

---

November 2015

## Snyder v. American Association of Blood Banks: Balancing Duties and Immunities in Assessing the Third Party Liability of Non-Profit Medical Associations

James A. Filkins

Follow this and additional works at: <https://via.library.depaul.edu/jhcl>

---

### Recommended Citation

James A. Filkins, *Snyder v. American Association of Blood Banks: Balancing Duties and Immunities in Assessing the Third Party Liability of Non-Profit Medical Associations*, 3 DePaul J. Health Care L. 243 (2000)

Available at: <https://via.library.depaul.edu/jhcl/vol3/iss2/3>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Health Care Law by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

***SNYDER v. AMERICAN ASSOCIATION OF BLOOD BANKS: BALANCING DUTIES AND IMMUNITIES IN ASSESSING THE THIRD PARTY LIABILITY OF NON-PROFIT MEDICAL ASSOCIATIONS***

*James A. Filkins\**

**INTRODUCTION**

A defendant's liability for a tortious act may often depend upon the interplay of complex and frequently competing policy considerations. Social policies and ideas of fairness are combined in decisions to impose liability. A useful illustration of the difficulty of this problem can be found in the tension between duties, which extend defendants' liabilities, and immunities, which limit them. *Snyder v. American Association of Blood Banks*<sup>1</sup> is a case in point. The case underscores the difficulty and complexity of balancing policies mandating broader impositions of duties against competing policies warranting further extensions of immunities. As *Snyder* demonstrates, the difficulty in imposing liability lies not only in deciding when reasons of policy may permit an immunity to offset a duty, but in defining what duties are and to whom immunities should apply.

---

\*Deputy Medical Examiner, Office of the Medical Examiner, County of Cook, Chicago, IL; B.A., McNeese State University, 1976; M.A., University of Illinois, 1977; Ph.D., University of Illinois, 1983; M.D., Southern Illinois University School of Medicine, 1990; J.D. (Cand.), DePaul University College of Law, 2000.

<sup>1</sup>See *Snyder v. American Assoc. of Blood Banks*, 676 A.2d 1036 (N.J. 1996).

### Duties

Although it is a well-settled principle of tort law that an action for negligence must be based upon a breach of some duty owed by the defendant to the plaintiff,<sup>2</sup> the legal test by which a duty can be identified and defined has remained elusive.<sup>3</sup> Duty is "a shorthand statement of a conclusion, rather than an aid to analysis in itself."<sup>4</sup> It is a means of balancing considerations of policy, limiting a defendant's responsibility for a tortious act, against considerations of policy entitling a plaintiff to redress for an injury.<sup>5</sup>

Policy considerations may also extend a defendant's duty to a third party. Section 324a of the RESTATEMENT OF TORTS (second) states "one who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm..."<sup>6</sup> Privity, that is, a mutual interest between parties arising from a contract, need not exist to trigger the defendant's duty to the third party.<sup>7</sup> If the second party justifiably relies on the defendant's undertaking to the harm of the third party, then the defendant is liable to the third party.<sup>8</sup> Changing social conditions reshape policy considerations so that new duties continually evolve.<sup>9</sup> "No better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists."<sup>10</sup> The calculus of liability does not, however, end in the finding of a duty.

---

<sup>2</sup>See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, 357-58, (5th ed. 1984). Three English cases introduced the concept of duty into Anglo-American tort law a century and a half ago: *Vaughan v. Menlove*, 132 Eng. Rep. 490 (1837); *Landridge v. Levy*, 150 Eng. Rep. 863 (1836); and *Winterbottom v. Wright*, 152 Eng. Rep. 402 (1842). *See id.* at 357.

<sup>3</sup>See Keeton, *supra* note 2, at 357-58.

<sup>4</sup>See *id.* at 358.

<sup>5</sup>See *id.*

<sup>6</sup>See RESTATEMENT (SECOND) OF TORTS § 324a (1965).

<sup>7</sup>See *id.*

<sup>8</sup>See *id.*

<sup>9</sup>See Keeton, *supra* note 2, at 358-59.

<sup>10</sup>See *id.* at 359.

### Immunities

Although courts may find duties where “reasonable persons” would agree new duties exist, the courts may also find that other competing, policy considerations nullify a defendant’s liability.<sup>11</sup> The same changing social conditions, which bring about new duties, also reshape policy considerations determining how far immunity, that is, freedom from liability for a tortious act, will extend.<sup>12</sup> Traditionally, judges and legislators receive absolute immunity for acts done within the scope of their judicial or legislative duties.<sup>13</sup> Even if the official acts maliciously or in bad faith, absolute immunity protects him.<sup>14</sup> Immunity has also been extended to “adjuncts” of the judicial system such as prosecutors and grand jurors, as well as to other state and federal officers.<sup>15</sup> Whether an official receives absolute immunity or qualified immunity—that is, immunity based on good faith and an absence of malice, depends upon the “functional comparability” of the official’s duties to those of a judge.<sup>16</sup> If the duties are essentially judicial, absolute immunity applies; if the duties are administrative and discretionary, qualified immunity is granted.<sup>17</sup> Over the years, the grant of immunity to private individuals and organizations performing quasi-governmental functions has been extended, as governmental responsibilities have grown more complex and governmental reliance on private individuals and organizations to assist in the discharge of those responsibilities has expanded.<sup>18</sup> Immunities have, for example, been extended to charities,<sup>19</sup> private contractors,<sup>20</sup> and private arbitrators.<sup>21</sup>

---

<sup>11</sup>*Id.* at 358, 1032-33.

<sup>12</sup>*See id.* at 1032.

<sup>13</sup>*See id.* at 1056-58. The common law grant of immunity to judges was upheld in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872); that of legislators in *Kilbourn v. Thompson*, 103 U.S. 68 (1881), and more recently in *Tenney v. Brandhove*, 341 U.S. 367 (1951). *See id.* at 1056 n.4, 1058 n.25.

<sup>14</sup>*See Keeton, supra* note 3, at 1057.

<sup>15</sup>*See id.* at 1057-59.

<sup>16</sup>*Id.* at 1057. The term “functional comparability” was first used in *Imbler v. Pachtman*, 424 U.S. 409, 423 n.20 (1976). The term was affirmed and expanded upon a year later in *Butz v. Economou*, 438 U.S. 478, 513-15 (1977). *See infra* pp. 30-32.

<sup>17</sup>*See id.* at 1058, 1060.

<sup>18</sup>*See Snyder v. American Ass’n of Blood Banks*, 676 A.2d 1036, 1060 (N.J. 1996).

<sup>19</sup>*Keeton, supra* note 2, at 1069. American courts followed a mid-nineteenth century English case, *Feoffees of Heriot’s Hosp. v. Ross*, 8 Eng. Rep. 1503 (1846), in extending

Absolute immunity for charities was based on a perceived need to protect non-profit organizations performing good works.<sup>22</sup> Courts justified charitable immunities on several grounds: the imposition of liability on non-profit organizations would divert trust funds away from a donor's intent, *respondeat superior* did not justify imposing liability on charities, and the imposition of liability would discourage donations.<sup>23</sup> Absolute immunity for charities was short-lived, but some measure of immunity for charities still exists in some jurisdictions.<sup>24</sup>

Immunity granted to private contractors and mediators based on their "functional comparability" to government actors is intended to protect private actors, who perform tasks the government would otherwise have to undertake, and to encourage private actors to continue participating in public activities.<sup>25</sup> In *DeVargas v. Mason & Hanger-Silas Mason Company*,<sup>26</sup> the United States Court of Appeals for the Tenth Circuit applied a three-part test to determine when a private party was entitled to qualified immunity.<sup>27</sup> First, the private party had to perform a duty imposed by a contract with a governmental entity.<sup>28</sup> Second, the private party had to perform a governmental function.<sup>29</sup> Finally, the private party had to be sued solely on the basis of acts done pursuant to the governmental contract.<sup>30</sup>

---

immunity to charities. As Prof. Keeton notes, charitable immunity is in retreat in many jurisdictions. *See id.* at 1070.

<sup>20</sup>*See Snyder*, 676 A.2d at 1060 (citing *Citrano v. Allen Correctional Ctr.*, 891 F. Supp. 312, 317 (W.D. La. 1995) and *City of Durham v. Reidsville Eng'g Co.*, 120 S.E.2d 564, 567 (N.C. 1961)).

<sup>21</sup>*See id.* *See generally* Cassandra E. Joseph, *The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity*, 12 OHIO ST. J. ON DISP. RESOL. 625, 634-53 (1997) (discussing the extension of immunity to private arbitrators as arbitration has grown as a means of alternative dispute resolution).

<sup>22</sup>*See Keeton*, *supra* note 2, at 1070.

<sup>23</sup>*See id.*

<sup>24</sup>*See id.*

<sup>25</sup>*See Joseph*, *supra* note 21, at 646-48.

