Labels, Liability and Preemption

Analysis of the *MSD v. Albrecht* U.S: Supreme Court Judgment of 2019

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Abstract: The most recent U.S. Supreme Court judgment has established that pharmaceutical companies selling originator drugs remain liable for damages incurred by patients who – based on an assessment by the judge under State law – were not duly warned about drug side effects. It is only when the FDA has explicitly refused the company's self-introduced warnings in its label that liability can be avoided based on the doctrine of federal preemption. In Switzerland, the solution would probably not be very different, in that a company would also escape liability if it could prove that Swissmedic refused the addition of a proposed warning in the professional information.

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I. Introduction

On May 20, 2019, the US Supreme Court decided yet another case of federal preemption with respect to drug (medicine) liability.[1] This is the fourth case decided by the highest Court.[2] This is unusual as the

1 587 U.S. __ (2019), 139 S.Ct. 1668, available at https://www.supremecourt.gov/opinions/18pdf/17-290_i425.pdf. The judgment was issued unanimously; however, Justice Thomas filed a concurring opinion; Justice Alito also filed an opinion concurring in the judgment, in which Chief Justice Roberts and Justice Kavanaugh joined. This case was closely followed with several amicus briefs filed in support of the parties; these briefs are available from https://www.scotusblog.com/case-files/cases/merck-sharp-dohme-corp-v-albrecht/.

2 Previously the Supreme Court had ruled on three pharmaceutical preemption cases:
- *Wyeth v. Levine*, 555 U.S. 578 (2009), a 6–3 judgment finding that State tort law claims are not preempted by the federal law with regard to *original* prescription drugs.
- *PLIVA Inc. v. Mensing*, 564 U.S. 604 (2011), a 5–4 judgment finding that "Federal drug regulations applicable to generic drug manufacturers directly conflict with, and thus preempt, state-law tort claims alleging a failure to provide adequate warning labels."
- *Mutual Pharmaceutical Co. v. Bartlett*, 570 U.S. 480 (2013), a 5–4 judgment finding again that federal law preempts a state design defect claim (inadequacy of a drug's warnings) against a generic drug manufacturer because federal law "prohibits generic drug manufacturers from independently changing Food and Drug Administration (FDA) approved drug labels". Two additional Supreme Court cases have dealt with preemption regarding medical devices: *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008), (preemption in favor of Premarket-Approved (PMA) Class III medical devices) and *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001).

These cases gave rise to a large number of comments, for example: A. W. Langvardt, Generic Pharmaceuticals and the "Unfortunate Hand" Dealt to Harmed Consumers: The Emerging State Court Resistance, 17 Minnesota Journal of Law, Science & Technology 556 (2016); B. Wolfman/A. King, Mutual Pharmaceutical CO. V. Bartlett and its Implications, Georgetown, 2013; GJ Wartman. Life after Riegel: a fresh look at medical device preemption one year after Riegel v. Medtronic, Inc., 64(2) Food Drug Law Journal pp. 291–311 (2009); Kesselheim/Studdert, The Supreme Court, preemption, and malpractice liability. N Engl J Med. 2009 Feb 05; 360(6):559-61; Gross/Curry, The federal preemption debate in pharmaceutical labeling product liability actions, Tort Trial Insur Pract Law J. 2007 Fall 43(1):35-70; A. Zimmerman, Regulating Safety After Merck v. Albrecht, The Regulatory Review, Jul 18, 2019 at https://www.theregreview.org/2019/07/18/zimmerman-after-merck-albrecht/; B.S. Rose/C.J. Falletta, Merck Sharp & Dohme Corp. v. Albrecht: The U.S. Supreme Court Weighs In On Preemption, Tuesday, July 9, 2019, at https://www.natlawreview.com/article/merck-sharp-dohme-corp-v-albrecht-us-supreme-court-weighs-preemption; J.M. Knobler, Merck v. Albrecht: Victories, Uncertainties & Opportunities from Supreme Court's Return to Branded-Drug Preemption, 34(8) WLF Legal Backgrounder, at https://www.wlf.org/2019/06/28/publishing/merck-v-albrecht-victories-uncertainties-and-opportunities-from-supreme-courts-return-to-branded-drug-preemption/; Morten et al., The Supreme Court's Latest Ruling on Drug Liability and its Implications for Future Failure-to-Warn Litigation, J Law Med Ethics. 2019 Dec;47(4) pp. 783–787.

