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## Products Liability - The Blood Transfusion as a Sale. *Cunningham v. MacNeal Memorial Hospital*, \_\_Ill. App. 2d \_\_, 251 N.E.2d 733 (1969)

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## CURRENT DECISIONS

**Products Liability**—THE BLOOD TRANSFUSION AS A SALE. *Cunningham v. MacNeal Memorial Hospital*, — Ill. App. 2d —, 251 N.E.2d 733 (1969).

Plaintiff, a paying patient, contracted hepatitis while undergoing treatment at the defendant hospital. This disease allegedly was caused by the presence of viral serum hepatitis in whole blood transfusions supplied by the hospital. Plaintiff's recovery was sought on the theory of strict liability in tort.<sup>1</sup>

The trial court dismissed the complaint.<sup>2</sup> However, the Appellate Court of Illinois, an intermediate appellate court, reversed, holding that human blood may properly be the subject of a sale.<sup>3</sup>

When a hospital makes a separate charge for the blood supplied for a transfusion, the transaction would seem to constitute a sale.<sup>4</sup> However, courts considering the question have generally preferred to follow the reasoning of the New York Court of Appeals in *Perlmutter v. Beth David Hospital*.<sup>5</sup> In this decision, the court characterized the contract between the patient and the hospital as a contract for services, and therefore, concepts of purchase and sale could not be attached separately

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1. *Cunningham v. MacNeal Memorial Hosp.*, — Ill. App. 2d —, 251 N.E.2d 733 (1969).

2. *Id.*

3. *Id.*

In this situation the plaintiff might have sought recovery under the doctrine of strict liability in tort or under the contract remedy afforded by implied warranties of merchantability. However, under either alternative it is necessary to establish a sale. See *Suvada v. White Motor Company*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965); UNIFORM COMMERCIAL CODE §§ 2-102, 2-314, 2-315.

4. *Jackson v. Muhlenberg Hosp.*, 96 N.J. Super. 314, 232 A.2d 879 (1967), *rev'd on other grounds*, 53 N.J. 137, 249 A.2d 65 (1969); *cf.* *Russell v. Community Blood Bank, Inc.*, 185 So. 2d 749 (Fla. App. 1966); R. DUSENBERG & L. KING, SALES AND BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE § 7.01[2]i (1966).

5. 308 N.Y. 100, 123 N.E.2d 792 (1954). See, e.g., *Sloneker v. St. Joseph's Hosp.*, 233 F. Supp. 105 (D. Colo. 1964); *White v. Sarasota County Pub. Hosp. Bd.*, 206 So. 2d 19 (Fla. App. 1968), *cert. denied*, 211 So. 2d 215 (Fla. 1968); *Whitehurst v. American Nat'l Red Cross*, 1 Ariz. App. 326, 402 P.2d 584 (1965); *Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc.*, 270 Minn. 151, 132 N.W.2d 805 (1965); *Koenig v. Milwaukee Blood Center, Inc.*, 23 Wis. 2d 324, 127 N.W.2d 50 (1964); *Dibblee v. Dr. W. H. Groves Latter-Day Saints Hosp.*, 12 Utah 2d 241, 364 P.2d 1085 (1961); *Goelz v. J.K. & Susie L. Wadley Research Int. & Blood Bank*, 350 S.W.2d 573 (Tex. Civ. App. 1961); *Gile v. Kennewick Pub. Hosp. Dist.*, 48 Wash. 2d 774, 296 P.2d 662 (1956).

to the materials supplied by the hospital incident to the rendering of the medical service.<sup>6</sup> Support for this view<sup>7</sup> has stemmed from the recognition that it conveniently implements the public policy of relieving deserving institutions from liability.<sup>8</sup> In *Dibblee v. Dr. W. H. Groves Latter-Day Saints Hospital*<sup>9</sup> the Utah court followed *Perlmutter*, but placed the decision more squarely upon this policy consideration.<sup>10</sup> More recently the Supreme Court has suggested that the supplier of the blood might not be held strictly liable in tort even if the transaction were denominated as a sale.<sup>11</sup>

In *Cunningham*,<sup>12</sup> the court joins two other jurisdictions<sup>13</sup> in denying

6. 308 N.Y. at 104, 123 N.E.2d at 794. The court applied the "essence test" which was devised to determine whether a contract was within the provision of the Statute of Frauds requiring that contracts for the sale of goods be in writing. 40 CORNELL L.Q. 803 (1955). The efficacy of utilizing this test to determine whether warranties should be implied has been severely challenged. Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653, 664 (1957); see also Note, *Extension of Warranty Concepts to Service-Sales Contracts*, IND. L.J. 367 (1956).

