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ignorant or incompetent, that it is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere with this kind of controversial misconduct.⁸⁷

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⁸⁷ MILL, ON LIBERTY 47 (Blackwell ed. 1947), noted in *Sullivan*, 376 U.S. at 272 n.13.

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THE MEDICAL PROFESSION AND STRICT LIABILITY FOR DEFECTIVE PRODUCTS—A LIMITED EXTENSION

"The cases on product liability are emerging as early chapters of a modern history on strict liability that will take long in the writing."¹ This note will consider whether an extension of strict liability for defective products to the medical profession is a feasible chapter in this history. Should the doctor be held strictly liable when a defect in the drug, organic human product, or surgical insert he administers to his patient causes harm?²

The facts of *Inouye v. Black*³ may be helpful as an illustration of the particular area this note will cover. A physician wired together two of plaintiff's cervical vertebrae. The wire later shattered, with the fragments migrating to various parts of the spinal area, necessitating surgical removal. The wires had been expected to break, but not to the extent that resulted nor in the time in which the actual fragmentation took place. There was thus a strong probability that the wire was defective. The patient sued the doctor on the ground of negligence but failed to recover. The court reasoned that no negligence could be found on the part of the doctor because all facts indicated that the wire was defective, rather than that the physician had been careless. Now, if the additional assumption is made that the manufacturer of the wire is not amenable to suit, what relief has the patient in this case for the injury done to him? That he has suffered harm is beyond doubt. However he cannot recover against the doctor, for he has not been negligent, and he cannot sue the manufacturer on the basis of strict liability for product defects unless he can bring an action in a jurisdiction where the manufacturer is amenable to suit. Why not compare the doctor to a retailer of goods and allow direct recovery against him on strict liability for product defects? If the hospital is the entity which has supplied the goods the same result could follow by analogy, in a suit

¹ Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 376 (1965).

² Professional charitable work, or treatment performed in charitable hospitals, is not here considered, due to the special rules of law which have developed around such institutions. See 15 AM. JUR. 2D *Charities* §§ 148, 152, 153, 154, 156 (1964).

³ 238 A.C.A. 36, 47 Cal. Rptr. 313 (1965).

against the hospital. This note is a consideration of the feasibility of such a suit and a discussion of the inherent problems and their possible solutions.

Requisites for Recovery in Products Liability

For any plaintiff to recover for injuries caused by defective products, he must show a duty to himself which has been breached by the defendant, causing the resultant injury.⁴ Let us consider the bases under which such a duty may be imposed in products liability. There are two main areas in which the duty arises: the contract area of implied and express warranties⁵ and the tort area of strict liability for product defects.⁶ Since there would seem to be no sales contract involved in the subject being considered, the sales warranties in the contract area are not applicable⁷ and need not be considered.

The tort duty not to supply defective products is of a different nature from that of sales warranties. It devolves upon anyone who sells or supplies a product. Justice Traynor, in the case of *Greenman v. Yuba Power Products Inc.*,⁸ states: "[T]he recognition that the liability is not assumed by agreement but imposed by law [makes] clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort."⁹ The duty not to supply defective products stands alone, unaffected by contractual disclaimers, privity requirements, or other contractual rules.¹⁰ It is not sustained by any contractual agreement, express or implied, but is a duty imposed by law on the supplier of the product because of the relationship between him and the injured party as a result of his station in the channel of distribution.¹¹ The duty is not owed merely to the immediate parties to an agreement but runs to any user or consumer of the product.¹²

It is to be noted that the duty imposed on the supplier of a product has no connotation of moral fault or blame.¹³ Legal fault is the only consideration of importance.

⁴ PROSSER, TORTS 4-5 (3d ed. 1964) [hereinafter cited as PROSSER].

⁵ *Perlmutter v. Beth David Hosp.*, 308 N.Y. 100, 123 N.E.2d 792 (1954); *Gile v. Kennewick Pub. Hosp. Dist.*, 48 Wash. 2d 774, 296 P.2d 662 (1956); CAL. COMM. CODE §§ 2313-15.

⁶ *Greenman v. Yuba Power Products Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962); *Piercefield v. Remington Arms Co.*, 375 Mich. 85, 133 N.W.2d 129 (1965).

