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Distinguishing between Products and Services in Strict Liability

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DISTINGUISHING BETWEEN PRODUCTS AND SERVICES IN STRICT LIABILITY

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Whether a consumer transaction that involves both a product and a service should be subjected to strict liability is an issue that has long troubled the courts. In part, this difficulty stems from the courts' failure to explore thoroughly the rationales underlying strict products liability. Professor Powers explores the various rationales advanced to support strict liability and concludes that only one, the difficulties of proof in products cases, supports the selective imposition of strict liability to products transactions. With this rationale identified, the courts can distinguish hybrid sales-service cases based on the difficulty of proving the negligent act. This approach will make possible a more principled resolution of the sales-services cases.

Because strict products liability applies its special standard of liability selectively,[1] courts must be able to identify cases that fall within its scope. This task has been especially difficult in cases involving service transactions. Although most courts have held that "pure" services are beyond the scope of strict products liability because they are not "product sales,"[2] many transactions are difficult to classify because they involve both a service and a product.[3] Courts have relied on various rationales to determine whether individual hybrid sales-service cases are governed by strict liability,[4] but have failed to

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1. RESTATEMENT (SECOND) OF TORTS § 402A (1965) applies to "[o]ne who sells any product in a defective condition . . . if . . . the seller is engaged in the business of selling such a product." The "special" nature of the strict products liability standard is primarily the fact that, unlike negligence, it purports to eschew an examination of the defendant's conduct. Although I have argued elsewhere that the distinction between defectiveness in strict products liability and negligence is often illusory, *see* Powers, *The Persistence of Fault in Products Liability,* 61 TEX. L. REV. 777 (1983), my concern here is the scope of strict products liability, assuming that its standard of liability is distinct from negligence, as it purports to be.

2. *See, e.g.*, Gagne v. Bertran, 43 Cal. 2d 481, 275 P.2d 15 (1954) (warranty); Hoffman v. Simplot Aviation, Inc., 97 Idaho 32, 539 P.2d 584 (1975) (strict tort liability).

3. *See, e.g.*, Newmark v. Gimbel's Inc., 102 N.J. Super. 279, 246 A.2d 11 (1968), *aff'd*, 54 N.J. 585, 258 A.2d 697 (1969) (permanent wave solution applied by beauty parlor held to be product sale); Hoover v. Montgomery Ward & Co., 270 Or. 498, 528 P.2d 76 (1974) (retailer of tires who failed to tighten lug nuts not covered by strict products liability).

4. While the purpose of this Article is not to focus on the law of one jurisdiction, a sampling of supreme court decisions in various jurisdictions does not reflect the ad hoc nature of the decisions concerning the sales-service distinction. Seemingly inconsistent decisions in different jurisdictions can be explained as merely adopting different approaches. The struggle of the courts in a single jurisdiction to reconcile the law in this area is much more instructive of the need for a general, comprehensive approach. The attempts of the Texas courts to grapple with the sales-service distinction typify the ad hoc nature of the decisions. They have decided eleven cases involving hybrid sales-service transactions, and a comprehensive approach is yet to emerge. *See* G-W-L, Inc. v. Robichaux, 643 S.W.2d 392 (Tex. 1982) (construction and sale of house not governed by U.C.C.); Barbee v. Rogers, 425 S.W.2d 342 (Tex. 1968) (optometrist not strictly liable for

develop a comprehensive approach to distinguish "products" from "services."

One impediment to a comprehensive analysis in hybrid sales-service cases is that the sales-service problem actually consists of four distinct issues that courts often combine. One issue, which is the primary focus of this Article, is how "products" and "services" are to be distinguished. For example, a plumber who improperly installs a water heater might be dealing in a product (an installed water heater) or a service (installation).[5]

A second issue is whether a transaction that involves a product involves a "sale" of the product. This issue is common in hybrid sales-service cases because service providers often use products while rendering their services. For example, a permanent wave solution is clearly a product, but it is unclear whether a beauty salon that has applied it to a customer has sold it or merely used it while performing a service.[6] Similarly, defective hypodermic needles and hospital gowns are clearly products, but has a doctor who has used the needles or a hospital that has issued the gowns sold them to the patients?[7]

A third issue is whether defendants engaged in a profession merit special treatment. Many of the sales-service cases have arisen in situations involving professional services, especially health care services,[8] and it is often unclear whether a court's analysis applies equally to nonprofessional services. A final issue is whether the sales-service distinction in cases relying on strict tort lia-

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improperly fitted contact lenses); Navarro County Elec. Coop. v. Prince, 640 S.W.2d 398 (Tex. Civ. App. 1982) (implied warranty of merchantability not applicable to transmission of electricity); Thomas v. Saint Joseph Hosp., 618 S.W.2d 791 (Tex. Civ. App. 1981) (hospital may be held strictly liable to patient supplied with flammable gown); Providence Hosp. v. Truly, 611 S.W.2d 127 (Tex. Civ. App. 1980) (hospital liable under implied warranty of merchantability for contaminated drug); Langford v. Kraft, 551 S.W.2d 392 (Tex. Civ. App. 1977) (stating in dictum that strict liability is not applicable to services); Moody v. City of Galveston, 524 S.W.2d 583 (Tex. Civ. App. 1975) (contaminated water supply governed by strict liability); Ethicon v. Parten, 520 S.W.2d 527 (Tex. Civ. App. 1975) (doctor not strictly liable for defective needle used during operation); Erwin v. Guadalupe Valley Elec. Coop., 505 S.W.2d 353 (Tex. Civ. App. 1974) (strict liability inapplicable to transmission of electricity); City of Denton v. Gray, 501 S.W.2d 151 (Tex. Civ. App. 1973) (strict liability not applicable to flooding caused by supplier of water); Shivers v. Good Shepherd Hosp., 427 S.W.2d 104 (Tex. Civ. App. 1968) (hospital not liable under warranty theory or strict tort liability for contaminated drug). *See also* Vergott v. Deseret Pharmaceutical Co., 463 F.2d 12 (5th Cir. 1972) (hospital not strictly liable for injuries caused by defective needle because not a seller under RESTATEMENT (SECOND) OF TORTS § 402A (1965)); Texsun Feed Yards, Inc. v. Ralston Purina Co., 447 F.2d 660 (5th Cir. 1971).

5. *Compare* O'Laughlin v. Minnesota Natural Gas Co., 253 N.W.2d 826 (Minn. 1977) (strict liability may be applied to defective installation of furnace) *and* Kopet v. Klein, 275 Minn. 525, 148 N.W.2d 385 (1967) (strict liability applied to defectively installed water softener) *with* Hoover v. Montgomery Ward & Co., 270 Or. 498, 528 P.2d 76 (1974) (strict liability not applicable to retailer who failed to tighten lug nuts while installing new tire).

6. *See* Newmark v. Gimbel's, Inc., 102 N.J. Super. 279, 246 A.2d 11 (1968), *aff'd*, 54 N.J. 585, 258 A.2d 697 (1969).

7. *See, e.g.*, Thomas v. Saint Joseph Hosp., 618 S.W.2d 791 (Tex. Civ. App. 1981) (strict liability applies to hospital that bailed defective hospital gown to patient); Ethicon v. Parten, 520 S.W.2d 527 (Tex. Civ. App. 1975) (strict liability does not apply to doctor who injured patient by using defective needle); Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (1967), *aff'd sub nom.* Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (1968) (strict liability does not apply to dentist who injured patient with defective hypodermic needle), *aff'd per curiam*, 53 N.J. 260, 250 A.2d 129 (1969).

