

RECENT DEVELOPMENT

A MANUFACTURER'S DUTY TO WARN IN A MODERN DAY TOWER OF BABEL

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I. INTRODUCTION

During the past thirty years, the duty to warn has received heavy emphasis in litigation relating to products liability.¹ In fact, "[f]ailure-to-warn claims are now the most common form of litigated product case in the U.S."² Suggested reasons for the proliferation of litigation in this area have included, *inter alia*, the relative ease of initiating tort actions based upon inadequate warnings, the difficulty in defending against such actions, and the apparently low cost of placing warnings on products.³ While the duty to warn would seem, on its face, to be a fairly straightforward legal principle to apply, it has taken on a new dynamic in the United States and in the European Union.⁴ Both the United States and the European Union are composed of highly diverse populations speaking a variety of languages. As these diverse populations continue to grow, they become very attractive to manufacturers seeking new markets for their products. These manufacturers, however, are not always prepared to provide foreign speaking consumers with warning materials in their native language. When a product injures someone the question inevitably arises: Did the manufacturer have a duty to provide a warning to consumers in their native language?

Products liability is a popular area of the law for comparative legal research between American and European legal systems. This has occurred at least in part due to the fact that products liability is a modern legal phenomenon and,

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¹ Mark R. Lehto & James M. Miller, *The Effectiveness of Warning Labels*, in JOURNAL OF PRODUCTS LIABILITY 225 (Pergamon Press, 1988).

² JANE STAPLETON, PRODUCT LIABILITY 252 (1994).

³ See Lehto & Miller, *supra* note 1, at 225.

⁴ The European Union (EU) member states are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom.

systems have reacted to this new topic, in a relatively short time span.⁵ This Recent Development will look specifically at the different ways in which the United States and European Union legal systems address the issue of foreign language product warnings and how their handling of that issue is reflective of the fundamental differences in the two legal systems.

II. BACKGROUND

Products liability is an area of tort law that holds those who provide defective products or goods liable for various types of losses resulting from the use of that product.⁶ This liability may extend to purchasers, users and bystanders.⁷ Products are considered defective if they are manufactured in such a manner as to be defective, designed in a defective manner, or if they completely or inadequately fail to warn consumers about known risks. Under the theories of products liability law, "a manufacturer can be held liable on the basis of strict liability, negligence, breach of warranty, fraud, negligent misrepresentation or a market share theory of liability."⁸

In addition to a manufacturer's duty not to negligently manufacture defective products, the manufacturer also has a duty to warn purchasers about any known dangers that might exist in its product. This includes a duty to give adequate warnings. A manufacturer who fails to warn or whose warning is inadequate regarding known risks or side effects associated with intended and reasonably foreseeable uses of a product may be liable for negligence.⁹

Providing warnings about a product's potential dangers serves two primary functions: promoting safe use and protecting consumers.¹⁰ Adequate warnings reduce the risk of harm posed by the product by allowing consumers to act more carefully in their use of the product. They also protect the ability of the consumer to make informed choices as to whether to encounter certain risks.¹¹

⁵ See Geraint G. Howells, *The Relationship Between Product Liability and Product Safety: Understanding a Necessary Element in European Product Liability Through a Comparison with the U.S. Position*, 39 WASHBURN L.J. 305, 308 (2000).

⁶ See Linda M. Baldwin, *Ramirez v. Plough, Inc.: Should Manufacturers of Nonprescription Drugs Have a Duty to Warn in Spanish?*, 29 U.S.F. L. REV. 837, 840 (1995).

⁷ See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 95, 677 (5th ed. 1984).

⁸ Baldwin, *supra* note 6, at 840.

⁹ *Id.* at 844-45.

¹⁰ See *Post v. American Cleaning Equip. Corp.* 437 S.W.2d 516, 520 (Ky. Ct. App. 1968) (holding that an equipment manufacturer had the duty to warn about foreseeable misuse; without such information, the warning was inadequate).

¹¹ See *Finn v. G.D. Searle & Co.*, 677 P.2d 1147, 1152 (1984); KEETON ET AL., *supra* note

The cases demonstrate that product manufacturers may be held liable for failing to warn of product dangers or for providing inadequate warnings under theories of both negligence and strict liability.

III. NEGLIGENCE

The general rule regarding a manufacturer's duty to warn consumers of product dangers under the negligence theory is embodied in *Restatement (Second) of Torts* section 388:

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the 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 or 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.¹²

All three of the criteria set forth in section 388 must be satisfied for liability to attach. A manufacturer must provide a warning of product risks when it knows, or should know, that a product, without warnings, is likely to be dangerous when used for the intended use. The duty to warn is also triggered when the danger, absent any type of warning, would be considered either "significant" or "sufficiently serious." Of all the parties in the distribution chain of a product only the manufacturer is charged with the "knows or should know" standard. The fact that the manufacturer is held to a higher standard is based on the fact that it is presumed to have superior knowledge of the product and its potential hazards.¹³

7, § 96, at 685.

¹² RESTATEMENT (SECOND) OF TORTS § 388 (1965).

¹³ See Douglas R. Richmond, *When Plain English Isn't: Manufacturers' Duty to Warn in a Second Language*, 29 TORT & INS. L.J. 588 (1994).

When a claim is based on negligence, the duty to warn hinges on whether the injury at issue was reasonably foreseeable by the manufacturer. Foreseeability takes on an important role in two contexts. The first question is, was the product use foreseeable? In other words, was the product used as the manufacturer might reasonably have expected? The second question is was the injury itself foreseeable? Typically this is considered a question of fact that is left to the jury to decide.¹⁴

IV. STRICT LIABILITY—A NEW STANDARD?—RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY

In May 1997, the question of establishing liability in a products liability case took on yet another twist. At its annual meeting the American Law Institute adopted, without a single dissenting vote, the new *Restatement of the Law (Third), Torts: Product Liability (Restatement (3d))*. It was a project that had consumed nearly six years and produced twelve drafts.¹⁵

The new *Restatement(3d)* replaces Section 402A of the *Restatement(2d)* and seeks to clarify some of the ambiguities of *Restatement(2d)* by providing separate definitions and standards for liability on the basis of manufacturing, design and warning defects. Another important aspect of *Restatement(3d)* that distinguishes it from its predecessor is the fact that it covers a number of issues not previously covered. These include: evidence of compliance with safety regulations, post-sales duties, successor liability, disclaimers and apportionment of fault.

