

Chapter 5

Duties and Immunities

5.1 Introduction

Although the duty requirement has received the greatest discussion in the context of negligence cases, it is, in fact, an essential requirement of any tort cause of action. For the most part, in strict liability cases, courts have adopted a fairly traditional negligence approach. The primary difference is that in strict liability products cases, the class of defendants who are held to owe a duty is narrower, made up only of those who can be classified as “sellers” who are “engaged in the business of selling” products of the type alleged to be defective.¹ There is no similar restriction in negligence cases and, therefore, provided the other elements are found to exist, one who engages in an isolated sale, for example, may be subject to liability. Nevertheless, because most of the same issues arise regardless of the legal theory presented, it is useful to consider duty as a whole, rather than to unnecessarily repeat the discussion in connection with each individual legal theory.²

Immunities, whether created by the judiciary or legislature, are simply the flip side of duties.³ A finding of “duty” allows the plaintiff to proceed and attempt to prove liability. A determination of “no duty” is simply another way of expressing that, because of the relationship of the parties or some other policy sought to be advanced by the judiciary or legislature, a particular defendant or class of defendants is immune from liability even if their conduct might have otherwise subjected them to liability.

1. Restatement (Second) of Torts, §402A(1)(a) (1965). See Chapter 4, §4.2.1.1.

2. Specialized duty issues are, however, separately covered with regard to some of the legal theories. In the case of warranty law, the implied warranty of merchantability only arises in the case of commercial sellers and state law often limits who can be sued for breach of warranty by the imposition of vertical privity requirements. The question of who is owed a duty, i.e., who can sue for breach, arises under UCC §2-318 (“horizontal privity”). See Chapter 3, §§3.2 and 3.3. Special restrictions on duty also have been developed in the context of negligent misrepresentation when the resulting injury is “pure economic loss.” See Chapter 2, §2.4.1.2. Similarly, restrictions have been developed concerning recovery for “pure economic loss” in negligence, strict liability and fraudulent misrepresentation. These issues are taken up in Chapter 7, §7.7.

3. See Dan B. Dobbs, *The Law of Torts*, §225, at 575–76 (2000) (comparing “no-duty rules” and “immunities” and concluding “Sometimes... the difference between the two lies in how we are likely to feel about the rules rather than in their ultimate legal effect on the plaintiff’s claim. The plaintiff cannot prevail against a defendant who is under no duty and equally cannot prevail against a defendant who is immune and to that extent the two concepts are the same.”).

5.2 Duty: In General

At its most basic, duty refers to the existence of a relationship between the defendant and plaintiff in which the plaintiff was a foreseeable victim from the standpoint of the defendant given the nature of the conduct in which the defendant was engaging. In Great Britain, the relational idea of duty was expressed in *Heaven v. Pender*.⁴ The case involved the liability of a dock owner who provided defective “staging” (scaffolding) to a ship painter. The plaintiff, an employee of the painting contractor, was injured when a supporting rope broke and the staging collapsed while the plaintiff was standing on it.⁵ Brett, M.R., explained that a duty would arise “whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to other persons or property of the other. . . .”⁶ Restating the proposition for use in a products liability case based on negligence, he asserted the general rule of duty is that:

[W]henever one person supplies goods, or machinery, or the like, for the purpose of their being used by another person under such circumstances that every one of ordinary sense would, if he thought, recognise at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing.⁷

Although he later attempted to back off this attempt to state “duty” as a universal principle,⁸ it was, nevertheless, eventually accepted by the English courts. Thus, in *Donoghue v. Stevenson*,⁹ a case in which a decomposing snail was found inside of a bottle of ginger beer, Lord Atkin, relying on Brett’s judgment in *Heaven v. Pender* formulated the “neighbour principle.”

The rule that you are to love your neighbour becomes in law: You must not injure your neighbour, and the lawyers’ question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in my contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.¹⁰

In this country, the “relational” concept of duty had been given expression a couple years earlier by Judge Cardozo in *Palsgraf v. Long Island R. Co.*¹¹ As every first year law student learns, a railroad employee, while helping a passenger on board, care-

4. [1882–83] L.R. 11 Q.B.D 503 (C.A. 1883).

5. *Id.* at 506.

6. *Id.* at 509.

7. *Id.* at 510.

8. See *Le Lievre v. Gould*, [1893] 1 Q.B. 491, 497 (C.A.).

9. *Donoghue (or M’Alister) v. Stevenson*, [1932] App. Cas. 562 (H.L.).

10. *Id.* at 580.

11. 162 N.E. 99 (N.Y. 1928).

lessly knocked a newspaper-wrapped package from a passenger's grasp. The package fell and exploded causing a scale on the train platform to fall over onto the plaintiff, Helen Palsgraf.¹² Cardozo reasoned that the defendant's employee's conduct, while undoubtedly negligent with regard to the passenger, was not negligent with reference to Mrs. Palsgraf who was standing at a considerable distance.¹³ "[T]he orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty,"¹⁴ he wrote:

What the plaintiff must show is "a wrong" to herself; i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct, "wrongful" because unsocial, but not "a wrong" to any one.... The risk reasonably to be perceived defines the duty to be obeyed and the risk imports relation; it is risk to another or to others within the range of apprehension.¹⁵

True "relational" duty problems are relatively rare in products liability cases. Commonly, the defendants in these cases will be manufacturers and/or other distributors of the product involved in the accident. The plaintiffs are typically purchasers, users or consumers of the product or someone who has the misfortune to be physically near the product when, depending on the product, it falls from the sky, fails to stop, explodes or what have you. In any case, purchasers, users, consumers and most bystanders will have been foreseeable from the standpoint of the defendant while he, she or it was doing whatever is alleged to have been negligent or, in a strict liability case, placed a defective product into the stream of commerce. In other words, the plaintiffs will typically be the defendant's "neighbours" in Lord Atkin's sense of the term, or within the "orbit of the danger" in Judge Cardozo's.

The Second Restatement of Torts, section 281 states the principle as follows: "The actor is liable for an invasion of an interest of another, if: (b) the conduct of the actor is negligent with respect to the other, or the class of persons within which he is included...."¹⁶ The comments explain:

In order for the actor to be negligent with respect to the other, his conduct must create a recognizable risk of harm to the other individually, or to a class of persons—as, for example, all persons within a given area of danger—of which the other is a member. If the actor's conduct creates such a recognizable risk of harm only to a particular class of persons, the fact that it in fact causes harm to a person of a different class, to whom the actor could not reasonably have anticipated injury, does not make the actor liable to the persons so injured.¹⁷

In Chapter 14 of the Second Restatement, entitled "Liability of Persons Supplying Chattels for the Use of Other," section 395 provides, in part, that:

A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for it for a purpose for which the manufacturer should expect it to be used *and to those whom he should expect to be endangered by its probable use*, is subject to liability for phys-

12. *Id.*

13. *Id.*

14. *Id.* at 100.

15. *Id.*

16. Restatement (Second) of Torts, § 281 (1965).

17. *Id.*, cmt. c.

ical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied.¹⁸

In the comments, it is explained that “[t]he words ‘those who use the chattel’ include...all persons whom the vendee or his subvendee or donee permits to use the article irrespective of whether they do so as his servants, or passengers for hire...or as licensees.... They also include any person to whom the subvendee or donee sells or gives the chattel ad infinitum, and also all persons whom such subvendee or subdonee permits to use the chattel or to share in its use.”¹⁹

Comment *i*, entitled “Persons endangered by use” explains that:

The words “those whom he should expect to be endangered by its probable use” may likewise include a large group of persons who have no connection with the ownership or use of the chattel itself. Thus the manufacturer of an automobile, intended to be driven on the public highway, should reasonably expect that, if the automobile is dangerously defective, harm will result to any person on the highway, including pedestrians and drivers of other vehicles and their passengers and guests; and he should also expect danger to those upon land immediately abutting on the highway.²⁰

Though normally the requisite relationship will be found, this generalization is subject to occasional exceptions. Thus, for example in *Tucker v. Collar*²¹ the court, purporting to rely on a Palsgrafian analysis, held that while a seller of a negligently made refrigerator might have owed a duty to a tenant/product owner, it was proper to instruct the jury that the product owner’s landlord who sustained fire damage to her building might not have been foreseeable. In other words, foreseeable danger to the tenant could not be the basis of imposing liability to the landlord unless “her interests were within the danger area.”²²

One can see the same issue arise, on occasion, in cases brought utilizing a strict liability approach.²³ Perhaps the most famous is *Winnett v. Winnett*,²⁴ a case involving a strict liability action by a four-year-old child against the manufacturer of farm equipment. While at her grandfather’s farm, the child was injured when she placed her hand on the conveyer belt of a forage wagon.²⁵ Noting that in products liability cases most courts categorize plaintiffs as users, consumers or innocent bystanders, the court observed,

We...find this categorization of plaintiffs...helpful only in a general sense. In the unusual case, the application of these labels does not assist resolution of the issues. In our judgment the liability of a manufacturer properly encompasses only those individuals to whom injury from a defective product may reasonably be foreseen and only those situations where the product is being

18. Restatement (Second) of Torts, § 395 (1965) (emphasis added).

19. *Id.*, § 395 cmt. h.

20. *Id.*, § 395 cmt. i. Also see Restatement (Second) of Torts, § 398 (1965) providing that “A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.”

21. 285 P.2d 178 (Ariz., 1955).

22. *Id.* at 181.

23. Pennsylvania, however, refuses to apply foreseeability principles in strict liability cases. See Chapter 4, § 4.2.3.2.3.3.

24. 310 N.E.2d 1 (Ill. 1974).

25. *Id.* at 2.

used for the purpose for which it was intended or for which it is reasonably foreseeable that it may be used.²⁶

* * *

It cannot, in our judgment, fairly be said that a manufacturer should reasonably foresee that a four-year-old child will be permitted to approach an operating farm forage wagon or that the child will be permitted to place her fingers in or on the holes in its moving screen.²⁷

This analysis, of course, is pure *Palsgraf*. The problem with it, as in all cases seeking to utilize a foreseeable plaintiff approach, is that the dividing line between those who are foreseeable victims from the standpoint of the defendant and those who are not, is rarely drawn based on anything more than the court's intuitive sense of how far a defendant's liability should extend. Thus, in *Richelman v. Kewanee Machinery & Conveyor Co.*,²⁸ a case virtually identical to *Winnett* on its facts, an Illinois appellate court allowed the question regarding the foreseeability of the plaintiff, a two-year-old child, to go to the jury.²⁹ In *Kirk v. Reese Hosp. and Medical Center*,³⁰ on the other hand, the Illinois Supreme Court, relying on *Winnett*, held that pharmaceutical manufacturers owed no duty to a passenger in an automobile driven by a consumer of their products.³¹

5.3 “Rules” and “Standards” Approaches to Duty or “No-Duty” Decisions

For generations, there has been an on-going debate as to whether tort law should develop as a series of judicially formulated rules which become precedent for subsequent cases, on the one hand, or as a set of behavioral standards to be applied on a case-by-case basis by the jury or judge as the trier of fact, on the other. In *Baltimore & O. R. Co v. Goodman*,³² Oliver Wendell Holmes, confronted with a case in which a truck driver was hit by a train at a railroad crossing, declared that the driver's failure to get out of his vehicle to check for an oncoming train was contributory negligence. Had he simply stated that, as a factual matter, a jury could have determined the driver's conduct to have been unreasonable under the facts of that particular case, or concluded, under the facts of that case, a jury necessarily had to find that driver's conduct was unreasonable, his decision would have been unremarkable. He continued, however, asserting that “the

26. *Id.* at 4. See also *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1007–08, 1009–10 (Pa. 2003) (strict liability count could not be maintained since two-year old child not an intended user of a disposable lighter, but duty was owed to her as a foreseeable user under the negligence count).

27. 310 N.E.2d at 5.

28. 375 N.E.2d 885 (Ill. App. 1978).

29. *Id.* at 889. Also see *Pierce v. Hobart Corp.*, 512 N.E.2d 14, 16–17 (Ill. App. 1987) (ten year old boy caught his hand in a food grinder—jury question); *Stanfield v. Medalist Industries, Inc.*, 340 N.E.2d 276, 280 (Ill. App. 1975) (whether an inexperienced or unsupervised adult operator of industrial machinery is a foreseeable user is a jury question); *Darsan v. Globe Slicing Machine Co.*, 606 N.Y.S.2d 317, 318 (App. Div. 1994) (fourteen-year-old user of a food grinder not foreseeable as a matter of law where child labor laws prohibited employment of children of that age).

30. 513 N.E.2d 387 (Ill. 1987), *cert. denied*, 485 U.S. 905 (1988).

31. *Id.* at 394.

32. 275 U.S. 66 (1927).

question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the Courts.”³³ In other words, he announced a “rule-based” approach, under which the judge established a rule of behavior, in that case the so-called “stop, look and listen” rule, which had to be followed in subsequent cases. Whenever a driver came to a railroad crossing, he had to exit his vehicle. If he did not, he would be declared negligent regardless of why he behaved as he did on the particular occasion.

In 1934, in *Pokara v. Wabash Ry. Co.*,³⁴ Benjamin Cardozo reconsidered and rejected Holmes’ rule-based approach. After laying out a number of scenarios in which exiting one’s vehicle at a railroad crossing would either be pointless or even increase the danger, he concluded:

Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. The need is the more urgent when there is no background of experience out of which the standards have emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without. Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the commonplace or normal. In default of the guide of customary conduct, what is suitable for the traveler caught in a mesh where the ordinary safeguards fail him is for the judgment of a jury. The opinion in Goodman’s Case has been a source of confusion in the federal courts to the extent that it imposes a standard for application by the judge, and has had only wavering support in the courts of the states. We limit it accordingly.³⁵

Generally speaking, Cardozo’s view that assessment of conduct should take place on a case-by-case basis with the jury as the body entrusted to determine whether a party’s conduct met the reasonableness standard under all of the facts and circumstances, has prevailed. Nevertheless, the matter is by no means settled, and many appellate courts, particularly those that believe that it is properly within the judiciary’s function to declare public policy, continue to make rules, particularly rules which assert that a defendant has a duty to do specific things, or no duty to do specific things—warn, or warn certain classes of persons, or recall defective products, and so on.³⁶

Other appellate courts, when dealing with precisely the same types of cases, take the view that the concept of “duty” never requires that an individual perform any specific act nor immunizes a party from liability if they have failed to do some other specified act. It simply deals with the principle that, because one should foresee that the activity in which he or she is engaged might injure the plaintiff, the actor must behave reasonably toward that foreseeable victim. In other words, duty is the “on-off” switch of the tort cause of action. If the court determines that plaintiff is not a foreseeable victim given the nature of the defendant’s conduct, no duty exists and the case ends there. If, on the other hand, the plaintiff is a foreseeable victim, then a duty is owed to that person and the plaintiff may proceed to attempt to establish that the duty was breached. Under this view, there is no such thing as a duty to warn, or to recall, or what have you,

33. *Id.* at 70.

34. 292 U.S. 98 (1934).

35. *Id.* at 583 (citation omitted).

36. For a discussion of the legitimacy of judicial rulemaking, see Martin A. Kotler, *Social Norms and Judicial Rulemaking: Commitment to Political Process and the Basis of Tort Law*, 49 U. Kan. L. Rev. 65 (2000) (arguing that judges have no warrant to dictate social policy).

but rather, a duty to behave reasonably under the particular facts and circumstances of the case, with the jury as the arbiter of whether the duty was breached or not.

In *Lasley v. Shrake's Country Club Pharmacy*,³⁷ a case where the defendant sought to have the court adopt a rule that pharmacists owe no duty to warn a customer, the court explained:

Shrake's contends that the trial court correctly ruled that Shrake's had no duty to warn Lasley or his physician of the potentially addictive nature of drugs legitimately prescribed for Lasley. We believe, however, that the trial court's ruling confused the concept of duty with that of the standard of care.

In *Markowitz*, the Arizona Supreme Court cautioned against confusing the existence of a duty with details of the standard of conduct. Specific details of conduct do not determine whether a duty exists but instead bear on whether a defendant who owed a duty to the plaintiff breached the applicable standard of care. In explaining the concept, the *Coburn* court quoted from Prosser and Keeton:

"It is better to reserve 'duty' for the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other. * * * [I]n negligence cases, the duty [if it exists] is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk. What the defendant must do, or must not do, is a question of the standard of conduct required to satisfy the duty."³⁸

Finally, there is one critically important distinction that is all too often overlooked or misunderstood. Even under a "standards approach," if the trial judge determines that under the facts of a particular case reasonable people could not disagree as to whether a party met the applicable standard of behavior or failed to meet it, trial judges have the power to take the case away from the jury and dictate the conclusion "as a matter of law." This power is granted primarily to permit greater efficiency in the trial process. There is simply no point in wasting everybody's time by submitting the case to the jury for decision after the outcome has become a foregone conclusion. In other words, the trial judge's decision in these cases is the "gimme putt" of the judicial system and, as every golfer who has ever missed a short putt should recognize, a determination that the outcome is not reasonably in doubt should be made only in the clearest of cases.

There are two important points in this regard. First, a trial judge who decides that the behavioral standard has been met or not met, as a matter of law, is not engaging in rules-based decisionmaking. The case is still decided by reference to the jury's assessment of the party's compliance or non-compliance with the relevant standard, albeit indirectly through the trial judge's prediction of what the jury would do. More importantly and unfortunately, it is all too common for judges to assert that there is no duty in a particular case when, what is really meant, is that they have concluded that reasonable people could not find the conduct to be negligent, i.e., there is no breach as a matter of law.

37. 880 P.2d 1129 (Ariz. App. 1994).

38. *Id.* at 1031–32 (citing *Markowitz v. Arizona Parks Bd.*, 706 P.2d 364, 367 (Ariz. 1990); *Coburn v. City of Tuscon*, 691 P.2d 1078, 1080 (Ariz. 1984) (quoting W. Page Keeton, Dan B. Dobbs, Robert E. Keeton and David G. Owen, *Prosser and Keeton on Torts*, § 52, at 356 (5th ed. 1984) (hereinafter cited as "*Prosser & Keeton*")).

5.4 Extension of the Foreseeability Principle: The Rescue Doctrine

The notion that a duty was owed only to foreseeable victims of the defendant's conduct has been extended somewhat by the "rescue doctrine."³⁹ As stated by Judge Cardozo in *Wagner v. International Ry. Co.*:⁴⁰ "Danger invites rescue. The cry of distress is the summons to relief. . . . The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer."⁴¹

Though many casebooks and texts treat the doctrine under the heading of "proximate cause," it is better understood as a judicial determination which serves to expand the "orbit of danger," and hence the "orbit of the duty," to include those persons who attempt to come to the aid of the initial foreseeable victim. In other words, rescue is declared to be a foreseeable event and, therefore, rescuers are foreseeable victims. This permits the rescuer to maintain a lawsuit seeking to recover for injuries sustained in the rescue attempt, although it does not ensure that ultimately the rescuer's lawsuit will be successful. *Govich v. North American Systems, Inc.*,⁴² for example, involved a case where a young hearing-impaired man entered his burning home in an unsuccessful attempt to rescue a dog specially trained to provide him with assistance. He sustained personal injury and emotional distress as a consequence.⁴³ Suit, alleging negligence, strict liability, and breach of express and implied warranty,⁴⁴ was filed against the manufacturer of an electric coffee maker and the manufacturer of an allegedly defective component part. The trial court had granted defendant's motion for summary judgment.⁴⁵ Reversing, the New Mexico Supreme Court, wrote:

Whether the person or entity creating the peril owes a duty to the rescuer is a matter of law to be decided by the court. The person or entity creating the peril owes an independent duty of care to the rescuer, which arises from a policy, deeply imbedded in our social fabric, that fosters rescue attempts. So far as the rescue doctrine can be understood as shorthand for a public policy, reflected in the law, imposing an independent duty of care owed a rescuer by persons creating unreasonable risks of harm to others, we think that facet of the doctrine remains vital under New Mexico's comparative negligence regime.⁴⁶

It is worth stressing that, although the rescue doctrine originally arose in a negligence context, courts have had little problem expanding it to products liability actions based on legal theories of liability other than negligence as well.⁴⁷

39. According to the court in *Guarino v. Mine Safety Appliance Co.*, 306 N.Y.S.2d 942 (N.Y. 1969), "the rescue doctrine had its historical genesis in *Eckert v. Long Is. R.R. Co.* (43 N.Y. 502 [1871]), which stated that the plaintiff's intestate, who was killed while attempting to rescue a child on the railroad tracks, was not to be found contributorily negligent unless acting rashly or recklessly." *Id.* at 944.

