

December 2019

Products Liability - The Defense of Products Liability Cases

James Barton Phelps

Follow this and additional works at: <https://scholarship.law.uwyo.edu/wlj>

Recommended Citation

James B. Phelps, *Products Liability - The Defense of Products Liability Cases*, 17 Wyo. L.J. 124 (1963)
Available at: <https://scholarship.law.uwyo.edu/wlj/vol17/iss2/7>

This Special Section is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Wyoming Law Journal by an authorized editor of Law Archive of Wyoming Scholarship.

PRODUCTS LIABILITY

JAMES BARTON PHELPS*

THE DEFENSE OF PRODUCTS LIABILITY CASES

I appreciate this opportunity to spend a few minutes discussing certain general areas of practical importance for the general practitioner in the defense of a products liability case. It is also my purpose to attempt to leave with you some understanding of this new and fascinating field of the law—a field which is ordinarily termed “products liability” but which might well be more accurately termed “the liability of sellers and manufacturers for harm caused by their products.”

At the outset of this discussion, I would caution you to avoid an approach based purely on traditional theories of tort or of contract; for while the case law borrows heavily from these branches of the law, the practical result of the most advanced and recent cases is to create and impose an absolute liability on manufacturers and sellers for harm caused by their products. What products will bear this burden, what manufacturers and sellers will be liable and what defenses, if any, may be available is still to be decided by the vast majority of the states.

Since this is a developing field, the case law of the several states is at variance, even within individual states there are conflicts in the cases; therefore no attempt is here made to delineate the law of any particular jurisdiction, nor are the citations of authority herein given by any means exhaustive of other cases on the same point.

1. *Preliminary*: The lawyer for the defendant in a products liability case is usually retained by an insurance carrier. The ordinary defense of a personal injury case may pose no problems to him. The defense of an automobile case, a slip and fall case, a dog bite case, may be second nature to him, but beware of the products liability case! It is unique, difficult and requires the utmost care and attention. It differs from the ordinary defense case in several particulars:

(a) Normally it contains more complex legal issues than any other type of litigation;

(b) The facts are of a highly technical nature and require thorough analysis and the acquisition by the lawyer of knowledge in an engineering or scientific field;

(c) The named defendant is highly interested in the case; his trade reputation is at stake; you may very well be caught between his desire for vindication and your company's desire for settlement; in most cases you will be reporting to the defendant's general counsel or engineering staff, as well as to the company;

(d) The defense is *expensive*. Most substantial products liability cases involve huge losses—as for example, explosions of boilers, collapses

*In the firm of Gledsoe, Catchcart, and Phelps, San Francisco, California.

of buildings, losses of entire crops, flooding—and usually serious injury or death. Their defense takes time—lots of it—imagination, thought and effort. Consequently, one of the first things the defense lawyer should do is to educate the relevant insurance carrier about the difficulties of the defense and the attendant expense involved. The company may then want to settle the case, if not, the lawyer's bill should come as no surprise to the carrier.

2. *Defenses of Law*: When a products liability file first comes into your office and after checking it for the usual facts such as service, coverage, venue, etc.—the lawyer will want to consider his defenses which are primarily legal in nature. The most important ones are as follows:

(a) *Privity*. The requirement of privity prevents an injured plaintiff from suing a defendant who is remote—for example, a middleman or manufacturer—and with whom the plaintiff has had no dealings, directly or indirectly. This requirement is observed more in the breach than otherwise.

(1) *Negligence cases*: As we have seen, where the defendant manufacturer, wholesaler or supplier or retailer has been negligent, no privity is required. The plaintiff may sue him directly.¹

(2) *Express warranty*: Where the defendant has *expressly* warranted a fact to the plaintiff, the plaintiff may bring an action for breach of this warranty in the same manner as he would sue on any other contract. There is no question of privity. However, modern cases tend to find an express warranty in written representations made by the manufacturer in labels or advertising material where they were of such a nature that the customer might reasonably be expected to rely thereon.²

(3) *Implied warranties*: The Uniform Sales Act is in effect in most of the United States with the exception of New Mexico and Wyoming which have adopted the Uniform Commercial Code. Both statutes provide for implied warranties of fitness for use of merchantability.³ The important thing to realize is the fact that, under the terms of the Act, these implied warranties only run from the “seller” to the “buyer.” Therefore the defense of privity arises in an action by a plaintiff against a remote seller who has not been negligent and who has made no express warranty. Since he is not a seller to the plaintiff no implied warranty

