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Liability of the Manufacturer to the Ultimate Consumer for Breach of Warranty in Ohio

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I. INTRODUCTION

The landmark case establishing the manufacturer's liability to the ultimate consumer for negligence is *MacPherson v. Buick Motor Co.*[1] Both state and federal courts in Ohio have followed that decision.[2]

The next logical step would seem to be to allow the ultimate consumer to recover from the manufacturer in a breach of warranty action, but the requirement of privity has, for the most part, prevented the courts from taking this step.[3] Originally breach of warranty was an action on the case and sounded in tort rather than in contract,[4] and accordingly there was no requirement of privity. Later the method of declaring on a warrant in *indebitatus assumpsit* arose and the tort elements of the action were lost.[5] Breach of warranty came to be considered a part of the contract, and since the manufacturer had no contract with the subpurchaser, there was no privity and hence, no liability in warranty.[6]

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[1] 217 N.Y. 382, 111 N.E. 1050 (1916) "On its face the decision purported merely to extend the class of 'inherently dangerous' articles to include anything which would be dangerous if negligently made. But its reasoning and its fundamental philosophy was clearly that the manufacturer, by placing the car upon the market, assumed a responsibility to the consumer, resting not upon contract but upon the relation arising from his purchase and the foreseeability of harm if proper care were not used." PROSSER, TORTS 677 (1941).

[2] White Sewing Machine Co. v. Feisel, 28 Ohio App. 152, 162 N.E. 633 (1927); O'Donnell v. Geneva Metal Wheel Co., 183 F.2d 733 (6th Cir. 1950) No privity is required in Ohio in a negligence action by a third person against the furnisher or supplier of an article when it is contemplated that the third person will use the article and may be injured by any hazard involved in such use. Witherspoon v. Haft, 157 Ohio St. 474, 106 N.E.2d 296 (1952)

[3] Considerations of policy have also proved a deterrent in this field, for the authorities have questioned the fairness of making the manufacturer an insurer of his product. See WILLISTON, SALES § 244 (3d ed. 1948) High responsibility has historically been placed on the seller of food, however, and there is today a strong tendency to impose strict liability on the manufacturer under a breach of warranty theory in the food and beverage cases. See Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W 382 (1920); Patargias v. Coca-Cola Bottling Co., 332 Ill. App. 117, 74 N.E.2d 162 (1947); Parks v. C. C. Yost Pie Co., 93 Kan. 334, 144 Pac. 202 (1914); Helms v. General Baking Co., 164 S.W.2d 150 (Mo. App. 1942); Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928); Coca-Cola Bottling Co. of Fort Worth v. Burgess, 195 S.W.2d 379 (Tex. 1946)

[4] Ames, *History of Assumpsit,* 2 HARV. L. REV. 1, 8 (1888); WILLISTON SALES § 195 (3d ed. 1948)

[5] Jeanblanc, *Manufacturers' Liability to Persons Other Than Their Immediate Vendees,* 24 VA. L. REV. 134, 149 (1937).

[6] See for instance: Paull v. McBride, 273 Mich. 661, 263 N.W 877 (1935); Wood v. Advance Rumely Thresher Co., 60 N.D. 384, 234 N.W 517 (1931); Turner v.

In order to avoid this technical rule, some courts have found the manufacturer liable by holding that no privity is required in the manufacturer-ultimate consumer cases.[7] Others have said that a warranty arises by operation of law and out of public policy.[8] Again, when the manufacturer accompanies his product with a descriptive manual, it has been held that there is an express warranty within Section 12 of the Uniform Sales Act.[9] Still other courts have found privity, and therefore, liability, by indulging in various legal fictions.[10]

II. OHIO

A. *Personal Injuries—Food Cases*

Apparently the first case in Ohio involving the question of implied warranty between the manufacturer and the ultimate consumer was an action for personal injuries, *Ward Baking Co. v. Trizzino*.[11] In this case the plaintiff purchased from a retailer a cake made by defendant. Upon eating the cake, plaintiff was injured by an imbedded needle. The peti-

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Edison Storage Battery Co., 248 N.Y. 73, 161 N.E. 423 (1928); J. I. Case Threshing Machine Co. v. Dulworth, 216 Ky. 637, 287 S.W 994 (1926); Welshausen v. Charles Parker Co. 83 Conn. 231, 76 Atl. 271 (1910)

[7] Mannsz v. MacWhyte, 155 F.2d 445, 449-450 (3rd Cir. 1946) —" the requirement of privity between the injured party and the manufacturer of the article which has injured him has been obliterated from Pennsylvania law." (On other grounds, however, plaintiff was denied recovery); Blanton v. Cudahy Packing Co., 154 Fla. 872, 19 So.2d 313 (1944); Nichols v. Nold, 174 Kan. 613, 258 P.2d 317 (1953).

