

12-1-1999

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### Recommended Citation

Hildy Bowbeer & David S. Killoran, *Liriano v. Hobart Corp.: Obvious Dangers, the Duty to Warn of Safer Alternatives, and the Heeding Presumption*, 65 Brook. L. Rev. 717 (1999).

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# LIRIANO V. HOBART CORP.: OBVIOUS DANGERS, THE DUTY TO WARN OF SAFER ALTERNATIVES, AND THE HEEDING PRESUMPTION\*

*Hildy Bowbeer & David S. Killoran*<sup>†</sup>

## INTRODUCTION

In *Liriano v. Hobart Corp.* (“*Liriano III*”),<sup>1</sup> the United States Court of Appeals for the Second Circuit held that a worker who lost his hand after inserting it into an operating meat grinder could sue its manufacturer for failing to warn him against using the grinder without a protective guard.<sup>2</sup> The guard was present at the time the grinder was sold to the plaintiff’s employer, but it had been removed before the accident.<sup>3</sup> Specifically, the Second Circuit ruled that even if the danger of placing one’s hand in a meat grinder was open and obvious, the manufacturer could be held liable for failing to place a warning on the machine informing the user that a “safer alternative,” i.e., a guard, was available.<sup>4</sup> The court then held that even if the plaintiff had no direct proof that the defendant’s failure to warn caused his injury, the jury could infer from the absence of a warning label and the occurrence of the accident that a label, if present, would have prevented the

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<sup>1</sup> 170 F.3d 264 (2d Cir. 1999) [hereinafter *Liriano III*].

<sup>2</sup> See *id.* at 267.

<sup>3</sup> See *id.* at 266.

<sup>4</sup> See *id.* at 271.

accident<sup>5</sup>—a theory of causation that effectively shifts the burden to the defendant to prove that a warning would not have altered the outcome.

The *Liriano III* decision represents an unfortunate expansion of products liability law regarding the duty to warn and flies in the face of common sense and safety policy as well as judicial precedent. As the following discussion will demonstrate, neither product safety nor respect for the judicial process is engendered by decisions that speculate about the efficacy, and encourage the proliferation, of warnings about obvious product hazards.

## I. THE *LIRIANO III* OPINION

### A. *Factual and Procedural Background*

In 1993, Luis Liriano, a seventeen-year-old recent immigrant employed in the meat department at a Super Associated grocery store ("Super"), was injured on the job while feeding meat into a commercial meat grinder from which his employer had removed the manufacturer-supplied safety guard. His hand was caught in the "worm" that grinds the meat, and his hand and lower forearm were amputated.<sup>6</sup>

Hobart Corporation ("Hobart") had manufactured and sold the meat grinder in or before 1961 with a permanently affixed safety guard that prevented the user's hands from coming into contact with the grinding "worm."<sup>7</sup> It was undisputed that the grinder as originally manufactured, with the guard in place, was safe, and that it was very dangerous to operate if the guard was removed.<sup>8</sup> No labels were placed on the machine to warn against operating it without the safety guard.<sup>9</sup> The

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<sup>5</sup> See *id.*

<sup>6</sup> *Liriano v. Hobart Corp.*, 132 F.3d 124, 125 (2d Cir. 1998) [hereinafter *Liriano I*].

<sup>7</sup> *Id.*

<sup>8</sup> See *id.*

<sup>9</sup> See *id.* Interestingly, while there is no reference in the Second Circuit opinion, it appears from the parties' briefs that the subject grinder did have a warning label affixed to it when first sold which told users to keep their fingers out of the mouth of the grinder and to push meat through with a stick or "stomper." That label, however, was no longer present on the grinder by the time of plaintiff's accident. It was undisputed that plaintiff was using his fingers, not a "stomper,"

grinding mechanism inside the grinder was not visible to the operator, but chunks of meat fed into one hole came out another as ground meat.<sup>10</sup> In 1962, Hobart began affixing warnings to new meat grinders admonishing against removal of the guard.<sup>11</sup> There was also evidence that, in the years after the grinder was sold and before plaintiff's accident, Hobart became aware of purchasers who had forcibly removed the safety guards.<sup>12</sup>

It was undisputed that when plaintiff's employer, Super, acquired the grinder, the safety guard was intact and that while the grinder was in Super's possession, the guard was removed.<sup>13</sup> The Second Circuit opinion also reveals that Liriano had only recently immigrated to the United States and could not read English.<sup>14</sup> He had been on the job for just one week, had never received instructions on how to use the meat grinder, and had used it only two or three times before his injury.<sup>15</sup> Liriano had, however, worked briefly with a meat grinder at another supermarket before he was injured at Super.<sup>16</sup>

Liriano sued Hobart for defective product design and failure to warn under principles of negligence and strict products liability in New York state court.<sup>17</sup> Hobart removed the case to federal court and impleaded Super as a third party defen-

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to push meat into the grinder. *See* Brief for Plaintiff-Appellee at 12, *Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 700 N.E.2d 303, 677 N.Y.S.2d 764 (1998).

<sup>10</sup> *See Liriano III*, 170 F.3d at 269.

<sup>11</sup> *See Liriano I*, 132 F.3d at 125.

<sup>12</sup> *See id.*

<sup>13</sup> *See id.*; *Liriano III*, 170 F.3d at 266. While not set forth in the Second Circuit opinion, the parties' briefs to the New York Court of Appeals reveal that the grinder involved in the accident was sold new not to Super, but to an A&P supermarket. *See* Brief for Defendant Hobart Corp. at 3, *Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 700 N.E.2d 303, 677 N.Y.S.2d 764 (1998). When it was acquired by Super many years later, the guard was still intact. In fact, the guard apparently remained in place on the grinder for more than 30 years when it was removed by Super just a few weeks before plaintiff's accident. *See id.* at 4. Moreover, the guard had been permanently affixed to the grinder by three rivets and could only be removed by forcibly destroying the rivets. *See id.* Nothing in the briefs or in the Second Circuit opinion reveals why the guard was removed.

<sup>14</sup> *See Liriano III*, 170 F.3d at 269.

<sup>15</sup> *See id.*

<sup>16</sup> *See* Brief for Appellee at 10, *Liriano v. Hobart Corp.*, 170 F.3d 264 (2d Cir. 1999) (Nos. 96-9641(L), 97-7449).

<sup>17</sup> *See Liriano I*, 132 F.3d at 125.

dant, seeking indemnification and/or contribution.<sup>18</sup> The district court dismissed all of Liriano's claims except those based on failure to warn.<sup>19</sup> Following trial, the jury concluded that the manufacturer's failure to warn proximately caused Liriano's injuries and apportioned liability five percent to Hobart and ninety-five percent to Super.<sup>20</sup> The jury assigned no fault to Liriano himself, but the trial judge ruled this to be unreasonable as a matter of law.<sup>21</sup> On partial retrial, limited to the extent of Liriano's responsibility, the jury assigned him one-third of the responsibility.<sup>22</sup>

On appeal, Hobart argued that a manufacturer could not be liable on a failure to warn theory in a case in which the substantial modification defense would preclude liability for design defect. Hobart further argued that the facts of the case precluded liability for failure to warn as a matter of law.<sup>23</sup> The Second Circuit certified these questions to the New York Court of Appeals,<sup>24</sup> which answered that a manufacturer can indeed be liable for failure to warn in a case of substantial modification, but it declined to answer the second question.<sup>25</sup> The Second Circuit thereupon issued the opinion that gives rise to this Article.

### B. *The Obvious Dangers of Meat Grinders: What the Liriano III Court Did Not Decide*

The Second Circuit, like the New York Court of Appeals on certification, declined to answer the principal question posed by the parties on appeal: whether the danger of placing one's

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<sup>18</sup> See *id.*

<sup>19</sup> See *id.*

<sup>20</sup> See *id.* at 125-26.

<sup>21</sup> See *Liriano v. Hobart Corp.*, No. 94 Civ. 5279, 1996 WL 304337, at \*8 (S.D.N.Y. June 6, 1996). During trial, plaintiff testified that he did not remember the accident, but claimed that he did not intend to put his hand into the grinder and that the contact was inadvertent. The judge's ruling that plaintiff was contributorily negligent as a matter of law indicates that the court was convinced that whether or not Liriano intended to put his hand into the grinder, he could have avoided the injury by exercising care in its operation. See *id.*

<sup>22</sup> See *Liriano I*, 132 F.3d at 126.

<sup>23</sup> See *Liriano III*, 170 F.3d 264, 266 (2d Cir. 1999).

<sup>24</sup> See *Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 700 N.E.2d 303, 677 N.Y.S.2d 764 (1998) [hereinafter *Liriano II*].

<sup>25</sup> See *id.* at 236, 700 N.E.2d at 304, 677 N.Y.S.2d at 765.

hand in a meat grinder is obvious as a matter of law.<sup>26</sup> In response to the same question certified to it, the New York Court of Appeals refused to answer in part because the Second Circuit's *Liriano I* opinion did "not indicate that there is an unsettled or open question of New York substantive law."<sup>27</sup> The Second Circuit, then, acknowledging that the danger might be obvious, found it unnecessary to answer whether the danger was obvious as a matter of law because it constructed an alternate basis for imposing liability—by imposing a duty to warn even where the danger is obvious.<sup>28</sup>

### C. *The Duty to Warn*

#### 1. Duty to Warn About Safer Alternatives

Apparently unable to resolve the question of obviousness raised by the parties, the *Liriano III* court instead extended the law on the duty to warn into unprecedented territory by ruling that, even if the danger is open and obvious, manufacturers may still have a duty to inform the user about safer alternatives.<sup>29</sup> Although the court did not cite a single reported decision in support of its expansion of the law, it did cite an excerpt from a law review article by James A. Henderson and Aaron D. Twerski:

As two distinguished torts scholars have pointed out, a warning can do more than exhort its audience to be careful. It can also affect what activities the people warned choose to engage in. And where the function of a warning is to assist the reader in making choices, the value of the warning can lie as much in making known the existence of alternatives as in communicating the fact that a particular choice is dangerous. It follows that the duty to warn is not necessarily obviated merely because a danger is clear.

To be more concrete, a warning can convey at least two types of messages. One states that a particular place, object, or activity is dangerous. Another explains that people need not risk the danger

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<sup>26</sup> See *Liriano III*, 170 F.3d at 271.

<sup>27</sup> *Liriano II*, 92 N.Y.2d at 243, 700 N.E.2d at 309, 677 N.Y.S.2d at 770.

<sup>28</sup> See *Liriano III*, 170 F.3d at 271 ("[E]ven if New York would consider the danger of meat grinders to be obvious as a matter of law, that obviousness does not substitute for the warning that a jury could, and indeed did, find that Hobart had a duty to provide.")

<sup>29</sup> See *id.*

posed by such a place, object, or activity in order to achieve the purpose for which they might have taken that risk.<sup>30</sup>

Then, despite the wealth of available reported decisions around the country on the issue of open and obvious dangers,<sup>31</sup> the court analogized the facts before it not to another case, but to a hypothetical "steep grade" road warning:

[A] highway sign that says "Danger-Steep Grade" says less than a sign that says "Steep Grade Ahead-Follow Suggested Detour to Avoid Dangerous Areas."

If the hills or mountains responsible for the steep grade are plainly visible, the first sign merely states what a reasonable person would know without having to be warned. The second sign tells drivers what they might not have otherwise known: that there is another road that is flatter and less hazardous . . . . Accordingly, a certain level of obviousness as to the grade of a road might, in principle, eliminate the reason for posting a sign of the first variety. But no matter how patently steep the road, the second kind of sign might still have a beneficial effect. As a result, the duty to post a sign of the second variety may persist . . . .

One who grinds meat, like one who drives on a steep road, can benefit not only from being told that his activity is dangerous but from being told of a safer way.<sup>32</sup>

Bolstered by this analogy, the court concluded that obviousness does not necessarily preclude liability for failure to warn as a matter of law. Stepping around the issue of whether the dangers associated with meat grinders are obvious as a matter of law in New York, the court held that a jury could impose on product manufacturers a duty to warn of obvious risks.