-
1. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).
 2. *Burr v. Sherwin Williams Co.*, 42 C.2d 682, 268 P.2d 1041 (1954) (label on insecticide); *Free v. Sluss*, 87 C.A.2d 933, 197 P.2d 854 (1947) (soap package contained printed guarantee of quality); *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); *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409 (1932) (automobile manufacturer represented windshield to be a non-shatterable glass); *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).
 3. I have great difficulty in differentiating between the two. Even Justice Cardozo states that they usually arise simultaneously. See *Ryan v. Progressive Grocery Stores*, 225 N.Y. 388, 175 N.E. 105 (1935). For discussion of these warranties see *Burr v. Sherwin Williams Co.*, *supra*, note 2 at 694. The distinction probably lies in the manner in which they arise under the Sales Act.

has arisen—so the theory goes but can the plaintiff sue the seller anyway on some theory? This is the present battleground of products liability; and we must be diverted for a moment for discussion and analysis of its present situation and the implications of the extreme position that these implied warranties in all cases run from the manufacturer to the ultimate consumer and thus provide a vehicle for absolute responsibility for breach thereof.

The majority of the states still require privity of contract as a prerequisite for an action for breach of implied warranty.⁴

In many states common justice has demanded that the requirement of privity be abandoned in cases involving food and drugs.⁵ But recent decisions have tended to abolish the requirement of privity in other types of cases.⁶

Finally in *Henningsen v. Bloomfield Motors, Inc.*,⁷ the New Jersey Supreme Court, acting on the theory that if you shoot at a king you had better kill him, went all the way in abandoning privity as a requirement in any case and held that the manufacturer and the retailer of an automobile were responsible to the buyer's wife injured as the result of a defect in the vehicle, even though neither was negligent nor made any warranty, express or implied, to the plaintiff. Let there be no misunderstanding: The decision was deliberate judicial "legislation," but that is the way our common law evolves. Listen, then to Mr. Justice Francis as he gives his reasons for killing the king:

With the advent of mass marketing the manufacturer became remote from the purchaser, sales were accomplished through intermediaries, and the demand for the product was created by

-
4. By far the most helpful and penetrating article on the entire subject is Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 *Yale L.J.* 1100 (June, 1960). Anyone involved in a products liability case of any consequence will want to read and ponder the thoughts of Dean Prosser. The statiscally minded will be interested in knowing that approximately 28 states and the District of Columbia require privity; 16 states do not; 6 states are undetermined. An article by Warren Freedman published by the Defense Research Institute, Inc. in the early part of this year lists these jurisdictions with the appropriate cases in support of their position on privity.
 5. *Klein v. Duchess Sandwich Co. Ltd.*, 14 *C.2d* 272, 93 *P.2d* 799 (1939); *Vaccarezza v. Sanguinett*, 71 *CA.2d* 687, 163 *P.2d* 470 (1945); *Gottsdanker v. Cutter Laboratories*, 6 *Cal. Rptr.* 320 (1960); *Greenberg v. Lorenz*, 9 *N.Y.2d* 195, 173 *N.E.2d* 773 (1962). See Prosser, *Op. Cit.*, at 1107, for a list of citations by states. Briefly, he states that Arizona, California, Florida, Illinois, Iowa, Kansas, Louisiana, Michigan, Mississippi, Missouri, Ohio, Oklahoma, Pennsylvania, Puerto Rico, Texas, Virginia, and Washington follow the rule of strict liability in food cases. In Connecticut, Georgia, Minnesota, Montana and South Carolina, the same result is reached by statute. Alabama, Arkansas, and the District of Columbia, Kentucky, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, South Dakota, Tennessee and Wisconsin, reject the doctrine; and North Carolina and West Virginia are doubtful. There is no definite law in the remaining states.
 6. *Rogers v. Toni Home Permanent Co.*, 167 *Ohio St.* 244, 147 *N.E.2d* 612 (1958) (home permanent wave set); *Worley v. Proctor & Gamble Co.*, 241 *Mo. App.* 1114, 253 *S.W.2d* 532 (1952) (soap detergent); *Divello v. Garnder Machine Co.*, 46 *Ohio* 161, 102 *N.E.* 289 (1951) (defective emery wheel); *Mannsz v. MacWhytle Co.*, 155 *F.2d* 445 (3d Cir. 1946) (defective wire rope); *Spense v. Three Rivers Builders & Machinery Supply*, 353 *Mich.* 120, 90 *N.W.* 873 (1958) (defective cinder blocks).
 7. 32 *N.J.* 358, 161 *A.2d* 69 (1960).

