

# Sales - Products Liability - Lagel Warning Requirements

Donald Bertucci

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stances are dangerous to life and limb.<sup>46</sup> In the long line of serum hepatitis cases, courts have excepted their holdings to this trend by making legislative policy decisions to protect blood distributors from liability. It appears, in this area, that courts have usurped legislative prerogative by concluding that blood distributors should not be protected against liability by insurance as other manufacturers and distributors are. These policy considerations seem to have influenced courts' decisions in this area. If courts continue to abide by policy-steeped serum hepatitis precedents, it is doubtful whether the arguments advanced in this note, though plausible, will find acceptance. For plaintiff-patient virtually all roads of recovery have been closed by prior decisions. However, as herein demonstrated, the sales warranty of recovery cannot be ignored as a recovery theory in a factual situation such as appears in the *Balkowitsch* case.

*Irwin Rosen*

<sup>46</sup> Products to which strict liability has been applied have been soap (*Kruper v. Proctor & Gamble Co.*, 113 N.E.2d 605, Ohio App., 1953); detergent (*Worley v. Proctor & Gamble Co.*, 241 Mo. App. 1114, 253 S.W.2d 532, 1952); grinding wheels; (*Jakubowski v. Minnesota Mining and Manufacturing Co.*, 80 N.J. Super. 184, 1963); airplane parts (*Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 1963).

### SALES—PRODUCTS LIABILITY—LABEL WARNING REQUIREMENTS

The Hubbard-Hall Chemical Company manufactured and sold an insecticide to a small farmer. The decedents who worked for the farmer had used the product on several occasions, but for some unforeseen reason had died from the insecticide after spending an entire day spraying. When the product was originally developed, registration was approved by the U.S. Department of Agriculture. A label on the container of the product warned the user that the insecticide contained a poisonous dust which might be fatal if smelled, inhaled or absorbed through the skin, and gave directions in regard to using the product, to wearing the proper clothing, and to treating anyone who might come in contact with the dust.<sup>1</sup> Even

<sup>1</sup> *Hubbard-Hall Chemical Co. v. Silverman*, 340 F.2d 402, 403 (1965): "Warning: May Be Fatal If Swallowed, Inhaled or Absorbed Through Skin. Do not get in eyes or on skin. Wear natural rubber gloves, protective clothing and goggles. In case of contact wash immediately with soap and water. Wear a mask or respirator of a type passed by the U.S. Dept. of Agriculture for parathion protection. Keep all unprotected persons out of operating areas or vicinity where there may be danger of drift. Vacated areas should not be re-entered until drifting insecticide and volatile residues have dissipated. Do not contaminate feed and foodstuffs. Wash hands, arms and face thoroughly with soap and water before eating or smoking. Wash all contaminated clothing with soap and hot water before re-use."

though one of the decedents did not speak English, their employer had warned them of the dangers in using the product, and provided them with protective suits, including rubber raincoats and masks. The plaintiffs, who were the heirs of the decedents, brought action against the chemical company, claiming that the defendant was negligent in failing properly to label its product so as to warn anyone of its inherent danger. In the U.S. District Court, the jury returned a verdict in favor of the plaintiffs upon which judgment was entered. The U.S. Court of Appeals affirmed the lower court judgment on the grounds that the defendant should have foreseen that the product would be used by farm laborers of limited education and background, and thereby an adequate warning should have consisted of some known symbol, such as a skull and bones. *Hubbard-Hall Chemical Co. v. Silverman*, 340 F.2d 402 (1st Cir. 1965).

This case represents the first instance when both wording and a symbol were required to give adequate warning of a dangerous product. The question thus presented by this decision is whether the defendant ought to foresee the education and background of the users and whether the manufacturer must direct its warning accordingly. Opposite this viewpoint stand numerous cases holding that a manufacturer need only foresee normal mentally alert people as the users of its product; that is, use by a reasonably prudent man.<sup>2</sup> Inherent in the issue set forth by the court is the question of whether defendant's label was satisfactory to meet the standards required by law. If it was adequate defendant should be exonerated from all liability for failure to give an adequate warning (the fact upon which this Court predicated liability). Also to be considered is the violation of the Federal Insecticide, Fungicide, and Rodenticide Act,<sup>3</sup> and whether this violation was a proximate cause of injury to decedents.

