

Retailer: Know Thy Customer! Product Warnings and "Special Circumstances"

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Abstract

This paper is a discussion of the legal requirements for product warning. It argues that base in both practical and public policy considerations, retailers who deal with buyers or other parties who may speak or understand a language other than English are in the best position to ascertain whether warnings should be given in addition to those provided by the manufacturer. The article argues that such warnings should be mandated by considering the "special circumstances" exhibited by these parties.

Key Words: products liability; warnings; negligence; summary judgment; "special circumstances"

1. Introduction

In December 2015, Odilon Cordova and his wife, Jaime Busse, filed a complaint for damages against Crawfordsville Town & Country Home Center ("Town & Country") and Do It Best Corp. ("Do It Best") hardware after Cordova was electrocuted and seriously injured in the aerial lift rented from Town & Country. Cordova and Busse alleged that Town & Country and Do It Best were: (1) negligent in renting the aerial lift; (2) negligent for failing to provide sufficient warnings, training, and instructions; and (3) negligent because they knew or should have known that the aerial lift created an unreasonable risk of harm when used in a manner reasonably foreseeable to Town & Country and Do It Best. As a matter of law, "To prevail on a claim of negligence, a plaintiff is required to prove: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty by the defendant; and (3) an injury to the plaintiff proximately caused by the breach." In a seminal article published in 2007, Professor Owen stated: "Also essential to negligence, evident from an early date, was the necessity of a causal connection between the defendant's breach of duty and the plaintiff's damage that was natural, probable, proximate, and not too remote" (Owen, 2007, p. 1671).

1.1. Summary of Facts (adapted from *Crawfordsville Town & Country Home Center v. Cordova*, 2019)

In August 2014, the owners of a Mexican restaurant located in Crawfordsville, Indiana, hired Rogelio Barcelata to paint the rear exterior wall of the establishment. Barcelata asked two of his friends, Cordova and Gonzales, to assist him. The three friends agreed to split the payment for the work. In order to remove the old paint, the men decided to rent a pressure washer and an aerial lift. Barcelata and Cordova went to Town & Country, where Corey Perigo, manager of the rental department, assisted them in the selection of the equipment. The record is replete with differences and contradictions in the parties' testimony. Barcelata, Gonzales, and Cordova claimed that they spoke limited English. Barcelata and Cordova testified in their depositions that they could not read English. Perigo testified in a deposition that Barcelata spoke fluent English and that he did not know if the other men spoke English.

Perigo eventually rented the pressure washer and the lift to Barcelata. According to Perigo, he explained the operation of the aerial lift to Barcelata. According to Cordova, Perigo explained how to use the aerial lift to Cordova, who spoke more English than Barcelata. Perigo maintained that he had also showed Cordova where the operator's manual was located. The operator's manual and the warning labels on the aerial lift were all written in English. Cordova did not ask for the instructions or safety information to be provided in Spanish. Perigo then spent fifteen to twenty minutes giving an operation and safety orientation. Perigo conceded, however, that most of that time was spent on the operation of the aerial lift, not on its safety. Perigo did not review the operator's manual with either Cordova or Barcelata.

The manufacturer had placed multiple warning labels (with diagrams) on the aerial lift that directed users not to use the lift within ten feet of a high-voltage line. Perigo testified in his deposition that he had explained the electrocution warning sticker on the lift and that he said "to stay away from the power lines at least 10 feet." Barcelata, however, testified that Perigo did not point out the warning labels.

The operator's manual further directed operators to avoid power lines. The operator's manual provided: "Inexperienced users should receive instruction by a qualified instructor before attempting to operate or maintain the aerial work platform." However, Perigo was not "certified" to "provide training or instruction" on the aerial lift. The men then transported the aerial lift to the job site. After they arrived at the job site, the men experienced some problems operating the aerial lift. Cordova called Perigo, who came to the job site, and corrected the problem. There was a dispute whether the aerial lift was situated in the parking lot or was in position next to the building when Perigo arrived. Perigo testified that when he arrived, the equipment was parked in the parking lot away from the restaurant.

Cordova, however, stated that when he and Barcelata arrived at the site with the aerial lift, they immediately placed the lift next to the restaurant's back wall and had leveled it. Barcelata testified that the aerial lift had been placed "where we were going to work" and that Cordova had leveled it before discovering that it would not work. According to Barcelata, the men placed the aerial lift between the back wall of the building and power lines that were located a few feet away.

Thus, according to Cordova and Barcelata, the aerial lift was already in position when Perigo arrived to fix it. Barcelata testified that he assumed Perigo "would have said something" if the aerial lift could not be operated in its location when Perigo repaired it and saw its positioning. Cordova testified that Perigo saw their pressure washer and told Cordova that it was too small for the job. Perigo recommended that the men use a more powerful pressure washer, and the men followed Perigo back to Town & Country to rent a larger piece of equipment.