40. 133 N.E. 437 (N.Y. 1921).

41. *Id.*

42. 814 P.2d 94 (N.M. 1991).

43. *Id.* at 96.

44. *Id.*

45. *Id.* at 100-01.

46. *Id.* at 100 (citations omitted).

47. See e.g. *Guarino v. Mine Safety Appliance Co.*, 306 N.Y.S.2d 942 (cited at note 39) (breach of warranty); *Caldwell v. Ford Motor Co.*, 619 S.W.2d 534 (Tenn. App. 1981) (strict liability).

5.4.1 The Fireman's Rule

Although traditional Palsgrafian foreseeable plaintiff duty principles have been expanded to include rescuers within the orbit of the duty owed to the person being rescued, there has been one notable exception. Firemen, and perhaps policemen and other professional rescuers,⁴⁸ were regarded by many courts as falling into a special class of persons to whom no duty was owed notwithstanding the fact that they are clearly “rescuers.” This “no duty” rule,⁴⁹ often dubbed “the fireman’s rule” found its primary application in the occupier liability cases. As the court in *Court v. Grzelinski*⁵⁰ explained:

[T]he “fireman’s rule,” is founded in negligence and derives from numerous cases... which rest on two distinguishable propositions. The more common of the two propositions is that a *landowner or occupier* owes no duty of care to firemen to prevent the fire which necessitated their presence on the premises. The other proposition is that a fireman cannot recover *from any defendant* for any injury resulting from those risks inherently involved in fire fighting.⁵¹

The *Grzelinski* court expressed a willingness to allow the fireman’s rule to stand in the context of a land occupier’s liability, but declined to expand the rule “to a free-floating proposition that a fireman cannot recover for injuries resulting from risks inherently involved in fire fighting.”⁵² As a result, the plaintiff, a fireman who was injured when an automobile’s gas tank exploded, was permitted to maintain a products liability action against the seller of the automobile.⁵³

Nevertheless, some other jurisdictions appear to have been willing to make that expansion and apply the “fireman’s rule” to cases brought against the seller’s of negligently made or otherwise defective products that cause injury to rescuers. Thus, for example, in *Brown v. General Electric Co.*,⁵⁴ a firefighter was injured while fighting a fire allegedly started by a defective coffee urn. The court refused to allow him to maintain the action, finding that the fireman’s rule applied, not the rescue doctrine.⁵⁵

Although the current status of the rule appears to be somewhat uncertain, there is a substantial body of authority flatly denying recovery to this class of rescuers. Some cases

48. See e.g. *Fletcher v. Illinois Central & Gulf RR Co.*, 679 S.W.2d 240, 242 (Ky. App. 1984) (police); *Carter v. Taylor Diving & Salvage Co.*, 341 F.Supp. 628, 632 (E.D.La. 1972) (physician); *Berko v. Freda*, 459 A.2d 663, 666 (N.J. 1983) (police) (but abrogated by statute, see N.J. Stat. Ann. § 1A:62A-21); *Hack v. Gillespie*, 658 N.E.2d 1046, 1048 (Ohio 1996) (fire fighter or police officer); *Maltman v. Saur*, 530 P.2d 254, 258 (Wash. 1975) (military rescue team).

49. It is not uncommon for courts to refer to some kinds of “no duty rules” in this context as “primary assumption of risk.” See e.g. *Armstrong v. Mailand*, 284 N.W.2d 343, 348–49 (Minn. 1979). Primary assumption, as distinct from “secondary assumption,” is simply a way of expressing the notion that the defendant was not negligent because no duty to exercise due care was owed. *Id.* Secondary assumption of risk is used to describe the situation where a prima facie case of the defendant’s negligence can be established, but the plaintiff’s conduct of knowingly and voluntarily confronting the risk thereby created serves as an affirmative defense. See generally, *Blackburn v. Dorta*, 348 So.2d 287, 290 (Fla. 1977) (explaining the terminology). Also see Chapter 8, § 8.3.3.

50. 379 N.E.2d 281 (Ill. 1978).

51. *Id.* at 283.

52. *Id.* at 284.

53. *Id.* at 285.

54. 648 F.Supp. 470 (M.D.Ga. 1986).

55. *Id.* at 472 (citing *Buchanan v. Prickett & Sons, Inc.*, 279 N.W.2d 855, 857–58 (Neb. 1979)).

have found the rescuer to be unforeseeable in a Palsgrafian sense,⁵⁶ others have found assumption of risk as a matter of law,⁵⁷ or no proximate cause as a matter of law.⁵⁸ Additionally, a number of cases, somewhat vaguely, have refused to permit recovery based on “policy” considerations.⁵⁹

5.5 The Foreseeability Principle and Preconception Torts

In cases where a tortious act affects a pregnant woman in some manner which results in injury to the fetus, the modern approach is to find that a duty was owed to the unborn child.⁶⁰ When, on the other hand, there is a preconception tort and the woman subsequently conceives, courts are sharply divided on the question of whether a defendant can owe a duty to a child who, while harmed by the tortious conduct, was not yet in existence at the time the tortious act was done.⁶¹

*Jorgensen v. Meade Johnson Laboratories, Inc.*⁶² appears to have been the first case that permitted such an action to proceed. In that case, it was alleged that the mother’s preconception ingestion of birth control pills manufactured by the defendant caused chromosome damage to her which later resulted in the birth of twins afflicted with a chromosomal disorder.⁶³ In holding that the action could proceed, the court reasoned that:

If the view prevailed that tortious conduct occurring prior to conception is not actionable in behalf of an infant ultimately injured by the wrong, then an infant suffering personal injury from a defective food product, manufactured before his conception, would be without remedy. Such reasoning runs counter to the various principles of recovery which Oklahoma recognizes for those ultimately suffering injuries proximately caused by a defective product or instrumentality manufactured and placed on the market by the defendant.⁶⁴

56. See e.g. *Bobka v. Cook County Hospital*, 422 N.E.2d 999, 1002 (Ill. App. 1981) (relying on *Winnett v. Winnett*, 310 N.E.2d 1) (cited at note 24)).

57. See e.g. *Brown v. General Elec. Corp.*, 648 F.Supp. at 472 (cited at note 54) (expressing a lack of duty in terms of “primary assumption of risk”). See Chapter 8, § 8.3.3.

58. *Id.* at 473 (alternative basis for decision).

59. See e.g. *Giorgi v. Pacific Gas & Electric Co.*, 72 Cal. Rptr. 119, 122–23 (Cal. App. 1968).

60. If the child is not born alive, there is a question as to whether a wrongful death action can be brought. Since wrongful death cases are statutory actions, the ability to bring such a case commonly depends on the language of the statute itself and the court’s interpretation of the language. See e.g. *Endresz v. Friedberg*, 248 N.E.2d 901 (N.Y. 1969) (requiring a live birth as a condition of bringing a wrongful death case); *Thibert v. Milka*, 646 N.E. 1025 (Mass. 1995) (wrongful death action depends on whether fetus was viable at the time of injury).

61. *Hegyves v. Unjian Enterprises, Inc.*, 268 Cal. Rptr. 85 (Cal. App. 1991) (no duty); *Empire Casualty Co. v. St. Paul Fire & Marine Ins. Co.*, 764 P.2d 1191, 1196–97 (Colo. 1988) (insurance coverage problem based on failure to recognize RH incompatibility during earlier pregnancy-duty recognized); *McAuley v. Wills*, 303 S.E.2d 258 (Ga. 1983) (no duty); *Renslow v. Mennonite Hospital*, 367 N.E.2d 1250, 1254–55 (Ill. 1977) (duty owed); *Walker v. Rinck*, 604 N.E.2d 591, 594–95 (Ind. 1992) (duty); *Monusko v. Postle*, 437 N.W.2d 367, 369 (Mich App. 1989) (duty); *Bergstreser v. Mitchell*, 577 F.2d 22, 25 (8th Cir. 1978) (Missouri law) (duty); *Lynch v. Scheininger*, 744 A.2d 113, 126 (N.J. 2000) (duty).

62. 483 F.2d 237 (10th Cir. 1973) (Okla. law).

63. *Id.* at 239.

64. *Id.* at 240.

In *Albala v. City of New York*,⁶⁵ on the other hand, the plaintiff's mother's uterus had been punctured during an abortion four years prior to the plaintiff's birth. It was alleged that this negligently inflicted injury was responsible for the plaintiff's brain damage.⁶⁶ Falling back on the familiar "floodgates" argument, the court declined to recognize a duty, fearing that a different result would give rise to "[u]nlimited hypotheses accompanied by staggering implications..." and concluded that duty "cannot be judicially established in a reasonable and practical manner."⁶⁷ The *Albala* position was reiterated in *Enright v. Eli Lilly & Co.*,⁶⁸ a second-generation DES case.⁶⁹ The court again cited the "staggering implications" and, noting that "the rippling effects of DES exposure may extend for generations" asserted "[i]t is our duty to confine liability with manageable limits."⁷⁰ Finally, the majority cited the importance of ensuring that the development of prescription drugs not be excessively deterred.⁷¹

The blanket "no-duty rule" adopted in New York has not impressed all judges in other jurisdictions. In *Lough v. Rolla Womens' Clinic, Inc.*,⁷² the court wrote:

The concern expressed in *Albala*, that liability will not be confined to manageable boundaries if preconception torts are permitted, is speculation. The respondents have not directed this Court to any indication that the states permitting preconception torts have been swallowed by the kind of apocalypse of liability actions envisioned by the *Albala* court.⁷³

Similarly, in a recent malpractice decision, the New Jersey Supreme Court, in recognizing the existence of a duty explained, in language reminiscent of some of Cardozo's eloquence:

[O]ur Court's conception of foreseeability as a determinant of duty is of sufficient breadth to accommodate the principle that in appropriate circumstances a physician's duty should extend to children conceived after the physician's negligence occurred:

"The probability of injury by one to the legally protected interest of another is the basis for the law's creation of a duty to avoid such injury, and foresight of harm lies at the foundation of the duty to use care and therefore of negligence. The broad test of negligence is what a reasonably prudent person would foresee and would do in the light of this foresight under the circumstances. Negligence is clearly relative in reference to the knowledge of the risk of injury to be apprehended. The risk reasonably to be perceived defines the duty to be obeyed; it is the risk reasonably within the range of apprehension, of injury to another person, that is taken into account in determining the existence of the duty to exercise care. In other words, damages for an injury resulting from a negligent act

65. 429 N.E.2d 786 (N.Y. 1981).

66. *Id.* at 787.

67. *Id.* at 788.

68. *Enright by Enright v. Eli Lilly & Co.*, 570 N.E.2d 198 (N.Y. 1991).

69. DES (diethylstilbestrol) was a synthetic estrogen widely prescribed for roughly 25 years beginning in the late 1940s to prevent miscarriage. As it turned out, not only was it ineffective for its intended purpose, but it also caused vaginal and cervical cancer and pre-cancerous growth in the children exposed to it in utero. Since, it has been established that it also caused similar problems for subsequent generations.

70. 570 N.E.2d at 203 (cited at note 68).

71. *Id.* at 204.

72. *Lough by Lough v. Rolla Women's Clinic, Inc.*, 866 S.W.2d 851, 854 (Mo. 1983).

73. *Id.* at 854.

of the defendant may be recovered if a reasonably prudent and careful person should have anticipated, under the same or similar circumstances, that injury to the plaintiff or to those in a like situation would probably result.⁷⁴

Nevertheless, although most of the DES litigation has been brought in the New York courts, in the few second and third generation cases brought elsewhere, the *Enright* court's policy-centered restriction on duty seems to have garnered considerable support.⁷⁵

5.6 Acts and Omissions

The principle of “non-feasance” immunity—that, potentially, one can be held liable if one acted, but cannot be held liable if one failed or refused to act—is well established in Anglo-American law. The most obvious application of this “no-duty rule,” but by no means the only one, is evident in the cases where there has been a refusal to rescue. Although, as previously noted, as an extension of the Palsgrafian notion of foreseeability, a duty is owed not only to the foreseeable victim, but to the victim's rescuer as well,⁷⁶ the fact that a duty is owed to the rescuer if he or she chooses to act, does not obligate one to act and, absent some exception to the general no-duty rule, liability cannot be imposed on one who elects not to rescue, even if it could have been done easily and without risk.

There are, of course, numerous exceptions to the basic rule of non-feasance immunity, many of which center around the existence of certain relationships between the defendant and plaintiff. These special relationships, which may give rise to an affirmative obligation to act, include common carrier-passenger, innkeeper-guest, invitor-invitee and a few others.⁷⁷ However these relationship-based exceptions are rarely relevant in products liability cases. In fact, at least in the misrepresentation cases, courts have not shown any inclination to impose an affirmative obligation to disclose based solely on a product-manufacturer/product buyer relationship.⁷⁸

However, in addition to the exception based on pre-existing relationships, it is well established that if one puts another in a position of danger, whether this is done negligently or innocently, a duty arises to thereafter exercise reasonable care for the safety of the endangered person. Section 321 of the Second Restatement provides that:

(1) If an actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.

74. *Lynch v. Scheininger*, 744 A.2d at 126–27 (cited at note 61) (quoting *Hill v. Yaskin*, 380 A.2d 1107, 1109 (N.J. 1997)).

75. *Sparapany v. Rexall Corp.*, 618 N.E.2d 1098, 1101 (Ill. App. 1993); *Sorrells v. Eli Lilly & Co.*, 737 F.Supp. 678, 679 (D.D.C. 1990) (Md. law); *Grover v. Eli Lilly & Co.*, 591 N.E.2d 696, 699 (Ohio 1992).

76. *See supra* § 5.4.

77. *See generally*, Restatement (Second) of Torts, §§ 314A through 320 (1965).

78. *See e.g.* *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 593 (Ill. 1996) (no disclosure obligation based solely on relationship); *Wright v. Brooke Group Inc.*, 652 N.W.2d 159, 175 (Iowa 2002) (no general affirmative obligation to disclose); *Estate of White ex rel. White v. R.J. Reynolds Tobacco Co.*, 109 F.Supp.2d 424, 431 (D.Md. 2000) (no disclosure obligation).

(2) The rule stated in Subsection (1) applies even though at the time of the act the actor has no reason to believe that it will involve such a risk.

5.6.1 The Post-Sale Duty Cases: In General

Situations which involve the exception to the non-feasance immunity rule expressed in section 321, arise repeatedly in products cases. Assume for the sake of illustration that a manufacturer produces a product under the mistaken belief that the product poses no hidden danger to potential users or consumers. After the product has been placed on the market, however, the manufacturer or other seller receives notice that the product is more dangerous than it was thought to be at the point of sale—perhaps as the result of a manufacturing flaw, or design problem, or some inadequacy in the warnings and/or instructions which accompanied the product. Regardless of whether the manufacturer's initial marketing of the product was innocent or negligent, the presence of that product in the hands of users or consumers may present an unreasonable danger to them, and most jurisdictions recognize that an affirmative obligation to act arises as a result.⁷⁹ As the court in *Cover v. Cohen*⁸⁰ observed:

Although a product be reasonably safe when manufactured and sold and involve no then known risks of which warning need be given, risks thereafter revealed by user operations and brought to the attention of the manufacturer or vendor may impose upon one or both a duty to warn.⁸¹

Although it is very common in these circumstances for courts to speak of a duty to do some specific act—warn, or retrofit, or recall, for example, this is either the result of imprecise use of language, or from the unfortunate decision to deal with the “duty” issue in tort law under a “rules approach.”⁸² Under a traditional “standards approach,” the existence of a “duty” simply requires the defendant to act reasonably under the circumstances. Precisely what the product manufacturer should do after it becomes aware,

79. See e.g. *Rodrigues v. Besser Co.*, 565 P.2d 1315, 1320 (Ariz. App. 1977) (continuing duty to warn); *W. M. Bashlin v. Smith*, 643 S.W.2d 526, 529 (Ark. 1982) (negligent not to recall); *Braniff Airways v. Curtiss-Wright Corp.*, 411 F.2d 451, 453 (2nd Cir. 1969) (Fla. law) (duty to remedy if feasible or warn); *Chrysler Corp. v. Batten*, 450 S.E.2d 208, 211 (Ga. 1994) (duty to warn); *Fell v. Kewanee Farm Equip. Co.*, 457 N.W.2d 911, 920–21 (Iowa 1990) (duty to warn); *Patton v. Hutchison Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1313–14 (Kan. 1993) (duty to warn of life threatening danger where those to be warned were readily identifiable); *Davies v. Datapoint Corp.*, 1996 WL 521394 *3 (D.Me. 1996) (predicting Maine would impose post-sale obligation); *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 646 (Md. 1992) (reasonable effort to warn of defects discovered after marketing); *LaBelle v. McCauley Indus. Corp.*, 649 F.2d 46, 49 (1st Cir. 1981) (Mass. law) (duty to warn); *Comstock v. General Motors Corp.*, 99 N.W.2d 627, 634 (Mich. 1959) (if life-threatening dangers are discovered shortly after marketing); *Stevenson v. R. A. Jones & Co., Inc.*, 510 A.2d 1161, 1164 (N.J. 1986) (duty to correct problem); *Feldman v. Lederle Laboratories*, 479 A.2d 374, 389 (N.J. 1984) (duty to warn); *Smith v. Selco Products*, 385 S.E.2d 173, 176–77 (N.C. App. 1989) *rev. denied*, 393 S.E.2d 883 (N.C.) (continuing obligation); *Greycalny v. Westinghouse Electric Corp.*, 723 F.2d 1311, 1318 (7th Cir. 1983) (Wis. law) (jury could find post-sale warning inadequate, manufacturer should have corrected problem).

Declining to find a post-sale duty, see *Carrizales v. Rheem Mfg. Co.*, 589 N.E.2d 569, 579 (Ill. App. 1991); *Deon v. Ford Motor Co.*, 804 S.W.2d 302, 310 (Tex. Civ. App. 1991) (no duty unless assumed); *Estate of Kimmel v. Clark Equip. Co.*, 773 F.Supp. 828, 831 (W.D.Va. 1991) (Va. law).

80. 461 N.E.2d 864 (N.Y. 1984).

81. *Id.* at 871.