⁷ Cf. *Perlmutter v. Beth David Hosp.*, 308 N.Y. 100, 123 N.E.2d 792 (1954).

⁸ 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962).

⁹ *Id.* at 63, 27 Cal. Rptr. at 701, 377 P.2d at 901.

¹⁰ *Greenman v. Yuba Power Products Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962).

¹¹ See cases cited note 6 *supra*. See also PROSSER 651, Ashe, *So You're Going to Try a Products Liability Case*, 13 HASTINGS L.J. 66 (1961).

¹² *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964); *Greenman v. Yuba Power Products Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962); *Canifax v. Hercules Powder Co.*, 237 A.C.A. 50, 46 Cal. Rptr. 552 (1965); *La Hue v. Coca Cola Bottling Co.*, 50 Wash. 2d 64, 314 P.2d 421 (1957).

¹³ PROSSER at 508 states: "[T]he last 100 years has seen a general acceptance of the principle that in some cases the defendant may be held liable, although he is not only charged with no moral wrongdoing, but has not even departed in any way from a reasonable standard of intent or care."

The Retailer and Products Liability

In *Vandermark v. Ford Motor Co.*,¹⁴ both the manufacturer and the retailer of an automobile were held strictly liable for a defect in the automobile which caused injury to the buyer and his passenger. The court suggested that the manufacturer, wholesaler, and retailer would all be liable to the injured consumer. Liability is imposed on the retailer because he is in the business of distributing goods for profits and thus should bear the risk of losses caused by defects in those products. Furthermore, the retailer is in a position to do something about the defects by exerting pressure on the manufacturer. Again, *Piercefield v. Remington Arms Co.*¹⁵ indicates that the injured party can recover from either the retailer or the manufacturer because the retailer and manufacturer can control defects and are able to bear the loss by shifting it back upon the market as a whole. The same reasoning has been used to hold the wholesaler strictly liable.¹⁶

One of the principal bases for the imposition of strict liability is the retailer's theoretical ability to allocate the risk of harm from defective products to the area of the population which should bear it.¹⁷ Through strict liability, the risk of injury is theoretically returned to the industry which has created the risk, and from there it is distributed among the public at large in the form of price additions.¹⁸ This is deemed preferable to a limited distribution among the persons actually injured. When recovery is obtained against a retailer he may recoup his loss from the manufacturer on the rationale that the manufacturer is better able, and ought, to bear any such loss, as he is the one responsible for it by virtue of the fact that he placed the product in distribution channels.¹⁹

A second reason for imposing strict liability for defective products is that the retailer, wholesaler, or manufacturer is assumed by law to have been adequately paid to take the risk of defective products by the compensation received from being in business and by deriving a profit from sales.²⁰ The distributor makes a profit from his sales of products, and he should bear the risk of any defects in those products which cause injury.²¹ The consumer has good reason to believe he is buying a product which is fit to be used, or he would not have purchased it.

A third reason for imposing strict liability is the inequality of distribution of power in the distributing process. The retailer is said to be able, through pressure

¹⁴ 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964).

¹⁵ 375 Mich. 85, 133 N.W.2d 129 (1965). While the opinion discusses warranties, it is clearly based upon strict liability in tort.

¹⁶ *Canifax v. Hercules Powder Co.*, 237 A.C.A. 50, 46 Cal. Rptr. 552 (1965).

¹⁷ James, *Products Liability*, 34 TEXAS L. REV. 192 (1955) states: "In modern context, strict liability for accidental harm tends to distribute fairly equitably the inevitable casualties of enterprise." See also PROSSER at 673; Notes, 2 KAN. L. REV. 188, 189-92 (1953); 103 U. PA. L. REV. 833, 835 (1955).

¹⁸ Authorities cited note 17 *supra*.

¹⁹ *Seely v. White Motor Co.*, 63 A.C. 1, 45 Cal. Rptr. 17, 403 P.2d 145 (1965); *Greenman v. Yuba Power Products Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962); *Canifax v. Hercules Powder Co.*, 237 A.C.A. 50, 46 Cal. Rptr. 552 (1965) (retailers dismissed or not joined when manufacturer amenable to suit).

²⁰ *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964); PROSSER 673; James, *supra* note 17, at 222.

