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Sales: Implied Warranty--Furnishing of Blood by a Hospital for a Transfusion

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recognition to a factual situation not uncommon in the business world. A decision on facts would not lead to such an extreme result as the Oklahoma case of *Ardmore Paint and Oil Products Co. v. State Ind. Comm'n.*²⁵ where compensation benefits were awarded to a partner who was the only active member of a husband-wife partnership and who managed the business alone. Such a case would easily be handled on analogy to the *Bowne* case so that only persons who are bona fide employees of the partnership firm and in fact subject to the control of the employing firm would be covered by the act. Courts of most jurisdictions in the United States have handled such factual distinctions without too much difficulty in the corporation cases, and it is reasonable to presume they could do the same where partnerships are involved.

If this advance in judicial thinking is followed it will operate to benefit the class of persons intended to be benefited by the Workmen's Compensation Act; it will eliminate the unrealistic results of deciding cases mechanically on a narrow aggregate theory or on an equally narrow entity theory; and it will substitute therefore realistic decisions based on the actual facts of the relationship as it exists and operates.

—*Frances-Jana Mackay.*

SALES: IMPLIED WARRANTY—FURNISHING OF BLOOD BY A HOSPITAL FOR A TRANSFUSION.—The New York Court of Appeals in *Perlmutter v. Beth David Hospital*¹ recently held in a 4-3 decision, that a hospital which furnishes blood for a transfusion does not impliedly warrant such blood to be free from harmful ingredients, because the furnishing of the blood did not constitute a sale.

The plaintiff, a patient in the defendant hospital received a transfusion of blood for which she paid \$60. The blood furnished by the hospital contained jaundice virus, and the transfusion of this contaminated blood resulted in the plaintiff's becoming infected with the disease. The plaintiff brought an action against the defendant hospital for breach of implied warranty. Defendant moved to dismiss plaintiff's complaint for failing to state a cause of action. This motion was denied by the two lower courts. The Court of Appeals in granting the motion found, as a matter of law, that in a transfusion the transfer of blood is incidental to the service rendered. Since service predominates, the transfer of the blood is not a sale; there being no sale, there is no implied warranty that the blood transferred is fit for a transfusion.

If this blood had been sold, there would have been an implied warranty that the blood was fit for a transfusion, under section 15 of the Uniform Sales Act and the plaintiff would have prevailed.² A sale of goods is an agreement whereby the seller transfers the property in the goods to the buyer for a consideration called the price.³ However, not all transfers of property for a price constitute a sale. If the transfer of the property is merely incidental to the performance of a contract for work and labor the transaction would not be a sale.⁴ In the *Perlmutter* case the hospital transferred the blood to the patient for a consideration of \$60. Therefore the transaction

²⁵ 109 Okla. 81, 234 Pac. 582 (1925).

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

² UNIFORM SALES ACT § 15(1) provides: "Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment . . . , there is an implied warranty that the goods shall be reasonably fit for such purpose." This section is embodied in NEW YORK PERSONAL PROPERTY LAW § 96(1). The implied warranty of this section applies to all sales of goods. *Rinadli v. Mohican*, 225 N.Y. 70, 121 N.E. 471 (1918).

³ NEW YORK PERSONAL PROPERTY LAW § 82(2).

⁴ 1 WILLISTON, SALES §§ 54-55a. (Rev. Ed. 1948.)

falls within the general definition of a sale. But because the court found, as a matter of law, that the transfer of blood was incidental to the service rendered,⁵ the plaintiff is precluded from offering evidence to show as a matter of fact that the blood was sold.

Whether service predominates in any particular transaction would seem to be largely a question of fact and not of law. This is especially true in New York where the hospitals do not render medical service.

"Such a hospital undertakes not to heal or attempt to heal through the agency of others, but merely to supply others who will heal on their own responsibility."⁶

"The hospital undertakes to procure for the patient the services of a nurse. It does not undertake through the agency of nurses to render these services itself."⁷

If a hospital orderly undertakes to perform even a slight service, such as placing a hot water bottle in bed with a patient, he is an independent contractor and the hospital is not liable for his negligent acts, although the acts were obviously within the scope of his employment.⁸

It then appears that the defendant hospital in the *Perlmutter* case could not render any service, but merely supplied the blood to the plaintiff for a price. This then was a sale of the blood. Therefore, it is submitted that the court erred in not permitting the plaintiff to offer evidence of such a sale.

Assuming there was no sale of the blood, but only a servicing of the plaintiff with impure blood, the plaintiff has still stated a good cause of action. Plaintiff cannot take advantage of the implied warranty of section 15 of the Uniform Sales Act, because the implied warranty of this section is limited to sales transactions. However, this does not mean that all actions based upon implied warranties are restricted to sales. Implied warranties are found in other transactions such as: bailments, short term leases, and in contracts in which service predominates and transfer of property is incidental.⁹

The court in the *Perlmutter* case stated that the plaintiff failed because she did not show a sale. She showed instead a contract in which service predominated and transfer of property was incidental. Since such a contract may carry an implied warranty of fitness the question then before the court was, did this contract carry such an implied warranty?

