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"Fair" warning: How to traverse a products-liability pitfall

A case of failure-to-warn: Corbo v. Taylor-Dunn Manufacturing Company

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[***Editor's note: The case discussed was tried by The Veen Firm.***]

Can a product manufacturer avoid responsibility for injuries or deaths caused by the absence of an adequate warning unless the victim testifies that he would have heeded a hypothetical warning if one had been provided and if he had known that he would be injured by the product?

Corbo v. Taylor-Dunn Manufacturing Company

This question arises from a 2011 jury verdict that was taken away from the plaintiff by the trial court's grant of a JNOV. The case is currently on appeal.

Plaintiff Christopher Corbo was at his place of employment. A coworker driving a flatbed truck designed and manufactured by defendant, Taylor-Dunn Manufacturing Company, called out to Corbo and drove to where Corbo was working. Corbo walked over to the truck. It was parked. There was no indication to Corbo that its electric motor was operating; the motor was virtually silent and there was no sign of movement, not even a vibration. Nor was there any warning, either audible or visual, that a pedestrian such as Corbo should not stand near the truck. Without any warning, the truck suddenly lurched forward and crushed Corbo against a stairway. He suffered debilitating and permanent injuries.

The case proceeded to trial against the manufacturer of the truck, Taylor-Dunn on three different failure-to-warn theories. A jury returned a verdict in Corbo's favor, finding that Taylor-Dunn's truck lacked any warning that would have alerted Corbo or the truck's occupants that the parked truck could suddenly lurch forward into a pedestrian.

The trial court granted Taylor-Dunn's motion for judgment notwithstanding the verdict on the ground that Corbo did not affirmatively testify that he would have heeded a warning if one had been given. In other words, the trial court agreed with Taylor-Dunn that plaintiff did not prove a causal link between the failure-to-warn and the conduct that caused Corbo's injuries. Here is what the trial judge ruled:

> Proof that warnings were not provided, and that some of the individuals were not aware of the risks, does not constitute substantial evidence that any of those individuals would have read the warning and acted in a manner that would have avoided the accident . . . [N]one of the individuals involved in the accident testified that any particular warning would have affected his behavior.

(Order Granting JNOV)

Causation in failure-to-warn cases?

Causation in other types of products' cases is typically a question of science. For example, did a defect in a gasoline tank cause it to explode? In failure-to-warn cases, though, the question is not one that can be answered by physical science. Rather, it is one of psychology. What would the plaintiff have done in the hypothetical situation if an adequate warning had been given? The answer is necessarily a prediction of what might have been.

> The number of variables that affect whether a particular plaintiff would or would not have read or heeded a warning is so substantial that it is sheer folly to predict whether in any given setting a warning or alternative warning would have been efficacious.

(Twerski & Cohen, Resolving the Dilemma of Nonjusticiable Causation in Failure-to-Warn Litigation, supra, 84 So. Cal. L.Rev. 125, 132.)

Compounding this problem is the fact that the jury does not know what the missing warning would have been. That is because the plaintiff is not required to show precisely what the warning should have been; he is required only to show that the warning was nonexistent or inadequate. Thus, a jury must doubly speculate: (1) What might the warning have been? (2) And would the plaintiff have heeded it?

Solution #1: Plaintiff testifies speculatively

One solution to the problem is to have the plaintiff testify to his subjective opinion, with the benefit of hindsight, that, if there had been a warning, he

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would not have subjected himself to the danger posed by the product.

Simple enough, but this proposal is problematic. As another court observed, a plaintiff's testimony that he would have heeded a warning is mere "magic words" that are no help to a jury:

> To make a sufficient evidentiary showing on this issue, there need not be uttered by plaintiff (or any other witnesses) certain 'magic words;' counsel is not required to ask the plaintiff explicitly whether he would have behaved differently if he had received a different warning, and the plaintiff need not testify precisely to this effect. Indeed, a jury could reasonably perceive such a formulaic exchange as weightless.

(*Tamraz v. BOC Group, Inc.* (N.D. Ohio 2008) 2008 U.S. Dist. LEXIS 54932, pp. *12-13 [applying California law].)

