Boston College Law Review

Volume 9
Issue 4 *Number 4*

Article 4

7-1-1968

Blood Transfusions and the Warranty Provisions of the Uniform Commercial Code

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UNIFORM COMMERCIAL CODE COMMENTARY

BLOOD TRANSFUSIONS AND THE WARRANTY PROVISIONS OF THE UNIFORM COMMERCIAL CODE

Approximately one percent of all persons who receive whole blood transfusions develop homologous serum hepatitis,[1] which has been described as "an acute infectuous inflammatory disease of the liver" brought on by a virus.[2] Rarely do victims die from the disease,[3] but bed rest and/or hospital care is required for varying periods depending upon the severity of the case.[4] It is undisputed that serum hepatitis virus is contained in some blood used in transfusions and that recipients of this blood can and do thereby develop hepatitis.[5] At present, however, there is no known scientific method by which the hospital or blood bank can detect the presence of serum hepatitis virus in whole blood used for transfusions.[6] Within this context, a significant legal question has arisen over whether the hospital administering the transfusion and/or the blood bank supplying the blood is to be held liable to the recipient who develops hepatitis as a result of a blood transfusion.

Parties contracting homologous serum hepatitis subsequent to a blood transfusion have frequently brought actions alleging breach either of an implied warranty of "merchantability" or "fitness for a particular purpose."[7] Two of the most recent cases have used the Uniform Commercial Code as a basis for decision. In both *Jackson v. Muhlenberg Hosp.*[8] and *Lovett v. Emory University, Inc.*,[9] hospital defendants were held not liable under Code breach of warranty theories. In arriving at their holdings, the courts raised several issues of Code intent and policy. The primary issue is whether the administration of a blood transfusion constitutes a "sale of goods" under relevant Code

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[1] P. Beeson & W. McDermott, Textbook of Medicine 1033 (11th ed. 1963).

[2] Id. at 1032.

[3] Jackson v. Muhlenberg Hosp., 96 N.J. Super. 314, 327-28, 232 A.2d 879, 887 (1967), indicates that serum hepatitis is fatal in approximately .5% of all cases.

[4] P. Beeson & W. McDermott, supra, note 1, at 1036.

[5] Id. at 1032. There are other ways in which the recipient could contract hepatitis. Unsanitary conditions in puncturing the recipient's skin could permit infusion of hepatitis virus. Because the incubation period for hepatitis is 6 weeks to 6 months, it is possible that the patient developed hepatitis completely independent of the transfusion. However, since serum hepatitis may be contracted only as a result of a direct infusion by a puncturing of the skin, the possible incidence of such independent causation would appear to be relatively minimal. Id. at 1032-33.

[6] Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc., 270 Minn. 151, 154, 132 N.W.2d 805, 807 (1965).

[7] See, e.g., Sloneker v. St. Joseph's Hosp., 233 F. Supp. 105 (D. Colo. 1964); Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc., 270 Minn. 151, 132 N.W.2d 805 (1965); Koenig v. Milwaukee Blood Center, Inc., 23 Wis. 2d 324, 127 N.W.2d 50 (1964); Gile v. Kennewick Pub. Hosp. Dist., 48 Wash. 2d 774, 296 P.2d 662 (1956).

[8] 96 N.J. Super. 314, 232 A.2d 879 (1967).

[9] 116 Ga. App. 277, 156 S.E.2d 923 (1967).

sections.[10] The relevance of this issue becomes obvious when it is noted that Code warranty provisions specifically apply where there has been a "sale of goods."[11] The second issue concerns whether, if a transfusion does constitute a "sale of goods," there can be a breach of the Code's implied warranty of merchantability[12] in the absence of a showing of fault on the part of the seller for the product's defect. This consideration is, of course, important because of the fact that hepatitis virus is not detectable in blood used for transfusions. Finally, in addition to these interpretative issues, there is the basic policy question concerning whether the provisions should or should not be made applicable to blood transfusions. It is the purpose of this comment to explore these questions in the light of the intent and policy underlying the warranty and other provisions of the Uniform Commercial Code. In so doing, it will be necessary to examine to some extent the general field of products liability law, both at the present time and prior to the adoption of the Code.

I. "Sale of Goods" or Service: The "Essence" Test

Perlmutter v. Beth David Hosp.[13] is the leading pre-Code case dealing with the issue of whether a blood transfusion constitutes a "sale of goods." The facts of the case are typical: A patient was given a blood transfusion as ordered by a doctor. The blood apparently contained serum hepatitis virus which caused the patient to develop homologous serum hepatitis. The patient sued the hospital for breach of an implied warranty in that she was given "bad" blood.[14]

The court refused to impose liability on a warranty theory. It found that the predominant aspect of the patient-hospital contract was for the *service* of restoring the patient's health[15] and that the transfusion of blood was only an incidental transfer of property made in the course of performing the service.

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[10] U.C.C. §§ 2-105, -106, -401. All citations to the Uniform Commerical Code are to the 1962 Official Text.

