LIABILITY WITHOUT FAULT FOR PROFESSIONAL SERVICES: TOWARD A NEW STANDARD OF PROFESSIONAL ACCOUNTABILITY

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The author urges the extension of liability without fault to certain standardized professional services. Professor Mallor argues that the rationale for the extension of strict liability to routine professional services is analogous to the application of strict liability to the sale of goods.

INTRODUCTION

The consumer revolution has brought with it the expansion of several doctrines which permit recovery for injury without proof of fault.[1] Originally, liability under the doctrines of implied warranty[2] and strict tort[3] was limited to sellers of goods with respect to injuries caused by products which were defective or unmerchantable at the time of sale.[4]

These doctrines have been expanded recently to include transactions which are unrelated to the sale of goods, such as bailments,[5]

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[1] *See, e.g.*, Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

[2] Sections 2-314 and 2-315 of the Uniform Commercial Code govern the implied warranties of merchantability and fitness for a particular purpose, respectively. Section 2-314 provides in part that "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." U.C.C. § 2-314 (1972 version). One of the synonymous phrases given for "merchantability" in section 2-314 is that the goods "are fit for the *ordinary* purposes for which such goods are used." *Id.* § 2-314(2)(c) (emphasis added). Section 2-315, on the other hand, provides that a warranty is implied that the goods will be fit for the buyer's *particular* purpose "[w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods . . . ." *Id.* § 2-315.

[3] The Restatement of Torts provides that

> [o]ne 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 . . . .

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[4] W. PROSSER, HANDBOOK OF THE LAW OF TORTS 641–62 (4th ed. 1971).

[5] McClaflin v. Bayshore Equip. Rental Co., 274 Cal. App. 2d 446, 79 Cal. Rptr. 337 (1969).

chattel leases[6] and the sale of new homes.[7] A number of courts are now applying strict liability principles to the so-called "hybrid" transaction, where goods are supplied in connection with a service.[8] A few courts have even applied strict liability to pure commercial services.[9] Efforts to extend liability without fault to professional services, however, have encountered judicial resistance. The courts have almost uniformly relegated the consumer injured by a professional to the law of negligence, both where the injury has been caused by a professional's use or supply of a defective product and where the injury has been caused by a defect in the service itself.[10]

Several rationales have been advanced for the refusal to extend strict liability to professional services. One reason for this hesitancy is that professionals often deal in inexact sciences[11] and deliver nonstandardized services tailored to the needs of an individual client.[12] Courts have also feared that the professional will be unable to distribute costs of increased liability without pricing his much-needed

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[6] Martin v. Ryder Truck Retail, Inc., 353 A.2d 581 (Del. 1976); Cintrone v. Hertz Truck Leasing, 45 N.J. 434, 212 A.2d 769 (1965).

[7] Pollard v. Saxe & Yoles Dev. Co., 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974); Schipper v. Levitt & Sons, 44 N.J. 70, 207 A.2d 314 (1965). *See generally* Comment, *Extension of Implied Warranties to Developer-Vendors of Completed New Homes*, 11 URBAN L. ANN. 257 (1976).

[8] *See, e.g.*, Newmark v. Gimbel's, Inc., 54 N.J. 585, 258 A.2d 697 (1969). *But see* Epstein v. Giannattasio, 25 Conn. Supp. 109, 197 A.2d 342 (C.P. 1963).

[9] *See, e.g.*, McCool v. Hoover Equip. Co., 415 P.2d 954 (Okla. 1966); Buckeye Union Fire Ins. Co. v. Detroit Edison Co., 38 Mich. App. 325, 196 N.W.2d 316 (1972), *appeal denied*, 393 Mich. 763 (1974). For an overview of the battle over the extension of strict liability to services, see generally Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957); Greenfield, *Consumer Protection in Service Transactions—Implied Warranties and Strict Liability in Tort*, 1974 UTAH L. REV. 661; Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 FORDHAM L. REV. 447 (1971); Reynolds, *Strict Liability for Commercial Services—Will Another Citadel Crumble?*, 30 OKLA. L. REV. 298 (1977); Singal, *Extending Implied Warranties Beyond Goods: Equal Protection for Consumers of Services*, 12 NEW ENG. L. REV. 859 (1977); Note, *Products and the Professional: Strict Liability in the Sales-Service Hybrid Transaction*, 24 HASTINGS L. J. 111 (1972) [hereinafter cited as *Products and the Professional*]; 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) [hereinafter cited as *Extension of Enterprise Liability*].

[10] *See, e.g.*, Gagne v. Bertran, 43 Cal. 2d 481, 275 P.2d 15 (1954) (defect in service only); Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (Hudson County Ct. 1967), *aff'd sub nom.* Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (App. Div. 1968) (per curiam), *aff'd*, 53 N.J. 259, 250 A.2d 129 (1969) (per curiam); Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792 (1954) (defective product supplied).

[11] Johnson v. Sears, Roebuck & Co., 355 F. Supp. 1065, 1066 (E.D. Wis. 1973); *see* Newmark v. Gimbel's, Inc., 54 N.J. 585, 596–97, 258 A.2d 697, 703 (1969).

[12] Newmark v. Gimbel's, Inc., 54 N.J. 585, 596–97, 258 A.2d 697, 703 (1969).

services beyond the reach of many individuals.[13] Furthermore, since professionals were prohibited from advertising until recently, they have not been held to have the same marketing responsibilities as do sellers of goods.[14] Although this reasoning may have been persuasive at one time, the realities of the 70's dictate that a closer look should be taken at the propriety of shielding all professional services from the trend of increased responsiveness to consumers. The contemporary professional no longer conforms to the stereotype of the country doctor who makes housecalls and takes his fees in homegrown produce. He is more likely to be a shareholder in a professional corporation engaged in a highly lucrative enterprise. He may delegate to paraprofessional personnel many functions which were once considered to be solely professional.[15] Many of his services are standardized to a degree that nearly reaches the level of mass production.[16] One need only browse through the increasing array of do-it-yourself will and divorce manuals[17] to witness consumer awareness of this fact. The increase of malpractice suits in recent years evidences the fact that consumers are now expecting from professionals what they have always expected from the seller of goods—their money's worth.[18] Additionally, the intersection of two results of the consumer revolution—liability without fault and professional advertising[19]—signals the potential for placing the professional on an equal footing with the seller of goods.

This article does not advocate the complete abolition of the fault standard of liability for professionals. Instead, it will reexamine the reasoning that has been used to preserve this standard, and will urge that strict liability doctrines should be extended to those professional services in which the policies underlying liability without fault are served.

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[13] *See, e.g.*, Magrine v. Krasnica, 94 N.J. Super. 228, 238, 227 A.2d 539, 545 (Hudson County Ct. 1967), *aff'd sub nom.* Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (App. Div. 1968) (per curiam), *aff'd*, 53 N.J. 259, 250 A.2d 129 (1969) (per curiam).

