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Torts - Manufacturer's Liability - Duty to Warn

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promise. Suppose, however, that the plaintiff had been a child who was rendered helpless by his obvious ignorance concerning rabies. In such a situation the court might well find that the defendant, who has had an innocent part in creating the danger of rabies, is under a duty to aid another who is helpless is face of danger so created. Two Louisiana decisions involving railroads indicate some support for such a basis of liability. In both cases the plaintiff was an inebriate in danger of eventually being struck by defendant's train, and each victim had been seen in his predicament by employees of the railroad. Both cases held that defendant was bound to take precautions to secure plaintiff from danger.[14]

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TORTS — MANUFACTURER'S LIABILITY — DUTY TO WARN

Plaintiff was struck in the eye by a rubber exerciser that accidentally slipped off her foot while she was following instructions furnished by defendant manufacturer. Plaintiff sued in tort, contending that the manufacturer failed to warn her of the danger which caused her injury. In reviewing a summary judgment for defendant, the Court of Appeals for the District of Columbia, in a five to four decision, *held,* affirmed. A manufacturer is not under a duty to warn users of particular dangers in prescribed uses of the product if the reasonably foreseeable injuries from the use of the product are minor and the general danger in using the product is obvious. The dissent maintained that the manufacturer was liable for marketing a product accompanied by directions that contained no warning of danger and which, when followed, resulted in injury to the user. The dissent reasoned further that, although the propensity of rubber to contract might be obvious, the danger in using a rubber exerciser as directed by the manufacturer is not so obvious as to take the question away from the jury. *Jamieson v. Woodward & Lothrop,* 247 F.2d 23 (D.C. Cir. 1957).[1]

14. Kramer v. New Orleans City & L.R.R., 51 La. Ann. 1690, 26 So. 411 (1899); Grennon v. New Orleans Public Service, Inc., 120 So. 801 (La. App. 1929). Consider further the language in a more recent decision: "Everyone is under the obligation, whether his role be that of an agent or owner, of not allowing things subject to his control to injure another, either because of active or passive negligence, and *whenever property in one's control becomes dangerous to third persons, there is a duty to act affirmatively.*" (Emphasis added.) Washington v. T. Smith & Son, 68 So.2d 337, 346 (La. App. 1953).

1. The suit was brought against the retailer and the manufacturer. The judgment in favor of the retailer was unanimously affirmed. A portion of both the

A manufacturer who knows or should know that his product is likely to be dangerous when put to the use for which it is supplied, and who has no reason to believe that the danger will be known by those who use it, owes a duty of reasonable care to inform users of such danger.[2] A very high standard of skill and care is used to determine whether a manufacturer should have known of dangers in his product.[3] Even if he should have known of a danger, the manufacturer need only inform users if the danger is not obvious to those who may be expected to use the product.[4] The kind of person expected to use the product therefore becomes a very important consideration. Ordinarily, a manufacturer may reasonably anticipate that his product will be put to normal use by a normal user.[5] A factor which favors

majority and dissenting opinions dealt with the possibility of there being an issue as to the manufacturer's duty to take "other precautions" such as the provision of safeguards in the design of the product, but the case really seems to have turned solely upon the duty to warn issue.

2. RESTATEMENT, TORTS §§ 388, 395 (1934); 2 HARPER & JAMES, THE LAW OF TORTS 1540 (1956). This articulation of the general duty is that which is imposed under negligence principles. A higher standard may sometimes be imposed under one or another theory of strict liability without fault. The weed-killer cases are an example of how a strict liability approach may be toned down in subsequent cases to a treatment of the subject matter under negligence theory. See note 9 *infra*. The scope of this paper does not include an analysis of the approaches which purport to impose strict liability.

3. Negligence may consist of a failure to discover a danger in a product. See, e.g., McPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). The scope of this Note does not deal with the standard of knowledge problem except insofar as it incidentally relates to the types of users a manufacturer should anticipate and the foreseeability of the size of risks. See RESTATEMENT, TORTS § 388(a) and Comments under § 395 (1934) for tests on the standard of knowledge.

