

SOME INDISPENSABLE ELEMENTS OF PRODUCTS LIABILITY CASES

JAMES H. WILKINSON*

This seminar is evidence of the tremendous interest in products liability cases throughout the United States. The consideration given to this field by the publishing houses and writers in the last few years has both stimulated and given recognition to this phase of litigation. I have some concern over the classification "Products Liability Cases." Basically, the cases we are talking about are either personal injury or property damage cases involving the use of or the exposure to something which has been manufactured, concocted, assembled, processed or distributed by someone.

There has been comparatively little case law in Ohio on this subject, but I will here attempt to give a review of some Ohio cases to illustrate the development of products liability law in Ohio, with more specific reference to one case, *Rogers v. Toni Home Permanent Co.*¹

I will try to present the basic theories upon which products liability cases are brought. In reviewing the Ohio cases, I am not so much impressed with any new theory of law as I am with the attempts by courts and lawyers to apply existing principles of law which we use in everyday tort work to new fact situations. I am suspicious that those lawyers who first began to pursue those drivers of horseless carriages who ran down chickens, cows and sundry farmers felt the same way we do now when they went to the case law and to the statutes, trying to find the proper remedy against what they considered to be a new species of tortfeasors.

The claims which come into our offices are basically claims for personal injury or property damage or both. In Ohio the theory of recovery is still tied to the concept of fault on the part of the person from whom damages are sought. Some writers and some speakers have sought to eliminate the requirement of fault on the general theory that this is a social problem involving a situation where the mass of consumers must be compensated for loss or injury by the producer or the seller of products who, by itself or with the help of insurance, is better able to sustain the expense of loss or injury due to the consumption of goods or products than is the individual from that mass who has spent all his money on something else. As will be seen from the Ohio cases at least, even where our courts have allowed recovery in warranty, the element of fault is still present. Even in warranty one must prove

* Of the firm of Arter, Hadden, Wykoff and Van Duzer, Cleveland, Ohio.

¹ 167 Ohio St. 244, 147 N.E.2d 612 (1958).

that there was something wrong with the product or that there was a deleterious substance in the product.

OHIO CASES

Two of the earliest Ohio cases involving products liability are *White Sewing Machine Co. v. Feisel*² and *Ward Baking Co. v. Trizzino*.³ For some reason, the earlier case was reported later so that the appellate court in the *Ward* case, without knowledge of the *White* case, felt that it was all alone in the State of Ohio when it considered the problem of liability of a remote seller or manufacturer.

These two cases are very interesting and show ingenuity, imagination, preparation and hard work resulting in a favorable result from the plaintiff's point of view. The *Ward* case involved a cake purchased by plaintiff from a retailer, the eating of that cake by the plaintiff, and the injuries caused to plaintiff when he swallowed a needle which had been embedded in the cake. The cake had been sold by defendant who had packaged it in wrapping paper, boxed it and delivered it to the retailer who, as a mere conduit in the line of distribution, sold it to the purchaser. Plaintiff had competent medical testimony, fortified with X-rays, following the needle all the way through plaintiff's digestive tract, and properly, medically documented his case on causation. In considering the theories claimed by plaintiff supporting liability sounding in either warranty or tort, the Court of Appeals of Cuyahoga County was troubled with the problem of privity, but decided that plaintiff was a third-party beneficiary of a contract between manufacturer and his vendee, the retailer, and therefore plaintiff was the beneficiary of an implied warranty on the part of defendant as to wholesomeness and freedom from foreign substances.

The theory of this case has not been followed in Ohio in subsequent case law. The case has been cited far and wide in support of the third-party beneficiary theory. It is interesting to note, however, that the third-party beneficiary principle shows up again in Ohio as of July 1, 1962, the effective date of our Uniform Commercial Code.

*White Sewing Machine Co. v. Feisel*⁴ is a negligence case, again well prepared by an imaginative and effective attorney. This case involved a child injured by a defective electric sewing machine cord or plug. Plaintiff's mother had purchased the sewing machine involved from defendant. The child was severely burned about the mouth when she stuck one end of the cord into her mouth while the other end was plugged into an electric outlet. Counsel was careful to show that plain-

² 28 Ohio App. 152, 162 N.E. 633 (1927).

³ 27 Ohio App. 475, 161 N.E. 557 (1928).