[14] *E.g.*, Newmark v. Gimbel's, Inc., 54 N.J. 585, 596–97, 258 A.2d 697, 702 (1969); Comment, *Professional Negligence*, 121 U. PA. L. REV. 627, 635 (1973).

[15] Engel, *The Standardization of Lawyers' Services*, 1977 AM. B. FOUNDATION RESEARCH J. 817, 826–34, 838–41.

[16] *See* notes 147–48 *infra* and accompanying text.

[17] *See, e.g.*, N. DACEY, HOW TO AVOID PROBATE! (1965).

[18] *See Extension of Enterprise Liability*, *supra* note 9, at 424–30.

[19] *See generally* Note, *Professional Advertising Ban Yields to Consumer Right to Know: Commercial Speech Granted First Amendment Protection*, 8 SETON HALL L. REV. 67 (1976). The *Bates* case held advertising of routine legal services to be protected under the first amendment. *See* notes 87–97 *infra* and accompanying text.

THE PRESENT STANDARD OF CARE

When a professional is sued for damages resulting from the performance of his services, his ultimate liability will depend upon the jury's determination as to whether he performed his service as well as a reasonable member of his profession would have performed it.[20] In order to recover, the plaintiff must, therefore, establish some minimum standard of behavior and prove that the professional failed to meet that standard.[21] Although this will almost always require expert testimony,[22] such experts may be difficult to obtain, due to the professional's reluctance to testify against a colleague.[23] If the defendant is found to have acted in accordance with the common practices of his profession, it is unlikely that he will be held liable, even if the "state of the art" has advanced to a degree that would have made a perfect service possible.[24]

In contrast, if a merchant sells a product to a consumer which causes injury due to some flaw that could not be discovered even through the exercise of reasonable care, the consumer can sue the seller under one of several strict liability doctrines.[25] If the product is proved to have been sold in a defective or unmerchantable condition which proximately caused an injury, the seller's fault is irrelevant.[26] The ordinary tort defenses, other than the most aggravated assumption of risk, are inoperative against the plaintiff.[27] It is no wonder that malpractice lawyers may well covet the standard of liability under which the products liability lawyer operates.

The basis of this stricter standard of liability rests fundamentally on the disparity of knowledge and bargaining power between buyer and seller.[28] One commentator has described this dichotomy as being characterized by a "sophisticated and financially powerful seller dealing with a relatively unsophisticated and financially weak consumer respecting a complicated product whose capacities for inflicting injury are often hidden, all in the context of a highly complex system

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[20] *See generally* Comment, *supra* note 14, at 633–45.

[21] W. PROSSER, *supra* note 4, at 161.

[22] *Id.* at 164.

[23] *Id. See also* Mallor, *A Cure for the Plaintiff's Ills?*, 51 IND. L. J. 103, 107 (1975).

[24] *See generally* Comment, *supra* note 14, at 627; *see also* notes 103–06 *infra* and accompanying text.

[25] *See* notes 2–3 *supra*. *See generally* Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713 (1970); Dickerson, *The ABC's of Products Liability—With a Close Look at Section 402A and the Code*, 36 TENN. L. REV. 439 (1969).

[26] W. PROSSER, *supra* note 4, at 672.

[27] *Id.* at 670–71.

[28] Dickerson, *supra* note 25, at 440.

of merchandising and distribution."[29] Where a defect results from the manufacturing process, it is likely that neither party will be able to reconstruct what actually went wrong with the particular product.[30] Recovery on a negligence theory would therefore be very difficult, resulting in a large number of plaintiffs bearing the costs of their own injuries. Given the difficulty of proving or rebutting negligence in these circumstances, the courts have essentially made a policy determination that the seller should bear the loss, by imposing a higher standard of legal responsibility for sellers of goods.[31] The courts reasoned that shifting the risk to the seller in the form of an absolute duty of care would provide the impetus needed to improve product safety.[32] A seller faced with liability for the cost of all injuries resulting from his product will be more inclined to take steps to reduce the number of injuries by improving the quality of his materials, the procedures for manufacture, and the research and testing of his products before sale. The courts have reasoned that the seller is certainly in a better position to guard against these risks than the buyer, who is forced to rely on the manufacturer's care in assembling his products.[33]

The buyer's reliance on the seller, stemming from the fact that he must purchase products in finished form out of almost total ignorance about their contents and manufacture, was another important justification for increasing the responsibility of sellers.[34] Furthermore, this inherently unavoidable reliance is actively encouraged by the seller through advertising which creates expectations in the mind of the buyer that the product will not only perform its function, but will do so safely.[35] Finally, it was thought that shifting the risk to the seller would not lead to his economic ruin, since the seller could redistribute the costs inherent in the stricter standard of care more easily than could the buyer;[36] the seller is in a better position to insure against the cost of injuries, and can in turn distribute the cost

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[29] *Id.*

[30] *Id.* at 441.

[31] Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 62–63, 377 P.2d 897, 900–01, 27 Cal. Rptr. 697, 700–01 (1963).

[32] *See* Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor J., concurring).

[33] *See generally* Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329 (1966).

[34] *See* Singal, *supra* note 9, at 878–85 (discussion of buyer's reliance as force behind development of implied warranties).

[35] *See* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 378–80, 161 A.2d 69, 80–81 (1960).

[36] Comment, *Sales-Service Hybrid Transactions: A Policy Approach*, 28 SW. L.J. 575, 578 (1974).

of increased insurance premiums by simply raising the cost of his product.[37] Thus, those consumers who choose to buy a given product are, in effect, underwriting the cost of injuries.[38] If the product is very dangerous, with a high risk of injuries, presumably the cost of the product would become so high as to either put the seller out of business, since his product would be priced beyond the reach of most potential buyers, or force him to otherwise reduce the risk of injury. As we shall see, however, the rationales which support implied warranties of quality have been largely ignored where the seller provides professional services rather than tangible goods.

ATTEMPTS TO EXTEND LIABILITY WITHOUT FAULT TO PROFESSIONAL SERVICES

The earliest, and probably most easily justifiable, attempts at enlarging the scope of professional liability took place in those cases in which a defective product was supplied by a professional in connection with a service.[39] In such cases the plaintiff is not usually concerned with the manner in which the service was performed, but rather with the product supplied.

The most frequently encountered case of this sort involves contaminated blood transfusions, in which a patient has contracted serum hepatitis from a blood transfusion given to him in connection with medical treatment.[40] Proving negligence in a lawsuit against the hospital or bloodbank that provided the contaminated blood is nearly impossible, due to the lack of reliable detection methods.[41] In order to recover, the plaintiff must proceed under one of the strict liability doctrines by urging the applicability of implied warranties or strict tort.

