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A New Approach To Hospital Immunity

A NEW APPROACH TO HOSPITAL IMMUNITY

Since 1954 hospitals have been subjected to substantial litigation concerning the distribution and transfusion of blood that is infected with the hepatitis virus.[1] Legal actions are complicated by the fact that the presence of the virus in the blood cannot be prevented, nor can the virus be detected in the donor's whole blood by any known medical test;[2] thus any legal action in negligence is impractical and the injured party must resort to a claim of implied warranty or strict liability. Cases generally hold that this process is a service;[3] therefore an implied warranty would not attach because no sale exists. However, the New Jersey Superior Court has recently held in *Jackson v. Muhlenberg Hospital*[4] that the distribution and transfusion of blood is a sale.

In *Jackson* the plaintiff received five transfusions of whole blood during her hospitalization. Blood for four of the transfusions was purchased from Eastern Blood Bank for $18 per container. Blood for the fifth transfusion was obtained from Essex County Blood Bank, a nonprofit organization. Soon thereafter, the plaintiff contracted hepatitis attributable to these transfusions. She brought this action against the hospital and blood banks upon the claims of breach of implied warranty and strict liability.

Jackson held that the distribution and transfusion of blood was a sale.[5] The court apparently reasoned that since the serving of food in a restaurant is a sale with respect to the implied warranty provision of the New Jersey Code,[6] even though the service was predominate to the transfer of food, then the same rationale should be used for

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[1]*Perlmutter v. Beth David Hosp.*, 308 N.Y. 100, 123 N.E.2d 792 (1954) was the first case decided under the Uniform Sales Act to consider whether the transfusion of blood in a hospital was a sale. *See, e.g.*, 15 DE PAUL L. REV. 203, 205 n.8 (1965).

[2]*See*, Note, *Liability For Blood Transfusion Injuries*, 42 MINN. L. REV. 640, 654-5 (1958).

[3]*See*, Sloneker v. St. Joseph's Hosp., 233 F. Supp. 105 (D. Colo. 1946); Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc., 270 Minn. 151, 132 N.W.2d 805 (1965); Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792 (1954); Goelz v. J. K. & Suzie L. Wadley Research Institute & Blood Bank, 350 S.W.2d 573 (Tex. Civ. App. 1961); 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); Koenig v. Milwaukee Blood Center, Inc., 23 Wis. 2d 324, 127 N.W.2d 50 (1964). *But see* Russell v. Community Blood Bank, 185 So. 2d 749 (Fla. Dist. Ct. App. 1966), *rev'd*, 196 So. 2d 115 (1967).

[4]96 N.J. Super. 314, 232 A.2d 879 (Super. Ct. 1967). The court held that two sales were involved: first between the blood bank and the patient; second between the hospital and the patient.

[5]*Id.* at 883.

[6]N.J. REV. STAT. § 12A:2-314(1) (1962).

the transfusion of blood. However, the court did not imply a warranty based upon this sale, because labels on the blood containers disclaimed any warranty as to the presence of the hepatitus virus in the blood.[7] The disclaimer was held to be reasonable within § 2-316 of the Code,[8] thereby negating the application of the implied warranty sections.[9]

The court then considered the possibility of imposing strict liability upon the defendants. The requirement for the imposition of strict liability is that the product sold must be in a defective condition unreasonably dangerous to the user;[10] the court concluded that this product did not meet the requirement, since the virus cannot be detected by any known medical test.[11]

Jackson's holding that the transfusion of blood is a sale is based upon its rejection of the sales versus service test in the area of hospital liability.[12] The distinction between contracts for sales and contracts for services grew out of the Statute of Frauds requirement that contracts for the sale of goods be in writing.[13] In determining whether an act was a sale or a service, the courts developed several rules of

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[7]The labels on the blood containers carried disclaimers of liability, stating, "'[d]espite the utmost care in the selection of donors, human blood may contain the virus of Homologous Serum Hepatitis. Therefore Eastern Blood Bank does not warrant against its presence in this blood.'" 232 A.2d at 882.

[8]*See* N.J. REV. STAT. § 12A:2-316 (1962). The court stated that "[i]n view of the undisputed fact that the presence of the virus cannot be detected and prevented, the disclaimer is clearly reasonable." 232 A.2d at 888.

[9]N.J. REV. STAT. §§ 12A:2-314, 315 (1962) (implied warranty of merchantability and implied warranty of fitness).

[10]See, RESTATEMENT (SECOND) OF TORTS § 402A, comment k at 353 (1965).

