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Fattening Food: Should Purveyors of Fast Food be Required to Warn? A Call for a New Tort

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INTRODUCTION

Being overweight,[1] continues to be an important issue for many Americans.[2] The latest diet fad is likely to include at least one title

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1. MEDLINE PLUS MEDICAL ENCYCLOPEDIA, *How to Determine Your BMI, available at* http://www.nlm.nih.gov/medlineplus/ency/article/007196.htm:
Your body mass index (BMI) estimates whether you are at a healthy weight. Your BMI estimates how much you should weigh, based on your height. Here are the steps to calculate BMI:

* Multiply your weight in pounds by 703.
* Divide that answer by your height in inches.
* Divide that answer by your height in inches again.

For example, a woman who weighs 270 pounds and is 68 inches tall has a BMI of 41.0.

The webpage for this article also provides a chart explaining the BMI ranges: below 18.5 is underweight, 18.5 - 24.9 is healthy, 25.0 - 29.9 is overweight, 30.0 - 39.9 is obese, and over 40 is morbidly obese. *Id.*

2. *See* Connie L Bish et al., *Diet and Physical Activity Behaviors among Americans Trying to Lose Weight: 2000 Behavioral Risk Factor Surveillance System*, 13 OBESITY RES. 596 (2005) (reporting that forty-six percent of women and that thirty-three percent of men in America are trying to lose weight); *see also* Paul Krugman, *Girth of a Nation*, N.Y. TIMES, July 4, 2005, A13 (stating that number of obese American adults has doubled to more than thirty percent and that research shows high health cost). Krugman focuses on the attempts of Center for Consumer Freedom, a group financed by food providers such as Coca-Cola, Wendy's, and Tyson Foods tried to change the public impression of obesity issues in part through a Fourth of July

on the current bestseller list,[3] and newspapers carry daily articles on the most recent study regarding risks related to obesity.[4] Heeding these concerns, the federal government has added its own impetus by requiring the packaged food industry to list, not only nutritional information, but also calories.[5] Perhaps the most influential voice in this arena has been the medical profession.[6] They have determined

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media campaign to convince Americans that worrying about obesity is American. *Id.*

3. A look at the New York Times Bestseller list on July 9, 2005 reveals the following books which are related to obesity and weightloss: MIREILLE GUILIANO, FRENCH WOMEN DON'T GET FAT (2004); ARTHUR AGATSTON, THE SOUTH BEACH DIET A WEIGHT-LOSS PLAN DESIGNED BY A MIAMI CARDIOLOGIST (2005); JORDAN RUBIN, THE MAKER'S DIET (2004); PAMELA PEEKE, BODY FOR LIFE FOR WOMEN (2005). N.Y. Times, July 9, 2005.

4. *See* Fred Barbash, *It's a Weighty Problem, But A Crisis? C'mon*, THE WASHINGTON POST, Aug. 31, 2003, at B1 ("I'm alarmed by the hysteria in the mass media, reflected in words such as 'crisis' and 'epidemic.' There's been an epidemic of alarmist stories about obesity and its costs in the past year (about 2,000 according to my Internet search)"); Neil Buckley et al., *WHO Warns Against Media Obsession With Obesity*, FINANCIAL TIMES, June 24, 2003, at International Economy 14 (reporting the World Health Organization view that the media is too focused on obesity).

5. Nutrition Labeling and Education Act of 19990 (NLEA), Pub. L. No. 101-535, 104 Stat.2353 (1990) (codified in various sections of 21 U.S.C.). The requirement for nutritional information and calories is at 21 U.S.C. § 343(q)(1) (2000):

> Except as provided in subparagraphs (3), (4), and (5), if it is a food intended for human consumption and is offered for sale, unless its label or labeling bears nutrition information that provides—
> (A)(i) the serving size which is an amount customarily consumed and which is expressed in a common household measure that is appropriate to the food, or
> (ii) if the use of the food is not typically expressed in a serving size, the common household unit of measure that expresses the serving size of the food,
> (B) the number of servings or other units of measure per container,
> (C) the total number of calories—
> (i) derived from any source, and
> (ii) derived from the total fat,
> in each serving size or other unit of measure of the food,
> (D) the amount of the following nutrients: Total fat, saturated fat, cholesterol, sodium, total carbohydrates, complex carbohydrates, sugars, dietary fiber, and total protein contained in each serving size or other unit of measure,
> (E) any vitamin, mineral, or other nutrient required to be placed on the label and labeling of food under this chapter before October 1, 1990, if the Secretary determines that such information will assist consumers in maintaining healthy dietary practices. *Id.*

6. The involvement of the medical community in obesity is clear from the volumes of recent articles on the subject in medical journals, including a peer reviewed

that obesity,[7] is more than a health risk; it shortens one's life span.[8] To summarize, obesity kills. It is a leading cause of death in the United States.[9] There is no doubt eating fattening food, especially of the fast food variety, has a rippling effect.[10] Larger girths are not the only consequence; cardiovascular disease, diabetes, high choles-

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medical journal published twelve times a year and devoted to medical studies related to obesity. *See generally* OBESITY RES. published by The North American Association for the Study of Obesity, *available at* http://www.obesityresearch.org; *see also* United States Dept. of Health and Human Servs. (DHHS), *The Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity* 1-3 (2001), *available at* http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf. [hereinafter DHHS Obesity Call to Action].

7. MEDLINE PLUS MEDICAL ENCYCLOPEDIA, *Obesity*, *available at* http://www.nlm.nih.gov/medlineplus/ency/article/003101.htm. "Obesity is also defined as a BMI over 30 kg/m2 . . . . An adult male is considered obese when his weight is 20% or more over the maximum desirable for his height; a woman is considered obese at 25% or more than this maximum weight. Anyone more than 100 pounds overweight is considered morbidly obese." *Id.*

8. Jay S. Olshansky et al., *A Potential Decline in Life Expectancy in the United States in the 21st Century*, 352 NEW ENG. J. MED. 1138, 1138-46 (2005) (predicting a shortening in the life expectancy of Americans and attributing at least in part to the rise in obesity).

9. *Compare* Katherine M. Flegal et al., *Excess Deaths Associated With Underweight, Overweight, and Obesity*, 293 J. AM. MED. ASS'N 1861 (2005) (revising the Center for Disease Control's (CDC) mortality rate attributable to obesity for the year 2000 from over 400,000 to 111,909 deaths in that year), *and* David H. Mark, *Deaths Attributable to Obesity*, 293 J. AM. MED. ASS'N 1918, 1918-19 (explaining that a small change in the determination of how much of a risk factor obesity is towards specific conditions, such as cardiovascular disease, creates a large variation in the overall measurement of obesity on mortality rates), *with* Christine Gorman, *Is It O.K. to Be Pudgy?*, TIME, May 9, 2005, at (noting that CDC and Flegal believe that despite the revised mortality rate, the numbers are likely to change again and that what is certain is obesity is on the rise and the negative health effects of carrying extra weight are undeniable).

