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# TRANSFUSION OF SH VIRUS — TORT OR BREACH OF CONTRACT

## INTRODUCTION

NO area of the law has experienced more rapid change than that presently evidenced in the area of products liability.<sup>1</sup> The philosophy of products liability, perhaps best stated in *Greenman v. Yuba Power Products, Inc.*,<sup>2</sup> is one of reallocating the risk of economic injury to the entire society.<sup>3</sup> Is this new social policy to be a universal policy, or are some institutions and organizations to retain a favored position in this new legal framework of consumer protection?

Blood transfusions are an invaluable aid to medical science and doubtless save many thousands of lives each year. There are, however, attendant dangers in the transfusion of blood, and undoubtedly one of the most prominent of these dangers is the contraction of homologous serum hepatitis.<sup>4</sup> Given both the idea of consumer protection, embodied in the doctrine of products liability, and the use of the blood transfusion, an admittedly invaluable aid to medical science, who is to bear the cost of an allegedly unavoidable injury caused by serum hepatitis infection?

### I. SERUM HEPATITIS

Serum hepatitis is a disease of the liver caused by the inoculation of human blood or blood products containing a

<sup>1</sup> For excellent analyses of the growth of products liability law see: Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099 (1960); Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEXAS L. REV. 855 (1963); Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeon-hole and Communication Barriers*, 17 WESTERN RESERVE L. REV. 5 (1966) [hereinafter cited as Shanker].

<sup>2</sup> 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962).

<sup>3</sup> "[T]o insure that the costs of injuries resulting from defective products are borne by the manufacturer that put such products on the market rather than by the injured persons who are powerless to protect themselves." *Id.* at 63, 27 Cal. Rptr. at 701, 377 P.2d at 901.

<sup>4</sup> "Serum hepatitis . . . is [an] exclusively man-made [disease]. It is definable as the syndrome or group of signs and symptoms produced artificially by inoculation with a filterable agent known as virus B. The virus may be introduced through the skin by deliberate administration, for therapeutic (curative) purposes, of human blood or certain of its products obtained from one who is not apparently ill but is carrying virus B in his blood. It may also be introduced . . . through [the] use of inadequately sterilized syringes, needles, stylets or cutting instruments that penetrate the skin or mucus membrane." 14 AM. JUR. PROOF OF FACTS *Hepatitis* § 5 (1964).

causative (SH) virus.<sup>5</sup> Recent medical research has significantly increased the detection rate of SH virus in donor blood; but, no test has been developed to discover all incidents of "bad" blood.<sup>6</sup>

The disease is contracted by about 30,000 people yearly; up to 10 percent of that number die.<sup>7</sup> Since this strain of hepatitis (SH virus) is contracted primarily by the use of inadequately sterilized instruments or by transfusion of plasma or whole blood containing the SH virus<sup>8</sup> the cause of death or disease in a particular case is relatively clear.

The question then becomes one of policy. Is the hospital or blood bank, indisputably the transferor of the causative agent, to be held legally liable for the injury sustained by the patient? Or does the doctrine of consumer protection, embodied in the developing law of products liability, not extend so far as to make a supplier of an admittedly valuable product liable to an innocent consumer absent supplier "fault"? This in essence is the policy decision with which the courts have been forced to come to grips. They are faced with a potentially large group of litigants (patients who have contracted serum hepatitis) seeking redress against a group of institutions traditionally favored in our legal framework.<sup>9</sup> In this setting the courts have been forced to fashion rules to facilitate or deny recovery to patients infected by serum hepatitis. It is the purpose of this note to explore in Part III two theories that are available to a plaintiff seeking recovery for injuries caused by the transfusion of infected blood. But first a look at the theory which has prevailed for many years.

## II. THE EARLIER VIEW — PERLMUTTER

The landmark case defining the extent of liability for transfusion of "bad" blood is *Perlmutter v. Beth David Hospital*.<sup>10</sup> The court denied recovery against the hospital on the basis that a transfusion of blood by a hospital to a patient

<sup>5</sup> BEESON & McDERMOTT, TEXTBOOK OF MEDICINE, 1032 (1963).

<sup>6</sup> M. Prince and K. Burlee, *Serum Hepatitis Antigen (SH): Rapid Detection by High Velocity Voltage Immunoelectrophoresis*, 169 SCIENCE 593 (1970).

<sup>7</sup> Bockel, *Tests for Australian Antigen Answer a Need*, 97 SCIENCE NEWS 584 (1970).

<sup>8</sup> See note 4 *supra*.

<sup>9</sup> Hospitals and charitable institutions (non-profit blood banks) traditionally were not subject to tort liability. PROSSER, LAW OF TORTS § 127 at 1019 (3d. ed. 1964). Although this immunity is presently breaking down, it still persists in a number of jurisdictions. *Id.* at 1021-24.

<sup>10</sup> 308 N.Y. 100, 123 N.E.2d 792 (1954).

was a *service* rather than a *sale*.<sup>11</sup> There was a strong dissent on the grounds that to rule that the transfusion of blood was a service and not a sale was contrary to the then existing New York case law.<sup>12</sup> The majority, however, seemed to reach their decision not so much on the basis of the sales-service dichotomy but rather upon the basic policy issue of exempting a hospital from liability for the transfusion of a virus it could not detect.<sup>13</sup>

Although the majority opinion of *Perlmutter* has been severely criticized in the literature,<sup>14</sup> the service rationale has been adopted by a number of jurisdictions both as to hospitals<sup>15</sup> and blood banks<sup>16</sup> supplying infected blood. The underlying policy decision of denying recovery in transfusion cases by classifying the transfusion of blood as a service rather than a sale is made glaringly apparent by the fact that many cases are now being decided, in other areas of the law, that are ex-

<sup>11</sup> "[S]uch 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 medical services it offers. That the property or title to certain items of medical materials may be transferred, so to speak, from the hospital to the patient during the course of medical treatment does not serve to make such a transaction a sale. "Sale" and "transfer" are not synonymous, and not every transfer of personal property constitutes a sale." *Id.* at 104, 123 N.E.2d at 794.