<sup>26</sup>*See DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 814, 821-22 (10th Cir. 1988), *cited in Joseph*, *supra* note 21, at 646.

<sup>27</sup>*See Joseph*, *supra* note 21, at 646.

<sup>28</sup>*See id.* at 722.

<sup>29</sup>*See id.*

<sup>30</sup>*See id.*

### Non-Profit Medical Associations

Non-profit medical associations like the American Association of Blood Banks (AABB) present a special problem in deciding when immunities should apply to them. Such associations possess characteristics of both charitable organizations as well as private parties acting under governmental contracts. Non-profit medical associations provide support and assurances of quality to those relying on the profession's services.<sup>31</sup> Ostensibly, this is done out of a sense of responsibility, rather than financial gain. In this regard, non-profit medical associations resemble charities to a degree. To the extent non-profit medical associations also undertake work the government would have to do, such as formulating professional regulations and standards, non-profit medical associations resemble private contractors.<sup>32</sup> Often their work in devising standards is undertaken without an explicit grant of governmental authority.<sup>33</sup> In this regard non-profit professional medical associations may resemble for-profit trade associations.<sup>34</sup> However, despite their non-profit status, the work of such medical associations may produce substantial revenue vesting the officers and employees of the association with an economic interest in the association's growth.<sup>35</sup> Under what circumstances, then, should policy considerations impose duties on non-profit medical associations to third parties, and when, if ever, should policy considerations permit non-profit medical associations to claim immunity?

In *Snyder* the majority found considerations of policy imposed a duty on the defendant AABB, a non-profit professional association of

---

<sup>31</sup>See, e.g., Ross D. Eckert, *The AIDS Blood Transfusion Cases: A Legal and Economic Analysis of Liability*, 29 SAN DIEGO L. REV. 202, 246 (1992) (discussing the AABB in particular).

<sup>32</sup>See *Snyder v. American Ass'n of Blood Banks*, 676 A.2d 1036, 1060 (N.J. 1996); Eckert, *supra* note 31, at 223 (discussing the relationship of the Food & Drug Administration (FDA) to the AABB).

<sup>33</sup>See *Snyder*, 676 A.2d at 1060.

<sup>34</sup>See, e.g., *Meyers v. Donatucci*, 531 A.2d 398, 403 (N.J. 1984) (discussing the National Spa and Pool Institute); *Prudential Property v. American Plywood Ass'n*, No. 932026 1994 WL 463527, at \*1 (S.D. Fla. 1994) (discussing the American Plywood Association); *FNS Mortgage Serv. v. Pacific Gen. Group*, 29 Cal. Rptr. 2d 916, 917 (Ct. App. Cal. 1994) (discussing the International Association of Plumbing Manufacturers). See also Freddie Ann Hoffman, & Peter H. Rheinstein, *Health Professions and the Regulated Industry: the Laws and Regulations Enforced by the U.S. Food and Drug Administration*, LEGAL MEDICINE 585, 600-01 (4th ed. 1998).

<sup>35</sup>See *Snyder*, 676 A.2d at 1047.

blood banks, to a third-party blood product recipient.<sup>36</sup> The lone dissenter argued on the basis of competing policy considerations that qualified immunity, that is, immunity based on good faith, should protect the AABB.<sup>37</sup> The goal of this note is to examine the policy considerations in *Snyder* that led to the imposition of a duty on the defendant, as well as to those competing policy considerations that led the dissent to argue qualified immunity should be granted. First, this note will review the facts and procedural history of *Snyder*. Then the note will examine the majority opinion. The third part of this note will consider the dissenting opinion. Particular attention will be given to the dissent's use of cases in which immunity has been extended to private parties and to the dissent's definition of "functional comparability." The note will also consider the impact the *Snyder* decision may have as medical technology advances. Finally, this note will suggest that the need to protect from liability certain categories of decisions made by non-profit medical associations may justify a grant of qualified immunity in the absence of any formal delegation of governmental authority to the association.

## BACKGROUND

### The Facts of the Case

On August 23, 1984 William Snyder, the plaintiff, underwent elective coronary artery by-pass graft surgery and an aortic valve replacement at St. Joseph's Hospital in Paterson, New Jersey.<sup>38</sup> Dr. Harotune Mekhjian and his assistants, Drs. Yougick Lee and Wilmo Orejola performed the surgery.<sup>39</sup> Several hours after the first operation, Dr. Mekhjian performed a second operation on Mr. Snyder to repair a bleeding artery.<sup>40</sup> During the second operation, the plaintiff received several units of blood products, including a unit of platelets bearing the serial number 29F0784.<sup>41</sup> The unit of platelets had been collected by the Bergen County Blood Center (BCBC) at a bloodmobile in

---

<sup>36</sup>See *id.* at 1055.

<sup>37</sup>See *id.* at 1064.

<sup>38</sup>See *Snyder v. Mekhjian*, 582 A.2d 307, 309 (N.J. Super. Ct. App. Div. 1990).

<sup>39</sup>See *id.*

<sup>40</sup>See *id.*

<sup>41</sup>See *id.*

Hacksensack, New Jersey<sup>42</sup> and supplied to the blood bank at St. Joseph's. BCBC is a non-profit collector and supplier of donated blood to hospitals.<sup>43</sup> The plaintiff's recovery continued without further problems.<sup>44</sup> Several weeks later the hospital discharged him.<sup>45</sup>

In March 1985 the Enzyme Linked Immunoabsorbent Screening Assay (ELISA) test for the human immunodeficiency virus (HIV) antibody became available.<sup>46</sup> The ELISA test enabled blood banks to screen all donated blood for HIV antibodies, that is, for antibodies to the virus that causes acquired immune deficiency syndrome (AIDS).<sup>47</sup> The test also allowed identification of HIV positive donors, prompting blood banks to check whether any of those donors had given blood before March 1985, and if so, to which hospital their blood had been supplied.<sup>48</sup> In October 1986, BCBC informed St. Joseph's that unit 29F0784 came from a donor who had tested positive for HIV.<sup>49</sup> After a review of its records, St. Joseph's informed Mr. Snyder's physician of the HIV-infected platelets, however, the physician had already learned that Mr. Snyder had tested positive for the virus.<sup>50</sup>

### Procedural History

The plaintiff filed suit in February 1989 naming the physicians involved in his care, St. Joseph's Hospital, BCBC, and the AABB as defendants.<sup>51</sup> BCBC is a member of the AABB.<sup>52</sup> The plaintiff asserted claims of strict liability and negligence against all defendants.<sup>53</sup> Specifically, the plaintiff claimed the AABB negligently

---

<sup>42</sup>See *id.*

<sup>43</sup>See *Snyder v. Mekhjian* 593 A.2d 318, 319 (N.J. 1991) (per curiam).

<sup>44</sup>See *id.*

<sup>45</sup>See *id.*

<sup>46</sup>See P.L. MOLLISON, ET AL., *BLOOD TRANSFUSION IN CLINICAL MEDICINE* 736 (8th ed. 1987).

<sup>47</sup>See *id.*; *AMERICAN ASSOCIATION OF BLOOD BANKS TECHNICAL MANUAL* 427 (10th ed. 1990).

<sup>48</sup>See *Snyder*, 582 A.2d at 309.

<sup>49</sup>See *id.*

<sup>50</sup>See *id.*

<sup>51</sup>See *id.*

<sup>52</sup>See *id.*

<sup>53</sup>See *Snyder*, 582 A.2d at 309.



failed to promulgate surrogate testing procedures for screening blood,<sup>54</sup> thereby greatly increasing his risk of receiving contaminated blood.<sup>55</sup>

The trial court, on motions for summary judgment, dismissed the strict liability claims against all defendants, dismissed all claims against St. Joseph's Hospital, and dismissed the punitive damage claims against the physicians.<sup>56</sup> The trial court also ruled BCBC was not entitled to charitable immunity.<sup>57</sup> Finally, to protect the confidentiality of AIDS blood bank records, the trial court denied the plaintiff's request for the production by BCBC of its records identifying the donor of unit 29F0784.<sup>58</sup>

Snyder appealed only on the issues of the strict liability claims and the denial of donor discovery.<sup>59</sup> The Appellate Division of the Superior Court of New Jersey affirmed the dismissal of the strict liability claims, reversed the denial of donor discovery, and remanded for trial the negligence claims.<sup>60</sup> The defendants moved for permission to appeal the reversal of the denial of donor discovery to the Supreme Court of New Jersey.<sup>61</sup> The court granted the appeal, but upon review affirmed

---

<sup>54</sup>Until the ELISA test was first used in 1985, there was no blood test that specifically identified HIV. By 1982, the Centers for Disease Control (CDC) believed a virus transmitted by blood or blood products and sexual contact caused AIDS. *See* RANDY SHILTS, *AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC*, 220 (1987). In the years before the introduction of the ELISA test, the CDC-sponsored AIDS Task Force recommended surrogate testing as one method of excluding potential blood donors at high risk for transmitting HIV. *See id.* at 220, 225. Studies had shown homosexual males, intravenous drug users, and Haitian immigrants had a much higher incidence of AIDS than the general population. *See id.* at 220-22. Those three groups also had higher incidences of hepatitis and certain white blood cell abnormalities. The Task Force proposed that surrogate tests, that is tests for hepatitis or white blood cell abnormalities, be used to screen blood donors. Surrogate testing was intended to identify indirectly those individuals likely to have AIDS by identifying hepatitis or white blood cell abnormalities, two disorders known to be found in a high percentage of AIDS patients. *See id.* at 221-22.