82. See *supra* §5.3.

or should have become aware, that it sold an unreasonably dangerous product, and how it should go about implementing that remediation, is purely a fact-specific negligence problem. The manufacturer must behave as would the ordinary reasonable product manufacturer under the circumstances. If the identities of those in possession of the product are known and they are few in number, perhaps the reasonable thing to do is contact each individually.⁸³ If the number of products which have been distributed is large and/or the identities of the possessors cannot reasonably be determined, perhaps notices should be posted in a place where a possessor is likely to see them. Thus, for example, where it has been discovered that a toy presents a choking hazard for small children, it is common to see notices posted in toy stores or pediatricians' offices. Sometimes notices are published in local newspapers. The point is simply that a duty to exercise reasonable care has now arisen and compliance or non-compliance with this obligation will necessarily be judged by a traditional negligence standard, taking into account the nature and extent of the danger posed and the cost of averting injuries in light of how many people need to be contacted, how the need for appropriate remediation can be effectively conveyed, the cost of the remedy, and so on.⁸⁴

For example, in *Downing v. Overhead Door Corp.*,⁸⁵ the defendant sold garage doors with an activating button that was placed within the reach of small children. Upon realization of the danger, the company began warning new purchasers, but did not warn previous purchasers, including the plaintiff's family. Finding a duty to act, the court stated:

The duty to warn exists where a danger concerning the product becomes known to the manufacturer subsequent to the sale and delivery of the product, even though it was not known at the time of sale. After a product involving human safety has been sold and dangerous defects in design have come to the manufacturer's attention, the manufacturer has a duty either to remedy such

83. See e.g. *Yarrow v. Sterling Drug, Inc.*, 263 F.Supp. 159, 163 (D.S.D. 1967) (predicting S.D. law), *aff'd*, 408 F.2d 978 (8th Cir. 1969) (most efficient way to warn of dangers associated with pharmaceutical was to have company "detail men" personally contact physicians).

84. *Id.* at 872 ("The nature of the warning to be given and to whom it should be given... turn upon a number of factors, including the harm that may result from use of the product without notice, the reliability and any possible adverse interest of the person, if other than the user, to whom notice is given, the burden on the manufacturer or vendor involved in locating the persons to whom notice is required to be given, the attention which it can be expected a notice in the form given will receive from the recipient, the kind of product involved and the number manufactured or sold and the steps taken, other than the giving of notice, to correct the problem. Germane also will be any governmental regulation dealing with notice. Generally, the issue will be one of fact for the jury whose function will be to assess the reasonableness of the steps taken by the manufacturer or vendor in light of the evidence concerning the factors listed above presented in the particular case...") (citations omitted).

Also see *McDaniel v. Bieffe USA, Inc.*, 35 F.Supp.2d 735, 742 (D.Minn. 1999) ("serious injury was a consequence of the dangers associated with the use of the product. The defendants became aware of those dangers after the manufacture and sale of the product, and those dangers may have been eliminated by appropriate post-sale warnings. The number of individuals exposed to the potential dangers... was significant. Although the number of... products produced militates against individualized notice to the original purchasers, that same factor suggests that the manufacturers cannot totally ignore post-sale information which has the potential to prevent serious injury to so many people. * * * [A] manufacturer can satisfy this duty by 'taking reasonable steps to warn foreseeable users about the dangers associated with their product.' The reasonableness of the post-sale warnings depends on the particular facts in each case.") (quoting *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988), *cert. denied*, 492 U.S. 926 (1989)).

85. 707 P.2d 1027 (Colo. App. 1985).

defects, or, if a complete remedy is not feasible, to give users adequate warnings and instructions concerning methods for minimizing danger.⁸⁶

5.6.1.1 *Latent Defect or Danger at Point of Sale*

Most jurisdictions appear to agree that a post-sale duty will arise in cases where, after the sale, it is learned (or should have been learned) that the product contained a latent danger at the point of sale.⁸⁷ In this context, most courts do not appear to require that the existence of the latent danger be such as to make the product legally “defective” for purposes of a strict liability action based on the point-of-sale distribution, although that will commonly be the case. Unfortunately, sometimes somewhat careless descriptions of products as being “defective” or as having a “defect”⁸⁸ creates a misleading impression and, even more unfortunately, some courts have in fact explicitly held that no post-sale duty arises unless the product was “defective” in the sense that a product liability suit could have been brought based on the product’s condition at the point of sale.⁸⁹

The application of traditional tort principles supports the conclusion that “defectiveness” should not be required since it is generally understood that the duty to act is triggered by the discovery that one’s conduct has imperiled others, completely apart from the question of whether one would be subject to liability for having done so. For example, the Second Restatement contains the following illustration:

A, reasonably believing his automobile to be in good order, lends it to B to use on the following day. The same night A’s chauffeur tells him that the steering gear is in dangerously bad condition. A could readily telephone B and warn him of the defective steering gear but neglects to do so. B drives the car the following day, the steering gear breaks and the car gets out of control, causing a collision with the car of C in which B and C are hurt. A is subject to liability to B and C.⁹⁰

Following a substantially similar line of reasoning, in *Hernandez v. Badger Construction Equipment Co.*,⁹¹ the court stated:

Failure to conduct an adequate retrofit campaign may constitute negligence apart from the issue of defective design. In *Lunghi*, the appellate court stated

86. *Id.* at 1033 (citations omitted).

87. *See e.g.* *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 198 (Colo.1984) (“When a manufacturer or seller knows or should know of unreasonable dangers associated with the use of its product [that are] not obvious to product users, it has a duty to warn of these dangers; and a breach of this duty constitutes negligence.”).

88. *See e.g.* *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d at 1310 (cited at note 79); *Sharp ex rel. Gordon v. Case Corp.*, 595 N.W.2d 380, 388 (Wis. 1999) (“A defect imposing a serious hazard may not be unreasonably dangerous. We agree with the circuit court that ‘the jury could have found that some or all of the defects pointed out by plaintiffs’ experts were not foreseeable at the point of sale, but became apparent later.’”).

89. *See e.g.* *Permuter v. U.S. Gypsum Co.*, 54 F.3d 659, 663 (10th Cir. 1995) (Colo. law) (requiring that the product be “defective” at the point of sale); *Gregory v. Cincinnati Inc.*, 538 N.W.2d 325, 328 (Mich. 1995) (“Generally, before there can be any continuing duty—whether it be to warn, repair, or recall—there must be a defect or an actionable problem at the point of manufacture. If there is no defect or actionable problem at this point, then there can be no continuing duty to warn, repair, or recall.”).

90. Restatement (Second) of Torts, § 321 cmt. a, illus. 2 (1965).

91. 34 Cal. Rptr.2d 732 (Cal. App. 1994).

“appellants presented evidence on negligence quite apart from the design issue, pertaining to the ‘retrofit campaign.’ This was Clark’s efforts to notify owners of the Bobcat (and the failure to notify the owner of the Bobcat involved in the instant case) about the dangerous propensities of the machine discovered after the machine had been on the market for awhile, and the availability of safety devices which the manufacturer would install. Even if, properly instructed, the jury had found that none of the mechanical design features in issue . . . constituted a defect, it could still have found that Clark’s knowledge of the injuries caused by these features imposed a *duty to warn* of the danger, and/or a *duty to conduct an adequate retrofit campaign*. A finding that Clark had not met the standard of reasonable care with regard to either of these duties would have had some support in the evidence, and would have been consistent with a finding that the product’s design was not defective.”⁹²

If the product was legally defective at the point of sale, of course, the plaintiff should be able to pursue two claims—the first based on strict liability for the point of sale defect and the second alleging post-sale negligence. However, post-sale negligence may exist even if, technically speaking, there was no point-of-sale defect as a matter of legal definition.

Although it has been asserted that it would be superfluous to allow both a negligence cause of action to arise out of post-sale conduct and a negligence or strict liability claim to arise out of the product’s point-of-sale defectiveness,⁹³ whether this is true depends on the definition of product “defect” which has been adopted in the jurisdiction. If the jurisdiction uses a hindsight risk-utility approach, the “defectiveness” of the product is a function of how dangerous it turned out to be, regardless of whether that danger was known or even knowable at the point of sale. In that case, a post-sale duty would only arise in cases where the product was actionably defective at the point of sale and the claim that multiple legal theories are unnecessary is strengthened. On the other hand, if the jurisdiction uses a foresight risk-utility or negligence test for determining point-of-sale defectiveness, i.e., recognizes a state-of-the-art “defense,” a seller will not be liable if the product is excessively dangerous at the point of sale if the seller was justifiably ignorant of that danger.⁹⁴ While such justifiable ignorance may provide a good reason for not imposing liability based on point-of-sale conduct, it is difficult to imagine why it should even arguably provide an excuse to a seller for failing to act reasonably after the dangers are discovered.⁹⁵

As a general proposition, if the product seller would be liable for selling a product which was defective at the point of sale, the fact that it engaged in reasonable post-sale attempts at remediation will not extinguish the liability arising out of the point-of-sale conduct or condition of the product. Only if the facts occurring post sale rise to the level of being considered a superseding cause, will the initial strict liability or negligence cause of action fail.⁹⁶

92. *Id.* at 754 (citing and quoting *Lunghi v. Clark Equipment Co.*, 200 Cal.Rptr. 387, 392 (Cal. App. 1984) (emphasis in original).

93. *Ostendorf v. Clark Equipment Co.*, 122 S.W.3d 530, 535 (Ky. 2003).

94. See Chapter 4, §4.2.3.2.2.4.1.

95. The *Ostendorf* court also noted the possibility that a statute of repose might bar a claim based on point-of-sale conduct, but not bar a claim based on post-sale conduct. See *Ostendorf*, 122 S.W. at 537 (cited at note 93).

96. See e.g. *Balido v. Improved Machinery, Inc.*, 105 Cal. Rptr. 890, 901 (Cal. App. 1972) (“The infinite variety of factual situations arising out of corrective efforts highlights the factual nature of an inquiry as to whether the manufacturer has done what it could reasonably be expected to do to correct an earlier design deficiency. Central to the inquiry here is the question whether under the

5.6.1.2 *Voluntary Assumption of Post-Sale Duty*

In jurisdictions that deny the existence of a post-sale duty or insist either that no post-sale duty to act arises in the absence of point-of-sale defectiveness or limit the duty to the provision of a warning, one must consider the question of whether a manufacturer might be subject to liability on the basis of having assumed at duty. In other words, if a product seller learns of dangers associated with a product sold earlier and attempts to remedy the problem by voluntarily recalling or repairing the product, there is an argument to be made that liability might be imposed if these post-sale attempts at remediation were themselves negligent. It is hornbook law that, although there may be no initial obligation to act, if one voluntarily undertakes to act, the actor might be subject to liability if the duty assumed is negligently performed. The Second Restatement, section 324A, provides:

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 protect his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of such harm, or
- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.⁹⁷

Such an approach was endorsed by the court in *Bell Helicopter Co. v. Bradshaw*.⁹⁸ That case arose out of a 1975 crash caused by a fatigue failure of a rotor blade. The helicopter was originally sold in the early 1960s. At the time it was equipped with a state-of-the-art “type 102” rotor blade which required frequent inspections and needed to be replaced after 600 hours of use. In 1970, Bell developed a new rotor blade, the “type 117,” which did not need to be inspected as often and only needed to be replaced every 2500 hours.⁹⁹ From 1969 to 1973, the helicopter was owned by Houston Helicopters, a Bell service station. During that period of time,

[a]lthough Bell did not possess the actual power of the FAA to require owners to replace the 102 system with the 117 system, as a practical matter, it could accomplish the same result through its service stations. All of Bell service stations were required to adhere to and comply with all Bell-issued service bulletins or safety notices regarding Bell-made component parts, the servicing of same, or the replacement thereof.¹⁰⁰

Thus, unlike the typical case where a manufacturer effectively loses control over a product after the initial point of sale, in *Bradshaw*, the manufacturer retained the ability

particular circumstances the manufacturer could have reasonably foreseen that the neglect of third persons to respond to the manufacturer’s warnings of danger would frustrate its corrective efforts. Insofar as machinery dangerous to life and limb is involved, we think it a question of fact whether a manufacturer would reasonably anticipate that a wholesaler, a dealer, a retailer, an owner, or a user, may not positively respond to warnings of the need to correct a design deficiency.”). *But see* Ford Motor Co. v. Wagoner, 192 S.W.2d 840, 845 (Tenn. 1946) (conscious rejection of offered repair defeats proximate cause as a matter of law). *See* Chapter 6, §6.3.3.3.3-4.

97. Restatement (Second) of Torts, § 324A (1965).

98. 594 S.W.2d 519 (Tex. Civ. App. 1979).

99. *Id.* at 526–27.

100. *Id.* at 531.

to have required the product owner to institute a post-sale design improvement. Under those circumstances, the court treated the redesign of the rotor blades as an assumption of duty, stating:

This Court does not adopt the rule . . . that a manufacturer is under a continuing duty to improve his product, nor is it necessary for us to hold in this case that a manufacturer has a duty to remedy dangerous defects in a product which are not discovered until after manufacture and sale. However, where the record reflects, as in this case, an apparent assumption of such a duty by a manufacturer, it is not wholly improper for us to measure its conduct against such duty with respect to plaintiffs' allegations of post-manufacture negligence. Here, Bell assumed the duty to improve upon the safety of its helicopter by replacing the 102 system with the 117 system. Once the duty was assumed, Bell had an obligation to complete the remedy by using reasonable means available to it to cause replacement of 102 systems with 117 systems.¹⁰¹

Subsequent cases, however, have been quite critical of the *Bradshaw* court's finding that a duty was assumed. In *Tabieros v. Clark Equipment Co.*,¹⁰² the court rejected a similar argument, holding "as a matter of law that no negligent failure on Clark's part to complete any voluntary undertaking regarding safety equipment, in and of itself, either increased Tabieros's risk of physical injury . . . , or was initiated on behalf of Terminals (or any other party owing a duty to protect Tabieros from physical injury) . . . , or caused either Terminals or Tabieros to rely upon any such alleged undertaking . . ."¹⁰³

In short, although an assumption of duty argument might be adopted in an appropriate case,¹⁰⁴ generally, courts have shown little inclination to expand upon the Second Restatement's requirements.

5.6.1.3 *Obligations Arising Out of Post-Sale Technological Advances*

Two other situations should also be noted. First, it is entirely possible that, as in *Bradshaw*, a product may be reasonably safe when initially marketed but, relatively dangerous when compared to newer, more technologically advanced products of the same general type.¹⁰⁵ Under these circumstances, is there an affirmative obligation on the part of the manufacturer or other seller to act—usually by retrofitting older products or advising possessors of the older models that safer alternatives now exist?

101. *Id.* at 531–32.

102. 944 P.2d 1279 (Haw. 1997).

103. *Id.* at 1303 (citing Restatement (Second) of Torts, §324A(a),(b) and (c)). *Also see* Ostendorf, 122 S.W.3d at 538 (cited at note 93) (rejecting the *Bradshaw* approach).

104. *See e.g.* *Nichols v. Westfield Industries, Ltd.*, 380 N.W.2d 392, 398 (Iowa 1985) ("The jury could infer that had Van Zetten supplied Guter's name to Westfield this would have produced a chain of events resulting in a safety shield welded in place on the auger at the time it was sold to plaintiff's employer. We conclude that these several inferences, if drawn by the jury, are sufficient to support a finding that Van Zetten was negligent in failing to cooperate in the recall procedure and that such negligence was a proximate cause of plaintiff's injuries.")

105. For the sake of clarity, one should distinguish the questions of whether there was a design defect at the point of sale which can be established by proof that the design adopted later was technologically feasible at the point of sale, and whether it is negligent to fail to advise those who bought the now outdated product that "new and improved" versions have become available.

Some jurisdictions seem to simply deal with the problem under a traditional nonfeasance immunity approach and find no duty to act.¹⁰⁶ The Kansas Supreme Court, for example, noted that product manufacturers have a commercial incentive to advise customers of technological improvements, but declined to impose a duty to do so.¹⁰⁷ Others, however, seem to at least tacitly acknowledge the existence of a duty, but recognize that it is unlikely that a failure to advise or otherwise act will be unreasonable in most cases. Thus, for example, in *Kozlowski v. John E. Smith's Sons Co.*¹⁰⁸ the court noted that:

It is beyond reason and good judgment to hold a manufacturer responsible for a duty of annually warning of safety hazards on household items, mass produced and used in every American home, when the product is 6 to 35 years old and outdated by some 20 newer models equipped with every imaginable safety innovation known in the state of the art. It would place an unreasonable duty upon these manufacturers if they were required to trace the ownership of each unit sold and warn annually of new safety improvements over a 35 year period.¹⁰⁹

Nevertheless, in that particular case involving a sausage stuffing machine, the court quite properly went on to treat the problem, not as a duty issue, but as a question of breach, i.e., negligence, holding that the question of whether the manufacturer should have advised of technological advancement was a jury question to be decided by “look[ing] to the nature of the industry, warnings given, the intended life of the machine, safety improvements, the number of units sold and reasonable expectations inherent therein.”¹¹⁰

Along the same lines, in *Dixon v. Jacobsen Mfg. Co.*,¹¹¹ a case involving the obligation of a manufacturer to advise existing product owners of post-sale improvements in both design and warnings, the court asserted:

We need not decide the outer limits of a manufacturer’s duty to inform consumers generally of updated warnings or design changes with respect to dangers discovered since the time of manufacture. Suffice it to say that, in the context of this case, where the manufacturer knew the identity of the owner of its product, we have no hesitation in holding that such a duty existed, and it was for the jury to determine whether that duty had been discharged.¹¹²

5.6.1.4 Duty to Respond to Post-Sale Information Regarding Misuse

Some cases have also considered the question of the manufacturer’s or seller’s duty in cases where it learns post sale that a product is being misused in a dangerous manner which was not foreseen at the point of sale. Particularly in those cases where the misuse

106. *Wilson v. U.S. Elevator Corp.*, 972 P.2d 235, 241 (Ariz. App. 1998); *Romero v. International Harvester Co.*, 979 F.2d 1444 (10th Cir. 1992) (Colo. law); *Moorehead v. Clark Equipment Co.*, 1987 WL 26158 *3 (N.D.Ill.) (predicting Ill. law); *Williams v. Monarch Machine Tool Co., Inc.*, 26 F.3d 228, 232–33 (1st Cir. 1994) (Mass. law); *Bradshaw*, 594 SW2d at 531–32 (cited at note 98).

107. *Patton*, 861 P.2d at 1311 (cited at note 79).

108. 275 N.W.2d 915 (1979).

109. *Id.* at 923–24.

110. *Id.* at 924.

111. 637 A.2d 915 (N.J. Super. App. Div. 1994).

112. *Id.* at 923–24.

can be fairly characterized as inadvertent, courts show no inclination to distinguish between dangers arising out of misuse and any other unforeseen danger. Thus, in *McDaniel v. Bieffe USA Inc.*,¹¹³ the defendant-manufacturer of motorcycle helmets learned that users of their helmets were being injured because they were incorrectly fastening them. The court explained:

The helmet has a velcro strip on the chin strap to give the rider a means of fastening down the loose end of the strap after it has been passed through the retaining bar. Plaintiff claims the presence of this strip induces helmet users to fasten the helmet without properly securing the chin strap. Prior to McDaniel's accident, Bieffe knew of at least one other incident in which a helmet with a velcro strip came off a rider's head on impact.¹¹⁴

Based on these facts, the court had little difficulty finding a post-sale obligation, though, as in so many of these cases, the court attempted to define precisely what needed to be done.¹¹⁵ Similarly, several cases have held that an automobile wheel maker had a post-sale duty to warn when it became clear that the inadvertent mismatching of pieces of multi-piece rim assemblies had become a significant source of danger.¹¹⁶

When the dangers arise out of the intentional post-sale modification of the product, there is less agreement as to whether the manufacturer is potentially liable for failure to take post-sale action. In *Liriano v. Hobart Corp.*,¹¹⁷ New York took the position that the manufacturer of a food grinder had a post-sale obligation to warn about the dangers of removing safety guards.¹¹⁸ The court reasoned that: "A manufacturer's superior position to garner information and its corresponding duty to warn is no less with respect to the ability to learn of modifications made to or misuse of a product. Indeed, as in this case, Hobart was the only party likely to learn about the removal of the safety guards and, as it ultimately did, pass along warnings to customers."¹¹⁹

There appears to be little inclination on the part of most courts, however, to follow suit where the product misuse consists of the inhalation of various and sundry chemicals for the purpose of getting high. In those cases, it would appear that courts are flatly unwilling to impose liability on the product producer no matter what the theory.¹²⁰

113. 35 F.Supp. 2d 735 (cited at note 84).

