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SALE OF GOODS IN SERVICE-PREDOMINATED TRANSACTIONS

The Uniform Commercial Code states that one of its underlying purposes is "to simplify, clarify and modernize the law governing commercial transactions . . . ."[1] The need for simplification, clarification and modernization of commercial law can be seen lucidly from an examination of what, in this comment, shall be termed the sale-service dichotomy. This court-created dichotomy, simply stated, means that where goods are transferred and paid for as an incident to a predominately service-oriented transaction, there is only a service, no sale, and hence no warranty. In other words, where service predominates there can be no sale. It is hoped that this comment and the logic of two recent cases will point out the fallacious reasoning that has created this fiction.

The leading case in the area is *Perlmutter v. Beth David Hospital*.[2] In that case, a patient sued the hospital on warranty theory for contracting serum hepatitis which resulted from a blood transfusion. The court reasoned that the purpose of the contract was the care and treatment of the patient and that the blood supplied was incidental to the service. Therefore the court held that the essence of the contract was service and the contract was not divisible.[3] Since warranty is a creature of sales law, there was no sale and thus no warranty. The dissent stated that the action was brought for breach of warranty in the "sale" of bad blood for a separate charge and not for the injection of that blood.[4] The decision in *Perlmutter* has been followed consistently throughout the country in shielding hospitals[5] and blood banks[6] from liability.

The policy behind the *Perlmutter* decision is just. The need for the blood is great, the risk is comparatively small,[7] and the possibility of detection of the

1. N.Y. U.C.C. § 1-202(2)(a).

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

3. Id. at 104, 123 N.E.2d at 794.

4. Id. at 108-09, 123 N.E.2d at 796.

5. See Sloneker v. St. Joseph's Hosp., 233 F. Supp. 105 (D. Colo. 1964); Lovett v. Emory Univ., Inc., 116 Ga. App. 277, 156 S.E.2d 923 (1967); Dibblee v. Dr. W.H. Groves Latter-Day Saints Hosp., Inc., 12 Utah 2d 241, 364 P.2d 1085 (1961); Gile v. Kennewich Pub. Hosp. Dist., 48 Wash. 2d 774, 296 P.2d 662 (1956); Koenig v. Milwaukee Blood Center, Inc., 23 Wis. 2d 324, 127 N.W.2d 50 (1964). It should be noted that one court has held that Perlmutter does not deal with express warranties and that parties can contract as they see fit. However, it seems that the court really discussed an express condition in a contract and not a "warranty." Napoli v. St. Peter's Hosp., 213 N.Y.S.2d 6 (Sup. Ct. 1961). See also the dissent in Payton v. Brooklyn Hosp., 21 App. Div. 2d 898, 252 N.Y.S.2d 419 (2d Dep't 1964), aff'd, 19 N.Y.2d 610, 224 N.E.2d 891, 278 N.Y.S.2d 398 (1967).

6. See Whitehurst v. American Nat'l Red Cross, 1 Ariz. App. 326, 402 P.2d 584 (1965); Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc., 270 Minn. 151, 132 N.W.2d 805 (1965); Krom v. Sharp & Dohme, 7 App. Div. 2d 761, 180 N.Y.S.2d 99 (3d Dep't 1958).

7. Blood transfusions cause death to approximately one of every 150 persons over age fifty. 185 J.A.M.A. 1037 (1963) (editorial). In certain instances as many as one of every twenty-five patients receiving transfusions is struck by serum hepatitis. Look, March 22, 1966, at 29. It has even been reported that infection is as high as eight percent of all blood stored

defect is negligible. Yet the fairness of the decision and the reasoning behind it is often lost in the process of stare decisis as *Perlmutter* is cited in commercial areas for the proposition that if service predominates there is no sale and thus no warranty.[8]

It has been suggested that an analogy should be made between the law of sales and other areas so that the lack of a sale would not preclude the existence of a warranty.[9] Indeed, a leading New York case, *Hoisting Engine Sales Co. v. Hart*,[10] has held that there is an implied warranty in a lease. Thus the no-sale-no-warranty reasoning has at times been disregarded by the courts, a further indication of the fallacious reasoning behind the sale-service dichotomy. If the court is willing to imply a warranty where there is admittedly no sale, then why not find a warranty where there is a sale although accompanied by a service? While some courts have implied warranties in non-sales cases,[11] the majority have not. Thus in order to find a warranty, most courts have had to find a sale. The supply of water by a city,[12] the leather used in repairing a shoe,[13] an injection of morphine,[14] the installation of a part in a clutch during its repair,[15] and the dentures made by a dentist for his patient[16] have all been held to involve sales. Yet none of these cases was confronted by *Perlmutter*, and it would appear that *Perlmutter* is an obstacle to the extension of consumer protection through the use of implied warranties. In order to extend protection to a transaction which has both sale and service aspects, the sale aspect must