One such case, which set the tone for many subsequent professional hybrid cases, was *Perlmutter v. Beth David Hospital*.[42] There, the plaintiff had argued that, since separate charges had been made by the hospital for the blood transfusion he had received, the transac-

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[37] Keeton, *supra* note 33, at 1333–34.

[38] *See id.* at 1333.

[39] *See generally Products and the Professional, supra* note 9. The authors contend that strict liability for the use or sale of a defective product is justified by the financial benefit that the professional derives from the use or sale of such a product and his ability to spread the loss to the manufacturer. *Id.*

[40] *See, e.g.*, McDaniel v. Baptist Memorial Hosp., 469 F.2d 230 (6th Cir. 1972); Shepard v. Alexian Bros. Hosp., Inc., 33 Cal. App. 3d 606, 109 Cal. Rptr. 132 (1973).

[41] McDonald v. Sacramento Medical Foundation Blood Bank, Inc., 62 Cal. App. 3d 866, 873, 133 Cal. Rptr. 444, 448 (1976).

[42] 308 N.Y. 100, 123 N.E.2d 792 (1954).

tion was properly characterized as a sale of goods, thereby invoking the implied warranty provisions of the Uniform Commercial Code.[43] In denying the plaintiff's claim, the court utilized the so-called "essence test."[44] Under this test, if services, rather than goods, have primarily been bargained for, the transaction is characterized as a service.[45] Since the transaction is, therefore, not a sale of goods, implied warranties do not attach.[46] The essence test is merely a means of characterizing or labelling the transaction, and is not in any way analytical. It merely applies the plaintiff's subjective bargaining intent as an index by which to characterize the transaction.[47]

Despite its lack of detailed analysis, the essence test has been widely followed,[48] even in cases in which the defective product supplied was something other than blood.[49] For example, in *Gagne v. Bertran*,[50] a "pure" service case decided the same year as *Perlmutter*, the plaintiffs had retained the defendant to test soil on land they intended to purchase in order to ascertain the depth at which the foundation for a building would have to be poured.[51] When it was discovered that a deeper foundation was required than the defendant's report had led them to expect, the plaintiffs sued on theories of breach of warranty, deceit, and negligence.[52] The Supreme Court of California reversed the judgment of the trial court which had allowed recovery for breach of warranty, stating that "[t]he amount of [the

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[43] *Id.* at 103, 123 N.E.2d at 793.

[44] *Id.* at 106, 123 N.E.2d at 796.

[45] For a history of the essence test as developed in English law, see *Products and the Professional*, *supra* note 9, at 113–14.

[46] *Id.*

[47] *See generally* Singal, *supra* note 9, at 871–78. The author discusses the presumed intention of the parties as a basis for implied warranties.

[48] *See, e.g.*, McDaniel v. Baptist Memorial Hosp., 469 F.2d 230 (6th Cir. 1972); McDonald v. Sacramento Medical Foundation Blood Bank, Inc., 62 Cal. App. 3d 866, 133 Cal. Rptr. 444 (1976). Several states have also enacted statutes declaring blood transfusions to be "services" and not subject to implied warranties or strict tort. *See, e.g.*, IND. CODE ANN. § 16-8-7-2 (Burns 1973). The constitutionality of such statutes has been unsuccessfully challenged on equal protection grounds. *See* McDonald v. Sacramento Medical Foundation Blood Bank, Inc., 62 Cal. App. 3d 866, 871–73, 133 Cal. Rptr. 444, 447–48 (1976).

[49] *See, e.g.*, Berry v. G. D. Searle & Co., 56 Ill. 2d 548, 309 N.E.2d 550 (1974) (prescription for birth control pills); Batiste v. American Home Prods. Corp., 32 N.C. App. 1, 231 S.E.2d 269 (1977) (supply of birth control pills); Shivers v. Good Shepherd Hosp., Inc., 427 S.W.2d 104 (Tex. Civ. App. 1968) (contaminated intravenous injection). This rule has even been extended to cases not dealing with professional services. Computer Servicecenters, Inc. v. Beacon Mfg. Co., 328 F. Supp. 653, 655 (D.S.C. 1970) *aff'd*, 443 F.2d 906 (4th Cir. 1971) (computer data service); Bonebrake v. Cox, 499 F.2d 951, 957–60 (8th Cir. 1974) (installation of bowling alley equipment; essence of contract is sale).

[50] 43 Cal. 2d 481, 275 P.2d 15 (1954).

[51] *Id.* at 484, 275 P.2d at 18.

[52] *Id.* at 485, 275 P.2d at 18.

defendant's] fee and the fact that he was paid by the hour also indicate that he was selling service and not insurance."[53] Thus, as in *Perlmutter*, the court reached its decision by merely characterizing the transaction as a service.

Unfortunately, many courts have used the essence test to limit the application of strict liability to professional services.[54] An example of the way in which this approach can obfuscate analysis is seen in the case of *Barbee v. Rogers*.[55] In *Barbee*, the defendants were two optometrists doing business both as a partnership and as a state-wide corporation that employed 125 other licensed optometrists.[56] The fitting and sale of contact lenses was promoted through media advertisement.

Barbee had been fitted with contact lenses at one of the defendants' locations.[57] Alleging that the lenses had been improperly fitted and had caused damage to his eyes, he brought suit on a theory of implied warranty.[58] Since the court found that the lenses themselves were not defective, the question was narrowed to whether the doctrine of strict liability should be extended to the service of fitting and prescribing of contact lenses.[59]

Addressing the issue of liability, the court declared that the defendants' complicated system of distribution and use of media solicitation supported the extension of warranty doctrine to the case.[60] The court, however, seemed to perceive its task as merely classifying the defendants' activities as being either professional or commercial.[61] Despite the nature of the defendants' operation, the court was persuaded not to apply strict liability since the prescribing and fitting of contact lenses were "art[s] with many variables and call[ed] for an exercise of judgment by the practitioner."[62] The court did not recognize the fact that the manufacturing of goods is often an art which calls for the exercise of judgment. Once satisfied that the relationship between plaintiff and defendant was a professional one, the court

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[53] *Id.* at 487, 275 P.2d at 20.

[54] *See, e.g.*, Nitrin, Inc. v. Bethlehem Steel Corp., 35 Ill. App. 3d 577, 342 N.E.2d 65 (1976); Aegis Prods., Inc. v. Arriflex Corp. of America, 25 App. Div. 2d 639, 268 N.Y.S.2d 185 (1966); Freitas v. Twin City Fisherman's Coop. Ass'n, 452 S.W.2d 931 (Tex. Civ. App. 1970). *See generally* Comment, *supra* note 36, at 575.

[55] 425 S.W.2d 342 (Tex. 1968).

[56] *Id.* at 344.

[57] *Id.*

[58] *Id.* at 343–44.

[59] *Id.* at 344.

[60] *Id.* at 345–46.