Thirteen years before the decision in *MacPherson v. Buick*,<sup>4</sup> it was held that a manufacturer who knows that his product is dangerous when used as intended is liable for failure to warn the user that such danger exists.<sup>5</sup> However, it should be stated that the law does not impose upon a manufacturer any duty to warn of common dangers which are obvious to a user, or of dangers he may be reasonably expected to know. A duty to

<sup>2</sup> *Accord*, *E. I. DuPont de Nemours & Co. v. Baridon*, 73 F.2d 26 (8th Cir. 1934); *Walton v. Sherwin-Williams Co.*, 191 F.2d 277 (8th Cir. 1951); *Tampa Drug Co. v. Wait*, 103 So.2d 603 (Fla., 1958); *Hunter v. E. I. DuPont de Nemours & Co.*, 170 F.Supp. 352 (D.C. Mo. 1958); *Harmon v. National Heater Co.*, 240 Minn. 264, 60 N.W.2d 804 (1953); *Crouse v. Wilbur-Ellis Co.*, 77 Ariz. 359, 272 P.2d 352 (1954); *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79 (4th Cir. 1962); *Tomao v. DeSanno & Sons*, 209 F.2d 544 (3rd Cir. 1954); *Marker v. Universal Oil Products*, 250 F.2d 603 (10th Cir. 1957).

<sup>3</sup> Federal Insecticide, Fungicide, and Rodenticide Act, §§ 1-13, as amended 7 U.S.C.A. 135-135k. (1964).

<sup>4</sup> 217 N.Y. 382, 111 N.E. 1050 (1916).

<sup>5</sup> *Huset v. J. I. Case Threshing Machine Co.*, 120 Fed. 865 (8th Cir. 1903).

warn only arises when a product is composed of latent qualities that are likely to cause harm if the consumer is not apprised of the proper methods to use, and if he is not warned of the dangers involved in usage. The *Restatement of Torts* imposes a duty on a supplier to warn a customer when "he knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is intended."<sup>6</sup> However, the *Restatement* also states that a supplier who exercises reasonable care to inform users of this dangerous condition or of the facts which make the product likely to be dangerous should be relieved from an injury so caused. The Minnesota court, when confronted with a similar case applied the *Restatement* rule, and then went on to define reasonable care as "that degree of care that a reasonably prudent person would exercise under the same or similar circumstances. It must be commensurate with the risks of the situation as they were, or should have been, reasonably anticipated by the actor. If no risk could have been reasonably anticipated, there can be no negligence predicated upon such act."<sup>7</sup> So it can be seen that many of the cases relative to this area of law quote the manufacturer as having a duty to adequately warn of foreseeable and latent dangers upon proper and intended use of his product by the user.<sup>8</sup>

Once a manufacturer of a dangerous product has a duty to warn of its latent potentialities and harm, it must be determined to what degree the manufacturer must be forced to go in executing such a warning so that he may exonerate himself from liability. In other words, the manufacturer must know, for his own protection, the requirements of law, not only as stated abstractly by traditional tort law and restatements of law, but the law established by courts when dealing with such questions. In order to determine the standards so established by courts of law, it will be necessary to review decisions in the area and determine if the principal case actually adopts new standards for adequate warnings.

Of immediate importance in determining the requisites for an adequate warning, distinction must be made between those labels on products which furnish directions or instruction for use and those which provide warn-

<sup>6</sup> RESTATEMENT (SECOND), TORTS, § 388 at 309 (1964). Section 388 reads as follows: "One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use of which it is supplied, and, (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous."

