LIABILITY OF A BLOOD BANK OR HOSPITAL FOR A HEPATITIS ASSOCIATED BLOOD TRANSFUSION IN NEW JERSEY

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The purpose of this article is to consider the applicability of the doctrine of strict liability and implied warranty to an action involving a hepatitis associated blood transfusion.[1] The hepatitis cases ordinarily arise from hospitalization of a patient for medical treatment. In the course of that treatment, the patient receives, on the instructions of his doctor, a transfusion of blood obtained from a donor by the hospital or by either a charitable or commercial blood bank. Thereafter the patient contracts hepatitis. Assuming that the patient is correctly diagnosed as having contracted hepatitis from the blood, the question arises as to what are the respective liabilities, if any, of the hospital and the blood bank.

If blood banks and hospitals are held to be liable because of the doctrine, a beachhead will be established from which products liability advocates may launch a full scale invasion of hospital and medical transactions. The import of the blood cases is that they represent an attempt to extend strict liability, originally conceived in *Henningsen v. Bloomfield Motors, Inc.*[2] and its progeny,[3] to the supplying of medical services and human tissue. In those decisions, the supreme court has attempted to distribute to a supplier the economic loss attendant upon personal injuries caused by a defective product. The thrust of the decisions is to allocate the economic loss in products liability cases to the parties who can control the risk and better afford the loss.

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1 Although strict liability has its origins in tort law and implied warranty is identified with contract law, the New Jersey courts have applied the two concepts as one. Newmark v. Gimbel's Inc., 54 N.J. 585, 595, 258 A.2d 697, 702 (1969); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 90, 207 A.2d 314, 325 (1965). While recognizing the conceptual difference between them, this article will refer to strict liability-implied warranty as a single doctrine.

2 32 N.J. 358, 161 A.2d 69 (1960).

3 Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); Jakubowski v. Minnesota Mining & Mfg., 42 N.J. 177, 199 A.2d 826 (1964); Courtois v. General Motors Corp., 37 N.J. 525, 182 A.2d 545 (1962).

THE PROBLEM WITH NEGLIGENCE CONCEPTS

The fundamental problem encountered by the courts in blood transfusion cases is that there is no reasonably certain method of testing or treating blood to detect or eliminate hepatitis.[4] Recent publications indicate that significant improvements have been made in testing.[5] Although it is encouraging to note the progress in this area, the available data demonstrate, that the test will not disclose the presence of hepatitis with a reasonable degree of medical certainty.[6] Consequently, neither the blood supplier nor the recipient can effectively control the risk of injury from hepatitis. Traditionally an action against a hospital and a blood bank would be grounded on principles of negligence for failure to use reasonable care in obtaining, processing or transfusing blood.[7] In the absence of an accepted method of testing or treating blood for hepatitis, plaintiffs have resorted to strict liability-implied warranty as a basis of liability.[8]

At present, the most effective means of controlling the risk of hepatitis is through the careful selection of donors.[9] If a plaintiff can establish lack of due care in this selection, liability should follow pursuant to traditional negligence concepts without reference to strict liability-implied warranty. A consideration of the exercise of due care will involve many facts,[10] including the background of the donor. A

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4 Jackson v. Muhlenberg Hosp., 96 N.J. Super. 314, 320, 232 A.2d 879, 882 (L. Div. 1967).

5 Prince & Burke, *Serum Hepatitis Antigen (SH): Rapid Detection by High Voltage Immunoelectroosmophoresis*, 169 Science 593 (1970); Szmuness, Pick, & Prince, *The Serum Hepatitis Virus Specific Antigen (SH): A Preliminary Report Of Epidemiologic Studies In An Institution For The Mentally Retarded*, 92 AM. J. EPIDEMIOLOGY 51 (1970); Cherubin, Hargrove & Prince, *The Serum Hepatitis Related Antigen (SH) In Illicit Drug Users*, 91 AM. J. EPIDEMIOLOGY 510 (1969).

6 In a conference, Alfred M. Prince stated that he estimated that the test will detect 25-40% of the carriers of hepatitis. Although the test represents significant progress in detecting hepatitis, Dr. Prince stated that a negative result in the test would not permit a doctor to testify with a reasonable degree of medical certainty that the tested blood was free from hepatitis.

7 There is a fundamental difference between strict liability-implied warranty and negligence. The former doctrine does not require proof of breach of a standard of care. It is sufficient to show that the defendant has sold a product in a defective condition, unreasonably dangerous to the consumer. The seller may be liable even though he has exercised due care. In contrast, a defendant is not liable for negligence unless he has failed to exercise due care. Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 66-67, 207 A.2d 305, 313 (1965).