[61] *Id.*

[62] *Id.* at 345.

simply concluded that "[t]he considerations supporting the rule of strict liability were not present" in these circumstances.[63]

Although several other decisions have reached the same result as *Barbee*, some courts have explicitly based their refusal to apply strict liability doctrines on policy grounds. For example, in *Shepard v. Alexian Brothers Hospital*,[64] another blood transfusion case, a California statute was in issue which provided that the procurement, processing, or use of whole blood for transfusion into the human body was to be considered to be a service for all purposes.[65] The plaintiff urged the California court of appeals to extend strict liability doctrines to services.[66] The court discussed the frequently stated rationales for imposing strict liability and concluded that they did not apply where a hospital had supplied a blood transfusion to a patient as part of its service.[67] The court stated that the imposition of strict liability would not achieve the goal of adding an incentive to safety, since it was not possible to accurately detect hepatitis in blood.[68] Rather, the application of strict liability would result in inhibiting the exercise of sound medical judgment, and would contravene the important policy of promoting an adequate supply of blood.[69]

In contrast to the *Shepard* decision, the Supreme Court of Illinois, in *Cunningham v. MacNeal Memorial Hospital*,[70] was unpersuaded by the argument that the undetectability of hepatitis in whole blood should preclude the application of strict liability.[71] The court emphasized the similarity between the seller of goods and the professional supplier of blood with respect to the difficulty of discovering defects.[72] In support of its position, the court relied upon *Kenower*

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[63] *Id.* at 346.

[64] 33 Cal. App. 3d 606, 109 Cal. Rptr. 132 (1973).

[65] CAL. HEALTH & SAFETY CODE § 1606 (West 1970).

[66] 33 Cal. App. 3d at 610, 109 Cal. Rptr. at 135.

[67] *Id.* at 610–11, 109 Cal. Rptr. at 134. *See also* Brody v. Overlook Hosp., 127 N.J. Super. 331, 317 A.2d 392 (App. Div. 1973). *But see* Cunningham v. MacNeal Memorial Hosp., 47 Ill. 2d 443, 266 N.E.2d 897 (1970); Hoffman v. Misercordia Hosp., 439 Pa. 501, 267 A.2d 867 (1970).

[68] 33 Cal. App. 3d at 611, 109 Cal. Rptr. at 134–35.

[69] 33 Cal. App. 3d at 612, 109 Cal. Rptr. at 136.

[70] 47 Ill. 2d 443, 266 N.E.2d 897 (1970).

[71] *Id.* at 455, 266 N.E.2d at 903.

[72] *Id.* at 453–54, 266 N.E.2d at 902. However, as indicated by the California court of appeals in Shepard v. Alexian Bros. Hosp., 33 Cal. App. 3d 609, 613, 109 Cal. Rptr. 132, 136 (1973), shortly after the *Cunningham* decision, the Illinois State Legislature adopted a statute limiting the liability of hospitals for defective blood transfusions to instances of negligence or willful misconduct. ILL. ANN. STAT. ch. 91, § 181 (Smith-Hurd Cum. Supp. 1978). The *Cunningham* case has been criticized on the grounds that it clings to the old sales-service distinction, *see Products and the Professional, supra* note 9, at 123; and that it applied an unduly

v. Hotels Statler,[73] a case in which the court applied an implied warranty upon the seller of contaminated clams.[74] The *Kenower* court had imposed liability despite its recognition that it was impossible for producers or vendors of clams to know that the clams are not infected.[75]

Despite the application of such doctrines to sellers of goods in circumstances in which the discovery of the defect is uncontrollable, the courts have been more reluctant to apply this standard to professionals. In the New Jersey case of *Magrine v. Krasnica*,[76] for example, the plaintiff sued her dentist on theories of strict tort and implied warranty when a surgical needle that was being injected into her gums broke and separated at a depth of 1-⅝ inches.[77] The court conceded that the situation was analogous to that of the retailer who is held strictly liable for a defective product sold in a sealed container.[78] Nevertheless, the court held that strict liability should not be imposed on the dentist, since he was in no better position to guard against the danger than was his injured patient.[79]

It can be argued that the accuracy of this assumption is highly questionable. If a dentist knows that he will be liable for injury

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restrictive construction of comment (k) to section 402A of the Second Restatement of Torts. 69 MICH. L. REV. 1172, 1181–83 (1971).

[73] 124 F.2d 658 (6th Cir. 1942).

[74] *Id.* at 660.

[75] *Id.*

[76] 94 N.J. Super. 228, 227 A.2d 539 (Hudson County Ct. 1967), *aff'd sub. nom.* Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (App. Div. 1968) (per curiam), *aff'd*, 53 N.J. 259, 250 A.2d 129 (1969) (per curiam).

[77] 94 N.J. Super. at 230, 227 A.2d at 540.

[78] 94 N.J. Super. at 235, 227 A.2d at 543.

[79] 94 N.J. Super. at 234, 227 A.2d at 543. *Accord*, Silverhart v. Mt. Zion Hosp., 20 Cal. App. 3d 1022, 98 Cal. Rptr. 187 (1971). *See generally* Rubin, *Manufacturer and Professional User's Liability for Defective Medical Equipment*, 8 AKRON L. REV. 99, 99–105 (1974). In Anderson v. Somberg, 67 N.J. 291, 338 A.2d 1 (1975), *cert. denied*, 423 U.S. 929 (1975), part of a surgical instrument had broken off and imbedded itself in the spinal cord of an unconscious patient. *Id.* at 294, 338 A.2d at 3. The plaintiff sued the manufacturer of the instrument on a strict tort theory, the supplier on a warranty theory, and the surgeon and hospital on a negligence theory. *Id.* at 295, 338 A.2d at 3. The evidence indicated that the instrument had broken either because it was defective or because it had been negligently used. *Id.* at 296, 338 A.2d at 4. The plaintiff, however, could not prove which of these was the proximate cause of his harm, and received a negative verdict as to each defendant. *Id.* at 297, 338 A.2d at 4. On appeal, the Supreme Court of New Jersey ordered a new trial, *id.* at 305, 338 A.2d at 8, applying a concept "akin to res ipsa loquitur" whereby the burden of proving absence of fault was shifted to each defendant. *Id.* at 299–300, 338 A.2d at 5–6. In a case in which alternative theories of liability are utilized, this doctrine would allow the imposition of strict liability upon the doctor and hospital by a jury instructed that it must find liability on the part of one of the defendants. 51 WASH. L. REV. 981, 995 (1976). *See also Products and Professionals*, *supra* note 9, at 126 (greater consumer reliance is placed on tools a professional uses than on goods supplied by the retailer, because of professional's greater expertise).

caused by defective instruments, greater care will be exhibited in his selection of supplies. Furthermore, the dentist is clearly in a better position than his patient to inspect his instruments. The consequences of the failure to apply strict liability may be to deny the plaintiff, as a practical matter, any action whatsoever.