<sup>12</sup> The three dissenting justices felt that no distinction could be drawn between the furnishing of blood by a hospital and the case law of New York holding that implied warranties attached to the sale of food in a restaurant, *Temple v. Keeler*, 238 N.Y. 344, 144 N.E. 635 (1924); or to the sale of drugs *Hopkins & Co. v. Silverman*, 234 App. Div. 224, 254 N.Y.S. 724 (Sup. Ct. 1932). *Id.* at 110, 123 N.E.2d at 797-98.

<sup>13</sup> The majority recognized that if the transfer of blood were considered a sale, liability would attach for breach of warranty. They then made a very obvious policy decision based upon the undetectable nature of the hepatitis virus and declared: "The art of healing frequently calls for the balancing of risks and dangers to a patient. Consequently, if injury results from the course adopted, where no negligence or fault is present liability should not be imposed upon the institution or agency actually seeking to save or assist the patient." *Id.* at 107, 123 N.E.2d at 795.

<sup>14</sup> Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957); Garibaldi, *A New Look at Hospital's Liability for Hepatitis — Contaminated Blood on Principles of Strict Tort Liability*, 48 CHI. BAR REC. 204 (1967); Haut & Alter, *Blood Transfusions — Strict Liability?*, 43 ST. JOHN'S L. REV. 557 (1969); 37 NOTRE DAME LAW. 565 (1962); 18 OKLA. L. REV. 104 (1965); U. PA. L. REV. 833 (1955).

<sup>15</sup> *Sloneker v. St. Joseph's Hosp.*, 233 F. Supp. 105 (D. Colo. 1964); *White v. Sarascta Pub. Hosp. Bd.*, 206 So. 2d 19 (Dist. Ct. App. Fla. 1968); *Holder v. Sayet*, 196 So. 2d 205 (Dist. Ct. App. Fla. 1967); *Dibblee vs. Dr. W. H. Groves Latter-Day Saints Hosp.*, 12 Utah 2d 241, 364 P.2d 1085 (1961) (charitable immunity a factor in transfusing incompatible blood); *Gile v. Kennewick Pub. Hosp. Dist.*, 48 Wash. 2d 774, 296 P.2d 662 (1956) (charitable immunity a factor).

<sup>16</sup> *Whitehurst v. American Nat'l Red Cross*, 1 Ariz. App. 326, 402 P.2d 584 (1965) (charitable blood bank); *Balkowitsch v. Minneapolis War Memorial Blood Bank*, 270 Minn. 151, 132 N.W.2d 805 (1965); *Koenig v. Milwaukee Blood Center, Inc.*, 23 Wis. 2d 324, 127 N.W.2d 50 (1964).

tending sales warranties to cases that admittedly involve service transactions.<sup>17</sup>

In recent years a few courts have chosen to alter the obviously artificial sales-service distinction involved in blood transfusion litigation and have held that a cause of action exists in either tort<sup>18</sup> or under the Uniform Commercial Code,<sup>19</sup> on the theory that either a hospital,<sup>20</sup> a blood bank,<sup>21</sup> or both<sup>22</sup> have made a sale of blood within the respective definitions of "seller" established by the two doctrines. The recent case of *Hoffman v. Misericordia Hospital*<sup>23</sup> has gone so far as to hold that this artificial sales-service distinction may be immaterial. "[I]t cannot be said with certainty that no recovery is permissible upon the claim here made, even if it should ultimately be determined that the transfer of blood from a hospital for transfusion into a patient is a service."<sup>24</sup>

The subsequent discussion will deal with those recent cases deciding upon what grounds a cause of action may be stated in a suit predicated on contraction of serum hepatitis by transfusion.

<sup>17</sup> WILLISTON, WILLISTON ON SALES § 242 b (1948) (Sale of food in a restaurant justified imposition of an implied warranty of fitness); *Amacorp Indus. Leasing Co. v. Robert C. Young Assoc., Inc.*, 47 Cal. Rptr. 294, 237 Cal. App. 2d 724 (Dist. Ct. App. 1965) (leasing of equipment implies warranty); *Newark v. Gimbel's Inc.*, 102 N.J. Super. 279, 246 A.2d 11 (1968) (injury as a result of the application of a permanent wave hair dressing, court allowing recovery on the basis of implied warranty despite the service character of the application); *Cintrone v. Hertz Truck Leasing & Rental Serv.*, 45 N.J. 434, 212 A.2d 769 (1965) (implied warranty in leasing agreement for trucks). *Contra*, *Epstein v. Giannattasso*, 25 Conn. Supp. 109, 197 A.2d 342 (C.P. 1963) (denying recovery on the basis of rendition of services rather than the sale of goods); see *Farnsworth, Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957).

<sup>18</sup> RESTATEMENT (SECOND) OF TORTS § 402A (1965).

<sup>19</sup> UNIFORM COMMERCIAL CODE § 2-103 (d).

<sup>20</sup> *Cunningham v. MacNeal Memorial Hosp.*, 113 Ill. App. 2d 74, 251 N.E.2d 733 (1969), *aff'd* Ill. Sup. Ct. Nos. 42526, 42578 cons. (Mar. 1970) (finding that plaintiff had stated a cause of action on the basis of a sale).

