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# Sales - Implied Warranty - Blood Received from a Blood Bank

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concerned with the problem of dual aspect uses of public property leased to private individuals. It would appear from the facts and decisions of these cases, that, if faced with the tax problem created by the "oases," California and Indiana would not favor an exemption, while Massachusetts would allow the exemption to stand. As noted earlier, Ohio would probably continue strictly to construe the "exclusive" requirement of its constitution<sup>40</sup> and disallow an exemption. New Jersey, on the other hand, under almost identical circumstances, approved of the exemption. The only other jurisdiction to have considered the problem of dual aspect uses was New York, which, through a liberal application of the primary use doctrine, has approved of such an exemption.<sup>41</sup> Without any decisions to indicate otherwise, it must be presumed that remaining jurisdictions continue to construe constitutional and statutory grants of exemption against the party to be taxed and the exemption. Illinois, in following the view of the Massachusetts, New York, and New Jersey courts, represents the new trend. The real purpose behind this new trend is not merely the recognition of supremacy of the primary use doctrine based on the benefit bestowed upon the public but, more importantly, a recognition of the expanding use of publicly-owned property in a proprietary manner to serve public ends. In discussing a New York case which had supported an exemption in a dual aspect situation, one commentator stated that:

[T]he tone of the case indicates the court is attempting to ease the restrictions on incidental use of state property for a private purpose.<sup>42</sup>

As more jurisdictions are confronted with this still novel problem of dual aspect leases, they will begin to adopt the view of the Illinois court. It is inevitable that, as the scope and functions of city and state government expand to meet the increasingly complex problems of industrialization and urbanization, the courts will be confronted with many more cases involving the dual aspect use of public property.

*Bruce Rashkow*

<sup>40</sup> *Supra* note 31.

<sup>41</sup> *State Insurance Fund v. Hamblin*, 31 Misc. 2d 977, 222 N.Y.2d 732 (1961).

<sup>42</sup> Note, 13 SYRACUSE L. REV. 617 (1962).

### SALES—IMPLIED WARRANTY—BLOOD RECEIVED FROM A BLOOD BANK

Plaintiff's wife entered St. Mary's Hospital for treatment of an ailment. While being treated, she required several blood transfusions which were administered by the hospital using whole blood supplied by the defendant

blood bank. After several weeks, the patient developed infectious serum hepatitis caused by the defendant's supply of jaundiced blood. The patient became severely ill, and subsequently, her husband sued the defendant for his wife's injuries under derivative rights. Recovery was denied. *Balkowitsch v. Minneapolis War Memorial Blood Bank*, 132 N.W.2d 805 (Minn. 1965).

The plaintiff's argument for recovery was predicated upon two contentions. First, a sale had taken place between the parties, since the plaintiff had received blood and the defendant direct payment for the blood. Secondly, an implied warranty of merchantability had accompanied the sale, warranting that the substance sold was of merchantable quality.<sup>1</sup> Plaintiff contended that since the blood sold to him caused serious injury to his wife, it was not of merchantable quality, and he sought recovery on these grounds. The court denied plaintiff recovery on the theory holding that a transfer of blood was more a service than a sale.<sup>2</sup> This rejection by the court of the sales warranty theory of recovery necessitates an analysis and discussion of the implications of this theory as applied to a factual situation such as appears in the *Balkowitsch* case.

In discarding the sales warranty theory in the *Balkowitsch* case, the court reviewed several serum hepatitis cases which had previously rejected the theory.<sup>3</sup> Since hospitals were defendants in all of these cases, in order to hold as they did in the instant case, the court concluded that hospitals and blood banks performed similar acts.<sup>4</sup> However, if the court had concluded that blood banks and hospitals differed in function, all of the preceding serum hepatitis case holdings which had rejected the warranty theory of recovery would have been inapplicable to the *Balkowitsch* factual situation. One rationale for distinguishing a blood bank from a hospital is that a hospital can perform the functions of a blood bank but, conversely, a blood bank cannot function as a hospital.<sup>5</sup> Since blood banks cannot provide the overall curative services of a hospital, the court could not have adopted the reasoning of the hospital cases to reject the sales warranty theory as it did in this case. The reasoning was peculiar to hospitals and could not be expanded to include blood banks. The court, therefore, would have been forced to seek different authority in arriving at a conclusion.

