

1-1-1971

Hepatitis and Strict Liability

Judith Finkel Rinsky

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

Recommended Citation

Judith Finkel Rinsky, *Hepatitis and Strict Liability*, 25 U. Miami L. Rev. 349 (1970)

Available at: <http://repository.law.miami.edu/umlr/vol25/iss2/12>

This Case Note is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

At present, arrests are still being made under the Florida vagrancy statute. However, both *Lazarus* and the instant case are being appealed to the United States Supreme Court. Hopefully, that court will lay the abuses of Florida Statute section 856.02 to rest.

HAROLD G. MELVILLE

HEPATITIS AND STRICT LIABILITY

Plaintiff, a patient in defendant hospital, received several transfusions of whole blood as part of a course of treatment. She developed serum hepatitis which required further hospitalization. Her suit against the hospital, sounding in strict liability in tort, was dismissed by the Circuit Court of Cook County. On appeal, the Illinois appellate court held that the complaint stated a cause of action and remanded the cause for trial.¹ A certificate of importance was granted by the appellate court and the cause was heard by the Supreme Court of Illinois which *held*: affirmed: The doctrine of strict liability based upon sale of a defective product in an unreasonably dangerous condition is applicable to an eleemosynary hospital which transfuses blood to a patient as part of its general services. *Cunningham v. MacNeal Memorial Hospital*, — Ill. 2d —, 266 N.E.2d 897 (1970).

The majority of cases involving blood transfusions have been based on the theory of breach of an implied warranty, under first, the UNIFORM SALES ACT and, more recently, the UNIFORM COMMERCIAL CODE. The leading case is *Perlmutter v. Beth David Hospital*.² In that case, plaintiff sought to recover on the theory that supplying blood was a sale within the provisions of the SALES ACT and that, consequently, a warranty that the blood was reasonably fit for the purpose intended was implied from the sale. In a four-to-three decision, the New York Court denied recovery, holding that the contract between the hospital and the patient was one for services—not for the sale of goods—and was not divisible into sale and service components.³

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.⁴

The majority of the reported cases are in accord with the *Perlmutter* decision.⁵ However, some courts have differentiated between a hospital

1. *Cunningham v. MacNeal Memorial Hosp.*, 113 Ill. App. 2d 74, 251 N.E.2d 733 (1969).

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

3. *Id.* at 104, 123 N.E.2d at 794.

4. *Id.* at 106, 123 N.E.2d at 795.

5. *Accord*, *Whitehurst v. American Nat'l Red Cross*, 1 Ariz. App. 326, 402 P.2d 584 (1965); *Koenig v. Milwaukee Blood Center, Inc.*, 23 Wis. 2d 324, 127 N.W.2d 50 (1964);

and a blood bank in applying the sales-service distinction. These courts have found a contract for services when a hospital was the defendant and a contract for the sale of goods in cases involving commercial blood banks.⁶ In *Carter v. Inter-Faith Hospital of Queens*,⁷ a New York court held that under the UNIFORM COMMERCIAL CODE, a blood bank was a merchant, and thus an implied warranty of merchantability could attach to a sale of its goods. The court concluded that such cause of action for breach of implied warranty would lie against a commercial blood bank although not against a hospital.⁸ Many states, including Florida, have by statute declared that the sale of whole human blood for the purpose of transfusions shall be considered a service.⁹ These statutes make it unnecessary for the courts to resolve the issue.

In deciding how to apply the sales-service distinction, several courts have been cognizant of, and influenced by, the lack of a definitive test to determine the presence of hepatitis virus in the blood, and that such blood should therefore be considered an unavoidably unsafe product. These arguments have been raised as defenses to recovery based on implied warranty. Some courts have felt that if the action could be maintained at all, the hospital or blood bank would be liable regardless of the fact that the virus could not be detected.¹⁰ Others have held exactly the opposite,¹¹ and one court has recently declared the issue must be resolved at trial where all the evidence could be fully developed.¹²

A recent Pennsylvania case¹³ has rejected the sales-service distinction,

Dibblee v. Dr. W.H. Groves Latter-Day Saints Hosp., 12 Utah 2d 241, 364 P.2d 1085 (1961); *Goelz v. J.K. & Susie L. Wadley Research Institute & Blood Bank*, 350 S.W.2d 573 (Tex. Civ. App. 1961). *Contra*, *Jackson v. Muhlenberg Hosp.*, 96 N.J. Super. 314, 232 A.2d 879 (1967), *rev'd on other grounds*, 53 N.J. 138, 249 A.2d 65 (1968).

