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TORTS—AN ACTION BASED ON STRICT TORT LIABILITY IS MAINTAINABLE AGAINST THE HOSPITAL THAT FURNISHED BLOOD CONTAMINATED WITH HEPATITIS TO PATIENT. *Cunningham v. MacNeal Memorial Hospital*, 266 N.E.2d 897 (Ill. 1970).

Plaintiff was a patient at defendant's hospital, her condition having been diagnosed as anemia<sup>1</sup> at the time of hospitalization. Plaintiff sued defendant hospital to recover damages which she alleges were sustained because she contracted serum hepatitis<sup>2</sup> as the result of several transfusions of whole blood. Defendant maintained that plaintiff could not recover on the theory of "strict liability" averred to in her complaint because the theory does not apply to the transfusion of whole blood by a hospital as part of its services rendered to patients. The trial court entered judgment on the pleadings in favor of defendant; dismissing plaintiff's complaint. The appellate court reversed, holding that plaintiff's complaint was sufficient to state a cause of action based on strict liability against the defendant.<sup>3</sup> On appeal to the Supreme Court of Illinois, Held—*Affirmed*. An action based on strict tort liability is maintainable against the hospital that furnished blood contaminated with hepatitis to the patient.

Prior to recent litigation most transfusion-hepatitis suits were based upon the implied warranty theory. Implied warranty is designed to attach liability upon the manufacturer or seller on a theory of contract. In an action for breach of implied warranty the injured party is required to prove the product to be defective when purchased, that purchaser relied upon the implied warranties<sup>4</sup> attached, that the product was used as intended, and that the defect was the proximate cause of the injury. Recovery on implied warranty is difficult, because of such contract requirements as reliance, privity and notice, as well as the fact that implied warranties may be excluded by a disclaimer,<sup>5</sup> or

<sup>1</sup> "Anemia. A reduction below normal in the number of erythrocytes per cu. mm., the quantity of hemoglobin, or the volume of packed red cells per 100 ml. blood which occurs when the equilibrium between blood loss and blood production is disturbed." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 82 (24th ed. 1965); "Acute blood loss is the commonest and usually most emergent indication for blood transfusions." 11 AM. JUR. *Proof of Facts* § *Transfusions*, 332 (1961).

<sup>2</sup> "Hepatitis. Inflammation of the liver, usually from toxic agents. Serum hepatitis is transmitted by injection of contaminated blood or blood derivatives or merely by a needle, lancet, or other instrument contaminated and not sterilized." STEDMAN'S MEDICAL DICTIONARY 726-27 (2d Lawyer's Ed. 1966); "In 1963, in the United States about 1.8 million patients were transfused, and it has been estimated that the incidence of clinical transfusion hepatitis was 30,000 cases with nearly 3,600 deaths." Zucherman, A. J., *Price of Blood*, 2 BRIT. MED. J. 174, 175 (1968).

<sup>3</sup> *Cunningham v. MacNeal Memorial Hospital*, 251 N.E.2d 733 (Ill. App. 1969).

<sup>4</sup> UNIFORM COMMERCIAL CODE § 2.314; § 2.315 (1970).

<sup>5</sup> UNIFORM COMMERCIAL CODE § 2.316 (1970); e.g., Usual disclaimer found on package of blood reads: "WARNING: NO LABORATORY TEST IS AVAILABLE TO DETERMINE THE PRESENCE OF THE VIRUS OF HEPATITIS. THE RISK OF TRANSMITTING HEPATITIS IS PRESENT. NO WARRANTIES ARE MADE OR CREATED. WARRANTIES OF FITNESS OR MERCHANTABILITY ARE EXCLUDED."

non-applicable if the transaction is deemed a service. In order to avoid the requirements of contract law, which often prevent recovery under implied warranty, strict liability in tort developed. Plaintiff need only prove that the product was defective and injury resulted therefrom while using the product in the manner intended.<sup>6</sup> The Restatement of the Law of Torts, Section 402A, imposes liability even though the seller has exercised all possible care in preparation and sale of his product.<sup>7</sup> Hence, strict liability in tort is replacing the implied warranty theory, to insure recovery for the injured consumer.<sup>8</sup>

