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## The Parent Trap: Using the Good Samaritan Doctrine to Hold Parent Corporations Directly Liable for their Negligence

Nicole Rosenkrantz

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# THE PARENT TRAP: USING THE GOOD SAMARITAN DOCTRINE TO HOLD PARENT CORPORATIONS DIRECTLY LIABLE FOR THEIR NEGLIGENCE

As the harm which safely may be considered foreseeable to the defendant changes with the evolving expectations of a maturing society, so change the "special relationships" upon which the common law will base tort liability for the failure to take affirmative action with reasonable care.<sup>1</sup>

A New Testament parable gives the name "Good Samaritan" to the only passerby who stops to help a man who had been beaten and starved.<sup>2</sup> Nearly two thousand years later, America's legal fictions—corporations—are acquiring this magnanimous label by lending their services to their subsidiaries, often gratuitously.<sup>3</sup> Along with the benevolent public image that accompanies the "Good Samaritan" designation comes a host of legal responsibilities and potential liabilities.<sup>4</sup> Section 324A of the Restatement (Second) of Torts, often referred to as the "Good Samaritan Doctrine," imposes a duty of care upon an individual or organization who voluntarily undertakes to perform some action to benefit a third party.<sup>5</sup> Adopted by a majority of states, this duty is based on the premise that even a volunteer must use due care upon affirmatively undertaking a particular course of conduct and, therefore, is liable to third persons who suffer physical harm from the volunteer's negligent performance of the undertaking.<sup>6</sup> Specifically, section 324A provides:

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<sup>1</sup> *Irwin v. Town of Ware*, 467 N.E.2d 1292, 1300–01 (Mass. 1984).

<sup>2</sup> *Luke* 10:33 (King James).

<sup>3</sup> See RESTATEMENT (SECOND) OF TORTS § 324A (1965). This Restatement section applies to undertakings for consideration as well as those that are gratuitously provided. See *id.*

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

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

<sup>6</sup> Most states have expressly adopted § 324A. See, e.g., *Heinrich v. Goodyear Tire & Rubber Co.*, 532 F. Supp. 1348, 1354 (D. Md. 1982); *Ray v. Transamerica Ins. Co.*, 208 N.W.2d 610, 657 (Mich. 1973); *Wright v. Schum*, 781 P.2d 1142, 1144 (Nev. 1989). Others have adopted a common law cause of action containing language similar to the language used in § 324A. See, e.g., *Johnson v. Abbe Eng'g Co.*, 749 F.2d 1131, 1132 n.1 (5th Cir. 1984) (stating that Texas Supreme Court has never expressly adopted § 324A but has addressed and followed its policy); *Mullins v. Pine Manor College*, 449 N.E.2d 331, 336 n.10 (Mass. 1983) (stating that Massachusetts's version of

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to [perform] his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of such harm,
- (b) he has undertaken to perform a duty owed by the other to a third person, or
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.<sup>7</sup>

As recently as twenty years ago, section 324A's Good Samaritan Doctrine was a rarely used and relatively insignificant cause of action.<sup>8</sup> Parties utilized section 324A in three limited contexts: employment, landlord-tenant disputes and claims against municipalities and other government entities.<sup>9</sup> In the employment arena, typical Good Samaritan claims included claims by injured employees against their workers' compensation insurers for negligent inspections,<sup>10</sup> actions by general contractors against their subcontractors for negligence,<sup>11</sup> and suits by employees against co-employees for failing to protect them from harm.<sup>12</sup> In the landlord-tenant context, tenants used section 324A against their landlords for failing to provide adequate security or against building inspectors for negligent inspections.<sup>13</sup> Finally, individuals relied upon the Good Samaritan Doctrine to hold government entities liable for

§ 324A differs from Restatement); *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 807 n.9 (Minn. 1979) (stating that Minnesota's requirements to impose special duty are similar to factors set out in § 324A).

<sup>7</sup> RESTATEMENT, *supra* note 3, § 324A. Although the published text of § 324A uses the word "protect" instead of "perform," this is apparently a typographical error. *Hill v. United States Fidelity & Guar. Co.*, 428 F.2d 112, 115 n.5 (5th Cir. 1970).

<sup>8</sup> The limited applicability of § 324A, nearly always brought in conjunction with other theories of liability, suggests this premise.

<sup>9</sup> See *infra* notes 10-19 and accompanying text.

<sup>10</sup> See, e.g., *Huggins v. Aetna Cas. & Sur. Co.*, 264 S.E.2d 191, 192 (Ga. 1980); *Ray*, 208 N.W.2d at 657; *Otto v. American Mut. Ins. Co.*, 361 A.2d 815, 819 (Pa. 1976).

<sup>11</sup> See, e.g., *Simon v. Omaha Pub. Power Dist.*, 202 N.W.2d 157, 169 (Neb. 1972); *Quail Hollow E. Condominium Ass'n v. Donald J. Scholz Co.*, 268 S.E.2d 12, 15 (N.C. Ct. App. 1980).

<sup>12</sup> See, e.g., *Craven v. Oggero*, 213 N.W.2d 678, 682 (Iowa 1973); *Miller v. Muscarelle*, 170 A.2d 437, 451 (N.J. 1961).

<sup>13</sup> See, e.g., *E.G. Rock, Inc. v. Danly*, 633 A.2d 485, 492-93 (Md. Ct. Spec. App. 1993); *Speaker v. Cates Co.*, 879 S.W.2d 811, 816 (Tenn. 1994); *Coffey v. City of Milwaukee*, 247 N.W.2d 132, 139 (Wis. 1976).

dangerous road conditions,<sup>14</sup> negligent inspections of airplanes,<sup>15</sup> and other dangerous conditions aggravated by negligent government inspections.<sup>16</sup> In most of the above examples, the Good Samaritans' undertakings that led to liability were often completed incident to some statutorily imposed duty.<sup>17</sup> Plaintiffs relied upon the regulatory schemes requiring action by the Good Samaritans to successfully claim that a special relationship existed between the Good Samaritans and themselves, thus imposing a duty of care upon the actors.<sup>18</sup> Although the existence of a special relationship is not explicitly mandated by section 324A, plaintiffs were rarely successful in asserting Good Samaritan claims absent a showing that such a special relationship existed.<sup>19</sup>

Today, typical special relationship cases such as those in the employment and landlord-tenant arenas are not the only forums for imposing a duty under section 324A.<sup>20</sup> Courts no longer limit the class of section 324A plaintiffs to only those who can prove the existence of a special relationship.<sup>21</sup> Consequently, the Good Samaritan Doctrine has evolved from a little-used statute into a powerful tool that allows individuals to impose liability upon parent corporations for their own

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<sup>14</sup> See, e.g., *Wever v. Towner Cty.*, 565 F.2d 1001, 1009, 1010 (8th Cir. 1977); *Matternes v. City of Winston-Salem*, 209 S.E.2d 481, 491 (N.C. 1974).

<sup>15</sup> See, e.g., *United Scottish Ins. v. United States*, 692 F.2d 1209, 1210-11 (9th Cir. 1982), *rev'd*, 467 U.S. 797 (1984); *Zabala Clemente v. United States*, 567 F.2d 1140, 1145 (1st Cir. 1978); *Johnston v. United States*, 461 F. Supp. 991, 993 (N.D. Fla. 1978), *aff'd*, 603 F.2d 858 (5th Cir. 1979).

<sup>16</sup> See, e.g., *Toppi v. United States*, 327 F. Supp. 1277, 1279 (E.D. Pa. 1971) (plaintiff sued government for injuries resulting from explosives after safety inspector had given plaintiff misleading advice concerning disposal of explosives); *Brown v. MacPherson's, Inc.*, 545 P.2d 13, 19 (Wash. 1975) (plaintiffs sued state for damages resulting from avalanche about which state was previously warned).

<sup>17</sup> See, e.g., *Clemente*, 567 F.2d at 1145 (FAA weight and flight crew regulations); *Toppi*, 327 F. Supp. at 1278 (regulations regarding disposal of explosives); *Matternes*, 209 S.E.2d at 491 (regulations governing city's maintenance of streets).

<sup>18</sup> See, e.g., *Clemente*, 567 F.2d at 1145 (FAA weight and flight crew regulations); *Toppi*, 327 F. Supp. at 1278 (regulations regarding disposal of explosives); *Matternes*, 209 S.E.2d at 491 (regulations governing city's maintenance of streets).

<sup>19</sup> "Typical" special relationships include landlord-tenant, guest-host and employer-employee. See *supra* notes 13, 14.

<sup>20</sup> See, e.g., *State v. Philip Morris, Inc.*, No. C1-94-8565 (Minn. Dist. Ct. May 19, 1995) (opinion not published) (imposing a duty on tobacco companies); *Mahlum v. Dow Corning Corp.*, No. CV93-05941 (Nev. Dist. Ct. Oct. 30, 1995) (opinion not published) (imposing duty on parent corporation of breast implant manufacturer).

<sup>21</sup> Section 324A is still based on an assumption of a "special" duty by the defendant, as opposed to a legal duty based on general tort law. See *Philip Morris*, No. C1-94-8565. The courts have become more willing to apply § 324A where the parties do not have a typical "special relationship," and conclude that the defendant nevertheless owes a "special duty" to the plaintiff. See *id.*

tortious conduct in providing assistance to their subsidiaries.<sup>22</sup> In the past, plaintiffs seeking to impose liability upon parent corporations had to overcome the high burden imposed by traditional corporate veil-piercing standards.<sup>23</sup> This Note examines the use of section 324A as a viable alternative to piercing the corporate veil for imposing direct liability on a corporation for its negligent acts, particularly in products liability situations.<sup>24</sup>

Part I discusses the elements of a section 324A claim and examines the evolution of section 324A in the parent-subsidary context.<sup>25</sup> Part II examines the most recent forum for section 324A liability—breast implant litigation against Dow Chemical as the parent corporation of Dow Corning.<sup>26</sup> Part III provides a discussion of the benefits of section 324A, an examination of the policy considerations behind its use in the corporate tort liability context and a look at the problems with section 324A and its modified versions.<sup>27</sup> Part IV looks at the future of the Good Samaritan Doctrine as an avenue of imposing tort liability on corporations.<sup>28</sup>

## I. RESTATEMENT (SECOND) OF TORTS SECTION 324A

Section 324A of the Restatement is rooted in *Glanzer v. Shepard*, the seminal Good Samaritan case in which the Court of Appeals of New York held that one who assumes to undertake an action, even though gratuitously, may thereby become subject to the duty of acting carefully.<sup>29</sup> In *Glanzer*, the plaintiffs found that the beans they had purchased weighed 11,854 pounds less than the weight certified by the public weigher.<sup>30</sup> The plaintiffs brought action against the public weigher,

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<sup>22</sup> See, e.g., *id.*; *Mahtum*, No. CV93-05941; .

<sup>23</sup> See generally Andrew J. Natale, Note, *Expansion of Parent Corporate Shareholder Liability Through the Good Samaritan Doctrine—A Parent Corporation's Duty to Provide a Safe Workplace for Employees of Its Subsidiary*, 57 U. CIN. L. REV. 717, 719-22 (1988).

<sup>24</sup> The Good Samaritan Doctrine is a means of imposing direct liability on a parent corporation rather than indirect liability as in a corporate veil piercing situation. A cause of action under § 324A does not involve an assertion of derivative liability but one of direct liability because it is based on the actions of the defendant itself. *In re Silicone Gel Breast Implants Prod. Liab. Litig.*, 887 F. Supp. 1455, 1460 (N.D. Ala. 1995). Furthermore, the standards for piercing the corporate veil are more difficult to satisfy than the requirements for § 324A. See *infra* notes 207-212 and accompanying text.

<sup>25</sup> See *infra* notes 29-129 and accompanying text.

<sup>26</sup> See *infra* notes 130-81 and accompanying text.

<sup>27</sup> See *infra* notes 182-282 and accompanying text.

<sup>28</sup> See *infra* notes 283-99 and accompanying text.

<sup>29</sup> 135 N.E. 275, 276 (N.Y. 1922).

