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LIABILITY FOR BLOOD TRANSFUSIONS RESULTING IN SERUM HEPATITIS

A blood transfusion, once considered a major surgical event, has become a standard practice. Despite the most meticulous and up-to-date precautions, however, statistics show that approximately one of every one hundred patients receiving a blood transfusion becomes infected with serum hepatitis as a result of the presence of a hepatitis virus in the blood used for the transfusion.¹ In effect, such a patient runs the risk of an illness which, if not fatal, will at least result in an infirmity lasting between six months and one year. Who shall bear the financial burden of the illness and its treatment? The unfortunate patient? The hospital or the blood bank supplying the blood, despite the probability that neither was negligent?

By the use of various rationales, the courts have generally determined that the loss shall be borne by the patient. Some courts have settled this problem by simply granting hospitals and blood banks an across-the-board charitable immunity. Others have said that no "sale" of the blood took place, and have therefore denied recovery to patients who had based their claims on a warranty theory. Still others have denied recovery on the reasoning that since no test as yet exists for determining the presence of this virus in blood, and since no method as yet exists for removing the virus, it is unreasonable to require the supplier of blood to warrant his product to be free from the serum hepatitis virus.

It is similarly unreasonable to force unfortunate patients to bear a loss which they have in no way caused. It is conceivable that through a program of governmental regulation and indemnification of hospitals and blood banks, the harsh results of this situation could be eliminated. Such a program would be similar to the protection already afforded by many states to persons injured by uninsured or hit-and-run motorists.²

1. Trout, *Blood Transfusions*, 73 *DICK. L. REV.* 201, 212 (1969). See generally 202 *J.A.M.A.* 27 (1967).

2. An example of such protection is New Jersey's Motor Vehicle Financial-Responsibility Law, *N.J. STAT. ANN.* § 39:6 (1961). Briefly, it provides that persons injured by uninsured or hit-and-run motorists shall have a remedy against a fund maintained by the state. The injured party may recover his loss in an action against the fund, so that in effect the state has undertaken to indemnify uninsured or hit-and-run motorists so that its citizens shall not suffer from the acts of such parties.

NEGLIGENCE AND THE DOCTRINE OF CHARITABLE IMMUNITY

Some injured patients have attempted recoveries predicated on theories of negligence. Cases of this type encounter two major obstacles: the doctrine of charitable immunity, and the fact that no test can determine or prevent the presence of the serum hepatitis virus in the blood used in transfusions.³

The doctrine of charitable immunity has been repudiated, at least partially, in most jurisdictions. At present, less than a dozen states still grant complete immunity to charitable organizations,⁴ while the number of those that grant no immunity at all is growing.⁵ Between these extremes lie the jurisdictions which grant a partial immunity only,⁶ but the trend toward ending charitable immunity is clear. In the past, this immunity has been based on one of two theories, either that a beneficiary of a charity has waived his remedy and assumed the risk of negligence by the charity when he has accepted its benefits,⁷ or that to hold charities liable for tortious injury is violative of public policy.⁸

Opponents have argued that it is more equitable for the community to bear the burden of loss by holding liable an institution, like the hospital, from which the entire community benefits, rather than to force the individual to bear the entire loss.⁹ They have reasoned that "men must be just before they are generous. . . ." ¹⁰ Despite the fact that the

3. 202 J.A.M.A. 27 (1967). Research in this area is being conducted at the present time. However, nothing effective has as yet been developed.

4. See Randall, *Medicolegal Problems in Blood Transfusions*, 20 S.C. L. REV. 1, 4 (1968); ANNOT., 25 A.L.R.2d 35 (1952). Those jurisdictions which grant complete immunity include: Arkansas, Maryland, Missouri, Ohio, Oregon, Pennsylvania, and South Carolina. See also 3 A.L.R.2d LATER CASE SERVICE 743-44 (1965).

5. Randall, *supra* note 4, at 4. Those states granting no immunity at all include: Alabama, Alaska, Arizona, California, Delaware, the District of Columbia, Florida, Georgia, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Puerto Rico, Utah, Vermont, and Wisconsin.

6. Annot., 25 A.L.R.2d 35, 143-200 (1952).

7. *Id.* at 68.

