

# *Nova Law Review*

---

*Volume 25, Issue 1*

2000

*Article 7*

---

## The Healthy Debate: A Proposal for the Addition of Negligent Failure to Warn and Strict Liability Failure to Warn Jury Instructions to the Florida Standard Jury Instructions for Product Liability Cases

Michael Flynn\*

\*

Copyright ©2000 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <http://nsuworks.nova.edu/nlr>

# The Healthy Debate: A Proposal for the Addition of Negligent Failure to Warn and Strict Liability Failure to Warn Jury Instructions to the Florida Standard Jury Instructions for Product Liability Cases

Michael Flynn \*

---

## TABLE OF CONTENTS

I. INTRODUCTION .....	267
II. THE FLORIDA LAW OF NEGLIGENT AND STRICT LIABILITY FAILURE TO WARN CLAIMS IN PRODUCT LIABILITY CASES.....	268
III. THE DISTINCTION BETWEEN NEGLIGENT FAILURE TO WARN AND STRICT LIABILITY FAILURE TO WARN CAUSES OF ACTION .....	270
IV. PROPOSED JURY INSTRUCTIONS .....	272
V. CONCLUDING ANALYSIS OF PROPOSED JURY INSTRUCTIONS .....	276

## I. INTRODUCTION

Everyday in courtrooms throughout Florida, plaintiff and defendant trial lawyers and trial judges engage in a healthy debate over jury instructions. It is here that the law of Florida is really made and unmade. No area of the law engenders more of a debate than product liability law.<sup>1</sup> These debates routinely dissect warranty, negligence, and strict liability causes of action. Thankfully, the Supreme Court of Florida provides guidance for trial lawyers and trial judges through the *Florida Standard Jury Instructions*.<sup>2</sup> These standard jury instructions cover express and implied warranty product

---

\* Professor of Law, Nova Southeastern University Shepard Broad Law Center. J.D., cum laude, Gonzaga University, 1977; B.A., magna cum laude, Gonzaga University, 1973. The author gratefully acknowledges and thanks Karen Slater, J.D., Nova Southeastern University Shepard Broad Law Center, 2002, for her superior work in the preparation of this article.

1. John Howie & Ladd Sanger, *Failure to Warn: The Difference Between Strict Liability and Negligence from a Plaintiff's Perspective*, 13 AIR & SPACE L. 3 (1999).

2. See generally Fla. Standard Jury Instructions in Civil Cases (1998).

liability claims, strict liability manufacturing and design defect claims,<sup>3</sup> and negligence claims.<sup>4</sup> Yet, something is missing!

What is missing are *Florida Standard Jury Instructions* for negligent failure to warn and strict liability failure to warn causes of action. Absent this guidance from the supreme court, trial lawyers and trial judges scramble to put together jury instructions of which neither the lawyers, nor the judges, can be confident will hold up on appeal. What should be a healthy debate becomes a needless, unhealthy debate.

The purpose of this article is to propose standard jury instructions for product liability negligent failure to warn and strict liability failure to warn causes of action for use in the Florida courts. The article first examines Florida law concerning negligent failure to warn and strict liability failure to warn product liability causes of action. Next, the article presents proposals for negligent failure to warn and strict liability failure to warn jury instructions based on Florida law. Finally, the article concludes with an analysis of the proposed standard jury instructions.

## II. THE FLORIDA LAW OF NEGLIGENT AND STRICT LIABILITY FAILURE TO WARN CLAIMS IN PRODUCT LIABILITY CASES

Whether a substantive difference exists between theories of negligent failure to warn and strict liability failure to warn has long been a topic of debate.<sup>5</sup> Because theories of strict liability and negligence in the failure to warn context use some of the same terminology and address some of the same issues, many courts blur the line that separates each theory into distinct causes of action.<sup>6</sup> Some have gone as far as to deny that any practical difference exists, insisting that strict liability and negligent failure to warn claims are interchangeable.<sup>7</sup> This debate seemingly originated with the writing of the *Restatement (Second) of Torts*<sup>8</sup> and continues with the drafting of the *Restatement (Third) of Torts, Product Liability*.<sup>9</sup> While other states and academics characterize the difference between negligent and strict

3. *Id.* §§ PL 4, 5.

