

Comments

HOSPITAL AND BLOOD BANK LIABILITY TO PATIENTS WHO CONTRACT AIDS THROUGH BLOOD TRANSFUSIONS

As AIDS contagion spreads at epidemic proportions, and fear of the fatal disease runs rampant, it is noteworthy to recognize the legal impacts of the disease, especially as they affect the health care profession. Hospitals and blood banks face potentially unlimited liability if found legally responsible for transmitting AIDS through blood transfusions. A question remains as to what liability standard may provide or prevent recovery. This Comment balances the interests in providing recovery to AIDS victims against the interests in promoting available public health care and medical advancement.

INTRODUCTION

Acquired Immunodeficiency Syndrome (AIDS) has become the nation's primary health concern¹ since the first cases were reported

1. The United States Department of Health and Human Services has designated Acquired Immunodeficiency Syndrome (AIDS) as the nation's primary health concern. *Review of the Public Health Service's Response to AIDS* (Washington, D.C.: U.S. Congress, Office of Technology Assessment, OTA-TM-H-24, Feb. 1985), at 6 [hereinafter cited as *Review*]. The House of Representatives has recognized that AIDS is reaching epidemic proportions and that funding for prevention, treatment, and education is necessary to curtail the public health crisis. 130 CONG. REC. H10517-20 (daily ed. Oct. 1, 1984) (statements of Reps. Waxman and Weiss). In response to the emergency, Congress enacted Senate Bill S.2301, entitled "Preventive Health Amendments of 1984," Pub. L. 98-555, 98 Stat. 2854, on October 30, 1984, specifically authorizing the Director of the Centers for Disease Control (CDC) to make grants for education, diagnosis, prevention, and control of AIDS. 42 U.S.C.A. § 247c(d) (West 1982 & Supp. 1986). Furthermore, in 1985 the CDC announced the availability of funding for AIDS testing, 50 Fed. Reg. 9909 (1985), as well as for studies of transmission through pregnancy, 50 Fed. Reg. 16556 (1985), and through blood transfusions. 50 Fed. Reg. 30295 (1985). Most

in 1981.² More than 24,000 AIDS cases have been reported to the Centers for Disease Control, and more than 13,000 AIDS-related deaths have occurred.³ The epidemic continues as researchers struggle to develop an effective cure.⁴

Until recently AIDS victims typically belonged to four risk group categories.⁵ A new group of AIDS victims, however, has

recently, the CDC has announced funds for the fiscal year 1986 for AIDS prevention, health education, and risk reduction on both the state and community levels. 51 Fed. Reg. 3427 (1986).

On a more local front, in states in which AIDS is most prominent, legislation has been enacted establishing advisory committees and programs to combat the contagion, as well as establishing funding for AIDS education, victim support programs, and telephone hot-lines. *E.g.*, CAL. HEALTH & SAFETY CODE § 195 (West Supp. 1986); N.J. STAT. ANN. § 26:5C-1 to -4 (West Supp. 1986); N.Y. PUB. HEALTH LAW § 2775 (McKinney 1985).

The AIDS epidemic not only poses a serious health concern, but also carries with it several legal implications. Within the past three years, AIDS litigation has increased concerning issues of constitutional rights for AIDS victims, discrimination against children with AIDS and the rights of those children to attend school, as well as tort litigation for transfusion-associated AIDS. *See, e.g.*, Board of Educ. v. Cooperman, 209 N.J. Super. 174, 507 A.2d 253 (1986) (classroom attendance for AIDS-diagnosed children); District 27 Community School Bd. v. Board of Educ., 130 Misc. 2d 398, 502 N.Y.S.2d 325 (1986) (constitutional question of equal protection regarding exclusion of AIDS-infected children from school attendance as violation of Rehabilitation Act which does not allow discrimination against the handicapped); South Fla. Blood Serv., Inc. v. Rasmussen, 467 So. 2d 798 (Fla. Dist. Ct. App. 1985) (discovery of names of blood donors in tort litigation); *M., ex rel. S. v. R.*, 127 Misc. 2d 931, 487 N.Y.S.2d 685 (1985) (blood test to determine paternity did not pose threat of AIDS); LaRocca v. Dalsheim, 120 Misc. 2d 697, 467 N.Y.S.2d 302 (1983) (treatment of prisoners with AIDS in correctional facility).

2. *CDC Update: Acquired Immunodeficiency Syndrome—United States*, 34 MORBIDITY & MORTALITY WEEKLY REP. 245, 248 (1985) [hereinafter cited as *CDC Update 1985*]. The first symptoms, however, appeared as early as 1978. Squires, *The Impact of AIDS on Blood Donations*, 46 N.C. MED. J. 353 (1985).

3. These figures are based upon statistics available through September 1, 1986. Acquired Immunodeficiency Syndrome (AIDS) Weekly Surveillance Report—United States AIDS Program, Center for Infectious Diseases, Centers for Disease Control (Sept. 1, 1986) (provisional data available from the Department of Health & Human Services, Public Health Service, Centers for Disease Control, Atlanta, Georgia) [hereinafter cited as *AIDS Weekly Surveillance Report*]. It is difficult to estimate the actual number of people who have contracted AIDS, for a long latency period is associated with the disease. The onset of AIDS after contracting the virus takes an average of 27.5 months, with a general range from 15 months to 57 months. Fischinger, *Acquired Immune Deficiency Syndrome: The Causative Agent and the Evolving Perspective*, 9 CURRENT PROBLEMS IN CANCER 4, 19 (1985). It has been suggested, however, that the incubation period can be as low as six months. *Perspectives on the Future of AIDS*, 23 J. AM. MED. A. 247 (1985); *see also* Weiss, Hollander & Stobo, *Acquired Immunodeficiency Syndrome: Epidemiology, Virology, and Immunology*, 36 ANNALS REVISED MED. 545, 549 (1985) [hereinafter cited as *Weiss*].

4. *See, e.g.*, 51 Fed. Reg. 3427 (1986); Frazer & Donald, *First International Conference on the Acquired Immunodeficiency Syndrome*, 142 MED. J. AUSTL. 31, 34 (1985). The cause of AIDS was announced in April 1984 to be the Human T-cell lymphotropic virus type III (HTLV-III). *See* Squires, *supra* note 2. More recently, however, researchers indicate that other viruses also may be implicated in the AIDS contagion. *See infra* notes 19-21 and accompanying text.

5. The original four risk groups are homosexual males (71%), intravenous drug users (17%), Haitian immigrants (5%), and hemophiliacs (1%). *CDC Update: Acquired*

emerged—those who have contracted the disease through transfusions of blood and blood products.⁶ Blood banks, hospitals, and blood product manufacturers are the target against whom AIDS victims may seek recovery, based upon various theories of liability for manufacturing, marketing, or supplying AIDS-infected blood and blood products.

This Comment explores the possible theories of recovery available to blood transfusion recipients who contract AIDS. The Comment examines the medical and statistical data regarding AIDS and how these data may affect recovery and concludes that negligence provides the only viable means of recovery for transfusion-associated AIDS. Nonetheless, significant barriers remain which may preclude any hospital or blood bank liability.

AIDS AND BLOOD TRANSFUSIONS

Researchers initially found AIDS indigenous to members of four risk groups: homosexual males, intravenous drug users, hemophiliacs, and Haitian immigrants.⁷ Since intravenous drug users were a frequent group susceptible to the disease, researchers suspected that AIDS might be passed through blood.⁸ This hypothesis was bolstered by the fact that hemophiliacs were a minor yet still prevalent risk group.⁹ After months of research, the medical commu-

Immunodeficiency Syndrome (AIDS) — United States, 32 MORBIDITY & MORTALITY WEEKLY REP. 688, 689 (1984); see also Curran, Lawrence, Jaffe, Kaplan, Zyla, Chamberland, Weinstein, Lui, Schonberger, Spira, Alexander, Swinger, Ammann, Solomon, Auerbach, Mildvan, Stoneburner, Jason, Haverkos & Evatt, *Acquired Immunodeficiency Syndrome (AIDS) Associated with Transfusions*, 310 NEW ENG. J. MED. 69, 70 (1984) [hereinafter cited as Curran].

6. Blood products include platelets, whole blood, fresh frozen plasma, and packed cells in varying amounts. Most patients in need of transfusions require on the average three units of blood products. See Goldsmith, *Reactions and Counter-Reactions to Transfusion-Associated AIDS*, 251 J. AM. MED. A. 177 (1984).

7. See, e.g., Fischinger, *supra* note 3, at 5.

8. Sandler & Katz, *Impact of AIDS on Blood Services in the United States*, 46 VOX SANGUINIS 1 (1984).

9. Hemophiliacs comprise approximately one percent of AIDS victims. AIDS Weekly Surveillance Report, *supra* note 3; CDC Update 1985, *supra* note 2, at 246. It is estimated that one in every thousand hemophiliacs will contract the disease. This is the highest risk of any of the four risk groups. Fischinger, *supra* note 3, at 18. Hemophiliacs are a high risk group because of their constant need for blood and coagulation factors during bleeding episodes. Furthermore, the clotting factors used for treatment of hemophilia can come from 2000 to 25,000 donors, increasing the risk that the coagulation factor is infected with the AIDS virus. Hilgartner & Aledort, *AIDS in Hemophilia*, 437 ANNALS N.Y. ACAD. SCI. 466 (1984); see also Derrick, *AIDS and the Use of Blood Components and Derivatives: The Canadian Perspective*, 131 CAN. MED. A.J. 20 (1984).