8 Jackson v. Muhlenberg Hosp., 53 N.J. 138, 141-42, 249 A.2d 65, 67-68 (1969).

9 Haut & Alter, *Blood Transfusions—Strict Liability?*, 43 ST. JOHNS L. REV. 557, 559 (1969).

10 *See* Jackson v. Muhlenberg Hosp., 53 N.J. 138, 249 A.2d 65 (1969).

professional donor (especially an alcoholic or narcotics addict) might be expected to appear in "skid row," but a different type of donor will participate in a voluntary blood program of a corporation. Medical research has shown that a higher incidence of hepatitis obtains in the former situation[11] and that it is less likely that hepatitis will originate from a voluntary, as distinguished from a commercial, donor.[12] A donor contributing blood for cash has a greater motivation to misrepresent his medical history than a charitable donor who is performing a public service or obtaining credit in a blood bank. Similarly, commercial blood banks contemplating the profit on the sale of blood would have less reason to make a careful selection of donors than a charitable blood bank performing a public duty and, possibly, providing its services at a financial loss.

Consequently it is critical to obtain an accurate history from donors.[13] Normally a history of the donor will elicit information as to whether he has ever had kidney disease, jaundice or contact with jaundice in the recent past. However, a donor may be a carrier of hepatitis without knowing it, or may have sufficient motivation to conceal a history of hepatitis.[14] Recently developed techniques have been effective in detecting hepatitis among certain groups, including commercial donors.[15] The technique (known as the IEOP test) was developed as a means of screening donors,[16] and has been most effective in detecting hepatitis in groups known to have a higher hepatitis rate than voluntary donors.[17] One of its proponents suggests that the IEOP[18] test may

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11 Report delivered by Drs. John H. Walsh, Robert H. Purcell, Andrew G. Morrow and Paul T. Schmidt, 21st Annual Meeting of American Association of Blood Banks, Oct. 29, 1968; Norris, Potter & Reinhold, *Status of Hepatic Function Tests in the Detection of Carriers of Viral Hepatitis, Transfusion*, J. AM. ASS'N OF BLOOD BANKS, June, 1967 at 207; Report entitled Blood Transfusions from Narcotics Addicts by Drs. Cohen and Dougherty, N.J. State Dept. of Health, delivered before the Symposium of Prevention of Post Transfusional Viral Hepatitis, Oct. 6, 1964.

12 Allen & Sayman, *Serum Hepatitis from Transfusion of Blood*, 180 J.A.M.A 53, 59 (1962).

13 Grady, et al., *Risk of Post-Transfusion Viral Hepatitis*, 271 NEW ENG. J. MED. 337, 341 (1964).

14 *Id.* A system to control donors has been proposed in New York City by City Councilman Mario Merola (D-Bronx), N.Y. Sunday News, Aug. 23, 1970, at 112, col. 1.

15 *See generally* note 5 *supra*.

16 Prince & Burke, *supra* note 5, at 594:

> Since our technique was developed as a means of screening blood donors, populations with a high frequency of carriers were selected.

17 Cherubin, Hargrove & Prince, *supra* note 5.

18 Prince & Burke, *supra* note 5, at 594, IEOP is a technique of high voltage immunoelectroosmophoresis:

> In this procedure antigen is caused to migrate in an electric field through a

be used to reduce the risk of post-transfusion hepatitis by avoiding specific commercial sources.[19] Furthermore, in the future the test may be accepted generally by the medical profession or required by law. Consequently, the careful administration of the test would be relevant to the determination of the exercise of due care by the blood supplier. However, it would not necessarily be dispositive of the issues of strict liability-implied warranty.

Also involved in the analysis of due care is consideration of the conditions under which the blood is extracted or transfused. For example, the use of sterile and disposable needles decreases the likelihood of serum hepatitis being contracted from a source other than the blood.[20]

SALE V. SERVICE: AN UNSATISFACTORY ANALYSIS

The absence of negligence does not affect a claim based on strict liability-implied warranty. Consequently, plaintiffs have alleged that the supplying of blood is a *"sale"* of goods to which the doctrine attaches. Blood suppliers have answered that they are merely providing a *"service"* to which the doctrine does not apply. In the past, courts have generally accepted the conclusion that the supplying of blood is a *"service,"* and have held that a patient, when entering a hospital, does not contract to purchase so many pints of blood any more than he contracts for so many yards of gauze, or for any drugs or medicine. Consequently, most courts have held that the patient contracts for the total services of the hospital in caring for him.[21]

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suitable medium of diffusion against a stream of antibody migrating in the opposite direction as a result of endosmotic flow.

