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Injection of Contaminated Drug by Hospital Employee Sufficient to Constitute Sale of Product for Purposes of Implied Warranty.

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PRODUCTS LIABILITY—Breach of Implied Warranty—Injection Of Contaminated Drug By Hospital Employee Sufficient To Constitute Sale of Product for Purposes of Implied Warranty.

Providence Hospital v. Truly,
611 S.W.2d 127 (Tex. Civ. App.—Waco 1980, writ dism'd).

Mrs. Goldie E. Truly underwent cataract surgery at Providence Hospital. At the end of the operation, a contaminated drug supplied by the hospital's pharmacy was injected into her eye.[1] The contamination injured Mrs. Truly's eye and additional corrective surgery was required.[2] Truly pleaded an action in negligence for failure of the hospital's nurse or surgeon to discover the contamination.[3] She also sought damages for breach of implied warranty under the Deceptive Trade Practices Act.[4] The jury found the hospital was not negligent.[5] The trial court, however, entered judgment in favor of Truly upon the breach of warranty action.[6] The hospital appealed.[7] Held—*Affirmed.* Injection of contaminated drug by hospital employee's sufficient to constitute sale of product for purposes of implied warranty.[8]

An implied warranty of quality[9] is a legal fiction imposed upon a seller of goods who implicitly represents to buyers that the goods are fit for their ordinary or particular purpose.[10] The implied warranty provides the

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1. Providence Hospital v. Truly, 611 S.W.2d 127, 129 (Tex. Civ. App.—Waco 1980, writ dism'd). The injection of Miochol into Truly's eye was the final act of the cataract surgery. *Id.* at 129.

2. *Id.* at 129.

3. *Id.* at 129.

4. *Id.* at 129. Truly sought treble damages and attorney's fees provided under the Act. *Id.* at 129.

5. *Id.* at 130.

6. *Id.* at 130.

7. *Id.* at 130.

8. *Id.* at 132-33.

9. *See* TEX. BUS. & COM. CODE ANN. §§ 2.314, 2.315 (warranties of merchantability and fitness for a particular purpose).

10. *See, e.g.,* Interstate Folding Box Co. v. Hodge Chile Co., 334 S.W.2d 408, 414 (Mo. Ct. App. 1960) (no implied warranty by seller concerning quality or fitness of food cartons when cartons delivered according to buyer's specifications); Deere & Weever Co. v. Moch, 3 N.W.2d 471, 474 (N.D. 1942) (implied warranty imposed upon sale of farm machinery); J. A. Campbell Co. v. Corley, 13 P.2d 610, 613 (Or. 1932) (implied warranty extends to sale of unusable flour).

buyer with a remedy for injuries caused by the product.[11] The warranty is incorporated into the contract by operation of law when the goods are sold, regardless of the intent of the parties.[12] The basis for holding sellers of goods to an implied warranty is that the law must intercede in order to regulate a transaction which might otherwise result in hardship to the buyer.[13] Imposing an implied warranty on a seller of goods has been limited, however, by the degree of the buyer's reliance on the seller's representations.[14] If the buyer has an opportunity to inspect the product for patent defects, he is no longer said to rely on the seller and an implied warranty does not attach.[15]

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11. *See, e.g.*, Broyles v. Brown Eng'r Co., 151 So.2d 767, 770 (Ala. 1963) (engineering company breached implied warranty for adequacy of plans and specifications in absence of express warranty in contract); Stanfield v. F. W. Woolworth Co., 53 P.2d 878, 880 (Kan. 1936) (purchased food carries implied warranty of fitness for intended purpose in absence of express warranty); Nettles v. Imperial Distrib., Inc., 159 S.E.2d 206, 215 (W. Va. 1968) (breach of implied warranty when defective stove exploded). *See also* Sneed v. Beaverson, 395 P.2d 414, 415-16 (Okla. 1964) (food sold which causes injuries held to implied warranty); F. W. Woolworth Co. v. Garza, 390 S.W.2d 90, 91 (Tex. Civ. App.—San Antonio 1956, writ ref'd n.r.e.) (food sold for human consumption held to implied warranty).

