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Applying Strict Liability to Professionals:
Economic and Legal Analysis

FRANK J. VANDALL*†

I. INTRODUCTION

While the application of strict liability to injuries involving products has been expanding over the past few years,¹ no court has held that strict liability controls in a case involving a professional.² The policies underlying strict liabil-

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² See supra notes 188-248 and accompanying text.

The application of strict liability to professionals was selected for analysis because this issue is at the center of contemporary tort theory and is of substantial importance to claimants and professionals. Strict liability has been applied to sellers, manufacturers, lessors, and to sales/service hybrids, but it has not yet been applied to a pure service. The topic of this Article is a merger of two complex and important concepts in tort law: the strict liability cause of action and the scope of liability.

This Article will deal with a segment of the pure service classification, where no product is involved or the product is of secondary importance to the service. Professionals are unique because society and the courts have accorded them recognition and protection. The professions have been applied to sellers, manufacturers, lessors, and to sales/service hybrids, but it has not yet been applied to a pure service. The topic of this Article is a merger of two complex and important concepts in tort law: the strict liability cause of action and the scope of liability.

This Article will deal with a segment of the pure service classification, where no product is involved or the product is of secondary importance to the service. Professionals are unique because society and the courts have accorded them recognition and protection.

- The professions require a substantial period of formal education—at least as much if not more than that required by any other occupation.
- The professions require the comprehension of a substantial amount of theoretical knowledge and the utilization of a substantial amount of intellectual ability. Neither manual nor creative ability is typically demanded. This is one thing that distinguishes the professions both from highly skilled crafts—like glassblowing—and from the arts.
- The professions are both an economic monopoly and largely self-regulating. Not only is the practice of the profession restricted to those who are certified as possessing the requisite competencies, but the questions of what competencies are required and who possesses them are questions that are left to the members of the profession to decide for themselves.
- The professions are clearly among the occupations that possess the greatest social prestige in the society. They also typically provide a degree of material influence substantially greater than that enjoyed by most working persons.
- The professions are almost always involved with matters which from time to time are among the greatest personal concerns that humans have: physical health,
ity support applying the action to professionals, however. The purpose of psychic well-being, liberty, and the like. As a result, persons who seek the services of a professional are often in a state of appreciable concern, if not vulnerability, when they do so.

(6) The professions almost always involve at their core a significant interpersonal relationship between the professional, on the one hand, and the person who is thought to require the professional's services; the patient or the client.

Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 1977 NATIONAL CONF. ON TEACHING PROF. RESP. 105. Pound defines a profession as follows:

A profession is a group of men pursuing a learned art as a common calling in the spirit of public service—no less a public service because incidentally it may be a means of livelihood. The exigencies of the economic order require most persons to gain a livelihood and the gaining of a livelihood is a purpose to which they are constrained to devote their activities. But while in all walks of life men must bear this in mind, in business and trade it is the primary purpose. In a profession, on the other hand, it is an incidental purpose, pursued of which is held down by traditions of a chief purpose to which the organized activities of those pursuing the calling are to be directed primarily and by which the individual activities of the practitioner are to be restrained and guided.

R. Pound, *Jurisprudence* Vol. V. 676 (1959). As will be seen in Section III, these definitions are merely descriptive and are not helpful in deciding whether to apply strict liability to a professional.

3. Professor Greenfield stated:

The reasons commonly given for... applying strict liability in tort to transactions in goods also apply to service transactions. Foremost among those reasons are the public interest in the protection of human life, health, and safety; the seller's superior knowledge and opportunity to determine if the goods are defective; the consumer's reliance on the skill, care, and reputation of the seller; the superior ability of the seller to bear the loss caused by defects and to distribute the risk of that loss over all his customers; and the wasteful circuitry of action when the consumer is permitted to assert claims in negligence only against those with whom he is in privity.


Similarly, Professor Franklin, in discussing the application of strict liability to doctors for hepatitis, argued:

The safety incentive is compelling, however, since physicians are usually seeking profit in a competitive context. Imposing hepatitis costs on surgeons would emphasize the risks of blood transfusions, and the surgeons could respond by pressuring local hospitals to alter their source of blood or pressuring the blood banks to provide improved service. This latter approach would be particularly effective, since several are run by local medical societies. Finally, the loss-spreading justification applies to physicians since they are well aware of the risks involved and are able to insure against them. The risk of hepatitis would probably not raise the premiums for malpractice insurance appreciably, and the physician could pass these additional costs on to his patients through higher fees.


A student note analyzed whether the "least cost avoider test" for strict liability should be applied to doctors:

Calabresi and Hirschoff propose that strict liability for accidents be imposed on whichever "of the parties to the accident is in the best possible position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made."

. . .

. . . [A]pplication of the test to the medical malpractice field suggests that the physicians should be strictly liable. Presumably health care providers, as a category, have more information or better access to information than their patients and are therefore in a better position to perform the cost-benefit analysis as to
PROFESSIONAL LIABILITY

this Article is to examine, from both economic (Section II) and legal (Section III) perspectives, whether strict liability should apply to professionals. An additional purpose is to analyze the relationship among strict liability, contract, and no-fault.

Section II suggests that strict liability should be applied to physicians. Medical doctors were selected for study because of the complexity of the subject matter, the availability of appellate cases, and the continuing failure of injured patients to prevail in professional negligence cases. This failure is due to the need for an expert witness, the difficulties involved in proving negligence, and the hesitancy of juries to attach the negligence label to a physician. If it can be shown that strict liability should apply to physicians, then a strong case can be made that strict liability should apply to other professionals, such as lawyers and architects. This article will emphasize the pure service situation, not the cases involving products, commonly referred to as sale-service hybrids.

A definition of strict liability for application to professionals will be developed in Section III, but for purposes of economic analysis, strict liability will mean: first, that the doctor will be liable more often than under a negligence cause of action; and second, that the doctor will not be absolutely liable, that is, not liable for all injuries to the patient.

II. THE ECONOMIES OF APPLYING STRICT LIABILITY TO PROFESSIONALS

Many of the arguments against suing physicians are economic in nature: doctors will leave the profession or move to a less risky specialty, malpractice


5. See W. Prosser, LAW OF TORTS 161-66 (1971) [hereinafter cited as Prosser].
8. A pure service involves only a service, or primarily a service, where there is no material issue of whether a defective product caused the injury. An example of a pure service is ophthalmology. See, e.g., Helling v. Carey, 84 Wash. 2d 514, 519 P.2d 981 (1974), where an ophthalmologist was held liable for failing to test a patient for glaucoma.
9. For a classic example of a sale-service hybrid, see Newmark v. Gimbel's Inc., 54 N.J. 585, 258 A.2d 697 (1969), where a beauty parlor was held strictly liable for the damage caused by a permanent wave it had applied.
12. Id.
insurance rates will become too high,\textsuperscript{13} and suits will raise the costs of medical treatment beyond the reach of the poor.\textsuperscript{14} It is likely that these arguments will be raised to counter the application of strict liability to physicians. The purpose of this section is to discover whether economic analysis will shed light upon the question of whether strict liability should apply to physicians.

A. \textit{Comparing the Application of Strict Liability to Professionals with a Tax on Automobile Sales}

In evaluating the economic impact of applying strict liability to physicians, it will be helpful to examine a model: a legislatively imposed tax on automobile sales. This model will suggest that if strict liability is applied to only one doctor, he will have to bear the cost himself. If strict liability is applied to all physicians, however, the patients, the doctor, and other specialized medical employees will share the cost. Finally, the model will reflect that if the physician can control the supply of doctors, he will be able to pass the entire cost through to the patients.

1. Tax With a Fixed Supply

Assume that there are seven cars and that a buyer is willing to spend $500 for a car. Assume further that the demand and supply schedules are fixed.\textsuperscript{15}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure1.png}
\caption{FIGURE 1}
\end{figure}

\begin{itemize}
\item \textsuperscript{13} \textit{Id.} at 502.
\item \textsuperscript{14} \textit{Id.} at 501. \textit{See also}, Aitken, \textit{Medical Malpractice: The Alleged "Crisis" in Perspective}, 1976 INS. L.J. 90-97.
\item \textsuperscript{15} This hypothetical, as well as the accompanying graph, is adapted from A. Alchian \& W. Allen, \textit{Exchange and Production: Competition, Coordination, and Control} 88 (2d ed. 1977) [hereinafter cited as \textit{Alchian \& Allen}].
\end{itemize}
At this point, the legislature imposes a tax of $200 on the sale of a car. Because supply is fixed at seven cars and a buyer is only willing to spend $500, the entire tax falls upon the seller. 16 He keeps $300, and sends $200 to the state. As Professor Alchian states, "The upper demand curve is a smoothed version of the demand by consumers and the lower demand curve, exactly $200 lower, is the net of tax demand that sellers retain after the government tax." 17 The tax does not alter the price paid by the car buyers, instead, it reduces the portion retained by the seller by $200. 18 This result, of course, is dictated by the assumption that supply and demand were fixed. If the seller tried to raise his price to $700, fewer cars would be sold and the unsold cars will then be bid down in price back to the old $500 per car. 19 The import of this for doctors is that if the supply of physicians is fixed and the demand for medical treatment is fixed, then the application of strict liability to medical malpractice will mean that the cost of that liability will be borne entirely by the doctor.

One important point should be noted, however. If the $200 tax on cars was used to improve highways to the extent of $200, then car purchasers might be willing to pay more than $500 for the cars because of the additional value of the improved roads. 20 Similarly, if we assume that strict liability results in the patient receiving more from the physician (compensation for iatrogenic 21 injuries), then the doctor will be able to increase his fees to some extent, and the patients will pay more because of the increased value received. 22

2. Tax on All Producers in an Industry

To further approximate the real world, it will now be helpful to look at a model of the entire automobile industry. As with the previous model, the legislature imposes a tax of $200 on the sale of automobiles. This tax increases each car dealer's marginal costs by $200, and it adds $200 to the average cost of each car. 23 If we add together the new higher marginal-cost curves

16. Id. at 89.
17. Id.
18. Id.
19. See id. at 90.
20. See id. at 91.
21. "Iatrogenic" is defined as referring to "any condition in patient occurring as the result of treatment by a physician or surgeon." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY (24th ed. 1965).
22. In the auto example, if the taxes were burned (not used for something of value to the car buyer), people would not be willing to pay more than $500 for a car. If, on the other hand, some of the taxes were put into road improvement, people would pay more than $500 for a car because they received more in return (better roads). If all of the $200 tax was put into roads, people might be willing to pay more that $700 ($500 + $200) because they valued the new roads more than $200. Application of this theory to doctors suggests that they may be able to increase their fees more than the cost of added insurance (to cover strict liability), if the value of the potential strict liability recovery to the patient is greater than the cost of the insurance to the physician.
of all the dealers in the country, we obtain a higher-cost supply curve. Before the tax, the price of a car was $500. Each dealer, now operating on a higher marginal-cost curve, would reduce its supply at the old price from $X_1$ to $X_2$. The reduced total supply of cars would push up price, which would induce each dealer to restrain its supply reduction to $X_3$. The supply curve for the automobile industry shifts upward to reflect taxes of $200 per car.

This forces the price up to $600. Professor Alchian notes:

Part of tax is revealed as a higher price to [sic] consumer and a smaller rate of consumption; another part is reflected in reduced wealth value of resources specialized in production of this taxed good. Tax is borne by consumers and by owners of capital goods and labor services specialized to this industry.

