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## Sales--Breach of Warranty--Supplying of Blood by Hospital Not a Sale (Perlmutter v. Beth David Hospital, 308 N.Y. 100 (1954))

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merely because his action arose separately. In the latter instance, the individual is compelled to pay his judgment and rely upon the uncertainties and delays of diplomatic negotiations to afford him relief.

As was stated initially, the rule of foreign immunity evolved entirely from judicial opinion, and therefore may be altered as the Supreme Court deems it necessary. The question remains, however, whether it is proper for the Court to exercise this power. Much of Chief Justice Marshall's reasoning is valid today and care should be taken so as not to injure friendly relations with foreign governments. It is not intended to imply, however, that the rule should remain unaltered. What was deemed good 134 years ago might well be detrimental today. Rather, it is submitted that the legislative and executive branches of the Government, being in a better position to evaluate the effect of such changes, should re-appraise the entire concept of foreign sovereign immunity. This method would give foreign governments notice of any change in policy. The instant case might well prove to be the impetus needed to stimulate such re-appraisal of the rule.



SALES—BREACH OF WARRANTY—SUPPLYING OF BLOOD BY HOSPITAL NOT A SALE.—The plaintiff, a patient at defendant hospital, was given a blood transfusion by a physician. The blood, supplied to the plaintiff by the hospital for \$60, contained jaundice viruses and, as a result, the plaintiff developed homologous serum hepatitis. An action was commenced for breach of implied warranty.<sup>1</sup> The defendant moved to dismiss the complaint for insufficiency, but the Special Term denied the motion and the Appellate Division unanimously affirmed. The Court of Appeals, in reversing,<sup>2</sup> held that the supplying of blood for a price by a hospital is not a sale but merely an incident of an entire contract for services to which implied warranties do not attach. *Perlmutter v. Beth David Hospital*, 308 N.Y. 100, 123 N.E.2d 792 (1954).

In order for there to be an implied warranty under Section 96 of the Sales Act, there must be a contract of sale.<sup>3</sup> However, when

<sup>1</sup> "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." N.Y. PERS. PROP. LAW § 96(1). "Where the goods are bought by description from a seller who deals in goods of that description . . . , there is an implied warranty that the goods shall be of merchantable quality." *Id.* § 96(2).

<sup>2</sup> In a four-three decision, Conway, Dye and Froessel, J.J., dissented.

<sup>3</sup> *Haag v. Klee*, 162 Misc. 250, 293 N.Y. Supp. 266 (Sup. Ct. 1936); see WHITNEY, LAW OF SALES § 145 (4th ed. 1947).

the rendition of a service includes a transfer of property, a difficult question arises as to whether the transaction is a sale or a service. In certain instances, the question has been answered with some certainty in New York. For example, when the applicability of the Statute of Frauds is in issue, the test to be applied in determining whether the contract is for services or sale is clearly set out in Section 85 of the Personal Property Law.<sup>4</sup> Contrary to the rule before the enactment of the Uniform Sales Act,<sup>5</sup> a contract for the transfer of goods not yet in existence now constitutes a sale.<sup>6</sup> However, if the goods ". . . manufactured . . . for the buyer . . . are not suitable for sale to others in the ordinary course of the seller's business . . .,"<sup>7</sup> the transaction is regarded as a contract for services.<sup>8</sup>

In actions for breach of implied warranty under Section 96, there is no comparable statutory test. Furthermore, the cases that have dealt with the problem have not spelled out suitable criteria to aid the lawyer in distinguishing a sale from a service. For example, in *Temple v. Keeler*,<sup>9</sup> a patron sued a restaurant for breach of warranty of the food it served. The court, although recognizing the service aspect of the transaction, eluded the problem and simply held it to be a "qualified sale." In *Miller v. Winters*,<sup>10</sup> the court allowed the defendant's counterclaim for breach of implied warranty of an entire heating system installed by the plaintiff. In so deciding, the court implied the warranty, though admitting the importance of the service aspect.<sup>11</sup> Thus, until the instant case, the question was relatively unanswered in New York. In other jurisdictions, the problem has been squarely met most often in the "restaurant cases." A predominance test was applied and the transaction was held to be mainly one for services rather than for a sale of goods.<sup>12</sup>

In the instant case, the Court faced the problem squarely and, endeavoring to discover the essence of the contract, applied the test of predominance. The Court, in citing its authority, resorted mainly

<sup>4</sup> N.Y. PERS. PROP. LAW § 85(2), *Indiana Limestone Co. v. Harry Bernstein Cut Stone Co.*, 263 App. Div. 312, 32 N.Y.S.2d 956 (1st Dep't 1942).

<sup>5</sup> If the goods were not substantially in existence at the time of the making of the contract, the agreement was one for work, labor and services, and not for the sale of goods. *Parsons v. Loucks*, 48 N.Y. 17 (1871); see *Cooke v. Millard*, 65 N.Y. 352, 359 (1875).

