Where is that feature featured: Addressing geographic product features and warnings

November 18, 2020

Overview

Manufacturers have little control over how customers use their products. As a result, the obligation of manufacturers to warn users about the potential risks and dangers associated with their products is nuanced and often complicated by the varied skill level, experience and other unique characteristics of a particular consumer. The varied nature of consumers is an issue for manufacturers when determining what types of warnings will be sufficient to meet their duty to warn customers about their products, both pre-sale and post-sale.

This is, of course, particularly true for manufacturers of power tools, given the manner in which those tools are used, and the environment in which they are used. From the backyard to the jobsite, the duty of a manufacturer of power tools to warn users can be a tricky needle to thread (or bolt to screw or metal to saw). Even more so with the expansion of power tool manufacturers into new geographic regions. With the international demand for power tools expected to increase by around five percent by 2025, and the worldwide market expanding to $41.7 billion USD,[1] the most rapid areas of growth will be in developing and emerging regions with still exploding populations where housing is being expanded and improved, such as China and India.[2]

This geographic expansion is likely to raise several issues for manufacturers of power tools hoping to sell their products globally and in new regions.

Being aware of the regulatory requirements from region to region is, of course, a necessity before selling product in any new country.

Of particular concern will be how a manufacturer's duty to warn translates (literally and more generally) into these new markets where laws and jurisprudence may not be as evolved as in more traditional markets such as the United States, Canada and Europe. Available infrastructure may also pose challenges and risks to the safe use of power tools in the manner intended by manufacturers. Also, global and regional differences and contexts in language, education, and tool ownership are additional factors that may influence what is required of a manufacturer to meet a duty to warn in the different regions where their products are distributed.

As well, should safety features be modified from country to country or region to region? What about when additional safety features come at a cost?

This paper considers some of the risks and challenges facing manufactures of power tools in multiple geographic regions to provide warnings for use of their products.

The duty to warn – General principles

The "duty to warn" owed by manufacturers and others in the distribution chain (meant to include component part manufacturers, suppliers, distributors and retailers) to those who use their products is fairly similar as across Canada and the United States. That is, manufacturers and others in the distribution chain generally have a duty to warn consumers and users of their products of the risks and dangers that are known or ought to be known to be inherent in the use of the product, as well as foreseeable misuses of the product that could result in injury.

The basis of the duty to warn is generally accepted to be a result of a manufacturer almost always being in a better position than their consumers to be aware of the inherent dangers associated with the use (and misuse) of their products. As a consequence, where a danger is known or foreseeable, the duty obligates manufacturers to highlight and specify these dangers which may not be known by the ordinary (and reasonable) consumer or user. The nature and scope of the duty to warn also generally varies with the level of danger associated with the ordinary use of the product. Where there is significant risk associated with a product, the warning must be detailed and give the user a full indication of each of the specific dangers arising from the use of the product.

Further, although manufacturers are not generally required to warn consumers of dangers that are obvious or commonly known enough that users are expected to be familiar with them (i.e. that a knife is sharp), in some circumstances, those dangers which seem obvious to most (i.e. riding head first down a slide into shallow water), may be found to be outside the reasonable knowledge of a user.

Although most cases focus upon warnings provided to a consumer when purchasing a product, manufacturers generally also have an ongoing and continuing obligation to alert users of products where dangers are discovered after a product has been sold. In Canada, for example, once discovered, manufacturers must then take concrete steps to issue a warning and address the issue, with the urgency or explicitness of the warning depending on the risk posed to users.

The scope of a manufacturers' duty to warn in the United States has been clarified by the American Law Institute's Restatement (Third) of Torts: Product Liability, which expands upon and modifies the Restatement (Second) of Torts to provide specificity and address those issues not covered in the Restatement (Second), including the duty to warn.[3] Section 2 of the Restatement (Third) notes that a product may be defective due to 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."

The Restatement (Third) also provides that manufacturers may be liable where damage is caused "by the seller's failure to provide a warning after the time of sale or distribution of a product if a reasonable person in the seller's position would provide such a warning."

