The Heeding Presumption in Failure to Warn Cases: Opening Pandora's Box?

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INTRODUCTION

Even at this relatively mature stage in the development of products liability law,[1] courts and commentators are still to be bedeviled in their attempts to articulate a principled and understandable jurisprudence either for those actions arising from a failure to warn or for those alleging that a manufacturer provided an inadequate warning.[2] This Article focuses primarily on the problems surrounding proof of proximate cause in warning defect cases. After a discussion in Part I of the doctrinal debate whether warning cases are analyzed more appropriately as negligence or strict liability causes of action, Parts II and III describe the various approaches to proximate causation that have arisen. Part II of the Article concludes that both the subjective and objective standards of causation contain unacceptable shortcomings. Part III traces the development of the

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[1] After several drafts, the American Law Institute published the Restatement (Second) of Torts, which included a section dealing with products liability. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965). Interestingly, with the exception of Justice Traynor's landmark opinions in *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring), and *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963), the quantum of case law typically present to prompt the drafting of a restatement was largely absent. The limited text and comments of section 402A can be contrasted with the voluminous text of the Restatement (Third) of Torts: Products Liability, which spans over 300 pages. *Compare* RESTATEMENT (SECOND) OF TORTS § 402A (1965) *with* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1997).

[2] *See generally* Michael S. Jacobs, *Toward a Process-Based Approach to Failure-to-Warn Law*, 71 N.C. L. REV. 121 (1992) (arguing that failure-to-warn law has not been given the attention necessary to establish an understandable jurisprudence); Michael A. Pittenger, Note, *Reformulating the Strict Liability Failure to Warn*, 49 WASH. & LEE L. REV. 1509 (1992). *See also* David A. Fischer, *Causation in Fact in Product Liability Failure to Warn Cases*, 17 J. PROD. & TOXICS LIAB. 271 (1995) (setting out the different types of warnings).

heeding presumption[3] for causation in warning cases and takes issue with those commentators who conclude that the presumption provides plaintiffs with a dramatic advantage.[4]

Both the response of a defendant to the subjective standard and the rebuttal of the heeding presumption may allow introduction of evidence relating to plaintiff's conduct that would be otherwise inadmissible or inappropriate in a products liability case.[5] Within the discussion of the heeding presumption, distinctions shall be drawn between workplace and nonworkplace cases and the vexing interplay between the rebuttal of the heeding presumption in the workplace setting and the limitations of the workers' compensation system.[6] This Article suggests that a more realistic view of the workplace dynamic must be reflected in the applicability of a worker's conduct for purposes of rebuttal evidence.

In regard to nonworkplace cases, this Article embraces the approach suggested in the recent case of *Sharpe v. Bestop, Inc.*[7] In limiting rebuttal evidence to that concerning a plaintiff's tendency to heed safety warnings and by further requiring that a defendant show that plaintiff's indifference to such warnings rises to the level of habit, the court struck an appropriate balance between product safety and personal responsibility.[8] This treatment honors the product-oriented focus of a products liability case while simultaneously recognizing the fundamental importance of proximate cause in warning defect litigation.

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[3] *See* Technical Chem. Co. v. Jacobs, 480 S.W.2d 602, 606 (Tex. 1972). The court wrote, "'[w]here warning is given, the seller may reasonably assume that it will be read and heeded.'" *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965)).

[4] *See, e.g.*, James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 306 (1990) (arguing that a defendant risks jury inflammation by attacking a plaintiff's character in the rebuttal of the heeding presumption).

[5] *See* BARRY M. EPSTEIN ET AL., NEW JERSEY PRODUCT LIABILITY LAW § 8.09 (1994).

[6] *See* Charles E. Carpenter, Jr., *Products Liability – An Analysis of the Law Concerning Design and Warning Defects in Workplace Products*, 33 S.C. L. REV. 273, 275 (1981).

[7] 314 N.J. Super. 54, 713 A.2d 1079 (App. Div. 1998), *aff'd*, 158 N.J. 329, 730 A.2d 285 (1999).

[8] *See Sharpe*, 314 N.J. Super. at 77, 713 A.2d at 1091 (citing N.J. R. Evid. 406(a)-(b)).

I. THE DUTY TO WARN: STRICT LIABILITY VERSUS NEGLIGENCE AND THE POSITION OF THE RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY

A. Strict Liability Versus Negligence

As a prelude to any discussion of proximate causation, it is necessary to trace the development of a manufacturer's duty to warn and of the theories of recovery implemented to enforce the breach of such a duty. As the recently adopted Restatement (Third) of Torts: Products Liability (Restatement (Third)) reiterates, there are three categories of product defect: manufacturing defects, design defects, and defects based upon inadequate warnings or instructions.[9] In a warning defect case, the plaintiff attempts to prove that the defendant failed to provide an adequate warning that conveyed to the user the magnitude of the known risk.[10] Problems arise, however, in attempting to ascertain the time at which a manufacturer attains sufficient knowledge of the danger to justify the incorporation of a warning.[11]

In an effort to address this problem, commentators created the doctrine of imputation of knowledge of defect.[12] Under this doctrine, the knowledge of danger in a product is imputed to the manufacturer.[13] Armed with this knowledge, the question is asked, Did the manufacturer act reasonably in not providing a warning or in providing the warning as drafted?[14] For purposes of this paradigm, if knowledge is defined as that knowledge available at the time of manufacture, the inquiry becomes one of the reasonableness of the

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[9] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1997).

[10] *See* Pittenger, *supra* note 2, at 1511-12.

[11] *See* Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 202-03, 447 A.2d 539, 545-47 (1982) (discussing the appropriateness of the state-of-the-art defense in the context of strict liability cases).

[12] *See* John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 834-35 (1973); W. Page Keeton, *Products Liability – Inadequacy of Information*, 48 TEX. L. REV. 398, 404 (1970).

[13] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. m (1997) (citing Wade, *supra* note 12, at 834-35).

[14] *See id.* The Restatement (Third) quotes directly from Dean Wade's article:

> "In other words, the scienter is supplied as a matter of law, and there is no need for the plaintiff to prove its existence as a matter of fact. Once given this notice of the dangerous condition of the chattel, the question then becomes whether the defendant was negligent to people who might be harmed by that condition if they came into contact with it or were in the vicinity of it."

Id. (citations omitted).

defendant's conduct.[15] Reasonableness, of course, lies at the center of any inquiry into an actor's negligence.

Conversely, if knowledge of danger as it exists at time of trial is imputed to the defendant, warning defect cases become matters of strict, if not absolute, liability.[16] The imputation of knowledge at time of trial reached its apotheosis in *Beshada v. Johns-Manville Products Corp.*[17] In the context of an asbestos litigation, the New Jersey Supreme Court rejected the defendant's state-of-the-art defense.[18] In essence, the court held that, even if the dangers of asbestos were scientifically unknowable when the product was manufactured and marketed, the defendants still had a duty to warn.[19] Subsequently, the holding in *Beshada* was limited both judicially and legislatively.[20] Moreover, other jurisdictions addressing the issue of imputation of knowledge of danger generally failed to adopt the rationale of *Beshada.*[21]

Proponents no longer embrace the attempt to distinguish strict liability from negligence through the imputation of knowledge of danger.[22] Significantly, the Restatement (Third) also rejects the imputation doctrine.[23] Thus, to the extent that a manufacturer's potential strict liability for failure to warn emanates from the presumption of knowledge of danger, it appears unlikely that this justification remains viable.

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[15] *See* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1088 (5th Cir. 1973); *see also* Carlin v. Superior Court, 920 P.2d 1347, 1350 (Cal. 1996); Johnson v. American Cyanamid Co., 718 P.2d 1318, 1324 (Kan. 1986).

[16] *See* Pittenger, *supra* note 2, at 1522 n.68 (citing Keeton, *supra* note 12, at 407-09).

[17] 90 N.J. 191, 447 A.2d 539 (1982).

