

of which it knows or should know in exercise of reasonable care, danger must be reasonably foreseeable and injury must be proximately caused by failure to warn.

8. Druggists ☞10

Evidence established that defendant drug manufacturer knew or should have known that its ethical drug, a quadruple antigen with a prophylaxis against diphtheria, pertussis, tetanus and poliomyelitis might cause encephalopathies in some users and that it was negligent in failing to give adequate warning of that danger, in action for damage to brain and central nervous system of infant resulting from use of drug.

9. Druggists ☞9

Even if case of encephalopathy was the first occurring after administration of defendant's ethical drug, that did not preclude finding that such as foreseeable by defendant and that defendant was negligent in failure to give adequate warning.

10. Damages ☞132(3)

Where plaintiff as a baby suffered convulsions following administration of defendant's defective drug and at time of trial, when plaintiff was seven years old, he walked unsteadily, lacked coordination, spoke but a few words, had none of basic childhood skills normally possessed by children of this age, plaintiff suffered permanent and irreversible injuries to his brain and central nervous system and plaintiff would in all probability be institutionalized shortly for inability of his parents to give him necessary care, plaintiff was entitled to award of \$500,000.

Melvin M. Belli, of Belli, Ashe, Gerry & Ellison, San Francisco, Cal., Mart R. Vogel of Wattman, Vogel, Vogel, Bright & Peterson, Fargo, N.D., Carlton G. Nelson, and Jerome J. Mack, of Nelson & Mack, Grand Forks, N.D., for plaintiff.

Harold D. Shaft, of Shaft, Benson, Shaft & McConn, Grand Forks, N.D., for defendant.

MEMORANDUM AND ORDER

RONALD N. DAVIES, District Judge.

This is a product liability case tried to the Court without jury, involving the ethical drug Quadrigen made by the Defendant, Parke-Davis and Company, containing four antigens: diphtheria toxoid, tetanus toxoid, pertussis (whooping cough) vaccine and poliomyelitis vaccine. It was also described as a quadruple antigen with a prophylaxis against diphtheria, pertussis, tetanus and poliomyelitis. Jurisdictional requirements of 28 U.S.C.A. § 1332, have been met.

The Plaintiff was originally shown as "Robert M. Stromsodt, guardian ad litem of Shane Stromsodt, a minor." By ex parte order entered by this Court April 1, 1966, leave was granted Plaintiff to amend the caption of the amended complaint to include "and Robert M. Stromsodt, individually." The Defendant moved the Court to set aside this order, urging that it was given no opportunity to object to it and contending that the North Dakota Statute of Limitations had run as against any claim of Robert M. Stromsodt, individually. A ruling was reserved on this motion.

To make certain that the issues are solidly joined in this cause, and that its ultimate resolution may not be attacked by reason of any real or fancied future claim to which the Defendant may think itself exposed, the Defendant's motion upon which ruling was reserved, must be and it is hereby granted. The Defendant's motion to dismiss the cause of action as to Robert M. Stromsodt, individually, must be and it is hereby granted, for the reason that the complaint fails to state a cause of action as to Robert M. Stromsodt, individually. This case is ordered captioned as it appears herein, that is, "Shane Stromsodt, a minor, by Robert M. Stromsodt, his guardian ad litem. Plaintiff, versus Parke, Davis and Company, a corporation, Defendant," and as so styled it will be adjudicated.

In 1953 Parke, Davis commenced studies for the purpose of determining the feasibility of combining poliomyelitis vaccine with the company's trivalent antigen sold under the trade name "Triogen," containing diphtheria toxoid, tetanus toxoid and pertussis vaccine. Parke, Davis' product, Quadrigen, which has heretofore been described, was finally developed and licensed March 25, 1959, and its manufacture authorized by the Department of Health, Education and Welfare (HEW). Commercial marketing of the drug under the trade name "Quadri-