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COMMENTS

LIABILITY FOR TRANSFUSIONS OF HEPATITIS INFECTED BLOOD

Legal resolution of the liability of a supplier of a useful and desirable product which, in the present state of human skill and knowledge, is unavoidably and necessarily dangerous to the user is fraught with difficulty. A major portion of the law in this area revolves around cases of hepatitis resulting from blood transfusions.¹ The crucial problem encountered is the nondetectibility of the hepatitis virus in the blood donor. Even though no specific viral detection test has been perfected which can be applied practically to blood banking or plasma pooling, recent observations hold promise for a more accurate method of detecting the asymptomatic carrier of the virus. The impact of this new development cannot be adequately contemplated without an examination of the legal framework in which it must operate.

Over a sixteen year period hepatitis cases have run the gamut from nonliability of a hospital based upon an entrenched, but erroneous, premise of warranty law, to strict liability. The leading case in the nonliability area of the spectrum is *Perlmutter v. Beth David Hospital*.² Typical of most hepatitis cases where proof of negligence on the part of a hospital or a blood bank is almost impossible to acquire,³ the plaintiff had sued for breach of implied warranties for a particular purpose and merchantability. The court dismissed the action on the theory that a blood transfusion was not a sale under the then existing New York Sales Act, but was an incidental feature of a service (treatment),⁴ hence no war-

¹ It is estimated that two to three per cent of the adults in the United States are carriers of the serum hepatitis virus and that blood transfusions are associated with 30,000 cases of the disease a year. Of these cases, more than 1500 are thought to result in death. *Richmond Times Dispatch*, Oct. 30, 1970, § C, at 8, col. 1.

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

³ In cases involving negligence, the allegations were made in connection with the screening of donors, not the failure to detect the hepatitis virus in the blood. *See, e.g.*, *Baptista v. Saint Barnabas Medical Center*, 109 N.J. Super. 217, 262 A.2d 902 (Super. Ct. 1970); *Jackson v. Muhlenberg Hosp.*, 96 N.J. Super. 314, 232 A.2d 879 (Super. Ct. 1967), *rev'd and remanded*, 53 N.J. 138, 249 A.2d 65 (1969); *Carter v. Inter-Faith Hosp.*, 60 Misc. 2d 733, 304 N.Y.S.2d 97 (Sup. Ct. 1969); *Young v. Brooklyn Women's Hosp.*, 54 Misc. 2d 645, 283 N.Y.S.2d 212 (Sup. Ct. 1967); *Hubbell v. South Nassau Communities Hosp.*, 46 Misc. 2d 847, 260 N.Y.S.2d 539 (Sup. Ct. 1965) (action directly against donor).

⁴ The *Perlmutter* court stated that a transfusion of blood is not the same as supplying

warranties attached. Overlooking earlier cases in the same jurisdiction which implied warranties in non-sales situations⁵ and supporting a service definition with non-warranty cases,⁶ the court was averse to holding a hospital liable because the art of healing frequently requires a balancing of risks and a label of fault could not be attached to the actions of the hospital. Even though fault is not a prerequisite to warranty recovery and warranties do attach in non-sales cases,⁷ the rule of *Perlmutter* is still followed in many jurisdictions.⁸ Several other states, however, have used a more direct approach by exempting statutorily the sale of blood from implied warranties of merchantability and fitness.⁹

food at a restaurant because a sick person goes to a hospital for treatment while a hungry one goes to a restaurant for food. It is interesting to speculate what the result would have been if food served by the hospital kitchen had been involved. See Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 811 n.107 (1966); Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653, 662 (1957).

⁵ See, e.g., *Hoisting Engine Sales Co. v. Hart*, 237 N.Y. 30, 142 N.E. 342 (1923); Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653, 662 (1957); 103 U. PA. L. REV. 833 (1955).

One recent case did not overlook the fact that warranties may attach in non-sales cases. In *Hoffman v. Misericordia Hosp.*, 439 Pa. 501, 267 A.2d 867 (1970), a trial court was held to have erred in sustaining a demurrer to a warranty action against a hospital because of earlier Pennsylvania cases which implied warranties in non-sale cases. The court followed analogously the reasoning of *Russell v. Community Blood Bank*, 185 So. 2d 749 (Fla. Dist. Ct. App. 1966), *cert. discharged*, 196 So. 2d 115 (Fla. 1967), in that a transfusion by a hospital was not a sale. However, the case was remanded to build up a record on whether new tests have been developed to detect hepatitis. The *Russell* court had recognized that nondetectibility may constitute a defense to warranty liability if proven.

