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NOTES

The Manufacturer's Duty To Warn— A Higher Order of Enterprise Responsibility

This is a day of synthetic living, when to an ever-increasing extent our population is dependent upon mass producers for its food and drink, its cures and complexions, its apparel and gadgets. These no longer are natural or simple products but complex ones whose composition and qualities are often secret. Such a dependent society must exact greater care than in more simple days and must require from manufacturers or producers increased integrity and caution as the only protection of its safety and wellbeing.¹

In response to the needs of this dependent society, the courts have drastically expanded the doctrines of manufacturer's liability. There was a time when the concept of privity stood between the injured plaintiff and his compensation unless the harmful product was "imminently dangerous."² Today, the imminent danger test is virtually emasculated,³ and privity is on its way out, even in actions based upon warranty.⁴ Less familiar, perhaps, but no less important, is the extension of the duty of manufacturers to warn of the dangers of their products.

The new height of the standard of labeling is well illustrated by the 1958 decision, *Braun v. Roux Distributing Company*.⁵ Mrs. Braun regularly tinted her hair with defendant's preparation, "Roux Oil Shampoo Tint." She had read the instructions that came with the shampoo, which instructions told her:

Caution — This product contains ingredients which may cause skin irritation on certain individuals and a preliminary test according to accompanying directions should first be made. This product must not be used for dyeing the eyelashes or eyebrows; to do so may cause blindness.⁶

Mrs. Braun made the prescribed "patch test," and having no reaction, she applied the dye according to instructions. She later used the product to retouch her hair. There was no recommendation of a skin test for subsequent applications of the tint. She developed a severe toxic reaction, in the nature of an allergy. The manufacturer had no knowledge that any ingredient of the shampoo could cause

1. *Dalehite v. United States*, 346 U.S. 15, 51 (1953) (dissenting opinion of Jackson, J.).

2. *Huset v. J. I. Case Threshing Mach. Co.*, 120 Fed. 865 (8th Cir. 1903).

3. *Carter v. Yardley & Co.*, 319 Mass. 92, 64 N.E.2d 693 (1946); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

4. *Markovich v. McKesson & Robbins*, 149 N.E.2d 181 (Ohio Ct. App. 1958); *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N.W. 382 (1920).

5. 312 S.W.2d 758 (Mo. 1958).

6. *Id.* at 760.

systemic illness, as opposed to skin allergy; however in the suit against the Roux Company, articles in technical journals were presented which expressed opinion that a chemical ingredient of the product was dangerous. Testimony tended to show that one-twentieth to one-fifth of one percent of the population might be allergic to this substance. Judgment on a verdict for the plaintiff was affirmed on the basis that the warning to the purchaser was inadequate.

Such recent cases as this have caused at least one writer to question whether the theory involved is really negligence, or whether a "new tort" involving absolute liability has not evolved.⁷ It is suggested that the significance of this case lies not so much in doctrinal departure as in its demonstration of a trend: the raising of the standard of care imposed upon manufacturers. The requirement that producers of goods must warn of the hazards foreseeable in their use is not new. Thirteen years before the decision of *MacPherson v. Buick Motor Company*,⁸ it was held that a manufacturer who knows that his product is imminently dangerous if used as intended is liable for failure to warn the remote user that such danger exists.⁹

Generally, the duty to warn has kept pace with other facets of product liability. The old rule that a remote purchaser could not recover from the manufacturer unless the product was "imminently dangerous," has given way in large measure to the more easily satisfied prerequisite that danger be foreseeable;¹⁰ and lack of knowledge of the harmful quality of a preparation will seldom excuse its maker from failing to warn of those dangers of which he should have known.¹¹ The decisions of the past few years have not added new elements to the tort; rather they have insisted that the producer take far greater pains to know the peculiarities of his product, and to advertise such peculiarities prominently and in detail.

In Ohio, while there have been no important cases on the duty to warn,¹² the legislature, in 1959, enacted a series of statutes requiring comprehensive labeling for a wide variety of hazardous substances.¹³ The duty to warn received exhaustive attention in an article by Dillard and Hart in the 1955 issue of the *Virginia Law Review*.¹⁴

7. BELLI, TRIAL AND TORT TREND — 1958 BELLI SEMINAR p. 1xix (1959).

8. 217 N.Y. 382, 111 N.E. 1050 (1916).

9. *Huset v. J. I. Case Threshing Mach. Co.*, 120 Fed. 865 (8th Cir. 1903); Cf. *Genesee County Patrons Fire Relief Ass'n v. L. Sonneborn Bros., Inc.*, 263 N.Y. 463, 189 N.E. 551 (1934).

10. *Orr v. Shell Oil Co.*, 177 S.W.2d 608 (Mo. 1944).