The proposal also creates a Catch-22 problem in that a products' defendant is likely to object to the plaintiff's hypothetical testimony if offered but complain if not given. (See, for example, *Arnold v. Ingersoll-Rand Co.* (Mo.Ct.App. 1995) 908 S.W.2d 757 where the plaintiff attempted to testify "about what he would have done, had there been an adequate warning." (*Id.*, at p. 763.) The defendant objected to the testimony, and the trial court excluded it. The appellate court upheld the exclusion. "The testimony offered by Darryl [plaintiff] constituted his opinion of what he would have done in a hypothetical situation. Testimony about what a plaintiff might have done under a hypothetical state of facts is speculative and immaterial." (*Ibid.*))

Proponents of this solution will argue that self-serving testimony is not *per se* inadmissible. (See *Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 851.) They might also argue that a plaintiff may give opinion evidence about what he or she would have done in relevant hypothetical situations. (See e.g., *Love v. Wolf* (1969) 249 Cal.App.2d 822 [defendant physician testified he would not have given drugs if warned by manufacturer of dangers].) But until California provides clarity on this issue, the introduction of such evidence could undermine a plaintiff's jury verdict. Character evidence is inadmissible to prove conduct. (Evid. Code, § 1101, subd.(a); see generally, 2 Jefferson, Cal. Evidence Benchbook (Cont. Ed.Bar. 2013) § 35.8, p. 822 & 35.64, pp. 854.4-854.5.) And it's unlikely plaintiff could properly admit evidence of his or her habit of heeding all safety warnings because one cannot simply relabel a character trait as a habit. (*Bowen v. Ryan* (2008) 163 Cal.App.4th 916, 926.)

Another glaring problem with this proposal is that it would preclude recovery by the victims most egregiously injured by the absence of a warning: those who are killed or otherwise rendered unable to testify, e.g., those with catastrophic brain-injuries. A hypothetical example illustrates the problem: Two people are working on a machine. It is dangerous to clean the machine without first disengaging a particular gear. But the danger is not obvious and there is no warning of any kind. The two workers do not disengage the gear. One is killed; one is injured. Under the proposal that a plaintiff must give opinion evidence that she would have heeded the hypothetical warning, only the injured worker can recover; the killed worker's survivors cannot recover in a wrongful-death action because he cannot testify that he would have heeded a warning. That makes no sense. And it "is particularly offensive in that the plaintiff was killed in the accident and is in no position to testify." (Twerski & Cohen, supra, 84 So. Cal. L. Rev. at p. 141.)

Courts have identified a number of other problems with having the plaintiff testify to what he or she would have hypothetically done differently:

- Such testimony would be a virtual truism of no meaningful value to a jury.
- It would be inherently subjective and self-serving.
- It would be with the benefit of hindsight.
- It would be speculative and hypothetical, i.e., what the plaintiff would have done if there had been a warning.
- It would not be factual; rather it would be opinion testimony, i.e., the plaintiff's opinion that he would have heeded the warning.

Solution #2: Let the jury infer "what if"

A second possible solution is to simply allow the jury to infer what an objectively reasonable person would have done were an adequate warning given in the context of the facts and circumstances of the particular case.

In the analogous context of a physician's duty to provide adequate disclosure to his patient so that the patient can make informed consent to a medical procedure, the California Supreme Court addressed the many problems inherent in a plaintiff's subjective testimony as to what he hypothetically would have done. The court held that "[A]n objective test is preferable, i.e., what would a prudent person in the patient's position have decided if adequately informed of all significant risks?" (*Cobbs v. Grant*, *supra*, 8 Cal.3d 229, 245.) The Supreme Court has explained, "[T]he vast majority of jurisdictions that have considered the issue apply an objective standard." (*Moore v. Regents of University of California*, *supra*, 51 Cal.3d 120, 180, fn. 26.) This rule protects defendants as well as plaintiffs. (*Cobbs v. Grant*, *supra*, 8 Cal.3d at p. 245; *Warren v. Schecter*, *supra*, 57 Cal.App.4th 1189, 1206.)

The same logic applies to causation, in particular, the question of whether a reasonable person would have heeded an adequate warning. Again, "'[C]ausation in fact is ultimately a matter of probability and common sense.'" (*Raven H. v. Gamette*, *supra*, 157 Cal.App.4th 1017, 1029,

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quoting *Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 252.) A jury can sensibly infer that an objectively reasonable person would have heeded a warning that adequately informed him of the product's danger and the risk of injury and thus that the plaintiff would have heeded such a warning. Such inference is rooted in the human instinct for self-preservation, which the Supreme Court long ago recognized as relevant in determining whether a plaintiff was negligent. "In the absence of any direct proof, we are of the opinion that the jury are [sic] at liberty to infer ordinary care and diligence on the part of the plaintiff from all the circumstances of the case – his character and habits and the natural instinct of self-preservation." (*Gay v. Winter* (1867) 34 Cal. 153, 164.)