<sup>1</sup> *Balkowitsch v. Minneapolis War Memorial Blood Bank*, 132 N.W.2d 805 (Minn. 1965).

<sup>2</sup> *Id.* at 810.

<sup>3</sup> *Id.* at 809.

<sup>4</sup> *Id.* at 810.

<sup>5</sup> By defining a blood bank as "a place for storage of or an institution storing blood or plasma," WEBSTER, THIRD NEW INTERNATIONAL DICTIONARY 237 (1961 ed.), the court could have held that a blood bank could not function as a hospital, because, as a logical analysis of this definition illustrates, a hospital when storing blood can function as a blood bank, but, conversely, a blood bank in no way can assume all of the services of a hospital.

A careful examination of the "hospital" serum hepatitis cases illustrates their inapplicability in reasoning to the *Balkowitsch* factual situation. The landmark *Perlmutter* hospital case,<sup>6</sup> which was representative of those hospital cases relied upon by the court in the *Balkowitsch* decision,<sup>7</sup> was described as the leading of several "serum hepatitis blood-bank cases"<sup>8</sup> in which plaintiff had adopted the theory that a blood transfusion constituted a sale. In this case, the patient-plaintiff brought a cause of action against the hospital-defendant for providing jaundiced blood from which plaintiff contracted serum hepatitis.<sup>9</sup> The court held that a hospital could not be sued on a sales warranty theory because no sale had taken place, reasoning that the patient had bargained for the general overall services of the hospital to administer a cure and not merely for the transfer of blood from the hospital to the patient.<sup>10</sup> Such a transfer was in effect a part of the overall contract which the court further stipulated was indivisible.<sup>11</sup>

The *Balkowitsch* factual situation differs significantly from the facts in the *Perlmutter* case. In the *Balkowitsch* case, the patient-plaintiff did not bring a cause of action against a hospital-defendant for a defect in overall hospital services, but based its action against the blood-bank-defendant merely for the transfer (sale) of the jaundice producing blood.<sup>12</sup> The simple objective of this contract was that the defendant supply pure, infection-free, blood to the patient for direct monetary consideration. Unlike the *Perlmutter* and similar cases, overall services to effect a cure for the patient in no way became a part of the objective of the contract between the patient and the blood bank.

Therefore, if the *Balkowitsch* court had concluded that hospitals and blood banks functioned differently, it would have been forced to conclude that a blood bank does not offer overall curative services and that such services are not bargained for; the sole objective of the transaction is a transfer of blood from the blood bank to patient, which results in a sale. Hence, the court would have had to discard the hospital line of cases as precedent for rejecting the sales warranty theory, because the *Perlmutter* "overall" service theory was inapplicable. If the court had so held, other authority could have been sought in support of a conclusion.

<sup>6</sup> *Perlmutter v. Beth David Hospital*, 308 N.Y. 100, 123 N.E.2d 792 (1954).

<sup>7</sup> *Balkowitsch v. Minneapolis War Memorial Blood Bank*, *supra* note 1 at 809-10.

<sup>8</sup> *Hidy v. State*, 207 Misc. 207, 151 N.Y.S.2d 621 (1955), *aff'd*, 2 N.Y.2d 756, 143 N.E.2d 528, 163 N.Y.S.2d 985 (1957); *Koenig v. Milwaukee Blood Center, Inc.*, 23 Wis. 2d 324, 127 N.W.2d 50 (1964); *Dibble v. Dr. W. H. Groves Latter-Day Saints Hospital*, 12 Utah 2d 241, 364 P.2d 1085 (1956); and *Gile v. Kennewick Public Hospital Dist.*, 48 Wash. 2d 774, 296 P.2d 662 (1956).

<sup>9</sup> *Perlmutter v. Beth David Hospital*, *supra* note 6.

<sup>10</sup> *Id.* at 102, 123 N.E.2d at 794.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc.*, *supra* note 1 at 805.