11. Cf. *Farley v. Edward E. Tower Co.*, 271 Mass. 230, 171 N.E. 639 (1930).

12. A few cases hint at recognition of the duty to warn. See *Keyes v. Konald*, 26 Ohio L. Abs. 382 (Ct. App. 1937); see also *Sicard v. Kremer*, 133 Ohio St. 291, 13 N.E.2d 250 (1938).

13. OHIO REV. CODE, ch. 3716 (Supp. 1959).

14. Dillard & Hart, *Product Liability: Directions for Use and the Duty to Warn*, 41 VA. L. REV. 145 (1955).

Rather than to review all of the law on this subject, it is the purpose of this article to illustrate some of the major advances presented by a few recent cases, and also, very briefly, to indicate the possible effects of the new Ohio statutes upon civil liability for failure to warn.

ACTUAL KNOWLEDGE OF THE HAZARD

*Braun v. Roux Distributing Company*¹⁵ points to the demise of an anachronism: actual knowledge by the manufacturer of the harmful characteristics of the product as a precondition to imposing the duty to warn. The early cases stated the duty in terms of warning of dangers of which the manufacturer had knowledge.¹⁶ It is fundamental, of course, that to impose a duty which may be avoided by studied ignorance is to take less than a long step toward public safety. Consequently, it did not take long for the test to become, in most situations, and in most jurisdictions, whether the defendant *should have known* that the goods would cause harm.¹⁷ Even where actual knowledge remained a theoretical necessity, at least one jurisdiction adopted a presumption that the producer knows the nature of his product.¹⁸

All this was not true, however, in the allergy cases. Situations such as that presented in the *Braun* case have typically resulted in much confused thinking. Because of the virtual infinity of possible allergens, and because of the statistical improbability that any given user will be injured by a particular sensitizer, the courts have been reluctant to apply the ordinary doctrines of negligence. The early cases became hopelessly mired in the morass of proximate cause. A Texas court, in *Walstrom Optical Company v. Miller*,¹⁹ announced that an allergy resulting from a dye in an eyeglass frame was the proximate result, not of any failure to warn of the sensitizing tendencies of the dye, but rather of the plaintiff's hypersensitivity. As suggested by one annotator, this is very much like saying that the proximate cause of an automobile accident is not defendant's negligence, but the presence of the plaintiff under his wheels.²⁰

While more recent decisions have considered liability for allergies from the standpoint of foreseeability of the reaction,²¹ as recently as

15. 312 S.W.2d 758 (Mo. 1958).

16. *Heizer v. Kingsland & Douglass Mfg. Co.*, 110 Mo. 605, 19 S.W. 630 (1892); *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64 (1870).

17. *Cf. E. I. Du Pont De Nemours & Co. v. Baridon*, 73 F.2d 26, 29 (8th Cir. 1934).

18. *Thornton v. Carpenter-Morton Co.*, 220 Mass. 593, 108 N.E. 474 (1915); in *Sylvania Elec. Products v. Barker*, 228 F.2d 842 (1st Cir. 1955), *cert. denied*, 350 U.S. 988 (1956), defendant was charged with knowledge that breathing beryllium was dangerous. Sometimes knowledge is imputable from circumstances. *Cf. Clement v. Crosby & Co.*, 148 Mich. 293, 111 N.W. 745 (1907).

19. 59 S.W.2d 895 (Tex. Civ. App. 1933).

20. 49 MICH. L. REV. 253 (1950).

21. See *Bennett v. Pilot Products Co.*, 120 Utah 474, 235 P.2d 525 (1951). *Cleary v. John M. Maris Co.*, 173 Misc. 954, 19 N.Y.S.2d 38 (1940) applied the literal language of the

1949, it has been held that the manufacturer is not liable without actual awareness of the propensity of the product for causing the allergic reaction.²² In this regard, then, the *Braun* case becomes highly significant. In *Braun*, the notion that knowledge is necessary was expressly rejected. The court said:

[I]n manufacturing and distributing hair dye, the appellant is held to the skill of an expert in that particular business, . . . and is bound to keep reasonably abreast of scientific knowledge and discoveries concerning his field and, of course, is deemed to possess whatever knowledge is thereby imparted.²³

Since the "scientific knowledge" introduced in this case consisted of twenty-three obscure articles in medical periodicals, the fair inference is not merely that ignorance is no longer an excuse, but also, that whether the defendant should have known may be determined by looking to the information possessed by the most advanced technician whose research is available.

While undeniably striking, this decision is consonant with the needs of modern society. The manufacturer will usually have *expertise* at his fingertips. The consumer, on the other hand, is ordinarily helpless. Injury can be minimized only by imposing a duty upon the producer to learn what he may through careful study and arduous testing before putting a product upon the market. Assuming that the tests of foreseeability can be met, lack of knowledge ought not to excuse the manufacturer who could have known.