Id.

19 Cherubin, Hargrove & Prince, *supra* note 5, at 516:

> The remarkable difference in the rate of SH antigen between different commercial and volunteer sources of blood suggests that the risk of post-transfusion hepatitis can be reduced by the avoidance of the specific commercial sources, or of more adequate regulations of these sources.

20 Allen & Sayman, *supra* note 12, at 59.

21 The following cases have held that the supplying of blood constitutes a service: Sloneker v. St. Joseph's Hosp., 233 F. Supp. 105 (D. Colo. 1964); Whitehurst v. American Nat'l Red Cross, 1 Ariz. App. 326, 402 P.2d 584 (1965); Lovett v. Emory University Inc., 116 Ga. App. 277, 156 S.E.2d 923 (1967); Balkowitsch v. Minneapolis War Memorial Blood Bank, 270 Minn. 151, 132 N.W.2d 805 (1965); Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792 (1954); Goelz v. J. K. & Susie L. Wadley Res. Inst. & Blood Bank, 350 S.W.2d 573 (Tex. Civ. App. 1961). At least one case has held that the supplying of blood constitutes a sale, *see* Hoder v. Sayet, 196 So. 2d 205 (Fla. Dist. Ct. App. 1967). Since the writing of this article, the Supreme Court of Illinois has decided in Cunningham v. MacNeal Memorial Hospital, Nos. 42526, 42578 (Sept. 29, 1970), that

A recent case indicates that supplying of blood cannot, without noticeable strain, be analogized either to the sale of goods or the providing of medical services.[22] A blood transfusion differs from either transaction. For example, if blood was purchased by a commercial blood bank for $5.00 per pint, sold to a hospital for $25.00 and sold by the hospital to a patient for $35.00 without the incurrence of additional costs for testing, then the transaction has the aspects of a sale. If the blood was donated by a charitable blood bank which made various tests at a cost of $15.00 which the charitable blood bank recovered from the hospital, and if the hospital charged only that amount, plus the cost of additional tests, then the transactions do not have the aspect of sales.

A leading New York case concluded that in providing blood, a hospital is performing a service,[23] but recently a New York trial court, relying in part upon a Florida decision,[24] held that the transaction in

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strict liability applies to a hepatitis associated blood transfusion. The case was presented to the court on defendant's motion for judgment on the pleadings for failure to state a cause of action in strict liability. Apparently no affidavits were submitted. The court concluded: (1) blood is a product within *Restatement (Second) of Torts* § *402(a)* (1966); (2) the supplying of blood by either a blood bank or a hospital is a "sale"; (3) charitable immunity is not a defense; (4) the inability of a blood supplier to detect the existence of serum hepatitis is *"of absolutely no moment"*; (5) blood is not an unavoidably unsafe product within comment *K* of § *402(a)*. The first three conclusions are consistent with this article. The author disagrees with the last two conclusions.

Comment *K* provides an exception for *"'unavoidably unsafe products"*. Included in that term are products that are necessary or useful to protect human life even though they may have injurious effects. Blood, if otherwise fit to be sold, and reasonably safe for use, which may, nonetheless, contain viral hepatitis, is such a product. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. *791, 811-14 (1966)*.
The Illinois court began its analysis with the determination that blood containing viral hepatitis is impure or defective, and concluded that strict liability applied. By rejecting as irrelevant the argument that blood cannot be made safe from viral hepatitis, the Illinois court, in effect, rejected comment *K*.

Significantly, the Illinois court did not cite Jackson v. Muhlenberg Hosp. 53 N.J. 138, 249 A.2d 65 (1969), which held that the applicability of strict liability should be deferred until after receipt of evidence involving the availability of tests to ascertain the presence of viral hepatitis in blood. Implicit in *Jackson* is recognition that, if there are no such tests, blood may be an unavoidably unsafe product. That conclusion is enhanced by Newmark v. Gimbel's, 54 N.J. 585, 258 A.2d 697 (1969), which recognized the distinction between ordinary commercial products (*e.g.*, candy bars, bottle beverages, clams or mushrooms which the Illinois court found comparable to blood) and a medical necessity such as blood.

22 Baptista v. Saint Barnabas Med. Center, 109 N.J. Super. 217, 224, 262 A.2d 902, 906-07 (App. Div. 1970).

23 Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792 (1954).