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Court grants *certiorari* only in a very low percentage of cases (1 to 5%).[3] The recurrence of such cases "reveal a Court deeply divided over whether juries in tort cases should be able to second-guess the FDA [Food and Drug Administration] after the agency has approved a drug".[4]

In its *Merck Sharp & Dohme Corp. v. Albrecht* judgment, the Court confirmed and clarified the approach it had already decided in the previous case of *Wyeth v. Levine* (2009).[5] With extremely limited exceptions, drug companies selling originator drugs cannot escape civil liability by claiming impossibility preemption based on a contradiction between FDA regulations and State laws duties to warn patients. The standard remains one of "clear evidence" that the FDA would have rejected the requested change to add warnings; moreover, whether this standard is met is to be decided by judges, not juries.

The present article summarizes the US judgment (section II) and then analyzes the likely outcome should a similar affair have taken place Switzerland (section III).

II. The US Supreme Court's *Merck Sharp Dohme* Judgment of 2019

Companies selling originator drugs can usually comply both with the federal requirements enforced by the U.S. FDA and by the various States' requirements pertaining to product liability. The former governs *inter alia* the content and the appearance of the product label (broadly speaking).[6] This document is established in cooperation and sometimes following negotiations between the drug company applying for marketing approval and the FDA. It can and must be updated to reflect new information, notably new or increased risks for patients. However, State law may call for additional warnings to be included when necessary to provide full information to physicians and ultimately to patients. This obligation is grounded on general diligence duties. When injured patients sue for damages, state courts are to decide whether drug companies met this obligation to issue proper warnings. Thus, the application of State law may lead to the conclusion that additional warnings should have been added to the label, with failure to have done so resulting in liability. In other words, patients who would have avoided the harm if the additional warning had been included may recover damages under State law. Such cases of liability have been typically decided entirely by juries; States have no administrative agencies charged with deciding upon the label's content.

Even though conflict between Federal law and State laws is usually absent, it may sometimes occur.

For instance, the FDA may have received the corresponding risks information, may have assessed it and yet decided not to intervene to mandate new warnings in the label. Yet, even if the FDA did not (re)act, authorization holders remain free to add new warnings on their own, i.e. without the prior approval of the FDA. This is the so-called CBE procedure (for "changes being effected").[7] If the FDA does not formally oppose CBE changes, the conflict will have been "solved", since the company is able to meet its obligations both under Federal law and under State law.

On the other hand, if the FDA were to order company-initiated changes to be removed, which the FDA is entitled to do,[8] the company would have to obey. In this (rare) situation, State law and Federal law would indeed lead to contradictory results: the drug manufacturer cannot abide by both at the same time.

The *Merck Sharp & Dohme* (MDS) case, which gave rise to the present Supreme Court judgment, provides an interesting intermediate situation. Merck (hereafter: MSD[9]) was aware of the risk of significant atypical femoral fractures for patients taking its best-selling anti-fracture (more accurately anti-osteoporosis) drug Fosamax.[10] In September 2008,[11] MSD approached the FDA and proposed a label update through the PAS (prior approval supplement[12]) procedure.[13] In April and May 2009,[14] the FDA disagreed with MSD's suggested changes.[15] However, it

3 For statistics, see https://supremecourtpress.com/chance_of_success.html. More generally the website: www.empiricalscotus.com.

4 A. W. Langvardt, p. 596.

5 The *Merck Sharp Dohne v. Albrecht* judgment contains a detailed summary of the *Wyeth v. Levine* case in its section II.A.

6 For this notion, see the judgment at issue at section I.A.

7 See 21 Code of Federal Regulations (CFR) 314.70(c)(6)(iiii)(A).

8 21 CFR 314.70(c)(7).

9 The Supreme Court refers to Merck Sharp Dohme as simply Merck, but here, to avoid confusion with Merck KgB, I have preferred the abbreviation MSD.

10 For a short medical explanation, see the judgment at section I.B.; see further B. J. Edwards, Bisphosphonates and Nonhealing Femoral Fractures: Analysis of the FDA Adverse Event Reporting System (FAERS) and International Safety Efforts, A Systematic Review from the Research on Adverse Drug Events And Reports (RADAR) Project, J Bone Joint Surg Am. 2013 Feb 20; 95(4): 297–307. MSD's knowledge was first theoretical. Actual adverse event reports received by MSD following the launch of its drug made this knowledge concrete. For the nearly full review of Fosamax by the FDA, see the FDA access page https://www.accessdata.fda.gov/scripts/cder/daf/index.cfm?event=overview.process&ApplNo=020560.