114. *Id.* at 736.

115. *Id.* at 742 ("When a manufacturer of a mass produced, widely distributed product becomes aware that there is a danger associated with the product creating a risk of serious injury or death, the manufacturer may have a duty to take reasonable steps to notify users of that danger. It would be unreasonable to require such a manufacturer to track down every purchaser and user. It may be appropriate in certain cases, however, to require a manufacturer to take the steps that are reasonable under the circumstances to disseminate widely notice of the danger. What constitutes reasonable notice is a question of fact.").

116. *See e.g.* Hodder, 426 N.W.2d at 833 (cited at note 84); Crowston v. Goodyear Tire & Rubber Co., 521 N.W.2d 401, 409 (N.D. 1994).

117. 677 N.Y.S.2d 764 (N.Y. 1998).

118. *Id.* at 769.

119. *Id.* at 768; *Also see* Piper v. Bear Medical Systems, Inc., 883 P.2d 407, 414 (Ariz. App. 1993) ("a manufacturer may be liable for a failure to warn of dangers of product modifications that it knew or had reason to know were occurring.").

120. *See e.g.* Kelley v. Hanover Ins. Co., 722 So.2d 1133, 1137 (La. App. 1998) (not a "reasonably anticipated use"); Butz v. Lynch, 762 So.2d 1214, 12-17-18 (La. App. 2000) (not an intended use within the meaning of the Louisiana product liability statute, notwithstanding manufacturer's knowledge of misuse and ability to prevent it); Horstman v. Ferris, 725 N.E.2d 698, 702 (Ohio App. 1999) (intentional inhalation was a superseding cause).

5.6.2 Post-Sale Duty to Warn: Successor Corporations

A similar problem arises concerning the duty of a successor corporate entity to issue warnings regarding newly discovered dangers posed by products sold by a predecessor. Of course, if the successor entity acquires the liabilities as well as the assets of the predecessor, no particular additional problems arise. However, if the successor only acquires the assets of the predecessor, a somewhat different exception to the non-feasance immunity rule would have to be created. In the typical post-sale warning case, the obligation to act is based on the fact that the defendant created the danger. In the successor corporation cases, a different (corporate) person created the danger.

The Products Liability Restatement takes the position that such a duty may be imposed on the successor based on the fact that the successor will obtain “actual or potential economic benefit” and “it is both fair and efficient to require the successor to act reasonably to prevent such harm” that might be caused if no duty were imposed.¹²¹

Section 13, entitled “Liability of Successor for Harm Caused by Successor’s Own Post-Sale Failure to Warn,” provides, in part, as follows:

(a) A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity...is subject to liability for harm to persons or property caused by the successor’s failure to warn of a risk created by a product sold or distributed by the predecessor when:

(1) the successor undertakes or agrees to provide services for maintenance or repair of the product or enters into a similar relationship with purchasers of the predecessor’s products giving rise to actual or potential economic advantage to the successor, and

(2) a reasonable person in the position of the successor would provide a warning.

In other words, the acquisition of assets of the predecessor, and specific undertaking to be involved in the maintenance or repair of products sold by the predecessor with the expectation of economic gain is seen to be a sufficient basis upon which to impose a duty to act where none would otherwise exist. The duty imposed, however, is limited to warning even if recall or retrofitting or some other form of remediation might be reasonable under the circumstances.

Once the duty is established, the existence or non-existence of liability depends entirely on a very traditional negligence analysis. The Products Liability Restatement, section 13(b) provides:

A reasonable person in the position of the successor would provide a warning if:

(1) the successor knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and

(2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and

121. Restatement (Third) of Torts, Products Liability, §13 cmt. a (1998).

- (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and
- (4) the risk of harm is sufficiently great to justify the burden of providing a warning.

5.7 Other Judicially Imposed Limitations

In addition to the core duty requirements that the plaintiff be a foreseeable victim from the standpoint of the defendant and that the defendant either acted or failed to act in circumstances where there was an obligation to act, from time to time courts have imposed rules further restricting the requisite relationship between plaintiffs and defendants and immunizing defendants from liability for certain types of conduct. In products cases, perhaps the two most important of these judicially-created rules have been the privity doctrine and the patent danger rule.

5.7.1 The Privity Doctrine

The privity doctrine originated in England in the mid-nineteenth century when what we think of as modern tort law was in its infancy. Established by the decision in the famous case of *Winterbottom v. Wright*,¹²² the doctrine stated that duty in negligence cases—the obligation to exercise reasonable care—arose out of the contractual relations between individuals, not independently of contractual undertakings. Therefore, in the absence of a direct contractual relationship between the parties, no action for negligence could be maintained. Factually, *Winterbottom* arose out of the situation where the Post Master had entered into a contract with a repairman (Wright) under which the repairman agreed to keep the mail coaches in good repair. The plaintiff was a mail coach driver who was injured when a coach, which had not been kept in repair, broke down. Fearing the potential for numerous lawsuits,¹²³ the judges agreed that the plaintiff could not maintain the action because there was no contractual relationship between the plaintiff-coach driver and the defendant-repairman, i.e., the parties were not in privity, and, according to Barons Abinger, Alderson and Rolfe, duty in negligence cases arose only out of contract (or public undertaking).¹²⁴

The doctrine's full potential as a device for limiting lawsuits was not realized for a number of years. With the advent of the industrial revolution there was an enormous growth in the production and distribution of products. Additionally, and more importantly, there was a change in marketing practices. In the mid-nineteenth century when

122. 10 M. & W. 109, 152 Eng. Rep. 402 (1842).

123. *Id.* at 114 (“There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.” Lord Abinger, C.B.)

Also see, id. at 115 (“If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop.” Alderson, B.)

124. *Id.* at 116.

Winterbottom was decided, producers of products commonly sold them directly to their customers.¹²⁵ By the late nineteenth and early twentieth century, chains of product distribution had been created. Manufacturers sold either to retailers for resale to consumers or to distributors for resale to retailers. The legal consequence was that when a manufacturer was negligent in the design or manufacture of a product, and the negligence resulted in injury to a consumer (or bystander), the privity doctrine barred suit because the injured person had no contractual relationship with the manufacturer. The consumer's only contractual relationship was with the retailer and it was rare that a retailer did anything with the product that could fairly be characterized as negligent. Bystanders, of course, had no contractual relationship with anyone within the chain of product distribution.

Over a period of some years, some American and English courts began to impose exceptions to the privity rule.¹²⁶ If a product could be classified as “imminently dangerous” or “inherently dangerous” some courts would find a tort duty even in the absence of contractual privity. Thus, based on some older cases permitting recovery for gun-related injuries,¹²⁷ plaintiffs were allowed to show negligence in cases involving drugs and cosmetics—products which the consumer would be expected to put in or on their bodies;¹²⁸ and, a little later, potentially dangerous products such as a coffee urn¹²⁹ and scaffolding¹³⁰ joined the exception list.

In 1916, Judge Cardozo decided *MacPherson v. Buick Motor Co.*¹³¹ In *MacPherson*, Buick purchased a hickory spoked wheel from a supplier and incorporated it into a two-seater Buick automobile.¹³² Buick sold the vehicle to Close Brothers, a dealership, who sold it to MacPherson. While MacPherson was driving a neighbor to the hospital, the wheel collapsed causing a loss of control and the ensuing accident.¹³³

At trial, an expert witness for the plaintiff testified that the hickory used for the spokes was “brittle, of poor quality, trash.” The allegation of Buick's negligence was based on the claim that it had failed to inspect the wheel or pressure test it before incorporating it into the vehicle. Although, by all accounts, the factual issues were hotly contested at trial, a jury found for the plaintiff and returned a verdict of \$5000. The verdict

125. See generally, Lindsey R. Jeanblanc, *Manufacturers' Liability to Persons Other than Their Immediate Vendees*, 24 Va. L. Rev. 134, 155–56 (1938) (observing “[i]n earlier times the one who made the article generally sold it directly to the ultimate user, and thus the consumer, being in privity of contract with the manufacturer, was allowed to recover on the usual warranties for losses caused by defective workmanship.”).

126. See generally, Edward H. Levi, *An Introduction to Legal Reasoning* 9–24 (1949). Also see Frank J. Vandall and Joshua F. Vandall, *A Call for an Accurate Restatement (Third) of Torts: Design Defect*, 33 U. Mem. L. Rev. 909, 913–14 (2003).

127. *Langridge v. Levy*, 150 Eng. Rep. 863 (Ex. 1837); *Dixon v. Bell*, 5 M. & S. 198 (1816).

128. *George v. Skivington*, (1869) L.R. 5 Ex. 1 (shampoo); *Thomas v. Winchester*, 6 N.Y. 397, 405 (N.Y. 1852) (poison mislabeled as “dandelion extract” was “imminently dangerous”).

129. *Statler v. George A. Ray Mfg. Co.*, 88 N.E. 1063, 1064 (N.Y. 1909) (defective coffee urn was “inherently dangerous”).

130. *Coughtry v. Globe Woolen Co.*, 56 N.Y. 124, 126–27 (N.Y. 1874).

131. 217 N.Y. 382, 111 N.E. 1050 (1916).

132. The facts of the case, trial testimony and arguments of counsel are taken from D. Peck, *Decisions at Law* 40–64 (1961), and James A. Henderson, Jr., *MacPherson v. Buick Motor Company: Shaping the Facts While Reshaping the Law* in *Torts Stories* 41 (Robert L. Rabin and Stephen Sugarman, eds. 2003).

133. As in many products cases, whether the product failed and caused the accident, or whether the accident damaged the product was disputed at trial. See Henderson, *supra* note 132 at 45–6.

was affirmed on intermediate appeal,¹³⁴ which decision was further appealed to the New York Court of Appeal. Given that the facts were established by the jury's decision, the only significant issue on final appeal was the existence of a duty given that *MacPherson* and Buick were not in contractual privity.

The effect of Cardozo's opinion was to abolish the privity doctrine in New York in favor of the more general relational notion of duty which would later be articulated in *Palsgraf*. He wrote:

We are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If he is negligent, where danger is to be foreseen, a liability will follow... We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.¹³⁵

* * *

There is nothing anomalous in a rule which imposes upon A., who has contracted with B., a duty to C. and D. and others according as he knows or does not know that the subject-matter of the contract is intended for their use.¹³⁶

* * *

Subtle distinctions are drawn by the defendant between things inherently dangerous and things imminently dangerous, but the case does not turn upon these verbal niceties. If danger was to be expected as reasonably certain, there was a duty of vigilance, and this whether you call the danger inherent or imminent.¹³⁷

This is not to say, of course, that the privity doctrine instantly disappeared in the wake of the *MacPherson* decision. Maine, for example, did not abolish the doctrine in personal injury negligence cases until 1982.¹³⁸ Moreover, it retains considerable vitality in negligent misrepresentation cases where the harm suffered by the plaintiff is neither personal injury nor property damage,¹³⁹ and breach of warranty cases.¹⁴⁰ Nevertheless, to use the late Dean Prosser's famous metaphor, *MacPherson* marked the beginning of the "fall of the citadel"¹⁴¹ and today, in negligence-based products cases, at least where the plaintiff is seeking recovery for personal injury or property damage, privity is rarely, if ever, an issue.¹⁴²

In personal injury and property damage cases sounding in strict liability in tort, the privity doctrine has been much less of an issue. This is hardly surprising inasmuch as strict liability in tort was developed, in large part, in order to free the strict liability of

134. *MacPherson v. Buick Motor Co.*, 145 N.Y.S. 462 (App. Div. 1914).

135. 217 N.Y. 382, 390–91 (1916).

136. *Id.* at 393.

137. *Id.* at 394.

138. *See Adams v. Buffalo Forge Co.*, 443 A.2d 932, 939 (Me. 1982).

139. *See* Chapter 2, § 2.4.1.2.1.

140. *See* Chapter 3, §§ 3.2 and 3.3.

141. *See* William L. Prosser, *Assault Upon the Citadel*, 69 Yale L.J. 1099 (1960); William L. Prosser, *Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn. L. Rev. 791 (1966).

142. *See* Restatement (Second) of Torts, § 395 cmt. a (1965) (rejecting the privity rule in negligence-based products cases).

warranty from the privity doctrine and other restrictions on its use in personal injury and property damage cases.¹⁴³

5.7.2 The Patent Danger Rule

The “patent danger rule” or “open and obvious danger rule” was, like the privity doctrine, a judicially created and imposed bar to recovery. Unlike the privity doctrine, however, it was not based on a declared fear of excessive litigation (though this may have been a consideration as well), but on a rather long-standing judicial inclination to deal with cases which contain an element of assumption of risk as questions of law, rather than questions of fact.¹⁴⁴

The rule, which would appear to have its origin in occupier liability cases which limited the occupier’s liability to licensees to injuries caused by hidden dangers,¹⁴⁵ and /or the previously established rule that the provider of a chattel had no duty to warn of known or obvious dangers,¹⁴⁶ was most famously applied in a negligent design case in *Campo v. Scofield*.¹⁴⁷ In that case, the New York Court of Appeals held that a product manufacturer could only be found negligent if the product contained a “latent” defect. “The cases establish,” the court wrote, “that the manufacturer of a machine or any other article, dangerous because of the way in which it functions, and patently so, owes to those who use it a duty merely to make it free from latent defects and concealed dangers.”¹⁴⁸

143. See e.g. Adams, 443 A.2d at 940–41 (cited at note 138) (“[t]he fundamental difference which can emerge, however, by originating ‘strict’ products liability on a tort, rather than ‘warranty’, rationale is that the ‘consensual-contract’ features historically predominant in ‘warranty’ will not become the fundamental determinants of the nature and scope of the regulatory principles which will constitute the content of the doctrine.”) (quoting *McNally v. Nicholson Mfg. Co.*, 313 A.2d 913, 923 (Me. 1973)); Restatement (Second) of Torts, § 402A cmt. b (1965).

144. See G. Edward White, *Tort Law in America: An Intellectual History* 41–45, 84 (1980).

145. See e.g. Restatement (First) of Torts, § 340 cmt. e (1939) (“*Assumption of risks by licensee.* A licensee’s privilege to enter land in the possession of another is derived solely from the possessor’s consent which he is free to give or withhold, the licensee not being entitled to enter without it. The licensee is, therefore, entitled to nothing more than knowledge of the actual conditions, which he will encounter if he avails himself of the possessor’s consent. If he knows the actual conditions, he has an opportunity to exercise an intelligent choice as to whether the advantage to be gained from his entry is sufficient to justify him in incurring the risk which he knows is inseparable from it.”). Also see *Waters v. Markham*, 235 N.W. 797, 800 (Wis. 1934) (applying the rule by analogy to the liability of an automobile owner to his guests in a defective tire case).

146. See Restatement (First) of Torts, § 388 (1939) providing:

One who supplies directly or through a third person a chattel for another to use, is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be in the vicinity of its probable use, for bodily harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

- (a) knows, or from facts known to him should realize, that the chattel is or is likely to be dangerous for the use for which it is supplied;
- (b) and has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and
- (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be so.

Also see *Rosebrock v General Electric Co.*, 140 N.E. 571, 574 (N.Y. 1923) (no duty to warn of danger of transformer explosion when danger was known among electricians).

147. 95 N.E.2d 802 (N.Y. 1950).

148. *Id.* at 803.

We have not yet reached the state where a manufacturer is under the duty of making a machine accident proof or fool-proof. Just as the manufacturer is under no obligation, in order to guard against injury resulting from deterioration, to furnish a machine that will not wear out...so he is under no duty to guard against injury from a patent peril or from a source manifestly dangerous.¹⁴⁹

The consequences should be readily apparent. Just as in the pre-workers' compensation days, the "unholy trinity" (contributory negligence, assumption of risk and the fellow-servant doctrine¹⁵⁰) had been invoked by the courts to throw out injured workers' suits against their employers, the patent danger rule permitted courts to elevate assumption of risk principles into a "duty" question to be determined by the trial judge. As long as the danger was observable, a manufacturer could not be found negligent even if it could have lessened or eliminated the risk by exercising a minimal level of effort, cost or even common sense. Manufacturers could, without fear of liability, design, build and sell machinery with unguarded blades, gears or a variety of other nip points. In fact, one can plausibly argue that the doctrine encouraged danger since a badly designed safety guard could result in liability while the absence of any guard could not.

In 1976, New York rejected the patent danger rule in negligence cases. In *Micallef v. Miehle Co.*,¹⁵¹ recognizing that the tide had turned, the court adopted the Harper & James' view that "if it would be feasible for the maker of the product to install a... [safety device], it should be a question for the jury whether reasonable care demanded such a precaution, though its absence is obvious. Surely reasonable men might find here a great danger, even to one who knows the condition; and since it was so readily avoidable they might find the maker negligent."¹⁵²

Although an overwhelming majority of jurisdictions have now rejected the rule,¹⁵³ a few observations are still in order. First, even though it is no longer an automatic bar to recovery, the fact that the danger was observable to the plaintiff remains an important factor in the case. It may be relevant to the reasonableness of the design choice;¹⁵⁴ or whether a reasonable person would have provided a warning to reduce the danger.¹⁵⁵ Occasionally, obviousness of danger will be relevant to the question of proximate

149. *Id.* at 803-04.

150. Regarding the "fellow servant rule," see White, *supra* note 144 at 51 explaining "[t]hat rule...held that an employee could not successfully sue his employer for injuries sustained from the negligence of a fellow employee... [and] thereby served to relieve employers of vicarious liability for the injuries of a substantial class of potential litigants."

151. 348 N.E.2d 571 (N.Y. 1976).

152. *Id.* at 576 (quoting 2 Harper & James, *Torts*, §28.5 (1956)).

153. It appears that only North Carolina continues to follow it. See *McCullum v. Grove Mfg. Co.*, 293 S.E.2d 632, 635 (N.C. App. 1982) ("The manufacturer of a machine which is dangerous because of the way in which it functions, and patently so, owes to those who use it a duty merely to make it free from latent defects and concealed dangers. In a case against such a manufacturer, the plaintiff must prove the existence of a latent defect or of a danger not known to the plaintiff or other users."); Although Georgia too adhered to the rule long after most other jurisdictions rejected it, it joined the majority in *Ogletree v. Navistar Transp. Corp.*, 500 S.E.2d 570, 571 (Ga. 1998).

154. See e.g. *Albert v. J & L Engineering Co.*, 214 So.2d 212, 214-15 (La. App. 1968) (danger presented by lack of safety device open and obvious and proposed change would render machine inoperable); *Collins v. Ridge Tool Co.*, 520 F.2d 591, 594 (7th Cir. 1975) (Wis. law) *cert. denied*, 424 U.S. 949 (obviousness of danger relevant consideration in determining negligence in design).

