

THE APPLICATION OF IMPLIED WARRANTIES TO PREDOMINANTLY "SERVICE" TRANSACTIONS

I. INTRODUCTION.

Since 1960 many states have rejected the requirement that the plaintiff must be in privity with the defendant seller to recover for injuries caused by a defect in the defendant's product.¹ A corollary of this trend has been an extension of the doctrine of implied warranties in the sale of goods. The Uniform Commercial Code has had a great influence upon this development.² However, there has been some question concerning when the

¹ *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). In recent years the courts of twenty-three states have rejected the privity rule. Arkansas [*Delta Oxygen Co. v. Scott*, 238 Ark. 634, 383 S.W. 2d 885 (1964)]; California [*Greenman v. Yuba Power Products, Inc.*, 27 Cal. Rptr. 697, 377 P.2d 897 (1963)]; Connecticut [*Hamon v. Digliani*, 148 Conn. 710, 174 A.2d 294 (1961)]; Florida [*Manheim v. Ford Motor Co.*, 201 So. 2d 440 (Fla. Sup. Ct. 1967)]; Illinois [*Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E. 2d 182 (1965)]; Iowa [*State Farm Mutual Automobile Ins. Co. v. Anderson-Weber, Inc.* 252 Iowa 1289, 110 N.W. 2d 449 (1961)]; Kansas [*Chandler v. Anchor Serum Co.*, 198 Kan. 571, 426 P.2d 49 (1967)]; Kentucky [*Dealers Transport Co., Inc. v. Battery Distributing Co., Inc.*, 402 S.W. 2d 441 (Ky. Ct. App. 1966)]; Michigan [*Spense v. Three Rivers Builders & Masonry Supply, Inc.*, 353 Mich. 120, 90 N.W. 2d 873 (1958)]; Minnesota [*McCormack v. Hanksraft Co., Inc.*, 154 N.W. 2d 488 (Minn. Sup. Ct. 1967)]; Mississippi [*State Stove Mfg. Co. v. Hodges*, 269 F. Supp. 519, 189 So. 2d 113 (Miss. Sup. Ct. 1966)]; Missouri [*Morrow v. Caloric Appliance Corp.*, 372 S.W. 2d 138 (Mo. Sup. Ct. 1963)]; [Hacker v. Rector, 353 F. Supp. 300 (D.C. Mo. 1966)]; New Jersey [*Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960)]; New York [*Goldberg v. Kollsman Instrument Corp.*, 12 N.Y. 2d 432, 191 N.E. 2d 81 (1963)]; North Carolina [*Corprew v. Geigy Chemical Corp.*, 271 N.C. 485 (1967)]; Ohio [*Lonzrick v. Republic Steel Corp.*, 6 Ohio St. 2d 227, 218 N.E. 2d 185 (1966)]; Oklahoma [*Marathon Battery Co. v. Kilpatrick*, 418 P.2d 900 (Okla. Sup. Ct. 1965)]; Oregon [*Wights v. Staff Jennings, Inc.*, 241 Ore. 301, 405 P.2d 624 (1965)]; Pennsylvania [*Miller v. Preitz*, 422 Pa. 383, 221 A.2d 320 (1966)]; South Carolina [*Springfield v. Williams Plumbing Supply Co., Inc.* 153 S.E. 2d 184 (S.C. Sup. Ct. 1967)]; Tennessee [*Ford Motor Co. v. Lonon*, 398 S.W. 2d 240 (Tenn. Sup. Ct. 1966)]; Texas [*Shamrock Fuel & Oil Sales Co., Inc. v. Tunks*, 406 S.W. 2d 483 (Tex. Ct. Civ. App. 1966)]; Washington [*Brewer v. Oriard Powder Co.*, 66 Wash. 2d 187, 401 P.2d 844 (Wash. Sup. Ct. 1965)].

² Goods — §2-105; Sale — §2-106; Warranties — §§2-312-318. The Uniform Commercial Code has been adopted in every state of the union except Louisiana. It has also been adopted in the District of Columbia.

Generally there are two implied warranties—one of fitness for a particular purpose and one of merchantability. There are several differing historical developments for the implied warranty. One theoretical basis is in the law of torts. There it originally was a misrepresentation of fact. The action available was closely related to an action in common law deceit except the *scienter* element was not necessary. Also, the seller's assertion could be through his conduct and not his words. The essential element was, and is, reasonable reliance by the buyer. Many courts require the presence of reasonable reliance before implying a warranty — especially the warranty of fitness for a particular purpose.

The second theoretical basis is in the law of contracts. Here an agreement between buyer and seller is found even though not expressed. It is said to be "implied in fact." The usual description for this warranty remedy is *indebitatus assumpsit*. This action was advantageous because it did not require setting forth all the details of the transaction. This warranty does not rest upon the buyer's reliance upon the seller's special knowledge. However, it is based on the intent of the parties.

The third theoretical basis is that directly imposed by the law. It arises merely because there is a sale. The law reads a warranty into the transaction through the convenient vehicle of public policy. The idea is to shift the loss to the one better equipped to bear it. This is essentially liability without fault. Prosser, *The Implied Warranty of Merchantable Quality*,

implied warranties of the Code are properly applied. This note attempts to explore the recent developments of one such questionable area—implied warranties as applied to transactions which primarily involve the sale of services rather than products.

The present analysis includes an historical development of the “sale-service” distinction as applied to implied warranties and the subsequent extensions of this sales doctrine to areas somewhat inconsistent with the original policies. This article is not meant to expressly define the scope of commercial implied warranties. Rather, the approach here is to examine the use of the “sale-service” distinction and to indicate that there is no apparent reason for so limiting the scope of implied warranties. Thus, an attempt is made to encourage the expansion of the implied warranty doctrine by attacking the reasons underlying present and past limitations. The logic is that if there is no reason to limit implied warranties by a “sale-service” distinction, then implied warranties should not be so limited.