[18] *See id.* at 203-09, 447 A.2d at 546-49.

[19] *See id.*; *see also* John E. Keefe & Richard C. Henke, *Presumed Knowledge of Danger: Legal Fiction Gone Awry?*, 19 SETON HALL L. REV. 174, 183-87 (1989) (criticizing the New Jersey Supreme Court's holding in *Beshada*).

[20] *See* Feldman v. Lederle Lab., 97 N.J. 429, 455, 479 A.2d 374, 388 (1984) (limiting *Beshada* to the facts giving rise to its holding, specifically asbestos litigation). Section 6 of the New Jersey Products Liability Act, however, specifically exempts environmental torts. *See* N.J. STAT. ANN. § 2A:58C1-7 (West 1987). Asbestos cases were later deemed an environmental tort. *See* Stevenson v. Keene Corp., 254 N.J. Super. 310, 319, 603 A.2d 521, 526 (App. Div. 1992), *aff'd*, 131 N.J. 393, 620 A.2d 1047 (1993).

[21] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. m (1997).

[22] *See id.* (citing John W. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 764 (1983)). The Restatement (Third) also alludes to the fact that other commentators have found fault with the imputation doctrine. *See id.* (citing James A. Henderson, Jr., *Coping with the Time Dimension in Products Liability*, 69 CAL. L. REV. 919 (1981)).

[23] *See id.*

Another time-honored attempt to distinguish strict liability from negligence in warning defect cases concerns the product-versus-conduct analysis. The focus on product safety, as opposed to manufacturer's conduct, appears in the seminal opinions of Justice Traynor.[24] Such a focus became the doctrinal foundation for the adoption of strict liability in section 402A of the Restatement (Second) of Torts.[25] Once again, however, the focus on product safety becomes unclear if a plaintiff must prove the defendant's actual state of knowledge at the time of manufacture or marketing.[26]

B. *The Position of the Restatement (Third) on the Strict Liability-Versus-Negligence Debate.*

As noted in section IIA, the drafters of the Restatement (Third) have rejected the imputation-of-knowledge doctrine as a principled distinction between strict liability and negligence.[27] Moreover, the Restatement (Third) is critical of the attempts of the California Supreme Court to articulate a legitimate distinction between these theories.[28] Although the Restatement (Third) does not categorically reject the dichotomy, the commentators suggest that warning defect cases sounding in strict liability or negligence are analytically indistinguishable.[29]

II. PROVING PROXIMATE CAUSE IN WARNING DEFECT CASES: THE SUBJECTIVE AND OBJECTIVE STANDARDS

A. *The Subjective/Self-Serving Testimony Standard*

Whether any meaningful distinction remains between the strict liability or negligence standard for the existence of a warning defect,

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[24] *See* Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1963); *see also* Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440 (Cal. 1944) (citing MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916), for the proposition "that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings").

[25] *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[26] *See* Douglas R. Richmond, *Renewed Look at the Duty to Warn and Affirmative Defenses*, 61 DEF. COUNS. J. 205, 205-09 (1994); *see also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. m (1997) (citing Olson v. Prosoco, Inc., 522 N.W.2d 284, 289 (Iowa 1994)).

[27] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. m (1997).

[28] *See id.* (criticizing the California Supreme Court's decision in *Carlin v. Superior Court*, 920 P.2d 1347, 1350 (Cal. 1996)).

[29] *See id.*

the role of plaintiff's knowledge and conduct regarding causation remains crucial. Courts have struggled to formulate an acceptable approach. Commentators have spoken to unique problems inherent in plaintiffs' attempts to establish a nexus between an alleged warning defect and proximate cause of injury.[30] Three essential models have developed to address the proximate cause quandary.

The first approach is the subjective, ex post facto testimony standard. Under this test, a plaintiff is allowed to provide post-accident testimony regarding whether she would have read and heeded an adequate warning had the defendant so provided. In *Emery v. Federated Foods, Inc.*,[31] for example, after a young child choked on a marshmallow and suffered catastrophic injury, the boy's mother produced an affidavit indicating that she would not have purchased the product had she been warned of this risk.[32] In addition, the mother's affidavit also stated that she always took note of warnings regarding risks to children.[33] Putting aside the fact that such self-serving testimony belies empirical data on human behavior,[34] its presence also shifts the focus of the case away from product safety, where the focus properly belongs.

Interestingly, commentators have tended to conclude that the subjective standard for proximate cause creates a marked advantage for plaintiffs.[35] That conclusion rests on the assumption that, although the plaintiff has put her credibility at issue by supplying self-serving testimony, attempts to challenge plaintiff's testimony risk jury inflammation and alienation.[36] Although the issue of scope of cross-examination of plaintiffs shall be revisited in Part III of this Article in the context of rebutting the heeding presumption, able defense counsel can introduce a potentially far-flung set of personality traits in attacking a plaintiff's subjective testimony. Under the Federal Rules of Evidence, if a plaintiff provides such self-serving testimony as to the heeding of warnings, the defendant is free to introduce various evidence of plaintiff's character for truthfulness or untruthfulness.[37] All such testimony obscures the more appropriate focus on safety of a

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[30] *See, e.g.*, Henderson & Twerski, *supra* note 4.

[31] 863 P.2d 426 (Mont. 1993).

[32] *See id.* at 432.

[33] *See id.*

[34] *See* Howard Latin, *"Good" Warnings, Bad Products, and Cognitive Limitations*, 41 UCLA L. REV. 1193, 1227-29 (1994) (discussing the difficulties in determining the adequacy of warnings due to complex cognitive factors).

[35] *See generally* Jacobs, *supra* note 2; Henderson & Twerski, *supra* note 4.

[36] *See id.*

[37] *See* FED. R. EVID. 608.

manufacturer's product and the adequacy of a given warning. Indeed, it is instructive to recall the statement of the New Jersey Supreme Court in *Freund v. Cellofilm Properties, Inc.*,[38] in which a worker suffered severe burns in a chemical fire at an industrial plant. Speaking to the language of an appropriate jury charge, the Court stated:

> Though, in a sense, inadequate warning is related to fitness and suitability, it appears preferable to charge the jury in terms of safety, for fitness and suitability are subsumed by the concept of safety where the design defect consists of an inadequate warning involving safety of the product.
>
> *Hence, a product liability charge in an inadequate warning case must focus on safety and emphasize that a manufacturer, in marketing a product with an inadequate warning as to its dangers, has not satisfied its duty to warn, even if the product is perfectly inspected, designed and manufactured.*[39]

As one commentator suggests, the subjective standard of knowledge for causation is essential in cases involving fraud or misrepresentation, cases in which a plaintiff must prove actual reliance upon some fraudulent inducement.[40] In the context of failure to warn cases, however, the subjective standard becomes a misguided distraction from the fundamental inquiry into product safety.

B. The Objective Standard

One method by which to eliminate the self-serving testimony of the subjective standard is to adopt a so-called objective or reasonable person approach to causation. Instead of relying upon the predictable self-serving, post-accident testimony of the plaintiff, the objective standard substitutes the reasonable person for the plaintiff and asks whether that hypothetical individual would have followed a warning.[41] This approach and its genesis require a brief digression as to types of warnings.

In general, products liability failure-to-warn cases involve either risk-reduction warnings or informed-choice warnings.[42] In the former class, a user is provided with either safe-use instructions or is made

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[38] 87 N.J. 229, 432 A.2d 925 (1981).

[39] *Id.* at 242-43, 432 A.2d at 932 (emphasis added).

[40] *See* Mark Geistfeld, *Inadequate Product Warnings and Causation*, 30 U. MICH. J.L. REFORM 309, 342 (1997).

[41] *See* Jacobs, *supra* note 2, at 163 n.163.

