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Imposing Strict Products Liability on Medical Care Providers

*Bell v. Poplar Bluff Physicians Group*¹

I. INTRODUCTION

"[I]t is insane to snuff out with legal paper those who would light the candle of a cure . . ."²

Most jurisdictions preclude strict product liability claims against medical care providers.³ These jurisdictions have held, generally, that health care professionals do not *sell* medical products used pursuant to courses of medical treatment as is required under the products liability doctrine generally defined by *Restatement (Second) of Torts* § 402A and adopted, with modification, a majority of states.⁴ However, the Missouri Court of Appeals, in *Bell v. Poplar Bluffs Physicians Group*, held strict products liability does apply to medical care providers. The purpose of this Note is to analyze the *Bell* decision in light of both (i) the policies and purposes to be served by strict products liability and (ii) the magnitude of contravening law in Missouri and elsewhere regarding the application of this doctrine to the medical profession.

1. 879 S.W.2d 618 (Mo. Ct. App. 1994).

2. Peter W. Huber, *Safety And The Second Best: The Hazards Of Public Risk Management In The Courts*, 85 COLUM. L. REV. 277, 337 (1985) (arguing regulatory schemes are better able to handle societal risks, such as medical innovations, than the court system).

3. See generally Annotation, *Liability of Hospital or Medical Practitioner Under Strict Liability in Tort or Breach of Warranty For Harm Caused By Drug, Medical Instrument, or Similar Device Used in Treating Patient*, 54 A.L.R. 3D 258 (1974 & Supp. 1995); See also Richard L. Cupp, *Sharing Accountability For Breast Implants: Strict Products Liability And Medical Professionals Engaged In Hybrid Sales/Service Cosmetic Products Transactions*, 21 FLA. ST. U. L. REV. 873, 873-81 (1994); David Crump & Larry A. Maxwell, *Should Health Service Providers Be Strictly Liable For Product Related Injuries? A Legal And Economic Analysis*, 36 SW. L. J. 831, 831-34 (1982).

4. See *infra* note 15 and accompanying text and notes 31 to 77 and accompanying text.

II. FACTS AND HOLDING

In 1987, Joanna Bell purchased a "temporomandibular interpositional implant"⁵ from Poplar Bluff Physicians Group, doing business as Doctors Regional Medical Center ("the hospital").⁶ Claiming the implant was defective, Ms. Bell sought damages against the hospital under both strict product liability (count I) and negligence (count II) theories.⁷ With respect to count I, the hospital contended that strict product liability did not apply to surgical implants because the hospital was not a "seller" under *Restatement (Second) of Torts* § 402A.⁸ Summary judgment was granted in favor of the defendant hospital, and Ms. Bell appealed.⁹ The Missouri Court of Appeals, Southern District, reversed the grant of summary judgment and remanded the cause for further proceedings, holding (i) hospitals are not exempt from strict liability for defective medical devices sold to and implanted in its patients¹⁰ and (ii) the statute of limitations for medical malpractice claims does not apply to strict liability causes of action.¹¹

III. LEGAL BACKGROUND

A. *The Development of Products Liability Law*

Products liability is a fairly recent development in tort law, originating in the 1963 California Supreme Court decision, *Greenman v. Yuba Power Products, Inc.*¹² Justice Traynor, writing the court's opinion, stated the reason for imposing strict liability on a manufacturer as being to insure that the costs of defective products be borne by those engaged in the manufacturing of such products.¹³ Within one year, § 402A of *Restatement (Second) of Torts*¹⁴ was adopted by the American Law Institute as its

5. A temporomandibular interpositional implant (TMJ) is a jaw implant used to counter the effects of temporo-mandibular joint syndrome—a condition causing arthritis as well as jaw and facial discomfort. See Gary Taylor, *A Discovery by DuPont: Hidden Costs of Winning*, THE NATIONAL LAW JOURNAL, March 27, 1995, vol. 17, B1-B2.

6. *Bell*, 879 S.W.2d at 619.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 621

11. *Id.*

12. 377 P.2d 897 (Cal. 1963).

13. *Id.* at 901.

14. Section 402A. Special Liability of Seller of Product for Physical Harm to

definition of products liability.¹⁵ The *Restatement* doctrine, a strict liability doctrine,¹⁶ places liability on those engaged in the business of marketing and selling products found to be defective.¹⁷ Since the *Greenman* decision and

User or Consumer.

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate consumer or to his property, if

(a) the seller is engaged in the business of selling 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 is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1977).

15. Peter N. Swisher, *Products Liability Tort Reform: Why Virginia Should Adopt the Henderson-Twerski Proposed Revision of Section 402A, Restatement (Second) of Torts*, 27 U. RICH. L. REV. 856, 879 (1993).

16. See generally FRANK J. VANDALL, STRICT LIABILITY, 18-25 (1989).

17. RESTATEMENT (SECOND) OF TORTS, § 402A, cmt. c. The rule under the *Restatement* was not meant to apply to the occasional seller of a product, but rather to those who market products. *Id.* at cmt. f. See also Crump & Maxwell, *supra* note 3, at 852 (stating that medical professionals "advertise, merchandise, or make medical products available to the public").

Of further interest in the area of medical device liability are comment k and comment i—both concerning unavoidably unsafe products or unreasonably dangerous products. These sections may be helpful in arguing to preclude strict liability claims from all medical device cases.

Comment k excludes products that are unavoidably unsafe. The relevant example given in the comment is drugs and vaccines. The comment states such products are justified despite the inherent risks associated with their development and use. RESTATEMENT (SECOND) OF TORTS, § 402A, cmt. k. See Cupp, *supra* note 3, at 909-11 (discussing the possibility of applying this comment to medical implant device cases).

