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Mr. C. T. Derry
Rutherford

Product Liability
Private Labels

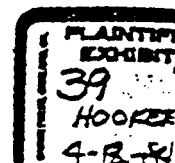
S. Weiss
Rochelle Park

October 8, 1976

Relative to your letter of September 9, 1976 addressed to Mr. J. C. Schmitt which we discussed during a telephone conversation on September 13, 1976, we met with insurance company representatives to discuss the method of handling the product liability exposure connected with customers' private labels and we were advised as follows:

1. If a customer's private label, designed by the customer, is applied to the product by Flintkote, any and all liability that is incurred as a result of label deficiencies will be Flintkote's.
2. If Flintkote's product is shipped to the customer and the customer applies his private label, which he has designed, Flintkote will still be liable but at a lesser degree than in #1 above. Because Flintkote is introducing the product into the stream of commerce, it is Flintkote's responsibility to apply all necessary warnings and cautions even though the customer may re-label the container at a later date. If we apply the private label at the time it is shipped from the plant, we would not have a defense for actions taken against us for inadequate labeling.
3. If Flintkote provides customers with product data sheets and if the customer indemnifies and holds Flintkote harmless for liabilities arising out of inadequate private label content and design, it is still not certain that the courts would absolve Flintkote from any liability. It would be very difficult for us to defend ourselves if it is shown that we knowingly applied a label which was deficient.

Upon further discussion with the insurance company, we arrived at three optional procedures for protecting Flintkote's interests in the use of private labels. They are as follows:



C. T. Derry

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1. Flintkote apply to containers the required warnings, precautions, instructions, etc. separately and in addition to a label furnished by the customer.
2. Flintkote provide the complete label leaving a blank section for the customer to have his name imprinted.
3. Flintkote provide a model label and require the customer to duplicate without deviation the same information on any private label.

It is suggested that you consider the above options as solutions to the private label problem.

As an example of what can occur through an over-^{sight} in labeling or advertising, we are enclosing a photo-static copy of an article entitled "Labels & Advertisements That Lead To Liability". You may wish to circulate this publication to concerned individuals.

SW:rv
Enc.

cc: Mr. J. C. Schmitt	- Rochelle Park w/e
Mr. J. C. Earkness	- Rutherford w/e
Mr. W. H. Mortenson	- Rutherford w/e
Mr. J. J. Moran	- Rutherford w/e
Mr. A. R. Hooker, Jr.	- Rutherford w/e
Mr. R. F. Stepanok	- Rochelle Park w/e
Mr. T. R. Parke, Jr.	- Stanford w/e

1960

LABELS AND ADVERTISEMENTS THAT LEAD TO LIABILITY

By

J. ARTHUR MILLER

Chicago, Illinois

Labels and advertising have played a substantial part in the rapidly expanding and changing law with respect to product liability. Possibility of liability predicated on labels is dependent on many factors; plaintiff's theory of the case, the particular jurisdiction involved and:

1. The product involved, whether inherently dangerous or not.
2. Statutory violation.
3. Breach of warranty, express or implied.
 - A. Based on Sales Act, or Uniform Commercial Code or.
 - B. Implied warranty imposed by law.
4. Strict liability intent where the product is defective.
5. Strict liability where no defect exists but product contains ingredient which may be harmful to a substantial number of users and no warning given.
6. Inadequacy of warning.
 - A. What is an adequate label?
 - B. What is the inadequacy?
 1. Is it with respect to the product?
 2. Is it in the instructions given?
 3. Is it in the failure to properly warn as to improper use?
 4. Is it the insufficiency of the warning where the product is inherently dangerous and inevitability of use by illiterates?
 5. Is it contradictory, thereby putting the user into a false sense of security?

Misbranding of products resulted in the enactment of food, drug and cosmetics acts (21 U.S.C.A.). Dangerous substances brought about statutory enactments with respect to insecticides, poisons, explosives, inflammable substances, to name a few.

A label on a particular drug may be good today but not tomorrow, as a manufacturer is under a continuing obligation to make known the results of his research. If research develops side effects, delay in promptly reporting and adding a cautionary warning will no doubt result in liability to one injured by use of product involved. In May of this year, for example, the Department of Food and Drugs ruled that drugs containing belladonna, sold over the counter and not by prescription, must add a warning to label, effective July 1, 1959, that use may be harmful to those suffering from glaucoma. This requirement necessarily requires the manufacturer to trace the sale of its products and have added an additional label containing the warning, or run the risk of liability because of failure to do so.

It is obvious that violation of any statutory requirement as to labeling will result in liability if injury proximately results therefrom.

The cases selected deal with common law liability, which refers to the

made in some of the decisions in the Sales Act or commercial code, such reference was in support of the common law duty of the jurisdiction involved.

The same is true with any statutory enactment. Reference to such by the court is to point out that the standard set thereby is a minimum requirement of care, and does not establish the common law duty of care of the jurisdiction involved.

