

Nova Law Review

Volume 11, Issue 4

1987

Article 14

A Spirited Call to Require Alcohol Manufacturers to Warn of the Dangerous Propensities of their Products

Donna D'Amico*

*

Copyright ©1987 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <https://nsuworks.nova.edu/nlr>

A Spirited Call to Require Alcohol Manufacturers to Warn of the Dangerous Propensities of their Products

Donna D'Amico

Abstract

Alcoholism affects approximately twenty-two million Americans.

KEYWORDS: alcohol, products, dangerous

D'Amico: A Spirited Call to Require Alcohol Manufacturers to Warn of the
A Spirited Call to Require Alcohol Manufacturers to Warn of the
Warn of the Dangerous Propensities of their Products

I. Introduction

Alcoholism affects approximately twenty-two million Americans.¹ Cancers of the mouth, tongue, pharynx, and esophagus, as well as diseases of the liver and kidney, are more common in alcoholics than in non-alcoholics.² A direct relationship exists between alcohol consumption and birth defects.³ Fetal Alcohol Syndrome (FAS)⁴ is "one of the most serious sets of birth defects"⁵ in the United States and is the only birth defect that is "potentially preventable."⁶

Notwithstanding these medical findings, many are unaware of the hazards associated with alcohol.⁷ Although the public "generally knows that alcohol abuse can cause serious health problems for the abuser," the public is not "sufficiently aware of all the specific short and long term effects of alcohol" on a person's health and well being.⁸ Despite

1. D. WHOLEY, *THE COURAGE TO CHANGE* 14 (1986).

2. *Medical Consequences of Alcohol, Summary of the Fifth Special Report to the U.S. Congress on Alcohol and Health*, ALCOHOL HEALTH AND RES. WORLD, Fall 1984, at 19 [hereinafter *Summary*].

3. Harwood & Napolitano, *Economic Implications of the Fetal Alcohol Syndrome*, ALCOHOL HEALTH AND RES. WORLD, Fall 1985, at 38.

4. Fetal Alcohol Syndrome (FAS) is a birth defect resulting from fetal exposure to alcohol. At least one feature from each of the following three categories must be present before a child is diagnosed as having FAS:

(1) Growth retardation before and/or after birth;

(2) A pattern of abnormal features of the face and head, including small head circumference, small eyes, or evidence of retarded formation of the midfacial area, including a flattened bridge and short length of the nose, and flattening of the vertical groove between the nose and mouth, i.e., the philtrum;

(3) Evidence of central nervous system abnormality, including, for example, abnormal neonatal behavior, mental retardation, or other evidence of abnormal neurobehavioral development.

Summary, supra note 2, at 27.

5. *Id.*

6. Goeringer & Morosco, *Preventing Fetal Alcohol Syndrome*, ALCOHOL HEALTH AND RES. WORLD, Fall 1983, at 31.

7. The Washington Post, July 2, 1986, at A23, col. 3.

8. NATIONAL COUNCIL ON ALCOHOLISM, *A CASE FOR HEALTH WARNING LA-*

the lack of public knowledge surrounding alcohol, alcohol manufacturers do not have a legal duty to warn of the dangerous propensities of its product.

Although manufacturers of machines,⁹ prescription drugs,¹⁰ chemicals,¹¹ and over-the-counter drugs¹² are liable for injuries caused by the dangers associated with their products, alcohol manufacturers have remained immune from civil liability. This immunity is especially distressing in light of the fact that the alcohol industry spends approximately one billion dollars a year advertising its products.¹³ While the alcohol industry is instilling into the American public the notion that drinking alcohol can lead to fun and relaxation, alcohol costs the nation approximately \$50 billion in lost employment, \$17 billion in health care, and \$7 billion in property loss and crime.¹⁴

In light of these devastating figures, holding alcohol manufacturers liable for injuries and deaths caused by their products is both desirable and logical. The imposition of civil liability on alcohol manufacturers would force the industry to join the nationwide effort to alert people to the dangers of alcohol.

This Note will argue for the imposition of civil liability upon alcohol manufacturers for their failure to warn of the dangerous propensities of their product, and will discuss the cases which have granted alcohol manufacturers civil immunity. Further discussion will center on the troubling aspects of these cases and will point out the problems facing plaintiffs in alcohol cases. The Note will conclude with a summary of efforts taken by the United States Congress and other groups to require the alcohol industry to take responsibility for the abuse of its product.

BELS ON ALCOHOLIC BEVERAGES (available from the Washington Office of the National Council on Alcoholism) [hereinafter NATIONAL COUNCIL].

9. *Dorsey v. Yoder Co.*, 331 F. Supp. 753 (E.D. Pa. 1971), *aff'd*, 474 F.2d 1339 (3d Cir. 1973).

10. *Crocker v. Winthrop Labs.*, 514 S.W.2d 429 (Tex. 1974).

11. *Tampa Drug Co. v. Wait*, 103 So. 2d 603 (Fla. 1958).

12. *Torsiello v. Whitehall Laboratories*, 165 N.J. Super. 311, 398 A.2d 132 (Super. Ct. App. Div. 1978).

13. Halliday, *Broadcasters Braced for Fight Over Alcohol Ban*, TELEVISION/RADIO AGE, Feb. 4, 1985, at 27.

14. *Summary*, *supra* note 2, at 37.

