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Products Liability - Bad Blood - Strict Liability

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Recent Decisions

PRODUCTS LIABILITY—"BAD BLOOD"—STRICT LIABILITY—The Supreme Court of Pennsylvania has held that an administrator of a decedent who died of hepatitis allegedly as a result of a transfusion with contaminated blood may maintain a cause of action against a hospital for breach of implied warranties of merchantibility and fitness.

Hoffman v. Misericordia Hospital of Philadelphia, 439 Pa. 501, 267 A.2d 867 (1970).

Margaret Sullivan entered Misericordia Hospital on May 2, 1967 for the birth of a child. Postnatal complications developed requiring that she receive transfusions of whole blood. The transfused blood was supplied partially by the hospital from its own reserves and partially by the Red Cross. As a result of the transfusions, Mrs. Sullivan contracted serum hepatitis[1] and died.[2] The administrator of her estate brought an implied warranty action against the hospital seeking damages for death.

The lower court sustained the hospital's demurrer to the complaint in assumpsit principally on the authority of *Perlmutter v. Beth David Hospital*.[3] *Perlmutter* denied hospital liability by holding that the transfusion of blood constituted an incident to the performance of medical "service" rather than a sales transaction. Thus the New York court, on which the lower court so heavily relied, viewed the relation-

1. Serum hepatitis has been described as 'an acute infectuous inflammatory disease of the liver' brought on by a virus. P. BEESON & W. MCDERMOTT, TEXTBOOK OF MEDICINE 1032 (11th ed. 1963).

2. It was estimated in the United States in 1963 that out of about 1.8 million patients transfused, the incidence of persons receiving hepatitis was 30,000 cases with nearly 3,600 deaths. Zuckerman, *"Price of Blood,"* 2 BRIT. MED. J. 174-75 (1968). In percentage terms it has been estimated that 1% of all patients who receive whole blood transfusions develop jaundice and .1% (1 out of every 1000 patients) will die from the disease. Grindon, *"Post-transfusion Hepatitis,"* 74 AM. HEART J. 591-92 (1967).

3. 308 N.Y. 100, 123 N.E.2d 792 (1954).

While in discredit of late *Perlmutter* still appears to be the majority rule having been followed in: Sloneker v. St. Joseph's Hospital, 233 F. Supp. 105 (D. Colo. 1964); White v. Sarasota County Public Hospital Board, 206 So.2d 19 (Fla. Ct. App. 1968); Hoder v. Sayet, 196 So.2d 205 (Fla. Ct. App. 1967); Lovett v. Emory University, Inc., 116 Ga. App. 277, 156 S.E.2d 923 (1967); Koenig v. Milwaukee Blood Center, Inc., 23 Wis. 2d 324, 127 N.W.2d 50 (1964). *Cf.* Dibblee v. Dr. W. H. Groves Latter-Day Saints Hospital, 12 Utah 2d 241, 364 F.2d 1085 (1961); Gile v. Kennewick Public Hospital District, 48 Wash. 2d 774, 296 P.2d 662 (1956), 59 A.L.R. 2d 761 (1958).

Contra, Cunningham v. MacNeal Memorial Hospital, 39 U.S.L.W. 2200 (Ill. Sup. Ct. Sept. 29, 1970); Jackson v. Muhlenberg Hospital, 96 N.J. Super. 314, 232 A.2d 879 (Law. Div. 1967), *rev'd* on other grounds, 53 N.J. 138, 249 A.2d 65 (1969). *But cf.* Hoder v Sayet,

ship between hospital and patient as a non-divisible one for services. From the point of view of liability, the significance of the distinction lay in the following syllogism: 1) implied warranties arise in sales transactions; 2) this transaction was not a sale; 3) therefore, no implied warranties could arise from it.

