MINNESOTA PRODUCTS LIABILITY LAW 1992-2003, PART I

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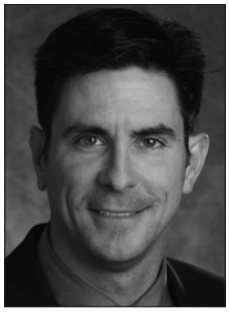


This is the first of a two-part article dealing with Minnesota Products Liability Law. Part I provides an introduction to the issues involved in Minnesota product liability law and failure to warn issues. Part II, which will appear in the next issue of *Minnesota Defense*, discusses the Seat Belt Gag Rule, Economic Loss Doctrine, Spoliation of Evidence, Res Ipsa Loquitur, Rejection of New Products Liability Theories, Foreseeability, Assumption of Risk, Subsequent Remedial Measures, and some helpful Miscellaneous Case studies.

I. INTRODUCTION

Products liability is a mature field of law. Most of the doctrinal developments in Minnesota products liability law occurred in the 1980's. See e.g., Bilotta v. Kelley Co., 346 N.W.2d 616, 621 (Minn. 1984) (adopting a reasonable care standard for design defect cases); *Germann v. F.L. Smithe Mach. Co.,* 395 N.W.2d 922, 926 n.4 (Minn. 1986) (failure to warn claims are based upon principles of negligence). Most of the court decisions since the 1980's have applied or refined the principles established in earlier cases. Most recent product liability cases have been decided in the Minnesota Court of Appeals or in federal court. In the past decade, the Minnesota Supreme Court has rarely addressed products liability.

This article covers Minnesota products liability law since 1992 and is intended as an update on prior articles in *Minnesota Defense*.[1] Other legal developments will also affect products liability litigation in Minnesota, such as amendments to Minnesota's comparative fault statute (Minn. Stat. § 604.01 was amended in 2003 to impose joint liability only on tortfeasors whose fault exceeds fifty percent); U.S. Supreme Court decisions, and amendments to the Federal Rules of Evidence concerning admissibility of expert witness testimony; *see Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993); Fed. R. Evid. 702[2] ; and U.S. Supreme Court decisions placing limits on punitive damages awards, such as *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003). Also, the American Law Institute published in 1998, the *Restatement of the Law Third, Torts: Products Liability.*[3] Finally, the Minnesota District Judge's Association published in 1999 a revised jury instruction guide. CIV JIG III, Cat. 75 (1999) (products liability jury instructions). While these developments will impact products liability cases, they are beyond the scope of this article, which focuses on case decisions and statutes directly involving Minnesota products liability law.

II. FAILURE TO WARN

A. Duty to Warn: A Question for the Court or Jury

In *Germann v. F.L. Smithe Machine Co.,* the Minnesota Supreme Court held that "whether a legal duty to warn exists is a question of law for the court – not one for jury resolution." *Germann v. F.L. Smithe Mach. Co.,* 395 N.W.2d at 924. The *Germann* court found, based on the facts of the

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[1] George W. Soule & Sheryl A. Bjork, *Minnesota Products Liability Law* 1986-1992, Minnesota Defense, Summer 1992 at 10; George W. Soule, *Returning Negligence Principles to the Trial of Failure to Warn Claims in Minnesota*, Minnesota Defense, Spring 1998 at 2; George W. Soule & Cynthia J. Atsatt, *Recent Developments in Minnesota Products Liability Law*, Minnesota Defense, Winter 1986 at 2.

[2] For analysis of Minnesota law on the admissibility of expert witness opinions, see Victor E. Lund & Michael DeKruif, *Admissibility of Novel Scientific Evidence: The Minnesota Supreme Court's Verdict*, Minnesota Defense, Spring 2001 at 7.

[3] Restatement (Third) of Torts: Products Liability (1998); see also, Shawn Raiter, *The Restatement (3d) of Torts and The Proof of a Reasonable Alternative Design, Parts 1 and 2,* Minnesota Defense, Spring 2000, at 3 and Summer 2000 at 3.

case, that the manufacturer had a duty to warn of the specific danger alleged by the plaintiff. *Id.* at 925.

> The result of *Germann* is that the courts have taken over the decision whether a manufacturer must warn against a specific danger under the particular circumstances. In other words, *Germann* requires the trial judge, rather than jury, to determine whether the standard of care requires a warning under the circumstances. In doing so, *Germann* and many courts following *Germann* have decided other preliminary facts to determine whether the standard of care was met.

