EXTENSION OF WARRANTY CONCEPT TO SERVICE-SALES CONTRACTS

Gussie Perlmutter received a blood transfusion during the course of treatment in Beth David Hospital and, after release, contracted jaundice.[1] In an action against the hospital,[2] she alleged that the disease resulted from a sale and transfusion of "bad" blood by the defendant to her.[3] Her theory of recovery was that the defendant breached an implied warranty of merchantability and fitness in the sale.[4] In a four to three opinion, the New York Court of Appeals characterized the relationship between hospital and patient as a contract for services[5] and held that a sale of blood incident to the relationship is not a sale to which the implied warranties of the Sales Act could attach.

In view of the New York court's unique position as a molder of judicial opinion and the severe limitation imposed on the scope of warranty liability, the implications of the decision should be examined. It has been said that "a sale is not the only transaction in which a warranty may be implied,"[6] but little attempt has been made to ascertain the areas

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1. Webster's Unabridged Dictionary defines jaundice as a disease, in its most common form, characterized by suppression and alteration of the liver functions, yellowness of the eyes, skin, and urine, whiteness of the discharges from the intestines, uneasiness referred to the region of the stomach, loss of appetite, and general languor and lassitude.

2. Perlmutter v. Beth David Hospital, 308 N.Y. 100, 123 N.E.2d 792 (1954). The defendant appealed from the trial court's denial of a motion to dismiss for failure to state a cause of action. The ruling of the trial court was affirmed by the Supreme Court, and the defendant appealed to the Court of Appeals. The case is discussed in Note, 69 HARV. L. REV. 391 (1955).

3. The plaintiff alleged that the blood "contained jaundice viruses and injurious substances, agents and impurities." Perlmutter v. Beth David Hospital, 308 N.Y. 100, 103, 123 N.E.2d 792, 793 (1954).

4. The plaintiff claimed under N.Y. PERS. PROP. LAW § 96, which corresponds to UNIFORM SALES ACT § 15.

5. The court's precedent for characterizing the relationship as one of service or sale derives from the test used to determine whether an obligation is enforceable under the requirements of the Statut of Frauds. See UNIFORM SALES ACT § 4. A contract for "services" need not be in writing to be enforceable. See Note, 40 CORNE.. L. Q. 803 (1955). Characterization is also used to determine the applicable tax rate where statutory rates vary depending upon whether the income is from services rendered or goods sold. See Samper v. Indiana Dept. of State Revenue, 231 Ind. 26, 37, 106 N.E.2d 797, 802-03 (1952); Washington Printing and Binding Co. v. State, 192 Wash. 448, 450-51, 73 P.2d 1326, 1327 (1937).

6. 1 WILLISTON, SALES § 242(b) (rev. ed. 1948). Professor Williston, however, does not attempt to determine the limits of warranty liability. That his consideration of the problem was limited is suggested by his comment on an English case: "[A] hairdresser was held liable as a warrantor to a customer for injury caused him by a hair dye, *though it was a contract for service and use of materials, rather than of sale.*"

to which warranty liability may be extended.[7]

The Uniform Sales Act codifies the common law rules regarding warranties in sales transactions.[8] These rules represent a different policy from the *caveat emptor* approach of the earlier common law and prescribe the conditions which must exist to give rise to warranties in connection with sales. The act defines warranties as expresss or implied.[9] Express warranties arise when the seller makes a promise or affirmation of fact relating to the goods upon which the buyer relies.[10] When goods are sold by description or sample, there is an implied warranty that the goods shall conform to the description or sample and be of merchantable quality.[11] A purchase of goods for a particular purpose in which the buyer relies upon the seller's skill or judgment in selecting the goods gives rise to an implied warranty that the goods shall be fit for the purpose.[12]

The common elements of the Sales Act warranties are promissory acts of a seller relating to goods upon which a buyer relies. Promises, affirmations, descriptions, selections in response to requests, and reliance represent the framework within which warranty liability, as exemplified by the case law, has been developed. An attempt to reconcile the case law on the basis of this framework, however, is impossible, for, just as the Sales Act represents one stage in the development of a social policy in favor of consumer protection, the case law subsequent to its formulation represents a further development explicable only in terms of conditions which have modified the sales concept.