The stimulus of this discussion is a recent decision by the New Jersey Superior Court in *Newmark v. Gimbel's Inc.*³ The case evolved from a transaction between a beautician and one of his customers. Mrs. Newmark, during one of her regular visits to Gimbel's Beauty Parlor, noticed a special sale advertisement of a permanent wave treatment. Upon inquiry, the beautician advised her against using the special treatment because her hair was too fine and needed a “good” permanent wave. The beautician then proceeded to give Mrs. Newmark a “good” permanent wave. The procedure involved applying a lotion to Mrs. Newmark's hair, rinsing it several times, and finally, the drying stage. Sometime after the treatment, Mrs. Newmark lost an unusual amount of hair and her forehead became red and blistered. A medical diagnosis by a dermatologist revealed that she had contact dermatitis, causally linked to the hair solution. Mrs. Newmark brought suit against Gimbel's, Inc. for breach of implied warranties.

27 MINN. L. REV. 117, 122-25 (1943); See also Ames, *History of Assumpsit*, 2 HARV. L. REV. 53, (1888); Bohlen, *Misrepresentation as Deceit, Negligence, or Warranty*, 42 HARV. L. REV. 733 (1929).

For the precise elements of misrepresentation in seller-buyer transactions see 2 RESTATEMENT OF TORTS §402B (1965). See also *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 250, 147 N.E.2d 612, 616 (1958) [concurring opinion of C.J. Taft]. The elements necessary for an action based on strict liability in tort are in 2 RESTATEMENT OF TORTS §402 A (1965). Generally, in this discussion the warranty referred to will be an implied warranty of fitness for a particular purpose. Section 2-315 of the Uniform Commercial Code defines this implied warranty as follows:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is . . . an implied warranty that the goods shall be fit for such purpose.

The word “sale” is defined in section 2-106 of the Code as “the passing of title from the seller to the buyer for a price.” “Goods” are “all things . . . which are movable at the time of identification to the contract for sale. . . .” These definitions become particularly relevant in determining whether implied warranties apply to commercial transactions in which service predominates.

³ *Newmark v. Gimbel's Inc.*, 102 N.J. Super. 279, 246 A. 2d 11 (1968).

The court held that the supplying of a product for use in administering a permanent wave by a beautician carries with it an implied warranty that the product used was reasonably fit for its intended purpose. The court premised its analysis with the proposition that the instances in which implied warranties may be imposed are not limited to "sales" that come strictly within the definition in the Uniform Commercial Code.⁴ To support this proposition, the court referred to the official comment to the warranty provisions in section 2-313 of the Code. The comment expresses the view that the warranty section was "not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract." The court based its decision on policy reasons considered applicable to both sales and service transactions.⁵ These policies stress the buyers' reliance on the seller.⁶ The court went a step further by ruling that the policies applicable to the sale of products justify an extension of warranty liability to "any commercial transaction where one person supplies a product to another. . . ."⁷ The rationale of this holding seems to be that the profit maker should bear the risk of injury since he is in the position to promote safety. Also, the seller can readily pass the loss on to the supplier through indemnity actions.⁸ The decision appears to be a significant step in limiting the broad application of the "sale-service" distinction in service predominated transactions.

II. DEVELOPMENT OF THE SALE-SERVICE DISTINCTION.

A. The Sale of Food

Before the sale of food products was expressly denominated a "sale" and not a service under the Uniform Commercial Code,⁹ there was a significant split in authority over this issue. An early common law notion placed stricter duties upon one selling food than those selling other arti-

⁴ See discussion under roman numeral III, *infra*.

⁵ 102 N.J. Super. 279, —, 246 A.2d 11, 15 (1968).

⁶ *Id.* at —, 246 A.2d at 16 (1968); See HARPER & JAMES, THE LAW OF TORTS, §28.19 (1956) [hereinafter cited as HARPER & JAMES]; PROSSER, HANDBOOK OF THE LAW OF TORTS, §97 (3rd. ed. 1964) [hereinafter cited as PROSSER, TORTS].

⁷ 102 N.J. Super. 279, —, 246 A.2d 11, 15 (1968).

⁸ *Id.*, see HARPER & JAMES, *supra* note 6; PROSSER, TORTS *supra* note 6; James, *Products Liability*, 34 TEXAS L. REV. 44, 222 (1955); Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 440 (1944). [concurring opinion of Justice Traynor]; Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897 (1963). See Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957); Comment, *Contracts For Services Distinguished From Those To Sell Goods*, 15 FORD. L. REV. 92 (1946); Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between The Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692, 696 (1965). cf. Jaeger, *Product Liability: The Constructive Warranty*, 39 NOTRE DAME LAW. 501 (1964); 2 FRUMER & FRIEDMAN, PRODUCTS LIABILITY §19.02.

⁹ UNIFORM COMMERCIAL CODE §2-313.

cles. Apparently Blackstone followed this notion. He is credited with saying that "in contracts for provisions it is always implied that they are wholesome."¹⁰ On the other hand, there was a critical distinction as to who was selling the food.

Many decisions found that a restaurateur did not "sell" the food. He was instead likened to the ancient innkeeper who "uttered" the food as one of his several services.¹¹ The distinction was significant because if the transfer was not deemed a sale, it was not covered by the law of implied warranties as to the sale of goods. Based upon a "sale-service" distinction these two views developed differing lines that later became majority and minority views.