Section 1 of *Restatement(3d)* sets out the basic liability rule: "One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect."¹⁶

This section serves to set forth in very simple terms the elements a plaintiff will need to set forth in order to establish a prima facie case in a products liability cause of action. The plaintiff must prove (1) the defendant was in the business of selling or distributing the product that injured the plaintiff; (2) that product was defective; and (3) that product defect caused personal injury or property damage.¹⁷

¹⁴ *Id.*

¹⁵ See Michael A. Pope & Michael A. Glackin, *What Every Products Seller Should Know About the Restatement (Third) of Torts* (visited Aug. 20, 1999) <<http://www.mwe.com/news/pln1297.htm>>.

¹⁶ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (1998).

¹⁷ See Pope & Glackin, *supra* note 15.

Section 2 is the "real character" of the new *Restatement(3d)*.¹⁸ This section recognizes three theories of defect and creates a functional approach to each. Section 2 states: "[A product] is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings."¹⁹ In the past most states have recognized these same three ways in which a product may be defective. Section 402A, however, did not recognize the distinction since it employed a single liability test for all three.²⁰

Following this new approach to establishing a definition of "defective," Section 2 then goes on to set forth precisely how each of the three categories of defect must be established. In adopting this method of distinguishing three separate categories *Restatement (3d)* "seems to reserve true strict liability for manufacturing defects and to place recovery for design and failure to warn defects on a negligence footing."²¹

Section 2(c) addresses warning defects specifically. It states:

[A product] is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller and the omission of the instructions or warnings renders the product not reasonably safe.²²

While this new guideline would appear on the surface to be helpful in either establishing or refuting the existence of liability based on product warnings, one quickly realizes the continuing difficulty of getting your hands around terms such as "reduced" and "reasonable." Through a careful reading of the comments that follow Section 2(c) it becomes apparent that the Reporter acknowledges the fact that the reasonableness standard is more difficult to apply in the context of warning and instructions than it is in the area of design defects. The comments explain that too many warnings or warnings that are too detailed may in fact have the reverse of the desired effect and may actually be ignored by the consumer. This makes determining the optimal intensity of

¹⁸ See Geraint G. Howells & Mark Mildred, *Is European Products Liability More Protective Than the Restatement (Third) of Torts: Products Liability?*, 65 TENN. L. REV. 985, 1021 (1998).

¹⁹ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).

²⁰ See Pope & Glacken, *supra* note 15.

²¹ Howells & Mildred, *supra* note 18, at 1022.

²² RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(c) (1998).

warnings seem to be nothing more than an exercise in futility.²³ The comments do provide some guidance however, by setting out several factors that courts should focus on in evaluating warnings or instructions. These include: the gravity and risk posed by the product; the content and comprehensibility of the warning; the intensity of expression; and characteristics of and knowledge of foreseeable users. This is for all intents and purposes a negligence analysis.²⁴

It is the last factor that provides the most guidance in the context of this examination of the duty owed to persons who speak a foreign language. If courts are indeed going to take the characteristics of and knowledge of foreseeable users into account in determining if a product is defective by reason of the seller or distributor having supplied inadequate warnings or instructions, then it should stand to reason that one of the "characteristics" the court would consider would be the plaintiff's ability to read and understand the language in which the instructions or warnings are provided.

The *Restatement(3d)* goes on to make it clear that a seller has no duty to warn or instruct about risks that should be obvious or are generally known by foreseeable products users.²⁵ The rationale behind this rule is that warnings of this nature may actually serve to diminish the significance of other warnings about non-obvious risks, as opposed to serving to enhance the overall safety of the product. In addition, when a particular consumer would use a product regardless of a warning or instruction, the fact that the warnings or instructions are deemed to be inadequate is not the legal cause of the plaintiff's injury.²⁶

The relevant time frame for assessing the adequacy of the product's warning is at the time of sale or distribution. Therefore, if the warnings that accompany a product serve to conspicuously set out the foreseeable risks of harm posed by the product as known at the time of manufacture or distribution, the warning will be deemed to be legally adequate. The fact that risks associated with the product's use are later discovered does not in and of itself render the warnings inadequate.²⁷

²³ See Pope & Glacken, *supra* note 15.

²⁴ See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. e (1998).

²⁵ See *id.*

²⁶ See Pope & Glackin, *supra* note 15.

²⁷ *Id.*

V. IS THE WARNING ADEQUATE?

The *Restatement (2d)* does not provide much effective guidance to courts and legislatures as to what a warning should say or exactly how a warning should be stated. As a result, legislatures and courts are left to fend for themselves when determining requirements for adequate warning. Their response to this dilemma has been to rely heavily on adequacy.²⁸ In order to be considered adequate, a warning must identify the scope of the attendant danger as well as the seriousness of the harm that could result from any foreseeable misuse of the product.²⁹ An adequate warning should allow consumers to make informed choices about the risks they could suffer from the use of a product.³⁰ A company effectively warns society of the product's dangers by prominently and clearly communicating the pertinent risks.³¹ Finally, an adequate warning serves to protect each buyer's safety by emphasizing the product's dangers to that buyer.³²

This final requirement forms the foundation of the adequacy test.³³ The typeface, color of the print or choice of the language make no difference if consumers are not able to grasp the warning's meaning.³⁴ They are still unable to make an informed analysis of the risks they might encounter if they chose to use the product.³⁵

VI. THE MODERN DEVELOPMENT OF PRODUCTS
LIABILITY LAW IN THE EUROPEAN UNION

Beginning in the 1960's and continuing until just recently it was increasingly apparent that the traditional legal principles found in European legal systems were inadequate to deal with the modern phenomenon of products liability.³⁶ Prior to the adoption of the European Product Liability Directive in 1985 products liability law was, for the most part undeveloped in the

²⁸ See Thomas H. Lee, *A Purposeful Approach to Products Liability Warnings and Non-English Speaking Consumers*, 47 VAND. L. REV. 1107, 1115-16 (1994).