<sup>30</sup> *Id.* at 275.

who had been paid by the bean seller.<sup>31</sup> The intermediate appellate court reversed the trial court's decision and decided for the public weigher, relying on the lack of privity of contract between the plaintiffs and the defendant.<sup>32</sup> On appeal, the New York Court of Appeals reasoned that by undertaking the task of weighing, the defendant assumed a duty to weigh carefully for the benefit of all to whom the weighers rendered their services.<sup>33</sup> Justice Benjamin Cardozo, writing for the court, also discussed the importance of foreseeability in this type of action, noting that the controlling circumstance is not the character of the consequence but the consequence's proximity or remoteness in the thought and purpose of the actor.<sup>34</sup> The court held, thus, that one owes a duty of reasonable care not only to those with whom he is bound by contract, but also to those who rely on the individual's actions.<sup>35</sup>

The New York Court of Appeals was the first court to impose a duty upon one who renders a service gratuitously.<sup>36</sup> The American Law Institute codified this legal principle in the Restatement (Second) of Torts, published in 1965.<sup>37</sup> Since the New York Court of Appeals held that a duty can arise in the absence of contract or consideration, the Good Samaritan's duty has evolved beyond the bounds of those cases that required a special relationship between plaintiff and defendant.<sup>38</sup>

### A. *Negligent Performance of an Undertaking—the Elements*

To sustain a claim of negligent performance of an undertaking under section 324A, a plaintiff must first show an affirmative undertaking by the defendant to benefit a third party.<sup>39</sup> Second, a plaintiff must establish negligence on the part of the defendant in discharging that undertaking.<sup>40</sup> Thus, the plaintiff must prove that the defendant assumed and breached his duty to perform the undertaking in a non-negligent manner.<sup>41</sup> Additionally, the plaintiff must prove the existence of one of three possible elements that establish the plaintiff's connection to the defendant's undertaking.<sup>42</sup> First, the plaintiff may

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 276.

<sup>34</sup> *Glanzer*, 135 N.E. at 276.

<sup>35</sup> *Id.* at 277.

<sup>36</sup> *See id.* at 276.

<sup>37</sup> *See* RESTATEMENT, *supra* note 3, § 324A.

<sup>38</sup> *See* 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 18.6, at 1048 (1956).

<sup>39</sup> RESTATEMENT, *supra* note 3, § 324A.

<sup>40</sup> *See In re All Maine Asbestos Litig.*, 581 F. Supp. 963, 978 (D. Me. 1984).

<sup>41</sup> RESTATEMENT, *supra* note 3, § 324A.

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

prove that the Good Samaritan's failure to exercise reasonable care increased the risk of harm.<sup>43</sup> Second, the plaintiff may alternatively prove that the Good Samaritan undertook to perform a duty owed by another to the plaintiff.<sup>44</sup> Or, third, the plaintiff may prove that the plaintiff suffered because the plaintiff or another relied upon the Good Samaritan's undertaking.<sup>45</sup> Requiring a clear connection between the Good Samaritan and the plaintiff distinguishes a section 324A claim from an ordinary negligence claim.

### 1. Increasing the Risk of Harm

The first element of a section 324A claim is satisfied if the actor's negligent performance of an undertaking increases the risk of physical harm to a third person.<sup>46</sup> For example, if a parent corporation provides faulty health and safety information to its subsidiary and an employee of the subsidiary is later injured as a result of this information, the parent corporation may be liable for increasing the risk of harm to the plaintiff pursuant to section 324A(a).<sup>47</sup> Litigants commonly use the increased risk of harm condition to prove liability in cases where employees or independent contractors negligently perform their duties, so as to create or increase a risk of harm to the litigants.<sup>48</sup>

### 2. Undertaking a Duty Owed by Another to a Third Person

A second situation in which a plaintiff can hold a party liable under the Good Samaritan Doctrine is when, in affirmatively undertaking to render services for another, the actor has undertaken a duty that the other party owes to a third person.<sup>49</sup> For example, where a parent corporation assumes the duty of training and supervising the employees of its subsidiary corporation on manufacturing safety, the

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

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

<sup>46</sup> See RESTATEMENT, *supra* note 3, § 324A(a).

<sup>47</sup> See *Heinrich v. Goodyear Tire & Rubber Co.*, 532 F. Supp. 1348, 1354, 1355-56 (D. Md. 1982).

<sup>48</sup> RESTATEMENT, *supra* note 3, § 324A cmt. c; see *LaFond v. United States*, 781 F.2d 153, 154 (8th Cir. 1986) (pedestrian claimed that government's failure to adequately clear path outside post office increased risk of harm to third persons); *In re Sabin Oral Polio Vaccine Prod. Liab. Litig.*, 774 F. Supp. 952, 954-55 (D. Md. 1991), *aff'd*, 984 F.2d 124 (4th Cir. 1993) (parents who contracted polio after children received polio vaccine claimed government was negligent and court held defendant increased risk of harm to those vaccinated and to plaintiffs); *Figueroa v. Evangelical Covenant Church*, 698 F. Supp. 1408, 1412-14 (N.D. Ill. 1988), *aff'd*, 879 F.2d 1427 (7th Cir. 1989) (plaintiff abducted from parking lot claimed owner's failure to provide adequate security increased risk of harm).

<sup>49</sup> RESTATEMENT, *supra* note 3, § 324A(b) & cmt. d.

parent has undertaken a duty owed by the subsidiary to its employees and all consumers of its products.<sup>50</sup>

### 3. Reliance upon the Undertaking

A third situation in which a plaintiff can hold an actor liable for negligent performance of an undertaking occurs when a plaintiff suffers harm because of reliance by the recipient of the Good Samaritan's services or the third party plaintiff upon the defendant's undertaking.<sup>51</sup> For example, where a consumer-plaintiff or a subsidiary corporation's reliance led either party to forgo other remedies or precautions against a risk, the subsidiary's parent corporation becomes subject to liability for harm suffered by the plaintiff because of the risk.<sup>52</sup> Thus, if a parent corporation provides a subsidiary corporation with safety standards and the subsidiary promulgates those standards in reliance upon the parent corporation's expertise and experience in this particular industry, the parent corporation is subject to liability to the subsidiary's employee who is injured as a result of a failure of the parent corporation's promulgated safety standards to protect that employee.<sup>53</sup>

### 4. Modified Versions of Section 324A

Some states have modified the elements required to sustain a successful cause of action under section 324A.<sup>54</sup> In Massachusetts, for example, the degree of negligence that the plaintiff must prove depends upon the nature of the undertaking.<sup>55</sup> While the Restatement explicitly states that section 324A applies to gratuitous undertakings and undertakings for consideration, Massachusetts modified section 324A such that Good Samaritans are not liable for their gratuitous undertakings.<sup>56</sup>

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<sup>50</sup> See *Boyer v. Empiregas, Inc.*, 734 S.W.2d 828, 832 (Mo. Ct. App. 1987).

<sup>51</sup> RESTATEMENT, *supra* note 3, § 324A(c). Although the third party is generally the party filing suit, the reliance element does not require that the third party relied on the parent corporation. See *id.* & cmt. e. Rather, as long as the subsidiary relied on the parent corporation and the plaintiff suffered because of the subsidiary's reliance, § 324A(c) is satisfied. See *id.*

<sup>52</sup> *Id.* § 324A cmt. e.

<sup>53</sup> See *Heinrich*, 532 F. Supp. at 1351.

<sup>54</sup> See *Mullins v. Pine Manor College*, 449 N.E.2d 331, 336 n.10 (Mass. 1983); *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 806-07, 807 n.9, n.11 (Minn. 1979); *Eisman v. State*, 511 N.E.2d 1128, 1135 (N.Y. 1987). For further discussion of Massachusetts, New York and Minnesota's modifications of § 324A, see *infra* notes 54-92 and accompanying text.

<sup>55</sup> See *Mullins*, 449 N.E.2d at 336 n.10.

<sup>56</sup> See *id.* (noting that Massachusetts treats gratuitous undertakings differently than the Restatement). Good Samaritans may be held liable for gratuitous undertakings only if they are grossly negligent. See *id.*



In 1983, in *Mullins v. Pine Manor College*, the Supreme Judicial Court of Massachusetts held that a college owed a duty to its students to provide them with security and that the college's negligence in performing that duty was the proximate cause of the student-plaintiff's injuries.<sup>57</sup> In *Mullins*, a female student at Pine Manor College was raped on campus by an unidentified assailant.<sup>58</sup> The student brought action against the college for the injuries she suffered as a result of the rape.<sup>59</sup> The court reasoned that colleges generally undertake to protect their students from criminal acts of third parties.<sup>60</sup> The court observed, furthermore, that the college did not provide this service gratuitously.<sup>61</sup> Rather, because students were charged for security service through tuition or dormitory fees, this protection formed an indispensable part of the bundle of services that colleges afford their students.<sup>62</sup> Additionally, the court noted that Massachusetts distinguishes gratuitous undertakings from those done for consideration.<sup>63</sup> The court explained that to impose liability for gratuitous undertakings, plaintiffs must prove gross negligence on the part of the Good Samaritan.<sup>64</sup> Thus, the Supreme Judicial Court of Massachusetts held that, under section 324A, colleges owe a duty to their students to use reasonable care to protect them from criminal acts of third persons.<sup>65</sup>

In New York, a plaintiff seeking to impose liability under the Good Samaritan Doctrine must satisfy an additional requirement not found in section 324A.<sup>66</sup> New York requires a plaintiff to prove the existence of a misrepresentation or nondisclosure on the part of the defendant that misleads the plaintiff to his or her detriment.<sup>67</sup> The plaintiff must satisfy this requirement in addition to the three elements of section 324A discussed above.<sup>68</sup>

In 1987, in *Eisman v. State*, the New York Court of Appeals held that a state university's alleged negligence involved no breach of a duty

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<sup>57</sup> *Id.* at 337.

<sup>58</sup> *Id.* at 333.

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

<sup>60</sup> *Mullins*, 449 N.E.2d at 336.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* The Supreme Judicial Court confusingly refers to undertakings done for consideration as "voluntary" undertakings. See *Pierre v. United States*, 741 F. Supp. 306, 309 (D. Mass. 1990) (citing *Mullins*, 449 N.E.2d at 336) ("undertaking is voluntary but not gratuitous if it is an 'indispensable part of a bundle of services' for which consideration had been given").

<sup>63</sup> *Mullins*, 449 N.E.2d at 336 n.10.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 337.

<sup>66</sup> See *Eisman*, 511 N.E.2d at 1135.

<sup>67</sup> *Id.*; see *In re Silicone Breast Implant Litig.*, N.Y. L.J., Sept. 27, 1995, at 25 (N.Y. Sup. Ct.).

<sup>68</sup> See RESTATEMENT, *supra* note 3, § 324A.

owed to a deceased student.<sup>69</sup> In *Eisman*, a state college accepted an ex-felon with a history of drug abuse and criminal conduct into its special program for disadvantaged high school graduates.<sup>70</sup> While at the college, the ex-felon befriended the decedent, a fellow student with whom he shared an apartment.<sup>71</sup> The ex-felon subsequently raped and murdered the decedent at their apartment.<sup>72</sup> The decedent's estate brought action against the State of New York for negligence due to the prison physician's failure to inform the college and its students of the ex-felon's medical history, and against the college for negligence in admitting the ex-felon or failing to restrict his activity in accordance with the risk he presented.<sup>73</sup> The court reasoned that because foreseeability does not determine duty, the prison physician who completed the ex-felon's physical examination report did not owe a duty to each member of the college community to search out and disclose his patient's medical past.<sup>74</sup> The court further explained that liability in negligence is based on a misrepresentation or nondisclosure on the part of the defendant that led the person to whom it was made, the college in this case, to forego action that it might otherwise have taken for the protection of the plaintiff.<sup>75</sup> The court noted that as a policy concern, the prison physician should not be held to limitless liability to an indeterminate class of persons.<sup>76</sup> The physician did not undertake a duty to the college community and he did not know, nor should he have known, that his report would be relied on by the plaintiff or other individual members of the college community.<sup>77</sup> The New York Court of Appeals concluded that the physician did not owe a duty to the plaintiff or the college and, therefore, the State was not liable for negligent performance of an undertaking.<sup>78</sup>

Like New York, Minnesota has modified the required elements of a section 324A claim.<sup>79</sup> In fact, the Supreme Court of Minnesota does

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<sup>69</sup> 511 N.E.2d at 1136.

<sup>70</sup> *Id.* at 1130-31.

<sup>71</sup> *Id.* at 1132.

<sup>72</sup> *Id.* The ex-felon also murdered one of his other roommates and inflicted serious injuries on a third roommate. *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Eisman*, 511 N.E.2d at 1134-35.

<sup>75</sup> *Id.* at 1135 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 33, at 207 (5th ed. 1984)). This dicta contains the most significant aspect of this case for purposes of this note, imposing an additional requirement for liability for negligent performance of an undertaking. *See id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Crucraft*, 279 N.W.2d at 806-07, 807 n.9, n.11.

not even recognize one of the subsections of 324A.<sup>80</sup> In Minnesota, undertaking to perform another's duty owed to a third person is insufficient to create a duty of care in an actor.<sup>81</sup> The Minnesota Court also added two elements that can create a duty of care: i) an ordinance or statute that sets forth mandatory acts clearly designed for the protection of a particular class of persons or ii) actual knowledge of a dangerous condition.<sup>82</sup> Finally, Minnesota modified the reliance element by adding that the reasonable reliance must be based on specific actions or representations that cause the plaintiffs to forego other alternatives of protecting themselves.<sup>83</sup>

In 1979, in *Cracraft v. City of St. Louis Park*, the Supreme Court of Minnesota held that none of the connection elements existed so as to create a special duty on the part of a city toward individual members of the public.<sup>84</sup> In *Cracraft*, a 55-gallon drum of a highly flammable liquid ignited on property in close proximity to a high school.<sup>85</sup> As a result of the explosion, two boys died and a third boy received severe burns over 50% of his body.<sup>86</sup> The city fire inspector had inspected the entire premises about six weeks prior to the explosion and failed to notice the drum.<sup>87</sup> The injured parties brought action against the city alleging that the city inspector negligently failed to discover a fire code violation on the premises.<sup>88</sup> The court discussed four factors that it would consider to determine whether a municipality assumed a duty to act for the protection of others.<sup>89</sup> These factors tend to impose a duty of care on the defendant: actual knowledge of the dangerous condition; reasonable reliance by persons on the defendant's repre-

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<sup>80</sup> See *id.* at 806-07.