Upon discovery of the potential effect of AIDS upon coagulation factor, hemophiliacs

nity officially recognized that AIDS could be transferred by infected blood.¹⁰

Reports within the past five years indicate that, in addition to hemophiliacs, a small percentage¹¹ of AIDS victims had received blood transfusions.¹² These AIDS victims comprise a fifth risk group.¹³ Though small compared to the other risk groups,¹⁴ the incidence of transfusion-associated AIDS has grown steadily since 1981.¹⁵ In light of the estimated three million blood transfusions given each year, the number of blood transfusion recipients who will develop AIDS remains small.¹⁶ Nonetheless, the potential for liability is substantial because most patients who contract the virus and develop AIDS¹⁷ subsequently die from the disease.¹⁸

have been advised to change from Factor VIII to cryoprecipitate, which the medical community believes is less susceptible to the AIDS virus. *AIDS and the Treatment of Hemophilia*, 84 MICH. MED. 62 (1985); see also Evatt, Ramsey, Lawrence, Zyla & Curran, *The Acquired Immunodeficiency Syndrome in Patients with Hemophilia*, 100 ANNALS INTERNAL MED. 499 (1984) [hereinafter cited as Evatt].

10. See, e.g., Curran, *supra* note 5; *AIDS Transmission Via Transfusion Therapy*, 8368 THE LANCET 102 (Jan. 14, 1984); Evatt, *supra* note 9.

11. Recent reports indicate that between one and three percent of AIDS victims have blood transfusion-associated AIDS. *CDC Update 1985*, *supra* note 2; AIDS Weekly Surveillance Report, *supra* note 3.

12. Feorino, Jaffe, Palmer, Peterman, Francis, Kalyanaraman, Weinstein, Stoneburner, Alexander, Raevsky, Getchell, Warfield, Haverkos, Kilbourne, Nicholson & Curran, *Transfusion Associated Acquired Immunodeficiency Syndrome*, 312 NEW ENG. J. MED. 1293 (1985) [hereinafter cited as Feorino].

13. This group consists of people who have had blood transfusions and have denied being either members of the various risk groups or sexual partners of AIDS victims. See *infra* notes 101-06 and accompanying text.

14. Over 20,000 cases have been reported of homosexual males and intravenous drug users who have contracted AIDS compared with less than 500 transfusion-associated AIDS cases which have been reported. AIDS Weekly Surveillance Report, *supra* note 3.

15. Before January 14, 1984, 34 (1.1%) transfusion-associated AIDS cases were reported. From January 14, 1984 to January 13, 1985, 56 (1.2%) transfusion-associated AIDS cases were reported. From January 14, 1985 to January 13, 1986, 171 (2.0%) transfusion-associated AIDS cases were reported. *CDC Update: Acquired Immunodeficiency Syndrome—United States*, 35 MORBIDITY & MORTALITY WEEKLY REP. 17, 20 (1986) [hereinafter cited as *CDC Update 1986*]. From January 1, 1986 to September 1, 1986, 177 (2.0%) transfusion-associated AIDS cases were reported in adults and adolescents. AIDS Weekly Surveillance Report, *supra* note 3.

16. See Derrick, *supra* note 9.

17. Some people may contract the virus but never develop the disease. *Safe Blood for Transfusion*, 25 THE MED. LETTER 93 (1983). Studies indicate that the HTLV-III/LAV virus is "associated with an asymptomatic carrier state, a mildly symptomatic state with transient immunologic abnormalities . . . , and other malignant conditions" besides acquired immunodeficiency. *Perspectives on the Future of AIDS*, 253 J. AM. MED. A. 247 (1985); see also Feorino, *supra* note 12. For a discussion of a system of classifying infected persons with the retrovirus of AIDS according to its various manifestations, see *CDC Classification System for Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus Infections*, 35 MORBIDITY & MORTALITY WEEKLY REP. 334 (1986).

18. As of April 1985, 4942 people had died from AIDS (49% of adults and 69% of children who had contracted the disease). *CDC Update 1985*, *supra* note 2. Nonethe-

In June 1984¹⁹ researchers discovered that a retrovirus,²⁰ human T-cell lymphotropic virus type III/lymphadenopathy-associated virus (HTLV-III/LAV),²¹ was the probable cause of AIDS.²² In 1985²³ testing procedures²⁴ were initiated to screen blood products and potential blood donors for antibodies of the HTLV-III/LAV virus.²⁵

less, 75% of the AIDS patients diagnosed before January 1983 have died. *Id.* More recent reports indicate that as of January 13, 1986, 8361 people have died from AIDS (51% of adults and 59% of children who have contracted the disease), and that 71% of the patients diagnosed before July 1984 have died. *CDC Update 1986, supra* note 15.

It should be noted that AIDS victims do not die from the virus itself. The virus attacks the immune system by depleting the body's T-4 helper cell lymphocytes. Weiss, *supra* note 3, at 553-55. Consequently, the AIDS patient is susceptible to opportunistic infections to which the immune system, through the T-4 helper cells, cannot respond effectively. *Id.* The most common of the opportunistic infections is *pneumocystis carinii* pneumonia. Fischinger, *supra* note 3, at 9.

Curiously, victims of blood transfusion-associated AIDS most commonly develop these opportunistic infections, while a significant portion of the homosexuals who contract AIDS develop Kaposi's sarcoma, *see* Weiss, *supra* note 3, at 549; Fischinger, *supra* note 3, at 11, identified by multiple tumor-like lesions on the skin. Giraldo, Beth & Buonaguro, *Kaposi's Sarcoma: A Natural Model of Interrelationships between Viruses, Immunologic Responses, Genetics, and Oncogenesis*, 32 ANTIBIOT. CHEMOTHER. 1 (1984). It has been suggested that several factors contribute to homosexuals contracting Kaposi's sarcoma, particularly an enormous increase in sexual promiscuity with a variety of partners. This increase in sexual activity fosters the spread of a wide variety of infections and ultimately leads to the development of Kaposi's sarcoma. *Id.* at 5-6; Fischinger, *supra* note 3, at 13; *see also* Weiss, *supra* note 3, at 546. Nonetheless, AIDS victims subsequently die from these infections. The mean age of most victims of transfusion-associated AIDS is 54, *see* Weiss, *supra* note 3, at 549, and most contract the disease during the course of surgery. *See, e.g.,* Curran, *supra* note 5, at 74. Men and women are represented equally; whites, however, more commonly are the victims of blood transfusion injuries. Fischinger, *supra* note 3, at 19.

19. Fischinger, *supra* note 3.

20. *Perspectives on the Future of AIDS*, 253 J. AM. MED. A. 247 (1985).

21. Human T-Cell Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus (HTLV-III/LAV) otherwise may be known as AIDS-associated retrovirus (ARV). Feorino, *supra* note 12. Nonetheless, some researchers feel that HTLV-III, LAV, and ARV all are closely related but not identical. *See* Fischinger, *supra* note 3, at 5; Weiss, *supra* note 3, at 551.

22. *Blood Transfusion, Hemophilia, and AIDS*, 8417 THE LANCET 1433 (Dec. 22/29, 1984).

23. On March 2, 1985, the test for HTLV-III/LAV antibodies in blood was licensed by the Food and Drug Administration (FDA). 50 Fed. Reg. 9909 (1985).

24. The test is an enzyme-linked immunosorbent assay (ELISA) which has proved to be 98.6% specific and 97.3% sensitive for antibodies to HTLV-III/LAV, but does not ensure against "false positive" results. Weiss, Goedert, Sarngadharan, Bodner, The AIDS Seroepidemiology Collaborative Working Group, Gallo & Blattner, *Screening Test for HTLV-III (AIDS Agent) Antibodies*, 253 J. AM. MED. A. 221, 223-24 (1985).

25. *Id.* at 223. In most blood banks, the ELISA test should have become fully operational before May 1985. Squires, *supra* note 2, at 354. Besides blood donation centers, alternate test sites have been established at which an individual at high risk of contracting AIDS may determine his antibody status. The primary goal of such alternate centers is protecting the nation's blood supply, that is, limiting the possibility of false-

The availability of the blood screening test—ELISA—should reduce significantly the number of future transfusion-associated AIDS cases.²⁶

THEORIES OF RECOVERY

A victim of transfusion-associated AIDS may pursue recovery under several legal theories. A *strict liability* action may lie against a blood product manufacturer, a hospital, or a blood bank, for placing defective blood onto the market. An AIDS victim also may claim a breach of *implied warranty* in a case in which defective blood is supplied. Finally, an action in *negligence* may be brought for inadequate blood testing or donor screening.

Each theory has been asserted in lawsuits by blood transfusion recipients who have contracted serum hepatitis,²⁷ though products lia-

negative donations. See *Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus Antibody Testing at Alternate Sites*, 35 MORBIDITY & MORTALITY WEEKLY REP. 284 (1986).

