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# Comments: Transfusion-Associated Acquired Immunodeficiency Syndrome (AIDS): Blood Bank Liability?

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# COMMENTS

## TRANSFUSION-ASSOCIATED ACQUIRED IMMUNODEFICIENCY SYNDROME (AIDS): BLOOD BANK LIABILITY?

*The Acquired Immunodeficiency Syndrome (AIDS) can be contracted via a blood transfusion. A legal question of growing importance in Maryland and across the country is whether a blood bank which supplies AIDS-tainted blood should be liable to a blood transfusee for the contraction of AIDS. Inherent in that question is a balancing of society's need to protect blood banks from liability and the individual's right of recovery. This comment examines that question. The author begins with a historical review of blood bank liability for blood tainted with viruses other than AIDS and then discusses various theories of liability under which a blood bank could be held liable for the transfer of AIDS-tainted blood. The comment concludes with a legislative proposal which would permit individual recovery for transfusion-associated AIDS without interfering with society's need for an adequate and safe supply of blood.*

### I. INTRODUCTION

In 1982, a septuagenarian woman entered a California hospital to undergo a hip-replacement operation. As part of the hip-replacement procedure, the woman received a routine blood transfusion. The operation was successful, but the blood transfusion had tragic consequences. Three months after the operation, the woman began to feel weak and lethargic. The woman's condition was diagnosed initially as hepatitis.<sup>1</sup> However, this diagnosis was revised later to Acquired Immunodeficiency Syndrome (AIDS), a disease that has been designated by the federal government as its "number one health priority."<sup>2</sup> The woman contracted her AIDS as a result of tainted blood used for her blood transfusion during her hip-replacement surgery.

The issues that arise from this tragic occurrence are many, but the question addressed in this comment is whether there is any legal recourse for a victim of transfusion-associated AIDS. Specifically, the comment will assess the liability of a blood bank that collects, stores, and distributes tainted blood that eventually causes a blood transfusee to contract

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1. Press, *AIDS Spreads to the Courts*, NEWSWEEK, July 1, 1985, at 61.

2. THE FEDERAL RESPONSE TO AIDS - TWENTY-NINTH REPORT BY THE COMMITTEE ON GOVERNMENT OPERATIONS TOGETHER WITH DISSENTING AND ADDITIONAL VIEWS, H.R. REP. NO. 582, 98th Cong., 1st Sess. 3-4 (1983). See also *AIDS* Wash. Post, Sept. 4, 1985, Health Section (Magazine), at 25 (Margaret M. Heckler, then Secretary of the Health and Human Services Department, stated that AIDS was the federal government's "number one health priority" because (1) "the number of reported AIDS cases was doubling every year. With that kind of exponential growth, it was clear that thousands of Americans would all-too-soon be affected by the disease," and (2) "AIDS leaves no survivors; it has been universally fatal.").

AIDS.<sup>3</sup> Not discussed in this comment are the related issues of the liability of an individual who negligently donates tainted blood,<sup>4</sup> or of a pharmaceutical company that manufactures medical products containing tainted blood.<sup>5</sup>

The comment begins with a discussion of the AIDS disease, and its national magnitude. Following that discussion, the causal link between blood banks and transfusion-associated AIDS is examined. The comment then considers the similarities between AIDS and serum hepatitis to establish a foundation upon which the blood liability cases of the early 1970's may be analogized to transfusion-associated AIDS cases. From that discussion, an examination of the law as it relates to blood bank liability will be presented. Following that, the comment will discuss theories of recovery for transfusion-associated AIDS victims. Finally, the comment will impart some general suggestions on how the problem of transfusion-associated diseases should be handled by the legal system.

## II. AIDS: THE DISEASE

AIDS is defined by the Center for Disease Control (CDC) 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."<sup>6</sup> In layman's terms, AIDS is a disease that weakens and eventually destroys the body's immune system. Because AIDS renders the immune system ineffective, the body becomes susceptible to a whole array of diseases. These diseases ravage the body and eventually cause death.<sup>7</sup>

The first cases of AIDS were identified in mid-1981.<sup>8</sup> The origin of the disease was, and still is, unknown.<sup>9</sup> At first, only homosexuals and

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3. For the purpose of this comment, no distinction is made between commercial and non-profit blood banks because the doctrine of charitable immunity generally has been abrogated throughout the United States. See RESTATEMENT (SECOND) OF TORTS § 895E (1980); W. PROSSER, THE LAW OF TORTS § 133 (5th ed. 1984). See *infra* note 125, for information on the charitable immunity doctrine in Maryland.
  4. See *Hubbell v. South Nassau Communities Hosp.*, 46 Misc.2d 847, 260 N.Y.S.2d 539 (N.Y. Sup. Ct. Sp. Term 1965)(liability of an individual who negligently donates tainted blood).
  5. See *Hyland Therapeutics v. Superior Court*, 175 Cal. App.3d 509, 220 Cal. Rptr. 590 (1985) (liability of a pharmaceutical company for its blood-derived product containing AIDS).
  6. *Update on Acquired Immune Deficiency Syndrome (AIDS) - United States*, MORTALITY AND MORBIDITY WEEKLY, Sept. 24, 1982, at 514.
  7. For general discussions on AIDS, see generally F. SIEGAL & M. SIEGAL, AIDS: THE MEDICAL MYSTERY (1983) [hereinafter SIEGAL]; AIDS, Wash. Post, Sept. 4, 1985, Health Section (Magazine); Wallis, AIDS: A Growing Threat, TIME, Aug. 12, 1985, at 40-47; U.S. Department of Health and Human Services, Public Health Service, *Facts About AIDS* (August, 1985) [hereinafter *Facts About AIDS*].
  8. Curran, Morgan, Hardy, Jaffe, Darrow, Dowdle [hereinafter cited as Curran], *The Epidemiology of AIDS: Current Status and Future Prospects*, 229 SCIENCE 1352 (Sept. 27, 1985); *Facts About AIDS*, *supra* note 7; SIEGAL, *supra* note 7, at 5.
  9. *Like No Other Human Disease*, Wash. Post, Sept. 4, 1985, Health Section (Maga-

intravenous drug users were thought to be susceptible to AIDS.<sup>10</sup> Later, recipients of blood transfusions and those who received blood products, e.g., hemophiliacs, were added to the list of those susceptible to AIDS.<sup>11</sup> Finally, a comprehensive list of those at high risk of contracting AIDS was formulated. That list included homosexuals, intravenous drug users, Haitians, hemophiliacs, recipients of blood transfusions, and any sexual intimate of those in the high risk group.<sup>12</sup>

By January 13, 1986, 16,458 confirmed cases of AIDS were reported in the United States.<sup>13</sup> Of that number, 51% of the adults with AIDS and 59% of the children with AIDS had died.<sup>14</sup> In 1985 there was an 89% increase in AIDS cases as compared with the 1984 figures.<sup>15</sup> According to forecasts by public health experts, the AIDS epidemic shows no sign of abating, and 1986 is almost certain to have twice as many new reported cases of AIDS as were reported in 1985.<sup>16</sup> Furthermore, the CDC has reported that AIDS is spreading among heterosexuals who are not members of the high risk group.<sup>17</sup> It is evident, then, that AIDS is a serious health problem that is slowly, but steadily, increasing its non-high risk victims as it extends into mainstream America.<sup>18</sup>

The potentially devastating impact of an uncontrolled AIDS epidemic has been recognized by the federal government as a major health concern. In October of 1984, Congress authorized the Secretary of Health and Human Services to award grants "to public and non-profit entities for information and education programs on, and for the diagnosis, prevention, and control of, acquired immune deficiency syndrome."<sup>19</sup>

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zine) at 11 [hereinafter *Like No Other Human Disease*](“We don't know of its [AIDS] origin, but it probably came into man very recently . . .”). *But cf. AIDS Called Punishment*, Wash. Post, Jan. 18, 1986, at A11, col. 2 (Reverend Charles Stanley, President of the Nation's largest Protestant denomination, believes that God created AIDS to show displeasure with America's acceptance of the homosexual lifestyle).

10. Feorino, Jaffe, Palmer, Peterman, Francis, Kalyanaraman, Weinstein, Stoneburner, Alexander, Raevsky, Getchell, Warfield, Haverkos, Kilbourne, Nicholson, Curran [hereinafter Feorino], *Transfusion-Associated Acquired Immune Deficiency Syndrome*, 312 NEW ENGLAND JOURNAL OF MEDICINE 1293 (May 16, 1985).

11. *Id.*

12. SEIGAL, *supra* note 7, at 68-99 (1983); Curran, *supra* note 8, at 1352; *Facts About AIDS*, *supra* note 7.

13. *AIDS Cases in 1985 Exceed Total of All Previous Years*, Wash. Post, Jan. 17, 1986, at A1, col. 4.

\* After this comment went to press, the CDC reported, as of Feb. 2, 1987, 30,396 cases of AIDS in the U.S. with 17,338 deaths. Wash. Post, Feb. 6, 1987, at A6, col. 1.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* (Approximately 4.6% of AIDS victims are heterosexuals. Of these 768 persons, 182 are known to have had sexual contacts with a member of the AIDS high risk group).

18. *Id.* (The number of heterosexuals contracting AIDS more than doubled in 1985 as compared to 1984).

19. 42 U.S.C. § 247c(d) (Supp. 1985).

In 1985, House and Senate Conferees approved \$234.2 million for research and related activities to combat AIDS.<sup>20</sup> State governments also have recognized AIDS as a major health concern. In New York, Schools Chancellor Nathan Quinones announced that the state school system would begin educating its pupils on AIDS in February of 1986.<sup>21</sup> In Maryland, former Governor Harry Hughes appointed a task force to study how Maryland should handle its AIDS crisis.<sup>22</sup>

Because AIDS is incurable at the present time, prevention is the priority of health experts.<sup>23</sup> Pre-1984 preventive measures consisted primarily of education programs aimed at those in high risk of contracting AIDS. These programs were designed to alert such individuals to the AIDS symptoms, warn them to eliminate, or at least decrease, sexual activities in places where multiple sexual contacts were frequent, warn them to eliminate sexual contacts with anonymous partners, warn them to refrain from intravenous drugs, and advance a policy of safe-sex by advocating the use of condoms whenever possible.<sup>24</sup> In 1984, convincing evidence was proffered that the human T-cell lymphotropic virus Type III (HTLV III), a retrovirus,<sup>25</sup> was the cause of AIDS.<sup>26</sup> Following

20. *Conferees Approve Funds to Fight AIDS*, Wash. Post, Nov. 29, 1985, at A21. *But cf. Budget Watch*, Wash. Post, Feb. 11, 1986, at A15, col. 2 (The Reagan administration cuts AIDS funding).

21. *AIDS Instruction for Students*, Wash. Post, Dec. 2, 1985, at A5, col. 2.

22. *Citing Rise in AIDS Cases, Hughes Names Task Force*, Wash. Post, Nov. 28, 1985, at B12, col. 1.

\* After this comment went to press, the Governor's Task Force issued its report. See *Governor's Task Force on Acquired Immune Deficiency Syndrome, AIDS and Maryland, Policy Guidelines and Recommendations* (Dec. 1986).

23. *AIDS*, Wash. Post, Sept. 4, 1985, Health Section (Magazine), at 3; Peterson, *Screening Blood Donations for AIDS*, FDA CONSUMER, May 1985, at 5-11 [hereinafter Peterson]; Curran, *supra* note 8. *But cf. Researchers Are Optimistic About New Drug for AIDS*, Wash. Post, Nov. 15, 1985, at A13, col. 4 (A new drug called AL721 is a promising candidate for treating AIDS. AL721 attacks the AIDS virus by breaking down the outer shell of the virus. With its shell broken, the AIDS virus cannot infect normal cells. Early test results of AL721 found that the drug restored immune system function to elderly people without any adverse side effects.); *Human Blood Substitute Closer to Reality*, Wash. Post, Nov. 29, 1985, at A1, col. 1 (Scientists are reporting progress on creating a human blood substitute which could be used in surgery where donor blood is to be avoided. If such a substitute is created, then transfusion-associated AIDS can be prevented.)

24. AIDS EDUCATION FUND WHITMAN-WALKER CLINIC, AIDS INFORMATION (1983); see also 42 U.S.C. § 247c(d) (Supp. 1985). This section reads, in pertinent part, as follows:

The Secretary [of Health and Human Services] acting through the Director of the Center of Disease Control, may make grants to public and non-profit private entities for information and education programs on, and for the diagnosis, prevention and control of, acquired immune deficiency syndrome. (emphasis added)

25. A retrovirus is a special strain of virus that has long been known to cause disease in animals, but only recently has been linked to human illness. Peterson, *supra* note 23, at 6. The fact that the cause of AIDS is a retrovirus lends credence to the theory that AIDS had its origin in the African Green Monkey. For example, virologist Myron Essex of Harvard believes that AIDS had its origin in the African Green

that significant discovery, a test that positively identifies the presence of HTLV-III<sup>27</sup> in human blood was developed,<sup>28</sup> thereby allowing for a reliable diagnosis that the blood examined has been exposed to, if not infected by, the AIDS virus.

### III. AIDS AND BLOOD BANKS: THE CAUSAL CONNECTION

Approximately three million Americans require blood transfusions or blood products annually.<sup>29</sup> To satisfy this need, eight million Americans donate approximately twelve million units of blood to blood banks.<sup>30</sup> Although it is not known how much AIDS tainted blood is currently in the blood banking system, approximately 227 blood transfusees have contracted AIDS as a result of tainted blood.<sup>31</sup> That blood is a conduit for the AIDS virus has been established conclusively.<sup>32</sup> Thus, blood banks are on the front line of the battle against the spread of AIDS from those in the high risk group to those not in high risk of contracting AIDS.

The United States Public Health Service has advised those in high risk of contracting AIDS to refrain from donating blood.<sup>33</sup> To further ensure a safer blood supply, the Public Health Service also has advised blood banks to scrutinize potential blood donors more carefully by way

Monkey and that the disease spread to humans who live in close association with the monkeys. Wallis, *AIDS: A Growing Threat*, TIME, Aug. 12, 1985 at 44. Robert Gallo, the director of the National Cancer Institute and the researcher who isolated HTLV-III, also believes that the African Green Monkey could have originated the AIDS virus. *Like No Other Human Disease*, *supra* note 9, at 11.

