A lthough blood can be bought, sold, donated, distributed, and consumed, it is not considered a product subject to strict products liability. Most states, including California, have enacted “blood shield statutes” which explicitly state that blood is not a product. This article examines California’s blood shield statute, explains how it and other blood shield statutes rose to prominence in the United States, and concludes by discussing the impact of such statutes on other parts of the human body.

California’s Blood Shield Statute

California Health and Safety Code (“H & S Code”) §1606 is California’s “blood shield statute.” It provides:

[the procurement, processing, distribution, or use of whole blood, plasma, blood products, and blood derivatives for the purpose of injecting or transfusing the same, or any of them, into the human body shall be construed to be, and is declared to be, for all purposes whatsoever, the rendition of a service by each and every person, firm, or corporation participating therein, and shall not be construed to be, and is declared not to be, a sale of such whole blood, plasma, blood products, or blood derivatives, for any purpose or purposes whatsoever.]

By characterizing a blood-related transaction as the rendering of a service, as opposed to the sale of a good, the statute shields from strict liability those who make or sell blood or blood plasma or use it in blood transfusions. However, liability for negligence is not foreclosed. The stated rationale behind H & S Code §1606 is that imposition of strict liability could jeopardize the constant availability of an adequate supply of blood products for those that need them. See, e.g., Murphy v. E.R. Squibb & Sons, Inc. (1985) 40 Cal. 3d 672, 680. As such, California courts applying the statute have held that a hospital using blood in a transfusion (Shepard v. Alexian Brothers Hosp. (1973) 33 Cal. App. 3d 606), a blood bank supplying the blood (McDonald v. Sacramento Medical Foundation Blood Bank (1976) 62 Cal. App. 3d 866) and a manufacturer of blood plasma selling it for transfusion (Fogo v. Cutter Laboratories, Inc. (1977) 68 Cal. App. 3d 744) are immune from strict products liability.

In extending the reach of H & S Code §1606 to various blood supplying entities, courts have relied on legislative intent to classify blood as a service. However, the Legislature’s classification of blood as a “service” rather than a “product” appears at odds with the traditional definition of a product. Section 19(a) of the Restatement (Third) of Torts: Products Liability (“Restatement”) declares that “[a] product is tangible personal property distributed commercially for use or consumption.” In light of this definition, an argument certainly can be made that, for example, a vial of blood sold from a blood bank to a hospital for medical needs and then subsequently provided to a patient for consumption, constitutes a product. Indeed, Comment (c) to §19 of the Restatement expressly states that human blood meets the formal requisites of a product, as defined subdivision (a). See Restatement (Third) of Torts: Products Liability §19 cmt. c (1998). Yet, California and 47 other states treat blood as a service. An examination of the development of these statutes reveals how this most unusual classification came about.

The Development of Blood Shield Statutes

The first court to consider the applicable liability standards in blood-related litigation was the New York Court of Appeals in Perlmutter v. Beth David
Hospital (1954) 300 N.Y. 100. In Perlmutter, the plaintiff brought an action for breach of the implied warranties of merchantability and fitness for a particular purpose after receiving blood tainted with hepatitis and jaundice from the defendant hospital. Id. at 103. The plaintiff argued that the hospital’s function in providing blood constituted a “sale” of goods, in part because she was required to pay $60 for the blood transfusion. Id.

A divided court, however, held that the blood transfusion constituted a “service.” Id. at 104. The court reasoned that the contractual relationship between a hospital and a patient was one for the rendition of services. Id. The defendant hospital’s furnishing of blood, even when charging $60, was “entirely subordinate” to the hospital’s “paramount function” of providing services to restore the plaintiff’s health. Id. at 106. It is noteworthy that in reaching this decision, the majority was conscious of the ramifications of imposing no-fault liability on blood distributors, noting:

If however, the court were to stamp as a sale the supplying of blood – or the furnishing of other medical aid – it would mean that the hospital, no matter how careful, no matter that the disease-producing potential in the blood could not possibly be discovered, would be held responsible, virtually as an insurer, if anything were to happen to the patient as a result of “bad” blood.

Id.

In the wake of Perlmutter, state legislatures rushed to codify the New York court’s holding. These laws became known as “blood shield statutes.” The California Legislature was one of the first to act, enacting the precursor to §1606 in 1955, just one year after the Perlmutter decision. By 1970, 25 states had enacted such statutes. Two years later, this number had skyrocketed to 41 states, largely due to a controversial 1970 decision from the Illinois Supreme Court in Cunningham v. MacNeal Memorial Hospital (1970) 47 Ill. 2d 443.

As in Perlmutter, the plaintiff in Cunningham contracted hepatitis after receiving blood contaminated with the disease from the defendant hospital. Id. at 445. In permitting the plaintiff to plead strict liability, the court disagreed with the defendant’s argument that whole human blood is not a “product.” Id. at 447. More importantly, the court rejected the Perlmutter rule, explaining that it was unrealistic “[i]t]o assert that the transfusion of whole blood by a hospital into a patient, for which a charge is made, des not give rise to implied warranties because no ‘sale’ is involved . . . .” Id. At 450.

The Cunningham decision triggered a national legislative response with numerous states enacting blood shield statutes. Today, 48 states have statutes that protect blood and blood products from strict products liability. Such nationwide uniformity is reflected in §19(c) of the Continued on page 34
Restatement, which expressly provides that “[h]uman blood and human tissue, even when provided commercially, are not subject to the Rules of this Restatement.” Absent this declaration, human blood and tissue, if contaminated, would be subject to Restatement rules imposing strict liability when a product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product.

The Impact of Blood Shield Statutes
The Restatement’s pronouncement that human tissue is likewise excluded from strict products liability rules demonstrates the impact blood shield statutes have had on the sale of human body parts for medical care. For example, in 1991, the California Legislature enacted California H & S Code §1635.2, which states that “the collection, processing, storage, or distribution of tissue for the purpose of transplantation, as regulated by this chapter, shall be deemed a service by those persons engaged in these activities.” Relying on H & S Code §1606 and its rationale, the California Court of Appeal in Cryolife, Inc. v. Superior Court (2003) 110 Cal. App. 4th 1145, held that H & S Code §1635.2 granted immunity from strict liability to entities such as tissue banks. The Cryolife court is not the only court to reach such a conclusion. Indeed, just a year earlier, a federal court from the District of Utah held that human bone tissue was not a product subject to strict products liability. Condos v. Musculoskeletal Transplant Foundation (D. Utah 2002) 208 F. Supp. 2d 1226.

With the entire human body all but shielded from strict products liability, it is clear that policy issues play an important role in shaping the law of products liability. The obvious question then is: What’s next? How far will a legislature or court go in determining that certain “products” are nevertheless entitled strict liability protection? The answer remains to be seen. TBN