

## COMMENTS

### IMPLIED WARRANTY IN SERVICE TRANSACTION: HOSPITAL LIABILITY IN BLOOD TRANSFUSION

*Hoffman v. Misericordia Hospital of Philadelphia*, 439 Pa. 501, 267 A.2d 867 (1970)

The plaintiff sought damages for death resulting from serum hepatitis which was allegedly contracted through impure blood "sold" to plaintiff's decedent and transfused into her circulatory system. The plaintiff based his petition upon an alleged breach of an implied warranty of merchantability and/or an implied warranty of fitness for a particular purpose. *Held*: Whether the transfer of blood is classified as a sale or a service, an action based upon breach of implied warranties and instituted against a hospital states a cause of action upon which recovery *may* be granted.<sup>1</sup>

In reversing the lower court's action sustaining the hospital's demurrer, the Supreme Court of Pennsylvania specifically limited its decision to the issue of "whether, on the facts averred, the law says with certainty that no recovery is possible."<sup>2</sup> The court expressly refused to rule upon collateral issues which have historically led courts to deny the existence of a cause of action based upon similar facts and theories of law.<sup>3</sup> Further, the court refused to classify the transaction as either a sale or a service; instead, it reasoned that neither case law nor statutory law precludes warranties from attaching to service contracts. By ruling in this manner, the court expressly refused to follow *Perlmutter v. Beth Davis Hospital*<sup>4</sup> which, for sixteen years, has been the leading case in this area.

The New York Court of Appeals held in *Perlmutter* that furnishing blood is an incidental feature of a service contract; the court further stated that when service predominates, and transfer of personal property

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1. *Hoffman v. Misericordia Hospital of Philadelphia*, 439 Pa. 501, 262 A.2d 867 (1970).

2. *Id.* at 503, 267 A.2d at 868.

3. *See, e.g.*, *Sloneker v. St. Joseph's Hospital*, 233 F. Supp. 105 (D. Colo. 1964); *White v. Sarasota County Public Hospital Board*, 206 So. 2d 19 (Fla. Ct. App. 1968); *Hoder v. Sayet*, 196 So. 2d 205 (Fla. Ct. App. 1967); *Lovett v. Emory University, Inc.*, 116 Ga. App. 277, 156 S.E.2d 923 (1967); *Hidy v. State*, 3 N.Y.2d 756, 143 N.E.2d 528 (1957); *Perlmutter v. Beth Davis Hospital*, 308 N.Y. 100, 123 N.E.2d 792 (1954); *Koenig v. Milwaukee Blood Center, Inc.*, 23 Wis. 2d 324, 127 N.W.2d 50 (1964).

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

is an incidental feature of the transaction, the transaction is not deemed a sale within the Sales Act.<sup>5</sup> From this conclusion of law the court, by means of a negative inference, held that there were no implied warranties when a hospital furnished blood for transfusion to a patient. The negative inference resulted from an examination of common law development and limitations of warranty. Since warranties applied at common law only when a technical sale existed, the court acted as if the Sales Act was merely a codification of the entire area of warranty as it existed prior to codification. If drawn in the context of the Uniform Commercial Code, this negative inference inhibits all development of law which is tangential but not coterminous with commercial law; moreover, this result is expressly rejected in the commentary under Section 2-313 of the U.C.C.<sup>6</sup>

Aside from doubtful statutory construction<sup>7</sup> and even more doubtful use of precedent,<sup>8</sup> most commentators have suggested that *Perlmutter* and subsequent cases decided upon its authority were motivated by a desire to continue, or at least prevent further deterioration of, the doctrine of charitable immunities.<sup>9</sup> This motive coupled with a more

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

6. UNIFORM COMMERCIAL CODE § 2-313, Comment 2 (Official Text 1962). The section states (in part):

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

7. If adopted in the context of the U.C.C., the negative inference accepted by the *Perlmutter* court results in a strict construction of the U.C.C. limiting the coverage of Article 2 to one area of commercial law. Such a result is not the intent as expressed in § 1-102 which states: "This Act shall be liberally construed and applied to promote its underlying purposes and policies." That section goes on to list one underlying policy as "to simplify, clarify and modernize the law governing commercial transactions."