<sup>7</sup> *Harmon v. National Heater Co.*, 240 Minn. 264, 60 N.W.2d 804, 810 (1953).

<sup>8</sup> 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY, §§ 8:01-8:05 (1960).

ings of the hazards involved. It has been said that directions and warnings serve different purposes, in that warnings have to do with avoiding dangers while directions have to do with promoting efficiency in the use of the product. The distinction being thus made, it follows the requirements of the warning may not be discharged by giving directions.<sup>9</sup> In connection with the above point, it should be mentioned that warnings need only embrace those dangers attendant upon directions being followed, and not danger associated with misuse of a product. If the law was otherwise the result would be that a manufacturer would be required to issue negative warnings to "use as directed and not otherwise or damage may ensue."<sup>10</sup> The fact that directions for use will not insulate defendant's duty to warn is best illustrated by *McClanahan v. California Spray Chemical Corporation*<sup>11</sup> in which defendant manufacturer distributed a product called Tag Fungicide #331, and plaintiff used the product on his apple orchard, resulting in the destruction of his crops. The court held that even though defendant adequately directed the use of the product, it failed to warn the users of the possible hazards to the crops from potential dangers in the product. This same proposition was held by the court in *Heaven v. Pender*,<sup>12</sup> wherein the court said "the fact that directions are overlooked or are not meticulously followed does not relieve the manufacturer of the duty to warn of latent dangers common to a class of articles."<sup>13</sup> Even after a manufacturer furnishes a warning on the product, many courts have held defendants negligent either on the basis that it was simply inadequate (this being considered no warning at all), or that the manufacturer failed to give warning that was accurate, strong, clear, and one that would be readily noticed.<sup>14</sup> Also, it has been held that any ambiguity in the language of the warning furnished is to be construed against the one who so chooses the words, and that to safely comply with the requirements of law, one should warn with a degree of intensity that would cause a reasonable man to exercise for his own well-being that caution commensurate with the potential danger.<sup>15</sup>

<sup>9</sup> Dillard & Hart, *Products Liability: Directions for Use and Duty to Warn*, 41 VA. L. REV. 145, 147 (1955).

<sup>10</sup> *McClanahan v. California Spray Chemical Corp.*, 194 Va. 842, 75 S.E.2d 712 (1953).

<sup>11</sup> 194 Va. 842, 75 S.E.2d 712 (1953).

<sup>12</sup> *Heaven v. Pender*, 11 O.B.D. 503 (C.A. 1883).

<sup>13</sup> *Id.* at 505.

<sup>14</sup> Cf., *Lovejoy v. Minneapolis-Moline Power Implement Co.*, 248 Minn. 319, 79 N.W.2d 688 (1956); *Crouse v. Wilbur-Ellis Co.*, 77 Ariz. 359, 272 P.2d 352 (1954); *Schilling v. Roux Distributing Co., Inc.*, 240 Minn. 71, 59 N.W.2d 907 (1953).

<sup>15</sup> *Marigny v. Dejoie*, 172 So. 808 (La. App. 1937); *Tingey v. Houghton & Co.*, 30 Cal.2d 97, 179 P.2d 807 (1947); *Briggs v. National Industries*, 92 Cal. App.2d 542, 207 P.2d 110 (1949).

Taking the general rule that the manufacturer need only inform users if the danger is not obvious to those who may be expected to use the product, the kind of person expected to use the product becomes very important. Ordinarily, a manufacturer need only expect normal use unless there is special purpose such as in the case of *Henry v. Cook*<sup>16</sup> wherein the defendant's product (sparklers) were intended for use by children. The defendant was held to be liable on the ground that since the defendant knew that the special class of users would be of limited education and intelligence, defendant should have been more cautious than if the product was intended for adults. But, in *Victory Sparkler & Specialty Company v. Price*<sup>17</sup> the defendant was not considered liable for a death of a child caused by the eating of fireworks manufactured by it, the court stating that the defendant has no duty to warn of the poisonous substance because it could not foresee that the product would be eaten. Hence when the "foreseeable users" are of little experience or intelligence, the defendant has a greater or higher duty which can only be executed by more cautious, intense warning.<sup>18</sup> Also, in *Bean v. Ross Manufacturing Company*<sup>19</sup> factors in determining a user's ability to comprehend a label were the background, experience and knowledge of the user, and such factors were deemed to be proper matters to be considered by the jury in primary negligence questions.<sup>20</sup> A manufacturer was held liable for the death of a fourteen month old child who swallowed defendant's furniture clean-