155. See *infra* § 5.7.3.1.

cause.¹⁵⁶ More commonly, it may be relevant to questions regarding the defenses of contributory (or comparative) fault¹⁵⁷ as well as assumption of risk.¹⁵⁸

Importantly, however, whether relevant to the factual question of negligence, causation or defenses, these issues will typically be decided by the jury. Duty, on the other hand, is typically regarded as a question of law for determination by the court. Thus, the real importance of the rejection of the patent danger rule in negligence cases lies in the reallocation of the decision-making power from the judge to the jury.¹⁵⁹

Moreover, although almost universally rejected as a duty issue in negligence cases, the patent danger rule has been resurrected in strict liability cases in those jurisdictions which have adopted the consumer expectation test as the sole test of product defectiveness.¹⁶⁰ After all, if the product has to be no safer than the ordinary consumer would expect, making the product obviously dangerous simply serves to lower expectations. Moreover, although some jurisdictions sought to get around this problem by adopting risk-utility as an alternative test,¹⁶¹ courts in some jurisdictions with a two-prong test of defect have insisted that, in cases of obvious dangers, the consumer expectation prong trumps the risk-utility prong. Thus, for example, in *Todd v. Societe BIC, S.A.*,¹⁶² the Seventh Circuit has held, as a matter of law, that regardless of any risk-utility analysis, a disposable lighter without a child-proof safety device is not a defective product.¹⁶³ In short, under some courts' approach to the question of "defectiveness" in strict liability cases, the patent danger rule remains alive and well.

5.7.3 The Duty Problem in Point-of-Sale Failure to Warn Cases

There is a substantial body of case law dealing with the problems which arise when a defendant has sold a product without a warning to alert the user or consumer to the product's dangers. Although often the better approach is to focus on breach of duty or product "defectiveness," i.e., whether a reasonable product seller would have provided warnings, or on causation, i.e., whether the harm would have been sustained had warnings been provided, many courts have sought to resolve these questions by formulating a series of rules which declare that no duty to warn exists as a matter of law.

156. See e.g. *Rosemond v. Harshaw Chemical Co.*, 521 N.Y.S.2d 754, 755 (App. Div. 1987) (plaintiff's employer's failure to guard against obvious danger superseding cause).

157. See e.g. *Kentucky Utilities Co. v. Auto Crane Co.*, 674 S.W.2d 15, 18 (Ky. 1983) (operation of crane near overhead electric lines established operator's contributory negligence).

158. See e.g. *Camacho v. Honda Motor Co., Ltd.*, 741 P.2d 1240, 1245 n.6 (Colo. 1987) (obviousness of danger may provide factual basis for voluntary assumption of risk defense); *Alexander v. Conveyors & Dumpers, Inc.*, 731 F.2d 1221, 1224 (5th Cir. 1984) (obviousness of danger supports giving assumption of risk instruction under Miss. law); *Berg v. Sukup Mfg. Co.*, 355 N.W.2d 833, 835 (S.D. 1984) (assumption of risk found to be a jury question notwithstanding claim that danger presented by exposed auger was open and obvious).

159. Additionally, when relevant to a defense, rather than the existence of a duty, the burden of proof is placed on the defendant.

160. See Chapter 4, §4.2.3.2.1.2.1.

161. See e.g. *Soule v. General Motors Corp.*, 882 P.2d 298 (Cal. 1994), discussed Chapter 4, §4.2.3.2.3.1.

162. 21 F.3d 1402 (7th Cir. 1994) (Ill. law), cert. denied, 513 U.S. 947.

163. *Id.* at 1412.

In some of these cases, of course, a traditional duty approach may seem appropriate since one who already knows of the danger is, at least arguably, not a foreseeable victim of a defendant's decision not to warn. In others, however, to fit the warning rules into a traditional Palsgrafian foreseeability approach, one would have to argue, for example, that if the danger is obvious, there are no foreseeable victims, a claim which seems much weaker.

In any event, in some sense, all of these no-duty rules resemble the patent danger rule and, in fact, they formed a large part of the precedent upon which the cases establishing the patent danger rule were based.¹⁶⁴ In all such cases, the anticipated user at least arguably should have been aware of the dangers associated with the particular product, thus negating the usefulness of warning. The anticipated user is expected to know of the danger either because it should be obvious to all or because the user has or is expected to have some specialized knowledge. This specialized knowledge usually is expected to exist because of the user's past experience with the product at issue. Thus, the adoption of a "rules approach" to duty can be seen in the "no duty to warn experts" cases, and in the "allergic reaction" cases. In the latter, the danger arises out of the user's idiosyncratic reactions to some ingredient in the product, and the users are in a uniquely good position to protect themselves, as long as the product's ingredients are apparent or otherwise adequately disclosed.

5.7.3.1 *No Duty to Warn of Obvious or Generally Known Dangers*

There are some dangers associated with particular products which are so widely recognized that it would serve no purpose to require product sellers to warn of them. Knives cut, clear glass can be difficult to see, and the laws of gravity can be expected to operate if one steps off an elevated platform into space.

Notwithstanding the apparent similarity to the patent danger rule in design cases, the issues involved are actually somewhat different. In the design cases, it may be unreasonable not to design an obvious danger out of a product. If, for example, the blade of a circular saw can be guarded without substantially impairing its performance and increasing its cost, it may be deemed negligent to fail to include the guard.¹⁶⁵ The addition of a warning of the obvious, on the other hand, rarely provides any additional measure of safety and, as previously noted, if one attempts to warn of all possible dangers, there is a real risk that the impact of the important warnings dealing with lesser known dangers may be diluted.¹⁶⁶

While there is, of course, a distinction to be made between cases where the danger is obvious, and thus apparent to all, and those in which the danger is generally, but not universally, known, it is, nevertheless, familiar basic tort doctrine that one will be held to possess that knowledge which is generally possessed by members of the community.¹⁶⁷ Reflecting this common sense approach, the Second Restatement states that a "seller is not required to warn with respect to products, or ingredients in them, . . . when

164. See *supra* notes 145 and 146 and accompanying text.

165. Or, the product might be deemed "defective" or "unmerchantable," depending on the legal theory being pursued.

166. See Chapter 4, § 4.2.3.3.1.

167. See "*Prosser & Keeton*" *supra* note 38, § 32, at 184.

the danger, or potentiality of danger, is generally known and recognized.”¹⁶⁸ Similarly, though somewhat more precisely, the Products Liability Restatement explains:

In general, a product seller is not subject to liability for failing to warn or instruct regarding risks and risk avoidance measures that should be obvious to, or generally known by, foreseeable product users. When a risk is obvious or generally known, the prospective addressee of a warning will or should already know of its existence. Warning of an obvious or generally known risk in most instances will not provide an effective additional measure of safety. Furthermore, warnings that deal with obvious or generally known risks may be ignored by users and consumers and may diminish the significance of warnings about non-obvious, not-generally-known risks. Thus, requiring warnings of obvious or generally known risks could reduce the efficacy of warnings generally.¹⁶⁹

While the foregoing is undoubtedly correct, problems often arise in attempting to determine whether a particular danger is obvious or not. Thus, while we all recognize some of the dangers of alcohol consumption (impairment of judgment and coordination and liver damage, for example),¹⁷⁰ is pancreatitis a known or obvious risk associated with moderate beer consumption?¹⁷¹ There is an obvious danger of spinal injury if one dives into shallow water, however, must the plaintiff have also realized that the rim on an above-ground pool might wobble when the dive is attempted?¹⁷²

The problem is a familiar one which arises in a number of contexts—e.g., using the consumer expectation test or determining whether a plaintiff has assumed the risk of injury. In all but the clearest cases, the specificity with which one defines the risk will dictate the conclusion. If the danger is seen as “health risks associated with alcohol use” or “injury associated with diving into shallow water,” the danger in those cases was obvious and no duty existed. If, however, the danger is specifically defined as “pancreatic cancer” or “loss of balance while diving off an excessively flexible rim on a pool,” a duty may well be found to exist, thus allowing the trier of fact to determine whether the failure to warn was reasonable or not in light of the severity of potential harm, likelihood of occurrence, and so on.

168. Restatement (Second) of Torts, §402A cmt. j (1965)

169. Restatement (Third) of Torts: Products Liability, §2 cmt. j (1998).

170. See e.g. *Dauphin Deposit Bank and Trust Co. v. Toyota Motor Corp.*, 6 Pa. D. & C.4th 609, 611 (Pa. Com. Pl. 1990) (no duty to warn since “the dangers of drinking and driving are obvious to anyone in this country”).

171. See *Hon v. Stroh Brewery Co.*, 835 F.2d 510 (3d Cir. 1987) (Pa. law) (For six years prior to his death, plaintiff consumed 2–3 cans of beer per night, 4 nights per week. “The district court granted summary judgment to Stroh because it concluded ‘as a matter of law that [Mr. Hon] knew or should have known that the amount of beer that he consumed was potentially lethal.’ It erred in reaching this conclusion. On the record before the district court, a trier of fact could properly find that while the amount of beer consumed by Mr. Hon was potentially lethal, that fact was known neither to him nor to the consuming public.”) (citations omitted).

This particular case would no longer present an issue given that 27 U.S.C.A. §§201–210 now pre-empts claims alleging failure to warn against alcohol producers.

172. See *Corbin v. Coleco Industries, Inc.*, 784 F.2d 411, 417 (7th Cir. 1984) (Ind. law) (“The district court held as a matter of law, and Coleco vigorously asserts in this court, that the danger of diving into four feet of water is open and obvious. If this is true, it is a complete defense to a charge of negligent breach of a duty to warn of the danger, since it entails that there is no such duty. We are persuaded that Corbin put on the record before the district court evidence that the danger of serious spinal cord injury from diving into shallow water is not open and obvious and that this evidence is sufficient to preclude summary judgment for Coleco on the basis of the open and obvious defense.”) (citation omitted).

It is not enough that the condition of the product be obvious, but rather that the danger posed by that condition be obvious.¹⁷³ Along the same lines, it is sometimes necessary to determine whether the nature of the risk must be obvious¹⁷⁴ or whether both the nature and degree of risk must be obvious. The issue was clearly presented in *Marzullo v. Crosman Corp.*,¹⁷⁵ a case where one teenager shot another with a BB gun thereby causing brain damage. The defendant argued that it had no duty to warn because the dangers of pointing a gun at another were obvious and, alternatively, the warnings it did provide were adequate. Plaintiff's counsel, on the other hand, argued that, because the gun had a higher than expected muzzle velocity, the extent of danger was not obvious.¹⁷⁶ The court dismissed the action holding that:

[A]s a matter of law, . . . the risk that an individual could suffer serious injury or death as a result of the misuse or careless use of a BB gun is apparent to the average consumer, including teenagers, and the dangers of such a product are open and obvious. The record . . . supports the conclusion that the Crosman 2100 did not place users at risk of injury *different in kind* than those that an average consumer might anticipate. The fact that the Crosman 2100 caused, in this case, brain damage, rather than the loss of an eye or mere skin abrasion, does not transform the fundamental nature of the injury. The risk of serious injury was open and obvious as a matter of law.¹⁷⁷

At one time at least, Michigan courts attempted to have the existence of a duty to warn turn on the complexity of the product involved. In *Michigan Mut. Ins. Co. v. Heatilator Fireplace, Div. of Vega Industries, Inc.*,¹⁷⁸ the intermediate appellate court asserted that a "manufacturer of a 'simple tool or product' has no duty to warn against obvious risks, but a manufacturer of other more complex products does have a duty to warn against such risks if the risks were unreasonable in light of the foreseeable injuries."¹⁷⁹ The reasoning appears to have been that the simplicity of some tools will necessarily ensure that the risk was, in fact, obvious and understood by the user. This inevitably raised problems of trying to decide which tools are simple and which are not. In fact, that particular case involved a fireplace and the question of whether it was a

173. See *e.g.* *Outboard Motor Corp. v. Schupback*, 561 P.2d 450, 453 (Nev. 1977) ("The record does not show that the employees knew of danger if they used the cart in a chemical atmosphere. Although aware that the cart sparked, they did not know the intensity required to cause an explosion. Indeed, that very cart had been used in all areas of the plant for years without an explosion resulting from such use. In these circumstances, it is appropriate to deem the defect in the product, that is, the failure to give suitable warning, as latent or hidden.");

174. Whether the "nature of the risk" is obvious is not always clear. In *Wheeler v. John Deere Co.*, 935 F.2d 1090, 1104 (10th Cir. 1991) (Kan. law), the court observed:

Whether a danger is open and obvious depends not just on what people can see with their eyes but also on what they know and believe about what they see. In particular, if people generally believe that there is a danger associated with the use of a product, but that there is a safe way to use it, any danger there may be in using the product in the way generally believed to be safe is not open and obvious.

175. 289 F.Supp.2d 1337 (M.D.Fla. 2003).

176. *Id.* at 1344.

177. *Id.* at 1346. *But see* *Michigan Mut. Ins. Co. v. Heatilator Fireplace, Div. of Vega Industries, Inc.*, 366 N.W.2d 202, 205 (Mich. 1985) ("Even if it is arguable that Mr. Geiger's testimony establishes consciousness on his part of a vague danger, it would not preclude a jury from finding that a warning was nonetheless required to give him a full appreciation of the seriousness of the life-threatening risks involved.");

178. 338 N.W.2d 238 (Mich. App. 1983), *overruled*, 366 N.W.2d 202 (Mich. 1985).

179. *Id.* at 241.

“simple tool” was one of the issues on appeal where the Michigan Supreme Court ruled that the fireplace was not appropriately dealt with as a simple tool since the dangers were not obvious.¹⁸⁰

While many courts continue to treat the problem of “obviousness” as a matter of “duty,”¹⁸¹ the current trend appears to favor the approach of considering it as a question of fact, though it is sometimes difficult to tell if a case has been dismissed because the court has applied a “no-duty rule” or found, as a matter of law, that reasonable jurors could not disagree.¹⁸² The Products Liability Restatement takes the position that: “When reasonable minds may differ as to whether the risk was obvious or generally known, the issue is to be decided by the trier of fact.”¹⁸³

5.7.3.2 Dangers Actually Known

Even though a particular danger is not obvious or generally known, a majority of courts have taken the position that there can be no liability on a failure to warn theory to a plaintiff¹⁸⁴ who had actual knowledge of the danger.¹⁸⁵ Some courts, however, reach this result as a duty issue,¹⁸⁶ while others focus on causation.

The analysis of the issue from a duty perspective is fairly straightforward, although all too often courts state the duty rule as a self-evident truth without any attempt at ex-

180. 366 N.W.2d at 205.

181. See *e.g.* *Lederman v. Pacific Industries*, 119 F.3d 551, 555 (7th Cir. 1997) (predicting Ind. law) (no duty to warn of dangers of diving into backyard swimming pools); *McColgan v. Environmental Control Systems, Inc.*, 571 N.E.2d 815, 818 (Ill. App. 1991) (no duty to warn since “the fact that one could not see through the opaque curtain to the other side is undoubtedly an open and obvious condition of the curtain.”); *Neff v. Coleco Industries, Inc.*, 760 F.Supp. 864, 968 (D.Kan. 1991) (“defendant owed plaintiff no duty to warn him of the open and obvious risk of diving head first into the shallow swimming pool.”); *Berry v. Eckhardt Porsche Audi, Inc.*, 578 P.2d 1195, 1196 (Okla. 1978) (“The dangers of nonuse of seat belts were readily apparent to plaintiff as a member of the general public. The fact such dangers were not uniquely within knowledge of defendant makes it clear no duty to warn existed on its part.”); *Keene v. Sturm, Ruger & Co., Inc.*, 121 F.Supp.2d 1063, 1069 (E.D.Tex. 2000) (no duty to warn of dangers of handguns);

182. See *e.g.* *Oza v. Sinatra*, 575 N.Y.S.2d 540, 542 (App. Div. 1991) (A gas station attendant whose clothing was soaked with gasoline came too near to a space heater. The court found that reasonable people could not help but find the danger was obvious and, therefore, as a matter of judicial efficiency, granted summary judgment for the space heater manufacturer.).

183. Restatement (Third) of Torts: Products Liability, §2 cmt. j (1998).

184. Although normally it is the plaintiff’s knowledge that is in issue, in cases where the defendant’s obligations could have been satisfied by warning a middleman, the relevant question is whether that middleman’s knowledge is such that a warning to him is not required. For example, under the learned intermediary rule, in the case of prescription drugs, the drug manufacturer need only warn the prescribing physician, not the ultimate user of the product. Under those circumstances, the issue is whether there is a duty to warn a physician who is already aware of the danger. The same approach would be taken in other cases where delegation is reasonable under the circumstances. See *e.g.* *Jones v. Hittle Service*, 549 P.2d 1383, 1395 (Kan. 1976) (bulk sales of propane gas to knowledgeable middleman).

185. It is not uncommon for courts not to distinguish between cases where the danger is obvious and cases where it is not obvious, but known to a particular individual. Thus, for example, in *In re Lawrence W. Inlow Accident Litigation*, 2002 WL 970403 *15 (S.D.Ind. 2002), a case where the plaintiff’s decedent was struck and killed by a moving helicopter blade, the court referred to the “no duty to warn of known dangers” rule, although it was clearly a danger obvious to all.

186. See *e.g.* *King v. Ford Motor Co.*, 209 F.3d 886, 898 (6th Cir. 2000) (Ky. law) (finding no error by the trial judge in refusing to instruct jury that there was no duty to warn of dangers known to the plaintiff since duty is an issue for the court, not the jury).

planation. Since the heart of the concept of duty is the idea that the plaintiff must be a foreseeable victim given the nature of the defendant's conduct which is alleged to have been negligent,¹⁸⁷ it is at least plausible that one who already actually knows of the danger is not a foreseeable victim from the standpoint of the defendant who is deciding whether a warning is necessary.

The problem with the duty analysis, however, is that it often rests on the familiar legal assumption "that the reasonable person will not forget what is actually known..."¹⁸⁸ As we all know, of course, it is common to momentarily forget known facts. One might even go further and acknowledge that momentary lapses account for many, or maybe most, accidents and it does not seem unreasonable to insist that product sellers take such common human lapses into account.

Some courts have taken a more realistic view of human behavior and chosen to treat the issue as a causation problem, rather than to reduce it to a blanket duty rule. This approach is illustrated by *Campos v. Firestone Tire & Rubber Co.*¹⁸⁹ Mr. Campos had assembled a multiple-piece tire rim assembly and then put a tube and tire on it. The tire and wheel were then placed in a protective cage for inflation. While the tire was inflating, Campos realized that the rim components were separating and about to blow apart. Impulsively, he reached into the cage to disconnect the air hose, at which point the assembly exploded causing serious injuries.¹⁹⁰

There was no question that Campos had at least once known of the danger involved. The evidence showed that six years earlier he had sustained minor injuries in a similar accident.¹⁹¹ Nevertheless, the court, quite properly, viewed the problem as one of causation, i.e., whether a warning would have affected the outcome.

A duty to warn is not automatically extinguished because the injured user or consumer perceived the danger. That preexisting knowledge, however, might negate a claim that the absence of a warning was a cause in fact of the plaintiff's injury. We thus agree...that viewing the plaintiff's conduct subjectively, the fact finder might properly assess plaintiff's awareness of the danger in terms of causation rather than duty.¹⁹²

Along similar, but not identical lines, in *Burke v. Spartanic Ltd.*,¹⁹³ Judge Calabresi distinguished obvious danger cases from those in which the plaintiff was actually aware of the danger. As to the former:

[I]t is a well-established principle of New York law that "a limited class of hazards need not be warned of a matter of law because they are patently dangerous or pose open and obvious risks." This is just another way of saying that a reasonable person would not warn of obvious danger, i.e. those harms that most all people know about. As a result, as to these risks, it cannot be negligent to fail to warn.¹⁹⁴

187. See *supra* §5.2.

188. Victor E. Schwartz, Kathryn Kelly and David F. Partlett, *Prosser, Wade & Schwartz's Torts: Cases and Materials* 148 (10th ed. 2000).