[11]A further problem presented by *Jackson* is an express warranty. *Jackson* directed itself to the language of the disclaimer which stated that the "Blood Bank employed 'the utmost care in the selection of donors.'" 232 A.2d at 888. The court concluded that the disclaimer's language created an express warranty that the Blood Bank did use "utmost care." *Jackson* then remanded this express warranty action back to the trial court for jury determination on the factual issue whether the Blood Bank had used "utmost care." If it had not, then the Blood Bank would have breached this express warranty. *See,* N.J. REV. STAT. § 12A:2-313(1) (1962).

Jackson likewise remanded the action of negligence back to the trial court to determine whether the Blood Bank had made some negligent act or omission.

Summary judgments were entered in favor of the two defendants on the plaintiff's claim of implied warranty of merchantability and of strict liability.

[12]Cases cited note 3 *supra*. One case has discussed this issue in relation to the Uniform Commercial Code. Lovett v. Emory University, Inc., 116 Ga. App. 277, 156 S.E.2d 923 (1967). *Lovett* concluded that the tranfusion of blood is a service, stating that this is the majority view under the Uniform Commercial Code. *Lovett* is apparently incorrect because the majority view stated was decided under the Sales Act, not the Code.

[13]3 S. WILLISTON, CONTRACTS § 505 (Jaeger 3d ed. 1960).

construction to aid them.[14] Gradually these rules were adopted by courts to distinguish between a sale or a service in other areas of the law such as tax cases,[15] cases involving the proper measure of damages,[16] warranty cases involving the transfer of title to machinery,[17] and food warranty cases.[18]

The sales versus service test was adopted for the first time in the area of hospital liability in *Perlmutter v. Beth David Hospital,*[19] decided under the Uniform Sales Act. Subsequently, hospital liability cases have based their decisions upon *Perlmutter,* thus making it the landmark case for the proposition that the transfusion of blood is a service.[20] In *Perlmutter,* the material facts are identical to *Jackson* in that the plaintiff contracted hepatitis attributable to the transfusion of blood during hospitalization. *Perlmutter* adopted the "essence" test, one of the four rules of construction derived from the Statute of Frauds,[21] to determine whether the transfusion of blood was a sale of goods. Utilizing this rule, the court reasoned that the patient contracted for the hospital's services, not for the transfer of blood; therefore, the dominant nature of the contract was service, and no sale was involved. This result eliminates any claim of breach of implied warranty against the defendant hospital.[22]

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[14]Four distinct rules were formulated by courts to determine whether a sale of goods had taken place. They are the English rule, essence test, Massachusetts rule, and the New York rule. For a general discussion as to these rules of construction, see, Farnsworth, *Implied Warranties of Quality in Non-Sales Cases,* 57 COLUM. L. REV. 653, 663 (1957).

[15]*See* Ingersoll Milling Mach. Co. v. Department of Revenue, 405 Ill. 367, 90 N.E.2d 747 (1950); Samper v. Department of State Revenue, 231 Ind. 26, 106 N.E.2d 797 (1952); Singing River Tire Shop v. Stone, 21 So. 2d 580 (Miss. 1945); Booth v. City of New York, 268 App. Div. 502, 52 N.Y.S.2d 135 (1944); Voss v. Gray, 70 N.D. 727, 298 N.W. 1 (1941).

[16]*See, e.g.,* Rino v. Statewide Plumbing & Heating Co., 74 Idaho 374, 262 P.2d 1003 (1953).

[17]*See, e.g.,* United Iron Works v. Standard Brass Casting Co., 69 Cal. App. 384, 231 P. 567 (1924); Poole Eng'r & Mach. Co. v. Swindell, 161 Md. 571, 157 A. 763 (1932).

[18]*See, e.g.,* Nisky v. Childs Co., 103 N.J.L. 464, 135 A. 805 (Ct. Err. & App. 1927).

[19]308 N.Y. 100, 123 N.E.2d 792 (1954).

[20]Cases cited note 3 *supra.*

[21]*Perlmutter* adopted the "essence" test as formulated in *Clay v. Yates,* 156 Eng. Rep. 1123 (Ex. 1856). This test is based upon the distinction whether the essence of a contract is the work or the materials supplied. *See, e.g.,* Farnsworth, *Implied Warranties of Quality in Non-Sales Cases,* 57 COLUM. L. REV. 653 (1957).