²⁹ See *id.*

³⁰ See *id.*

³¹ See *id.*

³² See Lee, *supra* note 28, at 1115-16.

³³ See *id.*

³⁴ See *id.*

³⁵ See *id.* at 1117.

³⁶ See Howells & Mildred, *supra* note 18, at 992.

European Union. This is not to say, however, that injured parties were without recourse.³⁷

Most of the member countries had a well-developed system of negligence law that provided a basis for recovery, but this didn't afford all of the advantages offered by strict liability. France had even gone as far as to develop a system of liability without fault, approximating strict liability, to deal with products.³⁸ In addition to this, several of the member states, prior to the enactment of the directive, had shifted the burden of proof on liability from plaintiffs to defendants in negligence actions in an effort to ease plaintiff's recovery in product cases.³⁹ Only in 1985, with the adoption of the European product liability directive,⁴⁰ did strict products liability become a true part of the European legal scene. Until then, English law had remained true to its traditional legal principles.⁴¹ As a result, contract remedies, although capable of covering consequential loss resulting from personal injury, were only available with parties to the contract,⁴² and fault was the basis of tort liability.⁴³ Various reports had favored introducing strict liability,⁴⁴ but there had been no political impetus for reform.

The situation changed when children were born with horrendous injuries to mothers who had ingested thalidomide (Contergan). It was this thalidomide scandal that gave the reform effort the impetus and the public support it needed to react. As a result, Germany created a special liability regime for medicine in 1976.⁴⁵ The Council of Europe adopted the Strasbourg Convention on Product Liability in regard to Personal Injury and Death in 1976.⁴⁶

³⁷ See Andrew C. Spacone, *Strict Liability in the European Union: Not a United States Analog*, 5 ROGER WILLIAMS U. L. REV. 341, 347 (2000).

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ Council Directive 85/374, 1988 O.J. (L 307) 54.

⁴¹ See GERIANT HOWELLS, *COMPARATIVE PRODUCT LIABILITY* (1993).

⁴² See *Daniels & Daniels v. White & Sons, Ltd.*, 4 All E.R. 258, (K.B.1938) (holding that plaintiff had no cause of action against a manufacturer because there had been adequate supervision of workmen, although there was a cause of action against a retailer on a descriptive sale theory).

⁴³ See *Hill v. James Crowe (Cases), Ltd.*, 1 All E.R. 812 (Q.B. 1978). De facto strict liability was applied to manufacturing defects and very high standards were demanded for inherently dangerous products.

⁴⁴ See Law Commission and Scottish Law Commission, *Report on Liability for Defective Products*, 1977, Cmnd. 6831; Royal Commission on Civil Liability and Compensation for Personal Injury, 1978, Cmnd. 7054-I.

⁴⁵ See *Howells & Mildred*, *supra* note 18, at 992.

⁴⁶ European Convention on Products Liability in Regard to Personal Injury and Death, Jan. 27, 1977, 1977 Europa T.S. No. 91.

Two weeks prior to the Strasbourg Convention being finalized a draft Directive was promulgated.⁴⁷

The basic idea of the Directive was to introduce the strict liability doctrine for defective products into the court systems of the fifteen member states of the European Economic Community (E.E.C.), as well as into the differing domestic remedies already existing in those member states.⁴⁸ Plaintiffs would have to prove the "defect," the damage suffered, and the causal link between the damage and the defect, but plaintiffs would not have to show that the product was "defective" at the time the product left the defendant's hands. The Directive also disregarded the "state of the art" defense and coverage was expanded to personal injury, death, and property damages.⁴⁹

Although introduced in 1976, the Directive was not adopted until July 17, 1985, nearly nine years after it was first promulgated. The long delay in adoption may best be explained by Europe's inclination to look to the west with respect to products liability laws. European industrialists were able to use the headlines generated in American products liability cases to make their own politicians nervous about enacting strict products liability legislation.

Most commentators agree that the events occurring on the American products liability scene were due to factors other than the substantive law. The outcomes in these cases were the result of jury trials, widely available punitive damages, the need for awards to cover the whole cost of injuries (including health costs), and inflation of awards to compensate for the known deduction of contingency fees. These features were not present in the European legal arena, where judges decide both issues of liability and damages, and where punitive damages are either not allowed or are available only in closely prescribed circumstances and for relatively modest amounts. It is also important to note that in Europe, health and social security systems offset a large amount of the cost of injuries. Also, contingency fees are not known in Europe, at least not known in the same form as we know them in America.⁵⁰

Implementation of the Directive was mandatory for all member states. The member states were, according to Article Nineteen, required to implement the provisions of the Directive in their national legislation by July 30, 1988. The United Kingdom, Greece and Italy were the only countries to implement the Directive prior to this deadline.⁵¹ A number of other countries passed statutes

⁴⁷ See WARREN FREEDMAN, *INTERNATIONAL PRODUCTS LIABILITY* 277 (1986).

⁴⁸ See MICHAEL R. WILL, *HARMONIZATION OF LAWS IN EUROPEAN COMMUNITY* 28, 30 (Peter E. Herzog, ed., University Press of Virginia 1983).

⁴⁹ Freedman, *supra* note 47, at 277.

⁵⁰ See Howells & Mildred, *supra* note 18, at 993.

