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Torts

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VI. TORTS

A. (1) THE STANDARD OF CARE OWED BY OPERATOR OF AMUSEMENT PARK RIDE TO PASSENGERS IS THAT OF HIGHEST DEGREE.

(2) PLEA OF UNAVOIDABLE ACCIDENT MAY NO LONGER BE SET UP AS SEPARATE DEFENSE IN ACTION BASED ON NEGLIGENCE.

The case of *Lewis v. Buckskin Joe's, Inc.*[1] involved an action for personal injuries sustained by paying passengers of an amusement park stagecoach ride when the stagecoach overturned. In the lower court a jury had returned a verdict in favor of the defendants and against all of the plaintiffs. The Colorado Supreme Court concluded, in a split decision, that the lower court had committed error in instructing the jury that the defendants "owed a duty of ordinary care"[2] to the plaintiffs. Justice Hall, writing for the majority, held that under the circumstances of the case, the defendants "should be held to the highest degree of care,"[3] and failure to so instruct the jury constituted reversible error.[4] Four separate opinions, other than the majority opinion, were written in this case. Three of these, by Justices Day, Moore, and McWilliams, attacked, in whole or in part, the reasoning used in the majority opinion while the fourth, by Justice Frantz, tried to justify the majority's position.

Justice Hall, in the majority opinion, cited no cases supporting his pronouncement that the defendants "should be held to the highest degree of care."[5] He did say, however, that "it is not important whether defendants were serving as a carrier or engaged in activities for amusement,"[6] which could indicate that he meant to impose the same duty of care upon the operators of amusement park rides as has been placed upon common carriers.[7] If this was the court's in-

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[1] 396 P.2d 933 (1964). The case was a consolidation of three suits involving a total of twelve plaintiffs. Only nine of the original plaintiffs joined in the appeal.

[2] 396 P.2d at 938.

[3] 396 P.2d at 939.

[4] *Ibid.* The opinion also reprimanded the trial judge for numerous procedural errors which had been committed: (1) The trial judge incorrectly instructed the jury as to the issues from the pleading rather than from the evidence as presented—the two were considerably different (at 939); (2) In the instructions, seven of the twelve plaintiffs had been referred to merely as "et al.;" (3) The defendant was given an instruction relating to the contributory negligence of the plaintiffs even though he had not offered even a scintilla of evidence (at 940-41); (4) There was no evidence in the record that the jury had ever been submitted any verdict forms by which they could have found for any or all of the plaintiffs (at 942).

[5] *Id.* at 939.

[6] *Ibid.*

[7] For cases dealing with the duty owed by common carriers see Publix Cab Co. v. Fessler, 138 Colo. 547, 335 P.2d 865 (1959) (a taxi); Colorado Springs & I. Ry. v. Allen, 55 Colo. 391, 135 Pac. 790 (1913) (a train); Colorado & S. Ry. v. McGeorge, 46 Colo. 15, 102 Pac. 747 (1909) (a train); Sanderson v. Frazier, 8 Colo. 79, 5 Pac. 632 (1885) (a stagecoach); Kansas Pac. Ry. v. Miller, 2 Colo. 442 (1874) (a train).

tention, it must be recognized as contrary to the prevailing view in the United States and to earlier Colorado decisions.[8] While some jurisdictions would hold owners and operators of amusement devices to the highest degree of care[9]—equivalent to that required of a carrier of passengers—the weight of authority requires only ordinary or reasonable care commensurate with the risks involved.[10]

Justice Frantz indicated that perhaps the reason for requiring the "highest degree of care" from amusement park operators is that an earlier Colorado case, *Hook v. Lakeside Park Co.*,[11] requires it.[12] *Hook* involved an action for injuries suffered while riding in a Loop-O-Plane at Lakeside Amusement Park in Denver. The trial court dismissed the complaint at the close of plaintiff's case and entered judgment in favor of the defendant. The Colorado Supreme Court affirmed the trial court and said:

> The legal standard applicable to liability for injuries incurred on an amusement device is that of reasonable precautions to avoid injury, or as it is sometimes called, that of *ordinary care*.[13] (Emphasis added.)