The conditions which help to justify the judicial extension of warranty liability as a device for distributing risks have been described as a

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Id. at n. 3 § 233(a). (Emphasis added.) The drafters of the UNIFORM COMMERCAL CODE, however, suggest a different approach: "[T]he warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined . . . to sales . . . ." UNIFORM COMMERCIAL CODE § 2-313, Comment 2.

7. See Note, 2 VAND. L. REV. 675 (1949), for a discussion of some of the areas to which warranty liability has been extended.

8. Sections 12 through 16 restated the common law warranties which existed in some states and materially expanded their scope in other jurisdictions. The act has been adopted in thirty-seven American legislative jurisdictions. 1 UNIFORM LAWS ANNO. v. (1950).

9. Implied warranties arise by operation of law from the nature of the transaction. 1 WILLISTON, SALES § 239(b) (rev. ed. 1948); VOLD, SALES § 150 (1931). The implied warranties of conformity to description or sample provided by UNIFORM SALES ACT §§ 14, 16 are designated express warranties under UNIFORM COMMERCIAL CODE § 2-313.

10. UNIFORM SALES ACT § 12.

11. *Id.* §§ 14, 15(2), 16(a), (c).

12. *Id.* § 15(1).

willingness of business to stand behind its products,[13] standardization,[14] and mass marketing techniques.[15] Effectuation of social policy requires that dealings be invested with minimum standards of responsibility; courts and writers have not failed to recognize insurance as an appropriate means toward this end.[16]

Broadening the scope of warranties has been accomplished within the framework of the Sales Act, so that the action has not become an amorphous theory. Courts continue to speak in terms of reliance and the promissory acts but have given new content to these elements. There may be specific reliance upon a seller, but in some transactions a general reliance upon the manufacturing and distribution system suffices.[17] If liability for breach of warranty is thought to be based on fault, relaxing the requirement of reliance at the retailer-consumer level allows the loss to fall at the probable source of fault; this also places the risk upon the party best able to absorb it.[18] Had warranty liability been fully developed at the time the Sales Act was written, a sale by description might be defined as one in which all attributes of the goods are stated. A "sale by

13. Many modern businesses have developed a practice of providing repair, replacement, or refund for defective goods which they have sold. See Bogert and Fink, *Business Practice Regarding Warranties in the Sale of Goods*, 25 ILL. L. REV. 400 (1930). However, business has not been willing, on its own initiative, to extend this practice to the point of compensating customers for personal injuries and property damage resulting from defective products.

14. Standardization has been accomplished through the development of mass production techniques. This produces an entirely different type of seller than the horse-trader of a century ago. The modern manufacturer can calculate the percentage which the risk of loss bears to each unit manufactured and can reflect it in the sales price of the goods.

15. The face-to-face transaction of yesteryear has given way to the complex marketing system of today. Manufacturers and dealers utilize advertising to induce potential purchasers to buy their goods to an extent undreamed of fifty years ago when the Sales Act was drafted. The purchaser may rely upon such advertising instead of closely examining competing products as he would have done in the absence of advertising. See Note, 29 IND. L. J. 173, 175-77 (1954).

16. Sellers can insure against the liability they may incur as a result of risk-shifting. Over $18,000,000 are spent annually in the United States for products liability insurance. Noel, *Products Liability of a Manufacturer in Tennessee II*, 22 TENN. L REV. 985 (1953).

17. In Ward v. Great Atlantic & Pacific Tea Co., 231 Mass. 90, 120 N.E. 226 (1918), the plaintiff broke a tooth on a pebble contained in a can of beans purchased from defendant retailer. The court held that the plaintiff did not need to prove reliance on the seller's skill or judgment in such a case because reliance is implicit in the nature of the transaction. *Id.* at 93, 120 N.E. at 226.