⁶ Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653, 662 (1957).

⁷ Uniform Commercial Code § 2-313, Comment 2; L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 19.02 at 500 (1960); Farnsworth, *Implied Warranties in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957); 103 U. PA. L. REV. 833, 834 (1955).

⁸ See *Sloneker v. St. Joseph's Hosp.*, 233 F. Supp. 105 (D. Colo. 1964); *Whitehurst v. American Nat'l Red Cross*, 1 Ariz. App. 326, 402 P.2d 584 (1965); *Lovett v. Emory Univ.*, 116 Ga. App. 277, 156 S.E.2d 923 (1967); *Balkowitsch v. Minneapolis War Memorial Blood Bank*, 270 Minn. 151, 132 N.W.2d 805 (1965); *Goelz v. Wadley Research Institute & Blood Bank*, 350 S.W.2d 573 (Tex. Civ. App. 1961); *Dibblee v. Groves Latter-Day Saints Hosp.*, 12 Utah 2d 240, 364 P.2d 1085 (1961); *Gile v. Kennewick Public Hosp. Dist.*, 48 Wash. 2d 774, 296 P.2d 662 (1956); *Koenig v. Milwaukee Blood Center*, 23 Wis. 2d 324, 127 N.W.2d 50 (1964).

⁹ See ALASKA STATS. ANN. § 45.05.100 (e) (1962); ARK. STATS. ANN. § 85-2-318(3)(d) (1969); MASS. LAWS ANN. ch. 106 § 2-316(5) (1966); TENN. CODE ANN. § 47-2-316(5) (Cum. Supp. 1970); TEX. BUS. & COM. CODE § 2.316(e) (1967).

Other states, following the no-sale-no-warranty theory of *Perlmutter*, have enacted statutes making the transfusion of blood a service and not a sale. See ARIZ. REV. STATS.

Several plaintiffs have been unsuccessful in their attempts to circumvent the application of *Perlmutter* to their causes of action. In *Krom v. Sharp & Dohme*,¹⁰ warranty liability of a blood bank was denied because the hospital which administered the transfusion was not considered as a purchasing agent of a patient.¹¹ At least one court has refused to allow recovery on the theory of negligence per se due to an alleged violation of a pure food and drug act because hepatitis contaminated blood is not a "filthy" substance as required by the statute.¹² In addition, New York courts have limited the application of *Perlmutter* by holding its rule does not apply to causes of action based upon the negligence of a blood bank¹³ or upon the breach of an express warranty given by a hospital.¹⁴

In the decade after *Perlmutter* courts were dogmatically following its rule until the appellate judiciary of Florida, when confronted with a hepatitis case¹⁵ for the first time, developed a new view which is at least complementary, if not contradictory, to the New York position. Significantly, the warranty action in *Russell v. Community Blood Bank* was against a nonprofit blood bank which had sold contaminated blood directly to the plaintiff even though she was in a hospital where it was transfused. The District Court of Appeals held (1) that the transfer from the blood bank to the plaintiff was a sale,¹⁶ and, therefore, implied war-

ANN. § 36-1151 (Cum. Supp. 1969); CAL. HEALTH & SAFETY CODE § 1606 (1963); FLA. STATS. ANN. § 672.2-316(5) (1969).

¹⁰ 7 App. Div. 2d 761, 180 N.Y.S.2d 99 (1958).

¹¹An unreported New York case, *Heitner v. City of New York*, New York Law Journal, July 9, 1968, at 12, dismissed a cause of action based upon warranty against a commercial blood bank because *Krom* had extended *Perlmutter* to such suppliers. As an alternate ground of decision, the court felt the complaint should be dismissed because there was no way the plaintiff could prove his claim (nondetectability of the virus). However, *Carter v. Inter-Faith Hosp.*, 60 Misc. 2d 733, 304 N.Y.S.2d 97 (Sup. Ct. 1969), expresses a contrary view that *Krom* merely held that the hospital was not the patient's agent and in warranty cases it is immaterial that there is a lack of knowledge of defects or a means of detection or that negligence cannot be proven.

¹²*Merck & Co. v. Kidd*, 242 F.2d 592 (6th Cir. 1957). See Note, *Liability for the Supplying of Impure Blood*, 1965 WIS. L. REV. 374, 386.

¹³*Young v. Brooklyn Women's Hosp.*, 54 Misc. 2d 645, 283 N.Y.S.2d 212 (Sup. Ct. 1967).