26. Curran, *supra* note 8; Feorino, *supra* note 10.

27. Silberner, *The Great AIDS Race: Testing the Test*, 127 SCIENCE NEWS 36 (Jan. 19, 1985) (article discussing the AIDS blood test); *Leveraging AIDS*, 135 FORBES 115 (April 8, 1985) (article describing the scramble to produce a blood test for AIDS, and the attendant benefits of being the first to develop the test, namely, a \$70 million market in the U.S. and a \$100 million market overseas).

28. See *infra* notes 36-37 and accompanying text.

29. R. ECKERT & E. WALLACE, SECURING A SAFER BLOOD SUPPLY: TWO VIEWS, at 3 (1985).

30. *Id.*

31. *AIDS Cases In 1985 Exceed Total of All Previous Years*, Wash. Post, Jan. 17, 1986, at A1 col. 4 ("AIDS cases among recipients of blood transfusions continued to grow, more than tripling from 56 in 1984 to 171 in 1985").

32. Peterson, *supra* note 23, at 6 (AIDS has been linked with the transfusion of whole blood); Finkbeiner, *AIDS: Just the Facts*, JOHNS HOPKINS MAGAZINE, Dec. 1985, at 24 ("People who received transfusions with infected blood had the virus injected directly into their bloodstreams, as did hemophiliacs receiving clotting factor, a concentrate of hundreds of different blood donations."); Feorino, *supra* note 10, at 1293 ("Subsequent cases [of AIDS] in persons with hemophilia and recipients of blood transfusions confirmed a pattern of occurrence suggesting that the cause was a transmissible infectious agent.").

33. Peterson, *supra* note 23, at 9. The U.S. Public Health Service stated: "It is vital to the safety of the blood supply that persons who are in groups at increased risk for AIDS continue to follow the U.S. Public Health Service recommendations and to voluntarily refrain from donating."

of increased screening.<sup>34</sup> With the discovery of HTLV-III, a highly effective AIDS blood test was developed — the enzyme-linked immunosorbent assay test (ELISA). The ELISA test detects the presence of HTLV-III in human blood.<sup>35</sup> ELISA is 98.6% effective in its detection of AIDS.<sup>36</sup> However, when ELISA is coupled with another test, the Western blot analysis, a 100% detection rate exists.<sup>37</sup> ELISA and the Western blot analysis do not show conclusively that an individual has AIDS; rather the tests indicate whether an individual has been exposed to the AIDS antibodies.<sup>38</sup> Exposure, however, is enough to preclude the use of the exposed-donor's blood for transfusion purposes. Because blood banks and their blood are perhaps the most common route for heterosexual contraction of AIDS, the ELISA and Western blot analysis tests appear to be an effective method of eliminating the spread of AIDS via blood transfusions.

#### IV. HOW AIDS RELATES TO SERUM HEPATITIS

No court has ruled on the liability of a blood bank for a case of transfusion-associated AIDS that results from a blood bank's blood supply. Only a few such cases have been filed.<sup>39</sup> Owing to the lack of case law precedent, courts probably will analogize transfusion-associated

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34. *Id.* Prior to the present AIDS crisis, blood banks were required to maintain records and medical histories of donors based upon screening questions. See MD. ADMIN. CODE tit. 10 § 10.02.08 (1984) (repealed May 5, 1986 13:9 Md. Admin. Reg. 1030); AMERICAN ASSOCIATION OF BLOOD BANKS, TECHNICAL METHODS AND PROCEDURES, 1-10 (6th ed. 1974).
  35. For an interesting article discussing the constitutional rights of HTLV-III carriers, see Note, *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274 (1986).
  36. Weiss, Goedert, Sarngadharan, Bodner, Gallo, Blattner, AIDS Seroepidemiology Collaborative Working Group [hereinafter Weiss], *Screening Test for HTLV-III (AIDS Agent) Antibodies: Specificity, Sensitivity, and Applications*, 253 J. A.M.A. 2, 221 (Jan. 11, 1985). "Excluding borderline ELISA ratios . . . from analysis, the test is 98.6% specific and 97.3% sensitive for AIDS. If borderline ratios are considered negative, the test is 98.7% specific and 81.8% sensitive, whereas if borderline ratios are considered positive, the test is 92.6% specific and 97.7% sensitive." *Id.* at 224.
  37. *Id.* at 224 ("In another study, using a combination of ELISA and Western blot analysis, 100% of patients with AIDS were found to have evidence of HTLV-III antibodies.")
  38. Peterson, *supra* note 23, at 6 ("The most important thing for donors to understand when they give blood is that the antibody test is not a test for AIDS, and that a positive test does not mean that the person definitely will develop AIDS."). Cf. Perkins, *Does Antibody Screening of Donors Increase the Risk of Transfusion-Associated AIDS?*, 313 NEW ENGLAND JOURNAL OF MEDICINE 2, at 115 (July 11, 1985) (where a doctor expresses his concern that many persons who fear that they have AIDS will try and donate blood for the purpose of getting their blood tested).
  39. *Va. Infant's Parents Sue Over Aids*, Wash. Post, Jan. 8, 1986 at D7, col. 1 (the family of an infant who developed AIDS after receiving a blood transfusion filed suit against the American National Red Cross and Georgetown Hospital in the United States District Court for the District of Columbia for \$20 million); *Kushnick v. Cedars Sinai Medical Center*, No. WEC-84010 (L.A. Sup. Ct. filed Jan. 7, 1985) (allegations of transfusion-associated AIDS).

AIDS cases to the case law dealing with transfusion-associated serum hepatitis.<sup>40</sup> This analogy is appropriate due to the basic similarities between AIDS and serum hepatitis: both diseases are spread via blood<sup>41</sup> and both diseases have the same high risk group members—homosexuals, intravenous drug users, blood transfusees, and sexual partners of the infected.<sup>42</sup> AIDS and serum hepatitis, however, have two major differences. First, AIDS is fatal while serum hepatitis can be treated successfully. Second, the detectibility rate for serum hepatitis, during the period of reported case law, was far less effective than is now possible for the detection of AIDS. When the majority of the transfusion-associated serum hepatitis cases were decided, detectibility for serum hepatitis in human blood ranged from 0% to 30% effective.<sup>43</sup> The current tests for AIDS in human blood are 100% effective.<sup>44</sup> Although the similarities between AIDS and serum hepatitis justify analogizing one to the other, the significant differences, particularly in detectibility rates, should strongly militate for different legal outcomes.

## V. REVIEW OF THE BLOOD LIABILITY CASES

The law relative to liability for tainted blood has its modern origin in the case of *Perlmutter v. Beth David Hospital*.<sup>45</sup> In *Perlmutter*, the plaintiff, Gussie Perlmutter, sued Beth David Hospital for damages resulting from transfusion-associated serum hepatitis. The plaintiff sued the hospital on an implied warranty of fitness theory and averred that the blood sold to her was "not fit or of merchantable quality," because it allegedly contained impurities that caused serum hepatitis.<sup>46</sup> The Court of Appeals of New York held that the plaintiff failed to state a cause of action cognizable under a warranty theory.<sup>47</sup>

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40. Miller, O'Connell, Leipold, Wenzel [hereinafter Miller] *Potential Liability for Transfusion-Associated AIDS*, 253 J. A.M.A. 23, 3420 (June 21, 1985). See Hyland Therapeutics v. Superior Ct., 175 Cal. App.3d 509, 220 Cal. Rptr. 590 (1985) (where the Court of Appeals of California analogized a case dealing with a blood product tainted with AIDS to cases dealing with serum hepatitis).

41. R. ECKERT & E. WALLACE, *supra* note 29, at 9-12 (for serum hepatitis being spread by blood transfusions); see *supra* note 32 (for AIDS being spread by blood transfusions).

42. Miller, *supra* note 40 (for serum hepatitis high risk group); see *supra* note 12 and accompanying text (for AIDS high risk group).

43. See *Perlmutter v. Beth David Hosp.*, 308 N.Y. 100, 123 N.E.2d 792 (1954) (no method for the detection of serum hepatitis in human blood); *Fisher v. Sibley Memorial Hosp.*, 403 A.2d 1130 (D.C. 1979) (test for detection of serum hepatitis in human blood is anywhere from 30% to 70% effective). Cf. R. ECKERT & E. WALLACE, *supra* note 29, at 104 (By 1980, the detection test for serum hepatitis in human blood was over 90% effective.).

44. See *supra* note 37.

45. 308 N.Y. 100, 123 N.E.2d 792 (1954).

46. 308 N.Y. at 103, 123 N.E.2d at 793.

47. 308 N.Y. at 107-108, 123 N.E.2d at 796. It is interesting to note that the New York Supreme Court at Special Term, 128 N.Y.S.2d 176 (1953) and the Appellate Division of the Supreme Court, 283 A.D. 784, 129 N.Y.S.2d 232 (1954), held that Ms. Perlmutter had stated a cognizable warranty action against Beth David Hospital.

The court's decision was predicated on a sales/service dichotomy. The court concluded that the blood transfusion, including the sale of blood, was a service to which no implied warranty could attach.<sup>48</sup> The court reasoned that the hospital was devoted primarily to the cure of the sick and its contract with the plaintiff was to make available the skill and materials to restore her health. The supplying of the blood for the plaintiff's transfusion was "entirely subordinate to [the hospital's] paramount function of furnishing trained personnel and specialized facilities in an endeavor to restore plaintiff's health."<sup>49</sup> The court concluded that the sale or furnishing of the blood by the hospital was only an "incidental and very secondary adjunct" feature of the services to be performed by the hospital.<sup>50</sup> The *Perlmutter* conclusion, that blood is part of a service and thus a service, was, and is, the basis for denying warranty recovery in blood transfusion litigation. The *Perlmutter* conclusion also had the effect of denying recovery in strict liability for victims of transfusion-associated serum hepatitis. The reason for this denial of recovery is that only a product is actionable under Restatement (Second) of Torts § 402A (1980).<sup>51</sup> Because supplying blood was deemed to be a service and strict liability only applies to the sale of products, courts have held § 402A strict liability to be inapposite in transfusion-associated serum hepatitis cases.<sup>52</sup>

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48. 308 N.Y. at 108, 123 N.E.2d at 796. *Cf.* *Napoli v. St. Peters Hosp. of Brooklyn*, 213 N.Y.S.2d 6 (N.Y. Sup. Ct. 1961) (upholding a cause of action for an express warranty that blood was fit.)

49. 308 N.Y. at 106, 123 N.E.2d at 795.

50. *Id.*

51. RESTATEMENT (SECOND) OF TORTS § 402A (1980):

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

- (a) the seller is engaged in the business of selling a product, and
- (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it was sold.

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

- (a) the seller has exercised all possible care in the preparation and sale of his product, and
- (b) the user or consumer has not bought the product from or entered into any contractual relationship with the seller.

52. *Martin v. Southern Baptist Hosp.*, 351 So.2d 351 (La. Ct. App. 1977) (blood is a service and not a commodity and thus strict liability does not apply); *Heirs of Fruge v. Blood Services*, 506 F.2d 841 (5th Cir. 1975) (blood is not a product, rather it is a service to which strict liability does not apply); *Shepard v. Alexian Brothers Hosp. Inc.*, 33 Cal. App.3d 606, 109 Cal. Rptr. 132 (1973) (blood is a service to which no warranty or strict liability recovery is applicable). *Contra* *Reilly v. King County Central Blood Bank, Inc.*, 6 Wash. App. 172, 492 P.2d 246 (1971) (blood has all the attributes of a sale, thus blood is a product to which strict liability applies); *Rostocki v. Southwest Florida Blood Bank*, 276 So.2d 475 (Fla. 1973) (blood is a product intended for human consumption); *In re Community Blood Bank of Kansas City Area, Inc.*, [1967-1970 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 17,728 at 23,010 (F.T.C. 1966) (the F.T.C. held that blood was a product of commerce over which it had regulatory jurisdiction), *rev'd on other grounds*, *Community Blood Bank of*

Since the *Perlmutter* decision, the sales/service dichotomy has been the threshold consideration in transfusion-associated serum hepatitis cases. Consistent with *Perlmutter*, courts have defined blood as a service and therefore have denied recovery under warranty and strict liability for the victims of transfusion-associated serum hepatitis. The *Perlmutter* decision, however, has not escaped its share of disapproval. It has been criticized by commentators<sup>53</sup> and a few courts.<sup>54</sup> The commentators have criticized *Perlmutter* for rendering a policy decision masked by the veil of the sales/service dichotomy. The criticism is that the *Perlmutter* court realized that blood and its abundant availability was important to society, but rather than stating that liability for transfusion-associated serum hepatitis cases would have the socially unacceptable effect of putting blood banks out of business as a consequence of large adverse judgments, the New York court justified its policy decision by resorting to the legalism of the sales/service dichotomy.<sup>55</sup>

Courts criticizing the *Perlmutter* decision have done so on the same basis. For example, the District Court of Appeals of Florida stated in *Community Blood Bank, Inc. v. Russell*,<sup>56</sup> that "it seems to us a distortion to take what is, at least arguably, a sale, twist it into the shape of a service, and then employ this transformed material in erecting the framework of a major policy decision."<sup>57</sup> Similarly, the Court of Appeals of Washington held in *Reilly v. King County Central Blood Bank, Inc.*, that a blood transfusion involved the sale of blood because the blood used in a transfusion had attributes of a sale.<sup>58</sup> According to *Reilly*, a blood transfusion consists of a property transfer through the consent of competent parties for a consideration in money paid, or to be paid.<sup>59</sup> The general

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Kansas City Area, Inc. v. Federal Trade Commission, 405 F.2d 1011 (8th Cir. 1969).