8. *See, e.g.*, Barbee v. Rogers, 425 S.W.2d 342 (Tex. 1968) (optometrist); Providence Hosp. v. Truly, 611 S.W.2d 127 (Tex. Civ. App. 1981) (hospital); Hoven v. Kelble, 79 Wis. 2d 444, 256 N.W.2d 379 (1977) (surgeon and anesthesiologist).

bility is the same as the sales-service distinction in cases relying on the warranty provisions of Article 2 of the Uniform Commercial Code.[9]

Each of these issues is important in its own right.[10] The primary purpose of this Article is to examine the first issue: the distinction between products and services. Nevertheless, the other three issues are relevant because courts have intertwined all four issues in cases involving hybrid sales-service transactions. Because most sales-service cases involve more than one of the four issues, it is often difficult to determine what a particular case holds for any one of them, especially since courts have not always distinguished carefully among them.[11]

Courts must disentangle these related but distinct issues before progress

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9. *See, e.g.*, Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (1967), *aff'd sub nom.* Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (1968) (explicitly conflating warranty and tort analysis of sales-service distinction), *aff'd per curiam*, 53 N.J. 259, 250 A.2d 129 (1969); G-W-L, Inc. v. Robichaux, 643 S.W.2d 392 (Tex. 1982) (sales-service distinction under U.C.C. analyzed without reference to precedents involving § 402A); Providence Hosp. v. Truly, 611 S.W.2d 127 (Tex. Civ. App. 1980) (§ 402A cases explicitly held inapplicable to warranty case).

10. For example, even in strict liability cases that do not involve services, it is often difficult to determine whether a "sale" (or something sufficiently close to a sale such as a bailment or lease) has taken place. *See, e.g.*, First Nat'l Bank v. Cessna Aircraft Co., 365 So. 2d 966 (Ala. 1978) (demonstration); Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965) (lease); Armstrong Rubber Co. v. Urquidez, 570 S.W.2d 374 (Tex. 1978) (bailment); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967) (free sample).

Moreover, plausible arguments can be made to exempt professionals from strict liability even if nonprofessionals would be covered. *See, e.g.*, Hoven v. Kelble, 79 Wis. 2d 444, 256 N.W.2d 379 (1977); Crump & Maxwell, *Should Health Service Providers Be Strictly Liable for Product-Related Injuries? A Legal and Economic Analysis,* 36 Sw. L.J. 831 (1982). Finally, the statutory mandate of the Uniform Commercial Code may require different conclusions concerning the scope of Article 2 than a court would adopt for the scope of strict liability. Section 2-102 provides that Article 2 applies to the "sale of goods." U.C.C. § 2-102 (1977). Section 2-105 provides: " '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 . . . and things in action . . . ." *Id.* § 2-105. This definition seems to exclude from the scope of Article 2 pure services which a court could include within the ambit of strict tort liability. It does not, then, help much to distinguish between goods and services in hybrid sales-service cases. Thus, the statute prevents a court from adopting the same test for distinguishing between products and services under Article 2 and § 402A, assuming that it has excluded pure services from strict tort liability.

Of course, even if services are not covered by Article 2 of the Uniform Commercial Code, a court could impose common-law warranty liability. *See* Broyles v. Brown Eng'g Co., 275 Ala. 35, 151 So. 2d 767 (1963); *cf.* Humber v. Morton, 426 S.W.2d 554 (Tex. 1968) (implied warranty of habitability for new house).

11. For example, in Barbee v. Rogers, 425 S.W.2d 342 (Tex. 1968), the court held that strict tort liability did not apply to an injury caused by contact lenses that had been improperly fitted by plaintiff's optometrist. The court relied on two facts. First, defendants were licensed optometrists whose profession was statutorily recognized and regulated. *See* TEX. STAT. ANN. art. 4552 (Vernon 1976). The court recognized that defendants, who had statewide offices under the name of Texas State Optical, "[fell] between those ordinarily associated with the practice of a profession and . . . a merchandising concern," *Barbee*, 425 S.W.2d at 345, but it nevertheless concluded that defendants were engaged in a professional activity. Second, the alleged defect (improper fit) was due to the diagnostic, service component of the transaction rather than to an impurity in the lens itself. "The miscarriage, if such there was, rests in the professional acts of the [optometrists] and not in the commodity they prescribed, fitted and sold." *Id.* at 346. The latter point might be a useful basis for distinguishing between products and services generally, *see infra* text accompanying notes 14-77, but the court did not clarify whether this point is relevant in cases not involving professional services. The ambiguity of the holding in *Barbee* is illustrated by the cases interpreting it. *See supra* note 4. *Barbee* cannot even be unequivocally interpreted to exclude the application of strict products liability to pure services outside the area of professional services. *But see*

can be made toward a comprehensive approach to the sales-service distinction. While the focus is on the distinction between products and services in strict tort liability, it is important to understand that a court's apparent position on this issue may be influenced by the court's failure to disentangle it from one or more of the other three issues.

Even if courts separate the product-service distinction from these other issues, the distinction itself poses problems that have a dual significance. In addition to impeding the resolution of specific cases, the failure to develop a comprehensive approach to the product-service distinction reveals a latent general problem of strict products liability. A premise of strict products liability is that product injuries constitute a discrete, integral problem that merits special treatment. Otherwise, it would be inappropriate to distinguish product injuries from other personal injuries, liability for which is governed by negligence. But courts have not always clearly articulated the features of a product case and the policies they evoke that distinguish product injuries from other personal injuries. Without a clear understanding of *why* products cases are distinct, it has been difficult to ascertain *what* constitutes a products case in borderline situations presented by hybrid product-service transactions.

Both the proponents and opponents of strict products liability have relied on various general arguments to support their respective positions.[12] Many of the arguments on both sides, however, do not distinguish between product injuries and other personal injuries; they apply equally to all personal injury cases.[13] Consequently, they do not explain the *selective* use of strict liability in products cases, and they do not help identify "products cases" in borderline situations. The difficulty courts have encountered in defining the boundaries of strict products liability in the hybrid product-service cases reflects this underlying confusion about the values that strict products liability purports to embody.

Langford v. Kraft, 551 S.W.2d 392, 396 (Tex. Civ. App. 1977); Sales, *An Overview of Strict Tort Liability in Texas*, 11 HOUS. L. REV. 1043, 1066 (1974).

Similarly, the New Jersey Superior Court has distinguished between a dentist, whose patient was injured by a defective hypodermic needle, and a beauty salon, whose customer was injured by the application of a hair wave solution. The court held that strict liability applied to the beauty salon but not to the dentist. *See* Newmark v. Gimbel's, Inc., 102 N.J. Super. 279, 246 A.2d 11 (1968) (distinguishing Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (1967), *aff'd sub nom.* Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (1968), *aff'd per curiam*, 53 N.J. 259, 250 A.2d 129 (1969), *aff'd*, 54 N.J. 585, 258 A.2d 697 (1969)). The distinction might be explained on either of two grounds: (1) the difference between professional and nonprofessional services; or (2) the hair wave solution had been "sold" whereas the hypodermic needle had not. *See Newmark*, 102 N.J. Super. at 287, 246 A.2d at 16 (adopting the latter rationale). The court also casually conflated tort and warranty analyses, *see Magrine*, 94 N.J. Super. at 228 n.2, 227 A.2d at 539 n.2, whereas other courts have either explicitly or implicitly distinguished between them, *see, e.g.*, G-W-L, Inc. v. Robichaux, 643 S.W.2d 392 (Tex. 1982); Providence Hosp. v. Truly, 611 S.W.2d 127 (Tex. Civ. App. 1980). Consequently, the court's position on any one of these issues is unclear.

12. *See, e.g.*, Epstein, *Products Liability: The Gathering Storm*, REGULATION, Sept.-Oct. 1977, at 15; Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. REV. 803 (1976); Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205 (1973); Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077 (1965); Note, *Strict Liability in Hybrid Cases*, 32 STAN. L. REV. 391, 393-94 (1980).

13. *See infra* text accompanying notes 14-77.