⁴ *Supra* note 2.

tiff's mother had left the cord plugged into the wall but detached from the sewing machine just as defendant's agent had done when he demonstrated the machine upon delivery. After the child had been taken to the doctor, the cord was taken to the lawyer's office and carefully kept in the safe until trial. There is no doubt that upon trial this cord was defective. Here the court of appeals upheld the judgment for plaintiff, applying the rule of *MacPherson v. Buick Motor Car Co.*⁵ This our court did reluctantly, stating that it was the general rule that there was no liability even in tort in the absence of privity between the parties. On the basis of public policy and on the general principle that the end justifies the means, the court stated: "Danger to members of the family from a defective appliance of this character is one to be foreseen by the manufacturer who sells it to one of the members of the family."⁶

I selected these two early cases because, as indicated above, they reflect theory now adopted by our Uniform Commercial Code, applying the idea of third-party beneficiary and restriction of foreseeability to members of the family and household.

There is no intent here to give all cases in Ohio involving products liability problems. For purposes of illustration, I have selected five cases involving the Honorable Lee J. Skeel, now judge of the Court of Appeals for Cuyahoga County, Ohio. I intend this as a tribute to Judge Skeel's interest in and effect upon products liability cases.

The first is *Sicard v. Kremer*,⁷ where Judge Skeel was the trial judge. This is a good case to begin with in that the Ohio Supreme Court opinion has in it statements of legal principles sounding in both tort and contract and, in addition, it has an interesting fact situation. This is an excellent case for reference and use in one's brief. Helpful quotations may be found in this opinion to support plaintiff or defendant in almost any products liability case.

This was an action against a distributor of a product. There was no privity between plaintiff and defendant. The trial judge, Skeel, dismissed the claim presented in warranty and let the case go to the jury on negligence. The court of appeals reversed the trial court, indicating that the case should have gone to the jury on warranty, but that there was nothing to submit to the jury on negligence. The Ohio Supreme Court's decision is a very useful decision on negligence or warranty.

The case actually seems to have been affirmed for plaintiff by the Ohio Supreme Court on the evidence, particularly with respect to the proof that the product contained a very dangerous substance, even a

⁵ 217 N.Y. 382, 111 N.E. 1050 (1916).

⁶ *White Sewing Machine Co. v. Feisel*, *supra* note 2, at 159, 162 N.E. at 640.

⁷ 133 Ohio St. 291, 13 N.E.2d 250 (1938).

poison. The very dangerous substance was hydrogen peroxide, still used in many hair dyes and bleaches. A chemist employed by the city of Cleveland had performed a demonstration in the courtroom using 100-volume hydrogen peroxide. When he put his finger in a glass of 100-volume hydrogen peroxide for a short period of time, his finger turned white. This should shock no one. This was, however, the evidence of poison or dangerous substance. I cannot overlook this opportunity to express my concern over these facts. No one uses 100-volume hydrogen peroxide undiluted in hair dyes or bleaches. Usually 20-volume hydrogen peroxide is used and only after it has been mixed with the rest of the product. Further, hydrogen peroxide is a common antiseptic and is often used as a mouthwash. Finally, the facts as shown in the opinion indicate that plaintiff was a beauty operator who was injured while using this dangerous hair dye on the head and hair of a customer. I have always wondered what happened to the customer.

Judge Skeel wrote the appellate decision in *Krupar v. Procter & Gamble*.⁸ The appellate decision is very similar in its approach to warranty and privity to the opinion eventually written by Judge Skeel on the appellate level in the *Rogers*⁹ case. In fact, *Krupar*, like *Rogers*, was certified to the Supreme Court of Ohio on the warranty question as being in conflict with another Ohio appellate decision. In *Krupar*, however, the Ohio Supreme Court decided that warranty was not even an issue in the case and proceeded to decide the case on pure negligence theory and on the evidence question of *res ipsa loquitur*. *Krupar* is the "wire in the soap" case. The reasoning of the opinion generally appeals to defendants and is shunned by plaintiffs. Plaintiff used a bar of soap which had been in use or at least had been in the bathroom for a week or so prior to the incident when plaintiff was scratched by a piece of wire embedded in the bar of soap. The Ohio Supreme Court held that the fact that the wire was there and did scratch plaintiff does not prove negligence on the part of the manufacturer. In the absence of further evidence plaintiff lost.

