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Warning! Failure to Read this Article May Be Hazardous to Your Failure to Warn Defense

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WARNING! FAILURE TO READ THIS ARTICLE MAY BE HAZARDOUS TO YOUR FAILURE TO WARN DEFENSE

By Hildy Bowbeer, Wendy F. Lumish, and Jeffrey A. Cohen[†]

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I. INTRODUCTION

The failure-to-warn claim is among the most common allegations in products liability litigation.¹ The premise of the claim is

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that a manufacturer or seller failed to warn a consumer about an unreasonable risk of foreseeable harm associated with the use of a product. Such claims may be brought independently or, as is more frequent, in connection with manufacturing and design defect claims.² This article analyzes the key elements of the failure-to-warn claim and addresses emerging or prevalent issues concerning this claim. The article also points out numerous roadblocks that can bar a plaintiff's failure-to-warn claim.

The frequency of failure-to-warn claims and their success has been attributed to a number of factors. First, the failure-to-warn claim is not highly technical in the same sense as a design or manufacturing defect claim.³ In that regard, the failure-to-warn claim is neither unduly confusing to a lay jury nor expensive to develop.⁴ Second, the intuitive notion stating that practically any product capable of causing serious harm can be made less dangerous by providing additional or different (i.e. "better") warnings or instructions is appealing to judges and juries alike.⁵ Third, it can be difficult for a manufacturer to persuasively dispute the feasibility of providing additional or better warnings.⁶ Fourth, in many jurisdictions, the plaintiff's burden to show that additional or better warnings would have prevented the injury is comparatively slight.⁷ Finally, the costs of providing warnings relative to the costs of the harm they may prevent are almost universally, if somewhat incorrectly, perceived as being low.⁸

authors wish to thank Christopher McKay for his assistance with this endeavor.

1. Douglas R. Richmond, *Renewed Look at the Duty to Warn and Affirmative Defenses*, 61 DEF. COUNS. J. 205, 205 (1994); see also Edward J. Higgins, *Gone But Not Forgotten: Manufacturers' Post-Sale Duties to Warn or Recall*, 78 MICH. B. J. 570, 570 (1999).

2. Richmond, *supra* note 1, at 205; see also Higgins, *supra* note 1, at 570.

3. Richmond, *supra* note 1, at 205; see also Higgins, *supra* note 1, at 570.

4. Higgins, *supra* note 1, at 570.

5. Richmond, *supra* note 1, at 205. See also James A. Henderson & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 269-70 (1990) (stating that "the common assumption is that warnings can often be improved upon but never be made worse...the issue at stake is always whether the defendant ought to have supplied consumers with more, and by definition better, information about product risks").

6. Higgins, *supra* note 1, at 570.

7. *Id.*

8. *E.g.*, *Anderson v. Hedstrom Corp.*, 76 F. Supp. 2d 422, 440 (S.D. N.Y. 1999) (holding that "[s]ince the cost of providing warnings is often minimal, the balance usually weighs in favor of an obligation to warn" (quoting *Cooley v. Carter-Wallace, Inc.*, 478 N.Y.S.2d 375, 376-77 (4th Dist. 1984)); *Ross Lab. v. Thies*, 725 P.2d 1076, 1079 (Alaska 1986) (stating that "[t]he cost of giving an adequate

Despite the apparent advantages plaintiffs possess in prosecuting a failure-to-warn case, there nevertheless remain potent arguments in a defense counsel's arsenal to defeat such claims. By attacking the existence of a duty to warn or a breach thereof, and attacking the grounds supporting causation, manufacturers and sellers can successfully defend against the failure-to-warn claim.

II. THE FOUNDATION OF FAILURE-TO-WARN STRICT LIABILITY VS. NEGLIGENCE

Failure-to-warn claims against the manufacturer or seller of a product manifest themselves under both strict liability and negligence theories. Under strict liability, "an otherwise safe product may be defective solely by virtue of an inadequate warning."⁹ Under negligence theory, by contrast, it is the behavior of the manufacturer or seller in failing to adequately warn, not the condition of the product, that is at issue.¹⁰ The Supreme Court of California has offered the following distinction between the theories:

[F]ailure to warn in strict liability differs markedly from failure to warn in the negligence context. Negligence law in a failure-to-warn case requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons which fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about. Strict liability is not concerned with the standard of due care or the reasonableness of a manufacturer's conduct. The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in the light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution. Thus, in strict liability, as opposed to negligence, the reasonableness of the defendant's failure to warn is immaterial.¹¹

warning is usually so minimal, i.e., the expense of adding more printing to a label, that the balance must always be struck in favor of the obligation to warn").

9. *Ferayorni v. Hyundai Motor Co.*, 711 So. 2d 1167, 1170 (Fla. Dist. Ct. App. 1998) (quoting *Giddons v. Denman Rubber Mfg. Co.*, 440 So. 2d 1320, 1323 (Fla. Dist. Ct. App. 1983)).

10. *Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 289 (Iowa 1994).

11. *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549, 558-59 (Cal. 1991).

As such, under strict liability failure-to-warn, a manufacturer or seller "can be found liable even though he was utterly non-negligent."¹² Other courts have followed this reasoning.¹³

Much has been written, by both courts¹⁴ and commentators,¹⁵ about whether there is any meaningful difference between the strict liability failure-to-warn and negligent failure-to-warn causes of action. While a detailed analysis of the competing viewpoints is beyond the scope of this article, a few examples demonstrate that such a distinction is highly questionable at best.

First, consider the oft-cited language from the California Supreme Court above.¹⁶ Whether a manufacturer or seller adequately warned is a question of reasonableness, a concept rooted in the law of negligence, as is what information the manufacturer or seller knew or should have known about the dangerous propensities of the product at the time of manufacture.¹⁷ That is, the manufacturer or seller reasonably adequately warned or it did not; it reasonably knew or should have known of risks related to the use of the product or it did not.¹⁸ As the Supreme Court of Iowa has explained:

12. *Moorman v. Am. Safety Equip.*, 594 So. 2d 795, 800 (Fla. Dist. Ct. App. 1992).

13. *Infra* note 14; *see also* *Fibreboard Corp. v. Fenton*, 845 P.2d 1168, 1174-75 (Colo. 1993) (stating that a manufacturer can be found liable even though not negligent).

14. *Compare* *Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 289 (Iowa 1994) (holding that "any posited distinction between strict liability and negligence principles [in failure-to-warn] is illusory"), *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 926 n.4 (Minn. 1986) (stating that "this court has adopted the position that strict liability for failure-to-warn is based upon principles of negligence"), *and* *Crislip v. TCH Liquidating Co.*, 556 N.E.2d 1177, 1183 (Ohio 1990) (stating that "[t]he standard imposed upon the defendant in strict liability claim grounded upon an inadequate warning is the same as that imposed in a negligence claim based upon inadequate warning"), *with* *Anderson*, 810 P.2d at 558 (stating that a manufacturer "can be found liable even though he was utterly non-negligent"), *and* *Ferayorni*, 711 So. 2d at 1172 (holding that "a prima facie case of strict liability failure-to-warn does not require a showing of negligence").