²¹ *Ibid.*

on the manufacturer, to demand more care in preventing defects,²² by refusing to purchase from a manufacturer of defective products. The consumer is not in such an advantageous position. Often he must purchase what he needs from whom he can, with no hope of forcing the manufacturer to exercise more care. The retailer and manufacturer are deemed better able to bear the risk of a defective product in that they are in a position to do something about it, while the injured consumer can do very little.²³

Granting the liability of the retailer and its justification, to whom is he liable? The most obvious party to whom this duty is owed is the buyer.²⁴ However the retailer's liability is not merely to the buyer. It may extend to users and consumers remote from the buyer-retailer relationship.²⁵ He has even been held liable for personal injuries to an innocent bystander who is injured when a defective product in the hands of a user causes harm.²⁶ It appears that the courts, with some variations, impose strict liability for product defects wherever there is a substantial foreseeability of injury if the product is defective, as evidenced by the fact that present law tends to reject limiting the benefits of strict liability to the purchaser.²⁷

Mention must be made here of the fact that in many cases the retailer is dismissed, or not even joined, in a suit for strict liability for product defects when the manufacturer is found to be available and able to pay a judgment.²⁸ Thus in *Greenman*,²⁹ the court realized that the primary duty in this area was upon the manufacturer and dismissed the retailer as a person only secondarily liable. In a typical case, the retailer may be held liable along with the manufacturer to assure the plaintiff his recovery,³⁰ but between the retailer and the manufacturer, the latter must reimburse the former for any loss he suffers.³¹

²² James, *supra* note 17, at 199 and at 222, where he states: "He [the retailer] profits from the transaction and is in a fairly strategic position to promote safety through pressure on his supplier. Also, he is known to his customers and subject to their suits, while the maker is often unknown and may well be beyond the process of any court convenient to the customer. Moreover, the retailer is in a good position to pass back the loss to his supplier." *Cf. Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 37 Cal. Rptr. 896, 319 P.2d 168 (1964).

²³ "[T]here are enough cases where the manufacturer is beyond the jurisdiction, or even unknown to the injured plaintiff, to justify giving the consumer the maximum of protection." PROSSER 682. See also *Seely v. White Motor Co.*, 63 A.C. 1, 45 Cal. Rptr. 17, 403 P.2d 145 (1965); *Ashe*, *supra* note 11. *Cf. James*, *supra* note 17, at 223.

²⁴ *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964).

²⁵ *Canifax v. Hercules Powder Co.*, 237 A.C.A. 50, 46 Cal. Rptr. 552 (1965); *Rodriguez v. Shell's City Inc.*, 141 So. 2d 590 (Fla. 1962) (dictum); *Goldberg v. Kollsman Inst. Co.*, 12 N.Y.2d 432, 240 N.Y.S.2d 592, 191 N.E.2d 81 (1963).

²⁶ *Piercefield v. Remington Arms Co.*, 375 Mich. 85, 133 N.W.2d 129 (1965).

²⁷ *Ibid.* (illustrating how far extension has progressed). See also *Canifax v. Hercules Powder Co.*, 237 A.C.A. 50, 46 Cal. Rptr. 552 (1965).

²⁸ *Greenman v. Yuba Power Products Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962); *Seely v. White Motor Co.*, 63 A.C. 1, 45 Cal. Rptr. 17, 403 P.2d 145 (1965).

²⁹ 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962).

³⁰ *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964).

³¹ *Cf. Greenman v. Yuba Power Products Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962) (manufacturer held and retailer dismissed).

Can Analogy Be Made between Retailer and Doctor?

In the fact situation here considered a doctor has administered a drug, organic human product, surgical insert or an appliance upon the patient, thereby vesting the patient with a property interest in the product used.³² The doctor is compensated for these products as part of his medical charges (at least where he, rather than the hospital, furnishes the product). In this manner, any prerequisite of a conveyance before imposition of strict liability for product defects has been satisfied. Therein is established the basis for examination of both the rationale underlying imposition of strict liability on the retailer and the applicability of the rationale to the doctor's situation.³³

The first reason for imposing strict liability for defective products is that the persons in the chain of distribution of any product are better able to transmit the risk of harm from defective products back to the manufacturer.³⁴ If the manufacturer is available for suit, the patient, like the consumer, would have a direct action against him. However, if the manufacturer is not accessible, the doctor could, if required to compensate for the loss, return the loss to the manufacturer either through an action in his own name or through his liability insurer, which would pay the loss and be subrogated to the doctor's action against the manufacturer.³⁵ In most cases the manufacturer will be available for suit, and the doctor may be dismissed or not joined.³⁶ The doctor would thus be secondarily liable because of his station in the chain of distribution. The doctor's ability to shift the loss back to the manufacturer seems as potent as the ability of other transferors of goods. The injured patient, however, can do nothing but bear his loss if the manufacturer is not amenable to suit or if the doctor is not strictly liable.

