1971

Recent Developments

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Recommended Citation
Various Editors, Recent Developments, 16 Vill. L. Rev. 983 (1971).
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RECENT DEVELOPMENTS

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.

Cunningham v. MacNeal Memorial Hospital (Ill. 1970)

The plaintiff, Mrs. Frances Cunningham, alleged in her second amended complaint that while a patient in the defendant MacNeal Memorial Hospital, she was transfused\(^1\) with a unit of blood which had been supplied to that hospital's blood bank by the Michael Reese Hospital Blood Bank.\(^2\) It was further alleged that this unit of blood, which was sold or supplied to her by this business enterprise, was defective and in an unreasonably dangerous condition at the time it left defendant's control and that she, a consumer, contacted serum hepatitis\(^3\) as a direct and proximate

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1. The infusion of human whole blood or blood fractions intravenously into a patient is called a transfusion. The person from whose veins the blood is obtained is termed the donor. Whole blood, which is a tissue of the body, consists of plasma, making up 50 to 60 per cent of its volume, and formed elements, which are the red corpuscles (erythrocytes), white cells (leukocytes), and platelets (thrombocytes), composing the other 40 to 50 per cent of the blood volume. AMERICAN ASSOCIATION OF BLOOD BANKS, TECHNICAL METHODS AND PROCEDURES 149 (4th ed. 1966) [hereinafter cited as AABB METHODS]. Besides the transfusion of plasma or the formed elements, transfusion of fractions derived from plasma such as albumin, fibrinogen, gamma globulin, and the immunoglobulins may be made. See Tullis & Pennell, Transfusion of Specific Plasma Components, 19 ANNUAL REV. MED. 233 (1968).

2. A blood bank is an organization engaged in at least four of the following functions, one of which must be the bleeding of donors: (1) donor recruiting, (2) bleeding of donors, (3) blood processing, (4) blood storage, (5) cross-matching, (6) infusion of blood, and (7) preparation of blood components. AABB METHODS, supra note 1, at 1. The responsibility of the blood bank within a hospital for these functions is total, for the clinician will have no clue to suspect that these laboratory procedures may have been improperly performed. A TEXTBOOK OF CLINICAL PATHOLOGY 245 (7th ed. S. Miller ed. 1966) [hereinafter cited as Miller].

3. Viral hepatitis can be caused by at least two different agents. The most common names applied to these agents have been infectious hepatitis (IH or MS-1) and serum hepatitis (SH or MS-2). While IH was characterized as a short incubation period virus (two to six weeks) which often occurred in epidemics and which was transmitted primarily by the fecal-oral route, SH was described as one having a long incubation period (six to twenty-six weeks), which occurred sporadically and which was transmitted by parenteral exposure to human blood or blood products. Evidence shows, however, that the similarity between these distinguishing factors is apparently too great to continue using the terminology of IH and SH, particularly since it has now been shown that: (1) both agents can be transmitted parenterally and orally, (2) SH may have the potential of being epidemic, and (3) the incubation period range of IH and SH overlap enough to permit erroneous diagnosis. It has been suggested that, in place of the ambiguous terminology of IH or SH, the future the terminology will rest on whether or not the Australia antigen [Au(1), also called the SH antigen or Hepatitis associated antigen (HAA)] is detectable in a patient's serum. Blumberg, Sutnick, London & Millman, Australia Antigen and Hepatitis, 283 NEW ENG. J. MED. 349, 353-54 (1970) [hereinafter cited as Blumberg]. See Barker, Shulman, Murray, Hirschman, Ratner, Diefenback & Geller, Transmission of Serum Hepatitis, 231 J.A.M.A. 1509 (1970) [hereinafter cited as Barker]; Shulman, Hepatitis-Associated Antigen, 49 AMER. J. MED. 669, 673-74, 678 (1970)

(983)
result of such defect which necessitated further hospitalization and medical treatment and which left her with permanent disabilities. Defendant contended that the theory of strict tort liability did not apply to the transfusion of blood by a hospital and accordingly moved for a judgment on the pleadings. The circuit court of Cook County granted the motion and entered judgment for the defendant. On appeal, the appellate court found that the complaint properly stated a cause of action under the theory of strict tort liability, reversed the circuit court's judgment and remanded the case for trial. On appeal of this judgment by the defendant, the Supreme Court of Illinois confronted the question of the legal propriety of applying strict tort liability, as found in section 402A of the Restatement (Second) of Torts, to a hospital which sold or supplied whole blood containing a hepatitis virus to the plaintiff for transfusion as part of the ancillary services rendered to the plaintiff by that hospital. Finding first that blood was a product, the court affirmed, holding that: (1) assuming the allegations in plaintiff's second amended complaint were true, blood was a product; (2) the defendant hospital was engaged in the business of selling whole blood for transfusion into patients; (3) blood containing a hepatitis virus was defective and unreasonably dangerous to the consumer; (4) such blood did not come within any exception to the section 402A principle; and (5) therefore, plaintiff had adequately stated a cause of action in strict tort liability. The court further noted that the inability of the defendant to detect the presence of the virus in blood was of "absolutely no moment." The case was remanded to the circuit court to be tried in accordance with the views expressed in that opinion. Cunningham v. MacNeal Memorial Hospital, Ill. 2d 266 N.E.2d 897 (1970).

Blood was once regarded as the very essence of life and attempts to transfuse man date as early as 1667. While transfusion continued in [hereinafter cited as Shulman]. Therefore, the new nomenclature provides that there are at least two viruses, which can be transmitted by two or more routes of infection and can cause hepatitis, but only one of the viruses can be detected by the presence of the Australia antigen. See Sutnick, London, Millman, Coyne & Blumberg, Viral Hepatitis, Revised Concepts as a Result of the Study of Australia Antigen, 54 Med. Clin. N.A. 805, 813 (May, 1970) [hereinafter cited as Sutnick].


5. Section 402A, entitled Special Liability of Seller of Product for Physical Harm to User or Consumer, provides:

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

ReSTATEMENT (SECOND) OF TORTS § 402A (1965).


the eighteenth and nineteenth centuries, it did not become a safe procedure until after 1900 when Landsteiner discovered the blood groups. Since 1939 and 1940 when the Rhesus factor in human blood was identified, research has shown that blood is exceedingly complex and that there is a probability of individuality in blood-group patterns as there is in fingerprints. A transfusion of blood may also transmit bacteria, spirochetes, protozoa and viruses if they were present in the donor's blood. These may not immediately cause any untoward reaction in the recipient, but they may later induce disease.

A few decades ago, human hepatitis was clearly established as being caused by a transmittable agent with the characteristics of a virus. In the past decade it has received increasing attention as a public health problem. To date, however, the etiologic agent of viral hepatitis has not been identified because all attempts to produce the disease experimentally, either in the usual laboratory animals or in the tissue cultures of cells, have failed or have been impossible to duplicate in other laboratories.

9. The main blood group is the ABO system. In the past seventy years, however, many other systems such as the I, MNS, P, Kell, Lewis, Duffy, Kidd and Lutheran have been identified. See AABB METHODS, supra note 1, at 79; Grove-Rasmussen, Lesses & Anstall, Transfusion Therapy, 264 NEW ENG. J. MED. 1034, 1091 (1961) [hereinafter cited as Grove-Rasmussen]; Miller, supra note 2, at 233-41.
10. The Rhesus (Rh) factor was discovered in 1939 and 1940. See Landsteiner & Wiener, An Agglutinable Factor in Human Blood Recognized by Immune Sera for Rhesus Blood, 43 PROC. SOC'Y EXP. BIOL. & MED. 223 (1940); Levine & Stetson, An Unusual Case of Intragroup Agglutination, 113 J.A.M.A. 126 (1939).
11. Grove-Rasmussen, supra note 9, at 1088. The reason why so many transfusions can be given with such apparent ease in spite of the potential complexity of the transfusion is because many of the blood group factors in man are so weakly antigenic that the recipient's body does not recognize them as foreign. MOLLISON, supra note 7, at xxi.
12. The main indications for transfusion therapy are: (1) to maintain the circulation, as in extracorporeal or cardiac-bypass shunts, (2) to maintain blood volume and prevent or treat shock, (3) to maintain the blood's oxygen-carrying capacity and to prevent or treat acute hypoxia, (4) to rid the blood of harmful substances, such as in the newborn infant's exchange transfusion, and (5) to maintain or promote blood coagulation. Grove-Rasmussen, supra note 9, at 1034.
13. For example, the transfusion of bacteria may induce a febrile reaction, a spirochete may cause syphilis in the recipient, protozoa cause malaria, and a hepatitis virus cause hepatitis. See MOLLISON, supra note 7, at 615-25. Another agent which may also be present in the donor's blood is that which causes infectious mononucleosis. See Kapsenberg, Langhenhuysen, Nieweg & Deiss, Posttransfusion Mononucleosis with Heterophil Antibodies, 187 ACTA MED. SCAND. 79 (1970).
15. Au(1) has been found in the blood of some subhuman primates. See Shulman, supra note 3, at 688; Shulman, Hirshman & Barker, Viral Hepatitis, 72 ANN. INTERN. MED. 237, 259-60 (1970).
16. See Shulman, supra note 3, at 688. There is no vaccine available for the prevention of hepatitis. DISEASES OF THE LIVER 468 (3d ed. L. Schiff ed. 1969) [hereinafter cited as Schiff]. For instance, after the viruses which caused measles and polio were isolated and identified, vaccines became available for immunization against these diseases. While medical researchers are currently trying to develop a vaccine against viral hepatitis, practically it is estimated that five to ten years will be needed after the hepatitis virus has been isolated before a commercially prepared vaccine will be available. See Koff & Isselbacher, Changing Concepts in the Epidemiology of Viral Hepatitis, 278 NEW ENG. J. MED. 1371 (1968) [hereinafter cited as Koff].
17. Schiff, supra note 16, at 418. The only source of information on the transmission of viral hepatitis must be derived from human experimentation and clinical
The discovery of the Australia antigen [Au(1)] in 1965\textsuperscript{18} led to the revelation of some of the physical, chemical and immunological characteristics of the virus\textsuperscript{19} and of the disease.\textsuperscript{20} This is because, although not conclusively proven, all evidence supports the theory that the Au(1) is either the hepatitis-causing virus\textsuperscript{21} or the non-infectious capsid material of the virus.\textsuperscript{22}

Out of the 1,800,000 transfusions given in the United States in 1963, an estimated 30,000 cases of transfusion-associated viral hepatitis\textsuperscript{23} resulted in approximately 3,000 deaths.\textsuperscript{24} Therefore, of the 5,548,807 units of blood or blood components reported as having been transfused in 1969 by institutional members of the American Association of Blood Banks,\textsuperscript{25}
it is theoretically possible that there were as many as 92,480 cases of transfusion-associated viral hepatitis, which could have resulted in 9,248 deaths, if calculated from the earlier statistics. It is equally possible, however, if the attack rate of one case per one thousand units transfused were used, to find that only 5,549 cases of hepatitis developed in the United States in 1969. It has also been found that, using the current sensitivity of readily available methods, only an approximate 20 to 40 per cent detection rate of Au(1) is possible. Therefore, even with the knowledge of a test for Au(1), several thousand deaths could not have been prevented at the present time. It has been suggested that the twin policies of avoiding the use of blood from high-risk sources and reducing the number of transfusions administered, should be implemented by blood banks and physicians respectively. This is because, contrary to some reports which have seeped into the legal literature, not only is there no way to detect all Au(1) carriers in the donor population,