11 Appealed judgment of the Third Circuit, 852 F.3d 268 (3d Cir. 2017), chapter I.C, available at https://casetext.com/case/in-re-fosamax-alendronate-sodium-prods-liab-litig-3.

12 21 CFR 314.70(b).

13 Fosamax was approved in the United States in 1995. MSD became first aware of possible atypical fracture risk in 2000 or 2001. In its PAS application, MSD used terms that could be interpreted to downplay the risk, such as "stress fractures" or "low energy femoral shaft fractures".

14 852 F.3d 268 (3d Cir. 2017), chapter I.C.

15 According to the judgment, the reason for this disagreement was that "identification of stress fractures may not be clearly related to the atypical subtrochanteric fractures that have been reported in the literature" Section I.B. According to the FDA, "for most practitioners, the term 'stress fracture' represents a minor fracture and this would contradict the seriousness of the atypical femoral fractures associated with [Fosamax]".

did not reject the application, but invited MSD to amend and resubmit it,[16] a course of action which MSD did not follow. Instead, MSD chose to make the change on its own using the CBE process, but only with the innocuous wording of "stress fracture" and only in certain sections of the label.[17] In turn, in January 2011, the FDA imposed a label change highlighting the risk of Fosamax-induced atypical femoral fractures, and not just "stress fractures".[18] Throughout this period, as the concurring opinion points out, MSD and the FDA had remained in close contacts and had pursued their discussion on risk appraisal.[19]
Patients who sued under State law had incurred fractures before the 2011 change. They argued that MSD should have, of its own, immediately added a strong warning, regardless of the ongoing discussion with the FDA. The drug company defended itself, claiming that the FDA had all the necessary information and nonetheless had refused to include the proposed reference to stress fractures.
The Third Circuit had ruled in favor of patients (over 500 of them joined in a class action). The case was appealed to the Supreme Court by MSD. The key issues to be decided were as follows: First, should the previous *Wyeth v. Levine* standard of FDA impossibility preemption be maintained? If yes, how should its "clear evidence" requirement be interpreted? And secondly, who of the judge or of the jury should to decide whether there is such clear evidence?
In a unanimous judgment,[20] the Supreme Court ruled that, for federal pre-emption to apply, the FDA must have had all the necessary information (along with a reasoned evaluation by the drug manufacturer[21]), and yet decided *affirmatively* that the added warning must not be introduced.[22] Thus, it upheld and even reinforced the 2008 *Wyeth* standard. The two above-mentioned conditions are cumulative. Three Justices, who agreed on the main conclusion, pointed out that it is not always clear what should be held as an affirmative decision not to introduce a change[23]. In the present case, the FDA had refused a softly-worded risk warning, but did not have the opportunity to refuse a strongly-worded warning[24]. For the majority of the Court, MSD could have added an appropriate warning through the CBE process. Conflict being absent, harmed patients could pursue their lawsuits under state-law-failure-to-warn. The plaintiff bar has hailed this judgment as entailing a higher standard to meet by drug companies wishing to invoke impossibility preemption.
The second legal issue decided by the Supreme Court was whether it is for the jury or for the judge to decide whether there is "clear evidence" that the FDA had all information and yet refused explicitly the disputed warning. The Supreme Court ruled that the matter was a complex one and thus primarily one of law[25] to be decided entirely by the judge[26].