10. *See* Martha L. Daviglus et al., *Relation of Body Mass Index in Young Adulthood and Middle Age to Medicare Expenditures in Older Age*, 292 J. AM. MED. ASS'N 2743, 2748 (2004) (studying the relationship between a high BMI at a younger age to medical spending at the age of sixty-five and finding that obesity in young adulthood and middle age has long-term adverse consequences for health care costs in older age); Klea D. Bertakis & Rahman Azari, *Obesity and the Use of Health Care Services*, 13 OBESITY RESEARCH 372, 378 (2005) (warning that as the epidemic of obesity grows there will be an escalating growth in the use of health services).
Olshansky, *supra* note 8, at 1143. "Presently, annual health care costs attributable to obesity are conservatively estimated at $70 billion to $100 billion." *Id.* Olshansky suggests that "[t]he [United States] population may be inadvertently saving Social Security by becoming more obese." *Id.*

terol, sleep apnea, and other health problems are also results of obesity.[11]

Individuals alleging injury and seeking recourse have made an attempt to place fault upon purveyors of fast food.[12] To date, American jurisprudence has not helped.[13] The courts have suggested that, from a products liability perspective, fast food is not defective[14] and writers have concurred.[15] An analogy has been made

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11. The website for the Harvard School of Public Health concludes based on their research that how much a person weighs will influence their chances of: "dying early; having, or dying from, a heart attack, stroke, or other type of cardiovascular disease; developing diabetes; developing cancer of the colon, kidney, breast, or endometrium; having arthritis; developing gallstones; being infertile; developing asthma as an adult; snoring or suffering from sleep apnea; or developing cataracts." *See* Harvard School of Public Health, *Healthy Weight,* Dec. 13, 2004, *available at* http://www.hsph.harvard.edu/nutritionsource/healthy_weight.html); *see also* Olshansky, *supra* note 8, at 1143 (finding that obesity will cause a decline in the life expectancy of Americans),

> With rapid increases in the prevalence of diabetes, and a decrease in mean age at the onset of diabetes, the cost of treating diabetes-related complications, such as heart disease, stroke, limb amputation, renal failure, and blindness, will increase substantially. A similar escalation of health care costs from other complications associated with obesity (e.g., cardiovascular disease, hypertension, asthma, cancer, and gastrointestinal problems) is inevitable. *Id.*

12. *See* Pelman v. McDonald's Corp., 237 F. Supp. 2d 512, 519 (S.D.N.Y. 2003) (dismissing claims against McDonald's because of a failure to make a sufficient causal connection between defendants food and the negative health effects suffered by the plaintiffs); *rev'd and remanded by* 396 F.3d 508, 512 (2nd Cir. 2005) (finding that the case was improperly dismissed because the claims were sufficient to survive a motion to dismiss subject to notice pleading under FED. R. CIV. P. 8(a), and that further discovery is appropriate).

13. *See* Pelman, 237 F. Supp. 2d at 542-43 (deciding to dismiss the complaint entirely).

14. *See id.* at 531-32. (reasoning that "the Complaint must allege either that the attributes of McDonald's products are so extraordinarily unhealthy that they are outside the reasonable contemplation of the consuming public or that the products are so extraordinarily unhealthy as to be dangerous in their intended use.") To support its conclusion, the court stated

> Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to some diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by 'unreasonably dangerous'. . . . The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fuel oil, is unreasonably dangerous. Good tobacco

between fattening food and smoking.[16] Its addictive nature aside, an occasional cigarette does not harm, nor can it be considered as being in a defective state.[17] It does exactly what it is suppose to do.[18]

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is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous. *Id.* at 531 (RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965)).

15. *See generally* Charles E. Cantu, *Fattening Foods: Under Products Liability Litigation is the Big Mac Defective?*, 1 J. FOOD L. & POL'Y 165 (explaining why fast food should not be considered a defective product under products liability theory); *cf.* Richard C. Ausness, *Tell Me What You Eat, and I Will Tell You Whom to Sue: Big Problems Ahead for "Big Food"?*, 39 GA. L. REV. 839, 851-55 (2005) (arguing that under multiple analyses fast food can not be a defective product).

16. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 587 (2001) (Thomas, J. concurring) (making the comparison between tobacco and fast food based on their similar marketing techniques, and the type and degree of harm that appears to be inflicted on health and wellbeing of Americans is also similar); *see also* John A. Cohan, *Obesity, Public Policy, and Tort Claims Against Fast-Food Companies*, 12 WIDENER L. REV. 103, 110-11 (2003).

> There are many similarities between the new fast-food cases and the tobacco cases that are relevant in assessing the merits of imposing liability on fast-food manufacturers and retailers. These similarities, discussed below, include the claim that both are devoid of nutritive value, are harmful or dangerous to their consumers, and are associated with high medical costs. Fast-food restaurants and tobacco companies also use targeted advertising campaigns that appeal to certain groups and often target the young. Furthermore, although tobacco use and eating fast food are generally considered voluntary activities, tobacco manufacturers have been held liable for the harmful effects of their products, and the government also has the ability to regulate and tax the sale of tobacco. *Id.*

See also John F. Zefutie, Jr., *From Butts to Big Macs–Can the Big Tobacco Litigation and Nation-Wide Settlement with States' Attorneys General Serve As a Model for Attacking the Fast Food Industry*, 34 SETON HALL L. REV. 1383 (2004) (making a detailed comparison between strategies for suits against fast-food companies based on the precedent of successful tobacco claims and suggests that plaintiffs attorneys face serious obstacles).

17. *See* Thomas C. Galligan, Jr., *Product Liability–Cigarettes and* Cipollone*: What's Left? What's Gone?*, 53 LA. L. REV. 713, 727-29 (1993) (explaining that although cigarettes have tar and nicotine, which are dangerous substances, these substances are intentionally included thus the product is not considered defective, "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer. . . . Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful." RESTATEMENT (SECOND) OF TORTS §402a cmt. i (1965)).

18. Robert F. Cochran, Jr., *From Cigarettes to Alcohol: The Next Step in Hedonic Product Liability?*, 27 PEPP. L. REV. 701, 702-03 (2000) (explaining that cigarettes are a hedonic product and that their primary purpose is to provide pleasure).

Although once there is excessive use over an extended period of time, serious injury is the result.[19] The medical profession has established a link to lung cancer, emphysema, heart disease, high blood pressure and other illnesses.[20] After much publicity and unassailable testing, the industry has been required to place appropriate warnings on their products.[21]

The same analogy can be made with alcohol.[22] In general, one drink will not harm someone.[23] In fact, some tests would indicate that an occasional cocktail or glass of wine is good.[24] Relaxation, lower cholesterol, and other benefits have been medically documented.[25] Excessive consumption, however, can cause dire consequences.[26] Driving while under the influence of alcohol can cause serious mishaps,[27] Alcoholism,[28] injury to the fetus,[29] and irreparable

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19. *See* DHHS, *The Health Consequences of Smoking: A Report of the Surgeon General* 3 (2004), *available at* http://www.cdc.gov/tobacco/sgr/sgr_2004/chapters.htm ("[R]eports have concluded that smoking is the single greatest cause of avoidable morbidity and mortality in the United States.") [hereinafter HDDS Consequenses of Smoking].

20. *See id.* at 4-8. (listing many diseases for which a medical link has been found for cancer including but in no way limited to those listed in the text).

21. Federal Cigarette Labeling and Advertising Act (FCLAA), 15 U.S.C §§ 1331-1341 (2000).

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive [f]ederal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby–
>
> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes. . . . *Id.* §1331.

22. *See generally* Cochran, *supra* note 18 (analyzing the similarities between alcohol and tobacco products in terms of the liability they may create for the companies that sell them).

23. *See* National Institute on Alcohol Abuse and Alcoholism (NIAA), Alcohol Alert, Apr. 1992, *available at* http://pubs.niaaa.nih.gov/publications/aa16.htm [hereinafter NIAA] (examining the potentially positive and negative effects of moderate drinking, explaining that variation in what people consider moderate drinking is what really causes the risk).