8. None of the cases cited to support the holding in *Perlmutter* were decided under the Sales Act; moreover, all cited cases concerned a type of future goods contract. Services applied to the materials supplied were intended to result in custom-made products. *Town of Saugus v. B. Perini & Sons, Inc.*, 305 Mass. 403, 26 N.E.2d 1 (1940) (contract to reconstruct roadway and supply gravel); *Racklin-Fagin Const. Corp. v. Villar*, 156 Misc. 220, 281 N.Y.S. 426 (1935) (contract to paint a picture); *Sidney Stevens Implement Co. v. Hintz*, 92 Utah 264, 67 P.2d 632 (1937) (contract to build drying oven); *Crystal Recreation, Inc. v. Seattle Ass'n of Credit Men*, 34 Wash. 2d 553, 209 P.2d 358 (1949) (contract to construct special restaurant fixtures). Blood, in contrast to custom-made goods, is not the product of services applied to materials. See 69 HARV. L. REV. 391 (1955).

9. See, e.g., *Balkowitsch v. Minneapolis War Memorial Blood Bank*, 270 Minn. 151, 132 N.W.2d 805 (1965); *Perlmutter v. Beth Davis Hospital*, 308 N.Y. 100, 107, 123 N.E.2d 792, 795 (1954) (" . . . if the transaction were to be deemed a sale, liability would attach irrespective of negligence or other fault. The art of healing frequently calls for a balancing of risks and dangers to the patient. Consequently, if injury results from the course adopted, where no negligence or fault is present, liability should not be imposed upon the institution or agency actually seeking to save or

specific concern over availability of blood supply<sup>10</sup> and a belief that there is no way to control blood contamination<sup>11</sup> has led several jurisdictions to deny warranty liability by applying the common law sales-service distinction to both hospital<sup>12</sup> and commercial blood distributors.<sup>13</sup>

When applied to the circumstances of a usual blood transfusion, that distinction<sup>14</sup> is artificial. Blood can be characterized as a product,<sup>15</sup> title to which passes<sup>16</sup> for a price.<sup>17</sup> These characteristics present a strong argument that transfer of blood *must* be characterized as a sale within Article 2 of the U.C.C.<sup>18</sup> This result has been adopted in two recent

otherwise assist the patient.”); *Dibbler v. Dr. W.H. Grover Latter Day Saints Hospital*, 12 Utah 2d 241, 244-45, 364 P.2d 1085, 1087-88 (1961); *Gile v. Kennewick Public Hospital Dist.*, 48 Wash. 2d 774, 296 P.2d 662 (1956). See also *Garibaldi, A New Look at Hospital's Liability for Hepatitis Contaminated Blood on Principles of Strict Tort Liability*, 48 CHI. B. REC. 204 (1967).

10. *Merck & Co. v. Kidd*, 242 F.2d 592 (6th Cir. 1957), cert. denied, 355 U.S. 814 (1958).

11. Medical knowledge being in a constant state of flux, it appears unwise for courts to take judicial notice of predictability of tests for hepatitis. See *Community Blood Bank, Inc. v. Russell*, 196 So. 2d 115 (Fla. 1967), modifying 185 So. 2d 749 (Fla. Ct. App. 1966).

12. In *Russell v. Community Blood Bank, Inc.*, 185 So. 2d 749 (Fla. Ct. App. 1966), modified, 196 So. 2d 115 (Fla. 1967), the Florida courts allowed recovery against a blood bank, but denied liability for the hospital upon the authority of *Perlmutter*. See also *Carter v. Inter-Faith Hospital of Queens*, 60 Misc. 2d 733, 304 N.Y.S.2d 97 (1969), for a similar limiting of *Perlmutter* to defendant hospitals.

