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Blood Bank Liability to Recipients of HIV Contaminated Blood

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COMMENTS

BLOOD BANK LIABILITY TO RECIPIENTS OF HIV CONTAMINATED BLOOD

I. INTRODUCTION

On June 5, 1981, health care providers in California and the Center for Disease Control (CDC) reported the first cases of an illness subsequently termed acquired immunodeficiency syndrome (AIDS).[1] Since these initial reports, state and local health departments reported to the CDC more than 179,000 AIDS cases in the United States.[2] In late 1982, the prospect of contracting AIDS through a blood transfusion[3] was first recognized.[4] It was not until 1984, however, that the medical community agreed that one could contract the disease through the transfer of blood.[5] Consequently, blood banks became a potential target for transfusion recipients seeking compensation for injuries sustained as a result of receiving HIV-contaminated blood.[6]

This Comment discusses the principal theories of liability relied upon in transfusion-associated AIDS cases involving blood suppliers.

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1. *Pneumocystis Pneumonia - Los Angeles*, 30 MORBIDITY & MORTALITY WEEKLY REPORT 250-52 (1981). The Center for Disease Control (CDC) defines a case of AIDS as a disease, at least moderately predictive of a defect in cell-mediated immunity, occurring in a person with no known cause for diminished resistance to that disease. *Update on Acquired Immune Deficiency Syndrome (AIDS) - United States*, 31 MORBIDITY & MORTALITY WEEKLY REPORT 507, 508 (1982).

2. *The HIV/AIDS Epidemic: The First 10 Years*, 40 MORBIDITY & MORTALITY WEEKLY REPORT 357 (1991). Of the more than 179,000 reported cases, more than 113,000 (63%) have died. *Update: Acquired Immunodeficiency Syndrome - United States, 1981-1990*, 40 MORBIDITY & MORTALITY WEEKLY REPORT 358, 359 (1991) [hereinafter *CDC Update 1981-1990*].

3. A blood transfusion is a therapeutic intervention in which viable cells not subjected to viral inactivation procedures are transferred from one person to another. Jay E. Menitove, *Current Risk of Transfusion Associated Human Immunodeficiency Virus Infection*, 114 ARCH. PATHOL. LAB. MED. 330 (1990).

4. *Possible Transfusion-Associated Acquired Immune Deficiency Syndrome (AIDS) - California*, 31 MORBIDITY & MORTALITY WEEKLY REPORT 652-54 (1982).

5. James W. Curran et al., *Acquired Immunodeficiency Syndrome (AIDS) Associated with Transfusions*, 310 NEW ENG. J. MED. 69 (1984).

6. *See, e.g.*, Kozup v. Georgetown Univ., 663 F. Supp. 1048 (D.D.C. 1987), *aff'd in part, vacated in part on other grounds*, 851 F.2d 437 (D.C. Cir. 1988).

This Comment also examines the judicial and legislative reactions to these cases. It concludes that negligence remains the only potentially successful basis for recovery by a recipient of HIV-contaminated blood.

II. BACKGROUND

In 1983, the medical community identified four high-risk groups susceptible to AIDS: homosexuals; intravenous drug users; Haitian immigrants; and hemophiliacs.[7] The appearance of AIDS in intravenous drug users and hemophiliacs led to the suspicion that the disease might be blood-borne.[8] In 1984, the medical community generally recognized that AIDS was transmissible by blood.[9]

In April, 1984, scientists identified HIV as the causative agent of AIDS.[10] The discovery of the etiologic[11] agent of the AIDS virus led to the development of the HTLV-III ELISA test.[12] The ELISA test screens blood for the presence of the antibody to the AIDS virus, although it does not detect the virus itself.[13]

The major drawback to the ELISA test is that after initial infection from the HIV virus, there is a two to six month period, referred to as a "window,"[14] during which the HIV antibody has not yet developed

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7. Warren R. Janowitz, *Safety of the Blood Supply - Liability for Transfusion Associated AIDS*, 9 J. LEG. MED. 611, 612 (1988). According to the CDC, homosexual/bisexual men and intravenous drug users have accounted for the largest number of AIDS cases throughout the epidemic. *CDC Update 1981-1990*, *supra* note 2, at 358.

8. Janowitz, *supra* note 7, at 612; *see also Kozup*, 663 F. Supp. at 1051. On June 13, 1983, the American Association of Blood Banks (AABB), the American Red Cross (ARC), and the Council of Community of Blood Centers issued a joint statement to the effect that the medical evidence as to whether or not AIDS could be transmitted by blood was inconclusive. The statement also recommended that members of high risk groups be asked not to donate blood. Thomas F. Zuck, *Legal Liability for Transfusion Injury in the Acquired Immunodeficiency Era*, 114 ARCH. PATHOL. LAB. MED. 309, 310 (1990) (citing Joint Statement of the AABB, ARC, Council of Community of Blood Centers on Acquired Immune Deficiency Syndrome Related to Transfusion (1983)).

9. *See supra* note 5. It is estimated that between 1981 and 1990, 2,943 transfusion recipients in the United States died as a result of contracting AIDS. This accounts for 2.9% of the total deaths in the United States attributed to AIDS. *Mortality Attributable to HIV Infection/AIDS - United States, 1981-1990*, 40 MORBIDITY & MORTALITY WEEKLY REPORT 41, 43 (1991).

10. Robert C. Gallo et al., *Frequent detection and isolation of cytopathic retroviruses (HTLV-III) from patients with AIDS and at risk for AIDS*, 224 SCIENCE 500-02 (1984)(HIV was initially called human T-cell lymphotrophic virus, type III/lymphadenopathy-associated virus HTLV-III).

11. Etiology is defined as "[t]he science and study of the causes of disease and their mode of operation." STEDMAN'S MEDICAL DICTIONARY 543 (25th ed. 1990).

12. On March 2, 1985 the enzyme-linked immunosorbent assay (ELISA) test was licensed by the Food and Drug Administration. Robert K. Jenner, *Transfusion Associated AIDS Cases*, 26 TRIAL 30 (1990).

13. *Id.* at 30.

14. This term refers to the interval between infection and the time of seroconversion. Jay E. Menitove, *Current Risk of Transfusion Associated Human Immunodeficiency Virus Infection*,

in the blood.[15] Consequently, a brief period exists when a donor may be infected with HIV, but the virus is undetectable.[16] Otherwise, the utilization of the ELISA test is markedly effective in screening out HIV-contaminated blood.[17] Use of the Western Blot Analysis along with the ELISA test increases detection of the HIV virus to 100%.[18] Despite the effectiveness of these tests, the possibility of infection by HIV-contaminated blood through a transfusion still exists.[19] The limitation on the ability of the ELISA test to accurately screen all donated blood for the presence of the HIV antibody, coupled with the fact that AIDS is virtually fatal in all cases,[20] leaves blood banks extremely vulnerable to litigation initiated by recipients of HIV-contaminated blood.

III. ANALYSIS

A. Theories of Liability

Most commonly, recipients of disease-infected blood seek recovery against blood banks based on one of the following theories:[21] (1) breach of warranty;[22] (2) strict liability;[23] and (3) negligence.[24] Judicial deci-

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114 ARCH. PATHOL. LAB. MED. 330, 332 (1990). The term seroconversion is defined as "the development of antibodies in response to infection or administration of a vaccine." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY (26th ed. 1985).