advertising media. In such an economy it became obvious that the consumer was the person being cultivated. Manifestly, the connotation of "consumer" was broader than that of "buyer." He signified such a person, who is the reasonable contemplation of the parties to the sale, might be expected to use the product. Thus, where the commodities sold are such that if defectively manufactured they will be dangerous to life or limb, then society's interests can only be protected by eliminating the requirement of privity between the maker and his dealers and the reasonably expected ultimate consumer. In that way the burden of losses consequent upon use of defective articles is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur." (page 80)

. . . And again on page 83:

The obligation of the manufacturer should not be based alone on privity of contract. It should rest, as was once said, "upon the demands of social justice. . ." If privity of contract is required, then under the circumstances of modern merchandising, privity of contract exists in the consciousness and understanding of all right thinking persons.

In *Gottsdanker* the California court held that the manufacturer of polio vaccine was liable in "warranty" to one to whom the vaccine was administered (not sold) even though Cutter was not negligent and had made no warranty, express or implied, to the plaintiff. Mr. Justice Draper was rather brusque. No real reason was given for his holding; he just said: "in this jurisdiction which holds that the implied warranties run with food products to the ultimate consumer I see no reason to exclude drugs from the rule. We have no hesitance in holding that the absence of privity does not bar recovery on implied warranty from the manufacturer of vaccine here at issue."

Then he turned aside Cutter's argument that, under the peculiar facts of the case, public policy could best be served by denying recovery and warranty from "new" drugs by saying that such a holding would amount to "judicial legislation!"

It is easy to see why judicial—and human—sympathy rest with the plaintiff in each of these cases. One was a child, the other a badly injured woman. The defendants were large, impersonal corporations. Viewing each case alone one might expect to say that a "just" or "equitable" result had been obtained. But these cases were not designed to be viewed in this light. They were policy decision—especially *Henningsen*—meant to affect the common law for years. So their policy must now be analyzed.

Basically, an action for breach of implied warranty is much more tort than contract. It was born of a tort action and merely took the name of contract by accident. It carries tort, not contract, damages. It runs afowl of the tort statute of limitations. In most instances it is subject to tort defenses of contributory negligence and assumption of risk. Why, therefore, can we not analogize this to a tort action for absolute liability

and resolve it in the light of the tort law applicable to this? It would not be shocking, for common law exceptions for liability without fault were long ago created in cases involving liability for the keeping of wild animals, for public nuisances, and for certain type of ultra-hazardous activities.⁸ The Restatement of Tort, Section 520, makes one absolutely liable for the carrying of an ultra-hazardous activity and states that an activity is ultra-hazardous if it (1) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (2) is not a matter of common usage. To my knowledge, no American jurisdiction has yet gone as far as the restatement doctrine. Generally speaking, such absolute liability is always subject to the defense of assumption of risk. The guide posts are already there. Why not use them?

The question is whether it is wise now to go as far as *Henningsen* and say that *all* sellers are liable for *all* products where the consumer is injured; and there are serious objections to this holding.

(1) It does not always "equalize" or "socialize" the liability. Too often we tend to think of a retailer or a manufacturer in terms of Macy's or General Motors; but the fact is that the vast majority of products in this country are manufactured by small companies and sold through small or closely owned retail outlets. These people simply cannot afford the high loss potential of several huge, or even one large, products liability verdicts. For example, the financial condition of Cutter, large as that company was, has been adversely affected by the Cutter recoveries.

(2) Insurance is not the answer. There will always be questions of coverage, excess insurance, etc. Furthermore, it is unfair to impose liability on all sellers simply because some of them may be insured. It is equally unfair to impose liability upon them if *all* are insured, for the price is simply passed on to the public in the form of the product.

(3) It is unfair to impose liability on middlemen (e.g., wholesales and jobbers) where they may not be able to recover over against the manufacturer. Often the manufacturer is immune from process, or the middleman may have difficulties in recovering against him by reason of the statute of limitations, the laws of indemnity, etc.

