Strict Liability for Commercial Services--Will Another Citadel Crumble

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STRICT LIABILITY FOR COMMERCIAL SERVICES
—WILL ANOTHER CITADEL CRUMBLE?

Osborne M. Reynolds, Jr.*

In a famous law review article, the late William Prosser noted the demise of the privity requirement in products liability cases based on breach of implied warranty, and urged that courts cease altogether their reliance on the "freak hybrid" of warranty and adopt outright the concept of strict liability in tort. At that time, implied warranty remained the most important protection for the injured consumer. Courts have utilized not only the warranty provisions of the Uniform Commercial Code and its predecessor, but have also extended possible liability for breach of warranty beyond the parties and situations covered by these statutes. Still, warranty liability could be said to have a basically statutory foundation, and some Code limitations were normally respected in all cases—for in-

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4 UCC §§ 2-313 (express warranties), 2-314 (implied warranty of merchantability), 2-315 (implied warranty of fitness for purpose). Along with these, of course, one must consider the limitations imposed by such sections as those requiring notice of breach to be given the seller (§ 2-607(3)), providing for disclaimers (§ 2-316), and naming the categories of possible plaintiffs (§ 2-318). See Cudahy, Limitations of Warranty Under the Uniform Commercial Code, 47 MARQ. L. REV. 127 (1963). The chief predecessor of the Code was the Uniform Sales Act, which provided for possible liability on express warranty (§ 12), implied warranty of fitness for purpose (§ 15(1)), and implied warranty of merchantable quality (§ 15(2)). Cf. Uniform Sales Act § 14 on warranties in sales by description. See L. Vold, SALES §§ 84-95 (2d ed. 1959).


stance, the requirement that a "sale of goods" have occurred in order for strict liability to attach.\(^7\)

Since Prosser's famed article, his suggestion has become hornbook law: in most states, strict liability in tort has been adopted in products liability cases, and breach of warranty is no longer essential to recovery.\(^8\)

This raises the possibility of yet another development: With statutory obstacles removed (since statutes are clearly no longer even a part of the foundation of liability), can strict liability, based either on warranty or squarely on tort principles, be extended to situations where there is a sale of services but not of goods?\(^9\) This article will review trends, proposals, and problems relating to that question.

Historically, no strict liability has been allowed—only liability for negligence or other "fault"—where a predominantly "service" transaction has occurred, even if the transfer of some product has taken place in connection with rendition of the service. This has been an important factor in the denial of any strict liability for performance of professional services, as in cases where a hospital or medical practitioner injures a patient through use of a drug or instrument.\(^10\) Thus, if a physician incorrectly diagnoses a problem,\(^11\) or performs an unsuccessful operation,\(^12\) or fails to

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\(^9\) See Greenfield, Consumer Protection in Service Transactions—Implied Warranties and Strict Liability in Tort, 1974 Utah L. Rev. 661, for an excellent discussion of this problem and a thorough review of all cases. At 661 n.3, the author points out that the distinction here involved is often stated in terms of sale versus service. But there can be a sale of either goods or services, and the true distinction is thus between these two types of sales.


\(^12\) Hackworth v. Hart, 474 S.W.2d 377 (Ky. 1971) (unsuccessful vasectomy).
effect a cure of a troublesome condition, there is ordinarily no liability unless negligence is proven, the physician not being considered an insurer nor the warrantor of a cure. (Sometimes, even if negligence is established, an "unsuccessful" treatment may not lead to liability if, on policy grounds, the court refuses to recognize harm to the patient, as some courts have in cases where sterilization surgery fails to prevent the birth of a healthy but unwanted child.) The "service" limitation has also prevented strict liability on the part of a dentist or optometrist whose treatments do not achieve the desired result. And, despite the usually obvious and essential involvement of a product, it has even been held that a druggist dispensing drugs is liable only for negligence because he is basically performing a service. In the drug cases, there sometimes could be strict liability of another party, such as a manufacturer who produces a defective drug, but intervening causes may present problems to recovery.

