Strict Liability for Chattel Leasing

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Leasing has become an increasingly popular substitute for outright purchases as a means of acquiring products for use. Few courts and commentators, however, have addressed the question of whether the principles of strict products liability which apply to sellers also apply to lessors. In this Article, Professor Ausness reviews the historical basis for imposing strict liability in tort on sellers and applies these rationales to five basic kinds of lease transactions. He concludes that strict liability should not apply when a product defect arises after the leased product is placed in the hands of the lessee (as contrasted with the more typical case of “manufacturing defects” which arise when the product is manufactured), nor when the leased product is a fixture attached to real property. In such cases, the lessor should be held to a negligence standard of liability. However, in all other cases, the rationales for imposing strict liability on sellers apply as well to lessors and support the imposition of strict liability upon these lessors.

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INTRODUCTION

The short-term leasing industry has grown rapidly in the last decade. For example, presently, more than 800,000 rental cars are in service,¹ and automobile leasing companies gross at least $4 billion a year.² In addition, between 5,000 and 7,000 rental centers in the United States³ rent everything from art to zoot suits.⁴ Many consumers prefer short-term renting because it is often cheaper to lease rather than to buy a product that is used only infrequently.⁵

² Id. About one half of the short-term car rental business is done at airports. Id. Hertz, Avis, National and Budget control the largest share of the car rental business. Hertz has 1767 rental locations in the United States, Avis has 1204, National has 1069 and Budget has 1056. Boyer, *Airport Rent-A-Car Bargains*, FORTUNE, Feb. 4, 1985, at 119, 120.
⁴ *From A to Z You Can Rent It*, CHANGING TIMES, Oct. 1981, at 63, 63-64.
⁵ For example, when a gardener needs to use a rotary tiller only a few days a year, it makes more sense to rent one for $25 a day than to purchase one for $400. Dunn, *supra* note 3, at 98.
The long-term leasing business is also booming. Rentals brought in revenues of $6.5 billion in 1982. Motor vehicles are the most popular item. Ten years ago, about ten percent of all cars were leased; now perhaps half of all new cars manufactured are on lease. Most of these 1.7 million vehicles are leased by government and corporate clients, but at least ten percent are leased by private individuals. In addition, furniture, audio-visual equipment and home appliances are now frequently leased on a long-term basis. Long-term leasing by consumers is sometimes referred to as “lifestyle financing.” Even though they may ultimately pay more, many high-income consumers use leasing as a way to live the good life based on monthly cash flow rather than on savings or net worth.

Many business enterprises now lease motor vehicles, office equipment and other products instead of buying them outright. Credit requirements are often less rigorous for leasing than for financing the purchase of a product. In addition, leasing is sometimes superior to purchase in terms of potential tax savings. Finally, since a lease obligation is not characterized as a debt, leasing instead of buying can make a company’s balance sheet look better.

As an increasing number of consumers and businesses engage in leasing, it is necessary to determine the extent of the lessor's liabil-

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7. Long-term leases can be either open-end or closed-end. In an open-end or finance lease, the lessor calculates the price he expects to get when the leased article is sold after the expiration of the lease. This is known as the residual or retained value. The consumer must pay extra at the end of the lease if the lessor does not obtain the expected residual value when he sells the leased article. On the other hand, the consumer may get a refund if the leased article is sold for more than its residual value. Look Before You Lease, CHANGING TIMES, Feb. 1985, at 59, 60. Many business leases are of the open-end variety, but most consumer leases now tend to be closed-end leases. Id. at 60-61. In a closed-end, net or walkaway lease, the lessee is not responsible for any additional payments at the end of the lease period. McNatt, The New Economics of Leasing, MONEY, Dec. 1984, at 96, 97.
10. See Blyskal, supra note 6, at 127; Look Before You Lease, supra note 7, at 59.
11. For example, a young white collar employee can lease a $27,000 Porsche for $380 a month as long as he or she has a minimum debt-free income of $18,000 a year. If the consumer borrowed money to purchase the car outright, he or she would have to put up a $5,400 down payment. In addition, the monthly loan payments would probably exceed the $380 monthly cost of renting. O'Donnell, supra note 8, at 36. See also McNatt, supra note 7, at 102.
13. In this Article, leases to individuals for personal or occasional business use will be referred to as “consumer leases.” The term “business lease” will be used in connection with leases by business entities.
ity for personal injuries to lessees and others. Three areas of law are potentially applicable: bailment law, implied warranty, and strict liability in tort. This Article will evaluate each of these legal regimes from the viewpoint of lessor liability. Part I focuses on the law of bailments; Part II is concerned with the principles of implied warranty; and Part III examines the concept of strict liability in tort. Part IV examines a variety of chattel leases, including sale substitutes, return leases, licenses, maintenance leases and finance leases, to determine where strict liability is appropriate. This Article concludes that strict liability in tort should not apply to some types of licenses or to maintenance leases. Instead, the lessor's duty in such cases is better expressed through negligence or warranty law.

I. PRINCIPLES OF BAILMENT LAW

The law of bailments provides one set of liability principles for lessors. Under the traditional approach, the bailee is required to exercise only slight care where the bailment is for the benefit of the bailor. In the case of a mutual benefit bailment, the bailee must

14. A bailment is defined as the "delivery of personalty for the accomplishment of some purpose upon a contract, express or implied, that after the purpose has been fulfilled, it shall be redelivered to the person who delivered it, otherwise dealt with according to his directions or kept until he reclaims it." Smalich v. Westfall, 440 Pa. 409, 269 A.2d 476, 480 (1970). See also American Enka Co. v. Wicaco Mach. Corp., 686 F.2d 1050, 1053 (3d Cir. 1982); Garfield v. Furniture Fair-Hanover, 113 N.J. Super. 509, 274 A.2d 325, 326 (1971); Wright v. Sterling Land Co., 157 Pa. Super. 625, 43 A.2d 614, 615 (1945).


A bailment requires: (1) an agreement by the parties to transfer possession of personal property for a specified purpose; (2) actual delivery or transfer of actual possession of the property from the bailor to the bailee; and (3) acceptance of exclusive possession by the bailee. Kirby v. Chicago City Bank & Trust Co., 82 Ill. App. 3d 1113, 403 N.E.2d 720, 723 (1980). It may be established by express contract or by implication. Id.; Berglund v. Roosevelt Univ., 18 Ill. App. 3d 842, 310 N.E.2d 773, 776 (1974). In the latter case, the court must consider the surrounding facts, such as benefits received by the parties, the parties' intentions, the kind of property involved and the opportunity of each party to exercise control over the property. Kirby, 403 N.E.2d at 723; Berglund, 310 N.E.2d at 776; Wall v. Airport Parking Co., 41 Ill. 2d 506, 244 N.E.2d 190, 192-93 (1969).

15. A number of states have done away with these distinctions and impose a duty of ordinary care on the bailee, regardless of the nature of the bailment. See 8 AM. JUR. 2d Bailments § 219 (1980). See also Kubil v. First Nat'l Bank, 199 Iowa 194, 200 N.W. 434, 436 (1924).

16. See, e.g., Thomas v. Hackney, 192 Ala. 27, 68 So. 296, 296 (1915); Maddock v. Riggs, 106 Kan. 808, 190 P. 12, 15 (1920); Hargis v. Spencer, 254 Ky. 297, 71 S.W.2d 666, 669 (1934); Cadwell
exercise ordinary care, and great care is necessary when the bailment is exclusively for the bailee's benefit.

A similar approach is followed with respect to the duty of care owed by a bailor to his bailee. In the case of a gratuitous bailment, the bailor is merely required to warn the bailee of latent defects known to him at the time the property left his possession. However, when a mutual benefit bailment is involved, the bailor must exercise ordinary care to ensure that the bailed property is safe for its intended use. This distinction rests on the notion that a bailor who receives no benefit from the bailment should not be required to put the property into usable condition solely for the convenience of the bailee. Arguably, imposing such an obligation on the bailor would unduly restrict the transfer of property by discouraging gratuitous loans. On the other hand, it seems more appropriate to impose a greater duty on the bailor when both he and the bailee profit from the transaction.

A. Gratuitous Bailments

Prior to the mid-nineteenth century, judges and commentators concentrated almost exclusively on the bailee's duty to protect the bailed property and paid little attention to the bailor's duty of care. That issue was not considered judicially until 1858 when the English
court of Queen's Bench decided *Blakemore v. Bristol & Exeter Railway Co.* The defendant in that case, a railroad, maintained a crane at its station in Weston Super Mare to enable its customers to unload their goods. The plaintiff's husband, who was helping to unload a cargo of stone, was killed when a chain gave way causing the crane's beam to strike him in the head. The trial judge directed a verdict for the defendant and the plaintiff appealed.

Acknowledging the dearth of authority on the subject, the court in *Blakemore* invoked the principle of correlative obligations enunciated by Lord Holt in *Coggs v. Bernard*. It then characterized

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24. *Id.* at 387. The railroad had two rate schedules, tonnage and mileage. The railroad would unload the goods if the customer paid the tonnage rate, but the customer was responsible for unloading the goods if he only paid the mileage rate. However, the railroad made its crane available at no charge to those customers who elected to unload their own goods. *Id.*
25. The court stated: "It is surprising how little in the way of decision in our Courts is to be found in our books upon the obligations which the mere lender of a chattel for use contracts toward the borrower." *Id.* at 391.
26. The court in *Blakemore* declared:
   
   It may however, we think, be safely laid down that the duties of the borrower and lender are in some degree correlative. The lender must be taken to lend for the purpose of a beneficial use by the borrower; the borrower therefore is not responsible for reasonable wear and tear; but he is for negligence, for misuse, for gross want of skill in the use, above all, for any thing which may be qualified as legal fraud. So, on the other hand, as the lender lends for beneficial use, he must be responsible for defects in the chattel with reference to the uses for which he knows the loan is accepted, of which he is aware, and owing to which directly the borrower is injured.

_Id._

These principles were first set forth in *Coggs v. Bernard*, 92 Eng. Rep. 107 (K.B. 1704), which is discussed in detail in Elliott, *Degrees of Negligence*, 6 S. CAL. L. REV. 91, 107-10 (1933). The defendant in *Coggs* transported several casks of brandy, belonging to the plaintiff, from one cellar to another. As the goods were being transferred one of the casks was staved and most of the brandy was lost. The plaintiff claimed that the defendant's employees were responsible for the accident and the assize court agreed. The defendant moved in arrest of judgment, arguing that as a gratuitous bailee he should not have been held liable for mere negligence. 92 Eng. Rep. at 107. Nevertheless, Chief Justice Holt, speaking for the Court of King's Bench, upheld the verdict. *Id.* at 114.

Lord Holt declared that the respective duties owed by bailor and bailee depended on the nature of the bailment. Relying on the writings of Roman jurists, Holt identified six types of bailment: (1) *depositum*, (2) *commodatum*, (3) *locatio et conductio*, (4) *pignor acceptum*, (5) delivery of chattels to be transported by the bailee, and (6) *mandatum*. *Id.* at 109.

*Depositum* or deposits are bailments of personal property to be kept for the bailor without recompense and to be returned when the bailor shall require them. *J. Story, supra* note 14, § 4; Weinstein v. Sheer, 98 N.J.L. 511, 120 A. 679, 681 (1923). In ordinary deposits, the bailee, in the absence of a special undertaking to keep the goods as he would his own, is liable only for gross neglect. *Coggs*, 92 Eng. Rep. at 110-11.

*Commodatum* are bailments of goods to be used gratuitously by the bailee temporarily or for a certain time. Slack v. Bryan, 299 Ky. 132, 184 S.W.2d 873, 875-76 (1945); Viers v. Webb, 26 Mont. 38, 245 P. 257, 258 (1926); Lowney v. Knott, 83 R.I. 505, 120 A.2d 552, 554 (1956). In the case of
commodatum, the borrower, because he derives a benefit from the transaction, is held to the "strictest care and diligence" and is answerable for the least neglect. Coggs, 92 Eng. Rep. at 111.

In locatio et conductio, or lending for hire, Lord Holt declared, "the hirer is bound to the utmost diligence, such as the most diligent father of the family uses; and if he uses that, he shall be discharged." Id. at 112.

Pignori acceptum or pledges are bailments of goods to a creditor as security for a debt or engagement. Clark v. Chapman, 215 Mich. 518, 184 N.W. 497, 500 (1921); Luckett v. Townsend, 3 Tex. 119, 129 (1848); J. Story, supra note 14, § 7. According to Lord Holt, the bailee is absolved of liability for the loss of the pledged property if he has exercised "true diligence" because "the law requires nothing extraordinary of the pawnee, but only that he shall use ordinary care in restoring the goods." Coggs, 92 Eng. Rep. at 112.

Lord Holt divided the fifth class of bailment, delivery to carry or otherwise manage for a reward, into two categories. The first involved delivery to a common carrier. The bailee in such a case was liable for any injury to the property except those arising from either Acts of God or public enemies. A more relaxed standard of care applied to the second category, cases involving private persons who agreed to transport goods for compensation. These bailees were merely required to exercise reasonable care. Id. at 112-13.

Mandatum or mandates are bailments of something for some service to be performed upon it gratuitously by the bailee. Maddock v. Riggs, 106 Kan. 808, 190 P. 12, 14 (1920); Erwin v. State, 152 Tex. Crim. 245, 212 S.W.2d 183, 184 (1948). According to Lord Holt, the bailee in such cases must exercise "diligent management" and is liable if he acts negligently. Coggs, 92 Eng. Rep. at 113-14.

In Coggs, Lord Holt determined that the defendant's undertaking fell into the category of mandatum. According to Roman law, the bailee in a mandate situation was required to exercise due care even though the bailment was gratuitous. The rationale for this rule was that the property owner, having entrusted the goods to the bailee, expected him to exercise due care on his behalf; consequently a bailee who failed to do so was thought to have defrauded the bailor. Lord Holt, therefore, concluded that the defendant should be held liable for his negligence. Subsequent commentators revised this classification somewhat, dividing bailments into five categories instead of six. For example, Sir William Jones in his treatise divided bailments into (1) depositum, (2) mandatum, (3) commodatum, (4) pignori acceptum and (5) locatum. The fifth category, locatum or lending for reward, was further divided into three subcategories: (a) locatio rei or hire for temporary use, (b) locatio operis faciendi, where work or labor were to be bestowed on the property, and (c) locatio operis mercium vehendarm or the bailment of goods to either a common carrier or a private person for transportation. W. Jones, Essay on the Law of Bailments 36 (3d ed. 1828). See also Seymour v. Brown, 19 Johns. 43, 46-47 (N.Y. 1821); Todd v. Fogley, 7 Watts 542, 543 (Pa. 1838); J. Kent, Commentaries on American Law 585-86 (13th ed. 1884). This fifth category was equivalent to Lord Holt's third and fifth categories.

Joseph Story incorporated Jones' analysis into his own treatise on bailments. According to Story, bailments could be divided into deposits, mandates, gratuitous loans for use (commodatum), pledges, and bailments for hire. To this last category, in addition to three subcategories provided by Jones, Story added a fourth, locatio custodiae or the hiring of care or services to be performed or bestowed on the property delivered. J. Story, supra note 14, § 8. See also Hanes v. Shapiro, 168 N.C. 24, 84 S.E. 33, 35 (1915); Krause v. Commonwealth, 93 Pa. 418, 420 (1880); Stein v. State, 132 Tex. Crim. 350, 104 S.W.2d 508, 510 (1937).

The modern tendency is to classify bailments as bailments for the benefit of the bailor, bailments for the benefit of the bailee, or mutual benefit bailments. Godfrey v. City of Flint, 284 Mich. 291, 279 N.W. 516, 517 (1938); Hanes v. Shapiro, 168 N.C. 24, 84 S.E. 33, 35 (1915). The first category embraces depositum and mandatum, the second is equivalent to commodatum, while the third includes pignori acceptum and locatum. J. Story, supra note 14, § 3.
the transaction as a gratuitous bailment and concluded that the railroad need not exercise due care in the maintenance of its crane but would only be liable if it concealed a known defect from its bailee.

The rule in Blakemore was quickly accepted in the United States, where numerous cases held that a gratuitous bailor was neither responsible for dangerous conditions that were not known to him, nor obligated to inspect the chattel for latent defects. If the gratuitous bailor was aware of a defective condition, he was required to communicate this knowledge to the bailee, but he was normally not required to take affirmative steps to make the chattel safe for use by the bailee or his guests. Moreover, third persons who were injured by defective chattels were treated in the same manner as the decedent in Blakemore was merely a bystander, not an employee of the railroad or of the customer. Relying on the rationale of Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. Ch. 1842), the court declared that the railroad's duty to provide a safe crane could only arise from contract and the decedent, Blakemore, was not privy to it. 120 Eng. Rep. at 392.

With its decision in Gagnon v. Dana, 69 N.H. 264, 39 A. 982 (1896), New Hampshire apparently became the first American jurisdiction to adopt the Blakemore rule. In Gagnon, Bradley employed Gay as a general contractor to do construction work on a hospital. Gay, in turn, hired St. Lawrence to act as foreman and obtained workers from the defendants, Dana and Provost. The defendants gratuitously provided Gay with 90 wall brackets to support the scaffolding upon which the carpenters were to work. The plaintiff, a carpenter employed by Dana and Provost, was injured when a defective bracket gave way causing the scaffolding on which he was standing to collapse. Id. at 983.

The defendants claimed that they did not know that the bracket in question was defective. Nevertheless, the trial court instructed the jury that the defendants should be held liable if they knew or ought to have known that the bracket was unsafe, regardless of whether the bailment was gratuitous. Id. However, the appellate court concluded that the bailment was gratuitous and, therefore, the defendants had not breached their duty of care. Id. at 983-84.


Howell v. Amerson, 116 Ga. App. 211, 156 S.E.2d 370, 371 (1967); Lampe v. Magoulakis, 159 Ohio St. 72, 111 N.E.2d 7, 10 (1953). The duty owed by a gratuitous bailor toward his bailee is similar to the duty traditionally owed by a landowner to a social guest. See Howell, 156 S.E.2d at 371; Davis v. Sanderman, 225 Iowa 1001, 282 N.W. 717, 720 (1938); Lampe, 111 N.E.2d at 10.
Thus, a gratuitous bailor could be held liable to a bystander when he failed to disclose a known defect to his bailee. He was, however, under no duty to inspect the property for defects and was absolved from any liability to a third party for injuries caused by undiscovered conditions in the property.