26. Squires, *supra* note 2, at 354.

27. The following cases have been brought upon a strict liability theory:

Sawyer v. Methodist Hosp., 522 F.2d 1102 (6th Cir. 1975) (applying Tennessee law); Heirs of Fruge v. Blood Servs., 506 F.2d 841 (5th Cir. 1975) (applying Louisiana law); Fogo v. Cutter Laboratories, Inc., 68 Cal. App. 3d 744, 137 Cal. Rptr. 417 (1977); McDonald v. Sacramento Medical Found. Blood Bank, 62 Cal. App. 3d 866, 133 Cal. Rptr. 444 (1976); Cramer v. Queen of Angels Hosp., 62 Cal. App. 3d 812, 133 Cal. Rptr. 339 (1976); Shepard v. Alexian Bros. Hosp., Inc., 33 Cal. App. 3d 606, 109 Cal. Rptr. 132 (1973); Belle Bonfils Memorial Blood Bank v. Hansen, 665 P.2d 118 (Colo. 1983); St. Luke's Hosp. v. Schmaltz, 188 Colo. 353, 534 P.2d 781 (1975); Fisher v. Sibley Memorial Hosp., 403 A.2d 1130 (D.C. Ct. App. 1979); Rostocki v. Southwest Fla. Blood Bank, Inc., 276 So. 2d 475 (Fla. 1973); McAllister v. American Nat'l Red Cross, 240 Ga. 246, 240 S.E.2d 247 (1977); Cunningham v. MacNeal Memorial Hosp., 47 Ill. 2d 443, 266 N.E.2d 897 (1970) (superseded by statute); Glass v. Ingalls Memorial Hosp., 32 Ill. App. 3d 237, 336 N.E.2d 495 (1975); McMichael v. American Red Cross, 532 S.W.2d 7 (Ky. Ct. App. 1975); De Battista v. Argonaut-Southwest Ins. Co., 403 So. 2d 26 (La. 1981), *on remand*, 410 So. 2d 279 (La. Ct. App.), *writ denied*, Faciane v. Argonaut-Southwest Ins. Co., 459 U.S. 836 (1983), *and writ denied*, 427 So. 2d 1208 (La. 1983) (superseded by statute); Fauchaux v. Alton Ochsner Medical Found. Hosp. & Clinic, 468 So. 2d 720 (La. Ct. App.), *rev'd*, 470 So. 2d 878 (La.), *writ denied on reconsideration*, 474 So. 2d 944 (La. 1985); Martin v. Southern Baptist Hosp., Inc., 352 So. 2d 351 (La. Ct. App. 1977), *writ denied*, 354 So. 2d 210 (La. 1978); Juneau v. Interstate Blood Bank, Inc., 333 So. 2d 354 (La. Ct. App.), *writ denied*, 337 So. 2d 220 (La. 1976); Brody v. Overlook Hosp., 66 N.J. 448, 332 A.2d 596 (1975); Hines v. St. Joseph's Hosp., 86 N.M. 763, 527 P.2d 1075, *cert. denied*, 87 N.M. 111, 529 P.2d 1232 (1974); Morse v. Riverside Hosp., 44 Ohio App. 2d 422, 339 N.E.2d 846 (1974); Garvey v. St. Elizabeth's Hosp., 103 Wash. 2d 756, 697 P.2d 248 (1985).

The following cases have been brought upon an implied warranty theory:

Sawyer v. Methodist Hosp., 522 F.2d 1102 (6th Cir. 1975) (applying Tennessee law); Heirs of Fruge v. Blood Servs., 506 F.2d 841 (5th Cir. 1975) (applying Louisiana law); McDonald v. Sacramento Medical Found. Blood Bank, 62 Cal. App. 3d 866, 133 Cal. Rptr. 339 (1976); St. Luke's Hosp. v. Schmaltz, 188 Colo. 353, 534 P.2d 781 (1975); Fisher v. Sibley Memorial Hosp., 403 A.2d 1130 (D.C. Ct. App. 1979); Lewis v. Associated Medical Insts., Inc., 345 So. 2d 852 (Fla. Dist. Ct. App.), *cert. denied*, 353 So. 2d 676 (Fla. 1977); Williamson v. Memorial Hosp., 307 So. 2d 199 (Fla. Dist. Ct. App. 1975); Mercy Hosp., Inc. v. Benitez, 257 So. 2d 51 (Fla. Dist. Ct. App. 1972); White v.

bility and implied warranty actions often have proved unsuccessful. Significant similarities exist between AIDS and serum hepatitis. Both diseases can be caused by infectious agents in the blood, both initially were of unknown origin, and both were undetectable in the blood by the standard procedures then available for testing.²⁸ In view of the similarities between AIDS and serum hepatitis, the same legal analysis arguably is applicable to the transfusion contagion of both diseases.

Strict Liability for Defective Products

Under a products liability theory, liability is imposed upon manufacturers²⁹ when a defective product causes an injury.³⁰ Manufacturer negligence is irrelevant since the manufacturer's conduct is not

Sarasota County Pub. Hosp. Bd., 206 So. 2d 19 (Fla. Dist. Ct. App.), *cert. denied*, 211 So. 2d 215 (Fla. 1968); Hoder v. Sayet, 196 So. 2d 205 (Fla. Dist. Ct. App. 1967); Russell v. Community Blood Bank, Inc., 185 So. 2d 749 (Fla. Dist. Ct. App. 1966), *aff'd as modified*, 196 So. 2d 115 (Fla. 1967); McAllister v. American Nat'l Red Cross, 240 Ga. 246, 240 S.E.2d 247 (1977); Lovett v. Emory Univ., Inc., 116 Ga. App. 277, 156 S.E.2d 923 (1967); McMichael v. American Red Cross, 532 S.W.2d 7 (Ky. Ct. App. 1975); Juneau v. Interstate Blood Bank, Inc., 333 So. 2d 354 (La. Ct. App.), *writ denied*, 337 So. 2d 220 (La. 1976); Warvel v. Michigan Community Blood Center, 74 Mich. App. 440, 253 N.W.2d 791 (1977); Jackson v. Muhlenberg, 53 N.J. 138, 249 A.2d 65 (1969); Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792, *reh'g denied*, 308 N.Y. 812, 123 N.E.2d 869 (1954); Morse v. Riverside Hosp., 44 Ohio App. 2d 422, 339 N.E.2d 846 (1974); Hoffman v. Misericordia Hosp., 439 Pa. 501, 267 A.2d 867 (1970); Foster v. Memorial Hosp. Ass'n, 159 W. Va. 147, 219 S.E.2d 916 (1975); Koenig v. Milwaukee Blood Center, Inc., 23 Wis. 2d 324, 127 N.W.2d 50 (1964).

Cases applying negligence principles include:

Samuels v. Health & Hosp. Corp., 432 F. Supp. 1283 (S.D.N.Y. 1977), *aff'd in part, rev'd in part*, 591 F.2d 195 (2d Cir. 1978) (also discussing strict liability); Parr v. Palmyra Park Hosp., Inc., 139 Ga. App. 457, 228 S.E.2d 596 (1976); Tufaro v. Methodist Hosp., Inc., 368 So. 2d 1219 (La. Ct. App. 1979); Warden v. Southwest La. Hosp. Ass'n, 300 So. 2d 590 (La. Ct. App. 1974); Hutchins v. Blood Servs., 161 Mont. 359, 506 P.2d 449 (1973); Gilmore v. St. Anthony Hosp., 598 P.2d 1200 (Okla. 1979).

28. Courts denying recovery for transfusion transmitted hepatitis have premised their decisions upon the fact that in each case at the time of transfusion hepatitis was undetectable. *See* Belle Bonfils Memorial Blood Bank v. Hansen, 665 P.2d 118, 120-21 (Colo. 1983); Fogo v. Cutter Laboratories, Inc., 68 Cal. App. 3d 744, 750, 137 Cal. Rptr. 417, 420 (1977); Fisher v. Sibley Memorial Hosp., 403 A.2d 1130, 1131 (D.C. Ct. App. 1979). Similarly, many researchers have found AIDS contagion through blood to be associated with the contagion of various types of hepatitis viruses. *See* Evatt, *supra* note 9, at 501; Jones, *Acquired Immunodeficiency Syndrome, Hepatitis, and Haemophilia*, 287 BRIT. MED. J. 1737 (1983); *Blood Transfusion, Haemophilia, and AIDS*, 8417 THE LANCET 1433, 1434 (Dec. 22/29, 1984).

29. Strict liability has been applied to those in the chain of distribution, including commercial lessors, Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970), retailers, Newmark v. Gimbel's Inc., 54 N.J. 585, 258 A.2d 697 (1969), and even landlords. Becker v. IRM Corp., 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985).

30. *E.g.*, Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27

at issue.³¹ Rather, the court focuses upon the nature of the product and its "defective" condition to determine liability.³²

Recovery under the theory of products liability generally requires the sale of a product.³³ Thus, in order to recover under a products liability theory, the victim of a defective blood transfusion must prove that a sale occurred in furnishing the blood transfusion.³⁴

Most courts do not recognize a blood transfusion to be a sale of a product³⁵ based upon statutory definitions characterizing blood transfusions as services.³⁶ These statutes specify that the use or

Cal. Rptr. 697 (1962); *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring). See generally W.P. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 692 (5th ed. 1984) [hereinafter cited as PROSSER & KEETON].

31. *Cunningham v. MacNeal Memorial Hosp.*, 47 Ill. 2d 443, 454, 266 N.E.2d 897, 903 (1970).

32. *Id.*

33. See, e.g., *St. Luke's Hosp. v. Schmaltz*, 188 Colo. 353, 534 P.2d 781 (1975).

34. See, e.g., *Shepard v. Alexian Bros. Hosp., Inc.*, 33 Cal. App. 3d 606, 109 Cal. Rptr. 132 (1973).

35. See, e.g., *St. Luke's Hosp. v. Schmaltz*, 188 Colo. 353, 534 P.2d 781 (1975) (no sale of a product had occurred because no consensual nor contractual nexus existed between the hospital and the transfusion recipient); see also *Shepard v. Alexian Bros. Hosp., Inc.*, 33 Cal. App. 3d at 610, 109 Cal. Rptr. at 134 (stating that "since [Cal. Health & Safety Code] section 1606 and its underlying rationale compel the conclusion that a blood transfusion must be regarded as a service, the doctrine of strict liability in tort is inapplicable as a matter of law").

36. E.g., ALA. CODE § 7-2-314(4) (1975); ALASKA STAT. § 45.02.316(e) (1985); ARIZ. REV. STAT. § 36-1151 (1986) (applying to serum hepatitis); CAL. HEALTH & SAFETY CODE § 1606 (West 1979); COLO. REV. STAT. § 13-22-104 (1974); CONN. GEN. STAT. ANN. § 19a-280 (West 1986); DEL. CODE ANN. tit. 6, § 2-316(5) (1975); FLA. STAT. ANN. 672.316(5), (6) (West Supp. 1986); GA. CODE ANN. § 105-1105 (Harrison 1984); IDAHO CODE § 39-3702 (1985); ILL. ANN. STAT. ch. 111½, ¶ 5102 (Smith-Hurd 1985); IND. CODE ANN. § 16-8-7-2 (Burns 1973); KAN. STAT. ANN. § 65-3701 (1980); KY. REV. STAT. ANN. § 139.125 (Baldwin 1981); ME. REV. STAT. ANN. tit. 11, § 2-108 (Supp. 1985); MASS. GEN. LAWS ANN. ch. 106, § 2-316(5) (West Supp. 1986); MICH. COMP. LAWS ANN. § 333.9121(2) (West 1980 & Supp. 1986); MISS. CODE ANN. § 51-41-1 (1972); MO. ANN. STAT. § 431.069 (Vernon Supp. 1986); MONT. CODE ANN. § 50-33-102 (1985); NEB. REV. STAT. § 71-4001 (1981); NEV. REV. STAT. § 460.010 (1979) (applying to serum hepatitis); OHIO REV. CODE ANN. § 2108.11 (Baldwin 1985); OR. REV. STAT. § 97.300 (1984); S.C. CODE ANN. § 44-43-10 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 57A-2-315.1 (1980) (applying to serum hepatitis); TENN. CODE ANN. § 47-2-316(5) (1979); UTAH CODE ANN. § 26-31-1 (1984); WASH. REV. CODE ANN. § 70.54.120 (1975 & Supp. 1986) (amended in 1985 to include transfusion of AIDS as well as hepatitis and malaria); WIS. STAT. ANN. § 146-31(2) (West 1974 & Supp. 1985); WYO. STAT. § 34-21-233(c)(iv) (1977).

Strict liability also is precluded by other statutes which state explicitly that the transfusion of blood will not be subject to strict liability. See, e.g., ARIZ. REV. STAT. ANN. § 32-1481 (1974); ARK. STAT. ANN. § 82-1608 (1976); COLO. REV. STAT. § 13-22-104 (1974); GA. CODE ANN. § 105-1105 (Harrison 1984); HAWAII REV. STAT. § 327-51 (1976); IDAHO CODE § 39-3702 (1985); ILL. ANN. STAT. ch. 111½, ¶ 5102 (Smith-Hurd 1985); IND. CODE ANN. § 16-8-7-2 (Burns 1973); KAN. STAT. ANN. § 65-3701 (1980); LA. REV. STAT. ANN. § 9:2797 (West 1965 & Supp. 1985); LA. CIV. CODE ANN. art. 2322.1 (West Supp. 1985); MD. HEALTH-GEN. CODE ANN. § 18-402 (1982) (applying to serum hepatitis); MICH. COMP. LAWS ANN. § 333.9121(3) (West 1980 & Supp. 1986);

transfusion of blood is not a "sale" for *any purpose*.³⁷ The effect of the "any purpose" language is to grant hospitals and blood banks absolute immunity from sales-based liability including strict liability. These immunity statutes are intended to promote public health and welfare:³⁸ imposing strict liability adversely would affect the public health and welfare by inhibiting the development of medical knowledge and by preventing sound medical decisionmaking.³⁹ States effectively proscribe strict liability in order to encourage uninhibited public access to medical care benefits and scientific advancements.⁴⁰

Prior to such enactments, however, some courts did find that hospitals and blood banks could be held strictly liable for injuries caused by blood transfusions.⁴¹ These courts had no difficulty char-

MONT. CODE ANN. § 50-33-103 to -104 (1985); NEV. REV. STAT. § 460.010 (1979) (applying to serum hepatitis); N.H. REV. STAT. ANN. § 507-8-b (1985); N.M. STAT. ANN. § 24-10-5 (1981) (applying to serum hepatitis); N.D. CENT. CODE § 43-17-40 (1978); PA. STAT. ANN. tit. 42, § 8333 (Purdon 1982); TEX. CIV. PRAC. & REM. CODE ANN. § 77.003 (Vernon 1986); WASH. REV. CODE ANN. § 70.54.120 (1975 & Supp. 1986); WIS. STAT. ANN. § 146-31(2) (West 1974 & Supp. 1985).

Many of these statutes have been challenged as unconstitutional denials of equal protection. *See, e.g., McDonald v. Sacramento Medical Found. Blood Bank*, 62 Cal. App. 3d 866, 133 Cal. Rptr. 444 (1976); *see also Heirs of Fruge v. Blood Servs.*, 506 F.2d 841 (5th Cir. 1975); *Bingham v. Lutheran Gen. & Deaconess Hosps.*, 34 Ill. App. 3d 562, 340 N.E.2d 220 (1975). Such challenges seldom have proved fruitful. Courts recognize that hospitals and blood banks provide services which are absolutely vital to combatting illness and disease; they also recognize that the imposition of strict liability seriously would inhibit medical progress. Therefore, the courts find that because these statutes serve legitimate purposes, they are not unreasonable, and thus are not unconstitutional denials of due process or equal protection. *McDonald*, 62 Cal. App. 3d at 873, 133 Cal. Rptr. at 488.

37. For example, California's blood processing statute states:

The procurement, processing, distribution, or use of whole blood, plasma, blood products, and blood derivatives for the purpose of injecting or transfusing the same, or any of them, into the human body shall be construed to be, and is declared to be, for all purposes whatsoever, the rendition of a service by each and every person, firm, or corporation participating therein, and shall not be construed to be, and is declared not to be a sale of such whole blood, plasma, blood products, or blood derivatives, for any purpose or purposes whatsoever.

CAL. HEALTH & SAFETY CODE § 1606 (West 1979).

38. *See, e.g., ARK. STAT. ANN. § 82-1607* (1976); *COLO. REV. STAT. § 13-22-104(1)* (1974); *ILL. ANN. STAT. ch. 111½, ¶ 5101* (Smith-Hurd 1986); *N.D. CENT. CODE § 43-17-40* (1978); *TEX. CIV. PRAC. & REM. CODE ANN. § 77.002* (Vernon 1986).

39. *See, e.g., TEX. CIV. PRAC. & REM. CODE ANN. § 77.002* (Vernon 1986).

40. Several of the codes were enacted based upon findings of an existing emergency in the health care field. *E.g., 1971 Ark. Acts 462, § 3* (enacting Arkansas' Chapter 16 of Public Health and Safety Title); *1971 Idaho Sess. Laws ch. 24, § 3* (enacting Idaho's Chapter 37 of Health and Safety Title).

41. *See, e.g., Belle Bonfils Memorial Blood Bank v. Hansen*, 665 P.2d 118 (Colo. 1983) (reversing lower court's denial of liability); *Cunningham v. MacNeal Memorial Hosp.*, 47 Ill. 2d 443, 266 N.E.2d 897 (1970).

acterizing blood as a product for sale and subject to strict products liability.⁴² Nonetheless, for purposes of strict products liability, some courts have treated blood banks differently from hospitals. These courts hold only blood banks to be strictly liable because they are engaged in the business of collecting and distributing blood; whereas hospitals primarily provide medical services, and blood transfusions are purely incidental to providing such services.⁴³ Other courts, however, have found no such distinction because both the hospital and the blood bank are in the blood distribution chain.⁴⁴ In either situation, the courts found the policies underlying strict products liability applicable to the transfusion of blood in order to enable recovery for transfusion-related injuries.

The primary goal of strict liability is to compensate innocent victims⁴⁵—“to insure that costs of injuries . . . are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.”⁴⁶ Strict liability recognizes that the manufacturer is in the best position both to insure against the risk of injury and to shift to the public through higher prices the costs of doing business and securing insurance.⁴⁷

42. *Cunningham*, 47 Ill. 2d at 447, 266 N.E.2d at 899 (finding that blood for transfusion purposes was “a ‘product’ in much the same way as other articles wholly unchanged from their natural state which are distributed for human consumption”).

More recently, transfusion-related hepatitis plaintiffs have urged that the Restatement (Second) of Torts section 402A be applied to define blood as an unreasonably dangerous product to which strict liability would attach. *See, e.g.*, *Belle Bonfils Memorial Blood Bank v. Hansen*, 665 P.2d 118 (Colo. 1983). These plaintiffs have suggested that blood be likened to other drugs that are injected into the body to which strict liability does attach. Nonetheless, in some cases, courts will rely upon the *comment k* exception to section 402A in denying strict liability for blood transfusion injuries. In these instances, blood is designated as unavoidably unsafe because no reliable or medically acceptable test for hepatitis in the blood existed at the time the transfusion was administered. *Belle Bonfils*, 665 P.2d at 122-27; *see also Moore v. Underwood Memorial Hosp.*, 147 N.J. Super. 252, 371 A.2d 105 (1977).

As an interesting side note, one court has held that because blood transfusions are unavoidably risky, the contracting of hepatitis through a blood transfusion administered during surgery for a gunshot wound, which ultimately led to the shooting victim’s death, is not a superseding factor to exculpate a criminal defendant from a manslaughter conviction. *People v. Flenon*, 42 Mich. App. 457, 202 N.W.2d 471 (1972).

43. *Russell v. Community Blood Bank, Inc.*, 185 So. 2d 749 (Fla. Dist. Ct. App. 1966), *aff’d as modified*, 196 So. 2d 115 (Fla. 1967). Nonetheless, when a hospital undertakes its own collection, processing and distribution of blood, the courts may find no such distinction. *See Mercy Hosp., Inc. v. Benitez*, 257 So. 2d 51 (Fla. Dist. Ct. App. 1972).

44. *Cunningham*, 47 Ill. 2d at 452, 266 N.E.2d at 901.

45. *See generally* RESTATEMENT (SECOND) OF TORTS § 402A comment c (1965) (stating “the consumer . . . is entitled to the maximum of protection at the hands of someone . . .”).

46. *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701; *see also Cunningham*, 47 Ill. 2d at 457, 266 N.E.2d at 904. *See generally Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 440 (1944) (Traynor, J., concurring).

47. *See generally* RESTATEMENT (SECOND) OF TORTS § 402A comment c (1965)

Strict liability also motivates manufacturers to design safer products, reducing future injuries and liability and, at least in theory, reducing the net cost to society which results from product-related personal injury.⁴⁸

Arguably, the policy of compensating innocent victims is no less warranted for blood-related injuries than for other product-related injuries. Blood transfusion recipients lack the ability to guard against potential injuries, outside of refusing to receive the blood transfusion altogether which often is not a viable option. Patients also are not able to ensure that the transfusion is administered correctly, nor are they able to inspect the blood for possible infection. On the other hand, it is hospitals and blood banks which possess the means both to detect and to eliminate possible impurities in the blood, and to ensure that blood transfusions are administered properly. It would be reasonable, therefore, to hold hospitals and blood banks strictly liable for transfusion-contracted diseases; hospitals and blood banks can spread the risk of such injuries in the form of higher charges for blood transfusions. However, this argument ignores both the fact that statutes were enacted specifically to preclude such recovery and the fact that courts continue to support these statutes in order to maintain the public health and welfare, to ensure sufficient blood supplies, and to enable medical treatment and discovery to advance.⁴⁹

Though most blood immunity statutes were enacted in response to increasing litigation regarding transfusion-related hepatitis,⁵⁰ they apply equally to all transfusion-related diseases, including AIDS. Without statutory immunity, hospitals and blood banks would face enormous expense if held liable for the costs of transfusion-related AIDS contagion, especially since detection and elimination were not medically possible when the majority of these transfusions were administered. Imposition of strict liability in cases in which testing was

(stating "public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained"); PROSSER & KEETON, *supra* note 30, at 692.

48. See generally PROSSER & KEETON, *supra* note 30, at 693. It has been suggested that the blood immunity statutes be amended to allow imposition of strict liability in order to increase product safety and allocate risks. See, e.g., Comment, *Strict Liability for Blood Derivative Manufacturers: Statutory Shield Incompatible with Public Health Responsibility*, 28 SAINT LOUIS U.L.J. 443 (1984).

49. See, e.g., *Cramer v. Queen of Angels Hosp.*, 62 Cal. App. 3d 812, 133 Cal. Rptr. 339 (1976).

50. See, e.g., *Belle Bonfils*, 665 P.2d at 120 n.2.

unavailable would drive up the cost of medical care to prohibitive levels and also would undermine the availability of blood necessary for transfusions. Clearly, affordable health care is among the nation's top concerns today. The skyrocketing cost of medical malpractice insurance already has had a significant impact upon health care. Many states have responded to these increasing costs by enacting statutes which limit the recovery of medical malpractice victims in an effort to keep insurance rates at tolerable levels, thereby protecting the future of the health-care professions.⁵¹ The blood transfusion immunity statutes serve the same protective function—preventing the imposition of liability without fault for transfusion-related injuries.⁵²

In *Hyland Therapeutics v. Superior Court*,⁵³ the California Sixth District Court of Appeal held that section 1606 of the California Health and Safety Code precluded strict liability recovery to a hemophiliac who contracted AIDS. In *Hyland Therapeutics*, the defendant was neither a hospital nor a blood bank; rather, it manufactured blood product Factor VIII, a clotting factor developed to correct or prevent bleeding episodes. The plaintiffs contended that commercial blood product manufacturers should be treated differently from hospitals and blood banks—that the need for available blood supplies which mandates immunizing hospitals and blood banks does not apply to commercial manufacturers.⁵⁴ The court rejected the distinction finding that blood product manufacturers should be afforded protection under section 1606 for the same reasons that support blood bank and hospital immunity.⁵⁵ Relying upon the clear and unambiguous language⁵⁶ of section 1606, the court held that *Hyland Therapeutics'* manufacturing and distributing of Factor VIII was the

51. See, e.g., CAL. CIV. CODE § 3333.2 (West 1970 & Supp. 1986). For an argument calling for legislative reform of California's statute, see Comment, *California's MICRA: The Need for Legislative Reform*, 23 SAN DIEGO L. REV. 171 (1986).

52. These statutory immunities only are given to preclude liability without fault; liability for negligence or wilful misconduct is recognized as the means by which to hold a blood bank or hospital responsible for the injuries caused by blood transfusions. *E.g.*, HAWAII REV. STAT. § 327-51 (1976).

53. 175 Cal. App. 3d 509, 220 Cal. Rptr. 590 (1985).

54. *Id.* at 515, 220 Cal. Rptr. at 593.

55. *Id.* at 516, 220 Cal. Rptr. at 594.

56. The *Hyland Therapeutics* court relied heavily upon the plain meaning rule of *Tieman v. Trustees of Cal. State Univ. & Colleges*, 33 Cal. 3d 211, 655 P.2d 317, 188 Cal. Rptr. 115 (1982), stating "if the statutory language is 'clear and unambiguous there is no need for construction, and courts should not indulge in it.' [Citations]" *Hyland Therapeutics*, 175 Cal. App. 3d at 514, 220 Cal. Rptr. at 593. Moreover, *Hyland Therapeutics* considered that "the plain meaning rule [was] fundamental to the concept of separation of powers. The judiciary has no power to rewrite plain statutory language." *Id.* Furthermore, *Hyland Therapeutics* noted that the legislature had recently addressed the problem of transfusion-associated AIDS, see CAL. HEALTH & SAFETY CODE § 195 (West Supp. 1986), but did not amend section 1606. *Hyland Therapeutics*, 175 Cal. App. 3d at 514, 220 Cal. Rptr. at 593.

rendition of services not subject to strict liability.⁵⁷

It seems likely that courts will continue to support the statutory interests which protect the public health and welfare by precluding strict liability recovery to recipients of blood transfusions who contract AIDS. *Hyland Therapeutics* supports this position.

Breach of Implied Warranty

Under an implied warranty theory, section 2-314 of the Uniform Commercial Code imposes liability upon a seller in cases in which goods not of merchantable quality are sold.⁵⁸ Section 2-315 imposes liability when goods are not fit for the particular purpose for which they are sold.⁵⁹ Because both section 2-314 and section 2-315 apply only to the sale of goods,⁶⁰ it must be determined whether blood transfusions are goods, the "sale" of which subjects the seller to liability under the Uniform Commercial Code.⁶¹ Most states have enacted legislation specifying that the use or transfusion of blood is a "service," not a sale, and therefore does not give rise to an implied warranty.⁶²

57. 175 Cal. App. 3d at 514, 220 Cal. Rptr. at 592. The court relied upon a factually similar hepatitis case in which a hemophiliac contracted serum hepatitis from clotting factor Konyne. *See Fogo v. Cutter Laboratories, Inc.*, 68 Cal. App. 3d 744, 137 Cal. Rptr. 417 (1977). There, too, the court focused upon the clear intent of section 1606 in defining the distribution of blood products as services even as applied to a commercial blood product manufacturer. *Fogo*, 68 Cal. App. 3d at 752, 137 Cal. Rptr. at 422.