*Rogers v. Toni Home Permanent Co.*¹⁰ originally gave no signs of being a "landmark case." It was like others handled by the defense attorney. Plaintiff had used a permanent wave solution and claimed she had lost her hair as a result of that use. Plaintiff sued for personal injuries, setting up what were described as three causes of action: negligence, express warranty and implied warranty. Plaintiff sued not only the retailer but also the alleged manufacturer, Toni Home Permanent

⁸ 160 Ohio St. 439, 117 N.E.2d 7 (1954). Judge Skeel's appellate decision is reported only in 113 N.E.2d 605 (Ohio Ct. App. 1953).

⁹ 105 Ohio App. 53 (1957).

¹⁰ *Supra* notes 1 and 9.

Co. Counsel for the defense followed a procedure which had been successful in the handling of similar cases. A demurrer was first filed on the grounds of misjoinder of parties defendant, relying on *Kniess v. Armour & Co.*¹¹ This case has been good authority for the proposition that you cannot join those who are primarily and secondarily liable, specifically a meat packer and the retailer. This demurrer was sustained and plaintiff had her first decision to make. She elected to proceed against the manufacturer as most plaintiffs do and have done, refiled the same petition but only against the alleged defendant-manufacturer. Relying on *Wood v. General Electric*,¹² a demurrer was then filed against the "causes of action" sounding in express and implied warranty. The trial court sustained the demurrers. This again was not an unusual result. Plaintiff was then left with only a fraction of her original petition and only one of her original defendants. Normally this would have been a good time to discuss an amicable disposition of the claim. Plaintiff allowed or encouraged the trial court to enter judgment with respect to the "causes of action" sounding in warranty and appealed to the court of appeals.

It should be remembered that the appeal taken was on what were described as two separate causes of action sounding in express warranty and implied warranty. The court of appeals sustained the trial court with respect to implied warranty and overruled and reversed the trial court with respect to express warranty. The appellate court indicated that it was bound by *Wood*, but that since that case was limited on its facts to implied warranty, the appellate court was free to decide for itself on the matter of express warranty and did so. Judge Skeel followed the same path he had pursued in *Krupar* and certified the case to the Supreme Court of Ohio as a conflict case. A majority of the Ohio Supreme Court substantially adopted the reasoning of Judge Skeel as set forth in his appellate opinion and eliminated the requirement of privity in an express warranty action. However, it should be noted that the decision of the Ohio Supreme Court affirmed the action of the appellate court which, in effect, upheld the requirement of privity in an implied warranty action.

Perhaps at this point it would be helpful to know that when the Supreme Court of Ohio heard the oral arguments in *Rogers*, it had already heard the arguments but had not decided *Welsh v. Ledyard*.¹³ This was an action founded on implied warranty where the question of the requirement of privity was raised. Two months before the decision was announced in *Rogers*, the Ohio Supreme Court handed down

¹¹ 134 Ohio St. 432, 17 N.E.2d 734 (1938).

¹² 159 Ohio St. 273, 112 N.E.2d 8 (1953).

¹³ 167 Ohio St. 57, 146 N.E.2d 299 (1957).

its ruling in *Welsh*, upholding *Wood* and requiring privity in an action based upon implied warranty.

In *Rogers* there are dicta which could easily be interpreted to give encouragement to those who sought elimination of privity as a requirement in implied warranty. After *Rogers* and within the same year, Judge Skeel wrote an opinion in *Markovich v. McKesson & Robbins*.¹⁴ In his opinion Judge Skeel attempted to eliminate the requirement of privity in an implied warranty action in a products liability case. It is the writer's personal opinion that Judge Skeel felt that this case would be appealed and that the Ohio Supreme Court would follow the dicta of *Rogers* and eliminate the requirement of privity in an action based upon implied warranty. What Judge Skeel could not foresee was that this case would not be appealed. He could not foresee the reason for the lack of appeal. What Judge Skeel could not know was that the real defendant in *Rogers* and *Markovich* was one and the same. The products were different but the manufacturers were owned by the same company which controlled the litigation. Though the cases arose in the same county, counsel for defendant in each case was a different attorney and none of the names of the parties was identical. When *Markovich* was first reported, *Rogers* was back for trial following the action of the Ohio Supreme Court. Counsel representing defendant in the *Rogers* case strenuously urged national counsel for the common manufacturer to appeal *Markovich* because of that decision's adverse effect on the forthcoming trial of *Rogers*. Counsel for Toni Home Permanent Co. was advised that no appeal would be taken for the reason that national counsel was disenchanted with the Ohio courts. A lack of confidence in Ohio courts was expressed on the reasoning that in order to defeat the defendant in *Rogers* our court had stated there was a difference between express and implied warranty, but in order to defeat the defendant in *Markovich* the same court indicated that there was no difference between express and implied warranty.