Although the traditional rule is still generally followed, some courts now impose a duty of reasonable care on gratuitous bailors. A few courts have relied on statutes to hold gratuitous bailors to a standard of reasonable care, while others have narrowed the definition of gratuitous bailment to exclude loans of automobiles to prospective purchasers. In addition, a small number of jurisdictions have adopted the rule that all bailors be treated the same, regardless of the nature of the bailment. This view is also reflected in the Restate-
ment (Second) of Torts. 41

B. Mutual Benefit Bailments

A mutual benefit bailment arises when both parties benefit from the bailment. 42 As noted earlier, 43 the bailor in a mutual benefit bailment situation owes the bailee a duty of ordinary care. 44 The measures that the bailor must take will vary according to the circumstances, but normally he will be required to inspect the chattel for latent defects. 45 For example, in Milestone System, Inc. v. Gasior, 46 the plaintiff, a passenger in an automobile rented from the defendant, was injured when the door latch gave way, causing her to fall out of the car onto the highway. Affirming a lower court judgment in her favor, the Maryland Court of Appeals declared that the law required the bailor to examine the automobile “with care and skill” to discover any defects which might make it unfit for its intended use. 47

Normally, the bailor is required to take affirmative steps to discover potentially dangerous conditions and cannot merely respond to others’ complaints. In Villines v. Sooner Chrysler-Plymouth, Inc., 48 for example, the defendant was held liable for failure to inspect a vehicle which he provided to the plaintiff as a courtesy car while her own car was being repaired. The plaintiff was injured in an intersectional collision when the brakes on her loaner car failed. The star adjuster on the loaner car’s brakes had become loose, and the brake lining was worn. The defendant admitted that the car had never been inspected by a mechanic because his policy was not to inspect or repair a cour-

41. See Restatement (Second) of Torts § 388 (1965). The liability of suppliers of chattels for the use of others is covered in §§ 388-408 of the Restatement. Section 388 sets forth general principles applicable to every situation. It provides that one who supplies a chattel for another to use is subject to liability for physical harm if he “knows or has reason to know” that the chattel may be dangerous for its intended use. Comment c states that the provisions of § 388 “apply to all kinds of bailors, irrespective of whether the bailment is for a reward or gratuitous.” Id. § 388 comment c.
43. See supra text accompanying notes 20-21.
46. 160 Md. 131, 152 A. 810 (1931).
47. Id. at 812.
tesy vehicle unless someone complained.\textsuperscript{49}

\textit{Witte v. Whitney}\textsuperscript{50} also involved the adequacy of a bailor's inspection. In that case, the bailee's son was killed when the car's brakes failed. Although the car had been driven for more than 80,000 miles, the bailor drove the car only a short distance before turning it over to the bailee. At trial, an expert witness for the plaintiff testified that the customary practice was to check the level of the hydraulic fluid in the brake system in addition to taking the car for a test drive.\textsuperscript{51} The appellate court ruled that determination of the reasonableness of the defendant's inspection should have been left to the jury.\textsuperscript{52}

However, the bailor is not an insurer of the bailee's safety and, therefore, is not liable for injuries caused by defects that could not have been discovered by reasonable inspection.\textsuperscript{53} Furthermore, many cases have held that the bailor is not responsible for obvious defects.\textsuperscript{54} In addition, the bailor is not responsible for defects which arise, or become discoverable, after the chattel leaves his possession\textsuperscript{55} unless the bailor agrees to keep the property in good repair or otherwise retains effective control over it.\textsuperscript{56}

In states which still adhere to the doctrine of contributory negligence, the bailee's recovery against a negligent bailor may be barred by his own conduct.\textsuperscript{57} Furthermore, some states recognize the effec-

\begin{itemize}
\item\textsuperscript{49} \textit{Id.} at 1013.
\item\textsuperscript{50} 37 Wash. 2d 865, 226 P.2d 900 (1951).
\item\textsuperscript{51} \textit{Id.} at 901.
\item\textsuperscript{52} \textit{Id.} at 902.
\item\textsuperscript{53} \textit{See}, e.g., Roberts v. William N. & Kate B. Reynolds Memorial Park, 12 N.C. App. 69, 182 S.E.2d 611, 612-13 (1971), rev'd on other grounds, 281 N.C. 48, 187 S.E.2d 721 (1972); Troop A Riding Academy v. Miller, 127 Ohio St. 545, 189 N.E. 647, 649 (1934); Smith v. Mooers, 206 Va. 307, 142 S.E.2d 473, 476 (1965).
\item\textsuperscript{56} \textit{See} Campbell v. Siever, 253 Minn. 257, 91 N.W.2d 474, 479 (1958); Skelly Oil Co. v. Darling, 375 P.2d 917, 920 (Okla. 1962). The same principle applies when a third party is injured. \textit{See} Hudson v. Moonier, 102 F.2d 96, 100 (8th Cir.), cert. denied, 307 U.S. 639 (1939).
\item\textsuperscript{57} \textit{See} West v. Wall, 191 Ark. 856, 88 S.W.2d 63, 65 (1935); Berhow v. Kroack, 195 N.W.2d 295 (Iowa 1972). 
\end{itemize}
tiveness of releases or disclaimers in mutual benefit bailment situations.\textsuperscript{58}

A bailor may also be liable to a third party for injuries caused by a defective chattel if he is negligent in failing to make the property safe for its intended use.\textsuperscript{59} This is qualified, however, by the principle that a third party cannot stand in a better position than the bailee with respect to liability for such defects.\textsuperscript{60} Moreover, the courts are split on the question of whether discovery of the defect by the bailee should be regarded as a superseding cause.\textsuperscript{61}

Most types of chattel leases are classified as mutual benefit bailments under bailment law. The mutual benefit bailee in such instances is treated much like the buyer of a defective product under the law of negligence. In each case, the supplier of a product owes only a duty of reasonable care. While in theory the injured party can recover against a negligent supplier, proof problems, the assertion of affirmative defenses by the defendant, and other practical difficulties often prevent recovery in meritorious cases. For these reasons, bailees, like buyers, prefer no-fault theories such as implied warranty and strict liability in tort.

II. **PRINCIPLES OF IMPLIED WARRANTY**

The law of warranty imposes certain minimum standards of quality on goods that a seller sells to a buyer. The warranty imposes such liability irrespective of the degree of care exercised by the seller.


\textsuperscript{61} Thus, liability was imposed in the following cases: Hudson v. Moonier, 102 F.2d 96 (8th Cir.), cert. denied, 307 U.S. 639 (1939); Charles Sys., Inc. v. Juliano, 66 F.2d 931 (D.C. Cir. 1932); Bowyer v. Cummins, 81 Ga. App. 118, 58 S.E.2d 224 (1950); Ferraro v. Taylor, 197 Minn. 5, 265 N.W. 829 (1936); Trusty v. Patterson, 299 Pa. 469, 149 A. 717 (1930). However, liability was denied in Saunders Sys. Birmingham Co. v. Adams, 217 Ala. 621, 117 So. 72 (1928) and Eklof v. Waterston, 132 Or. 479, 285 P. 201 (1930).
The common law provided for an implied warranty of fitness which has been superseded by warranties under the Uniform Commercial Code (UCC or Code). Breach of warranty is therefore a form of "no fault" liability. The application of these principles to bailments will be explored in this Section.

A. The Common Law Implied Warranty of Fitness

In the case of a bailment for hire, many states once imposed an obligation that the property hired be reasonably fit for its intended use. This warranty resembled the implied warranty of fitness in the law of sales. However, the two warranties differed in the degree of care required. In a typical sales warranty, the seller was held strictly liable for injuries caused by a defective product, whereas in a bailment for hire, a supplier was merely required to exercise due care in the selection of the chattel. For example, in Dam v. Lake Aliso Riding School, the plaintiff filed suit against a livery stable for injuries she received when she was thrown from her horse. The California Court of Appeals denied recovery on the theory that the bailor was merely required to use reasonable care to see that the horse was suitable for riding, stating:

Under this rule the so-called implied warranty is not a warranty in that sense which insures the suitability of the horse, but is only a contractual obligation assumed against reckless or heedless hiring out of a horse without reasonable care to ascertain the habits of the animal with respect to its safety and suitability for the purpose for which it is hired.

Although the court in Dam used warranty language, it did not hold the owner of the livery stable strictly liable. Rather, the court only imposed a negligence standard on the defendant. Therefore, the

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63. See McNeal v. Greenberg, 40 Cal. 2d 740, 255 P.2d 810, 812 (1953); Rohar v. Osborne, 133 Cal. App. 2d 345, 284 P.2d 125, 130 (1955). According to one commentator, the courts were more likely to impose a negligence requirement in personal injury cases than in cases where only economic injury occurred (see, e.g., Hoisting Engine Sales Co. v. Hart, 237 N.Y. 30, 142 N.E. 342, 344 (1923); Milwaukee Tank Works v. Metals Coating Co. of Am., 196 Wis. 191, 218 N.W. 835, 836 (1928)). See Farnsworth, Implied Warranties of Quality in Non-Sales Cases, 57 Colum. L. Rev. 653, 658 (1957).

64. 5 Cal. 2d 395, 57 P.2d 1315 (1936).

65. Id. at 1318.
so-called warranty added nothing to the responsibility imposed upon the supplier of the animal under the law of bailments.

B. Warranties Under the Uniform Commercial Code

The UCC integrated a large, and sometimes discordant, collection of doctrines into a unified system of commercial law. The Code recognizes two kinds of sales warranties, express and implied. An express warranty arises when the seller makes material representation of fact about the character of his product and the buyer relies on this representation. Implied warranties arise by operation of law, regardless of the intent of the parties. The most important implied warranty is that of merchantability. Under this warranty, the seller promises that the goods will be of average merchantable quality. An implied warranty of fitness for a particular purpose is created when

66. U.C.C. § 2-313 (1978) declares:

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.

67. Id. § 2-314 states:

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.
the buyer relies on the seller's judgment to supply him with a product that is suitable for a specified purpose. Unlike the common law warranty of fitness, implied warranties under the Code are not related to fault. Thus, a seller may be liable to a buyer for breach of implied warranty even though he exercised due care in the manufacture or selection of the goods.

Upon publication of the UCC, some commentators suggested that sales warranties should be extended, either directly or by analogy, to chattel leases. Although there was resistance at first to this notion, many courts now acknowledge that Code warranties may be applied, either directly or by analogy, to many chattel lease transactions.

1. Restriction of Code Warranties to Sales

Article 2 of the UCC expressly mentions sales and sellers but does not indicate whether Code warranties may apply to transactions other than sales. For this reason, some courts held that UCC warranties should be limited to the sale of goods. A Virginia case, Leake v.

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68. Id. § 2-315 provides:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.


71. U.C.C. § 2-101 (1978) declares, "This Article shall be known and may be cited as Uniform Commercial Code—Sales." In addition, § 2-314, which deals with the implied warranty of merchantability, refers to a "contract for ... sale." Section 2-313, which deals with express warranties, and § 2-315, which defines the implied warranty of fitness for a particular purpose, both refer to a "buyer" and a "seller," but do not mention any other type of transaction.


In a few cases, the courts have restricted the UCC to sales transactions in order to benefit a bailee. For example, in Owings v. Patent Scaffolding Co., 50 A.D.2d 866, 376 N.Y.S.2d 948, 950 (1975), a New York court refused to apply the Code's four-year statute of limitations (see U.C.C. § 2-725 (1978)) to an action for breach of warranty instead of the six-year statute of limitations applicable to contracts generally. Similarly, a Delaware court in Martin v. Ryder Truck Rental, Inc., 353 A.2d 581, 584 (Del. 1976), declared that because the UCC did not preempt bailment law, the court was free to apply strict liability in tort to bailment transactions.
Meredith,\textsuperscript{73} illustrates this view. The plaintiff in Leake rented an aluminum extension ladder from the defendant. The ladder collapsed during use. The plaintiff sued to recover for personal injuries, alleging both negligence and breach of an implied warranty of fitness. The trial court ruled that as a matter of law the defendant had not been negligent, but it submitted the issue of whether the defendant had breached an implied warranty to the jury.\textsuperscript{74} The jury found a breach, and the court entered judgment for the plaintiff. On appeal the judgment was reversed.

The plaintiff relied on Comment 2 to section 2-313 of the UCC to support the extension of Code warranties to bailments. This comment states that "the warranty sections of [Article 2] are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined . . . to sales contracts."\textsuperscript{75} The appellate court, however, declared that while the official comments were helpful as interpretive tools, they could not be used to expand the scope of the UCC. Thus, the court found that Code warranties were expressly limited to sales.\textsuperscript{76}

The court examined section 2-315 of the UCC,\textsuperscript{77} which deals with the implied warranty of fitness. It noted that the language of this section refers only to buyers and sellers. The UCC defines "buyer" as "a person who buys or contracts to buy goods"\textsuperscript{78} and "seller" as "a person who sells or contracts to sell goods."\textsuperscript{79} The UCC defines "sale" as "the passing of title from the seller to the buyer for a price."\textsuperscript{80} The court observed that the UCC declares that "unless the context otherwise requires, 'contract' and 'agreement' are limited to those relating to the present or future sale of goods."\textsuperscript{81} Consequently, the court concluded: "A literal reading of these Code sections thus indicates that the implied warranty of fitness for a particular purpose . . . applies to sales only, and not to bailments or chattel lease

\begin{footnotes}
\item[73] 221 Va. 14, 267 S.E.2d 93 (1980).
\item[74] The rental contract purported to rent the ladder "as is." However, the trial court held that the disclaimer was ineffective because it failed to meet the conspicuousness requirement of § 2-316(2) of the UCC, discussed infra at note 127 and accompanying text. 267 S.E.2d at 94.
\item[75] U.C.C. § 2-313 comment 2 (1978).
\item[76] 267 S.E.2d at 95.
\item[77] U.C.C. § 2-315 (1978). See supra note 68.
\item[78] U.C.C. § 2-103(1)(a) (1978).
\item[79] \textit{Id.} § 2-103(1)(d).
\item[80] \textit{Id.} § 2-106(1).
\item[81] \textit{Id.}
\end{footnotes}
transactions.\textsuperscript{82}

The appellate court in \textit{Leake} also observed that the legislature had changed some of the Code’s language when it adopted the uniform act for use in Virginia. The legislature’s failure to extend the Code to leases at that time evidenced an intent to limit the application of the UCC to sales.\textsuperscript{83}

A Massachusetts court utilized similar reasoning in \textit{Bechtel v. Paul Clark, Inc.}\textsuperscript{84} The plaintiff in \textit{Bechtel} applied the brakes of his rental car in order to avoid hitting another car. The brakes malfunctioned, causing his vehicle to strike a guard rail and overturn. The plaintiff sued the lessor to recover for personal injuries, alleging negligence and breach of the implied warranties of merchantability and fitness. The trial court granted a directed verdict on the warranty counts, and the jury held for the defendant on the negligence issue.\textsuperscript{85} This decision was affirmed by the Massachusetts Appeals Court. The appeals court noted that subsequent to the accident, the Massachusetts legislature had amended the UCC to include lessors.\textsuperscript{86} According to the appeals court, this did not indicate that the UCC in Massachusetts had covered such transactions at the time of the plaintiff’s injury, and the court refused to give the amendment retroactive application.\textsuperscript{87}

In summary, \textit{Leake} and \textit{Bechtel} held that warranties based on the UCC should be restricted to sales because the UCC itself does not expressly mention any other sort of transaction. Most states do not follow this position. In those that do, however, warranty law offers more protection to injured lessees than the law of bailment.

2. \textit{Chattel Leases Treated as Analogous to a Sale}

Most courts have been willing to recognize implied warranties in connection with some types of lease transactions.\textsuperscript{88} These courts have utilized a variety of theories in doing so. A few have extended sales warranties to chattel leases by concluding that such leases are “trans-

\begin{itemize}
  \item \textsuperscript{82} \textit{Leake}, 267 S.E.2d at 95.
  \item \textsuperscript{83} \textit{Id.}
  \item \textsuperscript{84} 10 Mass. Ct. App. 685, 412 N.E.2d 143 (1980).
  \item \textsuperscript{85} \textit{Id.} at 145.
  \item \textsuperscript{87} \textit{Bechtel}, 412 N.E.2d at 149-50.
  \item \textsuperscript{88} \textit{See generally} Murray, \textit{supra} note 69, at 449-54.
\end{itemize}
actions in goods."\textsuperscript{89} This approach, however, contradicts the provisions of the UCC and its official comments. Moreover, applying the UCC's warranty provisions across-the-board ignores important distinctions between the various types of leases and bailments.

Most of the courts that have applied sales warranties to chattel leases have reasoned that such transactions are similar to sales and should be treated in the same manner. \textit{Sawyer v. Pioneer Leasing Corp.},\textsuperscript{90} an Arkansas decision, is the leading proponent of this approach. In that case, the lessor of an ice machine sued his lessee to recover the balance due under a five-year lease. The lessee responded that the machine had become inoperable during the first year and claimed that the lessor had breached an implied warranty of fitness. Reversing the trial court's directed verdict for the lessor, the Arkansas Supreme Court held that an implied warranty of fitness had arisen in connection with the lease and that the purported disclaimer was invalid because it failed to satisfy the UCC's conspicuousness requirement.\textsuperscript{91} The UCC's disclaimer provision, section 2-316(2), states that exclusions of an implied warranty of fitness must be in writing and conspicuous. However, as the court observed, the entire lease agreement in \textit{Sawyer} was written in small print. Since the disclaimer was not written in larger print or boldface type, it was not conspicuous\textsuperscript{92}

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\textsuperscript{89} Thus, in \textit{Hertz Commercial Leasing Corp. v. Transportation Credit Clearing House}, 59 Misc. 2d 226, 298 N.Y.S.2d 392 (1969), \textit{rev'd on other grounds}, 64 Misc. 2d 910, 316 N.Y.S.2d 585 (1970), a New York trial court denied summary judgment to a lessor in an action against the lessee for failure to make required rental payments. The lessee argued that the lessor had breached implied warranties of merchantability and fitness and the lessor responded by claiming that the lease contract had expressly disclaimed all implied warranties. The court, however, held that the disclaimer was invalid because it did not comply with the conspicuousness requirements of Article 2 of the UCC. 298 N.Y.S.2d at 397-98. See U.C.C. § 2-316(2) (1978), quoted \textit{infra} at note 127.

\textsuperscript{90} 244 Ark. 943, 428 S.W.2d 46 (1968).

\textsuperscript{91} \textit{Id.} at 51. See U.C.C. § 2-316(2) (1978).

\textsuperscript{92} U.C.C. § 1-201(10) (1978) states that:

A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: \textit{NON-Negotiable Bill of Lading}) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous". Whether a term or clause is "conspicuous" or not is for decision by the court.
and consequently failed to meet the requirements of 2-316(2).

The lease contract in Sawyer required the lessee to pay for maintenance and repairs. The lessee also presented evidence that the lessor intended to sell the ice machine to him at the end of the lease period if a suitable price could be negotiated. Consequently, the Arkansas court concluded that the lease in Sawyer was analogous to a sale and applied the warranty provisions of the UCC to it:

We are holding that Section [2-316(2)] is applicable to leases where the provisions of the lease are analogous to a sale. Here, the contract provides that the lessee shall pay all expenses of repairs and maintenance . . . . The transaction really seems to be a sale in every respect, except for the fact that the instrument provided that the ice machine should be returned to the lessor.93

The Sawyer court's reasoning has been adopted in a number of other jurisdictions.94 Of the decisions following Sawyer, one group has involved leases that were used as financing devices. In such cases, the courts have usually concluded that the "lease" in question was nothing more than a disguised sale and have applied the warranty provisions of the Code to the transaction. Chatlos Systems, Inc. v. National Cash Register Corp.95 exemplifies this approach. In Chatlos, the lessee of a computer system sued the manufacturer for breach of warranty. The defendant argued that implied warranties only arose when a product was sold. The court, however, determined that the transaction was the functional equivalent of a sale and that the warranty provisions of the UCC therefore applied.96 The plaintiff had originally intended to buy the computer system from the manufacturer but was unable to obtain the necessary financing. Instead, its lender bought the computer system from the manufacturer and leased it to the plaintiff. The court noted that this was a common practice, and upheld the plaintiff's breach of warranty claim.97

93. 428 S.W.2d at 54 (emphasis in original).
96. 479 F. Supp. at 742.
97. Id. at 741-42, 743. See also Lectro Management, Inc. v. Freeman, Everett & Co., 135 Vt. 213, 373 A.2d 544, 546 (1977) (provision in lease giving lessee option to become owner for no additional consideration or nominal consideration at end of lease makes lease one intended for security, or a conditional sales contract, with lessee more accurately viewed as a "buyer"). These cases should
The courts have been especially willing to apply sales warranties to leases when the lease contract allows the lessee to acquire the property at the end of the lease term. 98 These courts have relied on section 2-106 of the UCC, which expressly covers future as well as present sales of goods. 99

On the other hand, many courts have refused to extend the provisions of Article 2 to transactions that are not similar to sales. 100 For example, in Neubros Corp. v. Northwestern National Insurance Co., 101 a federal district court declined to extend the provisions of the UCC to the bareboat charter of a sand barge. The court observed that the lease only extended for a period of eighteen months; since the normal useful life of a sand barge was twenty-five to thirty years, the barge would have been returned to the lessor long before its useful life was over. In addition, the barge in question was merely a temporary replacement for other vessels. Consequently, the court concluded that the lease was not analogous to a sale. 102

A Georgia appellate court used a similar approach in Mays v. Citizens & Southern National Bank. 103 In that case, a bank sued to recover overdue rental payments from the lessee of an automobile and the lessee counterclaimed, arguing breach of implied warranty. The trial court granted a partial summary judgment on the counterclaim,

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102. Id.

and the defendant appealed. The appellate court, however, upheld the trial court's decision.

