

## RECENT DEVELOPMENTS

### MANUFACTURER LIABLE FOR BREACH OF EXPRESS WARRANTY: PRIVACY NOT REQUIRED

*Rogers v. Toni Home Permanent Co.,*  
167 Ohio St. 244, 147 N.E.2d 612 (1958)

In her petition plaintiff alleged that she had purchased a home permanent set labelled "Very Gentle" from an independent retailer on the basis of defendant manufacturer's representations made to her through national advertising that the product was safe and harmless. She further alleged that although directions for use had been explicitly followed harmful ingredients in the product caused her hair to fall off "to within one-half inch of her scalp." Plaintiff's petition set forth three causes of action:<sup>1</sup> negligence, breach of express warranty, and breach of implied warranty. The trial court, adhering to the majority rule requiring privity of contract as an element in actions based on breach of warranty,<sup>2</sup> sustained defendant's demurrer to the second and third causes of action. The court of appeals reversing in part held that a cause of action based on breach of an express warranty was pleaded.<sup>3</sup> The Ohio Supreme Court affirmed and held that a direct contractual relationship is not required to maintain an action for damages for breach of an express warranty when the manufacturer has induced the party injured to purchase his product by representations made through advertising aimed at the consuming public.<sup>4</sup> Thus, Ohio has joined the growing number of jurisdictions where inroads on the requirement of technical privity have been made in actions based on breach of express warranty.<sup>5</sup>

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<sup>1</sup> "Cause of action" in this context denotes theory of recovery.

<sup>2</sup> *Rachlin v. Libby-Owens Ford Glass Co.*, 96 F.2d 597 (1938); 46 AM. JUR. SALES §§ 306, 307 (1943); WILLISTON, SALES §§ 244, 244a (Rev. ed. 1948).

<sup>3</sup> *Rogers v. Toni Home Permanent Co.*, 105 Ohio App. 53, 139 N.E.2d 871 (1957). The court of appeals held that a cause of action based on implied warranty could not be maintained because of the lack of privity of contract on the authority of the recent case of *Wood v. General Elec. Co.*, 159 Ohio St. 273, 112 N.E.2d 8 (1953). This issue was not before the Ohio Supreme Court but the court indicated that a re-examination of that issue would be undertaken in a proper case. A recent court of appeals case decided on April 2, 1958 squarely presents the issue by holding in a fact situation substantially the same as that in the principal case that a cause of action based on breach of implied warranty could be maintained. *Markovich v. McKesson and Robbins, Inc.*, 78 Ohio L. Abs. 111, 149 N.E.2d 181 (Ohio App. 1958).

<sup>4</sup> *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612 (1958).

<sup>5</sup> *Free v. Sluss*, 87 Cal. App. 2d 933, 197 P.2d 854 (1948) (soap package contained printed guarantee of quality); *Studebaker Corp. v. Nail*, 82 Ga. App. 779, 62 S.E.2d 198 (1950) (manufacturer represented automobile to be free

It is not clear whether the principal case will be construed as dispensing with the privity requirement in all actions against a manufacturer who has made false affirmations of fact concerning his product through advertising aimed at the public. The majority indicated that the doctrine of the food cases, a widely held exception to the privity requirement in actions based on warranty for injuries sustained because of defective food or medicine,<sup>6</sup> was being logically extended. The overriding public interest that food be fit for consumption has been the justification for this exception, and the court indicated that the same reasoning was also applicable to cases in which cosmetics and other preparations "are sold in sealed packages and designed for application to the bodies of humans or animals."<sup>7</sup> Prediction of a more liberal interpretation of the decision than that encompassed by the preceding quotation seems possible because the court, after noting the widespread use by manufacturers of advertising aimed at the consuming public, remarked that the manufacturer

owes a very real obligation toward those who consume or use his products. The warranties made by the manufacturer in his advertisements and by the labels on his products are inducements to the ultimate consumers, and the manufacturer ought to be held to strict accountability to any consumer who buys the product in reliance on such representations and later suffers injury because the product proves to be defective or deleterious.<sup>8</sup>