12. *See, e.g.*, Woodruff v. Clark County Farm Bureau Coop. Ass'n, 286 N.E.2d 188, 194-95 (Ind. Ct. App. 1972) (seller of chickens liable for breach of implied warranty imposed by operation of law); Chandler v. Anchor Serum Co., 426 P.2d 82, 89 (Kan. 1967) (action in implied warranty imposed by operation of law against manufacturer, distributor, and retailer of infectious animal vaccine); Mountaineer Contractors, Inc. v. Mountain State Mack, Inc., 268 S.E.2d 886, 889 (W. Va. 1980) (breach of implied warranty applies by operation of law to sale of bulldozers for surface mining operations).

13. *See* Llewellyn, *On Warranty of Quality, and Society: II*, 37 COLUM. L. REV. 341, 403 (1937). Implied warranties are also imposed because the seller often has greater ability to test, evaluate, control, and correct any defects in the product. *See* Singal, *Extending Implied Warranties Beyond Goods: Protection for Consumers of Services*, 12 NEW ENGLAND L. REV. 859, 878 (1977). The seller is, therefore, said to be in a better position to choose a product for buyer's purpose than the buyer himself. *See* U.C.C. § 2-315. Section 2-315 provides:"Where the seller [of goods] 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." *Id.*

14. *See, e.g.*, Lanphier Constr. Co. v. Fowco Constr. Co., 523 S.W.2d 29, 41 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (particular purpose as required for implied warranty envisions specific use by buyer); Brown v. Asgrow Seed Co., 379 S.W.2d 412, 414 (Tex. Civ. App.—San Antonio 1964, writ ref'd n.r.e.) (must be justifiable reliance by buyer on seller's representations before seller held to implied warranty that articles sold are suitable for purpose intended); Craftsman Glass, Inc. v. Cathey, 351 S.W.2d 950, 952 (Tex. Civ. App.—Amarillo 1961, no writ) (article sold for special purpose carries implied warranty that article is suitable for such use).

15. *See* U.C.C. § 2-316(3)(b) (1952 version). Section 2-316, Comment 8 of the UCC provides:

> The particular buyer's skill and the normal method of examining goods in the circumstances determine what defects are excluded by the examination . . . . A pro-

Since implied warranties of merchantability and fitness are limited to the sale of goods,[16] they generally have not been found to attach to the performance of a mere service.[17] *Perlmutter v. Beth David Hospital*[18] involved an action to impose an implied warranty of fitness for the transfusion of blood contaminated with serum hepatitis.[19] The New Jersey court held that when service predominates, and the transfer of a product is incidental, the transaction is not a sale and no implied warranty attaches.[20] Although *Perlmutter* has been widely followed,[21] recent decisions indicate

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fessional buyer examining a product in his field will be held to have assumed the risk as to all defects which a professional in the field ought to observe, while a nonprofessional buyer will be held to have assumed the risk only for such defects as a layman might be expected to observe.

Id. § 2-316(3)(b), Comment 8. *See, e.g.*, Chaq Oil Co. v. Gardner Mach. Corp., 500 S.W.2d 877, 878-79 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ) (no recovery under implied warranty because defects were apparent to buyer); Davis Motors, Dodge and Plymouth Co. v. Avett, 294 S.W.2d 882, 885 (Tex. Civ. App.—Fort Worth 1956, no writ) (where defect was concealed, buyer's inspection would not limit implication of warranty); Swift & Co. v. Roberson, 288 S.W.2d 226, 230 (Tex. Civ. App.—Texarkana 1956, no writ) (where party has opportunity to inspect, and defects are patent, no implied warranty attaches in absence of fraud).

16. *See, e.g.*, Board of Trustees v. Kennerly, 400 A.2d 850, 852 (N.J. Super. Ct. Law Div. 1979) (no implied warranty attaches to engineer's product in preparing construction specifications); Milau Assocs. v. North Ave. Dev., 368 N.E.2d 1247, 1250-51; 42 N.Y.S.2d 482, 485 (1977) (provider of service not held to implied warranty when underground pipe burst); Gordon v. Holt, 412 N.Y.S.2d 534, 537 (App. Div. 1979) (no implied warranty attaches to architectural service because there is no sale of a product). *But see* U.C.C. § 2-313, Comment 2 (1952 version) (recognizing warranties need not be confined to sales contracts).

