Application of Strict Liability to Repairers: A Proposal for Legislative Action in the Face of Judicial Inaction

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"Law, as an instrument for justice, has infinite capacity for
growth to meet changing needs and mores . . . the law should be
based on current concepts of what is right and just and the
judiciary should be alert to the neverending need for keeping legal
principles abreast of the times. Ancient distinctions that make no
sense in today's society and that tend to discredit the law should be
readily rejected."

—Kreigler v. Eichler Homes, Inc.
[269 Cal. App. 2d 224, 227, 74
Cal. Rptr. 749, 752 (1969)]

Since the monumental decision of *MacPherson v. Buick Motor Com-
pany*¹ in 1916, the barriers to bringing an action in strict products liability
have been slowly crumbling.² The court in *MacPherson* recognized that
negligence and warranty were inadequate bases of recovery for persons
injured by defective products.³ The enterprise creating the risk, said later
courts, should pay its own way and bear the loss for injuries sustained as a
result of a defective product.⁴ The underlying rationale of this public policy
position is that the enterprise is better able to protect against this very risk of
loss by obtaining insurance.⁵ The injured party, however, cannot obtain
"no-fault" insurance to protect against all injuries or losses resulting from
defective products.⁶ In addition to this ability to protect, the enterprise is in a
far better position than the consumer or bystander to know of the potential

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1. 217 N.Y. 382, 111 N.E. 1050 (1916).
2. See Lascher, *Strict Liability in Tort for Defective Products: the Road to and Past
  Vandermark*, 38 S. Cal. L. Rev. 30, 31 (1965) [hereinafter cited as Lascher]; Prosser, *The
  Assault on the Citadel—Strict Liability to the Consumer*, 69 Yale L.J. 1099, 1100 (1960)
  [hereinafter cited as Prosser].
3. See 217 N.Y. at 389, 111 N.E. at 1053 (1916); Lascher, supra note 2, at 31 n.3.
4. See, e.g., *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 63, 377 P.2d 897, 901,
  27 Cal. Rptr. 697, 701 (1963); *Escola v. Coca-Cola Bottling Company*, 24 Cal. 2d 453, 461-68,
  150 P.2d 436, 440-44 (1944) (Traynor, J., concurring).
5. For a general discussion of the underlying public policy rationales found in strict
   liability see Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L. Rev. 825
   (1973) [hereinafter cited as Wade].
6. See Wade, supra note 5, at 826. However, it is also established that a person held
   strictly liable is not a general insurer. See Calabresi & Hirschoff, *Toward a Test for Strict
   Liability in Tort*, 81 Yale L.J. 1055, 1056 (1972) [hereinafter cited as Calabresi & Hirschoff];
   Wade, supra note 5, at 828.
harms posed by the product and to take those measures necessary to remedy potential defects.\(^7\)

Predicated upon the aforementioned rationale, strict products liability has been extended by the California courts to a number of areas in which recovery was previously available only through actions in negligence or warranty.\(^8\) Despite the extensions, however, the decisions have staunchly refused to apply strict products liability to persons who repair or otherwise provide a service involving a product.\(^9\) Throughout the decisions, the courts, like a mythological Greek chorus, have sung much the same refrain—that there is no prior authority upon which such an extension of strict products liability to repairers can be predicated. In the absence of prior case law or statutory authority, California courts have flatly refused to act without even weighing the public policy factors as they did in other cases expanding strict products liability. Unfortunately, these refusals have only given future courts sitting in future cases further grounds upon which to

\(^7\) See Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 440-41 (1944), (Traynor, J., concurring); Wade, supra note 5, at 826. See generally Calabresi & Hirschoff, supra note 6, at 1055.


\(^9\) In Slayton v. Wright, 271 Cal. App. 2d 219, 76 Cal. Rptr. 494 (1969), a plaintiff was injured when a water heater installed by defendant exploded. The court in Slayton stated that strict liability must be limited to those selling a product and explicitly refused to include suppliers of services in this form of recovery:

A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being . . . . This rule is applicable only to those engaged in the business of selling.

Id. at 237, 76 Cal. Rptr. at 505. Four years later in Young v. Aro Corp., 36 Cal. App. 3d 240, 111 Cal. Rptr. 535 (1974), the court permitted a strict liability instruction to be given in a case where the manufacturer had performed defective repairs on one of its own products. There, the court stated:

Whatever may be the strict liability exposure of a repairer who also happens to be a manufacturer in general, this particular case appears to be well within the justification for manufacturers' strict liability.

Id. at 246, 111 Cal. Rptr. at 538. Once again, however, the court had reiterated the well-worn theme that strict liability did not apply to one who merely rendered a service. Thus, the basis for the strict liability instruction was a defect in manufacture and not repair. Id. A natural step from Aro would have been the expansion of strict liability to those manufacturers who incorrectly repair their own product, then to factory-authorized repairers who incorrectly repair the product for which they are authorized to repair, and finally to all repairers. Instead, two years later when the issue again appeared in Codekas v. Dyna-Lift Co., 48 Cal. App. 3d 20, 121 Cal. Rptr. 121 (1975), the court flatly refused to extend strict liability to repairers who were not engaged in the business of manufacture, based upon the decision in Aro. It was not possible, declared the court, to determine whether strict liability applied to repairers based upon the existing state of California case law. Id. at 24, 121 Cal. Rptr. at 124. With no authority on the subject of strict liability to repairers, the courts have created a "Catch-22" whereby they will not act because they have not previously acted and by not previously acting, they cannot so act in the future. Thus, the courts in treating the repairer cases, have failed to discuss the need for expansion of the public policy behind such expansion. See also 13 Cal. Trial L.J. 105, 106 (Summer, 1974).
predicate yet another refusal to act. Additionally, the legislature has failed to remedy this situation by providing the courts with statutory authority for the imposition of strict repairers liability.

It is the intent of this comment to propose that the doctrine of strict liability be legislatively extended to repairers. In light of the foregoing brief history, this comment will provide a discussion and analysis of the various analogies to existing law involved in the expansion of strict products liability to include persons who repair. First, the sale-service distinction, which is used as the dividing line between those causes of action deemed proper for strict liability and those deemed improper, will be explored. The rationale of the blood transfusion cases upholding this distinction will be contrasted with, and utilized to undermine, the sale-service distinction as it applies to repairers. Next, the public policy rationale advanced in the application of strict liability to manufacturers will be examined to demonstrate that this rationale supplies equally potent justification for the extension of strict liability to repairers. In connection with public policy issues, the financial ramifications of expanded liability will be assessed, to establish that the financial burden is not so onerous as to preclude the extension of strict liability in this direction. Thus, this comment will illustrate the necessity that the prior bases for judicial inaction give way, if not to changes implemented by the courts, to changes implemented by the legislature. Finally, a statutory proposal extending strict liability to repairers will be developed based upon the Restatement (Second) of Torts Section 402A.

THE SALE-SERVICE DISTINCTION IN CALIFORNIA

California courts have conspicuously limited strict liability recovery to transactions involving the sale of a product rather than the performance of a service. While the courts have provided ample public policy justification for the sale-service distinction, they have failed to adequately explain the distinction's existence. The sale of a product does not involve the rendering of any service other than the mere act of selling that product. While the purchaser may seek out and purchase a particular good in reliance on the skill of the manufacturer, the purchaser is not relying on any skills or knowledge possessed by the seller in the performance of the sale. Thus, the purchaser is not relying on the reputation behind the product and not on the reputation of the actual seller. A service, by contrast, directly involves the particular skills and training of the individual performing the service. It is in

10. See authority cited in note 8 supra. One possible explanation for the sale-service distinction is the inability of the professional to test for defects in his or her work. Even when a repairer does nothing more than provide a service without supplying any new parts, there is a present ability to test for defects. The professional, however, is faced with a long-range discoverability problem. Another possible explanation for this distinction is that the professional would raise the cost of his or her services beyond the level affordable to most of the population with the application of strict liability.

reliance on this person's skills and training that he or she is sought out by the purchaser. By maintaining this sale-service distinction in California, a body of persons such as doctors, dentists, lawyers, and repairers who are immune from the reaches of strict liability has been created. With the exception of repairers, this group is generally comprised of persons rendering professional services. In the case of a professional service, a consumer looks not to the product being provided, but to the skill of the person providing the product. On the other hand, the repairer is a commercial business that supplies parts as well as a working product. Thus in the case of a repairer, as with a manufacturer, the consumer ultimately looks to a functioning end product.

While maintaining the sale-service distinction as to professionals, England abandoned this distinction as to repairers in 1933 in G.H. Meyers & Co. v. Brent Cross Service Co. Thirty-two years later, a New Jersey court, grappling with the application of strict liability to services in Newmark v. Gimbel's Inc., involving a woman injured by a beauty shop application of a permanent solution, drew an additional distinction between those engaged in a commercial enterprise, such as the beauty shop, and those engaged in a professional enterprise, such as doctors, dentists or attorneys. The court found an area falling between a sale and service transaction to which strict liability should attach. As the court in Newmark noted:

It does not accord with logic to deny a similar right [to bring a strict liability action] to a patron against the beauty parlor operator or the manufacturer when the purchase and sale were made in anticipation of and for the purpose of use of the product on the patron who would be charged for its use. Common sense demands

13. Cf. Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 593 (1967), aff'd sub nom., Magrine v. Spector, 100 N.J. Super. 233, 241 A.2d 637 (1968), wherein no strict liability was found for a dentist who used a defective hypodermic needle in the course of performing dental services. The essence of the relationship between dentist and patient was one of offering skills in return for compensation. 94 N.J. Super at 235, 227 A.2d at 543. See generally Note, Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction, 24 Hastings L.J. 111, 124-25, 132 (1972), wherein the author indicates that the suppliers of services should be held strictly liable for the supply of a defective product causing injury in the course of giving professional services.
14. See notes 25-26 infra and accompanying text, and note 60 infra.
15. [1934] 1 K.B. 46; see Note, Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction, 24 Hastings L.J. 111, 114-16 (1972). The court could see no difference between the situation where the injurious product was consumed by or applied to the plaintiff. In both situations, plaintiff has relied on the safety of the product and defendant had derived a financial benefit from the transaction.
17. Id. at 593, 258 A.2d at 701. There are, of course, certain important differences between the service transaction involving a beautician and one involving a repairer. In the case of the beautician, a product must be provided with the service before strict liability could conceivably attach. The repair transaction is not so limited. The repairer may simply repair what exists without supplying any new parts.
that such patron be deemed a consumer as to both manufacturer
and beauty parlor operator. 18

Thus, strict liability was imposed where it could be said that a product had
been purchased in contemplation of its use for or on another in conjunction
with a service being performed upon the purchaser. 19 Where the service was
primarily dependent for its value on the products used or provided the court
felt that the supplier of those products should be held strictly liable. 20
Where, however, the service was not primarily dependent for its value on
the products utilized, but upon the skill, training and education of the person
performing the service, strict liability should not attach. 21 Thus, the hybrid
transaction looks to the products supplied and the supply of a flawless end
product rather than the actual service performed.