15. *Compare* *Henderson & Twerski*, *supra* note 5, at 269-70 (finding that negligence is the appropriate standard in failure-to-warn cases), *and* *Myron J. Bromberg*, *The Mischief of The Strict Liability Label in the Law of Warnings*, 17 SETON HALL L. REV. 526, 528 (1987) (same), *with* *Mark McLaughlin Hager*, *Don't Say I Didn't Warn You (Even Though I Didn't): Why The Pro-Defendant Consensus on Warning Law Is Wrong*, 61 TENN. L. REV. 1125, 1130-34 (1994) (finding that strict liability failure-to-warn does not require a showing of negligence and is a distinct cause of action).

16. *Anderson*, 810 P.2d at 558-59.

17. *Id.*

18. *Id.*

[C]ourts basing the application of a strict liability theory...[in failure to warn cases] cannot help but slip back into the type of analyses virtually identical to those employed in negligence cases...Inevitably the conduct of the defendant in a failure to warn case becomes the issue...The relevant inquiry therefore is whether the reasonable manufacturer knew or should have known of the danger, in light of the generally recognized and prevailing best scientific knowledge, yet failed to provide adequate warning to users or consumers.¹⁹

Thus, says the Iowa high court, even under strict liability, a manufacturer or seller is ultimately gauged by a reasonableness standard.²⁰

Second, even commentators who advocate a strict liability failure-to-warn claim have difficulty articulating a significant distinction between strict liability and negligent failure-to-warn. For example, one commentator boils down his argument in such a way as to destroy it. He states that "the ultimate issue in warnings law" is "[w]hat safety information did the user *NEED* and *HOW WELL* did the supplier do in providing it?"²¹ Clearly, what the user "needed" to know and "how well" the supplier provided that information is governed by a reasonableness standard: the consumer reasonably needed to be warned or she did not; the manufacturer or seller did a reasonable job in providing a warning or it did not. It is impossible to divorce the reasonableness aspect from the determination, short of imposing absolute liability on manufacturers and sellers. As such, the reasonableness of the defendant's failure-to-warn is always material, whether the action is tagged as one in negligence or strict liability.

Based on the position of the majority of commentators,²² as well as that of Section 2(c) of the *Restatement (Third) of Torts: Prod-*

19. *Olson*, 522 N.W.2d at 289-90.

20. *Id.*

21. *Hager*, *supra* note 15, at 1157 (emphasis added).

22. *E.g.*, Henderson & Twerski, *supra* note 5, at 276; Bromberg, *supra* note 15, at 529-30; John Howie & Ladd Sanger, *Failure to Warn: The Difference Between Strict Liability and Negligence From a Plaintiff's Perspective*, 13 AIR & SPACE LAW. 3, 3 (Winter 1999) (stating that "strict liability failure-to-warn is nothing more than a negligence test with a different label."); George W. Soule & 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, 389 (1995) (noting that "[t]he Minnesota courts have subscribed to [the reasonable care] theory for years. . .").

ucts Liability,²³ it is apparent that the strict liability approach to warnings law has been, or is in the process of being, supplanted with the negligence-based reasonableness standard as to whether a manufacturer failed to warn. Accordingly, this article adopts that view. In any event, those jurisdictions which cling to strict liability as a distinct cause of action, of course, also permit actions for negligent failure-to-warn,²⁴ and, as demonstrated, there are similar (if not functionally identical) elements in each claim.

III. THE ELEMENTS OF A FAILURE-TO-WARN CLAIM

If a failure-to-warn claim is, at root, a negligence claim, then it is clear a plaintiff must prove the traditional negligence elements to succeed on such a claim: that the manufacturer or seller owed a duty to warn of some danger associated with the foreseeable use of the product; the manufacturer or seller breached that duty; and the breach was the proximate cause of plaintiff's injuries.²⁵ If the plaintiff is unable to establish the existence of any of these three elements, the claim must fail.²⁶

A. *The Duty To Warn: Basic Principles*

The duty to warn is predicated upon the superior knowledge

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

§ 2. Categories of Product Defect

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is 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, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

Id.

24. *E.g.*, *Butz v. Werner*, 438 N.W.2d 509, 513 (N.D. 1989) (holding that the plaintiff does not have to elect between negligent failure-to-warn or strict products liability theory); *Crislip v. TCH Liquidating Co.*, 556 N.E.2d 1177, 1183 (Ohio 1990) (stating that elevation of form over substance in pleading "failure-to-warn" claims would lead to inequitable results).

25. *E.g.*, *Maneely v. Gen. Motors Corp.*, 108 F.3d 1176, 1179 (9th Cir. 1997) (California law); *Sharpe v. Bestop, Inc.*, 713 A.2d 1079, 1083-84 (N.J. Super. Ct. App. Div. 1998).

26. This article does not discuss affirmative defenses to the failure-to-warn claim as such. For an extended analysis of defenses available in failure-to-warn, *see* *Richmond*, *supra* note 1, at 209.

of a product that the manufacturer or seller possesses, and arises when the manufacturer or seller may reasonably foresee danger of injury or damage to another less knowledgeable, unless they are warned of the danger.²⁷ Courts generally recognize that this "duty to warn" is determined by courts in the same manner as "duty" in the ordinary negligence context. For example, the New York Court of Appeals has noted that "the definition of the existence and scope of an alleged tortfeasor's duty is usually a legal, policy-laden declaration reserved for Judges. . . ."²⁸ Likewise, Prosser and Keeton explain that "[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."²⁹ As such, "it is wrong for a judge to decide to permit a fact-finding jury to decide a question of duty."³⁰

There are two elements to the duty: the duty to warn of foreseeable dangers inherent in the use of the product, and the duty to provide adequate instructions for safe use.³¹ However, manufacturers and sellers need not provide a warning when the danger or potentiality of danger is generally known and recognized.³² Further, a manufacturer is not required to warn of every risk that is suggested

27. *Lovick v. Wil-Rich*, 588 N.W.2d 688, 693 (Iowa 1999).

28. *Palka v. Servicemaster Mgmt. Servs. Corp.*, 634 N.E.2d 189, 192 (N.Y. 1994); *accord Josue v. Isuzu Motors Am., Inc.*, 958 P.2d 535, 537 (Haw. 1998) (stating that "the existence of duty to warn is entirely a question of law for the Court to decide"); *Balder v. Haley*, 399 N.W.2d 77, 81 (Minn. 1987) (stating that "the existence of a duty to warn is a legal question to be determined by the judge, not the jury"). *But see Liriano v. Hobart Corp.*, 170 F.3d 264, 271 (2d Cir. 1999) (holding that "a jury could, and indeed did, find that Hobart had a duty to provide" a warning).

29. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 53, at 358 (5th ed. 1984).

30. 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, 726 (1999). This rule is necessary because "[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." *Id.*

31. *Delaney v. Deere & Co.*, 999 P.2d 930, 936 (Kan. 2000) (discussing duty to warn of foreseeable dangers in the use of a product); *see also* James B. Sales, *The Duty to Warn or Instruct in Strict Tort Liability*, 13 ST. MARY'S L. J. 521, 554 (1982) (stating that "[d]irections for use serve purposes distinct from warnings. Directions basically instruct the user of the product in the proper and efficient use of the product and the proper manner to avoid unsafe uses. . . . [I]nstructions seek to insure safe and appropriate use").

