William Mitchell Law Review

Volume 27 | Issue 1 Article 27

2000

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I. SYNOPSIS

This article explores whether the determination of the existence of a duty to warn is one for the court or the jury. The authors examine several cases in which the courts expressly state that the issue is solely one for the court, even when reasonable persons might disagree on the underlying issue of foreseeability. The article then presents the better view, followed by some courts and supported by the *Restatement (Second) of Torts,* requiring jury resolution of any reasonably disputed foreseeability issues as a precursor to the determination of the existence of a duty to warn.

II. INTRODUCTION

Manufacturers in products liability actions regularly face "failure-to-warn" claims in addition to allegations of design and manufacturing defects. For example, plaintiffs may claim that they should have been warned not to operate an industrial press without a hand-guard, or not to splice a power cord on an appliance, or not to turn a control knob with a tool. Whether phrased in strict liability, warranty, or negligence terms, failure-to-warn claims are typically decided under a negligence analysis requiring foreseeability of the use (or misuse) as a predicate to imposition of liability.[1] Manufacturers often argue against warnings-based liability on the ground that the use was not reasonably foreseeable. For example, the

1. *E.g.*, Douglas R. Richmond, *Renewed Look at the Duty to Warn and Affirmative Defenses*, 61 DEF. COUNS. J. 205, 207-208 (1994) (discussing failure-to-warn claims); JAMES T. O'REILLY, PRODUCT WARNINGS: DEFECTS AND HAZARDS § 6.02(A)-(B) (2nd ed. 1999) (discussing failure-to-warn claims).

manufacturer might argue that the danger was obvious and thus it could not foresee the user encountering the risk, or that the plaintiff used the product in an unforeseeable manner causing unforeseeable risks. The question explored by this article is whether the court or the jury should finally resolve these foreseeability issues in determining failure-to-warn liability.

Many courts routinely hold that the existence of a duty to warn is a question of law for the court, separate from what they consider jury issues, such as adequacy of the warning, breach of the duty, and causation.[2] However, the primary consideration in answering the duty-to-warn question is the foreseeability to the manufacturer of the manner of use of the product and/or the danger resulting from that use. Whether a particular use should have been anticipated or provided for is intuitively a question of social expectation—"what do we reasonably require of this actor under the circumstances?"—that has long been recognized by tort law as for the jury.

Indeed, despite the fact that some courts state that the existence of a duty to warn is a legal issue decided by the court's determination of foreseeability, those courts may or should have at least an implicit understanding that the jury must make the ultimate determination of foreseeability if the issue is reasonably in dispute. The court's role in a given case should be no more than to make a threshold determination of whether there is any reasonable dispute on foreseeability (and, thus, the existence of a duty) for jury resolution.

There are substantial dangerous consequences for both plaintiffs and defendants if the court in a particular case heeds the express terms of the case law pronouncements that the existence of a duty to warn is solely an issue for the court. Most significant to the plaintiff's claim is the risk of an adverse directed verdict. If the court assumes the position that it alone determines the existence of a duty, it logically must dismiss claims in which it resolves the foreseeability issue against the plaintiff. A judge with a particular social perspective or political attitude may believe that the use was absurd or the abuse incredible and dismiss the case, even though another judge or a more diversified jury could reach a different conclusion. Seemingly, if the facts allow reasonable disagreement about whether the risk was foreseeable (i.e., vested with the obligation to anticipate or deal with), the jury should be given the issue.

2. *See* discussion *infra* Part IV.

The warnings-claim defendant is also prejudiced by the court solely determining the existence of a duty. If the court holds that the plaintiff's use of the product was foreseeable, that determination is the final word. Logically, the court must then instruct the jury that a duty in the particular case exists and give the jury only the questions of the adequacy of the warning, breach of the duty, and causation.[3] If the defendant has not issued a warning, liability is probably axiomatic. The duty is obviously breached and the warnings "inadequate." Because of the commonly employed rebuttable presumption that a warning would have been heeded, causation may be academic unless the defendant can establish facts proving that the warning would not have prevented the injury.

