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DANGER: FAILURE TO WARN CLAIMS, WHERE THEY HAVE BEEN, AND WHERE THEY MAY BE HEADING

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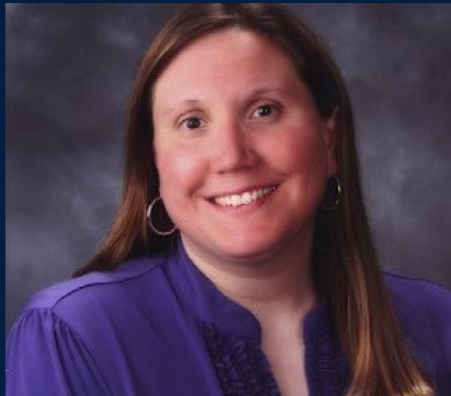

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PRODUCT LIABILITY FOR FAILURE TO ADEQUATELY WARN

- Parties in the chain of commerce
  - Designer, manufacturer, distributor, seller/retailer, acquiring company (post-sale duty to warn)
- Liability for injuries to users, consumers, and other persons (e.g. bystanders)
- Caused by:
  - Lack of warnings
  - Inadequate warnings

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WHAT ARE "WARNINGS"?

- Instructions and directions
  - Assembly, installation, use/operation, and maintenance
- Warnings about latent/nonobvious dangers
- Warnings about foreseeable misuse, errors in installation, operation, or maintenance
  - Where such misuse/errors pose a latent/nonobvious risk of harm

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HISTORY OF LEGAL LIABILITY FOR FAILURE TO WARN

- 1600’s English Common Law = Caveat Emptor
- 1800’s = Negligence and Privity of Contract
- 1900’s = Efforts to Change Harsh Rules that Left Injured Plaintiffs with No Remedy
  - Implied warranties
  - Abolish privity requirement
  - Strict liability (Restatement (Second) of Torts – Section 402A)
- Late 1900’s and 2000’s:
  - Tort reform, comparative fault, damages caps

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THEORIES OF LIABILITY FOR FAILURE TO WARN

- Negligence
- Strict liability
- Breach of warranty
- Consumer protection statutes

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WHY HAVE FAILURE TO WARN CLAIMS PROLIFERATED?

- Not highly technical
- Inexpensive to work up (e.g. fewer experts)
- Common sense notion that products can be made less dangerous by providing instructions
- Difficult to for manufacturers to dispute feasibility
- Evidentiary presumption that warnings would have prevented the injury
- Perception that the cost of providing warnings is lower relative to the cost of harm from a product

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WHEN IS THERE A DUTY TO WARN?

- Danger
- From a foreseeable use
- Which danger seller knew or reasonably should have known and
- Which danger a reasonable user would not expect

But what about known or obvious risks?

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SCOPE OF DUTY TO WARN

- “Open and obvious danger rule”
- Not required to warn about a danger from the product’s foreseeable use that is generally known and recognized
- Not required to warn about unforeseeable misuses

WHEN IS A WARNING GOOD ENOUGH? ADEQUACY STANDARD

- Warning must be "adequate"
- Considers the ordinary knowledge common to members of the community who use the product
  - Reasonably catch the user's attention
  - Understandable to foreseeable users
  - Fairly indicate the danger from the foreseeable use
  - Sufficiently conspicuous given the danger

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ADEQUACY STANDARD

- Must a warning be the “best” possible warning?
- “Product warnings and instructions can rarely communicate 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.”
- Restatement (Third) of Torts: Prod. Liab. § 2 (1998)

ADEQUACY STANDARD

- Does **not** have to be the **best** possible warning
- Does **not** have to list all the ways in which the product's risks and danger may result in harm
- Need only be **reasonable** under the circumstances
- No duty to warn of **every** potential danger
- No duty to explain the **scientific rationale** for each warning
- Only a duty to warn of those dangers which the owner or user would not be aware of

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DUTY TO WARN – WHO IS PROTECTED?

- Actual user or consumer
- Others injured by products
  - Bystander
  - Passenger
  - Spouse/family member (e.g. asbestos exposure)

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CAUSATION: WHEN IS AN INADEQUATE WARNING THE PROXIMATE CAUSE OF AN INJURY?

- The failure to warn must cause injury, i.e., a warning would have changed the outcome
- If the event which produced the injury would have occurred regardless of the defendant's conduct
  - then the failure to provide a warning is not the proximate cause of the harm

CAUSATION: THE HEEDING PRESUMPTION

- Heeding presumption is a critical component of the law of failure to warn
- Evidentiary presumption – shifts the burden of proof
- Plaintiffs are relieved of the burden of proof on the element of causation in a warning claim
- Had adequate warnings been provided, the injured party would have altered his use of the product or taken added precautions to avoid the injury

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REBUTTING THE HEEDING PRESUMPTION

- Evidence that plaintiff would not have followed the warning and instead would have proceeded voluntarily despite such warning
- Create a jury question as to whether a plaintiff is the type of person who ordinarily would not follow warnings
  - Evidence of the plaintiff's knowledge of the risk, which suggests that the plaintiff chose to face the risk knowingly and voluntarily
  - Evidence of the plaintiff's attitudes and conduct
  - Habit evidence or evidence that the plaintiff is blind, illiterate, intoxicated, etc., thus was unable to read or heed the warning
- Then what? Heeding presumption disappears, or burden shifts back to the plaintiff

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POST-SALE DUTY TO WARN

- Is there a post-sale duty to warn? Maybe
  - Seller or acquiring company's knowledge of the risks
  - Ease of identifying purchasers
  - Magnitude of the risk
  - Nature of the industry
  - Warnings originally given at the time of sale
  - Intended life of the product
  - Safety improvements post-sale
  - The number of units sold
  - Reasonable marking practices
  - Consumer expectations

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WHERE FAILURE TO WARN CLAIMS MAY BE HEADING

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Continuing duty to warn:

- Impact of claims/lawsuits (security gate example)
- Impact of social media (social media example)
- Impact of court rulings extending liability (*Dummitt*)
- Impact of Covid-19 on filings
- Considerations

RESTATEMENT (THIRD) OF TORTS

A reasonable person in the seller's position would provide a warning after the time of sale if:

(1) The seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and

(2) Those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and

(3) A warning can be effectively communicated to and acted on by those to whom a warning might be provided; and

(4) The risk of harm is sufficiently great to justify the burden of providing a warning.

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Restatement (Third) of Torts § 10 – Liability of Commercial Product Seller or Distributor for Harm Caused by Post-Sale Failure to Warn

CONTINUING DUTY TO WARN …

The manufacturer is required to keep abreast of developments in:

- the state of the art;
- through research;
- accident or other reports;
- scientific literature;
- and other available methods (*e.g.*, social media)

and may be held liable for failure to warn of dangers and risks which come to its attention following user operation of the product.

