New Directions in Products Liability Warning Cases

By Richard Alexander, Esq.
Alexander & Bohn - San Jose
and Robert H. Bohn, Esq.
Alexander & Bohn - San Jose

In the waning hours of the 1987 Legislative Session, Civil Code section 1714.45 was added to California law. While claiming not to change existing product liability law as stated in *Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, the statute provides that manufacturers and sellers are not liable for products that are "inherently unsafe and... known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community."

Most unusually the statute gives five examples of what is meant by common items of personal consumption: "such as sugar, castor oil, alcohol, tobacco and butter." The new statute applies to all "product liability actions" pending or commenced after January 1, 1988, with the exception of an action based on a manufacturing defect or breach of an express warranty.

While on its face the statute is intended to provide immunity in cases of failure to warn for the stated products, skeptics anticipate that manufacturers will attempt to extend protections granted to the alcohol and tobacco lobbies and that defendants will move to extend the categories of "common consumer products" from those taken internally to those applied externally, and finally to all products. Strict constructionists will not have difficulty following the statute, but any court interested in giving the statute a liberal reading will find sufficient vagueness or intent to expand the interpretation to other products.

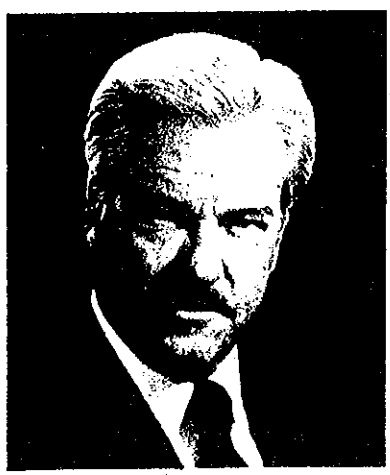
What has happened here is that the common law of products liability has been diverted in mid-stream. The challenge is to anticipate the next development.

The new statute will definitely be raised in all cases where there is a claim of failure to warn. It will become the relevancy base for lay and expert testimony that a defendant's product is a common

RICHARD ALEXANDER

consumer item and is known to be inherently unsafe. The offered defense instruction to the jury will be a direct quotation from the statute and defendants will argue that under the facts and the law they are not liable for failing to warn of the dangerous aspects of their products, which was obvious (at least in hindsight).

Unanswered is the question of what impact Civil Code section 1714.45 will have on plaintiffs securing verdicts and to what extent attempts will be made to use the statutory language to take a warning issue from the jury. It cannot be assumed that the new statute will be of no value to



ROBERT H. BOHN

manufacturers and suppliers in general and by far the greatest harm to consumers would occur where courts decide as a matter of law that Civil Code section 1714.45 precludes liability for failing to warn. The potential impact of this statute in this context is best studied by surveying California law on product warnings.

Adequacy of Warning for the Jury

That juries have been relied upon to determine the adequacy of warnings in the case of defective products has been with us since the inception of products liability law. What is different now is that defendants can claim as a matter of law that they are not liable for common consumer products that are inherently unsafe. Virtually every product can be unsafe depending upon how it is used, so the application of this new statute should be studied in every pending products liability case to determine whether in fact the defendant's warnings were adequate and whether the product is in fact inherently unsafe, or simply unsafe under given circumstances.

Whether a warning is adequate requires a weighing of all the factual circumstances against multiple criteria, none of which is totally controlling. *Cavers v. Cushman* (1979), 95 Cal.App.3d 336, 157 Cal.Rptr. 142, one of the leading cases concerning warnings in the products liability field, is an excellent example of the factual balancing a jury must undertake.

Cavers involved a motorized golf cart that rolled over causing injuries. The court instructed the jury that an otherwise faultlessly made article may be deemed defective if the manufacturer,

> fails to warn of dangerous propensities ... which in the absence of an adequate warning render the article substantially dangerous to the user. . . . Whether a danger is substantial or insubstantial must be determined from the evidence and measured in the light of several

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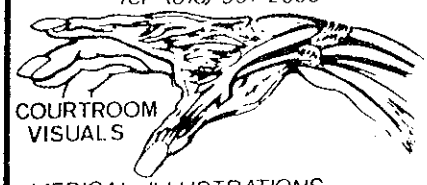

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> criteria none of which is totally controlling including the potential injurious consequences of such danger, the likelihood that injury might result, the quality and extent of danger to which the user is exposed and whether a danger is latent or patent .... (*Id.*, at p. 349.)

Whenever similarly complex factual questions are presented for determination in a case, the issue should go to a jury.

