You Should Know Better: California Adopts the Sophisticated User Defense

By Peter Vestal

A. Introduction

Did you know that heating the refrigerant used in many air conditioning units could create the same deadly gas used by combatants in World War I? Neither did an air conditioning technician named William Johnson. Yet, in a recent case of first impression, the California Supreme Court unanimously ruled a manufacturer is not liable to a "sophisticated" user of its product for failing to warn of a danger, if the user knew or should have known of the danger. (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56.)

B. The Facts of the *Johnson* Case

Mr. Johnson was a certified heating, ventilation, and air conditioning (HVAC) technician who alleged he was injured by phosgene gas while repairing air conditioners manufactured by the defendant, American Standard. Commercial systems commonly use refrigerants that can decompose into toxic gases such as phosgene when they are exposed to flame or high heat, as could happen while a technician is brazing metal air conditioner lines containing residual refrigerant.

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Johnson sued American Standard under theories of negligence, strict liability for failure to warn and strict liability for design defect under California's consumer expectations test. In each cause of action, Johnson alleged American Standard knew harmful gases, and phosgene in particular, would form when its product was serviced, but failed to provide an adequate warning of the hazard. In response, American Standard contended it was common knowledge within the HVAC industry that exposing certain refrigerants to a heat source could generate hazardous gases.

Prior to his injury, Mr. Johnson had obtained "universal" HVAC certification from the Environmental Protection Agency, and the EPA's certification literature referred to the phosgene gas risk. He also admitted receiving and reading the Material Safety Data Sheets ("MSDS") with each of his purchases of refrigerant. He claimed, however, he did not realize that heating refrigerant could produce phosgene.

On review, the Supreme Court upheld the lower court decisions dismissing Mr. Johnson's case after finding he belonged to a trade which presumably possessed specialized knowledge about the dangers attendant to the brazing of air conditioning lines. (*Id.* at p. 75.)

C. Product Liability

1. The Duty to Warn

Subject to certain exceptions, manufacturers, distributors and sellers of defective products are liable in tort if a defect in the product injures someone while the product is being used in a reasonably foreseeable way. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 560; *Morton v. Owens-Corning Fiberglas Corp.* (1995) 33 Cal.App.4th 1529, 1533.) A product may be defective because of a design or manufacturing flaw, or because the defendant failed to provide adequate warnings about the product's dangers. (See *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 995.)

The duty to warn is articulated in section 388 of the Second Restatement of Torts which provides that a supplier of goods is liable for the physical harm its goods cause if the supplier knows, or should know, the goods are likely to be dangerous, fails to reasonably warn of the danger, and has no reason to believe that the intended users of the goods will realize their dangerous condition. (Rest.2d Torts, § 388.) Comment j to section 402A adds that a seller may be required to provide directions or warnings in order to prevent the product from being unreasonably dangerous. (Rest.2d Torts, § 402A, com. j, p. 353.) Even a faultlessly made product can be deemed unreasonably dangerous and therefore defective if it is not accompanied by adequate warnings or instructions. (See, e.g., *Bunch v. Hoffinger Industries, Inc.* (2004) 123 Cal.App.4th 1278, 1304.) The adequacy of the warning is judged in view of existing knowledge at the time the product was manufactured. (*Rosburg v. Minnesota Mining & Manufacturing Co.* (1986) 181 Cal.App.3d 726.) Thus, a manufacturer is only obligated to warn about dangers which it is or should reasonably be aware of; there is no requirement for the manufacturer to warn about hazards unknown to its industry.