Originally "strict liability" was imposed only on those who engaged in inherently dangerous activities, which might injure third parties even when all possible care was exercised. Over the years, the theory was expanded to cover other kinds of activity, whenever the courts felt that the injured party should not shoulder the risk of loss from defective products.<sup>9</sup>

The case that has had the most profound effect in the transfusion-hepatitis area was *Perlmutter v. Beth David Hospital*.<sup>10</sup> In this landmark case the court held that a blood transfusion was essentially a "service" rather than a "sale" of goods and that plaintiff could not, therefore, recover for breach of implied warranties attached to sales under the State Sales Act.<sup>11</sup> Other jurisdictions have followed the *Perlmutter* "sales-service" distinction in suits against blood banks<sup>12</sup> and hospitals,<sup>13</sup> holding that the transfusion of blood is a "service."

<sup>6</sup> See *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1962); *Suvada v. White Motor Co.*, 210 N.E.2d 182 (Ill. 1965); RESTATEMENT (SECOND) OF TORTS § 402A, Comment m. (1965).

<sup>7</sup> RESTATEMENT (SECOND) OF TORTS § 402A, 347-348 (1965):

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer or to his property, if
  - (a) the seller is engaged in the business of selling such a product, and
  - (b) it is expected to reach the user or consumer in the condition in which it was sold.
- (2) The rule stated in subsection (1) applies although
  - (a) the seller has exercised all possible care in the preparation and sale of his product, and
  - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

<sup>8</sup> See, *Grinnell v. Charles Pfizer & Co.*, 79 Cal. Rptr. 369 (Cal. App. 1969); *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1962).

<sup>9</sup> See, Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

<sup>10</sup> 123 N.E.2d 792 (N.Y. 1954).

<sup>11</sup> UNIFORM SALES ACT § 15.

<sup>12</sup> *Whitehurst v. American Nat'l Red Cross*, 402 P.2d 584 (Ariz. App. 1965); *Balklitsch v. Minneapolis War Memorial Blood Bank, Inc.*, 132 N.W.2d 805 (Minn. 1965); Cases following *Perlmutter* but controlled by charitable immunity—*Goelz v. J.K. & Susie L. Wadley Research Institute & Blood Bank*, 350 S.W.2d 573 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.); *Koenig v. Milwaukee Blood Center, Inc.*, 127 N.W.2d 50 (Wis. 1964).

<sup>13</sup> *Sloneker v. St. Joseph's Hospital*, 233 F. Supp. 105 (D. Colo. 1964); *Fischer v. Wilmington General Hospital*, 149 A.2d 749 (Del. 1959); *White v. Sarasota County Public Hospital Board*, 206 So.2d 19 (Fla. App. 1968); *Lovett v. Emory Univ., Inc.*, 156 S.E.2d 923 (Ga. App. 1967); Incompatible blood cases—*Dibblee v. Dr. W.H. Groves Latter-Day Saints Hospital*,

In recent years the *Perlmutter* reasoning seems to have lost the acceptance it once possessed. The unsoundness of the doctrine and its implementation has been criticized. In *Russell v. Community Blood Bank, Inc.*,<sup>14</sup> the court said: "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."<sup>15</sup> Even *Perlmutter's* home state chose not to characterize a blood transfusion as a service when presented with an action based on express warranty.<sup>16</sup>

Recently, the New York Supreme Court held that an action for breach of implied warranty might lie against the blood bank, if the facts, as developed from a full trial, so warranted it.<sup>17</sup> The court recognized that the transfer of blood from a blood bank to a hospital constituted a sale within the meaning of the Uniform Commercial Code,<sup>18</sup> and that the blood bank was a "merchant" with respect to the sale of blood.<sup>19</sup> Therefore, the court declined to dismiss the action for breach of implied warranty on *Perlmutter's* "sales-service" reasoning.