17. *See, e.g.*, Raritan Trucking Corp. v. Aero Commander Inc., 458 F.2d 1106, 1114-15 (3d Cir. 1972) (airplane servicer not held to implied warranty or strict liability); Lemley v. J & B Tire Co., 426 F. Supp. 1378, 1379 (W.D. Pa. 1977) (no recovery from repairman of brakes on theory of implied warranty); Aegis Prod., Inc. v. Arriflex Corp., 268 N.Y.S.2d 185, 187 (Ct. App. 1966) (implied warranty does not attach to performance of service).

18. 123 N.E.2d 792, 140 N.Y.S.2d 54 (App. Div. 1954).

19. *Id.* at 793, 140 N.Y.S.2d at 55.

20. *Id.* at 795, 140 N.Y.S.2d at 56. The court stated: "The essence of the contractual relationship between hospital and patient is readily apparent; the patient bargains for, and the hospital agrees to make available, the human skill and physical material of medical science to the end that the patient's health be restored. Such a contract is clearly one for services, and just as clearly, it is not divisible." *Id.* at 795, 140 N.Y.S.2d at 56; *accord*, Whitehurst v. American Nat'l Red Cross, 402 P.2d 584, 586 (Ariz. Ct. App. 1965) (furnishing of blood by blood bank not a sale to which implied warranty could apply); Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc., 132 N.W.2d 805, 810-11 (Minn. 1965) (furnishing blood is the nature of service).

21. *See, e.g.*, Lovett v. Emory Univ., Inc., 156 S.E.2d 923, 924-25 (Ga. 1967) (blood transfusion incidental part of service furnished by hospital and not a sale); Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc., 132 N.W.2d 805, 810 (Minn. 1965) (furnishing blood a service; not actionable under UCC); Moore v. Underwood Memorial Hosp., 371 A.2d 105, 107 (N.J. Super. Ct. App. Div. 1977) (blood unavoidably unsafe product, therefore, no

a trend toward increased recognition of an implied warranty in certain service-oriented transactions.[22]

Courts which refuse to apply theories of strict liability or implied warranty to medical professionals have done so even when defective products were provided during the treatment of the patient.[23] The rationale employed to support this determination is that the essence of the relationship between the physician and patient is the provision of professional services to treat the patient's ailment.[24] The business of the medical pro-

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cause of action under strict liability or implied warranty). *But see, e.g.,* Belle Bonfils Memorial Blood Bank v. Hansen, 579 P.2d 1158, 1159 (Colo. 1978) (blood bank providing blood is a sale of product to which implied warranty attaches); Community Blood Bank, Inc., v. Russell, 196 So.2d 115, 117 (Fla. 1967) (sale of contaminated blood stated a cause of action); Hoder v. Sayet, 196 So.2d 205, 208 (Fla. Dist. Ct. App. 1967) (implied warranty imposed on blood bank for "sale" of blood). Several jurisdictions have extended the sales-service distinction to transactions other than blood. *See, e.g.,* Johnson v. Sears, Roebuck, & Co., 355 F. Supp. 1065, 1067 (E.D. Wis. 1973) (medical and professional service exempt from strict liability); Airco Refrigeration Service, Inc. v. Fink, 134 So.2d 880, 883 (La. 1961) (contract for installation of air conditioner not a sale); Aegis Prods., Inc. v. Arriflex Corp., 268 N.Y.S.2d 185, 187 (App. Div. 1966) (repair of movie camera is service).

22. *See, e.g.,* Aluminum Co. of America v. Electro Flo Corp., 451 F.2d 1115, 1118 (10th Cir. 1971) (transaction involving engineering and design aspects was, in essence, a sale); Buckeye Union Fire Ins. Co. v. Detroit Edison Co., 196 N.W.2d 316, 317-18 (Mich. Ct. App. 1972) (implied warranty of fitness and merchantability apply in sale of electrical service); Cintrone v. Hertz Truck Leasing and Rental Service, 212 A.2d 769, 777-78 (N.J. 1965) (lessor of defective truck liable for breach of implied warranty). The extension of implied warranties to service transactions is not discouraged by the UCC. Comment 2 to section 2-313 of the UCC does not limit the application of warranties to either sales contracts or to the direct parties to such a contract, and suggests that the Code be used as a guideline for dealing with future cases. U.C.C. § 2-313, Comment 2. A New Jersey court reasoned that the application of a permanent wave lotion by a beauty parlor attendant amounted to the sale of a product rather than the rendition of a service. Newmark v. Gimbel's Inc., 246 A.2d 11, 17 (N.J. Super. Ct. App. 1968).