<sup>55</sup>*See Snyder*, 582 A.2d at 310. At the time the lawsuit was filed New Jersey was one of a handful of states with no blood shield laws. Blood shield laws exempt blood banks from strict liability for transfusion related diseases and are yet another example of the complexity of balancing duties and immunities. *See* Eckert, *supra* note 31, at 205 and n.8.

<sup>56</sup>*See Snyder*, 582 A.2d at 310.

<sup>57</sup>*See id.*

<sup>58</sup>*See id.*

<sup>59</sup>*See id.*

<sup>60</sup>*See id.* at 315.

<sup>61</sup>*See Snyder*, 582 A.2d at 319.

the Appellate Division's reversal, holding that limited discovery of the donor was proper.<sup>62</sup>

Following remand, the trial court found the AABB had acted negligently in failing to promulgate surrogate testing to its member blood banks.<sup>63</sup> The trial court held the AABB owed the plaintiff a duty of care and that the AABB's failure to recommend surrogate testing greatly increased the plaintiff's risk of becoming infected with HIV-contaminated blood.<sup>64</sup> The defendant appealed, but the Appellate Division upheld the trial court's rulings.<sup>65</sup> The defendant petitioned to the Supreme Court of New Jersey for permission to appeal, which the court granted.<sup>66</sup> The Supreme Court, upon review, upheld the rulings of the Appellate Division.<sup>67</sup>

## THE SNYDER DECISION

### New Jersey Precedents

The issue on appeal in *Snyder* focused upon whether the AABB owed a duty of care to the plaintiff, a blood product recipient.<sup>68</sup> In formulating its analysis of the duty of care in *Snyder*, the Supreme Court of New Jersey relied substantially upon two recent New Jersey cases.<sup>69</sup> The two cases emphasized not only the wide latitude a New Jersey court could exercise in finding and imposing a duty, but also the essentially subjective quality of duty analysis. In *Dunphy v. Gregor*,<sup>70</sup> a case in which the fiancée of an automobile accident victim sued for negligent infliction of emotional distress, the court set out an analysis of a defendant's duty the *Snyder* court would follow very closely.<sup>71</sup> The court in *Dunphy* held the imposition of duty must be the result of a complex analysis including not only foreseeability, but also other

---

<sup>62</sup>See *id.* at 345.

<sup>63</sup>See *Snyder v. American Ass'n of Blood Banks*, 659 A.2d 482, 484 (N.J. Super. Ct. App. Div. 1995).

<sup>64</sup>See *id.*

<sup>65</sup>See *id.*

<sup>66</sup>See *Snyder v. American Ass'n of Blood Banks*, 676 A.2d 1036 (N.J. 1996).

<sup>67</sup>See *id.* at 1055.

<sup>68</sup>See *id.* at 1038.

<sup>69</sup>See *Dunphy v. Gregor*, 642 A.2d 372, 376 (N.J. 1994); *Carter Lincoln-Mercury v. EMAR Group*, 638 A.2d 1288, 1294 (N.J. 1994).

<sup>70</sup>See *Dunphy*, 642 A.2d at 372.

<sup>71</sup>See *id.* at 376.

factors such as the severity of the risk, the relationship of the parties, and the effect on public policy the imposition of a duty would create.<sup>72</sup> Although the court conceded “a foreseeable risk is the indispensable cornerstone of any formulation of a duty of care ... ultimately, whether a duty exists is a matter of fairness.”<sup>73</sup> The court emphasized the imposition of a duty must accord with public policy.<sup>74</sup> The court applied its analysis to avoid finding a duty in *Dunphy*, but it conceded duties could be adapted to impose liability in new or controversial areas.<sup>75</sup>

In *Carter Lincoln-Mercury v. Emar Group*<sup>76</sup> the plaintiff brought an action against his insurance broker after discovering the insurer was going out of business and his claim would remain unpaid.<sup>77</sup> The court in *Carter* emphasized that foreseeability alone was insufficient to impose a duty, but agreed foreseeability was a crucial element.<sup>78</sup> Foreseeability, the court continued, was a concept under which other relevant factors were subsumed.<sup>79</sup> Among those factors, as in *Dunphy*, were the relationships of the parties, the nature of the risk, and finally, considerations of fairness and policy.<sup>80</sup> The court’s analysis acknowledged the imposition of a duty was a subjective determination requiring a value judgment.<sup>81</sup> The *Carter* court held duty could be extended to third parties, in spite of the absence of contractual relations, if considerations of foreseeability and fairness so required.<sup>82</sup>

The *Dunphy* and *Carter Lincoln-Mercury* decisions allowed New Jersey courts to impose duty, and therefore liability, if the court believed it was “fair” to do so without offering much guidance about how a court should decide what was fair.<sup>83</sup> By emphasizing “fairness”

---

<sup>72</sup>See *id.*

<sup>73</sup>See *id.*

<sup>74</sup>See *id.* at 379.

<sup>75</sup>See *Dunphy*, 642 A.2d at 376.

<sup>76</sup>See *Carter Lincoln-Mercury v. EMAR Group*, 638 A.2d at 1288, 1288 (N.J. 1994).

<sup>77</sup>See *id.* at 1290.

<sup>78</sup>See *id.* at 1294.

<sup>79</sup>See *id.*

<sup>80</sup>See *id.*

<sup>81</sup>See *Carter Lincoln-Mercury*, 638 A.2d at 1294.

<sup>82</sup>See *id.*

<sup>83</sup>See *Dunphy*, 642 A.2d at 380-81 (Garibaldi, J. dissenting); *Carter Lincoln-Mercury*, 638 A.2d at 299 (O’Hern, J. dissenting and concurring).

and setting forth wide-ranging criteria in establishing duties,<sup>84</sup> the dissenting opinions in those two cases feared the decisions would grant New Jersey courts substantial freedom in deciding when to impose duties. The imposition of duty in New Jersey, as a result of the *Dunphy* and *Carter Lincoln-Mercury* decisions, approached a discretionary function of the individual court hearing a case.

### The Majority Opinion

The AABB relied on a New Jersey trade association case, *Meyers v. Donatacci*,<sup>85</sup> to argue the AABB should owe no duty of care to third party blood product recipients.<sup>86</sup> In *Meyers*, the plaintiff sued the National Spa & Pool Institute (NSPI), a voluntary trade association composed of swimming pool manufacturers.<sup>87</sup> The question before the *Meyers* court was whether a trade association such as the NSPI, which only conducted research and reported the results to its members, owed a duty to a consumer who was injured while using the product of one of its members.<sup>88</sup> Noting the NSPI lacked the authority to enforce its standards, the court found NSPI standards nothing more than suggested minimums, which could be implemented or rejected at the discretion of individual members.<sup>89</sup> The NSPI neither mandated nor inspected any member for compliance with its standards.<sup>90</sup> The court held there was no duty because the NSPI could not foresee the plaintiff would be injured by the NSPI's conduct.<sup>91</sup> The court added public policy would not be served by imposing a duty because trade associations, such as the NSPI, performed useful functions in promoting education, research,

---

<sup>84</sup>See *Dunphy*, 642 A.2d at 380-81 (Garibaldi, J. dissenting); *Carter Lincoln-Mercury*, 638 A.2d at 299 (O'Hern, J. dissenting and concurring).

<sup>85</sup>See *Meyers v. Donatacci*, 531 A.2d 398, 400 (N.J. 1984).

<sup>86</sup>See *Snyder v. American Ass'n of Blood Banks*, 676 A.2d 1036, 1049 (N.J. 1996). The AABB also argued the Noerr-Pennington doctrine as a defense, but the court held the AABB's liability did not rest on its right to petition the government. See *id.*

<sup>87</sup>See *Meyers*, 531 A.2d at 399.

<sup>88</sup>See *id.*

<sup>89</sup>See *id.*

<sup>90</sup>See *id.* at 403.