<sup>21</sup> *Russell v. Community Blood Bank Inc.*, 185 So. 2d 749 (Dist. Ct. App. Fla. 1966), *aff'd* 196 So. 2d 115 (Fla. 1967); *Hoder v. Sayet*, 196 So. 2d 205 (Dist. Ct. App. Fla. 1967); *Carter v. Inter-Faith Hosp.*, 60 Misc. 2d 733, 304 N.Y.S.2d 97 (Sup. Ct. 1969) (*Perlmutter* "sales-service" rationale rejected as to commercial blood bank); *Hoffman v. Misericordia Hosp.*, 439 Pa. 501, 267 A.2d 86 (1970) (not determining the issue of sale but implying that the absence of a sale should not in itself bar recovery).

<sup>22</sup> *Jackson v. Muhlenberg Hosp.*, 53 N.J. 138, 249 A.2d 65 (1969).

<sup>23</sup> 439 Pa. 501, 267 A.2d 867 (1970).

<sup>24</sup> *Id.* at page 505, 267 A.2d at 870.

## III. CAUSE OF ACTION

Breach of warranty under the Code<sup>25</sup> and the tort law's counterpart, strict liability,<sup>26</sup> are the modern doctrines that have developed in the law to facilitate an injured party's recovering without a showing of fault or negligence on the part of a seller.<sup>27</sup> While the pleading of a cause of action in strict liability does not preclude a pleading of breach of an implied warranty of merchantability, or vice versa, an examination of the recent blood transfusion cases shows that often only one of the two causes of action—strict liability—has been advanced.

*A. Strict Liability*

Strict liability in tort is a concept first developed to avoid the injustices created by the earlier sales laws requiring the presence of privity of contract for one to recover for injuries caused by deleterious products intended for human consumption and intimate bodily use.<sup>28</sup> Drugs entered the developing body of law on the analogy that they, like food and drink, were intended for human consumption and that the same social policy supporting liability for furnishing unwholesome food

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<sup>25</sup> The sections of the *Uniform Commercial Code* pertinent to stating a cause of action for breach of implied warranty are: "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." *UNIFORM COMMERCIAL CODE* § 2-314(1). And secondly, "... goods to be merchantable must be at least such as are fit for the ordinary purposes for which such goods are used." *Id.* § 2-314 (2) (c).

<sup>26</sup> The strict liability cause of action referred to here is that set out in *Restatement (Second) of Torts* § 402A(1965). Although it may be argued that there are two distinct causes of action for strict liability in tort, i.e. implied warranty or strict liability absent warranty, it is felt that the two causes are identical and that although a case predicated on a cause of strict liability in tort may talk of implied warranty, "the 'warranty' is a very different kind of warranty from those usually found in the sale of goods, and that it is not subject to the various contract rules which have grown up to surround such sales." *Id.* at Comment m. It is not necessary then to allege an implied warranty to state a cause of action in strict liability but neither does talk of implied warranty mean that a cause of action is being stated on a theory other than that stated by § 402A *supra*. See *Cunningham v. MacNeal Memorial Hosp.*, 113 Ill. App. 2d 74, 251 N.E.2d 733 (1969), *aff'd* Ill. Sup. Ct. Nos. 42526, 42578 cons. (Mar. 1970); *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965); *Jackson v. Muhlenberg Hosp.*, 53 N.J. 138, 249 A.2d 65 (1969); *Leavell, The Return of Caveat Venditor as the Law of Products Liability*, 23 *ARK. L. REV.* 355, 360 (1970).

<sup>27</sup> "[F]reedom from negligence is not a defense to a breach of warranty or to an action based on strict liability in tort. . . . If the facts show a defective condition constituting a breach of the applicable warranty or a breach of the duty to provide a truck fit for use, and the condition produces injury or damages, liability exists." *Cintrone v. Hertz Truck Leasing & Rental Serv.*, 45 N.J. 434, 452, 212 A.2d 769, 779 (1965).

<sup>28</sup> *Prosser, The Fall of the Citadel (Strict Liability to the Consumer)*, 50 *MINN. L. REV.*, 791 (1966).

was equally applicable to the furnishing of defective drugs.<sup>29</sup> The case of *Greenman v. Yuba Power Products, Inc.*<sup>30</sup> expanded the doctrine of strict tort liability to the manufacturers of products intended for human use, and the earlier criterion of products intended for human consumption was abandoned in favor of a general body of products liability law. The emphasis was on avoidance of technical rules that had often barred recovery on a contract theory.<sup>31</sup> The result was that if pleaded in tort, lack of privity would no longer defeat recovery for anyone reasonably expected to use the warranted article.<sup>32</sup> The basic policy of the new tort was to insure that the manufacturers of defective products would be required to bear the losses from injuries caused by these defective products rather than the innocent consumer who was powerless to protect himself against such losses.<sup>33</sup>

The courts of Florida have decided three cases seeking recovery on a theory of strict liability in tort and have reached different conclusions as to the possibilities of imposing liability depending upon the status of the defendant. As against a hospital both *Hoder v. Sayet*<sup>34</sup> and *White v. Public Hospital Board*<sup>35</sup> held that no cause of action was stated for breach of an implied warranty in tort. While in *Hoder* and *Russell v. Community Blood Bank, Inc.*<sup>36</sup> (appealed and reversed on other grounds) it was held that a cause of action was stated against a *commercial* blood bank.<sup>37</sup> This means, at least in Florida, that although the sales-service theory of *Perl-*

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<sup>29</sup> *Gottsdanker v. Cutter Labs.*, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (Dist. Ct. App. 1960). This case involved the ingestion of vaccine containing a live virus which caused the polio it was designed to prevent. The Court stated:

In view of the established California rule that the consumer of a food product may recover from the manufacturer upon implied warranty, is there any reason to apply a different rule to the vaccine here involved? We think not. The vaccine is intended for human consumption quite as much as is food. We see no reason to differentiate the policy considerations requiring pure and wholesome food from those requiring pure and wholesome vaccine. . . . The vaccine here involved is, like food products, designed solely for introduction into the body of a human being. *Id.* at 607, 6 Cal. Rptr. at 323.

