

3-1989

Strict Liability for Defective Ideas in Publications

Andrew T. Bayman

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Torts Commons](#)

Recommended Citation

Andrew T. Bayman, *Strict Liability for Defective Ideas in Publications*, 42 *Vanderbilt Law Review* 557 (1989)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol42/iss2/5>

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in *Vanderbilt Law Review* by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Strict Liability for Defective Ideas in Publications

I.	INTRODUCTION	557
II.	POLICIES BEHIND STRICT LIABILITY	559
	A. <i>Greenman v. Yuba Power Products and Its Progeny</i>	559
	B. <i>Modern Theory</i>	561
III.	APPLICATION OF STRICT LIABILITY TO PUBLICATIONS	564
	A. <i>Books, Magazines, and Newspapers</i>	564
	B. <i>Reports, Manuals, and Trade Publications</i>	567
	C. <i>Aeronautical Charts</i>	569
IV.	IMPLICATIONS OF IMPOSING STRICT LIABILITY ON PUBLICATIONS	575
	A. <i>First Amendment Concerns</i>	575
	B. <i>Effect on New Industries</i>	576
V.	CONCLUSION	578

I. INTRODUCTION

In 1963 the Supreme Court of California revolutionized the law of torts by adopting the theory of strict liability in products liability cases.¹ The American Law Institute subsequently promulgated section 402A of the *Restatement (Second) of Torts* in 1965. Section 402A provides that the seller of a “product in a defective condition unreasonably dangerous” may be held liable even though he has “exercised all possible care.”² Today, nearly every state has adopted some form of section

1. *Greenman v. Yuba Power Prods.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

2. RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter RESTATEMENT OF TORTS].

Section 402A states:

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

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

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

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

Id.

402A.³ Moreover, the list of modern products to which section 402A applies is virtually limitless.⁴ Yet, despite the unprecedented expansion of strict liability into new product areas and industries,⁵ courts still must grapple with defining the limits of section 402A in certain unique factual situations. The increasing variety and complexity of manufactured items have created problems for courts,⁶ some items do not fall neatly within the label of "product."

Recently, courts have had to decide whether the content of an article of property used to transmit information constitutes a product for section 402A purposes. Some courts have applied strict liability to publications that contain erroneous information which has caused injury to plaintiffs.⁷ These courts argue that the underlying policy justifications for strict liability compel this application.⁸ Other courts have refused to extend the doctrine of strict liability to cover "defective" ideas and words in a publication.⁹ These courts contend that strict liability only applies to the tangible properties of publications, not the words and thoughts contained within the publication.¹⁰ Because the physical properties of a book contain no inherent danger, strict liability arguably is not applicable.¹¹

This Note explores the issue of whether strict liability is appropriate for defective ideas in publications. Part II examines the development of strict liability and the underlying policy justifications for the doctrine. Part III analyzes cases that have considered the applicability of strict liability to various publications. Part IV examines the implications of imposing strict liability on publications. Finally, Part V concludes that strict liability should not be applied to publications that

3. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 98, at 694 (5th ed. 1984) [hereinafter PROSSER & KEETON].

4. See, e.g., *Cunningham v. MacNeal Memorial Hosp.*, 47 Ill. 2d 443, 266 N.E.2d 897 (1970) (blood); *Moorman Mfg. Co. v. National Tank Co.*, 92 Ill. App. 3d 136, 414 N.E.2d 1302 (1980) (grain storage tank); *Kelley v. R.G. Indus., Inc.*, 304 Md. 124, 497 A.2d 1143 (1985) ("Saturday Night Special" handgun); *Newmark v. Gimbel's, Inc.*, 54 N.J. 585, 258 A.2d 697 (1969) (permanent wave solution); *Ransome v. Wisconsin Elec. Power Co.*, 87 Wis. 2d 605, 275 N.W.2d 641 (1979) (electricity); see also 2 J. DOOLEY, MODERN TORT LAW: LIABILITY & LITIGATION § 32.41 (1983 & Supp. 1988) (stating that "[a] complete list of products which have been held *not* covered by strict liability would be substantially shorter than the list of products that are covered by the doctrine" (emphasis in original)).

5. See Walker, *The Expanding Applicability of Strict Liability Principles: How Is a "Product" Defined?*, 22 *Torr & Ins. L.J.* 1 (1986).

6. *Id.* at 15.

7. See, e.g., *Brocklesby v. United States*, 753 F.2d 794 (9th Cir.), *amended on other grounds*, 767 F.2d 1288 (9th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986).

8. *Id.* at 802.

9. See, e.g., *Cardozo v. True*, 342 So. 2d 1053 (Fla. Dist. Ct. App. 1977).

10. *Id.* at 1056.

11. *Id.*

contain defective ideas.

II. POLICIES BEHIND STRICT LIABILITY

A. *Greenman v. Yuba Power Products and Its Progeny*

Prior to 1963 products liability cases were tried either under a warranty¹² or a traditional negligence theory.¹³ *Greenman v. Yuba Power Products*¹⁴ began a trend in products liability cases of focusing on the character of the good rather than on the conduct of the manufacturer.¹⁵ In *Greenman* the plaintiff was injured severely while using an all-purpose power tool. A piece of wood clamped to the machine flew out and hit the plaintiff on the head while he was using the power tool as a lathe. Writing for the majority, Justice Roger Traynor held that the plaintiff's cause of action was not barred by his failure to give timely notice of breach of warranty because "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."¹⁶ The California court largely based its decision to impose strict liability on public policy grounds. The manufacturer was deemed to be in a better position to absorb the costs of injuries caused by its products than was the individual consumer.¹⁷

Various courts have expanded the reasoning of *Greenman* and have found additional policy justifications for strict liability—justifications which are incorporated in *Restatement* section 402A.¹⁸ These policy reasons were enumerated by an Arizona appellate court in *Lechuga*,

12. *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 161 A.2d 69 (1960).

13. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

14. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

15. PROSSER & KEETON, *supra* note 3, § 99, at 695.

16. *Greenman*, 59 Cal. 2d at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

17. *Id.* at 63-64, 377 P.2d at 901, 27 Cal. Rptr. at 701. After giving the reasons for rejecting a warranty theory in favor of strict liability, Justice Traynor stated: "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701; *see also* *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring). Justice Traynor emphasized the manufacturer's superior ability to understand the risks in its product. He noted:

As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered. Manufacturing processes, frequently valuable secrets, are ordinarily inaccessible to or beyond the ken of the general public. The consumer no longer has means or skill enough to investigate for himself the soundness of a product The manufacturer's obligation to the consumer must keep pace with the changing relationship between them

Id. at 467, 150 P.2d at 443-44 (citations omitted).