George W. Soule & Jacqueline M. Moen, *Failure to Warn in Minnesota, the New Restatement on Products Liability, and the Application of the Reasonable Care Standard*, 21 WM. MITCHELL L. REV. 389, 395 (1995) [hereinafter Failure to Warn in Minnesota].

One of the authors has criticized the Germann approach as "confus[ing] the element of 'duty' as it applies to negligence theory." *Failure to Warn in Minnesota* at 396. *See also*, George W. Soule, *Returning Negligence Principles to the Trial of Failure to Warn Claims in Minnesota,* Minnesota Defense, Spring 1998 at 2. Rather than have the court decide whether a warning is needed, it should be "for the jury to determine whether reasonable care requires the manufacturer to provide a warning, and if a warning is provided, whether it was adequate, under the circumstances of each case." *Failure to Warn in Minnesota* at 397.

While Minnesota courts have continued to cite the *Germann* approach, it is not clear in practice whether courts or juries have decided whether there is a duty to warn.

While Minnesota courts have continued to cite the *Germann* approach, it is not clear in practice whether courts or juries have decided whether there is a duty to warn. For example, in *Marcon v. Kmart Corp.,* a twelve-year-old boy was riding a snow sled down a hill on his knees, when the sled hit a bump and stopped, throwing him forward and leaving him a quadriplegic. *Marcon v. Kmart Corp.,* 573 N.W.2d 728, 729-30 (Minn. App. 1998). There were no warnings or instructions on the sled. *Id.* at 730. Plaintiff claimed that the manufacturer of the sled had a duty to warn that riders must sit upright. *Id.* The trial court submitted the claim to the jury, which concluded that the sled was defective for failure to warn. *Id.* After citing evidence that the sled's "dig and flip" danger was foreseeable, manufacturers of other sleds included warnings, and the manufacturer's president knew that children were using the sled while kneeling, the court concluded that "[t]he trial court properly submitted the issue to the jury." *Id.* at 733.

In *Krutsch v. Walter H. Collin GmBh Verfahrstechnik Und Maschinenfabric*, 495 N.W.2d 208 (Minn. App. 1993) plaintiff was injured while attempting to repair a hydraulic cylinder in a lead extruder machine. The jury found that the machine was defective for failure to warn. *Id.* The court of appeals affirmed after conducting its own *Germann* analysis of the evidence on the duty to warn issue. *Id.* at 212. The court found that the manufacturer "should have foreseen that the machine would be operated by individuals who were not fully trained in the machine's maintenance and repair procedures," and "[t]he dangers associated with 'bleeding' the cylinder are not obvious to such a user." *Id.* "Thus, [the manufacturer] had a duty to warn all foreseeable users of the machine of the dangers associated with 'bleeding' the machine's cylinder." *Id.*

Marcon and *Krutsch* both affirmed jury verdicts against manufacturers for failure to warn. It is not clear in these cases, however, whether it was the jury, the trial court, or the court of appeals that made the "duty to warn decision." In other words, it is unclear who decided issues of fact -- such as foreseeability -- that bear on whether a warning is needed. *Marcon* sounds like the court of appeals is affirming the jury's failure to warn findings on a sufficiency of the evidence basis, while *Krutsch* sounds like the court of appeals is conducting a de novo analysis of whether there was a duty to warn. *See also, Becerra Hernandez v. Flor,* No. Civ. 01-0183, 2002 WL 31689440, at *14 (D. Minn. Nov. 29, 2002) (mem.) (finding fact issue whether mobile home manufacturer had duty to warn about flammability of building materials; denying summary judgment for manufacturer); *Wilson v. Harris Corp.,* Civ. No. 3-92-711, 1993 WL 724813, at *4 (D. Minn. Oct. 20, 1993) (mem.) (finding removal of printing press guard was foreseeable; denying summary judgment for manufacturer on failure to warn claim); *Hatfield v. Qual-Craft Indus.,* No. C2-99-1454, 2000 WL 758403 (Minn. App. June 7, 2000) (manufacturer had duty to warn of the propensity of a pump jack lock to disengage under certain circumstances; district court's JNOV reversed and jury verdict in favor of

plaintiff reinstated); *Anderson v. Shaughnessy*, 519 N.W.2d 229, 233 (Minn. App. 1994) (fact issues preclude summary judgment on failure to warn claim against paintball pistol manufacturer).