2. The Obvious Danger Rule

An important exception to the duty to warn – under either a negligence or strict liability theory – concerns risks that should be known or obvious to the consumer. (*Bojorquez v. House of Toys, Inc.* (1976) 62 Cal.App.3d 930; see *Holmes v. J.C. Penney Co.* (1982) 133 Cal.App.3d 216, 220.) The rationale is that a warning will not reduce the risk of injury where the danger is generally known and recognized. Manufacturers of goods possessing dangerous attributes are not insurers – even under strict liability – for the mistakes or carelessness of users who should know of the hazards. (*Johnson, supra*, 43 Cal.4th at p. 70, citing *Anderson, supra*, 53 Cal.3d at p. 994.) Whether the danger posed by a product is obvious, however, depends on the circumstances. For example, the danger of diving into a four foot deep, above-ground swimming pool is not necessarily obvious to a child. (See *Bunch, supra*, 123 Cal.App.4th at p. 1294.)

3. The Sophisticated User Defense

The sophisticated user defense evolved out of section 388 of the Second Restatement of Torts and the obvious danger rule. (*Johnson, supra*, 43 Cal.4th at p. 65 (citing *Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 64, and *Bojorquez, supra* 62 Cal.App.3d at pp. 933-934).) Comment k to section 388, subdivision (b), is entitled "When warning of defects unnecessary" and says a supplier of goods is only required to inform users of the risks associated with a product if the supplier has no reason to believe the users will have special experience to enable them to perceive the danger. (Rest.2d Torts, § 388, subd. (b), com. k, p. 307.) Put another way, the supplier need not warn those who by virtue of their special experience should already know about the risks. The failure to warn about a product's dangerous attributes is not the legal cause of injuries resulting from use of the product if the user should have recognized the danger. (*Johnson, supra*, 43 Cal.4th at p. 65, citations omitted.) The rationale underlying the defense is that the user's knowledge of the danger is the equivalent of prior notice. (*Id.*, citing *Billiar v. Minnesota Mining & Manufacturing Co.* (2d Cir. 1980) 623 F.2d 240, 243.) Since the defense is considered an exception to the supplier's general duty to warn users, it acts as an affirmative defense to negate the duty in those jurisdictions which have adopted it. (*Id.*, citing *In re Related Asbestos Cases* (N.D. Cal. 1982) 543 F.Supp. 1143, 1151.)

D. The Johnson Decision

1. The holding

In Mr. Johnson's case, the California Supreme Court agreed with the central thrust of American Standard's defense. First, it explicitly embraced the sophisticated user defense in California by holding a manufacturer need not warn the members of a trade or profession about dangers generally known to that trade or profession. (*Id.* at pp. 70-71.) Second, it found American Standard had offered undisputed evidence that HVAC technicians could reasonably be expected to know of the hazard resulting from brazing air conditioning lines. (*Id.* at p. 74.)

Besides adopting the language of comment (k) in section 388 of the Second

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Restatement of Torts, the court concluded its approach was also consistent with section 402A of the Restatement, which addresses strict liability. Quoting Comment j of section 402A, it remarked that even in cases of strict liability a seller is not required to provide a warning when the danger, or potential for danger, is generally known and recognized. (*Id.* at p. 73, quoting Rest.2d Torts, § 402A, com. j, p. 353.) The court felt requiring manufacturers to warn users in all instances would saddle them with an excessive burden, could dilute the effectiveness of warnings in general and risked spawning widespread disregard for the warning process. (*Id.* at p. 70, quoting *Finn v. G. D. Searle & Co.* (1984) 35 Cal.3d 691, 701; see also Rest.3d Torts, Products Liability § 2, com. j, p. 31.)

2. Objective test

Mr. Johnson claimed he had no personal knowledge of the phosgene exposure danger. However, the court concluded the obvious danger rule is an objective test; accordingly, the courts should not inquire into the user's subjective knowledge. In other words, an ordinary consumer's unawareness of a product's hazards is irrelevant if the danger is objectively obvious, such as the self-evident dangers associated with sharp knives and sling shots. The court therefore extended the application of the objective test to the claims of sophisticated users. (*Id.* at p. 71.) It emphasized the duty to warn is measured by what is generally known or should have been known to the class of sophisticated users, rather than by the individual plaintiff's subjective knowledge. The question becomes whether the injured user knew, or should have known, of the particular risk of harm of the product giving rise to the injury.