*Perlmutter's* "sales-service" doctrine was rejected by the Pennsylvania Supreme Court, using a slightly different approach.<sup>20</sup> Considering circumstances approximating those in the present case, the court stated, "In view of our case law implying warranties in non-sales transactions, it cannot be said with certainty that no recovery is permissible upon the claim here made, even if it should ultimately be determined that the transfer of blood from a hospital for transfusion into a patient is a service."<sup>21</sup> This decision vacated the lower court's order that an action, based on implied warranty, was not viable since the transfusion of blood is a service. The court's decision did not consider whether a hospital should be liable on implied warranty. However, the decision effectively held that the technical distinction of a sale for the purposes of implied warranties attaching to blood transfusions is unnecessary for recovery. Implied warranties may attach to services as well as sales.<sup>22</sup>

364 P.2d 1085 (Utah 1961); *Gile v. Kennewick Public Hospital District*, 296 P.2d 662 (Wash. 1956).

<sup>14</sup> 185 So.2d 749 (Fla. App. 1966), *aff'd in part*, *Community Blood Bank, Inc. v. Russell*, 196 So.2d 115 (Fla. 1967).

<sup>15</sup> *Russell v. Community Blood Bank, Inc.*, 185 So.2d 749, 752 (Fla. App. 1966).

<sup>16</sup> *Napoli v. St. Peter's Hospital of Brooklyn*, 213 N.Y.S.2d 6 (N.Y. Sup. 1961).

<sup>17</sup> *Carter v. Inter-Faith Hospital of Queens*, 304 N.Y.S.2d 97 (N.Y. Sup. 1969).

<sup>18</sup> UNIFORM COMMERCIAL CODE § 2.314 (1970) states:

(1) . . . 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. . . .

(2) Goods to be merchantable must be at least such as . . .

(c) are fit for the ordinary purposes for which such goods are used. . . .

<sup>19</sup> "Merchant means a person who deals in goods of the kind. . . ." NEW YORK UNIFORM COMMERCIAL CODE § 2-104(1) (1964).

<sup>20</sup> *Hoffman v. Miscericordia Hospital of Philadelphia*, 267 A.2d 867 (Penn. 1970).

<sup>21</sup> *Id.* at 870.

<sup>22</sup> See, Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957).

The first jurisdiction which indicated a willingness to consider the issue of strict tort liability applied to hospitals for blood transfusions was New Jersey. The state supreme court reversed the lower court which would not apply the strict tort liability theory to blood transfusions. Instead, it held that a determination could not be made until a complete record considering the opposing public policy reasons involved was before them.<sup>23</sup> The case was settled prior to trial and the issue remains an open question in New Jersey.<sup>24</sup>

The *Cunningham* decision must be considered as a landmark case. The Illinois Supreme Court considered and rejected cases heretofore decided in the United States, presenting the same issues. Presently, it is the only court to hold that a hospital may be liable on the theory of strict liability. Defendant hospital argued that blood was not a product as contemplated by the Restatement section defining seller's liability. This reasoning was refuted by the court, relying on two federal cases to support their position.<sup>25</sup> Further, the court denied the argument that providing blood for patients is not a hospital's primary function; therefore, hospitals were not engaged in the business of selling a product and could not be held strictly liable. The court used comment *f. Business of Selling* of the Restatement as an analogy in disposing of defendant's contention: "The rule [strict liability] applies to the owner of a motion picture theatre who sells popcorn or ice cream, either for consumption on the premises or in packages to be taken home."<sup>26</sup> The transfusion of blood might be incidental to the treatment and care of patients, just as selling popcorn is incidental to the showing of a movie; nonetheless, liability arises.

Hospitals have always sought immunity from transfusion-hepatitis cases on the fact that no known tests were available to detect the presence of hepatitis in the blood. Here, the hospital employed the same argument, but to no avail. The court said: "[W]hether or not defendant can, even theoretically, ascertain the existence of serum hepatitis is of absolutely no moment."<sup>27</sup> The test for imposing strict liability is

<sup>23</sup> *Jackson v. Muhlenberg Hospital*, 249 A.2d 65 (N.J. 1969).

<sup>24</sup> *But see, Baptista v. Saint Barnabas Medical Center*, 262 A.2d 902, 906 (N.J. Super. App. Div. 1970). The court refused to apply strict tort liability to a hospital for the transfusion of incompatible blood. Although the court implied that had the blood been contaminated with the virus of hepatitis strict liability would have been applied, the reasoning employed in this case seems untenable to support that conclusion.