<sup>6</sup> See note 4 *supra*.

<sup>7</sup> N.Y. PERS. PROP. LAW § 85(2).

<sup>8</sup> See *Gura v. Herman*, 227 App. Div. 452, 238 N.Y. Supp. 230 (2d Dep't 1929), *aff'd mem.*, 253 N.Y. 618, 171 N.E. 808 (1930); *Indiana Limestone Co. v. Harry Bernstein Cut Stone Co.*, *supra* note 4.

<sup>9</sup> 238 N.Y. 344, 144 N.E. 635 (1924).

<sup>10</sup> 144 N.Y. Supp. 351 (Sup. Ct. 1913).

<sup>11</sup> *Id.* at 354.

<sup>12</sup> See, e.g., *Loucks v. Morley*, 39 Cal. App. 570, 179 Pac. 529 (1919); *Merrill v. Hodson*, 88 Conn. 314, 91 Atl. 533 (1914); *Nisky v. Childs Co.*, 103 N.J.L. 464, 135 Atl. 805 (1927); see *Kenney v. Wong Len*, 81 N.H. 427, 128 Atl. 343, 348 (1925).

to cases from foreign jurisdictions. It cited only one New York case,<sup>13</sup> not involving a breach of warranty, in which the court held, *per curiam*, that a contract to paint pictures is one for work, labor and services, and not within the purview of Section 82 of the Sales Act.<sup>14</sup> As the action in that case was not for breach of implied warranty, so the other cases cited by the Court may be likewise distinguished. One involved the applicability of an occupational tax,<sup>15</sup> another the applicability of a zoning ordinance,<sup>16</sup> a third was an action to recover the balance due upon a contract,<sup>17</sup> while the last was a replevin action.<sup>18</sup> These cases may be distinguished further on the ground that the property transferred was directly worked upon by the transferor in accomplishing the purpose of the contract.<sup>19</sup> In the instant case, the transfer of the blood was unattended by any acts of ministration by the hospital. The act of transfusing blood, on the other hand, was a medical act performed by a physician, for which the hospital is not legally answerable.<sup>20</sup> There were merely many various peripheral acts of service generally relatable to the transfer of blood in the form of prior and subsequent treatment of the patient.<sup>21</sup>

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<sup>13</sup> *Racklin-Fagin Constr. Corp. v. Villar*, 156 Misc. 220, 281 N.Y. Supp. 426 (App. T. 1st Dep't 1935).

<sup>14</sup> "1. A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

"2. A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." N.Y. PERS. PROP. LAW § 82.

<sup>15</sup> See *Babcock v. Nudelman*, 367 Ill. 626, 12 N.E.2d 635 (1937). The plaintiff-optometrist sought to enjoin the Director of Finance from enforcing the tax against him. The tax was directed against individuals engaged in the business of *selling* personalty. The court held that the supplying of lenses was incidental to the plaintiff's profession and that therefore he was not subject to the tax. The court did not hold it was not a sale.

<sup>16</sup> See *Town of Saugus v. B. Perini & Sons, Inc.*, 305 Mass. 403, 26 N.E.2d 1, 3 (1940). The town sought to enjoin the defendant from removing gravel from a pit, allegedly in violation of a zoning ordinance prohibiting such removal for purposes of *sale*. The defendant was removing the gravel pursuant to a contract for road construction. The court held that the ordinance was not applicable since the contract was not one of sale but for labor and services.

<sup>17</sup> See *Sidney Stevens Implement Co. v. Hintze*, 92 Utah 264, 67 P.2d 632 (1937). The plaintiff agreed to build an automobile trailer for the defendant. Upon defendant's default, the plaintiff sued to recover the balance of the agreed price. The court held that the contract was one for work, labor and services, and not one of sale.

<sup>18</sup> See *Crystal Recreation, Inc. v. Seattle Ass'n of Credit Men*, 34 Wash.2d 553, 209 P.2d 358 (1949). An agreement called for a contractor to manufacture fixtures for the plaintiff. The contractor later made an assignment for the benefit of creditors. Defendant, who was a creditor, took possession of some of the fixtures. The court upheld plaintiff's replevin action holding the contract to be for work, labor and services, title passing to plaintiff prior to assignment.

<sup>19</sup> See notes 13, 15-18 *supra*.

<sup>20</sup> See *Necolayff v. Genesee Hosp.*, 270 App. Div. 648, 652-653, 61 N.Y.S.2d 832, 836 (4th Dep't 1946), *aff'd mem.*, 296 N.Y. 936, 73 N.E.2d 117 (1947).

