Florida State University Law Review

Volume 3 | Issue 3 Article 11

Summer 1975

Williamson v. Memorial Hospital, 307 So. 2d 199 (Fla. 1st Dist. Ct. App. 1975)

Linda Jones Wells

Products Liability—BLOOD TRANSFUSIONS—"IMPLIED WARRANTY" ACTION AGAINST BLOOD SUPPLIERS REQUIRES SHOWING OF DETECTABLE DEFECT AND NEGLIGENCE.—*Williamson v. Memorial Hospital,* 307 So. 2d 199 (Fla. 1st Dist. Ct. App. 1975).

After receiving several blood transfusions, Faye Williamson, a patient at Memorial Hospital of Bay County, contracted serum hepatitis. She subsequently brought suit against the hospital, alleging *inter alia* that the hospital had breached implied warranties of fitness and merchantability by furnishing her with contaminated blood. The circuit court granted the hospital's motion to strike Ms. Williamson's complaint, relying on section 672.316(5), Florida Statutes.[1] That section classifies blood transactions as services rather than sales, and therefore arguably precludes the maintenance of an implied warranty action for the sale of defective blood. The lower court certified the question of the maintenance of such an action to the First District Court of Appeal.[2] In *Williamson v. Memorial Hospital,* the district court held that an action sounding in implied warranty could be maintained under this statute only when the plaintiff alleged and proved that the defect that caused the injury was detectable or removable by means of reasonable scientific procedures.[3]

Prior to the enactment of statutes exempting blood banks and hospitals from liability for transfusion-transmitted hepatitis,[4] pro-

1. FLA. STAT. § 672.316(5) (1973) provides:
The procurement, processing, storage, 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 for any purpose whatsoever is declared to be the rendering of a service by any person participating therein and does not constitute a sale, whether or not any consideration is given therefor, and the implied warranties of merchantability and fitness for a particular purpose shall not be applicable as to a defect that cannot be detected or removed by reasonable use of scientific procedures or techniques.

2. Since there was no controlling precedent under § 672.316(5), the following question was certified: "May a plaintiff maintain an action, on the theory of implied warranty, against the hospital and physicians, who sold and administered blood to her, which blood the plaintiff alleges caused the plaintiff to contract, or be infected with serum hepatitis?" Williamson v. Memorial Hosp., 307 So. 2d 199, 200 (Fla. 1st Dist. Ct. App. 1975).

3. *Id.* at 201.

4. To date, only New Jersey, New York, Rhode Island, and Vermont have not enacted statutes similar to FLA. STAT. § 672.316(5) (1973). *See* Heirs of Fruge v. Blood Services, 365 F. Supp. 1344, 1350-51 n.3 (W.D. La. 1973). Not listed in *Fruge* are two states, Iowa and New Hampshire, which have enacted similar statutes. *See* IOWA CODE ANN. §142A.8 (Supp. 1975); N.H. REV. STAT. ANN. § 507:8-b (Supp. 1973).

Only nine states of the 46 that have enacted statutes relieving hospitals and blood banks from liability for transfusion-transmitted hepatitis have not defined the procurement, processing and distribution of blood and blood products as a service. Three of those nine states have specifically limited hospital and blood bank liability for hepatitis

curement and distribution of blood and blood components[5] were classified as either sales or services. In jurisdictions where procurement and distribution were considered services, actions sounding in implied warranty or strict liability in tort could not be maintained to recover damages for injury resulting from post-transfusion hepatitis, since neither warranties nor strict liability attach to such transactions.[6]

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related injuries to actions sounding in negligence. *See* PA. STAT. ANN. tit. 35, § 10021 (Supp. 1975); TEX. REV. CIV. STAT. ANN. art. 4590-3, § 2 (Supp. 1974); WYO. STAT. ANN. § 35-221.10 (Cum. Supp. 1973). Oklahoma has defined procurement, processing and distribution as a "transaction" to which no implied warranties attach. OKLA. STAT. ANN. tit. 63, § 2151 (1973). Oregon has declared that these activities are not sales transactions for purposes of the warranty provisions of the Uniform Commercial Code. ORE. REV. STAT. tit. 10, § 97.300 (1974). Maryland and New Mexico, while not characterizing the procurement, processing and distribution of blood as either a sale or a service, have provided that such transactions shall neither give rise to implied warranties nor be subject to strict liability in tort. MD. ANN. CODE art. 43, § 136B (Supp. 1974); N.M. STAT. ANN. § 12-25-5 (1974). Hawaii and Virginia, without using the sales-service characterization, have provided that no implied warranties shall arise as a result of the procurement, processing and distribution of blood by a hospital or blood bank. HAWAII REV. STAT. § 325-91 (Supp. 1974); VA. CODE ANN. § 32-364.2 (1973).