24 Community Blood Bank, Inc. v. Russell, 196 So. 2d 115 (Fla. 1967).

which a commercial blood bank supplies blood to a hospital is a sale.[25]

In the past, the imposition of a separate charge for the blood has been considered pertinent to determining the nature of the transaction. If the only charge is for the services involved in obtaining, testing (for other defects) and transfusing the blood, then the transaction may be less susceptible of being characterized as a sale. A charitable blood bank should be able to show that the charge it imposes is solely for the recovery of its expenses. In a leading case, the Red Cross was able to make this showing and, as a result, avoided liability.[26]

The situation is different for a commercial blood bank which buys and sells blood for a profit. The transaction between a commercial blood bank and a hospital has all of the indicia of a commercial transaction. As a result, warranties would more naturally attach to the transaction between the commercial blood bank and the hospital.

Furthermore, in New Jersey, the absence of a separate charge for blood should no longer preclude characterization of the transaction as a sale. In *Newmark v. Gimbel's, Inc.*,[27] the supreme court extended strict liability to a transaction in which a beautician applied a permanent wave solution to a customer, which resulted in personal injuries. The defendant had argued that no sale was involved because there was no separate charge for the permanent wave solution. The supreme court stated that the cost of the solution was obviously considered in determining the price of the service.[28] In that context, the court concluded that "[t]he no-separate-charge argument puts excessive emphasis on form and downgrades the overall substance of the transaction."[29]

In *Newmark*, the court expressed dissatisfaction with the sales versus service distinction. The court wrote:

> One, who in the regular course of a business sells or applies a product (in the sense of the sales-service hybrid transaction involved in the present case) which is in such a dangerously defective condition as to cause physical harm to the consumer-patron, is liable for the harm.[30]

The court then declared that the transaction between a beauti-

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25 Carter v. Inter-Faith Hosp., 60 Misc. 2d 733, 304 N.Y.S.2d 97 (Sup. Ct. Spec. T. 1969).

26 Whitehurst v. American Nat'l Red Cross, 1 Ariz. App. 326, 402 P.2d 584 (1965).

27 54 N.J. 585, 258 A.2d 697 (1969); *See* Note, 1 SETON HALL L. REV. 214 (1970).

28 54 N.J. at 593, 258 A.2d at 701.

29 *Id.*

30 *Id.* at 595, 258 A.2d at 702.

cian and a customer is "a hybrid partaking of incidents of a sale and a service."[31] While recognizing that the providing of blood is not like most sales of goods, it can fairly be stated that the argument of service rather than sale provides a shaky defense.[32]

The inherent unfairness of the sale versus service distinction in hepatitis associated blood transfusion cases may be illustrated by the following example. Assuming a patient received four pints of blood, two each from a charitable blood bank and a commercial blood bank, each of which used due care in selecting donors, should a different result follow merely because one blood bank is discharging a charitable duty and the other is making a profit? It would be difficult to explain to two patients with hepatitis, lying side by side in a hospital, that one of them who obtained blood from a commercial blood bank has a cause of action but the other who obtained the blood from a charitable blood bank does not.

A more satisfactory explanation may be obtained by a detailed consideration of relevant facts in determining whether a blood supplier has been negligent. If the blood was procured under doubtful circumstances (*e.g.*, skid row) from a suspect donor (*e.g.*, a derelict) or without administering available tests, then the blood bank, whether commercial or charitable, may have been negligent. Thus analyzed, liability is predicated upon the conduct of the blood bank, not upon a strained characterization of the transaction between the bank and the donee.

A consideration of the underlying policy in products liability cases suggests that the doctrine should not apply to the hepatitis cases. The argument underlying the imposition of liability on the supplier of a chattel is that the supplier is in a better position to know and control the condition of the chattel and to absorb the economic loss resulting from a defect in it.[33] The inability of a blood bank to detect or eliminate hepatitis in whole blood excises one of the bases for the imputation of liability by implied warranties.

Nonetheless, in *Newmark*, the court rejected the defendant's argument that the beauticians had no greater opportunity to discover

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31 *Id.* at 593, 258 A.2d at 701.

32 Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 811 (1966); Rapson, *Products Liability under Parallel Doctrines; Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692 (1965).