<sup>16</sup> 202 App. Div. 19, 195 N.Y.S. 642 (1922).

<sup>17</sup> 146 Miss. 192, 111 So. 437 (1927).

<sup>18</sup> *Accord*, *Crist v. Art Metal Works*, 230 App. Div. 114, 243 N.Y.S. 496 (1930); *Karsteadt v. Phillip Gross Hardware & Supply Co.*, 179 Wis. 110, 190 N.W. 844 (1922); *Pease v. Sinclair Refining Co.*, 104 F.2d 183 (2nd Cir. 1939). See generally, 2 HARPER & JAMES, LAW OF TORTS, 1542 (1956).

<sup>19</sup> *Bean v. Ross Manufacturing Co.*, 344 S.W.2d 18, (Mo. 1961).

<sup>20</sup> Printed on the warning label were words such as "Poison," and "Caution" which were displayed in colors of red and black. The Court also stated, "In holding that the label was not, as a matter of law, sufficient to warn of the inherent danger, we have indirectly held that plaintiff did not, necessarily as a matter of law, have notice of that danger from the label. And we find that there was not sufficient in his general background and experience to establish his knowledge independent of the label as a matter of law. . . . It was for the jury to say whether plaintiff's background should have furnished him any means of knowledge of the danger, in the light of the directions and cautions actually given." According to this opinion, characteristics of plaintiff are considered in primary negligence as well as in secondary or contributory negligence. See also note, 11 W. RESERVE L. REV. 602, 610 (1960), which states that "[w]here the danger is apparent, there is ordinarily no duty to warn. 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. *Accord*, *Maize v. Atlantic Refining Co.*, 352 Pa. 51, 41 A.2d 850 (1945); *Tampa Drug Co. v. Wait*, *supra* note 2; *Haberly v. Reardon Co.*, 319 S.W.2d 859 (1958); *McLaughlin v. Mine Safety Appliance Co.*, 226 N.Y.S.2d 407, 181 N.E.2d 430 (1962).

ing liquid on the grounds that a manufacturer should have reasonably foreseen injuries arising in the course of such use.<sup>21</sup> The Court ruled that the defendant must also be expected to anticipate the environment which is normal for the use of his product and where, as here, that environment is the home, he must anticipate the reasonably foreseeable risks of the use of his product in such an environment.<sup>22</sup>

While some decisions seem to demand very high standards from the defendant, other decisions seem to abide by the reasonable man standard.<sup>23</sup> This position is typified by *Hunter v. E. I. DuPont de Nemours & Company*.<sup>24</sup> The plaintiff suffered inflammations of the skin after using defendant's product (DuPont Lawn Weed Killer #2). The court examined the label<sup>25</sup> on defendant's product and concluded defendant had not negligently failed to give an adequate warning of any danger from the use of its product. The label was sufficient to warn of any hazard to human life or health attendant from the use of the product.

It is readily noticed that some cases purport to hold defendant to a higher duty, whereas in other cases when the defendant merely prints the words "Caution" or "Warning" on the label liability is waived. The rationale seems to be that when a more immediate likelihood of danger is apparent from the product, the duty required of the defendant increases; that is, the care to be exercised in a particular instance is proportionate to the seriousness or gravity of the consequences which may be reasonably foreseeable as a result of the use of the product.<sup>26</sup>

There remains to be discussed one additional point to which the court in the noted case alluded; namely, violation of statute. In the noted case,<sup>27</sup> plaintiff alleged defendant violated the Federal Insecticide, and Rodenti-

<sup>21</sup> *Spruill v. Boyle-Midway, Inc.*, *supra* note 2.