[11] See U.C.C. §§ 2-313(1), -314(1), -315. U.C.C. § 2-313, Comment 2 suggests that Code warranty provisions need not necessarily apply only to cases involving "sales of goods," or that the Code restricts application of warranty law to "sales" transactions. There is some evidence that courts are developing a body of warranty law in non-sales cases. See, e.g., Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965). See also commentary and cases cited in R. Duesenberg & L. King, Sales and Bulk Transfers Under the Uniform Commercial Code § 7.01 [2][b] (1966).

[12] U.C.C. § 2-314. The implied warranty of merchantability, and in particular the warranty of fitness for ordinary purposes contained in § 2-314(1)(c), is more appropriate to the blood transfusion cases than the implied warranty of fitness for a particular purpose contained in U.C.C. § 2-315. When blood is processed for use in transfusion and is then infused into the patient, it is used for the "ordinary" purpose for which it was designated. The warranty of fitness for a particular purpose in § 2-315 is mutually exclusive of that contained in § 2-314. Thus only if the hospital were to use the "transfusion" blood for some project other than transfusion would an implied warranty of fitness for that "particular" purpose be raised.

[13] 308 N.Y. 100, 123 N.E.2d 792 (1954).

[14] Id. at 103, 123 N.E.2d at 793. The case was brought under the New York version of the Uniform Sales Act in force at the time. The implied warranty under the Sales Act was one of "merchantable quality." Uniform Sales Act § 15. The Uniform Sales Act is repealed by the Uniform Commercial Code. U.C.C. § 10-102.

[15] 308 N.Y. at 104, 123 N.E.2d at 794.

It was reasoned that the warranty provisions of the Uniform Sales Act specifically applied only to a contract for a "sale of goods,"[16] and further that the implied warranty of "merchantable quality" was not applicable to a contract that was predominantly for services rather than predominantly for goods.[17] In addition, the court refused to divide the contract into one part involving services and another part involving a sale of goods.[18]

The *Perlmutter* doctrine served as a foundation for several subsequent blood transfusion cases.[19] In each of these cases, courts relied on the theory that the hospital in administering a blood transfusion was essentially performing a service rather than selling a good. Transfers of property made in the course of supplying these services were not considered "sales of goods" to which implied warranties would attach. These courts thus followed the so-called "essence" test, which has generally been used by American courts when deciding whether warranty law is applicable to a contract involving both performance of services and transfers of goods.[20]

Commentators have criticised usage of the "essence" test in general, and in particular its usage in *Perlmutter* and subsequent blood transfusion cases. Two main arguments have been raised: (1) that a contract involving both goods and services should properly be viewed as two separate contractual relationships, one for the performance of services and one for the sale of goods, and that implied warranties should attach to the sale of goods[21] and (2) that there should be no necessity for a technical "sale of goods" to apply warranty law.[22] The second criticism is more general than the first and in fact encompasses it. In short, the essence of this criticism is that even if the contract is considered predominantly for services, warranties should attach either to the performance of the service itself or to the transfer of any goods involved in the process of performance.

Of the two blood transfusion cases decided under the Code, one, despite the above criticisms, has retained the "essence" test, the other has rejected it. *Lovett v. Emory University, Inc.*[23] followed the *Perlmutter* doctrine in holding "that the furnishing of blood by a hospital in the course of treatment is not a sales transaction covered by an implied warranty under the Uniform Commercial Code or otherwise."[24] *Jackson v. Muhlenberg Hosp.*,[25] on the

[16] Id. at 103-04, 123 N.E.2d at 794; see Uniform Sales Act § 15.

[17] 308 N.Y. at 104, 123 N.E.2d at 794.

[18] Id. The court stated: "Such a contract is clearly one for services, and, just as clearly, it is not divisible."

[19] See, e.g., cases cited note 7 supra.

[20] Farnsworth, Implied Warranties of Quality in Non-Sales Cases, 57 Colum. L. Rev. 653, 664 (1957). English courts will separate the contract into one part involving services and another involving goods. Implied warranties then attach to the sale of goods. Id.

[21] See Comment, Contract Formation and the Law of Warranty: A Broader Use of the Code, 8 B.C. Ind. & Com. L. Rev. 81, 88-89 (1966); Note, 31 Ind. L.J. 367, 373-74 (1956).

[22] See Farnsworth, supra note 20, at 667; Note, 33 Miss. L.J. 253, 256 (1962); Note, 37 Notre Dame Law. 565, 569 (1962).

[23] 116 Ga. App. 277, 156 S.E.2d 923 (1967).

[24] Id. at 279, 156 S.E.2d at 925.

[25] 96 N.J. Super. 314, 232 A.2d 879 (1967).

other hand, rejected this reasoning. The *Jackson* court looked to sections 2-105 and 2-106 of the Code to determine whether a transfusion of blood constituted a "sale of goods."[26] Section 2-105(1) defines "goods" as "all things . . . which are movable at the time of identification to the contract for sale other than money in which the price is to be paid, investment securities . . . and things in action." Section 2-106(1) provides that a " 'sale' (of goods) consists in the passing of title from the seller to the buyer for a price . . . ." Section 2-401 provides generally that title passes upon completion of the seller's delivery obligations. Finding that blood qualified as "goods" under section 2-105(1), the court adopted a broad interpretation of the "sale" provision of section 2-106(1): " 'The broad aspect of the term "sale" signifies the transfer of property from one person to another for a consideration of value . . . .' "[27] Relying on this interpretation of the applicable Code provisions, the court went on to reject the *Perlmutter* "essence" test as applied to blood transfusions: "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] (Emphasis added.)