Some courts recognized that a restaurateur differed from the ancient innkeeper but were reluctant to abandon such distinguished precedent.¹² These courts reasoned that the customer does not ever own the food. It is merely placed before him and he is privileged to eat what he can, but cannot take away the uneaten portion. The only remedy available under this reasoning is for lack of due care.¹³ Some courts even seemingly rejected the sales requirement and still refused to find an implied warranty.¹⁴ Judge Augustus Hand suggested that "[i]f the food was unfit for consumption, the remedy would be an action to recover back the purchase money, if it had been paid."¹⁵ This remedy is inadequate particularly where the purchase has resulted in consuming the back half of a mouse,¹⁶ trichinae,¹⁷ fragments of glass,¹⁸ a stone,¹⁹ or a few insects.²⁰ It seems that recovering the small purchase price cannot be adequate compensation for the injury caused. However, several states followed the rule that an implied warranty does not accompany the furnishing of food by a restaurateur.²¹

¹⁰ 1 WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT, §181 (3rd. ed. 1948) [hereinafter cited as WILLISTON].

¹¹ *Id.*

¹² *Merrill v. Hodson*, 88 Conn. 314, 317, 91 A. 533, 534 (1914); The Connecticut court cited Lord Mansfield saying that "[t]he analogy between the two cases of an innkeeper and a victualler [restaurateur] is so strong that it cannot be got over." *Saunderson v. Rowles*, 4 Burrows 2067, 2068.

¹³ BEALE, INNKEEPERS AND HOTELS §§169, 302 (1906).

¹⁴ *Valeri v. Pullman & Co.*, 218 F. 519, 521 (S.D.N.Y., 1914).

¹⁵ *Id.*

¹⁶ *Menaker v. Supplee-Wills-Jones Milk Co.*, 125 Pa. Super. 76, 189 A. 714 (1937).

¹⁷ *Karger v. Armour & Co.*, 17 F. Supp. 484 (D. Mass. 1936).

¹⁸ *Swift & Co. v. Blackwell*, 84 F.2d 130 (4th Cir. 1936).

¹⁹ *Savin v. Francis H. Leggett & Co.*, 114 N.J.L. 421, 177 A. 120 (1935).

²⁰ *Hoback v. Coca Cola Bottling Works*, 98 S.W.2d 113 (Tenn. App. 1936).

²¹ Alabama [*Travis v. Louisville & N.R. Co.*, 183 Ala. 425, 62 So. 851 (1913), (fitness of oysters served in a dining car)]; Connecticut [*Merrill v. Hodson*, *supra* note 12]; Georgia [*Rowe v. Louisville & N.R. Co.*, 29 Ga. App. 151, 113 S.E. 823 (1922), (contaminated food on dining car)]; Maryland [*Childs Dining Hall Co. v. Swingler*, 173 Md. 490, 197 A. 105 (1938), (a piece of tin concealed in the food)]; New Hampshire [*Kenney v. Wong Len*, 81 N.H. 427, 128 A. 343 (1925), (food containing a dead mouse)]; (*see* note 26, *infra*; this case was deemed no longer controlling)]; and Delaware, note 22 *infra*.

The argument that the proprietor of a restaurant was not an insurer and that his customers merely had the privilege to eat has been followed in a number of jurisdictions.²²

Other jurisdictions have held that an implied warranty, expressing that food is wholesome, does attach to the transfer. Some of these cases expressly rejected the reliance upon the "uttering" concept.²³ In *Friend v. Childs Dining Hall Co.*,²⁴ Chief Judge Rugg set down the Massachusetts rule that an implied warranty expressing that the food is fit, could be found either under the Sales Act or apart from it.²⁵ He reasoned that purchasing a meal includes all the products that make up the meal. This expressly rejected the minority Connecticut-New Jersey rule. Doubts as to the minority rule were acknowledged by the New Jersey court itself. The court chose to distinguish the rule and found that an implied warranty did accompany the transfer because it took place at a cafeteria and not a restaurant.²⁶ However, the need to so distinguish was probably abolished along with the rule when the New Jersey legislature adopted the Uniform Commercial Code.²⁷

In Wisconsin the "sale-service" distinction was considered as a case of first impression in *Betehia v. Cape Cod Corp.*²⁸ The state Supreme Court reasoned that the Connecticut-New Jersey rule was based upon an old "boardinghouse" theory and was inconsistent with conditions in modern restaurants. The conclusion was that the sale of food in a restaurant gives rise to an implied warranty of fitness for consumption and a recovery of damages could be had.

The foregoing summary of the differing lines of food cases indicates the ability of the law to build a general policy rule from a minor and ancient distinction. It seems that relying upon the antiquated role of the innkeeper to decide whether one warrants the quality of his food is somewhat preposterous. An implied warranty did not accompany the transfer because the food was "uttered" and not because the food was not a saleable product. The sale of food is now expressly made a sale within the meaning of the Code.²⁹ The significance of that denomination is that it seems to be an a priori matter that the "serving" aspect of the transaction does not keep it from being a sale covered by the law of implied warranty.

²² *Pappa v. F. W. Woolworth Co.*, 33 A.2d 310 (Del. Super. Ct., 1943).

²³ *Heise v. Gillette*, 83 Ind. App. 551, 149 N.E. 182 (1925).

²⁴ 231 Mass. 65, 120 N.E. 407 (1918).

²⁵ Chief Judge Rugg relied on Massachusetts and English precedent. See *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 84 N.E. 481 (1908).

²⁶ *Sofman v. Denham Food Service, Inc.*, 37 N.J. 304, 181 A. 2d 168 (1962).

²⁷ *Id.*, 37 N.J. 304, 308, 181 A.2d 168, 170.

²⁸ 10 Wis. 2d 323, 103 N.W.2d 64 (1960).

²⁹ *Supra* note 9.