[8] Coca-Cola Bottling Co. v. Burgess, 195 S.W.2d 379 (Tex. 1946); Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942).

[9] Mannsz v. MacWhyte, 155 F.2d 445 (3rd Cir. 1946) (On other grounds, however, plaintiff was denied recovery) It is doubtful though that many jurisdictions will apply Section 12 (OHIO REV. CODE § 1315.13) beyond the two-party or retailer-ultimate consumer situation. See for instance: Jordan v. Brouwer, 86 Ohio App. 505, 93 N.E.2d 49 (1949)

[10] Hertzler v. Manshum, 228 Mich. 416, 200 N.W 155 (1924) (The manufacturer owes a duty to the consuming public); Klein v. Duchess Sandwich Co., Ltd., 14 Cal. 2d 272, 93 P.2d 799 (1939), and Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927) (Privity runs with a chattel just as a covenant runs with land); Ward Baking Company v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928) (These are third party beneficiary contracts, the middleman making the contract with the manufacturer for the benefit of the ultimate consumer); Madouras v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W.2d 445 (1936) (Since the middleman could have brought an action against the manufacturer, he merely assigns his right to the ultimate consumer); Roberts v. Anheuser-Busch Assoc., 211 Mass. 449, 98 N.E. 95 (1912) (The manufacturer has made representations to the public at large, and any consumer is entitled to rely upon them); Timberland Lumber Co. v. Climax Mfg. Co., 61 F.2d 391 (3d Cir. 1932) (The manufacturer authorizes the dealer as his agent to make representations).

[11] 27 Ohio App. 475, 161 N.E. 557 (1928)

tion alleged both breach of warranty and negligence,[12] but the court of appeals, in affirming a judgment for plaintiff, held that it was not necessary to resort to *res ipsa loquitur* and that plaintiff could recover for breach of warranty under a third party beneficiary theory.[13]

> The Baking Company, when it delivered the cake in question to the groceryman, to say the least, impliedly represented to the public, who is the ultimate consumer, that this cake: is free from injurious substances and fit for consumption as food. There is no doubt that an implied warranty arises between the groceryman who purchased the cake and the Baking Company. Since the Baking Company was fully aware that the groceryman did not purchase the cake for his own consumption, but purchased the same for the purpose of selling the same to members of the public, who are the ultimate consumers, this implied obligation which unquestionably arose in favor of the groceryman may be legally said to have also arisen for the benefit of the consumer. The groceryman, who is in effect merely a distributing medium for the articles of food furnished by the Baking Company, and the Baking Company having full knowledge of that fact dealt with each other and entered into a contractual relationship for the benefit of the public which is the ultimate consumer.[14]

The court went on to say:

> we are content to place ourselves in the category of the minority states, if such be the case, and to hold that there is imposed the absolute liability of a warrantor on the manufacturer of articles of food in favor of the ultimate purchaser, even though there are no direct contractual relationships between such ultimate purchaser and the manufacturer.[15]

The strong language of the *Ward* case is somewhat weakened by the holdings in *Canton Provision Co. v. Gauder*[16] and *Kniess v. Armour & Co.*,[17] both of which were actions for personal injuries sustained from the sale of unwholesome food. The decisive principle of both cases was that the consumer could not join the manufacturer and the retailer in a single action. However, dicta in the two cases as to the warranty problem were entirely contradictory. The *Gauder* court said that there was no implied warranty between the consumer and the manufacturer since there was no meeting of the minds, and the *Kniess* court asserted that public policy de-

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[12] "There is the obligation that the goods will be fit for the particular purpose intended and the further duty to refrain from including therein any hidden danger unknown to the buyer. Failure to meet the first obligation is a breach of warranty, express or implied; failure to meet the second duty is negligence." Sicard v. Kremer, 133 Ohio St. 291, 294, 13 N.E.2d 250, 252 (1938)

[13] This theory may, perhaps, be supported on the ground that the third party beneficiary of a contract need not be in being at the time of the making of the contract. RESTATEMENT, CONTRACTS § 139 (1932)

[14] Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 481, 161 N.E.557, 559 (1928)

[15] Id. at 482, 161 N.E. at 559.