32. *Maneely v. Gen. Motors Corp.*, 108 F.3d 1176, 1179 (9th Cir. 1997) (California law).

by "any obscure tidbit of available knowledge,"³³ and, therefore, "[a] supplier of goods...is not required to provide a warning of danger when the reasonable probability of injury is remote, slight, or inconsequential."³⁴

Moreover, there is no rationale basis to impose a duty to warn where no one has offered competent proof that the warning would have been effective to make the product safer. That is:

a person cannot, after suffering an accident, simply draw up a warning limited to the dangers involved in that accident and argue that that warning should have been conveyed by the manufacturer or seller without first also establishing that that warning is adequate and that it actually could have been communicated in the manner proposed.³⁵

Similarly, it is not enough for an expert to testify that some additional warning or some modification of language was necessary to raise a duty to warn. "[A] plaintiff must do more than simply present an expert who espouses a new or different warning."³⁶ The expert must establish, based on reliable science that rests on a proper foundation, his proposed warning's "feasibility, adequacy and effectiveness."³⁷

1. *Manufacturer's Knowledge Of Foreseeable Dangers*

It is presumed that a manufacturer is in the best position to know of foreseeable dangers of harm involved in the use of its product.³⁸ Furthermore, "a manufacturer must inform itself about what designs and methods are available in its industry and is under

33. *Ferayorni v. Hyundai Motor Co.*, 711 So. 2d 1167, 1172 (Fla. Dist. Ct. App. 1998).

34. *Henkel v. R&S Bottling Co.*, 323 N.W.2d 185, 188 (Iowa 1982); *see also Adelman-Tremblay v. Jewel Cos., Inc.*, 859 F.2d 517, 523 (7th Cir. 1988) (warning unnecessary where plaintiff's harm was "not reasonably foreseeable" or where the risk is "remotely possible" to few in the population); *Brown v. Gen. Motors Corp.*, 355 F.2d 814, 818 (4th Cir. 1966) (stating that "a manufacturer is not obligated to . . . warn as to all possible dangers"); Lars Noah, *The Imperative to Warn: Disentangling the "Right to Know" From the "Need to Know" About Consumer Product Hazards*, 11 YALE J. ON REG. 293, 346 (1994) (stating that manufacturers "do not have a duty to warn of risks that may affect only very few individuals").

35. *Meyerhoff v. Michelin Tire Corp.*, 852 F. Supp. 933, 947 (D. Kan. 1994), *aff'd*, 70 F.3d 1175 (10th Cir. 1995).

36. *Id.*

37. *Id.* at 947-48.

38. *Richmond*, *supra* note 1, at 206.

a duty to make reasonable tests and inspections to discover any latent hazards" associated with product use.³⁹ Indeed, manufacturers are held to the degree of knowledge and skill of experts.⁴⁰ Nevertheless, the guiding touchstone remains one of reasonableness regarding foreseeability, not omniscience.⁴¹

There are two questions in the foreseeability inquiry.⁴² First, was the manner that the product was used reasonably foreseeable by the manufacturer?⁴³ Second, was the resulting injury itself reasonably foreseeable?⁴⁴ Foreseeability includes not only uses intended by the manufacturer, but also reasonably foreseeable misuses.⁴⁵ Further, a manufacturer must anticipate the environment which is normal for its product's use. For example, the manufacturer of a household product must anticipate those conditions reasonably foreseeable in the home environment in fashioning its warnings.⁴⁶ In sum, foreseeability asks whether the particular use of the product and the resulting injury were reasonably foreseeable by the manufacturer. If the answer to this question is yes, the duty has been established. If no, then the plaintiff's cause of action must fail.

The burden is on the plaintiff to prove that the manufacturer knew or should have known that it was reasonably foreseeable that the plaintiff could use the product in a given way, and the dangers of harm from that use were themselves reasonably foreseeable.⁴⁷ While a given use might be reasonably foreseeable, the harm resulting from it might not. Alternatively, a given injury might be foreseeable, but not the use the product was put to that caused it. Both elements must be satisfied before the duty to warn arises.

2. *Known And Obvious Dangers*

Even if a plaintiff is successful in establishing the foreseeability

39. *Morgan v. Cavalier Acquisition Corp.*, 432 S.E.2d 915, 920 (N.C. Ct. App. 1993).

40. *Collins v. Interroyal Corp.*, 466 N.E.2d 1191, 1200 (Ill. App. Ct. 1984).

41. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(c) cmt. a (1998).

42. *Richmond*, *supra* note 1, at 206.

43. *Id.*

44. *Id.*

45. *Sales*, *supra* note 31, at 537.

46. *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79, 83-84 (4th Cir. 1962) (Virginia law).

47. *E.g.*, *Tampa Drug Co. v. Wait*, 103 So. 2d 603, 609 (Fla. 1958) (placing the burden on the plaintiff); *Bouchard v. Am. Orthodontics*, 661 A.2d 1143, 1145 (Me. 1995).

element, the duty to warn will still not arise if the danger or potentiality of danger accompanying the use of the product is generally known and recognized.⁴⁸ As is noted by the Model Uniform Product Liability Act, "a manufacturer should be able to assume that the product user is familiar with obvious hazards—that knives cut, that alcohol burns, that it is dangerous to drive automobiles at high speed."⁴⁹ Accordingly, the "obvious danger rule" will bar recovery where it can be shown that the danger was clearly apparent and that a reasonable consumer would have appreciated the danger and acted accordingly without the need of a warning.⁵⁰

Although the obvious danger rule has been significantly abrogated in design defect cases, it remains a potent defense in failure-to-warn claims.⁵¹ The position of the *Restatement (Third) of Torts: Products Liability* regarding obvious and generally-known dangers in failure-to-warn cases is reflected in *comment j* to Section 2:

j. 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. Warnings of an obvious or generally known risk in most instances will not provide an effective additional measure of safety.

An extension of the obvious danger rule is that manufacturers generally have no duty to warn of dangers actually known to the product user. The Supreme Judicial Court of Massachusetts' decision in *Carey v. Lynn Ladder and Scaffolding Company, Inc.*⁵² is instructive. The plaintiff sustained injuries when he fell from the seventh step of an eight foot ladder, and sued the manufacturer for failure-

48. *Maneely v. Gen. Motors Corp.*, 108 F.3d 1176, 1179 (9th Cir. 1997) (citing California cases).

49. 44 Fed. Reg. 62,714 at 62,725 (1979).

50. *Carey v. Lynn Ladder and Scaffolding Co., Inc.*, 691 N.E.2d 223, 224 (Mass. 1998).

51. *E.g.*, *Ogletree v. Navistar Int'l. Transp. Co.*, 500 S.E.2d 570, 572 (Ga. 1998) (stating that the "obvious danger rule" remains a potential defense in such cases); *Delaney v. Deere & Co.*, 999 P.2d 930, 934-35 (Kan. 2000) (same); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(c) cmt. d. (1998) (stating that "[t]he fact that a danger is open and obvious is relevant to the issue of defectiveness, but does not necessarily preclude a plaintiff from establishing that a reasonable alternative design should have been adopted that would have reduced or prevented injury to the plaintiff").