¹⁴*Napoli v. St. Peter's Hosp.*, — Misc. 2d —, 213 N.Y.S.2d 6 (Supp. Ct. 1961).

¹⁵*Russell v. Community Blood Bank*, 185 So. 2d 749 (Fla. Dist. Ct. App. 1966), cert. discharged, 196 So. 2d 115 (Fla. 1967).

¹⁶Other courts have reasoned that a transfer of blood from a supplier for a price is a sale under the Uniform Commercial Code. See *Cunningham v. MacNeal Memorial Hosp.*, 113 Ill. App. 2d 74, 251 N.E.2d 733 (1969); *Jackson v. Muhlenberg Hosp.*, 96 N.J. Super. 314, 232 A.2d 879 (Super. Ct. 1967), *rev'd and remanded*, 53 N.J. 138,

warranties attach; and (2) that the blood bank could be liable for breach of warranty, but only if the virus was capable of detection and removal. The burden was placed upon the supplier to prove that the virus was incapable of detection and that blood was an "unavoidably unsafe product."

The Supreme Court of Florida agreed that a cause of action in warranty had been stated, but felt that the validity of nondetectibility as a defense was in conflict with *Green v. American Tobacco Co.*,¹⁷ and, therefore, statements of the lower appellate court concerning the effect of the ability or inability to remove the virus were surplusage and expunged. The case was remanded¹⁸ for trial on the question of detectibility, but the court specifically refused to consider whether nondetectibility would be a legal defense if proved. The effect of these decisions is to allow warranty actions against blood banks, but not against hospitals.¹⁹

With the increasing vogue of strict products liability in the sixties,²⁰ it was inevitable that the question of imposing this doctrine on a hospital or blood bank would be raised.²¹ In *Balkowitsch v. Minneapolis War*

249 A.2d 65 (1969); *Carter v. Inter-Faith Hosp.*, 60 Misc. 2d 733, 304 N.Y.S.2d 97 (Sup. Ct. 1969).

¹⁷ 154 So. 2d 169 (Fla. 1963), *cert. denied*, 377 U.S. 943 (1964) (cigarette manufacturer could be liable in warranty for lung cancer even if the danger in smoking could not have been discovered by reasonable foresight).

¹⁸ The Florida Supreme Court discharged certiorari, which caused the reverse and remand ruling of the District Court of Appeals to become effective.

¹⁹ See *White v. Sarasota County Pub. Hosp. Bd.*, 206 So. 2d 19 (Fla. Dist. Ct. App. 1968); *Hoder v. Sayet*, 196 So.2d 205 (Fla. Dist. Ct. App. 1967). Even a New York court which dismissed an action against a *hospital* refused as a matter of law to do so as to a *blood bank*, and allowed the case to go to trial so a record could be created for later policy considerations. *Carter v. Inter-Faith Hosp.*, 60 Misc. 2d 733, 304 N.Y.S.2d 97 (Sup. Ct. 1969). Therefore, New York appears to be leaning toward adopting a rule similar to that of Florida.

²⁰ See, e.g., *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); *Greenman v. Yuba Power Products*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965); *Citrone v. Hertz Truck Leasing & Rental Serv.*, 45 N.J. 434, 212 A.2d 769 (1965); *Santor v. A. & M. Karagheusian*, 44 N.J. 52, 207 A.2d 305 (1965); *Heningsen v. Bloomfield Motors*, 32 N.J. 358, 161 A.2d 69 (1960).

²¹ Despite the large number of warranty liability cases which turn upon privity considerations, only two hepatitis cases have been found to have involved the concept. *Russo v. Merck & Co.*, 138 F. Supp. 147 (D.R.I. 1956); *Balkowitsch v. Minneapolis War Memorial Blood Bank*, 270 Min. 151, 132 N.W.2d 805 (1965). The *Russo* decision denied liability because there was no privity, however later cases hold privity unnecessary for a warranty to attach. See, e.g., *Heningsen v. Bloomfield Motors*, 32 N.J. 358, 161 A.2d 69 (1960); *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 240 N.Y.S.2d

Memorial Blood Bank,²² the Minnesota court cursorily refused to apply strict liability to a charitable activity which served a humane and public health service. It remained for a New Jersey trial court to make the first extended discussion of the possible application of the doctrine to hepatitis cases.²³ This Superior Court decision recognized that exemption from warranty liability should be based upon policy considerations, not on the basis of no-sale-no-warranty. Since strict liability and warranty causes of action are the same, the policy considerations of a highly desirable product attendant with a not unreasonable risk as opposed to an injured plaintiff with an almost unbearable burden of proof must be considered. On appeal the Supreme Court of New Jersey reversed and remanded the case for trial on all points in order that a complete record may be compiled for a proper determination as to the imposition of warranty or strict liability.²⁴

Following the same procedure as the New Jersey court, the Supreme Court of Illinois, in light of its earlier decision adopting strict liability,²⁵ remanded a hepatitis case for the compilation of a record.²⁶ In doing so the court held that the plaintiff had stated a cause of action and that the blood was a product which can be the subject of a sale by any supplier.