[16] 130 Ohio St. 43, 196 N.E. 634 (1935), reversing Gauder v. Canton Provision Co., 56 Ohio App. 170, 10 N.E.2d 163 (1937)

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

manded that the manufacturer should warrant to the public generally that its food products were fit for human consumption.

B. *Personal Injuries—Products Other Than Food*

Whether the doctrine of the *Ward* case should be limited to actions for personal injuries received from the consumption of unwholesome food is apparently undecided in Ohio. *Dow Drug Co. v. Nieman*[18] was an action against a distributor and a retailer for personal injuries sustained from an exploding cigar. The court of appeals said that there was evidence of negligence, and that since the case had been submitted to the jury on both negligence and breach of warranty, and the jury had found against the plaintiff as to the distributor, there was no prejudice. The court thus made no clear cut decision as to the applicability of the breach of warranty theory.[19]

In *Kruper v. Proctor & Gamble Co.*[20] the plaintiff brought an action against a soap manufacturer for injuries sustained from a piece of wire imbedded in a bar of soap which plaintiff purchased from a retailer. From a judgment for the plaintiff, defendant appealed to the Court of Appeals for Cuyahoga County. In holding that there was a breach of implied warranty, the court, citing the *Ward* case, said: "The question of privity should not protect one who sells unmerchantable goods when an inspection will not disclose the defect."[21]

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[18] 57 Ohio App. 190, 13 N.E.2d 130 (1936).

[19] After noting that since the distributor marketed the cigars as its own, whatever negligence was attributable to the original manufacturer was also attributable to it, the court said at page 201. "That there is a liability upon a negligent manufacturer who sells articles knowing they are intended for resale to sub-purchasers is clear from the trend of modern authorities. The only controversy is as to the basis of liability, some holding that the implied warranties are made for the benefit of the sub-purchasers and form the basis of liability, and others holding that there must be proof of negligence to impose a liability." [citing Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928); White Sewing Machine Co. v. Feisel, 28 Ohio App. 152, 162 N.E. 633 (1927); and MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).] Other Ohio cases which indicate that the manufacturer could be liable for personal injuries resulting from products other than food are Sicard v. Kremer, 133 Ohio St. 291, 13 N.E.2d 250 (1938), and DiVello v. Gardner Machine Co., 102 N.E.2d 289 (Cuyahoga Com. Pl. 1951). In the *Sicard* case, the court said that the manufacturer might be liable for personal injuries caused by a hair dye since the product could not be used for the purpose intended or represented. In that case, though, plaintiff purchased the hair dye from defendant's agent rather than from a retailer; thus, there was perhaps privity. In the *DiVello* case, the manufacturer was held liable for breach of warranty when a grinding wheel disintegrated, killing plaintiff's decedent, who was an *employee* of one who had purchased the wheel directly from the manufacturer.

[20] 113 N.E.2d 605 (Ohio App. 1953).

[21] Kruper v. Proctor & Gamble Co., 113 N.E.2d 605, 608 (Ohio App. 1953).

The court of appeals certified the record to the Ohio Supreme Court on the ground that the decision was in conflict with that of the Court of Appeals for Mahoning County on the same question.[22] When the supreme court reviewed the case, it found that the trial court had not charged the jury on the subject of implied warranty, that such a charge had not been requested, and that this question was, therefore, not even before the court. The supreme court held also that *res ipsa loquitur* was not applicable because the instrumentality was not under defendant's exclusive management and control and reversed the court of appeals.[23]