In preparing the Fourth Edition of the Minnesota Jury Instruction Guide, the drafters included two duty to warn instructions – one for cases in which product warnings or instructions were given by the manufacturer and adequacy is in issue, and a second for cases in which no warning was given. CIVJIG 75.25 (1999). The first instruction focuses on the adequacy issue, which all agree is a jury issue. *Id*. Notably, the second instruction also submits the duty to warn issue to the jury:

> A manufacturer has a duty to use reasonable care in deciding whether (to warn of dangers involved in using its product) . . . "Reasonable care" is the standard of care you would expect a reasonable person to follow in the same or similar circumstances. You must decide if a manufacturer using reasonable care would have provided (warnings) . . . for the safe use of the product. . . .

Id. While not necessarily true to *Germann*, this approach makes sense because it reserves for the jury the role of fact finding in determining whether reasonable care requires a warning.

Several cases that have applied the *Germann* approach to dismiss failure to warn claims may have turned out the same way under a traditional negligence approach. That is, courts may decide that reasonable care does not require the manufacturer to warn when the undisputed facts support that conclusion as a matter of law. Several of these cases are discussed in the next section – cases in which courts dismissed failure to warn claims when undisputed evidence showed that the product danger was or should have been known by the users. In these cases, the trial courts may simply have followed their traditional role in granting summary judgment or directed verdict when the evidence was undisputed, rather than deciding the duty to warn as discussed in *Germann*.

Simply stated, the *Germann* approach is confusing and defies the traditional roles of judge and jury in negligence cases. Hopefully, the Minnesota Supreme Court will soon take an opportunity to clarify the proper approach to deciding failure to warn claims.

B. No Warning Needed for Obvious and Generally Known Risks

In the past few years, the court of appeals and Minnesota federal courts have dismissed several failure to warn claims when the users knew or should have known of the products' dangers. In most of these cases, the court followed the *Germann* approach and held that there was "no duty to warn" of known or obvious dangers. Under a traditional negligence analysis, "reasonable care does not require a manufacturer to warn of obvious or generally known risks." *Failure to Warn in Minnesota* at 402. Thus, if the undisputed evidence is that the danger should have been known by the user, the manufacturer is entitled to dismissal of the failure to warn claim as a matter of law. *See Gamradt v. Federal Labs., Inc.*, No. 02-CV-816, 2003 WL 22143729 (D. Minn. Sept. 2, 2003) (the dangers of a black smoke grenade used to train prison guards are open and obvious; granting summary judgment dismissing failure to warn claim); *Holowaty v. McDonald's Corp.*, 10 F. Supp. 2d 1078, 1084 (D. Minn. 1998) (mem.) (no duty to warn of risk of burns from spilled coffee because "average person in the community knows that hot coffee can cause burns"; granting summary judgment for seller); *Voice v. Elevator Motors Corp.*, No. C3-01-1691, 2002 WL 338258 (Minn. App. Mar. 5, 2002) (manufacturer of elevator shackles did not have duty to warn of need to use safety devices when dangers were within the scope of the plaintiff's professional knowledge; affirming summary judgment for manufacturer); *McCarthy v. Target Stores*, Nos. C5-98-1194 & C4-98-1297, 1999 WL 58568 (Minn. App. February 3, 1999) (claim that door closer installation instructions were inadequate dismissed when installers were experienced and were aware of the door closer's characteristics; affirming summary judgment for manufacturer); *Roufs v. AG Systems, Inc.*, No. CO-97-1478, 1998 WL 171438, at *5 (Minn. App. Apr. 14, 1998) (no duty to warn plaintiff with extensive experience working with anhydrous ammonia of dangers of quick coupler; affirming summary judgment dismissing failure to warn claim); *Hoeg v. Shore-Master, Inc.*, No. C9-94-508, 1994 WL 593919 (Minn. App. Nov. 1, 1994) (boat lift canopy manufacturer had no duty to warn of open and obvious dangers of a spring that came loose and struck plaintiff in the eye; reversing denial of motion for JNOV).

