

# The Warranty of Sperm: A Modest Proposal to Increase the Accountability of Sperm Banks and Physicians in the Performance of Artificial Insemination Procedures

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## INTRODUCTION

An estimated ten percent to twenty percent of all couples of reproductive age are incapable of traditional procreation.<sup>1</sup> For many of these couples, artificial insemination has made the miracle of childbirth and the joy of parenthood a welcome reality. For others, including Fred and Julia Skolnick, the procedure has been less gratifying.<sup>2</sup>

In March of 1985, Fred Skolnick contracted with a Manhattan sperm bank to deposit and store sperm after learning he had a form of cancer which ultimately would affect his ability to father children. The following year, Fred's wife Julia was artificially inseminated after deciding that a child would bond her forever to the memory of her dying husband. Shortly after the child's birth, however, Julia began to doubt that her husband was the child's biological father. Her suspicions were later confirmed by tests revealing that the child was biracial; both Fred and Julia are Caucasian.

Motivated in part by the "unbearable" racial taunting which followed the sperm mix-up, Julia brought a negligence action against her gynecologist and the sperm bank alleging that she had been inseminated with the wrong sperm.<sup>3</sup> Although the Skolnick record was sealed from the public in October of 1989,<sup>4</sup> the case raised several novel issues with regard to

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1. Judith Lynn Bick Rice, Note, *The Need for Statutes Regulating Artificial Insemination by Donors*, 46 OHIO ST. L.J., 1055, 1056-57 (1985). See also Kathryn Venturatos Lorio, *Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 LA. L. REV. 1641 (1984) (approximately 17% of all couples of reproductive age are medically infertile).

2. See Edward A. Adams, *Sperm Donor Suit Raises Novel Tort Issues*, N.Y. L.J., March 8, 1991, at 1; Robin Schatz, *New Questions in Sperm Case; Semen Sample Found in Office*, NEWSDAY (N.Y.), April 22, 1990, at 4 [hereinafter *New Questions*]; Robin Schatz, *Woman Settles Sperm Bank Case*, NEWSDAY (N.Y.), July 31, 1991, at 13 [hereinafter *Woman Settles*]; Ronald Sullivan, *Mother Accuses Sperm Bank of a Mixup*, N.Y. TIMES, March 9, 1990, at A16 [hereinafter *Mother Accuses*]; Ronald Sullivan, *Sperm Mix-up Is Settled*, N.Y. TIMES, Aug. 1, 1991, at B4 [hereinafter *Mix-up Is Settled*].

3. *Mother Accuses*, *supra* note 2, at A16.

4. *Id.*

the liability of physicians and sperm banks which remain unexplored today.

While the notable absence of litigation arising from improper artificial insemination may signify that the procedure has been remarkably trouble-free over the past quarter-century, it is more likely that the lack of precedent is attributable to quiet, out-of-court settlements designed to prevent anxious consumers from discovering the risks involved in the procedure. The *Skolnick* case is a perfect illustration of the latter proposition. A recent edition of New York *Newsday* reported that Julia's attending physician paid a no-fault settlement of approximately \$300,000, and the sperm bank purchased its no-fault label from Skolnick for one-third of that amount.<sup>5</sup>

Despite the fact that justice ultimately was served in the *Skolnick* case, the no-fault settlement nevertheless is disturbing in light of the results of an investigation of the sperm bank following the Skolnick complaint. During that investigation, officials shockingly discovered that some of Fred Skolnick's sperm was still preserved in the storage tank, even though Julia was no longer a sperm recipient.<sup>6</sup> Investigating officials also attempted to locate sperm samples of three random donors in the bank's storage tank. In one instance, the officials found it "impossible" to locate the sample.<sup>7</sup> In the other two cases, the officials found it impossible to identify the sperm samples intended for specific recipients because the numerical identification system utilized by the sperm bank did not comply with suggested guidelines and was highly inefficient.<sup>8</sup> According to the investigators, the sperm bank's labeling method also was inadequate in that the paper shipping tags used to identify the storage goblets were likely to disintegrate in the liquid nitrogen utilized in freezing sperm, thus requiring the lab technicians to examine the identification numbers affixed to the sperm vials located inside the goblets. The investigators concluded that once a vial is removed from its goblet for identification purposes, "great concentration" by the technician is required to return the vial to its proper goblet in order to avoid a donor mix-up.<sup>9</sup>

In light of these findings, one might wonder how often donor mix-ups actually occur. One might surmise that even if donor mix-ups were prevalent, they often would go completely undetected in cases in which the mix-ups were not as obvious as the biracial mix-up in the *Skolnick* case.

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5. *Woman Settles*, *supra* note 2, at 13.

6. *New Questions*, *supra* note 2, at 4.

7. *Id.*

8. *Id.*

9. *Id.*

In addition to donor mix-ups, a second major risk assumed by artificial insemination patients involves the health and well-being of the sperm recipients and their potential offspring. Only three states—California, Florida, and Indiana—have enacted legislation going beyond the required testing of sperm donors for the HIV virus.<sup>10</sup> Thus, prospective parents

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10. 1991 Cal. Adv. Legis. Serv. 801 (Deering); FLA. STAT. ch. 381.6105 (1990); IND. CODE § 16-8-7.5-6 (1988).

Although the legislation in California and Indiana provides a specific list of the tests which must be performed before the sperm may be used, no state has statutorily imposed regulations sufficient to meet the recommended guidelines of the American Fertility Society. NEW GUIDELINES FOR THE USE OF SEMEN DONOR INSEMINATION: 1990, Am. Fertility Soc'y Guide, Vol. 53, No. 3 (Supp. 1990). The American Fertility Society suggests a four-step process for the selection and screening of donors with regard to potential diseases.

I. The first step is historical screening for purposes of excluding the following potential donors: 1. Men in AIDS risk groups: (a) any homosexual contact in the last eight years, (b) intravenous drug users, (c) sexual partners of persons in AIDS risk groups, and (d) donors from geographic areas where sex ratio of AIDS patients is close to 1:1; 2. Men having more than one sexual partner within six months; 3. Men with evidence of STD within last six months: (a) dysuria, (b) urethral discharge, (c) genital ulcer, (d) hepatitis, and (e) sexual partner with frequent episodes of trichomonas; and 4. Men with any past history of: (a) genital herpes, (b) genital warts, and (c) chronic hepatitis;

II. If the potential donor is not excluded through historical screening, the second step is blood testing for CMV serology;

III. If the CMV serology is negative, the third step is a physical examination which includes: 1. Genital examination for (a) urethral discharge, (b) genital warts, and (c) genital ulcers; 2. Urethral cultures for: (a) *Neisseria gonorrhoeae*, (b) *Chlamydia trachomatis*, (c) *Mycoplasma hominis* [optional], (d) *Trichomonas vaginalis* [optional], and (e) white blood cell count [optional]; 3. Blood testing for: (a) hepatitis-B surface antigen and core antibody, (b) HIV [If test is negative, semen samples may be collected and prepared for cryopreservation. The donor should be tested again in 180 days for HIV and the specimen released only if the results are negative.], (c) serologic test for syphilis, and (d) serum antibody test for CMV; and

IV. If the donor is not excluded through the physical examination, rescreening and surveillance should be conducted at least every 6 months. If the donor shows signs of STD, he should be discontinued. Any evident STD transmission should be traced to the donor and his recipients. *Id.* at 6-75.

In addition to disease testing, the American Fertility Society also recommends a four-step genetic screening process.

I. The donor should be generally healthy and, as determined by the use of state-of-the-art tests, should not have or carry: (a) any nontrivial malformation of complex causes, (b) any nontrivial Mendelian disorder, (c) any familial disease with known or reliably indicated major genetic component, (d) an autosomal recessive gene for any disease known to be prevalent in the donor's ethnic background for which heterozygosity can be detected, (e) a chromosomal rearrangement that may result in unbalanced gametes, (f) the donor should be young, and (g) the donor should be Rh-negative if the prospective mother is;

II. The donor's parents and offspring should be free of: (a) nontrivial malformations, (b) nontrivial disorders, showing Mendelian inheritance as to autosomal dominant or x-linked disorders, autosomal dominant inheritance with reduced penetrance, or autosomal recessive inheritance, and (c) a chromosomal rearrangement or imbalance if other than a proven

are understandably concerned about genetic birth defects and the transmission of sexual diseases in cases of anonymous sperm donation. Although the risk of defects and disease could be reduced significantly through more extensive donor screening procedures, such precautionary measures often are omitted by sperm banks and physicians because the additional time and cost involved are economically prohibitive.<sup>11</sup>

In sperm banks which do not automatically perform extensive screening of anonymous donors, in-depth testing could cost the donee an additional \$800 to \$900.<sup>12</sup> Although this additional cost might appear excessive, it arguably is a small price to pay relative to the enormous cost of caring for a genetically defective or diseased child. Moreover, because the artificial insemination procedure assists in the creation of human life, there clearly is a need for increased moral accountability and legal liability where economizing results in the creation of low-cost, low-quality human offspring.