A detailed analysis of a manufacturers' duty to warn across the United States and the world is well beyond the scope of this paper.[4] Some examples, however, will suffice. In Florida, manufacturers owe a duty to warn regarding a product that is potentially dangerous because of its inherent nature or because it is defective.[5] A manufacturer or supplier with actual or constructive knowledge of a danger associated with the use of its product must warn of that danger, at least where the hazard is not as well known to the user as to the manufacturer or supplier. A warning must be given with a degree of intensity that would cause a reasonable person to exercise caution commensurate with the potential danger.[6] Thus, a warning must be sufficient to give a user fair notice of the dangerousness of the product.[7] A warning is adequate if it is communicated by means of its positioning, font, lettering, colouring, and language that would convey to a user the information necessary to permit the user to avoid the risk and use the product safely.[8] Whether a warning is adequate depends on both the information provided and the injured person's independent knowledge or awareness of the product and dangers associated with its product.[9] The obviousness of the danger and the adequacy of the warning are based upon an objective standard, rather than a plaintiff's subjective appreciation of the danger.[10] Under Florida law, there is no duty to warn of a known danger.[11] There is likewise no duty to warn of open and obvious dangers.

In California, a manufacturer or supplier of a product is similarly required to give warnings of any particular dangerousness in the product or its use that the manufacturer knows or should know, that a user would not ordinarily discover.[12] A warning must be commensurate with the degree of danger. It must be directed to the specific danger and must be sufficient to cause a reasonable person acting under similar circumstances with the same knowledge and background to know the potential danger involved in the exercise of reasonable care.[13] A warning should be such that it will make the product safe for use, and the manufacturer or supplier must appropriately label the product, considering the likelihood of an accident and the seriousness of consequences from failure to so label.[14] And also in California, a manufacturer or supplier of a product may be under a post-sale duty to warn of dangers that the manufacturer or supplier becomes aware of after the product has left its possession.[15]

According to New York law, a manufacturer or seller has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known.[16] The manufacturer or seller may be held liable where it knows, or with reasonable diligence should anticipate, that the normal use of its product may result in substantial harm, and where it fails to exercise reasonable care to warn of such danger.[17] A manufacturer or seller can be under a duty to provide notice warnings, which apprise the product user of the product's risk so that it may be avoided; as well as instructional warnings, which provide the product user with directions as to how to use the product so as to avoid or minimize the potential for injury.

Since 2012, the states of Alabama, Minnesota, and New Hampshire have adopted section 10 of the Restatement (Third) of Torts: Products Liability which sets forth a post-sale duty to warn. New Hampshire has adopted the Restatement such that there is no duty on behalf of a manufacturer to inform users of post-sale safety improvements on

an otherwise non-defective product. Three states – Connecticut, Nebraska, and Tennessee – have made it clear that there is no post-sale duty to warn for manufacturers who have safety issues in their states. There still remain regulatory requirements to report to various government agencies regarding recalls and warnings required by manufacturers to consumers.

Power tools in emerging markets: Geography matters

As noted earlier, power tool manufacturers can expect (and hope) the global market for power tools to increase in developing and emerging regions where still surging populations are fueling a demand for construction. China and India, along with other developing countries throughout Africa, for example, have a growing demand for power tools but have significant differences from the Canadian, American and European market in terms of regulation, infrastructure and demographics. These factors, along with the different ways in which products will be sold and purchased, used and maintained, should be considered by manufacturers in understanding the nature of the duty to warn.

Product ownership

In Canada and the United States, consumers generally purchase their own power tools from a recognized retailer or distributor, safe in the knowledge that the product has not been abused, modified or is otherwise materially different than the state in which it left the factory floor. Having one's *own tools*, just like having one's *own truck*, is of particular pride in the construction world. The "sharing economy," once thought to be the saviour of our over-consumption tendencies, has not taken off in North America as expected.[18]

This is not to say that rental companies have not provided a useful and profitable service in the construction industry, and power tools specifically, but in developing regions the personal ownership of a power tool is likely to be significantly less common, and more complicated, given that greater proportions of individuals will be unable to afford to purchase their own power tools. That is, a sharing economy is likely to be a necessity. This, in turn, may create concerns for manufacturers hoping to understand, and meet, their obligations to warn consumers and users in such environments.[19]