The court's conclusion on this issue appears warranted by the language of the relevant Code sections. The specific definition of "goods" in section 2-105(1), with its emphasis simply on the movability of the item,[29] would, under any reasonable reading of the section, include a quantity of blood to be used for transfusion or for any other purpose. In satisfaction of the requirement of section 2-106(1), it is apparent that there is a passing of "title" or ownership of the "goods" for a price. A physical delivery of the goods takes place with the infusion of the blood into the patient's body. The patient later responds by paying an amount for the blood as enumerated on the hospital bill.[30] The literal Code provisions would thus appear to allow the finding of a

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[26] Id. at 322-23, 232 A.2d at 883-84.

[27] Id. at 323, 232 A.2d at 884, quoting from State v. Weissman, 73 N.J. Super. 274, 281, 179 A.2d 748, 752 (1962).

[28] 96 N.J. Super. at 324, 232 A.2d at 884. *Jackson* is not the only case involving blood transfusions to find a "sale of goods." Community Blood Bank, Inc. v. Russell, 196 So. 2d 115 (Fla. 1967), and Hoder v. Sayet, 196 So. 2d 205 (Fla. 1967), found a "sale of goods" in the transfer of blood from a blood bank to a hospital and then to the patient. In these pre-Code cases, however, the blood bank, not the hospital, was considered the seller. Because a blood bank usually deals exclusively in a product—as opposed to providing both services and a product—the problems created by usage of the "essence" test are not present. See also Cheshire v. Southampton Hosp. Ass'n, 53 Misc. 2d 355, 278 N.Y.S.2d 531 (Sup. Ct. 1967), in which the court espoused the *Perlmutter* doctrine yet denied that there is a presumption against there having been a "sale of goods" somewhere in the course of medical treatment. Id. at 356-57, 278 N.Y.S.2d at 533. The case involved the insertion of an allegedly defective surgical pin.

[29] See U.C.C. § 2-105, Comment 1.

[30] It is common practice for hospitals to itemize both the cost of the blood used for the transfusion and the service charge for administering the transfusion. See Jackson v. Muhlenberg Hosp., 96 N.J. Super. at 320, 232 A.2d at 882. Where the charge for the blood is specifically enumerated on the bill given the patient, the appearance of a completed sales transaction is made even more evident. To avoid giving this appearance, the Legal Department of the American Medical Association once recommended that hospitals refrain from itemizing a specific charge for blood. Comment, Liability for Blood Transfusion Injuries, 42 Minn. L. Rev. 640, 658-59 (1958).

"sale of goods" whenever the requirements of sections 2-105(1), 2-106(1) and 2-401 are met, regardless of whether such sale may occur in the course of performing a service.[31]

In supporting its decision that a blood transfusion constitutes a "sale of goods" under the Code, the court relied heavily on a change which adoption of the Code had made in the New Jersey law on sales. Before enactment of the Code there, the court had followed the minority rule[32] that the serving of food in a restaurant did not constitute a "sale of goods" but was rather a transfer of property incidental to performance of a service.[33] The Code, however, explicitly adopted the majority view that "the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale."[34]

The question arises as to the effect of this provision as an evidentiary factor in determining Code policy concerning the "essence" test. One possible argument is that this provision, as an implicit rejection of the "essence" test in an area where it had frequently been employed, is to be viewed as an indication of a general Code policy of disfavor with the use of the "essence" test in other situations. In the alternative, inclusion of the serving of food as a "sale of goods" could be seen as merely the adoption of the majority view so as to promote uniformity in a disputed area. Finally, it has been argued that the specific inclusion of the serving of food as a "sale," without references to other service-sale transactions, is indicative of a Code policy *sanctioning* retention of the "essence" test in the unspecified service-sale transactions.[35]

Of these three alternative interpretations of underlying Code policy, the *Jackson* court chose the first. Although the Code is silent as to the blood transfusion situation, the court found the change brought about in the restaurant-food situation a persuasive analogy for the transfusion case. Noting that its pre-Code line of decisions in the restaurant-food cases had been much criticised, the court seemed determined not to uphold a similar service-not-sale line of reasoning in the transfusion case before it: "It is unthinkable that such