<sup>91</sup>See *id.* In 1984 the plaintiff in *Meyers* suffered a spinal cord injury and quadriplegia after diving headfirst into the shallow end of a swimming pool. The pool had been certified by the NSPI, but no warning against diving appeared on the pool. The plaintiff alleged the NSPI knew of the association between spinal cord injuries and diving as far back as 1974 and therefore was negligent in failing to place warnings on swimming pools it certified. See *id.* at 400-01.

and standardization within their industries, as well as in assisting the government in areas the government did not regulate.<sup>92</sup>

The court further held that Section 324A of the RESTATEMENT OF TORTS (1965)<sup>93</sup> imposed no duty because the NSPI was not a "money-making operation" and did undertake the task of inducing the manufacturers of swimming pools to rely on its standards, which the plaintiff alleged it performed negligently.<sup>94</sup> NSPI membership dues were not fees creating a contract under which the NSPI would perform research on behalf of the membership.<sup>95</sup> Therefore, the NSPI did not engage in a "specific undertaking," which if performed negligently would trigger the application of section 324A.<sup>96</sup>

Thus, the example of a trade association offered by *Meyers* was that of a loosely organized, voluntary association with negligible authority over its members and little financial stake in the regulation of industry standards. The AABB's argument that it owed no duty to third party blood product recipients such as Mr. Snyder rested on what the court perceived as a spurious comparison with the NSPI.<sup>97</sup> Although the Supreme Court of New Jersey did not cite *Meyers* in its 1996 decision, the court made clear it rejected any comparison between the AABB and a weak trade association.<sup>98</sup> The court acknowledged the AABB had no direct connection with the donor of the contaminated

---

<sup>92</sup>See *Meyers*, 531 A.2d at 404.

<sup>93</sup>See RESTATEMENT (SECOND) OF TORTS, § 324A (1965). "One who undertakes gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person ..." See *id.*

<sup>94</sup>See *Meyers*, 531 A.2d at 405-06.

<sup>95</sup>See *id.* at 406.

<sup>96</sup>See *id.*

<sup>97</sup>See *Snyder*, 659 A.2d at 492.

<sup>98</sup>See *Snyder v. American Ass'n of Blood Banks*, 676 A.2d 1036, 1050 (N.J. 1996). The court's rejection of any comparison with a weak trade association was consistent with holdings in other jurisdictions. In other trade association cases in other jurisdictions, courts had imposed duties on trade associations for injuries inflicted upon third parties when the trade associations occupied dominant positions in their industries comparable to the AABB in blood banking. See *Prudential Property v. American Plywood Ass'n*, No. 932026 1994 WL 463527, at \*1 (S.D. Fla. 1994), in which the American Plywood Association was held liable to third parties because it was the industry leader in establishing plywood standards and *FNS Mortgage Serv. v. Pacific General Group*, 29 Cal. Rptr. 2d 916 (Ct. App. Cal. 1994), in which the International Association of Plumbing Manufacturers was held liable because it enforced conformity with its Uniform Plumbing Code by withdrawing certification of defective products.

platelets or with the plaintiff. The AABB neither obtained, processed, nor transfused the contaminated platelets that infected the plaintiff.<sup>99</sup> The court held, however, that the gravamen of the AABB's duty of care was its role in the blood banking industry in 1983-84, when the plaintiff received the contaminated unit of platelets.<sup>100</sup> In effect, the court asked how considerations of fairness and policy could be applied to justify the imposition of a duty upon a non-profit medical association, such as the AABB, to a patient, such as the plaintiff, who had received care from an institution accredited by the association.<sup>101</sup>

As the court noted, the AABB was a voluntary association composed of virtually every blood bank and non-profit blood center in the United States.<sup>102</sup> In the early 1980s, AABB member blood banks and blood centers collected about one-half of the nation's blood supply and transfused to patients 80 percent of the blood and products they collected.<sup>103</sup> The court quoted the AABB's certificate of incorporation, in which the AABB described itself as a "professional, non-profit, scientific and administrative association for individuals and institutions engaged in the many facets of blood and tissue banking, and transfusion and transplantation medicine."<sup>104</sup> The AABB's executive director stated that the association's mission was to promote public health through the development and promulgation of blood banking standards and to educate members and the public.<sup>105</sup> To that end, the AABB sponsored seminars and workshops, published newsletters and the journal, *Transfusion*. The AABB also published standards for blood banking in its *Technical Manual*, and annually inspected and accredited its members.<sup>106</sup> The AABB lobbied the Congress of the United States and state legislatures, and advised federal and state agencies in preparing blood-banking regulations.<sup>107</sup>

---

<sup>99</sup>See *id.* at 1048.

<sup>100</sup>See *id.* at 1039.

<sup>101</sup>See *id.* at 1048.

<sup>102</sup>See *id.* at 1039.

<sup>103</sup>See *Snyder*, 676 A.2d at 1040.

<sup>104</sup>See *id.* at 1040. Whether the AABB was a professional or trade organization was once the source of "divisive" arguments within the organization. See *Eckert*, *supra* note 31, at 293.

<sup>105</sup>See *Snyder*, 676 A.2d at 1040.

<sup>106</sup>See *id.*

<sup>107</sup>See *id.*

The AABB boasted that it led "the industry in setting policy and standards of practice for its member blood banks in excess of the FDA."<sup>108</sup> Blood banks throughout the United States, including BCBC, adopted and relied upon AABB standards.<sup>109</sup> As the executive director of BCBC proclaimed, in 1984, the AABB standards were "the Bible of the blood center."<sup>110</sup> Theoretically, an AABB member that lost AABB accreditation, but retained its FDA and New Jersey licenses, could have continued operating. Practically, its operation would have been significantly compromised because other hospitals and blood banks prefer to work only with other AABB accredited members.<sup>111</sup>

Most significantly, the court noted the AABB actively participated in establishing federal and state regulations for blood banks. So influential was the AABB's involvement in the Blood Products Advisory Council of the FDA that the FDA deferred to the AABB in developing its own standards and guidelines regarding transfusion-related AIDS.<sup>112</sup> At the state level most state governments incorporated AABB standards into their own state regulations.<sup>113</sup> The New Jersey Department of Health also accepted AABB inspections in place of its own inspections and adopted AABB standards for gathering medical information from and performing physical examinations on prospective donors.<sup>114</sup> In December 1983, the AABB reassured its members regarding potential blood bank liability for transfusion-related AIDS by reminding them that compliance with AABB standards had frequently been cited by courts as evidence of appropriate blood banking practice.<sup>115</sup>

Quoting the decision of the Appellate Division, the Supreme Court of New Jersey agreed that the "unique and dominant role of the AABB in blood-banking and the extent of its control over its institutional members" established a duty of care between the AABB and blood product recipients.<sup>116</sup> The Supreme Court of New Jersey went on to

---

<sup>108</sup>*See id.*

<sup>109</sup>*See id.*

<sup>110</sup>*See Snyder*, 676 A.2d at 1040.

<sup>111</sup>*See id.*

<sup>112</sup>*See id.* at 1041.

<sup>113</sup>*See id.* at 1040.

<sup>114</sup>*See id.* at 1041.

<sup>115</sup>*See Snyder*, 676 A.2d at 1041.

<sup>116</sup>*See id.* at 1039.

state “the picture that emerges is of a private tax-exempt organization with substantial power over the operation of blood banks, including BCBC. That blood banks would accept direction from the AABB is understandable—it was their organization.”<sup>117</sup> So substantial was the role of the AABB in the blood banking industry, the court could state, “blood banks, hospitals, and patients rely on the AABB for the safety of the nation’s blood supply.”<sup>118</sup>

Having determined the AABB exercised considerable power within the blood banking industry, the court next examined whether the AABB exercised that power appropriately in the early 1980s.<sup>119</sup> In 1983, the AIDS Task Force, on which representatives from the AABB served, recommended adoption of the hepatitis B core antibody test as the surrogate test for HIV.<sup>120</sup> The AABB disagreed, disputing the conclusion the AIDS virus was transmitted by blood or blood products.<sup>121</sup> The AABB opposed surrogate testing as too expensive and too likely to lead to the rejection of too many donors.<sup>122</sup> The AABB’s opposition to surrogate testing and direct donor questioning, in the court’s view, hardened even as evidence that AIDS could be spread by blood or blood products accumulated.<sup>123</sup> In the spring of 1983, the AABB issued a list of standard procedures requiring only that prospective donors be given information about AIDS.<sup>124</sup> The AABB issued no requirement for surrogate testing or direct donor questioning.<sup>125</sup> In spite of the AABB’s refusal to require surrogate testing, several blood banks implemented surrogate testing on their own

---

<sup>117</sup>See *id.* at 1041.

<sup>118</sup>See *id.*

<sup>119</sup>See *id.* at 1044-48.