52. 691 N.E.2d 223 (Mass. 1998).

to-warn.⁵³ The plaintiff testified that "every time he used the ladder, it was shaky" and that "he didn't need anyone to warn him not to go up to the sixth step [of the ladder]."⁵⁴ The trial court granted summary judgment to the manufacturer, and the Supreme Judicial Court affirmed.⁵⁵ In so doing, the court explicitly noted that the "plaintiff was aware of, and appreciated, the danger he was incurring...so that a warning to the plaintiff was not needed."⁵⁶ Thus, in cases where the danger is generally known to the reasonable person, or the specific plaintiff actually knew of the danger, summary disposition of plaintiff's failure-to-warn claim is warranted.⁵⁷

3. Through The Prism Of Risk-Benefit: No Legal Duty To Warn Where The True Cost Of Warning Is Higher Than Its Benefit

The rationale for not requiring manufacturers to warn of known or obvious dangers is supported by the risk-benefit analysis. In failure-to-warn claims, the risk-benefit calculus deduces that where the benefits of providing a warning are outweighed by the costs of providing it, a warning should not be given or required.⁵⁸ Where a danger is widely or actually known, the costs of warning of the danger are needlessly increased: the recipient of the warning is being told nothing new and will not alter his behavioral patterns in any appreciable way.⁵⁹ Indeed, *Comment j* to Section 2 of the *Restatement (Third) of Torts: Products Liability* incorporates risk-benefit analysis, cautioning that "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" and that "requiring warnings of obvious or generally known risks could reduce the efficacy of warnings generally."⁶⁰

As previously suggested, however, plaintiff's experts and unfor-

53. *Id.*

54. *Id.* at 224.

55. *Id.*

56. *Id.*

57. *E.g.*, *Plante v. Hobart Corp.*, 771 F.2d 617, 621 (1st Cir. 1985) (reversing verdict for plaintiff on warnings claim where "we do not see how one could reasonably conclude that any such additional warnings would have made a difference; . . . [the user] understood the relevant dangers").

58. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § (2)(c) cmt. j (1998).

59. *Id.*

60. *Id.*

tunately, juries, are often trapped in a "dollars and cents" analysis of warning costs, which tends to underestimate the true costs associated with providing additional warnings.⁶¹ They assume that the costs of warning are simply those monetary costs required to print a label and apply it to the product or include an additional page in an owner's manual.⁶² This misconception places manufacturers and sellers at a serious disadvantage because if additional warnings are perceived as being almost cost-free, the burden will always be to provide the additional warning.⁶³

However, the cost component is more akin to the economics concept of opportunity cost, such that the decision to provide a given warning is not merely an isolated choice to spend a few more cents on "paper and ink." Rather, this component is interrelated within an overall product warning configuration: the manufacturer's decision to warn about one risk can only be made with reference to the decision to warn about other risks related to product use. Theodore Jankowski has explained:

[W]here...additional warnings [are] proposed, the effect on the overall safety of the product, as determined by their net effect on the communication of the risks associated with the universe of adverse outcomes, must be evaluated. Whether the additional warnings take some attention away from the warnings already given, establish the misconception that all risks are the same, or lack content which would allow the user to avoid the risk, are all issues that must be considered as part of the cost inherent in providing additional warnings. From the standpoint of overall safety, providing an additional warning does not by itself serve the end of risk minimization if its effect is to denigrate the standing of other warnings which are more important in the safe utilization of the product. The cost of additional warnings results from the decreased ability of other warnings to communicate with the same effectiveness.⁶⁴

Professors Henderson and Twerski also discuss the "crowding-out" effect that can occur when a product user is inundated with

61. *Supra* note 8 and accompanying cases.

62. *Id.*

63. *Id.*

64. Theodore S. Jankowski, *Focusing on Quality and Risk: The Central Role of Reasonable Alternatives in Evaluating Design and Warnings Decisions*, 36 S. TEX. L. REV. 283, 298 (1995).

warnings of remote or obvious risks:

[W]arning about relatively remote risks generates substantial social costs which in most cases outweigh any corresponding benefits in reducing accident costs. The most significant social cost generated by requiring distributors to warn against remote risks is the reduced effectiveness of potentially helpful warnings directed towards risks which are not remote. Bombarded with nearly useless warnings about risks that rarely materialize in harm, many consumers could be expected to give up on warnings altogether. And the few persons who might continue to take warnings seriously in an environment crowded with warnings of remote risks would probably overreact, investing too heavily in their versions of "safety." Given these limits on the capacity of consumers to react effectively to excessive risk information, the optimal, rather than the highest, levels of risk information, measured both qualitatively and quantitatively, are what is called for.⁶⁵

Arguably, the risk-benefit conclusions reached by a manufacturer about whether or not to warn are, once again, subject to a reasonableness standard: would a reasonable manufacturer refrain from warning about a given risk as being so attenuated or obvious as to detract from warnings about more salient and less apparent risks? It would seem, therefore, that at least in some cases, deciding not to warn is a reasonable course for a manufacturer to follow. This is particularly true where the alleged "danger" is either very remote or at least reasonably apparent. In such cases, manufacturers can argue that as a matter of law, they should not be held accountable for not providing a warning that might diminish a user's capacity to heed other warnings of more common or less-known risks.⁶⁶

As Henderson and Twerski point out, however, it is difficult if not impossible to accurately plot the limits of human cognitive capability.⁶⁷ It cannot be said with precision when the information overload point is reached. As such, defendants generally have a hard time convincing a judge or jury that providing "one more warning" would tip the balance from the optimal amount of product warning to too much.⁶⁸ Nevertheless, even in cases where

65. Henderson & Twerski, *supra* note 5, at 296-97.

66. Jankowski, *supra* note 64, at 289.

67. Henderson & Twerski, *supra* note 5, at 301.

68. *Id.*

judgment as a matter of law is not appropriate, defendants can and should present evidence that the provision of additional warnings does not come without significant costs, and those costs should not be measured solely in monetary terms. This may prove to be the difference in prevailing against marginal failure-to-warn claims.

4. *Modification Of The Product*

While a manufacturer must warn of reasonably foreseeable dangers associated with the use of the product as they designed it, products are frequently modified by the end user. Generally, a manufacturer need not warn of the dangers inherent in a product that has been modified without manufacturer's consultation or approval.⁶⁹ The modification may be held to both create an essentially new product (where the duty to warn devolves to the person who modified the product) and to constitute an unforeseeable intervening cause.⁷⁰

However, a duty to warn may arise if the manufacturer can reasonably anticipate that a product will change and become dangerous absent a warning through regular use or deterioration.⁷¹ In either case, the test once again is whether the condition of the product, when it causes injury, was reasonably foreseeable by the manufacturer.⁷²

B. *Breaching The Duty To Warn*

Assuming a plaintiff successfully establishes that a defendant manufacturer had a duty to warn, the plaintiff must then show that the manufacturer breached that duty. A manufacturer can breach its duty to warn in two ways: (1) by failing "to take adequate measures to communicate the warning to the ultimate user," or (2) by failing "to provide a warning that, if communicated, was adequate to apprise the user of the product's potential risks."⁷³ Stated otherwise, a manufacturer breaches its duty to warn if it fails to provide any warning at all or provides a warning that fails to sufficiently impart the risks of harm in a meaningful way. Because it is obvious

69. Sales, *supra* note 31, at 582-83.

70. *Id.*

71. *Id.*

72. *Id.*

73. Henry v. Gen. Motors Corp., 60 F.3d 1545, 1548 (11th Cir. 1995) (Georgia law).

that the duty is breached when a manufacturer owes a duty to warn and provides none, the difficult question focuses on whether a given warning was adequate to inform the user of risks of harm.⁷⁴ Thus, conflict over whether a manufacturer breached its duty to warn necessarily requires examination of a given warning's effectiveness.