This Article examines the product-service distinction from the perspective of developing a coherent, workable standard for distinguishing services and products in specific cases, and from the perspective of gaining insight into the larger structure of strict products liability. Part I attempts to develop a comprehensive approach that can be used by courts to analyze cases on the product-service boundary of strict products liability. It concludes that courts should adopt an approach that attends to the reasons for distinguishing in the first place between product injuries and other personal injuries that are governed by negligence. Part II then explores some of the implications that the hybrid product-service cases have for strict products liability generally.

I. TOWARD A GENERAL APPROACH TO THE PRODUCT-SERVICE DISTINCTION

A general approach to the product-service distinction requires resolution of two related but distinct questions: (1) whether to include pure services within the scope of strict products liability; and (2) if pure service transactions are excluded, how to distinguish between products and services in hybrid product-service transactions. Although these two questions are distinct, they are also related: distinguishing between products and services in hybrid cases should be resolved consistently with the reasons for treating products and services differently in the first place.

A. The Basic Product-Service Distinction

While some commentators have argued that strict liability should apply to commercial services,[14] nearly all courts have refused to extend strict products liability to pure service transactions.[15] There has not been a similar consensus about the reason for excluding services from strict products liability, however.

1. "Legislative" history

One argument is that the "authors" of section 402A did not "intend" to include pure service transactions within its scope.[16] Although the language of

14. *See* Greenfield, *Consumer Protection in Service Transactions—Implied Warranties and Strict Liability in Tort,* 1974 UTAH L. REV. 661; Comment, *Guidelines for Extending Implied Warranties to Service Markets,* 125 U. PA. L. REV. 365 (1976); Note, *Continuing the Common Law Response to the New Industrial State: The Extension of Enterprise Liability to Consumer Services,* 22 U.C.L.A. L. REV. 401 (1974).

15. *See, e.g.*, La Rossa v. Scientific Design Co., 402 F.2d 937, 942-43 (3d Cir. 1968); Pepsi Cola Bottling Co. v. Superior Burner Serv. Co., 427 P.2d 833, 839 (Alaska 1967), Hoffman v. Simplot Aviation, Inc., 97 Idaho 32, 539 P.2d 584 (1975); Hoover v. Montgomery Ward & Co., 270 Or. 498, 528 P.2d 76 (1974). *But see* Broyles v. Brown Eng'g Co., 275 Ala. 35, 151 So. 2d 767 (1963) (per curiam) (warranty theory).

16. RESTATEMENT (SECOND) OF TORTS § 402 (1965). This type of argument is persuasive concerning the scope of Article 2 of the U.C.C., since it explicitly refers to "transactions in goods." *See* U.C.C. § 2-102 (1970). This does not preclude courts from developing common-law warranties in pure service transactions, however, since they have done so in other areas that are clearly beyond the scope of Article 2. *See* Humber v. Morton, 426 S.W.2d 554 (Tex. 1968) (certain real

section 402A appears to exclude service transactions,[17] courts should not interpret it as though it were a statute. While courts are understandably influenced by section 402A in difficult cases, principled common-law development is often thwarted when courts blindly abdicate to its language. Moreover, even if the language of section 402A provides a persuasive argument for excluding pure service transactions from strict liability, this does not advance the analysis in hybrid sales-service transactions because it does not explain *why* products are treated differently than services.

2. Defectiveness is meaningless for services

A second argument is that the concept of defectiveness or an implied warranty makes little sense when applied to service transactions.[18] The salient feature of defectiveness is that (unlike negligence) it purports to evaluate the product rather than the manufacturer's conduct.[19] Since a service necessarily involves "conduct" rather than a "product," a court would be required to evaluate the defendant's conduct if strict liability were applied to services.

This rationale is unconvincing. Courts can distinguish between negligence and defectiveness even in service transactions by evaluating the results of the service rather than the service provider's conduct, which would be appropriate under negligence.[20] Under this approach, a doctor who misdiagnosed an ailment would have rendered a "defective" service from the perspective of our knowledge at the time of trial, even if the diagnosis was reasonable from the perspective of what the doctor should have known when the diagnosis was made. The practical problem of confusing negligence and defectiveness might be exacerbated in service transactions, since the defendant's conduct is scrutinized, but there is no conceptual bar to applying strict liability to services.

3. The "tunnel vision" approach

A third rationale for excluding services focuses on specific aspects of service transactions that make them inappropriate for strict liability. For example, in *Gagne v. Bertran*,[21] the California Supreme Court refused to apply strict

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estate transactions). This is not to say that courts *should* develop common-law warranties for services, however.

17. RESTATEMENT (SECOND) OF TORTS § 402A (1965) repeatedly refers to the sale of a "product," and it appears in a chapter of the Restatement entitled "Suppliers of Chattels." All of the examples used in the comments are tangible chattels. It is reasonable to conclude that the authors of § 402A had tangible products rather than services in mind.

18. *See, e.g.*, Lewis v. Big Powderhouse Mountain Ski Corp., 69 Mich. App. 437, 245 N.W.2d 81 (1976).

19. *See* Phillips v. Kinwood Machine Co., 269 Or. 485, 493, 525 P.2d 1033, 1036 (1974); Powers, *supra* note 1, at 778.

20. For example, hindsight might reveal that an architectural design was "defective," even though the danger it failed to guard against was unforeseeable at the time the design was made. I have argued elsewhere that the distinction between hindsight and foresight is sometimes illusory, Powers, *supra* note 1, but this problem is just as applicable to products as it is to services.

21. 43 Cal. 2d 481, 275 P.2d 15 (1954). *Gagne* predates strict tort liability, but the opinion's reasoning might be applied to strict tort liability.

liability to a soil engineer because consumers do not expect services to be free from defects:

> [The engineer] was selling service and not insurance. Thus, the general rule is applicable that those who sell their services for the guidance of others in their economic, financial, and personal affairs are not liable in the absence of negligence or intentional misconduct.
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> . . . .
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> The services of experts are sought because of their special skill. They have the duty to exercise the ordinary skill and competence of members of their profession, and a failure to discharge that duty will subject them to liability for negligence. Those who hire such persons are not justified in expecting infallibility, but can expect only reasonable care and competence. They purchase service not insurance.[22]

The problem with this argument is that the same could be said of those who select product manufacturers. Arguments favoring negligence over strict liability or vice versa can be made for any type of accident.[23] The issue, however, is to determine the appropriate treatment of services in a system that distinguishes between product injuries and other personal injuries. The argument in *Gagne* does not itself distinguish service transactions from product sales and therefore does not justify their distinct treatment.[24]

This "tunnel vision" approach, which focuses solely on the nature of the service transactions, has been used elsewhere with more sophistication. One commentator has developed a complicated model based on information and marketing theory and concluded that strict liability would be desirable in some service transactions.[25] The analysis usefully distinguishes among different types of service transactions, and it offers reasons why strict liability would be desirable in some of them, but it does not even attempt to demonstrate that the arguments favoring strict liability are stronger in service transactions than in other situations, such as automobile accidents, in which strict liability is clearly inapplicable. Consequently, the argument does not justify the *selective* use of strict liability in service transactions when negligence is required in other personal injury cases.

4. One-way analogies

A fourth type of argument looks beyond the features of service transactions alone and compares service cases to other types of cases, the resolution of which is known or assumed. For example, proponents of strict liability have argued that the policies supporting strict liability in product cases (such as risk

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22. *Id.* at 487-89, 275 P.2d at 20-21.

23. *See, e.g.*, Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Posner, *supra* note 12.

24. Of course, it can be argued that consumer expectations actually are *different* in service transactions than in product transactions, *see* Note, *supra* note 12, at 397-98, but this point requires independent support that was not the basis of the decision in Gagne v. Bertran, 43 Cal. 2d 481, 275 P.2d 15 (1954). Mere conclusions to this effect are insufficient.

