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Lawrence Landsroner

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## *Tort Liability for Death by Poisoning*

*Lawrence Landskroner\**

**L**IABILITY IN DEATHS resulting from accidental ingestion of harmful material, toxic food, or drug product often is difficult to ascertain. Lack of compliance with the Federal Food and Drug Statutes,<sup>1</sup> or with the State or Municipal Code, often is the critical problem. Determination of liability in these cases usually rests on one of three major bases, in cases involving manufacturers and distributors:

- (a) That the product is improperly labeled.
- (b) That it is not labeled in compliance with the municipal, state or federal laws.
- (c) That it is an inherently dangerous product.

If any one of these bases is established, there is a breach or omission of duty on the part of the manufacturer or distributor in placing the said product on the market without proper safeguards for ultimate users.

The majority of such deaths occur accidentally, when the decedent uses a product which is not properly labeled, or which does not have adequate warnings on the label, or does not set forth antidotes in the event that the product is taken internally.

A drug may have a given reaction upon one person and an entirely different reaction on another. An individual's physical characteristics may influence his reaction to the drug. This reaction is influenced by many factors, such as age, individual tolerance, dosage, or hypersensitivity to the agent.

For example, a youngster (attracted by the characteristic minty odor), drinks a bottle of rubbing solution or methyl alcohol, and eventually dies. This happens in the City of Cleveland on an average of between ten and fifteen times per year. The national death rate in such cases has increased to such a degree that the Federal Government has enacted protective regulations, contained in the Federal Food and Drug Act.<sup>2</sup> These are described below, and set forth a standard of care and a warning to manufacturers and distributors of these products.

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\* Of the Cleveland Bar; Graduate of Vanderbilt Univ. Law School, after attending Denison Univ. and Miami Univ.

<sup>1</sup> U. S. Food and Drug Act, Title 21, U. S. C. A. And see, generally, Press, *Accidental Poisoning in Childhood*, Thomas Co., Springfield, Ill. (1956).

<sup>2</sup> 21 U. S. C. A., Sec. 502.07.

Many manufacturers and distributors of liniment or rubbing alcohol and similar compounds sold in Ohio do not list the two antidotes required by Sections 3719.33 and 3719.99 of the Ohio Revised Code. Therefore, one should check carefully for liability in this type of situation. In the State of Ohio, the following statutes are applicable:

Sections 3719.01 (General Code Section 12672-1) through 3719.99 regulate the sale of barbiturates, narcotics and drugs, and prescribe the standards of care required of producers, manufacturers and distributors of poisons.

Section 3719.32, *Regulating the Sale of Poisons*, itemizes the chief poisons, and penalties.

Sections 3719.33 and 3719.35 make provisions for labeling and distribution.

There is a decided variance between Revised Code Section 3719.32 and Section 3719.33, where there are certain exceptions allowed by the law, in setting forth what drugs or components need not bear a *poison* label. But Section 3719.33 states that, even though the word *poison* need not be spelled out on the package, there is no exception covering the failure to place two antidotes on a label, even if the word *poison* may be excluded under the statute, where the compound actually is a poison. Thus, the manufacturer or distributor must place notice of two antidotes on the bottle, especially if the product or solution may be attractive to children.

It is suggested that the following steps be taken in preparing a claim for wrongful death by poisoning:

Send the product to a laboratory for analysis; or, where there is a death involved, to the Coroner's office.<sup>3</sup> Arrange for autopsy.<sup>4</sup> While the findings are being made by the Coroner's office, investigative work should be done in order to locate the source of the product. Determine whether or not the product is "in interstate commerce." Evidence must also be produced to show the causal connection between the ingestion of the product and the death. A subpoena duces tecum should be issued to the Coroner's office, bringing in the Coroner's report and the findings from the autopsy, in addition to the death certificate. The death cer-

<sup>3</sup> See, Gerber, *Postmortem Examinations*, 6 Clev.-Mar. L. R. 194 (1957); McCormack, *The Pathologist and the Autopsy*, *Ibid.*, p. 205; *Petition of Sheffield Farms Co.*, 126 A. 2d 886 (N. J., 1956).

<sup>4</sup> *Ibid.*, n. 3.

tificate may be admitted into evidence under Section 2317.42 of the Ohio Revised Code.

