
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> (2) Goods to be merchantable must be at least such as
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> (a) pass without objection in the trade under the contract description; and
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> (b) in the case of fungible goods, are of fair average quality within the description; and
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> (c) are fit for the ordinary purposes for which such goods are used; and

because the injury-causing electricity had never left the utility company's control.

The second case was *Petroski v. Northern Indiana Public Service Co.*,[31] in which the Indiana Appellate Court expressly held electricity to be a product for purposes of products liability. That court ruled that a literal sale of goods was not necessary for the application of strict liability. Rather, it found the relevant inquiry to be whether the product had been placed into the stream of commerce.[32] The *Dubin* court applied the *Petroski* reasoning to x-radiation. *Petroski* stated that electricity is a product capable of being placed into the stream of commerce. Hence, it is the proper subject for imposing strict products liability.[33]

Policy Considerations

In defining electricity as a product, the *Dubin* court also mentioned those policy considerations which are generally taken into account in cases where strict liability in tort is invoked. These considerations generally serve to justify application of strict products liability.[34] Two considerations overlap. The first is the seller's ability to distribute the risk of injury by passing the costs on to the public. The second is the profit reaped by the party placing a product into the stream of commerce. The former is known as "loss spreading" or the "allocative effect."[35] The rationale is that injury from defective products ought to be insured against, and the seller or supplier is in the best position to distribute the cost by passing it on to the consumer. The latter is based on the assumption that the

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(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

31. 354 N.E.2d 736 (Ind. App. 1976). *See* note 4 and accompanying text *supra*.

32. *Id.* at 747.

33. It is significant to note that the *Dubin* court resorted to Michigan and Indiana appellate decisions for so much support. This evidences the extreme to which the *Dubin* court was forced to go in its search for authority, since Michigan and Indiana appellate decisions rarely carry much weight in Illinois.

34. *See* Lechuga, Inc. v. Montgomery, 12 Ariz. App. 32, 39, 467 P.2d 256, 261-62 (1970). *See* note 6 *supra*.

35. Brody v. Overlook Hosp., 127 N.J. Super. 331, 341, 317 A.2d 392, 398 (1974).

party reaping profit from merchandising a product can absorb the loss caused by injury from such product by shifting the loss on to the consumer.[36] The *Dubin* court found that power companies reap a profit by placing electricity into the stream of commerce and thus are able to distribute the risk of injury by transferring the loss onto the public in the form of increased utility rates. Hence, the court found that both considerations justified the application of strict liability to suppliers of defective electricity.

The third factor considered was whether the manufacturer or seller represented the product as being safe and suitable for its intended use.[37] A fourth factor brought into focus concerned the consumer's difficulty in proving that the source of his injury was the manufacturer's negligence. Many courts recognize the unfairness inherent in forcing injured consumers to trace articles along the channels of trade to the original manufacturer and then to pinpoint an act of negligence outside their knowledge and ability to inquire.[38] Although these final two considerations were mentioned, their application to the facts in *Dubin* was never analyzed by the court.

X-Radiation as the Offspring of Electricity

After defining electricity as a product for purposes of strict liability, the *Dubin* court employed a dictionary definition of "x-radiation" to demonstrate that it is an offspring of electricity.[39]

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36. *See* Keeton, *Products Liability Without Fault and the Requirement of a Defect*, 41 TEX. L. REV. 855 (1963) [hereinafter cited as Keeton]. The author states:

> Legal entities with mammoth accumulations of capital, large volume of sales, and national advertising are typical. This has led to the view that such entities are capable, if held responsible, of passing on to users generally losses suffered by the few. Thus there has come about a wider acceptance for the view that when the benefits to the many come at high cost to the few, the many should pay for these losses.

Id. at 856.

37. *Cf.* Santor v. A. & M. Karacheusian, Inc., 44 N.J. 52, 64-65, 207 A.2d 305, 311 (1965) (manufacturer who presents his goods to public for sale accompanies them with an implicit representation that they are suitable and safe for their intended use).

