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Sales And Service Warranties In Blood Transfusions

Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc.1

Plaintiff, while a patient at a hospital, received transfusions of whole blood supplied by the defendant blood bank, to whom payment was directly made. The blood was contaminated and caused plaintiff to contract serum hepatitis.2 The plaintiff and her husband sued for her injuries, claiming that the defendant "sold" the blood to her, thereby impliedly warranting its fitness and merchantability.3 The trial court granted summary judgment for the defendant.

The Supreme Court of Minnesota affirmed, holding that there could be no recovery on an implied warranty theory. This conclusion was based on a multiplicity of factors and, from the opinion, it would seem that the absence of any one of these factors might have produced a different result. The injury here was unpreventable: medical science has not yet developed a method for determining whether the serum hepatitis virus is in fact present in the whole blood, nor can the virus be killed without also destroying the blood's effectiveness. The defendant was a charitable, non-profit institution rendering a necessary service to the community. The plaintiff's physician was as well informed of the inherent dangers of a blood transfusion as the defendant, and this knowledge may be chargeable to plaintiff to create an assumption of risk. Also, the blood transfusion transaction falls within the sale-service distinction which precludes warranties from attaching in a service contract. The court characterized a blood transfusion as a sui generis activity in which legal concepts of both sale and service are involved, but agreed with decisions from other jurisdictions that the transaction is more in the nature of a service.

In denominating a blood transfusion a service rather than a sale, the Minnesota court has continued the problematical sale-service distinction4 as a basis for finding no implied warranties in blood transfusions. In effect, the court has said that because of the various factors, no matter what a sales statute says about implied warranties, such a defendant should not be held liable. Calling the transaction a service effectuates this result. The courts have generally held that implied warranties can arise only in sales contracts, and not under a contract for service.5 No court which has thus far faced the problem of implied warranties in blood transfusion cases has found that there was a sale of the blood.6

1. 132 N.W.2d 805 (Minn. 1965).
2. Although it may in fact be impossible to prove that a particular blood transfusion, rather than some other factor such as a contaminated instrument which punctures the patient's skin, caused the hepatitis virus to be transmitted, the blood bank did not dispute the causal issue. 132 N.W.2d at 807-08.
3. MINN. STAT. ANN. § 512.15 (1947); UNIFORM SALES ACT § 15.
4. "There are few legal topics perplexed by a greater number of irreconcilable opinions..." Finney v. Apgar, 31 N.J.L. 266, 268 (Sup. Ct. 1865).
5. See PROSSER, TORTS § 95 (3d ed. 1964); Farnsworth, Implied Warranties of Quality in Non-Sales Cases, 57 COLUM. L. REV. 653 (1957).
Various tests for distinguishing between a sale and service have been formulated for purposes of the Statute of Frauds. The English Statute of Frauds, the English Sale of Goods Act, and the Uniform Commercial Code require a writing to enforce a contract for the sale of goods but not for services. One of the first tests for distinguishing between sale and service was the so-called "English rule," developed in Lee v. Griffin. A contract to make a set of false teeth was held to be a contract to sell. The test, as enunciated by Lord Blackburn, was:

[If] the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labour; but, if the result of the contract is that the party has done work and labour which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered.

This test still has some vitality today.

What is known as the "essence test" was articulated by Chief Baron Pollock in Clay v. Yates, where a contract by a printer to publish a treatise was held to be a contract for services. The test was "whether work is the essence of the contract, or whether it is the materials supplied." The later English cases came to prefer this test over the "English rule." Probably indistinguishable from this "essence" test is the "main object" test of Grafton v. Armitage, where a contract to devise a method to curve metal tubing was held to be a contract for services. Chief Justice Tindal said that one must look at the "substance" or "main object" of the contract in order to determine the class to which it belongs.