In *Magrine*, the dentist did not even know who had sold him the needle;[80] thus, the patient was deprived of an action against the supplier. The unfairness of this result did not go unnoticed by one member of the court. In an exhaustive dissent to the appellate division's per curiam opinion, Judge Botter argued that strict liability should have been applied to the defendant dentist.[81] Noting the strong public policy in assuring compensation for victims of accidents and focusing on the defendant's superior ability to bear the risk, he concluded that the injured patient should be able to sue the dentist directly.[82] Such a procedure would facilitate a finding of third-party liability against a supplier or manufacturer since "[t]he dentist is in a better position to know and prove the identity of the manufacturer or distributor."[83] The *Magrine* court also based its decision on the fact that the dentist had not placed the defective needle in the stream of commerce and had not promoted its purchase.[84] This reasoning implies that the difference between the marketing and distribution of goods and the marketing and distribution of professional services justifies the present disparity of treatment.

This idea has been echoed in subsequent cases. Another justification advanced by the courts for refusing to extend implied warranties to professional services is the absence of mass production in the service provided. In *La Rossa v. Scientific Design*,[85] La Rossa's decedent had been an employee of a chemical company which had contracted with the defendant to design, engineer and supervise the construction of a new plant.[86] In performing this contract, Scientific Design had supervised the loading of pellets containing vanadium into a reactor.[87] La Rossa sued Scientific Design for wrongful death on theories of negligence and implied and express warranties when her husband

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[80] 94 N.J. Super. at 230, 227 A.2d at 540.

[81] *See generally* Magrine v. Spector, 100 N.J. Super. 223, 225, 241 A.2d 637, 639 (App. Div. 1968) (per curiam) (Botter, J., dissenting), *aff'd*, 53 N.J. 259, 250 A.2d 129 (1969) (per curiam).

[82] *Id.* at 232, 241 A.2d at 642.

[83] *Id.*

[84] 94 N.J. Super. at 235, 227 A.2d at 543.

[85] 402 F.2d 937, 942–43 (3d Cir. 1968).

[86] *Id.* at 938–39.

[87] *Id.* at 939.

died of cancer as a result of having been exposed to the vanadium dust.[88] Since the pellets themselves were not defective, the issue was whether the trial court had erred in dismissing the warranty counts in the plaintiff's complaint.[89] Characterizing Scientific Design's services as professional, the court stated that "[p]rofessional services do not ordinarily lend themselves to the doctrine of tort liability without fault because they lack the elements which gave rise to the doctrine."[90] According to the court, liability without fault had originated as a result of mass production which made "it . . . unfair to require [distant consumers] to trace the article they used to the original manufacturer and there to pinpoint an act of negligence remote from their knowledge and even from their ability to inquire."[91]

It can be argued that the *La Rossa* court's refusal to extend strict liability doctrines to professional services because they are not mass-produced distorts the function which mass production has had in the law of products liability. It should be remembered that the impetus for the development of the strict tort cause of action was to circumvent the privity requirements of warranty law.[92] The mass production of goods is a factor which makes it difficult for an ultimate purchaser to pinpoint and prove the negligence of a manufacturer, and thus militates for a strict liability rule as to that manufacturer.[93] The absence of mass production does not exculpate the retailer; as long as the retailer is in the business of selling the goods, his liability is not mitigated merely because he did not produce the goods.[94] Just as liability should not be dependent upon the existence of a contract, neither should liability be vitiated because the transaction is face to face.

If mass production is a significant factor because of the attendant difficulty in proving negligence, factors in the consumer-professional relationship which make the proof of negligence difficult should also be considered. The consumer of professional services has his own

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[88] *Id.*

[89] *Id.*

[90] *Id.* at 942.

[91] *Id.*

[92] *See generally* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099 (1960).

[93] *See* Dickerson, *supra* note 25, at 440–41.

[94] U.C.C. § 2-314 (1972 version); RESTATEMENT (SECOND) OF TORTS § 402A(1)(a) (1965). The seller need only be "a merchant with respect to goods of that kind" under section 2-314 of the *Uniform Commercial Code* and "engaged in the business of selling such a product" under section 402A(1)(a) of the *Second Restatement of Torts*.

problems in proving negligence brought about by the difficulty in obtaining expert witnesses and establishing a standard of care.[95]

In contrast to the almost unanimous judicial condemnation of liability without fault for professional services, *Johnson v. Sears, Roebuck & Co.*[96] stands as an example of a new approach adopted by a distinct minority. The plaintiff in that case was injured when a tire which had been installed by Sears fell off her car.[97] Sears impleaded, as a third-party defendant, the hospital that had treated her for her injuries, based on theories of negligence and strict liability.[98] Regarding the strict liability claim, the court stated that, rather than ruling based upon an "artificial distinction between sales and services," it would look to whether it was in the public interest to have hospitals bear the loss incurred by defective, although non-negligent, services.[99] The court divided the services provided by hospitals into two major categories: professional-medical and mechanical-administrative.[100] With regard to professional-medical services the court noted that, because of the inexactitude of medical science, one could only expect that the doctor would provide adequate treatment commensurate with the state of medical science.[101] To impose strict liability for the exercise of an inexact science would not promote a social benefit, since it would result in reluctance on the part of physicians to assume responsibility for treatment, particularly in developing areas of medicine.[102] This reasoning, however, should not immunize the hospital from strict liability for its administrative services. Stating that hospital services are "big business" for risk distribution purposes and are totally beyond control by the layman, the court felt that it would be in the public interest to extend strict tort liability to administrative services.[103] Noting the lack of a clear distinction, the court stated that the categorization between professional and administrative services would have to be made on an ad hoc basis.[104]

Despite its salutary attempt to analyze professional strict liability on a less conclusory basis, the *Johnson* case has not been followed.

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[95] For a detailed discussion of the problem, see notes 100–06 *infra* and accompanying text.

[96] 355 F. Supp. 1065, 1067 (E.D. Wis. 1973). *See also* Comment, *Torts—Strict Liability—Hospital May be Strictly Liable for Administrative Services*, 41 TENN. L. REV. 392 (1974).

[97] 355 F. Supp. at 1065.

[98] *Id.*

[99] *Id.* at 1066.

[100] *Id.*

[101] *Id.* at 1067.

[102] *Id.*

[103] *Id.*

[104] *Id.*

This lack of acceptance possibly stems from the use of a distinction that is feared to be as unworkable as the governmental-proprietary distinction in the doctrine of sovereign immunity.[105] Therefore, the rule that a professional is not liable without proof of negligence still stands fast as a general principle of law.