A jury could reasonably find that there exist people who are employed as meat grinders and who do not know (a) that it is feasible to reduce the risk with safety guards, (b) that such guards are made available with the grinders, and (c) that the grinders should be used only with the guards. Moreover, a jury can also reasonably find that

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<sup>30</sup> *Id.* at 270 (citing James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265, 285 (1990)). However, the excerpt from the Henderson and Twerski article which the court used as a springboard for its theory did not espouse a duty to warn about alternatives to obvious risks, but rather observed that under certain limited circumstances, there might be a duty to warn of *non-obvious* risks that could only be avoided by declining to use the product altogether—the so-called "informed choice" warning that appears most frequently in the pharmaceutical context. See *infra* notes 120-127 and accompanying text.

<sup>31</sup> See *infra* notes 52-54 and accompanying text.

<sup>32</sup> *Liriano III*, 170 F.3d at 270.

there are enough such people, and that warning them is sufficiently inexpensive, that a reasonable manufacturer would inform them that safety guards exist and that the grinder is meant to be used only with such guards. Thus, even if New York would consider the danger of meat grinders to be obvious as a matter of law, that obviousness does not substitute for the warning that a jury could, and indeed did, find that Hobart had a duty to provide.<sup>33</sup>

## 2. The Court's Theory of Causation

The Second Circuit then turned its attention to the issue of whether Hobart's failure to provide such a warning had caused the plaintiff's injury. Hobart argued that plaintiff failed to present any evidence that its "failure to place a warning on the machine was causally related to his injury."<sup>34</sup> The defense further asserted that there was no basis to conclude either that plaintiff would have "refused to grind meat had the machine borne a warning or that a warning would have persuaded [the employer] not to [permit] its employees [to] use the grinder without the safety attachment."<sup>35</sup> The Second Circuit rejected this argument and ruled that, "after [the plaintiff] had shown that Hobart's wrong greatly increased the likelihood of the harm that occurred," plaintiff had no burden to "introduce additional evidence showing that the failure to warn was a but-for cause of his injury."<sup>36</sup> The court explained:

When a defendant's negligent act is deemed wrongful precisely because it has a strong propensity to cause the type of injury that ensued, that very causal tendency is evidence enough to establish a *prima facie* case of cause-in-fact. The burden then shifts to the *defendant* to come forward with evidence that its negligence was *not* such a but-for cause.<sup>37</sup>

In support of this ruling, the court analogized the case to *Martin v. Herzog*,<sup>38</sup> in which a buggy driver argued that plaintiff had failed to prove the defendant's negligence in driving without lights was the cause-in-fact of the accident. Judge

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<sup>33</sup> *Id.* at 271.

<sup>34</sup> *Id.* (citations omitted).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Liriano III*, 170 F.3d at 271 (citing *Zuchowicz v. United States*, 140 F.3d 381, 388 nn.6-7, 390-91 (2d Cir. 1998)).

<sup>38</sup> 228 N.Y. 164, 170, 126 N.E. 814, 816 (1920) (Cardozo, J.).



Cardozo rejected defendant's argument, noting that the "legislature deemed driving without lights after sundown to be negligent precisely because not using lights *tended to cause* accidents of [this] sort."<sup>39</sup> Thus, the fact of the accident combined with defendant's conduct was deemed to create a rebuttable inference of but-for causation of the plaintiff's injury.<sup>40</sup> The Second Circuit in *Liriano III* found the *Martin* defendant's failure to use lights analogous to Hobart's failure to warn.<sup>41</sup> Plaintiff's "*prima facie* case," the court found, "arose from the strong causal linkage between Hobart's [failure to warn] and the harm that occurred."<sup>42</sup> Finding that Hobart had failed to rebut the *prima facie* case, the court held that plaintiff's had proven causation.

The court did not discuss, however, the extent to which any of the specific circumstances in the instant case might undermine the appropriateness of applying the inference of causation propounded by Judge Cardozo in *Martin*. For example, the court refused to consider the effect on causation of the obviousness of the danger of placing one's hand in a meat grinder, the plaintiff's inability to read English, the fact that another warning label that had been sold on the equipment had been lost by the time of the accident, the special circumstances of the employment context, or the difference in the nature and extent of the response that would have been required to avoid the injury.<sup>43</sup>

The net result of the *Liriano III* decision, therefore, was to impose a strange new duty on manufacturers: the duty to warn that when any product safety feature is removed or defeated, resulting in obvious danger to the user, the product would be

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<sup>39</sup> See *id.* at 168, 126 N.E. at 815 (emphasis added).

<sup>40</sup> See *id.* at 169, 126 N.E. at 816.

<sup>41</sup> See *Liriano III*, 170 F.3d at 272.

<sup>42</sup> *Id.*

<sup>43</sup> Interestingly, the court also did not discuss any of the numerous reported decisions that address the so-called "heeding presumption," even though its approach to burden-shifting on causation reflected a similar analytical leap. The "heeding presumption" is a device adopted by some courts to shift the burden of production on certain elements of the issue of causation in a failure to warn case from the plaintiff to the defendant. The presumption is that if an adequate warning had been provided by the defendant, it would have been read and heeded; therefore, the plaintiff need not produce independent evidence that he would have done so. See *infra* notes 130-153 and accompanying text (discussing the questionable foundation for this presumption).

safer with the safety feature. Moreover, the jury may assume without any evidence that such warnings would be effective generally, and would have prevented the plaintiffs accident in particular.<sup>44</sup> As the following discussion will describe, both the imposition of a duty and the leap to causation are contrary to basic principles of the judicial decision-making process, established case law, and sound safety policy.

## II. DISCUSSION

### A. *The Court Allowed the Jury to Impose a Legal Duty*

The *Liriano III* court's holding that "obviousness does not substitute for the warning that a jury could, and indeed did, find that Hobart had a duty to provide," typifies its flawed reasoning.<sup>45</sup> Virtually all courts agree that while a judge must leave questions of fact to the jury, he or she must not permit a jury to speculate on the existence of a duty.<sup>46</sup> In fact, "[o]ne of the basic principles of trial by jury is that the judge determines the applicable law and the jury determines the facts."<sup>47</sup> Therefore, by allowing the jury to find that Hobart had a duty to warn, the court approved the violation of this basic principle.

There is strong support in both the common law and legal scholarship that the question of whether or not a duty exists is for the judge, not the jury, to determine. The New York Court of Appeals has held that "[u]nlike foreseeability and causation, which are issues generally and more suitably entrusted to fact finder adjudication, the definition of the existence and scope of an alleged tortfeasor's duty is usually a legal, policy-laden declaration reserved for Judges . . . ."<sup>48</sup> As Prosser and Keeton explain: "[I]t should be recognized that 'duty' is not sacrosanct in itself, but is only an expression of the sum total of those

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<sup>44</sup> See *Liriano III*, 170 F.3d at 271.

<sup>45</sup> *Id.*

<sup>46</sup> See *Pinto v. Mr. Softee of N.Y. Inc.*, 22 A.D.2d 874, 874, 254 N.Y.S.2d 683, 684 (1st Dep't 1964) ("[T]he Trial Judge should not have permitted the jury to speculate on the existence of any such duty.").

<sup>47</sup> *Robinson v. Sanchez*, 168 Misc. 2d 546, 547, 639 N.Y.S.2d 897, 899 (Sup. Ct. Bronx County 1996).

<sup>48</sup> *Palka v. Servicemaster Management Servs. Corp.*, 83 N.Y.2d 579, 585, 634 N.E.2d 189, 192, 611 N.Y.S.2d 817, 820 (1994).

considerations of policy which lead the law to say that the plaintiff is entitled to protection."<sup>49</sup> More specifically, they note, "[i]t is no part of the province of a jury to decide whether a manufacturer of goods is under any obligation for the safety of the ultimate consumer."<sup>50</sup>

A jury is charged to hear and weigh the evidence, but it hears nothing of the policy considerations involved in a question of duty and is therefore ill-equipped to decide whether a duty exists. Accordingly, it is wrong for a judge to permit a fact-finding jury to decide a question of duty. When the *Liriano III* court held that "a jury could, and indeed did, find that Hobart had a duty to provide" a warning,<sup>51</sup> the court allowed a jury to invade the province of the judge, and a question of duty was thus decided by jurors uninformed of, and ratified by a court seemingly unconcerned with, the important issues of policy that limit a manufacturer's duty to warn in cases where plaintiffs are injured by obvious dangers.

## B. *The Court Should Have Addressed Policy Issues Relating to the Obviousness Doctrine and the Duty to Warn*

### 1. The Obviousness Doctrine and its Rationale

In an overwhelming majority of jurisdictions, manufacturers owe no duty to warn of product-related risks that are obvious to reasonable users.<sup>52</sup> Courts across the country acknowledge the futility of imposing a duty to warn in cases of open and obvious dangers.<sup>53</sup> Premised on this recognition that

<sup>49</sup> W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 358 (5th ed. 1984).

<sup>50</sup> *Id.* § 37, at 236.

<sup>51</sup> *Liriano III*, 170 F.3d 264, 271 (2d Cir. 1999).

<sup>52</sup> See *Kerr v. Koemm*, 557 F. Supp. 284, 287 n.1 (S.D.N.Y. 1983) ("[O]bviousness relieves the manufacturer of a duty to inform users of a danger.")

<sup>53</sup> See, e.g., *Argubright v. Beech Aircraft Corp.*, 868 F.2d 764, 766 (5th Cir. 1989); *Fanning v. LeMay*, 230 N.E.2d 182, 185 (Ill. 1967); *Duncan v. Louisiana Power & Light Co.*, 532 So. 2d 968, 971 (La. Ct. App. 1988); *Bell v. Wysong & Miles Co.*, 531 N.E.2d 267, 269 (Mass. App. Ct. 1988); *Nabkey v. Jack Loeks Enters., Inc.*, 137 N.W.2d 132, 134 (Mich. 1965); *Dempsey v. Virginia Dare Stores*, 186 S.W.2d 217, 220 (Mo. Ct. App. 1945); *Ruggiero v. Max Braun & Sons, Inc.*, 141 A.D.2d 528, 529-30, 529 N.Y.S.2d 144, 146 (2d Dep't 1988); *Berry v. Eckhardt Porsche Audi, Inc.*, 578 P.2d 1195, 1196 (Okla. 1978); *Pemberton v. American*

warnings serve no purpose when the dangers are apparent, the "open and obvious rule" is not only embedded in the common law of many states, but it has also been adopted by statute in several others.<sup>54</sup> In fact, the New York Court of Appeals, in its opinion on the question certified to it by the Second Circuit, held that there is no duty to warn of hazards that are patently dangerous, pose open and obvious risks, or are readily apparent as a matter of common sense. "Put differently, when a warning would have added nothing to the user's appreciation of the danger, no duty to warn exists as no benefit would be

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Distilled Spirits Co., 664 S.W.2d 690 (Tenn. 1984); American Tobacco Co. v. Grinnell, 951 S.W.2d 420 (Tex. 1997); Menard v. Newhall, 373 A.2d 505 (Vt. 1977).