The point is that the entire tax is not borne by consumers of the automobiles. Part of the tax is borne by consumers in the form of higher prices and fewer cars. The other part is borne by the owners of the resources specialized to automobile production. Applying this to physicians, the increased expense of strict liability will increase the marginal costs for each physician. Assuming that all medical doctors are subject to strict liability over time, the price of medical treatment will rise and fewer services will be available. The costs of strict liability will be shared by patients, doctors, and those who provide resources and labor services specialized to medical treatment.

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24. Id.
25. Id. We have dropped here the assumption in the previous example that supply and demand curves are fixed.
26. Id.
27. Id.
28. "Price rises by less than tax because, at smaller output, marginal and average costs are lower." Id. at 277.
29. Id.
30. Id.
31. Recent studies by economists endorse the results flowing from strict liability. Professor Shavell, for example, concludes:

Shavell, Strict Liability Versus Negligence, 9 J. LEGAL STUD. 1, 4 (1980). See also A.M. Polinsky & W.P. Rogerson, Products Liability, Consumer Misperceptions, and Market Power (May 1982) (working paper available from Emory University Law & Economics Center); Brown, Toward an Economic Theory of Liability, 2 J. LEGAL STUD. 323 (1973); Spence, Consumer Misperceptions, Product Failure and Producer Liability, 44 REV. ECON. STUD. 561 (1977). Economists are also beginning to recognize that strict liability has beneficial effects in situations, such as medicine, where the patient may fail to appreciate the risks, regardless of whether the producer faces a competitive market or an oligopoly:

Suppose consumers underestimate the accident probability and producers have no market power. Then the rule of strict liability leads to the first-best outcome. By forcing producers to internalize all accident costs, this rule leads them to choose the correct accident probability; it also leads them to raise their prices to reflect
3. Tax on One Car Dealer Only

Assume that in the previous example the tax is applied to only one automobile dealer. The market supply for all car dealers (the industry) would not shift substantially, because there is no tax on the other dealers.\footnote{33} The car dealer who receives the tax has no way to "recoup part of his wealth by a higher price."\footnote{34} If he attempted to raise his price, purchasers would go to other dealers.\footnote{35}

Applying this to physicians, the first new doctors who are forced to pay under strict liability will bear the entire loss themselves. But, as more doctors are subject to strict liability, they will raise their prices and thus cover part of their losses. Indeed, as noted above, if the patient received substantial benefits through strict liability, the doctor could completely cover the increased expense.\footnote{36} That is, the patient would be willing to pay more for the medical

\begin{figure}
\centering
\includegraphics[width=\textwidth]{figure2}
\caption{ONE AUTOMOBILE DEALER\hspace{2cm} ALL AUTOMOBILE DEALERS}
\end{figure}

\footnotesize

A.M. Polinsky & W.P. Rogerson, supra, at 2, 3. See also Shavell, supra, at 1.
32. The graph is adapted from Alchian & Allen, supra note 15, at 279.
33. Id. at 281.
34. Id.
35. Id.
36. See supra notes 20-22 and accompanying text.
service because he received more.

There is one sure method for the car dealer to pass the tax to the consumer: "If you could exclude competitors (whose supply in the market makes your selling price lower), you could raise your price." An example in the medical context would be limiting the number of competitors by controlling the size of medical schools, which is arguably one function of the American Medical Association.

4. A Caveat: Elasticity of the Physicians’ Demand Curve

The concept of elasticity indicates how responsive the quantity demanded is to a change in price. If the demand for medical services is very elastic, a small increase in physicians’ prices will lead to a substantial loss of physicians’ total revenue. On the other hand, if the demand schedule for these services is inelastic, then a small increase in price will lead to a corresponding small loss in total revenue. The following two graphs illustrate the two extremes of the elasticity concept: perfect inelasticity and infinite elasticity.

FIGURES 3 & 4

The impact of an increase in the price of medical services, brought on by the adoption of strict liability, will depend upon the elasticity of the demand curve facing the physician. Professor Alchian cautions, however: “Elasticities of demand with respect to prices are extremely difficult to estimate.” Nevertheless, he suggests that the elasticity of demand for physicians is less than

41. Id. at 360.
42. Alchian & Allen, supra note 15, at 63 (noting that “the total change in amount bought will not be the result only of a change in price along a fixed demand”). Variables other than price may have shifted the demand curve itself.
This means, for example, that if the elasticity for physicians was eight tenths, then a one percent rise in price would decrease the demand for physicians' services by .8%. In response, the medical profession might argue that since medical care is a "necessity," the amount demanded will not change much with an increase in price. The error is this argument can be shown by considering an example of another alleged "necessity"—water:

Although people cannot live without it, they will reduce (not eliminate) their use of water at a higher price. . . . People in arid regions use less water, but not because they couldn't use more; rather, they don't want more at its high price. They choose to consume less water and to use the money not spent on more water for other, more desired purposes.

Similarly, at some high price, people will elect to consume fewer medical services, even though the most urgent are commonly regarded as necessities.

Moreover, the elasticity for physicians' services may vary with the specialty. For example, neurosurgeons and emergency room physicians may face inelastic demand curves. It is unlikely that many people would make a decision not to visit an emergency room or have neurosurgery performed based on a small percentage increase in price. In contrast, plastic surgeons and general practitioners may face a rather elastic demand schedule. A slightly higher price may encourage a patient to endure minor pain or a slight scar, for example.

B. Choices Facing Physicians

The application of strict liability to medical doctors will mean that they will be paying more in damages or in insurance premiums than under a negligence cause of action. There are several choices open to the physician in response to the increased cost brought on by strict liability. These responses were foreshadowed by the alleged medical malpractice crisis in 1977.

An initial response by some physicians will be that, if they are going to be held strictly liable, they will quit the practice or shift to a less risky specialty. Some will no doubt state that they would rather sing country music, wait tables, or go sailing than be subject to strict liability. Others may go on strike as a means of protest. On the other hand, many doctors will likely work

43. Id.
44. Id.
45. Professor Alchian addresses this argument when he comments that "[n]eed is a word often used to suggest absolute minimum requirements, when in fact the amount 'needed' depends on the cost of having more." Alchian & Allen, supra note 15, at 74.
46. Id. at 64. The uses of water which would be reduced or eliminated as the price increased would be such non-essential activities as washing cars and houses.
47. For example, as the price of medical services increases, such uses as cosmetic surgery and visits for preventive treatment (flu shots, routine checkups, etc.) will most likely be reduced.
within the American Medical Association in order to lobby for the legislative overturn of strict liability.\textsuperscript{50}

The vast majority of physicians will remain in practice and devise means to shift the increased costs to the patients, however. The most obvious method for accomplishing this is to increase fees. A related approach is for the physician to purchase sufficient insurance to cover strict liability and add the cost to his fee. The increase may not be substantial. One study indicates that medical malpractice insurance costs one dollar and fifty cents per patient visit.\textsuperscript{51} Finally, the physician could require the patient to purchase insurance covering strict liability, as a condition precedent to treatment. Insurance companies, for example, could devise methods for selling insurance to patients much as they sell it to the parents of school children.\textsuperscript{52} Insurance kiosks similar to the ones in airports might appear in hospitals or in medical complexes.

The prediction of physician strikes, shifts to less risky specialties and mass resignations may indeed be inaccurate. After all, it is doubtful that many patients inquire about the fee before obtaining medical services, or if they do ask, that they make their decision based on an increased cost of several dollars.\textsuperscript{53} Since most patients would not consider a small amount determinative, it is unlikely that the application of strict liability will cause a substantial decrease in the demand for medical services. Therefore, few doctors will seriously consider resigning, moving to a less risky (and less rewarding) specialty, or striking because of the economic impact of strict liability.

C. Efficiency Considerations

One of the leading authors in the field of law and economics, Judge Posner, presents a thesis that "the dominant function of the fault system is to generate rules of liability that . . . will bring about . . . the efficient—the cost-justified—level of accidents and safety,"\textsuperscript{54} He suggests that the appropriate statement of the relationship between law and economics is contained in Judge Learned Hand's early formulation of the negligence standard:

\begin{quote}
[The judge (or jury) should attempt to measure three things: the magnitude of the loss if an accident occurs; the probability of the accident's occurring; and the burden of taking precautions that would avert it. If the product of the first two terms exceeds the burden of precaution, the failure to take these precautions is negligence. Hand was adumbrating . . . an
\end{quote}

\textsuperscript{50} For a discussion of the A.M.A.'s proposed Model Informed Consent Statute, see Meisel & Kabnick, \textit{supra} note 48, at 559-61.

\textsuperscript{51} \textit{Comparative Approaches, supra} note 3, at 1156 n.78. High risk specialties would likely have higher rates than general practitioners, however.

\textsuperscript{52} For example, Pilot Life Insurance Co. offers comprehensive accident insurance to parents of grade school children for $8.00 per year.

\textsuperscript{53} Assume, for example, that the cost of strict liability is double the cost of existing malpractice insurance. That would still only amount to $3.00 per visit. See \textit{Comparative Approaches, supra} note 3, at 1156 n.78.

\textsuperscript{54} Posner, \textit{A Theory of Negligence}, 1 J. LEGAL STUD. 29 (1972).
economic meaning of negligence. Discounting (multiplying) the cost of an accident if it occurs by the probability of occurrence yields a measure of the economic benefit to be anticipated from incurring the costs necessary to prevent the accident. The cost of prevention is what Hand meant by the burden of taking precautions against the accident. . . . If the cost of safety measures or of curtailment—whichever cost is lower—exceeds the benefit in accident avoidance to be gained by incurring that cost, society would be better off, in economic terms, to forego accident prevention.55

Posner's reason for endorsing the Hand negligence formula is to increase overall economic value or welfare.56

In a recent article, Judge Posner severely criticizes the theory of strict liability for failing to maximize the joint value of the interfering activities, and argues again that the Hand formulation of negligence leads to the most efficient results.57 Posner's thesis touches upon fundamental theories of negligence, strict liability, and economics. It therefore deserves more attention, particularly as applied to medical malpractice.

To prove his point, Judge Posner uses "the now familiar example of the railroad engine that emits sparks which damage crops along the railroad's right of way."58 He concludes that:

The value-maximizing solution may turn out to involve changes by both parties in their present behavior; for example, the railroad may have to install a good but not perfect spark arrester and the farmer may have to leave an unplanted buffer space between the railroad right of way and his tilled fields. Or, the value-maximizing solution may involve changes by the railroad only, by the farmer only, or by neither party.59

The invalidity of Posner's criticism of strict liability, as applied to medical malpractice cases, flows from several important considerations. First, in most medical malpractice cases the patient can do nothing to prevent the injury. For example, where a doctor ties an artery rather than a Fallopian tube, or an oral surgeon severs a nerve, or the wrong drug is prescribed, the patient can do nothing to avoid the injury. Posner argues that negligence is superior to strict liability, because it encourages the injured party to take preventive measures.60 In the sparking train example, the farmer may be in the best position to take preventative action. For example, the farmer could plant a nonflammable crop beside the tracks or leave a buffer zone unplanted.61 There are few medical situations, however, where the patient can avoid the iatrogenic injury.

