



An Article by Peter H. Gunst

Warning about “Failure to Warn”

A few years ago, a New York car dealer was sued by a couple who had sustained injuries in an accident that they claimed had been caused by the dealer’s negligent insertion of two plugs in their car’s right rear tire. The dealer then sued another dealer that had inspected but failed to discover the bad plugs in the interim between installation and accident.

The second dealer sought to dismiss the first dealer’s claim, contending no doubt that it took considerable chutzpah for a party allegedly guilty of negligent installation to claim that another should be liable for a failure to discover its shoddy workmanship. The court, however, denied the motion and permitted the first dealer’s claim to go to the jury.

This case illustrates the liability that may arise from the failure to discover or warn a customer about a potentially dangerous condition.

Liability for failure to warn may arise in two separate contexts: the sale of a potentially dangerous product, or the repair, inspection or maintenance of a vehicle having a defective condition. These situations are treated somewhat differently because

the law traditionally distinguishes between service transactions and transactions involving the sale of goods.

The law governing a dealer's duty to warn of a potential danger in a sales transaction has changed over time. At one time, the courts cut dealers -- as opposed to manufacturers -- considerable slack. This was because, as a prominent and progressive jurist of the time, Judge Traynor, wrote in 1944, "certainly there is greater reason to impose liability on the manufacturer than the retailer who is but a mere conduit of a product that he is not himself able to test."

More recently, the dealer's plight worsened with the expansion of the doctrine of strict liability with respect to the sale of potentially dangerous products. Most courts concluded that the doctrine applied equally to *all* sellers, whether manufacturers, distributors or dealers.

Now the pendulum is swinging back, at least to some extent. Either by statute or court decision, some jurisdictions are recognizing that a retailer who sells numerous products simply should not be held to the same degree of knowledge concerning each individual product as the manufacturer. For example, the applicable Georgia statute, § 51-1-11 of the Georgia Code, visits strict liability only upon the manufacturer.

Even where the law has been loosened, a selling dealer still can be held liable for negligence for failure to warn. An example is an Oklahoma case where a tire dealer was

held liable for actual and punitive damages for failure to pass on to its customer repeated warnings that it had received from the tire manufacturer of potential danger to car and tires resulting from excessive or high speed wheel spinning in ice and snow conditions. In that case, the manufacturer walked because it had provided adequate disclosures to the dealer and only the dealer was liable.

Inspection and maintenance cases involving only the sale of services are usually decided under general negligence standards. The traditionally accepted statement of the law is that --

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

The bottom line is that a dealer -- regardless of whether a sale of product or services is involved -- bears a real responsibility to uncover discoverable defects and to alert both its sales and service customers about potential dangers. Otherwise, extensive liability may ensue.