18. Warranties are generally considered to constitute contractual provisions, but the probability of fault is also considered. See Note, 29 IND. L. J. 173, 174 (1954). Relaxing the reliance requirements at the retailer-consumer level allows recovery against the retailer who, if not at fault, has a cause over against his supplier. Ultimately, the liability comes to rest on the party who is most likely at fault. The same result can be reached by relaxing the privity requirement and allowing the consumer to sue the manufacturer directly. Texas has done this in food cases. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942).

description" is today effected when a buyer requests goods by reference to their common name; thus, if a "ladder" is requested, it must be of merchantable quality.[19] The "selection" in the warranty of fitness for particular purpose is sometimes satisfied by the seller's offering the goods for sale.[20]

The Sales Act has been used as a point of departure from which warranty liability has been extended to transactions other than sales. This is graphically illustrated by the restaurant and bailment cases. Retail and wholesale sales of food are, of course, covered by the warranties sections of the act; but since at common law, the serving of food for immediate consumption on the premises was not a sale,[21] the imposition of warranty liability on restaurateurs has been more difficult. A majority of jurisdictions have found the transaction sufficiently analogous to a sale to justify liability under the Sales Act.[22] When the transaction

19. In Kelvinator Sales Corp. v. Quabrin Improvement Co., 234 App. Div. 96, 254 N.Y. Supp. 123 (1st Dep't. 1931), the plaintiff purchased refrigerators from the defendant described only as Kelvinator refrigerators. The court held that an implied warranty of merchantibility accompanied the refrigerators. Where a customer at a retail store requested a loaf of "Wards bread" and was injured by a pin contained therein, the court said: "Here was a sale by description, the defect was wholly latent, and inspection was impossible." Ryan v. Progressive Grocery Stores, Inc., 255 N.Y. 388, 395, 175 N.E. 105, 107 (1931). The court further held that a loaf of bread baked with a pin in it is not of merchantable quality. *Id.* at 394, 175 N.E. at 107.

20. The implied warranty of fitness for purpose requires that the buyer rely upon the seller's skill or judgment. This requirement is met if the buyer relies upon the seller's skill or judgment in selecting the goods at the time the seller obtains them, and the reliance on this selection may be inferred from the nature of the transaction. Rinaldi v. Mohican Co., 225 N.Y. 70, 125 N.E. 471 (1918); Ward v. Great Atlantic & Pacific Tea Co., 231 Mass. 90, 120 N.E. 225, (1918). In Kurris v. Conrad & Co., 312 Mass. 670, 46 N.E.2d 12 (1942), the plaintiff selected a dress from a number of dresses shown to her by the defendant's clerk. She contracted contact dermatitis as a result of her skin coming in contact with the dye used on the cloth. The court held that "in a sale over the counter of an article that is open to inspection, but where any practical inspection would not disclose an unsound condition, the plaintiff, by implication, has a right to rely upon the skill and judgment of the seller." *Id.* at 683, 46 N.E.2d at 19. The particular purpose requirement was satisfied by the purchase of a dress "to wear."

21. Beale states the old rule to be that "an innkeeper . . . does not sell the food he supplies to the guest . . . . Having finished his meal, he has no right to take food from the table, even the uneaten portion of the food supplied to him . . . ." BEALE, INNKEEPERS § 169 (1906).

22. See DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 167 (1951); Annot., 7 A.L.R.2d 1027, 1032-35 (1949). Today, a customer at a restaurant acquires an absolute right to the food served him. He can eat it on the premises or, if he desires, take the uneaten portion away with him. "The serving for value of food or drink to be consumed either on the premises or elsewhere is a sale." UNIFORM COMMERCIAL CODE § 2-314. Professor Williston reasons that if a retailer is liable for selling a defective can of beans to a customer, a restauranteur who opens a similar can of beans and serves the contents to a customer should be liable for damage caused by a similar defect. 1 WILLISTON, SALES § 242(b) (rev. ed. 1948).

The courts have been greatly influenced by the nature of the damage. The consumption of unwholesome food results in personal injuries. In addition to the

is analyzed in the light of the underlying basis for warranty liability, the implication of a warranty of wholesomeness is reasonable, giving effect to the expectations of the parties. In ordering, the customer expects to get food that will please his palate and nourish his body; and in serving the food, the restaurateur is aware of this expectation. The contract is not fulfilled if the food causes damage to the customer. The injuries which result are a great burden if borne by the individual; this burden can be eased by shifting the risk to the restaurateur who may protect himself by reflecting the risk in the prices he charges for food. The customer must be able to rely on the restaurateur who knows where he obtained the food, how long he has had it, and the manner in which it was prepared.