8. *Id.* at 70.

9. *Id.* at 59. See generally *Ray v. Tucson Medical Center*, 72 Ariz. 22, 230 P.2d 220 (1951); *Cohen v. General Hospital Society*, 113 Conn. 188, 154 A. 434 (1931).

10. *Tucker v. Mobile Infirmary Association*, 191 Ala. 572, 68 So. 4, 12 (1915). The court here simply reasons that it better serves the public interest to hold all members of the public liable for their torts. Despite the fact that a charity undertakes to perform a duty voluntarily and for little or no compensation, the public interest is better served if that fact does not give the charity license to perform the duty negligently. The charity, while wishing to perform an act of benevolence, must first account, as does anyone else, for its acts of wrongdoing.

situation which gave rise to the doctrine of charitable immunity no longer exists and the reasoning upon which it was based is no longer applicable,¹¹ it continues to survive in some jurisdictions, although the trend, as noted above, is toward the repudiation of charitable immunity for hospitals.

The second major obstacle that a patient faces in seeking recovery based on negligence is proof that the hospital or blood bank is guilty of actionable negligence. Certain kinds of negligence are obvious, such as the negligent performance of the transfusion itself, the mismatching of blood types, or the mislabelling of the blood used in a transfusion. However, these negligent acts rarely result in the patient's becoming infected with serum hepatitis. Since this infection results from the presence of the virus in the blood, the patient, to recover, must convince the court that the use of blood or plasma containing the serum hepatitis virus was in itself a negligent act.¹² Generally, courts have been unwilling to hold this to be a negligent act. In *Fischer v. Wilmington General Hospital*,¹³ the plaintiff, a patient who had received a whole blood transfusion and contracted serum hepatitis as a result, alleged that the hospital had been negligent in permitting its agents to administer the transfusion using blood containing the serum hepatitis virus. Plaintiff further contended that the hospital had also been negligent through its agents' failure to advise her of the possible danger of serum hepatitis in blood transfusions. The court noted that "[d]efendant's affidavits establish indisputably that there is no known medical technique by which the virus which causes hepatitis can be detected or destroyed in the whole blood."¹⁴ The court further stated that ". . . the issue . . . would appear to be whether the known risk here involved was of a type which imposed upon defendant a duty to warn plaintiff in advance."¹⁵ The court concluded that since all possible precautions against the virus had been taken, and since testimony had

11. Brown, *Stare Decisis is Worth Its Weight in Reason: Abolish the Charitable Immunity Doctrine*, 46 A.B.A.J. 629 (1960). See also *President and Directors of Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942).

12. If the patient can prove no other negligent act on the part of the defendant hospital, he is logically reduced to this single contention: that the use of whole blood in a transfusion by a hospital, in the light of the knowledge that it could contain the hepatitis virus and that there is no way to prevent or discover this, constitutes *in itself* a negligent act.

13. 51 Del. 554, 149 A.2d 749 (Super. Ct. 1959).

14. 149 A.2d at 750.

15. *Id.*

shown that the psychological upset which the patient might suffer if advised of the risk could outweigh the beneficial effects of the transfusion itself,¹⁶ the hospital was neither negligent in performing the transfusion nor in failing to advise the patient of the possible risks involved.

It is important to distinguish between transfusions involving whole blood and those involving plasma, for medical science has developed a method by which plasma can be made safe from the serum hepatitis virus. This process involves storing the plasma at room temperature for a period of approximately six months, thereby eliminating the hepatitis virus and rendering the plasma safe.¹⁷ Statistics conclusively show that this method is completely effective with regard to plasma,¹⁸ although no effective method is yet available to produce similar results with whole blood.¹⁹ The implications are clear: granted the availability of a method by which plasma can be made safe, failure of the hospital or blood bank to use this method, or the use of whole blood where plasma would have sufficed could be viewed as negligence on the part of the hospital or blood bank for which the injured patient could be allowed to recover.

Although no method is yet available by which whole blood can be made absolutely free of the serum hepatitis virus, this circumstance does not give hospitals and blood banks license to exercise anything less than maximum precaution in this area. Failure to do so may constitute negligence for which injured patients could recover. Recent research has shown positive correlations between environment, medical history, and personal contacts of the donor, and the presence of the hepatitis virus in the blood.²⁰ Tests have been developed which can detect the

16. *Id.* at 753.