The ruling case in Ohio on the admissibility of the certificate of death is *Glen v. National Supply Co.*<sup>5</sup> The case ultimately rests on the certificate of death, chemical expert testimony, and a physician's diagnosis as to cause of death.

In the *Glen* case, the death certificate stated that the cause of death was cancer; and it was argued that allegation of poison as the cause of death was nothing more than an opinion. Clearly, this was true. Nevertheless, the court said the evidence of the death certificate served only as prima facie proof of the facts therein stated. Other testimony may be employed in order to disprove any and all of the contents of the certificate. If such testimony is introduced, it need only equal the prima facie weight of the certificate's "testimony" in order to overcome its effect. The weight of counter evidence is, of course, for the jury.

Three statutory authorities must be considered in the preparation of a trial brief concerning death due to ingestion of a poison:

1. Is there a violation of a City Municipal Ordinance?
2. Is there a violation of the State law?
3. Is there a violation of the Federal Food and Drug Act?

Generally the Municipal Code of the City of Cleveland or of other Ohio cities, and also the State law, continually refer to the Federal Food and Drug Act for definitions, explanations, or rules. Thus, the City of Cleveland's Code Section covering this particular point, Ordinance 503.53,<sup>6</sup> states that: ". . . The standards of purity and labeling for food and drug products not specifically defined in this code shall be those standards established by the Federal Food and Drug Law of the Federal Security Administration. In the case of meats and meat products the standards shall be those of the Bureau of Animal Industry, United States Department of Agriculture . . ."

This requires search of both provisions even for basic definitions. Thus, what is a *drug*? The term *drug*, as used in the Ohio Code, is defined thus: ". . . all medicines for the internal or external use or inhalation, antiseptics, disinfectants, and cosmetics."<sup>7</sup>

<sup>5</sup> *Glen v. National Supply Co.*, 101 Ohio App. 6 (1954).

<sup>6</sup> City of Cleveland Codified Ordinances, Sec. 503.53.

<sup>7</sup> See, Food and Drug Act, 21 U. S. C. A., Sec. 7; and 14 Ohio Juris. 1051.

The Ohio Revised Code states that:<sup>8</sup> “. . . it prohibits also the offer for sale or delivery or possession with intent to sell or deliver a drug which is misbranded as defined therein.” In addition, it says, “No person shall manufacture for sale or offer for sale, or deliver or have in his possession with intent to sell or deliver a drug or article of food which is adulterated within the meaning of Sections 3715.01, 3715.02, through 3715.37, inclusive of the Revised Code”<sup>9</sup> . . . “or offer for sale or deliver or have in his possession with intent to sell or deliver a drug or article of food which is misbranded within the meaning of this Section . . . and makes the manufacture, sale or offer of sale a punishable crime.”<sup>10</sup>

It is apparent that the law aims to hold a manufacturer, packer, distributor or retailer subject to what amounts to warranty liability. But if the manufacturer or processor of food or drugs does not deal with the ultimate consumer, and does not as a matter of fact sell to him, the question of privity of contract arises.<sup>11</sup>

The courts have held that implied warranty runs with many articles, such as food or drugs. An increasing number of jurisdictions, including Ohio, now are recognizing liability on the theory of implied warranty.<sup>12</sup> Ohio recently adopted the rule of manufacturers' liability in tort, as for express warranty, where advertising induces the purchase. This Court of Appeals decision (Skeel, J.) has aroused widespread interest and approval.<sup>13</sup>

Usually, exercise of due care by the defendant is not a sufficient defense. In effect he is held to the duty of an insurer that his goods are fit for human consumption and use. In the *Leach* case<sup>14</sup> the court ruled that the jury could not speculate as to the breach of warranty. Where courts have rested decisions on warranty regardless of privity of contract, a more stringent

<sup>8</sup> Ohio Rev. Code, Sec. 3715.08 (Gen. Code 5774).

<sup>9</sup> Note how closely related are “adulteration” and “mislabeling” or “misbranding.”

<sup>10</sup> *Ibid.*, n. 9. And see, *Gielski v. State of N. Y.*, 3 Misc. (N. Y.) 2d 578 (1956).

<sup>11</sup> See, 173 C. C. H. Reports 20, Vol. 2; *Food, Drug and Cosmetic Reporter* (1956).

<sup>12</sup> Implied warranty: *Leach v. Joyce Products Co.*, 66 Ohio L. Abs. 296, 116 N. E. 2d 834 (1952).

<sup>13</sup> See, *Skeel, Product Warranty Liability*, 6 *Clev.-Mar. L. R.* 94 (1957). See, for comment on it, 2 *N. C. S.* (18) 141 (June 15, 1957); and see, *Rogers v. Toni Home Permanent Co.*, 139 N. E. 2d 871 (Ohio App., 1957).

<sup>14</sup> Above, n. 12.

liability for the manufacturer and dispenser results.<sup>15</sup> Thus, a court found that the Ohio Sales Code<sup>16</sup> imposed an implied warranty of merchantable quality on the retailer of a bottle of ale which had exploded. It was held to be a dangerous instrumentality and "adulterated" within the meaning of the Ohio Pure Food Laws,<sup>17</sup> because it contained an ingredient injurious to health. And in *Kropar v. Procter and Gamble Company*,<sup>18</sup> a wire in a cake of soap injured the plaintiff. The Court ruled that there was an implied warranty from the manufacturer to the ultimate consumer.

Of this strict view, Commerce Clearing House Food, Drug, and Cosmetic Law Reporter said:<sup>19</sup>

"... one of the results of passing statutes on Pure Food and Drug Laws has been to make a dispenser of food and beverages subject to a more stringent liability. Suit is brought on the basis of negligence of the defendant with an allegation in the pleadings that the particular statute has been violated."

The fact that there may not have been any contract between the parties now may be of small consequence. In most instances, the question in issue is, under the statute, "has the Act been violated." If it has been, the next question is whether the violation amounts to negligence per se, or is merely evidence of negligence. Obviously, in jurisdictions where violation of the statute constitutes negligence per se, the plaintiff has a much easier time of it. If he proves a violation, even without proving negligence, he has at least a case that can go to the jury.

The Federal Food and Drug Act<sup>20</sup> spells out the required prominence of labeling. In addition, the various sub-sections set forth other details.<sup>21</sup>

Violation of a statute or ordinance may or may not be negligence per se.<sup>22</sup> The ruling case in Ohio concerning a "dangerous

<sup>15</sup> *Mahoney v. Shaker Square Beverage Co.*, 46 Ohio Op. 250 (1951); and Skeel, above, n. 13.

<sup>16</sup> Ohio Rev. Code, Sec. 1315.14, in the *Mahoney* case, supra, n. 15.

<sup>17</sup> *Ibid.*, Code, n. 16, Title 37.

<sup>18</sup> *Kropar v. Procter and Gamble Co.*, 160 Ohio St. 489 (1954).

<sup>19</sup> 133 C. C. H. Food, Drug and Cosmetic Law Reporter, Vol. 2, p. 2301.

<sup>20</sup> Food and Drug Act, 21 U. S. C. A. 502.

<sup>21</sup> *Ibid.*, n. 20.

<sup>22</sup> *Claypool v. Mohawk Motors Co., Inc.*, 155 Ohio St. 8, 97 N. E. 2d 32 (1951).

instrumentality" is *White Sewing Machine v. Fiesel*.<sup>23</sup> This case sets forth the doctrine of liability for a dangerous instrumentality and uses the "foreseeable test." It means, in brief, that if the occurrence could have been reasonably foreseen, or if the article is inherently dangerous, a prima facie case is spelled out by resulting injury. The plaintiff should then have an opportunity to present his case to the jury as to the sufficiency of the facts.

*Ruling Case Law* states:<sup>24</sup> "If a merchant or dealer knows an article is dangerous, it is his duty to properly label the article." Put otherwise this means that, if the natural proximate result of the negligence can be reasonably anticipated, then the court shall find for the plaintiff. *Ruling Case Law*<sup>25</sup> also states: "that injury that is foreseeable or could be anticipated rendered the manufacturer liable therefor." Cases in point are *Carter v. Towne*,<sup>26</sup> *McCrossen v. Hoyes*,<sup>27</sup> *Hasbichs v. R. & M. Co.*<sup>28</sup>

In *Levin v. Muser*<sup>29</sup> there was no label on the bottle, and the manufacturer had full knowledge of the dangerous character of the instrumentality. Plaintiff was therefore entitled to a verdict. *Ruling Case Law*<sup>30</sup> also says that "a manufacturer and retailer owes a duty to the ultimate consumer to exercise caution in the compounding and packing and labeling drugs and it is liable for any injuries resulting from defective or mis-labeled products."

A case that neatly illustrates the rule is *Mossrud v. Lee*.<sup>31</sup> It involved a sale of a poison to destroy "Quackgrass," without the label required by the statute. The seller's negligence in not properly labeling the container was held to be the proximate cause of the loss of cattle which ingested the compound. This was sufficient to warrant submission of the case to the jury. The Court stated that the reason for holding the manufacturer of the "Quackgrass" responsible was that his failure to comply with statutory requirements pertaining to labeling sufficed for the jury to find reasonably that the defendant had lulled the plaintiff into a false sense of security.

<sup>23</sup> *White Sewing Machine Co. v. Fiesel*, 28 Ohio App. 152 (1927).

<sup>24</sup> R. C. L., Sec. 8.

<sup>25</sup> *Ibid.*, n. 24.

<sup>26</sup> *Carter v. Towne*, 98 Mass. 567 (1868).

<sup>27</sup> *McCrossen v. Hoyes*, 143 Minn. 181, 173 N. W. 566 (1919).

<sup>28</sup> *Hasbichs v. R. & M. Co.*, 139 Wis. 357, 121 N. W. 157 (1909).

<sup>29</sup> *Levin v. Muser*, 194 N. W. 672 (Nebr., 1923).

<sup>30</sup> R. C. L., Sec. 801.

<sup>31</sup> *Mossrud v. Lee*, 163 Wis. 229, 157 N. W. 758 (1916).

One point which should be noted is that contributory negligence is probably not a defense in an action for breach of warranty.<sup>32</sup> In theory, since warranty is an action in contract, not in tort, the question of whether or not the plaintiff "was in the exercise of due care" is immaterial; and the majority of the Courts have held that this would not be a defense. The statute of limitations is extended in a breach of warranty action past the two years negligence limitation, to 6 years. Therefore, it is wise to join both the negligence and warranty theories in the same cause of action. If the plaintiff does not prevail under his negligence action, the case still may be considered with respect to the warranty theory. In *Kropar v. Procter & Gamble Company*,<sup>33</sup> the court ruled that when inspection will not reveal the defect, the ultimate consumer may sue the manufacturer on the warranty theory.<sup>34</sup>

A manufacturer or distributor of a product which is used in interstate commerce, and which comes within the meaning of the Federal Food and Drug Act,<sup>35</sup> the Ohio Code Sections,<sup>36</sup> or pertinent City Ordinances,<sup>37</sup> is liable for violation of these ordinances and statutes, and such violation now usually seems to be viewed as negligence per se.

In summary then: A death claim due to poisoning should be checked for any possible violation of the local City Ordinances. Then, check Ohio Revised Code Sections 3719.01 through 3719.99, to see if there is a violation of the State Food and Drug Act pertaining to narcotics, barbiturates and poisons. The next step, as to statutes of this kind, is to see whether or not there is a violation of any local or general regulations covering prescription-type drugs. Then see if the drug was used in interstate commerce. If it was, check the Federal Food and Drug Act Sections, regulations and interpretations, including the congressional comments, as set forth hereinabove.

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<sup>32</sup> *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N. W. 382, 17 A. L. R. 649 (1920); *Challis v. Hartloff*, 136 Kans. 823, 18 P. 2d 199 (1933); *Friend v. Childs Dining Hall Co.*, 231 Mass. 65, 120 N. E. 407, 5 A. L. R. 1100 (1918); *Bahlman v. Hudson Motor Car Co.*, 290 Mich. 683, 288 N. W. 309 (1939).

<sup>33</sup> Above, n. 18.

<sup>34</sup> See also, 1 Belli, *Modern Trials*, Sec. 47 (1954).

<sup>35</sup> Food and Drug Act, 21 U. S. C. A. 502.

<sup>36</sup> Cited in text, above.

<sup>37</sup> See above, Cleveland's provision.