<sup>81</sup> See *id.* The Supreme Court of Minnesota does not explicitly preclude undertaking another's duty as a potential theory of liability. See *id.* Nevertheless, although the court notes that its list of factors is not exhaustive, the conspicuous absence of a factor similar to § 324A(b) suggests that the court does not intend to recognize this element as a theory of liability. See *id.* at 806-07, 807 n.9, n.11.

<sup>82</sup> *Id.* at 806-07. The court's utilization of actual knowledge of the dangerous condition to impose a duty might be specific to municipalities. See *id.* at 806.

<sup>83</sup> *Id.* at 807. This is similar to New York's requirement of a misrepresentation or nondisclosure on the part of the defendant that misleads the plaintiff to her detriment. See *id.*; *Eisman*, 511 N.E.2d at 1135.

<sup>84</sup> 279 N.W.2d at 806.

<sup>85</sup> *Id.* at 803.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 802.

<sup>89</sup> *Cracraft*, 279 N.W.2d at 806-07. The court notes that this list is not exhaustive, but the court fails to express whether these four factors are balanced or whether each factor must be satisfied. See *id.* The court's language and comparison of these factors to the subsections of § 324A suggest that each factor is independently sufficient to create a duty of care in the actor. See *id.*

sentations and conduct that causes the persons to forego other alternatives of protecting themselves; existence of an ordinance or statute that sets forth mandatory acts clearly designed for the protection of a particular class of persons; and increasing the risk of harm by failing to use due care.<sup>90</sup> The court applied these factors to the facts of this case and determined that the evidence failed to show that a duty was assumed or a special duty was statutorily created.<sup>91</sup> Thus, the court held that merely undertaking an inspection was insufficient to create a duty of care in the actor.<sup>92</sup>

### B. *Negligent Performance of an Undertaking—the Cases*

The cases discussed below in which the litigants have used the Good Samaritan Doctrine to impose liability on a corporate parent are still very different from the recent Good Samaritan Doctrine cases, such as the breast implant and tobacco cases, where special relationships did not exist between the parties.<sup>93</sup> First, few of the plaintiffs in the cases discussed below succeeded on their section 324A claims.<sup>94</sup> Furthermore, many of the cases discussed below are reminiscent of early section 324A cases, containing negligent inspections, employer-employee relationships and government defendants.<sup>95</sup> Only with the breast implant litigation did the Good Samaritan Doctrine begin to succeed in the non-special relationship context of corporate tort liability, clearing the path for a new generation of section 324A claims.<sup>96</sup> These late-generation cases illustrate the evolution of the tort of negligent performance of an undertaking, as it developed from a rare

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<sup>90</sup> *Id.* The second and fourth factors are analogous to § 324A(a) & (c), with the Supreme Court of Minnesota requiring more specific reliance than § 324A(c)'s general reliance. *See id.* at 806-07, 807 n.9, n.11; RESTATEMENT, *supra* note 3, § 324A(a), (c). The Minnesota court's first condition creating a duty, actual knowledge of the dangerous condition, and third condition creating a duty, by statute or ordinance, are not present in § 324A. *See Cracraft*, 279 N.W.2d at 806-07.

<sup>91</sup> *Cracraft*, 279 N.W.2d at 807-08.

<sup>92</sup> *Id.* at 806. This holding is undoubtedly contingent on the Minnesota Supreme Court's unwillingness to recognize § 324A(b), undertaking a duty owed by another to a third party.

<sup>93</sup> Compare *infra* notes 97-129 and accompanying text with *infra* notes 292-99 and accompanying text.

<sup>94</sup> *See infra* notes 97-104, 113-21 and accompanying text. These particular cases were chosen for background because of their role in shaping § 324A, not because of the plaintiffs' success rate.

<sup>95</sup> *See infra* text accompanying notes 97-129.

<sup>96</sup> *See, e.g., In re Silicone Gel Breast Implants Prod. Liab. Litig.*, 887 F. Supp. 1455, 1460 (N.D. Ala. 1995), *vacating prior order granting summary judgment, In re Silicone Gel Breast Implants Prod. Liab. Litig.* (MDL 926), 837 F. Supp. 1128, 1142 (N.D. Ala. 1993); *Mahlum v. Dow Corning Corp.*, No. CV93-05941 (Nev. Dist. Ct. Oct. 30, 1995).

feline into a ferocious lion roaming the corporate jungle, devouring negligent companies.

In *Rick v. RLC Corp.*, in 1981, the United States District Court for the Eastern District of Michigan held that, under section 324A, a parent corporation was not liable to its subsidiary's employee for personal injuries because the parent did not undertake to provide services pursuant to an agreement or with the intention of benefitting the subsidiary corporation or its employees.<sup>97</sup> The plaintiff in *Rick* worked for the defendant-parent's subsidiary corporation as a truck driver.<sup>98</sup> While driving his truck, the vehicle allegedly overturned on its right side.<sup>99</sup> The plaintiff claimed that he was injured and left totally and permanently disabled.<sup>100</sup> The plaintiff contended that the defendant-parent, by undertaking to provide management services in accident prevention and safety to the subsidiary corporation, incurred a duty to the plaintiff as an employee of the subsidiary to exercise reasonable care in accordance with section 324A while providing these services.<sup>101</sup> The court reasoned that the evidence must show that the defendant intended to render services for the benefit of the subsidiary corporation or its employees, not merely that either of these parties received a benefit.<sup>102</sup> The court concluded that although the subsidiary may have benefitted from the parent's services, an agreement or intention to benefit the subsidiary or its employees is required to establish an undertaking under the Good Samaritan Doctrine.<sup>103</sup> Thus, the court held that absent evidence showing that the parent corporation undertook to provide services to its subsidiary, the defendant-parent had no duty to an employee of the subsidiary corporation under section 324A.<sup>104</sup>

In *Heinrich v. Goodyear Tire & Rubber Co.*, in 1982, the United States District Court for the District of Maryland held that a corporate defendant was potentially liable under section 324A(a) or section 324A(c) if it provided its subsidiary with health and safety information and

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<sup>97</sup> 535 F. Supp. 39, 46-47 (E.D. Mich. 1981).

<sup>98</sup> *Id.* at 40. Martlack was a wholly owned subsidiary of defendant RLC Corporation. *See id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 41.

<sup>102</sup> *Rick*, 535 F. Supp. at 43. Additionally, the court expressly stated that evidence that benefits were conferred upon the subsidiary or its employees was insufficient to establish a duty if the parent's conduct was "consistent with an intention primarily to serve its own purposes." *Id.* at 45. The court also noted that an agreement in which the parent undertook to provide the services in question to the subsidiary would establish that the parent corporation owed a duty to the plaintiff. *Id.*

<sup>103</sup> *Id.* at 47.

<sup>104</sup> *Id.*

services.<sup>105</sup> In *Heinrich*, an employee allegedly contracted an occupational disease while working at a tire manufacturing plant.<sup>106</sup> The plant was a wholly-owned subsidiary of the defendant-parent corporation.<sup>107</sup> The employee and his wife brought an action against the parent corporation for damages sustained as a result of the occupational disease.<sup>108</sup> The plaintiffs claimed that the disease arose as a result of the defendant-parent's negligence in providing the subsidiary with health and safety information and services.<sup>109</sup> The court first eliminated undertaking another's duty to a third person as a possible avenue of relief, reasoning that liability under this condition arises in the workplace setting only if the actor's undertaking was intended to be in lieu of, rather than a supplement to, the subsidiary's own duty of care to its employees.<sup>110</sup> In determining whether the plaintiff stated a claim for relief based on increasing the risk of harm or reliance upon the undertaking, the court relied on a policy argument that a parent corporation should not be shielded from tort liability when rendering services to a subsidiary for economic gain but should be regarded as any other information-supplying entity, thus subject to liability under section 324A.<sup>111</sup> The court thus held that the plaintiffs' allegations that the parent corporation negligently provided health and safety information to the subsidiary were sufficient to state a section 324A claim.<sup>112</sup>

In *Muniz v. National Can Corp.*, in 1984, the United States Court of Appeals for the First Circuit held that a parent corporation was not liable for injuries sustained by an employee of its subsidiary corporation because the plaintiff failed to show proof of a positive undertaking by the parent corporation to ensure safety at its subsidiary's plant.<sup>113</sup> In *Muniz*, an employee claimed that he was injured as a result of continuous exposure to toxic lead fumes at his place of employment.<sup>114</sup> The plaintiff sought relief from his employer's parent corporation.<sup>115</sup> The parent corporation's involvement with industrial safety at its sub-

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<sup>105</sup> 532 F. Supp. at 1354.

<sup>106</sup> *Id.* at 1350.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* The plaintiffs expressly contended that they were not seeking to pierce the subsidiary plant's corporate veil. *Id.* at 1351. Rather, all of the plaintiffs' legal theories were premised on duties allegedly owed to the plaintiffs by Goodyear, the defendant and corporate parent. *Id.*

<sup>110</sup> *Heinrich*, 532 F. Supp. at 1355.

<sup>111</sup> *Id.* at 1356.

<sup>112</sup> *Id.*

<sup>113</sup> 737 F.2d 145, 146, 148 (1st Cir. 1984). The *Muniz* court also noted that neither mere concern nor minimal contact about safety matters creates a duty to ensure a safe working environment for the employees of a subsidiary corporation. *Id.* at 148.

<sup>114</sup> *Id.* at 147.

<sup>115</sup> *Id.*

sidiary corporation included the issuance of general safety guidelines and assistance with specific safety matters upon request by the subsidiary's local management.<sup>116</sup> The court reasoned that to establish a duty, the plaintiff must show that the parent agreed to provide the service or that the parent intended to confer benefits on the subsidiary, either for a fee or gratuitously.<sup>117</sup> Moreover, the court noted that conduct designed with an intention to solely or primarily serve the parent's own purposes does not create a duty.<sup>118</sup> The court found that the plaintiff failed to show that the parent assumed responsibility for safety at the subsidiary or that the subsidiary relied on the parent by abandoning its own safety measures.<sup>119</sup> The court concluded that the parent-defendant did not affirmatively undertake to provide a safe working environment at the subsidiary corporation.<sup>120</sup> The First Circuit, therefore, held that the parent corporation's concern with safety matters did not rise to the level of a positive undertaking, and for this reason, the defendant was not liable to an employee of the subsidiary corporation under section 324A.<sup>121</sup>

In *Johnson v. Abbe Engineering Co.*, in 1984, the United States Court of Appeals for the Fifth Circuit held that a parent corporation had a duty to protect employees of a subsidiary corporation where the subsidiary relied on the expertise of the parent's safety division.<sup>122</sup> In *Johnson*, two employees were severely burned in an explosion and fire that occurred during the course of their employment.<sup>123</sup> Using a section 324A claim, the plaintiffs were successful in their trial against the parent corporation of the wholly owned subsidiary-employer.<sup>124</sup> The court first addressed whether the parent corporation had a duty to protect the subsidiary's employees.<sup>125</sup> The court reasoned that the parent corporation's inspection of the subsidiary's entire plant for

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 149.

<sup>118</sup> *Muniz*, 737 F.2d at 149.

<sup>119</sup> *Id.*; see RESTATEMENT, *supra* note 3, § 324A.

<sup>120</sup> *Muniz*, 737 F.2d at 149.

<sup>121</sup> *Muniz*, 737 F.2d at 149.

<sup>122</sup> 749 F.2d 1131, 1134 (5th Cir. 1984).