<sup>54</sup> See R.D. Hursh, Annotation, *Manufacturer's or Seller's Duty to Give Warning Regarding Product as Affecting His Liability for Product-Caused Injury*, 76 A.L.R.2d 9, § 9 (1961) (jurisdictions adhering to the view that there is no duty to warn of open and obvious dangers); see also 735 ILL. COMP. STAT. 5/2-2106(c) (West 1999) ("[A] defendant shall not be liable for failure to warn of material risks that were obvious to a reasonably prudent product user and material risks that were a matter of common knowledge to persons in the same position as or similar positions to that of the plaintiff in a product liability action."); *Maneely v. General Motors Corp.*, 108 F.3d 1176, 1179 (9th Cir. 1997); *Lamb v. Sears, Roebuck & Co.*, 1 F.3d 1184 (11th Cir. 1993) (danger of drowning in swimming pool is apparent, open danger, commonly known to all, including a nine-year-old boy; open and obvious danger constitutes absolute legal defense in failure to warn cases); *Kerr*, 557 F. Supp. at 287 n.1 ("Obviousness should not relieve manufacturers of the duty to eliminate dangers from their design if that can reasonably be done, but obviousness relieves the manufacturer of a duty to inform users of a danger."); *Auburn Mach. Works Co. v. Jones*, 366 So. 2d 1167 (Fla. 1979); *Knox v. Delta Int'l Mach. Corp.*, 554 So. 2d 6, 7 (Fla. Dist. Ct. App. 1989) ("[A] manufacturer has no duty to warn consumers of . . . an obvious danger."); *Gragg v. Diebold, Inc.*, 403 S.E.2d 229 (Ga. Ct. App. 1991) (summary judgment proper when absence of warning light on bank security system was open and obvious); *National Bank of Bloomington v. Westinghouse Elec. Corp.*, 600 N.E.2d 1275 (Ill. App. 1992) (no duty to warn that hot water can scald or burn skin); *Colter v. Barber-Greene Co.*, 525 N.E.2d 1305, 1312 (Mass. 1988); *Glittenberg v. Doughboy Recreational Indus.*, 491 N.W.2d 208 (Mich. 1992) (no duty to warn in negligence case involving simple product; dangers associated with diving into shallow water in an above ground swimming pool open and obvious); *Holm v. Sponco Mfg. Inc.*, 324 N.W.2d 207 (Minn. 1982); *Mix v. MTD Prods., Inc.*, 393 N.W.2d 18, 19 (Minn. Ct. App. 1986) (stating that "a manufacturer of a product has no duty to warn of dangers that are obvious to anyone using the product"); *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976); *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 382 (Tex. 1995) ("The fact that a risk is readily apparent serves the same function as a warning."); *Jerry S. Phillips, Products Liability: Obviousness of Danger Revisited*, 15 IND. L. REV. 793 (1982).

gained by requiring a warning."<sup>55</sup> The rule has drawn further support from the Restatement (Third) of Torts: Products Liability:

Warnings: obvious and generally known risks. In general, a product seller is not subject to liability for failing to warn or instruct regarding risks and risk-avoidance measures that should be obvious to, or generally known by, foreseeable product users. When a risk is obvious or generally known, the prospective addressee of a warning will or should already know of its existence. Warning of an obvious or generally known risk in most instances will not provide an effective additional measure of safety. Furthermore, warnings that deal with obvious or generally known risks may be ignored by users and consumers and may diminish the significance of warnings about non-obvious, not-generally-known risks. Thus, requiring warnings of obvious or generally known risks could reduce the efficacy of warnings generally.<sup>56</sup>

An extensive discussion of the open and obvious doctrine and its rationale appears in the Michigan Supreme Court's decision in *Glittenberg v. Doughboy Recreational Industries*.<sup>57</sup> Acknowledging the real-world effects of imposing legal duties, *Glittenberg* noted that there must be limits on a manufacturer's duty to warn, for "if there were an obligation to warn against all injuries that conceivably might result from the use or misuse of a product, manufacturers would find it practically impossible to market their goods."<sup>58</sup> Moreover, the court noted, warnings of obvious dangers are purposeless. Warnings serve "[to] protect consumers where the manufacturer or seller has superior knowledge of the products' dangerous characteristics and those to whom the warning would be directed would be ignorant of the facts that a warning would communicate."<sup>59</sup> If, however, the risks are obvious, then "the consumer is in just as good a position as the manufacturer to gauge the dangers associated with the product."<sup>60</sup> A warning about such dangers, therefore, adds nothing. The *Glittenberg*

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<sup>55</sup> *Liriano II*, 92 N.Y.2d 232, 242, 700 N.E.2d 303, 308, 677 N.Y.S.2d 768, 769 (1998).

<sup>56</sup> RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 2 cmt. j (1997) [hereinafter RESTATEMENT].

<sup>57</sup> 491 N.W.2d 208 (Mich. 1992).

<sup>58</sup> *Id.* at 212 (citation omitted).

<sup>59</sup> *Id.* at 213.

<sup>60</sup> *Id.*

court also observed that its refusal to impose a duty to warn of obvious dangers "is consistent with the approach used by a vast majority of the jurisdictions in their negligent failure to warn cases."<sup>61</sup>

In *Caterpillar, Inc. v. Shears*,<sup>62</sup> for example, the Texas Supreme Court overturned a Texas Court of Appeals decision which held that the dangers of operating a front-end loader without a rollover protective structure ("ROPS") were not so open and obvious as to negate any duty to warn.<sup>63</sup> The supreme court held that a manufacturer had no duty to warn of the dangers of operating a front-end loader without a ROPS; an average person looking at an open cab of an 18,000 pound loader without its protective equipment would understand that nothing stands in the way of intrusion from rear or above.<sup>64</sup> As Justice Kennedy's dissent from the court of appeals opinion had observed:

The policy for requiring manufacturers to inform users of the risks inhering in their products is based upon the sound policy that the user is entitled to the information necessary to make an intelligent choice about whether the product's utility or benefits justify exposing himself to the risk of harm . . . . I conclude that the danger of collision and injury when operating a front-end loader without a ROPS is obvious as a matter of law. I conclude that the judgment

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<sup>61</sup> *Id.* at 214 n.15 (citations omitted). The court stated:

In the failure to warn context, the obvious nature of the simple product's potential danger serves the core purpose of the claim, i.e., it functions as an inherent warning that the risk is present. Stated otherwise, if the risk is obvious from the characteristics of the product, the product itself telegraphs the precise warning that plaintiffs complain is lacking.

. . . .  
. . . . Reduced to its simplest terms, the obvious danger rule in the context of a warning with regard to a simple product is both fair and logical. Where a warning is not needed because the product's potentially dangerous condition (and the consequences of ignoring that condition) is fully evident, providing a warning does not serve to make the product safer.

*Glittenberg*, 491 N.W.2d at 215 (citations omitted).

<sup>62</sup> *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379 (Tex. 1995), *overruling* *Caterpillar, Inc. v. Shears*, 881 S.W.2d 923 (Tex. App. 1994).

<sup>63</sup> *See Shears*, 881 S.W.2d at 936.

<sup>64</sup> *See Shears*, 911 S.W.2d at 382-83.

against Caterpillar based upon the failure to warn of the danger of collision and possibility of operator injury when the ROPS is removed based upon strict liability or negligence should be reversed.<sup>65</sup>

Moreover, courts have applied this doctrine even in cases where the obvious risk threatens serious bodily harm. For example, in *Maneely v. General Motors Corp.*,<sup>66</sup> the United States Court of Appeals for the Ninth Circuit declared that there could be no liability for failing to warn passengers against the open and obvious dangers of riding unrestrained in the bed of a pickup truck, despite their potential seriousness.

The manifest danger to which all of this is addressed is being ejected from the vehicle during a crash or being slammed against an unforgiving hard surface of the vehicle itself. From all of this, we conclude that the dangers of riding unrestrained in a moving motor vehicle have become common knowledge and are firmly engraved upon the public consciousness.<sup>67</sup>

The rationales discussed in *Glittenberg* and *Shears* are also viewed favorably by scholars, and the Second Circuit's rejection of them is unfounded. In fact, the passage from the Henderson and Twerski article quoted in support of the newly-minted *Liriano* duty to warn<sup>68</sup> does not, contrary to the *Liriano III* court's interpretation of it, address obvious, unavoidable risks at all. Rather, the authors observe that latent, unavoidable risks may, in special circumstances limited primarily to toxic agents and pharmaceuticals, trigger a duty to inform potential users of those risks, so that the users can decide in light of the risks and benefits (and often with the assistance of a learned intermediary such as a health care provider) whether to use the product at all. When it comes to warnings about obvious risks, however, the authors' position leaves no room for confusion: "[A]ssuming that some risks are patently obvious, the obviousness of a product-related risk invariably serves the same function as a warning that the risk is present. Thus, nothing is to be gained by adding a warning of the danger already telegraphed by the product itself."<sup>69</sup>

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<sup>65</sup> *Shears*, 881 S.W.2d at 936 (Kennedy, J., dissenting) (citations omitted).

<sup>66</sup> 108 F.3d 1176 (9th Cir. 1997).

<sup>67</sup> *Id.* at 1180.

<sup>68</sup> See *supra* note 30 and accompanying text.

<sup>69</sup> James A. Henderson & Aaron D. Twerski, *Doctrinal Collapse in Products*

## 2. Policies Underlying the Obviousness Doctrine

Courts and commentators alike have articulated a number of policies at work in determining whether there should be a duty to warn of open and obvious dangers. Even if the emotionally compelling facts of a particular case suggest that there may have been some minute benefit in offering further warnings about an obvious danger, the policies that guide the overall development of the law in this area must not be sacrificed to the desire to find a remedy for a tragic injury. The *Liriano III* court should have considered these policies before imposing any duty to warn or allowing a jury to impose such a duty.

### a. *The Policy of Preventing Future Harm Is Not Advanced by Imposing a Duty to Warn a Person Who Is Unaware of an Obvious Danger*

Undeniably, products liability law seeks to encourage the use of product designs and warnings that will reduce the risk of future harm.<sup>70</sup> The goal of preventing future harm is not advanced, however, by imposing a duty to warn a person who is oblivious to an obvious danger. In *Pineda v. Ennabe*,<sup>71</sup> for example, a small child fell out the second story window of her apartment. The child's mother had placed a bed directly under the window. Plaintiff, playing without adult supervision, bounced on the bed, knocked the window screen out or aside, and fell 30 feet to the ground.<sup>72</sup> Plaintiff claimed the landlord should have placed a warning label on or near the window advising tenants the screen would not keep a person from falling out.<sup>73</sup> The court reasoned that "[t]he policy of preventing future harm would not likely be significantly advanced by imposing a duty here. A parent oblivious to the obvious danger posed by an unsupervised child near an open upper story win-

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*Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 282 (1990).

<sup>70</sup> On the other hand, the courts have uniformly held that the manufacturer is not an "insurer" of the safety of users of its products, and does not have a duty to produce only products that represent the "ultimate" in safety, but rather products that are "reasonably safe." See *infra* notes 86-89 and accompanying text.

<sup>71</sup> 61 Cal. App. 4th 1403 (Cal. Ct. App. 1998).

<sup>72</sup> See *id.* at 1405.

<sup>73</sup> See *id.*



dow would likely be equally oblivious to the warning."<sup>74</sup> Therefore, the court concluded, the landlord "owed no duty of care to prevent the kind of accident which occurred here."<sup>75</sup>

Similarly, the *Liriano III* court should have considered whether the policy of preventing future harm would have been significantly advanced by imposing a duty to warn of an obvious danger. The plaintiff in *Liriano* ignored the obvious danger of placing his hand in an operating meat grinder. Therefore, even if advising users of a safer alternative could theoretically prevent some injuries, the circumstances of this case make the efficacy of an additional warning speculative at best.

This issue points out another of the fundamental flaws in the process followed by the *Liriano III* court: the willingness to take for granted that the warning it proposed would in fact make the product (or, in the steep grade analogy, the road) safer. One of the most thoughtful analyses of this issue can be found in *Meyerhoff v. Michelin Tire Corp.*<sup>76</sup> In that case, the plaintiffs' decedent had been killed when a tire he was inflating exploded. The plaintiffs sued the tire manufacturer for negligent failure to warn.<sup>77</sup> After trial and a verdict for the plaintiffs, the district court granted judgment as a matter of law in favor of Michelin, which the Tenth Circuit Court of Appeals affirmed.<sup>78</sup> The district court excluded plaintiffs' expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>79</sup> because it lacked a sufficient foundation to prove the proposed warning's feasibility, adequacy, and effectiveness.<sup>80</sup> The court then found that in the absence of such evidence, plaintiff could not prevail on his claim that there was a duty to warn:

"To prove defective design, it is insufficient merely to assert that a different design would have alleviated or averted the plaintiff's injuries, since it may be assumed that any particular accident involving man and machine might have been avoided through a variation in

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1408.