17. Note, *Liability for Blood Transfusion Injuries*, 42 MINN. L. REV. 640 (1958). See generally *Pooled Plasma with Little or No Risk of Homologous Serum Jaundice*, 154 J.A.M.A. 103 (1954).

18. Note, *supra* note 17, at 656-57.

19. *Id.*

20. Garibaldi, *A New Look at Hospital's Liability for Hepatitis Contaminated Blood on Principles of Strict Tort Liability*, 48 CHI. B. RECORD 204 (1967). The writer states: Research has developed a relationship of the instance of viral hepatitis to environment. Tests have shown that only 10 per cent of patients (potential blood donors) tested for viral hepatitis showed positive results in new, middle-class, residential areas; whereas, in older, more crowded areas of lower economic status, 33 per cent tested positive; and ward patients who lived in old, overcrowded, low-income areas tested 91 per

possibility that a prospective donor may be a carrier of the virus.²¹ If a blood bank or hospital fails to investigate the donor's medical history, or fails to administer these tests, such failure could constitute a breach of the duty owed to the prospective donee, for which he should be allowed a recovery.

IMPLIED WARRANTY ATTACHED TO THE "SALE" OF BLOOD

Some plaintiffs have attempted to base their claims on a warranty theory, contending that the blood used in their transfusions was sold to them, and therefore the presence of the virus in the blood constituted a breach of an implied warranty that the blood was safe.²² The land-

cent positive. In other words, any blood from a donor of the third group would have a nine to one likelihood of affecting the recipient of the blood.

Id. at 206.

21. Persons once infected may remain carriers; accordingly, the medical history of each potential donor should be taken by the hospital and carefully examined. Hospitals and blood banks can and should take particular care to ascertain whether records indicate that any past recipient of blood from the donor has ever contracted hepatitis. There are several tests for prospective donors, which indicate whether a particular donor might be carrying the virus, including (a) thymol turbidity test, (b) urine bilirubin test, and (c) elevated serum glutamic oxalactic transaminase activity. The National Institute of Health requires exclusion of donors who within the preceding six months have had contact with a known case of hepatitis and donors who have had a transfusion or infusion of human blood, plasma, or serum.

Id.

22. Very briefly, the theory of such a case begins with the contention that the supplier of the blood is a "merchant" as defined in UNIFORM COMMERCIAL CODE § 2-104(1). The Code states that "merchant" means

a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

The patient then contends that under section 2-106(1), the transfer of the blood to him is "the passing of title from the seller to the buyer for a price" and is therefore a sale, to which, under sections 2-314 and 2-315, the implied warranties of merchantability and fitness for a particular purpose attach. Under section 2-314(2)(c) the patient contends that the implied warranty of merchantability was breached by the presence of the hepatitis virus in the blood, which he contends makes the blood unfit for the ordinary purpose for which it is used. Under section 2-315 the patient contends that the implied warranty of fitness for a particular purpose was breached in that he relied on the supplier's skill and judgment in the selection of the blood, and the presence of the hepatitis virus therein made the goods unsuitable for the purpose for which they were selected.

mark case on this point is *Perlmutter v. Beth David Hospital*,²³ wherein a separate charge for the blood used in the transfusion was itemized on the patient's hospital bill. Plaintiff contended that there had been a sale of the blood, and that the blood contained serum hepatitis virus which ultimately infected him. The sale of defective blood, therefore, constituted a breach of warranty. The court rejected plaintiff's contention, stating that the contract between plaintiff and defendant hospital was one primarily for services; the transfer of the blood to the plaintiff was merely incidental to this contract for services, and therefore no warranties attached to the blood itself. Nearly all jurisdictions which have been presented with this issue have adopted a similar view.²⁴

The vigorous dissent in *Perlmutter* stated that ". . . plaintiff is not suing defendant for the service of injecting the blood into her bloodstream, but simply for the sale of 'bad' blood for a separate valuable consideration . . ." ²⁵ The dissent further stated that while the primary purpose of plaintiff's dealing with defendant was service, the transaction was divisible into separate contracts, one for service and one for the sale of physical material, the blood used in the transfusion.

We have had no difficulty whatever in the past in frequently distinguishing between medical and administrative acts . . . recognizing that the contract is divisible, and, while we have held hospitals immune when they have carefully selected persons supplying human skill, we have never extended that doctrine to physical material which was bad . . . ²⁶

The dissent concluded that the transfer of the blood to the plaintiff constituted a sale, and the presence of the hepatitis virus was a breach of the implied warranty which attached to such sale.

23. 308 N.Y. 100, 123 N.E.2d 792 (1954).

24. *Sloneker v. St. Joseph's Hosp.*, 233 F. Supp. 105 (D. Colo. 1964); *Whitehurst v. American Nat'l Red Cross*, 1 Ariz. App. 326, 402 P.2d 584 (1965); *White v. Sarasota County Pub. Hosp. Bd.*, 206 So.2d 19 (Fla. App. 1968); *Lovett v. Emory Univ., Inc.*, 116 Ga. App. 277, 156 S.E.2d 923 (1967); *Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc.*, 270 Minn. 151, 132 N.W.2d 805 (1965); *Goelz v. J. K. & Susie L. Wadley Research Institute & Blood Bank*, 350 S.W.2d 573 (Tex. Civ. App. 1961); *Dibblee v. Dr. W. H. Groves Latter-Day Saints Hosp.*, 12 Utah 2d 241, 364 P.2d 1085 (1961); *Gile v. Kennewick Public Hosp. Dist.*, 48 Wash. 2d 774, 296 P.2d 662 (1956); *Koenig v. Milwaukee Blood Center, Inc.*, 23 Wis. 2d 324, 127 N.W.2d 50 (1964).

25. 308 N.Y. at 108-09, 123 N.E.2d at 796.

26. *Id.* at 111, 123 N.E.2d at 798. In support of this statement the dissenting opinion cites *Volk v. City of New York*, 284 N.Y. 279, 30 N.E.2d 596 (1940) (involving an impure morphine solution).

Although most courts have chosen to follow the majority opinion in the *Perlmutter* case, there are three jurisdictions which have held that such a transaction is in fact a sale. One is New Jersey where, in *Jackson v. Muhlenberg Hospital*,²⁷ the court held that a transfer of human blood for a consideration is a "sale" within the meaning of the Uniform Commercial Code, section 2-106(1). The court, nevertheless, refused to impose a warrantor's liability upon the defendant hospital, reasoning that "[t]he means available for avoiding the risk of harm and the extent of the risk must be weighed against the utility of the product."²⁸ Crucial in the court's decision were the considerations that not only were there no means available to eliminate the virus from the whole blood, but defendant had so stated on the container in which the blood was bottled. This was ruled to be an effective warranty disclaimer.²⁹ The court concluded that despite the fact that a sale of the blood took place, as a matter of policy no warrantor's liability could be imposed upon the supplier of the blood since the virus could not be eliminated from the blood and the utility of the product far outweighed the potential danger to the donee.³⁰

27. 96 N.J. Super. 314, 232 A.2d 879 (1967).

28. 232 A.2d at 886.

29. *Id.* at 888. The court based this holding on UNIFORM COMMERCIAL CODE § 2-316(2) and N.J. STAT. ANN. § 12A:2-316(2) (1962) which state that to exclude the implied warranty of fitness for a particular purpose the disclaimer must be in the form of a conspicuous writing. The disclaimer was placed on the container and read as follows:

Despite the utmost care in the selection of donors, human blood may contain the virus of Homologous Serum Hepatitis. Therefore Eastern Blood Bank does not warrant against its presence in this blood.

The court reasoned that this disclaimer was not unreasonable or unconscionable, and therefore held it valid as disclaiming liability in case the blood proved unfit for transfusion due to the presence of the hepatitis virus. As to merchantability, the court in effect equated this with plaintiff's contention that defendant was strictly liable in tort for supplying a defective product which was unreasonably dangerous to the ultimate consumer. The court, quoting at length from RESTATEMENT (SECOND) OF TORTS § 402(A), comment *k* at 353-354, reasoned that a product's utility and necessity must be weighed against its potential harm to the consumer in determining whether it is defective and/or unreasonably dangerous. The court concluded that blood must be classified as an "unavoidably unsafe product," the utility of which far outweighs its potential danger. The court states unequivocally that this refusal to impose strict liability, which is in effect a warrantor's liability on an implied warranty of merchantability, is a rule of policy. *Id.* at 886.

30. It must be noted, that while the court in the *Jackson* case never actually stated that blood containing the serum hepatitis virus is merchantable, such an implication is clear from the reasoning employed by the court. The failure to state this explicitly was due to the fact that the plaintiff chose to litigate the issue of strict liability rather

In accord with the *Jackson* case is *Cunningham v. MacNeal Memorial Hospital*,³¹ where the Illinois Supreme Court held that such a transfer of whole blood by a hospital to a patient is a sale. The court held merely that the plaintiff, in alleging that she had received a transfusion from defendant hospital, with blood sold to her by the hospital, and had contracted serum hepatitis therefrom, had stated a valid cause of action against the defendant based on a theory of strict liability. As to whether plaintiff would be able to recover from defendant, the court indicated that it would base its ultimate decision on whether the defendant could have removed the hepatitis virus from the blood.³² The court further indicated that as a matter of policy, no liability could be imposed upon defendant if no means were available to accomplish this removal.³³

In agreement with these decisions as to a commercial blood bank, *but not as to a hospital*, is *Russell v. Community Blood Bank, Inc.*³⁴ The Florida court held that the transfer of blood by a blood bank was a sale,³⁵ and that plaintiff's allegation that she had contracted serum hepatitis as a direct result of the presence of the virus in the transfused blood was sufficient to state a cause of action against defendant blood bank on a theory of breach of implied warranty.³⁶ The court further stated, however, that plaintiff would be able to recover only if she could prove that the blood bank could have eliminated the virus from the blood.³⁷

It appears the better approach in affixing liability under the warranty doctrine is that taken by the three minority jurisdictions. The opposing *Perlmutter* view employs the artificial reasoning that the patient's contract is one for services rather than for a sale. This position is difficult

than that of implied warranty of merchantability. Nevertheless, by equating the two the court made its position on the merchantability of blood containing the hepatitis virus unmistakably clear. 232 A.2d at 884.

31. 113 Ill. App. 2d 74, 251 N.E.2d 733 (1969).

32. 251 N.E.2d at 738-39.

33. *Id.*

34. 185 So.2d 749 (Fla. D. Ct. App. 1966), *aff'd*, 196 So.2d 115 (Fla. Sup. Ct. 1967). The court accepts the *Perlmutter* case "service" theory as to a hospital, reasoning that it is primarily a service organization, but adopts the "sale" theory as to a blood bank which the court classifies as a commercial enterprise.

35. *Id.* at 752.

36. *Id.* at 755-756. Since the court did not state which implied warranty the plaintiff might rely upon, one may assume that the court means both the implied warranty of merchantability and that of fitness for a particular purpose.

37. *Id.* at 755.

to rationalize in light of the decisions involving the "sale" of food in a restaurant where the contract is mainly for services. Section 2-314(1) of the Uniform Commercial Code specifically provides that the serving of food for consumption on the premises is a "sale" of such food. Surely, there can be no clearer example of a transaction the primary purpose of which is a service, yet the transfer of goods from the restaurant to the customer for a price included within this transaction is considered a separate contract for a sale. Nevertheless, the courts which follow the *Perlmutter* view have refused to apply this principle to the analogous situation of a patient who, in procuring the services of a hospital, purchases a container of whole blood to be used for the purpose of a transfusion.³⁸ The New Jersey, Illinois and Florida courts present a more logical argument in stating that a sale does in fact take place in cases of this type, but that as a matter of *policy* they feel it would be improper to impose a warrantor's liability upon the supplier of the blood since no method is available to him to make the blood safe.