<sup>123</sup> *Id.* at 1132. At the time of the accident, the plaintiffs were pouring flammable solvents from 55-gallon drums into a large grinder. *Id.* The prescribed procedures for pouring the solvents involved laying the drums on their sides, opening them, and allowing the chemical to flow into a funnel in the middle of the second floor balcony on which the plaintiffs worked. *Id.* It was undisputed that the plaintiffs were following the prescribed procedures when the accident occurred. *Id.*

<sup>124</sup> *Id.* The opinion implies that while the subsidiary-employer was initially named as a defendant, it was later dismissed prior to trial. See *id.*

<sup>125</sup> *Id.* at 1133.

conformity to safety practices and procedures was an affirmative undertaking that established a duty on the part of the defendant.<sup>126</sup> The court then engaged in a proximate cause analysis.<sup>127</sup> The court noted that the plaintiff satisfied the reliance element because the subsidiary's plant manager relied upon the parent's safety representatives for accident prevention and safety training.<sup>128</sup> The Fifth Circuit held, thus, that a parent corporation was liable under section 324A because it undertook safety inspections of the subsidiary's plant and lulled the subsidiary into a false sense of security concerning safety at the plant.<sup>129</sup>

## II. BREAST IMPLANT LITIGATION AGAINST DOW CHEMICAL—AN IDEAL FORUM FOR SECTION 324A

On April 25, 1995, Judge Pointer of the United States District Court for the Northern District of Alabama denied Dow Chemical's motion for summary judgment with respect to all direct liability claims by breast implant plaintiffs against the corporation, including the plaintiffs' Good Samaritan based claims.<sup>130</sup> The plaintiffs' claims against Dow Chemical proved to be crucial when Dow Corning filed for bankruptcy protection soon after Judge Pointer's decision, leaving Dow Chemical as the only viable defendant for plaintiffs with Dow Corning breast implants.<sup>131</sup> The court, in *In re Silicone Gel Breast Implants Products Liability Litigation*, noted that in 1942, Corning and Dow Chemical agreed to create a corporation in which they would each serve as fifty percent shareholders, with Corning supplying their silicone technology and Dow Chemical supplying their knowledge of chemical processing and manufacturing.<sup>132</sup> Dow Corning was incorporated the following year.<sup>133</sup> In 1948, Dow Chemical scientists published

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<sup>126</sup> *Id.*; cf. *Hernandez v. Union Carbide Corp.*, 642 F. Supp. 1000, 1002 (D.P.R. 1986) (duty was not established where subsidiary did not delegate duty of implementing safety measures to parent). Notably, the Manager of Accident Prevention and Safety Training at the parent corporation testified that he knew of the procedures followed by the plaintiffs and was aware that explosive and highly flammable solvents were being used. *Hernandez*, 642 F. Supp. at 1002.

<sup>127</sup> *Johnson*, 749 F.2d at 1133. The court looked at the conditions outlined in § 324A(a), (b) & (c) that satisfy the plaintiffs' burden of proving proximate cause. *See id.*; RESTATEMENT, *supra* note 3, § 324A.

<sup>128</sup> *Johnson*, 749 F.2d at 1133-34.

<sup>129</sup> *Id.*

<sup>130</sup> *In re Silicone Gel Breast Implants Prod. Liab. Litig.*, 887 F. Supp. 1455, 1463 (N.D. Ala. 1995), *vacating prior order granting summary judgment*, *In re Silicone Gel Breast Implants Prod. Liab. Litig.* (MDL 926), 837 F. Supp. 1128, 1142 (N.D. Ala. 1993).

<sup>131</sup> *See infra* note 192 and accompanying text.

<sup>132</sup> 887 F. Supp. at 1457. At the time of the litigation, Corning and Dow Chemical each remained 50% shareholders. *Id.*

<sup>133</sup> *Id.* Dow Corning was incorporated in Michigan in February 1993. *Id.*



the results of their initial tests of silicone products, stating that they were very low in toxicity and that "finished silicone resins are physiologically inert and present no hazards."<sup>134</sup> Although the article related to the handling of commercial silicones, it has been cited as spawning interest in the use of silicones in medical products.<sup>135</sup>

Dow Chemical performed the toxicological tests on certain silicone compounds, arranged and directed outside research on behalf of Dow Corning, analyzed outside research results and for many years made recommendations to Dow Corning regarding future silicone testing.<sup>136</sup> In 1970, after Dow Corning had been marketing breast implants for six years, the only toxicology tests Dow Corning retained in their files regarding the fluid contained in breast implants were those conducted by Dow Chemical.<sup>137</sup> Until the early 1970s, Dow Corning did not even have its own toxicology lab.<sup>138</sup> Even after Dow Corning created its own toxicology lab, Dow Corning frequently sought input from Dow Chemical scientists on their silicone research.<sup>139</sup> Additionally, Dow Corning had access to and used Dow Chemical's equipment, facilities, lab animals and personnel in conducting Dow Corning toxicology tests on silicone for use in breast implants.<sup>140</sup>

Tests conducted by both Dow Chemical and its subsidiary Dow Corning prior to and after the introduction of breast implants in 1964 revealed that some silicones, including some used in breast implants, were not wholly inert but had some biologically active properties.<sup>141</sup> Specifically, the studies revealed that low molecular weight silicones could affect the immune system and that certain silicone fluids, such as the gel contained in about eighty percent of breast implants, had estrogenic effects.<sup>142</sup> Nevertheless, Dow Chemical scientists continued to assure Dow Corning that the adverse reactions were due to other factors and that no further testing was needed.<sup>143</sup>

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *In re Silicone*, 887 F. Supp. at 1457-58. Although Dow Corning conferred with outside consultants, these toxicology tests were not on file in Dow Corning's library. *Id.*

<sup>138</sup> *Id.* at 1458.

<sup>139</sup> *Id.* During Dow Corning's start-up period, several Dow Chemical scientists transferred to Dow Corning and later returned to Dow Chemical. *Id.* Many of these individuals researched and tested silicone breast implants during their employment at Dow Corning and returned to Dow Chemical with a great deal of information concerning the risks and hazards associated with the silicone contained in breast implants. *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *In re Silicone*, 887 F. Supp. at 1458.

<sup>143</sup> *Id.*

In 1975, Dow Chemical and Dow Corning entered into a trade name and trademark agreement.<sup>144</sup> This agreement allowed Dow Corning to continue to use Dow Chemical's name as a part of its name.<sup>145</sup> The agreement provided that Dow Corning would submit specimens of its products to Dow Chemical upon request and permit Dow Chemical to inspect Dow Corning's premises to examine the quality of Dow Corning's products.<sup>146</sup>

Furthermore, beginning in the early 1960s, Dow Chemical purchased interests in an Italian pharmaceutical company called Lepetit, eventually owning over ninety-nine percent of the company.<sup>147</sup> Lepetit promoted, sold and distributed Dow Corning's breast implants.<sup>148</sup> Lepetit continued to distribute implants until 1992.<sup>149</sup> Thus, in addition to its activities in product development, Dow Chemical was deeply involved with the marketing and distribution of breast implants.<sup>150</sup>

These facts led the court to deny Dow Chemical's motion to dismiss the plaintiffs' negligent undertaking claim.<sup>151</sup> The court first addressed whether Dow Chemical undertook to perform services for Dow Corning that Dow Chemical should have recognized as necessary for the protection of third persons, specifically, breast implant recipients.<sup>152</sup> The court reasoned that the silicone testing performed by Dow Chemical, Dow Chemical's knowledge that Dow Corning lacked a toxicology lab and was therefore relying on the information it provided to them, and Dow Chemical's awareness of the possible risks associated with the silicones contained in breast implants imposed a duty on Dow Chemical that would otherwise not exist.<sup>153</sup> Furthermore, because Dow Corning could have reasonably foreseen that its testing was being relied upon to develop products that would be implanted in humans, Dow Chemical had a duty to use due care in providing Dow Corning

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 1458-59. The agreement also required that Dow Corning's products that use Dow Chemical's name be "of a nature and quality that is acceptable to Dow [Chemical] and shall not damage or reflect adversely on the reputation and goodwill associated with the name and mark 'Dow.'" *Id.* at 1458.

<sup>147</sup> *In re Silicone*, 887 F. Supp. at 1459.

<sup>148</sup> *Id.* Lepetit's market included Europe, Central America, South America, Mexico and Australia. *Id.* For several years, Lepetit was Dow Corning's largest distributor in Europe and Australia and its sole distributor in South America. *Id.*

<sup>149</sup> *Id.*

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

<sup>151</sup> *See id.* at 1462.

<sup>152</sup> *In re Silicone*, 887 F. Supp. at 1460.

<sup>153</sup> *Id.*

with reasonably accurate and complete information.<sup>154</sup> The court concluded, thus, that a jury could determine that Dow Chemical affirmatively undertook to provide research and testing for Dow Corning,<sup>155</sup> that Dow Chemical recognized that this research was necessary for the recipients of Dow Corning medical devices, that physical harm could result from Dow Chemical's failure to use reasonable care in conducting or reporting its findings, and that, as a result, the first paragraph of section 324A was satisfied.<sup>156</sup>

The court then addressed whether the plaintiffs presented evidence that satisfied one of the elements contained in the subsections of section 324A: increasing the risk of harm, undertaking a duty owed by another to a third party, or reliance upon the undertaking.<sup>157</sup> The court reasoned that Dow Corning relied on Dow Chemical's toxicology testing, silicone testing, research and recommendations and, therefore, did not perform other tests on silicone prior to marketing and distributing breast implants.<sup>158</sup> Moreover, the court noted that Dow Corning continued to rely on Dow Chemical's research during the 1970s.<sup>159</sup> The court concluded that Dow Chemical could be found liable based on undertaking a duty owed by another to a third party because Dow Chemical undertook Dow Corning's duty owed to the

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<sup>154</sup> *Id.* at 1461.

<sup>155</sup> The court explicitly stated that while it remained unclear whether Dow Chemical ever received direct compensation from Dow Corning for the services it provided, Dow Chemical, as a 50% stockholder, certainly had a financial interest in Dow Corning's profits and a reason to render services to Dow Corning. *Id.* at 1461-62. Because § 324A covers gratuitous undertakings as well as those done for consideration, the court never determined whether Dow Chemical provided its services to Dow Corning for consideration. *See id.* at 1462. This part of the opinion was most likely included to prevent confusion in future litigation in jurisdictions that use a modified § 324A and condition liability upon proof of consideration. *See infra* notes 272-76 and accompanying text; *Mullins v. Pine Manor College*, 449 N.E.2d 331, 336 n.10 (Mass. 1983) (noting that Massachusetts only applies § 324A to undertakings done for consideration).

<sup>156</sup> *In re Silicone*, 887 F. Supp. at 1461; *see* RESTATEMENT, *supra* note 3, § 324A. In its duty analysis, the court noted two considerations which were insufficient on their own to establish an affirmative duty, yet were considered in assessing Dow Chemical's involvement and knowledge concerning breast implants. *See In re Silicone*, 887 F. Supp. at 1461. The first factor was the distribution of implants by Lepetit, a subsidiary over which Dow Chemical retained 99% control. *Id.* Rather than engage in a corporate veil-piercing analysis to determine Dow Chemical's responsibility for Lepetit's implant distribution, the court considered Lepetit as a factor in the duty analysis. *Id.* The second additional factor considered in assessing Dow Chemical's involvement with Dow Corning was the trademark agreement. *See id.* The court reasoned that the provisions of a trademark agreement do not create an affirmative undertaking under § 324A. *Id.* Nevertheless, the court noted that the trademark agreement was a factor to be considered in assessing Dow Chemical's knowledge and involvement in Dow Corning's breast implant activities. *Id.*

<sup>157</sup> *In re Silicone*, 887 F. Supp. at 1461; *see* RESTATEMENT, *supra* note 3, § 324A(a), (b) & (c).

<sup>158</sup> *In re Silicone*, 887 F. Supp. at 1461.

<sup>159</sup> *Id.*

plaintiffs to adequately test and research silicones for human implantation. The court also decided that Dow Chemical could be found liable based on reliance upon the undertaking because Dow Corning, implant recipients and their physicians relied on Dow Chemical's research and testing of silicones, to the plaintiffs' detriment.<sup>160</sup> The United States District Court for the Northern District of Alabama thus denied summary judgment to Dow Chemical because a jury could find that Dow Chemical undertook to perform research and testing services for Dow Corning that were necessary for the protection of future recipients of silicone implants, that Dow Chemical had a duty to use reasonable care in conducting the silicone tests, and that Dow Corning relied on the research and testing performed by Dow Chemical.<sup>161</sup>

Soon after Judge Pointer denied Dow Chemical summary judgment, a woman injured by her breast implants, and her husband, went to trial solely against Dow Chemical.<sup>162</sup> In this case, *Mahlum v. Dow Corning Corp.*, in 1995, a Nevada jury found Dow Chemical liable for negligent performance of an undertaking and awarded fourteen million dollars to the plaintiffs.<sup>163</sup> As in *In re Silicone*, the plaintiffs presented evidence regarding Dow Chemical's involvement with Dow Corning, specifically, the research and testing services Dow Chemical performed for Dow Corning on the toxicology and safety of silicones.<sup>164</sup> In their post-trial memorandum, the plaintiffs specifically noted that a jury could find that when Dow Corning put their breast implants—a new medical device designed for lifetime implantation in humans—on the market, Dow Corning was relying on Dow Chemical for the safety of breast implant materials.<sup>165</sup>

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<sup>160</sup> *Id.*; see RESTATEMENT, *supra* note 3, § 324A cmts. d & e.