13 See Champion v. Keith, 17 Okla. 204, 87 P. 845 (1906).
20 See Note, Defenses in Drug Products Liability Cases, 17 OKLA. L. REV. 318 (1964). In some jurisdictions which have adopted strict tort liability for defective products, it now seems, however, that intervening causes will seldom if ever cut off liability. See Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964) (manufacturer liable despite...
Just as the drug cases approach the uncertain line between "sale of goods" and "sale of services," so do cases involving transfusion of blood, where the blood proves harmful. Following a leading New York case, a number of cases refused to apply strict liability, under either warranty or tort rules, because the transaction was regarded as primarily a service. Strict liability in tort can be denied partly on the basis of the Restatement of Torts language indicating that sale of a product is necessary to such liability. Recently, however, it has been noted that defects in blood may now be detectable and removable, and that proof of this could open the way for implied warranty liability. "Even without so much attention to scientific advances, some courts have now adopted the view that implied warranty or strict tort liability can be utilized in these cases. This dealer's failure to make adjustments); Alvarez v. Felker Mfg. Co., 230 Cal. App. 2d 987, 41 Cal. Rptr. 514 (1964). Arguably, a totally unforeseeable intervening cause—including, perhaps, passing on a product despite actual knowledge of a dangerous defect in it—could still cut off liability of earlier parties, as was true under negligence law. See Halpern v. Jad Constr. Corp., 27 Misc. 675, 202 N.Y.S. 945 (1960).


Strict liability has been denied, even though the blood was supplied by a commercial blood bank. Evans v. Northern Ill. Blood Bank, Inc., 13 Ill. App. 3d 19, 298 N.E.2d 732 (1973). Cf. Koenig v. Milwaukee Blood Center, Inc., 23 Wis. 2d 324, 127 N.W.2d 50 (1964). And it has been held that the transaction remains a service, not a sale, even if a separate charge is made for blood. Whitehurst v. American Nat'l Red Cross, 1 Ariz. App. 326, 402 P.2d 584 (1965).

See Williamson v. Memorial Hosp., 307 So. 2d 199 (Fla. Dist. Ct. App. 1975), noted in 3 FLA. ST. U.L. REV. 483 (1975). In the past, the lack of a test for detecting hepatitis virus in blood had been relied on as a reason for not imposing strict liability. See Hines v. St. Joseph's Hosp., 86 N.M. 763, 527 P.2d 1075 (1974). See generally Dunn, Blood Transfusions and Serum Hepatitis, 15 CLEV.-MAR. L. REV. 497 (1966). Despite such indications that harm could occur even if the greatest care were exercised, the suggestion was occasionally made that res ipsa loquitur be available to a plaintiff injured by "bad blood." Redding v. United States, 196 F. Supp. 871 (W.D. Ark. 1961) (Oklahoma law) (plaintiff seldom in a position to discover cause of injury). Of course, the development of tests for detecting defects in blood also strengthens the possibility of negligence actions.


would appear to be the trend in the absence of legislation, which, however, now largely governs this area.28

The potential liability of an attorney has been called similar to that of the medical doctor.29 Thus, the lawyer is not an insurer or guarantor of the soundness of his opinions, the validity of instruments he drafts, or the outcome of litigation he handles.30 An express warranty by an attorney might be found, of course, but there are no implied warranties arising from the attorney-client relationship.31 Further, there is no strict liability in tort—the attorney is liable only for negligence,32 not for every mistake he may make.33 Occasionally, even the standard for negligence liability is stated in terms of a lawyer's duty to use his own best skill and judgment.34 Usually, the standard, as with doctors, is that of the reasonable person, under the circumstances, in that profession.35 It could be thought that the attorney cases would be even weaker for strict liability than those involving doctors,


because in the medical cases an allegedly defective product (drug, blood, etc.) is often involved in the course of rendition of the service. Seldom in the attorney cases is there a harmful product used in the course of service; rather (as is often true in medical cases as well), there is frequently an allegation of improper performance of the work. But the attorney cases often do involve production, by the attorney, of a tangible product, such as a document, and sometimes the possible liability is based on defects in that instrument. Thus, in many situations, the attorney cases may actually be more closely analogous to sales of commercial products than are the medical cases.

Similarly, architects directly produce a tangible product—a plan—and indirectly produce yet another tangible result—a structure. But here, too, courts have found no strict liability, distinguishing the sale-of-goods cases because the latter often involve mass production and sale so that it is unfair to require the individual consumer to trace a product’s history and pinpoint an act of negligence. Thus, the architect is also said not to guarantee satisfactory results and is not liable for a defective plan, or for an improperly designed building, unless fault is shown. Neither is an engineer held strictly liable for alleged failures in designing or supervising the construction of a structure.

Although the unpredictable outcome of efforts in such fields as law and medicine has bolstered support for the denial of strict liability for professional services, the service versus goods distinction has made appearances elsewhere. Thus, it has been stated that strict liability does not apply to such “personal services” as repair of an airplane or of a fishing boat engine. Other repairers and performers of such diverse services as sur-

43 See Berg v. General Motors Corp., 13 Wash. App. 326, 534 P.2d 838 (1975), the holding of which, however, is limited to the rule that there could be no recovery for economic loss on either an implied warranty or strict tort liability theory. Cf. Ginoff v. Holeman G.M. Diesel, Inc., 156 Mont. 260, 479 P.2d 263 (1971). Recovery for economic loss, especially where it is not
veying and exterminating also have been held outside the scope of strict liability. This has been true not only where the allegations were of unsuccessful performance of the service, apart from defects in any products utilized, but also where the basis of liability was a defect in a product furnished or used where the transaction was considered basically one of service, not sale of the goods.

The service versus goods distinction has not escaped criticism, nor has it escaped encroachment from the general expansion of strict liability in tort. Even in 1949 it was being recognized that strict liability, as a method of shifting a loss from the harmed individual to all those in the marketplace, could be equally useful in service situations. Perhaps the first major change in the “service rule” came when courts, often overruling prior authority, found that the serving of food or beverage by a commercial establishment amounts to sale of a product, even if the product is to be consumed on the premises, as in a restaurant situation. In two other consequential damage but simply a result of the product not being worth as much as plaintiff supposed, has presented troublesome questions; such recovery has often been denied unless it could be based on a misrepresentation or express warranty theory. See Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). But see Santor v. A&M Karageusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); Nobility Homes, Inc. v. Shivers, 539 S.W.2d 190 (Tex. Civ. App. 1976). See generally Franklin, When Worlds Collide: Liability Theories and Disclaimers in Defective Products Cases, 18 Stan. L. Rev. 974 (1966).


See Barbee v. Rogers, 425 S.W.2d 342 (Tex. 1968) (prescription and fitting of contact lenses, not themselves defective).


Note, Should the Doctrine of Implied Warranties Be Limited to Sales Transactions?, 2 Vand. L. Rev. 675, 685 (1949), commenting, "There is no basis in logic or policy for confining the doctrine of implied warranty to sales."
situations, the service distinction is now being increasingly rejected as inapplicable: lessors of personal property are being held strictly liable on the same grounds as are sellers of such property. The builder-vendor's strict liability for transfer of defective buildings and other real property has now been established in a number of cases and has been noted as a trend by writers. On the basis of implied warranty, such liability has been


extended to lessors of real property; an extension to all sellers of realty, not just those involved in the construction, has been urged. Although much of this expansion in the real property field is based on implied warranty, and all the growth may be traced to English and early American “warranties of quality,” the criticisms Prosser made of the warranty basis in traditional “products areas” are obviously applicable outside those areas as well. Strict liability of business enterprises, if it comes, may well turn out to be pure tort strict liability.

The above-described expansions of strict products liability are, of course, limited encroachments on the traditional fault requirement, because, like the products cases, they still involve some defective, tangible entity. The entity merely is leased rather than sold, or it is classified as real property rather than personal. There is little argument that the “service” element of the transaction normally remains slight in these cases. But there are two situations in which, despite a strong factor of service, rules of strict liability may apply. One clear-cut example is the situation in which an express warranty accompanies the rendition of service. Thus, it has been recognized that even a professional, such as an attorney, may warrant or guarantee the results of his efforts, although this will never be assumed


unless a special agreement to that effect is shown by a preponderance of the evidence. Where found, such an express warranty may be quite limited, as a physician’s guarantee that a patient’s condition will not be worsened by a particular procedure. At least in those cases where intentional deception or negligence has been present in the giving of the warranty, the door is also open for recovery on the theory of misrepresentation (called “fraud” or “deceit” in various jurisdictions). Indeed, the misrepresentation action does not require the making of a warranty or guaranty, but only some type of assertion or deception—if the other elements of the action are present. Where intentional deception or extreme negligence is shown, punitive damages may become a possibility.

A second situation in which some courts and numerous writers have exhibited willingness to apply strict liability (not necessarily here limited to a warranty basis) is that in which the transfer or use of a harmful product has occurred, even though there is also a strong “service” element in the


63 See Comment, Imposing Liability on Data Processing Services—Should California Choose Fraud or Warranty?, 13 Santa Clara Law. 140, 168 (1972). See generally Green, Decelt, 16 Va. L. Rev. 749 (1930), discussing the varying situations in which a fraud action may be brought.

62 See W. Prosser, Torts 694-95 (4th ed. 1971). Cf. Keeton, Fraud—Concealment and Non-Disclosure, 15 Tex. L. Rev. 1 (1936). See generally Weisiger, Basis of Liability for Misrepresentation, 24 Harv. L. Rev. 415 (1911); Harper & McNeely, A Synthesis of the Law of Misrepresentation, 22 Minn. L. Rev. 938 (1938). On the relationship of misrepresentation to other actions, see Bohlen, Misrepresentation as Deceit, Negligence, or Warranty, 42 Harv. L. Rev. 733 (1929). Where the misstatement is made due to negligence, not intent to deceive, there is a split of authority as to whether the appropriate action is negligence or misrepresentation. See Bohlen, Should Negligent Misrepresentation Be Treated as Negligence or Fraud?, 18 Va. L. Rev. 703 (1932); Goodhart, Liability for Innocent but Negligent Misrepresentation, 74 Yale L.J. 286 (1964); Wiener, Negligent Misrepresentation: Fraud or Negligence, 13 Clev.-Mar. L. Rev. 250 (1964). Under either theory, the range of persons to whom defendant may be held liable is usually narrower if liability is not based on actual intent. See Prosser, Misrepresentation and Third Parties, 19 Vand. L. Rev. 231 (1966). Cf. Keeton, The Ambit of a Fraudulent Representor’s Responsibility, 17 Tex. L. Rev. 1 (1938). An action for breach of warranty has historically not required fault at all, while a misrepresentation action does. See Hamilton, The Ancient Maxim Caveat Emptor, 40 Yale L.J. 1133 (1931). But in recent decades, a number of jurisdictions have also been allowing misrepresentation actions, under certain circumstances, without the need for either intent or negligence. See Morris, Liability for Innocent Misrepresentation, 22 Minn. L. Rev. 939 (1938).

overall transaction. It has been reasoned that if a product changes hands within a commercial relationship, "[t]he additional element of service should not logically preclude the application of a warranty." And, without reference to warranty, it has been noted that strict liability can extend "to the hybrid sale-service transaction, provided a defective product is supplied to the plaintiff or used by the defendant in the course of performing the service."

Where defective goods are furnished under a contract, the case is clearly strongest for allowing recovery without a showing of fault, especially under an implied warranty theory, even if the transaction is one that has often been considered a service. Thus, if unmerchantable electricity is supplied by a utility, breach of implied warranty may be found. In such a case, the essence—perhaps the entirety—of the "service" performed consists of transfer of a product. Only slightly less strong is the case in which goods are transferred by defendant to plaintiff at the same time as other (although often related) services are performed, as where blood is supplied plaintiff during the course of an operation he undergoes, or parts are replaced in his car as it is being repaired. Here it may often be true that there is more to the service than mere provision or installation of the product; but if the product supplied is defective, a justification for strict liability can be found in the transferor's greater ability to inspect for flaws and/or to determine the dependability of the source of supply. It has been observed that even where products are dispensed by a professional person, such as a medical doctor, the same rationale of more effective loss-spreading supports imposing strict liability on the professional as supports imposing such liability on the ordinary retail merchant or commercial manufacturer. Whatever the uncertainties that exist when it comes to evaluating performance of

professional services, the same objective standards obviously may be applied to the goods dispensed by a professional as are applied to goods dispensed by anyone else.\textsuperscript{70} Unlike the above-described express warranty situations, it is the goods supplied, not the service performed or results achieved, that are being judged. And if "liability without fault" (i.e., strict liability) is imposed, there should be little or no implication of moral blame or incompetence as to the defendant-dispenser initially held liable.\textsuperscript{71} The same reasoning applies where the defective goods are merely used, not transferred, in the course of service, although here the authority is scant and liability has often been based at least partially on negligence.\textsuperscript{72}

On the basis of the newer thinking, some courts have recently imposed strict liability on hospitals for the transfusion of impure blood,\textsuperscript{73} and on beauty parlors using harmful lotion or dye.\textsuperscript{74} It is true that some of the urging that strict liability be applied in such situations dates to a time when this liability would have had a statutory implied warranty basis under


which disclaimers were readily available to limit possible liability.\textsuperscript{76} Under the now-developed strict liability in tort, disclaimers may still have some significance, but it is lessened and uncertain.\textsuperscript{76} It is also true that, even where a transfer of a tangible and allegedly defective product is involved, there remain "islands of fault"—areas where liability is generally imposed only if negligence is found. This is true, for instance, of the potential liability of the certifier or endorser of a product,\textsuperscript{77} and, as modified by workmen's compensation laws, of the liability of an employer for injury caused an employee by food purchased at plant facilities.\textsuperscript{78} But clearly there is a trend—at least outside the area of professional services, with ripples now invading even that sanctuary—to extend strict liability on some theory to cases where transfer or use of a defective product is a dominant factor, even though services, along with and/or in addition to the transfer or use, are also being rendered.

The question then arises—will the law take the next step? Will strict liability be extended to situations where the harm-producing defect is not in a product transferred or used, but is in the manner of performance of the service?\textsuperscript{79} The distinction between contracts for sale of goods and those for sale of services has been called "one of form and not one of substance."\textsuperscript{80}

Difficulties arise where courts try to determine how a particular contract is

\textsuperscript{76} See Farnsworth, \textit{Implied Warranties of Quality in Non-Sale Cases}, \textit{57 Colum. L. Rev.} 653, 674 (1957), stating, "Finally, it should be remembered that that sometimes-overworked device, the disclaimer, is always available for use in situations where the understandings are other than might be supposed or imposed by a court."


\textsuperscript{79} See Annot., \textit{Master and Servant: Employer's Liability for Injury Caused by Food or Drink Purchased by Employee in Plant Facilities}, 50 A.L.R.3d 505 (1973). Cf. Annot., \textit{Workmen's Compensation: Illness or Injury from Contaminated Water}, 141 A.L.R. 1490 (1942). But cf. Bark v. Dixon, 115 Minn. 172, 131 N.W. 1078 (1911) (food furnished as part of compensation). See also Strika v. Netherlands Ministry of Traffic, 185 F.2d 555 (D.C. Cir. 1950) (ship furnished to work on). The presence of workmen's compensation in many of these situations has no doubt lessened the need for adoption of any \textit{other} form of strict liability, such as warranty or strict liability in tort.

\textsuperscript{80} See generally Annot., \textit{Application of Rule of Strict Liability in Tort to Person Rendering Services}, 29 A.L.R.3d 1425 (1970).

to be classified, or whether the "service" element can be said to pre-
dominate. If a car or other machine is being repaired, but a number of
parts must necessarily be added or replaced during the course of repair, is
this basically a sale or a service transaction? But, despite problems that
arise when questions are posed in this manner, it would be possible in most
instances to retain the goods versus service distinction. It is normally pos-
able to determine whether the alleged harm-producing defect was in the
goods themselves, or was in the way the goods were used, installed, treated,
etc., or whether there is an alleged defect in both the product and the per-
formance. It would then be feasible to ignore the query of whether the
transaction predominantly involved goods or service, and simply apply
strict liability as to defects in the goods, the usual fault standard to defects
in the activities. Whether it is desirable to stop at this point may be ques-
tioned, however. It has been suggested that already courts are using the
sale-service dichotomy merely to veil consideration of such other factors as
the complexity and urgency of the tasks performed, the potential for caus-
ing injury in a particular transaction, and the difficulty of proving
negligence.

Certainly there is no triumph of logic in the present state of the law
under which a patient injured by a defective instrument used in surgery
performed on him may be unable to employ strict liability, while a person
purchasing an article at the hospital gift shop is able to hold the hospital
strictly liable. The problems of drawing such lines are likely to become
more difficult as modern technology increasingly blurs traditional differ-
ences. But all this may still point toward no more than the need to impose
liability without fault on the person who transfers to plaintiff, or uses on
the plaintiff, in a commercial context, some defective product. Beyond this,
any strict liability applied to rendition of the service itself is justifiable, if
at all, mainly on the ground of spreading the loss among all users of the
service.

This greater step of strict liability for harmful performance of com-

See Comment, Contracts for Services Distinguished from Those to Sell Goods, 15 Fordham L. Rev. 92 (1946). An example of a case talking in terms of whether sale or service predominates is McCool v. Hoover Equip. Co., 415 P.2d 954 (Okla. 1966), where, however, an implied warranty was found as to rechroming of crankshafts, even though the contract was predominately for service.


commercial or professional services has been taken by a few courts in such situations as the preparing of plans and specifications by engineers, the painting of an automobile, and the rechroming of crankshafts, as well as in some cases involving unsatisfactory delivery or installation of goods. Many agree that if strict liability is extended to this additional realm, the expansion should proceed cautiously and with limitations, but there is again disagreement on how the line is to be drawn. One early authority suggests weighing such factors as the degree of reliance on the defendant, the size of the business, and the availability and cost of liability insurance. Recognizing the loss-spreading rationale behind the rule, a more recent article also proposes consideration of the "customer redistribution base." Case authority may be found suggesting that strict liability could be applied to merely mechanical or administrative services, but not to the rendition of services requiring considerable judgment or discretion. This last-


mentioned distinction is similar to that often employed in deciding on the immunity or possible liability of government officials and employees, but all such distinctions are difficult to make and simply move the line-drawing to a different location. It can be argued in all these situations that the performer of the services may be expected to have greater experience in the matter, and greater control of the outcome, than the recipient can have. Thus, if liability without fault is adopted here, it will be difficult to keep within very restricted bounds, especially when the limitations suggested often seem vague or based on policy considerations of arguable validity.

A somewhat more definite limitation might be that of imposing strict liability only outside the area of professional services. It has been suggested that too many uncertainties enter into the practice of law or medicine, for example, to allow strict liability, on an implied warranty basis or otherwise, for harmful rendition of such services. The lack of a “sale” (at least in the sense of a sale of goods) and the great need for professional services have also been cited as supporting the fault requirement in these areas, and it has been predicted that the imposition of anything more stringent than a standard of reasonable performance would result in the demise of some professions. Against this, it may be argued that the uncertainties and the dependence on the performance of “third parties” are not necessarily greater than in many other activities, including automobile driving, and thus if strict liability should come to those activities, it would be illogical to maintain separate standards for the professions. As has been indicated, the need for a technical “sale of goods” to create strict liability may be on


See Note, Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction, 24 Hastings L.J. 111, 120 (1972), which, however, concludes there is no good reason not to impose strict liability on the professional user of a defective product.

its way to extinction. The future security of the professions may well depend more on the efficiency of the insurance and loss-spreading systems used, and on possible limitations on damages, than on the particular standard of liability imposed. The basic loss-spreading arguments used as to manufacturers of products can be applied with equal force to purveyors of services, professional or otherwise. Furthermore, to exclude the professions from a general policy of strict liability would again raise difficult questions of definition, because there has been considerable disagreement on what is a "profession."\textsuperscript{100} Medicine and law have long claimed this status; education and the ministry are usually accorded it; but persons in such diverse fields as accounting and aviation, architecture and barbering, engineering and dry cleaning now lay claim to the title "professional" when it suits their purposes.

Again, varying limitations have been suggested by those facing the possibility of strict liability for professional services. Mirroring the concern over uncertainties, one suggestion is that liability without fault be employed only if the court can determine that no unknown or uncontrollable factors entered into performance of the specific service.\textsuperscript{101} So strict a rule might mean little change in present law. In cases involving use of defective products, it has been proposed that the professional-user might be held liable only where no other responsible party could be reached.\textsuperscript{102} This could, by analogy, be applied to nonproduct cases so that, for instance, the doctor whose conduct was the sole cause of injury could be held liable, but not the doctor whose conduct involved merely foreseeable aggravation of an injury earlier inflicted by another responsible and reachable party.\textsuperscript{103}

\textsuperscript{100} Compare State ex rel. Lennon v. District Court, 138 Minn. 103, 164 N.W. 366 (1917) ("profession" means any trade in which a person tries to make his livelihood), with Stoor v. City of Seattle, 44 Wash. 2d 405, 267 P.2d 902 (1954) (member of profession has special knowledge for instructing, guiding, or advising others). Sometimes it is said that in a profession, the labor is predominantly mental, as opposed to physical or mechanical. See State v. Cohn, 184 La. 53, 165 So. 449 (1936); Maryland Cas. Co. v. Crazy Water Co., 160 S.W.2d 102, 104 (Tex. Civ. App. 1942).


\textsuperscript{103} Ordinarily, where a doctor merely aggravates an existing injury, this aggravation, even if through negligence, is foreseeable, and thus the tortfeasor who caused the original injury may be held liable for the full amount of damage. Simmons v. Lollar, 364 P.2d 774 (10th Cir. 1962) (no negligence involved in subsequent harm); Ewing v. Duncan, 209 Ind. 33, 197 N.E. 901 (1935) (negligence of one looking after injured person); Thompson v. Fox, 326 Pa. 209, 192 A. 107 (1937) (negligence of doctor caring for plaintiff). Cf. Pullman Palace Car Co. v. Bluhm, 109 Ill. 20 (1884). If the aggravation is entirely unforeseeable, this cuts off liability of the
There seems little logic in such a rule, however, and the law has not normally made liability dependent on whether or not there is some other potentially liable and accessible person.

If strict liability comes to services, what standard, beyond mere causation, would be applied? Borrowing from warranty law as to goods, a few cases involving services (many of which might arguably be termed "professional") have recognized possible liability for breaching a warranty of fitness for particular purpose. "Fitness" is a term clearly better suited to judging tangible goods, and this fact has led some courts to speak of such warranties as warranties of "sufficiency" or "suitability," when dealing with services. The other implied warranty often applied to products—that of merchantability—could also be extended to services, even professional ones, but courts have very generally denied this possibility unless dealing with a transaction that could be considered predominantly a sale of goods. Additionally, any theory of liability based on warranties, even if warranties better suited to services could be formulated, would face the same objections, and the same eventual erosion, as has occurred in the products field.

Thus, a likely development, should strict liability be extended to the service area, is the application of a rule analogous to that of present strict liability for "unreasonably dangerous" or defective products that cause
Since the "unreasonably dangerous" language as to products has led some courts to view this standard as too close to the old negligence rules, a similar difficulty might occur as to services: would "unreasonably dangerous" rendition of a service really be much different from "unreasonable" or "not reasonably prudent"? (Of course, if strict liability in tort is applied, there are important differences in the defenses available here over those available in negligence.) Thus, careful attention might well be given the view of one writer that strict liability, even to the professions, might be imposed where the recipient's reasonable expectations as to quality of service are not met, causing him detriment. If this standard appears to be too unrelated to the actor himself, then the reasonable expectations of the actor engaging in such service could be substituted as the standard, as could those of the reasonable member of the community. Although the use of "reasonable" may still bring objections for smacking greatly of negligence law, the term here relates to expectations and/or community standards rather than purely to conduct. The norm would be the reasonable anticipation, and this would be applied to results, outcomes, consequences. Any complete surrender of "reasonableness" may leave us in a vacuum, and will certainly cause us to lose a vast body of otherwise useful precedent.

Eventually, of course, all reference to reasonableness may be removed.
from tort law, and liability may be strictly imposed merely on the basis of causation, with no fault standard, no required deviation from a norm. Such proposals have been made.111 Strict liability may then apply not only to commercial sales and services, to which it is so far being limited,112 but even to gratuitous transfers and services performed outside the course of any


112 In situations of full-fledged transfers of ownership, liability without proof of fault has so far been limited to cases in which defendant has been engaged in the business of supplying goods of the kind involved. See Thrash v. U-Drive-It Co., 158 Ohio St. 465, 110 N.E.2d 419 (1953) (owner trading in own car not liable). Cf. Southwest Forest Indus., Inc. v. Westinghouse Elec. Corp., 422 F.2d 1013 (9th Cir. 1970); Freitas v. Twin City Fisherman's Coop. Ass'n, 452 S.W.2d 931 (Tex. Civ. App. 1970). See generally RESTATEMENT (SECOND) OF TORTS § 402A (1965) and Comment f. The defendant who makes a gift or other gratuitous transfer is normally held liable only for fault. See Golembe v. Blumberg, 262 App. Div. 759, 27 N.Y.S.2d 692 (1941) (father bought car for epileptic son). Sometimes, no possible liability at all has been found on the part of the transferor, responsibility being held to have passed with title to the chattel. Estes v. Gibson, 257 S.W.2d 604 (Ky. App. 1953) (mother gave car to son known to be an alcoholic and drug addict). Liability may also be based, by common law or special statute, on the "dramshop rule," under which a supplier of liquor to certain persons (such as minors or intoxicated people) is held liable to third parties injured by these persons. Occasionally, this liability has been extended even to defendants who have supplied the liquor gratuitously, i.e., to social guests. See Ross v. Ross, 294 Minn. 115, 200 N.W.2d 149 (1972). But see Garcia v. Hargrove, 46 Wis. 2d 724, 176 N.W.2d 566 (1970). See generally Cahn, New Common Law Dramshop Rule, 9 CLEV.-MAR. L. REV. 302 (1960); 45 AM. JUR. 2d Intoxicating Liquors §§ 561-614 (1969).

Strict liability may also be based on other special statutes or the handling of an ultrahazardous object. See Morris, Hazardous Enterprises and Risk Bearing Capacity, 61 YALE L. J. 1172 (1952). It would seem arguable that the person regularly engaged in the business of supplying a particular good might be held strictly liable even for a gratuitous transfer, at least if strict liability is no longer to be confined purely to "sale" situations.

Where a mere bailment is involved, the same basic distinction has so far been applied, and strict liability has been used only as to defendants engaged in the business of supplying chattels. See W. PROSSER, TORTS 679 n.76 (4th ed. 1971). However, the gratuitous lender can clearly be liable for negligent entrustment. See Annot., Liability Based on Entrusting Automobile to One Who Is Intoxicated or Known to Be Excessive User of Intoxicants, 19 A.L.R.3d 1175 (1968). See generally Woods, Negligent Entrustment: Evaluation of a Frequently Overlooked Source of Additional Liability, 20 ARK. L. REV. 101 (1966).

In the service realm, it is also likely that any strict liability will be largely limited to businesses regularly engaged in offering the service. So long as this "commercial" limitation is followed, the same rationale of making the business pay for accidents it causes can apply to services as to products. 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 (1974).
regular business or profession. These limitations may well prove the most durable citadels, but they too may eventually crumble. For the present, the advance of strict liability seems likely to continue as to leases and sales of both real and personal property; it seems likely to be adopted as to all transfers (and probably uses) of defective property if within the context of performing a nongratiuous service; and it seems likely to achieve eventual adoption, applying some standard of reasonableness or community expectations, in the field of nongratiuous "pure service."