1985

Products Liability and the Chemical Manufacturer: Limitations on the Duty to Warn

Richard O. Faulk

Available at: https://works.bepress.com/richard_faulk/8/
THE KANSAS JOURNAL OF LAW & PUBLIC POLICY

Volume VIII Number I Fall 1998

FEATUREING

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY
Is it a Reasonably Safe Product?

ANNUAL APPELLATE JUDGES SYMPOSIUM
Sponsored by the Law and Organizational Economics Center of the University of Kansas

June 26-27, 1998

FEATURING PRESENTATIONS AND PAPERS BY:

James A. Henderson, Jr. & Aaron D. Twerski
American Law Institute Reporters

AND

Sheila L. Birnbaum
Hildy Bowbeer
Richard L. Cupp, Jr.
Richard O. Faulk
Michael D. Green
Theodore S. Jankowski
M. Stuart Madden
Jerry R. Palmer
Harvey S. Perlman
Andrew F. Popper
Gary T. Schwartz
Victor E. Schwartz
Marshall S. Shapo
Larry S. Stewart
Jeffrey S. Thompson
Frank J. Vandall
Bill Wagner
William E. Westerbeke
Malcolm E. Wheeler
I am very pleased to be here and somewhat challenged to speak to so many judges. I was talking to my youngest son last night on the telephone and he was playing around on America Online and became very frustrated, believe it or not, that he kept getting a busy signal when he was still calling America Online. I was thinking this morning as I was coming over here that I was really going to be talking to "America En Banc." And like Josh, I hope the busy signal isn't coming through after all the complexities we've discussed today and yesterday.

My talk is a somewhat related to Jeff's presentation. The Restatement really is "common sense through common law." In a real sense, the Restatement appears to me to be a collection of common sense through experience. But as we all recognize from remarks by Professor Henderson's other scholars, it's also an attempt to step forward. Back in the days when the Second Restatement was drafted, I don't think there was a lot of precedent to cite for section 402A. I don't think fifty states had adopted it already by the time it was published -- but the drafters had a vision that was ultimately accepted because it made common sense at the time.

I represent typically oil and chemical manufacturers, those horrible companies that juries seem to love to hate, in warning cases where I must call on the juries to exercise their common sense. Regarding warnings, there is a principle stated in the section 388 of the Second Restatement of Torts that has been carried through to section 2(c) of the Third Restatement that is very relevant to the chemical industry. As is explained in comment (i) to section 2 of the Third Restatement, the drafters continued to recognize "bulk seller" and "sophisticated user" considerations as limitations on a manufacturer's duty to warn. Under these principles, a bulk seller of products, such as a major chemical manufacturer who sells products to a sophisticated employer, or a manufacturer who sells through a knowledgeable distributor, may not have a duty to warn the sophisticated employer's employees, or the customers of the knowledgeable distributor. Indeed, in most such instances, the manufacturer cannot feasibly warn such remote customers or employees.

These rules derive from section 388 of the Second Restatement of Torts, which was added as a section separately from section 402A. For years, section 388 has been the reference point for determining when a warning is necessary. There has been a dispute in some states regarding whether this section applied in products liability cases for strict liability, but the disputes have generally been resolved in favor of its applicability to product liability cases. Section 388 has also provoked debates regarding whether it states a duty owed by the manufacturer that a plaintiff must prove or whether it is an affirmative defense that the manufacturer must prove. Since section 388's requirements

Richard O. Faulk is a partner for Gardere, Wynne, Sewell & Riggs, L.L.P. in Houston, Texas.
set forth specific prerequisites to liability, the better rule is one that recognizes that the section defines a legal duty owed to the plaintiff, as opposed to a defense that explains why a warning was not provided.\(^8\)

Let’s look at section 388, which provides:

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.\(^9\)

If you’ll take a look at it, you’ll see that liability under section 388 has three essential elements. The most important for chemical products litigation is the one that I’ve italicized. Essentially, section 388 says that a supplier must warn only if he has reason to believe that those for whom the chattel is supplied are unaware of its dangerous condition.\(^10\) In other words, if the seller has no reason to believe that the persons to whom he is supplying products are ignorant of the hazard, the seller doesn’t have a duty to warn.\(^11\) I’ve heard some discussion through the day as to whether this is an issue of law or whether this is an issue of fact. And I’ll tell you that depending upon the facts of the case, just like any other case, a record can be built so that it can be an issue of law or can be an issue of fact.

Let’s look at a couple of examples. Let’s say, for example, that Shell and Exxon sell benzene in separate shipments to Arco across the docks at Arco’s refinery. Let’s say that Arco is not only a manufacturer of benzene in its own right, who is charged with knowledge of its hazards, but Arco also has a program to protect its employees, to instruct its employees, and to make sure its employees know the hazards associated with benzene. Applying section 388, neither Shell nor Exxon has any reason to believe that Arco or Arco’s employees are ignorant of this hazard. In fact, Arco is charged as a matter of law under OSHA for maintaining a safe workplace,\(^12\) and Arco is also charged under the Hazard Communications Rules for training their employees who are potentially exposed to benzene.\(^13\) Under these circumstances, there is no duty to warn because the sellers are entitled to rely upon a sophisticated employer to warn the employees. That’s especially true because you can’t put a label on a molecule of benzene. How can these sellers feasibly communicate with Arco’s employees? Can the sellers communicate with employees with respect to a product that they cannot label? These feasibility problems have led many courts to follow section 388 by holding that no duty to warn arises under these circumstances.\(^14\)

The second example is even more attenuated, and it is also a common situation that you see in the cases. Let’s say Shell and Exxon sell a generic product to a distributor. This happens all the time. The distributor takes the product in, puts it in a common tank, blends it with
more product from Ashland, more product from Chevon and then they barrel it out. The distributor puts its own label on the container, writes its own warnings for the product, and then sells the repackaged product to a customer down the line. How, under these circumstances, are the manufacturers going to get in touch with this customer? How can they possibly do anything more than ensure that this distributor is aware of the hazards associated with the product? Under some circumstances, it may be an issue of fact regarding whether this distributor is capable of communicating the hazard downstream. But whether it’s an issue of fact or law, the relevant consideration is feasibility. It may be that a jury will find that some such suppliers should have supplied a warning. It may be that a judge will say that under some facts there was a duty to warn. But the underlying principle remains the same. And I think, in this example, it doesn’t really matter whether the party who’s ultimately injured is the customer’s employee or, even more attenuated, the consumer of the product down the line.

So, one of the “common sense” principles coming out of the common law of the Second and Third Restatements is feasibility, and feasibility is extremely important in cases involving chemical products. The ability to communicate is extremely important in warnings cases because communication is a dynamic principle. We who are involved in the debate regarding the Restatement should remember that warnings are a dynamic process. The warning process deals with real businesses and real business practices, and it deals with real people in the courtroom, both the judges and jurors who have to translate these principles into “common sense” applications.

Notes

2. See Restatement (Second) of Torts § 402A (1965).
3. See Restatement (Second) of Torts § 388 (1965).
4. See Restatement (Third) of Torts § 2(c) (1998).
6. See id.
7. See Restatement (Second) of Torts § 388 (1965).
8. See Restatement (Second) of Torts § 402A (1965).
10. Restatement (Second) of Torts § 388 (1965) (emphasis added).
11. See id.
12. See id.
15. See Restatement (Second) of Torts § 388 (1965).