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Sales - Blood Transfusions - Implied Warranties under the Uniform Commercial Code

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RECENT CASES

SALES—BLOOD TRANSFUSIONS—IMPLIED WARRANTIES UNDER THE UNIFORM COMMERCIAL CODE—Blood obtained from defendant National Blood Bank, Inc. was given to plaintiff during a blood transfusion while she was a patient at defendant hospital. Plaintiff contracted serum hepatitis, due allegedly to the "bad blood," and sought recovery against both defendants through assertions of negligence and breach of an implied warranty of fitness for use within the Uniform Commercial Code. The New York Supreme Court *held* the transfer of blood from the Blood Bank to the hospital a "sale", not a "service," to which the warranties of the Uniform Commercial Code might be applied. Rather than imposing liability upon the Blood Bank, however, the court remanded for further proceedings on the facts. *Carter v. Inter-Faith Hospital of Queens*, 60 Misc. 2d 793, 304 N. Y. S. 2d 97 (Sup. Ct. 1969).

Plaintiff's theories of negligence and breach on an implied warranty of fitness for use are not novel to the action on account of "bad blood" used in a transfusion. Since 1952, the cases have revolved around one or both of the above assertions. It will become apparent, however, that until recently neither has met with any success. In reviewing this patent failure of the plaintiffs' cases, it is proper to consider scientific and social attidues on the subject.

Dried blood plasma was first used in World War II to treat casualties on the battlefield. At the close of the war, the remaining was distributed to the states by the American Red Cross. Numerous cases of jaundice (hepatitis)[1] in users of blood from these pools, both during and immediately after the war, led to further investigation, which reported that the plasma was the source of the hepatitis. In 1952 about 12% of patients receiving pooled blood in transfusions contracted hepatitis, as compared with about 2% of those who received whole blood.[2] At the same time, there was little medical science could do to prevent the transfer of virus-containing blood.

1. Hepatitis is an inflammation of the liver. 1 ATTORNEY'S DICTIONARY OF MEDICINE 401 (1969). Homologous serum hepatitis is hepatitis resulting from a transfusion of blood, serum, or plasma containing the causative virus. W. TABER, CYCLOPEDIC MEDICAL DICTIONARY, H-28 (8th ed. 1959).

2. *See generally*, A Report of the Committee on Medicolegal Problems of the American Medical Ass'n., *Medicolegal Aspects of Blood Transfusion*, 151 A.M.A.J. 1435 (1952).

> [A]t the present stage of knowledge, homologous serum hepatitis is a calculated risk which the patient assumes as part of a blood or plasma transfusion.[3]

The legal-medical fraternity was forewarned, but ill-prepared, for the 1952 case of *Parker v. State*.[4] The claimant's husband, while unconscious and in critical condition, had received a transfusion of blood plasma, and died two months later due to serum jaundice. Plaintiff's claim of tort liability against the state was dismissed, the court noting that since the American Red Cross had cautioned the use of blood plasma only in emergencies,[5] the state had a right to rely on the physician's sound medical judgment that an emergency was at hand.[6]

Perlmutter v. Beth David Hospital[7] was decided only two years after *Parker*, but already the battle ground had shifted. Plaintiff charged that the transfer of blood to him was a sale, within the Sales Act,[8] to which implied warranties of fitness for use and merchantability could be applied.[9] The issue, then, was whether or not a vendor-vendee relationship between plaintiff and defendant existed. Rejecting the argument, the bench stated what has become an oft-quoted rule on the subject:

> The supplying of blood by the hospital was entirely subordinate to its paramount function of furnishing trained personnel and specialized facilities in an endeavor to restore plaintiff's health. It was not for blood—or iodine or bandages—for which plaintiff bargained, but. . . to provide whatever medical treatment was considered advisable. The conclusion is evident that the *furnishing of blood was only an incidental and very secondary adjunct to the services performed* by the hospital, and therefore was not within the provisions of the Sales Act.[10] (Emphasis added).