III. BACKGROUND ON THE DUTY TO WARN

In general, the duty to warn may be summarized as follows:

> A manufacturer or other seller is subject to liability for failing either to warn or adequately to warn about a risk or hazard inherent in the way a product is designed that is related to the intended uses as well as the reasonably foreseeable uses that may be made of the products it sells.[4]

A. Sources Of Warnings-Related Liability

One source courts rely on to impose warnings-related liability is the *Restatement (Second) of Torts* section 388, which provides:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

3. *But see* discussion *infra* Part VII (discussing how adequacy of warning is not a separate issue from breach of duty).

4. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 96, at 685 (5th ed. 1984).

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.[5]

Courts also frequently rely on comments h, j, and k to the "strict liability" provisions of the *Restatement (Second) of Torts* section 402A for warnings-related liability.[6] The comments incorporate the failure to provide adequate warning of a danger that the seller "has reason to anticipate. . .may result from a particular use" into the framework of products that are defective and unreasonably dangerous.[7]

As is well-known by the products liability bar, the *Restatement (Third) of Torts: Products Liability* now expressly sets out inadequate instruction or warning as a category of product defect for which a manufacturer is liable:

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or defective because of inadequate instructions or warnings...A product:

(c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor. . .and the omission of the instructions or warnings renders the product not reasonably safe.[8]

B. Theoretical Framework For Failure-To-Warn Claims

The various *Restatement* provisions of the duty to warn set forth above all require that the need for a warning must be reasonably foreseeable. Thus, in the majority of jurisdictions, the inquiry is negligence-based.

Some courts permit plaintiffs to frame failure-to-warn claims in

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5. RESTATEMENT (SECOND) OF TORTS § 388 (1965). *E.g.*, Natural Gas Odorizing, Inc. v. Downs, 685 N.E.2d 155, 163 n.11 (Ind. Ct. App. 1997) (relying on section 388 in discussing circumstances justifying delegation of duty to warn).

6. Richmond, *supra* note 1, at 207-08.

7. RESTATEMENT (SECOND) OF TORTS § 402A cmt. h (1965).

8. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).

terms of strict liability, negligence, or warranty concepts.[9] Confusion has been generated by some courts attempting to preserve a distinction between negligent and strict liability failure-to-warn claims.[10] In fact, a minority of jurisdictions excuse the foreseeability test in a strict liability failure-to-warn claim.[11] However, the majority rule is that, regardless of the purported underlying theory, failure-to-warn claims are essentially negligence-based and require a finding that the manufacturer reasonably should have foreseen the danger and reasonably should have warned or instructed to prevent the injury.[12]

The foreseeability issue may be two-fold. Obviously, the manufacturer must have been able to foresee the danger or risk that ultimately injured the plaintiff. However, the manufacturer often argues that it could not foresee that danger because the plaintiff used (or, from the manufacturer's perspective, misused) the product in an unforeseeable manner. Liability is imposed only where the use or misuse was reasonably foreseeable.[13]

IV. AUTHORITY FOR THE PROPOSITION THAT THE EXISTENCE OF A DUTY TO WARN IS SOLELY A QUESTION OF LAW FOR THE COURT

A number of courts hold, unequivocally and without significant analysis, that the existence of a duty to warn is a question of law for the court alone.[14] The Minnesota Supreme Court, in *Germann v. F.L. Smithe Machine Co.*,[15] summarized the inquiry as fol-

9. Richmond, *supra* note 1, at 205 n.4.

10. O'REILLY, *supra* note 1, at § 6.02(B).

11. *Id.*

12. Richmond, *supra* note 1, at 205; *see also* Germann v. F.L. Smithe Machine Co., 395 N.W.2d 922, 926 n.4 (Minn. 1986) (noting that strict liability to warn is based upon principles of negligence); Natural Gas Odorizing, 685 N.E.2d at 163 n.11 (acknowledging that "there is no doctrinal distinction between negligence and strict liability failure-to-warn actions under the Restatement"); KEETON ET AL., *supra* note 4, § 99 at 697 (noting the "generally accepted view" is that failure-to-warn claim requires proof of negligence even if framed in strict-liability terms).