B. Blood Transfusions

Probably the leading case for the proposition that an implied warranty does not apply where service predominates in a transaction is the New York case of *Perlmutter v. Beth David Hospital*.³⁰ The case involved an action to recover damages for personal injuries allegedly due to the transfusion of impure blood. The plaintiff, who was a paying patient at the hospital, sought recovery on the theory of a breach of warranty. The New York Court of Appeals through the opinion of Judge Fuld held that the injured plaintiff's complaint failed to state a cause of action for breach of implied warranty. The court reasoned that "[s]uch a contract is clearly one for services . . ." and therefore an implied warranty does not apply.³¹ Judge Fuld admitted the difficulty of determining whether the essence of a particular contract is for services or for a sale of property. However, he went on to say that the main object of the contract was care and treatment of the patient and not the purchase of blood. Perhaps the real basis of the decision was an underlying policy to limit the liability of hospitals. Judge Fuld suggested this when he said:

to stamp as a sale the supplying of blood . . . would mean that the hospital, no matter how careful . . . would be held responsible, virtually as an insurer, if anything were to happen to the patient as a result of 'bad' blood.³²

In *Napoli v. St. Peter's Hospital of Brooklyn*,³³ the New York Supreme Court of Kings County considered another blood transfusion case. The question there was whether, even assuming that the transaction was not a sale of blood, a cause of action would lie based upon breach of an express warranty by the hospital staff. Judge DiGiovanna reviewed the language of *Perlmutter* and correctly concluded that *Perlmutter* was based upon the theory of implied warranty and the question of express warranty had not been decided. He then stated that the subject matter involved was a valid subject for a contract and denied the motion to dismiss. Even though the court did not mention the policy of protecting hospitals, it is doubtful that this policy was ignored. The probable effect of the decision was a personal contract between individual parties, and the hospital did not face liability. The significance of this case may be that it limited *Perlmutter* to implied warranties. Obviously, the decision is not inconsistent with the policy bases expressed in *Perlmutter*.

The New York Court of Appeals had a chance to reconsider the *Perlmutter* decision in *Payton v. Brooklyn Hospital*.³⁴ An action was brought

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

³¹ *Id.* 104, 123 N.E.2d at 794.

³² *Id.*, at 106, 123 N.E.2d at 795.

³³ 213 N.Y.S. 2d 6 (N.Y. Sup. Ct. 1961).

³⁴ 19 N.Y. 2d 610, 224 N.E.2d 891 (1967).

to recover damages for the death of plaintiff's wife allegedly due to a transfusion of impure blood. The complaint was based on an allegation that the deceased wife had received blood contaminated with serum hepatitis. The complaint was dismissed by the New York Supreme Court and the dismissal was affirmed by the appellate division. The plaintiff then appealed to the court of appeals maintaining that the transfer of blood was a sale and that therefore it was impliedly warranted to be pure. The court of appeals, without an opinion, affirmed the order to dismiss the complaint. This seems to clearly indicate the law in New York on the matter.

Many jurisdictions follow the *Perlmutter* rule as to the supplying of blood by a hospital to a paying patient. A 1967 Georgia case, *Lovett v. Emory University, Inc.*,³⁵ involved a wrongful death action allegedly due to serum hepatitis contracted from a blood transfusion. The trial court had sustained a general demurrer to the petition and an appeal was taken. The court of appeals stated that furnishing blood for a transfusion is incidental to the service provided by the hospital and is not a sales transaction covered by an implied warranty. Obviously, this was following the reasoning of *Perlmutter*.

Most courts citing *Perlmutter* merely refer to the statement that supplying blood is not a sale and therefore an action based upon implied warranty will not lie.³⁶ There is little mention of such other factors as the difficulty of avoiding hepatitis virus by inspecting the blood or the policy of protecting a non-profit hospital from liability. However, there are indications that some courts are beginning to recognize the uniqueness of *Perlmutter*. In a New Jersey case, *Magrine v. Krasnica*,³⁷ Judge Lynch of the superior court made mention of *Perlmutter* and indicated the significance of whether or not the hospital staff could completely avoid the use of impure blood. The *Magrine* case was an action to recover damages for injuries sustained when a hypodermic needle broke off in plaintiff's jaw. The defendant was a dentist. Judge Lynch indicated that the opportunity for avoidance of the injury was perhaps a more valid ground for dismissal than the "sale-service" distinction. This indication that the real basis of the *Perlmutter* decision was not the "sale-service" distinction seems to be the more realistic view.³⁸ Some courts, in considering this type of case, have also indicated a reliance upon the public policy of protecting non-profit hospitals from liability. In *Koenig v. Milwaukee Blood Center, Inc.*,³⁹ the Wisconsin Supreme Court considered an

³⁵ 116 Ga. App. 277, 156 S.E.2d 923 (1967).

³⁶ *Id.*

³⁷ 94 N.J. Super. 228, 227 A.2d 539 (1967).

³⁸ New Jersey rejected *Perlmutter* in *Jackson v. Muhlenberg Hospital*, 96 N.J. Super. 314, 232 A.2d 879 (1967).

³⁹ 23 Wis. 2d 324, 127 N.W.2d 50 (1964).

action by a hospital patient for injuries from hepatitis. The complaint alleged that the plaintiff had contracted hepatitis from a transfusion of impure blood. This was a case of first impression for the Wisconsin court so it turned to the *Perlmutter* case. However, the court noted that the amended complaint alleged a cause of action for breach of warranty against the hospital and not against the blood center. Therefore, the court declined to decide whether or not a cause of action for breach of warranty could be made against the blood center. But a Florida Court of Appeals decision, *Russell v. Community Blood Bank, Inc.*,⁴⁰ supports the notion that the basis of these decisions is really a policy to protect non-profit organizations from liability.⁴¹ The suit was brought against a blood bank for breach of an implied warranty in the sale of blood. The trial court dismissed the complaint and the plaintiff appealed. The question that the Wisconsin court in *Koenig* had recognized but had declined to decide was before this court. The *Perlmutter* case had been brought against a hospital whereas the case at bar was against a blood bank. The court reasoned that the significant factor in the hospital cases was not the "sale-service" distinction for which *Perlmutter* is commonly cited. It was actually the medical inability to detect the presence of the virus or effectively remove it from the blood. The court then referred to a Minnesota case *Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc.*,⁴² another blood transfusion case. Although an action against a blood bank and not a hospital, the Minnesota court noted that the blood bank was a non-profit corporation. After discussing the limited medical knowledge as to detecting this serum, the court indicated what seems to be the general policy reason underlying these blood transfusion cases.