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[31] It should be noted that despite this lack of a specific inclusion of the "essence" test within the definitional provisions of the Code, courts have continued to employ it in a variety of situations. A leading Code case employing this test is Epstein v. Giannattasio, 25 Conn. Supp. 109, 197 A.2d 342 (Fairfield County C.P. 1963), in which the plaintiff was injured by a cosmetic applied in the course of a beauty treatment. Plaintiff alleged breach of an implied warranty of "merchantability" under U.C.C. § 2-314. The court decided that the contract was "essentially" one for the service of the beauty treatment, not for the "sale" of cosmetics. While a transfer of goods occurred in the course of performing the services, the Code warranty provisions were held not applicable. See also Aegis Prods., Inc. v. Arriflex Corp. of America, 25 App. Div. 2d 639, 268 N.Y.S.2d 185 (1966); Victor v. Barzaleski, 19 Pa. D. & C.2d 698 (Luzerne County Ct. 1959). These cases give only cursory consideration to the provisions of the Code that define a "sale of goods" and do not elaborate on the effect of these provisions on the use of the "essence" test. Compare Foster v. Colorado Radio Corp., 331 F.2d 222 (10th Cir. 1967), in which the court found no difficulty in dividing a contract for sale of a radio station into "goods"—movable items such as furniture and office equipment—and nongoods—items such as the station license, good will and real estate.

[32] Note, 37 Tulane L. Rev. 336, 337 (1963); see Sofman v. Denham Food Serv., Inc., 37 N.J. 304, 309, 181 A.2d 168, 171 (1962) (concurring opinion).

[33] See, e.g., Nisky v. Childs Co., 103 N.J.L. 464, 135 A. 805 (1927).

[34] U.C.C. § 2-314(1).

[35] See Lovett v. Emory Univ., Inc., 116 Ga. App. 277, 278, 156 S.E.2d 923, 924 (1967).

a legalism should be revived to avoid holding hospitals and blood banks liable. If these valuable organizations are to be exempted from the liability, the immunity should be based upon the true policy consideration and not upon an irrelevant circumstance."[36]

In applying the restaurant-food analogy, the *Jackson* court relied on the writings of various commentators criticising usage of the "essence" test in the pre-Code blood transfusion cases.[37] Prior to the enactment of the Code, a majority of states had reversed the old innkeeper rule that did not treat the restaurateur as a seller of goods.[38] The commentators found that the rejection of the "essence" test in this situation was relevant to the blood transfusion cases in two ways: (1) Both situations are susceptible to the "essence" test in that they involve both goods and services; (2) both involve the transfer of property which is "consumed" by the buyer. Rejection of the "essence" test by courts in the one case was seen as an indication that it would or should be rejected in the other. The *Jackson* case is the first to find the reasoning of these commentaries compelling.

In opposition to the view taken by the *Jackson* court, the court in *Lovett v. Emory University, Inc.* viewed the inclusion of the restaurant-food case as indicative of a Code policy sanctioning continued usage of the "essence" test in all those service-sale transactions left unspecified. The court said:

> [W]e are of the opinion that such a blood transfusion is an incidental part of the service furnished by a hospital . . . and is not a sales transaction under our statutes . . . . As to the Uniform Commercial Code-Sales we think it is significant that the General Assembly expressly provided that the "serving for value of food or drink . . . is a sale" of goods . . . without expressly including other service-type transactions as covered by any implied warranty.[39]

Between the two extreme positions taken by these courts, there is an interpretation of Code intent and policy which most reasonably reflects the circumstances surrounding the inclusion of the restaurant-food provision. The restaurant-food case was one about which courts had developed two rather clearly defined positions—the majority of courts finding a sale of goods and warranty liability, the minority not finding a sale and thus rejecting warranty liability. It is submitted that the Code designation of the serving of food in a restaurant as a "sale" should be viewed simply as the adoption of a majority view to promote uniformity in a disputed area rather than either a general adoption of the "essence" test with only this single exception or a complete rejection of the test. Thus, when viewed alone, the restaurant-food provision in section 2-314 is hardly a persuasive argument for either the *sanctioning* or *rejection* of the "essence" test by the Code in blood transfusion cases.[40]

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[36] 96 N.J. Super. at 323-24, 232 A.2d at 884.

[37] E.g., Farnsworth, supra note 20, at 661-62; Note, 37 Notre Dame Law. 565, 568-69 (1962); Note, 103 U. Pa. L. Rev. 833, 833-34 (1955).

[38] The various pre-Code doctrines are discussed in Sofman v. Denham Food Serv., Inc., 37 N.J. 304, 181 A.2d 168 (1962).

[39] 116 Ga. App. at 278, 156 S.E.2d at 924.

[40] Both Massachusetts and Texas have amended U.C.C. § 2-316 dealing with war-

Usage of the "essence" test has been the major impediment to finding a "sale of goods" in the blood transfusion cases. Finding, as the *Jackson* court did, that there is no requirement under the Code that usage of the test be continued, one is relegated to interpretation of Code sections 2-105, 2-106 and 2-401 to determine whether a transfusion constitutes a "sale of goods." As noted earlier, the transfusion appears to fit squarely within the definitional requirements of those sections.

II. The Warranty Issues

With the preliminary conclusion that a blood transfusion constitutes a "sale of goods" under the Code, attention may now be focused on the warranty issues raised by such a sale. The primary question is whether, under the Code warranty provisions, the hospital-seller may be liable for injuries caused by the "defective" blood even though under the present state of medical knowledge, the seller could not have discovered the "defect."