13. Some jurisdictions deny hospital and blood bank liability for the transfer of impure blood. *Whitehurst v. American Nat'l Red Cross*, 1 Ariz. App. 326, 402 P.2d 584 (1965); *Balkowitsch v. Minneapolis War Memorial Blood Bank*, 270 Minn. 151, 132 N.W.2d 805 (1965); *Goelz v. J.K. & Susie L. Wadley Research Institute and Blood Bank*, 350 S.W.2d 573 (Tex. Civ. App. 1961).

14. See *Russell v. Community Blood Bank, Inc.*, 185 So. 2d 749, 752 (Fla. Ct. App. 1966) (“It seems to us a distortion to take what is at least arguably, a sale, twist it into the shape of a service, and then employ this transformed material in erecting the framework of a major policy decision.”).

15. In the Matter of *Community Blood Bank of the K.C. Area, Inc.*, Docket # 8519, F.T.C. 22,023 (issued June 8, 1964) found that whole human blood “is viable human tissue mixed with an anticoagulant in a sterile container which must be stored and refrigerated and the admixture is a commodity and/or an article of commerce under the administrative practice of National Institutes of Health.” Cf. *United States v. Calise*, 217 F. Supp. 705 (S.D. N.Y. 1962) (blood is a product or serum within Public Health Service Act § 351, 42 U.S.C. § 262).

16. See UNIFORM COMMERCIAL CODE §§ 2-401(2), 2-105(1), 2-106(1) (Official Text 1962); *Perlmutter v. Beth Davis Hospital*, 308 N.Y. 100, 123 N.E.2d 792, 794 (1954). Clearly one can “sell” blood on the commercial market for a price.

17. In *Hoffman*, the petition alleged “consideration”. This is apparently the usual situation despite the fact that the AMA legal staff has suggested that hospitals cease separate itemization of blood costs. *Blood Transfusion—Medicolegal Responsibility*, 163 J.A.M.A. 283, 286 (1957). Some hospitals intentionally charge high prices to induce patients to become donors when health returns. Cf. Note, *Liability for Blood Transfusion Injuries*, 42 MINN. L. REV. 640 (1958).

18. A strong analogy must be drawn between food cases and blood cases. The same legal theory which the court accepted in *Perlmutter* had been expressly rejected when used to deny liability for suppliers of food. *Temple v. Keeler*, 238 N.Y. 344, 346, 144 N.E. 635, 636 (1924). The distinction between service and sale was expressly rejected when applied to food by U.C.C. § 2-313. One case involving transfer of impure blood, *Lovett v. Emory University, Inc.*, 116 Ga. App. 277, 156 S.E.2d

decisions,<sup>19</sup> and is anticipated in states which have legislated to prevent warranties from attaching to the transfer of blood.<sup>20</sup> Under this approach, liability remains dependent upon the injured party establishing a "sale". As early as 1957, the AMA legal staff suggested that separate itemization of blood costs be discontinued by hospitals.<sup>21</sup> If this recommended procedure is followed, a sale under U.C.C. § 2-106(1) will be less apparent and may allow courts to continue immunity for hospitals without considering the underlying contract between the parties.<sup>22</sup>

Assuming, however, that the transfer of blood is not a sale within the U.C.C., the conclusion that no warranties attach to the transaction does not, as *Hoffman* indicates, necessarily follow. There is ample case law implying warranties in non-sales transactions.<sup>23</sup> When applied to *any* transaction, warranties are held to express the contractual intent of the parties.<sup>24</sup> In a transaction in which warranties would not normally be within contractual intent, *i.e.*, a pure service contract,<sup>25</sup> the parties can

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923 (1967), has found this section of the U.C.C. significant in 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 an implied warranty." *Id.* at 278, 156 S.E.2d at 924. Like food and medical products, blood is intended for human consumption and probably should be held to the same warranties. See *Gottsdanker v. Cutter Laboratories*, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960); *Volk v. City of New York*, 284 N.Y. 279, 30 N.E.2d 596 (1940).

