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Sales: Implied Warranties in Blood Transfusions

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Obviously *Medina* has not dealt a fatal blow to the time-honored rule that a minor is not held to the same degree of care as an adult. Rather, it has created a justifiable exception to that rule. Increasingly more minors are involved in traffic accidents, and despite recent emphasis on automobile safety features, there is little hope for substantial physical protection. Inadequate physical protection should be countered by ample legal protection, which prevents a negligent minor from being shielded by a lesser degree of care than required of adult drivers. As our affluent society becomes more technologically complex, the law must respond with the appropriate exceptions and alterations needed to protect the public. *Medina v. McAllister* is such a response.

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SALES: IMPLIED WARRANTIES IN BLOOD TRANSFUSIONS

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

Plaintiff, while a hospital patient, received a transfusion of whole blood supplied by the defendant blood bank and administered separately by hospital personnel. After contracting viral hepatitis, she sued the blood bank alleging the transfused blood contained serum hepatitis and the "sale" of such impure blood constituted a breach of implied warranties of merchantability and fitness. The trial court dismissed the complaint, reasoning that the transfusion was a service; hence no implied warranties could attach. The Second District Court of Appeal reversed,[1] declaring the transfer a sale and recognizing a cause of action for breach of implied warranty. The court concluded, however, that if the defendant proved hepatitis virus could not be detected in or eliminated from the donor's blood, such proof would be a valid defense to the warranty claim. On further appeal, the supreme court, in a per curiam opinion HELD, the blood transfusion did constitute a sale, and a cause of action was stated for breach of warranty; however, the question of a valid defense was premature and was erroneously considered.[2]

undertaken by adults and for which adult qualifications are required, such as the operation of an automobile, motorboat, motor scooter, or motorcycle." Although the court did not make these instructions mandatory on the lower courts it did express confidence "that the forms of instructions recommended by the committee state[d] as accurately as a group of experienced lawyers and judges could state the law of Florida in simple understandable language." This endorsement seems to affirm the doctrine of the instant case. *In re* Use by the Trial Courts of the Standard Jury Instructions, No. 36,286 (Fla. Sup. Ct., April 19, 1967).

1. Russell v. Community Blood Bank, Inc., 185 So. 2d 749 (2d D.C.A. Fla. 1966).
2. 196 So. 2d at 118.

Transfer of blood from the healthy to the infirm heralded the first successful transplant of human tissue.[3] But the success of blood transfusions has been marred by difficulties, the major one being the elimination of all impurities from the donor's blood before it is given to the patient. The real culprit has been serum hepatitis. A recent study indicates that viral hepatitis develops in one of every five hundred patients receiving transfusions.[4] The rate probably has not diminished greatly to date since medical science has discovered no method to detect or destroy the virus in whole blood.[5]

A court allowing an action for breach of implied warranty would greatly aid a plaintiff in these circumstances. If he sues for negligence he must prove the blood service knew the blood contained serum hepatitis or, by exercise of reasonable care, should have known it. This is virtually impossible.[6] With implied warranty the plaintiff's burden of proof is less since courts can avoid issues of negligence and simply find the blood was neither merchantable nor fit for human consumption. But breach of implied warranty is an aspect of the law of sales;[7] thus, to maintain this cause of action, the transaction must be recognized as a sale. The determination whether a transaction constitutes a service or a sale lies at the threshold of implied warranty. If held a service, warranty claims are prevented, and the plaintiff must rely upon negligence. In the leading case, *Perlmutter v. Beth David Hospital*,[8] plaintiff contracted hepatitis from a transfusion. In a 4-3 decision the New York Court of Appeals rejected plaintiff's warranty claim holding the contract between patient and hospital was predominantly for services, and any "sale" aspects were incidental. All other jurisdictions faced with similar claims have willingly followed the *Perlmutter* decision.[9] This includes suits against independent blood banks as well as hospitals as suppliers of the blood.[10] The reluctance of courts to hold liable the suppliers of such a necessary commodity

3. *Hearings Pursuant to S. Res. on S. 2560 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. 6 (1964) [hereinafter cited as *Hearings*].

4. *See* Dunn, *Blood Transfusions and Serum Hepatitis*, 15 CLEV.-MAR. L. REV. 497 (1966).

5. "The possible presence of the agent of viral hepatitis in donors cannot be eliminated by history, physical examination, laboratory test, or by any other means available today." COMMITTEE ON STANDARDS, AM. ASS'N OF BLOOD BANKS, STANDARDS FOR A BLOOD TRANSFUSION SERVICE 9 (4th ed. 1966). However, there has been developed a way for destroying hepatitis in plasma. *See* Note, *Liability for Blood Transfusion Injuries*, 42 MINN. L. REV. 640, 656-57 (1958).