The plaintiff in *Perlmutter* analogized his case to that of a

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3. *Id.* at 1438.
4. 280 App. Div. 157, 112 N.Y.S.2d 695 (1952).
5. *Id.* at ——, 112 N.Y.S.2d at 696; *See also* Comm. on Blood & Blood Derivatives of the Advisory Board on Health Services of the American Red Cross, *Report on the Incidence of Homologous Serum Jaundice Following the use of Surplus Dried Blood Plasma*, 135 A.M.A.J. 714, 715 (1947).
6. "The state was bound to know that the use of this type of plasma involved some risk, but with that knowledge it also knew that its use was justifiable when the risk involved ought, in good medical judgment, to be taken." Parker v. State, 280 App. Div. 157, 112 N.Y.S.2d 695, 698 (1952).
7. 308 N.C. 100, 123 N.E.2d 792 (1954).
8. N.Y. PERS. PROP. § 82(2) (McKinney 1962); UNIFORM SALES ACT § 1(2) defines a sale as a transfer of the property in goods for a price.
9. N.Y. PERS. PROP. §§ 96(1)-(2) (McKinney 1962); UNIFORM SALES ACT §§15(1)-(2).
10. Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792, 795 (1954). For approval of this principle, *see generally* Sloneker v. St. Joseph's Hosp., 233 F. Supp. 105 (D. Colo. 1964); Fischer v. Wilmington Gen. Hosp., 51 Del. 554, 149 A.2d 749 (1959); Hidy v. State, 207 Misc. 207, 137 N.Y.S.2d 334 (Ct. Cl. 1955); Koenig v. Milwaukee Blood Center, Inc., 23 Wis.2d 324, 127 N.W.2d 50 (1964). *See also* Annot., 59 A.L.R.2d 768 (1958).

sale of food in a restaurant as a "purchase of goods."[11] The restaurant gourmet purchases a given quantity; namely, his meal. But the hospital patient seeks no specific quantity or item, rather ". . . a course of treatment in the hope of being cured of what ails him."[12] The *Perlmutter* court agreed to a comparison of their case to that where the plaintiff unsuccessfully alleged that the furnishing of eyeglasses was a sale of tangible personal property within the meaning of the Illinois Retailer's Occupation Tax Act.[13] The Illinois Supreme Court held the furnishing of glasses ". . . merely incidental to the services rendered, . . ."[14] and not within the statute.

Apparently implying a public policy rationale, Judge Fuld, in *Perlmutter*, suggests that if the supplying of blood was termed a "sale", the hospital would become a virtual insurer of pure blood.[15] Imposition of liability without fault or negligence seems a rather harsh "strict liability" standard, particularly when there was no known means of detecting the virus in the blood nor of eliminating the virus from the blood used in transfusions. Though subjected to much criticism, the state of medical knowledge in 1952 necessitated the result in *Perlmutter*.

Perlmutter has been consistently followed until just recently. A 1961 Utah case[16] referred approvingly to *Perlmutter*, and reached the same result. Reliance seemed to be placed on public policy and on a California statute which specifically rejected any warranty of blood used in blood transfusions.[18] Similarly, a 1965 Arizona decision turned at least partially on a state statute which declared the furnishing of blood to be a service and not a sale[19] thus the allegation of breach of implied warranty could not stand.[20] Numerous other states have legislated with regard to the transfer of blood, and all have termed that transfer a "service," and not a "sale."[21]

A different statutory scheme barred recovery in *Gile v. Konnewick Public Hospital District*,[22] where the plaintiff pleaded both

11. Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792, 795 (1954). *See* Temple v. Keeler, 238 N.Y. 344, 144 N.E. 635 (1924).
12. Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792, 796 (1954).
13. *Id.* at ——, 123 N.E.2d at 794.
14. Babcock v. Nudelman, 367 Ill. 626, 630, 12 N.E.2d 635, 637 (1937).
15. Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792, 795 (1954).
16. Diblee v. Dr. W. H. Groves Latter-Day Saints Hospital, 12 Utah 2d 241, 364 P.2d 1085 (1961).
17. *Id.* at ——, 364 P.2d at 1088. "[H]ospitals furnishing blood, so far as implied warranties are concerned, are hardly second-cousins to those seeking the public purse for profit, ..."
18. *Id.* at ——, 364 P.2d at 1087; CAL. HEALTH & SAFETY CODE § 1623 (West 1955).
19. ARIZ. REV. STAT. ANN. § 36-1151 (Supp. 1969).
20. Whitehurst v. American Nat. Red Cross, 1 Ariz. App. 326, 402 P.2d 584 (1965).
21. DEL. CODE ANN. tit. 5A, § 2-316(5) (Spec. UCC Pamphlet 1967); MASS. GEN. LAWS ANN. ch. 106, § 2-316(5) (Supp. 1970); MICH. COMP. LAWS ANN. § 691.1511 (Supp. 1969); MISS. CODE ANN. § 7129.71 (Supp. 1968); NEB. REV. STAT. § 71-4001 (Supp. 1967); N.M. STAT. ANN. § 12-12-5 (Supp. 1969); N.D. CENT. CODE § 41-02-33(3)(d) (Supp. 1969); OKLA. STAT. ANN. tit. 63, § 2151 (Supp. 1969); S.C. CODE ANN. § 32-559 (Supp. 1968); S.D. CODE § 57-4-33.1 (Supp. 1969); WIS. STAT. ANN. § 146-31 (Supp. 1969).
22. 48 Wash. 2d 774, 296 P.2d 662 (1956).

negligence and breach of warranty of fitness. The court found that the defendant hospital's negligence had caused Mrs. Gile's death, and also that the same negligence caused the breach of warranty. Both actions thus failed because of the hospital's statutory immunity.[23] Quaere whether or not there could ever be a breach of warranty without negligence in Washington.