38. *E.g.*, Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 467, 150 P.2d 436, 443 (1944) (Traynor, J., concurring). It was stated:

> The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks.

39. 74 Ill. App. 3d at 932, 393 N.E.2d at 588 (citing WEBSTERS THIRD INTERNATIONAL DICTIONARY 2645 (1971)):

> An X-ray is "any of the electromagnetic radiations having the nature of visible light . . . produced by bombarding a metallic target with

This made it possible for the court to apply all that was set forth regarding electricity to x-radiation. Hence, the court decided that x-radiation was a product within the meaning of products liability law. Furthermore, the court cited *Cunningham v. MacNeal Memorial Hospital*[40] for the proposition that a hospital could be held strictly liable for treating a patient with a defective product.

In accepting *Cunningham*, the *Dubin* court expressly rejected the federal district court decision in *Neuberg v. Michael Reese Hospital & Medical Center*,[41] which was factually similar to *Dubin* in that the plaintiffs developed cancer as a result of x-radiation treatment. In *Neuberg*, it was held that *Cunningham* could not control in a case involving x-radiation treatments which, unlike blood, were not tangible articles for human consumption. The *Neuberg* court further held that since the x-radiation was used as treatment incidental to the rendering of a medical service, the doctrine of products liability was not applicable. The *Dubin* court dismissed the *Neuberg* decision as not binding upon it.

Finally, the court examined the hospital's contention that the plaintiff failed to state a cause of action due to the lack of an allegation that the hospital knew or should have known that x-radiation was a carcinogen. The court rejected this contention for two reasons. First, it was not until January, 1978 that it was held that a complaint does not state a cause of action for failure to warn, in the absence of an allegation that the defendant knew, or should have known, of the danger.[42] Secondly, the court held

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fast electrons in a vacuum so that the spectrum of the radiation emitted x-radiation consists of lines characteristic of the target material and that has the properties of ionizing a gas upon passage through it, of penetrating through various thicknesses of all solids, of producing secondary radiations by impinging on material bodies.

74 Ill. App. 3d at 942, 393 N.E.2d at 596.

40. Cunningham v. MacNeal Mem. Hosp., 47 Ill. 2d 443, 266 N.E.2d 897 (1970). *See* note 15 and accompanying text *supra*.

41. No. 75 C 3844 (N.D. Ill. June 21, 1977).

42. Woodill v. Parke Davis & Co., 58 Ill. App. 3d 349, 374 N.E.2d 683 (1978). This court concluded that a manufacturer or seller has a duty to warn under strict liability only when it has active or constructive knowledge of the danger. Therefore, a product is not defective by reason of the seller's failure to warn the consumer of a danger which is not known or which could not be anticipated. If the *Dubin* court would have followed this decision, the result may have been a dismissal of Dubin's strict liability count. Although it was widely known that x-radiation could cause burns to those exposed to it, it was not known that it was carcinogenic until well after Dubin received his treatments. *See* Neuberg v. Michael Reese Hosp. & Medical Center, 60 Ill. App. 3d 679, 377 N.E.2d 215 (1978). Thus, according to *Woodill*, absent an allegation that the defendant knew or should have known that x-radiation was carcinogenic, Dubin's complaint was deficient and should have been dismissed.

that since the defendant did not urge this insufficiency as a ground for dismissal at the trial level, it could not raise the issue on appeal and thereby deny the plaintiff the opportunity to amend his complaint. Consequently, Michael Reese Hospital was found strictly liable for supplying defective x-radiation for Dubin's consumption.

