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The Applicability of Strict Products Liability to Sales of Live Animals

by

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The Applicability of Strict Products Liability to Sales of Live Animals

The law of strict products liability has developed rapidly since the first opinions in support of the doctrine by Justice Traynor of the California Supreme Court.[1] The theory has enjoyed widespread acceptance[2] and innovative application to many frontiers, expanding in coverage of products,[3] plaintiffs,[4] and defendants.[5] However, one significant area of commerce has gone virtually unnoticed by products liability lawyers in this era of expanding strict liability. This area is the purchase and sale of live animals.[6]

Generally, the buyer of live animals who suffers injury because of some defect in the animals' condition may seek redress under theories of warranty and negligence.[7] However, if allowed, a theory of strict liability would be an attractive option to the injured buyer because of the limita-

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1. Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring); Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963).

2. *See, e.g.*, 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A[3] (1981); 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 4:41 (2d ed. 1974 & Supp. 1980).

3. *See, e.g.*, Cunningham v. MacNeal Memorial Hosp., 47 Ill. 2d 443, 447, 266 N.E.2d 897, 899 (1970) (blood); Petroski v. Northern Ind. Pub. Serv. Co., 171 Ind. App. 14, 30, 354 N.E.2d 736, 747 (1976) (electricity).

4. *See, e.g.*, Elmore v. American Motors Corp., 70 Cal. 2d 578, 587, 451 P.2d 84, 89, 75 Cal. Rptr. 652, 657 (1969) (bystander); Moss v. Polyco, Inc., 522 P.2d 622, 626 (Okla. 1974) (bystander).

5. *See, e.g.*, Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 457, 212 A.2d 769, 781 (1965) (lessor); Nath v. National Equip. Leasing Corp., 473 Pa. 178, 180, 373 A.2d 1105, 1106 (1977) (lessor).

6. *Cf.* Note, *Implied Warranties in the Sale of Diseased Livestock in Iowa; A Return to Caveat Emptor?*, 31 DRAKE L. REV. 637, 649-50 (1981-82) (list of remedies available to buyers of diseased animals; fails to include strict liability). Total animal commerce volume would include, *inter alia*, sales of livestock, pets, and investment animals such as racehorses. The sales figures for one particular type of creature give some indication of the significance of this commercial area. For the first 11 months of 1981, 358,000 cattle constituted 14.6% of all grain-fed slaughter beef sold by Iowans. Des Moines Sunday Register, Dec. 27, 1981, § F (Farm), at 2, col. 4. Thus the 11-month sales volume of that single commodity in Iowa alone reached nearly 2.5 million head.

7. *See* Anderson v. Farmers Hybrid Cos., 87 Ill. App. 3d 493, 501, 408 N.E.2d 1194, 1199 (1980). *Cf.* R. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 26 (1980) (warranty and negligence are two of "three dominant theories used in products liability actions"; third theory is strict liability); 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 4:2 (2d ed. 1974) (negligence and warranty were "chief potential avenues to recovery for products liability" before advent of strict liability); Kimble, *Theories of Pleading*, in PRACTISING LAW INSTITUTE, PRODUCTS LIABILITY—NEW DEVELOPMENTS 21 (1970) (typical products liability complaint includes theories of negligence and warranty, in addition to strict liability).

tions and burdens of the other theories.[8] For example, warranty theories are subject to a variety of limitations.[9] Express warranties exist only by the seller's caprice. Implied warranties are subject to conspicuous disclamation[10] and, in some states, statutory exemption.[11] The buyer may also find strict liability preferable to negligence. Unlike negligence, strict liability does not require proof that seller failed to exercise reasonable care[12] and is not vulnerable to a defense of contributory negligence.[13]

In some cases, these limitations may combine to render strict liability the injured buyer's only available alternative. For example, in situations in which the seller gives no express warranty and conspicuously disclaims all implied warranties, the contributorily negligent buyer's recourse under contract and negligence theories is foreclosed.[14] Absent a statutory source of liability,[15] the buyer in this situation will have no redress if denied a theory of strict liability.[16] Clearly, the advantages of strict liability invite inquiry into its applicability to the sale of live animals.

The issue of the applicability of strict liability to transactions in live animals has arisen twice at the intermediate appellate level in Illinois.[17] If left standing in Illinois and followed elsewhere, the doctrine of these novel cases would categorically foreclose the availability of strict tort recovery in this important commercial context.[18] The paucity of other

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8. For a comparison of the theories of warranty, negligence, and strict liability, see Galligan, *Strict Liability in Tort*, in ASSOCIATION OF TRIAL LAWYERS OF IOWA, PRODUCTS LIABILITY IN-DEPTH 75-76 (1974).

9. Warranty theories, such as provided for in U.C.C. § 2-314 (1978), arise from contracts, which are the result of bargaining between the parties. However, some situations, such as auctions, offer little or no opportunity for bargaining. Thus, warranty theories seem particularly ill-suited for auction sales. *See generally* IOWA CODE § 554A.1(b) (1981). Notably, much of the nation's commerce in animals takes place at auctions. *See U.S. Farm Auctions Rate Low Bid*, FARM INDEX, June 1975, at 20; *Business as Usual at the Livestock Auction*, FARM INDEX, June 1971, at 12-13.

10. *See* U.C.C. § 2-316(2), (3) (1978).

11. *E.g.*, IOWA CODE § 554A.1 (1981); S.D. CODIFIED LAWS ANN. § 57A-2-316.1 (1980). *See generally* Note, *The Iowa Livestock Warranty Exemption: Illusory Protection for the Buyer*, 67 IOWA L. REV. 133 (1981).

12. Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 66, 207 A.2d 305, 313 (1965); *see* 2 RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (1965), *reproduced at* note 22 *infra*.

13. 2 RESTATEMENT (SECOND) OF TORTS § 402A comment n, at 356 (1965).

14. In comparative negligence jurisdictions, contributory negligence at least reduces plaintiff's recovery and, in some states, may bar recovery altogether. *See* Li v. Yellow Cab Co., 13 Cal. 3d 804, 827, 532 P.2d 1226, 1242, 119 Cal. Rptr. 858, 874 (1975).

15. *E.g.*, Illinois Diseased Animals Act § 24, ILL. REV. STAT. ch. 8, § 191 (1979); Animal Control Act § 16, ILL. REV. STAT. ch. 8, § 366 (1979).

16. For a discussion of the societal benefits of imposing strict liability in this and other situations, see text accompanying notes 36-46 *infra*.

17. Anderson v. Farmers Hybrid Cos., 87 Ill. App. 3d 493, 408 N.E.2d 1194 (1980); Whitmer v. Schneble, 29 Ill. App. 3d 659, 331 N.E.2d 115 (1975).

18. *See* notes 77-84 *infra* and accompanying text.

cases on this issue[19] renders the Illinois decisions required reading for any lawyer or judge who may encounter the question. The rigidity of the doctrine developing in these cases necessitates assessment of its persuasiveness as authority.

In *Anderson v. Farmers Hybrid Cos.*[20] an Illinois Appellate Court held that live gilts,[21] sold for breeding purposes, are not "products" within the meaning of *Restatement (Second) of Torts* section 402A.[22] Adhering to the approach developed in *Whitmer v. Schneble*,[23] *Anderson* broadly disapproved the applicability of strict products liability to any transaction in living creatures.[24] As a result, the strict tort liability option appears to be categorically foreclosed to buyers of diseased or otherwise defective[25] animals in Illinois.