EXPANDING THE PROFESSIONAL'S RESPONSIBILITY

Much of the difficulty in convincing courts that a professional should be held to impliedly warrant the quality of his services lies in the courts' obsession with the special qualities of the professional.[106] The member of a learned profession has traditionally been cloaked with an aura of being "above the morals of the market place."[107] Traditionally, the public image of the professional has been that of a person whose primary incentive is to serve his fellow man and to whom profit is a secondary motive. Rather than focusing solely on the characteristics of the professional, courts should be scrutinizing the entire professional-consumer relationship. The seductive rationales for refusing to extend strict liability lose much of their charm when the similarity between the position of the consumer of tangible goods and the consumer of professional services is exposed.

Normally, a consumer seeks out a professional when he needs advice or services which are beyond layman abilities. Thus, the professional-consumer relationship almost by definition fits the mold of the knowledgeable seller-ignorant buyer dichotomy that gave rise to strict liability for the seller of goods.[108] Because of the technical nature of professional services, the consumer is forced to rely on the

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[105] *See, e.g.*, Campbell v. State, 259 Ind. 55, 284 N.E.2d 733 (1972) (abolished governmental-proprietary distinction).

[106] *See, e.g.*, Newmark v. Gimbel's Inc., 54 N.J. 585, 258 A.2d 697 (1969). The court applied strict tort to the hybrid service of a beauty parlor, but distinguished professional services:

> Practitioners of such callings, licensed by the State to practice after years of study and preparation, must be deemed to have a special and essential role in our society, that of studying our physical and mental ills and ways to alleviate or cure them . . . . Their unique status and the rendition of these sui generis services bear such a necessary and intimate relationship to public health and welfare that their obligation ought to be grounded and expressed in a duty to exercise reasonable competence and care toward their patients.

Id. at 597, 258 A.2d at 703.

[107] Singal, *supra* note 9, at 912–15. The author indicates that, while the preferred status of the professional has contributed to the professional's relative immunity from implied warranties, that status is crumbling under the weight of decisions such as Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (minimum fee schedule violates Sherman Act), and Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (advertising of prescription drug prices protected by first amendment).

[108] Dickerson, *supra* note 25, at 440.

ability of the professional.[109] He has little or no means to evaluate the professional's services until those services have been completed. Like the buyer of goods, he cannot evaluate the quality of what he has bought until he has received it. The consumption of either goods or services is an everyday act of faith, and the consumer who buys professional services is in no better position with respect to forced reliance on his supplier than is the consumer of tangible goods. While the consumer of tangible goods must rely on the seller's skill and care in selecting raw materials, machinery, workers, design, packaging and manufacturing procedures, the consumer of professional services must rely on the training, skill, and judgment of the professional, as well as on his selection of office personnel and procedures. In fact, the consumer of goods may be in a better position to shop for his seller than is the consumer of professional services. Consumer-oriented testing and rating of goods is widely available, whereas word of mouth or routine referral from professional associations must suffice for one who seeks the services of a professional.

Moreover, the contention that the proscription on professional advertising eliminates public reliance on professionals has been seriously abrogated. In *Bates v. State Bar of Arizona*[110] the Supreme Court found certain limited forms of attorney advertising protected by the first amendment.[111] The Court recognized the value of such advertising to the potential consumer, while reserving on the question of the permissibility of quality assurances in such advertisement.[112] The fact remains, however, that professionals may now use the mass media to "invite the public in." The result is that even this limited type of advertising, combined with the built-in factor of holding oneself out as an expert, solicits reliance on the part of the public.[113]

The *Bates* decision performs another important and germane function in recognizing the commercial factor implicit in any professional activity.[114] The State Bar of Arizona had objected to attorney advertising on the ground that it would bring about commercialization

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[109] W. PROSSER, *supra* note 4, at 161–66.

[110] 433 U.S. 350 (1977).

[111] *Id.* at 354.

[112] *Id.* at 377.

[113] *See* Greenfield, *supra* note 9, at 689–90. The author indicates that non-professionals advertise and otherwise promote their services, although not as extensively as do sellers of goods. *Id.* Such advertising typically holds the service provider out as an expert in services that will be tailored to the needs of the customer, and the factor of expertise is probably designed to solicit even greater reliance. *Id.* Now that professionals may advertise, the same analysis should hold true with respect to their services.

[114] 433 U.S. at 368–72.

which would tarnish the dignity of the profession's image.[115] In rejecting this argument, the Court stated that "the belief that lawyers are somehow 'above' the trade has become an anachronism."[116] Accordingly, the *Bates* decision brings the profit motive in professional activity out of the closet. In recognizing that lawyers and other professionals are in business to make money, the day is brought closer when the professional, like the ordinary seller of goods, will be required to warrant his services as part of the cost of doing business.

The *Bates* decision also foreshadows a trend toward increasing responsiveness of professionals to needs of the public, since it was the potential advantage to the public which persuaded the Court that professional advertising ought not be suppressed.[117] Fulfilling the consumer's expectations was an important factor in the development of warranty law applicable to tangible goods, and so should it be for extending warranties to professional services. Consumer expectations, however, have actually been used as a shield in the battle over extension of strict liability. As one court, in an often quoted passage, stated, "[t]hose who hire such persons are not justified in expecting infallibility, but can expect only reasonable care and competence. They purchase service, not insurance."[118] This statement, however, is tautological. The reason the consumer can only expect reasonable care from a professional is that, under the present legal system, that is all he can get. It is likely that the consumer expects the same things from a professional service that he expects from the goods he buys—that what he purchases will do its job and do so safely.[119] He may not expect perfection, but certainly expects that the job will be done as well as the current state of the art allows.

It must be remembered that the impetus behind the development of strict liability was the lack of an adequate remedy for the plaintiff injured by defective goods. The consumer of professional services has as much difficulty in proving negligence as did the consumer of tangible goods, although that difficulty is due to different factors. The ultimate purchaser of goods will often be unable to prove negligence because of the complexity of the production and distribution of goods.[120] The "conspiracy of silence," that is, the difficulty in obtaining expert testimony against professionals, has been well-

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[115] *Id.* at 368.

[116] *Id.* at 371–72.

[117] *Id.* at 377.

[118] Cagne v. Bertran, 43 Cal. 2d 481, 491, 275 P.2d 15, 21 (1954).

[119] Greenfield, *supra* note 9, at 698.

[120] *See* Dickerson, *supra* note 25, at 441.

documented as a leading cause of the frustration of meritorious claims.[121] Moreover, if a plaintiff succeeds in finding some maverick to testify for him, the defendant will likely have a battery of willing experts of his own to refute this testimony. This leads to confusion in the mind of the layman-juror who is given the impossible task of resolving contradictory testimony about something in which he has no expertise.[122] The very standard of care that is applied to professionals—that of the reasonable member in good standing in the profession—builds in elements which frustrate the goals of compensating the injured and promoting increased safety. If one must act only as a reasonable member of the profession would act, the law is allowing each profession to establish its own potential for liability.

