The Illusive Meaning of the Term "Product" Under Section 402A of the 
Restatement (Second) of Torts

Charles E. Cantu
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RESTATEMENT (SECOND) OF TORTS

CHARLES E. CANTU*

I. Introduction

When the American Law Institute1 published their final draft2 of section 402A of the Restatement (Second) of Torts in 1965,3 the resulting impact had far-reaching effects.4 The most noticeable effect was that strict liability,
which had previously been applicable only to injuries resulting from dangerous activities\(^1\) and wild animals,\(^6\) was accepted as a cause of action in

the defendant. See id. § 1.2, at 7 (privity requirement means by which manufacturer avoided liability to indirect purchaser). As a response to such a harsh rule, courts created limited exceptions to the privity requirement. See Huset v. J.I. Case Threshing Mach. Co., 120 F. 865, 870-71 (8th Cir. 1903) (summarizing privity exceptions). In Huset, the court enumerated three established exceptions to the privity requirement:

1. [A]n act of negligence of a manufacturer or vendor which is imminently dangerous to the life or health of mankind, and which is committed in the preparation and sale of an article intended to preserve, destroy, or affect human life . . . .
2. . . . an owner's act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner's premises . . . .
3. . . . one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities . . . .

Id. at 870-71.

Ultimately, courts abolished the privity requirement altogether. See MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, 1053 (1916) ("We have to put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of the contract and nothing else."); see also McCormack v. Handscraft Co., 278 Minn. 322, 154 N.W.2d 488, 499-500 (1967) (traditional privity limitation does not appeal to sense of justice); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55, 58-63 (1967) (discussing evolution and policies involved in elimination of privity obstacle).

5. See, e.g., Luttringer v. Moore, 31 Cal. 2d 489, 190 P.2d 1, 3-4 (1948) (escape of lethal gas into adjacent building); Green v. General Petroleum Corp., 205 Cal. 328, 270 P. 952, 953 (1928) (oil well blowout); Kall v. Caruthers, 211 P. 43, 43 (Cal. Ct. App. 1922) (water allowed to percolate); Colton v. Oderdonk, 69 Cal. 155, 10 P. 395, 396 (1886) (blasting); Caporale v. C.W. Blakeslee & Sons, Inc., 149 Conn. 79, 175 A.2d 561, 562 (1961) (vibrations resulting from pile driving operations); Berger v. Minneapolis Gaslight Co., 60 Minn. 296, 62 N.W. 336, 336 (1895) (seepage of inflammable liquids); Hannem v. Fence, 40 Minn. 127, 41 N.W. 657, 657 (1896) (construction of roof caused ice and snow to fall on passerby); French v. Center Creek Powder Mfg. Co., 173 Mo. App. 220, 158 S.W. 723, 723 (1913) (explosion of powder manufacturing plant); Defiance Water Co. v. Olinger, 54 Ohio St. 332, 44 N.E. 238, 238 (1896) (water collected in dangerous place); Young v. Darter, 363 P.2d 829, 830-31 (Okla. 1961) (crop dusting); Frost v. Berkeley Phosphate Co., 42 S.C. 402, 20 S.E. 280, 280 (1894) (factory emitting phosphate gas). The policy of imposing strict liability for dangerous activities is most often traced back to the English case of Rylands v. Fletcher, decided in 1868, in which water stored in a reservoir on Mr. Ryland's property flooded the plaintiff's coal mines. See Rylands v. Fletcher, L.R. 3 H.L. 330 (1868). The English court held that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not so, is prima facie answerable for all the damage which is the natural consequence of its escape.

Id. at 339-40.

The Restatement (Second) of Torts enumerates the law of strict liability for dangerous activities which basically follows the Rylands rationale. See Restatement (Second) of Torts §§ 519, 520 (1965).

6. See, e.g., Hays v. Miller, 150 Ala. 621, 43 So. 818, 819 (1907) (owner of wolf liable for damages even without proof of negligence); Collins v. Otto, 149 Colo. 489, 369 P.2d 564, 566 (1962) (absolute liability is well-settled rule for harboring wild animals); Briley v. Mitchell, 238 La. 551, 115 So. 2d 831, 854 (1959) (owner of wild deer liable for injuries caused regardless of how deer escaped); Phillips v. Garner, 106 Miss. 828, 64 So. 735, 736 (1914) (owner of monkey liable because notice of danger presumed); Molloy v. Starin, 191 N.Y. 21, 83 N.E.
almost all cases involving defective products. As a result, there was an explosion of products liability litigation. Suits involving strict liability for defective products soon outnumbered all other tort cases.

Naturally, the vast number of lawsuits caused some confusion. Courts interpreted some terms of section 402A of the Restatement to include


Generally, a plaintiff who is injured by a product will plead a claim not only for strict products liability, but also for negligence and U.C.C. breach of warranty. See W. KIMBLE & R. LESHER, PRODUCTS LIABILITY § 11, at 17 (1979).

8. See Bivins, The Products Liability Crisis: Modest Proposals for Legislative Reform, 11 AKRON L. REV. 595, 598 (1978) (products liability reform volatile area of law for many years). The pivotal case which "burst the dam" of products liability litigation was the Michigan Supreme Court case of Spence v. Three Rivers Builders & Masonry Supply. See Putnam v. Erie City Mfg. Co., 338 F.2d 911, 919 n.18 (5th Cir. 1964) (Prosser credits Spence with opening the floodgate of products liability); see also Spence v. Three Rivers Builders & Masonry Supp., 335 Mich. 120, 90 N.W.2d 873, 880 (1958) (no privity required to hold manufacturer of cinder blocks liable).

individuals and events not originally mentioned, while some terms, which at first were thought to be clear and concise, proved quite illusive. One such term is "product." If one is held strictly liable for placing a defective "product" into the stream of commerce, or conversely, if one may escape strict liability by showing that no "product" was introduced into the marketplace, it is imperative to define the meaning of this term. For purposes of section 402A, courts generally reject the broad dictionary definition of the term "product." Instead, courts use a policy-based approach to determine whether a particular transaction involves a product which deserves section 402A protection. In some cases, as illustrated below, this has proven to be a phantasmal objective.

