Hepatitis, AIDS and the Blood Product Exemption from Strict Products Liability in California: A Reassessment

According to California Health & Safety Code section 1606, suppliers of blood and blood products provide a service, not a sale, "for all purposes whatsoever."1 Traditionally, courts have interpreted section 1606 to preclude strict products liability actions against hospitals, blood banks, and blood products manufacturers2 in cases involving hepatitis-contaminated blood. The statute is under new scrutiny, however. Since the discovery of Acquired Immune Deficiency Syndrome ("AIDS"),3 a new line of cases has arisen in which plaintiffs who contracted the disease from blood transfusions and blood products have challenged California courts' traditional interpretation of section 1606. Whether the statute will continue to preclude strict liability actions in the context of AIDS contamination is uncertain; only one case has reached a California appellate court.4 Due to the devastating impact of AIDS on its victims, however, the time has come to reevaluate whether immunizing suppliers of transfusible blood and blood products from strict liability furthers the policies underlying the doctrine.

This Note reexamines the background of section 1606 and of the public policy rationales underlying strict liability and concludes that suppliers of transfusible blood, such as hospitals and blood banks, should continue to be exempt from strict products liability in all contamination cases. For purposes of this Note, "transfusible blood" means whole blood or plasma that is always professionally administered, usually in a hospital or other medical facility. Transfusible blood is not self-administerable and is not sold to consumers for home use; thus, it is not placed into the general stream of commerce. To the extent that other entities

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1. CAL. HEALTH & SAFETY CODE § 1606 (West 1979) provides in full:
The procurement, processing, distribution, or use of whole blood, plasma, blood products, and blood derivatives for the purpose of injecting or transfusing the same, or any of them, into the human body shall be construed to be, and is declared to be, for all purposes whatsoever, the rendition of a service by each and every person, firm, or corporation participating therein, and shall not be construed to be, and is declared not to be, a sale of such whole blood, plasma, blood products, or blood derivatives, for any purpose or purposes whatsoever.
2. See infra notes 55-57 & accompanying text.
3. See infra note 103 & accompanying text for a description of the disease.
supply transfusable blood exclusively to medical facilities, they also should continue to be exempt from strict liability.

This Note proposes, however, that immunity from strict liability should not extend to manufacturers of blood products. The term "blood products" is used here to refer to blood-derivative products that can be self-administered and that are placed directly into the stream of commerce for purchase and use by individual consumers. The only blood products currently manufactured are coagulants, or blood-clotting agents, used in the treatment of hemophilia; however, other blood-derived products with other uses probably will emerge in the future.

Section 1606 mischaracterizes the manufacture and sale of blood products as a "service." Blood products manufacturers, unlike hospitals or blood banks, conduct "normal commercial transactions"5 to which strict liability rationales apply; those manufacturers should be subject to strict liability actions to the same extent as other commercial manufacturers. While strict liability should apply to blood products manufacturers in all contamination cases, including hepatitis, application of strict liability is even more important in AIDS cases because of the severity of that disease.6 Accordingly, section 1606 should be amended to eliminate strict liability protection for blood products manufacturers.

This Note first examines the present doctrine of strict products liability in tort under California law. In particular, it analyzes the history of the blood product exemption, stemming from cases involving hepatitis contamination. As a preface to a discussion of the cases involving AIDS-contaminated blood, the Note compares hepatitis and AIDS to reveal why courts have analyzed those cases in a parallel fashion. The Note then contrasts AIDS and hepatitis, disclosing the medical differences that weaken the precedential value of hepatitis cases in determining liability in the AIDS context. Next, the Note focuses on California courts' disposition of strict liability actions in cases involving AIDS-contaminated blood. The Note then demonstrates that, in the context of both hepatitis and AIDS contamination, strict liability should apply to blood products manufacturers but should not be imposed upon hospitals and blood banks. Finally, the Note proposes that section 1606 be amended to clarify and narrow that statute's application to strict liability actions and establishes that such an amendment would be constitutional.

5. Magrine v. Krasnica, 94 N.J. Super. 228, 235, 227 A.2d 539, 543 (1967) ("[T]he essence of [such a] transaction . . . relates to the article sold. The seller is in the business of supplying the product to the consumer. It is that, and that alone, for which he is paid.") (emphasis in original), aff'd sub nom., Magrine v. Spector, 100 N.J. Super. 223, 241 A.2d 637 (1968); see infra note 63 & accompanying text.

6. See infra notes 103, 115-18 & accompanying text.
The California Doctrine of Strict Products Liability in Tort

In 1963, the California Supreme Court formulated the doctrine of strict products liability in tort in *Greenman v. Yuba Power Products*, a case involving a defective lathe attachment that flew off and hit the plaintiff in the head. Until *Greenman*, California courts, as well as courts in other states, had relied on an implied warranty theory to impose strict liability for damage to persons and property caused by defective products. Because of its connection to contract and sales law, however, the implied warranty theory was not suited to tort actions arising from personal injuries sustained by a user of the product who had no contractual relationship with the seller. "[C]ourts were forced to resort to rather transparent devices" to sidestep warranty requirements imposed by the law of sales. To eliminate such judicial contortions, the *Greenman* court established an alternative theory of recovery based on tort law. Under this theory, "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." Section 402A of the *Restatement (Second) of Torts* (*"Restatement"*), published two years after *Greenman*, included a standard very similar to that presented in *Greenman*, but imposed the additional requirement that the defective condition render the product "unreasonably

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9. "However well warranty served in the field of commercial transactions, its invocation in torts to rationalize compensation for injury also served to frustrate it." Traynor, *supra* note 8, at 365.
10. W. Prosser & W. Keeton, *supra* note 8, at 692. For example, some courts held that long-delayed claims satisfied statutory notice requirements, or construed the requirements as inapplicable to personal injury claims. *Id.*
12. *Id.* at 62, 373 P.2d at 900, 27 Cal. Rptr. at 700.
13. Section 402A states:
   (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.
dangerous” to the user or consumer.\textsuperscript{14} For several years, California courts used both the Greenman and the Restatement standards in tandem in strict liability cases.\textsuperscript{15}

In 1972, however, the California Supreme Court expressly rejected the Restatement’s additional requirement. In Cronin v. J.B.E. Olson Corp,\textsuperscript{16} the court held that the Restatement imposed a greater burden on plaintiffs than the Greenman court had intended.\textsuperscript{17} The court found that the words “unreasonably dangerous” required proof of an element “which rings of negligence.”\textsuperscript{18} The court reasoned that this was inconsistent with the basis for strict products liability, which had developed largely to relieve plaintiffs from problems of proof inherent in negligence actions.\textsuperscript{19} Thus, Cronin established that a plaintiff need not prove that a defective condition was unreasonably dangerous, but merely that the product had a defect, existing at the time it left the manufacturer, which proximately caused his injuries.\textsuperscript{20} Cronin also established that strict liability can arise from a defect in a product’s manufacture or design,\textsuperscript{21} but the court declined to offer a legal definition of “defect.”

A definition of “defect” emerged six years after Cronin in Barker v. Lull Engineering Co.,\textsuperscript{22} a strict products liability suit involving a defective design.\textsuperscript{23} The Barker court recognized that, while the meaning of

\textsuperscript{(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.

\textbf{RESTATEMENT (SECOND) OF TORTS § 402A (1965).}

14. The term “unreasonably dangerous” is defined as “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.” \textit{Id.} comment i.


16. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972). In Cronin, plaintiff was hurled through the windshield of his delivery truck when an aluminum safety hasp failed in a collision, forcing bread trays in the rear of the truck to lurch forward.


18. \textit{Id.} at 132, 501 P.2d at 1162, 104 Cal. Rptr. at 442.


20. \textit{Id.} at 123, 501 P.2d at 1159, 104 Cal. Rptr. at 435.

21. “A defect may emerge from the mind of the designer as well as from the hand of the workman.” \textit{Id.} at 134, 501 P.2d at 1162, 104 Cal. Rptr. at 442. The court affirmed the application of the Greenman doctrine to both types of defects. \textit{Id.} A manufacturing defect arises from an inadvertent mistake in production, while a design defect is a problem inherent in the plan or makeup of a product.

22. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

23. The plaintiff in Barker was struck and injured by falling lumber when he jumped from a high-lift loader which began to vibrate and tip during the course of operation. He alleged that the absence of various safety equipment resulted in a design defect that caused his injuries. \textit{Id.} at 419-20, 573 P.2d at 447, 143 Cal. Rptr. at 229.
the term "defect" required little elaboration as applied to manufacturing mistakes, such as "when one machine in a million contains a cracked or broken part."\textsuperscript{24} cases involving design defects posed more difficult problems of definition.\textsuperscript{25} The court explicitly set forth two alternative tests for establishing a "design" defect. First, a product is defective in design if it "failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner."\textsuperscript{26} Alternatively, there is a design defect "if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove [that] the benefits of the challenged design outweigh the risk of danger inherent in such design."\textsuperscript{27} The court listed the factors to consider in the latter risk-benefit analysis: the gravity of the potential danger; the likelihood danger will occur; the mechanical feasibility of a safer, alternative design; the financial cost of an improved design; and the adverse consequences to the product and the consumer resulting from the alternative design.\textsuperscript{28}

The greatest significance of the \textit{Barker} risk-benefit test for design defects is that it shifts the burden of proof to the manufacturer. Unlike the negligence standard, under which the plaintiff bears the burden of proving both that the manufacturer deviated from the standard of care and that the resulting defect caused the injuries,\textsuperscript{29} the strict liability standard requires only that a plaintiff make a prima facie showing that the product's design proximately caused his injury. Once the plaintiff meets

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\item \textsuperscript{24} Id. at 417, 573 P.2d at 446, 143 Cal. Rptr. at 228.
\item \textsuperscript{25} Id. at 418, 573 P.2d at 446, 143 Cal. Rptr. at 228.
\item \textsuperscript{26} Id. at 435, 573 P.2d at 457, 143 Cal. Rptr. at 239. Professor Keeton calls this the "consumer-contemplation" test. \textsc{W. Prosser \& W. Keeton, supra} note 8, at 702.
\item \textsuperscript{27} \textit{Barker}, 20 Cal. 3d at 435, 573 P.2d at 457-58, 143 Cal. Rptr. at 239-40.
\item \textsuperscript{28} Id. at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237. The \textit{Barker} court emphasized that risks and benefits are to be analyzed in hindsight. "[A] product may be found defective . . . if through hindsight the jury . . . finds that the risk of danger inherent in the challenged design outweighs the benefits of such design." \textit{Id.} at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236. Further, "that the manufacturer . . . acted as a reasonably prudent manufacturer would have under the circumstances, while perhaps absolving [him] of liability under a negligence theory, will not preclude . . . strict liability . . . if, upon hindsight, the trier of fact concludes that the product's design is unsafe to consumers, users or bystanders." \textit{Id.} at 434, 573 P.2d at 457, 143 Cal. Rptr. at 239. This discussion of "hindsight" raises the question of whether jurors are to evaluate a challenged design in light of state-of-the-art technology existing at the time of trial. \textsc{See W. Prosser \& W. Keeton, supra} note 8, at 700-02. Despite its emphasis on the hindsight approach, the \textit{Barker} court expressly reserved judgment on an unchallenged portion of the jury instructions directing jurors to consider the state of the art at the time of design. \textit{Barker}, 20 Cal. 3d at 422 n.4, 573 P.2d at 449 n.4, 143 Cal. Rptr. at 231 n.4. Consequently, it remains unclear exactly how a hindsight analysis is to be applied in California, if at all. For a general discussion of the California courts' struggle to define and apply the strict products liability standard, see \textsc{Diamond, Eliminating the "Defect" in Design Strict Products Liability Theory}, \textsc{34 Hastings L.J.} 529 (1983).
\item \textsuperscript{29} \textsc{See Frantz v. San Luis Medical Clinic, 81 Cal. App. 3d 34, 39, 146 Cal. Rptr. 146, 150 (1978).}
\end{itemize}
this burden of going forward, the burden shifts to the defendant to prove that the product was not defective.\textsuperscript{30} Shifting the burden of proof shifts the focus of the lawsuit as well. The reasonableness of the manufacturer’s conduct, which is the focus of a negligence action, is irrelevant under strict liability, which instead centers on the adequacy of the product\textsuperscript{31} under an objective risk-benefit test. This shift emphasizes the policy goals of strict liability discussed in the following section.

Rationales for Strict Products Liability

Four primary public policy rationales support holding manufacturers strictly liable for defective products. First, strict liability is a means of relieving plaintiffs from the problems of proving negligence in product defect cases.\textsuperscript{32} Proving negligence often is difficult for plaintiffs because manufacturers control both the design and the production processes.\textsuperscript{33} In addition, procedures for the design and manufacture of a product can be highly complex and technical. While the doctrine of res ipsa loquitur allows an inference of negligence when no specific negligent act is proved,\textsuperscript{34} that doctrine “seldom [has been] applied against a manufacturer because of the necessity of indulging two or more inferences.”\textsuperscript{35} Because of these difficulties, the trend has been to shift the legal focus from the fault of the tortfeasor—the essence of a negligence action—to the safety of the individual who is harmed.\textsuperscript{36}

The second rationale for the imposition of strict liability is that it serves as an incentive to manufacturers to improve product safety.\textsuperscript{37} As Justice Traynor stated:

Even if there is no negligence . . . public policy demands that responsi-

\textsuperscript{30} Barker, 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.
\textsuperscript{31} Id. at 432, 573 P.2d at 456, 143 Cal. Rptr. at 238.
\textsuperscript{32} Id. at 431, 573 P.2d at 455, 143 Cal. Rptr. at 239; Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972); W. PROSSER & W. KEETON, supra note 8, at 693; Franklin, Tort Liability for Hepatitis: An Analysis and a Proposal, 24 STAN. L. REV. 439, 461 (1972).
\textsuperscript{34} “The doctrine of res ipsa loquitur permits negligence to be inferred from certain circumstances in which it is more likely than not that the injury resulted from negligent behavior, but no direct evidence of negligence can be produced.” Diamond, supra note 28, at 532 n.12.
\textsuperscript{35} W. PROSSER & W. KEETON, supra note 8, at 695.
\textsuperscript{36} Barker, 20 Cal. 3d at 435, 573 P.2d at 457, 143 Cal. Rptr. at 239; Keeton, Product Liability and the Meaning of Defect, 5 ST. MARY'S L.J. 30, 33 (1973); see also Traynor, supra note 8, at 364 (the concern for product safety led first to the doctrine of res ipsa loquitur, whereby the existence of a defect would permit an inference of negligence, then to the courts' trend of imposing liability without negligence).
\textsuperscript{37} W. PROSSER & W. KEETON, supra note 8, at 693; Franklin, supra note 32, at 462; Note, Strict Liability—The Medical Service Immunity and Blood Transfusions in California, 7 U.C.D. L. REV. 196, 200-01 (1974).
bility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot.\(^{38}\)

Since manufacturers control both the design and production processes, they are in a better position than the public to develop and employ safer alternatives in the design and manufacture of their products.\(^{39}\)

The third rationale for strict products liability is risk-spreading.\(^{40}\) Under this rationale, the manufacturer producing a defective product should bear the cost of resulting injuries because it can spread the financial burden of accidents among all purchasing consumers through the product’s price.\(^{41}\) Rather than imposing the financial burden on the occasional victim, the insurance costs, more expensive production techniques, and other related expenses are passed on as a cost of doing business and ultimately are borne by all who purchase the product.

The fourth rationale underlying strict products liability is resource allocation, which is based on the notion that the price of a product should reflect not only its production cost, but also its cost to society.\(^{42}\) This theory of “resource allocation” encourages individuals to consider “accident costs”\(^{43}\) when choosing among two or more products that “can substitute for one another to some significant extent.”\(^{44}\) Professor Calabresi explains that

as long as individuals are adequately informed about the alternatives and as long as the cost to society of giving them what they want is reflected in the cost to the individual, the individual can decide better than anyone else what he wants. . . . Some people who would engage in [buying] a relatively dangerous [product] at prices that did not reflect its accident costs will shift to a safer [product] if accident costs are reflected in prices. The degree of the shift will depend on the relative difference in accident costs and on how good a substitute the safer [product] is.\(^{45}\)


\(^{39}\) See W. Prosser & W. Keeton, supra note 8, at 693; Franklin, supra note 32, at 462.

\(^{40}\) Risk-spreading has been called “a fairness and justice reason of policy.” W. Prosser & W. Keeton, supra note 8, at 693; see Franklin, supra note 32, at 463; Note, supra note 37, at 200.

\(^{41}\) See W. Prosser & W. Keeton, supra note 8, at 693; Franklin, supra note 32, at 463-64.


\(^{43}\) “Accident costs” can include increased liability or insurance premiums for a riskier product and “accident avoidance” costs, such as the cost of preventive safety measures to make a dangerous product safer. G. Calabresi, supra note 42, at 73-74.

\(^{44}\) Id. at 83.

\(^{45}\) Id. at 70, 73.
In summary, manufacturers’ strict liability for injuries resulting from defective products is justified as an easier road to recovery where negligence may be present but difficult to prove, an incentive to improve product safety, an equitable way to spread the economic risk of loss among all who use a product, and a way to induce allocation of consumer resources toward safer products.\(^4\) In cases in which most or all of these rationales are inapplicable, courts decline to impose strict liability.\(^4\)

**The Blood Product Exemption from Strict Liability**

**Emergence of a Common-Law Exemption: *Perlmutter v. Beth David Hospital***

Transfusable blood was first exempted from strict products liability in *Perlmutter v. Beth David Hospital*,\(^4\) a 1954 New York case. At that time, strict liability was premised on an implied warranty theory, governed by contract and sales law, which required privity, and was predicated upon the “sale” of a defective product.\(^4\)

The plaintiff in *Perlmutter* sued the defendant hospital after contracting hepatitis from a blood transfusion. She sought recovery on a warranty theory, claiming that the hospital “sold” her the contaminated blood for separate consideration. The hospital moved to dismiss her complaint on the ground that the transaction did not constitute a sale. The New York Supreme Court denied the motion and its appellate division affirmed.\(^5\)

In reversing the lower court, the New York Court of Appeals held that the furnishing of blood was not a “sale” because it was merely incidental to the hospital’s service of care and healing and thus was an integral and indivisible part of that service.\(^5\) Once the court characterized

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\(^4\) Id. (reasoning that one applicable rationale is not enough to justify the imposition of strict liability).

\(^4\) 308 N.Y. 100, 123 N.E.2d 792 (1954).

\(^4\) In 1954, the doctrine of strict liability in tort had not yet been developed. See *supra* note 8 & accompanying text. Some commentators, however, have suggested that the court in *Perlmutter* could have found implied warranties in the transaction even if providing blood were classified as a service. Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653, 662 (1957); Franklin, *supra* note 32, at 457.