[22]*Perlmutter's* adoption of the "essence" test is weakened by the fact that apparently the decision was based upon pure policy considerations. The general language of the decision indicates that the court was more concerned with protecting hospitals from liability for nonnegligent acts, than whether the sales-service test was applicable in this area. *See,* Russell v. Community Blood Bank, 185 So. 2d 749 (Fla. Dist. Ct. App. 1966), *rev'd,* 196 So. 2d 115 (Fla. 1967). *Russell* recognized

However, *Jackson* rejected the sales versus service test, in the area of hospital liability, relying on § 2-314 of the Code.[23] This section states that "the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale."[24] The court stated that it had been an apparent anachronism prior to this section, to attach an implied warranty to food sold in a store, while not to attach an implied warranty to food served in a restaurant. Because § 2-314 eliminates this anachronism by voiding the application of the sales-service distinction in the area of food warranty, the court concluded that it should also be eliminated in the area of hospital liability.[25]

It is apparent that the validity of *Jackson's* rejection of the sales versus service test is dependent upon the viability of the analogy between food sold in a restaurant and blood transfusions in a hospital. Assuming the analogy is permissible, the Code's rejection of the sales versus service test in the area of food warranties calls for the same result in the area of hospital liability.

In a similar situation, *Gottsdanker v. Cutter Laboratories*[26] lends support to *Jackson's* analogy between food sold in restaurants and the transfusion of blood in hospitals. In *Gottsdanker,* a child contracted polio attributable to an inoculation of Salk vaccine manufactured by the defendant laboratories. The court granted recovery to the plaintiff, reasoning that because courts allow a consumer of a food product to recover from a manufacturer upon an implied warranty, the recipient of an inoculation should likewise receive an implied warranty from the manufacturer of the vaccine. *Gottsdanker's* rationale appears to be equally applicable to the area of hospital liability. The transfusion of blood and the serving of food are both designed for introduction into the human body; thus there exists a strong rational cohesion between the two factual situations. This analogy is further supported by *Gottsdanker's* argument as to the relative dangers between ingestion and injection of impurities into the body.[27] Impurities introduced into the circulatory system have

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the legal disguises used to implement hospital immunity for nonnegligent acts in *Perlmutter* and the cases which followed it.

[23]N.J. REV. STAT. § 12A:2-314 (1962).

[24]*Id.*

[25]Jackson concluded "[I]t is unthinkable that such a legalism should be revived to avoid holding hospitals and blood banks liable. If these valuable organizations are to be exempted from liability, the immunity should be based upon the true policy consideration and not upon an irrelevant circumstance." 232 A.2d at 884.

[26]182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (Dist. Ct. App. 1960).

[27]*Id.* at 323.

To further support this analogy, the court turned to the relative dangers between ingestion and injection by reasoning: "The fact that the entry is made by injection

much less chance of being rejected than do those introduced into the digestive tract. Therefore, the policy for rejecting this sales-service test in the area of food warranty by § 2-314 would be even more applicable to the hepatitis cases where the chance of harm is much greater. Thus, it appears that *Jackson's* analogy between the serving of food and the transfusion of blood is permissible.[28]

If the sales versus service test is invalidated in the area of hospital liability, the transfusion of blood should be a sale within the provisions of the U.C.C. The Code defines 'goods' as "all things . . . which are moveable at the time of identification to the contract for sale . . . ."[29] The blood used for the transfusion in *Jackson* falls within this definition in that the specified blood was a moveable thing identifiable at the making of the contract for sale. The Code also defines a sale as "the passing of title from the seller to the buyer for a price."[30] As mentioned in *Jackson,* the term "title passing" is not restrictive in terminology, and the character of the sale is the transfer of property for value from one person to another without reference to the manner of payment.[31] In *Jackson* the hospital transferred four containers of blood to the patient for $25 apiece, which makes the transaction a sale within the provisions of the Code.

In light of *Jackson's* decision as to the existence of a sale in the transfusion of blood, it appears that the superior court was correct upon two significant points. First, it would seem that the sales-service

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rather than ingestion in no way alters the premise that each is for human consumption—each enters the human system. In fact, the digestive system has means of rejecting or minimizing the effects of many toxic compounds taken orally. Such defenses are much less available as against harmul elements introduced into the system by hypodermic injection." 6 Cal. Rptr. at 323.