53. See, e.g., Note, *Warranty-Implied Warranty of Quality Held Not Applicable to Blood Furnished by Hospital to Patient*, 103 U. PA. L. REV. 833 (1955); Note, *Sales-Implied Warranties—Action for Breach of Implied Warranties of Quality Not Maintainable Against Hospital That Furnished Impure Blood to Patient*, 69 HARV. L. REV. 391 (1955); Note, *Sales: Implied Warranty: Blood Transfusions*, 18 OKLA. L. REV. 104 (1965).
54. *Reilly v. King County Central Blood Bank, Inc.*, 6 Wash. App. 172, 492 P.2d 246 (1971). *Community Blood Bank, Inc. v. Russell*, 185 So.2d 749 (Fla. Dist. Ct. App. 1966), *aff'd as modified*, 196 So.2d 115 (Fla. 1967); *Cunningham v. MacNeal Memorial Hosp.*, 113 Ill. App.2d 74, 251 N.E.2d 733 (1969), *aff'd as modified*, 47 Ill.2d 443, 266 N.E.2d 897 (1970).
55. See, Boland, *Strict Liability In Tort for Transfusing Contaminated Blood*, 23 ARK. L. REV. 236, 247 (1969) (where Professor Boland states that the *Perlmutter* court justified its policy decision by resorting to a "kind nonunderstanding nonsense, in awkwardly averring that a sale is not a sale. . .").
56. 185 So.2d 749 (Fla. Dist. Ct. App. 1966), *aff'd as modified*, 196 So.2d 115 (Fla. 1967). For a further elaboration of this case, see *infra* notes 64-68 and accompanying text.
57. 185 So.2d at 752.
58. *Reilly v. King County Central Blood Bank, Inc.*, 6 Wash. App. 172, 492 P.2d 246 (1971).
59. 6 Wash. App. at 175, 492 P.2d at 248.

criticism of the *Perlmutter* decision, therefore, has been that the *Perlmutter* court categorized blood as a service in order to provide a legal basis of protection for the important blood industry against claims premised on implied warranty or strict liability.

The *Perlmutter* decision, and the later courts which adopted its sales/service dichotomy, ignored the underlying justification for the denial of recovery in a transfusion-associated serum hepatitis case. Implicit in the *Perlmutter* decision, however, was the court's recognition that the non-detectibility of serum hepatitis in blood required that the danger of tainted blood reaching a transfusee be balanced against putting blood banks out of business as a consequence of excessive adverse judgments.<sup>60</sup> Because excessive adverse judgments against blood banks for non-detectible blood defects conceivably could destroy the blood banking industry, the court implicitly concluded that the small risk of serum hepatitis in blood should be borne by the transfusee. Preserving the blood banking industry by way of this risk shifting advanced the important policy of maintaining an adequate and ready supply of blood for the betterment of society. In essence, then, the *Perlmutter* court employed the sales/service dichotomy as the "framework of a major policy decision."<sup>61</sup>

The *Perlmutter* sales/service dichotomy, however, was formulated in a situation involving a suit against a hospital, not a blood bank. Most courts have employed *Perlmutter* in a hospital transfusion-associated serum hepatitis liability case,<sup>62</sup> only a few courts have extended *Perlmutter* to suits against a blood bank in a transfusion-associated serum hepatitis case.<sup>63</sup> The rationale behind this disparate treatment is that blood banks play a different role than hospitals in the blood transfusion process. Hospitals generally perform the blood transfusion itself. The activities of the blood bank, in contrast, generally resemble the activities of a supplier of goods. That is, blood banks solicit, collect, store, and sell or furnish their product—blood—to hospitals, who in turn perform the actual transfusions. It was because of the blood bank's similarity to a supplier that the Florida court in *Community Blood Bank, Inc. v. Russell*<sup>64</sup> refused to apply *Perlmutter* in a suit involving a blood bank, thus becoming the first court to refuse to apply *Perlmutter* in a suit against a blood bank.

In *Community Blood Bank*, the plaintiff contracted serum hepatitis from a blood transfusion administered to her while in a Florida hospital.

60. See 308 N.Y. at 106-7, 123 N.E.2d at 795.

61. See *supra* note 57 and accompanying text.

62. See, e.g., *Fisher v. Sibley Memorial Hosp.*, 403 A.2d 1130 (D.C. 1979); *Lovett v. Emory Univ., Inc.*, 116 Ga. App. 277, 156 S.E.2d 923 (1967); *Dibblee v. Dr. W. H. Groves Latter-Day Saints Hosp.*, 12 Utah 2d 241, 364 P.2d 1085 (1961).

63. *Goetz v. J.K. and Suise L. Waldey Research Inst. and Blood Bank*, 350 S.W.2d 573 (Tex. Civ. App. 1961); *Koening v. Milwaukee Blood Center, Inc.*, 23 Wis.2d 324, 127 N.W.2d 50 (1964); *Whitehurst v. American Nat'l Red Cross*, 1 Ariz. App. 326, 402 P.2d 584 (1965); *Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc.*, 270 Minn. 151, 132 N.W.2d 805 (1965).

64. 185 So.2d 749 (Fla. Dist. Ct. App. 1966), *aff'd as modified*, 196 So.2d 115 (Fla. 1967).

The plaintiff decided not to bring an action against the hospital, rather the plaintiff sued the blood bank which had supplied the blood for her transfusion. The defendant blood bank moved to dismiss the claim, relying on *Perlmutter*.<sup>65</sup> The Florida trial court granted the defendant's motion, but the Florida District Court of Appeals, Second District, reversed.<sup>66</sup> The Supreme Court of Florida affirmed the judgment of the Second District Court of Appeals with respect to the fact that the plaintiff had stated a cause of action.<sup>67</sup> The concurring opinion, by Florida Supreme Court Justice Roberts, laid the foundation for the subsequent assaults on the *Perlmutter* decision. Justice Roberts stated:

A transaction whereby a blood bank, which is engaged in the business of collecting and distributing blood, transfers the title to the commodity to a patient for a consideration, is unquestionably a 'sale' . . . . Nor can it be questioned that the commodity in question — blood supplied for the purpose of a blood transfusion — is a product 'intended for human consumption' quite as much as is a vaccine, or a food product; and it is well settled in this jurisdiction that the manufacturer or producer of a product intended for human consumption or intimate body use is held strictly liable, without fault, for consequential injuries to a consumer or user resulting from a defect in such product.<sup>68</sup> (citations omitted)

By expressly holding that blood is a product, the Supreme Court of Florida paved the way for warranty and strict liability recovery against blood banks for transfusion-associated diseases.

Although *Community Blood Bank* set the attack on *Perlmutter* in motion, it was the case of *Cunningham v. MacNeal Memorial Hospital*<sup>69</sup> that sent blood industry lobbyists scurrying to their legislatures for protection from *Cunningham's* radical departure from *Perlmutter*. In *Cunningham*, the plaintiff, Francis Cunningham, received several blood transfusions at MacNeal Memorial Hospital. She later contracted serum hepatitis and required additional hospitalization.<sup>70</sup> Cunningham filed suit against the hospital alleging strict liability because the hospital "sold and supplied" her blood that was "defective and in an unreasonably dangerous condition and was in that condition at the time it left the hands of the defendant."<sup>71</sup> Relying on *Perlmutter*, MacNeal Hospital moved to dismiss the plaintiff's complaint. MacNeal Hospital averred that the plaintiff erroneously was seeking to state a cause of action "against the

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65. 196 So.2d at 117.

66. 185 So.2d at 755-56.

67. 196 So.2d 115 (Fla. 1967) (Roberts, J., concurring specially).

68. 196 So.2d at 118-19.

69. 113 Ill. App.2d 74, 251 N.E.2d 733 (1969), *aff'd as modified*, 47 Ill.2d 443, 266 N.E.2d 897 (1970).

70. 113 Ill. App.2d at 75, 251 N.E.2d at 733.

71. 113 Ill. App.2d at 75-76, 251 N.E.2d at 733.

defendant upon the theory that blood is a product, that such product was furnished in a defective and unreasonably dangerous condition and that by reason thereof defendant is strictly liable to plaintiff for her alleged damages."<sup>72</sup> MacNeal Hospital further stated that such a claim was totally repugnant to the established precedents based upon *Perlmutter*. The trial court granted the motion to dismiss. The Appellate Court of Illinois reversed, relying on *Community Blood Bank*, and stated that to "take a sale and twist it into a service is a distortion."<sup>73</sup> The appellate court held that both MacNeal Hospital and the blood bank that supplied the tainted blood could be liable.

On appeal to the Supreme Court of Illinois, MacNeal reasserted its *Perlmutter* argument, coupled with an argument that had its basis in comment (k) of the Restatement (Second) of Torts § 402A.<sup>74</sup> Comment (k) essentially recognizes the societal importance of some products.<sup>75</sup> Comment (k) states that there are some products which are incapable of being made completely safe for their intended use, but because their use is important to society, public policy favors their use. An example of such a product is the Pasteur treatment for rabies which can lead to serious and damaging consequences when used. However, public policy favors the use of the product because the risk of adverse consequences is generally slight. Therefore, the risk of the product's dangerous consequences is to be borne by the consumer, because the product, according to comment (k), is neither "defective" nor "unreasonably dangerous" if properly prepared and accompanied by proper directions and warnings.<sup>76</sup>

MacNeal Hospital, by asserting the comment (k) argument, recognized the developing trend that blood was indeed a product. However, MacNeal qualified its concession that blood was a product by stating that it was a product incapable of being made safe. Hence, MacNeal argued that § 402A strict liability did not attach to blood because blood was "incapable of being safe" from serum hepatitis because serum hepatitis could not be detected in blood with any certainty.

The Supreme Court of Illinois, however, rejected MacNeal Hospital's assertions, held that the providing of the blood was a sale, and ex-

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72. 113 Ill. App.2d at 76, 251 N.E.2d at 734.

73. 113 Ill. App.2d at 85, 251 N.E.2d at 738.

74. 47 Ill.2d at 447-451, 266 N.E. 2d at 900, 903-4.

75. RESTATEMENT (SECOND) OF TORTS § 402A comment K (1980):

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. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified. . . . Such a product, properly prepared, and accompanied by proper directions and warnings, is not defective, nor is it unreasonably dangerous. . . .

76. *Id.*

tended § 402A to cover both hospitals and blood banks in the realm of transfusion-associated diseases. In reference to MacNeal's comment (k) argument, the court held that comment (k) only applied to products that were not *impure* and which, even if properly prepared, involved a substantial risk of injury to the user. Because the blood that caused Cunningham's illness was impure, comment (k) was not applicable.<sup>77</sup> Therefore, the *Cunningham* court expressly rejected *Perlmutter* and held that hospitals and blood banks were strictly liable for tainted blood that results in a transfusion-associated disease.<sup>78</sup>

*Cunningham* was criticized for its narrow reading of comment (k).<sup>79</sup> The Court of Appeals of New Mexico, in *Hines v. St. Joseph's Hospital*,<sup>80</sup> summarized this criticism:

[the] *Cunningham* court, by categorically limiting the applicability of [comment (k)] to 'pure' products stultified the flexible policy behind the exception. Instead of a balancing of the dangers of a particular product against its benefits, *Cunningham* would categorize a large segment of products as vulnerable to strict liability without regard to social benefits.<sup>81</sup>

The gist of this criticism is that a product, such as blood, which is highly beneficial to society should not be labeled "unreasonably dangerous" within the meaning of § 402A unless a reliable test is available to detect and remove the dangers from that product. Even in the face of this criticism, some courts began to adopt *Cunningham* and reject *Perlmutter*.<sup>82</sup>

Fearing a nationwide collapse of their *Perlmutter* immunity, the blood industry lobbied state legislatures to codify *Perlmutter* and thus render void court decisions like *Community Blood Bank* and *Cunningham*. A majority of the state legislatures did so.<sup>83</sup> A typical codification

77. 47 Ill.2d at 456, 266 N.E.2d at 900.

78. 47 Ill.2d at 457-58, 266 N.E.2d at 904.

79. See, e.g., Note, *Torts - Strict Liability - Strict Liability in Tort Held Applicable in Suit by Patient Against Hospital for Injuries Received from Transfusion of Defective Blood*, 24 VAND. L. REV. 645, 653 (1971); Note, *Products Liability - Hospital Blood Bank - Restatement of Torts § 402A - Transfusion of Blood Which Contains Hepatitis Virus Is A Sale and Hospital is Strictly Liable in Tort for Resultant Injury to Patient*, 16 VILL. L. REV. 983, 1002-3 (1971); Note, *Liability for Serum Hepatitis In Blood Transfusions*, 32 OHIO ST. L.J. 585, 597-98 (1971).

80. 86 N.M. 763, 527 P.2d 1075, cert. denied, 87 N.M. 111, 529 P.2d 1232 (1974).

81. 86 N.M. at 768, 527 P.2d at 1077.

82. See *Reilly v. King County Central Blood Bank, Inc.*, 6 Wash. App. 172, 492 P.2d 246 (1971); *Brody v. Overlook Hosp.*, 121 N.J. Super. 299, 296 A.2d 668 (1972), rev'd, 127 N.J. Super. 331, 317 A.2d 392 (1973), aff'd, 66 N.J. 448, 332 A.2d 596 (1975); *Belle Bonfil's Memorial Blood Bank v. Hansen*, 579 P.2d 1158 (Colo. 1978) (en banc).