> "The question often involves the use of legal skills to determine whether agency disapproval fits facts that are not in dispute. Moreover, judges, rather than lay juries, are better equipped to evaluate the nature and scope of an agency's determination. [...] Doing so should produce greater uniformity among courts [...]"[27]

The Court drew a parallel with patent claim construction under the 1996 case of *Markman v. Westview Instruments, Inc.* This is an important conclusion in favor of drug companies as judges are thought to have a better grasp of technical data and as reaching fairer judgments. In contrast, juries are perceived as often swayed by emotional pleadings by patients and therefore more likely to reach conclusions that serve their ultimate goal to indemnify patients. On the other hand, legal findings by judges can be reviewed *de novo,* meaning that they can be reversed on appeal. First instance lawsuits are thus more likely to be appealed with success. Somewhat paradoxically, the 2019 judgment was also hailed as a victory for MSD.[28]

16 More accurately, the FDA issued a so-called complete response letter.
17 For details, see the Thomas' concurring opinion at section II.
18 The FDA received authority to *impose* label changes only in 2007; Food and Drug Administration Amendments Act of 2007, Pub. L. No. 110–85, codified at 21 U.S.C. 355(o)(4). In this case, the label change was accepted by MSD.
19 The concurring opinion cites to material showing that the FDA was reluctant to add a clear risk of Fosamax-induced femoral atypical fracture. Therefore, it could be argued as did MSD, that, had the FDA been asked to issue a decision, it would have rejected a strongly-worded CBE change. However, this hypothesis cannot be verified ex post.
20 Even though the judgment is unanimous (see footnote 1), there are two concurring opinions. The one by Alito, Roberts and Kavanaugh expresses views more closely aligned with the interest of the industry. The three Justices would have wanted pre-emption to apply as soon as the FDA was fully informed, regardless of the origin of the information.
21 It is the responsibility of the manufacturer to "fully inform" the FDA; it must provide "the FDA with an evaluation or analysis concerning the specific danger's that would have merited the warning.". Sections II.A and II.B.
22 Informal exchanges between the FDA and the marketing application holder would not suffice. To be taken into account for the purpose of preemption, the FDA rejection must have been operated *through formal decision-making.* See section II.B. in fine of the judgment.
23 According to the Alito's opinion, "the FDA could simply consider the new information and decide not to act."
24 Of course, the FDA could have imposed the strong-worded labels it saw fit (see footnote 18), but it did not do so in the present instance.
25 As the Justice Alito's concurring opinion emphasizes, it is not all a question of "preponderance of the evidence" or "clear and convincing evidence", because this is a question of law.
26 Even if some factual issues are disputed (e.g., was the FDA truly fully informed?), the judge should still decide them.
27 Section III of the judgment.
28 Johnston/Bournil, A new Supreme Court Ruling on Drug Liabiliy, JAMA 2019.

III. Pre-emption in Switzerland?

We now turn to the analysis of the legal situation prevailing in Switzerland. The exact issue ruled upon by the US Supreme Court has never been handled by our Courts[29]; in any case, it could not play out in the same manner, since civil liability is a federal issue in Switzerland.[30] Swiss legal literature has rarely tackled the problem of label preemption. Moreover, lawsuits by injured patients remain very rare, while lawsuits complaining that drug warnings were introduced *too late* have – to my knowledge – never been attempted.

Is this surprising given the frequency of such lawsuits in the United States? Not really. Switzerland offers a social security net, which is far more extensive than that of the United States; it also prohibits class action, punitive damages and lawyers' contingency fees. It has basically no discovery process managed by lawyers. The incentive for patient lawsuits is therefore much reduced.

Is the (relative) absence of drug liability lawsuits in Switzerland to be worried about? Not necessarily. To my knowledge, no scientific studies have established that warnings are introduced earlier in the United States[31,32]. Yet, following the *Merck Sharp Dohme* judgment, companies will have an incentive to quickly add warnings on their own through the CBE process. This may widen a (hypothetical) discrepancy between US and Swiss practices. It may even trigger more lawsuits in jurisdictions where added warnings comparable to the one implemented in the US were not included. This brings us to the question: what would be the odds of success of such lawsuits in Switzerland?

A. Legal Analysis under the Federal Product Liability Act (PLA)

As per the PLA, producers are liable for damage incurred by a plaintiff if the latter can prove that the producer's product is defective and that this defect caused the injury for which payment is sought. However, even if the injury party meets this burden of proof, a producer can escape liability if it can show that "the defect is attributable to compliance with compulsory, official regulations" (Article 5 letter d PLA)[33]. In our context, if the producer can prove that Swissmedic has forbidden a given warning to be added, this "escape" provision would apply and the injured patient's claims would be rejected, even though the defect and the causal link were duly established[34].