It might also be well to point out that the selected cases, excluding one, were selected in conformance with that subject. They stand for the law therein expressed as to that jurisdiction only, as a directly opposite holding might be reached in another jurisdiction. It is likewise true that a jury in the same jurisdiction might reach a different result on the factual issues involved.

The danger of these holdings, because they express the opinions of a court of review, is the possibility and on some issues the probability, that courts of other jurisdictions will adopt their reasoning.

Advisory of the label was established in the case of *Kormpfe v. Loh and Fink Product Corporation*, 24 N.Y.S. 2d 80 (1971), involving Etopot Spray On, a disinfectant prepared and sold for the purpose of preventing bath prostration and sores.

The label stated: "Easy to use—a quick sprayer, it sprays. Stops under-sore sores. Cures prostration. Safe for normal skin. Harmless to clothes."

It also contained statement "Contains aluminum sulphate." The plaintiff, a nineteen year old girl, applied the spray and within a short time, developed itching; dermatitis developed and spread with burning and blistering in addition to the itching.

The testimony indicated that this was her first reaction to this or any other product, that practically all disinfectants in the market contain aluminum sulphate. Plaintiff's medical testimony showed that reaction was due to the aluminum sulphate, but considered safe for normal skin.

Sales of the product totaled \$20,000 at time of plaintiff's lawsuit and but four complaints. The jury found for the plaintiff which was affirmed by the Appellate Court. The Supreme Court, Appellate Division, however, reversed the Appellate Court and Trial Court and entered judgment for the defendant.

The case is cited for its holding that:

1. Notice that product contained a particular sulphate was adequate to warn any and all persons who knew that they had an allergy to such sulphate.
2. Specific words of warning would be meaningless to plaintiff and those like her who did not know they were allergic to the ingredient and the defendant should not be held negligent in failing to give a warning which would have served no purpose.
3. The plaintiff failed to prove by credible evidence that the product was not safe for a normal skin and likewise for failure to prove that she was one of a substantial number or appreciable number of an identifiable class of persons who were allergic to the defendant's products.

Plaintiff's complaint alleged negligence in the inadequacy of warning on label.

Defendant successfully established that allergy of plaintiff was the cause of reaction; this case accordingly can be distinguished from cases of express warranty, wherein proof of allergy was not permitted. *Spiegel vs. Saks, infra*.

Use of the word "Safe" on label and advertisements proved unsafe to manufacturer in the case of *Spiegel v. Saks 34th Street and National Toilet Company*, 13 Misc. (2d) 1067, 232 N.Y. 2d 572 (1969).

Plaintiff's evidence established that after reading an advertisement in October of 1960, with respect to Ultra-Nadomils, published by defendant Saks, where she purchased the cream, it was delivered with legend which stated among other things, "Ultra-Nadomils with Dinitramin is the new hospital tested deodorant, the new way to take age spots on hands, facial blemishes, freckles to hidden dark skin. Over 200,000 applications under doctor's supervision prove new Ultra-Nadomils non-irritating cream safe." (Dinitramin, a compound of the anesthetic type.)

The label itself on the jar contains the following: "Ultra-Nadomils with Dinitramin. Is hospital tested and proven. It's new. It's safe."

The newspaper advertising which induced the sale, contained among other statements the following: "Ultra-Nadomils is clinically proven and absolutely safe! Over 200,000 hospital controlled doctor supervised applications found not one single case of skin irritation from its use."

The plaintiff used it but twice. The first was in the afternoon when she applied some of the cream to certain brown spots which had been on the back of her hands. That night before retiring about midnight, she made another application. During the night, she awoke due to a severe burning sensation in areas where the cream had been applied, hands were puffed up, blistered, red and inflamed.

The inflammation progressed from above the knuckles to above the wrists and took two months to clear but hands remained sensitive. That she never before or since the incident suffered from the condition, which a doctor testified could only come about from the application of the medicine applied to definite areas and that based upon the history given, could have to come from the contents of the cream used and that such opinion was based upon a reasonable degree of medical certainty.

The defendant put on its pail. A verdict was rendered for the plaintiff and an appeal followed based upon the contention that the plaintiff had failed to prove a prima facie case, in negligence, implied or express warranty on which the case was submitted.

The reviewing court affirmed the verdict on the basis that there was sufficient evidence that the wording in the advertisement and label, constituted an express warranty, that she used such product upon such expressed representation that it was "safe" and it was a use of this product alone that was responsible for the injury and a breach of the express warranty that the product was safe. The court further stated that the affirmation in the advertisement and on the cation and on the jar itself, constituted an express warranty within the definition of Section 91 of the Personal Property Law of New York.

The court, in support of its opinion, cited many cases, including *Fitch v. Liggett and Myers Tobacco Company*, 3rd Cir. 293 F (2d) 292 (1961) (the well known case involving Chesterfields) and 70 Ala (2d) 410.

