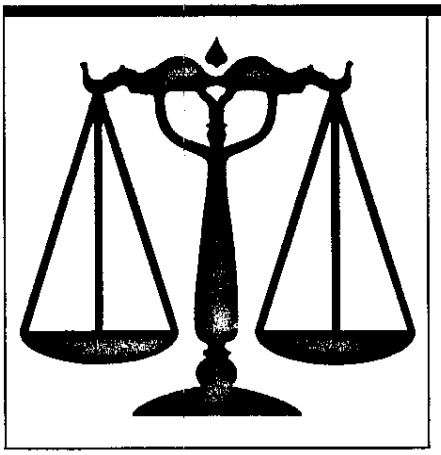

LEGALLY SPEAKING

by Lawrence Savell

Who's liable when the "product" is information?

When you think of the potential claims that may be brought against a publisher, you probably think of traditional allegations such as libel, invasion of privacy and copyright infringement.

It is less likely you would think about product liability, usually associated with things such as exploding gas tanks or soda bottles with foreign objects inside.

However, the reality is that claims are increasingly being made that the publication of a book or a magazine or newspaper article or advertisement has caused personal injuries to a reader who relied on the information presented.

Fortunately for publishers, the courts so far have not given much credence to such claims, which continue, as reflected in the May 13 decision by the Texas Court of Appeals in *Jan Way v. Boy Scouts of America.*

The September 1988 issue of *Boys' Life* magazine, published by the Boy Scouts, included an advertising supplement on shooting sports. It was sponsored by the National Shooting Sports Foundation Inc. (NSSFI) and included ads by Remington Arms Co. Inc. and other firearms and ammunition manufacturers.

Articles — such as "Earn Your Straight Shooter Award" and "Getting Started in the Shooting Sports" — provided information about earning merit badges for shooting; the biathlon, an Olympic shooting sport; and the Presidential Sports Award, earned for shooting accomplishments. The supplement also included a checklist on firearm safety.

After reading the supplement, 12-year-old Rocky William Miller and several of his friends located an old rifle and a .22-caliber cartridge. On Nov. 19, 1988, Rocky was killed when the rifle accidentally discharged.

Rocky's mother, Jan Way, sued the Boy Scouts, NSSFI, and Remington. Way claimed that publication of the supplement was negligent and that the information in it made the magazine a defective product. She alleged that the supplement's presentation of information about the power and speed of firearms, with images promoting the fun and excitement of shooting to boys of Rocky's age, motivated him to experiment with the rifle.

The defendants asked the court to dismiss the suit without a trial. They argued, among other things, that (1) Texas law does not recognize negligent publication claims; (2) there was no duty to warn of the allegedly dangerous nature of the supplement; (3) *Boys' Life* and its supplement were not "products" under products liability law; and (4) the First Amendment barred Way's claims.

The trial court granted the defendants' motions. Way appealed. The Court of Appeals affirmed, concluding that Texas law does not recognize a cause of action for publishing an article or ad that allegedly causes harm under such circumstances.

Way's negligence claims required proof of: a legal "duty" owed by one to another, a breach of that duty and resulting damages.

To determine whether a "duty" exists, Texas courts apply a "risk-utility" balancing test. This involves weighing the foreseeable risk against the social utility of the actor's conduct and the burden of guarding against injury.

The court, concluding that the defendants owed no duty to Rocky, decided that his experimentation with the rifle was not a reasonably foreseeable consequence of the publication. Way herself had characterized Rocky's conduct with the rifle and cartridge as an "experiment" and said Rocky and the other boys were not supervised by an adult when the rifle fired. By contrast, the articles, photographs and ads presented firearm use as a supervised, structured and safety-conscious activity.

Moreover, on the utility side of the equation, the court concluded that encouraging safe and responsible use of firearms by minors with the Boy Scouts and as part of other supervised activities was of significant social value.

Thus, the defendants had no duty either to refrain from publishing the supplement or to add any warning about the danger of firearms.

Turning to the "strict liability" — that is, liability without regard to the defendant's "fault" claims — the court again upheld the trial court's rejection of Way's arguments.

Under Texas law, a manufacturer may be responsible for physical harm caused by a defective product or a misrepresentation concerning the quality of the product.

However, the essence of a product's liability claim under either theory is the existence of a "product" as defined by such laws.

Way did not complain about the supplement's physical properties — the toxicity of the ink or the sharpness of the paper. She alleged that the ideas and information encouraged children to engage in dangerous activities.

Ruling them "intangible characteristics, not tangible properties," the court

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(Savell is a products liability lawyer with Chadbourne & Parke and sits on the media law committees of the New York State and City bar associations.)

Legally

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said, "Products liability law is geared to the tangible world." It concluded that the ideas, thoughts, words and information in question failed to qualify as products under the law.

As the Way court noted, the case follows a trend of courts refusing to hold publishers liable for physical injuries to readers.

For example, last year the Hawaii Supreme Court ruled for Fodor's Travel Publications Inc. and against a reader who alleged that a travel guide failed to warn of dangerous ocean conditions at a Kauai beach, causing him injuries when he bodysurfed there. Fodor's did not author its publications; it printed manuscripts from outside writers. The court ruled that as a publisher of a work of general circulation that neither authors nor guarantees the contents, Fodor's had no duty to warn readers about accuracy. It agreed that a publication — specifically its information — is not a "product" for purposes of a suit and that books and magazines cannot be rendered "defective" by their contents.

Similarly, a 1991 California decision about a reference guide to collecting and cooking mushrooms rejected claims by readers who became critically ill after picking and eating mushrooms. The court ruled that the publisher — which neither wrote nor edited the book — had no duty to investigate independently the accuracy of its texts, nor to warn of such lack of investigation, as it did not guarantee its contents.

Courts have, however, ruled that publishers may be held responsible for personal injuries to readers in the narrow situation of aeronautical charts. Some courts applying the law of California, Colorado and Nevada have held that charts graphically depicting geographical features or instrument approach information for pilots may be considered "products."

Nevertheless, courts have refused to extend the reasoning applicable to these technical publications to the broader claims regarding ideas and expressions in popular periodicals and books.

Although the courts have largely rejected readers' claims against publishers for personal injuries, there is no guarantee that future decisions will follow this trend. Those courts that ruled that publishers have no duty to verify or guarantee the accuracy of texts submitted by others might be more receptive to claims if the author were an employee, such as a staff writer. Additionally, if a plaintiff can convince a court that a technical publication merits "aeronautical chart" treatment, recovery may be more likely.

Finally, the frequent inclination to give a clearly injured person his or her "day in court" may allow such claims eventually to be presented to a potentially sympathetic jury. ■E&P