THE COURT'S APPLICATION OF THE LEGAL PRINCIPLES SURROUNDING ELECTRICITY TO X-RADIATION

Perhaps the greatest weakness of the *Dubin* decision involved the overall approach used by the court in determining whether x-radiation treatments administered by a hospital were a product. Much of the opinion was spent demonstrating that electricity was a product. After establishing that fact, the court proceeded to define x-radiation as being electricity, thereby applying all that was stated about electricity to x-radiation, *i.e.*, that x-radiation is a product. Hence, many of the policy considerations cited in support of the application of strict liability in tort, were tested against electricity, rather than x-radiation. By using this approach, the court was able to expend minimal effort struggling with the difficult issue of whether x-radiation *itself* was a product for purposes of strict products liability.

One of the policy considerations discussed in the *Dubin* opinion was the seller's ability to distribute the risk of injury by shifting the loss to the general public. This issue of loss spreading was dealt with in reference to the ability of a utility company to distribute the cost of insurance onto the consumer rather than the ability of a hospital to spread insurance costs to all its patients. The facts in *Dubin* would have been much more relevant if the court had demonstrated the ability of a hospital to distribute the risk of injury caused by x-radiation treatments by transferring it to the patients via increased rates. This would not have been difficult to demonstrate because after *Darling v. Charleston Community Memorial Hospital*,[43] where the Illinois Supreme Court extended a hospital's liability for negligence of a physician, the number of suits against hospitals increased.[44] Accordingly, the cost of insurance for hospitals has risen, and so have the hospitals' charges to the patient.[45] Such an approach would have strengthened the decision by developing a direct argument favoring the imposition of strict liability against a hospital.

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43. 33 Ill. 2d 326, 211 N.E.2d 253, *cert. denied*, 383 U.S. 946 (1965).

44. *See* AMERICAN MEDICAL ASSOCIATION, MALPRACTICE IN FOCUS 21, 32 (1975).

45. *Id.*

A second policy consideration in *Dubin* concerned the profit reaped by the party placing the product into the stream of commerce. The imposition of strict liability is favored where the seller or supplier profits because such profits presumably absorb the loss caused by the injury.[46] The conclusion reached in *Dubin* was that since electricity may be bought and sold, those placing it into the stream of commerce reap a profit. But here again, the court, by first dealing with the broad topic of electricity, evaded the application of a significant policy consideration to x-radiation supplied by a hospital. To reach a conclusion that a non-profit hospital reaped a profit from placing x-radiation into the stream of commerce would have been more difficult. However, the court did find that the hospital, by supplying x-radiation for treatment purposes, was in the business of introducing the x-radiation into the stream of commerce.[47] Furthermore, the court reasoned that since non-profit hospitals are no longer immune from liability for acts of negligence, neither should such institutions escape the application of strict tort liability when they distribute a defective product for human consumption.[48]

Another aspect behind the imposition of strict liability mentioned by the court dealt with the manufacturer or seller representing his product as being safe and suitable for its intended use. However, the question of whether hospitals represented x-radiation treatment as being safe and suitable for its intended use was never discussed. An examination into the use of x-radiation for treatment purposes reveals that the safety of x-radiation had been questioned years prior to 1947 when Dubin received his treatment.[49] It is difficult to conceive how x-radiation could have been regarded as safe and suitable for its intended use in 1947, when its harmful propensities were exposed as early as 1921.[50]

A fourth reason supportive of strict liability holdings cited in *Dubin*, involved the plaintiff's difficulty in proving that the source of his injury was the defendant's negligence. In situa-

46. *See* Keeton, *supra* note 36.

47. 74 Ill. App. 3d at 945, 393 N.E.2d at 597; *see* Cunningham v. MacNeal Mem. Hosp., 47 Ill. 2d 443, 266 N.E.2d 897 (1970).

48. *See* Cunningham v. MacNeal Mem. Hosp., 47 Ill. 2d 443, 266 N.E.2d 897 (1970). *See* note 14 and accompanying text *supra*.

