Torts - Strict Liability - A Hospital is Strictly Liable for Transfusions of Hepatitis Infected Blood

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Recommended Citation
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol48/iss2/13
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TORTS—STRICT LIABILITY—A HOSPITAL IS STRICTLY LIABLE FOR TRANSFUSIONS OF HEPATITIS INFECTED BLOOD.—In the recent case of Cunningham v. Mac Neal Memorial Hospital,1 the Supreme Court of Illinois was called upon to decide the hospital’s liability to the patient for supplying blood which caused the patient to contract homologous serum hepatitis.2 The supreme court, by Justice Culbertson, held that a hospital which supplied defective blood to a patient as a part of the services for which it charged, was engaged in the business of “selling” blood for the purposes of strict liability.

The plaintiff, Mrs. Frances Cunningham, was a patient at the defendant hospital in May of 1966. The defendant hospital supplied her with blood for a transfusion. It had received the blood in the commercial line of distribution from the Michael Reese Hospital Blood Bank. The plaintiff contracted serum hepatitis and had to remain in the hospital for further treatment.

The plaintiff brought her cause of action in the Circuit Court of Cook County requesting damages of $50,000. The plaintiff’s claim was based on the theory that the defendant hospital was strictly liable in tort.3 The trial court dismissed the complaint for failure to state a cause of action. It held that the theory of strict liability in tort was not applicable. The appellate court reversed and remanded,4 but granted the defendant hospital a certificate of importance.5 The supreme court allowed the filing of the following briefs amici curi:

1. The Illinois Hospital Association, the Chicago Hospital Association and the Illinois State Medical Society.
2. Blood Services, a community blood bank.
3. The American Association of Blood Banks.
4. The American Trial Lawyers Association.6

The supreme court affirmed the appellate court’s decision and remanded with instructions that the case proceed to trial.7

2 Schmidt’s Attorney’s Dictionary of Medicine (1st edition, 1970) defines homologous serum hepatitis as:
   a form of hepatitis [inflammation of the liver] caused by a virus and transmitted by injections of blood [as in transfusions], the injection of blood products [as yellow fever vaccine or convalescent measles serum], or the use of an unsterile syringe containing the causative virus.
3 113 Ill. App. 2d 74, 75-76, 251 N.E.2d 733, 733-34 (1969). This opinion contains the substantive part of the plaintiff’s complaint.
4 Id. at 87, 251 N.E.2d at 739.
7 Id. at 458, 266 N.E.2d at 905.
The defendant's argument was based on four main points which suggested that the doctrine of strict liability was inapplicable: (1) Whole blood is not a "product" as contemplated by the Restatement (Second) of Torts, section 402A; (2) Strict tort liability applies to sales only and a blood transfusion is a service; (3) Since the hospital is not engaged in the business of selling blood, the hospital cannot be held strictly liable in tort for contaminated blood; and (4) Medical science cannot detect the serum hepatitis virus in whole blood, therefore the hospital should not be held liable for selling blood containing such virus.

The defendant initially argued that the doctrine of strict liability was not applicable in the case for the reason that whole human blood is not a "product" in the sense contemplated by Section 402(A) of the Restatement (Second) of Torts. The court pointed out that comment (e) to section 402(A) of the Restatement states that section (e) is not limited to products that have undergone processing before sale.

The Illinois Supreme Court cited Suvada v. White Motors in which the court had largely adopted the Restatement view of strict products liability. The supreme court also cited Community Blood Bank Inc. v. Russell, a Florida Supreme Court case which held a blood bank liable on the theory that blood infected with hepatitis which was sold to a patient was a breach of the warranty that the blood was fit for its intended purpose.

The defendant next contended that the transfusion of whole blood as alleged in the complaint was a "service" as opposed to a "sale." If this contention were true, strict tort liability would not attach since the Restatement view requires that the party charged be "engaged in the business of selling the defective product." The defendant relied on the New York case of Perlmutter v. Beth David Hospital which is the leading case on the subject and is supported in a number of other jurisdictions. Perlmutter was decided on the basis of the sales act.

8 § 402. A. Special Liability of Seller of Product for Physical Harm to User or Consumer.
(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if a. the seller is engaged in the business of selling such a product, and b. it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

9 Restatement (Second) of Torts § 402A, Comment e at 347 (1965).
10 32 Ill. 2d 612, 210 N.E.2d 182 (1965).
11 185 So.2d 749 (Fla. Ct. App. 1966).
12 Restatement (Second) of Torts § 402A (1965).
13 308 N.Y. 100, 123 N.E.2d 792 (1954).
then in force in New York, which required a “sale” before a warranty of fitness for purpose arose for the benefit of the plaintiff. The court in Perlmutter reasoned that a patient enters the hospital “not to buy medicine or pills, not to purchase bandages or iodine or serum blood, but to obtain a course of treatment in the hope of being cured of what ails him.”

The supreme court in Cunningham noticed that the plaintiff, Mrs. Cunningham, based her case on the theory of strict liability in tort. Since Perlmutter and its progeny deal with implied warranty, those cases were not relevant to Cunningham. The court in Cunningham, nevertheless, disagreed with the reasoning of Perlmutter. The court quoted with apparent approval from Community Blood Bank Inc. v. Russell:

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 creating the framework of a major policy decision.

The defendant next contended that since providing blood was not the principal function of the hospital, the defendant was not “engaged in the business of selling such a product” as required by 402(A) of the Restatement (Second) of Torts. The court briefly pointed out that the Restatement does not require that a seller be solely in the business of selling the product. The fact that a hospital is within the distribution chain meets the Restatement’s requirement of being a seller.

The defendant further asserted that it could not be held liable for serum hepatitis virus found in whole blood since medical science is yet unable to detect such a virus. The court pointed out that the rule set out in the Restatement holding the seller liable applies even though, “the seller has exercised all possible care in the preparation and sale of his product.” The court further pointed out that to allow the defendant to avoid liability on the grounds that impurities in the blood are undetectable would emasculate the doctrine of strict liability in tort.

The defendant argued that since detecting serum hepatitis is impossible the

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15 308 N.Y. 100, 102, 123 N.E.2d at 795 (1954).
16 Id. at 103, 123 N.E.2d at 796.
18 185 So. 2d 749, 752 (Fla. Ct. App. 1966).
19 Restatement (Second) of Torts § 402A (1965).
21 Restatement (Second) of Torts § 402A (1965).
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blood transaction falls under the recognized category of being an "unavoidable unsafe product" within comment (k) of Section 402(A), Restatement (Second) of Torts. Comment (k) applies to some products which are incapable of being made completely harmless in our present state of technology and yet are justified in their use because of their value to humanity. Comment (k) uses the example of the Pasteur vaccine treatment of rabies which may seriously harm a patient. Since the disease itself invariably leads to a dreadful death, the selling and the use of the vaccine is fully justified.

The court differentiated the hepatitis infected blood from the "unavoidably unsafe product" in comment (k) saying:

We believe it clear that the exception set forth in the quoted comment relates only to products which are not impure and which, even if properly prepared, inherently involve substantial risk or injury to the user, such exception cannot avail where, as here, the product is alleged to be impure.

The difference between an impure substance that technology cannot rid of its impurities, and an unavoidably unsafe product as defined by comment (k) is difficult to grasp. The distinction, however, does seem to be valid. The rabies vaccine, which is produced in the circulatory system of rabbits, contains brain cells of the rodent which break off as the blood circulates through the animal's head. These brain cells, which cannot be removed from the vaccine, cause a reaction in some humans who receive the vaccine. The severity of the reaction depends on the sensitivity of the particular patient and in some cases can be fatal. Some people may experience no reaction to the same vaccine that caused a violent reaction in another person.

A blood transfusion differs in that some blood is free from the serum hepatitis germ and will be safe for any patient who receives it.

23 Unavoidably unsafe products. There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

The Cunningham case extends the doctrine of strict tort liability into a new area. The doctrine of strict liability in tort, until Cunningham, was applied when a product was defective and should not have been26 because the technological means to discover the defect existed. The manufacturer of candy bars may have exercised reasonable care to insure that his product reached the consumer free of any foreign substance. In spite of reasonable care, a few of the candy bars may have picked up a foreign substance in the mass production methods of processing and packaging. The foreign substance could be discovered by unwrapping and analyzing each bar, but after the unwrapping and analysis, the marketability of the bar would be destroyed. In spite of the exercise of reasonable care, the manufacturer bears the risk of harm caused by the foreign substance because he is at fault. The manufacturer anticipates this risk, looks upon the risk as a cost of doing business, and spreads the risk among all consumers of candy bars.27 Since the means do not exist to detect serum hepatitis in blood the hospital is held strictly liable without fault.

The policy of spreading the financial risk among hospitals who can foresee the risk and of spreading the loss among all hospital patients is a sound one. Some critics of the decision argue that such a ruling will only add to hospital costs which are already soaring and will put hospital care further out of the reach of the poor. To further increase hospital costs is the preferable alternative. In the majority of the jurisdictions that have dealt with the question of liability for furnishing blood infected with hepatitis, hospitals and blood banks are protected from liability by case law28 or statute.29 In these jurisdictions, the

26 32 Ill. 2d 612, 210 N.E.2d 182 (1965).
29 See, Comment, 69 Mich. L. Rev. 1179 at n.41 (May 1971): Cal. Health & Safety Code 1606 (West 1970), which provides: The procurement, processing, distribution, or use of whole blood, plasma, blood products, and blood derivatives for the purpose of injecting or transfusing the same . . . into the human body shall be construed to be . . . the rendition of a service by each and every person, firm, or corporation participating therein, and shall not be construed to be . . . a sale . . . for any purpose or purposes whatsoever. Other states that have enacted similar legislation include:
Alaska: Alaska Stat. 45.05.002 (1968).
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individual who contracts serum hepatitis from a blood transfusion is forced to bear all the financial loss since the law exempts hospitals and blood banks from liability. This burden is a heavy one for those too poor to purchase health insurance. The Cunningham decision in holding the hospital liable, will spread the cost of treating serum hepatitis contracted from a blood transfusion among all hospital users.

Cunningham would also seem to encourage research to learn to detect the hepatitis germ in blood. Whether the medical research community needs any encouragement is debatable. Cunningham will encourage hospitals and blood banks to use more care in the screening of donors. Studies have shown a much higher incidence of serum hepatitis in blood banks that utilize the blood of paid donors. Paid donors are often transients who donate blood for a "living" and respond falsely to questions asked about a history of hepatitis.\textsuperscript{30} Since asking the donor is presently the most effective means of detection, elimination of paid donors would probably do away with much of the problem.\textsuperscript{31}

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Restatement (Second) of Torts § 402A uses terms of sale and should seem to be inapplicable in states where a blood transfusion is considered a service.

\textsuperscript{30} Gordy-Gray, Attorney's Text Book of Medicine § 38.35 (3d ed. 1971).