In *Mays*, the defendant leased the vehicle from S&S Sales of Florida, Inc., for a period of twenty-four months. S&S Sales subsequently assigned the future rental payments on the lease to the plaintiff. The original lease agreement between the defendant lessee and S&S Sales contained an express disclaimer. Although this disclaimer failed to comply with the UCC's requirements for a disclaimer in section 2-316, the court held that it was effective. The court noted that section 2-316 expressly referred to “sales” and to “buyers and sellers.” Another provision of the UCC states that it only applies to a contract or agreement limited to those relating to the present or future sale of goods. Furthermore, the UCC declares that “a sale consists in the passing of title from seller to the buyer for a price.” Since the lease agreement did not contain an option to buy, the court refused to treat it as a present or future sale.

The “analogy to a sale” approach is open to serious criticism. First, the test is too restrictive because it extends warranty protection only to transactions that resemble a sale of goods, when other classes of lessees also deserve protection. In addition, as the dissent in *Sawyer* pointed out, courts have provided few guidelines to determine when a lease is like a sale. If the courts use the “analogous to a sale” approach, they should explicitly consider such factors as the length of the lease term, the intent of the parties, the lessee's obligation to repair, and the lessee’s ability to acquire title to the property at the end of the lease term.

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104. *Id.* at 618-19. The court noted that § 2-316 requires that to exclude or modify the implied warranty of merchantability or any part of it, the disclaimer must mention merchantability, and be conspicuous. See U.C.C. § 316(2) (1978), quoted *infra* at note 127.


106. *Id.* § 2-401.


110. As one commentator has suggested, the courts in *Sawyer* and similar cases might have applied the same test that the UCC utilizes to determine whether a lease is intended to be a security interest. Murray, *supra* note 69, at 451. The UCC provides that the question of whether a lease is a security interest must be determined by the facts of each case. However, a lease will always be treated as a security interest if the lessee has the right to obtain the property when the lease expires at no additional cost or at only nominal cost. U.C.C. § 1-201(37) (1978).
3. Policy-Oriented Approach

Some courts have examined the circumstances surrounding the transaction to determine whether an implied warranty should be imposed on the supplier.111 Baker v. City of Seattle112 and W.E. Johnson Equipment Co. v. United Airlines, Inc.113 illustrate this “policy-oriented” approach. In Baker, the plaintiff was injured when the brakes on his rented electric golf cart failed and the vehicle overturned. The lessor argued that the disclaimer in the lease contract foreclosed any claim based on breach of implied warranty. Because the golf cart was only rented for a few hours, the transaction bore no resemblance to a sale. However, the Washington court held that the disclaimer was invalid114 because it was contrary to the Code’s provisions on conspicuousness and unconscionability.115 According to the court, these provisions constitute an expression of legislative policy about disclaimers generally and, therefore, are not limited to sales warranties.116 Thus, the Baker court showed a willingness to extend the Code’s warranty and disclaimer provisions to chattel lease transactions, even when they did not resemble sales, as long as this was consistent with the Code’s underlying policies.

The Johnson case involved a suit by United Airlines against the lessor of a defective forklift hoist. The machine was used by the airline to load and unload wheelchair passengers to and from its airplanes at a Miami airport. The machine malfunctioned, causing a passenger to be severely injured. After settling the passenger’s claim, United brought an indemnity action against the lessor on grounds of negligence and breach of implied warranty. The trial court directed a verdict for the defendant on the warranty claim, and the jury found in the defendant’s favor on the negligence claim. The intermediate appellate court, however, reversed the trial court on the warranty issue,117 and the lessor appealed to the Florida Supreme Court.

112. 79 Wash. 2d 198, 484 P.2d 405 (1971).
113. 238 So. 2d 98 (Fla. 1970).
114. 484 P.2d at 406-07.
115. See U.C.C. § 2-316(2) (1978) (conspicuousness); id. § 2-719(1), (3) (unconscionability). These provisions are discussed infra at notes 120-33 and accompanying text.
The Florida Supreme Court also ruled in favor of United, declaring that the UCC's implied warranty of fitness should be extended to bailments for hire:

The reasons for imposing the warranty of fitness in sales cases are often present in lease transactions. Public policy demands that in this day of expanding rental and leasing enterprises the consumer who leases be given protection equivalent to the consumer who purchases. Although a sale transfers ownership and a lease or bailment merely transfers possession and anticipates future return of the chattel to the owner, there may be as much or more reliance on the competence or expertise of the lessor than on the competence of the seller.\(^{118}\)

The courts' approach in Baker and Johnson correctly focuses on the policies that underlie warranty protection instead of applying a mechanical test.\(^{119}\) Whether a warranty arises should depend on whether the lessor possessed expertise in the characteristics of the leased property, whether the lessee's reliance upon the lessor's selection of a suitable chattel was commercially reasonable, and whether the lessor was a mass dealer in the leased article.

C. Limitations on Recovery for Breach of Warranty

Although lessees receive more protection under implied warranty than under bailment law, this protection may be substantially limited in certain circumstances. First, the privity of contract requirement limits the scope of implied warranty protection. Second, the lessor may be able to disclaim implied warranties.

Historically, implied warranties extended only to parties in contractual privity with the supplier.\(^{120}\) Of course, privity will usually exist between the lessor and lessee; however, third parties such as employees may be excluded from warranty protection for lack of privity. For example, an Illinois appellate court denied recovery in Knox v. North American Car Corp.\(^{121}\) to a plaintiff who was injured when his forklift fell through a hole in the floor of a boxcar owned by the defendant. The defendant had leased the boxcar to a food corporation

\(^{118}\) Johnson, 238 So. 2d at 100.


\(^{120}\) For a discussion of the erosion of contractual privity in implied warranty cases, see generally Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099 (1960).

\(^{121}\) 80 Ill. App. 3d 683, 399 N.E.2d 1355 (1980).
but had retained responsibility for maintaining it. The lessor had been notified of the hole in the floor but failed to repair the condition.

The court held that the injured employee was not entitled to recover under the warranty provisions of Article 2, because he was not a beneficiary of the warranty. To qualify as a third party beneficiary of a warranty under Alternative A of section 2-318, which applied in Knox, the plaintiff had to be a "family member or guest" of the lessee. Although an employee of the lessee might have qualified, the plaintiff, as an employee of a business customer of the lessee, did not fit that definition.

The second reason why the UCC's implied warranty provisions

122. Id. at 1359-60.
123. U.C.C. § 2-318 (1978) offers three alternatives with regard to defining the class of persons entitled to benefit from an express or implied warranty. Alternative A, which was applicable in Knox, is the most restrictive of the three alternatives. Alternative A provides:

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of warranty. A seller may not exclude or limit the operation of this section.

Id. § 2-318, Alternative A. Alternative B broadens the class of beneficiaries by deleting the requirement that the injured person be "in the family or household" of the buyer, while Alternative C goes further by deleting the requirements that the injured party be a "natural" person and that the party suffer personal injury. Alternatives B and C are quoted infra at note 126. For a discussion of the three alternatives, see Comment, Enforcing the Rights of Remote Sellers Under the UCC: Warranty Disclaimers, the Implied Warranty of Fitness for a Particular Purpose and the Notice Requirement in the Nonprivity Context, 47 U. Pitt. L. Rev. 873, 883-87 (1986).

124. 399 N.E.2d at 1360.
125. The court acknowledged that an employee of the buyer or lessee might qualify as a third party beneficiary under Alternative A of § 2-318. This conclusion is based on the notion that the employee stands in such a relationship to his employer that he may be considered the functional equivalent of a guest or family member. Id.

126. The plaintiff argued for a broad interpretation of § 2-318's language. However, the court observed that the legislature had already considered and rejected Alternatives B and C to § 2-318. Id. at 1359. These alternatives extend warranty protection to a broader class of persons and would have included the plaintiff. Alternatives B and C provide:

Alternative B

A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative C

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.

provide inadequate protection is that the lessor may easily disclaim implied warranties. Section 2-316(2) of the UCC allows a seller to disclaim the implied warranties of merchantability and fitness provided that the seller uses the proper language and the exculpatory language is conspicuous and not unconscionable. Although the Code restricts the right to disclaim in the case of transactions involving retail consumers, disclaimers nevertheless enable lessors to avoid liability for defective products in many instances. For example, in *Triple C Leasing, Inc. v. All-American Mobile Wash*, the court held that the lessor of a mobile van did not breach an implied warranty because the lease agreement specifically provided that the lessor made no express or implied warranties concerning the van.

The court in *World Wide Lease, Inc. v. Groeschmit* reached a similar conclusion. In that case, an ice-vending machine lessor sued to recover overdue rentals from its lessee. The lessee cross-complained against the machine’s seller, alleging breach of express and implied warranties. The lessor, a financing institution, had obtained the machine on the lessee’s behalf, and the court found that an implied warranty of fitness for a particular purpose would have extended through the lessor/buyer to the lessee under the circumstances. However, the seller had expressly disclaimed all warranties and sold the product in an “as is” condition. Consequently, the court concluded that the seller had not breached any implied warranties, and, therefore, dismissed the cross-claim.

Thus, the law of implied warranty and bailments often fail to adequately protect the lessor of a defective product. Bailment law requires proof that the lessor negligently failed to make the leased property safe for its intended use, a showing which is difficult. Im-

127. U.C.C. § 2-316(2) (1978) provides:

Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in the case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be in writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that “There are no warranties which extend beyond the description on the face hereof.”

128. Id. § 2-719(3) provides: “Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.”

129. 64 Cal. App. 3d 244, 134 Cal. Rptr. 328 (1976).
131. Id. at 892-93.
132. Id. at 898.
plied warranties do not require proof of negligence but may require that a plaintiff be in contractual privity with the lessor. In addition, lessors frequently may defeat implied warranties by disclaiming them. Arguably, those who lease should receive the same protection as those who buy. For these reasons, some commentators have recommended that the principles of strict liability in tort be extended from sales transactions to chattel leases.\textsuperscript{133} It is to this question that we now turn.

III. STRICT LIABILITY IN TORT

A. Historical Development

In 1963 the California Supreme Court first applied the concept of strict liability to the law of sales in its celebrated decision, \textit{Greenman v. Yuba Power Products, Inc.}\textsuperscript{134} Shortly thereafter, the Restatement (Second) of Torts incorporated a strict liability provision, section 402A, which applied to sales. Section 402A provides:

(1) One who sells a product in a defective condition unreasonably dangerous to the user or consumer or his property is subject to liability for physical harm thereby caused to the ultimate user or 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.\textsuperscript{135}

Almost every American jurisdiction now imposes some strict liability in tort on sellers of defective products either by statute or through judicial adoption of section 402A.\textsuperscript{136}


\textsuperscript{134} 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

\textsuperscript{135} \textit{Restatement (Second) of Torts} § 402A(1) (1965). Subsection (2) of 402A declares that the seller is liable even though the seller has exercised all possible care in the preparation and sale of the product and there is no contractual privity between the seller and the user or consumer.

\textsuperscript{136} For a list of those states which have expressly adopted strict products liability, see 2 L. FRUMER & M. FRIEDMAN, \textit{Products Liability} § 3.03(3) n.4 (1986). Most commentators applauded the imposition of strict liability in tort on the manufacturers and sellers of defective products. See, e.g., Prosser, \textit{The Fall of the Citadel (Strict Liability to the Consumer)}, 50 MINN. L. REV. 791 (1966). However, some legal scholars have expressed concern about the prospect of strict liability in tort displacing the law of warranty in sales transactions. See Dickerson, \textit{Products Liability: Dean Wade and the Constitutionality of Section 402A}, 44 TENN. L. REV. 205 (1977); Dickerson, \textit{The ABC’s of Products Liability—With a Close Look at Section 402A and the Code}, 36 TENN. L. REV. 439 (1969); Shanker, \textit{Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communication Barriers}, 17 CASE W.
Soon after the Restatement incorporated section 402A, consumers sought to extend strict liability in tort to lease transactions. Cintronc v. Hertz Truck Leasing & Rental Service, 137 decided by the New Jersey Supreme Court in 1965, was the first case to do so. The plaintiff in Cintronc was injured when the brakes on a truck failed and the vehicle struck a bridge. Plaintiff was a passenger in the truck, which had been leased to his employer along with eight other vehicles from Hertz. Under the terms of the lease, the trucks were kept on the lessee's premises but the lessor agreed to service, repair and maintain them. 138

The plaintiff sued Hertz for breach of implied warranty and negligence in maintaining the vehicle. The trial court dismissed the warranty claim but submitted the negligence claim to the jury, which found for the defendant. 139 On appeal, the New Jersey Supreme Court reversed the trial court's dismissal of the warranty claim, holding that the lease agreement gave rise to an implied warranty that the trucks would be fit for the lessee's use throughout the lease period. Furthermore, the court said that the defendant's duty could better be expressed in terms of strict liability in tort rather than breach of implied warranty. 140 The court noted the following policy reasons which supported the imposition of strict liability:

Most of the significant criteria which in sales transactions give rise to an implied warranty of fitness or which support a cause of action based on strict liability in tort, are present in the type of lessor-lessee relationship now before us. (1) The risk of harm to the lessee, his employees, passengers, and members of the public from the operation of a defective truck on the highways is great; (2) the representation of the lessor that the vehicles are fit for use for the lessee's purposes is of major proportions; . . . (3) the reliance of the lessee on the representation of the lessor is bound to be great. 141

Cintronc has been widely followed. Most courts that have considered the issue have extended strict liability to chattel lease transactions. A great number of these courts have expressly relied on the reasoning in the Cintronc case. 142

137. 45 N.J. 434, 212 A.2d 769 (1965).
138. Id. at 772-73.
139. Id. at 771.
140. Id. at 777-78.
141. Id. at 781.
B. Objections to Extending Strict Liability to Lease Transactions

As one might expect, lessors vigorously oppose the extension of strict liability in tort to lease transactions. They argue that the UCC preempted the common law in commercial areas, thereby precluding any bases of liability not explicitly set forth in its provisions. In addition, they claim that even if the UCC did not preempt the field, the drafters of the Restatement intended section 402A to be limited to sales. These arguments will be addressed separately in the Sections that follow.

1. Preemption by the Uniform Commercial Code

Martin v. Ryder Truck Rental, Inc. was the first decision to consider the preemption issue. The plaintiff in Martin was struck by a rented car when the car's brakes failed. Plaintiff sued on the basis of strict liability in tort. The defendant argued that if the legislature had intended to create a regime of strict liability for chattel leases, it would have done so explicitly in the UCC. The court, however, held that the UCC did not preempt the entire field of commercial law.

The court observed that while the warranty provisions of the Code were limited to sales, the Code was “neutral” as to other types of relationships. The court also noted that the Code's drafters acknowledged that common law warranties could arise outside of the sales context. Furthermore, the court refused to conclude that legislative silence on the question of warranty protection for lessees amounted to preemption. Consequently, the court applied strict li-


144. Id. at 584.

145. The court in Martin quoted language from Comment 2 to § 2-313 of the UCC. Id. at 584 n.6. This comment declares:

Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire, whether such bailment is in itself the main contract or is merely a supplying of containers under a contract for the sale of their contents.


146. 353 A.2d at 584.
ability principles to the lease in question and reversed a lower court judgment for the defendant.147

2. Section 402A Limited to Sales

Lessors have also contended that the Restatement’s strict liability provisions were expressly limited to sales. This argument initially met with some success. For example, in Speyer, Inc. v. Humble Oil and Refining Co.,148 a federal court refused to impose strict liability in tort because it concluded that the defendant was not a “seller.”149 In Speyer, the defendant, Humble Oil, leased a gasoline pump to the Yellow Cab Company, which purchased gasoline from the defendant. Yellow Cab’s previous supplier of gasoline, Cemico, had originally installed the pump in Yellow Cab’s garage. When Yellow Cab switched suppliers to Humble Oil Company, Yellow Cab purchased the pump from Cemico. Under the terms of Yellow Cab’s new supply contract with Humble Oil, Humble Oil purchased the pump from Yellow Cab then leased it back to Yellow Cab without any charge. Yellow Cab’s employees damaged the pump’s flex steel hose, causing the pump to leak. The spilled gasoline burst into flames and the fire caused considerable damage to the Yellow Cab’s property. Yellow Cab sued Humble Oil to recover its damages in strict liability in tort. The court denied recovery, however, concluding that Humble Oil was not a seller of gasoline pumps.150

Some parties have also claimed that the drafters of the Restatement would not have left sections 407 and 408 in the Restatement if they had intended section 402A to control leases and bailments as well as sales. Sections 407 and 408 impose a duty of reasonable care on lessors. Section 407 provides that a lessor who leases a chattel knowing or having reason to know that it may be dangerous for its intended use is subject to liability as a supplier of the chattel.151 Sec-

147. Id. at 583-84.
149. Id. at 772. See also Wagner v. Coronet Hotel, 10 Ariz. App. 296, 458 P.2d 390, 394-95 (1969) (strict liability does not apply to hotel because hotel was not in the business of selling products for use or consumption).
150. 403 F.2d at 772. The court in Speyer did not expressly hold that strict liability in tort could never apply to a lease transaction. Arguably, the lease arrangement was merely a one-time concession to a prospective customer and not a normal marketing device. Consequently, Speyer may simply stand for the principle that strict liability in tort will only be imposed on one who is in the “business of leasing.” See Comment, supra note 133, at 119. See also Freitas v. Twin City Fisherman’s Coop. Ass’n, 452 S.W.2d 931 (Tex. Civ. App. 1970).
151. Restatement (Second) of Torts § 407 (1965) provides: “A lessor who leases a chat-
tion 408 states that one who leases a chattel for immediate use is liable for physical harm to the user or to foreseeable nonusers if the lessor fails to exercise reasonable care to make the chattel safe for its intended use or to disclose any dangerous condition to those who may be expected to use the chattel.152

A Maryland court accepted this argument in Bona v. Graefe.153 The plaintiff in Bona sustained personal injuries when he was thrown from a runaway golf cart when its brakes failed. He sued the owner of the golf cart and the manager of the golf course on grounds of negligence, breach of warranty and strict liability.154

At the end of the plaintiff’s case, the trial court directed a verdict for the defendants on all three counts. On appeal, the Maryland Supreme Court affirmed the trial court’s decision. The court refused to extend section 402A liability to bailments for hire in part because section 408 expressly dealt with such transactions.155

Other courts, however, have reached a different conclusion. These courts have usually considered whether the policies underlying strict liability in tort would be furthered by applying strict liability to the lease transaction in question. Price v. Shell Oil Co.156 exemplifies this approach. The plaintiff in Price was a mechanic employed by the Flying Tiger Line. In 1958, Flying Tiger leased from Shell Oil Company a gasoline tank truck with a movable ladder mounted on the tank for refueling aircraft. Under the terms of the lease, Flying Tiger was required to maintain the equipment in good condition, but Shell was responsible for major repairs. In 1962, Shell, at Flying Tiger’s request, removed the original ladder and replaced it with a new one. Two years later, the plaintiff was injured when the ladder gave way.

tel for the use of others, knowing or having reason to know that it is or is likely to be dangerous for the purpose for which it is to be used, is subject to liability as a supplier of the chattel.”