The American courts have also devised sale-service tests. The "New York rule" of Crookshank v. Burrell is that if the contract is


The American courts have also devised sale-service tests. The "New York rule" of Crookshank v. Burrell is that if the contract is
for manufacturing of goods in the future, it is a contract for services
and not a sale.22 The "Massachusetts rule" of Mixer v. Howarth23
and Goddard v. Binney\(^ {24} \) is that all contracts for constructing custom-
made goods are for services if the product is not part of the supplier's
stock in trade for the general market. Most jurisdictions, including
Maryland, have read the "Massachusetts rule" into the Uniform Sales
Act.25 The Sales Act does not say that custom sales are not sales, but
merely that the Statute of Frauds, section 4 of the act, does not apply
to them. Thus, the "Massachusetts rule" is not the exclusive statement
of the service-sale distinction for purposes of the Uniform Sales Act.

The first court to decide a blood transfusion warranty case was the
New York Court of Appeals in Perlmutter v. Beth David Hospital.26
Plaintiff had contracted serum hepatitis from a blood transfusion and
sued the defendant hospital for breach of a Sales Act implied warranty.27
In holding that there was no warranty because there was no sale, the
court combined the "essence" and "main object" tests: "While deter-
mination, as to whether the essence of a particular contract is for the
rendition of services or for the sale of property, may at times be trouble-
some and vexatious, there is no doubt that the main object sought
to be accomplished in this case was the care and treatment of the
patient."28 In formulating its sale-service test for warranty, the court
relied on cases which used the distinction for purposes of the Statute
of Frauds,29 a zoning ordinance,30 and a sales tax statute.31 This
"essence-main object" test has since been the one primarily used by the
courts in dealing with warranties in blood transfusions.32

There is much reason to doubt the validity of any of these Statute
of Frauds tests for purposes of implied warranty. Determinations of

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22. This test is actually based on the conclusion of Lord Loughborough in
Rondeau v. Wyatt, 2 H.B. 63, 126 Eng. Rep. 430, 432 (1792), that the provision of
the Statute of Frauds which applied to contracts for the sale of goods extended to
executory contracts but not to cases involving "work and labour to be done" and
"materials to be found." See also Lord Tenterden's Act, 9 Geo. 14, ch. 14, \( \text{§} 7 \) (1828),
which eliminated this distinction while codifying the application of the Statute of
Frauds to executory contracts.
24. 115 Mass. 450 (1874).
25. See, e.g., Stem v. Crawford, 133 Md. 579, 105 Atl. 780 (1919); Willard v.
Higdon, 123 Md. 447, 91 Atl. 577 (1914); Berman Stores Co. v. Hirsh, 240 N.Y. 209,
Corp., 15 Misc. 2d 985, 179 N.Y.S.2d 45 (1958), which held \text{contra} to the "Massa-
chusetts rule." See 1 WILLISTON, SALES \( \text{§} \ 55a \) (rev. ed. 1948); Note, 40 CORNELL
L.Q. 803, 805 (1955); Note, 43 IOWA L. REV. 95, 103 (1957).
26. 308 N.Y. 100, 123 N.E.2d 792 (1954) (a 4-3 decision).
27. UNIFORM SALES ACT \( \text{§} \ 15 \).
28. 123 N.E.2d at 795.
29. Racklin-Fagin Constr. Corp. v. Villar, 156 Misc. 220, 281 N.Y.S. 426 (1935);
31. Babcock v. Nudelman, 367 Ill. 626, 12 N.E.2d 635 (1937). Note also that the
Perlmutter court, 123 N.E.2d at 794, cited Stevens Implement Co. v. Hintze, 92 Utah
264, 67 P.2d 632, 11 A.L.R. 331 (1937), in support of the "essence-main object" test,
but the Hintze court not only did not use the "essence-main object" test, but very
questionably ignored the express language of the Sales Act limiting the "Massachu-
setts rule" to the Statute of Frauds, section 4, and held that the policy of section 4
extended to the entire act. The court then found that a custom job was not a sale
for purposes of determining whether the seller could assert a lien.
32. See cases cited note 6 supra.
whether a transaction is a sale or service for purposes of the Statute of Frauds are made by courts as a basis for deciding whether someone can avoid a contract because it was not in writing. But when the Statute of Frauds itself is not an issue, the tests used for determining whether someone has complied with its provisions should be irrelevant, the policy questions being different. The Minnesota court seems to have sensed this, and, while not disavowing the Perlmutter rule, was careful to utilize additional considerations for its holding.