II. Sales/Service Transactions

From the start, courts were adamant on two points. The first was that strict liability was not tantamount to absolute liability. Defendants were

10. See, e.g., Cantu, Reflections on Section 402A of the Restatement (Second) of Torts: A Mirror Crack'd, 25 Gonz. L. Rev. 205 (1989/90) [hereinafter Cantu, Reflections]. The author makes it clear that the apparent intent of the drafters of § 402A has been extended to include events and individuals not mentioned in the original text. As a result § 402A should now read: (1) One who places into the stream of commerce any product which is defective in its manufacture, design, or marketing scheme and as such is in an unreasonably dangerous condition to the user, consumer, or innocent bystander, or to that person’s property is subject to strict liability for physical harm and economic loss, and may be subject to liability for punitive damages thereby caused to the ultimate user, consumer, or innocent bystander, or to that person’s property, if (a) the seller is engaged in the business of placing such product into the stream of commerce, and (b) it is expected to and does reach the user, consumer, or innocent bystander without substantial change. (2) The rule stated in Subsection (1) applies (a) although the defendant has exercised all possible care in the manufacture, design, or marketing scheme of the product, and (b) where there is total lack of privity between such parties. Id. at 236.

11. The word "product" has several general definitions. The American Heritage Dictionary defines a product as "[e]something produced by human or mechanical effort or by a natural process . . . . A direct result; consequence . . . . " AMERICAN HERITAGE DICTIONARY 988 (2d ed. 1982). Black's Law Dictionary defines product as "[g]oods produced or manufactured, either by natural means, by hand, or with tools, machinery, chemicals, or the like. Something produced by physical labor or intellectual effort or something produced naturally or as a result of natural process as by generation or growth." BLACK'S LAW DICTIONARY 1209 (6th ed. 1990). "Product" is also defined as "any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce." 63 AM. JUR. 2d Products Liability § 3 (1984).


not held liable simply because an injury had occurred; instead, liability was imposed because injury was inflicted by a defective product. 14 Second, courts made it clear that strict liability was applicable only to products. 15 In other words, only transactions involving chattels were included within the purview of section 402A. Real estate transactions (discussed below) and the rendering of services were not proper objectives. 16

The reason for the rule that negligence, and not strict liability, is the proper vehicle for recovery in a service transaction is that individuals practice inexact sciences 17 and, therefore, should only be expected to act as reasonable prudent persons. 18 Additionally, in a service transaction there is no “middle-


infallible, therefore, one can only expect reasonable care and competence); Burns v. Forsyth County Hosp. Auth., 81 N.C. App. 556, 344 S.E.2d 839, 846 (1986) (healthcare provider held to reasonable standard of care); Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144, 146 (1954) (attorneys should exercise best judgment). This rule of reasonableness with respect to professional services has been consistently followed. See Allied Properties v. John A. Blume & Assocs., Eng'rs, 25 Cal. App. 3d 848, 102 Cal. Rptr. 259, 264 (1972) (listing numerous cases where court held professionals to reasonableness standard). See generally Sales, supra note 16, at 18 (essence of service provider is performance of service with reasonable care); Wade, The Attorney's Liability for Negligence, 12 Vand. L. Rev. 755, 760 (1959) (attorney liable only for negligence).

19. See Sales, supra note 16, at 18 (service provider deals face-to-face with consumer). In a service transaction, there is no distributive chain upon which to spread the risk of injury. Id. at 19. Risk distribution represents one of the fundamental underpinnings for the imposition of strict liability against sellers. Id.; see also Greenman v. Yuba Power Prod., 59 Cal. 2d 57, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962); Suvanda v. White Motor Co., 51 Ill App. 2d 318, 201 N.E.2d 313, 317 (Cl. App. 1965). See generally Brook, supra note 14, at 580 (discussing inability of risk distribution in service based transaction).


22. Newmark v. Gimbel's, Inc., 54 N.J. 585, 258 A.2d 697 (1969). In Newmark, a beauty parlor was sued for injuries resulting from the application of a permanent wave solution. Id., 258 A.2d at 698. The product, marketed as a "Helene Curtis Candle Wave," was applied with cotton as the plaintiff's hair was rolled section by section. Id., 258 A.2d at 699. Next, a cream was placed along the plaintiff's hair line and covered with cotton. Thereafter, plaintiff complained of a burning sensation along her scalp. After returning home, plaintiff's head reddened and eventually her entire head was red and blistered. Almost a week later, the plaintiff consulted her dermatologist, who diagnosed her condition as dermatitis. The doctor concluded that her injury resulted from the wave solution. Id., 258 A.2d at 700.

The court explained the application of strict liability as:

One, who in the regular course of a business sells or applies a product (in the sense of the sales-service hybrid transaction involved in the present case) which is in such a dangerously defective condition as to cause physical harm to the consumer-patron, is liable for the harm. Id., 258 A.2d at 702 (emphasis added). The court adopted the approach that the "liability of a manufacturer or retail seller of a product should not be made to depend upon the intricacies of the law of sales." Id. Instead, the application of strict liability hinges on whether the policy reasons underlying the imposition of strict liability are satisfied. Id. Accordingly, the court stated that:

A beauty parlor operator in soliciting patronage assures the public that he or she possesses adequate knowledge and skill to do the things and to apply the solution necessary to produce the permanent wave in the hair of the customer. When a patron responds to the solicitation she does so confident that any product...
In some cases, however, it became clear that the distinction between transactions involving the sale of a product and those involving the rendering of a service was not clearly delineated. Although little doubt exists that traditional professionals such as doctors, lawyers, and architects, as well as nonprofessional providers, such as plumbers, bar-

used in the shop has come from a reliable origin and can be trusted not to injure her. She places herself in the hands of the operator relying upon his or her expertise both in the selection of the products to be used on her and in the method of using them. The ministrations and the products employed on her are under the control and selection of the operator; the patron is a mere passive recipient.

*Id.*, 258 A.2d at 701.

In response to the application of strict liability to a service-predominated transaction, the defendants claimed there was no distinction between the services rendered by a doctor or dentist and those supplied by a beautician. *Id.*, 258 A.2d at 702. Therefore, all three occupations should be judged by the same principles. The court vehemently disagreed with this assertion and in a lengthy diatribe espoused the differences between a physician and beautician. See infra note 30.

Several years later, the Supreme Court of New Jersey reiterated the rule that was handed down by the *Newmark* case that strict liability could be imposed on service providers. See Michalko v. Cooke Color & Chem. Co., 91 N.J. 386, 451 A.2d 179, 186 (1982). In *Michalko*, the supreme court stated that the arguments for imposing strict liability on the providers of services are three-fold. *Id.*, 451 A.2d at 186. First, the risk of harm from defective repair services is great, and customers rely on the expertise of the providers of services as much as they rely on the expertise of the providers of products. Second, there is no reason to believe that providers of services are any less able to spread the cost of accidents than suppliers of products. Third, imposing strict liability would induce providers of services to invest in safety, leading to greater protection for the customers and reduced accident costs. *Id.*


bers,\textsuperscript{28} and automobile repairmen,\textsuperscript{29} provide services, there are other situations where the distinction is somewhat mixed.\textsuperscript{30} For example, situations where the bargain involved air conditioning,\textsuperscript{31} electrical,\textsuperscript{32} heating-

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430 (1984) (strict liability not applicable to plumber-installed water heater that could have been purchased elsewhere).