Obvious dangers do not require special knowledge, only common sense. So it does not necessarily follow that an objective test is equally well-suited when looking at so-called sophisticated users who by definition acquire their specialized knowledge only through a combination of education, training and experience. The court conceded it was foreseeable otherwise sophisticated users might fail to study the harmful nature of a product, but still pass their certification, or later forget what they learned. It nevertheless concluded manufacturers should be relieved of the duty to warn such users precisely because the "infinite number of user idiosyncrasies" resulting in lack of awareness on the part of the individual user make it nearly impossible for a manufacturer to predict or determine whether a given user actually has knowledge of the dangers. (*Id.*)

3. Applicability to negligence and strict liability causes of action

Any confusion over how an objective test could properly apply to a strict liability action is understandable, and the court allowed that failure to warn claims are rooted in negligence to a greater extent than are the manufacturing or design-defect theories. (*Id.* at p. 73.) Practically speaking there is only a slight functional difference between strict liability and negligence in the context of failure to warn cases. Under both schemes, the court or jury examines the reasonableness of the manufacturer's conduct in providing – or not providing – warnings to users. Some would no doubt express concern that adoption of an objective test would undermine the concept of strict liability, but the court insisted that strict liability product liability law in California may incorporate negligence concepts without undermining the principles fundamental to a strict liability claim. (*Id.*, citations omitted.)

4. Determining the date of user sophistication

Because the focus of the defense is on the user as opposed to the manufacturer, the sophisticated user's knowledge of the risk is measured from the time of the user's injury, rather than from the date the product was manufactured. (*Id.* at pp. 73-74.)

E. Significance of the *Johnson* Case

The *Johnson* case clearly has significant implications for future product liability claims premised on the duty to warn.

1. Distributors and Sellers

The *Johnson* opinion refers to the sophisticated user defense with respect to manufacturers only, perhaps because of American Standard's role in the case as a manufacturer. However, it is reasonable to expect the defense will prove equally available to other suppliers of goods such as distributors and sellers, given the defense's origins in section 388 of the Second Restatement of Torts which applies to all suppliers of goods.

2. Other industries, trades and professions

Johnson explicitly immunizes certain potential defendants by imputing knowledge of a product's danger to the user based on membership in a specialized trade or profession irrespective of the user's actual knowledge of the danger. While it is premature to catalog the types of products or industries ultimately encompassed by the defense, the court did favorably cite to a number of cases from around the country involving such diverse goods as asbestos products, customizable "skeleton" trucks, natural gas lines, scaffolding and aircraft warning systems. Defendants can therefore be expected to assert the defense any time a failure to warn claim is brought by a user who is injured while using a product in the course of a specialized trade or profession.

3. Mass tort class actions

The defense could arguably pertain to mass tort class actions. Differences in the knowledge and experience levels of individual class members, including their membership in certain trades or professions, could conceivably influence a court to decide individual issues outweigh common ones and the class members are not similarly situated, making a class action inappropriate.

4. Asbestos cases

Johnson could potentially affect certain types of asbestos cases. If, for example, insulators have special experience in the use of insulation, then the defense might prevent them from recovering against insulation suppliers.

5. Non-professional users

The court applied the sophisticated user defense to Mr. Johnson's personal injury claims after deciding he possessed special experience by virtue of his membership and certification in a trade. However, section 388, comment k of the Second Restatement does not necessarily

limit the defense to tradesmen or professionals. Future defendants will be tempted to utilize the defense against non-professional users of specialized products, such as hobbyists, who nonetheless have greater knowledge than the general public. Hypothetical examples include: amateur racers of sailboats, gun enthusiasts, owner-users of off-road vehicles such as ATV's and wood-workers. On the other hand, extending the defense outside the realm of professional users runs the risk of broadening the sophisticated user exception to the point where it practically overtakes the duty to warn rule.

F. Questions for Another Day

The precise scope and contours of the sophisticated user defense will doubtless be tested and refined in subsequent cases, and particular areas will likely receive further inquiry.