<sup>22</sup> *Id.* at 83.

<sup>23</sup> *Id.* at 85: "If warning of the danger is given and this warning is of a character reasonably calculated to bring home to the reasonably prudent person the nature and extent of the danger, it is sufficient to shift the risk of harm from the manufacturer to the user. To be of such character the warning must embody two characteristics: first, it must be in such form that it could reasonably be expected to catch the attention of the reasonably prudent man in the circumstances of its use; secondly, the content of the warning must be of such a nature as to be comprehensible to the average user and to convey a fair indication of the nature and extent of the danger to the mind of a reasonably prudent person."

<sup>24</sup> *Supra* note 2.

<sup>25</sup> The label on the product was: "CAUTION—Avoid contact with eyes, skin, and clothing. 2,4—D weed killer may cause skin irritation and should be washed off with soap and water. Do not take internally."

<sup>26</sup> *Maize v. Atlantic Refining Co.*, 352 Pa. 51, 41 A.2d 850 (1945); *Jamieson v. Woodward & Lathrop* 247 F.2d 23 (D.C. Cir. 1957).

<sup>27</sup> *Supra* note 1.

cide Act,<sup>28</sup> and that said violation was a proximate cause of the injury. The court held that since defendant failed to exhibit a skull and bones thereon, it had failed to give an adequate warning of the danger. In the *Hunter* case<sup>29</sup> the same federal statute was involved and the court, after examining the label on the product, held that “[t]he caution statement on the label of defendant’s product was an adequate warning of any hazard . . . and defendant was not negligent in failing to place any additional or further warning on its label.”<sup>30</sup> Here the defendant was found to have fully exercised his duty, whereas in this case<sup>31</sup> the label the defendant had exhibited on its product far surpassed the detailed warnings and instructions on the label in the *DuPont* case.<sup>32</sup> Furthermore, in *McClanahan v. California Spray Chemical Corporation*<sup>33</sup> plaintiff used the product, Tag Fungicide #331, and his apple crop was destroyed. The court held defendant liable for failure to warn of the danger involved in the use of the product. However, of more importance is the fact that the same federal statute was applied in this case, but nowhere did the court mention the necessity of a skull and bones, or hieroglyphics. The court only required a warning to be so construed as to protect the public.<sup>34</sup> Also, California, Illinois, Massachusetts, Virginia, and Wisconsin either have insecticide or hazardous substance laws, and not one of the states requires symbols or some form of hieroglyphics to be exhibited on the label to prevent misbranding.<sup>35</sup> In comparison with the above statutes, and cases

<sup>28</sup> The Federal Insecticide, Fungicide, and Rodenticide Act, §§ 1-13 as amended 7 U.S.C.A. §§ 135-135k (1964). § 135(a) reads as follows: “Prohibited Acts . . . (3) Any economic poison which contains any substance or substances in quantities highly toxic to man, determined as provided in section 135d of this title, unless the label shall bear (otherwise it is unlawful to sell), in addition to any other matter required by sections 135-135k of this title—(a) the skull and crossbones; (b) the word ‘poison’ prominently (in red) on a background of distinctly contrasting color; and (c) a statement of an antidote for the economic poison.”

<sup>29</sup> 170 F. Supp. 352 (D.C. Mo. 1958).

<sup>30</sup> *Id.* at 356.

<sup>31</sup> *Supra* note 1.

<sup>32</sup> *Supra* note 2.

<sup>33</sup> *Supra* note 11.