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26. See note 23 supra.
27. The subclinical hepatitis cases associated with transfusions as compared to cases of the overt disease may be in a ratio as high as 5:1. NAS-NRC Statement, supra note 24, at 2.
28. Whether a positive test for Au(1) can be obtained is dependent on the type of test used, the number of samples taken per donor or patient, and the stage of disease at which time the serum is drawn and tested. Shulman, supra note 3, at 673. For these tests, good antibody is still of human origin and in extremely short supply, thereby prohibiting implementation of the test as a routine procedure by many transfusion services. Medical News, NAS-NRC Tells Status of Hepatitis Screening Tests, 211 J.A.M.A. 907, 908 (1970). Since the sensitivity and specificity of the tests for Au(1) vary among laboratories, it has not yet been recommended that the Au(1) test be used for routine testing by blood banks. See NAS-NRC Statement, supra note 24, at 1. Issue was taken with this statement. See Alter, Holland & Schmidt, Hepatitis-Associated Antigen, To Test or Not to Test?, LANCET 142 (July 18, 1970). However, the American Association of Blood Banks has approved the NAS-NRC Statement. See News and Comments, AABB Statement on Australia Antigen, PATHOLOGIST 315 (Sept., 1970).
29. See Prince & Burke, Serum Hepatitis Antigen (SH): Rapid Detection by High Voltage Immunoelectroosmophoresis, 169 SCIENCE 393 (1970); Blumberg, supra note 3, at 352. The screening by complement fixation or counterelectrophoresis methods can eliminate 40 to 80 per cent of the donors who transmit hepatitis as opposed to the 20 to 40 per cent detection rate by the more commonly used Ouchterlony method. See Shulman, supra note 3, at 682.
30. Professional donors, especially "skid row" individuals, demonstrate a higher frequency of Au(1), 2 per cent, than do nonprofessional donors, 0.1 per cent. See Blumberg, supra note 3, at 352; Cohen & Dougherty, Transfusion Hepatitis Arising from Addict Blood Donors, 203 J.A.M.A. 427 (1968); Schiff, supra note 16, at 429. The blood obtained from prisoners used as a donor source also carries a comparatively high incidence of Au(1). See Schiff, supra note 16, at 429. Consequently, it has been recommended that the professional donor be eliminated entirely since the chances of his being a carrier are essentially six times greater than those of the volunteer or family donor. See Allen, supra note 23, at 1085.
31. The risk of hepatitis is closely related to standards of donor selection and increases almost linearly with the amount of blood transfused. See Koff, supra note 16, at 1376.
33. The first step in the determination of whether the donor carries disease is the taking of a comprehensive history and the performance of a brief physical examination prior to his being bled. See AABB METHODS, supra note 1, at 7-14; Myhre, Adashek & Adashek, The Blood Bank as a Public Health Service, 11 CALIF. MED. 15
there is also no way to inactivate or remove the virus from the whole blood once it is drawn. Furthermore, initial attempts at plasma sterilization by the use of ultra-violet irradiation and long-term storage have proved ineffective. Despite the inability of medicine to devise a method to rid whole blood or plasma of viruses, patients who have contacted post-transfusion hepatitis have occasionally filed suit against either the hospital or the commercial blood bank supplying blood to the hospital. In 1954, in the landmark decision of Perlmutter v. Beth David Hospital, the New York Court of Appeals denied that the plaintiff, who allegedly contacted hepatitis from a blood transfusion, had stated a cause of action under the Uniform Sales Act for breach of implied warranty of reasonable fitness for a particular purpose and of merchantable quality. The court reasoned that there existed an indivisible contract for services between the patient and the hospital and, therefore, this transfer of blood from the hospital to the patient, even though for separate consideration, had not been a sale

(1969). No individual may be used as a blood donor if he has a personal history of: Viral hepatitis, close contact within the past six months to someone having viral hepatitis, or receipt of a transfusion within the past six months from a possible source of viral hepatitis. Public Health Service, Department of Health, Education and Welfare, 42 C.F.R. § 73.301(e) (Supp. 1970). Next, various chemical and serological procedures may be used on the donor's serum to determine the presence of liver disease, such as hepatitis, or other diseases. Finally, the donor's serum may be immunologically or serologically tested for the presence of Au(1). See note 16 supra. There are some donors who will give no positive history or response to testing of any sort which would indicate the possibility that he is a carrier of hepatitis. See Schiff, supra note 16, at 447. See also Holland, Walsh, Morrow & Purell, Failure of Australia Antibody to Prevent Post-Transfusion Hepatitis, LANCET 553 (Sept. 13, 1969). An examination of these viral characteristics reveals that removal or inactivation of the virus in the whole blood would damage either the cellular components or the plasma proteins.

Transfusion-associated hepatitis, at least in relation to whole blood and some blood products, cannot be eliminated; there are, however, ways to reduce its incidence. For prevention, the blood bank should enforce high standards of donor quality, report all cases of blood-associated hepatitis to the bank supplying the blood and to the health department, maintain donor registries with exclusion of recognized carriers (similar to typhoid carrier registries in relation to food handling) and maintain adequate transfusion records. Schiff, supra note 16, at 472-73.


While some blood fractions, such as packed red cells, plasma, fibrinogen and antihemophilic globulin, are considered average risk or high risk for the transmission of hepatitis, other fractions, including albumin, thrombin and immune globulin, have been considered safe to transfuse due to their method of preparation. See Schiff, supra note 16, at 427. As the sensitivity and specificity of testing methods increase, however, it is suspected that all fractions from pooled plasma, except the Cohn cold ethanol fraction II (gamma globulin), contain sufficient virus to transmit hepatitis. Shulman, supra note 3, at 681. When medically possible, the use of erythrocytes, which have been washed free of plasma, and hence most of the virus, and frozen prior to use, will decrease the incidence of post-transfusion hepatitis. See Tullis, Hinman, Sprout & Nickerson, Incidence of Post-transfusion Hepatitis in Previously Frozen Blood, 214 J.A.M.A. 719 (1970). The problems with this method of preparation of erythrocytes are: (1) only about 50 per cent recovery of cells is possible; (2) the procedure requires from four to six hours per unit of blood for preparation; and (3) the cost is about $80.00 per unit. (Personal communication, Howard M. Rawnsley, M.D., Director, William Pepper Laboratory of the University of Pennsylvania Hospital; Professor of Pathology, University of Pennsylvania School of Medicine.)

under the Sales Act. Stressing that there was no way to detect the causative agent in the donor’s blood, the majority said that, in the absence of negligence or fault, no liability should be imposed upon an institution seeking to save or assist a patient. This characterization of the transaction as a service and not a sale was followed for more than a decade by those courts which heard cases on post-transfusion hepatitis brought in implied warranty. It was not until 1966, that a Florida court, in Russell v. Community Blood Bank, Inc., found that there was a sale present in the transaction between the commercial blood bank, which initially bled the donor, and the hospital, which supplied the blood to the patient. Once this initial transaction was denominated a sale, the court found implied warranties of merchantability and fitness for the use intended which extended from the commercial blood bank to the ultimate consumer, thereby distinguishing, for purposes of liability, a suit against a commercial blood bank from one against a hospital.

During this period, a parallel development of strict liability sounding in tort instead of contract was rapidly evolving. The early actions for breach of warranty had been brought on the case and this tort form of the action had survived at common law, apart from the contract rule, in the food cases. When section 15 of the Sales Act codified the existing common law rules of merchantability and fitness, the courts viewed the special food warranties as existing outside the Sales Act, and, therefore, these cases were not bound by contractual rules. Thus, privity of contract was not essential to recovery in an action for breach of implied warranty if the action concerned the sale of food and the other requirements of strict tort liability were present. As expressed in the 1961 draft of the Restatement (Second) of Torts, the section 402A strict tort liability was limited to the sale of food. This warranty protection, apart from any contractual privity, was extended in the 1962 draft beyond the

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37. Id. at 104, 123 N.E.2d at 794.
38. Id. at 107, 123 N.E.2d at 795.
39. This rationale was not followed by courts in non-blood transfusion cases. For example, in Gottsdanker v. Cutter Laboratories two children contacted polio after being innoculated with the Salk vaccine. At trial, the jury found the defendant manufacturer liable for breach of implied warranties of merchantability and fitness for the intended purpose. Rejecting the Perlmutter reasoning, insofar as the court there had found a sale to the plaintiff necessary before the imposition of implied warranty liability, the California court stated that the initial sale by the manufacturer to a distributor or retailer was sufficient to impose warranties for the benefit of the intended consumer. The manufacturer was held liable on the implied warranty theory despite the fact that there was no direct sale of the product to the plaintiffs. Gottsdanker v. Cutter Labs., 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960).
40. 185 So. 2d 749 (Fla. Dist. Ct. App. 1966), aff’d as modified, Community Blood Bank, Inc. v. Russell, 196 So. 2d 115 (Fla. 1967).
41. See Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099, 1126 (1960).
43. See Titus, supra note 42, at 745-46.
consumer of food to include the consumer of any product intended for intimate bodily use.\textsuperscript{44} Then, in 1964, although not stating a rule currently followed by the majority of jurisdictions in the United States,\textsuperscript{45} the American Law Institute adopted section 402A in its present form,\textsuperscript{46} which extended strict tort liability to encompass all products. By this time, however, both \textit{Greenman v. Yuba Power Products, Inc.}\textsuperscript{47} and \textit{Goldberg v. Kollsman Instrument Corp.}\textsuperscript{48} had been decided. Each was a landmark decision in the products liability area and each persuasively stated that breach of a warranty was present independently of the sales contract between the parties. Alluding to these cases, the Reporter and the Council for the American Law Institute proposed the all-inclusive 1964 draft of section 402A because the prior statement of the law with regard to the seller's liability for defective products was now too narrow in scope as evidenced by the rapid and dramatic changes embodied in these decisions.\textsuperscript{49} The Reporter, in comment \textit{m} to section 402A, also cautioned that if one stated this section in terms of warranty, this would be a warranty different from that found in the sale of goods in that it would not be subject to any of the contract rules surrounding such sales. For instance: (1) liability would not be dependent on a contract of sale between the plaintiff and defendant; (2) the plaintiff would not have to show reliance upon the judgment, reputation or skill of the seller; (3) the seller could not limit the scope or content of his warranties; (4) the plaintiff would not have to give notice within a reasonable time of his injury; and (5) the plaintiff's cause of action would not be affected by any disclaimer attached to the product. It was recommended, therefore, that the term "strict liability in tort" be used in lieu of the term "warranty."

Although plaintiffs could prove a prima facie case\textsuperscript{50} more easily, the strict liability in section 402A did not mean that the manufacturer of a

\begin{itemize}
\item \textsuperscript{44} \textit{RESTATEMENT (SECOND) OF TORTS} § 402A (Tent. Draft No. 7, 1962).
\item \textsuperscript{45} The role of the American Law Institute is to present an orderly statement of the general common law of the United States, including both the law flowing from generally enacted statutes which have been in force for many years and the law developed by judicial decision. \textit{RESTATEMENT OF TORTS} at viii–ix (1934). It is supposed that this statement of law will be that which has been adopted by a majority of states. Titus, \textit{supra} note 42, at 715. However, the Restatement may follow a rule accepted by a minority of states. Id. at 750.
\item \textsuperscript{46} See note 5 \textit{supra}.
\item \textsuperscript{47} Plaintiff received a power tool as a gift, was injured while using it due to the defective design and manufacture of the instrument, and recovered from the manufacturer. The court made clear that the liability imposed was one of strict liability in tort and not one governed by the law of contract warranties. \textit{Greenman v. Yuba Power Prods., Inc.}, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).
\item \textsuperscript{48} A passenger injured in an airplane crash recovered damages against the manufacturer of the airplane despite lack of privity of contract. The court reasoned that a breach of the implied warranties of fitness and merchantability not only violated the sales contract, but was tortious in nature and could be sued on by a non-contracting party if the article's usage was within the reasonable contemplation of the manufacturer. \textit{Goldberg v. Kollsman Instrument Corp.}, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).
\item \textsuperscript{49} \textit{RESTATEMENT (SECOND) OF TORTS} at ix (Tent. Draft No. 10, 1964).
\item \textsuperscript{50} For instance, if the plaintiff is able to submit either direct or circumstantial evidence from which the jury can infer the facts resulting in his injury, he has then established a prima facie case and the defendant has the burden of going forward
\end{itemize}
product was an insurer for all injuries from his goods. A plaintiff still had to prove a defect in the product which was attributable to the manufacturer, as well as a causal connection between that defect and his injury. This non-statutory liability, based on the rules of common law, was almost immediately adopted by the judiciaries in several states without consideration of whether the judicial recognition of this tort rule was precluded by the state's prior legislative enactment of the Uniform Commercial Code, the successor to the Uniform Sales Act. It could be argued, however, that these courts had not improperly violated legislative supremacy by ignoring the Code, since Section 1-103 of the Uniform Commercial Code requires explicit rejection by provisions of the Code before the common law principles can be displaced. If the legislature, therefore, did not intend the Code to be the exclusive remedy in the products liability cases, the courts were not prevented from following the Restatement of Torts. In 1965, Illinois became one of the first states to express judicial approval of section 402A in this expanded form when it decided the case of Suvada v. White Motor Co., and, in 1970, with the Cunningham decision, is the first state to apply this tort form of strict liability to a hospital blood bank for supplying a unit of blood allegedly containing the virus from which a patient contacted hepatitis.

In extending the section 402A rule of liability to a hospital, the Supreme Court of Illinois in Cunningham first found that whole human blood was a "product" within the meaning of this section. Utilizing comment e with his rebuttal evidence. See Bailey v. Montgomery Ward & Co., 6 Ariz. App. 213, 431 P.2d 108 (1967) (jury could reasonably conclude from the facts that a pogo stick was defective).