<sup>76</sup> 852 F. Supp. 933 (D. Kan. 1994), *aff'd*, 70 F.3d 1175 (10th Cir. 1995).

<sup>77</sup> *See id.* at 936.

<sup>78</sup> *See Meyerhoff v. Michelin Tire Corp.*, 70 F.3d 1175 (10th Cir. 1995).

<sup>79</sup> 509 U.S. 579, 589-90 (1993).

<sup>80</sup> *See Meyerhoff*, 852 F. Supp. at 947.

the design of the machine. However, such a variation might greatly magnify the chances of other sorts of mishaps taking place . . . .”

Similarly, in a warning case, a plaintiff must do more than simply present an expert who espouses a new or different warning. He must establish that warning’s feasibility, adequacy, and effectiveness . . . . The Supreme Court stated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, —, 113 S.Ct. 2786, 2793, 125 L.Ed.2d 469 (1993):

The subject of the experts’ testimony must be ‘scientific . . . knowledge.’ The adjective ‘scientific’ implies a grounding in the methods and procedures of science. Similarly, the word ‘knowledge’ connotes more than subjective belief or unsupported speculation.<sup>81</sup>

The court’s reasoning in *Meyerhoff* is compelling. Apart from whether there should ever be a duty to provide a warning about an obvious danger, it makes no sense from either the legal or public policy perspective to impose a duty to provide such a warning where no one has offered competent proof that the warning would have been effective to make the product safer. Nevertheless, that is precisely what happened in *Liriano*.

Furthermore, research in the human factors field has called into question whether the effectiveness of a proposed warning on users generally or on the plaintiff in particular can ordinarily be appraised through subjective assessment and intuition alone, whether that assessment is made by a panel of jurors or a single judge.<sup>82</sup> In one study, researchers asked

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<sup>81</sup> *Id.* (first citation omitted) (omissions in original).

<sup>82</sup> See T. Ayres et al., *Do Subjective Ratings Predict Warning Effectiveness?* (Human Factors Soc’y 34th Annual Meeting) (on file with authors); A. Dorris, *Product Warnings in Theory and Practice: Some Questions Answered and Some Answers Questioned*, PROC. OF THE HUMAN FACTORS SOC’Y 35TH ANNUAL MEETING 1073, 1074 (1991) (“[T]here is a tendency for people to respond with what they believe to be the ‘correct’ or ‘expected’ answer. The available research does not demonstrate that the responses of subjects in experiments of this type [studying the relationship between various message variables and the preferences, expectations, and stated responses of test participants] have consistent predictive value with respect to actual behavior.”); J. Frantz & J. Miller, *Communicating a Safety-Critical Limitation of an Infant-Carrying Product: The Effect of Product Design and Warning Salience*, INT’L J. INDUS. ERGONOMICS 1, 10-11 (1993) (“The nonintuitive nature of our findings regarding warning salience provides additional evidence that proposed warning solutions need to be evaluated in some manner beyond subjective impressions as to how they will perform . . . . Just as it is important to evaluate the physical design of a product along such dimensions as strength, reliability, and durability, it is important to evaluate proposed warnings along rele-

three panels of laypersons (law students, engineering students, and shoppers at a local mall) to rate subjectively the comparative effectiveness of two warning label designs for a caustic drain cleaner. Their predictions were compared with the results of a previous study in which the actual effectiveness of the two labels was measured in a group of college students. Less than one-half of the engineering students, only one-third of the law students, and only 17 percent of the shoppers correctly identified the more effective of the two designs. In addition, the engineering students were asked to predict the likelihood that college students such as themselves would read and comply with the precautions set forth on the labels. The predicted compliance rates did not match the observed compliance rates in the earlier study—the predicted rates overstated actual compliance for one label, and understated actual compliance for the other. Summing up, the authors observed:

This research does not support Hardie's (1992) position that juries are capable of determining the effectiveness of a warning unaided by well-founded expert assistance. Specifically, this study does not support the assertion that the "knowledge of ordinary people" is sufficient to (1) distinguish between warnings that differ in their behavioral effectiveness and (2) accurately predict the likelihood that people such as themselves will read and heed safety instructions when using a product.

The authors then commented on the implications of these findings for a trial in which the label design chosen by the

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vant dimensions such as attractiveness, comprehensibility, memorability, and behavioral effectiveness."); P. Frantz et al., *The Ability of Three Lay Groups to Judge Product Warning Effectiveness*, 1995 Prod. Safety and Liab. Rep. [BNA] 494 (Analysis and Perspective) (citing research results indicating that subjective assessment of warning effectiveness did not predict actual effectiveness among product users, and taking issue with view that jurors can accurately assess the effectiveness of product warnings without assistance from well-founded expert testimony); G. McCarthy et al., *Measured Impact of a Mandated Warning on User Behavior*, PROC. OF THE HUMAN FACTORS SOC'Y 31ST ANNUAL MEETING 479, 483 (1987) ("The study also demonstrated that subjective opinions on the quality of labels may not be a valid predictor of the impact of the labels on user behavior, even when the opinions are drawn from persons who have failed to follow the instructions correctly and have had their errors pointed out to them before the opinions are solicited."). *But see* W. Hardie, *Can Experts Evaluate the Effectiveness of Warnings?*, FOR THE DEFENSE, Oct. 1991, at 14-21; W. Hardie, *Critical Analysis of On-Product Warning Theory*, 1994 Prod. Safety and Liab. Rep. [BNA] 145 (Analysis and Perspective); D. Houser & R. Clark, *Human Factors Testimony: Does the Jury Really Need It?*, FOR THE DEFENSE, May 1993, at 13-19.

drain cleaner manufacturer was at issue: "In such a situation, the 'common sense, fairness, and the knowledge of ordinary people' upon which Hardie suggests relying would likely cause a jury to reach the incorrect conclusion that the warning was inadequate and that the safety instructions could and should have been made more prominent . . . ."<sup>83</sup>

Whether or not it is possible in particular cases for a factfinder to subjectively, and accurately, assess the effectiveness of a plaintiff's proposed warning, the research findings described above cast serious doubt on the wisdom of a court's decision to significantly expand the duty to warn based on nothing more than an analogy to an invented set of facts and its own subjective appraisal of the value of a warning under those circumstances.

b. *The Policy of Encouraging People to Take Reasonable Care for Their Own Safety Is Not Advanced by Imposing a Duty to Warn of Obvious Risks at the Expense of Attention to Warnings of Latent Risks*

While products liability law is intended to encourage manufacturers to design and label products in such a way as to promote their safe use, tort law in general is premised on the policy of encouraging individuals to take reasonable care for their own safety and that of those around them.

As the Michigan Supreme Court has recently explained: Under ordinary circumstances, the overriding public policy of encouraging people to take reasonable care for their own safety precludes imposing a duty on the possessor of land to make ordinary [conditions] "fool-proof." Accordingly, the general duty to protect or warn about known or obvious dangers is triggered only where some "special aspect" of the allegedly dangerous condition, such as its "character, location, or surrounding conditions," indicates that the risk of harm was unreasonable. Otherwise, the invitor is relieved of its duty toward an invitee who is aware of the danger.<sup>84</sup>

The only "special aspect" of the meat grinder in *Liriano* was that its permanently affixed guard had been sawed off by the plaintiff's employer. The jury obviously considered this in

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<sup>83</sup> Frantz et al., *supra* note 82, at 500.

<sup>84</sup> Schollenberger v. Sears, Roebuck & Co., 925 F. Supp. 1239, 1243 (E.D. Mich. 1996) (citations omitted) (alteration in original).

assigning Hobart only five percent responsibility for the accident. However, before letting the jury decide the issue, the court should have considered whether the goal of encouraging people to take reasonable care for their own safety would be advanced by requiring manufacturers to warn not only of those dangers that reasonable persons would not have appreciated, but also of those which reasonable persons, unprompted, would have seen, understood, and taken steps to avoid. In fact, as will be discussed below, there is a significant risk that the proliferation of such warnings would not only fail to improve the lot of those who deliberately or negligently encounter obvious dangers, but would, by diluting the user's attention, make it less likely that other warnings of latent hazards would be efficacious in assisting reasonable people to notice and avoid them.<sup>85</sup> The end result would very likely run counter to everything the law of torts and products liability seek to accomplish.

*c. Liability Under the Liriano III Decision Would Make Manufacturers Insurers and Would Make it Virtually Impossible for Manufacturers to Make Rational, Safety-Optimizing Decisions About Which Warnings to Include*

A manufacturer "is not an insurer and its product need not be accident proof."<sup>86</sup> In fact, the New York Court of Appeals noted, in *Bocre Leasing Corp. v. General Motors Corp.*<sup>87</sup> "Transforming manufacturers into insurers, with the empty promise that they can guarantee perpetual and total public safety, by making them liable in tort for all commercial setbacks and adversities is not prudent or sound tort public policy."<sup>88</sup> However, imposing liability for failing to warn about obvious dangers effectively casts manufacturers in the role of insurers of their products. As the Ohio Court of Appeals has said: "To impose a duty upon manufacturers and sellers to . . . safeguard against obvious dangers, would in effect make them insurers of their product. Such a rule would also be so broad-

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<sup>85</sup> See *infra* notes 92-111 and accompanying text.

<sup>86</sup> *Caprara v. Chrysler Corp.*, 52 N.Y.2d 114, 123-24, 417 N.E.2d 545, 550, 436 N.Y.S.2d 251, 255 (1981).

<sup>87</sup> 84 N.Y.2d 685, 645 N.E.2d 1195, 621 N.Y.S.2d 497 (1995).

<sup>88</sup> *Id.* at 694, 645 N.E.2d at 1199, 621 N.Y.S.2d at 501.

ranging as to amount to judicial legislation, which is not a function of this court."<sup>89</sup>

In *Liriano III*, the court should have considered the far-reaching effects of imposing a virtually limitless duty to warn of alternatives in the face of an open and obvious danger. Certainly, consideration of this particular consequence and its effect on other manufacturers in other situations was not within the purview of the *Liriano* jury. And, while Judge Newman's concurring opinion suggests that the effect of the decision should be limited only to the facts of the case,<sup>90</sup> it is not possible to read the majority decision without understanding that, in the Second Circuit's view, a duty to warn can be established merely by alleging that the user of any product should have been advised of alternatives to using that product in an openly dangerous fashion.

The fallacies of the Second Circuit's analysis become evident when one considers its ramifications for meat grinder manufacturers alone. First, any grinder manufacturer would have to conclude from this opinion that it should provide an on-product warning capable of informing even uneducated, inexperienced, non-English speaking users about the existence of every machine part that is capable of being removed (however forcibly) and the safety consequences (however obvious) of its absence. And, in formulating the list of items to be addressed, the manufacturer can take no comfort in having permanently affixed a part in such a way that the machine must be partially destroyed to remove it—if the part can be sawed, hammered, or chiseled off, it is a candidate for inclusion in the list. Indeed, by the same rationale, the *Liriano* duty to warn should be extended to cover not only the removal but the potential modification of machine parts that could have safety consequences. Alteration as a result of accidental damage or lack of maintenance should also be included.

In preparing this warning list, the manufacturer will most likely find that it is not sufficient simply to name the part,

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<sup>89</sup> *Koepke v. Crosman Arms Co.*, 582 N.E.2d 1000, 1001 (Ohio Ct. App. 1989); see also *Glittenberg v. Doughboy Recreational Indus.*, 491 N.W.2d 208, 212 n.8 (Mich. 1992) (recognizing that product manufacturers and sellers are not insurers and so are not "absolutely liable for any and all injuries sustained from the use of [their] products") (citations omitted).

<sup>90</sup> See *Liriano III*, 170 F.3d 264, 275 (2d Cir. 1999) (Newman, J., concurring).

because the user might not recognize the part by name, or be able to detect whether it had been removed or modified. Thus, to implement the goal apparently sought by the *Liriano III* court, the manufacturer must assume a duty to educate the user about the original configuration of the machine, how to recognize each piece of original equipment, and how to detect every modification that might affect his safety. It must then inform the user of the safety consequences of those modifications and, ultimately, motivate the user (who, we must assume, would not have been motivated by even obvious dangers) to demand from his employer a product that has not been so modified. All of this would have to be accomplished by use of on-product labels. In the end, the manufacturer may well devote more surface space and reader attention (both precious and limited resources) to the description of risks associated with the product it did not sell (i.e., the modified or dismembered product) than with the product it did sell.