13. *See* Richmond, *supra* note 1, at 206.

14. *See generally* O'REILLY, *supra* note 1, at § 6.02(A) (noting that a court determines whether duty to warn existed based on foreseeability of risk, obviousness of danger, and common knowledge of the danger); 63A AM. JUR. 2D. *Prod. L.* § 1216 (1997 & Supp. 1999) (stating the existence of a duty to warn is generally a question of law for a court unless the "record is in dispute"); 63 AM. JUR. 2D. *Prod. L.* § 151 (1996 & Supp. 1999) (noting a court held that the existence of a component manufacturer's duty to warn is a question of law for the court requiring consideration of foreseeability issues).

15. 395 N.W.2d 922 (Minn. 1986).

lows:

> [T]he court goes to the event causing the damage and looks back to the alleged negligent act. If the connection is too remote to impose liability as a matter of public policy, the courts then hold there is no duty and consequently no liability. On the other hand, if the consequence is direct and is the type of occurrence that was or should have been reasonably foreseeable, the courts then hold as a matter of law a duty exists.[16]

The case law generally holds that once the court determines the existence of a duty to warn, it should instruct the jury on the adequacy of the warning, breach of the duty, and causation.[17] Most significant in this framework is that it purports to prohibit the judge from allowing the jury to determine the existence of a duty to warn—a determination based on a foreseeability evaluation that clearly seems to require jury resolution.[18]

A. *Examples Of Cases Holding That The Existence Of A Duty To Warn Is A Question Of Law For The Court Alone*

1. Balder v. Haley *(Minnesota)*

In *Balder v. Haley*,[19] the Minnesota Supreme Court held that the trial court erred in allowing the jury to determine the existence of a duty to warn. The plaintiff was injured in a gas explosion caused by a leak at the valve of his mother's water heater.[20] Uncontroverted evidence established: (1) use of the gas valve for many years without a control knob (which had broken), but rather by turning the reset shaft to which the knob had been attached; (2) repeated "repair" of a leak around the reset shaft, which was producing a small flame at that location, by "plugging" the leak several

16. Germann, 395 N.W.2d at 924-25 (citing Christianson v. Chicago St. P., M. & O. Ry. Co., 67 Minn. 94, 69 N.W. 640 (1896)).

17. *Id.*

18. *Infra* Part V. One article argues persuasively that *Germann* and its progeny have "creat[ed] confusion and depriv[ed] litigants of the community judgment provided by juries." George W. Soule and Jacqueline M. Moen, *Failure to Warn in Minnesota, the New Restatement on Products Liability, and the Application of the Reasonable Care Standard*, 21 WM. MITCHELL L. REV. 389, 392-93 (1995). The authors then call upon the Minnesota Supreme Court to "take the opportunity that the Restatement (Third) presents to correct the failure-to-warn analysis in Minnesota." *Id.* at 397.

19. 399 N.W.2d 77 (Minn. 1987).

20. *Id* at 78.

times with dental wax; and (3) the plaintiff's mother was repeatedly warned by a repairman not to use and to replace the valve.[21]

Plaintiff claimed negligence and strict liability against the valve manufacturer, including failure to adequately warn of dangers associated with use of the valve.[22] The jury found that the manufacturer was not liable and divided fault among the plaintiff, his mother, and the repairman.[23] The Minnesota Court of Appeals reversed in part, holding the manufacturer negligent as a matter of law for failure to warn and remanding for a jury determination of causation.[24]

The Minnesota Supreme Court held that, for procedural reasons, the court of appeals abused its discretion in even considering the failure-to-warn issue.[25] More significantly, though, the supreme court went on to cite *Germann* and emphasize that the trial court should not have submitted the issue of the existence of a duty to warn to the jury in the first place because it was a purely legal question for the court.[26] Stating that "[t]here is 'no duty to warn of an improper use that could not have been foreseen,'" the court held that the manufacturer could not foresee the improper use or alteration of the valve or the danger presented thereby and, thus, that there was no duty to warn.[27]

Critically, the court did not couch its holding as a determination that no reasonable juror could conclude otherwise. In other words, the court did not take the issue *away* from the jury but, rather, held that the foreseeability issue in the duty-to-warn context is solely for the court. Indeed, the court did not even revisit or analyze in any detail the facts set forth earlier in the opinion when holding that there was no duty.