What about a situation closest to that MSD affair? In other words, what if Swissmedic had known of a health risk and yet decided not to intervene? As explained below in section C., under Swiss law, there is no legal pathway for authorization holders to introduce safety warnings on their own; put differently, a company cannot change its drug label without Swissmedic's approval. Hence the question: for the liability exemption of Article 5 letter e PLA to apply, would the producer be required to submit the change to Swissmedic along with all supporting data and obtain its explicit refusal? In my view, given the information asymmetry, the answer should be yes. Otherwise, there would be the danger that the company retain some data and that Swissmedic's inaction be based on a partial or biased dataset. Requiring that the producer formally submits its data would also facilitate the subsequent verification by Courts that all data were disclosed in a timely fashion. Requiring that Swissmedic formally opposes the proposed changes would also bring clarity to the process and avoid situations such as the one in MSD where, years later, the reasons for the FDA's inaction remain controversial.

29 Of course, the issue plays a bit differently in Switzerland, because it is never a question of whether State (cantonal) law is been preempted by Federal law, given that liability in Switzerland is also subject to Federal law.

30 Whereas in the United States, product liability is in part governed by State law, in Switzerland it is only subject to Federal law.

31 A study has focused on approvals *in general* for drugs in the European Union, in the United States and in Switzerland. It notes: "From 2007 to 2016, 134 new drugs were approved by all three regulatory agencies. Overall, 66.4% of the drugs were first approved by the FDA, 30.6% by the EMA, and 3.0% by SMC. The difference in approval dates between SMC and the EMA, SMC and the FDA, and the FDA and the EMA were statistically significant. The indications approved by the FDA, the EMA, and SMC for the same drugs were similar in content for 23.1% drugs and different in 76.9% of the drugs. Significant differences in indications existed between the FDA and SMC and the FDA and the EMA, but not between the EMA and SMC." M.-J. Zeukeng et al., A comparison of new drugs approved by the FDA, the EMA, and Swissmedic: an assessment of the international harmonization of drugs, February 2018 European Journal of Clinical Pharmacology 74(2)

32 Studies have been conducted to compare EU and US practices of drug approvals. They usually show heterogenous outcomes: sometimes the FDA react earlier and sometimes it is the European Medicines Agency (EMA). See *e. g.*:
- Rashmi R Shah et al., A fresh perspective on comparing the FDA and the CHMP/EMA: approval of antineoplastic tyrosine kinase inhibitors, Br J Clin Pharmacol. 2013 Sep; 76(3): 396–411.
- M. Hartmann et al., Approval probabilities and regulatory review patterns for anticancer drugs in the European Union. Crit Rev Oncol Hematol. 2013 Aug;87(2):112-21.
- Nicholas S. Downing et al., Comparison of Three Regulatory Agencies, NEJM 366;24 2284–93 (2012).
- Y. Lis et al., Comparisons of Food and Drug Administration and European Medicines Agency Risk Management Implementation for Recent Pharmaceutical Approvals: Report of the International Society for Pharmacoeconomics and Outcomes Research Risk Benefit Management Working Group Volume 15, Issue 8, December 2012, Pages 1108–1118 Value in Health Health Policy Analyses.
- Mwango Kashoki et al., A Comparison of EMA and FDA Decisions for New Drug Marketing Applications 2014–2016: Concordance, Discordance, and Why, Clinical Pharmacology & Therapeutics 107(1), (2020).

33 This English translation is taken from F. Scherrer et al., Product Liability, SWITZERLAND, Chapter 17, at https://www.wengervieli.ch/getattachment/11bc71b2-7461-4ef5-b9e0-f77e9f305f78/Switzerland_Chapter_2018_Product_Regulation_Review.pdf.aspx.

34 V. Junod, La responsabilité de la société pharmaceutique pour l'information défectueuse sur son médicament, in: Chappuis/Winiger, Journée de responsabilité civile 2008, Genève 2009.

B. Legal Analysis under the Swiss Code of Obligations

Patients' lawsuits against drug manufacturers can also take the Article 55 CO pathway. The patient has to show that she suffered damages from an illicit action imputable to the drug company and its drug. Illicit action is usually easy to prove as harm to bodily integrity qualifies as such. Causality can be an obstacle, depending on whether other circumstances (e.g., the disease itself or another treatment) could have caused the bodily harm and thus the damage. In the case of Fosamax, it appears that the types of fractures caused by the drug are fairly unique (they are called "atypical") and are not usually confused with fractures caused "simply" by osteoporosis or falls.