C. *Property Damage*

Apparently the first case in Ohio of an ultimate consumer against a manufacturer for breach of warranty resulting in property damage was *Jordan v. Brouwer*.[24] In that case the plaintiff brought an action to recover for damages to his automobile allegedly resulting from the use of anti-freeze manufactured and distributed by defendant. In reversing a judgment for plaintiff, the Court of Appeals for Hamilton County held that there was no privity between plaintiff and defendant, and that such privity is necessary to sustain an action based upon breach of warranty. The court in this case drew a distinction between property damage and personal injury saying, " there are exceptions to the rule of privity, where injury results to the *person* of plaintiff."[25]

Wood v. General Electric Co.,[26] was an action to recover for property damage allegedly resulting from a defective electric blanket purchased by plaintiff in the original package from an intermediate dealer. The petition stated two causes of action — one for negligence and one for breach of warranty. The jury returned a general verdict for the defendant manu-

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[22] Male v. Colgate Palmolive Co., 14 Ohio L. Abs. 119 (Ohio App. 1932) This case was based on the theory that a manufacturer is liable for injuries sustained by a purchaser from a retailer only when he produces an article which he knows is inherently dangerous to life or health, or when in the manufacture of the article he uses ingredients which are to his knowledge inherently dangerous to life and health. This case did not discuss breach of warranty but was based on a negligence theory. It is apparent that the *Male* case represents a refusal to accept the general judicial interpretation of the *MacPherson* doctrine, i.e., that a manufacturer can be liable to the ultimate consumer for the manufacturer's own negligence, even though the article in question is not inherently dangerous.

[23] 160 Ohio St. 489, 117 N.E.2d 7 (1954)

[24] 86 Ohio App. 505, 93 N.E.2d 49 (1949).

[25] Jordan v. Brouwer, 86 Ohio App. 505, 511, 93 N.E.2d 49, 52 (1949) In an especially well reasoned dissent, Judge Matthews emphasized that representations on the label of the anti-freeze amounted to an express warranty to the ultimate consumer, since the latter would be the only person likely to suffer by reason of the falsity of the representations and the breach of warranty. See *supra* note 9.

[26] 159 Ohio St. 273, 112 N.E.2d 8 (1953).

facturer, and the plaintiff appealed on the ground that the court's charge with respect to contributory negligence misled the jury into believing that contributory negligence would bar plaintiff's recovery not only on the cause of action for negligence, but also on the cause of action for breach of warranty. The court of appeals reversed on the ground that the trial court did err in its general charge to the jury. On appeal, the Ohio Supreme Court held that the trial court's charge did not mislead the jury, and that even if it did, plaintiff had waived the error. The supreme court was not content, however, to rest its decision on this ground alone. The court also looked into the breach of warranty aspect:

> There is another reason why the charge of the court on contributory negligence was not prejudical to the plaintiffs as it related to the subject of implied warranty. The blanket in question was purchased in the original package from an independent dealer. To support an implied warranty there must be contractual privity between the seller and buyer. Although a subpurchaser of an inherently dangerous article may recover from its manufacturer for negligence, in the making and furnishing of the article, causing harm to the subpurchaser or his property from a latent defect therein, no action may be maintained against such manufacturer by such subpurchaser for such harm, based upon implied warranty of fitness of the article so purchased. Hence, there was no such privity and hence no implied warranty upon the part of General Electric and no valid issue on that subject.[27]

Although the holdings in the *Jordan* and *Wood* cases are not difficult to rationalize if the court refused to extend the strict liability of the *Ward* doctrine to encompass a wider area, it is difficult to see why liability should be determined by the type of damage which results. As a matter of fact, the supreme court in the *Wood* case did not even mention the distinction between personal injury and property damage — thus the possibility that the *Wood* doctrine could be applied in the personal injury cases. Another alarming feature of that case is that the court would apparently limit recovery by the subpurchaser even for negligence to situations involving inherently dangerous articles. This is manifestly against the growing weight of authority, at least in the personal injury cases.

III. *Observations and Conclusions*

"A breach of warranty gives rise to strict liability, which does not depend upon any knowledge of defects on the part of the seller, or any negligence."[28] Perhaps it seems harsh to bring the manufacturer within the orbit of this stringent rule, but modern social requirements and the

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[27] Wood v. General Electric Co., 159 Ohio St. 273, 278, 112 N.E.2d 8, 11-12 (1953).