<sup>120</sup>See Shilts, *supra* note 54, at 221. The Aids Task Force considered three surrogate tests: the hepatitis B core antibody test, the T-cell ratio test, and the absolute lymphocyte test. One expert reported that the hepatitis B core antibody test was positive in 83 percent of homosexual men with AIDS, one hundred percent of intravenous drug users with AIDS, and 87 percent of Haitians with AIDS. In the control group, composed of homosexual men not afflicted with AIDS, 79 percent tested positive for the hepatitis B core antibody. Based on those studies the Task Force concluded the hepatitis B core antibody test was the most promising surrogate test. See *id.*

<sup>121</sup>See *Snyder*, 676 A.2d at 1047.

<sup>122</sup>See *id.*

<sup>123</sup>See *id.*

<sup>124</sup>See *id.* at 1045-46.

<sup>125</sup>See Shilts, *supra* note 54, at 220; *Snyder*, 676 A.2d at 1045-46.



in 1983 and 1984.<sup>126</sup> In 1984, two reports, one published in the *New England Journal of Medicine* and the other in the *Annals of Internal Medicine*, concluded AIDS could be transmitted through blood or blood products.<sup>127</sup> One month later, Mr. Snyder received his transfusion.

On the basis of its findings the court concluded that the risk of harm from transfusion-related AIDS was severe, and at the time of the plaintiff's transfusion in August 1984, reasonably foreseeable.<sup>128</sup> The court rejected the AABB's argument that it owed no duty to the plaintiff because the evidence of transfusion-related AIDS was inconclusive in 1984.<sup>129</sup> "The foreseeability, not conclusiveness, of harm suffices to give rise to a duty of care."<sup>130</sup> The court held by 1984 evidence supporting the conclusion HIV could be transmitted by blood transfusions was substantial enough for the AABB to foresee a contaminated unit could transmit HIV.<sup>131</sup> By 1984 the AABB knew, or should have known, of the substantial risk of contracting HIV infection from blood transfusions.<sup>132</sup>

The court concluded the AABB's dominance within the blood banking industry established a duty of care, which the AABB exercised negligently.<sup>133</sup> In making its determination, the court gave considerable weight to the manner in which the AABB achieved its influence and to what the court believed to be the AABB's stake in preserving its position as the arbiter of blood banking standards:

Society has not thrust on the AABB its responsibility for the safety of blood and blood products. The AABB sought and

---

<sup>126</sup>See Shilts, *supra* note 55, at 220. Among the blood banks implementing surrogate testing were the Stanford University Blood Bank in San Francisco, California, the Tulane University Medical Center Blood Bank in New Orleans, Louisiana, and the American National Red Cross regional center in San Jose, California. See Eckert, *supra* note 31, at 281.

<sup>127</sup>See *Snyder*, 676 A.2d at 1047. See James W. Curran, et al., *Acquired Immune Deficiency Syndrome (AIDS) Associated with Transfusions*, 310 *NEW ENG. J. MED.* 73, 74 (1984); James W. Curran & Llewelyn F. Barker, *The Acquired Immune Deficiency Syndrome Associated with Transfusions: The Evolving Perspective*, 100 *ANNALS INTERNAL MED.* 298, 299 (1984).

<sup>128</sup>See *Snyder*, 676 A.2d at 1048-49.

<sup>129</sup>See *id.* at 1049.

<sup>130</sup>See *id.*

<sup>131</sup>See *id.*

<sup>132</sup>See *id.*

<sup>133</sup>See *Snyder*, 676 A.2d at 1049.

cultivated that responsibility. For years, it has dominated the establishment of standards for the blood-banking industry... [b]y words and conduct, the AABB invited blood banks, hospitals, and patients to rely on the AABB's recommended procedures.<sup>134</sup>

AABB members, so the court believed, had a substantial financial interest in the regulation of the blood banking industry.<sup>135</sup> In 1984, as the court noted, voluntary blood banks generated a billion dollars in revenue.<sup>136</sup>

### The *Snyder* Court's Criteria for the Imposition of a Duty

The *Snyder* court made full use of the considerable discretion the decisions in *Dunphy* and *Carter* allowed in imposing duties. The *Snyder* court justified the imposition of a duty on the basis of its conclusion about the AABB's financial stake in regulating the blood banking industry.<sup>137</sup> Thus, the court could conclude "the AABB resisted surrogate testing because it did not want to suffer the added inconvenience and costs of such testing."<sup>138</sup> Another factor that weighed heavily with the *Snyder* court was the AABB's position as a "standard-setting industry association."<sup>139</sup> That factor distinguished *Snyder* from *Meyers* because, in *Meyers*, the NSPI had no power to enforce its swimming pool standards.<sup>140</sup>

The *Snyder* decision applied principles to a professional association that had been set forth in *Meyers* and other cases for imposing a duty on trade associations. If a trade association grew dominant enough to dictate industry standards, the court reasoned it could be held liable to the customers of its member manufacturers and distributors for deficient or negligently enforced standards.<sup>141</sup> Implicit

---

<sup>134</sup>See *id.* at 1048.

<sup>135</sup>See *id.* at 1050.

<sup>136</sup>See *id.*

<sup>137</sup>See *id.*

<sup>138</sup>See *Snyder*, 676 A.2d at 1055.

<sup>139</sup>The term "standard-setting industry association" was first used in *Weigand v. University Hosp. of N.Y.*, 659 N.Y.S.2d 395, 399 (N.Y. 1997) in its discussion of *Snyder v. American Ass'n of Blood Banks*.

<sup>140</sup>See *Meyers v. Donatucci*, 531 A.2d 398, 403 (N.J. 1984).

<sup>141</sup>*Snyder*, 676 A.2d at 1050. "In 1984, the AABB was more than a *trade association*. It was the governing body of a significantly self-regulated industry." See *id.* (emphasis added)

in the reasoning of the *Snyder* decision was the court's assumption that the example of trade associations applied to non-profit medical associations, such as the AABB. The majority opinion in *Snyder* never fully considered whether countervailing policy considerations applicable to non-profit medical associations, but not necessarily applicable to trade associations, justified a grant of qualified immunity to the AABB.<sup>142</sup> The AABB never argued a defense of qualified immunity. Accordingly, the court refused to remand for the purpose of considering that defense,<sup>143</sup> and so never explored any distinctions between trade and non-profit medical associations.

The *Snyder* court set forth four criteria by which considerations of fairness and policy could coalesce to impose a duty when the defendant was a professional association lacking privity or some special relationship to the plaintiff. First, the harm to the plaintiff posed by the defendant's conduct had to be reasonably foreseeable, a reiteration of the principle expressed by Justice (then Judge) Cardozo in *Palsgraf v. Long Island Railroad*.<sup>144</sup> Second, the association's influence within its profession had to be so dominant the members had little discretion in choosing whether to join or to adopt the association's standards.<sup>145</sup> Moreover, the members and those whom they served had to have relied on the association's standards for their well being.<sup>146</sup> Third, the association had to have actively sought to become the arbiter of its profession's standards.<sup>147</sup> Finally, the association must have had a financial interest in maintaining its position as the arbiter of its profession's standards.<sup>148</sup>

Professional associations concerned with matters of public health are not fraternal organizations that exist solely for the benefit of their members. Playing a vital role in the protection of health, these associations are inescapably imbued with a public interest. The associations' commitment to public health should not immunize them from liability for

---

<sup>142</sup>See *id.* at 1052-53.

<sup>143</sup>See *id.* at 1053

<sup>144</sup>See *id.* at 1049. See *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928).

<sup>145</sup>See *id.* at 1048.

<sup>146</sup>See *Snyder*, 676 A.2d at 1048.

<sup>147</sup>See *id.* at 1053.

<sup>148</sup>See *id.*

the negligent discharge of their obligations. Nor should the associations enjoy immunity when they stubbornly reject persuasive evidence, unreasonably prolong the debate, and fail to inform their constituents of threats to public health.<sup>149</sup>

Although the majority found policy considerations imposed a duty, it never considered whether other competing policy considerations might warrant a grant of some form of immunity. That task was left to the dissent.

### JUSTICE GARIBALDI'S DISSENTING OPINION

Justice Garibaldi, the lone dissenter, agreed that the AABB owed a duty,<sup>150</sup> but she argued the AABB's "quasi-governmental nature" in regulating blood banks, as well as public policy considerations, justified a grant of qualified immunity provided a showing of good faith could be made.<sup>151</sup> Justice Garibaldi based her dissent on two concepts. First, she considered a line of cases from New Jersey and other jurisdictions in which immunity had been incrementally extended on the basis of policy considerations to private individuals or groups undertaking various quasi-governmental tasks.<sup>152</sup> Second, she adopted a broader definition of the doctrine of "functional comparability," that is, the grant of immunity to private individuals or organizations based on the similarity of their responsibilities to those actors traditionally afforded immunity, such as judges or legislators.<sup>153</sup> Justice Garibaldi argued the adoption by the New Jersey Department of Health (DOH) of AABB standards together with the public's need to have such standards justified a measure of protection for the AABB.<sup>154</sup>

---

<sup>149</sup>See *id.* at 1055.