152. Id. § 408 provides:

One who leases a chattel as safe for immediate use is subject to liability to those whom he should expect to use the chattel, or to be endangered by its probable use, for physical harm caused by its use in a manner for which, and by a person for whose use, it is leased, if the lessor fails to exercise reasonable care to make it safe for such use or to disclose its actual condition to those who may be expected to use it.


154. Id. at 608. Graefe, the manager, had leased the golf cart from Royce, the owner of the cart, and then subleased it to Bona, the plaintiff. Id. Plaintiff also sued the operator of the cart for negligence.

155. Id. at 611. See also Speyer, Inc. v. Humble Oil and Refining Co., 403 F.2d 766, 772 n.10 (3d Cir. 1968) (Restatement (Second) §§ 407, 408, which deal with liability of lessors of chattels, speak in terms of negligence, not strict liability), cert. denied, 394 U.S. 1015 (1969).

The plaintiff sued Shell on theories of negligence, breach of warranty and strict products liability. The trial court dismissed the negligence and warranty claims but submitted the strict liability claim to the jury. The jury found for the plaintiff.\textsuperscript{157} On appeal, Shell contended that it was a bailor or lessor, not a manufacturer or seller, and therefore could not be held strictly liable for the plaintiff's injuries.\textsuperscript{158} The defendant maintained that section 408 of the Restatement evidenced the drafters' intent to exclude lessors of personal property from strict liability under section 402A.\textsuperscript{159}

The California Supreme Court, however, looked to the risk-spreading and accident cost avoidance goals of products liability\textsuperscript{160} in order to determine whether to subject the lessor to strict liability in tort. Another California court had previously decided that extending strict liability to builders engaged in the mass production of housing would further these two goals.\textsuperscript{161} Consequently, the Price court had little difficulty in concluding that these policies applied with equal force to lease transactions:

Similarly we can perceive no substantial difference between sellers of personal property and non-sellers, such as bailors and lessors. In each instance, the seller or non-seller "places [an article] on the market, knowing that it is to be used without inspection for defects, * * *." In the light of the policy to be subserved, it should make no difference that the party distributing the article has retained title to it. Nor can we see how the risk of harm associated with the use of the chattel can vary with the legal form under which it is held.\textsuperscript{162}

Accordingly, the court affirmed the trial court's judgment.\textsuperscript{163}

\textsuperscript{157} Id. at 724. The trial court also dismissed a cross-claim for indemnification brought against Flying Tiger by Shell. Id.

\textsuperscript{158} Id. Section 1955 of California's Civil Code imposes an implied warranty of fitness on a bailor. See Cal. Civil Code § 1955 (West 1985) (amended 1982). However, as the court in Price pointed out, this is not a true warranty, but rather only a duty to exercise reasonable care to ascertain that the chattel is safe and suitable for its intended use. 466 P.2d at 724 n.1. See also Tierstein v. Licht, 174 Cal. App. 2d 835, 841, 345 P.2d 341, 345 (1959).

\textsuperscript{159} 466 P.2d at 724-25.

\textsuperscript{160} For a more complete discussion of these goals, see infra notes 284-93 and accompanying text.


\textsuperscript{162} Price, 466 P.2d at 726 (emphasis in original) (citing Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 900, 27 Cal. Rptr. 697 (1962)).

\textsuperscript{163} A federal district court in Wisconsin used a similar approach in George v. Tonjes, 414 F. Supp. 1199 (D. Wis. 1976). The plaintiffs in that case were injured when their leased airplane crashed. The defendants moved to dismiss the strict liability claim. The defendants contended that Wisconsin would apply the negligence principles of § 407 and § 408 to lease transactions. The federal district court, however, rejected that argument and held that § 402A was applicable to commer-
C. Requirements for Strict Liability

Although strict liability in tort provides more protection for the lessee than negligence or warranty law, the lessee must still prove each element of his cause of action. In general, the lessee must meet the same proof requirements as in an action by a buyer against a seller.

The elements of a cause of action against a lessor in strict liability in tort resemble those in an action against a seller. Thus, the product in question must be defective and the defect must exist when the product leaves the lessor’s control. Moreover, just as section 402A does not apply to casual sellers, strict liability in tort is limited to those who are “in the business” of leasing. Finally, the lessee or some other foreseeable party must suffer physical harm to his person or property. Each of these elements creates a burden on a party seeking to impose strict liability on a lessor. The manner in which courts have dealt with these elements is the subject of the Sections that follow.

1. Defective Condition

Section 402A imposes strict liability on “one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property.” A product may be defective in various ways. Manufacturing defects are the most common; however, section 402A also imposes liability on the seller for design defects and inadequate warnings or instructions accompanying the product.

The same principles apply to leases as well as sales. Thus, even under a strict liability rationale, the lessor will not be liable for injury to lessees or others unless the product is defective in some respect. For example, in Baird v. Power Rental Equipment, Inc., the plaintiff was injured when a forklift rolled over on its side and crushed his leg. He sued the lessor of the forklift on theories of strict liability and breach of warranty. The plaintiff contended that the forklift was defective because it had no seat belts or other human restraint devices. The trial court directed a verdict for the defendant. The appellate

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court affirmed, finding that the forklift was not defective.\textsuperscript{167}

Of course, the lessor is responsible for manufacturing defects when he has actually constructed or manufactured the product. Thus, the lessor was held liable in \textit{Price v. Shell Oil Co.}\textsuperscript{168} for construction of a defective ladder, where the ladder collapsed in part because of poor welding.\textsuperscript{169} In addition, a lessor may be held liable for a product that has been defectively manufactured by another.\textsuperscript{170} In such cases, the lessor is treated as a retail seller and the manufacturer may also be held liable.\textsuperscript{171}

Design defects are a second ground for liability under section 402A. The manufacturer, of course, is strictly liable to consumers who are injured by improperly designed products;\textsuperscript{172} however, lessors, like retail sellers, may also be held liable for their role in placing such products into the stream of commerce.\textsuperscript{173}

Inadequate warnings or instructions are a third ground for liability under section 402A.\textsuperscript{174} Presumably, lessors, like retail sellers, are liable when a manufacturer fails to provide an adequate warning, although apparently no reported cases have addressed this issue. Furthermore, the lessor, again like the seller, presumably has a duty to warn that is independent of the manufacturer's duty. Thus, in \textit{Fulbright v. Klamath Gas Co.},\textsuperscript{175} the lessor of a potato vine burner was

\textsuperscript{167} 533 P.2d at 943-44. \textit{See also} Browning Ferris Indus. v. Baden Tire Center, Inc., 536 S.W.2d 203, 205 (Mo. App. 1976) (no liability for supplier of truck tire which blew out in the absence of any evidence that the tire was defective); Waters v. Patent Scaffold Co., 75 A.D.2d 744, 427 N.Y.S.2d 436, 438 (1980) (no liability for lessor of I-beams since plaintiff failed to show that they were physically defective, inappropriate in size or improperly installed).


\textsuperscript{172} Delaney v. Townmotor Corp., 339 F.2d 4, 6 (2d Cir. 1964).


\textsuperscript{174} \textit{RESTATEMENT (SECOND) OF TORTS} § 402A comment j (1965). The Restatement also imposes a duty to warn in connection with the sale of unavoidably unsafe products. \textit{See id.} § 402A comment k.

\textsuperscript{175} 271 Or. 449, 533 P.2d 316, 318 (1975).
held liable for failing to warn the plaintiff about the danger of operating the machine on a windy day.

In addition to defects which originate with the manufacturer—manufacturing and design defects and inadequate warnings—lessors may also be responsible for defects which they themselves cause. The lessor may create a dangerous condition by some affirmative act\(^{176}\) or by failing to perform a duty. For example, in *Rudisaile v. Hawk Aviation, Inc.*,\(^{177}\) a lessor was held strictly liable for failing to put oil in a leased aircraft, and in *Garcia v. Halsett* \(^{178}\) a licensor was held strictly liable for failing to install a cut-off switch on a washing machine.

Lessors also may be strictly liable for failing to keep their products in proper repair. In a sense, the law imposes higher standards for lessors than for either manufacturers or retail sellers because this duty may continue throughout the life of the product. For example, short-term lessors, such as those in the rent-a-car business, must keep their vehicles in proper working order as long as they continue to lease them.\(^ {179}\)

2. **No Substantial Change**

Section 402A of the Restatement (Second) of Torts imposes strict liability on the seller if a product “is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.”\(^ {180}\) Comment g provides that a seller will not be liable when he delivers the product in a safe condition and subsequent mishandling or other events make it harmful by the time it is used or consumed.\(^ {181}\) The exemption from liability for subsequent mishandling applies to lessors as well as sellers. Thus, a lessor is not respon-

\(^{176}\) See Coleman v. Hertz Corp., 534 P.2d 940 (Okla. Ct. App. 1975). In Coleman, the plaintiff was injured when the milk truck he was driving went out of control because one of the wheels came off. The defendant, Hertz, had leased the truck to the plaintiff’s employer, Gilt Edge Dairy. Although Hertz was responsible for maintenance, it delegated responsibility for servicing the tires to the Firestone Tire and Rubber Company. Apparently, a Firestone employee failed to put the tire on properly. Strict liability was imposed on Hertz. *Id.* at 946.

\(^{177}\) 92 N.M. 575, 592 P.2d 175 (1979).


\(^{180}\) *RESTATEMENT (SECOND) OF TORTS* § 402A (1965).

\(^{181}\) *Id.* § 402A comment g.
sible for defects that arise once a product has left his control.\textsuperscript{182} When a lessor leases a product repeatedly on a short-term basis, as in the case of a rental car, each lease is regarded as a separate delivery of the product to the lessee. Therefore, the lessor will be liable for any defect that exists at the time of the most recent lease.\textsuperscript{183}

The exemption from liability for subsequent mishandling is more limited when the lessor remains responsible for servicing the leased product. Most cases have held the lessor strictly liable for defects that arise during the lease period as long as the lessor has the opportunity to discover and correct them.\textsuperscript{184} These courts have reasoned that the lessor retains sufficient control over the product to justify a continuing duty to prevent defects from arising.\textsuperscript{185}

The provision in section 402A which limits liability when a product has undergone substantial change is applicable to leases as well as sales. Removal of safety equipment would qualify as a substantial change. For example, the plaintiff in \textit{Lechuga, Inc. v. Montgomery}\textsuperscript{186} argued that the truck his employer leased from the defendant was defective because the engine cover was not secured by a safety chain. However, the lessor established that the vehicle originally had a safety chain and that it had been removed sometime after the commencement of the lease. Consequently, the court ruled in favor of the lessor.\textsuperscript{187}

\textsuperscript{182} Nissenegger v. Lakeland Constr. Co., 95 Ill. App. 3d 420, 420 N.E.2d 262 (1981), offers an interesting twist to this principle. The defendant, Lakeland Construction Co., leased an asphalt spreading machine to the plaintiff’s employer, H.J. Curran Contracting Co., on a per hour basis and provided a driver to operate the machine. The plaintiff was injured when the machine ran over his foot. Lakeland argued that strict liability should not apply because the asphalt spreader had not left its control. The court, however, held that the defendant had transferred control of the machine when Curran accepted possession. The defendant’s employee was treated as a borrowed servant of Curran. \textit{Id.} at 265-66. \textit{See also} Brimba v. Ausdale Equip. Rental Corp., 440 A.2d 1292, 1298-99 (R.I. 1982) (backhoe leased to another left lessor’s control for purposes of imposing strict liability when the lease term began, notwithstanding the fact that lessor was operating the machine at the time the plaintiff was injured).


\textsuperscript{187} \textit{Id.} at 260.
3. The "Physical Harm" Requirement

Section 402A of the Restatement (Second) of Torts limits recovery under strict products liability to "physical harm."188 Physical harm clearly includes personal injuries189 and property damage.190 Only a small minority of states, however, permit recovery for lost profits and other forms of economic harm under strict liability.191

Similarly, courts generally have not allowed lessees to recover against lessors for economic damages. For example, in Hawkins Construction Co. v. Matthews Co.,192 a construction company sued the lessor of scaffolding equipment which collapsed during plaintiff's use. Plaintiff sought to recover the cost of repairing its property, which had been damaged in the accident, and of replacing the scaffolding. The trial court held for the lessee. On appeal, the Nebraska Supreme Court ruled that plaintiff could not recover against the lessor for economic injury under strict liability,193 stating that warranty, not strict liability, was the appropriate theory for recovering purely economic losses. However, the supreme court found that the lessor had

188. RESTATEMENT (SECOND) OF TORTS § 402A (1965).


190. See Morrow v. Caloric Appliance Co., 372 S.W.2d 41 (Mo. 1963); Ghera v. Ford Motor Co., 246 Cal. App. 2d 639, 55 Cal. Rptr. 94 (1966). A few courts permit recovery for injury to other property, but have refused to allow the plaintiff to recover for damage to the product itself. See, e.g., Mid Continent Aircraft Corp. v. Curry County Spraying Serv., 572 S.W.2d 308 (Tex. 1978).


193. Id. at 653.
breached an express warranty and therefore affirmed the trial court's judgment.\textsuperscript{194}

4. \textit{Injection Into the Stream of Commerce}

Several courts have stated that a lessor cannot be held strictly liable unless he is in the business of leasing.\textsuperscript{195} Section 402A subjects only commercial sellers to strict liability. However, some states have interpreted this requirement somewhat more broadly, imposing strict liability on those who inject a product "into the stream of commerce." When this interpretation is applied to leasing, it means that the lease must serve a commercial purpose of some sort before strict liability will be imposed on the lessor. The leased article itself must be the object of a commercial transaction or it must be furnished to the customer to promote or facilitate the sale of another product or the furnishing of a service. Lessors have often been held strictly liable under this approach, even though their nominal business was not leasing, when the court found them to be part of the distributive process by which the product was placed into the stream of commerce.

a. \textit{Isolated Transactions}

As a general rule, the courts have declined to impose strict liability on a lessor who leases a product in an isolated transaction. This rule undoubtedly stems from the Restatement's exclusion of "occasional" sellers from liability under section 402A.\textsuperscript{196} For example, in

\textsuperscript{194} Id. at 654-55. Recovery was also denied in Abco Metals Corp. v. Equico Lessors, Inc., 721 F.2d 583, 584 (7th Cir. 1983), where a machine manufactured according to the lessee's specifications and purchased by the lessor failed to perform properly.


\textsuperscript{196} See RESTATEMENT (SECOND) OF TORTS § 402A comment f (1965), which provides:

\textit{Business of selling}. The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesaler or retail dealer or distributor, and to the operator of a restaurant. It is not necessary that the seller be engaged solely in the business of selling such products. Thus the rule applies to the owner of a motion picture theatre who sells popcorn or ice cream, either for consumption on the premises or in packages to be taken home.

The rule does not, however, apply to the occasional seller of food or other such products who is not engaged in that activity as a part of his business. Thus it does not apply to the housewife who on one occasion sells to her neighbor a jar of jam or a pound of sugar. Nor does it apply to the owner of an automobile who, on one occasion, sells it to his neighbor, or even sells it to a dealer in used cars, and this even though he is fully aware that the dealer plans to resell it. The basis for this rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters the business of supplying
Browning Ferris Industries v. Baden Tire Center, Inc.,¹⁹⁷ a tire repair company had loaned a tire to a truck owner while it repaired his tire. The truck owner sued the tire repair company for property damage caused when the tire blew out. Apparently, the defendant did not make a practice of loaning tires to its customers. A Missouri appellate court affirmed the lower court’s judgment for the defendant, stating “[t]his was at best a strictly incidental and collateral convenience to the appellant by the loan of a used tire to it under the circumstances.”¹⁹⁸

Natasi v. Hochman¹⁹⁹ also involved an isolated transaction. Defendant Hochman purchased a Cessna aircraft from International Aviation Industries. Hochman then leased the aircraft back to International. Under the terms of the lease, International was required to keep the aircraft airworthy. Hochman could choose the suppliers for maintenance work and could use the aircraft on twenty-four hours’ notice. Either party could terminate the lease on fifteen days’ written notice.²⁰⁰

During a flight, a strobe light system malfunctioned, causing a fire. The plane crashed, killing the pilot and a passenger. The decedents’ estates instituted wrongful death actions against Hochman, alleging that he was responsible for the improper installation of the strobe light system. In fact, International had installed the system at Hochman’s request. The trial court granted summary judgment against Hochman, but the New York appellate court reversed, holding that Hochman’s lease to International was an isolated transaction.²⁰¹ International, not Hochman, was in control of the airplane

human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods. This basis is lacking in the case of the ordinary individual who makes the isolated sale, and he is not liable to a third person, or even to his buyer, in the absence of his negligence. An analogy may be found in the provision of the Uniform Sales Act, § 15, which limits the implied warranty of merchantable quality to sellers who deal in such goods; and in the similar limitation of the Uniform Commercial Code, § 2-314, to a seller who is a merchant. This Section is also not intended to apply to sales of stock of merchants out of the usual course of business, such as execution sales, bankruptcy sales, bulk sales and the like.

¹⁹⁷. 536 S.W.2d 203 (Mo. App. 1976).
¹⁹⁸. Id. at 205. The court also held that there was no proof that the tire was defective. Id. See also Gilliland v. Rothermal, 83 Ill. App. 3d 116, 403 N.E.2d 759 (1980) (service station not strictly liable for incidental loan of defective tire gauge to customer).
²⁰⁰. Id. at 217.
²⁰¹. Id. at 217-18.
and was responsible for the installation of the strobe light system. Consequently, the court felt that strict liability was inappropriate in this situation.202

A number of decisions have refused to extend strict liability to a one-time lessor of plant equipment. For example, in *Luna v. Rossville Packing Co.*,203 the plaintiff suffered injuries when he fell into a conveyor apparatus which his employer, Rossville Packing Company, rented from its sole shareholder, Richard Schlecht.204 The plaintiff sued both Rossville and Schlecht. The plaintiff’s suit against Rossville was dismissed because his right to compensation against his employer was limited to Workers Compensation benefits.205 The trial court also rejected the plaintiff’s strict liability claim against the lessor, Schlecht. The Illinois appellate court affirmed,206 concluding that the lease in question was an isolated transaction similar to a bulk sale, which is excluded from strict liability under comment f to section 402A of the Restatement.207 The court observed that the conveyor was never intended for sale and had never been moved from the spot on which it had been constructed. Schlecht was not in the business of leasing and, therefore, strict liability was inappropriate.208

Thus, courts will not impose strict liability on a lessor who engages in an isolated lease transaction. They will, however, often treat defendants as commercial lessors if they lease products routinely even though leasing is not their principal business interest. In *Niffenegger v. Lakeland Construction Co.*,209 for example, the plaintiff’s employer,

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202. *Id.* at 218.
204. *Id.* at 613.
205. *Id.*
206. *Id.*
207. *See Restatement (Second) of Torts § 402 comment f* (1965), quoted *supra* at note 196.
208. 369 N.E.2d at 614. A federal circuit court reached a similar conclusion in *Daniels v. McKay Mach. Co.*, 607 F.2d 771 (7th Cir. 1979). In that case, Dow installed a “hot shear” device in its plant at Madison, Illinois, in 1953. In 1969, Dow leased the entire plant to Phelps-Dodge Aluminum Products Corporation. Phelps-Dodge then merged with the Consolidated Aluminum Corporation (Conalco) in 1971. The plaintiff, an employee of Conalco, was injured by the hot shear mechanism in 1972. *Id.* at 772.

The plaintiff in *Daniels argued that “Dow participated in the design, assembly, manufacture, and modification of this hot shear line and its component parts.” Id.* at 776. The evidence demonstrated that Dow had modified the hot shear line on three occasions prior to its lease to Phelps-Dodge. Nevertheless, the court refused to impose strict liability on the defendant. Relying on the *Luna* decision and comment f to § 402A, the court in *Daniels* held that a single lease transaction was not sufficient to treat Dow as a commercial lessor. *Id.*
H.J. Curran Contracting Co., rented an asphalt spreading machine on a per hour basis from Lakeland Construction Company, another contractor. Lakeland leased this machine out twice during the year, once to Curran and once to another construction firm.\footnote{210} While in operation, the machine ran over the plaintiff’s foot. Plaintiff sued Lakeland in strict liability.

Lakeland argued that it was not in the business of leasing. The trial court, however, allowed the strict liability claim to go to the jury, which returned a verdict for the plaintiff. The appellate court affirmed, finding that the lease was related to the defendant’s business because it helped to defray the expenses of operating the machine. Therefore, according to the court, the defendant could be held strictly liable even though it was primarily a service business.\footnote{211}

Thus, the general rule appears to be that routine leasing activities ancillary to a lessor’s business will subject the lessor to strict liability for defects in his leased products. Courts, however, have carved out an exception for railroads which interchange rolling stock under the rules of the American Association of Railroads (AAR). In \textit{Torres v. Southern Pacific Transportation Co.},\footnote{212} the plaintiff was injured as a result of a train derailment. The plaintiff had been hitching a ride in an open gondola car. A cement hopper developed a “hotbox,” an overheated journal resulting from insufficient lubrication, which caused fourteen cars to derail, including the one in which the plaintiff was riding. The cement hopper belonged to the Atchinson, Topeka & Santa Fe Railway Company but was on lease to the Southern Pacific Transportation Company under the interchange rules of the AAR.\footnote{213} The plaintiff sued Southern Pacific in negligence and strict liability.

The trial court granted summary judgment for the defendant on both counts. The appellate court affirmed, stating that the highly specialized industry use-interchange program differed too much from the commercial distribution of a product to warrant the application of
strict liability.\textsuperscript{214}

Although other courts have reached the same conclusion with respect to railroad lessors,\textsuperscript{215} at least one court has deviated, finding that routine leasing activities justify imposing strict liability. In \textit{Vanskike v. ACF Industries, Inc.},\textsuperscript{216} a railroad employee was injured when his arm was caught in a trailer hitch. The trailer hitch was a mechanical device mounted on a railroad flatcar which secured truck semi-trailers to the flatcar. The Union Pacific Railroad Company owned the trailer hitch\textsuperscript{217} and was leasing it to the plaintiff's employer, the St. Louis-San Francisco Railway Company, under the AAR interchange rules.\textsuperscript{218}

The plaintiff sued Union Pacific in strict liability. The federal district court found for the plaintiff. The circuit court affirmed the trial court's finding of liability but remanded the case for a new trial on the issue of damages.\textsuperscript{219} It held that under Missouri law a lessor is subject to strict liability when he leases goods in a "commercial transaction."\textsuperscript{220} The court then concluded that Union Pacific should be treated as a commercial lessor.\textsuperscript{221}

\textit{Vanskike} seems more consistent with the general principles of lessor liability than \textit{Torres}. Even though railroads do not regard AAR exchanges as part of their principal business purpose, such exchanges do promote the commercial interests of the railroad industry by increasing the efficiency of the transportation network. Strict liability is therefore appropriate.

\textbf{b. Supplying Products Incident to a Sale}

Sellers will often furnish a product in connection with the sale of another product or the provision of a service. These are hybrid transactions, consisting of a sale or service and a bailment. The question of whether strict liability should be imposed on the seller when a defective product is loaned hinges on whether the seller is in the "business

\begin{itemize}
\item \textsuperscript{214} \textit{Id.} at 902.
\item \textsuperscript{216} 665 F.2d 188 (8th Cir. 1981), \textit{cert. denied}, 455 U.S. 1000 (1982).
\item \textsuperscript{217} \textit{Id.} at 193.
\item \textsuperscript{218} \textit{Id.} at 196.
\item \textsuperscript{219} \textit{Id.} at 198.
\item \textsuperscript{220} \textit{Id.}
\item \textsuperscript{221} See also Parker v. Seaboard Coastline R.R., 573 F.2d 1004, 1010 (8th Cir. 1978) (owner of railroad hopper car leased to another railroad treated as a "supplier" within the meaning of Arkansas products liability statute).
\end{itemize}
of leasing.” Most courts do not impose strict liability on a seller who merely furnishes a product as an “incidental convenience” to a customer. However, courts generally impose strict liability on a seller who furnishes a product to promote a sale or service.

Thus, the nature and intended use of the product accompanying the service often determine whether strict liability is imposed on the seller. For example, courts typically regard furnishing containers for the sale of products such as propane gas as a commercial transaction. Thus, in *Bainter v. Lamoine LP Gas Co.*, a farmer was allowed to recover against the seller of liquid propane gas for property damage caused by a defect in a propane gas tank. The defendant contended that it was not in the business of leasing gas cylinders. An Illinois intermediate court reversed a lower court’s judgment for the defendant, holding that the defendant should be held strictly liable regardless of whether the parties had entered into a formal lease arrangement. The court observed that “the furnishing of the tank by the defendant and the use thereof by the plaintiff was an incident of the sale of the gas and the consideration for the sale included the use of the tank.”

On the other hand, courts have disagreed over whether providing an article that merely facilitates the purchase of another product constitutes a commercial transaction. The court in *Gabbard v. Stephenson’s Orchard, Inc.* imposed strict liability in this situation. The plaintiff in *Gabbard* fell from defendant’s aluminum ladder when it collapsed while he was picking apples at defendant’s orchard. The court noted that the defendant had advertised its “You Pick” feature

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223. See, e.g., *Delaney v. Townmotor Corp.*, 339 F.2d 4 (2d Cir. 1964) (strict liability imposed where defendant provided a demonstrator to a customer to induce him to buy the product); *Bainter v. Lamoine LP Gas Co.*, 24 Ill. App. 3d 913, 321 N.E.2d 744 (1974); *Gabbard v. Stephenson’s Orchard, Inc.*, 565 S.W.2d 753 (Mo. App. 1978); *Fulbright v. Klamath Gas Co.*, 271 Or. 449, 533 P.2d 316 (1975). Strict liability was imposed on a Piper aircraft dealer in *Bachner v. Pearson*, 479 P.2d 319, 328 (Alaska 1970), even though the defendant was primarily in the business of selling, not leasing, airplanes.


225. Id. at 746.

226. Id. See also *Fulbright v. Klamath Gas Co.*, 271 Or. 449, 533 P.2d 316, 320-21 (1975) (seller of propane gas held strictly liable for supplying potato vine burner to customer without providing adequate warning).

227. 565 S.W.2d 753 (Mo. App. 1978).
to induce customers to buy its apples. The ladders facilitated the sale of apples by enabling customers to pick from the higher parts of the trees. The court concluded that furnishing ladders was so closely associated with the orchard’s sale of apples that it could be regarded as part of the same transaction. Thus, strict liability was imposed for providing the customer with a defective ladder. 228

However, the court in Keen v. Dominick’s Finer Foods, Inc. 229 refused to hold a seller strictly liable in a similar fact situation. In Keen, a customer at a supermarket was injured when a shopping cart supplied by the store toppled over. The plaintiff argued that the supermarket furnished carts as an incident to the sale of groceries and should be strictly liable for defects in those carts. The court rejected this argument, stating that strict liability only applies to those who put a product in the stream of commerce. 230 Because the supermarket was not in the business of selling or renting shopping carts, the court found strict liability inapplicable. The court distinguished Bainter; 231 finding that the defendant’s propane gas customers in Bainter had no choice but to use the defendant’s gas containers. On the other hand, the supermarket’s customers in Keen were free to use shopping carts or not. Shopping carts are not essential to the sale of groceries, 232 whereas propane gas tanks are inextricably tied to the sale of propane gas.

The dissent in Kane disagreed, noting that it would be virtually impossible for a customer to make substantial purchases at the supermarket without using a cart. Furthermore, as the dissent observed:

The customer may be regarded as paying for this use because the cart is a cost of doing business which no doubt is reflected in the charge [the supermarket] makes for its merchandise. The cart not only provides a convenience for [the supermarket’s] customers, but it also increases [the supermarket’s] sales and profits. 233

Consequently, the dissent felt that the defendant was part of the distributive process by which the defective product entered the stream of commerce and thereby reached the public. 234

228. Id. at 757.
230. Id. at 503-04.
232. 364 N.E.2d at 504-05.
233. Id. at 505 (Simon, P.J., dissenting).
234. Id. at 506. Recovery was also denied under strict liability in Smith v. Nick’s Catering
As the foregoing discussion indicates, the courts agree that strict liability is appropriate when the seller supplies a product to promote or facilitate the sale of other products. However, the courts sometimes find it difficult to determine when a bailment is an integral part of a commercial transaction or merely ancillary to it. Strict liability is imposed on the seller in the former situation, but not in the latter.

There is a similar split of authority over whether providing a defective product in connection with furnishing a service constitutes a commercial transaction. The court in *Dixon v. Four Seasons Bowling Alley, Inc.* held that such activity is not a commercial transaction. While bowling at the defendant's bowling alley, the plaintiff cut her finger on a chipped portion of a bowling ball. Defendant provided balls free of charge and permitted patrons to select their own. The trial court found defendant strictly liable. The appellate court reversed, stating that the patrons' use of bowling balls was incidental to their use of the defendant's premises. The court apparently viewed the situation as a premises liability problem, not a products liability problem. Because the bowling balls never left the defendant's premises, the court felt that the defendant had not placed them in the stream of commerce. Consequently, the court ruled that strict liability was inappropriate and instead imposed a negligence standard.

*Katz v. Slade* accorded with *Dixon*. The *Katz* court refused to impose strict liability on the operator of a municipal golf course for injuries suffered by a patron who was struck by a golf cart with defective brakes. The court stated that strict liability was appropriate when a lessor's operation was commercial in character, integral to marketing the leased product, and constituted a commercial distribution by a profitmaking concern to a public forced to rely upon a repre-

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Serv., 549 F.2d 1194 (8th Cir. 1977). The defendant in *Smith*, a catering service, cleaned, serviced and lubricated trucks and leased them to its drivers. The drivers bought food and beverages wholesale from the defendant and sold them at retail prices to industrial workers and others. The cost of the lease was a percentage of the driver's sales. *Id.* at 1195. The plaintiff, a retail customer, was injured when he struck his head on a truck. The trial court dismissed his strict liability claim against the catering service company. On appeal, the circuit court held that the defendant should not be held strictly liable because it was not a "mass lessor" analogous to a manufacturer. *Id.*


236. *Id.* at 429-30.

237. *Id.* at 431.


239. 460 S.W.2d 608 (Mo. 1970).
sentation of safety.\textsuperscript{240}

Although the city that operated the golf course in \textit{Katz} charged a separate rental fee for use of the cart, the court determined that the city was not in the business of renting golf carts. Instead, the city provided carts as an incidental or collateral convenience to customers. The court emphasized that the golf course was a nonprofit community recreational facility, that the city rented the carts for short time periods, did not encourage rentals through widespread advertising and that patrons were not forced to rely on the expertise of the lessor to inspect the golf carts prior to use.\textsuperscript{241}

On the other hand, strict liability was allowed in \textit{Sipari v. Villa Olivia Country Club},\textsuperscript{242} which involved a fact situation similar to that in \textit{Katz}. The plaintiff in \textit{Sipari} was injured when his rented golf cart overturned. The trial court directed a verdict for the defendant golf club, but the appellate court reversed. Relying in part on \textit{Galluccio v. Hertz Corp.},\textsuperscript{243} the Illinois court characterized the transaction as a commercial lease and imposed strict liability on the lessor.\textsuperscript{244}

\hspace{1cm} \textbf{c. Finance Leases}

As the foregoing discussion suggests, the courts have not been consistent in the way they have applied the "stream of commerce" theory to bailments which are intended to promote a sale or service. There is also some question about whether a finance institution which "leases" a product to a client in lieu of taking a security interest should be treated as a commercial lessor and subjected to strict liability in tort. Leasing is sometimes used as a device for financing an equipment purchase. Traditionally, equipment purchasers financed acquisitions by securing a loan from an investor, who often took a security interest in the equipment. Equipment purchasers are now increasingly financing acquisitions using leases. Under these arrangements, the investor purchases the equipment and then leases it back to

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\textsuperscript{240} Id. at 613. \textit{See also} Bona v. Graefe, 264 Md. 69, 285 A.2d 607 (1972) (recovery denied under similar circumstances when one of the plaintiffs sued for breach of warranty).

\textsuperscript{241} 460 S.W.2d at 613. The court in \textit{Katz} also stated that the transaction more closely resembled a license than a lease and that the "renter" was more like the patron who buys a ticket to ride a merry-go-round than one who leases an automobile from a commercial lessor. \textit{Id}

\textsuperscript{242} 63 Ill. App. 3d 985, 380 N.E.2d 819 (1978).

\textsuperscript{243} 1 Ill. App. 3d 272, 274 N.E.2d 178 (1971).

\textsuperscript{244} 380 N.E.2d at 824. \textit{See also} Baker v. City of Seattle, 79 Wash. 2d 198, 484 P.2d 405 (1971) (implied warranty theory applied to lessor of golf cart).
the business enterprise. Courts have generally refused to subject the lessor in a financing lease to strict liability for defects in the leased product.

_Brescia v. Great Road Reality Trust_ is the leading case in support of the rule that lessors in financing leases are not subject to strict liability. The plaintiff in _Brescia_ suffered injuries when a truck crane boom collapsed and struck him. His employer, Constructors, Inc., was renting the truck crane from the defendant, Great Road Realty Trust. The plaintiff sued Realty Trust on theories of strict liability and breach of implied warranty. The trial court denied the defendant's motion to dismiss, and the defendant took an interlocutory appeal. On appeal, the New Hampshire Supreme Court held that the defendant lessor was not subject to strict liability.

The court stated that strict liability is appropriate only when the defendant is in the business of supplying the product in question. Here, Realty Trust was not in the business of supplying cranes; rather, its business was providing financial services. Realty Trust purchased the crane and turned it over to the construction company without inspecting it. Accordingly, the court refused to impose strict liability on Realty Trust.

The Court of Appeals for the Fifth Circuit reached a similar conclusion in _Cole v. Elliott Equipment Corp._ Plaintiff was injured while riding in an aerial basket on the job. The basket conducted electricity and drew an arc from a high voltage transmission line, elec-

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248. _Id._ at 1311.
249. _Id._ at 1312.
250. _Id._ The construction company was owned by one Lawrence Moore, who was also the sole owner of Great Road Realty Trust. Realty Trust owned several parcels of land which it rented to Constructors. Moore testified that Realty Trust never had any employees and was formed solely as a tax-saving device. It purchased the crane because Constructors was short on cash. _Id._ at 1311.
251. 653 F.2d 1031 (5th Cir. 1981).
trocuting the plaintiff. Plaintiff’s employer had acquired the basket through a financing lease. Under the financing arrangement, the lessor never possessed the equipment and did not participate in its selection, manufacture or design.\textsuperscript{252} The court found, therefore, that the lessor was not in the business of supplying equipment and was not subject to strict liability for defects in the aerial basket.\textsuperscript{253}

In \textit{Wright v. Newman},\textsuperscript{254} plaintiff’s decedent was killed on a highway when a car broke loose from a tow truck and struck the decedent’s vehicle. The truck had been repossessed by Ford Motor Credit Corporation (FMCC). Apparently, the towing ball on the truck was defective. The plaintiff sued FMCC in negligence and strict liability. The trial court granted summary judgment in favor of FMCC.\textsuperscript{255} On appeal, the circuit court affirmed the lower court’s decision on the strict liability issue, but reversed and remanded on the negligence issue.

With respect to the strict liability issue, the circuit court held that the focus should be on “whether the commercial entity is in the chain of distribution that provides a product to the consumer.”\textsuperscript{256} Finance companies generally have the merely tangential function of providing money to facilitate product purchases. This generalization applied to FMCC, which had neither sold nor leased the truck and, therefore, was not part of the distributive process by which the defective product reached the market. Therefore, the court concluded that

\textsuperscript{252}  \textit{Id.} at 1032-33.

\textsuperscript{253}  \textit{Id.} at 1034-35. \textit{See also} Aboco Metals Corp. v. Equico Lessors, Inc., 560 F. Supp. 125, 131-33 (N.D. Ill. 1982) (finance lessor not responsible under strict liability doctrine for defective wire chopper), \textit{aff’d}, 721 F.2d 583 (7th Cir. 1983). The courts have also refused to impose an implied warranty on the lessor when a finance lease is involved. Thus, in Leasco Data Processing Equip. Corp. v. Starline Overseas Corp., 74 Misc. 2d 898, 346 N.Y.S.2d 288 (1973), \textit{aff’d}, 45 A.D.2d 992, 360 N.Y.S.2d 199, \textit{appeal dismissed}, 35 N.Y.2d 963, 324 N.E.2d 557, 365 N.Y.S.2d 179 (1974), the court held that the lease of a billing machine was not analogous to a sale but rather was nothing more than a financing device. In \textit{Leasco}, the lessor purchased a machine selected by the lessee and rented it to him for a period of five years and five months at a fixed monthly rental. The lease contained an option which allowed the lessee to renew the lease at its expiration for a nominal yearly rental. 346 N.Y.S.2d at 289. The court held that the transaction was not a sale of goods within the scope of Article 2, but instead was a title retention contract and lease intended as a security device to which Article 9 applied. \textit{Id.} at 290. The court noted that § 2-102 of the UCC expressly excludes from Article 2 any transaction which is intended to operate solely as a security transaction. \textit{Id.} \textit{See also} Brescia v. Great Road Realty Trust, 117 N.H. 154, 373 A.2d 1310, 1312-13 (1977); A-Leet Leasing Corp. v. Kingshead Corp., 150 N.J. Super. 384, 375 A.2d 1208, 1212 (1977).

\textsuperscript{254}  735 F.2d at 1073 (8th Cir. 1984).


\textsuperscript{256}  735 F.2d at 1078.
strict liability was inappropriate.\textsuperscript{257}

\textit{Brescia, Cole} and \textit{Wright} exemplify the prevailing view that finance lessors are not directly involved in the distributive process and, consequently, should not be subjected to strict liability. On the other hand, the courts have applied strict liability to lessors who played an integral role in the distributive process. In such cases the objectives of strict liability could be achieved by imposing the same liability standard on lessors as on sellers. At the same time, the courts have allowed lessors to invoke the same defenses that are available to sellers under the provisions of section 402A.