In cases involving dangers actually *known* by the users, the courts have sometimes confused "duty to warn" and causation. These cases should be analyzed as causation cases. If the evidence shows that the user was aware of the danger, then a failure to warn could not have been the cause

of the accident. *See Ramstad v. Lear Siegler Diversified Holdings Corp.*, 836 F. Supp. 1511, 1516 (D. Minn. 1993) (manufacturer entitled to dismissal of failure to warn claim when plaintiff was fully aware of the danger of stepping on the rods over a grain auger's intake); *Knaack v. Holstad, No. CX-95-222*, 1995 WL 333864 (Minn. App. June 6, 1995) (seller cannot be liable for failure to warn when plaintiff was aware of the dangers of combine's spinning shaft; affirming summary judgment dismissing failure to warn claim); *Drager by Gutzman v. Aluminum Indus. Corp.*, 495 N.W.2d 879, 885 (Minn. App. 1993). ("[T]he manufacturer had no duty to warn potential users of a danger of which they were aware"; affirming summary judgment dismissing failure to warn claim against window screen manufacturer).

C. Duty to Warn Whom – Intermediary Versus End User

In many instances, there may be an intermediary between the product manufacturer and end user. The intermediary's relationship with the end user and knowledge of the product's risks may insulate the manufacturer from liability to the end user for failure to warn.

Learned intermediary. A well-known application of this principle is the learned intermediary doctrine, applicable to failure to warn cases involving pharmaceuticals and medical devices.

> When a plaintiff's failure to warn claim involves medical issues, courts have found that a manufacturer does not have a duty to warn the lay public. . . . Instead, the manufacturer has a duty to warn the medical professional – the learned intermediary – regarding the dangers inherent in medical devices. . . . Manufacturers have a duty to warn only the treating physician because she "is in the best position to understand the patient's needs and assess the risks and benefits of a particular course of treatment."

Mozes v. Medtronic, Inc., 14 F. Supp. 2d 1124, 1130 (D. Minn. 1998) (citations omitted). In *Mozes*, the district court granted summary judgment dismissing plaintiff's claim that Medtronic failed to warn him of the risks of a pacemaker lead. *Id.* The court found that there was undisputed evidence that Medtronic had warned the plaintiff's physician of such risks, and Medtronic did not have a duty to warn the plaintiff. *Id.*

Bulk supplier. In *Gray v. Badger Mining Corp.*, the intermediary was plaintiff's employer, a foundry where plaintiff was exposed to silica sand. *Gray v. Badger Mining Corp.*, 664 N.W.2d 881, 883 (Minn. App. 2003), *pet. for rev. granted* (Minn. 2003). After plaintiff developed silicosis, he sued the company that had supplied sand to his employer, alleging that the seller failed to warn him of the dangers of breathing silica dust. *Id.* at 882-83. The court of appeals held that the sand supplier had no duty to warn:

> The undisputed facts here show that [the foundry employer] knew or should have known of the dangers of silica and was in a reasonable position to warn its employees. Thus, [the employer] was a sophisticated purchaser of the sand to which [plaintiff] was exposed during his foundry career. . . . [I]t was reasonable for [defendant] as a bulk supplier of silica sand to rely on [the employer] to warn and protect its employees.

Id. at 887.

In ruling for the sand supplier, the court of appeals had to distinguish its opinion in *Todalen v. U.S. Chem. Co. Id.* 424 N.W.2d 73, 86 (Minn. App. 1988), *review denied* (Minn. 1998), overruled on other grounds by *Tyroll v. Private Label Chems., Inc.*, 505 N.W.2d 54 (Minn. 1993)). In *Todalen*, the court held that the manufacturer of a caustic chemical had a duty to warn a product user of the danger of its misuse. *Todalen*, 424 N.W.2d at 80. The court rejected the manufacturer's argument that the court should apply a "learned intermediary" or "knowledgeable user" principle to defeat plaintiff's failure to warn claim. *Id.; see also*, George W. Soule & Sheryl A. Bjork, *Minnesota Products Liability Law 1986-1992*, Minnesota Defense, Summer 1992 at 14-15 [hereinafter *Minnesota Products Liability Law*]. The Gray court distinguished *Todalen* on four grounds: In *Gray*, the plaintiff was exposed to the hazard during proper use of the sand; the sand was shipped in bulk without a container on which to affix a warning label; the plaintiff did not receive or unload the bulk sand delivery; and the burden on the manufacturer to place warning labels on containers would be significant because the sand was delivered in bulk. *Gray*, 664 N.W.2d at 885. In *Todalen*, the plaintiff was misusing the product; the chemical was shipped in drums that could have contained a warning label; the employee handled the chemical container; and "the burden on the chemical supplier to place warning labels on the containers seemed minimal." *Id.* at 885-86.