In contrast, the doctor is usually in the best position to prevent the injury. He can, for example, select another procedure, prescribe a different drug,

55. Id.
56. Id.
58. Id.
59. Id. at 206.
60. Id.
61. Id.
or exercise more care during surgery. Moreover, the American Medical Association is in an excellent position to fund injury-prevention research. The conclusion that a doctor should be held strictly liable for iatrogenic injuries follows from Professor Calabresi's strict liability test: "which of the parties to the accident is in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs . . . ."\(^6\) In medical malpractice, because of the technical material and his superior education, the doctor is in the best position to make the cost-benefit evaluation. The patient retains the authority to approve of the risk, the procedure, or the drug, of course.\(^4\)

Second, the railroad example upon which Judge Posner bases his theory is inapplicable to medical cases. The relationship between doctor and patient is one of trust and confidence, a fiduciary relationship.\(^6\) The doctor has an obligation to inform the patient of all material risks.\(^6\) Posner may be able to suggest that the railroad should be permitted to cause substantial damage to the landowner, without liability, for efficiency reasons.\(^6\) This is invalid as applied to the physician, however. Because of the fiduciary relationship, the doctor must avoid substantial damage to the patient. Certainly, there is no suggestion, in medical malpractice precedent, that a doctor should be able to inflict injury upon a patient for efficiency reasons.\(^6\) If injury to the patient is to be anticipated, a different course of action must be selected, or the patient warned.\(^6\)

Third, the physician is in the best position to administer insurance. In Judge Posner's example of the sparking train, he assumes that either the railroad or the farmer could, with equal ease, purchase insurance.\(^7\) In contrast, the doctor, because of wealth, experience, and ability to foresee the hazards involved, is best able to purchase insurance. Often the patient will be extremely anxious, unconscious, or poor. Because of this, it makes little sense to suggest that the patient has the responsibility to purchase insurance or to negotiate with the doctor over whether or not the doctor will be liable for iatrogenic injuries.\(^7\) The doctor, however, may either purchase insurance,


\(^{64}\) Scholendorf v. Society of N.Y. Hosp., 211 N.Y. 125, 105 N.E. 92 (1914).


\(^{66}\) Id.

\(^{67}\) Posner, supra note 57.

\(^{68}\) In an emergency, however, a physician may select either of two available courses of action when both will lead to injury. PROSSER, supra note 5, at 168-69.


\(^{70}\) Posner, supra note 57.

or require the patient to purchase it as a condition precedent to treatment.\textsuperscript{72}
When strict liability is adopted, the insurance expense will likely become a normal part of the patient's bill.

Fourth, the physician has reasons for not warning of risks or discussing a more expensive treatment.\textsuperscript{73} But if he did, the patient would become aware of the dangers and might not purchase the treatment or surgery. In this unique type of marketing situation, Judge Posner argues in favor of strict liability:

> If a product hazard is small, or perhaps great but for some reason not widely known . . . consumers may not be aware of it. In these circumstances a seller may be reluctant to advertise a safety improvement, because the advertisement will contain an implicit representation that the product is hazardous. . . . But make the producer liable for the consequences of a hazardous product, and no question of advertising safety improvements to consumers will arise. He will adopt cost-justified precautions not to divert sales from competitors but to minimize liability to injured consumers.\textsuperscript{74}

Therefore, if the physician is held strictly liable, but able to avoid liability by means of accurate warnings, he will likely warn the patient of the risks.

Fifth, the problem of setting the monetary value for benefits and burdens of medical injuries suggests that the cost-benefit discussion may be more philosophical than economic. That is, it may be possible to set a price for an acre of hay or a train's spark arrester,\textsuperscript{75} but it is much more difficult to evaluate the birth of an unwanted child,\textsuperscript{76} death due to an inappropriate drug,\textsuperscript{77} or the suffering caused by a failure to diagnose cancer. Because these costs are so hard to monetize, the opposition to strict liability may in fact rest on values.\textsuperscript{78}

In summary, strict liability has substantial economic advantages over the Posner-Hand formula in the medical malpractice setting. Strict liability will shift losses from the patient to the doctor and encourage the doctor to spread those losses through insurance. The economic impact is reduced when losses are spread, rather than visited upon one person, the patient.\textsuperscript{79} As an alternative, the physician may require the patient to purchase insurance. In response to strict liability, the doctor or the A.M.A. will engage in research to develop

\textsuperscript{72} The doctor may also self-insure, if he believes he is particularly careful.
\textsuperscript{73} \textit{Contra}, Miller, 11 Wash. App. at 286, 522 P.2d at 862 ("There is no room for paternalism.").
\textsuperscript{74} Posner, supra note 57, at 211.
\textsuperscript{75} Id.
\textsuperscript{76} "When the parents say their child should not have been born, they make it impossible for a court to measure their damages in being the mother and father of a defective child." Gleitman v. Cosgrove, 49 N.J. 22, 29-30, 227 A.2d 689, 693 (N.J. 1967).
\textsuperscript{78} See Dworkin, \textit{Is Wealth a Value?}, 9 J. LEGAL STUD. 191 (1980).
safer procedures, methods of treatment, or drugs. Finally, in order to avoid strict liability the physician will likely provide more adequate warnings of risks. This analysis suggests that an exception exists to the Posner-Hand formula: the strict liability rule should apply when the injured party was helpless to prevent the injury. This reasoning has been followed in cases involving ultrahazardous activities. For several hundred years, strict liability has applied in blasting cases, where the neighboring landowner was helpless to avoid the damage.\textsuperscript{80} Strict liability has also been applied in many products liability cases where the consumer is helpless to avoid the effects of the defective product.\textsuperscript{81} Indeed, the law expressly recognizes this helplessness. If the product consumer is not helpless and can prevent the injury but fails to, then the defenses of misuse or assumption of risk apply.\textsuperscript{82} Judge Posner recognizes such an exception for the helpless plaintiff: "strict liability . . . would produce an efficient solution where that solution was . . . for the railroad alone to take precautions . . ."\textsuperscript{83} Therefore, since a patient in the medical malpractice setting is usually helpless to prevent damage, the strict liability rule should apply to medical malpractice as well.

\textbf{D. Who Pays for Medical Malpractice Injuries?}

Thus far it has been assumed that whenever a patient suffered injury because of medical malpractice, he bore the loss himself, unless he could recover in negligence from the doctor. That is, the need for strict liability was predicated, in part, on preventing great losses from falling upon innocent patients. If patients usually carried insurance and therefore rarely shouldered a substantial portion of the loss, then the need for strict liability would be weakened. Examination is appropriate, therefore, to determine how much of medical malpractice damages are presently borne by the patient.

It is assumed here that malpractice damages are borne by consumers in the same ratio as consumers bear the cost of physicians' services. Over one third of the amount spent for physicians' services ($17.4 billion) is paid directly by consumers.\textsuperscript{84} Slightly less than two-thirds of the amount is paid by third party payment sources.\textsuperscript{84}


\textsuperscript{81} See, e.g., Stevens v. Parke-Davis, 9 Cal. 3d 51, 507 P.2d 653, 107 Cal. Rptr. 45 (1973) (extensive over promotion of chloromycetin); Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960) (purchaser's wife injured when car suddenly veered off the road and into a wall).

\textsuperscript{82} "The seller is entitled to have his due warnings and instructions followed; and when they are disregarded, and injury results, he is not liable." Prosser, \textit{supra} note 5, at 669.

\textsuperscript{83} Posner, \textit{supra} note 57, at 207.

\textsuperscript{84} Figures for 1980 indicate that 37.31\% of physicians' services were paid for directly by consumers. Gibson & Waldo, \textit{National Health Expenditures, 1980, 3 Health Care Fin. Rev.} 40 (1981).

In contrast, only 9.1\% of the amount spent for hospital care was paid directly by consumers in 1980. The remaining 90.9\% was paid by various third party payment sources. \textit{Id.} at 39.
parties,\textsuperscript{85} a mixture of private and public sources.\textsuperscript{86} Since the cost of physicians' services will fall directly on a substantial number of consumers,\textsuperscript{87} and those who pay from their own pockets are likely to be the poor, the unemployed, and the unsophisticated,\textsuperscript{88} it is appropriate that the loss due to malpractice be borne by the person who caused it rather than the innocent patient. To be sure, the absence of insurance on the part of the plaintiff will become a more telling factor in favor of strict liability when the application of strict liability to attorneys and architects is considered, since very few persons who suffer malpractice damages from these two professions will have appropriate insurance coverage. However, even in an area of professional malpractice where many consumers do carry insurance, such as medical malpractice, the coverage will often be inadequate to compensate fully the injury sustained.\textsuperscript{89}

Several conclusions can be drawn from an analysis of the economics of applying strict liability to professionals. First, it is not clear that physicians' fees will rise substantially or that large numbers of doctors will be motivated to strike for long periods if strict liability is applied. Second, hard data is needed on whether health care workers will bear the expense of strict liability or whether it will be passed on to patients. Third, although some recent economic studies strongly support the application of strict liability to professionals,\textsuperscript{90} traditional economics does not answer the question of whether strict liability \textit{should}\textsuperscript{91} apply to professionals.

\textsuperscript{85}Sixty-two and seven tenths percent of physicians services were paid for by third parties in 1980. \textit{Id.} at 40.
\textsuperscript{86}Private insurance sources paid 36.3\% of the cost of physicians' services; public programs paid 26.1\% of that cost. \textit{Id.}
\textsuperscript{87}This assumes that there is a correlation between the amount spent on physicians' services (and paid for directly by the consumer), and the number of people who pay directly for physicians' services.
\textsuperscript{88}In evaluating who will carry insurance, Professor Franklin concluded:
The argument can always be made that those who wish protection against such risks can do so by purchasing insurance for medical expenses and income loss. Even with the increased use of such insurance in the United States today, however, the very poor are unlikely to have any, much less adequate, protection. Strict liability is thus a much more reliable method for spreading this type of loss. Thus if it is conceded that every person who suffers substantial harm should receive some financial assistance, strict liability could be justified solely because it always defuses the cost of such assistance . . . .
Franklin, \textit{supra} note 3, at 464.
\textsuperscript{89}For example, Professor Franklin, in discussing the liability of blood banks for transmitting hepatitis, states:
For some policyholders, general first-party medical and income protection policies would help, should hepatitis strike. But even if such policies provided full coverage without limits or deductibles, they would still not cover pain and suffering.
\textit{Id.} at 469.
\textsuperscript{90}See A.M. Polinsky & W.P. Rogerson, \textit{supra} note 31; Shavell, \textit{supra} note 31.
\textsuperscript{91}"Economic theory provides no basis, in general for preferring strict liability to negligence, or negligence to strict liability, provided that some version of a contributory negligence defense is recognized." Posner, \textit{supra} note 57, at 221.
III. Legal Analysis

The application of strict liability to professionals raises two challenging legal questions: what is meant by strict liability, and how do you draw a line between injuries for which a plaintiff will be able to recover and those for which no recovery will be permitted. This section will consider these problems and apply strict liability to cases involving professionals. Detailed discussions of the policy reasons for applying strict liability to physicians may be found elsewhere.\(^9\)

A. What is Strict Liability?

This section will examine a highly controversial question: the definition of strict liability. It will evaluate several tests for strict liability, consider a func-

\(^9\) Professor Marc Franklin, in discussing the liability of physicians for injuries resulting from hepatitis, stated:

Few attempts have been made to hold physicians strictly liable in any context. Since strict liability for defective products has been limited to those in the product's chain of distribution, rather than persons using the product in supplying services, attempts to apply this doctrine to physicians have thus far proved fruitless.