\textbf{D. Limitations on Liability}

Even under strict liability, the product supplier’s liability to the consumer is not absolute. For example, section 402A expressly applies only to “physical harm.”\textsuperscript{258} Consequently, most courts have refused to hold the supplier strictly liable when the consumer suffers economic injury instead of physical harm to himself or his property.\textsuperscript{259} In addition, the comments to section 402A state that a seller will not be strictly liable if the consumer fails to follow product directions, puts a product to an abnormal use or continues to use a product that is clearly dangerous.\textsuperscript{260} Furthermore, strict liability requires proximate causation. Thus, the action of a third party or a force of nature may sometimes relieve the seller of liability if it is a superseding cause.\textsuperscript{261} However, sellers may not contractually disclaim strict liability, whereas they may disclaim implied warranties.\textsuperscript{262} The foregoing principles apply to chattel leases as well as sales transactions. The limitations on strict liability will be examined in the following Sections.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{257} Id. at 1079.
\item \textsuperscript{258} See text accompanying note 135 for text of § 402A.
\item \textsuperscript{259} See supra notes 188-91 and accompanying text.
\item \textsuperscript{260} Restatement (Second) of Torts § 402A comment h (1965) (misuse); id. § 402A comment n (contributory negligence and assumption of risk). See also Uniform Products Liability Act § 112, reprinted in 2A L. Frumer & M. Friedman, supra note 136, § 16E, at 3E-102.
\item \textsuperscript{261} Uniform Products Liability Act § 111, reprinted in 2A L. Frumer & M. Friedman, supra note 136, § 16E, at 3E-95.
\item \textsuperscript{262} Restatement (Second) of Torts § 402A comment m (1965). Warranty disclaimers are discussed supra at notes 127-28 and accompanying text.
\end{itemize}
\end{footnotesize}
1. Conduct of the Plaintiff—Contributory Negligence, Assumption of Risk and Misuse

Defendant lessors have occasionally argued that the victim’s conduct should relieve them of liability. They have asserted three theories: contributory negligence, assumption of risk and misuse. Contributory negligence bars recovery if the plaintiff is partly culpable for an injury associated with using a product. Assumption of risk bars recovery if the plaintiff uses a product which he knows to be defective. The plaintiff is not considered to be culpable, but his conduct relieves the defendant of a duty to make the product safe. Misuse or abnormal use of a product bar recovery by breaking the chain of causation.

Courts have generally refused to allow lessors to escape liability on grounds of contributory negligence, but permitted them to escape liability on the theory of assumption of risk. *Bachner v. Pearson*263 is illustrative. In *Bachner*, the pilot and several passengers injured in an airplane crash brought suit against the lessor. The crash occurred because the pilot-lessee passed out as a result of carbon monoxide poisoning. The carbon monoxide escaped from a defective exhaust and heat exchanger system.264 The lessor claimed that the lessee was contributorily negligent for failing to discover the defect.265

At the close of evidence, the trial court ruled that there was insufficient evidence to submit the issue of contributory negligence to the jury. The jury decided for the plaintiff.266 On appeal, the Alaska Supreme Court distinguished between failure to discover and voluntarily encountering a known risk. The court concluded that only the latter conduct would relieve the defendant of liability.267 Because there was no evidence that the pilot of the airplane was aware of the risk, the supreme court affirmed the judgment.268

An Indiana court followed *Bachner* in *Gilbert v. Stone City Construction Co.*269 The plaintiff in *Gilbert* was injured when a road roller, leased to a construction firm by the defendant, struck him from behind. Plaintiff sued in strict liability. At the close of evidence the

264. Id. at 321.
265. Id. at 330.
266. Id. at 322.
267. Id. at 329-30.
268. Id. at 330. *See also* Rudisaile v. Hawk Aviation, Inc., 92 N.M. 575, 592 P.2d 175, 177 (1979) (pilot's failure to make customary pre-flight check of airplane no defense to strict liability).
trial court dismissed the case, and the plaintiff appealed. The appellate court overruled the trial court's dismissal, but instructed the lower court on remand that the plaintiff's claim should be barred if defendant could prove that the plaintiff assumed risk of injury.270

In states that have incorporated comparative negligence into products liability law, Bachner and Gilbert are probably no longer persuasive authority.271 Comparative negligence apportions fault according to each party's contribution to the plaintiff's injury and is generally considered to be incompatible with contributory negligence and assumption of risk, which apportion liability on an all-or-nothing basis.

In certain circumstances, courts have allowed lessors to escape liability when a plaintiff has misused a product. In misuse cases, courts often distinguish between foreseeable and unforeseeable misuse; the former usually is not sufficient to relieve the lessor of liability, while the latter is.272 Thus, in Knapp v. Hertz Corp.,273 the driver of a rental car recovered against the lessor for injuries that occurred when the vehicle's brakes malfunctioned. The lessor contended that the brake failure was caused by the plaintiff's driving with the emergency brake partially on, which generated heat and vaporized the brake fluid. The lessor argued that the plaintiff's misuse should thus relieve him of liability.274 The court concluded, however, that the plaintiff's misuse was foreseeable and therefore did not negate the lessor's liability. Emergency brake warning lights, which would have prevented the accident, were available as optional equipment on automobiles like the one leased to the plaintiff, and the court found that the lessor should have anticipated this sort of conduct on the part of a driver.275

2. Conduct of Another as a Superseding Cause

Lessors have sometimes avoided liability because of the interven-

270. Id. at 746.
271. See Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); Annotation, Applicability of Comparative Negligence Doctrine to Actions Based on Strict Liability in Tori, 9 A.L.R.4th 633 (1981). See also UNIFORM PRODUCT LIABILITY ACT § 111, reprinted in 2A L. FRUMER & M. FRIEDMAN, supra note 136, § 16E, at 3E-95 (adopting "comparative responsibility").
274. Id. at 1354.
275. Id. at 1355.
ing misconduct of third parties. For example, in *Conder v. Hull Lift Truck, Inc.*,\(^{276}\) the plaintiff was injured when a forklift truck over\- turned. The truck was manufactured by Allis-Chalmers Corporation and leased to the plaintiff’s employer by Hull Lift Truck. Hull was responsible for maintaining the truck. The manufacturer failed to report the truck’s defective condition to Hull. The plaintiff sued Hull and the manufacturer in strict liability. Hull defended on the ground that the manufacturer’s conduct was a superseding cause of injury.

At trial, the jury found for both defendants. The intermediate appellate court affirmed the judgment for Hull, but reversed the judgment for the manufacturer.\(^{277}\) The Indiana Supreme Court reinstated the trial court’s judgment. The court stated that the normal proximate cause rules limiting liability to the foreseeable consequences of an action operated in products liability cases in the same manner as in negligence cases.\(^{278}\)

A Tennessee intermediate appellate court in *Werne v. H.L.R. Corp.*,\(^{279}\) similarly allowed a lessor to escape liability because of the intervening conduct of a third party. In this case, an employee of a car dealer which sold a new car to the defendant lessor apparently negligently failed to properly tighten the lug nuts on one of the car’s tires after the tires were stolen while the car was still in the dealer’s possession. The court concluded that the dealer’s intervening negligence constituted a superseding cause, thus relieving the lessor of liability for injuries to his lessee caused by the defect.\(^{280}\)

3. **Disclaimers of Liability**

One significant difference between implied warranty and strict liability in tort is that disclaimers are generally not enforced under the latter theory. This makes strict liability a popular theory for plaintiffs in lease cases because disclaimers are common in lease transactions. For example, in *Sipari v. Villa Olivia Country Club*,\(^{281}\) the lessee of a golf cart sued the lessor for personal injuries when the golf cart overturned and fell on him. The rental contract contained a boilerplate liability disclaimer. The trial court directed a verdict for the lessor, thus enforcing the disclaimer. On appeal, however, the intermediate

\(^{276}\) 435 N.E.2d 10 (Ind. 1982).


\(^{278}\) 435 N.E.2d at 14-15.


\(^{280}\) Id. at 18,988.

appellate court reversed, holding that strict liability was applicable and that the disclaimer was ineffective.\textsuperscript{282}

In summary, despite early opposition, many courts have accepted the argument that strict liability can be extended to chattel leases. As the preceding Sections indicate, however, these courts have usually adopted section 402A's requirements that the distributed product be defective, reach the consumer without substantial change and cause physical harm. Furthermore, courts have not applied strict liability unless the lease transaction was integral to the lessor's ordinary business and the leased product entered the stream of commerce.

These requirements are consistent with the policies that underlie strict products liability.\textsuperscript{283} However, many types of lease transactions should not be subject to strict liability. Public policy and the factors underlying the implied warranties under the UCC should dictate the transactions in which strict liability is required. The following Section will examine the various types of chattel leases and identify those for which strict products liability is appropriate.

IV. WHEN SHOULD STRICT LIABILITY APPLY TO CHATTEL LEASES?

Lessors should not be held strictly liable in tort in all cases where a person is injured by a defective leased product. Rather, the courts must distinguish between situations in which strict liability is appropriate and those in which it is not, based on the policies which underlie strict liability.

A. Policy Considerations

Courts and legal scholars have offered a variety of reasons for imposing strict liability on suppliers of defective products. Some courts and commentators have maintained that proving that a product supplier was negligent is an excessively difficult task for injured consumers. Strict liability relieves the plaintiff of this burden and thus promotes the goal of compensating accident victims.\textsuperscript{284}

\textsuperscript{282} Id. at 823-24.
\textsuperscript{283} See infra notes 284-93 and accompanying text.
Courts and commentators have also argued that strict liability protects consumers’ reasonable expectations about product safety. By placing their products in the stream of commerce, sellers impliedly represent to the public that they are safe. Product advertising reinforces this expectation.\textsuperscript{285}

Judges and scholars have also justified imposing strict products liability on sellers as a means of spreading the losses and distributing the risks associated with using dangerous products. Losses should be borne by the party that can best absorb and spread the cost of compensating for injuries.\textsuperscript{286} Generally, manufacturers and other participants in the distributive chain are better able to bear these costs than are individual consumers. Sellers can obtain insurance against the risk of loss from defective products\textsuperscript{287} or insure against such losses. In either case they can pass the cost of compensating injured product users along to the consuming public in the form of higher prices for their products.\textsuperscript{288}

Finally, commentators have argued that products liability should be imposed upon product suppliers to reduce the occurrence of future accidents. This theory, referred to as “accident cost reduction,” has probably received the widest acceptance among the rationales underlying products liability. Accident costs, in this context, mean the economic and noneconomic consequences of personal injuries and property damage caused by exposure to defective products. Imposing strict liability on the manufacturer will ultimately reduce all of these costs. This level may be established collectively by legislative or administrative action or it may be set by market forces. The latter ap-


\textsuperscript{288} Keeton, Products Liability—Liability Without Fault and the Requirement of a Defect, 41 TEX. L. REV. 855, 856 (1963); Keeton, supra note 284, at 1333.
approach is known as “market deterrence.” 289

The manufacturer, it is argued, is usually in the best position to
discover and eliminate defects in a product before it enters the stream
of commerce. 290 Conversely, the consumer often has no means of as-
certaining or eliminating such defects. Imposing strict liability on
sellers forces them to internalize the cost of product injuries, and
thereby motivates them to discover and reduce the risks associated
with their products. 291

Advocates of the accident cost reduction rationale also argue
that imposing strict liability on the manufacturer leads to a more effi-
cient allocation of resources. The market forces tradeoffs between
safety and other consumer desires such as economic cost, appearance
and ease of operation. In a free market, resources will be allocated
most efficiently if product costs accurately reflect all of these social
and economic costs. Strict products liability imposes society’s costs of
product defects upon the manufacturer. The manufacturer reflects
these costs by charging higher prices, which leads to an optimal allo-
cation of resources. 292 Consequently, the cost of injuries must be
placed on the party who is most likely to cause this cost to be reflected
in the price of the product. 293 Once again, this goal is best accom-
plished by imposing liability on the product manufacturer.

Having briefly examined these principles in the context of manu-
facturer liability, the next step is to determine whether they are rel-
vent to chattel lease transactions as well. As mentioned earlier, there
is considerable judicial support for extending strict liability to lease
transactions. The lessor is said to be in a better position than the
lessee to distribute the cost of compensating injury by purchasing lia-
bility insurance and adjusting the rent paid for the chattel to reflect

refers to this as “general deterrence.”

concurring); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140, 151-52 (1979);
Note, Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction, 24 Has-

291. Note, Strict Liability in Hybrid Cases, 32 Stan. L. Rev. 391, 393 (1980); Calabresi &

292. Calabresi, supra note 284, at 502. Dean Calabresi has observed that “failure to include
accident costs in the prices of activities will, according to the theory, cause people to choose more
accident prone activities than they would if the prices of these activities made them pay for these
accident costs, resulting in more accident costs than we want.” G. CALABRESI, supra note 289, at
70.

293. Calabresi, supra note 284, at 505.
this cost.\textsuperscript{294} In addition, some decisions have suggested that lessors, like sellers, are in a better position than the product users to prevent the circulation of defective products because lessors have the physical facilities and expertise to keep their products in a safe condition.\textsuperscript{295} Finally, many courts have asserted that the lessee is forced to rely on the competence and expertise of the lessor, often to a greater extent than the consumer is forced to rely on the expertise of a seller.\textsuperscript{296}

Unfortunately, courts have sometimes applied these policies to lease transactions in a haphazard manner, treating different types of leases as if they were the same. The landmark case of \textit{Cintrone v. Hertz Truck Leasing & Rental Service}\textsuperscript{297} illustrates this problem. \textit{Cintrone} involved a long-term maintenance lease of a fleet of trucks to a business entity. However, the New Jersey court described the arrangement as if it were a short-term “rent-a-car” lease.\textsuperscript{298} It cited the following as bases for imposing strict liability on Hertz: the lessor’s superior knowledge, its retained supervision and control over the product, the implied representation of safety stemming from the nature of the lease transaction and the consumer’s reliance and dependence on the lessor’s expertise in the “U-drive-it” business.\textsuperscript{299} Unfortunately, the court failed to demonstrate that a long-term maintenance lease and a short-term rent-a-car transaction were sufficiently alike that they should be governed by the same policy considerations.

\textit{Cintrone} raises the question of classification. Chattel leases may

\begin{footnotesize}


\textsuperscript{296} W.E. Johnson Equip. Co. v. United Airlines, Inc., 238 So. 2d 98, 100 (Fla. 1970); Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769, 777 (1965); Comment, \textit{Products Liability—Liability of the Bailor for Hire for Personal Injuries Caused by Defective Goods}, 51 N.C.L. Rev. 786, 791 (1973) [hereinafter Comment, \textit{Products Liability}]; Comment, \textit{supra} note 133, at 116; Case Note, \textit{supra} note 183, at 753. In addition, it has been said that the seller of a product for use and consumption assumes a special responsibility toward members of the consuming public. Having received a financial benefit from product sales, fairness requires that they bear the responsibility for the consequences of marketing the particular product. This rationale also applies to commercial lessors who derive a financial benefit from leasing products to the public. See James, \textit{Products Liability}, 34 Tex. L. Rev. 192, 222 (1955); Comment, \textit{Torts—Strict Liability for Services—Chevron v. Sutton}, 4 N.M.L. Rev. 271 (1974).

\textsuperscript{297} 45 N.J. 434, 212 A.2d 769, 778 (1965).

\textsuperscript{298} \textit{Id.} at 777, 778.

\textsuperscript{299} \textit{Id.} at 777-78, 781.
\end{footnotesize}
be categorized in a number of ways. For example, one might distinguish between long-term and short-term leases. However, a distinction based solely on whether a lease is “long-term” or “short-term” is likely to be arbitrary and unrelated to the policies that underlie strict liability. Another possibility is to differentiate between lessees. Leases to business enterprises, such as equipment and fleet rentals, raise different policy considerations than do leases to individual consumers. Once again, such a distinction is arbitrary and may be only marginally related to the policies underlying strict liability.

A more promising approach is to classify chattel leases along functional lines. Leases assume many different forms and serve a variety of commercial purposes. This Article will discuss the following general categories of leases: (1) leases that function like sales; (2) leases which contemplate return of the leased property to the lessor (return leases); (3) licenses; (4) leases which require that the lessor maintain the lease property; and (5) finance leases.

B. Leases that Function as Substitutes for a Sale

Both business enterprises and individual consumers frequently lease products instead of purchasing them outright. Leasing requires less up-front cash than does a cash purchase. Leasing also usually requires lower monthly payments and less stringent credit standards than does buying a product on credit. In addition, leasing often provides tax advantages for businesses.

Strict liability is particularly appropriate for leases which operate as substitutes for a sale. Since sales are subject to strict liability, lease transactions that serve essentially the same purpose should also be subject to strict liability. Therefore, it is surprising that apparently no appellate court has considered the applicability of strict liability to such transactions.

In imposing strict liability on lessors, however, it is not enough that the transaction itself resemble a sale; the role of the lessor must also be analogous to that of some member of the distributive chain. Lessors seldom manufacture the products that they lease. They usually distribute products to consumers and therefore function like retailers. Therefore, some of the policy justifications for imposing strict liability on retail sellers may also apply to lessors.

Since most defects originate with the manufacturer, not the retail

300. Many lessors also act as retail sellers for the products that they lease to consumers.
seller, the retailer arguably is not in a position to correct product defects and thus reduce accident costs. This implies that strict liability should not apply to retailers. However, some courts have asserted that retailers can indirectly correct defects in the products they sell by collectively influencing the quality control practices of manufacturers and can protect their customers by dealing only with reputable suppliers.\textsuperscript{301} Lessors similarly can exercise collective influence over manufacturers and use discretion in their choice of suppliers. Therefore, holding lessors strictly liable would also further the goal of accident cost reduction.

Imposing strict liability on retail sellers and others in the distributive chain also promotes risk spreading. Retail sellers, many of whom are large commercial enterprises,\textsuperscript{302} have a greater capacity to spread the risk of injuries than individual consumers.\textsuperscript{303} Moreover, the retail seller can frequently obtain indemnification from the manufacturer for any compensation paid to injured consumers.\textsuperscript{304} Thus, the manufacturer, who is in the best position to spread the product risks, will often bear the ultimate cost of product defects even if the retail seller is initially held liable.

Arguably, lessors have the same risk-spreading capacity as retail sellers. Many leasing companies have substantial economic resources.\textsuperscript{305} Moreover, lessors, like retail sellers, can either obtain liability insurance or seek indemnification agreements from product manufacturers. Consequently, even small leasing enterprises can generally spread the cost of injuries more effectively than individual consumers.\textsuperscript{306}

\textsuperscript{301} \textit{See}, e.g., Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 171, 37 Cal. Rptr. 896, 899-900 (1964); Dunham v. Vaughan & Bushnell Mfg. Co., 42 Ill. 2d 339, 247 N.E.2d 401, 404 (1969) (strict liability of a retailer arises from retailer's "integral role in the overall producing and marketing enterprise and affords an additional incentive to safety").

\textsuperscript{302} \textit{See} Embs v. Pepsi-Cola Bottling Co., 528 S.W.2d 703 (Ky. 1975); Prosser, \textit{supra} note 136, at 816.

\textsuperscript{303} \textit{See} Caruth v. Mariani, 11 Ariz. App. 188, 463 P.2d 83 (1970); PROSSER & KEETON ON THE LAW OF TORTS § 100, at 706 (W. Keeton 5th ed. 1984).


\textsuperscript{305} Revenues from long-term rentals exceeded $6 billion in 1982. \textit{See} Blyskal, \textit{supra} note 6, at 126.

\textsuperscript{306} Since the lessor loses control over the chattel during the lease term, presumably he will not be liable for defects that originate after the lessee has taken possession unless the lessor has also agreed to maintain and service the chattel. Consequently, the post-manufacturing defect problem that arises in connection with licenses, return leases and maintenance leases (discussed \textit{infra} in Sec-
Thus, the lessor whose lease is a sale substitute functions much like a retail seller, and the policies which justify imposing strict liability on a seller apply to this kind of lessor. Therefore, it is reasonable to conclude that strict liability is justified in the case of leases of new products when the lease serves the same function as a sale. Indeed, it would be both anomalous and unjust to provide the consumer who leases with less protection than one who purchases the same product outright.

C. Return Leases

Most chattel leases resemble traditional bailments-for-hire in the sense that both parties to the transaction expect the property in question to be returned to the lessor. Motor vehicles, boats, airplanes, hardware and sports equipment are commonly rented on this basis. These leases are typically short-term in nature; however, the contemplated return of the property, not the length of the lease term, is their distinguishing feature. This type of lease will be referred to as a "return lease."