24. *See id.* (looking at the evidence of psychological and cardiovascular benefits of moderate drinking).

25. *See id.*

26. *See id.* (suggesting that the greatest risk of moderate drinking is the possibility of a "[s]hift to heavier drinking. . . . Once a person progresses from moderate to heavier drinking, the risks of social problems (for example, drinking and driving, violence, trauma) and medical problems (for example, liver disease, pancreatitis, brain damage, reproductive failure, cancer) increase greatly.") (ciations omitted).

27. Robert F. Cochran, Jr., *"Good Whiskey," Drunk Driving, and Innocent Bystanders: The Responsibility of Manufacturers of Alcohol and Other Dangerous Hedonic Prod-*

harm to the liver,[30] are also foreseeable consequences of alcohol abuse. Due to these foreseeable problems, appropriate warnings have been required.[31]

Clearly, an occasional outing to a fast food establishment, like an occasional cigarette or an occasional alcoholic drink, may not be harmful, but extended use has been found to produce deleterious results.[32] Because there is a precedent to warn the public of hazards regarding cigarettes and alcohol,[33] and because the consuming public, as a result of the media coverage mentioned above, has become increasingly attentive to food choices,[34] it follows that citizens should

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ucts for Bystander Injury, 45 S.C. L. REV. 269, 271 (1994) (focusing on the harm to innocent bystanders but looking at the problem of drunk driving more generally also).

28. *See* NIAA, *supra* note 23 (explaining that the risk of alcoholism is the most important risk associated with moderate drinking).

29. *See* Cochran, *supra* note 27, at 301-02, n.143 (discussing the dangers of fetal alcohol syndrome).

30. *See* NIAA, *supra* note 23 (citing the risk of liver failure as a risk of greater alcohol consumption).

31. Alcoholic Beverage Labeling Act, 27 U.S.C. § 215 (a) (2005), (requiring that Surgeon General warning labels be placed on all alcoholic beverages)

> [I]t shall be unlawful for any person to manufacture, import, or bottle for sale or distribution in the United States any alcoholic beverage unless the container of such beverage bears the following statement:
> "GOVERNMENT WARNING: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems." *Id.*

32. *See* Sandra B. Eskin & Sharon Hermanson, *Nutrition Labeling at Fast-Food and Other Chain Restaurants*, AARP PUBLIC POLICY INSTITUTE, Issue Brief Number 71, at 2-3, *available at* http://assets.aarp.org/rgcenter/consume/ib71-nutrition.pdf (explaining the impact of eating out more often on the obesity epidemic and that "[f]ast-food meals, in particular, often involve higher calorie consumption" and are less healthy); *see also* DHHS Obesity Call to Action, *supra* note 6 at 19, 24 (explaining that part of the Surgeon General's plan to combat obesity is to analyze the marketing tactics of fast food companies and counteract the "excess calories. . .generated by the fast food industry"); SUPER SIZE ME (Roadside Attractions/Samuel Goldwyn Films 2004) In response to the dismissal of the *Pelman* case, filmmaker Morgan Spurlock decided to eat only McDonald's food for a month, which resulted in weight gain of nearly 25 pounds and liver damage such that his doctors suggested that he quit the experiment after three weeks. *Id.*; *see also* Super Size Me Homepage *at* http://www.supersizeme.com (last visited Feb. 19, 2006).

33. *See generally* FCLAA, 15 U.S.C §§ 1331-1341 (2004); Alcoholic Beverage Labeling Act, 27 U.S.C. § 215 (2005).

34. Press Release, Harvard School of Public Heath, Despite Conflicting Studies about Obesity, Most Americans Think the Problem Remains Serious (July 14, 2005), *available at* http://www.hsph.harvard.edu/press/releases/press07142005.html (find-

now enjoy the protection of warnings on food labels also.[35] The public is entitled to know the caloric content of their hamburger, pizza, fried chicken, or other fast food take out,[36] so remainder of this article will present reasons why the public should know about caloric information and other suggestions as to how this warning should be conveyed.

ACTIONABLE NEGLIGENCE

As a rule, liability in the area of food has been based upon actionable negligence,[37] implied warranties,[38] and/or products liability.[39] As previously indicated, our courts have decreed that fattening

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ing in a new opinion poll that three quarters of Americans rate obesity as an extremely or very serious public health problem, also finding that thirty-two percent of Americans report that they keep track of calories and forty-six percent keep track of fat content of the food in their diet).

35. A. Falba & Susan H. Busch, *Survival Expectations of the Obese: Is Excess Mortality Reflected in Perceptions?* 13 OBESITY RES. 754 (2005) (concluding that persons in the study underestimate the mortality risk of obesity and that more public awareness campaigns should be pursued).

36. Public Health Advocacy Institute, *Obesity and Law*, *available at* http://www.phaionline.org/projects_obesity_law.php (calling for the uses of litigation and legislation as a means to curb the obesity epidemic).

37. *See* Kyle v. Swift & Co., 229 F.2d 887, 889 (4th Cir. 1956) (finding sufficient evidence to try both the manufacturer and retailer of food stuff for negligence); Escola v. Coca Cola Bottling Co., 150 P.2d 436, 439 (Cal. 1944) (discussing possible situations in which the defendant manufacturer may be found negligent); Mushatt v. Page Milk Co., 262 So. 2d 520, 523 (La. Ct. App. 1972) (shifting the burden of proof from the plaintiff to the defendant to prove non-negligence once a prima facie case was made); Gramex Corp. v. Green Supply, Inc., 89 S.W.3d 432, 438-39 (Mo. 2002) (en banc) (tracing the history of the determination of liability back to negligence).

38. *See* Martel v. Duffy-Mott Corp., 166 N.W.2d 541, 545 (Mich. Ct. App. 1968) (allowing recovery for unwholesome applesauce on the basis of breach of implied warranty of merchantability); Metty v. Shurfine Cent. Corp., 736 S.W.2d 527, 530 (Mo. Ct. App. 1987) (per curiam) (reiterating the court's policy that food for immediate consumption is impliedly warranted to be wholesome and fit for consumption); Welch v. Schiebelhuth, 169 N.Y.S.2d 309, 314 (N.Y. Sup. Ct. 1957) (interpreting the implied warranty of quality and wholesomeness of food offered for sale as imposing a legal obligation upon the wrong-doer); Ayala v. Bartolome, 940 S.W.2d 727, 729 (Tex. App. 1997)(finding that a retailer who sells unwholesome food is liable under an implied warranty imposed by law as a matter of public policy).

39. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 7 (1998).

> One engaged in the business of selling or otherwise distributing food products who sells or distributes a food product that is defective under § 2, § 3, or § 4 is subject to liability for harm to persons or property caused by the defect. Under § 2(a), a harm-causing ingredient of the food product

fast food is not considered to be in a defective state under products liability law.[40] Because our discussion does not include warranties established either by the common law[41] or the Uniform Commercial Code (UCC),[42] negligence must be pursued.