49. Runyan v. Goodrum, 147 Ark. 481, 228 S.W. 397 (1921); Simon v. Kaplan, 321 Ill. App. 203, 52 N.E.2d 832 (1944); Berg v. Willet, 212 Iowa 1109, 232 N.W. 821 (1930); Waddell v. Woods, 158 Kan. 469, 148 P.2d 1016 (1944). X-radiation treatments were linked to cancer in the late 1940's. *See* Neuberg v. Michael Reese Hosp. & Medical Center, 60 Ill. App. 3d 679, 682, 377 N.E.2d 215, 218 (1978). *See* note 41 *supra*.

50. Runyan v. Goodrum, 147 Ark. 481, 228 S.W. 397 (1921) (plaintiff was seriously burned and permanently injured following exposure to x-radiation treatment).

tions where the complexities of the manufacturing process make it difficult for the injured plaintiff to prove the manufacturer's negligence, it is more likely that the court will impose strict liability.[51] The *Dubin* court chose not to analyze this principle, but had the court done so, the opinion would have been strengthened. In the past, it was always difficult for a claimant injured by x-radiation to prove negligence on the part of a hospital.[52] This was due in large part to the testimony of experts who were able to demonstrate that there was no effective way to determine how much x-radiation a person could be subjected to without suffering injury.[53] In fact, Michael Reese Hospital was granted summary judgment on the negligence count of Dubin's complaint. Thus, Dubin's difficulty in proving that the source of his injury was the hospital's negligence is an element which supports the imposition of strict liability.

THE HYBRID TRANSACTION

The Cunningham-Dubin *Rationale*

Essentially, the *Dubin* case involved a hybrid transaction. The hospital rendered a service in treating Dubin's throat ailment, but it also transferred goods (*i.e.*, food, medicine) for which Dubin paid consideration. But the court chose not to analyze the case in terms of the application of strict products liability to the hybrid transaction. Instead, it relied upon the decision in *Cunningham v. MacNeal Memorial Hospital*[54] to dispose of

51. *See* Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944). *See* note 38 *supra*.

52. There is a presumption of due care in favor of the practitioner whenever an action is brought which seeks to recover for injuries allegedly resulting from a physician's negligence in using x-radiation. This presumption prevails until it is overcome by contrary evidence. *See* Davis v. Pittman, 212 N.C. 680, 194 S.E. 97 (1937); Cooper v. McMurry, 194 Okla. 241, 149 P.2d 330 (1944).

53. Nance v. Hitch, 238 N.C. 1, 10, 76 S.E.2d 461, 467 (1953). Quoting from expert witness Dr. J.L. Calloway, Professor of Dermatology at Duke University School of Medicine:

> It appears that some people are able to take more x-ray than others, in the same way that one person may be able to take more sunshine than others without reacting . . . . Burns occur at time when X-ray is applied . . . .
>
> Expert witness for plaintiff, Dr. T.C. Worth testified: [I]t happens to the most careful practitioner at times. It may happen to you no matter how much knowledge you may have or how much skill you may exercise. . . .

Id.

54. 47 Ill. 2d 443, 266 N.E.2d 897 (1970). *See* note 14 and accompanying text *supra*. *But cf.* ILL. REV. STAT. ch. 91, § 182 (1971) (negated the effect of *Cunningham* by stating that a blood transfusion is a service, and therefore not subject to products liability law). *See* note 15 *supra*.

the issue.

In *Cunningham*, the plaintiff sued the hospital in strict products liability for the injury she received from a contaminated blood transfusion. The hospital submitted that it supplied blood to the plaintiff incidentally to the services rendered in the treatment of her condition, no sale occurring. But the *Cunningham* court rejected this contention and then cited *Russel v. Community Blood Bank*[55] for the proposition that the supplying of blood by a hospital to its patients constitutes a sale.[56]

Furthermore, the hospital in *Cunningham* argued that it could not be held strictly liable for the transfusion of defective blood since its principal business was not the sale of blood. But the court decided that a seller under section 402A[57] need not be engaged solely in the business of selling the allegedly defective product. Thus, the *Dubin* court, by following *Cunningham*, ruled that Michael Reese Hospital was engaged in the business of placing x-radiation into the stream of commerce, even though the x-radiation was only ancillary to the hospital's overall treatment service and the hospital was not solely engaged in the business of selling such x-radiation.