15. Janowitz, *supra* note 7, at 613.

16. *See* Jenner, *supra* note 12, at 31. It is estimated that as many as 4% of donors infected with HIV will not be detected by the ELISA test. Joseph R. Bove, *Transfusion Associated Hepatitis and AIDS*, 317 NEW ENG. J. MED. 242 (1987).

17. The Center for Disease Control reports that the number of AIDS cases associated with blood or blood products has stabilized. CDC Update 1981-1990, *supra* note 2, at 358.

18. Kozup v. Georgetown Univ., 663 F. Supp. 1048, 1053 (D.D.C. 1987), *aff'd in part, vacated in part on other grounds*, 851 F.2d 437 (D.C. Cir. 1988). For a discussion of the ELISA and Western Blot testing procedures, see generally *The Impact of Routine HTLV-III Antibody Testing of Blood and Plasma Donors on Public Health*, 256 JAMA 1778 (1986).

19. It is estimated that the risk of being transfused with HIV-contaminated blood is between 1:40,000 and 1:153,000. John W. Ward et al., *Transmission of Human Immunodeficiency Virus (HIV) by Blood Transfusions Screened as Negative for HIV Antibody*, 318 NEW ENG. J. MED. 473 (1988); *see also*, Paul D. Cumming et al., *Exposure of Patients to Human Immunodeficiency Virus Through the Transfusion of Blood Components that Test Antibody-Negative*, 321 NEW ENG. J. MED. 941, 943-44 (1989).

20. *See supra* note 2.

21. For a comprehensive list of cases brought on each of these theories of liability as a result of contracting serum hepatitis through blood transfusions see Robert C. Greif, Comment, *Hospital and Blood Bank Liability to Patients Who Contract AIDS Through Blood Transfusions*, 23 SAN DIEGO L. REV. 875, 880-81 n.27 (1985).

22. *See infra* notes 28-71 and accompanying text.

23. *See infra* notes 72-96 and accompanying text.

24. *See infra* notes 97-157 and accompanying text.

sions[25] and legislative measures,[26] however, effectively preclude recovery against a blood bank except on a negligence theory.[27]

1. Breach of Warranty

As stated in Article 2 of the Uniform Commercial Code (UCC),[28] the implied warranties of merchantability[29] and fitness for a particular purpose[30] arise when there is a sale of goods.[31] The warranties are "contractual in nature and absolute in character,"[32] and courts apply them regardless of fault or negligence by the seller.[33] For the UCC's implied warranties to attach to the furnishing of blood, such a transaction must be considered a sale.[34]

The New York Court of Appeals in *Perlmutter v. Beth David Hospital*[35] first dismissed the breach of warranty theory when the plaintiff, who had contracted serum hepatitis[36] through a blood transfusion, sought to hold the defendant hospital liable.[37] The plaintiff claimed that the supplying of blood was a sale,[38] and therefore the implied warranties of merchantability and fitness for a particular purpose

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25. *See infra* notes 67-71 and accompanying text.

26. *See infra* notes 61-64 and accompanying text.

27. *See infra* notes 97-157.

28. The UCC is an authoritative statement of the best laws and practices in the area of commercial law in the United States. Walter D. Malcolm, *The Uniform Commercial Code, in* UNIFORM COMMERCIAL CODE HANDBOOK (American Bar Association, 1964).

29. U.C.C. § 2-314 states: "(1) Unless excluded or modified . . . a warranty that the goods shall be merchantable is implied in a contract for their sale . . . ." U.C.C. § 2-314 (1983).

30. U.C.C. § 2-315 states: "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is . . . an implied warranty that the goods shall be fit for such purpose." U.C.C. § 2-315 (1983).

31. Although Article 2 of the UCC covers transactions in goods, the implied warranties of merchantability and fitness for a particular purpose require a sale in order to be applicable. RONALD A. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-314:6 at 108 (3rd ed. 1983) [hereinafter ANDERSON].

32. *Id.* at 266.

33. *Id.*

34. *Id.*; *see also* Roberts v. Suburban Hosp. Ass'n., 532 A.2d 1081, 1085 (Md. Ct. Spec. App. 1987).

35. 123 N.E.2d 792 (N.Y. 1954).

36. "Hepatitis B virus and AIDS share several recognized similarities: both can be transmitted parenterally (by injection) and sexually; hemophiliacs are in the known high-risk groups associated with both diseases; the incubation period for both is considerable . . .; and both diseases were originally undetectable in blood . . . ." Pamela T. Westfall, Note, *Hepatitis, AIDS and the Blood Product Exemption from Strict Products Liability in California: A Reassessment*, 37 HASTINGS L.J. 1101, 1116 (1986).

37. *Perlmutter*, 123 N.E.2d at 794.

38. The complaint alleged "that the blood used in the transfusion was 'sold' by defendant to plaintiff for $60." *Id.* at 793.

should have attached.[39] The court rejected this assertion by holding that the supplying of blood by the hospital constituted a service.[40]

The *Perlmutter* court based its decision on the essence of the contractual relationship between hospital and patient.[41] According to the court: "such a contract is clearly one for services, and, just as clearly it is not divisible."[42] The court concluded that the hospital's incidental function of supplying blood was inseparable from its primary function of providing medical treatment.[43] The *Perlmutter* court predicted the result if it were to hold that the supplying of blood constituted a sale:

> If, however, the court were to stamp as a sale the supplying of blood . . . 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.[44]

Implicit in the court's decision was its belief that imposing liability without fault or negligence upon an institution seeking to provide health care to its patients was contrary to the public health and welfare.[45]

A substantial majority of courts which faced the issue of hospital and blood bank liability for supplying contaminated blood followed the precedent established in *Perlmutter*.[46] Some courts, however, distinguished between the functions of a hospital and those of a blood bank.[47] The supplying of blood by a blood bank was not viewed as one small part of a vast array of services provided, as in the case of a hospital.[48] Rather, supplying blood was viewed as the principal function of a blood bank and was readily classified as a sale.[49] This enabled courts to

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39. *Id.*
40. *Id.* at 794.
41. *Id.*
42. *Id.*
43. *Id.* at 795.
44. *Id.*
45. *Id.*
46. *See, e.g.*, Whitehurst v. American Nat'l Red Cross, 402 P.2d 584 (Ariz. Ct. App. 1965) (furnishing of blood by blood bank was not a sale); St. Luke's Hosp. v. Schmaltz, 534 P.2d 781 (Colo. 1975) (supplying of blood for transfusion by hospital constitutes a service rather than a sale); Balkowitch v. Minneapolis War Memorial Blood Bank, Inc., 132 N.W.2d 805 (Minn. 1965) (furnishing of blood by blood bank was more in the nature of a service than a sale); Foster v. Memorial Hosp. Ass'n, 219 S.E.2d 916 (W. Va. 1975) (action in warranty was improper based on reasoning in *Perlmutter*).
47. *See, e.g.*, Belle Bonfils Memorial Blood Bank v. Hansen, 579 P.2d 1158 (Colo. 1978) (supplying of blood by blood bank constitutes a sale subject to implied warranties); Russell v. Community Blood Bank, 196 So. 2d 115 (Fla. 1967) (affirming lower court holding that plaintiff's complaint against blood bank stated a cause of action based on implied warranties).
48. *Belle Bonfils*, 579 P.2d at 1159; *see infra* notes 95-96 and accompanying text.
49. *Belle Bonfils*, 579 P.2d at 1159.

distinguish between cases involving blood supplied by hospitals as compared to blood banks, which resulted in the applicability of an implied warranty theory against the latter.[50] This sales/service distinction, however, did not receive universal acceptance relative to hospitals supplying blood.