1. Adequacy Of The Manufacturer's Warning: Judicial Constructions

The courts have announced a number of broad principles to consider when determining whether a given warning is adequate. Generally, a warning must be of a character reasonably calculated to bring home to the reasonably prudent person the nature and extent of the danger involved.⁷⁵ To do so, a warning must: (1) catch the attention of the reasonably prudent product user during use; and (2) be comprehensible to the average user and convey a fair indication of the nature and extent of the danger.⁷⁶ A warning must possess a degree of intensity that would cause a reasonable person to exercise caution commensurate with the potential danger.⁷⁷ A warning may be found inadequate in factual content, in expression of the facts, or in the method by which it is conveyed.⁷⁸ A clear cautionary statement setting forth the exact nature of the dangers is necessary to fully protect the manufacturer.⁷⁹ Ordinarily, the question of whether a given warning was adequate is left to the finder of fact.⁸⁰

James Sales has identified seven factors, which govern the adequacy of a warning.⁸¹ First, a warning must be conspicuous. It must be printed in such a manner as to assure that a user's attention will be attracted to its message.⁸² Second, it should use symbols when appropriate. For example, a skull and crossbones device may be necessary in addition to written warnings if the product can cause

74. Sales, *supra* note 31, at 550.

75. *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79, 85 (4th Cir. 1962).

76. *Id.*

77. *Tampa Drug Co. v. Wait*, 103 So. 2d 603, 609 (Fla. 1958).

78. *Spruill*, 308 F.2d at 85.

79. *Bituminous Cas. Corp. v. Black and Decker Mfg. Co.*, 518 S.W.2d 868, 873 (Tex. Ct. App. 1974).

80. *Tampa Drug Co.*, 103 So. 2d at 609; *see also Spruill*, 308 F.2d at 86.

81. Sales, *supra* note 31, at 558-67.

82. *Id.* at 559.

death.⁸³ Third, it must sufficiently communicate the risk of danger associated with the product. In that regard, the warning must be qualitatively sufficient to impart the particular risk of harm.⁸⁴ Fourth, the warning must be located where the user is likely to encounter it. In some cases, placement of the warning in an owner's manual or package insert will be sufficient; in others, placement on the product itself may be required.⁸⁵ In the latter case, the warning must be placed where it will catch the user's eye.⁸⁶ Fifth, the warning must be clear and unambiguous. Its content must not be vague or otherwise minimize the likelihood of the very harm it is seeking to put the user on guard of.⁸⁷ Sixth, the warning must be sufficiently broad and encompassing and not unduly limited in scope.⁸⁸ If the product can reasonably be put to a number of uses, the warning should address each. Seventh, the warning must be undiluted. That is, the manufacturer cannot engage in marketing or promotional activities, which tend to negate the very dangers the warning speaks of.⁸⁹

One additional factor which may play a role in determining adequacy of the warning is language. As a general matter, manufacturers are not required to warn in any language other than English.⁹⁰ However, the duty to warn in another language may arise in cases where a manufacturer actively markets its product to a non-English speaking segment of the population and utilizes non-English language media in reaching its audience.⁹¹

While these factors undoubtedly cover a broad spectrum, it is possible that any one of them may become central in determining whether a manufacturer discharged its duty to warn. A defendant is advised to determine which factors are most relevant to the claim it is defending.

83. *Id.* (citing *Hubbard-Hall Chem. Co. v. Silverman*, 340 F.2d 402 (1st Cir. 1965)).

84. *Sales*, *supra* note 31, at 560.

85. *Id.* at 562-64.

86. *Id.*

87. *Id.* at 564.

88. *Id.* at 564-65.

89. *Id.* at 566.

90. *E.g.*, R. Geoffrey Dillard, *Multilingual Warning Labels: Product Liability, "Official English," and Consumer Safety*, 29 GA. L. REV. 197, 208 (1994) (stating that only the English language is required when warning); Thomas H. Lee, *A Purposeful Approach to Products Liability Warnings and Non-English Speaking Consumers*, 47 VAND. L. REV. 1107, 1109 (1994) (same).

91. Dillard, *supra* note 90, at 208.

Moreover, a defendant should not lose sight of the fact that determination of a warning's adequacy is based on a balancing test. That balancing has been succinctly described as follows:

[D]etermination of the content of a product warning is a design decision involving tradeoffs between the costs and benefits of selectivity....[T]he designer of the product warning should consider the probability that the risk will be encountered, the severity of harm likely to result, the general characteristics of the expected user including his experience or knowledge, the likelihood that a warning will be effective in reducing the risk and the expected context in which the product will be used.⁹²

Accordingly, if a manufacturer can show that its decision about how to warn, or not to provide a warning, was reasonable under the circumstances, it should not be found liable under a failure-to-warn theory.

2. *Criticism Of The Judicial Adequacy Yardstick*

The court-created guidelines determining whether a warning is adequate or not, while useful as guideposts, lack a scientific definiteness. Accordingly, they have not gone without criticism. As Victor Schwartz and Russell Driver have pointed out:

Although the evaluation of the efficacy of a product warning is a complex and difficult process, few courts provide more than open-ended generalities to the jury in instructing in this area. The apparent absence of technical or scientific guidelines regarding what an adequate warning is allows sympathetic juries considerable leeway to compensate an injured plaintiff from the manufacturer's deep pocket.⁹³

Schwartz and Driver further caution about the dangers of using "open-ended generalities" to determine the adequacy of warnings:

[O]verly broad legal guidelines regarding the adequacy of warnings, not supported by scientific principles, may cause some manufacturers to substitute 'legally sufficient,' but practicably useless and perhaps even counterproductive warnings, for more innovative and effective warnings.

92. Victor E. Schwartz & Russell W. Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory*, 52 U. CIN. L. REV. 38, 61 (1983).

93. *Id.* at 40.

If the rules regarding warnings foster that kind of irrationality and unpredictability, some manufacturers may regard the whole exercise as futile.⁹⁴

As such, unless courts use scientific guidelines to determine the necessity and/or adequacy of a warning, a manufacturer might conclude that minimizing its liability through "encyclopedic" warnings is preferable to providing an "optimal" disclosure of risk information. While an "optimal" disclosure might omit warning of a remote danger in the interest of providing a better warning addressing more substantial risks, a manufacturer may be less inclined to provide the optimal warning because doing so may expose it to potential liability.⁹⁵

C. *Causation: Would A Warning Have Made A Difference?*

If the plaintiff establishes that the manufacturer or seller owed and breached a duty to warn, the issue of proximate causation arises. Proximate causation includes both cause-in-fact (but-for) and legal causation.⁹⁶ There are essentially two avenues for a plaintiff to establish causation depending upon the jurisdiction: the plaintiff can offer non-speculative proof that she would have heeded an adequate warning, and/or rely on an un rebutted heeding presumption where no warning is given.⁹⁷ In the latter case, the defendant must initially demonstrate that the plaintiff would not have followed an additional or better warning, in the former, the plaintiff bears the burden of proving that she, or a reasonable person, would follow the warnings in the same situation.⁹⁸ In either situation, however, the defendant's task is the same: it must introduce a quantum of evidence necessary to show that plaintiff would not have followed a warning if given.

1. *The Plaintiff's Burden*

In those situations where a heeding presumption does not apply, or has been successfully rebutted by the defendant, the burden

94. *Id.* at 43.

