

Location of Warnings: On Product or in the Manual?

By Kenneth Ross*

An important issue to be considered in trying to meet the duty to warn and instruct is for the manufacturer to decide where to place the warning – on the product, in the manual, or on the product and in the manual. Generally speaking, all labels on the product should be shown in the manual. But the converse is not true. Not all warnings in the manual have to be placed on the product.

Since our first goal is to get the warning to the user, we need to figure out where best to place it to maximize the possibility of that happening. In the event of an accident, the plaintiff will always claim that they didn't see the warning and therefore, the manufacturer may need to testify as to why they placed it where they did.

This article will discuss the basic duty to warn and instruct and then examine the law and standards as they pertain to this issue. Then it will discuss recommendations about how to make this decision.

Basic Legal Duty to Warn and Instruct

Product sellers must provide “reasonable warnings and instructions” about their product’s risks. The law differentiates between warnings and instructions as follows: “Warnings alert users and consumers to the existence and nature of product risks so that they can prevent harm either by appropriate conduct during use or consumption or by choosing not to use or consume.” Instructions “inform persons how to use and consume products safely.” *Products Liability Restatement, §2 (c), cmt. i.*

Therefore, when the law talks about the “duty to warn,” it includes warnings on products in the form of warning labels; safety information in instructions; instructions that affirmatively describe how to use a product safely; and safety information in other means of communication such as videos, CDs, advertising, catalogs and websites.

The law says that a manufacturer has a duty to warn where (1) the product is dangerous; (2) the danger is or should be known by the manufacturer; (3) the

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danger is present when the product is used in the usual and expected manner; and (4) the danger is not obvious or well known to the user. *See Billiar v. Minnesota Mining and Manufacturing Co.*, 623 F.2d 240, 243 (2d Cir. 1980).

Once the decision has been made to warn, the manufacturer needs to determine whether the content of the warning is adequate. Generally, the adequacy of a warning in a particular situation is a question of fact to be decided by the jury. However, various courts and commentators have described a list of requirements and goals of an adequate warning. An adequate warning will:

- alert the consumer or user to the severity of the hazard (severity being defined as the magnitude of the hazard and the likelihood of it being encountered)
- clearly state the nature of the hazard
- clearly state the consequences of the hazard
- provide instructions on how to avoid the hazard.

And the *Products Liability Restatement* says that a court must focus on a warning's "content and comprehensibility, intensity of expression and the characteristics of expected user groups" to determine its adequacy.

Case law does treat the duty to warn and instruct separately. So, including adequate warnings in the manual may not be enough to meet the duty to instruct. And, adequate instructions in the manual may not fulfill the duty to warn.

There are very few cases talking about the adequacy of instruction manuals as instructions and not warnings. And the case law is not particularly illuminating. The cases only say that manuals should be "adequate, accurate, and effective," *Antcliff v. State Employees Credit Union*, 414 Mich 624 (1982), and "clear, complete, and adequately communicated," *Broussard v. Houdaille Industries, Inc.*, 183 Ill. App. 3d 739 (1st Dist. 1989).

Standards on Warnings

On the issue of location, which is certainly related to adequacy, let's first look at what the standards in the U.S. and elsewhere say. With the exception of some product specific standards, general warning label standards deal with the format of a warning label when attached to a product but do not deal at all with warnings to be included in instructions. As a result, they do not talk about when the warning should also be placed in the manual and, more importantly, when you can just warn in the manual and not on the product.

In researching this article, I reviewed the following general warning label standards: ANSI Z535.4, ISO 3864, ISO 11684, ISO 6750, and ISO 9244. I found no requirements or guidance on when you can just warn in the manual.

Many product specific standards promulgated by ANSI, ASTM, UL, CSA, etc. do generally talk about what warnings have to be attached to the product and what information, including warnings, has to go in the manual. However, not all product specific standards deal with the content of instructions and some don't deal with warnings or instructions at all. And, of course, compliance with these standards is not a defense; therefore, manufacturers cannot completely rely on them to answer this question.