33 Prosser, *supra* note 32, at 799; Magrine v. Krasnica, 94 N.J. Super. 228, 235, 227 A.2d 539, 543 (L. Div. 1967).

the defect than the patron,[34] and the court wrote with reference to beauticians:

> [T]hey occupy the status of retailers, and lack of opportunity to inspect the goods they supply to the publicly solicited customer does not relieve them of liability.[35]

The court noted that, like other retailers, beauticians select the manufacturer whose products they choose to sell,

> and thus they become part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products.[36]

However, the court distinguished the nature and quality of services of doctors from the services of beauticians, and declared that the liability of the former should be determined according to the principles of negligence.[37] The providing of blood probably falls somewhere between the exercise of medical judgment and the supplying of a product. Consequently, the relief apparently accorded the medical and dental professions by *Newmark* may not necessarily extend to a blood bank or hospital which supplies blood.

Comparison reveals that the activities of the blood supplier are more closely related to medical services than to ordinary commercial transactions. At present, neither the doctor nor the blood supplier may guarantee a perfect result.[38] Unlike a beautician, a doctor or blood bank does not advertise for customers.[39] The need for blood is so important to the general welfare that under present circumstances public policy does not compel the imposition of strict liability-implied warranty upon blood transfusions.

Furthermore, there would be far reaching complications concerning organ transplants if strict liability was imposed upon blood transfusions. If the supplying of blood is characterized as a sale, then what is the nature of the transaction involving the supplying of an eye, a kidney, a heart or any other form of human tissue? Even if blood is considered *"goods"* within the definition of the *Uniform Commercial Code*[40] or a *"product"* within the *Restatement (Second) of Torts*,[41] the doctrine does not necessarily apply.

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34 54 N.J. at 600, 258 A.2d at 704-05.

35 *Id.*, 258 A.2d at 704.

36 *Id.*, 258 A.2d at 705.

37 *Id.* at 596-97, 258 A.2d at 702-03.

38 *Id.* at 597, 258 A.2d at 703.

39 *Id.* at 596, 258 A.2d at 702.

40 N.J. STAT. ANN. § 12A:2-105(1) (1962).

41 RESTATEMENT (SECOND) OF TORTS § 402A (1966).

The uncertainty of extending strict liability and implied warranty to the supplying of blood is also apparent from the divergent opinions of the Appellate Division in *Baptista v. Saint Barnabas Medical Center*.[42] In that case, plaintiff's decedent allegedly received from the hospital a transfusion of incompatible blood which caused his death. The majority acknowledged the unresolved status of the supplying of blood in the hepatitis cases, but concluded that, where the asserted basis for liability is improper crossmatching and typing of blood, a hospital is essentially providing a service and should not be liable under strict liability or implied warranty. The majority determined that strict liability should not be extended to a case where the blood was not "infected" or "defective."[43]

One judge dissented, urging that the doctrine should apply.[44] He relied upon the conclusion of the supreme court in *Newmark* that an implied warranty attaches to the supplying of a product even though supplied in a transaction that is not strictly a sale. The dissenting judge concluded that, if the blood supplied was incompatible, it breached the implied warranty of fitness for a particular purpose.[45]

It is submitted that, where blood is free from defects and the asserted basis of liability is negligence in processing or testing, the doctrine need not be stretched to impose liability on the blood supplier. Consequently, it appears that the majority in *Baptista* correctly concluded that the doctrine should not apply to a hospital which is alleged to have negligently crossmatched blood. Although there are adequate tests to disclose blood compatability, the tests for hepatitis have not yet been recognized as reliable. It follows that strict liability should not attach at present to hepatitis associated blood transfusions.

Charitable Immunity

With respect to charitable blood banks, one possible answer, though not necessarily more easily understood, would be to expand the defense of charitable immunity to cover the supplying of blood by a charitable blood bank. The defense of charitable immunity, excised from the common law of New Jersey by the supreme court,[46] was re-

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42 109 N.J. Super. 217, 262 A.2d 902 (App. Div. 1970).

43 *Id.* at 224, 262 A.2d at 906-07.

44 *Id.* at 230, 262 A.2d at 910.

45 *Id.* at 228, 262 A.2d at 909.

46 Collopy v. Newark Eye & Ear Infirmary, 27 N.J. 29, 141 A.2d 276 (1958).

instated the following year by the legislature. However, the statute, as enacted, limits the immunity to acts of "negligence".[47]

There is a significant conceptual difference between liability resulting from negligence as distinguished from strict liability or implied warranty.[48] In the latter situation, the exercise of due care does not establish a defense. Shortly after the New Jersey Legislature passed statutes creating immunity for hospitals and other charities from acts of negligence,[49] the supreme court introduced liability under implied warranty and strict liability into New Jersey law.[50] Liability under those doctrines, not recognized at the time of the enactment of the immunity statutes, may not be precluded by the statutes in their present form. However, one court has concluded that, where a doctrine such as strict liability is being stretched to cover an area normally covered by negligence, then the defense of charitable immunity should apply.[51] Nonetheless, the present phraseology of the immunity statutes may expose charities to liability under theories of strict liability of implied warranty. Furthermore, regardless of the protection accorded other charities, a hospital enjoys only the limited immunity under the charitable immunity statute.[52]

DISCLAIMER

Another frequently asserted defense arises from the concept of disclaimer.[53] Often a supplier will print words of warning on the label of the blood container, stating in essence that "[d]espite the utmost care in the selection of donors, human blood may contain the virus of Homologous Serum Hepatitis."[54] The blood banks then argue that the warning constitutes a disclaimer of implied warranty under the *Uniform Commercial Code*.[55] There is no doubt that such words express the intent to disclaim. However, the problem remains whether such a disclaimer should be given effect.

One difficulty is that the patient invariably does not read the warning on the label. Often the patient has not even been warned

47 N.J. STAT. ANN. §§ 2A:53A-7, 8 (Supp. 1969).

48 *See*, note 7 *supra*.

49 N.J. STAT. ANN. §§ 2A:53A-7, 8 (Supp. 1969).

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

51 Gile v. Kennewick Pub. Hosp. Dist., 48 Wash. 2d 774, 296 P.2d 662 (1956).

52 N.J. STAT. ANN. § 2A:53A-8 (Supp. 1969) creates immunity from damages in amounts in excess of $10,000.

53 *See* N.J. STAT. ANN. § 12A:2-316 (1962).

54 Jackson v. Muhlenberg Hosp., 53 N.J. 138, 140, 249 A.2d 65, 66 (1969), wherein a similar disclaimer is noted by the court.

55 N.J. STAT. ANN. § 12A:2-316 (1962).

that a blood transfusion may be necessary. Under such circumstances, it would not be fair to permit a blood bank to avoid liability by an exculpatory clause, the terms of which are not known to the injured party.[56] If a patient knows of the disclaimer and voluntarily makes an informed decision to accept the blood, notwithstanding the risk of hepatitis, then the disclaimer should be enforced; but, if the only alternative is the risk of personal injury or death from loss of blood, it is not fair to the patient to preclude recourse against a blood bank with whom he cannot bargain. Conversely, it is not fair to the blood bank, which is remote from the patient at the time of transfusion, to invalidate its disclaimer if the patient, having been properly advised, chooses (no matter how restricted the choice) to accept the blood. It is evident that the existence of a disclaimer does not provide a satisfactory or reliable resolution of the problem.[57]

The inability of the hospital, blood bank or patient to detect or eliminate hepatitis, and the urgent need of the patient for blood,[58] dictates a resolution based on social policy. One might expect the legislature to be the forum for resolving so important a question of public policy. The legislatures of some states, adopting a policy favoring blood banks, have enacted statutes stating the providing of blood containing the virus of hepatitis should not result in an action for breach of implied warranty.[59] Speculation about the influence of the insurance industry leads to a cynical appraisal of such legislation. In any event, the answer for New Jersey has been left to the courts.

Jackson v. Muhlenberg Hospital: THE NEED FOR A TRIAL

The stage has been set by the decision of the supreme court in *Jackson v. Muhlenberg Hospital*[60] for a determination of the applica-

56 *See* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 407-08, 161 A.2d 69, 96-97 (1960).

57 *See* Prosser, *supra* note 32, at 833.

58 Allen & Sayman, *supra* note 12, at 59:

> The great need is for a simple biological test to detect the carrier-donor. In lieu of this, the present situation would be vastly improved if the professional donor were to be eliminated entirely, for it has been demonstrated that the chances of his being a carrier are essentially 6 times greater than those of the volunteer or family donor. But this, too, is not possible. Attempts to overcome public apathy by campaigns for donations of blood have in most metropolitan areas failed to elicit a sustained response. The physician is faced with the choice between the greater risk of withholding blood transfusion and the lesser risk of serum hepatitis from use of the professional donor.

59 MISS. CODE ANN. § 7129-71 (Supp. 1968); ARIZ. REV. STAT. ANN. § 36-1151 (Supp. 1969); MICH. STAT. ANN. § 14.528(19) (1956); WIS. STAT. ANN. § 146.31 (Supp. 1969); MASS. GEN. LAWS ANN. ch. 106, § 2-316 (1958); OKLA. STAT. ANN. tit. 63, § 2151 (Supp. 1969); *see* Traut, *Blood Transfusions*, 73 DICK. L. REV. 201, 212 (1969).