. . . The safety incentive rationale is compelling, . . . since physicians are usually seeking profit in a competitive context. Imposing hepatitis costs on surgeons would emphasize the risks of blood transfusions, and the surgeons could respond by pressuring local hospitals to alter their source of blood or pressuring the blood banks to provide improved service. This latter approach would be particularly effective, since several are run by local medical societies. The most likely response, however, would be analogous to the resource allocation response that we discussed for banks and hospitals: Surgeons would give fewer transfusions and increase their use of component therapy. Finally, the loss-spreading justification applies to physicians since they are well aware of the risks involved and are able to insure against them. The risk of hepatitis would probably not raise the premiums for malpractice insurance appreciably, and the physician could pass these additional costs on to his patients through higher fees.

Franklin, supra note 3, at 472. See also Comparative Approaches, supra note 3. Judge Tobriner, concurring in Clark v. Gibbons, stated:

A system openly imposing liability without any pretense of negligence in this narrow range of cases can avoid unwarranted imputations of fault while permitting the rational development of badly needed doctrine. Simultaneously, such a system can insure that the burdens of unexplained accidents will not fall primarily upon the helpless but will be borne instead by those best able to spread their cost among all who benefit from the surgical operations in which these misfortunes occur.


In a suit against a dentist, the dissent stated:

Moreover, the strict liability rule does not discourage prudence but may actually encourage examination for defects which are not obvious.

. . . .

The law of torts should seek to compensate the injuries, to encourage safety practices and to distribute losses justly. . . . Dentistry as an enterprise should pay its own way. Denying compensation is to require an injured person who bears the loss alone to subsidize the risk-creating activities by which others profit.

For the foregoing reasons strict liability in tort should apply to a dentist who injures his patient by a latently defective instrument.

tional test for strict liability, and conclude with a caveat from Judge Posner.

In deriving a strict liability test for application to professionals, it will be helpful to examine strict liability as applied to defectively designed products and abnormally dangerous activities, such as blasting. Most of the commentary and judicial writing dealing with strict liability, has concerned these two areas.

1. Strict Liability in Products Liability

The keystone policy underlying strict liability was stated in *Henningesen v. Bloomfield Motors*: "[T]he burden of losses consequent upon use of defective articles is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur." At least seven tests have been suggested for evaluating a defective product such as the one involved in *Henningesen*: first, the section 402A "unreasonably dangerous" test; second, the risk-benefit test; third, the California test; four...

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94. Restatement section 402A provides that "[o]ne who sells any product in a defective condition, unreasonably dangerous to the user or consumer or to his property, is subject to liability for physical harm thereby caused to the ultimate user or consumer . . . ." *RESTATEMENT (SECOND) OF TORTS* § 402A (1965). The greatest difficulty in the interpretation of this definition has risen from the term "unreasonably dangerous." There are several grounds for criticism of the "unreasonably dangerous" language. It is argued that the usage misleads the jury by suggesting that it is not enough that the defective product be dangerous. It is also argued that use of language relating to reasonableness implies that the defendant must have been negligent. Proponents of the Restatement formulation respond that "unreasonably dangerous" means the same thing as "defective" and adds no additional elements to the proof required of the plaintiff. Difficulty in reconciling these opposing interpretations of the language is compounded by the fact that there is no precedent for the use or interpretation of the term "unreasonably dangerous." Vandall, "Design Defect" in Products Liability: Rethinking Negligence and Strict Liability, 43 Ohio St. L.J. 61, 72 (1982).
95. The risk-benefit test assures that strict liability does not result in the manufacturer being an insurer of a product, by providing that danger and utility must be weighed in evaluating a design hazard. Dean Keeton, the leading proponent of the risk-benefit rest, states:
A product is defective if it is unreasonably dangerous as marketed. It is unreasonably dangerous if a responsible person would conclude that the magnitude of the scientifically perceptible danger as it is proved to be at the time of the trial outweighed the benefits of the way the product was so designed and marketed.
Factors in measuring risk include likelihood of harm, potential seriousness of the harm, and the nature of the danger. Factors in measuring benefit include need for the product, feasibility of a safer design, and availability of substitute products.
The use of the term "unreasonably dangerous" here, as in the Restatement test, *supra* note 94, creates problems by implying a negligence standard and a need for the plaintiff to prove more than defectiveness. The language is thus misleading to that extent, even though the focus on balancing risk and benefit is otherwise valid. Vandall, *supra* note 94, at 74.
96. The two-prong test for defect developed by the California Supreme Court has been stated as follows:
[A] product may be found defective in design, so as to subject a manufacturer to strict liability for resulting injuries, under either of two alternative tests. First, a product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Second, a product may alter-
natively be found defective in design if the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design.

Barker v. Lull's Eng'g Co., 20 Cal. 3d 413, 432, 573 P.2d 443, 455-56, 143 Cal. Rptr. 225, 237-38 (1978). This definition grew largely out of a concern that the term "unreasonably dangerous" puts an unfair burden on the injured plaintiff of proving something like negligence. It also reflects the rationale that defectiveness of design cannot be determined without some balancing of competing factors.

Despite the attempt to improve the definition by eliminating the term "unreasonably dangerous," the California test has potential problems of its own. First, Dean Wade has criticized the consumer expectation standard by noting that often "the consumer would not know what to expect, because he would have no idea how safe the product could be made." Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 829 (1973). A second and even more serious problem is the use of the term "proximate cause." The term adds no clarity to the definition, and is superfluous in that determinations of defect and proximate cause involve basically identical questions of policy. It is confusing and misleading to ask the same policy questions twice, once in determining proximate cause and once in assessing defect. Vandall, supra note 94, at 75.

97. This test, as developed by the Oregon Supreme Court, involves a modification of the traditional negligence approach. The test has been stated as follows:

A dangerously defective article would be one which a reasonable person would not put into the stream of commerce if he had knowledge of its harmful character.

The test, therefore, is whether the seller would be negligent if he sold the article knowing of the risk involved. Strict liability imposes what amounts to constructive knowledge of the condition of the product.

Phillips v. Kimwood Mach. Co., 269 Or. 485, 492, 525 P.2d 1033, 1036 (1974) (emphasis in original). Both Professor Wade and Professor Keeton accept this test, but they disagree as to its relationship to negligence. Professor Wade argues that it is essentially a negligence test. Professor Keeton counters that "[s]ince the test is not one of negligence, it is not based upon the risks and dangers that the makers should have, in the exercise of ordinary care, known about."

Keeton, Manufacturer's Liability: The Meaning of "Defect in the Manufacture and Design of Products, 20 SYRACUSE L. REV. 559, 568 (1969). The Oregon court's assessment of these two views is that they "appear to be identical except that Keeton would impute the knowledge of dangers to the manufacturer at time of trial, while Wade would impute only the knowledge existing at the time the product was sold." Phillips v. Kimwood Mach. Co., 269 Or. 485, 492 n.6, 525 P.2d 1033, 1036 n.6 (1974).

The use of the term "negligent" in the definition thus creates an obvious difficulty in the interpretation and application of this test. Courts have consistently held that strict liability is not a matter of negligence. Also, the usage adds nothing that was not already available to and in use by courts, which had found constructive knowledge of defects where circumstantial evidence was strong enough to permit such an inference. By including an apparent requirement that the plaintiff prove negligence, this test runs contrary to the established cases as well as the fundamental theory of strict liability. Vandall, supra note 94, at 76.

98. The communicative tort action, as proposed by Dean Leon Green, is one "based on the duty to inform or to give reliable information, set off distinctly from the . . . negligence action based on the duty of care." Green, Strict Liability Under Sections 402A and 402B: A Decade of Litigation, 54 TEX. L. REV. 1185, 1188 (1976). The basic theory is that a seller will be held liable if the defective product injures a consumer due to absence of warnings or adequate instructions. The seller's liability is justified on the basis of the "corporate seller's command of all the media of communications to support his aggressive campaigns." Id. at 1190.

The adequacy of the information provided by the seller is clearly a critical factor in products liability, and Dean Green's proposal is important insofar as it encourages courts to consider this factor. The language of the proposed tort is so different, however, from the familiar language of products liability that it seems unlikely to gain wide acceptance by courts. Also, such an action based on information given by the seller to the purchaser would probably not be appropriate in a case brought by a donee or bystander. There are some cases, however, in which
The concept of strict liability in defective products is similar to strict liability in abnormally dangerous activities, such as blasting. Strict liability in abnormally dangerous activities is primarily a question of social policy: who should bear the loss? That is, "the justification for strict liability... is that useful but dangerous activities must pay their own way." 103

The adequacy of warnings or instructions is the critical concern, and in which an action in the nature of Green's communicative tort would be most appropriate. Vandall, supra note 94, at 77.

99. The concept of the cheapest cost avoider comes from Professor Guido Calabresi's work in applying economic analysis to products liability. Calabresi examined the traditional Learned Hand cost-benefit test and determined that it "tends to make injurers richer at the expense of victims." Calabresi & Hirschoff, supra note 63, at 1077. In arguing for a different test, Calabresi notes that strict liability developed not merely to distribute risk, but also "at least in part... to accomplish better primary accident cost reduction." Id. at 1075.

This accident cost reduction, as proposed by Professor Calabresi, can be achieved through a novel approach:

The strict liability test we suggest does not require that a government institution make such a cost-benefit analysis. It requires of such an institution only a decision as to which of the parties to the accident is in the best position to make the cost-benefit analysis between costs and accident avoidance costs and to act on that decision once it is made. The question for the court reduces to a search for the cheapest cost avoider.

Id. at 1060 (emphasis in original). An example of this is that "a violinist is the best evaluator of the relative advantages and costs of working in a steel mill, with regard to the suffering he will feel if he loses his hand ....... " Id. at 1069.

The Calabresi cheapest cost avoider test is unlikely to be widely adopted since it relies upon non-judicial terminology. In effect the test would often approach strict liability, since most products liability suits involve a relatively unsophisticated consumer against a seller knowledgeable of his product, and the seller will in all such cases be the cheapest cost avoider. In any event, the Calabresi test is valuable for its application of economic principles to the imposition of liability for injury from defective products. Vandall, supra note 94, at 78.

100. Professor Richard Epstein states that "that concept of causation, as it applies to cases of physical injury, can be analyzed in a matter [sic] that both renders it internally coherent and relevant to the ultimate question who shall bear the loss." Epstein, A Theory of Strict Liability, 2 J. LEGAL STUD. 151, 173 (1973). In analyzing causation he rejects the traditional two-part, cause in fact and proximate cause, format. His causation test is expressed as "proof of the proposition A hit B should be sufficient to establish a prima facie case of liability... The choice is plaintiff or defendant, and the analysis of causation is the tool which, prima facie, fastens responsibility upon the defendant." Id. at 168-69.

Professor Epstein's theory has two major problems. First, he defines so many traditional torts concepts in new ways that it is unlikely to be widely followed. Second, the total focus on causation, like earlier attempts to use foreseeability as a catchall concept, may well overload the term to the point that it loses usefulness. Vandall, supra note 94, at 79.


102. "The question... was not whether it was lawful or proper to engage in blasting but who should bear the cost of any resulting damage—the person who engaged in the dangerous activity or the innocent neighbor injured thereby." 25 N.Y.2d at 17, 250 N.E.2d at 34, 302 N.Y.S.2d at 532 (emphasis in original).

3. A Functional Test for Strict Liability

Analysis of a test developed for the application of strict liability to defectively designed products manifests that it is a statement of the important policies that should be weighed by the judge in deciding whether a product seller should be held strictly liable. The social policies indicated in the test prove to be more important than the fact that the seller has marketed a product as opposed to providing a service:

The court’s test for whether the product is defective involves a balancing of operative factors. First, the court must consider that the reasons for strict liability are to shift the loss from the consumer to the seller and that the loss should be borne by the person who created it. Second, the court should weigh: (1) the product’s utility, including style or aesthetic appeal; (2) the alternative designs; (3) the substitute products; (4) the likelihood of injury; (5) the nature of the injury; (6) the cost of making the product safer; (7) the availability and effectiveness of warnings; (8) the ability of the seller to obtain insurance or otherwise carry the loss; (9) the impact upon society of finding the product defective; (10) the experimental nature of the product. This is not an exclusive list, and the court may consider other factors that it deems relevant.