FORESEEABILITY

Foreseeability, in the context of the duty to warn, has many aspects. Is the harmful quality of the product foreseeable? Is such use of the product as will elicit its dangerous nature foreseeable? If instructions for use are given, is it to be anticipated that someone may not follow them and thereby suffer injury? If the product is safe for most persons, must the manufacturer take cognizance of the idiosyncracies of the remaining few? Where foreseeability is clear, liability follows with ease. It is not hard to fix blame upon the maker of a threshing machine which has over its blades a catwalk of such thin metal that a man of normal weight collapses it;²⁴ nor is it difficult to find negligent the manufacturer of a party dress that bursts into flame upon the slightest touch of a cigarette;²⁵ or the manufacturer

MacPherson case and held that there must be knowledge that danger is probable. Did probability of danger ever mean that over 50% of the users must suffer?

22. *Briggs v. National Industries*, 92 Cal. App. 2d 542, 207 P.2d 110 (1949); see *Gerkin v. Brown & Sehler Co.*, 177 Mich. 45, 143 N.W. 48 (1913) which allowed recovery where manufacturer had actual knowledge of a high percentage of sensitivity.

23. *Braun v. Roux Distributing Co.*, 312 S.W.2d 758 (Mo. 1958). For contrary arguments see *Bonowski v. Revlon, Inc.*, 100 N.W.2d 5 (Iowa, 1959).

24. *Huset v. J. I. Case Threshing Mach. Co.*, 120 Fed. 865 (8th Cir. 1903).

25. *Noone v. Fred Perlberg, Inc.*, 268 App. Div. 149, 49 N.Y.S.2d 460 (1944).

of a grinding wheel that flies apart when turned at ordinary speed,²⁶ when such manufacturers do not give notice of the infirmities of their wares. Cases permitting recovery where the inherent danger appeared in the course of typical and expected use of the product are legion,²⁷ and need little comment.

In most actions predicated upon failure to warn, the item was used as intended by the producer. Where the product is harmful only if used in an unintended manner, the question becomes whether the hazardous use was foreseeable. For example, the maker of a baling machine intended that hay should be fed into it by throwing from a distance, but failed to warn of the consequence of getting too close. A worker who fed the machine by pressing the hay into it by hand was permitted to recover when his hand was caught in its rolls.²⁸ In a more extreme case, a manufacturer sold two products for the same purpose: the heat-treating of steel. Each of the mixtures alone was safe, but together they were highly explosive. In *Tingey v. E. F. Houghton & Company*,²⁹ a workman who was injured upon mixing the two products collected damages because of the inadequate warning.

On several occasions the manufacturer has claimed that the duty to warn is satisfied by the giving of instructions, and that if the plaintiff does not follow the instructions, his recovery is barred. While this contention was accepted in *E. I. Du Pont De Nemours & Company v. Baridon*,³⁰ the trend has been to the contrary. As was well-explained in the leading work on this subject, by Dillard and Hart, instructions for use typically relate to efficiency, rather than to the avoidance of harm.³¹ Were an explosion to follow the grossest error in combining the ingredients of a cake mix, there is little doubt that the defense that instructions were given would not succeed. It should not be surprising, therefore, that a manufacturer has been held liable where he instructed the user as to the correct method of operating an old-fashioned automobile starting-crank, but failed to warn of the possibility of kick-back.³² The most famous case on the relation between instructions and warning is *McClanahan v. California Spray-Chemical Corporation*.³³ In this case a manufacturer produced a new variety of chemical spray which the plaintiff applied to his apple

26. *Tomao v. A. P. De Sanno & Son, Inc.*, 209 F.2d 544 (1954).

27. See for example: *Beadles v. Servel, Inc.*, 344 Ill. App. 133, 100 N.E.2d 405 (1951), in which a refrigerator gave off carbon monoxide. See also, *Altorfer Bros. Co. v. Green*, 236 Ala. 427, 183 So. 415 (1938); Annot. 86 A.L.R. 947 (1933).

28. *Wichman v. Allis-Chalmers Mfg. Co.*, 117 F. Supp. 857 (W.D. Mo. 1954).

29. 30 Cal. 2d 97, 179 P.2d 807 (1947).

30. 73 F.2d 26 (8th Cir. 1934).

31. Dillard & Hart, *Product Liability: Directions for Use and the Duty to Warn*, 41 VA. L. REV. 145 (1955).

32. *Martin v. Maxwell-Brisco Motor Vehicle Co.*, 158 Mo. App. 188, 138 S.W. 65 (1911).