189. 485 A.2d 305 (N.J. 1984).

190. *Id.* at 307.

191. *Id.* at 308.

192. *Id.* at 311.

193. 252 F.3d 131 (2nd Cir. 2001) (N.Y. law).

194. *Id.* at 137. (citation omitted).

Although this comes out in the same place as a duty analysis, the focus is on the reasonableness of the conduct, not the foreseeability of the plaintiff as a victim. In other words, the conclusion is that there is no breach of duty as a matter of law, not that there is no duty owed.

In any event, Judge Calabresi went on to distinguish obvious dangers from those which are (subjectively) known to a particular individual.

So long as the relevant risks are not obvious to *some* members of the class of foreseeable users, a reasonable manufacturer might well be expected to warn. And, as a result, a duty to warn will generally be said to exist. *** This is so, moreover, notwithstanding the fact that there may also be foreseeable users for whom the warning is superfluous. It is always possible that a particular plaintiff has a greater awareness of the risks in question than do other users who are or ought to be foreseeable to the manufacturer, and it is, therefore, error to instruct the jury... that there is no duty to warn simply because *the particular plaintiff* was cognizant of the relevant hazards.¹⁹⁵

But of course a defendant's *liability* will not arise from a breach of duty alone. Instead, the plaintiff must show, in addition that "the failure to warn [was a cause]... of the events which produced the injury."¹⁹⁶

In some cases, the lack of causation will be clear. For example, in *Daniell v. Ford Motor Co., Inc.*,¹⁹⁷ the plaintiff attempted to commit suicide by locking herself in the trunk of a Ford automobile where she remained for nine days. Thereafter, she sued Ford alleging, among other things, that they had a duty to warn about the danger posed by the lack of a trunk release located inside the trunk. Finding the claim to be without merit, the court noted, in something of an understatement, that "the potential efficacy of any warning, given the plaintiff's use of the automobile trunk compartment for a deliberate suicide attempt, is questionable."¹⁹⁸

5.7.3.3 Duty to Warn Experts or Sophisticated Purchasers

Although there are cases which have declared that there is no duty to warn experts or professional or experienced users of a particular product,¹⁹⁹ on close inspection it generally turns out that the courts' decisions add little to those cases involving open and obvious dangers or dangers actually known to the plaintiff. Thus, for example, in *House v. Armour of America, Inc.*,²⁰⁰ the court acknowledged the general rule that there is no duty to warn of known or obvious dangers, but held when the extent of users' knowledge regarding the limitations of a bullet-proof vest are disputed, "application of the sophisticated user rule as a matter of law [is rendered] inappropriate."²⁰¹ In other words, in the absence of a situation where the danger is obvious to all, the relevant question becomes what was actually known by that class of people who actually use the product and that

195. It is worth noting that Judge Calabresi is analyzing "duty" in terms of an obligation owed to a foreseeable class of people (product users), rather than an obligation owed to a specific individual.

196. 252 F.3d at 138–39.

197. 581 F.Supp. 728 (D.N.M. 1984).

198. *Id.* at 731.

199. *See e.g.* *Sauder Custom Fabrication, Inc. v. Boyd*, 967 S.W.2d 349, 350 (Tex. 1998).

200. 886 P.2d 542 (Utah App. 1994).

201. *Id.* at 550.

is a question of fact for the jury.²⁰² Thus, in *Graham v. Joseph T. Ryerson & Son*,²⁰³ one of many cases where the plaintiff was injured while attempting to inflate a tire mounted on a multi-piece rim, the court held that the manufacturer's awareness that "members of the particular trade or profession commonly engage in a dangerous practice... may give rise to a duty to warn."²⁰⁴

Thus, it would appear that most courts are not really talking about "duty" at all. Obviously, the level of expertise of the intended user will bear on whether it was reasonable or unreasonable to have declined to warn.²⁰⁵ This, however, is a "breach" question, not one of duty. Similarly, if it is determined that a reasonable seller would provide a warning, the appropriateness of the content and the manner in which it is expressed will necessarily vary depending on the level of expertise of the foreseeable user.²⁰⁶ This too is a breach problem, not a question of duty.

Additionally, in some of the cases, the primary issue appears to be causation, rather than duty. In *Loughan v. Firestone Tire and Rubber Co.*,²⁰⁷ the court rejected a failure to warn claim in an exploding wheel rim case noting that "[e]vidence presented portrays Loughan as a mechanic knowledgeable of the potential danger involved in mismatching multi-piece assemblies."²⁰⁸ However, the court also noted that "Firestone asserted that because Loughan relied on his 'expertise' and routinely failed to read the identification markings stamped on each component, the efficacy of additional warning language was speculative."²⁰⁹

Similarly, the question of to whom the warning should be directed, although often couched in terms of "duty" to warn a sophisticated user, or "duty" of a drug manufacturer to warn the prescribing physician (or patient), is almost invariably better analyzed in terms of reasonableness—i.e., breach of duty. The problem is clearly illustrated by the court's decision in *Davis v. Avondale Industries, Inc.*²¹⁰ In that case, the plaintiff, a welder, contracted lung disease from inhaling fumes emitted from brazing rods manufactured and sold by the defendants to her employer. The defendants requested an instruction which would have advised the jury that:

202. See e.g. *Koonce v. Quaker Safety Products & Mfg. Co.*, 798 F.2d 700, 716 (5th Cir. 1986) (Tex. law) ("reasonable persons could differ over whether [decendent]... was or could reasonably be expected to be aware of safety limitations" of the product). Also see *Leonard v. Uniroyal, Inc.*, 765 F.2d 560, 566 (6th Cir. 1985) (Ky. law) ("there was no prejudicial error in the failure of the District Court to instruct the jury that no duty to warn arises when the danger of the product is known to the user or is reasonably discoverable by him, since there was no evidence in the record upon which to predicate such actual or discoverable knowledge." Applying the court's holding to the instant case, no evidence whatsoever was introduced by the defendant in its case in chief pertaining to the knowledge of professional truck drivers with respect to maintaining proper tire pressure or the dangers of underinflation,") (citation omitted).

203. 292 N.W.2d 704 (Mich. App. 1980).

204. *Id.* at 707.

205. See e.g. *Koonce*, 798 F.2d at 716 (cited at note 202) ("Whether a product seller must provide a warning or instructions in light of the user's experience is generally a question for the jury.>").

206. See *id.* ("The adequacy of the warning must be evaluated in connection with the knowledge and expertise of the user of the product. Under Texas law, a product supplier has no duty to warn of danger in using the product when the ultimate user possesses special knowledge, sophistication, or expertise; in such cases, the supplier may rely on the professional expertise of the user and tailor its warnings accordingly.") (citations omitted).

207. 749 F.2d 1519 (11th Cir. 1985) (Fla. law).

208. *Id.* at 1525.

209. *Id.* Also see *Campos v. Firestone Tire and Rubber Co.*, 485 A.2d at 310 (cited at note 189) (discussing causation).

210. 975 F.2d 169 (5th Cir. 1992) (La. law).

“When a manufacturer or distributor sells an industrial product to a sophisticated purchaser, and that purchaser then supplies the product to its employee for use, the manufacturer and distributor have no legal duty to provide any warnings to the employee/user concerning possible health hazards associated with the product’s use. A sophisticated purchaser is one who by experience and expertise is aware of the possible health hazards associated with the use of the product, and who has an obligation to inform its employees of such potential health hazards. Therefore, if you find that Avondale is a sophisticated purchaser of brazing alloys, then you must return your verdict in favor of defendants.”²¹¹

The trial judge refused the instruction and, instead, instructed the jury that:

“In considering the adequacy of the warning, you must consider the knowledge and expertise of those who may reasonably be expected to use or otherwise come in contact with the product.... The manufacturer or supplier is obligated to warn the user of potential dangers of which the manufacturer or supplier is aware, and which it would reasonably anticipate. Adequate warnings are required as to all foreseeable uses or misuses of the product.”²¹²

In other words, the court refused to instruct in terms of duty, putting the focus on the reasonableness of the defendant’s conduct, taking into account the nature and extent of the risk foreseeably imposed on the user in the absence of a warning. Although the trial judge’s instruction made it clear that “there is no duty to warn a person of a danger that is obvious or a danger which he or she knows about,”²¹³ the Fifth Circuit reversed holding that, under Louisiana law, there was neither a duty to warn the plaintiff’s employer since it was a sophisticated purchaser and no duty to warn the plaintiff since she was an employee of a sophisticated buyer.²¹⁴

Although the court relied, in part, on *Goodbar v. Whitehead Bros.*,²¹⁵ that case is clearly distinguishable. It involved the bulk sale of silica sand and, therefore, providing a warning that accompanied the product was clearly impractical. In *Davis*, on the other hand, there was no particular reason why the manufacturer and distributor could not have warned the plaintiff and, as the trial court apparently recognized, the issue should have been the reasonableness or unreasonableness of the defendant’s conduct under the circumstances.

A straightforward reasonableness approach was taken in *Tasca v. GTE Products*.²¹⁶ In that case the court recognized the problem as raising nothing more than the question of whether it may be reasonable for one product seller to delegate the responsibility to warn to a middleman and held that, depending on the circumstances, it could be.²¹⁷

211. *Id.* at 171–72.

212. *Id.* at 172.

213. *Id.*

214. *Id.* at 173.

215. 591 F. Supp. 552 (W.D. Va. 1984). Discussed in Chapter 1, §1.2.2 and Chapter 4, §4.2.3.3.1.2.

216. 438 N.W.2d 625 (Mich. App. 1988).

217. *Id.* at 628 (“defendants can avoid liability only if they acted reasonably in relying on [plaintiff’s employer] to warn [plaintiff] of the dangers of cobalt. That determination, in turn, can be made only after balancing the following considerations: the reliability of the employer as a conduit of necessary information about the product; the magnitude of risk involved; and the burdens imposed on the supplier by requiring it to directly warn the ultimate users. The reason for weighing the above considerations, and not merely imposing an absolute duty to warn, is that ‘[m]odern life

5.7.3.4 Duty to Warn of Dangers of Using Another's Product

In order to analyze warning obligations in cases where the injury-causing product is made up of components produced by two or more manufacturers, it is necessary to make an important distinction. Did the harm occur because one of the components was independently "defective" in some sense, or did the harm occur because the components, though fine by themselves, were not compatible with each other?

In *Rastelli v. Goodyear Tire and Rubber Co.*,²¹⁸ a tire made by Goodyear was mounted on a multi-piece rim manufactured by Kelsey-Hayes. The rim was allegedly defective, however, it was conceded that there was nothing wrong with the tire. The primary claim against Goodyear was that it failed to warn of the dangers created if its tires were mounted on the allegedly defective rims. Finding no duty to warn, the court stated:

Under the circumstances of this case, we decline to hold that one manufacturer has a duty to warn about another manufacturer's product when the first manufacturer produces a sound product which is compatible for use with a defective product of the other manufacturer. Goodyear had no control over the production of the subject multipiece rim, had no role in placing that rim in the stream of commerce, and derived no benefit from its sale. Goodyear's tire did not create the alleged defect in the rim that caused the rim to explode. Plaintiff does not dispute that if Goodyear's tire had been used with a sound rim, no accident would have occurred.

This is not a case where the combination of one sound product with another sound product creates a dangerous condition about which the manufacturer of each product has a duty to warn.²¹⁹

Generally, other courts are in agreement, at least with the first part of the court's statement. Cases where only one of several components is independently defective involve little more than the application of a traditional non-feasance immunity approach to duty.²²⁰ In many of the cases, although the defendants may well have had the ability to avert future harm by warning about the dangers of other manufacturer's products, since they did not create the risk in the first instances, they incurred no duty to act, any more than one has a duty to rescue another. Thus, in *Spencer v. Ford Motor Co.*,²²¹ Ford did not owe a duty and therefore could not be held liable when a defective wheel manufactured by another company was mounted on the Ford at some time after it was sold.²²² In *Firestone Steel Products Co. v. Barajas*,²²³ Firestone could not be held liable for a defective multi-piece rim manufactured by Kelsey-Hayes,²²⁴ and in *Baughman v. Gen-*

would be intolerable unless one were permitted to rely to a certain extent on others' doing what they normally do, particularly if it is their duty to do so.") (citations omitted).

218. 582 N.Y.S.2d 373 (N.Y. 1992).

219. *Id.* at 376-77.

220. *See supra* § 5.6.

221. 367 N.W.2d 393 (Mich. App. 1985).

222. *Id.* at 396.

223. 927 S.W.2d 608 (Tex. 1996).

224. *Id.* at 614 ("A manufacturer generally does not have a duty to warn or instruct about another manufacturer's products, even though a third party might use those products in connection with the manufacturer's own product.").

eral Motors Corp.,²²⁵ G.M. could not be held liable for injuries caused by a defective replacement wheel manufactured by another company.²²⁶

There is, however, clearly disagreement as to the issues raised by the mismatching of otherwise non-defective component parts. Thus, for example, in *Griggs v. Firestone Tire & Rubber Co.*,²²⁷ Firestone was held liable for failing to warn against the danger of mismatching parts of a multi-piece rim assembly which appeared to fit together but, in fact, did not.²²⁸ Although, in fact, *Griggs* involved a case where both mismatched components were produced by the same manufacturer, there is no language in the decision that would seem to indicate that this fact was seen to have any significance. Furthermore, the existence of a duty was apparently not even a significant issue in the case²²⁹ and the opinion focuses entirely upon the question of whether the manner of communicating the warning was adequate, i.e., the existence of a breach of duty.

In *Hill v. General Motors Corp.*,²³⁰ on the other hand, the plaintiff purchased a 1977 Chevrolet Blazer and, thereafter, modified the vehicle by installing oversized wheels and tires.²³¹ Although neither the vehicle nor the wheels were independently defective, in combination the vehicle was apt to roll over, which is precisely what happened. The plaintiff alleged that General Motors knew that such modifications were being made and further recognized the roll-over dangers thereby created.²³² Nevertheless, relying on a case dealing with a manufacturer's non-liability for *defective design* where the product was subsequently modified, the court held that General Motors was not liable for failing to warn of the dangers of modification asserting that even though "these modifications were foreseeable, a manufacturer does not have a duty to warn in anticipation that a user will alter its product so as to make it dangerous."²³³

There are at least three possible explanations for the conflict between decisions in *Hill* and *Griggs*. First, notwithstanding some of the language used, in *Hill*, the court appeared to be focusing on whether the Blazer was, at the point of sale, safe for its *intended use*, rather than its *foreseeable use*.²³⁴ Second, though closely related, in *Griggs*, the mismatching of component parts was inadvertent, whereas in *Hill* it was, in some sense, intentional, although there was no particular reason to believe that the plaintiff recognized the danger created by his modification. Third, the court's decision in *Hill* may simply be regarded as wrong. The court relied on the New York Court of Appeal decision in *Robinson v. Reed-Prentice*,²³⁵ identifying it as the "only... case which has confronted this issue."²³⁶ In fact, however, *Robinson* was a case dealing with the question of whether a manufacturer could be held liable for defective design, where a machine was sold with a safety guard which was subsequently altered by the plaintiff's employer, rather than whether

225. 780 F.2d 1131 (4th Cir. 1986) (S.C. law).

226. *Id.* at 1133.

227. 513 F.2d 851 (8th Cir. 1975) (Mo. law), *cert. denied*, 423 U.S. 865 (1975).

228. *Id.* at 856.

229. *Id.* at 854 ("A principal issue at trial concerned the type of warnings which Firestone in fact conveyed and the type of warnings which would have been practicable for it to convey.")

230. 637 S.W.2d 383 (Mo. App. 1982).

231. *Id.* at 383.

232. *Id.* at 383-84.

233. *Id.* at 386.

234. *Id.* at 385 ("The duty to warn for foreseeable and latent dangers is attendant upon the proper and intended use of a product.")

235. *Robinson v. Reed-Prentice Div. of Package Machinery Co.*, 426 N.Y.S.2d 717 (N.Y. 1980).

236. 637 S.W.2d at 385 (cited at note 230).

the manufacturer could be held liable for failure to warn. More recently, the New York Court of Appeal has distinguished the design and warning cases, holding that liability for failure to warn of the dangers of post-sale modification could be appropriate in cases where liability for defective design was prohibited by *Robinson*.²³⁷

The decision in *Griggs*,²³⁸ on the other hand, should be neither surprising nor controversial. The duty arose simply because Firestone produced the product which foreseeably could be misused by later mismatching it with another piece of a multi-piece rim. Thus, they owed a duty to foreseeable users and bystanders as the supplier of a potentially dangerous product.²³⁹ Once the duty is established, it was relatively easy to demonstrate breach based on a typical cost-benefit analysis.²⁴⁰

On the other hand, where the dangerous combination of components is not reasonably foreseeable to a component producer, there can be no liability, not because there is no duty, but simply because, under a negligence or foresight risk-utility strict liability approach, there obviously is no breach in failing to warn against unforeseeable dangers. Thus, in *Mitchell v. Sky Climber, Inc.*,²⁴¹ the manufacturer of a motor that was improperly incorporated into scaffolding was not liable for failure to warn. Although the court asserted that they had no duty to warn,²⁴² a better basis for the decision was simply that there was no breach as a matter of law.

In cases involving the manufacture of replacement parts, the manufacturer is held to have no duty to warn of the dangers associated with the use of the product to which they are to be added. Thus, for example, in *Crossfield v. Quality Control Equipment Co., Inc.*,²⁴³ the manufacturer of a replacement chain for a machine that lacked a guard or interlock system could not be held liable for failing to warn of the dangers created by the machine's design.²⁴⁴

5.7.3.5 Allergic Reactions (Other than Prescription Drugs)

The possibility of an allergic reaction to food, food additives, drugs and cosmetics creates a special problem for the courts.²⁴⁵ Much of the problem arises simply because of the way that allergies work. First, an individual must be exposed to the allergen and become sensitized to it. How many exposures are required before there will be an allergic reaction vary depending on the allergen involved and the individual's idiosyncratic makeup. By definition, allergic reactions to a particular substance are found in some members of the general population, but not all.²⁴⁶ Allergic reactions to some things are quite common, contact dermatitis from poison ivy, for example, while reaction to other substances, peanut butter, for example, is relatively rare. While various skin and blood

237. See *Liriano*, 677 N.Y.S.2d 764 (cited at note 117) (although *Liriano* was a post-sale duty to warn case, that simply affects when the duty arose, not its existence).

238. 513 F.2d 851 (cited at note 227).

239. Restatement (Second) of Torts, § 388 (1965).

240. 513 F.2d at 858–59 (cited at note 227).

241. 487 N.E.2d 1374 (Mass. 1986)

242. *Id.* at 1376.

243. 1 F.3d 701 (8th Cir. 1993) (Mo. law).

244. *Id.* at 703–04

245. Because allergic reactions to prescription drugs create some special problems, that subject is taken up separately. See Chapter 11, § 11.3.3.2.2.

246. *But see* *Advance Chemical Co. v. Harter*, 478 So.2d 444, 448 (Fla. App. 1985) (dealing with reaction to ammonia as an allergy case notwithstanding testimony that “everyone is allergic to ammonia”).

tests may show a sensitivity, in the absence of testing, there is no way to know in advance whether one will react to a given substance or not. Additionally, the severity of the reaction may range from mildly annoying to life threatening.