[42] *See* Fischer, *supra* note 2, at 271.

aware of the magnitude of the risk involved in using a product.[43] In the latter case, typically, a patient is informed of risks associated with a medical procedure or the receipt of a vaccination. This latter case essentially is the case of informed consent.[44] As Professors Twerski and Cohen indicate, the objective standard is particularly troublesome in the context of informed-consent cases:

> If the standard of decision causation is objective (reasonable patient), the problems are even more daunting. Clearly, the reasonable person (at least if that mythical creature is modeled on actual, accepted human behavior) is not an objectively 'rational' decision maker. Therefore, we cannot assume that the reasonable patient would have acted rationally. Yet, the irrationality that would attend a decision made by a reasonable patient cannot easily be quantified or predicted. How would a reasonable patient act? Reasonably irrationally? Unless this question can be answered, the objective standard of causation lacks all credibility.[45]

In addition to the empirical problems the objective standard presents,[46] the increasing ethnic and linguistic diversity of our society complicates the definition and identification of the mythical reasonable person.[47] Hence, indirectly, the adoption of an objective standard implicates issues of foreign language warnings. Courts have struggled with the question of whether a manufacturer has a duty to warn in foreign (typically Spanish) languages.[48] Although this debate is largely beyond the scope of this Article, the answer tends to turn on the consumer expectations created by a manufacturer's attempt to saturate a non-English speaking market with its product.[49] Nevertheless, the judicial system is ill-equipped under the objective standard to define subcategories of objective product users based upon idiosyncratic character traits.

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[43] *See id.*

[44] *See id.* at 272 (citing Davis v. Wyeth Lab., Inc., 399 F.2d 121 (9th Cir. 1968)).

[45] Aaron D. Twerski & Neil B. Cohen, *Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation*, 1988 U. ILL. L. REV. 607, 642.

[46] *See* Latin, *supra* note 34, at 1228-29.

[47] *See* R. Geoffrey Dillard, Note, *Multilingual Warning Labels: Product Liability, "Official English," and Consumer Safety*, 29 GA. L. REV. 197, 205 (1994).

[48] *See, e.g.*, Ramirez v. Plough, Inc., 863 P.2d 167 (Cal. 1993); Stanley Indus. Inc. v. W.M. Barr & Co., 784 F. Supp. 1570 (S.D. Fla. 1992); Hubbard-Hall Chem. Co. v. Silverman, 340 F.2d 402 (1st Cir. 1965).

[49] *See* Dillard, *supra* note 47, at 233.

III. DETERMINING PROXIMATE CAUSE THROUGH THE HEEDING PRESUMPTION

A. *The Discussion in* Technical Chemical Co. v. Jacobs[50]

To understand and appreciate the import of the heeding presumption, it is necessary to trace its development. In the seminal case of *Technical Chemical Co. v. Jacobs*, a plaintiff was injured when a can of refrigerant exploded while the user was attempting to place its contents in his automobile air conditioner.[51] Although the plaintiff's testimony was at best ambivalent concerning whether he read the existing label on the can,[52] the court sought to avoid such narrow focus by invoking Restatement (Second) of Torts, section 402A comment j. This section states: "Where 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."[53]

The situation in *Jacobs*, however, implicated the converse of this presumption:

> Where there is no warning, as in this case, however, the presumption that the user would have read an adequate warning works in favor of the plaintiff user. In other words, the presumption is that Jacobs would have read an adequate warning. The presumption may, however, be rebutted . . . by the manufacturer's producing evidence that the user was blind, illiterate, intoxicated at the time of the use, irresponsible or lax in judgment or by some other circumstance tending to show that the improper use was or would have been made regardless of the warning.[54]

That this converse presumption defies logic is well documented.[55] Indeed, many jurisdictions that have adopted the heeding presumption do so as a matter of public policy.[56] Significantly, the Restatement (Third) does not contain the

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[50] 480 S.W.2d 602 (Tex. 1972).

[51] *See id.* at 602.

[52] *See id.* at 602-04 (demonstrating plaintiff's conflicting testimony regarding his actions prior to the explosion).

[53] RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965).

[54] *Technical Chem.*, 480 S.W.2d at 606.

[55] *See generally* Henderson & Twerski, *supra* note 4.

[56] *See* Coffman v. Keene Corp., 133 N.J. 581, 597, 628 A.2d 710, 718 (1993); *see also* Kevin J. O'Connor, *New Jersey's Heeding Presumption in Failure to Warn Product Liability Actions:* Coffman v. Keene Corp. *and* Theer v. Philip Carey Co., 47 RUTGERS L. REV. 343, 359 n.69 (1994).

presumption and the comments that accompany the section on warnings. Professor Latin has leveled a withering and insightful criticism at the comment j language.[57] Although Professor Latin criticizes the presumption as it applies to plaintiffs, he also notes the mischief inherent in comment j that allows a defendant to exonerate itself by substituting a warning for an alternative safer design.[58] Professor Latin writes: "In reality, courts frequently do give 'good' product warnings exculpatory effect notwithstanding the potential availability of design improvements, safer substitute products, better marketing practices, or better warnings that could reduce accident risks."[59]

Professor Latin also discusses a number of cases in which courts allowed manufacturers to take refuge under comment j by attaching warnings to products that otherwise lack adequate safety devices.[60] Two recent cases, however, appear to embrace the commentary of the Restatement (Third)'s criticisms of the comment j presumption as it pertains to manufacturers. In *Rogers v. Ingersoll-Rand Co.*,[61] a road crew worker suffered an injury when a milling machine rolled backward and crushed the plaintiff's leg and pelvis. The plaintiff sued the manufacturer, Ingersoll-Rand, on a design defect theory.[62] At trial, Ingersoll-Rand proffered a proposed jury instruction that essentially sought exoneration from liability if an admittedly dangerous product is accompanied by a warning.[63] The district court refused to adopt this proposed charge, and Ingersoll-Rand claimed reversible error.[64] The Court of Appeals for the District of Columbia rejected this argument, indicating that the "instruction assumes that an adequate warning by itself would immunize a manufacturer from any liability caused by its defectively designed product. This is not a correct statement of applicable law."[65] The court buttressed this assertion by citing the Restatement (Third) and the aforementioned comments.[66]

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[57] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. l (1997) (citing Latin, *supra* note 34, at 1206-07).

[58] *See* Latin, *supra* note 34, at 1206-07.

[59] *Id.* at 1258-59.

[60] *See id.* at 1259 n.291, 1282 n.399.

[61] 144 F.3d 841 (D.C. Cir. 1998).

[62] *See id.* at 842.

[63] *See id.* at 843.

[64] *See id.*

[65] *Id.*

[66] *See id.* at 845.

An even more resounding renunciation of comment j as it pertains to manufacturers occurred in *Uniroyal Goodrich Tire Co. v. Martinez*.[67] In *Martinez*, the plaintiff suffered severe injuries when he was struck by an exploding sixteen-inch Goodrich tire that he was mounting on a sixteen-and-one-half inch rim.[68] Although a prominent warning label was attached to the tire,[69] the plaintiff claimed that the tire was defectively designed, as it failed to incorporate a safer alternative bead design that would have kept it from exploding.[70] In rejecting the defendant's assertion that comment j should insulate it from liability, the court cited comment l of the Restatement (Third), emphasizing the importance of safer alternative design.[71] The Texas Supreme Court went on to note the criticism leveled at comment j as indicated herein, and ultimately refused "to adopt the approach of Comment j of the superseded Restatement (Second) of Torts section 402A."[72]

To the extent that *Rogers* and *Martinez* refocus attention on product safety and integrity rather than allowing a manufacturer to escape liability by the simple attachment of a warning, these cases pay doctrinal homage to the foundation of early products liability law. Whether other jurisdictions retreat from comment j, as originally written for defendants, remains to be seen. Nevertheless, it is difficult to dispute the logic of Professor Latin. Latin writes: "If a substitute product provides the same appearance and same functions in a safer manner, the presence of a good warning on the more dangerous product should not be determinative."[73]

Returning to the heeding presumption as applied to plaintiffs, whether the basis for its adoption is derived from the seemingly moribund comment j of section 402 of the Restatement (Second) or from an acknowledgment of pertinent policy reasons,[74] recognition of the heeding presumption is widespread.[75] Hence, even if the

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[67] 977 S.W.2d 328 (Tex. 1998).