EQUITABLE CONSIDERATIONS: DISTRIBUTION OF LIABILITY

The courts are confronted with an extremely difficult choice between two alternatives, neither of which is equitable to all the concerned parties. One alternative dictates that a patient who has to undergo a transfusion must risk the possibility of being exposed to the virus, while the other alternative would penalize an innocent hospital or blood bank for a sickness which it is absolutely incapable of preventing. There are several factors which the courts must consider in determining which party shall assume the risk of this possible loss. Equitably, these factors center around an estimation of which of these two innocent parties is more capable of bearing the loss. It appears, at first glance, that the patient is the less capable, for his financial reserve is often miniscule when compared to that of modern hospitals and blood banks; but a closer examination discloses that this is often not correct. Some hospitals and blood banks can perform between one and two hundred blood transfusions each week. To place the risk of loss upon these organizations might be to condemn them to defend one or more lawsuits every week, necessitating the devotion of enormous amounts of their financial resources to this purpose to the detriment of the general public. It has

38. For an elaborate discussion of the failure of the courts following the *Perlmutter* view to recognize this analogy and apply the principal stated in the UNIFORM COMMERCIAL CODE § 2-314(1), see Comment, *Sales: Implied Warranty: Blood Transfusion*, 18 OKLA. L. REV. 104 (1965).

been suggested that the hospitals and blood banks could defray these extra expenses by increasing charges for their services,³⁹ but the effect of such a proposal would be to raise these charges to an exorbitant level. The increased revenues would not be drawn from the general public, only from that segment of the public in need of hospital care. Despite the fact that the hospital may have recourse against a third party supplier of the blood,⁴⁰ the third party will cover this expenditure by correspondingly increasing the price of blood so that the ultimate effect will be the same. Furthermore, insurance coverage for this liability will be almost impossible to procure, for the fact remains that a sizable loss will be incurred at least once every hundred times the risk is taken. Finally, it hardly seems just to penalize the hospital or blood bank for the consequences of the patient's unfortunate position.

Under the present system it is clear that the patient, however unfortunate he may be, is more capable of assuming this risk than the institutions with which he deals. Yet the result of this policy is harsh, and often calamitous, from the patient's point of view. An alternative solution must be found by which all parties can be at least partially accommodated.

PROPOSED SOLUTION: A CHANGE IN THE LAW

The solution appears to be to devise a plan which holds down medical expenses while allowing the injured patients some measure of financial recovery, and to fund such a plan with the resources of the general public since it is the general public which benefits from the services of hospitals and blood banks. An analogous plan does exist, and is in use in some states today to protect the citizens against losses due to acts of uninsured or hit-and-run motorists.⁴¹ Each state could set up a commission which would license blood banks or hospitals dealing in blood for transfusion purposes. No organization would be able to participate without a license, and by withholding licenses from any organization that did not comply with the commission's standards, the commission could effectively regulate hospitals and blood banks to ensure that the maximum possible precautions and preventative measures against serum hepatitis virus are taken. The commission might be funded by the state's tax revenues, and from these funds it would

39. *Id.* at 109.

40. *Id.*

41. *E.g.*, N.J. STAT. ANN. § 39:6 (1961).

indemnify every licensed supplier of blood for any liability they might incur as a result of the presence of the hepatitis virus in the blood they have supplied, assuming, of course, a finding of no other grounds for liability on the supplier's part.

The injured patient's remedy would be a statutory one against the commission and the supplier of the blood, and his recovery would be paid from the funds available to the commission. Since total compensation from this fund would be unfeasible, a ceiling would have to be placed on the amount any patient could recover. This ceiling amount would be determined from the amount of funds available to the commission, and the anticipated number of claimants.

The major advantage of this plan is that it benefits all parties concerned to some degree, as opposed to the present state of the law which leaves the injured patient without a remedy. There would also be no danger to the financial security of hospitals and blood banks, as recoveries would not be paid from their resources. Medical expenses would not be increased for the same reason, and the service organizations would feel no increased strain on their finances. The plan offers the injured patient at least some mitigation of his loss. Furthermore, by funding the plan with tax revenues, the expense of this system would rest upon the public, ensuring maximum diffusion of expense and minimum actual cash outlay by each individual.

While the present state of the law forces the patient to assume the risk involved in a blood transfusion, neither the patient nor the hospital or blood bank is capable of assuming the entire risk alone. It is therefore incumbent upon the legislatures to adopt some method, such as that herein proposed, so that the general public may be both served by the hospitals and protected from the dangers of serum hepatitis.

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