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CASES NOTED

BLOOD BANKS, BAD BLOOD, AND IMPLIED WARRANTY

The plaintiff contracted serum hepatitis as the result of a blood transfusion. He sued the blood bank for breach of implied warranty. The trial court dismissed the complaint, and plaintiff appealed. The District Court of Appeal *held*, reversed and remanded: a plaintiff can state a cause of action against a blood bank for breach of implied warranty, but can only recover for injuries if they were caused by failure to detect or remove a deleterious substance capable of detection or removal. *Russell v. Community Blood Bank, Inc.*, 185 So.2d 749 (Fla. 2d Dist. 1966).

Jurisdictions have generally refused to apply the laws of implied warranty to the sale of blood on the theory that the administering of the blood was but an incidental feature of the hospital's service.¹ Other jurisdictions have enacted statutes to this effect.² The precedent for this approach is *Perlmutter v. Beth David Hosp.*³ The plaintiff in that case sued the hospital for injuries resulting from a transfusion of blood which caused her to contract serum hepatitis. This was the first such action based on the theory of implied warranty of fitness.⁴ Previous actions for similar injuries were usually supported by negligence allegations.⁵ In *Perlmutter*, however, the New York court held that the supplying of blood was a "service" and not a "sale," and therefore the laws of warranty would not apply.⁶

1. *Sloneker v. St. Joseph's Hosp.*, 233 F. Supp. 105 (D. Colo. 1964); *Whitehurst v. American Nat. Red Cross*, 1 Ariz. App. 326, 402 P.2d 584 (1965); *Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc.*, 270 Minn. 151, 132 N.W.2d 805 (1965); *Hidy v. State*, 3 N.Y.2d 727, 143 N.E.2d 528, 163 N.Y.S.2d 985 (1957); *Gile v. Kennewick Pub. Hosp. Dist.*, 48 Wash.2d 774, 296 P.2d 662 (1956); *Koenig v. Milwaukee Blood Center, Inc.*, 23 Wis.2d 324, 127 N.W.2d 50 (1964); *Diblee v. Dr. W. H. Groves Latter-Day Saints Hosp.*, 12 Utah 2d 241, 364 P.2d 1085 (1961).

2. See ARIZ. REV. STAT. § 36-1151 (1956) (furnishing of blood is a service and not a sale), and CAL. HEALTH & SAFETY CODE § 1606:

The procurement, processing, distribution or use of whole blood, plasma, blood products, and blood derivatives . . . shall be construed to be . . . the rendition of a service . . . and is declared not to be, a sale. . . .

3. 308 N.Y. 100, 123 N.E.2d 792 (1954).

4. See generally Note, *Liability for Blood Transfusion Injuries*, 42 MINN. L. REV. 640 (1958).

5. *Parker v. State*, 280 App. Div. 157, 112 N.Y.S.2d 695 (3d Dep't. 1952) (action for negligence on the ground that physician should have been warned of the danger of hepatitis virus). See also *Merck & Co. v. Kidd*, 242 F.2d 592 (6th Cir. 1957), *cert. denied*, 78 Sup. Ct. 15 (1957), where plaintiff argued that hepatitis virus in pooled blood was a violation of Tennessee Food, Drug, and Cosmetics Act and hence negligence per se.

6. *Perlmutter v. Beth David Hosp.*, 308 N.Y. 100, 106, 123 N.E.2d 792, 794 (1954).

The conclusion is evident that the furnishing of blood was only an incidental and

Perlmutter was a 4-3 decision with a well reasoned dissent. It was extensively criticized by all commentators,⁷ but followed by the courts.⁸ Criticism of the decision centered on the "sale-service" dichotomy:

Regardless of the conclusion reached on the liability issue, the court's opinion does a disservice by framing the issue in terms of the "service" doctrine. . . .⁹

Another commentator stated:

The effect of the instant case is to limit patients to their difficult task of establishing negligence. This is contrary to the general trend of widening the bounds of hospital liability.¹⁰

The dissenters in *Perlmutter* argued:

We have held that where a person orders food in a restaurant . . . it constitutes a sale to which the Personal Property Law annexes an implied warranty that the food is reasonably fit for consumption . . . [s]o it has been held with regard to drugs. . . . We cannot logically differentiate those decisions from the one involved here. . . .¹¹

The dissatisfaction with the *Perlmutter* decision (the "sale-service" dichotomy) stems from the failure of that court to face the crucial policy considerations involved.¹² The simple question is, of course, who shall bear the loss (blood bank, hospital, or patient) when hepatitis¹³ is con-

very secondary adjunct to the services performed by the hospital and therefore was not within the provisions of the Sales Act.