95. Jankowski, *supra* note 64, at 289; *see also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § (2)(c) cmt. g (1998).

96. *Hiner v. Bridgestone/Firestone, Inc.*, 978 P.2d 505, 509 (Wash. 1999).

97. Mark Geistfeld, *Inadequate Product Warnings and Causation*, 30 U. MICH. J. L. REF. 309, 337-38 (1997).

98. *Id.* at 343-44.

is on the plaintiff to show causation.⁹⁹ At bottom, this requires plaintiff to prove that, had the manufacturer supplied an adequate warning, the plaintiff would have altered her behavior to avoid injury.¹⁰⁰ That is to say, but for the absence of the warning, the injury would not have occurred.

Under an objective standard for causation, the plaintiff must show that a reasonable person would have followed a warning if given.¹⁰¹ Under a subjective standard, plaintiff must show that she would have altered her behavior if warned.¹⁰² Under either standard, plaintiff must offer competent evidence that affirmatively answers the question "[w]hat difference would [a warning] have made in this case?"¹⁰³ "The evidence must support a reasonable inference, rather than a guess, that the existence of an adequate warning may have prevented the accident before the issue of causation may be submitted to the jury."¹⁰⁴ Mere speculation is not

99. *Hiner*, 978 P.2d at 509; see also *Sharpe v. Bestop, Inc.*, 713 A.2d 1079, 1086 (N.J. Super. Ct. App. Div. 1998).

100. *Henderson & Twerski*, *supra* note 5, at 305 (stating that a plaintiff must show "not only that [the reader] would have read, understood and remembered the warning, but also that she would have altered her conduct to avoid the injury."). In other words, a plaintiff is required to offer competent evidence that answers the question, "[w]hat difference would [a warning] have made in this case?" *Id.* at 304; see also *Conti v. Ford Motor Co.*, 743 F.2d 195, 198 (3rd Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985) (stating that "[t]he evidence must be such as to support a reasonable inference, rather than a guess, that the existence of an adequate warning may have prevented the accident before the issue of causation may be submitted to the jury"); *Nelson v. Ford Motor Co.*, 150 F.3d 905, 907 (8th Cir. 1998) (dismissing warnings claim where it was not shown that modified or additional warnings would have likely prevented the accident); *Am. Motors Corp. v. Ellis*, 403 So. 2d 459, 466 (Fla. Dist. Ct. App. 1981) (stating that "[o]nly if we were to engage in the speculation that the owner, properly warned, would not have purchased the car, or would not have allowed it to be driven on interstate highways, could we recognize a causal relationship between breach of a duty to warn and the instant injury."), *rev. denied*, 415 So. 2d 1359 (Fla. 1982); *Broussard v. Houdaille Indus., Inc.*, 539 N.E.2d 360, 363 (Ill. App. Ct. 1989) (same); *Mowery v. Crittenton Hosp.*, 400 N.W.2d 633, 638 (Mich. Ct. App. 1986) (plaintiff must show that an adequate warning would have prevented the injury by altering the defendant's conduct involved); *Mothershead v. Greenbriar Country Club*, 994 S.W.2d 80, 89 (Mo. Ct. App. 1999) (holding that plaintiff must show that a warning would alter behavior).

101. *Geistfeld*, *supra* note 97, at 337-38.

102. *Id.*

103. *Henderson & Twerski*, *supra* note 5, at 304.

104. *Conti*, 743 F.2d at 198; accord *Drackett Prods. Co. v. Blue*, 152 So. 2d 463, 465 (Fla. 1963) (stating that a "statement by a witness as to what action he would have taken if something had occurred which did not occur...prov[es] nothing").

enough.¹⁰⁵ Further, "[t]he required causal connection . . . is weak if the proof shows that the claimant would have pursued the same course of conduct irrespective of any cautionary information."¹⁰⁶

A recent case thoroughly analyzing these concepts is *Hiner v. Bridgestone/Firestone, Inc.*¹⁰⁷ There, plaintiff had a third party install studded snow tires, which she obtained from her father, on the front wheels of her front-wheel drive car.¹⁰⁸ The rear tires were not changed.¹⁰⁹ Due to handling problems associated with this configuration, plaintiff lost control of her car and collided with a truck.¹¹⁰ She sued the tire manufacturer and car manufacturer alleging failure-to-warn of the dangers of mounting studded snow tires only on the front wheels.¹¹¹

The Supreme Court of Washington upheld the grant of summary judgment for the tire manufacturer on the failure-to-warn claim.¹¹² First, the court was impressed by the fact that a warning of such problems was printed in the vehicle's owner's manual, which the plaintiff admitted she did not read.¹¹³ Second, the court noted that a warning on the tires would have been ineffective because plaintiff admitted that she did not examine the tires for warnings.¹¹⁴ Finally, the court rejected as mere speculation the argument that a warning on the tires, if not noticed by plaintiff, might have been noticed by the third-party installer of the tires.¹¹⁵

2. Failure To Heed A Given Warning

When a plaintiff is injured by a product containing a warning, the question of whether the warning was adequate may not arise if plaintiff failed to read the allegedly inadequate warning. Numerous courts have held that any insufficiency of the warning may not be the proximate cause of an injury when the user fails to read it.¹¹⁶

105. *Hiner*, 978 P.2d at 510.

106. M. Stuart Madden, *The Duty to Warn in Products Liability: Contours and Criticism*, 89 W. VA. L. REV. 221, 272 (1987).

107. 978 P.2d 505 (Wash. 1999).

108. *Id.* at 508.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 505.

113. *Hiner v. Bridgestone/Firestone, Inc.*, 978 P.2d 505, 507 (Wash. 1999).

114. *Id.* at 508.

115. *Id.*

116. *E.g.*, *Nelson v. Ford Motor Co.*, 150 F.3d 905, 907 (8th Cir. 1998); *Henry v. Gen. Motors Corp.*, 60 F.3d 1545, 1548 (11th Cir. 1995); *Hurt v. Coyne Cylinder*

For example, in *Henry v. General Motors Corp.*, the Eleventh Circuit Court of Appeals, applying Georgia law, upheld a grant of summary judgment to the manufacturer on a failure-to-warn claim where the plaintiff admitted seeing the warning but not reading it.¹¹⁷ The plaintiff argued that this rule should not apply because he was illiterate and could not read the warning.¹¹⁸ Nevertheless, the court concluded that "[w]hy the user failed to read the warning . . . does not matter. Whatever the user's reason, if the user is aware of a warning but ignores its language, the manufacturer's negligence in drafting the warning ceases as a matter of law to be a cause of injury."¹¹⁹

However, there are contrary views regarding this issue.¹²⁰ In *Town of Bridport v. Sterling Clark Lurton Corp.*,¹²¹ a claim for failure-to-warn of the dangers of fire presented by floor cleaning materials, which spontaneously combusted causing serious property damage, was not barred simply because the plaintiff admitted he did not read the warnings on the product containers.¹²² Rather, because the plaintiff "squarely raised the conspicuousness of the warnings as an issue," the Vermont Supreme Court ruled that "[a]lthough [the user] did not look at the warnings, plaintiff could still show that inadequate warnings were a proximate cause of the fire by establishing that the warnings were not properly designed to draw the attention of a reasonably prudent person."¹²³

Accordingly, under both *Henry* and *Town of Bridport*, a plaintiff's claim for failure-to-warn will fail when the user sees the warn-