<sup>150</sup>See *id.*

<sup>151</sup>See *Snyder*, 676 A.2d at 1056.

<sup>152</sup>See *id.* at 1060.

<sup>153</sup>See *id.* at 1061.

<sup>154</sup>See *id.*

### Extension of Immunities

Justice Garibaldi relied on a 1979 New Jersey case, *Centennial Land & Development Company v. Township of Medford*,<sup>155</sup> for the principle that policy considerations could justify an extension of immunity. In *Centennial Land* the Superior Court of New Jersey granted absolute immunity to the Medford Township Zoning Board.<sup>156</sup> The New Jersey Supreme Court held “[t]he policy factors are myriad and weighty on both sides of the argument. Resolution of the issue involves a balancing of the citizen’s interest in having a remedy for a wrong suffered and society’s interest in attracting qualified persons to public office.”<sup>157</sup> Although *Centennial Land* did not precisely follow the facts in *Snyder* because the zoning commissioners acted in a formal governmental capacity, Justice Garibaldi nevertheless argued the decision justified the extension of immunity beyond its traditional beneficiaries.<sup>158</sup> Policy considerations, she noted, always justified each increment of expansion.<sup>159</sup>

Justice Garibaldi cited fifteen cases in which immunity had been granted to private individuals or organizations for their good faith performance of quasi-governmental tasks.<sup>160</sup> The majority countered that, in each of the cases, Justice Garibaldi cited, the private individual or organization acted “pursuant to a governmental grant of authority.”<sup>161</sup> Thus, the distinction in the eyes of the majority between

---

<sup>155</sup>See *Centennial Land & Dev. Co. v. Township of Medford*, 397 A.2d 1136 (N.J. Super. Ct. Law Div. 1979).

<sup>156</sup>See *id.*

<sup>157</sup>See *Snyder*, 676 A.2d at 1056 (citing *Centennial Land*, 397 A.2d at 1136).

<sup>158</sup>See *Centennial Land*, 397 A.2d at 1139.

<sup>159</sup>See *Snyder*, 676 A.2d at 1056.

<sup>160</sup>See *id.* at 1060-61. See e.g., *Austern v. Chicago Bd. Options Exch., Inc.*, 898 F.2d 882 (2d Cir. 1990); *Kwoun v. Southeast Mo. Prof'l Standards Review Org.*, 811 F.2d 401 (8th Cir. 1987); *Wasyf v. First Boston Corp.*, 813 F.2d 1579 (9th Cir. 1987); *Austin Mun. Sec., Inc. v. National Ass'n of Sec. Dealers, Inc.* 757 F.2d 676 (5th Cir. 1985); *Bushman v. Seiler*, 755 F.2d 653 (8th Cir. 1985); *Lundgren v. Freeman*, 307 F.2d 104 (9th Cir. 1962); *Citrano v. Allen Correctional Ctr.*, 891 F. Supp. 312 (W.D. La. 1995); *Weissman v. Hassett*, 47 B.R. 462 (S.D.N.Y. 1985); *Lythgoe v. Guinn*, 884 P.2d 1085 (Alaska 1994); *Craviolini v. Scholer & Fuller Assoc. Architects*, 357 P.2d 611 (Ariz. 1960); *Latt v. Superior Ct.*, 212 Cal. Rptr. 380 (Cal. Ct. App. 1985); *Rubenstein v. Otterbourg*, 357 N.Y.S.2d 62 (N.Y. City Civ. Ct. 1973); *City of Durham v. Reidsville Eng'g Co.*, 120 S.E.2d 564 (N.C. 1961); *Warner v. Grand County*, 57 F.3d 962 (10th Cir. 1995); *Corey v. New York Stock Exch.*, 691 F.2d 1205 (6th Cir. 1982).

<sup>161</sup>See *Snyder*, 676 A.2d at 1051.

*Centennial Land* and *Snyder* was the legal obligation zoning commissioners incurred when agreeing to serve, in contrast to the absence of any such obligation for AABB members.<sup>162</sup>

Justice Garibaldi found the distinction unpersuasive. The DOH had been established under state law with the authority to regulate blood banking.<sup>163</sup> Under its statutory authority, the DOH incorporated AABB standards into its regulations and allowed blood banks to use AABB standards to fulfill licensing requirements.<sup>164</sup> In Justice Garibaldi's analysis, the dispositive question was whether the DOH's adoption of AABB standards constituted a delegation of governmental authority sufficient to justify an extension of qualified immunity to the AABB.<sup>165</sup> Absent a direct legislative or contractual grant of authority, the majority held there could be no immunity.<sup>166</sup> Justice Garibaldi argued immunity should be granted or withheld on the basis of the nature of the decision-making process to be protected, not the existence of a formal grant of governmental authority.<sup>167</sup>

Grants of immunity, she explained, are based fundamentally on the need to assure "vigorous and appropriate decisionmaking" in certain areas of endeavor.<sup>168</sup> Thus, if a governmental agency delegates de facto authority to a professional association, as Justice Garibaldi contended the DOH delegated the authority to devise blood banking standards to the AABB, a grant of immunity may be warranted.<sup>169</sup> Whether immunity will be granted depends on two factors. First, whether the "decision-making process" at issue (for example, in *Snyder* the development of blood banking standards) is of sufficient public importance. This is but another way of saying policy considerations may shape immunities. Second, whether there has been at least a de facto delegation of governmental authority to the private actor make the decisions at issue.<sup>170</sup> This latter factor represents Justice Garibaldi's application of functional comparability.

---

<sup>162</sup>See *id.* at 1052.

<sup>163</sup>See *id.* at 1061.

<sup>164</sup>See *id.*

<sup>165</sup>See *id.*

<sup>166</sup>See *Snyder*, 676 A.2d at 1050-51.

<sup>167</sup>See *id.* at 1061.

<sup>168</sup>See *id.*

<sup>169</sup>See *id.*

<sup>170</sup>See *id.*

### Policy Considerations

As before Justice Garibaldi began her analysis with *Centennial Land*. The court in *Centennial Land* observed many of the local zoning officials served voluntarily and without pay, often working long hours at night.<sup>171</sup> To deny them immunity, the *Centennial Land* court held, would be to discourage "intelligent civic-minded persons" from serving in such capacities.<sup>172</sup> Many AABB committee members were also unpaid volunteers, as were the zoning board members in *Centennial Land*.<sup>173</sup> For example, a number of AABB committee members were on the faculties of prestigious universities such as Yale and Michigan where they taught and served as laboratory directors.<sup>174</sup>

Because the AABB, a private association, performed a quasi-governmental task, which the state would otherwise have to perform, Justice Garibaldi argued public policy warranted a grant of immunity to the AABB.<sup>175</sup> In areas requiring specialized knowledge such as blood banking, Justice Garibaldi continued, the state needed to rely on associations such as the AABB for guidance.<sup>176</sup> Citing *Costa v. Josey*, Justice Garibaldi argued when the government has to make difficult policy decisions requiring specialized knowledge, such as regulating blood banking, traditional tort principles restricting the grant of immunity to government actors may not work well.<sup>177</sup> The government must rely on private individuals, but without immunity private individuals may withhold assistance.<sup>178</sup> The United States or the State of New Jersey would absolutely be immune from liability in situations such as *Snyder* Justice Garibaldi observed, but the AABB, as a private organization would be denied any immunity.<sup>179</sup>

Justice Garibaldi relied on two earlier New Jersey cases to support her position. In *Sherman v. Ford County Counseling Center*,<sup>180</sup> a

---

<sup>171</sup>See *Centennial Land & Development Co. v. Township of Medford*, 397 A.2d 1136, 1140 (N.J. Super. Ct. Law Div. 1979).

<sup>172</sup>See *id.*

<sup>173</sup>See *Snyder*, 676 A.2d at 1057.

<sup>174</sup>See *id.* at 1058.

<sup>175</sup>See *id.* at 1058.

<sup>176</sup>See *id.* at 1058.

<sup>177</sup>See *id.* at 1059 (citing *Costa v. Josey*, 415 A.2d 337 (N.J. 1980)).

<sup>178</sup>See *Snyder*, 676 A.2d at 1059.

<sup>179</sup>See *id.* at 1057.