58. U.C.C. § 2-314 (1986); *see, e.g.*, *Hoffman v. Misericordia Hosp.*, 439 Pa. 501, 267 A.2d 867 (1970); *Fisher v. Sibley Memorial Hosp.*, 403 A.2d 1130 (D.C. Ct. App. 1979).

59. U.C.C. § 2-315 (1986); *see, e.g.*, *Foster v. Memorial Hosp. Ass'n*, 159 W. Va. 147, 219 S.E.2d 916 (1975) (discussing West Virginia's implied warranty code section 46-2315).

60. U.C.C. § 2-314 states: "(1) Unless excluded or modified . . . a warranty that the goods shall be merchantable is implied in a contract for their sale . . ."

U.C.C. § 2-315 states:

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

Most states have enacted code provisions similar to Uniform Commercial Code section 2-314, *see, e.g.*, CAL. COM. CODE § 2314 (West 1964), and Uniform Commercial Code section 2-315. *See, e.g.*, N.Y.U.C.C. § 2-315 (McKinney 1964).

61. Some courts have found that strict products liability and implied warranty actions basically look to the same factors: sale of a product and liability without fault. *See, e.g.*, *McDaniel v. Baptist Memorial Hosp.*, 352 F. Supp. 690 (W.D. Tenn. 1971), *aff'd*, 469 F.2d 230 (6th Cir. 1972); *Shepard v. Alexian Bros. Hosp., Inc.*, 33 Cal. App. 3d 606, 109 Cal. Rptr. 132 (1973).

62. *E.g.*, ALASKA STAT. § 45.02.316(e)(1985); ARIZ. REV. STAT. ANN. § 32-1481

Again, without sales-based immunity statutes, some courts have found hospitals and blood banks to be liable under an implied warranty for transfusing defective blood.⁶³ Courts subjected blood banks to liability under both implied warranties because the blood banks were in the business of procuring and selling blood for profit.⁶⁴ Moreover, these courts also rejected the notion that hospitals were engaged solely in the business of providing medical services to their patients,⁶⁵ and concluded that hospitals were engaged in the business of selling blood to the transfusion recipient,⁶⁶ especially in cases in which the hospital charged a fee for the blood.⁶⁷ Therefore, absent the statutory immunity, hospitals and blood banks could be found liable for breaching an implied warranty when furnishing defective blood.⁶⁸

Nevertheless, when state legislatures have granted hospitals or blood banks statutory immunity, the courts generally have upheld

(1974); CONN. GEN. STAT. ANN. § 19a-280 (West 1985); DEL. CODE ANN. tit. 6, § 2-316(5) (1975); FLA. STAT. ANN. § 672.316(5), (6) (West Supp. 1986); GA. CODE ANN. § 105-1105 (Harrison 1984); GA. CODE ANN. § 109A-2-316(5) (Harrison 1979); IDAHO CODE § 39-3702 (1985); ILL. ANN. STAT. ch. 111½, ¶ 5102 (Smith-Hurd 1985); IND. CODE ANN. § 16-8-7-2 (Burns 1973); KAN. STAT. ANN. § 65-3701 (1980); MD. HEALTH-GEN. CODE ANN. § 18-402 (1982) (applying to serum hepatitis); MASS. GEN. LAWS ANN. ch. 106, § 2-316(5) (West Supp. 1986); MICH. COMP. LAWS ANN. § 333.9121(3) (West 1980 & Supp. 1986); MO. ANN. STAT. § 431.069 (Vernon Supp. 1986); NEV. REV. STAT. § 460.010 (1979) (applying to serum hepatitis); N.H. REV. STAT. ANN. § 507-8-b (1985); N.M. STAT. ANN. § 24-10-5 (1981) (applying to serum hepatitis); OHIO REV. CODE ANN. § 2108.11 (Baldwin 1985); OKLA. STAT. ANN. tit. 63, § 2151 (West 1984); OR. REV. STAT. § 97.300 (1984); PA. STAT. ANN. tit. 42, § 8333 (Purdon 1982); S.C. CODE ANN. § 44-43-10 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 57A-2-315.1 (1980) (applying to serum hepatitis); TENN. CODE ANN. § 47-2-316(5) (1979); VA. CODE § 32.1-297 (1985); WASH. REV. CODE ANN. § 70.54.120 (1975 & Supp. 1986) (amended in 1985 to include transfusion of AIDS as well as hepatitis and malaria); WYO. STAT. § 34-21-233(c)(iv) (1977).

When defects in the blood are detectable by established medical procedures, these codes may allow recovery under implied warranties. *E.g.*, VA. CODE § 32.1-297 (1985). Nonetheless, proving an established medical standard for detecting impurities in the blood is a large obstacle to overcome—an obstacle which depends upon the time of donation and transfusion. Moreover, a focus upon medical standards looks to a negligence cause of action, rather than one of implied warranty which looks to liability without fault. *See infra* text and accompanying notes 72-100.

63. *E.g.*, *Mercy Hosp., Inc. v. Benitez*, 257 So. 2d 51 (Fla. Dist. Ct. App. 1972); *Reilly v. King County Cent. Blood Bank, Inc.*, 6 Wash. App. 172, 492 P.2d 246 (1971).

64. *E.g.*, *Rostocki v. Southwest Fla. Blood Bank, Inc.*, 276 So. 2d 475 (Fla. 1973); *Hoder v. Sayet*, 196 So. 2d 205 (Fla. Dist. Ct. App. 1967).

65. *Mercy Hosp., Inc. v. Benitez*, 257 So.2d 51 (Fla. Dist. Ct. App. 1972); *Hoffman v. Misericordia Hosp.*, 439 Pa. 501, 267 A.2d 867 (1970) (finding that a hospital providing services still might be liable under implied warranty).

66. *Rostocki v. Southwest Fla. Blood Bank, Inc.*, 276 So. 2d 475 (Fla. 1973).

67. *Id.*

68. *E.g.*, *Reilly v. King County Cent. Blood Bank*, 6 Wash. App. 172, 492 P.2d 246 (1971) (superseded by the enactment of section 70.54.120); *Rostocki v. Southwest Fla. Blood Bank, Inc.*, 276 So. 2d 475 (Fla. 1973) (superseded by the enactment of section 672.316).

these immunities,⁶⁹ denying recovery under an implied warranty to recipients of hepatitis-infected blood transfusions.⁷⁰ Following the rationale of *Hyland Therapeutics v. Superior Court*,⁷¹ transfusion-associated AIDS victims would be treated no differently. Sales-based immunity statutes which preclude strict liability most likely will preclude recovery under implied warranty for transfusion-associated AIDS victims.

Negligence

To recover under negligence, a plaintiff must prove that a standard of care existed, that the defendant's conduct fell below that standard, and that this conduct was the proximate cause of the plaintiff's injury.⁷² In blood transfusion cases, the standards most commonly identified concern blood testing and donor screening.

Standards for Blood Testing

The duty owed to a blood transfusion recipient is measured by the standard of care which exists at the time of the transfusion.⁷³ This standard is based upon the ability of medical science to discover the disease, as well as the ability to develop an accurate, reliable, and generally accepted method for testing blood for such disease.⁷⁴

Most case law concerning blood transfusion liability involves

69. *E.g.*, *McDonald v. Sacramento Medical Found. Blood Bank*, 62 Cal. App. 3d 866, 133 Cal. Rptr. 444 (1976); *Juneau v. Interstate Blood Bank, Inc.*, 333 So. 2d 354 (La. Ct. App.), *writ denied*, 337 So. 2d 220 (La. 1976).

In noting that some statutes specifically apply to the transfusion contagion of serum hepatitis, a question of legislative intent arises—whether the legislature intended the immunities to extend only to hepatitis cases, or whether the legislature intended protection to extend to all unknown and undetectable diseases that could be transmitted through blood. In those situations in which the statute applies only to transfusion of hepatitis, the courts, faced with upholding legislative policies, may be required to interpret the statutes broadly to include the transfusion of AIDS and other undetectable viruses.

70. *See supra* note 69.

71. *See supra* text accompanying notes 53-57.

72. *See, e.g.*, *Hutchins v. Blood Servs.*, 161 Mont. 359, 506 P.2d 449 (1973); *see also* *Warden v. Southwest La. Hosp. Ass'n*, 300 So. 2d 590 (La. Ct. App. 1974). If the patient should die, a wrongful death suit may be available. *McDonald v. Sacramento Medical Found. Blood Bank*, 62 Cal. App. 3d 866, 133 Cal. Rptr. 44 (1976).

Actions also have been based upon violations of pure food and drug laws. *See Morse v. Riverside Hosp.*, 44 Ohio App. 2d 422, 339 N.E.2d 846 (1974). Most courts, however, have found that whole blood, plasma, and blood products are not "food" or "drugs" for human consumption, but rather are "human tissue," and thus unnecessary to meet the standards of the pure food and drug laws. *Id.* at 424-25, 339 N.E.2d at 849.

73. *See Hutchins*, 161 Mont. at 362-67, 506 P.2d at 451-53.