25. Comment, *supra* note 14.

spreading) are also applicable to services.[26] Conversely, an opponent of strict liability for services has argued that the policies supporting the rejection of strict liability for medical services are equally applicable to nonmedical services.[27]

These "one-sided" analogies are helpful, but they overlook the possibility that services also may be analogous to other cases in which the legal treatment is different. For example, services may be analogous to products because, in each situation, accident costs can be internalized into price and spread among consumers. But the accident costs of any activity also could be internalized into the "price" of the activity by subjecting it to strict liability.[28] This feature of services makes them analogous both to products and to other accident-causers normally governed by negligence, and consequently it does not select between the divergent treatment given to product injuries and other accidents.

Other accidents, such as automobile accidents, and product injuries share common features, yet they are treated differently. Service transactions share common features with each. Consequently, one-sided analogies are not very helpful. Courts should ascertain what distinguishes product cases from other accidents (and why) and then determine whether service cases are more akin to one or the other in light of the reasons for distinguishing between them in the first place. One-sided analogies fail to do this.

5. Two-way analogies

Some courts have gone beyond one-sided analogies and have relied on policies that distinguish products injuries cases from other personal injuries and thereby justify strict liability in product cases even though negligence is required elsewhere. For example, in *Lemley v. J & B Tire Co.*[29] the court reasoned that product cases are distinct because they present victims with acute problems of proof. A manufacturer's conduct normally has occurred at a time and place remote from the accident, making it difficult for a plaintiff to ascertain specific facts about the manufacturer's behavior. Problems of proof are not usually as acute in nonproduct cases because the defendant's alleged

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26. *See, e.g.*, Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (1968) (Botter, J., dissenting), *aff'd per curiam*, 53 N.J. 259, 250 A.2d 129 (1969); Greenfield, *supra* note 14; Note, *supra* note 14.

27. *See* Sales, *The Sales-Service Transaction: A Citadel Under Assault*, 10 ST. MARY'S L.J. 13, 36 (1978).

28. For automobile accidents, spreading costs would be effected through the mechanism of nearly universal insurance rather than through market prices, but the risk spreading argument does not distinguish between these mechanisms. In either case, accident costs would be spread throughout the relevant population. Another major problem with the risk spreading argument as an explanation of strict products liability is that it would also apply to the accident costs of nondefective products. *See infra* text accompanying notes 35-40.

One commentator has argued that risk spreading distinguishes between products and services because manufacturers are normally larger than service providers and therefore can more easily spread costs. *See* Note, *supra* note 12, at 396. Putting aside the empirical validity of this claim (especially given that small product retailers are not exempt from strict products liability), it overlooks the fact that the actual spreading mechanism is insurance, and insurance makes the size of a particular product or service provider irrelevant.

29. 426 F.Supp. 1378, 1380 (W.D. Pa. 1977) (mem.).

negligent conduct is more likely to be accessible to the plaintiff. The *Lemley* court then concluded that this distinguishing feature of products cases was not a salient feature of repair transactions, and consequently it refused to hold a repairman strictly liable.

Regardless of the specific result in *Lemley*, the court's basic approach is sound. Rather than making general references to arguments favoring or disfavoring strict liability, the court focused on specific policies that distinguish product injuries from other personal injuries and that therefore justify the *selective* use of strict liability in products cases.[30]

The key to this approach is identifying policies that distinguish products injuries from other personal injuries. Many of the policies advanced to support products liability are convincing within the context of a specific products case, but they are equally applicable to nonproducts cases. Consequently, they do not explain the distinct treatment products cases receive.

(a). Incentives to promote safety

One common rationale for strict products liability is that it will promote product safety,[31] because requiring manufacturers to bear accident costs regardless of negligence gives them an incentive to produce safer products. This argument is controversial even on its own terms. It is debatable both analytically and empirically whether strict liability increases product safety, much less tends to optimize it.[32] More importantly for the present inquiry, however, is that this argument fails to distinguish between product injuries and other personal injuries. Strict liability for automobile accidents would also internal-

30. One commentator has also used this type of analysis to develop a comprehensive approach to hybrid sales-service cases. Note, *supra* note 12. My disagreement with his conclusions is not based on the style of the argument, but rather on the policies that actually can be used to distinguish product cases from the rest of personal injury law. *See infra* text accompanying notes 31-60.

31. *See, e.g.*, Hoven v. Kelble, 79 Wis. 2d 444, 256 N.W.2d 379 (1977); Epstein, *supra* note 12, at 19-20; *see also* Note, *supra* note 12, at 393.

32. Strictly speaking, "safer" products are not the goal. Any product could be made safer with some design change, but that in turn might make the product unduly expensive or detract from its utility. The appropriate goal is for manufacturers to design products with an optimal level of safety. Optimal safety, in turn, requires incentives for both manufacturers and consumers. Theoretically, negligence coupled with the defense of contributory negligence provides incentives that tend to optimize safety, while strict liability without contributory negligence does not. *See, e.g.*, Brown, *Toward an Economic Theory of Liability*, 2 J. LEG. STUD. 323, 338-43 (1973); Epstein, *supra* note 12, at 19-20; Posner, *supra* note 12, at 209.

Of course, consumers and manufacturers both have incentives for safety other than legal rules, which may justify results that contradict theoretical models, even if the goal were merely to optimize safety. But the practical impact of strict liability on product safety is unclear. As Judge Posner has noted, "the question is at bottom empirical, and the empirical work has not been done." Posner, *supra* note 12, at 212. The existing empirical evidence does not reflect a consensus. *See* Whitford, *Comment on a Theory of the Consumer Product Warranty*, 91 YALE L.J. 1371 (1982). *Compare* Priest, *A Theory of Consumer Product Warranty*, 90 YALE L.J. 1297, 1348 (1981) (suggesting that strict liability may reduce product safety) *with* Note, *An Empirical Study of the Magnuson-Moss Warranty Act*, 31 STAN. L. REV. 1117, 1137-46 (1979). It is not implausible to attribute most of the increases in product safety to consumer pressure, direct governmental regulation, or increased litigation that may have occurred even under negligence, rather than to changes in the common law of products liability.

ize the cost of accidents into the cost of driving, thereby providing an incentive for safety.[33] Incentives for safety might support strict liability generally (depending on the empirical evidence), but they do not explain the *selective* application of strict liability to product injuries.[34]

(b). Risk spreading

A second common rationale for strict products liability is that it helps internalize accident costs into a product's price to spread a victim's loss among an entire group of consumers.[35] Even if spreading risks is a desirable goal, which is itself controversial,[36] it is not specific to product injuries.[37] Victims of other accidents could also have their losses spread. In the case of automobile accidents, a large class of cases governed solely by negligence, accident costs could be spread among drivers through the mechanism of nearly universal

33. Ironically, product cases might be distinguished from nonproduct cases on the basis that the liability rule has *less* impact on product manufacturers than on nonproduct tortfeasors. In transactions subject to market forces, we might be less concerned with any allocative inefficiency caused by a liability rule (here in terms of optimal safety) because the parties can bargain their way back to an efficient result. For example, we may not be concerned that the entitlements given to real property owners permit them to use their land frivolously because they pay the price of foregoing a sale or rental at a value reflecting the more efficient use. To the extent that strict liability is theoretically inefficient, it may be more tolerable in product cases in which a market may mitigate its effect. The absence of a market among strangers prevents a similar mitigation of inefficiency in automobile accidents, and we might therefore insist on a theoretically more efficient liability rule, such as negligence. *See generally* Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960); Powers, *Methodological Perspective on the Duty to Act* (Book Review), 57 TEX. L. REV. 523, 529 & n.21 (1979) (reviewing M. SHAPO, THE DUTY TO ACT: TORT LAW, POWER, & PUBLIC POLICY (1977)).