[68] *See id.* at 331-32.

[69] *See id.* at 332. The warning label stated "Danger — Never Mount A 16" Size Diameter Tire On A 16.5" Rim" *Id.*

[70] *See id.*

[71] *See id.* at 336. The court specifically stated, "In general, 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 over a warning that leaves a significant residuum of such risks." *Id.*

[72] *Id.* at 337.

[73] Latin, *supra* note 34, at 1268.

[74] *See* O'Connor, *supra* note 56, at 357 n.64, 358-59 n.69.

[75] *See id.* at 357 n.64.

debunking of comment j addressed in the Restatement (Third) is embraced, its foundation and relevance in numerous jurisdictions will be unaffected.

B. *The Heeding Presumption in Failure to Warn Cases Versus Inadequate Warnings Cases*

Within that group of jurisdictions adopting the heeding presumption for plaintiffs, some states draw a distinction as to its applicability based upon whether the allegation involves a failure to warn or an inadequate warning. In *Safeco Insurance Co. v. Baker*,[76] for example, homeowners suffered property damage when a fire destroyed their home. The accident occurred as a result of the installation of a fireplace that lacked a certain metal safety strip that was designed to fit between the hearth extension and the firebox.[77] Moreover, the fireplace also was delivered without an addendum to the installation instructions.[78] These omissions aside, the installer of the fireplace read only one page of the instructions supplied.[79]

After reviewing case law in Louisiana adopting the heeding presumption,[80] the court opined that, on these facts, the plaintiff insurance company failed to prove that the lack of an adequate warning was a cause-in-fact of the fire.[81] In essence, the manufacturer of the fireplace successfully rebutted the heeding presumption by stressing that the installer read only the first page of the instructions.[82] Thus, the court concluded that "even if the more specific warnings contained in the addendum had been available, such warnings would have been futile because Baker did not read the instructions he had available."[83] The rebuttal of the heeding presumption shall be developed in greater detail herein.[84] *Safeco*, however, represents a clear example of a troubling shift in emphasis away from product safety to user's conduct in the case of an inadequate warning. Despite commentary to the contrary,[85] this theme is endemic to cases adopting a heeding presumption.

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[76] 515 So. 2d 655 (La. App. 1988).

[77] *See id.* at 656.

[78] *See id.*

[79] *See id*

[80] *See id.* at 657 (discussing Bloxom v. Bloxom, 512 So. 2d 839 (La. 1987)).

[81] *See id.* at 658.

[82] *See Safeco Ins.*, 515 So. 2d at 657-58.

[83] *Id.* at 658.

[84] *See* discussion *infra* Part III.C.

[85] *See* Henderson & Twerski, *supra* note 4, at 275-76.

Another critical opinion that differentiates failure to warn and inadequate warning cases in this area is *General Motors Corp. v. Saenz*.[86] The plaintiff in *Saenz* was killed when the water tank truck he was driving suffered a tire blowout, causing the loss of control and overturning of the truck.[87] As originally constructed, the truck in question consisted of a cab and chassis manufactured by General Motors Corporation. The original owner of the truck utilized it for towing purposes, and a subsequent purchaser, Sascon Inc., added a 2000-gallon water tank.[88] Ultimately, Sascon Inc. sold the water tank truck to the decedent's employer, Cantu Lease, Inc.[89]

Operation of the truck with a full water tank exceeded the gross vehicle weight rating (GVWR); the acceptable GVWR was imprinted on the metal plate "which GM had attached to the doorjamb."[90] The metal plate also made reference to further instructions in the owner's manual.[91] The owner of Sascon conceded that no one at the company "ever checked either the doorplate or owner's manual to ascertain the vehicle's GVWR."[92] Sascon, however, did not drive the truck with a full tank, except during the course of three to five mile-per-hour treks through the construction sites. Assuming Cantu would do the same, Sascon, when selling the truck to Cantu, failed to warn Cantu of the danger of overloading.[93] On the day of the accident, Saenz was directed to drive the truck over 100 miles to a distant construction site. The case proceeded to trial against General Motors[94] on an inadequate warning theory, and the jury awarded a substantial verdict.[95] The Texas Court of Appeals affirmed, determining that the warning was inadequate in four respects and holding that the faulty warning caused the accident.[96] The Supreme

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[86] 873 S.W.2d 353 (Tex. 1993).

[87] *See id.* at 354.

[88] *See id.*

[89] *See id.*

[90] *Id.*

[91] *See id.* The owner's manual informed the reader: "Overloading can create serious potential safety hazards and can also shorten the service life of your vehicle." *Id.*

[92] *Saenz*, 873 S.W.2d at 354.

[93] *See id.* at 355.

[94] *See id.* Maria Saenz sued six parties for wrongful death. *See id.* She settled, however, with five of the six defendants prior to or during trial. *See id.* GM was the sole remaining defendant when the case was submitted to the jury. *See id.*

[95] *See id.* The jury awarded compensatory and punitive damages exceeding $4.8 million. *See id.*

[96] *See id.* First, General Motors failed to provide information about the safe center of gravity for a certain load. *See id.* Second, the doorplate did not clearly state

Court of Texas affirmed as to breach of duty to warn, but found that plaintiff failed to establish a nexus between the inadequate warning and causation.[97] In arriving at this conclusion, the court traced the history of the adoption of the heeding presumption in Texas,[98] noted commentary criticizing the presumption,[99] but concluded that it remains "the best solution to the problem [of causation]."[100] Despite this assertion, the court went on to distinguish the applicability of the heeding presumption in a failure to warn and in an inadequate warning case:

> There is no presumption that a plaintiff who ignored instructions that would have kept him from injury would have followed better instructions . . . . It is one thing to presume that a person would have heeded a warning had it been given; it is another to presume that the person would have heeded a better warning when, in fact, he paid no attention to the warning given, which if followed would have prevented his injuries.[101]

This distinction inspired Justice Doggett to write a scathing dissent. Heralding the majority's decision as "the next step in the dismemberment of Texas consumer product safety law,"[102] the dissent cited the importance of risk reduction and the protection of individual autonomy in decision-making in the requirement that a manufacturer provide an adequate warning.[103] By eliminating the heeding presumption in an inadequate warning case and allowing a manufacturer to be exonerated despite a deficient warning, the dissent, quite appropriately, questioned the resulting incentive to reduce risk to its minimum. Moreover, the "evidence also demonstrated that the reason that the GM notice went unread was a deficiency in the placement and prominence of the notice itself."[104] That evidence is particularly troubling in the context of the heeding presumption. Indeed, a plaintiff should be entitled to any and all

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the truck's payload. *See id.* Third, General Motors did not disclose the risk of rolling the truck. *See id.* Finally, the cautionary language was not set off from the standard language. *See id.*

[97] *See id.* at 361.

[98] *See Saenz*, 873 S.W.2d at 357-58.

[99] *See id.* at 358 (citing Henderson & Twerski, *supra* note 4 at 325-26).

[100] *Id.* at 359.

[101] *Id.* at 359 n.4.

[102] *Id.* at 362 (Doggett, J., dissenting).

[103] *See id.* (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 96, at 685 (5th ed. 1984)).

[104] *Saenz*, 873 S.W.2d at 365.

reasonable opportunity to evaluate the totality of available information.