The remaining 36 states have enacted statutes similar to Florida's. As a whole, the few actions which have accrued and have been litigated since the enactment of these statutes, sounding either in implied warranty or in strict liability in tort, have met with little success. To date, no forum, other than the district court of appeal in *Williamson*, 307 So. 2d at 201, has characterized one of these statutes as creating a "hybrid implied warranty." The forums which have heard cases under these statutes have recognized, as did the *Williamson* court, that implied warranty and strict liability no longer apply in cases involving injuries resulting from post-transfusion hepatitis. Instead, these forums have recognized that actions against blood banks and hospitals for such injuries must sound in negligence. *See, e.g.,* Sawyer v. Methodist Hosp., 383 F. Supp. 563 (W.D. Tenn. 1974); Shepard v. Alexian Bros. Hosp., Inc., 109 Cal. Rptr. 132 (Ct. App. 1973). *See also* McDaniel v. Baptist Memorial Hosp., 469 F.2d 230 (6th Cir. 1972).

5. Common components prepared by blood banks for transfusion include red blood cells (also called packed cells), frozen red blood cells, leukocyte-poor blood cells (also called buffy-poor packed cells), single donor plasma, single donor fresh frozen plasma platelet poor whole blood, platelet rich plasma, and platelet concentrate. AMERICAN ASSOCIATION OF BLOOD BANKS, STANDARDS FOR BLOOD BANKS AND TRANSFUSION SERVICES 19 (7th ed. 1974).

6. In a landmark decision, the New York Court of Appeals held that blood transfusions were incidental to overall medical services utilized by a hospital in the course of treatment. The court further stated that the patient does not contract with the hospital for individual items used in medical care, but instead contracts for a package of medical services including such items as bandages, medicine, blood and professional skills. Since blood is part of hospital services no implied warranties are attached to its distribution, and an action sounding in implied warranty cannot be maintained. Perlmutter v. Beth David Hosp., 123 N.E.2d 792 (N.Y. 1954). *See, e.g.,* Sloneker v. St. Joseph's Hosp., 233 F. Supp. 105 (D. Colo. 1964); Dibblee v. Dr. W. H. Groves Latter-Day Saints Hosp., 364 P.2d 1085 (Utah 1961). *See also* Whitehurst v. The American Nat'l Red Cross, 402 P.2d 584 (Ariz. Ct. App. 1965) (action against a blood bank); Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc., 132 N.W.2d 805 (Minn. 1965); Koenig v. Milwaukee Blood Center, Inc., 127 N.W.2d 50 (Wis. 1964).

There were, however, a few jurisdictions which held that transactions involving blood for transfusion constituted sales;[7] in at least one of these jurisdictions this classification permitted the maintenance of an action sounding in strict liability.[8] Florida utilized a combination sales-service classification system. In Florida, the activities of blood banks in the distribution of blood were considered sales,[9] while those activities when performed by hospitals were considered services.[10] Thus before the enactment of section 672.316(5) a donee who contracted post-transfusion hepatitis could recover against the blood bank which provided the infected blood[11] on a theory of breach of implied war-

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In McDaniel v. Baptist Memorial Hosp., 469 F.2d 230 (6th Cir. 1972), the court held that a statute that characterizes the transfer of blood from a hospital or blood bank to a patient as a service not only eliminates actions sounding in implied warranty, but also eliminates actions sounding in strict liability in tort. RESTATEMENT (SECOND) OF TORTS § 402A (1965) (emphasis added) provides:

> (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
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> (a) the *seller* is engaged in the business of *selling* such a product, and
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is *sold.*
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> (2) The rule stated in Subsection (1) applies although
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> (a) the *seller* has exercised all possible care in the preparation and sale of his product, and
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> (b) the user or consumer has not bought the product from or entered into any contractual relation with the *seller.*

7. Cunningham v. MacNeal Memorial Hosp., 266 N.E.2d 897 (Ill. 1970); Jackson v. Muhlenberg Hosp., 232 A.2d 879 (N.J. Super. Ct. 1967). In *Jackson* the court held: "The transfer of human blood for a consideration is a sale. So is its transfusion into the body of a patient when a charge is made for the blood." *Id.* at 884.