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for transfusions. 49 Chi. Bar Rec. 22 (1967). Yet as alarming as these figures may be, the amount of harm caused by infected blood in comparison to the benefits conferred by pure blood seems insufficient to call for the doctrine of strict liability in tort. See Restatement (Second) of Torts § 402A, comment k, at 353 (1965); Prosser, The Fall of the Citadel, 50 Minn. L. Rev. 791, 811-12 (1966). See generally Note, Liability for Blood Transfusion Injuries, 42 Minn. L. Rev. 640 (1958).

8. See, e.g., William H. Wise & Co. v. Rand McNally & Co., 195 F. Supp. 621, 626 (S.D.N.Y. 1961); Aegis Prods., Inc. v. Arriflex Corp., 25 App. Div. 2d 639, 268 N.Y.S.2d 185 (4th Dep't 1966); Ben Constr. Corp. v. Ventre, 23 App. Div. 2d 44, 257 N.Y.S.2d 988 (4th Dep't 1965) (construction of a swimming pool not a sale, thus no warranty).

9. See, e.g., 2 F. Harper & F. James, The Law of Torts § 28.19, at 1576 (1956); Farnsworth, Implied Warranties of Quality in Non-Sales Cases, 57 Colum. L. Rev. 653 (1957); Comment, Implied Warranties in Service Contracts, 39 Notre Dame Law. 680 (1964).

10. 237 N.Y. 30, 142 N.E. 342 (1923). See also Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965). It has been suggested that an analogy can be made between a bailor and the hospital or blood bank since both supply the goods. 2 L. Frumer & M. Friedman, Products Liability § 19.02(2), at 502 (1967).

11. Hoisting Engine Sales Co. v. Hart, 237 N.Y. 30, 142 N.E. 342 (1923); Dodd v. Wilson, [1946] 2 All E.R. 691 (K.B.); Samuels v. Davis, [1943] 2 All E.R. 3 (C.A.). See generally Farnsworth, supra note 9.

12. Canavan v. Mechanicville, 229 N.Y. 473, 128 N.E. 882 (1920).

13. Western Leather & Finding Co. v. State Tax Comm'n, 87 Utah 227, 48 P.2d 526 (1935).

14. Ratigan v. United States, 88 F.2d 919 (9th Cir. 1937) (criminal).

15. Delo Auto Supply, Inc., v. Tobin, 198 Misc. 601, 100 N.Y.S.2d 135 (Syracuse Mun. Ct. 1950).

16. Lee v. Griffin, 121 Eng. Rep. 716 (Ex. 1861).

be isolated and warranties implied. However, in order to do this, the *Perlmutter* reasoning must be disregarded or held to be antiquated.

While the courts are often justifiably slow to disregard stare decisis, it would seem that a good argument can be advanced for the proposition that the Uniform Commercial Code has overruled *Perlmutter*. Article 2 of the Code deals with "transactions in goods."[17] While the word "transactions" is nowhere defined in the Code, "goods" is defined as "all things . . . which are movable at the time of . . . the contract for sale . . . ."[18] A seller is one "who sells or contracts to sell goods."[19] A buyer is one "who buys or contracts to buy goods."[20] "A 'sale' consists in the passing of title from the seller to the buyer for a price . . . ."[21] Under these definitions, there would seem to be a sale in *Perlmutter*, as the Code contains no requirement that the sale not be accompanied by a service. To hold that there is no sale where there is also service involved seems inconsistent. If a person were to walk into a medical supplier and purchase blood, there would obviously be a sale. The warranties that accompany the product should be no different when the hospital buys it from a supplier.