Barcelata stated that he was aware that "nobody should get close to electric cable[s]." However, he stated that he thought they had enough room to do the job without touching the power lines. Barcelata also understood that they needed to stay away from the power lines. Barcelata was not concerned about using water near the power lines because they "were spraying the wall, not the lines." Cordova testified that he knew the power lines were "bad" and that they had tried to stay away from the lines. Cordova also testified, however, that they were not paying attention to the power lines while they were in the basket because they "were working."

The next day, Cordova and Gonzales were once again working in the basket of the aerial lift using the power washer. Cordova was at the controls, and Gonzales was spraying water to remove old paint from the wall. The aerial lift was positioned between the building and power lines. The aerial lift was less than ten feet away from the power lines. According to Cordova, however, the aerial lift did not touch the power lines.

Emergency personnel at the scene and Town & Country's corporate representative, John Whitecotton, however, testified that the aerial lift was less than ten feet away from the power lines. Whitecotton was asked the following question in his deposition: "Is there any way that that lift could have been safely used to power wash that wall?" Whitecotton responded, "No. There's power lines within ten feet of there. I actually believe the power lines are too low to the ground to begin with, and the pole's leaning toward the building." Whitecotton also testified, "If we knew at the time that the customer was going to do something near power lines, and we're talking within 25 feet or less, we would say, you can't do that. And if they say, we're going to do it anyway, we would refuse rental."

In response to the lawsuit filed by Cordova and Busse, Town & Country filed a motion for summary judgment (see Brunet, 2012). [Summary judgment is a judgment that may be granted by the court upon a party's motion when the pleadings, discovery, and any affidavits show that there is no issue of material fact and that the party is entitled to judgment in its favor as a matter of law.] The defendants asserted that: (1) Town & Country did not owe any duty to Cordova beyond passing on the warnings of the manufacturer; (2) Town & Country's conduct was not the proximate cause of Cordova's injuries; and (3) based on principles of comparative fault, Cordova's fault (negligence) was greater than the fault (negligence) of any other person who contributed to Cordova's damages, thus barring recovery by the plaintiffs (see Klein, 2006; Basten, 2018). As to the last assertion of the defendants, it should be noted that there is still a considerable debate in the legal community about the place of comparative fault in products cases (see Wickert, 2013). For example, Sobelsohn (1985, pp. 414-416) noted that a "workable system of comparative fault requires resolution of a host of troubling issues, ignored by most of the states in the general rush to adopt comparative fault."

Cordova filed a response to Town & Country's motion for summary judgment based on Section 388 of the Restatement (Second) of Torts (1965). Town & Country filed a reply.

2. Did Town and Country Owe the Plaintiffs a Duty of Due or Reasonable Care Beyond "Passing On" the Manufacturer's Warnings?

"The failure-to-warn claim is among the most common allegations in products liability litigation" (Bowbeer, Lumish, and Cohen, 2000, p. 439). Town & Country cited *Ford Motor Co. v. Rushford* (2007) for the proposition that a retail merchant has no duty to provide an *additional warning* of danger to a buyer, if the retailer passes on the warnings of the manufacturer concerning any dangers related to the product which have been deemed adequate. Monroe (2014) offers what might be considered as a practical reason for the rule:

"The question of whether a supplier [retailer], who has no control over product manufacturing, has a duty to warn, and at one level, raises some issues. From a policy perspective, imposing a duty to warn on a supplier [retailer] who does not manufacture the ultimate end product sold to consumers can cause many complications."

In *Rushford*, the plaintiff had claimed that the defendant dealership had a duty to direct her to the airbag warnings in the manufacturer's owner's manual which had been provided to her by the dealership. The plaintiff and her husband had purchased a car from a Ford dealer. A few weeks later, the plaintiff, who was a passenger in the vehicle, was injured by the air bag during a crash. The plaintiff brought an action in products liability against the dealer and the manufacturer, alleging that they failed to provide reasonable, adequate warnings regarding the air bags.

According to the plaintiff, the dealer should have given the plaintiff *additional warnings* beyond those provided by the manufacturer because it was aware of certain "special circumstances," such as the fact that she did not drive and that the defendant had seen her "short stature." The plaintiff argued that the failure to do so constituted remedial negligence on the part of the defendant. The *Rushford* court disagreed and found for the defendant. The court ruled that no additional warnings were required.

3. The Law Relating to Product Warnings

Citing *Lovick v. Wil-Rich* (1999), Bowbeer, Lumish, and Cohen (2000, pp. 444-445), note that "The duty to warn is predicated upon the superior knowledge of a product that the manufacturer or seller possesses, and arises when the manufacturer or seller may reasonably foresee danger of injury or damage to another less knowledgeable, unless they are warned of the danger." Mitchell (2001, p. 574) states that "Adequate warnings reduce the risk of harm posed by the product by allowing consumers to act more carefully in their use of the product."

