

## Buyer Beware

### To the Editor:

Early in my career, my former law partner, Richard L. Steinberg, dragged me to the library to scour through Blackstone's *Commentaries on the Laws of England* to research an issue of common law. Richard was writing a brief (along with Harry Philo and Linda Miller Atkinson) in a case involving a drug product manufacturer's duty to directly warn the user of hazards associated with the use of a prescription drug. He hoped to persuade the judge that language in more recent cases adopting the so-called "learned intermediary" rule reflected a misapplication of dicta rather than a correct application of the common law. At the time, I thought it was a fool's errand. I was wrong.

Although U.S. District Judge Avern Cohn did not cite Blackstone's *Commentaries* in his decision and his analysis was different than ours, he did discuss the development

of the common law duty of a manufacturer to warn the user of known dangers inherent in the use of that product (*Odgers v Ortho Pharmaceutical Corp*, 609 F Supp 867, 873, n 12 (ED Mich 1985)). He also cited the Bible ("All that I am required to do in this case is to find the rule of law to be applied to the dispute currently before me, see *Matthew 6:33* (King James)"). Richard knew that Judge Cohn shared his appreciation for the history of our jurisprudence and how important it was to understand that history when deciding a novel legal issue. He taught this newbie lawyer an important lesson.

Judge Cohn's "Vignette" (November 2011 *Michigan Bar Journal*) regarding Justice Antonin Scalia's citation of a decision of the Michigan territorial supreme court reminded me of that lesson. It also reminded me of Judge Cohn's brave ruling in *Odgers*, which has been decimated by legislation limiting consumer rights. As the great trial lawyer Harry Philo used to say, "The law is never

settled until it is settled right, it is never right until it is just, and it is never just until it serves society to the fullest." I am confident that history and rational thinking will someday prevail in Michigan and that drug product manufacturers will once again be held to the common law duty to directly warn users of known hazards.

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