This case is cited for its holdings:

1. The representation that product was safe constituted an express warranty.
2. Those cases involving implied warranties which exculpate manufacturers from liability, resulting from unusual susceptibility or allergic reaction of a consumer are not applicable; that the warranty in effect stated that it would be safe in that there would be no allergic reaction.

This decision illustrates the danger of the use of the word "safe." So far as the record indicates, defendant had no knowledge that any of the liposolvents therein contained might be proved injurious to a small percentage of users who might be allergic thereto. The well established principle of law of no duty to warn where there is no knowledge of danger, was of no avail in this particular case, because of the warranty of its being completely safe.

EXPLICITLY DANGEROUS PRODUCTS AND INADEQUATE WARNINGS

Inadequate warnings have been productive of much litigation. The vast majority of such cases present two questions, as to the negligence of the manufacturer, and the contributory negligence of the plaintiff. A much cited case is that of *Tampa Drug Company v. Wall*, Fla. Sup. (1975) 101 So. (2d) 201, 73 Ala. (2d) 707.

Decendant, requested an employee to purchase a gallon of carbon tetrachloride who did so from the Tampa Drug Company, a self-advertised manufacturing chemist.

Having been recommended as an effective floor cleaning fluid, plaintiff with the assistance of one Morgan, started to clean the floors of his home in the morning. Using an open pan, they poured the liquid two inches in depth and then on hands and knees dipped cloth in the fluid and spread over the floor. Both noticed a strong odor from the liquid. Plaintiff worked but an hour when he complained of headache and dizziness and discontinued, but Morgan continued the work that day and part of the following day to complete the job and suffered no injury. In the afternoon, however, plaintiff became ill and died thirteen days later. There was medical testimony that death was due to carbon tetrachloride poisoning.

Testimony indicated, that plaintiff had read the label before he undertook to use and had been warned that he had to be careful when using; that while working, three windows and a door leading to the room where he was working were all open.

His widow filed suit, alleging in Count 1 that the label was inadequate to warn of the dangerous characteristics of the product and the fatal effects which might follow the use thereof.

Other count was based upon the alleged inadequacy of the label to warn the public of the characteristics and fatal potentialities involved in

the use of the liquid.

The label read as follows:

Carbon tetrachloride—technical technical means almost one hundred per cent pure carbon tetrachloride. Useful as fire extinguisher, cleaning clothing, oil, stains, waxes, greases, etc. Volatile solvent—vapour harmful. Use with adequate ventilation. Avoid prolonged or repeated breath of vapour. Avoid prolonged or repeated contact with skin. Do not take internally. Tampa Drug Company, Manufacturing Chemists, Tampa, Florida.

The case, from the pleadings, to the conclusion, was hotly contested. The trial judge struck defenses grounded on state and Federal Statutes. The jury returned a verdict in the sum of \$160,000.

Plaintiff, in the course of the trial, produced numerous labels by nationally known manufacturing chemists which it was contended were more complete and thoroughly effective in warning of the dangers inherent in carbon tetrachloride as well as the potential harm which might ensue on use of the liquid.

Defendant in turn, placed in evidence various labels used by other suppliers to show the adequacy of the label involved. Included in the labels of the defendants, was one approved by the Secretary of Agriculture, under the Federal Insecticide, Fungicide and Rodenticide Act, in order to show that he had met the standard of care prescribed by such Act. This was admitted in evidence on the basis of being an adequate label consistent with defendant's contention, although the defense of the act itself had been stricken.

The following court held:

1. The product involved was an inherently dangerous commodity and that the measure of duty of such type product is the reasonable foreseeability of injury that might result from the use of the commodity.
2. There could not hold as a matter of law, that the warning matters on the label met the requirements of adequacy and particularly so because of the differences in the various labels introduced into evidence. [The reported facts did not disclose such differences but one must infer, that they contained language warning user of possible danger to life if directions not followed.]
3. Not error, in striking the defense of the Federal Insecticide Act, pointing out, that in any event, they were not controlling as an absolute statutory standard of care, as such act only provided minimum standards, which did not meet the common law standards, in view of the product and facts involved.
4. That implicit in the duty to warn is the duty to warn with a degree of intensity that would cause a reasonable man to exercise for his own safety, the caution commensurate with the potential danger. It is the failure to exercise such a degree of caution after proper warning that constitutes contributory negligence and, that in this particular case, such was a question of fact for the jury and could not be disturbed on appeal.

The judgment accordingly was affirmed.

It is interesting to note, that the plaintiff was only exposed to the product for approximately an hour while Morgan continued the balance of the day, and part of the following day and suffered no injury. This leads one to wonder as to whether or not the vapor mixed with some other chemical in the plaintiff's lung, not contained in Morgan's, resulting in the fatality.

The case is cited to emphasize:

1. A manufacturer cannot rely upon compliance with requirements of a Federal act, as such is a minimum requirement and that the common law standards will control.
2. That a manufacturer of an inherently dangerous product must weigh his warnings, in this case, five, as against warning labels of competitors whose warnings might be more numerous perhaps, or the wording thereof more emphatic as to danger.

Molz v. Atlantic Refining Company, 332, Pa. 51, 41 Atlantic (2d) 550, also involved the question of inadequacy of warning the same product, but wherein the calcium tetrahydride was only sixty-five per cent and not one-hundred per cent. (Incidentally, this case was cited and relied upon, in *Tompas vs. Wall, supra*.)

The name of the product "Safety-Kleen" was on each of the four sides of the can while in smaller letters, on but two sides of the can was the word "Caution." Immediately thereunder in one-eighth inch letters, "Do not inhale fumes; use only in well ventilated places."

The jury found in favor of the plaintiff and on review, the court held:

1. The word safety was so conspicuously displayed on all four sides of this can of dangerous fluid as to make the word "Caution" and the admonition against inhaling fumes and as to use only in a well ventilated place seem of comparatively minor importance; that the defendant could have reasonably foreseen that the prominent words on four sides of the can "Safety-Kleen," would naturally fill the eyes of that fluid so called, into a false sense of security.
2. A jury issue being involved as to plaintiff's failure to heed the cautionary wording displayed on the can, judgment was affirmed.

It would appear therefore, that where the word "Safety" is used either in the name of the product or concerning its use, that the word "Caution," and the warning thereafter following, must be displayed on the label an equal number of times and in the same dimensions, where the product involved contains a dangerous substance, or a jury question will be involved as to the adequacy of the warning, and the negligence of the mfr. in failing to heed such warning.

Misreading of the plaintiff's labels, resulted in an adverse verdict in the recent case of *Hickman-Hall Chemical Company v. Silberman*, 310 Fed. (2d) 802 (1963-1st Circuit).

The action was brought against the manufacturer of an insecticide named "Parathion Dust" sold in bags bearing a label reading as follows:

Caution, may be fatal if swallowed, inhaled or absorbed through skin. Keep off clothing. Wash exposed body parts. Wear cotton rubber gloves, protective clothing and goggles. In case of contact, wash immediately with soap and water. Wear a mask on a phosgene type mask by the U. S. Department of Agriculture.

for Parathion protection. Keep all unprotected persons out of operating areas or vicinity where there may be danger of drift. Do not sit or stand and be protected until drifting has stopped and volatile residues have dissipated. Do not contaminate food and feedstuffs. 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.

The application for such label was approved by the U. S. Department of Agriculture pursuant to the Federal Insecticide Act, 7 U.S.C. Chapter 6, Section 173. The Department, however, required that the word "Warning" be substituted for the word "Caution."

The deceased workers were both Puerto Ricans, one could read no English whatsoever, and the reading ability of the other was limited. The intestates had often used various chemicals for spraying and dusting, including Parathion on several occasions, including four times the week of the occurrence.

The employer, knowing the dangerous character of Parathion, kept available for his employees gas masks, rubber raincoats and rubber boots. He also testified in lower court (as a party defendant) that he told plaintiff's intestates and other laborers that the chemicals used in spraying were dangerous and that if they did not wear protective clothing and masks and follow instructions, they were likely to die.

On August 11, 1964, he observed them at approximately 9:15 a.m. without protective clothing; however, they were then eating and resting. After a full day's work, they became sick and died within a few minutes after admission to the hospital. The evidence was adequate that the cause of death was due to use of defendant's product.

The plaintiff's theory was that the label should have had some markings, such as a skull and crossbones to warn the users. Defense contended that the label was adequate and also that the employer of the deceased warned them personally of the dangerous insecticide and that the death resulted when they used product without wearing any protective clothing.

A plaintiff's verdict was returned and the trial judge decreed a motion for a new trial.

Upon appeal, the reviewing court commented more than once that the trial judge was obviously favorable to the defendant. In his charge to the jury, he reminded them that plaintiff's counsel had suggested a skull and crossbones be included on the label; he then asked the jury if defendant should, for example, put a coffin on the label.

Two special interrogatories were submitted by the trial judge.

1. Was adequate warning of the dangerous nature of Parathion and instructions as to its use given?
2. Did the plaintiff's intestates fail to exercise due care of an inherently poisonous person under the circumstances?

The jury answered "no" as to both interrogatories. The reviewing court affirmed the judgment and held:

1. The jury could reasonably have believed that the defendant should have foreseen that its abominably dangerous product would be used, among others, by persons like plaintiff's intestates, who were farm laborers of limited reading ability.

2. The label, even if it had been in the precise form of the label approved by the Department of Agriculture, would not, because of its lack of a skull and crossbones or other comparable symbols or hieroglyphics be adequate warnings of its [Parathion's] dangerous condition.
3. The approval given to the label by the Government was merely for the shipment of the product in commerce and did not relieve the defendant of its duty of care as defined by the common law of Massachusetts.
4. Whether or not the decedent received adequate warning, and their contributory negligence, were jury questions. [Court pointing out that the jury could have disbelieved the employee, because he was a defendant at the time he testified and accordingly an interested party.]

It is an old cliché for defense counsel when an unanticipated plaintiff's verdict is returned (and that certainly was the case here) to vehemently exclaim, "A gross miscarriage of justice."

The writer submits, that it would be difficult to find a case representing an actual miscarriage of justice not only as to the adequacy of the label, but also as to the negligence of the plaintiff's being the sole cause of their death, than the above.

The label contained ten warnings, including directions if product contacted skin. In view of the deadliness of the product it should appear obvious that on the four prior occasions the decedents must have worn the protective clothing indicated or they would not have survived to the day of the incident.

It is submitted that the facts in this case create an inference that the decedents were allergic to soap and water resulting in their disregarding warnings of which they were fully aware.

The case stands for and well illustrates the lengths to which a reasonable court will go to support a jury finding where plaintiffs are illiterate.

Spurill v. Doyle-Mulvey Inc., U.S. Dist. Ct. Va. 208 F. 2d 79 (1952) involved the death of a fourteen month infant, who ingested a small quantity of defendant's "Old English Red Oil Furniture Polish."

Product was a bright cherry red color contained in clear glass bottle with a red metal cap.

The label passed completely around bottle. Front part described the product in large letters and below that, "An all purpose polish for furniture, woodwork, planes, floors." Reverse side of the label, with a white background in red letters capitalized was, "CAUTION. COMBUSTIBLE. INFLAMMABLE."

Immediately below, also in red letters, one-sixteenth inch high, appeared, "Do not use near fire or flame."

Then several lines down, in brown ink, were directions. In the eighth line in letters one-sixteenth of an inch high, also in brown ink, appeared the word, "Safety note." Following in letters one-thirty-second inch in height "Caution: when petroleum distillates May be harmful if swallowed especially by children."

The petroleum distillate was a toxic substance, one teaspoonful of which

would kill a small child. The medical testimony was uncontested that the child died of hydro carbon pneumonia resulting from the defendant's polish.

The mother's testimony was that after purchase, she started to use the same day and while in the child's room left same for four or five minutes. She placed the bottle on the cover cloth of a bureau next to the child's crib. During her absence, the child apparently pulled the cloth containing the polish and other articles into the crib, removed the cap and consumed a small portion of the polish.

She further testified that she had read the statement with reference to being combustible but did not read the directions because she knew how to use furniture polish.

Introduced into evidence were answers by defendant to plaintiff's interrogatories which established knowledge of at least thirty-two cases of chemical pneumonia since 1931 resulting from the ingestion of their product of which resulted in death.

The jury returned a verdict for all surviving heirs except the mother. The sustaining court affirmed and held:

1. Under the Virginia law the test of whether a product is inherently dangerous stems from the product itself and not from any defect in it, and that the product involved was inherently dangerous.
2. Question of the sufficiency of the warning of danger of an inherently dangerous product to user is a jury question.
3. That the label involved, and particularly the "safety note warning may be harmful if swallowed especially by children," was insufficient.
4. Manufacturer of product inherently dangerous, was required to anticipate reasonably foreseeable risks of use of such product in the home.
5. The question of the mother's negligence as an intervening proximate cause or concurrent negligence, was likewise a question of fact for the jury.

The court rationalized that a reasonable jury could conclude considering the environment of the mother in home, that due care and caution would require that the poisonous character of the product be given greater prominence on the label, at least equal to the warning of danger arising from its combustible nature.

The court further stated, considering the admission of the mother that she had never read that portion of the label, that had the warning been in a form calculated to attract the user's attention, as to position, size and coloring of lettering, and had the words used therein been reasonably calculated to convey conception of the true nature of the danger, that the mother might not have left the product in the presence of her child. The court further stated that the mother might not have purchased the product at all if the warning had properly been conveyed to her, a fact of which the manufacturer appeared to be aware, and that the failure of its warning of the greater danger within its warning of the lesser, by highlighting its merchantable interests at the expense of the duty of due care it owes to the purchasing public.

The reviewing court was severely critical, not only of the manufacturer, but also of cases cited by defense as to a use other than for intended purposes and foreseeability. The case stands squarely for the holding that in any product designed for household use, the manufacturer thereof should foresee that a young child may get hold of the product and drink same.

AMENDMENTS

Tires have been very much in the public eye recently, and the advertisements of a manufacturer, resulted adversely, in the case of *Hannon v. Firestone Tire and Rubber Company*, 270 Fed. [2d] 251 [March, 1960].

Plaintiff, on July 29, 1953, purchased directly from Firestone's Detroit outlet, four new Firestone Supreme tubeless tires (then new to use). Installed in each tire was a rubber "safety diaphragm," described in its advertising literature as an "emergency tire that holds large volume of air in case of blowout" with a "safety valve in the diaphragm that closes instantly in case of a blowout." Literature further stated tires made to "fit present rims" and to "fit any standard rim" and would remain "airtight" and an "airtight seal" formed when mounted against rim. That Firestone Supremes were further described as "safe enough to control one or two tons" at "speeds up to 80 miles per hour," "safe enough to cling to road on dangerous curves" as having lining that "holds air longer than ordinary tubes" and having "greater road stability at any speed" that they hugged the highway and provide "greater corner power, more control, more safety."

The testimony established that Firestone employees encountered much difficulty in properly mounting and seating tires requiring brushing of the tires many times with a vegetable oil compound. The week following, vibration abnormal in steering wheel and upon examination Firestone found that the diaphragm in the left front tire was broken, requiring installation of a new one, and then the same difficulty was encountered in properly mounting and seating, and again requiring brushing of the with vegetable compound.

Two days later, plaintiff left Detroit and as he drove around a sharp curve, felt the back end of the car fall at the right as if from a blowout on a flat tire; felt as though he was riding on the left, car then veered to the left side and he then lost control and rolled over (apparently more than once, with resulting injuries).

Examination, following the accident, revealed that the two right side tires were not in contact with the rim, were deflated with vegetable compound running out of tires where pulled away from rim; however tires were not broken, but in typical open.

Hannon's theory was based upon:

1. The use of defendant's employees in mounting tires, and,
2. Breach of express and implied warranties.

Hannon stated that the effect of defendant's evidence to rely entirely on the breach of warranty theory, and abandoned his negligence theory.

Jury returned a verdict in plaintiff's favor. Six months later, the District Judge entered a N.O.V. for the defendant.

The trial judge reasoned in support of his finding that the plaintiff had attempted to prove his case by proof of misrepresentation of facts and misrepresentation, these acts constituting alleged negligence. That the only proof of breach of warranty was the negligent action of the defendant's employees in the naming and seating of the tires and because no negligence was charged (such theory having been abandoned), the proof of the negligent acts could not support claim of breach of warranty.

The Appellate Court rejected this reasoning based upon the plaintiff's testimony that he relied upon the truth of the advertisements (above quoted) and that he purchased the tires in reliance on the truth of the representations and the warranties proved to be untrue and his immediate harm resulted.

The Court quoted with approval, *Rogers v. Tont Home Permanent Company*, 167 Ohio St. 211, 117 N.E. (2d) 612-613 (1974), among others, together with Sec. 1979 of the Michigan Statutes annotated Psa. 40, 61, breach of warranty with respect to Uniform Sales Act).

It is submitted that plaintiff on repeated facts, made out a case of negligence in misquoting misreading and seating the tires and that if case had gone to jury on such count, a plaintiff's verdict would have resulted.

The foregoing court did not qualify the statements contained in warranties. The facts were not broken so it would appear that there was no breach. Several of the statements would appear to be puffing and opinion of comparison with other tires and not warranties.

It would appear that an express warranty arose in each instance where the word "Safety" appeared in statements made as to carbon qualities.

The case illustrates that where a manufacturer warrants the safety of a product, he becomes an insurer to the user thereof.

Express warranties, arising out of advertisements, as defined by the Supreme Court of Ohio, in the case of *Rogers v. Tont Home Permanent Company*, 167 Ohio 211, 117 N.E. (2d) 612 (1974), has been accepted and followed in a number of jurisdictions.

This case involved the purchase of a home permanent, alleged reliance advertisements of product, and the following of explicit directions as to use. Plaintiff, as a result of application, suffered a loss of hair to within one-half inch of scalp.

The Supreme Court concluded, that the pleading stated a cause of action, and overruled their prior decisions, and stated:

Under modern merchandising practices, where the manufacturers of a product in his advertising makes representations as to the quality and worth of his product aimed directly at the ultimate consumer and urges the latter to purchase the product from a retailer, and such ultimate consumer relies on his reliance on and payment for the inducements of the manufacturer and suffers harm in the use of such product by reason of defective ingredients therein, such ultimate consumer may maintain an action for damages immediately against the manufacturer on the basis of express warranty, and without showing that there is no direct contractual relationship between them.

This decision in effect, made the manufacturer an insurer, as the court

did not require knowledge on the part of the manufacturer before he sold the product, that the deleterious ingredients were contained therein, as pointed out by one further, who dissented to that portion of the opinion.

Connecticut adopted and followed *Rogers v. Tont* in 1961 in the case of *Hannon v. Dylmont*, 143 Conn. 710, 174 A2d. (2d) 291.

This case likewise was decided on the pleadings and involved severe burns sustained by the plaintiff, when the contents of a bottle of Lestoil, a household detergent, accidentally spilled on her.

Second Count of her Complaint was based upon extensive advertising via radio, television, newspaper and other advertising which implicitly warranted that it could be used safely for household and other cleaning tasks and also expressly warranted that it was the all-purpose detergent for all household cleaning and laundering. It also alleged sale by inducement via the advertisement, reliance thereon, that the product was not as warranted and that she was injured by reason of the breach of the express and implied warranties.