30. See Newmark v. Gimbel's, Inc. 54 N.J. 585, 258 A.2d 697, 702 (1969) (court distinguishes professionals from non-professional providers). In Newmark, the court explained why the same standard of liability should not be imposed on doctors and dentists as it is in New Jersey on a beautician. See id. The court stated:

The beautician is engaged in a commercial enterprise; the dentist and doctor in a profession. The former caters publicly to a need but to a form of aesthetic convenience or luxury, involving the rendition of nonprofessional services and the application of products for which a charge is made. The dentist or doctor does not and cannot advertise for patients; the demand for his services stems from a felt necessity of the patient. In response to such a call the doctor, and to a somewhat lessor degree the dentist, exercises his best judgment in diagnosing the patient's ailment or disability, prescribing and sometimes furnishing medicines or other methods of treatment which he believes, and in some measure hopes, will relieve or cure the condition. His performance is not mechanical or routine because each patient requires individual study and formulation of an informed judgment as to the physical or mental disability or condition presented, and the course of treatment needed. Neither medicine nor dentistry is an exact science; there is no implied warranty of cure or relief. There is no representation of infallibility and such professional men should not be held to such a degree of perfection. There is no guaranty that the diagnosis is correct. Such men are not producers or sellers of property in any reasonably acceptable sense of the term.

In a primary sense they furnish services in the form of an opinion of the patient's condition based upon their experienced analysis of the objective and subjective complaints, and in the form of recommended and, at times, personally administered medicines and treatment. 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 . . . . Thus their paramount function - the essence of their function - ought to be regarded as furnishing of opinions and services. 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. In our judgment, the nature of the services, the utility of and the need for them, involving as they do, the health and even survival of many people, are so important to the general welfare as to outweigh in the policy scale any need for the imposition on dentists and doctors of the rules of strict liability in tort.

Id., 258 A.2d at 702-05 (citations omitted).


ing,33 or plumbing systems,34 concrete,35 steel,36 swimming pools,37 and
floor coverings38 proved perplexing to the courts. Was the transaction
one involving the sale of a product or the rendering of a service? Was
the injury caused because the product was defective or because the service
rendered was faulty? These threshold questions were very important
because the applicability of section 402A depended upon the answer to
these questions.

The dilemma was soon solved by applying the "predominant factor test."39
This standard, which more often than not presents a question of fact for
the jury,40 is easy to apply. It simply asks what was the predominant factor

Air Heaters, Inc. v. Johnson Elec., 258 N.W.2d 649, 652 (N.D. 1977) (discussing necessary
analysis to determine whether contract for electrical installation is for goods or services).
33. See O'Laughlin v. Minnesota Natural Gas Co., 253 N.W.2d 826, 829 (Minn. 1977)
(discussing whether strict liability can be imposed on installation of heating system); see also State
Hodges, 386 U.S. 912 (1967) (strict liability applied to home builder who defectively installed
water heater in home). In Hodges, the defendants were not only involved in installing the
heater, but they also sold it to the plaintiff. Hodges, 189 So. 2d at 123. This fact aided in
effectuating the policy reasons for imposing strict liability. Id.

In Victor v. Barzaleski, the court held that a handyman who merely installed a heating
system and did not make a sale was not liable under the UCC. Victor v. Barzaleski, 1 U.C.C.
have been liable under 402A because he only provided a service.
pipes and fittings considered service predominant contract); see Cork Plumbing Co. v. Martin
Bloom Assocs., 573 S.W.2d 947, 958 (Mo. Ct. App. 1978) (plumbing construction contract
which included materials predominate by service). See generally Annotation, Applicability of
UCC Article 2 to Mixed Contracts for Sale of Goods and Services, 5 A.L.R. 4TH 501, 508
(1981) (discussing numerous cases dealing with hybrid sales/service contracts).
(concrete provided in construction contract constituted sale of goods); S.J. Groves & Sons Co.
v. Warner Co., 576 F.2d 524, 528 (3d Cir. 1978) (contract for delivery of ready-mixed concrete
was sale of goods). But see R. C. Freeman v. Shannon Constr. Co., 560 S.W.2d 732, 737
(Tex. Civ. App. 1977) (essence of contract between general contractor and subcontractor
for concrete was service).
structural steel constituted sale of product). But see United States v. Framen Steel Supply Co.,
435 F. Supp. 681, 685 (S.D.N.Y. 1977) (contracts for supply of steel were financing agreements
not sale of goods).
1975) (contract for installation of swimming pool predominately service) with Riffe v. Black,
548 S.W.2d 175, 177 (Ky. Ct. App. 1977) (installation of pool held to be sale of product).
App. 1982) (major component of contract price was cost of carpeting not installation labor
not for sale of goods just because cost of materials included in price).
595, 597 (1986) (essence of relationship hospital provides while installing pacemaker is profes-
sional services); Trujillo v. Berry, 106 N.M. 86, 738 P.2d 1331, 1334 (Ct. App. 1987) (car
wash supplier held strictly liable as product predominated service); Perlmuter v. Beth David
Hosp., 308 N.Y. 100, 123 N.E.2d 792, 794 (1954) (hospital provides requisite human skill
necessary to restore patient's health). See generally Cantu, Reflections, supra note 10, at 214.
of the transaction. 41 If the injured plaintiff entered into the bargain because he wished to purchase a product, as opposed to the associated service, the transaction is considered to be for a product.

A good example would involve contact lenses. 42 When individuals are tested, examined, and fitted with such lenses, the question arises whether they purchased a product (the lenses) or whether they bargained for the attending services. What induced the individual to enter into the bargain? Would any lens suffice, or was the skill of the attending optometrist or ophthalmologist the main reason for the bargain?

As a rule, if it is established that the defendant’s knowledge, expertise, or reputation was the prevailing reason for entering into the agreement, the transaction will be deemed a service. 43 If, however, such proficiency was incidental, the transaction will be considered the sale of a product. 44 After

of whether hospital gown which caught fire was essential to professional relationship presented jury question).