⁵¹ See *id.* at 1015.

that the European Commission deemed to be nonconforming, and prior to 1998, only eight⁵² of the fifteen member nations had adopted a measure implementing the products liability directive.⁵³ Today all fifteen of the E.U. member states have adopted the Directive. France was the last to adopt the Directive in May of 1998.

The EC Products Liability Directive requires a person bringing a claim against a manufacturer for injuries arising from an alleged product defect "to prove the damage, the defect and the causal relationship between defect and damage."⁵⁴ The EC Directive effectively adopts a consumer expectation standard for defectiveness. Article 6 of the Directive provides the following standard for a defective product:

1. A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:
 - (a) the presentation of the product;
 - (b) the use to which it could reasonably be expected that the product would be put;
 - (c) the time when the product was put into circulation.
4. A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.⁵⁵

The issue of warnings is most clearly addressed in Article 6(1)(a) of the Directive, which refers to the "presentation of the product."⁵⁶ This term, however, can be broadly interpreted. Clearly, it would cover the container or packaging that comes with the product and any literature on them, the product itself or any accompanying literature. It would also cover the manner in which the product is displayed or arranged.⁵⁷ The phrase would also seem to be

⁵² These nations are Denmark, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal and the United Kingdom. See Anita Bernstein, *A Duty to Warn: One American View of the EC Products Liability Directive*, 20 *ANGLO-AMERICAN L. REV.* 224, 225 n.7 (1990).

⁵³ See *id.*

⁵⁴ EC Directive, *supra* note 40, at art. 4.

⁵⁵ *Id.* at art. 6. The consumer expectation test articulated in the EC Directive is similar to the test applied by some courts in the United States. See *RESTATEMENT (SECOND) OF TORTS* § 402A cmt. I (stating that a product is defective if "[t]he article sold [is] dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it with the ordinary knowledge common to the community as to its characteristics").

⁵⁶ EC Directive, *supra* note 40, at art. 6.

⁵⁷ See *HOWELLS*, *supra* note 41, at 37.

broad enough to encompass promotional material from the manufacturer, distributor or retailer and any advertisements for the product.⁵⁸ The products' presentation can serve to either raise or lower the consumer safety expectations.⁵⁹ Typically, advertising and marketing practices will serve to raise expectations about the product in question by stressing its advantages and generally promoting consumer confidence in it. Expectations, however, can also be lowered through these practices by suggesting that certain designs are standard. This creates the perception that special safety features are only found on deluxe models.⁶⁰

There will also be an increase in the amount of information provided, with producers trying to avoid liability by drawing all the potential risks to the consumer's attention in the accompanying information.⁶¹ As an example, drugs will come with package inserts describing any possible contraindications. Detailed instructions relating to the use of the product will be given and liability will be denied if the user transgresses from these rules in any way.⁶² There is a real danger that consumers will be faced with an information overload.⁶³

It is, however, impracticable for a consumer to be warned of every possible danger of a particular product. For example, should a manufacturer of microwave ovens be required to warn purchasers that they should not dry their dogs in them?⁶⁴ Fortunately, the Directive requires that, in deciding the defectiveness of a product, the reasonably expected use to which the product will be put is to be taken into consideration.⁶⁵ Without this caveat, it is possible that producers might subject product users to ever-longer lists of instructions and warnings in an attempt to avoid liability.⁶⁶ This action could prove to be counterproductive to consumer safety because consumers might be less likely to read longer and more intricate warnings.⁶⁷

⁵⁸ *See id.*

⁵⁹ *See id.*

⁶⁰ *See id.*

⁶¹ *See id.*

⁶² *See id.*

⁶³ *See id.* at 37-38.

⁶⁴ *See* Simon Whittaker, *The EEC Directive on Product Liability*, 5 Y.B. OF EUR. L. 233, 243 (1985).

⁶⁵ *See id.*

⁶⁶ *See id.* at 244.

⁶⁷ *See id.*

VII. U.S. PERSPECTIVE

In the United States it is becoming increasingly frequent that foreseeable users are persons for whom English is a second language.⁶⁸ In recent years millions of immigrants, both legal and illegal, have come to the United States. They come looking for work and in search of a new life in a free society. Most of these immigrants come from Latin America and Asia, and they often form insular communities where they continue to speak their native language and practice their native customs.⁶⁹ According to the 1990 Census more than thirty-one million Americans do not speak English at home.⁷⁰ If all the Americans who speak Spanish at home lived in a single state, then it would form the third most populous state in the nation.⁷¹ Statistics help to explain why non-English newspapers, television stations and radio stations comprise a rapidly growing market for readers and advertisers.⁷²

A. Hubbard-Hall Chemical Co. v. Silverman

One of the earliest cases to address the issue of foreign language warnings in the United States was *Hubbard-Hall Chemical Co. v. Silverman*.⁷³ In this case an insecticide manufacturer sold bags of a product called Parathion to a farmer.⁷⁴ The bag's warning label was printed in English only, and it contained no symbols or picture type warnings. After working with the product all day long two farm workers became violently ill and died.⁷⁵ Both of these workers were Puerto Ricans, one of whom was able to read only a limited amount of English.⁷⁶

The administrators of the two decedents' estates sued the manufacturer for negligently failing to warn the two men of the dangers associated with the use of Parathion.⁷⁷ The jury found that the defendant/manufacturer did not

⁶⁸ See Richmond, *supra* note 13, at 589.

⁶⁹ See Jonathan Michael Purver, *Manufacturer's or Seller's Liability for Failure to Provide Foreign Language or Symbolic Product Warning or Instruction*, 34 AM. JUR. PROOF OF FACTS 3d 239, 245 (1995).

⁷⁰ Thomas H. Lee, *A Purposeful Approach to Products Liability Warnings and Non-English Speaking Consumers*, 47 VAND. L. REV. 1107, 1109 (1994).

⁷¹ See *id.*

⁷² See *id.*

⁷³ 340 F.2d 402 (1st Cir. 1965).

⁷⁴ See *id.* at 403.

⁷⁵ See *id.* at 404.

⁷⁶ See *id.* at 403.

⁷⁷ See *id.* at 404.

exercise reasonable care in giving the workers adequate warning of the dangerous nature of the product and proper instructions for its use.⁷⁸ The judgement was affirmed on appeal.

In response to situations such as this, the U.S. Environmental Protection Agency (EPA) has adopted a mandatory approach for the labeling of toxic pesticides. The EPA has identified four levels of toxicity. For categories I and II, which are the highest level, the rule requires that the "signal word" be in Spanish.⁷⁹ A signal word is that word contained in the warning or instructions that is intended to catch the user's attention.⁸⁰ This would include such words as: 'Danger,' 'Warning,' 'Poison' or 'Caution.'⁸¹ The label is also required to contain a statement in Spanish instructing anyone who does not understand the label to find someone to explain it in full detail. This rule serves to assure that the consumer is aware of the need to understand the label, but it does not go so far as to require the manufacturer to provide a full translation of the label.⁸²

B. Campos v. Firestone Tire & Rubber Co.

It would be almost 20 years before another court would have the opportunity to consider the court's rationale in *Hubbard-Hall*. That chance came when the New Jersey Supreme Court heard *Campos v. Firestone Tire & Rubber Company*.⁸³ Armondos Campos was Portuguese by birth.⁸⁴ He worked for a truck-trailer manufacturer assembling tires. This process is so dangerous that the work is performed inside a cage to protect workers if the tire rim explodes under pressure.⁸⁵ Firestone, the manufacturer of the rim, was aware of the fact that this could occur, and as a result had provided Campos' employer with a sign to warn of this occurrence. However, Campos was unable to read either English or Portuguese.⁸⁶ Campos reached into the cage to lock the rim shut and, when he did, the rim exploded, severely injuring him.

⁷⁸ See *id.* at 404.

⁷⁹ See R. Geoffrey Dillard, *Multilingual Warning Labels: Product Liability, "Official English," and Consumer Safety*, 29 GA. L. REV. 197, 202 (1994).

⁸⁰ See *id.*

⁸¹ See *id.* at 202 n.24.

⁸² See *id.* at 203.

⁸³ 98 N.J. 198, 485 A.2d 305 (1984)

⁸⁴ See *id.* at 307.

⁸⁵ See *id.*

⁸⁶ See *id.*

Campos sued Firestone under New Jersey's strict products liability law and a jury awarded him damages in the amount of \$225,000.⁸⁷

Firestone appealed the verdict and the New Jersey Supreme Court held that Firestone did in fact have a duty to warn those persons whose job it was to assemble tire rims.⁸⁸ The court held that it was foreseeable that a number of the persons who would be doing this type of work would be unskilled or semi-skilled workers who cannot read English. The warning Firestone provided was therefore inadequate.⁸⁹ This case suggests that, in similar circumstances, manufacturers should give warnings of this nature in the form of symbols.⁹⁰

C. Stanley Industries, Inc. v. W.M. Barr & Co., Inc.

Eight years later, the U.S. District Court for the Southern District of Florida was presented with an opportunity to weigh in on this issue. That opportunity presented itself in the form of *Stanley Industries Inc. v. W.M. Barr & Co. Inc.*⁹¹ The case involved two brothers from Nicaragua who spoke primarily Spanish. They worked for the plaintiff corporation and in their job were using linseed oil, manufactured by the defendant corporation and sold by Home Depot, to oil a cutting table. After finishing their task, they stored their oil soaked rags in a manner contrary to the instructions on the product label. Stanley alleged that this led to the spontaneous combustion of the rags, which resulted in a fire that damaged its plant.⁹² The English-only label included instructions and directions for the use of linseed oil. The label contained no graphics, symbols or pictographs to alert users of the product's potentially dangerous properties.⁹³ Both men testified that, if the label had contained warnings in Spanish concerning the flammability of the product, they would have sought more information relating to its proper use.⁹⁴ Prior to the fire, the defendant manufacturer and Home Depot had engaged in a cooperative advertising program to promote various products, including the linseed oil, in the Miami market and particularly in the Hispanic community there.⁹⁵

⁸⁷ See *id.* at 203.

⁸⁸ See *Campos v. Firestone Tire & Rubber Co.*, 98 N.J. 198.

⁸⁹ See *id.* at 208.

⁹⁰ See *Lee*, *supra* note 70, at 1125.

⁹¹ 784 F. Supp. 1570 (1992).

⁹² See *id.* at 1572.

⁹³ See *id.*

⁹⁴ See *id.* at 1573.

⁹⁵ See *id.*

Stanley sued the manufacturer and the retailer under theories of negligent failure to warn, strict liability and breach of warranty of fitness for a particular purpose claiming that the defendants failed to adequately and fairly warn the users of the linseed oil's dangerous propensities.⁹⁶

The court found that, as in *Hubbard-Hall*,⁹⁷ in light of the advertising in Hispanic markets and the nature of the product, a jury should decide whether the manufacturer should have foreseen that its product would be used by non-English speaking persons.⁹⁸ Secondly, the court concluded, using the rational of *Campos*, that this foresight made the English-only warnings inadequate.⁹⁹ *Stanley Industries*, therefore, established a new rule of law: When a product manufacturer uses non-English language media to reach non-English speaking consumers, the manufacturer cannot insist that English only product warnings are sufficient as a matter of law. Of course this rule is not as strong as a finding that English-only warnings are inadequate as a matter of law when the manufacturer targets non-English speaking consumers.¹⁰⁰

D. *Ramirez v. Plough, Inc.*

Perhaps surprisingly, in light of the court's decision in *Stanley*, this has not been a very heavily litigated area of the law. However, while there may not have been a great quantity of courts to consider this issue many would argue that there has certainly been quality. The most recent case on point is *Ramirez v. Plough, Inc.*¹⁰¹ This case was decided almost two years after *Stanley* by the California Supreme Court, the same court that gave us *Escola* and *Greenman*.

Ramirez involved a minor plaintiff, Jorge Ramirez, who, when he was four months old, was given three St. Joseph Aspirin for Children by his mother. St. Joseph Aspirin for Children is manufactured and distributed by the defendant Plough, Inc. The product label carried a warning that stated that the aspirin should only be given to children under two years old "as directed by doctor."¹⁰² However, the plaintiff's mother did not consult a doctor prior to giving her child the aspirin. Jorge later contracted Reye's syndrome and as a result

⁹⁶ *Id.*

⁹⁷ 340 F.2d 402 (1965).

⁹⁸ *See id.* at 1576.

⁹⁹ *See id.*

¹⁰⁰ *See Lee, supra* note 70, at 1127.

¹⁰¹ 863 P.2d 167 (1993).

¹⁰² *See id.* at 169.

suffered "severe neurological damage, including cortical blindness, spastic quadriplegia and mental retardation."¹⁰³

Saint Joseph Aspirin for Children packages and package inserts displayed a warning to alert consumers of the dangers of Reye's syndrome. These warnings on the packaging and inserts were written only in English. Ms. Ramirez was born in Mexico and was only literate in Spanish.¹⁰⁴ The defendant had advertised the product in the Hispanic community in both English and Spanish.¹⁰⁵ Plaintiff brought suit against the defendant through his mother who was acting as guardian ad litem. The causes of action were fraud, negligence and product liability and all were based upon the theory of defendant's alleged failure to warn about the dangers of Reye's syndrome.¹⁰⁶ Plough moved for summary judgment, arguing that it was under no duty to label the aspirin with Spanish language warnings, that the English warnings were adequate.¹⁰⁷

The trial court granted defendant's motion for summary judgment on the grounds that there was no duty to warn in a foreign language, and there was no causal relationship between the plaintiff's injuries and the defendant's actions. The plaintiff appealed.¹⁰⁸

The California Court of Appeal reversed the trial court's order.¹⁰⁹ Plough's own evidence showed that over 148 foreign languages are spoken in the United States and more than 23,000,000 Americans speak a language other than English in their home.¹¹⁰ The plaintiff submitted evidence to show that Plough knew that Hispanics were an important segment of the children's aspirin market and that they often maintain their first language rather than learn English. Relying on this fact, the court held that "the foreseeability of purchase by a Hispanic not literate in English and the reasonableness of not giving a Spanish language warning" were issues for the jury to decide.¹¹¹

This decision was appealed to the Supreme Court of California which reversed the lower court. The supreme court began its analysis of the case by addressing the appropriate standard of care. The court noted that in a tort

¹⁰³ *See id.*

¹⁰⁴ *Id.*

¹⁰⁵ *See Ramirez*, 863 P.2d at 170.

¹⁰⁶ *See id.*

¹⁰⁷ *See id.*

¹⁰⁸ *See id.*

¹⁰⁹ *See Ramirez v. Plough, Inc.*, 12 Cal. Rptr. 2d 423, 430 (Ct. App. 1992), *rev'd*, 863 P.2d 167 (Cal. 1993).

¹¹⁰ *See id.*

¹¹¹ *Id.* at 430.

liability case the usual standard of care is that of a reasonably prudent person under like circumstances. However there are instances where the proper conduct of a reasonable person can be prescribed by statute or ordinance.¹¹²

Because the FDA comprehensively regulates nonprescription drug labeling and because their regulations specify not only the subject of warnings, but also the actual language to be used, the court held that "the prudent course is to adopt for tort purposes the existing legislative and administrative standard of care."¹¹³ The court deferred to these bodies because of "their superior technical and procedural lawmaking resources."¹¹⁴

The court reasoned that since both the California Legislature and the U.S. Congress required Spanish warnings in certain specified circumstances, it could be inferred that their silence with regard to nonprescription drugs indicated a deliberate intent to exclude drug manufacturers from a duty to warn in a foreign language.¹¹⁵

After all was said and done, the court recognized that if a Spanish language warning had been included with the aspirin, and if Ms. Ramirez had read and heeded the warning, the tragedy that befell little Jorge might have been avoided. Still the court held that "manufacturers of nonprescription drugs have no presently existing legal duty, within the tort law system, to include foreign-language warnings in their packaging materials."¹¹⁶

VIII. EU CASE ANALYSIS: THE BELGIAN DEPARTMENT STORE BATTLE

Though the European Union community has not had a case directly on point with this issue, a recent dispute between two Belgian department stores may provide an excellent insight into how the European community views the matter.

In *Colim NV v. Bigg's Continent Noord NV*,¹¹⁷ the Court of Justice of the European Communities addressed the issue of whether member states could require imported products to carry certain label information in the language of the area in which the products are sold or in a language that is readily understood by the consumer.¹¹⁸

¹¹² Ramirez, 863 P.2d at 171.

¹¹³ See *id.* at 176.

¹¹⁴ *Id.* at 177.

¹¹⁵ See *id.* at 175.

¹¹⁶ *Id.* at 178.

¹¹⁷ Case C-33/97, 1999 ECR I-3175, [2000] 2 C.M.L.R. 135 (1999).

¹¹⁸ See *id.* at 141.

