

with Quadrigen suffered fevers of 104 degrees and above. Parke-Davis alleges that the reason such study was not mentioned in its brochure was that the Sauer report had not been published until after Parke-Davis had written its package insert. However, it would appear from the evidence that Parke-Davis was fully familiar with the contents of this report in light of Dr. Sauer's continuing association with defendant since the early days in the development of the pertussis vaccines. As the cases cited above hold, it was Parke-Davis' duty timely to amend its brochure to inform the medical profession of any significant new developments or information which could reasonably be expected to affect a doctor's decision to use the product. Had Parke-Davis promptly amended its literature to include the results of the study conducted by Dr. Sauer, the medical profession would have been apprised prior to the day that the infant plaintiff was inoculated of the unusual reactivity produced by Quadrigen.

[31] Having raised the possibility at trial that plaintiff's injury could have been caused by an allergic reaction and therefore due to plaintiff's own particular hyper-sensitivity (a possibility rejected by me herein), it would appear sufficient to note in passing that defendant was under a duty in 1959 to warn the medical profession of this possibility, especially in view of the fact that such an etiological theory had been recognized since 1947. Berg, *Neurological Complications of Pertussis Immunization*, *British Medical Journal* 26 (July 5, 1958). Inasmuch as Parke-Davis did see fit to warn of a possible allergic reaction to penicillin and streptomycin, the two antibiotic residuals from the poliomyelitis vaccine, it similarly should have warned of that possibility with regard to the pertussis component.

Finally, the warning that "[l]ocal reactions have been known to be more severe when the child is in the incubative stage of pertussis" was ambiguous in that it reasonably could have misled the members of the medical profession to believe that only in cases where the child was in the incubative stage of pertussis would encephalitic symptoms occasionally occur. *Stromsodt v. Parke-Davis & Co.*, supra, 257 F.Supp. at 997. This was Dr. Feinberg's interpretation and, in the opinion of this Court, could reasonably have been followed by others.

After due consideration and for the reasons set forth herein, it is the opinion of this Court that the defendant was negligent both in its failure to adequately test its product prior to releasing it on the commercial market and for its failure to adequately warn the medical profession of the dangers inherent in its use. As stated by the late Justice Jackson, dissenting in *Dalehite v. United States*:¹⁰

"This is a day of synthetic living, when to an ever-increasing extent our population is dependent upon mass producers for its food and drink, its cures and complexions, its apparel and gadgets. These no longer are natural or simple products but complex ones whose composition and qualities are often secret. Such a dependent society must exact greater care than in more simple days and must require from manufacturers or producers increased integrity and caution as the only protection of its safety and well-being. Purchasers cannot try out drugs to determine whether they kill or cure. * * * Where experiment or research is necessary to determine the presence or the degree of danger, the product must not be tried out on the public, nor must the public be expected to possess the facilities or the technical knowledge to learn for itself of inherent but latent dangers. The claim that a hazard was not foreseen is not available to one who did not use foresight appropriate to his enterprise."

[32] Finally, as to the damages claimed, I have been guided by the principle enunciated by the New York courts that damages are compensatory, not punitive. Little purpose would be served by further detailing the catastrophe irrevocably visited on this infant child.

[33] The plaintiff father is, of course, entitled to recover for the loss of the child's services and for medical attendance and expenses. *Kalina v. General Hospital*, 31 Misc.2d 18, 20, 220 N.Y.S.2d 733, 735 (Sup.Ct.1961), aff'd, 18 A.D.2d 737, 235 N.Y.S.2d 808 (4th Dep't 1962), aff'd mem., 13 N.Y.2d 1023, 245 N.Y.S.2d 599, 195 N.E.2d 309 (1963). The parties have stipulated that his out-of-pocket payment for hospital and medical expenses for the infant total \$3,470.55 and payments made by him to the State hospitals total \$2,812.97, for which he is entitled to recover herein. Eric has been confined to State institutions since January 30, 1962 and will require institutional care, either of a public or private nature, for the rest of his life.

[34-36] Defendant suggests that since the infant plaintiff might be cared for at State expense, the doctrine of *Drinkwater v. Dinsmore*, 80 N.Y. 390 (1880)

¹⁰ 346 U.S. 15, 51, 73 S.Ct. 956, 97 L.Ed. 1427 (1953).