The lesson of *Todalen* and *Gray* is that when the intermediary is the plaintiff's employer the courts will decide the duty to warn issue on a variety of circumstances, including whether the employer was aware of the danger, whether the employer was motivated to provide warnings to its employees, and whether it was practicable for the manufacturer to provide warnings directly to the employees.

Component supplier. Another type of intermediary is a product manufacturer that incorporates materials or components in a final product that is used by the plaintiff. In these cases, the issue is whether the material or component supplier has a duty to warn the plaintiff user of the component's dangers. In *In re Temporomandibular Joint (TMJ) Implants Products Liability Litigation,* the recipients of prosthetic devices used to correct TMJ disorders sued the suppliers of raw materials used to construct the implants. *In re TMJ Implants Prods. Liab. Litig.*, 97 F.3d 1050, 1052 (8th Cir. 1996). The implants were designed, manufactured, and sold by a company that had gone bankrupt. *Id.* The Eighth Circuit Court of Appeals affirmed the district court's summary judgment dismissing plaintiff's failure to warn claims "on the basis of the raw material/component part supplier doctrine." *Id.* at 1055. Under this doctrine, "suppliers of inherently safe raw materials have no duty to warn end-users of a finished product about dangers posed by the incorporation of the raw materials into that product." *Id.* at 1058. The court found it significant that the material at issue was "safe for multiple uses," that any danger associated with the material stemmed from the final product design, and that the defendant suppliers had no control over the design or manufacture of the final product. *Id.*

In another TMJ case, *Hegna v. E.I. du Pont Nemours and Co.,* plaintiff claimed that the material supplier had a duty to warn the manufacturer of jaw implants of the dangers of using the material in the final product. *Hegna v. E.I. du Pont Nemours and Co.,* 806 F. Supp. 822, 823 (D. Minn. 1992). Initially, the district court denied defendant's motion for summary judgment because there were fact issues as to the elements of plaintiff's claim. *Id.* at 825-26. The court found that there was evidence that the defendant was aware of the final product manufacturer's intended use of the material and the potential risks involved in using that material in jaw implants. *Id.* at 826. The court found that the defendant's reliance on the final product manufacturer "as an intermediary may have been unreasonable." *Id.*

In a later decision in the case, after further development of the record, the court found that its concerns were allayed, and granted summary judgment in favor of the material supplier. *Hegna v. E.I. du Pont de Nemours and Co.,* 825 F. Supp. 880, 884-85 (D. Minn. 1993). The court relied on undisputed evidence that the final product manufacturer knew about the properties of the defendant's material and concerns regarding the use of the material to make jaw implants, and that the defendant informed the product manufacturer of concerns about using the material to make implants and that the manufacturer would have to rely on its own judgment if it chose to use the material in the implants. *Id.* at 884. The court concluded that the material supplier "reasonably believed that [the final product manufacturer] knew of the dangers associated with using [the material] to make implants and that [the supplier] reasonably relied on [the manufacturer] to warn the ultimate users of such dangers. Accordingly, the court concludes that, as a matter of law, [the supplier] discharged its duty to warn." *Id.* The *Hegna* cases suggest that the material or component supplier may need to warn the final product manufacturer of the material or component's dangers if the manufacturer is not a sophisticated user, already knowledgeable about such dangers.

D. Other Failure to Warn Issues

Liability of retailer. In *Marcon v. Kmart Corp.,* 573 N.W.2d 728, 733 (Minn. App. 1998), the court of appeals affirmed a nearly $8 million judgment against Kmart – the retailer of a snow sled – for failure to warn of the dangers of riding the sled on the user's knees. Before the lawsuit was started, the sled manufacturer declared bankruptcy. *Id.* at 730 n.1. The jury found that the sled was defective for failure to warn, that one hundred percent of the causal fault was attributable to the manufacturer, and that Kmart was not negligent. *Id.* at 730. The court held that even though Kmart was not negligent, it was liable under strict liability for selling a defective product. *Id.* The court cited Minn. Stat. § 544.41, which absolves a non-manufacturer defendant from strict liability unless the manufacturer is unable to satisfy the judgment, as a reason to impose strict liability on Kmart. *Id.* at 731. While Minnesota failure to warn claims are to be tried under a reasonable care standard, the court retained the strict liability label as a reason to impose liability on the retailer. *Id.* at 731-32.