51. See Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); note 147 and accompanying text infra.

52. See note 5 supra; notes 148-53 infra. See, e.g., Cochran v. Brooke, 243 Ore. 89, 409 P.2d 904 (1966) (the drug Chloroquine, marketed as "Aralen," contained no impurities). See generally Rossignol v. Danbury School of Aeronautics, Inc., 154 Conn. 549, 527 A.2d 418 (1967) (the plaintiff must allege that the product reached him without substantial change in the condition in which it was sold by the defendant); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966), cert. denied, 386 U.S. 912 (1967) (water heater installed without temperature valve was in a defective condition). Also, the product is not defective unless injury occurred during its intended use. See, e.g., Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841 (5th Cir. 1967), cert. denied, 391 U.S. 913 (1968) (hair bleach was intended to be used by a professional beautician).


54. See Titus, supra note 42, at 714.

55. Id. at 751-60.

56. A plaintiff sub-purchaser was allowed to recover against the remote manufacturer of a defective brake system which caused plaintiff's tractor, in which the brake was installed, to collide with a bus. Declaring that lack of privity was no defense in a tort action against a manufacturer, the court stated that although strict liability did not make the defendant an insurer, where the plaintiff could prove injury or damage from an unreasonably dangerous condition of the product which existed at the time it left the manufacturer's control, the plaintiff could recover damages. The court further stated that the liability was based, not on warranty, but on public policy. Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

to section 402A, the court stated that while whole blood may be a human tissue and not a manufactured article, it was a product similar to any product which was marketed in its natural state for human consumption. While the supreme court did not discuss further the denomination of blood as a product, it appears that, to give the term “product” a commonly accepted meaning, blood could properly be found to fall within its definition.

The Cunningham court next considered whether the Perlmutter classification of the hospital blood bank’s function as a service, was necessarily determinative of whether or not strict liability could attach to the blood. This was required because, in order for liability to attach in the instant case, both section 402A and Suvada stipulated that the de-

58. Comment e states:

Normally the rule stated in this Section will be applied to articles which already have undergone some processing before sale, since there is today little in the way of consumer products which will reach the consumer without such processing. The rule is not, however, so limited, and the supplier of poisonous mushrooms which are neither cooked, canned, packaged, nor otherwise treated is subject to the liability here stated.

RESTATEMENT (SECOND) OF TORTS § 402A, comment e at 350 (1965).

59. See note 1 supra.

60. See United States v. Steinschreiber, 218 F. Supp. 426 (S.D.N.Y. 1962), aff’d, 326 F.2d 759 (2d Cir.), cert. denied, 376 U.S. 962 (1964) (whether the statutory phrase “therapeutic serum or analogous product” was to encompass normal human plasma should be resolved at trial); United States v. Calise, 217 F. Supp. 705 (S.D.N.Y. 1962). The lower Illinois court, when faced with this issue, concluded that blood and plasma were items which were capable of legislative or judicial control and, therefore, there existed no important distinction between food, other products and blood for the purposes of this case. Cunningham v. MacNeal Mem. Hosp., 113 Ill. App. 2d 74, 82, 251 N.E.2d 733, 736 (1969). The following definitions established by the United States Public Health Service indicate that blood is a product for the purpose of federal regulation:

(h) “Products” includes biological products and trivalent organic arsenicals,

(i) “Biological product” means any virus, therapeutic serum, or analogous product applicable to the prevention, treatment or cure of diseases or injuries of man:

(2) A therapeutic serum is a product obtained from blood by removing the clot or clot components and the blood cells.

(5) A product is analogous:

(ii) To a therapeutic serum, if composed of whole blood or plasma . . . .


61. See notes 36–38 and accompanying text supra.

62. See note 5 supra. Comment f provides in pertinent part:

... The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant. It is not necessary that the seller be engaged solely in the business of selling such products. . . .

The rule does not, however, apply to the occasional seller of food or other such products who is not engaged in that activity as a part of his business. . . .

The basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods. This basis is lacking in the case of the ordinary individual who makes the isolated sale, and he is not liable to a third person, or even to his buyer, in the absence of his negligence. . . .


63. See note 56 and accompanying text supra.
fendant must be in the business of selling blood. Moreover, since the plaintiff, in her second amended complaint, charged that the defendant hospital had "sold or supplied" the blood to her, and, because the word "sold" was conclusory in nature, the question for consideration by the court became whether the "supplying" of whole blood placed the hospital into the category of a "seller" of this blood when a charge was made to the patient for that transfusion, even though it was an ancillary patient service. While stating that an evidentiary basis would be needed to make this determination, the court was able to accept as true all of the plaintiff's well-pleaded facts for the purpose of rendering its opinion on defendant's motion for a judgment on the pleadings, and held that the defendant hospital was engaged in the business of "selling" whole blood for transfusions.

The defendant principally relied upon the majority opinion in Perlmutter where it was enunciated that, even though a transfusion charge was made to the patient, the transfusion of blood was a service incidental to the patient's overall medical treatment and the furnishing of blood or blood fractions by a hospital was not a sale. Following this rationale, the Perlmutter court ruled that no implied warranties could exist and no recovery could be allowed an injured patient where neither negligence nor fault were present. Noting that "[t]he art of healing frequently calls for a balancing of risks and dangers to a patient," the Perlmutter court further commented that a patient enters a hospital to be cured, not to buy iodine, bandages or pills. Several other courts subsequently considered this same question and they also found that no sale was involved in the transaction between the patient and the hospital even though a charge was placed on the unit of blood. As in the Perlmutter case, however,

64. ___ Ill. 2d ___, 266 N.E.2d 897, 899-900 (1970).
65. ___ at ___, 266 N.E.2d at 902.
66. 308 N.Y. 100, 107, 123 N.E.2d 792, 795 (1954).
67. ___ at 107, 123 N.E.2d at 795.

Non-hepatitis cases in which no liability attached to the hospital include: Dibblee v. Dr. W.H. Groves Latter-Day Saints Hosp., 12 Utah 2d 241, 364 P.2d 1085 (1961) (incompatible transfusion, no implied warranty of fitness) in which the court, in finding a service and not a sale, said that the hospital was not a commercial enterprise which:

[B]eseaches the public to buy its products, . . . gives green trading stamps on the occasion of a blood transfusion, . . . or a car for one having the lucky blood purchase order number. We know of none that fills out forms under any Fair
these other actions had been brought in implied warranty and not under the section 402A strict tort liability theory utilized in Cunningham. Furthermore, the rule of service as opposed to a sale had been extended by some courts to cover those cases in which the plaintiff attempted suit against the commercial blood bank which had originally supplied the particular viral-infected unit of blood to the patient’s hospital.

Even though the Cunningham court found Perlmutter and its progeny relevant to the decision at hand, it termed “unrealistic” any assertion that there were no implied warranties or sale involved when a hospital made a transfusion charge to the patient, thereby implying that the Perlmutter rationale would not be determinative in deciding a case under the strict tort liability theory. Instead, the court looked to the Russell decision where, in granting the patient a cause of action in implied warranty against a commercial blood bank, that court stated:


70. Two cases against a commercial blood bank arising from post-transfusion infection with long incubation period hepatitis are: Whitehurst v. American Nat'l Red Cross, 1 Ariz. App. 326, 402 P.2d 584 (Ct. App. 1965) (no implied warranty of merchantability), and Balkowitsch v. Minneapolis War Mem. Blood Bank, Inc., 270 Minn. 151, 132 N.W.2d 805 (1965) (the transaction between the noncommercial blood bank and the hospital is not a sale). The latter court indicated a public policy reason for its decision:

We find it difficult to give literal application of principles of law designed to impose strict accountability in commercial transactions to a voluntary and charitable activity which serves a humane and public health purpose.

Id. at 159, 132 N.W.2d at 811. A non-hepatitis case is Goelz v. J.K. & Susie L. Wadley Research Inst. & Blood Bank, 350 S.W.2d 573 (Tex. Civ. App. 1961) (incorrect blood type administered, but no breach of warranty since it was a service transaction).

71. ___ Ill. 2d ___, ___, 266 N.E.2d 897, 901 (1970).

72. In Hoffman v. Misericordia Hosp., 439 Pa. 501, 267 A.2d 867 (1970), the Supreme Court of Pennsylvania recently stated that the question of the technical existence of a sale may not be determinative of the issue of whether or not recovery in warranty against a hospital will be permitted by a patient who allegedly contacted post-transfusion hepatitis. Remarking that prior Pennsylvania case law has allowed a cause of action in implied warranty in non-sales transactions, the court sent this case back for trial before making a final decision as to whether warranties could be present in this type of transaction, and, if so, their extent, applicable defenses, and possible immunities. Id. at 507-10, 267 A.2d at 870-71.

73. Other courts granting a cause of action against a commercial blood bank but not a hospital include: White v. Sarasota County Pub. Hosp. Bd., 206 So. 2d 19 (Fla. Dist. Ct. App.), cert. denied, 211 So. 2d 215 (Fla. 1968) (supplying of blood by a commercial blood bank is a sale and a warranty action will be allowed); Hoder v. Sayet, 196 So. 2d 205 (Fla. Dist. Ct. App. 1967) (blood banks must take necessary precautions in selection of donors and processing of blood, therefore, action in implied warranty of fitness for a particular purpose will be allowed against the commercial blood bank, but not against the hospital); Carter v. Inter-Faith Hosp., 60 Misc. 2d 733, 304 N.Y.S.2d 97 (Sup. Ct. 1969) (the warranty of merchantability can attach to the commercial blood bank since its transaction with the hospital is a sale; however, the case was sent back for trial in order that public policy matters could be considered). Noted in 46 N.D.L. Rev. 367 (1970).
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. Florida has rejected the “service” rule in the sale of food by a restaurant, [citation omitted] and we apply the rationale of that case to reject the “service” rule here, in a suit against the blood bank.74

The Cunningham court bolstered this statement by noting with approval the dissenting opinion in Perlmutter75; and concluded that whether providing blood to patients was the principal function of a hospital did not determine whether that hospital was a seller of the product for the purpose of the imposition of strict liability as prescribed in section 402A, comment f.76 While the principal function of each type of blood bank varies — the commercial blood bank draws, stockpiles, and dispenses units of blood, while the hospital blood bank, which also draws, mainly processes and provides blood to a patient for transfusion ancillary to and a part of its total services — the court found that both entities were within the distributive chain of the product and no real distinction between them existed.77 Remarking that hospitals in Illinois would undoubtedly be held strictly liable in tort to one personally injured from drugs or medications, the court observed that the same liability should result from blood transfusions.78

It is difficult to make a valid distinction between the different blood banks so far as the imposition of strict liability for post-transfusion hepatitis is concerned. Legal consideration usually passes between the hospital and patient just as it does between the individual blood banks.79 At least

75. That a sale had taken place was also recognized by Judge Froessel’s dissent in Perlmutter. There it was said that the courts, recognizing that the contracts were divisible, had always been able to distinguish between medical acts and administrative acts, even when they were performed by the same person. Perlmutter v. Beth David Hosp., 308 N.Y. 100, 111, 123 N.E.2d 792, 798 (1954) (Froessel, J., dissenting) (a four to three decision). Liability in New York could, therefore, extend to a hospital when it supplied: impure morphine solution, see Volk v. New York, 284 N.Y. 279, 30 N.E.2d 596 (1940); a defective hot-water bottle, see Iacono v. New York Polyclinic Medical School & Hosp., 269 App. Div. 955, 58 N.Y.S.2d 244 (1945), aff’d, 296 N.Y. 502, 68 N.E.2d 450 (1946); or a defective chair, see Holtforth v. Rochester Gen. Hosp., 304 N.Y. 27, 105 N.E.2d 610 (1952). Judge Froessel thereby implied that this liability should apply equally in the post-transfusion hepatitis cases.
79. In considering the service versus sale rationale, it must be remembered that the simplest distributive chain of whole blood or blood fraction is from donor to hospital blood bank to patient. Other hospital blood banks may become a link in this chain, such as a commercial blood bank, another hospital blood bank or both, but in each instance it is a service to a needy patient or potential patient that is being performed. As a service to the patient, the use of whole or fractional components of blood will
technically, these transactions can be termed a sale even though they are being performed for the benefit of a patient. Inasmuch as comment f clearly points out that section 402A applies to any manufacturer, wholesaler or retailer in the distributive chain, it appears that, regardless of profit motive, a blood bank is engaged in a sale of blood to the patient ancillary to the total patient care.