4. *Id.* § 3.2.

5. See Richard N. Pearson, *Strict Liability and Failure to Warn*, 3 PROD. LIAB. L.J. 108 (1992); see also Howie & Sanger, *supra* note 1, at 3.

6. THE FLORIDA BAR CONTINUING LEGAL EDUCATION, PRODUCTS LIABILITY IN FLORIDA § 2.4, (3d ed. 1995) (hereinafter PRODUCTS LIABILITY).

7. Howie & Sanger, *supra* note 1, at 3.

8. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

9. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1997); Pearson, *supra* note 5, at 108.

liability failure to warn claims as “fuzzy,”<sup>10</sup> “difficult,”<sup>11</sup> and “illusory,”<sup>12</sup> Florida has chosen to separate strict liability failure to warn and negligent failure to warn claims.<sup>13</sup> Perhaps the easiest way to understand the distinction between these two causes of action under Florida law is to first examine how these claims are the same.

Under either a negligence theory or a strict liability theory, product sellers and manufacturers must warn foreseeable users of a product.<sup>14</sup> Further, liability for failure to warn foreseeable product users will extend to those who suffer personal injury or property damage as a result of using the product, or being within the vicinity of the use of the product.<sup>15</sup> Hence, a manufacturer’s liability in negligence and strict liability extends to bystanders.<sup>16</sup> An exception to this rule can be found in cases where the product is a drug, prescribed for a patient’s use through a physician. In these cases, the manufacturer is only required to warn the prescribing physician.<sup>17</sup> Florida’s adoption of this “learned intermediary rule,” did not, however, protect the manufacturer of fingerprint ink cleaner for injury to a prisoner because the police were not considered “learned intermediaries.”<sup>18</sup>

A failure to warn claim, whether sounding in negligence or strict liability, includes not only failing to warn of a particular risk, but also giving an inadequate warning.<sup>19</sup> In short, the mere existence of a warning is not dispositive of the adequacy of the warning. An adequate warning must notify the user not only of the dangerous propensities of the product, but also of the dangers of use and misuse.<sup>20</sup> The wording in a warning must be directed to the significant dangers arising from the failure to use the product in the prescribed manner, such as the risk of serious injury or death.<sup>21</sup> The failure of a warning to effectively communicate the risk consistent with this

10. PRODUCTS LIABILITY, *supra* note 6, at § 2.4.

11. See Michael A. Pittenger, Note, *Reformulating the Strict Liability Failure to Warn*, 49 WASH. & LEE L. REV. 1509, 1510 (1992).

12. Howie & Sanger, *supra* note 1, at 3.

13. *Ferayomi v. Hyundai Motor Co.*, 711 So. 2d 1167, 1169 (Fla. 4th Dist. Ct. App. 1998).

14. *Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242, 248–49 (Fla. 1st Dist. Ct. App. 1984); 3 Fla. Torts (MB) § 70.21 [2][d] (2000).

15. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 89 (Fla. 1976).

16. *Id.*

17. *Upjohn Co. v. MacMurdo*, 562 So. 2d 680, 683 (Fla. 1990).

18. *Hayes v. Spartan Chem. Co.*, 622 So. 2d 1352, 1354 (Fla. 2d Dist. Ct. App. 1993).

19. Howie & Sanger, *supra* note 1, at 4.

20. *Tampa Drug Co. v. Wait*, 103 So. 2d 603, 607 (Fla. 1958).