[28]This same analogy could have been used to reject *Perlmutter's* adoption of the sales-service test in this area, even though § 2-314 had not been enacted at that time. Prior to *Perlmutter, Temple v. Keeler,* 238 N.Y. 344, 144 N.E. 635 (1924) had held that the serving of food in a restaurant was a sale, carrying with it an implied warranty of wholesomeness. *Perlmutter* rejected any analogy to *Temple,* rationalizing that one enters a restaurant solely for the purpose of purchasing food, while in entering a hospital, the dominant purpose is to obtain a curative course of treatment. *Perlmutter's* reasoning is questionable upon two grounds. First, the sole purpose for entering a restaurant is not to purchase food, as in a grocery store, but also for the preparation and serving of the food. Second, a basic analogy does seem to exist between food sold in restaurants and the transfusion of blood in a hospital. See text accompanying note 27 *supra* for *Gottsdanker's* support of this analogy. Apparently, *Perlmutter* could have substantiated this analogy; however, it appears that this would have been detrimental to the court's immunization policy, and for this reason it was rejected. See note 22 *supra.*

[29]UNIFORM COMMERCIAL CODE § 2-105(1).

[30]UNIFORM COMMERCIAL CODE § 2-106(1).

[31]96 N.J. Super. 314, 232 A.2d 879, 883 (Super. Ct. 1967).

distinction should not be extended to the area of hospital liability. *Jackson's* analogy to § 2-314, combined with *Gottsdanker's* comparison of the likeness between ingestion and injection of impurities, appear adequately to support the rejection of this distinction. Moreover, it appears *Perlmutter* could have reached the same conclusion if the New York court's purpose had not been to immunize hospitals from nonnegligent acts. Second, in absence of this sales-service test, the transfusion of blood is a sale within the provisions of both the Sales Act[32] and the U.C.C.

Once a sale is formulated, § 2-314 of the U.C.C.,[33] in the absence of a disclaimer, appears to make the hospital and blood bank liable for the patient's contraction of hepatitis. This implied warranty section states:

> (1) Unless excluded ... a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect of goods of that kind.... (2) Goods to be merchantable must be at least such as ... (c) are fit for the ordinary purpose for which such goods are used ....[34]

As determined by *Jackson,* a contract of sale was present between the hospital and patient; therefore the warranty provisions of this section would be applicable to this transaction. *Jackson* also indicates that the determination of the blood bank's liability is governed by this section,[35] even though no privity of contract was present between the blood bank and patient. This proposition is validated by reference to the U.C.C. provisions. Section 2-318 of the Code[36] states that Article II makes no decision as to whether an ultimate consumer may hold a manufacturer liable under this article, despite the lack of privity. Instead, this important question as to whether privity was a necessary element in the warranty sections, would be left to the "developing case law" in the different states.[37] Few states have abolish-

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[32]It also appears that the transfusion of blood should be a sale within the Uniform Sales Act. *Perlmutter* falls within the Sales Act's definition of a 'sale' because the patient paid a specific price, $60, for the blood, and there was an agreement between the parties for the transfer of blood. See, UNIFORM SALES ACT § 1(2).

[33]UNIFORM COMMERCIAL CODE § 2-314.

[34]*Id.*

[35]232 A.2d at 890.

[36]UNIFORM COMMERCIAL CODE § 2-318, Comment 3. Also in some instances this section limits the necessity of privity in the third party beneficiary of warranty area. Thus, a member of the family or household or guest of the purchaser who bought the goods may sue the retailer from whom the purchaser had contracted a sale.

[37]The requirement of privity in warranties was originated at the time when producers and purchasers dealt with one another at "arms length." Therefore,

ed this privity requirement.[38] However, prior to *Jackson,* the New Jersey Supreme Court held in *Henningsen v. Bloomfield Motors, Incorporated,*[39] that the ultimate consumer could sue the manufacturer despite the lack of privity.[40] Since New Jersey had held that privity was not an absolute requirement, *Jackson* was then permitted, according to § 2-318, to hold that the Blood Bank was governed by the warranty sections of the Code.[41]

However, *Jackson* held that a warranty was not applicable in this instance, because a written disclaimer was on the face of the blood container.[42] This disclaimer stated that the blood might be contaminated with the hepatitis virus even though "utmost care" had been used in its prevention. Therefore, the blood bank declined to warrant "against its presence in this blood." Jackson held that this

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the privity doctrine was not harsh because this element was present between the two parties. However, with the advent of industrialization, the manufacturers became once or twice removed from the purchaser, and at this point, the privity doctrine became harsh. It is for this reason, plus other social aspects, that the liberalizing trend has moved away from privity. This trend is necessary to form a détente between the present mode of industry and the law of warranties. *See,* Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.D.2d 828 (1942). *See, e.g.,* Jaeger, *Products Liability: The Constructive Warranty,* 39 NOTRE DAME LAWYER 501 (1964).