Commercial v. Professional Hybrid Transactions

Although strict liability has been invoked in an increasing number of hybrid transaction cases, an examination of the litigation reveals that most courts distinguish between hybrid cases involving a commercial service and those involving a professional service. Generally, courts have not hesitated to invoke strict products liability when the service involved was a commercial one. In *Newmark v. Gimbel's, Inc.*,[58] a New Jersey court held a beauty parlor strictly liable when a patron suffered scalp disease after receiving a permanent wave. The policies underlying strict products liability were found applicable because the beautician solicited patronage, and the patron responded to the solicitation, relied upon the expertise of the beautician, and trusted her not to cause injury.[59] This seems to be the general

55. 185 So. 2d 749 (Fla. App. 1966). A subsequent act of the Florida legislature declared that blood could not be the subject of a sale and that no warranties attach to it. *See* FLA. STAT. ANN. § 672.2-316(5) (1979 Supp.).

56. 185 So. 2d at 753.

57. RESTATEMENT (SECOND) OF TORTS 402A, Comment (f), 350 (1965) states that "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."

58. 54 N.J. 585, 258 A.2d 697 (1968). *See* note 8 *supra*.

59. *Id.* at 593-94, 258 A.2d at 701.

rationale supporting the application of strict liability to most commercially oriented hybrid transactions.[60]

Contrary to *Dubin*, most courts appear reluctant to invoke strict products liability where the hybrid transaction is one that involves a professional service.[61] One of the leading cases on this issue was *Gagne v. Bertran*,[62] where it was decided that professionals should not be subject to strict products liability. Justice Traynor reasoned in *Gagne* that the services of professionals are sought because of their special skill, and failure to exercise the ordinary skill and competence of members of their profession will subject them to liability for negligence. We are not justified in expecting infallibility from professionals but can expect only reasonable care and competence. Thus, those who hire professionals purchase a service, not insurance.[63] This view has prevailed in most situations where the service in a hybrid transaction is a professional one.

A California court recently found that an engineering firm rendering professional services could not be analogized to manufacturers who are in the best position to spread the cost of injuries resulting from the marketing of defective products.[64] In *La Rossa v. Scientific Design Co.*,[65] the court refused to apply strict products liability to professional services because the services lacked the elements which gave rise to the doctrine. "There [was] no mass production of goods or a large body of distant consumers to trace an article along the channels of trade . . . to

60. *But see* Raritian Trucking Corp. v. Aero Commander, Inc., 458 F.2d 1106 (3d Cir. 1972) (refused to invoke strict liability against airplane servicer when wing separated during aerobatic maneuvers because only services were supplied); Hillas v. Westinghouse Elec. Corp., 120 N.J. Super. 105, 293 A.2d 419 (1972) (strict liability not applied to elevator maintenance company because company merely serviced articles supplied by another). *See* note 10 *supra*.

61. *E.g.*, La Rossa v. Scientific Design Co., Inc 402 F.2d 937 (3d Cir. 1968). *But cf.* Berry v. G.D. Searle & Co., 56 Ill. 2d 548, 309 N.E.2d 550 (1974) (plaintiff suffered a stroke as a result of taking birth control pill known as Envoid). The drug was manufactured by the defendant G.D. Searle & Co. and prescribed and sold to the plaintiff by the co-defendant, Planned Parenthood Association of Chicago. The Association argued that it was primarily a service organization which maintained a staff of physicians to give birth control advice. It further contended that it was merely performing an incidental service in dispensing birth control pills and therefore was not a seller of such pills. But the court rejected this contention and found the Association to be a seller, although the court refused to invoke strict liability in tort against the Association because the statute of limitations had tolled prior to the plaintiff's filing of the action.