With modifications, this test for defective products can be used in dealing with professionals. Such a test, appropriate for applying strict liability to professionals, is developed in a later section.

4. Caveat: An Economist’s Critique of Strict Liability

Judge Posner has developed a theory of strict liability. Because it is a challenge to traditional notions of strict liability, it must be examined closely. Posner’s concept of strict liability is simple to state: “If the expected loss from some type of accident is great, and the loss cannot be reasonably averted by taking greater care but can be by an adjustment in the activity level, an economic case for strict liability is made out.” Several points should be noted in regard to Posner’s concept of strict liability. First, Posner’s definition of strict liability is contrary to the cases. In the classic strict liability case, blasting, the goal of the courts is not to adjust the level of activity, but just the opposite. Blasting is highly valuable to society and to be encouraged. The goal of strict liability is not to reduce the level of activity; it is to spread the inevitable losses. Second, there is no reason for concluding that strict liability will lead to a change in the level of activity. In-

104. Vandall, supra note 94, at 83.
105. See infra notes 174-248 and accompanying text.
106. POSNER, TORT LAW, supra note 79, at 477, 511. Judge Posner may be referring to Shavell’s theory concerning unilateral activities. Shavell, supra note 31.
108. 25 N.Y.2d at 17, 250 N.E.2d at 34, 302 N.Y.S.2d at 532.
deed, all that flows from a strict liability action is damages. This is also what results from a negligence action. To be sure, the defendant in a negligence action may decide to reduce his level of activity, as may the defendant who is held strictly liable. The calculation of damage is based on the losses the plaintiff has suffered, not whether the defendant was sued in strict liability or negligence. Indeed, there is some feeling that damage verdicts in strict liability cases might be lower than in negligence cases.

In support of his definition of strict liability, Judge Posner challenges the traditional rationale for strict liability, loss spreading, on three grounds. First, "there is an element of conjecture involved in supposing that taking a concentrated loss off the back of a victim of some accident and dividing it up into many small losses to customers or shareholders will increase total utility." Professor Calabresi takes the contrary position and states that the party "in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs . . . " should bear the loss. In this way the defendant will soon adjust his conduct. Also, Calabresi notes that placing the entire loss on one person is not economically beneficial.

Second, Posner argues that "there is an alternative . . . method of loss spreading available to potential victims besides strict liability: they can buy insurance . . . . " Professor Calabresi suggests that this is invalid to the extent that there is little deterrence value in placing the loss on the victims. They rarely have the ability to make changes in the conduct that is causing the injury.

Third, Posner states: "[T]here is no presumption that changing the potential injurer's activity level is the economically most efficient method of internalizing some external cost . . . . " This reduction in the activity level is apparently Judge Posner's personal thesis as it is not supported by other economists, or the cases. In addition, the Hand theory advocated by Judge

109. PROSSER, supra note 5, at 143-44.
110. "In McLuenesque terms negligence is 'hot' and strict liability is 'cold.' It is easier to prevail by showing that the defendant did something wrong than that there is something technically defective about the product." Rheingold, The Expanding Liability of the Product Supplier: A Primer, 2 HOFSTRA L. REV. 521, 531 (1974).
111. POSNER, TORT LAW, supra note 79, at 517. Posner defends his position by noting that while for any given individual the marginal utility of each dollar of income decreases as income rises, the marginal utility functions for individuals differ. Thus he hypothesizes that a given dollar may in fact have more utility to some rich individual than to a poor individual, so that total utility would not be increased by shifting the loss of that dollar from the poor man to the rich man.
112. Calabresi & Hirschoff, supra note 63, at 1060, 1076-84 (further discussing the relationship of their test to distributional goals such as loss spreading).
113. CALABRESI, supra note 79, at 68-94.
114. Id. at 39-45.
115. POSNER, TORT LAW, supra note 79, at 517-18.
116. CALABRESI, supra note 79, at 55.
117. See POSNER, TORT LAW, supra note 79, at 518 (emphasis added).
119. See supra text accompanying note 55.
Posner places the loss upon those who are often the weakest members of society, and is unlikely to lead to any decrease in the costs of accidents.

B. The Compensable Event

A major issue in applying strict liability to professionals is how to draw the line between injuries for which the claimant will be able to recover in strict liability and other injuries. A line must be drawn at some point, because strict liability theory does not intend, in dealing with professionals or product manufacturers, for the defendant to be held liable for all injuries he causes. Clearly, strict liability is not absolute liability. Several commentators have suggested that there is no feasible method to draw such a line when considering professionals. However, while marking the outer limits of strict liability will be challenging, examination will manifest that doing so is similar in function to the negligence concepts of proximate cause and duty, which also deal with cutting off liability at some point.

This section will evaluate several approaches for determining a compensable event, that is, when the claimant can recover from a professional in strict liability. It will conclude with a proposed alternative to these approaches.

1. Proximate Cause and Duty

Proximate cause is the term used for resolving the scope of liability issue under the negligence cause of action. Several tests have been used to handle this complex question of where to draw the line in negligence cases: foreseeability; remoteness; natural cause; direct cause; the foreseeable

120. Calabresi & Hirschcoff, supra note 63, at 1076-84.
121. Id.
123. Vandall, supra note 94, at 79.
124. See Comparative Approaches, supra note 3, at 1153.
125. See PROSSER, supra note 5, at 517. Prosser notes various formulations of the scope of strict liability, concluding that “ordinarily . . . the limitation is one of the policy underlying liability.” Id.
126. Prosser notes, in discussing proximate cause, that
[as a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.
PROSSER, supra note 5, at 236-37.
127. See Overseas Tankship (U.K.) Ltd. v. Mort Dock & Eng’g Co. (Wagon Mound No. 1), [1961] A.C. 388. The court there stated that “if it is asked why a man should be responsible for the natural or necessary or probable consequences of his act . . . the answer is that it is not because they are natural or necessary or probable, but because, since they have this quality . . . he ought to have foreseen them.” Id. at 390.
128. See In re Kinsman Transit Co., 388 F.2d 821, 824 (2d Cir. 1968).
129. Atlantic Coast Line R.R. v. Daniels, 8 Ga. App. 775, 779, 70 S.E. 203, 205 (1911).
small risk; and the foreseeable plaintiff. All suffer from vagueness and serve to conceal the true social policies that motivate the judge to decide that liability should end at a particular point. Because of these shortcomings, it fosters clear analysis to use the duty approach in negligence cases rather than proximate cause.

Dean Leon Green has pioneered an analytical approach to the scope of liability issue that rests on the duty concept and eliminates the issue of proximate cause. In weighing that issue, he urges the courts to consider several factors: flood of litigation, administrative impracticality, no limitation on liability, immorality, hardship, injustice, ability to carry the risk, changed social conditions, economics, and prevention. The duty approach avoids “squid function” words such as foreseeability and directs the court to consider the important and operative social policies.

Green’s approach has real merit in that it points us to the policies that should be considered in deciding where to draw the line on liability. There are several problems, however, in applying the duty approach to strict liability and professionals. First, it fails to indicate that cases dealing with abnormally dangerous activities and products liability have held that the primary reason for strict liability is loss spreading. Second, the duty approach was developed over fifty years ago to clarify the negligence question, and fails to reflect recent judicial developments in strict liability.

2. Cheapest Cost Avoider

Professor Calabresi’s test for strict liability should also be considered for determining the compensable event. He suggests that strict liability be imposed on whichever “of the parties to the accident is in the best possible position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made.” Several reasons suggest the application of this test to medical doctors:

133. Dean Green notes that courts are “exceedingly timid in discussing the policies which lie at the base of liability based upon negligent conduct. Instead, they lower the curtain of ‘proximate cause’ and seldom disclose the policies at the base of their decisions.” Green, Proximate Cause in Texas Negligence Law (pt. 4), 28 Tex. L. Rev. 755, 758 (1950) [hereinafter cited as Green].
134. Green argues that the judge should determine the defendant’s duty to the plaintiff, considering “the policies which enter into the allocation of risks such as may be involved in the particular case.” Id. at 773-74. See also Vandall, supra note 94, at 67-68.
135. Green, supra note 133, at 773.
136. Id. at 757 n.4; Green, The Duty Problem in Negligence Cases (pt. 1), 28 COLUM. L. REV. 1014, 1034-44 (1928).
137. See Green, supra note 133.
138. See Vandall, supra note 94, at 63-64.
140. Calabresi & Hirschoff, supra note 63, at 1060.
Implicit in the test is the notion that strict liability should place fault wherever a marked differential in ability to perform the cost-benefit analysis relevant to the maloccurrence is evident between identifiable categories of parties. . . . Presumably health care providers, as a category, have more information or better access to information than their patients and are therefore in a better position to perform the cost-benefit analysis as to what procedures to follow in diagnosing and treating ailments. Moreover, strict liability seems to promise a savings in administrative costs comparable to that expected under no-fault automobile insurance plans or under strict products liability.¹⁴¹

The "cheapest cost avoider" test has several serious drawbacks, however. When applied to doctors, the result is absolute liability, because in most medical cases, the doctor possesses superior knowledge. In application then, there is no basis for drawing the line between two close cases.¹⁴² Because the "cheapest cost avoider" approach leads to absolute liability, there may be a substantial increase in insurance costs and related administrative expenses.¹⁴³ Finally, the author of the test has never endorsed its application to professionals.¹⁴⁴ Indeed, he appears to prefer a type of workers' compensation in this area.¹⁴⁵

3. New Zealand’s Medical Misadventure

A possible test for the compensable event under strict liability is New Zealand’s approach to medically related injuries. In 1972, New Zealand abolished tort claims for personal injury damages and other "categorized systems of compensation."¹⁴⁶ This was replaced with a system of social insurance.¹⁴⁷ The main features of the system are straightforward.¹⁴⁸ As describ-

¹⁴¹. Comparative Approaches, supra note 3, at 1152.
¹⁴². "According to its originators, this test would be applied to broad categories, and not to individuals on a case-by-case basis." Id. at 1151-52.
¹⁴³. Id. at 1154-55.
¹⁴⁵. Calabresi states that he considers "the most promising attempt at reform . . . that tried by Havighurst & Tancredi." Id. at 137. The Approach is described in Havighurst & Tancredi, Medical Adversity Insurance—A No-Fault Approach to Medical Malpractice and Quality Assurance, 613 INS. L.J. 69, 71 (1974), in which the authors note that the proposed scheme is "roughly analogous to the workmen's compensation system for handling industrial accidents." Calabresi notes that the Havighurst & Tancredi Scheme would not cover all situations, Calabresi, The Problem of Malpractice, supra note 144 at 137, 140, and states that it does not provide "enough of an answer." He does not, however, advance any alternative scheme as preferable.
¹⁴⁶. T. ISON, ACCIDENT COMPENSATION 13 (1980) [hereinafter cited as ISON].
¹⁴⁷. Id.
¹⁴⁸. Stated over-simply, the main features of the system are as follows. A statutory body, the ACC, is the administering agency and adjudicating tribunal. The main revenues of the system are derived in three ways and recorded in three funds.
1. Levies on employers and the self-employed are collected by the Inland Revenue (a collecting agent for the ACC), and paid into an "earners' fund." The rate of levy payable in respect of employees ranges from 50 cents to $5.00 per $100.00
ed by Terence G. Ison, "[T]he system generally covers all cases of 'personal injury by accident' without inquiry into fault, without inquiry into cause, and for the most part, without other qualifying requirements that would delay or complicate the payment of benefits." The Accident Compensation Act states that "personal injury by accident" includes "[M]edical, surgical, dental, or first aid misadventure."