From this language it seems clear that the *Hook* case does not require that operators of amusement devices exercise the "highest degree of care" but only "ordinary care." In *Hook* the court correctly stated

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[8] Hook v. Lakeside Park Co., 142 Colo. 277, 351 P.2d 261 (1960). In *Hook* the court said:

> The presumptions or inferences available to a passenger in an action against a carrier are not available in such circumstances [actions against operators of amusement devices]. The warranty of safe carriage, present in the carrier case, is absent where a plaintiff undertakes to ride on a device such as a Loop-O-Plane in an amusement park. [T]he predominant warranty which the operator offers is not that the passenger shall be safe, but that he shall receive a thrill. 142 Colo. at 282.

[9] See Pajak v. Mamsch, 338 Ill. App. 337, 87 N.E.2d 147 (1949) (a ferris wheel); Styburski v. Riverview Park Co., 298 Ill. App. 1, 18 N.E.2d 92 (1938); Gromowsky v. Ingersol, 241 S.W.2d 60 (Mo. Ct. App. 1951) (an airplane ride); Tennessee State Fair Assn. v. Hartman, 135 Tenn. 159, 183 S.W. 735 (1915) (the "Ocean Wave"); Banner v. Winton, 28 Tenn. App. 69, 186 S.W.2d 222 (1944) ("Loop-the-Loop").

[10] See Potts v. Crafts, 5 Cal. App. 2d 83, 42 P.2d 87 (1935) (miniature automobile); Firszt v. Capitol Park Realty Co., 98 Conn. 627, 120 Atl. 300 (1923) ("aeroplane swing"); Carlyle v. Goettee, 64 Ga. App. 360, 13 S.E.2d 206 (1941) (motor scooter); Bee's Old Reliable Shows, Inc. v. Maupins Admix., 311 Ky. 837, 226 S.W.2d 23 (1950) ("tilt-a-whirl"); Wagnespack v. Playland Corp., 195 So. 368 (La. App. 1940) ("loop-o-plane"); Carlin v. Smith, 148 Md. 524, 130 Atl. 340 (1925); Beaulieu v. Lincoln Rides, Inc., 328 Mass. 427, 104 N.E.2d 417 (1952) ("whip"); Frear v. Manchester Traction, Light & P. Co., 83 N.H. 64, 139 Atl. 86 (1927) (ferris wheel); Schweit v. Harum Scarum Amusement Corp., 247 App. Div. 755, 285 N.Y.S. 63 (1936) (revolving barrel); Durbin v. Humphrey Co., 133 Ohio St. 367, 11 Ohio Ops. 27, 14 N.E.2d 5 (1938) ("the bug"); Engstrom v. Huntley, 345 Pa. 10, 26 A.2d 461 (1942) ("tilt-a-whirl"); 4 AM. JUR. 2d *Amusements and Exhibitions* § 88 (1962).

[11] 142 Colo. 277, 351 P.2d 261 (1960).

[12] 396 P.2d at 946.

[13] 142 Colo. at 281-82.

that operators of amusement park devices must "render care commensurate with the risk involved."[14] The court also held that the Loop-O-Plane involved in that case was "extremely and intrinsically hazardous" and "consequently a slight deviation from the standard"[15] would render the operator liable for resultant injuries. Justice Frantz, and perhaps Justice Hall, determined that *Hook* was susceptible of two interpretations and read the decision as requiring every operator of an amusement park ride to exercise the highest degree of care.[16] This interpretation not only seems contrary to the express language of *Hook,* as pointed out by Chief Justice Moore[17] and Justice McWilliams[18] in their separate opinions, but it also tends to establish "degrees of care" contrary to the dictates of an early Colorado case.[19]

In placing upon the operators of amusement park rides the burden of exercising "the highest degree of care," as opposed to "reasonable care under the circumstances" or "ordinary care," the Colorado Supreme Court has taken a position contrary to the weight of authority[20] and contrary to Colorado precedent.[21]

The second major change in Colorado tort law arising out of the *Lewis* case, by way of dictum, is the prohibition against further use of the defense of "unavoidable accident" to allegations of negli-

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[14] *Id.* at 282. See cases cited *supra* note 10.

[15] *Id.* at 282.

[16] 396 P.2d at 946.