8. Cunningham v. MacNeal Memorial Hosp., 266 N.E.2d 897 (Ill. 1970). There the Illinois Supreme Court rejected the reasoning in Perlmutter v. Beth David Hosp., 123 N.E.2d 792 (N.Y. 1954), *see* note 6 *supra,* and stated: "To assert that the transfusion of whole blood by a hospital into a patient, for which a charge is made, does not give rise to implied warranties because no 'sale' is involved is in our judgment simply unrealistic." 266 N.E.2d at 901. *See also* Note, *Strict Liability for Disease Contracted from Blood Transfusion,* 66 NW. U.L. REV. 80 (1971); Note, *Liability for Serum Hepatitis in Blood Transfusions,* 32 OHIO ST. L.J. 585 (1971); 69 MICH. L. REV. 1172 (1971); 25 U. MIAMI L. REV. 349 (1971); 24 VAND. L. REV. 645 (1971); 16 VILL. L. REV. 983 (1971); 11 WM. & MARY L. REV. 1004 (1970).

9. *E.g.,* Russell v. Community Blood Bank, Inc., 185 So. 2d 749 (Fla. 2d Dist. Ct. App. 1966), *aff'd as modified,* 196 So. 2d 115 (Fla. 1967). In *Russell* the district court stated:

> Regardless of the fact that a *hospital* supplying whole blood to a patient may be merely performing a service incident to the over-all medical attention being furnished, we are not willing to extend this "service" characterization to the blood bank which originally collects and distributes the commodity.

185 So. 2d at 752.

10. *See* note 9 *supra.*

11. *See* Rostocki v. Southwest Florida Blood Bank, Inc., 276 So. 2d 475 (Fla. 1973) (action commenced prior to the enactment of § 672.316(5)); Mercy Hosp., Inc. v. Benitez,

ranty, but could not rely on that theory in suing the hospital that administered the blood.[12]

The actual concern underlying these classification schemes was not the nature of the transaction, but rather the allocation of risk for damages arising from transfusion-transmitted hepatitis.[13] Florida courts have long held retailers and manufacturers liable to purchasers and consumers for injuries resulting from defective products.[14] Blood

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257 So. 2d 51 (Fla. 3d Dist. Ct. App. 1972) (hospital that provides blood from self-maintained blood bank assumes the same liability as the operator of an independent blood bank); Hoder v. Sayet, 196 So. 2d 205 (Fla. 3d Dist. Ct. App. 1967); Russell v. Community Blood Bank, Inc., 185 So. 2d 749 (Fla. 2d Dist. Ct. App. 1966), *aff'd as modified,* 196 So. 2d 115 (Fla. 1967).

12. White v. Sarasota County Hosp. Bd., 206 So. 2d 19 (Fla. 2d Dist. Ct. App. 1968) (transfer of blood by a hospital to a patient constitutes a service to which no warranties attach).

13. In Russell v. Community Blood Bank, Inc., 185 So. 2d 749 (Fla. 2d Dist. Ct. App. 1966), *aff'd as modified,* 196 So. 2d 115 (Fla. 1967), the district court stated:

> It is evident from our research that although many of the decisions denying recovery for breach of implied warranty are based on the technical distinction between a service and a sale, the factor underlying the decisions is the inability, in the present state of medical knowledge, to detect or remove the virus which causes serum hepatitis. It is often stated that it would be against public policy to impose strict warranty liability, for an undetectable, unremovable defect, against a non-commercial organization which was supplying a commodity essential for medical treatment.