19. *Cunningham v. MacNeal Memorial Hospital*, 113 Ill. App. 2d 74, 251 N.E.2d 733 (1969); *Jackson v. Muhlenberg Hospital*, 96 N.J. Super. 314, 232 A.2d 879 (1967), *rev'd on other grounds*, 53 N.J. 138, 249 A.2d 65 (1969).

20. ARIZ. REV. STAT. ANN. § 36-1151 (Supp. 1970) (added Laws 1964, Ch. 83, § 1); CAL. HEALTH & SAFETY CODE § 1623 (West 1955); *cf.* TIME, Oct. 19, 1970, at 57.

21. *Blood Transfusion—Medicolegal Responsibility* 163 J.A.M.A. 283, 286 (1957).

22. Courts could look beyond the immediately apparent facts to reveal that even without separate itemization the transferee is still gaining title for a price.

23. See, e.g., *Cushing v. Rodman*, 82 F.2d 864 (D.C. Cir. 1936); *Broyles v. Brown Engineering Co.*, 275 Ala. 35, 151 So. 2d 767 (1963); *Cunningham v. MacNeal Memorial Hospital*, 113 Ill. App. 2d 74, 251 N.E.2d 733 (1969); *Cintrone v. Hertz Truck Leasing & Rental Service*, 45 N.J. 434, 212 A.2d 769 (1965). See also 1 S. WILLISTON, SALES § 2426 (rev. ed. 1948); Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 643 (1957); 103 U. PA. L. REV. 833, 834 (1955); *cf.* Note, *The Application of Breach of Warranty to Wrongful Death Statutes: Conflict Between Archaic Legal Concepts and a Sense of Justice*, 22 BAYLOR L. REV. 384 (1970).

24. See Note, *Implied Warranties in Service Contracts*, 39 NOTRE D. LAW. 680 (1964); UNIFORM COMMERCIAL CODE § 2-315, Comment 1.

25. The dissent in *Perlmutter* suggested that what the court really had was two contracts—thus suggesting severability of the transaction. Under this theory, the transfer of the blood would be a sale but the doctor's act of transfusion would remain a service. See *Perlmutter v. Beth Davis Hospital*, 308 N.Y. 100, 123 N.E.2d 792 (1954); Note, *Extension of Warranty Concept to Service-Sales Contracts*, 31 IND. L.J. 367, 373-74 (1956).

*expressly warrant* like results<sup>26</sup> if they so desire. Implied warranties, on the other hand, seldom arise in pure service contracts, but can easily arise in transactions which are classified as work, labor and material contracts at common law.<sup>27</sup> The work, labor and material contract is a hybrid contract falling between pure service and pure sale contracts not unlike those which courts must confront in blood transfusion cases. Implied warranties now arise where goods are to be used by,<sup>28</sup> or upon,<sup>29</sup> the transferee. In *Cintrone v. Hertz Truck Leasing & Rental*,<sup>30</sup> the New Jersey Supreme Court applied warranties in a bailment lease situation, stating that warranties of fitness are regarded as an incident of a transaction where one party is in a better position than the other to know and control the condition of the chattel transferred and to distribute any losses which may occur. The court went on to say that the party acquiring possession of the article in this situation is likely to assume it is in a safe condition for use and, therefore, refrain from taking precautionary measures himself.<sup>31</sup>

The key elements of risk distribution, availability of information, and reliance by the transferee are the basis of implied warranty when applied to any transaction.<sup>32</sup> The surrounding circumstances of each transaction should determine the existence of implied warranties.

Viewed as one step in the continuing common law development of warranty, the decision in *Hoffman* is proper and makes good law. If the surrounding circumstances indicate that the rationale behind implied

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26. *E.g.*, *Napoli v. St. Peter's Hospital of Brooklyn*, 213 N.Y.S.2d 6 (Sup. Ct. 1961) (pleading states cause of action when based upon express warranty even though no implied warranty results from the sale of blood for transfusion).