7. The result in *Perlmutter* appears incongruous when viewed in light of a previous New York decision which held that the restaurateur impliedly warranted his food. *Temple v. Keeler*, 238 N.Y. 344, 144 N.E.2d 635 (1934). "One is left to wonder what result would have been reached had the plaintiff's injury been due to bad food served by the hospital." Farnsworth, *supra* note 6, at 662.

8. 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16.03[4] (1968); 22 BROOKLYN L. REV. 164 (1955); 30 N.Y.U. L. REV. 1253 (1955). The tenuous nature of this view has prompted two states to implement the policy factors favoring the hospital by statute. See ARIZ. REV. STAT. ANN. art. 5, § 36-1151 (1964); CAL. HEALTH & SAFETY CODE § 1623 (West 1954).

9. 12 Utah 2d 241, 364 P.2d 1085 (1961).

10. We think that practically all hospitals are bourns of mercy . . . . We do not say that hospitals should be immune from negligence. But we think they should not be strapped with an insurability of blood purity, absent negligence.

*Id.* at —, 364 P.2d at 1087.

11. The court said:

We find it difficult to give literal application of principles of law designed to impose strict accountability in commercial transactions to a voluntary and charitable activity which serves a humane and public health purpose. The activities involved in the transfusion of whole blood, . . . may be characterized as sui generis in that the sequence of events involve acts common to legal concepts of both a sale and a service. Moreover, it seems to us that . . . it would be unrealistic to hold that there is an implied warranty as to the qualities of fitness of human blood . . . .

*Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc.*, 270 Minn. —, at —, 132 N.W.2d 805, 811 (1965).

12. *Cunningham v. MacNeal Memorial Hosp.*, — Ill. App. 2d —, 251 N.E.2d 733 (1969).

13. *Jackson v. Muhlenberg Hosp.*, 96 N.J. Super. 314, 232 A.2d 879 (1967), *rev'd on other grounds*, 53 N.J. 137, 249 A.2d 65 (1969); *Russell v. Cunningham Blood Bank*,

the service characterization as protection to institutional suppliers of blood. The *Cunningham* court rejects the underlying policy determination as unsound in view of the rejection of the doctrine of charitable immunity in Illinois.<sup>14</sup> The court concludes that the blood transaction involves a sale since there is no meaningful distinction between blood, food and other products.<sup>15</sup>

The court extends the doctrine of strict liability in tort into the medical supply field by holding that the transfusion of blood constitutes a sale. The court felt that to perpetuate the decision in *Perlmutter* would be counter to Illinois policies of consumer protection and rejection of charitable immunity.<sup>16</sup> This decision does not intimate that the hospital is to be made an insurer of the purity of its medical supplies. The court merely intends that the hospital shall be held to the same standards of accountability as apply to other suppliers of goods.<sup>17</sup>

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**Constitutional Law—DUE PROCESS—JURISDICTION OVER ALIEN CORPORATION IN PRODUCTS LIABILITY ACTION.** *Duple Motor Bodies, Ltd. v. Hollingsworth*, 417 F.2d 231 (9th Cir. 1969).

Defendant Duple Motor Bodies, a British corporation, designed and manufactured coach bodies for Vauxhall Motors, which assembled the busses and shipped them to Hawaii where they were sold to Maui Island

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Inc., 185 So. 2d 749 (Fla. App. 1966) (action against blood bank). *But see* White v. Sarasota County Pub. Hosp. Bd., 206 So. 2d 19 (Fla. App. 1968), *cert. denied*, 211 So. 2d 215 (Fla. 1968) (action against hospital).

14. *Darling v. Charleston Community Memorial Hosp.*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965).

15. — Ill. App. 2d at —, 251 N.E.2d at 736.

16. *Id.*

17. The court's characterization of the blood transfusion as a sale does not eliminate all of the problems of recovery for a plaintiff. This is because the Supreme Court of Illinois has adopted the doctrine of strict liability in tort as provided in RESTATEMENT (SECOND) OF TORTS § 402A (1965). *See* *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965). A seller of products which are unavoidably unsafe is not to be held strictly liable "merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk." RESTATEMENT (SECOND) OF TORTS § 402A, comment *k* at 353 (1965). *See* Garibaldi, *A New Look at Hospitals' Liability for Hepatitis Contaminated Blood on Principles of Strict Tort Liability*, 48 CHI. B. RECORD 204 (1967); *Medical Judgment v. Legal Doctrine in the Matter of Hepatitis Contaminated Blood*, 49 CHI. B. RECORD 22 (1967). *See generally* Note, *Liability for Blood Transfusion Injuries*, 42 MINN. L. REV. 640 (1958).