Co., 956 F.2d 1319, 1329 (6th Cir. 1992); *Eyre v. McDonough Power Equip., Inc.*, 755 F.2d 416, 417 (5th Cir. 1985)) (Georgia law); *Johnson v. Niagara Mach. & Tool Works*, 666 F.2d 1223, 1225 (8th Cir 1981); *E.R. Squibb & Sons, Inc. v. Cox*, 477 So. 2d 963, 968 (Ala. 1985); *Ashby Div. of Consol. Aluminum Corp. v. Dobkin*, 458 So. 2d 335, 337 (Fla. Dist. Ct. App. 1984); *Cobb Heating & Air Conditioning Co., Inc. v. Hertron Chem. Co.*, 229 S.E.2d 681, 682-83 (Ga. Ct. App. 1976); *Kane v. R.D. Werner Co., Inc.*, 657 N.E.2d 37, 39 (Ill. App. Ct. 1995), *appeal denied*, 664 N.E.2d 641, 641 (Ill. 1996); *Felice v. ValleyLab, Inc.*, 520 So. 2d 920, 928 (La. Ct. App. 1987), *writ denied*, 522 So. 2d 564, 564 (La. 1988); *Hiner v. Bridgestone/Firestone, Inc.*, 978 P.2d 505, 510 (Wash. 1999).

117. 60 F.3d at 1548.

118. *Id.*

119. *Id.*

120. *E.g.*, *Town of Bridport v. Sterling Clark Lurton Corp.*, 693 A.2d 701, 701 (Vt. 1997); *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79, 81 (4th Cir. 1962).

121. 693 A.2d 701 (Vt. 1997).

122. *Id.*

123. *Id.* at 704-05. The court ultimately ruled that the plaintiff failed to make "the requisite showing that the warnings were insufficiently prominent." *Id.* at 705.

ing for what it is but fails to follow it. However, failure to read the warning because the warning was not noticed in the first instance can raise the issue of the warning's adequacy, a question of fact, which may preclude judgment as a matter of law.¹²⁴ The plaintiff bears the burden of proof that the warning was insufficiently prominent.¹²⁵

3. *The Heeding Presumption*

Many jurisdictions recognize a heeding presumption on the basis of *comment j* to Section 402A of the *Restatement (Second) of Torts*.¹²⁶ The relevant provision states: "[w]here [a] warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous."¹²⁷ As written, the benefits of the presumption afforded by *comment j* run to the manufacturer. However, when *comment j* was applied in situations where no warning was provided, courts created a corollary to the presumption that shifted the benefit of the presumption to the plaintiff: if an adequate warning had been given, it is presumed that the plaintiff would have followed it.¹²⁸ The admitted purpose of this corollary presumption—in cases where no warning is present—is to lighten a plaintiff's burden of proof in order to assist the plaintiff in surmounting the causation hurdle.¹²⁹

The heeding presumption has not gone without criticism, however, both as to the benefits it affords manufacturers as well as plaintiffs. Professor Latin argues that the *comment j* presumption, as it applies to manufacturers, provides a disincentive to the development of safer products.¹³⁰ Because a product is rendered safe and not unreasonably dangerous when it carries an appropriate warning under strict liability theory, and the provision of reasonable warnings will likewise serve to defeat negligent failure-to-warn

124. *Id.*

125. *Id.*

126. RESTATEMENT (THIRD) OF TORTS § 402A cmt. j (1998).

127. *Id.*; see also Richard C. Henke, *The Heeding Presumption in Failure-to-Warn Cases: Opening Pandora's Box?*, 30 SETON HALL L. REV. 174, 182 (1999).

128. Henke, *supra* note 127, at 182.

129. *Sharpe v. Bestop, Inc.*, 713 A.2d 1079, 1083-84 (N.J. Super. Ct. App. Div. 1998).

130. Howard Latin, "Good" Warnings, Bad Products, and Cognitive Limitations, 41 U.C.L.A. L. REV. 1193, 1257 (1994).

claims, manufacturers have no incentive to make products safer when a warning alone will suffice to shield them from liability.¹³¹

Moreover, the presumption is contrary to the recent emphasis placed by courts on ensuring that evidence (particularly expert opinion testimony) is sufficiently reliable and scientific before it can be admitted.¹³² Recent scientific research "clearly establishes that one cannot rely on even the most carefully-designed label to consistently and reliably elicit compliance with its admonitions."¹³³ In the face of this research, as well as ordinary experience demonstrating that warning labels often 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 fundamentally at odds with the courts' efforts to insure that decision-making in products liability cases is based on reliable evidence rather than 'junk-science.'"¹³⁴

In addition, the benefits afforded plaintiffs by the heeding presumption have also been disapproved. In *Riley v. American Honda Motor Co., Inc.*,¹³⁵ the Montana Supreme Court declined to adopt a rebuttable heeding presumption, concluding that "the presumption is not appropriate running in either direction, to the manufacturer/seller where a warning is given or to a plaintiff where it is not."¹³⁶ The court reasoned that relieving a plaintiff of establishing causation could not be justified, in that "[a] defendant certainly is in no better position to rebut a presumption which totally excuses a plaintiff from meeting the causation element than a plaintiff is in establishing the causation element...."¹³⁷

The criticisms leveled at the *Restatement (Second) of Torts Section 402A comment j* presumption, and its corollary presumption, are reflected in the *Restatement (Third)*.¹³⁸ *Comment l* to Section 2 of the *Restatement (Third)* provides in pertinent part that "when a safer design can reasonably be implemented and risks can reasonably be designed out of a product, adoption of the safer design is required

131. *Id.*

132. *E.g.* *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 579 (1993); *General Elec. Co. v. Joiner*, 522 U.S. 136, 147-48 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 138-139 (1999).

133. Bowbeer & Killoran, *supra* note 30, at 757-58 & nn. 149-50.

134. *Id.* at 758-59.

135. 856 P.2d 196 (Mont. 1993).

136. *Id.* at 200.

137. *Id.*

138. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 402A cmt. j (1998).

over a warning that leaves a significant residuum of such risks."¹³⁹ This view clearly incorporates Professor Latin's arguments.¹⁴⁰ The *Restatement (Third)* is also conspicuously silent regarding the corollary presumption as it applies to plaintiffs where no warning was provided.¹⁴¹ In short, the *Restatement (Third)* has rejected the use of these presumptions.¹⁴²

Nevertheless, in jurisdictions where the corollary heeding presumption is applicable, the plaintiff need only prove initially that the manufacturer owed a duty to warn and failed to adequately do so: it is then presumed the user would have followed an adequate warning. The burden of production then shifts to the defendant to rebut the presumption. The New Jersey Superior Court Appellate Division has explained this shifting:

[O]nce the heeding presumption comes into play, the burden of coming forward with evidence, i.e., the burden of production, shifts to the defendant to overcome or rebut the presumption...[T]he defendant's failure to produce evidence at this stage 'risk[s] a directed finding against it' on the issue of proximate causation. If, however, the defendant satisfies its burden of production, that is, if defendant presents sufficient evidence to rebut the presumption...the presumption disappears and the plaintiff, consistent with his original burden of persuasion, must prove by a preponderance of the evidence that the failure to warn was a proximate cause of his injury...[I]f defendant fails to produce evidence to rebut the presumption, plaintiff is relieved of proving proximate causation.¹⁴³

In order to defeat the presumption, the defendant must present evidence such that reasonable minds could differ as to

139. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. 1 (1998).

