PRODUCTS LIABILITY—TRANSFUSIONS—NEW JERSEY COURT APPLIES THEORY OF STRICT TORT LIABILITY TO HOSPITALS AND BLOOD BANKS FOR TRANSFUSION-RELATED HEPATITIS—*Brody v. Overlook Hospital*, 121 N.J. Super. 299, 296 A.2d 668 (L. Div. 1972).

Following his admission to Overlook Hospital for a routine operation, Eugene Brody received a number of blood transfusions upon the advice of his physican.[1] He subsequently developed serum hepatitis which proved to be fatal.[2] His wife, Sarah Brody, in *Brody v. Overlook Hospital*,[3] brought an action for damages, individually and as executrix of his estate, against the hospital, two blood banks, two doctors and a medical technician.[4]

The complaint charged negligence on the part of each defendant under the Wrongful Death Act,[5] and further alleged that the hospital and blood banks breached implied warranties of merchantability and fitness for particular purpose by supplying decedent with the hepatitis-infected blood which purportedly caused his death.[6] The theory of strict liability in tort, upon which the case was ultimately decided, was not alleged in the complaint, but instead appeared in the pretrial order as stipulated by the parties.[7]

The court decided that the evidence presented against the two doctors and the medical technician raised a jury question on the theory of negligence. But, with respect to the hospital the court determined that

> [i]f the jury finds that serum hepatitis virus was in the blood transfused into decedent under the supervision of Overlook Hospital, and that decedent died as a result of hepatitis, then strict tort liability must be applied to Overlook Hospital.[8]

Additionally, if the jury found that "contaminated blood [was] at any time under the control" of either blood bank, then that bank would be

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1 Brody v. Overlook Hosp., 121 N.J. Super. 299, 301-02, 296 A.2d 668, 669-70 (L. Div. 1972). Brody entered Overlook Hospital to be treated for a broken hip. Plaintiff's Brief for Motion to Amend Complaint at 2-3.

2 121 N.J. Super. at 302, 296 A.2d at 670.

3 121 N.J. Super. 299, 296 A.2d 668 (L. Div. 1972).

4 *Id.* at 301, 296 A.2d at 670. The blood banks named in the complaint, Essex County and Eastern, were the suppliers of the blood used in the transfusions.

5 N.J. STAT. ANN. §§ 2A:31-1 *et seq.* (1952).

6 121 N.J. Super. at 302, 296 A.2d at 670. Plaintiff also sought damages for decedent's pain and suffering and loss of consortium and services.

7 Pretrial Order, Brody v. Overlook Hosp., No. L-18378-68 (N.J. Super. Ct., L. Div., Nov. 23, 1972) [hereinafter cited as Pretrial Order].

8 121 N.J. Super. at 302-03, 296 A.2d at 670.

liable under the same theory of strict tort liability.[9] The court concluded that public policy considerations "of the utmost importance" dictated the imposition of strict liability upon hospitals and blood banks.[10] The case was subsequently submitted to the jury, which returned a verdict for the plaintiff against both the hospital and one of the blood banks under the strict tort liability theory.[11] Defendants were granted leave to appeal shortly thereafter.[12]

Although the plaintiff sought recovery in strict liability, actions by hepatitis victims have traditionally been based upon negligence principles. However, these suits proved ineffectual since no foolproof method exists for testing or treating blood to detect or eliminate the hepatitis virus. Therefore, since fault was almost impossible to establish, plaintiffs were eventually compelled to proceed upon an implied warranty theory when seeking recovery.

Perlmutter v. Beth David Hospital[13] is the most influential case in the area of transfusion-related hepatitis, and is exemplary of the attempted use of the implied warranty theory by hepatitis victims seeking relief for injuries sustained.[14] Relying on the fact that she was billed separately by the hospital for the blood used in the transfusion, the plaintiff in *Perlmutter* alleged that the transfer consituted a "sale" under the Uniform Sales Act.[15] The New York court of appeals re-

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9 *Id.* at 303, 296 A.2d at 670.

10 *Id.* at 306, 296 A.2d at 672.

11 Eastern Blood Bank was dismissed from the suit at the inception of the trial, when it was found that the blood it had supplied had been administered to the decedent only days before his death. Pretrial Order, *supra* note 7, at 1. Serum hepatitis has an incubation period in the human body that varies from six weeks to six months. 7 F. SCHAFFNER, TRAUMATIC MEDICINE AND SURGERY FOR THE ATTORNEY 272-73 (1962). Therefore, since the blood had not been in the decedent's body long enough for the disease to have matured, Eastern's culpability was a medical impossibility.

12 Order Granting Leave to Appeal, No. AM-151-72 (N.J. Super. Ct., App. Div., Jan. 4, 1973).

13 308 N.Y. 100, 123 N.E.2d 792 (1954).

14 The doctrine of breach of warranty maintains that if a product is defective, the warranty, or manufacturer's promise that his product will conform to his representations, is broken and the manufacturer is automatically liable, whether or not he exercised due care or was otherwise at fault. *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

15 308 N.Y. at 102, 123 N.E.2d at 793. The Sales Act, Law of Sept. 1, 1911, ch. 571, § 96 [1911] N.Y. Laws 1305 (repealed 1964), stated in pertinent part:

> (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.
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> (2) Where the goods are bought by description from a seller who deals in

jected this contention, holding that the contract between the plaintiff and the hospital was primarily one for services and that the transfusion was incidental to the overall purpose of treating the patient and therefore not subject to any warranties.[16] The majority refused to label the hospital an "insurer" of its patients,[17] relying in part on the fact that there was

> neither a means of detecting the presence of the jaundice-producing agent in the donor's blood nor a practical method of treating the blood to be used for transfusion so that the danger may be eliminated . . . .[18]

The vast majority of jurisdictions, apparently unwilling to depart from the "sales-service" distinction,[19] have chosen to follow *Perlmutter*. However, at present at least four courts, employing various theories,

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goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

16 308 N.Y. at 104-05, 123 N.E.2d at 794. The court reasoned:

> Such a contract is clearly one for services, and, just as clearly, it is not divisible. Concepts of purchase and sale cannot separately be attached to the healing materials—such as medicines, drugs or, indeed, blood—supplied by the hospital for a price as part of the medical services it offers. That the property or title to certain items of medical material may be transferred, so to speak, from the hospital to the patient during the course of medical treatment does not serve to make each such transaction a sale. "'Sale' and 'transfer' are not synonymous", and not every transfer of personal property constitutes a sale. . . . It has long been recognized that, when service predominates, and transfer of personal property is but an incidental feature of the transaction, the transaction is not deemed a sale within the Sales Act.

Id. at 104, 123 N.E.2d at 794 (citation omitted).

17 *Id.* at 106, 123 N.E.2d at 795. The court in reaching its conclusions stated:

> If, however, the court were to stamp as a sale the supplying of blood—or the furnishing of other medical aid—it would mean that the hospital, no matter how careful, no matter that the disease-producing potential in the blood could not possibly be discovered, would be held responsible, virtually as an insurer, if anything were to happen to the patient as a result of "bad" blood.