(4) Absolute liability in *all* cases may well create a whole new class of malingering plaintiffs who, with the sure, clear eye of hindsight, will be convinced that their illness or injury resulted from some defect in the defendant's product. Thus, household cleaners, the household lawn mower, garden hoses, plumbing fixtures, clothes, shoes, razor blades, household tools and the like, become potential sources of profit for the plaintiff.

In sum, if the *Henningsen* rule is to be followed at all, I would

8. See Bohlen, *Studies in the Law of Torts*, Bobbs-Merrill Co. (1926); *Green v. General Petroleum Co.*, 205 C 328, 70 Pac. 952 (1928).

strongly recommend that it be limited to cases against the retailer or manufacturer, excluding the middleman, that the tort defenses of contributory negligence and assumption of risk be allowed, that it be limited to products which the manufacturer realizes must be *ultra*-hazardous if improperly made. At the moment I see no reason for extending it to *all* products.

(b) *Statute of Limitations*: Did the plaintiff file his action for personal injuries within the time prescribed by the statute of limitations respecting actions for personal injuries? The majority rule is that he must do so, even though actions for breach of an implied warranty (oral contract) or express warranty (written contract) need not be so filed.⁹ What is the position of the retailer and the middleman in respect to his action over against the guilty manufacturer? The general rule is that the statute of limitations for breach of implied or express warranty commences to run as of the date of the sale from which the warranty springs.¹⁰ Thus, if the original sale was made by the manufacturer or by the middleman at some remote date, the retailer may find his action over against the really guilty party barred by the statute.

Some amelioration of this rule is found in recent cases which say that if a warranty relates to a *future* event before which the defect cannot be discovered by the exercise of reasonable diligence, the warranty, though accompanied by a representative as to present condition, is *prospective* in character and the statute of limitations begins to run as of the time of that event.¹¹

While it would seem logical that the retailer, knowing of the breach, could wait until the plaintiff's suit was decided in order to see whether there was any recovery and then sue the wholesaler and manufacturer on a theory of indemnity, the one case which considers this point seems to imply wrongly, I think—that a retailer's action is properly one for breach of implied warranty and that the statute runs as of the date the retailer learned of the breach. The effect, of this, if it is to be law, will be to make all retailers file actions over to bring in the various middlemen and manufacturers. The resultant complexity of cross-complaints and issues, the resultant presence of many different counsel at the trial, only serves to lengthen products liability trials, to increase their expense and to make a rather simple plaintiff's case much more difficult.¹²

(c) *Notice*: The Sales Act requires notice of breach of warranty. California has held that notice must be served in writing prior to suit; that notice must be pleaded; that the complaint itself is not notice; and a

9. *Rubino v. Utah Canning Co.*, 123 CA.2d 18, 266 P.2d 163 (1954); *Lai Wum Chain Mok v. Melfast Beverages*, 14 Cal. Rptr. 602 (1961); *Patterson v. Vincent*, 44 Del. 442, 61 A.2d 416 (1948); *Seymour v. Union News Co.*, 39 Ill. App. 197, 110 N.E.2d 475 (1953); see 37 ALR.2d 703.

10. *Mary Pickford Co. v. Bayly Bros. Inc.*, 12 C.2d 501, 86 P.2d 102; 1 Williston on Sales, ¶ 212(a), p. 550.

11. *Aced v. Hobbs-Sesack Plumbing Co.*, 55 C.2d 735, 360 P.2d 897 (1961).

12. See *Riesen v. Leeder*, 193 CA.2d 580, 14 Cal. Dptr. 469 (1961).

non-suit will be granted where no notice is shown.¹³ It has been suggested that a notice should no longer be a requirement where privacy is denied on the theory that, there being no contract between the parties, the Sales Act has no real application. This suggestion springs from the idea that an action for a breach of "implied warranty" is really an action in tort for absolute liability and that notice is an anachronism. We suggest that this is error and that notice is even more important in such a case in order to give the defendant some opportunity to view the alleged offending product before it is changed, destroyed or lost.