27. Compare *Wm. H. Wise & Co. v. Rand McNally & Co.*, 195 F. Supp. 621, 625 (S.D. N.Y. 1961); *Ladd v. Redd*, 320 Mich. 167, 30 N.W.2d 822 (1948); *Stammer v. Mulvany*, 264 Wis. 244, 58 N.W.2d 671 (1953) with *Samuel v. Davis*, 1 K.B. 526 (1943); *Aced v. Hobbs-Sesack Plumbing Co.*, 55 Cal. 2d 573, 360 P.2d 897, 12 Cal. Rptr. 257 (1961); *Miller v. Winters*, 144 N.Y.S. 351 (Sup. Ct. 1913). *Cf.* *Darling v. Charleston Community Hospital*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965), *cert. denied*, 383 U.S. 946 (1966).

28. The most frequent application of warranty in non-sale transactions is found in bailment lease cases. *See, e.g.*, *Cintrone v. Hertz Truck Leasing & Rental Service*, 45 N.J. 434, 212 A.2d 769 (1965); *Farnsworth, Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957).

29. Hair products applied to a customer's head have been held to carry implied warranty. *Newmark v. Gimbel's Inc.*, 102 N.J. Super. 279, 246 A.2d 11 (1968); *contra*, *Epstein v. Giannattasio*, 25 Conn. Sup. 109, 197 A.2d 342 (1963).

30. 45 N.J. 434, 212 A.2d 769 (1965).

31. *Id.* at 446, 212 A.2d at 775. *See also* *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965).

32. *See generally* Comment, *Warranties in the Leasing of Goods*, 31 OHIO STATE L.J. 140 (1970); 38 FORDHAM L. REV. 830 (1970); 18 OKLA. L. REV. 104 (1965).

warranty applies, liability may be denied through standard warranty defenses.<sup>33</sup> Prior to *Hoffman*, all decisions predicated recovery for impure blood transfusions upon the existence of a sale. Recent cases based on a finding of "sale" repeat *Perlmutter's* deficiencies in failing to base liability upon the underlying contractual intent instead of a technical legalism. The service-sale distinction is probative, but not determinative, in achieving an equitable solution to warranty disputes. By eliminating the technical service-sale roadblock to recovery, the Pennsylvania Supreme Court has done much to square liability with the expectations of the parties.

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33. In particular, the causal relationship may be difficult to establish due to the potential time lag between transfusion and active disease. This difficulty has been discussed in connection with criminal prosecution of a physician in *State v. Weiner*, 41 N.J. 21, 194 A.2d 467 (1963).

More important, the plaintiff must establish the existence of a defect. Two courts have found a defect but ruled that impurity in blood is not an unreasonable defect since it is undetectable. Both cases were specifically modified by the state supreme courts to eliminate this section of the opinion. *Russell v. Community Blood Bank, Inc.*, 185 So. 2d 749, 753-56 (1966), *modified*, 196 So. 2d 115 (Fla. 1967); *Jackson v. Muhlenberg Hospital*, 96 N.J. Super. 314, 232 A.2d 879 (1967), *rev'd*, 53 N.J. 138, 249 A.2d 65 (1969). In both cases the lower court adopted the reasoning of RESTATEMENT (SECOND) OF TORTS § 402A, Comment k. This comment exempts manufacturers of products which cannot be made perfectly safe from strict liability; if the product is in the field of medicine, the comment would allow greater risk so long as the risk is not *unreasonable* in relation to the potential benefits. *Accord Canavan v. City of Mechanicville*, 229 N.Y. 473, 128 N.E. 882 (1921) (municipality held not liable for typhoid transmitted through impure water which was sold to the plaintiff).

*Cf. Merck & Co. v. Kidd*, 242 F.2d 592 (6th Cir. 1957) (action was brought in connection with impure blood for violations of pure food and drug act, held not a filthy substance within act since undetectable with microscopic examination).

See generally Note, *Products Liability—Determination of Liability of Hospitals and Blood Banks for Hepatitis Transmitted Through Transfusion*, 18 KAN. L. REV. 119 (1969).