This rationale could potentially lead to an "equality of incompetence" standard. In *Lucas v. Hamm*,[123] for example, a lawyer was sued by the beneficiaries under a will he had drafted for his deceased client.[124] A testamentary trust contained in the will ran afoul of the rule against perpetuities, causing the beneficiaries a loss of approximately $75,000.[125] The court held that since the rule against perpetuities is a complicated doctrine which perplexes ordinary, reasonable lawyers, the defendant could not be said to have breached his duty to behave as a reasonable member of his profession.[126] Thus, the court, in effect, exculpated the attorney because he was "equally incompetent." Such a holding not only penalizes the injured party, but also fails to encourage research and study of a problematic but common rule of law. Holding a professional accountable only to the care ordinarily used in his profession provides no impetus for raising the standards of that profession.[127]

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[121] *See, e.g.*, Strodel, *Piercing the Veil of Silence in Malpractice Litigation* (Presented at Midwest Clinical Conference Illinois State Medical Society and Chicago Medical Society; Symposium on Socio-Economic Problems of Internal Medicine in Illinois), *reprinted in* I QUALITY OF MEDICAL CARE—A CITIZEN'S RIGHT (Cambridge: Ass'n of Trial Lawyers of America) 93 (1975).

[122] *See* W. PROSSER, *supra* note 4, at 164–65.

[123] 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962).

[124] 56 Cal. 2d at 586, 364 P.2d at 686, 15 Cal. Rptr. at 822.

[125] *Id.* at 587, 364 P.2d at 687, 15 Cal. Rptr. at 823.

[126] *Id.* at 590–91, 364 P.2d at 689–90, 15 Cal. Rptr. at 825–26.

[127] *See* Singal, *supra* note 9, at 922–23. *But see* Comment, *supra* note 14, at 638–40 (courts have shown unwillingness to accept unreasonable custom as appropriate standard of care). Members of the accounting profession may wonder if a form of strict liability is not already being applied to them in the guise of a very strict negligence standard. *See, e.g.*, Blakely v. Lisac, 357 F. Supp. 255 (D. Ore. 1972); 1136 Tenants' Corp. v. Max Rothenberg & Co., No. 10575/1965 (N.Y. Sup. Ct. 1970), *aff'd*, 36 App. Div. 2d 804, 319 N.Y.S.2d 1007 (1971), *aff'd*, 30 N.Y.2d 585, 281 N.E.2d 846, 330 N.Y.S.2d 800 (1972) (accountants not engaged for audit work held liable for failure to perform auditing functions). In the area of legal malpractice, see

Another argument frequently advanced against the application of warranties to professionals is that they are not as adept at risk distribution as are sellers of goods.[128] The fear is that they will be forced to raise the price of their much-needed services so that a substantial portion of the population would be unable to afford them.[129] Professionals would bear this risk in the same manner as do sellers of goods—by insuring against it.[130] Although professional liability insurance is already costly, refusing to place greater responsibility on professions because of the increased cost erroneously presupposes that the insurance system will not change,[131] and that professionals operate from a base that is so small that they would be unable to distribute the costs.[132] It is important to remember that the professional is in a much better position to bear and insure against the cost of injuries than is the injured consumer,[133] for the same reasons that apply to the seller of goods.

Shifting the risk of loss to the professional may actually serve to further the goal of increased safety and care. If it is assumed that more successful actions will be brought, the professional who causes the most injury will bear the most cost. If prices will be raised to cover the cost, the professional who causes the most injury will be the highest-priced, thus cutting out a substantial portion of the mar-

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Smith v. Lewis, 13 Cal. 3d 349, 358–60, 530 P.2d 589, 595–96, 118 Cal. Rptr. 621, 627–28 (1975) (holding lawyer liable for not having researched uncertain area of law). *See also* Schnidman & Salzer, *The Legal Malpractice Dilemma: Will New Standards of Care Place Professional Liability Insurance Beyond the Reach of the Specialist?*, 45 U. CIN. L. REV. 541 (1976). If some courts are employing an unrealistically high standard of care in some cases, perhaps this evidences the beginning of a trend toward an absolute duty of care.

[128] Stuart v. Crestview Mut. Water Co., 34 Cal. App. 3d 802, 811, 110 Cal. Rptr. 543, 549 (1973); Magrine v. Krasnica, 94 N.J. Super. 228, 238–39, 227 A.2d 539, 545 (Hudson County Ct. 1967), *aff'd sub nom.* Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (App. Div. 1968) (per curiam), *aff'd*, 53 N.J. 259, 250 A.2d 129 (1969) (per curiam). For an overview of the economic considerations of shifting risks to service providers, see Comment, *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, 433–46 (1974).

[129] *See* Comment, *supra* note 14, at 652.

[130] Greenfield, *supra* note 9, at 692.

[131] Several no-fault insurance plans have been proposed for both professional and commercial services. *See, e.g.*, O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals*, 59 VA. L. REV. 749 (1973); O'Connell, *Products and Services No Fault Without Legislation*, 62 A.B.A.J. 343 (1976). *But see* Lanzone, *Products Liability and Professional Liability No-Fault*, 47 N.Y.S. B.J. 185 (1975).

[132] *See generally* Greenfield, *supra* note 9, at 691–92.

[133] *Id.* at 691. *But see* Hoven v. Kelble, 79 Wis. 2d 444, 256 N.W.2d 379 (1977) (strict liability held inapplicable to professional services because of significant differences between rendition of professional services and transactions in goods).

ket and reducing his opportunity to cause injury. In an extreme situation, he may be put out of business completely.

An additional factor supporting the imposition of a higher standard of care upon professionals is the lack of success of professional organizations in "weeding out" the incompetents in the respective professions.[134] This view is supported by a remark recently made by Warren Burger, Chief Justice of the United States Supreme Court, in which he estimated that one-half of all trial lawyers are unqualified to represent their clients.[135] Whether or not the Chief Justice is correct in his estimation, the fact remains that licensing for a profession does not assure competency. Forcing professionals to respond in damages for injuries they have caused, without the protective barriers that negligence law provides, could help to ensure that the consumer will receive the expert services that he reasonably expects.

LIMITATIONS ON THE EXTENSION OF STRICT LIABILITY TO PROFESSIONAL SERVICES

Although the preceding discussion suggests that strict liability be imposed on professionals for defective services, there should be some limitations on the use of these doctrines. Even the seller of tangible goods is not held to so high a standard. In warranty law, for example, it is clear that "merchantability" does not necessarily mean perfection,[136] but rather that the goods are fit for their ordinary purpose or will pass without objection in the trade.[137] This principle is subject to an exception for goods which are unavoidably unsafe.[138]

The situation in which a lawyer brings a case to trial, with the outcome dependent on the judgment of third parties, has no analogy

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[134] *See Extension of Enterprise Liability, supra* note 9, at 427.

[135] N.Y. Times, Dec. 4, 1977, § 4, at 11.

[136] *See generally* Dickerson, *Products Liability: How Good Does a Product Have to Be?*, 42 IND. L.J. 301 (1967).