Section 388 of the Restatement (Second) of Torts (1965), which had been adopted by courts in Indiana and most other jurisdictions, creates a duty on the supplier of a chattel to exercise reasonable care to inform anyone whom the supplier reasonably expects to use the chattel that "the chattel is or is likely to be dangerous for the use for which it is supplied." This duty arises where the supplier "has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition." Thus, the supplier, normally the manufacturer, is required to "to exercise reasonable care to inform [the user] of its dangerous condition or of the facts which make [the chattel] likely to be dangerous." Does Section 388 contemplate a *retailer* giving "additional warnings" beyond those supplied by the manufacturer based on any "special circumstances"? And if so, what might these "special circumstances" be?

Town & Country asserted that it had met its legal duty to the plaintiff in this case and argued that it did not have a legal duty to give any additional warnings to the plaintiff beyond those of the manufacturer. It pointed to the manufacturer's warnings contained on the stickers on the lift and the warnings contained in the owner's manual (see Roe, 2010), a copy of which was given to Cordova and/or Barcelata, and the verbal instructions and warnings that Perigo gave to Cordova at the time of the rental. That being the case, it could not be found negligent as a matter of law.

3.1. Summary Judgment

As a matter of law, in determining whether a party's motion for summary judgment should be granted, "The court must consider all designated evidence in the light most favorable to the party opposing the summary-judgment motion. If a trial could result in the jury (or judge in a bench trial) deciding in favor of the party opposing the motion, then summary judgment is inappropriate" (see Genetin, 2010).

Why did the trial court deny Town & Country's motion for summary judgment? In its ruling, the trial court cited the following: (1) that Perigo testified that at the time of the rental at the Town & Country building he only spoke to Barcelata; (2) there was a genuine question of fact as to how well Barcelata and Cordova would have understood the language contained in the stickers or owner's manual or Perigo's verbal instructions which were in English and not in Spanish; and while Cordova spoke and understood some degree of English, his primary language appears to have been Spanish; and Barcelata's understanding of English was less than that of Cordova's; and (3) in addition to the language issue, there was a question of fact whether the manufacturer had adequately warned Cordova that the danger arising from using the lift in close proximity to power lines resulted not only from direct contact with a power line but also could arise from the phenomena known as arcing. [Arcing is an electric current that is brief, strong and highly luminous. An arc is the luminous current discharge which is produced when strong current leaps across the gap between electrodes or within a circuit.]

In addition, the trial court determined that summary judgment was inappropriate because there were several issues of fact that had not been resolved through the parties' deposition testimony. For example, the trial court found that there was a genuine issue of fact as to whether Cordova had made direct contact with the power line or not. In addition, the trial court found that while there was an undisputed fact that Perigo went to the job site where the men intended to use the lift when the men were unable to get the lift to operate, there was a question of fact whether Perigo knew that the men intended to use the lift to power wash the building because while at the job site there was a discussion and suggestion that the men needed a more powerful power washer. If Perigo knew that the men intended to set up the lift between the building and the power lines in order to power wash the upper story of the building, then an issue arises whether Perigo complied with the Section 388 duty to "inform [the men] of the dangerous condition or of the facts which make [the Lift] likely to be dangerous."

The fact that several of these issues were in dispute was critical in precluding the trial court from granting Town & Country's Motion for Summary Judgment. Town & Country filed an appeal of the denial of its motion.

4. The Appellate Case

As a matter of law, "Whether a duty exists is a question of law for the court to decide" (*Rogers v. Martin*, 2016). "Although the adequacy of warnings, which implicates breach of duty, is generally a question of fact for the trier of fact to resolve, the nature of the duty to provide warnings is a question of law to be decided by the court" (*Rushford*, 2007, p. 810).

On appeal to the Indiana Court of Appeals, the court would consider the arguments relating to the question of duty raised in the defendant's motion for summary judgment. As stated in *Pacific Energy & Mining Company v. Fidelity Exploration and Production Company* (2018):

"An appellate court reviews a trial court's decision to grant a motion for summary judgment *de novo*. In its review, the appellate court takes the non-movant's competent evidence as true, indulges in every reasonable inference in favor of the non-movant, and resolves all doubts in favor of the non-movant. If a trial court grants summary judgment without specifying the grounds for granting the motion, the appellate court must uphold the trial court's judgment if any of the asserted grounds is meritorious" (*Pacific Energy*, 2018, Headnote 1).

The issue had been joined. According to Town & Country, the warnings issued by the lift's manufacturer were sufficient, and it was not required to provide additional warnings to Cordova. At the heart of its contention, Cordova argued that the warnings were inadequate under these circumstances because they were provided in English and that Cordova's English was limited. Cordova also asserted that Town & Country clearly had had a duty to him because Perigo allegedly was aware of where Cordova was using the aerial lift.