"We find it difficult to give literal application of principles of law designed to impose strict accountability in commercial transactions to a voluntary and charitable activity which serves a humane and public health purpose."⁴³

The Florida court in *Russell* noted this concern over the public policy involved in the question and applied it to the case at bar. It felt "compelled" to disregard the "sale-service" distinction and examine the question on the basis of implied warranty. The court reasoned that it is "a distortion to take what is, at least arguably, a sale, twist it into the shape of a service, and then employ this transformed material in erecting the framework of a major policy decision."⁴⁴ Acting Chief Judge Shannon proceeded to state the predominate elements of the rationale for denying

⁴⁰ 185 So. 2d 749 (1966) *aff'd* 196 So. 2d 115 (1967).

⁴¹ In fact, many states have enacted statutes which expressly exempt charitable institutions from tort liability.

⁴² 270 Minn. 151, 132 N.W.2d 805 (1965).

⁴³ *Id.*, 159, 132 N.W.2d 811 (1965).

⁴⁴ 185 So. 2d 749, 752 (1966).

liability in the blood transfusion cases. First, since the defect which causes the virus in the blood cannot readily be detected, it is against public policy to hold hospitals and blood banks strictly liable "when they are supplying a commodity essential to health."⁴⁵ Second, blood suppliers are non-profit organizations and do not advertise to the general public to increase the demand for their product. Third, the patient's reliance is upon the physician's expertise and not upon that of the blood supplier. These indicia were deemed to be the actual bases of the *Perlmutter* line of decisions. The Florida court then alluded to the California appellate case of *Gottsdanker v. Cutter Laboratories*,⁴⁶ where a drug manufacturer was sued for breach of implied warranty due to the sale of Salk polio vaccine. The California court had analogized the reasoning of the California rule as to food products to that of polio vaccine. Judge Draper stated that "[t]he vaccine is intended for human consumption quite as much as food."⁴⁷ The Florida court in *Russell* felt that the same analogy was applicable to the sale of blood. Therefore, the court held that a cause of action based upon implied warranty could be stated against a blood bank.

The foregoing indicates the actual rationale of the alleged *Perlmutter* "sale-service" distinction. Public policy reasons were actually at the heart of the decisions. It will be helpful to keep those reasons in mind when we consider the judicial extension of the distinction.

III. VARIOUS APPLICATIONS OF THE DISTINCTION.

A. Extending the Blood Transfusion Rule

The *Perlmutter* rule as generally stated is that when service predominates, and a transfer of personal property is only incidental, the transaction is not a sale and therefore warranties do not attach. As discussed above, the rationale of the rule is really based on a public policy unique to the blood cases.⁴⁸ However, the "sale-service" distinction has not been so limited. In *Aegis Productions, Inc. v. Arriflex Corporation of America*,⁴⁹ the Supreme Court, Appellate Division, of New York considered an action alleging a breach of warranty due to improper repair of a motion picture camera. The court, per curiam, held that there was no such cause of action because warranties were limited to the sale of goods. The court cited *Perlmutter* and stated that warranties did not attach to the performance of services, and only an action for negligence is available.⁵⁰ Thus, the New York court extended the "sale-service" distinction in *Perl-*

⁴⁵ *Id.*

⁴⁶ 182 Cal. App. 2d 602, 6 Cal. Rptr. 40 (1960).

⁴⁷ *Id.*

⁴⁸ Alaska, California, Delaware, Massachusetts, Mississippi, Ohio, and South Carolina have statutes explicitly stating that blood is not subject to sale.

⁴⁹ 268 N.Y.S. 2d 185 (1966).

⁵⁰ *Id.* at 187.

mutter to repairs. The court made no attempt to consider the rationale of the *Perlmutter* rule. The policy of protecting non-profit hospitals from liability for defects in blood, which were practically impossible to detect, was not mentioned. Only the "sale-service" distinction was regarded as relevant precedent. A Louisiana case, *Airco Refrigeration Serv., Inc. v. Fink*,⁵¹ further demonstrates this judicial extension. The Supreme Court of Louisiana maintained that a contract for the installation of an air conditioner was not a sale. This principle has been followed in construction contract cases where the furnishing of materials is held to be only incidental to the work and labor performed. Thus, the transaction does not come within the purview of the sales requirement.

In a Connecticut case, *Epstein v. Giannattasio*,⁵² a beauty parlor patron, who suffered acute dermatitis allegedly due to a beauty treatment, brought an action based on breach of warranty. The operator of the beauty parlor demurred to the breach of warranty cause of action. The Court of Common Pleas of Fairfield County referred to Connecticut "sale of food" cases. The Connecticut rule was that the serving of food in a restaurant is not a sale.⁵³ The court then explained that the only thing provided is the personal service of preparing and presenting the food. It concluded that since service is the predominate feature of the transaction, the transfer of personal property is incidental and there is no sale of goods. Thus, an implied warranty was not found to protect the beauty parlor patron from the harmful products used by the beautician. An indication of the inconsistency in the application of the "sale-service" distinction is exemplified by comparing *Epstein* with *Sicard v. Kremer*.⁵⁴ In *Sicard* a beauty parlor operator brought an action for personal injuries received from a hair dye distributed by the defendant. The Ohio Supreme Court found that a seller owes a duty beyond the mere contract. This duty was to refrain from including in the articles any dangerous substance unknown to the buyer. The court concluded that there was an obligation that the goods will be fit for their intended purpose. A breach of this obligation was deemed to be a breach of an implied warranty. Thus, it would appear that a beauty operator in Ohio who has her hands injured by a beauty product can recover on the basis of implied warranty. However, if the beauty operator had been applying the same beauty product to the hair of a customer in Connecticut, the injured customer would not be covered by an implied warranty.⁵⁵ It seems obvious that the "sale-service" distinction is one of form and not one of substance.