<sup>25</sup> *United States v. Calise*, 217 F. Supp. 705 (S.D. N.Y. 1962). Defendant was charged with mislabeling packages or containers ". . . of any virus, serum, toxin, antitoxin, or other product aforesaid; . . ." under 42 U.S.C. 262(b) (1969). Defendant argued that blood was not a serum and therefore not within § 262. The court held, "There can be no question but that the defendants dealt in blood products for their use in the treatment of human diseases. I, therefore, hold that the whole human blood referred to in the indictment would constitute a 'drug' within the meaning of the statute."; *United States v. Steinschreiber*, 218 F. Supp. 426, 428 (S.D. N.Y. 1962) held that blood plasma was a product.

<sup>26</sup> RESTATEMENT (SECOND) OF TORTS § 402A, Comment *f.*, 350 (1966).

<sup>27</sup> *Cunningham v. MacNeal Memorial Hospital*, 266 N.E.2d 897, 903 (Ill. 1970).

whether the product was "unreasonably dangerous" for its intended use, and not whether the seller can determine if the product is safe.<sup>28</sup> The fact that the seller is unaware of the defect does not alter the fact that the product is defective.<sup>29</sup>

Defendant further asserted that since hepatitis in blood cannot be detected, the blood is an unavoidably unsafe product, thus an exception to strict liability. The court ruled that the exception only applies to such commodities which are pure, but inherently dangerous. Thus, blood in its pure state is not inherently dangerous and cannot, therefore, be considered an exception.<sup>30</sup>

*Perlmutter's* "sales-service" doctrine was termed "unrealistic." It seems that for purposes of strict tort liability, the term "sale" will be given a broader definition than what would otherwise be included as a "service" under the warranty theory. The Illinois court did in fact declare that a blood transfusion constitutes a sale.<sup>31</sup>

The significance of *Cunningham* cannot be over-emphasized. Application of the *Cunningham* rule may be utilized to include any product the hospital provides to a patient. A federal case from Vermont suggests that implied warranties may be attached to the administering of an anesthetic to a patient.<sup>32</sup> Further, physicians may be held liable when furnishing some product to a patient.

Twenty-six jurisdictions<sup>33</sup> have enacted specific legislation to deny recovery on the basis of implied warranty or strict liability attaching

<sup>28</sup> See, RESTATEMENT (SECOND) OF TORTS § 402A, Comment *i*. (1966).

<sup>29</sup> See, Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 13 (1965); Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEXAS L. REV. 855, 860 (1963).

<sup>30</sup> *Cunningham v. MacNeal Memorial Hospital*, 266 N.E.2d 897, 904 (Ill. 1970). See also RESTATEMENT (SECOND) OF TORTS § 402A, Comment *k*. (1965); *Gottsdander v. Cutter Laboratories*, 6 Cal. Rptr. 320 (Cal. Dist. Ct. App. 1960).

<sup>31</sup> A question arises as to whether strict tort liability would apply if the hospital furnished the blood without a specific charge, or through the contribution of blood by a relative. It seems that a technical sale is not required in a strict tort liability case; decisions tend to use the phrase "place into the stream of commerce" rather than "sale." See, e.g., *Delany v. Towmotor Corp.*, 339 F.2d 4 (2d Cir. 1964); See also *Gottsdander v. Cutter Laboratories*, 6 Cal. Rptr. 320 (Cal. Dist. Ct. App. 1960); *Dunham v. Vaughan & Bushnell Mfg. Co.*, 247 N.E.2d 401 (Ill. 1969).

<sup>32</sup> *Mauran v. Mary Fletcher Hospital*, 318 F. Supp. 297 (D. Vt. 1970).