Actionable negligence came into being around 1825.[43] It was the result of the Industrial Revolution in general,[44] and the widespread use of locomotives in particular.[45] They were known to run over and kill wandering livestock,[46] as well as heads of state,[47] and as

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constitutes a defect if a reasonable consumer would not expect the food product to contain that ingredient. *Id.*

See also McCroy ex rel. McCroy v. Coastal Mart, Inc., 207 F. Supp. 2d 1265, 1270 (D. Kan. 2002) (noting that Kansas products liability law merges legal theories of negligence, breach of implied warranty, and strict liability into a 'products liability' claim); Jackson v. Thomas, 21 P.3d 1007, 1009 (Kan. Ct. App. 2001) (recognizing that the Kansas Products Liability Act includes action based on negligence, breach of warranty, or strict liability); Creach v. Sara Lee Corp., 502 S.E.2d 923, 923-24 (S.C. Ct. App. 1998) (allowing an injured plaintiff to recover under negligence, breach of warranty, or strict liability theories); Cobb v. Dallas Fort Worth Med. Ctr.–Grand Prairie, 48 S.W.3d 820, 826 (Tex. App. 2001) (claiming a plaintiff may bring causes of action involving a product in negligence, strict liability, or breach of warranty); *cf.* Hitachi Const. Mach. Co. v. Amax Coal Co., 737 N.E.2d 460, 465 (Ind. Ct. App. 2000) (recognizing that an action based on the Indiana Products Liability Act may sound in negligence or strict liability, while the Uniform Commercial Code governs actions based on a breach of warranty).

40. For a discussion of fast food under products liability law, see Cantu, *supra* note 15, at 165. *See also Pelman*, 237 F. Supp. 2d at 543 (dismissing plaintiffs' claim against McDonald's because of their failure to make a sufficient causal connection between defendants food and the negative health effects suffered by the plaintiffs).

41. For a discussion of common law warranty for foodstuffs, *see* David G. Owen, *Manufacturing Defects*, 53 S.C. L. REV. 851, 891-92 (2002).

42. For a discussion of warranty for foodstuffs under the UCC, see Franklin E. Crawford, *Fit for Its Ordinary Purpose? Tobacco, Fast Food, and the Implied Warranty of Merchantability*, 63 OHIO ST. L.J. 1165, 1217-1223 (2002) (discussing the UCC implied warranty of merchantability in fast food cases).

43. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 261-62 (2d ed. 1984) (making the point that negligence is mentioned, but treated quite casually as early as the 1820's) (citing NATHAN DANE, A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW, VOL. III 31, 35 (1824)); *see also* Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 926 (1981) (saying that by 1870, most scholars agree that the "negligence era" had begun).

44. *See* FRIEDMAN, *supra* note 43, at 300, 303 (stating that "[t]he explosion of tort law, and negligence in particular, has to be attributed to the industrial revolution").

45. *See id.* at 300 (explaining that the locomotive generated more tort law than any other product in the nineteenth century).

46. *See* Bethje v. Houston and Cent. Tex. Ry. Co., 26 Tex. 604 (1863) (requiring proof of negligence for the plaintiff to recover from the railroad for injury to plaintiff's cattle); Ft. Worth and R.G. Ry. Co. v. Swan, 78 S.W. 920, 922 (Tex. 1904) (finding the railroad liable for injury to the plaintiff's mule based on statute)

a result, Anglo-American jurisprudence met the challenge by establishing a new cause of action.[48] The elements are well known: duty,[49] the breach of that duty,[50] injury,[51] and proximate cause.[52]

One of its enduring characteristics is that actionable negligence has always had the ability to undergo a metamorphosis.[53] As society

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> Each and every railroad company shall be liable to the owner for the value of all stock killed or injured by the locomotives and cars of such railroad company in running over their respective railways, which may be recovered by suit before any court having competent jurisdiction of the amount. If the railroad company fence in their road, they shall only then be liable in cases of injury resulting from want of ordinary care. *Id.* at 921 (quoting 2 Batts' Civ. St. art. 4528).

47. Ben Webster, *What is Britain's greatest invention? You decide,* THE TIMES (LONDON), Nov. 16, 2004, at T2, 6. "The Rocket caused the first railway passenger fatality–hitting William Huskisson, the President of the Board of Trade, during the opening ceremony for the Liverpool and Manchester Railway in 1830." *Id.*

48. Rabin, *supra* note 43, at 926 (saying that, by 1870, most scholars agreed that the "negligence era" had begun).

49. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 30 (5th ed. 1984) (giving a background explanation of negligence, the elements of the cause of action, and defining "duty" as "[a] duty, or obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks").

50. *See id.* (explaining that the "breach of duty" is "[a] failure on the person's part to conform to the standard required").

51. *See id.* (explaining "injury" as "[a]ctual loss or damage resulting to the interests of another").

52. *See id.* (explaining that "proximate cause" is "[a] reasonably close causal connection between the conduct and the resulting injury . . . which includes the notion of cause in fact").

53. There are certainly many examples of changes in actionable negligence that have allowed claims that once seemed untenable to become acceptable in the courts. One example of a change in tort law is the change in negligence law from the "privity requirement" to the *MacPherson* rule. MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916). Negligence claims used to depend on contractual privity before a duty would be imposed on the negligent actor; the *MacPherson* rule simply requires duty based foreseeability–the harm that could result from a defendant's action. *Compare* MacPherson 111 N.E. 1050 (holding the foreseeability rule) *with* Winterbottom v. Wright (1842), 152 Eng. Rep. 402, 405 (Ex. Div.) (requiring privity of contract to find liability on a negligence action). *See also,* Melanie Warner, *U.S. Food Industry Dodging Big, Fat Lawsuits,* THE INT'L HERALD TRIB., July 8, 2005, at 21.

> John Banzhaf, a George Washington University Law School professor and an outspoken supporter of tobacco litigation, acknowledged that public opinion was not currently in favor of obesity litigation. But he added that the situation for tobacco was similar [fifteen] years ago when people began suing cigarette companies for making smokers sick. "People laughed and said, 'You won't even get one of these cases to a jury,' Banzhaf recalled. 'Today it's, ho hum, there's another verdict.'

evolved, the law changed to meet new needs.[54] Many examples can be found of causes of action that were accepted in response to a change in technology, science, or in societal awareness: the law with regard to the negligent infliction of emotional distress,[55] the recognition of wrongful birth,[56] and wrongful life,[57] and other actions such

54. *See generally* DAVID G. OWEN ET AL., MADDEN & OWEN ON PRODUCTS LIABILITY § 2:2 (3d ed. 2000) ("[t]he citadel of privity has crumbled, and today the ordinary tests of duty, negligence and liability are applied widely . . . . This trend was responsive to ever-growing pressure for protection of the consumer coupled with a realization that liability would not unduly inhibit the enterprise of manufacturers . . . .") (quoting Fleming James, *Products Liability*, 34 TEX. L. REV. 44, 44 (1955)).

55. Initially the law in regard to negligent infliction of emotional distress required that a plaintiff show some kind of physical harm to recover for mental injuries. *See* RESTATEMENT (SECOND) OF TORTS § 456 (1965) (allowing recovery for fright, shock, or mental disturbance premised on an initial physical impact). *See also* KEETON ET AL., *supra* note 49, §54 (explaining that courts limited recovery of emotional distress to cases in which there was an impact because of suspicion that mental anguish could be exaggerated, temporary, or feigned). As the medical profession became better able to identify the effects and causes of mental disturbances the courts allowed recovery based on the foreseeability of the emotional distress. *See* Dillon v. Legg, 441 P.2d 912, 919-21 (Cal. 1968) (holding that the standard for liability should be based on foreseeability).

> In determining, in such a case, whether defendant should reasonably foresee the injury to plaintiff, or, in other terminology, whether defendant owes plaintiff a duty of due care, the courts will take into account such factors as the following: (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship. *Id.*

56. *See* Berman v. Allan, 404 A.2d 8, 14 (N.J. 1979) (allowing recovery only for the emotional distress caused by the "wrongful birth" of a child). Wrongful birth developed as a cause of action as a duty on a defendant doctor to reasonably inform the patients of possible birth defects that could result from having certain medical conditions during the pregnancy. *Id.* A wrongful birth action alleges that a patient would have ended the pregnancy if they had been properly informed or properly tested to allow them to be informed of possible birth defects. *Id. Berman* rejected the claim for wrongful life on behalf of the child because it is impossible to measure the value of the child's life against no life at all. *Id.* at 13. The court also refused to allow parents to recover for all medical, and educational expenses of the child. *Id.* at 14. *See also* Schroeder v. Perkel, 432 A.2d 834, 841-42 (N.J. 1981) (extending the rights of the parents to recover on wrongful birth to medical expenses for those extraordinary expenses that were incidental to the condition which was not detected by the defendant).

57. *See* Procanik v. Cillo, 478 A.2d 755 (N.J. 1984) (allowing recovery to the child, under wrongful life for actual medical expenses for the child). The court

as the loss of chance of recovery,[58] are just a few examples. The two common threads of continuity running through each cause of action is that not one was recognized by early common law and many have a direct link to expert testimony provided by the medical profession.[59] Once doctors were able to establish the existence of a preventable injury, the legal profession was forced to acknowledge the claim and provide an appropriate remedy.[60] At times the process was slow and tedious;[61] at others, our system of jurisprudence was more receptive.[62]

Additionally, the cause of action should be distinguished from conduct that is deemed to be negligent. There is a distinct difference. Negligence is usually defined as doing what a reasonable, prudent person would not do, or not doing what a reasonable, prudent person would do.[63] In each instance, the compared action must be of the same or like circumstance.[64] As a result, it is clear that negligent behavior can be either active or passive.[65] The standard may

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recognized that there were large medical expenses to care for the child which were caused by the defendant's failure to properly warn mother that her medical condition at pregnancy created a significant risk the child would be born with medical defects. *Id.* at 764. The court allowed recovery under wrongful life only for actual medical expenses for the child, that were allowed primarily because the statute of limitations on a wrongful birth action had expired. *Id.*

58. *See* Herskovits v. Group Health Coop. of Puget Sound, 664 P.2d 474, (Wash. 1983) (holding that the fourteen percent reduction in the plaintiff's loss of chance of recovery was sufficient to allow the jury to determine whether the defendant's negligent care was a proximate cause of plaintiff's death).

59. *See supra* notes 54-57. Negligent infliction of emotional distress, wrongful birth, wrongful life, and loss of chance of recovery each required advances in medicine to be able to impose the duty warn or to find causation. *See id.*

60. *See id.*

61. *See* KEETON ET AL., *supra* note 49, §54 (charting the development of negligent infliction of emotional distress over time, in which the requirements for recovery become less demanding as medical assessment of mental conditions become more reliable).

62. Actions under wrongful birth, which were only possible as a cause of action after *Roe v. Wade*, 410 U.S. 113 (1973), have now turned into many causes of action such as wrongful conception and wrongful pregnancy. *See* KEETON ET AL., *supra* note 49, §55.

63. *See* Rhoads v. Serv. Mach. Co., 329 F. Supp. 367, 373 (E.D. Ark. 1971). "[N]egligence is the doing of something that a person of ordinary prudence would not have done in the same or similar circumstances or a failure to do something that a person of ordinary prudence would have done in the same or similar circumstances." *Id.*

64. *See id.* (requiring that there be "same or similar circumstances").

65. *See, e.g.*, Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 CORNELL L. REV. 583, 621-22 (2003) (discussing the difference between active and passive negligence in the context of medical malpractice).

be stated as a formula: PL (G) > B = N.[66] This is usually interpreted to mean that if the probability of loss (PL) times the gravity of such injury (G) is greater than (>) the burden of reducing or eliminating such risk (B), then the individual in question is deemed negligent (N).[67] Conversely, if the burden is greater, the defendant is not negligent: PL (G) < B ≠ N.[68] This formula is going to be applied to the issue of whether or not the defendant has breached a duty as a rule.[69] The first question which must be decided in our discussion,

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66. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (setting the most complete, or at least best known, explanation of Judge Learned Hand's Risk Utility analysis); *see also* OWEN ET AL., *supra* note 54, § 2:5 (explaining the importance of the Learned Hand Risk Utility Test as it applies to products liability).

67. *See, e.g.*, Brown v. Link Belt Div. of FMC Corp., 666 F.2d 110, 115 (5th Cir. 1982) (stating the balancing test is mandated when determining whether a product is unreasonably dangerous); *see also* Charles E. Cantu, *A Continuing Whimsical Search for the True Meaning of the Term "Product" in Products Liability Litigation*, 35 ST. MARY'S L.J. 341, 372 (2004) (discussing the application of the Learned Hand Risk Utility test to products liability cases).

68. *Carroll Towing Co.*, 159 F.2d at 173 (applying the risk utility test to determine liability).

69. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (1998) (adopting the interpretation in the reporters note that "[w]hile the strict liability standard of § 2(a) is the superior standard for assessing liability for harm caused by manufacturing defects, the 'risk-utility' balancing of costs and benefits embraced by §§ 2(b) and 2(c) is the proper method of defining defects in design, instructions, and warnings"). The Restatement itself defines categories of product defects as follows:

> § 2. Categories of Product Defect
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> 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:
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> (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
>
> (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
>
> (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.*

See also Fibreboard Corp. v. Fenton, 845 P.2d 1168, 1173 (Colo. 1993) (applying the risk benefit analysis also in a case of negligent design); Ruiz-Guzman v. Amvac Chem. Corp., 7 P.3d 795, 807 (Wash. 2000) (finding that balancing of risks and benefits can be used for marketing and negligent design cases).

therefore, is whether sellers of fast food owe a duty to the plaintiff in the first place.

DUTY

Historically, duty existed only when there was privity between the parties.[70] Requiring a contractual relationship was an attempt to limit the liability of commercial entities.[71] At the time, protecting emerging enterprise was considered more important than protecting the needs of individuals.[72] As society evolved, however, the law changed, and during the early part of the Twentieth Century, the requirement of privity for the most part was eliminated.[73] Apparently, the Industrial Revolution had run its course, and there was no longer a need to protect a fledgling economy.[74] Today, as a rule, duty is imposed whenever an individual is faced with a foreseeable risk of harm that is weighed against and exceeds the magnitude of the burden of guarding against such harm.[75]

Before calling for acceptance of a new tort, all factors that play in the imposition of this new obligation must be considered. To impose a duty there must first be a foreseeable harm.[76] As mentioned, extended consumption of fast food over a period of time will

70. Winterbottom, 152 Eng. Rep. at 404-05. (holding that a plaintiff injured by the negligence and poor coach repair of the defendant could not recover because there was no duty in the absence of privity). The Plaintiff in *Winterbottom* worked for the Postmaster, yet he could not recover based on the negligent defendants repair because the Postmaster, and not the Plaintiff employee, was in privity with the defendant. *Id.*

71. *Id.* (rationalizing the need for privity in negligence actions because without such a limitation there would be unlimited liability on defendants who negligently harm persons).

72. *See also* Rabin, *supra* note 43, at 936-37 (explaining that the Winterbottom v. Wright privity requirement limited liability for nearly one hundred years as a means of insulating manufacturers from liability).

73. *See MacPherson*, 111 N.E. at 1053 (holding, in this American case in which the Plaintiff purchased a vehicle from an auto dealer and was injured due to a broken spoke in a wheel and sued the car manufacturer instead of the dealer from whom he purchased the vehicle, that liability should exist if the danger of the product to any plaintiff was foreseeable to the defendant); *see also* OWEN ET AL., *supra* note 54, § 2:2 (describing the *MacPherson* case as having started the modern era of products liability).

74. *See* OWEN ET AL., *supra* note 54.

75. *Id.* § 2:1 (indicating that now the duty of manufacturers is defined in "terms of foreseeable risks to foreseeable victims" and the requirement that reasonable care must be used to prevent the potential harm to such victims).

76. *See MacPherson*, 111 N.E. at 1053 (holding that duty is dependent on whether a harm to the plaintiff was foreseeable to the defendant).

certainly add unwanted weight with all of the related harmful consequences.[77] The medical profession has established a direct link to resulting illnesses,[78] and the public, as a result of extended media coverage,[79] has become increasingly aware of the dangers of obesity. So knowledgeable, in fact, that the foreseeability of harm is clearly established. It could be said that this foreseeable risk is what has made the consuming public conscious of their food choices, and the existence of choice is the underlying argument for the consumer's right to be informed.[80] One also could argue that the poor are most

77. *See* Sandra B. Eskin & Sharon Hermanson, *supra* note 32, at 2-3 (explaining the impact of eating out more often on the obesity epidemic and that "[f]ast-food meals, in particular, often involve higher calorie consumption" and are also less healthy); *see also* DHHS Obesity Call to Action (stating that part of the Surgeon General's plan to combat obesity is to analyze the marketing tactics of fast food companies and counter act the encouragement of "excess calories.. .generated by the fast food industry"); *see also* SUPER SIZE ME, *supra* note 32 (exposing how unhealthy fast food can be, in a documentary film made in response to the dismissal of the *Pelman* case).

78. *See, e.g.,* DHHS Obesity Call to Action, *supra* note 6, at 9 (listing many diseases attributable to overweight and obesity)

> Obesity is [a]ssociated with an [i]ncreased [r]isk of: premature death; type 2 diabetes; heart disease; stroke; hypertension; gallbladder disease; osteoarthritis (degeneration of cartilage and bone in joints); sleep apnea; asthma; breathing problems; cancer (endometrial, colon, kidney, gallbladder, and postmenopausal breast cancer); high blood cholesterol; complications of pregnancy; menstrual irregularities; hirsutism (presence of excess body and facial hair); stress incontinence (urine leakage caused by weak pelvic-floor muscles); increased surgical risk; and psychological disorders such as depression; psychological difficulties due to social stigmatization. *Id.*

79. *See* Barbash, *supra* note 4, (stating in an editorial that, "I'm alarmed by the hysteria in the mass media, reflected in words such as 'crisis' and 'epidemic.' There's been an epidemic of alarmist stories about obesity and its costs in the past year (about 2,000 according to my Internet search)"); Buckley et al., *supra* note 4. Popular media has also paid attention to obesity as is clear from the success of Super Size Me, a documentary movie about the health effects of eating McDonald's food for a month. SUPER SIZE ME (Roadside Attractions/Samuel Goldwyn Films 2004). *See also* Maria Elena Fernandez, *Television; A Few More Ideas to Digest; Moving the Momentum of His 'Super Size Me' Success to the Small Screen, Documentary Filmmaker Morgan Spurlock Again Strikes Out Against Complacency and Convention*, L.A. TIMES, June 12, 2005, at E27 (discussing the success of Super Size Me as the basis for a new television show by the same director).

80. *See* David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth, 1996* U. ILL. L. REV. 743, 762 (1996) (asserting that warnings are important to optimization of public safety because by informing consumers of the dangers inherent in certain products consumers can make the informed choice not to purchase less safe products); *see also* Sandra B. Eskin & Sharon Hermanson, *supra* note

vulnerable.[81] Those whose diet, as well as the lack of opportunity for exercise, have been placed in the highest risk of harm.[82] However, regardless of one's socio-economic status, all consumers, whether on a diet or simply concerned with caloric intake, should be aware of the risks created by excessive consumption of fattening fast food.[83]

WARNINGS

Once the foreseeability of risk has been established,[84] the second element of duty must be addressed: the magnitude of the burden of guarding against such harm.[85] As a general rule, a warning will always appear to be less of a burden than the foreseeable risk involved,[86] and as a result, the element of duty would appear to always arise.[87] The difficulty, however, is that if too much information

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32, at 3 (stating that the use of labels has been shown by research to be associated with more healthy diets).

81. Jane E. Brody, *As America Gets Bigger, The World Does Too*, N.Y. TIMES, Apr. 19, 2005, at F5 (explaining that there is a close correlation between poverty and obesity world; obesity rates rise faster among those who are poorest because as the poor populations are more frequently urban they have access to foods with high concentrations of fat and have lifestyles in which they do not expend much energy).

82. *See* DHHS Obesity Call to Action, *supra* note 6, at 13-14 (correlating socio-economic status with the rate of obesity in men, women, and children in the United States).

83. *See supra* note 79.

84. *See, e.g.*, OWEN ET AL., *supra* note 54, § 9:1 ("[T]he inquiry in a duty to warn case is much more limited, focusing principally on the foreseeability of the risk and the adequacy and effectiveness of any warning" (citing Liriano v. Hobart Corp., 700 N.E.2d 303. 306 (N.Y.1998)).

85. The burden of providing a label with calorie information and a color coded symbol to alert the consumer when a food he or she eats is high in fat or calories would not create a large burden on the manufacturers and retailers off food stuff. *See* OWEN ET AL., *supra* note 54, § 9:1 ("[An adequate warning] by its size, location and intensity of language or symbol, must be calculated to impress upon a reasonably prudent user the nature and extent of the hazard involved.").

86. 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, 271-72 (1990) ("[I]n both defective-design and failure-to-warn cases, cost-benefit balancing is inevitably required to determine product defectiveness.").

87. *See* Charles E. Cantu, *Distinguishing the Concept of Strict Liability for Ultra-Hazardous Activities from Strict Products Liability Under Section 402A of the Restatement (Second) of Torts: Two Parallel Lines of Reasoning That Should Never Meet*, 35 AKRON L. REV. 31, 51-53 (2001) (suggesting that risk utility will almost always require a duty to warn of foreseeable dangers) (citing Moran v. Faberge, Inc., 332 A.2d 11, 15 (Md. 1995) (observing that the failure to warn "will almost always weigh in favor of an obligation to warn of latent dangers"); Vicki Lawrence MacDougall, *Products Liability Law in the Nineties: Will Federal or State Law Control?*, 49 CONSUMER FIN. L.Q. REP.

is given, the net result is what is referred to as warnings pollution.[88] If the consumer is inundated and overwhelmed with too much information, he or she will in all likelihood ignore it.[89] The solution is a compromise; convey only that which is deemed adequate to warn the consumer.[90] Whether couched in terms of the "reasonable person" or the "reasonable consumer," there may be some difficulty in attaining this standard.[91] Pity the poor seller. What is an adequate or inadequate warning will be a question of fact for the jury.[92] In almost all cases the seller will not know whether they have complied

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327, 335-36 (1995) (criticizing the risk-benefit analysis because the test focuses on how much an additional warning would cost only to indicate that, because the cost is low, the test generally would result in a defective product).