Consistent with the dual policy goals of risk reduction and the protection of individual autonomy in decision making, the New York courts have declined to draw the failure to warn/inadequate warning distinction adopted in Texas. Two cases are instructive. In *Power v. Crown Controls Corp.*,[105] plaintiff suffered severe injuries when a forklift he was operating during the course of his employment tipped over. Although the plaintiff admitted that he failed to read the warning on the truck, the warning language did not address what a user should do in the case of a tipover.[106] Furthermore, the plaintiff was not made aware of the existence of an owner's manual that contained further instructions.[107]

The court acknowledged that, in an appropriate case, the heeding presumption could be "rebutted by proof that an adequate warning would have been futile since plaintiff would not have read it."[108] The court proceeded, however, to emphasize the salient fact that the plaintiff's injury arose in the workplace:

> Thus, it is possible that the plaintiff may be able to prove at trial that the failure to warn was a proximate cause after all, this on the following theory: if a proper warning had been given, it could have come to the attention of officials of plaintiff's employer or perhaps even fellow workers, who could have informed plaintiff of what he had not personally read. It is a fact of modern industrial life that safety directives are made general knowledge in just this fashion.[109]

Therefore, plaintiff's failure to read an inadequate warning was not dispositive as to the applicability of the heeding presumption.

Another example of New York's rejection of the failure to warn/inadequate warning distinction occurred in *Johnson v. Johnson Chemical Co.*[110] In *Johnson*, plaintiff suffered severe burns after she sprayed a can of "King Roach Spray" in close proximity to an ignited pilot light. The plaintiff conceded that she had not read the warning affixed to the can.[111] Nevertheless, plaintiff's expert testified that the

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[105] 149 Misc. 2d 967 (N.Y. Sup. Ct. 1990).

[106] *See id.* at 968.

[107] *See id.* However, "Plaintiff never asked for a manual or brochure about the forklift." *Id.*

[108] *Id.* at 969.

[109] *Id.* at 970 (citing Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1539 (D.C. Cir. 1984)).

[110] 183 A.D.2d 64 (N.Y. App. Div. 1992).

[111] *See id.* at 66. The warning stated that "all flames, pilot lights, burners & ovens

warning label was inadequate in that it failed to specify "the actual dangers (explosion or flash fires) which would present themselves if the product were used near a pilot light."[112] The court was persuaded by this reasoning and concluded:

> A consumer such as Ms. Kono who, by her own admission, tends to ignore one sort of label, might pay heed to a different, more prominent or more dramatic label. The reasonableness of her behavior is for the jury to decide . . . . In light of the foregoing, we conclude that Ms. Kono's admitted failure to read the manufacturer's warnings concerning the use of "La Bomba" does not necessarily sever the causal connection between the alleged inadequacy of those warnings, on the one hand, and the occurrence of the accident, on the other.[113]

If product safety is to remain paramount in a general analysis of a warning defect case, there is no principled reason to draw the distinction as the Texas Court did in *Saenz.* Although this discussion has already recognized that a user's decision-making process may be less than ideal,[114] products liability doctrine should demand the best possible information to assure individual autonomy and risk reduction.[115]

C. *The Heeding Presumption in Workplace Cases Versus Nonworkplace Cases and Types of Rebuttal Evidence*

1. The Heeding Presumption in the Workplace

A significant percentage of products liability litigation involving serious injuries arises as a result of workplace accidents.[116] In this context, the workers' compensation system collides with the law of products liability. The tension between these two systems is treated insightfully in an article by Charles E. Carpenter, Jr.[117] To appreciate the unique problems of the heeding presumption relative to workplace accidents, it is instructive to set forth Mr. Carpenter's basic analytical framework:

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must be turned off before using this product." *Id.* at 67.

[112] *Id.* at 68.

[113] *Id.* at 70-71.

[114] *See generally* Latin, *supra* note 34 (discussing the cognitive limitations of the human mind and the effects of those limitations on the decision-making process).

[115] *See id.*

[116] *See* Carpenter, *supra* note 6, at 273 (reporting that from 1965 to 1970, 46% of the products liability cases surveyed were work-related; from 1971 to 1976, 50% of the products liability cases surveyed were work-related).

[117] *See id.*

> When manufacturers sell products to employers, they presumably have no desire to be sued by injured employees; and they presumably want to make products as safe as the state of the art permits, provided the marketplace demands and will pay for safe products. Manufacturers, however, do not control the manner in which products are used, the safety procedures that are observed on the job, or the environment in which the product is used. These conditions are controlled by employers.[118]

Employers, however, are unlikely to be injured and may not have the same personal incentive for achieving safety that individual consumers have for themselves. Thus, both employees' expectations of a safe workplace and manufacturers' expectations that products will be used safely in the workplace may be frustrated by an employer's lack of incentive to ensure that a product is used in a safe manner.[119]

Adding to this tension is the fact that, absent the commission of an intentional wrong, most states have workers' compensation statutes[120] that preclude an employee from suing his employer directly in tort.[121] This preclusion is commonly known as the exclusive remedy doctrine.[122] Exacerbating the conflict between the common law of products liability and the statutory framework of workers' compensation is the narrow judicial construction given to the intentional wrong exception.[123] The comment by former New Jersey Appellate Division Judge William Dreier captures this phenomenon:

> By way of editorial comment, we see that these problems so often arise out of a [w]orkers' [c]ompensation system that provides relatively inadequate recovery even when the employer's negligence is so extensive that it borders on wanton conduct. Provided it falls short of an "intentional wrong," the employee has

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[118] *Id.* at 275.

[119] *See id.* at 275-78.

[120] *See, e.g.*, N.J. STAT. ANN. § 34:15-8 (West 1987) (stating that if injury or death is compensable under the statute, the statutory remedy is exclusive to the injured party for actions that occurred while the responsible party and the injured party worked together, unless the action is intentional).

[121] *See* Thomas A. Eaton, *Revisiting the Intersection of Workers' Compensation and Product Liability: An Assessment of a Proposed Federal Solution to an Old Problem*, 64 TENN. L. REV. 881, 887 (1997).

[122] *See id.*

[123] *See* Millison v. E.I. duPont de Nemours & Co., 101 N.J. 161, 171-72, 501 A.2d 505, 510-11 (1985). The court cites *Prescott v. United States*, 523 F. Supp. 918 (D. Nev. 1981), which held that "willful intent to send [an] employee into [a] test area . . . immediately after nuclear detonations to perform his job is not the same as intent to make workers sick" and, consequently, that the state workers' compensation statute is the exclusive remedy. *Id.* at 511.

> no remedy against the employer apart from [w]orkers' [c]ompensation . . . . So many of these costly suits against equipment manufacturers could be forestalled if either the [w]orkers' [c]ompensation remedy were more realistic, the tort law compensation were more circumscribed, or if the common-law suit exception were expanded to permit indemnification claims against an employer by a third party which is found liable for less than some fixed percentage of liability.[124]

The fundamental tension between these systems becomes particularly problematic when the heeding presumption is applied in a workplace setting and when the defendant manufacturer attempts to introduce rebuttal evidence. The paradigm in this regard is *Theer v. Philip Carey Co.*[125] In *Theer*, plaintiff, Joseph Theer, died of lung cancer after a long history of asbestos exposure. His wife, Rose Marie, commenced an action for asbestosis as a result of secondary or bystander exposure.[126] After a bitterly contested litigation and partial settlement,[127] the jury concluded that the decedent failed to prove that a failure to warn was a proximate cause of the decedent's lung cancer.[128] As to Mrs. Theer, the jury found no asbestos-related injury.[129] On appeal, the applicability of the heeding presumption was raised. Although the appellate division addressed other causation issues, it eschewed the appropriateness of the heeding presumption.[130]

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[124] Seeley v. Cincinnati Shaper Co., 256 N.J. Super. 1, 10, 606 A.2d 378, 382 n.4 (App. Div. 1992).

[125] 133 N.J. 610, 628 A.2d 724 (1993).

[126] *See id.* at 614, 628 A.2d at 726. In the course of asbestos litigation, the overwhelming majority of cases have involved plaintiffs exposed directly to either raw asbestos fiber or to a finished product containing asbestos. A number of other cases, however, contain a secondary or bystander exposure. In these cases, a spouse or child is exposed to asbestos through contact with clothing or perhaps through exposure to asbestos in the ambient air. For an illuminating discussion of asbestos disease, see Irving Selikoff & T. Ehrenreich, *Diseases Associated with Asbestos Exposure: Diagnostic Perspectives in Forensic Pathology*, 1983 AM. J. FORENSIC MED. PATHOL. 63.