Belgium had adopted a national law requiring that certain product label information¹¹⁹ be given in the language or languages of the area in which the products were placed on the market.¹²⁰ Colim charged that Bigg's was selling products in its store, including food, cosmetics, detergent and pet food, that was not labeled in Dutch, the language of the area.¹²¹ Bigg's then counter-claimed, alleging that Colim was also selling goods that were not properly labeled in Dutch. Bigg's also raised the defense that the Belgian national law requiring labeling in other languages was invalid because this constituted a "technical regulation," and as such should have gone through a review process by the E.C. Commission prior to adoption.¹²²

The court held that the national legislation at issue was not a "technical issue" and was not therefore invalid.¹²³ The court went on to find that member states may adopt national laws requiring that labeling information appearing on imported products be given in the language of the area in which the products are sold or in another language which is easily understood by the consumers in that area. The court limited its holding to some degree by including the proviso that any national laws that are adopted by member states putting in place requirements of this nature must "apply without distinction to all national and imported products and are proportionate to the objective of consumer protection which they pursue. They must, in particular, be restricted to information which the Member State makes mandatory and which cannot be appropriately conveyed to consumers by other than translation."¹²⁴

IX. LEGAL ANALYSIS

But what about the tort law system of the European Union or the United States tort law system as it currently exists following the adoption by the ALI of *Restatement(3d)*? Does a manufacturer still not have a duty to include foreign-language warnings in their packaging materials or has a new day dawned for the Jorge Ramirezes of the world?

By applying the EC Directive to the facts in *Ramirez*, one easy answer would be to say that certainly the language of Article 6¹²⁵ would lead to the

¹¹⁹ Instructions for use and guarantee certificates.

¹²⁰ Case C-33/97, *supra* note 117, at 135.

¹²¹ *See id.* at 140.

¹²² *See id.*

¹²³ *See id.* at 165.

¹²⁴ *Id.* at 166.

¹²⁵ *See* Directive, *supra* note 40. Article 6 states: "(1) A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account,

conclusion that a person is entitled to expect to be able to read the warnings on a product that is actively marketed in his or her community. This rationale would lead to the conclusion that a court applying the EC Directive to these facts would have found that the defendant manufacturer had marketed a defective product and was therefore liable to the plaintiff.

Before we allow ourselves to go too far down that path, however, it is imperative to the fact that the Directive, as it was adopted, takes the form of an extension, or a supplement, to the individual Member States' product liability rules. The Member States' preexisting rules remain in force without change.¹²⁶ This means that we must look beyond the Directive itself and also consider any preexisting rules or case law in the particular Member State at issue. In the United Kingdom, for example, there is a wealth of case law dealing with the issue of the duty to warn that must be considered.¹²⁷

It is in considering this point that the Court of Justice of the European Communities decision in *Colim* becomes important. While the case does not establish a duty to warn, if a Member State has adopted its own legislation requiring labeling information in the language or languages of the area where the product is being marketed then that law is going to be upheld. This would certainly seem to open the door to a potential negligence per se argument if the requirement of the legislation is not met and a person is harmed as a result.

Another factor to take into consideration is the fact that the EC Directives provide a number of specific defenses. One that might be particularly applicable to the facts in *Ramirez* is set out as follows: "the defect is due to compliance of the product with mandatory regulations issued by the public authorities."¹²⁸ This would take us back to the regulations of the state and the federal government that the California court relied on to establish the standard of care. The defense makes clear the fact that it applies only to *mandatory*

including (a) the presentation of the product . . ."

¹²⁶ See Michael Christiani Havemann, *The EC Directive on Product Liability: Its Background, Aims and System*, in *PRODUCT LIABILITY: PREVENTION, PRACTICE AND PROCESS IN EUROPE AND THE UNITED STATES* 17, 18 (Rudolph Hulsenbek & Dennis Campbell eds., 1989).

¹²⁷ See generally *Farr v. Butter Bros.*, (1932) 2 KB 606 (holding no liability for failure to warn of a defect in a crane because the deceased continued to work despite knowing that the crane was defective); *British Chartered Co. of South Africa v. Lennon Ltd.*, 31 TLR 585 (1915) (holding that a warning that is positively misleading can be the basis of liability); *Holmes v. Ashford*, 2 All ER 76 (1950) (holding that a warning on the literature that accompanies the product may be appropriate and it is often sufficient for the warning to be given to an intermediary). A manufacturer does not have to warn the ultimate recipient of a product if it provides sufficient warning to an intermediary.

¹²⁸ See Directive, *supra* note 40, at art. 7(d).

regulations, so a manufacturer would not be able to rely on compliance with a voluntary Code of Practice or any non-regulatory standard.¹²⁹ In the *Ramirez* case, the regulations that the defendant put forth in its defense were mandatory regulations so it would seem that this defense would be available in the EU.¹³⁰ However, the defense is more narrowly drawn than might be apparent from a cursory reading of the text. The defense is not available simply because the product complies with the mandatory regulations.¹³¹ The defect must be *due to* compliance with the regulations. Therefore, the defense would not be available if the product could have been made in a non-defective manner while still complying with the regulations.¹³² The state and federal labeling regulations that Plough relied upon did not state that the warning could *only* be provided in English. Therefore, it would have been possible for the manufacturer to have provided a Spanish warning in addition to the English warning. This would have allowed the product to be made in a non-defective manner while still conforming to the regulations, therefore eliminating this defense.

It is impossible to say for sure whether the EC Directives would result in a different outcome in the *Ramirez* case, but it is certain that the products Directive and other consumer measures still appear attractive to the Member States. The adoption of measures such as this allow governments to appear active in fields such as a consumer protection and to appear to establish substantially greater protection than before, even when this is not the case. This is especially true considering the fact that local regimes survive untarnished.¹³³ Any reform brought about by the Directive becomes more of a façade when the European Court of Justice is persuaded for legal or political reasons to see issues such as defectiveness, causation and remoteness as ones of fact to be decided at the local level.¹³⁴

Would the application of *Restatement (Third) of Torts: Products Liability* to the facts in *Ramirez* result in a different outcome? As has previously been pointed out, liability for a defective warning under *Restatement (3d)* hinges on "the provision of *reasonable* instructions or warnings."¹³⁵ One of the factors set out in the comments to Section 2(c) for courts to consider in evaluating

¹²⁹ See HOWELLS, *supra* note 41, at 42.

¹³⁰ *Ramirez*, 863 P.2d at 167.

¹³¹ HOWELLS, *supra* note 41, at 42.

