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PRODUCT LIABILITY - USA

Contributed by **Chadbourne & Parke LLP**

Liability and the Media: Defensive Strategies

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The update Courts Consider Whether Information is a 'Product' provided a summary of the broad range of situations in which plaintiffs have claimed that information, as contained in the pages of books and periodicals and in other forms of media, is a 'product' that can be shown to be defective and the cause of personal injuries to a reader or viewer who relies upon such content. In the cases previously discussed the plaintiffs were unsuccessful. This update explores cases in which the courts were more receptive.

Science Experiments/Textbooks

In contrast to the *Walter v Bauer*(1) case discussed in the previous update, in *Kercsmar v Pen Argyl Area School District*(2) - a prior (and somewhat obscure) case not cited in the trial or appellate opinions of *Walter* - the court denied the preliminary objections of the publisher of a high school chemistry textbook alleged to have been followed by a student injured while conducting an experiment. In a portion of its opinion regarding jurisdiction over the non-resident authors, the court broadly proclaimed: "Freedom of speech is not absolute" and "There is no right to be free to commit tortious acts or distribute defective or dangerous products."(3) It explained:

> "*This substantive issue of tortious and warranty liability for physical injury on the basis of the words of a book is novel. This is clearly not within the often litigated defamation and privacy areas where First Amendment rights are discussed at length. The court does not feel that First Amendment rights would be chilled if authors of informational texts are held liable for physical harm caused as a result of their tortious conduct. A book, such as that which is the subject of a portion of this lawsuit, might well prove to be a defective product within the ever-expanding field of product liability*."(4)

The court stated that, since "the duty imposed is an affirmative one to warn, not a negative one that would chill the author's freedom to write and publish", attaching jurisdiction would not be "unreasonable or offensive" to the First Amendment.(5) It denied and dismissed the publisher's preliminary objections to the plaintiff's negligence counts, finding that the pleadings were sufficient and stated a cause of action. It also denied and dismissed objections by the publisher and authors to the plaintiff's breach of implied warranty claims (granting objections to breach of express warranty claims), noting that the textbook was a 'good' under the Uniform Commercial Code:

> "*Defendants argue that an experiment in a book cannot possibly be 'movable,' and hence, not a 'good.' However, we deem it to be the text book which constitutes the 'goods,' while the description of the chemistry experiment contained therein is the defect, ergo the breach. Today, when the Supreme Court has heralded the demands of public policy and legal symmetry, we cannot afford to take a myopic view of the area of product liability*." (6)

The court thus concluded that the plaintiff had sufficiently pled a breach of implied warranty: "The

averment of an injury due to the defect in the text (the chemistry experiment) is sufficient for the liberal implied warranty pleading requisites."(7)

A similar claim in another case reportedly resulted in a sizable out-of-court settlement. The court's opinion in *Herceg v Hustler Magazine, Inc*(8) contains the following footnote:

> "*The court notes, however, that a theory of negligent publication has been used in an action against the publisher of a textbook for injuries caused to a student by methyl alcohol vapours which exploded where use of the alcohol was recommended and suggested by the publisher without warnings.* Carter v Rand McNally*, CA 76-1864-(D Mass) (unreported case cited in* Swartz*, 'You can't judge a book by its cover', Trial, November 1981, 89 at 110). The action settled for $1.1 million*."(9)

Express Endorsement/Guarantee

Some courts may be more willing to hold a magazine publisher liable for a defective advertised product if the publisher expressly guarantees or endorses the item. In *Hanberry v Hearst Corp*(10) the court upheld a shoe purchaser's claim alleging personal injuries sustained when she slipped and fell wearing defective shoes guaranteed by the publisher through the consumer guaranty service of one of its publications. The shoes had been advertised in *Good Housekeeping* as meeting "*Good Housekeeping*'s Consumers' Guaranty Seal". The magazine stated regarding the 'seal': "This is *Good Housekeeping*'s Consumers' Guaranty" and "We satisfy ourselves that products advertised in *Good Housekeeping* are good ones and that the advertising claims made for them in our magazine are truthful."

The *Hanberry* court ruled that one who endorses a product for one's own economic gain, and for the purpose of encouraging and inducing the public to buy it, may be liable to a purchaser who, relying on the endorsement, buys the product and is injured because it is defective and not as represented in the endorsement.(11) The court stated that this case went beyond the typical situation of a magazine simply accepting and publishing advertisements, finding that the seal and certification implicitly represented that the publisher had independently and reasonably examined the product and found it satisfactory, such that the publisher had a duty to use reasonable care:

> "*Having voluntarily involved itself into the marketing process, having in effect loaned its reputation to promote and induce the sale of a given product...we think respondent Hearst has placed itself in the position where public policy imposes upon it the duty to use ordinary care in the issuance of its seal and certification of quality so that members of the consuming public who rely on its endorsement are not unreasonably exposed to the risk of harm*."(12)