Consider, for example, the protective guard on the meat grinder in *Liriano*. It seems easy enough for the court to suggest a warning indicating that a guard is available and that the machine should only be used with the guard in place. Even if the user knows what is meant by a guard and could tell whether it was missing, what if the guard was not removed, but instead modified by enlarging the holes to accommodate a larger "stomper"? The warning that focuses solely on the presence of the guard rather than its performance characteristics might well lead to a false sense of security. Thus, the warning would have to caution against using the product with the guard removed or modified. But, the question arises: How will the user recognize whether the guard is in its original condition? Will the warning need to include a picture? A set of dimensions and specifications? Should calipers and T-square be attached? What if it is not the guard that is modified, but the cylinder that is replaced, altering the interaction between the guard and the cylinder and compromising the effectiveness of the guard? The warning must therefore teach the user how to detect modification not only of the guard, but of the body of the grinder as well.

Placement of such a warning would also present practical issues. One might well argue that it should be placed on the guard itself, to maximize the chances that the employer will

see it and be persuaded to leave the guard intact (although the manufacturer must certainly have hoped to accomplish this by permanently affixing the guard to the grinder). On the other hand, if the guard is nevertheless removed, the label would necessarily go with it, defeating the ability of the warning to serve the purpose envisioned by the *Liriano III* court. What if the warning is attached to another part of the machine that itself is subsequently modified or replaced? For that matter, is it not even foreseeable that warning labels themselves will be removed?<sup>91</sup> Following the analysis of the *Liriano III* court to its natural conclusion would suggest the need for a label informing the user that the grinder was originally sold with labels and that the user should seek them out before using the grinder.

The problem is further compounded when one considers the myriad of ways in which even a simple piece of equipment like a meat grinder could be modified to affect safety. A manufacturer could foresee, for example, the replacement of the original three-pronged grounded electrical cord with a two-pronged ungrounded cord. The *Liriano III* opinion would therefore impose a duty to place a warning on the product instructing the operator that it originally came with a three-pronged plug, that a two-pronged plug increases the risk of electrical shock, and that the operator should refrain from using the machine if the three-pronged plug is not present.

Consider the impact of such a rule if it is then expanded to all of the equipment potentially encountered by a supermarket employee. In the course of a single day, he will need to be educated, again through on-product labelling, about the original "safe" configuration of the forklift in the stockroom, how to determine the presence and working condition of features such as the back-up alarm, rollover protection system, transmission, and brakes, and how to detect shorts or defeated safety switches. How does a manufacturer teach a seventeen-year-old about the original "safe" configuration of an industrial trash compactor? A loading dock leveler? A meat slicer? A pallet mover?

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<sup>91</sup> In fact, that appears to have happened in the *Liriano* case, in which there was evidence that the grinder was originally sold with a warning label cautioning against putting one's fingers into the grinder, but that the label was no longer present at the time of the accident. See *supra* note 9.



Imagine the number of labels that would have to be plastered on the company van to let the youthful delivery driver know that the truck would be safer if the seatbelts, airbags, antilock brakes, and ignition interlock were intact and functioning per the manufacturer's specifications.

Fundamentally, the *Liriano III* decision tells manufacturers that they must provide warnings that begin with: "This product was originally sold with these components [insert list of parts], which were configured in the following way [insert specifications]. You may be at increased risk of injury [insert injuries] if you use the product without any of these components or features, or if they were modified in any way." The warning would then have to provide specific hazard and consequence information regarding each potential removal, modification, addition, or substitution of each part or combination of parts, all to the end of informing the operator that there is a "safer alternative," namely, the way the manufacturer designed and manufactured the product to begin with. To satisfy the safety needs of all who might become victims of third parties' destructive alterations of reasonably safe products would not merely add a few words to existing warnings, but would create an unending, constantly changing laundry list of warnings on all types of obvious risks.

Widespread adherence to such a rule would not only fail to advance product safety; it would be truly counterproductive. Apart from whether any manufacturer could realistically hope through warning labels to educate users of equipment in the workplace about the safety ramifications of all possible modifications to the equipment, the result would be an unprecedented proliferation of warning labels. The social cost of "overwarning," not in monetary terms but in the diversion of limited user attention to warnings that are perceived as verbose, irrelevant false alarms, has been recognized by human factors scientists,<sup>92</sup> courts,<sup>93</sup> and commentators<sup>94</sup> alike.

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<sup>92</sup> See, e.g., J. EDWORTHY & A. ADAMS, WARNING DESIGN: A RESEARCH PERSPECTIVE (1996); B. KANTOWITZ & R. SORKIN, HUMAN FACTORS: UNDERSTANDING PEOPLE-SYSTEM RELATIONSHIPS (1983); T. Ayres et al., *What is a Warning and When Will it Work?*, PROC. OF THE HUMAN FACTORS SOC'Y 33D ANNUAL MEETING 426 (1989); Dorris, *supra* note 82, at 1076; R. Driver, *A Communication Model for Determining the Appropriateness of On-Product Warnings*, IEEE TRANSACTIONS ON PROF. COMM. 157-63 (1987); J. Frantz et al., *Potential Problems Associated with*

Since most warnings must not only be read once but re-read, and since the information provided in such "Liriano warnings" would be completely irrelevant most of the time, imagine the disincentive for users asked repeatedly to absorb a plethora of warnings that include copious statements of the obvious. The increased competition for user attention would come at the expense of those truly necessary warnings about hidden dangers that, if read and heeded, have the potential to motivate a change in the user's safety-related behavior. The New York Court of Appeals made precisely this point in explaining the rationale underlying the principle that there is no duty to warn of obvious or well-known risks:

[R]equiring a manufacturer to warn against obvious dangers could greatly increase the number of warnings accompanying certain products. If a manufacturer must warn against even obvious dangers, "[t]he list of foolish practices warned against would be so long, it would fill a volume." Requiring too many warnings trivializes and undermines the entire purpose of the rule, drowning out cautions

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*Overusing Warnings*, PROC. OF THE 7TH INT'L CONF. ON PRODUCT SAFETY RES., AND PROC. OF THE HUMAN FACTORS & ERGONOMICS SOC'Y 274 (1999); R. Krenek & J. Purswell, *Warning Label Content Strategies: An Approach to the Integration of User Knowledge and Designer Judgment*, INT'L J. COGNITIVE ERGONOMICS 2, 53-60 (1998); J. Purswell et al., *Warning Effectiveness: What Do We Know?*, PROC. OF THE HUMAN FACTORS SOC'Y 31ST ANNUAL MEETING 1116-20 (1987).

<sup>93</sup> See *Cotton v. Buckeye Gas Prods. Co.*, 840 F.2d 935, 937-38 (D.C. Cir. 1988) ("Failure-to-warn cases have the curious property that when the episode is examined in hindsight, it appears as though addition of warnings keyed to a particular accident would be virtually cost free. What could be simpler than for the manufacturer to add the few simple items noted above? The primary cost is, in fact, the increase in time and effort required for the user to grasp the message. The inclusion of each extra item dilutes the punch of every other item. Given short attention spans, items crowd each other out; they get lost in fine print . . . . Plaintiff's analysis completely disregards the problem of information costs . . . . If every foreseeable possibility must be covered, 'the list of foolish practices warned against would be so long, it would fill a volume.' Unlike plaintiff, we must review the record in light of these obvious information costs." (citations omitted)); *Broussard v. Continental Oil Co.*, 433 So. 2d 354, 358 (La. Ct. App. 1983) ("As a practical matter, the effect of putting at least ten warnings on the drill would decrease the effectiveness of all of the warnings. A consumer would have a tendency to read none of the warnings if the surface of the drill became cluttered with the warnings."); see also *Kerr v. Koemm*, 557 F. Supp. 283, 288 n.2 (S.D.N.Y. 1983); *Finn v. G.D. Searle & Co.*, 677 P.2d 1147, 1153 (Cal. 1984); *Dunn v. Lederle Labs.*, 328 N.W.2d 576, 580-81 (Mich. Ct. App. 1982).

<sup>94</sup> See, e.g., *Henderson & Twerski*, *supra* note 69, at 296-97; Victor E. Schwartz & Russell W. Driver, *Warnings in the Workplace: The Need for Synthesis of Law and Communication Theory*, 52 U. CIN. L. REV. 38, 58-60 (1983).

against latent dangers of which a user might not otherwise be aware. Such a requirement would neutralize the effectiveness of warnings as an inexpensive way to allow consumers to adjust their behavior based on knowledge of a product's inherent dangers.<sup>95</sup>

In this regard, it is ironic that the Second Circuit seems to have missed not only the philosophical underpinning of the New York Court of Appeals opinion, but the primary point of the law review article that the court credited for inspiring the new duty to inform users of "safer alternatives" to obvious risks. Far from encouraging the creation of expanded duties, Henderson and Twerski urged a "hard, critical look" at unprincipled standards for failure to warn which proliferate frivolous litigation; they continued:

[I]n failure-to-warn cases the common assumption is that warnings can often be improved upon but can never be made worse; that is, the issue at stake is always whether the defendant ought to have supplied consumers with more, and by definition better, information about product risks. Whether the defendant should have supplied more information seems, therefore, an intuitively manageable, eminently adjudicable question.<sup>96</sup>

The authors then went on to demonstrate that the "question" is anything but "intuitively manageable" and "eminently adjudicable."<sup>97</sup> They described precisely the difficulties discussed above, i.e., the social costs and limited helpfulness of proliferation of warnings.<sup>98</sup>

The court in *Cotton v. Buckeye Gas Products Co.*<sup>99</sup> expressed similar concerns:

Failure-to-warn cases have the curious property that when the episode is examined in hindsight, it appears as though addition of warnings keyed to a particular accident would be virtually cost free. What could be simpler than for the manufacturer to add the few simple items noted above. The primary cost is, in fact, the increase in time and effort required for the user to grasp the message. The inclusion of each extra item dilutes the punch of every other item. Given short attention spans, items crowd each other out; they get lost in fine print.

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<sup>95</sup> *Liriano II*, 92 N.Y.2d 232, 242, 700 N.E.2d 303, 308, 677 N.Y.S.2d 764, 769 (1998) (quoting *Kerr*, 557 F. Supp. at 288).

<sup>96</sup> Henderson & Twerski, *supra* note 69, at 269-70 (citations omitted).

<sup>97</sup> *Id.* at 270.

<sup>98</sup> See *id.* at 296-303.

<sup>99</sup> 840 F.2d 935 (D.C. Cir. 1988).

. . . Plaintiff's analysis completely disregards the problem of information costs . . . . If every foreseeable possibility must be covered, "the list of foolish practices warned against would be so long, it would fill a volume." Unlike plaintiff, we must review the record in light of these obvious information costs.<sup>100</sup>

Indeed, the New York Court of Appeals, in its opinion on the questions certified by the Second Circuit, echoed these considerations:

Requiring too many warnings trivializes and undermines the entire purpose of the rule, drowning out cautions against latent dangers of which a user might not otherwise be aware. Such a requirement would neutralize the effectiveness of warnings as an inexpensive way to allow consumers to adjust their behavior based on knowledge of a product's inherent dangers.<sup>101</sup>

Scientists specializing in this area of human cognition confirm these courts' understanding of the problems associated with the proliferation of warnings. In their article *Potential Problems Associated with Overusing Warnings*,<sup>102</sup> Frantz et al. describe the concerns arising out of the overuse of warnings that have been discussed or reported in the scientific and research literature. These include reduced attention to warnings generally,<sup>103</sup> reduced attention to individual messages within warnings (i.e., the selective filtering out of messages within a warning, or the "skipping" of warning information deemed unimportant or already known to the user),<sup>104</sup> reduced recall of certain warning messages because of human memory limitations,<sup>105</sup> reduced believability or credibility of warnings (especially where warnings are perceived as raising remote risks or "false alarms"),<sup>106</sup> reduced ability to differentiate the relative magnitude of risks,<sup>107</sup> and misplaced reliance on the completeness of the warning label.<sup>108</sup> While the authors emphasize that not all of these concerns have yet been the subject of

<sup>100</sup> *Id.* at 937-38 (citations omitted).