(d) *Disclaimer*: A disclaimer is language in writing accompanying the article usually to the effect that, with the exception of certain warranties conveyed by the label, "all other warranties express or implied are negated." Provided the buyer has knowledge or is chargeable with the knowledge of the disclaimer before the bargain is complete, the implied warranties can thereby be disclaimed.¹⁴

However, disclaimers are construed most strongly against the seller; and some have been absolutely void as a matter of public policy where the sale is made to a member of the general public and the disclaimer is in fine print.¹⁵

While public policy may well strike down disclaimers in fine print on labels of products which are sold to the general public, I wonder if the same result should obtain when the product is sold to a commercial user who is an experienced business man and well able to take of himself. It is submitted there should be a distinction.

4. *Mixed Defenses of Law and Fact*:

(a) *Contributory Negligence*: Contributory negligence is a defense to an action predicated on negligence. While there are four older cases (all decided before 1930) which state that it is not a defense to an action for breach of implied warranty, the modern cases are rather unanimous in holding to the contrary. We are indebted to Dean Prosser for a collection of those cases.¹⁶

13. *Vogel v. Thrifty Drug Co.*, 43 C.2d 184, 259 P.2d 450 (1953); *Arata v. Tonegato*, 152 C.A.2d 837, 314 P.2d 130 (1957).

14. *Burr v. Sherwin Williams Co.*, *supra* note 2; Prosser, *Warranties of Merchantable Quality*, 27 Minn. L. Rev. 117, 157 (1943).

15. *Henningsen v. Bloomfield Motors*, *supra* note 7; *Woodworth v. Rice Bros. Co.*, 179 N.Y. Supp. 722 (1958); *Black v. Kirkland Seed Co.*, 158 S.C. 112, 155 S.E. 268 (1930); *Linn v. Radio Center Delicantessan*, 9 N.Y. Supp.2d 110 (1939).

16. *Nelson v. Anderson*, 245 Minn. 445, 72 N.W.2d 861 (1955) (continuing to use oil burner after notice that it was smoking); *Hitchcock v. Hunt*, 28 Conn. 343 (1859) (using barrels of store park after discovery that they were leaking); *Cedar Rapids & I.C. Ry. & Light Co. v. Sprague Electric Co.*, 203 Ill. App. 424, *aff'd.*, 280 Ill. 386, 117 N.E. 461 (1917) (use of electric shovel after discovery of dangerous defects); *Bruce v. Fiss, Doerr & Carroll Horse Co.*, 47 App. Div. 273, 62 N.Y. Supp. 96 (1900) (use of horse discovered to be dangerous); *McCormick Harvesting Machine Co. v. Nicholson*, 17 Pa. Super. 188 (1901) (use of rope after it had broken); *Eisenbach v. Gimbel Bros., Inc.*, 281 N.Y. 474, 24 N.E.2d 131 (1939) (improper cooking of pork by experienced cook); *Pates v. Fish Bros. Wagon Co.*, 50 App. Div. 38, 63 N.Y. Supp. 649 (1900) (use of steam heating apparatus after discovery of defects); *Tomita v. Johnson*, 49 Ida. 643, 290 Pac. 395 (1930) (planting seeds after discovery they

Logically, contributory negligence should not be a defense to an action for a breach of express warranty and is not.¹⁷

(b) *Assumption of Risk*: This would be a defense to an action predicated on negligence. Since assumption of risk is a defense to an action in tort predicated on absolute liability, it would seem that the defense would equally be available where the plaintiff is suing for breach of implied warranty. The two actions are so closely alike they are indistinguishable. Most of the cases cited above and dealing with contributory negligence deal actually with situations in which the plaintiff discovered the defect and the danger and proceeded nevertheless to make use of the product, which is really the defense of assumption of risk. Cases in which the defense of contributory negligence has been denied the defendant are those in which the plaintiff negligently failed to discover the defect in the product or to guard against the possibility of its existence. These fall into line with the general rule that contributory negligence is not a defense to an action based upon absolute liability.