The problematic aspect of the approach of the Illinois courts is the

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19. One of the Illinois decisions noted that plaintiffs were unable to cite "any case from any jurisdiction which has held a living creature to be a 'product.' " Anderson v. Farmers Hybrid Cos., 87 Ill. App. 3d at 501, 408 N.E.2d at 1199. The *Anderson* plaintiffs apparently overlooked Beyer v. Aquarium Supply Co., 94 Misc. 2d 336, 404 N.Y.S.2d 778 (Sup. Ct. 1977), holding that the doctrine of strict liability applies to the distribution of diseased hamsters. *Id.* at 336-37, 404 N.Y.S.2d at 778-79.

20. 87 Ill. App. 3d 493, 408 N.E.2d 1194 (1980).

21. Gilts are immature female swine. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 957 (1976).

22. 87 Ill. App. 3d at 501, 408 N.E.2d at 1199.

Entitled "Special Liability of Seller of Product for Physical Harm to User or Consumer," § 402A provides:

> (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
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> (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.
>
> . . . .
>
> Caveat:
>
> The Institute expresses no opinion as to whether the rules stated in this Section may not apply
>
> (1) to harm to persons other than users or consumers;
>
> (2) to the seller of a product expected to be processed or otherwise substantially changed before it reaches the user or consumer; or
>
> (3) to the seller of a component part of a product to be assembled.

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

23. 29 Ill. App. 3d 659, 663, 331 N.E.2d 115, 119 (1975).

24. *See* 87 Ill. App. 3d at 501, 408 N.E.2d at 1199.

25. Possible defects other than disease include genetic defects and physical defects such as improperly healed fractures. *See* text accompanying notes 119-20 *infra*.

analytical link between the courts' reasoning and conclusion. Both *Anderson* and *Whitmer* attached controlling significance to the changing nature of living creatures and their constant interaction with the environment.[26] Based on these observations, the courts in *Anderson* and *Whitmer* concluded that living creatures are not products within the meaning of section 402A;[27] hence, these cases authorize the exclusion of all sales of live animals from the coverage of strict products liability. However, section 402A reveals that mutability, while significant and perhaps controlling on the issue of the section's applicability in any given case,[28] is not determinative on the issue of product status.[29]

The issue raised by *Anderson* is the effect of animals' inherent mutability on the applicability of strict products liability to animal sales.[30] The purpose of this Note is to suggest an analytical framework for the resolution of this issue. Several steps will be taken toward that end. First, the policy considerations traditionally invoked in support of strict liability will be discussed.[31] Second, the development and contours of the "product" concept will be examined.[32] Third, the categorical exclusion of transactions in animals from the coverage of strict liability and an opposing view will be examined[33] and the problematic aspects of the exclusionary approach will be discussed.[34] Finally, this Note will develop an alternative approach that permits the imposition of strict liability on animal sellers in certain cases.[35]

I. The Policies Underlying Strict Products Liability

The arguments traditionally invoked in support of strict products liability suggest that its imposition furthers three major policy goals. The first of these goals is compensation. Proponents of strict liability argue that the public interest requires the suppliers of defective products to compensate the products' victims.[36] Several reasons for this compensation policy have been articulated. One common argument is that suppliers reap the profit of their activity, and thus fairness requires that suppliers also bear

26. *Id.* at 500-01, 408 N.E.2d at 1199; Whitmer v. Schneble, 29 Ill. App. 3d at 663, 331 N.E.2d at 119.

27. Anderson v. Farmers Hybrid Cos., 87 Ill. App. 3d at 501, 408 N.E.2d at 1199; *see* Whitmer v. Schneble, 29 Ill. App. 3d at 663, 331 N.E.2d at 119.

28. *See* 2 Restatement (Second) of Torts § 402A(1)(b) (1965), *reproduced at* note 22 *supra*.

29. *See* text accompanying notes 93-97 *infra*.

30. *See* 87 Ill. App. 3d at 499-501, 408 N.E.2d at 1198-99.

31. *See* text accompanying notes 36-46 *infra*.

32. *See* text accompanying notes 47-64 *infra*.

33. *See* text accompanying notes 65-88 *infra*.

34. *See* text accompanying notes 89-120 *infra*.

35. *See* text accompanying notes 121-38 *infra*.

36. *See* Henderson, *Extending the Boundaries of Strict Products Liability: Implications of the Theory of the Second Best*, 128 U. Pa. L. Rev. 1036, 1039-40 (1980).

the losses.[37] Another rationale for placing the compensation duty on the suppliers is that the suppliers create the risks by placing their products in the stream of commerce.[38] A third argument is that consumers rely on suppliers to guard against product defects and the law should protect this reliance.[39]

Whenever suppliers are required to compensate victims of defective products, the cost of producing such products increases. This increase in cost provides the basis for the second major policy goal of strict liability: deterrence. The essence of the deterrence rationale is that the imposition of strict liability will benefit society by reducing the number of accidents caused by defective products.[40] Two parallel arguments are traditionally offered to support this conclusion. First, strict liability provides a financial disincentive for suppliers to market defective products by making the activity more costly. As suppliers respond to this disincentive, fewer defective products reach the market; correspondingly, fewer product-caused accidents occur.[41]

The second deterrence argument assumes that consumers, by underassessing product risks, tend to overconsume risky products. When strict liability increases the cost of marketing defective products, the suppliers are likely to pass the increased cost on to consumers in the form of higher prices. Because consumption is discouraged by higher prices, fewer defective products will be consumed. As a result, the number of product-caused injuries will decrease.[42]

Critics of the deterrence rationale argue that the negligence system creates identical incentives yet is less costly to operate because it shifts only negligently caused losses.[43] Proponents of strict liability respond to this contention on two levels. First, the incentive effects of negligence are less potent than those of strict liability because the difficulty of negligence proof often allows the marketers to escape liability.[44] Second, although the negligence system may result in fewer litigated cases than a system

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37. *See, e.g.*, Suvada v. White Motor Co., 32 Ill. 2d 612, 619, 210 N.E.2d 182, 186 (1965); Hawkeye-Security Ins. Co. v. Ford Motor Co., 174 N.W.2d 672, 684 (Iowa 1970) (quoting *Suvada*).

38. *See, e.g.*, Lechuga, Inc. v. Montgomery, 12 Ariz. App. 32, 37, 467 P.2d 256, 261 (1970) (Jacobson, J., concurring); Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring).

39. *See, e.g.*, Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 446-50, 212 A.2d 769, 775-78 (1965); 2 RESTATEMENT (SECOND) OF TORTS § 402A comment c, at 349-50 (1965).

40. *See* Henderson, *Extending the Boundaries of Strict Products Liability: Implications of the Theory of the Second Best*, 128 U. PA. L. REV. 1036, 1040 (1980).

41. *Id.*

42. *Id.*

43. *See* R. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 40-41 (1980).

44. *See* Henderson, *Extending the Boundaries of Strict Products Liability: Implications of the Theory of the Second Best*, 128 U. PA. L. REV. 1036, 1040 (1980).

of strict liability, an individual negligence suit is more costly to litigate than its strict liability counterpart because of the consumption of time that proof of negligence requires.[45]

This notion of reduced time consumption suggests the third major policy goal of strict liability: administrative efficiency. The elimination of the negligence requirement reduces the burden on the litigation system in two ways. First, elimination of the negligence requirement reduces the number of issues at trial, saving trial time. Second, the enhanced likelihood that suppliers will be held liable under a strict liability system creates an incentive for them to settle out of court, and this incentive may result in fewer litigated cases. By reducing the burden on the courts, strict liability improves the efficiency of the litigation process. The benefits of more efficient litigation accrue directly to society in the form of reduced expenditures.[46]

II. THE "PRODUCT" CONCEPT

Strict products liability has a history of expansive application. The earliest pressures for the elimination of the negligence requirement arose in the context of food for human consumption.[47] Once established in the food sale context, the theory's application was extended to transactions in products intended for intimate bodily use, such as soaps and hair dyes.[48] Next, courts began to erode the intimate bodily use requirement.[49] By 1963, the California Supreme Court was able to claim, with authority, that the theory applied not merely to unwholesome food, but also "to a variety of other products that create as great or greater hazards if defective."[50]

This history is mirrored by the development of section 402A. The original *Restatement of Torts* included no provision for strict products liability. Section 402A was introduced in the sixth tentative draft of the *Restatement (Second) of Torts*, but was limited in applicability to sales of food.[51] One year later, in 1962, Tentative Draft No. 7 broadened the section's coverage to include sales of products intended for intimate bodily use.[52] As finally

45. *See* R. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 29 (1980).