Of course, if this were the reason for distinguishing between products and nonproducts cases, service transactions should be classified with the products cases, since they too are subject to market forces. No court has relied on this distinction, however, possibly because the actual impact of liability rules on behavior is so uncertain and the presence of effective markets is doubtful, regardless of the theoretical models.

34. One distinction between product injuries and other personal injuries may be that commercial defendants are more susceptible to influence by economic incentives than are individuals. If this were the rationale for the distinct treatment of product injuries, commercial services should be treated like products, but no court has relied on this rationale. Indeed, this rationale would be just as applicable to any injury caused by a commercial defendant, not merely one involving products or services.

One commentator has argued that services and products can be distinguished because incentives are more effective against product manufacturers than service providers. *See* Note, *supra* note 12, at 396-97. This conclusion is pure conjecture, and intuition suggests it is incorrect. *See* Greenfield, *supra* note 14, at 700-01.

35. *See, e.g.*, Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841, 862 (5th Cir. 1967), *cert denied,* 391 U.S. 913 (1968); Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring); Hoven v. Kelble, 79 Wis. 2d 444, 468, 256 N.W.2d 379, 391 (1977); Epstein, *supra* note 12, at 19-20. This rationale often parades under the banner of the defendant's financial ability to bear the loss. *See* Phipps v. General Motors Corp., 278 Md. 337, 343, 363 A.2d 955, 958 (1976).

36. *See, e.g.*, Markle v. Mulholland's, Inc., 265 Or. 259, 295-96, 509 P.2d 529, 546 (1973) (en banc) (Bryson, J., dissenting); Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153, 191-93 (1976).

37. *See, e.g.*, Epstein, *supra* note 12, at 19-20. Indeed, some cases have declined to recognize it as a significant policy underlying strict products liability. *See, e.g.*, Brody v. Overlook Hosp., 127 N.J. Super. 331, 341, 317 A.2d 392, 398 (1974), *aff'd per curiam*, 66 N.J. 448, 332 A.2d 596 (1975).

automobile insurance.[38] Indeed, victims of disease and natural disaster are indistinguishable from product victims from the perspective of spreading losses.[39] Even more telling in the present context is that the argument for spreading risks is equally powerful for injuries caused by nondefective products,[40] yet recovery is uniformly denied in such cases. Although the rhetoric of risk spreading is often used to support strict products liability for victims of defective products, it does not justify the selective use of strict liability for victims of defective products.

(c). Difficulty of proving specific acts of negligence

A third rationale for strict products liability is that it is unduly burdensome for a plaintiff to prove specific acts of negligence in a products case.[41] Proving negligence is difficult in any personal injury case. Witnesses may give conflicting versions of the events, and the mechanism of the injury may have been destroyed in the accident. The problem is more acute in products cases, however, because the alleged negligence normally occurred at a place controlled by the defendant before the plaintiff purchased the product. Although this sometimes occurs in nonproduct cases, for example, when a motorist has failed adequately to maintain his brakes,[42] products injuries present this problem more acutely than other injuries.[43] Consequently, courts can consistently relieve plaintiffs of the burden of proving negligence in products cases while requiring proof of negligence in other personal injury cases.[44]

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38. Just as compensation in a product case tends to slightly raise a product's price, strict liability in automobile accidents would tend to raise liability insurance rates. Although a court might argue that a product's price is a better mechanism to spread risks than automobile insurance, no court has done so. Moreover, such a distinction would be empirically dubious.

Another possible argument for distinguishing product injuries is that victims do not typically insure against product injuries and therefore need another mechanism for spreading losses. Of course, they could insure against product injuries, and they typically do not insure against most types of loss through first party automobile insurance (maybe this tells us something about the desirability of spreading these losses). Again, this argument does not distinguish product injuries from other types of accidents.

Of course, if either of these distinctions were a basis of strict products liability, it would apply equally to commercial services.

39. *See* Epstein, *supra* note 12, at 19-20.

40. *Id.*

41. *See, e.g.*, La Rossa v. Scientific Design Co., 402 F.2d 937, 942 (3d Cir. 1968); Escola v. Coca Cola Bottling Co., 24 Cal. 2d 435, 463, 150 P.2d 436, 441 (1944) (Traynor, J., concurring); Phipps v. General Motors Corp., 278 Md. 337, 343, 363 A.2d 955, 958 (1976); Hoven v. Kelble, 79 Wis. 2d 444, 468, 256 N.W.2d 379, 391 (1977); Cowan, *supra* note 12, at 1087; Montgomery & Owen, *supra* note 12, at 809; Note, *supra* note 12, at 395.

42. Indeed, the plaintiff's inability to gather evidence sometimes triggers the doctrine of *res ipsa loquitur*, and at least one commentator has analogized strict products liability to *res ipsa loquitur*. *See* Cowan, *supra* note 12, at 1094. *Cf.* Siegler v. Khulman, 81 Wash. 2d 448, 453-60, 502 P.2d 1181, 1184-87 (1973) (comparing common law strict liability to *res ipsa loquitur*).

43. *See supra* note 41.

44. Improved discovery techniques and a more sophisticated plaintiff's bar may have mitigated the proof problem. Moreover, difficulties of proof might be remedied by shifting the burden of proving the absence of negligence to the defendant, or by permitting the jury to draw an inference of negligence from the fact of defectiveness. The present issue, however, is not the continuing wisdom of strict products liability compared to its alternatives; it is whether plausible reasons exist to explain why courts single out products cases for special treatment. The special problems of proof provide such a rationale.

This rationale for strict products liability does not deny fault as the underlying motivation for liability. It posits that negligence is a common cause of defective products and that a plaintiff's inability to *prove* negligence is more likely to be a consequence of the difficulty of proof than of the manufacturer's not actually having been negligent.[45]

This rationale is especially attractive because it harmonizes with specific features of strict products liability in a way that other rationales do not. For example, the "unavoidable danger" explanation of excluding hepatitis infected blood plasma from strict liability[46] and the "state of the art" defense[47] are essentially grounded on conclusions that we could not have expected the manufacturer to have made the product safer. Risk spreading does not explain these defenses, since these risks are as worthy of spreading as any others. But notwithstanding the normal inference of negligence from defectiveness, we are usually convinced that a manufacturer was not negligent in cases involving unavoidable dangers or state of the art technology. The plaintiff's failure to prove negligence in these cases is not likely to be due merely to problems of proof.[48]

Unlike other rationales, the proof rationale is also consistent with courts' refusal to compensate victims of nondefective products. On one hand, a defect raises a much stronger inference of negligence than does a mere injury. On the other hand, while defectiveness is not always easy to prove, a plaintiff at least has contemporaneous access to the product itself, mitigating the special problems of proving negligence in a products case.[49]

The importance of the proof rationale of strict products liability is that while it does not necessarily represent good policy, it does distinguish product injuries from other personal injuries and thereby provides a plausible basis for selectively eschewing negligence in product cases. Consequently, its application to service cases can be used to ascertain whether they fall within the scope

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45. Sometimes there will be "smoke without fire," but experience and intuition may suggest that defectiveness implies negligence more often than not, even when the plaintiff cannot prove it. The plaintiff's failure may simply be due to the acute problems of proof presented by a product injury. *See supra* note 41.

46. *See, e.g.*, Brody v. Overlook Hosp., 127 N.J. Super. 331, 339-40, 317 A.2d 392, 397 (1974), *aff'd per curiam*, 66 N.J. 448, 332 A.2d 596 (1975). *But see* Cunningham v. MacNeal Memorial Hosp., 47 Ill. 2d 443, 453-56, 266 N.E.2d 897, 902-03 (1970).