The second reason for application of strict liability is that the remuneration a product transferor receives from his business is said to have compensated him for the risks incident to that business.³⁷ Among these risks is that of injury caused by a defective product. The doctor is in business for a profit; once divorced from the humanitarian citadel in which he is often placed, the doctor may be seen to work for pecuniary compensation. The products a doctor administers in the practice of medicine are certainly more than merely incidental to the service performed. The result of a doctor's work may directly depend upon the quality of the products he transfers to the patient. Like the consumer, the patient has little choice between products. Logical consistency would indicate that if a person transfers products as

³² As in *Bowles v. Zimmer Mfg. Co.*, 277 F.2d 868 (7th Cir. 1960) and *Inouye v. Black*, 238 A.C.A. 36, 47 Cal. Rptr. 313 (1965), where the insert was supplied by the hospital.

³³ See Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653, 667-69 (1957), on the advantages of reasoning by analogy in non-sales cases. The three primary advantages are: (1) greater care in adjusting legal rules to social change; (2) avoidance of application of sales rules that have no place in non-sales cases; and (3) the fact that it is useful to extend strict liability to many cases which are like sales but cannot be defined as sales.

³⁴ See authorities cited note 22 *supra*.

³⁵ Cf. *Offer v. Superior Court*, 194 Cal. 114, 228 P. 11 (1924); *London Assur. Co. v. Anderson*, 194 Cal. App. 2d 418, 15 Cal. Rptr. 13 (1961).

³⁶ See *Greenman v. Yuba Power Products Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962) (analogous retailer case).

³⁷ See authorities cited notes 20-21 *supra*.

a part of his business, he should be strictly liable for defects in those products because he has been compensated for any such risk by being paid. Note that this compensation is not for the ultimate risk of injury itself, for this risk is on the manufacturer. Rather, it is compensation for bearing the limited risk of being secondarily liable.³⁸

The third reason for the application of strict liability for product defects is that there is inequality between the parties as to ability to prevent defects in products.³⁹ It may be doubted whether any dispenser of products on a retail level is in an effective position to prevent defects in products. However, the doctor appears to be in a better position than a patient. By economic pressure the doctor can, to a certain extent, stimulate greater care in production, for he can choose what brand of medical product he wishes to purchase. The patient has no such power; he must accept the product the doctor offers because he is not normally qualified to determine the quality of medical products. The patient has even less power in this regard than does the consumer who, in most cases, has at least some basis upon which to evaluate the quality of the product. If the criterion of ability to prevent risks or defects has validity, it would apply to others in intermediate positions within distributive chains.

The Doctor-Patient Relationship

Strict liability in tort for product defects rests entirely on a duty imposed by law as a result of the relationship between the parties. It must be determined at this point whether there are any factors in the reasons for strict liability which preclude its extension to the medical profession.

In terms of remoteness of the recovering party from the party recovered against, the relationship of doctor-patient seems quite close, and the possibility of injury is certainly not unforeseeable. Strict liability is imposed by law because of the relationship of the parties, and the doctor-patient relationship is undoubtedly closer in terms of personal trust and confidence than is that of the retailer-buyer.⁴⁰

Secondly, there is no requirement of moral blame or fault in a strict liability recovery.⁴¹ Thus, there can be no objection to the lack of moral blame where the injury has occurred in a doctor-patient context. The relationship of a doctor and patient is sufficiently close for many duties to be imposed.⁴² If one of these duties were that of administering only defect-free products, it would be consistent with the closeness of the relationship, and a breach thereof would not necessarily connote blameworthiness.