46. *See generally id.* at 28-29, 48.

47. *See* Wiedeman v. Keller, 171 Ill. 93, 99, 49 N.E. 210, 211 (1897); 2 RESTATEMENT (SECOND) OF TORTS § 402A comment b, at 349 (1965).

48. *See* RESTATEMENT (SECOND) OF TORTS § 402A note 4, at 12 (Tent. Draft No. 7, 1962).

49. *See* RESTATEMENT (SECOND) OF TORTS § 402A comment *l*, at 15-16 (Tent. Draft No. 7, 1962).

50. Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963) (citations omitted).

51. RESTATEMENT (SECOND) OF TORTS § 402A (Tent. Draft No. 6, 1961).

52. RESTATEMENT (SECOND) OF TORTS § 402A (Tent. Draft No. 7, 1962).

drafted, section 402A applies to the sale of "any product."[53]

Widespread adoption of section 402A[54] has ensured the continuing vitality of its expansive use of the "product" concept. However, courts are still grappling with the issue of what the "product" requirement includes. One transaction that has raised this issue is the transfusion of blood. Courts and commentators are sharply divided about the availability of section 402A recovery to recipients of impure blood.[55] One view holds that the transfusion is the rendition of a service, to which section 402A does not apply.[56] However, a contrary view readily finds the blood transfusion to be the sale of a product as required by section 402A.[57] The issue has been settled in many states by the enactment of statutes that abolish the imposition of strict liability on suppliers of blood.[58]

Notwithstanding legislative intervention, the cases that hold blood is a product are significant in the analysis of section 402A's applicability to animal sales. Blood is a life form which, although living at the microscopic level, is very complex.[59] Thus, the cases holding that blood is a product clearly reject the existence of life as a characteristic sufficient to exclude creatures from the coverage of strict products liability.

This conclusion can be distinguished from the cases that refuse to hold blood suppliers strictly liable. These cases focus on the transfusion as the essence of the blood supply transaction and reject strict liability because a service is involved. Thus, the division of opinion in this context actually stems from a divergence of views about the predominating aspect of the transaction; the cases that find the transfusion aspect to dominate reject strict liability without reaching the issue of blood's product status. Therefore, the cases rejecting strict liability are inapt on the issue of living creatures' product status.

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53. 2 RESTATEMENT (SECOND) OF TORTS § 402A (1965), *reproduced at* note 22 *supra*.

54. *See* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A[3] (1981); 1 R. HURSCH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 4:41 (2d ed. 1974 & Supp. 1980).

55. *See generally* Henderson, *Extending the Boundaries of Strict Products Liability: Implications of the Theory of the Second Best*, 128 U. PA. L. REV. 1036, 1053-56 (1980); Note, *Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction*, 24 HASTINGS L.J. 111, 121-23 (1972); Note, *What Is or Is Not a Product Within the Meaning of Section 402A*, 57 MARQ. L. REV. 625, 641-43 (1974).

56. *Cf.* Perlmutter v. Beth David Hosp., 308 N.Y. 100, 106, 123 N.E.2d 792, 795 (1954) (rejecting application of implied warranty theory).

57. *See, e.g.*, Russell v. Community Blood Bank, Inc., 185 So. 2d 749, 753 (Fla. Dist. Ct. App.), *aff'd as modified*, 196 So. 2d 115 (Fla. 1967); Cunningham v. MacNeal Memorial Hosp., 47 Ill. 2d 443, 447, 266 N.E.2d 897, 899 (1970).

58. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1606 (West 1979); An Act to define the nature of all transactions relating to procuring, furnishing, donating, processing, distributing or using human blood and blood derivatives and products, corneas, bones or organs or other human tissue § 2, ILL. REV. STAT. ch. 111½, § 5102 (1979).

59. *See* C. SAGAN, COSMOS 34-35 (1980).

However, an arguable distinction would preclude the blood cases from settling the question of strict liability's applicability to animal sales. Blood may be packaged to protect it from the effects of external influences. Animals may not be similarly packaged; instead, they are constantly exposed to the environment.[60] However, the significance of exposure to environmental phenomena in determining strict liability's applicability to animal sales varies with the facts of each case.[61] Thus, the importance of the packaging distinction should not be overemphasized.

The blood transfusion issue is also significant because it suggests the need for a methodology by which to delineate the contours of the "product" concept. The development of strict products liability from the early "food for human consumption" requirement to the "any product" standard of section 402A may be viewed as a gradual discarding of limitations not necessitated by the theory's rationale.[62] However, the theory should be constrained when its policies fail to justify its application.[63] One court has stated that "the policy reasons underlying the strict products liability concept should be considered in determining whether something is a product within the meaning of its use in the Restatement."[64] Thus, future expansion of the "product" concept depends on the rationale from which it originally stemmed.

III. Status of the Law on the Applicability of Strict Products Liability to Sales of Live Animals

Three cases address the availability of strict tort recovery to injured buyers of animals. Two of the cases, arising in Illinois, refuse to impose strict liability. The third case, a New York decision, holds that strict tort recovery is available in the live animal context.

A. *The Categorical Exclusion of Animal Sales from the Coverage of Strict Products Liability*

The two Illinois cases that have addressed the issue of the applicability of strict products liability to transactions in live animals concluded that

60. This distinction was noted in *Anderson*. 87 Ill. App. 3d at 500-01, 408 N.E.2d at 1199.

61. *See* notes 101-06 *infra* and accompanying text.

62. *See* text accompanying notes 47-53 *supra*.

63. The court in *Lowrie v. City of Evanston* refused to impose strict liability on the lessor of a parking garage and parking spaces on the ground that the policies of strict liability failed to support the product status of the garage and spaces. 50 Ill. App. 3d 376, 384-85, 365 N.E.2d 923, 928-29 (1977).

64. Lowrie v. City of Evanston, 50 Ill. App. 3d at 383, 365 N.E.2d at 928. *See also* Note, *What Is or Is Not a Product Within the Meaning of Section 402A*, 57 MARQ. L. REV. 625, 626-27 (1974).

animals are not products within the meaning of section 402A.[65] In so doing, these cases reach far beyond their own facts to foreclose the availability of strict tort recovery to all injured buyers of defective animals in Illinois.

Anderson v. Farmers Hybrid Cos. involved the sale of livestock by the defendant, Farmers Hybrid Companies, to the plaintiffs, Lawrence and Richard Anderson. In September 1972, the Andersons ordered, by phone, eleven gilts from Farmers Hybrid. They later received from Farmers Hybrid an order confirmation slip containing data about the transaction and a paragraph by which Farmers Hybrid sought to limit and condition any liability it might incur as a result of the sale.[66] The gilts were delivered in October. Upon delivery, some of the swine were infected with bloody dysentery, a contagious disease. The Andersons promptly phoned Farmers Hybrid about the situation, and a veterinarian hired by Farmers Hybrid investigated and advised the Andersons of cures. Nevertheless, the disease spread and destroyed some of the Andersons' other stock.[67]

The Andersons sued Farmers Hybrid, seeking damages for the loss of their hogs and the expenses of treatment. The seven-count complaint included a theory of recovery based on strict liability in tort.[68] The trial court sustained a defense motion to dismiss and strike the complaint, ruling, *inter alia*, that strict products liability had not been applied to the sale of living things.[69] The Illinois Appellate Court affirmed the dismissal of the strict liability theory, specifically holding that the gilts were not products within the meaning of section 402A.[70] In so doing, the court cited

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65. Anderson v. Farmers Hybrid Cos., 87 Ill. App. 3d at 501, 408 N.E.2d at 1199; Whitmer v. Schneble, 29 Ill. App. 3d at 663, 331 N.E.2d at 119.

