¡Cuidado!

Product Warnings in an Increasingly Multicultural Society

By Christopher A. Duggan

Increasingly, courts are turning to juries to decide whether an adequate product instruction or warning required providing it in a foreign language.

A product may be determined to be defective by virtue of defects in its design, manufacture, or as a result of inadequate warnings or instructions. The parameters of appropriate product instructions and warnings are outlined in the *Restatement (Third) of Torts*:

> [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 or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

Restatement (Third) of Torts: Products Liability §2(c) (1998). The applicable comments in the *Restatement* illustrate the complexities involved in determining the adequacy of instructions and warnings:

> In evaluating the adequacy of product warnings and instructions, courts must be sensitive to many factors. It is impossible to identify anything approaching a perfect level of detail that should be communicated in product disclosures. For example, educated or experienced product users and consumers may benefit from inclusion of more information about the full spectrum of product risks, whereas less-educated or unskilled users may benefit from more concise warnings and instructions stressing only the most crucial risks and safe-handling practices. In some contexts, products intended for special categories of users, such as children, may require more vivid and unambiguous warnings. 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. Product warnings and instructions can rarely communicate

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all potentially relevant information, and the ability of a plaintiff to imagine a hypothetical better warning in the aftermath of an accident does not establish that the warning actually accompanying the product was inadequate. No easy guideline exists for courts to adopt in assessing the adequacy of product warnings and instructions. *In making their assessments, courts must focus on various factors, such as content and comprehensibility, intensity of expression, and the characteristics of expected user groups.*

Restatement (Third) of Torts: Products Liability §2, cmt. i (1998) (emphasis added).

If particular risks known to the manufacturer or distributor are made known to consumers by means of accurate, clear, and unambiguous warnings in English, the duty to warn is satisfied—usually, but not always.

How, then, are courts to determine the adequacy of instructions and warnings in the United States in light of the characteristics of an expected user group that speaks a language other than English? The First Circuit Court of Appeals addressed this issue in 1965 in a case involving instructions on farm herbicides. Surprisingly, however, there have only been a few published decisions addressing the requirement of non-English warnings since then. Given the expansion of languages spoken in the United States, it seems likely that cases addressing these issues will become more frequent.

According to the US Census Bureau's 2017 report on Community Survey Statistics, 21.6 percent of the United States' population over the age of five—some 66.5 million people—speak a language other than English at home. Press Release, US Census Bur., New American Community Survey Statistics for Income, Poverty and Health Insurance Available for States and Local Areas (Sept. 14, 2017). Spanish, as measured at that time, was spoken at home by 13.3 percent of the population over the age of five, some 40.5 million people. *Id*. It was estimated that over 350 different languages were spoken in the United States as of 2013. United States Census Bureau, Department of Commerce, 2009 – 2013, American Community Survey.

Given the multitude of languages spoken and written in the United States, and the general knowledge that a certain segment of consumers in the United States may not speak or read English, can a warning given only in English render a product defective because the foreseeable risks of harm could have been reduced or avoided by providing instructions or warnings in languages other than English? Or put another way, when is a product seller required to give warnings or instructions in a language other than English, if ever?

Historically, courts have been disinclined to find a duty to provide instructions or warnings in foreign languages based solely on the fact that a specific consumer did not understand English. However, given the growth of languages other than English in the United States, we can expect that there will be at least some movement toward that end. Under certain circumstances, some courts have already held that whether a seller should give warnings in a language other than English is a factual question for a jury to decide, and as the population of our country evolves, it is likely that this trend will continue.

Who Decides Whether the Duty to Warn Requires Foreign-Language Warning: Court or Jury?

As a general matter, a manufacturer or seller of a product has no general duty to warn or instruct about risks that should be obvious or are generally known by foreseeable users of the product. *Restatement (Third) of Torts: Products Liability* §2, cmt. e (1998). If particular risks known to the manufacturer or distributor are made known to consumers by means of accurate, clear, and unambiguous warnings in English, the duty to warn is satisfied—usually, but not always. Issues such as the target market for the product, the seller's knowledge of the likely users, and presence or absence of clear and generally used pictograms that might substitute or supplement written warnings are factors that are often central to determining the reasonableness of a seller's decision to include or omit warnings in several languages.

Courts address whether the duty to warn requires foreign-language instructions or warnings in one of two ways. The threshold issue is whether the judge or a jury is the final arbiter on whether warnings in multiple languages are required to render a product reasonably safe. Most jurisdictions hold that the court, not a jury, is to "determine and formulate the standard of conduct to which the duty requires the defendant to conform." *Ramirez v. Plough, Inc*., 6 Cal. 4th 539, 546, 25 Cal. Rptr. 2d 97, 101, 863 P.2d 167, 171 (1994) (citing *Restatement (Second) of Torts* §328B, cmt. f.)). But that is only the primary issue. Whether the seller's conduct meets that standard of conduct is usually held to be a question for the jury, including whether a reasonably prudent seller under a given set of circumstances should include warnings or instructions in a language other than English to render the product reasonably safe for foreseeable users. For this second inquiry, some courts have left it to the jury to determine whether it would have been reasonable to provide a non-English warning, considering the circumstances of a particular case.

While not a product liability case, *Soon Jeon v. 445 Seaside, Inc*., 2013 WL 431846 (D. Haw. Jan. 31, 2013), is instructive on the issue of duty. This case involved the death of a Korean tourist, Mr. Kwak, staying at the Island Colony Hotel in Hawaii, a hotel known to be frequented by Korean tourists. While at the hotel, Mr. Kwak went swimming in the hotel pool, and he was found drowned, possibly due to a heart attack. At the time, the hotel maintained a sign near the pool gate stating, "WARNING NO LIFEGUARD ON DUTY," which complied with the applicable building code. There was evidence that Mr. Kwak could speak English; in fact he actually taught English in a Korean school. Nonetheless, he was not a native English speaker.

On the defendants' motion for summary judgment seeking to dismiss the plaintiffs' negligent failure-to-warn claim, the court looked to Hawaii law on the duties required of an occupier of land "to warn people using the land of any condition that 'poses and unreasonable risk of harm,' if the occupier 'knows, or should have known of the unreasonable risk'." *Id.* at *8 (citing *Corbett v. Assoc. of Apartment Owners of Bayview Apts.*, 70 Haw. 415, 417, 772 P.2d 693, 695 (Haw. 1989)). Denying the hotel's motion for summary judgment on this count, the court determined that whether the sign should have been posted in Korean was a matter that went to the *reasonableness* of the warning, and that reasonableness could not be determined by the record before it, because compliance with the building code was a "minimal requirement but does not necessarily establish the reasonableness of the warning given." *Id.* at *9. The court noted that while there was no law requiring warnings signs in any language other than English, some circumstances may require it for the warning to be reasonable:

> [A] juror could nonetheless determine that Defendants had to post a warning sign in Korean to satisfy their duty. Whether such duty to warn exists turns on the specific facts of the case. If, for example, a hotel catered exclusively to non-English speaking Korean tourists, a jury might reasonably determine that the absence of signs in both Korean and English was a breach of the duty to warn. Those specific facts are not before this court, but whether the duty to warn Kwak was breached by the existing sign can only be determined in light of all the circumstances.

Id. Thus, although the court did not see this as a fit subject for summary judgment on the record before it, it signaled that in certain, specific situations—such as having a hotel that *exclusively* catered to Korean tourists—a jury might reasonably conclude that a duty to warn in Korean existed.

Special Situations Impacting the Duty to Warn

Federal or state regulations governing the sale and labeling of certain products may preempt common law duty-to-warn principles. Certain actions by a manufacturer or supplier may also become a factor in determining whether a duty to warn requires warning in a foreign language.

Preemptive Effect of Federal or State Regulations

Common law principles of duty and causation may be preempted by federal or state regulations governing the sale and labeling of certain products, so it is important to determine whether there are federal regulations that apply to a particular product. For example, in *Ramirez v. Plough, Inc.*, 6 Cal. 4th 539, 25 Cal. Rptr. 2d 97, 863 P.2d 167 (1994), a Spanish-speaking mother of a four-month-old child brought a product liability action against an aspirin manufacturer for failing to include a Spanish-language warning on the bottle. The English warning on the bottle stated that the dosage for a child under two years old was "as directed by doctor," but the child's mother did not consult a doctor before treating her child's condition. The child then developed Reye's syndrome, resulting in severe neurological damage.

The California Supreme Court reversed the appellate court and affirmed summary judgment for the manufacturer. The court noted that the extensive federal and state regulations governing the labeling of nonprescription drugs, including 21 C.F.R. §201.15(c)(1) (1993), required only that sellers provide full, English labeling for all nonprescription drugs except those "distributed solely in the Commonwealth of Puerto Rico or in a Territory where the predominant language is one other than English.…" The court also noted that California law at that time required that cautionary statements for, among other things, dangerous drugs "shall be printed in the English language…." *Ramirez*, 6 Cal. 4th at 549–50, 25 Cal. Rptr. 2d at 103–04, 863 P.2d at 173–74 (citing and quoting Cal. Health & Safety Code §25900 (since repealed by Stats.1995, c. 415 (S.B.1360), §156)). The court determined that the prudent course was to adopt, for tort purposes, the existing legislative and administrative standard of care on the issue, and rejected the plaintiff's attempt to impose on nonprescription drug manufacturers a duty to warn that was broader in scope and more onerous than that imposed by applicable statutes and regulations. *Ramirez*, 6 Cal. 4th at 552–53, 25 Cal. Rptr. 2d at 105–06, 863 P.2d at 175–76.

Likewise, in *Torres-Rios v. LPS Laboratories, Inc.,* 152 F.3d 11 (1st Cir. 1998), a worker was burned by a hazardous cleaning product in a workplace accident. The product was sold in Puerto Rico but only contained English warnings, which were combined with a pictorial of a flame. In granting summary judgment to the manufacturer, the court held that because federal law on the labeling of hazardous materials stated that the manufacturer must provide required warnings in English, and the regulations further provided that an employer (not the manufacturer) may provide additional warnings in other languages, the manufacturer's failure to provide Spanish-language warnings did not violate federal law and could not render the cleaner a defective product: "[t]he combination of the flame pictorial and safety information labels satisfied applicable federal regulations and provided sufficient notice to users of the highly flammable nature of the cleaner and the danger of accumulated vapors from it." *Id.* at 15. This was despite the manufacturer intentionally selling the product in an area in which English was not the primary language.

It is notable that regulations are indeed moving toward requiring some type of warnings to be provided to non-English speakers in some circumstances. For example, in 2016, California passed a law requiring pharmacists to provide prescription-drug labels in five languages other than English—Spanish, Tagalog, Chinese, Vietnamese, or Korean—on request from patients or their caregivers. Cal. Bus. & Prof. Code §4076.6 (West 2016). And the United States Environmental Protection Agency, while generally requiring that labeling appear in the English language, unless otherwise required by the agency or proposed by the entity seeking registration of a pesticide, (40 C.F.R. §156.10(a)(3)), now requires that for the two most toxic categories of pesticides,(40 C.F.R. §156.62), the "signal word" (such as *danger*, *poison*, or *warning*) must be in Spanish, along with a statement in Spanish instructing the user that if he or she does not understand the label, the user is to find someone to explain it to him or her in detail. 40 §C.F.R. 156.206(e).

Assumption of a Duty to Warn in a Foreign Language through Actions of the Manufacturer or Supplier

The knowledge and actions of the manufacturer or supplier may also bear on whether a duty to warn in a foreign language is required. In *Stanley Indus. v. W.M. Barr & Co., Inc.*, 784 F. Supp. 1570 (S.D. Fla. 1992), a fire occurred at the plaintiff's plant that was caused by the spontaneous combustion of rags soaked in the linseed oil used by the plaintiffs' employees to oil a cutting table. The employees were brothers from Nicaragua whose primary language was Spanish. One brother could not read any English, and the other could read English words but struggled with understanding their meaning. Instructions and directions for use of the linseed oil were written on the backside of the label in English, along with English warnings concerning spontaneous combustion of disposal rags. There were no graphics, symbols, or pictographs, a fact emphasized by the court.

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Before the incident, the defendants had engaged in a joint advertising program to promote products, including the linseed oil, specifically aimed at Hispanic customers in the Miami area. In denying the defendants' motion for summary judgment on the adequacy of the warnings, the court found that due to the "advertising of defendants' product in the Hispanic media," and "the pervasive presence of foreign-tongued individuals in the Miami workforce," it was for the jury to decide whether the defendants could reasonably have foreseen that the linseed oil would be used by persons such as the plaintiff's employees. *Id*. at 1576.

Illiterate Consumers and the Impossibility of Giving Warnings in Every Possible Language: Pictorial Warnings

If juries are left with the responsibility to determine whether a foreign-language instruction or warning was appropriate on a case-by-case basis, based on fact-specific factors such as the identity of the plaintiff, his or her actual ability to read English or another language, the percentage of foreign-language speakers in a product area or the percentage of foreign-language speakers purchasing a particular product, manufacturers and suppliers may decide to give instructions and warnings on their products in a great many more languages. But, of course, to do so raises a myriad of other problems, such as having insufficient space on a product to provide clear, concise, but important information in that many languages, disinclination among consumers to sift through pages and pages of instructions just to find the instructions in a consumer's preferred language, or the ineffectiveness of these comprehensive instructions and warnings for a consumer who is illiterate. Manufacturers, therefore, have turned to graphics, symbols, and pictorials that do not depend on users' ability to read a particular written warning in a particular language to notify users of potential dangers.

Failing to use graphics, symbols, or pictorials may result in breach of a duty to warn. In *Hubbard-Hall Chemical Co. v. Silverman*, 340 F.2d 402 (1st Cir. 1965), two farm laborers (natives of Puerto Rico, one who could read some English, and the other who could read none) died as a result of using 1.5 percent Parathion dust while working on a farm in Massachusetts without using masks and coats as set forth in the English-language warning on the product, a warning specifically approved by the US Department of Agriculture. In affirming the jury verdict for the plaintiffs, the First Circuit held:

> We are of the opinion that the jury could reasonably have believed that defendant should have foreseen that its admittedly dangerous product would be used by, among others, persons like the plaintiffs' intestates, who were farm laborers, of limited education and reading ability, and that a warning even if it were in the precise form of the label submitted to the Department of Agriculture would not, because of its lack of a skull and bones or other comparable symbols or hieroglyphics, be "adequate instructions or warnings of its (Parathion's) dangerous condition."

Id. at 405.

Likewise, in *Campos v. Firestone Tire & Rubber Co.*, 98 N.J. 198, 485 A.2d 305 (1984), the New Jersey Supreme Court found that the manufacturer of a tire-rim assembly had a duty to warn the plaintiff mechanic, who was Portuguese but could not read or write Portuguese or English, of the dangers of inserting his hand into a steel safety cage while assembling a tire. The court noted that "[i]n view of the unskilled or semi-skilled nature of the work and the existence of many in the work force who do not read English, warnings in the form of symbols might have been appropriate.…" *Id*. at 208, 485 A.2d at 310.

Thus, if a manufacturer has reason to believe that its product will be used by a workforce that is semi-skilled and possibly illiterate, pictorial warnings may be required to satisfy a duty to warn. And given the multiplicity of possible foreign languages that product users who are not illiterate may be able to read, these pictorial warnings may be necessary in lieu of over-inclusive warnings in numerous languages.

Conclusion

In the past, courts determining whether product instructions or warnings were adequate did not pay significant attention to the ability of the ultimate user of the product to read and understand English. In today's society, however, where a certain percentage of a product's user base might not speak or understand English, even having the ideal instruction or warning on a product in English may not be enough. The challenge facing the manufacturer is where to draw the line. Should an instruction or warning in Spanish be given? Should an instruction or warning in other languages be given? Is the product regulated such that other languages are required or excluded? Does the potential multiplicity of instruc-

tions and warnings themselves cause confusion to such an extent as to be rendered inadequate? Will symbols or pictorials suffice instead?

Much depends on the seller's actual knowledge of the market and the end users. For products distributed broadly across the country with no specific target market, clear and comprehensive warnings and instructions in English seem to be sufficient to discharge the seller's duty under both on negligence and strict liability theories as a matter of law. However, if the seller targets a specific market knowing that the end users might not speak or understand English, more might be required. How much more appears, at this juncture, to be a fact question left for juries to parcel out. In these circumstances, pictograms and illustrations are often good solutions for most sellers. If the seller does opt to provide multilingual communications, it must do so reasonably.