Bailments for hire also have been found analogous to sales transactions and subjected to implied warranties.[23] Although title does not pass in bailments and return of the goods is a term of the contract, these distinctions from sales do not relate to the interests protected by warranty liability. The inapplicability of the election of remedies provisions of the Sales Act based upon passage of title ought not to limit the extent of liability in bailment cases; indeed, the election of remedies doctrine sometimes defeats the policy underlying warranty liability.[24] When a

growing tendency to protect consumers in general, the implied warranty of wholesomeness in food cases rests upon a social policy of protecting human health and life. Cushing v. Rodman, 82 F.2d 864, 869 (D.C. Cir. 1936); Decker & Sons v. Capps, 139 Tex. 609, 612-13, 164 S.W.2d 828, 829-30 (1942).

23. "One who lets property for hire may reasonably be subjected to the same implied warranties as one who sells goods . . . . Analogy with the law of sales justifies the further statement that if the hirer reasonably relied on the bailor's superior skill or knowledge in furnishing suitable property, the latter would be liable even though in fact ignorant of the defects in the goods which he furnished." 4 WILLISTON, CONTRACTS § 1041 (rev. ed. 1936). A gratuitous bailment is analogous to a gift; the bailor is under a duty to warn the bailee against defects of which he is aware. Ruth v. Hutchinson Gas Co., 209 Minn. 248, 296 N.W. 136 (1941); Davis v. Sanderman, 225 Iowa 1001, 282 N.W. 717 (1939). A person who receives no compensation for a transfer of property is no better able to distribute the risk of loss than is an injured party.

Many courts compare the bailment transaction to a sale and hold that as an implied warranty would accompany a sale completed under circumstances similar to the bailment, a corresponding warranty should accompany the bailed goods. Hoisting Engine Sales Co., v. Hart, 237 N.Y. 30, 142 N.E. 342 (1923); Thompson Spot Welder Co. v. Dickelman Manufacturing Co., 15 Ohio App. 270 (1921); El Paso & S. W. R. Co., v. Eichel & Weikel, 130 S.W. 922 (Tex. Civ. App. 1910). The drafters of the Uniform Commercial Code stated that warranties "may arise . . . in the case of bailments for hire . . . ." UNIFORM COMMERCIAL CODE § 2-313, Comment 2.

24. The election of remedies provided under § 69(2) of the Sales Act has been severely criticized. See Llewellyn, *On Warranty of Quality, and Society II*, 37 COL. L. REV. 341, 390-393 (1937). Llewellyn rightly feels that a buyer who has suffered special damages should be able to return the defective goods and maintain an action for his damages instead of having to elect between the two.

The election requirement has not always been strictly complied with. Fiterman

bailor knows the purpose for which the goods are required, he impliedly warrants that the goods are fit for that purpose.[25]

If the *Perlmutter* case is persuasive, liability for implied warranties in sales incident to contracts of work, labor, and materials will be denied in American jurisdictions.[26] This is an unnecessary and formalistic limitation on warranty liability. English courts have refused to so limit the Sale of Goods Act,[27] model for the Uniform Sales Act. In the case of *Dodd v. Wilson*[28] in which "bad" vaccine caused sickness and death in a herd of cattle, the court reasoned that "justice . . . does not require that, by taking on themselves the administration of the substance in addition to recommending and supplying it, the defendants thereby . . .

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v. J. N. Johnson & Co., 156 Minn. 20, 194 N.W. 399 (1923); Russo v. Hochschild Kohn & Co., 184 Md. 462, 41 A.2d 600 (1945). In New York § 69(1)(d) of the Sales Act has been amended to allow both recission and damages for the breach. N.Y. PERS. PROP. LAW § 150.

25. The question is considerably confused by opinions which seem to accept the principle but yet require the plaintiff to prove negligance. Butler v. Northwestern Hospital of Minneapolis, 202 Minn. 282, 278 N.W. 37 (1938); Vanigan v. Mueller, 208 Wis. 527, 243 N.W. 419 (1932). See Annots., 12 A.L.R. 744 (1921); 61 A.L.R. 1336 (1929); 131 A.L.R. 845 (1941); for a detailed analysis of the bailment cases.