66. 87 Ill. App. 3d at 495-96, 408 N.E.2d at 1196. The paragraph contained, *inter alia*, a warranty disclaimer, a 30-day written claim condition, and a clause limiting liability to the sale price. *Id.* at 496, 408 N.E.2d at 1196.

67. *Id.* at 496, 408 N.E.2d at 1196.

68. *Id.* at 495-97, 408 N.E.2d at 1195-96. The Andersons' other theories included breach of implied warranties, negligence, and liability under Illinois Diseased Animals Act § 24, ILL. REV. STAT. ch. 8, § 191 (1979), a diseased swine statute. 87 Ill. App. 3d at 495, 497, 408 N.E.2d at 1195, 1196-97.

69. 87 Ill. App. 3d at 495, 408 N.E.2d at 1195. The trial judge also ruled that Farmers Hybrid had effectively disclaimed the warranties, that the Andersons were not within the class of persons the statute was intended to protect, and that their failure to plead compliance with the written claim provision barred recovery based on negligence. *Id.* at 495, 408 N.E.2d at 1195-96. The trial judge noted that the pleading defect would also bar each of the Andersons' other theories, if they were otherwise viable. *Id.* at 495, 408 N.E.2d at 1196.

70. *Id.* at 501, 408 N.E.2d at 1199. The court also held that Farmers Hybrid had waived strict compliance with the written claim requirement by furnishing the veterinarian. *Id.* at 498, 408 N.E.2d at 1197. The dismissal of the Andersons' warranty theory was reversed upon the determination that the disclaimer was inconspicuous. *Id.* at 502, 408 N.E.2d at 1200. The dismissal of the Andersons' statutory liability theory was also reversed, on the ground that the diseased swine statute rendered sellers liable to persons in the Andersons' situation. *Id.* at 503, 408 N.E.2d at 1201.

with approval the rationale and result of *Whitmer v. Schneble*.[71]

In *Whitmer* the issue concerned whether a seller was liable to the buyer for injury caused by a biting dog. In July 1968, Robert and Frances Schneble purchased a female Doberman Pinscher, described in the bill of sale as "medium aggressive." The dog had puppies more than two years later. Nine days after the puppies' birth, the dog bit a neighbor's child. Proceeding under an Illinois dog-bite statute,[72] the child, by her father, sued the Schnebles. The Schnebles promptly filed a three-count third-party complaint against the seller of the dog. Included in their complaint was a theory of recovery based on strict liability in tort.[73] The trial court struck the entire third-party complaint.[74] On appeal, the Illinois Appellate Court affirmed,[75] noting the mutability of a creature like a dog and emphasizing the relevance of this fact to the determination whether the dog was a product under section 402A.[76]

The articulated reasoning of the two Illinois cases begins with the proposition that one purpose for imposing strict liability is to insure that marketers of defective products bear the costs of injuries caused by the products.[77] This purpose, the Illinois courts' argument continues, would be defeated if sellers were held strictly liable for injuries caused by items that are not of a fixed nature on leaving the sellers' control.[78] Neither opinion elaborates about the precise meaning of this purpose or about the actual manner in which the purpose is frustrated by imposing strict liability on sellers of subsequently mutated items. However, two interrelated concerns seem to underlie the reasoning.

First, the opinions may reflect a judicial concern with fairness to

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71. *Id.* at 500, 408 N.E.2d at 1199.

72. Animal Control Act § 16, ILL. REV. STAT. ch. 8, § 366 (1979).

73. *Id.* at 660-61, 331 N.E.2d at 117. The Schnebles' other theories were based on alleged express warranties and failure to warn of the dog's propensities. *Id.* at 661, 331 N.E.2d at 117.

74. *Id.* at 661, 331 N.E.2d at 117.

75. *Id.* at 666, 331 N.E.2d at 121.

76. *Id.* at 663, 331 N.E.2d at 119. This represents, at most, an alternative holding. The court continued by assuming the dog to be a product and rejected the theory on the ground that the Schnebles could establish no defect or inherent danger beyond the commonly known tendency of a bitch with pups to bite. *Id.* at 663-64, 331 N.E.2d at 119.

The court rejected the warranty theory after finding no express warranty and refusing to imply a warranty contrary to the "known forces of nature." *Id.* at 661-62, 331 N.E.2d at 117-18. In addition, the failure to warn theory was rejected because the Schnebles were charged with notice of the "common knowledge that dogs bite." *Id.* at 662-63, 331 N.E.2d at 118.

77. Anderson v. Farmers Hybrid Cos., 87 Ill. App. 3d at 500, 408 N.E.2d at 1199 (quoting Whitmer v. Schneble, 29 Ill. App. 3d at 663, 331 N.E.2d at 119). *See also* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 337 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

78. Anderson v. Farmers Hybrid Cos., 87 Ill. App. 3d at 500, 408 N.E.2d at 1199; Whitmer v. Schneble, 29 Ill. App. 3d at 663, 331 N.E.2d at 119.

sellers.[79] If the courts in *Whitmer* and *Anderson* were indeed concerned about fairness, their conclusion seems reasonable. Imposing liability on sellers for injuries caused by factors operating on the items sold after the sellers surrender control would be extremely unfair, because the sellers could take no steps to avoid the occurrence of such losses.[80]

This notion suggests a second unarticulated concern that may be motivating these decisions. Proponents of strict liability often argue that its imposition results in fewer product-caused injuries by creating incentives for sellers to market defect-free products.[81] The Illinois courts' reasoning may be that if sellers cannot affect the external influences operating on their wares, then incentives to that end are of no value. Consequently, imposition of strict liability in such situations lacks economic utility in that it would not reduce the number of product-caused injuries.[82]

Under the analysis of these cases, then, it follows that, because living creatures are constantly changing through continuous interaction with the environment, imposition of strict products liability on marketers of live animals would confer no social benefit and thus defeat the purpose of insuring that sellers bear the cost of injuries caused by their products.[83] The cases conclude that, because this purpose of strict liability is not furthered by the theory's application in the context of live animals, living creatures cannot be products within the meaning of section 402A.[84]

B. In Opposition to Categorical Exclusion: Beyer v. Aquarium Supply Co.

Factually similar but doctrinally opposed to *Anderson* and *Whitmer* is

79. *Cf.* Coca Cola Bottling Co. v. Hobart, 423 S.W.2d 118, 125 (Tex. Civ. App. 1967) (noting fairness of Texas rule that imposes strict liability on sellers of bottles that break moments after being displayed in a grocery store but not on sellers of bottles that break days later).

80. However, the fairness consideration raises an issue of the substantiality of the animals' mutation, and not an issue of their status as products. *See* text accompanying notes 89-100 *infra*.

81. *See* notes 40-45 *supra* and accompanying text.

82. Although imposition of strict liability in these situations would not reduce the number of accidents, it would yield the benefits of administrative efficiency. *See* notes 45-46 *supra* and accompanying text. In addition, imposition of strict liability in these cases would not be inconsistent with the compensation rationale. *See* notes 36-39 *supra* and accompanying text. The courts in *Anderson* and *Whitmer* did not discuss these other policy objectives of strict liability.