⁵¹ 242 La. 73, 134 So. 2d 880 (1961).

⁵² 25 Conn. Supp. 109, 197 A.2d 342 (1963).

⁵³ *Supra* note 21.

⁵⁴ 133 Ohio St. 291, 13 N.E.2d 250 (1938).

⁵⁵ However, Connecticut accepts the doctrine of strict liability in tort so that the patron may recover against the manufacturer under that theory.

B. Bailments and Implied Warranty

There is authority for the proposition that a bailor for hire impliedly warrants that the product he supplies is reasonably fit for its intended purpose. Probably the most commonly cited case for this proposition is *Hoisting Engine Sales Co., Inc. v. Hart*.⁵⁶ The case involved the leasing of a hoist to defendant for structural work. The defendant installed the traveler and hoist to lift large pipes and place them in a trench. However, the hoist broke when this was attempted. The Hoisting Company then sued Hart for damaging the hoist. Hart counterclaimed on the basis of an implied warranty. The New York Court of Appeals through the opinion of Judge Crane considered whether an action for breach of implied warranty was available. The court noted that by analogy there is an implied warranty in the hiring or bailment of certain kinds of property. Judge Crane concluded that since the plaintiff owned a traveler with a hoist for digging and lifting work and had hired it to defendant to do such work, there was an implied warranty "that the thing would do the work." It is noteworthy that Judge Crane further explained:

The defendant does not claim that there was a warranty that this machine would do a special class of work for which it might or might not be adapted; [but] . . . the class of work which its nature indicates it was intended to perform.⁵⁷

Thus, an implied warranty that the hoist was reasonably fit for "digging and lifting" was found to exist even though the relationship of the parties was that of bailor-bailee and not one of vendor-vendee.

In a Washington case, *Hatten Machinery Co. v. Bruch*,⁵⁸ an action was brought by a lessor of earth moving equipment to recover allegedly unpaid rental and incidental charges. The lessee counterclaimed that the equipment did not perform as the lessor had warranted. Apparently, the defendant was engaged in constructing a road for a logging company and had informed plaintiff of his need for earth removers or scrapers to load and transport gravel. The Washington Supreme Court in the opinion by Chief Justice Finley, indicated that the evidence clearly showed that the scrapers provided were inadequate. The court then concluded on the basis of rules analogous to sales law, "the roots of which are imbedded in the common law," that an implied warranty attached to the transaction.⁵⁹

Admittedly, both the *Hoisting* case and *Hatten Machinery* were actions for a recovery of money expended on the article leased and not for personal injuries. However, there are a few cases which apply implied warranties to a bailment transaction in an action due to personal injuries.

⁵⁶ 237 N.Y. 30, 142 N.E. 342 (1923).

⁵⁷ *Id.* at 37, 142 N.E. at 344. See *Seely v. White Motor Co.*, *infra* note 68.

⁵⁸ 59 Wash. 2d 757, 370 P.2d 600 (1962).

⁵⁹ *Id.* at 761, 370 P.2d 603.

One such case involved a claim for personal injuries sustained when plaintiff fell while roller skating. The case was *Covello v. New York*,⁶⁰ a 1959 Court of Claims action predicated upon an implied warranty that the skates rented to plaintiff were fit and suitable for skating. Plaintiff had rented a pair of clamp skates from the defendant and after about two minutes of skating the rollers came loose and plaintiff fell. The plaintiff sustained a broken leg and lost six weeks of work. The court, relying on *Hoisting Engine Sales Co. v. Hart*, said that when plaintiff paid her entrance fee and received a pair of skates and used them, a bailor-bailee relationship was created for mutual benefit. The court further stated that an implied warranty of fitness for use arises in bailment as well as sales cases. It then held that defendant had breached an implied warranty that the skates hired by plaintiff were reasonably fit for the purposes for which they were hired. The court awarded the sum of \$5,500 for personal injuries and medical bills.

In most bailor-bailee warranty cases there seems to be some confusion over what is warranted. An example is *Butler v. Northwestern Hospital of Minneapolis*,⁶¹ a 1938 case before the Supreme Court of Minnesota. In its syllabus, the court stated that a person furnishing an instrumentality for a special use or service impliedly warrants that it is reasonably fit and suitable for that purpose. However, in the opinion of Justice Olson, it added the words ". . . and is liable for injuries to the bailee or third persons for injuries proximately resulting from any defect due to this want of due care."⁶² This would appear to indicate some confusion between the strict warranty standard and negligent disregard of due care.

In *Hoisting*, the court relied upon an 1874 Massachusetts case in finding an implied warranty.⁶³ The case was for personal injuries. Thus, implied warranties have been found to cover bailor-bailee relationships, in some cases even as to personal injuries. The obvious significance of this fact here is that the implied warranty concept is being used even though the transaction was not a sale.

C. Contracts for Labor and Material

In a California case, *Aced v. Hobbs-Sesack Plumbing Co.*,⁶⁴ the question was whether an implied warranty could be found if the transaction was not a sale. Aced had contracted to build a home with a radiant heating system installed in a concrete slab floor. Hobbs, a subcontractor, agreed with Aced to furnish the necessary labor and materials and installed

⁶⁰ 17 Misc. 2d 637, 187 N.Y.S. 2d 396 (1959).