(c) *Not a Sale*: This defense is often overlooked. The implied warranties arising under the Sales Act are available to the plaintiff only when there has been a "sale" within the meaning of the Act. A leading case, *Sidney Stevens Implement Co. v. Hintze*,¹⁸ held that if goods are to be manufactured by the seller, especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the transaction is not a sale within the meaning of the Uniform Sales Act.¹⁹ Accordingly, many cases have held that there is no implied warranty in situations where the alleged seller has merely supplied labor and materials to be incorporated in the product of another, as for example, a building.²⁰

However, another line of cases has held that implied warranties may arise in these situations, independently of the Sales Act. The leading case is *Aced v. Hobbs-Sesack Plumbing Co.*,²¹ where the Supreme Court of California by judicial decision extended the doctrine of implied warranties to the furnishing of installation of a radiant heating system in a

-
- were the wrong kind); *Pauls Valley Milling Co. v. Gabbert*, 182 Okla. 500, 78 P.2d 685 (1938) (same); *Walker v. Hickory Packing Co.*, 220 N.C. 158, 16 S.E.2d 668 (1941) (eating biscuits made of lard smelling like carrion); *Missouri Bag Co. v. Chemical Delinting Co.*, 214 Miss. 13, 58 So.2d 71 (1952) (use of bags known to be defective); *Topeka Mill & Elevator Co. v. Triplett*, 168 Kan. 428, 213 P.2d 964 (1950) (dictum) (use of chicken feed known to be defective); *Finks v. Viking Refrigerators, Inc.*, 235 M. App. 699, 147 S.W.2d 124 (1941) (use of refrigerator meat showcase known to be defective); cf. *Prenhenhall v. Abraham & Strauss*, 279 N.Y. 146, 18 N.E.2d 11 (1938) (use of cleaning fluid in small unventilated bathroom after warning), *Prosser, The Assault Upon the Citadel, supra* note 4.
17. *Bahlman v. Hudson Motor Car Co.*, 290 Mich. 683, 288 N.W. 309 (1939); *Baxter v. Ford Motor Co.*, 168 Ariz. 456, 12 P.2d 409 (1932); *Hansen v. Firestone Tire & Rubber Co.*, 276 F.2d 254 (CCAC 1960).
 18. 92 Utah 264, 67 P.2d 632, 111 ALR 331 (1937).
 19. 1 Williston on Sales, ¶ 55 (a), p. 148 (Rev. Ed. 1948).
 20. *Authorized Supply Co. of Arizona v. Swift & Co.*, 277 F.2d 710 (9th Cir. 1960) (refrigerator installations); *Rino v. Statewide Plumbing & Heating Co.*, 74 Ida. 374, 262 P.2d 1003 (1953) (heating system); *Crystal Recreation v. Seattle Assoc. Etc.*, 34 Wash.2d 553, 209 P.2d 358 (1949) (restaurant fixtures).
 21. 55 C.2d 573, 360 P.2d 897 (1961).

house. I wonder if the adoption of this rule might not be a startling extension of the liability of contractors in states which have abolished the requirement of privity.

(d) *Proximate Cause*: Here is the real battleground of the trial lawyer in a products liability case. Here the defense has its best opportunity to succeed. Here the defense can show that the event of which the plaintiff complains was not caused by the product.

5. *Parties*: If you are representing any person other than the manufacturer, you should check to see whether or not the real wrongdoers are joined in the suit before filing a responsive pleading. Some state practices allow a cross-complaint as a matter of right when the same is filed with the answer and one may not file such cross-complaint after answer without leave of court first had and obtained. Consequently, if you fail to file a cross-complaint against co-defendants at the time of answer, you may find yourself faced with an adverse decision when you seek to file one later on. The plaintiff in such cases will always contend that a cross-complaint should not be filed because it complicates the issues of his lawsuit.

You should also be sure that, if the real wrongdoer is not a party to the action, he is put on notice to you. Serious question should be given to bringing him in as a third party cross-defendant. We have already mentioned above the unfortunate situation which may exist if a defendant defends a products liability case and fails to bring in the real wrongdoer within the two year period of the statute of limitations for breach of implied warranty.

6. *Discovery Procedures*: I refer here only to those specialized discovery procedures which should be employed in products liability cases.

(a) *Interrogatories*: After you have *thoroughly* analyzed the facts and know *exactly* what you want to know, written interrogatories where available under local practice are probably the most useful initial discovery proceeding. They must be well thought out and comprehensively used. They serve to narrow the issues of the case, reveal the existence of documentary evidence, reveal the names and identities of witnesses (fact and scientific) whom you may wish to dispose, and indicate what the adverse party is really going to contend at the trial.