21. *Brown v. Glade & Grove Supply, Inc.*, 647 So. 2d 1033, 1036 (Fla. 4th Dist. Ct. App. 1994).

standard renders the warning inadequate and the product seller or manufacturer liable.<sup>22</sup>

The wording or language of a product warning must be of such intensity as to attract the attention of a product user and be commensurate with the potential danger in using the product.<sup>23</sup> For example, a warning label on a chemical sealant was considered inadequate because it “did not particularly call attention to itself” by its composition, type, or color, and failed to communicate with sufficient intensity the severity of the danger in the use of the sealant.<sup>24</sup>

A warning may also be considered inadequate by virtue of its location.<sup>25</sup> Where the driver of a tractor was killed when the tractor he was operating rolled over, a warning in the user’s manual would not preclude a finding that the manufacturer was liable for failing to adequately warn.<sup>26</sup> The court explained that just because a warning in an instruction manual is adequate, a jury could find a manufacturer liable for failing to warn because the warning was not affixed to the tractor.<sup>27</sup> Further, the fact that a warning complies with industry guidelines for warnings does not automatically render the warning adequate.<sup>28</sup>

Finally, both a negligent and strict liability failure to warn case can be based on the failure of a manufacturer to warn of potential dangers from the misuse of a product. A manufacturer must warn of a product danger, which could cause injury, if the misuse of the product is foreseeable.<sup>29</sup>

From the foregoing, it would be quite easy for trial lawyers and judges to conclude that with so many overlapping principles, a negligent failure to warn and a strict liability failure to warn claim are identical and interchangeable.<sup>30</sup> But if Florida trial lawyers and judges so concluded, they would be fooled.

### III. THE DISTINCTION BETWEEN NEGLIGENT FAILURE TO WARN AND STRICT LIABILITY FAILURE TO WARN CAUSES OF ACTION

The key to understanding the real difference between negligent and strict liability failure to warn claims rests with an analysis of the seller’s or

22. Brito v. Palm Beach, 753 So. 2d 109, 113 (Fla. 4th Dist. Ct. App. 1998).

23. Radiation Tech., Inc. v. Ware Constr. Co., 445 So. 2d 329 (Fla. 1983); Am. Cyanamid Co. v. Roy, 466 So. 2d 1079, 1082 (Fla. 4th Dist. Ct. App. 1983).

24. Roy, 466 So. 2d at 1082–83.

25. Brown, 647 So. 2d at 1035.

26. *Id.*

27. *Id.*

28. *Id.*

29. High v. Westinghouse Elec. Corp., 610 So. 2d 1259, 1262 (Fla. 1992).

30. See PRODUCTS LIABILITY, *supra* note 6, at § 2.4.

manufacturer's knowledge of product risks.<sup>31</sup> Negligent failure to warn is just that, a negligence cause of action.<sup>32</sup> Therefore, a product seller or manufacturer must warn of product risks if a reasonably prudent product seller or manufacturer would supply such a warning.<sup>33</sup> Implicit in this rule of law is the requirement that a reasonably prudent product seller need only warn about product risks known to such seller or those kinds of product risks which a reasonably prudent product seller should have known about.<sup>34</sup> A reasonably prudent product seller or manufacturer is considered an expert with expert knowledge about its own product.<sup>35</sup> Therefore, if a reasonably prudent product seller could reasonably foresee injury to a product user, however rare, the product seller or manufacturer has a duty to warn.<sup>36</sup>

In contrast, strict liability is not concerned with the reasonably prudent seller or manufacturer standard.<sup>37</sup> Strict liability does not require an evaluation of the product seller or manufacturer's conduct.<sup>38</sup> A product seller can be found strictly liable for failing to warn even though the seller was completely non-negligent.<sup>39</sup> Under Florida law, a prima facie case of strict liability does not require a showing of negligence.<sup>40</sup> In a strict liability failure to warn case, the product seller will be liable for failing to warn about a product risk that was known or knowable in light of the prevailing and generally recognized best scientific information available at the time of product manufacture and sale.<sup>41</sup>

Florida law recognizes that absent the requirement that the product seller have actual or constructive knowledge of product risk, a strict liability failure to warn claim would render a product seller an insurer.<sup>42</sup> Florida clearly rejects imposing strict liability on a product seller for failing to warn of product risks it could not have known about.<sup>43</sup> Further, Florida rejects the theory of imputing knowledge of product risks which were not knowable at the time of product manufacture and sale to the product seller to set up a

