August 9, 1971

Monsanto's Duty and Liability
to Silo Manufacturer and Dairy
Herd Owner for Damages Due to
use of PCB in Silo Interiors

Mr. C. B. Holleran

I. Duty Toward the Silo Manufacturer

A. Prior to 1969

The scope of a manufacturer's duty to know and to warn of potentially harmful effects resulting from use of its products varies with the degree of risk and the seriousness of the harm. The manufacturer has a duty -- statutory or common law -- to test its products for toxicity to humans and to ensure that they are not unreasonably dangerous when used as intended.

The duty to test for and warn of potentially toxic effects on humans is especially important to manufacturers of inherently dangerous products, such as insecticides. In these instances, the manufacturer is held to a duty to warn of known risks, since the poisonous character of the product is known. However, a manufacturer might be found to have breached a duty to test and know his product if he markets a harmful product without any knowledge of its dangerous effects. In addition to the duty to warn of known potentially harmful effects, there is a duty to know what effects the product may have.

The case of Sylvania Electric Products, Inc. v. Barker, 228 F.2d 842 (1st Cir. 1955) illustrates the absolute nature of the manufacturer's duty to know and warn of dangers risked by humans in the ordinary use of a product. In this wrongful death action, the manufacturer had no knowledge that the beryllium in its glass tubing might be dangerous if inhaled. Ignorance of the danger, however, was no excuse. The court deviated from the general rule that a manufacturer has a duty to warn only when he knows or should know that the product may be dangerous. Instead, it applied a Massachusetts rule that a manufacturer has presumptive knowledge of its products' dangerous nature and held the defendant liable.

Where the manufacturer knows that its product is within the class of inherently dangerous products, it must test for possible harm resulting from its reasonably foreseeable uses. A manufacturer of parathion dust could not escape liability on the grounds of lack of knowledge that the dust may be absorbed through the user's skin. The court in Griffin v. Planters Chemical Corp., 302 F. Supp. 937 (D.S.C. 1969), found a breach of duty, relying on such factors as the "glaring proof of lack of tests" and the "highly toxic effects" of the dust.

STLCOPCB4102570

If the manufacturer knows of a risk of property damage in the ordinary use of his product, he has a duty to test for and warn of characteristics which may increase the likelihood of the danger's occurrence. This is essentially a duty to investigate the extent of the risk involved. Cases arising from a breach of this duty may involve damage which the manufacturer knew the product was capable of causing, but under circumstances which he did not foresee. The case of Chapman Chemical Co. v. Taylor, 215 Ark. 630, 222 S.W.2d 820 (1949), involved such a situation. The manufacturer knew its chemical dust would be harmful to broad-leafed plants, but marketed it for use on rice fields. The peculiar floating quality of the dust resulted in its drifting to nearby fields of broad-leafed plants. Failure to test for this floating characteristic was held to be a breach of duty of ordinary care. The harm was foreseeable, the court reasoned, since the defendant knew that the dust was usually applied by airplane.

Where the manufacturer has no knowledge, actual or constructive, of any harmful effects resulting from the normal use of its product, it has no duty to warn of unknown dangers if, "by the application of reasonable developed human skill and foresight," it should not have known of such effects. Restatement (Second) of Torts (1968) §402A, Comment J. A possible exception to this principle might be the Massachusetts rule of presumptive knowledge where harm to humans has resulted. Also, if the effects of a combination of chemicals used in a product are well known among chemists, or if harmful effects of a particular product are generally suspected within an industry, the manufacturer might not claim it had no knowledge of the harm.

In sum, a manufacturer has a duty to know his product to the extent of testing for toxicity, ensuring that it is not unreasonably dangerous, and in addition, engaging in a reasonable amount of research to uncover any possibly harmful effects. The amount of testing and research deemed reasonable may depend on such factors as whether the product is to be consumed by humans, whether any danger is known or suspected in the foreseeable use of the product, whether it is inherently dangerous, and whether the manufacturer complied with usual industry standards for testing. If a possibly harmful effect is known or suspected, there is a duty to know characteristics bearing on the likelihood of its occurrence.

Factors relating to the scope of Monsanto's duty to the silo manufacturer prior to 1969 include:

1) PCB was not intended to be consumed by humans.

DSW 440935

2) Assuming Monsanto adequately tested it prior to marketing and found no evidence of toxicity, PCB would probably not be considered inherently dangerous.

3) As of this date there is apparently no scientific evidence of harmful effects on humans, and this action is limited to property damage, hence the absolute liability doctrine applied in wrongful death actions should not apply here.

4) Apparently Monsanto had no actual or constructive notice of its effects from literature, expert opinion, or prior incidents of harm from the use of PCB.

Bearing in mind these mitigating factors, the Restatement standard of reasonableness for testing and research should govern Monsanto's duty to warn prior to 1969. Monsanto had a duty of ensuring that PCB was reasonably fit for the purpose intended and not unreasonably dangerous in its foreseeable uses. This duty presumably was fulfilled by a reasonable amount of research and testing. Provided that its testing was adequate, Monsanto owed no duty to the silo manufacturer to warn of possible risks unknown to it.

B. After 1969

If evidence gathered after the marketing of a product indicates possible hazards in its use and that the warning label may be inadequate, the manufacturer owes its customers a continuing duty to warn of potential harm. Reasonableness defines the scope of this duty and, with the possible exception of toxicity, warnings are required only if the harm might occur in the reasonably foreseeable use of the product.