83. ALA. CODE § 7-2-314(4) (Repl. Vol. 1984 & Cum. Supp. 1986); ALASKA STAT. § 45.02.316(2)(e) (Cum. Supp. 1985); ARIZ. REV. STAT. ANN. § 32-1481 (1976); ARK. STAT. ANN. § 82-1608 (Repl. Vol. 1976 & Supp. 1985); CAL. HEALTH & SAFETY CODE § 1606 (West 1979 & Supp. 1986); COLO. REV. STAT. § 13-22-104(2) (1973 & Supp. 1985); CONN. GEN. STAT. ANN. § 19a-280 (West 1986); DEL. CODE ANN. tit. 6, § 2-316(5) (Revised 1974); D.C. CODE ANN. § 28:2-314 (1984) (this is

of *Perlmutter*, generally referred to as a blood immunity statute, reads, in pertinent part, as follows:

The implied warranties of merchantability and fitness shall not be applicable to a contract for the sale, procurement, processing, distribution, or use of . . . whole blood, plasma, blood products, or blood derivatives. Such . . . whole blood, plasma, blood products or blood derivatives shall not be considered commodities subject to sale or barter, and the . . . transfusion or other transfer of such substances into the human body shall be considered a medical service.<sup>84</sup>

Thus, after a decade and half of change, the legislatures returned to the *Perlmutter* sales/service dichotomy as the grounds upon which transfusion-associated disease cases were to be decided. In so doing, most of the legislatures completely ignored the policy underlying the denial of liability in a transfusion-associated serum hepatitis case.<sup>85</sup> That is, because serum hepatitis was undetectable in human blood, the enormous social benefit of an ample and ready supply of blood far exceeded the slight risk of a transfusee contracting serum hepatitis via a blood transfusion. The

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the general implied warranty section which was interpreted in *Fisher v. Sibley Memorial Hosp.*, 403 A.2d 1130 (D.C. 1979), to preclude implied warranty recovery in transfusion-associated serum hepatitis litigations); FLA. STAT. ANN. § 672.316(5) (West Supp. 1986); GA. CODE ANN. § 11-2-316(5) (1982 & Supp. 1986); HAWAII REV. STAT. §§ 325-91, 327-51 (Repl. Vol. 1976); IDAHO CODE § 39-3702 (1980 & Supp. 1985); ILL. ANN. STAT. ch. 111 1/2, §§ 5101, 5102, 5103 (Smith-Hurd Supp. 1986); IND. CODE ANN. § 16-8-7-2 (Burns Repl. Vol. 1983); IOWA CODE ANN. § 142A.8 (West 1972 & Supp. 1986); KAN. STAT. ANN. § 65-3701 (1985); KY. REV. STAT. ANN. § 139.125 (Baldwin 1983); LA. REV. STAT. ANN. § 9:2797 (West Supp. 1986); ME. REV. STAT. ANN. tit. 11, § 2-108 (Supp. 1985-86); MD. HEALTH-GENERAL CODE ANN. § 18-402 (1982 & Supp. 1986); MASS. GEN. LAWS ANN. ch. 106, § 2-316(5) (West Supp. 1986); MICH. COMP. LAWS ANN. § 333.10108 (West Supp. 1986); MINN. STAT. ANN. § 525.928 (West 1975); MISS. CODE ANN. § 41-41-1 (1981); MO. ANN. STAT. § 431.069 (Vernon Supp. 1986); MONT. CODE ANN. § 50-33-102 (1985); NEB. REV. STAT. 71-4001 (1981); NEV. REV. STAT. § 460.010 (1985); N.H. REV. STAT. ANN. § 507:8-b (Repl. Vol. 1983); N.J. STAT. ANN. § 26:2A-7 (West Supp. 1985); N.M. STAT. ANN. § 24-10-5 (Repl. Pamphlet 1981 & Supp. 1985); N.Y. PUB. HEALTH LAWS § 580(4) (McKinney Cum. Supp. 1986); N.C. GEN. STAT. § 130A-410 (Cum. Supp. 1985); N.D. CENT. CODE § 41-02-33(3)(d) (Repl. Vol. 1983); OHIO REV. CODE ANN. § 2108.11 (Page 1976 & Supp. 1984); OKLA. STAT. ANN. tit. 63, § 2151 (West 1984); OR. REV. STAT. § 97.300 (Repl. Part 1985); 42 PA. CONS. STAT. ANN. § 8333 (Purdon 1982); S.C. CODE ANN. § 44-43-10 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 57A-2-315.1 (Revision 1980); TENN. CODE ANN. § 47-2-316(5) (Repl. Vol. 1979); TEX. CIV. PRAC. & REM. CODE ANN. §§ 77.001-.004 (Vernon 1986); UTAH CODE ANN. § 26-31-1 (Repl. Vol. 1984); VA. CODE § 32.1-297 (Repl. Vol. 1985); WASH. REV. CODE ANN. § 70.54.120 (1975); W. VA. CODE § 16-23-1 (Repl. Vol. 1979); WIS. STAT. ANN. § 146.31 (Supp. Pamp. 1986).

84. TENN. CODE ANN. § 47-2-316(5) (Repl. Vol. 1979).

85. Some states have given policy justifications for their blood immunity statutes, but have nonetheless relied upon the *Perlmutter* service definition of blood. See, e.g., COLO. REV. STAT. § 13-22-104(1) (1973 & Supp. 1985); ILL. ANN. STAT. ch. 111 1/2, § 5101 (Smith-Hurd Supp. 1986); TEX. CIV. PRAC. & REM. CODE ANN. § 77.002 (Vernon 1986).

denial of liability in a few cases eliminated the possibility that excessive adverse judgments would force blood banks out of business. The legislatures, instead of stating an express policy justification for the denial of liability, retreated into the *Perlmutter* legalism at the expense of the basic public policy consideration underlying § 402A strict liability. Justice Traynor, in his famous concurrence in *Escola v. Coca Cola Bottling Co.*,<sup>86</sup> identified that policy concern:

Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot.<sup>87</sup>

Courts, unlike most of the legislatures, understood that policy concern. One court decision stressed that if the basic policy considerations of strict liability were found to be present in a blood liability case, then strict liability would be applied "regardless of whether such activity by . . . [the] defendant [blood bank] be characterized as a sale or service."<sup>88</sup> Thus, the public policy concern of strict liability favors that the product manufacturers bear the risks and costs of injuries that result from products. The blood immunity statutes, however, place the risks upon the consumers in contravention of the public policy concern of strict products liability.

## VI. BLOOD IMMUNITY STATUTES: A CLOSER LOOK

The general reaction to *Cunningham*, as discussed above, was the enactment of blood immunity statutes by a majority of state legislatures.<sup>89</sup> In general, these statutes expressly state that any activity dealing with blood is a service upon which warranty and strict liability do not attach.<sup>90</sup> In essence, the state legislatures codified the *Perlmutter* decision.

Although it might have seemed that these statutes would have resolved the *Perlmutter* type transfusion-associated disease cases, they did not. Plaintiffs continued to bring suits with the strategy of attacking the blood immunity statutes. Most of these attacks could have been avoided

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86. 24 Cal.2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring).

87. 24 Cal.2d at 462, 150 P.2d at 439-40; cf. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 367 (1965) (where Judge Traynor stated that § 402A would not impose strict liability on unavoidably unsafe products. Judge Traynor characterized blood as a "classic example" of an unavoidably unsafe product.).

88. *Brody v. Overlook Hosp.*, 127 N.J. Super. 331, 317 A.2d 392 (1974), *aff'd*, 66 N.J. 448, 332 A.2d 596 (1975).

89. See *supra* note 83. See also *AIDS Suits Focus on Blood Safeguards*, Wall Street Journal, Aug. 20, 1984, § 2, at 17, col.2.

90. See *supra* notes 83-84.

had the state legislatures expressly adopted the public policy rationale of preserving an adequate supply of blood as the basis of their legislation, rather than the strained *Perlmutter*-type service categorization.

The first attacks on the blood immunity statutes were on constitutional grounds.<sup>91</sup> For example, in *McAllister v. American National Red Cross*,<sup>92</sup> the plaintiff alleged that the Georgia blood immunity statute was unconstitutional under the Georgia and United States Constitutions.<sup>93</sup> McAllister's claim under the Georgia Constitution was that the blood immunity statute violated the provision which forbade the issuance of special laws that were contrary to general laws.<sup>94</sup> The plaintiff argued that the Georgia law constituted a special law because it exempted manufacturers of blood from the general law of strict products liability. The Supreme Court of Georgia held that the blood immunity statute was a general law because it operated uniformly throughout Georgia in spite of the fact that it excepted blood manufacturers from liability.<sup>95</sup> Further, the court held that because the blood immunity statute applied uniformly to a specific class of affected persons, and had a reasonable general effect on those persons, the law was a general law.<sup>96</sup> Hence, plaintiff's state constitutional attack failed. McAllister's federal constitutional claim was predicated upon the privileges and immunities clause of the Fourteenth Amendment.<sup>97</sup> While McAllister claimed that the statute abridged his rights as a national citizen, he neglected to aver those abridged rights. Consequently, the court refused to invalidate the statute under the privileges and immunities clause. Thus, the Georgia court, like other courts which faced similar constitutional claims, upheld the blood immunity statute as constitutional.<sup>98</sup>

Following the failure of the constitutional attacks, a new litigation

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91. See *McDaniel v. Baptist Memorial Hosp.*, 352 F. Supp. 690 (W.D. Tenn. 1971), *aff'd*, 469 F.2d 230 (6th Cir. 1972) (the Tennessee blood immunity statute does not violate equal protection or due process); *Heirs of Fruge v. Blood Services*, 365 F. Supp. 1344 (W.D. La. 1973), *aff'd*, 506 F.2d 841 (5th Cir. 1975) (Louisiana law extinguishing all causes of action except negligence against blood banks does not violate due process); *Juneau v. Interstate Blood Bank, Inc. of Louisiana*, 333 So.2d 354 (La. Ct. App. 1976) (Louisiana blood immunity statute does not violate Louisiana Constitution.)

92. 240 Ga. 246, 240 S.E.2d 247 (1977).

93. 240 Ga. at 248, 240 S.E.2d at 249.

94. *Id.* GA CONST. art. I, § II.

¶ VII stated in pertinent part:

"Laws of general nature shall have uniform operation throughout the State, and no special law shall be enacted in any case for which provision has been made by an existing general law."

95. 240 Ga. at 248-249, 240 S.E.2d at 249.

96. *Id.*

97. 240 Ga. at 249, 240 S.E.2d at 250. U.S. CONST. amend. XIV, § 1, states in pertinent part:

"No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States."

98. 240 Ga. at 249, 240 S.E.2d at 250. See *supra* note 91 for court decisions where blood immunity statutes were upheld as constitutional.

strategy was adopted. Plaintiffs attempted to limit the blood immunity statutes to their express and plain language. As noted, a majority of the blood immunity statutes state that blood and blood related activities are deemed to be services.<sup>99</sup> Because of this definition, warranty liability does not attach to blood and blood related activities. Plaintiffs, then, conceded that the statutes denied them warranty recovery. However, the plaintiffs asserted that the statutes, in their plain language, did not foreclose strict liability recovery. Like the constitutional challenges, these attacks failed because the courts, acting in a legislative role, looked beyond the plain language of the statute and ruled against strict liability recovery based upon public policy. That is, the courts stated that the societal benefits of an adequate supply of blood outweighed the risk that some blood tainted with serum hepatitis would infect a blood transfusee.<sup>100</sup>

The critical question, however, remains: Do the blood immunity statutes limit all liability and thus effectively immunize the blood industry? The answer depends upon the language and scope of the blood immunity statute in question.

Generally, the statutes have not foreclosed liability in the area of blood bank negligence and willful infliction of harm. But the solace contained in the fact that the blood industry is not immunized completely quickly evaporates when the intricate nature of proving negligence in a transfusion-associated disease case is considered.<sup>101</sup> Furthermore, the doctrine of *res ipsa loquitur* is unavailable in transfusion-associated serum hepatitis cases.<sup>102</sup> The doctrine is inapplicable because it requires a

99. See *supra* note 84 and accompanying text for language of a representative blood immunity statute.

100. See *McDaniel v. Baptist Memorial Hosp.*, 352 F. Supp. 690 (W.D. Tenn. 1971), *aff'd*, 469 F.2d 230 (6th Cir. 1972) (while the Tennessee law is couched in language of warranty, the intent was to preclude all liability except negligence); *Shepard v. Alexian Brothers Hosp. Inc.*, 33 Cal. App.3d 606, 612, 109 Cal. Rptr. 132, 136 (1973) ("[T]here is a strong public policy in favor of promoting an adequate supply of blood. Notwithstanding the danger from latent hepatitis virus, blood transfusions result in a significant net gain in lives."); *Martin v. Southern Baptist Hosp.*, 352 So.2d 351 (La. Ct. App. 1977) (the public policy of the Louisiana blood immunity statute recognizes the lifesaving need for blood and thus strict liability as grounds for recovery will be denied.)

101. See *Sussman, Blood Transfusion Accidents*, 1 *TRAUMA* 5, 86 (1960); 2 *GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE*, 38.34-35 (1984); *COURT ROOM MEDICINE - VOLUME 3B DEATH, Blood Transfusion Reactions for Blood Transfusion Problems*, § 25.21 (1985). For cases dealing with negligence in transfusion-associated defect cases see *Morse v. Riverside Hosp.*, 44 Ohio App.2d 422, 339 N.E.2d 846 (1974) (hepatitis); *Juneau v. Interstate Blood Bank, Inc. of Louisiana*, 333 So.2d 354 (La. Ct. App. 1976) (hepatitis); *Tufaro v. Methodist Hosp., Inc.*, 368 So.2d 1219 (La. Ct. App. 1979) (transfused-malaria).

102. See *Schmaltz v. St. Luke's Hosp.*, 33 Colo. App.351,521 P.2d 787 (1974), *rev'd in part*, 188 Colo. 353, 534 P.2d 781 (Colo. 1975) (*en banc*) (Supreme Court of Colorado affirmed lower court's decision concerning *res ipsa loquitur*); *Morse v. Riverside Hosp.*, 44 Ohio App. 2d 422, 339 N.E.2d 846 (1974); *Joseph v. Dr. W. H. Groves Latter-Day Saints Hosp.*, 10 Utah2d 94, 348 P.2d 935 (1961).

presumption of negligence. Because serum hepatitis cannot be effectively detected in blood, a presumption that a blood bank was negligent cannot be drawn solely from the fact that the transfusee received a blood transfusion that later resulted in serum hepatitis.<sup>103</sup>

Absent the applicability of *res ipsa loquitur*, a plaintiff is relegated to proving negligence without the aid of a *res ipsa* presumption. Such a proof is very difficult because the blood banking industry is heavily regulated by local and state health departments that issue many regulations and procedures to ensure safe blood collection, storage, and sale.<sup>104</sup> To prove negligence, then, a plaintiff must show a deviation from these regulations which, in many cases, is virtually impossible because of the professionalism of blood banks. Further, blood banks tend to adhere rigidly to the regulatory procedures in order to protect the integrity of their business and their licensure status. Finally, a negligence action for transfusion-associated serum hepatitis is compounded by the fact that serum hepatitis is not effectively detectible in human blood. Thus, if a blood bank properly screens potential donors but serum hepatitis is nevertheless found in the bank's blood, it is not because the blood bank was negligent, rather it is due to the unavailability of an effective test for detecting serum hepatitis in human blood. Given these difficulties, it seems that the state legislatures have effectively immunized the blood banking industry from liability for transfusion-associated serum hepatitis by limiting liability to negligence.<sup>105</sup>

All blood immunity statutes are not, however, identical in language and scope. A few states deny warranty and strict liability for a transfusion-associated virus only if the virus in the human blood cannot be detected or removed by the reasonable use of scientific procedures or techniques.<sup>106</sup> In the states of Florida, Hawaii, Idaho, Louisiana, Missouri, Michigan, Montana and Virginia liability in a transfusion-associated virus suit is not based solely on a codification of *Perlmutter*. Rather, liability is dependent upon the detectibility of the virus or defect in the human blood.<sup>107</sup> These states have created a hybrid warranty scheme. That is, if a test is available for effective detection of a blood virus or defect, the blood bank will lose its immunity as to that virus or defect, and will be liable in warranty and strict liability for that defect. In essence, if a scientifically validated test is available to detect a virus or de-

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103. See *Schmaltz*, *supra* note 102.