In discussing this issue, it is appropriate to examine briefly the theories of recovery available in products liability cases. Two bodies of law have developed in this area. They are "strict liability in tort" and "contract warranty," a field now dominated by the Code warranty provisions. The "strict liability in tort" theory holds the seller of defective merchandise liable for physical harm caused by it. There is no requirement that the seller or manufacturer must have been negligent in the product's manufacture or processing or that he must have been able to discover the defect. The seller of the product will be strictly liable to the injured user of the product as long as it was "unreasonably dangerous" in its defective condition.[41]

It has been suggested that the courts developed the strict liability concept to make up for shortcomings of the old Uniform Sales Act.[42] The Sales Act

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ranty disclaimers to the effect that a transfusion of blood may not be a "sale of goods." Mass. Gen. Laws Ann. ch. 106, § 2-316(5) (1966):

> The implied warranties of merchantability and fitness shall not be applicable to a contract for the sale of human blood, blood plasma or other human tissue or organs from a blood bank . . . . Such blood, blood plasma or tissue or organs shall not for the purposes of this Article be considered commodities subject to sale or barter, but shall be considered as medical services.

The Texas provision differs from the Massachusetts provision only in the respect that the word "Title" is substituted for the word "Article." Tex. Bus. & Comm. Code Ann. § 2-316(e) (1967). An inference to be drawn from the enactment of these amendments is that the legislatures suspected that blood transfusions could be a "sale of goods" under the Code. It is arguable that, not wishing to impose warranty liability on hospitals or blood banks, the legislatures acted to exempt these organizations by designating possible "sales" transactions as medical services. That these amendments have been made is not conclusive as to legislative intent upon original enactment of the Code in those states since the warranty coverage originally given may have been either intentional or inadvertent.

Arizona and California have amended other sections of their statutes to preclude application of warranty law to blood transfusions in those states. Ariz. Rev. Stat. Ann. § 36-1151 (1967); Cal. Health & Safety Code § 1606 (West Supp. 1967).

[41] Restatement (Second) of Torts § 402A (1965).

[42] See Shanker, Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communication Barriers, 17 West. Res. L. Rev. 5, 18 (1965).

has been described as little more than a codification of nineteenth century contract law.[43] As such, the Act allowed for the application of outmoded contract privity requirements and disclaimers of warranty which made recovery by the injured user of the defective product unlikely in many cases.[44] Finding the results achieved under such contract warranty concepts shocking to a modern social conscience, the courts developed the strict liability doctrine which succeeded in imposing the burden of loss on the seller of a product rather than on an innocent purchaser.[45] Under "strict liability" principles, contract requirements of privity are dispensed with, and disclaimers of warranties are ineffective.[46]

There is, however, an exception to the "strict liability" doctrine which will excuse the seller. Where the seller of a socially beneficial product could not, by even the most careful research, have discovered his product's defect, he may be relieved from strict liability for resulting harm to a user.[47] The Restatement of Torts takes the position that the seller of such a product, if it is not "unreasonably dangerous" in its defective condition, will not be liable for harm caused by it.[48] The Restatement uses the example of rabies vaccine which may be carefully prepared yet may cause injury to the recipient when injected. Such a product is not "unreasonably dangerous" in view of the sure death which will follow if it is not used. Furthermore, the vaccine is "unavoidably unsafe" because the patient's reaction cannot be predicted nor can the purity of ingredients be exactly determined.[49]

Unlike the Uniform Sales Act which was basically a codification of the common law of contracts, the Uniform Commercial Code was drafted with apparent intent to do away with various legal anachronisms that would burden modern commercial practice.[50] The Code's warranty provisions were de-

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[43] 1 W. Hawkland, A Transactional Guide to the Uniform Commercial Code 3-4 (1964); Shanker, supra note 42, at 20-21.

[44] Shanker, supra note 42, at 19. The Uniform Sales Act did not contain provisions specifically dealing with disclaimers of warranty or privity. In a Sales Act jurisdiction, therefore, a broad disclaimer of warranty hidden in the fine print of a contract would be effective to relieve the seller under common law contract principles. Furthermore, under simple contract notions of privity, the injured party could not recover from the seller on a warranty theory unless he had himself purchased the product from the seller. 1 W. Hawkland, supra note 43, at 80, 86.

[45] See Shanker, supra note 42, at 7, 8, 19, 20.

[46] Restatement (Second) of Torts § 402A, Comment m (1965). See generally Comment, Limitations Upon the Remedy of "Strict Tort" Liability for the Manufacture and Sale of Goods—Has the "Citadel" Been Devastated? 17 West. Res. L. Rev. 300 (1965).

[47] Cochran v. Brooke, 243 Ore. 89, 409 P.2d 904 (1966); Cudmore v. Richardson-Merrell, Inc., 398 S.W.2d 640 (Tex. Civ. App. 1965).

[48] Restatement (Second) of Torts § 402A, Comment k (1965).