The court suggested that Hearst might be liable for negligent misrepresentation if it failed to test, inspect or examine the shoes it certified, or if it did but did so negligently. It concluded that Hearst's attempt to limit its liability by inserting in its seal the words "If the product or performance is defective, *Good Housekeeping* guarantees replacement or refund to consumer," while possibly bearing on the contractual obligation it assumed, would not insulate it from full liability for injury resulting from tortious negligent misrepresentation. However, it did reject the plaintiff's attempt to pursue warranty or strict liability in tort claims, since the publisher was not directly involved in manufacturing or supplying the products to the public. (13)

Subsequent cases have distinguished *Hanberry*.(14) An older case demonstrates that, even when the facts seem to indicate an endorsement, recovery is not guaranteed. (15)

Aeronautical Charts/Maps

In contrast to the vast majority of other cases, some courts have ruled that publishers may be held responsible for personal injuries of readers in the narrow and specific situation of aeronautical charts and maps, graphically depicting geographical features or instrument approach information for pilots, which are considered 'products':

> "*One area in which some courts have imposed strict product liability involves false*

information contained in maps and navigational charts. In that context the falsity of the factual information is unambiguous and more akin to a classic product defect. However, the better view is that false information in such documents constitutes a misrepresentation that the user may properly rely upon." (Restatement (Third) of Torts Section 19(d) (1998)).

Examples of these cases include the following:

- *Brocklesby v United States*(16) ("We agree with the plaintiffs' position that Jeppesen's chart was a defective product for purposes of analysis under Section 402(A).");

- *Fluor Corp v Jeppesen & Co*(17) (characterizing instrument approach charts as 'products' promotes "the protection of otherwise defenceless victims of manufacturing defects and the spreading throughout society of the cost of compensating them"; "although a sheet of paper might not be dangerous *per se* it would be difficult indeed to conceive of a salable commodity with more inherent lethal potential than an aid to aircraft navigation that, contrary to its own design standards, fails to list the highest land mass immediately surrounding a landing site");

- *Saloomey v Jeppesen & Co*(18) ("We believe that the trial court did not err in classifying appellant's charts as products...The comments to Section 402(A)...envision strict liability against sellers of such items in these circumstances. By publishing and selling the charts, Jeppesen undertook a special responsibility, as seller, to ensure that consumers will not be injured by the use of the charts"); and

- *Aetna Casualty and Surety Co v Jeppesen & Co*(19) (graphic approach chart was publisher's 'product'; trial court's finding that chart was defective product not clearly erroneous).

Not all courts have adopted this approach in this context, such as that in *Times Mirror Co v Sisk*(20) ("we have serious misgivings about whether this is a product liability case"; the court did not consider whether charts were 'products' or 'goods' within Sections 402(A) and 402(B), or under the Colorado Commercial Code).

Beyond this context, the courts have distinguished and refused to extend the rulings or reasoning applicable to these specific and highly technical publications to the broader claims regarding ideas and expressions in popular periodicals, books and other mass media previously discussed. Interestingly, in a case involving an ordinary highway map, the court did not specifically address the issue whether the map was a 'product', but agreed that there was not substantial evidence that the map was defective.(21)

Practice Pointers

Although the majority of American courts have rejected readers' claims against publishers and media organizations for personal injuries, there is no guarantee that all future decisions will follow this trend. Moreover, many of these decisions have stated or implied that certain changes in the facts presented might possibly lead to different results. Courts ruling that a publisher has no duty to verify or guarantee the accuracy of articles or manuscripts submitted to it may be more receptive to claims where the publisher or its employees (eg, a staff writer or reporter) participate in the creation of the work's content. Additionally, if a plaintiff can convince a court that a particular technical book or article merits 'aeronautical chart' treatment, recovery may be more likely. Finally, the increasingly apparent inclination to give a clearly injured person his or her 'day in court' may allow such claims eventually to survive summary judgment or dismissal and be presented to a potentially sympathetic jury.

So what can publishers, media organizations and other potential defendants do to minimize the risk of their being hit with such a claim, or to maximize the chance of winning if they do get sued? Based on general litigation defence principles and on insights from the rulings in these cases, suggestions can be offered:

- Be careful when dispensing advice or advocating products or activities that could potentially

cause physical injuries.

- Make no guarantees regarding the safety of the products or activities described, the results reported or the accuracy of the information presented.

- Consider including a disclaimer in each issue or volume specifically advising and putting readers on notice that the publication or work is not making any guarantees regarding safety. Be aware that a 'warning' tied to a specific article or book of particular concern (eg, *How to Make Your Own Parachute*) might prompt a plaintiff's lawyer to argue that the failure to do the same for another article or book somehow implied that the product or activity discussed in the latter was safe.

- Advise readers to consult their personal medical or other professionals as appropriate.

- For internally produced content, institute and follow defensible procedures for verifying accuracy of information presented, particularly for discussions of products or activities that pose a significant risk of physical injury.

- For freelance content, require verification of information by outside writers as a term of their contract with the publisher or media organization.

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Endnotes

(1) 451 NYS 2d 533 (App Div 4th Dept 1982), mod'g and aff'g, 439 NYS 2d 821 (Sup Ct 1981).

(2) Pa D&C 3d 1 (Common Pleas Northampton County 1976).

(3) Pa D&C 3d at 7.

(4) *Ibid* at 7(7).

(5) *Ibid* at 8.

(6) *Ibid* at 11.

(7) *Ibid* at 12-13. The only reported decisions to cite *Kercsmar* are the trial and intermediate appellate opinions in *Smith v Linn*, discussed in Courts Consider Whether Information is a 'Product' The Pennsylvania Superior Court in *Smith* distinguished and declined to accept the reasoning in *Kercsmar*:

> "*While Kercsmar does suggest at least that a trial court believed the contents of a book to be a good, as an appellate court, we may decline to accept that view. Further, as the trial court in the instant matter observed, no other court has followed the Kercsmar view.*" (*Smith*, 563 A 2d at 126-127)

In the lower court decision in *Smith* the Court of Common Pleas of Montgomery County had noted that "*Kercsmar* provides little help in deciding this case since it deals with preliminary objections, settled before progressing further, and is not binding authority on this court." *Smith v Linn*, 48 Pa D&C 3d 339, 344 (Common Pleas Montgomery County 1988), aff'd, 563 A 2d 123 (Pa Supr Ct 1989), aff'd, 587 A 2d 309 (Pa 1991). The lower court further stated (48 Pa D&C 3d at 356-357):

> "*We find* Kercsmar *unpersuasive for several reasons and limit it to its facts... In the 12*

years since Kercsmar *was decided, no court has followed the* Kercsmar *view; rather the view has been rejected as witnessed by the* Cardozo *and* Herceg *decisions.* Kercsmar *does not set precedent on this court as it hails from the common pleas level in Philadelphia, as does this court. Further, in light of the First Amendment concerns discussed earlier in this opinion and the more recent cases dealing with publisher's liability we see no indication of the* Kercsmar *view being adopted.* "

(8) 565 F Supp 802 (SD Tex 1983).

(9) 565 F Supp at 804(1).

(10) 81 Cal Rptr 519 (Ct App 1969).

(11) 81 Cal Rpt at 521. The court conceded: "In arriving at this conclusion, we are influenced more by public policy than by whether such cause of action can be comfortably fitted into one of the law's traditional categories of liability."

(12) *Ibid* at 522.

(13) *Ibid* at 524 ("liability for individually defective items should be limited to those directly involved in the manufacturing and supplying process, and should not be extended through warranty or strict liability to a general endorser who makes no representation it has examined or tested each item marketed").

(14) For example, in *Walters v Seventeen Magazine*, 241 Cal Rptr 101 (Ct App 1987) (discussed in Courts Consider Whether Information is a 'Product'), the court distinguished *Hanberry* as "clearly inapposite" because Seventeen "did not in any way sponsor or endorse products advertised in its pages. There was no representation of quality, no promotional effort, and no attempt to induce the public to buy Playtex tampons beyond merely printing the advertisement." *Walters*, 241 Cal Rptr at 102. The *Walters* court rejected the plaintiffs' claim that (i) the placement of the advertisement amid articles on menstruation, sex and the female body, or (ii) the supposed resemblance of the advertisement to feature stories (which the court disagreed with), somehow implied an endorsement.

(15) In *Mac Kown v Illinois Publishing & Printing Co*, 6 NE 2d 526 (Ill App Ct 1937), the court held that a newspaper was not liable for injuries to a reader resulting from her use of a dandruff remedy formula, even though an article (not an advertisement) describing it used language like: "Effective Remedy for Dandruff Woes," "Proves its Values in Doctors' Tests," "has proved an effective remedy," and "is not only reliable, it is scientific, having been given to me years ago by a reputable doctor for my own use." 6 N E 2d at 527. However, the court did observe: "There is no allegation, nor is there any contention, that the article did not speak the truth. Plaintiff may have been allergic to this remedy." *Ibid* at 529.

(16) 767 F 2d 1288, 1295 (9th Cir 1985), cert denied sub nom. *Jeppesen & Co v Brocklesby*, 474 US 1101 (1986).

(17) 216 Cal Rptr 68, 71-72 (Ct App 1985).

(18) 707 F 2d 671, 676-677 (2d Cir 1983).

(19) 642 F 2 d 339, 342-343 (9th Cir 1981).

(20) 593 P 2d 924, 927 (Ariz Ct App 1978).

(21) *Miller v Rand McNally & Co*, 595 So 2d 1367, 1368 (Ala 1992) (action by truck driver against a highway-map publisher for injuries sustained in accident under Alabama Extended Manufacturer's Liability Doctrine; summary judgment for publisher affirmed). It can be argued that the 'defect' issue would not have been reached had the court not determined (or assumed) that the map was a 'product' under the statute.