*Kennedy v. General Beauty Products*¹⁵ points up what the writer feels is technically the case law of Ohio today with respect to implied warranty and emphasizes the distinction between an action based upon express warranty and an action based upon implied warranty insofar as the requirement of privity is concerned.

Kennedy was a hair-dye case with the personal injury action being brought against the distributor. The element of privity was missing. The case was sent to a jury on the theory of negligence and express warranty. Implied warranty was not submitted by the trial judge. The

¹⁴ 106 Ohio App. 265, 149 N.E.2d 181 (1958).

¹⁵ 112 Ohio App. 505, 167 N.E.2d 116 (1960).

judgment for the defendant was appealed on several grounds including claimed error in the refusal to submit the case to the jury on implied warranty. Judge Skeel's appellate opinion clearly states, without approval, that the Ohio law as pronounced by the supreme court differentiates between express and implied warranty, requiring the element of privity in the latter but not the former.

What the Supreme Court of Ohio will do with this question should it accept a case which raises the question is anyone's guess.

It can be argued that there is no reason in theory for any distinction between express and implied warranty to support a difference in the requirement of privity. This is a legalistic, technical argument. The elimination of the requirement of privity in *Rogers* was not, however, founded upon a technical, legalistic base. The syllabus and the opinion in that case clearly show the reason for the rule established. The rule of *Rogers* is that where a defendant manufacturer affirmatively does something, usually by way of advertising, making a direct representation to the buyer which induces the buyer to purchase, and where the seduced purchaser uses the product—properly of course—and is injured by reason of a deleterious substance in the product, he should and will be permitted recovery from that manufacturer because of what the manufacturer did despite the lack of privity between the parties. The reason for the rule of *Rogers* does not exist in implied warranty. The defendant manufacturer did or has done nothing directly to or directed at the ultimate consumer who was injured. Realistically, the consumer who may be injured was not led by any implied warranty to purchase.

BASIC THEORIES OF ACTION IN OHIO

A personal injury action or an action for property damage which has as its factual foundation the use of, or exposure to, or contact with a product may be founded on negligence, warranty, or fraud and deceit.

Although fraud and deceit is a perfectly good theory as expressed by Judge Taft in his concurring opinion in *Rogers*, practically speaking, it doesn't exist because it isn't needed. Moreover, because of its connotation of malice, evil and crime, there is a consequent difficulty of proof to a jury.

Negligence

The theory of a negligence action as applied to a products liability case in no way differs from negligence as applied in any other personal injury case. It is the facts and the proof of facts which create the problems. In food cases the breach of a statutory duty, namely, the pure food and drug laws, makes proof of negligence easy.¹⁶

¹⁶ *Yochem v. Gloria, Inc.*, 134 Ohio St. 427, 17 N.E.2d 731 (1938); *Kniess v.*

Warranty

No attempt will be made here to tell you what an implied warranty is because of limitations of space. Express warranty, however, as defined in *Rogers* should be studied carefully. For plaintiff or defendant the elements set forth by our supreme court should be crystal clear, for plaintiff must not leave out a single element and defendant must search for the one missing element.

There must be some representation by defendant directed to plaintiff with respect to the quality or merit of defendant's product which urges plaintiff to purchase the product from a retailer. Plaintiff must have relied upon that representation in making the purchase. Plaintiff must use the product reasonably and properly, and in many cases in accordance with the directions. Plaintiff must be injured as a result of a deleterious ingredient in the product or as a result of a defect in the product.