This solution addresses many problems posed by having a plaintiff answer hypothetical questions and is consistent with the reasonable person standard contained in other instructions that would be read to the jury.

Solution #3: The "heeding presumption"

A third proposal adopted by the majority of jurisdictions is a rebuttable inference or presumption that the plaintiff would have heeded a warning if one had been given. California has neither recognized nor rejected this presumption.

Faced with the numerous problems discussed above, "Scholars have advocated and many courts have adopted a 'heeding presumption' shifting either the burden of coming forward or the burden of proof to the manufacturer." (Twerski & Cohen, *supra*, 84 So. Cal. L. Rev. at p. 129; Henderson, Pearson & Kysar, The Torts Process, *supra*, p. 566; [noting the "substantial trend in favor of applying a 'heeding presumption'"]; Dobbs, The Law of Torts, *supra,* § 367, p. 1016 [Many courts are "willing to presume or infer that the plaintiff would have heeded a warning."]; Annot., *supra*, 38 A.L.R.5th at p. 701, § 3 [noting that a "plurality of decisions in those cases where the question has been presented" have adopted a heeding presumption]; Bohmholdt, The Heeding Presumption and Its Application: Distinguishing No Warning from Inadequate Warning (2003) 37 Loyola L.A. L.Rev. 461 [noting that "many states" have adopted a heeding presumption]; *Coffman v. Keene Corp.* (N.J. 1993) 628 A.2d 710, 719-720 ["[A] great many jurisdictions" have adopted a "heeding presumption," i.e., a rebuttable presumption or rebuttable inference, that the plaintiff would have heeded a warning if one had been provided.].)

As other courts have explained, the heeding presumption makes practical sense.

> An adequate warning is by definition one that in the ordinary course have come to the user's attention. The failure to give such a warning therefore permits the inference that it would have alerted the user to the danger and forestalled the accident.

(*Butz v. Werner* (N.D. 1989) 438 N.W.2d 509, 517, quoting *Wolfe v. Ford Motor Co.* (Mass. 1978) 376 N.E.2d 143, 146.)

The presumption (or inference) avoids the "necessity of making self-serving assertions that he [the plaintiff] would have followed adequate instructions." (*DaimlerChrysler Corp. v. Hillhouse*, (Tex.Civ.App. 2004) 161 S.W.3d 541, 550.) Indeed, as noted above, the plaintiff is faced with a "Catch 22." (*Moore v. Ford Motor Co.* (Mo. 2011) 332 S.W.3d 749, 762-763.) She "must prove what she would have done had a warning been given to prove causation, but evidence on this issue must be precluded as speculative." (*Ibid.*) The heeding presumption avoids this problem. (*Ibid.*) Likewise, the presumption "serves to eliminate conjecture about whether a given plaintiff would have heeded a hypothetical warning, and discourages determinations of causation that are based on extraneous, speculative considerations and unreliable or self-serving evidence." (*Facendo v. S.M.S. Concast, Inc.* (N.J.Super.Ct. 1996) 670 A.2d 44, citing *Coffman v. Keene Corp.* (N.J. 1993) 628 A.2d 710.)

The heeding presumption is also a doctrinal corollary to the Restatement (Second) of Torts section 402A, comment j:

> 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 it unreasonably dangerous.

(*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 73 (noting comment j with approval).)

If a manufacturer is permitted to presume that a warning will be heeded, logic and fairness dictate that the same presumption should apply to a plaintiff's case.

Conclusion

Until California decides to address the causation problem in failure-to-warn cases, you would do well to consider all three of the above solutions. Argue to the trial court that a heeding presumption should apply.

Argue to the court and jury that an objectively reasonable person would have followed an adequate warning if given. To the extent possible, elicit evidence from which the jury could infer that your particular plaintiff would have heeded the warning. Ask the plaintiff if she would have heeded a warning. What other evidence is there that the plaintiff attempted to use the product safely? Did the plaintiff read the instruction manual? Did the plaintiff have a habit of following safety rules and instructions? While such questions may draw objections, they will at least highlight the causation problem for the trial court. As they say, "Damned if you, damned if you don't."

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