(b) *Expert Witnesses*: Your expert witness whom you wish to use at the trial should be chosen early and carefully. The defendant will usually have some "experts" to suggest, but they will ordinarily be people from his own staff or persons who are so closely connected with the defendant that their bias would be obvious. Ordinarily, a member of the faculty of a local college or university is an ideal expert; but he must be chosen member is a little naive in these matters and very often tend to overlook with caution. It has been my experience that the ordinary faculty

important aspects of the case which should have been considered. Consulting engineers are expensive but ordinarily combine the best practical and theoretical approach to the problem. The essential characteristics of the ideal expert are that he have a thorough knowledge of the problem, that he be truly independent but at the same time "ringwise" so he can anticipate and warn you of the probable contentions of your adversary.

(c) *Use of Demonstrative Evidence:* Since the defense of a products liability case is essentially a matter of teaching, all teaching skills should be employed—and the use of demonstrative evidence as a teaching skill should not be overlooked. (In my opinion it is all too often used by the plaintiff as a means of "show," a method of emphasis; as used by the defendant the purpose of demonstrative evidence should be directed more toward explanation and qualification.) Pictures still and moving, color and black and white, are most important. But pictures are never a substitute for the actual product. If possible, the product should be produced and explained in the courtroom. If the product is too large or bulky, a model should be used. Emphasis should be laid on using a model as simple and inexpensive as possible. For example, in an elevator case, we made one out of an Erector set! In other cases, (e.g., one involving a boiler explosion or the collapse of scaffolding on a complicated construction site) a model may have to be rather complicated. In any event, the trial lawyer should not automatically order a model but should consider carefully *what kind* of a model he wants and what he wants it to show.

Be very careful with experiments! *Never* experiment in the courtroom. It might go wrong! Extreme care should be used in conducting experiments outside the courtroom for they, too, many yield unfavorable results for reasons not connected with the lawsuit; but the results may be elicited on cross-examination to haunt the defendant. Quite often, however, the use of experimental devices is the only way in which the defendant in a products liability case may truly see whether the claim as made by the plaintiff is valid.

(d) *Personal Knowledge of Facts:* The lawyer handling the case *must* be intimately familiar with the product, its uses and the manner in which it is made. Visit the plant! See it made! Handle it! Know the engineers! Only by so doing can he efficiently mold the technical and scientific knowledge of his client into the facts of the case for successful legal defense. Only by so doing can he know enough about the facts to ask intelligent questions.

(e) *Depositions:* I think it is a mistake to take depositions of technical personnel early in the case and before you have exhausted the discovery procedures outlined above. While depositions are strongly recommended for discovery purposes, you must know enough to ask the right questions. In taking the depositions of independent witnesses at

points remote from the place of trial, you should weigh the risk that their answers will be adverse and that their testimony will be used *against you* at the trial.

6. *Conduct of Trial:*

(a) *Proof of Plaintiff's Case:* While the plaintiff is ordinarily going to get to a jury either on the theory of *res ipsa loquitur* (if he is trying a count of negligence) or on implied warranty (if he is trying a warranty count), it should still be remembered that, fundamentally, he has the burden of proof of the following things: (1) that there was a "sale" of the product (in a warranty count), (2) that the plaintiff was a consumer, (3) that the product was defective, (4) that the defect was the "fault" of the defendant—or, in other words, that the defect was present when the product left the defendant's hands, (5) that plaintiff was injured as the proximate result of this defect. There is a controversy as to whether the defendant is entitled to show "due care" in manufacturing when being sued on a warranty count. I think the phrase "due care" is a mistake; it is merely another way of showing that the defect was probably not present when the product left the defendants' premises.²²

(b) Defendant must be prepared to show what really *did* happen. You must have a valid theory and must sell it to the jury. In a products liability case there is usually a lesser danger of over-trying defendant's case than in other personal injury cases.

(c) I do not think it always to be true that the defendant needs a jury in a products liability case. If the issues are simple enough for a jury, then, by all means, have one. But if, on the other hand, there are multiple defendants, cross-actions, and a myriad of issues to be decided, you may find that a jury trial is too ponderous and you may run afoul of the risk that a jury will disregard several important defendants and side with the injured plaintiff against one or more defendants.

(d) In any event, the trial of a products liability case, being technical, should be approached as a teaching matter. If you are trying a jury case, the emphasis will probably be on making the jury understand what *really* happened so far as your client is concerned. Regardless of whether the trial is before a court or jury, it is most important for you to go to court the first day with a well thought out and exhaustive memorandum of law for the court.

22. See *Ray v. J. C. Penney*, 274 F.2d 519 (10th Cir. 1959).