[137] Section 2-314 of the *Uniform Commercial Code* provides in part:

> (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
>
> (c) are fit for the ordinary purposes for which such goods are used; and
>
> (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 labelled as the agreement may require; and
>
> (f) conform to the promises or affirmations of fact made on the container or label if any.

U.C.C. § 2-314 (1972 version).

[138] *Id.*; RESTATEMENT (SECOND) OF TORTS § 402A, Comment (k) (1965).

in the present law of warranty or strict liability for the sale of goods. Nor is there an analogy in the situation where a physician performs surgery or provides some treatment, the outcome of which is dependent on forces beyond the realm of present medical knowledge. In such cases, the injury is occasioned by forces beyond anyone's control. To apply strict liability would not further the goal of increased safety because the professional himself is powerless to affect a positive change. Indeed, the imposition of strict liability for all poor results, even those which are occasioned by activity in a truly inexact science or art, would actually frustrate advances in professional fields because of the fear of liability.[139] In such an instance once a professional has performed his service with all due care, and has informed the consumer of the attendant risks,[140] he is truly in no better position than the consumer to guard against injury.

The fact that some professional activity involves informed guesswork in the rarefied atmosphere of an inexact science should not, however, insulate all professional services from increased responsiveness to consumers. Where a professional uses or supplies a defective product in the course of rendering his services, there is little justification for treating him any differently than the commercial seller or user of such goods.[141] Beyond professional "hybrid" cases, liability without fault should be imposed for professional services in which the doctrine's underlying rationale would be served—specifically, for those services which are routine or standardized.

The proposed application of liability without fault parallels the result reached in the *Johnson* case; imposing strict liability for "mechanical-administrative" services of a hospital which were characterized as the "mastery of routine," but refusing to extend the doctrine to "professional-medical" services.[142] The bulk of the criticism of *Johnson* has been that the court failed to provide standards for distinguishing "mechanical" from "professional."[143] Nevertheless, the possibility of identifying certain standardized professional services is implicit in the *Bates* holding, allowing the advertisement of such services.[144] In the wake of *Bates*, courts and commentators must

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[139] *See* Johnson v. Sears, Roebuck & Co., 355 F. Supp. 1065, 1067 (E.D. Wis. 1973).

[140] *See* Broyles v. Brown Engineering Co., 275 Ala. 35, 38–39, 151 So. 2d 767, 771 (1963) (dictum).

[141] *Products and the Professional*, *supra* note 9, at 125–26.

[142] *See generally* Singal, *supra* note 9, at 925. The approach of applying strict liability doctrines to standardized services is suggested by the author.

[143] *See, e.g.*, Singal, *supra* note 9, at 919.

[144] 433 U.S. at 381–82. *But see id.* at 392 (Powell, J., dissenting) (concern expressed for dividing broad range of professional services into two categories: "unique" and "routine").

evolve criteria for "standardization."[145] One author, for example, writing about standardization of legal services, listed five indicators of standardization:

> (1) The assessment of attorneys' fees; (2) the delegation of lawyers' tasks to lay assistants; (3) the use of systems analysis in the performance of legal services; (4) the use of automation and computer technology by lawyers; and (5) the encroachment of lay persons and lay institutions upon areas of work [formerly] performed by lawyers.[146]

Of course, the determination of what constitutes a standardized service will have to be made for each profession. Nevertheless, if the "standardized" can be distinguished from the "unique" for purposes of determining what services may be advertised, it can certainly be done for purposes of determining the services which should give rise to liability without fault. Imposing strict liability for injuries caused in rendering the standardized services is consonant with the goals of strict liability and the rationales for its imposition.

It is with the standardized service that the professional will now enter the marketplace through the medium of advertising, and with respect to which he will openly compete for customers on the basis of price.[147] Unless he is a specialist of some sort, the professional is likely to do a brisk business in routine, standardized services, because therein lies the greatest public need.[148] Standardized services are likely to be more profitable than the more complicated, customized services a professional performs, since the standardized service is easier, takes less time and judgment, and is usually susceptible to some degree of delegation to non-professional support staff.[149] Moreover, it is the standardized service which gives rise to the greatest consumer reliance and the highest expectations because such a service is capable of being performed perfectly. Because routine services involve activity in a settled field of knowledge, improving safety and accuracy is within the power of the professional.

In those cases in which the extension of strict liability to pure services has been considered, some courts have seemed troubled by the prospect of applying the concept of defectiveness to a service.[150]

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[145] *See, e.g.*, Engel, *supra* note 15.

[146] *Id.* at 822.

[147] 433 U.S. at 381–82, 384.

[148] *See generally* Singal, *supra* note 9.

[149] Engel, *supra* note 15, at 826–31.

[150] *See, e.g.*, Buckeye Union Fire Ins. Co. v. Detroit Edison, 38 Mich. App. 325, 196 N.W.2d 316 (1972), *appeal denied*, 393 Mich. 763 (1974). While the court found the warranty of

This has led some to conclude that any warranty of quality would be coterminous with the duty of reasonable care.[151] Perhaps the problem arises from focusing on the procedure by which the end "product" is reached rather than on the quality of the end product itself. In the field of manufacturers' liability, difficulty in proving negligence in the procedure led to a focus on the quality of the end product, rendering fault in the procedure itself to be irrelevant.

The professional who turns out a routine, standardized service produces a product in a very real sense, intangible though it may sometimes be. The product may range from the drafting of a simple will to the fitting of contact lenses or the filling of a carious tooth. In applying the concept of defectiveness to professional services, courts should scrutinize the quality of the result and ask whether the consumer has received what he reasonably expected. In other words, the result should be compared to the result expected of similar services. If the fitness of the final product is the focus of inquiry, negligence in the process is irrelevant and lack of negligence is no defense.

CONCLUSION

While the consumer revolution has caused tremendous growth in legal doctrines which facilitate the public's expectations about the goods and services it consumes, the growth has not gone far enough. Professional services stand as the final fortress to be conquered in the onslaught of consumerism. If the trend is, as it appears to be, to shift the risk of loss to the person who profits from the activity and who is best able to guard against the loss, then it makes little sense for courts to treat professionals as fledgling industries. Out of a blind deference to professional status, courts have treated all professional services as if they were monolithic. Where the professional behaves as a merchant, entering the marketplace with routine, standardized services, his responsibility with respect to his product should not be less than that of the seller of goods.

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merchantability applicable to electrical service, it was stymied by the requirement that the product be unmerchantable at the time it left the seller's hands. *Id.* at 330, 196 N.W.2d at 318. The court held the service not to be unmerchantable because there was no showing that a defect in the electricity existed at the time it had passed through the defendant's meter. *Id.* at 331, 196 N.W.2d at 319.

[151] *See, e.g.*, Greenfield, *supra* note 9, at 672–73.