Interestingly, the Court of Appeals noted that although neither party had cited the *Indiana Product Liability Act* (2009) (Alberts, Petersen, & Thornburg, 2010), it was certainly relevant. The court analogized and noted that the Act "governs all actions that are: (1) brought by a user or consumer; (2) against a manufacturer or seller; and (3) for physical harm caused by a product; regardless of the substantive legal theory or theories upon which the action is brought." Under the Act, "[a] product is defective under this article if the seller fails to . . . properly package or label the product to give reasonable warnings of danger about the product . . . when the seller, by exercising reasonable diligence, could have made such warnings or instructions available to the user or consumer." Does the Act support either party's contention?

4.1. What Did the Court of Appeals Decide?

Since the Court of Appeals would be viewing the motion for summary judgment *de novo*, it would be required to carefully consider both the facts and the law. The Court of Appeals saw the case "as presenting the question of whether a duty existed... on the part of the defendant." The court stated that "the seller of a product that, to its knowledge, involves danger to users has a duty to give a warning of such danger at the time of sale and delivery" (see *Natural Gas Odorizing, Inc. v. Downs*, 1997). Citing *American Jurisprudence Products Liability* § 1188 (1997), the court noted that "[T]he manufacturer, seller or distributor of a product has a duty to warn those persons it should reasonably foresee would be likely to use its product or who are likely to come into contact with the danger inherent in the product's use." The court noted that the requirement is placed on the manufacturer—and not on the retailer in most cases. In resolving this question, the Court of Appeals specifically asked: Does the retail seller (retailer) owe an *independent or derivative duty* to give additional warnings to a user or consumer of dangers when such dangers already have been communicated by the product's manufacturer?

The manufacturer's duty to warn is discharged, however, where the retailer provides the buyer with the manufacturer's warning relating to the danger in question, the court stated, "absent special circumstances, if the manufacturer provides adequate warnings of the danger of its product and the seller passes this warning along to the buyer or consumer, then the seller has no obligation to provide additional warnings."

Thus, the court emphasized that where an adequate warning has been given by the manufacturer, a reasonable retailer may assume that the warning will be read, understood, and heeded. Thus, a product bearing an adequate warning, which is safe for intended use if the warning is followed by the user or consumer, "is not in defective condition, nor is it unreasonably dangerous" (quoting *Dias v. Daisy-Heddon*, 1979). In such a case, granting the motion for a summary judgment would be appropriate.

5. Adequacy of the Warnings: Should the Court Have Gone Further?

Assuming, *arguendo*, that the defendant retailer was under no legal duty to supply the plaintiff with any "additional warnings" provided that the manufacturer's warnings were adequate, should the focus now shift to the question of the *adequacy* of the warnings based on the unique characteristics of a plaintiff? This question brings into sharp focus a larger policy question that underlies an evaluation of both *Rushford* and *Cordova* that was not addressed by either court.

The court in *Rushford* concluded that the air bag warnings in the owner's manual were adequate; that the owner's manual was provided to the plaintiff; and that there was no claim of a modification of the air bags by the retailer which would require the issuance of any additional warning by the retailer. The *Rushford* court thus concluded that, "having provided Rushford with the manufacturer's warning, [the dealer] was under no duty to give Rushford additional warnings, including advising Rushford to read the manufacturer's warnings based on [the dealer's] knowledge of Rushford's peculiar characteristic." The *Rushford* court specifically held that "To conclude otherwise would place retail sellers . . . in the position of attempting to determine which particular manufacturer warnings may be of unique importance to an individual consumer and then direct the consumer's attention to those warnings." The court concluded that requiring sellers to give additional warnings would be "an untenable position and an unnecessary burden." As a result, the *Rushford* court had reversed the denial of the defendant's motion for summary judgment and held for the defendant.

In *Cordova*, Defendant Town & Country argued that, based on *Rushford*, it had no obligation to give Cordova any particular or individualized warnings in addition to the warnings provided by the manufacturer. Town & Country contended that Cordova's limited grasp of the English language is a "unique characteristic" that was analogous to the plaintiff's short stature in *Rushford*, which did *not* require additional warnings. Cordova, however, argued that Town & Country's position would unfairly favor English speakers and would, in effect, penalize non-English speakers. Non-English speakers would not be "entitled to receive critical safety information and/or warnings in a form that they can understand." In effect, Cordova argued that the existence of "special circumstances" should *mandate* additional warnings.