The repairer, like the beautician, may be seen as a skilled technician
whose services derive their value from the parts or products supplied in
conjunction with those services. 22 The consumer seeking repairs is actually
seeking a repaired product and it is to an accurate repair of the product
which the consumer looks. 23 The same analysis will not hold for the doctor,
dentist or attorney whose services derive their value from long and intensive
years of education. 24 The consumer of a professional service is looking to
the skill and training, rather than an end product as absolute as an accurate
repair. Any goods supplied are only incidental to the service rendered.

The repairer, whether or not he or she supplies parts, falls in a hybrid
class somewhere between the extremes of sale and service. 25 The repairer

18. Id. at 593, 258 A.2d at 701.
19. Id. Once again, it must be noted that the repairer presents a slightly different case
from the beautician, and therefore requires some extension of the legal principles found in the
Newmark case to accommodate the situation where the repairer has not supplied any parts.
20. See id. at 593, 258 A.2d 702-03. See also note 9 supra.
22. Cf. id. at 593, 258 A.2d at 701. In Newmark, the court found that the beautician was
strictly liable based upon her supply of a defective product. Thus, where the repairer supplied a
defective product or part, liability should also attach. As the court in Newmark reasoned,
where the consumer could have brought a strict products liability action against the manufac-
turer, so should the consumer be permitted to bring a strict products liability action against the
supplier of the product.
23. The supply of parts is not a requisite for repair. In many respects, the repair without
the supply of parts resembles the situation in Cronin v. J.B.E. Olsen Corp., 8 Cal. 3d 121, 501
P.2d 1153, 104 Cal. Rptr. 433 (1972). There, a sales agent for assembled vehicles was held
strictly liable for a defective hasp supplied by the manufacturer. The sales agent actually
compiled the various parts. In performing a repair, the repairer acts in a manner similar to both
a manufacturer and a seller of component parts. When the repairer merely repairs without
providing parts, he or she acts much like a manufacturer in providing a finished product; when
the repairer does provide parts, he or she becomes a seller of component parts. In either case,
strict liability applies. See Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897,
27 Cal. Rptr. 697 (1963) (manufacturer); Cronin v. J.B.E. Olsen Corp., 8 Cal. 3d 121, 501 P.2d
1153, 104 Cal. Rptr. 433 (1972) (supplier of component parts).
24. See note 13 supra. A doctor’s product, for example, is advice based upon long years
of training. Contra, Note, Products and the Professional: Strict Liability in the Sale-Service
25. In some cases the repairer is actually more closely akin to a manufacturer. When a
repairer fixes a product without the use of parts, he or she has, nevertheless, placed a product
on the market and impledly warranted it to be safe. The repairer has become, in essence, a
manufacturer of a repaired product. See note 23 supra and accompanying text.
purchases parts in contemplation of their use in the act of repairing an item belonging to another. This transaction is not like the retailer who purchases merely in contemplation of a resale, having no further connection with the goods beyond the actual act of sale. On the other hand, it is not like the doctor or dentist who purchases goods to be used only as a small incident of the professional’s skill and knowledge provided. Even where the repairer does not utilize parts in the repair transaction, the consumer is looking to the repairer to provide a functioning end product, rather than to the repairer’s knowledge.

The result is the creation of three basic categories of transactions: (1) the sale of goods involving no services; (2) the service where goods are only furnished as incidental to the service; and (3) the sale-service where any goods that may be provided are integrally linked with the end product. Just as it would violate logic to permit the patron of a beauty shop to bring suit against the manufacturer of the product, but not against the beauty operator, so would it violate logic to deny the same right to one whose product was defectively repaired. Both parties have been involved in a transaction of the same nature and both should have the same right of recovery.

A. Blood Transfusion Cases

Unlike England and New Jersey, California has continued to uphold the validity of the sale-service distinction and subject sellers to strict products liability while exempting providers of services. California has failed to recognize that there is a "middle ground" between the sale and the service transaction, involving some elements of each. Thus, the treatment of repairers as a service has served to exclude and protect them from strict liability. In recent years, this sale-service dichotomy has been exemplified by a series of cases refusing to impose strict liability on suppliers of blood which contains hepatitis virus. Not only have the blood transfusion cases been a predominate forum for litigation of this sale-service distinction, but they also serve to provide much of the rationale for the distinction's existence. There are, however, important distinctions between suppliers of blood and repairers of goods. The remainder of this section will illustrate the important differences between suppliers of blood and repairers of goods. These differ-

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26. Newmark, 54 N.J. at 593, 258 A.2d at 701, indicates that strict liability should apply where the product has been used in conjunction with a service.

27. See note 9 supra.

To impose strict liability under existing law, the defendant must be engaged in the business of selling or manufacturing items. The court in Shepard v. Alexian Brothers Hospital Inc. found the supplying of blood by a hospital to be "entirely subordinate to its paramount function of furnishing trained persons and specialized facilities." The supplying of blood by a hospital can be clearly isolated from other services rendered by a hospital and is only a small part of the overall function of a hospital. Since a hospital is not in the business of providing blood, it cannot be held strictly liable in tort for defects in the blood causing injury. A repairer, however, is in the business of supplying an accurately repaired product by supplying parts and skill or skill alone. Like the beautician in Newmark v. Gimbel's Inc., the repairer's services derive their value from both the product and the parts being supplied. Unlike the hospital, which is regarded as supplying services rather than blood, the repairer is engaged in the business of furnishing a reliable end product frequently involving, equally and inseparably, services and products. Thus, while it may be said that the hospital is not in the business of supplying blood and may not be held strictly liable, the sale-service distinction is not valid as to the repairer who is in the business of supplying repaired and working products.

Strict liability requires more than that one merely be engaged in the business of selling a certain item. The imposition of strict liability must be consonant with public policy. Despite all due care on the part of the hospital, it is not presently possible to test with more than 65 percent accuracy for the presence of hepatitis virus in the blood, the defect upon which suits have been brought. Public policy mandates that one be held responsible for those defects which he or she is in a better position to control, but not for those defects beyond detection due to the present state of the "art." The suppliers of blood are forced to rely upon the honesty and...

29. See note 8 supra.
31. Id. at 611, 109 Cal. Rptr. at 134. The rationale employed by the California court in determining the hospital's primary function was quite similar to that employed by the New Jersey court in Newmark v. Gimbel's, Inc., 54 N.J. 585, 258 A.2d 697 (1969), when the court distinguished between a commercial and a professional enterprise. In both instances, the courts looked to the primary nature of the business and whether its value was derived from the education, skill and training of the individual or merely from the supply of products.
34. See notes 22-24 supra and accompanying text.
36. See notes 22-25 supra and accompanying text.
38. See id.
veracity of the donors as to matters such as a donor’s medical history which can drastically affect the quality of blood. Thus, this inability to detect defects is coupled with a distinctly human element, which only serves to compound the problem faced by suppliers of blood in controlling quality. The repairer does not deal in “human products” and need not place the same degree of reliance on the quality of another’s product. Unlike suppliers of blood, whose product cannot be tested for purity with complete accuracy, the repairer is directly involved with the items being repaired in such a manner as to know the item’s strengths and weaknesses. The repairer is in a better position to test his or her repairs and to inspect each portion of the work for the existence of defects. Also unlike the supplier of blood, the repairer is not impeded by the state of his or her “art.”

While the treatment of blood as a sale and the resultant imposition of strict liability would not serve to improve product safety, such is not the case for the repairer who can demand improved product safety, spread the risk of loss and reallocate resources towards providing safer repairs. In short, the public policy rationale of the blood transfusion cases, which forbids application of strict liability to suppliers of blood, does not preclude the application of strict liability to repairers.

Those plaintiffs who attempted to challenge the principles governing blood transfusion liability had an additional hurdle to overcome. They were attempting to challenge an existing legislative pronouncement that expressly classified transfusions as service transactions. Repairers are not subject to such legislative pronouncement. Thus, while the courts may have used lack of judicial and statutory precedent as grounds for not extending strict

39. California expressly recognizes this problem at Cal. Health & Safety Code §§1600.1-1603.5 which contain extensive regulations and recordkeeping requirements as to both donees and donors.

40. In his concurring opinion in Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944), Justice Traynor states that responsibility must be placed where it will most effectively reduce hazards. By fixing responsibility on suppliers of blood for defects beyond their knowledge and control, there is no reduction of hazards. On the other hand, fixing responsibility on the repairer, under the rationale of Justice Traynor’s opinion, would serve to reduce hazards. Id. at 462, 150 P.2d at 440-41. There is nothing to preclude a repairer from fully and accurately testing for defects in the repair. See note 10 supra and accompanying text.


42. The manufacturer, reasoned Justice Traynor in Escola, 24 Cal. 2d at 462, 150 P.2d at 440-41, is able to distribute the cost of injuries among the public as an incident of doing business. The manufacturer is best able to afford such a constant and continuing protection. This same ability to distribute the cost of injuries is possessed by the repairer. See notes 61-69 infra and accompanying text. Cf. Note, Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction, 24 Hastings L.J. 111, 131-32 (1972); Wade, supra note 5, at 826.