In a federal district case, the court classified "blood plasma" as a drug,<sup>13</sup> the processing of which is regulated under the Virus, Serum and Toxic Act<sup>14</sup> of the Department of Health, Education, and Welfare. From this, it could be concluded that drug cases dealing with serums (i.e., vaccines) sold by manufacturers to patients would be most analogous to the *Balkowitsch* case. Such a drug case is *Gottsdanker v. Cutter Laboratories*.<sup>15</sup> In this case, a child had been inoculated with the Salk polio vaccine<sup>16</sup> manufactured by defendant laboratories. The child later contracted polio from the vaccine which had contained live poliomyelitis virus. As one ground of recovery,<sup>17</sup> the plaintiff alleged that the supplier manufacturer had breached the implied warranty of merchantability. The court granted recovery on this strict liability theory, stating that in California, the rule provided that the consumer of adulterated food products could recover upon an implied warranty of merchantability and that there is "no reason to differentiate the policy considerations requiring pure and wholesome food from those requiring pure and wholesome vaccine."<sup>18</sup> Since blood plasma<sup>19</sup> can be classified as a drug, certainly this policy argument should be applicable to blood when transfused into the body. According to one commentator, the argument may be stronger regarding blood plasma because

[t]he defenses provided by the digestive system as a means of rejecting or minimizing the effects of many toxic compounds taken orally are much less available as against harmful elements introduced into the system by injection.<sup>20</sup>

<sup>13</sup> *Merek & Co. v. Kidd*, 242 F.2d 592 (6th Cir. 1957).

<sup>14</sup> 42 U.S.C.A. § 262 (1964).

<sup>15</sup> 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960).

<sup>16</sup> Both the heterogenous and autogenous vaccines are made of microorganisms which have been isolated from persons having a particular infectious disease. Vaccines liken themselves to blood transfused into the body in that both emanate from one person and are either injected or transfused into another. 23 *ENCYCLOPEDIA BRITANNICA* 924 (1961 ed.).

<sup>17</sup> Another ground upon which plaintiff sought recovery was negligence; however, the case was decided upon the implied sales warranty theory. *Gottsdanker v. Cutter Laboratories*, *supra* note 15.

<sup>18</sup> *Id.* at 607, 6 Cal. Rptr. at 323.

<sup>19</sup> Plasma is the fluid part of the blood remaining after the red cells have been removed. It is more advantageous to administer plasma rather than whole blood because the typing of plasma is less necessary since plasma from one individual can generally be given to anyone else regardless of blood groups. Both whole blood and plasma can be jaundiced and contain the serum hepatitis virus. 3 *ENCYCLOPEDIA BRITANNICA* 749 (1961 ed.), see also *Hidy v. State*, *supra* note 8.

<sup>20</sup> Note, 18 *OKLA. L. REV.* 104, 108 (1965).

Even though courts in the blood bank cases have rejected the analogy between the implied warranty of food and that of blood,<sup>21</sup> the *Gottsdanker* analysis, relating food to drugs, indicates that such an analogy exists.<sup>22</sup> As early as 1936, one court held that the dispenser of food for consumption on the premises impliedly warranted that such was of merchantable quality, even though the food had not been prepared by the dispenser.<sup>23</sup> The court stated that “[t]he customer knows that mere due care in the selection and preparation of food will not fully protect the customer. Nothing will protect him effectively but wholesome food.”<sup>24</sup> This court’s argument can be adopted to a situation wherein a patient relies on the judgment and skill of the blood bank to supply wholesome blood. Due care is not enough to protect the patient.<sup>25</sup> Nothing will protect him effectively but wholesome blood. Therefore, this argument, when applied to blood banks, asserts that nothing other than a strict liability theory in either tort or contract (i.e., sales warranty) can be used to gain recovery from a blood bank by a patient injured by jaundice blood.

Thus, the authority provided by analogous drug and food cases indicates that a patient should be able to recover on an implied warranty theory from a blood bank which sold jaundice-producing blood to the patient for a direct monetary consideration.

According to the case law, it appears that a court should be able to grant recovery to a plaintiff seeking damages from a blood bank on a sales warranty theory if the court relies on food and drug case authority. If such a factual situation as arose in the *Balkowitsch* case should arise in a jurisdiction which has adopted the Uniform Commercial Code, a different decision might result from that rendered in the *Balkowitsch* case. There have been no decisions in Uniform Commercial Code Jurisdictions directly in point, but an indication of the treatment given by the Code can be seen by examining sections of the Uniform Commercial Code text and comments, as well as associated cases.