[28] PROSSER, TORTS 670 (1941).

facts of modern economic practice would seem to require it in many instances. Manufacturers advertise widely, creating a demand and inducing the public to purchase their goods. The retailer is often a mere conduit for the dissemination of these goods. The manufacturer controls production methods and is, therefore, in the best position to insure the safety or wholesomeness of products offered for sale. The consumer, relying upon appearances of quality, has little or no opportunity for inspection and must take the goods as they come. Furthermore, as one writer has said, there is " an increased feeling that social policy demands that the burden of accidental injuries caused by defective chattels be placed upon the producer, since he is best able to distribute the risk to the general public by means of prices and insurance."[29]

From the point of view of the injured plaintiff, the imposition of a strict liability on the manufacturer certainly seems desirable. The Ohio courts, along with many other courts in the country,[30] have given some indication of placing themselves in the strict liability column so far as food products are concerned.[31] If a plaintiff has the right to recover damages against the manufacturer without proof of negligence when his food contains a needle,[32] should he not have a similar right when his person is injured by a wire embedded in a piece of soap,[33] or when his property is damaged by an electric blanket bursting into flames?[34] If the plaintiff were able to prove negligence in these cases so as to come within the scope of the *MacPherson* doctrine, there would be far less of a problem. We have here, however, situations in which it would be extremely difficult to prove negligence.[35] For one thing the doctrine of *res ipsa loquitur* is generally inapplicable because the instrumentality in question is usually not under the defendant manufacturer's exclusive management and control.[36]

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[29] *Id.* at 689, citing Patterson, *The Apportionment of Business Risks Through Legal Devices*, 24 COL. L. REV. 335, 357 (1924).

[30] See *supra* note 3.

[31] Apparently the Ohio courts do not draw a distinction between sales of food and sales of other articles of personal property so far as actions against the retailer under the Uniform Sales Act (OHIO REV. CODE § 1315.16-B) are concerned. See Dow Drug Co. v. Nieman, 57 Ohio App. 190, 198-199, 13 N.E.2d 130, 134 (1936).

[32] Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928).

[33] Kruper v. Proctor & Gamble Co., 113 N.E.2d 605 (Ohio App. 1953)

[34] Wood v. General Electric Co., 159 Ohio St. 273, 112 N.E.2d 8 (1953).

[35] The argument that it is unjust to apply the warranty doctrine since the article in question is ordinarily consumed in plaintiff's home and the manufacturer, therefore, has no way of disputing plaintiff's evidence, is overcome by the difficulty which plaintiff has in proving negligence and in refuting the manufacturer's evidence of due care during production. Helms v. General Baking Co., 164 S.W.2d 150 (Mo. App. 1942).

[36] See for instance: Kruper v. Procter & Gamble Co., 113 N.E.2d 605 (Ohio App. 1953).

The practitioner should not overlook the possibility of a suit against the manufacturer under the Pure Food Law.[37] Dicta in the *Kneiss* and *Gauder* cases correctly indicate that privity is irrelevant under that statute, and, too, a federal court in Ohio has held that a distributor was guilty of negligence *per se* under the statute.[38] As we have seen, the rule is otherwise if the suit be instituted under section 15 of the Uniform Sales Act.[39] The distinction can be rationalized only on historical grounds, certainly not in terms of social need.[40]

Other factors to be considered are the possibility and the practicality of the injured consumer's proceeding against the retailer. In Ohio, the latter is guilty of negligence *per se* if he violates the Pure Food Law.[41] Whether this rule will be applied in cases of beverages containing deleterious substances remains an open question in Ohio.[42]

If the sale is of a product other than unwholesome food, or if there is property damage rather than personal injury, the retailer's liability is not so clear. There is strong dictum in *McMurray v. Vaughn's Seed Store*[43] to the effect that when a dealer sells merchandise in the original package as it comes from the manufacturer, there is no implied warranty, and that the dealer is not liable for damages caused by any deleterious substance in such merchandise. The implied warranties sections of the Uniform Sales Act[44] were, however, not mentioned in that case, and subsequent cases lead to the conclusion that the retailer may be liable for breach of these warranties even when he has no opportunity to inspect.[45] Whether this liability will extend to persons other than the immediate purchaser from the retailer is still undecided in Ohio.[46]

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[37] OHIO REV. CODE § 3715.21. No person shall sell, offer for sale, or have in his possession with intent to sell, diseased, corrupted, adulterated, or unwholesome provisions without making the condition thereof known to the buyer.