[127] This Author has served as a Special Master for various toxic tort cases venued in New Jersey, including asbestos litigation. In this capacity, I have attempted to resolve thousands of asbestos cases, including *Theer*. The *Theer* case raised an unusual number of interesting and profound legal issues. I appointed a special mediation panel to assist me in the attempted settlement of this case. Plaintiff's counsel, Karl Asch, was one of the preeminent lawyers in the early days of asbestos litigation. For a fascinating account of Mr. Asch's role in developing discovery to combat the asbestos industry, see PAUL BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL 106-11 (1985).

[128] *See Theer*, 133 N.J. at 616, 628 A.2d at 727.

[129] *See id.*

[130] *See id.* Although the appellate court did not rule on the heeding-presumption issue, it did address whether the warnings were adequate and whether those warnings

The New Jersey Supreme Court granted certification[131] and, in conjunction with the companion case of *Coffman v. Keene Corp.*,[132] engaged in an exhaustive analysis of the heeding presumption. After noting that the heeding presumption is especially important in cases such as this, in which a witness is unavailable to testify,[133] the court acknowledged the difficulties inherent in the dynamics of the workplace that frustrate a manufacturer's efforts to convey warnings and an employee's ability to heed them.[134] Indeed, consistent with its long-standing jurisprudence,[135] the New Jersey Supreme Court articulated a standard that recognized that workers in industrial settings seldom have a meaningful choice to abandon their jobs, even in the face of a warning.[136] With this ruling in mind, the *Theer* court, citing *Coffman*, suggested the following alternatives for the manufacturer in rebutting the heeding presumption in a workplace setting:

> [T]he manufacturer must prove that had an adequate warning been provided, the plaintiff-employee with meaningful choice, would not have heeded the warning. *Alternatively, the manufacturer must show that had an adequate warning been provided, the employer itself would not have heeded the warning by taking reasonable precautions for the safety of its employees and would not have allowed its employees to take measures to avoid or minimize the harm.*[137]

Assuming the typical lack of meaningful choice on the part of the employee,[138] the alternative approach to rebutting the presumption is critical. Ascertaining whether a manufacturer can discharge its duty to warn and rebut the heeding presumption by providing adequate

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had contributed to Mr. Theer's cancer. *See id.*

[131] 130 N.J. 601, 617 A.2d 1223 (1992).

[132] 133 N.J. 581, 628 A.2d 710 (1993).

[133] *See Theer*, 133 N.J. at 619, 628 A.2d at 729.

[134] *See Coffman*, 133 N.J. at 605-07, 628 A.2d at 722-23.

[135] *See id.* at 605-06, 628 A.2d at 721-22. (citing Bexiga v. Havir Mfr. Corp., 60 N.J. 402, 290 A.2d 281 (1972); Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979)).

[136] *See id.*; *see also* Tirrell v. Navistar Int'l, Inc., 248 N.J. Super. 390, 401, 591 A.2d 643, 648 (App. Div. 1991) (extending these principles to cases that go beyond the traditional industrial setting).

[137] *Theer*, 133 N.J. at 621, 628 A.2d at 730 (emphasis added) (citing *Coffman*, 133 N.J. at 609, 628 A.2d at 724).

[138] *See Coffman*, 133 N.J. at 605, 628 A.2d at 722 (citing Green v. Sterling Extruder Corp., 95 N.J. 263, 271, 471 A.2d 15, 20-21 (1984) (other citations omitted)). Interestingly, although warnings were not supplied to the employees in the *Theer* case, Mr. Theer had read an article in a magazine, before he retired, about asbestosis. *See Theer*, 133 N.J. at 615, 628 A.2d at 727. Even after reading the article, Mr. Theer "never wore a mask or any other protective gear." *Id.*

information to an employer who then fails to communicate the information is paramount. A review of section 388 of the Restatement (Second) of Torts is instructive.[139] Specifically, comment n to section 388 explains the parameters of the duty of a supplier of dangerous products to warn the end user (the employee) directly. In essence, comment n adopts a balancing test that requires increased effort at direct communication with the end user as a function of the magnitude of risk involved in the use of the product:

> Thus, while it may be proper to permit a supplier to assume that one through whom he supplies a chattel which is only slightly dangerous will communicate the information given him to those who are to use it unless he knows that the other is careless, it may be improper to permit him to trust the conveyance of the necessary information of the actual character of a highly dangerous article to a third person of whose character he knows nothing.[140]

A pair of recent cases highlights the ability of a manufacturer to discharge the section 388 duty to warn an employer. The manufacturer then utilizes the employer's misconduct in failing to transmit the warning to employees as rebuttal evidence in the context of the heeding presumption. The manufacturer thus absolves itself of liability and dooms a plaintiff to an inadequate workers' compensation award when the employer's misconduct fails to rise to the level of an intentional wrong. In *Dresser Industries, Inc. v. Lee*,[141] plaintiff, a foundry worker, suffered from silicosis. The plaintiff worked at Tyler Pipe Industries, Inc. (Tyler Pipe), at which time he

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[139] *See* RESTATEMENT (SECOND) OF TORTS § 388 (1965). Section 388 specifically states:

> 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
>
> (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.

Id. § 388.

[140] *Id.* § 388 cmt. n.

[141] 880 S.W.2d 750 (Tex. 1993).

was exposed to large quantities of silica dust.[142] The defendant supplier, Dresser Industries, Inc. (Dresser), was aware of the dangers of respiratory disease associated with the inhalation of silica dust, but failed to affix a warning label to the bags.[143] Moreover, Tyler Pipe also had such knowledge yet "took few precautions to safeguard its employees."[144] Despite Tyler Pipe's immunity from tort liability under the Texas Workers' Compensation Law,[145] the Supreme Court of Texas allowed Dresser to introduce evidence that Tyler Pipe's negligence was the sole proximate cause of plaintiff's injury.[146]

After once again reviewing the history of its adoption in Texas,[147] the court allowed the employer's negligence in maintaining a horrific workplace essentially to rebut the presumption that the plaintiff would have heeded a warning on Dresser's bags of silica:

> Dresser offered evidence that because of the heat in the workplace Lee seldom used a mask or respirator to protect against inhaling the silica dust, even though it bothered him so much that he had to blow it out of his nose and spit it out of his mouth . . . . This evidence was sufficient to rebut any presumption that Lee would have heeded a warning by Dresser and that the absence of such a warning was at least a cause, if not the only cause, of Lee's injury.[148]

As was the case in *General Motors Corp. v. Saenz*,[149] the majority opinion provoked a heated dissent from Justice Doggett. Although Justice Doggett did not cite to the Restatement (Second) of Torts section 388, he noted the irony of a defense that allows Dresser to delegate to an employer its duty to warn simply because the product is unusually dangerous.[150] Indeed, this is antithetical to the balancing formula of comment n noted herein.[151] Having allowed this bizarre delegation, the plaintiff finds his heeding presumption rebutted by the employer's maintenance of a grossly negligent workplace:

> Incredibly, today's opinion declares that evidence that an employee works in a "hot, dusty, improperly ventilated" workplace

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[142] *See id.* at 751.

[143] *See id.*

[144] *Id.*

[145] *See generally* TEX. REV. CIV. STAT. ANN. art. 8308 (West 1967).

[146] *See Dresser*, 880 S.W.2d at 753.

[147] *See id.* at 753-54 (discussing Technical Chem. Co. v. Jacobs, 480 S.W.2d 602, 606; Magro v. Ragsdale Bros., 721 S.W.2d 832, 834 (Tex. 1986)).

[148] *Dresser*, 880 S.W.2d at 754.