43. Cal. Health & Safety Code §1606 provides that:

The procurement, processing, distribution, or use of whole blood, plasma, blood products, and blood derivatives for the purpose of injecting or transfusing the same, or any of them, into the human body shall be construed to be, and is declared to be, for all purposes whatsoever, the rendition of a service by each and every person, firm, or corporation participating therein, and shall not be construed to be, and is declared not to be, a sale of such whole blood, plasma, blood products, or blood derivatives, for any purpose or purposes whatsoever.
liability to repairers, they are not impeded from making this extension by existing legislative pronouncements.

It appears, then, that the sale-service distinction as typified by the blood transfusion cases is inapplicable to persons who repair. The repairer is engaged in an enterprise which, by the nature of the sale-service being provided, lends itself better to liability than does activity which is strictly a sale or, as in the case of a hospital, strictly a service. Further, the repairer is not impeded by the state of his or her art and is better able to avoid potential injuries than is the supplier of blood who is unable to test properly for the presence of injurious virus. Finally, there is no legislative pronouncement to overcome in the application of strict liability to repairers as there is in the case of suppliers of blood. However, unless the goals of public policy would be furthered by the expansion of strict liability to include repairers, there is no valid reason for the abolition of the sale-service distinction and with it immunity of repairers from strict liability.

PUBLIC POLICY

A number of public policy arguments have been advanced by the courts in their application of strict liability to manufacturers, retailers, wholesalers, distributors, licensors and sellers. A public policy decision involves a determination by the courts that the extension of strict products liability to a given area is in the public and judicial interest. Before the courts have been willing to extend strict products liability to any area, they have balanced the public policy arguments against the increased burdens, such as the increased cost of insurance, to determine whether such an expansion is in the public interest. Arguments of public policy are not contingent upon legal theories per se, but upon a weighing of social factors. Thus, the extension of strict liability to repairers is dependent upon a showing that the public interest is furthered by such a form of loss distribution.

Five major arguments have been advanced by the courts for the imposition of strict liability on manufacturers: (1) the manufacturer is in a better position than the injured party to know of defects and to correct them; (2) the manufacturer is in a better position than the injured party to allocate the

44. Repair contains elements of both the sale and the service. As indicated, according to the rationale of Justice Traynor in Escola, placing responsibility on the repairer would serve to reduce hazards. See note 40 supra. In this sense, the repairer resembles a manufacturer. But, the repairer also resembles the sales agent in Cronin. See note 23 supra. In this sense, an element of service is also seemingly involved to a small degree. Hence, by falling in this "gray area," the repairer is subject to all arguments in favor of strict liability.

45. See note 8 supra.

46. See note 8 supra. See Note, Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction, 24 Hastings L.J. 111, 131 (1972). The author indicates that the application of strict liability should be determined by the policy considerations of economic gain, risk distribution and consumer protection.

47. See generally Wade, supra note 5, at 825-27.

risk of loss and avoid accidents; (3) the imposition of strict liability will have a deterrent effect; (4) the manufacturer should be liable by virtue of having received a financial benefit from the injured party's business; (5) the injured party relied upon the skill of the manufacturer. Each of the above arguments will be examined to determine its applicability to repairers.

A. Repairers are in a Better Position to Know of Defects

A manufacturer introduces goods into the stream of commerce with the awareness that the goods are to be utilized by the ultimate consumer or user. As stated in the original cases applying strict liability to suppliers of defective food products, the manufacturer has a responsibility to this consumer or user since the manufacturer has dealt with the goods and should know that if the goods are defective, they are likely to cause harm. Because of this intimate relationship with the goods, the manufacturer is in a better position than the consumer to know whether the goods are defective.

Like the manufacturer or supplier of defective goods, the repairer is holding himself or herself out as having special knowledge or being an expert as to a particular product; the repairer is an expert in the repair of a certain product or type of product. A repairer, through extensive contact with a product, develops a knowledge of that product similar to the manufacturer's knowledge. Thus, logic dictates that the repairer be held to the same standard of knowledge as the manufacturer, based upon a substantial knowledge derived from contact with the product far exceeding the knowledge possessed by the consumer.

50. See Wade, supra note 5, at 826, indicating that a manufacturer will be deterred from furnishing defective products if he or she knows that strict liability will result for any defects.
51. See, Note, Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction, 24 HASTINGS L.J. 111, 131 (1972). The author indicates that one of the underlying policy considerations for imposing strict liability is economic gain.
53. See RESTATEMENT (SECOND) OF TORTS §402A, comment c (1965) [hereinafter cited as RESTATEMENT].
54. The RESTATEMENT indicates that as long ago as 1266, penalties were imposed upon persons supplying corrupt food and drink. In the early part of this century, the courts resorted to a number of theories to hold sellers of defective foods liable without a finding of negligence. Id. at 348-49.
55. Id. Strict liability has been extended beyond products intended for intimate use or consumption to include any product which, if defective, may be expected to cause injury. This result has been reached by many different theories, but underlying all of them is the public policy justification that the manufacturer has undertaken a special responsibility to the public by marketing his or her product. Id.
57. Vandermark v. Ford Motor Co., 61 Cal. 2d 236, 291 P.2d 168, 37 Cal. Rptr. 896 (1964) indicates that although a seller of goods has no reason to acquire such an intimate knowledge of the workings of an item that he or she stocks, he or she will be held strictly liable for defects in the item sold. Id. at 262, 391 P.2d at 171, 37 Cal. Rptr. at 899. In his concurring opinion in Escola, Justice Traynor expressly recognized the complexity of the manufacturing process and
The strict liability doctrine applies only to one who is engaged in the business of providing a certain product, and thereby does not impose liability on “grandma” who sold one jar of jelly to her friend. “Grandma” and those like her who do not have continual and substantial product contact would have no reason to know whether the product is defective and would cause injury. Just as public policy dictates that “grandma” be exempt from strict liability, the person who repaired a friend’s vehicle improperly would also be excluded from strict liability. One who is not engaged in the business of providing a certain item, either through manufacture or repair, should not be held to the same degree of knowledge as one who derives a livelihood from providing a product. Public policy would not impose such onerous liability on a private party engaged in an isolated transaction.

B. Repairers are in a Better Position to Allocate the Risk and Avoid Accidents

Strict liability is concerned with allocation of the risk of loss and avoidance of accidents caused by defective products. The manufacturer has the ability to avoid accident costs more cheaply than does the purchaser or ultimate consumer. The manufacturer is better able to obtain insurance against the risk of loss from a defective product than the consumer who cannot obtain “no-fault” insurance against all accidents. In addition, the manufacturer may reflect the cost of injuries in the price of the product, thereby allocating the cost among all consumers rather than burdening only the injured party. Furthermore, the manufacturer is in the best position to test the product and control or alter its design in the sake of safety and the accessibility of such knowledge to the general public. 24 Cal. 2d at 467, 150 P.2d at 443. The manufacturer has special knowledge gleaned from product contact, not available to the consumer. See id. As a result, the manufacturer has been held strictly liable. See Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 262, 391 P.2d 168, 171, 37 Cal. Rptr. 896, 898 (1964), in which the court took this analysis one step further and held that even though a seller of goods had no reason to acquire such an intimate knowledge of the workings of a product, he or she was strictly liable for defects in the item sold. Id. at 263, 391 P.2d at 172, 37 Cal. Rptr. at 900. If a retailer who has no reason to acquire knowledge of the defective condition may be held strictly liable, it does not stretch logic to find that the repairer who has gained intimate and extensive contact with the product should be held strictly liable for defects in his or her work. Like the manufacturer, repair has become highly specialized and the repairer possesses the same sort of special knowledge referred to in Escola.
avoiding defects.\textsuperscript{65} Substantial accident costs can be averted by what is sometimes a very minor change or adjustment. Additionally, the manufacturer plays more than a random and accidental role in the marketing enterprise by injecting the product into the stream of commerce and by advertising to encourage consumers to purchase.\textsuperscript{66} Since the manufacturer possesses a better ability to spread the risk of loss and to avoid accident costs, the manufacturer should bear the cost of resultant injuries.\textsuperscript{67}

Like the manufacturer, the repairer is also in a better position to allocate the risk of loss and avoid accident costs. The repairer, too, may obtain insurance and pass the increased costs of liability to the consumer by an adjustment of the price charged for the repair. The repairer, like the manufacturer, is also in a better position to test his or her work for defects. The person for whom the repairs were made has relied on the repairer,\textsuperscript{68} and it should be no more incumbent on one having an item repaired to test the quality of the repairs than it is incumbent on the purchaser of a product to test that product for defects.\textsuperscript{69} Thus, a consumer of a repaired item should equally be granted the protections of strict liability.

Finally, as in the case of the manufacturer, the repairer, too, plays more than a random role in the marketing enterprise.\textsuperscript{70} By holding out his or her services to the public, the repairer has, in essence, marketed these services.\textsuperscript{71} In fact, the availability of repair may cause the potential purchaser to select repair over purchase of a new product.\textsuperscript{72} Thus, the repairer may be seen as having an inverse effect on the marketing of new products. Had the


\textsuperscript{67} See Restatement, supra note 53, comment c.

\textsuperscript{68} See Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969). In Kriegler, the court held a seller of mass-produced homes strictly liable on a theory that consumers had relied on the quality of the seller's work. The rationale employed by the court was that sellers and purchasers are not on an equal footing, hence the purchaser must rely on the quality of the seller's work. Id. at 228, 74 Cal. Rptr. at 752-53. Since the consumer does not have the ability to test, he or she must rely on the quality of the seller's product. Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 467, 150 P.2d, 436, 443 (1944) (Traynor, J., concurring). Likewise, the consumer of a repair is equally unable to test due to the sophistication of the industry and must rely on the quality of the repairer's work.

\textsuperscript{69} Kriegler indicates that when one purchases a mass-produced home, he or she is entitled to rely on the quality and skill of the seller-builder. In relying, there would seem to be no requirement of testing. Likewise, the consumer is relying on the seller's skill and should not be required to test that which it would not be possible to test.