88. *See* Owen, supra note 80, at 766 (noting that "[i]n this context, it is safety itself that may suffer when product risks are exaggerated and when important safety information is drowned in a sea of trivia. This is the problem of information overload, sometimes called 'warnings pollution,' that results from promoting maximum in lieu of optimal safety and danger information.").

89. *See* Aetna Cas. & Sur. Co. v. Ralph Wilson Plastics Co., 509 N.W.2d 520, 523 (Mich. Ct. App. 1993) ("[E]xcessive warnings on product labels may be counterproductive, causing 'sensory overload' that literally drowns crucial information in a sea of mind-numbing detail"); *see also* Mark Geistfeld, *Inadequate Product Warnings and Causation*, 30 U. MICH. J.L. REFORM 309, 322-27 (1997) (recognizing that people will not stop reading warnings if they feel they do not appropriately disclose all nonmaterial hazards because it is only the material ones that consumers care about).

90. *See* Owen, *supra* note 80, at 765 (explaining that there is both a procedural and substantive reasonableness component to be considered in evaluating warnings).

> [The procedural] component requires that the information be conveyed in a form and manner that is reasonably calculated to reach and catch the attention of persons who need it. Thus, written warnings and instructions must be presented in an appropriate size, color, and style of type, and sometimes should be preceded by a heading; pictures, bells, or buzzers will be necessary for certain types of products. . . . *Id.*

91. *See* Henderson & Twerski, *supra* note 86, at 266 (suggesting that "Failure to warn when a reasonable person would have warned exposes defendants to tort liability").

92. *Compare* Laaperi v. Sears, Roebuck & Co. 787 F.2d 726, 731-32 (1st Cir. 1986)

> The common law duty to warn of inherent dangers of products necessitates a warning comprehensible to the average user and conveying a fair indication of the nature and extent of the danger to the mind of a reasonably prudent person. Whether a particular warning measures up to this standard is almost always an issue to be resolved by a jury,

with George Arthur Davis, Note, *The Requisite Specificity of Alcoholic Beverage Warning Labels: A Decision Best Left for Congressional to Determine*, 18 HOFSTRA L. REV. 943, 978-80 (1990) (arguing that there are problems associated with allowing juries to hear the issue on adequate warning).

with this standard until after a trial.[93] There are, however, some guidelines available.[94] Prior cases have given us the necessary parameters.[95] In order to be deemed sufficient, the warning must reach the consumer, catch their attention, and ultimately, penetrate their mind.[96] In other words, it is the duty of a food seller to ensure that the appropriate information is delivered to the ultimate plaintiff, they must absorb it, and most importantly, they must pay attention to it.

The food industry has used a variety of methods to catch the attention of their target groups in the past, and marketing schemes have been varied and quite innovative.[97] Research is a large part of introducing a product into the stream of commerce, and sellers are

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93. *See Laaperi*, 787 F.2d at 729 ("It is not necessary that the product be negligently designed or manufactured; the failure to warn of hazards associated with foreseeable uses of a product is itself negligence, and if that negligence proximately results in a plaintiff's injuries, the plaintiff may recover."); Brownlee v. Louisville Varnish Co., 641 F.2d 397, 400 (5th Cir. 1981); Stapleton v. Kawasaki Heavy Industries, Ltd., 608 F.2d 571, 573 (5th Cir.1979); Dougherty v. Hooker Chem. Corp., 540 F.2d 174, 179 (3d Cir. 1976); LeBouef v. Goodyear Tire & Rubber Co., 451 F.Supp. 253, 257 (W.D. La. 1978); Berry v. Coleman Sys. Co., 23 596 P.2d 1365, 1369 (Wash. Ct. App. 1979).

94. *See* Bituminous Cas. Corp. v. Black & Decker Mfg., 518 S.W. 2d 868, 872-73 (Tex. App. 1974).

> The question of adequacy of warning in such a situation has been dealt with extensively by courts in Texas as well as in other jurisdictions. In Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 85 (4th Cir. 1962) the court appropriately summarized the essential factors of a legally adequate warning by setting forth two essential characteristics: (1) it must be in such form that it could reasonably be expected to catch the attention of the reasonably prudent man in the circumstances of its use; (2) the content of the warning must be of such a nature as to be comprehensible to the average user and to convey a fair indication of the nature and extent of the danger to the mind of a reasonably prudent person. As stated in Walton v. Sherwin-Williams Co., 191 F.2d 277, 286 (8th Cir . 1951) the question of whether or not a given warning is legally sufficient depends upon the language used and the impression that such language is calculated to make upon the mind of the average user of the product. *Id.* (citations omitted).

95. *See id.*

96. *See id.*

97. *See* Marion Nestle & Michael F. Jacobson, *Halting the Obesity Epidemic: A Public Health Policy Approach*, 115 PUB. HEALTH REP. 12, 18 (2000), *available at* www.cspinet.org/reports/obesity.pdf; (stating that the food industry spends about $11 billion annually on advertising and another $22 billion or so on trade shows, supermarket 'slotting fees', incentives, and other consumer promotions); *see also* SUPER SIZE ME, *supra* note 32 (showing a scene filmed in an elementary school in which children more readily recognize Ronald McDonald more than any other figure, except for Santa Clause).

well aware of the importance of good marketing techniques.[98] In the present situation, however, it would seem that an easy and efficient scheme to achieve adequate warning would be to follow a color code system.[99] For example, green if the caloric count as well as the required nutritional values are within a safety zone; yellow if they are relatively moderate to medium; and red for an excessive amount of fat, high calories or unnecessary substances.

Information of this sort is already in use in some restaurants,[100] and has been required for prepackaged foods ranging from candy, chips, canned goods, cereals, nuts, and other foods.[101] Studies show that consumers who read labels are likely to have healthier diets.[102] Under a tagging system our goal could be met. The ultimate consumer would be informed, because in all likelihood they would notice the colored tag, and hopefully, they would choose accordingly.[103]

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98. *See* ERIC SCHLOSSER, FAST FOOD NATION 40-49 (Houghton Mifflin Company 2001) (discussing marketing techniques, especially those directed at children and how this sort of marketing has been part of the development and growth of the fast food industry). Schlosser focuses on McDonald's use of television ads, recognizable characters, and "Playland" playgrounds, which were designed by former Disney set designers to attract children. "The restaurant chain evoked a series of pleasing images in a youngster's mind: bright colors, a playground, a toy, a clown, a drink with a straw, [and] little pieces of food wrapped up like a present." *Id.* at 42.

99. *See generally* J. Stanley McQuade, *Products Liability–Emerging Consensus and Persisting Problems: An Analytical Review Presenting Some Options*, 25 CAMPBELL L. REV. 1, 51 (2002) (suggesting color codes should be used to warn consumers in situations when "some degree of user inadvertence or even carelessness is to be anticipated, how much should this be considered and incorporated into the warnings, e.g. with especially lurid symbols or color codes to catch the user's attention").

100. *See* Lisa Smith & Bryan A Liang, *Childhood Obesity: A Public Health Problem Requiring a Policy Solution*, 9 J. Med. & L. 37, 49-50 (2005) (discussing the need for restaurants to give nutritional information and listing examples of restaurants that already do); *see also* Rebecca S. Fribush, Comment, *Putting Calorie and Fat Counts on the Table: Should Mandatory Disclosure Laws Apply to Restaurant Foods?*, 73 GEO. WASH. L. REV. 377, 384-85 (2005) (analyzing legislative attempts to require labeling in restaurant and also giving examples of companies that have provided nutritional info to clientele).