Minnesota recently followed *Perlmutter* by applying its rule to a non-profit corporation, rather than to a hospital.[24] The acts performed by defendant, noted the court, are related to those performed by the hospital in *Perlmutter*.[25] The apparent implication is that public policy will not allow liability to hinder a charitable and humane purpose when there is no scientific information available to either the physician or the supplier of blood.

Leading the objections to the *Perlmutter* decision was Judge Froessel in dissent. He felt that, since there was no negligent act by a doctor or nurse, the traditional reason for invoking the hospital's immunity rule was absent, and plaintiff should recover in negligence against the hospital administration.[26] Also, because plaintiff paid sixty dollars above normal hospital expenses for the transfusion, Judge Froessel would hold this transaction a sale.[27] A comment on this case further suggests that, in lieu of proving a "sale", plaintiff should recover on a common law implied warranty where ". . . . personal services seem to have predominated."[28]

The finding in *Diblee*, that without a profit motive there is no sale, has been criticized as invalid.[29] Sale is defined as a transfer for a price; there is no necessity of profit.[30]

A 1967 Florida Supreme Court decision partially satisfied the critics of *Perlmutter*, by holding that the plaintiff's complaint against the blood bank stated a cause of action under a breach of implied warranties.[31] The District Court of Appeals had stated:

> It seems to us a distortion to take what is, at least arguably, a sale, twist it into the shape of a service, and then employ this transformed material in erecting the framework of a major policy decision.[32]

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23. *Id.* at ——, 296 P.2d at 667; WASH REV. CODE § 70.44.060(8) (1962). "[S]aid public hospital district shall not be liable for negligence for any act of any officer, agent, or employee of said district . . . ."
24. Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc., 270 Minn. 151, 132 N.W.2d 805 (1965).
25. *Id.* at ——, 132 N.W.2d at 810.
26. Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792, 797 (1954).
27. *Id.* at ——, 123 N.E.2d at 796. *See* N.Y. PERS. PROP. § 82(2) (McKinney 1962).
28. 69 HARV. L. REV. 391 (1955).
29. 37 NOTRE DAME LAW. 565, 568 (1961).
30. UNIFORM SALES ACT § 1(2).
31. Community Blood Bank, Inc. v. Russell, 196 So. 2d 115 (Fla. 1967); *Contra*, White v. Sarasota County Pub. Hosp., 206 So. 2d 19 (Fla. App. 1968) (as to hospitals).
32. Russell v. Community Blood Bank, 185 So. 2d 749, 752 (Fla. App. 1966).

Though limply agreeing, the Supreme Court remanded for further proceedings on the facts.

The concurring justice, conceding that there were no known means of detecting the hepatitis-causing virus, pointed out that neither was there a way to discover an impurity in a tin of canned meat,[33] or in a candy bar.[34] Then he bluntly termed this transfering of title to a commodity a sale.[35] Perhaps it should be pointed out to the justice that an impurity in a tin of canned meat can be prevented; but quaere how to prevent the hepatitis virus from polluting the blood.

A shift of public policy from the position, mentioned with reference to non-profit blood banks, that liability should not hinder a charitable and humane function, is suggested in the concurring opinion:

> [I]t is more consonant with right and justice to require the Blood Bank to be held absolutely and strictly answerable to the consumers of its products for defects therein, so that the burden. . . may be spread among all who benefit. . . rather than to require such losses to be borne by the innocent victims alone.[36]

More recently, in *Jackson v. Muhlenberg Hospital*,[37] the court was aware of the possible far-reaching applications of their ruling, and resolved that such an important policy decision should not rest on a wholly inadequate record.[38] The New Jersey Supreme Court reversed the lower court's dismissal of the action for breach of warranty and remanded for findings of fact ". . . as to the availability of any tests to ascertain the presence of viral hepatitis in blood, the respective incidences of hepatitis in blood received from commercial blood banks. . . ."[39]

The instant case follows *Perlmutter* to a degree in that the action against the defendant hospital was dismissed. Distinguishing the action against the defendant blood bank on the grounds that there were no *services* performed by the bank (as were furnished by the hospital in *Perlmutter*), but merely a *transfer of blood for consideration*, the court questioned the liability of the blood bank for breach of implied warranties.[40]