104. See *Tufaro v. Methodist Hosp., Inc.*, 368 So.2d 1219 (La. Ct. App. 1979) (dealing with interviewing blood donors and two blood bank regulators — the American Association of Blood Banks and the National Institute of Health); *Morse v. Riverside Hosp.*, 44 Ohio App.2d 422, 339 N.E.2d 846 (1974) (discussing regulatory measures and negligence). See also MD. ADMIN. CODE tit. 10, § 10.02 (1986) (for Maryland blood bank regulations).

105. For cases where a negligence cause of action failed in a transfusion-associated defect suit, see *supra* note 101.

106. The states include: Florida, Hawaii, Idaho, Louisiana, Missouri, Michigan, Montana, and Virginia. For the statutory citations see *supra* note 83.

107. *Id.*

fect in a blood sample, then the blood bank will be negligent *per se* if any of its tainted blood causes an injury that should have been detected. Negligence exists even if the blood bank used the test because it is presumed the "effective" test was administered negligently. Until this act of negligence occurs, no warranty action can be maintained. Absent the warranty action, there can be no strict liability action. Thus, in order to invoke the contract theory of warranty, one initially must invoke the tort theory of negligence. Once the tort theory is invoked, the contract theory will attach, which in turn, will activate the theory of strict liability. Under these detectibility statutes, an individual essentially has a new form of action predicated upon negligence. That action, because it is based upon statutory language, aptly may be called the "positive-tort" theory of recovery.<sup>108</sup>

A short hypothetical will aid in the understanding of how the positive-tort theory operates. Plaintiff receives a blood transfusion from defendant blood bank. Plaintiff then contracts a virus from the transfusion and establishes a causal connection between the virus and the blood bank's blood. If the virus in question is detectible by a scientifically validated test, the blood bank has committed an act of negligence either by not using the test or by using the test in a negligent fashion. Plaintiff, because of defendant's negligence, is now permitted to claim a warranty or strict liability theory of recovery against the blood bank for damages incurred as a result of the transfusion-associated virus.

If the virus contracted by the plaintiff is undetectible, then no negligence exists and, consequently, there is no cognizable claim of recovery in warranty or in strict liability. Hence, the positive-tort theory recognizes the important public policy of blood availability by immunizing blood banks from warranty and strict liability recovery when a defect is undetectible. However, in a detectibility situation, the individual rights of the victim will be advanced by allowing the use of warranty and strict liability recovery. Therefore, the positive-tort theory provides a balance between the conflicting interests of individual rights to recovery versus society's need for an abundant blood supply. The balance achieved protects blood availability by denying warranty and strict liability recovery for non-detectible defects. Individual rights are protected by allowing warranty and strict liability recovery for detectible defects. This balancing provides for a safer blood supply and a more equitable allocation of risks in the realm of blood transfusions. Under the positive-tort theory, the blood transfusee does not bear all the risks as do transfusees under the *Perlmutter* codifications.

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108. The basic idea for the detectibility statutes having a so-called "hybrid" form of implied warranty recovery was stated by Judge Spector of the Florida District Court of Appeals in *Williamson v. Memorial Hosp. of Bay County*, 307 So.2d 199, 201 (Fla. Dist. Ct. App. 1975) ("In essence, the legislature has created a hybrid form of implied warranty and by invoking what courts refer to as its infinite legislative wisdom, that body has made a legal concept ordinarily cognizable in the law of sales now applicable to the law of negligence.").

In summary, recovery against blood banks is based upon positive law. The majority view adheres to the *Perlmutter* codification thereby effectively immunizing the blood banking industry. The minority approach precludes warranty and strict liability recovery *only* if the virus or defect in the blood cannot be detected by a scientifically validated test. The minority approach, namely the positive-tort theory, properly balances the two conflicting interests involved in transfusion-associated virus litigations, i.e., the need for an adequate and ready supply of blood which might be jeopardized if blood banks were to be liable for non-detectible defects, and the need to protect the individual's right to recover from tainted blood. If a defect is non-detectible, the need to protect blood banks from court judgments and thus guarantee an adequate supply of blood outweighs the small risk of a few transfusion-associated victims. But, if a defect is detectible, then public policy favors the individual's right to recovery for that detectible defect. Such individual recoveries would encourage the use of detectibility tests and thus result in a safer blood supply.

#### VII. TRANSFUSION-ASSOCIATED AIDS: RECOVERY UNDER TODAY'S LAW

AIDS has a detectibility rate of between 97.3% and 98.6% under the ELISA test.<sup>109</sup> When the ELISA test is coupled with the Western blot analysis, the effective detectibility rate is 100% for AIDS antibodies.<sup>110</sup> Although it is true that a positive reaction under these tests does not show conclusively that an individual has AIDS, it does show that an individual has been exposed to AIDS antibodies and as such provides a sufficient basis to reject the blood for transfusion purposes.<sup>111</sup> Unlike the blood tests for serum hepatitis which were ineffective, the AIDS blood tests are very effective and, as a result, should afford transfusion-associated AIDS' victims with excellent chances of recovery against blood banks.

Whether a plaintiff will be able to recover against a blood bank for a case of transfusion-associated AIDS will be determined by the applicable law of each respective jurisdiction. Where the applicable law mirrors the *Perlmutter* decision, recovery will be unlikely. Where, however, the applicable law mirrors the positive-tort theory, recovery will be possible.

Illustrative of the statutes which mirror *Perlmutter* is the California blood immunity statute. That statute reads, in pertinent part, as follows:

The procurement, processing, distribution, or use of whole blood, plasma, blood products, and blood derivatives for the purpose of . . . transfusing the same . . . into the human body shall be construed to be, and is declared to be, for all purposes

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109. See *supra* note 36.

110. See *supra* note 37.

111. See *supra* note 32.

whatsoever, the rendition of a service by each and every person, firm, or corporation participating therein, and shall not be construed to be . . . , a sale of such whole blood, plasma, blood products, or blood derivatives for any purpose or purposes whatsoever.<sup>112</sup>

Because blood is, by statutory definition, a service, warranty liability is inapposite as the basis of recovery for transfusion-associated AIDS. Furthermore, the California statute has been interpreted to preclude strict liability recovery.<sup>113</sup> Therefore, a victim of transfusion-associated AIDS in California will have to rely on a cause of action founded in negligence to recover for damages.

The doctrine of *res ipsa loquitur*, although inapplicable in earlier transfusion-associated serum hepatitis cases,<sup>114</sup> should be allowed to operate for a plaintiff in a transfusion-associated AIDS case. The reason for its disallowance in the serum hepatitis cases — serum hepatitis being undetectable and thus no presumption of negligence could be drawn from the release of tainted blood from the blood bank — is not present in transfusion-associated AIDS suits. AIDS is scientifically detectable and thus a presumption that the blood bank was negligent can be drawn from the fact that AIDS tainted blood was released from the blood bank for a transfusion. That presumption is that the blood bank negligently administered the AIDS detection tests, or failed to use the tests at all.

However, as evidenced in a recent California case, the fact that AIDS was detectable in blood was outweighed by the public policy ideals imbued in the California blood immunity statute. In *Hyland Therapeutics v. Superior Court*,<sup>115</sup> the heirs and widow of a hemophiliac brought suit against plasma manufacturers for a fatal case of AIDS contracted by the hemophiliac as a result of defendant-manufacturers' blood derived product.<sup>116</sup> The court took notice of the fact that AIDS is detectable through testing.<sup>117</sup> However, the court held that a plain reading of the California statute expressed a legislative intent that the protection of the blood supply was of the utmost importance, and that the plaintiffs should address their arguments to the California legislature.<sup>118</sup> Hence, this case seems to suggest that, at least in California, the detectibility of AIDS in human blood will not allow for a recovery because the policy of protect-

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112. CAL. HEALTH & SAFETY CODE § 1606 (West 1979 & Supp. 1986).

113. *McDonald v. Sacramento Medical Found. Blood Bank*, 62 Cal. App.3d 866, 133 Cal. Rptr. 444 (1976); *Klaus v. Alameda-Contra Costa Medical Ass'n Blood Bank, Inc.*, 62 Cal. App. 3d 417, 133 Cal. Rptr. 92 (1976); *Shepard v. Alexian Brothers Hosp., Inc.*, 33 Cal. App.3d 606, 109 Cal. Rptr. 132 (1973).

114. For information relative to the fact that the doctrine of *res ipsa loquitur* was inapplicable in transfusion-associated serum hepatitis case see *supra* notes 102-103 and accompanying text.

115. 175 Cal. App.3d 509, 220 Cal. Rptr. 590 (1985).

116. 175 Cal. App.3d at 511-12, 220 Cal. Rptr. at 591.

117. 175 Cal. App.3d at 513, 220 Cal. Rptr. at 591.

118. 175 Cal. App.3d at 514, 220 Cal. Rptr. at 593.

ing an adequate blood supply greatly outweighs the rights of individual victims of transfusion-associated AIDS.

The main problem with the *Perlmutter* codifications like that enacted in California is that they were enacted in response to the once undetectable virus of serum hepatitis. Because serum hepatitis was undetectable, the courts employed the service definition to shield the blood industry from the dangers of warranty and strict liability recoveries. The legislatures essentially codified *Perlmutter* in response to the judicial trends recognizing that blood was a product, and holding the blood industry liable under warranty and strict liability. The AIDS virus, however, is detectable in human blood. To permit the scope of antiquated statutes to quell recovery in transfusion-associated AIDS cases is irresponsible and dangerous. This is because public policy requires that blood banks utilize effective detection methods to ensure a safe blood supply. Because blood is a product, the allowance of warranty and strict liability recovery for victims of transfusion-associated AIDS would encourage blood banks to utilize modern detection methods for all detectible viruses and thus create a safer blood supply.

Not all blood immunity statutes have the harsh effect of the *Perlmutter*-type statutes. Some statutes permit a plaintiff to recover for a transfused blood defect where the plaintiff can demonstrate that the blood defect was detectible. The Florida blood immunity statute permits such a recovery. That statute reads, in pertinent part, as follows:

The procurement, 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 therefore, and *the implied warranties of merchantability and fitness for a particular purpose shall not be applicable as to a defect that cannot be detected or removed by reasonable use of scientific procedures or techniques.*<sup>119</sup>

Although the Florida statute resembles the *Perlmutter*-type statutes in that it defines the sale of blood as a service, the statute contains a detectibility mediated trigger that allows for the invocation of warranty liability. Such warranty recovery is, however, contingent on whether the alleged transfused blood defect can be detected or removed reasonably by scientific means. Because AIDS is reasonably and scientifically detectible, warranty recovery under the positive-tort theory will be available to a transfusion-associated AIDS' victim.<sup>120</sup> A Florida plaintiff merely

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119. FLA. STAT. ANN. § 672.316(5) (West Supp. 1986) (emphasis added).

120. See *supra* notes 36-37 for scientific detectibility of AIDS. See Smith, *Racing to Sell an AIDS Test to Blood Banks*, BUSINESS WEEK, at 136 (Feb. 18, 1985) (where the reasonableness of the test is discussed. That is, each test will cost between \$2 and \$3

need prove that the ELISA test, when coupled with the Western blot analysis, provides an effective detection of AIDS in human blood. Because AIDS is detectable by a scientifically effective and reasonable means, the plaintiff would be able to assert a successful warranty action against the blood bank. Thus, the Florida statute, and others like it, provides a recovery based upon the positive-tort theory. Such statutes maintain a proper balance between an adequate supply of blood for the public and the rights of the individual blood transfusee.

### VIII. MARYLAND LAW

AIDS is no longer unique to San Francisco, Miami, or New York; it has spread to all parts of the United States, including Maryland, Virginia, and the District of Columbia. To date, 463 AIDS cases have been documented in Maryland, Virginia, and the District of Columbia.<sup>121</sup> Of these 463 cases, 248 AIDS victims have died.<sup>122</sup> Maryland has reported 284 cases of AIDS, fifteen of which were the result of blood transfusions.<sup>123</sup> As the number of individuals who come in contact with the AIDS antibodies grows, the probability of more transfusion-associated AIDS cases also increases. To counteract the growth of AIDS in Maryland, former Governor Harry Hughes appointed a task force to study and formulate answers to the Maryland AIDS crisis.<sup>124</sup> In the meantime, however, the Maryland courts will have to consider transfusion-associated AIDS cases based upon present case and positive law.<sup>125</sup>

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per blood donor.) Cf. Norton, *Current Issues In Workplace Safety: AIDS PERSONNEL LAW UPDATE* 1985 p. G-23 n.5 (Dec. 2, 1985) (the CDC has estimated that the average hospital stay of an AIDS victim is 170 days, resulting in costs of \$147,000 per patient. Further, the economic loss from lost earnings and premature death is \$470,000).

121. Wash. Post, Nov. 9, 1985, at D3, col.1.

122. *Id.*

123. TESTIMONY OF GILBERT M. CLARK, EXECUTIVE DIRECTOR AMERICAN ASSOCIATION OF BLOOD BANKS, BEFORE THE COMMITTEE ON THE JUDICIARY, MARYLAND HOUSE OF DELEGATES, ANNAPOLIS, MARYLAND, MARCH 10, 1986 at 9.