It might here be asked, what is the difference between a case founded on negligence and a case founded on warranty? Setting aside the requirement of proof as to the express warranty itself, negligence and warranty would still seem to require proof in each situation of either a deleterious substance in the product or a defect, and the element of proximate cause. Under *Rogers* the proof would seem complete. In theory at least, in a negligence action one must go further and show whether defendant as a reasonable person knew or should have recognized the danger and should thus have taken precautions to avoid the danger, and that the defect was caused by defendant's failure to exercise reasonable care. As set out by our court in *Sicard v. Kremer*:

Where the product is manufactured and sold with the knowledge that it will come into contact with the user or operator, the manufacturer or distributor has not only the obligation that the product will be according to contract, express or implied, but the added common-law duty of not placing or having anything in the product that will injure the buyer when used as intended. An action for the violation of the former sounds in contract; an action for the latter is in tort, yet both may be joined in the same complaint.¹⁷

Problems

In the breakdown of problems related to negligence and to warranty, more time will be devoted to warranty than negligence. The

Armour & Co., *supra* note 11; *Leonardo v. Haberman*, 143 Ohio St. 623, 56 N.E.2d 232 (1944); *Allen v. Grafton*, 170 Ohio St. 249, 164 N.E.2d 167 (1960). Examples of cases based upon negligence where the breach of duty is not established by the violation of a statute are *Witherspoon v. Haft*, 157 Ohio St. 474, 106 N.E.2d 296 (1952), and *Thrash v. U-Drive-It Co.*, 158 Ohio St. 465, 110 N.E.2d 419 (1953).

¹⁷ *Sicard v. Kremer*, *supra* note 7, at 298, 13 N.E.2d at 253.

reason is that most practitioners are familiar with negligence and its problems, both from plaintiff's and defendant's point of view. This is not necessarily true of warranty. Illustrative of a problem in a negligence action is a break in the chain of causal connection between the negligence of defendant sued and the injury of plaintiff by an intervening act of negligence on the part of someone other than defendant. In *Thrash v. U-Drive-It Co.*,¹⁸ plaintiff sued his immediate seller and the remote seller for injuries resulting from an accident caused by a defect in an automobile. The Ohio court held the immediate seller liable but let out the remote seller, holding that the immediate seller was responsible for his failure to find the defect in the automobile when it was sold to him by the remote seller since he was a dealer in automobiles, but the second or remote defendant was permitted to escape liability as a matter of law because any negligence of his was superseded and interrupted by the intervening act of negligence on the part of the first defendant.

For illustrative purposes, *Krysiak v. Acme Wire Co.*¹⁹ is cited. The facts in this case indicated that an insulated wire manufactured by defendant was sold to plaintiff's employer for use in the employer's manufacturing process. In that manufacturing process considerable heat was applied to the product and this caused gaseous odors and vapors to be released which injured plaintiff while he was working. Having recovered under workmen's compensation from his employer and limited as to defendants by that act, plaintiff pursued his remedy against the manufacturer. As a matter of law, defendant was excused from any responsibility toward plaintiff for two stated reasons. First, the court held that plaintiff had failed to prove that the manufacturer had knowledge of the use to which the product would be put and that the defendant manufacturer need not anticipate the use to which the product had been put. Second and I think more important, the court held as a matter of law that defendant manufacturer need not anticipate that plaintiff's employer would be guilty of intervening negligence—in this particular case, in violating Revised Code section 4101.02 requiring the employer to provide plaintiff with a safe place in which to work. The court stated that defendant manufacturer did not have to foresee that the employer would violate this statutory requirement.

A problem in products liability cases common to negligence and warranty is proximate cause. Proximate cause is today supplied more often than not in products liability cases by experts. Technically this may not be a correct statement. The facts must still be proved by

¹⁸ *Supra* note 16.

¹⁹ 169 F. Supp. 576 (N.D. Ohio 1959).

evidence. However, the expert not only tells the jury but seems to tell the court that there is a causal relationship between facts suggested or proven by evidence about the accident and the injury sustained.