The Illinois court next discussed the defendant's contention that there should be no strict liability attached to injury from this product, since there is currently no way to absolutely detect the presence of the hepatitis virus in the banked blood.80 Disagreeing with defendant's conclusion, the court reiterated that, no matter what the current state of medical knowledge in this regard, section 402A applies although "the seller has exercised all possible care in the preparation and sale of his product."81 The court concluded, therefore, that any allowable defense, on the ground that there was no way for the defendant to ascertain if his product contained impurities, would signal a return to a negligence theory of liability, thereby emasculating the strict liability doctrine.82 In support of this determination, the court utilized Justice Roberts' concurring opinion in Russell which drew an analogy between whole blood and the defects which were non-discoverable in a tin of canned meat,83 a candy bar in a sealed wrapper,84 a bottled drink,85 or in clams.86 By including blood with those products, the salability of which would have been destroyed had any attempt been made to discover the adulteration, Justice Roberts reached the conclusion that when a product is intended for human consumption, the seller is liable for injuries which result from the adulteration or defect, whether or not it was practically or scientifically possible to discover the adulterating or defective substance at the time of the sale or consumption of the product.87 It is possible, however, to distinguish the distribution always be ancillary to total patient care, and will be prescribed by the patient's physician only to treat a serious underlying medical problem. This service can be provided on either a profit or a non-profit basis, and a series of charges is made by each link in the chain as the unit of blood travels on its way to the patient. The donor usually receives either cash or a credit, which he may then use in the future to obtain a unit of blood for himself, his family or his colleagues. The credit may also be immediately given by the blood bank to the third party beneficiary of his donation, the patient. This consideration, in the form of cash or credit, is established in each transfer of the pint of blood as it finds its way to the patient, who can then provide for the credit by having a friend donate a unit in his name, or pay for the unit, which monies are then used by the hospital to buy more blood. Legal consideration, therefore, is almost always present in the transaction.

82. Ill. 2d ...., 266 N.E.2d 897, 902 (1970).
and use of blood and blood fractions from other products on the basis of volition, since in almost every other type of products liability case there has been either voluntary production, purchase, use or consumption of the product. There being discretion on someone's part, the injuries could have been prevented. For example, drugs can undergo further clinical testing,88 be accompanied with a sufficient warning as to possible side effects89 and their use correctly monitored by the prescribing physician,90 food can be properly sterilized before marketing, cooked before eaten or not placed in the market for sale,91 and the defective design or manufacture of commercial products can be prevented through extensive quality control.92 When the use of blood is clinically indicated, however, there is no real choice on the part of the physician to order it, or the hospital to supply it, or the patient to accept it. The best that can be done at the present time is for the physician to weigh the risks of hepatitis or other disease to the patient against his need for the transfusion, there being no real substitute in serious situations as when death is imminent. Consequently, when Justice Roberts conceded that there was no practical way to detect the defects in blood, just as there was no way to discover defects in meat, soda, candy or clams, his analogy was not completely accurate. The public policy reasons for leaving blood in a separate category are certainly as strong as those calling for the inclusion of human tissue in the category of goods for human consumption which are sold in the condition in which they are expected to reach the ultimate consumer.

To support Justice Roberts' position, the Illinois court quoted extensively93 from an article by Professor Wade,94 one of the advisors to the American Law Institute's Tentative Draft number 10 of the Restatement (Second) of Torts section 402A, wherein he stated that strict liability was strict in the sense that there was no need to prove the negligence of the manufacturer. If the product failed to comply with an implied warranty or was in a dangerously unsafe condition once it left defendant's possession, he was liable whether or not he created, failed to discover, or

88. See, e.g., Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967) (drug company tested MER/29 inadequately and the patient developed side-effects from the use of the drug).
89. See, e.g., Sterling Drug, Inc. v. Yarrow, 408 F.2d 978 (8th Cir. 1969) (Aralen was unreasonably dangerous when no reasonable warning of side effects was given).
91. See notes 83-86 and accompanying text supra; note 96 and accompanying text infra. See, e.g., Cushing v. Rodman, 82 F.2d 864 (D.C. Cir. 1936).
93. See supra note 80.
failed to eliminate the condition. Therefore, Professor Wade's test to impose strict liability was to determine whether the product was, in the language of the Restatement, "unreasonably dangerous" or "not reasonably safe," both terms characterizing the product rather than the conduct of the defendant. Instead, to phrase the test in terms of conduct, one would ask whether the defendant knew of the product's condition and whether he acted unreasonably by marketing it.\textsuperscript{95} The Illinois court also referred to an opinion by the Sixth Circuit which, although it could find no negligence and a bacteriological examination was the only way to determine whether the food was contaminated, allowed recovery to the plaintiff on an implied warranty theory.\textsuperscript{96} From these two sources the Illinois court concluded that it was of "absolutely no moment" whether or not a determination could be made as to the theoretical possibility of ascertaining the existence of the hepatitis virus in the blood, and further, that "[a]ny other ruling would be entirely inconsistent with the concept of strict tort liability."\textsuperscript{97}

Professor Wade's article, subsequent to that portion cited by the Illinois court, discussed the hospital's use of blood for purposes of human transfusion. He commented that the service-sale distinction was weak, and that, as a matter of law, the courts could well hold that blood was reasonably safe.\textsuperscript{98} If the "unreasonably dangerous" test is viewed in terms of conduct, or whether the manufacturer acted unreasonably by marketing the product,\textsuperscript{99} public policy considerations arise when strict liability is imposed on such conduct. In this instance, the questions would be (1) whether the hospital acted unreasonably in marketing the product, or (2) whether blood products should even be labeled "unreasonably dangerous."

It has been suggested that one public policy reason for imposing strict liability in the products cases is its deterrent effect on the one who puts the goods into the stream of commerce.\textsuperscript{100} The rationale for this argument is that the safety of a product will increase as the potential economic burden related to enterprise liability increases because the price rise

\textsuperscript{95} Id. at 13, 15.

\textsuperscript{96} The court allowed plaintiff, who contacted typhoid fever as the result of ingesting clams, to recover in implied warranty even though it was impossible to have previously determined that the clams were contaminated. Kenower v. Hotels Statler Co., 124 F.2d 658 (6th Cir. 1942).

\textsuperscript{97} Ill. 2d 266 N.E.2d 897, 903 (1970).

\textsuperscript{98} In a discussion of the service-sale distinction in the use of blood by a hospital, Professor Wade stated:

These courts are wrong on both counts. It would be far simpler and less damaging to the state of the law to hold the blood plasma reasonably safe when the virus is unlikely to be present and impossible to eliminate, and the need for the plasma is great. This could well be pronounced in these cases as a matter of law. Wade, supra note 80, at 20.

\textsuperscript{99} See notes 94-95 and accompanying text supra.

created by this burden will cause the volume of sales to decrease, consequen-
tly forcing some hazardous activities out of the market\textsuperscript{101} and irre-
parably injuring the reputation of the product and its producer.\textsuperscript{102} This
hypothesis also points out another distinguishing factor between blood
and other products; that, unlike blood, the product mentioned in most
strict tort liability cases, was commercially prepared and advertised or
marketed for profit.\textsuperscript{103} Imposition of liability, then, has the resultant
effect of minimizing the flow of any type of potentially hazardous product
into the stream of commerce by making any seller who has marketed his
product for consumption assume a special responsibility to the consumer
who is injured by the product.\textsuperscript{104} Although the imposition of strict lia-
ibility may induce manufacturers or sellers to use more care in their
production or selection methods, it is doubtful that the public would best
be served by having whole blood and blood products driven entirely
from the hospitals since these are usually provided, not for profit, but as
an adjunct to patient care. While the unnecessary use of transfusions
may be deterred by the imposition of strict liability, some patient trans-
fusions will always be necessary\textsuperscript{105} and, therefore, the hospital is not
acting in an unreasonable or dangerous manner when it maintains blood
for the purpose of patient transfusions.

The question of whether to designate blood and blood products as
unreasonably dangerous was decided in the affirmative by the Cunningham
court.\textsuperscript{106} The defendant hospital, however, attempted to defend by reason of
the exception to strict liability found in comment \textit{k} to section 402A.\textsuperscript{107}

\textsuperscript{101} See Morris, \textit{Enterprise Liability and the Actuarial Process — The Insignifi-

\textsuperscript{102} See Plant, \textit{Strict Liability of Manufacturers for Injuries Caused by Defects

\textsuperscript{103} Cunningham v. MacNeal Mem. Hosp., 113 Ill. App. 2d 74, 88, 251 N.E.2d
733, 740 (Burke, J., dissenting). See cases cited in notes 76–79, 81–85 \textit{supra}; note
51 \textit{infra}.

\textsuperscript{104} Comment \textit{c} supports the public policy argument of the distribution of the
\textit{cost} of injuries:

\textit{On whatever theory, the justification for the strict liability has been said to
be that the seller, by marketing his product for use and consumption, has under-
taken and assumed a special responsibility toward any member of the consuming
public who may be injured by it; that the public has the right to and does expect,
in the case of products which it needs and for which it is forced to rely upon the
seller, that reputable sellers will stand behind their goods; that public policy
demands that the burden of accidental injuries caused by products intended for
consumption be placed upon those who market them, and be treated as a cost of
production against which liability insurance can be obtained; and that the con-
sumer of such products is entitled to the maximum of protection at the hands of
someone, and the proper persons to afford it are those who market the products.
\textit{Restatement (Second) of Torts} \textsection{402A, comment \textit{c} at 349–50 (1965). See note 138
and accompanying text \textit{infra}.

\textsuperscript{105} A physician or hospital may in certain situations be equally liable in negli-
gence for not transfusing blood and thereby breaching their duty to the patient, just
as much as the hospital would be strictly liable by selling potentially viral–contami-
nated blood to the patient.

\textsuperscript{106} \textit{ill.} 2d \textsection{4}, \textsection{4}, 266 N.E.2d 897, 904 (1970).

\textsuperscript{107} Comment \textit{k}, on the topic of unavoidable unsafe products, sets forth that:
\ldots 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
Entitled "unavoidably unsafe products," that portion of this comment dealing with products which cannot be made safe for their intended and ordinary use in the present state of human knowledge was considered by the court. One example given in the Restatement is the Pasteur treatment for rabies which, if not given, results in a dreadful death. The marketing and use of the product, therefore, is justified, notwithstanding the high degree of risk involved, and the product is neither unreasonably dangerous nor defective if accompanied by proper directions and warning. On this basis, the Cunningham court found that the exception in comment k related "only to products which are not impure and which, even if properly prepared, inherently involve substantial risk of injury to the user." The court thereby concluded that the exception could not be utilized where the product is alleged to be impure, as in the instant case, and, consequently, blood containing a hepatitis virus is in a defective condition unreasonably dangerous to the user.

A product which is reasonably dangerous, or not unreasonably dangerous, will not cause the imposition of strict liability on one who has sold the product to another, even if the product causes later injury because of a defect. This is true since the marketing and use of the product are necessarily justified even though a high degree of risk is involved. Consequently, if blood containing the hepatitis virus is not unreasonably dangerous to the consumer, it is not defective and does not give rise to 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 product, 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 very 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.

RESTATEMENT (SECOND) OF TORTS § 402A, comment k at 353-54 (1965).


109. See note 107 supra.

110. See Traynor, The Ways and Meanings of Defective Products and Strict Liability, 32 Tenn. L. Rev. 363 (1965). Five suggested criteria which must be met in order to term a product "legally defective" are:

(1) The product carries a significant physical risk to a definable class of consumer and the risk is ascertainable at least by the time of trial.

(2) The risk is one that the typical member of the class does not anticipate and guard against.

(3) The risk threatens established consumer expectations with respect to a contemplated use and manner of use of the product and a contemplated minimum level of performance.

(4) The seller has reason to know of the contemplated use and, possibly where
to strict liability.\textsuperscript{111} Therefore, when blood is sold to a patient, it must be “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.”\textsuperscript{112} The ordinary physician who must prescribe blood for a patient understands that there is a disease known as viral hepatitis and that this disease can be transmitted by blood or blood products. As a corollary, the blood bank neither knows that the unit which shows negative testing and is otherwise properly prepared is free from the virus, nor may it make any warranty to this effect.\textsuperscript{118} The Restatement, by providing an exception to liability without fault, has stressed that a product which is \textit{reasonably} dangerous is not defective when it is attended by a \textit{known risk}.\textsuperscript{114} Human blood, while safe for the purposes for which it is intended, such as the transportation of gases or maintenance of blood volume,\textsuperscript{115} carries a known risk, that of the transmission of any disease\textsuperscript{118} which the donor’s blood harbors. While the Pasteur vaccine for rabies treatment is the example given in comment \textit{k} to section 402A, that it was not intended to be the exclusive example is indicated by the Reporter’s language. After asserting that such a product is not unreasonably dangerous if it is properly prepared and accompanied by proper directions and warning,\textsuperscript{117} he remarked that “[t]he same is true of many other drugs, vaccines and the

\textsuperscript{111} Jackson v. Muhlenberg Hosp., 96 N.J. Super. 314, 329, 232 A.2d 879, 888 (1967). This court held that the unavoidable presence of the hepatitis virus in the blood which proximately caused the patient’s disease did not give rise to strict liability or implied warranty of merchantability. The case was, however, allowed to go to trial on negligence. See generally Pollock, Liability of a Blood Bank or Hospital for a Hepatitis Associated Blood Transfusion in New Jersey, 2 SETON HALL L. REV. 47 (1970).