31. 3 Fla. Torts (MB) § 70.21 [2][d][v] (2000).
32. See 41A FLA. JUR. 2D *Products Liability* § 19 (1995).
33. See *id.*
34. See 3 Fla. Torts (MB) § 70.21 [2][d][i] (2000).
35. *Advance Chem. Co. v. Harter*, 478 So. 2d 444, 448 (Fla. 1st Dist. Ct. App. 1985).
36. *Id.*
37. *Ferayorni v. Hyundai Motor Co.*, 711 So. 2d 1167, 1172 (Fla. 4th Dist. Ct. App. 1998).
38. *Id.*
39. *Jennings v. BIC Corp.*, 181 F.3d 1250 (11th Cir. 1999); *Ferayorni*, 711 So. 2d at 1171.
40. *Ferayorni*, 711 So. 2d at 1172.
41. *Id.*
42. *Id.*
43. *Id.*

strict liability claim.<sup>44</sup> Finally, it is important to note that a product seller is required to warn only of those risks which are known or discoverable based on the prevailing and best scientific information available, as opposed to every risk which might be suggested by some obscure piece of research or information.<sup>45</sup>

The foregoing distinction in Florida law between a negligent and a strict liability failure to warn claim can be traced to the *Ferayorni v. Hyundai Motor Co.*<sup>46</sup> case. This 1998 Fourth District Court of Appeal case relied on and adopted the reasoning of the Supreme Court of California in *Anderson v. Owens-Corning Fiberglas Corp.*<sup>47</sup> In *Anderson*, the Supreme Court of California was concerned that applying strict liability to a failure to warn cause of action would reduce the product seller to an insurer.<sup>48</sup> It is this concern, shared by the *Ferayorni* court, that prompted the subtle but substantial difference in the knowledge required of a product seller in a negligent failure to warn claim and a strict liability failure to warn claim.<sup>49</sup>

#### IV. PROPOSED JURY INSTRUCTIONS

The consequence of Florida recognizing the distinction between a negligent and strict liability failure to warn cause of action is that a plaintiff who pleads both claims is entitled to two jury instructions.<sup>50</sup> As the *Ferayorni* court noted, the giving of a negligent failure to warn jury instruction does not satisfy the need for a strict liability failure to warn jury instruction.<sup>51</sup> Although there exists *Florida Standard Jury Instructions* for negligence in general,<sup>52</sup> and product liability for manufacturing and design defect claims,<sup>53</sup> *Ferayorni* specifically points out that, not only is there no jury instruction for a negligent failure to warn claim, but also that “[t]he Committee on Standard Jury Instructions in Civil Cases has not provided standard instructions on any theory of strict liability duty to warn.”<sup>54</sup> *Florida Standard Jury Instructions* Product Liability IV, comment 2, specifically states, “[p]ending further development of Florida law, the committee reserved the question of whether there can be strict liability for failure to

---

44. *Id.*

45. *Ferayorni*, 711 So. 2d at 1172.

46. *Id.* at 1167.

47. 810 P.2d 549 (Cal. 1991).

48. *Id.* at 552–53.

49. *Ferayorni*, 711 So. 2d at 1170.

50. *Id.*

51. *Id.*

52. Fla. Standard Jury Instructions in Civil Cases § 4.1 (1998).

53. *Id.* §§ PL 4, 5.

54. *Ferayorni*, 711 So. 2d at 1171.

warn and, if so, what duty is imposed on the manufacturer or seller.”<sup>55</sup> The *Ferayorni* case appears to have resolved this question.<sup>56</sup> Now, all that is needed is the publication of standard jury instructions for both types of claims. The following are proposed standard jury instructions for a negligent failure to warn and strict liability failure to warn cause of action.<sup>57</sup>

### NEGLIGENT FAILURE TO WARN

**The issue for your determination on the claim of (claimant) against (defendant) is whether (defendant) was negligent [in failing to warn of the dangers of (describe product)] [or] [in failing to give an adequate warning of the dangers of (describe product)].**

**Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful [manufacturer] [or] [distributor] would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances or in failing to do something that a reasonably careful person would do under like circumstances. A reasonably careful [manufacturer] [or] [distributor] would possess expert knowledge in the area of (describe product). A reasonably careful [manufacturer] [or] [distributor] would warn of the dangers in using a product if [he] or [she] or [it] knew of, or should have known of the dangers, and should have foreseen (claimant’s) use of (describe product), and (claimant’s) particular injury, however rare. A product is considered dangerous when the risk of injury to the user of the product is not obvious.**

**A warning is inadequate if its [wording is inadequate] [or] [its location is inadequate] [or] [if the manner in which it was conveyed is inadequate]. The wording is inadequate unless it makes apparent the product’s potentially harmful consequences and contains specific language directed at the significant dangers caused by a failure to use the product in the prescribed manner. The location of a warning is**

---

55. Fla. Standard Jury Instructions in Civil Cases §§ PL 1–5, cmt. 2. (1998).

56. See *Ferayorni*, 711 So. 2d at 1172.

57. The idea for this article actually grew out of a writing assignment I gave to the law students in my Product Liability class. As is almost always the case, my students exceeded my expectations in drafting model jury instructions. In particular, one student, Mary Clarke, J.D. Nova Southeastern University Shepard Broad Law Center, 2000, distinguished herself in this writing assignment. In fact, the proposed jury instructions in this article are taken in large part from Ms. Clarke’s writing assignment. Therefore, Ms. Clarke deserves all of the credit for putting together these proposed jury instructions. Any mistakes or inaccuracies are clearly due to my attempt to add and revise her draft. By the way, she deserved and received an “A” grade for her work on these instructions.



**inadequate if it is not likely to reach the user. The manner of the warning is inadequate unless it is of such intensity to cause a reasonable person to exercise caution, for his or her own safety, equal to the potential danger.**

## PL

### PRODUCT LIABILITY

**The issues for your determination on the claim of (claimant) against (defendant) are whether the (describe product) [sold] [supplied] by (defendant) was defective when it left the possession of (defendant) and, if so, whether such defect was a legal cause of [loss] [injury] [or] [damage] sustained by (claimant or person for whose injury claim is made). A product is defective**

#### *PL 6 strict liability (warning defect)*

**if due to [a failure to provide a warning] [and] [or] [an inadequate warning] the product does not adequately warn of a particular risk that was known or knowable in light of the generally recognized and best scientific and medical information available at the time of manufacture and distribution and the product is expected to and does reach the user without substantial change affecting that condition.**

**A warning is inadequate if its [wording is inadequate] [or] [its location is inadequate]. The warning's wording is inadequate unless it makes the potential harmful consequences apparent and contains specific language directed at the significant risks or dangers caused by a failure to use the product in the prescribed manner. The location of a warning is inadequate if it is not likely to reach the user. The manner of the warning is inadequate unless it is of such intensity to cause a reasonable person to exercise caution equal to the potential danger.**

**If the greater weight of the evidence does not support the claim of (claimant), your verdict should be for (defendant).**

**[However, if the greater weight of the evidence does support the claim of (claimant), then your verdict should be for**

(claimant), and then you shall consider the defense raised by (defendant).] \*[However, if the greater weight of the evidence does support the claim of (claimant), then you shall consider the defense raised by (defendant). On the defense, the issues for your determination are (state defense issues).]

\* “Greater weight of the evidence” means the more persuasive and convincing force and effect of the entire evidence in the case.

#### NOTE ON USE

1. When defense issues are to be submitted, use the charge contained within the second pair of brackets. In other cases, use the first bracketed sentence instead.

2. The committee intends for part PL6 of this instruction to be used in conjunction with the current Product Liability Florida Model Jury Instruction, and should be inserted after PL5 (strict liability).

#### COMMENT

1. *Inherently Dangerous*. The plaintiff is not required to show that the product was inherently dangerous to maintain a strict liability for failure to warn cause of action because whether or not a product is “inherently dangerous” is not determinative of the applicability of a strict liability cause of action. *Brown v. Glade & Grove Supply, Inc.*, 647 So. 2d 1033 (Fla. 4th Dist. Ct. App. 1994); *Ferayorni v. Hyundai Motor Co.*, 711 So. 2d 1167 (Fla. 4th Dist. Ct. App. 1998).

