PRODUCT LIABILITY - USA

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Courts Consider Whether Information is a 'Product'

March 21 2001

Product liability law in the United States is constantly evolving. Creative prosecuting counsel have sought to expand the reach of product liability law in a variety of ways. Perhaps the most novel is the claim that information (as contained in the pages of books, newspapers, magazines and within other forms of media) is a product that can be shown to be defective and the cause of personal injury to a reader or viewer who relies on such content. To date, US courts have not given much credence to such claims (although a second update to be published later this year will examine cases in which courts have been more receptive to these kinds of claim). The Restatement (Third) of Torts (Section 19, comment d) states:

> *"Plaintiffs allege that the information delivered was false and misleading, causing harm when actors relied on it. They seek to recover against publishers in strict liability in tort based on product defect, rather than on negligence or some form of misrepresentation. Although a tangible medium such as a book, itself clearly a product, delivers the information, the plaintiff's grievance in such cases is with the information, not with the tangible medium. Most courts, expressing concern that imposing strict liability for the dissemination of false and defective information would significantly impinge on free speech have, appropriately, refused to impose strict product liability in these cases."*

This update provides examples of some of the circumstances in which such claims have been and continue to be brought.

Weather Reports

In *Brandt v The Weather Channel, Inc*(1) a fishing boat passenger drowned when adverse weather conditions caused him to be thrown overboard. The decedent's personal representative brought a wrongful death action alleging that the decedent monitored The Weather Channel in the morning before going out on the boat and that the channel had neither issued a small craft warning for that day, nor forecast bad weather. The court granted the broadcaster's motion to dismiss. The court stated:

> *"In this case, the plaintiffs seek a novel and unprecedented expansion of the scope of tort law: to impose on a television broadcaster of weather forecasts a general duty to viewers who watch a forecast and take action in reliance on that forecast. As the defendant points out, if the court were to impose such a duty under either a breach of contract or tort theory, the duty could extend to farmers who plant their crops based*

on a forecast of no rain, construction workers who pour concrete or lay foundation based on the forecast of dry weather, or families who go to the beach for a weekend based on a forecast of sunny weather. The court further notes that if it were to impose a duty upon a weather broadcaster for a faulty broadcast, such a duty could be extended to non-weather related broadcasts such as traffic reports upon which individuals rely to arrive timely to scheduled events. It is clear that to impose such a duty would be to chill the well-established first amendment rights of the broadcasters. It is well established that mass media broadcasters and publishers owe no duty to the general public who may view their broadcasts or read their publications."(2)

Periodical Advertisements

In *Way v Boy Scouts of America*(3) the Texas Court of Appeals affirmed the granting of summary judgment to the publisher and sponsors of an advertising supplement on shooting sports, which ran in *Boys' Life* magazine. After reading the supplement, a boy and his friends located an old rifle and a .22-calibre cartridge. The boy was killed when the rifle accidentally discharged. His mother claimed that the publication of the supplement was negligent and that the information contained in the supplement rendered the magazine a defective product. The court concluded that the defendant publisher owed no legal duty to the boy, and that the decedent's experimentation with the rifle and cartridge was not a reasonably foreseeable consequence of the publication.

The appellate court upheld the trial court's rejection of Way's strict liability claims, noting that "the very essence of a product liability cause of action under 402A or 402B is the existence of a product within the meaning of the Restatement (Second) of Torts".(4) It noted that Way was not complaining about the physical properties of the supplement (eg, the toxicity of the ink or the sharpness of the paper). Instead, she alleged that the ideas and information contained in the magazine encouraged children to engage in dangerous activities. As the court observed, "[t]hese are intangible characteristics, not tangible properties".(5) It concluded that the ideas, thoughts, words and information conveyed by the magazine and the supplement did not qualify as 'products' within the meaning of the restatement.

In *Yuhas v Mudge*(6) the plaintiff sued the publisher of *Popular Mechanics* magazine for injuries sustained from fireworks purchased by others through an advertisement in the periodical. The court affirmed the summary judgment, ruling that a magazine publisher that did not manufacture, distribute, sell, test, warrant, or endorse an allegedly defective product advertised in its magazine may not be held responsible in negligence for injuries resulting from the use of the product. The court reasoned:

"To impose the suggested broad legal duty upon publishers of nationally circulated magazines, newspapers and other publications would not only be impractical and unrealistic, but would have a staggering, adverse effect on the commercial world and our economic system. For the law to permit such exposure to those in the publishing business who in good faith accept paid advertisements for a myriad of products would open the doors 'to a liability in an indeterminate amount, for an indeterminate time, to an indeterminate class'."(7)

Similarly, in *Walters v Seventeen Magazine*(8) a subscriber sued the publication and its publisher under negligence, product liability, breach of warranty and other theories, for injuries allegedly sustained as a result of using tampons advertised in the magazine. Affirming the dismissal of the claims, the court of appeal likewise voiced economic concerns:

"In the absence of any cause of action supported by traditional theories, we are loath to create a new tort of negligently failing to investigate the safety of an advertised product. Such a tort would require publications to maintain huge staffs scrutinizing and testing each product offered. The enormous cost of such groups, along with skyrocketing insurance rates, would deter many magazines from accepting advertising, hastening their demise from lack of revenue. Others would comply, but raise their prices beyond the reach of the average reader. Still others would be wiped out by tort judgments, never to revive. Soon the total number of publications in circulation would drop dramatically."(9)

Periodical Articles

Like *Way*, other cases have involved claims raised against magazine publishers regarding articles they have printed. In *Herceg v Hustler Magazine, Inc*(10) the plaintiff asserted negligent publication and strict liability claims concerning an article on the practice of auto-erotic asphyxiation, the printing of which the plaintiff alleged caused the death of a family member. The court granted the defendant's motion to dismiss the "novel claims" that the article was both "an attractive nuisance" and "a dangerous instrumentality or a defective, unreasonably dangerous product" on the grounds that the complaint failed to state a claim.(11) The court also said there was no case law support for the plaintiff's negligent publication claim. Finally, it noted that First Amendment considerations argue against imposing liability on a publisher for a reader's reactions to a publication, unless there is evidence of incitement to commit an illegal act.(12)

Travel Guides

In *Birmingham v Fodor's Travel Publications, Inc*(13) the Hawaii Supreme Court affirmed summary judgment for Fodor's and against a reader who alleged that a travel guide negligently failed to warn of dangerous ocean conditions at a Kauai beach, which caused him injuries when he bodysurfed there. Fodor's did not author its publications; instead it published manuscripts prepared and submitted by outside writers. It also did not expressly guarantee, warrant or endorse the locations and subjects to which the publication provided descriptions and information. The court ruled that "a publisher of a work of general circulation, that neither authors nor expressly guarantees the contents of its publication, has no duty to warn the reading public of the accuracy of the contents of its publication".(14) With regard to the plaintiff's strict liability claims, the court also ruled that a publication is not a product for the purposes of strict/product liability analysis.

Recipes and Food Reference Works

In *Winter v GP Putnam's Sons*(15) mushroom enthusiasts who became severely ill from picking and eating mushrooms after relying on information in *The Encyclopedia of Mushrooms* sued the reference book's publisher under strict liability, negligence and other theories. Affirming summary judgment for the defendant, the 9th Circuit explained the distinction between the tangible and intangible aspects of a publication:

> *"A book containing Shakespeare's sonnets consists of two parts, the material and print therein, and the ideas and expression thereof. The first may be a product, but the second is not. The latter, were Shakespeare alive, would be governed by copyright laws; the laws of libel, to the extent consistent with the First Amendment; and the laws of misrepresentation, negligent misrepresentation, negligence and mistake. These doctrines applicable to the second part are aimed at the delicate issues that arise with respect to intangibles such as ideas and expression. Product liability law is geared to the tangible world."*(16)

Moreover, the court observed that the application of strict liability in the publishing context would have a chilling effect, outweighing the benefits of imposing such a doctrine. The court rejected as illusory any attempt to mitigate that concern by applying strict liability only to publications giving instruction on how to accomplish a physical activity that is inherently dangerous:

> *"We place a high priority on the unfettered exchange of ideas. We accept the risk that words and ideas have wings we cannot clip, and which carry them we know not where. The threat of liability without fault (financial responsibility for our words and ideas in the absence of fault or a special undertaking or responsibility) could seriously inhibit those who wish to share thoughts and theories."*(17)

Deferring to the First Amendment, the court also declined to extend negligence liability to the ideas and expressions contained in a book. The court concluded that the publisher (which neither wrote nor edited the volume) had no duty to investigate independently the accuracy of the content of the books it published. It noted that while a publisher may assume such a burden, there is nothing inherent in the role of publisher requiring that such a duty be imposed. Finally, it ruled that a

publisher had no duty to warn of the information being incomplete or of the publisher's lack of investigation, as it had no duty to investigate or guarantee the contents.

Diets

In *Smith v Linn*(18) the court affirmed summary judgment in favour of the publisher of *When Everything Else Fails ... The Last Chance Diet* against claims that a reader died due to sudden complications allegedly caused by following a liquid protein diet described in the book. The court rejected the plaintiff's claim that the publisher should be as responsible as if it had directly sold liquid protein to the decedent and had at the same time supplied her with the book as a form of package insert. It also rejected the plaintiff's argument that the book was a product and defective under Section 402A.

Medical Treatises

In *Jones v JB Lippincott Co*(19) the court granted summary judgment to a publisher against a nursing student who sued for allegedly suffering personal injuries when she followed a treatment described in the *Textbook for Medical and Surgical Nursing*. The court distinguished the liability of publishers from that of authors:

> *"Author liability for errors in the content of books, designs or drawings is not firmly defined and will depend on the nature of the publication, on the intended audience, on causation in fact, and on the foreseeability of damage ... Publisher liability, on the other hand, has more clearly defined principles and is therefore more easily determined. If a publisher serves the function of publishing the contents of an author, other than one of its own employees for whom it would be liable under the doctrine of* respondeat superior*, it has no duty for the contents."*(20)

Since there was no evidence of Lippincott participating in the preparation of the content of the section of book involved, the court concluded that the company had no duty of care and made no warranty to the plaintiff with respect to the content. The court also refused to hold Lippincott strictly liable as publisher for the content of books that it published, noting that "[n]o case has extended Section 402A to the dissemination of an idea or knowledge in books or other published material" and that "to do so could chill expression and publication, which is inconsistent with fundamental free-speech principles".(21)

Similarly, in *Libertelli v Hoffman-La Roche, Inc*(22) the court dismissed claims against the publisher of the *Physicians Desk Reference* by a plaintiff who allegedly became addicted to Valium, a drug listed in the volume. The court rejected claims of gross negligence against the publisher for failing to warn or test. The publisher argued, in effect, that the book was a book of advertisements. Noting that each annual volume explicitly stated that the product descriptions were supplied by the manufacturers and that the publisher did not advocate the use of any of the products, the court ruled that no warranty had been made and that neither intent to harm nor recklessness had been shown. It also ruled that even if the publisher's characterization of the descriptions as 'advertisements' was rejected, the First Amendment would defeat the plaintiff's claim.

Craft Guides

In *Alm v Van Nostrand Reinhold Co*(23) the appellate court upheld the dismissal of a negligence action against the publisher of *The Making of Tools* by a reader injured while allegedly following the book's instructions for making a tool that shattered. Concluding that the facts did not support a cause of action for negligent misrepresentation, the court rejected the plaintiff's contention that a publisher of a 'How To' book has a duty to provide adequate and safe instructions and warnings to intended purchasers and users of its publications. Such a contention, the court cautioned, "would place upon publishers the duty of scrutinizing and even testing all procedures contained in any of their publications" such that "[t]he scope of liability would extend to an undeterminable number of potential readers".(24)

The *Alm* decision was followed in *Lewin v McCreight*(25), which granted a book publisher's motion to dismiss an action regarding an explosion that allegedly occurred while the plaintiff was mixing

materials according to instructions in *The Complete Metalsmith*. The court focused on the fact that the defendant publisher had merely printed and bound a book written by an outside author:

> *"[G]iven the tremendous burden such a duty would place upon defendant publishers, the weighty societal interest in free access to ideas, and potentially unlimited liability, it would be unwise to impose a duty to warn of 'defective ideas' upon publishers of information supplied by third-party authors."*(26)

Nevertheless, the court expressly cautioned:

> *"The balance might well come out differently, however, if the publisher contributed some of the content of the book. The burden of determining whether the content was accurate would be less than in the present case. Similarly, publishers may have greater responsibilities where the risk of harm is plain and severe such as a book entitled* How To Make Your Own Parachute*. Any such legal responsibilities would, of course, have to comport with the rule that manufacturers have no duty to warn of obvious dangers."*(27)

Science Experiments and Textbooks

The case of *Walter v Bauer*(28) involved a student injured while conducting a science experiment described in a textbook. The court affirmed a lower court's ruling denying leave to add a product liability cause of action against the defendant publisher, upholding the determination that the proposed amendment failed to state a cause of action.

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Endnotes

(1) 42 F Supp 2d 1344 (SD Fla), aff'd, 204 F3d 1123 (11th Cir 1999).

(2) 42 F Supp 2d at 1345-46.

(3) 856 SW2d 230 (Tex Ct App 1993) (writ of error denied October 6 1993).

(4) 856 SW2d at 238.

(5) Id at 239.

(6) 322 A2d 824 (NJ Super Ct App Div 1974).

(7) 322 A2d at 825 (quoting *Ultramares Corp v Touche, Niven & Co* 174 NE 441 444 (NY 1931)).

(8) 241 Cal Rptr 101 (Ct App 1987).

(9) 241 Cal Rptr at 102-103.

(10) 565 F Supp 802 (SD Tex 1983).

(11) 565 F Supp at 803. The court observed: "A magazine article is easily distinguishable from items such as gunpowder, fireworks, gasoline and poison, which have an obvious physical effect".

(12) Id at 804. Although the court granted the plaintiff leave to amend to add an incitement claim, it noted that the article in question began with the following italicized 'Editor's Note': "HUSTLER emphasizes the often-fatal dangers of the practice of 'auto-erotic asphyxia' and recommends that readers seeking unique forms of sexual release DO NOT ATTEMPT this method. The facts are presented here solely for an educational purpose". Id at 805 n3.

(13) 833 P2d 70 (Haw 1992).

(14) 833 P2d at 76.

(15) 938 F2d 1033 (9th Cir 1991).

(16) 938 F2d at 1034.

(17) Id at 1035.

(18) 563 A2d 123 (Pa Super Ct 1989), aff'd, 587 A2d 309 (Pa 1991).

(19) 694 F Supp 1216 (D Md 1988).

(20) 694 F Supp at 1216-1217.

(21) Id at 1217-1218.

(22) 7 Med L Rptr 1734 (SDNY 1981).

(23) 480 NE2d 1263 (Ill App Ct 1985).

(24) 480 NE2d at 1267.

(25) 655 F Supp 282 (ED Mich 1987).

(26) 655 F Supp at 283-284.

(27) Id.

(28) 451 NYS2d 533 (App Div 4th Dep't 1982), mod'g and aff'g, 439 NYS2d 821 (Sup Ct 1981).