2. Genaust v. Ill. Power Co. *(Illinois)*

The Supreme Court of Illinois, in *Genaust v. Ill. Power Co.*,[28] similarly held that foreseeability in the context of a failure-to-warn claim is a question for the court alone. In *Genaust*, the plaintiff

21. *Id.* at 78-79.
22. *Id.* at 80.
23. *Id.*
24. *Id.* at 80-81.
25. *Id.* at 80.
26. *Id.* at 81.
27. *Id.* (citing Frey v. Montgomery Ward & Co., Inc., 258 N.W.2d 782, 788 (Minn. 1977)).
28. 343 N.E.2d 465 (Ill. 1976).

contracted to install a steel tower and antenna on top of a roof.[29] As he was doing so, the antenna came close to some uninsulated power lines owned by the power company.[30] Electrical current arced between the power lines and the antenna, traveled through the steel tower, and electrocuted the plaintiff.[31]

One of the plaintiff's claims was that the tower and antenna were unreasonably dangerous products because "they failed to have adequate warnings or labels attached informing users of the danger of electrical arcing if either of the products were brought in close proximity to power wires."[32] In affirming the trial court's dismissal of the action on the pleadings, the supreme court of Illinois stated: "The determination of whether a duty to warn exists is a question of law and not of fact. Underlying such a determination is necessarily the question of foreseeability, which, in the context of determining the existence of a duty, is for the court to resolve."[33]

Thus, the *Genaust* court expressly assumed the role of determining foreseeability as the predicate for holding that a duty to warn existed.

The court went on to hold, as a matter of law, that it was not "objectively reasonable for [defendant manufacturers and sellers of the tower and antenna] to expect a user of their products to be injured in the manner in which plaintiff was injured."[34] The court relied on the fact that the plaintiff admitted that the danger of electricity is common knowledge and, more significantly, simply stated that "it is common knowledge that metal will conduct electricity."[35] The court concluded that "it is not objectively reasonable to expect that a person, knowing the danger of electricity if metal should contact electrical wires, would attempt to install a metal tower and antenna in such close proximity to electrical wires."[36]

The court acknowledged that the injury resulted not from direct contact with the power lines, but arcing from the lines to the antenna and tower.[37] Nonetheless, the court believed that the "controlling fact" was that the defendants could not reasonably

29. *Id* at 460-61.
30. *Id.*
31. *Id.*
32. *Id.* at 465.
33. *Id.* at 466 (citations omitted).
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*

foresee a user installing the products so close to the lines, when there were obvious "harsh consequences of the slightest mishap."[38] The court, therefore, affirmed dismissal of the action on the pleadings.[39]

Like the Minnesota Supreme Court in *Balder*, the *Genaust* court did not suggest that it was resolving the foreseeability issue because it believed that no reasonable jurors could disagree. Rather, the court held that foreseeability in the duty-to-warn context was never a jury issue but one for the court alone.

3. Pettis v. Nalco Chem. Co. *(Michigan)*

Courts have also held, as a matter of law, that a duty to warn does exist. In *Pettis v. Nalco Chem. Co.*,[40] the plaintiff was injured when molten steel that he was pouring into a mold exploded.[41] The plaintiff claimed that the explosion was caused by excess moisture in a coating regularly applied to the inside surface of the mold.[42] The coating apparently had been applied though use of a bucket rather than a spray gun.[43] The plaintiff argued that this resulted in over-application and a slower evaporation time for moisture within the coating.[44]

The evidence was undisputed that the plaintiff and all employees understood that moisture in the mold presented a danger of explosion.[45] However, they did not know that the coating should not be applied by means other than the spray gun and did not know exactly how long it took for moisture to evaporate from the coating at various temperatures.[46] The plaintiff claimed that the coating manufacturer had a duty to warn of proper and improper application techniques.[47]