<sup>180</sup>See *Sherman v. Ford County Counseling Ctr.*, 987 F.2d 397, 399 (7th Cir. 1993).

private hospital admitted, detained and treated a mentally ill patient pursuant to a court order.<sup>181</sup> To deny immunity, the court reasoned, would be to discourage public service.<sup>182</sup> In *Berends v. City of Atlantic City*,<sup>183</sup> an airplane crashed while attempting to land at the Atlantic City airport. Pan Am Management Systems operated the airport.<sup>184</sup> The plaintiff argued the city's decision to close one of the airport's two runways created a dangerous situation, which caused the crash.<sup>185</sup> The court dismissed the suit against the city because of statutory immunity.<sup>186</sup> The court also dismissed the claim against Pan Am because Pan Am made a substantial contribution to the same decision-making process which shielded the city from liability.<sup>187</sup> Justice Garibaldi reasoned, following *Berends* and emphasizing the content of the decision-making process, it would be unfair to punish the AABB for its participation in the same high level policy-making, which justified the government's immunity.<sup>188</sup> Even though no statute granted immunity to the AABB, "statutory immunities are reflective of public policy and may serve as a guide to the evolution of related common law immunities."<sup>189</sup> Policy considerations regarding bloodbanking practices sought to enlist the help of private organizations in formulating government regulations in areas requiring special expertise.<sup>190</sup> The AABB could, Justice Garibaldi contended, justifiably be granted qualified immunity because it participated in the decision-making process by which government blood-banking regulations were formulated, a process requiring protection for the private participant.<sup>191</sup> The final test was how similar the AABB was in function to a governmental agency in the decision-making process or in other words, functional comparability.

---

<sup>181</sup>See *id.*

<sup>182</sup>See *id.* at 406.

<sup>183</sup>See *Berends v. City of Atlantic City*, 621 A.2d 972, 975 (N.J. Supr. Ct. App. Div. 1993).

<sup>184</sup>See *id.* at 976.

<sup>185</sup>See *id.* at 977.

<sup>186</sup>See *id.*

<sup>187</sup>See *id.* at 981.

<sup>188</sup>See *Snyder*, 676 A.2d at 1059.

<sup>189</sup>See *id.* at 1057 (quoting *Crawn v. Campo*, 643 A.2d 600, 605 (N.J. 1994)).

<sup>190</sup>See *id.* at 1061.

<sup>191</sup>See *id.* at 1057.



### Functional Comparability

“Functional comparability” was first used by the U. S. Supreme Court in *Imbler v. Pachtman*.<sup>192</sup> There the court extended the grant of immunity to prosecutors and grand jurors on the basis of their similarity to judges.<sup>193</sup> All three—judges, prosecutors, and grand jurors—made discretionary judgments based on evidence presented to them.<sup>194</sup> Two years later, the court, in *Butz v. Economou*,<sup>195</sup> applied a three part test to determine functional comparability.<sup>196</sup> First, the entity claiming immunity had to operate in a manner comparable to those traditionally granted immunity at common law, such as judges or legislators.<sup>197</sup> Second, the risk of intimidation or harassment had to exist for those performing such duties.<sup>198</sup> Third, adequate legal safeguards had to be in place to prevent abuse.<sup>199</sup>

Justice Garibaldi argued the AABB merited qualified immunity because the DOH adopted AABB standards and substituted them for DOH regulations.<sup>200</sup> In effect, she argued, the DOH conscripted the AABB into governmental service by delegating a portion of its regulatory authority to the AABB when it co-opted AABB standards for its own.<sup>201</sup> By choosing AABB standards over any it might have developed on its own, the DOH granted a measure of de facto governmental authority to the AABB.<sup>202</sup> The AABB became more than a “mere advisory body” to the DOH, much as Pan Am was more than a “mere advisory body” to Atlantic City.<sup>203</sup> The appellate court had

---

<sup>192</sup>See *Imbler v. Pachtman*, 424 U.S. 409, 424, n.20 (1976).

<sup>193</sup>See *id.*

<sup>194</sup>See *id.*

<sup>195</sup>See *Butz, v. Economou*, 438 U.S. 478, 485 (1977).

<sup>196</sup>See *id.*

<sup>197</sup>See *id.*

<sup>198</sup>See *id.*

<sup>199</sup>See Joseph, *supra* note 21, at 636-37 (citing *Butz*, 438 U.S. at 513-17).

<sup>200</sup>See *Snyder v. American Ass'n of Blood Banks*, 676 A.2d 1036, 1058 (N.J. 1996).

<sup>201</sup>See *id.*

<sup>202</sup>See *id.* at 1061.

<sup>203</sup>See *id.* Pan Am, as the majority noted, acted under a contract with Atlantic City. That arrangement, in the majority's opinion, distinguished *Snyder* from *Berends* in justifying withholding the grant of immunity. As Justice Garibaldi noted, the *Berends* decision explicitly omitted considerations of the contract because it had not been entered into evidence. One of the issues in *Berends* was whether Pan Am was entitled to derivative immunity, that is, immunity deriving from its governmental duty. But the appellate court did not hold Pan Am was entitled to derivative immunity because that would have required the court to determine if

conferred immunity on Pan Am because of its involvement in the same decision-making process on which Atlantic City's immunity was based.<sup>204</sup> Moreover, the decision-making processes in both *Berends* and *Snyder* were similar in that each was the product of a multi-agency discussion in which the respective government agencies also participated.<sup>205</sup>

Justice Garibaldi cautioned that as a private association, the AABB could be encouraged to make negligent decisions if allowed complete immunity because the association would bear no costs of its mistakes, but would enjoy the financial benefits of its decisions.<sup>206</sup> Qualified immunity, that is immunity in the absence of malice or bad faith, offered a compromise, preserving the incentive of private associations such as the AABB to continue developing standards beneficial to the public, while preserving the right of individuals to seek redress when malice is found.<sup>207</sup> According to Justice Garibaldi, the three tests of functional comparability were met: the AABB acted in manner similar to a governmental agency, it was at risk for lawsuits stemming from its quasi-governmental activities, and an adequate remedy existed in the form of qualified immunity to protect innocent parties.<sup>208</sup> Thus, the AABB was functionally comparable to a governmental agency.<sup>209</sup>

### THE SNYDER IMPACT

Will courts consider duties *as well as immunities* before imposing third party liability on non-profit medical associations in future litigation? To date the majority opinion in *Snyder* has been the more persuasive, but the predictive value of the decision is uncertain because no defendant has argued qualified immunity. Two courts, one in Louisiana and the other in New York, have followed *Snyder* in imposing a duty on the AABB to recipients of transfusions from AABB

---

Pan Am had deviated from the contract specifications. See *Berends v. City of Atlantic City*, 621 A.2d 972, 980 (N.J. Super. Ct. 1993).

<sup>204</sup>See *Snyder*, 676 A.2d at 1060.

<sup>205</sup>See *id.*

<sup>206</sup>See *id.* at 1062.

<sup>207</sup>See *id.*

<sup>208</sup>See *id.* at 1060-62.

<sup>209</sup>See *Snyder*, 676 A.2d at 1060-62.

member blood banks.<sup>210</sup> Neither decision addressed the issue of qualified immunity because the AABB, as it had done in *Snyder*, argued its case on the basis of duty analysis. The courts in Louisiana and New York rejected the AABB's reliance on *Meyers* and the comparison of the AABB to a weak trade association, such as the NSPI. Justice Garibaldi's dissenting argument that non-profit medical associations may merit qualified immunity when government agencies adopt association standards in matters of public health has been largely ignored. If this proves true then the majority opinion in *Snyder* could eventually have a chilling effect on the involvement of non-profit

---

<sup>210</sup>In *Douglass v. Alton Oschner Medical Foundation*, (696 So. 2d 136 (La. Ct. App. 1997), the Court of Appeals of Louisiana for the Fifth Circuit vacated a grant of summary judgment in favor of the AABB. The plaintiff's daughter had contracted AIDS from a transfusion received during surgery in 1983. *See id.* at 137. The plaintiff alleged the AABB had been negligent in failing to establish appropriate procedures for screening blood for AIDS. *See id.* The AABB argued, as it had done in *Snyder*, because it was a voluntary, non-profit association with no regulatory power over member blood banks it owed no duty to the plaintiff. *See id.* The court noted the imposition of a duty in Louisiana required a case by case analysis. *See id.* at 139 (citing *Gresham v. Davenport*, 537 So. 2d 1144, 1146 (La. 1989)). The court reviewed the plaintiff's evidence, which established the AABB had considerably more influence in the blood banking industry than its status as a voluntary, non-profit association suggested. By late 1982, the court concluded, the AABB could reasonably have foreseen HIV could be transmitted by blood. *See id.* The court found persuasive not only the decision in *Snyder*, but also numerous other cases in Louisiana and elsewhere in which blood banks had been relieved of liability upon a showing of non-negligent conduct and compliance with AABB standards. *See id.* Consequently, the court vacated the trial court's grant of summary judgment after finding several issues of material fact. *See id.* at 140.