It should also be noted that the court did not attempt to distinguish the earlier case of *Jordon v. Brouwer*.<sup>9</sup> The decision in the latter case conflicted with the court of appeals holding in the principal case and led to review by the supreme court. In the *Jordon* case recovery for damages to plaintiff's automobile because antifreeze purchased from an inde-

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from defects in material and workmanship. Held, purchase of automobile by plaintiff was the consideration for manufacturer's warranty); *Bahlman v. Hudson Motor Car Co.*, 290 Mich. 683, 288 N.W. 309 (1939) (automobile manufacturer represented top of car to be made of seamless steel); *Simpson v. American Oil Co.*, 217 N.C. 542, 8 S.E.2d 813 (1940) (representation on label that insecticide was non-poisonous to humans); *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409, 88 A.L.R. 521 (1932) (automobile manufacturer represented windshield to be non-shatterable glass). Cf. *Silverman v. Samuel Mallinger Co.*, 375 Pa. 422, 100 A.2d 715 (1953) where court indicated that privity of contract was not necessary but found that no misrepresentation had been made. For general discussion of problem of liability of manufacturer to consumer who purchased from an independent retailer see Annot. 88 A.L.R. 527, (1934), supplemented by 105 A.L.R. 1502 (1936); 111 A.L.R. 1239 (1937); 140 A.L.R. 191 (1942); 142 A.L.R. 1490 (1943).

<sup>6</sup> *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N.E. 557 (1928).

<sup>7</sup> *Supra* note 4, at 247, 147 N.E.2d at 614.

<sup>8</sup> *Supra* note 4, at 249, 147 N.E.2d at 615.

<sup>9</sup> 86 Ohio App. 505, 93 N.E.2d 49 (1949).

pendent retailer did not meet specifications on the label was denied in an action against the manufacturer. The court could have distinguished the *Jordon* case on the type of product or type of injury involved had it desired to so limit the scope of its holding.

The rationale of the first case dispensing with the requirement of technical privity of contract was that national advertising aimed at the public was a substitute for privity of contract.<sup>10</sup> The Ohio Supreme Court in the principal case took a more realistic view. After noting that warranty was originally an extension of the action on the case for deceit unladen with any contractual implications,<sup>11</sup> the court relied on this tort aspect of express warranty<sup>12</sup> and held that privity of contract was not required.<sup>13</sup>

Although the foregoing invites prediction of a liberal interpretation of the scope of the holding in the principal case, the fact remains that three judges in a concurring opinion denied recognition of the express warranty theory of recovery because privity of contract was lacking.

It is interesting to note that Judge Taft in the concurring opinion construed the petition as pleading a cause of action in deceit and hence good against demurrer. Unlike its offspring, express warranty, which is a form of strict liability, deceit is an intentional tort and requires the additional elements of intent to mislead and knowledge that the affirmation of fact or representation was false.<sup>14</sup> Thus, on the face of it, the majority and concurring opinions seem to be diametrically opposed. However, the recent Ohio Supreme Court case of *Pumphrey v. Quillen*<sup>15</sup> casts considerable doubt on such an assertion.

In the *Pumphrey* case the defendant, a real estate agent, induced the plaintiff to purchase a house by representing the walls to be constructed of tile. Approximately six months after moving into the house the plaintiff removed some wall boards and upon drilling holes through the exterior walls discovered the walls were constructed of clay with a

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<sup>10</sup> *Baxter v. Ford Motor Co.*, *supra* note 5.

<sup>11</sup> Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 8 (1888); 1 WILLISTON, SALES §§ 195-97 (Rev. ed. 1948).

<sup>12</sup> The UNIFORM SALES ACT recognizes both the tort and contractual aspects of express warranty. § 12 defines express warranty as: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty. . . ." See 1 WILLISTON, SALES § 194 (Rev. ed. 1948).