47. *See, e.g.*, Bruce v. Martin-Marietta Corp., 544 F.2d 442, 447 (10th Cir. 1976); Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 199-209, 447 A.2d 539, 544-49 (1982); Boatland of Houston, Inc. v. Bailey, 609 S.W.2d 743, 746 (Tex. 1980).

48. *See* Brody v. Overlook Hosp., 127 N.J. Super. 331, 339-40, 317 A.2d 392, 397 (1974), *aff'd per curiam*, 66 N.J. 448, 332 A.2d 596 (1975).

49. The proof rationale does not explain the liability of retailers who have not been negligent. The liability of retailers is due in part to the historical legacy of warranty law and to the difficulty of obtaining local jurisdiction over a manufacturer who normally would be required to indemnify the retailer. Since long-arm jurisdiction has undermined this rationale, the liability of retailers may be vestigial.

One other rationale for manufacturer liability is that since the retailer is already liable, a direct action against the manufacturer avoids the circuitous route of successive lawsuits. This assumes that retailers are liable; it does not independently define situations in which strict liability will be available against retailers. Consequently, it is no help in ascertaining whether or not services fall within the scope of strict products liability.

of strict liability.[50]

(d). Consumer expectations

A fourth rationale reflects the warranty heritage of strict products liability: defective products frustrate consumer expectations.[51] Especially in early cases, courts relied on general assurances of safety and quality that were found in advertising or in the mere marketing of a product.[52] The emphasis on consumer expectations has waned, both as a test of defectiveness and as a reason for liability.[53] Courts have been willing to free products liability from its warranty moorings, and concrete consumer expectations are difficult to ascertain in any but the simplest cases.[54] To the extent that consumer expectations remain a basis of strict products liability, however, this rationale justifies a distinction between products cases (in which bargains may create expectations) and other personal injuries (in which they do not).[55]

(e). Manufacturers are in a better position to prevent injury

A fifth rationale for strict products liability is that it places the burden of injuries on manufacturers, who are in a better position to prevent injury, "rather than [on] the injured persons who are powerless to protect themselves."[56] This rationale is itself controversial,[57] but more importantly, it does not distinguish product injuries from other types of personal injuries. Victims of automobile accidents are often "powerless" to protect themselves, and an alleged tortfeasor is in a better position to prevent the loss. Indeed, in consumer transactions the victim often has had at least the opportunity to select the manufacturer, a choice not usually given to the victim of an automobile accident.

(f). Manufacturers deliberately impose risks

A final rationale of strict products liability—relying on fairness—requires a manufacturer to compensate victims because the manufacturer has deliber-

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50. *See infra* text accompanying notes 74-84.

51. *See* RESTATEMENT (SECOND) OF TORTS § 402A comment i (1964); Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974); Note, *supra* note 12, at 395.

52. *See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); *see also* Henderson v. Ford Motor Co., 519 S.W.2d 87 (Tex. 1974); Heaton v. Ford Motor Co., 248 Or. 467, 435 P.2d 806 (1967); McCown v. International Harvester Co., 463 Pa. 13, 342 A.2d 381 (1975); Vincer v. Esther Williams All-Aluminum Swimming Pool Co., 69 Wis. 2d 326, 230 N.W.2d 794 (1975).

53. *See, e.g.*, Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979).

54. *See* Powers, *supra* note 1, at 794-97.

55. This rationale distinguishes product cases from automobile accident cases only to the extent that the expectations created by bargains are special. Reliance and expectations are also present in many nonbargaining situations. Automobile drivers, for example, routinely rely on their expectations about the conduct of fellow drivers.

56. Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

57. *See, e.g.*, Klemme, *supra* note 36, at 191-92 n.107.

ately imposed risks on consumers for its own benefit.[58] Similar arguments have been used to explain tort liability generally,[59] and therein lies its weakness as a justification for special treatment of product injuries. Motorists deliberately impose risks on pedestrians for their own benefit, yet proof of negligence is still required.[60]

(g). Application of rationales to the product-service distinction

Of these rationales, only two explain the distinction between product injuries and other personal injuries: (1) the unique problems of proof a plaintiff confronts in a products case; and (2) the tacit representations of safety that constitute part of a consumer bargain. The other putative rationales for strict product liability support strict tort liability generally, not its selective application in cases involving defective products.[61]

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58. *See* Cowan, *supra* note 12, at 1087-92.

59. *See* Fletcher, *supra* note 23. *But see* Coase, *supra* note 33; Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972) (arguing that the alleged tortfeasor no more imposes risks on the victim than vice versa).

60. Indeed, this rationale provides a stronger argument for strict liability in accidents among strangers than it does in many product cases. Since a manufacture's liability normally is passed on to consumers, so the risks and benefits of a liability rule are distributed reciprocally. This is not necessarily true for accidents among strangers. (In the most common form of accident among strangers—automobile accidents—the rate structure of automobile insurance tends toward reciprocity. Lack of reciprocity is a problem in accidents between drivers and pedestrians, but it is similarly a problem in product injuries involving bystanders.)

Other arguments might be constructed to support strict products liability. For example, strict products liability might rest on an argument similar to unit pricing in supermarkets. If accident costs are internalized into a product's price, they are more visible to consumers, although the true cost of the product (including risk) is unchanged. This, in turn, might help consumers to shop comparatively and otherwise better allocate their resources. The problem with this argument (in addition to its not having been used by courts) is that, like the spreading argument, it is incompatible with the requirement of defectiveness. Of course, this could be remedied by dropping the requirement of defectiveness, but that solution is very unlikely.

Another possible rationale is that strict products liability avoids technical obstacles (such as timely notice) that plaintiffs face under the Uniform Commercial Code. *See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 60, 377 P.2d 897, 899, 27 Cal. Rptr. 692, 699 (1963). It is difficult to take this argument seriously, since the obvious solution is to amend the U.C.C. Furthermore, this rationale does not itself explain why we have implied warranties in the first place.

One source of difficulty in attempting to ascertain the rationales of strict products liability is that many courts have been relatively silent about them or alluded to them in an unsystematic way. For example, the Texas Supreme Court has alluded to the arguments that (1) manufacturers are in a better position than the consumer to prevent harm; (2) the burden of proving specific acts of negligence is unusually great in products cases; and (3) strict liability spreads risks among consumers. *See* Jacob E. Decker & Sons, Inc. v. Capps, 164 S.W.2d 828 (Tex. 1942) (decided prior to the adoption of § 402A, but heavily relied upon after § 402A was adopted, *see* Boatland of Houston, Inc. v. Bailey, 609 S.W.2d 743 (Tex. 1980) (Pope, J., concurring); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967)). But the court has not purported to give a definitive list of policies supporting strict products liability, and it has not excluded specifically arguments that have been suggested by commentators or other courts. Thus, the courts of civil appeal can be excused for their failure to develop a comprehensive approach to the sales-service distinction. *See supra* note 4.

61. Four of the tangential rationales discussed in the notes distinguish between product injuries and other personal injuries: (1) that market forces tend to mitigate inefficiencies created by a liability rule, *see supra* note 33; (2) that commercial defendants are more responsive to economic incentives, *see supra* note 34; (3) that product price is a better spreading mechanism than personal injury insurance, *see supra* note 38; and (4) that internalizing accident costs makes them explicit, permitting consumers to make better purchasing decisions, *see supra* note 60. Since courts have not relied on these arguments, I will not rely on them in my analysis. It should be noted, however,

The two rationales that do distinguish between product injuries and other personal injuries suggest opposing resolutions of cases involving pure services. The rationale based on implicit representations of quality and safety seems to be equally powerful in service cases,[62] since they too are "contractual" and consequently give rise to consumer expectations. The proof rationale, however, distinguishes between services and products because the special obstacles of proof encountered by plaintiffs in products cases are not as acute in service cases. Alleged misconduct in service transactions often takes place at a location accessible to the consumer after the consumer has chosen the service provider.[63]

Depending on a court's choice between these rationales, a coherent liability system could either include or exclude service cases from the scope of strict liability. Although the proof problem better explains the special treatment given to products cases,[64] a court could plausibly rely on either rationale and treat service cases either like products cases or like cases involving accidents among strangers.