<sup>161</sup> *In re Silicone*, 887 F. Supp. at 1460–62; see RESTATEMENT, *supra* note 3, § 324A. The court noted that under the substantive law of some states, the evidence might not create a jury question in federal court. *In re Silicone*, 887 F. Supp. at 1462.

<sup>162</sup> *Mahlum v. Dow Corning Corp.*, No. CV93–05941 (Nev. Dist. Ct. Oct. 30, 1995). This was the first breast implant case tried against Dow Chemical as the sole defendant. *Mahlum Awarded \$14 Million in Nevada Suit Against Dow Chemical*, MEALEY'S LITIG. REP.: BREAST IMPLANTS, OCL. 31, 1995, at 3. The plaintiffs had named Dow Corning as a defendant in the original complaint, but the company was severed from the case after it filed for bankruptcy in May 1995. See *id.*

<sup>163</sup> *Mahlum*, No. CV93–05941. The jury also found the defendant liable for fraudulent concealment, for providing substantial assistance or encouragement to Dow Corning in its fraudulent misrepresentation, and for acting in concert with or pursuant to a common design to engage in a fraudulent misrepresentation. *Id.* (jury verdict form no. 3).

<sup>164</sup> *Mahlum*, No. CV93–05941 (Plaintiff's Brief in Opposition to Defendant's Motion for JNOV or New Trial at 27–28); see *supra* notes 136–40 and accompanying text. In the negligent undertaking portion of their brief, plaintiffs' counsel relied heavily on language from Judge Pointer's opinion. *Id.* (Plaintiff's Brief in Opposition to Defendant's Motion for JNOV or New Trial at 26–38).

<sup>165</sup> *Id.* (Plaintiff's Brief in Opposition to Defendant's Motion for JNOV or New Trial at 28).

Dow Chemical argued that liability under section 324A can only arise as to the specific final product and that the plaintiffs, thus, must specifically prove that Dow Chemical assumed responsibility for breast implants.<sup>166</sup> In response, the plaintiffs explained that the defendant was attempting to impose a requirement not found in section 324A.<sup>167</sup> In support of their argument, the plaintiffs cited Judge Pointer's opinion in which he stated that Dow Chemical's reading of section 324A was too restrictive and that liability under section 324A arises when it is reasonably foreseeable that another will be harmed by the failure to exercise reasonable care in performing an undertaking.<sup>168</sup>

In their argument that Dow Chemical negligently performed an undertaking, the plaintiffs utilized the condition that provides for liability when the Good Samaritan undertakes to perform a duty owed by another to a third person.<sup>169</sup> The plaintiffs claimed that Dow Corning owed a duty to properly test and ensure the safety of the liquid silicone that leaked from its implants into women's bodies, and that Dow Chemical assumed a portion of this duty.<sup>170</sup> The plaintiffs contended that Dow Chemical's assumption of Dow Corning's duty was evidenced by the 1975 trademark agreement, Dow Chemical's numerous tests of liquid silicones, Dow Chemical's toxicology testing recommendations, and Dow Chemical's knowledge that Dow Corning was using and relying on their research and advice to develop liquid silicone for medical products.<sup>171</sup>

The plaintiffs also relied upon a recent Nevada Supreme Court decision, *Wright v. Schum*, where the plaintiffs brought a section 324A claim.<sup>172</sup> In *Wright*, the court held that a landlord could have been found to have partially undertaken a tenant's duty to protect the public from the tenant's pit bull.<sup>173</sup> The court based its finding of liability on the landlord's "power to control" the acts of the tenant in protecting

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The plaintiffs cited to documentary evidence and witness testimony which showed Dow Corning's reliance on its parent, Dow Chemical. *Id.* (Plaintiff's Brief in Opposition to Defendant's Motion for JNOV or New Trial at 28).

<sup>166</sup> *Id.* (Plaintiff's Brief in Opposition to Defendant's Motion for JNOV or New Trial at 28-29).

<sup>167</sup> *Id.* (Plaintiff's Brief in Opposition to Defendant's Motion for JNOV or New Trial at 28).

<sup>168</sup> *Id.* (Plaintiff's Brief in Opposition to Defendant's Motion for JNOV or New Trial at 27-28) (citing *In re Silicone*, 887 F. Supp. at 1460).

<sup>169</sup> *Mahlum*, No. CV93-05941 (Plaintiff's Brief in Opposition to Defendant's Motion for JNOV or New Trial at 30-31); see RESTATEMENT, *supra* note 3, § 324A(b).

<sup>170</sup> *Mahlum*, No. CV93-05941 (Plaintiff's Brief in Opposition to Defendant's Motion for JNOV or New Trial at 31).

<sup>171</sup> *Id.* (Plaintiff's Brief in Opposition to Defendant's Motion for JNOV or New Trial at 31-32).

<sup>172</sup> *Id.* (Plaintiff's Brief in Opposition to Defendant's Motion for JNOV or New Trial at 32); see *Wright v. Schum*, 781 P.2d 1142, 1144 (Nev. 1987).

<sup>173</sup> *Wright*, 781 P.2d at 1146.

the public.<sup>174</sup> The plaintiffs argued that Dow Chemical, like the landlord in *Wright*, through its status as fifty percent stockholder of Dow Corning and its extensive involvement with Dow Corning in other areas clearly had the power to control the acts of Dow Corning.<sup>175</sup> The research and testing by Dow Chemical, argued the plaintiffs, amounted to more than passive observation and constituted influence and control over Dow Corning's conduct.<sup>176</sup>

The plaintiffs also argued that Dow Chemical could be found liable because Dow Chemical's negligent performance of an undertaking increased the plaintiffs' risk of harm or, in the alternative, because the plaintiffs' harm was suffered due to the plaintiffs' and Dow Corning's reliance upon Dow Chemical's undertaking.<sup>177</sup> The plaintiffs contended that Dow Chemical's negligence increased the breast implant recipients' risk of harm because Dow Chemical failed to conduct or recommend long term safety testing.<sup>178</sup> The plaintiffs predicated liability under section 324A(c), reliance upon the undertaking, on Dow Corning's reliance on Dow Chemical for silicone toxicity testing and safety advice.<sup>179</sup> The plaintiffs supported their reliance claim with evidence that when Dow Corning began marketing implants in 1962, it had done no silicone toxicity testing itself and thus Dow Corning was completely relying on the toxicity testing conducted by Dow Chemical.<sup>180</sup> The jury's verdict accepting the plaintiffs' negligent undertaking theory of liability, followed by a state judge's denial of Dow Chemical's motion for judgment notwithstanding the verdict or a new trial, constituted a landmark decision in the history of section 324A.<sup>181</sup>

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<sup>174</sup> *Id.*

<sup>175</sup> *Mahlum*, No. CV93-05941 (Plaintiff's Brief in Opposition to Defendant's Motion for JNOV or New Trial at 32); see *Wright*, 781 P.2d at 1146.

<sup>176</sup> *Mahlum*, No. CV93-05941 (Plaintiff's Brief in Opposition to Defendant's Motion for JNOV or New Trial at 32-33). Control is not an element of § 324A, nevertheless, the Nevada Supreme Court incorporated it into its § 324A analysis in *Wright*. See *Wright*, 781 P.2d at 1146; RESTATEMENT, *supra* note 3, § 324A. Control is actually an important element of piercing the corporate veil. See H. BALLANTINE, BALLANTINE ON CORPORATIONS § 138, at 318-21 (1946).

<sup>177</sup> *Mahlum*, No. CV93-05941 (Plaintiff's Brief in Opposition to Defendant's Motion for JNOV or New Trial at 36).

<sup>178</sup> *Id.* (Plaintiff's Brief in Opposition to Defendant's Motion for JNOV or New Trial at 37).

<sup>179</sup> *Id.* (Plaintiff's Brief in Opposition to Defendant's Motion for JNOV or New Trial at 37).

<sup>180</sup> *Id.* (Plaintiff's Brief in Opposition to Defendant's Motion for JNOV or New Trial at 37).

<sup>181</sup> See *id.* (Plaintiff's Brief in Opposition to Defendant's Motion for JNOV or New Trial at 38); *Dow Chemical Denied JNOV, New Trial in Nevada Breast Implant Case*, MEALEY'S LITIG. REP.: BREAST IMPLANTS, Feb. 15, 1996, at 11. In addition to succeeding on her § 324A claim, the plaintiff also succeeded on her claims of fraudulent concealment, substantial assistance or encouragement, and acting in concert with or pursuant to a common design. *Mahlum*, No. CV93-05941 (Jury Verdict Form No. 3, at 1).

### III. NEGLIGENT UNDERTAKING—THE GOOD, THE BAD & THE UGLY

#### A. *The Good*

The widespread use of the negligent undertaking cause of action by employees of subsidiary corporations led to the birth of a new generation of section 324A plaintiffs: consumers. Armed with this weapon, consumer-plaintiffs could hold parent corporations accountable for their negligence just as their predecessors, subsidiary employees, had done.<sup>182</sup> The evolution of the negligent undertaking cause of action into the products liability arena is not only a logical step, but a positive one.

The plaintiffs in *In re Silicone* stated a claim for relief by satisfying the requirements set forth in section 324A.<sup>183</sup> Although this satisfied the prima facie requirements, the ultimate success of the plaintiffs' claim remains to be seen. By analogizing the products liability cases to the employer-employee cases, the success of breast implant plaintiffs such as Charlotte Mahlum using the negligent undertaking cause of action is not surprising.

The subtleties that helped give subsidiary employees a cause of action under section 324A are also present in the products liability arena. Just as employers owe a duty to their employees, corporations owe a duty to the purchasers of their products. When a parent corporation decides to assist its subsidiary in carrying out its duty, employees and consumers are often victims of the parent corporation's failure to use reasonable care in providing advice and services. Just as employees rely on their employer to ensure their own personal safety, consumers expect a manufacturer to ensure the safety of a product that they place on the market.<sup>184</sup> Additionally, the subsidiary-manufacturer relies on the expertise of its parent corporation regarding employee safety issues as well as product safety.<sup>185</sup> Thus, there is a chain of reliance—the consumer relies on the subsidiary, the subsidiary relies on the parent.<sup>186</sup> In each link, the reliance on the other party is fairly placed.<sup>187</sup> This

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<sup>182</sup> See, e.g., *In re Silicone Gel Breast Implants Prod. Liab. Litig.*, 887 F. Supp. 1455, 1460 (N.D. Ala. 1995); *Mahlum v. Dow Corning Corp.*, No. CV93-05941 (Nev. Dist. Ct. Oct. 30, 1995).

<sup>183</sup> *In re Silicone*, 887 F. Supp. at 1463.

<sup>184</sup> This is especially true when the product is designed for human implantation, as in the breast implant litigation. See *supra* note 154 and accompanying text.

<sup>185</sup> See *supra* notes 158-61 and accompanying text.

<sup>186</sup> The subsidiary's reliance on the parent is sufficient to impose liability under § 324A. See RESTATEMENT, *supra* note 3, § 324A(c). The language in § 324A(c) reads that the Good Samaritan is subject to liability if "the harm is suffered because of reliance of the other or the third person upon the undertaking." *Id.*

<sup>187</sup> See RESTATEMENT, *supra* note 3, § 324A(c). The Restatement recognizes this chain of

chain connects the plaintiff to the parent corporation; section 324A merely transforms this connection into a legal cause of action.<sup>188</sup> Consumer-plaintiffs, similarly situated to the earlier employee-plaintiffs, are thus imparted with the power to retaliate when colossal corporate parents are responsible for their harm.

Furthermore, litigants' utilization of the Good Samaritan Doctrine to recover from parent corporations for negligently assisting their subsidiaries satisfies the goals of the tort system: compensation and deterrence.<sup>189</sup> When a corporation branches into a risky or experimental area, it often establishes this division as a separately incorporated subsidiary so that if the experimental endeavor is unsuccessful, any losses will be wholly contained within the subsidiary.<sup>190</sup> Thus, the establishment of subsidiaries protects parent corporations and their shareholders from financial liability associated with failed business ventures if the venture is required to declare bankruptcy.

Consumers of the failed venture's products, however, are often left unprotected. Consumers are sometimes harmed as a result of a corporation's unsuccessful endeavor and are left without an avenue of recourse against the insolvent subsidiary.<sup>191</sup> Prior to *In re Silicone*, subsidiaries' increasingly popular practice of filing for bankruptcy protection under Chapter 11 of the Bankruptcy Code left consumers uncompensated for the harm they suffered.<sup>192</sup> Now, using section 324A, parent corporations' "deep pockets" are available to the injured victims of corporate experiments who seek compensation for the harm they suffered.

The breast implant litigation illustrates this series of events. Dow Corning's filing for bankruptcy protection left women with Dow Corning implants unable to recover for their injuries.<sup>193</sup> Fortunately for

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reliance by providing for liability under § 324A(c) where the direct recipient of the Good Samaritan's services or a third party relied upon the undertaking. *See id.*

<sup>188</sup> *See id.*

<sup>189</sup> *See* WILLIAM L. PROSSER ET. AL., CASES AND MATERIALS ON TORTS § 1, at 1 (9th ed. 1994).