The jury returned a verdict for the plaintiff.[48] The trial court then granted the manufacturer's motion for a directed verdict.[49]

In reinstating the verdict, the court of appeals of Michigan

38. *Id.*
39. *Id.* at 472.
40. 388 N.W.2d 343 (Mich. Ct. App. 1986).
41. *Id.* at 346.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id* at 348.
47. *Id.*
48. *Id* at 345.
49. *Id.*

ruled that the trial court should have held that a duty to warn existed:

> It is well-settled law that the question of duty is to be resolved by the court rather than the jury. We find that defendant owed a legal duty to provide warnings with its product....Because the danger of a severe explosion was not obvious, and because it was foreseeable that the product would be applied other than by spraying, there was a duty to warn potential users that over-application of the product would cause an explosion.[50]

Thus, the *Pettis* court also expressly accepted sole responsibility for resolving the foreseeability issue in ultimately holding, as a matter of law, that the manufacturer had a duty to warn.

B. Summary Of The Case Law's Implications

The mandate of these cases in failure-to-warn claims is twofold: (1) the court alone must resolve the issue of the foreseeability of a risk in ruling whether a duty-to-warn exists; and (2) if a court determines that a duty to warn exists, it should advise the jury that it has found such a duty and then instruct the jury only on the adequacy of the warning, breach of the duty, and causation.

Of course, if the court truly resolved the foreseeability issues and there was no warning, the breach and adequacy determinations (which, as discussed later, are one and the same) would be axiomatic and should not go to the jury. Causation may still remain for jury resolution, but typically only where there is evidence that the plaintiff subjectively knew of the danger anyway, that the plaintiff would not have heeded the warnings, or that the event was actually caused by something other than the danger that the plaintiff claims should have been warned against.

V. AUTHORITY FOR THE PROPOSITION THAT THE EXISTENCE OF A DUTY TO WARN MAY REQUIRE JURY RESOLUTION OF FORESEEABILITY ISSUES

The problem presented by the above cases is that the court may infringe, one way or another, on what should be the jury function of resolving foreseeability.[51] The problem likely is avoided

50. *Id.*

51. Soule & Moen, *supra* note 18, at 397 (discussing lack of any "conceptual difference" between design and defect claims that would support "significant de-

much of the time by court intuition and common sense. More appropriately, though, it should be avoided in every case by following significant authority for the better view—that the foreseeability issue is for the jury where reasonable minds could disagree under the facts of the case.

A. *The Common Sense Considerations*

Former Minnesota Supreme Court Justice John E. Simonett insightfully discussed the danger posed by the frequent pronouncement that the court must decide the issue of whether a duty to warn exists:

> Some of the language in *Germann* has been interpreted to mean that a jury never decides whether a duty to warn exists. The trial court must decide, of course, based on the evidence, whether to submit the issue of failure to warn to the jury. This is a question of law for the court. Put another way, it is a question of law for the judge whether there is a question of fact for the jury. In submitting a failure to warn claim to the jury, the trial court ordinarily is instructing the jury to determine from all the evidence if, in fact, the risk to be warned against was reasonably foreseeable, so that a duty to warn was necessary; and, if so, whether any warnings were adequate or could have been effective (which relates to the scope of the duty); and, finally, whether the duty was breached and causation was present. In a particular case, one or more of these questions may be decided by the trial court as a matter of law and the jury so told. But otherwise, generally, the jury decides if a duty to warn exists and if it was breached.[52]

Justice Simonett thus recognized that courts should not decide foreseeability issues where reasonable jurors could disagree.

The Minnesota pattern jury instructions, quoting Justice Simonett's analysis in commentary, contemplate that the jury will be asked to determine the foreseeability issues despite *Germann* and its progeny:

> A manufacturer has a duty to provide reasonably ade-

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parture from the traditional roles of court and jury").