33. 194 Va. 842, 75 S.E.2d 712 (1953).

orchard. The spray came with instructions as to the proper time of year for its application. The label further cautioned the user: "Do not use this product" later than the time limited in the instructions. Neither the label nor the accompanying pamphlet warned of the danger to the trees from noncompliance with the instructions. Plaintiff used the spray in accordance with the schedule he had learned for use with sprays previously sold in the area. His orchard was ruined. The appellate court overturned a decision that plaintiff's misapplication of the product barred his recovery. Danger from foreseeable misuse was held to be within the scope of the duty to warn.

There was no question in *McClanahan*, nor is there in most cases, but that the manufacturer well knew the potential of his product for harm. The issue of foreseeability related not to the product's harmfulness, but rather to the likelihood that it would be used in such a way as to bring forth this destructive characteristic. The added burden placed upon the manufacturer in the *McClanahan* case does not call for more careful production, better analysis, nor more testing. The duty can be satisfied simply by affixing a better label to the package. Where the obligation is so easily discharged, it should cause no alarm that the standard is high.

With this background, it is possible to appreciate the significance of the recent decisions which have extended the duty to label beyond hitherto accepted limits of foreseeability. In *Martin v. Bengue*,³⁴ the plaintiff had suffered from a heavy cold. He applied defendant's balm, known as "Ben-Gay," to his chest, and over his ailing thorax he replaced his pajama top. The "Ben-Gay" vapors that had accumulated between his chest and the pajama top burst into a flash fire while he tried to light a cigarette. There was no warning of combustibility on the label, but, at trial it was demonstrated that "Ben-Gay" will not ignite at ordinary temperatures. The fire in this case was made possible only because the air-space between the pajamas and their wearer was constricted, permitting a build-up of temperature. The trial court found that the fire was unforeseeable as a matter of law. The Supreme Court of New Jersey reversed that decision, holding that the evidence permitted a finding that defendant should have known that users of the preparation would smoke, and would wear clothing.

Foreseeability assumes a different meaning in the allergy cases. Of course there is no duty to warn of the possibility of an allergic reaction if there is no reason to anticipate such a reaction, but assuming that the manufacturer knew or should have known of the presence of an allergen in his product, must he act upon the foreseeability of harm to only a few of its potential users? As recently as 1951, a court said "no." In *Bennett v. Pilot Products Company*,³⁵ there was

34. 25 N.J. 359, 136 A.2d 626 (1957).

35. 120 Utah 474, 235 P.2d 525 (1951).

evidence that one-tenth of one per cent of the potential users would be allergic to the product. The court held that a reaction was unforeseeable as a matter of law. Six years later, a court permitted recovery where the manufacturer of the deodorant, "Arrid," had received 373 complaints of dermatitis during a period in which over 82 million jars were sold.³⁶ The opinion reasoned that while the manufacturer, under these circumstances, could not be required to alter the formula, it could be compelled to warn "those few persons who it knows cannot apply the product without serious injury."³⁷ Among the factors considered by the court was the ease of giving notice. In the light of this factor, improbability of injury loses its appeal as an argument in favor of the defendant.

THE ADEQUACY OF WARNING

The duty to warn is not discharged by a warning which is insufficient to apprise a reasonably prudent man of the danger to be apprehended. Mere listing of the ingredient naphtha on the label of a solvent is not adequate warning that the solvent is highly explosive,³⁸ and despite folk wisdom to the effect that where there is smoke there is fire, an admonition that the user should keep a smoke-making device away from the face does not suffice to warn him of the danger of flame.³⁹ The trend toward a higher standard of care finds manifestation in increasingly stringent requirements of specific warning.⁴⁰ In *Tampa Drug Company v. Wait*,⁴¹ a Florida case decided in 1958, the following caveat appeared on the label of a bottle of carbon tetrachloride cleaning fluid:

Volatile Solvent — Vapor Harmful
Use with adequate ventilation —
Avoid prolonged or repeated contact
with skin.

A judgment for plaintiff, who had read the label but was poisoned while using the liquid, was affirmed. The court held that the substance was so toxic that a jury could find such warning inadequate. In connection with the previously discussed relation between warning and instructions, it may be seen that while this label displayed many words, the only words evincing warning were "Vapor Harmful." All else amounted merely to negative instruction. Would not the words "highly dangerous poison" have better served to bring

36. *Wright v. Carter Products, Inc.*, 244 F.2d 53 (2d Cir. 1957).

37. *Id.* at 58-59.

38. *Standard Oil Co. v. Lyons*, 130 F.2d 965 (8th Cir. 1942).

39. *Larramendy v. Myres*, 126 Cal. App. 2d 636, 272 P.2d 824 (1954).