\* After this comment went to press, Maryland reported 426 AIDS cases as of Oct. 31, 1986. Of that total, 140 were diagnosed after Jan. 1, 1986. *Governor's Task Force on Acquired Immune Deficiency Syndrome, AIDS and Maryland, Policy Guidelines and Recommendations* 5, 7 (Dec. 1986).

124. *Citing Rise in AIDS Cases, Hughes Names Task Force*, Wash. Post, Nov. 28, 1985, at B12, col.1. The Maryland General Assembly has also reacted to the Maryland AIDS crisis. This is evidenced by several pre-filed bills for the 1986 session. For example, HB 258 would allow the Secretary of Health and Mental Hygiene to close "establishments where high risk sexual activity is allowed." SB 155 would require the Secretary of Health and Mental Hygiene to establish a statewide public information program on AIDS. SB 155 was enacted into law, 1986 Md. Laws 299 to be codified at MD. HEALTH-GEN. CODE ANN. § 18-333. The AIDS crisis has also affected the private sector in Maryland. See *Md. Morticians Set Rules for AIDS Burials*, Wash. Post, Nov. 15, 1985, at A18, col.1 (where the state board of morticians ruled that funeral directors may refuse to embalm the bodies of AIDS victims, but they must offer immediate burial or cremation, or face a suspension or revocation of their license).

125. The earlier nationwide discussion on blood bank liability was premised on the fact

At the present, there is no Maryland case law on the liability of a blood bank for damages that result from tainted blood used in a transfusion. Presently filed in a Maryland court, however, is a case alleging transfusion-associated AIDS against a hospital for supplying a hemophiliac with blood tainted with AIDS.<sup>126</sup> Maryland also has reported a case dealing with a blood transfusion administered in a negligent fashion.<sup>127</sup>

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that the charitable immunity doctrine had been abrogated. *See supra* note 3. Maryland, however, still adheres to a doctrine of charitable immunity. *See James v. Prince George's County*, 288 Md. 315, 418 A.2d 117 (1980). Maryland has modified its doctrine, by statute, by providing that if a charitable organization has procured insurance, the insurer will be estopped from asserting the charitable immunity defense. MD. ANN. CODE art. 48A, § 480 (1984). Therefore, unless the Maryland blood bank is a commercial blood bank or a non-profit blood bank with insurance, it may be immune for its tainted blood. *See MD. ADMIN. CODE* tit. 10, § 10.02.03(16) (1986) (where a "Tissue bank" is defined to include a blood bank that distributes or sells blood); *See also MD. ADMIN. CODE* tit. 10 §§ 10.02.01(d), 10.02.01(h) (1984) (repealed May 5, 1986 13:9 Md. Admin. Reg. 1030) (where prior regulations defined a blood bank as "any activity that procures, processes, distributes, or sells human blood . . ." and a commercial blood bank as an "enterprise established for the purpose of procuring, processing, storing, and distributing human whole blood . . . for profit.").

126. Wayne A. Roberts and Helen Roberts v. Surburban Hosp. Ass'n., Inc. Civil No. 15852 (Mont. Co. Cir. Ct. filed June 27, 1986).

\* After this comment went to press, the Court of Special Appeals of Maryland decided *Cheney v. Bell Nat'l Life Ins. Co.*, No. 842, slip op. (Md. Ct. Spec. App. Feb. 4, 1987) (Gilbert, C.J.). In *Cheney*, a hemophiliac contracted AIDS via a blood transfusion. The hemophiliac died, and his wife made a claim on the hemophiliac's accidental death insurance policy issued by Bell National Life Insurance Company. Slip op. at 1. The insurance policy specifically excluded payment for death resulting from disease. Slip op. at 3. Mrs. Cheney argued that her husband's death was accidental, the accident being the use of AIDS-tainted blood for her husband's transfusion. Slip op. at 5. Bell argued that Mr. Cheney died from pneumonia which was a direct result of the AIDS. Slip op. at 1. As such, Bell argued that Mr. Cheney's death was from disease and not accident. The court, per Chief Judge Gilbert, agreed with Bell and held that Mrs. Cheney's argument fell short "in that the receiving of the blood from [the] infected donor was not an accident." Slip op. at 5. The court further held that the tainted blood "was purposely drawn from the donor and infused into the deceased." *Id.* The court noted that at the time of Mr. Cheney's transfusion no "test was . . . available to . . . determine whether evidence of AIDS was present in [the] blood." *Id.* As such, Mr. Cheney's death was not accidental because the hospital that administered the transfusion had no method of AIDS detection, and thus could not have accidentally allowed AIDS-tainted blood to be used for transfusion purposes. Because no accident could be found here, the court ruled that Mr. Cheney's death was by disease and thus the insurance policy did not apply. Slip op. at 8. From this opinion, it may be surmised that if Mr. Cheney received his transfusion after the availability of the AIDS detection tests then the Court may have found an underlying accident of death. The accident being the use of AIDS-tainted blood when the AIDS in that blood could have been detected. If this supposition is correct, then Maryland appears to be deciding transfusion-associated AIDS cases based on a judicially created "positive-tort" theory. *See supra* notes 106-109 and accompanying text for explanation of the positive-tort theory. That is, the determinative factor for recovery is whether an AIDS detection test is available. In *Cheney*, the plaintiff was denied recovery because when Mr. Cheney received his transfusion no AIDS detection test was available to detect AIDS antibodies in blood. Now that an effective AIDS detection is available, recovery should be available for plaintiff's who contract AIDS from blood transfusions

The Maryland General Assembly, however, has enacted statutes relative to blood transfusion liability.

In 1971, the Maryland General Assembly reacted to the *Cunningham* decision by enacting a blood immunity statute.<sup>128</sup> The Maryland statute has, over 15 years, undergone revision<sup>129</sup> and amendments.<sup>130</sup> The current Maryland blood immunity statute, as amended by the 1986 General Assembly, reads as follows:

A legally authorized person who obtains, processes, stores, distributes, or uses whole blood or any substance derived from blood for injection or transfusion into an individual for any purpose is performing a service and is not subject to:

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administered after the availability of such tests. Further, because such tests are available, plaintiff's who contract AIDS via blood transfusions after the availability of AIDS detection tests should be able to claim that their AIDS was *accidentally* contracted for insurance policy purposes.

127. See *Kyte v. McMillion*, 256 Md. 85, 259 A.2d 532 (1969). In this case, a unit of Rh positive blood was administered to a 15 year old girl injured in an automobile accident. The attending physician had ordered that the girl be transfused with Rh negative blood. Prior to a jury verdict, a settlement between the parties was reached. The main issue of the case dealt with the settlement agreement and its applicability to the joint tort-feasors involved.

128. MD. ANN. CODE art. 43, § 136B (1980). The fact that the Maryland blood immunity statute was a reaction to *Cunningham* is based upon the following deductions as the committee reports for the bill do not exist.

(1) The Illinois Supreme Court's decision in *Cunningham* expanding warranty and strict liability to the entire blood industry was rendered on September 29, 1970, with a rehearing denied on December 3, 1970. See *supra* note 69.

(2) 1971 saw a proliferation of blood immunity statutes. See *AIDS Suits Focus on Blood Safeguards*, Wall Street Journal, Aug. 20, 1984, § 2, at 17, col.1 ("these state laws [blood immunity statutes] were passed during the 1970's in response to the transmission of . . . hepatitis [ ] through blood transfusions.").

(3) The pre-filed Maryland Blood Immunity Statute read as a codification of *Perlmutter*. See *infra* notes 161-162 and the accompanying text for the wording of the pre-filed bill.

(4) The Maryland blood immunity statute was introduced in the first General Assembly Session after *Cunningham*. See 1971 JOURNAL OF PROCEEDINGS OF THE HOUSE OF DELEGATES 515.

(5) The bill was signed into law by Governor Mandel on May 24, 1971. See 1971 Md. Laws 717.

Therefore, it is fairly apparent from the bill's original wording, its introduction in the first legislative session following *Cunningham*, and its immediate passage that this bill was Maryland's reaction to *Cunningham*. This conclusion is further buttressed by the fact that Maryland had no blood immunity statute prior to the *Cunningham* decision.

129. In 1982, the health provisions of the Maryland Code were subject to revision. As part of the revision process, the Maryland blood immunity statute was reorganized and reworded. According to the Revisor's Note of that Statute, the blood immunity statute, after the 1982 revision, consisted of "new language derived without substantive change" from the former blood immunity statute. MD. HEALTH-GEN. CODE ANN. § 18-402 (1982) (Revisor's Note). See also 1982 Md. Laws 21, § 2.

130. In the 1986 Legislative Session, the Maryland General Assembly amended the blood immunity statute to expressly label blood as a service, and thus adopt *Perlmutter*. MD. HEALTH-GEN. CODE ANN. § 18-402 (Supp. 1986) See also 1986 Md. Laws 259.

- (1) Strict liability in tort;
- (2) The implied warranty of merchantability; or
- (3) The implied warranty of fitness.<sup>131</sup>

The 1986 Maryland General Assembly, therefore, defined blood to be a service, and thus embraced the *Perlmutter* rationale. In so doing, the Maryland General Assembly has denied the victims of all transfusion-associated diseases, including AIDS, the use of strict liability and warranty theories as grounds upon which to sue blood banks. Victims of transfusion-associated diseases who contract such diseases via blood transfusions administered after July 1, 1986, the effective date of the 1986 amendments,<sup>132</sup> will be relegated to suits grounded in negligence. Because a negligence case against a blood bank for a transfused defect is almost impossible to win, the Maryland General Assembly effectively has immunized the Maryland blood banking industry from liability.<sup>133</sup> In taking this action, the Maryland General Assembly has tipped the balance in favor of society's need for an adequate blood supply against the individual's right to recover for a transfused defect. Hence, the newly amended Maryland blood immunity statute effectively will foreclose recovery for victims of transfusion-associated AIDS whose AIDS is contracted via a blood transfusion administered after July 1, 1986.

The newly amended Maryland blood immunity statute is prospective only and will not foreclose blood bank liability for AIDS cases that result from blood transfusions administered prior to July 1, 1986.<sup>134</sup>

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131. MD. HEALTH-GEN. CODE ANN. § 18-402 (Supp. 1986). The following amendment to MD. HEALTH-GEN. CODE ANN. § 18-402 (1982 & Supp. 1986) was introduced in the 1987 Session of the Maryland General Assembly:

A legally authorized person who obtains, processes, stores, distributes, or uses whole human blood, tissue, organs, or bones or any substance derived from human blood, tissue, organs, or bones for injection, transfusion, or transplantation into an individual for any purpose is performing a service and not subject to:

- (1) Strict liability in tort;
- (2) The implied warranty of merchantability; or
- (3) The implied warranty of fitness.

If enacted, the *Perlmutter* rationale will be applicable not only to blood, but also to human tissue, organs, and bones.

132. 1986 Md. Laws 259, § 2. See also MD. HEALTH-GEN. CODE ANN. § 18-402 (Supp. 1986) (Revisor's Note).
133. The statute, of course, does not relieve a blood bank from its liability for intentional infliction of harm causes of action. For discussion of negligence as a cause of action in transfusion-associated suits, see *supra* notes 101-105 and accompanying text.
134. Statutes enacted in Maryland are presumed to be prospective, unless the language of the statute is shown to have a retroactive intent. *Dallam v. Olivers Ex'rs*, 3 Gill. 445 (1845); *Kastendike v. Baltimore Ass'n for Retarded Children, Inc.*, 267 Md. 389, 297 A.2d 745 (1972); *Maryland Classified Employee Ass'n v. Anderson*, 281 Md. 496, 380 A.2d 1032 (1977). Amendatory acts take effect, like any other legislative enactments, only from the time of their passage and have no application to prior transactions or occurrences, unless an express or implied retroactive intent can be drawn from the amendment. *State Tax Comm. v. Pepco*, 182 Md. 111, 32 A.2d 383 (1943). The 1986 amendments exhibit no retroactive intent, either express or im-

Such cases will be governed by the pre-1986 Maryland blood immunity statute.<sup>135</sup> As such, an examination of the Maryland blood immunity statute prior to the 1986 amendments is of importance.

The Maryland blood immunity statute, prior to the 1986 Amendments, read as follows:

A person who obtains, processes, stores, distributes, or uses whole blood or any substance derived from blood for injection or transfusion into an individual for any purpose may not be held liable for *the virus of serum hepatitis* under:

- (1) Strict liability in tort;
- (2) The implied warranty of merchantability; or
- (3) The implied warranty of fitness.<sup>136</sup>

Although the Maryland courts never had occasion to construe this statute, the Court of Appeals of Maryland took notice of the statute's existence in a case unrelated to blood transfusions.<sup>137</sup> How the Maryland courts will construe this statute in a case of transfusion-associated AIDS resulting from a transfusion administered prior to July 1, 1986 will hinge upon the court's determination of the statute's legislative intent. The Maryland courts utilize a six-part analysis in ascertaining legislative intent.<sup>138</sup>

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plied, as the amendments were stated to become effective on July 1, 1986. *See supra* note 132.

135. For the fact that there are individuals who contracted AIDS via blood transfusions prior to the effective date of the 1986 Amendments to the Maryland blood immunity statute, *see supra* note 123 and accompanying text. Although only 15 individuals have contracted AIDS via pre-July 1, 1986 transfusions, many other pre-July 1, 1986 blood transfusees may later contract AIDS as the AIDS antibodies could have been infused into their blood and can remain dormant for many years. *See, e.g., Life Skills Education, AIDS and the Heterosexual Community* at 2 (1986) (AIDS can remain dormant in a body for two to five years); *American Council on Science and Health, Answers About AIDS* at 23 (1986) ("researchers estimated that the true average incubation period for transfusion-associated AIDS will be four and one-half to five and one-half years, with a possible upper limit of 14 years."); *M. Irwin, AIDS fears and facts* at 5 (1986) ("For transfusion-related AIDS, the incubation period is believed to range from 4 to 62 months.") *See also* *Cheney v. Bell Nat'l Life Ins. Co.*, No. 842, slip op. at 3 n.2 (Md. Ct. Spec. App. Feb. 4, 1987) ("The incubation period for AIDS 'may be two and one-half to five years or more. Indeed some researchers believe that there is no real maximum incubation period—that is, an infected person may develop symptoms at any time during his or her life.'" citing *Hammitt, AIDS in Correctional Facilities: Issues and Options* at 6 (U.S. Dept. of Justice Apr. 1986). The CDC has alerted doctors to administer AIDS blood detection tests to patients who received blood transfusions between 1978 and late spring of 1985. *Human Immunodeficiency Virus Infection In Transfusion Recipients and Their Family Members*, MORBIDITY AND MORTALITY WEEKLY REPORT, March 20, 1987, at 139. The screening of these patients probably will result in more transfusion-associated cases, thus, making the examination of the pre-1986 Maryland blood immunity statute more relevant.