52. John E. Simonett, *Dispelling the Products Liability Syndrome: Tentative Draft No. 2 of the Restatement (Third)*, 21 WM. MITCHELL. L. REV. 361, 365 (1995).

quate (warnings) (instructions) for its products to those who use the product when the product:

1. Is used as intended, or

2. Is used in a way that the manufacturer could reasonably have anticipated.

A manufacturer has a duty to use reasonable care in deciding whether (to warn of dangers involved in using its product) (to provide instructions for safe use of the product).

In deciding whether the manufacturer should have provided (warnings) (instructions), consider all the facts and circumstances, including, among others:

1. The likelihood that harm would result from use of the product

2. The seriousness of the harm that would result

3. The cost and ease of providing (warnings) (instructions) that would avoid the harm

4. Whether the manufacturer considered the scientific knowledge and advances in the field...[53]

Assuming that the pattern instructions are substantially followed, the jury will be instructed to resolve the foreseeability issue as a predicate to a liability determination (even if the trial court purports to have "resolved" the foreseeability issue in holding that a duty existed). The inquiry set out by the pattern instructions is not functionally different from that set forth in *Germann* and quoted in section IV above, purportedly to guide a court's resolution of the foreseeability issue.

Even the *Balder* court, despite pronouncing that the existence of a duty to warn is solely an issue for the court, seemed to have some implicit recognition that the foreseeability issue is "jury-like." After clearly ruling that the issue was one for the court, the Minnesota Supreme Court noted that the plaintiff had failed to object to the trial court's submission of the issue to the jury.[54] Holding that any objection was waived, the court proceeded to review and uphold the jury's implicit determination of no duty under a "sufficiency-of-the-evidence" standard.[55] The court expressed no diffi-

53. 4A MINNESOTA PRACTICE § 75.25 (4th ed. 1999).
54. *Balder v. Haley*, 399 N.W.2d 77, 81 (Minn. 1987).
55. *Id.*

culty reviewing the issue as it would any other factual issue.[56] It may be that the court instinctively recognized that the foreseeability issue may require jury consideration.

The tone of Justice Simonett's analysis reflects some confidence that most trial courts will ultimately appreciate that they cannot take disputed issues on foreseeability from the jury. However, there is clear authority for his analysis that was simply unrecognized by the courts above.

B. Established Authority For Giving The Foreseeability Issue To The Jury

1. Comment e To The Restatement (Second) Of Torts § 328B

Comment e to the *Restatement (Second) of Torts* section 328 B provides:

> It is the further function of the court to determine whether, upon facts in evidence which the jury may reasonably find to be true, the law imposes upon the defendant any legal duty to act or to refrain from acting for the protection of the plaintiff. This decision is always for the court... *Where the existence of the duty will depend upon the existence or non-existence of a fact as to which the jury may reasonably come to either one of two conclusions. . .then it becomes the duty of the court to instruct the jury as to the defendant's duty, or absence of duty, if either conclusion as to such fact is drawn.*[57]

The section provides plain and sensible authority for courts to relinquish the foreseeability issue to the jury where it is reasonably disputed.

2. Butz v. Werner *(North Dakota)*

The Supreme Court of North Dakota in *Butz v. Werner*[58] cited Comment e to the *Restatement (Second) of Torts* section 328B in holding that the jury must decide foreseeability issues as they affect the existence of a duty to warn.[59] In *Butz*, the plaintiff was being towed by boat on a "Super Tube" water toy and hit a parked boat close to

56. *Id.*

57. RESTATEMENT (SECOND) OF TORTS § 328 B, cmt. e (1965) (emphasis added) (discussing the function of courts in the proof of negligence generally).

58. 438 N.W.2d 509 (N.D. 1989).

59. *Id* at 511.

shore.[60] He alleged that the manufacturer should have warned: (1) of a maximum towing speed; (2) that the tube "would accelerate and arc around corners;" (3) that the rider could not control the tube's direction or speed; and (4) that spray from the tube would obstruct the rider's visibility.[61]

The tube manufacturer argued that the dangers were open and obvious and, thus, that it had no duty to warn as a matter of law.[62] The court rejected the contention that the issue was one for the court:

> In a negligence action, whether a duty exists is generally a preliminary question of law for the court. However, if the existence of a duty depends upon factual determinations, their resolution is for the trier of fact. The appropriate procedure in such cases is for the court to instruct the jury as to the defendant's duty, or absence of duty, if certain facts are found.[63]

The court held that whether the danger was open and obvious was a question for the jury.[64] In other words, the court held that the jury had to decide whether the accident and plaintiff's injuries were foreseeable in the absence of a warning.