41. See, e.g., Anthony Pools v. Sheehan, 295 Md. 285, 455 A.2d 434, 441 (1983) (predominant nature test should not be applied mechanically). The court in Sheehan argued that the predominant factor test should be modified to a “gravamen” test. The court quoted Hawkland’s treatise on the Uniform Commercial Code where he wrote:

Unless uniformity would be impaired thereby, it might be more sensible and facilitate administration, at least in this grey area, to abandon the “predominant factor” test and focus instead on whether the gravamen of the action involves goods or services. For example, in Worrell v. Barnes, if the gas escaped because of a defective fitting or connector, the case might be characterized as one involving the sale of goods. On the other hand, if the gas escaped because of poor work by Barnes the case might be characterized as one involving services, outside the scope of the U.C.C.


42. See Barbee v. Rogers, 425 S.W.2d 342, 342 (Tex. 1968) (strict liability does not apply to sale of contact lenses). The plaintiff in Barbee sued Rogers, who was doing business as Texas State Optical, for improperly fitting the plaintiff with contact lenses. Id. at 343. The plaintiff also alleged that he was given improper prescriptions and instructions for the use of the contacts. After pointing out the statutory definition of the practice of optometry, the court concluded that the defendant’s business (i.e., optometry plus the sale of glasses) falls between the distinction separating the practice of optometry and the merchandizing of retail goods. Id. at 345. The court recognized that Texas State Optical had characteristics of both a professional service and a merchandising concern. The court based its decision on the fact that there was no evidence of a defect in the lenses themselves. Id. at 346. The court also pointed out that the contact lenses were not a finished product which the general public was solicited to purchase. Id.

This case signifies that whether or not a good is a product depends upon whether it was completely assembled and available to the general public before sold to a consumer. This logic is erroneous if applied to manufacturers who customize a product or operate on a zero inventory make-to-order business. Surely, they should not be exempt from strict liability.


all, it would be fair to assume that if the principal reason for entering into the bargain was the subject matter, the transaction concerns the sale of a product. If not, the agreement must be viewed as one where a service was rendered. In other words, if any lens would suffice, then the plaintiff clearly entered into a sales transaction. If, however, the lenses were purchased as a result of the accompanying service, the converse would be true. As stated above, these questions are sometimes very complex. By definition and necessity, juries must provide the solution.

The answer to the initial sales/service dilemma will determine whether the plaintiff's remedy will lie in negligence or strict liability. If the transaction is a service, strict liability is generally not available. If the transaction involves the sale of a product, strict liability is an available remedy. In hybrid situations, the dilemma rests upon the scope of the term "product."

III. Real Estate Transaction

Nowhere is this dilemma better illustrated than in transactions involving real estate. Historically, houses have never been considered a product. Land and everything permanently attached thereto is considered real property, and everything else is considered personal property. If, therefore, one is to assume that a "product" is synonymous with a chattel or personal property, there would be little difficulty with a rule that section 402A never applies to real estate. It seems obvious that because land is the antithesis of personal property, strict liability would never be an issue when a house is allegedly defective. In fact, however, the opposite is true.

The application of section 402A to the sale of a house occurred gradually. In Humber v. Morton, the Texas Supreme Court took the first step toward the rule that a house is a product by recognizing that the common law warranties of good workmanship and habitability were implied in the "gown involves sale of product). In Thomas, the plaintiff died after suffering from burns caused when plaintiff dropped a lighted match and ignited his hospital gown. Id. at 793. In holding that the trial court erred in refusing to submit a strict liability issue to the jury, the appellate court stated: "Where, as here, a hospital apparently supplies a product unrelated to the essential professional relationship, we hold that it cannot be said that as a matter of law the hospital did not introduce the harmful product into the stream of commerce." Id. at 796-97.

45. See supra note 40 and accompanying text.
46. See supra notes 17-20 and accompanying text.
47. See supra note 22 and accompanying text.
48. See supra note 15 and accompanying text.
49. BLACK'S LAW DICTIONARY 1096 (5th ed. 1979).
50. See Bismarck Tribune Co. v. Omdahl, 147 N.W.2d 903, 906 (N.D. 1966) (personal property is property other than real property).
52. Id. at 555. By implying warranties from the sale of a home, the Texas Supreme Court expressly abolished the long-standing doctrine of caveat emptor. Id. at 562.
contract for the sale of a new home. While the court in Humber did not fully explain their holding with regards to implying these warranties, subsequent court decisions gave several reasons for this position. First, courts recognized that the purchase of a new house is one of the most important agreements that an individual will ever make.\(^5\) Buying a house is not an everyday transaction; therefore, buyers are entitled to the protection offered to them by these legal principles.\(^6\) In addition, the parties involved in this type of contract do not share equal bargaining power.\(^5\) Typically, the builder has much more knowledge than the average home buyer.\(^6\) Furthermore, because many defects in a house may be latent, or may go undetected to even the most vigilant of purchasers, the buyer must rely heavily upon the skill, knowledge, and expertise of the builder to provide a suitable abode.\(^5\) Aside from this element of superior knowledge, the builder/vendor is also in a much better position to prevent the occurrence of any major problems.\(^6\) For these reasons, builders should warrant the suitability of their work.

Additionally, standard-form contracts are generally used in this type of purchase, and because express warranties are seldom given, and almost impossible to negotiate, the unsuspecting buyer is again forced to rely upon the skills of the builder.\(^5\) Finally, the applicability of implied warranties to the purchase of a house is further supported by the idea that contractors hold themselves out as possessing the necessary expertise in building houses.\(^6\) Buyers would never encounter a contractor averring to the contrary; consequently, home buyers expect good workmanlike skills and a habitable home.\(^6\) With such arguments, it was easy to extend the common law


\(^{54}\) See McDonald, 398 A.2d at 1289.

\(^{55}\) Id.


\(^{57}\) McDonald, 398 A.2d at 1289.

\(^{58}\) Id.

\(^{59}\) Id., 398 A.2d at 1290.

\(^{60}\) Id.

\(^{61}\) See Comment, The Implied Warranty of Habitability Doctrine in Residential Property Conveyances: Policy-Backed Change Proposals, 62 WASH. L. REV. 743, 747 (1987) (builder-vendor purposely creates expectation of quality home). The builder-vendor creates not only an expectation that the home is liveable but that the home is "truly wonderful." Id.; accord
warranties of good workmanship and habitability, hybrids of tort and contract, to the arena of real estate transactions. New home buyers, as well as their subsequent purchasers, now have this protection, and as a result, the traditional rule that implied warranties never arose in real estate transactions became a historical fact.