<sup>30</sup> 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962).

<sup>31</sup> *Id.* at 61-62, 27 Cal. Rptr. at 701, 377 P.2d at 901.

<sup>32</sup> *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 436, 191 N.E.2d 81, 82 (1963).

<sup>33</sup> *Shipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 90, 207 A.2d 314, 325 (1965).

<sup>34</sup> 196 So. 2d 205, 208 (Dist. Ct. App. Fla. 1967).

<sup>35</sup> 206 So. 2d 19, 22 (Dist. Ct. App. Fla. 1968).

<sup>36</sup> 185 So. 2d 749 (Dist. Ct. App. Fla. 1967), *rev'd* 196 So. 2d 115 (Fla. 1967).

<sup>37</sup> *Id.* at 756.

*mutter* has been abandoned as to blood banks,<sup>38</sup> it is still very much a factor in litigation against hospitals.<sup>39</sup>

The *Russell* case is the leading case in Florida defining a blood bank's potential liability for the transfusion of blood. The court of appeals stated that the blood bank could be held liable only for failure to detect a substance capable of detection and removal, and that if in fact the SH virus was not capable of removal, no liability would attach.<sup>40</sup> The opinion went on to say that the burden of proving an inability to detect the virus would be on the defendant blood bank.<sup>41</sup> That decision was modified by the Florida Supreme Court<sup>42</sup> on the basis that both the trial court and the district court of appeals had gone beyond the controlling question—was there a sale by the blood bank which could support a cause of action.<sup>43</sup> The supreme court opinion stated:

The question of whether there is a recognized method of detection was premature since that question is one of fact, and it was error for the trial court to settle it with a pronouncement of law. For that reason it was premature and error for the District Court to undertake to settle as a question of law that, which under the pleadings, would be a question of fact. We do not here review, consider or decide as a question of law whether or not there is a recognized method of detection...nor have we considered whether, if established by the fact, such *would* constitute a legal defense as that question is premature for the same reason. (emphasis added)<sup>44</sup>

The concurring opinion of Mr. Justice Roberts is especially interesting in that he felt that the court should have decided the issue of detectability as a matter of law.<sup>45</sup> Relying on *Green v. American Tobacco Company*,<sup>46</sup> Justice Roberts stated after reviewing the Florida products liability cases:

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

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<sup>38</sup> *Hoder v. Sayet*, 196 So. 2d 205, 208 (Dist. Ct. App. Fla. 1967).

<sup>39</sup> *Id.*

<sup>40</sup> 185 So. 2d at 755, *rev'd* 196 So. 2d 115 (Fla. 1967).

<sup>41</sup> *Id.*

<sup>42</sup> *Community Blood Bank, Inc. v. Russell*, 196 So. 2d 115 (Fla. 1967).

<sup>43</sup> *Id.* at 117.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 121 (Roberts, J., concurring opinion).

<sup>46</sup> 154 So. 2d 169 (Fla. 1963). "[A] manufacturer's or seller's actual knowledge or opportunity for knowledge of a defective or unwholesome condition is wholly irrelevant to his liability on the theory of implied warranty. . . ." *Id.* at 170. No reasonable distinction can, in our opinion, be made between the physical or practical impossibility of obtaining knowledge of a dangerous condition, and scientific inability resulting from a current lack of human knowledge and skill." *Id.* at 171.



and consumption of such product practically or scientifically impossible to discover the defect or adulteration of such product.<sup>47</sup>

### B. Breach of Warranty

In *Perlmutter* the majority in holding that the transfusion of blood was a service and not a sale reasoned that if the transaction were to be considered a sale, liability would automatically attach, and the hospital would become an insurer of injuries from "bad" blood transfusions.<sup>48</sup> In view of this belief—that liability would be automatic for a breach of an implied warranty of merchantability—it is interesting that this theory of liability has not been more frequently advanced. The only other reported case that rests directly on the Code's warranty of merchantability is another New York case, *Carter v. Inter-Faith Hospital*.<sup>49</sup>

In *Carter* the court worked around cases apparently extending the service rule of *Perlmutter* to commercial blood banks and concluded that if the no-sale rule of *Perlmutter* had in fact been extended to commercial blood banks these cases were overruled in that respect.<sup>50</sup> The court said that Code warranties attached to the sale by a blood bank and that: "If in fact the blood sold by the blood bank contains serum hepatitis and causes injury, it is not fit for the ordinary purpose for which it is used and would in turn give rise to a claim for breach of warranty."<sup>51</sup>

The fact that the plaintiff in *Carter* was not in privity with defendant blood bank was held not to bar his recovery under the Code.<sup>52</sup> The court relied on *Goldberg v. Kollsman Instrument Corp.*,<sup>53</sup> as authority for the proposition that privity is not required if plaintiff is one reasonably contemplated to be part of the distributive chain of the product.<sup>54</sup> Although this was an easy way to circumvent the privity doctrine of the code, it is submitted that the *Kollsman* decision is one based

<sup>47</sup> 196 So. 2d 115, 119-20 (Fla. 1967) (Roberts, J., concurring opinion).