18. PROSSER & KEETON, *supra* note 3, § 98, at 693.

Inc. v. Montgomery.¹⁹ Strict liability, in short, was designed to be a doctrine of social utility. It was intended to be an instrument of social policy in promoting fairness, justice, and efficiency.²⁰

Despite the numerous policy reasons behind strict products liability, perhaps the most important justification for the doctrine is that it eliminates the necessity of proving negligence.²¹ The essential difference between negligence and strict liability is the element of scienter, or knowledge, of the dangerous conditions of the product.²² In a negligence products liability action, the plaintiff must prove that the defendant failed to exercise due care either in the manufacture of the product or in the failure to discover and correct its dangerous condition.²³ In a strict products liability cause of action, the plaintiff must prove only that the product was in an unreasonably dangerous defective condition when it left the control of the manufacturer or seller and that the defect was the proximate cause of his injury.²⁴ This evidentiary burden is much easier for the plaintiff to meet²⁵ and can be illustrated best by

19. 12 Ariz. App. 32, 467 P.2d 256 (1970). The court enumerated the policy reasons for strict liability as follows:

- (1) The manufacturer can anticipate some hazards and guard against their recurrence, which the consumer cannot do.
- (2) The cost of injury may be overwhelming to the person injured while the risk of injury can be insured by the manufacturer and be distributed among the public as a cost of doing business.
- (3) It is in the public interest to discourage the marketing of defective products.
- (4) It is in the public interest to place responsibility for injury upon the manufacturer who was responsible for its reaching the market.
- (5) That this responsibility should also be placed upon the retailer and wholesaler of the defective product in order that they may act as the conduit through which liability may flow to reach the manufacturer, where ultimate responsibility lies.
- (6) That because of the complexity of the present day manufacturing processes and their secretiveness, the ability to prove negligent conduct by the injured plaintiff is almost impossible.
- (7) That the consumer does not have the ability to investigate for himself the soundness of the product.
- (8) That the consumer's vigilance has been lulled by advertising, marketing devices and trademarks.

Id. at 37-38, 467 P.2d at 261-62 (citations omitted).

20. *Symposium on Products Liability*, 57 MARQ. L. REV. 623, 624 (1974); see also PROSSER & KEETON, *supra* note 3, § 98, at 693.

21. See *Dippel v. Sciano*, 37 Wis. 2d 443, 460, 155 N.W.2d 55, 63 (1967). As the Wisconsin Supreme Court noted in adopting section 402A, the "most beneficial aspect" of strict liability is that it removes the injured plaintiff's burden of "proving specific acts of negligence and protects him from the defenses of notice of breach, disclaimer, and lack of privity." *Id.*

22. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 850 (1973).

23. Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965).

24. See P. Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559 (1969).

25. Wade, *supra* note 22, at 826.

reference to the facts of *Greenman v. Yuba Power Products*.²⁶ For the plaintiff in *Greenman* to have prevailed under a negligence theory, he would have had to show that the defendant knew or should have known that the design and manufacture of the machine was such that inadequate set screws would cause the tailstock to move away from the wood and, thus, cause the piece to fly out of the machine.²⁷ For the plaintiff to have prevailed under a negligence theory would have entailed showing a failure on the part of one of the manufacturer's employees to exercise ordinary care in the assembly line or in the final inspection process.²⁸ To hold the supplier of the power tool liable, the plaintiff would have had to show that the supplier was negligent in failing to discover the dangerous condition of the product.²⁹ Given the complexity of the mass production and distribution cycle, negligence would have been nearly impossible to prove.³⁰ Thus, requiring proof of negligence often is unfair to an injured plaintiff by causing him to lose a remedy while a manufacturer, who is in a superior position to bear the cost caused by its defective product, escapes liability.³¹ Strict liability eliminates this inordinate evidentiary burden by focusing on the defect in the product and, in effect, imputing knowledge of the risk of harm to the manufacturer.³²

B. Modern Theory

Although the language expressly limiting the application of *Restatement* section 402A to "[o]ne who sells any product"³³ appears straightforward, it has caused problems for courts faced with factual situations that do not fall within the literal language of the section.³⁴ The drafters' attempts at defining this language could produce only a list of products covered, not a comprehensive definition.³⁵ Faced with this uncertainty, various courts use different approaches in determining whether a particular good in a particular transaction constitutes a "product" for the purposes of section 402A. One approach is a transaction analysis, focusing on whether a given transaction involves the sale

26. For a discussion of *Greenman*, see *supra* notes 14-17 and accompanying text.

27. Wade, *supra* note 23, at 16.

28. Wade, *supra* note 22, at 825-26.

29. *Id.* at 826.

30. *Id.*

31. Walker, *supra* note 5, at 3.

32. See *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 430, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 236 (1978).

33. RESTATEMENT OF TORTS, *supra* note 2, § 402A.

34. Maloney, *What Is or Is Not a Product Within the Meaning of Section 402A*, 57 MARQ. L. REV. 625, 626 (1974).

35. *Id.*

of a product or the rendering of a service.³⁶ A second approach is a product analysis, focusing on whether a given good should be characterized as a product.³⁷ These approaches are not satisfactory because they are overly definitional. Additionally, courts often confuse the two analyses, deciding that a good should not be labeled a product because the transaction involved the rendering of a service more than the sale of a product.³⁸

The most popular approach is to define the "sale of a product" for purposes of section 402A entirely in terms of the social policy justifications for the imposition of strict liability.³⁹ In other words, when the public policies underlying strict liability apply, the court will label the transaction as the sale of a product for the purposes of section 402A.⁴⁰ Thus, in deciding whether to impose strict liability on a particular defendant, most courts look to factors including risk spreading, economic incentives to make safe products, and the problem plaintiffs face in proving a negligence case.⁴¹ If these public policies do not apply, the courts will deem the transaction to be a service because section 402A applies only to sales.⁴² In short, as strict liability has evolved as a powerful instrument of fairness, justice, and social utility, the underlying social policies have become the definition of a "product."⁴³

Defining a product in terms of the public policies behind strict liability gives courts a great deal of flexibility when faced with unique factual situations. A court can delineate the parameters of strict liability based on its view of the nature of the item involved and the nature of the defendant.⁴⁴ Courts often act as super-legislatures in evaluating certain products and industries.⁴⁵ In many cases, a court's classification will have a tremendous impact on the creation and development of new industries and products. Additionally, the classification may determine

36. Wunsch, *The Definition of a Product for the Purposes of Section 402A*, 50 INS. COUNS. J. 344, 345 (1983).

37. *Id.*

38. *Id.*

39. *See id.* at 344; Maloney, *supra* note 34, at 626; Walker, *supra* note 5, at 4. For a list of the policy justifications for strict products liability, see *supra* note 19 and accompanying text.

40. *See* Maloney, *supra* note 34, at 627.

41. Walker, *supra* note 5, at 12.

42. *See* Wunsch, *supra* note 36, at 345.

43. *See* Maloney, *supra* note 34, at 627.

44. *See* Walker, *supra* note 5, at 2.

45. *Id.* As San Francisco products liability lawyer Gary T. Walker has noted:

If the court believes that public policy will best be served by protecting a particular industry or profession, then the defendant's activity will be considered a service. However, if the court favors protection of the consumer rather than the industry or profession involved, then the defendant will have manufactured or sold a product.