\textsuperscript{112} Restatement (Second) of Torts § 402A, comment \textit{i} at 352 (1965).


\textsuperscript{114} See note 107 supra.

\textsuperscript{115} See note 12 supra.

\textsuperscript{116} See note 13 and accompanying text supra.

\textsuperscript{117} The Restatement cautions that the seller may be required to give a warning on the container as to the product’s use in order to prevent the product from becoming unreasonably dangerous. Restatement (Second) of Torts § 402A, comment \textit{j} at 353 (1965). See Dunham v. Vaughan & Bushnell Mfg. Co., 86 Ill. App. 2d 315, 229 N.E.2d 684 (1967). It is the doctor who prescribes the blood, however, and there ordinarily is no duty to give a warning to a member of a profession against generally known risks. See Littlehale v. E.I. duPont de Nemours & Co., 268 F. Supp. 791 (S.D.N.Y. 1966), aff’d, 380 F.2d 274 (2d Cir. 1967); Parker v. State, 201 Misc. 416, 105 N.Y.S.2d 733 (Ct. Cl. 1951), aff’d, 280 App. Div. 157, 112 N.Y.S.2d 695 (1952). One court has also found that there is no duty to give a warning to the patient that hepatitis might be transmitted through a blood transfusion. Fischer v. Wilmington Gen. Hosp., 51 Del. 554, 149 A.2d 749 (1959).
like." Even if blood for transfusions is not technically categorized as a drug, it is sufficiently analogous to fall within the meaning of this language. Also, the Reporter's failure to mention blood specifically does not necessarily exclude this product from falling into the unavoidably unsafe category in which the seller is not held strictly liable merely because he undertook to supply the public with an apparently useful and desirable product. The Reporter, Professor Prosser, supports this interpretation in commenting on the hepatitis cases:

All this leads rather irresistibly to the conclusion that there is no strict liability when the product is fit to be sold and reasonably safe for use, but it has inherent dangers that no human skill or knowledge has yet been able to eliminate.

It can be argued, therefore, that blood is, in the language of the Restatement, an unavoidably unsafe product "which, in the present state of human knowledge, [is] quite incapable of being made safe for [its] intended and ordinary use."

It can be further argued that the weakest aspect of the Cunningham opinion is the failure of the court to recognize blood as being in that group of compounds which are unavoidably unsafe. Reason dictates that blood ranks as a product and reasonableness perceives a sale sufficient to carry the issue into the domain of section 402A. The fact that there is an impurity in the product should not per se remove the product from the comment k exception without a balancing of the necessity of that product's use against the risks involved or without the enunciation of another standard for "unreasonably dangerous." This is because a condition precedent to the imposition of strict tort liability is that the product should first be found to be unreasonably dangerous. One test which has

118. Restatement (Second) of Torts § 402A, comment k at 354 (1965) (emphasis added). See note 107 supra.
121. Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 32 J. A.M. Trial Lawyers Ass'n 1, 10 (1968).
122. Restatement (Second) of Torts § 402A, comment k at 353 (1965). See note 107 supra. Other commentators and some courts have suggested that blood containing an undetectable disease is unavoidably unsafe and therefore reasonably dangerous. See Cunningham v. MacNeal Mem. Hosp., 113 Ill. App. 2d 74, 251 N.E.2d 733 (1969) (Burke, J., dissenting); Jackson v. Muhlenberg Hosp., 96 N.J. Super. 314, 232 A.2d 879 (1967); Haut, supra note 80, at 571; Traynor, supra note 110, at 367, where the author stated "[a] classic example of an unavoidably unsafe product is blood." Also, a federal district court in dicta mentioned that a blood transfusion was an unavoidably unsafe product. LaGorga v. Kroger Co., 275 F. Supp. 373 (W.D. Pa. 1967) (strict liability to the manufacturer who used flammable material in children's clothing).
123. Some courts have suggested that the questions of whether there was a method of detection of the hepatitis virus and whether an inability to detect could be a legal defense, were premature and could not be decided as a matter of law, but were questions of fact to be deduced from testimony at trial. See, e.g., Community Blood Bank, Inc. v. Russell, 196 So. 2d 115 (Fla. 1967); Carter v. Inter-Faith Hosp., 60 Misc. 2d 733, 304 N.Y.S.2d 97 (Sup. Ct. 1969).
been recommended is that a product is unreasonably dangerous "if, and only if, a reasonable man, with knowledge of the condition of the product and an appreciation of all the risks as found to exist at the time of trial, would not now market the product at all or would do so pursuant to a different set of warnings and instructions as to use." At the time of sale the product, therefore, was defective and unreasonably dangerous if it then appeared to be safe, but by the time of trial inherent risks and dangers had been discovered to be such that the seller would not now market the product under these conditions. While the maker would not be strictly liable in tort for obvious dangers, since assumption of the risk is a valid defense to section 402A, he would be liable when the magnitude of the unintentional harm that resulted outweighed the benefit to the user. Such a criterion, if used in a blood case, would support the *Cunningham* court's determination, because the temporal setting of the knowledge element is the time of trial.

Moreover, by denying blood the shelter of the comment *k* provision, it is also arguable that the *Cunningham* court has impliedly introduced a new era of strict liability, beyond the proposals of the American Law Institute and into the realm of making the hospital a guarantor of blood. The drafters of the Restatement intended to cut away the encumbrances of contract rules to allow a plaintiff easier access to a jury, but did not dispense with the necessity of causation in fact. Yet, where strict liability is imposed upon an entity with a legal and medical duty to market the product, and where there is no absolute method of detection or avoidance of viral contamination of that product, the mere happening of the event, post-transfusion hepatitis in this case, will be sufficient to allow recovery for the injury from a hospital. In effect, the hospital now insures the purity of every blood transfusion in Illinois. When the *Cunningham* court denied the categorization of human blood as an unavoidably unsafe product, this should have prompted the court to clearly establish the extent to which Illinois departed from the policy considerations underlying the Restatement of Torts.

Hospitals at one time had been exempt from liability for their torts by the charitable immunity doctrine. One principle on which the immunity rested was that the funds of the institution were held in trust and could not be diverted to purposes other than those designated by the trust. Charities, and hospitals in particular, were protected from liability for their negligence because the trust fund could not be made liable for breaches

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126. See notes 50–52 and accompanying text supra.

of trust by the trustee. This immunity doctrine has been abrogated, however, by a majority of states, including Illinois. The Cunningham court referred to this doctrine when it declared that, since hospitals were no longer insulated from liability for their negligence, they should not have a judicial exception in their favor under the theory of strict tort liability, even though this had been granted legislatively in some states.

The court answered what was termed defendant's "ad terrorem" argument, that hospital funds would be drained from their intended purposes due to the anticipated flood of litigation should liability be imposed, by observing that today "the operation of eleemosynary hospitals constitutes one of the biggest businesses in this country" and indicated that a protection-of-the-funds theory could not justify hospital immunity.

Another theory which had been employed for the imposition of charitable immunity was that recovery would be against public policy and to hold otherwise would be to discourage the institution, to dissipate its assets in damage suits, and ultimately, perhaps, to destroy it.


One court, however, has held that the hospital was not negligent in administering whole blood to the plaintiff when it knew that the blood might be infected with the hepatitis virus but failed to warn the plaintiff of this possibility. Fischer v. Wilmington Gen. Hosp., 51 Del. 554, 149 A.2d 749 (Super. Ct. 1959). Two other cases have stated that the State of New York was not negligent in distributing to hospitals war-surplus plasma containing the hepatitis virus. Hidy v. State, 207 Mich. 207, 137 N.Y.2d 334 (N.Y. Ct. Cl. 1955), aff'd, 2 App. Div. 2d 644, 151 N.Y.2d 756, 143 N.Y.2d 258, 163 N.Y.2d 985 (1957); Parker v. State, 280 App. Div. 157, 112 N.Y.2d 695 (1952). One case on the hepatitis issue was sent back for trial on a negligence count. See note 111 supra.


Section 132. Id. at ...., 266 N.E.2d 897, 902 (1970).

Section 133. Id. at ...., 266 N.E.2d at 904.

Section 134. Id. at ...., 266 N.E.2d at 904.

402A, however, is also grounded in public policy and this is apparently the reason why the Illinois court extended strict tort liability to cover blood transfusions. Not only is there a social interest in the safety of the individual, but the law has come to recognize that the seller can distribute his risk of liability as a cost of doing business, causing all who purchase his product to bear the losses of a few. While it has been suggested that there are inherent weaknesses in the risk-spreading argument, if the injured person is poor, the costs of the injury are apportioned among the public, although among a different segment. When a person is injured in one institution he must be medically treated for those injuries. After he has exhausted his own resources, either the same institution, another institution, the community, or the state must pay his bills. The Cunningham court found that the concept of strict liability dictated that an entity which had distributed the product for human use or consumption should bear the legal consequences for any injury which it caused, rather than having the loss fall upon the faultless consumer.

There is present in this opinion a different balancing of values than was utilized in Jackson v. Muhlenberg Hospital. When the Jackson court discussed the section 402A theory, it balanced the risk of not using blood in a given situation against the risk of post-transfusion hepatitis, and found that blood was not unreasonably dangerous. By balancing the needs of an injured consumer against the hospital's ability to pay, however, the Cunningham court has found a stronger policy argument which dictates against having the economic consequences of hepatitis fall upon the injured individual. Instead of allowing blood products the benefit of the comment exception, the court has found that blood should remain within the provisions of section 402A which places the burden of strict liability on the alleged initial wrongdoer.

136. See note 104 supra.
138. There will be the inevitable occurrence of those defendants who cannot pass on the cost of insurance to their customers, who are uninsured, or whose liability will be in excess of their insurance coverage. Prosser, supra note 41, at 1121. Dean Prosser further stated:

What insurance can do, of course, is to distribute losses proportionately among a group who are to bear them. What it cannot and should not do is to determine whether the group shall bear them in the first instance — and whether, for example, consumers shall be compelled to accept substantial price increases on everything they buy in order to compensate others for their misfortunes.

139. ___ Ill. 2d ___, 266 N.E.2d 897, 904 (1970).
The future impact of the Cunningham ruling may be the beginning of an era of strict liability in other fields of medicine.\textsuperscript{141} When there is resultant injury or disease from a deleterious contaminant in a drug or other medication, the courts of Illinois would most surely apply strict liability to the entity dispensing the product.\textsuperscript{142} Whether or not, for instance, the giving of an inhalation anesthetic, possibly containing a virus from which a patient may post-operatively develop pneumonia, will be considered a sale of an unreasonably dangerous product to the consumer-patient is speculative, but perhaps a logical extension of the Suvada and Cunningham decisions. Since blood is a human tissue, potential liability also exists in the transplantation of other tissue, such as renal or bone marrow, into a patient.\textsuperscript{143} The court's opinion makes it evident that any defect or adulteration of blood is unreasonably dangerous. Causes of action in strict tort liability may conceivably be implied, therefore, not only for the hepatitis and mononucleosis viruses,\textsuperscript{144} but for those viruses which are demonstrated to cause human cancer\textsuperscript{145} as well as any disease, viral or otherwise, which is yet to be isolated and identified and which may be carried in the blood stream of a supposedly healthy donor. There is also a likelihood of liability extending to those allergic reactions\textsuperscript{146} to a blood transfusion which are sufficiently severe to cause injury to the patient.

Although future expansion of the Cunningham rationale is conceivable and although liability may inundate the medical profession, no

\textsuperscript{141} There has been fear expressed in the medical profession that the courts will extend the strict liability principle to physicians. See Committee on State Legislation of the College of American Pathologists, \textit{Strict Liability and Medical Practice}, 3 \textit{LEGISLATIVE KEYHOLE} 1 (Nov., 1970); Editorial, \textit{Blood Money}, 215 J.A.M.A. 109, 110 (1971). However, it is doubted that any judicial extension of section 402A to the clinician will occur as this would be violative of public policy and most certainly be abrogated by the legislatures. Given a literal reading of the Cunningham holding, the donor of the blood is potentially liable. The donor is the true manufacturer of the product, he is the one responsible for the defect in the blood, and he is the initial link in the chain of distribution of the product. It is doubtful, however, that even a professional donor would fit successfully into the section 402A "seller," see comment f, note 62 supra, or the analogous U.C.C. "merchant," \textit{Uniform Commercial Code} § 2-104(1). The donor has been sued, unsuccessfully, on a negligence theory by the patient. The court found that the plaintiff had not shown that this donor ever had hepatitis or knew or had any reason to know of any contamination of the blood. Hubbell v. South Nassau Communities Hosp., 46 Misc. 2d 847, 260 N.Y.S.2d 539 (Sup. Ct. 1965).