In overruling the lower court, the Supreme Court of Pennsylvania found the *Perlmutter* reasoning less convincing. The court noted that *Perlmutter* failed to consider the possibility that warranties may be implied in non-sales transactions.[4] The court undermined the major premise in *Perlmutter* by observing the frequency of implied warranties in non-sales transactions in Pennsylvania.[5] In addition to criticizing the logic of *Perlmutter*, the court indicated its displeasure at an approach that perceived the critical question to be one of sale and not policy. The court, expressing reluctance to resolve the important policy issue raised on the technical existence of a sale, quoted the following statement with approval, "It seems to us a distortion to take what is, at least arguably, a sale, twist it into the shape of a service, and then employ this transformed material in erecting the framework of a major policy decision."[6]

On the basis of the factual record before it, the Pennsylvania court held it could not preclude the possibility of recovery on a warranty theory.[7] In so holding, the court stated its willingness to entertain policy arguments for extending implied warranties to the "bad blood" situ-

196 So.2d 205 (Fla. Ct. App. 1967); Russell v. Community Blood Bank, Inc., 185 So.2d 749 (Fla. Ct. App. 1966), *modified*, 196 So.2d 115 (Fla. 1967) (Transfer of whole blood by a blood bank for the purpose of transfusion constituted a sale).

4. 439 Pa. 501, 505 & n.3, 267 A.2d 867, 869 & n.3 (1970).

5. Conn v. Hunsberger, 224 Pa. 154, 73 A. 324 (1909) (bailment for hire); Shannon v. Boggs & Buhl, 124 Pa. Super. 1, 187 A. 313 (1936) (bailment lease); Hartford Battery Sales Corp. v. Price, 119 Pa. Super. 165, 181 A. 95 (1935) (lease of personal property); White Co. v. Francis, 95 Pa. Super. 315 (1929) (bailment lease); Crown Printing Co. v. Charles Beck Co., 73 Pa. Super. 419 (1920) (bailment lease); Dufort v. Smith, 53 Pa. Dist. & Co., 307 (1944) (bailment for hire). *Contra*, York Heating & Ventilating Co. v. Flannery, 87 Pa. Super. 19 (1926).

While all precedents were decided prior to the adoption of the Uniform Commercial Code the court did not perceive that enactment as an obstacle to its position. It was content to point out that Comment 2 to U.C.C. 2-313 provides that the Code was never intended to impede the case law development of implied warranty concepts in non-sales situations.

6. Russell v. Community Blood Bank, Inc., 185 So.2d 749, 752 (Fla. Ct. App. 1966) as quoted by the court at 439 Pa. at 507, 267 A.2d at 870.

7. The case was argued on the theory of implied warranties of merchantibility and fitness for a particular purpose. PA. STAT. ANN. tit. 12A §§ 2-314-15 (1953) *as amended.* It is important to note that blood cases are generally argued on an implied warranty theory under the U.C.C. or a strict liability theory as put forward in section 402A of the Restatement (Second) of Torts. Negligence is not usually effective, due to the frequent defendant contention and court finding that at present no known scientific means exists by which serum hepatitis can be detected in blood.

ation. Nevertheless, the court issued a caveat to those who would read too much into their opinion: "We do not decide that the extent of the warranties implied at common law in non-sales situations need necessarily be the same as those given statutory sanction in sales transactions under the Uniform Commercial Code, ..."[8] On a related point, the court expressed its disinclination to decide whether all types of sales transactions in all situations gave rise to warranties of the same extent.[9] The court's cautious approach did not foreclose argumentation on either the nature or scope of a warranty provision applicable to blood.

To understand the problems the Pennsylvania court will face in approaching "bad blood" as a policy question, it is necessary to review certain authorities that have opposed *Perlmutter. Russell v. Community Blood Bank, Inc.*,[10] found a sale in the case of a commercial blood bank. The *Russell* court addressed itself to the problems of whether any implied warranties attached to the sale of blood and what the nature of these warranties might be. On the first issue, it held that the law of implied warranties should apply to blood. Nevertheless the Florida court refused to hold the blood bank liable.

The reticence of the *Russell* court in imposing liability can be explained by its belief that serum hepatitis could not be eliminated, regardless of the amount of inspection or care. Since hepatitis apparently could not be detected, the court reasoned that blood might be an "unavoidably unsafe product." Perceiving an analogy to a comment of § 402A of the Restatement (Second) of Torts,[11] the court quoted:

There are some products which, in the present state of human

8. 439 Pa. at 508, 267 A.2d at 871.

9. *Compare* Vlases v. Montgomery Ward & Company, 377 F.2d 846 (3rd Cir. 1967) *with* Russell v. Community Blood Bank, Inc., 185 So.2d 749 (Fla. Ct. App. 1966), *modified*, 196 So.2d 115 (Fla. 1967); Jackson v. Muhlenberg Hospital, 96 N.J. Super. 314, 232 A.2d 879 (Law. Div. 1967), *rev'd* 53 N.J. 138, 249 A.2d 65 (1969); Adams v. Scheib, 408 Pa. 452, 184 A.2d 700 (1962); Eimco Corp. v. Joseph Lombardi & Sons, 193 Pa. Super. 1, 162 A.2d 263 (1960); and Frigidinners v. Branchtown Gun Club, 176 Pa. Super. 643, 109 A.2d 202 (1954).

10. 185 So.2d 749 (Fla. Ct. App. 1966), *modified*, 196 So.2d 115 (Fla. 1967).

11. RESTATEMENT (SECOND) OF TORTS § 402A (1965):

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

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

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

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

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

> knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. . . . Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situaiton calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.[12]

The court observed that the position of 402A(k) was entirely reasonable as well as being good public policy.

Confronted with competing considerations, the court molded a compromise verdict. *Russell* held that a plaintiff can state a cause of action against a blood bank for breach of implied warranty, but can only recover for injuries if they were caused by the failure to detect or remove a deleterious substance capable of detection or removal. The practical effect of the holding shifts the burden of proof to the defendant to show that by the reasonable exercise of existing skill or knowledge, hepatitis could not be detected.

On appeal the Florida Supreme Court upheld the court of appeals on the question of shifting the burden of proof in blood cases. The court, however, overturned the district court's holding that no method of detecting hepatitis existed as a matter of law. Believing the "detectability" issue to be one of fact requiring expert testimony the court refrained from deciding the issue. From the court's holding, the inference can be drawn that a party might be held liable for the existence of "bad blood," whether or not it was scientifically possible of detection.[13]

12. RESTATEMENT (SECOND) OF TORTS § 402A, comment *k* at 353-54 (1965).

13. At least one Florida case, *Green v. American Tobacco Co.*, 154 So.2d 169 (1963), seems to stand for the proposition that knowledge or opportunity for knowledge of a defective condition is wholly irrelevant for purposes of imposing liability on an implied warranty theory.

Although reversed,[14] the approach of the court in *Jackson v. Muhlenberg Hospital*,[15] holding that "bad blood" was not unreasonably dangerous under 402A, should be considered. The court first assumed an identity between a warranty cause of action and strict liability in tort under 402A. It noted that a 402A action was based on proof that the product when marketed was "in a defective condition unreasonably dangerous to the ultimate user or consumer." From these two premises, the court concluded that blood which is neither defective nor unreasonably dangerous does not give rise to strict liability.

The *Jackson* court reasoned further from its understanding of 402A and 402A *k.* as based on policy. As the court perceived it the policy basis of the rule lay in balancing the means available for avoiding the risk of harm and the extent of the risk against the utility of the product. Applying such a calculus of risks approach to the medical situation, the court exonerated the hospital of liability.

In this regard the *Jackson* court seemed especially impressed with the reasoning of *Fischer v. Wilmington General Hospital.*[16] The *Fischer* court argued that since the statistical risks of death from hemorrhaging and shock when blood is not furnished far exceed those arising when blood is transfused, it was reasonable to give a transfusion even knowing of the hepatitis risk. On a related point the *Fischer* court exonerated the hospital of a need to warn patient or relatives of the risks involved.[17] Using a practical approach, the court found that the psychological and psychosomatic harm likely to result from such a warning would outweigh the medical benefits sought by the transfusion. Implicitly the court in *Fischer* was asking "knowing what you know about the product, would you have marketed it?" even if it did not view the case from a products liability perspective.

It should be pointed out that all courts have not found the *Jackson*/

14. The New Jersey Supreme Court overuled on the basis that the factual record was too sketchy to support such a holding, 53 N.J. at 142, 249 A.2d at 67-68 (1969).

15. 96 N.J. Super. 314, 232 A.2d 879 (Law Div. 1967).

16. 1 Storey 554, 149 A.2d 749 (Del. Super. Ct. 1959).

17. In this regard it has been observed that a problem arises when it is not possible to improve the performance of a product in a situation where a consumer appears vulnerable to possible bodily harm, Dickerson, *Products Liability: How Good Does a Product Have to Be?*, 42 IND. L. J. 301, 307 (1967). In such a case it would seem that the duty to warn serves as an alternative means of discharging a distributor's broader duty of providing a product that does not violate a consumer's expectations by exposing him to an unreasonable and concealed danger. Although there is force in the argument that a consumer should never have to expose himself to latent dangers absent a warning, the strength of the point appears to be vitiated in the case of blood. It is believed that any reasonable man warned of the risks would nevertheless choose to encounter them.

Fischer line of reasoning persuasive.[18] One recent case, *Cunningham v. MacNeal Memorial Hospital*,[19] has held that a cause of action in strict liability under 402A can be stated against a hospital as a supplier of "bad blood." In reaching its conclusion, the Illinois court was not impressed with arguments that proved stumbling blocks in *Russell* and *Jackson*. For example the Illinois court rejected the notion that the non-detectability of hepatitis could ever operate as a legal defense to imposing strict liability on the hospital. In support of its holding that any other rule would be inconsistent with the concept of strict liability, the court called attention to § 402A(2)(a) of the Restatement (Second) of Torts. The language of this provision stated that the strict liability rule applies even though the seller has exercised all possible care in the preparation and sale of his product. In addition the court rejected the argument that blood qualifies as an "unavoidably unsafe product" under 402A(k). The court reached this result by reading 402A(k) as relating to pure products. Since "bad blood" is by definition and allegation impure, it could not qualify for the exception to liability.

It should be apparent from the diversity of approaches enumerated above that the law of products liability is in a state of flux over the "bad blood" issue. Amidst this uncertainty it is submitted that the Pennsylvania court acted soundly in allowing the instant case to go to trial. It is believed the court saw through the oft-repeated judicial error of only focusing on the technical sales-service issue. To its credit the court recognized the important policy aspects and dimensions of the case. The court was correct in its failure to take judicial notice of the impossibility of detecting hepatitis in blood. Since the "detectability" issue is a factual one and medical technology is constantly on the advance, a finding of scientific impossibility can only occur at a point in time. It is felt that such a point in time should occur at trial where medical data may be introduced and an opportunity to rebut such data afforded.

18. Cunningham v. MacNeal Memorial Hospital, 113 Ill. App. 2d 74, 251 N.E.2d 733 (App. Ct. 1969) (*semble*); Russell v. Community Blood Bank, Inc., 196 So.2d 115 (Fla. 1967) (concurring opinion). Contra Cunningham v. MacNeal Memorial Hospital, 113 Ill. App. 2d 74, 251 N.E.2d 733 (App. Ct. 1969) (dissenting opinion). It would appear that courts which have not perceived 402A(k) to be a problem have relied on the conviction that the overriding policy of 402A calls for risks to be distributed among all persons rather than being borne by the injured person alone. Courts which have thought 402A(k) to be a real problem have argued that the strict liability doctrine only applies: 1) where one party is in a better position to know and control the condition of a transferred chattel or; 2) where there is an underlying assumption of mistake in either design, production, or inspection. *Cf.* 30 U. PITT. L. R. 508, 515 (1969).

19. 39 U.S.L.W. 2200 (Ill. Sup. Ct. Sept. 29, 1970).

The Pennsylvania court acted properly in refusing to answer most of the issues raised. In the face of uncertainty as to the law in this area, prudence may be the best policy until all possible facts are introduced and issues explored at the trial level. In adopting a cautious approach, however, it is felt the court should have issued some guidelines regarding the content of an appropriate trial record. The following suggestion might beneficially have been inserted at the close of the Pennsylvania court's opinion. A complete trial record should include, ". . . not only detailed testimony as to the nature of the defendants' operations, but also expert testimony as to the availability of any tests to ascertain the presence of viral hepatitis in blood, the respective incidences of hepatitis in blood received from commercial blood banks and other sources, and such other available testimony and materials as may be relevant to any of the questions presented by the parties, including such economic and other factors as may bear on whether the doctrine of implied warranty or strict liability should apply to deliveries and transfusions of blood.[20]

Using such guidelines as a starting point, a trial court might profitably obtain written findings on issues of fact that would bear on questions of negligence and strict liability. Assuming negligence could not be proved on the basis of these findings, the court could entertain arguments on whether a hospital is a good risk-bearing or risk-spreading institution. In this context it would not be premature to inquire: (1. How much hosptal rates would rise in reflection of any potential liability actually incurred? and (2. How likely such an increase in rates would be effectively distributed as a cost of doing business?

With the exception of its omission of possible guidelines for a trial court to follow, the Pennsylvania Supreme Court is to be commended for its recognition of the factual and policy nature of the problems confronting it at the demurrer stage. Nevertheless it would appear its larger and more difficult task lies ahead. If the *Hoffman* case goes to trial, a special verdict of non-negligence is made, and the case returns on appeal, the court will have to decide whether or not to extend the policy of strict liability to hospitals.

It is submitted that a court presented with this difficult issue should not be bound by the particular label given a cause of action. For example, an allegation of an implied warranty theory should not affect one's answers to the following questions:

20. Jackson v. Muhlenberg Hospital, 53 N.J. at 142, 249 A.2d at 67-68 (1969).

(1 When a products related injury causes death and a warranty action is brought, does an action ex contractu survive when no express provision for breach of contract actions is made in the wrongful death statute?[21]
(2 What statute of limitations is or should be applicable to products cases?
(3 If a warranty theory is argued, must notice of the breach be given within a reasonable time as is the case regarding intangible commercial loss?
(4 Shall contributory negligence and assumption of the risk be defenses and must the answer to this question depend on whether a tort or contract theory is alleged?[22]

It is suggested that personal injury considerations should influence the disposition of these questions. The nature of the injury should carry more weight than the means by which the injury was inflicted.

If the label "implied warranty" does not dictate a certain result in a products case, what should a court do? In many cases the question of strict liability in a products context can be sharply distinguished from the question of intangible commercial loss. Since 402A was expressly designed to deal with the problem of physical injury arising from defective and unreasonably dangerous products, a court is bound to look to the principles and policies of that doctrine. It is believed to the extent there is a possible discrepancy in results arising from the independent application of alternative theories to a particular case, 402A should prevail.

The abstract suggestion put forward may be illustrated by thinking through possible applications of implied warranty and strict liability theories to the "bad blood" situation. Before proceeding to such a comparative exercise, it is necessary to review a few basic theoretical considerations. According to one distinguished commentator the basic question one asks in any products case is: "How good does a product have to be to satisfy the legal responsibilities of its makers and distributors?"[23] Under this approach the task is one of discovering and applying a standard of performance to see whether a particular product measures up or is in some critical way "legally defective." It has also

21. For a court who went so far as to say that recovery would be denied in a blood case on the basis of a strict construction of its wrongful death statute, *see* Lovett v. Emory Universiy, Inc., 116 Ga. App. 277, 156 S.E.2d 923 (1967). In view of the court's adoption of the *Perlmutter* reasoning, however, it is believed that the court's language represents dicta.
22. These four questions among others are put forward by Keeton, *Recent Decisions and Developments in the Law of Products Liability*, 32 INS. COUN. J. 620, at 630-631 (1965).
23. Dickerson *supra* note 17 at 301.

been observed that products do not measure up to minimal standards when they frustrate normal, reasonable, and established expectation patterns of buyers and sellers.[24] Thus, the goal of a manufacturer/distributor, desiring to avoid liability for the marketing of his product, would be to meet (or at least not frustrate) rather than defeat reasonable consumer expectations. The question then arises: how can a manufacturer accomplish this goal.[25]

By the express terms of 402A it would seem that the goal of not frustrating consumer expectations in the case of blood could be accomplished by marketing a product not unreasonably dangerous to the patient. Absent the argument that blood is an "unavoidably unsafe product" under 402A(k), difficulties are encountered in calling blood an unreasonably dangerous product. If one asks the question, "knowing what you know about the product, would you have marketed blood?," the answer has to be yes. Despite the knowledge of statistical certainty[26] that hepatitis may be present in a given pint of blood, one cannot say in light of its great social utility that it is unreasonable to market blood. It can be argued that a reasonable consumer fully informed of the attendant risks would still choose to confront the dangers of receiving a transfusion. If the above argument is accepted, the idea that it is reasonable for a consumer receiving a transfusion to expect a guarantee of actual safety is undermined.

If 402A(k) is not repudiated, there is evidence of limitations on the idea of consumer expectations being determinative in all instances of products liability. It is believed 402A(k) recognizes that at least occasionally, conflicts of social and economic policy may occur between the interest in protecting reasonable consumer expectations regarding product performance and the interest in encouraging the development and marketing of needed products. As the contrasting approaches in *Cunningham*, *Russell*, and *Jackson* illustrate, reasonable men may differ on the question of whether blood is within the class of products 402A(k) was designed to protect. The significance of the policy enunciated in 402A(k) remains for a certain class of therapeutic products. That

24. *Id.* at 305.
25. The difficulty in discharging this duty by means of a warning has already been alluded to. See note 13.
26. Disquieting objections can be made to this type of analysis. It has been suggested, for example, that the knowledge of the risk in the case of blood reaches such a level of cognizance that one is not far removed from the realm of intentional torts. Lecture by Professor Aaron Twerski, Duquesne University, July 27, 1970.

significance is reflected in the perception of the need to invoke a balancing of interests test.

Instead of weighing and balancing interests, it is believed that an implied warranty theory often imposes absolute liability on the assumption absolute interests are involved. Too often under an implied warranty approach the only question asked is: "was the product fit for the purpose intended?" According to such a test, contaminated blood is never fit for the purpose intended. However, the answer to this question should not provide an end to the inquiry.

In fairness to the implied warranty approach, it should be pointed out that some courts in a non-blood context have attempted to give new content to terms such as "unfit for intended use." One judge recently defined the term as meaning, "the product was sold in a defective condition unreasonably dangerous to a user or consumer or his property, that is to say, dangerous to an extent beyond that which would be contemplated by the ordinary user with the knowledge available to him as to the characteristics of the product."[27] Similarly, the approach of the *Russell* court could be read as conceiving implied warranty in terms of reasonable expectations rather than as guaranteeing actual safety in all instances. However, many other cases have taken the position that opportunity for knowledge of a risk under an implied warranty theory is totally irrelevant.[28]

By conceiving the "bad blood" problem in terms of 402A, the court might state the issue as follows: If unreasonably dangerous means so dangerous that a reasonable man would not have sold the product in such a condition, can one hold a distributor liable when he acts out of excusable ignorance? It might seem that such a question answers itself. However, depending on the particular policy interpretation and emphasis given 402A, it is possible to hold a hospital liable as did the Illinois court in *Cunningham*. A court who adopts an absolute liability approach, seeing risk allocation and the distribution of consumer losses as the sole underlying purpose of 402A, can find language in the Restatement (Second) of Torts to support that view. The question then becomes how such a view can be reconciled with the qualifying concept

27. C. A. Hoover & Son v. O. M. Franklin Serum Co., 444 S.W.2d 596, at 597 (Tex. 1969). *Cf.* Lartigue v. Reynolds Tobacco, 317 F.2d 19 (5th Cir. 1963).

28. Vlases v. Montgomery Ward & Company, 377 F.2d 846 (3rd Cir. 1967); Green v. American Tobacco, 154 So.2d 169 (1963). See notes 9 and 13.

of unreasonably dangerous which is necessary to trigger the imposition of strict liability.

So long as unreasonably dangerous is given the meaning suggested above, it is believed that the court will assume the role of arbiter of public policy on close medical questions in the products area. In the absence of legislative initiative, a state supreme court might function as the United States Supreme Court does in deciding commerce cases. That is to say in evaluating facts as to whether a medical product was "unavoidably unsafe" or "unreasonably dangerous," a court would be guided more by the balancing of interests and pragmatic considerations than by hard and fast rules. It should be noted that a court may exercise potent authority in deciding whether a certain kind or class of product is unreasonably dangerous.

The argument presented maintains that in view of the nature of the problem 402A represents a better perspective from which to view the "bad blood" cases. The meaning of the strict liability doctrine under 402A and its application to medical situations is not clear. As a result courts may differ in their understanding of that doctrine. One court may construct fault-type limitations on the operation of the doctrine in certain situations, based on its interpretation of 402A(k) and the unreasonably dangerous idea. Another court may adopt a strictly no-fault interpretation of 402A for all purposes and thereby impose absolute liability upon a hospital.

It is believed that at least in medical situations a fault-type limitation in the sense argued for above constitutes the preferable position. Under such an approach, important social interests are more likely to be balanced against those of the consumer instead of ignored. It is submitted that the framers of 402A intended "unreasonably dangerous" to mean something in terms of measuring the performance and justifying the marketing of a product. Therefore, a plaintiff, attempting to prove a product legally defective, should have to demonstrate something more than actual physical harm and cause-in-fact.

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