Standards on Instructions

There is one general standard that talks about instructions. ANSI Z535.6, the new standard dealing with instructions, was published in late 2006. The purpose of the new standard is, in part, to "establish a uniform and consistent visual layout for safety information in collateral materials for a wide variety of products and establish a national uniform system for the recognition of potential personal injury hazards for those persons using products."

The standard applies to all "collateral material" that accompanies a product but does not deal with safety information placed in advertising and promotional material, or stated in audio/visual material such as safety videos and websites.

This standard says nothing about when a warning in the manual is sufficient without it also being attached to the product. In addition, this standard only deals with safety instructions usually in a hardcopy format.

Today, more interesting, compelling and understandable safety information can be transmitted by video, CDs and web casts in combination with written literature. The challenge for manufacturers in the future will be to provide information that is more likely to be read or viewed.

Government Guidelines on Instructions

In addition, I reviewed a number of governmental guidelines or guidances and found no discussion of this subject. These include the *CPSC Guide to Instruction Manuals*, *FDA's Write it Right*, *DTI's Writing Safety Instructions for Consumer Products (UK)*, and *FDA's Guidelines for Medical Device Labeling*.

Common Law on Warning Location

On the issue of location of the warning on the product, case law requires the warning to be in a position so it can be seen before the user encounters the hazard. This is also required in ANSI Z535.4.

There are also a number of cases where a warning was deemed inadequate because it was in the wrong location on the product and a few cases where the warning was only in the manual and not on the product.

On the issue of how to analyze whether to place a warning just in the manual, Professor David Owen, in his products liability hornbook, said:

Whether adequacy requires in any given case that warnings be placed directly on the product involves a balance of the significance of the hazard, the user's need for the information, the availability of a feasible means to place the warnings on the product, and other factors in the calculus of risk. If feasible, reason normally suggests that important warnings be placed on the product itself rather than in a pamphlet, booklet, or information sheet that can be damaged, lost, or destroyed. *** Depending on the circumstances, however, a warning may still be adequate even if it is provided off the product in a manual or other writing. *Product Liability Law*, page 580 (Thomson West 2004).

Professor Owen cited just a few cases for the above proposition. One of the cases, *Broussard v. Continental Oil Co.*, 433 So. 2d 354 (La. App), cert. denied, 440 So. 2d 726 (La. 1983), illustrates one basis of putting warnings in the manual and not on the product – a lack of space on the product.

Black & Decker sold a hand drill with one warning on the product, "CAUTION: For Safe Operation See Owner's Manual." In the manual, there was a section devoted to safety. And item #18 dealt with the safety precaution that was not followed and resulted in injury to the plaintiff.

The court dealt specifically with the question of whether Black & Decker met its duty to warn by warning in the manual and not on the product. Plaintiff's counsel submitted a proposed warning label for the hand drill that included 10 of the 18 warning messages in the manual. The court felt that the proposed language concerning the hazard involved in this accident was inadequate. In addition, the proposed warning showed how difficult it is to adequately warn of multiple hazards in a small space.

The court felt that putting even 10 warning messages on the drill decreased the effectiveness of all of the warnings and that a consumer might not read any of them given the clutter.

The court held that Black & Decker met its duty to warn by including a warning referring to the manual on the product and including the specific warning, which was deemed adequate in content, in the manual.

Another case from Louisiana held that a warning in the manual was sufficient because a warning on the product would not have been readable given the

corrosion and wear to which the product and label would be subjected. *Williams v. Super Trucks, Inc.* 842 So. 2d 1210 (La. Ct. App. 2003).

What to Do

This issue illustrates the importance of creating or revising instruction manuals and warning labels at the same time. They are inextricably intertwined. They form all or part of a safety communications system and will be viewed as such by the plaintiff and a jury.

With this in mind, I suggest that the manual first be developed with the warning labels to follow. Here are a few suggestions to consider for incorporating safety information into the manual. Some but not all of these suggestions are in ANSI Z535.6.