Id. The majority was apparently not ready to impose the burden of strict liability upon hospitals, blood banks or the medical profession. There was, however, a vigorous dissent in *Perlmutter* which stated that the court should not have held as a matter of law that no sale was involved and that the plaintiff should have been given an opportunity to establish the allegations in the complaint. *Id.* at 108-12, 123 N.E.2d at 796-98 (Froessel, J., dissenting).

18 *Id.* at 106, 123 N.E.2d at 795.

19 121 N.J. Super. at 305, 296 A.2d at 671. The court cited the following cases as having followed the *Perlmutter* rule: Sloneker v. St. Joseph's Hosp., 233 F. Supp. 105 (D. Colo. 1964); White v. Sarasota County Pub. Hosp. Bd., 206 So. 2d 19 (Fla. Dist. Ct. App.), *cert. denied*, 211 So. 2d 215 (Fla. 1968); Hoder v. Sayet, 196 So. 2d 205 (Fla. Dist. Ct. App. 1967); Lovett v. Emory Univ., Inc., 116 Ga. App. 277, 156 S.E.2d 923 (1967); Carter v. Inter-Faith Hosp., 60 Misc. 2d 733, 304 N.Y.S.2d 97 (Sup. Ct. 1969); Dibblee v. Dr. W.H. Groves Latter-Day Saints Hosp., 12 Utah 2d 241, 364 P.2d 1085 (1961); Gile v. Kennewick Pub. Hosp. Dist., 48 Wash. 2d 774, 296 P.2d 662 (1956); Koenig v. Milwaukee Blood Center, Inc., 23 Wis. 2d 324, 127 N.W.2d 50 (1964).

have taken exception to this rule.[20] Faced with the reasoning in *Perlmutter*, there were at least three directions in which courts could move to afford relief to plaintiffs: (1) they could find that there was a sale, at least in the case of a transfer between a blood bank and a hospital; (2) while agreeing with *Perlmutter* that the transfer of blood was a service, they could still allow recovery under implied warranty, relying on the comment to the Uniform Commercial Code which states that the legislation is not intended to impair the development of common law warranties in non-sales situations; or (3) they could disregard the warranty theory altogether, find blood to be a product, and apply strict liability in tort.

The sales-service dichotomy first began to crumble in *Russell v. Community Blood Bank, Inc.*,[21] which held that the commercial blood bank which may have supplied the infected blood to a hospital could be held liable on a theory of breach of warranty since there was "at least arguably" a sale of goods involved.[22] The *Russell* court, however, refused to treat the volunteer blood banks in the same manner, reasoning that since no profit was realized, no sale occurred within the meaning of the Uniform Commercial Code.[23]

New Jersey has remained in the forefront in the development of hepatitis case law, just as it has continued to lead in the field of general

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20 The jurisdictions whose courts have rejected the *Perlmutter* rule are Florida (as to blood banks only), New Jersey, Pennsylvania, and Illinois.

21 185 So. 2d 749 (Fla. Dist. Ct. App. 1966), *aff'd as modified*, 196 So. 2d 115 (Fla. 1967).

22 *Id.* at 752. The court in distinguishing the blood banks' transaction from that of a hospital stated:

> Regardless of the fact that a *hospital* supplying whole blood to a patient may be merely performing a service incident to the over-all medical attention being furnished, we are not willing to extend this "service" characterization to the blood bank which originally collects and distributes the commodity. 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.

Id. However, the court held that the plaintiff could recover only if, through due care, hepatitis virus could be eliminated from the blood. *Id.* at 755.

On appeal, the Florida supreme court felt that consideration of the subject of hepatitis detection and elimination was "premature," and treated that part of the lower court decision as "surplusage." 196 So. 2d at 118. Even though a breach of warranty on the part of a blood bank was found, the "sale-service" distinction remained intact, thus leaving a hospital or nonprofit blood bank free from attack by hepatitis victims.

23 185 So. 2d at 753. Subsequently, the Florida legislature amended the state's Uniform Commercial Code to exclude causes of action based upon breach of warranty. FLA. STAT. ANN. § 672.2-316(5) (Supp. 1973).

products liability. In *Jackson v. Muhlenberg Hospital*,[24] the trial court, in granting a partial summary judgment for the defendant, found that a "sale" under the Uniform Commercial Code did exist when blood was transfused into a patient for consideration. The court further held, however, that if hepatitis were contracted, liability would arise only upon a finding of negligence on the part of a hospital or blood bank since all implied warranties had been expressly waived by means of disclaimer.[25] Refusing to affirm the trial court's decision, the supreme court held that the record below was far too "inadequate" for a ruling on the "highly significant" issue of whether supplying and administering institutions might be held liable to a hepatitis victim on the basis of implied warranty or strict liability in tort.[26] The court remanded the case for further study and deliberation, leaving for the future any challenge to New Jersey's policy of reluctance to apply strict liability to hospitals and blood banks.[27]

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[24] 96 N.J. Super. 314, 232 A.2d 879 (L. Div. 1967), *rev'd and remanded*, 53 N.J. 138, 249 A.2d 65 (1969).

[25] *Id.* at 329, 333, 232 A.2d at 888, 890. The court reasoned that because medical science had developed no conclusive test for determining whether human blood contained hepatitis virus, and since the blood bank had placed a label disclaiming liability upon the blood containers, invalidating all implied warranties under the Uniform Commercial Code, an action could only be maintained in negligence. *Id.* at 329, 232 A.2d at 888.

[26] 53 N.J. at 139-43, 249 A.2d at 66-68. The court, in emphasizing the need to obtain more information, stated:

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

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

Most decisions in other jurisdictions have resolved the strict liability issue either before submission of the case to the jury or in the resolution of pretrial motions against the plaintiff. *Jackson* was important in setting the stage for later decisions, which also held that there was a need for a trial on all issues, including those involving strict liability and breach of warranty. Pollock, *Liability of a Blood Bank or Hospital for a Hepatitis Associated Blood Transfusion in New Jersey*, 2 SETON HALL L. REV. 47, 57-58 (1970). Notably, the New Jersey supreme court did not mention the lower court's determination that the transfer of blood was a sale. Thus, there was the implication that the court either approved of the decision or was not concerned with the sales-service distinction. Note, *Strict Liability for Disease Contracted from Blood Transfusions*, 66 NW. U.L. REV. 80, 85 (1971). *Jackson* was subsequently settled, but the court's strong showing of interest in finding policy considerations foreshadowed the *Brody* decision.

[27] 53 N.J. at 142-43, 249 A.2d at 67-68. Questions of public policy are usually resolved in the state legislatures. Through the lobbying efforts of physicians, hospital associations and blood bank groups, 41 states, not including New Jersey, have now enacted statutes to

The major obstacle to those who have attempted to obtain recovery against hospitals under the theory of breach of implied warranty, as opposed to strict liability in tort, is the postulate that the Uniform Commercial Code only applies to transactions involving sales.[28] The Supreme Court of Pennsylvania, in *Hoffman v. Misericordia Hospital*,[29] observed that

> [n]o consideration is given to the possibility that warranties may be implied in non-sales transactions, thus placing an undue emphasis upon whether the elements of a technical sale are present.[30]

Therefore, *Hoffman* held that recovery may be permissible under a breach of warranty theory "even if it should ultimately be determined that the transfer of blood from a hospital for transfusion into a patient is a service."[31] As a basis for this decision, the court cited many instances where, prior to the adoption of the Uniform Commercial Code, implied warranties were found in non-sales transactions.[32] The court also quoted from the official comments to the Code,[33] noting that the

limit liability for hepatitis to actions based solely on negligence. Franklin, *Tort Liability for Hepatitis: An Analysis and a Proposal*, 24 STAN. L. REV. 439, 474-75 (1972).

