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Strict Product Liability - Blood as an Unavoidably Unsafe Product; Cunningham v. MacNeal Memorial Hospital

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TORT LAW—STRICT PRODUCT LIABILITY—BLOOD AS AN UNAVOIDABLY UNSAFE PRODUCT

Cunningham v. MacNeal Memorial Hospital, 47 Ill. 2d 443, 266 N.E. 2d 897 (1970).

PLAINTIFF SOUGHT DAMAGES against a hospital by broadening the application of strict liability in tort to include the contraction of serum hepatitis resulting from a blood transfusion. The hospital had purchased blood from a blood bank and used it for a transfusion for the plaintiff who thereafter contracted the disease serum hepatitis. In her complaint, the plaintiff alleged that she was a patient at defendant hospital; that the defendant hospital sold and supplied blood to her for her treatment; that the blood sold to plaintiff came from the Michael Reese Blood Bank; that the blood was defective when supplied by the hospital, and was in an unreasonably dangerous condition at that time; and that, as a result of the defect in the blood, plaintiff contracted serum hepatitis. Defendant responded that the theory of strict liability in tort does not apply to the transfusion of blood by a hospital as a part of its services rendered to its patients. The circuit court agreed with the defendant, but on appeal, the appellate court reversed and said that plaintiff did state a cause of action under a theory of strict liability in tort. The Illinois Supreme Court modified and affirmed the decision of the appellate court.

In arriving at its decision, the state supreme court considered five main issues, of which this note will discuss only two, namely: (1) Is the supplying of blood by either a blood bank or a hospital a sale? (2) Is blood an unavoidably unsafe product within comment K of Section 402A of the *Restatement (Second) of Torts?*[1]

In 1970, Professor Prosser wrote ". . . the cases of hepatitis resulting from blood transfusions all have held that the supplier of the blood is not strictly liable on a warranty, usually on the rather shaky ground that the transfusion itself is not a sale but a "service."[2] Another commentator remarked, in accord:

> The absence of negligence does not affect a claim based on strict liability-implied warranty. Consequently, plaintiffs have alleged that the supplying of blood is a "sale" of goods to which the doctrine attaches. Blood suppliers have answered that they are merely providing a "service" to which the doctrine does not apply. In the past, courts have generally accepted the conclusion that the supplying of blood is a "service," and have held that a patient, when entering a hospital, does not contract to purchase so many pints of blood any

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[1] The other issues considered by the court were: Is blood a product within *Restatement (Second) of Torts,* Section 402A (1966)? Is charitable immunity a defense? Is the inability of a blood supplier to detect the existence of serum hepatitis of absolutely no moment?

[2] Prosser, Wm. L., "Strict Liability to the Consumer in California," *Products Liability —New Developments,* Practicing Law Institute, 117 (1970).

> more than he contracts for so many yards of gauze, or for any drugs or medicine. Consequently, most courts have held that the patient contracts for the total services of the hospital in caring for him.[3]

In a somewhat analogous situation, a New Jersey court[4] imposed strict liability in a case where a beautician had applied a permanent wave solution to a customer, resulting in her injury. The defendant had argued that no sale was involved because there was no separate charge for the permanent wave solution. The New Jersey Supreme Court reasoned, however, that the cost of the solution was obviously considered in determining the price of the service. In that context, the court concluded that "the no-separate-charge argument puts excessive emphasis on form and downgrades the overall substance of the transaction."[5] Viewing with disfavor this distinction between a sale and a service, the court said:

> One who in the regular course of a business sells or applies a product (in the sense of the sales-service hybrid transactions involved in the present case) which is in such a dangerously defective condition as to cause physical harm to the consumer-patron, is liable for the harm.[6]

The court did acknowledge, however, that the transaction between a beautician and a customer is a "hybrid partaking of incidents of a sale and a service."[7]

In *Carter v. Inter-Faith Hospital of Queens,*[8] a New York lower court, relying on an earlier Florida decision, *Russell v. Community Blood Bank Inc.,*[9] held that the transaction in which a commercial blood bank supplies blood to a hospital is a sale.[10] The court, however, drew a distinction between a commercial blood bank and a charitable blood bank, stating that a non-profit corporation should not be treated as a business which sells goods in the market and that it should be treated as a hospital is treated. Such a distinction was also drawn in *Whitehurst v. American National Red Cross.*[11] In that case, the defendant was permitted to show that the charge for blood covered only its expenses; the result was that no liability was imposed on the blood bank. Mr. Pollock suggests the anomoly created by this distinction:

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[3] Pollock, *Liability of a Blood Bank or Hospital for a Hepatitis Associated Blood Transfusion in New Jersey,* 2 Seton Hall L. Rev. 47, at 50 (1970).

[4] Newmark v. Gimbel's Inc., 54 N.J. 585, 258 A. 2d 697 (1969).