A consideration of both the consumer-retailer and the doctor-patient relationships reveals that both the consumer and the patient rely on the respective transferors of products to them. The extent to which this reliance is justified is an important consideration. The consumer expects that when he purchases a product it will be free from defects; otherwise he would not purchase it. The patient also

³⁸ See authorities cited note 23 *supra*.

³⁹ See authorities cited note 22 *supra*.

⁴⁰ The consumer simply purchases or uses a product purchased from a retailer. The patient is quite closely related to his doctor in that the doctor works upon the body of the patient.

⁴¹ PROSSER 508.

⁴² For example, the duty not to injure the patient negligently and the duty not to divulge confidential information.

relies on his doctor to transfer a defect-free product to him. The element of trust and reliance is, if anything, greater in the instance of a doctor-patient relationship than is that between the retailer and the consumer. The doctor-patient relationship, by its very nature, should permit the law to impose a higher standard of conduct upon the doctor, and strict liability for defective products would be consistent with this standard.⁴³

The contract between the parties is important, not as a source of liability, but as a source of the relationship between the parties as a result of which the law imposes a duty. In this respect the service contract of the doctor imposes at least as valid a criterion for the imposition of a legal duty as the sales contract of a retailer. A duty of reasonable care is owed to a patient under a service contract for medical aid. The parties to a medical service contract are certainly not remote. By contrast, where a sales contract is concerned, a duty may be imposed on the basis of a relationship between parties who are not even in privity.⁴⁴

Can the Extension of Strict Liability for Product Defects Be Made to Physicians?

The writer has been unable to locate a single case brought under strict liability in tort for product defects involving a doctor sued by his patient.⁴⁵ Let us examine and analyze the objections to the imposition of strict liability.

The first objection to extending strict liability for product defects is that the humanitarian nature of the doctor's work is inconsistent with such liability. Physicians today are regarded very differently from the retailer. An aura of humanitarian effort comparable to few other professions surrounds the work of a doctor.⁴⁶ The contemporary public is amazed at the development of modern medicine and tends to regard the doctor with awe and respect. It is generally felt that the doctor's efforts help the patient and preserve his life and do not involve the commercial factor necessary for the imposition of strict liability for product defects.

Intermingled with the humanitarian doctrine are the reputation and status which a doctor holds in society. A physician commands a high niche in our present scale of social and occupational merit. He is regarded as a professional man of the highest standards, devoted to the welfare of humanity and the curing of its ills. It is generally felt that any recovery in a court of law against the doctor has a very damaging effect on his reputation and that no liability should be imposed upon him unless he is actually at fault in a moral sense, *i.e.*, when he is negligently or intentionally guilty of malpractice. It might be argued that strict liability for product defects would be considered a form of malpractice, thus impairing a physician's reputation even though he is morally blameless. While the retailer can be sued

⁴³ Cf. *Cushing v. Rodman*, 82 F.2d 864 (D.C. Cir. 1936); James, *supra* note 17, at 222.

⁴⁴ *Greenman v. Yuba Power Products Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962); *Piercefield v. Remington Arms Co.*, 375 Mich. 85, 133 N.W.2d 129 (1965).

⁴⁵ An example of a case where the proposed extension would seem to permit a patient recovery but where no recovery was granted on a negligence basis is *Inouye v. Black*, 238 A.C.A. 36, 47 Cal. Rptr. 313 (1965).

⁴⁶ See *Perlmutter v. Beth David Hosp.*, 308 N.Y. 100, 123 N.E.2d 792 (1954), illustrating the "personal help, not sale" view. See also Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 367-70 (1965).

without any maternal damage to his reputation,⁴⁷ any suit at all might damage the reputation of a doctor.

The second objection is that the law has developed a degree of insulation around the practice of medicine which protects it from damage liability. Strict liability might hamper the doctor in his work by making him less able or less willing to experiment with new procedures which could be of substantial benefit to medical progress. Any liability over and above that to which he is now subject would stifle medical progress. The doctor must be free to take certain risks and to use certain untried products in the interest of medical advancement.