62. 43 Cal. 2d 481, 275 P.2d 15 (1954).

63. *Id.* at 489, 275 P.2d at 21.

64. Stuart v. Crestview Mut. Water Co., 34 Cal. App. 3d 802, 110 Cal. Rptr. 543 (1973).

65. 402 F.2d 937 (3d Cir. 1968). *See* note 61 *supra*.

pinpoint an act of negligence" on the original manufacturer.[66]

In *Barbee v. Rodgers*,[67] the Supreme Court of Texas declined to extend the doctrine of strict products liability to the services rendered by an optometrist in fitting a patient with contact lenses. The court concluded that fitting lenses to remedy a defect in vision is not the act of one selling a product in a defective condition unreasonably dangerous to the user.[68]

In *Magrine v. Krasnica*,[69] a clear distinction between a commercial seller and a professional who offers services was enunciated. The *Magrine* court found that the seller was in the business of supplying a product to the consumer and it was that alone for which he was paid. Whereas, a professional offers, and is compensated for, his professional services and skill. *Service* is the essence of the relationship between the doctor and his patient.[70] This notion has controlled in a number of professionally oriented hybrid transactions.[71]

Attempts to Invoke Strict Liability Against a Hospital

Attempts to recover from hospitals for product-related injuries under strict liability in tort have been thwarted by the inclination of courts to characterize the alleged "sale" of the product as a professional service.[72] The rationale behind the refusal to impose strict liability against hospitals emanated from an old New York case, *Perlmutter v. Beth David Hospital*.[73] Although this case did not involve an attempt to invoke strict liability

66. 402 F.2d at 942-43.

67. 425 S.W.2d 342 (Tex. 1968). *See* note 9 *supra*.

68. 425 S.W.2d at 346.

69. 94 N.J. Super. 228, 227 A.2d 539 (1967). In *Magrine*, the court found that strict liability should not be extended to a dentist who broke off a hypodermic needle in the plaintiff's jaw. Four reasons were given for the court's holding: (1) the dentist was in no better position than the plaintiff to control, inspect, and discover the defect in the hypodermic needle; (2) the dentist did not put the article involved into the stream of commerce, nor promote its purchase by the public; (3) the dentist could not distribute the risk of injury to his patients, because to do so would subvert the policy consideration that the loss should be imposed on those best able to withstand it; and (4) to impose strict liability against the dentist would add an irrational consequence to the progress achieved thus far in products liability. *See* Annot., 29 A.L.R.3d 1425 (1970).

70. 94 N.J. Super. at 235, 227 A.2d at 543.

71. Silverhart v. Mount Zion Hosp., 20 Cal. App. 3d 1022, 1027, 98 Cal. Rptr. 187, 190 (1971) (doctor diagnosing and treating patient is not selling either a product or insurance); Carmichael v. Reitz, 17 Cal. App. 3d 958, 979, 95 Cal. Rptr. 381, 393 (1971) (patient seeks doctor for his professional services, not to buy goods); Balkowitsch v. Minneapolis War Mem. Blood Bank, Inc., 270 Minn. 151, 132 N.W.2d 805 (1965); Baptista v. Saint Barnabas Medical Center, 109 N.J. Super. 217, 262 A.2d 902 (1970).

72. *See* Annot., 54 A.L.R.3d 258 (1974).

73. 308 N.Y. 100, 123 N.E.2d 792 (1954).

against a hospital, the reasoning employed by the court is typical of that used by courts in declining the application of strict products liability to hospitals.