II. Cases Granting Civil Immunity to Alcohol Manufacturers

The 1982 United States court of appeals case of *Garrison v. Heublein, Inc.*¹⁵ was the first case to hold that an alcohol manufacturer does not have a duty to warn of the dangerous propensities of its products.¹⁶ The plaintiffs sued the manufacturer and distributor of Smirnoff vodka, alleging that the plaintiff "suffered physical and mental injuries as a result of consuming the defendant's product over a twenty-year period."¹⁷

Illinois, whose law was used in *Garrison*, has adopted the doctrine of strict products liability.¹⁸ This doctrine imposes liability on "[o]ne who sells any product in a defective condition unreasonably dangerous to the user"¹⁹ Finding that an alcohol manufacturer does not have to warn of the dangerous propensities of its product, the *Garrison* court relied on comments h, j, and i of the *Restatement (Second) of Torts*. Comment h states:

[w]here . . . [a seller] has reason to anticipate that danger may result from a particular use, as where a drug is sold which is safe only in limited doses, [the seller] may be required to give adequate

15. 673 F.2d 189 (7th Cir. 1982).

16. *Id.* at 192.

17. *Id.* at 189. The United States District Court for the Northern District of Illinois dismissed the plaintiff's complaint for failure to state a claim upon which relief could be granted. *Id.* at 190. The court of appeals affirmed the district court's decision. *Id.*

18. *Id.* at 190.

19. RESTATEMENT (SECOND) OF TORTS § 402A (1965). This section of the *Restatement* reads as follows:

§402A. Special Liability of Seller of Product for Physical Harm to User or Consumer.

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

warning of the danger . . . and a product sold without such warning is in a defective condition.²⁰

Comment j, which deals with warnings and directions for use, qualifies comment h, however:

[A] seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excess quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized. *Again the dangers of alcoholic beverages are an example . . .*²¹

Comment i, which describes the requirement of unreasonably dangerous products, also makes reference to alcoholic beverages:

The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. *Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics*, but bad whiskey containing a dangerous amount of fusel oil, is unreasonably dangerous.²²

After considering comments i and j, the *Garrison* court found that "even though there are dangers involved in the use of alcoholic beverages, because of the common knowledge of those dangers, the product cannot be regarded as unreasonably unsafe."²³ Consequently, because alcohol was not unreasonably unsafe, there was no duty to warn of the product's dangerous propensities.²⁴

In the Tennessee case of *Pemberton v. American Distilled Spirits*,²⁵ a father brought a products liability action against a grain alcohol manufacturer, seeking to recover damages for the death of his minor son who died from the ingestion of alcohol.²⁶ The father alleged that the alcohol consumed by his son "contained a content of pure grain

20. *Id.* comment h.

21. *Id.* comment j (emphasis added).

22. *Id.* comment i (emphasis added).

23. *Garrison*, 673 F.2d at 192.

24. *Id.*

25. 664 S.W.2d 690 (Tenn. 1984).

26. *Id.* at 691.

alcohol far in excess of that which can be safely consumed by a human being."²⁷ The plaintiff proceeded on the theory that "the grain alcohol was in a 'defective condition' and was 'unreasonably dangerous' because of its high alcoholic content and because of the failure of the defendants to warn consumers of dangers inherent in its consumption."²⁸

As in *Garrison*, the *Pemberton* court relied on comment j of the *Restatement*, saying that the law does not impose a duty to warn of widely known risks.²⁹ The *Pemberton* court took judicial notice of the dangers associated with the use of alcoholic beverages.³⁰ As in *Garrison*, however, the court did not cite specific evidence to support its finding that the dangers of alcohol are common knowledge. Instead, the court stated only that "[c]ourts, legislatures, parents, ministers and temperance organizations and others have long recognized and decried the dangers inherent in alcohol."³¹ In addition, the court noted that "[t]he pathological effect of using intoxicants is well known"³²

The Court of Appeals of Ohio in *Desatnik v. Lem Motlow Properties, Inc.*³³ reached results similar to those reached in *Garrison* and *Pemberton*. In *Desatnik* the decedent died of acute alcohol poisoning after consuming approximately eight beers and over a fifth of the manufacturer defendant's whiskey.³⁴ The county coroner identified the decedent's blood alcohol level as 0.37%.³⁵ The plaintiff set forth three theories of recovery: (1) negligence, (2) implied warranty, and (3) strict

27. *Id.* at 692.

28. *Id.* The trial court granted the defendant's motion to dismiss. *Id.* at 691. A divided court of appeals reversed and held that the plaintiff's allegations could support a cause of action based on strict liability, negligence, and warranty against the manufacturer. *Id.* The Supreme Court of Tennessee reversed the court of appeals and found that because the danger of using grain alcohol was apparent to an ordinary user there was no duty to warn of any danger or hazard associated with its use. *Id.* at 693.

29. *Id.* at 692.

30. *Id.* at 693.

31. *Id.* It is interesting to note that those cited by the court as having long recognized the dangers inherent in alcohol are not "ordinary consumers."

32. *Id.* (quoting *Sworski v. Coleman*, 208 Minn. 43, 293 N.W. 297, 299 (1940)). The court then acknowledged that "Webster's *Third International Dictionary* defines 'toxic' - 'toxic substance: something poisonous.'" *Id.* at 693.

33. *Desatnik v. Lem Motlow Prop. Inc.*, No. 84 C.A. 104 (Ohio Ct. App. Jan. 9, 1986) (LEXIS, States library, Ohio file).

34. *Id.*

35. *Id.* In Ohio, a person with a blood alcohol level of .10% is presumed to be under the influence of alcohol. OHIO REV. CODE ANN. § 4411.19 (Anderson 1985).

liability.³⁶ As in *Garrison* and *Pemberton*, the *Desatnik* court, in finding that an alcohol manufacturer has no duty to warn of the dangerous propensities of its product, relied upon comments i and j of the *Restatement*.³⁷ Rejecting the plaintiff's assertions that the comments do not "specifically refer to the danger of death by a single overdose of alcohol," the court accorded great deference to the fact that comment j specifically mentions whiskey as an example of the type of product that is not unreasonably dangerous "when consumed over a long period of time or in excessive quantity."³⁸

Although based on theories similar to those of *Garrison*, *Pemberton*, and *Desatnik*, the Tennessee case of *Russell v. Bishop*³⁹ was a case of first impression in the United States. In *Russell* the plaintiffs' seventeen-year-old daughter died when the defendant, after consuming a bottle of whiskey, drove his car through an intersection and collided with the automobile in which their daughter was riding.⁴⁰ The plaintiffs brought actions against the driver, the package store which sold the alcohol, and the manufacturer which produced it.⁴¹

The plaintiffs' complaint alleged that the defendant manufacturer placed "an unreasonably dangerous product in the stream of commerce which was one of the direct and proximate" causes of their daughter's death.⁴² The plaintiffs argued both negligence and strict liability in tort.⁴³

In response to the defendant's motion for summary judgment, the plaintiffs submitted the affidavit of the Director of the Traffic Safety Coordinating Committee for Shelby County, Tennessee. The affidavit specifically addressed the issue of whether the "ordinary consumer with

36. *Desatnik v. Lem Motlow Prop. Inc.*, No. 84 C.A. 104 (Ohio Ct. App. Jan. 9, 1986) (LEXIS, States library, Ohio file). The trial court granted the defendant's motion for summary judgment and found as a matter of law that the dangers of alcoholic beverages are common knowledge and that there is no duty to warn of such obvious dangers. *Id.* The court of appeals affirmed the trial court's decision and found that the manufacturer did not have a duty under any theory of liability to warn of the dangers of accidental death from overconsumption of its product. *Id.*

37. *Id.*

38. *Id.*

39. *Russell v. Bishop*, No. 88 (Tenn. Ct. App. Jan. 7, 1986) (LEXIS, States library, Tenn. file).

40. *Id.*

41. *Id.*

42. Brief for Plaintiff-Appellants at 8, *Russell v. Bishop*, No. 88 (Tenn. Ct. App. Jan. 7, 1986) (LEXIS, States library, Tenn. file).

43. *Id.*

the ordinary knowledge common to the community is [able] to gauge, judge and determine" the amount of alcohol which can safely be consumed before the blood alcohol reaches a level of intoxication which affects his mental and physical capacities.⁴⁴ The affidavit stated in part that "the normal drinker or user, without some type of training or instruction has no conception of the correlation between the amount of alcoholic beverage consumed and the time period of consumption to blood alcohol level."⁴⁵ Moreover, the expert found it both desirable and necessary to place a warning guideline for use on the label of all alcoholic beverages sold.⁴⁶ Notwithstanding the affidavit, the court found *Pemberton* controlling and held that "under the common law of this State as enunciated to date, no cause of action arises against a distiller, and if a change is to be made in regard thereto it should not be by this Court, but [by] the highest judicial authority in the State."⁴⁷

As in *Russell*, the Iowa Supreme Court in *Maguire v. Pabst Brewing Co.*⁴⁸ addressed the issue of whether an alcohol manufacturer must supply consumers with a warning indicating the effects of "varying quantities" of alcohol.⁴⁹ In *Maguire*, the plaintiffs sued the manufacturer of Pabst beer, alleging that

the product distributed and placed in the stream of commerce by the Defendant Pabst Brewing Company carried no warning as to its dangerous effects by reason of overconsumption thereof; and that the lack of warning as to its excessive use made the product unreasonably dangerous thereby making the product sold by the defendant defective.⁵⁰

The plaintiffs in *Maguire* sought to hold the alcohol manufacturer liable for injuries sustained when a motorist struck the vehicle in which James Maguire was riding.⁵¹ The plaintiffs alleged that the motorist became intoxicated after consuming an "excessive amount of beer brewed and distributed" by Pabst.⁵² Once again, comments j and i de-

44. *Id.* at 28.

45. *Id.* at 30, 31.

46. *Id.* at 32.

47. *Russell v. Bishop*, No. 88 (Tenn. Ct. App. Jan. 7, 1986) (LEXIS, States library, Tenn. file).

48. 387 N.W.2d 565 (Iowa 1986).

49. *Id.* at 569.

50. *Id.*

51. *Id.* at 566.

52. *Id.*

terminated the outcome of the case.⁵³ The risks of intoxication when consuming draft beer were "sufficiently known to consumers at large."⁵⁴ Consequently, the plaintiffs' complaint was held not to have stated a cause of action under Iowa law.⁵⁵

III. Troubling Aspects of the Alcohol Cases

The alcohol cases are troubling in two respects. First, each case was dismissed before the plaintiffs could present their cases to the jury. In each case the court determined as a matter of law that alcohol is not an unreasonably dangerous product and that it is not dangerous "to an extent beyond that which would be contemplated by the ordinary consumer."⁵⁶ Because alcohol was not considered an unreasonably dangerous product and because the dangers of alcohol were considered to be obvious as a matter of law, each case held that alcohol manufacturers do not have to warn of the dangers associated with their product.

Case law has established that the issue of whether a product is unreasonably dangerous in light of consumer expectations is one which should be presented to the jury. In *Torsiello v. Whitehall Laboratories*,⁵⁷ a New Jersey case, an arthritis patient who suffered gastrointestinal hemorrhaging after using an over-the-counter drug containing aspirin brought suit against the drug manufacturer.⁵⁸ The plaintiff alleged that the manufacturer did not give adequate warning of the dangers associated with use of its product.⁵⁹ The plaintiff took eight Anacin tablets a day for fourteen months to relieve his arthritis pain.⁶⁰

The defendant's product contained the following warning:

CAUTION—If pain persists for more than 10 days or redness is present, or in arthritic or rheumatic conditions affecting children under 12 years of age consult a physician immediately.⁶¹

The trial judge granted the defendant's motion for involuntary dismissal.

53. *Id.* at 569-70.

54. *Id.*

55. *Id.* at 570.

56. RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965).

57. 165 N.J. Super. 311, 398 A.2d 132 (Super. Ct. App. Div. 1979).

58. *Id.* at 315, 398 A.2d at 134.

59. *Id.*

60. *Id.*

61. *Id.*

sal and found as a matter of law that "the dangers of prolonged use of aspirin products are commonly known to the consuming public."⁶²

The defendant argued that as a matter of law the warning contained on its product was adequate to warn consumers.⁶³ In response to the defendant's argument, the appellate court noted that "[a]dequacy . . . must be gauged in terms of probable efficacy in sparing the consumer the hazard of a risk not reasonably appreciated by him in his use of the product."⁶⁴ It was "clearly for the jury to determine whether in fact [the danger from prolonged aspirin use] is, in *Restatement* verbiage, as 'generally known and understood' among lay consumers as it apparently is in medical and pharmaceutical circles."⁶⁵

Contrary to the decisions in the alcohol cases, scientific evidence and studies support the proposition that alcohol is dangerous "to an extent beyond that which would be contemplated by the ordinary consumer."⁶⁶ In a report issued to the President and Congress, *Health Hazards Associated with Alcohol and Methods to Inform the General Public of these Hazards*, the Departments of Treasury and Health and Human Services found that "Americans are less knowledgeable about the adverse effects of alcohol on health (with the exception of cirrhosis of the liver) than they are about the harmful effects of smoking."⁶⁷ Only one in three surveyed "knew that alcohol was associated with cancers of the mouth and throat."⁶⁸ In addition, "[a] 1985 government survey found that only 57 percent of Americans . . . had heard of Fetal Alcohol Syndrome."⁶⁹ The report issued to the President and Congress also found the following:

[N]umerous information gaps and substantial misinformation relating to alcohol use exists among the American public. People are unaware of the effect rapid consumption can have on the body, the nature of the links between drinking and cancer or birth defects, and problems that can arise if alcohol is consumed with any one of

62. *Id.* at 318, 398 A.2d at 135. The appellate court reversed and remanded for a new trial as to all issues. *Id.* at 328, 398 A.2d at 141.

63. *Id.* at 321, 398 A.2d at 137.

64. *Id.*

65. *Id.*

66. *Id.*

67. The Washington Post, July 2, 1986, at A23, col. 3.

68. *Id.*

69. *Id.*

a wide range of drugs.⁷⁰

Although the *Pemberton* court noted that "[a]lcohol has been present and used in society during all recorded history and its characteristics and qualities have been fully explored and developed and are part of the body of common knowledge,"⁷¹ the above noted studies indicate otherwise. Contrary to the court's statement, medical research is discovering new links between alcohol consumption and the effects on the human body each day.⁷² The existence of studies such as those cited above should at the very least entitle the plaintiff in an alcohol case to present his case to the jury.

A second troubling aspect of the alcohol cases is that each relies heavily on examples given in comments i and j of the *Restatement* in making its decision. Recent studies on alcohol consumption and its effects on the body have dramatically undercut the examples used in comments i and j of the *Restatement*. Since 1965, when the *Restatement* was published, new studies have clearly demonstrated that "good whiskey" will not only cause cirrhosis of the liver and drunken driving but may directly injure the gastrointestinal tract, muscles, and pancreas, as well as cause cancer of the stomach, large intestine, pancreas, throat, pharynx and esophagus.⁷³ Medical research identified Fetal Alcohol Syndrome in the early 1970s, but only in the last ten years has FAS been "conclusively established . . . has one of the most serious sets of birth defects in the United States."⁷⁴ Not only is "good whiskey . . . especially dangerous to alcoholics,"⁷⁵ but it is now considered especially dangerous to unborn children as well.

The authors of the *Restatement* did not view alcohol as a product that is "unreasonably dangerous."⁷⁶ Rather, they saw alcohol as a product that is "unavoidably dangerous"⁷⁷ to the user or consumer.⁷⁸ A

70. NATIONAL COUNCIL, *supra* note 8, at 1.

71. *Pemberton*, 664 S.W.2d at 693 (emphasis added).

72. *See generally Summary*, *supra* note 2.

73. *See id.*

74. Harwood & Napolitano, *supra* note 3, at 38.

75. *See generally Summary*, *supra* note 2.

76. RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965).

77. An "unavoidably dangerous" product is one which "cannot possibly be made entirely safe for all consumption . . ." *Id.* comment i.

78. *See Prosser, The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 807-808 (1966) [hereinafter cited as Prosser, *The Fall of the Citadel*]; Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 23

1987]

policy choice was made concerning products that are unavoidably dangerous:⁷⁹ A product would not be considered "unreasonably dangerous" if the seller had done all he could to make the product safe for human consumption.⁸⁰ The seller, however, must warn of dangers not contemplated by the ordinary consumer.⁸¹ A product sold without such a warning is regarded as defective and the seller will be subject to strict liability.⁸²

The *Restatement* assumes that the dangers of alcoholic beverages are common knowledge. Consequently, no warning is required. Dean Prosser assumed that most people are informed of the high degree of danger involved in using alcohol,⁸³ and was himself aware that alcohol causes "a variety of unpleasant consequences ranging from delirium tremens and cirrhosis of the liver to drunken driving"⁸⁴ Like Dean Prosser, most people are aware that alcohol causes drunken driving and cirrhosis of the liver.⁸⁵ Most people are not sufficiently aware, however, of other significant effects caused by alcohol.⁸⁶

When a plaintiff brings suit against an alcohol manufacturer, courts must take into consideration the recent medical and social findings concerning alcohol. Products liability law must be flexible in light of new scientific research. Courts should not continue to rely on assumptions made in the *Restatement*. Justice would best be served by allowing plaintiffs in alcohol cases to present their cases to the jury. The plaintiff should be permitted to attempt to prove that the injury complained of was one not contemplated by the ordinary consumer.

IV. Obstacles Confronting Plaintiffs

A. Statute of Limitations

A potential problem may arise when a plaintiff who has been addicted to alcohol for a number of years wishes to sue the alcohol manu-

(1966).

79. *Id.*

80. *Id.*

81. RESTATEMENT (SECOND) OF TORTS § 402A comment j. See also Prosser, *The Fall of the Citadel*, *supra* note 78, at 808.

82. RESTATEMENT (SECOND) OF TORTS § 402A comment h. See also Prosser, *The Fall of the Citadel*, *supra* note 78, at 807.

83. *Id.*

84. *Id.*

85. See *supra* text accompanying note 67.

86. See *supra* text accompanying notes 67-70.

facturer: the statute of limitations may block his lawsuit. In *Copeland v. Armstrong Cork*,⁸⁷ a Florida case, the plaintiffs brought a products liability action against defendant manufacturers of asbestos products. As will be discussed later, both asbestosis and alcoholism are "creeping diseases" which develop gradually over a period of years. The central issue in *Copeland* was at what point a cause of action accrues in a products liability claim for the purpose of the statute of limitations.⁸⁸

Because of the nature of asbestosis, a cause of action was held to accrue when "the facts giving rise to the cause of action . . . were [actually] discovered [by the claimant] or . . . should have been discovered [by the claimant] with the exercise of due diligence, . . . whichever is earlier"⁸⁹ Where the injury in a products liability case is a so-called "creeping disease," like asbestosis, the cause of action accrues when the "cumulated effects of the deleterious substance manifest themselves to the claimant."⁹⁰ Moreover, the question of whether the plaintiff knew or should have known that the effects of the substance were manifesting themselves is a question of fact for the jury to determine.⁹¹

Alcoholism, like asbestosis, is a "creeping disease." Alcoholism is a slow, progressive disease which can take anywhere from ten to fifteen years to go through its various stages.⁹² Alcoholism is "so insidious [a disease] that people become addicted without realizing what is happening."⁹³ A plaintiff in an action against an alcohol manufacturer may be able to demonstrate to the court that he did not realize what was happening to him during the various stages of the disease. The plaintiff can show that he continued to drink because of his addiction to alcohol and could not, therefore, voluntarily stop his compulsion. Because denial is a part of the disease of alcoholism,⁹⁴ the alcoholic will be able to show that he failed to recognize the presence of the disease or the consequences of his drinking.

87. *Copeland v. Armstrong Cork Co.*, 447 So. 2d 922 (Fla. 3d Dist. Ct. App. 1984), *approved in part and quashed in part sub nom. Celeotex Corp. v. Copeland*, 471 So. 2d 533 (Fla. 1985) (approved on statute of limitation issue).

88. *Id.* at 924.

89. *Id.* (quoting FLA. STAT. § 95.11(3)(e) (1981)).

90. *Id.* at 926 (quoting *Urie v. Thompson*, 337 U.S. 163, 170 (1949)).

91. *Id.* at 926.

92. D. WHOLEY, *supra* note 1, at 15.

93. *Id.* at 13.

94. *Id.* at 17.

B. Obviousness of the Danger

In each of the alcohol cases, the obviousness of the dangers associated with alcohol barred the plaintiff from recovery. Numerous jurisdictions have expressly rejected this so-called "patent danger rule."⁹⁵ The patent danger rule allows a defendant manufacturer to argue that since the dangers of his product are obvious, no warning is necessary to alert potential users of the product's dangerous propensities.⁹⁶

In *Auburn Machine Works v. Jones*,⁹⁷ the Supreme Court of Florida rejected the patent danger doctrine and held that the obviousness of the danger is not a bar to liability, but instead is a defense which the manufacturer can raise to show that the plaintiff did not exercise reasonable care in light of the circumstances.⁹⁸ The court noted that the patent danger doctrine encourages manufacturers to eliminate devices which can make their products safe.⁹⁹ As relevant to the defense that the danger is obvious, the defendant may show that the cost, function, and competition narrow its design choices, that the product is unworkable "when the alleged missing feature is added, or that the product would be so expensive as to price it out of the market."¹⁰⁰

The Maryland Court of Appeals in *Banks v. Iron Hustler Corp.*¹⁰¹ decided that the patent danger doctrine is "inconsistent with the multifaceted balancing approach that most courts . . . have taken in strict liability cases."¹⁰² The obviousness of the danger was only one of seven factors¹⁰³ used to determine whether a product is unreasonably

95. See *Union Supply Co. v. Pust*, 583 P.2d 276, 284 (Colo. 1978); *Banks v. Iron Hustler Corp.*, 59 Md. App. 408, 475 A.2d 1243, 1252 (Ct. Spec. App. 1984); *Holm v. Sponco Mfg., Inc.*, 324 N.W. 2d 207, 213 (Minn. 1982); *Olson v. A.W. Chesterton Co.*, 256 N.W. 2d 530, 537 (N.D. 1977).

96. *Union Supply Co.*, 583 P.2d at 284.

97. 366 So. 2d 1167 (Fla. 1979).

98. *Id.* at 1167.

99. *Id.* at 1170.

100. *Id.* at 1171.

101. 475 A.2d at 1243.

102. *Id.* at 1252.

103. The seven factors used to determine whether a product is unreasonably dangerous are as follows:

(1) The usefulness and desirability of the product, (2) the availability of other and safer products to meet the same need, (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger, (5) common knowledge and normal public expectation of the danger (particularly for established products), (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings), (7) the

dangerous.¹⁰⁴

Applying the principles of the preceding cases and others which have rejected the patent danger doctrine, the alcohol manufacturer's duty to warn should not automatically be extinguished because the injured consumer was aware of some of the dangers associated with use of its product.

In jurisdictions retaining the assumption of the risk doctrine, the obviousness of the danger may be a significant factor in the assumption of the risk defense.¹⁰⁵ The elements of the assumption of the risk defense are "knowledge of abnormal danger, voluntary exposure to it, freedom of choice to avoid it, and injury proximately caused by the abnormal danger."¹⁰⁶ The determination of whether the plaintiff assumed the risk is a question of fact.¹⁰⁷

Two considerations suggest that it would be difficult for alcohol manufacturers to successfully argue that the plaintiffs assumed the risk in consuming its product. First, it is clear from the preceding scientific studies that most people *do not* in fact know and appreciate the dangers associated with alcohol consumption. While for most people alcohol conjures up images of a celebration or dinner with friends, the reality is that alcohol's influence on the body is profound. Alcohol's influence ranges from the distorted judgment of the drunken driver to the disease of alcoholism. Research continues to explore the links between alcohol consumption and its effects on the body. A true appreciation of the risks of alcohol cannot be said to be enjoyed by the "ordinary consumer."

A second consideration in determining whether assumption of the risk is a viable defense to an action against an alcohol manufacturer is the danger of alcohol addiction. As noted,¹⁰⁸ in some instances a person becomes addicted to alcohol without realizing what is happening to him. The addictive nature of alcohol makes the plaintiff's actions less than voluntary. At what point "dependency" becomes "addiction" is a

ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.

Dorsey, 331 F. Supp. at 760. See also *Turner v. Machine Ice Co.*, 138 Ariz. 329, 674 P.2d 883 (Ct. App. 1983); *Auburn Mach. Works*, 366 So. 2d at 1167.

104. *Banks*, 475 A.2d at 1252.

105. *Olson*, 256 N.W.2d at 538.

106. *Id.*

107. *Id.*

108. D. WHOLEY, *supra* note 1, at 13.

matter of grave dispute among alcohol researchers.¹⁰⁹ It is clear to both sides, however, that "addiction begins when drinking creates problems for the drinker and the drinker keeps on drinking even though he himself is aware of the problems."¹¹⁰ If the plaintiff in an alcohol case reaches this point and if this point comes before the injury complained of, the jury may find that the plaintiff's actions were not in fact voluntary.

Because of the potential for addiction and the likelihood that the consumer is unaware of many of the hazards associated with the use of alcohol, the manufacturer may have a difficult time proving to the jury that the plaintiff knew, appreciated, and voluntarily assumed the risks associated with the consumption of its product.

V. Defendant's Promotional Activities

Advertising is a significant policy consideration in a products liability action.¹¹¹ The image of a product as portrayed through advertising may be frustrated by the product's actual performance.¹¹² Strict liability involves the "consumer expectations" test. "[A]dvertising, promotional [activities] and public portrayal of the product may have a significant influence in molding reasonable consumer expectations."¹¹³ Consequently, the defendant's promotional activities are relevant.¹¹⁴

Alcohol advertisements focus on the pleasure of drinking. There is no attention paid to the product's addictive nature or its effects on the cognitive and bodily functions. The alcohol industry uses ex-athletes and celebrities to glamorize drinking. Associating athletes and celebrities with alcohol is likely to mislead consumers, especially young consumers, by conveying the message that the use of alcohol is conducive to the development of charisma or athletic skill. The Superior Court of New Jersey in *Torsiello*,¹¹⁵ for example, found that "a jury would be

109. L. GROSS, HOW MUCH IS TOO MUCH? 39 (1983).

110. *Id.*

111. See generally *Stevens v. Parke, Davis & Co.*, 9 Cal. 3d 51, 507 P.2d 653, 107 Cal. Rptr. 45 (1973); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Torsiello v. Whitehall Labs.*, 165 N.J. Super. 311, 398 A.2d 132 (Super. App. Div. 1978). See also Hoenig, *The Influence of Advertising in Products Liability Litigation*, 5 J. PROD. LIAB. 321 (1982).

112. *Id.*

113. *Id.* at 325.

114. *Id.* at 326.

115. 165 N.J. Super. at 311, 398 A.2d at 132.

justified in concluding that the [defendant's] advertising and mass marketing techniques [were] . . . calculated to assure the public of [the product's] essential innocuousness and inherent safety."¹¹⁶

In *Stevens v. Parke Davis & Co.*,¹¹⁷ a doctor prescribed the drug Chloromycetin to the plaintiff's decedent. The plaintiff sued the manufacturer of the drug for negligence, breach of implied warranty and strict liability. The defendant promoted its product to physicians extensively, despite findings that its product was dangerous.¹¹⁸ These promotional activities included "personal visits to doctors by 'detail men' urging [physicians] to use the drug [and] dissemination of calendars, rulers and other 'give-a-ways' carrying the name Chloromycetin."¹¹⁹ The physician introduced expert testimony to prove that the advertising and promotion of the drug "played a role" in inducing him to prescribe the drug even though it was "not sound practice to do so."¹²⁰ There was "adequate circumstantial evidence in the record . . . to support a reasonable inference by the jury that [the physician] was induced to prescribe the drug for Mrs. Stevens because of [the defendant's] overpromotion."¹²¹

Like the physician in *Stevens*, the plaintiff in an alcohol case may introduce evidence to show that the alcohol manufacturer's promotional activities induced him to overindulge in the defendant's product by lulling him into a false sense of security concerning the dangers involved in overindulgence. In *Maguire v. Pabst Brewing Co.*,¹²² the plaintiff argued that the defendant's "untrammelled marketing practices" were an "invitation to excess" through "exaltation of hedonistic tendencies over good judgment."¹²³ Pabst had produced a series of television commercials which depicted young men and women drinking in a tavern.¹²⁴ The commercials concluded with one character turning to another and saying, "Let's have another."¹²⁵

A manufacturer who places a potentially dangerous product in the stream of commerce has a responsibility to the members of the public

116. *Id.* at 322, 398 A.2d at 138.

117. 9 Cal. 3d 51, 507 P.2d 653, 107 Cal. Rptr. 45 (1973).

118. *Id.* at 57, 507 P.2d at 655, 107 Cal. Rptr. at 47.

119. *Id.* at 58, 507 P.2d at 656, 107 Cal. Rptr. at 48.

120. *Id.* at 68, 507 P.2d at 663, 107 Cal. Rptr. at 55.

121. *Id.*

122. 387 N.W.2d 565 (Iowa 1986).

123. *Id.* at 569.

124. *Id.* at 567, 568.

125. *Id.* at 568.

who may use the product.¹²⁶ In its decision adopting the doctrine of strict liability, the Supreme Court of Florida stated that "[t]he manufacturer, by placing on the market a potentially dangerous product for use and consumption and by *inducement and promotion encouraging the use of these products* thereby undertakes a certain and special responsibility toward the consuming public who may be injured by it."¹²⁷ The alcohol industry, by encouraging drinking through commercials such as the one described above, undertakes a special responsibility by molding consumer expectations of alcoholic beverages.

Alcohol is a potentially dangerous product, especially to consumers who are not aware of its potential for birth defects and other diseases. Consequently, alcohol manufacturers, like other manufacturers of potentially dangerous products, should be responsible for placing their product in the stream of commerce and for extensively promoting its use. Advertising is a relevant issue in products liability litigation. The plaintiff in an alcohol case should be able to introduce evidence to show that the defendant's advertising techniques played a role in molding the plaintiff's expectations concerning the dangers of alcohol.

VI. Proposals for the Future

This Note has discussed the possibility of holding alcohol manufacturers responsible under products liability law for their failure to warn of the dangers associated with use of their product. Other proposals would also, if successful, force alcohol manufacturers to take responsibility for their product.

The United States Senate passed a bill in 1979 requiring warning labels on all alcoholic beverages.¹²⁸ The House of Representatives did not pass the measure, however.¹²⁹ After this legislative effort, the alcohol industry volunteered to conduct campaigns to spark public awareness concerning the effects of drinking on pregnant women.¹³⁰ In July, 1986, another bill was introduced in the Senate¹³¹ which would have required alcohol manufacturers to place warning labels on their prod-

126. *West v. Caterpillar Tractor Co., Inc.*, 336 So. 2d 80, 86 (Fla. 1976).

127. *Id.* (emphasis added).

128. See A. LUKS, *WILL AMERICA SOBER UP?* 57 (1983). The bill would have required the following warning: "Caution: consumption of alcoholic beverages may be hazardous to your health." *Id.*

129. *Id.*

130. *Id.*

131. S. 2595, 99th Cong., 2d Sess. (1986).

ucts.¹³² According to the bill's accompanying report, "such warnings [would] 'facilitate a national public education effort to make our citizens more aware of the health consequences of abusing alcohol.'"¹³³ One of the warnings recommended by the legislation stated:

WARNING; THE SURGEON GENERAL HAS DETERMINED THAT THE CONSUMPTION OF THIS PRODUCT, WHICH CONTAINS ALCOHOL, DURING PREGNANCY CAN CAUSE BIRTH DEFECTS.¹³⁴

Unfortunately, the bill faces enormous opposition from the alcohol industry. Because the lobbying power of the alcohol industry is so powerful, the bill is unlikely to pass.¹³⁵

In addition to efforts by the United States Congress, the Florida Legislature has recently considered a bill that would require all alcoholic beverages sold in the state to contain a health warning label.¹³⁶ The bill states that "many persons are unaware of the hazards of misusing alcohol" and that a health warning label is necessary to "inform the residents of the State of Florida of these risks."¹³⁷

A second major effort by the United States Congress aimed at reducing alcohol abuse is legislation restricting television and radio advertisements. Like the warning bill, however, it is unlikely to pass. In this fight the alcohol industry is joined by the broadcasting and advertising industries, who stand to lose hundreds of millions of dollars in revenue generated by alcohol advertisements.¹³⁸

The alcohol industry does not confine its lobbying efforts to the halls of Congress, however. Opposition from the alcohol industry arose when New York State began plans to require warning signs in each of

132. *Liquor-Label Suit Will Test Warning Issue*, Nat'l L. J., Sept. 22, 1986, at 12, col. 1.

133. S. 2595, 99th Cong., 2d Sess. 531 (1986).

134. *Business and the Law*, N.Y. Times, Sept. 20, 1986, at 30, col. 1.

135. *Id.*

136. S. 70, 10th Leg., Reg. Sess. (1987). The health warning proposed reads as follows:

HEALTH WARNING: This product contains alcohol, an intoxicating and addictive drug. It impairs driving, should never be used with other drugs, and is dangerous to unborn children. Alcohol . . . % by volume.

137. *Id.*

138. Fields, *Legislative Battle Looms over Proposed Beer, Wine Ad Ban, While FCC Focuses on 'Consolidation'*, TELEVISION/RADIO AGE, Jan. 21, 1983, at 38.

the state's 8,000 alcohol-vending sites.¹³⁹ Similar efforts to require warning signs in each of its alcohol-vending sites were made in Philadelphia.¹⁴⁰ At least five communities have passed ordinances requiring alcohol vendors to "post conspicuous signs notifying consumers of the link between drinking during pregnancy and the incidence of birth defects."¹⁴¹

VII. Conclusion

Products liability law, using the theory of strict liability, is a viable tool for holding alcohol manufacturers liable for their failure to warn of the dangerous propensities of their product. Various studies indicate that alcohol is dangerous beyond the ordinary consumer's expectations. Because of the alcohol industry's powerful lobby, legislative efforts to force the alcohol industry to act responsibly will almost surely continue to fail. But American consumers may succeed through products liability litigation where legislative efforts have failed.¹⁴² The principles that apply to manufacturers of other unreasonably dangerous products should apply to manufacturers of alcohol as well. The imposition of civil liability may force the alcohol industry to voluntarily provide warning labels on its products. If this happens, consumers will be better able to understand the consequences of their actions.

Donna D'Amico

139. Prugh, *Point-of-Purchase Health Warning Notices*, ALCOHOL HEALTH AND RES. WORLD, Summer 1986, at 36. The message posted reads: "WARNING: DRINKING ALCOHOLIC BEVERAGES DURING PREGNANCY CAN CAUSE BIRTH DEFECTS." *Id.*

140. *Id.* "In New York the vote was 28 to 4 in favor of the warning signs." *Id.*

141. *Id.* "The Philadelphia council voted unanimously in favor of the warnings." *Id.*

142. Currently pending is *Hoover v. Jack Daniels Distillery*, No. 86 L 19211 (Ill. Cir. Ct. filed September 2, 1986). The complaint sets forth three theories of recovery: (1) strict tort liability, (2) negligence, and (3) willful and wanton conduct. Plaintiff's Complaint at 1, 16, *Hoover v. Jack Daniels Distillery*, No. 86 L. 19211 (Ill. Cir. Ct. filed September 2, 1986). The complaint alleges that the plaintiff, an alcoholic, began drinking alcoholic beverages in January, 1978, at age 16 and continued to do so until January, 1986. *Id.* at 2. The complaint requests that the defendant be "ordered to properly label its products with adequate warning of the health and social dangers of excessive use of Old Style Beer and other alcoholic beverages produced by said defendant." *Id.* at 17.

The following errata in the article "Drug-Use Testing: Scientific Perspectives" by Kurt M. Dubowski, Ph.D. (Nova Law Review 11: 415-552, Winter 1987) should read as follows:

- Page 464 Line 7: curves can be constructed as linear-linear plots of radioactivity in CPM ver. . .
- Page 465 Text Line 18-22: Δ^9 -THC and 9-carboxy-THC cross-react at 100% with the antibody. In the . . . (Lines 19-22 are deleted)
- Page 471 Line 19-20: . . . compounds with a carbonyl ($=C=O$) group. . .
- Page 483 Line 7, 10: 9-carboxy metabolite. . .
- Page 509 Line 14: original natural state. . .
- Page 534 Line 16: chlorphentermine
Line 18: diethylpropion
- Page 535 Line 23: triamterene
Line 35: . . .in the urine exceeds 6.
- Page 536 Line 14-15: . . . Aminophylline and Theophyllines, Beclomethasone and Atropine Sulfate. . .