3. Liriano v. Hobart Corp. *(Second Circuit)*

Similarly, in *Liriano v. Hobart Corp.*,[65] the Second Circuit held that the obviousness of a danger had to be resolved by a jury as part of the determination of whether a duty to warn existed.[66] In *Liriano*, the plaintiff was injured by a meat grinder from which his employer or another person had removed the safety guard.[67] The machine did not have a warning against operation without the guard.[68]

The court held that it did not even need to resolve the conflicting New York case law on whether the risk posed by meat grinders was obvious as a matter of law.[69] The court recognized that, although many New Yorkers know that meat grinders are dan-

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60. *Id.* at 510.
61. *Id.* at 512.
62. *Id.* at 511-12.
63. *Id.* at 511 (citations omitted).
64. *Id.* at 512.
65. 170 F.3d 264 (2nd Cir. 1999).
66. *Id* at 271.
67. *Id.* at 266.
68. *Id.*
69. *Id.* at 271.

gerous, the plaintiff was seventeen at the time, was a recent immigrant, had only worked for a week, had never been instructed on the use of the meat grinder, and had used it only a few times.[70] The court stated that there might be "enough" meat grinders who did not know that safety guards were available and should be used to reduce the risk of injury that the court could not "say, as a matter of law, that [the manufacturer] had no duty to warn [the plaintiff]."[71] The court affirmed the trial court's submission of the foreseeability/open-and-obvious issues to the jury as a predicate to determining whether the manufacturer had a duty to warn.[72]

C. *Summary Of The Better View On Analyzing The Existence Of A Duty To Warn*

The courts should not determine alone the existence of a duty to warn. When the issue turns on a reasonably disputed foreseeability of the risk posed by a product, the jury should resolve the dispute. The contrary opinions discussed above do not seem to expressly disagree as much as they simply fail to examine the issue. In any event, there does not appear to be any authority for the court to make the foreseeability determination for a failure-to-warn claim when it is a classic jury question in other contexts.[73]

Revisiting the decision in *Genaust v. Ill. Power Co.* helps demonstrate why the court should not alone determine foreseeability. The *Genaust* court first stated that "it is not objectively reasonable to expect that a person, knowing of the danger of electricity if metal should contact electrical wires, would attempt to install a metal tower and antenna in such close proximity to electrical wires."[74] The plaintiff, though, apparently had evidence that such antenna set-ups were common in areas with the type of uninsulated power lines that caused his injury.[75] It seems arguable, at least, that the plaintiff's evidence created a reasonable dispute as to whether the tower and antenna manufacturers should have foreseen that people would attempt installation near power lines and, thus, had a duty to warn of the dangers.

More significantly, though, is the fact that the plaintiff was in-

70. *Id.* at 269.
71. *Id.* at 271.
72. *Id.*
73. Soule & Moen, *supra* note 18, at 396 n.52.
74. Genaust v. Ill. Power Co., 343 N.E.2d 465, 465 (Ill. 1976).
75. *Id.* at 470.

jured by *arcing* from the wires to the antenna (not direct contact) and the arcing danger was the basis of his failure-to-warn claim. Plaintiff did not claim that he needed to be warned not to touch the wire with the antenna, which he may have been careful to ensure.[76] The court casually dismissed this fact, holding that the plaintiff's conduct was not reasonably foreseeable given "the harsh consequences of the slightest mishap."[77]

The court appears to have missed the real issue—whether it was reasonable for the manufacturer to expect that consumers would know that *arcing* (apparently the "slightest mishap" that the court refers to) could occur and cause injury. The foreseeability of that danger, especially given that the plaintiff had at least some evidence that the installation he attempted was common, seems to raise a fact question that should not have been resolved by the court based upon its own belief of what reasonable consumers know about the arcing properties of electricity. Indeed, the court never even stated that arcing specifically was a commonly known danger.