23. *See, e.g.,* Vergott v. Deseret Pharmaceutical Co., Inc., 463 F.2d 12, 16 (5th Cir. 1972) (hospital not liable for breach of implied warranty when defective intracath needle caused catheter to break off in patient's vein); Barbee v. Rodgers, 425 S.W.2d 342, 346 (Tex. 1968) (strict liability not applicable to prescription, fitting, or sale of contact lenses, absent claim lenses were defective); Shivers v. Good Shepard Hosp., Inc., 427 S.W.2d 104, 107 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.) (hospital not liable for injuries caused by negligent injection of contaminated drug). This rule has also been followed in cases involving prescriptions of defective or contaminated drugs. *See, e.g.,* Carmichael v. Reitz, 95 Cal. Rptr. 381, 393 (Ct. App. 1971) (no liability on medical doctor prescribing drug as treatment); Bichler v. Willing, 397 N.Y.S.2d 57, 58-59 (App. Div. 1977) (druggist not held to implied warranty for drug sold); Batiste v. American Home Prods. Corp., 231 S.E.2d 269, 273 (N.C. 1977) (doctor not a seller to which implied warranty could apply when oral contraceptive is prescribed). *See also,* McCoy v. Commonwealth, Bd. of Medical Educ. and Licensure, 391 A.2d 723, 730 (Pa. Commw. Ct. 1978) (Crumlish, J., dissenting) (increased insurance rates to provide protection against liability upon medical professional results in increased medical costs).

24. *See, e.g.,* Dorney v. Harris, 482 F. Supp. 323, 324 (D. Colo. 1980) (essence of rela-

fession, therefore, is not viewed as introducing products into the stream of commerce or promoting their sale.[25]

In Texas, breach of an express or implied warranty creates a potential violation of the Texas Deceptive Trade Practices—Consumer Protection Act (the Act).[26] The Act is primarily intended to eliminate "false, misleading and deceptive business practices" and "breaches of warranty."[27] A Texas consumer may maintain an action for breach of an express or implied warranty under the Act when the breach constitutes a producing cause of actual damages.[28] If a consumer prevails in his action, he is enti-

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tionship between physician and patient is providing services); Magrine v. Krasnica, 227 A.2d 539, 543 (N.J. Hudson County Ct. 1967) (essence of relationship between doctor and patient is doctor offers professional service and skill), *aff'd sub nom.*, Magrine v. Spector, 241 A.2d 637, 638 (N.J. Super. Ct. App. Div. 1968), *aff'd*, 250 A.2d 129 (N.J. 1969) (per curiam); Potts v. W. Q. Richards Memorial Hosp., 558 S.W.2d 939, 946 (Tex. Civ. App.—Amarillo 1977, no writ) (essence of hospital stay is to furnish services including incidental sales of medicines).

25. *See, e.g.*, Carmichael v. Reitz, 95 Cal. Rptr. 381, 393 (Ct. App. 1971) (physician prescribes drug only to achieve a cure and he is not in the business of selling a product); Magrine v. Krasnica, 227 A.2d 539, 543 (N.J. Hudson County Ct. 1967) (professional offers a service, and is not in the business of selling or supplying products), *aff'd sub. nom.*, Magrine v. Spector, 241 A.2d 637, 638 (N.J. Super. Ct. App. Div. 1968), *aff'd*, 250 A.2d 129 (N.J. 1969) (per curiam); Batiste v. American Home Prods. Corp., 231 S.E.2d 269, 273 (N.C. Ct. App. 1977) (doctor not a seller and breach of implied warranty could not apply). The United States Court of Appeals for the Third Circuit has stated that it would be unfair to require the professional "to trace the article they used along the channels of trade to the original manufacturer and there to pinpoint an act of negligence remote from their knowledge and even from their ability to inquire." La Rossa v. Scientific Design Co., 402 F.2d 937, 942 (3d Cir. 1968). Additionally, the reasonable expectation of the user is that the professional will provide competent and cautious service, and the user generally does not rely on the professional to guarantee the quality or condition of any product incidentally used in the performance of the professional service. *Cf. id.* at 943 (one cannot expect infallibility from a professional, only reasonable care); Gagne v. Bertran, 275 P.2d 15, 20 (Cal. 1954) (no strict liability of warranty imposed because professional offers service, not product in a guaranteed condition).

26. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1980-1981). *See, e.g.*, Holifield v. Coronado Bldg., Inc., 594 S.W.2d 214, 216 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) (consumer eligible to bring suit under DTPA because of breach of implied warranty of new home); Young v. DeGuerin, 591 S.W.2d 296, 299 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ) (recovery available under Texas Deceptive Trade Practices Act if consumer proves breach of implied warranty in construction of home); Bunting v. Fodor, 586 S.W.2d 144, 145 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ) (action lies for breach of warranty under DTPA).

27. TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon Supp. 1980-1981). This section "shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection." *Id.*. *See* United Postage Corp. v. Kammeyer, 581 S.W.2d 716, 723 (Tex. Civ. App.—Dallas 1979, no writ).

28. TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (Vernon Supp. 1980-1981). *See* Young v.

tled to recover court costs, attorney's fees, and treble damages.[29]

In *Providence Hospital v. Truly*,[30] the Waco Court of Civil Appeals considered the question of applying section 17.50 of the Act to a medical transaction. The court relied on several facts in support of its conclusion that the hospital "sold" the drug Miochol to Mrs. Truly. First, Truly anticipated Providence Hospital would furnish whatever drugs and supplies were necessary.[31] Second, Truly expected to pay the hospital for those items or supplies furnished by the hospital.[32] Third, the hospital charged Truly for the drug.[33] The court rejected the hospital's contention that it was not liable for breach of an implied warranty merely because it was a "health-care provider of medical services."[34] Additionally, the court determined that section 2.315 of the Texas Business and Commerce Code imposes an implied warranty of fitness on goods sold for a particular purpose,[35] unless the warranty is excluded or modified under section 2.316.[36] Ultimately, insofar as section 2.316 does not exclude the furnishing of drugs from implied warranties, the court held an implied warranty existed.[37]

DeGuerin, 591 S.W.2d 296, 299 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ) (sufficient for recovery if buyers prove implied warranty, breach thereof, and that such breach was proximate cause of damages).

29. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1), (c) (Vernon Supp. 1980-1981). Texas courts have held treble damages mandatory when the consumer establishes the necessary elements of a breach. *See, e.g.*, Woods v. Littleton, 554 S.W.2d 662, 671-72 (Tex. 1977) (treble damages mandatory to purchasers of home alleging defective sewer system and faulty repair work); Staley v. Terns Serv. Co., 595 S.W.2d 882, 884 (Tex. Civ. App.—Waco 1980, writ dism'd) (intent by sellers of collection agency to defraud buyers to contract sufficient to award treble damages); Longoria v. Atlantic Gulf Enterprises, Inc., 572 S.W.2d 71, 76 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (homeowner could recover treble damages if establish necessary elements). *But see* Spradling v. Williams, 553 S.W.2d 143, 146 (Tex. Civ. App.—Beaumont 1977), *aff'd*, 566 S.W.2d 561 (Tex. 1978) (word "may" in § 17.50(b)(1) suggests treble damages are not mandatory, but trier of fact "may" award damages up to treble damages).

30. 611 S.W.2d 127 (Tex. Civ. App.—Waco 1980, writ dism'd).

31. *Id.* at 131.

32. *Id.* at 131.

33. *Id.* at 131.