Once the claimant has proven these three main conditions, the drug company can still escape liability if it proves that it met its standard of diligence. In drug liability cases, this standard of diligence is not evident to analyze, because the issue is not ordinarily whether the employer properly hired, instructed and oversaw its employees. The problem usually does not lie in the manufacturing process and its oversight either. In my view, the standard of care should be whether the company knew or should have known of the risk and did its best to suppress or minimize it. However, this particular issue has not been ruled upon by Swiss courts. Taking the Fosamax case as an example, if a company had knowledge of a safety risk and yet did not effectively warn Swissmedic to have the label modified, it should not be able to escape liability. Consequently, the outcome under Article 55 CO appears fairly similar to that applicable under the PLA.

C. Legal Analysis under the Federal Therapeutic Product Act (TPA)

Section B. above mentioned that pharmaceutical companies in Switzerland do not have a process akin to the CBE route to add warnings. The requirements for introducing new side effects, adverse events, interactions or precautions are explained here.

As per Art. 28 of the Ordinance on Medicinal Products[35], it is the duty of the marketing authorization holder to adapt the pharmaceutical product's professional information (PI; drug label) continuously so that it matches the current state of scientific and technical knowledge. The procedure to be followed is specified at Articles 21 through 24. If the change's impact on safety, security and efficacy is truly minor, the MA holder can inform Swissmedic within 12 months after its implementation (art. 21). For more significant changes, Swissmedic must be informed in advance (art. 22); for major changes, a formal approval by Swissmedic is necessary (art. 23 and 24). Article 22a of Swissmedic's Ordinance on the requirements for medicinal products[36] introduces an Appendix 7 which specifies which procedure applies to which changes[37]. The joint reading of Appendix 7 with Swissmedic' Guidance "Variations and extensions HMV4"[38] reveals that new security warnings in the label are type II variation, which require the prior explicit approval of Swissmedic. Thus, although the initiative may– or must depending on the situation – come from the pharmaceutical company, the latter cannot implement it on its own.

For a new warning to be required or justified, it must meet *inter alia* the requirements of Appendix 4 of the Swissmedic's Ordinance[39], that is the additional piece of information must be *directly related* to the use of the pharmaceutical product at issue, it must be *essential* for patients' health and it must *not contradict* other information provided.

A 2019 judgment by the Federal Tribunal[40] throws light on the above requirements. Contrary to the MSD affair, this case *only indirectly* relates to product liability. Its fact pattern was unusual: Roche had been asked by Swissmedic to change its label (more accurately the professional information) to remove various mentions that could indirectly discourage use of biosimilar versions of its Herceptin drug. Roche had opposed the requested changes, considering that the mentions were important to safeguard the health of patients, who could otherwise be switched to an allegedly less safe biosimilar medicine. The company further argued that these mentions could reduce its own liability risk in case patients incurred side effects due to a biosimilar drug.

A first issue was whether the label of a drug can include warnings that relate to alternative products, here competitors' biosimilar versions. The three authorities which ruled on the matter – Swissmedic, then the Federal Administrative Tribunal and finally the Federal Tribunal – answered no. The label can only include warnings that relate to its own drug, and

35 In French: Ordonnance sur les médicaments (OMéd) du 21 septembre 2018 (RS 812.212.21).

36 In French: Ordonnance de l'Institut suisse des produits thérapeutiques sur les exigences relatives à l'autorisation de mise sur le marché des médicaments (Ordonnance sur les exigences relatives aux médicaments, OEMéd) du 9 novembre 2001 (RS 812.212.22)

37 Appendix 7 is available on Swissmedic's website, at https://www.swissmedic.ch/dam/swissmedic/fr/dokumente/recht-normen/HMV4-SMC-Appendices/AMZV-Liste-Aenderungen-Art21-24-VAM-Anhang-7.pdf.download.pdf/20180817_Anh_7_AMZV_Liste_Aenderungen_nach_Art_21_24_VAM_FR.pdf.

38 Swissmedic, ZL300_00_001e_of December 2019, at https://www.swissmedic.ch/dam/swissmedic/en/dokumente/zulassung/zl_hmv_iv/zl300_00_001d_wlaenderungenundzulassungserweiterungen.pdf.download.pdf/ZL300_00_001e_WL%20Guidance%20document%20Variations%20and%20extensions.pdf.