60 53 N.J. 138, 249 A.2d 65 (1969).

bility of the doctrines of strict liability-implied warranty in the trial of an action involving allegations that a blood transfusion caused serum hepatitis. The trial court in *Jackson* entered a summary judgment to the effect that the supplying of blood by a commercial blood bank was a sale, but that strict liability did not attach to the transaction.[61] The supreme court in a per curiam opinion reversed and remanded, holding that there should by a full trial on all issues.[62] Thereafter, the case was settled before trial.[63]

In earlier cases, courts in other jurisdictions had resolved the issue either on pretrial motions or before submission of the case to the jury. However, different jurisdictions reached conflicting conclusions concerning the application of the doctrines.[64] Nonetheless, the supreme court's ruling in *Jackson* was anticipated by a decision of the Florida Supreme Court.[65] Subsequently, the Pennsylvania Supreme Court[66] and a New York trial court[67] have also concluded that the issue should be resolved only after a trial.

The plaintiff in *Jackson,* while a patient in the hospital, received blood supplied by both charitable and commercial blood banks. The matter was presented to the courts on cross-motions for summary judgment by the hospital, commercial blood bank and plaintiff. No motion was made by or against the charitable blood bank. The trial court held that the transaction was a *"sale,"* but concluded that the hospital and commercial blood bank were not liable under theories of strict liability or implied warranty.[68] The trial court's decision left open the questions of whether the defendants had been negligent and whether there had been a breach of an express warranty concerning the blood.

In its opinion, the trial court referred to strict liability as explained by the *Restatement (Second) of Torts* § 402*A*, concerning strict liability imposed upon a seller of a product for physical harm to a user or consumer.[69] That section, which had already been adopted by the New Jersey courts,[70] provides that a seller of a product is liable

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61 96 N.J. Super. 314, 232 A.2d 879 (L. Div. 1967).

62 53 N.J. 138, 249 A.2d 65 (1969).

63 Stipulation of dismissal filed June 29, 1969.

64 *See* cases cited note 21 *supra.*

65 Russell v. Community Blood Bank, Inc., 185 So. 2d 749 (Fla. Dist. Ct. App. 1966), *modified,* 196 So. 2d 115 (Fla. 1967).

66 Hoffman v. Misericordia Hosp., — Pa. 2d —, 267 A.2d 867 (1970).

67 Carter v. Inter-Faith Hosp., 60 Misc. 2d 733, 304 N.Y.S.2d 97 (Sup. Ct. Spec. T. 1969).

68 96 N.J. Super. at 324, 232 A.2d at 884.

69 *Id.* at 327, 232 A.2d at 886-87.

70 Newmark v. Gimbel's Inc., 54 N.J. 585, 600, 258 A.2d 697, 704 (1969).

to the ultimate consumer if the product is *"in a defective condition unreasonably dangerous to the user or consumer."*[71] The section continues in *comment k* by making an exception to the general rule for *"unavoidably unsafe products."*[72]

The trial court, after considering that neither the blood bank and hospital nor the patient could detect or eliminate hepatitis, concluded that the blood was not *"defective or unreasonably dangerous."*[73] The trial court also concluded that blood was an *"unavoidably unsafe product"* within the exception of *comment k.*[74] The supreme court held that more proof should be adduced before concluding that strict liability did not apply.[75]

Problems of Proof

In setting forth the guidelines for a trial, the supreme court stated in *Jackson*:

> At the trial, a complete record should be made, including not only detailed testimony as to the nature of the defendants' operations, but also expert testimony as to the availability of any tests to ascertain the presence of viral hepatitis in blood, the respective incidences of hepatitis in blood received from commercial blood banks and other sources, and such other available testimony and materials as may be relevant to any of the questions presented by the parties, including such economic and other factors as may bear on the question of whether the doctrine of implied warranty or strict liability should apply to deliveries and transfusions of blood.[76]

The court did not state which party had the burden of proof concerning the testimony. In a product's liability case, the plaintiff has the burden of establishing that the defendant has supplied a defective product and that it has caused his injury.[77] In a hepatitis case, the plaintiff would have the burden of proving that the blood is defective and unreasonably dangerous within § 402*A* of the *Restatement.* Modern discovery devices should ease the plaintiff's burden. Through interrogatories, depositions and requests for admissions, a plaintiff may fully explore the nature of a hospital or blood bank's operations. The appropriate information could then be introduced on the plaintiff's

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71 Restatement (Second) of Torts § 402A (1966) (emphasis added).