34. *Id.* at 131. In rejecting the hospital's contention, the court relied on section 2.103(a)(4) of the Texas Business and Commerce Code which provides that a "seller" is a "person who sells or contracts to sell goods." TEX. BUS. & COM. CODE ANN. § 2.103(a)(4) (Vernon 1968). The court also relied on section 2.106(a) which provides that "a 'sale' consists in the passing of title from the seller to the buyer for a price . . . ." *Id.* § 2.106(a). The court concluded that Providence Hospital was a "seller" of goods, and that a sale of the Miochol had transpired. Providence Hospital v. Truly, 611 S.W.2d 127, 131 (Tex. Civ. App.—Waco 1980, writ dism'd).

35. TEX. BUS. & COM. CODE ANN. § 2.315 (Vernon 1968).

36. *Id.* § 2.316.

37. *Id.* § 2.316(e). Section 2.316(e) provides:

The court in *Providence Hospital* departed from the traditional sales-service distinction regarding application of warranties by extending implied warranties of merchantability and fitness to what were previously considered service transactions.[38] Although such an approach provides increased consumer protection, it has the impractical effect of forcing the doctor and the hospital to insure the services and products they provide in the treatment of the patient.[39] Hospitals or medical professionals are not in the business of supplying or selling a product commercially,[40] and, consequently, are not in a superior position to discover latent defects in the product employed in administering treatment.[41] This inability to discover hidden defects will prevent the hospital or doctor from exercising the control necessary to guarantee the quality of the product.[42] Additionally, because medical professionals are not in the business of selling products commercially, it will be extremely difficult for the hospital or doctor to exert the amount of pressure required to force the manufacturer to

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> The implied warranties of merchantability and fitness shall not be applicable to the furnishing of human blood, blood plasma, or other human tissue or organs from a blood bank or reservoir of such other tissues or organs. Such blood, blood plasma or tissue or organs shall not for the purpose of this title be considered commodities subject to sale or barter, but shall be considered as medical services.

Id. § 2.316(e).

38. *See* Providence Hospital v. Truly, 611 S.W.2d 127, 132-33 (Tex. Civ. App.—Waco 1980, writ dism'd). *Compare* Buckeye Union Fire Ins. Co. v. Detroit Edison Co., 196 N.W.2d 316, 317 (Mich. Ct. App. 1972) (implied warranties should apply to sale of services as well as sale of goods) *with* Batiste v. American Home Prod. Corp., 231 S.E.2d 269, 273 (N.C. Ct. App. 1977) (individual furnishing professional service not liable in absence of negligence or intentional conduct).

39. *See* Carmichael v. Reitz, 95 Cal. Rptr. 381, 393 (Ct. App. 1971) (physician prescribes medicine only as chemical aid to achieve a cure, and is normally not selling either product or insurance); Perlmutter v. Beth David Hosp., 123 N.E.2d 792, 795, 140 N.Y.S.2d 54, 56 (Ct. App. 1954) (if supplying blood were sale, hospital held responsible as insurer if injuries resulted from bad blood). *Cf.* Gagne v. Bertran, 275 P.2d 15, 20-21 (Cal. 1954) (those who hire experts can expect only reasonable care and competence; they purchase service, not insurance).

40. *See, e.g.*, Carmichael v. Reitz, 95 Cal. Rptr. 381, 393 (Ct. App. 1971) (doctor not in business of selling products); Cutler v. General Elec. Co., 4 U.C.C. REP. SERV. 300, 301 (N.Y. Sup. Ct. 1967) (neither doctor nor hospital in business of selling surgical appliances); Batiste v. American Home Prod. Corp., 231 S.E.2d 269, 273 (N.C. Ct. App. 1977) (doctor not a seller to which breach of implied warranty could apply).

41. *See* Magrine v. Krasnica, 227 A.2d 539, 543 (N.J. Hudson County Ct. 1967) (medical professional generally in no better position than patient to discover defects), *aff'd sub nom.*, Magrine v. Spector, 241 A.2d 637 (N.J. Super. Ct. App. Div. 1968), *aff'd*, 250 A.2d 129 (N.J. 1969) (per curiam).