101. *See* NLEA, 21 U.S.C § 343 (q) (Supp. 2005). (requiring prepackaged foods to provide nutritional labels).

102. *See* Sandra B. Eskin & Sharon Hermanson, *supra* note 32, at 3 (making the point that the use of labels has been shown to be associated with more healthy diets) (citing Matthew W. Kreuter et al., *Do Nutrition Label Readers Eat Healthier Diet? Behavioral Correlates of Adults' Use of Food Labels*, 13 AM. J. OF PREVENTIVE MED. 277 (1997) and Marian Neuhouser et al., *Use of Food Nutrition Labels is Associated with Lower Fat Intake,* 99 J. AM. DIETETIC ASS'N 45 at 45, 50, 53 (1999)).

103. *See* Owen, *supra* note 80, at 762.

> Warnings and instructions thus provide consumers with informational "software" that helps them better understand the true utility[,] cost [, and]

As previously stated, duty is imposed when an individual is faced with a foreseeable risk of harm that exceeds the magnitude of the burden of guarding against it.[104] Some of the most important perspectives of this burden would consist of cost, the utility and/or marketability of the product, and whether such technique is within the state of the art of our technology.[105] Obviously, in this instance, the elements of our burden are minimal.[106] It would be difficult to imagine how much cost would be involved in attaching a colored tag to fast food. Whether hamburgers, pizzas, fried chicken, or other take out, they all have one common characteristic: they are packaged. Adding a colored tag would be a negligible factor. Providing caloric and nutritional information might not impair the utility/marketability of the product.[107] In fact, it could be argued that an

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safety mix that constitutes each product. Providing safety information to consumers promotes two ideals: (1) individual autonomy, by helping consumers make informed choices in the selection and use of products that each consumer decides contain the mix of utility[,] cost [, and] safety that best advances his or her personal goals; and (2) (optimal) safety, by providing consumers with information they may use to reduce (optimally) the risks inherent in the products they choose to purchase. *Id.*

104. *See Group Calls for Soft Drink Warnings*, N.Y. TIMES, July 14, 2005, at C9 (reporting that the Center for Science in the Public Interest has recommended that the FDA should require health warnings similar to those on cigarettes and alcohol to warn of the harmful effects of highly sweetened soda).

105. *See* Smith & Liang, *supra* note 100, at 50 (discussing the need for restaurants to give nutritional information and listing examples of restaurants that already do); *see also* Fribush, *supra* note 100, at 385 (analyzing legislative attempts to require labeling in restaurant and also giving examples of companies that have provided nutritional info to clientele).

106. Margo G. Wootan, Center for Science in the Public Interest, *Anyone's Guess; The Need for Nutrition Labeling at Fast-Food and Other Chain Restaurants* 17 (2003), *available at* www.cspinet.org/restaurantreport.pdf (explaining that many commercial laboratories will provide nutritional analysis). The cost to measure calories alone varies from $55-$95 per meal, and the cost to analyze calories, saturated fat, trans fat and sodium has a cost of about $220 per menu item. *Id.* Wootan argues that nutritional analysis is not prohibitively expensive and because restaurants routinely change menus, when they change items or cost, it would not be difficult to add nutritional information when making one of those changes. *Id.* The overall cost to a restaurant to provide nutritional information and warn consumers would not be prohibitively expensive. *See id.*

107. *See* Caleb E. Mason, *Doctrinal Considerations For Fast-Food Obesity Suits*, 40 TORT TRIAL & INS. PRAC. L. J. 75, 103 (2004) ("If juries begin awarding damages to obese fast-food consumers there will be market consequences, but fast food will only vanish from the marketplace if the price increases necessitated by tort payouts are sufficiently high to suppress demand enough to negate the profitability of selling fast food.") (citing WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 192 (1987)).

informed public actually might be encouraged to purchase it over competing products. Finally, a color tag is well within the state of our technological development and they would be effective. Even common adhesive tags are found everywhere, and used extensively by children, adolescents, adults and the elderly whether to post a reminder, catch one's attention to a page in a book, or some other purpose.[108] In addition, their very color would convey the necessary information, and are easily noticeable.[109] In essence, tags comply with our objective, and present a burden that is far less than the foreseeable risk of harm we are attempting to prevent.

CALLING FOR A NEW TORT

In summary, it could be stated that excessive consumption of fattening fast food presents a foreseeable risk of harm.[110] The medical profession, as it has done in cases involving alcohol[111] and cigarettes,[112] has established this undeniable fact.[113] The burden of warning of this risk is minimal when compared to the degree of harm threatened. It would follow that a duty to warn is clearly established,[114] and if the other elements of actionable negligence—breach,

108. A visit to a local office supply store, or even grocery store, will show the wide variety of colors in which 3M Post-it® Notes or similar products are available. *See also* http://www.3m.com/us/office/postit/25years/index.jhtml. Also the software imitation of colored notes on computer desktops, such as Stickies 2.1 ©1994-2002, Apple Computer, Inc., shows a fairly clear pattern of use of colored notes to catch the attention of many American consumers.

109. *See* Owen, *supra* note 80, at 765 (suggesting the use of color as one means of capturing the consumer's attention to ensure adequate delivery of the warning).

110. The American awareness of dieting and weight loss as a result of media coverage suggest that the dangers of obesity should reasonably be known. *See* Connie L. Bish et al., *Diet and Physical Activity Behaviors Among Americans Trying to Lose Weight: 2000 Behavioral Risk Factor Surveillance System*, 13 OBESITY RES. 596 (2005) (reporting that forty-six percent of women and that thirty-three percent of men in America are trying to lose weight); *see also* Krugman, *supra* note 2 (criticizing the attempt of Center for Consumer Freedom, a group financed by food providers such as Coca-Cola, that has put forth a 4th of July campaign to convince Americans the worrying about obesity is un-American, and also stating that number of obese American adults has doubled to thirty percent and that research shows high health cost).

111. Alcoholic Beverage Labeling Act, 27 U.S.C. § 215 (Supp. 2005).

112. CLAA, 15 U.S.C §§ 1331-1341 (Supp. 2005).

113. *See, e.g.*, DHHS Obesity Call to Action, *supra* note 6, at 1-3 (the surgeon general as the representative of the medical community in the executive branch of the federal government has made it a priority to deal with issue of obesity in this country).

114. *See supra* notes 83-109.

proximate cause, and injury—are present, a cause of action has been established,[115] but only if American jurisprudence, in the absence of legislation, is willing to accept this new tort. It would seem that the time to do so is now.

CONCLUSION

Choice is ultimately the responsibility of the consumer. The buyer, however, should be informed. Food products should readily and easily allow consumers to differentiate between foods that are a healthy choice in a regular diet and food that is likely to cause harm if eaten frequently. An occasional outing to a fast food establishment does not harm. But, as in the case of smoking and/or drinking alcohol, medical data shows that excessive consumption over an extended period of time will result in physical harm. The obligation to warn, in the case of cigarettes and alcoholic beverages is well established. Now, purveyors of fattening fast food must follow suit. The duty to do so is clear.

115. *See* KEETON,ET AL., *supra* note 49, § 30 (giving a background explanation of negligence and the elements of the cause of action).