<sup>21</sup> "The supplying of blood by the hospital was entirely subordinate to its

Prior to the instant case, the traditional liability of a hospital to its patients was in the area of tort. In New York, relying upon the doctrine of *respondere superior*,<sup>22</sup> a hospital has been held liable to its patients for the negligence of its servants, doctors and nurses when engaged in administrative acts.<sup>23</sup> However, where the act is a medical one, the negligent conduct of a doctor, nurse or employee will not be imputed to the hospital.<sup>24</sup> It is the nature of the act that determines the hospital's liability.<sup>25</sup> The instant case is illustrative of a few pioneer attempts to attach liability upon a hospital on a theory other than negligence. Similar actions have been brought in Ohio<sup>26</sup> and Kentucky.<sup>27</sup> In those jurisdictions, however, the action was defeated upon the ground that it was really tortious in nature and the prevailing policy would not permit a further extension of the tort liability of hospitals.<sup>28</sup>

In the instant case, the Court felt that liability without fault ". . . should not be imposed upon the institution . . . actually seeking to save . . . the patient."<sup>29</sup> Thus, the patient is referred to the often difficult task of proving negligence. The ability of an anesthetized

paramount function of furnishing trained personnel and specialized facilities in an endeavor to restore plaintiff's health. It was not . . . blood . . . for which plaintiff bargained, but the wherewithal of the hospital staff and the availability of hospital facilities. . . ." *Perlmutter v. Beth David Hosp.*, 308 N.Y. 100, 106, 123 N.E.2d 792, 795 (1954).

<sup>22</sup> This is the oldest theory upon which the liability of charitable hospitals to their patients is predicated. See Grunfeld, *Recent Developments In the Hospital Cases*, 17 *Mod. L. Rev.* 547, 549-550 (1954).

<sup>23</sup> *Ranelli v. New York Hosp.*, 295 N.Y. 850, 67 N.E.2d 257 (1946) (nurse); *Dillon v. Rockaway Beach Hosp.*, 284 N.Y. 176, 30 N.E.2d 373 (1940) (servant); see *Greenberg v. Hillside Hosp.*, 73 N.Y.S.2d 21, 22 (Sup. Ct. 1947) (doctor and nurse).

<sup>24</sup> *Phillips v. Buffalo General Hosp.*, 239 N.Y. 188, 146 N.E. 199 (1924) (servant); *Schloendorff v. New York Hosp.*, 211 N.Y. 125, 105 N.E. 92 (1914) (doctor); *Morse v. Syracuse Mem. Hosp.*, 83 N.Y.S.2d 830 (Sup. Ct. 1948) (nurse).

<sup>25</sup> *Phillips v. Buffalo General Hosp.*, *supra* note 24; *Jones v. City of New York Hosp.*, 134 N.Y.S.2d 779, 781 (Sup. Ct. 1954); see *Bobbé, Tort Liability of Hospitals in New York*, 37 *CORNELL L.Q.* 419, 432-435 (1952); Note, 25 *N.Y.U.L.Q. REV.* 612, 618 (1950).

<sup>26</sup> *Cf. Lovich v. Salvation Army, Inc.*, 81 Ohio App. 317, 75 N.E.2d 459 (1947). This was a suit for breach of implied warranty of food served by defendant-charitable institution to plaintiff-resident.

<sup>27</sup> See *Forrest v. Red Cross Hosp., Inc.*, 265 S.W.2d 80 (Ky. 1954). The action was for breach of implied warranty of food served to a paying patient by the hospital.

<sup>28</sup> ". . . [W]hether the liability is based upon a breach of implied warranty or negligence, . . . the result is the same. The action . . . is tortious in nature and the rule of limited liability in favor of eleemosynary or charitable institutions must be applied." *Lovich v. Salvation Army, Inc.*, *supra* note 26, 75 N.E.2d at 464. See *Forrest v. Red Cross Hosp., Inc.*, *supra* note 27, 265 S.W.2d at 82.

<sup>29</sup> *Perlmutter v. Beth David Hosp.*, 308 N.Y. 100, 107, 123 N.E.2d 792, 795 (1954).

individual to bear witness to negligent conduct is, of course, limited. One troubled by serious afflictions of the body is seldom able to perceive a negligent act or omission. This results in an inability not only to adduce affirmative evidence by the plaintiff, but to rebut the testimony of adverse witnesses. However, even if the plaintiff surmounts these barriers and negligence is proven, a final stumbling block lies in the nature of the acts or omissions. If they be adjudged to be medical, whether there be negligence or not, the plaintiff has no remedy against the hospital.<sup>30</sup> The effect of the instant case is to limit patients to their difficult task of establishing negligence. This is contrary to the current trend of widening the bounds of hospital liability.<sup>31</sup>

Actions for breach of implied warranty are tortious in nature and have their common-law foundation in actions for deceit.<sup>32</sup> "The basis of implied warranty is justifiable reliance on the judgment or skill of the warrantor. . . ." <sup>33</sup> According to Section 96, a warranty of fitness for use attaches to goods sold provided that the buyer makes known to the seller the purpose for which the goods are required and ". . . relies on the seller's skill or judgment. . . ." <sup>34</sup> However, "[i]f the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed." <sup>35</sup> It would appear, therefore, that the basis of the cause of action was not materially changed. The declaration by the legislature that a warranty is implied in the sale of goods did not serve to make the fact of sale an *inflexible element* in the gravamen of the complaint, but merely a *circumstance* which permits an action to be maintained. Recognizing the tort history of warranty and the true nature of the action, it does not seem proper to subject the essential *condition* of a sale to the same rigid scrutiny as it must undergo in other actions, purely *ex contractu*.