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33. Community Blood Bank, Inc. v. Russell, 196 So. 2d 115, 119 (Fla. 1967).
34. *Id.*
35. *Id.*
36. *Id.* at 121.
37. 53 N.J. 138, 249 A.2d 65 (1969).
38. *Id.* at ——, 249 A.2d at 67.
39. *Id.* at ——, 249 A.2d at 68.
40. Carter v. Inter-faith Hosp. of Queens, 60 Misc. 2d 793, 304 N.Y.S.2d 97 (Sup. Ct. 1969).

Applying the Uniform Commercial Code (§2-106(1)),[41] the court agreed with *Jackson* that the transfer of blood from defendant blood bank to defendant hospital was a transfer of title for a price, and thus a sale.[42] Once the "sale" of blood was established, the court had no difficulty terming the blood bank a "merchant";[43] so then a warranty that the "goods" be merchantable was implied in the sale of blood.[44] To be merchantable the goods must be fit for the ordinary purpose for which such goods were intended.[45] Clearly, blood containing serum hepatitis is not fit for the ordinary purpose of circulating through the heart, and a transfusion of such blood would give rise to an action for breach of warranty against the seller.[46]

Although the instant court held this transfer of blood a sale to which warranties did apply, it did not decide that liability should be cast upon the blood bank. Rather, with an eye to public policy, it denied the defendant blood bank's motion to dismiss so further findings of fact could be developed at trial.

The instant bench was confronted with the same absence of medical knowledge of serum hepatitis as plagued the *Perlmutter* court. Only very recently has a 1963 discovery, which suggests a future consistent method for determining the presence of the virus, come to light. By matching the blood of a donor with that of an individual believed to have developed antibodies to the hepatitis, scientists may detect a precipitation, which would indicate the presence of a material called "Australian antigen", also known as hepatitis or serum antigen. Though researchers speculate that this discovery may eventually lead to a vaccine, they are not yet completely certain of its reliability.[47]

North Dakota courts would have had little difficulty disposing of the present case had it arisen in their jurisdiction. Section 41-02-33(3)(d) (Supp. 1969) of the North Dakota Century Code provides:

> [T]he implied warranties of merchantability and fitness shall not be applicable to a contract for the sale of human blood, blood plasma, or other human tissue or organs from

41. "A 'sale' consists in the passing of title from the seller to the buyer for a price."
42. Carter v. Inter-faith Hosp. of Queens, 60 Misc. 2d 793, 304 N.Y.S.2d 97, 100 (Sup. Ct. 1969).
43. *Id.* at ——, 304 N.Y.S.2d at 101.
44. UNIFORM COMMERCIAL CODE § 2-314(1). "Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind."
45. UNIFORM COMMERCIAL CODE § 2-314(2)(c). To be merchantable, goods must be fit for the ordinary purposes for which such goods are used.
46. Carter v. Inter-faith Hosp. of Queens, 60 Misc. 2d 793, 304 N.Y.S.2d 97, 101 (Sup. Ct. 1969).
47. Altman, *Blood Banks Using a New Test to Identify Hepatitis in Donors*, N.Y. Times, Oct. 19, 1969, at 1, col. 1. *See* 60 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCE, AN ANTIGEN DETECTED IN THE BLOOD DURING THE INOCULATION PERIOD OF SERUM HEPATITIS 814-21 (1969).

> a blood bank or reservoir of such other tissues or organs. Such blood, blood plasma, or tissue or organs shall not for the purposes of this chapter be considered commodities subject to sale or barter, but shall be considered as medical services.[48]

By this law, the Legislature has decided that public policy demands that there need not be a balance of interests before placing the burden on the blood bank or the innocent purchaser. This seems to run afoul of the modern policy which holds manufacturers of goods for consumption strictly liable.[49] The Legislature rejected the imposition of liability without fault upon the blood supplier who has met all standards of due care known to the profession, apparently because of the non-commercial nature of the blood banks in North Dakota and what has been termed the unavoidable risk inherrent in blood transfusions.[50] Even conceding that the legislation was somewhat fashioned by the absence of a test for the virus, it still seems apposite to the modern policy mentioned above to place the burden on the unwary blood recipient.

The ultimate decision in the instant case has not yet been rendered.[51] Understandably, the lack of an authoritative test for the hepatitis virus may bar imposition of liability on the blood bank. That final decision, however, may not be relevant to the future liability of blood banks and hospitals.