This extension has been applied to furnished premises, leased for immediate occupancy, but long established doctrines of fault liability are generally used. The warranty extends only to the furniture, not to the building, and the remedy is limited. The lessee is justified in abandoning the premises and rescinding the lease. In Morganthau v. Ehrich, 77 Misc. 139, 136 N.Y. Supp. 140 (Sup. Ct. 1912), the lessee of a furnished house was allowed to rescind the lease because the house was overrun with vermin. "[I]n the lease of a furnished house, particularly one for a short season, or under other circumstances which indicate the purpose of immediate occupancy, there is an implied warranty of the availability of the furniture." *Id.* at 141, 136 N.Y. Supp. at 142. A similar case is Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892). An exception to the rule that recission is the only remedy is found in an English case where the plaintiff recovered damages for personal injuries suffered as a result of being bitten by bugs while spending the night at the defendant's Turkish bath. Silverman v. Imperial London Hotels, 137 L.T.Rep. 57, 43 T.L.Rep. 260 (K.B. 1927). Most jurisdictions do not imply warranties of habitability as to a lease of furnished premises. Rubins v. Hill, 115 Ill.App. 565 (1904), aff'd. 213 Ill. 523, 73 N.E. 1127 (1904); Davis v. George, 67 N.H. 393, 39 A. 979 (1892).

26. Decisions of the New York Court of Appeals are given great weight by the courts of other states. Many of the country's outstanding jurists have made their mark from this bench. Notable among these is Cardozo. MacPherson v. Buick Motor Co., 217 N.Y. 382, 11 N.E. 1050 (1916), and other New York cases led the way for extention of liability in the tort field. It is unfortunate that the New York court should now decided a case which may have the opposite effect on warranty law. A second, and probably controlling, consideration for the decision, however, is the policy against non-fault liability for hospitals. If this was the real reason for the decision, the court should have expressed it as the sole basis for its ruling and avoided establishing a precedent which, if followed, will seriously retard the growth of warranty law. In any case, the minority opinion pointed out that the reason underlying the rule granting immunity to hospitals did not exist in this case as the hospital had a cause over against its supplier, a third-party defendant in the suit. Perlmutter v. Beth David Hospital, 308 N.Y. 100, 110, 123 N.E.2d 792, 797 (1954).

27. Sale of Goods Act, 1893, 56 & 57 Vict., c. 71.

28. [1946] 2 All E.R. 691 (K.B.).

succeed in lessening their liability."[29]

The fact that a transfer of goods in the performance of a contract of work, labor, and materials is accompanied by services makes it no less a sale within the terms of the Sales Act.[30] The policy reasons for implying warranties in the transactions heretofore considered apply with equal force to goods transferred under contracts of work, labor, and materials. That treatment should not worsen a patient's condition is basic to the relationship which existed in the *Perlmutter* case. This expectation is not fulfilled when contaminated blood is used in the treatment. Since the defect was latent, probably undiscoverable under any circumstances, and the loss occasioned by the injury represented a serious burden upon the patient, ability to distribute the cost of injury becomes an important consideration. Skill and knowledge were factors beyond the patient's control. If a fault concept is necessary,[31] it may exist in the fact that a hospital deals in blood and can determine the reliability of its sources of supply.

The bases for the implication of warranties are also present when goods are transferred under other contracts of work, labor, and materials. If one takes his automobile to a garage for repairs, he normally does not remain there to select and inspect the parts which are to be installed. He relies upon the judgment of the mechanic, not only to select parts which are suitable for the purpose, but also to determine which parts, if any, need to be replaced. If parts are purchased and installed by the buyer, the warranties of the Sales Act are applicable to the sale. The seller who

29. *Id.* at 695. This case follows a line of cases to the same effect. In Samuels v. Davis, [1943] 1 K.B. 526, where the court implied a warranty of fitness in a contract to make a set of dentures, the court said: "[I]t is a matter of legal indifference whether the contract was one for the sale of goods or one of service to do work and supply materials." *Id.* at 127. A similar result was reached in a case where defective hair dye was applied by a hairdresser, Watson v. Buckley, [1940] 1 All. E.R. 174 (K.B. 1939), and where defective connecting rods were installed in an automobile engine by a garage, G. H. Myers & Co., v. Brent Cross Service Co., [1943] 1 K.B. 46.