<sup>13</sup> *Cf.* *May v. Roberts*, 126 Wash. 645, 219 Pac. 55 (1923): "It is immaterial whether appellants made the representations (if they were made) innocently, believing them to be true, or fraudulently, knowing them to be false; the result to the respondent would be the same in either event if he relied on them. The question is, were representations made, and not the purpose or intent in making them." Query whether it was necessary to find that national advertising is a substitute for privity of contract in the *Baxter* case, *supra* note 5, with this test for imposing liability for deceit?

<sup>14</sup> *Gleason v. Bell*, 91 Ohio St. 268, 110 N.E. 513 (1915); PROSSER, TORTS § 86 (2d ed. 1955).

<sup>15</sup> 165 Ohio St. 343, 135 N.E.2d 328 (1956).

tile veneer. In the face of seemingly overwhelming evidence<sup>16</sup> that he could not have known nor even reasonably believed that the house was not constructed of tile, the defendant was held liable for deceit. The court held that a person who asserts a fact as of his own knowledge, when he knows that he has insufficient information upon which to make such assertion, may be held liable for deceit. This substitute for actual knowledge of falsity has been termed "conscious ignorance"<sup>17</sup> and seems clearly valid since either actual knowledge of falsity or "conscious ignorance" indicates the culpable state of mind necessary to constitute an intentional tort. However, it is submitted that the "conscious ignorance" concept was misapplied in the *Pumphrey* case because a finding that the representation was false in effect foreclosed the possibility that defendant made the representation in good faith. The evidence does not justify an inference that defendant knew that he had insufficient knowledge upon which to base his representation. It seems clear that Toni could not escape liability for deceit if the "conscious ignorance" concept be similarly applied.

It is not contended that deceit and the tort aspect of express warranty have merged. Indeed, Judge Taft, who strongly dissented in the *Pumphrey* case on the ground that strict liability was being imposed, cited the *Pumphrey* case in his concurring opinion in the *Toni* case as authority for the "conscious ignorance" concept. Perhaps his allusion to the *Pumphrey* case was designed to mitigate the persuasiveness of that dissent. However the *Pumphrey* case may be construed in the future, it indicates at least an inclination toward the imposition of liability for false representations innocently made.

Perhaps the *Pumphrey* and *Toni* cases signal the approach of Professor Williston's test for imposing liability for false representations innocently made. It provides:

If a man makes a statement in regard to a matter upon which his hearer may reasonably suppose he has the means of information, and that he is speaking with full knowledge, and the statement is made as part of a business transaction, or to induce action from which the speaker expects to gain an advantage, he should be held liable for his misstatement.<sup>18</sup>

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<sup>16</sup> The dissent outlined the following as arguments against imposing liability for deceit: An appraiser had reported the house as masonry for his bank, thereby enabling plaintiffs to obtain a substantial loan. No evidence was submitted that defendant knew the walls were constructed of clay. Plaintiff's building expert witness testified that before removal of the wall he would have thought the building was constructed of masonry. The previous owners thought the house was constructed of masonry. There was no evidence that anyone suspected the true construction of the house until plaintiff removed the wall boards. *Id.* at 349-50, 135 N.E.2d at 332-33.

<sup>17</sup> PROSSER, *TORTS* § 88 (2d. ed. 1955).

<sup>18</sup> Williston, *Liability for Honest Misrepresentation*, 24 HARV. L. REV. 415, 437 (1911).

This test seems to be in accord with the court's results in the *Pumphrey* and *Toni* cases and carefully excludes those cases in which liability for innocent misrepresentations should clearly not be imposed, *i.e.*, when defendant has no business interest.<sup>19</sup> Professor Williston's test recognizes an absolute right to rely on representations made in business transactions. The results of the court's decisions in these two cases indicate an inclination to recognize such a right; but because express warranty is tied up by the requirement of privity of contract and deceit is limited to intentional misrepresentations, the courts are hard pressed to make these ancient rules apply to their modern concepts of liability.

*L. L. Inscore*

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<sup>19</sup> *But see* Plant, *Strict Liability of Manufacturer for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938 (1957), for an argument against the imposition of strict liability against manufacturers.