- The cover of the manual should have a boxed warning saying something like “Read this manual before using this product. Failure to follow the instructions and safety precautions in this manual can result in serious injury or death.” It should also say, “Keep this manual in a safe location for future reference.”
- A Safety Section should be placed at the beginning of the manual, before or after the table of contents, that describes the risks involved in the use of the product and how to minimize or avoid them. This section should include definitions of the signal words—such as “danger,” “warning,” and “caution”—that are used on labels and in the manual, as well as reproductions of the labels showing where they are attached to the product. If the product has symbol-only labels, the manual should describe the meaning of all symbols.
- The Safety Section should be separated into subsections to make the precautions easy to read and find. The subsections can be devoted to the type of activity (Assembly, Installation, Operation, Maintenance) or type of hazard (fire, electrocution, crush) or even type of avoidance procedure (avoid open flames, wear protective gear, stay away from power lines, keep hands out of moving parts).
- Not all safety messages in the Safety Section need to be repeated in the text, especially if they are general and apply to many activities. In addition, not all safety messages in the instructional sections need to be repeated in the Safety Section. For example, lower level messages, such as those using

“Caution” and “Notice” as signal words, may not need to be in the Safety Section.

- General safety messages should be included at the beginning of a chapter (i.e. maintenance or installation or operation) or within a chapter. They should include general references to the Safety Section and other safety messages such as “Do not operate equipment without first reading this chapter and the Safety Section at the beginning of this manual” and “Failure to follow safety precautions in this chapter could result in serious injury or death.”
- Embedded safety messages should be contained within a specific procedure. For example, “To prevent burns, wear protective gloves when performing this procedure.” As stated above, not all of these messages need to be in the Safety Section.

As described above, the cover of the manual should tell the user to read the manual before using the product and then to keep the manual nearby for future reference. In addition to that, the manufacturer should include a label on the product saying the same things and telling the user how to get another manual if the original manual is missing or illegible.

With the message on the cover of the manual and this label on the product, the manufacturer can argue that all of the warnings in the manual that are not on the product should have been read before using the product and that they can assume that this will be done. That basically is what won the case for Black & Decker in the *Broussard* case.

However, of course, you don't stop there. Now you need to figure out what safety messages should also go on the product. Based on what Professor Owen said above, it sounds somewhat like factors in a negligence test: the level of hazard (considering probability and severity), the “user's need for the information” on the product and not just in the manual (considering obviousness and the user's need to see this precaution each time they use the product), and “the availability of a feasible means to place the warnings on the product” (considering available space and the environment in which the label would be placed).

So, the higher the risk, the more the label should be accessible during each use, and the easier it is to place a warning on the product, the more likely you should place a label on the product. Having helped manufacturers with this analysis for 30 years, I can tell you that this is basically the analysis that I utilize.

Lower level hazards, hazards that only exist during unlikely uses, and maintenance hazards where maintenance personnel are professionals, are some of the kinds of hazards where a label may not be necessary.

With that being said, when in doubt, and where there is room, add the label. While there is a possibility that over warning will be used to argue that the warnings are inadequate, I think the risk of liability for under warning is far more likely.

If making a final decision is problematic or if the manufacturer truly doesn't know, it is possible for the manufacturer to do a focus group study to try to determine what information would be best to place on the product versus the manual. In other words, they can find out from actual product users what information in the manual these users feel should be visible to them each time they use the product.

Conclusion

No matter what a manufacturer does in the area of warnings and instructions, a plaintiff will argue that they should have done something different, and that this would have prevented the accident. Given the wide variety of options and analyses that can be done, and the lack of clear guidance on this issue concerning most products, the manufacturer should use the factors described above and develop a rationale as to why certain messages are on the product and why some are just in the manual.

This should lessen the chances of a plaintiff using location against the manufacturer and hopefully will provide some defense if such an argument is raised.