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BLOOD TRANSFUSIONS—STRICT LIABILITY?

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ADVERSE REACTIONS

BLOOD is the most potent therapeutic agent used by physicians in the treatment of patients and in many instances its administration is life saving. Of course, the only source of blood for humans is blood donated by other humans. In order to determine, therefore, whether a donor's blood would transmit any disease or be harmful in any way to a potential blood recipient the blood donor is asked whether he has ever had such diseases as hepatitis, syphilis, or malaria, and his hemoglobin level, blood pressure and body temperature are determined. In addition, individuals who are taking drugs which might be considered harmful to a blood recipient are not permitted to be donors.

When blood is needed by a patient, a specimen of his blood is obtained and placed in a test tube, which is then labelled with his name and identification number. The specimen is then studied for its ABO and Rh type and in some institutions tests are made for unusual antibodies in the patient's blood which might result in transfusion reactions. After the patient's type is determined, donor blood of the same ABO and Rh type and the patient's specimen of blood are mixed in a test tube to determine compatibility. Several tests are conducted in order to detect whether or not compatibility exists, and if an incompatibility is found the blood is not transfused

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and a different unit of blood is similarly tested. The unit of acceptable blood is then removed from the blood bank to the patient's bedside and the transfusion is started.

The most common and severe incompatibility reactions occur where there are errors of the ABO and Rh types. The most serious transfusion reaction, often resulting in death or serious morbidity, is the hemolytic transfusion reaction which results from the rapid destruction of transfused red blood cells in the patient's circulatory system, or the destruction of a patient's own red cells by antibodies transfused in the donor blood. This type of reaction is usually caused by the transfusion of the wrong unit of blood into the patient as a result of technical or clerical errors. These errors include: incorrect labelling of the blood container; defective typing serum which can result in erroneous ABO and Rh typing; or human error, such as an error in recording the correct typing result or recording the typing result for the wrong unit of blood. Other errors can result from the submission to the blood bank of a blood specimen with the name of the wrong patient on the tube. Since the hemolytic transfusion reaction is usually the result of technical or clerical errors it is almost always preventable. However, on occasion this reaction will occur despite the use of all proper procedures, precautions and safeguards.¹

The least serious and most frequent transfusion reactions are the "allergic" reactions which are usually manifested by skin rashes, fever, and chills during or after the transfusion. These reactions are usually of no serious consequence to the patient and result from an allergic reaction to some of the contents of the blood which are being transfused, such as white blood cells, platelets, plasma proteins, or other plasma constituents. They occur most often in patients who have been transfused many times or in women who have had multiple pregnancies. There is no adequate way at the present time of preventing these reactions.

¹See P. L. MOLLINSON, BLOOD TRANSFUSION IN CLINICAL MEDICINE, ch. 12 (4th ed. 1967).

The second most serious complication of blood transfusion is serum hepatitis which is transmitted by donor blood. This reaction may result in death or in serious morbidity. There is no known way at the present time of detecting a hepatitis carrier and there is no test available which will screen out those bloods capable of transmitting hepatitis. There have been many attempts to identify those blood donors who are capable of transmitting hepatitis. The most commonly used tests have been those of liver function, which have proved unreliable in screening out these hepatitis carriers. At the present time there is an intensive effort to find a test which will detect the hepatitis virus carriers so that they can be excluded as blood donors. The only acceptable means of screening out possible carriers is to question the patient carefully for a previous history of hepatitis or jaundice as well as to obtain a history of recent exposure to hepatitis or of any of the symptoms which might suggest that the donor might be in the early stages of hepatitis. This attempt is of limited value, however, since the potential donor may not be aware that he is a carrier and in many cases may lie or fail to disclose such facts to the examining nurse or doctor. The latter situation is especially prevalent among donors to commercial blood banks, some of whom are drug addicts or chronic alcoholics, as will be more fully discussed below.

LEGAL LIABILITY

As indicated above, the hemolytic transfusion reaction is usually caused by technical or clerical errors in the handling of the transfused blood, and is almost always preventable. On the other hand, blood transfusion reactions resulting in the contraction of serum hepatitis are almost never preventable by reason of the impossibility of detecting the presence of the hepatitis virus in the donor blood. Thus, the cases dealing with legal liability for hemolytic transfusion reactions and transfusion reactions not involving serum hepatitis, have been decided under traditional theories of tort law. These cases have usually

dealt with the issues of negligence of the physician or hospital administering the blood transfusion and questions of causation.² However, the cases dealing with the liability for the contraction of serum hepatitis have, by virtue of the impossibility of detecting that virus, been forced to proceed upon some theory of absolute liability, either under warranty theory or under a theory of strict liability in tort.

The distinction between warranty and an action in tort was that in the case of a sale of goods a warranty gave rise to a cause of action without fault for a breach thereof, whereas negligence must have been pleaded and proved before a recovery was permitted under traditional tort rules.³ Since fault can almost never be shown in serum hepatitis transfusion reaction cases, it followed that warranty theory might be a possible vehicle for recovery in such cases. Or so the lawyers thought before the courts spoke.