1. Gauging special expertise and membership in a trade or profession

The court described some of the aspects of Mr. Johnson's qualifications and training that conferred upon him special expertise as a HVAC technician. Future cases must flesh out the means for determining: 1) whether an injured user of a product belongs to a trade or profession, and 2) whether the dangerous characteristic(s) of a product is sufficiently known within the trade or profession to obviate the supplier's duty to warn.

2. Sophistication of employer as defense

While the facts of the *Johnson* case involved a plaintiff who was both the purchaser of the product and the sophisticated user, the court also cited, seemingly approvingly, cases where the sophisticated user defense applied to claims brought by plaintiffs who were the employees of the sophisticated user/purchaser. The court declined to decide the issue of whether an employee plaintiff may negate the defense by demonstrating the sophisticated user-employer's misuse of the product was foreseeable. That scenario and outcome occurred in a case decided some years ago by a federal district court in California. (*In re Related Asbestos Cases* (N.D.Cal. 1982) 543 F.Supp. 1142.) Based on the court's favorable citation to the federal decision, future state courts are likely to deem sophisticated employers the "end user" of the product, although the question remains whether they will permit the injured employee to undercut the defense.

G. Discovery Advice

The *Johnson* case provides a roadmap for the types of evidence that will be germane to determining the viability of the sophisticated user defense in future cases.

1. Laws and regulations

American Standard successfully made use of a California Code of Regulations provision requiring employers to provide information to their employees about the hazardous substances to which they may be exposed while working. (See Cal. Code Regs., tit. 8, § 5194, subd. (g) and (h).) Such regulatory notice requirements may help establish constructive notice on the part of the employer as well as that of the injured employee assuming the employer complied with the requirements.

2. Experts

Future cases may well turn on expert testimony, just as it did in *Johnson* where the court approved defendant's expert testimony concerning widespread knowledge among HVAC technicians about the creation of phosgene gas during brazing of refrigerant lines. Expert testimony will probably provide the strongest evidence to resolve whether a product's harmful characteristics are generally known to the class of people to which the plaintiff belongs.

3. Regulatory and certification literature

Literature from government regulatory bodies who provide certification for trades and professions may be relevant to determining whether an injured plaintiff is a sophisticated user. American Standard successfully introduced a web page from the Environmental Protection Agency which described the dangers associated with the decomposition of refrigerants at high temperatures. Other documents such as certification study guides and course curriculum for members of the profession, including those used by the claimant, may tend to show constructive or even actual knowledge of the danger.

4. Employer and personnel records

Numerous documents in the possession of the plaintiff's employer are likely apropos, including employer safety manuals, OSHA-required Hazard Communication Plans, training materials, the plaintiff's personnel file, and any other safety related documents in the employer's files that the plaintiff had or should have had access to.

5. Manufacturer records

Pertinent manufacturer records may include notices to users of the potential hazards associated with the product at issue, examples of product warning labels and MSDS's as well as any other safety-oriented information provided by the manufacturer to others in the chain of commerce.

6. Other relevant information about product dangers

Evidence that government agencies or other manufacturers provided warnings regarding similar products may have a tendency to prove constructive notice in a particular trade or profession. American Standard introduced a MSDS for the type of refrigerant that gave off phosgene gas through heat-induced decomposition. The court concluded the document was relevant in that it generally outlined the dangers associated with decomposition of refrigerant even though American Standard did not generate the MSDS, and the MSDS did not concern the particular product at issue. Additional investigation may reveal the existence of records in the public domain supportive of a party's position, such as from trade associations, medical journals, newspapers and academic publications.

H. Conclusion

The California Supreme Court has sent a robust message by virtue of its unanimous verdict, although only time will tell how broadly the lower courts apply the sophisticated user defense. Trial courts will probably interpret *Johnson* narrowly until further appellate decisions emerge. Even so, adoption of the defense to any degree is bound to shake up the realm of product liability jurisprudence. ■