<sup>48</sup> *Perlmutter v. Beth David Hospital*, 308 N.Y. 100, 106, 123 N.E.2d 792, 795 (1954).

<sup>49</sup> 60 Misc. 2d 733, 304 N.Y.S.2d 97 (Sup. Ct. 1969).

<sup>50</sup> "The basis of the *Perlmutter* decision was that the supplying of blood by a hospital to a patient is incidental to the services rendered and is not a sale. In the instant situation, we have solely a transfer of blood and no services are rendered by the blood bank to the hospital." *Id.* at 735, 304 N.Y.S.2d at 99-100.

<sup>51</sup> *Id.* at 736, 304 N.Y.S.2d at 101. See UNIFORM COMMERCIAL CODE § 2-314 (2) (c).

<sup>52</sup> 60 Misc. 2d 733, 736, 304 N.Y.S.2d 97, 101 (Sup. Ct. 1969).

<sup>53</sup> 12 N.Y.2d 432, 191 N.E.2d 81 (1963).

<sup>54</sup> *Id.* at 436, 191 N.E.2d at 82.

on strict liability in tort rather than on a warranty of merchantability,<sup>55</sup> and although the Code is not intended to restrict the development of case law on the question of privity,<sup>56</sup> the court for the sake of clarity should have recognized *Kollsman* for what it is.

Upon deciding that a cause of action had been stated for breach of warranty, the *Carter* court did not grant judgment summarily,<sup>57</sup> as the majority in *Perlmutter* reasoned would be the case.<sup>58</sup> Rather, the case was sent back to trial for the development of a record on the issue of detectability of serum hepatitis virus in blood so that the court might weigh "[a]ll factors in regard to public policy . . . a weighing of interest between the unfortunate patients who contract the disease and the general public who are in constant need of blood from these commercial blood banks."<sup>59</sup> Given this summation it is difficult to predict whether the courts would in fact strictly apply the warranty of merchantability or make some judicial exception on the basis of social policy to deny plaintiff's apparent statutory relief.

While *Carter* is the only recent case to rest *solely* on the basis of an implied warranty of merchantability, the case of *Jackson v. Muhlenberg Hospital*<sup>60</sup> contained a claim of both a breach of an implied warranty of merchantability and a cause of action premised on strict liability in tort.<sup>61</sup> The trial court dismissed both claims and the intermediate appellate court affirmed but remanded for consideration of the negligence issue.<sup>62</sup> The New Jersey Supreme Court reversed and remanded for a further development of the record to justify such dismissal.<sup>63</sup>

<sup>55</sup> *Id.*

<sup>56</sup> UNIFORM COMMERCIAL CODE § 2-313 Comment 3.

This section expressly includes as beneficiaries within its provisions the family, household and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge, or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain. *Id.*

It is then possible for a party to be brought under the *Code* by the development of case law and the courts are free to eliminate the requirement of privity as to all non-purchasers, even those outside of the distributive chain. Shanker, *supra* note 1, at 25.

<sup>57</sup> 60 Misc. 2d 733, 737, 304 N.Y.S.2d 97, 101 (Sup. Ct. 1969).

<sup>58</sup> See note 13 *supra*.

<sup>59</sup> 60 Misc. 2d 733, 737, 304 N.Y.S.2d 97, 101 (Sup. Ct. 1969).

<sup>60</sup> 96 N.J. Super. 314, 232 A.2d 879 (1967), *rev'd* 53 N.J. 138, 249 A.2d 65 (1969).

<sup>61</sup> *Id.* at 321, 232 A.2d at 882.

<sup>62</sup> *Id.* at 333, 232 A.2d at 890.

<sup>63</sup> 53 N.J. 138, 142, 249 A.2d 65, 67 (1969). A later New Jersey case which

The courts have then had occasion to deal with Code warranties of merchantability of fitness; but the two decisions since *Perlmutter* construing such fitness warranties have been influenced by policy factors, and both courts have essentially denied recovery on a warranty theory by either remanding for more information<sup>64</sup> or by asking that a trial court record concerning the detectability of SH virus be made (indicating that their decision would be one of policy based on that finding).<sup>65</sup>

While it would seem that once the warranty of merchantability was breached liability would automatically attach,<sup>66</sup> the *Carter* case indicates that this may not be so in relation to transfusions of blood.<sup>67</sup>

Perhaps a more important consideration in evaluating the application of liability under the Code would be a review of the provisions for disclaimer of implied warranties of merchantability. The question of disclaimer of an expressed or implied warranty has been litigated only once in connection with the transfusion of impure blood, but with the increasing number of cases holding that a possibility exists for liability to attach to a transfusion of infected blood, disclaimers of liability for the presence of hepatitis virus are likely to become more common. In *Jackson* there was an express disclaimer of this type.<sup>68</sup> The court relied upon the inability to detect the virus and declared the disclaimer reasonable under section 2-316 of the Code<sup>69</sup> without making reference to the issue of unconscionability of disclaiming physical injuries developed by 2-719(3).<sup>70</sup> This seems to be more of a policy decision than a strict interpretation of the Code. This is quite surprising in

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referred to *Jackson* mentioned that *Jackson* never came to trial after remand but was amicably settled between the parties and the action was dismissed with prejudice. *Baptista v. Saint Barnabas Medical Center*, 109 N.J. Super. 217, 223, 262 A.2d 902, 906 (1970).

<sup>64</sup> *Jackson v. Muhlenberg Hosp.*, 53 N.J. 138, 142, 249 A.2d 65, 67 (1969).