40. A pioneer case is *Maize v. Atlantic Refining Co.*, 352 Pa. 51, 41 A.2d 850 (1945). "Caution . . . Do not inhale fumes" was held insufficient to warn of the dangers of carbon tetrachloride where the prominently displayed name of the product was "Safety-Kleen."

41. 103 So. 2d 603 (Fla. 1958).

home the need for all this caution? In view of the severity of the potential harm, such a decision is hardly unreasonable.

In *Haberly v. Reardon*,⁴² the offensive product was a cement base paint. The directions said:

Caution: Inasmuch as the alkalinity of Bondex may be irritating to tender or sensitive skin, it is advisable to use a paddle for mixing.

The young plaintiff lost the use of one eye when his father accidentally brushed it with the paint. It was held that a jury could find that the warning could be construed as "an assurance that the *only* danger in the use of Bondex was that it might have a slightly irritating effect upon a tender skin after prolonged contact."⁴³

This label, like the carbon tetrachloride label in the previous case, did not suffer from brevity; it was rather long. Like the carbon tetrachloride label, however, it was at least euphemistic. The words "highly caustic" would have taken less space and conveyed much more. While the explanation for such politely veiled warnings, in some few cases, may be lack of foresight by the manufacturer, the conclusion is impelling that these labels reflect nothing more than fear of alarming the market. If the everyday truths that cement burns holes in things, and that carbon tetrachloride is a killer, were revealed, sales might decline. Irrespective of the validity of this fear, to permit the sale of goods to continue at the price of injuries that could easily have been prevented is practically to condone fraud.

From these recent holdings, the principle emerges that it is not enough to warn of the ordinary consequences of use; the consumer must be apprised of the worst that can be foreseen. Here too, the harshness of the duty is strongly mitigated by the ease of its discharge. All that is demanded is the use of language and imagination.

RESTRICTED DEFENSES

Among the benefits to be obtained by the injured plaintiff who grounds his action upon failure to warn is the severe limitation upon the defenses available to the manufacturer. Speaking of contributory negligence and assumption of risk, Dillard and Hart say:

Though these time-honored defenses are frequently invoked to defeat recovery, they are theoretically inapplicable when the defendant's breach of duty is based on a failure to warn. To allow these defenses is to indulge in circular reasoning, since usually the plaintiff cannot be said to have assumed a risk of which he was ignorant or to have contributed to his own injury when he had no way of reasonably ascertaining that the danger of injury existed.⁴⁴

42. 319 S.W.2d 859 (Mo. 1958).

43. *Id.* at 867.

44. Dillard & Hart, *Product Liability: Directions for Use and the Duty to Warn*, 41 VA. L. REV. 145, 163 (1955).

These writers suggest that if the danger should have been perceived, failure to warn was not the proximate cause of the injury. This would appear to be equally true whether the danger was apparent from the contents of the label or from the nature of the product. This analysis has been approved in at least one decision.⁴⁵

Where the danger is apparent, there is ordinarily no duty to warn.⁴⁶ Whether the plaintiff should know of the danger, of course, must be determined in connection with the experience of the class of persons likely to use the product.⁴⁷ A cement product may be dangerous when distributed to household consumers who may not be aware of the caustic qualities of lime,⁴⁸ while a similar preparation, distributed to the building trades, needs no accompanying warning.⁴⁹

This rule that patent dangers need not be advertised by the producer seems to arise from the very nature of the duty to warn, and has almost never been questioned. Nevertheless, there may be circumstances in which a warning is indicated to remind the user of familiar hazards which may not be at the forefront of his attention. In at least one decision, the trier of fact was permitted to find that a reasonable manufacturer would have anticipated the forgetfulness of the person expected to use the product.⁵⁰ Infection had been introduced into the plaintiff's body via the hypodermic injection of an impure milk preparation produced by the defendant. The doctor who administered the injection saw the coagulated condition of the substance and later testified that he knew that it was unsafe in that condition, but that the hazard slipped his mind at the time. In affirming judgment for plaintiff, the federal court of appeals said:

Sometimes it is well to have our attention called to the things we know best, and that is well illustrated by this doctor's testimony. With knowledge that coagulated Lactigen should not be administered, he did not observe the contents of the ampule, with that in mind.⁵¹

An often tempting argument for the defense is the speculation that no warning, however complete, would have averted the accident.

45. *Wright v. Carter Products, Inc.*, 244 F.2d 53 (2d Cir. 1957).

46. Where the manufacturer has adequately warned of the hazard, the *duty to warn* is satisfied. Suppose the manufacturer of a dangerous ingredient notifies his purchaser of the hazard, but continues to sell the product to him despite strong reason to believe that the purchaser is selling to the public without warning. In *Nishida v. E. I. Du Pont De Nemours & Co.*, 245 F.2d 768 (5th Cir. 1957), the court held that the manufacturer had a *right* to believe that the warning would be heeded.