A scientific job of proof without scientists is illustrated by *A. & P. Tea Co. v. Hughes*.²⁰ This was a food case involving a charge of negligence in selling poisoned or putrified pork sausage alleged to be unfit for human food and injurious to the life and health of the person eating it. The proof with respect to cause and deleteriousness of the product was sustained by evidence that plaintiff had purchased the product and, within a very short period of time, thoroughly fried the pork in patties. Plaintiff ate the product and thereafter became quite ill. Plaintiff developed his own experimental control group. He showed that for several meals previous to the ingestion of defendant's pork, plaintiff and other members of his family had eaten the same foods but that no member of this control group had eaten any of defendant's sausage. Strangely enough, no one besides plaintiff became ill. The doctor diagnosed food poisoning. This case is often cited by counsel for claimants for the law of the syllabus which shows that unwholesomeness in a food case need not be proven by chemical or bacteriological analysis or examination. The reasoning of the court is rather interesting:

That sausage caused such illness in one whom the evidence tends to show was in a natural and normal condition, with presumably natural and normal functions of the body, in the absence of evidence to the contrary, is surely some proof that the sausage was unwholesome and deleterious to health.²¹

For the defense it can be seen from this case that it is important to produce some evidence concerning the prior physical condition of plaintiff, his exposure to other foods or to other possible causes of illness to which the control group, *i.e.*, plaintiff's family, was not exposed.

Another problem in proximate cause facing plaintiff is the danger of the application of the rule expressed in the syllabus in *Gedra v. Dallmer Co.*:

In such an action, if the cause of an injury to a plaintiff may be as reasonably attributed to an act for which the defendant is not liable as to one for which he is liable, the plaintiff has not sustained the burden of showing that his injury is a proximate result of the negligence of the defendant.²²

²⁰ 131 Ohio St. 501, 3 N.E.2d 415 (1936).

²¹ *Id.* at 505, 3 N.E.2d at 416-7.

²² 153 Ohio St. 258, 91 N.E.2d 256 (1950).

In *Janko v. Schneiderman and Roux Distributing Co.*,²³ plaintiff testified that she had bought a product called Roux Color Shampoo at a drug store. At the same time she had purchased some 20-volume hydrogen peroxide which the instructions in the Roux pamphlet called for and which must be mixed in equal proportions with the Roux Color Shampoo. Plaintiff testified that she mixed the Roux Color Shampoo with an equal amount of 20-volume hydrogen peroxide, applied it to her head and developed dermatitis shortly thereafter. At the time plaintiff was deposed prior to trial, she testified that she did not know what brand of 20-volume hydrogen peroxide she had used and that she had the hydrogen peroxide bottle at home. Upon trial, plaintiff testified substantially as indicated above except that on direct examination she omitted any reference to the kind of hydrogen peroxide she had used or the fact that she had the bottle in her possession. On cross-examination counsel for defendant gained the admission from plaintiff that she did not know what kind of hydrogen peroxide she had used and that she did not have the bottle. Plaintiff had already testified on direct that she had mixed the hydrogen peroxide with the Roux Color Shampoo in an equally proportioned mixture and applied this to her head.

The dermatologist who testified for plaintiff on direct testified that the substance applied to plaintiff's head was the cause of the dermatitis which she found thereafter. On cross-examination the doctor was asked the following question:

Q. If Mrs. Janko did in fact apply Roux, this product, in equal proportion and mixture with hydrogen peroxide of unknown description and not here present, and thereafter she got the same symptoms which you saw and examined, can you with reasonable medical certainty tell which caused the dermatitis?

A. No.

The trial court directed a verdict on the reasoning of *Gedra*. The court of appeals affirmed on this and other grounds but rendered no opinion except a short journal entry published only in *The Legal News*.

Warranty actions pose more specialized problems. What is an affirmation of fact to fulfill the requirements of a warranty as distinguished from puffing? Each case must be decided on its own facts. No rules can be clearly delineated. In Missouri, "kind to the hands" has been held to be an express warranty where the plaintiff claimed she suffered injury to her hands while using the product,²⁴ but in Ohio a

²³ Unreported, Court of Appeals of Cuyahoga County, 1959, motion to certify overruled; *appeal dismissed* 170 Ohio St. 48, 162 N.E.2d 124 (1959).

²⁴ *Worley v. Procter & Gamble Mfg. Co.*, 244 Mo. App. 1057, 253 S.W.2d 532 (1952).

plaintiff claimed to rely on a statement on the package that Cheer was "kind to your hands" when she washed her hair, and the court would not allow the case to be submitted to the jury on warranty.²⁵

In *Kennedy*,²⁶ plaintiff testified that she purchased the product, Lilly Dache's Color Safe, because it was more expensive than the product she went to buy in the first place. It should be noted also that plaintiff testified that she bought the product because she had once purchased a Lilly Dache hat. The purpose of these illustrations is to show that meticulous questioning as to all circumstances surrounding the procurement and use of the product must be undertaken by defense counsel in his cross-examination, and counsel for plaintiff must, in discussing the case with his client, explore all the requirements of his case in detail.