\textsuperscript{142} See note 78 and accompanying text supra.

\textsuperscript{143} Most of those states which have legislatively prohibited liability outside of negligence to a hospital for the transfusion of blood or blood fractions have included tissue transplantation within the excepted categories. See note 131 supra.

\textsuperscript{144} See note 13 supra.


\textsuperscript{146} Allergic reactions are due to allergens in the donor's blood to which the patient is hypersensitive, and the symptomology may vary from urticaria to bronchospasm and asthma. While these reactions are seldom severe, they occur with relative frequency despite the screening of the donor for allergic symptoms such as hay fever, skin rash and food and drug sensitivities. AABB \textit{Methods}, supra note 1, at 157; Miller, supra note 2, at 247.
one should be an insurer of his product under section 402A. The mere occurrence of an injury from the use or consumption of a product is not sufficient for a recovery by the patient. The plaintiff must show: (1) the presence of a defect in the product; (2) that the product was sold by a defendant in the business of selling such products; (3) that the product reached the plaintiff without substantial change in its condition; and (4) normal use of the product was the proximate cause of harm to the plaintiff. If the plaintiff fails to prove a causal relationship between defendant's act and his own injuries, he has not met his burden of proof and liability cannot be imposed upon the defendant. Therefore, the proof of proximate causation in some of these speculated future extensions of strict liability will be difficult to meet as more becomes known about the etiology and epidemiology of viruses. This is because, although the plaintiff need not eliminate all other potential causes for his injuries, he must prove that the alleged defect was more likely than not the cause in fact of his injuries. Furthermore, the allegation of proximate cause will be defended after the burden of proof has shifted. Plaintiff's proof of a defect, adulteration or that the product was unreasonably dangerous, therefore, is not sufficient, and the defendant will not be subject to the imposition of strict liability on any of the speculated extensions of section 402A, until the plaintiff has proved the causal relationship between the happening of the event and his injury.

Whether the use of a disclaimer by a defendant blood bank would be sufficient to negate the imposition of strict liability was not considered by the Cunningham court. In Jackson, a disclaimer of warranty as to the

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148. See, e.g., Jastrzembski v. General Motors Corp., 100 F. Supp. 465 (E.D. Pa. 1951). (mere happening of the event without any evidence of specific defect in the manufacture or design of the article is insufficient proof to allow plaintiff's case to go to the jury). The burden of proof is on the injured plaintiff to show that the product was defective at the time that it left the seller's control. RESTATEMENT (SECOND) of Torts § 402A, comment g at 351 (1965). If the product is not actually defective, liability does not result. See Fanning v. LeMay, 38 Ill. 2d 209, 230 N.E.2d 182 (1967) (soles of shoes which become slippery when wet are not defective). Consequently, where the blood is not defective or infected, strict liability will not attach. See Baptista v. Saint Barnabas Med. Center, 109 N.J. Super. 217, 262 A.2d 902 (App. Div. 1970).
151. See note 5 supra.
153. See note 20 supra.
presence of the hepatitis virus in the blood sold by the commercial blood bank to the hospital was found to be reasonable and therefore valid.\textsuperscript{154} However, parties to a contract may agree to limit their liability only so far as the limitation is not violative of public policy.\textsuperscript{158} While assumption of the risk is a defense to a section 402A action,\textsuperscript{156} the relative helplessness of a patient when blood has been prescribed eliminates the idea that he has freely bargained for and assumed the risks of transfusion by signing a waiver. If the patient were unconscious, no attempted disclaimer would be possible and if the patient were conscious, agreed to accept the transfusion, but refused to waive his legal rights, it is doubtful that public policy would support any hospital's decision to withhold the transfusion. Section 402A makes clear that any disclaimer or contract will not affect the consumer's cause of action.\textsuperscript{157} Moreover, one of the purposes of strict liability in tort is to prevent a manufacturer from defining the scope of his responsibility for harm caused by his product, and therefore liability cannot be disclaimed.\textsuperscript{158} The use of a disclaimer, consequently, would be insufficient to remove liability from a blood bank in a cause of action under section 402A.

From the foregoing analysis it has been seen that the following was found by the Cunningham court: (1) blood is a product; (2) a sale is present; and (3) when blood contains a virus which causes disease, it is impure, and therefore defective and unreasonably dangerous. The defenses that there is currently no way to absolutely detect or prevent the

\textsuperscript{154} 96 N.J. Super. at 329, 232 A.2d at 888. See note 111 supra. Section 2-316 of the Uniform Commercial Code does not sanction a disclaimer which is unreasonable. The Jackson court concluded that in view of the fact that there was no way to detect or prevent the presence of the hepatitis virus in the blood the disclaimer was reasonable. For a case in which there was no effective disclaimer that a polio vaccine was merchantable and fit for its purpose, see, e.g., Gottsdanker v. Cutter Labs., 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960). See note 39 supra.


\textsuperscript{156} Where a buyer, knowing of the defect, voluntarily and unreasonably proceeds to use the product, he has assumed the risk of injury which is a complete defense to the action of strict liability. Restatement (Second) of Torts § 402A, comment n at 356 (1965). See, e.g., Bartkewich v. Billinger, 432 Pa. 351, 247 A.2d 603 (1968); Ferraro v. Ford Motor Co., 423 Pa. 324, 223 A.2d 746 (1966); Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779 (Tex. Sup. Ct. 1967). See also Restatement (Second) of Torts § 496E, comment a at 576 (1965).

Contributory negligence, however, is not a defense to an action brought under Section 402A. Ettin v. Ava Truck Leasing, Inc., 53 N.J. 463, 251 A.2d 278 (1969). The defendant must show either misuse of the product or voluntary assumption of the risk in order to defeat recovery. Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970). In a state with a comparative negligence statute, the plaintiff's contributory negligence should be given effect as in a negligence per se case. Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

\textsuperscript{157} Restatement (Second) of Torts § 402A, comment m at 355-56 (1965). Disclaimers are a matter of contract and therefore are not controlling under the rule of strict tort liability. See Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

transmission of the virus through donor blood, that an extension of chari-
table immunity under a protection-of-the-funds theory should be applic-
cable, and that the transfusion falls within the comment \( k \) exception to
section 402A will not be recognized. Furthermore, waiver or disclaimer
will not abrogate liability nor can the patient freely assume the risks of
transfusion. Future courts have the option of either protecting an inno-
cent hospital by deciding differently on one of the above elements or of
protecting the innocent consumer by imposing liability. Should protection
of the hospital be decided, the most logical reasoning would be to classify
the blood as unavoidably unsafe, and therefore reasonably dangerous.
But should liability be imposed by other states, several elections are
possible. Their legislatures or the federal government can either create
immunity for the hospital by calling the transaction a service, or they
can enact measures controlling patient recovery similar to uninsured mo-
torist acts, workman compensation acts, or the law of admiralty.\(^{159}\)
Preferably, the matter would remain in the private sphere and continue
to be worked out between the hospitals, the commercial blood banks and
their insurance carriers. It is probable that the vast majority of entities
handling human blood already carry insurance. Additional insurance
might be placed upon the hospital, the patient, the unit of blood, or the
entity which drew the blood. If the drawer of the blood were a com-
cmercial blood bank, it seems that insurance coverage should rest with it thus
giving the hospitals a right of collection against the real party in interest —
the commercial blood bank — since it is in the distributive chain with the
hospital serving as a mere conduit.\(^{160}\) If the drawer of the blood were
the hospital, the incident of risks would probably be less because they
are more selective in the screening of their donors. In each instance of
insurance coverage by the drawer of the blood, the costs would be passed
on to the users of the blood with the costs decreasing as the incidence of
hepatitis in their donors decreased.

Moreover, the incidence of hepatitis for which recovery is possible
may be less than the present statistics reveal\(^{161}\) because many of the


\(^{160}\) See note 79 supra.

\(^{161}\) For example, if a large urban university hospital transfuses 15,000 units of
blood or blood fractions per year, and if an attack rate of 1 case per 1,000 units
administered is employed, see note 23 supra, then the hepatitis virus would be present
in 15 of those units of blood. Some of those units might be transfused into the same
patient, many of the patients will expire from other causes prior to the six month
period necessary to determine whether hepatitis will develop, see note 3 supra, and
some of those patients will be less susceptible to the virus due to age, see note 23
supra, or genetic makeup, see note 18 supra. Therefore, the total number of patients
which develop an icteric form of Au(1) positive hepatitis might number approxi-
mately 7. If the overall mortality rate is 0.9 per cent, see note 23 supra, then there
would be only one death per year at that hospital due to post-transfusion hepatitis.
Smaller non-urban hospitals with a significantly fewer number of annual transfusions,
see note 23 supra, which obtain their donors from a low-risk population, see note 30
supra, would rarely have a death of a patient from hepatitis. The figure derived of
approximately 7 patients who would be likely to contact hepatitis will be lowered
as the Au(1) test is implemented. See note 29 and accompanying text supra.
recipients of the transfusions of whole blood or blood fractions die from other causes before hepatitis presents itself as a disease. Other patients are asymptomatic. Of the remaining potential plaintiffs, the incidence of hepatitis will be significantly reduced within the foreseeable future. This is so because legal impetus on the hospital will result in the following: (1) a more careful screening of donors will occur, with less use of blood from high-risk populations;\(^{162}\) (2) the use of one or two units of whole blood will be avoided whenever possible\(^{163}\) by education of the physicians; (3) blood products which have a low incidence of transmittance of viruses\(^{164}\) will be transfused whenever medically feasible, with the cost factor decreasing as the volume of preparation and use increases; (4) blood substitutes will be further researched and developed for clinical use;\(^{165}\) and (5) as the test for Au(1) leaves the realm of research and is implemented as a routine procedure by the blood banks,\(^{166}\) more contaminated blood will be discarded. The more sensitive methods, which pick up a higher ratio of positive bloods, will provide the means for a detection rate increased from a 20 to 40 per cent\(^{167}\) to an 80 to 90 per cent level. The blood which escapes detection at the testing level as being positive for Au(1) will have a comparatively slight amount of viral contamination probably resulting in no disease or a milder form of the disease in the recipient of the blood. For the present, it is recommended that: (1) liability for blood transfusions remain with the hospital or commercial blood bank; (2) additional insurance be carried by the drawer of the blood if necessary; and (3) the non-drawer hospital recover its liability from the entity which drew the contaminated blood.

In conclusion, human blood and blood fractions are products. When prescribed by a clinician, this product is sold to a patient by the hospital as part of the ancillary patient services necessary for total patient treatment and care. In the weakest part of the opinion, the Cunningham court has denied that human blood is reasonably dangerous and, therefore, an unavoidably unsafe product. Blood containing the hepatitis virus has, instead, been classified as defective and, therefore, unreasonably dangerous which has permitted the imposition of strict liability, under section 402A of the Restatement (Second) of Torts, on the seller hospital. In view of the fact that human blood is a unique product, that there is a legal necessity to provide the whole blood or fractions of blood to needy patients for transfusion and other purposes, and that there is yet no way to absolutely assure the purity of this product, or the absence of the hepatitis virus, it appears that the Illinois court has abrogated the policy

162. See notes 30–34 supra.
163. See note 31 supra.
164. See note 35 supra.
165. Substitution for one erythrocytic function, that of oxygen transport, is being experimentally provided by the use of a liquid fluorochemical. Sloviter, Erythrocyte Substitutes, 54 MED. CLIN. N.A. 787 (May, 1970). See note 12 supra.
166. See notes 18 & 28 supra.
167. See note 29 and accompanying text supra.
underlying the American Law Institute's comment\(k\) exception — unavoidably unsafe products — to the strict tort liability principle. By their extension of strict tort liability under these circumstances, the Cunningham court has made the hospital a virtual insurer of the blood which it provides for transfusions, without clearly enunciating this deviation from the Restatement's policy or making it clear whether, in the future, the comment\(k\) exception to strict liability will be similarly ignored for other unique products. However, the Cunningham court has adopted another policy behind the judicial extension of strict tort liability to all sellers of products which cause injury to a user or consumer. This policy reflects a balancing of the needs of an injured person against this seller's ability to provide medical or financial compensation. The court has determined that public policy demands that, as between two innocent parties, the hospital which supplied the blood should furnish the remedy. Certainly, when a hospital has provided the product causing a disease, it can best afford to provide the treatment necessary to cure this disease. The hospital will have a cause of action against any external drawer of the unit of blood, since this entity, too, will be in the chain of distribution of the product and, therefore, strictly liable in tort. Also, the attack rate of post-transfusion viral hepatitis will be decreased as recent technological advances can be implemented in the hospital laboratories. The pecuniary obligation to a patient who contacts this disease can, therefore, be adequately absorbed by the hospital's present insurance provisions.