The most outright rejection of the *Perlmutter* reasoning occurred in *Cunningham v. MacNeal Memorial Hospital*.[51] The *Cunningham* court characterized the view of *Perlmutter* and its progeny[52] as unrealistic.[53] The court suggested that *Perlmutter* took what was arguably a sale and labeled it a service in order to reach a desired policy decision.[54] The *Cunningham* court concluded that the supplying of blood for a transfusion engaged the defendant hospital in the sale of a product subject to the doctrine of strict tort liability.[55] Subscribing to the rationale employed by courts holding implied warranties applicable to blood banks, the court determined that hospitals furnishing blood are "clearly within the distribution chain."[56] The *Cunningham* court had no difficulty in separating the hospital's supplying blood from its function of providing medical services and thus found the defendant liable regardless of fault.[57]

Most other jurisdictions failed to embrace the *Cunningham* view. Its reasoning, as well as similar rationales applied by other courts,[58] triggered a legislative response[59] which prevents recovery against blood suppliers based on a breach of warranty theory.[60] Today, 48 out of 50 states have enacted "blood shield statutes"[61] which protect blood sup-

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50. *See id.*

51. 266 N.E.2d 897 (Ill. 1970) (involving a claim asserting strict liability against hospital).

52. *See supra* note 46.

53. *Cunningham*, 266 N.E.2d at 901.

54. *Id.*

55. *Id.* at 901-02.

56. *Id.* at 901.

57. *Id.*

58. *See supra* note 47 and accompanying text.

59. Legislatures in various states were also under pressure from the blood industry. *See* Janowitz, *supra* note 7, at 617.

60. *See infra* notes 61-62 and accompanying text.

61. *See* for example, OHIO REV. CODE ANN. § 2108.11 (Anderson 1990 & Supp. 1991). Ohio's blood shield statute states:

> The procuring, furnishing, donating, processing, distributing, or using human whole blood, plasma, blood products, blood derivatives, and products, corneas, bones, organs, or other human tissue except hair, for the purposes of injecting, transfusing, or transplanting any of them in the human body, is declared for all purposes to be the rendition of a service by every person, firm, or corporation participating therein, whether or not any remuneration is paid therefore, is declared not to be a sale of any such items, and no warranties of any kind or description are applicable thereto.

Id.

pliers from liability unless liability is asserted due to negligence.[62] Only Minnesota and New Jersey do not have such statutes.[63] Likewise, the District of Columbia has not adopted a blood shield statute.[64]

The litigation surrounding the transmission of hepatitis through blood transfusions equipped courts with a foundation for deciding transfusion-related AIDS lawsuits. Although statutory enactments[65] usually provide a basis for denying recovery, courts are sometimes re-

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62. Some statutes declare a transfusion to be a service; others prevent liability except for negligence; others limit liability only if there is no effective test for detecting the defect in the blood. The following is a complete listing of the various state blood shield statutes: ALA. CODE § 7-2-314 (4) (1984); ALASKA STAT. § 45.02.316(e) (1986); ARIZ. REV. STAT. ANN. §§ 32-1481, 36-1151 (1986); ARK. CODE ANN. § 20-9-802 (Michie 1991); CAL. HEALTH & SAFETY CODE § 1606 (West 1990); COLO. REV. STAT. ANN. § 13-22-104 (West 1989); CONN. GEN. STAT. ANN. § 19a-280 (West 1986); DEL. CODE ANN. tit. 6, § 2-316(5) (1975); FLA. STAT. ANN. § 672.316(5) (West Supp. 1992); GA. CODE ANN. § 11-2-316(5) (Michie 1982); HAW. REV. STAT. § 325-91 (1985); IDAHO CODE § 39-3702 (1985); ILL. ANN. STAT. ch. 111½, para. 5102 (Smith-Hurd 1988); IND. CODE ANN. § 16-8-7-2 (West 1992); IOWA CODE ANN. § 142A.8 (West 1989); KAN. STAT. ANN. § 65-3701 (1985); KY. REV. STAT. ANN. § 139.125 (Baldwin 1990); LA. REV. STAT. ANN. § 9:2797 (West Supp. 1991); ME. REV. STAT. ANN. tit. 11, § 2-108 (West Supp. 1991); MD. HEALTH-GEN. CODE ANN. § 18-402 (Supp. 1991); MASS. GEN. LAWS ANN. ch. 106, § 2-316(5) (West 1990); MICH. COMP. LAWS ANN. § 333.9121 (West 1980 & Supp. 1991); MISS. CODE ANN. § 41-41-1 (Supp. 1989); MO. ANN. STAT. § 431-069 (Vernon Supp. 1992); MONT. CODE ANN. §§ 50-33-102 to 104 (1991); NEB. REV. STAT. § 71-4001 (1990); NEV. REV. STAT. ANN. § 460.010 (Michie 1991); N.H. REV. STAT. ANN. § 507:8-b (1983); N.M. STAT. ANN. § 24-10-5 (Michie 1991); N.Y. PUB. HEALTH LAW § 580(4) (McKinney 1990); N.C. GEN. STAT. § 130A-410 (1989); N.D. CENT. CODE § 41-02-33(3)(d) (1983); OHIO REV. CODE ANN. § 2108.11 (Anderson Supp. 1991); OKLA. STAT. ANN. tit. 63, § 2151 (West 1984); OR. REV. STAT. § 97.300 (1990); 42 PA. CONS. STAT. ANN. § 10021 (1982); R.I. GEN. LAWS § 23-17-30 (1989); S.C. CODE ANN. § 44-43-10 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 57A-2-315.1 (1988); TENN. CODE ANN. § 47-2-316(5) (1979); TEX. CIV. PRAC. & REM. CODE ANN. §§ 77.001-.003 (West 1986 & Supp. 1992); UTAH CODE ANN. § 26-31-1 (1989); VT. STAT. ANN. tit. 9A, § 2-108 (Supp. 1991); VA. CODE ANN. § 32.1-297 (Michie 1985); WASH. REV. CODE ANN. § 70.54.120 (West Supp. 1991); W. VA. CODE § 16-23-1 (1991); WIS. STAT. ANN. § 146.31(2) (West 1989); WYO. STAT. § 35-5-110 (1988).

63. Minnesota repealed its statute, Minn. Stat. Ann. § 25.928 (West & Supp. 1992), protecting blood banks from liability on strict liability grounds. *See* 1991 Minn. Sess. Law Serv., C. 202, § 42 (West). The Minnesota courts can resort to the Minnesota Supreme Court's decision in *Balkowitch v. Minneapolis War Memorial Blood Bank, Inc.* which held that the furnishing of blood is more in the nature of a service than a sale, thus preventing recovery on the theory of strict liability. 132 N.W.2d 805 (Minn. 1965).