Upon the subsequent appeal, the Illinois court did not hesitate to impose strict liability upon a hospital that performed a transfusion of hepatitis contaminated blood.²⁷ Citing comment *e* to section 402A of the *Restatement (Second) of Torts*, whole human blood was considered by the court to be a "product" in the same manner as other articles which are wholly unchanged from their natural state and are distributed for human consumption. The court was unable to accept the service-no-sale reasoning of *Perlmutter* and felt that blood banks and hospitals were entities within the distribution chain of the blood, hence the fact it was provided ancillary

592, 191 N.E.2d 81 (1963). The *Balkowitsch* case made it clear that recovery was not being denied on the ground of lack of privity.

²² 270 Minn. 151, 132 N.W.2d 805 (1965).

²³ *Jackson v. Muhlenberg Hosp.*, 96 N.J. Super. 314, 232 A.2d 879 (Super. Ct. 1967), *rev'd and remanded*, 53 N.J. 138, 249 A.2d 65 (1969).

²⁴ The action in this case was later dismissed under a stipulation dated June 29, 1969. See *Baptista v. Saint Barnabas Medical Center*, 109 N.J. Super. 217, 262 A.2d 902, 906 n.1 (Super. Ct. 1970) (strict liability not applied where the blood transfused was neither infected nor defective, but merely mismatched).

²⁵ *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

²⁶ *Cunningham v. MacNeal Memorial Hosp.*, 113 Ill. App. 2d 74, 251 N.E.2d 733 (1969).

²⁷ *Cunningham v. MacNeal Hosp.*, 39 U.S.L.W. 2200 (Sup. Ct. Ill. Sept. 29, 1970).

to a service had no bearing. The nondetectability of the virus was considered irrelevant because any other rule in the exercise of all possible care in preparation and production would be inconsistent with the concept of strict liability. The most important problem—whether blood is an “unavoidably unsafe product” under comment *k* of section 402A of the *Restatement*—was glossed over by the court, which stated that the comment can be read only as relating to products that are not impure and, even if properly prepared, inherently involve substantial risk of injury to the user. Because it was alleged to have been impure, the transfused blood was held not to fall under comment *k*.

Despite the skepticism of some authorities that strict liability would be imposed in hepatitis infected blood transfusion cases,²⁸ this landmark Illinois case decision will undoubtedly open the door to the application of the doctrine by other states. Even though New York has been termed an “island of resistance,”²⁹ its view as espoused in *Perlmutter* and as modified by *Russell* remains overwhelming in the United States.³⁰ Only the passage of time will demonstrate whether courts, which are, for the most part, reluctant to impose liability, will yield to the increasing tide of strict liability.

The major reason for this reluctance is the fact that the presence of the etiological factors in a donor's blood cannot be detected with any accuracy.³¹ Serum hepatitis,³² an inflammatory disease of the liver, is caused

²⁸ See Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 812 (1966); Note, *Liability for the Supplying of Impure Blood*, 1965 WIS. L. REV. 374, 338; Note, *Liability for Blood Transfusion Injuries*, 42 MINN. L. REV. 640, 660 (1958).

²⁹ *Cunningham v. McNeal Hosp.*, 113 Ill. App. 2d 74, 251 N.E.2d 733, 737 (1969).

³⁰ See cases cited note 8 *supra*.

³¹ See *Perlmutter v. Beth David Hosp.*, 308 N.Y. 100, 123 N.E.2d 792 (1954); L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 19.02[2], at 502.5 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 812 (1966).

One court has suggested that the most valid reason for denying liability is the inability to avoid virus contamination. *Magrine v. Krasnica*, 94 N.J. Super. 228, 227 A.2d 539 (Super. Ct. 1967).