4. But there is some difference of opinion as to whether there can be a duty to provide safeguards other than warnings against obvious dangers. Compare Campo v. Scofield, 301 N.Y. 468, 472, 95 N.E.2d 802, 804 (1950) (exposed moving parts on onion-topping machine; no duty to provide safeguards where danger obvious); Karsteadt v. Phillip Gross Hardware & Supply Co., 179 Wis. 110, 190 N.W. 844 (1922) (exposed gears on electric clothes wringer — duty to provide safeguards even though danger obvious). The *Campo* case has been criticized in that it failed to take into account that the reasonableness of precautions by the manufacturer as determined by the utility and size of the risk is the true question in cases based upon negligence principles. A rigid rule as expounded by the *Campo* case ignores this factor. 2 HARPER & JAMES, THE LAW OF TORTS 1542 (1956). See also cases cited by PROSSER, TORTS 504, n. 81 (1940). The dissent of the instant case seems to have erred in relying upon a master-servant case, which was not at all concerned with a manufacturer's duty to warn, for the proposition that obviousness of a danger is a factor that bears only upon the question of assumption of risk and is not related to a determination of what duty there was to warn. 247 F.2d at 38.

5. See the collection of cases in PROSSER, TORTS 503 (1955). There seems to be no dispute that ordinarily a manufacturer needs only to foresee normal mentally alert people unless there is special cause, such as an awareness that a toy is for use by children. Compare Walton v. Sherwin Williams Co., 191 F.2d 277 (8th Cir. 1951) (weed killer spray intended for use by farmers and professional crop dusters — manufacturer need only anticipate use by reasonably prudent man); Henry v. Crook, 202 App. Div. 19, 195 N.Y.S. 642 (1922) (sparklers intended for use by children — manufacturer should therefore have been more cautious than if the product had been intended for adults). *But see* Victory Specialty Co. v. Price,

the imposition of a duty to warn by a finding that a danger was not obvious is present when the nature of the product is such that the normally foreseeable user is a person of little experience or intelligence.[6] The reason for this lies in the fact that the probability and seriousness of injury are greatly increased.[7] These last two factors gauge the size of the risk, which in turn

146 Miss. 192, 111 So. 437 (1927) (child died from eating fireworks — manufacturer had no duty to warn that it was poisonous because it was not foreseeable that the product would be eaten — product represented as safe for children). Cases involving physical idiosyncracies of the user, such as allergies, do not appear to be altogether in accord. Quoting Prosser, the court in Bennett v. Pilot Products Co., 120 Utah 474, 235 P.2d 525, 528, 26 A.L.R.2d 958 (1951) held that "'the manufacturer is at least entitled to assume that the chattel will be put to normal use by a normal user, and is not subject to liability where it would ordinarily be safe, but injury results from some unusual use or some personal idiosyncracy of the consumer.'" Prosser's view seems to have been based upon Walstrom Optical Co. v. Miller, 59 S.W.2d 895 (Tex. Civ. App. 1933) (allergy to lacquer on spectacles — no duty to conduct tests — plaintiff's allergy was the proximate cause). But that case really seems to have been based upon the view that the particular facts of the case did not impose a duty upon defendant to conduct tests. In other words, the manufacturer did not know and should not have known that there would be an unusual user, who would probably be injured by the product. A special concurring opinion in *Bennett v. Pilot Products* pointed out that that there would have been a duty to warn if there had been evidence introduced to show that, to the knowledge of the distributor, as many as one out of 1,000 users might be injured. See Bish v. Employer's Liability Assurance Corp., 236 F.2d 62 (5th Cir. 1956) (reaction to hair wave — plaintiff's sensitivity was the cause so no duty to warn); Briggs v. National Industries, 92 Cal. App.2d 542, 207 P.2d 110 (1949) (hair preparation — sensitive skin — plaintiff's complaint only known complaint — no evidence that manufacturer knew product was dangerous — no duty to warn); Levi v. Colgate Palmolive Proprietary, Ltd., 41 New So. W. St. 48, 58 New So. W.W.N. 63 (1941), as reported at 26 A.L.R.2d 974 (1952) (bath salts — injury due to sensitivity — manufacturer only had duty to foresee normal users). *But see* Wright v. Carter Products, Inc., 244 F.2d 53 (2d Cir. 1957) (maker of deodorant should have warned sensitive users — 373 complaints received by defendant out of 82 million sales of the product). Perhaps the *Wright* case can be reconciled with the other cases in that there was definite notice and actual knowledge that the product was harming a sensitive class of people, even though that class was very small. The *Wright* case relies on a long line of cases which imposed duties to warn upon *distributors* of products, if the distributor knew or should have known that there was a danger to a class of sensitive users, however small that class might be. See Annot., 26 A.L.R.2d 963 (1952), 121 A.L.R. 464 (1939). See also Comment, 5 VAND. L. REV. 212, 221-26 (1952) for a more critical discussion of allergy and the duty to warn or otherwise protect consumers.

