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Torts—Statutory and Common Law Duty to Label Poisons

In *Porter v. Yoder & Gordon Co.*[1] the plaintiff contracted to paint municipal water tanks and acting pursuant to a provision therein ordered from defendant litharge[2] in powdered form to mix with red lead paint. The only labeling on the litharge containers was "Lev-L-Lite Paint Products-Litharge-Manufactured by Yoder & Gordon Company—Established 1904—Norfolk, Virginia." In mixing the litharge with the paint, the plaintiff and four of his employees sustained lead poisoning. Basing his action solely upon a poison labeling statute,[3] plaintiff sued the defendant for negligence in failing to label its product as poison. By this theory plaintiff was attempting to establish defendant's violation of the statute as negligence per se.[4] The jury found the defendant negligent and the plaintiff not contributorily negligent.

The supreme court reversed and entered a nonsuit against plaintiff, holding as a matter of law that the statute was inapplicable as it related to "Pharmacy" and to the sale of medicines containing poisonous ingredients.[5] There had been no previous litigation in the North Carolina Supreme Court in regard to this statute.[6]

[1] 246 N.C. 398, 98 S.E.2d 497 (1957).

[2] Litharge is principally lead monoxide, which is dangerous if inhaled or ingested. In powdered form, it is even more dangerous because of the susceptibility of being breathed. When mixed with paint, litharge dries the paint quickly and gives it hardness.

[3] N.C. GEN. STAT. § 90-77 (1950). "Poisons; sales regulated; label; penalties.—It shall be unlawful for *any persons* to sell or deliver to any person any of the following described substances or any poisonous compound, combination or preparation thereof, to wit: The compounds and salts of arsenic, antimony, *lead*, mercury, silver, zinc, . . . except in the manner following: It shall first be learned by due inquiry that the person to whom delivery is made is aware of the poisonous character of the substance, and that it is desired for a lawful purpose, and the box, bottle, or other package shall be labeled with the name of the substance, the word 'Poison' and the name of the person or firm dispensing the substance . . . . : Provided further, that it shall not be necessary to place a poison label upon, or to record the delivery of, the sulphide or antimony or the *dioxide* or *carbonate* of zinc or *lead*, or of colors ground in oil and intended for use as paint . . . .

"If any person shall sell or deliver to any person any poisonous substance specified in this section without labeling the same and recording the delivery thereof in the manner prescribed, he shall be guilty of a misdemeanor, and fined not less than twenty-five nor more than one hundred dollars." (Emphasis added.)

It is obvious that litharge is not expressly exempted by the statute from being labeled "poison." Logically it would seem to follow that litharge is enumerated by statute as requiring a "poison" label.

[4] Violation of a criminal statute unless otherwise provided is negligence per se in a civil action. Hinson v. Dawson, 241 N.C. 714, 86 S.E.2d 585 (1955); Aldridge v. Hasty, 240 N.C. 353, 82 S.E.2d 331 (1954).

[5] Chapter 90 of the *General Statutes of North Carolina* is entitled "Medicine and Allied Professions." Article 4 is entitled "Pharmacy." Part 2 of the article is captioned "Dealing in Specific Drugs Regulated."

[6] This fact may have helped the defendant. "Long acquiescence in the practical interpretation of a statute is entitled to great weight in arriving at its meaning. It is not thought that the real intent of the enactment could have been so generally misunderstood for years on end." State v. Emery, 224 N.C. 581, 587, 31 S.E.2d 858, 862 (1944).

Under the doctrines of *ejusdem generis*[7] and strict construction of penal statutes[8] the meaning of the statute was restricted so as not to apply to the sale of this commercial paint ingredient. Once strict construction is adopted, the decision is sound.[9] There is no North Carolina case in point, so the court used two extra-jurisdictional cases, *Boyd v. Frenchee Chemical Co.*[10] and *McClaren v. G. S. Robins Co.*,[11] as authority.