Cavers is a good statement of law because it summarizes into one standard forty years of decisional law on various types of products. But with the adoption of Section 1714.45, some manufacturers may attempt to label their product as one that is inherently unsafe in order to escape liability. Because the statute states that existing product liability law is not changed or modified by the new rule, a review of existing case law before undertaking a products liability case on failure to warn is necessary to understand the application of Civil Code section 1714.45.

Forty years ago in *Tingley v. E. F. Houghton* (1947) 30 Cal.2d 97, 179 P.2d 807, the jury was called upon to determine the adequacy of a limited warning that did not warn that contaminated chemicals could result in an unexpected explosion. The Supreme Court held, in affirming verdicts for the plaintiffs, that "the jury nevertheless could have found that... the resulting explosion was a direct consequence of defendant's negligence in failing to give an adequate warning of the dangerous nature of his products." *Id.*, at p.811.

Case after case since that time has reaffirmed the role of the jury in making a factual determination whether a given warning is adequate, appropriate, suitable or sufficient under the specific facts of a given case. The same should also be true after passage of Section 1714.45. Those cases in which the trial court has found for the manufacturer by granting a motion for summary judgment, judgment n.o.v., or a nonsuit are uniformly reversed, as the following products liability warning cases show.

Gall v. Union Ice Co. (1952) 108 Cal.App. 303, 230 P.2d 48 involved the absence of sufficient warning labels on drums of sulfuric acid which exploded. Affirming verdicts for the plaintiffs, the court held that the questions of defendants chemical companies' negligence in failing to place proper warning labels on sulfuric acid drums were for the jury.

A theatrical smoke-producing device set fire to a child's dress in *Laramendy v. Myers* (1954) 126 Cal.App.2d 636, 272 P.2d 824. "The written directions which were with the device when it was received, warned: to hold the device away from the face while filling the hole with powder; and to stand back without making contact (when the device is on the floor) so that 'puff' will not strike face." Notwithstanding these warnings the court found the warning was incomplete, affirmed a verdict for plaintiff, and held that the "defendants neglected to reasonably warn of the dangerous propensities of the device. . . . There was no warning of danger from fire." *Id.*, at p.639.

In *Crane v. Sears Roebuck & Co.* (1963) 218 Cal.App.2d 855, 32 Cal.Rptr. 754, an inflammable mixture used to prepare surfaces for painting was ignited by a water heater. Among other things the label provided: "Caution: Inflammable mixture. Do not use near fire or flame... Contains more that 15% Benzol-Beware of Poisonous Fumes." *Id.*, at p.856. In affirming a judgment for the plaintiff the court found the warning incomplete and stated: "The label cautioned that the surface preparer was an inflammable mixture, not to be used near fire or flame, and to beware of poisonous fumes. It did not say that the mixture was combustible or explosive." *Id.*, at p.856. Because of the limited warning, the court held that

> it is a question of fact whether the label gave appropriate warning .... In view of the latent, dangerous qualities of the surface preparer herein involved, Universal, as manufacturer, had an independent duty of determining that adequate warning was given to the public with respect to its use. The facts herein presented a question for the jury to determine whether this was done. (*Ibid.*)

In 1966 a judgment of nonsuit was reversed in *Gherna v. Ford Motor Company* (1966) 246 Cal.App.2d 639, 55 Cal.Rptr. 94, a negligence action arising from a fire that destroyed a new Thunderbird. Ford knew of the danger of fire resulting from transmission fluid contacting the exhaust manifold, but "did not include a warning as to such dangers in its handbook, or otherwise, except for the admonition against rocking the car when stuck in sand or snow." *Id.*, at p.651. The

court held the question of negligent failure to warn "should have been submitted to the jury under appropriate instructions." *Ibid.*

Toole v. Richardson (1967) 251 Cal.App.2d 689, 710, 60 Cal.Rptr. 398, involves the infamous MER/29. In affirming a jury verdict for the plaintiff's eye damage as a result of inadequate warnings given with this prescription drug, Justice Salsman found there was substantial evidence to support the jury's verdict and award of punitive damages. On the strict liability question the court stated:

> The possibility of eye injury and damage was known to appellant before the product was placed on the market and yet no warning of this danger was given until the weight of accumulating evidence and the insistence of the FDA compelled it. Thus strict liability is justified on the ground that the product was marketed without proper warning of its known dangerous effect. (*Id.*, at p.710.)

Toole is another example of the adequacy of warnings being a question for the jury.