\(^5\) *Perlmutter*, 308 N.Y. at 101, 123 N.E.2d at 793. The Supreme Court is New York’s lowest court, while the Court of Appeals is its highest.

\(^5\) It was not for blood—or iodine or bandages—for which plaintiff bargained, but the wherewithal of the hospital staff and the availability of hospital facilities to provide whatever medical treatment was considered advisable. . . . [I]t is the transaction, regarded in its entirety, which must determine its nature and character. As long as it involves the medical care and treatment of a patient at a hospital, it is immaterial that [the hospital supplies] facilities and material. *Id.* at 106, 123 N.E.2d at 795.
furnishing blood as a service and not a sale, strict liability in warranty was inapplicable. The court reasoned that it would be unfair to hold a hospital strictly liable, virtually as an insurer, when there was no way to detect or eliminate hepatitis in blood. It stated that the "art of healing frequently calls for a balancing of risks and dangers to a patient. Consequently, if injury results from the course adopted, where no negligence or fault is present, liability should not be imposed upon the institution or agency actually seeking to save or otherwise assist the patient." 

Exemptions in California

The sale-service distinction for blood first appeared in California law in 1955, when the California Legislature enacted the predecessor to Health & Safety Code Section 1606. The statute does not address issues of liability or fault, and the legislative history fails to disclose the reason for its enactment. At least two California appellate courts, however, have stated that the statute was inspired by Perlmutter. Consequently, California courts have relied on section 1606 and Perlmutter to preclude strict liability actions in defective blood cases. On this basis, California appellate courts first extended immunity from strict liability to hospitals, then to blood banks and, finally, to blood product

52. Id. at 107, 123 N.E.2d at 795. The dissenting judge argued that the court had frequently separated the service from the product in past cases, such as those involving an impure morphine solution. Id. at 111, 123 N.E.2d at 798 (Froessel, J., dissenting). As one commentator has noted, however, "New York at that time retained some aspects of immunity [from liability] for charitable hospitals even where their servants were negligent. The court might have thought it incongruous for the hospital to bear strict liability when it would bear no liability even for some negligence." Franklin, supra note 32, at 458 n.108. For criticisms of the Perlmutter decision, see Garibaldi, A New Look at Hospital's Liability for Hepatitis Contaminated Blood on Principles of Strict Tort Liability, 48 Chi. Bar Rec. 204 (1967); Farnsworth, supra note 49, at 662; Note, Warranty—Implied Warranties of Quality Held Not Applicable to Blood Furnished by Hospital to Patient, 103 U. Pa. L. Rev. 833 (1955).


Hospitals

A hospital was first exempted from strict liability on the basis of section 1606 and Perlmutter in Shepard v. Alexian Brothers Hospital. The plaintiff sued a hospital on theories of strict liability in tort and breach of warranty for injuries resulting from a transfusion of blood contaminated with hepatitis. The plaintiff argued that section 1606 was inapplicable to his tort theory of recovery because a “sale” was not a prerequisite to strict liability in tort.

While the court acknowledged that the doctrine of strict liability had been expanded in recent cases in which no direct sale existed, it emphasized that strict liability had been imposed only when defendants "played an integral and vital part in the overall production or marketing enterprise." It would be inappropriate to impose liability on a hospital, the court reasoned, as hospitals are not in the business of producing or marketing blood. The court concluded that a blood transfusion, given in the course of a hospital’s care and treatment of a patient, was too unlike "the normal commercial transaction contemplated in the strict liability cases [in which] the essence of the transaction relates solely to the article sold, the seller is in the business of supplying the product to the consumer and it is that, and that alone for which he is paid." The Shepard court also reasoned that the policy rationales underlying strict liability did not apply to a hospital’s furnishing of a blood transfusion. The only strong public policy relevant to the case, the court stated, was that of "promoting an adequate supply of blood."

Thus, the Shepard court, citing Perlmutter, found that a blood trans-

59. Id. at 611, 109 Cal. Rptr. at 133.
60. The cases cited in Shepard involved commercial transfers of products or use of products in the course of providing a service. Strict liability extended to defendants such as home builders. See Shepard, 33 Cal. App. 3d at 612, 109 Cal. Rptr. at 135 for a list of cases.
61. Id. (emphasis in original).
62. Id. at 612, 109 Cal. Rptr. at 136.
63. Id. at 611, 109 Cal. Rptr. at 135 (emphasis in original).
64. For instance, hospitals were not in a position to spread the cost of liability in the price of the product, since they did not put the product on the market. In addition, the safety incentive of liability could not be achieved because there was no way to make blood safer. Id. at 611-12, 109 Cal. Rptr. at 134-35.
65. Id. at 612, 109 Cal. Rptr. at 136 (emphasis in original). In addition, the court stated that it was constrained to adhere to the “time-honored, well-established law which states that those who sell their services for the guidance of others in their economic, financial and personal affairs are burdened only with a duty of reasonable performance under the circumstances and cannot be made liable in the absence of negligence or intentional misconduct.”
fusion given in the course of treatment is aptly considered a service because "[t]he supplying of blood by the hospital is entirely subordinate to its paramount function [of restoring] the patient's health." Because section 1606 and its underlying rationale, stemming from Perlmutter, compelled a finding that blood transfusions supplied by a hospital are a service and not a sale, the court held that the hospital was exempt from strict liability.

In Cramer v. Queen of Angels Hospital, this application of section 1606 survived its first constitutional challenge. In Cramer, the plaintiff, who allegedly contracted hepatitis from a blood transfusion administered to him while hospitalized, sued the hospital on theories of strict liability in tort and breach of warranty. The trial court, relying on Shepard, granted the hospital's motion for a nonsuit.

On appeal, the plaintiff contended that section 1606 denied equal protection to victims of contaminated blood. The court found that California law follows the federal standard for determining the constitutionality of economic regulations such as section 1606. For the statute to survive an equal protection challenge under that standard, there must be a rational legislative basis "for distinguishing those who suffer injuries from blood transfusions from those injured by other tortious conduct for which strict liability is imposed."

The Cramer court reasoned that, because hepatitis was undetectable in blood, the state had enacted the statute to encourage the production and use of transfusible blood by protecting providers who were free from fault. Thus, the court held that section 1606 was constitutional because it was reasonably related to a legitimate state purpose.

Blood Banks

In 1976, three years after Shepard had exempted a hospital from strict liability on the basis of section 1606 and Perlmutter, a California appellate court extended immunity to a blood bank on the same basis. In Klaus v. Alameda-Contra Costa County Medical Association Blood Bank.

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66. Shepard, 33 Cal. App. 3d at 611, 109 Cal. Rptr. at 134.
67. Id. at 610, 109 Cal. Rptr. at 134.
69. Id. at 814-15, 133 Cal. Rptr. at 339-40.
70. Id. at 815, 133 Cal. Rptr. at 340.
71. Such legislation carries a presumption of constitutionality and is upheld as long as its distinction bears some rational relationship to a legitimate state purpose. Id.
73. Cramer, 62 Cal. App. 3d at 816, 133 Cal. Rptr. at 341.
the plaintiff alleged that he contracted hepatitis from transfusible blood supplied by the defendant blood bank. The court refused to apply strict liability, stating that immunity must be extended to blood banks for the same policy reasons that apply to hospitals. Citing Shepard, it held that the need to promote an adequate blood supply, coupled with the present inability to detect hepatitis in blood, required blood banks' exemption from strict liability. While the court conceded that, unlike hospitals, blood banks do produce and distribute a product, it looked to the language of section 1606 and stated that “regardless of the merit of the public policy considerations, it is clear from the inclusive language of Section 1606 that the legislative intent was to preclude suits against blood banks as well as hospitals on the basis of strict liability.”

That same year, McDonald v. Sacramento Medical Foundation Blood Bank upheld the constitutionality of applying section 1606 to exempt blood banks from strict liability. In McDonald, a plaintiff sued a blood bank for the wrongful death of his wife, who died as a result of contracting hepatitis from a blood transfusion. The trial court dismissed the plaintiff's actions of strict liability in tort and warranty.

On appeal, the plaintiff argued that, in enacting section 1606, the legislature did not intend to preclude strict liability suits. This argument was supported by the California Legislature's refusal in 1972 to pass a statute expressly prohibiting the imposition of strict liability to blood services. The McDonald court rejected this argument, stating that the legislative intent in failing to pass that statute was unclear.

Focusing on the sale-service distinction, the court said that strict liability might arguably apply in situations in which facts indicating a sale were "mischaracterized" as a service. The court said, however, that section 1606 plainly foreclosed such a mischaracterization of blood. The court

75. Id. at 418, 133 Cal. Rptr. at 92-93.
76. Id. at 419, 133 Cal. Rptr. at 93. The court suggested in dicta that if “the choice of donors could be made in a way to mitigate the possibility of infection, a failure to use a reasonable means of doing so could furnish the basis for a cause of action in negligence.” Id.
77. Id.
79. Id. at 870, 133 Cal. Rptr. at 446. This position has been supported by several commentators. See 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16.04(3)(b) (1975); Franklin, supra note 32, at 476; Note, supra note 37, at 202 n.31.
80. Cal. Assem. Bill No. 2889 (1971 Reg. Sess.) stated: “No person shall be entitled to civil damages for injuries sustained as the result of contracting hepatitis by reason of a blood transfusion either in strict liability or breach of warranty.”
82. McDonald, 62 Cal. App. 3d at 871, 133 Cal. Rptr. at 446-47.
refused to "second-guess clearly-expressed legislative enactments." It maintained that section 1606 was a direct result of the Perlmutter decision and of the California Legislature's intent to codify that decision.