6. See Crist v. Art Metal Works, 230 App. Div. 114, 243 N.Y.S. 496 (1930), affirmed per curiam, 255 N.Y. 624, 175 N.E. 341 (1931); Henry v. Crook, 202 App. Div. 19, 145 N.Y.S. 642 (1922). Both cases based a duty to warn in part upon the fact that the products were intended for children. *Cf.* Karsteadt v. Phillip Gross Hardware & Supply Co., 179 Wis. 110, 190 N.W. 844 (1922) (exposed cogs on washing machine wringer — apparent danger — inexperienced user — manufacturer liable for failure to provide safeguard). See also RESTATEMENT, TORTS § 390 (1934). *But see* Victory Specialty Co. v. Price, 146 Miss. 192, 111 So. 437 (1927) (child died from eating fireworks — manufacturer not under a duty to warn of the danger because it was not foreseeable that product would be eaten — product represented as safe for children).

7. See cases cited note 6 *supra*. See also 2 HARPER & JAMES, THE LAW OF TORTS 1542 (1956), wherein it is pointed out that the obviousness of a danger bears upon the reasonableness of the risk. Probability and seriousness of injury are determinants of reasonableness. See note 8 *infra*.

determines the scope of all duties to act reasonably.[8] This is particularly apparent in measuring the scope of the duty to exercise reasonable care in informing users of dangers in the use of products.[9] Since the intelligence and experience of users are im-

8. The utility of conduct or the ease with which a risk may have been avoided is generally weighed against the size of the risk generated by that conduct, and the size of the risk is essentially determined by the probability and seriousness of injury. In duty to warn cases involving manufacturers, the utility of not giving a warning is apparently inconsequential. See, e.g., Pease v. Sinclair Refining Co., 104 F.2d 183, 186 (2d Cir. 1939). *Cf.* Karsteadt v. Phillip Gross Hardware & Supply Co., 179 Wis. 110, 190 N.W. 844 (1922), discussed note 4 *supra*. The probability and seriousness of injury which the product might foreseeably cause seem to be the ultimate underlying considerations behind the various more specific rules relative to a manufacturer's duty to warn. See RESTATEMENT, TORTS §§ 291-293 (1934). See also note 9 *infra*. The majority opinion of the instant case took pains to note that the foreseeable danger in the use of the product was minor. 247 F.2d at 29.