Some states have specifically enacted statutes to relieve hospitals and blood banks from strict liability. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-1151 (Supp. 1972); ILL. ANN. STAT. ch. 91, § 181 (Smith-Hurd Supp. 1972) (discussed *infra* note 50); MICH. STAT. ANN. § 14.528(1) (1956); MISS. CODE ANN. § 7129-71 (Cum. Supp. 1971); WIS. STAT. ANN. § 146.31 (Supp. 1972-73). Other states have achieved the same result by amending the appropriate sections of the Uniform Commercial Code as adopted. *See, e.g.*, FLA. STAT. ANN. § 672.2-316(5) (Supp. 1973); MASS. GEN. LAWS ANN. ch. 106, § 2-316 (Cum. Supp. 1972); TENN. CODE ANN. § 47-2-316(5) (Supp. 1972).

In Baptista v. Saint Barnabas Medical Center, 109 N.J. Super. 217, 262 A.2d 902 (App. Div. 1970), the court dealt with the question of whether a plaintiff could recover damages sustained from a transfusion of incompatible blood. The court, finding for the defendant, decided that a hospital, in the absence of negligence, should not be held liable as an insurer of its medical services. *Id.* at 224, 262 A.2d at 906. The court, in limiting liability to negligence alone, stated:

> Whatever may be the final policy decision to be reached in cases involving blood infected with viral hepatitis, we find no justification for extending the doctrine of strict liability to a case such as this where the blood is not infected or defective.

Id.

28 UCC §§ 2-314, 2-315 (West 1972). New Jersey adopted these sections verbatim in N.J. STAT. ANN. §§ 12A:2-314 and 2-315 (1962).

29 439 Pa. 501, 267 A.2d 867 (1970).

30 *Id.* at 505 n.3, 267 A.2d at 869.

31 *Id.* at 507, 267 A.2d at 870.

32 *Id.* at 506 n.9, 267 A.2d at 870.

33 UCC § 2-313 (N.J. STAT. ANN. § 12A:2-313 (1962)), Comment 2 provides:

> Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case

"enactment did not intend to impede the parallel development of warranties implied in law in non-sales situations."[34]

Prior to *Hoffman*, the New Jersey supreme court, in *Newmark v. Gimbel's, Inc.*,[35] showed its dissatisfaction with the sales-service distinction, at least in a non-medical context. It held a beautician, who applied a permanent wave solution to a customer, liable for personal injuries under breach of warranty despite the contention that this was a service rather than a sale. Justice Francis, speaking for a unanimous court, stated that "[t]he no-separate-charge argument puts excessive emphasis on form and downgrades the overall substance of the transaction."[36] He stated:

> One, who in the regular course of a business sells or applies a product (in the sense of the sales-service hybrid transaction involved in the present case) which is in such a dangerously defective condition as to cause physical harm to the consumer-patron, is liable for the harm.[37]

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law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire, whether such bailment is itself the main contract or is merely a supplying of containers under a contract for the sale of their contents. The provisions of Section 2-318 on third party beneficiaries expressly recognize this case law development within one particular area. Beyond that, the matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.

See also UCC § 1-103 (N.J. STAT. ANN. § 12A:1-103 (1962)).

34 439 Pa. at 507, 267 A.2d at 870. Here, as in *Jackson*, the court remanded the case for further proceedings "due to the sparsity of the record." Recognizing that the law of products liability was in a state of flux, the court noted:

> 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 . . . . Nor do we decide that all types of sales transactions in all situations necessarily give rise to warranties of the same extent, or whether any duty existed on the part of the hospital or the physician to warn the patient of any risk that may exist in the performance of the blood transfusion due to hepatitis virus.

Id. at 508-09, 267 A.2d at 871 (footnote omitted). Therefore, a possibility of recovery did exist, but the court was not willing to commit itself. It did, however, express interest in the hepatitis problem when it said:

> We do, however, feel that all of these issues are pertinent to a proper disposition of the cause of action here stated, and we encourage the parties to explore them so as to provide the lower court and/or jury with adequate information upon which to make a decision in conformity with this opinion.

Id. at 510, 267 A.2d at 871.

35 54 N.J. 585, 258 A.2d 697 (1969). *See* Pollock, *supra* note 26, at 52-54; Note, *Warranties—Application of Implied Warranty to a Service Transaction*, 1 SETON HALL L. REV. 214 (1970).

36 54 N.J. at 593, 258 A.2d at 701.

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

An earlier New Jersey case[38] had held that a dentist who injured a patient because of a defective hypodermic needle was immune from the imposition of strict liability because he furnished professional skills and services rather than products. Relying on that case, the defendant in *Newmark* had argued that there was

> no doctrinal basis for distinguishing the services rendered by a beauty parlor operator from those rendered by a dentist or a doctor, and that consequently the liability of all three should be tested by the same principles.[39]

The court disagreed, stating that "there is a vast difference in the relationships."[40] Furthermore, the court stated, the medical practitioner occupies a special status, and the nature of his services, relating to the general welfare, is "so important . . . as to outweigh . . . any need for the imposition . . . of strict liability in tort."[41]

There was no mention of whether the supplying of blood by either a hospital or a blood bank would fall within the scope of medical services rendered, or of an ordinary commercial sale. Therefore, despite the immunity apparently granted to the medical profession through the dicta in *Newmark*, the question of hospital and blood bank liability remained unsettled.[42]

The most revolutionary concept to arise since *Perlmutter* in the area of infected blood, however, was the application of strict liability in tort.[43] In *Cunningham v. MacNeal Memorial Hospital*,[44] a hepatitis case, the Illinois supreme court based its finding of liability on section 402 A of the *Restatement (Second) of Torts*, drawing an analogy to its earlier decision in a defective automobile case.[45] Section 402 A provides:

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38 Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (Hudson County Ct. 1967), *aff'd sub nom.*, Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (App. Div. 1968), *aff'd*, 53 N.J. 259, 250 A.2d 129 (1969).

39 54 N.J. at 596, 258 A.2d at 702.

40 *Id.*

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

42 Pollock, *supra* note 26, at 54.

43 Franklin, *supra* note 27, at 458. Strict liability in tort applies only if an "inherently dangerous product" is in fact "defective" or harmful to a normal individual in the normal or expected use of such product. RESTATEMENT (SECOND) OF TORTS § 402 A (1965). This doctrine achieves the same result as an action for breach of warranty but it differs in that it allows a plaintiff to maintain an action directly against a manufacturer, even when there is no privity of contract. *See* Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692, 697-98 (1965).

44 47 Ill. 2d 443, 266 N.E.2d 897 (1970).