7. See Note, *Liability for Blood Transfusion Injuries*, 42 MINN. L. REV. 640 (1958); 69 HARV. L. REV. 391 (1955); 37 NOTRE DAME LAW. 565 (1962); 29 ST. JOHNS L. REV. 305 (1955); 103 U. PA. L. REV. 833 (1955).

8. Cases cited *supra* note 1.

9. 103 U. PA. L. REV. 833, 836 (1955).

10. 29 ST. JOHN'S L. REV. 305, 309 & n.31 (1955). The same article went further: The declaration by the legislature that a warranty is implied in the sale of goods did not serve to make the fact of sale an *inflexible element* in the gravamen of the complaint, but merely a *circumstance* which permits an action to be maintained. Recognizing the tort history of warranty and the true nature of the action, it does not seem proper to subject the essential *condition* of a sale to the same rigid scrutiny it must undergo in other actions, purely *ex contractu*.

Id. at 309.

11. *Perlmutter v. Beth David Hosp.*, 308 N.Y. 100, 110, 123 N.E.2d 792, 797-98 (1954).

12. [A]rguments about "sale" or "service" seem to lead nowhere in this area. The real question involved seems to be one of policy. . . . 42 MINN. L. REV. 640, 660 (1958).

See also 37 NOTRE DAME LAW. 565, 568 (1962):

[T]he blood cases are quite out of line with the general trend of authority which rejects the service sale dichotomy in the major area of food warranties and certainly plays it down in other areas. It is suggested that the findings of "no sale" in the blood cases *actually represent unconscious resolution of policy issues*. . . . (Emphasis added.)

13. TABER'S CYCLOPEDIA MEDICAL DICTIONARY (9th ed. 1962). Hepatitis—Inflammation of the liver of infectious or toxic origin. It is manifest by jaundice and in some instances, liver enlargement. Fever and other systemic disorders are usually present.

tracted as the result of a blood transfusion? The answer demands that matters beyond the narrow issue of whether the transfusion is a sale or a service be discussed. Policy considerations are essential.¹⁴

The question is complicated by the fact that, at present, no means have been devised to destroy the hepatitis virus in whole blood.¹⁵ The problem was well stated in *Balkowitsch v. Minneapolis War Memorial Blood Bank*¹⁶ where the court quoted from defendant's brief:

[T]he risk is inherent in every bottle of blood issued. The problems of control are multiple; no donor's history is really reliable; any donor may be an innocent carrier; no laboratory test, or group of tests, is specific for the virus of hepatitis; there is no way of treating the blood to kill the virus without violating essential storage or safety requirements for whole blood. . . .¹⁷

It therefore appears evident that the courts, in *Perlmutter* and similar decisions, have been reluctant to impose liability on the hospital or blood bank, not because of the fictitious concept that a blood transfusion is not a "sale," but rather because there is no means available to detect the harmful virus. Subsequent cases articulated this concern and made it clear that this was the primary motive behind their decisions.¹⁸ The inherent weakness of *Perlmutter* therefore, is that the court

14. See *Russell v. Community Blood Bank, Inc.*, 185 So.2d 749, 752 (Fla. 2d Dist. 1966): In light of this patent concern for the public policy involved in this question we feel compelled to depart from the "sale versus service" category . . . expressions of sound policy preferences are more in harmony with the doctrine with which we will be dealing.

15. 9 TRAUMATIC MEDICINE & SURGERY FOR THE ATTORNEY 110 (Cantor ed. 1963).

It is estimated that one transfusion in three hundred results in a case of hepatitis which can be recognized . . . the death rate is about 6 per cent Hepatitis does not appear to be a preventable complication of blood transfusion. Any donor with a history of the disease or recent contact with the disease is eliminated. Units of blood with jaundiced plasma are also eliminated. This means that transmitters of the disease are healthy people who are unaware that they harbor the virus. It has not been possible to destroy the virus in whole blood. It can be destroyed in plasma only by prolonged incubation . . . attempts to kill the virus by other methods have been unsatisfactory, those which kill the virus also injure the plasma proteins.