Once the sterile sale-service distinction based on irrelevant cases is abandoned, which the Balkowitsch court could not bring itself to do entirely, there are several means which can be used to hold a supplier of defective blood liable on a warranty theory. The dissent in Perlmutter suggested a severability technique, whereby the contract is divided into one for sale and one for service. This method would find a supplier of blood liable even with the "essence-main object test." In determining what the essence of the contract is, only those services specifically related to the transfusion are considered. The general services provided by the hospital are part of a separate contract not dealing with the blood transfusion. The result is a finding that the essence or main object of the blood transfusion contract is the transfused blood.

The most satisfactory technique is that employed by the British courts in similar situations. When a transaction involves legal concepts of both sale and service, those courts, instead of carrying over the tests used in the Statute of Frauds area, imply a warranty that the materials used are fit for the purpose. Although the Sales Act does not expressly limit warranties to sales transactions, American courts have not considered whether a warranty might be implied without a sale in the blood transfusion situation. The British method would allow such a result, and it is surely a more logical system. If A supplies B with a chattel for a price, the law calls the transaction a sale and implies a warranty of fitness. But if A administers as well as supplies, the warranties do not attach according to the Perlmutter rule. What was at first a sale becomes no longer a sale when service accompanies the transaction; the greater the extent to which a receiver of goods is

33. See the comment of Professor Williston, one of the drafters of the Uniform Sales Act: "It would be indeed unfortunate if the strained construction which has been adopted in order to evade the Statute of Frauds should be applied in other classes of cases." 3 WILLISTON, op. cit. supra note 25, § 563. See also Note, 43 IOWA L. REV. 95, 105-07 (1957).


35. See Note, 1965 Wis. L. REV. 374, 383, for a favorable comment on this method.

at the mercy of the supplier's skill and judgment, the less the supplier's liability. The British courts, by declining to call the transaction a service, have refused to so diminish the supplier's responsibility as reliance increases.

In certain areas such as leases of chattels, American courts have extended implied warranty liability to non-sale situations. The Uniform Sales Act could have aided the growth of warranty in the non-sale area by offering a basis for analogy; however, the act has evidently hindered this growth, since the courts have generally assumed that the specific Sales Act warranties were the only ones applicable. The fallacy of this reasoning is most apparent in the area of blood transfusions. The courts have been forced to say that there is no sale in blood transfusions because they feel that such a holding is necessary to preclude implied warranties. On the other hand, when someone eats a meal in a restaurant, many courts agree there is a sale, although the elements of service involved are certainly substantial. The result is a confusing and inconsistent state of the law; for instance, what is the result when a hospital supplies bad food to a patient?

At any rate, the methods for holding a supplier of bad blood liable are available: apply the "Massachusetts rule" (the test generally applied under the Sales Act); sever the contract into contracts for sale and service; or, without finding a sale, imply a warranty of materials. What accounts for the reluctance of the courts to employ one of these methods?

37. In the instant Balkowitsch case, the service argument is particularly weak, since we are dealing not with a hospital but with a blood bank. In Perlmutter the court rationalized its decision on the ground that "the supplying of blood by the hospital was entirely subordinate to its paramount function of furnishing trained personnel and specialized facilities in an endeavor to restore plaintiff's health." 123 N.E.2d at 795. But the service argument in the case of a blood bank is less significant, because it is not the blood bank but the hospital which furnishes the services to the patient; the blood bank merely supplies the blood. The Minnesota court in Balkowitsch refused to make this distinction, saying that a blood bank should not "be characterized as a commercial business which offers its products for sale in the market place in competition with others for the sole motive of making a profit." 132 N.W.2d at 810. See also Whitehurst v. American National Red Cross, 402 P.2d 584 (Ariz. 1965), where the court in the case of a hospital refused to make this distinction, saying that a blood bank should not "be characterized as a commercial business which offers its products for sale in the market place in competition with others for the sole motive of making a profit." 132 N.W.2d at 810.


39. See Farnsworth, supra note 5, at 653-54.

40. Prosser, supra note 5, § 95. See Uniform Commercial Code, § 2-314(1): "Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale." For an argument that an analogy to the sale of food can be applied to Balkowitsch under the U.C.C., see Note, 15 De Paul L. Rev. 203, 207-10 (1965).

41. The Perlmutter court rejected any analogy between a customer in a restaurant and a patient in a hospital, 123 N.E.2d at 796:

[When one goes into a restaurant, he does so in order to buy what the restaurant in truth has to sell, namely, food. That is not so, though, when one enters a hospital as a patient; he goes there, not to buy medicines or pills, not to purchase bandages or iodine or serum or blood, but to obtain a course of treatment in the hope of being cured of what ails him.]

42. See Farnsworth, supra note 5, at 662.
The principal reason is probably that there is no way of preventing some of the injuries caused by bad blood.

The bad blood cases can be roughly divided into two categories: those where incompatible blood types are transfused, and those where the blood itself is diseased or contaminated prior to transfusion. For purposes of implied warranty, both kinds of cases have been treated similarly in that the courts have said there is no sale. In the "incompatible" blood cases, the negligence theory of recovery is often utilized. But negligence is not an especially useful theory in the "diseased" blood area, unless the disease transmitted is syphilis. The syphilis agent can be destroyed by chilling the whole blood; consequently, failure to chill should be grounds for negligence. The other two most frequently transmitted diseases are malaria and serum hepatitis. Malaria can be detected in the whole blood only by means of an extensive, detailed microscopic examination. Serum hepatitis cannot be detected in the donors or in the whole blood at all. The result is that in these two diseases the possibility of proving negligence for failure to detect the disease is virtually nil, and it is unlikely that any other form of a negligence argument will be successful. Thus, the only way a plaintiff is...
likely to recover in such an instance is by holding the hospital or blood bank strictly liable in either tort or warranty.

Hence, the real issue in all of the bad blood cases is not whether there was a technical sale, but whether as a matter of policy suppliers of blood should be held strictly liable for a foreseeable but unpreventable injury. In this respect, it is time that the courts began looking at the reasons for implying a warranty, rather than the fatuous sale-service distinctions. There are two basic reasons for imposing on a manufacturer or supplier a warranty type of strict product liability: the deterrent effect — insurance that the manufacturer or supplier is especially diligent in inspecting for and preventing defects — and the distribution of loss and risk. In the case of blood transfusions, any deterrent effect of strict liability would be negligible. Both hospitals and blood banks are organizations devoted to saving human life, and to hold them strictly liable would not be likely to exact more diligence than to hold them liable merely for their negligence. In the “diseased” blood cases in particular, the deterrent effect is unimportant, since the diseases are mostly undetectable.

If, then, we are to hold a supplier of bad blood strictly liable, it is for the second effect of strict product liability — distribution of loss and risk. It is generally conceded that this reason is in fact the most significant justification for strict product liability today, and the impact of liability insurance on modern transactions is especially relevant. When the supplier can foresee the risk, he can insure against it and meet the cost of the insurance by raising the price of the product or enterprise. In this way, the loss is distributed to those who use the product or engage in the enterprise. Such a solution seems eminently more fair than to allow the full loss to fall upon the particular in-

50. Serum hepatitis will be transmitted to one out of every two hundred people receiving a whole blood transfusion, and may cause death in one out of every six thousand transfusions. See Weiner, Grant, Unger, and Workman, supra note 48, at 1437. Serum hepatitis, being foreseeable although unpreventable, is distinguishable from lung cancer from cigarettes as presented in cases such as Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964), discussed in 24 Md. L. Rev. 462 (1964).

51. See Farnsworth, supra note 5, at 670; Comment, 63 Colum. L. Rev. 515, 530 (1963).

52. The charitable nature of such institutions obviously has had an impact on the courts. For an extreme example, see Dibblee v. Dr. W. H. Groves Latter-Day Saints Hosp., 12 Utah 2d 241, 364 P.2d 1085, 1087 (1961): “We think that practically all hospitals are born of mercy and most physicians are unselfish disciples of relief and the cure of human ills. . . . No hospital gives green trading stamps on the occasion of a blood transfusion as some commodity vendors do, or a car for one having the lucky blood purchase order number.” Such thinking seems blatantly anachronistic in an age which is abrogating the doctrine of charitable immunity. See generally Prosser, op. cit. supra note 5, § 127; 19 Md. L. Rev. 87 (1959).

53. See 103 U. Pa. L. Rev. 833, 835 (1955). But see Farnsworth, supra note 5, at 672, for an argument that strict liability would induce hospitals to intensify their research for methods of detecting blood defects.


55. Legal scholars have differed as to whether it is desirable for society to spread the risk of loss in such a manner. Compare Holmes, The Common Law 50 (1881): “Sound policy lets losses lie where they fall, except where a special reason can be shown for interference;” with Pound, The Spirit of the Common Law 189 (1921): “There is a strong and growing tendency, where there is no blame on either side, to ask in view of the exigencies of social justice, who can best bear the loss.”
individual who is the unfortunate victim of the product’s deficiency.\textsuperscript{56} Some feel that while it is usually better to shift the risk of loss to the manufacturer or supplier, this should not be done when no amount of care can prevent the product from being unsafe.\textsuperscript{57} However, as long as the risk is foreseeable, there does not seem to be an adequate justification for this distinction, since the supplier’s ability to insure and distribute the loss is not affected by his inability to prevent the harm.\textsuperscript{58}

Unquestionably, the Balkowitsch court has moved beyond Perlmutter in articulating a rationale for not holding suppliers of defective blood liable. But the Balkowitsch court has likewise failed to ask the right questions. The issue is: do the reasons for implying a warranty apply? The charitable nature of the defendant and the unpreventability of the injury are no more relevant than whether we call the transaction a sale or service. It is just as easy for a non-profit blood bank to insure against the risk as it is for a profit-making organization, and the fact that the injury is unpreventable but foreseeable by the blood bank should be all the more reason to require it to insure.

The assumption of risk argument is somewhat more troublesome. It is generally recognized that assumption of risk is a defense to a warranty action, but the plaintiff must be fully aware of the particular risk and voluntarily expose himself to it.\textsuperscript{60} The Minnesota court suggested that there was an assumption of risk in the blood transfusion situation, since plaintiff’s physician knew of the danger.\textsuperscript{60} This is
hardly an acceptable analysis. Whatever agency arguments may be made, the fact remains that since the courts have held there is no duty to warn, as a practical matter the plaintiff will never know of the danger and will not have voluntarily exposed himself to it. Although the plaintiff may well go through with the blood transfusion even if he knows of the risk, it is grossly inequitable to use legal reasoning to impute knowledge to him which in fact he will never have.61 Like the service-sale distinction, imputation of the physician’s knowledge to the plaintiff for an assumption of risk defense is merely a pigeonhole into which a holding can fall, rather than a rational analysis of policy. Even though both defendant and plaintiff may be innocent parties in the blood transfusion situation, only one knows of the risk and can distribute it.

Perhaps a policy which requires a supplier of chattels to be held strictly liable primarily because he is in the best position to spread the loss is, at present, too revolutionary a concept to become law by judicial extension. Legislative action may ultimately be necessary. However, those legislatures which have acted have taken the opposite approach and made transactions in blood “services” as a matter of law, thereby employing the same fiction as the courts.62

The Uniform Commercial Code presents a new legislative expression of the law governing the sale of goods. For purposes of the blood-transfusion warranty problem, the Code is different from the Uniform Sales Act. The Sales Act defined a sale as “an agreement whereby the seller transfers the property in the goods to the buyer for a consideration called the price.”63 The Code says, “A ‘sale’ consists in the passing of title from the seller to the buyer for a price.”64 The Code section dealing with the scope of article 265 provides that “unless the

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61. Even if a court should decide that there is a technical assumption of risk, which the Minnesota court merely suggests, it could well be argued that as a matter of public policy defendant should still be liable. Cf. Tunkl v. Regents of University of California, 32 Cal. Rep. 33, 383 P.2d 441 (1963).

62. See CAL. HEALTH AND SAFETY CODE § 1606:
The procurement, processing, distribution, or use of whole blood, plasma, blood products, and blood derivatives for the purpose of injecting or transfusing the same, or any of them, into the human body shall be construed to be, and is declared to be, for all purposes whatsoever, the rendition of a service by each and every person, firm, or corporation participating therein, and shall not be construed to be, and is declared not to be, a sale of such whole blood, plasma, blood products, or blood derivatives, for any purpose or purposes whatsoever.

In Gottsdanker v. Cutter Laboratories, 182 Cal. App. 2d 602, 6 Cal. Rep. 320, 79 A.L.R.2d 290 (1960), the court held that this statute did not apply to Salk polio vaccine even though a horse blood component was used as part of a culture medium. The court found the vaccine manufacturer liable despite the absence of a technical sale from defendant to plaintiff. For a dubious argument that a blood transfusion is a service, but a polio inoculation is a sale, see Note, 65 YALE L.J. 262, 269 n.36 (1955).

The legislative intent manifested by the California statute would probably preclude recovery for a serum hepatitis injury even on a non-sales implied warranty theory. The intent in the Arizona statute is even clearer; there, transfusions of blood “shall be construed as to the transmission of serum hepatitis to be the rendition of a service. . . .” ARIZ. REV. STAT. art. 5, § 36-1151 (Supp. 1964). A pending Wisconsin statute, Wis. Bill 218S (1965), would make transactions in blood products “and other human tissues such as corneas, bones or organs” services as a matter of law.

63. UNIFORM SALES ACT § 1(2).
64. UNIFORM COMMERCIAL CODE § 2-106(1).
65. Id. at § 2-102.
context otherwise requires, this Article applies to transactions in goods;" and reference is made throughout the warranty sections to the "seller" of goods. Consequently, the old distinction between what is and what is not a sale of goods could crop up under the Code as easily as it did under the Sales Act.

But official comment 2 to section 2-313 casts a new light on the problem:

Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, 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. They may arise in other appropriate circumstances such as in the case of bailments for hire, whether such bailment is itself the main contract or is merely a supplying of containers under a contract for the sale of their contents. The provisions of Section 2-318 on third party beneficiaries expressly recognize this case law development within one particular area. Beyond that, the matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.

Thus, even though the Code does not expressly extend warranty protection to non-sales areas, it is not intended to disturb the case law growth in these areas and offers itself as a basis for analogy. The fiction of denomining a transaction a service in order to enable the supplier to escape liability, as employed in the Sales Act blood transfusion cases, has stunted the growth of warranty in non-sales areas. Nevertheless, it should be obvious that implied warranty is a rapidly expanding field whose limits have not yet been fully determined. The gradual demise of the privity requirement manifests the modern policy of affording warranty protection despite lack of a technical sale between plaintiff and defendant. It is hoped that in future cases involving the issue of warranties in blood transfusions, this policy will induce the courts to look to the reasons for imposing a warranty, rather than the form of the transaction.

66. Id. at §§ 2-312-15.
67. See Note, 18 Okla. L. Rev. 104, 106 (1965), which argues that the Code would impose a warranty for blood transfusions because a hospital could be a "merchant" for purposes of section 2-314. This note, however, employs the severability technique, which the courts have been unwilling to do. See note 34 supra and accompanying text.
69. The immediate prospects do not look promising. In Whitehurst v. American National Red Cross, 402 P.2d 584 (Ariz. 1965), decided shortly after Balkowitsch, the court said, at 586: "Concluding as we do, that the furnishing of the blood by the defendant, the American National Red Cross, to the plaintiff is a service and not a sale, it is unnecessary to consider or discuss the policy aspects. . . ."