<sup>65</sup> *Carter v. Inter-Faith Hosp.*, 60 Misc. 2d 733, 737, 304 N.Y.S.2d 97, 101 (Sup. Ct. 1969). "This court feels that the approach taken by the New Jersey Supreme Court in *Jackson v. Muhlenberg Hospital* . . . is correct." *Id.* at 737, 304 N.Y.S.2d at 101.

<sup>66</sup> See note 13 *supra*.

<sup>67</sup> 60 Misc. 2d 733, 737, 304 N.Y.S.2d 97, 101 (Sup. Ct. 1969).

<sup>68</sup> "Despite the utmost care in the selection of donors, human blood may contain the virus of Homologous Serum Hepatitis. Therefore Eastern Blood Bank does not warrant against its presence in this blood." *Id.* at 320, 232 A.2d at 882.

<sup>69</sup> *Id.* at 329, 232 A.2d at 888.

<sup>70</sup> On further appeal the case was reversed and remanded for other reasons. *Jackson v. Muhlenberg Hosp.*, 53 N.J. 138, 142, 249 A.2d 65, 67 (1969).

light of the fact that the New Jersey courts have traditionally not been overly impressed by disclaimers seeking to limit liability from injury caused by defective products.<sup>71</sup> The protection against disclaimer provided by section 2-719(3) should be considered an important part of plaintiff's case based on warranty theory, and although *Jackson* is an indication to the contrary, arguably, such liability may not be capable of disclaimer under the Code.

While it has been claimed that strict liability has not been attained within the framework of the Code,<sup>72</sup> a review of the applicable sections and the case law would seem to indicate the opposite conclusion. Even though section 2-316 provides for the disclaimer of implied warranties attached to a sale of goods,<sup>73</sup> section 2-719(3) states that any attempt to limit consequential damages involving personal injuries is *prima facie* unconscionable.<sup>74</sup>

The test to be used in determining whether a contract or clause is unconscionable is to be resolved by an examination of the needs of the trade and the relative bargaining positions of the parties at the time of the making of the contract.<sup>75</sup> The presumption that a disclaimer of liability for physical injuries is *prima facie* unconscionable is an attempted move toward strict liability for breach of warranty,<sup>76</sup> and a review of the cases before and since the formulation of the Code lends support to the proposition that section 2-719(3) is an attempt to prohibit the manufacturer or someone in a superior bargaining position from defining his own liability for personal injury.<sup>77</sup>

<sup>71</sup> *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) is an example of this attitude. In that case there was an express warranty to make repairs for defects of materials and workmanship and a disclaimer of all other warranties regarding an automobile. The car was defective and injury was sustained by the plaintiff. The court held that such disclaimers were not favored and were to be strictly construed against the manufacturer. *Id.* at 373, 161 A.2d at 77-78. The court stated further that the types of disclaimers contemplated by the Sales Act were those disclaimers arrived at by relatively equal parties with some real freedom of choice as to the type of contract selected. *Id.* at 404, 161 A.2d at 95.

<sup>72</sup> Comment, *The Application of the Doctrine of Unconscionability to Warranties: A More Forward Strict Liability within the Uniform Commercial Code*, 38 FORDHAM L. REV. 73, 75-76 (1969) [hereinafter cited as Comment].

<sup>73</sup> UNIFORM COMMERCIAL CODE § 2-316.

<sup>74</sup> *Id.* § 2-719 (3).

<sup>75</sup> *Id.* § 2-302 Comment 1.

<sup>76</sup> Comment, *supra* note 72 at 80.

<sup>77</sup> *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1949) (unequal bargaining power); *Ford Motor Co. v. Tritt*, 244 Ark. 883, 430 S.W.2d 778 (1968); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) (unconscionable disclaimer).

### C. Comparison of the Two Doctrines

The theories of warranty under the Code and strict tort liability have been discussed; the question remains whether there are any real differences between them. Both theories generally require a sale by a person normally engaged in selling such a product, and both strict liability and the Code have overlapping rules to govern the liabilities which arise.<sup>78</sup> Strict liability in tort requires that the injury result from the use of a "defective" product, while the Code requires that the injury result from goods not of merchantable quality; but the definitions "defect" and "non-merchantability" are apparently synonymous.<sup>79</sup> One writer has even suggested that all of the cases decided under the theory of strict liability could have been decided exactly the same way under the Code.<sup>80</sup>

Privity of contract has traditionally been a stumbling block to recovery for injuries. Under contract theory the Code, however, has expanded the scope of implied warranty to include not only the buyer but members of his household and guests who may be reasonably expected to use the product.<sup>81</sup> Some variations of the Code are much broader than this in their abolition of privity.<sup>82</sup> The Code makes it clear that its provisions governing privity are not to preclude the development of case law redefining the warranties created by a sale within the definition of the Code,<sup>83</sup> and the decision in *Carter* was seen to be an application of this principle.<sup>84</sup> The latitude left to the courts in developing the requirements of

<sup>78</sup> Shanker, *supra* note 1, at 13.

<sup>79</sup> Rapson, *Products Liability Under Parallel Doctrines: Contrasts between the Uniform Commercial Code and Strict Liability in Tort*, 19 *RUTGERS L. REV.* 69 (1965). "This definition of defect, appearing in cases involving strict liability in tort, is closely related to the concept of defect as it appears in cases dealing with breach of implied warranty." *Farr v. Armstrong Rubber Co.*, 179 N.W.2d 64, 69 (Minn. 1970).

<sup>80</sup> Shanker, *supra* note 1, at 13.

<sup>81</sup> UNIFORM COMMERCIAL CODE § 2-318.