Under the Sales Act, the Uniform Commercial Code, and such opinions as *Thrash*,²⁷ plaintiff may find he has no warranty action since the product was sold to him on an "as is" basis.

There may be no purchase or sale to support either implied warranty or express warranty under the *Rogers* theory if the product involved was a gift to the plaintiff. This raises such questions as occurred in *Carone v. Procter & Gamble*²⁸ as to whether or not a free-sample distribution could create a warranty.

With respect to distributors who do not handle, except as a conduit, the products involved, does the "original package" doctrine as suggested in *McMurray v. Vaughn Seeds*,²⁹ *Wolf v. A. & P. Co.*,³⁰ *Outz v. Maloney*,³¹ and the *Rogers* case apply? After all, if the reason for placing the responsibility on the manufacturers in *Rogers* was the fact that the retailers were mere conduits, then should not the retailers be given the benefit of the "original package" doctrine?

Finally, in an action based upon warranty, either express or implied, buyer or purchaser must give notice to the seller of the breach of any promise or warranty within a reasonable time or any action in warranty fails. This is an affirmative requirement on the part of the plaintiff and should be pleaded.³² Failure on the part of plaintiff to give this notice within six months may preclude recovery as a matter of law.³³

²⁵ *Carone v. Procter & Gamble Co.*, Cuyahoga County Court of Appeals unreported; motion to certify overruled.

²⁶ *Kennedy v. General Beauty Products*, *supra* note 15.

²⁷ *Thrash v. U-Drive-It Co.*, *supra* note 16.

²⁸ *Supra* note 25.

²⁹ 117 Ohio St. 236, 157 N.E. 567 (1927).

³⁰ 143 Ohio St. 643, 56 N.E.2d 230 (1944).

³¹ 157 Ohio St. 537, 106 N.E.2d 561 (1952).

³² *McMurray v. Vaughn Seeds*, *supra* note 29.

³³ *Columbia Axle v. American Auto. Ins. Co.*, 63 F.2d 206 (6th Cir. 1923).

There is no recent Ohio decision on this notice question. From personal experience I can say that it has been raised at an appellate level in at least five cases in the last five years, but in each case the reviewing court has decided the case in favor of the defendant who raised the defense but on some issue other than notice and no comment was made. Other jurisdictions, however, have tended to support this defense and it is embodied in the Uniform Commercial Code, as adopted in Ohio Revised Code section 1302.65.

In the comments of the American Law Institute on this section in the draft of the Uniform Commercial Code it is suggested that the time for notification would be controlled by commercial standards with respect to a merchant buyer but that some undefined, different standard is to be applied to the consumer. The element of good faith is injected into this rule and an intent not to deprive a good-faith consumer of his remedy is expressed.

An additional problem involved in products liability cases which must be considered is that of obtaining jurisdiction over the proper party. Because of the nature of national distribution of products by large manufacturers, it is not always easy to obtain jurisdiction in the forum of the plaintiff. Even if it is possible, it may be possible only after considerable research and investigation on the part of counsel to determine that the defendant is doing business within the state and is subject to service. Many corporations will still litigate first the question of jurisdiction and whether they are doing business in the state. Their purpose may not be just to avoid jurisdiction in your particular case but this may involve corporate problems, especially taxation.

Another problem is the proper identification of the defendant. The package does not always carry the name of the manufacturer. It may indicate a particular corporation as the distributor only. The plaintiff in *Rogers* sued "Toni Home Permanent Co." This was the name of an actual corporation but it was neither the manufacturer nor the distributor. It was never determined whether this was a good defense inasmuch as the case was settled.

Further, in our state court it is not always possible to join the retailer and the distributor or the manufacturer.³⁴ A recent decision of the Court of Appeals of Cuyahoga County³⁵ seems to suggest that a retailer and a manufacturer may be joined in the same cause. The opinion is not enlightening as to the actual allegations in the petition.

³⁴ This is based upon *Kniess v. Armour & Co.*, *supra* note 11, and *Canton Provision Co. v. Gauder*, 130 Ohio St. 43, 196 N.E. 634 (1935).