[49] Id.

[50] See Shanker, supra note 42, at 21. U.C.C. § 1-102 states in part:

> (1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.
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> (2) Underlying purposes and policies of this Act are
>
> (a) to simplify, clarify and modernize the law governing commercial transactions;
>
> (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
>
> (c) to make uniform the law among the various jurisdictions.

veloped with much the same purpose—protection of the innocent consumer—as that contemplated by the courts in developing the concept of "strict liability in tort."[51] The Code warranty sections, generally, hold the seller liable for commercial loss or physical harm caused by the defective product unless he made no express warranties and disclaimed all implied warranties.[52] Under the Code, contract principles are preserved, but they are so modified as to prevent easy avoidance of warranty liability by the seller. For instance, the Code sets no privity requirements. Rather it states only that warranties must extend to "any natural person who is in the family or household of the buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods. . . ."[53] Beyond that, "the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain."[54] Implied warranties may be disclaimed, but the Code lays down specific requirements that "merchantability" must be mentioned and that the disclaimer must be conspicuous.[55] While "strict liability in tort," in protecting the consumer, rejects entirely the usage of these contract principles, the U.C.C. modifies such principles so as to increase the protection afforded the consumer.

In the *Jackson* case "strict liability in tort" and Code warranty concepts come into conflict. The plaintiff alleged both a breach of implied warranty of merchantability and strict liability in tort. The *Jackson* court considered these two doctrines to be identical.[56] The court determined that there had been a "sale of goods" under the U.C.C. yet denied warranty liability. It did so pri-

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[51] See Hart, Impact of the Uniform Commercial Code on Products Liability Law, 20 Bus. Law. 173 (1964); Rapson, Products Liability Under Parallel Doctrine: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort, 19 Rutgers L. Rev. 692, 695 (1965); Shanker, supra note 42, at 20-21.

[52] See U.C.C. §§ 2-313 to -316.

[53] U.C.C. § 2-318.

[54] U.C.C. § 2-318, Comment 3. Due to the proliferation of individual state amendments to § 2-318, the Code's Permanent Editorial Board has recently suggested two alternatives to the present section. Each would require that liability extend to users of the product beyond the family of the purchaser. The new alternatives are designated as Alternative B and Alternative C. Alternative B states:

> A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative C states:

> A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.

3 Permanent Editorial Board for the Uniform Commercial Code Rep. 13 (1967).

[55] U.C.C. § 2-316(2). Vlases v. Montgomery Ward & Co., 377 F.2d 846 (3d Cir. 1967), suggests by way of dictum that even a specific, conspicuous disclaimer may be ineffective where the goods transferred are "worthless." The court cites Code § 1-102(3) which prevents the setting up of contract standards which are manifestly unreasonable. Id. at 850.

[56] 96 N.J. Super. at 324, 232 A.2d at 884.

marily because (1) the product was "unavoidably unsafe" in that the seller could not have discovered the defect in the blood which caused the plaintiff to contract homologous serum hepatitis and (2) the product was not "unreasonably dangerous" in view of the danger to the patient were the transfusion not given.[57]

The result achieved in *Jackson* is open to question. While it is true that strict liability in tort and Code warranty provisions were both developed with the purpose of protecting the consumer, there is little support for the position that they work in exactly the same way or that defenses to one action may be interposed against the other.[58] Just as the "strict liability in tort" doctrine developed so as to disallow contract defenses such as lack of privity and disclaimer of warranty, the contract warranty action will not admit certain tort defenses such as contributory negligence.[59]

It is submitted that the defense that the blood is "unavoidably unsafe" may not properly be raised in an action for breach of an implied warranty of merchantability under section 2-314 of the Code. The language of the section does not provide for such a defense. It states in part:

> (1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
>
> (2) Goods to be merchantable must be at least such as
>
> . . .
>
> (c) are fit for the ordinary purposes for which such goods are used . . .
>
> . . .
>
> (3) Unless excluded or modified . . . other implied warranties may arise from course of dealing or usage of trade.

The section thus clearly provides that the only defense to an action based on a breach of the implied warranty of "merchantability" is a showing that the product carried a disclaimer as stipulated in section 2-316. Several warranty cases thus far decided under the Code have so interpreted the implied war-

[57] 96 N.J. Super. at 329, 232 A.2d at 887-88. It is noted that the court went on to find that a specific disclaimer of warranty was printed on the container of blood. Id. at 329, 232 A.2d at 888. The plaintiff never read the disclaimer. The court does not emphasize the existence of the disclaimer, and it appears to be subsidiary to the main force of the opinion.

[58] Restatement (Second) of Torts § 402A, Comment m (1965) declares that the principles of "strict liability in tort" are independent from those of contract warranty and that the application of these principles is not governed by provisions of the Uniform Sales Act or the Uniform Commercial Code. Shanker, supra note 42, at 22-23, 30 suggests that "strict liability in tort" cases thus far decided (July 1965) would probably have achieved the same result under the U.C.C. He points out, however, that differences in the functioning of the two theories may lead to different results in certain situations. For instance, the Code would apparently permit a valid disclaimer of warranty if not unreasonable or "unconscionable," but strict liability in tort would not permit such a defense. Id. at 31. See Rapson, supra note 51, at 704-11.