<sup>82</sup> COLO. REV. STAT. ANN. § 155-2-318 (1963).

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section. *Id.*

<sup>83</sup> UNIFORM COMMERCIAL CODE § 2-318 Comment 3.

This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether a seller's warranties, given to the buyer who resells, extends to other persons in the distributive chain. *Id.*

<sup>84</sup> 60 Misc. 2d 733, 737, 304 N.Y.S.2d 97, 101 (Sup. Ct. 1969).

privity is felt to be very broad.<sup>85</sup> Thus, privity, in a suit on a breach of warranty theory, should not be a major problem in suing a blood bank and is definitely no bar to a suit by a patient against a hospital.<sup>86</sup>

One distinction between the Code warranty of merchantability and a cause of action in strict liability is the applicable statute of limitations. Should the statute of limitations run from the time of the sale or from the time of the injury? Under the Code the time of breach of an implied warranty is the date of sale<sup>87</sup> while under a tort theory breach occurs at the time of the injury.<sup>88</sup> The time of the running of the statute of limitations can be a very important aspect of a case when a latent defect is the cause of injury. Different jurisdictions have treated the problem differently—some have created a new warranty action in tort,<sup>89</sup> while others have limited recovery to the time specified in the Code.<sup>90</sup>

Although the causes of action labeled "strict liability in tort" and "breach of warranty of merchantability" are strikingly similar and may present identical causes of action in the average case, there is one distinct difference in attempting to recover against a supplier of blood using a strict liability approach as opposed to a warranty approach. While the Code makes no allowance for the present state of human knowledge, comment k of § 402 A, *Restatement of Torts (Second)* makes a

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<sup>85</sup> "It thus seems clear that the courts, if they wish to do so, may eliminate the privity requirement as to all non-purchasers, even those outside the distributive chain." Shanker, *supra* note 1, at 27.

<sup>86</sup> The only state to decide that such a cause of action may be stated against a hospital is Illinois in the case of *Cunningham v. MacNeal Memorial Hospital*, 113 Ill. App. 2d 74, 251 N.E.2d 133 (1969), *aff'd* Ill. Sup. Ct. Nos. 42526, 42578 cons. (Mar. 1970). The court stated that the sales-service dichotomy of *Perlmutter* and other decisions was "too simple and that to maintain an artificial barrier around blood is not sensible." *Id.* at 80, 251 N.E.2d at 135. The *Cunningham* court, however, did not hold as a matter of law that an inability to detect serum hepatitis in blood would not be a defense in law. *Id.* at 86, 251 N.E.2d at 139. The *Cunningham* case, therefore, does not appear to extend the possibility of recovery on the theory of strict liability further than other decided cases. See notes 34-37 and accompanying text *supra*, and notes 92-100 and accompanying text *infra*. *Cunningham* is, however, important for it is the first case to hold that the transfusion of blood is a sale of a product and recovery for the transfusion of contaminated blood by a hospital on a strict liability theory is not precluded where there is the presence of a sale. *Cunningham v. MacNeal Memorial Hospital*, *supra* at 86.

<sup>87</sup> *Mendel v. Pittsburg Plate Glass Co.*, 25 N.Y.2d 340, 342, 305 N.Y.S.2d 490, 492, 253 N.E.2d 207, 208 (1969).

<sup>88</sup> *Holifield v. Setco Indus., Inc.*, 42 Wis. 2d 750, 755, 168 N.W.2d 177, 180 (1969).

<sup>89</sup> *Chapman v. Brown*, 198 F. Supp. 78 (D. Hawaii 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962); *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962).

<sup>90</sup> *Mendel v. Pittsburg Plate Glass Co.*, 25 N.Y.2d 340, 342, 305 N.Y.S.2d 490, 492, 253 N.E.2d 207, 208 (1969).

specific exception for some products from the application of the rules of strict liability by classifying them as unavoidably unsafe.<sup>91</sup>

There are several possible ways of avoiding the classification of the transfusion of blood containing the serum hepatitis virus as unavoidably unsafe under comment k. The first of these methods is an argument that would take blood out of the category of products intended to be exempted by comment k. If blood can be made reasonably safe by the detection of the virus in the blood of the donor<sup>92</sup> the fact that the virus cannot be conclusively detected in blood should not be considered relevant in classifying the product as unavoidably unsafe. The *Restatement* standard is not that products must be capable of being made absolutely safe; it is something less; the product must be *reasonably* safe. To allow a product that is capable of being made reasonably safe to be categorized as "unavoidably unsafe" is to defeat the purpose of the *Restatement* by sanctioning the non-use of preventive measures while research goes on in a search of the "ultimate" test capable of determining the presence of the virus in blood.<sup>93</sup>

The application of comment k to the transfusion of blood seems to be weak on another basis. The example of an unavoidably unsafe product used by the *Restatement* is the Pasteur treatment for rabies. The Pasteur treatment does not involve the use of a defective product, rather it involves a risk attendant to a product which, although not defective, is capable of causing serious consequences despite the fact that the product is "pure" when used.<sup>94</sup> Blood is not an analogous product. In its usable form it does not contain the SH virus and unlike the vaccine for the Pasteur treatment it is the additive defect in the blood itself rather than the particular idiosyncrasy of the recipient that causes the danger.

A third line of reasoning that might be advanced to overcome the comment k defense is the concept presented in the tobacco cases deciding liability for the contraction of lung cancer. In *Green v. American Tobacco Co.*<sup>95</sup> the tobacco company defended on the ground that at the time plaintiff contracted lung cancer the state of current scientific knowledge

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<sup>91</sup> RESTATEMENT (SECOND) OF TORTS § 402A, comment k (1965).