<sup>34</sup> The Court found defendant negligent for failure to warn the consumer of the latent dangers of the product, and the possible effect on the crops dusted. The label did, in fact, contain a warning, but since it was not prominent and clearly noticeable the Court found negligence. But, the Court never mentioned the requirement of any symbols or hieroglyphics to constitute an adequate warning.

<sup>35</sup> CAL. AGRIC. CODE, §§ 1061-1064 (no requirements as to symbols, but only words to convey cautions and warnings); ILL. REV. STAT., ch. 111½, § 261 (1963) (requires a label to contain words: “Danger, Warning or Caution”); MASS. ANN. LAWS, ch. 94B, § 3 (1957) (merely requires ordinary cautionary statements); VA. CODE ANN. ch. 12, § 3-208.7 (1957) (only mentions the need for warning and cautionary statements, but it should be noted that the Federal Act served as a model for this Code, and that the Legislature deleted the section requiring the skull and bones on labels of such economic poisons); Wis. Stat. Ann. § 94.676 (1957) (requires only written warn-

relative to the federal statute, it would seem that the warnings and directions provided by the defendant in this case would be deemed an adequate warning.<sup>36</sup>

The court's holding in *Hubbard-Hall Chemical Company v. Silverman*<sup>37</sup> brings to the foreground the most advanced or progressive theory of negligent failure to warn in the products liability field. Prior case law demanded the manufacturer to use reasonable care to provide adequate warnings and instructions with respect to dangers inherent in the intended use of their products, and in some instances foreseeable misuse of a product. But this case projects the manufacturer's foreseeability not only to misuse of a product, but also to the education, intelligence and background of the users, and to direct all warnings and instructions accordingly. In so doing, the court has made explicit its stand on failure to warn, and whether this holding will form a precedent remains a matter of conjecture. Despite opinion to the contrary, there has been a rapid change in the logic of the courts in the past two decades which indicates they have discontinued to frame their decisions on the theory of the Industrial Revolution, and have commenced to afford the consumer and user far greater protection to compensate the reliance placed on the expertise of the manufacturers.

*Donald Bertucci*

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ings and statements). It should be mentioned that the Court, in the Silverman case, predicated liability on the fact there were no symbols or hieroglyphics to apprise the users of the danger.

<sup>36</sup> Once plaintiff has proven defendant's act was negligent, plaintiff must also allege and prove said act was a proximate cause of the injury; if this cannot be shown defendant should not be found liable. Of equal importance to plaintiff's recovery is freedom from contributory negligence. See, *Towberman v. Des Moines*, 202 Iowa 1299, 211 N.W. 854 (1927); *Goldschmidt v. Schumann*, 304 Pa. St. 172, 155 Atl. 297 (1931); *Bullard v. Ross* 205 N.C. 495, 171 S.E.789 (1933); *Chapman v. Blackmore* 39 Ohio app. 425, 177 N.E. 772 (1931); *Marker v. Universal Oil Products* 250 F.2d 603 (10th Cir. 1957). For a comprehensive analysis of proximate causation, see BECHT & MILLER, *THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES* (1961); HART & HONORE, *CAUSATION IN THE LAW* (1959); Noel, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543 (1963).

This note has not dealt with those cases dealing with allergic consumers. On this topic, see Noel, *The Duty to Warn to Allergic Users of Products*, 12 VAND. L. REV. 331 (1959); Barasch, *Allergies and the Law*, 10 BROOKLYN L. REV. 363 (1941); Freedman, *Allergy and Products Liability Today*, 24 OHIO ST. L.J. 431 (1963).

On the duty to warn of dangers on non-defective products, see Prosser, *The Assault upon the Citadel*, 69 YALE L.J. 1099 (1960); Noel, *Manufacturer's Negligence of Design or Direction for Use of a Product*, 71 YALE L.J. 816 (1962); Frucke, *Personal Injury Damages in Products Liability*, 6 VILL. L. REV. 142 (1960); Fleming, *Products Liability*, 34 TEXAS L. REV. 44 (1955).

<sup>37</sup> *Supra* note 1.