The issues associated with a renting or borrowing system are highlighted in a 2009 decision of the Florida Middle District Court, *Alvarez v. Gen Wire Spring Co.*[20] Not owning the appropriate power tools to complete the job, the plaintiff rented a drain clearing machine but was not provided with the instruction manual.[21] While a number of warnings were located on the machine itself, some directed the user to the owner's manual (not provided with the rental) and stated that this should be reviewed before the machine was used. Unfortunately for the plaintiff, the instruction manual contained a specific warning not to use the "reverse" function to pull the machine's cable out of the drain. The plaintiff, not having reviewed the instruction manual, put the machine into reverse while backing the cable out of the drain and his hand was caught in the rotating cable, causing injury.[22] While the claim was ultimately dismissed due to the plaintiff's failure to read <u>any</u> warnings for the machine (in the manual <u>or</u> on the machine itself), the case highlights the importance of considering the manner in which a product will be operated and how best to bring dangers to a user's attention. Had the plaintiff read the warnings on the machine alone, it would have remained an open question whether the

manufacturer would have satisfied its duty to warn by directing the user to an instruction manual that may not necessarily be available. It may not be helpful to provide a link on the product or its container to the online version of the safety or user manual, where internet access may be unreliable.

Now imagine where the norm is the sharing of power tools, but without the sharing of the safety or user manual, or all the necessary parts, including safety guards and equipment. In circumstances where a failure to heed warnings may have contributed to a loss, the sharing economy makes it especially challenging for a manufacturer to demonstrate that the user of the product had the opportunity to review and consider the appropriate instructions or warnings. Where a claim is commenced in these circumstances, manufacturers may be forced to seek contribution or indemnity from the product's owner who may not have provided the appropriate instruction manual or warnings to a user. This is not ideal, given that the exact nature of the relationship between the various parties may also be uncertain, causing difficulty in defending such claims.

Additional issues may arise where defects or dangers are identified by a manufacturer after a product has been sold, triggering a post-sale duty to warn. Manufacturers will have to be concerned, not only with the content of the warnings themselves, but how to effectively contact an individual using a product who may no longer be the individual who originally purchased it. In these cases, manufacturers may be put into a position where they need end-users to make themselves known to a manufacturer rather than choosing to give notice to only those individuals for whom a manufacturer has contact information.

Language, literacy and sophistication

In addition to the obvious need for manufacturers to provide warnings and user and safety manuals to match the most common languages in use where the product is being sold, manufacturers will need to be aware of the degree of literacy and sophistication of their products' end-users, particularly in emerging and developing regions.

In China, for example, while literacy rates in certain sections of the population are high[23], other regions have *illiteracy* rates of between 10 to 15 percent.[24] In India, data from its 2011 census identified a national literacy rate of 74%, with some regions as low as 63%.[25] Experience with operating power tools may also vary, requiring manufacturers to consider the capabilities of the reasonably foreseeable end-user of their product. The analysis of what is a reasonably foreseeable misuse of a product may be different where the expected sophistication of users and the safe use of products is lower. The reasonable user may be a moving target. The lack of worker safety laws and protections may also predispose workers (and their employers) in developing regions to use products in less safe manner than would be expected elsewhere. Creativity in anticipating the potentials uses and misuses by a manufacturer of its power tools will be required.

Misuse, modification and maintenance

As mentioned, the infrastructure and workplace safety in developing regions may also create issues for manufacturers who wish to ensure that their products are operated and maintained as intended. In China, for example, accidents at work remain high due

to a lack of safety equipment and mechanical failures causing approximately 134 work-related hazards occurring each day.[26] In India, it has been estimated that approximately 38 fatalities occur in the construction industry each day, with greater danger faced in the mining, railway and construction sectors.[27]

Given an anticipated decrease in the prevalence of and adherence to safety standards, it is a reasonable possibility that those using power tools may have less regard to manufacturer instructions with respect to the proper set-up, use and maintenance of tools. When designing the appropriate warnings to be issued to end-users, it is incumbent on manufacturers to consider the reasonably foreseeable ways in which their products may be misused or altered, and to ensure that a warning of the risk associated with doing so is provided.