140. Latin, *supra* note 130, at 1257. Even the new position staked out by the *Restatement (Third)* is not without detractors insofar as it might impose liability on manufacturers who nevertheless provide adequate warnings. *Id.* See also Victor E. Schwartz, *See No Evil, Hear No Evil: When Clear and Adequate Warnings Do Not Prevent The Imposition of Product Liability*, 68 U. CIN. L. REV. 47, 52 (1999); W. Kennedy Simpson et al., *Recent Developments in Products, General Liability, and Consumer Law*, 35 TORT & INS. L. J. 553, 568-71 (2000).

141. Henke, *supra* note 127, at 182-83.

142. *Id.*

143. *Id.*

143. Sharpe v. Bestop, Inc., 713 A.2d 1079, 1085 (N.J. Super. Ct. App. Div. 1998).

whether the warning, if given, would have been heeded.¹⁴⁴ This can be done in several ways: first, by offering evidence concerning the plaintiff's knowledge of the very risk that the absent warning was supposed to address; second, by introducing evidence of the plaintiff's conduct and the circumstances surrounding his use of the product that would call into question whether the plaintiff would have noticed a warning if provided, and would have been motivated to heed the warning if he had noticed it; and third, by introducing evidence of plaintiff's attitudes and conduct that demonstrates an indifference to safety warnings generally.¹⁴⁵

4. *Disputing Plaintiff's Evidence That She Would Have Followed A Warning*

Once a plaintiff presents evidence tending to show that she would have followed a warning if given the opportunity to do so, or the heeding presumption is invoked, the manufacturer must introduce evidence to the contrary in order to defeat causation. "The appropriate quantum of evidence needed...is that which will demonstrate that a given plaintiff has a 'habit' of ignoring safety warnings."¹⁴⁶ "[T]he defendant must adduce evidence, either from the plaintiff or other witnesses, that the plaintiff has in the past failed to heed safety warnings...and that the plaintiff's indifference to the warning[s] rose to the level of habit."¹⁴⁷

In *Sharpe v. Bestop, Inc.*,¹⁴⁸ the plaintiff was ejected from his jeep when he fell asleep behind the wheel and impacted a guardrail.¹⁴⁹ The jeep was equipped with a soft top and the doors had been removed.¹⁵⁰ Although the vehicle's sun visor was labeled with a warning stating "WEAR SEAT BELTS AT ALL TIMES," the plaintiff did not wear his seatbelt at the time of the accident.¹⁵¹ Nevertheless, the plaintiff alleged that the manufacturers of the jeep and the soft top failed to warn him of the dangers of driving the vehicle so equipped without wearing a seatbelt.¹⁵² The court affirmed a jury

144. *Id.*

145. *Id.* at 1089.

146. *Id.* at 1091 (citing *Magro v. Ragsdale Bros., Inc.*, 721 S.W.2d 832 (Tex. 1986)); see also *Technical Chem. Co. v. Jacobs*, 480 S.W.2d 602, 602-03 (Tex. 1972).

147. *Sharpe*, 713 A.2d at 1091.

148. *Id.* at 1079.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

finding of no proximate causation.¹⁵³ The court concluded that the failure to heed the unambiguous warning on the sun visor precluded plaintiff from arguing that he would have heeded an additional warning, in light of plaintiff's own testimony that he knew of the existing warning but rarely wore his seatbelt.¹⁵⁴

In many cases where no warning accompanies the product, the manufacturer can still argue and prove that a warning would not have changed the result. For example, a defendant can demonstrate that the user failed to follow other safety warnings so there is no basis to believe that the absence of the proposed warning would have altered the user's behavior. A simple method of doing so would be, for example, to introduce evidence that the plaintiff was a cigarette smoker, in spite of the presence of on-package warnings, or had numerous speeding tickets, or the like. Whatever the proof, such evidence can go a long way in establishing that the absence of a warning was not the proximate cause of injury.

5. *Intervening Or Superseding Causes*

A manufacturer may attempt to defeat plaintiff's proof of causation by showing that the act of a third party operated as the efficient intervening or superseding cause of the injury.¹⁵⁵ "An intervening or superseding cause is an event that produces harm different from that foreseen by the manufacturer, or a type of harm brought about by an independent force after the defendant's tortious conduct has occurred."¹⁵⁶ The intervening event severs the causal connection between the manufacturer's conduct and the plaintiff's harm. "A superseding cause is a factor of such extraordinary, unforeseeable nature as to relieve the original wrongdoer of liability to the ultimate victim."¹⁵⁷

In *Briscoe v. Amazing Products, Inc.*, the plaintiff suffered severe injuries when a drain cleaner called "Liquid Fire," a highly caustic substance, was thrown on him in the course of a criminal attack.¹⁵⁸ He alleged that the manufacturer and distributor failed to warn of

153. *Id.*

154. *Id.*

155. Madden, *supra* note 106, at 273.

156. Richmond, *supra* note 1, at 214.

157. *Briscoe v. Amazing Prods., Inc.*, No. 1998-CA-001289-MR, 2000 WL 377494, at *2 (Ky. Ct. App. Apr. 14, 2000).

158. *Id.*

the dangers of Liquid Fire.¹⁵⁹ The Kentucky Court of Appeals affirmed summary disposition of the claims because the attacker admitted knowing of the product's dangerous propensities, and purposefully used the product as a weapon.¹⁶⁰ According to the court, "there is simply no manufacturer's warning which could prevent this type of intentional conduct."¹⁶¹ The criminal attack severed the causal link between any alleged tortious conduct of the defendant's and plaintiff's injury.¹⁶²

IV. CONCLUSION

The nature of the failure-to-warn claim, whether brought solely or in connection with other claims, requires defendants to analyze a plaintiff's case with care. While the debate continues over whether such claims are more appropriately brought in strict liability or negligence, the *Restatement (Third)* and recent cases indicate that any distinction between the two theories is more imagined than real. Under either theory, the plaintiff must establish a duty to warn based on reasonably foreseeable dangers. Reasonableness is the key, not speculation to the limits of all probability. The duty can be attacked where the use of the product or resulting injury was not reasonably foreseeable by the manufacturer, the danger was of generally known and obvious nature, where additional warnings would have the propensity to dilute others of more importance, or where the plaintiff modified the product in a way the manufacturer could not have anticipated.

Whether a manufacturer breached a duty owed generally depends upon analysis of the warning itself. Defense counsel must be prepared to dispute court-created standards of a warning's adequacy when scientific principles dictate a contrary result. Finally, a plaintiff cannot prevail unless causation is established. Although many jurisdictions will presume a warning would have been heeded if given, defense counsel must strive to prove the opposite in the face of plaintiff's proof that she would. When a plaintiff notices yet fails to read a given warning, or where a superseding cause intervenes in the causal chain of events, any tortious conduct of the manufacturer ceases to be the basis of plaintiff's injuries.

159. *Id.* at *1.

160. *Id.*

161. *Id.*

162. *Id.* at *2.

Despite some of the advantages plaintiff's may have in prosecuting the failure-to-warn cause of action, defense counsel who pay attention to the key elements of the claim and offer contrary proof at every stage of plaintiff's case stand a good chance of a successful outcome for their client.