47. The problem has often arisen with regard to sales of medical supplies and equipment to physicians. The usual holding is that the physician should know the nature of any purchase, and need not be warned. See *Parker v. State*, 201 Misc. 759, 105 N.Y.S.2d 735 (1951), *aff'd*, 208 App. Div. 157, 112 N.Y.S.2d 695 (1952), *appeal denied*, 280 App. Div. 562, 115 N.Y.S.2d 311 (1952).

48. *Haberly v. Reardon Co.*, 319 S.W.2d 859 (Mo. 1958).

49. *Katz v. Arundel-Brooks Concrete Corp.*, 220 Md. 200, 151 A.2d 731 (1959).

50. *Abbott Laboratories v. Lapp*, 78 F.2d 170, (7th Cir. 1935).

51. *Id.* at 176.

This approach has been unsuccessful. Returning to the case of the boy who was blinded by the brush loaded with caustic paint,⁵² the defendant argued that a man should know not to get things in his eyes, so that a warning to that effect would be superfluous; the freak accident might well have happened even though the brush-wielder had known of the precise danger. Rejecting this argument, the court properly observed that a specific warning of tragic consequences might alert a man to act far differently than would his ordinary desire to keep his eyes clear of foreign substances.⁵³

Since a warning, to be effective at all, demands response from the person warned, the defendant can not argue that proximate cause is absent because the warning, if given, might not have been heeded. Such an argument, if allowed, would defeat every case. The contrary assumption, that warning would have averted the accident, is implicit in each decision for plaintiff, and renders each such recovery at least slightly conjectural.

A particularly interesting set of facts is presented by the case of the garage mechanic who was injured because of the faulty brakes of a car which was being repaired by a co-worker. In a suit against the manufacturer for failure to disclose the defect to the purchaser, the reviewing court refused to find that the failure to warn was not the proximate cause of the accident.⁵⁴ Recovery was allowed on the theory that had the purchaser been aware of the defective brakes he would have fixed them before they failed. While the facts of this case are extreme, the principle appears correct. If the manufacturer has not done all he should to publicize the danger of using his product, the victim of this laxity should be able to resolve in his own favor all speculations as to what would have happened had warning been given.

THE DUTY TO WARN AND THE DEFECTIVE PRODUCT

In the typical situation in which the manufacturer's breach of duty consists of failure to warn, there is no negligence in fabricating or marketing the item. If a proper label is placed upon the bottle, the common law does not prevent the making and selling of the most dangerous poison or the most violent explosive. Absent warning, the same act becomes negligent. On the other side of the coin, where the product is negligently designed or manufactured, and consequently defective, failure to warn is not often the essence of the victim's complaint. Nevertheless, some of the most promising applications of the failure to warn theory have been in instances where the product

52. *Haberly v. Reardon Co.*, 319 S.W.2d 859 (Mo. 1958).

53. *Id.* at 867.

54. *Comstock v. General Motors Corp.*, 358 Mich. 163, 99 N.W.2d 627 (1959).

was defective and action might have been grounded upon negligent manufacture.

For example, in one case the defendant had put out a caustic soda mixture for use as a drain cleaner. The batch which plaintiff purchased contained more of one ingredient than defendant's formula prescribed, and the contents of the drain pipe blew up in plaintiff's face.⁵⁵ The plaintiff did not prove that the manufacturer failed to use ordinary care in mixing or testing the product; recovery was grounded instead upon the failure to warn of the product's dangerous nature. In another instance, the plaintiff was able to avoid all sorts of complex scientific questions as to the defendant's negligence in designing a carbon dioxide fire extinguisher for use on commercial aircraft by showing that the defendant had evidence that the product was toxic, and concealed this fact from the purchaser.⁵⁶

Comstock v. General Motors Corporation,⁵⁷ the case previously referred to, involving the garage mechanic who was injured by defective brakes, presents the most far-reaching application of the duty to warn in the defective product situation. In this setting, a more detailed description of the facts becomes necessary. In 1953, General Motors had difficulties with the newly developed power brakes installed in its Buick line. The design of the brakes was such that they tended to fail suddenly and without warning. Learning of this deficiency, General Motors issued repair kits to all Buick dealers and instructed them to repair the brakes on cars brought in for service regardless of whether such repair was requested. No warning was given to purchasers, nor was warning attempted. Leon Friend bought a Buick equipped with these brakes and drove it for 6,000 miles. His brakes failed one day, but he drove carefully, and, avoiding any accident, arrived at the garage where plaintiff-to-be was employed. Friend told another employee that he had no brakes, and left the scene. A few minutes later that same mechanic, forgetting that the car could not be stopped, went to move it, and drove it into plaintiff. Suit was brought against General Motors for negligently failing to warn the purchaser. Despite the fact that the Buick had been sold before the defect was discovered by the manufacturer, and despite the obvious intervening negligence of the fellow employee, the Supreme Court of Michigan reversed a directed verdict for defendant, holding that the manufacturer had a duty to warn.