Id.

whether a given product or industry survives.⁴⁶ Given the courts' broad discretion in deciding whether the policies behind strict liability apply to a particular product, it is not surprising that there has been a discernible trend on the part of many courts to expand strict liability.⁴⁷

Despite the fact that the public policy approach has allowed for an expansive interpretation of what constitutes a product for purposes of section 402A, in nearly every case courts have considered goods that contain some inherent harm. In other words, regardless of whether the product was Mr. Greenman's defective power tool,⁴⁸ an untempered shower door,⁴⁹ a spoiled egg salad sandwich,⁵⁰ or numerous other examples, the product itself caused the physical injury. A Pennsylvania court has noted that a reading of the comments to section 402A indicates that the only products which fall under the section are those which themselves are dangerous and cause physical harm to the plaintiff or his property.⁵¹ For example, a plaintiff would not be able to recover in strict products liability for jewelry stolen from his home when a burglar alarm system purchased and installed by the defendant failed to operate properly.⁵² However, if the same burglar alarm system had defective wiring which caused a fire and destroyed the plaintiff's house, the plaintiff would have a claim under section 402A.⁵³ In this second example, the product itself is the injury-producing agent, and its inherently defective properties caused the harm. Given the fact that nearly every

46. *Id.*

47. *Id.*

48. *See id.* at 2-5.

49. *Becker v. IRM Corp.*, 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985).

50. *Watchel v. Rosol*, 159 Conn. 496, 271 A.2d 84 (1970).

51. *Lobianco v. Property Protection, Inc.*, 9 Pa. D. & C.3d 655 (1978); *see also* RESTATEMENT OF TORTS, *supra* note 2, § 402A comment d. Comment d states:

The rule stated in this Section is not limited to the sale of food for human consumption, or other products for intimate bodily use, although it will obviously include them. It extends to any product sold in the condition, or substantially the same condition, in which it is expected to reach the ultimate user or consumer. Thus the rule stated applies to an automobile, a tire, an airplane, a grinding wheel, a water heater, a gas stove, a power tool, a riveting machine, a chair, and an insecticide. It applies also to products which, if they are defective, may be expected to and do cause only "physical harm" in the form of damage to the user's land or chattels, as in the case of animal food or a herbicide.

Id.

52. *Lobianco*, 9 Pa. D. & C.3d at 660. The court noted:

It is immediately apparent from the foregoing language that this section [402A] does not apply in the present case. Defendant's product was not dangerous and did not cause any physical harm to plaintiff or her property. A reading of the comment to the section supports the conclusion that the only products which come under the section are those which cause physical harm, such as food which causes illness, bottles which explode or a defective automobile tire which causes an accident.

Id.

53. *Id.*

products liability case involves harm caused by the inherent physical flaws in the product itself, the courts face a difficult problem when confronted with strict liability claims based on the potential for harm caused by erroneous statements in a publication. These cases caused various courts to examine whether they should extend the doctrine of strict liability beyond the parameters which likely were envisioned by the drafters of the *Restatement*.⁵⁴

III. APPLICATION OF STRICT LIABILITY TO PUBLICATIONS

A. *Books, Magazines, and Newspapers*

One of the first cases addressing the issue of strict liability for "defective" ideas in books was *Cardozo v. True*.⁵⁵ In *Cardozo* the purchaser of a cookbook sued the retail dealer alleging breach of implied warranty. As the Florida Second District Court of Appeals noted, an action for breach of implied warranty is an action for liability without fault.⁵⁶ The plaintiff alleged that while following a recipe in the cookbook, she tested a raw piece of the Dasheen plant and suffered burning in her mouth and throat, gasping and coughing, and severe stomach cramps which continued for several days, despite medical treatment.⁵⁷ Her breach of implied warranty claim was that the book was not reasonably fit for its intended purpose, due to inadequate instructions and a failure to warn that the Dasheen plant was poisonous until cooked.⁵⁸ The Florida court, while noting that "books are goods,"⁵⁹ denied the plaintiff's implied warranty claim. The court distinguished between the tangible properties of the book and the ideas conveyed within the book.⁶⁰ The court said that the defendant had impliedly warranted the tangible properties of the book, including the printing and the binding, but not the ideas and thoughts contained in the book.⁶¹ In short, the court remained consistent with the body of case law which seems to indicate that strict liability is appropriate only when the injury is caused by the inherent physical defects in the product itself.⁶²

The underlying rationale for the *Cardozo* decision was that ideas

54. For a full discussion of these cases, see *infra* notes 55-148 and accompanying text.

55. 342 So. 2d 1053 (Fla. Dist. Ct. App. 1977).

56. *Id.* at 1056.

57. *Id.* at 1054.

58. *Id.* at 1055.

59. *Id.* at 1056.

60. *Id.*

61. *Id.*; see also *Pacific Indem. Co. v. Linn*, 766 F.2d 754, 765 (3d Cir. 1985) (noting that there is a question as to whether a diet book can be a product within the meaning of products liability law).

62. See *supra* notes 48-54 and accompanying text.

“are not equivalent to commercial products.”⁶³ For liability to attach under section 402A, the mere sale of a product accompanying the words is insufficient because there can be no strict liability imposed on the words themselves.⁶⁴ The court stated that “ideas hold a privileged position in our society,” and books, magazines, and newspapers perform a “unique and essential function.”⁶⁵ To hold book publishers or newspaper owners strictly liable would impede the free flow of ideas in society severely.⁶⁶ Thus, absent proof that the seller knew of a possible reason to warn the public about the contents of a book, the implied strict liability warranty of fitness is limited to the physical properties of the book and does not extend to the words and ideas communicated within the book.⁶⁷ It appears that ideas may have a higher place in the hierarchy of judicial concerns than the cost distribution policies behind strict liability.

In 1981 a New York court heard a novel section 402A strict liability claim involving a fourth grade science textbook in *Walter v. Bauer*.⁶⁸ The child plaintiff suffered eye injuries while performing a science experiment described in the textbook involving a ruler and rubber bands. The plaintiff alleged that the book was inherently defective because it posed an unreasonable risk of harm by suggesting an experiment that placed “dangerous instrumentalities of rubber bands and ruler in the hands of fourth grade students.”⁶⁹ The court rejected this claim and held that the plaintiff was not injured by use of the book in the manner in which it was designed to be used—to be read.⁷⁰ While the court noted that one of the policies behind strict liability is to protect the consumer from defective merchandise,⁷¹ its holding appears to be grounded in the fact that the book had no inherent defect in its physical properties which caused injury to the plaintiff. Presumably, a book would be defective within the meaning of section 402A if, for example, a sharp object embedded in the cover injured the plaintiff. This approach to the application of strict liability theory is consistent with *Cardozo*

63. *Cardozo*, 342 So. 2d at 1056.

64. Phillips, *Product Misrepresentation and the First Amendment*, 18 IDAHO L. REV. 395, 398 (1982).

65. *Cardozo*, 342 So. 2d at 1056-57.

66. *Id.* at 1057.