136. MD. HEALTH-GEN. CODE ANN. § 18-402 (1982) (emphasis added).

137. *Burton v. Artery Co., Inc.* 279 Md. 94, 103 n.1, 367 A.2d 935, 941 n.1 (1977).

138. *Montgomery County v. Lindsey*, 50 Md. App. 675, 678, 440 A.2d 411, 413 (1982).

The cardinal rule of Maryland statutory construction is to ascertain and effectuate the actual intent of the General Assembly.<sup>139</sup> To accomplish the fulfillment of the cardinal rule, a court first seeks the legislative intent of a statute by examining the words of the statute — the plain meaning rule.<sup>140</sup> The second part of gaining the legislative intent of a statute consists of construing the statute so as to effectuate its objective or purpose based upon the statute's plain meaning.<sup>141</sup> Third, a statute with various provisions is to be construed to give meaningful effect to all of its parts.<sup>142</sup> Fourth, Maryland courts adhere to the basic adage of *expressio unius est exclusio alterius* — the expression of a specific term will exclude all others.<sup>143</sup> A court may not, according to the fifth element, disregard the natural import of the statutory language, unless some imperative reason is found in the statute for enlarging or restricting its meaning.<sup>144</sup> Finally, when a statute is plain, free of ambiguity, and expresses a definite and sensible meaning a court is not at liberty to insert or delete words with a view towards making the statute express an intention that is different from the plain meaning.<sup>145</sup> If a statute is ambiguous or of doubtful meaning, a court may employ the use of extrinsic aids, such as the history of the statute's passage, committee reports, and testimony before committee, to ascertain legislative intent.<sup>146</sup>

Applying the above rules of statutory construction to the former Maryland blood immunity statute yields a construction that denies the use of implied warranties<sup>147</sup> and strict liability<sup>148</sup> against a blood bank that "obtains, processes, stores, distributes, or uses whole blood . . . for . . . transfusion . . ." purposes *if and only if* the transfusion in question results in a case of transfusion-associated serum hepatitis.<sup>149</sup> Since the former statute expressly applies to serum hepatitis, it does not preclude the application of implied warranties or strict liability in cases involving other transfused impurities, such as AIDS.<sup>150</sup> Therefore, the former blood immunity statute will not bar a transfusion-associated AIDS suit

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139. Penn. Nat. Mutual Casualty Ins. Co. v. Gartelman, 288 Md. 151, 416 A.2d 734 (1980).

140. Mauzy v. Hornbeck, 285 Md. 84, 400 A.2d 1091 (1979).

141. State v. Fabritz, 276 Md. 416, 348 A.2d 275 (1975), *on remand*, 30 Md. App. 1, 351 A.2d 477, *cert. denied*, 425 U.S. 942 (1976).

142. Thomas v. State, 277 Md. 314, 353 A.2d 256 (1976).

143. Thanhauser v. Savins, 44 Md. 410 (1876); more recently Miller v. Forty West Builders, Inc., 62 Md. App. 320, 489 A.2d 76 (1985).

144. Giant of Maryland, Inc. v. States Attorney for Prince George's County, 267 Md. 501, 298 A.2d 427 (1973).

145. *Id.* See also Gatewood v. State, 244 Md. 609, 224 A.2d 677 (1966).

146. Bledsoe v. Bledsoe, 294 Md. 183, 448 A.2d 353 (1982).

147. MD. COM. LAW CODE ANN. § 2-314 (1982 & Supp. 1985) (Maryland's statute for implied warranty and implied warranty of merchantability).

148. See Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976) (where Maryland adopted Restatement (Second) of Torts § 402A).

149. MD. HEALTH-GEN. CODE ANN. § 18-402 (1982).

150. See *supra* note 143 and accompanying text.

where a plaintiff alleges that the AIDS was contracted from a blood transfusion administered prior to July 1, 1986.

Even though the former blood immunity statute does not preclude a transfusion-associated AIDS suit, it remains uncertain whether a Maryland court would classify blood as a sale or service under the pre-1986 statute. There is no Maryland law in point. However, the framework of analysis for deciding whether blood is a sale or service has been provided for in a Maryland case.

The Maryland case which enunciated the analytical framework is *Burton v. Artery Co., Inc.*<sup>151</sup> The issue in *Burton* was whether the general three year statute of limitations or the four year Uniform Commercial Code statute of limitations applied to a contract for the sale and installation of trees and shrubs.<sup>152</sup> The court concluded that the four year statute of limitations applied.<sup>153</sup> In so concluding, the court held that the contract was one of a mixed sales/service nature, and that the sales nature of the contract predominated.<sup>154</sup> In deciding this, the court adopted the *Bonebrake* test for determining the predominate nature of a mixed sales/service contract.<sup>155</sup> The *Burton* court stated the *Bonebrake* test as:

[N]ot whether [the sales/service components] are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom).<sup>156</sup>

Hence, the Maryland test of whether a mixed contract is predominantly a service or sales contract is the *Bonebrake* analysis.

Of importance in *Burton* is the court's extensive discussion of sales/service contracts in other jurisdictions. The court examined such situations as food served in restaurants,<sup>157</sup> purchase and installation of certain materials during the construction of a home,<sup>158</sup> and contracts for wedding photographs to name a few.<sup>159</sup> Included in the court's discussion of sales/service contracts is an at length discussion of blood transfusion cases from other jurisdictions.<sup>160</sup> Although this discussion is dicta, it suggests very strongly that the Court of Appeals of Maryland would apply the *Bonebrake* test in a suit alleging transfusion-associated AIDS

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151. 279 Md. 94, 367 A.2d 935 (1977).

152. 279 Md. at 95, 367 A.2d at 936.

153. 279 Md. at 115, 367 A.2d at 946.

154. 279 Md. at 114-15, 367 A.2d at 946.

155. *Bonebrake v. Cox*, 499 F.2d 951 (8th Cir. 1974).

156. 279 Md. at 108-9, 367 A.2d at 943.

157. 279 Md. at 103-4, 367 A.2d at 940.

158. 279 Md. at 105-6, 367 A.2d at 941.

159. 279 Md. at 113, 367 A.2d at 945.

160. 279 Md. at 102-4, 110-11, 367 A.2d at 939-41, 944.

where AIDS contraction resulted from a transfusion administered prior to July 1, 1986, to determine the predominating factor of the blood transfusion, which *Burton* characterizes as a mixed sales/service contract.

The application of the *Bonebrake* analysis in a pre-July 1, 1986, transfusion-associated AIDS case would engender in Maryland the entire *Perlmutter* controversy of whether blood is to be defined as a sale or service. The *Bonebrake* test would, in a pre-July 1, 1986, transfusion-associated virus case not concerning serum hepatitis, resurrect the entire *Perlmutter* line of cases dealing with the sales/service dichotomy.

It seems, however, that the *Perlmutter* controversy can be avoided in a pre-July 1, 1986, transfusion-associated AIDS case if one examines, closely, the legislative history of the pre-1986 Maryland blood immunity statute. In 1971, Delegate Menes pre-filed House Bill Number 761 — the precursor of the later enacted Maryland blood immunity statute.<sup>161</sup> House Bill Number 761 read, in pertinent part, as follows:

Neither strict liability in tort nor the implied warranties of merchantability and fitness shall be applicable to the procurement, processing, storage, distribution, and/or use of whole blood, plasma, blood products, and blood derivatives for the use of injecting or transfusing the same or any of them into the human body for any purpose whatsoever. Such procurement, processing, storage, distribution, and/or use constitutes the rendering of a service by every person, firm, or corporation participating therein, whether or not any remuneration is paid therefor, and does not constitute a sale.<sup>162</sup>

Hence, the initial draft of the pre-1986 Maryland blood immunity statute rejected the *Cunningham* and *Community Blood Bank* decisions, and embraced the *Perlmutter* decision. On March 3, 1971, the bill was referred to the House Committee on Environmental Matters.<sup>163</sup> In Committee, the bill was amended by the addition of the introductory phrase "as to the virus of serum hepatitis."<sup>164</sup> This amendment supports the earlier conclusion that the General Assembly's express intention was that the bill was to apply exclusively to transfusion-associated serum hepatitis cases. The amendment was adopted, and on March 27, 1971, the House of Delegates passed the bill by a vote of 95-13 and then referred the bill to the Maryland Senate.<sup>165</sup>

In the Senate, the bill was significantly amended by the striking of the language "designating it [blood] as a service and not sale" from the

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161. MARYLAND HOUSE PRE-FILED BILLS, 1971 Session, Bill No. 761.

162. *Id.*

163. 1971 JOURNAL OF PROCEEDINGS OF THE HOUSE OF DELEGATES 515. *See generally* MD. CONST. art. 2, § 17, art. 3, §§ 27-31 (for process by which a bill becomes a law in Maryland).

164. 1971 JOURNAL OF PROCEEDINGS OF THE HOUSE OF DELEGATES 1268.

165. 1971 JOURNAL OF PROCEEDINGS OF THE HOUSE OF DELEGATES 1427-28.

bill's title,<sup>166</sup> and striking from the purview the language: "Such procurement, processing, storage, distribution, and/or use constitutes the rendering of a service by every person, firm or corporation participating therein, whether or not any remuneration is paid therefor, and does not constitute a sale."<sup>167</sup> The House of Delegates adopted the Senate amendments by a vote of 89-2, and referred the enrolled bill to the governor for his approval.<sup>168</sup>

On May 24, 1971, Governor Marvin Mandel signed the enrolled bill into law to become effective July 1, 1971.<sup>169</sup> The enacted statute read, in pertinent part, as follows:

As to the virus of serum hepatitis, neither strict liability in tort nor the implied warranties of merchantability and fitness shall be applicable to the procurement, processing, storage, distribution, and/or use of whole blood, plasma, blood products, and blood derivatives for the use of injecting or transfusing the same or any of them into the human body for any purpose whatsoever.<sup>170</sup>

The Maryland General Assembly revised the statute in 1982, but the revision was only in language and not in the substantive reach of the law.<sup>171</sup>

The changes between the pre-filed bill and the enacted statute are significant. The most significant is the express rejection of the service categorization of blood as advocated by *Perlmutter*. The General Assembly's rejection of the *Perlmutter* rationale can be interpreted as an implicit recognition that blood is indeed a product and thus a sale. This interpretation provides strong support for the notion that Maryland courts would define blood as a sale and not a service in a pre-July 1, 1986, transfusion-associated AIDS suit. Therefore, the legislative history of the pre-1986 Maryland blood immunity statute voids the *Perlmutter* decision in Maryland because the General Assembly addressed *Perlmutter*'s rationale, and rejected it.

A plaintiff alleging transfusion-associated AIDS as a result of

166. The title to Bill No. 761 originally read:

"AN ACT to add new section 136B to Article 43 of the Annotated Code of Maryland (1965 Replacement Volume and 1970 Supplement), title "Health", subtitle "Practitioners of Medicine," to follow immediately after Section 136A thereof, relating to the procurement, processing, storage, distribution and/or use of blood and blood derivatives for transfusions and *designating it as a service, and not a sale*, to which no implied warranties of merchantability or fitness attach, nor to which strict tort liability applies." (emphasis added) MARYLAND HOUSE PRE-FILED BILLS, 1971 Session, Bill No. 761.

167. 1971 JOURNAL OF PROCEEDINGS OF THE HOUSE OF DELEGATES 2462-63.

168. *Id.*

169. 1971 Md. Laws 717.

170. MD. ANN. CODE art. 43, § 136B (1980).

171. 1982 Md. Laws 21. See also MD. HEALTH-GEN. CODE ANN. § 18-402 (1982) (Revisor's Note).

tainted blood received from a Maryland blood bank prior to July 1, 1986, will not, therefore, be barred from a suit grounded in warranty and strict liability by the pre-1986 Maryland blood immunity statute. As such, the issues at such a trial will revolve around when the plaintiff received the blood transfusion, as the test for AIDS detection in blood was not made available to blood banks until March 2, 1985.<sup>172</sup> If the plaintiff's blood transfusion which resulted in AIDS was administered prior to the availability of the AIDS detection test, then the blood bank, absent any negligence and intentional infliction of wilful harm, should not be held liable for the plaintiff's case of AIDS because the blood bank could not scientifically detect the AIDS in the blood.<sup>173</sup> To hold the blood bank liable for the scientifically undetectable defect would be inapposite to the public policy of providing society with an adequate supply of blood. Such liability in an undetectable blood defect situation possibly could lead to large adverse judgments which would force blood banks out of business, jeopardizing all of society.

If, however, the AIDS victim contracted AIDS via a blood transfusion after March 2, 1985, and prior to July 1, 1986, then such a victim should be permitted to utilize warranty and strict liability theories against the blood bank that supplied the blood. This is so because the blood bank had available to it an AIDS detection test. As such, the AIDS in the blood was detectible, and thus the defective blood should not have been supplied for blood transfusion purposes. Therefore, public policy would favor the use of warranty and strict liability theories here as such theories allow for the plaintiff to recover. Individual recovery is favored in a detectible defect situation so as to force blood banks to utilize all reasonable detection methods so as to further a safer blood supply.

Therefore, in a suit alleging pre-July 1, 1986 transfusion-associated AIDS, the rationale of the positive-tort theory should be determinative in Maryland. That is, if the AIDS was contracted via blood transfusion prior to March 2, 1985, then the plaintiff should not be able to utilize warranty and strict liability theories as a basis of recovery because the AIDS was undetectible by the blood bank prior to March 2, 1985. However, if the AIDS was contracted via blood transfusion after March 2, 1985, and prior to July 1, 1986, then the plaintiff should be able to utilize warranty and strict liability theories as a basis of recovery because the AIDS was scientifically detectible in the blood.

