OHIO STATE LAW JOURNAL

Volume 24 | Summer 1963 | Number 3

FOREWORD

DAVID J. YOUNG*

"Hard Cases, It Has Frequently Been Observed, Are Apt To Introduce Bad Law"

These concluding remarks of Justice Rolfe in one of the first Product cases, *Winterbottom v. Wright*,[1] are accurately descriptive of the development of what today is classified as Products Liability law. It is ironical that although the court found the plaintiff had suffered an injury through no fault of his own, it rendered judgment for defendant rather than allow a hard case to make bad law.

The glamour in this area of the law is evidenced by the enormous volume of Products Liability articles appearing in journals or periodicals arriving almost daily at trial lawyers' offices. Most of these commentaries include a discussion of the *Winterbottom* rule. If one could find a consensus it would probably be that the court did, indeed, introduce bad law, and that poor Mr. Winterbottom suffered "damnum absque injuria" to no avail.

The *Winterbottom* case involved an action by the driver of a mail coach for injuries caused by latent defects in the coach. The action was against the party who had contracted with the Postmaster General to repair the coach and keep it in safe condition. The court held that the defendant's contractual duty did not run to anyone not in privity to that contract. The English court was concerned that a contrary ruling would open the floodgates of litigation and lead to most "absurd and outrageous consequences to which they could see no limit." This doctrine became the common law rule in negligence cases in America, and was used in early cases to relieve manufacturers from responsibility for injuries resulting from their negligent manufacture of goods.

The harshness of these early decisions gave rise to a host of exceptions which, after a period of legal bending and twisting, resulted in a rule which discards "privity of contract" as an element of recovery

* Associated with the firm of Dunbar, Kienzle and Murphey, Columbus, Ohio; formerly Director of the Ohio Legal Center Institute.

1 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

when the Product case is based upon negligence as distinguished from warranty.

This development did not put the privity of contract rule to rest. Many Product cases include an express and/or implied warranty cause of action (eliminating the necessity of proving negligence and hopefully avoiding the defense of contributory negligence.) The cases eliminating privity as an element in negligence cases were distinguished on the basis that breach of warranty was a contract action. This basis for distinction was somewhat unfortunate in view of the split among legal historians as to whether warranty had its foundation in tort or in a contractual relationship.

The retention of privity of contract as an essential element in a Product case based on breach of an express or implied warranty has been looked upon with disfavor by many courts. There were and are those who refuse to accept the proposition that the immediate vendee of a defective appliance could recover from the vendor, but that one of the vendee's friends or relatives could not; that the immediate vendee could recover, but a sub-purchaser could not; or that a manufacturer should be held responsible in warranty to a vendee of a defective product if the manufacturer "sells direct," but not if it utilizes intermediate channels of distribution.

Some courts circumvented what they considered to be an inequity by finding fictitious agency relationships or by stretching the third party beneficiary doctrines. Others used a more direct approach and discarded privity of contract as an element of recovery in warranty cases. The Supreme Court of Ohio explained the rationale of its attack upon the privity doctrine in *Rogers v. Toni Co.* as follows:

> Occasions may arise when it is fitting and wholesome to discard legal concepts of the past to meet new conditions and practices of our changing and progressing civilization. . . .
>
> We are fully aware that the position outlined is opposed to the present weight of authority and may conflict with previous decisions of this court. However we consider it a reasonable and logical approach today in keeping with the modern methods of doing business.[2]

Privity of contract as an element of recovery in Product cases based upon warranty is still with us in many jurisdictions, but it is difficult, if not impossible, to determine precisely what the status of this doctrine is today, much less to predict what it will be tomorrow.

The above bird's-eye view of the privity battle is not intended to imply that this has been the only struggle in Product cases. Legal

[2] 167 Ohio St. 244, 248-249, 147 N.E.2d 612, 615-616 (1958).

entanglements in Product cases commonly include problems in reference to such matters as *res ipsa loquitur*, disclaimer clauses, the original-package doctrine, existence of sales warranties in relation to gifts or administration of services, status of standard warranty defenses such as lack of reliance or failure to give notice, disclosure of secret formula, and labeling requirements.

The function of a foreword (and surely there must be an important function) should be to set the stage for articles to appear in the publication. This could be accomplished in this symposium by briefly formulating the present status of Products Liability law and setting forth a prognosis as to future developments.

Products Liability law could best be defined as a hodgepodge of contract, tort and sales law applied to actions for personal injuries or property damage caused by defective products. The decisions in this area are marked by an unfortunate failure to distinguish between cases in negligence and those based upon breach of express or implied warranty with the result that the legal principles applied are not always discernible.

This difficulty is compounded by the fact that much of the law in this area has developed product by product, and has been based upon many varied commercial relationships between the parties.

I suspect that many of the difficulties are related to the Products Liability label. Although this has proven to be a convenient label for a myriad of cases involving varying legal theories and widely divergent products, it has apparently served to obliterate important distinctions which should have been made.

We now find cases based upon negligent repair of products and service cases (*e.g.*, injection of medicines) being classified as Products Liability cases. Such classification results in these cases being decided on the basis of legal principles whose development has been justified in part by the "new methods of mass distribution and hard-sell advertising techniques."

Although the Products Liability label is probably here to stay, I doubt that it will stay here in its present stage of development. Legal concepts in this area have experienced a turbulent growth pattern, and the courts have in many of the major cases demonstrated a willingness to discard long-standing legal principles. Dicta in these major cases suggest a continued expansion.

The subject selected for this symposium is one of the most glamorous areas of "tort law." Many feel that it is the present battleground for preservation or elimination of legal concepts applicable to all personal injury litigation. This symposium arises out of a Continuing Legal Education program presented by the Ohio Legal Center In-

stitute. That program was not designed to provide historical justification or explanation for the development of Products Liability law, nor to champion or challenge the validity of "liability without fault," but rather to provide some practical assistance in the preparation and trial of cases involving defective products.

Although the legal problems suggested in this foreword have been and will continue to be dynamic and expansive, the great majority of Product cases are settled, won or lost on the basis of "knowledge of the Product" and painstaking investigation. It is in recognition of this fact that this symposium presents a practical approach to the investigation and trial of typical Product categories.