<sup>101</sup> *Liriano II*, 92 N.Y.2d 232, 242, 700 N.E.2d 303, 308, 677 N.Y.S.2d 764, 769 (1998).

<sup>102</sup> See Frantz et al., *supra* note 92, at 274.

<sup>103</sup> See Frantz et al., *supra* note 92, at 274-75.

<sup>104</sup> See Frantz et al., *supra* note 92, at 275.

<sup>105</sup> See Frantz et al., *supra* note 92, at 275-76.

<sup>106</sup> Frantz et al., *supra* note 92, at 276-77.

<sup>107</sup> Frantz et al., *supra* note 92, at 277.

<sup>108</sup> See Frantz et al., *supra* note 92, at 277.

empirical study, "there is virtually total agreement in the warnings-related literature that providing product warnings about all risks associated with a product is an ill-fated and incorrect approach."<sup>109</sup>

Moreover, Frantz notes, these concerns arise not simply from the sheer number of warnings provided on any particular product, but also out of the cumulative number of warnings on products generally and the inclusion of warnings that have questionable value in terms of injury prevention. "Thus, the issue of overusing warnings is far more complex than merely counting the number of warnings on a label on a product. It is not simply an intra-product issue, but also an inter-product issue."<sup>110</sup> The article concludes that "deciding when and how to provide warnings often requires consideration of the potential impact, both positive and negative, of adding a particular warning to a product or manual."<sup>111</sup>

Thus, the impact of a poorly-designed warnings policy and ill-conceived duty is not only upon the manufacturer and user of the specific product involved in an individual case, or even those manufacturers and users to whom the duty might logically extend, but in its cumulative effect, upon all manufacturers and users who rely upon warnings to motivate safety-related behavior. Unfortunately, in *Liriano III*, there appears to have been no "consideration of the potential impact, both positive and negative" of adding the type of warning proposed by the court to the Hobart grinder, let alone to every other product that may be susceptible of third-party destructive alterations.

*Liriano III* must also be considered for the duty it appears to impose on manufacturers *after* the product has been sold. Nothing in the Second Circuit opinion or in the parties' briefs suggests that at the time of original sale Hobart had any reason to foresee that purchasers of its meat grinders would forcibly remove the riveted guard.<sup>112</sup> Indeed, it appears that the

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<sup>109</sup> Frantz et al., *supra* note 92, at 277.

<sup>110</sup> Frantz et al., *supra* note 92, at 277.

<sup>111</sup> Frantz et al., *supra* note 92, at 278.

<sup>112</sup> The New York Court of Appeals held in *Amatulli v. Delhi Construction Corp.*, 77 N.Y.2d 525, 571 N.E.2d 645, 569 N.Y.S.2d 337 (1991), that there is no duty to warn of a risk created by the subsequent transformation of a product unless the manufacturer knew, at the time of sale, that such modifications were

subject grinder survived more than 30 years with the guard intact.<sup>113</sup> Moreover, even the plaintiff's own expert appears to have agreed that the grinder was safe when sold and that the safety features made warnings unnecessary.<sup>114</sup> Therefore, the tacit implication of *Liriano III* is that at some point *subsequent to sale*, when Hobart learned that some owners were removing the guards, Hobart should not only have affixed warnings to its new grinders, but it should have also sought out prior purchasers to recall and relabel the grinders with warnings of the obvious risks of operating without the permanently affixed guards.

The ramifications of such a duty, particularly for manufacturers of durable products that not only can be expected to last many years, but are often transferred from owner to owner, are staggering and utterly unprecedented in New York law. The seminal New York case on post-sale duty to warn, *Cover v. Cohen*,<sup>115</sup> involved the manufacturer's post-sale duty to warn of a defect that existed at the time of sale but which was not discovered until later. It is one thing to conclude that a manufacturer who belatedly learns of a product defect is obligated to take reasonable steps to inform existing owners, and quite another to impose a duty on a manufacturer of a reasonably safe product to seek out purchasers to inform them about the obvious dangers resulting from the post-sale conduct of third parties who defeat and destroy the safety features of that product.

Even the more expansive recognition of post-sale duty to warn articulated in the Restatement (Third) of Torts: Products Liability § 10 (1998) limits the imposition of such a duty to situations where

- (1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and (2) those to whom a warning might be provided can be identified and may reasonably be assumed to be unaware of the risk of harm; and (3) a warning can be effectively communicated to and acted on by

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being made.

<sup>113</sup> See *supra* notes 6-13.

<sup>114</sup> See Brief for Appellant at 19, *Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 700 N.E.2d 303, 677 N.Y.S.2d 764 (1998).

<sup>115</sup> 61 N.Y.2d 261, 461 N.E.2d 864, 473 N.Y.S.2d 378 (1984).

those to whom a warning might be provided; and (4) the risk of harm is sufficiently great to justify the burden of providing a warning.<sup>116</sup>

Comment *a* to section 10 of the Restatement explains the rationale for caution in imposing such a duty, and the importance of the court's role in delimiting it:

Nevertheless, an unbounded post-sale duty to warn would impose unacceptable burdens on product sellers. The costs of identifying and communicating with product users years after sale are often daunting . . . .

As with all rules that raise the question whether a duty exists, courts must make the threshold decisions that, in particular cases, triers of fact could reasonably find that product sellers can practically and effectively discharge such an obligation and that the risks of harm are sufficiently great to justify what is typically a substantial post-sale undertaking . . . . In light of the serious potential for overburdening sellers in this regard, the court should carefully examine the circumstances for and against imposing a duty to provide a post-sale warning in a particular case.<sup>117</sup>

While it appears from the Second Circuit opinion there was evidence Hobart "knew or reasonably should know" after it sold the subject grinder that some employers had removed some guards from grinders, and that an unguarded grinder posed "a substantial risk of harm,"<sup>118</sup> there is no information from which a court or jury could conclude that the remaining three requirements were met. On the contrary, given the change in ownership of the subject product, the obviousness of the risks, the destruction of the safety feature by the employer, and the relative powerlessness of the employee, the facts of *Liriano* offer a textbook example of why courts should be loath to view a post-sale duty to warn as an effective safety measure in such cases.

Manufacturers should not be required to expend huge resources to send multiple notices about risks of which they can assume users will be cognizant or to send warnings that they have no reason to believe will be effective. Moreover, consumers cannot possibly want safety dollars spent in this

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<sup>116</sup> RESTATEMENT, *supra* note 56, § 10, at 191.

<sup>117</sup> *Id.* cmt. a, at 192.

<sup>118</sup> That is, the first element required to be established to impose a post-sale duty to warn under the Restatement. *See id.* § 10.

way or mailboxes stuffed with such mindless, overwhelmingly irrelevant notices. None of the comments and none of the cases cited in the Reporters' Notes supporting section 10 of the Restatement supports the imposition of such a duty under the facts set forth in *Liriano*,<sup>119</sup> and nothing in *Cover v. Cohen* even comes close.

The natural effect of *Liriano III* on the decision-making of manufacturers would be to motivate them to attempt to inoculate themselves against this new onslaught of product liability by papering their products with advisories about the "safer alternatives" to the myriad obvious ways in which the products might be abused or misused to cause injury. Because the court in *Liriano III* did not give significant thought to whether such a program would improve product safety, the manufacturers must necessarily also take from the opinion the lesson that liability avoidance, not improved safety, is the goal to be sought by their decision-making. When products liability law encourages manufacturers to be more concerned about limiting their liability exposure than accomplishing real safety gains, it has failed in its essential purpose.

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If the *Liriano III* decision is followed by New York courts, then all manufacturers who sell products in that state must now give warnings, including post-sale warnings, about safer alternatives even in the face of obvious dangers. It is doubtful the *Liriano* jury considered how broad and unmanageable the imposition of such a duty would be or the consequences of imposing such a duty. Certainly, the Second Circuit itself did not. It is a flawed lawmaking process to leave such matters to a single jury that has not considered the relevant policy issues. For this reason alone the *Liriano III* decision must be rejected by other courts addressing comparable issues.

### C. *Liriano Was Not an Appropriate Scenario for Application of an "Informed-Choice" Warning Analysis*

In its effort to find some precedent in legal analysis for its decision, the court in *Liriano III* sought to posture its ruling as a natural application of the concept of "informed choice warn-

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<sup>119</sup> See *id.* at 192-200.



ings" described by Henderson and Twerski. But neither the "steep grade" scenario<sup>120</sup> nor the *Liriano* fact scenario were conducive to application of the "informed choice" paradigm, and the *Liriano III* court's extension of the concept to these settings was not only unprecedented, but ill-conceived.

Henderson and Twerski explained their view of two types of warnings thus: "Several early commentators distinguished between warnings to reduce the risk of harm—risk-reduction warnings—and warnings given simply to inform the purchaser that the use of the product involves a nonreducible risk—informed-choice warnings."<sup>121</sup>

Thus, in the "risk-reduction" scenario, a warning may help the consumer reduce the risk of product-related injury by instructing the consumer about risks associated with a product's use and how to avoid those risks by using the product correctly.<sup>122</sup> On the other hand, in the less common "informed choice" scenario, Henderson and Twerski suggested that a

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<sup>120</sup> The *Liriano* court did not refer to a single reported decision or statute in support of its holding. Instead, the court analogized the case to an imaginary scenario in which the court determined that a highway sign saying "Steep Grade Ahead-Follow Suggested Detour to Avoid Dangerous Areas" was better than one that merely said "Danger-Steep Grade." *Liriano III*, 170 F.3d 264, 270 (2d Cir. 1999). Apart from whether the proposed long-form "steep grade" warning would actually be more effective in preventing accidents (a proposition for which there was no foundation laid in the opinion), the obviousness of the dangers of a steep grade, the ability to communicate the alternatives, and the likely response of a driver cannot fairly be compared to the obviousness of the danger of sticking one's hand into a meat grinder and the likely response of a young, uneducated, and unskilled employee to the type of on-product label that would be necessitated by this decision. Because the proposition underlying the analogy was unsupported, and the analogy itself easily distinguishable, it cannot sustain the Second Circuit's conclusions. Furthermore, because the court avoided answering the question briefed by the parties—whether the danger of putting one's hand into a meat grinder was obvious—and instead embarked upon a new theory of liability for failure to warn of even obvious dangers, the court's consideration of both the analogy and the theory premised upon it had the benefit neither of precedent nor of any evidence or argument from the parties. Thus, the process itself was flawed and would tend to undermine the confidence in the outcome of such judicial decision-making. See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 5 (University of Chicago Press 1949) ("The forum protects the parties and the community by making sure that competing analogies are before the court. The rule which will be created arises out of a process in which if different things are to be treated as similar, at least the differences have been urged. In this sense, the parties as well as the court participate in the law-making.")

<sup>121</sup> Henderson & Twerski, *supra* note 69, at 285 n.88 (citations omitted).

<sup>122</sup> See *id.* at 285 n.87.

warning may provide the consumer with information about latent, unavoidable risks inherent in the use of a product, i.e., risks that cannot ordinarily be reduced or avoided simply by modifying the manner in which the product is used.<sup>123</sup> Indeed, the consumer's interaction with the product and with its attendant risks is largely passive except for the initial, binary decision about whether to use the product in the first place. "In the case of unavoidably unsafe products, the user or consumer typically can do little or nothing to reduce the risk of injury once the choice to use or consume is made."<sup>124</sup> Instead, the consumer, applying his own "risk-benefit analysis," must choose whether he wishes to encounter those risks or avoid them by declining to use the product altogether.<sup>125</sup>

Cases finding a duty to provide a so-called "informed-choice warning" have generally been "limited to prescription drugs and cosmetics, although occasionally other products are implicated."<sup>126</sup> Typical examples of these warnings in our society include the warnings on inserts in prescription drugs which advise of the risk of side-effects, or the language sometimes found on cosmetics which note the possibility of allergic reactions.