The proximate cause aspect of this decision has already been men-

55. *Kieffer v. Blue Seal Chemical Co.*, 196 F.2d 614 (3d Cir. 1952).

56. *De Vito v. United Air Lines, Inc.*, 98 F. Supp. 88 (E.D.N.Y. 1951). This aspect of the case was discussed in Dillard & Hart, *Product Liability: Directions for Use and the Duty to Warn*, 41 VA. L. REV. 145, 154 (1955). The defendant had in its possession a report on the toxic effect of carbon dioxide, disclosure of which might have averted an air disaster. The essence of the breach of duty, however, was not failure to warn, but the inadequacy of the device for its intended purpose.

57. 358 Mich. 163, 99 N.W.2d 627 (1959).

tioned. More drastic still is its extension of the duty to warn to the area of shortcomings discovered after the manufacturer's handiwork has left his control. Logically, there is no reason not to impose such a duty. Practically, the ramifications are enormous. The manufacturer probably could not have escaped liability, under the rule of this case, by any action short of locating all the purchasers and notifying each of them. On the other hand, the only alternative is to permit the manufacturer to sit on his hands with full knowledge that his creation is rushing about the countryside committing mayhem. This would be totally unacceptable.

The law has not dealt with this question of business ethics as often as it probably has arisen. The lack of cases on the point is probably due to the practice of basing such suits upon negligent design or production. Nevertheless, the advantages of easier proof and restricted defense make the use of the "duty to warn" theory worthy of consideration. The duty to warn of subsequently developed defects does not depend in any way upon the presence or absence of negligence in making or testing the product. Plaintiff, in the *Comstock* case, did not prove that a reasonable manufacturer would not have made a car with such brakes; nor did he prove that the defendant should have discovered the defect by testing. All he proved was that sometime after the car had left the defendant's hands, defendant learned of its lethal potential and did nothing about it.

Obviously, the problem of proving subsequent discovery of the defect will often be insurmountable. Does the manufacturer have a continuing duty to learn of developing infirmities, or does the duty end with sale of the product? The possibility of proof that the defendant *later should have discovered* a defect which developed after the product left his control presents a totally unexplored territory. The recent trend in the allergy cases indicates that lack of knowledge is not a defense where the defendant might have acquired knowledge. Upon similar reasoning, the future may see the imposition upon manufacturers of a continuing duty to acquaint themselves with the performance of their goods on the street and in the beauty parlor, as well as in the laboratory and on the designing board. The groundwork has been laid.

THE OHIO STATUTE

Any analysis, even in general terms, of the various state and federal food, drug and cosmetic acts, or similar statutes imposing duties to warn with regard to specific kinds of products, is beyond the scope of this note. Nevertheless, it would be grossly misleading to leave the impression that control of labeling has been left solely to the courts. Suffice it to say that such statutes as the Federal Food, Drug and Cosmetic Act,⁵⁸ the Federal Insecticide, Fungicide and Rodenti-

58. 52 Stat. 1040 (1938), as amended, 21 U.S.C. §§ 301-92 (1958).

cide Act,⁵⁹ and their counterparts in state law, have established standards for warning-labels on products within their scope, and that the adequacy of those standards varies greatly. Since such statutes provide minimum requirements, compliance will not necessarily absolve the producer of liability.⁶⁰ Ohio, in 1957, amended its food and drug act to include warning requirements.⁶¹

In 1959, a new chapter of the Revised Code was enacted, which has no comparable antecedent in either Ohio or federal law.⁶² Entitled "Labeling of Hazardous Substances," this act touches upon a number of the areas that were found to be troublesome to the common law. The act makes it unlawful to sell, or deliver for sale, any "misbranded package of a hazardous substance,"⁶³ and defines "hazardous substance" as

. . . any substance or mixture of substances which is toxic, corrosive, an irritant, strong sensitizer, flammable, or which generates pressure through decomposition, heat, or other means, if such substance or mixture of substances may cause substantial personal injury or illness during any customary or reasonably anticipated handling or use.⁶⁴

"Misbranded package" is defined as "any package of a hazardous substance intended or suitable for household use," which, *inter alia*, fails to state the name of the substance, or of each component, which contributes to the hazard.⁶⁵ The word "DANGER" must appear on substances which are extremely flammable or corrosive,⁶⁶ or which produce death in a certain proportion of a group of laboratory animals within a specified time.⁶⁷ The signal "CAUTION," or "WARNING" must appear on all other hazardous substances.⁶⁸ In addition, the label must display a description of the principal hazard;⁶⁹ precautionary measures;⁷⁰ instructions for first-aid when necessary;⁷¹ the word "poison" on highly toxic substances;⁷² instructions

59. 61 Stat. 163-72 (1947), 7 U.S.C. §§ 135-35k (1958), as amended, 73 Stat. 286 (1959), 7 U.S.C.A. § 135 (Supp. 1959).