6. COMMITTEE ON STANDARDS, AM. ASS'N OF BLOOD BANKS, *supra* note 5. Courts have even refused to hold a physician liable in negligence for prescribing a transfusion that has caused hepatitis. That the blood may be impure is a calculated risk about which the physician must exercise his professional judgment. 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 (1956).

7. *See, e.g.*, FLA. STAT. ch. 670 (1965).

8. 308 N.Y. 100, 123 N.E.2d 792 (1954).

9. Sloneker v. St. Joseph's Hosp., 233 F. Supp. 105 (D. Colo. 1964); Dibblee v. Dr. W. H. Groves Latter-day Saints Hosp., 12 Utah 2d 241, 364 P.2d 1085 (1961); Gile v. Kennewick Pub. Hosp. Dist., 48 Wash. 2d 774, 296 P.2d 662 (1956).

10. *E.g.*, Whitehurst v. American Nat'l Red Cross, 1 Ariz. App. 326, 402 P.2d 584 (1965); Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc., 270 Minn. 151, 132 N.W.2d 805 (1965).

for undetectable impurities has been justified primarily on policy grounds. The defendant has been termed a "nonprofit public service corporation,"[11] a "voluntary and charitable activity which serves a humane and public health purpose."[12] The transaction has been called a "gift" since, in many instances, the patient is obligated to pay only a small service charge for the blood.[13] All the courts have noted the inability of medical science to locate serum hepatitis in the blood.[14] Several states have gone even further and enacted laws specifically making blood transfusions a service,[15] thus effectively precluding recovery for plaintiffs unable to prove negligence.

By treating a blood transfusion as a sale, the Florida Supreme Court has opened the door to liability under breach of warranty theory — a door previously locked securely by every other jurisdiction that has considered the question. Why has Florida rejected such strong decisional law, and can the *Russell* decision be justified in light of existing Florida law and policy? Florida courts embrace a liberal application of implied warranty doctrine, which amounts to strict liability when such warranties have been breached. Lack of knowledge of a product's danger is insufficient as a defense to a warranty claim.[16] Privity requirements have essentially been negated with regard to all products,[17] the result being that an injured plaintiff stands a great chance of recovering for damage caused by any defective goods sold to him. But few cases have tested the applicability of warranty theory on the basis of the sale versus service dichotomy. An early Florida decision prescribed the presently followed definition of a sale: "[W]here property is taken for a fixed money price the transfer amounts to a sale whether the price be paid in money or in goods."[18] This definition was relied upon in *Cliett v. Lauderdale Biltmore Corp.*[19] when the Florida Supreme Court held the serving of food in restaurants for value constituted a sale. Reasoning that there was no difference between consumption of food on or off the premises, the court concluded the real basis of the sale was the transfer of food for value, even though part of a larger service. Blood, like food, is meant for human consumption, and a transfusion is clearly part of a larger service performed by the hospital or blood bank. This factual analogy between *Cliett* and *Russell* shows the consistency of the latter decision with existing law.

11. Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc., 270 Minn. 151, 152-53, 132 N.W.2d 805, 807 (1965).

12. *Id.* at 159, 132 N.W.2d at 811.

13. Whitehurst v. American Nat'l Red Cross, 1 Ariz. App. 326, 328, 402 P.2d 584, 586 (1965).

14. Cases cited notes 9, 10 *supra.*

15. *E.g.*, ARIZ. REV. STAT. ANN. §36-1151 (Supp. 1964); CAL. HEALTH & SAFETY CODE §1623 (Deering 1955). The Arizona statute reads: "The procurement, processing, distribution or use of whole human blood, plasma, blood products and blood derivatives for the purpose of injecting or transfusing them into the human body shall be construed as to the transmission of serum hepatitis to be the rendition of a service by every person participating therein and shall not be construed to be a sale."

16. Green v. American Tobacco Co., 154 So. 2d 169 (Fla. 1963).

17. Lily-Tulip Cup Corp. v. Bernstein, 181 So. 2d 641 (Fla. 1965).

18. Edwards v. Baldwin Piano Co., 79 Fla. 143, 149, 83 So. 915, 917 (1920).

19. 39 So. 2d 476 (Fla. 1949).

Of special interest is the district court's desire in *Russell* to grant the blood bank a defense under comment *k*, section 402A, of the *Restatement of Torts*.[20] Under this section, if the blood were deemed "unavoidably unsafe," defendant would not be liable. Such a defense would result in a movement away from the strict liability of implied warranty and toward negligence. If it is permitted, plaintiff's warranty action is as effectively precluded as if the transfusion were declared a service. The *Russell* court held that judicial consideration of section 402A was untimely. Therefore, it granted itself a second opportunity to refuse to apply absolute liability to blood banks for breach of implied warranty. A previous decision indicates that the supreme court may so utilize this second chance in favor of the defendant. In *McLeod v. W. S. Merrill Co.*,[21] the court employed section 402A in holding druggists exempt from strict liability for selling experimental drugs not considered absolutely safe. The social utility of providing such drugs justified the risk taken.[22] Similarly, transfusion of blood has become a medical necessity. The possibility of serum hepatitis in the blood is a risk that is widely recognized by the medical profession;[23] therefore, to place blood transfusions under the "unavoidably unsafe" rule would be a viable and preferable alternative to strict liability.