In *Russel v. Community Blood Bank, Inc.*,[22] a Florida court held that the supplying of blood by a blood bank is a sale and as such, implied warranties are present. The court stated:

> It is evident . . . 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 . . . . The Perlmutter court was concerned with the supplier becoming . . . an insurer of a patient should anything happen as a result of "bad" blood.[23]

If the transaction were looked upon as a sale, there would indeed be warranty liability, subject to a valid disclaimer. Warranty liability is not predicated upon fault, and lack of knowledge of the defect or how to detect it is irrelevant.[24] "If it were deemed that the protection of the sick person, the patient who received blood, was more important than protecting the hospital, then . . . sufficient logic and reason could have been used to impose the liability . . . simply by holding that the providing of the blood constituted a sale."[25]

17. N.Y. U.C.C. § 2-102.

18. N.Y. U.C.C. § 2-105.

19. N.Y. U.C.C. § 2-103(1)(d).

20. N.Y. U.C.C. § 2-103(1)(a).

21. N.Y. U.C.C. § 2-106(1). It should also be noted that § 2-204 allows a contract to be made by conduct.

22. 185 So. 2d 749 (Dist. Ct. App. Fla. 1966), aff'd, 196 So. 2d 115 (1967).

23. Id. at 752 (citations ommitted).

24. See Foley v. Ligget & Myers Tobacco Co., 136 Misc. 468, 241 N.Y.S. 233 (Sup. Ct. 1930), aff'd mem., 232 App. Div. 822, 249 N.Y.S. 924 (2d Dep't 1931). See also 2 L. Frumer & M. Friedman, supra note 10, § 19.01(3), at 483 (1967).

25. R. Duesenberg & L. King, Sales & Bulk Transfers Under the Uniform Commercial Code § 7.01(2)(i), at 7-7 (1966).

Once there is a sale, the next question to ask is whether there is a warranty. If the supplier had sold to the hospital blood which it did not own, there seems little likelihood that the court would not say there is a breach of the warranty of title.[26] However, problems arise when the court deals with an implied warranty of merchantability.[27] First, the seller must be a "merchant with respect to goods of that kind."[28] Merchant is defined as "a person who deals in goods of the kind or . . . holds himself out as having knowledge or skill peculiar to the practices or goods involved . . . ."[29] Second, there must have been no effective disclaimer of the warranty. The implied warranty of merchantability can be excluded by language which mentions merchantability which if written must be conspicuous;[30] by "language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty;"[31] or, by course of dealing, course of performance or by usage of the trade.[32] The supplier of blood or medical supplies is a merchant with respect to goods of that kind, and consequently, unless the implied warranty is excluded it will be implied in the contract of sale with the hospital.

Assuming therefore that the warranty is not excluded, the blood would have to be fit for the ordinary purpose for which it is used.[33] If the blood contained serum hepatitis, it would not be so fit, and there would be a breach of the warranty from the supplier to the hospital. Once there is a warranty to the hospital, in view of the decline of privity requirements as evidenced by the decision in *Goldberg v. Kollsman Instrument Corporation*,[34] it would appear that the injured patient should be able to take advantage of that warranty.

In *Goldberg*, the deceased was killed in a commercial air crash. An action was brought against the manufacturer of the airplane for breach of an implied warranty. The plaintiff recovered even though there was only a service contract between the plaintiff and his contracting party, the airline. Thus by analogy, it would seem that even if the court finds a service contract between the patient and the hospital, there is still a sale from the supplier to the hospital and the plaintiff should have the benefit of any warranty that exists in that sale.[35]

While *Goldberg* was not decided under the Code, there is no reason to believe

26. N.Y. U.C.C. § 2-312.

27. N.Y. U.C.C. § 2-314.

28. N.Y. U.C.C. § 2-314(1).

29. N.Y. U.C.C. § 2-104(1).

30. N.Y. U.C.C. § 2-316. A term is "conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it." N.Y. U.C.C. § 1-201(10).

31. N.Y. U.C.C. § 2-316(3)(a).

32. N.Y. U.C.C. § 2-316(3)(c).

33. N.Y. U.C.C. § 2-314(2)(c).

34. 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963). See also Sevits v. McKiernan-Terry Corp., 264 F. Supp. 810 (S.D.N.Y. 1966); Schwartz v. Macrose Lumber & Trim Co., 50 Misc. 2d 547, 270 N.Y.S.2d 875 (Sup. Ct. 1966), rev'd on other grounds, 29 App. Div. 2d 781, 287 N.Y.S.2d 706 (1st Dep't 1968).