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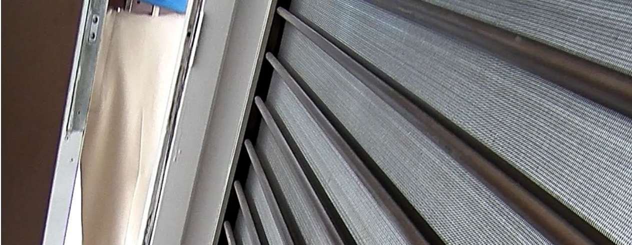
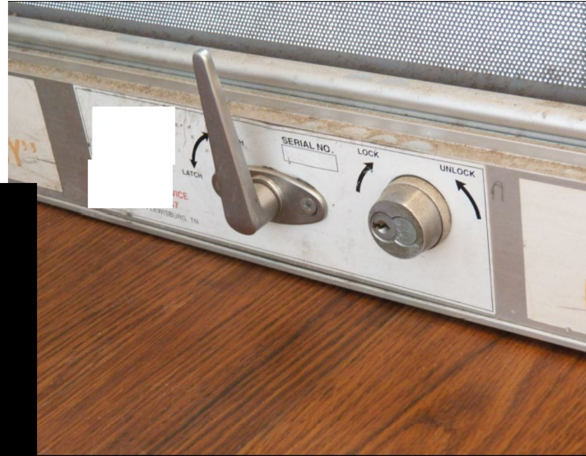
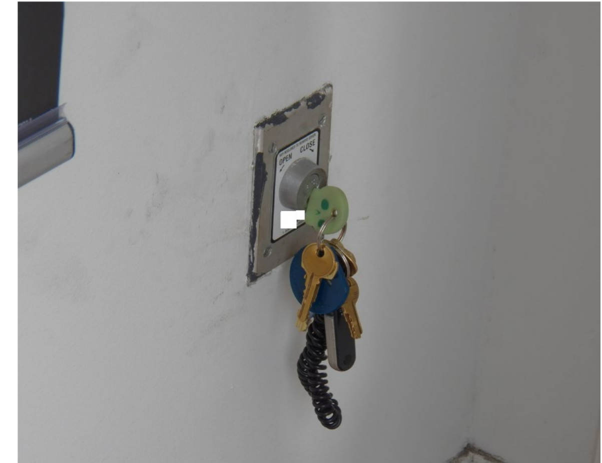
N.Y. Pattern Jury Instr.--Civil 2:120

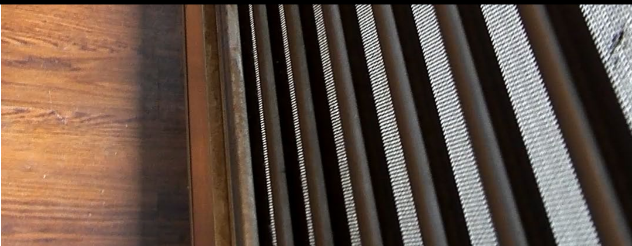
SECURITY GATE EXAMPLE

- Recently became aware of an active case involving the manufacturer of a security gate;
- The product, *i.e.*, the security gate, on its face does not appear to pose any significant risk of injury;
- The gate is equipped with a latch which when turned to its vertical position allows the gate to go up;
- Once the latch is vertical there is a key which must be turned to power the motor that lifts the gate









Security Gate Operation

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SO WHAT HAPPENED …

- As fate would have it, an employee of the store where the security gate was installed turned her back to the latch in order to turn the key to power the gate;
- The vertical latch caught her beltloop and carried the employee to the gate's top height;
- Once at the top, the employee's beltloop ripped and the employee fell to the floor resulting in injury.

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IMPACT OF CLAIMS/LAWSUITS

The post-sale duty of a manufacturer to warn involves weighing a number of factors, including:

- the degree of danger that the problem involves;
- the number of the reported instances;
- the burden of providing the warning; and
- the burden and/or ability to track a product post-sale.

Note: What if the injured plaintiff also posted the facts of the claim on social media?

N.Y. Pattern Jury Instr.--Civil 2:120

SOCIAL MEDIA EXAMPLE

The manufacturer of a product which is reasonably certain to be harmful *if used in a way that the manufacturer should reasonably foresee* is under a duty to use reasonable care to give adequate warning of any danger known to it or which in the use of reasonable care it should have known and which the user of the product ordinarily would not discover.

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N.Y. Pattern Jury Instr.--Civil 2:120

MISUSE OF PRODUCT

- A manufacturer who sells a defectively designed product *is liable for injuries resulting from foreseeable misuses* of the product as well as from the product' s intended use …
- *Misuse of a product which is so outrageous that there is no product defect, and, therefore, no liability at all should not be confused with a use of the product which was not intended but was reasonably foreseeable.*

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MISUSE OF PRODUCT VIDEO EXAMPLE

WHICH IS IT?

Outrageous misuse

or

Reasonably foreseeable misuse

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MISUSE OF PRODUCT CONT…

… [T]he focus of analysis in a strict products case is whether the use to which the product was put by the consumer was *abnormal*, given the realities of actual use of the product by consumers generally…

Answer: Outrageous Misuse

N.Y. Pattern Jury Instr.--Civil 2:120

IMPACT OF SOCIAL MEDIA

If you *don't* monitor social media …

- Plaintiff will argue you were negligent for failing to take reasonable steps to learn how the public is using your product

If you *do* monitor social media…

- Plaintiff will argue any use, no matter how outrageous, is foreseeable

IMPACT OF SOCIAL MEDIA, CONT.

Social media posts can impact:

- Written discovery, *e.g.*, demands for manufacturer's social media posts;
- Corporate representative depositions (Reptile tactics);
- Summary judgment;
- Trial; and
- Damages.

IMPACT OF COURT RULINGS EXTENDING LIABILITY

- While manufacturers have owed a duty for their own products, an open question (at least in NY) has persisted with respect to products, e.g., component parts, manufactured by third-parties

- The open question had to do with component parts manufactured by third parties that were compatible with the defendant's product, *e.g.*, valves for boilers, brakes for automotive vehicles

- In 2016, the New York Court of Appeals decision in *Dummitt* shed light on the issue:
  - According to the Court in *Dummitt*, the duty of a manufacturer to warn extends to danger arising from the known and reasonably foreseeable use of its product *in combination with a third-party product which*, as a matter of design, mechanics or economic necessity, is necessary to enable the manufacturer's product to function as intended.
  - *The duty to warn extends to the original or ultimate purchasers of the product, to employees of those purchasers, and to third persons exposed to a foreseeable and unreasonable risk of harm by the failure to warn.*

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In *re New York City Asbestos Litigation (Dummitt v. A.W. Chesterton, et al*), 27 N.Y.3d 765 (2016)

IMPACT OF COVID-19 ON FILINGS

- While case filings during Covid-19 are down generally, *e.g.*, less automotive accidents, product liability claims are reportedly up 300 percent in civil federal courts.
- We see evidence of warnings being a “hot spot” in the product liability filings.
- Its is speculated, reasons for increase in claims, include allegations that:
  - PPE not affording ultimate protection from Covid-19
  - Manufacturers pivoting to make ventilators, shields, hand sanitizers
  - Prescription medicines are being re-purposed to treat Covid-19

CONSIDERATIONS

- Post sale duty makes failure to warn a ripe ground for claims
- Duty is complicated by the ubiquitous use of social media
- At least some Courts (*e.g.*, New York) seem inclined to extend a manufacturer's duty to products manufactured by third party manufacturers (*Dummit*)
- Impact of Covid-19 on filings
- Will future legislation protect manufacturers during Covid-19 and beyond?
- Unintended consequences of a warning, *i.e.*, admission?

THE CLIENT'S PERSPECTIVE

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- FOR PURPOSES OF SUBPOENAS OR DEPOSITIONS, THIS IS MY ONLY SLIDE

- First Job: Safety Town Instructor
- Started at Invacare in 1998
- Likes: Reading, Gardening, and Animals
- Dislikes: Wind Chimes, Water, and Roller Coasters

POP UP QUESTION

- How old is Gretchen in the picture?

A. 2
B. 6
C. 7
D. 9

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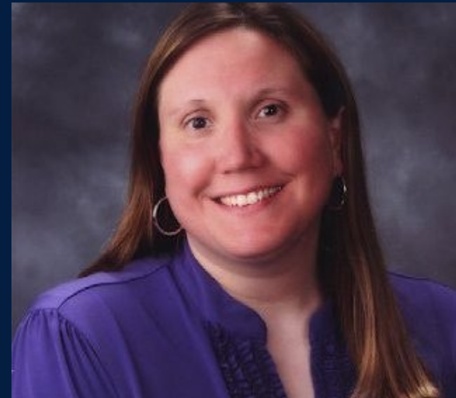

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