Uniform legislation specifically governing the artificial insemination process theoretically could supply an adequate remedy to these problems, but practically speaking, the legislative process is too slow and enforcement too rare to provide the needed swift, effective solution.<sup>13</sup> An alternate

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trisomy, unless the donor has a normal karyotype;

III. Major psychoses, epileptic disorders, juvenile mellitus, and early coronary heart disease should be considered as causes for rejection; and

IV. A permanent record designed to maintain confidentiality should be maintained. It should include the genetic workup and other nonidentifying information and should be made available on request, on an anonymous basis, to the recipient and/or any resulting offspring. *Id.* at 8-9S.

11. Lorio, *supra* note 1, at 1652 n.51.

12. Interview with Evan E. Follas, General Manager of Follas Laboratories Inc., Indianapolis (Nov. 12, 1991).

13. As one author stated,

The implications of the incomplete legal regulation of [artificial insemination by donor] and of the absence of a clear, comprehensive framework for societal policy dealing with new reproductive technologies for the future are important. The issues are too complex, too divisive for us to expect clear-cut resolutions in a short period. The issues must undergo a process of identification, clarification, and consideration that will take time. Prolonging the process will be the impact of the era of technological, cultural, and legal transition and the social debate over the underlying value issues. As a result, it is likely that slow, piecemeal progress through legislation, primarily, and through litigation, on occasion, will continue. *This slowness is not much consolation for those engaged in developing and using these new technologies, but it represents a more accurate view of what the law is and how public policy develops . . . For the foreseeable future, we must live with large areas of legal uncertainty, while working to shape the growth and development of legal policy in these areas.*

Joseph M. Healey, Jr., *Legal Regulation of Artificial Insemination and the New Reproductive Technologies: The Search for Clarification Continues*, in *GENETICS AND THE LAW* III 139,

system is needed to hold physicians and sperm banks more accountable for their actions and to better compensate disappointed donees. Applying warranty law to the sale of sperm would fulfill this need by economically compelling sperm banks and physicians to be more scrupulous in their endeavors to create human life.

This Note specifically addresses whether Article 2 of the Uniform Commercial Code (U.C.C.), which regulates the sale of goods, can and should be applied to sperm transactions. To demonstrate the need for warranty law in this area, Section I of this Note addresses the shortcomings of negligence as an alternative theory of recovery. Section II advocates the replacement of the outdated "service" characterization of human tissue transactions with a more accurate "vendor-buyer" sales analysis. To lend precedential support to the sperm warranty argument, Section III discusses the liability of commercial blood banks for breach of implied warranty and illustrates how the warranty of sperm likewise has been statutorily implemented in some states. Finally, Section IV briefly concludes this Note by emphasizing the benefits which inevitably would accrue if commercial sperm banks and physicians were bound by the express and implied warranty provisions of the Uniform Commercial Code.

#### I. BREACH OF WARRANTY AS A NECESSARY THEORY OF RECOVERY FOR INJURED DONEES

A common reaction to sperm warranty as a cause of action is that it is entirely unnecessary. After all, negligence is seemingly the most logical theory of recovery in actions for improper artificial insemination. Although there is little, if any, precedent directly on point, speculation surrounding the *Skolnick* case indicates that there are significant limitations on negligence which may preclude injured donees from recovering at trial.<sup>14</sup> For instance, in those states such as New York which do not recognize theories of joint liability in negligence actions, the donee must prove that either the physician or the sperm bank was responsible for the injury.<sup>15</sup> This evidentiary burden makes recovery virtually impossible in the many instances in which record-keeping and semen processing procedures are

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143-44 (1985) (emphasis added).

See also Rice, *supra* note 1, at 1073 n.197. Rice suggests that legislation in the area of artificial insemination may be difficult to enact because of the negative stigma which the public often attaches to the subject. *Id.* More specifically, legislators are forced to choose between the introduction of bills proposing extensive regulation of the process which will inevitably be poorly received and bills which are very general in nature which are more likely to meet with approval. *Id.*

14. See Adams, *supra* note 2, at 1.

15. *Id.*

grossly inadequate both in the doctor's laboratory and in the sperm bank.<sup>16</sup>

Additionally, there is some question as to what specific duty, if any, is owed by the physician and sperm bank to the potential child and prospective parents. In many instances, it is likely that the recipient is led to believe that no duty of care is owed or that, even if a duty of care is owed and subsequently breached, no recovery is possible.<sup>17</sup> Fur-

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16. See *New Questions*, *supra* note 2, at 4. See generally Lorio, *supra* note 1 (discussing the need for better regulation and structure of the artificial insemination process).

17. This conclusion is supported by the required signing of standard consent and disclaimer forms releasing both the physician and the sperm bank of any legal liability resulting from improper artificial insemination.

The following is an excerpt from an actual physician release form:

We release Dr. \_\_\_\_\_ from any and all liability and responsibility of any nature whatsoever which may result from the complications of childbirth or delivery or from the birth of an infant or infants abnormal in any respect, or from the heredity or hereditary tendencies of such issue, or from any other adverse consequences which may arise in connection with or as a result of the artificial insemination herein contemplated. We shall refrain from bringing legal action of any kind, and refrain from aiding or abetting anyone else in bringing legal action for or on account of any matter or thing which might arise out of the artificial insemination herein contemplated. We shall indemnify Dr. \_\_\_\_\_ for attorney's fees, court costs, damages, judgments, or any other losses or expenses incurred by him or for which he may be responsible with respect to any claim, legal action, or defense thereto, arising out of the artificial insemination herein contemplated including any claim of or legal action brought by the child or children resulting from the artificial insemination.

Unpublished consent form provided by a local sperm bank.

In addition to signing the physician release form, the recipient must also sign a form releasing the sperm bank from all legal liability. The following is an excerpt from a sperm bank release form:

We understand that [said sperm bank] does not warrant or guarantee the qualifications of said donor, and that in determining whether the donor meets the aforesaid qualifications of [said sperm bank] or any of its employees shall be required to make only such investigations of and concerning such donor as shall in the sole discretion of [said sperm bank] or any of its employees seem reasonably necessary. We further covenant and agree to forever refrain from instituting, pressing or in any way aiding any claim, demand, cause of action for damages, cost, loss of services, expense of compensation for or on account of or hereafter arising out of the premises hereinabove set forth. We further promise and agree to indemnify and save harmless [said sperm bank] and any of its employees from loss and/or expenses incurred by them in connection with the defense of payment of any claim or action arising out of the aforesaid premises or agreements herein contained. [Said sperm bank], whenever used herein, shall include all physicians and other personnel who perform services for us on behalf of [said sperm bank]. This agreement shall be binding upon ourselves, and each of use, our assigns, heirs, executors, and administrators.

Unpublished consent form provided by a local sperm bank.

In light of the legally binding appearance of these agreements and the patent disincentive

thermore, while several states have recently enacted or proposed legislation mandating the testing of sperm donors for the HIV virus,<sup>18</sup> only three states require that donors meet additional medical standards in order to donate sperm.<sup>19</sup> Absent significant legislation in the remaining forty-seven states, the additional screening of sperm donors for genetic disorders and diseases in these states arguably is optional, thereby releasing the sperm bank and attending physician from liability if the donation of contaminated or defective sperm results in the birth or abortion of genetically defective or diseased offspring.

On the other hand, it is possible that the lack of statutory provisions has left the door wide open to the imposition of liability, thereby discouraging cautious physicians from actively participating in the procedure.<sup>20</sup> Despite the real possibility of a negligence suit, the artificial insemination procedure is still quite popular.<sup>21</sup> At least one physician speculates that the willingness of physicians to perform the procedure without first having tested the donor for genetic defects or diseases is attributable to the routine use of medical students as sperm donors.<sup>22</sup> Because medical students are generally "men who realize the importance of certain family genetic details and know what information is crucial to the safety of their sperm, . . . [the] process spares the expense of performing a series of expensive tests on every donor."<sup>23</sup>

Notwithstanding the reliability and integrity of medical students in general, donor screening is absolutely imperative whether the donor is a

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to bring suit embodied in the indemnification clauses, it is possible that injured donees will forego any legal claims because, on the basis of the disclaimer provisions, litigation would prove to be both costly and futile. However, this reaction would appear to be a misconception because several courts have held that exculpatory clauses of this nature are unenforceable. See Bernard D. Hirsch, J.D., *Parenthood by Proxy*, 249 JAMA 2251, 2252 (1983).

18. 1991 Cal. Adv. Legis. Serv. 801 (Deering); DEL. CODE ANN. tit. 16, § 2801 (1990); FLA. STAT. ch. 381.6105 (1990); ILL. REV. STAT. ch. 127, para. 55.45 (1989); IND. CODE § 16-8-7.5-14 (1988); LA. REV. STAT. ANN. 40:1062.1 (West 1990); MD. HEALTH-GEN. CODE ANN. § 18-334 (1990); MONT. CODE ANN. § 50-16-1008 (1991); N.C. GEN. STAT. § 130A-148 (1990); OHIO REV. CODE ANN. 3701.246 (Baldwin 1991); OKLA. STAT. tit. 63, § 2151.1 (1990); R.I. GEN. LAWS § 23-1-38 (1987); W. VA. CODE § 16-3C-2 (1991); WIS. STAT. § 146.025 (1987).