The New Jersey courts also have prevented recovery against a blood bank under a strict liability theory based on public policy grounds. *See generally* Brody v. Overlook Hosp., 317 A.2d 392 (N.J. Super. Ct. App. Div. 1974), *aff'd*, 332 A.2d 596 (N.J. 1975).

64. The District of Columbia courts have concluded, however, that blood banks are immune from liability under theories of implied warranty and strict liability. *See* Kozup v. Georgetown Univ., 663 F. Supp. 1048 (D.D.C. 1987) *aff'd in part, vacated in part on other grounds*, 851 F.2d 437 (D.C. Cir. 1988).

65. *See supra* notes 61-62 and accompanying text.

quired to apply common law principles in HIV-infected blood cases when deciding the blood supplier liability issue.[66]

In *Howell v. Spokane & Inland Empire Blood Bank*,[67] the plaintiff contracted AIDS from a blood transfusion before the Washington state legislature had amended its blood shield statute to include AIDS.[68] The Supreme Court of Washington held that the legislature intended prospective application of the statute, thus requiring a determination whether the supplying of blood by hospitals and blood banks constituted a service or a sale.[69] The court approved the *Perlmutter* rationale and concluded that the transfusion of blood by a hospital was a service.[70] Moreover, the *Howell* court refused to draw a distinction between hospitals and blood banks resulting in the inapplicability of both breach of warranty and strict liability theories to the defendant blood bank.[71]

2. Strict Liability

The doctrine of strict liability in tort imposes liability upon the seller of a defective product that causes injury where the seller knows that the product will be used without inspection.[72] The seller is subject to liability regardless of whether the plaintiff establishes fault or negligence.[73] Recovery under a strict liability theory is based on three policy considerations: (1) sellers of products are in a better position to bear the costs of injuries by shifting these costs to purchasers and through obtaining insurance; (2) strict liability will promote greater care on the part of sellers; and (3) strict liability will relieve the heavy burden on plaintiffs of proving the fault or negligence of the seller.[74]

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66. *See* Roberts v. Suburban Hosp. Ass'n, Inc., 532 A.2d 1081 (Md. Ct. Spec. App. 1987)(involving a suit brought against a hospital for the sale and transfusion of AIDS contaminated blood); Howell v. Spokane & Inland Empire Blood Bank, 785 P.2d 815 (Wash. 1990).

67. 785 P.2d 815 (Wash. 1990).

68. *See* WASH. REV. CODE ANN. § 70.54.120 (West Supp. 1991). Prior to the 1985 amendment the statute limited liability only in cases of hepatitis and malaria. Because the blood shield statutes were enacted as a response to transfusion-associated hepatitis lawsuits, many states limited the application of the statute to that disease.

69. *Howell*, 785 P.2d at 820.

70. *Id.* at 821.

71. *Id.*; *see supra* cases cited at note 47.

72. Greenman v. Yuba Power Prods., Inc., 377 P.2d 897 (Cal. 1962); Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436 (Cal. 1944) (Traynor, J., concurring).

73. *See* RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) which states that strict liability applies although "the seller has exercised all possible care in the preparation and sale of his product . . . ." *Id.*

74. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 98 at 692-93 (5th ed. 1984) [hereinafter PROSSER & KEETON]. The same social purpose of protecting persons who will be affected by the use of the product support the concept of breach of warranty. *See* ANDERSON, *supra* note 31, at 105.

The doctrines of implied warranty and strict liability in tort are intertwined,[75] and they receive similar treatment in transfusion-associated AIDS litigation.[76] A plaintiff asserting a strict liability theory against a blood bank must show the sale of a product.[77] Once again, blood shield statutes prevent the application of a strict liability theory to blood banks.[78] The statutes protect blood banks by characterizing the furnishing of blood as a service and not as a sale,[79] specifically excluding liability except for negligence,[80] or limiting liability to situations where the defect in the blood is detectable.[81]

Despite variations in the wording of blood shield statutes,[82] courts interpreting these statutes uniformly hold that they preclude the application of strict liability to the blood industry.[83] Even in jurisdictions

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75. *See* ANDERSON, *supra* note 31, at 153-59.

76. *See, e.g.*, Kozup v. Georgetown Univ., 663 F. Supp. 1048, 1058 (D.D.C. 1987), *aff'd in part, vacated in part on other grounds*, 851 F.2d 437 (D.C. Cir. 1988) (concluding that plaintiff's assertion of strict liability and breach of implied warranties against blood bank may be viewed together in determining whether summary judgment is appropriate).

77. *See, e.g., Kozup*, 663 F. Supp. at 1058 (D.D.C. 1987); St. Lukes Hosp. v. Schmaltz, 534 P.2d 781, 784 (Colo. 1975); Roberts v. Suburban Hosp. Ass'n, Inc., 532 A.2d 1081, 1085 (Md. Ct. Spec. App. 1987).

78. *See supra* notes 61-62 and accompanying text.

79. *See supra* note 61.

80. For example, Illinois' statute states:

> The procuring, furnishing, donating, processing, distributing or using human whole blood, plasma, blood products, blood derivatives and products, corneas, bones, or organs or other human tissue for the purpose of injecting, transfusing or transplanting any of them in the human body is declared for purposes of liability in tort or contract to be the rendition of a service by every person, firm or corporation participating therein, whether or not any remuneration is paid therefore, and is declared not to be a sale of any such items and no warranties of any kind or description nor strict tort liability shall be applicable thereto . . . ."

ILL. ANN. STAT. ch. 111½, para. 5102 (Smith-Hurd 1988).

81. For example, Florida's statute provides:

> The procuring, processing, storage, distribution, or use of whole blood, plasma, blood products, and blood derivatives for the purpose of injecting or transfusing the same, or any of them into the human body for any purpose whatsoever is declared to be the rendering of a service by any person, participating therein and does not constitute a sale whether or not any consideration is given therefor; and the implied warranties of merchantability and fitness for a particular purpose are not applicable as to a defect that cannot be detected or removed by a reasonable use of scientific procedures or techniques.

FLA. STAT. ANN. § 672.316(5) (West Supp. 1987).

82. *See supra* notes 79-81 and accompanying text.

83. *See, e.g.*, Kirkendall v. Harbor Ins. Co., 887 F.2d 857, 859 (8th Cir. 1989) (construing Arkansas law); Samuels v. Health and Hosp. Corp., 591 F.2d 195, 197 (2d Cir. 1979) (construing New York law); Sawyer v. Methodist Hosp., 522 F.2d 1102, 1105 (6th Cir. 1975) (construing Tennessee law); Cutler v. Graduate Hosp., 717 F. Supp. 338, 339-40 (E.D. Pa. 1989) (construing Pennsylvania law); Hyland Therapeutics v. Superior Court, 220 Cal. Rptr. 590, 594 (Cal. Ct. App. 1985); Klaus v. Alameda-Contra Costa Medical Ass'n Blood Bank, Inc., 133 Cal. Rptr. 92, 93 (Cal. Ct. App. 1973); Zichichi v. Middlesex Memorial Hosp., 528 A.2d 805, 808 (Conn. 1987); Williamson v. Memorial Hosp. of Bay County, 307 So. 2d 199, 201 (Fla. Dist. Ct. App. 1975); McAllister v. American Nat'l Red Cross, 240 S.E.2d 247, 248 (Ga. 1977); Hill v. Jackson

without blood shield statutes, courts refuse to find blood banks and hospitals strictly liable.[84] Public policy considerations are the bases for denying strict liability.