⁶¹ 202 Minn. 282, 278 N.W. 37 (1938).

⁶² *Id.* at 285, 278 N.W. at 38.

⁶³ *Horne v. Meakin*, 115 Mass. 326 (1874).

⁶⁴ 55 Cal. 2d 573, 581, 360 P.2d 897 (1961).

the system. The system proved faulty and had to be replaced. The homeowners brought an action against Aced for damages. Aced's cross-complaint named Hobbs as a cross-defendant upon the theory that there had been a breach of an implied warranty. In determining whether there was an implied warranty, the court first considered whether there was a sale. It noted prior applications of the Massachusetts rule that there is not a sale where the person supplying the labor and materials incorporated the product into a building. Chief Justice Gibson decided that in this type of situation the test was

. . . not whether the materials used were specially manufactured for the particular work but whether the finished product in which they are incorporated is specially constructed for the job and not suitable for use in the ordinary course of the contractor's business.⁶⁵

He then concluded that the present contract was not a sale, but one for labor and material. However, there may nevertheless be an implied warranty. Justice Gibson then noted that for historical reasons implied warranties had become identified primarily with transactions involving a sale, but they were not so confined. He concluded that

[t]here is no justification for refusing to imply a warranty of suitability for ordinary uses merely because an article is furnished in connection with a construction contract rather than one of sale.⁶⁶

This language in the *Aced* case seems particularly significant in relation to so-called "service" predominated transactions. The test suggested by former Chief Justice Gibson of the California Supreme Court appears to indicate that there is no justification for refusing to apply the concept of implied warranties to the "service" type contract.⁶⁷

The question may be whether Justice Gibson's test is applicable when the particular product causes personal injuries. There seems to be no basis within the Code definitions to limit the recoveries to the value of the product or the economic loss. However, there are some who maintain that the law of sales is to govern only the economic relations between suppliers and consumers of goods. Under this approach injuries to the consumer would be compensated through other remedies. In the words of Justice Traynor of the California Supreme Court,

[t]he distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss . . . rests on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products.⁶⁸

⁶⁵ *Id.* at 581, 360 P.2d at 901.

⁶⁶ *Id.* at 583, 360 P.2d at 902.

⁶⁷ See *Mack v. Hugh W. Comstock Associates, Inc.*, 37 Cal. Rptr. 466 (1964); cf. *Corporation of Presiding Bishop v. Cavanaugh*, 217 Cal. App. 2d 492 (1963).

⁶⁸ *Seely v. White Motor Co.*, 45 Cal. Rptr. 17, 23, 403 P.2d 145, 151 (1965).

He then explains that a manufacturer can be liable for physical injuries due to defective goods where his goods create unreasonable risks of harm. However, the manufacturer should not be liable for the level of performance of his product except where he has agreed that the product was designed to meet the consumer's demands. This distinction does not appear particularly helpful where a product causes personal injury whether or not the "level of performance" of the product was guaranteed. If the idea is that this person should be able to recover in tort, as Justice Traynor suggests, that is a distinction. However, it seems that the responsibilities of the manufacturer or seller should include personal injuries caused by their defective products regardless of the level of performance. The real reasoning seems to be that since actions for negligence and actions for strict liability in tort are limited to physical harm, then actions for breach of warranty should be limited to economic loss. Strict liability in tort has been recognized in eighteen states.⁶⁹ An implied warranty doctrine has been accepted in eleven states and the District of Columbia.⁷⁰ However, it still may be questionable whether the service predominated transaction is covered. In commenting to section 402A of the Restatement of Torts, the American Law Institute stated that they expressed no opinion as to whether the rule applied to the seller of a product expected to be processed or substantially changed before reaching the consumer.⁷¹ However, some states

⁶⁹ Arizona [Bailey v. Montgomery Ward & Co., 6 Ariz. App. 213, 431 P.2d 108 (1967)]; California [Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897 (1963)]; Connecticut [Garthwait v. Burgio, 153 Conn. 284, 216 A.2d 189 (1965)]; Illinois [Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965)]; Indiana [Greeno v. Clark Equipment Co., 237 F. Supp. 427 (D. Ind., 1965)]; Kentucky [Dealers Transport Co., Inc. v. Battery Distributing Co., 402 S.W.2d 441 (Ky. ct. App. 1966)]; Pennsylvania [Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966)]; Tennessee [Ford Motor Co. v. Lonon, 217 Tenn. 400, 398 S.W.2d 240 (1966)]; Texas [McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. Sup. Ct. 1967)]; Wisconsin [Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967)].