¹³² See *id.*

¹³³ See Stapleton, *supra* note 2, at 355.

¹³⁴ See *id.*

¹³⁵ RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 2(c) (1998).

warnings and instructions is "the characteristics of and knowledge of foreseeable users."¹³⁶

The facts in *Ramirez* would seem to support the conclusion that it was foreseeable to Plough that members of the Hispanic community would be users of its St. Joseph Aspirin for Children. The foreseeability is compounded by the fact that they were actively marketing the product in the Hispanic community through the use of Hispanic media sources. If we accept the fact that members of the Hispanic community of Los Angeles were foreseeable users, then our analysis shifts to a focus of their characteristics and knowledge. What are the characteristics and knowledge of the Hispanic community of Los Angeles? Should Plough have known that there are members of this community that cannot read English? Does not the fact that they placed ads in Spanish indicate that they had this knowledge? Does that knowledge, in and of itself translate into a duty on Plough to place warnings in Spanish on its product?

The fact that Plough used English only warnings may not be the proximate cause of Jorge Ramirez's injuries. Maybe not. *Restatement (3d)* makes it clear that a seller has no duty to warn or instruct about risks that should be obvious or are generally known by foreseeable product users. Therefore, when a particular consumer would use a product regardless of a warning or instruction, the lack of adequate warnings or instructions is not the legal cause of the plaintiff's injury.¹³⁷ If this is a negligence analysis, as has been suggested by some,¹³⁸ then without proximate cause there is no cause of action because one of the elements is missing.¹³⁹

Just as we saw in attempting to apply the standards of the EC Directive to the facts of *Ramirez*, an attempt to apply *Restatement (3d)* raises more questions than it answers. However, "while both the EC Directive and the *Third Restatement* have adopted different defectiveness standards, both have adopted a standard which is considered to be pro-defendant."¹⁴⁰ In the European Union the limitations inherent in a judge's strict application of the consumer expectation standard are emphasized. Whereas in the United States, "the *Third Restatement's* preference for risk-utility and a down playing of consumer expectations reflects a desire to reduce the potential of jury verdicts

¹³⁶ *Id.*

¹³⁷ See Pope & Glackin, *supra* note 15.

¹³⁸ *Id.*

¹³⁹ See PROSSER ET AL., *supra* note 7, at 164.

¹⁴⁰ Howells & Mildred, *supra* note 18, at 1025.

based on heightened assessments of safety expectations from jurors who are swayed by images of suffering, injured plaintiffs."¹⁴¹

X. A MANUFACTURER'S OPTIONS

So where does this leave a manufacturer in the United States or the European Union who knows that his products are being purchased or used by consumers who speak a foreign language? Persons in decisionmaking roles with regards to the placement of warning labels should begin their assessment from the premise that product warning labels should be designed to prevent injuries, not just to absolve manufacturers of liability. Therefore, manufacturers should construct warnings in a way that communicates clearly and effectively with all the populations at risk.¹⁴²

With this in mind a number of potential solutions have been suggested. These include: a case-by-case determination of when a manufacturer must give warnings in a foreign language,¹⁴³ symbolic warnings,¹⁴⁴ and a blanket foreign warning requirement.¹⁴⁵

None of these possible solutions are without their drawbacks. The California Supreme Court rejected a case-by-case solution in *Ramirez* because of the burden on manufacturers of including warnings in so many different languages and the potential for a counterproductive effect.¹⁴⁶ The use of symbols raises more questions such as: when should they be used,¹⁴⁷ who would develop these symbols, and would they be adopted internationally? Finally, the option of a blanket foreign language warning requirement seems to run the greatest risk of overkill and counterproductivity. A requirement of this nature could easily result in manufacturers printing multilingual warning labels that might intimidate or confuse consumers, causing them to ignore all of the information, including that in their own language.

¹⁴¹ *Id.*

¹⁴² See Christopher S. Maciejewski, *The Dilemma Over Foreign-Language Labeling of Over-the-Counter Drugs*, 15 J. LEGAL MED. 129 (1994).

¹⁴³ See Baldwin, *supra* note 6, at 872-73 (setting out a threshold inquiry under which the consumer must show: "(1)he or she was a member of a *foreseeable group* of non-English-speaking consumers that the defendant was specifically targeting; and (2)that the foreseeable group comprised a *significant portion* of the defendant's market and [the population of the state in which the action was brought].") The proof of these two points would establish a rebuttable presumption that language would be a factor that could be considered by the jury).

¹⁴⁴ See Maciejewski, *supra* note 142, at 150.

¹⁴⁵ See *id.* at 151.

¹⁴⁶ See *Ramirez*, 863 P.2d at 175.

¹⁴⁷ See Maciejewski, *supra* note 142, at 150.

XI. CONCLUSION

There are no easy answers for manufacturers in the United States or the European Union. However, they must remain mindful of the fact that *Ramirez* is a very limited holding that applies only to manufacturers of nonprescription drugs. Any manufacturer that produces a product that is not subject to the same stringent warning guidelines that are in place for nonprescription drugs will find himself outside the protection of *Ramirez* or the EC Directive defenses and in largely uncharted territory.

It seems clear that manufacturers should not have to provide blanket warnings in every conceivable foreign language. However, for the manufacturer who specifically targets a population and actively markets to that group through the use of advertising devices produced in that population's native language, the bar must be raised. That manufacturer must accept some responsibility for his deliberate actions and that includes accepting a duty to provide warnings in that population's native language.

Our world is becoming smaller with each passing day. As we witness the revolution of e-commerce and the advent of faster modes of transportation people are gaining access to products that were never before available to them. If we are going to insure that these new opportunities are positive experiences as opposed to journeys into the dangerous unknown, then some mechanism must be put in place to insure that manufacturers give those consumers that they seek out all of the information they need to use products safely. A case-by-case evaluation for manufacturers that seek out minority markets is the only way to accomplish that.