[59] Shanker, supra note 42, at 35-36.

ranty sections. These cases have specifically rejected the defense that the seller of the product could not have discovered its defect.[60]

The *Jackson* court, it appears, was correct in finding a "sale of goods" under the Code. It is submitted, however, that the court was incorrect in allowing the "unavoidably unsafe" defense. Where a supplier makes available blood specifically prepared for transfusion into a patient in order to promote his health and where the blood is ultimately used for that purpose, it may be said to have been used "for the ordinary purposes for which such goods are used . . . ." It seems clear that the disease-producing blood infused into the patient is not "fit" for such purpose. Having thus breached the implied warranty of merchantability, defendant hospital should have been liable in the absence of a valid disclaimer of warranty.[61]

III. The Policy Background

Perhaps the best explanation for the anomalous result achieved in the *Jackson* case is that it and all other blood transfusion cases have been decided more in regard to policy factors than to case or statutory law. The reluctance of the pre-Code cases to find a sale of goods, it appears, stemmed from the realization that finding such a sale would force the imposition of strict liability on a warranty theory.[62] Not wishing to impose liability on hospitals and blood banks for something which they could neither detect nor completely control, the courts chose the most obvious method of avoiding liability—that is, by refusing to call the transaction a "sale of goods."

Courts have developed in these cases three basic policy reasons for not imposing warranty liability on hospitals or blood banks: (1) They have determined that it is unfair to impose liability where the defect in the blood could

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[60] See Vlases v. Montgomery Ward & Co., 377 F.2d 846 (3d Cir. 1967), in which the court states:

> What the Code requires is not evidence that the defects should or could have been uncovered by the seller but only that the goods upon delivery were not of a merchantable quality or fit for their particular purpose. If those requisite proofs are established the only exculpatory relief afforded by the Code is a showing that the implied warranties were modified or excluded by specific language under Section 2-316.

Id. at 850. Cf. Speed Fasteners, Inc. v. Newsom, 382 F.2d 395 (10th Cir. 1967); Marathon Battery v. Kilpatrick, 418 P.2d 900 (Okla. 1965).

[61] See, in Community Blood Bank, Inc. v. Russell, 196 So. 2d 115 (Fla. 1967), the concurring opinion of Justice Roberts in which he criticises the lower court for not imposing liability despite defendant's lack of fault for the product's defect. Id. at 118-21. In Hoder v. Sayet, 196 So. 2d 205 (Fla. 1967), the court found a "sale of goods" but admitted that the "unavoidably unsafe" doctrine would be a defense. The court then went on to find that potential warranty liability existed in the case because it appeared that defendant blood bank might have been negligent in its selection of donors. The court does not make clear why negligence should be required to impose warranty liability.

[62] See Farnsworth, supra note 20, at 664. The policy statement of the court in the *Perlmutter* case is representative of the position taken in these cases:

> If . . . the court were to stamp as a sale the supplying of blood . . . it would mean that the hospital, no matter how careful, no matter that the disease-producing potential in the blood could not possibly be discovered, would be held responsible, virtually as an insurer, if anything were to happen to the patient as a result of "bad" blood.

308 N.Y. at 106, 123 N.E.2d at 795.

not have been detected;[63] (2) there is a general feeling that hospitals are engaged in the sort of public-spirited work that should not be fettered by liability of this type;[64] and (3) there is a reluctance to impose liability on the supplier of blood where another party, a doctor, has been the one taking the affirmative action of weighing the alternative risks of giving or not giving a transfusion. Under this third line of reasoning, the hospital or blood bank is viewed as merely a party which holds the blood for subsequent use by another. In deciding to give a transfusion, the doctor is considered the only party who has taken direct action and therefore should be the only one to be held responsible should the transfusion result in the patient's contracting hepatitis.[65]

In opposition to the courts' reasons for excusing defendants from liability, commentators have suggested reasons why, on policy grounds alone, the hospital or blood bank should be held liable. First, it is argued that the net result of such a holding would be to achieve a more equitable distribution of the burden of loss.[66] It has been suggested, in addition, that the imposition of liability would force blood banks and allied medical research facilities to search even more diligently for a method to detect serum hepatitis in blood to be used for transfusions.[67] Finally, it has been suggested that imposition of liability would force hospitals and blood banks to raise their standards for selection of blood donors and thereby reduce the incidence of hepatitis virus in blood used for transfusion.[68]

In view of the general purpose of both the Code-warranty and "strict liability in tort" actions—that of protecting the consumer—the arguments in favor of imposing liability seem to outweigh those against imposition. In regard to the first argument for imposition of liability, it is clear that imposing liability on a hospital would force it to incur the costs of treating the patient. To recover these extra costs, the hospital could charge patients more for each quantity of blood used in transfusions.[69] In effect each person who needs a

[63] See, e.g., Perlmutter v. Beth David Hosp., 308 N.Y. 100, 106, 123 N.E.2d 792, 795 (1954).