Is it possible to reconcile these views? Two sources should be considered. First, it is important to consider the applicability of Section 388 of the Restatement (Second) of Torts (1965), most especially subsections (b) and (c) which provides:

"One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier:

- (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
- (b) has *no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and*
- (c) *fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous."*

Secondly, it is necessary to review the *standard for judging the adequacy of any warnings given* (Hunter, Shannon, Amoroso, 2018, p. 19). The seminal case is *Spruill v. Boyle-Midway* (1962). In *Spruill*, the United States Court of Appeals for the Fourth Circuit stated emphatically that "*an insufficient warning is in legal effect no warning,*" and laid down the three requirements for judging the adequacy of product warnings:

- (1) the warning must be displayed to reasonably "catch the attention" of person expected to use the product, and would involve issues such as the size, position, and color of any warning;
- (2) the warning must "fairly apprise" users of the nature and extent of danger, and should not minimize the danger by the use of such words as "may." As noted by Latin (1994), "when manufacturers choose to minimize product risks by using warnings rather than safer product designs, consumers must protect themselves against hazards that might feasibly have been eliminated"; and
- (3) the warning must provide instruction on how to safely use the product.

Twenty years later, Sales (1982, pp. 558-567) expanded upon the *Spruill* criteria and identified seven factors, which govern the adequacy of a warning:

"First, a warning must be conspicuous. It must be printed in such a manner as to assure that a user's attention will be attracted to its message. Second, it should use symbols when appropriate. For example, a skull and crossbones device may be necessary in addition to written warnings if the product can cause death. Third, it must sufficiently communicate the risk of danger associated with the product. In that regard, the warning must be qualitatively sufficient to impart the particular risk of harm. Fourth, the warning must be located where the user is likely to encounter it. In some cases, placement of the warning in an owner's manual or package insert will be sufficient; in others, placement on the product itself may be required. In the latter case, the warning must be placed where it will catch the user's eye. Fifth, the warning must be clear and unambiguous. Its content must not be vague or otherwise minimize the likelihood of the very harm it is seeking to put the user on guard of. Sixth, the warning must be sufficiently broad and encompassing and not unduly limited in scope. If the product can reasonably be put to a number of uses, the warning should address each. Seventh, the warning must be undiluted. That is, the manufacturer cannot engage in marketing or promotional activities, which tend to negate the very dangers the warning speaks of."

Drahos et al. (2014) further commented on the issue of adequacy: "To be adequate, a warning must be communicated by means of positioning, lettering, coloring and language that will convey to the typical user of average intelligence the information necessary to permit the user to avoid the risk and to use the product safely" (citing *Stanley Industries, Inc. v. W. M. Barr & Co.*, 1992). Ultimately, a warning must "(1) be designed so it can reasonably be expected to catch the attention of the consumer; (2) be comprehensible and give a fair indication of the specific risks involved with the product; and (3) be of an intensity justified by the magnitude of the risk" (citing *Pavlidis v. Galveston Yacht Basin, Inc.*, 1984).

Addressing the issue of the adequacy of the warnings in *Cordova*, the Indiana Court of Appeals returned to Section 338 and stated: "Section 388 imposes liability on a supplier of a chattel for physical harm caused by the supplier's failure to exercise reasonable care to provide to any expected user of the chattel any information as to the character and condition of the chattel ... which [the supplier] should recognize as necessary to enable [the user] to realize the danger of using it."

In applying this standard, but limiting it only to the form of the warnings, the Indiana court concluded that "warnings were given by the manufacturer and were clearly visible on the aerial lift. *Cordova* cites no authority that Indiana law imposes a duty to provide bilingual warnings on a product or that the "reasonable warning" requirement includes an obligation to provide bilingual warnings." The court, however, went further and stated that issues relating to *marketing* might prove to be especially critical. "Other courts considering this issue have analyzed whether the product was specifically marketed to non-English speakers, and there is no evidence of such here" (See *Farias v. Mr. Heater, Inc.*, 2012). In *Farias*, the Eleventh Circuit Court of Appeals held that the warnings on a heater were adequate even though they were not provided in Spanish where the product had not been specifically marketed to Spanish-speaking customers. Should this be the determining factor as a matter of law?

The *Cordova* court concluded that the *Rushford* analysis was "more applicable and persuasive here." In *Rushford*, the court had determined that the seller had no obligation to provide additional warnings regarding the airbags even though it was aware of the plaintiff's short stature. Similarly, Town & Country had no obligation to provide *Cordova* with additional warnings regardless of *Cordova*'s limited English skills.

6. The Marketing and Demographic Aspects Relating to the Adequacy of Warnings

As reported by Find Law (2008), "In the United States, the common law provides little guidance on the question of when foreign languages or illustrated safety communications are appropriate or required. In fact, there have been very few cases discussing the necessity to communicate to product users in the United States who do not read English or are illiterate."

The 2011 *American Community Survey* (U.S. Census Bureau, 2011) estimated that there were nearly 330 million people in the United States. Nearly 61 million, over the age of five, spoke a language other than English at home, and over 25 million Americans spoke English "less than very well." Of the 37.6 million respondents who spoke Spanish, the Census Bureau estimated that 56.3% spoke English "very well," 16.9% "not well," and 9% "not at all." Over the past thirty years, the U.S. saw an 147% increase in the number of people that spoke a language other than English at home. It was projected at that time that by 2020, as many as 71.8 million people would speak a language other than English at home.