9. In the case which made the first crack in the now crumbled rule that suppliers of chattels owed no duty to third persons not in privity of contract, a highly dangerous substance was involved — a falsely labeled poison. Thomas v. Winchester, 6 N.Y. 397, 57 Am. Dec. 455 (1852). Items which contacted the body or were otherwise of a nature which could easily be understood to be seriously dangerous to personal safety came to be declared imminently or inherently dangerous and thus a duty to warn or a duty to avoid making a defective product could be imposed upon the manufacturer. An "article intended to preserve, destroy or affect human life" was one definition of an imminently or inherently dangerous article. Huset v. J. I. Case Threshing Machine Co., 120 Fed. 865 (8th Cir. 1903). See also the collection of early drug, food, and drink cases by Bohlen, *Liability of Manufacturers to Persons Other than Their Immediate Vendors*, 45 L.Q. REV. 343, 353-69 (1929). Remote possibilities of harm are often not covered by the duty to warn. Hentschel v. Baby Bathinette Corp., 215 F.2d 102 (2d Cir. 1954), cert. denied, 349 U.S. 923 (1955) (magnesium alloy bathinette caught fire from being placed next to heater — very high temperature needed to ignite it — no duty to warn); Schindley v. Allen-Sherman-Hoff Co., 157 F.2d 102 (6th Cir. 1946) (2,000 gates manufactured — plaintiff's complaint the only one — no recovery); Sawyer v. Pine Oil Sales Co., 155 F.2d 855 (5th Cir. 1946) (no duty to warn cleaner might splash in eye); Poplar v. Bourgeois, 298 N.Y. 62, 80 N.E.2d 334 (1948) (no duty to foresee that ornament on box might scratch, cause infection). Where the danger is remote, but the possible injury is a very serious one, the latter consideration may control and a duty to warn might be imposed. Pease v. Sinclair Refining Co., 104 F.2d 183 (2d Cir. 1939) (oil display sent to chemistry teacher contained bottle labeled kerosene — bottle intended only for display — bottle contained water, which when used with sodium caused violent explosion — recovery). The weed killer cases illustrate how the courts may temper the duty owed by the manufacturer when the probability of injury is reduced by proper instructions and warnings. Taylor v. Chapman Chemical Co., 215 Ark. 630, 222 S.W.2d 820 (1949) (2, 4-D powder, used for killing weeds in rice lands but deadly poison to cotton — inflicted great damage to adjacent cotton crops — capable of being carried many miles when used in aircraft dusting — manufacturer liable on strict liability without fault theory). But the holding of the court was greatly tempered in effect by the same court when negligence principles, not strict liability theory, were used in Reasor-Hill Corp. v. Kennedy, 224 Ark. 248, 272 S.W.2d 685 (1954) (adequate warning and instructions to users of the product freed the manufacturer of any liability to neighbors of user whose crops were destroyed by 2, 4-D). See also Stull's Chemicals v. Davis, 263 S.W.2d 806 (Tex. Civ. App. 1953) (manufacturer not liable because 2, 4-D would have been safe if used as directed); Walton v. Sherwin Williams Co., 191 F.2d 277 (8th Cir. 1951) (2, 4-D liquid distinguished from ultra-hazardous powder of *Taylor v. Chapman* — jury verdict for defendant manufacturer affirmed). If instructions and warnings to intermediate users substantially reduce the size of the risk to ultimate users or others who may be expected to come in contact with the product, the duty to warn may be satisfied.

portant in that they bear upon the probability or seriousness of injury which the product may cause, *a fortiori* it follows that where the probability and seriousness of injury remain great because of the nature of the product and its intended use even if the product is used by intelligent, experienced persons, there is greater reason to find that a danger is not obvious. Thus, where dynamite and blasting caps were used by construction workers, even though the users were experienced to some extent and knew in general that such items may explode when subjected to heat and vibration, it has been held that the more specific danger of explosion from the heat of a freshly drilled hole and the vibration of nearby drilling is not obvious.[10] But if the probability and seriousness of injury factors are small, there is a greater inclination to find that if the user of the product could be expected to have a general knowledge of a dangerous characteristic of the product, he may be expected to know that similar dangers in specific uses of the product are obvious.[11] The adequacy of the instructions or warning, in addition to being measured by the kind of user, may also turn upon the amount of danger in

