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A warning about your failure-to-warn case

The $10 million question: If you saw a warning, did you read and heed it?

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Catastrophic auto accidents often require examination of product liability theories to fully compensate your client. Less frequently, failure to warn theories may be advanced. Knowledge of the nuances in the case law and a focused strategy in pursuing this theory is essential.

Courts have long recognized that strict liability does not only involve those products which have been defectively manufactured or which are designed in such a manner as to make them unreasonably dangerous. It has been repeatedly acknowledged that for some products, an inherent danger is present and that no amount of care in the manufacture or design can prevent danger to the user. For those products, the manufacturer often owes a duty to warn the user. In the case of products liability, the defect lies on the failure to warn the purchaser and use of the risk and how that risk may be avoided.

Finding liability for failure to warn, in either negligence or strict liability, requires that the conduct of the defendant manufacturer be a substantial factor in causing the harm. In cases of failure to warn, requirements of proof of substantial factor in causing the harm have often been different than in other strict liability cases because of the difficulties that a plaintiff has in proving a negative hypothetical – that if she had received the warning, her conduct would have changed and she would not have been injured.

Many decisions have noted the difficulties in determining the answer to such an abstract question. Generally, a plaintiff can establish that she would have read and heeded a warning only through self-serving testimony. However, this testimony is rarely probative. And further, what happens when the plaintiff is deceased, making even self-serving testimony unavailable? These issues have led some jurisdictions to recognize a presumption, or an inference, that had an adequate warning been given, it would have been read and heeded, preventing the plaintiff's injury.

This presumption or inference has been in large part based on comment j to § 402(a) of the Restatement (Second) of Torts which states in part:

> In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use…Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is reasonably dangerous.

(Rest.2d Torts, § 402A, com. j, p. 353.)

The original intent behind comment j was to absolve manufacturers of liability when a non-defective product was sold with a sufficient warning. The California Supreme Court analyzed comment j in *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 65.

In *Johnson*, the plaintiff was a trained HVAC technician. He was injured after he was exposed to phosgene gases when he brazed an air conditioning line manufactured by defendant. Plaintiff's theory was that defendant knew that servicing the evaporator would create harmful phosgene gas, but defendant failed to provide plaintiff with an adequate warning. However, plaintiff testified that he had read the material data safety sheets, and had received instruction in the course of his training regarding phosgene gases. Additionally, it was established through both plaintiff's and defendant's experts that the danger created by exposing refrigerant to high heat and flame was well known within the community of HVAC technicians to which plaintiff belonged. The court noted that "generally the rule of strict liability imposed on all manufacturers for their failure to warn of known or reasonably scientifically knowable risks was one that we had previously required of drug manufacturers…when a sufficient warning is given, 'the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.'" (Rest.2d Torts, § 402A, com. j, p. 353.)" The Supreme Court essentially recognized that while generally manufacturers are strictly liable for failing to warn, that duty is discharged where a sufficient warning is made because it can be reasonably assumed the warning will be read.

It seems logical and fair that the inverse should be true as well – that because *sellers* may "reasonably assume" that users will read and heed warnings, a jury could infer that if a warning is placed on a product, the plaintiff would read and heed it. The motivation behind putting labels and warnings on products is not merely to protect manufacturers and sellers from liability, but to inform consumers about a product's hazards and faults of which they are unaware, so that

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they can refrain from using the product altogether or evade the danger by careful use. However, in California, the presumption created by comment j has not been extended to afford plaintiffs any protection.

Rebuttable presumption

As it currently stands, California does not recognize a rebuttable presumption in favor of the plaintiff in products liability failure-to-warn actions that had an adequate warning been provided by the manufacturer, it would have been read and heeded by the injured plaintiff. (*Huitt v. Southern California Gas Co.* (2010) 188 Cal.App.4th 1586, 1603.)

In *Huitt*, two plumbers brought an action against Southern California Gas Company for failure to warn, alleging that natural gas that had accumulated in a water heater closet lacked odorant, which is required by federal regulations. Evidence established that the odorant added is absorbed by new steel gas pipes, until the pipes become saturated. Plaintiffs alleged the gas company had a duty to warn them that new steel pipes absorb the odorant, and had they known this, they would not have attempted to light the pilot light in the confined space of a water heater closet. Defendants argued that there was no evidence of causation – there was no evidence that, had the gas company issued a warning, plaintiffs would have been aware of it.

Plaintiffs' argument, in essence, is that if they had known that the odorant in natural gas could fade, they would not have bled the natural gas pipe servicing the water heater for over two minutes. The court agreed with this contention, but noted "Causation, in this case, requires the plaintiffs to prove that if the Gas Company had issued a warning, they would have acquired the knowledge they lacked. A warning that never reached plaintiffs would not have changed the events that occurred on the day of the accident." The court stated that it was "incumbent upon plaintiffs to present evidence on this issue" and their failure to present such evidence precluded recovery. (*Id.* at 1598-1600.)