Section 2-102 of the Code, provides that “[u]nless the context other-

<sup>21</sup> *Perlmutter v. Beth David Hospital*, *supra* note 6; *Dibble v. Dr. S. H. Groves Latter-Day Saints Hospital*, *supra* note 8.

<sup>22</sup> *Gottsdanker v. Cutter Laboratories*, *supra* note 15 at 607, 6 Cal. Rptr. at 323.

<sup>23</sup> *Cushing v. Rodman*, 82 F.2d 864 (1936); see *Decker and Sons v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942).

<sup>24</sup> *Cushing v. Rodman*, *supra* at 868.

<sup>25</sup> Medical science has obviated recovery in serum hepatitis cases on a theory of *negligence* because there is no scientific way of discovering serum hepatitis virus in either the blood donated or the donor. If there is to be recovery in these cases, it will have to be on a theory of strict liability. See *Alsever, The Blood Bank and Homologous Serum Jaundice*, 261 NEW ENGLAND JOURNAL OF MEDICINE 383 (1959).

wise requires, this article applies to transactions in goods."<sup>26</sup> If a supply of blood can be considered as goods within the confines of the Code and there are no provisions to the contrary, the Code would govern transactions regarding the transfer of blood. The Code defines "goods" as "*all things . . . which are movable at the time of identification to the contract for sale, other than money . . . investment securities and things in action.*"<sup>27</sup> Nowhere in the Code text or comments is there a further expansion or delineation of the definition of "all things."<sup>28</sup> Since blood has not been expressly or impliedly excluded as a thing and is a movable quantity at the time of identification to a contract of sale, it would appear that a supply of blood can be considered as "goods" within the confines of the Code.<sup>29</sup>

The Code provides that a contract or agreement for a sale refers to the present or future sale of goods,<sup>30</sup> and that "a 'sale' consists in the passing of title from seller to the buyer for a price."<sup>31</sup> In the *Balkowitsch* case, the plaintiff and defendant had entered into an agreement whereby the defendant passed title to a movable thing identifiable to the contract at its inception for a price paid by the plaintiff. Accordingly, this would appear to be a sale which would be governed by the provisions of the Uniform Commercial Code.

Under the provisions of the Code, in order for an implied warranty of merchantability to attach to the sale of goods, the seller must be a merchant with respect to the goods sold.<sup>32</sup> Section 2-104 defines a person who deals in goods of a kind as a merchant.<sup>33</sup> Therefore, if a quantity of blood can be considered as goods, a seller of blood (i.e., blood bank) should be considered as a merchant. The Code does not require that a profit motive underly a transaction in order for a person or institution to be considered a merchant.<sup>34</sup> The only Code qualification for a merchant is that he deal in goods of a kind. If a seller of goods also qualifies as a merchant, an implied warranty of merchantability then attaches to goods

<sup>26</sup> UNIFORM COMMERCIAL CODE § 2-102.

<sup>27</sup> UNIFORM COMMERCIAL CODE § 2-105 (emphasis added).

<sup>28</sup> UNIFORM COMMERCIAL CODE, Art. 2.

<sup>29</sup> For further discussion of what constitutes "goods" under the Uniform Commercial Code, see SMITH AND ROBERSON BUSINESS LAW 165 (Uniform Commercial Code ed. 1962).

<sup>30</sup> UNIFORM COMMERCIAL CODE § 2-106.

<sup>31</sup> UNIFORM COMMERCIAL CODE § 2-106. For an expansion of the definition of a "sale" not to the contrary, see *Arrowhead Sportswear Corp. v. School District*, 22 Pa. D.&C.2d 134, (1960); *National Dairy Products Corp. v. Gleeson*, 16 Pa. D.&C.2d 390, 72 Dauph. 112 (1958).

<sup>32</sup> UNIFORM COMMERCIAL CODE § 2-314(1).

<sup>33</sup> UNIFORM COMMERCIAL CODE § 2-104.