Medical misadventure is defined as follows:

(a) a person suffers bodily or mental injury or damage in the course of, and as part of, the administering to that person of medical aid, care or attention, and

(b) such injury or damage is caused by mischance or accident, unexpected and undesigned, in the nature of medical error or medical mishap.

The compensable event for strict liability could track the New Zealand plan by adopting the test for a medical misadventure and stating that the compensable event is broader than negligence, in that it includes medical mishaps and medical errors. There are several problems with relying on the New Zealand approach too heavily, however. First, in New Zealand the term medical misadventure "clearly excludes the normal risks of operative or other medical procedures." Second, because the scope of coverage is not precisely defined, there is an "uncertainty about the extent to which tort claims are abolished." Third, in New Zealand, "medical misadventure" covers most, but not all, negligence, and therefore doctors still carry liability insurance. Fourth, tough cases involving an absence of diagnosis, a wrong diagnosis, or adverse consequences from proper treatment have created substantial difficulties in New Zealand. For example, coverage has been rejected for cases involving post-operative infection. Coverage will likely be rejected in New Zealand for treatment that "does not improve the patient's condition . . . or where the change results from . . . bodily reaction, or other complication." These problems suggest that the New Zealand approach is inadequate for defining the compensable event for strict liability.

of payroll (as of 1 April 1979), depending on the risk classification of the employment. For the self-employed there is a standard rate of $1.00 per $100.00 of earnings.

2. Levies on motor vehicles are collected by the Post Office (a collecting agent for the ACC) as part of the motor vehicle license fee. These levies are paid into a "motor vehicle fund." The rate of levy for an ordinary motor car is $14.20 per annum, with other rates applying to other types of motor vehicles.

3. A "supplementary fund" is created from general government revenues to provide benefits in respect of injuries not covered by either of the other two funds, for example, housewives injured at home.

Id. at 14.
149. Id. at 18.
150. Id.
151. Id. at 36.
152. Id.
153. Id.
154. Id.
156. Id. at 257.
157. Id. at 258.
4. Consumer’s Reasonable Expectations

Professor Greenfield suggests that a service should be considered defective “if it fails to meet the reasonable expectations of the consumer.” He reasons:

[Just as the purchaser of goods reasonably expects them to perform in such a way as to accomplish the purpose for which they were manufactured and for which he purchases them, so the purchaser of services expects those services to be performed in such a way as to accomplish the purpose for which he purchases them. The consumer’s reasonable expectations as to quality are the same for services as for goods.]

He qualifies this by stating: “In service transactions ... it is not always possible to attain the consumer’s goal, and when this is so, an expectation of perfection is not reasonable.”

The “consumer’s reasonable expectations” test contains a fatal flaw; many professional-service transactions, particularly those of doctors, lawyers, and architects, are too technical and specialized for consumers to form reasonable expectations. In the products area, Dean Wade stated that the expectations of the ordinary consumer cannot be used as a standard for evaluating design defectiveness because “in many situations ... the consumer would not know what to expect, because he would have no idea how safe the product could be made.” This reasoning applies, a fortiori, to technical professional services and suggests that it is unlikely that the consumer’s reasonable expectations test will be helpful in determining the compensable event.

5. Inouye-Kennedy No-Fault Bill

In 1975, Senators Inouye and Kennedy proposed strict liability for medical injuries in Senate Bill 215. The bill provided for no-fault compensation “for loss from any injury suffered as a result of health care services provided by an insured to [any] beneficiary ....” An injury was defined to mean “physical harm, bodily impairment, disfigurement, or delay in recovery.”

A patient could either claim against the doctor in strict liability or sue in negligence before a state court. The compensable event was defined as follows:

[A]n injury “results” from the provision of health care services when it is more probably associated in whole or in part with the provision of such services than with the condition for which such services were provided.

158. Greenfield, supra note 3, at 697.
159. Id. at 698.
160. Id.
163. Id. § 1711(a).
164. Id. § 1721(7).
165. Id. § 1717.
This proposed bill does answer the critics who argue that no test can be devised for the compensable event. There are two major problems with using this particular test, however. First, the phrase "more probably associated with the provision of such services" is extremely vague and will only be answered through case by case administration or litigation. Second, such extensive litigation may consume the savings brought about through strict liability.

6. A Functional Test for Determining the Compensable Event

Analysis of various tests for the compensable event manifests that they are too broad, too narrow, or clearly inappropriate. A test is needed that combines generality and specificity, while indicating appropriate factors for consideration. The test must be capable of fine tuning. Modifications to the design-defect test noted earlier produce a functional test that accomplishes these goals. The purpose of the functional test is to set forth the factors that have been identified by the courts as important in deciding two related questions: first, should strict liability apply to these facts; second, if strict liability applies, should this defendant be held liable?

The test for the court in deciding whether a professional should be held strictly liable involves a balancing of operative factors. First, the court must consider that the reasons for strict liability are to shift the loss from the injured person to the professional and that the loss should be borne by the person who created it. Second, the court should weigh: (1) the social utility of the service performed by the professional, including whether it was trivial or necessary; (2) the modified procedures that could have been used to ac-

166. Id. § 1721(8), (11).
167. See, e.g., Greenfield, supra note 3, at 697-98; Comparative Approaches, supra note 3, at 1153-54.
168. See Comparative Approaches, supra note 3, at 1159.
169. Savings would probably result, however, if special hearing officers developed expertise in making determinations using the test. Id.
170. See discussions of proximate cause, supra notes 126-39 and accompanying text; cheapest cost avoider test, supra notes 140-45 and accompanying text; New Zealand's social insurance system, supra notes 146-57 and accompanying text; and the Inouye-Kennedy proposals, supra notes 162-69 and accompanying text.
171. See, e.g., Calabresi's criticisms of the Havighurst/Tancredi scheme, supra note 145.
172. For discussion of the "consumer's reasonable expectations" test, see sources cited supra notes 158-61 and accompanying text.
173. See sources cited supra notes 104-05 and accompanying text.
175. For example, was the doctor performing neurosurgery to remove a malignant tumor or was he removing a mole for cosmetic reasons?
complish the same result;\(^{(3)}\) possible substitute services;\(^{(4)}\) the likelihood of injury;\(^{(5)}\) the nature of the injury;\(^{(6)}\) the cost of making the service less risky;\(^{(7)}\) the value and opportunity of providing the patient or client with a warning of the risks;\(^{(8)}\) the ability of the professional to obtain insurance or otherwise carry the loss;\(^{(9)}\) the impact upon society of finding the professional strictly liable for this service;\(^{(10)}\) the experimental nature of the service;\(^{(11)}\) the amount of judgment required of the professional in making the decision;\(^{(12)}\) and the time available to make the decision.\(^{(13)}\)

176. Could, for example, a less risky drug have been prescribed? Could the technique or surgery have been less invasive?

177. Could rest and diet have accomplished the same result as surgery? Could the attorney have settled the case without going to trial?

178. Should the physician have anticipated a substantial chance of adverse results? Should the attorney have been able to anticipate that he might lose the case?

179. Is the resultant injury trivial, substantial, or very serious?

180. Could the service have been made substantially less risky by a small expenditure of time or money?

181. Was the patient very young or in an emergency situation so that a warning would be inappropriate? Could the patient or client comprehend the warning?

182. In medical malpractice cases, the doctor will usually have insurance. Sometimes, however, the patient will have insurance. In malpractice cases involving attorneys, however, it is unlikely that the client will have insurance that covers the injury. In malpractice cases involving architects, an uninsured third party often will be injured. In contrast, insurance is readily available to architects. Note, Architect Tort Liability in Preparation of Plans and Specifications, 55 Cal. L. Rev. 1386 (1967). In Helling v. Carey, 83 Wash. 2d 514, 520, 519 P.2d 981, 985 (1974), the concurring judge argued that strict liability "serves a compensatory function in situations where the defendant is, through the use of insurance, the financially more responsible person."

183. Is this service so vital to society that any real and prolonged decrease in its availability would adversely affect society as a whole? In this vein, there is evidence that the medical malpractice crisis never existed. See generally, Sepler, Professional Malpractice Litigation Crises: Danger or Distortion, 15 Forum 493 (1980).


185. One commentary suggests that the "routine" or "standardized" nature of the service is the key to applying strict liability to a lawyer. Five factors are presented for evaluating when an attorney's service is "standardized":

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


This is an important distinction between products liability and services. In the services context, if the decision is technical or routine and the results of each alternative are clear, then strict liability would be appropriate. But if the decision involves substantial amounts of discretion or judgment, then negligence is the better cause of action. This principle was applied in Helling v. Carey, 83 Wash. 2d 514, 518, 519 P.2d 981, 983 (1974), where the court rejected the standard of the medical profession and held the doctor liable. One factor the court placed weight on was that the decision whether to give a glaucoma test to persons under 40 years of age involved no judgment. 83 Wash. 2d at 518, 519 P.2d at 983. Similarly, Johnson v. Sears, 355 F. Supp. 1065 (E.D. Wis. 1973), held that strict liability applied to the "mechanical and administrative services" of the defendant hospital.

186. Professionals often find themselves confronted with an emergency. There is little time for reflection and a decision must be made. When a professional is confronted with an emer-
This is not an exclusive list and the court may consider other factors that it deems relevant.

The proposed test states that priority should be given to the primary reason for strict liability: loss shifting.\textsuperscript{187} No priority is given to the twelve secondary factors, because the weight given to each will vary with the facts of the particular case. The policies that are important to holding a professional liable are expressly stated in the test.

C. Application of the Functional Test to Decided Cases

Several cases have in fact considered the application of strict liability to professionals. This section will apply the functional test to the reported cases.

\begin{itemize}
\item \textit{emergency, negligence is the preferred cause of action.}
\item In most products cases, however, the manufacturer has time to evaluate the various courses of action. \textit{See, e.g., Dreisonstok v. Volkswagenwerk, 489 F.2d 1066 (4th Cir. 1974); Evans v. General Motors, 359 F.2d 822 (7th Cir.), \textit{cert. denied}, 385 U.S. 836 (1966).}
\item \textit{See} \textit{Helling v. Carey, 83 Wash. 2d 514, 519 P.2d 981, 984-85 (1974) ("strict liability serves a compensatory function in situations where the defendant through the use of insurance, is the financially more responsible person").}
\end{itemize}

In regard to jury instructions, the best approach is to charge the jury with the same test for strict liability that was employed by the court in deciding whether there was sufficient evidence of strict liability to send the question to the jury. The "jury should be charged to weigh the appropriateness of loss shifting, as well as the other important factors." Vandall, \textit{supra} note 94, at 85.

The following statement, made in regard to products, seems valid here also:

\begin{itemize}
\item In reply to those who argue that the jury is too unsophisticated to evaluate such complex issues as loss shifting, substitutability of other products, and prevention of injury, it must be remembered that the products liability jury likely has gone through weeks or months of expert testimony on such complex questions as modification costs, alternativeness of the product, and sales problems. The jury should be charged to weigh what they have heard during the trial which is, in large part, social policy. To do other than this is to force the attorneys to emphasize concepts, such as proximate cause, foreseeability, and remoteness, that may mislead the jury. \textit{Id.} at 85-86.
\end{itemize}

On the other hand, in dealing with products liability, several charges have been suggested and may be considered for professional-service cases. \textit{See generally id.} at 84-86. One suggested approach is to submit the factors enumerated by Dean Wade to the jury, instructing them specifically to weigh those factors in their decision as to whether the product was defective. Critics of this approach argue that our relatively unsophisticated juries are poorly equipped to handle such complex and subtle considerations. A second approach is thus to simply ask the jury directly "was the product defective?" Both these approaches raise the issue of whether the court should give the jury some definition of defect, or simply ask for a determination of whether the product was defective without further definition. The California court resolved this issue by including a definition in the jury charge. Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 432, 573 P.2d 443, 455-56, 143 Cal. Rptr. 225, 237-38 (1978). \textit{See supra} note 96.

The California test has several problems as a jury instruction. The consumer expectation language in the first prong of the test could mislead a jury into denying liability merely because a consumer had no particular knowledge or expectations of the product. A second problem is the term "foreseeable" which, according to Dean Green, is a "red herring" which distracts the jury's attention from the real social policy questions which should in fact be addressed. \textit{See generally id.} \textit{supra} notes 133 & 137. The major problem with the second prong of the California test as a jury instruction is the term "proximate cause," a term troublesome for lawyers, much more so for lay jurors. Besides the basically definitional problems just noted, the California test also fails to give the jury any indication of the historical rationale for strict liability, i.e., shifting loss to a seller of a product. Vandall, \textit{supra} note 94, at 84-85.
dealing with the medical profession, architects, and attorneys. The purpose is to manifest that the functional test is workable and produces appropriate results.

1. Physicians: Cases Involving a Service

Only three reported cases have dealt with a strict liability suit against a physician for injuries from a service where no product was involved. In *Helling v. Carey*, the plaintiff developed glaucoma because the defendant, an ophthalmologist, failed to test for it. The doctor, however, was following the professional standard for ophthalmologists: the glaucoma test was usually not given to persons under forty years of age. The court expressly rejected the standard of the medical profession and found the ophthalmologist negligent. The court reasoned that the test was simple, inexpensive, and harmless; thus it should have been given. The court also emphasized that there was "no judgment factor involved" on the part of the doctor.

In applying the functional test for strict liability to *Helling*, the simple, inexpensive and harmless nature of the glaucoma test, as well as the ministerial nature of the decision, argue that strict liability should apply. Indeed, the concurring opinion in *Helling* suggested that the case rested on strict liability:

>The difficulty of this [negligence] approach is that we as judges . . . seem to be imposing a stigma of moral blame upon the doctors who . . . used all the precautions commonly prescribed by their profession. . . . Lacking their training in this highly sophisticated profession, it seems illogical for this court to say they failed to exercise a reasonable standard of care. It seems to me we are, in reality, imposing liability, because, in choosing between an innocent plaintiff and doctor . . . the plaintiff should not have to bear the risk of the loss. As such, imposition of liability approaches that of strict liability.

The concurring opinion emphasized the role of insurance: "strict liability serves a compensatory function in situations where the defendant is, through use of insurance, the financially more responsible person." *Hoven v. Kelble* involved a suit against a surgeon, an anesthesiologist, the hospital, and the insurance carrier. The patient suffered cardiac arrest while undergoing a lung biopsy. After considering the policies for and against strict liability, the court rejected it, because "the consequences of the step the plaintiffs urge cannot be predicted with sufficient clarity." The court permitted a count in res ipsa loquitur, however.

Unfortunately, there is insufficient information presented in *Hoven* to decide

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188. 83 Wash. 2d 514, 519 P.2d 981 (1974).
189. Id. at 518, 519 P.2d at 983.
190. Id.
191. Id. at 520, 519 P.2d at 984.
192. Id. at 521, 519 P.2d at 985.
193. 79 Wis. 2d 444, 256 N.W.2d 379 (1977).
194. 79 Wis. 2d at 472, 256 N.W.2d at 393.
whether, under the functional test, strict liability was appropriate. For example, the following questions need to be answered before the test can be adequately applied: could the procedure have been modified; were other services available; what was the likelihood of the injury and the cost of making the service less risky; was there an opportunity to provide the patient with a warning; how much judgment was involved in the decision; and was there an emergency? The Hoven case simply did not present enough factual information to adequately address these questions.

Clark v. Gibbons\(^{195}\) presents the most clearly stated judicial discussion of the application of strict liability to professionals. In Clark, the patient suffered injury from premature termination of a fracture reduction. The spinal anesthesia wore off before the surgery was completed. The patient sued the anesthesiologist and the orthopedic surgeon. The majority applied res ipsa, but Judge Tobriner, in a concurring opinion, argued for the application of strict liability:

> A system openly imposing liability without any pretense of negligence ... can avoid unwarranted imputations of fault while permitting the rational development of badly needed doctrine. Simultaneously, such a system can insure that the burdens of unexplained accidents will not fall primarily upon the helpless but will be borne instead by those best able to spread their cost among all who benefit from the surgical operations in which those misfortunes occur.\(^{196}\)

Judge Tobriner added that strict liability will encourage settlements\(^{197}\) and avoid the destruction of reputations that flows from a finding of negligence.\(^{198}\) He concluded that:

> Basic error lies in primary reliance upon the concept of negligence and ... the courts should undertake a fundamental re-assessment of the largely fictitious and often futile search for fault which presently characterizes medical injury litigation ... .\(^{199}\)

Under the functional test for strict liability, the doctors would be liable in Clark. Several different procedures could have been used by the anesthesiologist,\(^{200}\) there was substantial likelihood of injury if the anesthetic wore off,\(^{201}\) the cost of extending the duration of the anesthetic was small,\(^{202}\) the doctors failed to communicate with each other and therefore failed to exercise the judgment they possessed,\(^{203}\) and there was no emergency.\(^{204}\)

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196. 426 P.2d at 539, 58 Cal. Rptr. at 139 (Tobriner, J., concurring).
197. Id. at 540, 58 Cal. Rptr. at 140 (Tobriner, J., concurring).
198. Id.
199. Id. at 538, 58 Cal. Rptr. at 138 (Tobriner, J., concurring).
200. Id. at 528-29, 58 Cal. Rptr. at 128-29. Other anesthetics or other modes of administration could have been used.
201. Id. at 529, 58 Cal. Rptr. at 131.
202. Id.
203. Id.
204. Id. at 528-29, 58 Cal. Rptr. at 128-29.
Together these factors tip the balance in favor of holding the physicians in *Clark* strictly liable.

2. Physicians: Cases Involving a Service and Product

Several of the many important cases dealing with strict liability and a professional service have also involved a product. The functional test suggests that the celebrated case of *Magrine v. Krasnica* was wrongly decided. In *Magrine* a patient sued a dentist for damages suffered when a hypodermic needle broke off in the patient's jaw. On appeal, the New Jersey Superior Court affirmed the Hudson County court's decision in favor of the dentist. The court rejected the application of strict liability:

[The dentist] . . . neither created the defect nor possessed any better capacity or expertise to discover or correct it. . . . Defendant dentist did not put the needle in the stream of commerce. . . . [P]rofessional services and skill [are] the essence of the relationship . . . .

Under the proposed functional test, *Magrine* was wrongly decided because the dentist was in the best position to spread the loss and to prevent the injury. If his insurance did not presently cover such losses, it would in the future, or the dentist could become a self-insurer. His ability to purchase insurance and spread the loss was the key factor, not that he was a "small business." Also, the dentist was in the best position to prevent the injury. He will note the needle's manufacturer, and select a more reliable manufacturer the next time. Indeed, he could have cheaply prevented the breakage by not using each needle eight times. The cost of using more needles, in relation to the potential injury, was low. Another important factor is that the dentist's decision was ministerial in nature and involved little judgment.

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206. *Id.*

207. *Id.*

208. *Id.* at 234-35, 227 A.2d at 543 (emphasis in original).

209. The insurance carrier here was denying coverage, apparently on the grounds that the case involved implied warranty, a contract claim, rather than a covered malpractice claim. *Id.* at 239, 227 A.2d at 545.


211. The refusal of courts to visit large losses upon small businesses has, in part, rested on the idea that it would put them out of business. Contemporary insurance equalizes the loss spreading ability of large and small businesses, however. Applying this to professionals, then, the dentist is just as able to purchase malpractice insurance as the large or small business is able to purchase product liability insurance.

212. He could have used the needle only once or purchased a better grade of needle (if that was the problem).


214. 94 N.J. Super. at 230, 227 A.2d at 540.
The choice was merely whether to use a new needle. Finally, the dissent in *Magrine* makes a telling point in support of applying strict liability:

Dentistry as an enterprise should pay its own way. Denying compensation is to require an injured person who bears the loss alone to subsidize the risk-creating activity by which others profit.

In *Newmark v. Gimbel's Inc.* the Superior Court of New Jersey limited the scope of *Magrine* when it held that strict liability applied to a beautician who caused the plaintiff to contract dermatitis by applying a permanent wave solution to the plaintiff's hair: "the transaction here... consisting of the supplying of a product for use in the administration of a permanent wave to plaintiff, carried with it an implied warranty that the product used was reasonably fit for the purpose for which it was to be used." On appeal in *Newmark*, the New Jersey Supreme Court was faced with a challenging argument: "there is no doctrinal basis for distinguishing the services rendered by a beauty parlor operator from those rendered by a dentist or a doctor." The court rejected the argument:

On the contrary there is a vast difference in the relationships. The beautician is engaged in a commercial enterprise; the dentist and doctor in a profession. The former caters publicly not to a need but to a form of aesthetic convenience or luxury... The dentist or doctor does not and cannot advertise for patients... This reasoning has been severely undermined by the recent Supreme Court decisions that advertising by doctors and lawyers is commercial speech and cannot be prohibited. These decisions remove the asserted basis for distinguishing the beautician in *Newmark* from the dentist in *Magrine*, suggesting that the same standard should be applied to both.

215. Compare the judgment factor with the discretionary functions exception in administrative law. The discretionary functions exception to the Federal Torts Claims Act protects the official from suit. The purpose of the exception is to avoid dampening the ardor of the official. K. Davis, *Administrative Law Text* § 26.01-02 (1972).

Another decision dealing to some degree with the nature of the judgment required was Johnson *v. Sears, Roebuck & Co.*, 355 F. Supp. 1065 (E.D. Wis. 1973). The plaintiff there sued Sears for injuries resulting from an improperly installed tire. Sears impleaded the defendant hospital. Although the court held that strict liability applies to the "mechanical and administrative services provided by hospitals," *id.* at 1067, the acts of the hospital were so unclear that the whole opinion is of doubtful value. The test proposed for applying strict liability to professionals cannot be used without a clear understanding of the facts of the case.

216. 100 N.J. Super. at 240-41, 241 A.2d at 647.


218. 102 N.J. Super. at 286, 246 A.2d at 15.

219. 54 N.J. at 596, 258 A.2d at 702.