72 *Id.*, comment *k* at 353 (emphasis added).

73 96 N.J. Super. at 329, 232 A.2d at 888 (emphasis added).

74 *Id.*

75 53 N.J. at 142, 249 A.2d at 67-68.

76 *Id.* at 142-43, 249 A.2d at 67-68.

77 Restatement (Second) of Torts § 402A, comment *g* at 351 (1966).

case. Expert testimony could be adduced through a qualified medical doctor.

The burden of proof that hepatitis is not detectable and unremovable should rest on the defendant. The defendant could also offer proof that blood is not unreasonably dangerous and that it is unavoidably unsafe within the meaning of *comment k* of § 402.

Comment k also states, with reference to an unavoidably unsafe product, that "[s]uch a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous."[78] Presumably the showing of proper preparation could be made through a demonstration of due care in the selection of donors, including the taking of the medical history. Such a showing might be made by producing relevant medical records of the blood bank. Those records should qualify as business records,[79] thereby eliminating the necessity of testimony from the donors, who may not be available to testify. The requirement of providing proper directions and warning may be met by introducing the label on the blood container (assuming it contains appropriate language).

As previously stated, there is no reasonably certain means of detecting or treating blood for hepatitis. However, tests are currently being developed at several blood centers which may result in a test to detect hepatitis in whole blood with a reasonable degree of medical certainty.[80] If such a test is developed, then a plaintiff could resort to traditional concepts of negligence if the blood supplier carelessly failed to detect hepatitis in whole blood.

Another item of proof required by the supreme court pertained to the "respective incidences of hepatitis in blood received from commercial blood banks and other sources."[81] Parties to actions in New Jersey are fortunate in that data concerning incidences of hepatitis in blood from various sources are currently being accumulated by the Department of Health, State of New Jersey. For the past few years, the Department of Health has been making statistical analyses with respect to a source of blood for all hepatitis associated blood transfusions.[82] When completed, the statistics should satisfy one of the items of proof required by the supreme court in *Jackson*.

The last item required by the *Jackson* case concerned other relevant questions including *"economic and other factors."*[83] The court

78 *Id.*, comment *k* at 353-54.

79 N.J. UNIFORM RULE OF EVIDENCE 63(13).

80 *See* articles cited note 5 *supra*.

81 53 N.J. at 142, 249 A.2d at 68.

82 N.Y. Times, Sept. 5, 1970, at 12, col. 1.

83 53 N.J. at 142, 249 A.2d at 68.

did not specify the information to be provided in response to that question. Proof might be adduced on the costs of obtaining, testing and supplying blood so that a court could conclude whether the blood bank was selling blood for a profit or supplying a service. Perhaps the supreme court desired proof of the economic impact on blood banks of a determination of strict liability. Although most banks and hospitals are insured, the imposition of liability could result in increased premiums and, therefore, an increased cost of blood. Conceivably, some blood banks might not be able to obtain insurance or afford the cost. The availability and cost of insurance has been considered by the appellate courts,[84] and is relevant to the imposition, as a matter of public policy, of liability on a blood supplier.

CONCLUSION

Blood transfusions may be essential for the health or life of a patient. Nonetheless, there are no reliable means of detecting hepatitis or of eliminating it from whole blood. Even in the absence of negligence, a blood transfusion may result in hepatitis. To that extent, a blood transfusion is unavoidably unsafe. A hospital or blood bank should not be liable under products liability law merely because it has provided blood to a patient who contracts hepatitis from the transfusion.

Although tests are being developed to detect hepatitis in blood, they have not yet attained sufficient reliability to compel the application of strict liability-implied warranty to blood transfusions. If a test produces results with a reasonable degree of medical certainty or if a reliable test is accepted by the medical profession or imposed by law, then the failure to administer such a test would tend to support a finding of negligence by the blood supplier without recourse to strict liability-implied warranty. Consequently, negligence concepts would be sufficient to resolve the rights of the donee and the blood supplier. Whether strict liability-implied warranty should attach to the blood transfusions would depend upon not only the status of the test, but also proof of the additional facts required by the supreme court in *Jackson v. Muhlenberg Hospital.*

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84 Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 87, 207 A.2d 314, 323 (1965); *see also* Immer v. Risko, 56 N.J. 482, 489, 267 A.2d 481, 484-85 (1970).