Defendants demurred on the sole ground of no privity of contract or any sale between them. (Plaintiff having purchased from retailer and who was a defendant in another count not herein involved.)

The court sustained the demurrer, judgment was rendered for the defendants from which the plaintiff appealed.

The reviewing court analyzed its prior decisions which were adverse to the plaintiff and which in effect stated that the implied warranty was in the nature of a contract of personal indemnity with the original purchaser and did not "run with the goods."

The court took recognition of the growth of supermarkets, display of goods therein with such alluring labels, made comments on the wide spread appeal to the ultimate consumer by radio, magazine, billboard or newspaper, and concluded, that the rule as expressed in *Rogers vs. Tont*, supra, correctly stated the law, in view of the changing methods of sales. The court accordingly set aside the judgment and remanded and defendant was required to answer.

This case is cited because of its holdings:

1. Where a manufacturer makes representation in his advertisements, or by the label on his products as an inducement to the ultimate purchaser, the manufacturer or producer should be held to strict accountability to any person who buys the product and relies on the representation and later suffers injury because the product fails to conform to them.
2. The rule, as announced, is an expansion of *Rogers v. Tont* as it is noted that the advertising only implicitly warranted that it could be used safely for household tasks and the express warranty was an all purpose detergent for all household cleaning and laundering.

Implied in the decision is foreseeability, that the defendant should foresee that in such use within a home, it was inevitable, that in some instances, the product would be used upon the user thereof and if there is any harmful and deleterious ingredient therein contained, ample warning should have been given.

The following year the Connecticut Court took up the case of *Huderman v. Warner-Lambert Pharmaceutical Company*, 27 Conn. Sup. 410, 151 A.2. (2d) 61 (1959).

This involved an alleged breach of warranty against a manufacturer of a home permanent preparation. The plaintiff alleged that in purchasing and using she relied upon representations and warranties made through various advertising media and that she was injured by reason of the falsity of those claims.

The primary defense having been held to rest in *Hamm v. Mifflint*, *supra*, defendant demurred because of failure to give notice of the claimed breach of warranties, based upon the Connecticut statutes, since replaced by the Uniform Sales Act.

The court held that the warranties sued upon, were not contractual between the parties and therefore not subject to the requirements of the Sales Act with respect to notice of breach.

This case is cited for its holdings, that an express warranty via advertisements is one that "runs with the goods," and that implied warranties are imposed by law, and that a contractual relationship is not required or needed.

The cases above cited deal with products which are not defective but do contain some defects which are hazardous, which might produce an irritation or discomfort to a normal person or user.

The only defense left, in those jurisdictions adopting such holdings, is that of productive cause.

Advertising may also lead to liability wherein products are not involved. The well known case of *Nelson v. Union Wire Rope Corporation*, 31 Ill. (2d) 62, 193 N.E. (2d) 767, is an example of a decision which caused difficulty in the insurance industry.

This case resulted in a judgment of \$1,369,000 when a hoist with nineteen workmen fell six stories in Jacksonville, Florida, resulting in death of seven and severe injuries to the remainder, two of the plaintiffs were employees of the general contractor and the others, employees of his sub-contractors.

The action was against Union Wire Rope Company, manufacturer of a cable that broke, Archer Iron Works, designer and manufacturer of the hoist and a safety device thereon which failed to halt the fall, and the general liability and Workmen's Compensation carrier of the general contractor.

The jury entered a not guilty as to all defendants other than the insurance carrier. On appeal, the Illinois Appellate Court reversed outright judgment against the carrier, and affirmed the not guilty findings as to the other defendants. Plaintiff was granted leave to appeal to the Supreme Court and several insurance groups to file a brief as *amicus curiae*.

The case was an involved one, but for our purpose, reference will be made primarily to the advertisements placed by the insurance carrier and the obligations resulting therefrom.

Plaintiff's theory of the case against the insurance carrier was that it had gratuitously undertaken to make safety inspections of the premises and equipment of the general contractor, had carelessly and negligently

performed said inspection as the proximate result of which the plaintiffs were injured and killed. Further allegations were made that they had carelessly and negligently failed to detect and report that the hoist safety mechanism was inadequate and defective; that the tower was improperly designed and unbalanced and did not have sufficient strength to permit the safety device to function; that the cable was in a worn condition; that the hoist was being used for the transportation of personnel in violation of a city ordinance and that a device on the hoist was of improper size in violation of a city ordinance.

The defendant in its answer, denied such allegations, denied probable or regular surveys of the equipment including the hoist, but admitted that they made intermittent and infrequent surveys and inspections of the premises.