See Soto v. E. C. Brown Co., 283 App. Div. 896, 130 N.Y.S.2d 21 (1954) (it was reasonable to expect spray pump buyer would convey to his employees a warning to attach the hose securely before using); Foster v. Ford Motor Co., 139 Wash. 341, 246 Pac. 945 (1926) (instructions to purchaser were adequate so no liability to employee of purchaser who was unaware of tractor's tendency to up-end when stuck in mud if not handled in a special way); RESTATEMENT, TORTS § 388, Comment 1 (1934). If the danger to third persons remains great (usually because it is improbable that instructions or warnings will be conveyed to ultimate users), liability may rest upon the manufacturer even if the intermediate user has been fully apprised of the dangers in the product. See Tomao v. De Sano & Son, Inc., 209 F.2d 544 (3d Cir. 1954) (grinding wheel furnished on special order to trade school — wheel was too delicate for normal use and disintegrated when student used it beyond its special limited capacity — recovery). See the allergy cases, note 5 *supra*. If the size of the risk involved in a possible deviation from instructions which would be safe if followed is sufficiently large, the court may hold that the duty to warn or inform has not been met. See McClanahan v. California Spray Chemical Corp., 194 Va. 842, 75 S.E.2d 712 (1953) (instructions provided safe method of spraying apple trees with product — custom in area was to spray at time and in manner different from the instructions — manufacturer's agent witnessed such use without warning of danger — liability for injury to trees). *Cf.* Dillard & Hart, *Product Liability: Directions for Use and the Duty to Warn*, 41 VA. L. REV. 145 (1955).

10. Hopkins v. E. I. DuPont DeNemours & Co., 199 F.2d 930 (3d Cir. 1952).

11. This is the principle which appears to have underlaid the majority attack on the position of the dissent when it was said that the dissent erred in placing the rubber rope in the same category as a complex machine with moving parts, when in fact it should be placed in the category of a knife, or ax, or other simple tool. 247 F.2d at 30. Sawyer v. Pine Oil Sales Co., 155 F.2d 855 (5th Cir. 1955) (no duty to warn that cleaner might splash in user's eye).

the intended use[12] or the presence of misleading assurances.[13] Louisiana law does not appear to differ from any of the above principles.[14]

The significance of the instant case rests in the fact that four of the nine judges would have extended the scope of the duty to warn beyond that which was recognized in previous cases. The majority opinion pointed to facts which showed that the user of the product was aware of the general danger that stretched rubber contracts violently when suddenly released.[15] Thus, the general danger was not only obvious, but known. The majority emphasized that the product was simple, and not defective, and normally would not cause serious injury in the event of mishap.[16] There was a suggestion by the majority that to extend the scope of the duty to warn so as to allow recovery under such facts would be tantamount to establishing unlimited liability.[17] The dissent maintained that the user of the product should not, merely because of her awareness of the general danger, be held to have been aware of the specific danger of

12. If the size of the risk involved in a possible deviation from instructions which would be safe if followed is sufficiently large, the court may hold that the duty to warn or inform has not been met. See McClanahan v. California Spray Chemical Corp., 194 Va. 842, 75 S.E.2d 712 (1953) (instructions provided safe method of spraying apple trees with product — custom in area was to spray at time and in manner different from the instructions — manufacturer's agent witnessed such use without warning of the danger — liability for injury to trees). *Cf.* Dillard & Hart, *Product Liability: Directions for Use and the Duty to Warn*, 41 VA. L. REV. 145 (1955).

13. Allis Chalmers Mfg. Co. v. Wickman, 220 F.2d 426 (8th Cir. 1955); De Eugenio v. Allis Chalmers Mfg. Co., 210 F.2d 409 (3d Cir. 1954) (both cases involved what might have otherwise been considered obvious dangers in certain farm machinery but for the manufacturers' instructions as to the method of use); Miller v. New Zealand Insurance Co., 98 So.2d 544 (La. App. 1957) (manufacturer assured distributor who assured plaintiff that cleanser was safe for use on wash basins — label contained warning against such use — recovery); Rulane Gas Co. v. Montgomery Ward & Co., 231 N.C. 270, 56 S.E.2d 689 (1949) (seller of stove liable for representing that stove was safe for a type of gas which was dangerous if used with the stove). See also RESTATEMENT, TORTS § 388, Comment b (1934), cases cited 247 F.2d at 37-38, n. 4; cases cited by 2 HARPER & JAMES, THE LAW OF TORTS 1548 (1956).