In contrast, the scenario in the *Liriano* case has none of the characteristics of the settings in which courts have found "informed choice" warnings appropriate. The case involves methods of keeping employees' hands out of operating meat grinders. The risk was neither latent nor unavoidable. On the contrary, the risk was obvious: the grinder can and will grind whatever is put into it. The manner of avoiding the risk was equally obvious: Keep hands out of the grinder. If the worker was uncomfortable with his ability to keep his hands out of the grinder given its configuration, he had the option (if he had any options at all) of declining to use the grinder. Thus, every purpose of the "informed choice" warning is served—the user is aware of the risk, and can avoid it by careful use of the product, or by declining to use the product at all.

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<sup>123</sup> See *id.*

<sup>124</sup> *Id.* at 285 n.88.

<sup>125</sup> *Id.*

<sup>126</sup> Henderson & Twerski, *supra* note 69, at 286 & nn.89-90 (collecting cases involving tampons, deodorant, and asbestos).

Nothing in the cases that have dealt with "informed choice" warnings has suggested that the manufacturer must first warn of obvious risks and then embark upon an exposition of the array of available alternatives, including the alternatives that would have been present had someone not forcibly defeated them. In fact, the reasoning of *Liriano III* would suggest that the manufacturer should not even stop there, but should go on to describe the alternatives that would have been present if the purchaser had selected them as options, and perhaps even, in true "Miracle on 34th Street" fashion, the alternatives that would have been present if the purchaser had selected a competitor's product.<sup>127</sup>

Clearly, such an undertaking would be impractical and ultimately self-defeating, yet, all of this would appear to follow from the rationale underlying the *Liriano III* court's seemingly innocuous extension of the concept of "informed choice" warnings to the facts before it. The rationale underlying "informed choice" warnings is not advanced by their extension into this setting, and the policy considerations that militate against imposing a duty to warn of obvious risks are as powerful as in the cases that first articulated those considerations. To extend the "informed choice" concept under these circumstances, and, moreover, in the absence of any support for the efficacy of this type of warning in preventing this or any injury, is contrary to the goal of products liability law to foster wise safety policy and to promote good safety decision-making.

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<sup>127</sup> If there are risks (including even latent risks) associated with the alternative, the manufacturer would surely need to describe them as well, so that the user could make an "informed choice" about whether to proceed with the alternative. For example, in the "steep grade" analogy, the Highway Department may need to analyze whether there are other traffic hazards on the "flatter" road that drivers should take into account in deciding which route to choose. Those hazards may, of course, change over time if there is a significant diversion of new traffic onto the "flatter" route as a result of the advisory. Similarly, if a warning advising the user that a meat grinder is supposed to have a guard results in a bungled attempt to replace the guard, the result may well be a false sense of security that makes the grinder more dangerous because it appears safe—yet another issue to be addressed in the warning.

D. *There Should Be No Causation Presumption in Cases Involving Open and Obvious Dangers*

Having announced an unprecedented new duty to warn that obvious dangers may be avoided by using a product with all of its parts intact, thereby effectively abrogating the principle that there is no duty to warn against obvious dangers, and having intuited that such warnings would be effective generally, the Second Circuit severed the final tie between its view of the law on failure to warn and the real world by declaring that a jury may infer simply from the absence of the warning and the occurrence of the injury that a warning would have prevented the injury, effectively shifting to the defendant the burden of producing evidence of non-causation.

In essence, the *Liriano III* court applied a "heeding presumption," a device employed by some courts to shift the burden of producing evidence as to causation where the facts establish that a warning was required.<sup>128</sup> The heeding presumption permits a jury to infer that the warning the jury finds should have been given, would have been read and heeded by the plaintiff.<sup>129</sup> Just as in *Liriano III*, the presumption allows the plaintiff to make out a prima facie case of causation, shifting the burden to the defendant to produce evidence of noncausation. Thus, while the Second Circuit did not call its burden-shifting exercise a presumption, the effect was the same, as is evident from Rule 301 of the Federal Rules of Evidence.<sup>130</sup> In so doing, *Liriano III* ignores existing New York

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<sup>128</sup> See *Coffman v. Keene Corp.*, 628 A.2d 710, 718 (N.J. 1993); *House v. Armour of Am., Inc.*, 886 P.2d 542 (Utah Ct. App. 1994).

<sup>129</sup> See *Coffman*, 628 A.2d at 718; *House*, 886 P.2d at 542.

<sup>130</sup> The effect of a presumption "affecting the burden of producing evidence" is that the existence of the presumed fact is assumed unless and until evidence is introduced which would support a finding of its nonexistence. The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of *proof* as to the nonexistence of the presumed fact. To understand the different effects of the two types of presumptions, consider the presumption of receipt that arises from evidence that a letter has been mailed, and suppose the intended recipient claims he never got it. If the presumption of receipt is one "affecting the burden of producing evidence," then the presumption ceases to have any effect once the intended recipient introduces evidence that will support a finding that he never got the letter, and no finding one way or the other is compelled by the weight that might be assigned to his evidence. But if the presumption is one "affecting the burden of proof," then the intended

and Second Circuit precedent and articulates an approach that ignores policy, common sense, and real world considerations.

### 1. *Liriano III's* Application of an "Inference of Causation" Was Contrary to New York and Second Circuit Precedent

Before *Liriano III*, the Second Circuit in *Raney v. Owens-Illinois, Inc.*,<sup>131</sup> considered the role of inferences and presumptions on causation in failure to warn cases under New York law and found that New York had never recognized a "heeding presumption" in warning cases.<sup>132</sup> It did note that while the plaintiff has the burden of proving causation, the New York courts had acknowledged that in failure to warn cases, as in other cases, "causation may sometimes be inferred from the facts and circumstances that the plaintiff has presented . . . . Accordingly, even though a plaintiff is not entitled to a presumption, a jury might be permitted to infer the necessary element of causation."<sup>133</sup> On the other hand, the court in *Raney* specifically pointed out, an inference of causation will *not* be available in cases "where a warning is not reasonably required because the danger is obvious."<sup>134</sup>

Instead of following *Raney*, or at least examining the cases and authorities to determine whether the New York Court of Appeals, given the opportunity, would change course and now decide to adopt such a presumption in a warnings case, the panel in *Liriano III* turned to *Martin v. Herzog*,<sup>135</sup> a case of negligence per se which did not involve warnings at all. The

recipient's testimony would not destroy the presumption, and he would have to prove by greater weight of the evidence that the letter was not delivered. See JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 301.01-02 (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 1997).

Like other courts applying a heeding presumption, the *Liriano III* court noted that the inference it permitted the jury to draw affected only the burden of producing evidence, not the burden of proof. Accordingly, the shifting of burdens did not require Hobart to prove non-causation. Rather, it simply relieved plaintiff of the burden of coming forward with evidence of causation. See *Liriano III*, 170 F.3d 264, 272 & n.5 (2d Cir. 1999).

<sup>131</sup> 897 F.2d 94 (2d Cir. 1990).

<sup>132</sup> *Id.* at 95-96 (citations omitted).

<sup>133</sup> *Id.* at 96.

<sup>134</sup> *Id.* (citations omitted).

<sup>135</sup> 228 N.Y. 164, 170, 126 N.E. 814, 816 (1920).

doctrine of negligence per se may well support the application of a presumption that shifts the burden to the defendant to produce evidence of noncausation when it is shown that he injured someone in the course of violating a statute specifically designed to prevent such an injury. As the *Liriano III* court observed, the court shifted the burden of proof in *Martin* because "the legislature deemed driving without lights after sundown to be negligent precisely because not using lights tended to cause accidents of the sort that had occurred in the case."<sup>136</sup> But *Liriano* did not involve the violation of any statute and therefore did not involve the doctrine of negligence per se.

Whether the kind of negligence attributed to the defendant tends to cause the kind of injury plaintiff suffered is not alone enough to justify shifting the burden of production under Rule 301 of the Federal Rules of Evidence. A civil presumption affecting the burden of producing evidence requires "some rational connection between the fact proved and the ultimate fact presumed."<sup>137</sup> "The basis for the rational connection test includes considerations of policy and convenience, although convenience alone will not always justify the creation of a presumption."<sup>138</sup> In a case of negligence per se, such as *Martin v. Herzog*, the legislature has already evaluated the relevant policy issues. In a warning case involving an obvious danger, however, the relevant policy issues have not been examined by the legislature and therefore at the very least should have been examined by the court before shifting the burden of producing evidence to the defendant on the issue of causation. When those policy considerations are evaluated, the *Martin* concept of "causation per se" is fundamentally unfair and inapposite, especially where the dangers were apparent even without a warning.

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<sup>136</sup> *Liriano III*, 170 F.3d 264, 272 (2d Cir. 1999) (citing *Martin*, 228 N.Y. at 168, 126 N.E. at 815).

<sup>137</sup> *Mobile, Jackson & Kansas City R.R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910).

<sup>138</sup> WEINSTEIN & BERGER, *supra* note 130, § 301.03[2], at 301-19 (citations omitted).

## 2. Adoption of a Heeding Presumption in a Failure to Warn Case, Especially One Involving Obvious Dangers, Is Not Supported by the Recognized Bases for Creating Presumptions

Traditionally, courts and commentators have pointed to four rationales for creating presumptions: (1) to correct an imbalance resulting from one party's superior access to the proof necessary to rebut the presumption; (2) to promote a particular social and economic policy; (3) to avoid an impasse or reach some result, even though the result may be arbitrary; and (4) because the proof of a particular fact renders the inference of the existence of another fact so probable that it is sensible and timesaving to assume the truth of the inferred fact until the adversary disproves it.<sup>139</sup> In most cases, the presumption is not based upon any one of these reasons standing alone, but rather has been created for a combination of these and other reasons.<sup>140</sup> Some presumptions are tied closely to the area of substantive law to which they apply, particularly those presumptions established to further some social policy. For example, employees in employment discrimination cases are entitled to certain presumptions which, when the employee produces certain facts establishing a prima facie case, shift the burden to the employer to provide proof of a legitimate, non-discriminatory reason for the challenged action.<sup>141</sup> Those presumptions respond to the employer's superior access to proof, promote public policy embedded in statutory and constitutional rights, and reflect the recognized probability based on historical experience that if an employee is able to establish the elements of the prima facie case, it was more likely than not that the employee had in fact suffered discrimination.

On the other hand, the presumption in a failure to warn case that if an adequate warning had been given, plaintiff would have read and heeded it, does not advance any of the goals identified above. First, it does not correct an imbalance caused by one party's superior access to the proof necessary to rebut the presumption. On the contrary, the manufacturer has

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<sup>139</sup> See JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 343 (4th ed. 1992).

<sup>140</sup> See *id.* § 343, at 455.

<sup>141</sup> See *McDonnell Douglas Corp. v. Greene*, 411 U.S. 792, 802 (1973).

less access to proof regarding the plaintiff's knowledge, practices, judgment, attention, and state of mind which might have affected the likelihood that he or she would read and heed a warning. Therefore, to shift the burden of production to the manufacturer to prove that a warning would not have changed the plaintiff's behavior significantly handicaps the party who already has inferior access to relevant evidence.

Second, the heeding presumption does not promote desirable social and economic policies. While one might theorize that the increased risk of liability costs as a result of the application of the presumption would motivate manufacturers to devote additional resources to providing adequate warnings and instructions, it is just as likely that the effect would be to encourage manufacturers to plaster their products with self-serving, liability-reducing warnings without regard to actual effectiveness, a result that, as discussed above, would run counter to good safety policy.

Similarly, the heeding presumption does not avoid an impasse, but rather encourages a purely arbitrary result. By contrast, the presumption of survivorship of persons who died in a common disaster is necessary to allow other rules of law to operate, even though there is no factual basis upon which to believe that one party or the other was likely to have died first.<sup>142</sup> Similarly, the presumption of death of someone who has not been seen or heard from for seven years, facilitates the resolution of rights that otherwise may be stalled.<sup>143</sup> Neither of these interests would appear to be served by the heeding presumption in failure to warn cases.