PERLMUTTER AND ITS AFTERMATH

The case that has had the most profound effect in this area is *Perlmutter v. Beth David Hospital*.⁴ This was an action to recover damages for personal injuries sustained by plaintiff while a patient in a hospital maintained and operated by the defendant. It was alleged that the injuries resulted from the transfusing of "bad" blood supplied by the hospital for a price as part of the customary service rendered by the hospital to its patients. As a result of such transfusion of "bad" blood, the patient allegedly became afflicted with homologous serum hepatitis.

The plaintiff predicated her action on the theory that the supplying of blood constituted a "sale" within the Sales

² For cases dealing with these types of blood transfusion reactions and liability for negligence arising out of particular acts or omissions, including technical and clerical errors in the course of such transfusions, see Annot., 59 A.L.R.2d 768 (1958).

³ *Aegis Productions, Inc. v. Arriflex Corp. of America*, 25 App. Div. 2d 639, 268 N.Y.S.2d 185 (1st Dep't 1966).

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

Act and that there attached implied warranties imposed by that statute that the blood was "reasonably fit for the purpose" and of "merchantable quality."

The court, in a landmark opinion, held that the transfusion of blood by a hospital to a patient constituted a "service" rather than a sale of goods and that plaintiff could not, therefore, recover for breach of an implied warranty under the Sales Act. The court left untouched the question of the hospital's liability for negligence, if any.

In so holding the court said:

While determination, as to whether the essence of a particular contract is for the rendition of services or for the sale of property, may at times be troublesome and vexatious, there is no doubt that the main object sought to be accomplished in this case was the care and treatment of the patient. 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 the wherewithal of the hospital staff and the availability of hospital facilities 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. The fact that the treatment might have come from a physician, while the blood came from the hospital, is of no operative consequence; it is the transaction, regarded in its entirety, which must determine its nature and character. As long as it involves the medical care and treatment of a patient at a hospital, it is immaterial that it is the doctor who may diagnose and treat and the hospital which may supply facilities and material. . . . In this case, it is plain that what the complaint alleges and truly describes is not a purchase and sale of a given quantity of blood, but a furnishing of blood to plaintiff for transfusion at a stated sum, as part of, and incidental to, her medical treatment.⁵

In arriving at this conclusion the court noted there was "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."⁶ The court reasoned, therefore,

⁵ *Id.* at 106, 123 N.E.2d at 795.

⁶ *Id.*

that to impose liability upon the hospital in such circumstances would render it responsible, "virtually as an insurer," if anything happened to the patient as a result of the "bad" blood.

In a vigorous dissent, concurred in by three of the court's seven judges, it was contended that the transfusion of blood was indeed a "sale." The dissent noted further that the majority, in concluding that there was no means of detecting hepatitis in the donor's blood, relied "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."⁷

Other states have followed the *Perlmutter* case and have denied the liability of hospitals for breach of implied warranties of fitness and merchantability in serum hepatitis transfusion reaction cases.⁸ These cases have uniformly held that the transfusion of blood by a hospital to a patient constituted a "service" and not a "sale."

However, other cases point out the weakness of the "service-sale" distinction established by the *Perlmutter* court. Thus, several New York cases have presented the question of whether a plaintiff could recover under a theory of express warranty in blood-transfusion reaction cases.⁹

⁷ *Id.* at 111, 123 N.E.2d at 798.

⁸ *Arizona*: *Whitehurst v. American National Red Cross*, 1 Ariz. App. 326, 402 P.2d 584 (1965).

Colorado: *Sloneker v. St. Joseph's Hosp.*, 233 F. Supp. 105 (D. Colo. 1964).

Georgia: *Lovett v. Emory Univ.*, 116 Ga. 277, 156 S.E.2d 923 (1967).

Minnesota: *Balkowitsch v. Minneapolis War Mem. Blood Bank*, 270 Minn. 151, 132 N.W.2d 805 (1965).

Utah: *Dibblee v. Dr. W.H. Groves Latter-Day Saints Hosp.*, 12 Utah 2d 241, 364 P.2d 1085 (1961) (action was for death of patient allegedly resulting from transfusion of incompatible blood).

Washington: *Gile v. Kennewick Pub. Hosp. Dist.*, 48 Wash. 2d 774, 296 P.2d 662 (1956) (blood incompatibility case).

Wisconsin: *Koenig v. Milwaukee Blood Center, Inc.*, 23 Wis. 2d 324, 127 N.W.2d 50 (1964). See also *Hidy v. State*, 207 Misc. 207, 137 N.Y.S.2d 334 (Ct. Cl. 1955), *aff'd*, 2 App. Div. 2d 644, 151 N.Y.S.2d 621 (4th Dep't 1956), *aff'd*, 3 N.Y.2d 756, 143 N.E.2d 528, 163 N.Y.S.2d 985 (1957).