It does not seem that an opposite conclusion by the Court would have resulted in imposing a serious burden upon the hospital. If a recovery were had, then, as the dissent indicated, the hospital would have a right of indemnity over against a third party. Nor does it seem that the possibility of ultimate personal liability would result, in the case of blood, in any general public refusal to sell blood. The instances in which diseased blood reaches the patient would be few. Furthermore, in these cases, the ends of justice would be best served by imposition of liability since, in the case of jaundice, whether or

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<sup>30</sup> See notes 24 and 25 *supra*.

<sup>31</sup> See *Ranelli v. New York Hosp.*, 49 N.Y.S.2d 898, 901 (Sup. Ct. 1944), *modified*, 269 App. Div. 906, 56 N.Y.S.2d 481 (2d Dep't 1945), *aff'd mem.*, 295 N.Y. 850, 67 N.E.2d 257 (1946); see Bobbé, *Tort Liability of Hospitals in New York*, 37 CORNELL L.Q. 419, 437 (1952); 38 COL. L. REV. 1485, 1489 (1938).

<sup>32</sup> See Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 8 (1888).

<sup>33</sup> 1 WILLISTON, SALES § 242b (Rev. ed. 1948).

<sup>34</sup> N.Y. PERS. PROP. LAW § 96(1).

<sup>35</sup> *Id.* § 96(3).

not the blood reaches a patient depends upon the integrity of the paid donor<sup>36</sup> in most instances.<sup>37</sup>

Now that the test of predominance has been formulated, transactions which embrace both services and a transfer of property are required to be viewed in their entirety. This is true even though the transfer aspect is clearly distinguished by a separate consideration. Such a transfer may in itself involve no elements of service; however, because the general relationship between the contracting parties is one for services, the transfer is deprived of its standing as a sale. Although there be a predominance of services in such cases, this should not, in justice, preclude a breach of warranty action since the goods are transferred for a price, distinct from that offered for the services.

The purpose of implied warranty is to afford protection to the buyer. It is an answer of natural justice to the doctrine of *caveat emptor*.<sup>38</sup> It is submitted, therefore, that Section 82 be amended to include transactions in which, though the predominant aspect be service, there is a transfer of property for a separate consideration.



TORTS—LACK OF SUPERVISION AS GROUND FOR DENYING HOSPITAL IMMUNITY.—Plaintiff brought suit against defendant hospital for the wrongful death of his child. The decedent, a baby several hours old, had been placed in a bassinet and warmed by an electric lamp<sup>1</sup> in the hospital nursery. A student nurse, supervisor of the nursery, moved the lamp close to the child and left the ward to attend to administrative duties, returning twenty minutes later to find the bassinet enveloped in flames. The Court, *holding* that the hospital was

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<sup>36</sup> Homologous serum jaundice “. . . is produced by the parenteral inoculation of whole blood, serum or plasma, ordinarily obtained from an individual who is supposedly nonjaundiced, or at least from a donor not known (at the time) to be ill with infectious hepatitis.” Paul, Havens, Sabin, and Philip, *Transmission Experiments in Serum Jaundice and Infectious Hepatitis*, 128 J.A.M.A. 911 (1945). The incubation period for infectious hepatitis is from 10-40 days. This period is followed by severe reactions. See GREENBERG AND MATZ, *MODERN CONCEPTS OF COMMUNICABLE DISEASE* 183-184 (1953). Thus, one usually should be aware of such an affliction and, upon being asked at the time of giving the blood (which is the usual practice), should volunteer such information.

<sup>37</sup> There may be occasions when a person may sell his blood during the rather short incubation period of infectious hepatitis.

<sup>38</sup> See *Howard Iron Works v. Buffalo Elevating Co.*, 113 App. Div. 562, 570, 99 N.Y. Supp. 163, 167 (4th Dep't 1906), *aff'd mem.*, 188 N.Y. 619, 81 N.E. 1166 (1907).

<sup>1</sup> The use of a light bulb to warm infants is said to be normal hospital practice. See *Cadicamo v. Long Island College Hosp.*, 308 N.Y. 196, 199, 124 N.E.2d 279 (1954).