Legislatures bar the application of strict liability principles to blood suppliers in order to promote the health and welfare of the people of their respective states.[85] The immunity granted by blood shield statutes reflects a desire to ensure an adequate blood supply.[86] As the Supreme Court of Washington stated in *Garvey v. St. Elizabeth Hospital*:

> [t]he public policy represented by these statutes is not difficult to discern: blood transfusions are essential in the medical area and there are not now, and realistically there may never be, tests which can guarantee with absolute certainty that the donated blood is uncontaminated with certain viruses.[87]

Additionally, the Supreme Court of Connecticut stated: "[t]hese statutes reflect a legislative judgment that to require providers to serve as insurers of the safety of these materials might impose such an over-

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Park Hosp., 349 N.E.2d 541, 544 (Ill. App. Ct. 1976); Glass v. Ingalls Memorial Hosp., 336 N.E.2d 495, 499 (Ill. App. Ct. 1975); Iannucci v. Yonkers General Hosp., 59 A.D.2d 887, 888, 399 N.Y.S.2d 39, 40 (N.Y. App. Div. 1977); Morse v. Riverside Hosp., 339 N.E.2d 846, 850-51 (Ohio Ct. App. 1974); Gilmore v. St. Anthony Hosp., 516 P.2d 248, 251 (Okla. 1973); Royer v. Miles Lab., Inc., 811 P.2d 644, 646-47 (Or. Ct. App. 1991); St. Martin v. Doty, 493 S.W.2d 95, 97 (Tenn. Ct. App. 1972); Rogers v. Miles Lab., Inc., 802 P.2d 1346, 1351 (Wash. 1991); Garvey v. St. Elizabeth Hosp., 697 P.2d 248, 249 (Wash. 1985).

84. *See, e.g.* Kozup v. Georgetown Univ., 663 F. Supp. 1048, 1058-59 (D.D.C. 1987), *aff'd in part, vacated in part on other grounds*, 851 F.2d 437 (D.C. Cir. 1988); Fisher v. Sibley Memorial Hosp., 403 A.2d 1130, 1133 (D.C. 1979); Snyder v. Mekhjian, 582 A.2d 307, 312 (N.J. Super. Ct. App. Div. 1990); Brody v. Overlook Hosp., 332 A.2d 596, 597 (N.J. 1975).

85. For example, the Colorado blood shield statute states:

> The availability of scientific knowledge, skills, and materials for the transplantation, injection, transfusion or transfer of human tissue, organs, blood, or components thereof is important to the health and welfare of the people of this state. Equally important is the duty of those performing such service or providing such materials to exercise due care under the attending circumstances to the end that those receiving health care will benefit and adverse results therefrom will be minimized by the use of available and proven scientific safeguards. The imposition of legal liability without fault upon the persons and organizations engaged in such scientific procedures may inhibit the exercise of sound medical judgment and restrict 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 emphasizing the importance of exercising due care, and by limiting the legal liability arising out of such scientific procedures to instances of negligence or willful misconduct.

COLO. REV. STAT. § 13-22-104(1) (1989).

86. *Kozup*, 663 F. Supp. at 1059. The *Kozup* court precluded the application of strict liability to a blood bank stating that its decision should be guided by the sound public policy expressed by the various blood shield statutes. *Id.*

87. *Garvey*, 697 P.2d at 249.

whelming burden as to discourage the gathering and distribution of blood."[88]

Similarly, courts without the benefit of a blood shield statute immunize blood banks and hospitals from strict liability on public policy grounds.[89] Recognizing the necessity of an adequate blood supply, these courts also decline to apply strict liability to blood suppliers based on the "unavoidably unsafe"[90] nature of blood.[91] Consequently, it is unlikely that a transfusion-associated AIDS plaintiff seeking to hold a blood bank accountable under a strict liability theory will be successful.

Prior to the enactment of the statutory shield, however, a minority of courts held blood banks strictly liable for supplying contaminated blood.[92] In *Belle Bonfils Memorial Blood Bank v. Hansen*, the Colorado Supreme Court affirmed a lower court decision holding that a recipient of hepatitis-contaminated blood could maintain an action against a blood bank on a strict liability theory.[93] The court distinguished its previous decision in *St. Lukes Hospital v. Schmaltz*,[94] which denied the applicability of strict liability, on the grounds that *Belle Bonfils* involved blood provided by a blood bank as opposed to a hospital.[95] The distinguishing factor for the court was that supplying blood is the principal function of a blood bank, while the supplying of

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88. Zichichi v. Middlesex Memorial Hosp., 528 A.2d 805, 810 (Conn. 1987) (involving the contraction of serum hepatitis through the transfusion of blood).

89. *See, e.g.*, *Kozup*, 663 F. Supp. at 1059; Fisher v. Sibley Memorial Hosp., 403 A.2d 1130, 1133-34 (D.D.C. 1979); Snyder v. Mekhjian, 582 A.2d 307, 312-13 (N.J. Super. Ct. App. Div. 1990); Brody v. Overlook Hosp., 317 A.2d 392, 394-98 (N.J. Super. Ct. App. Div. 1974), *aff'd*, 332 A.2d 596 (N.J. 1975).

90. The RESTATEMENT (SECOND) OF TORTS § 402A provides for strict liability when the product is in a "defective condition unreasonably dangerous to the user or consumer." Comment k to § 402A expresses an exception to this doctrine for unavoidably unsafe products:

> 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 . . . The seller of such products . . . 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 . . . .

RESTATEMENT (SECOND) OF TORTS § 402A (1) and Comment k (1965).

91. *See Kozup*, 663 F. Supp. at 1059 (refusing to apply doctrine of strict liability to hospital and blood bank due to the inability to detect AIDS virus in blood); *Snyder*, 582 A.2d at 312 (refusing to hold blood bank strictly liable recognizing that it was beyond its power to ensure the safety of AIDS-contaminated blood).

92. *See, e.g.*, Belle Bonfils Memorial Blood Bank v. Hansen, 579 P.2d 1158 (Colo. 1978); Cunningham v. MacNeal Memorial Hosp., 266 N.E.2d 897 (Ill. 1970) (concluding that supplying of blood by hospital constituted the sale of a product subject to doctrine of strict liability).

93. *Belle Bonfils*, 579 P.2d at 1159.

94. 534 P.2d 781 (Colo. 1975).

95. *Belle Bonfils*, 579 P.2d at 1159.

blood by a hospital is only incidental to its primary purpose of providing medical services.[96]

Although it can be argued that a blood bank's furnishing blood constitutes a sale and thus strict liability applies, legislatures enacted blood shield statutes shielding blood banks from liability on such a theory. The basis for these blood shield statutes is the concern for the adequacy of the nation's blood supply. Hence, in order to recover compensation from a blood bank, a plaintiff must bring an action sounding in negligence.

3. Negligence

To establish actionable negligence, a plaintiff must show the existence of a duty, a breach of that duty and an injury proximately resulting from the breach.[97] Duty is satisfied by "conform[ing] to a standard of conduct for the protection of others against unreasonable risks."[98] Therefore, a transfusion-associated AIDS victim's first obstacle to recovery under a negligence theory is establishing the standard of care at the time of the blood donation.[99] Courts are divided as to whether blood banks must conform to a "professional"[100] or an "ordinary reasonableness"[101] standard.

In *Doe v. American Red Cross Blood Services*,[102] the South Carolina Supreme Court concluded that the defendant blood supplier should be held to a professional standard.[103] The court reasoned that because the state's blood shield statute[104] evidenced a legislative intent to characterize a blood transfusion as a skilled medical service, the defendant, as a collector and processor of blood, should be treated as a professional.[105] Thus, the plaintiff was required to prove that the blood bank

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96. *Id.*

97. PROSSER & KEETON, *supra* note 74, § 30, at 164-65.

98. PROSSER & KEETON, *supra* note 74, § 30, at 164.

99. *See* Janowitz, *supra* note 7, at 619.

100. The professional standard requires a blood bank to exercise that degree of care exercised by the blood banking industry in similar circumstances. Quintana v. United Blood Servs., 811 P.2d 424, 427 (Colo. Ct. App.), *aff'd*, 827 P.2d 509 (Colo. 1992).

101. The ordinary reasonableness standard requires a blood bank to exercise that degree of care that a reasonable and prudent blood bank would or should have exercised under the same or similar circumstances. Vuono v. New York Blood Ctr., Inc., 696 F. Supp. 743, 746 (D. Mass. 1988).

102. 377 S.E.2d 323 (S.C. 1989).

103. *Id.* at 326; *see also* Smith v. Paslode Corp., No. 88-2247-C-7, 1992 U.S. Dist. LEXIS 10995 (E.D. Mo. July 24, 1992)(finding that blood bank should be held to a professional standard of care when providing its health care services).

104. S.C. CODE ANN. § 44-43-10 (Law. Co-op. 1985).

105. *American Red Cross*, 377 S.E.2d at 326; *see also supra* note 100.

"failed to conform to the generally recognized and accepted practices in its profession."[106]

Conversely, in *Vuono v. New York Blood Center, Inc.*,[107] the plaintiff brought a negligence claim against New York Blood Center, a blood manufacturer, after receiving an infusion of contaminated serum albumin.[108] New York Blood Center argued that the standard of care it owed to the plaintiff was "that standard established by the blood products manufacturing industry and the applicable FDA [Food and Drug Administration] regulations."[109] The Court disagreed, stating: "the fact that a certain . . . practice is in common use is evidence that its use is not negligent, but such a fact is not conclusive evidence of due care because a large number of persons may fail to exercise due care in their usual practices."[110] Accordingly, the plaintiff was entitled to present evidence that the industry custom was unreasonable under the circumstances.[111]

Thus, in some jurisdictions, a blood bank's conduct may fall below the requisite standard of care even though it conformed with federal regulations[112] and its own internal standards.[113] Industry custom and practice are merely evidence considered in defining the appropriate standard of care.[114] Consequently, whether a professional or reasonableness standard is applied can be outcome determinative in transfusion-associated AIDS cases.

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106. *American Red Cross*, 377 S.E.2d at 326.

107. 696 F. Supp. 743 (D. Mass. 1988).

108. *Id.* at 744. Serum albumin is a fractionated blood plasma derivative. *Id.*

109. *Id.* at 747.

110. *Id.* at 746; *see also* Doe v. American Nat'l Red Cross, No. 91-03-CIV-3-BR, 1992 U.S. Dist. LEXIS 11220 (E.D.N.C. July 10, 1992). The *Doe* court interpreted N.C. GEN. STAT. § 90-220.13 (1990), which provides that "[i]n the selection of donors due care shall be exercised to minimize the risks of transmissions of agents that may cause hepatitis or other diseases," as evidencing a legislative intent of subjecting blood banks to an ordinary negligence standard. *Doe*, No. 91-03-CIV-3-BR, 1992 U.S. Dist. LEXIS 11220, at *14.

111. *Vuono*, 696 F. Supp. at 746.

112. *See generally* 21 C.F.R. § 640 (1991).

113. For example, the American Association of Blood Banks (AABB) is a national non-profit association of non-profit blood banks. The AABB's members collect about half of the country's donated blood. The AABB collects and disseminates relevant scientific and administrative information for its members, prescribes standards for their operation, and speaks for their members.

114. United Blood Servs. v. Quintana, 827 P.2d 509, 522 (Colo. 1992) (purporting to apply professional standard, court found that compliance with such standard was not conclusive proof of due care by blood bank); Hernandez v. Nueces County Medical Soc'y Community Blood Bank, 779 S.W.2d 867, 871 (Tex. Ct. App. 1989) (involving transfusion-associated hepatitis).

B. Blood Bank Conduct

A transfusion-associated AIDS victim usually challenges a blood bank's conduct in terms of the procedures it employs in screening prospective donors and testing blood donations. Most transfusion-associated AIDS litigation involves blood transfused prior to the licensing of the ELISA Test in March 1985. The absence of an effective test during this period of time, coupled with most courts holding blood banks to the more relaxed "professional" standard of care, has resulted in blood banks avoiding liability under the negligent blood testing theory.[115] Consequently, plaintiffs are more likely to succeed against a blood bank that negligently screened the donor.[116]

1. Negligent Donor Screening

Prior to the ELISA test's licensing,[117] the only method for protecting the safety of the blood supply from HIV-contamination was through donor screening.[118] The donor screening process requires that blood banks comply with minimum standards promulgated by the Food and Drug Administration (FDA).[119] These regulations require blood banks to determine the suitability of prospective donors.[120] Specifically, qualified donors have the following characteristics: normal temperature; normal blood pressure; adequate blood hemoglobin level; freedom of the arms from marks indicative of addiction to self-injected narcotics; and freedom from any disease transmissible by blood transfusion.[121] Beyond the FDA regulations, internal standards established by blood banks are disseminated throughout the industry.[122]

Transfusion-associated AIDS victims assert that blood banks are negligent because they do not employ sufficiently vigorous methods for screening out high-risk donors.[123] Plaintiffs find it difficult to succeed on this theory because it was not until 1984 that AIDS was conclusively determined to be transmissible by blood.[124]

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115. *See infra* notes 138-57 and accompanying text.

116. Jenner, *supra* note 12, at 32.

117. *See supra* note 12.

118. *See* Jenner, *supra* note 12, at 30.

119. *See infra* notes 120-21 and accompanying text.

120. 21 C.F.R. § 640.3 (1991).

121. 21 C.F.R. § 640.3(b) (1991). These qualifications are just a few examples of those listed.

122. *See, e.g., supra* note 8.

123. *See, e.g.*, Hoemke v. New York Blood Ctr., 912 F.2d 550 (2d Cir. 1990) (affirming district court's granting of summary judgment to blood bank).

124. *See supra* note 5 and accompanying text.