39 Point 1.6. of the 812.212.22 Ordinance. The same is true for patient leaflet. Appendix 5, point 1.1.7.

40 In its May 31, 2019 judgment 2C_60/2018, the Federal Tribunal confirmed the previous judgment of the Federal Administrative Tribunal of December 13, 2017, C-1669/2016. See also the comment by C. Helmle/C. Hirschi, Arzneimittelinformation: Gesundheitsschutz vs. Wirtschaftsfreiheit, Commentaire d'arrêt 2C_60/2018, LSR 2020 pp. 31–34.

not to the possible use of another product. Moreover, regarding the second requirement, the label can only include mentions that are *important* to prescribing physicians; that the information is correct or even useful does not suffice[41]. What is important to physicians must be decided primarily by Swissmedic, which is entitled a significant *latitude of judgment*. Information whose purpose is primarily to minimize possible (and in fact highly unlikely) liability risks of the pharmaceutical distributor has no place in the label. Additionally, the label cannot be used to impose unto physicians obligations that have no legal basis in the TPA. In the present instance, Roche wanted to force physicians, through the label, to record the drug lot number, even though physicians have no such duties. This was denied by the Courts.

This case is interesting as it reminds us that the label is first and foremost a tool to inform health professionals. Only indirectly does it determine which risks are duly conveyed to physicians and are therefore outside the scope of liability of the distributor. To Roche's complaint in this regard, the Federal Tribunal replied:

> *«Folglich ist äusserst fraglich, ob das Medikament deshalb als fehlerhaft im Sinne von Art. 4 Abs. 1 PrHG bezeichnet werden könnte, weil die Fachinformation die von der Beschwerdeführerin beantragte Passage nicht enthält. Vielmehr würde hier die Haftung des Arztes oder des Apothekers, namentlich wegen Verletzung der Aufklärungs- und Sorgfaltspflichen im Vordergrund stehen. Schliesslich ist davon auszugehen, dass der Beschwerdeführerin der Entlastungsbeweis nach Art. 5 Abs. 1 lit. d PrHG zustehen würde, wonach die Herstellerin nicht haftet, wenn der Fehler darauf zurückzuführen ist, dass das Produkt verbindlichen, hoheitlich erlassenen Vorschriften entspricht».*[42]

This *obiter dictum* confirms that, should Roche be sued for harms incurred by patients having been switched to a biosimilar version of Herceptin – a far-fetched hypothesis! –, the company could claim successfully that it was forced to remove warnings about switching risks by Swissmedic; it would therefore escape liability pursuant to Article 5.1.d PLA. The result in Switzerland would be the same as in the *Merck Sharp & Dohme Corp. v. Albrecht* case commented here.

D. Analogy with the Yasmin Judgment of 2015

In its now famous Yasmin judgment, the Swiss Federal Tribunal held that drug companies are to address their warnings for their prescription drugs to physicians through the product's PI[43]. They have no duty to warn patients *in the same terms*. On the contrary, patients are to rely on the explanations given to them by their doctors. In that affair, the detailed warning about the thrombosis risk of the contraceptive pill were to be found only in the PI, whereas the patient leaflet contained a less precise warning. The company, Bayer, was thus not liable toward the injured patient, because it was the duty of the prescribing physician to weigh the benefits and the risks in the specific instance and because the information made available to the physician had been correct. The issue in that judgment was therefore different. It was not whether the company had hidden health risks, but rather whether it should have included these risks in the patient leaflet.

However, in its judgment, the Federal Tribunal underscored that Swissmedic has ample discretion to decide which warnings are sufficient. One can infer a reluctance to call into question technical assessments made by the agency.

In my view, our Tribunal's outspoken reluctance is excessive. The comparatively low level of transparency at Swissmedic makes it hard for third parties, here injured patients, to check whether the agency indeed had all necessary factual data to reach its conclusion (that the risk warning label was sufficient). Had the MSD lawsuit occurred here, it would have been very difficult for injured patients to determine *ex ante* (i.e. before launching the lawsuits) which pieces of information had been forwarded to Swissmedic and which had not. Patients are thus faced with the dilemma of launching lawsuits without enough information as to their odds of success. It is no wonder that lawsuits are so rare in Switzerland.