45 Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (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
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> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
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> (2) The rule stated in Subsection (1) applies although
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> (a) the seller has exercised all possible care in the preparation and sale of his product, and
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> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.[46]

The court held that (1) blood was a "product" within the contemplation of section 402 A;[47] (2) that the blood was "sold" as required by the section;[48] and (3) that the blood in question was "in a defective condition unreasonably dangerous to the user."[49] The sales-service

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[46] RESTATEMENT (SECOND) OF TORTS § 402 A (1965) (emphasis added).

[47] 47 Ill. 2d at 447, 266 N.E.2d at 899. In holding that the blood was a "product," the court quoted the RESTATEMENT (SECOND) OF TORTS § 402 A, comment *e* at 350 (1965), which provides in essence that strict tort liability is normally limited to processed articles. But in refusing to apply that rule, the court cited another pertinent comment to the *Restatement:*

> "The rule is not, however, so limited, and the supplier of poisonous mushrooms which are neither cooked, canned, packaged, nor otherwise treated is subject to the liability here stated."

47 Ill. 2d at 447, 266 N.E.2d at 899 (quoting from RESTATEMENT (SECOND) OF TORTS § 402 A, comment *e* at 350). Therefore, blood was a "product" in "much the same way as other articles wholly unchanged from their natural state which are distributed for human consumption." *Id.*

[48] 47 Ill. 2d at 452-53, 266 N.E.2d at 902. The court said that "there can be no question that defendant is engaged in the business of 'selling' whole blood . . . under our ruling in [Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965)]." *Suvada* held that strict liability will be applied for reasons of public policy, rather than on traditional warranty theories.

[49] 47 Ill. 2d at 456, 266 N.E.2d at 904 (quoting from RESTATEMENT (SECOND) OF TORTS § 402 A). The defendant contended that the blood was not in a "defective condition unreasonably dangerous to the user" and it was impossible to detect the presence of viral hepatitis. The court, quoting from Community Blood Bank v. Russell, 196 So. 2d 115, 119-20 (Fla. 1967), stated that

> "neither is there any practical way of discovering a defect in a tin of canned meat . . . or in a candy bar sealed in a paper wrapper . . . or in a bottled drink . . . or typhoid baccilli in clams. . . . These decisions stand for the proposition that the seller of a product intended for human consumption is liable for injurious consequences resulting from the consumption of a defective or adulterated product, even though it was at the time of the sale and consumption of such product practically or scientifically impossible to discover the defect in or adulteration of such product."

47 Ill. 2d at 453-54, 266 N.E.2d at 902 (citations omitted). The court further stated that "[a]ny other ruling would be entirely inconsistent with the concept of strict tort liability." *Id.* at 455, 266 N.E.2d at 903.

distinction thus became of secondary importance in ascertaining the applicability of strict tort liability. As long as the criteria set out in section 402 A are met,

> an entity which distributes a defective product for human consumption, whether for profit or not, should legally bear the consequences of injury caused thereby, rather than allowing such loss to fall upon the individual consumer who is entirely without fault.[50]

A review of the case law concerning liability for transfusion-induced hepatitis indicates a pattern of judicial activism in opposition to *Perlmutter*. The *Perlmutter* court based its decision on a strict interpretation of the warranty theory as enmeshed in the Sales Act, and declined to render the hospital or blood banks liable as insurers of the patient.[51] The *Perlmutter* decision was extremely influential in its era, probably because the opinion "seemed sound on the basis of past doctrine."[52] Recent decisions, however, have begun to erode the *Perl-*

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50 47 Ill. 2d at 457, 266 N.E.2d at 904. The defendant contended that blood came within the purview of the "recognized exception to the rule of strict liability," that of an "unavoidably unsafe" product as provided in a comment to the *Restatement:*

> There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified . . . . Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous.

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

The court refused to classify transfused blood as an unavoidably unsafe product because comment *k* only refers to products which are not impure, but simply dangerous. Since blood in its unadulterated form is not impure and infected and it does not involve a "substantial risk of injury to the user," the court held that "the allegations . . . do not come within the exception contended for by defendant." 47 Ill. 2d at 456, 266 N.E.2d at 904.

Shortly after this decision, and as the result of pressure exerted by an influential medical lobby, the Illinois legislature adopted a statute protecting hospitals from strict liability. ILL. ANN. STAT. ch. 91, § 181 (Smith-Hurd Supp. 1972) states:

> The availability of scientific knowledge, skills and materials for the purpose of injecting, transfusing or transplanting human whole blood, plasma, blood products, blood derivatives and products, corneas, bones, or organs or other human tissue is important to the health and welfare of the people of this State. The imposition of legal liability without fault upon the persons and organizations engaged in such scientific procedures inhibits the exercise of sound medical judgment and restricts the availability of important scientific knowledge, skills and materials. It is therefore the public policy of this State to promote the health and welfare of the people by limiting the legal liability arising out of such scientific procedures to instances of negligence or willful misconduct.

The limitation itself is imposed by ILL. ANN. STAT. ch. 91, § 182 (Smith-Hurd Supp. 1972).

51 308 N.Y. at 106, 123 N.E.2d at 795.

52 Franklin, *supra* note 27, at 457. In forming this conclusion, Franklin reasoned:

mutter approach.[53] The *Russell* court, while still relying on the warranty theory, deemed the transfer of blood to be "at least arguably a sale," thus penetrating the barrier that had shielded blood banks from liability based upon warranty in the past.[54] The *Hoffman* court put an end to the fictitious distinctions between sales and services, thus affording hepatitis victims relief under the Uniform Commercial Code.[55] The court in *Cunningham* delivered the final blow by holding that, as long as the criteria set out in section 402 A of the *Restatement* were met, strict tort liability would be applied, and both a hospital and a blood bank could be held responsible on a theory completely independent of breach of warranty.[56] But none of the cases discussed thus far considered more than superficially the underlying policy considerations involved in transfusion-related hepatitis cases. The *Brody* decision, in contrast, is important because the court neither solely relied on the semantic distinction between sales and services, nor merely adhered to a "verbal formula" of an earlier products liability case.

Judge Steinbrugge, who wrote the *Brody* opinion, first considered the question of whether blood furnished by a hospital for transfusion purposes

> is perceived to be a "product" or "goods" sold to the patient, or whether the blood is merely part and parcel of the "services" supplied by the hospital . . . .[57]

In response, the court reviewed and rejected the *Perlmutter* rationale,

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> [T]he law of warranties had been applied only to man-made defects in the past; charitable hospitals were not even fully liable for their own negligence at this time; and even profit-making hospitals were generally liable only for negligence.

Id. at 457-58 (footnotes omitted).

53 *Id.* at 458. One reason given for this was the adoption of the Uniform Commercial Code in practically every jurisdiction (all states but Louisiana). See note 33 *supra* and accompanying text. Another factor considered was the decline of charitable immunity. *See generally* Note, *The Diminishing Doctrine of Charitable Immunity: An Analysis*, 19 DRAKE L. REV. 187 (1969).

54 See notes 21-23 *supra* and accompanying text.

55 See notes 29-34 *supra* and accompanying text.

56 See notes 44-50 *supra* and accompanying text.

57 121 N.J. Super. at 303, 296 A.2d at 670. The import of this determination was explained by the court when it stated:

> If blood is considered a "product" then, under the Uniform Commercial Code, theories of breach of the warranties of merchantability, N.J.S.A. 12A:2-314, and of fitness for particular use, N.J.S.A. 12A:2-315, are applicable. Equally as applicable is the theory of strict tort liability, *i.e.*, liability on the part of the supplier whether or not the supplier was at fault, as expressed in *Restatement* 2d, *Torts*, § 402A . . . . On the other hand, if the hospital's provision of infected blood is considered a "service," then a negligence action alone against the hospital will be maintainable.

Id. at 303-04, 296 A.2d at 670-71.

stating that "much has changed since 1954 in the operation of hospitals and the legal principles pertaining thereto."[58] Agreeing with the result in both *Cunningham*[59] and *Hoffman*,[60] the court nevertheless criticized these decisions for not addressing "themselves to any sound *policy* reasons for extending the doctrine of strict liability to hepatitis cases."[61] The court felt that policy considerations were of the utmost importance and quoted Justice Traynor of the California supreme court:

> "Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. . . ."[62]

In Judge Steinbrugge's estimation, then, a decision in *Brody* required an exploration of policy considerations.

The court examined the possible impact of strict liability upon blood banks and hospitals,[63] and concluded that strict liability would have

> the effect of forcing the entity that markets the product to consider the "accident costs" . . . when deciding whether and from where to procure it. In the case of blood, the "safety rationale" emphatically applies to hospitals because, as a general rule, each hospital has a choice of several blood banks as potential suppliers.[64]

Therefore, the adoption of a strict liability standard would force hospitals to purchase only from those blood banks maintaining the highest

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58 121 N.J. Super. at 305, 296 A.2d at 671.

59 *Id.* at 305-06, 296 A.2d at 672. The court, relying on § 402 A of the RESTATEMENT (SECOND) OF TORTS, held the hospital liable under strict liability for injuries suffered by a patient who had contracted hepatitis from a transfusion. See notes 44-50 *supra* and accompanying text.

60 *Id.* at 305, 296 A.2d at 671-72. The court held that, although a transfer of blood from a hospital to a patient was a "service," recovery might still be permissible on a breach of warranty theory under the Uniform Commercial Code. See notes 29-33 *supra* and accompanying text.

61 *Id.* at 306, 296 A.2d at 672. The court stated:

> *Perlmutter* dealt only with the semantic question of whether the transaction (the blood transfusion) was a "sale" or a "service" . . . . *Hoffman* recognized the problem; *Cunningham* dealt only with the verbal formula of § 402A.

Id.

62 *Id.* (quoting from Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring)).

63 *Id.* at 307-08, 296 A.2d at 672-73.

64 *Id.* at 307, 296 A.2d at 672 (footnote omitted). *See generally* AMERICAN MEDICAL ASSOCIATION, COMMITTEE ON BLOOD, DIRECTORY OF BLOOD BANKING AND TRANSFUSION FACILITIES AND SERVICES (1969).

level of safety, "thus decreasing the risk of a patient's becoming infected with hepatitis as a result of a transfusion."[65] The court explained that "even in the comparatively low number of cases" where a hospital deals with only one blood bank, the imposition of strict liability could consequently "spur the hospital to take a more active role in influencing the bank's collection processes, *i.e.*, more careful screening of donors."[66]

The court believed that the most important result to be achieved by applying the strict liability doctrine would be to force hospitals to regulate more carefully their own use of blood, and to encourage medical research to either advance new and adequate methods of discovering hepatitis in the blood or to develop a protective vaccine to be administered to a patient about to undergo a transfusion.[67]

The defendant Overlook Hospital argued that a hospital confronted with the threat of strict liability would only pass along its additional costs to its patients, thus defeating any safety incentive. The court, in finding that contention unpersuasive, observed:

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65 121 N.J. Super. at 307, 296 A.2d at 672. It has been suggested that hospitals could either change from one commercial bank to another which maintained a better record, or possibly induce volunteer blood banks to expand their activities by adding facilities or staying open longer. The result of these proposals would be a lower cost to the hospitals for those hepatitis cases that occurred despite these safety measures. Franklin, *supra* note 27, at 470.

66 121 N.J. Super. at 307, 296 A.2d at 672. There is an inherent difficulty surrounding the screening of blood donors. The only satisfactory method of identifying possible hepatitis carriers is through extensive questioning of donors regarding any prior medical history or past symptoms which might indicate an early stage of hepatitis. This procedure is of doubtful value in that the potential donors may not be aware that they are carriers of the disease. In the case of paid donors, many of whom are alcoholics or drug addicts, there is a strong motive to lie or refuse to disclose pertinent facts relating to their medical history. Haut & Alter, *Blood Transfusions—Strict Liability?*, 43 ST. JOHN'S L. REV. 557, 559 (1969). As to differences in the incidence of hepatitis among commercial and volunteer blood banks, see note 74 *infra*.

67 121 N.J. Super. at 307-08, 296 A.2d at 672-73. Although much experimentation has taken place over the years, no test has been developed that will satisfactorily detect a hepatitis carrier. The most effective test advanced to date is the hepatitis-associated antigen test, which has a detection rate of only about 20-30%. *See* Blumberg, Sutnick, London & Millman, *Australia Antigen and Hepatitis*, 283 NEW ENG. J. MED. 349, 352 (1970); Prince & Burke, *Serum Hepatitis Antigen (SH): Rapid Detection by High Voltage Immunoelectroosmophoresis*, 169 SCIENCE 593 (1970).

There has been research on a vaccine to immunize potential blood donors from hepatitis. While there is optimism for its eventual success, it has not yet progressed to a point where public use is possible. N.Y. Times, Mar. 24, 1971, at 1, col. 1.

It has also been suggested that if hospitals allocated their hepatitis costs as a charge on each unit of blood used, doctors would weigh the risks of elective surgery more carefully and would also utilize component therapy as an alternative to a blood transfusion, thus shifting toward safer substances and away from whole blood. Franklin, *supra* note 27, at 471; see note 80 *infra* and accompanying text.

> Insurers will not write liability policies unless satisfied with the level of care exercised by the hospital. And, even if the cost to each patient *is* marginally increased, public policy dictates the imposition of strict tort liability.[68]

Another policy consideration discussed by the court was the concept of "loss spreading." Under this theory, a hospital forced to sustain losses resulting from hepatitis-infected blood would "tend to spread the loss among all parties, *i.e.*, donors, blood-banks, [and] perhaps its patients."[69]

The court further considered the possible application of N.J. STAT. ANN. §§ 2A:53A-7 and -8,[70] which limit the liability of charitable corporations and nonprofit institutions respectively,[71] but which are

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68 121 N.J. Super. at 308, 296 A.2d at 673. The defendant's argument ignores the fact that the majority of patients obtaining transfusions will be covered by health insurance. Therefore, even if insurance costs increase marginally, the risk will be distributed among the largest group practicable, the policy holders. Although this theory might inflict a harsh burden upon some—for example, those who cannot afford to procure medical insurance or those who are denied coverage (*i.e.*, hemophiliacs)—the public policy involved in protecting the greatest number of people possibly outweighs such factors. Note, *supra* note 26, at 94 n.58. Aside from the economic aspect, another consideration that should be noted is the hospital's concern about its reputation and good will. This further motive should also increase the safety incentive.