Preemption. In several cases, courts have held that plaintiffs' failure to warn claims are preempted by federal regulations governing the products involved. See *Brooks v. Howmedica, Inc.,* 273 F.3d 785, 798 (8th Cir. 2001) (failure to warn claim involving bone cement preempted by FDA approval of the product); *Moe v. MTD Products, Inc.,* 73 F.3d 179, 182 (8th Cir. 1995) (failure to warn claim involving lawn mower preempted by Consumer Product Safety Act); *Goeb v. Tharaldson,* 615 N.W.2d 800, 817 (Minn. 2000) (failure to warn claim involving insecticide preempted by Federal Insecticide, Fungicide, and Rodenticide Act).

Practitioners should be mindful of preemption law and federal regulations that pertain to the product at issue.

Federal preemption of failure to warn claims is outside the scope of this article. Practitioners should be mindful of preemption law and federal regulations that pertain to the product at issue.

Adequacy of warning. Under the *Germann* approach, the jury is to decide whether the manufacturer's warnings are adequate. In *Krutsch v. Walter H. Collin GmBh Verfahrstechnik Und Maschinenfabric*, 495 N.W.2d 208, 211 (Minn. App. 1993), an injured employee brought an action against the manufacturer of a lead extruder machine for injuries sustained while he attempted to repair the machine. The employee consulted a partial copy of the machine's operation manual kept near the machine, which, unlike the complete manual kept elsewhere, did not contain the procedure for "bleeding" the machine's hydraulic cylinder. *Id.* The employee was injured while attempting to bleed the cylinder. *Id.* "The jury found that the machine was not defectively designed, but was defective for failure to warn . . . ." *Id.*

The court of appeals sustained the finding of a duty to warn: "The dangers associated with 'bleeding' the cylinder are not obvious" to a user, thus the manufacturer had a duty to warn all foreseeable users of such danger. *Id.* at 212. The jury then properly decided whether it was sufficient to have warnings in the operator's manual, or whether reasonable care required the manufacturer to place a warning on the machine. *See Id.*

E. Post-Sale Duty to Warn

In *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 833 (Minn. 1988), the Minnesota Supreme Court recognized a duty to warn of product dangers that the manufacturer discovers, or should have discovered, after sale of the product. The court noted that a post sale duty to warn "arises only in special cases." *Id.* In finding a duty to warn, the following factors influenced the court: the manufacturer's knowledge of the danger, the hidden nature of the danger, the degree of danger, the manufacturer's continued advertisement and service of the product, and the manufacturer's distribution of some warnings before the accident. *Id.* at 833-34; *see also Minnesota Products Liability Law* at 17-18.

In recent years, several federal courts in Minnesota have dealt with post-sale duty to warn.[4] In *Ramstad v. Lear Siegler Diversified Holdings Corp.*, 836 F. Supp. 1511, 1513-14 (D. Minn. 1993), plaintiff argued that a grain auger manufacturer had a post-sale duty to warn of dangers of the auger's intake area. The court found that judgment as a matter of law was properly granted to defendant, dismissing plaintiffs' post-sale duty to warn claim. *Id.* at 1517. Relying on *Hodder*, the court reasoned:

> The court concludes that the special factors which warranted a continuing duty to warn in *Hodder* do not exist in the instant case. Hutchinson had notice of only a handful of other accidents. The danger associated with the auger was not hidden and was known to users. There is no evidence that Hutchinson had undertaken a duty to warn. Hutchinson also adopted a new intake design and ceased marketing a shield for grain augers. The only factor that favors imposing a continuing duty to warn in this case is the gravity of the resulting harm. That factor alone, however, is insufficient to satisfy the special circumstances required by *Hodder*.

Id.