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**TORTS — NEGLIGENT INFILCTION OF MENTAL DISTRESS — RECOVERY ALLOWED FOR NEGLIGENTLY INFLECTED MENTAL DISTRESS WITHOUT REQUIREMENT OF CONTEMPORANEOUS PHYSICAL INJURY.**

*Wallace v. Coca-Cola Bottling Plants, Inc.* (Maine 1970)

Plaintiff, who had discovered a foreign object\(^1\) in a bottled soft drink he purchased and partially consumed, brought suit against the defendant bottling company for damages, alleging breach of warranty and negligence. The warranty action was dismissed by the trial court and the jury returned a verdict for the plaintiff on the negligence count.\(^2\) The defendant appealed on the grounds, *inter alia*, that plaintiff had suffered no physical injury for which he could be compensated, and that there was no evidence

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1. After pouring the remainder of the contents into a cup it was discovered that the foreign object was an unpackaged prophylactic. The evidence indicated that the plaintiff became ill and vomited causing him to be absent from work. However, the court failed to state what the illness was or for what period he was absent from work. Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117, 118 (Me. 1970).

2. *Id.* at 118.
that the foreign matter was in the bottle when it was delivered to the store. The Supreme Judicial Court of Maine affirmed the verdict for plaintiff, holding that where it is established by a fair preponderance of the evidence that there is a proximate causal relationship between an act of negligence and reasonably foreseeable mental and emotional suffering by a reasonably foreseeable plaintiff, proven damages are compensable even though there is no physical injury from external causes. The court also enunciated a procedural rule which makes the defendant’s claim that there has been tampering with a capped and airtight bottle after it has left its plant an affirmative defense. Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1970).

The law has been slow to recognize peace of mind as a distinct interest entitled to independent legal protection. The rationale for this reluctance, as stated in an early English case, has been that the law could not value, and therefore would not attempt to redress mental distress caused solely by a negligent act. Later English courts took the position that, because physical harm resulting from negligently inflicted mental distress was a remote injury, no recovery would be allowed for such harm unless the plaintiff also suffered some actual impact.

3. The procedural issue involved was whether a defendant, asserting that there has been tampering with a bottle after it left its plant, has the burden of proving tampering as an affirmative defense or whether the plaintiff must negate tampering. Courts have resolved the problem in a variety of ways. Some hold that the plaintiff must prove there was no tampering with the bottle after it left the defendant’s control. See Ashland Coca-Cola Bottling Co. v. Byrne, 258 S.W.2d 475 (Ky. Ct. App. 1953); Coca-Cola Bottling Works v. Sullivan, 178 Tenn. 405, 158 S.W.2d 721 (1942); Jordan v. Coca-Cola Bottling Co., 117 Utah 578, 218 P.2d 660 (1950).

Other jurisdictions allow the plaintiff to use the doctrine of res ipsa loquitur by relaxing the requirement of that doctrine that the instrumentality which causes the injury be within the exclusive control of the defendant. See Coca-Cola Bottling Co. v. Fitzgerald, 3 Ariz. App. 303, 413 P.2d 869 (1966); Asher v. Coca-Cola Bottling Co., 172 Neb. 855, 112 N.W.2d 252 (1961); Rutherford v. Huntington Coca-Cola Bottling Co., 142 W. Va. 681, 97 S.E.2d 803 (1957).


The rule adopted by the Wallace court makes tampering an affirmative defense, thus placing the burden of establishing it upon the defendant. 269 A.2d at 119. A plaintiff, who has been damaged by a foreign object in a capped and airtight bottle, makes out a prima facie case when he establishes that the bottle was processed by the defendant and that there was nothing unusual about it when it was opened. Id. See generally Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 MINN. L. REV. 791, 845-48 (1966).


6. Id. at 863.

7. In Victorian Ry. Comm’r v. Coultas, 13 App. Cas. 222 (P.C. 1888) (Canada), the plaintiff was denied recovery for physical injuries caused by shock when, as a result of defendant Commissioners’ gatekeeper’s negligence, she and her husband were nearly struck by a train. The Coultas decision was later repudiated in Dulieu v.
RECENT DEVELOPMENTS

The early American cases adopted the view that there could be no recovery for negligently inflicted mental distress unaccompanied by physical injury. Also, where the negligently inflicted mental distress resulted in physical injury, many American courts followed the English precedent, holding that there could be no recovery for such injury absent some physical impact upon the injured person.

As courts recognized the severity of physical harm which could result from mental distress, irrespective of impact, they began to strain the requirement by finding that it was satisfied in cases in which the impact bore no relationship to the injury sustained. The futility of this approach was recognized by many courts, which either refused to adopt, or soon abrogated, the impact requirement, holding that a plaintiff could recover for physical injuries caused by negligently inflicted mental distress, regardless of whether there was any actual impact upon his person. The vast majority of American jurisdictions have now abandoned the impact requirement where negligently inflicted mental distress produces some physical injury.

White & Sons, [1901] 2 K.B. 669. In that decision, a tavern owner’s pregnant wife recovered for physical injuries caused by fright, when defendant’s servant drove a horse and van into the plaintiff’s husband’s tavern. The Dulieu court recognized, however, that there could be no recovery for mental distress unaccompanied by physical injury. Id. at 673.

8. For example, the New York court in Mitchell v. Rochester Ry., 151 N.Y. 107, 109, 45 N.E. 354 (1896), simply asserted “not only . . . that no recovery can be had for mere fright, but also that none can be had for injuries which are the direct consequences of it.” See generally McNiece, supra note 4, at 9.


Several jurisdictions which have abandoned the impact requirement have set forth other mechanical rules, intended to guaranty the genuineness of a plaintiff’s claim, the most common being the requirement that the plaintiff be within the “zone of physical danger.” See, e.g., Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941); Robb v. Pennsylvania R.R., 210 A.2d 709 (Del. 1965); Niederman v. Brodsky,
It must be recognized that the courts in jurisdictions which have abandoned the impact requirement are not compensating plaintiffs for mental distress, but are allowing compensation for the physical injuries which flow from the mental distress. Mental suffering is, however, compensated as an element of damages where the plaintiff has suffered some well recognized tort, which may serve as a foundation upon which to base the mental distress. These torts include battery, false imprisonment, and defamation. Moreover, where the defendant’s negligence produces some immediate physical injury, courts are willing to allow recovery for mental pain and suffering occasioned by the injury, as a proper element of damages.

Where the mental distress has been intentionally inflicted the law has been more willing to afford recovery to the plaintiff, absent injury to his person, under the relatively new tort action labeled “the intentional infliction of mental suffering.” Where the requisite intent is established as a result of which a plaintiff suffers serious mental distress, most courts will allow recovery without requiring that the plaintiff suffer any physical impact or injury. Prior to the Wallace decision, it was only in this area


17. For the historical development of this new cause of action, see Prosser, supra note 13, at 874-87.


It appears that where physical injury is lacking, the courts will recognize a cause of action for the intentional infliction of mental distress, but may require more in the way of outrageous conduct on the part of the defendant to insure the genuineness of the mental suffering. See, e.g., Cornblith v. First Maintenance Supply Co., 268 Cal. App. 2d 564, 74 Cal. Rptr. 216 (1968); Curnett v. Wolf, 244 Iowa 683,
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of intentionally inflicted mental suffering that the courts were willing to compensate a plaintiff for his mental distress, without requiring some attendant physical injury. Where, however, a defendant has been negligent, and the plaintiff has suffered mental distress with no accompanying physical injury, the courts have consistently denied the plaintiff a cause of action. 20

The Wallace decision marks a clear departure from this general denial of recovery. 21 It grants the plaintiff, who has suffered negligently inflicted

57 N.W.2d 915 (1953); LaSalle Extension Univ. v. Fogarty, 126 Neb. 437, 253 N.W. 424 (1934). See also W. PROSSER, LAW OF TORTS § 11, at 51-52 (3d ed. 1964).


The Restatement adopts the rule that:

If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.


The courts have carved out only two minor exceptions to the general rule denying recovery. The first involves mental distress suffered as a result of a negligently transmitted telegraph message. A number of jurisdictions allow recovery for such mental distress with no accompanying physical injuries. See, e.g., Western Union Tel. Co. v. Cleveland, 169 Ala. 131, 53 So. 80 (1910); Russ v. Western Union Tel. Co., 222 N.C. 504, 23 S.E.2d 681 (1943). See also RESTATEMENT (SECOND) OF TORTS, Appendix § 436A, reporter's notes at 171-72 (1966).

The second exception concerns cases in which mental distress is suffered by a close relative as a result of the negligent mishandling of a corpse. See, e.g., Chelini v. Nieri, 32 Cal. 2d 480, 196 P.2d 915 (1948); Lamm v. Shingleton, 231 N.C. 10, 55 S.E.2d 810 (1949); Torres v. State, 34 Misc. 2d 488, 228 N.Y.S.2d 1085 (Ct. Cl. 1962). See also Amdursky, The Interest in Mental Tranquility, 13 BUFFALO L. REV. 339, 342-43 (1964).

21 Prior to the Wallace decision, in at least two jurisdictions, courts had asserted that recovery would be allowed for negligently inflicted mental distress absent attendant physical injuries.

In Sahuc v. United States Fidelity & Guaranty Co., 320 F.2d 18, 20 (5th Cir. 1963), the Fifth Circuit Court of Appeals held that Louisiana law permitted recovery for nervous shock unaccompanied by physical injuries, where the shock is evidenced by objective symptoms.

In New York, the law on this issue is unsettled but courts of that jurisdiction have noted in dicta that recovery would be allowed for negligently inflicted mental

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Published by Villanova University Charles Widger School of Law Digital Repository, 1971
mental distress, an opportunity to avoid a nonsuit and to get his claim before the jury. The rule as enunciated by the court requires that the mental distress be substantial, and that it be evidenced by "objective symptomatology." Failure to allege substantiality of mental distress or resulting objective symptoms could lead to a dismissal of the complaint for failure to state a cause of action, as a matter of law.

The Restatement of Torts takes the opposite approach of Wallace and follows the rule which denies a plaintiff, who has suffered only negligently inflicted mental distress, a cause of action. In support of its position, the Restatement poses an illustration which is taken from the case of Tuttle v. Meyer Dairy Products Co. In that case the plaintiff suffered nausea and mental distress for a few days after eating cottage cheese containing foreign matter. In reversing a verdict for the plaintiff the appellate court asserted that there could be no recovery since the plaintiff suffered no contemporaneous physical injury which could serve as a predicate to recovery for the ensuing mental distress.

The facts of the Wallace case are similar to those in Tuttle, especially as to the nature of the harm suffered by the respective plaintiffs. The plaintiff in Wallace also suffered only mental distress and nausea, but contrary to Tuttle the Maine court allowed recovery, asserting that mental distress no longer need be predicated on physical injury in order to be compensable. A plaintiff can therefore state a good cause of action without having to allege physical injury.

The Wallace court reached its decision after noting the dissimilar attitudes expressed by the courts of two neighboring jurisdictions, regarding recovery for negligently inflicted mental distress. It first noted that in Massachusetts the rule denying recovery for negligently inflicted mental

22. The rule as enunciated by the court provides that reasonably foreseeable mental and emotional suffering are compensable "even though there is no discernable trauma from external causes." 269 A.2d at 121. The word "trauma" is defined in T. Stedman's Medical Dictionary 1670 (21st ed. 1966), as "[a] wound; an injury inflicted, usually more or less suddenly, by some physical agent, . . . ." It is clear that the Maine court has abandoned the requirement that physical injuries must accompany negligently inflicted mental distress in order to be compensable.

23. 269 A.2d at 121. The jury will continue to exercise its proper function of applying the traditional tort concepts of duty, causation, and foreseeability in determining whether a particular plaintiff's mental distress should be recompensed by law.

24. Id. at 122. The court indicated that in the instant case the plaintiff's vomiting satisfied the objective symptomatology requirement. Subsequent plaintiffs will have little difficulty in meeting this requirement. It is apparent that the court is requiring only that the plaintiff's mental distress be manifested by some minimal objective symptoms to ensure, to some extent, the genuineness of the mental suffering.

25. See note 20 supra.


28. The foreign matter consisted of particles of broken glass which the plaintiff expelled from her mouth before she was cut or scratched. Id. at 857, 138 N.E.2d at 429.

29. Id. at 859, 138 N.E.2d at 430.

30. 269 A.2d at 121.
distress was enunciated in the early case of *Spade v. Lynn & Boston Railroad Company*. The court indicated that the *Spade* rule has been somewhat refined in subsequent cases, but it is clear that the law in Massachusetts still denies recovery for negligently inflicted mental distress absent some impact and injury.