There are two types of implied warranty. One is in the nature of a tort and the other in contract. The implied warranty in *tort* is based upon representations of fact, while the implied warranty in *contract* arises from a promise implied from the fact.¹⁰ The application of reliance is the basic distinction between the two. In a tort action the plaintiff must show that he has relied upon the fact misrepresented. In a contract action, the plaintiff must show that he has relied upon a promise given. This promise may be expressed in words, or implied from conduct. The only difference between

⁵ The court in the *Perlmutter* case has applied the test of predominance ". . . when service predominates, and transfer of property is but an incidental feature of the transaction, the transaction is not deemed a sale within the Sales Act." This is a test used to distinguish a contract for work and labor from a contract of sale and the court cites 1 WILLISTON, SALES §§ 54-55a, which has to do with contracts for work and labor. When the court refers to the contract between Mrs. Perlmutter and the Beth David Hospital as a contract in which service predominates, they liken it to a contract for work and labor.

⁶ *Bernstein v. Beth Israel Hosp.*, 236 N.Y. 268, 270, 140 N.E. 694, 695 (1923).

⁷ *Schloendorff v. Soc. of New York Hosp.*, 211 N.Y. 125, 132, 105 N.E. 92, 94 (1914).

⁸ *Phillips v. Buffalo General Hosp.*, 239 N.Y. 188, 146 N.E. 199 (1924).

⁹ *Miller v. Winters*, 144 N.Y.S. 351; *Gedding v. Marsh*, 1 K.B. 668 (1920); VOLD, SALES §§ 152-53 (1931).

¹⁰ Ames, *History of Assumpsit*, 2 HARV. L. REV. 1 (1888); 1 WILLISTON, *op. cit. supra* note 4, § 195; Prosser, *Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 118 (1943).

an expressed promise and an implied promise is in the manner in which the promise is proved.

Suppose A goes to B's seed store and asks for rape seed and B sells A mustard seed. As a result A suffers loss. If A is to recover in an action based on contract, he must show that B has promised this seed to be rape seed. B, by offering this seed to A in response to A's request for rape seed, has impliedly promised this seed to be rape seed. The effect of B's conduct is the same as though he had expressly stated: "I promise this seed to be rape seed." In the one case the promise is found in the words used by B and in the other the promise is inferred from B's conduct.

A patient who agrees to pay \$60 for blood to be used in a transfusion is bargaining for blood fit for such a purpose. A hospital which undertakes to furnish blood for this purpose impliedly promises that the blood furnished is fit for a transfusion. The patient in effect has asked to be furnished with wholesome blood. From the conduct of the hospital in furnishing the blood, a promise may be inferred that this blood is wholesome. If the blood which the hospital furnishes is not wholesome, the hospital has breached its promise and is liable to the patient for the damage which results.

Suppose the Ajax department store holds a package to be delivered to Mr. Smith and Mr. Jones tells the clerk that he is Mr. Smith and so gains possession of the package. Mr. Jones has represented himself to be Mr. Smith. This is a misrepresentation of fact. If the Ajax department store is to recover in an action of tort, they need not show that Jones *promised* to be Smith, but rather that Jones *represented* himself to be Smith and that Ajax reasonably relied upon this misrepresentation.

A hospital which induces a patient to part with \$60 by furnishing blood for a transfusion represents that the blood so furnished is fit. If the blood is not fit, the hospital has made a misrepresentation of fact, and the patient who has relied upon this misrepresentation should recover for the damage which results.

A single act may constitute both a misrepresentation and a breach of implied promise. The hospital in furnishing the unwholesome blood to the plaintiff breached its implied promise that the blood was fit and also misrepresented unwholesome blood to be wholesome blood. Since either a breach of implied promise or a misrepresentation may result in liability, those using the term "implied warranty" seldom distinguish the type of implied warranty to which they are referring.

The courts have further added to the confusion by finding an implied warranty where there is neither a breach of promise, nor the necessary reliance to constitute a misrepresentation. They have thus created an implied warranty based upon *policy*. When the court thinks it better policy that one of the innocent persons suffer the loss, it may impose this liability by finding a warranty. Such a warranty is not implied, but is more accurately termed an *imposed* warranty.¹¹

This imposed warranty has been found in the more candid opinions of cases involving the liability of a restaurateur who serves unwholesome food to his customers. In these cases the courts have been unwilling to base the liability of the restaurateur upon the narrow question of whether the transaction technically amounted to a sale. The customer who orders a roll for breakfast and breaks his tooth upon a pebble imbedded in it has a broken tooth regardless of whether the roll was sold or furnished incidently to the service rendered. If the court thinks the one furnishing the roll ought to be liable, they impose this liability by finding a breach of implied warranty.¹²

¹¹ Prosser, *Warranty of Merchantable Quality*, *supra* note 10.

¹² *Cushing v. Rodman*, 82 Fed.2d 864 (1913); *VOLD, SALES* §§ 152-53 (1931).