<sup>34</sup> UNIFORM COMMERCIAL CODE, Art. 2.

sold.<sup>35</sup> Section 2-314(1) explicitly provides that the serving of food or drink is a sale. This provision, viewed in the light of the *Gottsdanker* and *Merek* expansion,<sup>36</sup> would allow such a warranty to accompany the sale of vaccine as well as blood plasma. The implied warranty of merchantability imposed is limited in that it applies only to those goods which are used for the ordinary purpose for which such goods were developed.<sup>37</sup> This requirement seems to indicate that goods must be of ordinary quality when sold. In the case of blood, since medical science cannot discover whether blood is infected with serum hepatitis or not,<sup>38</sup> this provision might be satisfied by labeling the blood to the effect that the user might contract serum hepatitis from a transfusion of such blood. Thus, in a situation where a blood bank supplies blood directly to the patient for a price, according to this interpretation of the Code, a sale has occurred. Such a sale, furthermore, carries with it the implied warranty of merchantability, which, if broken, gives a cause of action to the injured party.

To date, there has been only one reported Code case that has interpreted those Code sections analyzed in this note. In *Epstein v. Giannattasio*,<sup>39</sup> plaintiff requested a beauty treatment and suffered acute dermatitis and disfigurement because of a misuse of certain products by her beauty salon. She sought recovery against the salon and the maker of the product on an implied sales warranty theory. To arrive at a conclusion, the *Epstein* court analyzed and discussed several of the pertinent Code provisions.<sup>40</sup> After such an analysis, the court held that where service is the predominant feature of a transaction, even though goods are also transferred during that transaction, the transfer is incidental to the overall service, and no sale has been accomplished under the provisions of the Uniform Commercial Code.<sup>41</sup>

In arriving at its holding the court relied on "a . . . dearth of case law construing the statutes . . ." <sup>42</sup> which were drawn from pre-Code food

<sup>35</sup> UNIFORM COMMERCIAL CODE § 2-314 (1): "Unless excluded or modified (§ 2-316), a warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind."

<sup>36</sup> *Merek & Co. v. Kidd*, *supra* note 13; *Gottsdanker v. Cutter Laboratories*, *supra* note 15.

<sup>37</sup> UNIFORM COMMERCIAL CODE § 2-314(2C): "Goods to be merchantable must be at least such as are fit for the ordinary purposes for which such goods are used."

<sup>38</sup> See *supra* note 25.

<sup>39</sup> 25 Conn. Sup. 109, 197 A.2d 342 (1963).

<sup>40</sup> The *Epstein* court discussed the following provisions of the Uniform Commercial Code as adopted by the Connecticut statutes, CONN. GEN. STAT. ANN. § 42a-1-101, 42a-2-102, 42a-2-105, 42a-2-106, 42a-2-401 (1963).

<sup>41</sup> *Epstein v. Giannattasio*, *supra* note 39 at \_\_\_\_\_, 197 A.2d at 344.

<sup>42</sup> *Ibid.*

cases which had construed the prior sales act. The court cited and relied on cases which held that the service of food in a restaurant for immediate consumption on the premises did not constitute a sale.<sup>43</sup> By basing its holding on prior food cases which had been used to construe the Uniform Sales Act, its holding in this case is inaccurate. According to the official comments regarding Section 2-314(1) of the Code, "subsection (1) covers the warranty with respect to food and drink. Serving food or drink for value is a sale, whether to be consumed on the premises or elsewhere. *Cases to the contrary are rejected.*"<sup>44</sup> The *Epstein* court ignored Section 2-314 in arriving at its conclusion, and to the extent that it did so, its logic and reasoning is inaccurate. If the court's reasoning had been accurate, its decision would have foreshadowed a result under the Code that would have been similar to the food and drug decisions in a case where a patient purchased blood from a blood bank. However, to the extent that inaccuracies exist in the court's reasoning, the *Epstein* conclusion should be disregarded and an analysis of the Code sections, as set out in this note, could be used to construe a situation similar to that in the *Balkowitsch* case if it should arise in a Code jurisdiction.

If a situation similar to that in the *Balkowitsch* case should arise again wherein defendant is a blood bank, under existing case law, plaintiff will have little chance to recover under any theory of law. Since most blood banks are charitable, non-profit making organizations, courts have been reluctant to grant recovery against them on any legal theory.<sup>45</sup> With this premise in mind, courts have manipulated logic and precedent to disregard theory after theory underlying grounds for recovery, which injured plaintiffs have presented in these cases.

Since blood banks cannot scientifically be held negligent in not discovering the existence of serum hepatitis in either the donor or donated blood, the injured party is left with a strict liability theory in seeking recovery. It can be argued in both Code and non-Code jurisdictions that legal recovery is feasible under the sales strict liability theory of implied warranty. The trend today is for courts to grant recovery on both tort and contract strict liability theories in many areas where products and sub-

<sup>43</sup> *Albrecht v. Rubenstein*, 135 Conn. 243, 63 A.2d 158 (1948); See also *Lynch v. Hotel Bond Co.*, 117 Conn. 128, 167 Atl. 99 (1933); *Kenney v. Wong Len*, 81 N.H. 427, 128 Atl. 343 (1925); *Sofman v. Denham Food Service, Inc.*, 37 N.J. 304, 181 A.2d 168 (1962).

All cases cited were decided before Uniform Commercial Code provisions went into effect in their respective jurisdictions. For pertinent dates see *Freedman, Products Liability under the Uniform Commercial Code*, 10 PRAC. LAW. 49 (1964).

<sup>44</sup> UNIFORM COMMERCIAL CODE, comment 5 to § 2-314 (emphasis added).

<sup>45</sup> *Balkowitsch v. Minneapolis War Memorial Blood Bank*, *supra* note 1 at 810.

stances are dangerous to life and limb.<sup>46</sup> In the long line of serum hepatitis cases, courts have excepted their holdings to this trend by making legislative policy decisions to protect blood distributors from liability. It appears, in this area, that courts have usurped legislative prerogative by concluding that blood distributors should not be protected against liability by insurance as other manufacturers and distributors are. These policy considerations seem to have influenced courts' decisions in this area. If courts continue to abide by policy-steeped serum hepatitis precedents, it is doubtful whether the arguments advanced in this note, though plausible, will find acceptance. For plaintiff-patient virtually all roads of recovery have been closed by prior decisions. However, as herein demonstrated, the sales warranty of recovery cannot be ignored as a recovery theory in a factual situation such as appears in the *Balkowitsch* case.

*Irwin Rosen*

<sup>46</sup> Products to which strict liability has been applied have been soap (*Kruper v. Proctor & Gamble Co.*, 113 N.E.2d 605, Ohio App., 1953); detergent (*Worley v. Proctor & Gamble Co.*, 241 Mo. App. 1114, 253 S.W.2d 532, 1952); grinding wheels; (*Jakubowski v. Minnesota Mining and Manufacturing Co.*, 80 N.J. Super. 184, 1963); airplane parts (*Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 1963).

### SALES—PRODUCTS LIABILITY—LABEL WARNING REQUIREMENTS

The Hubbard-Hall Chemical Company manufactured and sold an insecticide to a small farmer. The decedents who worked for the farmer had used the product on several occasions, but for some unforeseen reason had died from the insecticide after spending an entire day spraying. When the product was originally developed, registration was approved by the U.S. Department of Agriculture. A label on the container of the product warned the user that the insecticide contained a poisonous dust which might be fatal if smelled, inhaled or absorbed through the skin, and gave directions in regard to using the product, to wearing the proper clothing, and to treating anyone who might come in contact with the dust.<sup>1</sup> Even

<sup>1</sup> *Hubbard-Hall Chemical Co. v. Silverman*, 340 F.2d 402, 403 (1965): "Warning: May Be Fatal If Swallowed, Inhaled or Absorbed Through Skin. Do not get in eyes or on skin. Wear natural rubber gloves, protective clothing and goggles. In case of contact wash immediately with soap and water. Wear a mask or respirator of a type passed by the U.S. Dept. of Agriculture for parathion protection. Keep all unprotected persons out of operating areas or vicinity where there may be danger of drift. Vacated areas should not be re-entered until drifting insecticide and volatile residues have dissipated. Do not contaminate feed and foodstuffs. Wash hands, arms and face thoroughly with soap and water before eating or smoking. Wash all contaminated clothing with soap and hot water before re-use."