<sup>190</sup> NORMAN D. LATTIN, THE LAW OF CORPORATIONS § 13, at 91 (1959). Lattin notes that it is doubtful whether the statutory authority allowing corporations to establish subsidiaries was intended to authorize corporations to re-insulate themselves and their shareholders against unlimited liability by forming wholly owned corporations to serve as shock absorbers in some risky part of the business. *Id.*; *see* BALLANTINE, *supra* note 176, § 135, at 309; Natale, *supra* note 23, at 736 & n.123.

<sup>191</sup> *See, e.g., Mahlum*, No. CV93-05941.

<sup>192</sup> *See, e.g., In re Silicone*, 887 F. Supp. at 1462. Dow Corning filed for bankruptcy on May 15, 1995 due, in part, to the tide of litigation from breast implant recipients seeking compensation for their injuries. *Id.*

<sup>193</sup> *See In re Dow Corning Corp.*, No. 95-20512, 1995 WL 495978, at \*1 (Bankr. E.D. Mich. Aug. 9, 1995). There is also a record of Dow's bankruptcy filing. *See The Bankruptcy Data Source—DataPage*, 1995 WL 318460 (N.G.R.).



these victims, the Good Samaritan Doctrine provided the basis for Judge Pointer's ruling that plaintiffs with Dow Corning implants could recover from Dow Chemical, Dow Corning's parent.<sup>194</sup>

Ideally, imposing liability on parent corporations through section 324A will also satisfy the additional tort system objectives of deterring wrongful conduct and encouraging socially responsible behavior.<sup>195</sup> The looming threat of liability will most likely encourage parent corporations to exercise greater care when extending their services to subsidiary corporations.<sup>196</sup> Although corporations are persons in the eyes of the law, they lack human emotions such as integrity, empathy and sensitivity.<sup>197</sup> These emotions inspire individuals to act as Good Samaritans and use reasonable care when providing assistance.<sup>198</sup> Corporations, however, are motivated almost entirely by profit.<sup>199</sup> The threat of litigation and the accompanying fear of profit loss provide the necessary impetus for corporations to act as socially responsible citizens.

The benefit of limited liability enjoyed by parent corporations should only protect them to a certain extent.<sup>200</sup> Parent corporations cannot expect to receive the benefits of the corporate veil without subjecting themselves to liability in tort for their own negligent conduct.<sup>201</sup> Moreover, if parent corporations choose to incorporate their high-risk divisions as subsidiaries in order to insulate themselves from the subsidiaries' losses, then parents must treat these subsidiaries as separate legal entities rather than as divisions of the parent corporations.<sup>202</sup> If, however, parent corporations provide their subsidiaries with

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<sup>194</sup> *In re Silicone*, 887 F. Supp. at 1462.

<sup>195</sup> PROSSER, *supra* note 189, § 1, at 1.

<sup>196</sup> Robert B. Thompson, *Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise*, 47 VAND. L. REV. 1, 19 (1994).

<sup>197</sup> See 1 WILLIAM M. FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7.05, at 447 (rev. perm. ed. 1990) (noting that corporations are not always or in all senses "persons"); Martin Benjamin & Daniel A. Bronstein, *Moral and Criminal Responsibility and Corporate Persons*, in CORPORATIONS AND SOCIETY 277, 279 (Warren J. Samuels & Arthur S. Miller eds., 1987).

<sup>198</sup> See Benjamin & Bronstein, *supra* note 197, at 277. The authors further note that individuals, unlike corporations, are concerned with certain principles even when they do not further a basic goal, such as overall happiness. *Id.*

<sup>199</sup> See *id.* at 277-78 (noting that corporate decision-making is constrained by corporation's goals, which include maximization of profits).

<sup>200</sup> See HARRY G. HENN & JOHN R. ALEXANDER, LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES § 146, at 344 (3d ed. 1986).

<sup>201</sup> *Heinrich v. Goodyear Tire & Rubber Co.*, 532 F. Supp. 1348, 1356 (D. Md. 1982).

<sup>202</sup> See BALLANTINE, *supra* note 176, § 135, at 309. In addition to the reason for establishing subsidiaries that is discussed here, Ballantine lists the following additional reasons for parents to establish subsidiary corporations: 1) to obtain tax benefits; 2) to avoid service of process on the parent corporation and escape litigation in other states by having a selling subsidiary carry on business there for the benefit of its parent, but not as its agent; 3) to retain benefit of corporate

services designed to increase the subsidiaries' profitability, parents should accept the duty to act with reasonable care. Parent corporations want to have it both ways—insulate themselves from any harm caused by a risky subsidiary while profiting from the subsidiary's success. By providing the subsidiary with aid and assistance, the parent corporation ensures that the subsidiary's venture will be successful and profitable for its shareholders. Section 324A holds a parent corporation accountable to the victims of its subsidiary's risky venture when the parent's negligent aid and assistance leads to the victims' harm.<sup>203</sup>

Therefore, a parent corporation that undertakes to render services to a subsidiary should be regarded as any other information-supplying entity and be subject to liability under section 324A.<sup>204</sup> The only relevance of the parent corporation's relationship with the subsidiary would be to determine, as is required in some jurisdictions, whether the services were performed gratuitously or for consideration.<sup>205</sup> As the United States District Court for the District of Maryland aptly stated in *Heinrich v. Goodyear Tire & Rubber Co.*, "Parent corporations are not entitled, on public policy or other grounds, to an exemption from tort liability when their conduct results in harm to persons as to whom the law recognizes the existence of a duty of care."<sup>206</sup>

For plaintiffs seeking to impose liability on a parent corporation, the Good Samaritan Doctrine is a more attractive alternative to piercing the corporate veil.<sup>207</sup> Nevertheless, piercing the corporate veil is available to plaintiffs seeking to get at a corporation's shareholders, such as a parent corporation. A subsidiary will probably not be recognized as a separate corporation if any of the following factors are present: (1) intermingling of parent and subsidiary's business transactions, accounts, and records; (2) failure to observe formalities of separate corporate procedures for each corporation; (3) failure to adequately finance each corporation as a separate unit; or (4) failure to hold out the respective corporations to the public as separate enterprises.<sup>208</sup>

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name and good will; and 4) to combine various operating companies into one large company. *Id.* at 309–10.

<sup>203</sup> Piercing the subsidiary corporation's veil of limited liability is another option available to victims of corporate negligence. See *infra* notes 207–12 and accompanying text.

<sup>204</sup> *Heinrich*, 532 F. Supp. at 1356.

<sup>205</sup> For a discussion of Massachusetts's interpretation of § 324A, which requires proof of consideration, see *infra* notes 55–65 and accompanying text; *supra* notes 272–82 and accompanying text.

<sup>206</sup> *Heinrich*, 532 F. Supp. at 1356.

<sup>207</sup> See Natale, *supra* note 23, at 734–35.

<sup>208</sup> See HENN & ALEXANDER, *supra* note 200, § 148, at 355–56.

It is often difficult to pierce a corporation's veil of limited liability, and thus, section 324A is a much more attractive option.<sup>209</sup> Courts are hesitant to disregard the corporate form and expose its shareholders to liability.<sup>210</sup> As one court stated, "disregard of a legally established corporate entity is an extraordinary remedy which exists as a last resort."<sup>211</sup> Therefore, plaintiffs seeking to impose liability on a parent corporation will probably achieve greater success using the Good Samaritan Doctrine than attempting to pierce the corporate veil.<sup>212</sup>

The Good Samaritan Doctrine and corporate veil piercing are similar in that both disregard limited liability in the interests of justice, equity and fairness.<sup>213</sup> The most striking similarity between these two methods of imposing liability lies with the element of control.<sup>214</sup> Although section 324A does not require a showing of control, this element has made its way into many Good Samaritan cases.<sup>215</sup> As part of their section 324A claim, the plaintiffs in *Mahlum* argued that Dow Chemical's undertaking amounted to more than mere passive observation and that, for this reason, Dow Chemical had the power to control Dow Corning's conduct.<sup>216</sup> Control is relevant in a section 324A claim to show that the defendant affirmatively undertook actions of sufficient importance so as to influence the subsidiary's actions.<sup>217</sup> By rendering aid and assistance to another, the Good Samaritan is to some extent controlling the acts of the individual or organization to whom it is rendering its services.<sup>218</sup>

Nevertheless, the significance of control in the Good Samaritan Doctrine is different than in corporate veil piercing. In the former, control provides evidence of the Good Samaritan's knowledge of, and

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<sup>209</sup> See *infra* notes 210-12 and accompanying text.

<sup>210</sup> See Gayle L. Troutwine & Leslie A. Kocher, *Corporate Veil Piercing as it Applies to Breast Implant Litigation*, MED.-LEGAL ASPECTS OF BREAST IMPLANTS, Apr. 1995, at 4; Natale, *supra* note 23, at 734.

<sup>211</sup> *Amifac Foods, Inc. v. International Sys. & Controls Corp.*, 654 P.2d 1092, 1098 (Or. 1982).

<sup>212</sup> See Natale, *supra* note 23, at 734.

<sup>213</sup> See HENN & ALEXANDER, *supra* note 200, § 146, at 344.

<sup>214</sup> *But see* 10 FLETCHER, *supra* note 197, § 4878, at 351. Fletcher notes that under the Good Samaritan Doctrine, a parent corporation's liability is based on its own positive undertaking, not on allegations of control over the subsidiary. *Id.* Although this is true based on the explicit language of § 324A, further analysis reveals that control is not completely absent. See *infra* notes 215-21 and accompanying text.

<sup>215</sup> See, e.g., *Mahlum*, No. CV93-05941 (Plaintiff's Brief in Opposition to Defendant's Motion for JNOV or New Trial at 32-33).

<sup>216</sup> *Id.* (Plaintiff's Brief in Opposition to Defendant's Motion for JNOV or New Trial at 32-33).

<sup>217</sup> See *In re Silicone*, 887 F. Supp. at 1461; *Mahlum*, No. CV93-05941 (Plaintiff's Brief in Opposition to Defendant's Motion for JNOV or New Trial at 32-33).

<sup>218</sup> See *Mahlum*, No. CV93-05941 (Plaintiff's Brief in Opposition to Defendant's Motion for JNOV or New Trial at 32-33).

involvement in, the subsidiary's activities in order to establish a positive undertaking by the parent corporation.<sup>219</sup> In the latter, control shows that the subsidiary corporation did not exist as a separate legal entity and served as a mere instrumentality of its shareholder parent.<sup>220</sup> A subsidiary's failure to follow corporate formalities renders it undeserving of the benefit of limited liability for its shareholders and thus warrants piercing the subsidiary's corporate veil.<sup>221</sup>

Despite the common element of control, these two paths to shareholder liability are quite different. Whereas section 324A focuses on a parent corporation's independent duty owed to the plaintiffs, veil piercing focuses on the relationship between the parent corporation and the subsidiary, particularly, whether the two corporations were maintained as separate legal enterprises.<sup>222</sup> Unlike veil piercing, section 324A is not based on a parent's control over its subsidiary but rather on a parent's affirmative rendering of services to its subsidiary.<sup>223</sup>

### B. *The Bad*

While there are many arguments in favor of using the Good Samaritan Doctrine to impose liability on parent corporations, there are some persuasive arguments against its use in this context.<sup>224</sup> First, the use of section 324A to hold parent corporations liable might discourage parent corporations from intervening in their subsidiaries' operations.<sup>225</sup> Public policy encourages a parent corporation to share information with its subsidiary, not only to increase the profits of both entities but also to ensure that the subsidiary creates safe products.<sup>226</sup> A parent company often possesses superior knowledge regarding safety and operating procedures associated with the subsidiary's business.<sup>227</sup>

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<sup>219</sup> *In re Silicone*, 887 F. Supp. at 1461.

<sup>220</sup> See 10 FLETCHER, *supra* note 197, § 4878, at 350.

<sup>221</sup> See *id.*

<sup>222</sup> See generally *id.* at 351.

<sup>223</sup> See *id.*; HENN & ALEXANDER, *supra* note 200, § 146, at 345. Veil piercing is based on the parent corporation's disregard of the principle that a corporation is a separate legal entity, distinct from its shareholders. See 10 FLETCHER, *supra* note 197, § 4878, at 351; HENN & ALEXANDER, *supra* note 200, § 146, at 345. Just as this concept gives corporations limited liability, it can also be taken away to expose the shareholders to suit. See 10 FLETCHER, *supra* note 197, § 4878, at 351; HENN & ALEXANDER, *supra* note 200, § 146, at 345.

<sup>224</sup> This discussion will focus on the arguments against using § 324A to impose liability on parent corporations in products liability actions. For arguments against using § 324A to bring an action against a parent corporation for failing to provide a safe workplace, see Natale, *supra* note 23, at 735-36.

<sup>225</sup> Natale, *supra* note 23, at 736.

<sup>226</sup> *Heinrich*, 532 F. Supp. at 1356.