For the many children who contracted paralytic polio from live virus contained in six lots of Salk anti-poliomyelitis vaccine manufactured by Cutter Laboratories, an extension of warranty liability would be useful. One writer advocates that vaccine manufacturers be held to strict liability in tort for all injuries directly resulting from infective vaccine they produce. See Note, 65 YALE L. J. 262 (1955).

30. A sale of goods is "an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." UNIFORM SALES ACT § 1(2). The fact that a transfer is accompanied by services does not preclude it from coming within this definition. Many sales are accompanied by services as where the seller installs the goods as part of the purchase price. In the Perlmutter case the patient was billed separately for the blood she received. Perlmutter v. Beth David Hospital, 308 N.Y. 100, 103, 123 N.E.2d 792, 793 (1954). This is the usual practice in repair contracts where the customer is charged separately for parts and labor.

31. See note 18 *supra.*

also installs, despite his greater opportunity to inspect for defects, an opportunity neither required nor often found in sales cases, would be held to a lesser liability under the *Perlmutter* approach.[32]

A different problem arises when an attempt is made to extend implied warranties to the service rendered under a contract for work, labor, and materials. This part of the contract is the same as a pure service contract where warranties are not generally implied. The performer of services has a duty to perform in a workmanlike manner and to exercise reasonable skill.[33] A doctor, dentist, or surgeon does not impliedly warrant the result of his work;[34] a well digger does not warrant quality or quantity of the water, if any, which the well will produce.[35]

Some aspects of the service contract would seem to justify extension of warranty liability to this area. The performer of services has greater

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32. The seller who installs the goods has more opportunity to discover defects than a seller who merely sells them "over the counter." In the former situation he handles the goods and generally tests their sufficiency; in the latter situation he may turn them over to the buyer in their original package or wrapping.

33. Fitzsimmons v. Olinger Mortuary Association, 91 Colo. 544, 17 P.2d 535 (1932); Geiger v. Ajax Rubber Co., 179 Wis. 70, 190 N.W. 831 (1922); Sinclair Oil & Gas Co. v. Bryan, 291 S.W. 692 (Tex. Civ. App. 1927).

The history of liability for damage caused by faulty performance of a service contract sheds some light on why service contracts are not accorded warranty treatment. Originally, an action in assumpsit lay against a person who performed his contract in such a manner as to cause damage to the promisee. AMES, LECTURES ON LEGAL HISTORY 130-31 (1913). The liability was based upon the fact of an undertaking. A doctor was not liable for damages caused by negligent treatment unless he undertook to cure the patient. *Id.* at 131-32. Trespass would not lie because it embodied the notion of a nonconsensual injury caused by the act of a stranger. If one saw fit to authorize another to come in contact with his person or property and damage ensued, there was no trespass; the person injured took the risk of injurious consequences. *Id.* at 131 This theory of liability was changed in 1598 in the case of a farrier whose unskillful treatment resulted in the death of a horse. It was decided that an "action on the case lies in this matter without alleging any consideration, for his negligence is the cause of action, and not the assumpsit." Powtuary v. Walton, (1598) 1 Roll. Abr. 10, pl 5. This is the accepted basis of liability for damage incident to the performance of service contracts today.

The existence of absolute liability in some early cases however, raises the question of why warranty liability was not continued where a defective rendering of services caused damage. Blackstone states that a common farrier impliedly warrants that he will shoe "a horse well, without laming him . . . ." 3 BLACKSTONE, COMMENTARIES *165. Ames alludes to the same situation in the question, "What, then, was the significance of the Assumpsit which appears in all the cases and precedents, except those against a smith for unskillful shoeing?" AMES, LECTURES ON LEGAL HISTORY 131 (1913). Neither Blackstone nor Ames provides the reasons for this result. Evidently, the smith was absolutely liable for damage done to a horse while shoeing him, but it is not possible to determine why the smith was in a special class or why the liability was later discontinued.

34. McHugh v. Audet, 72 F.Supp. 394 (D.C. Pa. 1947); Sherlag v. Kelley, 200 Mass. 232, 86 N.E. 293 (1908); Hopkins v. Heller, 59 Cal. App. 447, 210 P. 975 (1922); Robbins v. Nathan, 189 App. Div. 829, 179 N.Y. Supp. 281 (2d Dep't 1919).