⁷⁰ Arkansas [Delta Oxygen Co. v. Scott, 238 Ark. 534, 383 S.W.2d 885 (1964)]; District of Columbia [Picker X-Ray Corp. v. General Motors Corp., 185 A.2d 919 (D.C. Mun. Ct. App. 1962)]; Florida [Manheim v. Ford Motor Co., 201 So. 2d 440 (Fla. Sup. Ct. 1967)]; Hawaii [Chapman v. Brown, 198 F. Supp. 78 (D. Haw. 1961) *aff'd* 304 F.2d 149 (9th Cir. 1962)]; Indiana [Dagley v. Armstrong Rubber Co., 334 F.2d 245 (7th Cir. 1965)]; Iowa [State Farm Mutual Automobile Ins. Co. v. Anderson-Weber, Inc., 252 Iowa 1289, 110 N.W.2d 499 (1961)]; Louisiana [Laclede Steel Co. v. Silas Mason Co., 67 F. Supp. 751 (D. La. 1946)]; North Carolina [Corprew v. Geigy Chemical Corp., 271 N.C. 485 (1967)]; Michigan [Browne v. Ferestra, Inc., 375 Mich. 566, 134 N.W.2d 730 (1965)]; Minnesota [McCormack v. Hanksraft Co., Inc. 278 Minn. 322, 154 N.W.2d 488 (1967)]; Mississippi [State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (1966) *cert. den'd* 386 U.S. 912]; Missouri [Morrow v. Caloric Appliance Corp., 372 S.W.2d 41 (Mo. Sup. Ct. 1963)]; Nevada [Shoshone Coca-Cola Bottling Co. v. Dolinski, 82 Nev. 439, 420 P.2d 855 (1966)]; New Jersey [Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965)]; New York [Goldberg v. Kollman Instrument Corp., 12 N.Y. 2d 432, 191 N.E.2d 81 (1963)]; Ohio [Lonrick v. Republic Steel Corp., 1 Ohio App. 2d 374, 205 N.E.2d 92 (1965) *aff'd* 6 Ohio St. 2d 227, 218 N.E.2d 185 (1965)]; Oklahoma [Marathon Battery Co. v. Kilpatrick, 418 P.2d 900 (Okla. Sup. Ct. 1965)]; Oregon [Wights v. Staff Jennings, Inc., 241 Ore. 301, 405 P.2d 624 (1965)]; South Carolina [Springfield v. Williams Plumbing Supply Co., Inc., 249 S.C. 130, 153 S.E.2d 184 (1967)]; Vermont [Deveny v. Rheem Mfg. Co., 319 F.2d 124 (2d Cir. 1963)]; Washington [Brewer v. Oriard Powder Co., 66 Wash. 187, 401 P.2d 844 (1965)].

⁷¹ Official Comment, RESTATEMENT OF TORTS §402 A.

have merely brought beauty parlor transactions within the "food" exception.⁷² It would appear that, at least in states not accepting strict liability in tort, Justice Gibson's test would be equally applicable to commercial transactions where a product is involved notwithstanding the fact that the product is administered to the customer.

IV. CONCLUSION.

In *Newmark v. Gimbel's Inc.*,⁷³ *supra*, the New Jersey Superior Court considered a beauty parlor transaction and its relationship to the concept of implied warranty. The Connecticut case of *Epstein v. Giannattasio*,⁷⁴ was authority for denying recovery on the basis of implied warranty. This case was discussed by the *Newmark* court, while other decisions denying recovery in a similar situation were not mentioned.⁷⁵ However, the Connecticut court in *Epstein* had looked to Connecticut cases on service of food in restaurants for their authority. Specifically, the court mentioned *Lynch v. Hotel Bond Co.*,⁷⁶ where the furnishing of food in a restaurant was held not to be a sale. The basis of that decision was largely the antiquated "uttering" of food concept. It seems that the New Jersey Superior Court in *Newmark* was justified in rejecting the "uttering" cases as relevant authority.

The *Epstein* court also relied upon the *Perlmutter* rule in blood transfusion cases to substantiate its holding that there was not a sale of goods and therefore no implied warranty. Hopefully, the earlier analysis of the *Perlmutter* rationale points out the weakness of this authority. The policy reasons which apparently were the basis of the blood transfusion "sale-service" distinction seem clearly to justify the *Newmark* court's rejection of that authority. Also, the court in *Epstein* completely ignored the possibility of implying a warranty in the absence of a sale.⁷⁷ We have seen that ignoring the possibility of an implied warranty being applicable to other transactions is ignoring a substantial amount of case law to the contrary.⁷⁸

A relevant question is whether *Newmark* is limited to its facts. The indications are that it is not. The New Jersey court itself felt that the policy reasons involved in sales cases should extend warranty liability to any commercial transaction where one person supplied a product to another. This statement is significant because it brings the *Newmark* situa-

⁷² *Patterson v. George H. Weyer, Inc.*, 189 Kan. 501, 370 P.2d 116 (1962).

⁷³ 102 N.J. Super. 279, 246 A.2d 11 (1968).

⁷⁴ *Supra* note 52.

⁷⁵ See 2 FRUMER AND FRIEDMAN, PRODUCTS LIABILITY §19.02, n.1.

⁷⁶ 117 Conn. 128, 167 A. 99 (1933). In this case the Connecticut court decided to follow the rule of *Merrill v. Hodson*, see note 12 *supra*.

⁷⁷ 25 Conn. Supp. 109, 111, 197 A.2d 342, 343.

⁷⁸ See sections on bailments and contracts for labor and materials, *supra*.

tion within the test used in labor and material cases.⁷⁹ The test notes a distinction between attaching the warranty to the product used in the construction process and the finished product. The materials used are incorporated into a finished product which is specially constructed for this particular job. The *Newmark* court may have alluded to this reasoning when it mentioned that the beauty product was used up in the process of giving Mrs. Newmark a permanent wave.⁸⁰ An effective argument might have been made that the permanent wave was constructed especially for Mrs. Newmark. The finished product was not subject to use in the beauty parlor's ordinary business, but was fit for this customer alone. Under this test, the warranty is applied to the finished product, itself, and not to the materials consumed in the construction process. The rationale of the case logically extends to all commercial transfers of products notwithstanding the element of service. The abandonment of the "sale-service" distinction in cases where there is a commercial transfer of products appears to be justified by the policy involved. The additional element of service should not logically preclude the application of a warranty. Since the "sale-service" distinction has been shown to have a basis in situations peculiar to their facts, it is realistic to end its extension. *Newmark* refuses to apply the distinction. The foregoing analysis has attempted to indicate the correctness of that view.

A. Mark Segreti, Jr.

⁷⁹ *Aced v. Hobbs-Sesack*, 55 Cal. 2d 573, 360 P.2d 897 (1961) *supra* note 64.

⁸⁰ *Supra* note 73, 246 A.2d at 16.