[5] *Id.* at 701, 258 A. 2d 697.

[6] *Id.* at 702, 258 A. 2d 697.

[7] *Id.* at 701, 258 A. 2d 697.

[8] Carter v. Inter-Faith Hospital of Queens, 60 Misc. 2d 733, 304 N.Y.S. 2d 97 (Sup. Ct. Spec. T. 1969).

[9] Russell v. Community Blood Bank Inc., 196 So. 2d 115 (Fla., 1967).

[10] Supra, note 8.

[11] Whitehurst v. American National Red Cross, 1 Ariz. App. 326, 402 P. 2d 584 (1965).

> Assuming a patient received four pints of blood, two each from a charitable blood bank and a commercial blood bank, each of which used due care in selecting donors, should a different result follow merely because one blood bank is discharging a charitable duty and the other is making a profit? It would be difficult to explain to two patients with hepatitis, lying side by side in a hospital, that one of them who obtained blood from a commercial blood bank has a cause of action but the other who obtained the blood from a charitable blood bank does not.[12]

The defendant in *Cunningham* relied on *Perlmutter v. Beth David Hospital*,[13] a New York Appellate Court decision narrowly holding that the providing of blood by the hospital was a service rather than a sale. But examination of cases subsequent to the *Perlmutter* decision suggests that an opposite result would be reached today. In *Jackson v. Muhlenberg Hospital*[14] and *Russell*,[15] both cases involving blood that was commercially supplied, the courts found the transactions to be sales and not services. In *Carter*,[16] the court also found the transaction to be a sale when made by a commercial blood bank.

While recovery on a theory of implied warranty in contract would appear to require a "sale," an Indiana court has recently held that strict liability in tort does not require a sale; all that is needed is that the product be placed in the stream of commerce.[17] Logically, it could be said that blood transactions are well within a "stream of commerce." In light of subsequent cases holding the supplying of blood by commercial blood banks to be a sale, and in light of the concept of "stream of commerce" in the *Perfection Paint* case, the *Perlmutter* decision was weakened considerably as support for defendant's position.

John W. Wade suggests a means to avoid the sale versus service argument:

> It would be far simpler and less damaging to the state of the law to hold the blood plasma reasonably safe when the virus is unlikely to be present and impossible to eliminate, and the need for the plasma is great. This could well be pronounced in these cases as a matter of law.[18]

Thus, it is suggested the result in the blood cases should not turn on the

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12 *Supra*, note 3 at 53.

13 Perlmutter v. Beth David Hospital, 308 N.Y. 100, 123 N.E. 2d 792 (1954).

14 Jackson v. Muhlenberg Hospital, 96 N.J. Super. 314, 232 A. 2d 879 (1967).

15 *Supra*, note 9.

16 *Supra*, note 8.

17 Perfection Paint and Color Co. v. Konduris, 258 N.E. 2d 681 (Ind. 1970). Here free samples of paint remover caused a fire resulting in damages and the court found the free samples to be in the stream of commerce. As a result, the court imposed liability on the manufacturer.

18 Wade, *Strict Tort Liability of Manufacturers*, 19 S.W. L.J. 5, 20 (1965).

sale or service question. Instead, the exception to strict liability—the unavoidably unsafe product—may be applicable. As Prosser indicates, some cases have rested on such a distinction:

> There are . . . a few cases of remote suppliers that have refused to find strict liability; and the stress laid in all of the decisions upon the unavoidability of the risk appears definitely to suggest that this is the real reason for the conclusion.[19]

The court in *Cunningham,* citing comment K to the *Restatement (Second) of Torts* Section 402A, said that the protection afforded by the concept of the unavoidably unsafe product includes only products that do not contain a defect. The reason for this is that Section 402A provides for liability only if the product is "defective and unreasonably unsafe." To be outside the strict liability of Section 402A, and within Comment K, then, according to the court, the product involved must be free from defect. This is derived from the comment's language: "such a product [referring to the rabies vaccine] properly prepared and accompanied by proper directions and warning is not defective; nor is it unreasonably dangerous." Referring to Section 402A generally, and in light of *Whitehurst,*[20] Freedman says: "Thus a manufacturer has no duty to make an *obviously dangerous* product safe; the unavoidably unsafe product is *not* unreasonably dangerous and defective."[21]

If the Illinois Supreme Court's present thinking as to Section 402A is correct (that comment K only applies to non-defective products) a continuing adherence to the test would mean that blood containing the hepatitis virus is defective and consequently comment K does not apply to blood. Comment K of Section 402A, however, suggests another test. If the product is unavoidably unsafe then it is not defective. It is accepted that if the hospital and the blood bank exercise diligent care in handling the blood and selecting the donors, the possibility of serum hepatitis is reduced. Thus we are presented with a question of utility. If the blood bank and hospital have done all that they can do in providing non-defective blood, yet still provide blood with a defect, should they be held liable? If the transfusion is administered the patient has a good chance of recovering from his ailment, and he has a remote chance of contracting serum hepatitis. But, if the transfusion were not given, the patient could quite probably go into shock or other conditions which could lead to serious physical impairment or even death. When the lack of safety of a product cannot be avoided, its public utility would seem to be the determining factor. Mr. Pollock makes this perfectly clear in his article:

Significantly, the Illinois court did not cite *Jackson v. Muhlenberg*

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[19] Prosser, *supra* note 2 at 133.