60. Cf. *Braun v. Roux Distributing Co.*, 312 S.W. 2d 758 (Mo. 1958).

61. See, for example, OHIO REV. CODE § 3715.64 (Supp. 1959).

62. OHIO REV. CODE ch. 3716 (Supp. 1959).

63. OHIO REV. CODE § 3716.02 (Supp. 1959).

64. OHIO REV. CODE § 3716.01(D) (Supp. 1959). The most obvious advance exhibited by this section is the inclusion of allergens within its provisions. Section 3716.01(I) defines "strong sensitizer" as "any substance which will cause on normal living tissue, through an allergic or photodynamic process, a hypersensitivity which becomes evident on reapplication of the same substance and which is designated as such by the director [of health]. . . ."

65. OHIO REV. CODE § 3716.01(N) (1) (b) (Supp. 1959).

66. OHIO REV. CODE § 3716.01(N) (1) (c) (Supp. 1959).

67. Section 3716.01(N) (1) (c) (iv) gives the director of health discretion in requiring labeling of substances which do not affect humans and animals alike.

68. OHIO REV. CODE § 3716.01(N) (1) (d) (Supp. 1959).

69. OHIO REV. CODE § 3716.01(N) (1) (e) (Supp. 1959).

70. OHIO REV. CODE § 3716.01(N) (1) (f) (Supp. 1959).

71. OHIO REV. CODE § 3716.01(N) (1) (g) (Supp. 1959).

72. OHIO REV. CODE § 3716.01(N) (1) (h) (Supp. 1959).

for handling and storage, where necessary;⁷³ and the statement, "Keep out of the reach of children," or some equivalent warning.⁷⁴ Excluded from the scope of this act are products regulated by the major federal statutes and the Ohio Food, Drug and Cosmetic Act.⁷⁵

A unique feature of this enactment is that instead of dealing with only a few products, it regulates labeling of most of the usual kinds of dangerous household goods. Of course, the exemption of foods, drugs, cosmetics, and all products within the federal laws curtails its effectiveness, and goods for non-household use are beyond its purview.⁷⁶ Nevertheless, its impact upon tort law should be considerable. Suits arising under this chapter have not yet been reported, but a few predictions may be made with some confidence.

Consistent with the construction of the former Ohio pure food law, violation of the provisions of the "Hazardous Substances" law will be negligence per se.⁷⁷ Although foreseeability of the use of the product is required by the words, "during any customary or reasonably anticipated handling or use,"⁷⁸ it would appear that it is unnecessary to show foreseeability of the hazardous quality of the substance. Upon proof that the product was in fact hazardous within the terms of the statute, when used in a reasonably anticipated manner, plaintiff's burden of proving negligence should be complete. While less than a panacea, this statute goes far in the direction of consumer protection and industrial responsibility.

CONCLUSION

Some of the decisions annotated herein may appear to stretch almost to the breaking point the traditional concepts of negligence, and the new Ohio act promises liability to the manufacturer who for any reason is ignorant of the hazards presented by his product. Are these results desirable? The duty to warn will often require the producer to learn more about his product, in order to know of what he must warn. This of itself is certainly to be desired. Very often, however, he knows quite well wherein the hazard lies. Only the esthetic sanctity of the package, lack of imagination, and fear of frightening buyers, prevent the producer from sharing this information with the public. None of these is an adequate reason for denying compensation to the injured victim of failure to warn.

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73. OHIO REV. CODE § 3716.01(N)(1)(i) (Supp. 1959).

74. OHIO REV. CODE § 3716.01(N)(1)(j) (Supp. 1959).

75. OHIO REV. CODE § 3716.01(N)(2) (Supp. 1959).

76. OHIO REV. CODE § 3716.01(N).

77. See *Rubbo v. Hughes Provision Co.*, 138 Ohio St. 178, 34 N.E.2d 202 (1941). It has been held an offense to sell adulterated food even if the vendor is ignorant of the adulterated condition of the food. See *State v. Kelly*, 54 Ohio St. 166, 43 N.E. 163 (1896).

78. OHIO REV. CODE § 3716.01(D) (Supp. 1959).