<sup>92</sup> See note 6 *supra*.

<sup>93</sup> Boland, *Strict Liability in Tort for Transfusing Contaminated Blood*, 23 ARK. L. REV. 236, 241-42 (1969).

<sup>94</sup> *Id.* at 242.

<sup>95</sup> 154 So. 2d 169 (Fla. 1963).

could not determine the causal link between smoking and lung cancer. The Florida court put the practical impossibility of obtaining knowledge of a dangerous condition (e.g. tainted meat in a can or faulty mechanism inside a steering column) and scientific inability resulting from a lack of human knowledge and skill (e.g. causal link between smoking and lung cancer) on the same level and decided that the policy reasons for applying strict liability to one set of circumstances were the same as for the other.<sup>96</sup> It was also stated that "a manufacturer's or seller's actual knowledge or *opportunity* to know of a defect or unwholesome condition is wholly irrelevant to his liability on the theory of implied warranty."<sup>97</sup>

This theory was advanced by Justice Roberts in his concurrence in *Russell*<sup>98</sup> and seems a viable method of attacking the theory of denial of recovery on the basis of the undetectable nature of the hepatitis virus. It should be noted, however, that the *Green* case has not been adhered to consistently and was modified by Louisiana in *Lartigue v. R. J. Reynolds Tobacco Co.*<sup>99</sup> where the court said "it is necessary to show that the warranted product contained an element from which, on the basis of existing human knowledge a harm might be expected to flow."<sup>100</sup>

Because of the problems presented by a possible classification of blood as a product included in the *Restatement's* comment k and the questionableness of *Green* being good precedent for the denial of a distinction between practical and scientific impossibilities of discovering a defect, plaintiff's case might be made more tenuous and recovery more easily deniable under a tort theory of pleading. An action tried under a theory of breach of warranty of merchantability would seemingly make no exception for liability on the basis that the product is incapable of being made absolutely safe.

#### CONCLUSION

Although in a particular case a plaintiff may be armed with adequate theories for legal recovery for injuries sustained

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<sup>96</sup> *Id.* at 171.

<sup>97</sup> *Id.* at 170 (emphasis added).

<sup>98</sup> 196 So. 2d 115, 119 (Fla. 1967).

<sup>99</sup> 317 F.2d 19 (5th Cir. 1963).

<sup>100</sup> *Id.* at 35. This modification appears to require that whether or not a harmful substance is detectable, and whether or not the language of *Green* is the accepted test, before liability can attach a showing must be made that the harmful agent must be one known to produce the resulting harm.



as the result of an infected blood transfusion, the ultimate issue is one of balancing opposing policy considerations. On the one hand blood banks and hospitals are considered to be institutions which should be given more than the normal amount of protection from the growing doctrines of products liability law than is afforded other enterprises.<sup>101</sup> Yet to deny recovery to individual persons injured is to subvert the very doctrine of spreading consumer losses which is at the heart of products liability law.

The question of liability for the transfusion of impure blood is an issue that has aroused enough medical institution concern to have been the impetus in 19 states for the adoption of statutes specifically exempting the suppliers of infected blood from liability.<sup>102</sup> The courts have stated that the question of liability in this area is more properly one that should be defined by the legislature.<sup>103</sup>

It is submitted that the attitude of the legislatures is incorrect. The imposition of liability on blood banks and hospitals for transfusion of infected blood would induce these institutions to make the very adjustments which products liability precipitates. To force hospitals and blood banks to absorb the loss of injury to innocent patients is to force them to spread the loss by increasing prices to consumers of the product. One method would be to insure against consumer loss through liability insurance.<sup>104</sup> This solution avoids the untenable consequence of placing the whole burden upon a singularly injured party whose unfortunate fate has placed him in the position to be injured. This approach is directly in line with the philosophy of spreading risks embodied in the emerging law of products liability.

<sup>101</sup> See note 9 *supra*.

<sup>102</sup> ALA. CODE tit. 7A, § 2-314 (1970); ARIZ. REV. STAT. ANN. § 36-1151 (1970); CAL. HEALTH & SAFETY CODE § 1606 (West 1970); DEL. CODE ANN. tit. 5A, § 2-316 (Spec. UCC Pamphlet 1968); LA. CIV. CODE ANN. art. 1764 (West 1970); ME. REV. STAT. ANN. tit. 11, § 2-108 (1970); MASS. GEN. LAWS ANN. ch. 106, § 2-316 (1971); MICH. COMP. LAWS ANN. § 691.1511 (1968); MISS. CODE ANN. § 7129-71 (1971); NEB. REV. STAT. § 71-400 (Supp. 1969); N.M. STAT. ANN. § 12-12-5 (1969); N.D. CENT. CODE § 41-02-33.3 (1969); OKLA. STAT. ANN. tit. 63, § 2151 (1970); ORE. REV. STAT. § 97.300 (1969); S.C. CODE ANN. § 32-55-9 (1970); S.D. CODE § 57-4-33.1 (1970); WIS. STAT. ANN. § 146.31 (1970). Colorado has enacted but has not yet published such a measure, S. 83, 48th Gen. Ass., 1st Sess. (1971); it has been reported that Utah has done likewise, Wall Street Journal, Mar. 2, 1971, at 1, col. 1.

<sup>103</sup> Carter v. Inter-Faith Hosp., 60 Mis. 2d 733, 737, 304 N.Y.S. 2d 97, 102 (Sup. Ct. 1969).

<sup>104</sup> Additional advantages of this policy would be an increased emphasis in research and development, higher standards of donor screening, and a reluctance of hospitals to deal with blood banks of questionable reputation.