Comment i provides that product liability will only apply to products which are unreasonably dangerous to consumers. An example of a *reasonably dangerous* product, according to the comment, is tobacco which is not unreasonably dangerous just because users may suffer ill side-effects. *Id.* at cmt. i. Presently, jurisdictions are preventing strict liability causes of action through federal pre-emption in the area of medical devices. Federal pre-emption and class exemptions for certain products are beyond the scope of this Note. See, however, Victor E. Schwartz, Robert P. Charrow, and Mark A. Behrens, *Following the Supreme Court's Analysis in Cipollone, Courts*

the adoption of § 402A, most jurisdictions have accepted the concept of product liability in some form.¹⁸

Scholars have developed a number of policy justifications for introducing products liability into the realm of tort law.¹⁹ The reason most accepted by legal scholars for imposing strict products liability is that of loss shifting, or loss spreading, whereby a loss resulting from consumer injury caused by a defective product is shifted onto the manufacturer and sellers of the product who are better able to bear, and spread, the cost of injury.²⁰ Other policy reasons for imposing strict product liability include protection of the safety and health of product consumers,²¹ fairness considerations (in that liability should be placed on those best able to control and eradicate the defect, namely, the manufacturer and sellers of the product),²² and deterrence of unsafe product manufacturing and marketing.²³ Risk assumption by manufacturers and sellers for their market participation has been offered as an overriding consideration for imposing strict liability, encompassing the reasons set forth above.²⁴

In *Keener v. Dayton Electric Mfg. Co.*,²⁵ the Missouri Supreme Court embraced § 402A as the law of products liability in Missouri.²⁶ In adopting

Are Finding Broad Preemption in Sophisticated Medical Device Tort Litigation, 17 J. OF PROD. AND TOXIC LIAB. 31 (1995). See also *Connelly v. Iolab Corp.*, 1995 WL 250794 (Mo. Ct. App. 1995) (Missouri case applying federal preemption).

18. See Swisher, *supra* note 15, at 860; Richard W. Bieman, *Strict Products Liability: An Overview of State Law*, 10 J. PROD. LIAB. 111 (1987).

19. See *Marshall S. Shapo*, THE LAW OF PRODUCTS LIABILITY 7-22 to 7-30 (1990); VANDALL, *supra* note 16, at 21-25; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 98 (5th ed. 1984); See also *Hoven v. Kelble*, 256 N.W.2d 379, 390-91 (Wis. 1977); John W. Wade, *On the Nature of Strict Tort Liability For Products*, 44 MISS. L. J. 825, 826 (1973); William L. Prosser, *Assault on the Citadel*, 69 YALE L. J. 1099, 1114-1124 (1960); *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 901 (Cal. 1963)

20. VANDALL, *supra* note 16, at 20-21; See also Swisher, *supra* note 15, at 861; William A. Worthington and David H. Timmins, *Empirical Effects of Restatement (Second) and Other Versions of Modern Product Liability Doctrine*, 15 J. PROD. AND TOXIC LIAB. 315 (1993).

21. VANDALL, *supra* note 16, at 21.

22. VANDALL, *supra* note 16, at 21-22.

23. Swisher, *supra* note 15, at 861. See also *Crump & Maxwell*, *supra* note 3, at 854-55 (discussing the deterrence rationale in the context of the medical profession).

24. See generally KEETON ET AL., *supra* note 19.

25. 445 S.W.2d 362 (Mo. 1969).

26. *Id.* at 364.

§ 402A, the Court accepted the loss-shifting rationale posited by Justice Traynor in *Greenman*²⁷ as its own.²⁸

The Missouri General Assembly codified Missouri products liability law in 1987.²⁹ The statute is nearly identical to § 402A, the essence of which holds a defendant liable for the sale or transfer of a defective product unreasonably dangerous to the ultimate user.³⁰

B. Products Liability and the Medical Profession

Despite general acceptance of strict products liability, states have refused to apply the doctrine to the medical profession.³¹ The Wisconsin Supreme Court expounded reasons for this refusal in *Hoven v. Kelble*.³² In *Hoven*, the Court observed that providing medical services is different than selling goods due to the experimental nature of the medical profession and the necessity of

27. *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963).

28. *Keener*, 445 S.W.2d at 364. See *supra* notes 12-14 and accompanying text.

29. Products liability claim defined. As used in §§ 537.760-537.765, the term "products liability claim" means a claim or portion of a claim in which the plaintiff seeks relief in the form of damages on a theory that the defendant is strictly liable for such damage because:

(1) The defendant, wherever situated in the chain of commerce, transferred a product in the course of his business; and

(2) The product was used in a manner reasonably anticipated;

and

(3) Either or both of the following:

(a) The product was then in a defective condition unreasonably dangerous when put to a reasonably anticipated use, and the plaintiff was damaged as a direct result of such defective condition as existed when the product was sold; or

(b) The product was then unreasonably dangerous when put to a reasonably anticipated use without knowledge of its characteristics, and the plaintiff was damaged as a direct result of the product being sold without an adequate warning.

MO. REV. STAT. § 537.760 (1994).

See *State ex rel. American Medical International, Inc. v. Sweeney*, 845 S.W.2d 648, 652 (Mo. Ct. App. 1992) (Maus, J., dissenting) (Judge Maus noted that the Missouri products liability statute, § 537.760 was a codification and slight modification of the *Restatement* approach.).

30. MO. REV. STAT. § 537.760 (1994). The Missouri Statute substitutes "transferred a product in the course of business" for § 402A's language imposing liability on sellers who are "engaged in the business" of selling. See *supra* notes 14 and 29.

31. See *supra* note 3. See also *infra* notes 35-70 and accompanying text.

32. 256 N.W.2d 379, 379 (Wis. 1977).

such services to society.³³ Possible cost increases in the medical profession were also addressed as a reason to preclude strict liability actions against doctors and hospitals.³⁴ The *Hoven* court held that, because of the unknown costs and the "inability to assess the results"³⁵ of imposing strict liability on the medical profession, the issue could be better addressed by the state legislature.³⁶

In a view slightly distinguishable from that in *Hoven*, a Wisconsin federal district court held, in *Johnson v. Sears, Roebuck and Co.*,³⁷ that hospitals could be held strictly liable for the services they provide. However, the court held a hospital could be strictly liable only for administrative services, not professional services.³⁸ The court noted that applying strict liability to professional services might make health care professionals reluctant to provide treatment, especially when the treatment involves new fields of medicine.³⁹

The tenor of most judicial decisions regarding medical products liability has been similar to that in *Hoven* and *Johnson*⁴⁰ as most jurisdictions have been consistent in precluding strict products liability from consideration as a theory of recovery in the medical setting regardless of the nature of the medical product used.⁴¹ The types of products that have been excluded from

33. *Id.* at 391.

34. However, the court questioned the persuasiveness of such an argument. *Id.* at n.17.

35. *Id.* at 392.

36. *Id.* at 393.

37. 355 F. Supp. 1065, 1067 (E.D. Wis. 1973).

38. *Id.* at 1067. The difference between professional and administrative services was not fully explained by the court as it asserted that the distinction between the two is "often vague." *Id.* The court did express that any service performed by a doctor in treating patients was professional and that hospital services that merely aided in the doctor's ability to treat patients was administrative or mechanical. *Id.* at 1066-67.

39. *Id.* According to the court such imposition of liability would work a "serious social disservice." *Id.*

Legal commentators have expressed similar concerns about the effects of strict products liability on medical innovation. Several authors suggest that industrial and medical innovation may be severely hampered by rising liability costs. Worthington and Timmins, *supra* note 20, at 318-23; Richard A Epstein, *Legal Liability For Medical Innovation*, 8 CARDOZO L. REV. 1139, 1142 ("Where products are subject to more stringent standards than medical services, there is a risk that treatment (services) will be substituted for products (goods), even when the latter is more suited to the task."); See generally Man C. Maloo and Benjamin A. Neil, *Products Liability Exposure: The Sacrifice of American Innovation*, 13 J. PROD. LIAB. 361, 371-72 (1991).

40. See *infra* notes 41 to 84 and accompanying text.

41. See *supra* and *infra* notes 35-70 and accompanying text. *But cf.* Thomas v.

products liability in the medical field can be categorized as follows: blood and tissue products,⁴² medical tools and equipment used incidental to the treatment of patients, and medical devices (prosthetic devices, implants, etc.) which themselves *are* the treatment prescribed.⁴³

Blood products were early subjects of strict liability scrutiny. In *Perlmutter v. Beth David Hospital*,⁴⁴ actually a breach of implied warranty case, the New York Court of Appeals concluded that blood transfusions were not "sales" but rather services.⁴⁵ The court stated that the relationship between medical care providers and patients existed to provide the patient services and not products.⁴⁶ State legislatures have followed the *Perlmutter* example in passing "blood shield statutes". These statutes generally provide that blood transfusions are services that are exempt from strict liability claims.⁴⁷

St. Joseph Hosp., 618 S.W.2d 791, 796-97 (Tex. Civ. App. 1981) (strict products liability action allowed where defective hospital robe caught fire and injured patient); *Cunningham v. MacNeal Memorial Hosp.*, 266 N.E.2d 897, 902 (Ill. 1970) (blood supplied by hospital during blood transfusion is a sale for strict liability purposes).

42. *See, e.g.*, *Osborn v. Irwin Memorial Blood Bank*, 7 Cal. Rptr. 2d 101, 120-22 (Cal. Ct. App. 1992) (standard of care is a professional standard of care in actions against blood banks and hospitals regarding defective blood supply); *Howell v. Spokane & Inland Empire Blood Bank*, 785 P.2d 815, 820-22 (Wash. 1990) (transfer of blood a service rather than a sale therefore falling outside of product liability actions); *Perlmutter v. Beth David Hosp.*, 123 N.E.2d 792, 794-96 (N.Y. 1954) (action for breach of implied warranty did not apply to blood since blood transfusion is provision of a service and not a sale).

43. These classifications have no legal significance. They are used merely to provide ease in understanding the history of product liability claims in the medical field. *See Crump & Maxwell, supra* note 3, at 836-37 (similar distinctions between classes of medical products were made as blood products and other medical products were categorized separately).

44. 123 N.E.2d 792 (N.Y. 1954).

45. *Id.* at 795. The court stated that, "[t]he supplying of blood by the hospital was entirely subordinate to its paramount function of furnishing trained personnel and specialized facilities in an endeavor to restore plaintiff's health." *Id.* About the patient the court noted, "[H]e goes there not to buy medicines or pills, not to purchase bandages or iodine or serum or blood, but to obtain a course of treatment in the hope of being cured." *Id.* at 796.

46. *Id.* at 795.

47. The following is an example of a blood shield statute:

The procurement, processing, distribution or use of whole blood, plasma, blood products, blood derivatives and other human tissues, including but not limited to corneas, bones, hearts or other organs for the purpose of injecting, transfusing, or transplanting any of them into the human body is declared to be, for all purposes, the rendition of a service by every person,

Upon general agreement by jurisdictions as to the impropriety of imposing strict liability on providers of blood products, courts shifted their focus to products used incidentally to medical treatment. These products, like blood products, have been held to be exempt from products liability claims by reason of the sales/service distinction asserted by the *Perlmutter* court.⁴⁸ Forceps,⁴⁹ dental needles,⁵⁰ surgical drapes,⁵¹ electric grounding pads,⁵² and catheters⁵³ all have been excluded from product liability considerations.

An important early case concerning this category of products is *Magrine v. Krasnica*.⁵⁴ In *Magrine*, a dentist's hypodermic needle broke in the mouth of a patient and the patient sued under products liability. The court noted the rapid development of this theory,⁵⁵ generally, but stated the essence of the relationship between dentist and patient was that of providing a professional service or skill.⁵⁶ The court explained the policy of risk spreading, a tenet of the products liability doctrine, was not a good policy consideration in the

firm, or corporation participating therein and, whether or not any remuneration is paid therefor, is declared not to be a sale of such whole blood, plasma, blood products, blood derivatives or other tissues, bones or organs for any purpose subsequent to enactment of this section. It is further declared that any implied warranties of merchantability and fitness for a particular purpose shall not be applicable as to a defect that cannot be detected or removed by reasonable use of scientific procedures or techniques. Nothing herein shall relieve any person, firm or corporation from negligence.

MO. REV. STAT. § 431.069 (1994).

48. Cupp, *supra* note 3, at 878-81.

49. See *Silverhart v. Mount Zion Hospital*, 98 Cal. Rptr. 187 (Cal. Ct. App. 1971) (hospital held not strictly liable for defective forceps used since hospital's relationship with patient is that of a service and therefore is not focused on any product); *Podrat v. Codman-Shurtleff, Inc.* 558 A.2d 895 (Pa. Super. Ct. 1989) (use of defective forceps was incidental to hospital's primary function of providing medical services to patient).

50. *Magrine v. Krasnica*, 227 A.2d 539 (N.J. Super. Ct. Law Div. 1967), *aff'd*, *Magrine v. Spector*, 250 A.2d 129 (N.J. 1969).

51. *Racer v. Utterman*, 629 S.W.2d 387, 398-99 (Mo. Ct. App. 1981).

52. *North Miami Gen. Hosp. v. Goldberg*, 520 So. 2d 650, 651-52 (Fla. Dist. Ct. App. 1988).

53. *Easterly v. HSP of Texas, Inc.*, 772 S.W.2d 211, 213 (Tex. Ct. App. 1989).

54. 227 A.2d 539 (N.J. Super. Ct. Law Div. 1967), *aff'd*, *Magrine v. Spector*, 250 A.2d 129 (N.J. 1969).

55. *Id.* at 540.

56. *Id.* at 543. The court noted the dentist did not place the needle into the stream of commerce or promote its purchase. *Id.* The court also placed importance on the fact the dentist had no control over discovery of the defect. *Id.*

context of medical care because it would only serve to increase medical and dental costs which, the court concluded, were already too high.⁵⁷

More recently, in a defective surgical grounding pad case, the Florida Court of Appeals held a defendant hospital was a consumer of the grounding pad it used to help perform its service of providing medical care.⁵⁸ The court concluded hospitals were not engaged in the business of selling products and that strict liability would not be allowed where the professional services could not have been provided without the use of the product.⁵⁹

Likewise, in a Texas medical equipment case, the determinative factor in precluding a products liability claim against a hospital for transfer of a defective epidural kit (catheter) was the fact the catheter was "intimately and inseparably connected to the professional service . . ." and was not an ordinary good sold to the general public.⁶¹

The final category of medical goods from which products liability has been precluded are those products that are themselves the source of healing, i.e. pacemakers,⁶² implants,⁶³ drugs,⁶⁴ and other such medical devices.⁶⁵ The use of these products, similar to the use of products in the previous category of cases, presents sales/service hybrid situations in which aspects of both sales and services exist.⁶⁶ Drugs and implants, however, are slightly

57. *Id.* at 545.

58. *North Miami*, 520 So. 2d at 652.

59. *Id.* (quoting 2 AM. PROD. LIAB. 3D § 16:83 (1987)).

60. *Easterly*, 772 S.W.2d at 213.

61. *Id.*

62. *See Hector v. Cedars-Sinai Medical Center*, 225 Cal. Rptr. 595 (Cal. Ct. App. 1986); *Cutler v. General Electric Co.*, 4 U.C.C. Rep. Serv. (Callaghan) 300, 301 (N.Y. Sup. Ct. 1967) (insertion of pacemaker not a sale, and does not create seller/purchaser relationship); *St. Mary Medical Center, Inc.*, 639 N.E.2d 312, 315 (Ind. Ct. App. 1994) (insertion of defective pacemaker not a sale under the products liability statute, but rather a service under the medial malpractice statute.).

63. *See, e.g., Cafazzo v. Central Medical Health Services, Inc.*, 635 A.2d 151, 152-54 (Pa. Super. Ct. 1993) (hospital found not strictly liable for defective temporomandibular joint implant); *Hoff v. Zimmer, Inc.*, 746 F. Supp. 872, 874-76 (W.D. Wis. 1990) (hospital found not strictly liable for defective hip prosthesis).

64. *Dove v. Ruff*, 558 N.E.2d 836, 839 (Ind. Ct. App. 1990) (doctor not liable for making and selling drug to patient); *Carmichael v. Reitz*, 95 Cal. Rptr. 381, 392-93 (Cal. Ct. App. 1971) (doctor prescribing defective drug is not strictly liable for the defect).

65. *Betro v. GAC Int'l, Inc.*, 551 N.Y.S.2d 72, 72 (N.Y. App. Div. 1990) (prescription for night brace did not constitute a "sale" as to impose strict liability upon the health care provider as it was incidental to medical treatment).

66. *Cupp, supra* note 3, at 876-79. The sales/service hybrid refers to transactions having both sales and service characteristics. *Id.* at 876. The classic case defining the

distinguishable from the foregoing products as drugs and implants are actually transferred to the patient through prescription or implantation. An analysis often used in examining cases involving products prescribed to or implanted in patients has been described as an "essence of the transaction" analysis.⁶⁷ This analysis focuses on the *predominant aspect of the transaction* (whether sale or service) in determining if strict liability should lie against a medical care provider.⁶⁸ The next two cases exemplify this type of analysis.

In *Dove v. Ruff*,⁶⁹ the Indiana Court of Appeals held that although a injury-causing drug was sold to a patient, the doctor who sold the drug was not susceptible to strict liability claims because (i) the practice of medicine is primarily a service,⁷⁰ and (ii) goods provided incidentally to the delivery of health services do not remove the health care provider's actions from malpractice considerations.⁷¹ The court believed the doctor was not engaged in the business of selling products as defined in § 402A of *Restatement (Second) of Torts*.⁷²

Similarly, in *Hector v. Cedars-Sinai Medical Center*,⁷³ the California Court of Appeals held a pacemaker sold by a hospital was not subject to strict products liability because the essence of the relationship between hospital and patient was that of providing services.⁷⁴ The court further stated the hospital's pricing scheme for pacemakers did not suggest the hospital was in the business of selling pacemakers.⁷⁵ The California court, like the

sales/service hybrid is *Newmark v. Gimbel's Inc.*, in which the plaintiff sued a hairstylist for scalp damage caused by a defective wave solution. *Id.* at 877 (citing *Newmark v. Gimbel's, Inc.*, 258 A.2d 697 (N.J. 1969)). The transaction was hybrid because it combined the service of styling one's hair with the sale of the wave solution. *Id.*

67. Cupp, *supra* note 3, at 878.

68. Cupp, *supra* note 3, at 878.

69. 558 N.E.2d 836 (Ind. Ct. App. 1990).

70. *Id.* at 838.

71. *Id.*

72. *Id.* See also *Carmichael*, 95 Cal. Rptr. at 393. In *Carmichael*, a doctor merely prescribed defective medicine. The court examined the relationship between patient and doctor and found that a doctor is not a retailer. The court quoted the Perlmutter decision regarding the relationship between care provider and patient in making its finding. *Id.*

73. 225 Cal. Rptr. 595 (Cal. Ct. App. 1986).

74. *Id.* at 597. In *Hector*, the court cited extensively the decisions in *Silverhart*, *Magrine*, and *Carmichael*. For the full citation and a discussion of these cases, see *supra* notes 49, 50 and 64, respectively.

75. *Hector*, 225 Cal. Rptr. at 599-600.

aforementioned *Magrine* court,⁷⁶ observed that strict liability might result in higher costs of health care.⁷⁷

C. Strict Liability for Medical Professionals in Missouri

Missouri Courts have addressed the issue of medical profession strict liability on only a few occasions. In *Hershley v. Brown*,⁷⁸ the Court of Appeals, Western District, citing medical product liability decisions from other jurisdictions, held strict liability would not lie against a physician if no negligence or fault were shown.⁷⁹

In *Racer v. Utterman*,⁸⁰ the Eastern District Court of Appeals held strict liability would not lie against a hospital for an injury caused by a surgical drape that caught fire while a patient was in surgery. The court concluded the surgical drape was not "sold" as the term is used in § 402A because (i) the hospital, rather than the patient, was the ultimate consumer of the product, and (ii) the hospital was not in the business of selling the product.⁸¹ This second determinative factor is reminiscent of the "essence of the transaction" analysis previously described.⁸²

In *State ex rel. American Medical International, Inc. v. Sweeney*,⁸³ a defective temporal mandibular joint interpositional implant resulted in injury. The majority decided the case on procedural grounds and did not discuss the substantive products liability issue. In a dissenting opinion, however, Judge Maus did discuss the product liability issue, declaring that the doctrine was applicable to hospitals providing injury-causing products.⁸⁴ Judge Maus

76. See *supra* notes 54-57 and accompanying text.

77. *Hector*, 225 Cal. Rptr. at 602-02.

78. 655 S.W.2d 671 (Mo. Ct. App. 1983).

79. The court, in reaching this conclusion, relied upon rationale used in *Hoven v. Kelble* and *Carmichael v. Reitz*—two early medical strict products liability cases. *Id.* at 675. The *Hershley* court referred to language in the *Hoven* decision explaining that medical services are necessary and that any increase in imposition of liability could unduly increase medical costs and hamper medical developments. *Id.* at 675 (citing *Hoven v. Kelble*, 256 N.W.2d 379, 391 (Wis. 1977)).

In *Carmichael*, the court held that a physician is not strictly liable for injuries suffered as a result of a drug prescribed by the doctor. *Carmichael*, 95 Cal. Rptr. at 392-93. The *Hershley* court cited to language in *Carmichael* asserting the necessity of negligence for claims against physicians. *Hershley*, 655 S.W.2d at 675 (citing *Carmichael*, 95 Cal. Rptr. at 381).

80. 629 S.W.2d 387 (Mo. Ct. App. 1981).

81. *Id.* at 398.

82. See *supra* notes 67-77 and accompanying text.

83. 845 S.W.2d 648 (Mo. Ct. App. 1992).

84. *Id.* at 650.

explained that the implant at issue was a product sold to the plaintiff and, therefore, should be subject to the rule stated in *Restatement (Second) of Torts* § 402A.⁸⁵

To date these have been the most significant medical strict liability cases decided by Missouri state courts.⁸⁶ However, the Missouri General Assembly has addressed the use of medical products in the course of medical treatment defining such use as "health care services."⁸⁷ Missouri statutes provide that in any claim against a health service provider for injuries resulting from defective medical products, the plaintiff must show negligence (i.e. that the health care provider *failed to use such care as a reasonable prudent and careful health care provider would use under similar circumstances*).⁸⁸

IV. INSTANT DECISION

In *Bell*, the Court of Appeals began its analysis by adopting Judge Maus' dissent in *Sweeney*⁸⁹ concerning the application of products liability to

85. *Id.* at 649.

86. A retail pharmacy has been held liable for selling defective crutches for being an entity "engaged in the business of selling such products." *Welkener v. Kirkwood Drug Store Co.*, 734 S.W.2d 233 (Mo. Ct. App. 1987). In a blood transfusion case, a federal district court relying on the Missouri blood shield statute, MO. REV. STAT. § 431.069, held that products liability would not lie against the American Red Cross for providing HIV tainted blood. *Smith v. Paslode Corp.*, 799 F. Supp. 960, 972-73 (E.D. Mo. 1992), *aff'd in part, rev'd in part*, 7 F.3d 116 (8th Cir. 1993). The court stated that such an imposition of liability inconsistent with the state's blood shield statute might deter the necessary production and distribution of blood products. *Id.* at 973. *See also* *Spuhl v. Shiley, Inc.*, 795 S.W.2d 573, 577-81 (Mo. Ct. App. 1990) (The doctrine of strict liability was considered applicable to the manufacturer of a defective heart valve).

Importantly, the Missouri Court of Appeals has refused to extend strict liability to other professionals such as architects reasoning that such liability on was inconsistent both with the rationale of risk spreading and with the consumer related origins of strict products liability. *Chubb Group of Insurance Co. v. C.F. Murphy & Associates, Inc.*, 656 S.W.2d 766, 779-80 (Mo. Ct. App. 1983).

87. MO. REV. STAT. § 538.205 (1994). *See* Judge Maus' dissent in *Sweeney*, which describes this and other health care statutes in finding these sections applicable to medical product defect claims. *Sweeney*, 845 S.W.2d 652-54 (Maus, J., dissenting).

88. MO. REV. STAT. § 538.225 (1994). The Missouri Supreme Court has observed that the medical tort statutes were enacted as an attempt to curb medical costs attributable to unfounded malpractice claims and to ensure the "preservation of the public health." *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 507 (Mo. 1991).

89. *See supra* notes 81-83 and accompanying text.

medical implants. The *Bell* court stated that Judge Maus' analysis of medical product sales was "well-reasoned and relevant" to the instant case.⁹⁰

Upon finding *Hershley's*⁹¹ negligence standard for medical providers inapplicable to the *Bell* facts,⁹² the court turned its attention to the role of the hospital as a seller. The court stated products liability should arise regardless of whether the product sold is a substantial part of the hospital's business.⁹³ According to the court, the fact a sale is incidental to the purpose of a hospital is irrelevant.⁹⁴

The court then explained that a "sale" is not required under Missouri product liability law, and that a "transfer" of the product is all that is necessary for a party to be liable under the doctrine.⁹⁵ The court stated that placing the product "in the stream of commerce" through a variety of means could lead to strict liability.⁹⁶

Upon establishing a party could be liable under products liability for merely transferring a defective product to another party, regardless of whether the transfer or sale was incidental to the primary purpose of the defendant's actions, the court turned to decisions from Missouri and elsewhere exempting hospitals from strictly product liability claims.⁹⁷

The court first distinguished the Missouri case *Racer v. Utterman*,⁹⁸ stating that since the hospital was a user of the surgical drape at issue in that case, and not a transferor of the drape, the case was not controlling.⁹⁹

The court then concluded, contrary to the holding in *Hector v. Cedars-Sinai Medical Center*,¹⁰⁰ that an organization can both sell products and provide services.¹⁰¹ The *Bell* court next dismissed the assertion made by a

90. *Bell*, 879 S.W.2d at 619.

91. *Hershley*, 655 S.W.2d at 675.

92. The court intimated that the *Hershley* decision centered upon the conduct of the physician, whereas, in *Bell*, the issue concerned the defective product and not the conduct of the hospital. *Bell*, 879 S.W.2d at 619.

93. *Id.*

94. *Id.* Comparing the instant case to one in which the hospital sells a defective gift in its gift shop. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *See supra* note 80 and accompanying text.

99. *Bell*, 879 S.W.2d at 620.

100. *See supra* notes 73-75 and accompanying text. In *Hector*, the court held that, in the case of a defective pacemaker, the hospital was a provider of services and not an entity engaged in the selling of products. *Hector*, 225 Cal. Rptr. at 601-02.

101. *Bell*, 879 S.W.2d at 620 (citing *Murphy v. E.R. Squibb & Sons, Inc.*, 710 P.2d 247, 251 (Cal. 1985)).

Pennsylvania superior court that a hospital could not be strictly liable for a product defect since it was in no better position than the patient to detect and control product defects.¹⁰² The court believed this to be true of all retailers selling defective products.¹⁰³

The court's final reference to a decision from another jurisdiction was *Greenberg v. Michael Reese Hospital*,¹⁰⁴ in which the Illinois Supreme Court explained that the sales/service distinction formulated by other jurisdictions was a distortion used to achieve desired results.¹⁰⁵ The *Bell* court quoted the *Greenberg* court, which stated that "imposition of [strict] liability enhances the public interest in human life and health."¹⁰⁶ As provided in the *Bell* decision, the *Greenberg* court did note that care should be taken in imposing such liability on the conduct of groups whose purpose it is to protect life and health so as to prevent an "ultimate diminution of protection".¹⁰⁷

In finding the plaintiff in the instant case to be attacking the implant rather than the conduct of the hospital, the *Bell* court concluded, "[T]he sales aspect of the transaction may predominate over the service aspect and the policy of strict liability in tort is served by allowing this action".¹⁰⁸ The court found that neither the Missouri Supreme Court nor the General Assembly intended to prevent such action.¹⁰⁹ The court referred to the Missouri products liability statute and found no exceptions for health care providers.¹¹⁰

Upon finding the products liability statute applicable to the instant case, the court considered whether the products liability claim could be barred by the medical malpractice statute of limitations.¹¹¹ The court determined that since malpractice requires negligence, or error, and products liability does not, product liability claims, by definition, fall outside the malpractice statute of limitations.¹¹²

102. *Id.* (citing *Cafazzo v. Central Medical Health Services, Inc.*, 635 A.2d 151, 154 (Pa. Super. Ct. 1993)).

103. *Id.* (implying that this proposition would be in contravention of the dictates of products liability law).

104. 415 N.E.2d 390 (Ill. 1980)

105. *Id.* at 393.

106. *Bell*, 879 S.W.2d at 620.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 620-21. *See supra* note 29.

111. *Bell*, 879 S.W.2d at 621-23.

112. *Id.* at 623.

V. COMMENT

Examination of the *Bell* decision leads to three important inquiries—(i), whether the court fairly interpreted the definitional restrictions generally placed on products liability claims, using the *Restatement* and its comments as a guide, (ii) whether the *Bell* decision contravenes the rationales upon which the products liability doctrine rests, and (iii) whether the Missouri General Assembly's declarations concerning medical care liability exempts the medical profession from strict liability claims.

A. *Definitional Considerations*

The *Bell* court found, simply, that the temporo-mandibular implant was a product within the meaning of the term under products liability law and that the hospital had sold the good as defined by that law.¹¹³

In doing so, the court failed to fully address the significance of the relationship between hospital and patient.¹¹⁴ Under the *Restatement*, the fact a product has been sold, alone, is not enough to create liability.¹¹⁵ *Restatement (Second) of Torts*, explains that a party should be engaged in the business of selling before products liability claims can arise.¹¹⁶ Furthermore, the *Restatement* has placed emphasis on the seller as a *marketer* of the defective product as a reason for establishing liability.¹¹⁷

The majority of courts, in evaluating defective implant claims based on their jurisdictions' products liability laws, have applied the "essence of the transaction" test¹¹⁸ to determine that physicians and hospitals are not *engaged in the business of selling medical products* but rather are *engaged in the practice of treating illnesses—a service*.¹¹⁹ If in fact the fundamental purpose of hospitals is providing service rather than selling products then, by definition, hospital activities should fall outside product liability considerations.¹²⁰

113. *Id.* at 620.

114. RESTATEMENT (SECOND) OF TORTS, § 402A, cmt. f (1965).

115. *See supra* note 17 and accompanying text.

116. RESTATEMENT (SECOND) OF TORTS, § 402A, cmt. f (1965). However, under the Missouri products liability statute, the seller need only sell "in the course of his business." *See supra* note 29.

117. *See supra* note 17 and accompanying text.

118. *See supra* notes 65-73 and accompanying text.

119. *See supra* notes 65-73 and accompanying text.

120. But *cf.* comment f of *Restatement (Second) of Torts* § 402A does state that a provider of services, such as a movie theater, would be liable for the popcorn it sells even though this activity may be secondary to its service of providing entertainment.

Problems arise, however, because of a slight textual difference existing between § 402A of the *Restatement* and the Missouri products liability statute. Under the *Restatement*, liability is imposed when a person is "engaged in the business" of selling a defective product, whereas the Missouri statute imposes liability when a party sells or transfers a defective product in the "course of his business".¹²¹ Such a distinction may justify imposing liability on hospitals as the Missouri statute does not explicitly require a business to be "engaged in the business of selling" a defective product. The *Bell* court did not mention this textual difference,¹²² however, declining altogether to accept the view that the fundamental purpose of a business should be a determining factor in imposing strict liability.¹²³

B. Policy Considerations

Besides possible inconsistency with § 402A, as modified by Missouri's products liability statute,¹²⁴ the *Bell* decision appears inconsistent with the policies underlying strict products liability.

The *Bell* court spent little time distinguishing *Hershley v. Brown* from the instant case.¹²⁵ The *Hershley* court specifically stated that physicians are not to be held to a strict liability standard of care.¹²⁶ Hospitals, statutorily, are held to the same standard of care as physicians for medical services provided.¹²⁷ By imposing strict liability on products transferred in the course of medical treatment, the *Bell* court replaced, in certain circumstances, the professional standard of care previously accepted by the courts of Missouri, in *Hershley*, and by the legislature.¹²⁸ This general result may be an especially important consideration in medical fields where medical equipment or pharmaceutical products may be heavily relied upon. Such liability may deter medical professionals from seeking innovations as solutions

RESTATEMENT (SECOND) OF TORTS, §402A, cmt. f (1965).

121. See *supra* notes 14, 29-30.

122. *Bell*, 879 S.W.2d at 619. The *Bell* court gave little mention of the business of hospitals, finding this determination unimportant. *Id.*

123. The court in *Racer v. Utterman* did use an essence of the transaction analysis, placing importance on the fact the hospital was not engaged in the business of selling the product at issue. *Racer*, 629 S.W.2d at 398.

124. See *supra* note 29 and accompanying text.

125. *Bell*, 879 S.W.2d at 619.

126. *Hershley*, 655 S.W.2d at 675.

127. MO. REV. STAT. § 538.205 (1994).

128. MO. REV. STAT. § 538.225 (1994). See *infra* notes 138 to 145 and accompanying text.

to medical ailments, instead forcing these professionals to rely on traditional methods of care that may be less effective yet less susceptible to liability.¹²⁹

An additional policy consideration and its consequences should have been more thoroughly scrutinized by the court. The Missouri Supreme Court accepted the strict liability rationale of loss shifting¹³⁰ in *Keener*:¹³¹ the belief that of two parties—the consumer and producer—the burden of assuming the loss caused by injury should be borne by a producer or seller who can spread the loss more easily than an injured consumer.¹³² In assuming such loss, producers and sellers, in turn, can increase their prices to offset the increased financial burden.¹³³ The cost of medical care may be increased in a similar manner, as courts and commentators have explained.¹³⁴ This may be especially detrimental to needy patients as increased prices may not cause a measurable decline in the need for necessary treatments with few alternatives.¹³⁵ Perhaps an even more detrimental effect of imposing strict liability on hospitals and physicians than price increases is the possibility such liability, with its attendant litigation cost increases, might deter physicians and small medical facilities from providing care in less profitable rural or inner-city markets, instead forcing medical professionals to leave these markets altogether.¹³⁶

129. *Johnson v. Sears, Roebuck and Co.*, 355 F. Supp. 1065, 1067 (E.D. Wis. 1973) (In the face of strict liability, professionals might be reluctant to provide treatment); *See also* Cupp, *supra* note 3, at 880; text accompanying *supra* notes 32 and 34; *supra* note 38; and Arthur Leff, *Medical Devices and Paramedic Personnel: A Preliminary Context for Emerging Problems*, 1967 WASH U. L. Q. 332, 355 (1967).

130. *See supra* note 25 and accompanying text.

131. *See supra* note 28 and accompanying text.

132. *See supra* note 25-28 and accompanying text.

133. KEETON ET AL., *supra* note 19, at § 98.

134. *Magrine*, 227 A.2d at 545 (risk spreading in the medical context would serve to greatly increase medical costs that were already too high); *Hoven*, 256 N.W.2d at 391 and n.17 (recognizing that strict liability will increase medical cost, but questioning the persuasiveness of that argument for denying strict liability); *Hector*, 225 Cal. Rptr. at 601-02 (agreeing that strict liability might result in higher costs of health care). *See also* Cupp, *supra* note 3, at 890-91.

135. VANDALL, *supra* note 16, at 112 (asserting that medical care has an inelastic demand, such that if prices go up, demand will not measurably decline). *See also* Frank J. Vandall, *Applying Strict Liability To Professionals: Economic and Legal Analysis*, 59 IND. L. J. 25, 38-39 (1984) (stating a large portion of medical expenses are not covered by insurance). *See also* Cupp, *supra* note 3, at 880; Crump & Maxwell, *supra* note 3, at 846.

136. Some authors assert that liability costs force market competitors to leave the market, thus leaving fewer consumer choices. Worthington and Timmins, *supra* note 20, at 318-23. Maloo and Neil, *supra* note 39, at 371-72. Both of these articles refer

The adoption of an "essence of the transaction" analysis to preclude strict product liability claims in the medical field may be justified when considering the foregoing purposes served by and results flowing from imposition of strict liability.¹³⁷ However, unlike most courts,¹³⁸ the *Bell* court did not consider the special burdens placed upon the medical profession when imposing strict products liability with its loss-shifting rationale.

C. Legislative Intent

Besides failing to address general policy considerations associated with products liability, the *Bell* court may have refused a specific legislative mandate prohibiting the imposition of strict liability upon health care providers. In language reminiscent of the "essence of the transaction" approach described above, the statute providing for actions in tort against the medical profession states the following:

Professional services shall include, but are not limited to, transfer to a patient of goods or services incidental or pursuant to the practice of the health care provider's profession or in furtherance of the purposes for which an institutional health care provider is organized.¹³⁹

Hospitals are defined by statute as health care providers.¹⁴⁰ The medical tort statutes further provide that if injury results from professional services rendered, the injured party must present an affidavit stating the injury was caused by a health care provider's negligence.¹⁴¹ This language

to drug manufacturers' mass exodus from particularly risky ventures in the area of vaccines. Cupp, *supra* note 3, at 880 (citing to *Newmark v. Gimbel's Inc.* 258 A.2d 697, 702-03); Crump & Maxwell, *supra* note 3, at 853 (noting the harmful effect of litigation on rural hospital cost increases).

137. See generally Cupp, *supra* note 3; Crump & Maxwell, *supra* note 3.

138. See *Hoven*, 256 N.W.2d at 391 (the services of the medical profession are necessary to society); *Johnson*, 355 F. Supp. at 1067 (recognizing that strict liability might make the medical profession reluctant to provide treatment); *Magrine*, 227 A.2d at 543 (because the dentist primarily provides a service, he had no control over discovery of the defect); *Hector*, 225 Cal. Rptr. at 597 (the doctor-patient relationship is based on the giving and receiving of services, not goods).

139. MO. REV. STAT. § 538.205 (1994) (emphasis added).

140. *Id.*

141. MO. REV. STAT. § 538.225 (1994). Furthermore, § 538.300 provides that the product liability sections shall not apply to actions under the medical tort statutes described above. However, this section is inapplicable to the *Bell* case as the injury occurred prior to the effective date of the statute. MO. REV. STAT. § 538.300 (1994) (effective in 1988).

suggests that if a product transferred pursuant to a course of medical treatment causes injury, the injured party must show a medical care provider's negligence in order to recover against that medical care provider. Such a reading, which ultimately limits medical care provider liability to professional negligence only, seems consistent with the Missouri Supreme Court's observation that the affidavit process requiring a showing of negligence was intended to curb medical costs associated with malpractice claims and to ensure the "preservation of the public health."¹⁴² The failure to consider this statutory scheme in defective medical device cases, or, at least, the failure to interpret the statute as limiting liability to negligence in such cases would seem contrary to the Missouri Supreme Court's observation that the medical tort statutes were enacted to control excessive medical costs resulting from claims against medical care providers.¹⁴³

The *Bell* court, however, did not discuss the medical tort statutes, declaring instead (i) that the legislature had not asserted any intention to preclude product liability claims against medical care providers and (ii) that products liability actions, being no fault actions, fall outside of the malpractice statute of limitations.¹⁴⁴ The medical tort statutes should have been addressed by the *Bell* court as, contrary to the court's view, the Missouri General Assembly has definitively spoken on whether to include medical products within the traditional malpractice standard.¹⁴⁵ Despite the outcome reached in *Bell*, the General Assembly has arguably exempted all future medical device claims from products liability consideration.¹⁴⁶

In summary, the *Bell* court concluded that the implant at issue was a defective product falling within products liability law.¹⁴⁷ In so doing, the court should have given greater consideration to (i) the nature of the health care industry as related to products liability policies and rationale,¹⁴⁸ (ii) the economic consequences of imposing such liability on the medical profession,

142. *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 507 (Mo. 1991).

143. Further examination of the medical tort statutes provide additional evidence of the legislature's intent to limit medical care liability to professional negligence. Section 538.300 of the medical tort statutes provides that strict product liability claims are precluded in all actions falling under the medical tort statutes. MO. REV. STAT. § 538.300 (1994).

144. *Bell*, 879 S.W.2d at 621.

145. *Id.*

146. MO. REV. STAT. § 538.300, which precludes product liability claims in medical tort actions was not effective at the time of *Bell*, but would seem to control in future defective medical product claims.

147. *Bell*, 879 S.W.2d at 620.

148. *See supra* notes 42-76 and accompanying text.

and (iii) the guidance provided by the General Assembly concerning medical device exclusions from products liability law. Regardless of the propriety of the court's holding, its decision would have been less susceptible to future scrutiny had these issues been explored more fully.

VI. CONCLUSION

The medical field is a rapidly evolving and complex one, with legal and ethical considerations weighing heavily in innovative treatment decisions. We place the medical profession in a difficult position when holding it strictly accountable for treatment based injuries while asking it to become more cost-effective and accessible to those the medical system is designed to help. Exacting strict products liability against the medical profession requires a more exhaustive analysis of the purposes to be served by such a policy than that given by the *Bell* court in its decision. Indeed such analysis, may have been undertaken by the Missouri General Assembly in adopting its view of medical tort liability.

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