69 121 N.J. Super. at 308, 296 A.2d at 673. The theory of "loss spreading" involves an attempt to maximize the number of persons who will bear the losses or increased costs resulting from strict liability, thus minimizing the effect upon the individual. Although some argue that these risks can be covered by health insurance, this rationale is dubious since the very poor would probably have no insurance. Further, medical policies generally cover only such damages as medical expenses and lost income, providing no coverage for pain and suffering. Therefore, strict liability offers a more trustworthy means of allocating the losses sustained. Franklin, *supra* note 27, at 463-64. *See generally* Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

70 N.J. STAT. ANN. § 2A:53A-7 (Supp. 1972-73) provides in pertinent part:

> No nonprofit corporation, society or association organized exclusively for religious, charitable, educational or hospital purposes shall . . . be liable to respond in damages to any person who shall suffer damage from the *negligence* of any agent or servant of such corporation, society or association, where such person is a beneficiary, to whatever degree, of the works of such nonprofit corporation, society or association . . . .

Id. (emphasis added).

N.J. STAT. ANN. § 2A:53A-8 (Supp. 1972-73) provides in pertinent part:

> [A]ny nonprofit corporation, society or association organized exclusively for hospital purposes shall be liable to respond in damages to such beneficiary who shall suffer damage from the *negligence* of such corporation, society or association or of its agents or servants to an amount not exceeding $10,000.00, together with interest and costs of suit, as the result of any 1 accident and to the extent to which such damage, together with interest and costs of suit, shall exceed the sum of $10.000.00 such nonprofit corporation, society or association organized exclusively for hospital purposes shall not be liable therefor.

Id. (emphasis added).

71 121 N.J. Super. at 308-10, 296 A.2d at 673-74. The court stated that Overlook

specifically worded to include liability based upon negligence only. The court held that "[t]he concept of 'negligence' is foreign to that of 'strict liability,' and therefore the statute has no application to the situation at bar."[72]

Turning to a consideration of the blood banks' liability, the court dealt with the question of whether the two suppliers involved fell within the ambit of section 402 A. It concluded that blood banks do meet the requirements of that section since

> [a]ll blood banks sell their product (blood) for a price. If the sold blood is infected with hepatitis virus, that blood is in a "defective condition unreasonably dangerous to the user or consumer" (the ultimate patient). A blood bank's actual business *is* to sell the product, blood. And it is mandatory that the blood reach the user (the patient) "in the condition in which it is sold": no opening of the container carrying the blood is permitted at any step along the line of distribution.[73]

Judge Steinbrugge stated that public policy demanded the imposition of strict tort responsibility on blood banks, "if for no other reason

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Hospital would only fall within the ambit of N.J. STAT. ANN. § 2A:53A-8 if it were shown to be a non-profit institution. *Id.* at 309, 296 A.2d at 673.

[72] *Id.* at 310, 296 A.2d at 674. Judge Steinbrugge further stated that

> the concept of negligence is not relevant to the doctrine of strict liability. One is the antithesis of the other. Wherever the ordinary concept of negligence obtains, a showing of "due care" by the defendant rebuts the plaintiff's contentions. But where strict liability prevails, "due care" is not relevant. Defendant's liability is predicated upon the fact of the injury's occurrence, and not upon any lack of care.

Id. at 309, 296 A.2d at 673.

Although the court read these statutes as referring to negligence only, it is questionable whether the New Jersey legislature intended such a result. It seems more likely that those who enacted the statutes sought to protect the nonprofit and charitable organizations from all liability arising without fault. *See* Statement accompanying N.J. Senate Bill 789, introduced Mar. 20, 1972 (proposed amendment to N.J. STAT. ANN. § 12A:2-316). This bill would provide that implied warranties of merchantibility and fitness under the Uniform Commercial Code do not apply to the sale of blood, blood plasma, human tissues or organs. Section 5 of the bill states:

> Such blood, blood plasma or tissue or organs shall not for the purposes of this chapter be considered commodities subject to sale or barter, but shall be considered as medical services.

But realistically, what would the passage of this act accomplish? If S. 789 were enacted as presently written, only actions based on breach of warranty would be eliminated, leaving intact strict liability actions sounding in tort. Of course, the bill could be reworded to include strict tort liability and thus effectively avoid responsibility without fault.

It will be interesting to see the legislative reaction to *Brody*. Whether New Jersey's strong medical lobby will succeed in thwarting strict liability, as happened in Illinois following *Cunningham*, will be decided in the coming months. Thus, compensation for the hepatitis victim may be determined by the legislature and not the judiciary.

[73] 121 N.J. Super. at 310, 296 A.2d at 674; *cf.* Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

than to discourage carelessness in the selection of donors."[74] He reasoned that under the strict liability theory, a blood bank would assume the position of a supplier of goods, as opposed to a manufacturer, in choosing which of several donors (the actual manufacturers) it would purchase from.[75] Quoting from *Cunningham*, the judge concluded:

> "If the article left the defendant's control in a dangerously unsafe condition . . . the defendant is liable whether or not he was at fault in creating the condition or in failing to discover and eliminate it . . . ."[76]

The court also examined the effect that strict liability would have upon commercial and volunteer blood banks. Where a commercial or volunteer blood bank held a monopoly in a community, it would risk competition if it maintained a poor safety record and was forced to raise its rates in order to "pass along" the costs "inevitably associated with strict liability."[77] In such a case, the competition would be from

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74 121 N.J. Super. at 310, 296 A.2d at 674. For a discussion of the difficulty involved in screening donors, see note 66 *supra*. It has been suggested that if higher sums of money were offered, healthy donors would be more readily induced to give blood. Franklin, *supra* note 27, at 466-67 n.167 and accompanying text. On the subject of blood bank economics, *see generally* R. TITMUSS, THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY (1971), reviewed by Solow, 80 YALE L.J. 1696 (1971).

Most medical authorities concede that blood obtained from a commercial blood bank has a higher incidence of hepatitis contamination than that obtained from a volunteer bank. Several reasons have been suggested for this disparity. One reason is that a donor for cash has a greater incentive to misrepresent his medical history than the volunteer donor. Also, commercial banks tend to be located in large urban areas where they attract drug addicts, alcoholics and others in questionable physical condition. Allen, *Volunteer Blood for Everyone*, 9 STAN. M.D. 2 (1970); Cohen & Dougherty, *Hepatitis Arising From Addict Blood Donors*, 203 J.A.M.A. 427 (1968); Grady & Chalmers, *Risk of Post-Transfusion Viral Hepatitis*, 271 NEW ENG. J. MED. 337 (1964); Kunin, *Serum Hepatitis from Whole Blood: Incidence and Relation to Source of Blood*, 237 AM. J. MED. SCI. 293 (1959). Furthermore, a blood bank that sells its product at a profit has less incentive to carefully screen donors than a nonprofit blood bank that is performing a public service. Pollock, *supra* note 26, at 49.

Generally, the probability of receiving infected blood from a commercial blood bank is five per hundred compared to a rate of five per thousand for volunteer banks. For statistics relating to the comparative ratio between commercial and volunteer blood banks, see Franklin, *supra* note 27, at 444-45 n.37.