[149] 873 S.W.2d 353 (Tex. 1993).

[150] *See Dresser*, 880 S.W.2d at 756-58 (Doggett, J., dissenting).

[151] *See* discussion *supra* Part III.C.

> where use of a safety device is uncomfortable can defeat the presumption that any warning about the deadly qualities of a product would be heeded . . . . That an employee prefers the discomfort of heat and dust to the sweaty discomfort of wearing a mask hardly demonstrates that he would have made the same choice had he known that his very life was at stake.[152]

The perverse aftermath of this analysis finds a manufacturer of a lethal product justifying its failure to warn and rebutting the heeding presumption by citing to an employer's creation of a hazardous workplace. The employer, in turn, takes shelter in the pages of the workers' compensation statutes and avoids any liability that would deter future misconduct or even prompt a correction of current conditions.

Similarly, the plaintiff in *Calderon v. Machinenfabriek Bollegraaf Appingedam BV*[153] (Bollegraaf) found himself in almost the same legal void as the victim in *Dresser*. In *Calderon*, plaintiff's arm was amputated when it became caught in a paper baling and compacting machine.[154] In an attempt to untangle some wires, the plaintiff reached into the machine while it was still running. Unfortunately, the plaintiff failed to withdraw his arm before four large steel rods were activated and moved through the area.[155] Defendant Van Dyk Baler Corporation (Van Dyk), distributor for the manufacturer, sold the machine to plaintiff's employer, Alpha Paper Recycling Company (Alpha).[156]

When manufactured by defendant Bollegraaf, the product contained a "caution" sign near the small access doors on either side of the machine.[157] These access doors allowed the user to peer into the needle area of the machine and determine whether the wires in the needle assembly were becoming tangled.[158] As originally manufactured, however, "[t]he access doors were covered by a heavy metal grate with an interlock that shut down the needle assembly whenever the grate was lifted."[159] Despite the presence of the

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[152] *Dresser*, 880 S.W.2d at 756 (Doggett, J., dissenting) (citation and footnote omitted).

[153] 285 N.J. Super. 623, 667 A.2d 1111 (App. Div. 1995).

[154] *See id.* at 625, 667 A.2d at 1112.

[155] *See id.*

[156] *See id.* at 626, 667 A.2d at 1113.

[157] *See id.*

[158] *See id.* at 626-27, 667 A.2d at 1113. The wires within the needle regularly became tangled because the machine was heavily used. *See id.* at 627, 667 A.2d at 1113.

[159] *Calderon*, 285 N.J. Super. at 626, 667 A.2d at 1113.

interlock system, plaintiff's employer discovered a way to sabotage the safety of the machine:

> Alpha's management removed the safety grates on the access doors approximately two years before this accident . . . . Using blow torches, grinders and precision instruments, Alpha cut away all of the grate except the small portion that triggered the interlock. A small strip of metal remained in contact with the bottom of the access door, thus effectively nullifying the manufacturer's safety device. Employees could then reach into the machine and straighten the wires without having the machine automatically shut down.[160]

The trial judge dismissed plaintiff's design defect claim and submitted the case to the jury on the issue of warning defect.[161] The jury determined the warning to be inadequate but declined to find the inadequacy a proximate cause of plaintiff's injury.[162] Citing the opinion of the New Jersey Supreme Court in *Coffman v. Keene Corp.*,[163] the court noted the adoption of the heeding presumption and the mechanism by which a manufacturer or distributor rebuts the presumption in the workplace setting.[164] Given the outrageous misconduct of plaintiff's employer, the court quite properly concluded that any additional warning provided by the distributor, Van Dyk, would have been meaningless. Thus, as to the rebuttal of the heeding presumption, the court observed:

> Absent contrary evidence, there would have been a presumption that Alpha would have followed Van Dyk's warnings, had they been given. In this case, however, we have the evidence that the original interlocked grates which would have shut down the machine were painstakingly removed by Alpha so that the machine could be kept running during servicing. Further, all parties acknowledged that plaintiff's employer required him to untangle the wires while the machine was running. The undisputed facts of this case strongly rebut the presumed fact, thus abrogating the presumption.[165]

Significantly, although the plaintiff's lawyer failed to raise the issue, the court speculated whether the employer's egregious conduct in this case implicated the intentional wrong exception to the

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[160] *Id.* at 627, 667 A.2d at 1113.

[161] *See id.* at 629, 667 A.2d at 1114-15.

[162] *See id.* at 633, 667 A.2d at 1117.

[163] 133 N.J. 581, 628 A.2d 710 (1993).

[164] *See Calderon*, 285 N.J. Super. at 632, 667 A.2d at 1116.

[165] *Id.* (citing N.J. R. Evid. 301).

Workers' Compensation Act in New Jersey.[166] In poignant language, the court captured the essence of the conundrum faced by a plaintiff in the workplace when his employer's misconduct rebuts the heeding presumption:

> Severe inequities are visited upon workers by the actions of their employers in removing, disconnecting, refusing to install, or otherwise thwarting safety devices that are provided to protect the users of industrial machinery. *Such employees are generally left to the inadequate remedies of workers' compensation, virtually sacrificed on the altar of production quotas with no downside risk to the employer.*[167]

To the extent that manufacturers will continue to rebut the heeding presumption in workplace cases by showing that plaintiff's employer would have failed to convey the information to the worker, courts must be willing to rethink the narrow scope given to the intentional wrong exception in state workers' compensation statutes. To ignore this inherent tension is to leave workers, as Judge Dreier indicated, "sacrificed on the altar of production quotas with no downside risk to the employer."[168] Alternatively, in making the balancing inquiry as contemplated in section 388 of the Restatement (Second) comment n, the ability of a manufacturer to delegate to the employer the duty to warn must be more narrowly circumscribed to recognize the unfortunate dynamic of many workplace accidents in which employers fail to communicate warnings.[169]

2. The Heeding Presumption in Nonworkplace Cases

While heeding-presumption cases in the workplace often raise troubling issues regarding an employer's conduct, cases outside the traditional work site implicate the scope of a plaintiff's actions and their relevance in rebutting the heeding presumption. Although commentators generally have seen the heeding presumption in such cases as creating a distinct advantage for plaintiffs,[170] at least one writer has noted a defendant's ability to present otherwise inadmissible plaintiff-conduct proofs under the guise of the rebuttal of the heeding presumption.[171] Admittedly, the Restatement (Third)

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[166] *See id.* at 636-37, 667 A.2d at 1118 (citing N.J. Stat. Ann. § 34:15-8 (West 1988)).

[167] *Id.* at 637, 667 A.2d at 1118 (emphasis added).

[168] *Id.*

[169] *See* Carter v. E.I. duPont de Nemours & Co., 456 S.E.2d 661, 662 (Ga. Ct. App. 1995); *see also* Square D Co. v. Hayson, 621 So. 2d 1373, 1377-78 (Fla. Dist. Ct. App. 1993).

[170] *See* Henderson & Twerski, *supra* note 4, at 306-09.

[171] *See* Joseph G. Manta, *Proximate Causation in Failure to Warn Cases, The Plaintiff's Achilles Heel*, 1985 THE ADVOC. 16.

suggests that plaintiff's conduct in a products liability case should be treated no differently than it would be in a routine tort matter.[172] Nevertheless, some jurisdictions still limit the relevance of plaintiff's conduct for purposes of comparative fault in products liability litigation.[173] Moreover, regardless of the jurisdictional view on comparative fault, unfettered character evidence offered to rebut the heeding presumption effects a far more dramatic result by defeating plaintiff's prima facie case on proximate causation.