After a court makes this determination, however, its range of approaches in hybrid cases is more limited. If it decides to treat services like products, the hybrid cases cease to be problematic: they too would be governed by strict liability. If a court decides to exclude pure services from strict liability, however, it must then decide whether to treat a hybrid case either like a product or like a service. It is because most courts have declined to extend strict liability to pure services[65] that the hybrid cases continue to be perplexing.

At this point, however, the analysis can be simplified, because only the proof rationale distinguishes products cases from automobile accidents *and* from pure services cases. Although a court might vindicate the representation rationale by extending strict liability to pure services, only the proof rationale provides a satisfactory explanation for current law in jurisdictions that require proof of defectiveness in products cases and exclude pure services from the

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that each of them depends on the commercial nature of product cases and would apply equally to all other commercial transactions, including services, and therefore would support including pure service transactions within the scope of strict liability.

62. *See* Greenfield, *supra* note 14. One commentator has used this rationale to distinguish between products and services, arguing that "[w]hile purchasers of goods expect a product free of defects, hirers of services normally contract for the services of an expert rather than for a particular result." Note, *supra* note 12, at 397. If this point is meant to be empirical, it is pure conjecture, and probably wrong. Surely purchasers of products actually expect that some products are "lemons." *See* Powers, *supra* note 1, at 796-97. In many cases consumers of services also expect a result. If the point is that consumers have a *right* to expect, it is a mere conclusion about the distinction between services and products, rather than a justification of it.

63. This is not always true in service transactions, but neither is it always true in cases involving accidents among strangers. The point is that the acute problems of proof in products cases as a category are not as severe in service cases as a category. In this regard, service cases are more akin to cases involving accidents among strangers.

64. *See* Powers, *supra* note 1, at 796-97.

65. *See, e.g.*, Pepsi Cola Bottling Co. v. Superior Burner Serv. Co., 427 P.2d 833 (Alaska 1967); Gagne v. Bertram, 43 Cal. 2d 481, 275 P.2d 15 (1954) (en banc) (warranty); Hoffman v. Simplot Aviation, Inc., 97 Idaho 32, 539 P.2d 584 (1975); Hoover v. Montgomery Ward & Co., Inc., 528 P.2d 76 (Or. 1974). *But see* Broyles v. Brown Eng'g Co., 275 Ala. 35, 151 So. 2d 767 (1963) (warranty theory).

scope of strict liability.[66] Accordingly, courts should rely on this rationale to determine whether specific hybrid cases are more like products (and governed by strict liability) or are more like services (and governed by negligence).

B. The Product-Service Distinction in Hybrid Cases

If products cases are special because of their acute problems of proof, it should be possible to resolve hybrid product-service cases in accordance with this distinction. Courts should inquire in a hybrid case whether it is the type of case that evokes the proof rationale of strict products liability.

This task could be accomplished at various levels of generality or specificity. At one extreme, a court could examine an entire transaction—from the perspective of proving specific acts of negligence—and determine whether it is, as a whole, more like a service or a product. One test currently used by some courts—the essence of the transaction test—adopts this type of approach, although courts have not explicitly viewed the transaction from the perspective of the proof rationale.[67] A court following this approach would not differentiate among separate portions of a transaction in determining whether it involved a product or a service. For example, a plumber who installs a water heater would be judged by a single test, regardless of whether the installation or the water heater itself were defective.

A court, however, could scrutinize transactions in more detail to ascertain the applicability of the proof rationale to its specific portions. For the plumber who installs a water heater, defective installation might be considered a service, since it occurred at a location accessible to the consumer after he had selected the plumber. A defect in the water heater, however, would subject the consumer to the obstacles of proof that make product injuries special, and might therefore be governed by strict liability. For the water heater itself, the plumber would be treated like a retailer of a defective product.[68]

Scrutinizing a hybrid transaction to ascertain the source of the defect has been suggested by some courts and commentators. For example, in *Barbee v.*

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66. Even the tangential rationales discussed earlier, *supra* note 61, must be discarded in jurisdictions that exclude pure services from strict liability because each is as applicable to services as it is to products.

67. *See, e.g.*, Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974); Allied Properties v. John A. Blume & Assocs., 25 Cal. App. 3d 848, 855, 102 Cal. Rptr. 259, 264 (1972); G-W-L, Inc. v. Robichaux, 643 S.W.2d 392, 394 (Tex. 1982); Clay v. Yates, 25 L. J. Ex. 237, 239-40, 156 Eng. Rep. 1123, 1125-26 (1856).

One court has used the "essence of the transaction" test to define the scope of Article 2 of the Uniform Commercial Code, but not to define the scope of strict tort liability. *Compare* G-W-L, Inc. v. Robichaux, 643 S.W.2d 392 (Tex. 1982) (warranty) *with* Barbee v. Rogers, 425 S.W.2d 342 (Tex. 1968) (strict tort liability).

68. *See* Note, *supra* note 12, at 402-04. If the plumber installed a water heater that the consumer had purchased elsewhere, strict liability would not be applicable to him because he would not have "sold" the water heater. *See supra* text accompanying notes 6-7.

A single transaction could have two sources of defect, as in a case in which a plumber improperly installs a defective water heater. In such a case, the installation should be governed by negligence, while the defect in the water heater should be governed by strict liability. It is also possible for a product such as a water heater to be defective because it does not protect against negligent installation. Again, each source of liability should be analyzed separately.

Rogers[69] the Texas Supreme Court refused to apply strict liability to an optometrist who had improperly fitted a contact lens. Although the defendant's practice of a regulated profession strongly influenced the court, it also relied on the fact that "[t]he miscarriage . . . rests in the professional acts of [the optometrists] and not in the commodity they prescribed, fitted and sold."[70] Although the court did not base this distinction on the proof rationale of strict products liability, the nature of the defect did not present the plaintiff with the special problem of tracing the defect to specific acts of negligence that occurred at a remote time and place. Had the lens been made from impure material, the proof rationale would have been implicated and the optometrist might reasonably have been held strictly liable as a retailer.[71]

Courts could fine tune their analysis even further by asking in each specific fact situation whether the difficulty of proving specific negligent acts was unduly burdensome. There may even be traditional product cases in which the proof problems are not acute, such as an airplane that has been manufactured under the scrutiny of independent safety inspectors. There also may be pure service cases in which proof problems are serious, such as an appliance that has been shipped back to the manufacturer for "assembly line" repairs. This additional level of fine tuning, however, might create more unpredictability than its additional flexibility is worth.[72]

The important point is that even if the proof rationale distinguishes services from products, it can be applied at various levels of generality or specificity. Scrutinizing a transaction more specifically than is contemplated by the essence of the transaction approach is probably worth the trouble; the difference between installing a defective product and defectively installing a good product is not especially difficult for courts to ascertain or for litigants to predict.[73]

There is another type of hybrid case that is not as easy to analyze according to the source of the alleged defect. Transactions such as the installation of a water heater, the prescription of a contact lens, or the application of a hair permanent are combinations of constituent parts that can be classified themselves fairly easily as product or service, but other transactions are not. For

69. 425 S.W.2d 342 (Tex. 1968). *See also* Nastasi v. Hochman, 58 A.D.2d 564, 396 N.Y.S.2d 216 (1977); Hoover v. Montgomery Ward & Co., 270 Or. 498, 528 P.2d 76 (1974); Note, *supra* note 12, at 402-04.

70. *Barbee*, 425 S.W.2d at 346.