³² There are two basic varieties of hepatitis. The first is toxocological hepatitis which is a liver injury caused by chemical agents introduced into the body or by toxins of internal origin presumably present in certain diseases unconnected with the liver. The other variety is viral hepatitis of which there are two types: infectious hepatitis and serum (or homologous serum) hepatitis. See Prince, Hargrove, Szmunes, Cherubin, Fontana & Jeffries, *Immunologic Distinction between Infections and Serum Hepatitis*, 282 NEW ENG. J. MED. 987 (1970). Because the infectious hepatitis virus can be neutralized by the protective antibodies in ordinary gamma globulin, victims of hepatitis infected blood usually contract serum hepatitis.

by an exclusively manmade virus introduced through the skin when human products, such as blood, are injected either therapeutically or parenterally into the body.³³ Major impediments to detectibility include a present impossibility of isolating the virus for positive microscopic identification and a nontransmittance to laboratory animals because man is the only acceptable host.³⁴

Despite the existence of various tests and storage procedures for the detection and neutralization of the virus, such preventives are, at most, minimally successful. At present the most effective means of avoiding a transfusion of hepatitis infected blood is careful selection of donors.³⁵ However, a significant breakthrough was accomplished recently by the chance observation that a certain antigen was found to be present in a high percentage of certain diseases such as hepatitis.³⁶ This antigen has been called variously the Australia antigen (AA),³⁷ serum hepatitis antigen, or hepatitis associated antigen (HAA). The close relation between the presence of the antigen and of the presumable virus in the acute stages of serum hepatitis, as emphasized by Dr. Alfred Prince of Cornell Medical Center,³⁸ has been confirmed by the work of a group headed by Dr. J. P. Giles.³⁹ In addition, Dr. Prince has developed an immunoelectroosmorphism test which can detect fifty to ninety per cent of AA carriers and

³³ Prince, Hargrove, Szmunes, Cherubin, Fontana & Jeffries, *Immunologic Distinction between Infectious and Serum Hepatitis*, 282 NEW ENG. J. MED. 987, 990 (1970); Koff & Isselbacher, *Changing Concepts in the Epidemiology of Viral Hepatitis*, 278 NEW ENG. J. MED. 1371, 1380 (1968).

³⁴ Bang, *Genesis of Hepatitis*, 281 NEW ENG. J. MED. 1190 (1969).

³⁵ Haut & Alter, *Blood Transfusions—Strict Liability?*, 43 ST. JOHN'S L. REV. 557, 559 (1969).

³⁶ Bang, *Genesis of Hepatitis*, 281 NEW ENG. J. MED. 1190, 1191 (1969).

³⁷ In the course of studying human population genetics in the Pacific, a group of doctors found, in the serum of an Australian aborigine, a factor that reacted immunologically with an antiserum from patients who had received many transfusions. This factor was thus called the Australia antigen. See Blumberg, Gerstley & Hungerford, *A Serum Antigen (Australia Antigen) in Down's Syndrome, Leukemia, and Hepatitis*, 66 ANNALS INTERN. MED. 924 (1967); Blumberg, *Polymorphisms of the Serum Proteins and the Development of Iso-Precipitins in Transfused Patients*, 40 BULL. N.Y. ACAD. MED. 377 (1964).

³⁸ Prince, *An Antigen Detected in the Blood During the Incubation Period of Serum Hepatitis*, 60 PROCEED. NAT'L ACAD. SCI. 814 (1968). Doctor Prince discovered that the Australia antigen is found very rarely in the serum of infectious hepatitis patients.

³⁹ Giles, McCollum & Berndtson, *Viral Hepatitis: Relation of Australia/SH Antigen to the Willowbrook MS-2 Strain*, 281 NEW ENG. J. MED. 119 (1969). See also Schweitzer & Spears, *Hepatitis-Associated Antigen (Australia Antigen) in Mother and Infant*, 283 NEW ENG. J. MED. 570 (1970).

twenty-five to forty per cent of hepatitis virus carriers.⁴⁰ The National Research Council has determined that the incidence of serum hepatitis among patients who receive blood containing the antigen is three to five times as great as those who receive blood not containing the substance.⁴¹ Testing for the presence of AA is at present the only promising test for use in screening prospective blood donors.⁴² Even though the accuracy in detecting hepatitis infected blood is not as effective as desirable, it is substantially better than before the relationship between the Australia antigen and serum hepatitis was first observed.

In deciding a hepatitis case, a court must consider the availability and success of present tests and other preventive procedures in order to determine whether a duty should be imposed on a blood bank or hospital to utilize such measures; and, if such a duty exists, whether or not a blood supplier is entitled to rely on the results thereof. The usefulness and necessity of blood transfusions, which in many instances spell the difference between life and death, is unquestioned. The crucial question is the application of nondetectibility as a defense to negligence, warranty, or strict liability.