Significantly, the "unavoidably unsafe" concept was considered by the Florida Legislature in a bill recently introduced and passed by the senate.[24] This bill applied the doctrine of implied warranty in suits against blood banks, but provided an exception where proof was offered that the harmful substance in the blood could not be detected or eliminated. If the bill is enacted into law at a later session its effect will be to grant an affirmative defense to the blood banks, thus tending to cause the action to sound in negligence. However, the plaintiff will be relieved of proof of such negligence since this burden will fall upon the defendant. As in the *Russell* case, such a statute would permit adjudication of the merits, rather than dismissal at the outset by holding the transfusion a service.[25] By putting the blood

20. RESTATEMENT (SECOND) OF TORTS §402A, comment *k* at 353-54 (1965), states in part: "*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. . . . The seller of such products . . . 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."

21. 174 So. 2d 736 (Fla. 1965).

22. *Id.* at 739.

23. *Hearings, supra* note 3, at 7.

24. FLA. S.B. 433 (July 7, 1967). As amended, the bill was passed by a vote of 46-1 in the senate. It stated: "The doctrine of implied warranty shall apply in cases involving the procurement, processing, storage, distribution, or use of whole blood, blood plasma, blood products, or blood derivatives for the purpose of injecting or transfusing the same or any of them into the human body, where action is brought to recover damages for injury or death resulting from such injecting or transfusing, except in those cases in which there is proof offered that the deleterious substance causing death or injury was not capable of detection or removal." The bill was referred to the house of representatives where it died, as a result of inaction, at the closing of the session.

25. See statutes cited note 15 *supra*.

banks to their proof in each case such a law could well aid in a more selective and careful processing of blood and spur research to discover more quickly a method to prevent hepatitis in transfused blood. The failure of the passage of this bill leaves the obligation with the judiciary to reconsider and expand the basic holding of the *Russell* decision.

The practical effects of the *Russell* decision overshadow the conceptual or legal aspects of the case. The district court distinguished between blood furnished by a blood bank and by a hospital, declaring that blood supplied by the latter could not be considered a sale.[26] However, many blood banks are organized and run solely for the benefit of a particular hospital because the hospital does not possess the facilities to operate its own blood service.[27] The *Russell* decision may cause such independent blood banks to merge with hospitals to avoid strict liability. If such consolidations are not feasible, the blood banks may resort to operation on a commercial, profitmaking basis. Presently most blood services are nonprofit public service corporations.[28] Surveys indicate commercial blood banks are less selective in procuring healthy donors.[29] Since one of the best preventives of transfusion deaths and injuries is a careful selection of donors, widespread commercialization will tend to increase potential harm.

A further possible result is that blood banks will voluntarily close, fearing that until a method for destroying hepatitis is discovered, their liability is inevitable. The state may then be forced to subsidize the services or operate its own blood service in lieu of the independent banks. If the state refuses to waive its immunity regarding transfusion injuries, the law will have come full circle, accomplishing nothing except severely disrupting the medical profession.

With Florida's disregard of privity in warranty actions, *Russell* lends support to the proposition that an injured plaintiff may recover from a donor who supplied the impure blood. But unless the donor consciously misrepresents his physical condition, it seems unlikely such liability will extend so far. If it did, a substantial decrease in blood supply could well result, and encouragement of donations is essential to modern surgical medicine.

In addition, blood is not bought and sold on an ordinary commercial basis. Rather, the transfusion is authorized by a physician for a patient who, in all likelihood, is in no condition to bargain and who certainly makes no decision whether he needs the transfusion.[30] He assumes no risk that his health may be impaired by a transfusion of impure blood. Between two innocent parties the onus of compensation would appear to fall more justly upon the blood bank. Insurance may offer a solution, but if the rate of hepatitis infections cannot be reduced, the premiums would be exorbitant and the financial imposition may force blood banks to close their doors.

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26. Russell v. Community Blood Bank, Inc., 185 So. 2d 749, 752 (2d D.C.A. Fla. 1966).
27. *Hearings, supra* note 3, at 6.
28. *Id. Accord,* Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc., 270 Minn. 151, 152, 132 N.W.2d 805, 807 (1965).
29. *Hearings, supra* note 3, at 7.
30. *Id.* at 6.