"Questions of fact were presented with respect to the issue whether the manufacturer should have known that the general instructions to use a lubricant were more respected in the breach than by observance, and, if so, whether special warnings should have been given of the particular hazard from safety rims," was the holding in *Casetta v. United States Rubber* (1968), 260 Cal.App.2d 792, 816, 67 Cal.Rptr. 645, 661. The court reversed a judgment notwithstanding the verdict in this tire mounting explosion case. Although the manufacturer knew that a special hazard arose in mounting tube-type tires on safety or hump-type rims, the evidence was in dispute on the extent to which warnings "were communicated . . . to the plaintiff himself." *Ibid.* "There was substantial evidence to support a finding for the plaintiff on the foregoing issues, and it was error to withdraw them from the consideration of the jury." *Id.*, at p.817.

Midgeley v. S.S. Kresge Company (1976) 55 Cal.App.3d 67, 127 Cal.Rptr. 217, reversed a jury verdict for a supplier in a case where a telescope was sold without proper warnings. Justice Puglia found the warnings to be incomplete:

> Thus a product requiring . . . use in conformity with the supplier's directions is defective if the supplier fails to warn adequately of conditions and circumstances created by such . . . use which would render the product dangerous to the user. Therefore, the supplier is strictly liable for injuries proximately resulting from composing and furnishing a set of instructions for . . . . use which does not adequately avoid the danger of injury. It follows that plaintiff was entitled to jury consideration of the adequacy of the instructions for assembly and use of the telescope in the context of strict liability." (*Id.*, at p.74.)

In cases where the manufacturer knows that the product sold is dangerous, "even thought the circumstances under which the danger may occur are limited in number compared to the total number of uses of the product, the manufacturer is liable if he fails to warn of the latent defect." *John Norton Farms v. Todagco* (1981) 124 Cal.App.3d 149, 175, 177 Cal.Rptr. 215, 228; *Proctor & Gamble Co. v. Superior Court* (1954) 124 Cal.App.2d 157, 162. The plaintiff in this case offered proof that defendants knew that using a chemical could result in a limited, specific harm for which they did not warn. The court of appeal reversed a

*▲ Richard S. Weiner, Ph.D., Director
Fellow and Diplomate in Medical Psychotherapy Board Certified in Behavioral Medicine, Certified Family Mediator, Board Certified Counselor, Fellow and Diplomate in Professional Counseling

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nonsuit and found that the plaintiff had established a prima facie case on his cause of action for negligent failure to warn.

Adequacy of Warning a Legal Issue

In failure to warn cases, where a warning label has been affixed to the product, defendants routinely claim that under *Temple v. Velcro USA, Inc.* (1983) 148 Cal.App.3d 1090, 196 Cal.Rptr. 531, a court can, as a matter of law, find that the warning is adequate and take the issue from the jury on a summary judgment.

Temple arose under very unusual facts where consumers were directly warned by mail that the product in question was dangerous and was being taken off the market. When Velcro learned that its product was being used for an unintended use in hot air balloons, it wrote all hot air balloonists:

> Velcro closure has not been designed and is not proper for use to secure the deflation panels in hot air balloons. Any balloon which uses Velcro closure for this purpose is unsafe . . . could cause uncontrollable descent and serious injury or death . . . Velcro is immediately ceasing sales of Velcro closures for sale in hot air balloons . . . do not fly any hot air balloon which uses Velcro closures . . . Velcro . . . is not responsible for loss or injury caused by the use of its product in this manner. Individuals who ignore this warning do so at their own risk and may suffer serious injury or death . . . The use of Velcro in this manner is extremely dangerous and you must not fly any hot air balloon under any circumstances unless and until it has been retrofitted with a deflation plane which does not employ or rely on Velcro closures to hold it in place.

In *Temple*, the plaintiff admitted having received the warnings, "but we didn't pay any attention to it." *Id.*, at p.1092. Under such facts, it is understandable why the order granting summary judgment was affirmed.

Future Applications of Section 1714.45

Section 1714.45, when read with *Temple*, appears to offer an opportunity to manufacturers to create warnings for their products which will allow them to take direct advantage of Section 1714.45's immunity provision. By adding a warning label that states "this consumer product is inherently unsafe" a manufacturer need only supply readily available testimony that the product's inherent unsafeness is common knowledge in order to claim immunity for failure to warn.

Section 1714.45 can be reasonably anticipated to result in increased summary judgment motions on the legal adequacy of a warning, especially where the manufacturer's warning label is designed to bring the product under the statute's immunity provisions.

At trial where both the product and the user's conduct are the focus of scrutiny, the victim's injuries will provide hindsight authentication that the product is, in fact, inherently dangerous. Discovery in such cases will have focused not just on the consumer's familiarity with the product, but in addition, polls and surveys will be utilized to prove the product is in fact a common consumer item. This fact coupled with a well-drafted warning label could result in lower settlements and fewer plaintiff's verdicts in failure to warn cases. ■

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