67. *Id.*

68. 109 Misc. 2d 189, 439 N.Y.S.2d 821 (Sup. Ct. 1981), *modified on other grounds*, 88 A.D.2d 787, 451 N.Y.S.2d 533 (1982).

69. *Id.* at 190, 439 N.Y.S.2d at 822.

70. *Id.* at 191, 439 N.Y.S.2d at 822. The court also discussed first amendment problems associated with imposing strict liability on publications. For a full discussion of the first amendment concerns, see *infra* notes 149-65 and accompanying text.

71. *Walter*, 109 Misc. 2d at 191, 439 N.Y.S.2d at 822.

and earlier case law.⁷²

The first strict liability case involving a magazine was the 1983 case of *Herceg v. Hustler Magazine*.⁷³ In *Herceg* the plaintiffs brought a wrongful death suit against *Hustler* magazine alleging that a *Hustler* article on autoerotic asphyxiation was a defective, unreasonably dangerous product which caused the plaintiffs' son and brother to hang themselves while trying to duplicate the sexual technique described in the article. The United States District Court summarily dismissed the strict liability claim. The court noted that no court has held that the content of a publication is a product subject to liability under section 402A.⁷⁴ The court stated that words are not a dangerous instrumentality to which the policies of strict liability should apply.⁷⁵ The court went on to distinguish a magazine article from products including gunpowder, fireworks, gasoline, and poison, which have clearly physical effects.⁷⁶ Thus, the court examined the nature of the product and found that the policies underlying strict liability do not apply to words, however atrocious those words may be.

Two recent cases, *Alm v. Van Nostrand Reinhold Co.*⁷⁷ and *Lewin v. McCreight*,⁷⁸ shed further light on the applicability of strict liability to books and magazines. Both cases involved claims based on a failure to warn of "defective ideas" in "How To" books. Although both courts characterized the failure to warn action in negligence terms, failure to warn often is recognized as a basis for imposing strict liability in products litigation.⁷⁹ Failure to warn involves negligence for selling a defective product, subject to the strict liability defenses and other limitations on liability.⁸⁰ Both courts refused to impose a duty to warn of "defective ideas" on a publisher. The courts recognized that imposition of a duty to warn would place a tremendous burden on publishers, would expose a publisher to potentially unlimited liability, and would interfere with the important societal interest in free access to ideas.⁸¹

72. See *supra* notes 48-54 and accompanying text.

73. 565 F. Supp. 802 (S.D. Tex. 1983), *modified on other grounds*, 814 F.2d 1017 (5th Cir. 1985).

74. *Id.* at 803.

75. *Id.*

76. *Id.* The written word is not "like a slingshot with physical properties which cause harm, and which raises the question . . . whether, balancing of the magnitude of the risk against the utility of defendants' conduct for society, the risk of harm in a particular case is unreasonable." *Id.* (citing *Moning v. Alfonso*, 400 Mich. 425, 254 N.W.2d 759 (1977)).

77. 134 Ill. App. 3d 716, 480 N.E.2d 1263 (1985).

78. 655 F. Supp. 282 (E.D. Mich. 1987).

79. See Phillips, *supra* note 64, at 400.

80. PROSSER & KEETON, *supra* note 3, § 99, at 697; see also *Parke-Davis & Co. v. Stromsodt*, 411 F.2d 1390 (8th Cir. 1969).

81. *Lewin*, 655 F. Supp. at 284; *Alm*, 134 Ill. App. 3d at 718-19, 480 N.E.2d at 1267. Both

Alm and *Lewin* are important cases because they arguably provide a basis for the proposition that if courts are unwilling to allow a cause of action involving negligence principles against a publication whose "defective ideas" harm a plaintiff, they should not allow strict liability claims against publications in similar situations.

B. Reports, Manuals, and Trade Publications

The first case involving strict liability for ideas beyond the sphere of books and magazines was *Sears, Roebuck & Co. v. Employers Insurance of Wausau*.⁸² In *Sears* the plaintiff sued Sears for hand injuries caused by erroneous information in a manual containing instructions for the operation and maintenance of a radial arm saw. While the plaintiff did not allege a traditional strict liability claim,⁸³ the court noted that the key issue to be decided was whether the manual constituted a product for the purposes of an insurance policy.⁸⁴ Employers Insurance contended that it had no obligation to defend Sears because their "product" policy only covered the physical manual, not the intellectual content.⁸⁵ The district court held that the manual was a product, and because the policy made no distinction between the physical manual and its intellectual content, Employers was obligated to defend the lawsuit against Sears.⁸⁶ Given *Cardozo* and *Walter*, this holding in *Sears* is disturbing. However, in a very prescient caveat, the court was careful to note that a substantive defense may exist to the underlying cause of action,⁸⁷ namely that a products liability action for "defective ideas" may be inappropriate. Given existing case law, the *Sears* case should be read narrowly to characterize the intellectual content of a manual as a "product" only for insurance policy purposes.

A strict liability claim that a trade publication was a defective product was advanced in *Beasock v. Dioguardi Enterprises*.⁸⁸ In *Beasock* the plaintiff's husband was killed by an explosion of a 16-inch truck tire mistakenly mounted on a 16.5-inch rim. The complaint al-

cases also raised first amendment questions. For a discussion of first amendment problems associated with strict liability, see *infra* notes 149-65 and accompanying text.

82. 585 F. Supp. 739 (N.D. Ill. 1983).

83. *Id.* at 745. The district court noted that the plaintiff's claim appeared to be a negligence claim for failure to warn. *Id.* As noted earlier, failure to warn claims properly can be characterized as strict liability claims. See *supra* notes 79-80 and accompanying text.

84. *Sears*, 585 F. Supp. at 745.

85. *Id.* Employers also argued that the price of the policy, \$9.00, was too low to cover anything more than the physical book with its physical characteristics. A policy insuring injuries from a saw presumably would be much higher. *Id.* at 743.

86. *Id.* at 744.

87. *Id.* at 745.

88. 130 Misc. 2d 25, 494 N.Y.S.2d 974 (Sup. Ct. 1985), *rev'd*, 117 A.D.2d 1015, 499 N.Y.S.2d 558 (1986) (reversing on issue of summary judgment).

leged that the design of the rim was defective in that it allowed a 16-inch tire to be mounted without difficulty, but when the mismatched combination was attempted, the tire exploded.⁸⁹ The Tire & Rim Association (TRA) was named as a defendant because it published and distributed the tire and rim standards which were followed in mounting the decedent's tires. TRA contended that it merely performed a service by publishing tire and rim standards which facilitated the interchangeability of products within the automotive industry, but that such standards only were advisory and that adherence to them and their use was entirely within the control and discretion of the manufacturer.⁹⁰ The district court held that the only products TRA was responsible for placing in the stream of commerce were its publications.⁹¹ Although these publications contained the specifications for the tire and rim that exploded on the car, the court stated that "the publications themselves did not produce the injuries" and, thus, could not serve as the basis for strict products liability or breach of warranty.⁹² The court distinguished TRA's role from that of a typical defendant in a strict products liability action.⁹³ TRA was a trade association with the limited function of publishing dimensional specifications for interchangeability purposes.⁹⁴ It neither derived the economic benefits of a typical strict liability defendant,⁹⁵ nor was it in a position to spread the loss. The *Beasock* court seemed to imply that the usual policies behind the imposition of strict liability do not apply to a defendant who disseminates trade publications.