A return lease differs substantially from a sale. Therefore, policies such as accident avoidance and risk-spreading may not apply to such leases in precisely the same fashion as they apply to a sale or to a lease that functions like a sale. In the case of return leases, defects may arise at two different stages within the chain of distribution. First, as with a sale lease, the defect may arise when the goods are still in the control of the manufacturer. Second, because the lessor rents out the chattel repeatedly, a defect may arise after the lessor assumes title to the chattel.

Several cases have held lessors strictly liable for defects that originate with the manufacturer.307 For example, in Stewart v. Budget Rent-A-Car Corp.,308 the Hawaii Supreme Court upheld a large jury verdict against a car rental company for injuries resulting from a manufacturing defect in a car that it had rented. The plaintiff was injured when her rented car veered off the side of the road because of a defect in the steering mechanism. According to the court, the lessor, like a seller, was in a better position than the consumer to dis-

cover defects and spread the cost of compensating injuries.\textsuperscript{309}

The court in \textit{Stewart} reached this conclusion because it believed that lessors were similar to retail sellers. The rental car in \textit{Stewart} had been driven less than 3,000 miles at the time it was leased to the plaintiff. The court found that the lessor’s relationship with its product manufacturer was similar to that of a retail seller vis-à-vis its manufacturer. In both cases, the retailer could recover the cost of compensating the injured plaintiff from the manufacturer. Thus, in both cases the manufacturer would ultimately be required to bear the cost of putting a defective product into the stream of commerce.

The \textit{Stewart} court’s reasoning is correct. When a defect originates with the manufacturer, the lessor’s position is indeed analogous to that of a retail seller and strict liability can be justified on both loss-spreading and accident cost reduction grounds. Retailers are a link in the distribution chain by which products flow from the manufacturer or producer to the ultimate consumer. When retailers are held strictly liable for defective products, they can usually pass this cost on to the manufacturer by means of indemnity agreements.\textsuperscript{310} Even when a retailer cannot reach the manufacturer, it is in a better position to absorb the loss than the individual consumer because it has some ability to spread the cost of product injuries through insurance or higher prices. Furthermore, retailers can sometimes reduce accident costs even though they have no direct control over the manufacturing process. Retailers can protect consumers by purchasing their products only from manufacturers who place a high value on product safety. Similarly, retailers, particularly large-scale purchasers, can exert pressure on manufacturers to make their products safer and thus reduce accident costs. Large scale lessors, such as rent-a-car agencies, like their retail sales counterparts, have this same ability to protect consumers, either directly or by influencing the conduct of product manufacturers.

The logic of \textit{Stewart}, however, does not necessarily apply to situations in which a dangerous condition arises after a product has left the manufacturer’s possession. In such cases, the lessor will not be indemnified by the manufacturer but instead must bear the entire cost

\textsuperscript{309} \textit{Id.} at 243.

\textsuperscript{310} As noted earlier, strict liability is imposed on retail sellers as well as wholesalers and other distributors, primarily as a means of reaching the manufacturer. \textit{See} Henderson, \textit{Extending the Boundaries of Strict Product Liability: Implications of the Theory of the Second Best}, 128 U. PA. L. REV. 1036, 1058-59 (1980).
of compensating injured parties. A defendant lessor attempted to
draw this distinction in Stang v. Hertz Corp. The plaintiff in Stang
was killed in an automobile accident caused by the blowout of a defec-
tive tire. The defendant, Hertz, contended that strict liability
should not be imposed on a lessor whose product develops a defect
after it leaves the manufacturer because in such a case the lessor has
no right of indemnity from the manufacturer. The New Mexico
Supreme Court rejected this argument, however, and held the lessor
strictly liable for the death of the plaintiff.

When the lessor cannot shift liability for post-manufacturing de-
fects to another, its position becomes more like that of a manufacturer
than a retail seller. Therefore, one must consider whether the poli-
cies that support imposing strict liability on manufacturers also justify
imposing such liability on return lessors.

As with manufacturers, lessors can spread the losses resulting
from defective products among the consuming public. As discussed
previously, the costs associated with accidental injuries should be
placed on those in the chain of distribution, who can either absorb
those costs or distribute them among the product’s consumers. Does the loss-spreading rationale fail when the distributive chain be-
tween manufacturer and consumer is broken, as in the case of a post-
manufacturing defect? Arguably, lessors who profit from leasing can
still bear the cost of consumer injuries. They either absorb these costs
or pass them on to the consumer by charging higher prices. However,
this argument can be made about almost any profitable business

312. The plaintiff’s personal representative brought suit against Firestone, the tire manufac-
turer, and Hertz, the rental car company. The jury held in favor of Firestone and the trial court
directed a verdict in favor of Hertz. The Firestone verdict was not appealed, but the plaintiff sought
review of the lower court’s decision with regard to Hertz. An intermediate appellate court affirmed
the trial court, but the New Mexico Supreme Court reversed, holding that Hertz was strictly liable
for the defective tire. Id. at 733, 737.
313. Id. at 737. See also McClafflin v. Bayshore Equip. Rental Co., 274 Cal. App. 2d 446, 79
Cal. Rptr. 337 (1969); Galluccio v. Hertz Corp., 1 Ill. App. 3d 272, 274 N.E.2d 178 (1971); Rudis-aile v. Hawk Aviation, Inc., 92 N.M. 575, 592 P.2d 175 (1979). See also Case Note, supra note 183,
at 757.
314. See Comment, Products Liability, supra note 296, at 800.
which is likely to draw tort claims.\footnote{317} For example, used car dealers, repairers and landlords all profit from their activities and are thus presumably better able than consumers to absorb the costs created by their conduct or to spread those costs among all consumers by charging higher prices. Yet, the courts have generally refused to extend strict liability to such businesses.\footnote{318} These decisions suggest that courts place relatively little emphasis on loss-spreading as a justification for imposing strict liability on a defendant who is not a manufacturer.

Accident cost reduction may provide a better rationale, because lessors are usually in a position to reduce future accidents associated with post-manufacturing defects. Leased products are often put to more sustained use than are products owned by the user,\footnote{319} yet the lessee ordinarily does not inspect a product for defects; rather, he relies upon the competence and expertise of the lessor.\footnote{320} On the other hand, one may argue that strict liability should not be imposed on a party simply because he may be able to discover a defective condition. Rather, strict liability should be limited to those who actually create the defective condition unless they can seek indemnity against the defect's creator. For example, in \textit{Peterson v. Lou Bachrodts Chevrolet Co.},\footnote{321} an Illinois court refused to impose strict liability on a used car dealer because the defect arose after the vehicle left the manufacturer’s possession but before the defendant acquired it. The court asserted that losses should only be borne by those “who have created the risk and reaped a profit by placing the product in the stream of commerce.”\footnote{322} Retailers are held strictly liable for new products in part because they can recover against manufacturers for any compensation paid to accident victims, thus ensuring that the party who cre-


\footnote{321}{61 Ill. 2d 17, 329 N.E.2d 785 (1975).}

\footnote{322}{\textit{Id.} at 786.}
ated the risk would ultimately be required to bear it.\textsuperscript{323} By contrast, used product retailers cannot recover against manufacturers and would bear the entire cost if strict liability were imposed on them.

Assuming the Peterson court's conclusion is correct, its rationale does not necessarily apply to return leases. Used product sellers are not subject to strict liability because defects in the product usually arise before the product reaches the seller. By contrast, defects in leased products typically arise after the product reaches the lessor. Arguably, it is more equitable to hold a supplier liable (when he cannot obtain indemnification against another) for defects which arise after the product has come into his possession.

In these circumstances, lessors can control the level of risk associated with the products which they distribute. In this respect, lessors resemble manufacturers. Manufacturers can design their products, choose the raw materials and component parts to be used, and select the quality control measures to employ in the manufacturing process, all in a manner that will improve product safety.\textsuperscript{324} Lessors, on the other hand, service their products regularly. When they lease a large number of identical products, lessors can determine statistically when a product is likely to wear out or otherwise become dangerous.\textsuperscript{325} Thus, lessors, like manufacturers, can take measures to reduce the number of accidents even though they cannot prevent them from occurring entirely.

This ability to control risk distinguishes return lessors for used product sellers. Unlike return lessors, used product dealers seldom know their product's prior history, and consequently must inspect each product individually. For this reason, they can discover and correct latent conditions only at great cost.\textsuperscript{326} Therefore, although the accident cost reduction rationale may not support imposing strict liability on used product sellers, it does justify imposing such liability on return lessors.

Two other factors support the imposition of liability on return lessors. First, the nature of a lease transaction carries with it an implied representation of safety that is akin to that made by manufactur-

\textsuperscript{323} Id. at 787.

\textsuperscript{324} See Note, supra note 291, at 394-95.

\textsuperscript{325} See Comment, Products Liability, supra note 296, at 802.

ers when they place their products into the stream of commerce.\textsuperscript{327} Second, excluding lessors from liability for post-manufacturing defects would create severe proof problems for accident victims. Proof of causation would be very difficult if the plaintiff were required to show whether the injury occurred as a result of a manufacturing or post-manufacturing condition. If strict liability were denied, the plaintiff in a return lease situation would be forced to sue the lessor in a negligence action instead. However, such a plaintiff would have trouble proving that the lessor was negligent if in fact the product suffered from a post-manufacturing defect. The difficulty in proving negligence would be similar to that experienced by injured consumers prior to the development of strict liability, who were required to prove negligence in order to recover from a manufacturer for injuries resulting from a defective product.\textsuperscript{328}

Thus, many of the policies that support the imposition of strict liability on a manufacturer also justify imposing strict liability on a return lessor for defects that arise after the leased product leaves the manufacturer's control.

\textbf{D. Licenses}

Strict liability has been imposed on those who license rather than lease their products. A license resembles a return lease in the sense that the licensee, like the lessee in a return lease, uses the product for a limited time and then returns it to the licensor's control. However, a license differs from a chattel lease in that legal possession of the product is transferred to the lessee in a lease relationship, but remains with the licensor in a license arrangement.\textsuperscript{329} Licensors have relied on this aspect of the license relationship to argue against the imposition of strict liability. Thus, licensors have argued that they do not place their products into the stream of commerce because legal possession does not pass to the licensee, and therefore they should not be subject to strict liability. In addition, licensors have claimed that furnishing a product pursuant to a license was not an integral aspect of their business, but merely a collateral act.


\textsuperscript{328} According to one commentator, this rationale is particularly suitable as a basis for imposing strict liability for defective products. See Powers, supra note 317, at 425-26.

For example, in *Garcia v. Halsett*, an eleven year old boy sought to recover for injuries sustained when his arm became entangled in a washing machine at the defendant's laundromat. The boy had reached into the machine to retrieve some clothes when the washer suddenly started again. The plaintiff argued that the machine was defective because the timing mechanism was not operating properly, and the machine was not equipped with a microswitch which would have shut off power to all of the circuits when the door was opened.

The trial court refused to instruct the jury on strict liability, presumably because the defendant had merely licensed his product and not injected it into the stream of commerce. On appeal, a California intermediate appellate court reversed. The appellate court found that while the defendant was not engaged in the distribution of a product in the same manner as a manufacturer or retailer, he nevertheless provided a product for use by the public and, therefore, played more than an ancillary role in the overall marketing scheme. Consequently, the court concluded that strict liability was applicable.

A Missouri court in *Gabbard v. Stephenson's Orchard, Inc.* also imposed strict liability on a licensor. The plaintiff, who had been picking apples at the defendant's orchard, suffered injuries when an aluminum ladder provided by the defendant collapsed. In support of its decision to impose strict liability, the court noted that the ladders enabled customers to pick the apples and thus directly aided the defendant's business.

Other courts, however, have refused to impose strict liability upon licensors, concluding that the defendants were not in the business of leasing or that they had not placed a defective product into the stream of commerce. In *Wagner v. Coronet Hotel*, for example, a hotel guest sought to recover for injuries suffered when he slipped on a bath mat while taking a shower. Alleging that the mat was defective, the plaintiff brought suit against both the manufacturer and the

331.  Id. at 421-22.
332.  Id. at 422-23.
333.  565 S.W.2d 753 (Mo. App. 1978).
334.  Id. at 757.
hotel. The court agreed that strict liability was appropriate in the case of the manufacturer, but refused to extend it to the hotel. The court stated that strict liability applies "only to those engaged in the business of selling products for use or consumption, such as manufacturers, wholesalers, retailers or distributors."\footnote{337} Apparently, the court did not believe that providing bath mats for hotel customers amounted to commercial distribution of a product.

The court in \textit{Keen v. Dominick's Finer Foods, Inc.}\footnote{338} declined to impose strict liability on a supermarket. In \textit{Keen}, a customer had been injured when a shopping cart supplied by the defendant store tipped over. Although the defendant provided the carts to facilitate the purchase of groceries, and thus arguably had placed the carts in the stream of commerce, the court held that the plaintiff was limited to a cause of action in negligence.\footnote{339} The court in \textit{Dixon v. Four Seasons Bowling Alley, Inc.}\footnote{340} followed \textit{Keen}. The plaintiff in \textit{Dixon} cut her hand on a chipped ball at the defendant's bowling alley. The court held that using the ball was incidental to using the bowling alley premises and therefore the defendant had not placed the ball in the stream of commerce.\footnote{341}

In summary, courts have seldom distinguished between licenses and return leases in determining whether to hold a supplier of a defective product strictly liable. Instead, most courts have focused on whether the license arrangement satisfied the "business of leasing" or "stream of commerce" criterion. If either requirement is met, most courts treat the transaction like an ordinary chattel lease and subject the licensor to strict liability.

Arguably, many of the policies that support strict liability in other situations also apply to licensors. The licensor, as with the lessor, can spread any losses he suffers from certain kinds of products liability suits to the consuming public. Furthermore, the licensor, like the lessor, is in a good position to correct defects in his products and thus prevent future accidents.

When a defect originates with the manufacturer, the licensor, like the lessor and the retail seller, is entitled to indemnification from the manufacturer. Consequently, the manufacturer ultimately bears

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\begin{itemize}
  \item 337. \textit{Id.} at 394.
  \item 339. \textit{Id.} at 505.
  \item 341. \textit{Id.} at 431.
\end{itemize}
the burden of compensating those who are injured by defective products. The manufacturer, as noted previously, can spread his losses over the consuming public in the form of higher prices.342 Thus, a licensor's ability to spread his losses by seeking indemnity from the manufacturer supports imposing strict liability on the licensor just as it does in the case of a lessor.

When a defect arises after a product leaves the manufacturer's control, however, the licensor cannot spread the cost of compensation to others in the distributive chain. Dixon v. Four Seasons Bowling Alley, Inc.343 exemplifies this situation. In Dixon, normal wear and tear undoubtedly caused the chip in the defendant's bowling ball. If the defendant bowling alley had been held strictly liable for failing to discover the defect and remove the ball from service, it could not have recovered indemnity from the ball's manufacturer. This suggests that risk-spreading does not provide a convincing rationale for imposing strict liability on licensees for post-manufacturing defects.

However, subjecting licensees to strict liability may promote the goal of accident cost reduction. Licensors, like lessors who rent products on a recurring basis, should be familiar with the condition of their products and can prevent injuries by adopting scheduled maintenance procedures. In addition, licensees, like return lessors, can monitor the condition of their products and take them out of service when the products have reached the end of their useful life. Furthermore, as the court in Garcia v. Halsett344 observed, the licensee has little opportunity to inspect the product and usually relies on the licensor to discover defects.

Imposing strict liability on the licensor would motivate him to discover and cure product defects and thereby prevent accidents. Furthermore, when an injury stems from a manufacturing defect, the licensor can, through indemnity, spread costs he incurs from a product liability judgment over the consuming public.

There is one type of license, however, which does not completely resemble a return lease. That is the license of a fixture or article which cannot be physically moved by the licensee, but which must be used on the licensor's premises. The policies behind premises liability conflict with those which underlie strict products liability in cases

342. See supra notes 286-93 and accompanying text.
where one licenses a nonmovable article. Historically, landowners were held liable for conditions on the premises only if they were negligent. Arguably, imposing strict liability on licensors undermines the settled principles of premises liability by substantially altering the landowner’s duty of care. The court in *Keen v. Dominick’s Finer Foods, Inc.*\(^{345}\) recognized this point of view when it stated that “[p]ublic policy considerations do not demand that the duty of a shopkeeper to keep its premises in a safe condition be elevated beyond the traditional standard of reasonable care.”\(^{346}\)

The court in *Dixon v. Four Seasons Bowling Alley, Inc.*\(^{347}\) also concluded that negligence was the appropriate standard for premises liability and expressed concern that strict liability might invade this area. Ironically, the shopping cart and bowling ball involved in *Keen* and *Dixon*, respectively, were not fixtures, but were movable goods that could easily be distinguished from the premises themselves. On the other hand, the defendant apparently did not raise the premises liability issue in *Garcia*, where the product in question, a washing machine, was immobile.

Nevertheless, the premises liability argument is valid in cases where the injury results from a defective fixture. As long as the landowner’s duty for defective conditions on the premises is expressed in terms of reasonable care, the line between products liability and premises liability should be kept clear and distinct. For this reason, courts should not hold landowners strictly liable for injuries caused by defective fixtures. On the other hand, there is no reason to distinguish between licenses and return leases involving movable goods. Strict liability seems appropriate in either case.

In summary, the courts have imposed strict liability on licensors in limited circumstances. They will not impose strict liability on a licensor if he either did not place his product into the stream of commerce or was not in the business of distributing the product to the public.

**E. Maintenance Leases**

In a maintenance lease, the lessor is responsible for maintaining and repairing the leased product. Business enterprises often lease motor vehicles, construction equipment and office equipment on this ba-

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346. Id. at 505.
sis. A maintenance lease may be viewed as consisting of both a lease and a maintenance component.

_Cintrone v. Hertz Truck Leasing & Rental Service_, the landmark case which first imposed strict liability on lessors, involved a maintenance lease. In _Cintrone_, the plaintiff was injured when the brakes on a truck which was rented to his employer failed and the truck struck a bridge. Under the lease with plaintiff’s employer, the lessor was responsible for servicing the vehicle. Reversing a lower court’s dismissal, the New Jersey Supreme Court found the lessor strictly liable, stating that the lessor, like a seller, was in a better position than the consumer to reduce the risk of accidents. The court also asserted that the lessor’s liability was not dependent on its undertaking to service the trucks, but arose from its continuing control over the vehicles.

In _Coleman v. Hertz Corp._, an Oklahoma appellate court also imposed strict liability on a maintenance lessor. The plaintiff in _Coleman_ was injured when the left rear wheels of his vehicle fell off, causing him to lose control of the milk truck he was driving and run into a ditch. The plaintiff’s employer had leased the truck from Hertz, but the defendant maintained a garage on the employer’s premises to keep the truck in repair. An employee of one of Hertz’s subcontractors apparently had not screwed the wheel nuts on tightly when he replaced the tires. The appellate court affirmed a lower court’s judgment for the plaintiff in strict liability in tort.

349. 212 A.2d at 772. Each of the nine vehicles rented to the plaintiff’s employer was to be examined and serviced once a year or every 18,000 miles, whichever came first. In addition, one of the lessor’s mechanics was sent to the lessee’s garage every two weeks to inspect the trucks. If repairs were needed, they were made on the spot or the truck would be removed to the lessor’s garage. Moreover, at the end of each day the trucks would be brought to the lessor’s garage to be “gassed up” for the next day. If the driver had any trouble with the truck, he would report it to the lessor’s mechanics at that time. Repairs would be made either immediately or during the evening and the truck would be returned to the lessee in time for use in the morning. _Id._ at 772-73.