The question of Monsanto's duty to the silo manufacturer after 1969 depends on whether Monsanto should have suspected, from the evidence of PCB's effect on pelicans and shellfish, that other products containing PCB might have similarly harmful effects. Its post-1969 duty hinges largely on a question of foreseeability, i.e., whether it knew or should have known that PCB was used in paint, that paint was used in silo interiors, and that cattle feed was stored inside the silos. These facts appear to be reasonably foreseeable, and after 1969 Monsanto may have had a duty to warn the silo manufacturers.

II. Duty to Dairy Herd Owner

A. Prior to 1969

Monsanto's duty toward the dairy herd owner is probably limited to ensuring that the component in the paint was

STLCOPCB4102572

not unreasonably dangerous. The dairy herd owner's remedy for breach of a warranty of fitness lies with the silo manufacturer. Although it could proceed against Monsanto under the strict liability doctrine, it would have to prove that the paint was defective. This issue is considered below.

B. After 1969

Where physical harm to the ultimate consumer may follow from ordinary use of a product, the manufacturer must communicate warnings of newly-disclosed hazards to the consumers. This is true of drugs, Basko v. Sterling Drug, Inc., 416 F.2d 417 (2nd Cir. 1969) and motor vehicles, Comstock v. GM Corp., 358 Mich. 163, 99 N.W.2d 627 (1959).

Where physical harm to the consumer is not at issue, the duty to warn is less critical. Provided that the 1969 evidence did not render PCB an inherently dangerous product, Monsanto probably owed no duty to warn the dairy herd owner of the potential harm.

III. Liability to the Silo Manufacturer

A. Prior to 1969

There are three overlapping theories on which the silo manufacturer might proceed against Monsanto: breach of an implied warranty of fitness, strict liability, and negligence. The first two theories are similar, the main differences being that disclaimers are inoperative in strict liability and that privity is required in a warranty action except as provided in the U.C.C.

In proceeding under strict liability or breach of warranty, the plaintiff must establish: 1) that he suffered injury to his person or property; 2) the injury was caused by a defect in the product; 3) the product was defective and not suitable for its intended use at the time it left defendant's place of business. The definition of "defective" has been continuously expanded in recent years, and case law indicates that now a product may be held defective if it is inadequately labelled, even though it has no inherent defects. If a product is unreasonably dangerous because warnings on the label are inadequate, the manufacturer may be liable for harm resulting therefrom. Anderson v. Klix Chemical Co., 472 P.2d 806 (Or. 1970).

In a strict liability or warranty action, the main issue is the fitness of the product, and the manufacturer's due care is not a defense. Plaintiff need not prove negligence.

STLCOPCB4102573

As stated in the Restatement, a manufacturer who sells a product in a defective condition unreasonably dangerous to the consumer or his property is subject to liability for harm to the consumer or his property if: 1) the manufacturer is engaged in the business of selling the product; and 2) the product reaches the consumer without substantial change in its condition. Restatement (Second) of Torts (1965) §402A. However, when the allged defect in the product is inadequate labelling, the negligence issue reappears. If the manufacturer exercised due care in writing the warning label, and in testing for harmful effects, it has a possible defense to a strict liability action. Anderson v. Klix Chemical Co., supra. The scope of the duty to test and warn has already been considered.

In order for the silo manufacturer to succeed against Monsanto, it must show that the PCB was inadequately labelled and that Monsanto failed to apply "reasonable developed human skill and foresight," which would have revealed the potential effects of PCB. Restatement, §402A, Comment J. Assuming no actual or constructive knowledge or suspicion of harm on Monsanto's part, and assuming adequate testing, it appears that Monsanto could avoid liability to the silo manufacturer for damages occurring prior to 1969.

B. After 1969

If "reasonable developed human skill and foresight" would have concluded, from evidence of harm to pelicans and shellfish, that similar harm might follow from PCB in silo interiors, then liability could be imposed on Monsanto for post-1969 damage. Again, the question of foreseeability arises but could apparently be reasonably resolved by finding the harm foreseeable. The possibility of liability to the silo manufacturer for the cost of replacing the silo interiors seems significant.

IV. Liability to the Dairy Herd Owner

A. Prior to 1969

The dairy herd owner can proceed against Monsanto only on a strict liability or negligence theory, since privity is lacking between them. It seems unlikely that the dairy herd owner could establish that the PCB was "defective" prior to 1969, since Monsanto neither knew nor suspected its effects. Provided Monsanto's testing satisfies the Restatement standard, the risk of liability here seems slight.

STLCOPCB4102574

B. After 1969

Although the 1969 evidence might well have imposed upon Monsanto a duty to warn the silo manufacturer, the evidence was not so compelling nor the harm so severe as to require notice to every dairy herd farmer. Notice to the ultimate consumer by the manufacturer is usually necessary where physical harm to the consumer may follow. However, where property damage alone is possible, and where the foreseeability issue is not easy to resolve, it appears that notice to the silo manufacturer alone is appropriate. The risk of liability to the dairy herd owner for post-1969 damage appears significantly less than that to the silo manufacturer.

Holly N. Groat

HNG:ss

STLCOPCB4102575