\textsuperscript{70} Manufacturers, retailers, and licensors are all deemed to be "an integral part of the overall . . . marketing enterprise that should bear the cost of injuries resulting from defective products." Garcia v. Halset, 3 Cal. App. 3d 319, 325, 82 Cal. Rptr. 420, 423 (1970), by having "provided a product to the public for use by the public." Id. at 326, 82 Cal. Rptr. at 423. Like a manufacturer, a repairer holds his or her supply of a functioning repaired product out to the public for use by the public. See note 60 supra.

\textsuperscript{71} The public are invited by the repairer, to contract for the product provided by the repairer, the defect-free repair. By holding himself or herself out as qualified to repair, and in fact, repairing, the repairer has marketed an end product much like the manufacturer markets and end product. See notes 57-70 supra and accompanying text.

\textsuperscript{72} This, however, is not to require the repairer to return the product to "like new" condition. The repairer is only required to provide the customer with a defect-free repair.
party actually purchased a new item, strict liability would have attached for resultant injuries from defects in the product.\(^7\) Therefore, all the consequences of marketing should also attach to the repairer, requiring the repairer to bear the responsibility for a defective repair.\(^7\)

C. Deterrent Effect

Strict liability poses a far greater deterrent effect than does merely holding the manufacturer to a negligence standard of due care.\(^7\) With an eminent threat of liability, the manufacturer tends to provide the public with a safer product.\(^7\) With the threat of strict liability looming larger than life, it would seem that repairers, too, would strive harder to provide a defect-free repair. Repairers would be required to inspect where there is now no duty to inspect;\(^7\) to study repair directions where they might have been previously disregarded; and to provide full and comprehensive testing of the repaired item before its return to the owner, rather than merely assuming that because the repaired item works, that it works properly.\(^7\)

Strict liability has also been characterized as an attempt to protect the consumer from impersonal merchandising.\(^7\) Protection from mass-merchandising is needed because a large portion of the mass-produced goods are made as poorly as the traffic will bear.\(^8\) Just as mass-produced goods are made with a minimum of effort, so may “mass repairs” be performed with an eye towards the clock rather than to the quality of the repair.\(^8\) The potential for performing these repairs as poorly as the traffic will bear appears to be so comparable to the mass-production manufacturing situation that the same strict liability should be imposed. In these situations,

\(^7\) See Restatement, supra note 53, comment a.

\(^7\) See Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963). One purpose of strict liability, the court in Greenman states, is to prevent the manufacturer from defining the scope of its own responsibility for defective products. Id. Rather, the manufacturer is made liable for the consequences of having marketed a defective product. See id. Like the manufacturer, the repairer does not agree to assume liability. Rather, strict liability would preclude the repairer from just such actions. Having marketed a product, the repairer should not then be allowed to define the scope of his or her responsibility.

\(^7\) See Jensvold, A Modern Approach of Loss Allocation among Tortfeasors in Products Liability Cases, 58 Minn. L. Rev. 723, 735 (1974) [hereinafter cited as Jensvold]; Wade, supra note 5, at 826.

\(^7\) See Jensvold, supra note 75, at 735; Wade, supra note 5, at 826.

\(^7\) When a manufacturer knows he or she will be liable despite due care, he or she will strive to provide a safer product. Wade, supra note 5, at 826. If a repairer knew that he or she would be liable despite all due care, the repairer would strive harder to avoid liability. For example, the repairer might conduct a more comprehensive inspection than would be required under the “reasonableness” standard of negligence. See W. Prosser, Law of Torts §32, at 149-51 (4th ed. 1971) [hereinafter cited as Prosser].

\(^7\) See note 77 supra.

\(^7\) See Cowan, Some Policy Bases of Products Liability, 17 Stan. L. Rev. 1077, 1086 (1965) [hereinafter cited as Cowan].

\(^8\) Id. at 1087.

\(^8\) A mass repairer is one who operates on a large scale, similar in some respects to an assembly line. An individual repairer, on the other hand, operates on a much smaller scale and employs fewer persons. The business of the individual repairer does not tend to rely on volume to the degree that the business of the mass repairer does.
a negligence standard of care requires only that the repairer act as a reasonable repairer under the circumstances. The possibility that a negligence action would not be successful is very real where the repairer acted as a reasonable repairer in the mass-repair situation, but due to the time factor failed to provide a defect-free repair. With the imposition of strict products liability, however, it would make no difference whether the conduct was reasonable. Upon a finding that defendant repairer had defectively repaired an item, he or she would be held strictly liable for the subsequent harm. The traffic could no longer be said to bear the inferior repairs since the repairer now would be ultimately responsible for defective or inferior repairs. Imposing strict liability on repairers would force repairers to provide the public with a safer product since the consequences for failure to do so would be onerous.

D. Repairer's Financial Benefit

Public policy mandates that strict liability be imposed on the manufacturer because he or she has derived a financial benefit from product sales and should therefore bear the responsibility for related consequences of marketing the particular good. Since a potential injury from a defective product is inherent in the product's sales, no manufacturer should receive financial benefit at the expense of the injured party.

A repairer also receives a financial benefit from the repair of products and the sale of parts. The factory-authorized repairer obtains both an indirect financial benefit from the manufacturer's creation or production of the product and a direct benefit from the manufacturer's authorization. By

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82. See Prosser, supra note 77, §32, at 149-51.
83. See Wade, supra note 5, at 826. One of the prime reasons for imposing strict liability is the difficulties in proving negligence against the supplier or manufacturer, even through the use of res ipsa loquitur. See Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring). The same difficulties would exist in the repairer situation. Thus, the same potential of an unsuccessful negligence action exists in the repair situation as existed in the manufacturer situation. Cf. Codekas v. Dyna-Lift Co., 48 Cal. App. 3d 20, 121 Cal. Rptr. 121 (1975) for an example of a repairer case predicated on a negligence theory.
84. Wade, supra note 5, at 826.
85. That a repair was defective does not mean that it was the result of negligence; but under strict liability there is no need to find negligence. See note 83 supra. A defect may exist despite due care. See note 83 supra. Strict liability would operate to hold the repairer liable in the same manner as it holds the manufacturer liable—without concern for care exhibited.
86. Cf. Note, Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction, 24 Hastings L.J. 111, 125, 131-32 (1972), where the author indicates that one of the bases for imposing strict liability is economic gain, i.e., that defendant has been enriched through the transaction in which the defective product was supplied.
87. See id.; James, Products Liability, 34 Tex. L. Rev. 192, 222 (1955). Both authors indicate that although the case law does not expressly say so, one of the underlying rationales for extending strict products liability is the financial benefit aspect.
88. See Note, Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction, 24 Hastings L.J. 111, 125 (1972). It does not seem to stretch the imagination, then, to infer that a repairer also receives an economic benefit from the repair transaction. This transaction, after all, is of much the same nature as the transaction in Newmark, which was deemed to be of a sufficiently commercial nature for strict liability to attach. See notes 15-22 supra and accompanying text.
providing a factory authorization, the manufacturer has encouraged the consumer to seek repairs from a particular individual. Without this authorization, it is highly unlikely that there would have been a transaction between the particular repairer and the customer, hence no financial benefit to the repairer. Because of the authorization, a repair transaction occurred which culminated in injury to the consumer. Receipt of a financial benefit has been deemed sufficient to impose strict liability on the retailer and by analogy should supply an adequate basis upon which to impose strict liability on the factory-authorized repairer for defects in the repair.

As to the independent repairer, his or her business does not stem from a recommendation by the manufacturer. The only connection between the repairer and the manufacturer is the production of the good without which there would have been no sale and no repair. Considerations of fairness, however, should outweigh the indirectness of the benefit to impose strict liability on even the independent repairer, who has received remuneration for the repaired product and supplied parts. Sufficient financial benefit has been derived to justify the imposition of strict products liability on both the factory-authorized and the independent repairer. Like the manufacturer or supplier of goods, both the factory-authorized and the independent repairer should bear responsibility for the related consequences of a defective repair since the repairer has received compensation in exchange for a repaired product.

89. California in Ray v. Alad Corp., 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977), held the successor in interest to a corporation strictly liable for defective products manufactured by the predecessor corporation. Id. at 34, 560 P.2d at 10-11, 136 Cal. Rptr. at 581-82. The court reasoned that the successor corporation had benefited from the predecessor's good will. Id. The court also predicated strict liability on the ground that the successor continued to market the same product as its own. Id. at 33-34, 560 P.2d at 10-11, 136 Cal. Rptr. at 581-82. By analogy, the repairer is deriving a benefit of sorts, from the corporation's good will by virtue of the factory authorization. Although not actually a successor to the corporation, the repairer may be viewed by the consuming public as an arm or extension of the manufacturing corporation.

90. Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 262, 391 P.2d 168, 171, 37 Cal. Rptr. 896, 899 (1964) states that:

Retailers like manufacturers, are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products.

See notes 86-88 supra and accompanying text.

91. Cf. Note, Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction, 24 HASTINGS L.J. 111, 125 (1972). The repairer has received a financial benefit and has benefited from the corporation's reputation and good will.

92. Policy considerations should control in the application of strict liability. See Note, Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction, 24 HASTINGS L.J. 111, 131 (1972). These considerations involve risk distribution and consumer protection. Id. Although a repair is not strictly a sale, it has many elements of the commercial transaction. See notes 14-22 supra and accompanying text. Thus, a financial benefit is derived from the use of products and the supply of parts in repair. See generally Note, Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction, 24 HASTINGS L.J. 111, 125. Also see note 84 supra and accompanying text, for a discussion concluding that use of a product in strictly a service transaction is sufficient basis upon which to impose liability.

93. See Note, Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction, 24 HASTINGS L.J. 111, 126 (1972). The author states that:

Regardless of the manner in which the financial benefit is derived, the policy considerations underlying liability should not change. . . . [A] plaintiff's reliance on prod-
E. Reliance

Consumers frequently select products in reliance on the manufacturer's reputation. Had the consumer not relied on the manufacturer's reputation and subsequently purchased the product, the consumer would not have been exposed to risk of injury from a possible defect in the manufacturer's product. Like manufacturers, repairers are also selected based upon reputation for such things as honesty and dependability. The factory-authorized repairer may be selected in reliance on the manufacturer. The availability of factory-authorized repairs may have been one of the factors that induced the consumer to purchase the particular product. As such, it may be said that the purchase of a particular product includes the purchase of a factory-authorized repairer. In such a case, any reliance placed on the manufacturer and his product is likewise reliance on the repairer. The factory-authorized repairer, as stated earlier, is deriving a benefit from the sale of the product. Thus, the factory-authorized repairer and manufacturer, are, in essence, part and parcel of the same transaction.