In *T.H.S. Northstar Associates v. W.R. Grace and Co.*, 66 F.3d 173, 177 (8th Cir. 1995), the court considered whether W.R. Grace – a manufacturer of asbestos-containing fireproofing material – had a "continuing duty to warn" a building owner about asbestos risks and abatement programs. The court held that "the evidence in this case justified submitting the continuing-duty-to-warn issue to the jury":

> [G]race's pamphlets, letters, and extensive publicity discussing the risks of asbestos-containing materials and purporting to advise building owners on how to manage that risk raise a jury issue under Hodder whether to impose a continuing legal duty to warn.

Id.

In *McDaniel v. Bieffe USA, Inc.*, plaintiff alleged that a motorcycle helmet manufacturer had a post-sale duty to

[4] See, e.g., *Beniek v. Textron, Inc.*, 479 N.W.2d 719, 721 (Minn. App. 1992). In *Beniek*, the jury found that a chain saw manufacturer failed to provide adequate post-sale warnings about the product's dangers, but did not find that such failure to warn was a cause of the accident. *Id.* On appeal from the plaintiff's verdict on product defect, the manufacturer argued that the trial court's erroneous admission of evidence on the post-sale duty to warn prejudiced the jury's findings on product defect. *Id.* at 723. The court of appeals held, however, that the admission of a post-sale, but pre-accident, design change to the chain saw was relevant as to feasibility of an alternative design, was not a subsequent remedial measure, and did not prejudice the manufacturer. *Id.*

warn "helmet users of the danger of using the velcro strip to attach the chin strap." *McDaniel v. Bieffe USA, Inc.*, 35 F. Supp. 2d 735, 739 (D. Minn. 1999). On defendant's motion for summary judgment, the court ruled that "assuming it had adequate notice of the alleged danger, [the manufacturer] had a duty to take reasonable steps to alert the public of the risks associated with misuse of the velcro strip." *Id.* at 742-43. The court found that plaintiff had offered sufficient evidence that the manufacturer "had reason to know that the velcro strip . . . may pose a risk to users, the dangers the helmet poses may be hidden or unknown to the user, and serious injury or death likely will result from the alleged defect." *Id.* at 740. The court also found *Hodder* factors against imposing a post-sale duty to warn:

> [The manufacturer] has not continued to "service" or maintain its product, does not sell aftermarket attachments or related products, and has not assumed a duty to remain in communication with or warn previous users, and is not otherwise in contact with helmet owners. The [helmet] is a mass-produced and widely marketed consumer item. [The manufacturer's] business does not afford it the ability to communicate easily and continually with its customers. . . . [The manufacturer] would have had no way of tracking its helmet to [plaintiff] . . . .

Id. at 741.

In finding a post-sale duty to warn, the court was influenced by *Crowston v. Goodyear Tire & Rubber Co.*, in which the North Dakota Supreme Court held that Goodyear had a post-sale duty to warn of the danger of mismatching different sized tires and rims. *Id.* at 741-43 (citing *Crowston*, 521 N.W.2d 401, 409 (N.D. 1994)). The *McDaniel* court reasoned:

> In certain circumstances, some but not all of the *Hodder* factors may be sufficient to give rise to a post-sale duty to warn. As the North Dakota court made clear, the fact that a product is mass-produced and widely distributed does not necessarily rule out application of this duty when other *Hodder* factors are present. Mass production and wide distribution may *limit the response the duty mandates* rather than *defeat the duty's existence.* When a manufacturer of a mass produced, widely distributed product becomes aware that there is a danger associated with the product creating a risk of serious injury or death, the manufacturer may have a duty to take reasonable steps to notify users of that danger.

Id. at 742. Given the existence of a duty to provide "reasonable notice," the adequacy of the manufacturer's post-sale efforts was an issue for the jury. *Id.*; see also *Doesken v. Krause-Anderson Construction Co.*, No. CX-92-111, 1992 WL 145477, at *2-3 (Minn. App. June 30, 1992) (no continuing duty to warn of danger of restaurant floor when there was no evidence builder knew of, or should have foreseen, hazards; affirming summary judgment dismissing post-sale duty to warn claim).