In other words, there must be an initial exposure, which normally does not cause a noticeable reaction, followed by an allergic reaction upon subsequent exposures. Because of this, neither the product producer nor the user can know in advance whether there will be a reaction. Thus, the user or consumer is usually in the best position to avoid future problems, and the product producer has no real options other than to remove the allergen from the product, if possible, or take the product off the market altogether, or make information available to potential users or consumers so that they can protect themselves.

Although it is possible that a product containing a common allergen might be dubbed defective by reason of design under any of the traditional approaches,²⁴⁷ or even possible for a manufacturing defect to exist if an allergen were to be inadvertently added to some product that was not supposed to contain it, these cases are rare. Most of the allergic reaction cases have been based on a failure to warn theory—negligence, strict liability or breach of implied warranty of merchantability. Regardless of the formal legal theory asserted, the basic issues involve negligence—was a duty owed, was that duty breached—should a reasonable seller of the product have warned of the potential for allergic reaction and, in some cases, instructed the user on what to do if symptoms were observed, and causation²⁴⁸—would a warning or instructions have averted the harm?

Dean Prosser explained the basic issue although, unfortunately, his analysis tends to blur the distinction between duty and breach. He wrote:

A large number of cases have involved the problem of warning to users of the product who are, or may be, allergic to it. Here the problem is complicated by the fact that most of those who are subject to the common allergies, as for example toward milk proteins or citrus fruits, are fully aware of their susceptibility, and quite able to protect themselves against it; and the risk of what is likely to be at most a trivial injury is not sufficiently serious to require even a warning to such purchasers. The situation may be quite different where there is an allergy, more serious in character, to some chemical of which the ordinary man in the street has never heard. The question becomes the familiar one of balancing the probability and gravity of the harm against the value of the product and the inconvenience of precautions. Where the allergy is so extremely rare as to amount to almost a personal idiosyncrasy, or where it is a very infrequent one, found in only an insignificant percentage of the population, and the threatened harm is not very serious, the tendency has been to hold that the seller need not give warning. But if it is one common to any sub-

247. Several recently decided cases have found a triable issue on the “defectiveness” of various products under a consumer expectation test of design defect. *See e.g.* *Allen v. Delchamps, Inc.*, 624 So.2d 1065, 1068 (Ala. 1993) (celery treated with sodium bisulfite could be found defective under consumer expectation test given that 1.2% of population is asthmatic and 8% of those people are sensitive to sulfites); *Ray v. Upjohn Co.*, 851 S.W.2d 646, 655 (Mo. App. 1993) (asthma from isocyanate fumes, chemical unreasonably dangerous as designed under consumer expectation test); *Green v. Smith & Nephew AHP, Inc.*, 617 N.W.2d 881, 887–88 (Wis. 2000) (“defectiveness” of latex gloves could be assessed under consumer expectation test on evidence that 5–17% of people react).

248. *See Gran v. Proctor & Gamble Co.*, 324 F.2d 309, 310 (5th Cir. 1963) (Ala. law) (warning would not have made a difference where plaintiff unaware of her own sensitivity); *Merrill v. Beaute Vues Corp.*, 235 F.2d 893, 897 (10th Cir. 1956) (same).

stantial, even though relatively small, number of possible users, and the consequences are more serious, the courts have tended to require the warning, and without it to find negligence.²⁴⁹

Not surprisingly, the Second Restatement reflects this view. The comments to section 402A state:

The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger.²⁵⁰

Many courts have adopted this position and find a duty to warn only where it has been voluntarily assumed by the defendant²⁵¹ or where the plaintiff can demonstrate that: “(1) that she was one of a substantial number or of an identifiable class of persons who were allergic to the defendant’s product, and (2) that defendant knew, or with reasonable diligence should have known of the existence of such number or class of persons.”²⁵² In other words, the traditional duty inquiry as to whether the plaintiff was a foreseeable victim given the nature of the defendant’s conduct was rejected in favor of a rather undefined quantitative approach. In fact, there are significant variations among the cases as to how large the class must be before courts will find the requisite “substantial” number of people apt to react and, therefore, impose a duty to warn.²⁵³

The competing view rejects the notion that the warning obligation arises only where a substantial group of persons are likely to be affected. In *Wright v. Carter Products, Inc.*,²⁵⁴ a case involving the plaintiff’s allergic reaction to an ingredient in a deodorant,

249. William L. Prosser, *Handbook of the Law of Torts*, §96, at 648 (4th ed. 1971).

250. Restatement (Second) of Torts, §402A cmt. j (1965).

251. See *Brown v. McDonald’s Corp.*, 655 N.E.2d 440, 441 (Ohio App. 1995) (duty assumed by distributing an ingredient list naming “carrageenan” (a seaweed derived additive), but potential breach by failing to advise what it is, where it comes from or danger of allergic reaction).

252. *Kaempfe v. Lehn & Fink Products, Corp.*, 249 N.Y.S.2d 840, 845 (App. Div. 1964).

As in virtually all products cases, the product manufacturer is held to the standard of an expert. See e.g. *Braun v. Roux Distributing Co.*, 312 S.W.2d 758, 762 (Mo. 1958); Also see Chapter 1, §1.2.1.1.

253. See e.g. *Short v. Edison Chouest Offshore, Inc.*, 638 So.2d 790, 792 (Ala. 1994) (no duty to warn in case where 3500 people exposed, but plaintiff was the only one to have asthmatic reaction, and asthma affects one quarter of 1% of people); *Presbrey v. Gillette Co.*, 435 N.E.2d 513, 521 (Ill. App. 1982) (no duty where reaction to antiperspirant “extremely rare”); *Blalock v. Westwood Pharmaceuticals, Inc.*, 1990 WL 10557 *2 (E.D.La. 1990) (no duty to plaintiff where her reaction to “Sunscreen” was the first, although more than 1 million sold); *Daley v. McNeil Consumer Products Co.*, a div. of McNeil-PPC, Inc., 164 F.Supp.2d 367, 374 (S.D.N.Y. 2001) (no duty where plaintiff’s reaction to “Lactaid” the first, although 6 million caplets sold); *Mountain v. Procter & Gamble Co.*, 312 F.Supp. 534, 535 (D.Wis. 1970) (no duty in cases where 225 million units of “Head and Shoulders” shampoo with 3 allergic reactions).

Also see *Goldman v. Walco Tool & Engineering Co.*, 614 N.E.2d 42, 49 (Ill. App. 1993) (distinguishing *Presbrey* on the basis that it involved an over-the-counter consumer product, and noting that in the case of “a chemical with dangerous propensities... the rule of non-liability is relaxed.”).

254. 244 F.2d 53 (2nd Cir. 1957) (Mass. law).

the evidence showed that over 200,000 sales resulted in only one complaint. Nevertheless, the court held that “quantitative standard” was inappropriate, and the obligation to warn was triggered by foreseeability alone.²⁵⁵

Of course, one should also remember that once duty is established either under a traditional Palsgrafian foreseeability approach or a modified duty approach requiring that there be a substantial number of potential victims before an obligation is imposed, one must still show that defendant breached the duty by not warning or instructing adequately, and that the breach caused the plaintiff’s harm.

5.8 Legislatively Imposed Limitations

5.8.1 The Workers’ Compensation Bar

In addition to judicially formulated doctrine which either bars certain classes of plaintiffs from maintaining an action or otherwise establishes limitations on suit, the same result may be accomplished by legislation. Clearly, the most important examples of such legislation are found in the workers’ compensation statutes. These laws typically provide that compensation for work-related injuries and illnesses is to be provided through an administrative process, rather than litigation and, in fact, make the administrative claim the injured workers’ exclusive remedy as to his or her employer. The workers’ compensation systems are universally recognized to represent a compromise solution to the problem of providing compensation within an employment context. As the New Jersey Supreme Court explained, the system represents a “historic trade-off whereby employees relinquished their right to pursue common-law remedies in exchange for automatic entitlement to certain, but reduced benefits whenever they suffered injuries in an accident arising out of and in the course of employment.”²⁵⁶

Thus, the employer is strictly liable in the truest sense. Prior to the enactment of such legislation, workers’ suits were often unsuccessful because of the so-called “unholy trinity” of defenses: contributory negligence, voluntary assumption of risk and the fellow servant doctrine.²⁵⁷ Under the legislation, however, the employer has no defenses. The workers’ entitlement to scheduled benefits arises upon a showing that the injury (or, more recently, illness) arose out of and in the course of employment.

One should also keep in mind that the worker is only precluded from suing his or her employer or co-employees. Other parties who may have played a role in causing the work-related injury are not immune from suit.²⁵⁸ Thus, for example, it is common for an injured worker to bring a products liability action against the manufacturer of a piece of machinery when the design, manufacture or marketing of the machinery was a causal factor in producing the harm.

255. *Id.* at 56. Following a foreseeability approach, *see e.g.* *Gober v. Revlon, Inc.*, 317 F.2d 47, 51 (4th Cir. 1963) (Cal. law); *Advance Chemical Co. v. Harter*, 478 So.2d at 248 (cited at note 246) (Fla. App. 1985); *Robbins v. Alberto Culver Co.*, 499 P.2d 1080 (Kan. 1972).

256. *Millison v. E. I. du Pont Nemours & Co.*, 501 A.2d 505, 512 (N.J. 1985).

257. *Id.* (citing “*Prosser & Keeton*” *supra* note 38, § 80, at 569).

258. The issue of whether a defendant can seek indemnity or contribution from the plaintiff’s employer is taken up in Chapter 9, §§ 9.6.1 and 9.6.2.

5.8.1.1 *The Intentional Harm Exception*

Although all workers' compensation laws provide for the employer's immunity from suits by the employee, many jurisdictions, either by express provision in the legislation²⁵⁹ or by judicial interpretation,²⁶⁰ provide an exception permitting suit against one's employer in addition to²⁶¹ or as an alternative to²⁶² proceeding under the workers' compensation system when the harm is intentionally inflicted. Since the scheduled benefits are considerably less than one might receive in a civil lawsuit, in cases where the employer's tort liability could otherwise be established, injured or ill employees have a real incentive to avoid being limited to the workers' compensation remedy. The question then becomes: what does "intentional" mean for purposes of the exception?

Given that employer immunity is one of the essential features of the workers' compensation "trade-off," it is not surprising that courts tend to find that the exception must be narrowly construed. New Jersey, for example, takes the position that a two-prong test must be employed. First, the traditional tort definition of "intent" must be applied to the employer's injury-causing conduct, i.e., the plaintiff must show that the employer either acted for the purpose of bringing about harm or acted with (subjective) knowledge that the harm was substantially certain to follow.²⁶³

The second prong, however, seeks to have courts recognize that "the system of workers' compensation confronts head-on the unpleasant, even harsh, reality—but a reality nevertheless—that industry knowingly exposes workers to the risks of injury and disease."²⁶⁴ Thus, in addition to showing "intent," the injured employee must address "the context in which that conduct takes place" and show that "the resulting injury or disease, and the circumstances in which it is inflicted on the worker [cannot] fairly be viewed as a fact of life of industrial employment, [but is]...plainly beyond anything the legislature could have contemplated as entitling the employee to recover *only* under the Compensation Act[.]"²⁶⁵

Thus, New Jersey cases have held that deliberately exposing a worker to asbestos with knowledge of the danger involved would not be grounds for avoiding the workers' compensation bar, while exposing workers to the risk and then concealing the existence of the disease would.²⁶⁶ Removal of safety guards from dangerous machinery is not

259. See e.g. N.J. Stat. Ann. § 34:15-8 ("If an injury or death is compensable under this article, a person shall not be liable to anyone at common law or otherwise on account of such injury or death for any act or omission occurring while such person was in the same employ as the person injured or killed, except for intentional wrong.").

260. See e.g. *Blankenship v. Cincinnati Milacron Chemicals, Inc.*, 433 N.E.2d 572, 576 (Ohio 1982), *cert. denied*, 459 U.S. 857, asserting that when an employee claims for damages for an intentional tort, such a claim does not relate to an injury "received or contracted by any employee in the course of or arising out of his employment within the meaning of [the statute]. *** Since an employer's intentional conduct does not arise out of employment, [the statute] does not bestow upon employers immunity from civil liability for their intentional torts and an employee may resort to a civil suit for damages."

261. See e.g. *Suarez v. Dickmont Plastics Corp.*, 639 A.2d 507, 508 (Conn. 1994) (fact that compensation collected prior to instituting law suit did not matter).

262. See e.g. Ky Rev. Stat. § 342.610(4) (permitting election).

263. *Millison v. E.I. du Pont Nemours & Co.*, 501 A.2d at 514 (cited at note 256).

264. *Id.* at 513.

265. *Id.* at 515.

266. *Id.* at 516 ("concealment of diseases already developed is not one of the risks an employee should have to assume. Such intentionally-deceitful action goes beyond the bargain struck by the Compensation Act").

enough, even though the employer is fully cognizant that injuries will follow, but where it was alleged that an employer attached guards in anticipation of an OSHA inspection and removed them after inspection, the court concluded “that the Legislature would never consider such actions or injury to constitute simple facts of industrial life. On the contrary, such conduct violates the social contract so thoroughly that... the Legislature would never expect it to fall within the Workers’ Compensation bar.”²⁶⁷ Thus, the second prong was satisfied as well.

Few, if any, other jurisdictions take matters quite as far as New Jersey in this regard and most permit a plaintiff to avoid the workers’ compensation bar simply by satisfying the first prong, i.e., by showing that the employer acted for the purpose of injuring or with actual knowledge that injury was substantially certain to follow. Thus, there is a body of authority that an employer’s removal or refusal to provide safety guards can, under appropriate circumstances, be deemed “intentional,” and thus outside of the workers’ compensation exclusivity rule.²⁶⁸ In Ohio, for example, immunity will be lost upon a showing that: (1) the employer knew of the dangerous condition; (2) that harm was substantially certain to occur; and, (3) the employee was directed to continue to encounter the dangerous situation.²⁶⁹

Generally speaking, the immunity from suit under workers’ compensation legislation extends both to employers and co-employees of an injured worker. Though rarely applicable to the employer, a few jurisdictions have allowed suits against co-employees for “willful, wanton and reckless” conduct or even, occasionally for “gross negligence.”²⁷⁰ If this is permitted, it might be possible for a worker to claim workers’ compensation benefits from his or her employer and also maintain a common law suit against a co-employee.²⁷¹

For a period of time, it appeared that courts might be prepared to weaken employer’s immunity as well by expanding the definition of “intent” or “willfulness” to include recklessness, i.e., high risk conduct done with subjective knowledge that harm was probable.²⁷² In *Mandolidis v. Elkins Indus., Inc.*,²⁷³ a case involving an injury while using a table saw with an unguarded blade, the court held that “willful, wanton or reckless” misconduct was a sufficient basis to overcome the employer’s immunity from suit.²⁷⁴

267. *Laidlow v. Hariton Machinery Co.*, 790 A.2d 884, 898 (N.J. 2002).

268. *See e.g.* *Award Metals, Inc. v. Superior Court*, 279 Cal. Rptr. 459 (Cal. App. 1991) (under Cal. Labor C. § 4558 (1982) which provides an exception to immunity in cases of knowing removal of guards from punch presses); *EAC USA, Inc. v. Kawa*, 805 So.2d 1, 5 (Fla. App. 2001) (removal of guard from printing press was conduct substantially certain to cause injury); *Coello v. Tug Mfg. Corp.*, 756 F.Supp. 1258, 1265 (W.D.Mo. 1991) (removal of safety guard if injury substantially certain); *Regan v. Amerimark Bldg. Products, Inc.*, 454 S.E.2d 849, 852 (N.C. App. 1995) (failure to inform employee that emergency switches were not working).

269. *See* *Walton v. Springwood Products, Inc.*, 663 N.E.2d 1365, 1368–69 (Ohio App. 1995).

270. *See e.g.* *McCorkle v. Aeroglide Corp.*, 446 S.E.2d 145 (N.C. App. 1994) (wanton negligence); *Smith v. Air Feeds, Inc.*, 556 N.W.2d 160 (Iowa Ct. App. 1996) (The court used the statutory “gross negligence” language, but defined it as requiring “knowledge of the peril to be apprehended; (2) knowledge the injury is a probable, as opposed to possible, result of the danger; and (3) a conscious failure to avoid the peril.” This makes “gross negligence” indistinguishable from “willful, wanton and reckless” behavior.). *Also see* *Eller v. Shova*, 630 So.2d 537, 541 (Fla. 1993) (discussing Florida’s exception for criminal acts of co-employees).

271. *See e.g.* *Pleasant v. Johnson*, 325 S.E.2d 244, 248 (N.C. 1985).

272. *See* *Restatement (Second) of Torts*, § 500 (1965) (defining “reckless disregard of safety”).

273. 246 S.E.2d 907 (W.Va. 1978).

274. *Id.* at 914.

Nevertheless, it is clear that any trend toward loosening restrictions on suit against employers which might have existed has since been reversed.²⁷⁵

In West Virginia, the workers' compensation law was later amended in order to overturn *Mandolidis*.²⁷⁶ Under the current version of the West Virginia Code,²⁷⁷ there is a limited exception to employer immunity for unsafe working conditions; of which an employer has actual knowledge; which violates federal or state statutes or regulations or accepted industry standards; which expose the worker to serious illness; with resulting serious illness. However, as the court made clear in *Handley v. Union Carbide Corp.*,²⁷⁸ these are not easy conditions to meet.

While California courts had interpreted its statute to permit an exception for intentional harm,²⁷⁹ in 1982 the statute was amended to abrogate the immunity except in the case of "willful physical assault" or "injury aggravated by employer's fraudulent concealment on the existence of the injury and its connection with the employment..."²⁸⁰ or the removal of safety guards from punch presses.²⁸¹

5.8.1.2 The Dual Capacity Doctrine

The only other major exception to the exclusivity of the workers' compensation remedy was the "dual capacity" doctrine, an approach that never had much support and now has virtually none. In *Duprey v. Shane*,²⁸² the plaintiff was a practical nurse who, while in the defendant's employ had injured her back. She filed a workers' compensation claim. Thereafter, the defendant employer/chiropractor provided treatment to the

275. Holding that an employer's gross negligence, willful, reckless and similar types of misconduct short of intentional were not sufficient, *see Sorban v. Sterling Engineering Corp.*, 830 A.2d 372, 375 (Conn. App. 2003) (under substantial certainty test, failure to repair or provide safety guards not enough); *Lawton v. Alpine Engineered Products, Inc.*, 498 So.2d 879, 880–81 (Fla. 1986) (ignoring machine manufacturer's warning of the need to install guards is gross negligence, but not enough to establish intent); *Copass v. Illinois Power Co.*, 569 N.E.2d 1211, 1215–16 (Ill. App. 1991) (failure to instruct and warn of danger, not enough to show substantial certainty); *Blanton v. Cooper Industries*, 99 F.Supp.2d 797, 805 (E.D.Ky. 2000) (exposure to carcinogens not enough); *Guillory v. Domtar Industries Inc.*, 95 F.3d 1320, 1327 (5th Cir. 1996) (La. law) (allowing employee to use forklift known to be malfunctioning not enough; injury must be "nearly inevitable," "almost certain," or "virtually sure"); *Peaster v. David New Drilling Co.*, 642 So.2d 344, 346 (Miss. 1994) (failure to repair is, at most, gross negligence, not enough); *Kuhnert v. John Morrell & Co. Meat Packing, Inc.*, 5 F.3d 303, 305–06 (8th Cir. 1993) (S.D. law) (previous scalding incidents and OSHA citations not enough to show substantial certainty).