The third objection is that the extension of strict liability in tort for product defects seems to have been halted by a requirement of a sale.⁴⁸ Case law⁴⁹ and the *Restatement of Torts*⁵⁰ still require a sale, though the recovery itself is based not on the sale but on a duty imposed by law.⁵¹

The burden on the doctor of obtaining and paying for liability insurance has also been thrown onto the scale of arguments against the proposed extension. It has been contended that the burden of the increased price of liability insurance would raise the price of medical care to prohibitive limits.⁵² This is said to outweigh any gains that may accrue to the public from holding the doctor strictly liable.

Another possible argument is that holding a doctor strictly liable would increase the multiplicity of suits, for the doctor would be forced to sue the manufacturer to recover his loss. One purported advantage of strict liability is decreasing multiplicity by allowing an injured party to sue the manufacturer directly, and this effect might be destroyed by holding a doctor strictly liable.⁵³

Let us examine these objections to the proposed extension to ascertain their true weight. While it may be admitted that the practice of medicine has great humanitarian appeal and that the doctor may believe that he is contributing toward the welfare of humanity in a way which no retailer could match,⁵⁴ the basic fact remains that most doctors are in business for monetary compensation.⁵⁵ They derive profits from their professional activities, as do the retailers. This is evidenced by the fact that the income of doctors is among the highest of any profession. The

⁴⁷ The retailer's reputation is not as vulnerable because he is concerned wholly with commercial matters, not normally with such personal matters as the power of life or death over a patient. The doctor, while in business for a profit, often has a life dependent on his skill. Possible future patients wish to entrust their lives to only the doctor with an unimpeachable reputation.

⁴⁸ *Seely v. White Motor Co.*, 63 A.C. 1, 45 Cal. Rptr. 17, 403 P.2d 145 (1965); *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964); *Greenman v. Yuba Power Products Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962).

⁴⁹ Cases cited note 48 *supra*.

⁵⁰ RESTATEMENT (SECOND), TORTS, § 402A (1965).

⁵¹ See authorities cited note 11 *supra*.

⁵² Interview with Dean William L. Prosser, in San Francisco, Nov. 8, 1965.

⁵³ *Cf. Harry Gill Co. v. Superior Court*, 238 A.C.A. 781, 48 Cal. Rptr. 93 (1965).

⁵⁴ See *Perlmutter v. Beth David Hosp.*, 308 N.Y. 100, 123 N.E.2d 792 (1954); *Gile v. Kennewick Pub. Hosp. Dist.*, 48 Wash. 2d 774, 296 P.2d 662 (1956). These cases show the court's feeling that the medical profession helps a patient for humanitarian, not commercial, motives.

⁵⁵ *Crutchett v. Lawton*, 139 Cal. App. 411, 33 P.2d 839 (1934).

average doctor can expect to make well over 10,000 dollars a year from his work, which is a far cry from the average retailer's expected income.⁵⁶ A doctor also charges patients for the goods used as part of their treatments (except those supplied by a hospital). These medical products also help the doctor make his profit by rendering his assistance more sure of beneficial results. Few persons would patronize a doctor who refused to use drugs or surgical inserts for physical treatment. The fact that the physician may enjoy his work and may deem it valuable to humanity should not obscure the fact that he is working for business profits and is engaged in a commercial venture. The two factors are not mutually exclusive.

There is, however, some danger of actions in strict liability for product defects damaging a doctor's reputation. The term malpractice is an unfortunate one as it connotes incompetence or dereliction of duty on the part of the doctor. Therefore, if recovery on the basis of strict liability is in any way equated with malpractice, the effect on the doctor's reputation could be serious. One solution to this problem might be a refusal to categorize a strict-liability recovery against the doctor as malpractice. The recovery, if one is granted, should be called strict liability for defective products and should not bear a label which would tend to connote blame. The medical profession should not attach any stigma to such a suit in light of the true basis for recovery. However, the important problem may be the effect of such a suit on the doctor's public reputation. As to this, it may be surmised that there would be a minimum of suits for the manufacturer would bear primary liability.⁵⁷ Pre-trial settlements will also avoid part of this problem by eliminating the publicity inherent in a public trial. Thus, damage to reputation could be minimized. Nevertheless, in a very real sense, the doctor's reputation is exposed and subjected to damage from suits to a greater extent than is that of the retailer.