Obviously, the millions of Americans who are not fluent in English purchase and use products just like the majority of English-speakers. Undeniably, most of these products contain warnings and instructions written only in English. However, at the same time, savvy marketers have taken account of their non-English speaking customers by advertising in their native languages and using clever, eye-catching graphics to secure their market positions and sales. As the size of the non-English speaking market increases, manufacturers must recognize that it is clearly foreseeable that their products will be used by consumers who may not be able to read their "English-only" warnings, labels, and instructions—even if these products had not been specifically marketed to these buyers? Yet, as was noted, there is very little definitive legal guidance for the appropriate incorporation of pictorial or foreign-language materials in product warnings in light of the reality of the consumer-mix or in cases such as this where there is no evidence that the defendant advertised the product to the plaintiff in Spanish.

But, this begs the question: Should there be?

7. One Possible Solution: Retailer Know Thy Customer!

As an update to prior demographic information, Zeigler and Camarota (2018) reported that Census Bureau data for 2017 released in September 2018 shows that nearly half (48.2 percent) of residents in America's five largest cities (New York, Houston, Los Angeles, Chicago and Phoenix) speak a language other than English at home. In total, almost 67 million of U.S. residents speak a foreign language at home, almost doubling the number from 1990 (Ziegler & Camarota 2018). As the American population continues to expand and diversify on ethnic, language, and demographic grounds, businesses would have to contend with providing adequate communications relating to risks and potential dangers inherent in the proper use of products and machinery to those who do not speak or read English. Dallavalle, Hunter and Lozada (2014) asserted that because manufacturers are responsible for creating warning labels and instructions for their products, they *must* consider the unique characteristics of their customers to communicate the appropriate way to use their product to ensure customer safety. From a marketing standpoint, however, retailers usually represent the frontline in addressing customers and their concerns head-on.

Therefore, we argue that no one is in a better position than retailers to know the customers with whom they are dealing. Face-to-face retail sales provide the retailer with factual, objective information about the language skills of purchasers if the parties engage in even limited conversation. In such a case, despite some disagreement about the level of comprehension or the level of language proficiency of a particular plaintiff, it might be safely assumed that the seller knows or at least should have an idea about breakdowns or gaps in communication. Under these circumstances, the retailer should restate any warnings, and/or offer additional warning relating to safety of its product to his or her customers. Such a warning could be administered verbally in the language of the buyer, accompanied by a statement to that effect in the language of the buyer that a verbal warning had been given, or through a written translation of the manufacturer's warning in English, or by some combination of the two, or by other means.

The selection of additional languages for product warnings or safety signs is an extremely complex issue. Experts suggest that nearly 150 languages are spoken in the United States and millions of Americans speak a language other than English in their homes. If it is determined that additional languages are efficacious for verbal or written warnings, or if the warnings are to be issued through the use of symbols or pictorial representations based on the "special circumstances" or "unique characteristics" of purchasers, these warnings should be at least highly encouraged or perhaps legally mandated in order to better communicate the nature of any danger across language barriers. The details of such a requirement can be left to legislatures.

7.1. A Non-Legal Solution: Technology

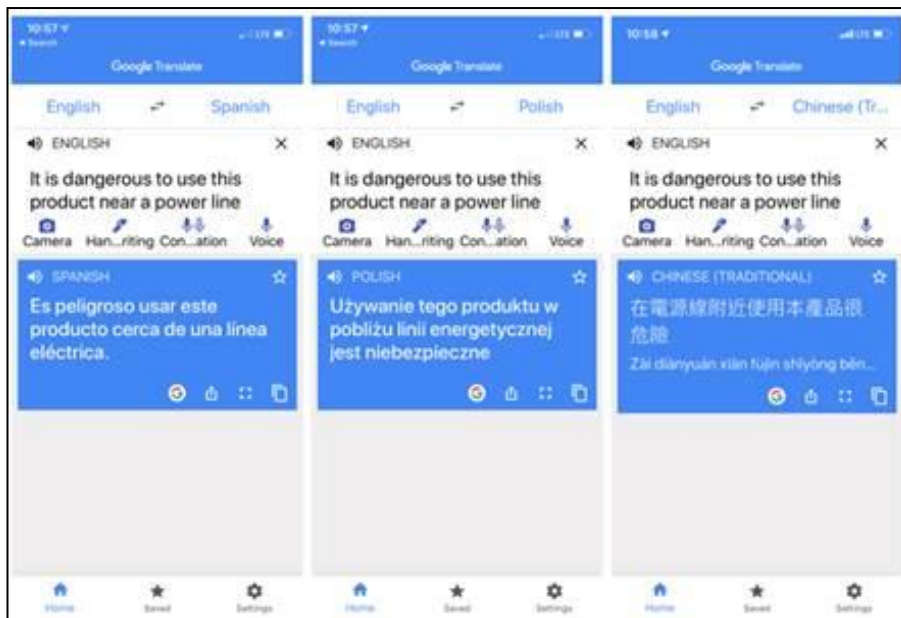
Rather than waiting for legislative intervention or mandates, retailers may be able to provide their customers verbal warnings that may clearly identify dangers associated with the use of what they rent or sell. For example, it took one of the authors less than *1 minute* to arrive at a suitable translation of the phrase "It is dangerous for you to use this product near an electric power line" in Spanish, Russian, and Mandarin Chinese using an iPhone X, just by using the verbal command "Hey Siri, translate into [specific language]" (see the Figure 1 below). Each translation has a verbal cue attached to the translation (note the "play" arrow). Please note that Samsung Galaxy phones also have a voice assistant (Bixby) that can translate to and from several languages.

There are in fact several translation apps. For example, iTranslate is available in iOS and Android versions, and contains 100 languages, including three versions of Spanish (Mexico, Spain, USA) and three versions of Chinese (Cantonese, Mandarin, and Taiwanese). Google Translate comes as an app for iOS or Android phones, or online at translate.google.com. See figure 2 for examples of iTranslate and Google Translate. Please note that all of these tools can be used by dictating or by typing the message and provide a verbal translation (notice the sound icon in all the examples).

Figure 1: Smartphone Translations



Figure 2: Google Translate



From our perspective, using the *available technology* would be a proactive one towards properly (“adequately”) informing those who do not have a working knowledge of English about the risks or dangers of using some products or machinery. This would comply with the retailer’s duty to inform and may relieve them from any liability based on miscommunications or misunderstandings. Focusing on the marketing aspects of these situations, while manufacturers may be required to offer product warnings clearly and visibly and in languages other than English in cases where they have marketed their products to non-English speakers, retailers may want to protect themselves against potential liability based on failure to communicate risks and dangers, especially in situations when they are renting equipment or machinery to those who may not possess the necessary English-language skills to understand them. The “special circumstances” criteria now become a requirement to act and not a limiting factor.

8. Back to *Cordova*: Would a Translation into Spanish Have Prevented their Injury?

In the end, the *Cordova* case may not have been the perfect vehicle in which to raise this issue. Setting aside the court's conclusion relating to the obligation of Town & Country to provide warnings in addition to those provided by the manufacturer, it is important to note that the inadequacy or adequacy of the warnings might *not* have been the deciding factor for the court because both *Cordova* and *Barcelata* admitted during their depositions that they *were aware* of the dangers caused by the proximity of the power lines.

In fact, the Indiana Court of Appeals found that the danger of using the aerial lift near power lines was well documented through the warnings, illustrations, and owner's manual, despite any confusion about the language skills of the plaintiff and that *Cordova* was well aware of the obvious dangers posed by the power lines. Adopting the language of Section 338, the court concluded Town & Country had "no duty to warn of an obvious hazardous condition" which a "mere casual looking over" would disclose. Given the adequacy of the manufacturer-provided warnings, Town & Country had reason to believe that *Cordova* would heed the multiple written and illustrated warnings and realize the danger of operating the aerial lift near power lines. The warnings were placed on the aerial lift and in the operating manual by the manufacturer, and Town & Country passed on these warnings to *Cordova* who was aware of the danger presented.

The Indiana Court of Appeals concluded that having considered "the written warnings and illustrations and our Supreme Court's opinions... we conclude that there is no genuine issue of material fact regarding whether the manufacturer-provided warnings and illustrations supplied adequate warnings of danger about the risks of electrocution when using the aerial lift. Town & Country had no duty to provide additional warnings to *Cordova*. Accordingly, Town & Country was entitled to judgment as a matter of law." The trial court had erred by denying Town & Country's motion for summary judgment."

Should this be the end of the discussion? Despite the factual circumstances developed in *Cordova*, we believe that the legal system should move to require some additional obligation on a retailer who actually comes face-to-face with a buyer who exhibits "special characteristics" or presents "special circumstances" as a matter of sound public policy—and good sales and marketing practices. In this way, the marketing profession can lead the legal system to a proper conclusion.

References

- Alberts, J.R., Petersen, J., & Thornburg, R.B. (2010). Survey of recent developments in Indiana product liability law. *Indiana Law Review*, 43: 873-917.
- American Jurisprudence. (1997). Products liability. 2nd ed.
- Basten, J. (2018). Personal injury – contributory negligence. *Judicial Review: Selected Conference Papers: Journal of the Judicial Commission of New South Wales*, 13(4), March 2018: 417-430.
- Bowbeer, H., Lumish, W.F., & Cohen, J.A. (2000). Warning! Failure to read this article may be hazardous to your failure to warn defense. *William Mitchell Law Review*, 27(1): Article 3, at <https://open.mitchellhamline.edu/wmlr/vol27/iss1/3/>
- Brunet, E. (2012). The efficiency of summary judgment. *Loyola University Chicago Law Review*, 43: 689-701.
- Dallavalle, K., Hunter, R.J., Jr., & Lozada, H. (2014). Should a legal analysis of the adequacy of warning labels consider issues relating to use of products by non-English speakers? *Atlantic Law Journal*, 16: 70- 94.
- Drahos, M., Greene, M., James, J., & Smith, L. (2004). Danger ahead: The changing face of failure to warn claims. *Trial Advocate Quarterly*, Winter, at <https://www.bankerlopez.com/pdf/articles/Danger-Ahead-The-Changing-Face-of-Failure-to-Warn-Claims.pdf>
- Find Law Attorney. (2008). The duty to warn illiterate and non-English read product users. Find Law, at <https://corporate.findlaw.com/litigation-disputes/the-duty-to-warn-illiterate-and-non-english-reading-product-users.html>
- Genetin, B.B. (2010). Summary judgment and the influence of federal rulemaking. *Akron Law Review*, 43: 1107-1138.
- Hunter, R.J., Jr., Shannon, J., & Amoroso, H. (2018). Products liability. Create Space (online).

- Indiana Products Liability Act. (2009).
- Klein, A.R. (2006). Comparative fault and fraud. *Arizona Law Review*, 48: 983-1000.
- Latin, H. (1994). "Good" warnings, bad products, and cognitive limitations, *UCLA Law Review*, 31: 1193-1295.
- Mitchell, S.M. (2001). A manufacturer's duty to warn in a modern day tower of Babel. *Georgia Journal of International and Comparative Law*, 29: 573-595.
- Monroe, M.W. (2014). Is there a duty to warn even the most sophisticated user? American Bar Association (Section of Litigation Products Liability), July 23, at <http://apps.americanbar.org/litigation/committees/products/articles/summer2014-0714-is-there-duty-warn-even-most-sophisticated-user.html>
- Owen, D.G. (2007). The five elements of negligence. *Hofstra Law Review*, 15: 1671-1686.
- Roe, R. (2010). Design standards for safety warning messages in manuals: Increasing design saliency and adapting for a broader range of professional communication settings, Iowa State University, Graduate Theses and Dissertations, at <https://lib.dr.iastate.edu/etd/11342/>
- Sales, J.B. (1982). The duty to warn and instruct for safe use in strict products liability. *St. Mary's Law Review*, 13: 521 ff.
- Sobelsohn, D.C. (1985). Comparing Fault. *Indiana Law Journal*, 60: 413-462.
- U.S. Census Bureau. (2011). Language use in the United States: 2001. American Community Reports, at <https://www.census.gov/prod/2013pubs/acs-22.pdf>.
- Wickert, G. (2013). Understanding comparative fault, contributory negligence and joint & several liability. *Claims Journal*, December 5, at <https://www.claimsjournal.com/news/national/2013/09/05/235755.htm>
- Zeigler, K. & Camarota, S.A. (2018). Almost half speak a foreign language in America's largest cities, Center for Immigration Studies, September 19, at <https://cis.org/Report/Almost-Half-Speak-Foreign-Language-Americas-Largest-Cities>

CASES

- Crawfordsville Town & Country Home Center, v. Cordova (2019). 2019 Ind. App. LEXIS 29 (Court of Appeals, Indiana).
- Dias v. Daisy-Hedon (1979). 390 N.E.2d 222 (Court of Appeals, Indiana).
- Farias v. Mr. Heater, Inc. (2012). 684 F.3d 1231 (U.S. Eleventh Circuit Court of Appeals).
- Ford Motor Company v. Rushford (2007). 868 N.E.2d 806 (Supreme Court, Indiana).
- Lovick v. Will-Rich (1999). 588 N.W.2d 688 (Supreme Court, Iowa)
- Natural Gas Odorizing, Inc. v. Downs (1997). 685 N.E.2d 155 (Court of Appeals, Indiana).
- Pacific Energy and Mining Company v. Fidelity Exploration and Production Company (2018). 2018 Tex. App. LEXIS 5586 (Court of Appeals, Texas).
- Pavlidis v. Galveston Yacht Basin, Inc. (1984) 727 F.2d 330 (U.S. Fifth Circuit Court of Appeals).
- Rogers v. Martin (2016). 48 N.E. 3d 318 (Court of Appeals, Indiana).
- Spruill v. Boyle-Midway (1962). 308 F.2d 79 (U.S. Fourth Circuit Court of Appeals).
- Stanley industries, Inc. v. W.M. Barr & Co. (1992). 784 F. Supp. 1570 (Southern District, Florida).