Challenges may also arise from the use of power tools when connected to unreliable and unsafe infrastructure, which may require specific warnings of the hazards associated with doing so. Where the quality and uniformity of power networks are an issue, these networks may not be able to provide consistent or standardized voltage levels, causing drops in power, malfunctions or an inappropriate level of voltage to power appliances and tools.[28]

It is also possible that users of power tools may not be able to rely on a uniform electrical receptacle or plug format, causing users to modify the tools to fit the available power system. Is this a foreseeable misuse of a product that a manufacturer must anticipate?[29]

Further issues may arise where maintenance instructions are unclear, or where customers may not have a reliable or approved method to repair or maintain their products. Given the relatively low market share for power tools in certain emerging regions, an expansive dealer network is unlikely to exist to distribute, maintain and repair power tools in the same manner as exists in Canada or the United States. Customers who wish to have their tools maintained will likely have to choose between a costly and time-intensive attempt to have the tool repaired by one of the few shops certified by a manufacturer to do so, visiting a local un-certified repair shop or attempting to repair the tool themselves. The second and third options are likely to create issues for manufacturers, particularly where operation or repair manuals are scarce or not easily available.[30]

Furthermore, in circumstances where an established supply and repair chain does not exist, it may be challenging for manufacturers facing product liability claims arising out of poor repair to argue that it was not foreseeable that individuals would attempt to repair the tools themselves.

Finally, the ability to monitor potential misuse or modification of a product may create issues for manufacturers where claims are made under manufacturers' warranties or in tort, alleging the product contained defects which led to damage. In many cases, the historical use and maintenance of a product is a key issue for a defending manufacturer. For example, should a chainsaw chain fail and cause injury, the manner in which the chainsaw was maintained and the blade maintained or replaced in accordance to manufacturer specifications will be highly relevant to a manufacturer's defence. In a sharing economy, the number of prior users may be unknown, along with

information with respect to how prior users used (or misused) the product prior to failure.

Further thoughts for products in emerging regions

Selling more tools and expanding the business is always good. Broadly speaking though, a manufacturer of power tools may have to contend with a number of unique issues when looking towards developing and emerging economies.

Understanding the various regulatory regimes from country to country and region to region – including warning and labelling requirements – is a must. And knowing that laws and jurisprudence may not be as evolved in developing and emerging markets as in more traditional markets such as the United States, Canada and Europe, is also a must. More nuance may be required, however, to understand and anticipate the challenges and risks to the safe use of power tools in the manner intended by manufacturers posed by geography in developing and emerging markets. Global and regional differences and contexts in language, education, and tool ownership are additional factors that may influence what is required of a manufacturer to meet a duty to warn in the different regions where their products are distributed.

Still other issues may arise in defending product claims where the breach of a duty to warn has been alleged. If warnings are modified from region to region and country to country, there could be uncomfortable questions during a trial for a company representative as to why a particular warning was included on a product sold in North America, and not, say, Africa. This may include marketing questions as well. What then, is the legal consequence of warnings and safety features on a global basis? Are some better than others? And this may not necessarily mean that there ought to be a standard worldwide warning for a particular tool, given the potential concerns raised above about geographical differences between populations and the use of a particular tool.

And what about where additional safety features are sold separately and perhaps with an additional charge? The price point for a tool, and the willingness (and ability) of consumers can surely be expected to vary from country to country and region to region, but charging for safety features at all, or only in some countries and regions, may be problematic.

Geography poses many particular risks for a manufacture of power tools.

And, you've now been warned…

This article first appeared in the DRI magazine "For the Defense," November 2020 issue, and is reproduced with their permission.

[1] PR Newswire, *Power Tools Market: Global Industry Analysis and Opportunity Assessment 2015-2025*, online: PR Newswire

[2] PR Newswire, *World Power Tools Market*, online: PR Newswire

[3] *American Law Institute, Restatement (Third) of Torts: Products Liability (1998) at §2 [Restatement (Third)].*

[4] For a detailed analysis of the duty to warn in the United States and globally, see DRI, *Product Liability: Warnings, Instructions, and Recalls* (2019).

[5] See, e.g., *Lesnick v. Duval Ford, LLC*, 185 So. 3d 577 (Fla. 1st DCA 2016); *A.O. Smith Harvestore Products, Inc. v. Suber Cattle Co*., 416 So. 2d 1176 (Fla. 1st DCA 1982); and *Robertson v. Deak Perera (Miami), Inc*., 396 So. 2d 749 (Fla. 3d DCA 1981).

[6] See: *Sta-Rite Industries, Inc. v. Levey*, 909 So. 2d 901 (Fla. 3d DCA 2004).

[7] See: *Edwards v. California Chemical Co.,* 245 So. 2d 259 (Fla. 4th DCA 1971).