[38]*See, e.g.,* 23 WASH. & LEE L. REV. 101 (1966).

[39]32 N.J. 358, 161 A.2d 69 (1960). The court held that "under modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade... an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser." 161 A.2d at 84.

[40]*Id.* According to *Henningsen,* once the manufacturer enters into a sale with the retailer, the warranty that arises from this sale will accompany the goods once resold to the ultimate consumer. This situation is analogous to *Jackson.* The Superior Court stated that a sale was present between the blood bank and hospital therefore, the warranty in § 2-314, absent the disclaimer, attaches to this sale, even though the hospital resold the blood to the patient.

[41]Two additional qualifications must be met by the blood bank and hospital in order to support a claim of breach of implied warranty. First, it appears that both defendants are merchants within § 2-314. This section requires that to be a merchant a party must be a professional in the particular kind of goods sold, to be a merchant. See, UNIFORM COMMERCIAL CODE § 2-104, Comment 2. Obviously, both are merchants in that both parties "have specialized knowledge" in the preparation and transfusion of blood. Both parties usually have the laboratory facilities and testing equipment necessary to qualify them as experts and professionals in this field. Second, the blood should not be merchantable under § 2-314(2)(c) because the blood was contaminated with the hepatitis virus, and therefore unfiit for the ordinary purpose of replenishing the patient's blood.

The implied warranty of fitness section, § 2-315, is also applicable to *Jackson* in that the blood was being used for a particular purpose known by the hospital and patient, that of transfusion into the human body.

[42]232 A.2d at 882.

disclaimer would be valid if reasonable;[43] concluding that "[i]n view of the undisputed fact that the presence of the virus cannot be detected and prevented, the disclaimer is clearly reasonable."[44]

It is apparent that the validity of this disclaimer is subject to a value judgment by the court, based upon public policy (*i.e.* what is reasonable). It should be recognized, therefore, that through social evolution, this policy as to immunizing hospitals for nonnegligent acts might well change in the future.[45] If it is decided that the hospitals and blood banks that are insured with liability insurance are the better parties to bear the cost of injury, then this disclaimer might well become invalid.

At present, this disclaimer is valid, preventing the application of the Code warranties; therefore strict liability is the only alternative basis for defendants' liability.[46] As mentioned in *Jackson,* if a product is placed upon the open market in an unreasonably dangerous condition,[47] then the defendants should be held strictly liable. *Jackson* held that the defective condition of the contaminated blood was not unreasonably dangerous because the virus cannot be detected by any known medical test. Therefore, the fact that the contamination was not the result of a negligent act, combined with the public utility of blood transfusions, makes the defective condition reasonable. Thus, strict liability does not apply.[48]

In conclusion, *Jackson* has correctly held that the transfusion of blood is a sale by rejecting the application of the sales-service test.

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[43]*Jackson* cited N.J. REV. STAT. § 12A:2-316 (1962) which states that a disclaimer is valid if reasonable. This section encompasses the modification of warranties also.

[44]232 A.2d at 888.

[45]In *Henningsen,* the New Jersey Supreme Court held that the manufacturer's attempt to disclaim an implied warranty was unreasonable, and thus was void. Therefore, in the future, the policy in the hepatitis cases might move closer to that of *Henningsen.* This would result in the invalidation of disclaimers as in *Jackson.* For a general discussion as to disclaimers, *see, e.g.,* Note, 77 HARV. L. REV. 318 (1963).

[46]*Jackson* attempted to consolidate nonsale warranties into strict liability. The sole justification of this consolidation would be that both are based upon the same cause of action. Since strict liability is based upon the law of torts, this nonsale warranty must also be based upon tort law to constitute the same cause of action. *See, e.g.,* RESTATEMENT (SECOND) OF TORTS, § 402A, comment m at 355 (1965). In those jurisdictions that have not negated privity in the Code warranties, the nonsale warranty arises when a manufacturer is held to have impliedly guaranteed the quality of his product to the ultimate consumer. No sale or privity of contract exists between the two parties, therefore this implied warranty would be based upon tort law and constitute the same cause of action as strict liability. Therefore, *Jackson's* consolidation theory would be valid.

[47]RESTATEMENT (SECOND) OF TORTS, § 402A, comment m at 355 (1965).

[48]*See,* RESTATEMENT (SECOND) OF TORTS § 402A, comment k at 353 (1965).