The first case to hold that new houses were products and that strict liability under section 402A was applicable to defective houses was *Schipper v. Levitt & Sons, Inc.* The court, faced with facts involving a sixteen-month-old child with extensive injuries resulting from a defective water heater, reasoned that houses which are mass-produced are no different from automobiles because both are the end product of an assembly line technique. Several policy considerations influenced the decision, but the most cogent were reminiscent of those used to justify the applicability of the common law warranties discussed above. The court specifically noted the unequal bargaining positions of the parties, the buyer's reliance upon the skill, knowledge, and expertise of the contractor, the builder's ability to spread the cost of liability, and the corresponding inability of the buyers to protect themselves from the risk of probable loss. By allowing a cause of action in strict liability, the court in *Schipper* established that a house could be a product. Therefore, strict liability will apply to a house which is proven defective and unreasonably dangerous.


63. *Id.*, 207 A.2d at 316. The child was severely scalded by hot water from a bathroom faucet. *Id.* The heating system used to provide hot water for the house also served the purpose of heating the house by pumping the hot water through coils imbedded in the cement foundation of the house. *Id.*, 207 A.2d at 316-17. The instructions that accompanied the heating system acknowledged that the water was "hotter than that to which you are accustomed" and instructed the homeowners to use the cold water tap to mix the water to an appropriate temperature. *Id.*, 207 A.2d at 317. Despite these instructions, members of the plaintiff's family were mildly burned on several occasions. The only way to reduce the temperature of the water coming out of the tap, other than using the cold water tap, was the installation of a mixing valve at the heating system. *Id.*

64. *Id.*, 207 A.2d at 326. "Buyers of mass produced development homes are not on equal footing with the builder vendors and are no more able to protect themselves in the deed than are automobile purchasers in a position to protect themselves in the bill of sale." *Id.*
65. *Id.*
66. *Id.*, 207 A.2d at 325. With a mass-produced home, the buyer does not have an architect or other professional advisor under his or her employ. Also, the buyer usually can do no more than a superficial inspection of the home. *Id.*
67. *Id.*, 207 A.2d at 326.
68. *Id.*
69. See *id.*, 207 A.2d at 329-30. The court in *Schipper* found that the heating system itself was not defective; therefore, the manufacturer could not be held strictly liable. *Id.*, 207 A.2d at 329. The defect arose as a result of improper installation of the heating system due to the builder vendor's failure to install the mixing valve. *Id.*
Interestingly, the Schipper decision, although refuted by some jurisdictions,70 has been followed71 and even extended by some courts to apply to the sale of custom homes.72 The underlying problem in all of these cases, however, was the central question of whether or not a house is a product. Neither section 402A nor the accompanying comments offer any clue in answering this question. By necessity, therefore, in order to equate a house to a product, the courts, in each case since Schipper, have had to examine the rationale behind the applicability of section 402A.73 One of the considerations specifically mentioned has been the public’s right to health and safety.74 It was this concern that originally encouraged the courts to hold a manufacturer of defective goods strictly liable.75 If the product in question proved defective, and if that defect caused injury, the concept of strict liability applied. Therefore, it is logical to rely upon this same reasoning to extend the concept of strict liability to real estate transactions.

The courts have also relied upon the above discussed reasons for extending common law warranties to the construction of houses when applying strict liability to transactions involving real estate.76 These reasons include the prospective buyer’s inability to discover potential defects in the construction of the house,77 reliance upon the expertise, skill, and knowledge of the


73. See Cross & Murray, supra note 71, at 705.


75. See supra note 7.


77. Id.
contractor,\textsuperscript{78} the ability of the builder to spread the cost of liability,\textsuperscript{79} and, of course, the mass production technique of the builder/vendors in the construction of new houses.\textsuperscript{80} The courts have also reasoned that houses are the equivalent of a product because they enter the marketplace in the condition intended by the contractor in much the same way as any other produced goods.\textsuperscript{81} These decisions have all reached one common conclusion: a house is a product. While this proposition may run counter to what we may have originally learned, it carries a great deal of authority.\textsuperscript{82} However, it is by no means a unanimous position.

Other jurisdictions, when faced with the exact same question, have arrived at the opposite conclusion.\textsuperscript{83} These cases emphasized the fact that injured plaintiffs involved in real estate transactions have more than adequate relief offered to them by traditional tort and contract theories.\textsuperscript{84} As such, there is no need to extend strict liability, and, therefore, it is not necessary to reach the conclusion that a house is a product.\textsuperscript{85} In addition, these courts have maintained that extending this concept would provide a powerful cause of action to individuals with somewhat dubious claims.\textsuperscript{86}

One of the original reasons for strict liability was to offer relief where none was available and to discourage litigation where there was no cause of action. Furthermore, allowing strict liability to apply to the sale of a new home would preclude a defendant/contractor from asserting defenses which have traditionally applied to the construction of houses.\textsuperscript{87} In other words, the purchasing public, when buying a house, have never believed that they were acquiring a perfect building. As such contractors should only be held to the standard of the reasonable prudent person. These courts have also reasoned that to hold that a house is a product and apply strict liability to any damaging event resulting therefrom is surpassing the initial intent of the \textit{Restatement}.\textsuperscript{88} Specifically, buyers of homes were not within the class

\textsuperscript{78} Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749, 752 (1969); Cross & Murray, \textit{supra} note 71, at 706.

\textsuperscript{79} See \textit{Schipper}, 207 A.2d at 326 (risk of loss on developer in better economic position to bear loss); \textit{Kriegler}, 74 Cal. Rptr. at 753 (developer who created danger in better economic position to bear loss than injured party); see also \textit{Cross & Murray, supra} note 71, at 706 (deep pocket considerations).

\textsuperscript{80} Cross & Murray, \textit{supra} note 71, at 706.


\textsuperscript{82} See \textit{supra} note 70.

\textsuperscript{83} See \textit{supra} note 72.


\textsuperscript{85} See \textit{id}.

\textsuperscript{86} \textit{Id.}; accord Milan v. Midland Corp., 282 Ark. 15, 665 S.W.2d 284, 284-85 (1984) (plaintiff alleged defendants caused motorcycle accident by designing street with too sharp a curve).

\textsuperscript{87} Note, \textit{Strict Liability, supra} note 84, at 118. Some defenses that would be lost in a strict liability cause of action include disclaimer of implied warranties, lack of reliance on warranties, failure to notify defendant of breach of warranty, and lack of privity. See 63 \textit{Am. Jur. 2d Products Liability} § 528 (1984).

\textsuperscript{88} See, \textit{e.g.}, Chandler v. Bunick, 279 Or. 353, 569 P.2d 1037, 1039 (1977). The court in
of individuals that section 402A was designed to protect. To hold otherwise 
violates the separation of powers doctrine in the Constitution. Because 
legislatures, not courts, are the proper forums to extend a new concept of 
liability, a court should never decide that a house is a product in order to 
extend the concept of strict liability to an allegedly defective structure.

Both sides of this argument claim respectable authority for their posi-
tions. What is interesting, however, is how a simple word like "product" 
can conjure so many meanings. In some jurisdictions, it includes houses 
which were traditionally thought of as real property and therefore immune 
from section 402A. Alternatively, several jurisdictions hold that items which 
are personal property are not products within the scope of section 402A.

IV. Blood

Unlike the discussion of sales and services or real estate transactions, the 
applicability of the term "product" has been clearly established in the 
area involving blood. Forty-nine jurisdictions have enacted what can be 
collectively called "blood shield" statutes. These statutes provide that such

Chandler stated that "the imposition of strict liability is the response to some demonstrated 
public need where the traditional legal theories have been found inadequate to the task." Id.
89. See id.; see also Wright v. Creative Corp., 30 Colo. App. 575, 498 P.2d 1179, 1182-
83 (Cl. App. 1972) (easier for buyer to make "meaningful inspection" of structure); Chapman 
v. Lily Cache Builders, 448 Ill. App. 3d 919, 362 N.E.2d 811, 813 (1977) (difference between 
manufacturer of homes and manufacturer of goods).
90. See Mike Bajalia, Inc. v. Amos Constr. Co., 142 Ga. App. 225, 235 S.E.2d 664, 665-
66 (Cl. App. 1977) (court refused to allow strict liability cause of action in deference to state 
statute).
91. See supra notes 70, 72.
92. See supra notes 13-91 and accompanying text.
93. See Ala. Code § 7-2-314 (1984) (providing blood is service); Alaska Stat. § 45.02.316(e) 
provider liable for negligence or wilful misconduct only); Cal. Health & Safety Code § 1606 
(Deering 1990) (blood transfusion by law is service not sale); Colo. Rev. Stat. § 13-22-104 
(blood is service not sale); Del. Code Ann. tit. 6 § 2-316(5) (1975) (blood is service not sale); 
D.C. Code Ann. § 28-2-314 (1990) (against public policy to hold blood bank strictly liable); 
Fla. Stat. Ann. § 672.316(5) (West 1991) (providing blood is rendition of medical services); 
§ 325-91 (1985) (no implied warranty that blood is pure where no scientific test to detect 
disease is available); Idaho Code § 39-3702 (1985) (providing blood is service except if sold 
for profit); Ill. Ann. Stat. ch. 111 1/2 para. 5102(2) (Smith-Hurd 1988) (strict tort liability 
not applicable to blood providers); Ind. Code Ann. § 16-8-7-2 (West 1990) (procurement of 
blood is a medical service which does not give rise to strict liability); Iowa Code Ann. § 
142A.8 (West 1989) (providing blood is service not sale and strict liability not applicable); 
unless negligence proven); Ky. Rev. Stat. Ann. § 139.125 (Michie/Bobs-Merrill 1991) (pro-
cessing and distribution of blood deemed service not sale); La. Civ. Code Ann. art. 2322.1 
(West Supp. 1991) (strict liability not applicable to nonprofit blood providers); Me. Rev. Stat. 
Ann. tit. 11, § 2-108 (Supp. 1990) (providing blood is service regardless of whether any
transactions are the rendering of a service or provide explicitly and/or implicitly that strict liability shall not apply. Only one jurisdiction, New Jersey, might allow a strict liability action against a hospital or blood bank for damages arising out of a blood transfusion. This liberal view follows


94. E.g., Ariz. Rev. Stat. Ann. § 32-1481 (1986) (nonprofit blood bank cannot be strictly liable); Ill. Ann. Stat. ch. 111 1/2, para. 5102(2) (Smith-Hurd 1988) (strict tort liability not applicable to blood providers); Ind. Code Ann. § 16-8-7-2 (West 1990) (procurement of blood is a medical service which does not give rise to strict liability). These statutes, along with many others, expressly state that blood provider cannot be held strictly liable.


96. See Note, New Jersey Court Applies Theory of Strict Liability to Hospitals and Blood
from New Jersey's interpretation that strict liability is an available remedy against a service provider. Therefore, in most jurisdictions, blood is not considered the equivalent of a product under section 402A of the Restatement.

V. Electricity

"What is electricity? Simply stated, it is a force, like the wind . . . " Is it a product? The answer to this question, as in those cases involving


97. See supra note 22 and accompanying text.
98. See supra note 93 and accompanying text.
99. Pierce v. Pacific Gas & Elec. Co., 186 Cal. App. 3d 68, 212 Cal. Rptr. 283, 288 n.3 (1985) (holding that electricity is product under § 402A). Electricity has been defined as "a form of energy that can be made or produced by men, confined, controlled, transmitted and distributed to be used as an energy source for heat, power, and light and is distributed in the stream of commerce." Ransome v. Wisconsin Elec. Power Co., 87 Wis. 2d 605, 275 N.W.2d 641, 643 (1979).

In Pierce, a home consumer of electricity was injured due to the mechanical failure of a transformer that sent 7000 volts of electricity into her home. Pierce, 212 Cal. Rptr. at 285. The court noted: "Electricity alone cannot perform work. Electricity alone is useless from a consumer's point of view. Electricity is a stream of electrons that is created, transmitted, distributed, and converted to energy all within milliseconds. No California court has ever held that electricity is a product." Id.; 212 Cal. Rptr. at 288 n.3. In this case, a California court for the first time held that Pacific Gas & Electric as a commercial supplier of electricity could be held strictly liable for personal injuries. Id., 212 Cal. Rptr. at 292. The basis of the court's decision was the numerous policy considerations underlying the imposition of strict liability.

Id., 212 Cal. Rptr. at 291. These policy considerations include:
1. That the defendant is in a much better position than a plaintiff to detect and correct any problems which inevitably occur in electrical supply.
2. The imposition of strict liability creates an incentive for defendants to avoid accidents before they occur by investing in safer equipment.
3. Imposing strict liability spreads the costs of personal injuries among millions of electricity consumers.
4. The defendant who profited from the sale of electricity should assume the associated costs involved.

Id., 212 Cal. Rptr. at 291-92. The Pierce court was clear to distinguish the facts in their case from a situation involving injuries initiated by an act of god. The court noted that:
Where electricity strikes a powerline and enters a consumer's home, causing damage, the utility is not strictly liable because it has not marketed a "product" at all. In such cases the utility has provided only a connecting medium through which the force of nature enters the consumer's home and causes injury.

Id., 212 Cal. Rptr. at 292 n.10. A judicial response to the aforementioned policy considerations justifying holding an electrical power company strictly liable was espoused by the Minnesota Supreme Court in Ferguson v. Northern States Power Co., 307 Minn. 26, 239 N.W.2d 190 (1976). In Ferguson, the court stated that while "spreading the cost of serious injury over all consumers of electricity is equitably more appealing . . . the court is persuaded by the amicus
blood,\textsuperscript{100} depends upon the jurisdiction involved. In determining whether electricity is a product, courts have been much more creative in determining their particular position. For example, some courts hold that electricity is a service to which only the action of negligence is applicable.\textsuperscript{101} These jurisdictions view electricity as a commodity which can not be packaged, labeled, and sold and, therefore, is not a fungible good. By definition, then, electricity is a service.\textsuperscript{102} Other courts maintain that even though electricity constitutes a service, non-code implied warranties still apply.\textsuperscript{103} The court in one case held that because other states applied implied warranties of fitness and merchantability to service transactions, electricity should not be excluded from these warranties.\textsuperscript{104}

\textsuperscript{100} See supra note 93 and accompanying text.


\textsuperscript{103} Cf. Buckeye Arms Co. v. Buckeye Union Fire Ins. Co., 38 Mich. App. 325, 196 N.W.2d 316, 318 (1972). But see Wirth v. Mayrathe Indus., 278 N.W.2d 789, 792 (N.D. 1979) (rejecting Buckeye case and holding that implied warranties do not apply to sale of electricity). The court in Buckeye held that non-code implied warranties still apply on the sale of electricity even though electricity is a service rather than a "product" or "good." Buckeye, 196 N.W.2d at 318.

\textsuperscript{104} Aversa v. Public Serv. Elec. & Gas Co., 186 N.J. Super. 130, 451 A.2d 976, 978 (Super. Ct. Law Div. 1982). The court notes that many of the cases that have held the liability
In addition, some courts have held that electricity met the definition of goods under the Uniform Commercial Code in that it is a thing, existing and movable, and as such subject to the Code’s implied warranties. Other courts view electricity as a product subject not only to the Uniform Commercial Code but also to the ramifications of section 402A. In this last instance, the courts have taken note of the fact that electricity is a substance which can be manufactured, distributed, and sold in the same manner as more tangible goods, and as a result should be considered a product. Finally, other jurisdictions have adhered to the position that while electricity itself may constitute a product for purposes of applying the doctrine of strict liability, its distribution should be viewed as a service subject to theories of recovery allocated to that type of transaction.

Even before the promulgation of section 402A, some courts held that electricity constituted a product. In these instances, much attention was
given to the fact that electricity could be produced, stored, measured, moved, or transported from one place to another and bought and sold by a definite and well-understood standard.\textsuperscript{110} Under these circumstances, it was logical to consider electricity in terms of a modern-day commodity.\textsuperscript{111} Since 1965, however, in deciding the issue of whether or not electricity constituted a product, much attention has been given to the policy reasons for imposing strict liability.

These policy reasons include the fact that section 402A was adopted to make it easier for an injured individual to recover.\textsuperscript{112} Section 402A is plaintiff-oriented\textsuperscript{113} and better suited to a situation involving electricity where the vast and complex nature of an electrical power plant may be beyond the ken of the ordinary layman. In other words, even though negligence may be present, it may not be readily apparent. Therefore, strict liability should apply, and since it applies only to "products," electricity should be considered as such.

The second reason for imposing strict liability is that it provides an incentive for improved product safety.\textsuperscript{114} If individuals or corporations know that they will have to pay if one of their defective products causes injury, they will attempt to avoid such damaging events in the future. Electricity is subject to improved handling, and, therefore, section 402A should apply.\textsuperscript{115} Finally, strict liability reallocates resources. Stated differently, by imposing strict liability the risk of loss may be spread among all individuals consequence, or effect."
\textit{Id.}\n
The court continued by establishing electricity as a commodity. The court explained that in the language of everyday life in the strictly commercial sense of the term, "electricity" is "produced," "stored," "measured," "bought and sold." It is moved or transported from place to place in containers or by cable. It is something that one trades or deals in. We buy it and pay for it and determine the amount of the purchases by a definite and well-understood "standard." Brought into being as a product, it exists in modern life as a commodity.

\textit{Id.}\n
11. \textit{Id.}\n12. Pierce v. Pacific Gas & Elec. Co., 166 Cal. App. 3d 68, 212 Cal. Rptr. 283, 291 (1985). According to the court, one of the main policy grounds for applying strict liability to electricity is to provide "a short-cut to liability where negligence may be present but is difficult to prove." \textit{Id.} The court stated:

Proof of negligence in cases such as this requires a plaintiff to present to a jury evidence of the inner workings of an electrical power system of vast and complex proportions. The technical operation of such systems and of electricity itself is far beyond the knowledge of the average juror. The expert witnesses who can explain such systems to the jury are concentrated within the industry itself and may be reluctant to serve as expert witnesses in plaintiffs' cases.

\textit{Id.}\n
using the product instead of a few blameless victims.\textsuperscript{116} This is especially true in situations involving electricity where the cost of tort liability would be spread among millions of consumers.\textsuperscript{117} Because the basic policy reasons for imposing strict liability are present, it should apply even though it requires designating a "force like the wind"\textsuperscript{118} as a product.

\textbf{VI. Other Situations Where the Term "Product" Has Been Applied}

The following cases illustrate the way in which ingenious advocates and willing courts have joined together and expanded the meaning of the term "product." Other than showing how exaggerated the meaning of a word can become, no clear consensus of the meaning of the term has emerged. For example, even though section 402A is silent on the subject of component parts, a majority of the jurisdictions have held that component parts may be considered products and that their manufacturers can be held strictly liable.\textsuperscript{119} The only caveat to this rule is that the component part, even though incorporated into and part of another object, must reach the consuming public without substantial change.\textsuperscript{120} This apparently means that if the component part is capable of being identified as a separate and individual entity of the total integral finished object, such as a windshield in an automobile, then it is a product.\textsuperscript{121} If the component part is no longer distinguishable or capable of being identified on its own, it loses its status as a product. The courts thus far have differed as to how much change must take place in order for this transformation to take place.\textsuperscript{122}