Independent repairers would seem to be selected for their reputation in much the same way that manufacturers are selected by the consumer. A consumer who takes a product to a repairer has indicated that he or she expects the return of a safe, functioning product. The consumer, in subsequent use of the repaired product, has relied on the repairer to provide a safe, repaired product. Like the purchaser of a product who has relied on the reputation of the manufacturer in purchasing, the consumer of a repair who has relied on the repairer to provide a safe repair should not be denied strict liability recovery.

Id. The author was arguing that strict liability should be applied to professionals who supplied a service. It is an even less tenuous reach to apply this rationale to the repairer who provides a hybrid sale-service and receives remuneration in return.

As expressed so aptly by Justice Traynor in *Escola*:

The consumer no longer has means or skill enough to investigate for himself the soundness of a product. Consumers no longer approach products warily but accept them on faith, relying on the reputation of the manufacturer or the trade mark. 24 Cal. 2d 453, 467, 150 P.2d 436, 443 (1944) (Traynor, J., concurring). For an application of this statement, see Elmore v. American Motors Corp., 70 Cal. 2d 578, 586, 451 P.2d 84, 89, 75 Cal. Rptr. 652, 657 (1969); Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 227, 74 Cal. Rptr. 749, 752 (1969).


Plaintiffs reliance on the products with which he comes in contact does not vary merely because the defendant has been enriched through the use instead of sale.

The level of consumer sophistication and reliance should be the same.

Thus, merely because one deals with a repairer, he or she would not rely any less that the repairer would select and use quality parts. See note 93 *supra*. The consumer of a repaired product should not be expected to have any more sophistication regarding the repair than he or she has as to the actual product. Since the *Escola* court has recognized that the consumer must rely on such things as manufacturer's reputation or trade-mark in purchase, it follows that the consumer of the repair relies on like things.

Since the independent repairer deals with much the same type of products as does the factory-authorized repairer, the level of consumer sophistication and reliance should be the same.

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The preceding discussion presumes that the consumer has voluntarily chosen to have the item repaired. Many persons resort to repair rather than purchase because it is the only financial possibility for them. The consumer with limited resources is now effectively denied the protections of strict liability solely due to any inability to afford a new item. To deny consumers with limited resources the strict liability protections which would extend to purchasers of new products on the basis of financial inability to purchase a new product is inequitable. Furthermore, repair may also be sought from a strong desire to retain the older product or out of a preference for the old design over the present design of the product. Once again, those persons should not be denied the strict liability protections which would have been theirs had they elected to part with the old product for a new model. By failing to impose strict liability on repairers, the courts have created a situation which penalizes consumers for selecting repair over purchase, denying strict liability to those seeking repairs while permitting it as to purchasers. Thus, to avoid such inequalities and to protect the consumer of repairs from injury, public policy dictates that strict liability be extended to repairers.

F. Conclusion

From the foregoing, it can be seen that the public policy considerations that resulted in the extension of strict liability to manufacturers are equally applicable to repairers. Repairers are in a better position than is the consumer to know of the defects and to correct them. Through devices such as insurance and price adjustments, repairers are better able to allocate the risk of loss and to avoid accidents. In addition, the repairer has received a financial benefit from the transaction and fairness dictates that he or she bear the consequences of the transaction, that the repair if performed defectively will cause injury. Strict products liability has been found to have a deterrent effect that would serve to promote safer repairs. Further, the consumer has relied on the repairer’s skill in providing a defect-free repaired product and the repairer, having induced that reliance, should be liable for the consequences of his or her actions. Beyond the public policy advantages to strict

98. The most common examples would be the choice to repair an automobile or major appliance rather than purchase a new one. It should be remembered that the repairer, if strictly liable, would not be deemed a general insurer against any and all defects in the product. See note 6 supra and accompanying text. Also see note 72 supra.

99. In Newmark, the court based the extension of strict liability to the sale-service transaction on the rationale that it is illogical to deny the patron the right to bring such an action against a beautician who used a product in connection with a service provided where strict liability would have been imposed had the patron purchased the product in a pure sales transaction. 54 N.J. at 593, 258 A.2d at 701-02. To deny the consumer of a repair the right to bring an action in strict liability violates the same logic. The consumer of a repair relies on the repairer to provide a safe product.

100. Again, Newmark’s rationale applies since it cannot be said that patrons of a beauty shop frequent the shop out of actual necessity. Rather, the opinion in Newmark upheld strict liability where the choice to patronize the establishment was purely voluntary.
products liability, application of strict liability to repairers would overcome most of the existing problems of proof in negligence and warranty actions.\textsuperscript{101} Although that alone would not provide adequate justification for the imposition of strict liability, such a streamlining of litigation would also be consonant with public policy.\textsuperscript{102} If, however, such an onerous liability as strict liability is not financially feasible, it cannot be practically imposed on the repairer. The repairer must be able to bear this financial burden or a judgment in strict liability will have little practical value.

**FINANCIAL RAMIFICATIONS OF STRICT LIABILITY**

Strict liability has been imposed upon manufacturers because of their ability to distribute the losses through insurance,\textsuperscript{103} indemnity and contribution.\textsuperscript{104} Similar options are not available to the injured person who may defray some of the costs with medical insurance, but must pay the remainder out of his or her own pocket.\textsuperscript{105} The repairer, like the manufacturer, is also in a position to distribute the losses through insurance, indemnity and contribution.\textsuperscript{106} Before it can be categorically stated that strict products liability should apply to the repairer, however, the financial ramifications of such an application must be assessed. Due to the scope and complexity of the area of financial impact, the forthcoming analysis cannot be, and is not intended to be, a comprehensive evaluation of the economic impact of strict liability on repairers, but a brief discussion will be undertaken.

**A. Products Liability Insurance**

Products liability insurance is no newcomer to the legal world. In Eng-
land, as early as 1890, bakers were able to obtain insurance for injuries sustained by consumers of their defective baked goods. With the development of strict products liability in the United States, comprehensive policies have been made available to provide manufacturers with coverage for injuries sustained as a result of their defective products. As is to be expected, however, the manufacturer does not absorb the entire cost of the insurance. Rather, premium costs reflecting losses due to injuries are frequently distributed to the consumer by increasing the price of the product to meet the cost of the premiums. Thus, those who opt to purchase a certain item indirectly pay for all injuries due to defects in the product purchased. Public policy has mandated this to be a more just way of dealing with injuries than to place the risks of loss and non-recovery on the injured individual.

A party who elects to have an item repaired will bear the cost of the repairers' products liability insurance, thus shifting the risk of loss for defective repairs from the injured consumer to the repairer who is in a position to spread that risk. In the case of one who has made a voluntary election to accept these increased repair costs, there is no injustice in requiring payment of a slightly elevated price. When, however, one is forced to have an item repaired because of the relatively high cost of replacement, the increased cost might practically preclude that person from having the item repaired by raising the cost of repairs to a level unaffordable by persons of limited finances. Thus, one would be disadvantaged for his or her lack of resources, a disadvantage that strict liability seeks to avoid.

There will undoubtedly be many repairers who will choose not to insure against the risk of defective repair and subsequent suit, and who will thus...

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108. Id. at 226.
109. See Calabresi & Hirschoff, supra note 6, at 1069; Prosser, supra note 2, at 1121 n.147.
110. See Calabresi & Hirschoff, supra note 6, at 1069; Prosser, supra note 2, at 1121; Wade, supra note 5, at 826.
111. See Wade, supra note 5, at 826.
112. One of the primary justifications for applying strict liability to the manufacturer was the better ability of the manufacturer to distribute losses. See notes 103-110 supra and accompanying text. Likewise, the repairer may increase the cost of the repair to pay the insurance premiums.
113. See Keeton and Shapo, Products and the Consumer: Defective and Dangerous Products 1235 (1970) [hereinafter cited as Keeton & Shapo]. The authors indicate that the costs of strict liability may preclude the less wealthy from purchasing an item. Likewise, the increased cost of repairs could preclude poorer persons from obtaining repairs, since repairers would be subject to the same strict liability costs as are manufacturers. The problem which increases the cost of insurance is the present unavailability of insurance due to insurers' reluctance to insure. It is not the actual cost of the premium that is presently prohibitive. The premium to insure for one year in strict products liability insurance, a repairer of electrical appliances with a gross income of $60,000 would be $138 per year, based upon calculations from 2 Merritt Manual, General Liability (Merritt Co.) 17 (May 29, 1974); 54 (Aug. 1, 1975).
114. Keeton & Shapo, supra note 113, at 1235; see Prosser, supra note 2, at 1121 n.147.
115. See Feldman, Liability of Manufacturers of Home Furnishings for Harm Done by the Product, 1955 Ins. L.J. 519, 560 [hereinafter cited as Feldman]. See note 113 supra for a discussion of the increased costs of strict products liability. As a result of these increased costs,
not be required to increase the costs of their repairs to cover their insurance premiums.\(^{116}\) Although the adoption of strict liability as to repairers would effectively limit the choice of repairers to which a person of limited resources could take his or her business, repairs would still be available to these persons.\(^{117}\) A judgment may not be collectable against the repairer who lacks the resources to pay insurance premiums, and persons relegated to seeking the services of an uninsured or undercapitalized repairer would be forced to assume the same risks of non-recovery with which they are presently faced in negligence and warranty actions.\(^{118}\) While the imposition of strict repairers’ liability does not categorically provide greater protections for persons of limited resources, neither does it manifestly increase their disadvantage since a successful suit brought in negligence would be equally uncollectible against the financially strapped repairer. The disadvantage to the imposition of strict liability, however, would be to limit the poorer person’s choice of repairers, forcing him or her to seek the services of a repairer whose establishment he or she might not otherwise have patronized.\(^{119}\) The benefits accruing to the majority with the application of strict repairers liability far outweigh the harm done by denying the services of certain repairers to those few persons unable to afford repairs. As with many changes in the law, it is likely that some group will suffer ill effects; this has rarely served as adequate justification for refusing to adapt the law to the demands of the times. Far less actual harm is done by denying a person the repair due to repairer unavailability, than is done by providing the repair but not assuring that a means of recovery is available for any injuries which may be proximately sustained from that repair.\(^{120}\)

Insurance, however, is not the heart of the problem in imposing strict

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\(^{116}\) See Feldman, supra note 115, at 560; Prosser, supra note 2, at 1121. Dean Prosser points out that, due to the competitive situation, manufacturers are unable to pass on the costs where to do so would too drastically reduce product sales. In the case of an individual, increased costs could price him or her out of the market. Prosser, supra note 2, at 1121. A repairer, as a sale-service enterprise, is faced with the same problems of competitive pricing so that the individual repairer, also, could price himself or herself out of the market.