⁹ *Payton v. Brooklyn Hosp.*, 21 App. Div. 2d 898, 252 N.Y.S.2d 419 (2d Dep't 1964), *aff'd*, 19 N.Y.2d 610, 224 N.E.2d 891, 278 N.Y.S.2d

In one lower court decision it was held that a complaint which alleged an express warranty that blood was fit for transfusion and that such transfusion would not be harmful to plaintiff's intestate, stated a cause of action against a hospital for breach of warranty.¹⁰ The court distinguished the *Perlmutter* case on the ground that the question of express warranty was not passed upon in that case.¹¹ However, this view would appear to be unsound in that it can hardly be said that an express warranty exists as to a transaction that has been denominated a "service" rather than a "sale" by New York's highest court. Thus, if under *Perlmutter* a blood transfusion by a hospital is not a "sale" but a "service" for the purpose of implied warranties of fitness and merchantability, it would be anomalous to hold that it could be a "sale" for the purpose of asserting express warranties.¹²

The basic unsoundness, however, of the "service-sale" distinction as applied to blood transfusion cases becomes even more apparent in another situation. When a hospital furnishes blood collected by its own blood bank to its patients it may be argued that the supplying of such blood is not a "sale," but a "service," just as the supplying of bandages or iodine by the hospital. But, when a hospital obtains blood from outside sources, such as commercial or non-commercial blood banks, this reasoning breaks down.

When commercial or non-commercial suppliers provide a unit of blood to a hospital, a charge is made therefor. This charge is usually made to the hospital and then passed on to the patient. The difference between commercial and non-commercial suppliers of blood is simply that the former

398 (1967); *Cheshire v. Southampton Hosp. Ass'n*, 53 Misc. 2d 355, 278 N.Y.S.2d 531 (Sup. Ct. 1967); *Napoli v. St. Peter's Hosp.*, 213 N.Y.S.2d 6 (Sup. Ct. 1961).

¹⁰ *Napoli v. St. Peter's Hosp.*, 213 N.Y.S.2d 6 (Sup. Ct. 1961).

¹¹ *See Payton v. Brooklyn Hosp.*, 21 App. Div. 2d 898, 252 N.Y.S.2d 419 (2d Dep't 1964) (dissenting opinion) which also makes this distinction. However, this view was apparently rejected by the Court of Appeals, which affirmed the dismissal of the action upon counsel's opening statement.

¹² *See also Aegis Productions, Inc. v. Arriflex Corp. of America*, 25 App. Div. 2d 639, 268 N.Y.S.2d 185 (1st Dep't 1966), reiterating the necessary sales basis for the attachment of warranties; *Cheshire v. Southampton Hosp. Ass'n*, 53 Misc. 2d 355, 278 N.Y.S.2d 531 (Sup. Ct. 1967).

are in the business of supplying blood as a distinct commodity for a profit, while the latter are nonprofit organizations and function to serve the community.

It is apparent, therefore, that the "service" rationale enunciated in *Perlmutter* is inapplicable as to such suppliers of blood, since it cannot be said that they "service" a patient in a hospital in the same sense that the hospital does. Furthermore, the underlying financial transaction itself, whereby the blood is supplied by such organizations to the hospital, surely appears to be a "sale" since it involves the supplying of goods for a consideration. And yet the courts have reached the same results as to commercial and nonprofit blood banks as they have to hospitals, and have denied liability in cases involving the contraction of serum hepatitis after blood transfusions.¹³ It is suggested that if this result is to be justified it can only be done on a basis other than the "service-sale" distinction enunciated in *Perlmutter*.

The courts' reluctance to impose liability in such cases of nonprofit suppliers of blood, is understandable. Thus, in one case the court reasoned that the defendant, the American National Red Cross, was not liable under a theory of a breach of implied warranty, in that the furnishing of blood by that organization to the patient was not a "sale" but a "gift."¹⁴ The court noted that the agreement between the patient's hospital and the blood bank provided that no charge for the blood was to be made to the recipient of such blood.¹⁵ Thus, although the court denied liability

¹³ *Krom v. Sharp & Dohme, Inc.*, 7 App. Div. 2d 761, 180 N.Y.S.2d 99 (3d Dep't 1958), *rearg. denied*, 14 App. Div. 2d 458, 218 N.Y.S.2d 587 (1961); *Whitehurst v. American Nat'l Red Cross*, 1 Ariz. App. 326, 402 P.2d 584 (1965); *Balkowitsch v. Minneapolis War Mem. Blood Bank*, 270 Minn. 151, 132 N.W.2d 805 (1965).

¹⁴ *Whitehurst v. American Nat'l Red Cross*, 1 Ariz. App. 326, 402 P.2d 584 (1965).

