Blood Banks, Bad Blood, and Implied Warranty

John Frost Walker

Follow this and additional works at: http://repository.law.miami.edu/umlr

Recommended Citation
Available at: http://repository.law.miami.edu/umlr/vol21/iss2/7
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. Other jurisdictions have enacted statutes to this effect. The precedent for this approach is Perlmutter v. Beth David Hosp. 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. Previous actions for similar injuries were usually supported by negligence allegations. 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.
Perlmutter was a 4-3 decision with a well reasoned dissent. It was extensively criticized by all commentators, but followed by the courts. 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.

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.

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 so it has been held with regard to drugs. We cannot logically differentiate those decisions from the one involved here.

The dissatisfaction with the Perlmutter decision (the “sale-service” dichotomy) stems from the failure of that court to face the crucial policy considerations involved. The simple question is, of course, who shall bear the loss (blood bank, hospital, or patient) when hepatitis is a very secondary adjunct to the services performed by the hospital and therefore was not within the provisions of the Sales Act.

2. See supra note 1.
4. Id. at 309.

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.
12. Arguments about “sale” or “service” seem to lead nowhere in this area. The real question involved seems to be one of policy. 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 Cyclopedic 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 Bank¹⁶ 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 ficticious 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.


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” dichotomy it gave a “slick” solution which never came to grips with the real problem.

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

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.” 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
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 Torts 31 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 en-
tirely 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 suc-
cessful, the warranty action must prove something akin to negligence:

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

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

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 . . . [w]hereas [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.

JOHN FROST WALKER

35. Ibid.
36. Ibid.
37. Ibid.
38. Ibid.
39. 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.