The trial court admitted into evidence, copies of twenty-nine advertisements placed by the insurance carrier at various times in national or trade publications and were referred to in the record as the "Mr. Friendly" advertisements. In general, each of the twenty-nine advertisements was to the effect that "their safety engineers took an active part in the safety program of its insureds," and "saved lives, limbs and money," that insureds "have worked hand in hand with its safety engineers to build safety into every job."

The Supreme Court held that in light of defendant's answers which denied that it had undertaken to make surveys or inspections and its repeated allegations that the "risks and inspection were solely for its own purposes of keeping informed and advised on the risk, that such evidence was inadmissible." In support thereof, and with citations, they held that a statement made by a party in his behalf which is inconsistent with his present position may be introduced in evidence against him; that advertisements, brochures, newspaper items, catalogs and the like are admissible and relevant to the subject matter of the suit where they contain statements of a party inconsistent with a claim or a position asserted by such party in the action.

The Supreme Court further stated that the advertisements, the work reports and testimony of the carrier's safety inspector, was sufficient to support jury findings as follows:

1. That the carrier undertook to render gratuitous safety inspections, which were planned, probable and directed to safety of project employees; that such undertaking imposed the duty to make such inspections with due care.
2. That such duty extended to such persons as insurer could reasonably have foreseen would be in danger as a result of its negligent performance and that such duty does not depend upon contract or privity of interest, but extends to remote and unknown persons.

One can only speculate as to how much a part the admission of the advertisements played in the ultimate result, in view of the testimony by the safety engineer in the work records. It may be safely assumed, however, that it played a substantial part in the ultimate result.

SUMMARY

Labels and advertisements are but one facet of the vast and expanding field of Products Liability. Many excellent textbooks have been written on the subject, scholarly analysis made in law reviews and many excellent papers delivered by members on this subject.

The last few years have witnessed what might be termed revolutionary changes of the law in some jurisdictions with the inevitable result that conflicts develop with resultant uncertainty as to determining what is the general rule. Formerly policy of constant requirement was the general rule and today may be classified as the minority rule.

The year 1955 has witnessed an unprecedented number of hearings by governmental bodies with almost daily automobile publicity. The automobile and tire industries have been the primary targets. Motorboating likewise has been much in the public eye. Safety and quality have been words and is the goal sought to be achieved. It is anticipated that there will be no letup of such hearings in the immediate future.

The impact upon the public, as to the charged lack of safety of automobiles has been reflected in technical sales.

The admission by the automobile owners of the surprising number of automobiles called back for correction because of a defect in some part thereof was a shock to all.

It is anticipated that the general public, who with each passing year become more claim conscious, will become so in increasing numbers and that litigation will materially increase.

It would appear with respect to advertisements that contain the word "Safety" that:

1. Each passing year will witness more jurisdictions adopting the Strict Liability intent theory, where the product is defective; and where the product is not defective, that warranty of safety to user thereof makes the manufacturer an insurer of safety.
2. Increased liberality of courts in construing statements made as warranties, rather than puffing of product or opinion comparison.
3. Greater liberality of courts in holding that question of fact is involved where statements made in advertising tend to disconcert cautionary warnings on labels, on theory that advertisements "lulled" the reader or listener into a false sense of security.

Perhaps worthy of mention is the opinion of a well known writer, that the caution on side of cigarette package, "Cigarette smoking may be hazardous to your health," was insufficient. He charged that televising of alcohol stars in his ball, football, hockey and the like, portraying their enjoyment as they inhaled the cigarette, induced teenagers to become addicts of the habit and that in effect, the appeal indicated the manufacturer's disbel in the warning. It will be surprising if such theory is not played in future litigation involving the product.

4. Additional statutory enactments relative to advertising, even states now having such.

Labels

Inherently dangerous products:

1. Enactment of more stringent requirements with respect thereto.
2. Increased liberality in holding that a question of fact is involved where positioning of warning, its size of lettering, the wording thereof, as contrasted with other statements therein contained, as to the adequacy of warning; thereby fixing that positioning and size of letters to be based on merit.
3. Cosmetics and allied products.

It would appear that where an advertisement is construed to be a warranty of safety, that liability for breach thereof will follow, if the breach proximately resulted in injury to the user, in an increasing number of jurisdictions. This is a harsh rule, but to avoid the application of such, the statement of safety must be qualified; such as "a normal skin," as in the case of *Kierulff v. Loh and Flak Product Corporation*, *supra*.

The changing law in Products Liability has been a boon to plaintiffs. It would appear that a marked increase of litigation will follow based on warranty arising out of advertisements and/or labels; a decrease of litigation under the Sales Act or Commercial Code, thereby eliminating the defense available theretofore.

Labels will be subjected to exacting scrutiny not only as to wording itself, but positioning and size, and liberality of use within the label, so as to develop a question of fact, as to inadequacy.

The cases cited illustrate the trend of the juris and courts to compensate the injured through use of a product by taxing the manufacturer thereof. After all, is it not however the same trend we are witnessing in the world and our nation in the changing economic and social life?