*Howard v. Poseidon Pools*⁹⁶ appears to follow this inference from *Beasock*. The defendant in *Howard* was a manufacturer's trade association which certified, reviewed, and recommended design changes in swimming pools and pool equipment.⁹⁷ The plaintiff made a strict liability claim against the association for crippling injuries that he had received when he dove into a four foot deep pool that had been certified in one of the defendant's publications. The *Howard* court followed *Beasock* in holding that a trade association certifier of swimming pool equipment is not the type of defendant against whom an action for

89. *Id.* at 26, 494 N.Y.S.2d at 976.

90. *Id.* at 28, 494 N.Y.S.2d at 977.

91. *Id.* at 29, 494 N.Y.S.2d at 978.

92. *Id.* at 29-30, 494 N.Y.S.2d at 978.

93. *See id.* at 32, 494 N.Y.S.2d at 979.

94. *Id.* at 32, 494 N.Y.S.2d at 979.

95. *Id.*

96. 133 Misc. 2d 50, 506 N.Y.S.2d 523 (Sup. Ct. 1986), *aff'd in part, rev'd in part*, 134 A.D.2d 926, 522 N.Y.S.2d 388 (1987).

97. *Id.* at 51, 506 N.Y.S.2d at 524.

strict liability can be brought.⁹⁸ A trade association is not a manufacturer of a product. Further, the policies of strict liability do not apply to a trade association because it is not in a position to insure against the loss by passing the cost to the public in the form of higher prices.⁹⁹

In one of the most novel product liability claims ever advanced, the plaintiff in *L. Cohen & Co. v. Dun & Bradstreet, Inc.*¹⁰⁰ alleged that an inaccurate credit report was a product within the meaning of the Connecticut Product Liability Act.¹⁰¹ The plaintiff asserted that it had suffered harm because Dun & Bradstreet prepared and distributed a credit report which erroneously indicated that the plaintiff was delinquent in meeting its financial obligations.¹⁰² The district court dismissed the plaintiff's product liability complaint and stated that it was not aware of any products liability case involving a credit report as a product.¹⁰³ The court also relied on the fact that the legislature did not intend to extend coverage of the Connecticut Product Liability Act to books, reports, periodicals, or other writings, but rather to "products of a more tangible nature."¹⁰⁴ Finally, the court noted that "mere words" can give rise to liability in a narrow line of failure to warn cases, but that the actual injury in such cases is not caused by the words but rather by the underlying product whose dangers were not disclosed properly.¹⁰⁵

C. Aeronautical Charts

Despite what appears to be a trend in modern case law against imposing strict liability for "defective ideas," courts have refused to exempt certain publications, such as aircraft instrument approach charts, from the operation of section 402A. The first case applying strict liability to an instrument approach chart was *Aetna Casualty & Surety Company v. Jeppesen & Co.*¹⁰⁶ In *Aetna* the survivors of a plane crash

98. *Id.* at 54, 506 N.Y.S.2d at 526.

99. *Id.*

100. 629 F. Supp. 1425 (D. Conn. 1986). Although the plaintiff did not assert a § 402A claim, this case involved the question of whether a credit report was a product. *See also* Kennedy v. Providence Hockey Club, 119 R.I. 70, 376 A.2d 329 (1977) (holding that purchase of a hockey ticket for a game in which the plaintiff was injured while sitting in the stands was not a transaction involving a product within the meaning of products liability).

101. CONN. GEN. STAT. § 52-572m (1982).

102. *L. Cohen & Co.*, 629 F. Supp. at 1426.

103. *Id.* at 1430.

104. *Id.*

105. *Id.* at 1430 n.6. An example would be a lawn mower with defective starting instructions. Liability attaches because the erroneous instructions inextricably are tied to the product with which they are sold, a product that causes the actual physical harm. The conclusion is consistent with prior case law, and, thus, logically would remove books, magazines, and other publications not sold with an underlying product from the sphere of strict liability.

106. 642 F.2d 339 (9th Cir. 1981).

asserted that the crash was caused by a defective approach chart. The chart had been prepared by Jeppesen by using the Federal Aviation Administration's tabular compilations of instrument approach procedures.¹⁰⁷ The error in the chart was that the graphic depiction of the profile was drawn to the same scale as the graphic depiction of the plan, when in fact the plan was five times the size of the profile.¹⁰⁸ Both the district court and the Ninth Circuit held that Jeppesen's chart was a product for purposes of section 402A strict liability.¹⁰⁹ While the courts simply asserted that the Jeppesen chart was a product without explaining why, this finding was not challenged seriously by Jeppesen in the *Aetna* cases.¹¹⁰

Perhaps the reason why Jeppesen failed to challenge this finding was that, at the time *Aetna* was decided, the only possible contrary view was expressed in dicta in *Times Mirror Co. v. Sisk*.¹¹¹ *Times Mirror* involved the fatal crash of a cargo jet into a mountain range outside Manila. One of the plaintiffs' claims was that the defendant, Jeppesen, was strictly liable under section 402A because the defective approach chart did not show the presence of the mountains.¹¹² While the jury found for Jeppesen, the trial judge granted judgment *non obstante verdicto*.¹¹³ In reinstating the original verdict as sufficiently supportable to be immune from judgment *n.o.v.*, the appellate panel noted that it had questioned whether the case was a products liability case.¹¹⁴ However, even if the chart was considered to be a defective product, the court concluded that pilot error was the proximate cause of the crash.¹¹⁵ It was not until *Halstead v. United States*¹¹⁶ that any court rendered a thoughtful opinion as to why an aircraft approach chart should be considered a product for the purposes of section 402A.

Halstead involved the crash of a small private plane while attempting a full instrument landing at a West Virginia airfield. The plane had the electronic equipment needed for a full instrument landing, but the airfield did not. The pilot relied on a Jeppesen area chart which erroneously indicated that the airfield had a complete instrument landing system. Because the airfield equipment could not inform the pilot of his approach altitude, the pilot was unable to avoid descending his plane

107. *Id.* at 342.

108. *Id.*

109. *Id.*; see also *Aetna Casualty & Sur. Co. v. Jeppesen & Co.*, 463 F. Supp. 94, 96 (1978).

110. Abney, *Liability for Defective Aeronautical Charts*, 52 J. AIR L. & COM. 323, 327 (1986).

111. 122 Ariz. 174, 593 P.2d 924 (Ct. App. 1978).

112. *Id.* at 175-77, 593 P.2d at 925-27.

113. *Id.* at 175, 593 P.2d at 925.

114. *Id.* at 177, 593 P.2d at 927.

115. *Id.* at 179, 593 P.2d at 929.