The McDonald court then analyzed the constitutionality of section 1606 as applied to blood banks. By weighing the vital need for an available blood supply for surgery and other medical procedures against the "relatively minor risk of hepatitis which the blood recipient must take," the court found a rational basis for the statute. Citing the four policy grounds on which strict liability is usually justified, the court held that only one policy, risk-spreading, was relevant to a blood bank but that it alone was too insignificant to support strict liability. Thus, the McDonald court held that section 1606 exempted blood banks from strict liability and that the statute was constitutional because protection of blood banks was rationally related to the state's purpose of encouraging the general blood supply.

**Blood Products Manufacturers**

In *Fogo v. Cutter Laboratories*, a California court first confronted the issue of whether section 1606 should be applied to preclude strict liability against manufacturers of blood products. James Fogo, a mild hemophiliac, had been given a blood product, a concentrated clotting agent called Factor IX Konyne, to prevent excessive bleeding while having his tooth pulled. He contracted hepatitis from the blood product and died two months later. In a wrongful death suit against the manufacturer of the blood-derived clotting agent, Fogo's wife contended that the product was defective and that the manufacturer should be held strictly liable. The trial court granted the manufacturer's motion to dismiss on the basis of section 1606 and Shepard.

A California appellate court, "persuaded [by] the clear language of Section 1606," held that the distribution of blood products was a service and not a sale and thereby provided blood products manufacturers with the same exemption from strict liability as that enjoyed by hospitals

83. *Id.* at 871, 133 Cal. Rptr. at 447.
84. *Id.* at 869-70, 133 Cal. Rptr. at 445-46.
85. *Id.* at 873, 133 Cal. Rptr. at 448.
86. *See supra* notes 32-46 & accompanying text.
87. *McDonald*, 62 Cal. App. 3d at 874, 133 Cal. Rptr. at 448.
88. *Id.* at 873, 133 Cal. Rptr. at 448.
90. *Id.* at 748, 137 Cal. Rptr. at 419.
91. "Konyne is a Factor IX concentrate developed by Cutter [Laboratories] through use of a fractionation process wherein this particular coagulation factor is removed from plasma extracted from the pooled blood obtained from thousands of donors." *Id.* at 750, 137 Cal. Rptr. at 420.
92. *Id.*
93. *Id.* at 752, 137 Cal. Rptr. at 422.
and blood banks. The Fogo court recited the Shepard court's rationale that the risk of hepatitis could not be eliminated despite every effort to screen donors. Because the blood product was thus unavoidably unsafe, the court in Fogo likened it to other unavoidably unsafe products such as penicillin and cortisone. The court analogized to those drugs because the blood product, "despite its hepatitis risk, [had] been instrumental in helping many hemophiliacs . . . attain normal and productive lives." By protecting blood products manufacturers from strict liability, the court's decision in Fogo significantly expanded the application of section 1606.

**Summary**

California courts have attributed to section 1606 a legislative intent to codify Perlmutter's sale-service distinction to foreclose strict liability actions against hospitals, blood banks, and blood products manufacturers in cases involving hepatitis-contaminated blood. Section 1606 has been held constitutional as applied to hospitals and blood banks because the strong policy in favor of promoting an adequate blood supply outweighed the minor risk of hepatitis, which could not be detected or eliminated. While not expressly holding section 1606 constitutional in the context of blood products manufacturers, the Fogo court extended immunity from strict liability to those manufacturers by relying on the inclusive language of the statute, by emphasizing that the product's benefits outweighed the hepatitis risk, and by analogizing blood products to innovative drugs with unavoidably unsafe side effects.

**From Hepatitis to AIDS**

Until AIDS was identified in the early 1980's, viral hepatitis created the biggest risk of contamination from transfusible blood and blood products. The increasing incidence of AIDS poses a new and more serious threat. Thus far, California courts have followed the hepatitis cases

94. *Id.*

95. *Id.* at 753, 137 Cal. Rptr. at 422. Those drugs are commonly exempted from strict liability because, although they cause dangerous side effects in some people, their overall benefit outweighs the risk of their side effects. *Id.* The court cited W. PROSSER, HANDBOOK OF THE LAW OF TORTS 661 (4th ed. 1971), which states:

The argument that industries producing potentially dangerous products should make good the harm, distribute it by liability insurance, and add the cost to the price of the product, encounters reason for pause, when we consider that two of the greatest medical boons to the human race, penicillin and cortisone, both have their dangerous side effects, and that drug companies might well have been deterred from producing and selling them.

96. Fogo, 68 Cal. App. 3d at 754, 137 Cal. Rptr. at 423. In addition, the Fogo court quoted Shepard's adherence to the "time-honored, well-established law" of Gagne. *Id.* at 753, 137 Cal. Rptr. at 422; see supra notes 65, 81.
in rendering their decisions in the AIDS suits. Before analyzing the AIDS cases, therefore, it is helpful to compare the two diseases.

Hepatitis is a disease that attacks the liver with varying degrees of severity.\textsuperscript{97} Although statistics are of limited value because hepatitis often goes unnoticed and unreported due to its mild symptoms, a five to ten percent fatality rate has been estimated for cases in which hepatitis is transmitted by blood transfusion.\textsuperscript{98} Until recently, there were no reliable means for detecting hepatitis in blood,\textsuperscript{99} but tests have gradually developed that provide greater reliability. In fact, a 1974 California statute requiring blood banks to test for hepatitis\textsuperscript{100} demonstrates an increased confidence in testing ability. Tests currently can detect the presence of a core antibody, which indicates exposure to the hepatitis virus, thereby revealing carriers who may never have known they had the disease.\textsuperscript{101} These improved tests are legally significant because courts in prior cases justified their decisions largely by stressing the impossibility of detecting hepatitis. Because that condition has changed, so should the courts' rationale in future cases involving hepatitis contamination.

In early 1981, the first cases of AIDS were reported to the Centers for Disease Control.\textsuperscript{102} AIDS is a virus that attacks the body's immune system, leaving it vulnerable to disease and infection.\textsuperscript{103} Presently no test will detect the active AIDS virus in blood, although a recently developed test indicates exposure to the virus by detecting antibodies in the blood.\textsuperscript{104} In 1985, the California Legislature amended Health & Safety

\begin{itemize}
\item \textsuperscript{97} See Franklin, supra note 32, at 443 & nn.29-31.
\item \textsuperscript{98} See id. at 443 & nn.26-28; Note, Strict Liability for Disease Contracted from Blood Transfusion, 66 NW. U. L. REV. 80, 91 & n.50 (1971).
\item \textsuperscript{99} Franklin, supra note 32, at 444.
\item \textsuperscript{100} CAL. HEALTH & SAFETY CODE § 1603.1 (West 1979).
\item \textsuperscript{101} On May 1, 1984, the Irwin Memorial Blood Bank in Northern California began testing all blood donations with a second test known as the core antibody to hepatitis. Irwin Memorial was the first United States blood service to announce plans to adopt the test for routine use. See IRWIN MEMORIAL BLOOD BANK OF THE SAN FRANCISCO MEDICAL SOCIETY, TOWARD A SAFER BLOOD SUPPLY: A SECOND TEST FOR HEPATITIS (undated).
\item \textsuperscript{102} U.S. DEPT. OF HEALTH & HUMAN SERVICES, CENTERS FOR DISEASE CONTROL, MORBIDITY AND MORTALITY WEEKLY REPORT (June 5, July 3, 1981) [hereinafter cited as MORBIDITY AND MORTALITY REPORT].
\item \textsuperscript{103} For a definition by the Center for Disease Control ("CDC"), see Miller, O'Connell, Liepold & Wentzel, Potential Liability for Transfusion-Associated AIDS, 253 J. A.M.A. 3419 (1985). The probable cause of AIDS, a virus known as HTLV-III, was announced in April 1984. P. EBBESON, R. BIGGAR & M. MELBYE, AIDS—A BASIC GUIDE FOR CLINICIANS 199 (1984); Strong New Candidate for AIDS Agent, SCI. MAG., May 4, 1984, at 475.
\item \textsuperscript{104} The reliability of the test has been disputed. See Lifson & Engleman, Special Report on AIDS, STAN. MED., Spring 1985, at 25; Blood Banks Aren't Safe from AIDS, Wall St. J., Mar. 20, 1986, at 28, col. 3. But see Blood Bank Tests Make Risk of AIDS 'Almost Nonexistent', San Francisco Chron., Aug. 1, 1985, at 6, col. 1 (federal health officials state test is 99.8% effective); see also New Test Detects AIDS Virus Itself, San Francisco Chron., April 12, 1986, at 1, col. 2 (Scientists say they have discovered a test to detect the active AIDS virus itself and predict that within a year or two it could replace the present antibody test.).
\end{itemize}
Code section 1603.1 to require that all blood and blood components to be used in vitro in humans be tested for the AIDS antibody.105

Hepatitis B virus and AIDS share several recognized similarities:106 both can be transmitted parenterally (by injection) and sexually;107 hemophiliacs are in the known high-risk groups associated with both diseases;108 the incubation period for both is considerable, though the incubation period for AIDS is now believed by some to be far longer than for hepatitis;109 and both diseases were originally undetectable in blood, although modern breakthroughs have significantly reduced that problem.110

The risk of exposure to both AIDS and hepatitis varies depending on whether the blood comes from a hospital, a blood bank, or a blood products manufacturer. The risk of contamination from either disease increases dramatically when blood is collected from paid rather than volunteer donors.111 Hospitals and blood banks primarily use volunteer donors, while blood products manufacturers collect blood primarily from paid donors.112