In some cases, plaintiffs have alleged that entities other than the actual product manufacturer should have a post-sale duty to warn. For example, in *Costello v. Unipress Corp.*, the court of appeals affirmed summary judgment dismissing a failure to warn claim against the alleged corporate successor to the manufacturer of the machine involved in the accident. *Costello v. Unipress Corp.*, No. C6-95-2341, 1996 WL 106215, at *2-3 (Minn. App. Mar. 12, 1996). Relying on *Niccum v. Hydra Tool Corp.*, the court of appeals stated that "[s]uccessor corporations have a duty to warn concerning a dangerous product manufactured by a predecessor corporation in certain situations," but not this one. *Id.* at *2 (citing *Niccum v. Hydra Tool Corp.*, 438 N.W.2d 96 (Minn. 1989)). In this case, plaintiff failed to offer evidence that the alleged successor knew of any defect in the machine, knew the location of the machine, or had any relationship with the predecessor's customers, including plaintiff's employer. *Id.; see also Gamradt v. Federal Labs., Inc.*, No. 02-CV-816JMR/RLE, 2003WL 22143729 (D. Minn. Sept. 2, 2003) (no liability for failure to warn where there was no evidence alleged successor knew of defect or of location of product, or had any relationship with plaintiff's employer).

F. Causation

To prevail on a failure to warn claim, plaintiff must prove a duty to warn, that the defendant failed to warn adequately, and that the failure to warn was a cause of the accident. *See U.S. Xpress, Inc. v. Great N. Ins. Co.*, No. 01-0195, 2003 WL 124021, at *5 (D. Minn. Jan. 8, 2003). There have been few Minnesota cases analyzing what evidence is sufficient to prove that an accident was caused by a failure to warn. In several cases, however, the courts have considered what evidence may defeat causation. For example, courts have found that a plaintiff's actual knowledge of a product danger defeats a claim for failure to warn of that danger. *See* cases cited *supra* Part I.B.

In *Holowaty v. McDonald's Corp.*, 10 F. Supp. 2d 1078, 1084-85 (D. Minn. 1998), plaintiff argued that, even though the danger of burns from hot coffee is open and obvious, the severity of the possible injury was not well known, therefore McDonald's had a duty to warn. The court rejected this argument on causation grounds:

> To prove causation, plaintiffs need to show that they would have acted differently if they had been warned of the risk of severe burns. . . . [E]ven if defendants had included a warning

> that stated "DANGER: COFFEE CAN CAUSE SEVERE BURNS," there is no reason to believe that plaintiffs would have altered their conduct. Consequently, there is no genuine dispute of material fact on the issue of causation.

Id. at 1085-86. Thus, the product user's knowledge of the danger will defeat causation in a failure to warn case, even if the user may not be aware of the severity of the danger.

In other cases, courts have held that a product user's failure to read the product manual or labels defeats a claim that the product's warnings were inadequate, a principle first applied in *J & W Enterprises, Inc. v. Economy Sales, Inc.*, 486 N.W.2d 179, 181 (Minn. App. 1992). If the user did not read the warning, how could its adequacy be a cause of the accident? *See Michel v. Minn-Dak Co.*, No. C8-02-1082, 2002 WL 31689352 (Minn. App. December 3, 2002) (lack of evidence that the truck seat installer had read seat's instructions or warnings barred claim that instructions and warnings were inadequate; affirming summary judgment for manufacturer); *Yennie v. Dickey Consumer Prods., Inc.*, No. C1-00-89, 2000 WL 1052175 (Minn. App. August 1, 2000) (no proof of causation when there was no evidence that decedent had read the label on the bottle of Ephedrine Plus tablets and decedent's "level of misuse of Ephedrine was extreme;" affirming summary judgment for manufacturer); *Marko v. Aluminum Co. of Am.*, No. CX-94-789, 1994 WL 61570004 (Minn. App. November 8, 1994) (manufacturer's "failure to provide a more detailed warning . . . could not have caused [plaintiff's] injuries because it was his practice not to read warnings and he conceded that he did not read the warnings actually provided;" affirming summary judgment for manufacturer).

Although Minnesota courts have rarely addressed the issue of what evidence is needed to prove causation, the courts have insisted that plaintiffs offer some evidence to prove this element of a failure to warn claim. The courts have rejected plaintiffs' contentions that Minnesota law should recognize a presumption that, if the manufacturer had provided adequate warnings, the user would have read and heeded the warnings. *See Ramstad*, 836 F. Supp. at 1516; *Yennie v. Dickey Consumer Products, Inc.*, No. C1-00-89, 2000 WL 1052175 (Minn. App. August 1, 2000). ▲

(Part II of this article will appear in the Spring 2004 issue of *Minnesota Defense* magazine.)

MINNESOTA LEGISLATURE ON THE INTERNET

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