In addition, it has been held that when a commodity such as water is sold by a city and distributed by a water works system, it is a product, and if defective, the city is subject to strict liability.\textsuperscript{123} In a situation where the water coming out of a kitchen tap had been intermingled with a flammable gas that was ignited by the plaintiff's cigarette, the court reasoned that the case was analogous to those cases in which food products had been contaminated by substances such as glass, rocks, or pieces of metal.\textsuperscript{124} As a result, the court concluded that the product was defective and unreasonably dangerous,\textsuperscript{125} and the city was subject to strict liability even though the injury did not occur as a result of drinking water.\textsuperscript{126}

\textsuperscript{116} Id., 212 Cal. Rptr. at 292.
\textsuperscript{117} Id.
\textsuperscript{118} See supra note 99 and accompanying text.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id. at 227.
\textsuperscript{123} Moody v. City of Galveston, 524 S.W.2d 583, 588 (Tex. Civ. App. 1975).
\textsuperscript{124} Id. at 589; see also Gladiola Biscuit Co. v. Southern Ice Co., 267 F.2d 138, 140 (5th Cir. 1959).
\textsuperscript{125} Moody, 524 S.W.2d at 589.
\textsuperscript{126} Id.
Decisions which will have a lasting effect well into the next century are those involving computer software. In this day of advanced technology when complex activities such as diagnosing medical problems, determining industrial robots, determining architectural stress, directing automatic airplane pilots, and supervising chemical or nuclear plants are all accomplished by giant, massive, and complex computers, some courts may hold that the software which guide them are products. The fact that the software can be owned, adjusted, repaired, and, in some cases, altered makes them resemble any other fungible goods.

Finally, the most recent genre of cases to expand upon the meaning of the term "product" are those dealing with what can best be described as defective ideas. Examples of this type of case include erroneous information in a manual containing instructions for the operation and maintenance of a radial saw, as well as erroneous information in an aircraft instrument approach chart. In both cases, the court held that the falsity of information constituted a defective product. In the aircraft approach situation, the court reasoned that because the chart was mass-produced, the defendant fit into the traditional mold of an individual who could bear the cost


130. Neuman, supra note 127, at 7-8; see also CPU Fails, Two Jets Nearly Collide, COMPUTERWORLD, July 9, 1979, at 1.


132. Lawrence, supra note 127, at 9; see also RR Indus. v. Lab-Con, Inc. 772 F.2d 543, 546 (9th Cir. 1985).

133. Comment, Strict Liability for Defective Ideas in Publications, 42 VAND. L. REV. 557, 567 (1989); see also Sears, Roebuck & Co. v. Employer’s Ins. of Wausau, 585 F. Supp. 739, 745 (N.D. Ill. 1983). In this case, the insurance company claimed they were not required to defend Sears because the insurance applied to the manual itself and not the words described within the manual. Sears, 585 F. Supp. at 745. The court held, however, that this was not a valid argument. Id. The court did acknowledge that a products liability action for "defective ideas" within the manual was inappropriate. Id.

134. Comment, supra note 133, at 570. In Aetna Casualty & Sur. Co. v. Jeppesen & Co., 642 F.2d 339, 342 (9th Cir. 1981), the court held that § 402A applied to aircraft instrument approach charts. In this case, the survivors of a plane crash claimed that the defective chart caused the crash. Id.

135. Comment, supra note 133, at 570-72.

of strict liability. This burden could be accomplished by distributing the risk of injury through insurance and higher prices spread out among the entire production, which was preferable to having the cost of injury borne by the individual injured plaintiff. It should be noted, however, that these cases have not been widely followed. In fact, more often than not, analogous fact situations have produced the opposite conclusion. For example, courts have held that credit reports, a magazine article dealing with autoerotic asphyxiation, a science experiment in a text book, a recipe in a cook book, as well as the lyrics in a song which allegedly influenced a teenager to commit suicide, are not products. In all of these cases the courts, stressing the importance of the first amendment, took a strong position against imposing strict liability upon the expression of ideas.

The cases cited above, however, should be taken into consideration when determining the emerging meaning of the term "product." The fact that such allegations have been made is indicative of the current thought. It also shows that inroads into the further expansion of the term "product" are being made. Once a new idea has been expressed in a dissenting opinion, it is sometimes only a matter of time before a new cause of action emerges.

VII. Conclusion

This article illustrates how far courts have come in interpreting the term "product" in section 402A of the Restatement (Second) of Torts. Courts have generally avoided the dictionary's definition and have instead utilized a strict liability policy approach in the interpretation of the term. This has led to some unusual results. Today, transactions involving traditional


138. Herceg v. Hustler Magazine, 565 F. Supp. 802, 803 (S.D. Tex. 1983), modified on other grounds, 814 F.2d 1017 (5th Cir. 1987), cert. denied, 485 U.S. 959 (1988). In this case, the plaintiffs brought a wrongful death suit against Hustler magazine alleging that an article on autoerotic asphyxiation was an unreasonably dangerous and defective product which caused the death of the plaintiff's son and brother. The two men were attempting to duplicate the sexual technique described in the magazine, which was intended to increase erotic pleasure during masturbation.

139. Walter v. Bauer, 109 Misc. 2d 189, 439 N.Y.S.2d 821, 822 (Sup. Ct. 1981), modified on other grounds, 88 A.D.2d 787, 451 N.Y.S. 533 (App. Div. 1982). In this case a child suffered injuries after attempting to duplicate an experiment involving a ruler and rubber bands. The court rejected the strict liability claim on the basis that the plaintiff "was not injured by use of the book for the purpose for which it was designed, i.e., to be read." Id., 439 N.Y.S.2d at 822.

140. Cardozo v. True, 342 So. 2d 1053, 1056 (Fla. Dist. Ct. App. 1977). The court concluded that strict liability did not apply to the recipe ideas contained within the book. Id.


142. Id.

143. Lewis v. Big Powderhorn Mountain, Ski Corp., 69 Mich. App. 437, 245 N.W.2d 81, 83 (1976). In the dissenting opinion Presiding Judge Burns stated that "the painter's 'product', if there must be one, is the performance of his work." Id.

144. See, e.g., Cantu, Privacy, 7 Sr. Louis U. PUB. L. Rev. 313, 322 (1988).

145. See supra note 12 and accompanying text.
services, houses, land, blood, electricity, component parts, water, computer software, and ideas have all been held in one form or another to constitute a product. How much further will we go? The answer to this question depends on the ingenuity of plaintiffs and the willingness of courts to extend the protection of section 402A to individuals injured by a commodity placed into the stream of commerce. The trend thus far has been to extend the meaning of the term beyond that originally contemplated in 1965 when section 402A was promulgated. This movement has met with little resistance as the courts have reached far in attempting to cloak injured plaintiffs with the protection offered by the concept of strict liability.