Damage to reputation could be minimized by use of the above means. An educational process impressing the public with the true nature of such suits would also be beneficial. Any policy judgment here, however, must be a value judgment. In the opinion of the writer, placing the loss of the patient's injury on the manufacturer, through the process of holding the doctor strictly liable, would outweigh possible damage to the doctor's reputation. A public interest which demands the best protection for a consumer should demand equal protection for a patient to whom a product is passed, even if there is some risk to the reputation of the doctor.⁵⁸

Would the imposition of strict liability hamper the doctor's work? If so, the proposed extension is flawed. However, strict liability for product defects does not seem to have hampered the business of the average retailer. The retailer has simply considered such liability a cost of doing business. It is not an excessive cost because, as stated, the primary liability is on the manufacturer.⁵⁹ It must be remembered

⁵⁶ STATISTICAL ABSTRACT OF THE UNITED STATES 230 (1965) states that the average income per year of a physician in 1959 exceeded \$10,000, compared to the average figure for the retailer or wholesaler for the same period of only \$6,067.

⁵⁷ *Bowles v. Zimmer Mfg. Co.*, 277 F.2d 868 (7th Cir. 1960); *Gottsdanker v. Cutter Laboratories*, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960); cf. *Greenman v. Yuba Power Products Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962).

⁵⁸ Cf. PROSSER 673 (public interest and safety demand best protection for consumer); Note, 13 STAN. L. REV. 645 (1960).

⁵⁹ *Greenman v. Yuba Power Products Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962).

that strict liability applies only to a defective product,⁶⁰ and an experimental or risky product is not necessarily defective. As an example, rabies vaccine may produce very unpleasant effects, but it is not necessarily defective. Medical products which involve an element of risk are not defective simply because the risk is present. It would not seem that strict liability would hamper prompt and enthusiastic medical services, since the doctor would, without opening himself to strict liability, still be free to try drugs or medical products which involve risk. The doctor would still have liberty to take risks and use untried products in cases where necessary, as long as the patient is warned of the risk and as long as such products were produced with no hazards other than those inherent in their nature.⁶¹

The requirement of a sale for the application of strict liability for product defects seems to be a way in which the applicability of strict liability is limited, even though liability for product defects is imposed by law, not by the sales agreement.⁶² While a sale may be used as a criterion for the imposition of a duty by the law, the imposition is not dependent upon that criterion,⁶³ and a sale should not be necessary for the imposition of strict liability for product defects. It is the *relationship* between the parties, not the *sale*, that is important.

The burden of increased liability insurance upon the doctor does not seem to be an insurmountable problem. This burden on retailers has not been a substantial factor in raising prices. Likewise it should not raise the price of medical aid. The insurance, it must be emphasized, will not be insurance against complete loss, but only against the risk of the doctor being held as a conduit to place the loss on the manufacturer.⁶⁴ The cost of the doctor's insurance would be the increased costs of a recovery through, not against, the doctor.

As to multiplicity of suits, the action against the retailer is subject to the same objections, yet it has not deterred the courts from holding the retailer strictly liable. The doctor, like the retailer, may be dismissed when the manufacturer is amenable to suit and able to respond in damages.⁶⁵ Thus, the proposed extension would not foster multiplicity any more than the present liability of a retailer. The writer believes multiplicity should be discouraged, but not at the price of denying a remedy for an injury.

Conclusion

In view of the foregoing material, the extension of strict liability for product defects to the doctor looms as a possible development in the law of torts. There are problems, but they do not seem to outweigh the desirability of compensating a patient for an injury he has received. The patient should not be required to choose the party who is primarily liable and go without remedy if that party is not amenable to suit in his jurisdiction, and the patient cannot afford to sue him elsewhere.

⁶⁰ "[T]here is no strict liability unless the product was in some way defective when it was sold by the defendant." PROSSER 683.

⁶¹ For example, a contaminant might be considered an extraordinary hazard, so the experimental product could be found defective.

⁶² See authorities cited note 12 *supra*.

⁶³ *Ibid.*

⁶⁴ See authorities cited notes 23 and 24 *supra*.

⁶⁵ Cf. *Seely v. White Motor Co.*, 63 A.C. 1, 45 Cal. Rptr. 17, 403 P.2d 145 (1965); *Greenman v. Yuba Power Products Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962); *Harry Gill Co. v. Superior Court*, 238 A.C.A. 781, 48 Cal. Rptr. 93 (1965).