¹⁵ The agreement between the patient's hospital, Tuscon Medical Center, and the Blood Bank provided further that the hospital would reimburse the Bank for part of the operating cost for the collection, processing and distribution of blood, amounting to a total of \$4.95 per unit for whole blood used. The hospital charged the plaintiff \$5.20 for each pint of blood, of which sum it reimbursed \$4.90 to the Blood Bank under this agreement. The court noted the obvious fact that the sum of \$4.95, reimbursed to the Blood Bank by the hospital, was sufficient to pay for only a part of the Bank's operating cost for the collection, processing and distribution of the blood.

in this case and characterized the furnishing of blood by the Blood Bank as a "service," the result it reached can readily be accepted if the furnishing of blood be viewed as a "gift," which it apparently actually was. There should, of course, be no application of warranty law in the complete absence of a "sale" and in an entirely non-commercial transaction.

In another case involving a nonprofit blood bank the court analyzed the policy considerations underlying *Perlmutter* more closely.¹⁶ In denying a claim predicated upon breach of implied warranty in the sale of impure blood and upon strict liability in tort, the court said:

Plaintiffs seek to distinguish the *Perlmutter* case on the basis that the defendant here is not a hospital as it was there. But we cannot concede that defendant, which is a nonprofit corporation, should be treated differently than a hospital or that it should be characterized as a commercial business which offers its products for sale in the market place in competition with others for the sole motive of making a profit. The acts performed by the hospital in the *Perlmutter* case are not so unrelated to those performed by the defendant in the case before us as to justify a different result. . . . We find it difficult to give literal application of principles of law designed to impose strict accountability in commercial transactions to a voluntary and charitable activity which serves a humane and public health purpose. The activities involved in the transfusion of whole blood, a component of the living body, from one human being to another may be characterized as *sui generis* in that the sequence of events involve acts common to legal concepts of both a sale and a service. Moreover, it seems to us that under the facts in the case before us it 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 and in respect to which plaintiffs' physician has the same information, knowledge and experience as the supplier.¹⁷

The New York courts have reached the same result in the case of *commercial* suppliers of blood for a profit. Thus, in the case of *Krom v. Sharp and Dohme*,¹⁸ the plaintiff brought an action against a commercial supplier of

¹⁶ *Balkowitsch v. Minneapolis War Mem. Blood Bank*, 270 Minn. 151, 132 N.W.2d 805 (1965).

¹⁷ *Id.* at 155, 132 N.W.2d at 810-11.

¹⁸ 7 App. Div. 2d 761, 180 N.Y.S.2d 99 (3d Dep't 1958).

blood based upon breach of warranty in the sale of blood plasma manufactured or processed by it. The plaintiff contended that the hospital, which was not a party to the action, in making the purchase of plasma from the defendant, did so as the agent for any patient that might require the infusion of such plasma. The court affirmed an order dismissing the plaintiff's cause of action based on warranty. In so doing the court relied upon the *Perlmutter* rule that the supplying of blood was a service, not a sale. The court reasoned further that the hospital could not be considered as an agent of the plaintiff's intestate in the purchase of the blood, since none of the ordinary elements of agency were present and the patient, allegedly the principal, had no right of control as to the result or the means to be used.

It is suggested that the decision in *Krom* is no longer valid, even if it was correct under New York law when decided. In the first place, it must be conceded that a "sale" was consummated between the hospital and the commercial supplier of blood (*Krom*). Secondly, today it would be irrelevant that the hospital did not act as the patient's agent in the purchase of the blood, or that the former and not the latter paid the commercial supplier for such blood. In either event, under recent New York decisions greatly limiting the privity requirement, warranties arising from such "sale" of blood should run in favor of all persons whose use of the blood is within the reasonable contemplation of the suppliers.¹⁹ The fact, therefore, that the hospital and not the patient was a party to the sale of the blood by the commercial supplier should not be determinative, since the use of such blood by the patient was certainly contemplated by the supplier and any warranties arising from the sale should therefore run in favor of the patient.²⁰

¹⁹ *Rooney v. S. A. Healy Co.*, 20 N.Y.2d 42, 228 N.E.2d 383, 281 N.Y.S.2d 321 (1967); *Goldberg v. Kollman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963); *Kopera v. Fisher Scientific Co.*, 23 App. Div. 2d 851, 259 N.Y.S.2d 165 (2d Dep't 1965). See also *Wilsey v. Sam Mulkey Co.*, 56 Misc. 2d 480, 289 N.Y.S.2d 307 (Sup. Ct. 1968).