In *Perlmutter*, the New York Court of Appeals focused on the hospital-patient contract and found that such a contract was clearly one for services, and not divisible. It was decided that concepts of purchase and sale should not be separately attached to the healing materials supplied by the hospital as part of the total medical services provided.[74] Moreover, the court held that although title to certain items of medical material may be transferred from the hospital to the patient, this does not make each transaction a sale.[75]

Four other reasons are often cited for the refusal to impose strict liability against hospitals. One is that the hospital is itself a user of the articles employed to treat patients and, therefore, is not a seller.[76] A second reason is that hospitals should not be insurers of what are essentially services and opinions.[77] Another is that hospitals, as institutions which serve humane and public health purposes, should not be subjected to strict liability.[78] A final justification is that the essence of the hospital-patient relationship relates to the services provided and not the products supplied.[79]

THE *DUBIN* DECISION AND PUBLIC POLICY

Obviously, none of these reasons compelled the *Dubin* court to preclude application of strict products liability to a hospital. In fact, the distinction between commercial and professional hybrid transactions was never discussed in the opinion. But perhaps this is an indication that the court examined the distinction and concluded that it is no longer viable when applying the doctrine of strict liability to the hybrid transaction. Thus, it may be implied from *Dubin* that social policy now dictates that strict liability can be invoked against any seller of services who transfers title to goods even though the service involved is a professional one.

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

75. *Id.*

76. Silverhart v. Mount Zion Hosp., 20 Cal. App. 3d 1022, 1028, 98 Cal. Rptr. 187, 191 (1971). *See* note 71 *supra.*

77. Baptista v. Saint Barnabas Medical Center, 109 N.J. Super. 217, 224, 262 A.2d 902, 907 (1969).

78. *See* Balkowitsch v. Minneapolis War Mem. Blood Bank, Inc., 270 Minn. 151, 132 N.W.2d 805 (1965). *See* note 9 *supra.*

79. Silverhart v. Mount Zion Hosp., 20 Cal. App. 3d 1022, 1027, 98 Cal. Rptr. 187, 190-91 (1971). *See* note 71 *supra.*

CONCLUSION

The *Dubin* decision is based upon two principles. The first is that x-radiation is a product for purposes of products liability law. The second is that a hospital may be held strictly liable for treating a patient with a defective product. In defining x-radiation as a product, the court used an indirect approach based on a finding that electricity is a product. The court reasoned that since electricity is a product and x-radiation is a form of electricity, then x-radiation also must be a product. By merely conceding that x-radiation is indeed an offspring of electricity, the assumption does not necessarily follow that x-radiation is a product. Electricity is used in a different manner and for a different purpose than x-radiation; therefore, the two cannot be compared for purposes of a strict products liability action. Hence, the attempt to define x-radiation as a product was not strengthened by the lengthy discussion of electricity.

The notion that a hospital may be held strictly liable for supplying a defective product for human consumption is a departure from the general rule. In so holding, the *Dubin* court relied heavily upon *Cunningham* which had held that a hospital supplying defective blood was subject to strict liability. However, the Illinois legislature subsequently decided that blood supplied by a hospital is not a product for purposes of products liability law.[80] Hence, the decision relied upon by *Dubin* was subsequently found to be contrary to social policy.

Aside from its emphasis on electricity, and the reliance on *Cunningham*, the *Dubin* decision is sound. If the opinion is interpreted in a broad manner, it may serve as the cutting edge for a trend favoring the application of strict products liability to hospitals. It could support the proposition that social policy now calls for the application of strict products liability to all defective articles consumed by a patient in the course of his hospital treatment.

Another interpretation could be that strict liability may be applicable in any situation where an unequal bargaining position forces the consumer to rely upon the ability of the seller to place nondefective goods into the stream of commerce. Situations to be included in this interpretation would be those where goods are transferred to the consumer incidentally to the service rendered by a professional. However, judging from the decisions in the majority of cases where courts refused to invoke strict liability against hospitals, it appears that the doctrine has

80. *See* ILL. REV. STAT. ch. 91, § 182 (1971). *See* note 15 *supra*.

not evolved to the point where the courts are ready to subject hospitals to such liability.

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