116. 535 F. Supp. 782 (D. Conn. 1982).

into a ridge.¹¹⁷ Jeppesen contended that it could not be subject to strict liability because it was rendering a service, not selling a product.¹¹⁸ It argued that the essence of its transactions with the airlines was the conveyance of information, and that the paper on which the map was printed was merely the mode of conveying the information to subscribers.¹¹⁹ Consequently, Jeppesen tried to compare its role to that of an architect, engineer, or doctor—all service professionals.¹²⁰ The district court rejected Jeppesen's arguments, holding that the chart was a product for strict liability purposes.¹²¹ The court refused to engage in the "product/service" semantic exercises because classification of the charts as products conformed to the policy rationale behind section 402A.¹²² District Judge Eginton stated that the rationale of section 402A applied because Jeppesen "mass produced and distributed its charts."¹²³ He noted that the comments to *Restatement* section 402A indicate that strict liability was intended to place special liability on those who mass distribute defective products to the general public.¹²⁴ Because of their mass market feature, the approach charts were "fungible goods" and, thus, fundamentally different from individualized architectural drawings.¹²⁵ The court seemed to indicate that because Jeppesen mass produced and distributed thousands of charts on the aviation market, it was like the traditional strict liability defendant who can bear the cost by distributing the risk of injury through insurance and higher prices better than the individual consumer.¹²⁶ The Second Circuit Court of Appeals agreed with the district court's analysis that the policy justifications for strict liability applied to the Jeppesen charts.¹²⁷

117. *Id.* at 784-85.

118. *Id.* at 789. For a discussion of the transaction analysis, see *supra* notes 36-38 and accompanying text.

119. *Halstead*, 535 F. Supp. at 789.

120. *Id.*

121. *Id.* at 791.

122. *Id.* at 790-91.

123. *Id.* at 791.

124. *Id.*; see *RESTATEMENT OF TORTS*, *supra* note 2, § 402A comments c & f.

125. 535 F. Supp. at 791. The court noted analogous labor cases holding that plans, maps, and plats could be goods. See *Wirtz v. A.S. Giometti & Assocs.*, 399 F.2d 738 (5th Cir. 1968); *Schultz v. Merriman*, 303 F. Supp. 1174 (D.N.H. 1969), *modified on other grounds*, 425 F.2d 228 (1st Cir. 1970).

126. For a description of the policy justifications behind strict liability, see *supra* notes 17-20 and accompanying text.

127. *Salomey v. Jeppesen & Co.*, 707 F.2d 671, 677 (2d Cir. 1983) (stating that "the mass production and marketing of these charts requires Jeppesen to bear the costs of accidents that are proximately caused by defects in the charts"), *aff'g Halstead v. United States*, 535 F. Supp. 782 (D. Conn. 1982). The court also noted:

By publishing and selling the charts, Jeppesen undertook a special responsibility, as seller, to insure that consumers will not be injured by the use of the charts; Jeppesen is entitled—and encouraged—to treat the burden of accidental injury as a cost of production to be covered by

In 1985 the Ninth Circuit Court of Appeals followed the logic of *Halstead in Brocklesby v. United States*.¹²⁸ The court held that Jeppesen was strictly liable for publishing a defective United States government-created instrument approach procedure which resulted in the crash of a cargo plane. Jeppesen argued that the government's instrument approach procedure was a procedure, not a product.¹²⁹ Unpersuaded by this argument, the *Brocklesby* court held that the mass production and marketing aspects of the chart made it a defective product subjecting Jeppesen to liability under section 402A.¹³⁰ As in *Halstead*, the policy rationale of section 402A applied because Jeppesen could spread the risk of loss. The court also noted the difference between aeronautical charts and the books and magazines in *Cardozo*,¹³¹ *Walter*,¹³² and *Herceg*.¹³³ The court stated that books and magazines are not dangerous if they are used in their intended manner.¹³⁴ Specifically, the court said that the plaintiff in *Walter* "was not injured by the use of the book for the purpose for which it was designed, i.e., to be read," whereas Jeppesen's chart was "allegedly dangerous for the use for which it was designed."¹³⁵

The first state case to address whether instrument approach charts constitute products under section 402A was *Fluor Corp. v. Jeppesen & Co.*¹³⁶ In *Fluor* a jet plane crashed into Johnson Hill at 2140 feet while attempting to land in New York on a snowy night in 1972. Johnson Hill, the highest point in the crash area, was not shown on the instrument approach chart. Rather, the highest hill designated in the area was only 1991 feet in elevation. In keeping with the federal courts' rea-

liability insurance.

Id. at 676-77.

128. 753 F.2d 794 (9th Cir.), amended on other grounds, 767 F.2d 1288 (9th Cir. 1985), cert. denied, 474 U.S. 1101 (1986).

129. *Id.* at 800.

130. *Id.*; see also *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 656 F. Supp. 49, 66 (S.D. Ohio 1986). In *Cincinnati Gas*, the court stated:

The doctrine of strict liability is primarily intended to impose special liability on those who market defective products to the general public in a mass-production context. Even if the Sargent and Lundy "design" could somehow be construed as a product for purposes of section 402A, the design was specially tailored to the Zimmer Plant and was not mass-produced.

Id. (citation omitted).

131. 342 So. 2d 1053 (Fla. Dist. Ct. App. 1977). For a full discussion of *Cardozo*, see *supra* notes 55-67 and accompanying text.

132. 109 Misc. 2d 189, 439 N.Y.S.2d 821 (Sup. Ct. 1981). For a full discussion of *Walter*, see *supra* notes 68-72.

133. 565 F. Supp. 802 (S.D. Tex. 1983). For a full discussion of *Herceg*, see *supra* notes 73-76 and accompanying text.

134. *Brocklesby*, 753 F.2d at 800 n.9.

135. *Id.* (quoting *Walter*, 109 Misc. 2d at 189, 439 N.Y.S.2d at 821).

136. 170 Cal. App. 3d 468, 216 Cal. Rptr. 68 (1985).

soning in *Halstead* and *Brocklesby*, the California Court of Appeals held that policy considerations made strict liability applicable to the approach charts.¹³⁷ The court rejected as erroneous the trial court's view that strict liability was applicable only to items whose physical properties render them innately dangerous.¹³⁸

A persistent flaw in the decisions that hold Jeppesen strictly liable for its aircraft instrument approach charts is the view that the policies behind strict liability mandate such a result. Courts argue that because aircraft charts are mass produced and marketed, the costs of injuries resulting from defective charts can be borne best by the mass distributor. However, books and magazines also are mass produced, yet courts consistently are unwilling to impose strict liability for "defective ideas" which may be contained within them. In fact, it is likely that books and magazines reach many more consumers than do aircraft approach charts. Also, these charts are similar to books because a consumer is purchasing the charts to obtain the information contained therein, not the charts themselves. Charts disseminate information, the free flow of which should not be impaired by the imposition of strict liability.¹³⁹ The privileged position of ideas, even in a commercial context, should outweigh the underlying cost distribution policies of strict liability.