74. *Id.* *see also* *Martin v. Southern Baptist Hosp.*, 352 So. 2d 351 (La. Ct. App. 1977), *writ denied*, 354 So. 2d 210 (La. 1978).

plaintiffs who have contracted serum hepatitis. In most of these situations, the virus could not be detected by the state-of-the-art blood testing procedures. Even where detectable, courts would find that the testing procedures had not developed with sufficient accuracy or reliability to establish a medical standard.⁷⁵ Plaintiffs were unable to prove an existing medical standard for hepatitis testing, and negligence actions in these cases consequently failed.⁷⁶

Transfusion-associated AIDS victims face obstacles to recovery identical to those faced by hepatitis victims: an AIDS victim must establish a standard of accurate and reliable testing available at the time of the transfusion, despite the long latency period of the disease during which testing procedures markedly improved.⁷⁷ As a result, recipients of pre-1985 transfusions may have difficulty establishing any standard of care. Although the cause of AIDS was not discovered until 1984,⁷⁸ it was not until March 1985 that the Food and Drug Administration (FDA) licensed the ELISA test for screening blood for HTLV-III/LAV antibodies.⁷⁹ Because no blood testing standard had been medically recognized prior to 1985, pre-1985 transfusion-associated AIDS victims will be unable to prove that AIDS-infected blood transfusions resulted from negligent blood testing.

75. See *Hutchins*, 161 Mont. at 362-67, 506 P.2d at 451-53. In fact, Montana, for example, will not impose liability if blood is tested according to the "latest testing procedures in accordance with recommendations of the American Association of blood banks . . ." MONT. CODE ANN. § 50-33-104 (1985).

76. See generally *Hutchins v. Blood Servs.*, 161 Mont. 359, 506 P.2d 449 (1973). In *Hutchins*, four "uncontradicted circumstances" led the court to find that the specific testing procedure, the SGOT test, had not been implemented nor recognized substantially so as to establish a medical standard:

- (a) no blood bank in the United States was using the SGOT test as a routine screening test;
- (b) neither federal regulations nor the accrediting standards of the American Association of Blood Banks required or had ever required the use of the SGOT test on prospective donors;
- (c) neither the Public Health Service, the American Association of Blood Banks of the American Medical Association Committee on Transplantation and Transfusion had ever recommended the use of SGOT testing; and
- (d) although some writers had suggested investigating the usefulness of SGOT for blood donors, those who were recognized as authorities in blood banking had concluded it was not a useful or meaningful test for purposes of screening blood donors.

Hutchins, 161 Mont. at 365, 506 P.2d at 452.

77. For statute of limitations purposes, however, the latency period may serve to postpone the tolling of the statute until the AIDS victim discovers, or reasonably could have discovered, the disease. See, e.g., CAL. CIV. PROC. CODE § 340.5 (West 1982) (in action against health care provider, the time for commencing the action shall be one year after the plaintiff discovers, or through reasonable diligence should have discovered, the injury).

78. Not until June 1984 was the medical community fairly certain that the cause of AIDS was HTLV-III/LAV, a retrovirus. See *Fischinger*, *supra* note 3.

79. See *supra* note 23.

Nonetheless, in 1985 when detection of the AIDS virus in blood became medically possible,⁸⁰ most donor centers began using the ELISA test.⁸¹ Furthermore, the Public Health Service recommended that all blood or plasma should be tested for HTLV-III/LAV antibodies,⁸² and if found, the blood or plasma should be discarded.⁸³ The availability and rapid implementation of the ELISA test arguably established a medical standard upon which to base a negligence action. If a transfusion recipient contracts AIDS from blood or plasma which could have been tested, the blood bank could be liable in negligence for the resulting injuries, either for failing to test the blood, for failing to test according to the proper procedures, or for failing to discard blood known to be infected.

The test is not completely accurate—this may provide a barrier to recovery. Blood showing no sign of HTLV-III/LAV antibodies still may slip through with the virus undetected.⁸⁴ To reduce the possibility that infected blood may pass undetected, blood donor centers now are using the ELISA test together with existing screening procedures for eliminating high risk donors.⁸⁵

Standards for Donor Screening

Liability for transfusion-associated injuries also may be established by proving that an existing procedure for screening potential donors was not followed by the collecting agency. Victims of transfu-

80. For example, California has enacted legislation requiring blood banks and plasma centers to test blood and plasma for the causative agent of AIDS. 1985 Cal. Legis. Serv. ch. 23 (West). Section 4, article 8 of Assembly Bill No. 488, mandating testing for AIDS, is designated to supplement already implemented programs for testing blood for serum hepatitis and other blood-transmitted diseases.

81. See *supra* note 25.

82. See generally *Review, supra* note 1.

83. *Review, supra* note 1.

84. *Id.* at 17. For example, a recent journal notes a case of a high risk person who was allowed to donate blood. The donor was a man who admittedly had only one homosexual encounter in the past year. The sexual partner, however, actively had been engaged in homosexual encounters for the past four years. Clearly these facts indicate that both men were of potentially high risk for carrying the AIDS virus. The difficult factor was that the donor tested negative for the HTLV-III/LAV virus. This case indicates the problems inherent in merely using the ELISA test as the only means of preventing transfusion-associated AIDS. It also indicates the necessity of supplementing the ELISA test with other tests, for example the Western Bloc test, as well as the donor screening questioning procedures, which in theory will eliminate anyone with a high risk of carrying AIDS. See *CDC Transfusion-Associated Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus Infection From a Seronegative Donor—Colorado*, 35 MORBIDITY & MORTALITY WEEKLY REP. 389 (1986).

85. *Review, supra* note 1, at 17.

sion-associated hepatitis have suggested that a blood bank's failure to effectively screen potential donors is negligent conduct.⁸⁶ In *Hoder v. Sayet*,⁸⁷ the Florida District Court of Appeal noted that the blood bank had the duty to correctly ascertain a donor's health and health history as part of the donor screening procedure, since the donor's health, well-being, and prior disease history would have established the probability that a donor had hepatitis.⁸⁸

Similarly, in *Tufaro v. Methodist Hospital, Inc.*,⁸⁹ the Louisiana Court of Appeal also recognized that failure to detect a strain of malaria in blood to be used for transfusion purposes might be negligent conduct. The *Tufaro* court, however, noted that liability would turn on whether the blood bank was capable of detecting the malaria strain using the available procedures for testing.⁹⁰ Because no test for malaria in the blood existed at the time, donor screening was the only available means to exclude malaria-infected blood.⁹¹ Whether a donor had a high risk of malaria could be determined by asking standardized questions regarding illnesses and relevant medical history. The *Tufaro* court held that for the plaintiffs to prevail, they would have had to establish that the donated blood was collected using methods unacceptable to the medical community at the time the blood was donated. In effect, the plaintiffs would have had to prove that the blood bank did not comply with the medical community's standards because it did not adopt or ask the specific screening questions. Alternatively, plaintiffs would have had to establish that the donor center, having implemented the guidelines and procedures, negligently failed to conduct the screening as specifically directed, and, in effect, allowed a known high risk donation.⁹²

In 1983 the medical community discovered the potential for AIDS

86. *E.g.*, *Klaus v. Alameda-Contra Costa Medical Ass'n Blood Bank*, 62 Cal. App. 3d 417, 420, 133 Cal. Rptr. 92, 93 (1976) ("[A] failure to use reasonable means of [choosing donors to mitigate the possibility of infection] could furnish the basis for a cause of action in negligence.").

87. 196 So. 2d 205 (Fla. Dist. Ct. App. 1967).

88. *Id.* at 209.

89. 368 So. 2d 1219 (La. Ct. App. 1979).

90. *Id.* at 1221.

91. The following groups were precluded from donating because of the high risk for transmitting malaria:

- a) anyone with a history of malaria;
- b) a United States citizen who had, six months prior, visited an endemic country (where malaria was prevalent);
- c) anyone who had taken anti-malarial drugs within the last three years; and
- d) military personnel stationed in an endemic country within the last three years.

Id. at 1220.

92. *Id.* at 1221. The court held that plaintiffs had not proven effectively that donor screening procedures were not followed adequately, based primarily upon the donor's unreliable testimony. *Id.*

to be transmitted through blood⁹³ and blood products,⁹⁴ and began eliminating members of known high risk groups from the donor pool,⁹⁵ using procedures similar to those which had proved effective in reducing the risk of transfusion-associated hepatitis and malaria.⁹⁶ The FDA Office of Biologics recommended eliminating from the donor pool homosexual and bisexual males with multiple sexual partners, intravenous drug abusers, Haitian immigrants, and sexual partners of any high risk group member,⁹⁷ as these classes represented the known high risk groups. Furthermore, programs were initiated to educate high risk group members of the potential danger for AIDS transmission if they were to donate blood. These programs urged high risk group members to refrain completely from donating blood.⁹⁸

The medical community maintained that these procedures, though not perfect, significantly would reduce the risk of contracting AIDS through blood transfusions.⁹⁹ Arguably, the potential for AIDS-infected blood diminished as early as 1983 when these steps were undertaken to combat the contamination of blood with the AIDS virus. Infected blood might have been transfused as the result of a blood bank's failure to comply with standard screening procedures which would have precluded a high risk person from donating blood. It seems likely, therefore, that a plaintiff could maintain a viable cause of action in negligence against a blood bank if he could prove he

93. Curran, *supra* note 5.

94. Perkins, *Transfusion-Associated AIDS*, 19 FRONT. RADIAT. THER. ONC. 23, 24 (1985).

95. See, e.g., Pindyck, Waldman, Zang, Oleszko, Lowy & Bianco, *Measures to Decrease the Risk of Acquired Immunodeficiency Syndrome Transmission by Blood Transfusion*, 25 TRANSFUSION 3 (1985) [hereinafter cited as Pindyck].