83. Anderson v. Farmers Hybrid Cos., 87 Ill. App. 3d at 500, 408 N.E.2d at 1199; Whitmer v. Schneble, 29 Ill. App. 3d at 663, 331 N.E.2d at 119.

84. Anderson v. Farmers Hybrid Cos., 87 Ill. App. 3d at 501, 408 N.E.2d at 1199; *see* Whitmer v. Schneble, 29 Ill. App. 3d at 663, 331 N.E.2d at 119.

Once animals are found to be nonproducts, other issues posed by § 402A need not be reached. For example, assuming animals to be products, any plaintiff seeking strict tort recovery for physical harm caused by a purchased animal must establish that the creature was in a defective and unreasonably dangerous condition. 2 RESTATEMENT (SEC-

the New York Supreme Court decision in *Beyer v. Aquarium Supply Co.*[85] In *Beyer* the defendant, Aquarium Supply Company, distributed some hamsters to the W.T. Grant Company. Beatrice Beyer, a Grant employee, became ill after coming in contact with the animals. Beyer sued Aquarium Supply, alleging that the hamsters were diseased and asserting as one cause of action a theory of strict liability in tort.[86] Aquarium Supply moved to dismiss Beyer's strict liability theory, arguing that the theory's applicability is limited to transactions in "sophisticated manufactured products."[87] The trial judge rejected Aquarium Supply's argument and ruled that Beyer could state a cause of action based on strict liability in tort, concluding, without analysis, that diseased animals pose as serious a risk to human safety as defectively manufactured products.[88]

The lack of analysis in *Beyer* should not discredit its result. This Note will show that the rationale of the *Whitmer-Anderson* categorical exclusion approach cannot justify its broad implications. Analysis reveals that the *Beyer* view is justifiable in some cases involving sales of live animals.

IV. PROBLEMS WITH THE CATEGORICAL EXCLUSION APPROACH

Although the rationale of the categorical exclusion approach does appeal to the intuition, it is an inappropriate justification for a definitional exclusion of all transactions in live animals from the law of strict products liability. Two aspects of the definitional approach yield this conclusion: analytical misapplication of the mutation limitation and inadequate accomodation of policy.

OND) OF TORTS § 402A(1) (1965), *reproduced at* note 22 *supra*. *Contra* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 123, 501 P.2d 1153, 1155, 104 Cal. Rptr. 433, 435 (1972) (rejecting unreasonable danger requirement). Although the intricacies of the defect and unreasonable danger requirements are beyond the scope of this Note, failure to establish either of them in any case would not bar other injured buyers of animals from use of the theory. For example, a determination that a dog's propensity to bite does not constitute a defect in its condition would not foreclose the possibility that a diseased dog is defective. However, once dogs are determined to be nonproducts, no seller of a dog can be held strictly liable. For a discussion of the defect and unreasonable danger requirements, see Galligan, *Strict Liability in Tort*, in ASSOCIATION OF TRIAL LAWYERS OF IOWA, PRODUCTS LIABILITY IN-DEPTH 78-81 (1974).

Another issue posed by § 402A is whether the product underwent substantial change after seller's surrender of control. 2 RESTATEMENT (SECOND) OF TORTS § 402A(1)(b) (1965), *reproduced at* note 22 *supra*. Such changes may clearly limit the theory's applicability in any given case, but the framework of § 402A suggests that the changes do not furnish grounds for classwide exclusion of any article from the theory's ambit. *See* text accompanying notes 89-107 *infra*. The substantial change issue is especially significant in the live animal context, in light of the inherent changes that all animals undergo. *See* text accompanying notes 121-124 *infra*.

85. 94 Misc. 2d 336, 404 N.Y.S.2d 778 (Sup. Ct. 1977).

86. The opinion does not indicate the nature of Beyer's other theories of recovery.

87. 94 Misc. 2d at 336, 404 N.Y.S.2d at 778.

88. *Id.* at 337, 404 N.Y.S.2d at 779.

A. *Analytical Misapplication of the Mutation Limitation*

The Illinois cases concluded that the status of animals as nonproducts followed from the creatures' inherent mutability.[89] However, the *Restatement* suggests that mutability is irrelevant to the issue of product status.[90] This analytical disparity is significant because the *Restatement* formulation of strict products liability has been adopted as the law of Illinois.[91] The conflict suggests that inquiry into the role of mutability in the imposition of strict liability is appropriate.

Section 402A does not apply to transactions in which the article sold undergoes substantial change after the seller's surrender of control. The section provides that the seller of a defective and unreasonably dangerous product is strictly liable for the physical harm thereby caused only if "it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold."[92] Two inferences may be drawn from this language. First, a given article may be a product yet undergo such substantial change that its seller is not subject to strict liability. Second, not all changes in a product are sufficient to exempt the seller from strict liability; only substantial changes render the section inapplicable.

That an article may be a product yet undergo such substantial change that its seller escapes liability is illustrated by *Hanlon v. Cyril Bath Co.*[93] In *Hanlon* the plaintiff was injured while operating a press brake[94] manufactured by the defendant. Before the accident, plaintiff's employer had substituted a sensitive starting mechanism for the less sensitive original device. When plaintiff's foot accidentally touched the starting device, the machine's ram descended onto his hand, severing his fingers. Plaintiff sued the manufacturer of the press brake under a theory of strict liability, alleging that its failure to include a safety device in the design of the press brake was the proximate cause of his injury.[95] Affirming a judgment for the manufacturer, the Court of Appeals for the Third Circuit held that the employer's substitution of the starting mechanism was a substantial change in the machine's condition within the meaning of section 402A.[96]

The change made in the press brake in *Hanlon* did not generate an issue of its status as a product. This conclusion is consistent with section 402A(1)(b), which explicitly prescribes the effect that mutation is to have on the theory's applicability. As *Hanlon* demonstrates, this effect is the

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89. *See* note 84 *supra*.

90. *See* text accompanying notes 28-29 *supra* and text accompanying notes 93-97 *infra*.

91. *See* Suvada v. White Motor Co., 32 Ill. 2d 612, 621, 210 N.E.2d 182, 187 (1965).

92. 2 RESTATEMENT (SECOND) OF TORTS § 402A(1)(b) (1965), *reproduced at* note 22 *supra*.

93. 541 F.2d 343 (3d Cir. 1975).

94. The *Hanlon* court explained that "a press brake is a machine used to bend, form, or punch metal." *Id.* at 344.

95. *Id.* at 344-45.

96. *Id.* at 345.

exemption of the particular transaction from the theory's coverage and not the exclusion of all transactions that involve the particular article.

The animal sale may be distinguished from the press brake sale in *Hanlon*. Unlike machines, all animals do change. However, the language of section 402A indicates that only substantial changes in an article after seller's surrender of control will exempt the transaction from the theory's coverage.[97] Thus, the next logical step is a consideration of the substantiality requirement.

Karabatsos v. Spivey Co.[98] offers insight into the nature of change required to trigger the section 402A(1)(b) exclusion. *Karabatsos* involved an installer's liability for failing to erect safety screens around the rollers of a conveyor belt. The defendant contended that, after it had installed the conveyor system, plaintiff's employer, in rearranging the system, had moved the belt line near a water fountain. Workers on the belt line commonly drank from this fountain and spat on the floor, making it very slippery. The plaintiff, an attendant on the conveyor, slipped on the wet floor and fell onto the belt. His right arm was pulled into the exposed rollers and torn off. In plaintiff's strict liability suit, the installer argued that it was absolved of liability by the relocation of the conveyor near the fountain.[99] The Illinois Appellate Court, affirming a judgment for plaintiff, rejected this argument and held that actions of a third party that make the product more unsafe do not generate a defense to strict liability "so long as the unsafe condition attributed to the manufacturer, and which existed when the product left the manufacturer, is the proximate cause of the plaintiff's injury."[100]

Karabatsos thus requires much more than mere mutation to relieve sellers of strict liability; the change in the product must itself contribute significantly to the injury-causing defect before the seller is excused. Thus, *Karabatsos* suggests that the appropriate approach under section 402A is a system of selectively imposed strict liability, in which noncontributing changes do not affect sellers' liability.