It was, however, because of the possible blood bank liability for

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172. *2,500 Blood Recipients Urged to Take AIDS Test*, Wash. Post, June 7, 1986, at A5, col.3. See also H.H.S. News, U.S. Department of Health and Human Services, March 4, 1985.

173. The case of Wayne A. Roberts and Helen Roberts v. Suburban Hosp. Ass'n., Inc., Civil No. 15852 (Mont. Co. Cir. Ct. filed June 27, 1986), would fall into this category because the plaintiff's complaint states that the plaintiff was diagnosed with AIDS in February of 1985. See plaintiff's complaint at ¶ 4.

transfusion-associated AIDS that the 1986 Maryland General Assembly amended its blood immunity statute to embrace the *Perlmutter* rationale. The 1986 amendments were introduced by Delegate Ellen R. Sauerbrey on February 5, 1986.<sup>174</sup> Delegate Sauerbrey introduced the bill at the request of the Maryland Chapter of the American Red Cross.<sup>175</sup> The reason for the bill's introduction was to close the loophole in the Maryland blood immunity statute which would permit an individual to sue a blood bank for a case of transfusion-associated AIDS.<sup>176</sup> Delegate Sauerbrey stated that because Maryland blood banks would be susceptible to transfusion-associated AIDS law suits, "the Red Cross was forced to seriously consider discontinuing [its] blood program in Maryland."<sup>177</sup> Because of this fear, the 1986 Maryland General Assembly amended the Maryland blood immunity statute by resorting to the *Perlmutter* rationale which the 1971 Maryland General Assembly implicitly had rejected.<sup>178</sup> By resorting to the *Perlmutter* rationale to amend the blood immunity statute, the 1986 General Assembly adopted a 1954 legalism which favors society's need for an adequate, but not wholly safe, blood supply while disregarding an individual's right to recover for a detectible defect in blood.

The pre-1986 Maryland blood immunity statute was in need of amendment because it only applied to serum hepatitis and thus permitted warranty and strict liability suits for all other defects, detectible or not. The 1986 Maryland General Assembly should have, however, amended the statute with a policy rationale instead of the *Perlmutter* service rationale. That is, the General Assembly should have denied the use of warranty and strict liability in non-detectible blood defect situations so as to further the societal need of an adequate blood supply. But where a blood defect is detectible, the General Assembly should have permitted the use of warranty and strict liability so as to further the rights of individuals and also to further a safer blood supply. In so doing, the Maryland General Assembly would have enacted the positive-tort theory and also would have announced a policy that balances society's need for an adequate blood supply and an individual's right to recover for a detecti-

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174. Maryland House of Delegates — House Bill No. 1629, 1986 General Session. The "first reader" of that bill read, in pertinent part, as follows:

"A person who obtains, processes, stores, distributes, or uses whole blood or any substance derived from blood for injection or transfusion into an individual for any purpose is performing a service and is not subject to:

- (1) Strict liability in tort;
- (2) The implied warranty of merchantability; or
- (3) The implied warranty of fitness."

Bill No. 1629 was later amended to its present language, *supra* note 131 and accompanying text, and enacted into law on April 29, 1986. 1986 Md. Laws 259.

175. Letter from Delegate Sauerbrey to the author dated October 21, 1986.

176. *Id.* See also TESTIMONY OF GILBERT M. CLARK, *supra* note 122; letter from the American Red Cross, Baltimore Regional Chapter to Delegate Jerry E. Perry, dated March 6, 1986 and introduced as the Testimony of the American Red Cross.

177. Letter from Delegate Sauerbrey to the author dated October 21, 1986.

178. See *supra* notes 161-171 and accompanying text.

ble blood defect, with the resulting policy leading to a *safer* and adequate blood supply. Therefore, the Maryland General Assembly should retreat from the 1986 amendments by repealing them. In their stead, the Maryland General Assembly should enact a blood immunity statute that embraces the positive-tort theory.<sup>179</sup>

## IX. PROPOSAL AND CONCLUSION

The law of blood bank liability essentially has been the struggle between two conflicting policies — the societal need for an adequate blood supply versus an individual's right to recover for transfusion-associated diseases. Generally, the individual's right to recovery was outweighed by the societal need for an adequate blood supply. The rationale behind the policy decision favoring society's need for blood was founded in the fact that blood defects were undetectable. Because the blood banks could not detect the defects in the blood, society deemed it important to immunize blood banks from potential business-busting court judgments in order to protect society's interest in an adequate and unimpeded blood supply.<sup>180</sup>

The above mentioned struggle has been influenced and dealt with by the courts and legislatures. The courts were the first to set a policy of favoritism in this struggle. The courts created a fiction that defined blood as a "service" to which no warranty or strict liability recovery could attach. The courts created this fiction in the realm of transfusion-associated serum hepatitis litigation because serum hepatitis was undetectable in human blood, and thus the blood industry needed to be protected. But as time passed and more courts began to consider transfusion-associated litigation, the courts began to reexamine the quixotic logic that blood was a service. Upon this re-examination, courts began to recognize the true role of blood banks — product suppliers — and began to permit warranty and strict liability recovery against the blood banks. The courts' adjustment of the struggle between society's need for blood versus an individual's right for recovery reached its zenith in favor of the individual when the *Cunningham* court held that hospitals and blood banks could be liable in warranty and strict liability for transfusion-associated defects. Hence, sixteen years after *Perlmutter*, the courts had totally rebalanced the struggle in the favor of the individual's right to recover for transfusion-associated defects.

At this juncture in the blood bank liability history, the legislatures

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179. The author drafted, and respectfully submits these bills for the purpose of enacting the "positive-tort" theory in Maryland. See Appendix.

180. Society's need for an adequate and unimpeded blood supply was recently reasserted in *Rasmussen v. South Florida Blood Service, Inc.*, 500 So.2d 533 (Fla. 1987). In *Rasmussen*, the Supreme Court of Florida held that the estate of a man who died of AIDS had no right to obtain the names of blood donors who donated the blood used for the man's transfusion after an automobile accident. The Court held that it was important for society to have a reliable blood supply, and any breach of blood donor confidentiality could discourage blood donations and thus jeopardize a reliable supply of blood.

sought to reset the balance in favor of the societal need for an adequate blood supply. The legislatures accomplished this task by retreating to the *Perlmutter* fiction that blood was a service to which no warranty or strict liability could attach as a basis for recovery. A majority of these antiquated blood immunity statutes will have the present day effect of barring warranty and strict liability recovery for victims of transfusion-associated AIDS.<sup>181</sup> Hence, a majority of the states will only afford victims of transfusion-associated AIDS with negligence actions. Since these actions are generally unsuccessful against blood banks, these *Perlmutter* codifications essentially will bar transfusion-associated AIDS suits and thus immunize the blood banking industry.

A few states, however, have abandoned the strict *Perlmutter* codifications which immunize the blood industry. These states have enacted statutes that recognize and balance the competing policies of society's need for an adequate blood supply versus an individual's right to recover for a transfusion-associated defect. These states follow the positive-tort theory whereby an individual is permitted warranty and strict liability recovery for a detectible defect in human blood, but is denied warranty and strict liability recovery for a non-detectible defect. This approach, the positive-tort theory, results in a safer blood supply in that warranty and strict liability recovery for detectible defects will force blood banks to utilize detection tests to avoid law suits and their potential business-busting judgments. The societal need for an adequate blood supply is maintained in nondetectible blood defect situations because, in effect, a transfusee of blood who contracts a disease because of the non-detectible defect will be deemed to have consented to the risk prior to the transfusion.<sup>182</sup> Because the positive-tort theory balances the two conflicting policies in such a way that the ultimate result is a safer blood supply, the positive-tort theory is the solution for handling transfusion-associated defect litigations.

Because blood bank liability is governed by positive law, the courts

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181. See *Hyland Therapeutics v. Superior Court*, 175 Cal. App.3d 509, 220 Cal. Rptr. 590 (1985) (a hemophiliac contracted AIDS from a blood clotting factor tainted with AIDS. The hemophiliac died and his heirs brought an action in strict liability against the manufacturer of the blood clotting factor. While the California court noted that AIDS was detectible, the court held that the California *Perlmutter*-type statute barred a strict liability claim because blood was classified as a service.)
  182. In this situation, a doctor that prescribes the blood transfusion may be liable under the informed consent doctrine as enunciated in *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir.), cert. denied, 409 U.S. 1064 (1972). Such claims, however, have not been successful in transfusion-associated serum hepatitis cases. See *Sawyer v. Methodist Hosp. of Memphis*, 383 F. Supp. 563 (W.D. Tenn. 1974), *aff'd*, 522 F.2d 1102 (6th Cir. 1975) (likelihood of contracting serum hepatitis by a blood transfusion was .013%, and thus the physician was under no duty to inform the patient of such a small risk); *Moore v. Underwood Memorial Hosp.*, 147 N.J. Super. 252, 371 A.2d 105 (1977) (plaintiff did not demonstrate a local standard that the physician was under a duty to issue a warning that a transfusion could result in serum hepatitis). Maryland acknowledges an informed consent cause of action. See *Sard v. Hardy*, 281 Md. 432, 379 A.2d 1014 (1977).

cannot enact the positive-tort theory by way of opinion. The legislatures will have to enact the positive-tort theory by way of statutes. Therefore, the state legislatures that have not already done so should adopt the positive-tort theory relative to blood bank liability law. In so doing, the legislatures will be balancing the two conflicting policies of blood litigations in such a manner that an adequate supply of safe blood will be maintained, while simultaneously ensuring that individuals receiving tainted blood in blood transfusions will have the right to recover for injuries caused by detectible defects in that blood.

Under present law, victims of transfusion-associated AIDS will find it difficult, if not impossible, to recover against blood banks for their transfused AIDS in a majority of states. However, in those states that adhere to the positive-tort theory, victims of transfusion-associated AIDS will be permitted to use warranty and strict liability theories against blood banks. The use of these theories generally will lead to victim recovery because AIDS is a detectible blood defect. While those states that adhere to the positive-tort theory are permitting victim recovery, they are also fostering a safer blood supply because blood banks will utilize all scientific tests to detect blood defects in order to avoid liability.

Hence, those states with *Perlmutter* codification should repeal their codifications. In their stead, those states, including Maryland, should enact the positive-tort theory relative to blood bank liability. Such an action by the states would provide America with a uniform system of law resulting in an adequate and safe supply of blood nationwide.

*David A. Roling*

## APPENDIX

## HOUSE OF DELEGATES

No.101

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By:

Introduced and read first time:

Assigned to:

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A BILL ENTITLED

AN ACT concerning

Human Blood - Transfusion - Warranty and Strict Liability

FOR the purpose of repealing warranty and strict liability immunity for persons who provide or sell human blood for transfusions when a defect in the blood causes a disease in the transfusee; providing for warranty and strict liability immunity for persons who provide or sell human blood for transfusions that cause disease in the transfusee when the defect in the blood is scientifically undetectible; providing for warranty and strict liability recovery against persons who provide or sell human blood for transfusions that cause disease in the transfusee when the defect in the blood is scientifically detectible; and providing for the interpretation of this Act.

BY repealing

Article - Health - General

Section 18-402

Annotated Code of Maryland

(1982 Volume and 1986 Supplement)

BY adding to

Article - Health - General

Section 18-402

Annotated Code of Maryland

(1982 Volume and 1986 Supplement)

## Preamble

WHEREAS, The availability of human whole blood, plasma, blood products, and blood derivatives is important to the health and welfare of the people of Maryland; and

WHEREAS, Blood transfusees should be protected from scientifically detectible blood defects, such as Acquired Immune Deficiency

Syndrome (AIDS), by way of warranty and strict liability recovery for detectable defects that cause disease in blood transfusees; and

WHEREAS, Blood banks and hospitals should be immune from warranty and strict liability recovery for blood defects that are scientifically undetectable so as to further the availability of human whole blood, plasma, blood products, and blood derivatives; and

WHEREAS, A balance needs to be struck between the conflicting interests of blood transfusees and blood banks so as to further the important public policy of blood availability; now, therefore,

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article - Health - General

18-402

(a) Except as provided in subsection (b) of this section, a person who obtains, processes, stores, sells, or uses human blood or any substance derived from human blood for transfusion into an individual for any purpose may not be held liable for defects in that blood that cause disease in the transfusee under:

- (1) Strict liability in tort;
- (2) The implied warranty of merchantability; or
- (3) The implied warranty of fitness.

(b) A person who obtains, processes, stores, sells, or uses human blood or any substance derived from human blood for transfusion into an individual for any purpose shall be liable for scientifically detectable defects in that blood that cause disease in the transfusee under:

- (1) Strict liability in tort;
- (2) The implied warranty of merchantability; and
- (3) The implied warranty of fitness.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall be construed only prospectively and may not be applied or interpreted to have any effect upon or application to any event or happening occurring prior to the effective date of this Act.

SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect January 1, 19 .

HOUSE OF DELEGATES

No. 102

By:  
Introduced and read first time:  
Assigned to:

A BILL ENTITLED

AN ACT concerning

Blood Banks - Non-Applicability of Maryland Health Care  
Malpractice Claims Act

FOR the purpose of providing that Blood Banks are not a "Health Care  
Provider."

BY adding to

Article - Health - General  
Section 18-402.1  
Annotated Code of Maryland  
(1982 Volume and 1986 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL AS-  
SEMBLY OF MARYLAND, That the Laws of Maryland read as  
follows:

Article - Health - General

18-402.1

A person who obtains, processes, stores, or sells human blood  
or any substance derived from human blood for transfusion into an indi-  
vidual may not be deemed a "Health Care Provider."

SECTION 2. AND BE IT FURTHER ENACTED, That  
this Act shall take effect on January 1, 19, contingent on the taking effect  
of Chapter — of the Acts of the General Assembly of 19 (H.B. 101),  
and if Chapter — does not become effective, this Act is null and void  
without the necessity of further action by the General Assembly.