42. *See* Sales & Purdue, *The Law of Strict Tort Liability in Texas*, 14 HOUS. L. REV. 1, 116 (1977). *Cf.* La Rossa v. Scientific Design Co., 402 F.2d 937, 942-43 (3d Cir. 1968) (difficult for the professional to trace the article to original manufacturer and pinpoint exact act of negligence).

improve the quality of the product.[43]

Under *Providence Hospital*, hospitals and medical professionals will be subjected to liability as any other seller of goods who breaches an implied warranty.[44] Such liability requires the hospital and doctor to provide an allowance in their fee for potential damages and increased insurance rates, raising the cost of medical care.[45] These extra costs will ultimately fall on the consumer-patient desiring medical treatment.[46] Moreover, increased liability will burden new practitioners who lack both the financial resources to meet the higher insurance premiums and the clientele able to sustain higher medical costs.[47]

The Waco Court of Civil Appeals in *Providence Hospital* has assumed the vanguard of the current trend holding hospitals liable for injuries caused by defective drugs administered for the purpose of treating patients. Such a view will force hospitals and physicians to meet the unduly

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43. *See* Sales & Purdue, *The Law of Strict Tort Liability in Texas*, 14 HOUS. L. REV. 1, 116 (1977). *Cf.* Johnson v. William C. Ellis & Sons Iron Works, Inc., 604 F.2d 950, 956 (5th Cir. 1979) (imposing duty on provider of services to discover defects in products used requires them to examine products and pass on cost of additional service not ordered by consumer); La Rossa v. Scientific Design Co., 402 F.2d 937, 942 (3d Cir. 1968) (unfair to require provider of professional service to trace article used to original manufacturer and pinpoint act of negligence remote from their knowledge and ability to inquire); Nath v. National Equip. Leasing Corp., 422 A.2d 868, 876 (Pa. Super. Ct. 1980) (whether imposing liability on finance lessor would indirectly cause manufacturers to improve the quality of their product is at best speculative).

44. *Compare* Providence Hospital v. Truly, 611 S.W.2d 127, 133 (Tex. Civ. App.—Waco 1980, writ dism'd) (hospital held to implied warranty for sale of drug used during operation) *with* Barfield v. F. W. Woolworth Co., 110 N.E.2d 103, 104 (Mass. 1953) (food which caused poisoning carried implied warranty of fitness) *and* Sneed v. Beaverson, 395 P.2d 414, 415-16 (Okla. 1964) (food sold carries implied warranty of wholesomeness) *and* F. W. Woolworth Co. v. Garza, 390 S.W.2d 90, 91 (Tex. Civ. App.—San Antonio 1956, writ ref'd n.r.e.) (food sold for human consumption held to implied warranty). Professionals are generally held only to a negligence standard. *See* Greenfield, *Consumer Protection in Service Transactions—Implied Warranty and Strict Liability in Tort*, 1974 Utah L. Rev. 661, 669-70. *Cf.* La Rossa v. Scientific Design Co., 402 F.2d 937, 943 (3d Cir. 1968) (claim of liability is no more than claim of negligence in failing to perform services with due care).

45. *See* Magrine v. Krasnica, 227 A.2d 539, 545 (N.J. Hudson County Ct. 1967) (purchase of insurance to protect doctor from damages would unduly increase medical costs to the patient), *aff'd sub nom.*, Magrine v. Spector, 241 A.2d 637 (N.J. Super. Ct. App. Div. 1968), *aff'd*, 250 A.2d 129 (N.J. 1969) (per curiam); Hoven v. Kelble, 256 N.W.2d 379, 391-92 (Wis. 1977) (imposing liability on medical transaction would unduly interfere with availability of essential medical care).

46. *See* McCoy v. Commonwealth, Bd. of Medical Educ. and Licensure, 391 A.2d 723, 730 (Pa. Commw. Ct. 1978) (Crumlish, J., dissenting); Sales, *The Service-Sales Transaction: A Citadel Under Assault*, 10 ST. MARY'S L. J. 13, 25 (1978).

47. *Cf.* McCoy v. Commonwealth, Bd. of Medical Educ. and Licensure, 391 A.2d 723, 730 (Pa. Commw. Ct. 1978) (Crumlish, J., dissenting) (insurance act which raises premiums unduly prohibitive to new practitioners).

burdensome task of insuring the quality of the products they dispense. As a result, medical costs will increase and the availability of essential medical care will be become severely limited.[48]

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48. *See* Hoven v. Kelble, 256 N.W.2d 379, 391-92 (Wis. 1977).