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Unsound Expansion of Strict Liability Failure to Warn in California: *Johnson v. Monsanto Co.*

by Claire C. Weglarz

California's First District Court of Appeal in *Johnson v. Monsanto Co.,* 52 Cal.App.5th 434 (2020), affirmed a finding of liability against the manufacturer of glyphosate-based herbicides Roundup Pro and Ranger Pro ("Roundup") for failure to warn about the products' alleged potential to cause non-Hodgkin's lymphoma (NHL). Product liability defendants should be concerned about an unpublished part of the San Francisco appellate court's opinion because the court disregarded California's well-established standard for strict liability failure to warn claims. Despite this error, the California Supreme Court declined to hear the matter.

California's standard for strict liability failure to warn was established in *Anderson v. Owens-Corning Fiberglas Corp.*, 53 Cal.3d 987 (1995), which held there is a duty to warn only of risks that are "known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution." The court said that eliminating the knowledge component would turn "strict liability into absolute liability." Further, "it was never the intention of the drafters of the doctrine to make the manufacturer or distributor the insurer of the safety of their products" and "never their intention to impose *absolute* liability."

Anderson's objective scientific knowledge standard, if properly applied, should eliminate the risk of a defendant being held liable based on an outlier study or expert's critique of that science at trial—neither of which represents the generally accepted, prevailing view of the science.

In *Johnson*, however, the court expanded strict liability failure to warn to include "*potential* risks" that "exist[] in possibility" or are "capable of development into actuality." This language is taken out of context from a discussion in *Valentine v. Baxter Healthcare Corp*., 68 Cal.App.4th 1467, 1483-1484 (1999) (1st Dist.) comparing failure to warn in strict liability versus negligence. *Valentine* affirms that both failure to warn theories encompass *Anderson*'s scientific knowledge standard.

Johnson involved a school district grounds manager who contracted NHL. As a part of his job, Johnson used Roundup heavily with protective gear, though about 80% of the time spray would drift onto exposed skin and he occasionally suffered "heavy exposure" when his protective gear malfunctioned. He used Roundup from June 2012 to January 2016.

Johnson's presentation at trial focused on a March 2015 report by the World Health Organization's International Agency for Research on Cancer (IARC). The IARC working group, which included one of Johnson's experts, classified glyphosate as "probably carcinogenic to humans." In rebuttal, Monsanto presented a number of experts and studies that identified no causal link between glyphosate and NHL, including a 2018 National Cancer Institute study.

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IARC's position is an outlier. Roundup has been approved as safe for use in the U.S. for more than 40 years and its active ingredient (glyphosate) is the most widely used herbicide in the world. "[E]very government regulator . . . with the exception of the IARC, has found that there was no or insufficient evidence that glyphosate causes cancer." (*Nat'l Ass'n of Wheat Growers v. Becerra*, 468 F.Supp.3d 1247, 1260 (E.D. Cal. 2020)). For instance, in 2020, the Environmental Protection Agency found "[a]fter a thorough review of the best available science . . . there are no risks of concern to human health when glyphosate is used according to the label and that it is not a carcinogen."

EPA's findings mirror those of other countries and federal agencies, including the U.S. Department of Agriculture, Canadian Pest Management Regulatory Agency, and European Food Safety Authority, among others. A June 2021 draft assessment for the EU's renewal of glyphosate concluded, "taking all the evidence into account . . . a classification of glyphosate with regard to carcinogenity is not justified" and "glyphosate meets the approval criteria for human health."

Faithful application of *Anderson* should have resulted in judgment for Monsanto on Johnson's failure to warn claims because there was (and continues to be) no generally accepted prevailing view in the scientific community that glyphosate is carcinogenic.

The *Johnson* court's requirement that manufacturers and distributors must warn of "potential risks" regardless of generally accepted scientific knowledge is problematic because it creates absolute liability for injuries caused by unlabeled products. A study that reflects a minority scientific view *after* a product is purchased and used may result in crippling liability and damages if there was no warning. This is precisely what the *Anderson* court sought to guard against.

Despite *Johnson*, *Anderson* is controlling precedent and California's failure to warn standard still requires a manufacturer or distributor to have actual or constructive knowledge of a particular risk that is generally accepted in the scientific community before strict liability may be imposed. The altered strict liability standard applied in *Johnson* is unpublished and may not be relied upon or cited in California courts. The California Supreme Court's denial of Monsanto's petition for review has no significance. Until the California Supreme Court holds otherwise, *Anderson* remains binding precedent over failure to warn litigation in the Golden State.

In addition to precedent, courts should consider the policy reasons against holding manufacturers and distributors liable for risks unknown to them at the time of sale. Decisions such as *Johnson* may incentivize manufacturers and distributors to issue "overly broad, and thus practically useless, warnings" (*Anderson*), leading consumers to tune out warnings altogether.

A good case study for the perils of over-warning exists in California's ubiquitous Proposition 65 labels. The 1986 Proposition 65 ballot initiative was intended to provide consumers with information about the carcinogenic nature and toxicity of products so they can make informed purchases. But now virtually *every* building and product sold in California bears a Proposition 65 warning label. Over-warning has resulted in desensitization to the Proposition 65 warnings.

The over-warning issue has become so widespread that efforts have been made to remove some of the more absurd warnings and revise the warning language and methods of transmission. As stated by California's Attorney General, "it does not serve the public interest to have the [sic.] almost the entirety of the state of California 'swamped in a sea [of] generic warning signs.'" (*Consumer Def. Grp. v. Rental Hous. Ind. Members*, 137 Cal. App. 4th 1185, 1208 (2006)).

California should adhere to a science-based approach that requires warnings only for dangers known to exist at the time of sale.

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