[64] See, e.g., Dibblee v. Dr. W.H. Groves Latter-Day Saints Hosp., 12 Utah 2d 241, 364 P.2d 1085 (1961). The court states: "We think that practically all hospitals are bourns of mercy and most physicians are unselfish disciples of relief and the cure of human ills." Id. at 243, 364 P.2d at 1087.

[65] See, e.g., Jackson v. Muhlenberg Hosp., 96 N.J. Super. 314, 330, 232 A.2d 879, 888 (1967).

[66] See Note, 103 U. Pa. L. Rev. 833, 835-36 (1955).

[67] See Farnsworth, supra note 20, at 672; Note, 103 U. Pa. L. Rev. 833, 835 (1955).

[68] See Brief for Defendant at 12-13, Jackson v. Muhlenberg Hosp., 96 N.J. Super. 314, 232 A.2d 879 (1967); cf. Comment, Liability for Blood Transfusion Injuries, 42 Minn. L. Rev. 640, 657 (1958).

[69] It is possible that hospitals would simply absorb the cost of liability, add it in as an additional operating expense, and raise the cost of hospital care to all patients whether or not they receive a blood transfusion. This does not seem likely, however, unless the hospital operates its own blood bank. This may be resolved in the following way: If the hospital is held liable to its patient, the hospital would, presumably, have a right of recovery over against its supplier of blood under U.C.C. § 2-314. In most cases this would probably be a community or regional blood bank which supplies blood to several hospitals. Therefore, the main supplier of blood would be forced to raise the price of its product to cover the cost of the liability. This specific increase in the price of blood could then be passed on directly to those patients who need transfusions. Im-

transfusion would pay something extra to insure himself against the possibility that the blood he receives will contain hepatitis virus. Given the choice, a person receiving a transfusion would almost certainly wish to pay this extra amount rather than take the chance on bearing the entire loss should he contract hepatitis.

Viewed in this light, the blood transfusion cases are not significantly different from other products liability cases. Although the courts may intend that the burden of loss be placed on the seller of the product, it seems certain that the net effect is, rather, to spread the burden among the users of the product; as the seller merely charges more for the item to cover the cost of insuring himself against potential liability. This means of spreading the loss seems equally applicable to the blood transfusion situation. Whether the defect in the blood is detectable is a less important consideration if it is recognized that the hospital would not in reality bear the whole loss were liability to be imposed.

The argument that liability should be imposed to force blood banks into selection of a better class of donors also has merit. There appears to be a consensus of opinion that blood banks use indigents or others of an undesirable nature as donors of blood.[70] Often these persons give unreliable medical information about themselves. The imposition of liability would serve as an inducement for hospitals to take greater care in screening donors. To accomplish this, hospitals might make greater efforts to have family or friends of the patient needing a transfusion donate blood to replace that blood used. In this way the general quality of blood available from blood banks and hospitals could be raised.

IV. Conclusion

This article has suggested: (1) that the transfusion of blood for a price constitutes a "sale of goods" under the Code; (2) that having found a "sale of goods," Code warranty provisions apply and that the only defense to such an action is a valid disclaimer; and (3) that the policy arguments in favor of imposition of liability on the hospital-seller outweigh those against imposition. At this writing, only one court has accepted even the first of these conclusions. While these conclusions suggest that liability should be imposed under the Code, it is not surprising that courts have interpreted the Code so as not to impose liability. First, there are the underlying policy reasons that have dominated the courts' position in these cases. Second, the general background of cases shows that personal injury cases are most often brought on the theory of "strict liability in tort," whereas cases involving commercial loss are usually brought under the Code warranty provisions.[71] While it is clear that the

position of liability on hospitals would not, therefore, necessarily result in higher hospital rates for *all* patients whether or not they need transfusions.

[70] See Brief for Defendant at 13, Jackson v. Muhlenberg Hosp., 96 N.J. Super. 314, 232 A.2d 879 (1967); Brief for Blood Services, Inc. as Amicus Curiae at Appendix 6, Community Blood Bank, Inc. v. Russell, 196 So. 2d 115 (Fla. 1967). Cf. Hoder v. Sayet, 196 So. 2d 205, 209 (Fla. 1967).

[71] See Shanker, supra note 42, at 15; see generally Seeley v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

Code contemplates personal injury actions, courts may not be sufficiently familiar with its working to find advisable its usage in such cases. Third, there may be reluctance to use the Code in the blood transfusion cases simply because of the conceptual difficulty of fitting this rather unique situation into the context of a code designed to govern everyday "business" transactions.[72] It is submitted, however, that these difficulties hardly provide a justifiable barrier to the imposition of liability in view of the persuasive statutory analysis and policy arguments supporting imposition of Code warranty liability in the blood transfusion cases.

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[72] Despite its obvious application to "business" transactions, the Code provisions and policies may be applied to a variety of situations not otherwise specifically included therein. U.C.C. § 1-102, Comment 1 states in part:

> This Act is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices.