

# The Jurisprudence of Direction for Use in Product Liability: Issues in Perspectives

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## Abstract

A product no matter how safely made, has the potential danger of injuring human life. It is therefore mandatory to call the attention of users to potential dangers or defects inherent in such products or how best such product may be used. The absence of warning or directions for use may also render an otherwise acceptably safe product unsafe. This therefore makes it imperative that products be accompanied with adequate warning instruction or instruction for use. Bearing in mind that the essence of warning is to call the attention of consumers to defects associated with the use of a product, whilst that of instruction for use is to ensure safety on how best the product can be put to use; it is unfortunate that such warnings or instructions for use fail to achieve the desired purpose. The reason being that such warnings or instructions are either couched in a language that most of the users are not literate about or its wordings are not legible / wrongly placed on the product's package. These shortcomings has led to product injury/accident and at times loss of lives as a result of such shortcomings. It is in the light of the above that this paper ex-ray the role of warning in product liability; and also justify the need why warnings and instructions connected with the usage of products should be couched in the language understood and spoken by the majority of people where such product is been offered for sale in order to ensure the safety of human lives. The fact is incontrovertible that defective or unsafe product has grave consequences on sustainability of the society.

*Keywords: Use Direction Product Liability, Sustainability*

## 1. Introduction

The preservation and safety of human life is closely linked with sustainable development. A situation where the welfare of citizens is threatened by, or not adequately safeguarded from, product related accidents greatly endangers the sustainability of the environment, human life and its quality. In order to promote the quality of human life, concerted efforts must be taken to ensure the safety of the environment by ensuring that safe products, accompanied by appropriate warning instructions /direction for use, are marketed, and that adequate instructions and/or directions also accompany such products detailing how waste management generated when such products are used would be managed. Virtually every product, no matter how safely made, has the potential of being a source of danger to human life and the environment in the absence of warning instruction / direction for use relating to how such product is to be used and its waste managed. The essence of a warning instruction or direction for use is to apprise consumers about how best the product can be put to use or to draw their attention to dangers associated with the use of such products. To accomplish this objective, direction for use must be couched in clear and

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comprehensible language and the use of bilingual warnings or universal symbols in cases where the English language may not be suitable such as in the case of persons who cannot read or comprehend the English language. Many challenges are associated with directions for use and warning instructions in product manufacture, sale, use, and the management of waste generated during the course of production.

It is as a result of the above that this paper examines the current state of the law and its challenges with regard to direction for use and warning instructions in Anglo – American jurisdictions. Incidentally, the state of the law in these jurisdictions has had a pronounced influence on the development of the law in other jurisdictions, particularly in developing countries. The scope of this work is restricted to tort law, which in other jurisdictions is known as law of *Delict*. The paper is divided into five segments comprising of:

- 1) Conceptual clarification of terms;
- 2) Product liability and sustainable development;
- 3) The jurisprudence of direction for use / warning instruction;
- 4) Issues in perspective; and
- 5) Recommendation and conclusion.

## 2. Conceptual Clarification of Terms

Words evidently are not instruments of mathematical precision;<sup>1</sup> by nature, words are elusive and some are also capable of at least three meanings.<sup>2</sup> In view of this, it is necessary at the outset to put some principal words to be employed in this work into context.

### 2.1 Product

The word ‘product’ within the context of product liability law has been defined variously depending on the theoretical principle adopted to ground the liability of the tortfeasor.<sup>3</sup>

Product is defined broadly as, "Something that is distributed commercially for use or consumption and that is usu. (1) tangible personal property, (2) the result of fabrication or processing, and (3) an item that has passed through a chain of commercial distribution before ultimate use or consumption".<sup>4</sup> In addition, the word ‘product’ is defined under the provisions of the *Consumer Protection Act of United Kingdom*<sup>5</sup> which introduced a strict liability principle as an additional theoretical basis of liability to complement the existing negligence regime. In this enactment, product is defined in section 1(2) of the *Act as* "...

<sup>1</sup> See the case of *Seaford Estate v Asber* [1949] 2 KB 481.

<sup>2</sup> Words ordinarily have three meanings; these are the usual, intended and comprehended meanings. The failure to put a word into context is capable of causing confusion or making it difficult for the reader to comprehend the message being communicated.

<sup>3</sup> There are many conceptual shelves under which product liability cases may be commenced; the ones relevant to this discourse are the negligence and strict liability theories.

<sup>4</sup> Black’s Law Dictionary 7th ed.

<sup>5</sup> 1987. See also section 2, 61(a-c) of the South Africa Consumer Protection Law, where ‘product’ was defined as “all movables, with the exception of primary agricultural products and game, even though incorporated into another movable or into an immovable....”

any goods or electricity and ... [including] a product which is comprised in another product, whether by virtue of being a component part or raw material or otherwise."<sup>6</sup>

## 2.2 Product Liability and Defective Product

The subject product liability was until very recently not treated as a separate field of law. The reason for this is that there are many conceptual shelves into which product frustration cases may be shelved. In general terms product liability refers to the liability of producers and others for damage or loss caused by product which has failed to meet the standards claimed expressly or implicitly for them and which are dangerous or otherwise defective.<sup>7</sup> A defective product on its own is defined as "...a product that is unreasonably dangerous for normal use, as when it is not fit for its intended purpose, inadequate instructions are provided for its use, or it is inherently dangerous in its design or manufacture."<sup>8</sup> A product may also be adjudged as being defective if proper guidance is not given for the disposal of its accompanying container / package, for instance in cases of noxious product for instance an insecticide can or battery, amongst a host of other hazardous products.

## 2.3 Direction for use / Warning instructions

Within the context of this work, the phrase "direction for use" will be used interchangeably with "warning instruction". In ascertaining whether a product is defective in terms of the accompanying warning instruction, recourse may be had to the provisions of section 3(2)(a) of the Consumer Protection Act of the United Kingdom.<sup>9</sup> Either concepts or terminologies have different meanings and serve different purposes in the product liability regime. The difference between both words was brought to fore by Dillard and Hart in their work where they discussed "the *McClanahan v California Spray Chemical Corporation*<sup>10</sup>, the Virginia apple grower's case." In this work, they posited that there is an important distinction between 'warnings' and 'directions for use'. The function of a warning is to call the attention of user or a responsible third party to dangers associated with a product, while the phrase 'directions or instructions for use' is regarded as indicating how the most beneficial results can be obtained when a product is put to use. The learned writers gave the following illustration which pertained to a new brand of toothpaste which, if used more than twice daily, was likely to discolour the teeth permanently. They commented as follows:<sup>11</sup>

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<sup>6</sup> Article 2 of the Product Liability Directive defined 'product' as follows, "Product means all movable (assets, goods,) even if incorporated into another movable or into an immovable object (?). 'Product includes electricity.' In the aftermath of the BSE or 'mad cow' crisis, the Directive was amended, and the definition of product in Article 2 was replaced by 'all movables even if incorporated into another movable or into an immovable.' 'Product' includes electricity.

<sup>7</sup> See Miller and Goldberg *Product Liability* 2004 Oxford University Press.

<sup>8</sup> Black's Law Dictionary 7<sup>th</sup> ed.

<sup>9</sup> This provision stipulates that, in ascertaining whether a product is defective or not, courts should take account of "any instructions for or warnings with respect to, doing or refraining from doing anything with or in relation to the product."

<sup>10</sup> 75 SE 2d 712 (1953), above, para 14.90. See 'Product Liability: Directions for Use and the Duty to Warn', 41 Va L Rev 145 (1955).

<sup>11</sup> See "Product Liability: Directions for Use and the Duty to Warn", 41 Va L Rev 145, 151 (1955).

"Not only would directions such as, 'For Best Results Use Twice Daily' be clearly inadequate; even such forthright statements as, 'Do Not Use More Than Twice Daily' would be inadequate unless accompanied by a warning statement cautioning the user that permanent damage was likely to result from more frequent applications. A bold cautionary statement setting forth the exact nature of the dangers involved would be necessary fully to protect the manufacture. Such factors as the likelihood that the average toothpaste user would not otherwise take more than a cursory glance at the label of an ordinary toothpaste container must be taken into account."

In addition, a full warning as to the dangers associated with a product may be inadequate unless they are accompanied by directions on how its wastes are to be managed effectively.

## 2.4 Sustainable Development

The phrase 'sustainable development' has been the trade mark of many international organisations dedicated to achieving environmentally benign or beneficial development. In a nutshell, it is an integration of developmental and environmental imperatives. To be sustainable, development must possess both economic and ecological sustainability. It signifies the way in which developmental planning should be approached.<sup>12</sup>

## 3. Product Liability and Sustainable Development

This segment discusses briefly the nexus between direction for use /warning instructions and sustainable development. Safeguarding future interest in terms of developmental planning, economic and environmental development with human safety is one of the hallmarks of sustainable development. Sustainable development promotes and encourages developments meant to achieve environmentally benign or beneficial development to the human race without unduly compromising the interest of future generations.<sup>13</sup> This establishes a strong nexus between directions for use/warning instruction and sustainable development. Virtually every product, no matter how simple or sophisticated it may be, must have gone through industrial processing before it becomes a finished product or a by-product to be used in the manufacture of other products. The absence of appropriate instructions/warnings on how to handle noxious and hazardous wastes generated during the course of either the production or use of the product have serious and devastating health and environmental implications. Equally, products not accompanied by proper directions for use or warning instructions pose serious health challenges to the safety of human lives.

In order to protect the environment for future generations effectively and enhance the quality of human life, it is necessary for products to be accompanied by appropriate warning instructions/directions for use on how to use such products effectively along with how wastes generated during the course of production should be managed effectively.

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<sup>12</sup> Gurdip Sighn, *Environmental Law-International and National Perspective*, 32 (1987).

<sup>13</sup> *Ibid.*

Under Anglo-American law, which has had profound influence on shaping other systems of law, the liability of a manufacturer relative to the production of a defective product could be hinged on either or any of these grounds: design defect; manufacturing defect; and defect in warning/instructions for use.<sup>14</sup>

#### 4. Jurisprudence of Direction for Use/Warning Instructions

The position under Anglo-American law is that appropriate warning instructions must be given to all foreseeable users of a product. This is in line with the decision in the seminal case of *Donoghue v Stevenson*<sup>15</sup>, a case in which the neighbour principle<sup>16</sup> which has had a profound influence in shaping and also directing the scope of liability in product liability law, was enunciated. The case laid down the firm proposition of law that a manufacturer is under an obligation to ensure that his/her product must not harm or injure his/her consumers. The proposition that warning must be given to foreseeable users of the product is delimited by the fact that it will be manifestly impracticable to require that a warning or direction for use should “reach any person who might conceivably be exposed to injury from it”.<sup>17</sup> The general rule is guided by the foreseeability of use doctrine. This is to the effect that the seller of a product which is capable of posing an unreasonable risk of injury, if not accompanied by a warning or instruction for use, owes a duty to purchasers of such goods.<sup>18</sup>

There is an obligation on the part of every manufacturer or producer of a product to ensure that such a product is accompanied by an appropriate warning instruction and direction for use.<sup>19</sup> Failure to do this may result in liability if the product in question is mishandled or becomes a source of danger where such a warning or direction for use was lacking. This also makes it imperative that manufacturers should, equally, accompany their products by specific label instructions about its storage and the disposal of its wastes where such have dangerous characteristics. This must be set apart and clearly

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<sup>14</sup> For further readings, see Miller and Goldberg *Product Liability op cit* Chapters 10 – 11.

<sup>15</sup> 1932 AC 562.

<sup>16</sup> *Ibid* at 597; the neighbour principle enunciated by Lord Atkin in this case is to the effect that, "The rule that you are to love your neighbor becomes, in law, you must not injure your neighbor; and the lawyer's question, 'Who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my acts that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question."

<sup>17</sup> Hodges, *Product Liability Europeans Laws and Practice* para 3-049

<sup>18</sup> See for instance the case of *Galanos v US* 608 F. Supp 360, 374-5.

<sup>19</sup> In case of *Wilson v US Elevator Corp* 972 P 2d 235 (Ariz, 1998). The court stated that: 'Strict liability as well as negligence standards "impose a duty to produce products with appropriate warning instructions." A product faultlessly made may be deemed "defective" if it is unreasonably dangerous to place the product in the hands of a user without a suitable warning. The duty to warn arises when the product is perfectly manufactured but is unreasonably dangerous without an appropriate warning of its dangerous characteristics': *ibid* 237-8. On the facts, however, the manufacturer had no legal duty to warn past customers of the availability of safety improvements in the door closing mechanism of an elevator, since its initial sale in 1974: *ibid* 241. See also the English cases of *Winterbottom v Wright* (1842) 10 M&W 109, and *Clarke v Army and Navy Co-operative Society* (1903) 1 KB 155.

distinguishable from other directions for use.

In the case of *Vacwell Engineering Ltd v BDH Chemical Ltd*,<sup>20</sup> the defendants supplied a chemical by the name of "boron tribomide" to the claimants in glass ampoules which were labelled "harmful vapour". The suppliers had no knowledge that the chemical sold would react violently when it came into contact with water. A scientist who accidentally dropped one of the ampoules in water was killed in the ensuing explosion. The supplier was held not to be liable, as he had no knowledge of the fact that such an explosion could occur. The manufacturer of the chemical was, however, held liable with regard to negligence for having failed to give adequate warning of the dangerous properties of the chemical which had been published in scientific journals.<sup>21</sup>

There is no obligation on the manufacturer to warn in cases of obvious dangers.<sup>22</sup> If there is a need to give warning, such a warning must be adequate<sup>23</sup> and, where it is foreseeable that the product might be put to a dangerous use, there is a duty to warn of such dangerous propensity and any failure to do this will lead to liability.<sup>24</sup> Where the dangers associated with the use of a product are obvious or known, there is no obligation to warn in respect of such dangers.<sup>25</sup> Under such circumstance, recovery will not be allowed for a product-related accident caused by such known or obvious dangers. There is also no obligation to warn in respect of unknown and unavoidable risks.<sup>26</sup> Furthermore, in some American cases, it has been held that strict product liability cannot be based on the absence of a warning in cases where the danger was unknown and undiscoverable,<sup>27</sup> while some others held otherwise.<sup>28</sup>

There are various doctrinal principles guiding the practice of whom to give notice. This depends on the nature of the product concerned. An attempt will now be made to highlight these principles.

Where the seller can reasonably foresee that a warning conveyed to the immediate purchaser will be inadequate in reducing the risk that may be occasioned to the foreseeable user, the duty may be extended to those foreseeable users.<sup>29</sup> Suffice it to state that the majority of sales where the seller's product will be used by someone other than the immediate buyers are sales to commercial or industrial buyers.<sup>30</sup>

<sup>20</sup> (1971) 1QB 88.

<sup>21</sup> See, however, the case of *Fisher v Harrods* (1966) 1 Lloyd's Rep 500, where a retailer was held liable for the harm occasioned by a jewellery cleaning fluid which came in contact with the claimant's eye.

<sup>22</sup> See the case of *Farr v Butter Bros* (1932) 2 KB 606.

<sup>23</sup> See *Vacwell Engineering Ltd v BDH Chemicals Ltd*, (1971) 1QB 88, where the label "harmful vapour" on the ampoules was held not to be adequate.

<sup>24</sup> See *Hill v James Crowe (Cases) Ltd* (1978) 1 All ER 812.

<sup>25</sup> For instance there is no duty to warn the purchaser of a knife or an act that both may cut and that dynamite will explode.

<sup>26</sup> See the case of *Farr v Butters* (1932) 2 KB 606.

<sup>27</sup> See *Oakes v Geigy Agricultural Chemicals* 77 Cal Rptr 709 (Cal App, 1969).

<sup>28</sup> See the cases of *Berkebile v Brantly Helicopter Corporation* 337 A 2d 893 and *Jackson v Coast Paint and Lacquer Co* 499 F 2d 809. (9<sup>th</sup> Cir, 1974).

<sup>29</sup> Miller and Goldberg *op cit* – 12:34.

<sup>30</sup> Restatement Second Torts (1965) S. 388 provides as follows: "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

#### 4.1 Sophisticated user doctrine

The sophisticated user doctrine is to the effect that, where products are targeted towards professionals, a warning or direction for use which ought to have been directed to the consumer may be communicated to a third party. This may suffice as communication to the consumer depending on the circumstance.<sup>31</sup> For instance, where it is expected that a product will be installed by a professional, direction for use or a warning instruction given to such a professional will suffice under such a circumstance.<sup>32</sup>

#### 4.2 Subordinate workers doctrine

The application of the sophisticated or professional user doctrine is relaxed in cases of subordinate workers. The essence is to avoid a situation where a subordinate worker, who may not know as much as his superior about the characteristics of certain products, might be denied recovery. It is necessary for the manufacturer seeking to rely on the sophisticated user doctrine or defence to establish that he/she informed the buyer-employer of the risk associated with the product and the buyer employer could be reasonably relied on to provide sufficient warning to his employees.<sup>33</sup> In the case of *Curtis v M & S Petroleum Inc*,<sup>34</sup> the court held that the manufacturer had discharged its duty to warn of the hazards of a toxic product (Heavy Aromatic Distillate [HAD]) by providing adequate warning to the refinery operator and lessees. The court in this case applied Mississippi law.

#### 4.3 By stander doctrine

This doctrine is to the effect that a manufacturer would be taken to have discharged his duty to warn by giving warnings of the products risks to the immediate purchaser as distinct from the person who has been injured. The decision, in the case of

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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 the facts which make it likely to be dangerous".

<sup>31</sup> See Miller and Goldberg *op cit* para 12:37.

<sup>32</sup> See the case of *Ex-Parte Chevron Chemical CO 720 So 2d 922* (Ala, 1998). See also *Helene Curtis Industries Inc v Pruitt* 385 F 2d 841 (5<sup>th</sup> Cir 1967). See also S. 388 Restatement Second Torts (1965) and also Section 388 (b) and the case of *Strong v EL. Di Pont de Nemours Co Inc* 667 F 2d 682 (8<sup>th</sup> Cir, 1981).

<sup>33</sup> See *Curtis v M&S Petroleum Inc* 174 F 3d 661 (5<sup>th</sup> Cir, 1999)

<sup>34</sup> 174 F 3d 661 (5<sup>th</sup> Cir, 1999). The above decision can be contrasted with the decision in *Jackson v Coast Paint & Lacquer Co*, 499 F 2d 809 (9<sup>th</sup> Cir. 1974). In this case, a painter brought an action against a paint manufacturer after he had been severely burned when the epoxy paint he was using to paint the inside of some railroad tank cars ignited, the paint fumes fuelling the fire. While there was evidence that the plaintiff's employer may have been aware of the possibility that flammable vapours permitted to accumulate in a closed, inadequately-ventilated area could be ignited by a spark resulting in a fire or explosion, the plaintiff was not so aware. Reversing a verdict for the defendant, the Ninth Circuit held that an instruction to the jury that knowledge of the hazard on the part of the plaintiff's employer would obviate a duty to warn the plaintiff was erroneous. As the Court explained: 'At least in the case of paint sold in labeled containers, the adequacy of warnings must be measured according to whatever knowledge and understanding may be common to painters who will actually open the containers and use the paints; the possibly superior knowledge and understanding of painting contractors is irrelevant'.

*Sills v Massey – Ferguson Inc*<sup>35</sup>, supports this principle of law. The court, commenting on this principle, observed as follows: “...while it would be admittedly difficult for a manufacturer to warn the general public, it might be that a warning as to safety precautions given to the user of the mower would discharge the duty.”<sup>36</sup>

#### 4.4 Learned Intermediary Doctrine

Under this doctrine, a manufacturer is exempted from liability for his failure to warn users of products when it is reasonably foreseeable that they may be injured once the relevant information or warning is given to a responsible intermediary. This doctrine is often applicable in medicinal products, where doctors or physicians are provided with information about a product’s risk. This is also the position in the United States; the practice is, however, not universal in all the states of the Union.<sup>37</sup> It must be noted that there is an exception to this general rule. Typical of such exception is where a conventional physician/patient relationship does not exist. Under such circumstance the learned intermediary rule may not operate.<sup>38</sup> This position is supported by the decision in the case of *McDonald v Orbo Pharmaceutical Corp.*<sup>39</sup>

There is no post marketing obligation to warn of subsequent dangers under the strict liability regime once a product is sold. There is, however, an obligation to take into account “new information and rising standards as products of the original design continue to be supplied.”<sup>40</sup>

### 5. Issues in Perspective

The above fairly summarizes the position of the law concerning warning and direction for use in the product liability regime.<sup>41</sup> It is important to note that many challenges still persist in this area of the law which needs urgent attention because of its environmental and health implications. Some of these challenges impact negatively on environmental sustainability and the welfare of human beings<sup>42</sup> and it is acknowledged that it is impracticable to have a perfect situation where warning instruction or direction for use given in respect of a product will suffice for all situations as a result of human dynamics and exigencies which vary from place to place and the fact that the sale/marketing of a product may transcend the borders of the country of manufacture. For these reasons, there is a need to reassess the current law and practice associated with direction for use and warning instructions with a view to ensuring that the safety of lives and of the environment are not compromised. Some of these challenges will now be summarized.

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<sup>35</sup> 296 F.Supp 776 (ND Ind. 1969).

<sup>36</sup> *Ibid* 783

<sup>37</sup> See the case of *Griffiths v Blatt* 51 P 3d 1256

<sup>38</sup> This rule also does not apply in vaccine cases and direct marketing cases. See *Perez v Wyeth Laboratories Inc.* 734 A 2d 1245 NJ, 1999) See para 12:54 – 12:56 of Goldberg and Miller.

<sup>39</sup> 475 NE 2d 65 (Mass 1985)

<sup>40</sup> Miller and Goldberg Product liability *op cit* para 12.90.

<sup>41</sup> For a detailed reading, see generally Goldberg and Miller *op cit* cap 12.

<sup>42</sup> Direction for use may also direct on how some waste products which have a hazardous effect on the environment may be disposed of.



### 5.1 Language barrier

There are so many countries with different nationalities speaking different local languages, even while English is the country's official language, for instance, this is the case in Nigeria. It is possible for a majority of such a country's nationals not to be literate in that official language in terms of its being spoken or read.<sup>43</sup> If, indeed, the essence of warning and direction for use is to inform the consumer about the dangers associated with the use of such a product or draw the consumer's attention to how such product can be used effectively, then such a rationale is defeated in a situation like this.<sup>44</sup> How effective would a warning instruction or direction for use be if couched in a language which most consumers may not comprehend? Such a position is capable of being unjust by defeating the philosophical justification or rationale behind a warning instruction and thereby occasioning product-related injury<sup>45</sup> to individuals and the environment generally.

### 5.2 Inadequacy of Warning

There are instances where a warning may be misleading or where a product is mislabeled. Typical of such instances is the case of *British Chartered Company of South Africa v Lennon Ltd.*<sup>46</sup> In this case, the respondents, who were a firm of druggists, had distributed an arsenite cattle dip in drums which were mislabeled. The appellant relied on the formula indicated on the label in preparing the dip meant for his cattle. The dip was too strong and about 180 cattle were killed and the respondents were held liable for mislabeling.

### 5.3 Watered down warning

There are cases where warnings and instructions for use may fail to point to the true nature of the extent of danger with sufficient clarity.<sup>47</sup> Typical of such an instance is where warning points to a particular danger which may suggest that other dangers do not exist. In such an instance, a warning about a harmful vapour may not indicate the danger of explosion.<sup>48</sup> For instance, in the case of *Saparito v Purex Corporation*<sup>49</sup> it was held that the words "keep in cool place" might be understood as indicating that a bottle of bleach might deteriorate rather than explode.

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<sup>43</sup> Nigeria for instance has over 250 nationalities, with different languages most of which live in remote areas and do not understand the English language.

<sup>44</sup> For instance see the case of *Hubbard-Hall Chemical Co v Silverman* 340 F 2d 402 (1st Cir, 1965). This was an action brought against an insecticide manufacturer for the death of two farm labourers who had been administering the pesticide Parathion. In the ensuing action, the court held that the manufacturer should have foreseen that its product would be used by those of 'limited education and reading ability' and, thus, a warning, even if it complied with Federal statutory requirements from the Department of Agriculture, would still not be adequate in the light of its 'lack of a skull and bones or other comparable symbols or hieroglyphics', *Ibid* 405.

<sup>45</sup> Miller and Goldberg *op cit* para 14.02

<sup>46</sup> (1915) 31 TLR 585 PC

<sup>47</sup> Miller and Goldberg *op cit* para 14.102

<sup>48</sup> *Ibid* 14.102.

<sup>49</sup> 255 P2d 7 (Cal, 1953).

#### 5.4 Warning instruction/Direction for use written in small lettering

There are instances where products are accompanied with directions for use or warning instructions written in small lettering and colours which are not conspicuous. At times, such small lettering is hidden. Such instances are likely to make consumers fail to pay attention to such information. For instance, in the case of *McLaughlin v Mine Safety Appliances Co.*<sup>50</sup> the warning was on the cardboard container, whereas the same ought to have been on the magnesium heat blocks themselves.

#### 5.5 Non-Direct communication where necessary

Related to the problems associated with warnings and direction for use is the fact that there are occasions where a warning may not be adequate unless there is direct communication with the consumer personally or at least with a responsible intermediary.<sup>51</sup> Where such circumstances exist, the manufacturer or seller must ensure that there is direct communication with the consumer to apprise him/her of the dangers associated with the use of the product.

#### 5.6 Misrepresentation of promotional activities

Accompanying products with misleading promotional literature which may mislead the consumer is a common occurrence in product cases. For instance, in the case of *Watson v Buckley, Osborne, Garrel & Co Ltd*<sup>52</sup> a hair dye, which caused dermatitis, had been advertised as needing no preliminary tests. The danger associated with this practice is also brought to fore in the case of *Maize v Atlantic Refining Co.*<sup>53</sup>

#### 5.7 Learned intermediary rule

The learned intermediary rule is capable of causing a problem. This is a common occurrence in cases of direction for use or warning instruction associated with medicinal products. There are instances where patients are not properly informed about the attendant consequences of the type of treatment to be administered to them.

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<sup>50</sup> 181 NE 2d 430 9 NY, CA 1962).

<sup>51</sup> See the case of *Yarrow v Sterling Drug Co* 263 F. Supp 159 (DCSD, 1967). In this case, the District Court observed as follows: "The most effective method employed by the drug company in the promotion of new drugs is shown to be the use of detail men (*viz.* Sales representatives); thus, the Court feels that this would also present the most effective method of warning the doctor about recent developments in drugs already employed by the doctor, at no great additional expense. The detail men visit the doctors at frequent intervals and could make an effective oral warning, accompanied by literature about the development, and that would affirmatively notify the doctor of side effects such as shown in the facts of this case".

<sup>52</sup> (1940) 1 All ER 174

<sup>53</sup> 41 A 2d 850 (Pa, 1945) This case related to the deceased, a woman aged 33, who had been working in a confined space with a carbon tetrachloride carpet cleaner marketed by the defendant company under the trade-name 'Safety Kleen'. Her estate commenced an action following her death from renal failure. The Supreme Court of Pennsylvania, granting recovery in the favour of the deceased, said of the two gallon container in which the cleaner was supplied: "The word 'Safety' was so conspicuously displayed on all four sides of this can of dangerous fluid as to make the word 'Caution' and the admonition against inhaling fumes and as to use only in a well-ventilated place seem of comparatively minor import." See Miller and Goldberg *op cit* para. 14.107

## 5.8 Waste management

Most hazardous products which are capable of having negative impact on the environment, for instance batteries and other related or similar products, are not accompanied by detailed instructions on how to manage their waste. Such waste pollutes the environment and causes serious health hazards.

## 6. Recommendations and Conclusion

In order to ensure human safety and an environment free from pollution, it is paramount that pragmatic efforts be taken to improve the current practice and law relating to direction for use /warning instructions which accompany products. Towards achieving this, the following recommendations are suggested in order to reduce the frequency of product-related accidents and to ensure a safe environment.

### 6.1 Clarity, Explicitness and Adequacy of Direction for Use and warning instructions

It is suggested that warning instructions and or direction for use should be couched in comprehensible language or, better still, translated into the local language of the area where such products are to be sold. The author is not unmindful of the fact that a product manufactured in Asia or Europe may find its way into a remote village in Africa, but this does not make translation into the local language impossible. Such an obligation should be imposed on the importer, distributor or marketer of the product in that locality. The warning instruction should be clear, explicit and couched in simple language devoid of technical jargon.

### 6.2 Learned Intermediary Rule

The learned intermediaries rule strives to ensure that directions for use or a warning instruction which may not be easily communicated to consumers are passed through intermediaries. There are, however, instances where such a rule has caused mishap or injury to consumers. For instance, in the case of *Yarrow v Sterling Drug Co.*,<sup>54</sup> the plaintiff suffered permanent damage to her eyes having taken chloroquine phosphate for arthritis though the manufacturers had warned, through the accompanying literature, of such a side effect. Notwithstanding this, the court held that the warning was not sufficient.<sup>55</sup> This case may be contrasted with the English case *Holmes v Ashford*,<sup>56</sup> where the court held that the learned intermediary rule adopted as a medium through which the side effect of the product in question was communicated to the claimant was appropriate in the circumstances of the case.<sup>57</sup>

As rightly observed by the court, in circumstances similar to the above, where new products are involved, say for instance a drug, the most effective method employed for sale in the promotion of new drug, could be the use of sales representatives and the

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<sup>54</sup> 263 F. Supp. 159 (DC. SD 1967)

<sup>55</sup> *Ibid* 163.

<sup>56</sup> [1950] 2 All ER 76.

<sup>57</sup> See also the case of *Kabach v Hollands*. [1937] 3 All ER 907, DC.

court suggested that this method be adopted or employed.

### 6.3 Location of Warning

There is need to place importance on the location of the warning or direction for use which accompanies a product. While being aware that most warnings or directions for use are contained in the package in which the product is enclosed; at times it may be appropriate that the warning should be printed or embossed on the product itself where practicable. This is likely to alert a consumer than where the warning is contained on the external part of the product package or in the accompanying leaflet within.<sup>58</sup>

### 6.4 Effective Management of Waste Product

There is need to provide appropriate and adequate guidelines on how waste hazardous by-products generated from used products or those generated during the course of production should be managed effectively. This is to be done in clear, explicit and spoken language/in the native language of the area where such a product is being offered for sale. The obligation for doing this should be imposed on the importer or manufacturer of the product in the locality concerned.

## 7. Conclusion

This article has attempted a brief discussion of the importance of warning instructions and directions for use in product matters and the implications of this on the safety of the environment and human lives. It is important that a concerted effort be made to ensure that products are accompanied by appropriate warning instructions and directions for use couched in comprehensible language. In addition, where the product would be harmful to the environment, special emphasis, in terms of warnings and directions for use for the disposal of waste arising from the use of the product or waste generated during the course of its production, should be provided in order to ensure the safety of the environment.

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<sup>58</sup> See the case of *McLaughlin v Mine Safety Appliances Co.* 181 NE 2d 430 (NY) 1962.