The risk of blood contamination also increases dramatically when donors' blood is pooled, a method used by blood products manufacturers to produce the concentrated clotting factor for hemophiliacs.113 Pooling mixes blood from thousands of individuals in a manufacturing procedure such that if even one donor's blood is contaminated, the entire batch will

106. Miller, O'Connell, Liepold & Wentzel, supra note 103, at 3420.
107. Id.
108. Id.; see also P. EBBeson, R. Biggar & M. Melbye, supra note 103, at 146; Check, Preventing AIDS Transmission: Should Blood Donors Be Screened?, 249 J. A.M.A. 567, 568 (1983) ("AIDS was the second leading cause of death among hemophiliacs in 1982. . . ."); Strong New Candidate for AIDS Agent, SCI. MAG., May 4, 1984, at 475 (Hemophiliacs are at high risk because they use a derivative factor from the blood of thousands of donors; "people who receive whole blood are at a much lower risk.").
109. See infra note 119.
110. See supra notes 101, 104 & accompanying text.
111. R. Eckert & E. Wallace, Securing a Safer Blood Supply: Two Views 123, 138 (1985); see Franklin, supra note 32, at 444-45 (reasons for increased risk). Contra R. Eckert & E. Wallace, supra, at 26 (arguing that "cash blood is not of lower quality if registries are employed and suppliers are screened with sufficient care").
112. California Health & Safety Code § 1626 strictly regulates the use of paid donors for blood transfusions. It renders unlawful the transfusion of blood from a paid donor unless "the physician performing the transfusion has determined, taking into consideration the condition of the patient who is the recipient of the transfusion, that other blood of a type compatible with the blood type of the patient cannot reasonably be obtained for the transfusion." CAL. HEALTH & SAFETY CODE § 1626 (West 1979). This statute does not apply to blood products.
113. See, e.g., P. Ebbeson, R. Biggar & M. Melbye, supra note 103, at 203 (stating that "it appears that the risk to persons with hemophilia may be 3 orders of magnitude greater than that for recipients of single donor products"); Note, Liability for Blood Transfusion Injuries, 42 MINN. L. REV. 640, 644-45 (1958). But see Gascon, Zoubos & Young, Immunologic Abnormalities in Patients Receiving Multiple Blood Transfusions, 100 ANNALS INTERNAL MED.,
be contaminated. Because each batch of the concentrated blood product goes to many patients, the risk of exposure increases exponentially.114

The most significant difference between hepatitis and AIDS is the fatality rate. Unlike the relatively low rate in hepatitis cases,115 AIDS is fatal in virtually every case.116 In addition, the incidence of AIDS is doubling every six months,117 while the incidence of hepatitis does not vary significantly from year to year.118 The development and improvement of screening tests undoubtedly will decrease the incidence of AIDS transmitted through transfusible blood and blood products. Because of the long incubation period of the AIDS virus, however, an increasing number of cases will arise from those who have already contracted AIDS but have not yet manifested its symptoms.119

The Cases Involving AIDS-Contaminated Blood

Since 1984, several victims of AIDS have initiated lawsuits in California alleging that they contracted the disease through contaminated transfusible blood or blood products. These claims are against hospitals, blood banks, and blood products manufacturers.

The plaintiffs in Burg v. Cedars-Sinai Hospital120 and Kushnick v. Cedars-Sinai Hospital121 received blood transfusions during hospitalization and contracted AIDS. Both plaintiffs filed suit against the hospital on a strict products liability theory. In both cases, the trial court dismissed the actions. The plaintiffs in Johnstone v. San Francisco Medical

Feb. 1984, at 176 ("The relative risk of [fractionated] concentrate versus large numbers of single unit blood transfusions may be difficult to estimate.").

The pooling method is a necessary element of fractionation, the process used to produce AHF concentrate, one treatment of hemophilia. The other treatment is cryoprecipitate, made from individual units of fresh frozen plasma. See MORBIDITY AND MORTALITY REPORT, supra note 102, at 16 (July 16, 1982).

114. See Check, supra note 108, at 568.

115. See supra note 98 & accompanying text.

116. As of December 1983, the CDC knew of 2952 AIDS cases. Acquired Immunodeficiency Syndrome (AIDS) Associated with Transfusions, 310 NEW ENG. J. MED., Jan. 12, 1984, at 75. As of January 8, 1985, there were 7788 cases of AIDS with 3687 deaths. Miller, O'Connell, Liepold & Wentzel, supra note 103, at 3419. As of July 26, 1985, 12,057 cases were reported with 6097 deaths. San Francisco Chron., Aug. 1, 1985, at 6, col. 1.


118. R. ECKERT & E. WALLACE, supra note 111, at 3 ("Each year 7 to 12 percent of transfusion patients...contract hepatitis.").

119. "The incubation period for AIDS is thought to be from two to eight months but may be as long as four years." Miller, O'Connell, Liepold & Wentzel, supra note 103, at 3419; see also Acquired Immunodeficiency Syndrome (AIDS) Associated with Transfusions, supra note 116, at 70 (of the transfusion-associated AIDS cases in the cited study, the "time between transfusion and onset of illness ranged from 10 to 43 months").

120. No. WEC 84010 (Santa Monica Super. Ct. filed Nov. 3, 1983).

Society sued a blood bank for the wrongful death of the decedent, who died in 1984 from an AIDS-contaminated blood transfusion supplied by the defendant. Again, the trial court summarily dismissed the plaintiffs' strict liability action.

_Gallagher v. Cutter Laboratories_ involved a wrongful death suit against commercial blood products manufacturers based on theories of negligence and strict liability in tort. The _Gallagher_ case is notable for the trial court's refusal to dismiss the strict liability suit, even in the face of section 1606. The decedent, a hemophiliac, regularly self-administered injections of a concentrated blood product manufactured by the defendants. He contracted AIDS and died, allegedly from a batch of the coagulant he had received. The lawsuit challenged the constitutionality of section 1606 as it applies to blood product manufacturers. Plaintiff also contended that section 1606 was not intended to preclude strict liability and that the public policy rationales underlying strict liability supported its imposition upon blood products manufacturers.

The _Gallagher_ trial court twice denied defendants' motions to dismiss the strict liability actions on the grounds of section 1606 and _Fogo_. These much-publicized rulings, apparently the first of their kind in the nation since the advent of AIDS, provided the plaintiffs a short-lived victory. The defendants successfully sought a writ of mandamus from the court of appeal to compel the trial court to set aside its order overruling their demurrers.

Plaintiffs contended on appeal that section 1606 should not apply to blood products manufacturers for three reasons: first, the statute was not intended to provide immunity from civil liability; second, commercial manufacturers, as distinct from hospitals and blood banks, are not providers of services but merely producers of products subject to the "stream-of-commerce rationale of strict product liability"; and third, valid policy reasons exist for subjecting blood products manufacturers to strict liability. While the court recognized that "[e]ach of these contentions is plausible," it refused to tamper with section 1606's "clear and unambig-

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122. No. 826447 (San Francisco Super. Ct. filed July 9, 1984).
128. _Id._ at 514, 220 Cal. Rptr. at 592.
uous" language, suggesting that the plaintiff address her arguments to the legislature.\textsuperscript{129}

Finally, the appellate court held that section 1606 was constitutional as applied to blood products manufacturers. The court reasoned that the statute's "relatively modest restriction" on the plaintiff's available theories of recovery was rationally related to the state's legitimate interest in encouraging the manufacture of blood products.\textsuperscript{130}

The plaintiff appealed the ruling, but on March 12, 1986, the California Supreme Court refused to hear the case.\textsuperscript{131} It may be some time before California's highest court directly addresses the issue of liability for AIDS-contaminated blood. Until then, it seems likely that lower courts will continue to dismiss strict liability actions on the basis of section 1606.

\textbf{The Need for a New Approach}

These AIDS cases—\textit{Gallagher} in particular—compel a reexamination of section 1606's applicability to strict products liability suits. AIDS is far more severe than hepatitis,\textsuperscript{132} and the severity of the potential danger is a key factor in determining strict liability.\textsuperscript{133} Moreover, technological advances render the risk-benefit analyses in earlier cases outdated.

A reexamination of the scope and meaning of section 1606 in blood products cases indicates several reasons for extending strict liability to commercial blood products manufacturers, but not to hospitals or blood banks. First, the courts' reliance on section 1606 to preclude strict liability in all blood-related cases may be misplaced. Second, even assuming that the statute is relevant in determining strict liability in tort, the statute's characterization of the manufacture and distribution of blood products as a "service" is unfounded. Finally, the policies underlying strict products liability justify the application of that doctrine to blood products manufacturers but not to hospitals or blood banks.