[20] *Supra,* note 11.

[21] Freedman, *"Defect" in the Product: The Necessary Basis For Products Liability In Tort and In Warranty,* 33 Tenn. L. Rev. 323, at 331 (1965-66).

> *Hosp.*, 53 N.J. 138, 249 A. 2d 65 (1969), which held that the applicability of strict liability should be deferred until after receipt of evidence involving the availability of tests to ascertain the presence of viral hepatitis in blood. Implicit in *Jackson* is recognition that, if there are no such tests, blood may be an unavoidably unsafe product. That conclusion is enhanced by *Newmark v. Gimbel's* . . . which recognized the distinction between ordinary commercial products (*e.g.*, candy bars, bottle beverages, clams or mushrooms which the Illinois court found comparable to blood) and a medical necessity such as blood.[22]

Accordingly, if the court is going to talk of strict liability within Section 402A of the Restatement, then the court should also accept the total concept of comment K. By so doing, it would appear that the court would have to adopt the scope of applicability of comment K which is stated in part:

> . . . *there can be no assurance of safety, or perhaps even a purity of the ingredients,* but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. (Emphasis added.)[23]

From this it is seen that the comment is not intended to encompass only non-defective products, but rather, defective ones as well. Thus, the application of comment K is broadened. As a result, blood would be within its exception, as is the rabies vaccine due to the unavoidability of danger and the utility of the product to the public good.

Admittedly, the area of strict liability is pregnant with intangibles and uncertainty of result as shown by the conflicting results in cases previously discussed. The court in the case of *Helene Curtis Industries, Inc., v. Pruitt*[24] sought a doctrine to replace fault as a means of limiting liability and said that "Section 402A of the Restatement provides a lucid definition."[25] The court continues:

> This definition demonstrates that the only change from the traditional negligence analysis is that the maker cannot be excusably ignorant of the defect; however, courts must still weigh the utility of the product against the risk of the harm created.[26]

Similarly, the court in *Cunningham* was endeavoring to apply strict liability which is a concept that the State of Illinois is not only keeping

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[22] Pollock, *supra* note 3 at 51 n. 21.

[23] *Restatement (Second) of Torts,* §402A, comment K at 354 (As Adopted and Promulgated 1963 and 1964).

[24] 385 F. 2d 841 (1967).

[25] One who sells any product in a defective condition *unreasonably dangerous* to the user or consumer . . . is subject to liability for physical harm thereby caused to the ultimate user or consumer.

[26] *Supra,* note 24 at 850.

on the "showroom floor."[27] Here it is being used and molded to encompass the situations involving blood transfusions. However, this writer believes that the court was overzealous in its application of Section 402A. It should be made clear that the court's treatment of the "sale-service" question was well within Section 402A—if it is needed at all. The modern trend in product liability cases does not require the transaction in question to be a sale. The movement has gone from an express sale (with privity), to the inclusion of food sold for consumption, to the beauty parlor cases, to the blood transfusion cases. If these were the only considerations involved, the inclusion of the blood cases in product liability would not be so readily challenged. However, since public policy and social benefit are such important considerations, the application of strict liability to blood cases must be questioned.

In conclusion, this writer respectfully disagrees with the application of Section 402A to blood cases (assuming our present facts) and believes that blood should properly be considered an unavoidably unsafe product. Professor James agrees with this position when the defect or possibility of injury from an "unavoidably unsafe product," could not be detected prior to use of the product and occurrence of the injury.[28] This point is strengthened, he continues, when the product is "socially desirable to put it out in spite of the inevitable risk."[29] In other words, the decision in *Cunningham* could be sound only if the court meant to make the defendant hospital reply to plaintiff's action and escape liability by a showing of reasonable care by the blood supplier in selection of healthy donors and by the hospital in requiring such standards.

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[27] For a good discussion of strict liability in Illinois *see* Weithers, *The Developing Law of Strict Liability in Tort in Illinois,* 1969 Ins. L.J. 659.

[28] James, *The Untoward Effects of Cigarettes and Drugs: Some Reflections on Enterprise Liability,* 54 Cal. L. Rev. 1550, at 1555 (1966).

[29] *Id.*