185 So. 2d at 752. *See generally* Haut & Alter, *Blood Transfusions—Strict Liability?,* 43 ST. JOHN'S L. REV. 557, 576-77 (1969), which suggests several situations that might develop if absolute liability were imposed upon hospitals and blood banks for transfusion-transmitted hepatitis: physicians might refrain from utilizing therapy, thus increasing the possibility of loss of life from shock and hemorrhage; the increased cost of litigation would place a severe economic burden on hospitals; and imposing absolute liability upon hospitals and blood banks would eventually result in a chronic and dangerous shortage of blood.

Although their approaches differ somewhat, a number of other commentators have discussed the allocation of risk in transfusion-transmitted hepatitis cases. *See, e.g.,* Franklin, *Tort Liability for Hepatitis: An Analysis and a Proposal,* 24 STAN. L. REV. 439, 461-79 (1972); Note, *Strict Liability for Disease Contracted from Blood Transfusion,* 66 NW. U.L. REV. 80, 89-94 (1971); Note, *Liability for Serum Hepatitis in Blood Transfusions,* 32 OHIO ST. L.J. 585, 596-99 (1971); 25 U. MIAMI L. REV. 349, 353-54 (1971).

14. *See, e.g.,* Miami Coca-Cola Bottling Co. v. Todd, 101 So. 2d 34 (Fla. 1958) (manufacturer liable for injuries to consumer of soft drink); Matthews v. Lawnlite Co., 88 So. 2d 999 (Fla. 1956) (manufacturer can be liable to potential purchaser for injuries sustained due to a defective design in a product); Florida Coca-Cola Bottling Co. v. Jordan, 62 So. 2d 910 (Fla. 1953) (manufacturer of soft drink liable to consumer injured by ingested glass); Sencer v. Carl's Markets, Inc., 45 So. 2d 671 (Fla. 1950) (retailer held liable in implied warranty to injured consumer of canned sardines despite inability to detect defect without destroying salability); Blanton v. Cudahy Packing Co., 19 So. 2d 313 (Fla. 1944) (manufacturer liable for injuries to ultimate consumer of unwholesome canned meat); Bernstein v. Lily-Tulip Cup Corp., 177 So. 2d 362 (Fla. 3d Dist. Ct. App. 1965) (manufacturer of product for intimate use or human consumption can be liable for injuries to ultimate consumer or user).

for transfusion, however, is not, in the ordinary sense, a manufactured or consumer product. Thus in determining whether to subject the supplier of blood to liability for transfusion-transmitted hepatitis, Florida's courts gave careful consideration to the nature of the product, the necessity for its procurement and distribution, and the unfortunate, but unavoidable, risk of transmitting the disease.[15]

Despite its willingness to hold retailers of injury-causing defective products liable on a breach of implied warranty theory, the Florida Supreme Court has not yet adopted strict liability in tort as expressed in either Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (Cal. 1962) (maufacturer "strictly liable in tort" for injuries caused by defect which renders product "unsafe for its intended use"), or RESTATEMENT (SECOND) of TORTS § 402(A) (1965), *supra* note 6. *See generally* Ausness, *From* Caveat Emptor *to Strict Liability: A Review of Products Liability in Florida,* 24 U. FLA. L. REV. 410 (1972); Hicks & Sternlieb, *Products Warranty Law in Florida—A Realistic Overview,* 25 U. MIAMI L. REV. 241 (1971); 41 U. DET. L.J. 459 (1964); 23 U. MIAMI L. REV. 266 (1968).

15. *See* Russell v. Community Blood Bank, Inc., 185 So. 2d 749, 752-53 (Fla. 2d Dist. Ct. App. 1966), *aff'd as modified,* 196 So. 2d 115 (Fla. 1967) (discussing impossibility of detecting hepatitis virus, importance of supplying a commodity essential to health, and other liability-related factors); Hoder v. Sayet, 196 So. 2d 205, 210 (Fla. 3d Dist. Ct. App. 1967) (listing diseases commonly transmitted by transfusion and noting yearly death rate in the United States from transfusions). *See also* Shepard v. Alexian Bros. Hosp., Inc., 109 Cal. Rptr. 132 (Ct. App. 1973).

In Perlmutter v. Beth David Hosp., 123 N.E.2d 792 (N.Y. 1954), the New York Court of Appeals stated:

> Informed opinion is at hand that there is today neither a means of detecting the presence of the jaundice-producing agent in the donor's blood nor a practical method of treating the blood to be used for transfusion so that the danger may be eliminated. . . . The art of healing frequently calls for a balancing of risks and dangers to a 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 otherwise assist the patient.

Id. at 795. *Cf.* cases cited notes 6, 8, 13 *supra.* The obvious necessity of transfusions, despite the accompanying and unavoidable risk of hepatitis, played a substantial role in the adoption of statutes relieving both blood banks and hospitals from warranty and tort liability. The Florida Legislature, in enacting § 672.316(5), stated:

> WHEREAS, the procurement, processing, storage, 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 provides the general public with a desirable and necessary medical service, and
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> WHEREAS, in the present state of human knowledge the rendering of this service is attended with a known but reasonable risk, and
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> . . . .
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> WHEREAS, the continuance of the operation of community and private blood banks provides the citizens of Florida with a service which might otherwise have to be provided by the State of Florida, . . .

Fla. Laws 1969, ch. 69-157, Preamble. The Illinois Legislature in enacting a similar statute, ILL. ANN. STAT. ch. 91, § 181 (Smith-Hurd Supp. 1975), stated:

> The availability of scientific knowledge, skills and materials for the purpose of injecting, transfusing or transplanting human whole blood, plasma, blood products, blood derivatives and products . . . is important to the health and welfare of the people of this State. The imposition of legal liability without fault upon the persons and organizations engaged in such scientific procedures inhibits the exercise of sound medical judgment and restricts the availability of important

The enactment of section 672.316(5) in effect ended the application of the tenets of conventional implied warranty to the procurement and distribution of blood in Florida. After defining blood procurement, processing and distribution as a service, the statute provides that "the implied warranties of merchantability and fitness for a particular purpose shall not be applicable as to a defect that cannot be detected or removed by reasonable use of scientific procedures or techniques."[16] The *Williamson* court construed this language to mean that an action sounding in implied warranty could be brought despite the classification of blood procurement, processing and distribution as a service.[17] The court indicated, however, that such an action is available only if it is shown that the defect was detectable *and* that there was a failure to exercise reasonable care.[18] This, the court opined, amounted to the creation of a new cause of action: a "hybrid form of implied warranty."[19]

> As applied to blood transfusions, the statute establishes what may be termed a hybrid implied warranty of fitness which departs from the concept of strict liability or liability without fault ordinarily ascribed to such warranty and instead establishes a criteria for recovery which is ordinarily understood by lawyers and judges to be cognizable in negligence.[20]

At present, the existence of this "hybrid" cause of action is of little more than academic interest. Even the most advanced techniques cannot detect the hepatitis virus in blood with any degree of certainty.[21] Thus under the present state of scientific knowledge, blood

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scientific knowledge, skills and materials. It is therefore the public policy of this State to promote the health and welfare of the people by limiting the legal liability arising out of such scientific procedures to instances of negligence or willful misconduct.

16. FLA. STAT. § 672.316(5) (1973).

17. 307 So. 2d at 201.

18. *Id.*

19. *Id.*

20. *Id.* The *Williamson* court seems to have been bothered by the somewhat confusing language of § 672.316(5). There was, however, no attempt to second-guess the legislature. The court simply noted, "[B]y invoking what courts refer to as its infinite legislative wisdom, [the legislature] has made a legal concept ordinarily cognizable in the law of sales now applicable to the law of negligence." *Id.* Thirty-six states have defined blood procurement, processing and distribution as a service. But only Idaho, Missouri, and Nevada have adopted statutory language akin to that of § 672.316(5). *See* IDAHO CODE § 39-3702 (Supp. 1974); MO. ANN. STAT. § 431.069 (Supp. 1975); NEV. REV. STAT. § 460.010 (1973). To date there have been no reported decisions construing these statutes; the *Williamson* court is apparently the first court in any jurisdiction to have embraced the concept of a "hybrid" implied warranty.

21. *See* Franklin, *Tort Liability for Hepatitis: An Analysis and a Proposal*, 24 STAN. L. REV. 439, 440-45 (1972).

banks and hospitals have been effectively exempted from warranty liability where post-transfusion hepatitis is concerned.

The *Williamson* decision apparently leaves only one avenue of recovery open to blood transfusion recipients who contract serum hepatitis—negligence.[22] Although the Florida Supreme Court has not dealt with the issue, one district court of appeal has implied that a blood bank could be held liable in a hepatitis case for negligently failing to question prospective donors concerning their general health and medical history.[23] Negligence actions might also be brought for

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It is presently impossible to detect the hepatitis virus in blood. What can sometimes be detected is an antigen associated with the presence of the virus. The most modern laboratory procedure utilized today in the detection of the Hepatitis B Antigen is the radioimmunoassay (RIA). This complicated procedure, which involves radioactive labels and counting devices, detects only 50-60% of all hepatitis positive bloods screened. By comparison, counterelectrophoresis (CEP), also a means of detecting hepatitis, detects only 25-30% of all hepatitis positive bloods screened. Interview with Dale Malloy, Director of the Leon County Blood Bank, in Tallahassee, Fla., Apr. 10, 1975. *See* letter from D. J. Gocke, M.D., and Z. F. Kachani, M.D., to the editor of the *Journal of the American Medical Association,* undated, in 224 J.A.M.A. 1425 (1973); Abbott Laboratories Diagnostics Division, Hepatitis Associated Antibody (Anti-Australia Antigen) ^{125}I (Human) Ausria® II-125, at 13, 14 (rev. Oct. 1974).

RIA is a procedure that involves expensive equipment. Consequently, this highly desirable technique is economically out of reach for most small hospitals and blood banks. Units of blood screened at the Leon County Blood Bank, Leon County, Florida, are screened both by RIA and CEP. The cost per unit for CEP is $1.03; for RIA, $3.10. The figure for RIA does not include capital outlay for equipment owned and operated by Tallahassee Memorial Hospital. Interview with Dale Malloy, *supra.*

22. *See* 307 So. 2d at 201. Actions for negligence may also be brought for a number of other transfusion-related injuries, including mislabeling the patient's specimen, failure to crossmatch the patient's specimen with compatible blood, and failure to transfuse properly. *See, e.g.,* Sherman v. Hartman, 290 P.2d 894 (Cal. Ct. App. 1955) (hospital may be held liable for negligent infusion of blood into patient); Ward v. Orange Memorial Hosp. Ass'n, 193 So. 2d 492 (Fla. 4th Dist. Ct. App. 1966) (hospital held liable for negligent crossmatch of patient's specimen resulting in death); Parker v. Port Huron Hosp., 105 N.W.2d 1 (Mich. 1960) (hospital held liable for negligence of technologist who mislabeled patient's specimen, causing failure to crossmatch proper blood group); Mississippi Baptist Hosp. v. Holmes, 55 So. 2d 142 (Miss. 1951) (hospital held liable for negligence of technologist who correctly crossmatched but incorrectly labeled blood). *Cf.* Goelz v. J. K. & Susie L. Wadley Research Inst. & Blood Bank, 350 S.W.2d 573 (Tex. Civ. App. 1961); Brown v. Shannon Memorial Hosp., 222 S.W.2d 248 (Tex. Civ. App. 1949); Gile v. Kennewick Pub. Hosp. Dist., 296 P.2d 662 (Wash. 1956). For general discussions of negligence in the blood transfusion context, see Dunn, *Blood Transfusions and Serum Hepatitis,* 15 CLEV.-MAR. L. REV. 497 (1966); Franklin, *Tort Liability for Hepatitis: An Analysis and a Proposal,* 24 STAN. L. REV. 439, 446-56 (1972).

23. Hoder v. Sayet, 196 So. 2d 205, 209-10 (Fla. 3d Dist. Ct. App. 1967). *See also* AMERICAN ASSOCIATION OF BLOOD BANKS, STANDARDS FOR BLOOD BANKS AND TRANSFUSION SERVICES 3 (7th ed. 1974). Criteria for donor selection include the rejection of donors who either have a history of hepatitis or have been in contact with the disease within the past six months. Any unit of blood with a positive screening test for hepatitis is traced to the donor, who is then excluded from future donations.

failure to utilize sterile techniques and equipment,[24] and possibly for failure to comply with at least the minimum accepted local laboratory procedures for detection of viral hepatitis.[25]

Absent negligence, a transfusion recipient who subsequently contracts hepatitis is effectively barred from recovery by section 672.316(5). Although probably not vulnerable to due process or equal protection attacks,[26] the statute may contravene the provisions of article 1, section 21 of the Florida Constitution, which provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, demand or delay." In *Kluger v. White*,[27] the Florida Supreme Court discussed whether this provision

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24. Hepatitis can also be transmitted by the use of contaminated equipment. Therefore, it is imperative that all needles, blood containers, lancets, syringes and other equipment capable of infecting either donor or unit be sterile. If the transmission of hepatitis can be traced to a failure to utilize sterile technique and equipment, there should be ample ground for an action sounding in negligence. No cases alleging this type of negligence have been found, however.

25. *See* note 21 *supra*. The relatively inexpensive CEP test is available to virtually every hospital and blood bank, regardless of size. Failure to utilize this very basic test should amount to failure to exercise due care.

26. Ms. Williamson contended that § 672.316(5) was unreasonable and capricious class legislation that denied her equal protection under the law. Brief of Petitioner at 5, Williamson v. Memorial Hosp., 307 So. 2d 199 (Fla. 1st Dist. Ct. App. 1975). The First District Court of Appeal, in its answer to the certified question, did not address itself to this issue.

It is doubtful that § 672.316(5) offends the equal protection clause of the fourteenth amendment. In Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974), the Florida Supreme Court pointed out: "In order to comply with the requirements of the Equal Protection clause, statutory classifications must be reasonable and non-arbitrary, and all persons in the same class must be treated alike." *Id.* at 18. The classification involved in § 672.316(5) does not appear to be unreasonable or arbitrary. By declaring that any transaction involving blood for transfusion is to be considered "the rendering of a service *by any person* participating therein," FLA. STAT. § 672.316(5) (1973) (emphasis added), the legislature clearly intended to exempt all suppliers of blood from warranty liability. Thus all blood recipients are equally affected. The statute therefore seems to comport with the requirements outlined in *Lasky*.

Similar statutes in other jurisdictions have been upheld against both due process and equal protection attacks. In upholding the constitutionality of such a statute in Tennessee, the federal district court in McDaniel v. Baptist Memorial Hosp., 352 F. Supp. 690 (W.D. Tenn. 1971), *aff'd*, 469 F.2d 230 (6th Cir. 1972), pointed out that:

> The fact that the important service of blood transfusions has been singled out for legislative treatment, and immunity to some degree is bestowed, does not, in and of itself, make it unlawful or unconstitutional. . . . The question is whether the classification is so arbitrary and capricious as to constitute denial of equal protection. . . .
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> The law in question involves all within the class of selling or distributing blood or plasma equally and treats this activity as a medical service.

352 F. Supp. at 695. In affirming *McDaniel*, the Sixth Circuit cited these statements with approval, 469 F.2d at 235, as did the court in Heirs of Fruge v. Blood Services, 365 F. Supp. 1344 (W.D. La. 1973).

27. 281 So. 2d 1 (Fla. 1973). *See* 2 FLA. ST. U.L. REV. 178 (1974).

"bars the statutory abolition of an existing remedy without providing an alternative protection to the injured party."[28] The court concluded that article 1, section 21 bars the enactment of a statute that abolishes a common law right of redress unless the legislature provides a reasonable alternative procedure for redress or can justify its action on the basis of some "overpowering public necessity," and no alternative method of meeting that necessity can be shown.[29]

By exempting blood banks and hospitals from conventional implied warranty liability for transfusion-transmitted hepatitis, section 672.316(5) has, in essence, abolished an injured donee's common law right of redress.[30] It is questionable whether an action for such injuries sounding in negligence represents a reasonable alternative to an ac-

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28. 281 So. 2d at 3.

29. *Id.* at 4.

30. Although the concept of implied warranty of title has been recognized in Florida since the middle of the last century, *see* Lines v. Smith, 4 Fla. 47 (1851) (implied warranty of title in sale of slave), the first reference to an implied warranty of merchantability appeared in Demens v. LeMoyne, 8 So. 442 (Fla. 1890). In 1918, the Florida Supreme Court, in Berger v. E. Berger & Co., 80 So. 296 (Fla. 1918), held that an implied warranty of fitness applied to a sale of lumber.

> We think the rule is well established . . . that where a person contracts to supply an article in which he deals for a particular purpose, knowing the purpose for which he supplies it and that the purchaser has no opportunity to inspect the article, but relies upon the judgment of the seller, there is an implied condition or "warranty" as it is called, that the article is fit for the purpose to which it is to be applied.

Id. at 299. *See* note 14 *supra;* Parkinson & Sanders, *Implied Warranty in Florida,* 12 U. FLA. L. REV. 241, 248 (1959).

Despite the fact that implied warranty is well-established in Florida's common law, the precise language used by the *Kluger* court may create problems for anyone attacking § 672.316(5)'s constitutionality. In *Kluger,* the Florida Supreme Court stated that the legislature could not, without providing a reasonable alternative or showing an overpowering public necessity, abolish a right of redress "where such right has become a part of the common law of the State pursuant to Fla. Stat. § 2.01, F.S.A." 281 So. 2d at 4. FLA. STAT. § 2.01 (1973) provides:

> The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state.

Implied warranties of fitness or merchantability were apparently unknown in English common law in 1776. The first judicial recognition in England of implied warranties of quality did not appear until the early part of the nineteenth century. Gardiner v. Gray, 171 Eng. Rep. 46 (K.B. 1815); Laing v. Fidgeon, 128 Eng. Rep. 974 (C.P. 1815). *See* Ausness, *From* Caveat Emptor *to Strict Liability: A Review of Products Liability in Florida,* 24 U. FLA. L. REV. 410 (1972). *See generally* 2 A. SQUILLANTE & J. FONSECA, WILLISTON ON SALES § 15 (4th ed. 1974). The precise holding in *Kluger* may thus preclude claims that § 672.316(5) is violative of FLA. CONST. art. I, § 21. *But cf.* Coleman v. Davis, 120 So. 2d 56 (1st Dist. Ct. App. 1960).

tion sounding in implied warranty.[31] Absent a reasonable alternative, there must exist some overpowering public necessity for section 672.316(5). This requirement dictates close judicial examination, and perhaps a reevaluation, of the reasons for the enactment of this statute.[32]

Hopefully a reliable and effective method for detecting serum hepatitis will one day be developed and this legislation will become obsolete.[33] At present, the legislature has refused to subject producers of blood products to liability without fault. This exemption from liability represents a balancing of the desirability of private procurement and distribution of an essential commodity against the risk to the individual of contracting post-transfusion hepatitis. The *Williamson* decision makes it clear that, in the absence of negligence, the individual in need of blood must bear the loss resulting from hepatitis in return for the protection of an enterprise deemed essential to the public welfare.

LINDA JONES WELLS

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31. There are two important phases of blood bank operation where negligence may result in transfusion-transmitted hepatitis. These two phases are hepatitis testing of donor specimens, and donor screening and selection. Determining whether transfusion-transmitted hepatitis resulted from negligence in performing hepatitis detection tests or from the inability of the test itself to detect hepatitis is virtually impossible. Therefore, this phase is not susceptible to attack on grounds of negligence. *See* note 21 *supra*. Proving negligence in the area of donor selection is also difficult. It would appear that failure to question a prospective donor concerning his medical history and the probability of contact with hepatitis would amount to negligence. However, the causal relationship between such questioning and transfusion-transmitted hepatitis is tenuous. There is no means of determining whether the donor has truthfully answered questions even if asked. Thus it can be argued that failure to ask is no more related to transfusion-transmitted hepatitis than asking and receiving an untruthful answer. *See* Franklin, *Tort Liability for Hepatitis: An Analysis and a Proposal*, 24 STAN. L. REV. 439, 446-50 (1972).

32. *See* cases cited notes 6, 8, 13; notes 15, 21 *supra*. The only available statement of matters considered by the legislature in enacting § 672.316(5) is contained in the minutes of the House Committee on Public Health and Welfare: "What blood banks want is relief from liability for hepatitis because of the fact that their insurance rates are going up rapidly." File on 1968 House Public Health and Welfare (Legislative Library, Holland Building, Tallahassee, Florida).

33. *See* Georgia Southern & Florida Ry. v. Seven-Up Bottling Co., 175 So. 2d 39, 40 (Fla. 1965) ("a statute which is valid when enacted may become invalid by changes in . . . conditions"); Atlantic Coast Line R.R. v. Ivey, 5 So. 2d 244 (Fla. 1941).