\textbf{Questionable Legislative Intent}

California courts have precluded strict liability actions involving

\begin{itemize}
  \item \textsuperscript{129} \textit{Id.} at 514, 220 Cal. Rptr. at 593.
  \item \textsuperscript{130} \textit{Id.} at 516, 220 Cal. Rptr. at 594.
  \item \textsuperscript{131} Hyland Therapeutics v. Superior Court, 6 Dist. H001204, petition for review of real parties in interest denied Mar. 12, 1986, Minutes of the Cal. Sup. Ct., pamphlet no. 9 at 28.
  \item \textsuperscript{132} See \textit{supra} notes 97-119 & accompanying text.
  \item \textsuperscript{133} Barker v. Lul Eng'g, 20 Cal. 3d 413, 431, 573 P.2d 443, 455, 143 Cal. Rptr. 225, 237 (1978). In light of the AIDS crisis, the medical community has recognized that, "[d]espite common law precedents governing contaminated blood, there is no predetermined common law rule or formula that can be applied per se to AIDS lawsuits with a reasonably clear result." Miller, O'Connell, Liepold & Wentzel, \textit{supra} note 103, at 3419. "[T]he legal issues associated with AIDS are on relatively untrod ground." \textit{Id.} at 3420.
\end{itemize}
transfusible blood and blood products largely on the assumption that the
state legislature enacted section 1606 to codify *Perlmutter*,\(^{134}\) which de-
nied recovery on a strict liability theory.\(^{135}\) While section 1606's legisla-
tive history does not specify the statute's purpose, several factors refute
the notion that the legislature intended to codify *Perlmutter* by enacting
section 1606.

First, substantial evidence indicates that the legislature enacted the
statute to provide an exemption to the sales and use tax, not to provide
immunity from civil liability. The Office of Legislative Counsel stated:

> The only effect that this bill would possibly have, so far as we are
> aware, is with respect to the sales and use tax. To the extent that it is
> consistent with that law, it will have the effect of indicating that the
> enumerated transactions with respect to human blood are not within
> the scope of the sales and use tax.\(^{136}\)

In addition, the Attorney General’s Office stated in an Inter-Departmen-
tal Memo that “[i]t seems that the purpose of this section is to provide an
exemption from the State Sales and Use Tax Law.”\(^{137}\)

Second, because *Perlmutter* was decided by the New York Court of
Appeals just twenty days before section 1623, the predecessor of section
1606, was introduced in the California Senate,\(^{138}\) it is doubtful whether
the statute’s drafters knew of the *Perlmutter* decision while framing the
statute. Even if *Perlmutter* did inspire such swift legislative action, it
seems likely that the decision or its principles would at least have been
mentioned in the legislative history. To the contrary, however, the legis-
lative history contains no reference either to *Perlmutter* or to civil
liability.\(^{139}\)

The theory that the legislature intended to codify *Perlmutter* was
first questioned five years after the statute’s enactment in *Gottsdanker v.
Cutter Laboratories*,\(^{140}\) a 1960 case involving a faulty polio vaccine that
transmitted live polio virus to two children. Although *Gottsdanker* did
not specifically involve a blood transfusion, the defendant attempted to
avoid strict liability by reference to section 1623. In dicta, the court left

\(^{134}\) 308 N.Y. 100, 123 N.E.2d 792 (1954); see supra notes 48-52 & accompanying text.

\(^{135}\) See supra notes 67, 74-77, 89-94 & accompanying text.

\(^{136}\) REPORT ON S.B. 1405, OFFICE OF LEGISLATIVE COUNSEL (June 7, 1955) (copy on
file with The Hastings Law Journal).

\(^{137}\) Inter-Departmental Communication from Office of the Attorney General to Gover-
nor Goodwin J. Knight (June 8, 1955) (copy on file with The Hastings Law Journal).

\(^{138}\) The *Perlmutter* decision was rendered on December 31, 1954, while § 1623, the iden-
tical predecessor to § 1606, was introduced on January 20, 1955, as Senate Bill 1405. Cal. Sen.
Bill No. 1405 (1955 Reg. Sess.).

\(^{139}\) Despite the absence of a clear legislative intent, it can be argued that § 1606 affects
civil liability suits because similar statutes in other states do expressly foreclose strict liability
actions. *See*, e.g., ILL. ANN. STAT. ch. 111 1/2, § 5102 (Smith-Hurd Supp. 1985); WASH.
REV. CODE ANN. § 70.54.120 (Supp. 1986).

\(^{140}\) 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960).
open the questions of whether the statute was inspired by *Perlmutter* and whether it was designed to bar application of implied warranties to blood products; however, the court was clearly unwilling to connect section 1623 unequivocally to *Perlmutter* as courts have done so readily in cases arising more than twenty years after the statute was passed.

The Sale-Service Distinction

If section 1606 was indeed enacted in response to *Perlmutter*, the statute still should not be controlling in cases involving theories of recovery based on strict liability in tort. In 1954, when *Perlmutter* was decided, strict liability was based solely on an implied warranty theory. Implied warranties derived from the existence of some contractual relationship between a seller and a buyer; the presence of a direct "sale" therefore was a key element to establishing strict liability in warranty. The *Perlmutter* decision rested primarily on the finding that no "sale" was involved.* Greenman v. Yuba Power Products,* however, supplemented strict liability in warranty with the alternative doctrine of strict liability in tort.* This alternative remedy eliminated the necessity of a direct contractual relationship such as a sale.* Strict liability in tort requires only a marketed product containing a defect and harm to a user caused by that defect.* Thus, the rigid sale-service distinction codified in section 1606 simply is not germane to actions instituted since *Greenman.*

Even if the sale-service distinction were relevant to a tort theory of

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141. Id. at 609-10, 6 Cal. Rptr. at 324-25. Admittedly, the questions did not require an answer, since the court held that the polio vaccine was not within the scope of the statute.
142. See supra notes 74-94 & accompanying text.
143. See supra notes 51-52 & accompanying text.
146. See W. Prosser & W. Keeton, supra note 8, at 692.

The doctrine of strict liability has been applied in cases in which a product is supplied as part of a commercial transaction such as a restaurant's service of tainted food; however, the doctrine has been rejected in the hybrid sale-service transaction in which a product is used in the course of rendering a professional service. See Note, *Products and the Professional: Strict Liability in the Sale-Service Hybrid Transaction*, 24 HASTINGS L.J. 111 (1972).
recovery, the statute's classification of the manufacturer's blood product as a "service" distorts commercial reality. Like the objectives of other manufacturers, a commercial blood product manufacturer's sole purpose is to sell its product at a profit. Both Fogo and Gallagher involved a concentrated blood clotting agent sold to hemophiliacs. When the manufacturer sold its product, it engaged in precisely that type of commercial transaction that Shepard v. Alexian Brothers Hospital cited as the "normal" transaction contemplated in strict liability cases. The manufacturer does not sell services for the "guidance of others in their economic, financial or personal affairs." It sells no service at all, and thus the transaction is not even a sale-service hybrid.

In contrast, hospitals are primarily service-oriented. Hospital staff administer blood transfusions in the course of treating patients. Transfusible blood is unique and essential to the hospital's comprehensive medical treatment. Thus, the professional services of hospitals, which include supplying blood transfusions, are not the normal commercial transactions to which strict liability applies.

Blood banks process and distribute transfusible blood but do not place it into the general stream of commerce. They supply it directly to hospitals for use in the professional service of treating patients. Blood banks are integrally related to service-oriented hospitals because patient treatment often depends on their supply of transfusible blood. In view of this unique relationship, blood banks should also be immune from strict liability.

The Fogo court extended section 1606 to preclude strict liability against a blood products manufacturer. While recognizing significant differences between such manufacturers and the service-oriented hospital in Shepard and the blood bank in Klaus v. Alameda-Contra Costa County Medical Association Blood Bank, the court felt compelled by the language of section 1606 to exempt the manufacturer from strict liability. Thus, the court let pass an opportunity to analyze the differences be-

149. In fact, the product is packaged and sold by prescription. Note that the plaintiff in Fogo, a mild hemophiliac, received the injection from his doctor prior to a tooth extraction. Fogo, 68 Cal. App. 3d at 750, 137 Cal. Rptr. 419-20.
150. Fogo v. Cutter Laboratories, Inc., 68 Cal. App. 3d 744, 137 Cal. Rptr. 417 (1977); see supra notes 89-96 & accompanying text.
153. Id. at 611, 109 Cal. Rptr. at 135; see supra note 63 & accompanying text. The product is sold by prescription for use at home. The hemophiliac mixes the concentrate and self-administers the product by injection; the process is comparable to self-administration of insulin by a diabetic.
155. See supra note 148.
between blood products manufacturers and other entities with specific reference to the strict liability rationales.

This failure to distinguish between blood products manufacturers and suppliers of transfusible blood allowed the court to propose an alternative, but questionable, basis for its holding. In addition to the exemption it found in section 1606, the Fogo court stressed that the hepatitis risk could not be eliminated completely and that blood products had nevertheless proven quite helpful to hemophiliacs. The court suggested that this small but constant risk, when weighed against the benefits provided, rendered blood products “unavoidably unsafe” as a matter of law and therefore exempt from strict liability in the same manner as prescription drugs such as penicillin and cortisone.

This analysis, perhaps appropriate for transfusible blood, should not be applied to blood products. While some risk may be inevitable, the level of risk posed by blood products could be reduced substantially by eliminating the pooling process and the use of blood taken from paid or high-risk donors. These additional risks simply do not justify the legal characterization of blood products as “unavoidably unsafe.” A more logical approach would weigh these risks against the benefits provided to determine whether the product is defective as a question of fact. In other words, the situation in Fogo logically presents an action of strict liability in tort. Had the court proceeded under strict liability, a jury could have conducted a valid risk-benefit analysis using the relevant factors listed in Barker. The jury still might have rendered a verdict for the defendant on the strict liability cause of action by concluding that the blood product was not “defective” because its benefits outweighed the “relatively minor risk of hepatitis.” Strict liability, however, would have been tried properly, and the burden of proof would properly have been placed on the defendant to establish the nonexistence of a “defect.”