In *Hoemke v. New York Blood Center, Inc.*,[125] the plaintiff contracted AIDS following a blood transfusion performed in 1981.[126] Plaintiff appealed the lower court decision entering summary judgment in favor of the blood bank arguing that the defendant was negligent for not aggressively screening out gay male donors.[127] The court rejected this argument stating: "before AIDS had been discovered to be a blood-borne disease, no standard of reasonable care could have required blood banks to screen out gay male donors. Such a practice, in fact, could well have been challenged as discriminatory."[128] Hence, prior to 1984, blood banks failing to screen out high-risk donors were not negligent because it was not foreseeable that this failure would result in contracting AIDS through transfusion.

A recipient of HIV-contaminated blood after 1984 has a better negligence claim against a blood bank for not employing more aggressive donor screening procedures. In *Snyder v. Mekhjian*,[129] a plaintiff who contracted AIDS in late 1984 through a transfusion advanced this argument in the trial court against the American Association of Blood Banks (AABB) and one of its member blood centers. Although the negligence issue was not before the appellate division,[130] the court indicated that a factual issue existed as to the reasonableness of AABB's conduct in choosing to forego measures requiring its members to adopt more vigorous donor screening measures.[131]

One difficulty that plaintiffs encounter when attempting to establish that blood banks negligently screened potential donors is that the donor is the most knowledgeable person to question regarding the procedures employed.[132] The donor may no longer be alive to assist in establishing the sufficiency of the blood bank's donor screening measures.[133] Furthermore, some courts refuse to grant donor access to plaintiffs for discovery purposes[134] based on the donor's right to pri-

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125. 912 F.2d 550 (2d Cir. 1990).

126. *Id.*

127. *Id.*

128. *Id.* at 554.

129. 582 A.2d 307 (N.J. Super. Ct. App. Div. 1990).

130. *Id.* at 312. The plaintiff sought leave to appeal only from the dismissal of his strict liability claims and the denial of donor discovery motions. *Id.*

131. *Id.* at 313. The court also indicated that the blood bank may also have been negligent in failing to adopt more vigorous donor screening procedures on its own. *Id.*

132. *See* Jenner, *supra* note 12, at 30.

133. *See supra* note 2.

134. *See, e.g.*, Rasmussen v. South Florida Blood Serv., 500 So. 2d 533, 537-38 (Fla. 1987) (upholding a decision to quash a subpoena *duces tecum* which sought the names and addresses of blood donors on the grounds that the privacy interests of blood donors and society's interest in maintaining an adequate volunteer blood supply outweighed victim's interest); Doe v. University of Cincinnati, 538 N.E.2d 419 (Ohio Ct. App. 1988).

vacy,[135] as well as society's interest in maintaining an adequate blood supply.[136] Other courts conclude, however, that a blood transfusion recipient's interest in obtaining information necessary to prosecute his claim is sufficient enough to allow for limited discovery.[137]

2. Negligent Blood Testing

Transfusion-associated AIDS recipients who contracted the disease prior to the licensing of the ELISA test in March of 1985 argue that blood banks negligently failed to perform "surrogate marker"[138] testing on blood donations.[139] Such a test would have indicated the presence of the hepatitis B-core antibody.[140] Studies show that up to ninety percent of those infected with AIDS also test positive for the hepatitis B-core antibody.[141] Consequently, transfusion-associated AIDS victims argue that if blood banks employ surrogate testing, high-risk donors could be effectively identified.[142]

Most courts refuse to hold blood banks negligent for failing to perform surrogate testing.[143] Because neither the blood banking industry nor outside governmental organizations advocated surrogate marker testing, courts would not find a blood bank negligent for failure to implement the B-core test.[144] These courts held blood banks to a profes-

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135. *Doe*, 538 N.E.2d at 420 (donor had a privacy right not to be identified as a donor of HIV-contaminated blood).

136. *See, e.g.*, Coleman v. American Red Cross, 130 F.R.D. 360, 363 (E.D. Mich. 1990) (finding that disclosure of identities of blood donors could compromise the adequacy and safety of the blood supply).

137. *See, e.g.*, Boutte v. Blood Sys., Inc., 127 F.R.D. 122, 125-26 (W.D. La. 1989) (finding that it was necessary for plaintiffs to have controlled access to donor); Snyder v. Mekhjian, 582 A.2d 307, 314-15 (N.J. Super. Ct. App. Div. 1990) (donor access under court supervision permitted).

138. Surrogate marker testing is employed when there is no specific test available for the primary condition. It is a test for the presence of factors believed to be associated with AIDS. *See e.g.*, Quintana v. United Blood Servs., 811 P.2d 424, 426 (Colo. Ct. App.), *aff'd*, 827 P.2d 509 (Colo. 1992).

139. Jenner, *supra* note 12, at 30-31.

140. Jenner, *supra* note 12, at 30-31.

141. Jenner, *supra* note 12, at 30-31.

142. Jenner, *supra* note 12, at 30-31.

143. *See, e.g.*, Smith v. Paslode Corp., No. 88-2247-C-7, U.S. Dist. LEXIS 10995 (E.D. Mo. July 24, 1992)(granting blood bank's motion for summary judgment as to the issue of surrogate testing on the basis that it did not deviate from the standard of care recognized in the blood bank industry); Osborn v. Irwin Memorial Blood Bank, 7 Cal. Rptr. 2d 101 (Cal. Ct. App. 1992)(blood bank cannot be found negligent for failing to perform tests that no other blood banks were performing); *see also* Kozup v. Georgetown Univ., 663 F. Supp. 1048 (D. D.C. 1987), *aff'd in part, vacated in part on other grounds*, 851 F.2d 437 (D.C. Cir. 1988).

144. *Kozup*, 663 F. Supp at 1057.

sional standard of care.[145] This standard requires that blood banks comply with federal regulations and accepted industry practices.[146]

Again, there are a minority of courts that refuse to hold blood banks to a professional standard and instead apply a reasonableness test.[147] In *Hernandez v. Nieces County Medical Society*[148] the court reversed a decision entering summary judgment in favor of the defendant blood bank against the plaintiff's negligence claim.[149] The court noted that other blood banks employed surrogate testing and the defendant knew of upcoming changes in the standards regarding these tests.[150] The court stated that blood banks cannot set their own standards regarding the duty of care owed to their patients.[151]

Following the ELISA test's phase-in, finding a blood bank liable for negligent blood testing is remote.[152] Currently, all donated blood must be tested for HIV.[153] Because the ELISA test is not infallible,[154] HIV contamination through a blood transfusion remains a possibility.[155] Assuming the blood bank tested the blood for HIV, liability for negligent blood testing can only be based on incompetent performance of the ELISA test.[156] Finding liability on this basis is slight, however, and plaintiffs' strongest argument may be that the blood bank negligently screened the blood donor.[157]

IV. CRITIQUE

Courts and legislatures throughout the United States conclude that principles of strict liability, whether in tort or contract, are not applicable to blood banks supplying blood for transfusions. Their determinations are based on the promotion of the health and welfare of the people of the respective states. They fear that applying strict liability principles would exact overwhelming financial burdens on blood banks, resulting in their eventual withdrawal from the industry.[158] This result is contrary to the goal of maintaining an adequate blood supply.