A further problem is posed by the imposition of liability on more than one blood bank, conceivably requiring an innocent party to pay for hepatitis caused by another's blood, thus depriving him of due process of the law. *See* 14 MEDICAL WORLD NEWS 60 (1973). Judge Steinbrugge answered these questions by noting that there was no way to decide which pint had caused the hepatitis, and that all the pints were actually a *single* product. Record at 411-13.

75 121 N.J. Super. at 310, 296 A.2d at 674.

76 *Id.* at 311, 296 A.2d at 674 (quoting from Cunningham v. MacNeal Memorial Hosp., 47 Ill. 2d 443, 454, 266 N.E.2d 897, 903 (1970)).

77 121 N.J. Super. at 311, 296 A.2d at 674.

both emerging commercial banks and hospital-created banks.[78] Where blood banks are in competition, "the imposition of strict liability will force them to intensify (or in some cases commence) their efforts to find 'safe' donors."[79] Blood banks as well as hospitals would feel the impact of such an "allocative effect" rationale:

> Where a community has more than one blood bank, strict liability will cause the blood bank with the poorer safety record to charge higher fees. Since hospitals patronize the bank charging the lowest fee, there will be greater demand for blood from the bank with the better safety record. The incidence of hepatitis infection must thus be reduced.[80]

Judge Steinbrugge considered the question of whether a blood bank or hospital might be unfairly burdened with strict liability and explained that strict liability is based not upon fault but upon physical control over the defective product while it is in its defective state.[81] He then traced the route that blood traveled from the donor to the patient, noting that hepatitis virus finds its origin either in the donor's blood or, "at the latest," by needle when the blood is extracted from the donor. Therefore, since it reaches the operating room or bedside *"in its original package,"* the blood in its defective state "passes through the physical control" of both the blood bank and the hospital, thus rendering them liable under section 402 A.[82]

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78 *Id.* It has been suggested that because a blood bank is monopolistic, there is less incentive to improve its supply of blood. Judge Steinbrugge felt that the imposition of strict liability would provide that incentive.

79 *Id.* See notes 66 and 74 *supra* for a discussion of the difficulties involved in finding safe donors.

80 *Id.* at 312, 296 A.2d at 675. Resource allocation is founded upon the premise that a purchaser should not only be informed of the costs of labor and materials used in producing a product, but that he should also be made aware of the social costs. Thus, if two products appear similar in both utility and manufacturing costs, but one causes undue injury to users, that product would be priced higher, thereby making consumers aware of the actual social costs involved. For an argument in support of the allocative effect, see Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—A Comment*, 11 J. LAW & ECON. 67 (1968). *But see* Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960). The court in *Brody* concluded that the allocative effect would be applicable to hepatitis situations. But, in fact, the market does not necessarily control the price of blood in all cases. Where, for instance, a number of hospitals use a single blood bank to supply their needs, there will probably be no price differential since all hospitals are likely to have similar hepatitis risks. Franklin, *supra* note 27, at 471. Another example of this is where either the Red Cross or other volunteer blood banks operate in an area with competing commercial banks. Arguably, since the volunteer banks supply blood of a higher caliber (less risk of hepatitis), they could command a higher price from the hospitals. But generally, the Red Cross charges only a processing fee for its blood, and therefore actually sells its blood at a *lower* price than do the commercial banks. *Id.* at 468-69.

81 121 N.J. Super. at 312, 296 A.2d at 675.

82 *Id.* at 312-13, 296 A.2d at 675 (emphasis in original).

The court concluded by declaring:

> [B]ecause transfused blood is a "product," its transferral constitutes a "sale" or "sales." Where the blood ("product") contains serum hepatitis virus, it is in a "defective condition unreasonably dangerous to the user or consumer" (the patient), and the doctrine of strict tort liability applies.[83]

Although strict tort liability was implemented to accord relief to Mrs. Brody, use of the warranty sections of the Uniform Commercial Code would have produced the same result. Perhaps the court felt that the warranty theory would place too great a hardship upon a plaintiff seeking relief for a hepatitis-related injury, thus contravening public policy. This burden is exemplified by the Code provision requiring a plaintiff to give notice to the seller of any breach of warranty "within a reasonable time" after injury occurs, and in absence of such notice, requiring that he be "barred from any remedy."[84] However, the average patient who contracts hepatitis in a hospital probably does not possess a sufficient knowledge of sales law to protect his interests under the Code. Alleviating the duty of timely notice through the use of strict tort liability thus provides a more equitable result.

An additional and far-reaching problem presented by the warranty theory involves the use by hospitals and blood banks of disclaimers which are printed on the blood containers and are designed to relieve these institutions from liability. This method of limiting or decreasing liability is valid in all actions based upon breach of implied warranty.[85] Courts may be reluctant to enforce this defense because almost invariably the patient is unaware of the disclaimer. Often he is unconscious and awaiting surgery when the blood arrives for the transfusion, so that it would be unfair to charge him with knowledge of the disclaimer and permit the blood bank or hospital to avoid liability.[86]

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83 *Id.* at 313, 296 A.2d at 675. Judge Steinbrugge stated that the latest the blood could have become infected was at the time of extraction from the donor. However, it is possible that hepatitis may have been contracted from the needle by which the patient received blood at the hospital. In such a case, the defective product would not have been under the blood bank's physical control and therefore it would seem that the strict liability rationale would not be valid. Perhaps the court took this possibility into consideration and determined that the likelihood of a patient contracting hepatitis in the sanitary surroundings of a hospital was so insignificant as to be outweighed by the public policy considerations involved in protecting an innocent hepatitis victim.

84 UCC § 2-607 (N.J. STAT. ANN. § 12A:2-607 (1962)) provides in pertinent part:

> (3) Where a tender has been accepted
>
> (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy
>
> . . . .

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

86 *See* Pollock, *supra* note 26, at 56-57. *Cf.* Henningsen v. Bloomfield Motors, Inc., 32

But the problems raised by the Uniform Commercial Code are not the only questions posed by the *Brody* opinion. A logical progression could lead to an extension of the doctrine of strict tort liability. For instance, now that blood is considered a product and its transfer a sale, will the same doctrine be extended to human organs and their transplantation? At present, since organ transplants are still a relatively new development and the supplying of organs bears little resemblance to the multi-million dollar interstate commerce in blood, the analogy may be inappropriate. However, with greater technical competence and the increased use of organ transplants, the near future may find these transfers paralleling in importance the use of blood transfusions. Thus, strict liability might be an appropriate basis for relief. Assuming that the comparison between blood transfusions and organ transplants is valid, it would seem in light of *Brody* that strict liability would attach in the case of a diseased organ even though there were still no adequate tests for determining whether a disease were present in the tissue. If such a test were available and it were not utilized, or if the tissue were merely incompatible, public policy would not necessarily dictate the imposition of strict liability, and a recovery could also be based upon negligence.[87]

N.J. 358, 161 A.2d 69 (1960) (manufacturer's disclaimer of liability for new car ineffective where terms were not made known to purchaser). *See also* Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 STAN. L. REV. 974 (1966); Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 804 (1966).

Although it is doubtful that warranty disclaimers constitute a viable defense, assumption of the risk is a valid defense even to a cause of action based on strict tort liability. RESTATEMENT (SECOND) OF TORTS § 402 A, comment *n* at 356 (1965), however, requires actual discovery or knowledge of the hidden defect rather than a general appreciation of the danger involved. Given the virtual impossibility of detecting hepatitis virus in the blood, it is doubtful whether this defense could be successfully utilized by a hospital or blood bank. The question is further complicated in light of the fact that New Jersey does not recognize the doctrine of assumption of risk as an affirmative defense, finding it indistinguishable from contributory negligence. *See* McGrath v. American Cyanamid Co., 41 N.J. 272, 196 A.2d 238 (1963); Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90 (1959).

87 *See* Baptista v. Saint Barnabas Medical Center, 109 N.J. Super. 217, 262 A.2d 902 (App. Div. 1970) (where blood was not infected, but merely incompatible, recovery could be sustained on a negligence theory only). See discussion at note 26 *supra*.

At present, there is a vast difference between blood transfusions and organ transplants. It has been estimated that some six million pints of blood are drawn from donors each year, and blood is bought and sold in enormous quantities. R. TITMUSS, *supra* note 74, at 47-69, 90-91. Human organs, in contrast, are not "in the stream of commerce" since they are not bought or sold in the open market, but rather, are transmitted from a donor directly to a recipient. However, given a situation where organs are within the "stream of commerce," (*e.g.*, an eye bank may buy and sell eyes), strict liability will not necessarily be invoked. Application of Section 402 A is not mandatory. Generally courts will apply strict liability, at least in a medical context, only if public policy so dictates.

The impact that *Brody* is likely to have upon New Jersey's blood supply may be widespread and significant. Judge Steinbrugge has suggested that blood banks will, as a result of this decision, commence screening blood donors more carefully.[88] However, with the implementation of such a procedure, the possibility exists that the volume of blood received by the banks will necessarily decline,[89] thus causing a possible shortage of an indispensable commodity. Yet, even in the face of such a shortage, it may be argued that the importance of compensating hepatitis victims outweighs the speculative risk of a blood defi-

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Two further questions involve the possible extension of strict tort liability either to the doctors, who prescribe transfusions, or to the donors, who are the real "manufacturers" of the "defective product." The court in *Brody* declined to consider the question of imposing strict liability upon a physician because the issue had not been raised by the plaintiff's pleadings. 121 N.J. Super. at 302, 296 A.2d at 670. But in light of prior New Jersey cases dealing with physicians' liability, it is doubtful that the court would depart from its traditional reluctance to render the medical profession liable under any theory except negligence. *See* Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (Hudson County Ct. 1967), *aff'd sub nom.*, Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (App. Div. 1968), *aff'd*, 53 N.J. 259, 250 A.2d 129 (1969) (court refused to hold dentist strictly liable when defective needle caused injury to patient). The court in that case distinguished between the distribution of products and the furnishing of professional skills and services. *See also* Newmark v. Gimbel's, Inc., 54 N.J. 585, 258 A.2d 697 (1969) (discussed at notes 35-42 *supra* and accompanying text).

The possible application of strict liability to a blood donor after contraction of hepatitis by a patient presents a different problem. Does public policy demand that an innocent donor bear the burden of strict responsibility for the blood he provides? Looking to the policy justification delineated by Judge Steinbrugge in *Brody*, the answer is apparently in the negative, since there is no substantial reason for imposing such liability upon a donor. For a discussion of policy considerations relating to the blood donor, see Franklin, *supra* note 27, at 465. In addition, when the normal economic status of the commercial donor is examined, it seems probable that he will be judgment-proof, thus rendering any benefit that might be derived from the application of strict liability ineffective. The enigma is further amplified in the case of the volunteer donor. It is not certain whether he falls within the ambit of section 402 A since he receives no compensation and therefore might not be a "seller."

88 121 N.J. Super. at 307, 296 A.2d at 672.

89 Commercial donors, who are the major source of hepatitis-infected blood, account for about 33% of all blood collected. Another high risk group are prison donors, who account for an additional 5%, and who may give blood to make a favorable impression upon parole boards and therefore may tend to falsify their medical histories so that their blood will be accepted. R. TITMUSS, *supra* note 74, at 94.

Should these two groups, who account for 38% of all blood collected, be thoroughly screened, a great number of donors would be found ineligible to contribute, thus greatly reducing the nation's blood supply. Haut & Alter, *supra* note 66, at 577. It should also be noted that the percentage of paid donors has been steadily increasing over the past few years. Franklin, *supra* note 27, at 441.

Judge Steinbrugge, however, does not agree that a blood shortage will necessarily result. He feels that the allocative effect will cause physicians to weigh the risks of surgery more carefully and thus cause less blood to be used, therefore striking a balance and nullifying any potential blood shortage. 121 N.J. Super. at 308, 296 A.2d at 673.

ciency. But the question still remains: where will the blood come from?[90]

One tenable solution would be a large-scale continuing education program geared to the middle and upper-income communities,[91] stressing the emergency proportions of the blood shortage along with the self-insurance available through blood donations.[92] Such a campaign could be directed toward social and fraternal organizations, the military, industry, and other large segments of the population. It has also been suggested that in order to induce healthy individuals to donate blood, higher sums of money must be offered.[93] But this alternative would have to be weighed against the additional insurance costs necessitated by the imposition of strict liability.

Transfusion-related hepatitis is a complex and serious medical and legal problem. The court in *Brody* has determined that public policy dictates that the interests of an injured patient outweigh those of a hospital or blood bank, and this can be interpreted as a judicial finding that society as a whole should bear the cost of transfusion-related hepatitis. New Jersey's hospitals and blood banks have expended virtually no funds for hepatitis research in the past, nor is there any indication that there will be any significant financial involvement by these institutions in the future.[94] Perhaps, in the wake of *Brody*, the medical profession, hospital groups, and blood banks, rather than opposing the imposition of strict liability, will be forced to expend their valuable time in pursuit of a suitable medical solution to this pressing problem.

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90 One author suggests a mandatory system of blood donation, possibly requiring all physically fit residents to give blood periodically. But this solution raises substantial constitutional questions. *See* Note, *supra* note 26, at 95 n.66.

Russia, in attempting to meet its blood requirements, has turned to the use of cadaver blood for transfusions. *Medical News*, 194 J.A.M.A. 30 (1965). This method, on a limited scale, has been attempted recently in the United States for the treatment of cancer patients and has been relatively successful. Trout, *Blood Transfusions*, 73 DICK. L. REV. 201, 217 (1969).

91 See note 74 *supra* for a discussion of the reasons for excluding low income groups.

92 An example of the blood insurance available to the public is provided by the Greater New York Blood Program. Membership requires blood donations rather than money, and plans are available for both individuals and groups. In essence, what this insurance provides is blood replacement credit for the donor and members of his family for each year blood is given. Replacement credit is transferable to any hospital in the United States and its possessions. This credit relieves the patient of the cost of any blood used but does not include a processing fee. A donor who is a member of a Blue Cross or Blue Shield plan, however, can avoid even this processing charge.

93 *See generally* R. TITMUSS, *supra* note 74.

94 Record at 293, 556-59, 604-06, 621-24 (*Brody*).