Of course, a blood supplier who indiscriminately solicits or accepts donors without any investigation of possible hepatitis history can, and should, be subject to liability for negligence regardless of the detectibility of the virus. The latter consideration becomes relevant when courts proceed into the realm of warranty and strict liability. Comment *k* of section 402A of the *Restatement (Second) of Torts*, which exempts suppliers of "unavoidably unsafe products" from such liability, contemplates useful and desirable products which presently cannot be made safe. Despite the "impure" reasoning of *Cunningham*, which in effect rejects comment *k*, hepatitis infected blood is very much similar to the rabies vaccine in that hopefully man will eventually develop a means of detecting and removing the virus from the blood and the etiological agents of the dread side effects from the Pasteur treatment. Until such an evolution, blood and the rabies vaccine will remain "impure," but not "defective," and hence, should be excluded from subjection to warranty coverage or strict liability in tort.⁴³

⁴⁰ Prince & Burke, *Serum Hepatitis Antigen (SH): Rapid Detection by High Voltage Immunoelectrosmorphoresis*, 169 *SCIENCE* 593 (1970). See also Prince, *An Antigen Detected in the Blood During the Incubation Period of Serum Hepatitis*, 60 *PROCEED. NAT'L ACAD. SCI.* 814 (1968).

⁴¹ Richmond Times-Dispatch, Oct. 30, 1970, § C, at 8, col. 1.

⁴² *Id.*

⁴³ It is interesting to note that no court has specifically held that the mere presence of

Even though nondetectability of the virus represents the major argument against such liability, other considerations add validity to such a determination. A basic factor in imposing strict liability is that the supplier is in a better position to know and control the condition of his product. The inability of any institution to detect or remove the hepatitis virus from blood with any degree of medical certainty considerably weakens this tenet of strict liability.⁴⁴ The ability of the supplier better to absorb the loss than the recipient runs counter to the rapidly increasing cost of medical care and the likelihood of inflated prices for whole blood to insulate the suppliers against possible judgments under implied warranty or strict liability. Insurers would naturally be reluctant to issue liability coverage policies where recovery thereunder could be based upon a defect no one could detect. Even beyond these considerations, a distinction must be drawn between ordinary commercial products, such as the untreated mushrooms referred to by the Illinois court, and medical necessities such as blood.⁴⁵

Because of such factors as nondetectability and exorbitant medical costs, the determinative for the imposition of warranty or strict liability for transfusions of hepatitis contaminated blood should be public policy.⁴⁶ In the absence of provable negligence, nonliability ought to be the standard due to the present state of human skill and knowledge in this area. Hopefully, Illinois will eventually prove to be a mere "island" in the sea of decisions rejecting the imposition of warranty or strict liability in hepatitis associated blood transfusion cases.

J. H. C.

the hepatitis virus constitutes a breach of warranty. The *Perlmutter* court must have assumed this because it stated that it was immaterial whether the virus was detectable or not because the hospital would be liable if the giving of a transfusion was a sale. See *Perlmutter v. Beth David Hosp.*, 308 N.Y. 100, 123 N.E.2d 792, 795 (1954). In addition, food cases show that strict liability in warranty should be imposed whether or not the defect could be eliminated. See, e.g., *Holt v. Mann*, 294 Mass. 21, 200 N.E. 403 (1936) (trichinosis). Logically this rule of wholesomeness and fitness for human consumption could be applied to blood. However, this application must be considered in light of the usefulness and desirability of blood for transfusions.

⁴⁴ See Pollock, *Liability of a Blood Bank or Hospital For a Hepatitis Associated Blood Transfusion in New Jersey*, 2 SETON HALL L. REV. 47, 53 (1970).

⁴⁵ One case recognizes such a distinction. *Newmark v. Gimbel's*, 54 N.J. 585, 258 A.2d 697 (1969).

⁴⁶ See *Jackson v. Muhlenberg Hosp.*, 96 N.J. Super. 314, 232 A.2d 879 (Super. Ct. 1967), *rev'd and remanded*, 53 N.J. 138, 249 A.2d 65 (1969); *Carter v. Inter-Faith Hosp.*, 60 Misc. 2d 733, 304 N.Y.S.2d 97 (Sup. Ct. 1969); *Hoffman v. Misericordia Hosp.*, 439 Pa. 501, 267 A.2d 867 (1970).