After The Sale: The Duty To Warn Of Later-Discovered Defects Under the New Jersey Product Liability Act

The New Jersey Product Liability Act (PLA) provides that a product manufacturer or seller shall be liable in a product liability action if the plaintiff proves by a preponderance of the evidence that "the product causing the harm was not reasonably fit, suitable or safe for its intended purpose."\(^1\) The PLA defines three types of defect, each of which may render a product "not reasonably fit, suitable or safe": (a) a manufacturing defect; (b) a failure to "contain adequate warnings or instructions"; and (c) a defective design.\(^2\) In the second of the three PLA categories -- the failure to adequately warn -- "the alleged product defect is not a flaw in the structure or design of the product itself [but] the absence of a warning to unsuspecting users that the product can potentially cause injury."\(^3\)

The statutory cause of action for failure to adequately warn imposes a test closely analogous to the standard of negligence.\(^4\) The PLA defines an adequate product warning or instruction as "one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and that communicates adequate information on the dangers and safe use of the product."\(^5\) The warning must take into account "the characteristics of, and the ordinary knowledge common to, the persons by whom the product is intended to be used."\(^6\)

In a design defect case, the plaintiff must demonstrate that the product was defective when it left the manufacturer’s control; compliance with the technological state of the art at the time of sale gives rise to an absolute defense.\(^7\) A failure to warn case is decided under a different analysis; conformance with the state of the
The duty to warn customers and users of newly-discovered dangers poses more complex practical issues than does the duty to warn of dangers known to the manufacturer at the time of sale. A manufacturer or seller may obtain information necessitating a new or amended warning or instruction years or even decades after the product at issue has left its control. It may not know who purchased the product, or may have lost track of the product after it was resold. It may be difficult to find a method of communication that will effectively convey the warning or instruction to employees and others who use the product as well as its current owner.

Not all of the potential issues raised by the post-sale duty to warn have been confronted by the courts. However, in several cases decided under the PLA, the courts have conducted a fact-specific analysis of the manufacturer's post-sale duty to warn, and have identified steps that may be taken in particular situations to satisfy that duty.

**What Knowledge Of A "Danger" Triggers The Duty To Warn?**

Like the duty to include appropriate warnings and instructions when a product is sold, the post-sale duty to warn arises when the manufacturer or seller knows or discovers a "danger" in the product, and the warning or instruction already on that product does not address that danger.¹¹ The duty exists "irrespective of when the knowledge is or could have been acquired."¹² A danger does not give rise to a duty to warn if it is "so obvious that [reasonably foreseeable] users would know of it."¹³

A "danger" giving rise to a post-sale duty to warn was recognized by the Appellate Division in two leading cases, Seeley v. Cincinnati Shaper Co.,¹⁴ and Dixon v. Jacobsen Manufacturing Co.¹⁵ Seeley arose from the plaintiff's 1987 workplace injury while operating a 1966 press brake that lacked a point-of-operation guard blocking the space between the jaws of the machine. A photoelectric guard had been removed at an unknown stage in the press brake's long history. In response to an inquiry from the press brake's current owner, the manufacturer not only sent the requested parts and operations manuals from the original machine, but advised the owner of possible changes in the safety standards for the machine and offered its "assistance", in the form of literature and a
The Appellate Division, noting that the danger of operating the machine without a point of operation guard was not newly-discovered, held that New Jersey law imposed a duty to warn the identified, inquiring owner of the product of post-sale changes in both the design of the product and the warnings that accompanied it:

[W]e see that there is a continuing duty (but only within the original state-of-the-art) to correct a design defect which existed when the machine was placed into the stream of commerce by a manufacturer; but there is a different duty to warn of a danger concerning the product, irrespective of when the knowledge is or could have been acquired.\(^{17}\)

The manufacturer having addressed that "danger" in later design changes and changes in its warnings, the court held that no proof of inadequacy had been presented.

In Dixon, the product was a snow thrower manufactured in 1965 and purchased at a 1986 garage sale by the father of the injured plaintiff. In response to his request that the manufacturer send him "any information" about the 1965 snow thrower, the plaintiff's father received the product's 1965 owner's manual and parts manual. However, the manufacturer did not provide product literature generated after 1965 to the plaintiff's father. That literature would have revealed that subsequent snow thrower models were equipped with a "dead man's control", designed to deactivate the snow thrower when the user leaves his work station at the rear of the snow thrower and approaches parts of the machine that pose a danger to him.\(^{18}\) It also contained more specific warnings about the dangers of contact with impeller blades concealed in the snow thrower's discharge chute. The 16-year-old plaintiff's fingers were severed by the concealed blades when he attempted to remove snow from the discharge chute while the snow thrower was running in neutral gear.

The plaintiff asserted claims for design defect by virtue of the absence of a "dead man's clutch". He asserted a claim for post-sale failure to warn (i) about design changes that incorporated the "dead man's clutch" into later product models; and (ii) about changes in the manufacturer's warnings, after the sale of the 1965 model, that made more explicit the danger of the concealed impeller blades. The Appellate Division agreed with the plaintiff that a "danger" giving rise to the duty to warn existed in both respects:

Plaintiff maintains that, at some point after the product entered the stream of commerce, defendant learned that its warnings were insufficient. Such knowledge, plaintiff contends, is evidenced by the more explicit warning labels and safety instructions defendant utilized as early as 1975. Whether that information came to defendant through its own experience, through the industry's experience, or both, is irrelevant. The point is that such evidence is relevant on the question of whether defendant had discovered a defect that it believed had not existed in 1965, i.e., its original warnings were inadequate to convey the necessary information to alert an average user to the hidden danger.\(^{19}\)
The Dixon court found that it was a jury question as to whether the manufacturer had breached its duty to warn, since it failed to supply the plaintiff's father with updated information about the product.

In Seeley and Dixon, product information that was generated between the date of manufacture and the date of the accident, and that informed of a design and/or warning change prompted by a concealed danger not adequately addressed in the original warnings, was critical to the courts' findings with respect to the post-sale duty to warn. Although other factors could determine the existence of a "danger" within the meaning of N.J.S.A. 2A:58C-4 in a given case, such product information may in many situations prove to be the central factor in the inquiry.

**Must The Manufacturer Ascertain The Identity Of The Product Owner?**

Particularly in cases involving consumer products or in which the product at issue is many years old, it may be difficult or impossible for manufacturers to find and inform the current owner. That factor is not addressed in the post-sale duty to warn language of the PLA. It was, however, considered by the Appellate Division in Seeley and Dixon, each of which involved a manufacturer that was specifically contacted by the product owner and was therefore aware of that owner's identity.

In Dixon, the Appellate Division underscored the importance of the manufacturer's knowledge of the owner's identity in the circumstances of that case. Discussing other jurisdictions' rejection of the post-sale duty to warn on the ground of "the burden that such a duty places on manufacturers to identity of current owners of the product, especially consumer products", the Court commented:

> No such policy consideration exists where the owner is known. . . . We need not decide the outer limits of a manufacturer's duty to inform consumers generally of updated warnings or design changes with respect to dangers discovered since the time of manufacture. Suffice it to say that, in the context of this case, where the manufacturer knew the identity of the owner of its product, we have no hesitation in holding that such a duty existed, and it was for the jury to determine whether that duty had been discharged.21

When the new product owner makes itself known to the manufacturer by inquiring about the product, the duty to warn clearly applies. As the Appellate Division's discussion of the issue in Dixon reflects, the duty imposed on a manufacturer who receives no such inquiry and does not know the owner's identity presents a more complex issue. Such a duty was found in Straley v. United States by the United States District Court, applying New Jersey law.22 There, the court imposed a post-sale duty to warn on a manufacturer who did not know the identity of a remote purchaser of its product, and
therefore did not send to it warning letters that were sent to identified owners of its products.

In Dixon, the Appellate Division commented that "[t]he imposition of a duty on a manufacturer to warn of dangers after a product is manufactured, and the extent of that duty, is essentially rooted in concepts of fairness." The existence and scope of a manufacturer's duty to seek and identify the owners of its products may be an important issue in future post-sale warning cases.