The plaintiff testified that he had reported that the brakes of the vehicle in which he was injured were not working three times in the week prior to the accident, but the record was unclear whether any repairs were made. _Id._ at 773. The brake failure was not reported to the lessor until eight days after the accident. The lessor produced a form at trial which indicated that the brakes were then inspected and tested and were found to be in working order. An employee of the lessor testified, however, that the brakes had been repaired. _Id._ at 774. The New Jersey Supreme Court inferred from the evidence that the brakes were defective. _Id._ at 778.
350. _Id._ at 777-78.
351. _Id._ at 778.
353. _Id._ at 944-46.
More recently, a Pennsylvania court, relying on Cintrone, also imposed strict liability on a maintenance lessor. In Francioni v. Gibsonia Truck Corp., a defect in the steering component of the tractor caused a tractor-trailer, which was leased from the defendant, to run off the road, injuring the plaintiff. The court found that the rationales for imposing strict liability on sellers also supported imposing strict liability on maintenance lessors.

Extending strict liability to maintenance lessors, however, raises two questions. First, should courts hold a maintenance lessor strictly liable for defects that arise after the lease has begun? Second, should a lessor be held strictly liable for improper performance of the service component of the maintenance lease? This Article contends that strict liability should not be applied in either case.

For the most part, the courts have treated maintenance leases in the same manner as return leases, and, therefore, have held lessors strictly liable for post-manufacturing defects without distinguishing between those which arise prior to the lease and those which arise after the lessee has taken possession of the product. Yet, there is an important difference between these two types of product defect.

As discussed previously, policy considerations justify imposing strict liability on return lessors. Maintenance lessors resemble return lessors and licensors in that each leases a product which may not be new when it is received by the lessee. In each case, the lessee may have no recourse against the manufacturer if the defect occurred after the product left the manufacturer's possession. Therefore, the lessee cannot look to anyone but the lessor for compensation if injury results from a defective condition in the leased article. However, in a return lease, the lessor reassumes exclusive control over the product when it is returned. This control gives the lessor an opportunity to inspect the product for defects or to take it out of service. At the same time, if the return lessor leases the product again, the new lessee has a right to assume that the product is safe at the time he takes possession of it.

A maintenance lease operates in a similar fashion and the maintenance lessor should similarly be held strictly liable for any product defects that exist when the new lessee assumes possession. However, the maintenance lessor, unlike the return lessor, remains responsible for product maintenance after he relinquishes possession of the prod-

355. Id. at 739.
356. See supra Section IV.C.
uct. Whether his continuing responsibility to maintain the product justifies holding him strictly liable for such defects is the primary issue. Arguably, he should only be liable in negligence for defects which occur after the lessee takes possession of the leased article.

Judicial concern about this problem appears to be limited to a concurring opinion in *Lechuga, Inc. v. Montgomery*. The defendant in *Lechuga* leased a fleet of trucks to the plaintiff’s employer. The lease provided that the lessor was to keep the trucks in good and serviceable condition. The plaintiff was injured while attempting to raise the engine cover on one of the trucks. In a resulting lawsuit, the plaintiff argued that the accident would not have occurred if the truck had been equipped with a safety chain to prevent the engine cover from swinging over the front of the truck. The evidence indicated that all of the leased trucks originally were provided with safety chains, but that the chain on the vehicle in question had been removed.

The plaintiff sued under both negligence and strict liability in tort. At trial, the jury returned a general verdict for the plaintiff. On appeal, an intermediate Arizona appeals court held that it was proper to submit the negligence issue to the jury, but that the plaintiff could not recover under strict liability unless he could show that the defect was present when the truck was first leased to the plaintiff’s employer. Because the plaintiff had not shown that the safety chain was missing when the truck was first leased to his employer, the lessor could not be held strictly liable for failing to replace the chain when it serviced the vehicle.

In a concurring opinion, Judge Jacobson went even further and stated that strict liability should be limited to defects arising from the manufacturing process:

Inherent in these policy considerations is not the nature of the transaction by which the consumer obtained possession of the defective product, but the character of the defect itself, that is, one occurring in the manufacturing process and the unavailability of an adequate remedy on behalf

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358. Id. at 258.
359. Id. at 259.
360. Id. at 260.
361. Id. Although the court agreed that the plaintiff could recover against the lessor under negligence principles, it granted a new trial because it was not clear from the verdict whether the jury had found for the plaintiff under a negligence theory or whether it had based its decision on strict liability. Id.
of the injured plaintiff.\textsuperscript{362}

Consequently, according to Judge Jacobson, strict liability should not be imposed on the lessor for conditions that arise solely because of inadequate maintenance. In light of the difficulty in determining the origin and nature of the defect, Judge Jacobson suggested that the burden of proof on this issue be shifted to the defendant after a prima facie showing by the plaintiff that the truck was first placed in the stream of commerce in a defective condition.\textsuperscript{363}

As discussed previously, consideration of the policies that support strict liability is necessary to determine whether such liability should be imposed on a lessor in a given situation. In \textit{Lechuga}, the court failed to discuss the policies underlying strict liability—loss-spreading and accident cost reduction. In fact, loss-spreading and accident cost reduction probably do not support subjecting maintenance lessors to liability for post-manufacturing defects. Thus, \textit{Lechuga} was probably decided correctly, although the court’s reasoning was incomplete.

With respect to loss-spreading, presumably maintenance lessors can spread losses as well as any other kind of lessor. However, as suggested earlier, loss-spreading alone is usually an inadequate justification for strict liability.\textsuperscript{364}

More importantly, the accident cost reduction rationale also provides little support for subjecting maintenance lessors to strict liability. \textit{Cintrone}\textsuperscript{365} and its progeny applied strict liability to lessors on the theory that lessors could control the level of risk associated with leasing. Those courts found that the lessor’s expertise and his control over the products he leased enabled him to reduce accident costs. According to the court in \textit{Cintrone},

\begin{quote}
The operator of the rental business must be regarded as possessing expertise with respect to the service life and fitness of his vehicles for use. That expertise ought to put him in a better position than the bailee to detect or anticipate flaws or defects or fatigue in his vehicles.\textsuperscript{366}
\end{quote}

Moreover, the court said that the maintenance lessor had maintained

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\begin{flushleft}
\textsuperscript{362} Id. at 262 (Jacobson, J., concurring).
\textsuperscript{363} Id.
\textsuperscript{364} Cost-spreading was briefly mentioned as a basis for strict liability by the court in Francioni v. Gibsonia Truck Corp., 472 Pa. 362, 372 A.2d 736, 739 (1977), discussed supra at text accompanying notes 354-55.
\textsuperscript{365} Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965).
\textsuperscript{366} Id. at 778.
\end{flushleft}
sufficient control over the product, even after the lessee took possession, to enable it to detect and repair defects which arose after the lease term began: “[R]etained supervision and control permit Hertz to see to it that the vehicles remain fit for use, or to withdraw them from operation and replace them if the estimated service life is at or approaching an end, or if for any reason continued fitness for use is questionable.”

The control rationale is not as persuasive, however, in the case of maintenance leases as it is in the case of return leases. The return lessor assumes complete control over the product each time the lease ends and reinjects it into the stream of commerce each time a new lease is made. On the other hand, a maintenance lessor shares control with the lessee.

Furthermore, maintenance and return leases also differ in the amount of product knowledge possessed by the lessee. In return lease situations, the lessee knows nothing about the previous history of the product and must rely on the lessor’s expertise and competence. Moreover, lessees in such cases are often unsophisticated consumers who have no real ability to inspect the product for defects before taking possession. In the case of a maintenance lease, however, the lessee is usually familiar with the history of the leased product and often has considerable knowledge about the product’s safety characteristics. Therefore, the lessee is not forced to rely on the lessor’s superior knowledge and expertise.

For these reasons, lessors should not be held strictly liable for defects which arise after the lessee takes possession of the product. Nevertheless, the courts have generally imposed strict liability for such defects if the lessor had assumed responsibility for maintenance.

It is also significant that product defects that arise after the commencement of a maintenance lease are usually caused by improper maintenance. This raises the question of how the “service” component of the maintenance lease should be treated. As discussed earlier, the prevailing approach, based on Cintrone, is to hold the lessor strictly liable for improper maintenance. However, two other approaches are possible: one is to treat a maintenance lease like a hybrid transaction; the other is to treat the maintenance component of the transaction like a pure service.

Under the first approach, a maintenance lease would be charac-

367. Id.
terized as a hybrid transaction, composed of a lease and a service component. According to this view, a maintenance lease would be treated in the same manner as a hybrid contract in which there is both a sale and a service component. Under the hybrid theory, a court would be able to determine whether a given maintenance lease should be characterized as a lease or a service. If the court characterizes the transaction as a service, strict liability would not be imposed. The hybrid theory would have the advantage of giving a court the flexibility to impose strict liability when it believes the defendant can reduce accident costs or spread such costs through the pricing mechanism.

Some courts have adopted the hybrid view in connection with sales/service transactions. The leading case is *Newmark v. Gimbel’s Inc.*, in which a New Jersey court allowed an individual to recover in strict liability against a beauty shop operator for personal injuries caused by a defective permanent wave solution. In *Newmark*, the permanent wave solution was defective, not the service, and the court apparently felt that distribution of the product was an essential part of the transaction and not merely incidental to the rendition of hairstyling services.

The courts have employed various tests to determine whether to treat a hybrid transaction as a sale or whether to characterize it as a service. One approach focuses on the essential or predominant nature of the transaction. Since the policies underlying strict liability are

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less applicable to services than to sales, determining the essential nature of a hybrid transaction may also determine whether strict liability should apply.\footnote{Magraine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (1968); Farnsworth, \textit{supra} note 63, at 662-65; Comment, \textit{supra} note 329, at 582; Note, \textit{supra} note 290, at 113-15.}

A second test used to determine whether a hybrid transaction is a sale or a service looks to the source of the defect. If a defective product causes the injury, strict liability is imposed, whereas if a defect in the service causes the injury, a negligence standard will be applied.\footnote{Note, \textit{supra} note 291, at 400-01.} For example, in \textit{Nastasi v. Hochman,}\footnote{Nastasi v. Hochman, 58 A.D.2d 564, 396 N.Y.S.2d 216, 217 (1977); Shaffer v. Victoria Station, Inc., 91 Wash. 2d 295, 588 P.2d 233, 236 (1978); Note, \textit{supra} note 291, at 402-03.} a pilot was killed in a plane crash caused by an electrical fire from a defectively installed navigation system. The court refused to hold the defendant strictly liable, concluding that the faulty installation was a service defect, not a product defect.\footnote{58 A.D.2d 564, 396 N.Y.S.2d 216 (1977).}

Courts do not appear to apply one of these tests or the other consistently, but use them interchangeably when deciding sales/service hybrid cases. Often, both tests yield the same result. Similarly, if a maintenance lease is viewed as a hybrid transaction, either approach could be applied to it.

The best approach, however, would be to acknowledge that a maintenance lease consists of two separate and distinct transactions: supplying a product and servicing a product. The lessor should be strictly liable for defects in the product that exist at the time the lessee takes possession. In this respect, the maintenance lessor's and return lessor's liability for product defects should be the same. However, the transaction should be treated as a service contract after the product leaves the lessor's possession. In this situation, negligence rather than strict liability would govern.\footnote{Id. at 217.}

express agreement to the contrary, the lessor should be liable in negligence for defects which arise from improper maintenance or servicing after the lessee takes possession of the product. Thus, maintenance lessors would be treated like others in the business of servicing or repairing products.\footnote{377} If it is uncertain when a product defect arose, the defect would be presumed to have arisen prior to the time the lessee took possession.

This approach is more consistent with the realities of the maintenance lease transaction than the rule in \textit{Cintrone}, which treats maintenance leases like other chattel leases and holds the lessor strictly liable for all product defects. Unlike \textit{Cintrone}, this proposal would impose on the lessor two different standards of liability, thereby reflecting the lessor's differing responsibility for defects arising in these two distinct phases of the maintenance lease.

\section*{F. Finance Leases}

Finance lessors include banks, insurance companies and other financial institutions that provide funds to help businesses acquire products and equipment for commercial use. Instead of financing the purchase directly and accepting a security interest, the finance lessor obtains title to the property and “leases” it to the actual user.\footnote{378} Since finance lessors are in the business of leasing and profit from this activity, arguably they should be subject to strict liability for defects in the products they lease. Courts, however, have generally not imposed strict liability on finance lessors.\footnote{379}

Courts have justified their refusal to hold finance lessors strictly liable on the theory that these lessors are not part of the physical process by which products are distributed to the public. For example, in \textit{Wright v. Newman}\footnote{380} the court declared: “The focus is thus on


\footnotesize{378. \textit{Note, supra} note 245, at 154 n.2.}


\footnotesize{380. 735 F.2d 1073 (8th Cir. 1984).}
whether the commercial entity is in the chain of distribution that provides a product to the consumer. Finance companies have the merely tangential function of providing money to make the purchase of a product possible.\textsuperscript{381} Similarly, the court in \textit{Cole v. Elliot Equipment Corp.}\textsuperscript{382} concluded that the finance lessor was outside of the distribution chain because it did not participate in the selection, manufacture or design of the allegedly defective product, nor did the finance lessor ever take physical possession of it.\textsuperscript{383}

The assumption that finance lessors are not in the chain of product distribution is questionable. Of course, in a technical sense finance lessors are in the chain of distribution because they take title to the goods and lease them to others. Moreover, finance leasing plays a significant role in the distributive process.\textsuperscript{384} Finance lessors not only assist businesses in acquiring products but often have a continuing business relationship with their lessees.\textsuperscript{385} This suggests that the decision to exclude finance lessors from strict liability is really based on considerations other than supposed lack of involvement in the distributive process.

Loss-spreading supports imposing strict liability on finance lessors for several reasons. These institutions have substantial economic resources and, therefore, can absorb the burden of compensating injured parties.\textsuperscript{386} As with retailers, finance lessors can obtain indemnification from manufacturers for injuries arising from manufacturing or design defects. Since finance lessors seldom purchase used products in order to lease them to business clients, liability for post-manufacturing defects would occur infrequently. When such defects do occur, arguably the finance lessor is better able to bear the cost of injuries caused by those defects than is the injured party.

One response to the loss-spreading argument is that imposing strict liability on finance lessors would increase the cost of financing equipment purchases by this method and might adversely affect the availability of credit in some cases.\textsuperscript{387} While this might occur, finance

\textsuperscript{381} \textit{Id.} at 1078.
\textsuperscript{382} 653 F.2d 1031 (5th Cir. 1981).
\textsuperscript{383} \textit{Id.} at 1032.
\textsuperscript{385} In Brescia v. Great Road Realty Trust, 117 N.H. 154, 373 A.2d 1310, 1311 (1977), for example, the finance leasing company was wholly owned by the lessee.
\textsuperscript{386} \textit{Nath}, 439 A.2d at 638 (Larsen, J., dissenting).
\textsuperscript{387} \textit{Id.} at 636. The same argument can be made with respect to limiting the scope of the holder in due course doctrine in consumer credit sales transactions. \textit{See Note, A Case Study of the
lessors, like retail sellers, would normally be able to shift the cost of compensation to product manufacturers by means of indemnification agreements. Loss-shifting to manufacturers, of course, would have virtually no effect on the cost of credit. Moreover, even if finance lessors were obliged to raise the cost of credit, higher credit rates would merely act as a mechanism for spreading compensation costs among finance lessees.

At first glance, the accident cost reduction rationale does not support imposing strict liability on finance lessors. Many courts have recognized that finance lessors do not deal directly with manufacturers and, therefore, cannot influence product quality, either directly by inspecting the goods, or indirectly through economic pressure. The lessee, not the finance lessor, usually selects the product, negotiates its purchase and has control over its use. Moreover, the lessee does not rely on the finance lessor's expertise, nor does the lessor make any implied representations that the product in question is safe. For these reasons, subjecting finance lessors to strict liability may not promote accident cost reduction objectives to the same extent as imposing such liability on sellers and other types of lessees.

Nevertheless, courts have questioned the merits of holding finance lessors immune from strict liability. In Nath v. National Equipment Leasing Corp., for example, three justices of the Pennsylvania Supreme Court dissented from a decision which followed the traditional rule. Nath involved a suit against a finance lessor by an employee who was injured by a wire and cable stripping machine. The machine was allegedly defective because it did not have a guard over its gears and blades to protect the user's hands. The trial court dismissed the action and an intermediate appellate court affirmed. Although the state supreme court upheld the dismissal, Justice Larsen, joined by the two other members of the court, vehemently dissented:


388. Nath, 439 A.2d at 636.
389. See id.
The pertinent factors . . . for extending Section 402A coverage to lessors are no less present and no less compelling in the context of financial leases. The availability of the lessor for redress, the incentive to safety, the possible prevention of the circulation of defective products, and finally cost-distribution for injuries sustained are all factors dictating 402A coverage no less for financial lessors than for commercial lessors, wholesaler, or retailers.392

Although the case for extending strict liability to finance lessors is not as strong as it is for other lessors, Justice Larsen's argument has merit. Finance lessors certainly play an important role in the distributive process. In addition, they often can influence their lessees' product selections. Finally, finance lessors can spread the risks of product injuries. For these reasons, it seems unjust to exclude finance lessors from strict liability.

V. CONCLUSION

The leasing business has grown substantially over the past few decades and has become a multibillion dollar industry. Large numbers of consumers, workers and other persons come into contact with leased products and are placed at risk when these products are defective. Arguably, those who are exposed to risks from defective leased products are entitled to the same protection as those who are injured by defective products that are sold. For this reason, many courts have imposed strict liability in tort on lessors.

There are many kinds of chattel leases, however. This Article has singled out five categories of leases and determined whether policy considerations justify imposing strict liability on the respective lessors.

Generally, lessors should be held strictly liable for injuries caused by defective leased products. However, several situations can be identified in which lessors should not be held strictly liable for product defects. Strict liability should not be imposed if the leased product is a fixture. In the case of fixtures, a better approach is to retain a negligence standard for determining liability in order to avoid conflicts with the principles of premises liability.

Post-manufacturing defects present a more difficult problem. While loss-spreading and accident cost reduction policies may support imposing strict liability for post-manufacturing defects, the case for liability is weaker than that for defects which originate with the

392. 439 A.2d at 638 (Larsen, J., dissenting).
manufacturers. The lessor’s conduct is not a cause-in-fact of the defect in the latter situation, and secondly, the lessor cannot shift the cost of compensation to others in the distributive chain.

Post-manufacturing defects can occur in connection with both return leases and maintenance leases. This Article concludes that strict liability should be imposed on return lessors for all defects, manufacturing and post-manufacturing, in their leased products. Strict liability is justified in these cases because the lessor has some ability to control risk through maintenance and amortization procedures. Moreover, the lessee justifiably relies on the lessor to remove defective products from the stream of commerce.

Maintenance lessors, however, should be subject to strict liability for manufacturing defects but not for post-manufacturing defects which occur after the commencement of the lease. In a maintenance lease, the lessee does not rely on the lessor’s expertise, nor does the lessor have exclusive control over the product. Furthermore, the injury in such cases typically results from a defect in the “service” component of the lease transaction. For these reasons, unless they assume a greater duty, lessors should be held to a standard of reasonable care for dangerous conditions that arise as a result of improper maintenance.

Ironically, the courts appear to have singled out only finance leases for special treatment. However, this Article suggests that the current practice of insulating finance lessors from strict liability should be reexamined. Finance lessors’ involvement in the distributive process may justify strict liability in some cases.

The interface between products liability and leasing has been somewhat overlooked in recent years. The increasing use of leases among business organizations and individual consumers is likely to generate more products liability claims against lessors in the future. Courts and commentators, therefore, will have new opportunities to consider and perhaps resolve the issues discussed in this Article.