Given the failure of past attempts to bring strict liability actions

157. Fogo, 68 Cal. App. 3d at 752-54, 133 Cal. Rptr. at 422-23; see supra note 96 & accompanying text.  
158. Fogo, 68 Cal. App. 3d at 753, 133 Cal. Rptr. at 422.  
159. Id. (citing W. Prosser, supra note 95, at 661-62).  
160. See supra notes 111-14 & accompanying text; see also Finn v. G.D. Searle & Co., 35 Cal. 3d 691, 721-22, 677 P.2d 1147, 1167, 200 Cal. Rptr. 870, 889-91 (1984) (Bird, C.J., dissenting) (arguing that prescription drugs in a strict liability action should be evaluated by a jury under the Barker risk-benefit test, rather than simply dismissed by the court as “unavoidably unsafe”).  
161. See supra note 28 & accompanying text.  
against providers of transfusible blood, and the courts' construction of section 1606 in those cases, it is perhaps understandable that the Fogo court declined to apply strict liability to the defendant blood products manufacturer. Still, section 1606 remains susceptible to interpretation, since it does not specifically mention liability, and its legislative background suggests rather strongly that it was enacted solely for tax purposes.\textsuperscript{164} This Note argues that a proper interpretation of the statute, guided by the underlying rationales of strict liability, would not extend immunity to blood products manufacturers.

**The Policy Considerations of Strict Liability in Contaminated Blood Cases**

There are four policies underlying the imposition of strict liability: relieving plaintiffs from the problems of proving negligence in product defect cases; serving as an incentive to improve product safety; providing an equitable way to spread economic risk; and inducing allocation of consumer resources toward safer products.\textsuperscript{165} As this section demonstrates, each of these policies supports the imposition of strict liability upon commercial manufacturers of blood products.

**The Problems of Negligence**

To recover under a negligence cause of action, a plaintiff must prove that the manufacturer breached the standard of care in the production or design of the product and that such breach was a proximate cause of the resulting injury.\textsuperscript{166} Strict liability serves as a means for plaintiffs to circumvent problems of proof of negligence inherent in products liability cases.\textsuperscript{167}

In cases involving contaminated blood products, the hemophiliac\textsuperscript{168} who uses the product and contracts hepatitis or AIDS may find that proving negligence is extremely difficult. Because of the time elapsed between contamination and manifestations of the disease, months or, in the case of AIDS, years may have passed since its transmission. Such a delay could make it impossible to pinpoint the date of contamination and the manufacturer's standard of care at the time. Most hemophiliacs use blood-derivative concentrates that are manufactured from pooled

\begin{itemize}
  \item \textsuperscript{164} See supra notes 136-37 & accompanying text.
  \item \textsuperscript{165} See supra notes 32-46 & accompanying text.
  \item \textsuperscript{166} See supra note 29 & accompanying text.
  \item \textsuperscript{167} See supra notes 32-36 & accompanying text.
  \item \textsuperscript{168} Although it is conceivable that some other customer may use a blood-derivative product at some time, this Note refers to hemophiliacs because they are the most common users of blood-derivative products and have been the plaintiffs in contaminated blood-product cases.
\end{itemize}
blood\textsuperscript{169} and receive many different "lots" of that concentrate during their lifetime.\textsuperscript{170} Moreover, with recent improvements in screening tests and manufacturing techniques, the standard of care for the production of clotting factor has changed rapidly and drastically in recent years. Therefore, the hemophiliac victim who cannot identify the contaminated lot will lack proof of the manufacturer's breach of the standard of care, which is an important requirement in a negligence action.

This difficulty in proving negligence is not as prevalent in cases involving contamination from blood transfusions supplied by a hospital or blood bank. In contrast to the hemophiliac's continuing, long-term use of blood-derivative products, patients who receive blood transfusions are usually in a hospital for an easily defined period of time. Thus, it is easier for the victim of a contaminated blood transfusion to pinpoint the source of the blood and to identify the standard of care.

Safety Incentive

Public policy demands that liability be placed on the entity that can most effectively improve a product's safety.\textsuperscript{171} Because blood products manufacturers control the methods for the design and production of their product, they are in a better position than the consumer to improve

\begin{quote}
169. A typical hemophilia patient in the United States is treated with approximately 50,000 units of antihemophilic factor (AHF) annually. Most patients are on home treatment programs using freeze-dried AHF concentrates prepared from pooled plasma. A production lot of AHF concentrate may contain plasma from 5000 to 50,000 individual donors. . . . Most hemophiliacs receive AHF concentrate from several different lots each year.

P. EBBESON, R. BIGGAR & M. MELBYE, supra note 103, at 200-01.

170. Id. For example, while the present standard of care for the production of blood-derivative products includes using the AIDS antibody test, the standard of care in 1983 would not have included that test because it did not yet exist. A hemophiliac could have received a contaminated dose of AHF concentrate in 1983, yet not discover he had contracted AIDS until 1985 when he manifested symptoms. This principle also holds true for hepatitis cases, but the example is even more dramatic in the AIDS context because of its longer incubation period. See supra note 119. By then, the hemophiliac likely would have received numerous other doses from other "lots" of concentrate and would not necessarily know at what time, and from what lot, he contracted the AIDS virus. As the American Medical Association Journal has noted, "Unfortunately, since each hemophilia patient receives many lots of concentrate over the course of a few years, it is not possible to identify the infectious lots." Check, supra note 108, at 568. Without knowing which lot of concentrate was contaminated and when it was produced, the hemophiliac would find it nearly impossible to ascertain the standard of care used; without establishing the standard of care, it would be difficult to find a breach. Because of this difficulty in proving negligence, the courts' preclusion of strict liability against a blood products manufacturer is not a "relatively modest restriction" on the plaintiff, as the court stated in Hyland Therapeutics v. Superior Court, 175 Cal. App. 3d 509, 516, 220 Cal. Rptr. 590, 594 (1985), but rather a substantial restriction. Thus, the doctrine of strict liability in these cases will provide an injured plaintiff with an available avenue for relief when negligence may be present, but difficult to prove.

171. See supra notes 37-39 & accompanying text.
\end{quote}
safety. For example, manufacturers can locate their blood collection centers away from neighborhoods with large populations of high-risk donors or simply refuse blood from such donors. They can promote research to develop and improve screening tests for the detection and elimination of hepatitis and AIDS in blood. More notably, manufacturers can use noncommercial sources for blood collection whenever possible. In contrast to hospitals and blood banks, blood products manufacturers use paid blood donors, a method which contributes to the danger of the blood product. In addition, manufacturers pool the blood from thousands of donors to produce freeze-dried concentrated clotting factor. Pooling dramatically increases the risk of contamination. This safety incentive policy is less relevant to hospitals and blood banks, since they use neither paid donors nor the pooling process in collecting transfusible blood.

Resource Allocation

Under the resource allocation rationale, a product's price should reflect its true cost to society. If two products can substitute for one another to some significant extent, and the price of the more dangerous product reflects its attendant risk factor, consumers will have a more accurate comparison when choosing which product to buy.

Resource allocation principles apply to blood products manufacturers because cryoprecipitate and freeze-dried concentrated clotting factor are significant substitutes for one another in treating hemophilia. Cryoprecipitate is a fresh-frozen plasma product, made from individual units of single-donor plasma, while freeze-dried concentrated clotting factor is produced by fractionation, which involves extracting plasma protein from thousands of pooled blood donors. Cryoprecipitate is a safer product because the risk of contamination from one donor is drastically less than that risk multiplied by thousands of donors pooled together. The freeze-dried concentrated clotting factor, while riskier, is a more convenient product for hemophiliacs because it can be stored at home without special freezers. It is also more effective in treating hemophiliacs, especially those with severe hemophilia. Despite their differences, the two products reasonably can be considered substitutes for

172. While these considerations might also apply to hospitals and blood banks, it is the aggregate of these and other considerations applying to manufacturers that make them relevant.
173. See supra note 111 & accompanying text.
174. See supra note 113 & accompanying text.
175. See supra note 114 & accompanying text.
176. See supra notes 42-45 & accompanying text.
177. See supra text accompanying notes 43-45.
178. See MORBIDITY AND MORTALITY REPORT, supra note 102, at 16 (July 16, 1982).
179. Id.
one another in many cases.\footnote{180}

Thus, the resource allocation theory applies to these blood products manufacturers. This theory is not applicable to hospitals and blood banks, on the other hand, because "there is no substitute for [transfusable] blood."\footnote{181}

Risk-Spreading

Another policy underlying strict products liability, risk-spreading, is premised on the belief that the cost of an accident should be placed on the entity that caused the accident rather than on the accident victim.\footnote{182} The public is less likely to anticipate the likelihood or the seriousness of the risk. Even if a consumer recognizes the risk, it is improbable that he can do much to guard against it. This is particularly true among the high-risk groups associated with both hepatitis and AIDS contamination, such as hemophiliacs. Because of their classification as high-risk candidates, hemophiliacs may find it difficult to obtain insurance. If insurance is available, the premiums likely will be astronomical. In addition, insurance, unlike a judgment in a tort liability suit, will not reimburse the victim for pain and suffering. This deficiency is especially noteworthy in AIDS cases because sufferers undergo months of pain and suffering in anticipation of inevitable death.

In keeping with the public policy of risk-spreading, it is fairer to place the cost of injury with the product manufacturer, who can absorb and spread the cost by increasing the price of the product. As is the case with other types of manufacturers, the blood products manufacturer can adjust the product's price to include the cost of liability insurance and of more expensive production methods employed in an attempt to minimize risk.