³⁵ *Huggins v. John Monell & Co.*, 89 Ohio L. Abs. 607, 184 N.E.2d 230 (Ohio Ct. App. 1962).

The opinion does not cite any Ohio Supreme Court decision on the question of joinder of defendants primarily and secondarily liable. It does cite cases which refer to the proper joinder of defendants who are charged with joint and concurrent acts of negligence. In short, a plaintiff may be able to plead in such a way as to withstand a demurrer against misjoinder of the retailer and the manufacturer, but his problems of proof will be something else again.^{35A}

COMMENTS ON UNIFORM COMMERCIAL CODE

Chapter 13 of the Ohio Revised Code became effective July 1, 1962, replacing the Sales Act and generally adopting the Uniform Commercial Code. This is not an attempt to explain the Uniform Commercial Code but rather to point out some sections of the Code applicable to products liability cases. Section 1302.26 defines in detail what an express warranty is and how it is created. Revised Code section 1302.27 defines an implied warranty of merchantability. Revised Code section 1302.28 defines the implied warranty of fitness.

Revised Code section 1302.29 makes it clear that all warranties may be avoided if the proper steps are taken on the part of the seller. It specifically includes the words which may be used to exclude any warranty. These include "as is." This confirms the Ohio case law.

Revised Code section 1302.31 eliminates the requirement of privity in an action based upon express or implied warranty in certain limited areas. It is entitled "Third Party Beneficiaries of Warranties, Express or Implied." It reflects the reasoning and the principles expressed as far back as *Ward* and *White* as well as *Rogers*. However, one must read this section carefully. It is not a panacea for plaintiffs' ills. It reads as follows:

A seller's warranty, whether express or implied extends to any natural person who is in the family or household of his buyer or who is the guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in his person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Frankly, this section appears to have a great potential for litigation. Privity is eliminated in an action in express or implied warranty but only in an action for personal injury. The elimination of privity extends only to a natural person, so your dog may die from dog food but there is no action in warranty against the manufacturer. It extends only to a natural person who is in the household or in the family of the buyer. Your children, if you are the purchaser, are covered and your wife

^{35A} See Ohio Rev. Code § 2307.191 which changed the rule on joinder of parties defendant to coincide with rule 20 F.R.C.P. effective 8-26-63.

is covered and perhaps even your mother-in-law is covered. Is your cleaning woman who works one day a week and has lunch in your home covered? Are the delivery man, the mailman, or the door-to-door salesman included? If you can squeeze the injured person within the group, then you must meet the further test, "Is it reasonable to expect that such person may use, consume or be affected by the goods?" In short, this section does not appear to affect *Wood* or *Rogers*. It would not seem to produce a different result in *Kennedy* on its facts, since Mrs. Kennedy was not General Beauty Products' buyer or in the prescribed relationship to General Beauty Products' buyer, the retailer.

I don't believe that we can say that there has been an elimination of the requirement of privity in an action by the donee of a gift. If one buys a toy for one's daughter to give to her little school chum at a birthday party as a birthday present, the donee has no action in express or implied warranty against the manufacturer. Beware of your Christmas presents!

Revised Code section 1302.59 is an interesting section which gives a defendant the statutory right to obtain the evidence with respect to goods involved for testing. This codifies the rule set down in *Driver v. F. W. Woolworth Co.*,³⁶ where a petition for discovery was used to obtain the claimed defective cosmetic for examination by the defendant.

In conclusion, it should be remembered that you are dealing primarily with a personal injury or property damage case which by its nature more often than not requires considerable effort on the part of the attorney to prove his case. From a practical standpoint, the vast majority of products liability cases involve little injury. In most cases the upset stomach has no permanency. The dermatitis goes away when the irritating agent is withdrawn. The cut or burn heals without permanent injury, disfigurement or disability. We know of the exceptions to this statement, but in fairness to clients it would seem reasonable to properly evaluate the injury first in a case which comes into one's office before undertaking an action.

What sets a "products liability case" apart from any other personal injury and property damage claim or cause is the amount of effort counsel must expend to prepare the case, and the degree to which the attorney must himself become an expert in fields outside of the law.

³⁶ 58 Ohio App. 299, 16 N.E.2d 548 (1938).