Perhaps most important, however, the heeding presumption is not based on experience or research justifying the assessment of a high probability that the user would have read and heeded an alternative warning. On the contrary, as will be seen, the scientific research tends to cast doubt on the effectiveness of on-product warnings in consistently or predictably modifying safety-related behavior in real world circumstances.

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<sup>142</sup> See *id.* § 343, at 454.

<sup>143</sup> 29 AM. JUR. 2D *Evidence* § 185 (1994).



### 3. Adoption of a Heeding Presumption in a Failure to Warn Case, Especially One Involving Obvious Dangers, Flies in the Face of Scientific Research and Real World Experience Which Tends to Show that Product Users Do Not Consistently Read and Heed On-Product Warnings

The idea of using warning labels to decrease risk is founded on two fundamental assumptions: (1) human behavior is important in controlling the frequency and severity of consumer product related accidents and (2) human behavior can be modified toward reducing frequency and severity of accidents by the presence of warning labels.<sup>144</sup> The second assumption is based on the further assumptions that (a) a user will notice and read a warning label; (b) a user will understand a warning label; (c) the information in the warning label is useful in preventing the accident or mitigating severity; and (d) the user will act appropriately based on the information contained in the warning label.<sup>145</sup>

Most agree that in the right circumstances, on-product warnings can play a useful role in guiding the behavior of individuals who are seeking information about how to use the product safely, and who are motivated to comply with that information when they receive it. On the other hand, everyday experience and observation tells us that on-product warnings are routinely overlooked, ignored, and disobeyed for any number of reasons that have nothing to do with the quality of the information or the manner of its presentation. Warnings may get short shrift because the user is distracted or hurried, or because the user chooses to follow the lead of friends or co-workers rather than the admonitions on the warning label. Other times, the user may ignore or disobey warnings because he has previous product experience that has led him to conclude that the risk is minimal, or she may have concluded that the "cost" in time or inconvenience of following the warning outweighs the perceived risk of ignoring it.

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<sup>144</sup> See Roger McCarthy et al., *Warnings on Consumer Products: Objective Criteria for Their Use*, in HUMAN FACTORS PERSPECTIVES ON WARNINGS 164 (K. Laughery et al. eds., 1994).

<sup>145</sup> See *id.*

Beyond these everyday observations, the efforts of researchers to prove by scientific means that on-product warnings are indeed effective to modify safety-related behavior in actual or simulated real-world applications have generally yielded disappointing results.<sup>146</sup> These efforts have included not only attempts by researchers to compare the behavior of subjects exposed to a warning with the behavior of subjects who were not,<sup>147</sup> but also studies analyzing targeted accident data for a particular product or group of products before and after warnings intended to address those types of accidents were introduced.<sup>148</sup> While the interpretation of the results of these studies on the question of whether on-product warnings have ever been found effective to modify safety-related behavior has been the subject of some debate within the human factors community,<sup>149</sup> the research clearly establishes that

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<sup>146</sup> See *id.* at 165; David DeJoy, *Consumer Products Warnings: Review and Analysis of Effectiveness Research*, in HUMAN FACTORS PERSPECTIVES ON WARNINGS 16 (K. Laughery et al. eds., 1994); see also T. Ayres et al., *Effectiveness of Warning Labels and Signs: An Update on Compliance Research*, PROC. OF THE SILICON VALLEY ERGONOMICS CONF. AND EXPOSITION 199-205 (ErgoCon 1998) (citing articles).

<sup>147</sup> See, e.g., D. Fergusson et al., *A Controlled Field Trial of a Poisoning Prevention Method*, 69 (5) PEDIATRICS 515-20 (1982); M. Lehto & J. Foley, *Risk-Taking, Warning, Labels, Training, and Regulation: Are They Associated with the Use of Helmets by All-Terrain Vehicle Riders?*, 22 J. SAFETY RES. 191-200 (1991).

<sup>148</sup> See S. Arndt et al., *Warning Labels and Accident Data*, PROC. OF THE HUMAN FACTORS AND ERGONOMICS SOC'Y 42D ANNUAL MEETING 550 (1998); L. Kerpelman, *Evaluation of the Effectiveness of Outdoor Power Equipment Information and Education Programs* (AAI No. 78-27) (Cambridge, MA, ABT Associates, Inc. 1978); S. Soumerai et al., *Effects of Professional and Media Warnings About the Association Between Aspirin Use in Children and Reye's Syndrome*, 70 (1) MILBANK Q. 155-82 (1992); S. Soumerai et al., *Effect of Government and Commercial Warnings on Reducing Prescription Misuse: The Case of Propoxyphene*, 77 (12) AM. J. PUB. HEALTH 1518-23 (1987); see also L. Robertson et al., *A Controlled Study of the Effect of Television Messages on Safety Belt Use*, 64 (11) AM. J. PUB. HEALTH 1071-80 (1974). Other efforts to analyze accident data have looked at accident or incident investigation reports to determine whether the incidents occurred despite the presence of warnings directed to the behavior that caused the incidents. See, e.g., K. Laughery & D. Lovvoll, *Automatic Shoulder Belt Manual Lap Belt Restraint Systems: Human Factors Analyses of Case Studies Data*, PROC. OF THE HUMAN FACTORS AND ERGONOMICS SOC'Y 42D ANNUAL MEETING 492-96 (1996); K. Laughery et al., *Tire-Rim Mismatch Explosions: The Role of On-Product Warnings*, PROC. OF THE HUMAN FACTORS AND ERGONOMICS SOC'Y 42D ANNUAL MEETING 1088-92 (1998).

<sup>149</sup> See Eli Cox, *Do Product Warnings Increase Safe Behavior? A Meta-Analysis*, 16 J. PUB. POL'Y & MARKETING 195-204 (1997) (citing articles).

one cannot rely on even the most carefully-designed label to consistently and reliably elicit compliance with its admonitions.<sup>150</sup>

At the same time, the courts, led by the decision of the United States Supreme Court in *Daubert*,<sup>151</sup> are placing increased emphasis on the requirement that expert opinion evidence must meet a rigorous standard of reliability before it may be admitted, including consideration of whether the opinion has been developed and tested in a manner consistent with accepted scientific methodology.<sup>152</sup> In the face of scientific research as well as ordinary experience demonstrating how often warning labels go unheeded, a presumption that a specific product user would have behaved differently if only a warning label (or a different warning label) had been present is funda-

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<sup>150</sup> See *id.*

<sup>151</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

<sup>152</sup> *Daubert* counsels that "a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested." *Id.* at 593. Additionally, the *Daubert* Court identified other "general observations" that are relevant in determining the scientific validity, and, therefore, the evidentiary reliability, of a particular methodology or technique, including: (1) "whether the theory or technique has been subjected to peer review and publication"; (2) the "known or potential rate of error" of the theory or technique; (3) "the existence and maintenance of standards controlling the technique's operation"; and (4) whether the theory or technique has reached general acceptance in "a relevant scientific community." *Id.* at 593-94. Under *Daubert*, courts must also consider whether the expert testimony in question "fits" the facts of the case and that the expert's proffered opinion "will have a reliable basis in the knowledge and experience of his discipline." *Id.* at 591-92.

*Daubert* limited its reach to experts' methodologies only, not their conclusions. In *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), the Court expanded its reasoning, holding that

conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert.

*Id.* at 146.

More recently, in *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999), the Court clarified the scope of *Daubert* and held that "a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony," regardless of whether the expert is testifying about a scientific or non-scientific subject matter. *Id.* at 1176. Today, in the wake of *Daubert*, *Joiner*, and *Kumho Tire*, parties are on notice of the exacting standards by which expert testimony is measured in the federal courts, as well as many state courts that apply similar tests. See, e.g., *Weisgram v. Marley Co.*, 120 S. Ct. 1011 (2000).

mentally at odds with the courts' efforts to insure that decision-making in products liability cases is based upon reliable evidence rather than "junk science."

#### 4. The Facts of this Case Cannot Support an "Inference of Causation" or Application of the "Heeding Presumption"

One need look no further than the *Liriano* case for circumstances illustrating the absurdity of applying a heeding presumption or "inference of causation" in a failure to warn case, and particularly in a failure to warn case involving obvious dangers. The very reason articulated by the courts for declining to impose a duty to warn of obvious dangers is that such warnings would most likely be futile if the plaintiff was not already motivated by the obviousness of the danger confronting him.<sup>153</sup> That being true, it is ironic that the *Liriano III* court not only imposed such a duty, but declared it to be so self-evident that a warning about obvious risks would induce safer behavior that a jury could infer it without the need for any evidence on the subject. It is ironic, too, that the court apparently gave the plaintiff the benefit of the inference notwithstanding that the plaintiff had not requested or argued it at trial, and the defendant had no notice that it would be required to rebut it.

Even so, the record is replete with reasons to conclude that no warnings, regardless of form or content, would have changed the unfortunate events that culminated in the plaintiff's injury. An enumeration of the assumptions underlying the inference bears this out:

(1) The inference of causation permitted by the court assumes that a warning sold with the grinder would have remained affixed to the product for thirty years and through an unknown succession of owners, despite evidence that a warning label that was sold with the product was not present at the time of the accident.

(2) The inference permitted by the court assumes that if a warning was provided post-sale, it would have reached the then-current owner of the grinder, who would have affixed it to the grinder, even

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<sup>153</sup> See *supra* notes 52-69 and accompanying text.

though that owner had maintained the guard intact and had no intention of removing it.

(3) The inference assumes that if the warning had been affixed, and if it had remained in place until plaintiff's employer obtained the grinder, plaintiff's employer would have decided not to remove the guard, even though no one knows who removed the guard or why, and even though the guard was permanently attached and therefore had to be forcibly removed.

(4) The inference assumes that if the warning had been affixed, and had remained in place until plaintiff first came in contact with the grinder and the guard had been removed, plaintiff would have understood the warning, recognized the absence of a guard, and refused to work with the grinder until the guard was replaced, notwithstanding that the plaintiff was seventeen, illiterate, poor, and non-English-speaking, notwithstanding it was obvious that whatever came in contact with the grinding mechanism was ground, notwithstanding that he knew he should not let his hands go into the mouth of the grinder, notwithstanding that he knew he should use a "stomper" to prevent his hands from contact with the grinder but did not, and notwithstanding that there was no easy way to reattach the guard given the destroyed rivets and no evidence that the employer would be motivated to try.

In short, the meat grinder, from the user's perspective, performed a simple function: whole meat went in one opening, and ground meat came out another opening. A user oblivious to the obvious danger posed by placing his hand in a meat grinder would likely be equally oblivious to any warning to use the grinder with a guard. The obviousness of the danger alone should have negated any inference of causation.

Whether articulated as a "heeding presumption" or as an "inference of causation," the *Liriano III* court's decision on remand that the plaintiff could simply forego proof that a warning about an obvious danger would have changed someone's behavior and prevented his injury contravened science, New York precedent, and common sense. To then impose that outcome on the defendant without an opportunity to try the case with full notice of both the theory and the presumption, contravened fundamental fairness.

## CONCLUSION

As Henderson and Twerski conclude:

If this perception is accurate, and if we have fairly and persuasively presented the shortcomings in current failure-to-warn doctrine, perhaps courts will respond generally with good sense and moderation . . . . It is imperative that failure-to-warn litigation become subject to the rule of law. Talk is cheap, but courts must recognize that the education of consumers through product warnings is not. For too long these easy cases have made bad law. The time for change has come.<sup>154</sup>

Unfortunately, the *Liriano III* decision represents a step in the wrong direction, away from the good sense and moderation urged by Henderson and Twerski. It is to be hoped that other courts will not follow the Second Circuit's lead, and that future panels take a new and more thoughtful look at the parameters of the duty to warn.

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<sup>154</sup> Henderson & Twerski, *supra* note 69, at 326-27.