\(^{117}\) Cf. Prosser, supra note 2, at 1121 n.147. Dean Prosser indicates that it is the small manufacturer who is hardest hit. However, strict products liability does not tend to put an entire industry out of business. Likewise, while the small repairer could be hardest hit, it is unlikely that repair would become totally unavailable.

\(^{118}\) See Feldman, supra note 115, at 560. Cf. Keeton & Shapiro, supra note 113, at 1235; Prosser, supra note 2, at 1121. It can be inferred from Dean Prosser’s recognition that some defendants will be uninsured, that these defendants are uninsured due to an inability to afford the premiums. While Prosser writes in the context of manufacturers, the same reasoning applies to repairers who find that they are unable to pay their insurance premiums.

\(^{119}\) The poorer person would be limited to selecting those repairers who did not insure, and thus did not increase their costs. See Feldman, supra note 115, at 560. See also notes 112-116 supra.

\(^{120}\) See Feldman, supra note 115, at 560. While one who has been denied repair due to its cost has no out-of-pocket losses, the person who has been injured due to a defective repair has substantial out-of-pocket losses which he or she will be unable to recoup against the uninsured repairer.
liability, but is merely one way to deal with it.\(^{121}\) In assessing the validity of insuring the repairer, it must be remembered that the injured parties are categorically unable to purchase "no-fault" insurance to provide full coverage for any injuries sustained as a result of contact with a product defectively repaired.\(^{122}\) Without extremely broad health and accident insurance, the victim is required to pay at least a portion of the cost of his or her injuries caused by a defectively repaired product. Even a small portion of a victim's expenses could be far more costly than the average person could afford. The victim, in essence, is required to pay the cost of the repairer's conduct.\(^{123}\) Finally, although insurance is available to the repairer, he or she is not relegated to the role of general insurer against all injuries.\(^{124}\) By retaining the requirements of proximate cause and cause in fact, strict liability would impose liability only for those injuries actually caused by the defect in the item.\(^{125}\) The repairer's liability, like that of the manufacturer, would be contained within the distinct legal limits of causation.

B. Indemnity and Contribution

Additional limits to the repairer's liability would be provided in the form of indemnity and contribution.\(^{126}\) These devices traditionally have been available to manufacturers whose conduct has not been the sole cause of the injury or occurrence.\(^{127}\) Indemnity is available to shift the entire judgment to a third person whose wrongful conduct resulted in the imposition of legal liability upon the defendant manufacturer.\(^{128}\) Since strict liability concerns itself with the actual culpability\(^{129}\) of the parties, culpability is also an issue when seeking indemnity and contribution.\(^{130}\) Where a manufacturer's conduct has not been in the least culpable, he or she ultimately is not required to pay for that conduct.\(^{131}\) Thus, if manufacturer No. 1 received a component part from manufacturer No. 2, which was inherently defective, with no way to test for such defects, upon being successfully sued, manufacturer No. 1 may seek indemnity from manufacturer No. 2. In the event that both

\(^{121}\) Prosser, supra note 2, at 1121.
\(^{122}\) Wade, supra note 5, at 826.
\(^{123}\) See id. The author indicates that the loss must be transferred from the injured party to the manufacturer who is better able to bear the risk of loss. The uninsured victim, it may be inferred, is hardly able to afford his or her accident costs. By an analogy to "no fault" automobile insurance, the author indicates that for a victim to be protected, that victim would have to take out such no fault insurance or pay the costs out-of-pocket.
\(^{124}\) Id. at 828; see generally, Calabresi & Hirschoff, supra note 6, at 1056.
\(^{125}\) See Wade, supra note 5, at 828.
\(^{128}\) See Jensvold, supra note 75, at 726.
\(^{129}\) The determination of "culpability" involves a determination that defendant placed a defective product on the market. See notes 168-183 infra and accompanying text. Culpability in the sense of the existence of a defect is not to be confused with the existence of negligence. See note 85 supra.
\(^{130}\) See Jensvold, supra note 75, at 724.
\(^{131}\) See id. at 726.
manufacturer No. 1 and manufacturer No. 2 were at fault, manufacturer No.
1 would only be entitled to contribution from No. 2. Applying these
principles of indemnity to repairers, indemnity would be permitted
whenever the repairer's conduct was free of culpability. In situations where
the repairer was supplied with an inherently defective repair kit from the
manufacturer or with inherently defective parts from another source, and the
repairer could not have discovered the defect, the repairer would be entitled
to indemnity. If, however, the repairer was careless or could have discov-
ered the defect, indemnity would not afford an escape from all liability; the
repairer, like the manufacturer, would have to shoulder the costs of resultant
injuries. Contribution, as applied to the repairer situation, would enable the
repairer to seek contribution from any joint tortfeasor. Thus, where both
manufacturer and repairer were responsible for a defective repair, each
would be required to shoulder a pro rata share of the damages awarded, with
the repairer not being required to bear the full financial burden.

The extension of strict liability to repairers will result in additional
expense, and some repairers, to be sure, will be unable to withstand this
added cost of doing business. While the cost can be defrayed to some
degree by increasing the price of the service, a portion of the cost necessarily
will be borne by the repairer. The goal of strict liability, however, is to
protect the consumer, and protections afforded the consumer against a
repairer presently unable to pay a judgment in negligence are small. The
extension of strict liability to repairers would provide a much needed
protection to the consumer by providing for an expanded possibility of
recovery.

Strict liability possesses no greater problems of financial feasibility for
the repairer than for the manufacturer. Through a number of devices, the
repairer can appropriately shift the liability in a manner consonant with
public policy. Besides being financially feasible, an application of strict
products liability to repairers is consonant with public policy considerations
advanced by prior case law. Strict products liability will serve to deter the
repair industry from injury-causing conduct, while, at the same time,

132. With the 1975 decision of Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal.
Rptr. 858 (1975), the state of California law on contribution is in flux. See, e.g., Safeway Stores,
Inc. v. Nest-Kart, 63 Cal. App. 3d 934, 134 Cal. Rptr. 150 (1976). Contribution is available in
California pursuant to CAL. CODE CIV. PROC. §875.
133. See PROSSER, supra note 77, at 308-09.
134. Id.
135. Prosser, supra note 2, at 1121.
136. Id.
138. See Feldman, supra note 115, at 560 for a discussion of the burdens placed on the
consumer by the uninsured defendant manufacturer. Likewise, the burden as to an uninsured
defendant repairer would be equally weighty upon the consumer of the repair.
139. See authority cited in note 8 supra for examples of the shifting of liability by the
California courts in a direction deemed to be consonant with public policy.
140. See Wade, supra note 5, at 826; Jensvold, supra note 75, at 735.
141. See notes 75-83 supra and accompanying text.
adjusting liability in a socially desirable manner. These goals, however, probably will not be achieved without the development of a workable statutory scheme. Thus, the remainder of this comment will be devoted to the development of a statutory proposal extending strict products liability to include repairers.

**STATUTORY PROPOSAL**

In the following paragraphs, a statutory proposal will be developed based upon Section 402A of the *Restatement (Second) of Torts* [hereinafter referred to as Section 402A], which articulates the basic criteria for holding sellers strictly liable for defects in products offered for sale. This section has been selected as a model since it provides a uniform statement of the general principles of strict products liability. The approach Section 402A provides to the problem of strict products liability is not only uniform, but demonstrably workable. Because Section 402A is expressly limited to sellers and sales of products, it will be necessary to adapt it somewhat to meet the requirements of strict repairer liability in the sale-service transaction.

**A. Who is the Proper Plaintiff?**

Section 402A indicates that the proper plaintiff in a strict products liability action is the ultimate consumer, and that a strict products liability suit is properly brought in the absence of a contractual relationship between the consumer and the manufacturer. California has interpreted this language to include a mere bystander injured by the product. A determination of who is the proper plaintiff is actually a question of public policy.

When one opts to purchase an item or to have an item repaired, he or she has assumed the added costs inuring from strict liability and should rightfully be deemed a proper plaintiff. It is clear that a person who has dealt directly with the repairer and was subsequently injured as a result of those dealings should be a proper plaintiff to bring suit.

The case is less clear when the only involvement with the repaired item is the injury sustained. Persons not in a contractual relationship with the repairer are far less likely to know of the defects that lurk in the product than are persons who have contracted for the item's repair. Bystanders and

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142. See authority cited in note 8 *supra* for an application of the principles of Restatement (Second) of Torts §402A by California's courts.
143. *Restatement, supra* note 53, comment b.
144. *Elmore v. American Motors Co.*, 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969). The court's opinion indicated that the bystander was far less able to protect against defects. *Id.* at 586, 451 P.2d at 89, 75 Cal. Rptr. at 657.
145. *Cf. id.* at 586-87, 451 P.2d at 89, 75 Cal. Rptr. at 657. The court made the traditional analysis of balancing the defendant's ability to distribute the cost of the harm as contrasted with the plaintiff's. See notes 109-120 *supra* and accompanying text.
146. See notes 112-116 *supra* and accompanying text.
147. *See Elmore v. American Motors Co.*, 70 Cal. 2d 578, 586, 451 P.2d 84, 89, 75 Cal. Rptr. 652, 687 (1969). While not in a contractual relationship with the repairer, persons such as
users have had no opportunity to inspect the item and take appropriate actions. Although one who contracts for the repair of an item can be said to have relied on the skill and quality of the repairer’s work, such cannot be said of one who is merely a user or bystander. Reliance, however, while providing some public policy justification, is not a prerequisite for the imposition of strict liability. The bystander or user who has not had an opportunity to rely should not be penalized for this absence of opportunity. Had this same user or bystander brought suit in negligence, a repairer would be deemed to owe a duty to the user or bystander as a person foreseeably injured by a defective repair. To deny the bystander the same right to bring suit in strict liability would be to create an arbitrary class of persons unable to sue except under negligence. The justification that a bystander has the least ability to protect himself or herself against the defective or negligent manufacture applies with equal force to the repairer situation. Based upon the need to protect all persons foreseeably injured by defective repairs, consumers, users and bystanders should all be proper plaintiffs to bring suit in strict repairs liability. Failure to extend the right to sue in strict liability to users and bystanders would serve to alleviate only partially the problems existing in the present law by perpetuating at least one class whose only recovery still would be in negligence.

B. Who is the Proper Defendant?

Under Section 402A, any manufacturer who places a defective product on the market is subject to suit in strict products liability, so long as the product was placed on the market in the regular course of business. While Section 402A requires that the product be in an unreasonably dangerous condition, California has eliminated this requirement, subjecting the manufacturer of any defective product to suit. While the elimination of the bystanders and users are highly foreseeable victims of injury from possible defects. See Prosser, supra note 77, at 254-56. Under the majority view, a duty is owed to all persons who might foreseeably be injured. As stated in Elmore, bystanders are foreseeable. While Elmore indicates foreseeability as to the manufacturer, this foreseeability of the bystander applies with like force to the repairer who returned the goods to a condition making them fit for their intended use. Cf. Note, Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction, 24 Hastings L.J. 111, 117 (1972). The author points to the irrationality of permitting only certain persons to sue and be sued in strict products liability. See note 144 supra and accompanying text.

148. Id. at 586, 451 P.2d at 89, 75 Cal. Rptr. at 657.
149. See id.
150. See id.
151. See Prosser, supra note 77, at 254-56. Under the majority view, a duty is owed to all persons who might foreseeably be injured. As stated in Elmore, bystanders are foreseeable. 70 Cal. 2d 578, 586, 451 P.2d 84, 89, 75 Cal. Rptr. 652, 657. While Elmore indicates foreseeability as to the manufacturer, this foreseeability of the bystander applies with like force to the repairer who returned the goods to a condition making them fit for their intended use.
152. Id. The RESTATEMENT defines unreasonably dangerous by stating that “the article must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with ordinary knowledge common to the community as to its characteristics.” RESTATEMENT, supra note 53, comment i. Thus, this language applies to products which, by their nature, will cause harm to the consumer if defective. The RESTATEMENTS, however, clearly indicates that there are certain products that cannot be made entirely safe for human consumption, and as to these products, strict liability will not be imposed. Id.
unreasonably dangerous limitation is well-settled as to manufacturers, the validity of a similar elimination for repairers must be assessed on its own merits.\textsuperscript{157}

Application of strict repairers liability only to repairers of inherently dangerous items would require the creation of a number of artificial categories as to what is inherently dangerous if defective.\textsuperscript{158} Imagine the case of a plaintiff who is injured when a spring flies off the back of her recently repaired carpetsweeper, and hits her eye. Plaintiff, injured by the defective repair of an item that is not inherently dangerous such as a carpetsweeper, would be unable to recover in strict liability. However, had plaintiff sustained an identical injury from an item deemed by the courts to be inherently dangerous if defective, she would have been able to recover in strict liability. The injury is the same, the repairer’s culpability is the same, yet one plaintiff is placed at an unfair advantage. The confusion which could result from such a scheme of classification is epitomized by the repairer who repairs several types of items, only some of which would be deemed inherently dangerous. To require the repairer to insure and be subject to suit in strict liability for only some occurrences would certainly create an inconsistent standard for injured individuals. The limitation of strict liability to repairers of inherently dangerous objects would not only create a myriad of practical problems in application, but would also perpetuate multifarious and arbitrary classification schemes so abhorrent to public policy.\textsuperscript{159} Thus, strict liability should be applied uniformly, making all repairers proper defendants.\textsuperscript{160}

For an individual to be subject to suit in strict products liability, that person must actually be engaged in the business of providing a certain product in which the defect arose, although this need not be the sole business in which the individual is engaged.\textsuperscript{161} This limitation serves to protect one who engaged in an isolated transaction such as “grandma” who sells a jar of jelly to her neighbor; liability cannot be fairly imposed in this situation.\textsuperscript{162} Application of this same limitation to repairers would operate to

\textsuperscript{157} At first glance, it would seem that if there is no reason to suspect that injury could ever arise from the repair of certain types of items, there would be no reason to require repairers of such items to insure against the risk of injury. This reasoning falls under a “hindsight” analysis—where there is no substantial injury, there will be no suit and for an injury to have occurred, the product must clearly have been dangerous if defective. The “inherently dangerous” distinction is, on a practical level, no distinction at all.

\textsuperscript{158} See generally Wade, supra note 5, for a further discussion of the problems with classifications of “defective.” Wade indicates that the attempt by the Restatement to apply a test such as “unreasonably defective” has been said to smack of negligence standards. Id. at 832. A product, for instance, may be defective, but not likely to cause injury. Id.

\textsuperscript{159} Id. at 837-38. Wade offers a list of factors involving policy considerations and suggests that a balancing of these factors is a proper way to determine liability, rather than the Restatement approach of “unreasonably dangerous.” Id.

\textsuperscript{160} See notes 88-93 supra and accompanying text for a discussion of similarities of independent and factory-authorized repairers.

\textsuperscript{161} Restatement, supra note 53, comment f.

\textsuperscript{162} Id. Also see notes 61-62 supra and accompanying text.
exclude from strict liability the person who repairs a friend's automobile but is not in the business of making such repairs. To require this person to insure against defects would be to impose an unreasonable and unworkable burden. Once again, the distinction becomes a question of where public policy would mandate that liability be limited. Thus, a repairer would be a proper defendant in a strict liability action if he or she is engaged in the business of repairing an item. The item need not be inherently dangerous nor need the repairer be exclusively engaged in the business of repairing that particular item.

C. What Harm will be Recoverable

Section 402A permits recovery for both personal injury and property damage, but excludes from recovery, pecuniary loss and loss of the benefit of the bargain. These limitations which have been imposed upon manufacturers should be retained in the application of strict liability to repairers, since to do otherwise would be to hold the repairer strictly liable simply because his or her work did not match the consumer's economic expectations. To extend liability to repairers for pecuniary or economic loss would be to impose a burden beyond that which public policy demands and beyond that which could be financially and practically imposed. Thus, the repairer would be financially responsible only for personal injury and property damage sustained as a result of the defective repair.

D. Defect must have been Proximate Cause of the Injury

Strict liability is also concerned with limiting liability and has retained the requirements of proximate cause. Proximate cause presumably would operate to provide strict liability with whatever limitations were available in negligence, exempting the manufacturer for occurrences of the most unforeseeable character and for those occurrences caused by defects that developed after the product left the hands of the manufacturer. Thus, proximate cause provides numerous limitations on a manufacturer's liability

163. See id.
165. See note 113 supra for a discussion on the cost of products liability insurance. The courts have expressly sought to limit liability. In Seeley v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), the court said, "The history of the doctrine of strict liability in tort indicates that it was designed . . . to govern the distinct problem of physical injuries." Id. at 15, 403 P.2d at 149, 45 Cal. Rptr. at 21. The court continued, "one purpose of strict liability in tort is to prevent a manufacturer from defining the scope of responsibility for harm caused by his products." Id. at 17, 403 P.2d at 150, 45 Cal. Rptr. at 22.

A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injury and there is no recovery for economic loss alone.

Id. at 18, 403 P.2d at 151, 45 Cal. Rptr. at 23.
166. See Wade, supra note 5, at 828.
Strict Liability of Repairers

for injurious defects. In addition to the general concepts of foreseeability found in negligence, Section 402A articulates several specific rules that further serve to delineate liability within a specified framework.

First, Section 402A requires the product causing injury to have been defective at the time it left the place of manufacture. Second, the product must not have suffered substantial change from the time that it left the manufacturer to the time that the injury occurred. Third, the product must have been utilized in its normal and intended fashion. These concepts become important as to repairers in two distinct situations, each of which requires a slightly different analysis. In the first situation, the defect is one of manufacture and is in existence at the time of the product’s creation. Thus, the repairer is not the actual cause of the defect but is made a defendant by virtue of his or her failure to discover the defect. The repairer, like the retailer, would be held strictly liable for those defects which were in existence at the time the product passed through the retailer’s hands. Without further qualification, the repairer would be strictly liable for manufacturing defects in a product brought in for repairs. Since strict liability does not concern itself with a duty of due care as a standard, the repairer would be liable for any defects in manufacture which resulted in injury to the consumer or other third persons after the goods left the repairer’s hands. The repairer would, however, be entitled to indemnity from the


168. RESTATEMENT, supra note 53, comment g. Even with the development of a statute, there will unavoidably be questions regarding the degree of proof required in actions against repairers in strict liability. In strict products liability, it is sufficient (other things being equal) that an injury is proximately caused by the manufacturing defect. By analogy, if an injury arises from an improper repair of the product such as the use of an incorrect part, this should be sufficient basis upon which to impose liability. Young v. Aro Corp., 36 Cal. App. 3d 240, 111 Cal. Rptr. 535 (1973), indicates that failure to correct a defect should be sufficient basis upon which to impose liability. Id. at 245, 111 Cal. Rptr. at 538. Although the case declines to hold the manufacturer liable as a repairer, it was found that failure to correct the defect on the part of the manufacturer when requested by the consumer, was sufficient basis upon which to impose strict liability on the manufacturer as a manufacturer. Id. Thus, if the manufacturer’s failure to repair a defect was adequate basis for the imposition of liability, the same standard should be imposed upon the repairer, making the repairer liable for mere failure to repair a defect when such defect results in injury or property damage. Problems with determining the cause of the injury and the source of the defect can be overcome through the use of expert testimony as is presently being done in strict products liability cases.