**What Must The Manufacturer Do To Satisfy Its Duty To Warn?**

If a duty to warn of dangers discovered after sale exists, the manufacturer must "provide an adequate warning or instruction", with adequacy defined under the PLA's reasonableness standard. Adequacy is determined on a case-by-case basis in light of the danger at issue. The manufacturer is held to the standard of an expert in the field.

Providing updated as well as original product information may prove important to the manufacturer's defense. In Dixon, the Court held that a reasonable factfinder could conclude that the manufacturer had breached its duty to warn by merely providing original product information and omitting more current materials reflecting an amended design and revised warnings. The Appellate Division held in Seeley that no proof of inadequacy had been presented at trial in light of the manufacturer's provision of an updated operation manual safety manual and safety standards, together with safety signs posted to inform the product owner's employees.

As the Appellate Division has noted, the warning should be conveyed promptly not only to comply with the law, but because "[w]e also expect that it makes sound business sense for a manufacturer not to delay or avoid giving warnings of known of known dangers at the earliest possible opportunity in order to prevent avoidable accidents and the resulting claims."
The warning must be conveyed by "whatever means are reasonable under the circumstances." If the "dangers" warned about may affect the employers of the current product owner as well as the owner itself, the manufacturer or seller may be required to issue a warning that will reach the employees. Merely sending a warning letter to the product owner/employer and a new safety device to be installed in the machine may be held insufficient. If employees are potentially at risk, the manufacturer is well-advised to include in its warning or instruction material that will reach the employees as well as the product owner. As Seeley illustrates, the manufacturer’s prompt effort to warn informatively and effectively, through several different means of communication, may establish a defense to a potential failure to warn claim if an accident occurs despite that effort.

**The Restatement (Third) Proposed Final Draft**

The post-sale duty to warn is a primary focus of the American Law Institute's *Restatement of the Law, Torts: Product Liability*, Proposed Final Draft (April 1, 1997). § 10 of the proposed draft provides:

**Liability of Commercial Product Seller or Distributor for Harm Caused by Post-Sale Failure to Warn**

(a) One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to provide a warning after the time of sale or distribution of a product when a reasonable person in the seller's position would provide such a warning.

(b) A reasonable person in the seller's position would provide a warning after the time of sale when:

(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 may 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.

The *Restatement* section and comments address some of the significant practical problems faced by a
manufacturer confronted with a newly-discovered potential hazard after the product's sale. If adopted by the courts, this section of the Restatement may serve to further define the parameters of the post-sale duty to warn and to provide more specific guidance to practitioners and their clients.

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N.J.S.A. 2A:58C-2 (applying to actions filed on or after July 22, 1987).
See Feldman v. Lederle Laboratories, 97 N.J. 429, 451 (1984) ("once the manufacturer or seller shall not be liable unless it is shown that the failure was within the reasonably anticipated and intended function of the product").
Id. In the case of prescription drugs or devices, the "learned intermediary" doctrine applies, and the warning or information to the provider replaces the duty to warn the ultimate user.
N.J.S.A. 2A:58C-3a(1) provides that the manufacturer or seller shall not be liable if it provides the warning or information to the appropriate person and that person fails to warn the ultimate user.
256 N.J. Super. at 6-7.
Id. at 15-16.
270 N.J. Super. at 577-581.
Id. at 585.
For analysis of N.J.R.E. 51 (evidence of subsequent remedial or precautionary measures) and for discussion of the post-sale duty to warn of a component part manufacturer, see Feldman v. Lederle Laboratories, 97 N.J. at 452.
270 N.J. Super. at 590-92.
256 N.J. Super. at 16-17.
Seeley v. Cincinnati Shaper Co., Ltd., 256 N.J. Super. at 15. The Model Jury Instructions state that "[a]dequate warning shall be provided to the consumer, seller, or another donee of the product and to the ultimate user.
See Coffman v. Keene Corp., 133 N.J. 581, 606 (1993) ("w"])e have required that a manufacturer or supplier of products...failure to warn the ultimate user.
See Coffman v. Keene Corp., 133 N.J. at 606; Seeley v. Cincinnati Shaper, Ltd., 256 N.J. Super. at 15. The Model Jury Instructions state that "[a]dequate warning shall be provided to the consumer, seller, or another donee of the product and to the ultimate user.

Practice:

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