41 *«Er ist unter anderem synonym mit bedeutend, gewichtig, wesentlich oder zentral (Duden, Das Synonymwörterbuch, Bd. 8, 6. Aufl. 2014). Dadurch wird zum Ausdruck gebracht, dass nicht jede zusätzliche Angabe, die der öffentlichen Gesundheit oder dem Patientenschutz dienlich sein oder sich als nützlich erweisen könnte, diese Voraussetzung erfüllt.» «Zudem ist mit der Vorinstanz davon auszugehen, dass ein allfälliges Risiko für die Gesundheit der Patienten bei dieser Ausgangslage ohnehin als gering bzw. abstrakt erscheint. Insofern kann von vornherein nicht gesagt werden, der von der Beschwerdeführerin beantragte Passus sei wichtig bzw. wesentlich für die gesundheitliche Aufklärung im Sinne von Ziff. 1 Abs. 6 des Anhangs 4 der AMZV. Wie bereits erwähnt, ist das Kriterium der Wichtigkeit nicht schon dann erfüllt, wenn sich eine zusätzliche Angabe als nützlich oder dienlich erweisen könnte (vgl. auch E. 4.1 hiervor).»* c. 4.1 and 4.2.4. of 2C_60/2018.

42 C. 4.2.5 of judgment 4C_60/2018, parenthesis omitted.

43 Judgment 4A_365/2014 and 4A_371/2014 of 5 January 2015, available at https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F05-01-2015-4A_365-2014&lang=de&type=show_document&zoom=YES&. This case was commented by E. Büyüksagis/S. Maurer, Die «learned intermediary» Doktrin im schweizerischen Pharmarecht, PJA 2016 p. 1645–1655; R. Bachmann, Instruktionsfehler in der Patienteninformation zur Pille "Yasmin" verneint, SwissBlawg of 24. Januar 2015, at https://swissblawg.ch/2015/01/4a3652014-instruktionsfehler-in-der.html; M. Sturny-Luder, «Yasmin II», sic 5/2015 pp. 31–33, at https://www.siconline.ch/de/artikel/2504-0723-2015-0065/yasmin-ii-bundesgericht-vom-5-januar-2015-i-zivilrechtliche-abteilung; D. Staffelbach/K.-N. Yokinger, Der ‹Yasmin›-Entscheid – kritische Würdigung de lege ferenda, HAVE 2017 p. 118–121; I. Herzog-Zwitter, Aufklärungspflicht bei Medizinprodukten- Das Urteil ‹Yasmin›, HAVE 2017 p. 103–104.

IV. Conclusion

Medical products inherently comport risks. This is known by all. However, when the risk befalls you, this knowledge is of little comfort. Looking for the "guilty" party is a typical reaction.

For drug agencies, the task is different: risks and benefits have to be balanced *for entire populations*. Not only do they have to take into account the risk-benefit of no treatment versus the risk-benefit of the drug at issue, but they are also increasingly called to consider comparative risk-benefit among possible drug treatments (e.g., a typical problem with contraceptives). This task is made even harder by the knowledge that not all patients react the same way to the same drugs. Moreover, science progresses slowly: clinical trials, although representing the scientific golden standard, take years to produce results and those results may still not fully match real-word outcomes. In this climate of uncertainty, drug agencies must therefore navigate the stormy waters of underwarning and overwarning, i.e. being too positive (type II error) or overly risk-averse (type I error). There is no obvious solution to this well-known quandary.

As already argued by this author elsewhere,[44] a partial solution would be (better) compensation funds for drug injuries incurred by patients. Although, as noted above, Switzerland offers good social insurance coverage, it is not always enough to fully cover loss of earnings due to drug injuries. Moreover, the amount granted by social insurances for pain and suffering remain low or even sometimes null. Having medical lawsuits removed from civil courts to be handled by no-fault processes could lead to increased patient satisfaction, less defensive medicine, sustained innovation and greater trust for proper administrative decision-making.

44 Liability for Damages Caused by AI in Medicine: Progress Needed, Journée de responsabilité civile 2018, Collection genevoise 2019; Prescription, responsabilité et fonds de compensation, in: Vers les sommets du droit, Liber amicorum pour Henry Peter Mélanges Henry Peter, Schulthess, 2019; Quelles pistes pour sortir de l'impasse, la responsabilité pénale du médecin et la causalité hypothétique, 100(42) BMS, pp. 1398–1400 (2019).