The facts in *Weigand v. University Hospital of New York University*, 659 N.Y.S. 395, 396 (N.Y. Sup. Ct. 1997), followed very closely those of *Snyder* and *Douglass*. The plaintiff's decedent contracted AIDS from a transfusion during surgery in 1983. *See id.* at 396. As in the preceding cases, the plaintiff alleged the AABB had promulgated deficient standards for the screening of blood for HIV. *See id.* The New York court, in rejecting the AABB's motion for dismissal, followed the analysis in *Snyder* very closely. The New York court found the AABB's reliance on *Meyers* inapposite. *See id.* at 399. There was, in the opinion of the court, a distinction between the degree of influence the AABB exercised regarding blood banking standards and that of the NSPI regarding swimming pool standards. The New York court held "if the industry association negligently sets inadequate standards for blood collection and screening and those standards are followed by a member blood bank, resulting in the collection and transfusion of tainted blood, it is the recipient of the blood transfusion who will be damaged, not the blood bank." *Id.* In addressing the concern of extending a duty, the court held the extension must reach specifically foreseeable parties while at the same time keeping liability to manageable levels. In *Weigand* the court noted the parties were clearly foreseeable—those who received blood transfused by blood banks belonging to the AABB and following its standards. *See id.* at 401. Because the AABB was a "standard-setting association" the court held the AABB had a duty to the recipients of blood transfused under its standards and could be found liable for negligently promulgating deficient standards. *See id.*

medical associations in public health matters at a time when their contributions are needed most.

As medicine becomes even more complex and technologically sophisticated, the need by state governments and the federal government for assistance from professional medical associations, such as the AABB, in developing standards will become indispensable. This much Jeffrey P. Koplan, the director for the Centers for Disease Control and Prevention (CDC) acknowledged in January 1999 in an address to the National Health Council (NHC).<sup>211</sup> Dr. Koplan urged greater collaboration between those acting to improve public health, such as the CDC, and those providing care to individual patients, such as the members of the NHC.<sup>212</sup> Dr. Koplan cited one example of the need for cooperation was in controlling the indiscriminate use of antibiotics, a practice that has led to the development of antibiotic resistant microorganisms.<sup>213</sup> Yet implicit in any collaboration to curb indiscriminate antibiotic use is the formulation of standards defining when antibiotics should be used and when they should be avoided. Implicit in the formulation of standards is the potential for liability should those standards prove inadequate.

Other areas of medicine require the same need for collaboration and could pose the same sort of risks for liability. Dr. Koplan stated there were "probably hundreds" of areas where collaboration is needed.<sup>214</sup> Transplantation medicine is one example. Advances in transplantation medicine have progressed rapidly in the past two decades, but a shortage of organ donors has led to an expansion of criteria by which suitable donors can be selected.<sup>215</sup> This in turn increases the risk of a bad outcome in transplanting an organ because the donor may be more likely to have a chronic disease such as diabetes or coronary atherosclerosis affecting the organ to be transplanted.<sup>216</sup> Organ donation also requires screening for transmissible diseases such

---

<sup>211</sup>See 281 J.A.M.A. 501, 501 (Feb. 10, 1999). The National Health Council is a non-profit organization composed of over one hundred voluntary health agencies, professional associations and other groups interested in health care. *See id.*

<sup>212</sup>*See id.*

<sup>213</sup>*See id.*

<sup>214</sup>*See id.*

<sup>215</sup>See MARY JO WILEY ET AL., ORGAN DONATION AND TRANSPLANTATION, LEGAL MEDICINE 323, 333 (American College of Legal Medicine, 4th ed. 1998).

<sup>216</sup>*See id.*

as infections and cancers.<sup>217</sup> Even though the federal government heavily regulates transplantation medicine and the Uniform Anatomical Gift Act provides a measure of statutory immunity, the potential for liability exists when a donated organ has been inadequately screened or a potential recipient has been denied an organ.<sup>218</sup> Yet, the standards by which organs may be harvested and donors selected require the input of physicians who could, under *Snyder's* reasoning, ultimately be held liable for their good faith development of standards.

Reproduction medicine offers another example of the same dilemma. As prenatal testing for genetically transmitted diseases becomes more sophisticated the indications for such testing may exceed the expertise of the pregnant woman's primary care obstetrician.<sup>219</sup> The Council on Scientific Affairs of the American Medical Association has formulated a list of indications for referring a patient to a specialist in genetic counseling.<sup>220</sup> An obstetrician who fails to refer a patient to a specialist in genetic counseling could be liable in an action for a wrongful birth or wrongful life.<sup>221</sup> After *Snyder* could the non-profit medical association that formulated the standards in good faith also be found liable if the standards proved inadequate?

## CONCLUSION

The foregoing discussion, one hopes, provides an understanding of the reasoning behind the majority's imposition of a duty to third party blood product recipients by the AABB, as well as of Justice Garibaldi's arguments for a grant of qualified immunity to the AABB. The majority opinion in *Snyder* applied the example of a trade association to the AABB, a non-profit medical association. Recognizing the substantial influence the AABB exercised within the blood-banking industry the court, following the reasoning of earlier trade association cases, found the AABB owed a duty to third party blood product recipients. The court acknowledged the imposition of a duty was an

---

<sup>217</sup>See *id.*

<sup>218</sup>See *id.* at 338-40.

<sup>219</sup>See MICHAEL S. CARDWELL & THOMAS G. KIRKHOPE, REPRODUCTION PATIENTS, LEGAL MEDICINE 380 (American College of Legal Medicine, 4th ed. 1998).

<sup>220</sup>See *id.*

<sup>221</sup>See *id.*

essentially subjective process, a matter of “fairness and policy.” Given the AABB’s influence and the potential for harm from negligently promulgated standards, the court reasonably determined the AABB owed a duty, but it never fully examined whether other competing policy considerations might have warranted a grant of qualified immunity. In the absence of some legislative grant of authority to the AABB, the majority found there could be no qualified immunity.

In her dissent, Justice Garibaldi argued qualified immunity should offset any liability the AABB faced, provided the AABB could show good faith.<sup>222</sup> Accordingly, Justice Garibaldi found the majority’s definition of a “grant of governmental authority” too narrowly drawn, limited as it was to a legislative grant or contract.<sup>223</sup> By substituting AABB standards in place of any it might have developed on its own, Justice Garibaldi contended the DOH granted de facto, if not de jure, governmental authority to the AABB<sup>224</sup> in that the DOH incorporated AABB standards and made them mandatory. Thus, any blood bank regulated by the DOH lost the option of substituting other standards. Much of the AABB’s influence, Justice Garibaldi continued, derived from the DOH’s ratification of AABB standards.<sup>225</sup> As Justice Garibaldi wrote, “[t]he majority seeks to have it both ways: finding a duty of care and liability because of the governmental authority delegated to the AABB, but then denying immunity because of a perceived lack of governmental authority.”<sup>226</sup> Without immunity a governmental agency’s adoption of a professional association’s standards increases the likelihood the association will be found liable, if those standards should foster negligence. The governmental agency, however, remains immune even though it shares some of the blame for the promulgation of those negligent standards.<sup>227</sup>

Justice Garibaldi’s dissenting opinion argues a court’s decision to deny immunity to a non-profit medical association must consider not only the position of authority the association occupies within its profession, but also the reasoning that led to the adoption of the

---

<sup>222</sup>See *Snyder v. American Ass’n of Blood Banks*, 676 A.2d 1036, 1063 (N.J. 1036).

<sup>223</sup>See *id.* at 1061.

<sup>224</sup>See *id.*

<sup>225</sup>See *id.* at 1058.

<sup>226</sup>See *id.* at 1061.

<sup>227</sup>See *Snyder*, 676 A.2d at 1061.

association's standards by a governmental agency. A contract or legislative grant of authority from the governmental agency to the association, while a factor to be considered, is not dispositive. This is because in the absence of a contract or governmental grant of authority, the agency may still adopt and impose the association's standards upon those whom it regulates. In this way the governmental agency can indirectly impose liability upon a non-profit medical association by co-opting its standards, while at the same time avoiding the costs of developing standards independently. Paradoxically, the greater merit a non-profit medical association achieves and the more widely its standards are adopted by those within the profession the more vulnerable the association becomes to a "governmental takeover" of its standards and to liability should those standards prove inadequate. If a governmental agency chooses to co-opt standards it will more likely be those of "standard-setting" association, such as the AABB in bloodbanking. The ability of the government to adopt and impose the standards of a non-profit medical association, or for that matter, any professional association, may present a disincentive to professional associations to develop standards unless the possibility of qualified immunity exists to offset the risk of liability.

Justice Garibaldi's dissent in *Snyder* suggests that when the government must rely on non-profit medical associations for the development of standards important to public health "standard tort principles" regarding the application of duties and immunities may ultimately prove detrimental to the public interest.<sup>228</sup> Those who rely upon the standards promulgated by non-profit medical associations deserve protection from inadequate and negligently adopted standards. Yet without the protection of qualified immunity for good faith decisions non-profit medical associations may be discouraged from participating in the regulation of their respective specialties at a time when their expertise is most needed.<sup>229</sup>

---

<sup>228</sup>See *id.* at 1057 (citing *Costa v. Josey*, 415 A.2d 330, 337 (N.J. 1980)).

<sup>229</sup>See *id.* at 1061.