However, the issue addressed in *Karabatsos* was the effect of changes wrought by human intervention on the availability of strict tort recovery. Arguably, the animal context is distinct because animals change through interaction with the environment rather than human alteration. As noted above, the *Anderson* court argued that the cases holding that blood is a

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97. *See* 2 RESTATEMENT (SECOND) OF TORTS § 402A(1)(b) (1965), *reproduced at* note 22 *supra*.

98. 49 Ill. App. 3d 317, 364 N.E.2d 319 (1977).

99. *Id.* at 319-20, 324, 364 N.E.2d at 320, 323.

100. *Id.* at 324, 364 N.E.2d at 323; *accord* Kuziw v. Lake Eng'g Co., 586 F.2d 33, 35-36 (7th Cir. 1978) (applying Illinois law); Aller v. Rodgers Mach. Mfg. Co., 268 N.W.2d 830, 838 (Iowa 1978); *see* Winters v. Sears, Roebuck and Co., 554 S.W.2d 565, 572 (Mo. Ct. App. 1977). *See generally* 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 4:16 (2d ed. Supp. 1980).

product fall short of extending strict liability to animal sales because, unlike animals, blood can be packaged to protect it from the environment.[101] However, mere environmental exposure—the distinction drawn in *Anderson* between blood and animals—appears, without more, to be insufficient to exempt the seller from strict liability.

The facts of *Hawkeye-Security Insurance Co. v. Ford Motor Co.*[102] illustrate this proposition. *Hawkeye-Security* involved a truck manufacturer's liability for a brake failure occurring twenty-one months after the sale of the truck.[103] During the period since the sale the truck had been driven over 31,000 miles and "subjected to rigorous use hauling dry and liquid fertilizer over good roads and bad and through farm yards and fields."[104] A clearer case of constant exposure to the environment is difficult to imagine. In twenty-one months of use, the assumption can be made that the brake parts at issue in this case experienced heat, cold, moisture, stress, thermal expansion and contraction, oxidation, and a variety of other environmental phenomena. Yet, the Iowa Supreme Court, reversing the lower court's dismissal of plaintiff's strict liability theory, adopted the principles of section 402A and held that the plaintiff's evidence was sufficient to generate a jury issue on strict liability.[105] Were environmental exposure a sufficient cause to exclude an item from the coverage of strict liability, the Iowa court could not have approved the theory's applicability to these facts.

The brake parts in *Hawkeye-Security*, like blood, are not perfectly analogous to the animals in *Anderson*. Animals actively experience their environment and grow from within, whereas brake parts stand passively exposed to the elements. Yet, however imperfect the analogy, *Hawkeye-Security* does support the imposition of strict liability in spite of the most pernicious environmental effects. This analysis suggests that something more is required to relieve the seller's strict liability; this additional requirement is identified by *Karabatsos*. The environmental phenomena must contribute significantly to the defect and resulting injury in order to free the seller of liability.[106]

To summarize, the terms of section 402A, as applied in *Hanlon*, indicate that the categorical exclusion of animal sales from the coverage of strict liability is analytically flawed. Although mutation is clearly relevant to the availability of strict tort recovery in any given case, it does not yield the nonproduct conclusion reached in *Anderson* and *Whitmer*.[107] The

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101. *See* note 60 *supra* and accompanying text.
102. 174 N.W.2d 672 (Iowa 1970).
103. *Id.* at 676.
104. *Id.* at 685 (LeGrand, J., dissenting).
105. *Id.* at 684.
106. *See* text accompanying notes 98-100 *supra*.
107. Other factors, not discussed in the Illinois cases, may weigh in favor of their result. An example of such a supporting factor is the degree of difficulty of proving negligence.

proper analysis, prescribed by section 402A(1)(b) and applied in *Karabatsos*, distinguishes changes that do and those that do not contribute to the injury-causing defect.

B. *Inadequate Accommodation of Policy*

The categorical exclusion approach excludes from the coverage of strict liability some cases to which its rationale does not apply. Such cases are those in which the change in the animal's condition does not contribute to the defect and resulting injury.[108] In these cases, the defect is not attributable to an influence operating after the seller's surrender of control; hence, the policy considerations of *Anderson* and *Whitmer* would actually support the imposition of strict liability in such cases.[109]

Of course, this problematic aspect of classwide exclusion would lack significance if cases involving noncontributing external influences are only abstract academic possibilities. Thus, although the categorical exclusion approach is overinclusive in theory, whether it is so in fact remains an important question. Examination of this question will incorporate the facts of *Whitmer* and *Anderson*.

Whitmer is a classic case of mutability contributing to injury. Many external influences shaped the dog's propensity to bite; among these were the temperament of her owner and his family, the adequacy of her care, her age, motherhood, her familiarity with the young child she bit, and the child's actions and temperament.[110] One cannot rule out the possibility that these factors, operating two and one-half years after seller's surrender of control, were decisive in causing the dog to bite. However, the context of *Anderson* shows that contribution to defect and injury is not a necessary implication of animals' inherent mutability. The defect in *Anderson*

Strict liability's furtherance of its policies of deterrence and administrative efficiency is based in part on the difficulty of proving negligence. *See* text accompanying notes 42-46 *supra*. However, the extensive regulation of livestock sales, *see, e.g.*, IOWA ADMIN. CODE § 30-18.1 to 30-18.11 (1981), may facilitate proof of negligence by providing plaintiff with statutory duty violations as a mode of proof. *See* Osborne v. McMasters, 40 Minn. 103, 105, 41 N.W. 543, 544 (1889); 2 RESTATEMENT (SECOND) OF TORTS § 288B(1) (1965). Thus, this factor suggests that the administrative efficiency and deterrence policies are of diminished significance in the livestock sale context. Because the policies underlying strict liability determine the scope of the "product" requirement, this eased burden of negligence proof under the regulations is available as a consideration in support of categorical exclusion.

108. For examples of such situations, see text accompanying notes 111-20 *infra*.

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

The court in *Beyer v. Aquarium Supply Co.* notes the incentive creation policy in holding the seller of a diseased animal to be subject to strict liability for resulting injury. *See* 94 Misc. 2d at 337, 404 N.Y.S.2d at 779.

110. *See* 29 Ill. App. 3d at 663, 331 N.E.2d at 119.

was disease.[111] In some cases, certain characteristics of disease may enable exclusion of any possibility of contribution to defect and injury by influences external to the marketer. Prominent among these characteristics are the incubation periods[112] and transmission modes of diseases.

Incubation period can be used to establish noncontribution to defect and injury in the following manner: In situations in which the incubation period is longer than the time elapsed since the seller surrendered control, contraction of the disease must have occurred while the animals were under the seller's control.[113] Because incubation periods vary widely,[114] the conclusion yielded by this analysis depends on the particular disease contracted. For example, appearance of a disease such as scrapie in sheep, which has an incubation period of several months,[115] five days after the seller relinquishes control would clearly exclude the possibility of external influences acting to create the defect after seller's surrender.[116]

The transmission mode of a disease can also be used to establish non-

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111. The swine were infected with bloody dysentery. 87 Ill. App. 3d at 496, 408 N.E.2d at 1196. *See generally* notes 116 and 118 *infra*.