220. *id.*


223. In the many other cases where a product and a professional service have been involved, the courts have generally rejected the application of strict liability. For example, in *Batiste v. American Home Prod. Corp.*, 32 N.C. App. 1, 231 S.E.2d 269 (Ct. App. 1977), a doctor was
3. Architects

There are several policy reasons for applying strict liability to architects.224 One is that insurance is readily available to architects, thereby providing a means of spreading the loss.225 Second, the contract between the client and the architect is not a sufficient basis for recovery. For example, injured persons who are not the architect's clients will not be able to recover under the terms of the contract.226 Third, clients are unaware of the need for inserting provisions into contracts that shift the loss to the architect.227 Finally, imposing strict liability upon an architect will deter him from designing dangerous structures.228

Despite these policies favoring strict liability, no reported case has held an architect strictly liable for the design or construction of a building. One important case, however, did apply strict liability to an architect who was both designer and builder. In Schipper v. Levitt & Sons, Inc.,229 a sixteen month old child was scalded by boiling-hot water that came out of a sink in a mass-
produced home designed by the architect. The defect was that the sink did not have a mixing valve which would have lowered the temperature of the water. The court applied both strict liability and negligence to the "mass developer of houses, who was architect, builder and vendor all in one." The Schipper court reasoned:

We consider that there are no meaningful distinctions between Levitt's mass production and sale of homes and the mass production and sale of automobiles and that the pertinent overriding policy considerations are the same. That being so, the . . . strict liability principles . . . should be carried over into the realty field . . . . The public interest dictates that if such injury does result from the defective construction, its costs should be borne by the responsible developer who created the danger and who is in the better economic position to bear the loss rather than by the injured party who justifiably relied on the developer's skill . . . .

Application of the functional test for strict liability suggests that the Schipper decision was correct: mixing valves were readily available, there was a substantial likelihood of injury, the injury was severe (seventy-four days in a hospital, two skin graft operations), the cost of making the sink safe was low (between $3.60 and $18.00), warnings were ineffective, malpractice insurance was available to architects, there was little judgment involved in the decision, and there was no emergency. Thus, the functional test supports the Court's conclusion that the architect should be strictly liable.

On the other hand, the general rule is that where the architect's function is solely to design the project, the plaintiff will be required to prove negligence. A few jurisdictions have avoided this rule by finding the architect liable for breach of an implied warranty. However, one court, in rejecting implied warranty as a cause of action has stated: "An engineer, or any other so-called professional, does not 'warrant' his service or the tangible evidence of his skill to be 'merchantable' or 'fit for intended use.' These are terms uniquely applicable to goods." The court continued, "the use of the term 'implied warranty' in these circumstances merely introduces further confusion into an area of law where confusion abounds."
4. Attorneys

No case has held that strict liability applies to attorneys. Indeed, no case has considered the question as a part of its holding. Two cases have noted the issue, however. One stated, in dicta, that implied warranty may apply to an attorney.\(^{244}\) Another merely referred to the question.\(^{245}\) \textit{Broyles v. Brown Engineering} is the only case that offers specific reasons why an attorney should not be held strictly liable:

Interpretation of law . . . cannot be an exact and accurate science. There is generally no formula to follow. Even when Code forms are used in the drafting of a complaint, questions often arise as to whether or not the correct form for the client’s case has been used. The courts from state to state, and among the judges on a particular court, often disagree in their interpretation as to the effect of judicial pronouncements or legislative enactments. Trial lawyers are dependent on the reactions of jurors to factual presentations and the application of law thereto. . . . [A]s a whole, lawyers are dealing with factors that are beyond their control and under such circumstances, common dealings would reasonably suggest the absence of any implied guaranty of results.\(^{246}\)

The functional test suggests that some activities of an attorney should be subject to strict liability, however. This possibility was noted by the \textit{Broyles} court:

[\textit{A} court might hold that an attorney who is entrusted with drawing a will and its proper execution impliedly insures its proper execution by sufficient number of witnesses signing their names as such—a very simple mandate of law that requires no room for divisional interpretation.]\(^{247}\)

The important factors in finding strict liability here would be: the likelihood of injury if too few witnesses were used, the low cost involved in checking the statute for the correct number of witnesses, the ability of the attorney to insure against the risk as compared with the client, the small amount of judgment involved in the activity,\(^{248}\) and the time available to research the law. Thus in certain routine matters the factors favoring the imposition of strict liability may apply to attorneys.

On the other hand, strict liability would not apply to many areas of an attorney’s work. For example, a great deal of judgment is involved in litigation decisions about who to depose and who to call as witnesses at trial. In these decisions, strict liability would not be helpful.

\(^{244}\) \textit{Broyles v. Brown Eng’g Co.}, 275 Ala. 35, 39, 151 So. 2d 767, 771 (1963).

\(^{245}\) \textit{Hoven v. Koble}, 79 Wis. 2d 444, 467, 256 N.W.2d 379, 390 (1979).

\(^{246}\) \textit{Broyles}, 275 Ala. at 39, 151 So. 2d at 771. Further discussion of reasons why an attorney should not be held strictly liable is found in Mallor, \textit{supra} note 185, at 475.

\(^{247}\) \textit{Broyles}, 275 Ala. at 39, 151 So. 2d at 771.

\(^{248}\) The “standardized” nature of the service has been suggested as a key to applying strict liability to a lawyer. See \textit{supra} note 191.
IV. STRICT LIABILITY, CONTRACT, AND NO-FAULT

Professor Epstein suggests that a physician employ contractual provisions to avoid the application of strict liability:

The important point again is to note that in most cases a medical malpractice suit is an outgrowth of a prior consensual relationship between physician and patient. Under these circumstances the parties themselves have strong incentives to allocate the risks of treatment between them in a manner that promotes both the efficient allocation of resources and optimum distribution of risk.249

This theory has been rejected by the courts because it fails to recognize the inherent imbalance in the physician-patient relationship. First, the patient likely knows little about the medical procedure involved.250 Second, the patient lacks bargaining power.251 Third, the physician has considerable market power.252 Fourth, the doctor would lack the incentive to draft an individualized contract and would probably resort to forms.253 Fifth, the patient would likely underestimate the risk of the medical procedure.254 Sixth, Epstein apparently intends no real "quid pro quo." He appears to favor a contract where the patient would surrender his or her right to sue for millions of dollars in damages in return for a slight decrease in the physician's fee.255 Finally, the courts have uniformly struck down disclaimers of liability in health care cases.256 Because disclaimers in physician-patient contracts violate public policy,257 it is doubtful that such disclaimers will be effective in limiting strict liability actions.

251. Id.
253. Epstein appears to consider general standardized forms as valuable in giving the physician "necessary discretion." Epstein, supra note 249, at 124.
255. See Epstein, supra note 249. In fact, Professor Epstein never sets out what the contract should contain.

Thus the . . . invalid exemption involves . . . the following characteristics. It concerns a business . . . thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often of practical necessity for some members of the public. . . . [T]he party invoking exculpation possesses a decisive advantage of bargaining strength. . . . [T]he party confronts the public with a standardized adhesion contract . . . .

Tunkl v. Regents of Univ. of Calif., 60 Cal. 2d at 98-100, 383 P.2d at 445-46, 32 Cal. Rptr. at 37-38.
257. Id. at 101, 383 P.2d at 447, 32 Cal. Rptr. at 39. The court in Tunkl notes that in the typical doctor-patient relationship:

The releasing party does not really acquiesce voluntarily in the contractual shifting of the risk, nor can we be reasonably certain that he receives an adequate con-
The real problem with the contract solution to professional liability is that much would be surrendered (the damage action) in return for very little (a decrease in the fee). A stronger case for the contract solution might be presented if the doctor promised to pay for all out-of-pocket expenses arising from an iatrogenic injury in return for the patient's promise to relinquish his right to recover in tort.

Analogizing medical malpractice to products liability, Professor Jeffrey O'Connell has proposed that no-fault insurance be adopted for injuries arising from medical treatment. According to Professor O'Connell:

The scenario for medical malpractice cases closely follows that for product liability. Here, too, one finds (1) liability turning on quite complicated fact situations, with concomitant expense and delay, (2) deeply offended defendants whose instinct is to resist settlement strongly, (3) such expenses and bother of litigation that only the largest claims are brought, (4) relatively little of the total loss being paid from liability insurance, (5) rapidly rising claims and premiums, and (6) most of the money going to lawyers and insurance companies rather than to the accident victims.258

As a solution to these problems, Professor O'Connell proposes that a professional "should be able to elect . . . to pay for injuries he causes on a no-fault basis, thereby foreclosing claims based on fault or defect."259 The no-fault solution would, of course, involve a contract, but a contract much more generous to the patient than the Epstein contract proposal:

Payment under elective no-fault liability would be limited to out-of-pocket losses above any amounts payable from collateral sources such as Blue Cross and sick leave. Payment would . . . not be made for pain and suffering.260

The no-fault solution to malpractice has not been widely adopted,261 and the reason is clear: there is little incentive for a physician to elect no-fault because he stands an excellent chance of winning most malpractice cases.262 The strict liability approach proposed in this article would provide an incen-

258. O'Connell, supra note 4, at 29.
260. Id. at 35.
262. See supra notes 4-7 and accompanying text.
tive for elective no-fault, however. If the doctor failed to offer no-fault to his patient, he would often be strictly liable if the patient suffered injury. If he offered no-fault, he could custom tailor the benefits within the bounds of public policy. 263

Strict liability has several advantages over elective no-fault, however. First, strict liability would have a more substantial deterrent effect than no-fault. 264 Second, as noted by Professors Polinsky and Shavell, 265 in most market situations, strict liability, rather than no-fault, would lead to medical services reflecting the socially correct price. Third, the patient’s recovery under no-fault is substantially less than under strict liability. Fourth, elective no-fault must await action by the physician, while strict liability is independent of any physician-patient contract.

CONCLUSION

The genesis for this article was Magrine v. Krasnica, 266 where the court failed to provide convincing reasons for rejecting the application of strict liability to a dentist. The case reflected a need to examine the application of strict liability to professionals from a broader legal perspective, and through insights provided by economics.

Section II demonstrated that traditional economic analysis suggests that a professional should not be treated differently from a product seller for the purposes of imposing liability. Indeed, recent economic studies which argue that strict liability should apply to product sellers suggest that strict liability is also appropriate for professionals. 267

Section III demonstrated that legal analysis also supports the application of strict liability to professionals. Tests for dealing with the core question of where to draw the line are available. Admittedly they are not tidy, but neither are other familiar tort concepts such as negligence or proximate cause. Specifically, this Article proposes that courts adopt the functional test. Applying the functional test for strict liability to decided cases manifests that the test is workable and will assist the courts in addressing the operative social

263. See the discussion of public policy limitations in Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963). See also the approach to incentives for no-fault in O’Connell, No-Fault Insurance, supra note 259, at 35-37, suggesting that “[i]n return for electing no-fault liability, an enterprise would pay victims for typical risks created by that enterprise only amounts above and beyond other payments due from all other sources.” Id. at 35.

264. It seems likely that strict liability would result in more cases being lost by the physician, with higher damage awards than under no-fault; the desire to avoid these results would lead to greater care on the part of the physician under strict liability.

265. Shavell, supra note 31, at 4; Polinsky & Rogerson, supra note 31, at 1-4.


267. See Shavell, supra note 31, at 4-6; Polinsky & Rogerson, supra note 31.
policies. Indeed, the case analysis section of this Article makes clear that strict liability is equally applicable to physicians, attorneys and architects.

At first blush, the concept of applying strict liability to professionals appears radical. However, economic theory, legal analysis, historical development, and the application of the functional test to decided cases all suggest that applying strict liability to professionals is a theory deserving serious consideration, particularly since elective no-fault has not been widely adopted and the United States lacks both national health care insurance and full injury protection (as found in New Zealand).