2. *Knowledge*. Florida law requires a showing of knowledge for a strict liability failure to warn claim. *Ferayorni v. Hyundai Motor Co.*, 771 So. 2d 1167 (Fla. 4th Dist. Ct. App. 1998). However, the theories of negligent failure to warn and strict liability failure to warn remain distinct and separate because the required showing of knowledge is less burdensome for a strict liability action—the plaintiff need not show that the manufacturer’s or distributor’s conduct fell below the standard of care. *Id.* Rather, the plaintiff need only show that the risk of danger was known or knowable in light of the generally recognized and best scientific and medical information available at the time of manufacture and distribution. *Id.*

3. *Risk-utility*. The committee recommends that no charge be given regarding the risk of the danger in relation to the utility of the product on the issue of failure to warn because the cost of precaution, the warning label, is

so minimal that it virtually never outweighs the likelihood of harm and severity of harm from failing to provide such a warning.

4. *Adequacy of Warning.* The committee finds that the adequacy of a warning as explained by *American Cyanamid Co. v. Roy*, 466 So. 2d 1079 (Fla. 4th Dist. Ct. App. 1984), should be addressed in the jury instructions for a strict liability failure to warn case.

## V. CONCLUDING ANALYSIS OF PROPOSED JURY INSTRUCTIONS

The two key aspects of the proposed negligent and strict liability standard jury instructions are that they substantively confirm and guide trial lawyers and trial judges regarding Florida law and mechanically follow the same format as the other standard jury instructions.

The negligent failure to warn jury instruction mirrors the definition of negligence found in the *Florida Standard Jury Instructions in Civil Cases* section 4.1, and accurately advises jurors that negligence, in the context of product warnings, can be both in the failing to give a warning or in giving an inadequate warning. Further, the proposed jury instruction avoids any mention of “inherently dangerous” in reference to a product risk or danger because that term is outdated and no longer applicable in Florida.<sup>58</sup> Instead, the proposed jury instruction excludes obvious product dangers from the product sellers’ duty to warn.<sup>59</sup>

The second part of the negligent failure to warn instruction, which is also present in the strict liability failure to warn jury instruction, is essential for jurors to be able to measure the adequacy of a warning. Without being either plaintiff or defendant friendly, this part of the jury instruction leaves the determination of the reasonableness and sufficiency of the product warning to the jury, where it belongs. The breakdown of the jury instruction into the wording, location, or manner of a product warning enables a jury to consider any one of the three inadequacies as the basis for liability.

The proposed instruction avoids any juror confusion about whether product warnings include directions or instructions on the use of a product by defining a warning in terms of product dangers. Further, the proposed instruction shields the product seller from liability for the unintended, unforeseeable misuse of a product by defining product dangers in terms of using a product in the prescribed manner. Finally, the proposed jury instructions use of the words “wording,” “location,” “manner,” and “intensity” is a purposeful choice to use and define legal concepts in plain and straightforward language.

---

58. *Advance Chem. Co. v. Harter*, 478 So. 2d 444, 447 (Fla. 1st Dist. Ct. App. 1985).

59. *Sanders v. Am. Body Armor & Equip., Inc.*, 652 So. 2d 883 (Fla. 1st Dist. Ct. App. 1995).

The proposed strict liability failure to warn jury instruction not only incorporates previous language concerning the adequacy of a product warning, but also patterns the *Product Liability Standard Jury Instructions* already adopted by the Supreme Court of Florida. Therefore, the language of the proposed instruction is consistent with the previously adopted jury instructions. The critical addition to this proposed jury instruction is the knowledge requirement that distinguishes a negligent failure to warn cause of action from the strict liability failure to warn cause of action.

The adoption of these proposed jury instructions does not amount to a reform of product liability law in Florida. Rather, such adoption provides needed guidance to trial lawyers and trial judges and ends an unhealthy and needless debate.