Disease appears to constitute a "defect" within the meaning of § 402A. *See* Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 66-67, 207 A.2d 305, 313 (1965) (article is defective if "not reasonably fit for the ordinary purposes for which such articles are sold and used"). Whether a diseased animal is unreasonably dangerous, as required by § 402A, is a more difficult question. Some cases suggest that products with undetectable defects are not unreasonably dangerous. *See* Brody v. Overlook Hosp., 127 N.J. Super. 331, 339-40, 317 A.2d 392, 397 (App. Div. 1974), *aff'd*, 66 N.J. 448, 332 A.2d 596 (1975); *cf.* Hines v. St. Joseph's Hosp., 86 N.M. 763, 764, 527 P.2d 1075, 1076 (Ct. App. 1974) (blood containing hepatitis virus not unreasonably dangerous because no test could adequately detect virus and no process could destroy it without damaging the blood). *But see* Cunningham v. MacNeal Memorial Hosp., 47 Ill. 2d 443, 453-55, 266 N.E.2d 897, 902-03 (1970).

For an analysis of the issues posed by undetectable risks, see Comment, *Strict Liability and the Scientifically Unknowable Risk*, 57 MARQ. L. REV. 660 (1974). For a discussion of the unreasonable danger requirement, see Galligan, *Strict Liability in Tort*, in ASSOCIATION OF TRIAL LAWYERS OF IOWA, PRODUCTS LIABILITY IN-DEPTH 73, 80 (1974).

112. Incubation period is "the average time elapsing between exposure to infection . . . and the appearance of the first disease symptoms." R. SEIDEN, LIVESTOCK HEALTH ENCYCLOPEDIA 259 (2d ed. 1961).

113. The incubation period may indicate that the disease was contracted prior to seller's control; however, this may have no effect on seller's strict liability. *See* Cunningham v. MacNeal Memorial Hosp., 47 Ill. 2d 443, 454, 266 N.E.2d 897, 903 (1970); Brody v. Overlook Hosp., 121 N.J. Super. 299, 312-13, 296 A.2d 668, 675 (1972), *rev'd on other grounds*, 127 N.J. Super. 331, 317 A.2d 392 (App. Div. 1974), *aff'd*, 66 N.J. 448, 332 A.2d 596 (1975).

114. *See* W. MILLER & G. WEST, ENCYCLOPEDIA OF ANIMAL CARE 449-50 (10th ed. 1972).

115. D. BLOOD & J. HENDERSON, VETERINARY MEDICINE 701-02 (2d ed. 1963).

116. External agencies may, however, aggravate the animals' condition.

The applicability of this method to the facts of *Anderson* is unclear. The disease in *Anderson*, bloody dysentery, has an incubation period of 4 to 12 days. D. BLOOD & J. HENDERSON, VETERINARY MEDICINE 572 (2d ed. 1963). Thus, if Farmers Hybrid surrendered con-

contribution to defect and injury. In a case in which animals are infected when delivered with a disease contractible only from other animals, the disease may be traced through the delivery lot back to the seller's control. An example would be swine infected with coccidiosis upon delivery. Because coccidiosis is contractible only by ingestion of infected cysts found in manure,[117] the assumption can be made that one of the swine must have brought the disease onto the delivery truck. Thus, the possibility of external causes is ruled out and the disease is traced back to the seller's hands.[118]

Noncontribution to defect and injury notwithstanding growth and environmental interaction is a very real possibility; the preceding discussion illustrates at least two ways of establishing impossibility of contribution to defect in specific cases.[119] However, noncontribution to defect is not limited to cases in which the defect is a disease. Illustrations of defects other than disease to which an animal's growth and environmental interaction may not contribute are numerous. For example, the equestrian who falls from a recently purchased horse because of an unsuspected, improperly healed fracture of the animal's leg should have recourse under a strict tort theory of recovery if the bone's healing stage indicates that forces operating after seller's surrender of control did not contribute to the creation of the defect. Genetic defects would be similarly traceable back into time. This variety of possibilities underscores the overinclusiveness of the

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trol to the Andersons or a third party less than four days before the Andersons received the diseased swine, the *Anderson* court's reasoning could not support the specific holding of the case. However, the *Anderson* opinion does not reveal the point at which Farmers Hybrid actually surrendered control. *See* note 118 *infra*.

117. *See* Iowa State University Cooperative Extension Service, Swine Health Fact Sheet No. 8, May, 1981 (J. McKean ed.).

118. This illustration assumes that no manure remained on the truck from previous uses and that all stock transported on the instant delivery originated from the same seller.

Application of the transmission mode anlaysis to the facts of *Anderson* closely parallels the coccidiosis example, but it yields less certain conclusions. The swine sold in *Anderson* were infected with bloody dysentery on delivery. This disease is most likely contracted by ingestion of feed contaminated by the feces of infected pigs. D. BLOOD & J. HENDERSON, VETERINARY MEDICINE 572 (2d ed. 1963). However, outbreaks of bloody dysentery do occur without recent introduction of new stock. *Id.* Consequently, a transmission mode not requiring exposure to an infected animal exists. Thus, there is some possibility that the disease developed after Farmers Hybrid's surrender of control.

119. The incubation period and transmission mode analyses discussed in the text suggest a fairly burdensome manner of proof, not traditionally a characteristic of strict liability. *Cf.* Lechuga, Inc. v. Montgomery, 12 Ariz. App. 32, 38, 467 P.2d 256, 262 (1970) (Jacobson, J., concurring) (noting reference to burdensome nature of negligence proof as a justification for imposition of strict liability). However, injured buyers may find this burden acceptable in light of the advantages of strict liability over theories of warranty and negligence. *See* text accompanying notes 7-16 *supra*.

categorical exclusion approach; policy[120] thus indicates that this approach should be modified to accommodate these exceptional cases.

V. A Proposed Alternative to the Categorical Exclusion Approach

A. *A Doctrinal Statement of the Proposal*

An approach preferable to categorical exclusion would preserve the intuitive sense of its rationale yet limit its impact to cases in which mutation does not contribute significantly to the injury-causing defect. A rule representing such an approach can be fashioned by converting the Illinois courts' irrebuttable presumption of strict liability's inapplicability to animal sales into a presumption that is rebuttable by a showing that the animal's inherent mutability did not contribute significantly to the defect and resulting injury.[121] Because the mutation of an animal is inherent and continuous, the likelihood of its contribution to an injury-causing defect is enhanced; thus, the establishment of noncontribution to defect will be possible in only a limited number of cases. The use of a rebuttable presumption of inapplicability will implement the compensation and deterrence policies of strict liability[122] in these exceptional cases while respecting the policy concerns of *Whitmer* and *Anderson* to the extent of their significance.[123] In addition, the unavailability of strict liability in cases in which noncontribution to defect cannot be established will discourage buyers who cannot rebut the presumption from bringing suit. As a result, the proposed approach will save society the cost of litigating some of these cases and thus implement strict liability's administrative efficiency policy.[124]

This approach would permit strict tort recovery in those cases in which the plaintiff [125] rebuts the presumption of the theory's inapplicability by a showing of noncontribution to defect and injury. Three considerations support the assignment of the proof burden to the plaintiff. First, the plaintiff must, under the proposed rule, rebut the presumption to maintain a strict liability theory. As the party seeking to change the status quo, the plaintiff appropriately bears the risk of proof failure.[126] Second, this risk assignment is consistent with the *Restatement* requirement that the plain-

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120. *See* text accompanying notes 36-46, 77-83 *supra*.

121. *See* text accompanying notes 89-107 *supra*.