Manufacturers will argue that exposure to strict liability will lead to exorbitant insurance premiums or difficulty in obtaining adequate insurance. While this argument has some truth, the manufacturer is still in a better position than one individual to insure against risks. Manufacturers can lessen their financial burden by spreading it among all consumers of a product, while individuals have no way to minimize the financial impact. Moreover, the force of this argument has weakened with time.

\footnote{180}{In fact, all hemophiliacs used cryoprecipitate before the freeze-dried concentrates were developed. Indeed, because of the increased risk of contamination in the AHF concentrate, some physicians have switched their patients with mild to moderate hemophilia back to treatment using cryoprecipitate whenever possible.} P. EBBEISON, R. BIGGAR & M. MELBYE,\footnote{supra note 103, at 205. As of mid-1982, there were an estimated 20,000 patients with hemophilia A in the United States. Of those, 60% were classified as severe, and 40% were classified as moderate.} supra note 103, at 205. As of mid-1982, there were an estimated 20,000 patients with hemophilia A in the United States. Of those, 60% were classified as severe, and 40% were classified as moderate.\footnote{MORBIDITY AND MORTALITY REPORT,\footnote{supra note 102, at 16 (July 16, 1982).} supra note 102, at 16 (July 16, 1982).}


\footnote{182}{See supra notes 40-41 & accompanying text.}
The incidence of AIDS contamination is not static; it has steadily decreased with the development of better screening tests and treatment procedures. This situation continues to improve. In April 1986, scientists reported the discovery of a test to detect the active AIDS virus, which they predict will replace the current antibody test within a year or two.\textsuperscript{183} As tests improve, risks decrease, and insurance coverage becomes more economical.

Manufacturers may also argue that the hemophiliac consumer base is too small to spread the increased cost effectively. Manufacturers may be forced to raise prices significantly. If prices cannot be raised enough to cover additional costs, there is a danger that manufacturers will stop making the product. The likelihood of this extreme consequence, however, is questionable. The problem of price increases in the context of AIDS-contaminated blood arose when newly developed screening tests were suggested as mandatory.\textsuperscript{184} Although manufacturers expressed concern that costs would become exorbitant, blood products continued to be produced after the tests indeed became mandatory.

While the concern over insurance costs and price increases cannot be dismissed, such concerns must be evaluated with reference to the capacity of developing technology to reduce the risk of contamination. Between the discovery of AIDS and the development and use of screening tests, consumers of blood products ran a higher risk of contracting the disease than they do today. Because AIDS can incubate for up to four years or more, new lawsuits will arise as individuals discover they have the disease.\textsuperscript{185} Currently, though, officials at both the Centers for Disease Control and the United States Public Health Service consider the AIDS antibody test 99.8\% effective, although the precise number of false results is debatable.\textsuperscript{186} Recent improvements in testing promise increased efficiency. Thus, while lawsuits originating in the initial years when testing was unavailable may continue to be brought, the incidence of AIDS contamination from blood products will be increasingly rare. In this environment, the manufacture of blood products will undoubtedly remain economically viable.

Moreover, hemophiliacs probably will be willing to pay more for their blood products if they know that they have a viable remedy against a manufacturer in the event of contamination. In addition, California administers several state programs, such as Medi-Cal and the Genetically Handicapped Persons Program, which subsidize treatment for

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{183} New Test Detects AIDS Itself, San Francisco Chron., April 12, 1986, at 1, col. 2.
\item \textsuperscript{186} Id.; see supra note 104.
\end{enumerate}
\end{footnotesize}
hemophiliacs and can help bear the burden of cost increases.  

The policy of risk-spreading applies even to blood banks, as the court in *McDonald v. Sacramento Medical Foundation Blood Bank* recognized, and presumably might apply to hospitals as well. However, none of the other strict liability rationales apply to either blood banks or hospitals, and risk-spreading alone is insufficient to justify imposition of strict liability upon those entities. Because all four strict liability rationales are applicable in suits against blood products manufacturers, public policy favors the imposition of strict liability upon such manufacturers.

**Proposal**

Because the manufacture and distribution of blood products are normal commercial transactions despite their mischaracterization as "services" in section 1606, and because strict liability's underlying rationales support its application in cases involving blood products, strict liability should be imposed upon blood products manufacturers. Although California courts have had the opportunity to restrict the immunity provided by section 1606, they have declined to take this approach. Therefore, the legislature should amend the statute to clarify and limit its application to avoid further judicial misinterpretation and to ensure uniform application of the statute in civil liability suits.

The amendment should eliminate judicial guesswork in issues of civil liability in blood-contamination cases by restricting liability of suppliers of transfusible blood to acts constituting negligence or unlawful conduct. This amendment should also allow the courts to impose strict liability against blood products manufacturers who engage in the commercial transactions to which strict liability rationales apply.

Such an amendment should pass constitutional scrutiny because there is a rational basis for distinguishing suppliers of transfusible blood from manufacturers of blood products. Protecting suppliers of trans-
fusible blood, such as hospitals and blood banks, from strict liability fosters the state’s interest in ensuring an adequate blood supply. Hospitals and blood banks should be encouraged to provide this supply; blood transfusions are imperative and have no substitute. The imposition of strict liability would have a negative impact on the supply of transfusible blood, which would result in poor patient care because transfusions are often an integral part of a broad course of a patient’s treatment. Thus, the proposed amendment rationally relates to the state interest in promoting an adequate supply of transfusible blood by immunizing hospitals and blood banks from strict liability.

This state interest is not furthered by immunizing blood products manufacturers, whose specialized products do not affect the general supply of transfusible blood. Such manufacturers are not in the business of supplying transfusible blood to hospitals; they merely produce commercial products for use by hemophiliacs. Moreover, the manufacturers obtain their supply of blood from paid donors. Thus, their source of blood for clotting factor is independent of the voluntary donor system used by hospitals and blood banks to collect transfusible blood. Therefore, because commercial blood products manufacturers do not affect the general blood supply, protecting those manufacturers from strict liability neither promotes nor rationally relates to that legitimate state purpose. To the extent that blood products manufacturers also are in the business of supplying transfusible blood to hospitals, they can be immunized from strict liability relative to such a service. The manufacture of blood products and placement into the stream of commerce is the transaction that should be subjected to strict liability.

While the existing statute purports to promote the state’s interest in encouraging the manufacture of blood products, this interest is outweighed by competing state interests. These interests include promoting the safety of such products, spreading the financial burden of injuries among all who use the product rather than resting it solely on the unfortunate victim, and the interest in providing that victim with a realistic avenue of legal relief. This latter interest is especially important in light of the devastating impact of AIDS contamination. What was considered a “relatively minor risk of hepatitis which the blood recipient must take” can no longer be considered minor when the risk of AIDS means the risk of certain death.

191. The product at issue is a clotting agent, plasma protein, which is derived from blood. In emergency shortages of blood at hospitals or blood banks, this product would not be called upon to fill the shortage. The product is entirely different in character from blood used for transfusion, and it is not a substitute for blood.


Conclusion

Although section 1606 is silent on issues of civil liability, the statute has been interpreted by California courts to preclude strict liability actions arising from both contaminated transfusible blood and blood products. Its application is justified in cases involving suppliers of transfusible blood such as hospitals and blood banks because, by protecting these entities from liability without fault, the state promotes its interest in ensuring a plentiful supply of transfusible blood. Shielding blood products manufacturers from strict liability, however, is not supported by the same legitimate public policies as are applicable to hospitals and blood banks. Subjecting blood products manufacturers to strict liability will not decrease the availability of transfusible blood because blood products are not substitutes for transfusible blood. Further, their manufacturing process involves an independent source of paid donors for blood collection.

The existing statute's broad-sweeping and over-inclusive language nevertheless has resulted in a safe harbor for blood products manufacturers. Immunity from strict liability based on section 1606's mischaracterization of blood products as a "service" has produced inequities to victims of defective blood products, such as hemophiliacs. To alleviate these inequities, the legislature should expressly exclude manufacturers of blood products from strict liability immunity.

Expanding the doctrine of strict liability to include blood products manufacturers will not expose such manufacturers to any greater burden than that already imposed on most other manufacturers. Further, the availability of a remedy based on a theory of strict liability will in no way assure victory for the plaintiff hemophiliac. It will merely lighten his burden of proof in establishing the existence of a "defect" in the blood product, a burden that often is too onerous when negligence is the only allowable theory of recovery. The burden of proof will shift to the de-

194. Fogo did analogize blood products to drugs with dangerous side effects—penicillin and cortisone—which are usually protected from strict liability by their classification as "unavoidably unsafe" products. See supra note 95 & accompanying text. As the Restatement of Torts states, “because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk.” Restatement (Second) of Torts § 402A comment k (1965). It can be argued, however, that drugs and vaccines with potentially dangerous side effects are nevertheless pure, while a blood product contaminated with hepatitis or AIDS is impure, thus defective. See Boland, supra note 148, at 241-43. Moreover, if a product is so dangerous as to inflict widespread harm, it is ironic to exempt the manufacturer from liability on the ground that any other sample of his product would produce like harm. If we scrutinize deviations from a norm of safety as a basis for imposing liability, should we not scrutinize all the more the product whose norm is danger?

Traynor, supra note 8, at 368.
fendant manufacturer, who will have an opportunity to establish the non-
existence of a defect under the risk-benefit test promulgated by Barker v. Lull Engineering Co.

Although the risk of blood contamination has not been completely eliminated, the incidence of contamination is greatly diminished by mod-
ern testing methods. As for the infrequent but inevitable accident, it is more reasonable to place the weight of the burden of such an accident on the blood products manufacturer than on its truly helpless victim.

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