[38] Trioetto v. G. H. Hammond Co., 110 F.2d 135 (6th Cir. 1940).

[39] OHIO REV. CODE § 1315.16.

[40] For further discussion of the problem as it arises under the Uniform Sales Act, see 21 U. CIN. L. REV. 460, 471 (1952) and Pelletier v. Dupont, 124 Me. 269, 128 Atl. 186 (1925).

[41] Great Atlantic & Pacific Tea Co. v. Hughes, 131 Ohio St. 501, 3 N.E.2d 415 (1936); Portage Markets Co. v. George, 111 Ohio St. 775, 146 N.E. 283 (1924); Lovich v. The Salvation Army, Inc., 81 Ohio App. 317, 75 N.E.2d 459 (1947). The retailer is liable even though the deleterious substance is in canned goods. Wolfe v. The Great Atlantic & Pacific Tea Co., 143 Ohio St. 643, 56 N.E.2d 230 (1944).

[42] 21 U. CIN. L. REV. 460, 464 (1952).

[43] 117 Ohio St. 236, 157 N.E. 567 (1927). In this case, manure containing soda ash caused the dwarfing and killing of plaintiff's plants.

[44] OHIO REV. CODE § 1315.16.

[45] Goljatowska v. Fred W Alberecht Co., 17 Ohio L. Abs. 294 (Ohio App. 1934), iron nut in canned pork and beans; Dow Drug Co. v. Nieman, 57 Ohio App. 190, 13 N.E.2d 130 (1936), exploding cigar which had been wrapped by manufacturer.

[46] For a discussion of this point, see 21 U. CIN. L. REV. 460, 469 (1952)

There are situations, however, in which the injured consumer may be unable either to prove negligence or to avail himself of his statutory remedies against the retailer. And even if he were able to do one or the other, he may prefer to proceed against the manufacturer for no other reason than that the latter will be financially more responsible. Furthermore, it should be the policy of the law in this area to avoid a multiplicity of suits. By allowing the consumer to proceed directly against the manufacturer, a suit by the retailer against the manufacturer would be avoided.

A re-examination of the nature of the warranty doctrine itself will perhaps dispel the argument that the privity requirement must necessarily bar an action by one who has no contractual relations with the manufacturer. As was noted above,[47] an action for breach of warranty was originally a tort action for breach of an assumed duty, and

> it is by no means clear that it was anything more than the accident that the cases which arose involved contracts that led to its being regarded as a matter of contract at all. A return to the tort theory is still possible, if the courts choose to find that the manufacturer has assumed a duty toward those who use his product.[48]

The existence of middlemen, a modern economic necessity, should not change substantive rights.[49] Furthermore, in many other situations, in their efforts to reach a just result in a given case, the courts have seemingly treated negligence and warranty as substantially similar.[50]

It is not suggested that the manufacturer should be held liable to the ultimate consumer in an instance when the product in question was not used for the purposes intended, or when the injury was the result of some personal idiosyncrasy of the user.[51] But whether the liability of the manufacturer is to be founded upon a strict liability in tort, upon a reliance theory in contract, or upon legislative or judicial extension of the Pure Food and Uniform Sales Acts must be worked out upon sound principles of law and public policy.

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[47] Page 1.

[48] PROSSER, TORTS 690 (1941).

[49] 42 HARV. L. REV. 414, 417 (1928)

[50] Even in the *Ward* case, the court talked of the presence of the needle as an evidential fact from which negligence could be inferred. Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 485, 161 N.E. 557, 560 (1928) This is hardly the language of warranty. See also the remarks of the court in Dow Drug Co. v. Nieman, 57 Ohio App. 190, 13 N.E.2d 130 (1936); and Jeanblanc, *Manufacturers' Liability to Persons Other Than Their Immediate Vendees,* 24 VA. L. REV. 134, 156 (1937).

[51] By analogy, it may be noted that contributory negligence is still available in Ohio as a defense in an action by a consumer against a retailer for violation of the Pure Food Law. Leonardi v. The A. Habermann Provision Co., 143 Ohio St. 623, 56 N.E.2d 232 (1944)