6. *Russell v. Community Blood Bank, Inc.*, 185 So.2d 749, 752 (Fla. 2d Dist. 1966), *aff'd as modified on other grounds*, 196 So.2d 115 (Fla. 1967) held:

Regardless of the fact that a *hospital* supplying whole blood to a patient may be merely performing a service incident to the over-all medical attention being furnished, we are not willing to extend this "service" characterization to the blood bank which originally collects and distributes the commodity. 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.

White v. Sarasota County Public Hosp. Bd., 206 So.2d 19 (Fla. 2d Dist. 1968), *cert. denied*, 211 So.2d 215 (Fla. 1968); *Hoder v. Sayet*, 196 So.2d 205 (Fla. 3d Dist. 1967).

7. 60 Misc. 2d 733, 304 N.Y.S.2d 97 (Sup. Ct. 1969).

8. *Id.* at 734, 304 N.Y.S.2d at 100.

9. FLA. STAT. § 672.316(5) (1969); ALASKA STAT. § 45.05.100 (1968); CALIF. HEALTH & SAFETY CODE § 1606 (1971); MASS. GEN. LAWS ch. 106, § 2-316(5) (1965). The Florida statute was adopted after *Russell v. Community Blood Bank, Inc.*, 196 So.2d 115 (Fla. 1967), presumably to overrule the result of that case.

10. *Perlmutter v. Beth David Hosp.*, 308 N.Y. 100, 106, 123 N.E.2d 792 (1954). This was one of the important factors that led the court to find that a service was involved. *See also*, *Community Blood Bank, Inc. v. Russell*, 196 So.2d 115, 119 (Fla. 1967) (Roberts, J., specially concurring).

11. *Jackson v. Muhlenberg Hosp.*, 96 N.J. Super. 314, 232 A.2d 879, *rev'd*, 53 N.J. 138, 249 A.2d 65 (1967).

12. *Hoffman v. Misericordia Hosp.*, 429 Pa. 501, 267 A.2d 867 (1970). *Accord*, *Community Blood Bank, Inc. v. Russell*, 196 So.2d 115, 118 (Fla. 1967).

13. *Hoffman v. Misericordia Hosp.*, 439 Pa. 501, 267 A.2d 867 (1970).

holding that a cause of action does exist based on the alleged breach by the hospital of the implied warranty of merchantability or the implied warranty of fitness for a particular purpose. The court reasoned that the UNIFORM COMMERCIAL CODE does not impede the development of implied warranties in non-sale cases,¹⁴ and stated:

We therefore do not feel obligated to hinge any resolution of the very important issue here raised on the technical existence of a sale.¹⁵

Even if it were decided that supplying whole blood for transfusions was a service, the Pennsylvania court refused to hold that recovery was impossible without a trial where a complete record could be established on the issues.¹⁶

In the instant case, the action was brought on the doctrine of strict tort liability rather than the theory of implied warranties.¹⁷ Although at least one court had previously held that the governing principles and remedy under either theory are identical,¹⁸ the Illinois Court attacked the problem anew. The court analyzed the issue of whether the doctrine of strict tort liability, as set forth in RESTATEMENT (SECOND) OF TORTS¹⁹ and as adopted in Illinois by *Suvada v. White Motor Co.*,²⁰ attached to a hospital supplying whole human blood to its patient for the purposes of a transfusion.

After finding that whole blood fit the definition of "product" as stated in the RESTATEMENT,²¹ the court went on to analyze the sale-service distinction relied upon by *Perlmutter* and the cases following it. The court stated, however, that it did not consider the public policy basis of *Perlmutter* relevant to its decision:

14. UNIFORM COMMERCIAL CODE § 2-313, comment 2.

[T]he warranty sections of this article are not designed in any way to disturb those lines of case law growth which have recognised that warranties need not be confined either to sales contracts or to the direct parties to such a contract.

15. *Hoffman v. Misericordia Hosp.*, 439 Pa. 501, 503, 267 A.2d 867, 870 (1970).

16. *Id.* at 504, 267 A.2d at 871.

17. *Cunningham v. MacNeal Memorial Hosp.*, 113 Ill. App. 2d 74, 251 N.E.2d 733 (1969) [hereinafter cited as *Cunningham*].

18. *Jackson v. Muhlenberg Hosp.*, 96 N.J. Super. 314, 324, 232 A.2d 879, 884 (1967).

19. RESTATEMENT (SECOND) OF TORTS § 402A [hereinafter cited as RESTATEMENT].

(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 and does reach the user or consumer without substantial change in the condition in which it is 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.

20. 32 Ill.2d 612, 210 N.E.2d 182 (1965).

21. RESTATEMENT, Comment e:

Normally the rule stated in this Section will be applied to articles which already have undergone some processing before sale, since there is today little in the way of

[T]here can be no question that defendant is engaged in the business of "selling" whole blood for transfusion into patients as that requirement is contemplated under our ruling in *Suvada*.²²

In failing to accept the reasoning of the *Perlmutter* majority,²³ the court also saw no distinction between a hospital and blood bank for the purpose of the imposition of liability based on the RESTATEMENT.²⁴

The court then considered an additional problem raised by earlier cases,²⁵ the problem of the effect of the impossibility of discovering the defect in blood and the unavoidably unsafe product exception to the rule of strict tort liability.²⁶ Both were rejected as possible defenses to liability.²⁷ As to the former the court held that:

[W]hether or not defendant can . . . ascertain the existence of serum hepatitis in whole blood employed by it for transfusion purposes is of absolutely no moment. Any other ruling would be entirely inconsistent with the concept of strict tort liability.²⁸

In discussing the related problem—whether blood should be considered an unavoidably unsafe product as contemplated in the RESTATEMENT's exception to strict liability,²⁹ the Illinois Court held that the exception applied only to products which are not by their nature impure but which even if properly prepared, would involve substantial risk to the user. For

consumer products which will reach the consumer without such processing. The rule is not, however, so limited, and the supplier of poisonous mushrooms which are neither cooked, canned, packaged, nor otherwise treated is subject to the liability here stated.

22. Cunningham, ___ Ill. 2d ___, 266 N.E.2d 897, 902 (1970).

23. The Illinois Court saw no difficulty in separating the contract for services from that of the purchase and sale of the healing materials. *Id.* at ___, 266 N.E.2d at 901.

24. In denying the existence of a difference between the hospital and blood bank for the purposes of liability, the court relied on comment f of section 402A of the RESTATEMENT. The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. . . . It is not necessary that the seller be engaged solely in the business of selling such products.

It found that although a blood bank's principal function is to stockpile blood for distribution to various institutions, while a hospital generally provides blood as only an ancillary part of its services, both entities were clearly within the distribution chain. Cunningham, ___ Ill. 2d at ___, 266 N.E.2d at 901.

25. *Hoffman v. Misericordia Hosp.*, 439 Pa. 501, 503, 267 A.2d 867, 870 (1970); *Jackson v. Muhlenberg Hosp.*, 96 N.J. Super. 314, 329, 232 A.2d 879, 886 (1967); *Russell v. Community Blood Bank, Inc.*, 185 So.2d 749, 755 (Fla. 2d Dist. 1966).

26. RESTATEMENT, Comment k.

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. . . . An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. . . .

27. Cunningham, ___ Ill. 2d ___, ___, 266 N.E.2d 897, 903 (1970).

28. *Id.* The impossibility of detection has previously been held not to bar recovery in an implied warranty case where the plaintiff contracted typhoid fever after eating contaminated clams. *Kenower v. Hotels Statler Co.*, 124 F.2d 658 (6th Cir. 1942).

29. See note 26 *supra*.

example, the Pasteur treatment for rabies, even though properly prepared, may involve serious consequences to the consumer, but because the disease leads to a dreadful death, the use of the vaccine is justified. On the other hand, blood with hepatitis virus is impure, and it is this impurity, rather than the product itself, that makes it unreasonably dangerous. Such blood is in a defective condition and calls for the application of strict liability.³⁰

The foregoing cases involve the resolution of a policy decision—whether it is preferable for the hospital or for the individual to bear the risk of loss when serum hepatitis results from a transfusion of contaminated blood. The instant case chose to place the burden of the loss on the hospital³¹ and made a very convincing application of the doctrine of strict tort liability in support of the decision. Other courts will be called upon for their decisions, and they now have available two theories on which they can base it—that of implied warranties and the one offered in this case of strict liability in tort, with its freedom from the limitations of the UNIFORM COMMERCIAL CODE.³²

The Illinois Court could have chosen to follow *Perlmutter* and find that there was a service. The view that a sale was involved seems, however, to be the more realistic view. Also, the court could have utilized the RESTATEMENT exception and declared blood an unavoidably unsafe product. However, it is the opinion of this writer that the court chose the better interpretation of the RESTATEMENT exception.

While it is true that there is as yet no definitive way to detect hepatitis virus in whole blood, the possible imposition of liability may cause the blood banks, both hospital and commercial, to take more care in the selection of their donors.³³ That hospitals often depend for blood on commercial banks is not sufficient cause to immunize the hospitals from liability, since under these circumstances the hospital could itself maintain an action against the commercial blood bank. The hospital would also be in a better position to pressure banks into using the utmost care. The decisive factor in determining where to place the burden of responsibility was that the hospital is better able to anticipate and bear the risk of loss than is the injured individual. For precisely this reason, the

30. Cunningham, — Ill. 2d —, —, 266 N.E.2d 897, 904 (1970).

31. The court stated that it did not believe that hospital immunity can be justified on the protection-of-the-funds theory. The concept of strict liability in tort logically, and we think, reasonably, dictates that an entity which distributes a defective product for human consumption, whether for profit or not, should legally bear the consequences of injury caused thereby, rather than allowing such loss to fall upon the individual consumer who is entirely without fault. *Id.* at —, 266 N.E.2d at 904.

32. RESTATEMENT, Comment m:

The rule stated in this Section is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code, as to warranties; and it is not affected by limitations on the scope and content of warranties, or by limitation to "buyer" and "seller" in those statutes.

33. Many blood banks pay for each donation, and, as there are some who are lax in their investigation, it is conceivable that a single donor could go from one to another for a ready source of income. However, it is precisely these people, many of whom are narcotic addicts, who are most likely to be carriers of hepatitis virus.

state legislatures will be under pressure from hospitals and their insurers to initiate legislation to prevent such imposition of liability. The Florida legislature was under this sort of pressure after the decision in *Russell v. Community Blood Bank, Inc.*,³⁴ and a statute effectively overruling that decision resulted.³⁵

JUDITH FINKEL RINSKY

HABEAS CORPUS RELIEF AND THE CONCURRENT SENTENCE DOCTRINE

The petitioner, who was serving concurrent sentences for convictions of robbery and uttering a forged instrument,¹ sought to have the robbery conviction set aside on the ground that his right of appeal from the conviction had been thwarted. Petitioner contended that he had requested his privately retained attorney to file a motion for new trial and notice of appeal; however, his attorney had advised him that he had been retained for trial work only and that if he wished for an appeal to be taken, a separate fee would have to be paid. Since this fee was not paid, the attorney never filed the motion for a new trial or notice of appeal.² After an unsuccessful attempt to have the judgment vacated,³ petitioner then petitioned the Florida Supreme Court for a writ of habeas corpus. The respondent argued that the writ could not be issued because Florida recognized the concurrent sentence doctrine which precluded issuance of the writ when the petitioner attacks only one of the sentences he is serving. *Held*: A prisoner serving concurrent sentences may use habeas corpus to attack the one sentence while still serving the other

34. In *Russell v. Community Blood Bank*, 196 So.2d 115 (Fla. 2d Dist. 1966), it was held that the supply of blood from a commercial blood bank was a sale and consequently, a cause of action was allowed for breach of an implied warranty.

35. The legislature then adopted FLA. STAT. § 672.316(5) (1969), which declared that any procurement or distribution of blood for transfusions is "the rendering of a service by any person participating therein, and does not constitute a sale, . . . and the implied warranties of merchantability . . . shall not be applicable. . . ." This effectively overrules the result of *Russell* and takes the blood bank out of the scope of liability based on implied warranty.

It is conceivable that a legislature might pass a similar statute declaring that blood shall not be considered an unreasonably dangerous product for the purposes of the imposition of strict tort liability, and thus avoid the result of the principal case.

1. Petitioner, James D. Frizzell, was incarcerated under two sentences for a term of ten years.

2. This alleged error was first raised and considered on a motion to vacate under FLA. R. CRIM. P. 1.850. The circuit court denied the motion and, on appeal, the District Court of Florida, Second District, affirmed, holding that in a collateral post-conviction proceeding a defendant cannot seek reversal for what his privately retained counsel failed to do. *Frizzell v. State*, 213 So.2d 293 (Fla. 2d Dist. 1968).

3. *Id.*