71. It is possible that the court would have relied on defendant's professional nature as a factor that overrode all other issues. Putting aside the "professional" issue, it seems anomolous to hold defendants to a stricter standard in situations in which they are less responsible for the defect, but this is merely a concomitant of holding retailers liable for manufacturer's defects.

72. *See, e.g.*, Powers, *supra* note 33, at 526-28; Erlich & Posner, *An Economic Analysis of Legal Rulemaking,* 3 J. LEGAL STUD. 257 (1974); Kennedy, *Legal Formality,* 2 J. LEGAL STUD. 351 (1973).

73. It sometimes may be difficult to determine either analytically or empirically whether the installation or the product being installed was defective when the product's own design makes it difficult to install. It is evident, however, that the plaintiff's *claim* about the product is governed by one standard while the *claim* about the installation is governed by another.

example, transmitting electricity[74] and supplying contaminated water[75] seem to be homogeneous transactions, but they are still difficult to categorize as product or service. Even here, a court might distinguish between causes of an injury that are local and contemporaneous (such as failure to rectify a sagging transmission line) and those that are remote and ancient (such as engineering studies concerning the location of water wells).[76] But even though some cases are not resolved easily, the proof rationale at least provides courts with a coherent, workable method of analyzing cases that are on the border between products and services.

This analysis does not resolve the other issues presented by the hybrid sales-service cases: whether professionals warrant special treatment, whether the test in tort cases should be similar to the test in warranty cases, and whether a product has been sold rather than merely used.[77] But for one problem presented by the hybrid sales-service cases—whether a product or a service is involved—this analysis presents a comprehensive approach that reflects a coherent theory for strict products liability generally.

II. Implications of the Product-Service Distinction for Products Liability

The hybrid sales-service cases are significant beyond their own immediate resolution. Few courts carefully scrutinize the rationales for distinguishing between product injuries and other personal injuries. Although courts have relied on numerous arguments to support strict products liability, few courts have justified the *selective* application of strict liability to products cases. Only the acute problems of proof in products cases can justify current law that both excludes pure services from strict liability and denies recovery for injuries caused by nondefective products.[78]

This rationale has important implications for strict products liability because it does not intrinsically reject fault as a basis of liability. Rather, it uses defectiveness as a surrogate for fault for "administrative" reasons. Dispensing with the requirement that plaintiffs prove negligence reflects a decision that negligence is too difficult to ascertain rather than a decision that blameless defendants should be liable.[79] According to this view, strict products liability

74. *See, e.g.*, Navarro County Elec. Coop., Inc. v. Prince, 640 S.W.2d 398 (Tex. Civ. App. 1982); Erwin v. Guadalupe Valley Elec. Co-op, 505 S.W.2d 353 (Tex. Civ. App. 1974).

75. *See, e.g.*, Moody v. City of Galveston, 524 S.W.2d 583 (Tex. Civ. App. 1975).

76. Because time and location both contribute to proof problems, courts must decide whether (1) both are necessary, (2) either is sufficient, or (3) an aggregate threshold of severity is needed to implicate the proof rationale of strict liability.

77. *See supra* notes 5-11 and accompanying text.

78. This does not mean that the proof rationale is itself convincing. But if it is not, then no rationale justifies current products liability law, and it should be altered or scrapped.

79. Retailers are normally blameless, and thus liability must rest on policies other than difficulties of proof, such as difficulties in obtaining jurisdiction over remote manufacturers. *See supra* note 49. This does not undermine fault as a basis of strict products liability, however, because retailers normally can recover indemnity from manufacturers. Thus, they merely insure against manufacturer's insolvency or bear the burden of tracking them down.

is a form of negligence per se, which one court has explicitly recognized.[80]

This rationale for strict products liability helps explain specific doctrines—such as the state of the art defense[81] and the unavoidable dangers defense[82]—that excuse manufacturers when we are confident that they have not, in fact, been negligent. Moreover, this rationale would mitigate drastically problems courts have encountered coordinating strict liability and negligence in cases involving comparative fault, either between a strictly liable defendant and a negligent plaintiff, or among defendants seeking contribution, some of whom are negligent and some of whom are strictly liable. Since strict liability and negligence are not antithetical theories under this rationale for strict products liability, they could be unified more easily.[83]

Even if the proof rationale explains strict liability, however, it must be evaluated on its own merits. Even if proof is more difficult in products cases and an inference from defectiveness to negligence is sound, the proof problem could be mitigated by other devices. For example, a doctrine similar to *res ipsa loquitur* could be used to require manufacturers to prove freedom from negligence.[84]

I have argued elsewhere that an explicit recognition of fault as the basis of liability in products cases would not be draconian and yet would mitigate numerous current problems courts are facing in products liability.[85] Without repeating that argument here, it is noteworthy that the present analysis of the rationales for strict products liability suggests that product cases are not that different from cases governed solely by negligence. This is not a surprising by-product of analyzing hybrid sales-service cases, since they form a significant portion of the boundary between strict products liability and negligence. While most boundary problems involve some ambiguity, a coherent division between groups of cases at least should have a boundary that responds to policies distinguishing the two groups. If a boundary cannot be maintained even in theory, the groups of cases may not be meaningfully different. The difficulty courts have encountered in distinguishing between products and services reflects that products cases are not all that distinct in the first place. Although products cases have significant aesthetic hallmarks, it is not easy to distinguish them on policy grounds.

This does not deny the possibility of coherently distinguishing product

80. *See* Casrell v. Altec Indus. Inc., 335 So. 2d 128, 132-33 (Ala. 1976); Atkins v. American Motors Corp., 335 So. 2d 134, 140 (Ala. 1976).

81. *See supra* note 47.

82. *See supra* note 46.

83. *See* Powers, *supra* note 1; General Motors Corp. v. Simmons, 558 S.W.2d 855 (Tex. 1977); Duncan v. Cessna Aircraft Co., 632 S.W.2d 375, 389-90 (Tex. Civ. App. 1982) (reversed pending rehearing by Texas Supreme Court, see slip opinion, 26 TEX. SUP. CT. J. 507).

84. *See* Caterpiller Tractor Co. v. Beck, 593 P.2d 871 (Alaska 1979); Barker v. Lull Eng'g Co., 20 Cal. 2d 413, 573 P.2d 443, 143 Cal Rptr. 225 (1978). As with *res ipsa loquitur,* a court could adopt a variety of procedural positions. *Compare* Newing v. Cheatham, 15 Cal. 3d 351, 540 P.2d 33, 124 Cal. Rptr. 193 (1975) (conclusive inference if defendant does not rebut) *with* George Foltis, Inc. v. City of New York, 287 N.Y. 108, 38 N.E.2d 455 (1941) (permissive inference only).

85. *See* Powers, *supra* note 1, at 809-15.

injuries from the remainder of personal injuries. Indeed, my thesis has been that unique problems of proof can account for the special treatment of products cases and should be used to define the boundary between products and services. But this rationale is itself debatable: it is not self-evident that the problems of proof in products cases are so significant that they cannot be mitigated by shifting burdens of proof within the negligence system.

III. CONCLUSION

Regardless of the broader implications of the courts' difficulty in distinguishing between products and services, the specific problem of resolving hybrid sales-service cases requires attention. Courts have groped for ad hoc solutions in specific circumstances, but they have not developed a comprehensive approach. One source of difficulty has been the courts' failure to disentangle the product-service issue from other issues typically presented by cases involving services. A second source of difficulty has been that courts have tried to distinguish between products and services without relying on the reasons for treating product injuries specially.

The best explanation of the selective use of strict liability in products cases is that plaintiffs face acute problems trying to prove remote acts of negligence. Even if this rationale is rejected, however, a court should resolve hybrid sales-service cases according to *its* understanding of the rationale for treating products cases distinctly. Not only will such an approach produce a better resolution of hybrid sales-service cases, it will give us a better understanding of the nature of strict products liability.