By Kenneth Ross

The Risk of Overwarning

In most product liability cases, manufacturers are alleged to have sold a product with inadequate or no warnings and instructions about a particular hazard that allegedly caused injury. One of the defenses to such allegations is that the warning was unnecessary because the hazard was obvious. In addition to that defense, many manufacturers have argued that the warnings that did not appear on the product or in the manual were too remote or the injury that could be suffered was minor and that they didn't want to "overwarn."

I thought that it would be interesting to examine the case law that supports leaving off warnings and discuss when the cases say that "overwarning" exists. Then I will discuss how manufacturers can decide whether to leave off warnings because they constitute "overwarning."

But first, let's discuss the basic legal duties in this area.

Basic Legal Duty to Warn and Instruct

Product sellers must provide "reasonable warnings and instructions" about their products' risks. The law differentiates warnings and instructions as follows: "Warnings alert users and consumers to the existence and nature of product risks so that they can prevent harm either by appropriate conduct during use or consumption or by choosing not to use or consume." Instructions "inform persons how to use and consume products safely." Restatement of the Law Third, Torts: Products Liability §2(c) cmt. i.

Therefore, when the law talks about the "duty to warn," it includes warnings on products in the form of warning labels, safety information in instructions, instructions that affirmatively describe how to use a product safely, and safety information in other means of communication such

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as videos, advertising, catalogs, blogs and websites.

The law says that a manufacturer has a duty to warn when (1) the product is dangerous; (2) the danger is or should be known by the manufacturer; (3) the danger is present when the product is used in the usual and expected manner; and (4) the danger is not obvious or well known to the user.

Once the decision has been made to warn, the manufacturer needs to determine whether the warning is adequate. Generally, the adequacy of a warning is a question of fact to be decided by a jury. However, one court provided a useful description of an adequate label as follows:

> If warning of the danger is given and this warning is of a character reasonably calculated to bring home to the reasonably prudent person the nature and extent of the danger, it is sufficient to shift the risk of harm from the manufacturer to the user. To be of such character the warning must embody two characteristics: first, it must be in such form that it could reasonably be expected to catch the attention of the reasonably prudent man in the circumstances of its use; secondly, the content of the warning must be of such a nature as to be comprehensible to the average user and to convey a fair indication of the nature and extent of the danger to the mind of a reasonably prudent person.

Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 85 (4th Cir. 1962).

More specifically, various courts and commentators described a list of requirements and goals of an adequate warning. An adequate warning will do the following:

1. alert the consumer or user to the severity of the hazard (severity being defined as the magnitude of the hazard and the likelihood of it being encountered);
2. clearly state the nature of the hazard;
3. clearly state the consequences of the hazard; and
4. provide instructions on how to avoid the hazard.

A court must focus on a warning's "content and comprehensibility, intensity of expression and the characteristics of expected user groups" to determine its adequacy. And "[i]t is impossible to identify anything approaching a perfect level of detail that should be communicated in product disclosures." Restatement of the Law Third, Torts: Products Liability §2 cmt. i.

Case law concerning the adequacy of warnings and instructions is not particularly illuminating. Most of the cases talk about the adequacy of warnings either on the product or in the instruction manual. In discussing the adequacy of instructions, the cases only say that manuals should be "adequate, accurate and effective" and "clear, complete and adequately communicated."

Once the decision has been made to warn, the manufacturer needs to determine whether the warning is adequate. Generally, the adequacy of a warning is a question of fact to be decided by a jury.

Despite the lack of guidance from U.S. courts, there are voluntary consensus standards that do provide some help. The ANSI Z535 standards, which will be discussed below, provide some guidelines on creating warning labels and how to incorporate safety information into instructions. Unfortunately, these voluntary standards mostly provide only format and general content guidelines and not specific content guidelines. As a result, it is possible to comply with these standards and still have inadequate content, thereby resulting in potentially legally inadequate warnings and instructions.

Exceptions to Duty to Warn

The first general exception to the duty to warn is that there is no need for a manufacturer to warn of an open or obvious danger. This exception has been narrowed in recent years so that in many cases, a jury will be allowed at trial to decide if a danger is open and obvious to the user. For example, a danger is not open and obvious when the seriousness of the danger is obvious, but the cause of the danger remains unknown to the user.

In *Hoffman v. E.W. Bliss Co.,* 448 N.E.2d 277 (Ind. 1983), the court held that a defect in a punch press was not open and obvious. Although a worker knew that placing his hand in the machine during its operation was dangerous, he did not know that the machine could operate without a button being pushed.

Likewise, even when the danger is open and obvious, a manufacturer may still be required to warn if the seriousness or specific nature of the harm or damage likely to result is not obvious to the user. This principle is illustrated in *Billiar v. Minnesota Mining and Manufacturing Corp.,* 623 F.2d 240 (2d Cir. 1980), in which the plaintiff read the warning label and knew that contact with the product could cause blisters on her fingers. However, she did not know that contact with the product could cause severe chemical burns.

On this point, Restatement of the Law Third, Torts: Products Liability §2 cmt. j says:

> When a risk is obvious or generally known, the prospective addressee of a warning will or should already know of its existence. Warning of an obvious or generally known risk in most instances will not provide an effective additional measure of safety. Furthermore, warnings that deal with obvious or generally known risks may be ignored by users and consumers and may diminish the significance of warnings about non-obvious, not-generally-known risks. Thus, requiring warnings of obvious or generally known risks could reduce the efficacy of warnings generally.

The last two sentences deal with the concept of "overwarning," which will be discussed below.

Manufacturers should consider warning about most open and obvious dangers that are specific to that product, particularly when the risk of injury or damage is

high. This is an area where an experienced U.S. product liability attorney can help analyze whether the hazard has been held by a court to be so open and obvious that a warning may not be necessary.

Second, a manufacturer need not warn about dangers that are commonly known to the general public. For example, there is no need to warn that knives cut, flames burn, or hammers smash. However, a jury may be allowed to decide if a danger or hazard is commonly known and was known to the injured party.

The third general exception to a manufacturer's duty to warn is when users of a product have special expertise using the product. For example, it is possible that an experienced electrician need not be warned about the dangers of coming into contact with live electrical parts. Also, an experienced machinery operator may not need to be warned about the hazards of pinch points. This exception is also somewhat limited in that in the United States, it is very possible that inexperienced and untrained users and operators will be allowed to operate potentially hazardous products.

The last general exception to the creation of a duty to warn is that a manufacturer need only warn of dangers that are known to, or reasonably foreseeable by, the manufacturer. Dangers that are not reasonably foreseeable, or that arise out of unforeseeable misuses of a product, need not be considered by a manufacturer in determining which warnings are necessary. For example, a manufacturer need not warn a user about the hazard of using a lawn mower to trim hedges.

A manufacturer should broadly analyze reasonably foreseeable dangers and misuses of a product. While it is not necessary to foresee bizarre uses of the product (once referred to as the "far reaches of pessimistic imagination"), the manufacturer should not assume that what it thinks is reasonable is what some potential user will think is a reasonable use or misuse of that product. As with open and obvious dangers, a jury will many times be allowed to decide if a use or misuse is reasonably foreseeable.

Law on Overwarning

There is much authority for the proposition that "overwarning" may detract from the more important warnings and cause the reader to ignore all of the warnings or to miss the important warnings embedded in the long list of warning messages.

In this regard, the Restatement of the Law Third, Torts: Products Liability §2 cmt. i says: "In some cases, excessive detail may detract from the ability of typical users and consumers to focus on the important aspects of the warnings, whereas in others reasonably full disclosure will be necessary to enable informed, efficient choices by product users." The Restatement goes on to caution courts to look at warnings carefully "before imposing a duty to provide overly numerous or too detailed warnings" or "trivial or far-fetched risks." Restatement of the Law Third, Torts: Products Liability §2 reporter's notes to cmt. i.

The case law considers "overwarning" in the context of justifying leaving a warning off a product or just putting it in the instructions. Courts talk about the problem of information costs and the lack of proof that a few more warnings on the label attached to a product would have prevented an accident. So the courts consider all places where safety information could have been placed in determining adequacy. In *Cotton v. Buckeye Gas Products Company*, 840 F.2d 935 (D.C. Cir 1988), for instance, the court said: "The primary cost is, in fact, the increase in time and effort required for the user to grasp the message. The inclusion of each extra item dilutes the punch of every other item. Given short attention spans, items crowd each other out; they get lost in fine print." *Id*. at 938.

Another case said the following:

> If a manufacturer had to list all sources of friction, or all sources of sparks, as a means of warning of a flammability hazard, its warning label would have to be of epic or encyclopedic proportions. Even then, the manufacturer could not be certain that it had covered every possibility. The combinations of circumstances or materials that could create a spark or friction would be almost limitless. This Court has previously recognized that excessive warnings on product labels may be counterproductive, causing "sensory overload" that literally drowns crucial information in a sea of mind-numbing detail.

Aetna Cas. & Sur. v. Wilson Plastics, 509 N.W.2d 520 (Mich. Ct. App. 1993).

The Louisiana Court of Appeals said in response to a plaintiff's proposed new warning label with ten messages:

> [a]s a practical matter, the effect of putting at least ten warnings on the drill would decrease the effectiveness of all of the warnings. A consumer would have a tendency to read none of the warnings if the surface of the drill became cluttered with the warnings. Unless we should elevate the one hazard of sparking to premier importance above all others, we fear that an effort to tell all about each hazard is not practical either from the point of view of availability of space or of effectiveness. We decline to say that one risk is more worthy of warning than another.

Broussard v. Continental Oil Co., 433 So. 2d 354 (La. App), *cert. denied*, 440 so. 2d 726 (La. 1983).

Lastly, in *Hood v. Ryobi America Corp.,* 181 F.3d 608 (4th Cir. 1999), the court said:

> Hood assumes that the cost of a more detailed warning label is minimal in this case, and he claims that such a warning would have prevented his injury. But the price of more detailed warnings is greater than their additional printing fees alone. Some commentators have observed that the proliferation of label detail threatens to undermine the effectiveness of warnings altogether. *See* James A. Henderson, Jr. & Aaron D. Twerski, ***Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265, 296–97 (1990)**. As manufacturers append line after line onto product labels in the quest for the best possible warning, it is easy to lose sight of the label's communicative value as a whole. Well-meaning attempts to warn of every possible accident lead over time to voluminous yet impenetrable labels-too prolix to read and too technical to understand.

There are many other cases with similar messages, many of them involving drug inserts. Some of the statements on overwarning are dicta, but some of them seem to be dispositive rulings on the facts. The trouble with all of this caselaw is that there is no guidance on when a label or manual has "overwarned," thus making the warning defective. And, of course, unlike an

on-product warning label, an instruction manual has unlimited space. The above quotes on overwarning always apply to on-product labels and not manuals.

In virtually all warnings cases that go to verdict, a jury decides whether a warning was adequate. Of course, the jury's ruling can be overturned on appeal, but when manufacturers are designing warnings and instructions, they need to decide how much is necessary, how much might be too much, and where to put the information.

In my research, I was looking for cases that deemed a warning label "inadequate" because it had too much information (referred to above as "sensory overload") and the plaintiff couldn't be expected to read any of it. I found no cases that held a warning to be defective because it was too long or too detailed. All of the warning adequacy cases that I read contained an allegation that the warning was inadequate because the pertinent warning was not present, and the defendant argued that adding all of those warnings would constitute overwarning and would diminish the effectiveness of all of the warnings.

As I will discuss below, this should support having more warnings rather than fewer warnings, especially when in doubt about whether it is an obvious hazard or a remote risk or whether you have some other possible exception to the duty to warn.

The ANSI Standards on Warnings and Instructions

While compliance with standards is not an absolute defense, the ANSI standards on warnings and instructions are well accepted and provide some guidance on creating what could be an adequate safety message.

The ANSI Z535 standards provide the basis for developing an on-product warning label system. ANSI Z535.4 sets forth performance requirements for the design, application, use and placement of warning labels for all consumer and industrial products. This standard calls for a specific label format containing a signal word panel, word message panel, and an optional pictorial or symbol panel.

The standard requires the message to be transmitted, with words or symbols individually or in combination, consisting of (1) the nature of the hazard, (2) the seriousness of the hazard or probability that the user will encounter the hazard, (3) the consequences of encountering the hazard or the severity of the injury, and (4) how to avoid the hazard. These requirements are consistent with the case law that requires a label to convey the "nature and extent" of the danger.

Given the limited space on products, and the desire to warn about even remote risks, safety information in instructions is taking on increased importance.

Even if a manufacturer meets its "duty to warn" with on-product labels, with most products, it will also need some instructions. Given the limited space on products, and the desire to warn about even remote risks, safety information in instructions is taking on increased importance.

With some products, there is only room for one label referring the user to the instructions that need to be read before the product is used. Some courts have permitted manufacturers to do that and then place all of the specific safety information in the instruction manual.

The standard dealing with instructions, ANSI Z535.6, is intended to "establish a uniform and consistent visual layout for safety information in collateral materials for a wide variety of products and establish a national uniform system for the recognition of potential personal injury hazards for those persons using products."

The standard applies to all "collateral material" that accompanies a product but does not include safety information placed in advertising and promotional material or stated in audio or visual material such as safety videos and websites.

The standard includes guidelines for the purpose, content, format, and location of four different kinds of safety messages: supplemental directives, grouped safety messages, section safety messages, and embedded safety messages.

Supplemental directives direct readers to read an entire manual or to the safety information in the manual. They can be located on the cover of a manual or on the first page of a section in the manual.

Grouped safety messages are commonly referred to as a "safety section." This section usually appears at the beginning of a manual, before or after the table of contents, and generally describes the risks involved in the use of a product and how to minimize or avoid them. These sections should include definitions of the signal words—such as "danger," "warning," and "caution"—that are used on labels and in the manual, as well as reproductions of the labels in an illustration showing where they are attached to the product.

Section safety messages are included at the beginning of a chapter (*i.e.*, maintenance or installation or operation) or within a chapter and do not specifically apply to a procedure.

Embedded safety messages are contained within a specific procedure.

These different kinds of messages, albeit without these fancy names, have been in use for decades (for example, a military standard from many years ago required a safety section in instruction manuals for products sold to the military), so many manufacturers' manuals have not changed significantly since this standard was published.

This standard only deals with basic safety instructions in a manual. However, as technological capabilities continue to develop, the standards groups, including ANSI, might in the future provide guidance on additional ways to transmit safety and instructional information.

Today, more interesting, compelling, and understandable safety information can be transmitted by online video and webcasts in combination with written literature. The challenge for manufacturers in the future will be to provide information in a way that is more likely to be read or viewed.

The ANSI standards don't address the issue of overwarning specifically. But ANSI Z535.4 does say that warnings should be "concise" and "readily understood." And it does say, "When detailed instructions, precautions, or consequences require a longer word message, or when space is limited, a sign may refer the user to the proper instruction manual or other relevant information." *Id*.

And ANSI Z535.6 says:

> Section safety messages should identify the hazard, indicate how to avoid the hazard, and advise of the probable consequences of not avoiding the hazard. Information regarding hazard, consequences, or avoidance behavior may be omitted from the safety message if it can be readily inferred. This information may also be omitted or abridged in situations where provision of the information would produce unnecessary repetition.

However, these ANSI standards are mostly design standards meant to achieve some consistency from label to label and instructions to instructions. There is very little guidance on content and on where the safety information should be located: on the product or in the instructions.

What to Do

It is interesting to learn about what the law says, but it doesn't help a manufacturer decide what information to include in its safety documentation as it is developing a product for sale in the United States and internationally. Manufacturers would prefer to develop warnings and instructions that are likely to be read, understood, and followed so that no accident occurs. However, in the event that an accident does occur, then a manufacturer wants warnings and instructions that will be defensible, or more importantly, that will convince the plaintiff's attorney that the manufacturer supplied enough information and that the injured party was culpable because he or she ignored this information and suffered injury as a result.

After having spent over 40 years helping to design warnings and instructions and defending their adequacy, I feel like I have some basis for providing practical advice on what to do during the warnings and instructions development phase. I tell manufacturers that to my knowledge, no company has been held liable for having too many warnings or warnings that are too long. So, despite the language on "overwarning," as discussed above, I haven't found cases finding that the warnings or instructions were defective because they were too voluminous.

I think it is better to provide more warnings and risk overwarning rather than provide fewer warnings and have to explain why a warning was left out.

While we do want to write warnings as succinctly as possible and not include clearly obvious hazards or remote risks, I tend to include all residual risks on the label, or at least in the manual where we have unlimited space. Given the lack of cases holding warnings defective for overwarning, when in doubt about whether an exception applies, I would include the warning. Kip Viscusi wrote about warnings and said on this point: "Firms may potentially incur tort liability penalties for underwarning. Yet there are no penalties levied for overwarning. The uncertainty of whether warnings meet the liability test consequently provides incentives for firms to overwarn, thus potentially diluting the efficacy of warning in other contexts as well." Kip Viscusi, *Individual Rationality, Hazard Warnings, and the Foundations of Tort Law,* 48 Rutgers L. Rev. 625 (1996).

In other words, I think it is better to provide more warnings and risk overwarning rather than provide fewer warnings and have to explain why a warning was left out. The best way to deal with this philosophy is to organize warnings and instructions so that the hazards are clearly classified by level of risk through the use of ANSI Z535.4 signal words—"Danger, Warning, and Caution"—to organize the warnings so that it is easy for the user to find information that he or she needs to operate a product safely and to add visual markers such as bullets so that the different messages can easily be distinguished from each other.

This can be done by grouping safety messages either by phase of usage—assembly, installation, use, maintenance, troubleshooting—or by the type of hazard that exists—electrical shock, burn, explosion, or dust, among others. In addition, you need to decide whether a warning goes on a product and in the manual or just in the manual. My operating principle is to determine whether the safety message should be seen by a user each time he or she uses the product, in which case it goes on the product, or can just be read in the manual before first using the product, and then the user can refer to it when necessary.

Lastly, when some safety information is contained in the instruction manual, the product should have one label telling the user to read the warnings and instructions before using the product, and if the instructions are missing, how to get a copy, either on the company's website or by calling customer service.

Conclusion

If a plaintiff is sympathetic, has suffered a significant injury, and a jury could believe that the plaintiff would not have been injured or killed if a manufacturer had added a warning or added a few more words to an existing warning, it is very difficult to defend the case. Almost 40 years ago, I sat in a courtroom, as an in-house lawyer, in that exact situation. I settled the case but was frustrated about how easy it seemed for the plaintiff to make out a prima facie case. Assuming that the decedent didn't want to kill himself, he must not have known about the hazard, and he would have followed the precautions if a label had been provided. It is hard to rebut that, especially if the plaintiff is dead.

This relative ease of proof should encourage manufacturers to think carefully about how to adequately transmit an entire warning message, even for users who should know better, and provide it in a way that a plaintiff's attorney or jury would believe, after seeing it, that there was nothing more that the manufacturer could do.