[17] *Id.* at 944-45. Justice Moore contended, "It is my opinion that the majority opinion in this [degree of care owed by the defendants] connection is out of harmony with Hook v. Lakeside Park Co. " (Citation omitted.)

[18] *Id.* at 947-48. Justice McWilliams made it clear that he did not consider this a "carrier case" but recognized that there is "a sharp division of judicial expression as to the standard of care owed by the owner and operator of an amusement park device to its patrons." (at 947). Regarding this division of opinion, McWilliams said, "This matter has already been considered by this court in Hook v. Lakeside Park Co." (Citation omitted.) (at 948). He then stated that in his opinion *Hook* required only "reasonable or ordinary care under all the facts and circumstances." (at 948).

[19] Denver Consolidated Electric Co. v. Simpson, 21 Colo. 371, 376, 41 Pac. 499 (1895). The court stated, "This court does not recognize any degrees of negligence, such as slight or gross and logically it ought not to recognize any degrees of its antithesis, care." See generally 65 C.J.S. *Negligence* § 10 (1950). *Cf.,* Clark v. Colorado & N.W.R.R., 165 Fed. 408, 411 (8th Cir. 1908). *But see* Wall v. Cameron, 6 Colo. 275, 277 (1882) (a common carrier case).

[20] See cases cited *supra* note 10.

[21] Hook v. Lakeside Park Co., 142 Colo. 277, 351 P.2d 261 (1960).

[22] 396 P.2d at 942, where Justice Hall stated:

> We conclude that from and after announcement of this opinion, an instruction on unavoidable accident should never be given; and, though recognizing that accidents may be unavoidable, now go on record holding that a plea of unavoidable accident may not be set up as a separate or independent defense and that to now instruct on unavoidable accident is error. We expressly overrule previous pronouncements of this court to the contrary.

gence.[22] While such a prohibition is contrary to the majority view,[23] it is well-founded in reason. An examination of the reason supporting the change shows that the change will prove to be more of procedure than substance. The only real loss to the defendant is a mechanical instruction—proof of a so-called "unavoidable accident" will still require a verdict in favor of the defendant.

In an action for injuries based on defendant's failure to use reasonable care, plaintiff must prove by a preponderance of the evidence that the defendant was negligent; that he owed the plaintiff a duty to use care; and that as a proximate result plaintiff was injured. Since, by definition,[24] an unavoidable accident is one which did not result from an act of negligence, the defendant can prevent recovery by plaintiff by satisfying the jury that the accident which caused the injury was unavoidable. However, prior to the *Lewis* case the defendant was, in effect, entitled to a double instruction on the defense of unavoidable accident.[24] It was the desire to avoid this "added 'you-should-find-for-the-defendant' type of instruction,"[25] which might "be misunderstood by the jury as constituting some sort of separate defense,"[26] that prompted the court to overrule a great deal of Colorado precedent upholding the giving of un-

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[23] See, *e.g.*, Beliak v. Plants, 84 Ariz. 211, 326 P.2d 36 (1958); Industrial Farm Home Gas Co. v. McDonald, 355 S.W.2d 174 (Ark. 1962); Seney v. Trowbridge, 127 Conn. 284, 16 A.2d 573 (1940); Panaro v. Cullen, 185 A.2d 889 (Del. 1962); Hart v. Jackson, 142 So. 2d 326 (Fla. App. 1962); Boatright v. Susebee, 108 Ga. App. 19, 132 S.E.2d 155 (1963); Turner v. Purdum, 77 Ida. 130, 289 P.2d 608 (1955); Wolpert v. Weidbreder, 21 Ill. App.2d. 486, 158 N.E.2d 421 (1959); Shane v. Fields, 190 N.E.2d 195 (Ind. App. 1963); Schevers v. American Ry. Exp. Co., 195 Iowa 423, 192 N.W. 255 (1923); Employers' Mut. Cas. Co. v. Martin, 189 Kan. 498, 370 P.2d 110 (1962); Massie v. Salmon, 277 S.W.2d 49 (Ky. 1955); Schapiro v. Mayers, 160 Md. 208, 153 Atl. 27 (1931); Agranowitz v. Levine, 298 Mich. 18, 298 N.W. 388 (1941); Daly v. Springer, 244 Minn. 108, 69 N.W.2d 98 (1955); Leach v. Great Northern R.R., 139 Mont. 84, 360 P.2d 94 (1960); Horrocks v. Rounds, 70 N.M. 73, 70 P.2d 799 (1962); Buchanan v. Smith, 5 App. Div. 2d. 950, 171 N.Y.S.2d 212 (1958); Reuter v. Olson, 79 N.D. 834, 59 N.W.2d 830 (1953); Simensky v. Zwyer, 40 Ohio App. 275, 178 N.E. 422 (1931); Wofford v. Lewis, 377 P.2d 37 (Okla. 1962); Cordell v. Scott, 79 So. Dak. 316, 111 N.W.2d 594 (1961); Bourne v. Barlar, 17 Tenn. App. 375, 67 S.W.2d 751 (1933); Blanton v. E. & L. Transport Co., 146 Tex. 377, 207 S.W.2d 368 (1948); Wellman v. Noble, 12 Utah 2d 350, 366 P.2d 701 (1961); Hoge v. Anderson, 200 Va. 364, 106 S.E.2d 121 (1958).

[24] PROSSER, TORTS § 29, at 143 (3d ed. 1964):

> An unavoidable accident is an occurrence which was not intended, and which, *under all the circumstances, could not have been foreseen or prevented by the exercise of reasonable precautions.* (Emphasis added.)

See Piper v. Mayer, 145 Colo. 391, 394-95, 360 P.2d 433 (1961).

[24] The jury was instructed on the one hand that the plaintiff cannot recover unless he proves negligence, and on the other hand that the plaintiff cannot recover if his injuries were the result of an unavoidable accident.

[25] 396 P.2d at 941 quoting from Fenton v. Aleshire, 393 P.2d 217 (Ore. 1964).

[26] 396 P.2d at 941.

avoidable accident instructions.[27] It was the overruling of this precedent to which Justice Moore objected and to which he referred as an act of "judicial legislation"[28] based on the court's "philosophical notions of what the law should be."[29]

In spite of Justice Moore's objections, the position taken by the court finds increasing support in some jurisdictions[30] and, more important, is based on the sound reasoning of avoiding a "double instruction."

B. IMPLIED WARRANTY OF WHOLESOMENESS AND FITNESS DOES NOT ATTACH TO BLOOD TRANSFUSION.

The case of *Sloneker v. St. Joseph's Hospital*,[31] tried in Colorado Federal District Court, raised a question which has never been decided by the Colorado Supreme Court: whether an implied warranty of wholesomeness and fitness attaches to hospital blood transfusions. The court followed the much criticized[32] leading case of *Perlmutter v. Beth David Hospital*,[33] and answered the question in the negative. In *Sloneker*, the plaintiff was given a blood transfusion while undergoing a medical operation at St. Joseph's Hospital in Denver. As a result of a virus carried by the blood used in the transfusion,

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[27] Miller v. Brazel, 300 F.2d 283 (10th Cir. 1962) (giving of the instruction was proper); Hinkle v. Union Transfer Co., 229 F.2d 403 (10th Cir. 1955) (giving of the instruction was proper); Daigle v. Prather, 152 Colo. 115, 380 P.2d 670 (1963) (giving of the instruction was proper); Dugan v. Kuner-Empson Co., 149 Colo. 343, 369 P.2d 82 (1962) (giving of the instruction was proper); Piper v. Mayer, 145 Colo. 391, 360 P.2d 433 (1961) (under this fact situation, giving of instruction constituted grounds for reversal); Baker v. Williams, 144 Colo. 470, 357 P.2d 61 (1960) (evidence did not warrant an instruction); Jacobson v. McGinness, 135 Colo. 357, 311 P.2d 696 (1957) (error to give instruction under these facts); Stephens v. Lung, 133 Colo. 560, 298 P.2d 960 (1956) (giving of instruction was proper); Union Pac. R.R. v. Shupe, 131 Colo. 271, 280 P.2d 1115 (1955) (failure to give instruction required reversal); Ridley v. Young, 127 Colo. 46, 253 P.2d 433 (1953) (giving of instruction was proper); Maloney v. Jussel, 125 Colo. 125, 241 P.2d 862 (1952) (giving of instruction was proper); Goll v. Fowler, 124 Colo. 404, 238 P.2d 187 (1951) (giving of instruction proper but not under these facts); McBride v. Woods, 124 Colo. 384, 238 P.2d 183 (1951) (giving of instruction proper but not under these facts); Iacino v. Brown, 121 Colo. 450, 217 P.2d 266 (1950) (giving of instruction was proper); Boulder Valley Coal Co. v. Jernberg, 118 Colo. 486, 197 P.2d 155 (1948) (giving instruction is proper but not under these facts). It must be noted that although the instruction on unavoidable accident has received sanction in Colorado, it could be used only in limited situations as discussed in *Piper, supra.*

[28] 396 P.2d at 945.

[29] *Ibid.*

[30] See Socier v. Woodard, 264 Ala. 514, 88 So. 2d 783 (1956); Bridgeman v. Safeway Stores, Inc., 53 Cal. 2d 443, 348 P.2d 696 (1960) (overruling about 65 earlier cases); Butigan v. Yellow Cab Co., 49 Cal. 2d 652, 320 P.2d 500 (1958); Klesath v. McQueen, 312 S.W.2d 122 (Mo. 1958); Harding v. Hoffman, 158 Neb. 86, 62 N.W.2d 333 (1954); La Duke v. Lord, 97 N.H. 122, 83 A.2d 138 (1951); Fenton v. Aleshire, 393 P.2d 217 (Ore. 1964); Larrow v. Martell, 92 Vt. 435, 104 Atl. 826 (1918); Van Matre v. Milwaukee Elec. R. & Transport Co., 268 Wis. 399, 67 N.W.2d 831 (1954).

[31] 233 F. Supp. 105 (D. Colo. 1964).

[32] *E.g.*, 69 HARV. L. REV. 391 (1955); 29 ST. JOHN'S L. REV. 305 (1955); 103 U. PA. L. REV. 833 (1955).

[33] 308 N.Y. 100, 123 N.E.2d 792 (1954).

the plaintiff contracted a disease known as serum hepatitus or homologous serum jaundice. Recovery was sought, based on the theory of negligence and on the theory of an implied warranty of wholesomeness and fitness with respect to the blood. The district court granted a motion to dismiss the breach of implied warranty claim and ruled that trial must be had on the issue of negligence. In so deciding, Judge Doyle wrote that:

> [I]n a blood transfusion service is the predominant factor and that the extra charge for the blood in no way indicates a sale but is merely an incidental feature of the services rendered.[34]

Since the court could find no sale, it concluded that there was no implied warranty. However, to say that a warranty is implied in a sale is not to say that none is implied if there is no sale.

The reliance placed upon the distinction between a pure sale and a sale which is merely incidental to a service is by no means a recent judicial innovation. For example, at common law and in the early decisions under the Uniform Sales Act[35] it was generally held that a restaurant did not warrant the quality of the food it served since the serving of the food was an "utterance" and no "sale" took place.[36] The courts felt the customer entered a restaurant primarily for the services it offered. Later decisions have generally rejected this view, and followed instead the so-called Massachusetts-New York rule[37] that an implied warranty attaches to the food even without a finding of a technical sale. However, this rule has not been applied in any blood transfusion cases. The sale-service distinction has also been discarded in some non-food cases,[38] including one which dealt with a polio vaccination administered by a physician.[39]

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[34] 233 F. Supp. at 106.

[35] Farnsworth, *Implied Warranties of Quality in Non-Sale Cases*, 57 COLUM. L. REV. 653 (1957).

[36] See cases cited at 1 WILLISTON, SALES § 242(b) (rev. ed. 1948), n. 5.

[37] The leading case supporting this rule is Friend v. Childs Dining Hall Co., 231 Mass. 65, 120 N.E. 407 (1918). See DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 157-80 (1951). *Contra*, Merrill v. Hodson, 88 Conn. 314, 91 Atl. 533 (1914) which is the leading case supporting the contrary Connecticut-New Jersey rule. For a complete discussion of both rules see Annot., 7 A.L.R.2d 1027 (1949).

[38] *E.g.*, Aced v. Hobbs-Sesack Plumbing Co., 12 Cal. Rptr. 257, 360 P.2d 897 (1961) (installation of a heating system held not even true sale of the materials installed, but nevertheless a warranty attached); Carver v. Denn, 117 Utah 180, 214 P.2d 121 (1950) (air conditioner sold with installation included was warranted); Delco Auto Supply Co. v. Tobin, 198 Misc. 601, 100 N.Y.S.2d 135 (Sup. Ct. 1950) (parts for clutch warranted even though installed by mechanic).

[39] 6 Cal. Rptr. 320 (1960), where the court said:

> In view of the established California rule that a consumer of a food product may recover from the manufacturer upon implied warranty, is there any reason to apply a different rule to the vaccine here involved? We think not. The vaccine is intended for human consumption quite as much as food. We see no reason to differentiate the policy considerations requiring pure and wholesome food from those requiring pure and wholesome vaccine.
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> The fact that the entry is made by injection rather than ingestion in no way alters the premise that each is for human consumption—each enters the human system. (At 323.)

The similarity between the English Sales of Goods Act and the Uniform Sales Act[40] is so great as to suggest an examination of the method by which the English courts have handled the sale-service problem. English decisions have held that a warranty may be implied to the part of the transaction that is concerned with goods furnished even though the service is the predominant factor in the transaction and the sale only incidental.[41] They will not, however, extend the warranty to the labor or services involved in the transaction.

Perhaps the real basis for the findings of "no sale" in cases such as *Sloneker* is a conscious or unconscious resolution of policy issues rather than a technical definition of a "sale" as used in the Uniform Sales Act. Evidence of this is found in *Perlmutter,* where the court said:

> 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 . . . .[42]

Such a statement ignores the real reason for implied warranties; *i.e.,* to protect the consumer who cannot protect himself. In line with this, the courts, in deciding cases involving fact situations like the one in *Sloneker,* should consider: (1) the factual difficulty in proving negligence in such cases; (2) the possibility that the doctrine of charitable immunity will preclude recovery even if the hospital is found negligent; (3) the availability of inexpensive liability insurance for hospitals; (4) the ability of the hospital to apportion the risk among the general public; (5) which party is best able to suffer the loss (assuming both parties are innocent) while recognizing that the patient has no choice but to rely on the hospital (even persons eating food in restaurants are better able to detect impurities); (6) the possibility that the imposition of strict liability on hospitals will promote discovery of more effective methods of detecting the presence of virus in blood.

Another criticism can be made of the allegiance the courts have shown to the use of the sale-service distinction as the test by which

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[40] Section 14(1) of the English Sales of Goods Act is the same as § 15(1) of the Uniform Sales Act, which reads:

> Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not) there is an implied warranty that the goods shall be reasonably fit for such purpose.

[41] Dodd v. Wilson, [1946] 2 All E.R. 691 (K.B.) (defendant vaccinated plaintiff's cattle with defective vaccine); Watson v. Buckley, [1940] 1 All E.R. 174 (K.B. 1939) (defendant used defective dye on plaintiff's hair); G. H. Myers & Co. v. Brent Cross Serv. Co., [1934] 1 K.B. 46, 150 L.T.R. 96 (1933) (materials used by defendant to repair plaintiff's automobile). See Note, 31 IND. L.J. 367 (1956).

[42] 123 N.E.2d at 795.

to determine whether or not the "purchaser" is protected by an implied warranty. This criticism is based on the analytical confusion which will result from its continued use. For example, the same policy considerations underlying the current findings of non-liability in the case of blood tranfusion cases dictate a similar finding of non-liability in the case of blood banks. However, it would require strained reasoning to rationalize non-liability on the grounds of no sale, since blood banks generally offer no services to the patient, but merely supply the hospital with the blood.[43]

It is unfortunate that the Colorado Federal District Court chose to follow the *Perlmutter* reasoning. Considering the historical development of the restaurant-food cases, and the English resolution of the sale-service dilemma, it is submitted that the more modern approach would be to find hospitals strictly liable for the damages caused by the transfusion of impure blood.

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[43] However, this result was reached in Golez v. J. K. and Suzy L. Wadley Research Institute and Blood Bank, 50 S.W.2d 573 (Tex. 1961).