A second flaw in the reasoning of these decisions is that the usual conditions triggering the imposition of strict liability are not present in the case of aircraft charts. The doctrine of strict liability is designed to protect persons injured by defective products on which they are forced to rely and against which they are powerless to protect themselves.¹⁴⁰ However, Jeppesen provides its service, not to an uninformed and powerless consumer, but rather to sophisticated airlines and pilots.¹⁴¹ Airline industry professionals have the technical expertise and the duty to study the charts which they use and, thus, are not forced to rely on the superior knowledge and expertise of the chart manufacturer.¹⁴²

137. *Id.* at 475, 216 Cal. Rptr. at 71.

138. *Id.* at 475, 216 Cal. Rptr. at 71-72. The court stated:

[A]lthough a sheet of paper might not be dangerous, per se, it would be difficult indeed to conceive a salable commodity with more inherent lethal potential than an aid to aircraft navigation that, contrary to its own design standards, fails to list the highest land mass immediately surrounding a landing site.

Id. at 476, 216 Cal. Rptr. at 71-72.

139. See *Cardozo v. True*, 342 So. 2d 1053, 1057 (Fla. Dist. Ct. App. 1977).

140. McCowan, *Liability of the Chartmaker*, 47 *INS. COUNS. J.* 359, 364 (1980).

141. *Id.*

142. *Id.* An argument can also be made that a chart manufacturer really is providing a service. As McCowan notes:

A chart publisher who prepares an approach chart by gathering information already specified by the appropriate authority and who depicts that information in such a manner as to be more readily and efficiently used by instrument rated pilots, may fairly be seen as providing a

An additional flaw in the *Brocklesby* analysis is the court's attempt to contrast the fact that the aircraft chart was dangerous for the use for which it was designed whereas a defective book was not dangerous for its purpose.¹⁴³ This distinction is not credible and should not be used to exempt books, but not charts, from strict liability. Similar to a science textbook, an aircraft chart is designed to be read. Further, the harm is caused in both cases not by the physical properties of the publications, but rather by carrying out the erroneous instructions contained within the publication.¹⁴⁴

The *Fluor* court made a similar erroneous leap of logic by disregarding a formidable body of case law and holding that a product need not possess innate danger to fall within the scope of section 402A. This conclusion directly contravenes the view that strict liability is not appropriate for words, but only for products that cause the actual injury because of some inherent defect.¹⁴⁵

Finally, and most importantly, the courts holding that strict liability applies to aircraft instrument approach charts have overlooked one important policy consideration behind strict liability. Strict liability was designed to relieve plaintiffs from the difficult burden of proving negligence.¹⁴⁶ Many commentators argue that this consideration is the most important policy justification for strict liability because otherwise, given the virtual impossibility of proving negligence, the plaintiff likely would be without a remedy.¹⁴⁷ However, in the cases involving defective aircraft instrument approach charts, negligence would be relatively easy to prove.¹⁴⁸ For example, failing to list Johnson Hill as the highest point near a landing site would constitute a prima facie case of negligence because a reasonable chartmaker exercising due care in investigating landmarks for the chart should have known or discovered that such a hill existed. In sum, the policies underlying strict liability illustrate why strict liability should not apply in cases of defective aircraft instrument approach charts.

service rather than a product.

Id. at 365.

143. See *Brocklesby*, 753 F.2d at 800 n.9. For a discussion of this reasoning, see *supra* notes 134-35 and accompanying text.

144. See *supra* notes 43-54 and accompanying text.

145. See *supra* notes 43-54 and accompanying text.

146. *Fluor*, 170 Cal. App. 3d at 474-75, 216 Cal. Rptr. at 71.

147. See *Dippel v. Sciano*, 37 Wis. 2d 443, 460, 155 N.W.2d 55, 63 (1967).

148. See McCowan, *supra* note 140, at 369. McCowan notes, "[a]s a practical matter, it is difficult to hypothesize a chart deficiency which would support a finding of a product defect that would not also lead the trier of fact to find against the producer on a negligence theory." *Id.*

III. IMPLICATIONS OF IMPOSING STRICT LIABILITY ON PUBLICATIONS

A. *First Amendment Concerns*

Given the United States Supreme Court's holdings in *New York Times Co. v. Sullivan*¹⁴⁹ and *Gertz v. Robert Welch, Inc.*,¹⁵⁰ there is a serious question as to whether strict liability will be imposed for "defective" ideas.¹⁵¹ The holdings in *Sullivan* and *Gertz*, taken together, provide that strict liability is prohibited by the first amendment in defamation actions.¹⁵² To recover for defamation, a private plaintiff must show some fault on the part of the defendant.¹⁵³ Professor Jerry Phillips has asserted that there is no meaningful distinction between the speech interests involved in defamation suits and those interests involved in a strict liability action.¹⁵⁴ If this assertion is true, there would be no greater interest in preventing tortious misconduct in either case.¹⁵⁵ Further, if suits based on innocent misstatements constitutionally are prohibited in defamation, they also logically should be prohibited in strict liability cases.¹⁵⁶ It seems incongruous to afford an author protection from strict liability when the cause of action is characterized as one in defamation or other communication tort but offer no strict liability protection when the action is characterized as one of products liability. Imposing strict liability on writers and publishers under product liability law effectively would nullify the constitutional constraints on the law of defamation.¹⁵⁷ This logic would apply to various forms of commercial speech,¹⁵⁸ including credit reports¹⁵⁹ and aircraft instru-

149. 376 U.S. 254 (1964).

150. 418 U.S. 323 (1974). In both *Sullivan* and *Gertz*, the Supreme Court has recognized that the imposition of tort liability on private defendants for the use of words involves state action, which implicates the first and fourteenth amendments. See *Sullivan*, 376 U.S. at 265.

151. See generally Phillips, *supra* note 64.

152. *Id.* at 395. Phillips notes that some cases indicate even a negligence standard may be constitutionally prohibited. *Id.* at 399; see, e.g., *Libertelli v. Hoffman-La Roche, Inc.*, [1980-1981 Transfer Binder] Prod. Liab. Rep. (CCH) ¶ 8968, at 20,573 (S.D.N.Y. Feb. 20, 1981) (stating that a publisher cannot constitutionally be held liable "for false reports of matters of public interest absent knowledge of falsity or reckless disregard of the truth").

153. See Phillips, *supra* note 64, at 395. While the Phillips article focuses on *Restatement* § 402B misrepresentation rather than § 402A, both sections involve strict liability. The basic difference is that § 402B requires reliance on a "misrepresentation of a material fact concerning the character or quality of a chattel." See *RESTATEMENT OF TORTS*, *supra* note 2, § 402B.