[8] See: *Stanley Indus., Inc. v. W.M. Barr & Co., Inc.,* 784 F. Supp. 1570, 1575 (S.D. Fla 1992).

[9] See: *Talquin Elec. Co-op. v. Amchem Products, Inc.,* 427 So. 2d 1032 (Fla. 1st DCA 1983).

[10] See: *Byrnes v. Honda Motor Co*., 887 F. Supp. 279 (S.D. Fla. 1994).

[11] See: *Rodriguez v. New Holland North America, Inc.,* 767 So. 2d 543 (Fla. 3d DCA 2000).

[12] See: *Groll v. Shell Oil Co.* (1983) 148 Cal. App. 3d 444, 448.

[13] See: *Saporito v. Purex Corp*. (1953) 40 Cal. 2d 608; *Tingey v. E. F. Houghton & Co*. (1947) 30 Cal. 2d 97.

[14] See: *Lee v. Electric Meter Division* (1985) 169 Cal. App. 3d 375.

[15] See: *Lunghi v. Clark Equipment Co*. (1984) 153 Cal. App. 3d 485; *Balido v. Improved Machinery, Inc*. (1972) 29 Cal. App.3d 633.9.

[16] *Liriano v. Hobart Corp*., 92 N.Y.2d 232, 237, 677 N.Y.S. 2d 764, 766 (N.Y. 1998).

[17] *Kaempfe v. Lehn & Fink Prods. Corp*., 21 A.D.2d 197, 200, 249 N.Y.S.2d 840, 845 (1st Dep't 1964), aff'd, 20 N.Y.2d 818, 284 N.Y.S.2d 708 (N.Y. 1967).

[18] For example, at TedxSydney (2010) Rachel Botsman, the author of the book "The Rise Of Collaborative Consumption" famously asked, "How many of you own a power drill?" Nearly everyone raised their hand. "That power drill will be used around 12 to 15 minutes in its entire lifetime." See: Online here. But the sharing economy hasn't been completely bad for manufactures.

[19] For a good overview of concerns relating to products liability in the sharing economy, see "Products Liability in the Sharing Economy, David Berke, Yale Journal on Regulation, Vol. 33, Issue 2.

[20] 2009 US Dist LEXIS 6878, 2009 WL 248264 [*Alvarez*].

[21] *Ibid* at p 4.

[22] *Ibid* at pp 4-5.

[23] For example, literacy rates for youth aged 15-24 years are approximately 99.7%: Unicef, *China Statistics*, online: Unicef.

[24] Statista, Illiteracy Rate in China in 2018, by Region, online: Statista.

[25] Census India, *Status of Literacy*.

[26] China Labour Bulletin, *Work Safety*, online: China Labour Bulletin.

[27] Patel, D A and Jha, K N (2016) An Estimate of Fatal Accidents in Indian Construction. In: P W Chan and C J Neilson (Eds.) *Proceedings of the 32nd Annual ARCOM Conference*, 5-7 September 2016, Manchester, UK, Association of Researchers in Construction Management, Vol 1, 577-586.

[28] Jingyue Zhang, "Research on power quality problems based on smart grid and new energy generation" *AIP Conference Proceedings 2066, 020022* (2019), online: AIP Conference Proceedings ; Forum of Regulators, Central Electricity Regulatory Commission, *Report on Power Quality of Electrical Supply to the Consumers* (August, 2018), online: Forum of Regulators.

[29] This is a concern everywhere. For example, in the case of *Smith v Inglis Ltd*, Smith v Inglis Ltd. (1978), 83 DLR (3d) 215, 1978 CanLII 2148 (NS CA), a consumer received an electric shock due, in part, to the installer's choice to cut the third prong (the ground) on an electrical plug for a refrigerator. Although the Court agreed that the grounding prong of the plug was a safety feature designed by the manufacturer, it held that the manufacturer owed a duty to advise its customers of the "serious danger" in removing the grounding plug. In reaching this conclusion, the Court held that it should have been foreseeable by the manufacturer that someone would try to tamper or modify the plug.

[30] This issue may be exacerbated in the context of the COVID-19 pandemic. The combination of businesses temporarily or indefinitely shutting down along with consumers' reluctance to visit stores in-person may lead to more consumers choosing to repair tools themselves.

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