<sup>33</sup> A.S. 45.05.100(e) (Supp. 1970); A.R.S. § 36-1151 (Supp. 1969); ARK. STAT. ANN. 85-2-316-3(d) (Supp. 1965); DEERING'S CAL. HEALTH & SAFETY CODE § 1606 (Supp. 1971); DEL. CODE ANN. 5A § 2-316(5) (Supp. 1968); FLA. STAT. ANN. para. 672.2-316(5) (Supp. 1971); KENTUCKY REV'D STATS. ch. 139.125 (1969); LA. CIVIL CODE art. 1764(b) (Supp. 1970); MAINE REV. STAT. ANN. 11 § 2-108 (Supp. 1971); MASS. ANN. LAWS—UNIFORM COMM. CODE ch. 106, § 2-316(5) (Supp. 1970); MICH. STATS. ANN. § 14.528(1) (1969); MISS. CODE ANN. § 7129-71 (Cum. Supp. 1970); NEB. REV. STATS. § 71-4001 (Cum. Supp. 1967); NEV. REV. STATS. § 460.010 (Supp. 1967); N.MEX. STATS. ANN. § 12-12-5 (Supp. 1969); N.D. CENT. CODE § 41-02-33(3)(d) (Supp. 1969); OHIO REV. CODE § 2108.11 (Supp. 1969); OKLA. STAT. ANN. 63 § 2151 (Supp. 1971); S.C. CODE § 32-559 (Supp. 1970); S.D. COMP. LAWS § 57-4-33.1 (Supp. 1970); TENN. CODE ANN. § 47-2-316(5) (Supp. 1970); TEX. BUS. & COM. ANN. § 2.316(e) (1968); VA. CODE ANN. § 32-364.2 (1969); W.VA. CODE § 16-23-1 (1971); WIS. STAT. ANN. (1957) § 146.31 (Supp. 1971); WYO. STAT. ANN. § 34-2-316(3)(d) (Supp. 1969).

to blood transfusions. Article 2.316(e) of the Business and Commerce Code of Texas, provides:

The implied warranties of merchantability and fitness shall not be applicable to the furnishing of human blood, blood plasma, or other human tissue or organs from a blood bank or reservoir of such other tissues or organs. Such blood, blood plasma or tissue or organs shall not for the purpose of this title be considered commodities subject to sale or barter, but shall be considered as medical services.

However, jurisdictions where such appropriate legislation does not exist will undoubtedly be stormed by an increase of transfusion-hepatitis suits. The increase of such suits prompted the Florida legislature into enacting legislation<sup>34</sup> which overruled *Russell v. Community Blood Bank*.<sup>35</sup> Other states, in anticipation of a flood of such suits, are considering the passage of legislation that would define blood transfusions by law as services.<sup>36</sup>

Thus, *Cunningham* magnifies the ever-increasing legal burden placed on hospitals. Consequently, only through legislation may hospitals find protection.

On careful analysis, it may be concluded that the theory of strict liability was correctly applied in the *Cunningham* case. However, overriding public policy should predicate an exception in this area. Such exception should not be hidden behind the illogical reasoning of the "sales-service" theory, and does not mean a return to the era of "charitable immunity." It should be based on the premise that the public's welfare would best be served by denying liability under implied warranty or strict liability. It is further submitted that the proper rule in this situation should be the negligence rule.

At this time there is no test or method that will detect all hepatitis carriers and their infected blood. Tests are available, though far from accurate,<sup>37</sup> and hospitals should be compelled to perform such tests.<sup>38</sup> Failure to perform such tests or to employ preventive measures in the

<sup>34</sup> FLA. STAT. ANN. para. 672.2-316(5) (1969).

<sup>35</sup> 185 So.2d 749 (Fla. App. 1966).

<sup>36</sup> Utah recently enacted such a law. Also Colorado and New York are considering a similar measure. Wall Street Journal, March 2, 1971, at 14, col. 3: Soon the appellate courts of Maryland will consider the issue for the first time—John J. Schuchman v. Johns Hopkins Hospital, Trial No. 14074-S (D. Md., filed Feb. 9, 1971).

<sup>37</sup> See generally, *A Tighter Screen on Transfusion Hepatitis*, 11 MEDICAL WORLD NEWS 4 (Feb. 1970); *Hepatitis—Have we finally corralled the virus?* 10 MEDICAL WORLD NEWS 39 (Oct. 1969); *Rapid Detection of Australia Antigen By Cross-Over Electrophoresis*, 2 THE LANCET 368 (Aug. 1970); Shulman, *Viral Hepatitis*, 72 ANNALS OF INTERNAL MEDICINE 257 (Feb. 1970); Shulman, *Virus-like Antigen, Antibody, and Antigen-Antibody Complexes in Hepatitis Measured by Complement Fixation*, 165 SCIENCE 304 (July 1969).

<sup>38</sup> New York State and Massachusetts require mandatory testing for the presence of hepatitis in blood. Wall Street Journal, March 2, 1971, at 14, col. 3.