35. See Gottsdanker v. Cutter Laboratories, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960).

that the Code has altered the importance of the decision. Section 2-318 states that "[a] seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty."[36] The official comment indicates that beyond that which is provided "the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain."[37]

Once a sale from the supplier to the hospital has been shown, the plaintiff might also want to join the hospital in the action. The only difference between the two actions is that service predominates in the contract between the patient and the hospital. It should be noted that, in a logically parallel situation, where food is served for value, there is a sale between the restaurant and its patron under the implied warranty section of the Code.[38] In some states prior to the Code this was viewed as a service and not a sale,[39] which view prompted a New Jersey court in a recent case to state:

> The rule that food served in a restaurant was not impliedly warranted to be fit for human consumption although food sold in a store was so warranted, had no support in modern concepts of justice. It was an anachronism. It is unthinkable that such a legalism should be revived to avoid holding hospitals and blood banks liable. If these valuable organizations are to be exempted from liability, the immunity should be based upon the true policy consideration and not upon an irrelevant circumstance.[40]

While the New York Annotation to the implied warranty section notes that the addition of the restaurant-served food to transactions deemed sales does not change *Perlmutter*,[41] the Annotation is subject to question. The Code was adopted throughout states which had previously followed a sale-service dichotomy as to food purchases. When the restaurant food rule was changed, the sale-service dichotomy as to food was obviated. As one commentator has stated, "[t]he real question, as the new Act recognizes, is not 'sale' or 'no sale,' but rather what the good faith restaurant keeper [hospital] . . . undertakes to deliver: clearly, food [blood] fit for consumption."[42] Under the implied warranty section of the Code, all that is required is "the serving for value of food or drink to be consumed either on the premises or elsewhere . . . ."[43]

If a hospital visitor were served food in the hospital cafeteria a warranty would be implied. This warranty should apply also when the patient is served food in his room. A contrary holding would clearly be in derogation of the Code.

36. N.Y. U.C.C. § 2-318.
37. N.Y. U.C.C. § 2-318, Comment 3.
38. N.Y. U.C.C. § 2-314(1).
39. See, e.g., Nisky v. Childs Co., 103 N.J.L. 464, 135 A. 805 (Ct. Err. & App. 1927).
40. Jackson v. Muhlenberg Hosp., 96 N.J. Super. 314, 323, 232 A.2d 879, 884 (1967).
41. N.Y. U.C.C. § 2-314, New York Annot. (1)(b).
42. Note, Warranties of Kind and Quality Under the Uniform Revised Sales Act, 57 Yale L.J. 1389, 1398-99 (1948).
43. N.Y. U.C.C. § 2-314(1).

It should be of no importance that the Code specifically mentions food and does not mention blood. *Inclusio unius est exlusio alterius* has no application to the Code; section 1-102 indicates that the Code should be liberally construed and applied in order to promote its underlying purposes. For example, the Code has no difficulty avoiding the sale-service dichotomy in the case of a contract involving both the labor and the raw materials for a specially manufactured good. Instead of deeming such a contract to be predominated by a sale *or* a service, the Code provides that the contract is governed by all of Article 2, except the statute of frauds section.[44] Hence the resultant good is subject to all Code warranties. Similarly, if *A* custom tailors a coat for *B*, surely the cost of the services predominates and yet there would seem to be little question that the coat is warranted.[45]

The argument was made in *Perlmutter* that the food and the coat cases are distinguishable from the hospital case because in the former cases the purchaser is interested in the food or the coat and not the service, while in the latter case the person is interested not specifically in the blood but in regaining his health.[46] This seems another mere technical fiction. If one were interested simply in a coat why would we have it custom tailored? The purchaser is as interested in the tailor as he is in the cloth. In any event, the end result of the coat is not the coat itself but what it does to the purchaser's body temperature or ego. The same argument is made with the food. If one wanted food and nothing else, why go to a restaurant? The gentleman wants the coat for his purpose, the diner wants food for his purpose and the patient wants blood for his purpose. No purchase is an end in itself but each is a means to an ultimate end the purchaser wants to attain. It seems merely a question of the directness in which the purchase of the good accomplishes the purpose of its purchaser.

There is a sale from the hospital to the patient as well as from the supplier to the hospital, and if there is no successful disclaimer there should be an implied warranty of merchantability. "There is no logical reason why a merchant should be held to fair product standards, i.e., warranties, while a doctor or dentist is not. Indeed, one would expect things to be just the reverse."[47] It is probable that if the courts were to hold the hospitals or suppliers liable, the legislatures would respond by absolving them of liability as has been done in some states.[48] In the meantime, the courts will have freed the consumer from precedents which become onerous when they are, inevitably, carried over into other service predominated areas.

Indeed, simply by holding that there is a sale, the courts would not necessarily place liability on the hospitals. If the policy considerations are deemed im-

44. N.Y. U.C.C. § 2-201(3)(a).

45. See notes 17-19, supra and cases cited therein.

46. 308 N.Y. at 107, 123 N.E.2d at 796.