19. See *supra* note 10 and accompanying text.

20. But see Rice, *supra* note 1, at 1070 (The Article notes a decrease in the performance of the artificial insemination procedure as a result of the enactment of the Ohio Paternity Act which *statutorily* opened the door to legal liability. This decrease, which became apparent only *after* the enactment of the statute, strengthens the argument that, absent legislation, sperm banks and physicians are not subject to legal liability for improper artificial insemination.).

21. See Rice, *supra* note 1, at 1070 n.168.

22. *Id.* at 1075 n.211. See also Lorio, *supra* note 1, at 1651 n.48 (confirming the frequent use of medical students, graduate students and professionals as sperm donors).

23. Lorio, *supra* note 1, at 1651 n.48.

genetic physicist or a panhandler. In either instance, the man may unknowingly be the carrier of a genetic disorder or sexual disease. If testing for such a condition is not performed, it is the recipient and potential human offspring who ultimately will suffer. Once the defect or disease is passed on by a donor to a donee or an innocent child, it is difficult to compensate for the pain, suffering, and embarrassment resulting from the injury.

Because negligence is not a sure-fire theory of recovery,<sup>24</sup> it is probable that in the past, physicians and sperm banks have pressured victims into accepting out-of-court settlements in order to protect their professional reputations and avoid the large judgments of sympathetic juries.<sup>25</sup> Although settlement does ensure at least minimal compensation for injured donees, it has done little to compel affirmative action by physicians and sperm banks to avoid similar claims in the future.<sup>26</sup>

The expeditious enactment of statutes regulating the artificial insemination process is highly unlikely.<sup>27</sup> Therefore, economic incentives must be used to exact the measures necessary to decrease the incidence of improper artificial insemination. By applying Article 2 of the U.C.C. to sperm transactions, the economic stakes for failure to pre-screen donors will invariably increase because the "strict liability" aspect of the claim will virtually guarantee recovery for injured donees. (However, an exception to the U.C.C. will be necessary where the medical disorder could not have been detected with available technology.<sup>28</sup>) Thus, the warranty of sperm would not only serve to compensate disappointed donees when problems arise, but it would also compel preventive measures to ensure that fewer donees are injured in the future.

## II. SPERM TRANSACTIONS AS "SALES" RATHER THAN "SERVICES"

Any valid claim for breach of warranty under the U.C.C. requires

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24. See *supra* notes 14-17 and accompanying text.

25. See, e.g., *Woman Settles*, *supra* note 2, at 13; *Mix-up is Settled*, *supra* note 2, at B4.

26. The following warning was published in the Journal of the American Medical Association in 1983:

Physicians have an ethical and legal responsibility to use caution and scientific screening techniques in the selection of donors of semen for artificial insemination. Relying on the verbal representations of donors as to their health, without any medical screening, is precarious. The donor should be checked for genetic defects and inheritable diseases.

Hirsch, *supra* note 17. Despite this warning, some sperm banks still do not engage in extensive donor screening, Interview with Evan Follas, *supra* note 12, and absent legislation or economic compulsion, it is likely that the safeguards afforded by donor screening will continue to be overlooked by these sperm banks in the future.

27. See *supra* note 13 and accompanying text.

28. See *infra* pp. 46-49.



an initial showing that the disputed transaction constitutes a "sale" pursuant to section 2-106(1) of the U.C.C. According to this section, "a 'sale' consists in the passing of title from the seller to the buyer for a price."<sup>29</sup> Even if these elements exist, a problem arises where the elements of a service also are present, because services are not governed by the U.C.C.<sup>30</sup> The determinative test in these situations is one of predominance.<sup>31</sup> If the transaction is predominately a service and the sale of goods is incidental, the U.C.C. will not apply; if a service is incidental to the sale of goods, the U.C.C. will apply.<sup>32</sup>

There are three possible types of sperm transactions involved in the artificial insemination process. First, there is the donor/sperm bank transaction in which the donor provides the sperm bank with a vile of semen and receives monetary consideration in return.<sup>33</sup> Although the donor performs a service in extracting the semen, it arguably is not the service of extraction for which the donor receives compensation.<sup>34</sup> Therefore, the service is incidental to the sale of the sperm, so the U.C.C. should apply.

The second type of sperm transaction involves the sperm bank and the attending physician. In this transaction, the sperm bank procures and stores the sperm, eventually passing it on to the donee's physician in exchange for monetary consideration.<sup>35</sup> No service elements are present here, so the U.C.C. clearly should apply.

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29. U.C.C. § 2-106(1) (1990).

30. 1 SAMUEL WILLISTON, WILLISTON ON SALES 94 (4th ed. 1973), noted in David E. Chapman, Note *Retailing Human Organs Under the Uniform Commercial Code*, 16 J. MARSHALL L. REV. 393, 408 (1983).

31. WILLISTON, *supra* note 30, at 103-04.

32. *Id.*

33. The normal rate of compensation for sperm donors is \$50 per donation, but payment does not begin until the donor has successfully completed the screening process. Donors generally are asked to donate for one to two years, at least once, but not more than twice a week. Interview with Evan Follas, *supra* note 12.

34. Theoretically, the money which the donor receives is compensation for the time, energy, and discomfort involved in the act of donating. OFFICE OF TECHNOLOGY ASSESSMENT, NEW DEVELOPMENTS IN BIOTECHNOLOGY: OWNERSHIP OF HUMAN TISSUE AND CELLS 56 (1987) [hereinafter NEW DEVELOPMENTS]. Under this rationale, it follows that a donor should be paid for every donation, regardless of whether the sperm subsequently is determined to be salable, since the time, effort, and discomfort involved in the process arguably is present regardless of the purposes and results of the donation. However, in those instances where the sperm bank engages in extensive donor screening, the donor often is required to provide several semen samples for testing purposes without compensation. Interview with Evan Follas, *supra* note 12. It is only after the donor has successfully completed the donor screening process that he is compensated for his efforts. *Id.* As one man put it, the sperm which is stored during the quarantine period (for AIDS testing) is "an investment." *Id.* When the sperm finally is released for sale, "return on the investment" is forthcoming. *Id.* Because, in practice, donors are not compensated unless their sperm is sold, it is clear that the service of extraction is incidental to the sale of the sperm, so the U.C.C. should apply.

35. Although some sperm banks will sell directly to recipients, it is more common

The third and final type of sperm transaction occurs when the physician inseminates the donee with the sperm in exchange for monetary payment. In this case, the payment covers both the sale of the sperm and the insemination procedure. This transaction includes service elements sufficient to warrant application of the predominance test.<sup>36</sup> Considering that the motivation of the donee is to receive the sperm rather than medical care or treatment, a strong argument can be made that the medical service provided by the physician is merely incidental to the sale of the sperm. This argument is bolstered by an increased incidence of self-insemination,<sup>37</sup> which illustrates that while a physician's services are not required for successful artificial insemination, the acquisition of sperm is absolutely imperative. Because the medical service is incidental to the sale in this transaction, the U.C.C. should apply to this transaction as well.

Unfortunately, the reasons for applying the U.C.C. to sperm transactions may be undermined by a line of cases and state statutes universally characterizing human tissue transactions as "services" rather than "sales."<sup>38</sup> This characterization is perhaps best explained as a well-intended legal fiction concocted by concerned judges and legislators as a pretextual vehicle for furthering various social policies. These policies include limiting legal liability in the medical community in cases of defective blood transfusions and organ transplants, preventing the sale of human organs for monetary gain, and protecting potential human life by eliminating the sale of human fetal tissue. Because the policy considerations underlying the "service" characterization arguably do not apply to sperm transactions, an injured donee might circumvent the fatal "service" characterization by distinguishing sperm transactions from other human tissue transactions so that U.C.C. may be applied. The grounds for distinguishing sperm from other human organs and tissues are discussed at length in the remainder of this section.

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for the sperm bank to sell to physicians and fertility clinics. Interview with Evan Follas, *supra* note 12. The physician or clinic will then resell the sperm to the recipient in conjunction with the insemination procedure. *Id.* The average cost for a vile of "good" sperm is between \$110 and \$120. *Id.*

36. See *supra* notes 29-32 and accompanying text.

37. Norman Frost, M.D., M.P.H., *Regulating Genetic Technology: Values in Conflict*, in *GENETICS AND THE LAW* III 15-17 (1985).

38. ALASKA STAT. § 45.02.316 (1991); ARK. CODE ANN. § 4-2-316 (Michie 1991); CONN. GEN. STAT. § 19a-280 (1990); DEL CODE ANN. tit. 6, § 2-316 (1990); FLA. STAT. ch. 672.316 (1990); GA. CODE ANN. § 11-12-316 (Michie 1991); IND. CODE § 16-8-7-2 (1990); MASS. ANN. LAWS ch. 106, § 2-316 (Law. Co-op. 1991); MICH. COMP. LAWS § 333.9121 (1991); MO. REV. STAT. § 431.069 (1990); NEV. REV. STAT. ANN. § 460.010 (Michie 1989); N.C. GEN. STAT. § 130A-410 (1990); N.D. CENT. CODE § 41-02-33 (1991); OR. REV. STAT. § 97.300 (1989); S.C. CODE ANN. § 44-43-10 (Law. Co-op. 1990); TENN. CODE ANN. § 47-2-316 (1991); TEX. BUS. & COM. CODE ANN. § 2.316 (West 1991); WYO. STAT. § 34.1-2-316 (1991). See also *NEW DEVELOPMENTS*, *supra* note 34, at 76.

### A. *Distinguishing Blood Transactions*

The landmark case establishing the sale/service distinction for human blood transactions is *Perlmutter v. Beth David Hospital*.<sup>39</sup> In *Perlmutter*, the plaintiff sought to recover for injuries resulting from a transfusion of "bad" blood, claiming that the hospital's furnishing of the bad blood was a breach of the implied warranties of merchantability and fitness under the New York Sales Act.<sup>40</sup> The New York Court of Appeals rejected this claim, holding that the plaintiff failed to state a cause of action for breach of implied warranty.<sup>41</sup> The court reasoned that the transaction between the hospital and the patient was predominately an agreement for the services of care and treatment.<sup>42</sup> Because the sale of blood was incidental to the services rendered, the Sales Act's warranties did not apply.

This rationale was criticized vehemently in Judge Froessel's dissenting opinion.<sup>43</sup> Judge Froessel argued that the plaintiff was not suing the hospital "for the service of injecting the blood into her bloodstream, but simply for the sale of 'bad' blood for a separate valuable consideration, over and above the consideration she was paying for room and board and the usual hospital facilities . . . and services."<sup>44</sup>

Although the *Perlmutter* decision technically rested on a valid application of warranty law, it is evident that the court's stringent sale/service distinction was predicated primarily on the fear of imposing strict legal liability on the medical community. This conclusion is supported by the majority opinion, which states in relevant part:

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 be discovered, would be held responsible, virtually as an insurer, if anything were to happen to the patient as a result of "bad" blood.<sup>45</sup>

Although strict liability for contaminated blood was a threat when *Perlmutter* was decided in 1954, technological advances have since made it possible to detect various disease-causing agents in human blood and tissue samples.<sup>46</sup> With modern safeguards in place, the strict liability concern

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39. 123 N.E.2d 792, *reh'g denied*, 125 N.E.2d 869 (1954).

40. *Id.* at 793.

41. *Id.* at 794.

42. *Id.*

43. *Id.* at 795-96.

44. *Id.* at 796.

45. *Id.* at 795.

46. See, e.g., Chapman, *supra* note 30, at 406 n.83 (discussing the discovery of a hepatitis vaccine which had the potential to drastically reduce the incidence of defective blood transfusions); see also AMERICAN ASSOCIATION OF BLOOD BANKS, TECHNICAL MANUAL (1990); JOHN A. KOEPKE, LABORATORY HEMATOLOGY (Churchill Livingstone 1984).

should have diminished greatly. However, even if strict liability is still a concern due to certain defects which are impossible to detect, one effective solution is an "undetectable defect" affirmative defense to strict products liability.<sup>47</sup> The "undetectable defect" exception would operate in a manner similar to section 402A of the Restatement (Second) of Torts:

[S]hould the product be one which cannot be made absolutely safe, but is nevertheless essential to human health, and if its use is prescribed by a physician who is made fully aware of the risk of harm, but who, in his sound judgment, believes that taking the risk is justified, then the fact that there is an undetectable defect in a certain percentage of the product will not result in a breach of warranty.<sup>48</sup>

This "undetectable defect" concept was recently expanded and codified in a 1987 Idaho statute which provides that "a paid blood, organ or tissue donor, or a blood, organ or tissue bank operated for profit" may be held liable under the implied warranties of merchantability, except that "the implied warranties of merchantability and fitness for a particular purpose shall not be applicable as to a defect that cannot be detected or removed by reasonable use of standard established scientific procedures or techniques."<sup>49</sup>

Having provided a safeguard for undetectable defects, it seems that there is no valid reason for insisting on a sale/service distinction to shield the medical community from legal liability.<sup>50</sup> Even so, it is still possible to create a public policy exception for physicians and hospitals acting to promote the public welfare by concluding that it is the blood bank (not the hospital or attending physician) which holds itself out as a merchant

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47. See Joseph E. Dugas, Jr., M.D., Note, *Implied Warranty in Sale of Blood*, 17 LOY. L. REV. 229, 231 (1970-71).

48. RESTATEMENT (SECOND) OF TORTS 402A cmt. (K), cited in Dugas, *supra* note 47, at 231-32.

49. IDAHO CODE § 39-3702 (emphasis added). See also IOWA CODE ANN. § 142A.8 (West 1989) ("[A]ny person or entity that renders such service warrants only under this section that due care has been exercised and that acceptable professional standards of care in providing such service according to the current state of the medical arts have been followed"); S.D. CODIFIED LAWS ANN. § 57A-2-315.1 (1991), which provides:

The implied warranties of merchantability and fitness shall not be applicable, so far as the transmission of certain infectious diseases . . . which diseases and reactions cannot be detected by standard testing are concerned, to a contract for the sale of human blood, blood components, or other human tissue or organs from a blood bank or reservoir of such other tissues or organs.

50. See, e.g., *Cunningham v. MacNeal Memorial Hosp.*, 266 N.E.2d 897 (Ill. 1970) (holding a hospital strictly liable for providing bad blood as part of the services for which it charged). This decision was later overruled by an Illinois statute which expanded the *Perlmutter* "service" characterization to tissues and organs.

having specialized knowledge and skill with respect to the sale of the blood.

Under the U.C.C., once it is determined that the disputed transaction is a "sale" within the terms of section 2-106(1), the seller of the goods must be deemed a merchant pursuant to section 2-104(1) in order for the implied warranty of merchantability to apply. In addition, the buyer must rely on the seller's knowledge and skill in order for the implied warranty of fitness to apply. U.C.C. section 2-104(1) provides:

'Merchant' means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill 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.<sup>51</sup>

Under this definition, the commercial blood bank is arguably the merchant which markets its knowledge and skill with respect to the blood, and the hospital and attending physician are merely consumers whose specialized knowledge and skill lie in the area of transfusion rather than blood testing.<sup>52</sup> Thus, the implied warranty of merchantability would not apply against the physician or hospital.

This "knowledge and skill" distinction, which clearly applies to commercial blood transactions, has even greater application to sperm bank/physician transactions in which the attending physician would most likely have specialized training in the performance of the artificial insemination procedure. However, it may not have the training and resources to screen the sperm donor for genetic defects and diseases. In fact, it is generally the sperm bank, not the physician, that selects and screens donors; the physician usually has little or no contact with the donor.<sup>53</sup> Once the

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51. U.C.C. § 2-104 (1990). The 'merchant' definition is supplemented by U.C.C. section 2-104 cmt. 2 which states in relevant part:

[I]n Section 2-314 on the warranty of merchantability, such warranty is implied only 'if the seller is a merchant with respect to goods of that kind.' Obviously this qualification restricts the implied warranty to a much smaller group than everyone who is engaged in business and requires a professional status as to particular kinds of goods.

52. In this respect, the detection of defects and diseases in the blood purchased from the blood bank can be said to lie outside the "mercantile capacity" of the hospital and physician, just as the U.C.C. suggests that buying fishing tackle for his own use lies outside the "mercantile capacity" of a lawyer or bank president. U.C.C. § 2-104 cmt. 2. This analogy presumably holds true regardless of whether the lawyer and bank president are world-class fisherman or mere dabblers in the sport.

53. Interview with Evan Follas, *supra* note 12.

physician has explained the sperm procurement procedure to the donee, the donee will not be able to "reasonably rely" on the physician's knowledge and skill with respect to the quality of the sperm, so the implied warranty of fitness will not apply against the physician.

Having established that the commercial sperm bank is a merchant with specialized knowledge and skill with respect to the sale of the sperm, the implied warranties of merchantability and fitness attach to the sale against the commercial sperm bank. Thus, an injured donee could invoke the operable form of U.C.C. section 2-318 as a third party beneficiary and recover for injuries by showing that "it [was] reasonable to expect that [she] may use, consume or be affected by the goods and [she was] injured by the breach of warranty."<sup>54</sup> The benefit of this section is that it eliminates the need for direct privity between the seller and the beneficiary of the goods.<sup>55</sup> Therefore, the injured donee would be able to bring a direct action for breach of warranty against the sperm bank whose warranty extends to her through the sale of the unmerchantable sperm to the hospital or attending physician.

Unfortunately, the *Perlmutter* court failed to recognize either the "undetectable defect" affirmative defense or the "acting as a merchant" rationale when it determined that there was no liability in the context of defective blood transactions. In effect, the court allowed the blood bank to shield itself from legal liability by using the hospital as a "middleman," so that the predominating services of the hospital and attending physician would bar any claim for breach of warranty. Thus, the sale/service distinction designed to protect the medical community actually operated to benefit the commercial blood bank, which presumably yielded higher profits from monies which otherwise would have been allocated to donor testing had the Sales Act warranties applied.

Addressing the inequities resulting from the shielding of commercial blood banks under the *Perlmutter* sale/service distinction is a long line of cases holding that a plaintiff *can* state a valid cause of action for

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54. The primary shortcoming of the third party beneficiary argument is that it might fail in those jurisdictions which have adopted U.C.C. section 2-318 Alternative A. This alternative limits recovery to "any natural person who is in the family or household of his buyer or who is a guest in his home," thereby making recovery by the injured donee more difficult. U.C.C. § 2-218 Alternative A (1990). However, U.C.C. section 2-318 Comment 3 provides:

The first alternative expressly includes as beneficiaries within its provisions the family, household and guests of the purchaser. Beyond this, *the section in this form is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.*

(emphasis added).

55. U.C.C. § 2-318 cmt. 2 (1990).

breach of implied warranty against a blood bank.<sup>56</sup> These cases are discussed further in Section III, where commercial blood banks are analogized to commercial sperm banks in order to lend precedential support to the sperm warranty argument.

Despite the recognition of implied warranty recovery by those courts rejecting *Perlmutter*, other courts are compelled to follow state statutes which codify the outdated *Perlmutter* sale/service doctrine.<sup>57</sup> In these states, the only way for an injured donee to circumvent the *Perlmutter* doctrine is for the court to reject the statute as impermissibly broad or vague or to explicitly distinguish sperm transactions from other human tissue transactions so that the statutes will not be interpreted to preclude the warranty of sperm.

In *Gottsdanker v. Cutter Laboratories*,<sup>58</sup> a plaintiff successfully circumvented such a statute by arguing that the contaminated poliomyelitis vaccine which caused his injury was intended for human consumption just as food is intended for human consumption. The plaintiff insisted that if a consumer of contaminated food could recover from the manufacturer under warranty law, then the same rule should apply to the manufacturer of the polio vaccine.<sup>59</sup> Notwithstanding the fact that the vaccine was developed from a culture which *included human blood*, the court in *Gottsdanker* accepted the plaintiff's argument, disregarding the literal wording of the applicable California statute, which provided in relevant part:

[T]he 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 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.<sup>60</sup>

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56. *White v. Sarasota County Pub. Hosp. Bd.*, 206 So. 2d 19 (Fla. Dist. Ct. App. 1968), *cert. denied*, 211 So. 2d 215 (Fla. 1968); *Russell v. Community Blood Bank*, 196 So. 2d 115 (Fla. 1967); *Hoder v. Sayet*, 196 So. 2d 205 (Fla. Dist. Ct. App. 1967); *Hoffman v. Misericordia Hosp.*, 267 A.2d 867 (Penn. 1970).

57. See statutes cited *supra* note 38.

58. 6 Cal. Rptr. 320 (Cal. Ct. App. 1960).

59. This human consumption analogy has also been applied to blood. See, e.g., *Russell v. Community Blood Bank, Inc.*, 196 So. 2d 115, 118 (Fla. 1967) (holding that blood is a commodity "intended for human consumption" and that the supplier of the blood is liable without fault for injuries caused by any defects in the blood).

60. *Gottsdanker*, 6 Cal. Rptr. at 324 (quoting CAL. HEALTH & SAFETY CODE § 1623 (West 1955) (emphasis added)).

Although the *Gottsdanker* court was aware that the applicable statute was a codification of the *Perlmutter* doctrine, it nevertheless rejected a literal interpretation of the statute, finding that it "strain[ed] construction unreasonably."<sup>61</sup>

In sperm transactions, an analogy can be drawn between defective sperm and the defective polio vaccine in that both products are intended for "human consumption." Just as the plaintiff in *Gottsdanker* convinced the court that codification of the *Perlmutter* doctrine "strained construction unreasonably" thereby leading the court to reject the statute in favor of the injured consumer, so too could the injured donee in a defective sperm case convince a court to disregard the literal wording of a warranty-limiting statute extending the *Perlmutter* doctrine to organs and other human tissues.

In arguing that the warranty-limiting statute does not apply to sperm, the injured donee can supplement his "human consumption" argument by emphasizing specific flaws or loopholes in the structure and wording of the statute. For example, South Carolina's warranty-limiting statute provides:

The implied warranties of merchantability and fitness shall not be applicable to a contract for the sale, procurement, processing, distribution, or use of *human tissues such as corneas, bones or organs*, whole blood, plasma, blood products or blood derivatives. *Such human tissues*, whole blood, plasma, blood products or blood derivatives shall not be considered commodities subject to sale or barter and the transplanting, injection, transfusion or other transfer of *such substances* into the human body shall be considered a medical service.<sup>62</sup>

By focusing on the legislature's failure to list sperm as one of the specific tissues within the scope of the statute, the injured donee can argue that the omission was intentional, thereby indicating that the statute does not apply to sperm transactions.

If the "human consumption" analogy fails and the court rejects the "intentional omission" argument, the injured donee has an even stronger argument that the *Perlmutter* doctrine does not apply to sperm transactions because the "life-or-death" need for medical aid which exists with regard to blood transfusions is not present in the context of artificial insemination. Since no life-threatening condition exists, the public interest in the medical service is not so great as to outweigh the need for donor screening. Thus, there is no need for the fictional characterization of the sperm transaction

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61. *Id.* at 325.

62. S.C. CODE ANN. § 44-43-10 (Law. Co-op. 1976) (emphasis added).



as a service rather than a sale, and the implied warranties of merchantability and fitness should apply. If the court accepts this argument, the plaintiff is likely to prevail if he is able to convince the court that sperm transactions also can be distinguished from other organ and tissue transactions governed by the warranty-limiting statute.

### B. *Distinguishing Organ Transactions*

The increased rate of successful organ transplantation over the past two decades has prompted an ever-increasing demand for human organs.<sup>63</sup> One of the more controversial legal issues today is whether human organs can and should be bought and sold on the open market to meet this demand.<sup>64</sup> With the passage of the National Organ Transplant Act (Transplant Act)<sup>65</sup> in 1984, Congress resolved this issue by prohibiting the sale of human organs for subsequent transplantation.<sup>66</sup> The effect of this Act was to deny basic property rights in the human body.<sup>67</sup>

Despite the severe restrictions imposed by the Transplant Act, the Act is not all-inclusive or overly broad. Significantly, the Transplant Act provides that "[t]he term 'human organ' is not intended to include replenishable tissues such as blood or sperm."<sup>68</sup> The theory behind this distinction is twofold. First, bodily tissues and fluids, including blood and sperm, have historically been viewed as commodities acceptable for sale.<sup>69</sup> Second, because of the replenishable nature of blood and sperm, there is no serious threat to human life involved in the donation process, thus making it much safer and more acceptable than the donation of vital human organs.<sup>70</sup>

Although sperm can be distinguished adequately from other human organs and tissues on the basis of replenishability alone, there are several policy considerations underlying the Transplant Act which are indispensable in determining the efficacy of human organ sales which do not apply to

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63. Chapman, *supra* note 30, at 395-95.

64. See generally Chapman, *supra* note 30 (advocating the sale and warranty of human organs as merchantable products); Note, *The Sale of Human Body Parts*, 72 MICH. L. REV. 1182 (1974) (emphasizing the shortcomings of the Uniform Anatomical Gift Act and the failure of altruistic donations to meet the high demand for human organs).

65. National Organ Transplant Act, Pub. L. No. 98-507, 98 Stat. 2342 (1984) (codified as amended at 42 U.S.C. §§ 273-74 (1988 & Supp. II 1990)).

66. Jennifer Lavoie, Note, *Ownership of Human Tissue: Life After Moore v. Regents of the Univ. of Cal.*, 75 VA. L. REV. 1363, 1372 (1989).

67. *Id.*

68. *Id.*

69. Roy Hardiman, Comment, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 UCLA L. REV. 207, 221 n.68 (1986).

70. Lavoie, *supra* note 66, at 1372 n.72.

the sale of sperm. These distinctions support the argument that state statutes precluding the warranty of human organs should not be construed to prohibit the warranty of sperm.<sup>71</sup> Among the factors which distinguish sperm donation from organ donation are: (1) the adverse effects which a market system would have on organ donation, (2) the "moral aversion" associated with the sale of human body parts, and (3) the possibility of improper pressures and motivations in the purchase and sale of human organs.<sup>72</sup>

With regard to the potential adverse market effects involved in commercialized human organ donation, at least three major concerns are present: (1) a decrease in charitable donations, (2) an increase in the donation of defective organs, and (3) competitive bidding between potential donees.<sup>73</sup> Since sperm donation, for the most part, has been successfully commercialized, these concerns largely have been eliminated.

First, unlike blood and organ donation, sperm donation traditionally has been a compensated activity.<sup>74</sup> Therefore, charitable sperm donations presumably were not sacrificed when commercial sperm banks went into business. Second, with regard to the donation of defective body parts, sperm is easily distinguished from human organs in that the sperm donation process is much simpler, less intrusive, and less expensive, making the cumulative economic costs of defective sperm donation quite low in comparison to the potential costs of defective organ donation.<sup>75</sup> Moreover, the life-threatening need which often accompanies organ transplantation is not present in the artificial insemination process.<sup>76</sup> There is more time for extensive screening to detect genetic defects and diseases in sperm donors, thus reducing the use of defective donations. In this respect, the potential social costs of defective sperm donation are much lower than the potential social costs of defective organ donation.<sup>77</sup> Finally, the "com-

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71. See statutes cited *supra* note 38.

72. Hardiman, *supra* note 69, at 236.

73. *Id.* at 237.

74. According to American Fertility Society Guidelines, "Payment to donors . . . should not be such that the monetary incentive is the primary factor in donating sperm." However, in reality, money—not altruism—is the ultimate motivation for sperm donors. Interview with Evan Follas, *supra* note 12.

75. While extensive genetic screening of sperm donors costs between \$800 and \$900 and the general rate of compensation for sperm donors is \$50 per donation, there are no additional costs involved in the procurement of sperm. Interview with Evan Follas, *supra* note 12. The procurement of organs, however, necessarily involves enormous medical fees because surgical removal of the donated organ is required. Thus, the combined costs of donor screening, organ removal, and donor compensation inherent in the organ donation process would be astronomical in comparison to the relatively low costs of sperm donation.

76. See *supra* text accompanying note 70.

77. Because the possibility of a defective organ donation and its concomitant social

petitive bidding" argument for precluding the sale of human organs in order to prevent unfair market competition has absolutely no application to the sale of sperm. Because "preferred" donors can, and often do, donate their sperm frequently, competitive bidding due to limited resources is not a legitimate concern for sperm recipients.<sup>78</sup>

The second major concern associated with the sale of human organs is moral aversion. One author has speculated that individuals often are reluctant to place a price on human body parts and consequently are offended by the concept of commercialized human organ sales.<sup>79</sup> Notwithstanding the merits of this concern in the context of human organ donation, sperm donations bring an average price of \$50 in the sperm banking industry. Moreover, while the sale of sperm arguably is less offensive than the sale of organs because semen is nonvital and naturally excreted, distinguishing sperm from human organs on the basis of the nature and practice of sperm donation is unnecessary since the barter and sale of more vital human body parts is actually commonplace in the medical research community.<sup>80</sup> In fact, a 1986 study reveals the existence of approximately 350 biotechnology companies nationwide working to develop multibillion dollar diagnostic and therapeutic products, *most of which are derived from human tissues*.<sup>81</sup> However, if current practice is followed, everyone involved in the biotechnology industry will profit from the sale of human body parts, except for the donors.<sup>82</sup> With a multibillion

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costs was<sup>7</sup> one of the reasons for prohibiting the sale of human organs, it follows that extensive donor screening should be compelled in the area of artificial insemination in order to prevent the donation of defective sperm, thereby reducing the number of genetically defective or diseased offspring who will be born as a result of the artificial insemination process.

78. See *supra* note 36. In fact, sperm donors who donate regularly can earn between \$2600 and \$5200 per year, Interview with Evan Follas, *supra* note 12, and there is so much repeat donation that incest and a subsequent weakening of the gene pool are issues addressed by many critics of the artificial insemination process. See Lorio, *supra* note 1, at 1652 n.57 (stating that physicians at Tulane limit the use of a single donor to one to three pregnancies); NEW GUIDELINES FOR THE USE OF SEMEN DONOR INSEMINATION: 1990, Am. Fertility Soc'y Guide, Vol. 53, No. 3 (Supp. 1990) (stating that "the danger of an increase in consanguinity over that which occurs in the general population is essentially nil if the limit is set at 10 pregnancies per donor").

79. Hardiman, *supra* note 69, at 240.

80. Interview with Evan Follas, *supra* note 12. See also note 74.

81. Lavoie, *supra* note 65, at 1364. See also Hardiman, *supra* note 69, at 221 (discussing a woman who earned "\$200 a week, together with \$25,000 cash, 1000 shares of stock, and the use of a car" in exchange for regular donation of her blood which contained a rare antibody and a graduate student who received \$150 in exchange for 10 grams of nonregenerative thigh muscle).

82. Hardiman, *supra* note 69, at 228. See also *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 494, 495 (Cal. 1990) (allowing a physician to profit at his patient's expense by holding that extension of conversion law to a patient's removed cells would "hinder research by restricting access to necessary raw materials").

dollar industry already in place, it is obvious that moral aversion has not been sufficient to preclude the exploitation of human body parts for monetary gain. Therefore, it is anomalous to argue that moral aversion is a valid reason for proscribing just compensation to the donors.

The third major reason for prohibiting the sale of human organs for subsequent transplantation is the possibility of improper pressures and motivations in the sale of human body parts. This objection is premised on the belief "that the poor will be encouraged to donate organs for the rich and that risks of death for pecuniary profit are unacceptable."<sup>83</sup> Though the merits of this argument could be debated extensively,<sup>84</sup> it is sufficient for the purposes of distinguishing sperm sales from organ sales to simply note that there is no risk of death or injury involved in the act of sperm donation and that compensated sperm donation is, in fact, an accepted practice.

In demonstrating the differences between sperm sales and organ sales, a great deal of emphasis has been placed on the commercialized sale of sperm as it exists in practice today. However, it is only when this practice is recognized in theory by replacing the outdated "service" characterization with a more accurate "vendor/buyer" sales analysis that the warranty of sperm will be possible.<sup>85</sup> Having distinguished sperm transactions from human blood and organ transactions, the final step in circumventing the outdated *Perlmutter* "service" characterization is to distinguish sperm from other human tissue transactions by showing that the policy reasons for prohibiting the sale and warranty of human tissues are not applicable to the sale and warranty of sperm.

### C. Distinguishing Other Tissue Transactions

1. *Tissue Transactions Which Threaten Human Life.*—In April of 1988, the Reagan Administration enjoined the United States National Institute of Health from performing experiments involving human fetal tissue until the government could carefully study the legal, ethical, and medical consequences of fetal tissue donation and use.<sup>86</sup> The ban on the use of fetal tissue was based on the notion that various federal and state

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83. Hardiman, *supra* note 69, at 239.

84. See, e.g., Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 1 (1989); Thomas H. Murray, *On the Human Body as Property: The Meaning of Embodiment, Markets, and the Meaning of Strangers*, 20 U. MICH. J.L. REF. 1055 (1987); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987); Theodore Silver, *The Case for a Post-Mortem Organ Draft and Proposed Model Organ Draft Act*, 68 B.U. L. REV. 681 (1988).

85. See *supra* pp. 14-18.

86. Ania M. Frankowska, *Fetal Tissue Transplants: A Proposal to Amend the Uniform Anatomical Gift Act*, 1989 U. ILL. L. REV. 1095-96 (1989).

laws regulating the use of aborted fetuses provided "improper incentives that may encourage a woman to get pregnant for the sole purpose of aborting the fetus . . . or to abort a fetus she otherwise would carry to term."<sup>87</sup> Subsequent investigations of the "fetal tissue market" yielded the following results: (1) experts prefer electively aborted fetuses to spontaneously aborted fetuses because the tissue is generally healthier; (2) dangerous hysterectomies are preferred to safer forms of abortion such as dilation and evacuation, because the type of abortion procedure employed greatly affects the condition of the fetal tissue; and (3) carefully timed abortions are preferable to natural abortions, because there is some evidence that the use of fetal tissue to cure various diseases is directly linked to the nature of the fetus at specific stages of development.<sup>88</sup>

On the basis of these findings, President Reagan sought to enforce the government's interest in protecting the lives of the mother and fetus by signing an amendment to the National Organ Transplant Act prohibiting the sale of human fetal tissue and organs for subsequent transplantation and prohibiting the transfer of fetal tissue and organs in interstate commerce.<sup>89</sup> President Reagan's amendment to the Transplant Act was later supplemented by the Bush Administration, which imposed an indefinite extension on the ban on federally funded research involving fetal tissue.<sup>90</sup>

These federal limitations on the sale of fetal tissue legitimize, in part, those state statutes which explicitly refuse to recognize the sale and warranty of "human tissue."<sup>91</sup> However, for the purpose of distinguishing sperm transactions from fetal tissue transactions, it is essential to note that the federal government did not find it necessary to restrict the sale of replenishable tissues such as blood and sperm.<sup>92</sup> This explicit omission was most likely due to the fact that a state's interest in protecting human life does not arise in the context of sperm transactions. Therefore, unless

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87. *Id.* at 1096.

88. *Id.* at 1098.

89. *Id.* at 1104. In its original state, the term "organ" as defined by the National Organ Transplant Act did not include tissue. *Id.*

90. *Id.* at 1096. The actions taken by the Bush and Reagan Administrations were sharply criticized by prominent physicians and researchers, *id.* at 1096 n.17, because human fetal transplantation has proven to be effective in treating diabetes and immunodeficiency diseases and, with more research, could prove helpful in treating other diseases such as Parkinson's disease, Alzheimer's disease, Huntington's disease, hemophilia, strokes, and some forms of cancer. *Id.* at 1095. In voicing his opposition to the ban on fetal tissue, one physician was quoted as saying, "This ban interferes with research, with new knowledge that is going to save lives of fetuses, babies, and adults as well." *Id.* at 1096 n.17. Despite the need for medical research involving human fetal tissue, the government has not yet lifted its ban on the use of fetal tissue in federally funded research projects.

91. See statutes cited *supra* note 38.

92. See *supra* note 89 and accompanying text.

there is an additional legitimate governmental interest which would be furthered by prohibiting the sale and warranty of sperm, the term "human tissue" as it appears in restrictive state statutes should not be interpreted as including sperm.

2. *Tissue Transactions Which Hinder Medical Research*.—Another governmental interest served by precluding the sale of human tissue is the pressing need for medical research involving tissue which historically has been donated or discarded rather than sold. The need for medical research recently was addressed in *Moore v. Regents of the University of California*,<sup>93</sup> a 1990 California case challenging the non-consensual use of a patient's surgically removed tissue for commercial research purposes on the theory of conversion.

In *Moore*, the trial court sustained the defendants' demurrers to a claim for conversion,<sup>94</sup> but the California Court of Appeal reversed, holding that the cause of action for conversion was valid because an individual has a tangible property right in his tissue.<sup>95</sup> The appellate court decision prompted a great deal of controversy in the medical research community. Consequently, the California Supreme Court reversed the decision despite "the seeming injustice in a result that denies a plaintiff a claim for conversion of his body tissue, yet permits defendants to retain the fruits thereof."<sup>96</sup> In holding that the patient did not retain an ownership interest in his cells following their removal, the court stated:

Research on human cells plays a critical role in medical research. This is so because researchers are increasingly able to isolate naturally occurring, medically useful biological substances and to produce useful quantities of such substances through genetic engineering . . . *The extension of conversion law into this area would hinder research by restricting access to the necessary raw materials.*<sup>97</sup>

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93. 793 P.2d 479, 495 (Cal. 1990) [hereinafter *Moore II*]. In this case, a patient sued his physician and two biotechnology firms for using his tissue to develop a profitable patented cell line without his informed consent. After the patient's spleen had been removed, he made approximately 12 follow-up visits from his home in Seattle to his doctor's office in Los Angeles for additional blood work. Although the patient believed that these visits were treatment-related, the actual purpose of the visits was to enhance the physician's research in the development of a cell line derived from the patient's tissue.

94. *Moore v. Regents of the Univ. of Cal.*, 249 Cal. Rptr. 494, 502 (Cal. Ct. App. 1988) [hereinafter *Moore I*].

95. *Id.* at 503-04. In its holding, the appellate court did not decide whether the transfer of human tissue should be gift-based or market-based but instead left that decision to future controversies on a case-by-case basis. *Id.* at 504.

96. *Moore II*, 793 P.2d at 498.

97. *Id.* at 494 (emphasis added).

On the basis of this holding, it is clear that the pressing need for medical research was a key factor in the California Supreme Court's determination that the sale of surgically removed human tissue is not legally permissible. This judicial decision also legitimates, in part, those state statutes which refuse to recognize the sale and warranty of human tissue.<sup>98</sup> However, it is essential to note that the court in *Moore* explicitly stated, "While we do not purport to hold that excised cells can never be property for any purpose whatsoever . . . we conclude that the use of excised human cells in medical research does not amount to a conversion."<sup>99</sup> Thus, it can be inferred that while the sale of human tissue for research is not legally permitted, the sale of human tissue for other purposes may be permissible. Because the sale of sperm does not hinder medical research and does not obstruct enforcement of any other legitimate governmental interest, it appears that the sale of sperm would fall into the *Moore* court's category of legally permissible tissue sales.

*D. Summary: Replacing the Outdated "Service" Characterization with a More Accurate "Vendor/Buyer" Sales Analysis*

The foregoing section of this Note illustrated that the universal characterization of human tissue transactions as "services" rather than "sales" is far from accurate. Although it may be socially desirable to keep this legal fiction intact in those instances where an underlying governmental interest would be furthered by precluding the sale and warranty of certain human organs and tissues, it is neither logical nor prudent to persist in characterizing human sperm transactions as "services" when sperm is legally bought and sold on a daily basis without issue. As one Florida court stated, it is a "distortion to take what is at least arguably, a sale, twist it into the shape of a service, and then employ this transformed material in erecting the framework of a major policy decision."<sup>100</sup>

The legal acknowledgment that sperm transactions are, in fact, "sales" would ultimately prove to be in society's best interest, because the warranty of sperm under the U.C.C.'s vendor/buyer sales analysis would serve as a means of regulating the practice of artificial insemination where legislation thus far has failed. To illustrate how the U.C.C. would apply to sperm sales and to lend precedential support to the sperm warranty argument, the following section analogizes commercial sperm banks to commercial blood banks which previously have been held liable for breach of implied warranties.

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98. See statutes cited *supra* note 38.

99. *Moore II*, 793 P.2d at 493 (emphasis added).

100. *Russell v. Community Blood Bank, Inc.*, 185 So. 2d 749, 752 (Fla. Dist. Ct. App. 1966) *modified*, 196 So. 2d 115 (Fla. 1967).

### III. LENDING SUPPORT TO THE SPERM WARRANTY ARGUMENT

#### A. *The Commercial Blood Bank Precedent*

In response to the inequitable shield of immunity which resulted from the *Perlmutter* characterization of blood transactions as "services" rather than "sales," several cases have held that the transfer of blood from a commercial blood bank to a hospital or patient for consideration is actually a "sale" rather than a "service."<sup>101</sup> This more accurate characterization consequently allowed an injured plaintiff to state a valid cause of action against a commercial blood bank for breach of implied warranty.

One of the landmark cases in this area is *Russell v. Community Blood Bank, Inc.*<sup>102</sup> In *Russell*, the plaintiff contracted serum hepatitis following a blood transfusion supplied by a commercial blood bank and later sued the blood bank for breach of the implied warranties of fitness and merchantability. The trial court dismissed the complaint because other jurisdictions had characterized blood transactions as "services" rather than "sales," and absent a sale, implied warranties do not apply.<sup>103</sup> In reversing this decision, the District Court of Appeal of Florida, Second District, held that a plaintiff can state a cause of action against a blood bank for breach of implied warranty.<sup>104</sup> However, the district court limited recovery to those injuries caused by defects which could have been detected or removed with available technology.<sup>105</sup> The Supreme Court of Florida affirmed the decision of the district court in part, but held that the court's ruling on the detection issue was premature.<sup>106</sup> In arriving at its decision to affirm, the Supreme Court of Florida recognized the need to limit legal liability in the medical profession, but the Court also found that there is "a distinction between a suit against a blood bank as opposed to a hospital, despite existing authority to the contrary."<sup>107</sup>

In a concurring opinion, Justice Roberts found:

A transaction whereby a blood bank, which is engaged in the business of collecting and distributing blood, transfers title to the commodity to a patient for a consideration is unquestionably a 'sale,' whether tested by the law in effect at the time of the transaction . . . or by the new Uniform Commercial Code.<sup>108</sup>

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101. See *supra* note 56 and accompanying text.

102. 185 So. 2d 749 (Fla. Dist. Ct. App. 1966), *modified*, 196 So. 2d 115 (Fla. 1967).

103. 185 So. 2d at 750.

104. *Id.* at 755.

105. *Id.*

106. 196 So. 2d at 118.

107. 185 So. 2d at 752.

108. 196 So. 2d at 118 (Roberts, J., concurring).



The concurring opinion in *Russell* was later echoed by the majority opinion in *Carter v. Inter-Faith Hospital of Queens*,<sup>109</sup> a 1969 New York case which held that a commercial blood transaction is a "sale" pursuant to section 2-314 of the U.C.C. and that a commercial blood bank clearly is a "merchant" with respect to the sale of the blood, so the implied warranties of merchantability and fitness attach to the sale.<sup>110</sup>

Unlike the courts in *Russell* and *Carter*, some courts were reluctant to apply the U.C.C. to commercial blood transactions because technology had not advanced to the point that the hepatitis strain could be completely avoided.<sup>111</sup> As one author put it:

Up to the time of the *Carter* decision, the courts . . . had to balance the social interest for the safety of the individual with the interests of the hospital and blood bank (in light of the absence of an adequate test to determine the presence of hepatitis in the blood) and the interests of the general public in assuring the ready availability of blood for medical treatments.<sup>112</sup>

Although the scales previously had tipped in favor of the hospital and commercial blood bank, the author noted a series of changes which took place around the time of the *Carter* decision in 1969 that would greatly affect the liability of commercial blood banks in the future.<sup>113</sup> Among the factors which the author predicted would be considered by courts after *Carter* were: (1) the belief that the party best able to bear the risk of loss should do so, (2) the fact that liability insurance to protect hospitals and commercial blood banks was increasingly available, and (3) the fact that a new test to determine the presence of the hepatitis virus had been formulated.<sup>114</sup>

In analyzing the predictions of this author, it is interesting to note the suggestion that the availability of a test to determine the presence of the hepatitis virus would have a profound impact on future decisions. Both before and after the *Carter* decision, a recurrent issue in the long line of commercial blood bank cases has been the appropriateness and desirability of applying strict liability under the U.C.C. to commercial blood transactions absent medical technology to detect defects in blood samples. For instance, the district court in *Russell* found it necessary to offset the lack of medical technology by limiting recovery under implied

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109. 304 N.Y.S.2d 97, 100-01 (1969).

110. *Id.* at 100-01.

111. *See, e.g.*, *Magrine v. Krasnica*, 227 A.2d 539, 545 (N.J. Super. 1967).