16. 270 Minn. 151, 132 N.W.2d 805 (1965).

17. *Id.* at 807.

18. The subject case is perhaps the most explicit:

It is evident from our research that although many of the decisions denying recovery for breach of implied warranty are based on the technical distinction between a service and a sale, *the factor underlying the decisions is the inability, in the present state of medical knowledge, to detect or remove the virus which causes serum hepatitis.*

Russell v. Community Blood Bank, Inc., *supra* note 14, at 752. (Emphasis added.)

Earlier decisions also made it clear that the "sale-service" dichotomy was not their major concern: *Balkowitsch v. Minneapolis War Memorial Blood Bank*, *supra* note 16, at 810: "[I]t would be unrealistic to hold that there is an implied warranty as to qualities of fitness of human blood on which no medical or scientific information can be acquired. . . ."; *Diblee v. Dr. W. H. Groves Latter-Day Saints Hosp.*, 12 Utah 2d 241, 364 P.2d 1085, 1087 (1961): "We do not say that hospitals should be immune from negligence. But we do not

never voiced this concern. By relying on the "sale-service" dichotomy¹⁹ it gave a "slick" solution which never came to grips with the real problem.²⁰

Russell v. Community Blood Bank, Inc.,²¹ however, began rather than ended, with "sale" versus "service." The court decided that the sale of blood by a blood bank was a "sale,"²² and then went on to discuss the real questions involved.²³ Despite the fact that it "found no case in which such a warranty has been implied,"²⁴ the court held that "the law of implied warranties applies to the transaction before us."²⁵

This courageous thinking brought the court face to face with the problem that "regardless of the amount of inspection or care . . . the defect of serum hepatitis virus cannot be eliminated."²⁶ A different holding on the warranty question (in accord with precedent) would have made a confrontation with this problem unnecessary.

Therefore, once implied warranty has been allowed, there seems

think they should be strapped with an insurability of blood purity, absent negligence." ; *Gile v. Kennewick Pub. Hosp. Dist.*, 48 Wash.2d 774, 779, 296 P.2d 662, 667 (1956): "[I]t appears . . . that the hospital district's negligence was the proximate cause . . . and that the same negligence caused the breach of warranty."

19. See note 12 *supra*.

20. The court may have tipped its hand as to the *real* basis of its opinion in this passing remark:

Informed opinion is at hand that there is neither a means of detecting the presence of the jaundice producing agent in the donor's blood nor a practical method of treating the blood to be used for transfusion so that the danger may be eliminated. . . .

Perlmutter v. Beth David Hosp. 308 N.Y. 100, 106, 123 N.E.2d 792, 795 (1954). This remark was quoted in *Russell, supra* note 14, at 751.

The dissenters in *Perlmutter* also seized upon this remark. After quoting it in full they commented on the majority's dismissal of the complaint:

Thus they rely upon so called medical reports which are neither in the record nor even mentioned in the briefs—matter which plaintiff has had no opportunity to rebut either by evidence or by argument—indeed, plaintiff is now prevented from furnishing any evidence whatever.

Id. at 111, 123 N.E.2d, at 796.

21. *Supra* note 14. Note that since *Perlmutter* dealt with a hospital and *Russell* a blood bank, the decisions may be reconciled. But the reasoning in *Russell* would seem to apply equally well to a hospital as to a blood bank:

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.

Russell v. Community Blood Bank, Inc., supra note 14.

22. We will now proceed to the real questions involved in this appeal, which are whether there are any implied warranties attached to the sale of blood by a blood bank, what these warranties might be, and whether these warranties run to the ultimate consumer.

Ibid.

23. *Id.* at 753.

24. *Ibid.*

25. *Ibid.*

26. *Ibid.*

to be no alternative but to hold the blood bank liable. This has been the stumbling block to other courts. Unable to surmount it, they were forced to follow *Perlmutter*.