96. *Id.* at 9. Suggested subjects about which to question potential donors include a "history of intravenous drug abuse, hepatitis, unexplained weight loss of greater than 10 pounds, unexplained persistent fever, symptoms of acute respiratory infection, including cough . . . recurrent night sweats, persistent diarrhea, persistent cough, [or] the presence of skin nodules suggestive of Kaposi's sarcoma." *Id.* at 4; see also *Safe Blood for Transfusion*, 25 THE MED. LETTER 93 (1983).

97. See Pindyck, *supra* note 95.

98. *Id.* at 9; see also Sandler & Katz, *Impact of AIDS on Blood Services in the United States*, 46 VOX SANGUINIS 1, 3 (1984). With the increased number of nonhigh risk group members carrying the disease, additional recommendations for prevention have been established for the purposes of increasing knowledge of AIDS, facilitating behavioral change to reduce risks of HTLV-II/LAV infection, and encouraging industry research. See *CDC Additional Recommendations to Reduce Sexual and Drug-Abuse-Related Transmission of Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus*, 35 MORBIDITY & MORTALITY WEEKLY REP. 152, 153-54 (1986).

99. See generally Pindyck, *supra* note 95; Review, *supra* note 1, at 16-21.

contracted AIDS through blood transfused as early as 1983.¹⁰⁰

Causation

To recover in negligence, blood transfusion injury victims must prove that the disease actually was contracted through the blood transfusion. Although courts often have approached the burden of proving causation differently, all have agreed that causation must be established for recovery under a negligence theory.¹⁰¹ Meeting the burden of proving causation might be accomplished by eliminating the possibility of other causes of AIDS; for example, a plaintiff might submit evidence that he is neither a homosexual, an intravenous drug user, nor a sexual partner of any high risk group member.

The nature of the disease also may assist in rebutting nontransfusion causes. In *DeBattista v. Argonaut-Southwest Insurance Company*,¹⁰² the Louisiana Supreme Court noted that two factors were significant in rebutting other possible causes of hepatitis. First, the court recognized that the delay in the manifestation of the plaintiff's hepatitis was consistent with contracting hepatitis through a blood transfusion. Second, the court noted that the plaintiff contracted *serum* hepatitis, which most commonly is transmitted through blood,

100. Several other negligence-based causes of action have been suggested in the past by transfusion-associated hepatitis victims. Plaintiffs have suggested that it is negligence per se for a hospital to obtain blood from a commercial blood bank, because commercial procurement from paying donors increases the likelihood of infected blood since most paid blood donors usually are not of the best health. See *Hoder v. Sayet*, 196 So. 2d 205 (Fla. Dist. Ct. App. 1967). Although the *Hoder* court determined that such conduct was not negligence per se, the court found that if the hospital had reason to know that a blood bank's testing or screening procedures in selecting donors were inadequate, then such a negligence action may be available. *Id.*

Similarly, it has been found that obtaining blood from a paid donor is not negligence per se simply because paid donors pose a higher risk of hepatitis transmission. Instead, whether such action is negligence will be a question of fact. *Gilmore v. St. Anthony Hosp.*, 598 P.2d 1200 (Okla. 1979); see also *Hutchins v. Blood Servs.*, 161 Mont. 359, 506 P.2d 449 (1973); *Moore v. Underwood Memorial Hosp.*, 147 N.J. Super. 252, 371 A.2d 105 (1977).

Furthermore, a doctor or surgeon may be liable for negligently failing to warn of the high risk in contracting hepatitis from blood transfusions. See *Heirs of Fruge v. Blood Servs.*, 506 F.2d 841, 848 (5th Cir. 1975). Likewise, such a cause of action may be available to an AIDS victim. Once it was discovered that AIDS could be transmitted through blood transfusions, a doctor may have had the duty to caution patients from undergoing purely elective surgery. See *Perkins*, *supra* note 94, at 24. A failure by the doctor to give such a warning may be a breach of this duty owed to the patient.

For a general discussion of many of the implications of AIDS on blood services, see Lipton, *Blood Donor Services and Liability Issues Relating to Acquired Immune Deficiency Syndrome*, 7 J. LEGAL MED. 131 (1986).

101. *E.g.*, *Warden v. Southwest La. Hosp. Ass'n*, 300 So. 2d 590 (La. Ct. App. 1974) (causation is a material fact at issue, thus summary judgment was improper); *Huffman v. SS. Mary & Elizabeth Hosp.*, 475 S.W.2d 631 (Ky. Ct. App. 1972) (requiring causation to be established, but finding that the blood transfusion caused the plaintiff to contract the hepatitis virus).

102. 403 So. 2d 26 (La. 1981), *cert. denied*, 459 U.S. 836 (1982).

rather than *infectious* hepatitis, which is transmitted orally.¹⁰³ Once this evidence was introduced, the court shifted the burden to the defendant to prove that the transfusion was not the cause of the plaintiff's contracting hepatitis.¹⁰⁴

This two-prong method also may prove workable for transfusion-associated AIDS victims to rule out other causes of AIDS. First, the latency period in developing AIDS symptoms after contracting the virus—approximately twenty-seven months¹⁰⁵—may indicate when the virus was contracted. An AIDS victim might prove causation by submitting evidence that he received a blood transfusion more than two years before developing the symptoms. Second, the type of underlying infection the patient suffers also may be significant. An AIDS victim can offer evidence that he suffers from an opportunistic infection such as *pneumocystis carinii* pneumonia, rather than from Kaposi's sarcoma which predominantly afflicts homosexual AIDS victims.¹⁰⁶ When an AIDS victim can present such evidence, the *DeBattista* rationale suggests shifting the burden of proving another cause to the hospital or blood bank.

When causation is unknown or cannot be proved, plaintiffs have urged that the doctrine of *res ipsa loquitur* allows an inference of negligence both against a hospital and against a blood bank.¹⁰⁷ Most courts, however, have not allowed such an application. *Res ipsa loquitur* requires that the defendant have exclusive control over the thing or instrumentality causing the injury,¹⁰⁸ which in this situation would be the infected blood. But if a blood bank collects the blood and a hospital transfuses the blood, it is not conclusive that *either* had exclusive control of the infected blood.¹⁰⁹ Consequently, *res ipsa loquitur* would not be a viable basis upon which transfusion-associated AIDS victims would be able to avoid proving causation through an inference of negligence.¹¹⁰ Rather, AIDS victims will have to rely

103. *DeBattista*, 403 So. 2d at 29.

104. *Id.*

105. See Fischinger, *supra* note 3, at 19.

106. Older transfusion recipients face a further obstacle in proving causation by proving the type of underlying symptoms, because older recipients may be more likely to develop Kaposi's sarcoma. *Id.* at 11.

107. *E.g.*, *McDaniel v. Baptist Memorial Hosp.*, 352 F. Supp. 690 (W.D. Tenn. 1971), *aff'd*, 469 F.2d 230 (6th Cir. 1972); *St. Luke's Hosp. v. Schmaltz*, 534 P.2d 781 (Colo. 1975); *Morse v. Riverside Hosp.*, 44 Ohio App. 2d 422, 339 N.E.2d 846 (1974).

108. *McDaniel*, 352 F. Supp. at 692; *Morse*, 44 Ohio App. 2d at 424, 339 N.E.2d at 849.

109. See *Koenig v. Milwaukee Blood Center, Inc.*, 23 Wis. 2d 324, 127 N.W.2d 50 (1964).

110. California courts may approach differently the burden of proving causation

on traditional methods for proving causation.

CONCLUSION

Three possible modes of recovery exist for a victim of an AIDS-infected blood transfusion—negligence, strict products liability, and breach of implied warranty. This Comment has set forth that the law generally precludes hospital or blood bank liability in every form but negligence. Absent any legislative change in characterizing blood transfusions as sales rather than services, strict liability and implied warranty actions will not provide recovery. If, however, an AIDS victim can prove the elements of a negligence cause of action—that standards for blood testing or donor screening existed but were not followed, causing AIDS to be contracted through the blood transfusion—then an AIDS plaintiff may be able to maintain a viable cause of action.

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by *res ipsa loquitur* after *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944). In *Ybarra*, the plaintiff argued that “exclusive control” meant any person that *could* have had some control over the instrumentality causing the injury. Nonetheless, *Ybarra* enabled this loosening of the “exclusive control” requirement only in cases in which the plaintiff would be unconscious while undergoing surgery. In cases of blood transfusion injuries, the two potential defendants are not engaged in one course of action, as in one surgical procedure; rather, the potential defendants actually perform two separate functions. Therefore, it does not seem likely that this factor independently will make a plaintiff’s proof of causation easier in California.