In this regard, another New Jersey appellate division decision proves instructive. In *Sharpe v. Bestop, Inc.*,[174] the court presented a carefully reasoned primer on the mechanics of the heeding presumption in a nonworkplace setting. In *Sharpe*, plaintiff suffered a serious injury after being ejected from his Jeep when it impacted with a guardrail.[175] At the time of the accident, plaintiff was not wearing his seat belt. Prior to the accident, plaintiff had replaced the hard, fiberglass top and removable steel doors on the Jeep and inserted a "Fastback" soft convertible top and doors manufactured by Bestop, Inc., and sold by Sears, Roebuck and Company.[176] The essence of plaintiff's failure to warn claim concerned the need for the defendant to provide a more compelling warning regarding the usage of seat belts in conjunction with the newly incorporated soft top and doors.[177] At trial, the jury determined that Bestop and Sears failed to warn of the "dangers attendant to the use of their product . . . . [t]he jury found, however, that their failure to warn was not a proximate cause of plaintiff's injuries."[178]

On appeal, Judge Keefe, who had previously authored an important decision on the heeding presumption outside the workplace,[179] took the opportunity to review the development of this

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[172] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 17 cmt. b (1997).

[173] *See id.* § 17, at 258-64.

[174] 314 N.J. Super. 54, 713 A.2d 1079 (App. Div. 1998), *aff'd*, 158 N.J. 329, 730 A.2d 285 (1999).

[175] *See Sharpe*, 314 N.J. Super. at 61, 713 A.2d at 1082.

[176] *See id.* at 60-61, 713 A.2d at 1082.

[177] *See id.* at 61, 713 A.2d at 1082-83. The Jeep's sun visor provided a warning that read: "WEAR SEAT BELTS AT ALL TIMES — DON'T DRINK AND DRIVE." *Id.* at 71, 713 A.2d at 1088.

[178] *Id.* at 61, 713 A.2d at 1083.

[179] *See* Graves v. Church & Dwight Co., 267 N.J. Super. 445, 631 A.2d 1248 (App. Div. 1993). In *Graves*, the plaintiff sued Church & Dwight Company, manufacturer of Arm & Hammer baking soda, after ingesting a large amount to calm his indigestion. *See id.* at 450, 631 A.2d at 1250-51. The ingestion caused his stomach to rupture. *See id.* Plaintiff sought the application of the heeding presumption. *See id.* at 458-59, 631 A.2d at 1255-56. After its application, rebuttal evidence was adduced concerning

branch of products liability law in New Jersey. The court noted the dearth of case law focusing specifically on the type of rebuttal evidence deemed appropriate in a nonworkplace setting.[180] Nevertheless, the court suggested two general methods for the rebuttal of the presumption:

> The first method is by offering evidence concerning the plaintiff's knowledge of the very risk that the absent warning was supposed to address . . . . *The second method is to introduce evidence of plaintiff's attitudes and conduct apart from knowledge of the product's risk that demonstrates an indifference to safety warnings.*[181]

Sensitive to the fact that evidence germane to the second method of rebuttal might unduly shift the emphasis from product safety to plaintiff's conduct, Judge Keefe admonished that rebuttal evidence "must be sharply focused on the question of whether plaintiff is the type of person who ordinarily does not follow safety warnings when given."[182] The court circumscribed the inquiry even further by indicating that the evidence must relate specifically to plaintiff's tendency to follow instructions and warnings related to safety.[183]

Having defined the qualitative form of rebuttal evidence, the court then addressed the issue of quantum of evidence that a defendant must introduce to demonstrate "that a plaintiff is the type of person who does not heed safety warnings."[184] Citing to the New Jersey Rules of Evidence[185] and to the Texas Supreme Court case of *Magro v. Ragsdale Bros.*,[186] the court defined the quantum of necessary evidence as follows:

> In sum, we conclude that in order for evidence to be admissible to rebut the heeding presumption and demonstrate that plaintiff is the type of person that is indifferent to safety warnings, the defendant must adduce evidence, either from the plaintiff or other witnesses, that the plaintiff has in the past failed to heed

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Mr. Graves' history of smoking and the exigent circumstances surrounding his accident. *See id.* at 461-62, 631 A.2d at 1257-58.

[180] *See Sharpe*, 314 N.J. Super. at 74, 713 A.2d at 1089 & n.4.

[181] *Id.* at 74, 713 A.2d at 1089 (emphasis added) (citing Theer v. Philip Carey Co., 133 N.J. 610, 628 A.2d 724 (1993); Graves v. Church & Dwight Co., 267 N.J. Super. 445, 631 A.2d 1248 (App. Div. 1993)).

[182] *Id.* at 75, 713 A.2d at 1090 (citations omitted).

[183] *See id.* at 75-76, 713 A.2d at 1090.

[184] *Id.*

[185] *See* N.J. R. EVID. 404(a), 406 (a)-(b).

[186] 721 S.W.2d 832 (Tex. 1986).

> safety warnings as construed by the reasonable user, and that the plaintiff's indifference to the warning rose to the level of habit.[187]

This principled approach to the issue of rebuttal evidence in a nonworkplace setting strikes an appropriate balance in a failure-to-warn setting between efficacy of warning and personal responsibility of the user.

In addition to the analysis of the scope of rebuttal evidence, the court in *Sharpe* also addressed the evidentiary impact of a presumption in a civil case. To the extent that critics of the heeding presumption contend that it creates a wholly unfair advantage to the plaintiff,[188] the opinion in *Sharpe* may allay their concerns. As David A. Fischer points out in a recent article,[189] there are essentially two approaches to the procedural effect of presumptions:

> Courts most frequently follow the *Thayer* rule in civil cases. Under this rule, rebuttable presumptions shift the burden of production to the party against whom they operate, but have no effect on the risk of nonpersuasion . . . . The other major approach to presumption[] is embodied in the "shifting rule" of presumption[] as advocated by Professor Morgan. This rule shifts both the burden of producing evidence and the risk of nonpersuasion.[190]

The adoption of the "shifting rule" in regard to presumptions, and specifically, the heeding presumption, does work a dramatic advantage to the plaintiff.[191] The court in *Sharpe* rejected this convulsive rule by indicating that the burden of persuasion "at all times remains with the party upon whom the burden of persuasion is originally placed."[192] Lest the fears of those who criticize the heeding

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[187] *Sharpe*, 314 N.J. Super. at 77-78, 713 A.2d at 1090-91.

[188] *See* Henderson & Twerski, *supra* note 4, at 306-09.

[189] *See* Fischer, *supra* note 2.

[190] *Id.* (citing JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 342, at 572-78 (4th ed. 1992)).

[191] *See id.* at 275. Fischer writes: "[s]uppose defendant introduces enough evidence [for] the jury [to] find that the warning would not have been heeded." *Id.* For instance, the defendant shows "that plaintiff had independent knowledge of the danger and how to avoid it . . . . Under the shifting rule, if the defendant [offers enough] evidence to "show that the warning would not have prevented the incident, causation becomes a jury question." *Id.* Defendant will lose on the issue, because he bears the risk of non-persuasion, "unless the jury [finds] that the warning would not have prevented the accident." *Id.*

[192] *Sharpe*, 314 N.J. Super. at 68, 713 A.2d at 1086. Judge Keefe's conclusion was affirmed by the New Jersey Supreme Court in a per curiam opinion. *See* Sharpe v. Bestop Inc., 158 N.J. 329, 330, 730 A.2d 285, 285 (1999). The court wrote "We agree that if a defendant offers evidence sufficient to rebut the heeding presumption, a plaintiff must then carry the burden of persuasion as to the proximate cause." *Id.*

presumption be realized, it is paramount that the burden of persuasion in proving proximate cause not be shifted by the imposition of the presumption.

CONCLUSION

The issue of proximate cause in warning defect cases will continue to challenge judges and juries. Although imperfect, the heeding presumption as framed by the cases discussed herein represents a measured approach to this vexing problem. The heeding presumption should not receive a different analytical treatment in an inadequate warning setting and a failure-to-warn case. Careful consideration should be paid, however, to whether the injured party's accident occurred in the workplace. Irrespective of the factual backdrop, heeding-presumption analysis should allow an appropriate balance between product safety and integrity and the responsible behavior of a worker or consumer.