The modern trend is toward the abolition of the charitable immunity concept.[52] If this is so, then there are no policy reasons against attaching warranties to the products of a charitable institution. *A fortiorari,* public policy decrees that the "seller" of blood be placed on a par with other "merchants" and be held strictly liable in tort for defects, regardless of a satisfactory test for the virus.[53] At a time when the charitable immunity doctrine is losing

48. Ch. 388, § 1, [1969] N.D. Sess. Laws 804. 805. House Bill 337 was introduced by Reps. A. G. Bunker and Robert Peterson, N.D.H.R. JOUR. (Jan. 23, 1969); It passed the House 88-2, N.D.H.R. JOUR. (Feb. 4, 1969); was rejected by the Senate 23-22, N.D.S. JOUR. (Mar. 3, 1969); was reconsidered and approved 34-10, N.D.S. JOUR. (Mar. 4, 1969); and was signed by Governor Guy on March 13, 1969, N.D.H.R. JOUR. (Mar. 5, 1969). Perhaps the legislative intent was to exempt blood from strict liability, even if it is defective. *See* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16.04(3)(b) (1968).

49. 17 CATH. U. L. REV. 359, 362 (1967).

50. Letter from Rep. A. G. Bunker to author, March 5, 1970.

51. The instant case was remanded for further hearings on the facts. On Feb. 24, 1970, the defendant National Blood Bank, Inc. moved to renew its prior motion for summary judgment, but was again denied judgment. Unless the defendant appeals, it is estimated that it will be two or three years before the case can be tried at a plenary trial. Letter from James P. Dollard, Jr., Acting Chief Law Assistant to the New York Supreme Court, to author, March 6, 1970.

52. W. PROSSER, THE LAW OF TORTS § 127 (3d ed. 1964). For a collection of cases supporting this trend, *see* 15 AM. JUR. 2d *Charities* § 153 (1964).

53. "The public interest in human life, health and safety demands the maximum possible protection that the law can give against dangerous defects in products which consumers must buy, and against which they are helpless to protect themselves; and it justifies the imposition upon all sellers of such products, of full responsibility for the harm they cause, even though the supplier has not been negligent." W. Prosser, *The Assault*

support, and when insurance can be obtained to cover nearly every risk,[54] public policy will no longer allow protection of the hospital or blood bank because of their "humane" function at the expense of the innocent consumer. North Dakota and other states have proclaimed policy by legislating against implied warranties on the "sale" of blood, but they cannot prevent the oncoming trend of strict liability protection to the defenseless consumer.

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CRIMINAL LAW — RIGHT TO COUNSEL — MUNICIPAL ORDINANCE VIOLATORS—The indigent respondent was arrested for disorderly conduct, a violation of the Police Code of the City of Portland. A plea of not guilty was entered. The respondent was not advised by the municipal court that if he was unable to employ counsel, the court would appoint counsel to represent him. After respondent was convicted and sentenced to six months in jail, he filed a petition for, and was granted a writ of habeas corpus by the circuit court of Multnomah County. Appeal was taken by the officer responsible for his custody, who claimed that a person charged with a municipal ordinance violation had no constitutional right to court appointed counsel. The Supreme Court of Oregon, one judge dissenting, *held* that the Sixth Amendment to the United States Constitution, as well as the Oregon Constitution extended the right to counsel to misdemeanants, including those accused of violating municipal ordinances. The court further stated that no person may be deprived of his liberty who has been denied the assistance of counsel as so guaranteed by the Sixth Amendment. *Stevenson v. Holzman*, ——*Ore.*——, 458 P.2d 414 (1969).

The Oregon Supreme Court relied primarily on the language of the Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right. . . to have the Assistance of Counsel for his defence.[1]

This constitutional right was first made applicable to the states

upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099, 1122 (1959). Prosser notes that the public outcry has been greatest in food cases, and that extension of this policy to other products will depend upon probable danger, frequency of injury, and reasonable public expectation. The rule of strict tort liability as set out by the RESTATEMENT (SECOND) OF TORTS § 402 A, comment M (1965), does not depend on the laws of contract or sale. The seller is strictly liable for his defective products whether there has been a representation or not. Rather than proceed in warranty, it would seem simpler to regard the liability of the Blood Bank as one of strict liability in tort. *See generally* Greenman v. Yuba Power Products, Inc., 57 Cal. 2d 697, 377 P.2d 897 (1963); Henningson v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

54. *See* VANCE, INSURANCE § 6 (3d ed. 1951); *cf.* Annot., 25 A.L.R.2d 141 (1952); 15 AM. JUR. 2d *Charities* § 154 (1964).

1. U. S. CONST. amend. VI.