The *Boyd* case lends support to the decision of the court in the principal case. Plaintiff's intestate, nineteen months old, drank a bottle of shoe cleaner labeled only by its trade name. Action was brought under a Pennsylvania statute under the "Pharmacy" section requiring labeling of poisons. The court held for defendant, stating that although the definition of poison contained in the statute could include the shoe cleaner, the statute could not be construed to regulate the sale of products having no connection with pharmacy. Possibly a distinguishing factor in this case is the statement that "the very name of the product must have brought home to the parents the knowledge that it was a 'fabric cleaner' and not something that their child should drink, and certainly the word 'poison,' even though it was carried

[7] "The statutory construction of the 'ejusdem generis' rule is that, where the general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned." John L. Roper Lumber Co. v. Lawson, 195 N.C. 840, 846, 143 S.E. 847, 850 (1928). "The rule of ejusdem generis is based on the theory that if the legislature had intended general words to be used in their unrestricted sense, it would have made no mention of particular classes." *In re* Bush Terminal Co., 93 F.2d 659, 660 (2d Cir. 1938). Thus in the principal case the words "any persons" mean any persons within the practice of pharmacy according to the *ejusdem generis* construction.

[8] State v. Jordon, 224 N.C. 579, 42 S.E.2d 674 (1947); State v. Heath, 199 N.C. 135, 153 S.E. 855 (1930); Hines v. Wilmington & W.R.R., 95 N.C. 434 (1886).

[9] McGee v. Bennett, 72 Ga. App. 271, 33 S.E.2d 577 (1945) (the doctrine of *ejusdem generis* applied to statutes prescribing label of fungicides). "The construction and operation of penal statutes relating to poisons are governed by the general principles applicable to all statutes, and such statutes, where penal in nature, are strictly construed and will not be extended by implication beyond their express terms." 72 C.J.S., *Poisons* § 4 (1951).

[10] 37 F. Supp. 306 (D.C.N.Y. 1941).

[11] 349 Mo. 653, 163 S.W.2d 856 (1942). Deceased, a workman, was cleaning a boiler with carbon tetrachloride. Breathing the fumes caused his death. It seems that he did not use proper care in procuring adequate ventilation. Wrongful death action was brought by administratrix under a statute requiring "every druggist or other person who shall sell . . . any arsenic, strychnine . . . or other substance . . . usually denominated as poisonous, without having the word 'poison' . . . thereon, shall be fined $25." ILL. REV. STAT. c. 38, § 184 (1937). There are other cases which support the North Carolina court's decision. Levin v. Musser, 110 Neb. 515, 194 N.W. 672 (1923) (deceased drank poisonous non-medicinal oil. The regulatory statute applied only to poisons if they were articles of medicine); Victory Sparkler & Specialty Co. v. Price, 146 Miss. 192, 111 So. 437 (1927) (sparkler fireworks were eaten by a child. The statute was held to apply only to sale of poisons by druggists, thereby exempting defendant).

on the package, would not have deterred a nineteen month old infant from drinking the substance."[12] In the principal case plaintiff used the product for its intended purpose. The *McClaren* case is similar factually, but the statute there does not specifically enumerate carbon tetrachloride as requiring a label, while the North Carolina statute by its terms seemingly requires a label for lead monoxide.[13]

Legislative purpose is heavily relied on by the court and it is correctly stated that the purpose of the act was to regulate the practice of pharmacy.[14] Not involving itself with the text of the statute, the court devotes its attention to the context and title in reaching its conclusion. If the statute applies only to the sale and labeling of poisons by pharmacists, why does the statute contain clauses excepting lead dioxide, lead carbonate, and colors ground in oil and intended for use as paint from being labeled? The defendant offered perhaps the most plausible explanation and one which plaintiff did not contest, *viz.*, that "it is a matter of common knowledge that paint dyes as we know them today were undiscovered in 1905 and that drugstores generally sold the only two paint pigments then available . . . ."[15]

A more liberal construction of a similar statute was given in *Stone v. Shaw Supply Co.*,[16] where plaintiff was injured by yellow phosphorous sold by defendant dealer (not a pharmacist) to one of plaintiff's friends, who gave the substance to the plaintiff. Action was brought under a statute making it unlawful to sell a deadly poison (which included yellow phosphorous) to anyone not aware of its poisonous character. Deciding against defendant's contention that the statute applied only to pharmacy, the court said that the statute should be applied against a dealer not a pharmacist in order to protect the public. Such an approach seems much more realistic in effecting what the statute ostensibly intends—the protection of public health.

Since there is no statutory remedy, the next question is whether the plaintiff has a common-law remedy.[17] Can plaintiff sue the manu-

[12] 37 F. Supp. at 308.

[13] See note 3 *supra*.

[14] N.C. Public Laws (1905), c. 108, §§ 20, 28, entitled, "An Act to Revise, Consolidate, and Amend the Pharmacy Law." N.C. Public Laws (1905), c. 108, § 2 reads, "That the object . . . is to unite the pharmacists and druggists of this state for mutual aid, encouragement and improvement, to encourage scientific research, develop pharmaceutical talent, to elevate the standard of professional thought and ultimately restrict the practice of pharmacy to properly qualified druggists and apothecaries."

[15] Brief for Appellant, p. 18, Porter v. Yoder & Gordon Co., 246 N.C. 398, 98 S.E.2d 497 (1957).

[16] 148 Ore. 416, 36 P.2d 606 (1934).

[17] If plaintiff could prove a cause of action for breach of warranty, he could maintain such action against the manufacturer because of privity of contract between the parties, which North Carolina, in accord with the majority view, requires. Caudle v. F. M. Bohannon Co., 220 N.C. 105, 16 S.E.2d 680 (1941); Thomason v. Ballard & Ballard Co., 208 N.C. 1, 179 S.E. 30 (1935). *But see*

facturer for common-law negligence for failure to warn of the danger? Generally a seller of inherently dangerous articles, known to be dangerous,[18] is under a duty to warn of the danger by labeling or otherwise conveying knowledge of the hazard to persons *likely* to be harmed.[19] However, notice or warning of danger is not required where no danger is reasonably to be anticipated because of the special knowledge or experience of the user.[20] In the principal case plaintiff was a college graduate,[21] an experienced paint contractor,[22] and a buyer of paint products from the defendant for years.[23] It seems that plaintiff could recover for common-law negligence only if a jury should find that an ordinary, reasonable and prudent man of his knowledge and experience would not have known what litharge was.

Davis v. Radford, 233 N.C. 283, 286, 63 S.E.2d 822, 825 (1951) (dictum), 30 N.C.L. Rev. 191 (1952). But in this case there was no breach of warranty. Since the goods were asked for by name, the only implied warranty is that of merchantability, which means that the substance sold is reasonably fit for the ordinary uses it was manufactured to meet. Giant Manufacturing Co. v. Yates-American Machine Co., 111 F.2d 360 (8th Cir. 1940). 46 Am. Jur., *Sales* § 351 (1943); 77 C.J.S., *Sales* § 327 (1952). For convenient groupings of cases in this regard see Annot., 59 A.L.R. 1180 (1929); Annot., 90 A.L.R. 410 (1934); Annot., 135 A.L.R. 1393 (1941). In the principal case defendant would be liable for breach of warranty only if the litharge were unfit for its ordinary use, and there was no evidence to that effect. Simmons v. Rhodes & Jamieson, Ltd., 46 Cal. 2d 190, 293 P.2d 26 (1956).

[18] Guyton v. S. H. Kress & Co., 191 S.C. 530, 5 S.E.2d 295 (1939).

[19] Farley v. Edward E. Tower & Co., 271 Mass. 285, 171 N.E. 639 (1930); Orr v. Shell Oil Co., 352 Mo. 288, 177 S.W.2d 608 (1943); Corum v. R. J. Reynolds Tobacco Co., 205 N.C. 213, 173 S.E. 78 (1933) (dictum); 65 C.J.S., *Negligence* § 100 (1950); Restatement, Torts § 388 (1934); Dillard and Hart, *Product Liability, Directions for Use and Duty to Warn,* 41 Va. L. Rev. 145 (1955); James, *Products Liability,* 34 Tex. L. Rev. 44, 192 (1956); Wilson, *Products Liability,* 43 Calif. L. Rev. 614, 809 (1955). Poisons are included within the rule. McCrossin v. Noyes Bros., 143 Minn. 181, 173 N.W. 566 (1919). Sale of the poisonous substance without labeling it as such must be the proximate cause of injury. Levin v. Musser, 110 Neb. 515, 194 N.W. 672 (1923).

[20] Howard Stores Corp. v. Pope, 1 N.Y.2d 110, 150 N.Y.S.2d 792, 134 N.E.2d 63 (1956); Parker v. State, 201 Misc. 416, 105 N.Y.S.2d 735 (Ct. Cl. 1951); Harper v. Remington Arms Co., 156 Misc. 53, 280 N.Y.S. 862 (Sup. Ct. 1935); Rosebrock v. General Electric Co., 236 N.Y. 227, 140 N.E. 571 (1923); Thrash v. U-Drive It Co., 93 Ohio App. 451, 113 N.E.2d 650 (1951). Restatement, Torts § 388 (b) (1934) requires that defendant have no reason to believe that those for whose use the chattel is supplied will recognize its dangerous condition. Two cases do not even require special knowledge of the buyer when the goods are asked for by name. The court laid down the rule in Gibson v. Torbert, 115 Iowa 163, 88 N.W. 443 (1901), that when a person has reached the age of discretion and is apparently in possession of his mental faculties and asks a druggist for a certain drug, he impliedly represents to the druggist that he knows its qualities. Unless there is something to indicate to the druggist that the purchaser cannot be safely entrusted with the drug, the seller is not liable in damages for injuries to the purchaser resulting from the improper use or handling of the article, no matter how little knowledge the purchaser may in fact have had of its qualities. The vendor's only duty, according to the court, is to supply the buyer with the identical substance asked for. *Accord,* Forney v. Sears. 153 Wash. 615, 280 Pac. 56 (1929).

[21] Transcript of Record, p. 116, Porter v. Yoder & Gordon Co., 246 N.C. 398, 98 S.E.2d 497 (1957).

[22] *Id.* at 55.

[23] *Id.* at 20.

The unfortunate plaintiff in the principal case is without a statutory remedy and probably without a common-law remedy. However, the case can serve a much greater purpose than food for torts' thought.

Despite whatever logic there may have been in including the sale of lead compounds used in paint under the "Pharmacy" caption of the *North Carolina General Statutes,* section 90-77 is now in an anomalous position. It would seem to be as much in the public interest and safety to have legislation regulating the sale of lead compounds used as paint ingredients as it is now for public safety that we have legislation regulating the sale of insecticides, fungicides, and rodenticides.[24] The only existing regulatory legislation in the general area of paint products applies to the sale of linseed oil[25] and turpentine.[26] In view of the inherently dangerous quality of lead compounds used as paint ingredients, the slight cost to the manufacturer in placing appropriate labels on containers,[27] and the welfare of the public, it is submitted that the duty to warn should be made statutory.

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Wills—Devises and Bequests by Implication

In *Finch v. Honeycutt*[1] the testator declared in his will: "My estate is a community estate[2] with my wife Georgia Greer Honeycutt and has been held as such for several years when paying Federal and State Income Tax.

"Therefore it is my will that my half of my and her (wife) estate be given to my three children."[3] No further mention of the other half of the estate was made anywhere in the will. *Held,* a half interest of all the real and personal property of the deceased went to the wife in fee under the will by virtue of the doctrine of devises and bequests by implication.

In an earlier North Carolina case, *Burcham v. Burcham,*[4] the testator willed his wife "support" and expressed his desire that she should have

[24] N.C. GEN. STAT. § 106-65.1 (1952). This is the insecticide, fungicide and rodenticide act.

[25] N.C. GEN. STAT. § 106-285 (1952).

[26] N.C. GEN. STAT. § 106-303 (1952).

[27] The insecticide, fungicide, and rodenticide act requires the labeling of the enumerated poisons with a skull and crossbones symbol and a "poison" label in red letters against a differently colored background. N.C. GEN. STAT. § 106-65.3 (3) (1952). This would seem to be an appropriate label to place on containers of lead compounds used as paint ingredients.

[1] 246 N.C. 91, 97 S.E.2d 478 (1957).

[2] The doctrine of community property is given effect in only seven states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, and Texas. 41 C.J.S., *Husband and Wife* § 462(c) (Supp. 1957).

[3] 246 N.C. at 92, 97 S.E.2d at 480.

[4] 219 N.C. 357, 13 S.E.2d 615 (1941).