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145. *See supra* note 100.
146. *See supra* note 100 and note 121 and accompanying text.
147. *See supra* note 101.
148. 779 S.W.2d 867 (Tex. Ct. App. 1987).
149. *Id.* at 868.
150. *Id.* at 872.
151. *Id.* at 871.
152. Jenner, *supra* note 12, at 31.
153. Jenner, *supra* note 12, at 31.
154. *See supra* text accompanying notes 13-16.
155. *See supra* note 19.
156. *See* Jenner, *supra* note 12, at 31-32.
157. Jenner, *supra* note 12, at 32.
158. *See supra* note 88 and accompanying text.

Proponents of strict liability argue that supplying blood should be treated in the same way that supplying other products is treated. They contend that holding blood banks strictly liable will compensate innocent victims of AIDS-contaminated blood, while also providing the incentive to produce safe products. Blood banks can spread liability costs to consumers through higher prices for blood. Moreover, the application of strict liability will relieve the injured plaintiff's burden of proving a blood bank's fault or negligence.

Although these policy reasons may justify application of strict liability to other products, they do not support its application to blood banks. As the *Howell* court aptly stated:

> First, the societal need to ensure an affordable, adequate blood supply furnishes a persuasive reason for distinguishing between victims of defective blood and victims of other defective products. Second, strict liability cannot provide an incentive to promote all possible accident prevention at a time when there was no possible means of screening the blood for HIV. Third, while the producers may be in a better position to spread the costs, it is not in society's best interest to have the price of a transfusion reflect its true costs.[159]

The *Howell* court recognized that blood suppliers are not like any other manufacturers and sellers of products.[160] Most blood banks are nonprofit organizations providing the valuable service of collecting and distributing blood for individuals' medical needs. Subjecting blood banks to strict liability for undetectable defects in blood is inimical to society's interest in maintaining an adequate blood supply.

One commentator suggests, however, that under certain statutes, such as Florida's blood shield law,[161] blood banks are subject to strict liability.[162] It is asserted that "strict liability is avoided only when there is no effective test for detecting the disease contracted by the plaintiff."[163] Consequently, after the ELISA test's licensing on March 2, 1985,[164] blood banks could be strictly liable "even if the antibody test were performed and the results were negative."[165] This interpretation may be seriously flawed, however.

Under Florida's blood shield statute,[166] for example, "a plaintiff must allege and prove that the defect of which he complains is detecta-

159. Howell v. Spokane & Inland Empire Blood Bank, 785 P.2d 815, 822 (Wash. 1990).
160. *Id.*
161. *See supra* note 81.
162. *See supra* note 81.
163. *See supra* note 81.
164. *See supra* note 12.
165. Janowitz, *supra* note 7, at 618.
166. *See supra* note 81.

ble or removable by the use of reasonable scientific procedures or techniques that as the direct and proximate result of defendant's failure to detect or remove the defect, the plaintiff suffered an injury."[167] Thus, the plaintiff must satisfy criteria for recovery similar to those under a negligence claim.[168] The ELISA test's limitations will likely prevent transfusion-associated AIDS plaintiffs from satisfying their burden of proof.

The ELISA test screens blood for the presence of antibodies to the AIDS virus; it does not detect the virus itself.[169] Because the HIV antibody does not develop in the blood for several months after initial infection,[170] the defect in the blood is undetectable during this "window" period.[171] Most courts, guided by a policy opposed to applying strict liability principles to blood banks, are not likely to find blood banks liable under these circumstances. Thus, transfusion-associated AIDS plaintiffs must resort to a negligence theory in order to recover from a blood bank.

Plaintiffs who contracted the AIDS virus prior to March 2, 1985, the date of the ELISA test's licensing, can assert negligence against a blood bank for not adequately screening blood donors. Because the donor is the best person to question regarding the screening procedures employed, courts should provide donor access through a limited discovery process.[172] Adequate procedures are available to assist a plaintiff's right to recover from a negligent blood bank, while also protecting the donor's privacy rights.[173] These procedures include anonymous depositions and written depositions with courts acting as a conduit between the plaintiff and the donor.[174]

Transfusion-associated AIDS victims can also pursue a theory that blood banks acted negligently by failing to implement surrogate marker testing.[175] The problem with this theory is that surrogate marker testing was not widely implemented within the blood industry.[176] In many jurisdictions, a blood bank's conduct is measured by compliance with

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167. Ray v. Cutter Lab., 744 F. Supp. 1124, 1127 (M.D. Fla. 1990) (interpreting Florida's blood shield statute).

168. *Id.* at 1127.

169. *See supra* notes 10-13 and accompanying text.

170. Jenner, *supra* note 12, at 31. "[T]he median time necessary for antibodies to form is 2.1 months, and 95 percent of the cases are expected to develop antibodies within 5.8 months." *Id.*

171. *See supra* notes 14-15 and accompanying text.

172. *See* Snyder v. Mekhjian, 582 A.2d 307, 315 (N.J. Super. Ct. App. Div. 1990) (providing examples of procedures for assisting plaintiff to obtain donor information while giving maximum protection to donor's privacy).

173. *Id.* at 315; *see also supra* notes 130-35 and accompanying text.

174. *Snyder*, 582 A.2d at 315.

175. *See* Jenner, *supra* note 12, at 31.

176. *See* Jenner, *supra* note 12, at 31.

accepted industry practices,[177] and therefore, plaintiffs have been unsuccessful in advancing this theory. This obstacle can be overcome by holding blood banks to a higher reasonableness standard of care.[178] As stated by Judge Learned Hand in *The T.J. Hooper*:[179]

> There are, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence . . . . Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.[180]

The blood industry should not be responsible for setting its own standard of care because conduct below the level necessary for society's protection may result.

Plaintiffs contracting AIDS through a blood transfusion performed after the ELISA test's implementation face a diminished chance of recovery. Today, all donated blood is tested for the HIV antibody.[181] Consequently, most HIV-infection cases through transfusion are caused by the inability to detect the virus during the "window" period.[182] A plaintiff's best prospect of recovery is the negligent-donor-screening theory. If a transfusion-associated AIDS plaintiff establishes that the blood bank negligently screened the donor, recovery is likely because this failure would be a substantial factor in producing the plaintiff's injury. Once again, limited donor access would assist plaintiffs in prosecuting negligence claims.

V. CONCLUSION

State legislatures across the country have adopted blood shield statutes limiting blood bank liability for distributing contaminated blood. These statutes are an overwhelming expression of the public policy interest in ensuring a safe and adequate blood supply. Until these same legislative bodies determine that blood suppliers can meet society's needs while absorbing the losses associated with no-fault liability for distributing contaminated blood, victims of AIDS-infected blood transfusions will be denied recovery under strict liability principles. In

177. *See supra* note 100 and accompanying text.
178. *See supra* note 101.
179. 60 F.2d 737 (2d Cir.), *cert. denied*, 287 U.S. 662 (1932).
180. *Id.* at 740.
181. *See* Jenner, *supra* note 12, at 31.
182. *See* Jenner, *supra* note 12, at 31.

the interim, negligence remains the only viable means of recovery for transfusion-associated AIDS plaintiffs.

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