<sup>227</sup> Natale, *supra* note 23, at 736.

For example, a parent corporation would hopefully advise its naive subsidiary that sacrificing product safety in order to cut costs is not worth the risk of consumer injury.<sup>228</sup> Nevertheless, a parent corporation's assistance only helps a subsidiary if it is properly given. Thus, parent corporations' failure to use due care when dispensing information and services could eventually harm, rather than help, their subsidiaries.<sup>229</sup>

The breast implant litigation provides another excellent example of this point. Dow Corning relied upon Dow Chemical's research and testing services; however, they might have received more honest advice from an independent, unbiased research facility that did not have anything to lose by advising Dow Corning that breast implants were potentially dangerous.<sup>230</sup> Dow Chemical's desire to increase profits likely colored their test results and advice. In a situation such as this, the availability of section 324A might diminish the parent corporation's inherent bias and encourage the parent to use due care when providing its subsidiary with services.<sup>231</sup>

Critics of section 324A also argue that use of the Good Samaritan Doctrine in the parent-subsidiary corporate context discourages corporations from establishing subsidiaries in high-risk areas.<sup>232</sup> As a result, technological development could suffer in industries where parents rely on their subsidiaries to insulate them from the dangers associated with developing a technologically advanced product.<sup>233</sup> This result, however, is highly unlikely. Innovative ideas and products result in corporate profits and success, and often these new ideas can only be realized by taking risks. Corporations exist to bring in dividends for the shareholders; thus, if achieving this purpose requires product development on the cutting edge of technology, then this practice will continue regardless of the potential liability.<sup>234</sup> Section 324A does not prevent parent corporations from developing subsidiaries in high-risk areas or from aiding those subsidiaries once they are established. It

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<sup>228</sup> See 1 Corp. L. Guide (CCH) ¶ 413, at 855 (1987) (noting that it is not improper for more experienced parent corporation to provide its subsidiary with helpful information); Note, *Strict Products Liability: Admissibility of Post-Manufacture Safety Standards on the Issue of Design Defect*, 2 REV. LITIG. 331, 336-37 (1982).

<sup>229</sup> Although Dow Chemical's aid and assistance to Dow Corning might have helped the subsidiary initially, it eventually forced them into bankruptcy. See *infra* notes 230-31 and accompanying text.

<sup>230</sup> See *In re Silicone*, 887 F. Supp. at 1458.

<sup>231</sup> See *infra* note 196 and accompanying text.

<sup>232</sup> See Natale, *supra* note 23, at 736.

<sup>233</sup> See *id.*

<sup>234</sup> See Benjamin & Bronstein, *supra* note 197, at 278.

simply requires that if a parent corporation decides to assist its subsidiary corporation, it must use due care.<sup>235</sup> It requires parent corporations to internalize the costs of entering into risky ventures rather than allowing a parent's shareholders to externalize the risks of its venture on some other unsuspecting individuals, such as consumers.

Another criticism of the Good Samaritan Doctrine is that it undercuts the corporate privilege of limited liability, one of the major advantages of incorporating.<sup>236</sup> Limited liability is one of the principle tenets of corporate law, allowing for increased investment in necessary but risky ventures. Exempting shareholders from individual liability for a corporation's debts or torts attracts investors and assembles large amounts of capital.<sup>237</sup> Shareholders are more likely to invest in a new or risky corporation knowing that they will not lose more than the amount of their investment.<sup>238</sup> Because investors' potential losses are limited to the amount of their investment, they spend less money to protect their investments and their positions.<sup>239</sup> Corporate investment would certainly suffer without the protection of limited liability for shareholders.<sup>240</sup> Section 324A, however, does not impose liability on a parent for just any harm caused by its subsidiary.<sup>241</sup> Section 324A imposes liability only for those harms that flow from the parent's negligent rendering of aid or assistance.<sup>242</sup> Thus, imposing liability seems only fair given that the parent corporation's shareholders are the ones who will benefit if the subsidiary's venture is successful.

Another potentially unjust result of utilizing the Good Samaritan Doctrine is that it has the same effect as piercing the subsidiary's corporate veil without consideration of the factors normally required to achieve this remedy of last resort.<sup>243</sup> Thus, even if the subsidiary was not formed or used for an improper, fraudulent or unjust purpose, the subsidiary corporation may be disregarded and the parent shareholder may be subject to liability under section 324A.<sup>244</sup> Nevertheless, a parent

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<sup>235</sup> See RESTATEMENT, *supra* note 3, § 324A.

<sup>236</sup> See 1 FLETCHER, *supra* note 197, § 14, at 464 (noting that main reason for popularity of corporations is limited liability of stockholders).

<sup>237</sup> BALLANTINE, *supra* note 176, at 4.

<sup>238</sup> See *id.*

<sup>239</sup> Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 95 (1985). Many of the arguments in favor of limited liability for shareholders are more applicable to individual shareholders than to corporate shareholders. See *id.* at 94-97.

<sup>240</sup> See BALLANTINE, *supra* note 176.

<sup>241</sup> See RESTATEMENT, *supra* note 3, § 324A.

<sup>242</sup> See *id.*

<sup>243</sup> See HENN & ALEXANDER, *supra* note 200.

<sup>244</sup> See 1 FLETCHER, *supra* note 197, § 41, at 602-03.

corporation's liability under section 324A is unrelated to its status as shareholder in the subsidiary corporation.<sup>245</sup> Under the Good Samaritan Doctrine, a parent is viewed as any other entity who undertakes to provide the subsidiary with services.<sup>246</sup> A parent should not be permitted to use its status as shareholder to exempt itself from the standard of due care that every other Good Samaritan must adhere to.<sup>247</sup> The Good Samaritan Doctrine does not mandate that parent corporations refrain from assisting their subsidiary corporations. It simply requires that if parent corporations choose to provide their subsidiaries with services, then they must use reasonable care when doing so.

### C. *The Ugly*

A particularly unpleasant result of the Good Samaritan Doctrine's application in the products liability arena is the disparity in verdicts due to states' modifications of section 324A.<sup>248</sup> Nevertheless, the modified versions of section 324A have remedied some of the policy concerns present in the Restatement's version. New York supplements section 324A with the additional requirement of a misrepresentation or non-disclosure on the part of the defendant that misleads the plaintiff to his or her detriment.<sup>249</sup> Reliance by the plaintiff is traditionally one of three possible ways to impose liability on a Good Samaritan under section 324A, yet in New York, reliance is a prerequisite to a successful claim.<sup>250</sup>

By requiring the element of reliance, New York focuses on the relationship between the plaintiff and the Good Samaritan. In fact, the court requires a "direct relationship" between the plaintiff and defendant, noting in *Eisman* that the relationship between the parties must be such that the plaintiff has the right to rely upon the Good Samaritan for information and the Good Samaritan owes a duty to give it with care.<sup>251</sup> Focusing on the relationship between the parties prevents virtually limitless liability to a universe of plaintiffs, eliminating many claims in situations in which the Good Samaritan did not owe a duty.<sup>252</sup>

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<sup>245</sup> See 10 FLETCHER, *supra* note 197, § 4878, at 351.

<sup>246</sup> See *Heinrich*, 532 F. Supp. at 1356.

<sup>247</sup> See *id.*

<sup>248</sup> See *supra* notes 54–92 and accompanying text; *In re Silicone Breast Implant Litigation*, N.Y. L.J., Sept. 27, 1995, at 25 (N.Y. Sup. Ct., 1st Dept.) (denying New York breast implant plaintiffs right to bring action against Dow Chemical) [hereinafter *In re Silicone New York*].

<sup>249</sup> *Eisman v. New York*, 511 N.E.2d 1128, 1135 (N.Y. 1987).

<sup>250</sup> See *id.*; *In re Silicone New York*, *supra* note 248, at 25.

<sup>251</sup> *Eisman*, 511 N.E.2d at 1135; *In re Silicone New York*, *supra* note 248, at 25.

<sup>252</sup> See *Eisman*, 511 N.E.2d at 1135.

Furthermore, imposing liability only if the Good Samaritan makes an affirmative misrepresentation or nondisclosure limits Good Samaritans' liability and thus furthers the policy of encouraging Good Samaritans to act.<sup>253</sup>

Yet there are negative consequences that flow from New York's modification of the elements required for a valid negligent undertaking claim. By mandating that reliance be present in the negligent undertaking claims, New York unfairly disadvantages the New York breast implant plaintiffs as compared to breast implant plaintiffs in other states.<sup>254</sup> New York's additional requirement caused the court in *In re New York State Silicone* to ignore what would have been a valid section 324A claim in virtually every other jurisdiction.<sup>255</sup> The court found only a tenuous connection between Dow Chemical and the breast implant plaintiffs and that Dow Chemical never undertook to provide the plaintiffs with any services.<sup>256</sup> A court in a traditional section 324A jurisdiction would recognize that although Dow Chemical may not have provided services to the breast implant plaintiffs, Dow Chemical undertook Dow Corning's duty owed to breast implant recipients by conducting research and testing on silicone for them.<sup>257</sup> Dow Chemical's undertaking of Dow Corning's duty is thus sufficient to impose liability under section 324A(b), which imposes liability on a Good Samaritan for undertaking a duty owed by another to a third person.<sup>258</sup>

The New York trial court's unique analysis of the breast implant plaintiffs' negligent undertaking claim also caused them to ignore section 324A(a), which imposes liability when the Good Samaritan's failure to exercise reasonable care increases the plaintiff's risk of harm.<sup>259</sup> Because the court found that the plaintiffs did not rely on Dow Chemical's information in making their decision to receive breast implants, the plaintiffs' claim could not succeed.<sup>260</sup> In a traditional section 324A jurisdiction, the breast implant plaintiffs' claim would succeed despite the lack of reliance if the court found that Dow Chemical's negligent testing and recommendations increased the risk of harm to the breast implant recipients.<sup>261</sup>

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<sup>253</sup> See *id.*

<sup>254</sup> See *In re Silicone New York*, *supra* note 248, at 25.

<sup>255</sup> See *id.* For a listing of states that follow § 324A, see *supra* note 6.

<sup>256</sup> See *In re Silicone New York*, *supra* note 248, at 25.

<sup>257</sup> See *In re Silicone*, 887 F. Supp. at 1461-62.

<sup>258</sup> RESTATEMENT, *supra* note 3, § 324A(b).

<sup>259</sup> *Id.* § 324A(a).

<sup>260</sup> *In re Silicone New York*, *supra* note 248, at 25.

<sup>261</sup> See RESTATEMENT, *supra* note 3, § 324A(a).



Finally, the court's focus on the relationship between the breast implant plaintiffs and Dow Chemical clouded its opinion and imposed a requirement that is not expressly or implicitly contained in section 324A.<sup>262</sup> Section 324A addresses a Good Samaritan's liability to a third person, rather than liability to the person the Good Samaritan helps directly.<sup>263</sup> Furthermore, the language of section 324A expressly focuses on the actions of the Good Samaritan, rather than on the relationship between the Good Samaritan and the third person.<sup>264</sup> By focusing on the plaintiff's relationship with the defendant, the court essentially misplaced the plaintiff's negligent undertaking cause of action under the Restatement (Second) of Torts Section 323, used when a direct beneficiary of the Good Samaritan's services seeks to impose liability.<sup>265</sup> This New York court misunderstood and incorrectly analyzed the plaintiffs' valid negligent undertaking claim, due in part to the confusion resulting from New York's modifications of section 324A.

Minnesota's modification of 324A is similar to New York's modification in its language but less severe in its application.<sup>266</sup> Minnesota defines reliance in much the same way as New York, requiring that reliance be based on specific actions or representations that cause the plaintiffs to forego other alternatives of protecting themselves.<sup>267</sup> Unlike New York, however, Minnesota does not require reliance as a prerequisite to imposing liability under section 324A.<sup>268</sup> Minnesota places the reliance element in the same position as the Restatement—as one of a variety of conditions which may be used to impose liability for negligent performance of an undertaking.<sup>269</sup> Although this aspect of Minnesota's modification will not cause a problem for plaintiffs, the conspicuous absence of section 324A(b), undertaking to perform a duty owed by another to a third person, from Minnesota's modified

<sup>262</sup> See *id.* § 324A.

<sup>263</sup> See *id.* § 324A cmt. a (explaining that § 323 addresses the liability of the actor to the one to whom he has undertaken to render services).

<sup>264</sup> See *id.* § 324A. This section provides liability for "one who undertakes to render services for another which the [Good Samaritan] should recognize as necessary for the protection of a third person or his things . . ." *Id.* Section 324A also focuses on the Good Samaritan's undertaking and the Good Samaritan's failure to exercise reasonable care. See *id.* The only plaintiff-based wording in § 324A is in subsection (c), which focuses on the plaintiff's reliance. See *id.*

<sup>265</sup> See *id.* § 323, § 324A cmt. a.

<sup>266</sup> See *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 806-07, 807 n.9, n.11 (Minn. 1979); *supra* notes 84-92 and accompanying text.

<sup>267</sup> *Cracraft*, 279 N.W.2d at 807.

<sup>268</sup> Compare *id.* at 806-07 (noting that reasonable reliance tends to impose duty of care) with *Eisman*, 511 N.E.2d at 1135 (noting that duty of care is only imposed when there is misrepresentation or nondisclosure by defendant which misleads plaintiff to his/her detriment).

<sup>269</sup> See *Cracraft*, 279 N.W.2d at 806-07; RESTATEMENT, *supra* note 3, § 324A.

version will prevent some plaintiffs in that state from bringing a successful claim against a parent corporation.<sup>270</sup> The absence of this avenue of liability will be felt most by plaintiffs in the corporate arena because a parent corporation's actions often supplant a duty owed by its subsidiary corporation to the consumer.<sup>271</sup>

Massachusetts's modification of section 324A requires a plaintiff to prove gross negligence where a Good Samaritan provided its services gratuitously.<sup>272</sup> Accordingly, the plaintiffs must prove that the Good Samaritan performed its services for consideration in order to avoid application of the heightened negligence standard.<sup>273</sup> Requiring gross negligence for gratuitous undertakings encourages true Good Samaritans—those who provide aid without any selfish motive—to act without fear of liability while requiring that they do not act recklessly. Applied in the corporate arena, an older, more experienced parent corporation may offer its expertise to a subsidiary corporation without much fear of liability. Nevertheless, in this situation the parent corporation is disguised as a Good Samaritan but is actually providing its services with the hope of resulting profits.

The law provides little guidance as to what constitutes consideration in this context, for example, whether the Good Samaritan must be directly compensated for the services it provides or whether a profit motive alone is sufficient. In *In re Silicone*, the Northern District of Alabama implicitly suggested that a profit incentive is sufficient evidence of consideration.<sup>274</sup> Specifically, the court stated that it was unclear whether Dow Chemical ever received direct compensation from Dow Corning for its testing and recommendations; however, Dow Chemical certainly had an interest in Dow Corning's profits and a reason to render services to Dow Corning due to Dow Chemical's position as a fifty percent stockholder.<sup>275</sup> The court did not reach a definitive conclusion on this issue because section 324A does not condition liability upon proof of consideration.<sup>276</sup> A determination as to whether a share-

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<sup>270</sup> See *Cracraft*, 279 N.W.2d at 806-07; RESTATEMENT, *supra* note 3, § 324A(b).

<sup>271</sup> See, e.g., *In re Silicone*, 887 F. Supp. at 1461 (court concluded that jury could reasonably find that Dow Chemical undertook Dow Corning's duty to test and research silicone adequately); *Mahlum*, No. CV93-05941 (Plaintiff's Brief in Opposition to Defendant's Motion for JNOV or New Trial at 31) (plaintiffs argued that Dow Chemical assumed portion of Dow Corning's duty to properly test and ensure the safety of liquid silicone in breast implants).

<sup>272</sup> *Pierre v. United States*, 741 F. Supp. 306, 309 (D. Mass. 1990); *Mullins v. Pine Manor College*, 449 N.E.2d 331, 336 n.10 (Mass. 1983); see *supra* notes 55-65 and accompanying text.

<sup>273</sup> See *Pierre*, 741 F. Supp. at 309; *Mullins*, 449 N.E.2d at 336 n.10.

<sup>274</sup> See *In re Silicone*, 887 F. Supp. at 1461-62.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 1462.

holder's profit incentive constitutes proof of consideration would have greatly assisted Massachusetts plaintiffs in attempting to hold a parent corporation liable for negligent performance of an undertaking.

The United States District Court for the District of Massachusetts complicated this issue further in *Pierre v. United States*, interpreting the *Mullins* decision as requiring the plaintiff to show that the undertaking was an "indispensable part of a bundle of services" for which consideration had been given.<sup>277</sup> The *Pierre* court's interpretation of *Mullins* is erroneous. The Supreme Judicial Court of Massachusetts never expressed an intention to require an undertaking to be an indispensable part of a bundle of services in order for the actor to be subject to liability under section 324A.<sup>278</sup> In *Mullins*, this language surfaced amidst the court's observation that colleges generally provide their students with protection from criminal acts of third parties and that students are charged for this service.<sup>279</sup> The court thus stated that adequate security is an indispensable part of a bundle of services that colleges afford their students.<sup>280</sup> This statement is merely dicta. The Supreme Judicial Court of Massachusetts presumably did not intend to establish an additional element required for a voluntary undertaking.<sup>281</sup> *Pierre* has little weight in Massachusetts state courts because it is a federal district court decision; nevertheless, litigants should still consider it when preparing to bring a section 324A claim in Massachusetts.<sup>282</sup>

#### IV. THE FUTURE OF SECTION 324A

Breast implant litigants' love affair with the Good Samaritan Doctrine has not ended. Thirteen thousand breast implant victims have filed suit against Dow Chemical, many of them claiming negligent performance of an undertaking among their causes of action.<sup>283</sup> After Dow Corning took refuge behind the bankruptcy code, the 1.3 million recipients of Dow Corning implants were denied a source of compensation for their harm.<sup>284</sup> Now, many frustrated breast implant recipients

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<sup>277</sup> *Pierre*, 741 F. Supp. at 309. The court also noted that the undertaking in question need not have been specifically contracted for. See *id.*

<sup>278</sup> See *Mullins*, 449 N.E.2d at 336 & n.10. For a discussion of *Mullins*, see *supra* notes 57-65 and accompanying text.

<sup>279</sup> See *id.* at 336.

<sup>280</sup> *Id.*

<sup>281</sup> The additional element referred to here is the requirement that the undertaking be an indispensable part of a bundle of services. See *id.* Consideration, on the other hand, is clearly required for a § 324A claim in Massachusetts. See *supra* note 273 and accompanying text. For a definition of "voluntary undertaking," see *supra* note 62.

<sup>282</sup> See *Pierre*, 741 F. Supp. at 309.

<sup>283</sup> Joanne Wojcik, *Coverage*, *Bus. Ins.*, Feb. 19, 1996, at 1.

<sup>284</sup> *Id.*

are finally obtaining justice and relief with the aid of the Good Samaritan Doctrine.

Section 324A is also seeing action in another toxic tort/products liability arena: tobacco litigation.<sup>285</sup> Though the Good Samaritan Doctrine is not being used in this context to impose liability on a parent for rendering services to its subsidiary, plaintiffs are nevertheless using this tort to obtain compensation from large corporate defendants.<sup>286</sup> Minnesota and Massachusetts are among the states that have brought actions against tobacco companies to recover for Medicaid payments that the states paid on behalf of their citizens who were suffering from smoking-related illnesses.<sup>287</sup> Many of these states have already settled with one of the defendants, cigarette maker Liggett Group.<sup>288</sup>

The Good Samaritan Doctrine will likely achieve different results in different states. In Minnesota, the State survived the defendants' motion to dismiss the Good Samaritan count of its complaint.<sup>289</sup> In Massachusetts, the success of the Good Samaritan Doctrine in tobacco litigation remains to be seen.<sup>290</sup> Nevertheless, the Commonwealth's complaint provides insight into section 324A's applicability in the tobacco litigation arena.<sup>291</sup> The Commonwealth first alleged that the tobacco companies undertook a duty to Massachusetts citizens, and the Department of Medical Assistance, to aid the research effort into all aspects of tobacco use and human health and to disclose complete and accurate information about the effects of cigarette smoking on human health.<sup>292</sup> Next, the Commonwealth claimed that the defendants undertook to render services and recognized that such services were necessary for the protection of the health of millions of Massachusetts citi-

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<sup>285</sup> Commonwealth v. Philip Morris, Inc., No. 95-7378 (Mass. Sup. Ct. filed Dec. 19, 1995) (complaint); State v. Philip Morris, Inc., No. C1-94-8565 (Minn. Dist. Ct. May 19, 1995).

<sup>286</sup> Commonwealth v. Philip Morris, Inc., No. 95-7378 (complaint); State v. Philip Morris, Inc., No. C1-94-8565.

<sup>287</sup> Commonwealth v. Philip Morris, Inc., No. 95-7378 (complaint); State v. Philip Morris, Inc., No. C1-94-8565. In addition to Minnesota and Massachusetts, the states of Arizona, Connecticut, Florida, Illinois, Kansas, Louisiana, Maryland, Michigan, Mississippi, New Jersey, Oklahoma, Texas, Utah, Washington and West Virginia have all brought similar claims against the tobacco industry. *State Medicaid Tobacco Suits Update*, West's Legal News 12174, 1996 WL 656978, Nov. 14, 1996.

<sup>288</sup> Maria Shao, *Mass. Moves to Ink Pact*, BOSTON GLOBE, March 15, 1996, at 33, 37.

<sup>289</sup> State v. Philip Morris, Inc., No. C1-94-8565.

<sup>290</sup> The Commonwealth of Massachusetts's lawsuit against the tobacco companies is at the early stages of litigation. On May 20, 1996, a federal judge remanded the case to state court. See Judy Rakowsky, *Tobacco Suit Goes to Mass Courts*, BOSTON GLOBE, May 21, 1996, at 23. Additionally, Massachusetts labelled its Good Samaritan cause of action, contained in Count I of its complaint, as "Undertaking of Special Duty." Commonwealth v. Philip Morris, Inc., No. 95-7378 (complaint at ¶ 66).

<sup>291</sup> See *id.* (complaint).

<sup>292</sup> *Id.* (complaint ¶ 185).

zens.<sup>293</sup> The Commonwealth then asserted that the defendants breached their "special duty" by failing to exercise reasonable care in performing their undertaking.<sup>294</sup> Thus, the Commonwealth's assertion of a special duty undertaken by the defendants and the defendants' breach of that duty satisfied the first paragraph of section 324A.<sup>295</sup> The Commonwealth next alleged the causal link between the defendants' breach and the resulting harm, claiming that the tobacco companies' failure to use due care in performing their undertaking increased the risk of harm to the public and the cost of health care for the Commonwealth.<sup>296</sup>

The last element of a negligence claim, proof of harm, presents a problem for the Commonwealth of Massachusetts.<sup>297</sup> The damages that the Commonwealth allegedly suffered as a result of the defendants' conduct are presumably economic in nature; however, section 324A provides liability only for physical harm.<sup>298</sup> This obstacle could preclude states' recovery from tobacco companies using a claim of negligent performance of an undertaking.<sup>299</sup>

## V. CONCLUSION

There are endless possibilities for applying the Good Samaritan Doctrine in the product liability arena. This tort lends itself well to products liability cases due to the abundance of subsidiary corporations that produce high-risk products and consumers' reliance on manufacturers for the safety of their products. Moreover, frustrated plaintiffs who are faced with a judgment-proof defendant now have a viable alternative to piercing the subsidiary's corporate veil or waiting in line with the subsidiary corporation's other creditors.

The Good Samaritan Doctrine provides equitable relief in an equitable manner—by imposing liability based on the defendant's affirmative actions. Requiring individuals and corporations to use due care when they act—regardless of whether they are bound by contract or compensated for their services—can only be a positive step for our

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<sup>293</sup> *Id.* (complaint ¶ 186).

<sup>294</sup> *Id.* (complaint ¶ 187).

<sup>295</sup> *Commonwealth v. Philip Morris, Inc.*, No. 95-7378 (complaint ¶¶ 185-88).

<sup>296</sup> *Id.* (complaint ¶ 187). Although unclear in the complaint, the Commonwealth possibly pled a reliance claim under § 324A(c) as well. *See id.* The language "above and beyond what [health care costs] would have been had defendants not publicly represented that they were going to engage in the undertaking" suggests an element of reliance. *See id.*

<sup>297</sup> *Id.* (complaint ¶ 188).

<sup>298</sup> *See id.* (complaint ¶ 188); RESTATEMENT, *supra* note 3, § 324A.

<sup>299</sup> *See* RESTATEMENT, *supra* note 3, § 324A.

society.<sup>300</sup> Furthermore, mandating that parent corporations use due care when providing assistance to their subsidiaries ensures that consumers do not bear the burden of parent corporations' limited liability. The *Mahlum* jury's award of ten million dollars in punitive damages is more than just a large sum of money; it is a message that the public refuses to let corporations escape liability for dispensing negligent information. Armed with section 324A, litigants now have the power to transform this morally-grounded policy into a legally enforceable reality.

NICOLE ROSENKRANTZ

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<sup>300</sup> See *Glanzer v. Shepard*, 134 N.E. 275, 277 (N.Y. 1922). While requiring corporations to use due care when providing services to their subsidiaries is clearly beneficial, whether individuals should be bound by this rule is a murkier issue. One would think that the Good Samaritan Doctrine would have a chilling effect on individuals. This doctrine has existed for so long, however, that it is difficult to determine whether more Good Samaritans would emerge in its absence. The benefits and costs of requiring the "road-side" Good Samaritan to use due care are beyond the scope of this Note.