112. Note, *Warranties — Blood Transfusions — Extension of Implied Warranties*, 38 *FORDHAM L. REV.* 830, 835 (1970).

113. *Id.*

114. *Id.*

warranty to those injuries "caused by failure to detect or remove a deleterious substance capable of detection or removal."<sup>115</sup> Upon reviewing this decision, however, the Supreme Court of Florida held that the district court had acted inappropriately in limiting recovery under implied warranty law because the new rule contradicted the historical basis of strict liability and could not be reconciled with those Florida cases which previously had held that a seller's knowledge of a defect is irrelevant to his liability for breach of implied warranty.<sup>116</sup>

Despite the historical view of strict liability espoused by the Florida Supreme Court, other courts have agreed with the Florida appellate court insofar as it recognized the need to modify the traditional strict liability rule.<sup>117</sup> In fact, one court went so far as to indicate that while the *Perlmutter* "service" characterization may not be accurate, it is possible to rationalize the doctrine solely on the ground that it precludes strict liability in those instances where it is impossible to detect the hepatitis strain in blood transfusions.<sup>118</sup>

Nonetheless, given the modern advances in medical technology, it is difficult to understand why some states continue to recognize the *Perlmutter* "service" characterization with respect to commercial blood bank transactions. As one physician stated after *Perlmutter* was rejected in *Russell* and *Carter*, "It is hoped now that the shield of immunity once provided by *Perlmutter* has been removed, that blood banks will exercise more caution in the selection of donors and processing of blood to insure a higher degree of safety to the patient receiving the blood as a transfusion."<sup>119</sup> Because application of the U.C.C. almost certainly would compel commercial blood banks to exercise greater care in testing blood products to ensure consumer safety, it seems regressive that several states have statutorily reinstated the "shield of immunity" provided by the *Perlmutter* doctrine.<sup>120</sup>

Notwithstanding the merits of this argument, given the immediate life-saving need for blood and its quick deterioration rate, there is some validity for applying *Perlmutter* as a shield when there is not sufficient time to test the blood for defects. Also, because it is essential to account for the interests of the public in guaranteeing the availability of blood for medical treatment, it may be too great a risk to hold commercial blood banks strictly liable for defects when there is a possibility that such

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115. *Russell v. Community Blood Bank, Inc.*, 185 So. 2d 749, 755 (Fla. Dist. Ct. App. 1966), *modified*, 196 So. 2d 115 (Fla. 1967).

116. 196 So. 2d at 119.

117. *See, e.g.*, *Magrine v. Krasnica*, 227 A.2d 539, 545 (N.J. Super. 1967).

118. *Id.*

119. *Dugas, supra* note 47, at 237.

120. *See supra* pp. 18-24.

liability would drive blood banks out of business and leave the public without the blood which they desperately need.<sup>121</sup>

However, as Section III of this Note makes clear,<sup>122</sup> sperm transactions can be distinguished from other human organ and tissue transactions on the grounds that the sale of sperm is not detrimental to any underlying governmental interest, such as assuring that adequate blood supplies are available to the public, or protecting potential organ and tissue donors from any bodily harm which might result from the sale of their body parts. Moreover, eliminating the fictional *Perlmutter* doctrine with regard to commercial sperm transactions would be in society's best interest because the warranty of sperm under the U.C.C. would serve as a means of regulating the practice of artificial insemination where legislation has failed.

Having demonstrated how warranty law operates in the context of commercial blood transactions, it is necessary to illustrate how it would operate in the context of sperm transactions.

### *B. The Application of Warranty Law to the Sale of Sperm*

Despite significant advances in medical technology over the past quarter-century, the detection and prevention of genetic defects and diseases is not one hundred percent. Therefore, the debate over the desirability of applying strict liability to commercial blood transactions will inevitably arise in the context of commercial sperm transactions as well. Although there are a variety of tests capable of detecting many diseases and genetic defects in sperm donors, a child could still be born with a defect or disease despite every possible precaution on the part of the sperm bank and physician. Thus, if strict liability in its traditional form were applied to commercial sperm transactions, the result would be a virtual "warranty on human life." Because of the moral and ethical opposition which necessarily would follow such a proposition, modification of strict liability is in order.

Modification of implied warranty law previously had been suggested in the closely related area of commercial blood transactions, but the proposed modification ultimately was rejected because it contravened the historical basis of liability without regard to fault.<sup>123</sup> While the urgent need for the testing of blood products to ensure consumer safety has since been answered statutorily, there is still an immediate need for regulation in the area of artificial insemination which has not been met

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121. *But see* statutes cited *supra* note 18 (mandating AIDS testing for blood and semen, with civil and criminal penalties for noncompliance).

122. *See supra* pp. 18-39.

123. *See supra* notes 115-16 and accompanying text.

sufficiently through legislation,<sup>124</sup> but which could be met through a modified application of implied warranty law. Despite the need for stability and predictability in the law, it seems counterproductive and inherently unjust to prohibit such a vital change on historical grounds alone. While it may be desirable to insist on liability without regard to fault in most sales transactions, the sale of sperm presents a unique problem in that its application, without modification, necessarily implies the possibility of commercially guaranteeing the quality of human life. In order to circumvent such a problem, public policy dictates the need for a carefully defined exception to strict liability in the context of sperm sales.

The most logical response to the need for modification is the ratification of the approach of the Florida appellate court in *Russell*. The *Russell* court suggested that recovery under implied warranty should be limited only to those injuries "caused by failure to detect or remove a deleterious substance capable of detection or removal."<sup>125</sup> The imposition of such a standard presumably would not be detrimental to those sperm banks which thoroughly screen their donors before using their sperm, but it inevitably would compel those sperm banks which do not currently test for defects and diseases to cautiously screen their prospective donors in the future in order to avoid liability under the implied warranties of fitness and merchantability.

A 1987 Idaho statute also supports the sperm warranty argument and illustrates how the strict liability exception might be applied in practice.<sup>126</sup> The Idaho statute provides that "a paid blood, organ or tissue donor, or a blood, organ or tissue bank operated for profit" may be held liable under the implied warranties of merchantability, except that "*the implied warranties of merchantability and fitness for a particular purpose shall not be applicable as to a defect that cannot be detected or removed by reasonable use of standard established scientific procedures or techniques.*"<sup>127</sup>

The enactment of similar statutes by those states which currently preclude the sale and warranty of sperm certainly would compensate for the current lack of regulation in the area of artificial insemination. Unfortunately, few states have followed Idaho's lead in applying the implied warranties of merchantability and fitness to sperm transactions.<sup>128</sup> Because the enactment of such statutes would not involve the development of an

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124. See *supra* note 13.

125. *Russell v. Community Blood Bank, Inc.*, 185 So. 2d 749, 755 (Fla. Dist. Ct. App. 1966), *modified*, 196 So. 2d 115 (Fla. 1967).

126. IDAHO CODE § 39-3702 (1987).

127. *Id.* (emphasis added).

128. However, two states which have enacted statutes similar to Idaho's are Iowa and South Dakota. See statutes cited *supra* note 49.

entire body of comprehensive legislation dealing with controversial methods of new reproductive technology, it is likely that legislators will be more apt to ratify a broad implied warranty provision similar to the one recently adopted in Idaho long before they are able to agree on a specific body of regulations dealing exclusively with the artificial insemination process.<sup>129</sup>

Moreover, even if legislation governing the artificial insemination process is enacted in the near future, application of warranty law remains a crucial regulatory device whereby severe economic sanctions may be levied against sperm banks and physicians for failure to comply with specific state regulations where their noncompliance causes the injury of a donee or a donee's child. In this sense, the warranty of sperm will prevent those transgressions of the law which otherwise would be economically efficient.<sup>130</sup>

#### IV. CONCLUSION

As medical technology advances, more and more infertile couples are able to procreate using various methods of artificial reproduction. Unfortunately, in the area of artificial insemination, practitioners in most states are allowed to forego precautionary measures which would significantly reduce the risk of donor mix-ups, diseases, and birth defects because uniform professional standards regulating the industry have not yet been adopted. Given the controversy surrounding the propriety of artificial reproduction, an expeditious legislative solution to this problem is not likely to be forthcoming. Therefore, an alternate mechanism is needed to increase the accountability of physicians and sperm banks under the current system.

Applying Article 2 of the Uniform Commercial Code to sperm transactions would meet this need by providing economic disincentives sufficient

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129. See *supra* note 13.

130. The following is a brief outline of how the U.C.C. would operate in the context of commercial sperm transactions.

*Step 1:* Establish that the sperm transaction is a "sale" pursuant to U.C.C. section 2-106(a). See *supra* pp. 14-18.

*Step 2:* Establish that the sperm bank is a "merchant" with respect to the sale of the sperm pursuant to U.C.C. section 2-104(1). See *supra* pp. 21-23.

*Step 3:* (A) If the injury is the result of a donor mix-up, state a claim for breach of express warranty pursuant to U.C.C. section 2-313. See *supra* pp. 1-4.

or (B) If the injury is the result of a genetic defect or disease which could have been detected with available medical technology, state a claim for breach of the implied warranties of merchantability and fitness pursuant to U.C.C. section 2-314 and 2-315.

*Step 4:* If a physician or hospital acted as an intermediary in the transaction between the sperm bank and the patient, and there is a statutory provision shielding the medical community from legal liability in the jurisdiction in which the action is brought, establish that the injured plaintiff is entitled to recover directly from the sperm bank as a third party beneficiary pursuant to U.C.C. section 2-318. See *supra* pp. 23-24.

to compel preventative measures in the industry. It is hoped that the benefits and safeguards proposed in this Note will incite state legislators to act—both by adopting the guidelines suggested by the American Fertility Society specifically regulating the practice of artificial insemination and by characterizing sperm transactions as “sales” rather than “services” so that liability for improper artificial insemination will attach under warranty law.