The *Russell* case, however, was more imaginative. The court pointed out the parallel between the sale of blood and the sale of certain drugs which are excepted from strict liability because they are "therapeutic products, which, in the present state of human knowledge, are incapable of being made absolutely safe for their intended and ordinary uses."²⁷ This doctrine enabled them to distinguish the sale of blood from the sale of tobacco in the *Green v. American Tobacco Co.*²⁸ decision which held that the "seller's actual knowledge or opportunity for knowledge of a defective or unwholesome condition is wholly irrelevant to his liability on the theory of implied warranty."²⁹

This "unavoidably unsafe" category was first recognized by the Florida Supreme Court in *McLeod v. W. S. Merrell Co.*³⁰ in which the court cited the Restatement of Torts³¹ as authority in refusing to hold a druggist liable for breach of implied warranty when a drug produced harmful effects on the purchaser. Under this theory, if the blood cannot be made safe the suit must fail. "This position," says *Russell*, "is entirely reasonable, as well as being good public policy."³² Accordingly, the mistake of *Perlmutter*³³ was not repeated: the complaint was allowed, and the court went on to say that "before the product can be termed 'unavoidably unsafe,' there will have to be some factual showing that it cannot be made safe."³⁴

Thus the court has arrived at a position where, in order to be successful, the warranty action must prove something akin to negligence:

[W]e have reached a point in which we are stating that a plaintiff can state a cause of action against a blood bank for breach of warranty, but can only recover for injuries if they were caused by the failure to detect or remove a deleterious sub-

27. *Russell v. Community Blood Bank, Inc.*, *supra* note 14, at 754.

28. 154 So.2d 169 (Fla. 1963). *Green* is "especially ominous" says the *Russell* court. *Id.* at 753.

29. *Green v. American Tobacco Co.*, 154 So.2d 169, 170 (Fla. 1963). Quoted in *Russell v. Community Blood Bank, Inc.*, *supra* note 14, at 753.

The *Green* court also stated at 171:

No reasonable distinction can, in our opinion, be made between the physical or practical impossibility of obtaining knowledge of a dangerous condition, and scientific inability resulting from a current lack of human knowledge and skill. . . .

30. 174 So.2d 736 (Fla. 1965).

31. RESTATEMENT (SECOND), TORTS § 402A, comment k (1965):

There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use.

32. 185 So.2d, at 754.

33. See dissenters' remarks regarding dismissal of complaint. *Supra* note 18.

34. *Russell v. Community Blood Bank, Inc.*, *supra* note 14, at 754.

stance capable of detection or removal. Admittedly this language goes right to the threshold of a suit for negligence. . . ."⁸⁵

But the distinction between the two actions was succinctly revealed:

[T]he difference between an action in negligence and one in implied warranty when dealing with a product "unavoidably unsafe" is to shift the burden of proof.⁸⁶

This is so because:

[A] complaint for negligent failure to inspect places the onus upon plaintiff to prove the manufacturer negligent . . . [whereas] [f]or breach of implied warranty . . . plaintiff must only show that the product was transferred from the manufacturer's possession while in a defective state, and as a result of the defect, the plaintiff was injured.⁸⁷

Then a final caveat:

[P]roof that the defect in blood is undetectable and unremovable would be a defense to breach of implied warranty. However the burden of this proof would be on the blood bank.⁸⁸

A decision which skirts the issue does a disservice. In the subject case the court met the problems head on, and carved out law that will endure beyond the time when a means is devised for detecting the serum hepatitis virus in blood.⁸⁹ When such a means is discovered, other jurisdictions even though they feel that perhaps the blood bank should be liable, may still be reluctant to apply the theory of implied warranty, for by so doing they will be forced to reverse their artificial notion that the sale of blood is not a "sale." In Florida, fortunately, the march of science will not so soon outmode the law. When the means of detecting the serum hepatitis virus is ultimately discovered, blood will no longer be classified as an "unavoidably unsafe product." That defense gone, the consumer-patient will find his just relief under the theory of implied warranty.

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35. *Ibid.*

36. *Ibid.*

37. *Ibid.*

38. *Ibid.*

39. Indeed, that time is near. See Berland, *New Gains in the War on Hepatitis*, *Today's Health*, Aug. 1966, p. 20, 73-74:

An even more effective approach—perhaps a final answer—is now being refined . . . Dr. Allen remembered . . . that patients who . . . received stored, safe plasma several months before getting whole blood transfusions never came down with hepatitis . . . (t)he safe plasma, given first, had made them immune The result, says the California surgeon, is that patients can be given hepatitis protection much as children are now given protection against measles: by simultaneous inoculation of tame viruses and strong antibodies.