14. Bish v. Employers Liability Corp., 236 F.2d 62 (5th Cir. 1956) (allergic reaction to hair preparation — no duty to warn). See discussion of the allergy cases note 5 supra. Sawyer v. Pine Oil Sales Co., 155 F.2d 855 (5th Cir. 1946) (no duty to warn that cleaner might splash in eye); Laclede Steel Co. v. Silas Mason, 67 F. Supp. 751 (W.D. La. 1946) (non-ferrous metal in scrap glass — injury to furnaces — duty to warn); Socola v. Chess Carley Co., 39 La. Ann. 344, 1 So. 824 (1887) (gasoline labeled "puroline" — manufacturer not liable because both substances equally explosive — danger not increased); Miller v. New Zealand Insurance Co., 98 So.2d 544 (La. App. 1957) (maker assured distributor who assured plaintiff that cleaner was safe for use on wash basins — label warned against such use — recovery).

15. 247 F.2d at 36.

16. *Id.* at 29, 33.

17. *Id.* at 33.

the rubber slipping and contracting violently when used as directed by the manufacturer.[18] This view seems to have been based upon the proposition that the directions operated to lull the user into a false sense of security.[19] To support this view the dissent cited several cases involving misleading assurances by the manufacturer.[20] In these cases there was either advertising or instructions which positively stated[21] or strongly implied[22] that the product was safe for the use which led to the injury; or there was danger that the use of the product was very likely to involve serious injury.[23] However, the facts of the instant case show that the language of the instructions could only remotely imply a representation of safety,[24] and the danger that was reasonably foreseeable was minor.[25]

In the writer's opinion, a person of average perception who can be expected to be aware of a general danger in a product may also reasonably be expected to appreciate the same danger in a specific use of that product. The law has imposed a duty to warn against such specific dangers only where special circumstances serve to increase the size of the risk to an extent which would warrant the protection of persons who had used less than average perception. The dissent would have extended the law to protect such persons against small risks.

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18. *Id.* at 35, 36.
19. *Id.* at 37.
20. *Id.* at 38. See notes 21, 22, and 23 *infra.*
21. Crist v. Art Metal Works, 230 App. Div. 114, 243 N.Y. Supp. 496 (1930) (advertising said toy pistol was "absolutely harmless"). Compare this with some of the language the dissent in the instant case found meaningful: "[I]t is possible for any body to prune the hips, sleek the legs, carve the waistline." 247 F.2d at 37. See also Wolcho v. Rosenbluth & Co., 81 Conn. 358, 71 Atl. 566 (1908) (inflammable stove cleaner ignited while being used on hot stove — fatal injuries — label said "will stand a high temperature"); Henry v. Crook, 202 App. Div. 19, 195 N.Y. Supp. 642 (1922) (sparkler ignited dress of child — label read "sparks are harmless. . . . A harmless and delightful amusement for children").
22. McCormick v. Lowe & Campbell Athletic Goods Co., 235 Mo. App. 612, 144 S.W.2d 866 (1940) (vaulting pole represented as "Extra Select" — lower grades were represented as "perfectly usable," "thoroughly satisfactory," "good, strong, serviceable poles" — the "Extra Select" pole contained hidden defect and broke); Maise v. Atlantic Refining Co., 352 Pa. 51, 41 A.2d 850 (1945) (small print warned against inhalation of cleaning fluid fumes — trade name "Safety-Kleen" emblazoned in large letters all over the container).
23. See notes cited note 22 *supra*; Wolcho v. Rosenbluth & Co., 81 Conn. 358, 71 Atl. 566 (1908) (inflammable stove cleaner); Henry v. Crook, 202 App. Div. 19, 195 N.Y. Supp. 642 (1922) (sparklers for use by young children).
24. See language of the advertisement in the instant case and its comparison with the language in the cases the dissent relied upon at note 21 *supra.*
25. 247 F.2d at 29.