154. Phillips, *supra* note 64, at 401-06. Phillips argues that the interests invaded the means of communication used, and the nature of the speech involved in defamation actions bear only a slight difference to those factors in a strict liability action. The differences are not enough to make a constitutional difference, and thus a first amendment defense should be justified in strict liability actions as well as defamation. *Id.*

155. See *id.* at 406.

156. *Id.*

157. See *L. Cohen & Co. v. Dun & Bradstreet, Inc.*, 629 F. Supp. 1425, 1431 (D. Conn. 1986).

158. There is no essential constitutional distinction between speech in a defamation context

ment approach charts, because the imposition of strict liability on commercial publications would be a short step from the imposition of liability without fault on an author or a publisher.¹⁶⁰ Any attempts to distinguish different types of publications for legal purposes would lead to impermissible content-based first amendment discrimination.¹⁶¹

Even if strict liability constitutionally could be imposed for misstatements or omissions in publications, its imposition likely would have a chilling effect on authors and publishers.¹⁶² Strict liability would discourage authors from writing and publishers from publishing because of a fear of exposure to liability from the vast number of plaintiffs that foreseeably would have access to their publications in the mass market.¹⁶³ Anything that has the effect of discouraging the exercise of a constitutional right should raise serious concerns. Given the importance of the uninhibited exchange of ideas in a free society, imposing strict liability for erroneous information in publications would create disturbing consequences. As the *Alm* court noted, the adverse effect of strict liability on the public's free access to ideas would be "too high a price to pay."¹⁶⁴ Society's interest in the "untrammelled dissemination of knowledge" should override all other policy concerns.¹⁶⁵

B. Effect on New Industries

Imposing strict liability for defective words or ideas also could hamper the development of new processes and technologies. This result is very likely in the area of computer software.¹⁶⁶ Computer software is not a tangible product. Programs and data are "entities that exist as patterns,"¹⁶⁷ unlike chattels to which section 402A is designed to ap-

and commercial speech. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

159. Credit reports are a form of commercial speech protected by the first and fourteenth amendments. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

160. See *L. Cohen & Co.*, 629 F. Supp. at 1431.

161. *Alm v. Van Nostrand Reinhold Co.*, 134 Ill. App. 3d 716, 722, 480 N.E.2d 1263, 1267 (1985). The court noted the first amendment problem raised by attempting to distinguish bad advice in a "how to" book from that in a treatise or great work of literature. *Id.*

162. See *id.* at 722, 480 N.E.2d at 1267; *Walter v. Bauer*, 109 Misc. 2d 189, 191, 439 N.Y.S.2d 821, 822-23 (Sup. Ct. 1981).

163. As the court in *Walter* noted, "[w]ould any author wish to be exposed to liability for writing on a topic which might result in physical injury, e.g., how to cut trees, how to keep bees?" 109 Misc. 2d at 191, 439 N.Y.S.2d at 823.

164. *Alm*, 134 Ill. App. 3d at 722, 480 N.E.2d at 1267.

165. *Demuth Dev. Corp. v. Merck & Co.*, 432 F. Supp. 990, 993 (E.D.N.Y. 1977).

166. See *Freed, Products Liability in the Computer Age*, 12 FORUM 461 (1977); *Walker*, *supra* note 5, at 12-15.

167. Comment, *Computer Software and Strict Products Liability*, 20 SAN DIEGO L. REV. 439, 442 (1983) (citing 2 R. DIDDAY, HOME COMPUTERS: QUESTIONS AND ANSWERS (1977)).

ply.¹⁶⁸ It has been argued that the output produced by a computer is the computer's way of communicating the functions that it has performed, in much the same way that humans use speech to communicate thoughts.¹⁶⁹ Thus, computer output would be comparable to the written expression of ideas.¹⁷⁰ If courts are willing to apply strict liability for defective ideas in aircraft approach charts, they likely will do so for defective computer programs. This analogous application will create problems because many computer software manufacturers believe themselves to be service providers.¹⁷¹ As service providers, they generally fail to obtain appropriate products liability insurance coverage.¹⁷² One mistake in the thousands of bits of information in a program might expose them to tremendous potential liability. This potential liability could cause many manufacturers to cease production of software that is vital to managing the world's affairs.¹⁷³

The rationale behind the court's decision in *Fluor Corp. v. Jepsen & Co.*¹⁷⁴ particularly should be disturbing to computer software manufacturers and others involved in public projects. The *Fluor* court applied strict liability to the aircraft chart not because the chart had inherently dangerous properties, but because the potential loss of life from the omission of Johnson Hill on the chart was tremendous.¹⁷⁵ The magnitude of the harm was so great that the policies behind strict liability were deemed to apply.¹⁷⁶ This policy justification for finding strict liability may have far reaching implications.¹⁷⁷ Computer software use has become more widespread in society, particularly in running hospitals and controlling public transportation.¹⁷⁸ Other professions also should be concerned. By focusing on the nature of the harm resulting from a defective idea in a publication or intangible good rather than the inherent dangerousness of the publication or good itself, an incalculable number of items could expose manufacturers or distributors to strict liability.¹⁷⁹ The threat of strict liability may halt the development of emerging industries or cause existing businesses to raise their prices drastically to cover sky-rocketing insurance rates.¹⁸⁰ This potential lia-

168. *Id.* at 445.

169. Freed, *supra* note 166, at 474-77.

170. *Id.*

171. See Walker, *supra* note 5, at 2.

172. *Id.*

173. See *id.*

174. See *supra* notes 136-38 and accompanying text.

175. *Fluor*, 170 Cal. App. 3d at 476, 216 Cal. Rptr. at 71-72.

176. See *id.* at 475, 216 Cal. Rptr. at 71.

177. Walker, *supra* note 5, at 14.

178. See *id.*

179. See *id.* at 14-15.

180. *Id.* at 1-2, 15; see also Andresky, *A World Without Insurance?*, FORBES, July 15, 1985, at

bility may force many producers of beneficial technology out of business entirely.¹⁸¹ In any event, the societal costs of imposing strict liability in these situations may be too great for the commercial system to bear.¹⁸²

V. CONCLUSION

Strict liability should not be imposed on publications that contain erroneous or defective information. Ideas are not commercial products, and imposing strict liability on those who distribute information would have a chilling effect on first amendment freedoms. Authors and publishers would be dissuaded from disseminating their publications because the risk of liability would be so tremendous. While policy arguments may be made in favor of imposing strict liability on publications, these policies are outweighed by the important need for the free flow of ideas. In order to survive, a democratic society depends on uninhibited free trade in the marketplace of ideas.

Second, to impose strict liability on an item whose physical properties contain no inherent danger would be to violate the intent of section 402A. The comments to section 402 seem to indicate that the provision only was intended to apply to factual situations in which the product itself caused the injury. Also, one of the most important policy justifications for strict liability under section 402A, to remove the difficult burden of proving negligence, would not be present in cases involving publications. A plaintiff easily could prove that a reasonable defendant would have exercised care in investigating, writing, proofreading, and publishing.

Finally, and perhaps most importantly, the imposition of strict liability likely will hamper, and potentially will preclude, the development of socially important products. Many manufacturers of important new technology may find the potential liability under section 402A to be too heavy a burden to bear and, thus, cease to produce their products. Society will suffer greatly if innovative products, including computer software packages and other articles of property used to transmit information or solve problems, remain undeveloped.

Andrew T. Bayman

40; Brody, *When Products Turn Into Liabilities*, FORTUNE, Mar. 3, 1986, at 20.

181. See Walker, *supra* note 5, at 1.

182. *Id.* at 15.