Further *in Motus v. Pfizer, Inc.*, (C.D. Cal. 2001) 196 F.Supp.2d 984, the Central District Court, relying on California law, held that it would not apply the rebuttable presumption that a warning would have been heeded if it were given in the context of prescription drugs and learned intermediary. The court held, as in *Huitt*, that the plaintiff was required to prove, with affirmative evidence, that the failure to warn was a substantial factor in causing plaintiff's injuries. In *Motus*, plaintiff's widow brought a products liability claim against Pfizer after her decedent husband committed suicide six days after taking Zoloft. Plaintiff alleged that Pfizer failed to adequately warn of the increased risk of suicide within the first few weeks of taking the drug. After determining that Mr. Motus was moderately depressed, his physician, Dr. Trostler, gave Mr. Motus a sample of Zoloft. The sample did not have any warnings on it, but the physician testified that he believed that the box that the samples came in probably had a warning insert in the package. The physician did not warn the decedent that Zoloft could create suicidal thoughts. Six days later, the decedent committed suicide. (*Motus*, *supra,* 196 F.Supp.2d 984.)

During the physician's deposition, he was asked if he had been told that Zoloft could cause an increased risk of suicide during the first few weeks of treatment, if he would have passed that information along to his patients. The physician stated that he would have. The physician testified that he was never told by any Zoloft representatives that Zoloft could cause increased thoughts of suicide. The physician admitted that he prescribed drugs without having previously reviewed the package insert, and that he first reviewed the Zoloft package insert after the decedent committed suicide. (*Ibid.*) The *Motus* court stated that "what is absent from Dr. Trostler's deposition may be as significant for purposes of this motion as what he did say. Plaintiff never asked Dr. Trostler whether he would have changed his decision to prescribe Zoloft to Mr. Motus if Pfizer had provided a "specified warning about the risk of suicide associated with ingestion of the drug. Plaintiff also never asked Dr. Trostler whether the warning she thinks was required would have affected what Dr. Trostler said to Mr. Motus at the time he prescribed him Zoloft. (*lbid.*)

The court noted:

> Plaintiff's lawyer did ask Dr. Trostler: 'If you had been told that Zoloft can cause an increased risk in suicide during the first few weeks of drug treatment, is that the kind of information you would pass on to your patients?' Dr. Trostler responded, 'Yes.' Plaintiff argues that this response creates a genuine issue as to whether Dr.Trostler would have changed his behavior had Pfizer provided adequate warnings. The Court does not agree. Given that this case is about the sufficiency of the warnings accompanying Zoloft, the appropriate question would have been: 'lf Zoloft's package insert had contained a warning that Zoloft can cause an increased risk in suicide during the first few weeks of drug treatment, would you have prescribed Zoloft to Mr. Motus?' But Plaintiff's lawyer did not ask this question, and at the hearing, in response to the Court's inquiry why not, he displayed commendable candor in acknowledging that he, and probably defense counsel as well, were afraid of how Dr.Trostler might respond. The testimony Dr. Trostler did give does not establish that if that warning had been provided, he would not have prescribed Zoloft or would have told Mr. Motus something other than what he did say.

(*Motus*, *supra*, citations omitted, at p. 997)

Based on the facts presented, the *Motus* court found that in drawing all inferences in plaintiff's favor, there was not enough evidence presented to establish causation under a failure to warn theory. (*Ibid.*)

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How a plaintiff proves failure to warn

There are clearly unique problems inherent in plaintiffs' attempts to establish a connection between an alleged warning defect and legal cause of injury.

Generally, plaintiffs are required to provide "ex post facto" testimony. Essentially, the plaintiff has to establish not only that she would have read, understood and remembered the warning, but also that she would have altered her conduct to avoid the injury. In other words, a plaintiff is required to offer competent evidence that answers the question: What difference would a warning have made in this case?

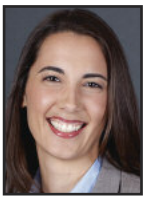
If a plaintiff provides such self-serving testimony as to the heeding of warnings, the defendant is free to introduce various evidence of plaintiff's character for truthfulness or untruthfulness. Defense counsel can also introduce a potentially far-flung set of personality traits in attacking a plaintiff's subjective testimony.

All such testimony blurs the more appropriate focus on safety of a manufacturer's product, the adequacy of a given warning, and flies in the face of the intent and public policy goals of products liability law.

The only real way to further the policy goals of fostering greater product safety and enabling victims of unsafe commercial products to obtain fair redress is for California courts to recognize the heeding presumption.

The rationale that has been advanced in favor of removing the burden of proof of causation is that the presumption provides an incentive for manufacturers to provide product warnings. A second rationale is grounded in fairness. It is difficult, if not impossible, for a plaintiff to prove what she might have done had the facts been different. This concept is strikingly obvious in the case of a deceased plaintiff. Without a heeding presumption, or at least inference, how can a deceased plaintiff prove what she would have done?

Until the current law changes, it is important to remember to ask the question: "Had a warning been placed, would you have read and heeded it?"


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