35. Norbeck & N. Co. v. Mallock, 26 S.D. 54, 127 N.W. 471 (1910); Butler v. Davis, 119 Wis. 166, 96 N.W. 561 (1903); Omaha Consolidated Vinegas Co. v. Burns, 49 Neb. 229, 68 N.W. 492 (1896).

experience concerning the service he renders than does the recipient. Unlike the general reliance which supports many sales warranties,[36] specific reliance is implicit in the nature of the service contract except in the few cases where service is performed under supervision. The performer of services is, perhaps, not as able to absorb the risk of loss as is the party ultimately liable for breach of a sales warranty, but his ability exceeds that of the recipient of the services.[37]

But the expectations of the parties must be considered. A client does not expect his attorney to win all lawsuits; he expects the attorney to do that which a competent attorney would do in an attempt to win. A patient does not expect his doctor to cure him of a disease; he expects the doctor to use reasonable care and skill in treating him for the disease. The expectation of the parties is not that a particular result will be reached but that the performer will do those acts which will ordinarily reach the result desired. The result is too uncertain and speculative for the parties to expect that it will necessarily be achieved. Negligence is a sufficient remedy for giving effect to the expectations of the parties where the end is not susceptible to reliable prediction.

It follows that implied warranties should apply to service contracts only when a specific result can reasonably be expected and is a basis of the bargain. If a person contracts to install a heating system in a building, there may be an implied warranty that the goods furnished shall be suitable for the purpose and that the plan or system used will heat the building.[38] When a plumber contracts to install a water system in a building, furnishing both the materials and the plan or system to be used, "the law will import into the contract an implied agreement that the . . . system of distributing the water will be . . . suitable for the purpose for which it was designed . . . it being a contract for the doing of certain work to accomplish certain results."[39] If a dentist contracts to fabricate a denture for a patient, a denture is contemplated which fits the patient's mouth and serves the normal purposes of eating and talking.[40]

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36. See discussion p. 369 *supra.*

37. The performer of services has no one to whom he can shift the risk as the retailer does. However, he can attempt to reflect the risk in the price he charges for his services; this makes him better able to bear the risk than the recipients of the services. The possibility of liability insurance should also be considered in this area.

38. Miller v. Winters, 144 N.Y. Supp. 351 (Sup. Ct. 1913).

39. Smallwood v. Pettit-Galloway Co., 187 Ark. 379, 380, 59 S.W.2d 1031, 1032 (1933).

40. This result was reached in Samuels v. Davis, [1943] 1 K.B. 526. However, the court considered the transaction to be a contract of work, labor, and mateirals rather than a contract for services. See note 30 *supra.*

A result contrary to these holdings was reached in the case of Ladd v. Reed, 320 Mich. 167, 30 N.W.2d 822 (1948). The plaintiff contracted to furnish all necessary

Contemplation of a specific result may be found in the nature of the agreement; warranty liability gives substance to the understanding.

In cases where the injured party may also have a claim for negligent performance, the type of evidence required in a breach of warranty action makes the latter remedy procedurally desirable. It is difficult to prove a deviation from standards of professional competency, and the ability of the performer to produce evidence of his conduct justifies requiring him to meet this burden.

Implied warranties is a developing field of law, and its boundaries cannot yet be fully ascertained. The principle, under the Sales Act, that warranties should accompany the sale of goods can be of great analogical value in the extension of the warranty liability.[41] It is submitted that courts, in deciding the wisdom of an extension, should look to the reasons underlying the growth of warranty liability rather than to the form

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labor and materials to install a new stack and grates for the defendant's boiler and represented that, when the work was completed, the boiler would have a specified power capacity. When the work was completed, the capacity of the boiler was not as great as was anticipated. The plaintiff sued for the unpaid balance of the contract price, and the defendant sought to recoup part of the money already paid. In rejecting the defendant's claim, the court stated: "The contracts were not for the sale of combustion equipment as argued by Reed, but were for services and material to be provided by Ladd in his capacity as a combustion engineer. Such contracts do not fall within the provisions of the uniform sales act . . . and therefore there was no implied warranty of quality or fitness for a particular purpose as provided in Section 15 thereof." *Id.* at 171, 30 N.W.2d at 824. The court did not consider the possibility of an implied warranty independent of the Sales Act.