47. 1 Uniform Commercial Code Law Letter 3, col. 1 (No. 4, June 1967).

48. This has been done in, e.g., Arizona, Ariz. Rev. Stat. Ann. § 36-1151 (Supp. 1967) (no sale); in California, Cal. Health & Safety Code § 1623 (1900) (no sale); and in Massachusetts, Mass. Gen. Laws Ann. ch. 106, § 2-316(5) (Supp. 1967).

portant by the courts, they could reason that the implied warranty is automatically excluded in blood cases by trade usage[49] since those in the trade are aware of the possibilities of the hepatitis. In addition, agency principles could be applied to absolve the hospital and the supplier.[50] If the doctor is viewed as the agent of the patient, then his knowledge of the possibility of serum hepatitis would be imputed to the patient,[51] and the contract description of the goods would include infected blood. The bad blood would then "pass without objection in the trade under the contract description,"[52] as is required by the Code,[53] and the implied warranty would not have been breached.

The question remains, then, what will this reasoning do to the law of warranty? If *Perlmutter* has been overruled by the Code, then it can no longer be authority for those cases where, in the past, predominance of service has prevented the use of implied warranties. Thus when a person contracts to have a swimming pool built and installed, the materials used will be warranted.[54] With the advance of consumer protection laws this seems just. In addition, in New York, the person who performs a service pays a tax on the income received for his services.[55] It is not unusual that this tax is shifted to the consumer. If the consumer is to pay the tax, why not give him the basic protection of warranties where materials are furnished?

This reasoning has been followed in two recent cases where trial courts in New York and New Jersey held that there is a sale under Article 2 of the Uniform Commercial Code where goods were transferred in a service predominated transaction. In the New Jersey case, *Jackson v. Muhlenberg Hospital*,[56] an action was brought by a patient against a hospital and a blood bank on the ground that the plaintiff had contracted serum hepatitis as a result of a blood transfusion. The plaintiff claimed in negligence, strict liability and breach of warranties. The court dismissed the claim of strict liability but found a cause of action on the other two theories. Though the action for breach of the implied warranty was also dismissed because there was a successful disclaimer, the court boldly stated that "[t]he 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."[57] In the New York case, *Cheshire v. South-*

49. N.Y. U.C.C. § 2-316(3)(c). N.Y. U.C.C. § 1-205(2) provides: "A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question."

50. Jackson v. Muhlenberg Hosp., 96 N.J. Super. 314, 330, 232 A.2d 879, 888 (1967).

51. See 200 E. End Ave. Corp. v. General Elec. Co., 5 App. Div. 2d 415, 172 N.Y.S.2d 409, (1st Dep't 1958), aff'd, 6 N.Y.2d 731, 158 N.E.2d 508, 185 N.Y.S.2d 216 (1959).

52. N.Y. U.C.C. § 2-314(2)(a).

53. N.Y. U.C.C. § 2-314.

54. See note 11, supra and cases cited therein.

55. N.Y. Tax Law §§ 1101(5), 1105(c)(3).

56. 96 N.J. Super. 314, 232 A.2d 879 (1967).

57. Id. at 324, 232 A.2d at 884.

hampton Hospital Association,[58] the plaintiff had been a patient at the defendant hospital and the hospital had supplied the surgeon with a surgical pin manufactured by the defendant manufacturing company. The pin was defective and caused injuries for which the plaintiff brought an action on a breach of implied warranty theory. The court, after discussing authorities, held that the plaintiff should be allowed to prove a sale of the pin.[59]

It is hoped that the reason of these two cases will prevail. If a warranty is present when the good is sold separately, then a warranty should be present when the good accompanies a service. The proposition that there is no sale when goods pass from one person to another in the context of a service predominated contract is a legal fiction which merely serves to deprive the consumer of needed protection.

58. 53 Misc. 2d 355, 278 N.Y.S.2d 531 (Sup. Ct. 1967).

59. In a recent New Jersey case, Newmark v. Gimbel's, Inc., 37 U.S.L.W. 2130 (N.J. Super. Ct. Aug. 7, 1968), the court held that implied warranties attached to the application of a product to plaintiff's scalp in defendant's beauty parlor. The court hedged, however. It said that the warranty should apply even though this was not a typical sale. The holding seemed to extend warranty protection to the supplying of a product where the court was unwilling to deem the supplying a sale. See Farnsworth, supra note 9.