²⁰ As enacted in New York, section 2-318 of the UNIFORM COMMERCIAL CODE extends express or implied warranties to "any natural person who is in the family or household of his buyer or who is a guest in his home

WARRANTY THEORY

If the liability of commercial and non-commercial suppliers of blood is to be denied today in these circumstances, it should be on some basis other than that such suppliers are performing a "service" rather than a "sale" of blood under the *Perlmutter* theory. At least one lower court decision in New York has recognized the need for some other rationale if commercial blood banks are to be relieved from liability in these circumstances. In this case, involving the contraction of serum hepatitis as a result of a blood transfusion, the court denied the liability of a commercial supplier of blood and said:

It was indicated in *Perlmutter* that informed opinion then was that there existed no means of detecting the presence of injury causing factors in the donor's blood or a practical method of treating the blood to be used so that danger may be eliminated. Although the case was decided fourteen years ago, plaintiff has given no indication that medical science has overcome these impediments. *Therefore, even if contrary to the Third Department holding in Krom, a distinction were to be made between hospital and commercial blood supplier, there is nothing shown herein to establish that the plaintiff's claim is capable of proof.*²¹

The latter court, in denying the liability of a commercial supplier of blood, apparently did so on the basis that it was impossible to detect the presence of hepatitis in the

if it "is" reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty." The explicit terms of this section would not appear to apply to the usual situation wherein a patient pays a charge to the hospital for the blood supplied and sold to the latter by a commercial supplier. In these circumstances, the "sale" of blood is actually between the supplier and the hospital. Section 2-318 would apparently not apply since the "patient is not "in the family or household of his [hospital]" and is not "a guest in [the hospital's] home." However, the cases in this area (cited in note 19 *supra*) have considerably extended the protection afforded persons not in privity with the manufacturer of an item beyond the scope of section 2-318. Other states have done so by amending section 2-318, or by eliminating it altogether. See 10 PERSONAL INJURY NEWSLETTER, No. 18, at 206, March 20, 1967; 9 PERSONAL INJURY NEWSLETTER, No. 2, at 20, July 26, 1965.

²¹ *Heitner v. City of New York*, N.Y.L.J., July 9, 1968, at 12, col. 2. The facts alluded to in the text and not contained in the court's opinion are taken from the briefs of the parties. For an examination of the entire court record in this case, see *Heitner v. The City of New York*, Supreme Court of the State of New York, Bronx Co., Index No. 7367/63.

donor's blood, rather than on the basis of the *Perlmutter* "sale-service" dichotomy. To impose warranty liability in such circumstances would be to render the commercial supplier an insurer of the blood supplied by it, which the court was not prepared to do.

At least one court has rejected the "sale-service" distinction as to commercial and non-commercial blood banks. Thus, while the Florida courts have followed *Perlmutter* and have held that the supplying of blood by a *hospital* to a patient constitutes a "service," rather than a "sale,"²² they have also held that a commercial or nonprofit blood bank, which supplied blood to a patient for a consideration, has made a "sale" and that there may be a cause of action against it for breach of warranty.²³ In one case a Florida

²² *White v. Sarasota County Pub. Hosp. Bd.*, 206 So. 2d 19 (Fla. App. 1968); *Hoder v. Sayet*, 196 So. 2d 205 (Fla. App. 1967).

²³ In *Russell v. Community Blood Bank, Inc.*, 185 So. 2d 749 (Fla. App. 1966), the appellate court reversed a trial court decision which granted a non-commercial blood bank's motion to dismiss. The appellate court reasoned that it seemed to be a distortion to take what was arguably a sale, twist it into the shape of a service and then employ this transformed material in erecting the framework of what was really a policy decision. The court then held that the law of implied warranty applied to the supplying of blood by a blood bank, but that the manufacturer or supplier of such blood would not be liable under any warranty theory unless there was a factual showing that the blood could be made safe. However, the Supreme Court of Florida, on appeal, 196 So. 2d 115 (Fla. 1967), held that that portion of the appellate court's decision holding that the plaintiff's complaint stated a cause of action for breach of implied warranty as to the blood bank was correct, and that the case was properly remanded by the appellate court for trial on the issue of fact as to whether any such warranty was breached. However, the supreme court held that the issues of whether there was a recognized method of detection for hepatitis, and whether such fact would constitute a legal defense to the action were premature. The portions of the appellate court's decisions dealing with such issues were accordingly, declared to be surplusage and were expunged. In a concurring opinion by Justice Roberts, 196 So. 2d at 119, it was pointed out that the holding of the appellate court that a blood bank could be liable for breach of implied warranties only if the hepatitis virus was capable of detection, was contrary to the very basis of the strict or implied warranty theory, *i.e.*, liability without fault. In his opinion, therefore, that decision was in conflict with an earlier Florida case *Green v. American Tobacco Co.*, 154 So. 2d 169 (Fla. 1963). (In that case a cigarette manufacturer was held liable for the injurious consequences resulting from the use of its product even though, at the time of consumption thereof by the plaintiff's decedent, the harmful effects of the product were not and could not, by the reasonable application of human skill and foresight, have been known by the manufacturer of the cigarettes.) Justice Roberts distinguished between adulterated and non-adulterated products and stated that the blood containing the hepatitis virus is in the category of "adulterated

court has held that even though there may be no way to detect or eliminate the hepatitis virus once the blood has been taken, a jury might well find that the risk of its being present could have been greatly minimized through more careful screening of donors.²⁴ That court, in reversing summary judgment entered in favor of a commercial blood bank, said:

A blood bank, in order to be accredited by the proper authorities, is required to ask certain questions concerning the donor's general health, well being, diseases and other relevant matters before taking his blood. Albanese [one of the 2 donors] testified by deposition that he was asked none of these questions prior to the taking of his blood by the blood bank. Even though Albanese stated that he would have answered any such questions in the negative, a jury might reasonably infer that there had been a similar failure to screen the other donor at the time his blood was taken and that this amounted to a breach of the blood bank's implied warranty to take necessary precautions to minimize the risk of obtaining impure blood.²⁵

It is suggested that the approach taken by the Florida courts represents a significant step forward in this area. It should be noted that in none of the Florida cases has it actually been held that a blood bank *was* liable for breach of implied warranty in the sale of blood. The most that can be said now is that Florida has held that a blood bank *may* be liable under warranty theory and that the issue of whether an implied warranty exists or was breached is one of fact. This approach would appear to be sounder than that taken by the *Perlmutter* line of cases, which have decided cases in this area upon the basis of an artificial distinction between a "service" and a "sale".

products," along with canned meat, bottled drinks, candy sealed in a wrapper and other similar products intended for human consumption, and which may give rise to an action for implied warranty against the manufacturer or supplier thereof. Thus, Justice Roberts would hold a blood bank liable for breach of implied warranty, whether or not there is a method of detecting the hepatitis virus in the blood of the donor.

²⁴ *Hoder v. Sayet*, 196 So. 2d 205 (Fla. App. 1967).

²⁵ *Id.* at 209.

STRICT LIABILITY

In a recent New Jersey case the court rejected in its entirety the "sale-service" distinction enunciated in *Perlmutter*. In the case of *Jackson v. Muhlenberg Hospital*,²⁶ the issue presented upon motions for summary judgment was the liability of a commercial blood bank and a hospital for the contraction of hepatitis by a patient as a result of a blood transfusion. The transfused blood was purchased by the hospital from a commercial supplier for \$18 per container. The hospital charged the patient \$25 for each container of blood and \$20 for the transfusion thereof. It was not disputed that there was and is no test for determining whether human blood contains the hepatitis virus. The court noted further that every bottle of blood furnished by the hospital bore a disclaimer to the effect that despite the utmost care in the selection of donors, human blood may contain the hepatitis virus and that the blood bank did not warrant against its presence in the blood. The plaintiffs proceeded on the theories of negligence, implied warranty of fitness of the blood for the use intended, and strict liability in tort for furnishing dangerously defective goods. The court reviewed the case law in this area and concluded that:

If these valuable organizations [hospitals and blood banks] are to be exempted from liability, the immunity should be based upon the true policy consideration and not upon an irrelevant circumstance.²⁷

The court then held that as to both hospitals and blood banks:

The transfer of human blood for a consideration is a sale. So is its transfusion into the body of a patient when a charge is made for the blood.²⁸

²⁶ 96 N.J. Super. 314, 232 A.2d 879 (1967). See also *Magrine v. Krasnica*, 94 N.J. Super. 228, 227 A.2d 637, *aff'd sub nom.* *Magrine v. Spector*, 100 N.J. Super. 223, 241 A.2d 637 (1968), which was an action to recover for injuries sustained when a hypodermic needle broke in plaintiff's jaw. The court asserted that it was doubtful that New Jersey would follow *Perlmutter*, at least insofar as the latter case held that a "sale" was not involved in the supplying of blood, or that such description of the transaction was necessary to establish strict liability.

²⁷ 96 N.J. Super. at 324, 232 A.2d at 884.

²⁸ *Id.*

In dealing with the issue of the blood bank's strict liability in tort, the court relied on Section 402-A of the Restatement of Torts 2d (1965) which, because of its potential importance for this area, warrants some extensive comments here.

That section deals with the liability of a seller of a product for physical harm to the user or consumer. The black-letter rule, according to the Restatement, imposes strict or absolute liability regardless of exercise of due care upon the seller of a product "in a defective condition unreasonably dangerous to the user or consumer" although "the user or consumer has not bought the product from or entered into any contractual relation with the seller."

In Comment m. to that section it is stated that the instant section has become associated with a theory of strict liability in tort, as distinguished from the strict liability under the theory of warranty which has become identified in practice with a contract of sale between a plaintiff and a defendant. The Comment concludes that the courts can still continue to apply the rule enunciated in this section under the label of "warranty," if the courts recognize that the subject warranty is a different kind from that usually found in the sale of goods, and that it is not subject to the various contract rules such as: the necessity for reliance on the reputation, skill or judgment of the seller by the buyer; the privity requirements normally associated with warranty theories and with other aspects of the laws of contracts; or the various sales codes relating to warranties.

It thus appears that the crucial question under this approach is whether a product is in a "defective condition" and "unreasonably unsafe" to the user. With respect to products which cannot be made absolutely safe, in which category blood containing the hepatitis virus appears to belong, Comment k. to that section states:

Unavoidably unsafe products. 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. These are especially common in the field of drugs. 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. *Such a product properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous.* The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and the use of the drug notwithstanding a medically recognizable risk. *The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.* (Emphasis supplied)

The court in *Jackson* noted further that the rules referred to and quoted above were based upon policy considerations in which the means available for avoiding the risk of harm must be weighed against the utility of the product. In the light of these rules the court concluded that blood containing the hepatitis virus was an "unavoidably unsafe product" within the meaning of Comment k. The court noted in this regard that unlike other products liability cases, wherein strict liability had been imposed upon manufacturers or suppliers, the harmful agent, *i.e.*, the hepatitis virus, may be present in the blood without any errors or oversight whatsoever on the part of the suppliers of the blood and that the latter were in no position to know or control the condition. There could, accordingly, be no implied representation that the blood was free of the virus. The court concluded therefore, that the conclusive presumption of fault underlying the imposition of strict liability upon a producer or manufacturer was inapplicable and that if blood was properly collected, preserved and marketed and proper warning given, the seller was not to be held to strict liability for unfortunate consequences attending its use.

Plaintiff's claim for the breach of implied warranty as a basis for the defendant's strict liability was denied by

the court on the ground of the disclaimer of warranty, referred to above. The court held that such disclaimer was valid and reasonable, since the presence of the hepatitis virus was not detectable. However, the aforesaid disclaimer was held to have constituted an "express warranty" by the blood bank that it had, in fact, exercised the utmost care in the selection of donors. Accordingly, the court entered summary judgment in favor of both defendants on the claims based upon strict liability in tort and implied warranty of merchantability, but denied such relief as to the claims based upon express warranty and negligence.

On appeal, the New Jersey Supreme Court just recently took a giant step toward the possible acceptance of the strict liability and implied warranty theories.²⁹ It concluded that the evidence before the lower court was too "meagre" to decide the case on summary judgment and directed that:

At the trial, a complete record should be made, including not only detailed testimony as to the nature of the defendants' operations, but also expert testimony 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 and other sources, and such other available testimony and materials as may be relevant to any of the questions presented by the parties, including such economic and other factors as may bear on the question of whether the doctrine of implied warranty or strict liability should apply to deliveries and transfusions of blood. . . .³⁰

Whether this decision harkens the approach of strict liability as to blood banks must, of course, await future developments. It is clear, however, that this court intends to conduct the search for policy considerations which has so far been avoided by the cases following *Perlmutter*.

CONCLUSION

It is suggested that the courts should avoid applying the "sale-service" distinction in deciding cases in this area. Instead, they should decide such cases solely upon the basis

²⁹ N.Y.L.J., Feb. 20, 1969, at 1, col. 1.

³⁰ *Id.* at 3, col. 5.

of the policy considerations underlying the imposition or denial of liability, regardless of whether the plaintiff's claim is framed under warranty theories or under a theory of strict liability in tort. That the theory under which the plaintiff is proceeding in a blood transfusion reaction case should not be determinative of liability is clearly indicated by a New York decision recognizing that:

A breach of warranty, it is now clear, is not only a violation of the sales contract out of which the warranty arises *but is a tortious wrong suable by a noncontracting party* whose use of the warranted article is within the reasonable contemplation of the vendor or manufacturer.³¹

In that case the court held that an airplane manufacturer's implied warranty of fitness of the airplane ran in favor of an airline passenger who was not in privity with the manufacturer. However, the court recognized that under the guise of applying warranty law, it was imposing a species of strict liability in tort, which it described as "surely a more accurate phrase."³²

Thus, if considerations of policy indicate that imposition of liability is proper, the courts should so hold and reject the artificial reasoning established in *Perlmutter*. Conversely, if such considerations lead to the belief that liability should be denied, this should again be done, on the sole ground of policy alone, without any regard to the formal characterization of the blood transfusion as a "sale" or a "service."³³

³¹ *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 436, 191 N.E.2d 81, 82, 240 N.Y.S.2d 592, 594 (1963) (emphasis added).

³² *Id.* at 437, 191 N.E.2d at 83, 240 N.Y.S.2d at 595. See also *Jackson v. Muhlenberg Hosp.*, 96 N.J. Super. 314, 232 A.2d 879 (1967), in which the court recognized that strict liability in tort for harm caused by defective merchandise sold or supplied for a consideration was the same cause of action as that asserted under warranty theory.

³³ For a view that a holding that the supplying of blood constitutes a sale would not necessarily require a court to impose liability upon suppliers of blood under traditional warranty theory, see Comment, 37 *FORDHAM L. REV.* 115, 120 (1968). It should also be noted that Florida has left open the question of whether the undetectability of the hepatitis virus would be a defense to a supplier of blood in an action for breach of warranty, although the latter theory apparently runs counter to the very basis of liability without fault under warranty law. See *supra* note 23.

Much can be said for and against the imposition of absolute liability upon commercial and non-commercial suppliers of blood in these cases. It has been suggested that even as to nonprofit blood banks, the financial burden of the risk should be borne by the bank and thus distributed among all of the users, rather than to require such losses to be borne by the innocent victims alone.³⁴

A step toward imposition of absolute liability can be seen in the case of *Hoder v. Sayet*.³⁵ In that case it was contended that it was negligence per se for a hospital to purchase or obtain blood from a commercial blood bank because commercial procurement increased the likelihood of hepatitis-infected blood. The court rejected this approach, but in denying the hospital's motion for summary judgment the court said that any purchase by the hospital from a blood bank which it knew, or should have known, was operating below minimum standards of care would have constituted a breach of the hospital's duty to use due care in the acquisition of blood for its patients.

This argument may become increasingly more potent in view of recent findings that the risk of transmitting the hepatitis virus to the recipient of the blood is increased by the use of blood obtained from commercial sources.³⁶ In one study the observed rate of the occurrence of hepatitis was studied in 42 adult patients undergoing corrective cardiac operations utilizing cardiopulmonary bypass. Among those patients receiving blood, 96% of which came from paid donors, the attack rate of hepatitis was 60% (25 out of 42). Whereas, in another group of 13 patients receiving blood, 97% of which was obtained from voluntary donors, no cases of hepatitis were found.³⁷ One reason assigned for this phenomenon is that "commercial donors often include persons of extremely low socio-economic status who sell

³⁴ *Community Blood Bank, Inc. v. Russell*, 196 So. 2d 115, 121 (Fla. App. 1966) (concurring opinion by Mr. Justice Roberts). *But see* *Jackson v. Muhlenberg Hosp.*, 96 N.J. Super. 314, 328 A.2d 879, 887 (1967).

³⁵ 196 So. 2d 205 (Fla. App. 1967).

³⁶ N.Y. Times, Nov. 3, 1968, § E. at 11.

³⁷ Report delivered by Drs. John H. Walsh, Robert H. Purcell, Andrew G. Morrow, and Paul T. Schmidt, 21st Annual Meeting of American Ass'n of Blood Banks, Oct. 29, 1968.

their blood periodically because they need the money. It might be a reasonable guess that these persons are a common source of hepatitis virus."³⁸

In attempting a policy analysis in this area it is suggested that the courts might well consider these possible effects of a holding imposing absolute liability upon hospitals and blood banks:

(1) If a rule of strict liability is adopted for hepatitis associated with blood transfusions the consequences from a medical viewpoint might be extremely harmful to the general public. Physicians who transfuse blood would then be frugal in its use and would transfuse patients less freely than they do at the present time. The result would probably be less use of blood in those situations where blood might not be absolutely indicated with no resulting harm to the patient and no risk of hepatitis. However, in those medical situations where blood might be helpful in decreasing mortality and morbidity, irreparable harm and death might result from the hesitancy on the part of the physician to transfuse blood. The decision not to use blood by the physician in certain indicated medical situations might leave the physician open to a malpractice suit. At the present time the medical profession is keenly aware of the hepatitis complication resulting from blood transfusion and as a rule does not transfuse patients unless there is a good medical indication.

(2) From a practical financial viewpoint, if absolute liability is imposed for the contraction of hepatitis following blood transfusions, insurance companies might refuse to offer insurance coverage to those doctors who transfuse patients, or might charge premiums which may be prohibitive for the average practicing physician to pay. As a consequence, physicians might refuse to treat patients who would, or might, require blood transfusions which might result in poor medical care for the community. If hospitals are also held liable for hepatitis associated with blood transfusions the consequence of legal action taken against

³⁸ N.Y. Times, *supra* note 36.

them will also increase hospital costs and place a huge economic burden on them.

(3) The imposition of absolute liability arising out of the use and sale of commercially obtained blood, on the ground that such blood carries with it a higher risk of contracting hepatitis, would result in a dangerous shortage of blood. Blood collected from commercial blood banks represents a large percentage of the blood available for transfusion purposes. In the New York City area approximately fifty percent of all blood transfused is obtained from commercial blood banks. If the blood obtained from commercial sources were no longer available the result would be a chronic shortage of blood which would reach emergency proportions.

The consequences, therefore, of adopting a strict liability rule would appear to be of great potential medical harm to the public while the benefits to the public would be small in comparison.

It thus appears that there is no simple or "pat" answer as to whether absolute liability is to be imposed upon suppliers of blood. However, it must be concluded that if substantial justice is to be done to the unfortunate patients contracting hepatitis, and equally as important, to the hospitals, supplying the patients with blood-life itself, the courts must engage in the weighing of interest and policy analysis approach in this area, attempted by the Florida and New Jersey courts, and reject the artificial reasoning adopted in *Perlmutter*.