41. A transfer of goods under a contract of work, labor, and materials is a sale as defined by the Sales Act. See note 31 *supra*. However, if courts decide that the definition is not as broad as the words imply, the doctrine of extension of statutes by analogy should be utilized to extend warranty liability to include such goods. Mr. Justice Stone ably discussed this principle. "The reception which the courts have accorded to statutes presents a curiously illogical chapter in the history of the common law. Notwithstanding their genius for the generation of new law from that already established, the common law courts have given little recognition to statutes as starting points for judicial lawmaking comparable to judicial decisions. They have long recognized the supremacy of statutes over judge-made law, but it has been the supremacy of a command to be obeyed according to its letter, to be treated as otherwise of little consequence. The fact that the command involves the recognition of a policy by the supreme lawmaking body has seldom been regarded by courts as significant, either as a social datum or as a point of departure for the process of judicial reasoning by which the common law has been expanded. . . . I can find in the history and principles of the common law no adequate reason for our failure to treat a statute much more as we treat a judicial precedent, as both a declaration and a source of law, and as a premise for legal reasoning. We have done practically that with our ancient statutes, such as the statutes of limitations, frauds and wills, readily molding them to fit new conditions within their spirit, though not their letter, possibly because their antiquity tends to make us forget or minimize their legislative origin." Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 12-13 (1936).

This principle of extension of statutes by analogy was applied in Agar v. Orda, 264 N.Y. 248, 190 N.E. 479 (1934). The New York Court of Appeals, while intimating that corporate stock is not "goods" within the meaning of the Uniform Sales Act, decided to use the same measure for recovery as in the Sales Act although the state's common law rule was not in accord with the act.

of transactions. Courts have been responsive to the need for expanding the framework of the Sales Act warranties; the need for a similar approach in areas other than sales should not be overlooked.

THE 'RIGHT' TO OBSERVE TRIALS—ITS SOURCE AND VINDICATION

Open trial is a well established feature of the Anglo-American judicial process. Few will dispute its desirability in a free society.[1] Open trial has been expressly recognized as a right of an accused in the Sixth Amendment and in state constitutions and statutes.[2] But a similar right of the public has had no express recognition.[3] For many centuries, in England and the United States, the public has attended trials, both civil and criminal; but it is not clear whether the public has a right to attend trials or whether public attendance is merely a way of vindicating the right of the accused.[4]

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1. A federal court recently named the supposed justifications for the right as: (1) a safeguard against any attempt to employ our courts as instruments of persecution; (2) notice to witnesses who may then voluntarily come forward with valuable evidence; and (3) confidence in judicial remedies instilled in spectators gained through observation of their government in action. *In re* Oliver, 333 U.S. 257 (1948). The first justification may be attributed to the traditional Anglo-Saxon distrust of secret trials ascribed to the Spanish Inquisition, the English Court of the Star Chamber, and to the French Monarchy's abuse of *lettre de cachet*. The second may be attributed to the ancient common law concept of public trials and its particular merits in reference to the quality and quantity of testimony given at the trial. This benefit accruing to the testimonial process relates to civil as well as criminal trials while the first justification seems peculiar to the criminal process. The third justification emphasized by the federal court seems to be an outgrowth of the concept of popular sovereignty and the right of the people to participate in the governmental process.

2. The constitutions of 41 states guarantee a public trial to the accused in criminal cases. For a list of the states, see Note, 35 CORNELL L.Q. 395 n. 8 (1950). Two states, New York and Nevada, provide a statutory guarantee: N.Y. CIVIL RIGHTS LAW § 12; NEV. COMP. LAWS § 10654 (1929).

3. The nearest thing to an express recognition similar to the right of the accused is the Michigan and New York statutory provisions: "The sittings of every court within this state shall be public, and every citizen may freely attend the same, . . ." N.Y. JUDICIARY LAW § 4; MICH. JUDICATURE ACT c. 4, § 604.5. But the N.Y. Court of Appeals, in United Press Ass'n v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954), interpreted the provision as not establishing an enforcible right in the public.

The Ohio Court of Appeals construed a more general provision as extending a distinct right in the public to an open trial. E.W. Scripps Co. v. Fulton, 125 N.E.2d 896 (1955). Art. I, § 16 of the Ohio Constitution provides: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law. . . ."

4. "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility