

Strict Liability – The Medical Service Immunity and Blood Transfusions in California

I. INTRODUCTION

The doctrine of strict liability in tort has become an established part of California law. However, there has been a continuing reluctance to impose strict liability on medical or medically related entrepreneurs. Today, California's medical industry is virtually exempt from strict liability.

This article suggests that the injured patient or the family of a patient who dies from serum hepatitis¹ contamination in blood transfusions at California hospitals should be able to recover from the hospital in strict liability. The families of the 500 Californians who die each year from serum hepatitis contamination in blood trans-

¹Serum hepatitis is thought to be a virus which is transmitted by blood transfusions and contaminated hypodermic needles. The disease has a mortality rate of approximately 20%. S. ROBBINS, *PATHOLOGY* 912-914 (3rd ed. 1967). While much progress is being made toward a more effective detection method, no test has been developed which will effectively identify a serum hepatitis carrier. The most accurate test now available is known as the hepatitis associated antigen test and it will identify about 25% of the carriers of serum hepatitis. Prince and Burke, *Serum Hepatitis Antigen (SH)*, 169 *SCIENCE* 593 (1970). Until a more accurate test is available, the most effective method of reducing the incidence of hepatitis in blood is through careful screening of donors. Cherubin and Prince, *Serum Hepatitis Specific Antigen (SH) in Commercial and Volunteer Sources of Blood*, 11 *TRANSFUSIONS* 25 (1971). Finally, there is little doubt that blood from commercial blood banks has a significantly higher incidence of serum hepatitis contamination than blood from volunteer sources. In a study at the National Institute of Health, the researchers compared the incidence of hepatitis in patients following open heart surgery. The study revealed that of the 53 patients who received blood from commercial donors, 28 developed chemical evidence of hepatitis. On the other hand, none of the patients who received the volunteer blood developed the disease. Study by the Blood Bank Department and the Cardiac Section of National Institute of Health, *CCH PRODUCTS LIABILITY REP.* 4290. Other estimates suggest that the incidence of contamination in commercial blood is five per hundred as opposed to five per thousand units of volunteer blood. Franklin, *Liability for Hepatitis*, 24 *STAN. L.R.* 439, 445 (1972). Numerous reasons are given for this disparity between commercial and volunteer blood, but most authorities agree that at least part of it is due to the poor screening methods of commercial banks which locate in central cities and attract drug users and derelicts. Allen, *Volunteer Blood for Everyone*, 9 *STAN. M.D.* 2 (1970).

fusions² cannot, under present California law, hold the hospital or blood bank strictly liable in tort.

This article will briefly review the status of the law concerning blood transfusions in other jurisdictions. Consideration will then be given to the policy rationales of strict liability in California and their relevance to liability for defective blood. It will then be argued that the California appellate courts which have exempted all hospital services from strict liability³ are in conflict with the general tenor of California products liability law and further that there is product liability precedent which supports the application of strict liability to some services. Finally, the major arguments which have been asserted against the application of strict liability to blood transfusions will be critically analyzed, and it will be argued that the policy considerations of strict liability warrant its application to defective blood.

II. THE TRADITIONAL RULE REGARDING STRICT LIABILITY FOR DEFECTIVE BLOOD

It is conservatively estimated that 3,000 persons die each year from serum hepatitis contamination in blood administered in the nation's hospitals.⁴ The general rule regarding strict liability for defective blood was established in the 1954 New York Court of Appeals decision of *Perlmutter v. Beth David Hospital*.⁵ In that case, the New York court held that the sale of blood was a service and therefore there could be no liability without fault or intentional wrongdoing. The characterization of the distribution of blood as a service prohibits recovery in strict liability⁶ or war-

²Statement by State Senator Anthony C. Beilenson, Chairman, State Senate Health Committee, *State Assembly Health Committee, Hearing on Blood Bank Practices*, The Sacramento Bee, Nov. 6, 1973 at 10, col. 1.

³See text accompanying notes 26-30 *infra*.

⁴*Comm. on Plasma and Plasma Substitutes, Division of Medical Sciences, National Research Council of the National Academy of Sciences, Statement of Laboratory Screening Tests for Identifying Carriers of Viral Hepatitis in Blood Banking and Transfusion Services*, 10 TRANSFUSION 1, 2 (1970). See also Holder, *Serum Hepatitis*, 6 LAWYERS MED. J. 79 (1970).

⁵208 N.Y. 100, 123 N.E.2d 792 (1954).

⁶The RESTATEMENT (SECOND) OF TORTS § 402A states the basic rule of strict liability as adopted in most jurisdictions.

- (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 such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is 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

ranty,⁷ because these remedies have traditionally been limited to sales transactions.⁸

The *Perlmutter* rule has been extremely influential and has been adopted by courts⁹ and legislatures¹⁰ in the majority of states. In recent years, however, the *Perlmutter* rule has been weakened by the decisions of courts in a number of jurisdictions¹¹ and by the criticism of an impressive number of commentators.¹² The courts in some

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

For the California rule, see text accompanying note 17 *infra*.

⁷Under the doctrine of express or implied warranty, a manufacturer is liable without fault when his product is defective. The defective condition of the product breaches the manufacturer's warranty, whether it be express or implied, and he is liable even though he exercised all possible care. See UNIFORM COMMERCIAL CODE § 2-315.

⁸The courts have expressed this limitation in regard to strict liability by emphasizing the requirement that the "seller is engaged in the business of selling such a product." See RESTATEMENT (SECOND) OF TORTS § 402A (1)(a) (1965). Further, the courts have traditionally limited warranties to sales transactions even though the UNIFORM COMMERCIAL CODE § 2-313, Comment 2 provides: "Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract." See also CAL. COMM. CODE §§ 2313-2315 (West 1964).

⁹The following courts have adopted the *Perlmutter* rationale: Arizona: Whitehurst v. American Nat'l. Red Cross, 1 Ariz. App. 326, 402 P.2d 584 (1965). Colorado: Sloneker v. St. Joseph's Hosp., 233 F. Supp. 105 (D.C. Colo. 1964). Connecticut: Epstein v. Giannattasio, 25 Conn. Supp. 109, 197 A.2d 342 (1963) (*dictum*). Florida: White v. Sarasota County Pub. Hosp. Bd., 206 S.2d 19 (Fla. Ct. App. 1966). *But see* Russell v. Community Blood Bank, Inc., 185 S.2d 749 (Fla. Ct. App. 1966). Georgia: Lovett v. Emory Univ., Inc., 116 Ga. App. 277, 156 S.E.2d 923 (1967). Minnesota: Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc., 270 Minn. 151, 132 N.W.2d 805 (1965). Texas: Goelz v. J.K. & Susie L. Wadeley Research Institute, 350 S.W.2d 573 (Tex. Cit. App. 1961) (*dictum*). Utah: Dibblie v. Dr. W.H. Groves Latter-Day Saints Hosp., 12 Utah 2d 241, 364 P.2d 1085 (1961). Washington: Gile v. Kennewick Pub. Hosp. Dist., 48 Wash. 2d 774, 296 P.2d 662 (1956). Wisconsin: Koenig v. Milwaukee Blood Center, Inc., 23 Wis. 2d 324, 127 N.W.2d 50 (1964).

¹⁰CAL. HEALTH & SAFETY CODE § 1606 (West 1970). Other states which have enacted similar legislation include: ARIZ. REV. STAT. ANN. § 36-1151 (Supp. 1972); FLA. STAT. ANN. § 672.2-316(5) (Supp. 1973); ILL. ANN. STAT. CH. 91 § 181 (Smith-Hurd Supp. 1972); MICH. STAT. ANN. § 14.528(1) (1956); MISS. CODE ANN. § 7129-71 (Cum. Supp. 1971); TENN. CODE ANN. § 47-2-316 (5) (Supp. 1972); WIS. STAT. ANN. § 146.31 (Supp. 1972-73).

¹¹See notes 13 and 14 *infra*.

¹²See e.g., Boland, *Strict Liability in Tort for Transfusing Contaminated Blood*, 24 ARK. L. REV. 236 (1969); Calabresi and Bass, *Right Approach, Wrong Implications: A Critique of McKean on Products Liability*, 38 CHI. LAW REV. 74, 83-87 (1970); Dunn, *Blood Transfusions and Serum Hepatitis*, 15 CLEV.-MAR. L. REV. 497 (1966); Franklin, *Tort Liability for Hepatitis: An analysis and a proposal*, 24 STAN. L. REV. 439 (1972); Haut and Alter, *Blood Transfusions — Strict Liability?*, 43 ST. JOHN'S L. REV. 557 (1969); Comment, *Serum Hepatitis Through Blood Transfusions: A Wrong Without a Remedy?*, 24 SW. L.J. 305 (1970); Note, *Products Liability — Transfusions — New Jersey Court Applies*

jurisdictions have rejected *Perlmutter* by characterizing blood transfusions as sales rather than services, and then permitting recovery either in strict liability or in warranty.¹³ The courts in other jurisdictions have rejected the assumption that a service is not an appropriate transaction upon which to impose strict liability or warranty and have held the hospital or blood bank liable without fault, even though treating the blood transfusion as a service.¹⁴

III. STRICT LIABILITY IN CALIFORNIA

— The California appellate courts have given two justifications for their refusal to hold a hospital strictly liable for defective blood or other defective products. First, they have reasoned that hospitals provide services, and services are exempt from strict liability. Second, they have held that the policy considerations of strict liability do not support its application to defective blood.¹⁵ Prior to analyzing these cases, it is helpful to review briefly the policy considerations of strict liability and their relationship to defective blood. The major arguments which have been asserted against the applicability of these policy considerations to contaminated blood will be considered in detail in section VI.

The California rule of strict liability was formulated in the 1963 California Supreme Court decision of *Greenman v. Yuba Power Prod-*

Theory of Strict Tort Liability to Hospitals and Blood Banks for Transfusion-Related Hepatitis, 4 SETON HALL 730 (1973); Note, *Sales — Blood Transfusions — Implied Warranties Under the Uniform Commercial Code*, 46 N.D.L. REV. 367 (1970); Note, *Blood Banks, Bad Blood, and Implied Warranty*, 21 U. MIAMI L. REV. 479 (1966); Note, *Sale — Implied Warranty — No Warranty in Blood Transfusion by Hospital*, 37 NOTRE DAME L.R. 565 (1962); Note, *Liability for Blood Transfusion Injuries*, 42 MINN. L. REV. 640 (1958); Note, *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, *Warranty — Implied Warranties of Quality Held Not Applicable to Blood Furnished by Hospital to Patient*, 103 U. PA. L. REV. 833 (1955); Note, *Sales — Breach of Warranty — Supplying of Blood by Hospital Not a Sale*, 29 ST. JOHN'S L. REV. 305 (1955).

¹³In the leading case, the Supreme Court of Illinois found a hospital strictly liable in tort for the serum hepatitis contaminated blood it supplied to a patient. The court characterized the transaction as a sale rather than as a service and allowed recovery under the reasoning of RESTATEMENT (SECOND) OF TORTS § 402A. *Cunningham v. MacNeal Memorial Hospital*, 47 Ill. 2d 443, 266 N.E.2d 897 (1970). The *Cunningham* result was subsequently reversed by the Illinois State Legislature. See note 84 *infra*. See also, *Russell v. Community Blood Bank, Inc.*, 185 So. 2d 749 (Fla. Dist. Ct. App. 1966), *aff'd as modified* 196 So. 2d 115 (Fla. 1967) (warranty — as to blood banks only); *Brody v. Overlook Hospital*, 121 N.J. Super. 299, 296 A.2d 668 (1972) (strict liability).

¹⁴*Hoffman v. Misericordia Hospital*, 439 Pa. 501, 267 A.2d 867 (1970); *Jackson v. Muhlenberg Hospital*, 96 N.J. Super. 314, 232 A.2d 879 (1967) *rev'd and remanded*, 53 N.J. 138, 249 A.2d 65 (1969). The appellate court reversed on other grounds and the case was subsequently settled.

¹⁵See text accompanying notes 29-31 *infra*.

ucts.¹⁶ An entrepreneur¹⁷ is held strictly liable, under the *Greenman* rule, when he places a product on the market which proves to have a defect that causes injury to a human being.¹⁸

The California Supreme Court has enunciated the following major policy rationales of the doctrine of strict liability: First, strict liability insures that the cost of injuries resulting from defective products are borne by the entrepreneurs who put them on the market, rather than allowing that burden to fall on the injured consumer.¹⁹ This basic rationale of strict liability assumes that, even though reasonable care is exercised, some defective products are the inevitable result of a given economic enterprise and the cost of injuries from these products should be placed on the party in the better position to spread the risk of loss. The strict liability doctrine assumes that this scheme of distributing the loss from defective products is more equitable than allowing the often catastrophic cost to fall on the unlucky consumer who is injured or killed by the defective product.²⁰

Holding suppliers strictly liable for defective blood would be consistent with this policy goal of spreading of the risk. Since each recipient of blood faces a risk of getting hepatitis, it is more equitable to have the blood bank and hospital spread the cost of injury or death among all who receive blood than to allow the cost to fall on the unfortunate patient who happens to receive the contaminated blood.²¹

The second policy rationale of the strict liability theory is that the cost of injury or death should be placed where it will create the greatest incentive to reduce the hazards from defective products.²² In the case of serum hepatitis contaminated blood, it is submitted

¹⁶59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963).

¹⁷The term entrepreneur is used throughout this article because a strict liability defendant need not be a manufacturer. The original *Greenman* doctrine has been expanded beyond manufacturers to include nearly all suppliers in the chain of distribution. See *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964) (retailers); *Barth v. B.F. Goodrich Tire Co.*, 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968) (wholesale and retail distributors); *Kriegler v. Eichler Homes, Inc.*, 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969) (mass home builder); *McClafin v. Bayshore Equipment Rental Co.*, 274 Cal. App. 2d 446, 79 Cal. Rptr. 337 (1969) (bailors and lessors); *Garcia v. Halsett*, 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970) (licensor of chattels).

¹⁸*Greenman v. Yuba Power Products*, 59 Cal. 2d at 57, 27 Cal. Rptr. at 697, 377 P.2d at 897 (1963).

¹⁹*Id.*

²⁰See generally Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 506-07, 527 (1961); Morris, *Enterprise Liability and the Actuarial Process — The Insignificance of Foresight*, 70 YALE L.J. 554-555 (1961).

²¹See text accompanying notes 63-71 and 83-84 *infra*.

²²*Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 440 (1944); *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 129, 104 Cal. Rptr. 433, 439, 501 P.2d 1153, 1162 (1973).

that shifting the loss from the patient to the hospital or blood bank will create a financial incentive, which does not now exist, to develop methods of reducing the hazard from the defective blood.²³

A third rationale of strict liability is that the price of products should reflect their true cost to society.²⁴ The cost of a unit of blood should reflect not only the costs of collection and distribution, but the cost of the potential serum hepatitis injury that each patient faces when he or she receives a blood transfusion. If blood prices include liability costs, banks with poor detection methods and high incidences of contamination will be forced to raise their prices proportionally higher than those with safer collection methods.²⁵ The disproportionate increase in price will encourage hospitals to purchase their blood from banks with safer and lower-priced blood.

IV. THE CALIFORNIA CASES

The California Supreme Court has not considered the issue of whether a hospital can be held strictly liable for defective products it distributes to its patients. However, the two California appellate courts which have considered the issue held that a hospital provides services and services are exempt from strict liability.²⁶ The discussion in this section analyzes these cases and the precedent upon which they relied. It is submitted that, in establishing the broad exemption of all hospital services from strict liability, these cases misinterpreted the prior California law.

The question of whether a hospital should be held strictly liable for a defective product it distributed to the public did not reach the California appellate courts until the 1971 decision of *Silverhart v. Mt. Zion Hospital*.²⁷ In that case, an allegedly defective surgical needle broke and became embedded in the pelvic area of a patient. The First District Court of Appeal rejected the plaintiff's contention that, if the needle was defective, the hospital should be strictly liable in tort. The court, following the traditional Restatement rule that strict liability was not applicable to services, held that the hospital was providing a service and was therefore exempt from strict liability in tort.²⁸

The issue of the strict liability of a hospital again arose in the 1973 case of *Shepard v. Alexian Brothers Hospital*, another First District

²³See text accompanying notes 63-71 *infra*.

²⁴*Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d at 462, 150 P.2d at 440 (1944). See also G. CALABRESI, *THE COST OF ACCIDENTS* 70-72 (1970).

²⁵See text accompanying notes 63-71 *infra*.

²⁶*Shepard v. Alexian Brothers Hospital*, 33 Cal. App. 3d 606, 109 Cal. Rptr. 132 (1973) (serum hepatitis contaminated blood); *Silverhart v. Mount Zion Hospital*, 20 Cal. App. 3d 1022, 98 Cal. Rptr. 187 (1971) (defective surgical needle).

²⁷20 Cal. App. 3d 1022, 98 Cal. Rptr. 187 (1971).

²⁸20 Cal. App. 3d at 1028, 98 Cal. Rptr. at 191 (1971).

decision.²⁹ In *Shepard*, the plaintiff contracted serum hepatitis from a blood transfusion administered at the Alexian Brothers Hospital. In California, blood transfusions are expressly deemed services under Health and Safety Code section 1606.³⁰ The plaintiff in *Shepard* argued that the California statute did not immunize the hospital from strict liability.³¹ He further argued that strict liability should be applied to those services, such as blood transfusions, which meet the policy considerations of strict liability. The Court of Appeal followed the *Silverhart* rationale and refused to apply strict liability to the service. Neither the *Shepard* nor the *Silverhart* decision was appealed to the California Supreme Court.

In enunciating the rule that hospitals are exempt from strict liability for providing services, the *Silverhart* and *Shepard* courts relied on the 1954 California Supreme Court decision of *Gagne v. Bertran*.³² The *Shepard* court, for example, stated that it was constrained to adhere to the "time honored, well established law"³³ of the *Gagne* decision. In the *Gagne* case, the plaintiff argued that the defendant, a soil expert and test driller, should be held liable without fault when the advice he gave on the depth of land fill proved to be inaccurate.

²⁹ 33 Cal. App. 3d 606, 109 Cal. Rptr. 132 (1973).

³⁰ CAL. HEALTH & SAFETY CODE § 1606 (West 1970) provides:

The procurement, processing, 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 shall be construed to be, and is declared to be, for all purposes whatsoever, the rendition of a service by each and every person, firm or corporation participating therein, and shall not be construed to be, and is declared not to be, a sale of such whole blood, plasma, blood products, or blood derivatives, for any purpose or purposes whatsoever.

³¹ The *Shepard* court did not find that the legislative intent of the statute was to immunize all blood from all liability without fault. Rather the court treated the statute as simply requiring that the blood transfusion be analyzed as a service. There are several reasons that suggest the legislature did not intend that the statute completely prohibit California courts from applying strict liability. First, the express language of the statute is clear and only requires that blood transfusions be deemed services. Secondly, the legislature has refused to pass a statute that would expressly prohibit the application of strict liability or warranty to blood services. CAL. A.B. 2889 (April 16, 1971) provided that "No person shall be entitled to civil damages for injuries sustained as the result of contracting hepatitis by reason of a blood transfusion either in strict liability or warranty." Finally, the legislature knew when it passed the statute that it would not guarantee immunity from liability without fault, because the California Supreme Court had already applied the strict liability of warranty to services. *Aced v. Hobbs-Sesack Plumbing Co.*, 55 Cal. 2d 573, 12 Cal. Rptr. 257, 360 P.2d 897 (1961). Had the legislature intended to grant complete immunity, the *Aced* decision would have required it to so state in the statute. Rather, it appears that the legislature wished to allow the courts to apply liability without fault to blood services if they so wished.

³² 43 Cal. 2d 481, 275 P.2d 15 (1954).

³³ *Shepard v. Alexian Brothers Hospital*, 33 Cal. App. 3d at 613, 109 Cal. Rptr. at 136 (1973).

Chief Justice Traynor refused to hold the expert as a guarantor of his advice, stating that one who sells his services for the guidance of others is not liable in the absence of negligence or intentional misconduct.³⁴

This decision was cited by both the *Shepard* and *Silverhart* courts as precedent for their conclusion that hospital services are exempt from strict liability. The *Gagne* decision is however readily distinguishable from the *Shepard* and *Silverhart* product liability cases. The rationale of *Gagne* was that liability without fault would deter anyone from giving professional advice.³⁵ The hospitals in *Shepard* and *Silverhart* were not giving professional advice but were providing defective products. While the unquestioned wisdom of the *Gagne* decision may be precedent for a case in which a hospital or doctor has made a non-negligent error in opinion, it is not relevant to cases such as *Shepard* and *Silverhart* which involve defective products. The policy considerations of strict liability for defective products, which are applicable to product-related cases such as *Shepard* and *Silverhart*, are totally unrelated to a case, such as *Gagne*, in which there was no product at all.

In fact, the Chief Justice distinguished the facts in *Gagne* from those product-related cases in which liability without fault had been applied. In a footnote, he noted that even though the strict liability of warranty could not be applied to the *Gagne* facts, it was appropriate for product related cases.³⁶ It is interesting to note, in passing, that the author of the *Gagne* decision, Chief Justice Traynor, has criticized the very rule that the *Shepard* and *Silverhart* courts have established. Speaking of the exemption of blood transfusions from strict liability, the former Chief Justice said: "Thus, ill health offers adventure; no one has a better chance to live dangerously than the ill who must take their medicine."³⁷

The *Gagne* decision is distinguishable from *Shepard* and *Silverhart* for still another reason. A principal rationale of strict liability, loss redistribution, cannot be achieved unless the entrepreneurs possess the size and commercial attributes necessary to efficiently redistribute losses as a cost of doing business.³⁸ Where the defendant cannot redistribute losses, the California courts refuse to impose strict liability.³⁹ The hospitals in *Shepard* and *Silverhart* were in a

³⁴*Gagne v. Bertran*, 43 Cal. 2d at 487, 275 P.2d at 20 (1954).

³⁵*Id.*

³⁶43 Cal. 2d at 486, n. 2, 275 P.2d at 19, n. 2 (1954).

³⁷Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L.R. 363, 368 (1965).

³⁸See generally, G. CALABRESI, *supra* note 24, at 39-67.

³⁹The California courts view risk spreading as basic to strict liability, and where the defendant is not capable of risk reallocation, they have not imposed liability. *Price v. Shell Oil Co.*, 2 Cal. 3d 245, 85 Cal. Rptr. 178, 466 P.2d 722 (1970)

position to accept and redistribute losses as a cost of doing business. But even if *Gagne* had been a product liability case, the *Gagne* defendant would not have been a proper strict liability defendant because he did not have the capacity to redistribute loss.⁴⁰ There are, of course, instances in which small "Mom and Pop" retail operations have been held strictly liable, but in these cases, unlike *Gagne*, the operations are part of a larger chain of distribution in which there will be a right of indemnity.⁴¹

When the broad language of the *Gagne* decision is viewed in context, it is apparent that the service the court wished to exempt from liability without fault was professional advice, not the distribution of defective products. It is for this proposition that the *Gagne* decision has been repeatedly cited by California cases other than *Shepard* and *Silverhart*.⁴²

V. STRICT LIABILITY FOR SERVICES IN CALIFORNIA

The conclusion of the First District in *Shepard* and *Silverhart* that hospital services are exempt from strict liability is not only questionable because of the erroneous reliance on *Gagne* but also because of its conclusion that strict liability does not apply to services. In product liability cases the California courts of appeal have shown little hesitation in applying the *Greenman* doctrine without regard to the formalistic Restatement sale limitation.⁴³

(Where a product is distributed on an isolated or occasional basis, there will be no strict liability).

⁴⁰Had the soil expert in *Gagne* been part of an organization which developed, advertised and sold real estate lots on a large scale rather than the single expert, he might today be considered an appropriate strict liability defendant. Under modern theories of strict liability, a land developer, real estate sales organization or builder of homes, if operating on a mass basis, will be considered comparable to a traditional product manufacturer and held strictly liable in tort. *Avner v. Longridge Estates*, 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (1969).

⁴¹The justification for imposing the cost of strict liability on small retail outlets is that the retailer can in turn pass the cost on to the manufacturer. In *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 263, 37 Cal. Rptr. 896, 900, 391 P.2d 168, 171 (1964) the California Supreme Court explained that holding the small retailer liable works no injustice because the retailer and the manufacturer can adjust the costs of protection between themselves in their continuing business relationship.

⁴²The *Gagne* decision has been repeatedly cited in non-product liability cases for the proposition that a single individual acting in an advisory capacity will not be held liable without fault for error in advice. While the courts continue to use the rather imprecise language of the *Gagne* decision, the service referred to has in each case been the giving of advice, not defective products. *See e.g.*, *Allied Properties v. John A. Blume and Associates*, 25 Cal. App. 3d 848, 102 Cal. Rptr. 259 (1972) (engineer); *Linder v. Barlow, Davis & Wood*, 210 Cal. App. 2d 660, 27 Cal. Rptr. 101 (1962) (accountant).

⁴³It should be noted that these courts have not expressly held that strict liability applies to services. Rather, they have ignored the RESTATEMENT sale require-

An excellent example is the 1970 decision of *Garcia v. Halsett*.⁴⁴ In *Garcia*, the court did not consider it determinative that the owner of a laundromat was performing a traditional service. The owner was held strictly liable for the injuries caused by his defective washing machine, even though there was no sale, because he played "more than a random role in the overall marketing enterprise of the product in question."⁴⁵ The courts have also applied strict liability to the traditional service⁴⁶ of homebuilding. In *Kreigler v. Eichler Homes, Inc.*,⁴⁷ the defendant homebuilder was held strictly liable for a defective heating system installed in newly constructed homes.

While the California Supreme Court has not considered the issue, there are indications that the court would approve of the application of strict liability to services. First, the court has applied strict liability in the form of warranty to services. In *Aced v. Hobbs-Sesack Plumbing Co.*,⁴⁸ the Supreme Court held that even though the construction contract was one for services, the defendant was strictly liable in warranty for the defective tubing it installed. The *Aced* decision is significant because the issue could have been avoided by characterizing the transaction as a sale. Instead, the court faced the issue squarely and applied liability without fault to the service transaction. Second, the court has repeatedly restated the *Greenman* rule as requiring only that "a product be placed on the market"⁴⁹ and has not incorporated the Restatement sale requirement. In addition, even

ment and proceeded as if there were no sale requirement in California. This approach appears to be entirely consistent with the *Greenman* doctrine which only requires that a "product be placed on the market." *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963). The California Supreme Court has not included the RESTATEMENT sale requirement in its strict liability test. Some of the commentators and courts have considered the *Greenman* doctrine synonymous with the RESTATEMENT, which has the strict sale requirement. See generally, Titus, *Restatement (Second) of Torts 402A and the Uniform Commercial Code*, 22 STAN. L.R. 713 (1970). However, numerous courts, including the California Supreme Court, have recognized that the *Greenman* doctrine is broader in scope than the RESTATEMENT view of strict liability. *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 104 Cal. Rptr. 433, 501 P.2d 1153 (1972).

⁴⁴3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970).

⁴⁵3 Cal. App. 3d at 325, 82 Cal. Rptr. at 423 (1970).

⁴⁶The traditional distinction between sales and services was whether the essence of the transaction was the labor and skill provided or the value of the material supplied. *Clay v. Yates*, 156 Eng. Rep. 1123, 1125 (Ex. 1856). In *Clay v. Yates*, the court held a contract to print 500 copies of a treatise to be one for services because the labor was of greater value than the paper and ink. In the case of the homebuilder, the wood and nails are not as valuable as the skill and labor involved in building the house. Therefore, the homebuilder would be considered to be providing a service under the traditional doctrine.

⁴⁷269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969). See also *Avner v. Longridge Estates*, 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (1969).

⁴⁸55 Cal. 2d 573, 12 Cal. Rptr. 257, 360 P.2d 897 (1961).

⁴⁹*Cronin v. J.B.E. Olson*, 8 Cal. 3d 121, 130, 104 Cal. Rptr. 433, 439, 501 P.2d 1153, 1159 (1972).

though the Restatement is highly respected, the court has, in recent decisions, shown a willingness to depart from its view of strict liability. In *Cronin v. J.B.E. Olson*,⁵⁰ the court rejected the Restatement requirement that a product be unreasonably dangerous, stating: "We have not hesitated in reaching conclusions contrary to those set out in the Restatement section 402A."⁵¹ Finally, the court's general attitude toward strict liability has been that formalistic distinctions should not bar a plaintiff's recovery. In its classic statement in *Greenman*, the court said that "the remedies of injured consumers ought not be made to depend on the intricacies of the law of sales."⁵² In light of this attitude, it can be expected that the California Supreme Court will approve of the extension of strict liability to some services.⁵³

The arguments, discussed above, that California product liability precedent supports the application of strict liability to services were lightly dismissed by the *Shepard* court. The plaintiff in *Shepard* argued that product liability precedent, such as *Garcia v. Halsett*, supported the application of strict liability to the service of supplying blood. The court, citing *Silverhart*, stated that the product liability precedent was not applicable because the hospital was not "an integral and vital part in the overall production or marketing enterprise."⁵⁴ It is difficult to accept the court's assertion that the hospital is not an integral part of the marketing enterprise. Few surgical needles or units of contaminated blood ever reach the consuming public without distribution through a hospital. Further, even if we assume this argument was valid in regard to the *Silverhart* facts, it would not apply to the contaminated blood in *Shepard*. The *Silverhart* court argued that the hospital was not an integral part of the marketing enterprise because the hospital was the user, not the sup-

⁵⁰ 8 Cal. 3d 121, 104 Cal. Rptr. 433, 501 P.2d 1153 (1972). See also, *Elmore v. American Motors Corp.*, 70 Cal. 2d 578, 75 Cal. Rptr. 652, 451 P.2d 84 (1969).

⁵¹ 8 Cal. 3d at 131, 104 Cal. Rptr. at 440, 501 P.2d at 1160 (1972).

⁵² *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 64, 27 Cal. Rptr. 697, 701, 377 P.2d 897, 900 (1963).

⁵³ Numerous commentators have noted that the formalistic technicalities of the sale-service distinction do not adequately reflect the policy considerations of strict liability. For example, Dean Prosser described the sale-service distinction as a somewhat shaky ground on which to rest a decision. Prosser, *The Fall of the Citadel*, 32 AM. TRIAL LAWYERS J. 1, 10 (1968). See also: Bailey, *Sale Warranties, Products Liability and the U.C.C.: A Lab Analysis of the Cases*, 4 WILLAMETTE L.J. 391, 305-6 (1967); Meveren, *The Extension of Liability to Service Contracts—Emphasizing the Furnishing of Unfit Blood for Transfusion*, 6 AM. BUS. L.J. 517, 524 (1968); Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692, 696-97 (1965). Note, *A New Principle of Products Liability in Service Transactions*, 30 U. PITT. L. REV. 508 (1969).

⁵⁴ *Shepard v. Alexian Brothers Hospital*, 33 Cal. App. 3d at 612, 109 Cal. Rptr. at 135 (1973).

plier, of the defective surgical needle.⁵⁵ This distinction would not apply to the *Shepard* case, where the contaminated blood was clearly supplied to the patient. Finally, the validity of the distinction between a user and supplier is open to question. The decision of *Garcia v. Halsett*,⁵⁶ discussed above, established that a product need not actually be transferred to a particular individual for strict liability to apply.

VI. THE POLICY CONSIDERATIONS IN REGARD TO HOSPITAL AND BLOOD BANK LIABILITY FOR DEFECTIVE BLOOD

The following analysis considers the major policy arguments which have been asserted by the courts⁵⁷ and commentators⁵⁸ in opposition to strict liability for defective blood. The majority of these arguments were reiterated in the recent California court of appeal decision of *Shepard v. Alexian Brothers Hospital*⁵⁹ where the court concluded that it was "quite apparent"⁶⁰ that the policy considerations underlying strict liability do not apply to the hospital which administers a blood transfusion.

One of the major policy justifications of strict liability, as noted earlier, is that the cost of injuries from defective products ought to be imposed on the party that is in the better position to reduce the danger from the defective product. It is submitted that the imposition of strict liability on the hospital and blood bank will create a financial incentive, that does not now exist, to reduce the dangers from defective blood.

It has been argued, however, that since no test has been developed that will detect all of the serum hepatitis contamination, the blood cannot be made safe and the safety incentive will not be achieved.⁶¹ This position⁶² ignores the fact that the safety incentive rationale can

⁵⁵*Silverhart v. Mount Zion Hospital*, 20 Cal. App. 3d 1022, 1029, 98 Cal. Rptr. 187, 191 (1971).

⁵⁶3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1970). In *Garcia* the defendant was the owner of a laundromat and no product was transferred to the plaintiff.

⁵⁷See cases cited at note 9 *supra*.

⁵⁸See generally, Haut and Alter, *Blood Transfusions — Strict Liability?*, 43 ST. JOHN'S L. REV. 557 (1969); Note, *Blood Transfusions and Human Transplants: A Problem of Proof and Causation*, 4 IND. LEGAL F. 518, 542 & 543 (1971); Note, *Liability For Blood Transfusions Resulting in Serum Hepatitis*, 12 WM. & MARY L. REV. 86 (1970).

⁵⁹*Shepard v. Alexian Brothers Hospital*, 33 Cal. App. 3d 606, 109 Cal. Rptr. 132 (1973).

⁶⁰33 Cal. App. 3d at 611, 109 Cal. Rptr. at 134 (1973).

⁶¹33 Cal. App. 3d at 612, 109 Cal. Rptr. at 135 (1973).

⁶²One eminent commentator concludes that the safety incentive rationale justifies shifting the loss to the maker only if he could have eliminated a danger that should not have existed. Further, he suggests that liability should not extend to makers of highly desirable products with unavoidably injurious effects. Keeton,

be served even though the defect cannot always be detected.⁶³ First, strict liability will encourage the hospital and blood bank to direct more financial resources to research that may lead to more effective methods of detecting the serum hepatitis contamination. Second, the fear of liability will encourage both the hospital and blood bank to institute the most effective methods of detection at their respective institutions. Strict liability will also create a greater financial incentive⁶⁴ for hospitals to purchase blood from banks with the lowest incidences of contamination.⁶⁵

The greatest impact from strict liability will be felt by the commercial banks which are now distributing blood with contamination rates many times higher than that from non-commercial banks.⁶⁶ The estimates of the extent of this disparity vary, but one author reports that the rate of contamination in blood from volunteer banks

Product Liability and the Meaning of Defect, 5 ST. MARY'S L.J. 30, 34 (1973). This position ignores the fact that the safety rationale of strict liability can be achieved without elimination of the defect. In the case of defective blood, for example, the cost can be placed where it will encourage the selection of banks with the lowest incidence of contamination. Secondly, the safety rationale should not be determinative of which products should be subject to strict liability. The safety rationale is a factor in determining which of the possible risk bearers is in a better position to assume the burden once it is determined that a defective product exists. Under the Keeton analysis, the maker would be strictly liable only if he could have eliminated the risk. The maker is then held to little more than a negligence standard. The more appropriate analysis would appear to be to hold the maker liable when he is in a better position to minimize the hazard.

⁶³See note 1 *supra*.

⁶⁴It has been suggested that the existence of liability insurance tends to absorb the cost of liability and reduce the incentive to make products safer, thereby defeating the safety incentive of strict liability. Ehrenzweig, *Negligence Without Fault*, 54 CAL. L. REV. 1422, 1440 (1966). While it is true that the liability insurer absorbs the initial cost of liability, it does not necessarily follow that the entrepreneur does not feel the impact of liability from his defective products. In the case of large manufacturers that distribute many products, it may be true that it is more economical for the insurer to tend toward broad forms of insurance which group numerous producers into large actuarial categories. Under these circumstances, the entrepreneur may not feel the impact of liability. However, business insurance in general tends to be in the form of specifically designed plans which are sensitive to the entrepreneurs' liability potential. Calabresi and Bass, *supra* note 12, at 85, n. 19. In addition, blood banks distribute only one product and we can expect increases in insurance premiums and threats of cancellation to be correspondingly more sensitive. Finally, the liability potential of blood banks, unlike that of numerous industries, may vary drastically between competing banks. See note 1 *supra*. Thus, even though the liability insurer absorbs the initial cost of liability, the entrepreneur's insurance cost will be sensitive to his liability potential. Those blood banks with high rates of contamination will be forced to charge disproportionately higher rates for their blood.

⁶⁵As a general rule, each hospital has a choice of several banks from which to buy blood. *Brody v. Overlook Hospital*, 121 N.J. Super. 299, 307, 296 A.2d 668, 672 (1972).

⁶⁶See note 1 *supra*.

is five per thousand as opposed to five per hundred from commercial banks.⁶⁷ There are numerous reasons for the higher rates of contamination in commercial blood, but at least some of the disparity results from the poor screening methods of commercial banks which locate in central cities and tend to attract drug users, derelicts and others who are likely to be carriers of serum hepatitis.⁶⁸ While no method of testing exists that will identify all of the contamination in blood, one of the most effective methods is the careful screening of donors.⁶⁹ If held strictly liable, the banks with higher incidences of contamination will have higher liability costs and correspondingly higher prices than banks with more thorough screening methods. In order to avoid liability and in order to keep their prices competitive,⁷⁰ the commercial banks will have a financial incentive to institute more careful screening procedures.

The effect that strict liability will have on commercial banks is an excellent example of the policy justification, discussed earlier, that the product should reflect its true cost to society.⁷¹ The highly contaminated blood which is now being sold by these commercial banks does not include liability costs because that cost is borne by the patient who receives the defective blood. Strict liability would shift that cost back to the hospital and blood bank distributing the blood. The imposition of strict liability will also create a financial incentive, which is not now present, to develop new methods of obtaining safer volunteer blood. For example, one result of the recent controversy over the high contamination rates from commercial blood has been the reduction in the age limit of non-paid donors from 18 to 17, thus encouraging the donation of blood by high school students. The implementation of more programs of this nature will have the beneficial effect of reducing the amount of highly contaminated commercial blood transfused in our nation's hospitals.⁷²

⁶⁷*Id.*

⁶⁸*Id.*

⁶⁹*Id.*

⁷⁰See note 65 *supra*.

⁷¹See text accompanying note 24 *supra*.

⁷²It has been suggested that strict liability will have detrimental effects on medicine that will offset these policy justifications. One such concern is that increased liability will lead to the practice of defensive medicine. This concern would not, however, appear to be as serious in regard to strict liability as it is in other areas of medical liability. First, the practice of defensive medicine is primarily a problem that is confined to doctors and it is not suggested that doctors should be held strictly liable. Secondly, defensive medicine commonly arises in areas where the doctor or hospital administration is exercising professional discretion. For example, a doctor or hospital fearing that a mistake in diagnosis or opinion will result in the stigma of a malpractice suit may be deterred from using a new procedure or, in the alternative, may proceed more cautiously than the situation warrants. This is precisely the area in which strict liability is not applicable. The courts uniformly refuse to apply strict liability to errors in pro-

Additionally, the concern over scientific undetectability of the serum hepatitis virus is somewhat academic in light of the practical inability to detect the defects in numerous product liability cases. As some courts have indicated,⁷³ the inability to detect the contamination in blood is analogous to the practical inability to detect the typhoid bacilli in clams, the contamination in a tin of canned meat or the impurities in a candy bar sealed in a wrapper. Yet, in each case, the entrepreneur is held liable without fault.⁷⁴ It has also been recognized in California, in other contexts, that a particular defendant's inability to discover the defect does not necessarily defeat the policy considerations of strict liability.⁷⁵

The concern over the detectability of the defect has the ring of deep-seated fault and negligence concepts. Liability without fault, unlike negligence, is not imposed because the entrepreneur should have detected the defect. The culpability of his conduct is not at issue. The defendant is liable even though he "exercises all possible care in the preparation of the product."⁷⁶ Strict liability is imposed because the entrepreneur is in the better position to improve the safety of the product and because he is better able to distribute the risks as a cost of doing business.

Another argument asserted against the imposition of strict liability is that it will result in a decrease in the supply of blood because the fear of liability will deter commercial blood banks from marketing their product.⁷⁷ While strict liability may encourage hospitals to buy the safer volunteer blood when possible, it will not deter the marketing of needed commercial blood.

fessional judgment. See discussion of the *Gagne* decision at notes 34 and 35 *supra*. Strict liability applies to defective products, not errors in medical judgment. In addition, strict liability will probably not be applied to experimental new products. See discussion of organ transplants at notes 84-86 *infra*. Finally, holding a hospital strictly liable for defects in blood, which cannot be removed, contains none of the stigma of negligence, sloppy practices or harm to reputation that a malpractice adjudication of fault implies. In fact, Justice Tobriner has suggested that under some circumstances, it would be better to hold a doctor strictly liable than to attempt to adjudicate fault. In a concurring opinion in *Clark v. Gibbons*, 66 Cal. 2d 399, 58 Cal. Rptr. 125, 426 P.2d 525 (1967), he argued that applying strict liability to that narrow range of cases where the cause of the accident is unexplainable would prevent unwarranted imputations of fault on doctors and insure that the helpless victim has a remedy. This he suggested would help eliminate some of the harmful effects of the fault system that presently leads to the practice of preventive medicine.

⁷³*Cunningham v. MacNeal Memorial Hospital*, 47 Ill. 2d 443, 266 N.E.2d 897 (1970).

⁷⁴47 Ill. 2d at 456, 266 N.E.2d at 902 (1970).

⁷⁵*Barth v. B.F. Goodrich Tire Co.*, 265 Cal. App. 2d 228, 71 Cal. Rptr. 306 (1968). In *Barth*, the defendant acted as a conduit for distribution of a product which he had no opportunity to inspect.

⁷⁶RESTATEMENT (SECOND) OF TORTS § 402A (2)(a) (1965).

⁷⁷*Shepard v. Alexian Brothers Hospital*, 33 Cal. App. 3d at 612, 109 Cal. Rptr. at 136 (1973).

The deterrent effect postulated above results from the fear of placing a product in the stream of commerce which may have unknown defects that might result in catastrophic liability for the entrepreneur. This possibility exists where the hazard is unknown and the actuary cannot determine with any degree of credibility the amount of risk for a particular enterprise. In such cases, it may be difficult to insure or self-insure against the loss and the deterrent effect theory may possess some validity. A hypothetical producer, such as a drug manufacturer who does not know the defects in his product, will be unable to insure against potential catastrophic loss and therefore, will not market his product until he is able to determine the degree of risk.

The hospital and blood bank, however, possess the necessary actuarial foresight to determine the risk of serum hepatitis with a fair degree of accuracy.⁷⁸ Each hospital or blood bank can obtain the necessary information concerning the source of its blood and insure on that basis. This ability to determine actuarially the incidence of risk from the product minimizes any effect of the deterrent theory. There will be no fear of catastrophic liability to deter the marketing of the product because the blood banks can adjust the prices to include the liability costs before they put the blood on the market. Thus, if commercial blood is needed, the bank will not be deterred from selling it, but it will be sold at a higher price.⁷⁹ It should be noted, however, that even though the commercial banks will not be deterred from marketing the blood, they may face a reduction in business. As discussed earlier, the banks with the highest rates of contamination will be forced to raise prices higher than the banks with safer collection methods. The disproportionate increase in prices will encourage hospitals to purchase their blood from banks with lower incidences of contamination or to develop other methods of obtaining safer blood.

The ability to determine actuarially the incidence of contamination in blood also alleviates another problem commonly associated with tort liability. This is the problem of the first victim recovery, which depletes the available insurance and/or drives the entrepreneur out of business. This may occur where the entrepreneur cannot ac-

⁷⁸The incidence of serum hepatitis contamination in blood transfusions is primarily a function of the health of the donor. The blood bank and hospital with their knowledge of whether the particular blood in question was obtained from commercial or non-commercial donors and with their information concerning the screening techniques used, can determine with a sufficient degree of credibility the risk from the blood they are distributing. Thus, "[t]ransfusion hepatitis is a statistically predictable event . . ." Calabresi and Bass, *Right Approach, Wrong Implications: A Critique of MacKean on Products Liability*, 38 CHI. L. REV. 74, 83 (1970).

⁷⁹See text accompanying notes 69-70 *supra*.

curately determine his liability potential because he does not know the incidence of risk from his product. In this circumstance, the other victims have no remedy. This should not be a problem with strict liability for defective blood. Unlike some entrepreneurs, such as some drug producers, the distributors of blood know, before they put the product on the market, what the incidence of contamination is and therefore, they know its approximate liability potential.⁸⁰ Thus, there would be no reason for a responsible institution to have inadequate insurance.

An additional concern that arises in any discussion of increased medical liability is the problem of the corresponding increase in the cost of medical services. The rising cost of medical care is certainly a valid problem but it should be remembered that the cost of injury from defective blood already exists and is being paid by the unfortunate patient who happens to receive the contaminated blood. Strict liability will not create additional costs;⁸¹ it will shift the costs that already exist from the patient to the entrepreneurs who are distributing the defective blood. If the hospital and blood bank are held strictly liable, each of the six million units of blood per year⁸² will be priced so that they more accurately reflect their true cost to society. It is this re-allocation of loss that is the basis of the strict liability theory.⁸³ Each patient that receives a transfusion faces a risk of getting serum hepatitis. Therefore, it is more equitable to shift the cost to the entrepreneurs who can increase the safety of the product and who are in a better position to distribute the cost over all who use the product, rather than leaving the catastrophic cost on one unlucky patient.

Numerous state legislatures have expressed the additional concern that once strict liability is applied to blood, it will be extended to such experimental areas as organ transplantations.⁸⁴ They argue that the imposition of strict liability would inhibit the development and use of these vitally needed procedures.

⁸⁰See note 78 *supra*.

⁸¹There will, of course, be transfer costs which result from litigation expense.

⁸²R. TITMUSS, *THE GIFT RELATIONSHIP* 47-69, 90-91 (1971).

⁸³See text accompanying notes 19-21 *supra*.

⁸⁴This argument appears to have been especially persuasive in state legislatures. Shortly after the Supreme Court of Illinois applied strict liability to hospitals in *Cunningham v. MacNeal Memorial Hospital*, 47 Ill. 2d 443, 266 N.E.2d 897 (1970), the Illinois Legislature adopted a statute which granted hospitals immunity from strict liability. The legislative preamble to the statute indicates that a primary concern of the legislature was that bone, tissue and other organ transplants should be protected from strict liability. Further, the legislature expressed concern that strict liability would inhibit research. ILL. ANN. STAT. Ch. 91, § 182 (Supp. 1972). See also FLA. STAT. ANN. § 672.2-316(5) (Supp. 1973); TEX. REV. CIV. STAT. ANN. Art. 4590-3 § 1 (1971). The Florida and Texas legislators expressed concerns similar to those enunciated by the Illinois Legislature.

There is, of course, reason to expect that strict liability may be expanded into other areas of medicine. However, the imposition of strict liability on heart, tissue, kidney and other organ transplantations seems unlikely and would require a major change from our present understanding of the doctrine. The basic policy rationale of strict liability, risk redistribution, presupposes that the liability will be imposed on a product in mass distribution. This policy is basic to strict liability and where this scheme of mass distribution is not present, the California courts have refused to impose strict liability. For example, a mass builder of homes is strictly liable, but the occasional builder is not. Also, the mass distributor of a product is liable while the occasional distributor is exempt from strict liability.⁸⁵ In most experimental areas, such as organ transplantations, the mass distribution necessary to support the strict liability notion of risk spreading is not present and therefore strict liability will probably not be applied. This should be contrasted with the distributive scheme of blood which is a massive and, in some cases, lucrative industry distributing over six million units of blood per year.⁸⁶ This distributive network is of sufficient size and possesses the necessary commercial attributes to efficiently reallocate losses as a cost of doing business.

Thus, it appears that the same policy considerations that encourage the application of strict liability to blood would discourage such a finding in such experimental areas as organ transplantations. Finally, this concern could be solved by legislative action exempting experimental procedures from strict liability.

It has also been contended that many hospitals and blood banks do not profit from putting blood on the market and therefore, should not be held strictly liable in tort.⁸⁷ While there are a significant and growing number of profit making institutions involved in the collection and distribution of blood,⁸⁸ the existence or non-existence of profit should be irrelevant to the applicability of strict liability. Profit making entrepreneurs may represent the typical strict liability defendant, but profit making should not be a prerequisite to liability.⁸⁹ This reasoning was accepted by the Supreme Court of Illinois in a decision holding a hospital strictly liable in tort for defective blood:

An entity which distributes a defective product for human consump-

⁸⁵Price v. Shell Oil Co., 2 Cal. 3d 245, 85 Cal. Rptr. 178, 466 P.2d 722 (1970). (In *Price*, the California Supreme Court stated that a defendant supplying products on an occasional or isolated basis will not be strictly liable.)

⁸⁶See note 82 *supra*.

⁸⁷Shepard v. Alexian Brothers Hospital, 33 Cal. App. 3d at 611, 109 Cal. Rptr. at 135 (1973).

⁸⁸R. TITMUSS, *supra* note 82, at 96-98.

⁸⁹See note 91 *infra*.

tion, whether for profit or not, should legally bear the consequences of injury caused thereby, rather than allowing such a loss to fall on the individual consumer . . .⁹⁰

The major justification of strict liability — efficient loss redistribution — is just as applicable to charitable or non-profit institutions as it is to profit making ones.⁹¹ Economically, it makes no difference whether the institution is profit or non-profit oriented as long as it is of sufficient size for loss redistribution and as long as imposing the cost on that entity will create an incentive to produce a safer product.

A final argument against strict liability for defective blood is that blood is within the Restatement Comment K unavoidably unsafe product exception to strict liability.

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 . . . Such a product . . . is not defective, nor is it unreasonably dangerous.⁹²

⁹⁰Cunningham v. MacNeal Memorial Hospital, 47 Ill. 2d at 457, 266 N.E.2d at 904 (1970).

⁹¹The basic rationale of strict liability is risk spreading and as long as an entrepreneur is of sufficient size to pass losses along as a cost of doing business, strict liability would appear to be applicable. There appear to be no cases on this issue because non-profit institutions are not generally involved in distributing products. What commentary exists on this issue appears to be in agreement. For example, Calabresi concludes that "[l]oss redistribution is as applicable to charitable or non-profit institutions as it is to profit-making ones." Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 548 (1961). The argument that non-profit institutions should be exempt from liability was also asserted (and has since been rejected) in support of the doctrine of charitable immunity. The weaknesses of the argument in terms of charitable immunity were recognized by Harper and James in their authoritative work. 2 HARPER & JAMES, THE LAW OF TORTS 1669 § 29.16 (1956):

. . . the true justification of vicarious liability is its tendency to provide compensation for innocent victims of an enterprise, and to distribute the burden of these losses broadly through the persons or institutions engaged in that enterprise. If the employer gets profit from the enterprise, that may serve as an added reason for making him take the burden of acting as a conduit for its losses. But the reason for making him bear the loss in the first instance is complete without this addition, where the enterprise is his and where he makes a good conduit for distributing losses. The modern charitable institution fully meets these tests

⁹²The RESTATEMENT (SECOND) OF TORTS § 402A, Comment K (1965) provides: 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, notwithstanding the unavoidable high degree of risk which they involve. Such a prod-

If an unavoidably unsafe product is prepared without negligence and sold with adequate warnings, the manufacturer will not be strictly liable for defects in the product. As there is presently no completely effective means of detecting the serum hepatitis contamination in blood, it has been argued that defective blood should be included within the Comment K exception.⁹³ The inclusion of defective blood within the unavoidably unsafe exception would not, however, be consistent with the rationale of Comment K.

The authors of the Comment did not give a formal indication of their intent in drafting the exemption, but it is apparent from a reading of the Comment that the drafters were concerned that strict liability would deter manufacturers from marketing new and life-saving drugs.⁹⁴ Three elements must exist before a product should be exempted under the Comment. First, the product must, at the time of marketing, be incapable of being made safe for intended use.⁹⁵ Secondly, the potential societal benefit, at the time of marketing, must appear to outweigh the possible harm.⁹⁶ Finally, the

uct, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

⁹³This position was asserted by Dean Prosser, *supra* note 53, at 10. See also Note, *Torts — Strict Liability — A Hospital is Strictly Liable for Transfusions of Hepatitis Infected Blood — Cunningham v. MacNeal Memorial Hospital*, 49 MICH. L. REV. 1172, 1181-1183 (1971); Note, *Liability of a Hospital for Supplying Unpure Blood*, 1965 WIS. L. REV. 374, 387 (1965).

⁹⁴See note 98 *infra*.

⁹⁵Comment K provides: "There are some products which, in the present state of human knowledge, are quite incapable of being made safe . . ."

⁹⁶This element of the immunity appears to be ignored by the courts. See note 97 *infra*. It appears from a reading of the Comment, that the drafters intended that it apply only to those products which had societal benefits which appeared, at the time of marketing, to outweigh the hazards. For example, the Comment gives the Pasteur treatment of rabies as an example of an unavoidably unsafe product. Then, Comment K provides: "Since the disease itself invariably leads to a dreadful death, both the marketing and use of the vaccine are fully justified . . ." Further, in discussing the marketing of drugs, in general, the Comment states, ". . . Such experience as there is justifies the marketing and use of the drug . . ." The requirement that the benefit of the product appear to outweigh the known hazards makes good practical sense. There is, for example, no benefit gained by granting an immunity to a prescription drug which offers no signifi-

product must be one that would not have been marketed or would have been delayed in marketing because of the fear of strict liability. This final element is essential to any meaningful reading of Comment K, yet it appears to be totally ignored by the courts.⁹⁷ The logical premise of the exemption is that society needs new and lifesaving products and it is believed that the fear of strict liability would deter the marketing of the product. The manufacturers of drugs, for example, should not be exempted simply because they are making a product that cannot be made safe. Society benefits only if the exemption encourages the marketing of a product that would not otherwise be marketed.⁹⁸

There are many products, such as drugs, which come within the rationale of Comment K. The drug manufacturer may delay in marketing, or not market his product at all, because of the fear that an unknown defect would cause catastrophic liability. The manufacturer may not be able to protect himself through insurance because he may not know the incidence of risk from his product. Therefore, he may delay in marketing until he can more accurately determine the risk. Society benefits, under these circumstances, because the exemption will encourage the marketing of a product that would not otherwise be marketed.

However, not every product that cannot be made safe falls within this rationale. If the product is one where the defect is known and

cantly new therapeutic value to society. To remain logically consistent with its rationale of benefit to society, the RESTATEMENT should only advocate immunity for those drugs which are both incapable of being made safe and offer some significant therapeutic value. Those drugs which provide no significantly new benefits to society should be kept off the market until the manufacturer can determine whether they are in a defective condition. This element of the immunity would appear to affect a large number of prescription drugs, yet some courts apply the immunity automatically. In the ten years prior to 1967, there were approximately 2000 new prescription drugs marketed. Only 20 percent of these drugs constituted significant new therapeutic advances. Merrill, *Compensation For Prescription Drug Injuries*, 59 VA. L. REV. 1, 3 (1973). The one adverse effect of this requirement is that it would tend to give the entrepreneur who first puts the new product on the market a form of monopoly. This results because the other drugs will be subject to strict liability unless they provide a new therapeutic value that the first did not.

⁹⁷Some courts cite Comment K as automatically applicable to all prescription drugs. *Davis v. Wyeth Laboratories, Inc.*, 399 F.2d 121, (9th Cir. 1968); *Toole v. Richardson-Merrill, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).

⁹⁸There appears to be no discussion in the legal literature concerning the policy rationale behind Comment K. However, the drafters' discussion of the Pasteur vaccine and of experimental drugs (*see note 92 supra*) indicates that they were concerned that lifesaving products would not be marketed if strict liability were imposed. It is easy to understand that the drafters felt the benefit of the new lifesaving products would be more important to society than compensating the injured consumer. It is more difficult to understand why the drafters would exempt products from liability if they would be marketed even though subject to strict liability. Since the product would be marketed anyway, there is no societal benefit in granting the immunity.

the incidence of potential injury from the product is actuarially determinable, then the fear of strict liability will not deter the marketing of the product. This entrepreneur, unlike the hypothetical drug manufacturer, knows the risk from his product and can insure against it by including the cost of the liability in the price of the product. This is the case with serum hepatitis contaminated blood. The incidence of contamination in the blood, unlike the risk inherent in new drugs, can be actuarially determined, and therefore the entrepreneur knows the liability potential of his product before he puts it on the market.⁹⁹ As a result, the entrepreneur includes the cost of his potential liability into the price of the blood and there is no fear of unknown defects or catastrophic liability to deter the marketing of the product. Thus, the entrepreneur will market the blood even if strict liability is imposed. If the rationale of Comment K is to encourage the production of products that would not otherwise be marketed, there is no societal benefit in applying it to defective blood.

VII. CONCLUSION

Strict liability is an appropriate remedy for a patient who contracts serum hepatitis from a blood transfusion administered at a California hospital.

The California court of appeal decisions which have exempted hospitals from all strict liability for their defective products appear to be in conflict with the mainstream of California product liability law. The California Supreme Court precedent upon which these cases relied was not intended to exempt all services from strict liability. Further, the California appellate courts have applied strict liability without regard to the traditional sale limitation.

The policy considerations of strict liability also warrant its application to contaminated blood. Strict liability will not only remove the financial burden from the injured patient but it will encourage the use or development of safer blood. If the price of blood reflects its true cost to society, commercial banks will be forced to improve their collection methods or hospitals will develop their own methods of obtaining the safer volunteer blood.

The issue of whether hospitals should be held strictly liable for defective blood will be particularly important in years to come because it is the testing ground for the application of strict liability to defective surgical needles and other defective products distributed by hospitals.

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⁹⁹See text accompanying note 78 *supra*.