122. *See* text accompanying notes 36-45 *supra*.

123. The policy concerns of *Anderson* are discussed in text accompanying notes 77-82 *supra*.

124. *See* text accompanying notes 45-46 *supra*.

125. "Plaintiff" is used in text to refer to the party seeking recovery under the theory of strict liability. In some situations, such as third-party actions and counterclaims, the party seeking recovery may not be the actual plaintiff in the suit.

126. C. McCormick, Handbook of the Law of Evidence § 337, at 786 (2d ed. E. Cleary 1972).

tiff prove absence of substantial change in the product's condition after seller's surrender of control.[127] Finally, by having possession of the creatures, the plaintiff may be in a superior position to bear this burden,[128] particularly when the manner of proof employs the incubation period or transmission mode analysis.[129]

Having illustrated the need for such a rule and its general contours, the rule's basic features may be refined into a doctrinal statement. The rule emerging in this discussion has five basic characteristics:

(1) Applicability of the rule is confined to transactions in live animals.[130]

(2) The mutability of living creatures through growth and continuous environmental interaction is assumed.

(3) Because live animals change inherently and continuously, the inapplicability of strict products liability is presumed.

(4) The rule does not respect this presumption as irrebuttable. The analysis focuses on contribution to defect, not product status.

(5) Strict liability is applied to situations in which the party asserting the theory shows that the external influences operating after the seller's surrender did not contribute significantly to the defective condition of the animal and the resulting injury.

A doctrinal statement reflecting these features might read as follows: Strict products liability is inapplicable to any transaction in living animals unless the party asserting the theory shows that the inherent mutability of the creatures could not have contributed significantly to their injury-causing defect.

The proposed rule, with the proof burden allocated to the plaintiff, enjoys several advantages not shared by the categorical exclusion approach. The principal advantage of the proposal is that it respects the deterrence policy fostered by strict liability both when this policy indicates strict liability is applicable and when this policy indicates strict liability's inapplicability. In addition, the proposal responds to considerations of fairness on behalf of suppliers while implementing the compensation and efficiency objectives that underlie strict liability. Because this system of selective applicability is more responsive to policy than classwide exclusion, it is preferable.

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127. 2 RESTATEMENT (SECOND) OF TORTS § 402A comment g, at 351 (1965).

128. As to the relevance of superior ability to prove, see C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 337, at 787 (2d ed. E. Cleary 1972).

129. *See* text accompanying notes 111-19 *supra*.

130. The continuous mutation of plants through growth and environmental interaction suggests that the proposed analysis would apply to sales of plants as well as animals.

B. Illustration of the Application of the Proposed Rule

The proposed rule does not actually change the analysis of products liability cases under section 402A; instead, it focuses the analysis on the mutation limitation of section 402A(1)(b). Because animals undergo constant change, an issue about the substantiality of that change will arise in each case. The essence of the proposal is that a plaintiff must demonstrate that the change was insubstantial to reach the jury on a theory of strict liability.

A riding horse hypothetical will illustrate the proposed analysis. In this illustration, the plaintiff purchases the horse from the defendant, an individual in business as a horse seller. While the plaintiff is riding the animal, one of its legs suddenly collapses, throwing the plaintiff to the ground and seriously injuring her. An examination of the horse reveals that its leg had been broken previously and that the break had not healed properly. As a result, the bone was unable to support the combined weight of the horse and the plaintiff. The plaintiff now sues the defendant for damages, asserting strict liability in tort as a theory of recovery.

In order to maintain this theory under the proposed rule, the plaintiff must be able to establish that the growth and environmental interaction of the horse, from the time the defendant surrendered control of the animal to the time of the accident, did not contribute significantly to the defect that caused her injury. Implicit in this burden is the antecedent requirement that the plaintiff must plead noncontribution to defect.

If the plaintiff fulfills the pleading requirement, she must then prove that the animal's mutation did not contribute significantly to its injury-causing defect. This proof may require a veterinarian's testimony dating the beginning and end[131] of the healing process. In situations in which any portion of the healing process occurred at a time after the defendant surrendered control of the animal, the presumption cannot be rebutted.[132] If the plaintiff is able to rebut the presumption, she would then proceed under section 402A.

Once the applicability of strict liability is determined, section 402A requires the plaintiff to prove that the horse was in a defective and unreasonably dangerous condition.[133] The improperly healed fracture appears to meet the test of defectiveness by rendering the horse "not reasonably fit for the ordinary purposes for which such articles are sold;"[134] that is, the horse is not fit to carry a rider. In addition, it can be assumed

131. For the purposes of this illustration, the end of the healing process is the point at which the bone has healed sufficiently to withstand environmental attacks.

132. In these situations, forces outside the sellers' control may contribute to the creation of the defect.

133. 2 RESTATEMENT (SECOND) OF TORTS § 402A (1965), *reproduced at* note 22 *supra*.

134. *See* Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 66-67, 207 A.2d 305, 313 (1965).

that the ordinary horse buyer would not anticipate the horse's inability to carry a rider because of an improperly healed leg; consequently, this defect would appear to be "dangerous to an extent beyond that which would be contemplated by the ordinary consumer . . . with the ordinary knowledge common to the community as to [the product's] characteristics" and thus satisfy the unreasonable danger requirement.[135]

Once established, these requirements would make out a prima facie case for the imposition of strict liability on the seller of the horse. However, the impact of the proposed analysis is not limited to cases involving horses with broken legs. In some cases, the incubation period and transmission mode analyses will enable plaintiffs to maintain strict liability theories of recovery for injuries caused by diseased animals.[136] Litigants will undoubtedly develop a variety of other ways to establish noncontribution to defect; whenever they can do so, the theory of strict products liability should be applied.

VI. CONCLUSION

Most courts have not addressed the issue of the applicability of strict products liability to sales of live animals. The courts that have addressed the issue disagree about its proper resolution. The approach holding that strict liability is inapplicable because the inherent mutability of animals precludes their status as products[137] seems to be an unsatisfactory solution. Analytically, mutability is a determinant of the applicability of strict liability to any given transaction, but it does not go to the issue whether the transaction concerned a "product." Also problematic are the policy concerns invoked in support of this view, for they fail to justify its implications in some cases.

One court has taken a contrary position, holding that sellers of defective animals may be held strictly liable for injuries thereby caused.[138] Although this court offered little justification for its conclusion, analysis of policy and extant authority reveals that the imposition of strict liability on animal sellers is supportable in some cases. Further analysis identifies the appropriate cases for the imposition of strict liability to be those in which the inherent mutation of the creature did not contribute significantly to the animal's injury-causing defect.

The system of selective imposition of strict liability suggested by this analysis may be implemented through the use of a presumption of the theory's inapplicability that may be rebutted by a showing that the animal's

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135. 2 RESTATEMENT (SECOND) OF TORTS § 402A comment i, at 352 (1965).

136. *See* notes 111-19 *supra* and accompanying text.

137. Anderson v. Farmers Hybrid Cos., 87 Ill. App. 3d 493, 501, 408 N.E.2d 1194, 1199 (1980); Whitmer v. Schneble, 29 Ill. App. 3d 659, 663, 331 N.E.2d 115, 119 (1975).

138. Beyer v. Aquarium Supply Co., 94 Misc. 2d 336, 337, 404 N.Y.S.2d 778, 779 (Sup. Ct. 1977).

inherent mutation did not contribute significantly to the injury-causing defect. Through the use of such a presumption the compensation, deterrence, and efficiency objectives of strict liability may be achieved consistently with the mutation limitation of section 402A(1)(b). The workability of the proposed presumption and its sensitivity to the policies underlying strict liability suggest that animals do have a niche in the law of strict products liability.

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