In contrast to this conservative approach, the *Wallace* court recognized that New Hampshire refused to follow the *Spade* decision. In *Chiuchiolo v. New England Wholesale Tailors*, the New Hampshire court exposed the anomaly of allowing recovery for pain and suffering when accompanied by physical harm, however slight, and denying it in cases where there was mental suffering caused by a negligent act without actual impact. While it is true that New Hampshire was one of the first jurisdictions to allow recovery for physical injuries caused by mental distress, no decision of that state has gone as far as *Wallace* in recognizing recovery for negligently inflicted mental distress alone.

Maine formerly followed *Spade* in *Herrick v. Evening Publishing Co.*, reasoning that when a plaintiff has suffered no bodily injury there could be no recognizable foundation upon which to base recovery for mental distress. The rationale of the *Herrick* case was that mental distress, absent accompanying physical injury, is simply outside the bounds of compensation which the law ought to recognize.

While the *Wallace* court recognized that the *Spade-Herrick* reasoning has been subjected to vigorous criticism by several prominent commentators, it failed to indicate the focus of this criticism and the alternatives posed by these commentators. In its brief opinion the court simply noted the criticisms of the rule denying recovery, and proceeded to enunciate its own rule. Moreover, the court failed to answer specifically the objections, which have long been advanced, against allowing a plaintiff to recover for mental distress unaccompanied by physical injury. While the

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32. In Sullivan v. H.P. Hood & Sons, Inc., 341 Mass. 216, 168 N.E.2d 80 (1960), plaintiff, who drank milk from a container in which there was a dead mouse, was denied recovery because her injuries were caused solely by her mental shock occasioned by the discovery of the mouse.
33. 84 N.H. 329, 150 A. 540 (1930).
34. Id. at 334, 150 A. at 543.
35. In *Chiuchiolo*, the New Hampshire court expressly stated that "there is no liability for carelessly causing mental pain and suffering without other injury. . . ." Id. at 337, 150 A. at 544.
36. 120 Me. 138, 113 A. 16 (1921). Plaintiff was denied recovery for mental distress suffered as a result of defendant's negligent publication of a picture of her son in connection with a report of the death of a person with the same name.
37. Id. at 140, 113 A. at 17.
39. The court simply noted the existence of the criticism and asserted:
In light of advances which have been made by medical science and the improvement in investigatory techniques since this Court decided *Herrick* in 1921, we decline to follow it any longer. 269 A.2d at 121.
commentators have seriously questioned these objections, the Wallace court did not expressly confront them, but rather seemed satisfied with their implicit rejection by the rule it announced.

The first of these objections to allowing recovery is that emotional disturbance, which is not so severe as to cause physical consequences, is too trivial for the law to attempt to compensate. This objection has been soundly laid to rest by various medical research findings which indicate the extent of psychic harm which may result from simple shock or fright. The Wallace court implicitly recognized the nature of this harm by citing a commentator whose research disclosed the existence and severity of such psychic injury.

Since many courts which do not allow recovery for mental distress alone allow recovery for physical injuries or the consequences flowing from negligently inflicted mental distress, it becomes necessary for these courts to distinguish between physical and mental consequences. The results of these distinctions are somewhat confusing.

One problem is created by the use of the word "shock." Some courts use the term synonymously with fright and deny recovery to a plaintiff who has suffered only this type of "shock." The word also has a technical meaning referring to a distinct physiological effect upon the body, and where it is used in this sense a plaintiff may recover for such "shock" even though the jurisdiction refuses to compensate negligently inflicted mental distress absent physical injury.

Another problem arises when a plaintiff suffers only nausea, headache, or dizziness as a result of the defendant's negligence. The difficulty arises in properly categorizing these symptoms as physical or mental.

40. See generally Amdursky, supra note 20, at 349–51; Goodrich, supra note 38; McNiece, supra note 4, at 29–32; Magruder, supra note 4; Prosser, supra note 13, at 875–79; Throckmorton, supra note 38, at 265–81.


42. See Cantor, Psychosomatic Injury, Traumatic Psychoneurosis, and Law, 6 CLEV.-MAR. L. REV. 428, 429-37 (1955) (discussing the variety of harmful consequences which may flow from simple shock or fright); Goodrich, supra note 38, at 497-501 (discussing the range of physical injuries which may be caused solely by mental distress).

43. Regarding the extent of harm which may result from mental distress, one commentator has asserted that "[i]t is then clear that fright as definitely affects the physical organism as does a blow with a club." Goodrich, supra note 38, at 503.


45. See, e.g., Vanoni v. Western Airlines, 247 Cal. App. 2d 793, 56 Cal. Rptr. 115 (1969) (allegation that the plaintiff suffered severe shock was held to state a good cause of action in a jurisdiction which requires physical injury to support a claim for mental distress); Belt v. St. Louis-San Francisco Ry., 195 F. 2d 241 (10th Cir. 1952) (court applying Oklahoma law, asserted that shock was a compensable physical injury, and not merely mental or emotional distress); Gulf C. & S.F. Ry. v. Hayter, 93 Tex. 239, 54 S.W. 944 (1900) (the court held that a serious nervous affliction caused by fright was compensable as a physical injury).

46. Some of the difficulties encountered in categorizing such symptoms as physical or mental can be seen in jurisdictions which do not consider such physical manifestations of mental distress as vomiting and dizziness to be physical injury unless they are of substantial duration. See Sutton Motor Co. v. Crysel, 289 S.W.2d 631 (Tex. Civ. App. 1956). This is the view adopted by the Restatement. It asserts that long

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categorization will determine whether the plaintiff has stated a proper cause of action. The *Wallace* approach avoids this problem of classifying harm as physical or mental and focuses upon the process of applying the concepts of duty and foreseeability in determining whether a plaintiff’s injury should be compensated. 47

A second objection to allowing recovery for mental distress without physical injury is that, in the absence of the guaranty of genuineness, provided by the presence of physical injuries, allowance of recovery would lead to a host of feigned suits. 48 The courts feel that this is an especially real danger since establishing the existence of mental distress depends largely upon the subjective testimony of the plaintiff. To deny honest claims for actual harm out of the fear that some dishonest claims may be successful is really no justification at all. 49 The issue can be reduced to a question of proof of facts, and the responsibility for weighing facts and sorting out feigned claims lies with the jury. 50

The *Wallace* rule properly allows the jury to assume this responsibility, and by couching its rule in the traditional tort requirements of causation and foreseeability, 51 the court provides the jury with basic concepts to utilize in ascertaining whether a particular defendant should be liable. This approach avoids the arbitrariness of denying or granting a cause of action by the application of mechanical rules, and embodies the concept that the jury will not shrink from the task of determining whether recovery should be allowed where only mental distress is involved.

A third objection to allowing recovery for mental distress alone is that the courts will be inundated with an increased volume of claims which

continued nausea, dizziness, or headaches may constitute physical injury, but would leave the problem of ascertaining what actually is a physical injury with the medical profession, not the law. *Restatement (Second) of Torts* § 436A, comment c at 462 (1965).

47. See Brody, *supra* note 12, at 250–54. The author discusses the unjust results which flow from the application of the physical injury requirement in food cases. He argues that whether a plaintiff recovers should not depend upon whether his injury is characterized as physical or emotional, but whether he has suffered harm for which he should be compensated. Furthermore, this determination is best made by the jury applying traditional tests of causation and foreseeability.


49. See, e.g., Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933); Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 A. 540 (1930); Simone v. Rhode Island Co., 28 R.I. 186, 66 A. 202 (1907). One commentator argues that "[t]o hold that all honest claims should be barred merely because otherwise some dishonest ones would prevail is stretching the public policy concept very close to the breaking point..." McNiece, *supra* note 4, at 31.

50. See Throckmorton, *supra* note 38, at 277, where the author asserts that the job of the jury is to sift the evidence and determine whether an honest claim has been proved. Brody, *supra* note 12, at 236, argues that in applying the physical injury requirement courts are determining matters of policy, where what is actually involved is the factual question whether the plaintiff has suffered a compensable harm, which is a matter for the jury to decide.

For discussions as to the effectiveness of disclosing feigned mental distress by medical examination, see Cantor, *supra* note 42, at 435–37; Goodrich, *supra* note 38, at 505–06.

51. 269 A.2d at 121.
will overburden court calendars and adversely affect the judicial process.\textsuperscript{52} This objection was also advanced by courts which were clinging to the requirement that a plaintiff suffer actual "impact" in order to recover for physical injuries caused by negligently inflicted mental distress.\textsuperscript{53} Jurisdictions which have abandoned the "impact" requirement have not been deluged with litigation,\textsuperscript{54} and it is submitted that neither will courts which abandon the physical injury requirement. The very nature of the \textit{Wallace} rule militates against the likelihood of a mass of claims confronting the court, because it requires that both the plaintiff and the resultant mental distress be reasonably foreseeable, and that the mental distress be substantial.\textsuperscript{55} Moreover, it is the function of the courts to see that persons who have been harmed by another's negligence are given an opportunity to state their claims to the jury, and to deny this opportunity to all on the ground that it may place a heavier burden on the courts is a "pitiful confession of incompetence."\textsuperscript{56}

A fourth objection which has been raised is that since the defendant has been only negligent the law should not require him to compensate persons who have suffered merely mental distress.\textsuperscript{57} This objection carries with it the assumption that mental distress in itself is not a serious injury. It has been noted that medical science has shown that mental distress can result in serious consequences.\textsuperscript{58} Justice Cardozo has indicated that the function of science in disproving factual assumptions which support legal rules, is one of the important motivating forces behind the growth of the law in protecting the injured plaintiff.\textsuperscript{59} Another important motivating force behind the growth of the law is changing social values.\textsuperscript{60} Societal concepts of liability for injury and the extent of that liability are constantly changing, and these changes are reflected in the expanding protections which the law affords the injured plaintiff.\textsuperscript{61} The \textit{Wallace} decision is a manifestation of such an evolitional growth of the law.

The law has greatly expanded the cloak of protection which it affords mental tranquility since the early cases which held that the law would not recognize mental distress as an injury deserving of compensation.

\begin{itemize}
\item \textsuperscript{54} See Niederman v. Brodsky, 436 Pa. 401, 411–12, 261 A.2d 84, 88–89 (1970); Throckmorton, supra note 38, at 274–75.
\item \textsuperscript{55} 269 A.2d at 121.
\item \textsuperscript{57} See, e.g., Spade v. Lynn & B. R.R., 168 Mass. 285, 290, 47 N.E. 88, 89 (1897); Throckmorton, supra note 38, at 270.
\item \textsuperscript{58} See note 42 and accompanying text supra.
\item \textsuperscript{59} B. CARDozo, THE NATURE OF THE JUDICIAL PROCESS 80–81 (1921).
\item \textsuperscript{60} Amdursky, supra note 20, at 339.
\item \textsuperscript{61} See E. LEvi, AN INTRODUCTION TO LEGAL REASONING (1948). The author notes that "[i]deas of the community and of the social sciences, whether correct or not, as they win acceptance in the community, control legal decisions." \textit{Id.} at 6.
\end{itemize}
Mental distress is now recognized as an element of damages where the plaintiff has suffered some well recognized tort. While peace of mind has been recently protected from intentional invasion, it can now be said that the interest in mental tranquillity has reached its maturity with the Wallace court's recognition that it is an interest deserving independent protection from negligent invasion by the general public.

The Wallace decision will certainly have an impact upon courts which have encountered difficulties in distinguishing between physical and mental results of a negligent act, in order to apply the physical injury requirement. The approach adopted by the Maine court would be particularly helpful in this respect in cases involving foreign objects in food where the plaintiff's usual reaction is transitory nausea and mental distress. Rather than hinge the plaintiff's claim on whether such symptoms are physical or mental, the Wallace approach openly recognizes that the plaintiff has been harmed, and allows the jury to apply the usual tests of causation and foreseeability in determining whether the law should compensate his harm.

When a plaintiff has been injured by a defendant's negligent act, his right to recover should not depend on how his injury is categorized, but on whether it is the natural and proximate result of the defendant's negligence.

William Hebe

62. See note 13 and accompanying text supra.
63. See note 18 and accompanying text supra.
64. See Amdursky, supra note 20, at 341, where the author analyzes the pattern which the common law follows in expanding its protection of particular interests, and concludes that an interest matures when the courts protect it from unreasonable invasions by the public at large.
65. In discussing cases in which plaintiffs are nauseated with some resulting mental distress as a result of finding foreign matter in food items, one commentator argues that application of the mechanical physical injury requirement:

[M]ore often than not results in a futile and unnecessary attempt to characterize as "physical" or "emotional", ... harms produced in the interaction between the internal response to the external stimulus.

Brody, supra note 12, at 251.