170. RESTATEMENT, supra note 53, comment h.

171. See Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 262, 391 P.2d 168, 171-72, 37 Cal. Rptr. 896, 899-900 (1964), holding a retailer liable for defects in existence at the time that the product left the retailer’s hands.

172. Id. In Vandermark, the court held a retailer to strict liability stating, Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. In some cases the retailer may be the only member of that enterprise reasonably available to the injured plaintiff. In other cases the retailer himself may play a substantial part in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer’s strict liability thus serves as an added incentive to safety.

Id. Like the retailer, the repairer is engaged in marketing goods to the public and is an integral part of this marketing enterprise. See notes 70-74 supra and accompanying text. Since the
manufacturer for failure to discover a defect in the absence of an independent duty to inspect.\textsuperscript{173} A hidden defect which cannot be discovered does not absolve the repairer of liability. It merely permits the repairer to seek indemnity. The repairer could not seek indemnity for manufacturing defects when there was an independent duty to inspect, such as where the repairs directly involved the defect.\textsuperscript{174}

In the second situation, the defect is one of repair, where the repairer, by his or her actions, has actually created a defect where none previously existed. These defects may take several forms. For example, a defective repair occurs where a repair of one part placed an additional strain on another part, resulting in the malfunction of the second part and injury to the plaintiff. The defect for which liability would be imposed in this situation is the repair of the item in such a manner that it could and would later malfunction. In situations where the repairer created a defect, that repairer would be strictly liable.\textsuperscript{175} So long as the defect did not arise from the installation of a faulty part or like defects, liability would be limited to the repairer.\textsuperscript{176}

A more complex situation of defective repair is presented by the repairer who "misdiagnoses" a problem and performs repairs based upon this misdiagnosis, resulting in a defect at the time that the product was in the repairer's hands. Strict liability would hold such a repairer liable for injuries stemming from a misdiagnosed repair done without full knowledge of the item's malfunction, so long as the defect arose as a result of the repair and was the proximate cause and cause in fact of the injury.\textsuperscript{177} At some point, the repairer is in much the same role as the retailer, the repairer should be subject to the same consequences as the retailer.

\textsuperscript{173} Even in \textit{Vandermark}, the court recognized that the manufacturer's duty to prepare and market a safe product was non-delegable. 61 Cal. 2d 256, 260-61, 391 P.2d 168, 170-71, 37 Cal. Rptr. 896, 898-99. In \textit{Barth v. B.F. Goodrich Tire Co.}, 15 Cal. App. 3d 137, 92 Cal. Rptr. 809 (1971), the court analyzed a retailer's right to seek indemnity from the manufacturer for defects in the product in terms of the retailer's active or passive participation. \textit{Id.} at 143-44, 92 Cal. Rptr. at 812-13. In \textit{Pearson v. Ford Motor Co.}, 273 Cal. App. 2d 269, 78 Cal. Rptr. 279 (1969), indemnity was denied because several of the defendant's employees had numerous occasions to have discovered the defect. \textit{Id.} at 274-75, 78 Cal. Rptr. at 283. The repairer who actually would seem to have a somewhat improved opportunity to inspect for defects than would the retailer, should be subject to the same standard for indemnity. Thus, while the manufacturer's duty to provide a defect-free product would remain non-delegable, the repairer would also be entitled to indemnity where his or her conduct was strictly passive as to the defect.

\textsuperscript{174} On the other hand, a retailer could be found to have failed to use due care in inspection, and thus be liable for negligence. Failure to find a defect would not necessarily be negligent since in a negligence action the repairer would only have a duty to repair and inspect with reasonable due care. See notes 172-73 \textit{supra}.

\textsuperscript{175} \textit{Restatement}, \textit{supra note 53, comment g}.

\textsuperscript{176} In a negligence action, there would be several approaches to limiting liability. First would be the concept of duty, requiring the repairer to act as a reasonable repairer. Where a reasonable repairer would have not known of the potential for added stress and malfunction, there may be no duty to take precautionary measures and hence no breach of duty. Second would be the limitations of foreseeability found in proximate cause. Where an unforeseeable injury occurs in an unforeseeable manner, there would be no liability. See notes 126-141 \textit{supra} and accompanying text.

\textsuperscript{177} In a negligence action, once again, the repairer would be held to the standard of a reasonable repairer under the same circumstances. So, where the repairer was not told by the
however, the connection between the misdiagnosis and the malfunction would become so attenuated that the chain of causation would be broken and the repairer would not be liable. Strict liability would not make the repairer a general insurer of the repaired item by imposing liability for completely unrelated defects.

The second limitation applied by Section 402A is that the product have suffered no substantial change from the time that it left the manufacturer to the time that the defect caused the injury. When there has been alteration by either the consumer or a third person after an item has left the hands of the manufacturer, no liability will be imposed on the manufacturer. Likewise, great potential for change and alteration by either the consumer or a third person exists in the repair situation. Retention of the requirement that the product be in substantially the same condition as when it left the repairer's hands would provide the repairer with a very necessary protection from liability for any changes effected by third persons where those changes resulted in injury. Thus, the retention of this requirement is valid as to the repairer.

Finally, Section 402A requires that the product have been utilized in its normal and intended manner. No liability is imposed upon the manufacturer when a product has been used in an abnormal or unforeseeable manner, since in either case, misuse by the consumer serves to break the chain of causation. Thus, where causation can be traced to the repairer due either to a defective repair or to failure to discover and correct certain defects of manufacture, the repairer, like the manufacturer, shall be held strictly liable in tort. However, just as liability for abnormal uses has not been imposed upon manufacturers, it should not be imposed upon repairers for the same reasons.

E. Statutory Proposal

Based upon the above reasoning, the following statutory proposal has been developed from the *Restatement (Second) of Torts* Section 402A, to impose strict liability on repairers of all items which, if defective, will cause injury. The adoption of such a statute by the California legislature would provide action where the courts have flatly refused to act. Thus, liability would be imposed in a sale-service hybrid, consistent with strict products liability as it exists to the sale of an item.

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179. See id.
180. *Restatement,* supra note 53, comment h.
181. Id.
Strict Liability of Repairer of Product for Physical Harm to User or Consumer

(1) One who repairs any product in such a manner as to return it to a consumer in a defective condition dangerous to the user, consumer, or bystander or to his or her property is subject to liability for physical harm thereby caused to said person or property, if:

(a) The repairer is engaged in the business of repairing such a product, and
(b) It is expected to and does reach the user or consumer without substantial change in the condition in which it was repaired, and
(c) Said repair is found to be the proximate cause and cause in fact of plaintiff’s injuries.

(2) The preceding section applies although the repairer has exercised all possible care in the preparation and repair of the item and the user or consumer has not entered into any contractual relationship with the repairer.

CONCLUSION

The barriers to bringing an action in strict products liability have indeed been crumbling as the courts have recognized the need for an alternative form of recovery to negligence and warranty. Since the courts have refused to extend strict liability to repairers, the California legislature must act to “meet the changing needs and mores” and to “abandon ancient distinctions that make no sense in today’s society.”\(^{182}\) With the application of this theory of recovery to the repairer situation, strict liability will have advanced once more in its logical chain of growth and progression.

It can no longer be argued that the sale-service distinction, as a rationale for refusing further extension of strict products liability, is valid as to the repairer transaction. Like the beautician in \textit{Newmark v. Gimbel’s Inc.},\(^{183}\) repair is a hybrid sale-service transaction, and as such the repairer should be held strictly liable for the injuries that he or she inflicts. The blood transfusion cases do not provide a valid justification for the retention of negligence and warranty as the only forms of recovery against repairers. Not only are the blood transfusion cases distinguishable from the repairer cases as involving strictly a service, unlike repair which involves a hybrid transaction, but they are also distinguishable in that the blood transfusion cases are impeded by the state of the art, unlike the repairer who can adequately test his or her


\(^{183}\) 54 N.J. 585, 258 A.2d 697 (1969). The repairer has been demonstrated to be much like both the retailer in \textit{Vandermark}, see note 57 \textit{supra}, and the manufacturer in \textit{Greenman}, see note 23 \textit{supra}. Further, the repairer, as a hybrid commercial enterprise, derives a far more product-related benefit than does the service enterprise, and should thus be required to bear the consequences which enure from the use or sale of the products. See notes 10-14 \textit{supra} and accompanying text.

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work. Nor is there an existing statute classifying repairs as service transac-
tions as exists in the case of blood transfusions. The sale-service distinction
must be recognized as invalid and a middle ground must be established
where strict products liability against repairers may exist.

Coupled with the invalidity of the sale-service distinction are strong
public policy arguments urging the adoption of strict liability to repairers.
Repairers are in much the same position as are manufacturers. They are
better able to know and to correct the defects in a product than is the
consumer, who probably sought the services of the repairer because he or
she was unable to perform the repairs. By virtue of the availability of such
devices as insurance, indemnity and contribution, the repairer is in a far
superior position to allocate the risk of loss. In addition, the repairer may
allocate the loss among all purchasers of the repairs by an increase in the
price of the service, much like the manufacturer’s increase of the price of his
or her product to pass on the cost of strict liability for injuries sustained from
defective products. By requiring the repairer to insure or face liability out of
his or her pocket, strict products liability has a deterrent effect on conduct
likely to result in an injury-causing defect. The consumer is thus further
protected and the public policy interest in safety advanced.

The passage of a statute modeled after the Restatement (Second) of Torts
Section 402A would accomplish all of the above public policy goals. Repairers
would be held strictly liable to all users, consumers, and bystand-
ers for those defects which cause injury to person or property. Such a statute
would serve to alleviate much of the disparity in recovery between those
persons able to purchase a new product and those who elect to or are forced
to seek repair of the old product. In light of this, the benefits of strict
repairer liability far outweigh the burden.

The legislature has issued no mandate expressly contrary to the urged
action. In the face of judicial inaction, it is clearly up to the legislature to
reject the nonsensical distinction between repairers and manufacturers, and
bring the law of repairers' liability into conformity with modern notions of
public policy.

Candice J. Cain