Had the court approached the duty issue under the approach set forth in comment e to the *Restatement (Second) of Torts* section 328B, it is unlikely that it would have dismissed the plaintiff's failure-to-warn claim as a matter of law. Rather, the jury would have determined whether it was reasonably foreseeable that consumers of the products would expose themselves to the arcing danger and whether that danger was open and obvious to expected consumers.

VI. WHEN AND HOW MAY A COURT DETERMINE THAT THERE IS NO DUTY AS A MATTER OF LAW?

This analysis does not suggest that a court may never determine, as a matter of law, that there is no duty to warn. The authors suggest that there are two broad circumstances under which a court may properly do so.

A. *Determination Of No Duty As A Matter Of Law Because No Reasonable Jurors Could Disagree On The Foreseeability Issue*

As with any purported fact dispute, a court may take the issue of foreseeability from the jury if it determines that no reasonable

76. *Id.* at 471.
77. *Id.*

jury could disagree on the resolution of the issue.[78] This well-established rule needs no elaboration beyond the standard cautionary advice that the court must not substitute its own judgment on the issue if any reasonable person could arrive at a different conclusion.

B. Defenses Based On Atypical Relationships Between The Parties

A court often may be able to resolve the duty issue as a matter of law when faced with defenses concerning the relationship of the parties. For example: (1) the sophisticated user defense, where warnings may not be required for users with special knowledge of the dangers;[79] (2) the bulk supplier defense, allowing a manufacturer of bulk products to rely on a downstream packager to provide warnings;[80] or (3) the learned intermediary defense, which typically arises in pharmaceutical cases and allows the manufacturer to rely on the prescribing physician to warn the user.[81] The focus of these defenses on the relationship of the parties raises perhaps the broadest public policy-based considerations involved in the determination of the existence of a duty. Therefore, the application of the defenses in a particular case may be decided more appropriately decided by a court, at least where, as may be typical, there is no genuine dispute as to the status on which the defense is based.

VII. ISSUES THAT REMAIN FOR THE JURY IF A DUTY TO WARN EXISTS

The case law often states that the issues that remain for the jury, once a duty to warn has been established, are the adequacy of the warning, breach of the duty, and causation.[82] Perhaps because of the confusion discussed in this article on whether foreseeability is a question of law or fact, these courts may be trying to "give something back" to the jury by proposing separate inquiries into the adequacy of the warning and breach of the duty. However, the adequacy of the warning is nothing more than an issue going to

78. *E.g.*, Brown v. Sears, Roebuck & Co., 667 P.2d 750, 756 (Ariz. Ct. App. 1983) (holding, as a matter of law, there was no duty to warn where "reasonable minds could not differ as to the obviousness of [the] danger").

79. Richmond, *supra* note 1, at 211-12.

80. *Id.* at 212.

81. *Id.* at 212-13.

82. *E.g.*, Germann v. F.L. Smithe Mach. Co., 395 N.W.2d 922, 924-25 (Minn. 1986) (noting that whether a duty exists is a matter of law, and that "Other issues such as adequacy of the warning, breach of duty and causation remain for jury resolution").

whether the duty was breached. An adequate warning must mean that there is no breach of the duty, not that there is no duty. Conceptually, there is no reason to parse out the adequacy issue from determination of breach.

The courts correctly state that causation remains, as in all negligence cases, a fact issue to be resolved by the jury unless no reasonable persons could disagree.

VIII. CONCLUSION

The better rule is that when reasonably disputed foreseeability issues exist in a failure-to-warn claim, the court should submit those issues to the jury as a precursor to determining the existence of the duty. Contrary case law does not analyze the issue in detail and may mislead later courts attempting to properly resolve the claims. There does not appear to be any justification for permitting the court to resolve reasonably disputed foreseeability issues that, in other contexts, are routinely submitted to the jury.

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