Holding that a triable issue was presented on the question of the employer's intent or willfulness, *see Suarez v. Dickmont Plastics Corp.*, 639 A.2d at 508 (cited at note 261) (employee ordered to clean machine while it was operating, triable issue on substantial certainty of injury); *McNees v. Cedar Springs Stamping Co.*, 457 N.W.2d 68, 70 (Mich. 1990) (punch press known to be malfunctioning caused several earlier near misses, enough to show willful conduct); *Gulden v. Crown Zellerbach Corp.*, 890 F.2d 195, 196–97 (9th Cir. 1989) (Or. law) (employee ordered to clean floors without being given protective clothing after PCBs released); *Birkliid v. Boeing Co.*, 904 P.2d 278, 284 (Wash. 1995) (employees ordered to work with chemical known to cause illness after earlier incidents may be enough to show willful disregard);

276. The entire issue is discussed at some length in *Handley v. Union Carbide Corp.*, 620 F.Supp. 428 (S.D.W.Va. 1985).

277. W. Va. Code § 23-4-2(d)(i)-(ii)(A)-(E) (2002).

278. 620 F.Supp. at 436–40 (cited at note 276).

279. *Magliulo v. Superior Court*, 121 Cal. Rptr. 621, 627–28 (Cal. App. 1975).

280. Cal. Labor C. §§ 3602(b)(1) and (b)(2) (1982).

281. Cal. Labor C. § 4558 (1982).

282. 249 P.2d 8 (Cal. 1952).

plaintiff and, in so doing, negligently injured her. She filed a malpractice case against her employer. The primary issue was whether the defendant was immune from civil liability by reason of the workers' compensation statute. The court held he was not, reasoning that the defendant did not cause plaintiff's injury in his capacity as employer, but in his capacity as her doctor. Responding to the defendant's argument that legal fictions are disfavored, the court wrote:

[T]he law is opposed to the creation of a dual personality, where to do so is unrealistic and purely legalistic. But where, as here, it is perfectly apparent that the person involved, Dr. Shane, bore towards his employee two relationships, that of employer and that of doctor, there should be no hesitancy in recognizing this fact as a fact.²⁸³

In 1981, the California Supreme Court applied the doctrine in the context of a products liability case, finding the defendant had the dual capacity of employer and manufacturer of a defective product and concluded it could be subjected to liability in a civil action for damages notwithstanding that it was an employment-related accident.²⁸⁴

Apparently in response, in 1982, California's workers' compensation law was amended to provide that compensation benefits were the "sole and exclusive remedy of the employee...and the fact that either the employee or employer also occupied another or dual capacity [at the time of injury]...shall not permit the employee or his or her dependents to bring an action at law for damages against the employer."²⁸⁵

The amended law also provided for an exception to the immunity:

Where the employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased or otherwise transferred for valuable consideration to an independent third person and that product is thereafter provided for the employee's use by a third person.²⁸⁶

The need to interpret these new provisions arose in *Behrens v. Fayette Manufacturing Co.*²⁸⁷ There, the plaintiff was an employee of Fayette who was sent out to do maintenance work on a wind turbine that was sold by Fayette to the Sheinbergs. She was injured in the process, allegedly because the wind turbine was defective. She argued that her products liability claim fell with the statutory exception to employer immunity because the product had been sold to a third party and she was "using" it at the time of the accident.²⁸⁸

The court rejected her argument reasoning that the statute requires that the employee come into contact with the defective product as a consumer. Here, she was not a consumer, rather she came into contact "as the primary objective of her job."²⁸⁹ In other words, the Sheinbergs had not "provided a wind turbine for her use, it was her job to perform certain tasks... [on it]."²⁹⁰

Interestingly, the California provision at issue in *Behrens* still leaves a small hole in what otherwise appears to be a solid wall of opposition to the dual capacity doctrine. For example, California might still permit recovery on the facts presented in *Mercer v.*

283. *Id.* at 15.

284. *Bell v. Industrial Vangas, Inc.*, 637 P.2d 266, 272 (Cal. 1981).

285. Cal. Labor C. § 3602(a) (1982).

286. Cal. Labor C. § 3602(b)(3) (1982).

287. 7 Cal. Rptr.2d 264 (Cal. App. 1992).

288. *Id.* at 265.

289. *Id.* at 267.

290. *Id.*

Uniroyal, Inc.,²⁹¹ an Ohio case which endorsed the dual capacity doctrine, but which has since been overruled. In *Mercer*, the plaintiff was employed by Uniroyal. While on the job, he was driving a truck which Uniroyal had leased from Avis which, coincidentally, was equipped with Uniroyal tires, one of which was allegedly defective.²⁹² In other words, the tire was sold to a third person and, thereafter, provided by that person for the employee's use.²⁹³

In any event, in *Mercer* the court permitted the plaintiff's products liability case to proceed on the basis of the dual capacity doctrine,²⁹⁴ making Ohio one of the very few jurisdictions to adopt it. In 1989, however, the Ohio Supreme Court decided *Schump v. Firestone Tire and Rubber Company*,²⁹⁵ rejecting the doctrine. The court reasoned:

The dual capacity test is not concerned with how separate or different the second function is from the first, but whether the second function generates obligations unrelated to those flowing from that of employer. This means the employer must step out of the employer-employee relationship, creating separate and distinct duties to the employee; the fact of injury must be incidental to the employment relationship.²⁹⁶

* * *

"If the employer is also the manufacturer of the product which caused the employee's injury, the two personas of manufacturer and employer are interrelated. An employer has a duty to provide a safe workplace for his employees. If an employer provides an employee with a defective machine or tool to use in his work, he has breached his duty as a manufacturer to make safe machinery, and his duty as an employer to provide a safe working environment. Yet, the two duties are so inextricably wound that they cannot be logically separated into two distinct legal personas."²⁹⁷

Thus, the only two jurisdictions that ever squarely endorsed the doctrine²⁹⁸ have now rejected it almost in its entirety. Those other states that considered it, rejected the doctrine on first impression.²⁹⁹

291. 361 N.E.2d 492 (Ohio App. 1976).

292. *Id.* at 493.

293. Of course, since Avis leased the truck (and tires) to Uniroyal and Uniroyal provided it to its employee, one could argue that it falls outside of the California statute.

294. 361 N.E.2d at 496 (cited at note 291).

295. 541 N.E.2d 1040 (Ohio 1989).

296. *Id.* at 1044-45

297. *Id.* at 1045 (quoting *Weber v. Armco*, 663 P.2d 1221, 1226 (Okla. 1983)).

298. New Jersey adopted it under very limited circumstances involving the post-manufacture merger of the product manufacturer and the plaintiff's employer. See *Petrocco v. AT & T Teletype, Inc.*, 642 A.2d 1072 (N.J. Super. L. 1994). New York found an exception to the exclusivity of workers' compensation where there was an assumption of common law liability by an employer. See *Billy v. Consolidated Machine Tool Corp.*, 412 N.E.2d 934 (N.Y. 1980). Both cases make it very clear, however, that the courts are refusing to adopt the dual capacity doctrine generally.

299. *Bowen v. Goodyear Tire & Rubber Co.* 516 So.2d 570, 571-72 (Ala. 1987); *State v. Purdy*, 601 P.2d 258, 260 (Alaska 1979); *Hills v. Salt River Project Assn.* 698 P.2d 216, 221 (Ariz. App. 1985); *Campbell v. Black Mountain Spruce, Inc.*, 677 P.2d 379, 381 (Colo. App. 1983); *Roberson v. Nooter Corp.* 459 So.2d 1156, 1157 (Fla. App. 1984); *Rosales v. Verson Allsteel Press Co.*, 354 N.E.2d 553, 556-57 (Ill. App. 1976); *Needham v. Fred's Frozen Foods, Inc.*, 359 N.E.2d 544, 545 (Ind. App. 1977); *Dauphine v. F.W. Woolworth Co.*, 451 So.2d 1333, 1334-35 (La. App. 1984); *Rader v. United States Rubber Reclaiming Co.*, 617 F.Supp. 1045, 1046 (S.D.Miss. 1985) (predicting Mississippi law); *Baker v. Armco, Inc.*, 684 S.W.2d 81, 83 (Mo. App. 1984); *Petrocco v. AT & T Teletype, Inc.*, 642 A.2d at 1074 (N.J. Super. L. 1994) (cited at note 298); *Billy v. Consolidated Mach.*

The fact that the doctrine has received such a poor reception is actually quite unfortunate. Particularly in a case like *Mercer*, where the fact that the employer is also the manufacturer of the defective product is purely coincidental and the product has already been put into the stream of commerce, the dual capacity doctrine would permit recovery in a manner which is utterly consistent with the bulk of products liability cases brought against third parties, but arising out of employment-related injuries. If the defective tire were made by anyone other than the employer, no one would question the employee's right to pursue an action for damages against that manufacturer and it seems fundamentally unfair to penalize an injured party when simple bad luck brings him into contact with his employer's products. Unless the applicable legislation explicitly deals with such a situation, the employer should be made to answer in its capacity as manufacturer.

5.8.2 Legislative Pre-Emption

5.8.2.1 Federal Pre-Emption: The Background

Subject to Constitutional limitations, no one seriously questions that Congress, if it so chooses, can displace state law that deals with product safety issues.³⁰⁰ This can be accomplished either directly, by statutory enactment, or indirectly, by delegating authority to a regulatory agency.³⁰¹

It is agreed that there are at least three ways in which federal legislation or regulation may pre-empt state law. First, there may be express pre-emption where the intent to pre-empt is "explicitly stated in the statute's language or implicitly contained in its structure and purpose."³⁰² Second, there may be so-called "conflict pre-emption," i.e., implied pre-emption under which "state law is pre-empted if that law actually conflicts with federal law"³⁰³ or "stands as an obstacle" to the implementation of Congressional purposes.³⁰⁴ Third, there may be so-called "field pre-emption" under which pre-emption may be implied "if federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'"³⁰⁵ At least in the context of regulatory agency pre-emption, it is established that occupa-

Tool Corp., 412 N.E.2d at 883 (cited at note 298) (N.Y. 1980); *Stewart v. CMI Corp.* 740 P.2d 1340, 1342 (Utah 1987); *Henning v. General Motors Assembly Div.*, 419 N.W.2d 551, 559 (Wis. 1988).

300. U.S. Const. Art. VI, cl. 2. (providing that the law of the United States "shall be the supreme Law of the Land; *** anything to the Contrary notwithstanding."); *M'Culloch v. Maryland*, 17 U.S. 316 (1819).

301. Of course, if the issue is pre-emption by a regulatory agency, the agency must be "acting within the scope of congressionally delegated authority, 'for an agency literally has no power to act, let alone pre-empt validly enacted legislation of a sovereign state unless and until Congress confers power on it.'" *New York v. F.E.R.C.*, 535 U.S. 1, 18 (2002) (quoting *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374 (1986)).

302. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

303. *Id.* (citing *Pacific Gas & Elec. Co. v. Energy Resources Conservation and Development Comm'n*, 461 U.S. 190 (1983)).

304. *Merrell Dow Pharmaceuticals, Inc. v. Oxendine*, 649 A.2d 825, 828 (D.C. App. 1994) ("obstructs federal purpose" or makes "compliance with both federal and state law... impossible.").

305. *Cipollone*, 505 U.S. at 516 (cited at note 302) (quoting *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))).

tion of the field may be found regardless of whether the agency has exercised the power or not. As long as Congress has delegated the power to occupy the field, implied pre-emption may be found.³⁰⁶

Nevertheless, since regulation of activities and things which affect the public safety is one of the traditional components of the states' police powers,³⁰⁷ for many years there had been considerable reluctance on the part of Congress to interfere, and perhaps even greater reluctance on the part of the courts to upset the balance of power between the federal government and the states. Thus, where federal legislation contained pre-emption language, courts commonly held that such language did not extend into the realm of common law litigation. In fact, prior to 1992, express pre-emption played only a marginal role in products cases. *Ferebee v. Chevron Chemical Co.*,³⁰⁸ for example, was a wrongful death action brought following the death of a farm laborer alleging that the decedent died as the result of long-term exposure to a pesticide manufactured by the defendant. The basis of the claim was inadequate labeling.

The defendant claimed that the suit was pre-empted by the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA").³⁰⁹ Under FIFRA, manufacturers are obligated to register their products with the Environmental Protection Agency and obtain EPA pre-marketing approval of their proposed label. The relevant pre-emption clause of FIFRA provided that states are prohibited from imposing "any requirements for labeling or packaging in addition to or different from those required under the Act."³¹⁰ Concluding that the plaintiff's claim was not pre-empted, the court reasoned that:

While FIFRA does not allow states directly to impose additional labeling requirements, the Act clearly allows states to impose more stringent constraints on the use of EPA approved pesticides than those imposed by the EPA. *** [I]f a state chooses to restrict pesticide use by requiring that the manufacturer compensate for all injuries or for some injuries resulting from the use of a pesticide, federal law stands as no barrier.³¹¹

There are two important points here. First, in the absence of a pre-emption claim, there is the familiar notion, previously discussed in the context of "due care per se,"³¹² that statutes are normally held to set minimum standards only. Thus, the violation of a statute may be deemed negligence per se, however, compliance with a statute, while admissible in a negligence case as evidence of due care, is not dispositive, since the finder of fact may still determine that a reasonable person would have done more than merely comply.³¹³ Second, and more important for the topic at hand, distinctions can be made between state legislation or administrative regulation, on the one hand, and the imposition of liability for damages under state law, on the other. Thus, a number of courts had

306. *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 613 (1926).

307. *Cipollone*, 505 U.S. at 516 (cited at note 302) stating that pre-emption analysis "starts with the assumption that the historic police powers of the States [are] not to be superseded by... [Federal law] unless that [is] the clear and manifest purpose of Congress." (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

308. 736 F.2d 1529 (D.C. Cir. 1984).

309. 7 U.S.C.A §§ 136-136y.

310. 7 U.S.C.A. § 136v(b).

311. *Ferebee*, 736 F.2d at 1541 (cited at note 308).

312. See Chapter 1, § 1.4.

313. See *Oxendine*, 649 A.2d at 828 (cited at note 304) ("FDA prescription drug regulations... are intended to be minimum standards which 'do not conflict with state law which sets higher standards for due care and safety in the manufacture of drugs.'" (citations omitted).

taken the position that even though the defendant was legally obligated to take a statutorily specified course of action that might result in civil liability, it was within a state's power to require that compensation be paid to victims nonetheless.³¹⁴ In *Mazur v. Merck & Co., Inc.*³¹⁵ the court explained that it is really a matter of federal regulation serving a different purpose than state tort systems:

[F]ederal regulation serves a deterrent purpose by limiting the manufacturer of inherently dangerous products to those applicants who meet stringent safety standards, while state tort law serves the equally important purpose of compensating individuals injured by those very same products. Since compliance with FDA regulations will not insure that a manufacturer's product will not cause injury, compliance will not necessarily exempt a manufacturer from liability. When those products do cause injuries, the state tort system provides a means of compensation. State tort law is intended to supplement federal regulation by providing a vehicle for compensation of vaccine-related injuries.³¹⁶

Additionally, in express pre-emption cases, there is the question of interpretation. Congress commonly uses some variation of the language "no state shall require." When that language is used, is it Congress's intention to preclude states from enacting legislation or promulgating administrative regulations only, or is the intent to preclude common law adjudication as well? Although the intent of Congress must be determined on a case-by-case basis, as early as 1959, the Supreme Court acknowledged that state tort law may serve a regulatory function and, therefore, may be pre-empted by federal law.³¹⁷

Although express pre-emption claims rarely amounted to anything before 1992, some courts were prepared to find implied pre-emption. Thus, while *Ferebee* declined to find either express or implied pre-emption by FIFRA, a number of cases disagreed. For example, in *Papas v. Upjohn Co.*,³¹⁸ the court found that FIFRA had occupied the field of labeling, and found implied pre-emption, though noting, but not deciding, that express pre-emption might exist as well.³¹⁹ In 1992, however, the Supreme Court weighed in making it appear that implied pre-emption was a thing of the past in cases where the legislation spoke to the pre-emption issue.

5.8.2.2 Cipollone v. Liggett Group

In 1992, the Supreme Court decided *Cipollone v. Liggett Group, Inc.*³²⁰ and, in so doing, dramatically changed the pre-emption legal landscape. Mrs. Cipollone contracted lung cancer as the result of many years of smoking. Suit was filed against three cigarette manufacturers in Federal District Court stating some thirteen causes of action.³²¹ When the case ultimately made its way to the U.S. Supreme Court, the Court addressed the following causes of action: (1) strict liability for failure to warn "of the health consequences

314. See *Riden v. ICI Americas, Inc.*, 763 F.Supp. 1500, 1507 (W.D. Mo. 1991); *But see* *Fitzgerald v. Mallinckrodt*, 681 F.Supp. 404, 406–07 (E.D. Mich. 1987 (rejecting the *Ferebee* rationale) and *Epler v. Ciba-Geigy Corp.*, 860 F.Supp. 1391, 1394 n.1 (W.D.Mo. 1994) (observing that *Riden* was effectively rejected by *Cipollone*).

315. 742 F.Supp. 239 (E.D. Pa. 1990).

316. *Id.* at 247.

317. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959).

318. 926 F.2d 1019 (11th Cir. 1991), *rev'd*, 505 U.S. 1215 (1992).

319. *Id.* at 1023–24.

320. 505 U.S. 504 (cited at note 302).

321. 593 F.Supp. 1146, 1149 (D.N.J. 1984).

of smoking”; (2) negligence in testing, researching, promoting and advertising cigarettes; (3) breach of express warranty; (4) fraudulent misrepresentation—in that the cigarette company’s advertising “neutralized the effect of federally mandated warning labels”; (5) fraudulent misrepresentation—that the cigarette companies concealed the health risks of smoking; and (6) conspiracy among the defendants to misrepresent and conceal the dangers of smoking.

In addition to all of the normal denials and defenses, the defendants claimed that the lawsuit was pre-empted by federal legislation,³²² namely, the Federal Cigarette Labeling and Advertising Act of 1965³²³ and the 1969 amendments to the Act.³²⁴

Section 5 of the 1965 Act, entitled “Pre-emption,” provided, in part, as follows:

(a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.

(b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this act.³²⁵

When the Act was amended in 1969, there were several significant changes. The “may be hazardous” language of the 1965 Act was strengthened to “is dangerous.”³²⁶ Additionally, “the 1969 Act banned cigarette advertising in ‘any medium of electronic communication subject to [FCC] jurisdiction’—i.e., television and radio.³²⁷ More importantly for our purposes, the pre-emption provision was changed to read as follows:

(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

The first issue which the Court addressed was the relationship between express pre-emption and implied pre-emption. Whereas the Court of Appeals found implied pre-emption of some of the plaintiff’s claims,³²⁸ the Supreme Court reversed, seeming to hold that there could be no implied pre-emption where there was an express pre-emption provision in the statute. The Court wrote:

322. *Id.* at 1149–50. The history of the case was quite involved. The original district court decision held that there was neither express nor implied pre-emption. *Id.* at 1165–68. The Third Circuit reversed and remanded. *See Cipollone v. Liggett Group, Inc.*, 789 F.2d 187 (3rd Cir. 1986). An opinion clarifying its earlier decision was then prepared finding pre-emption as to some issues, but not others. *See Cipollone v. Liggett Group, Inc.*, 649 F.Supp. 664 (D.N.J. 1986), *cert. denied*, 479 U.S. 1043 (1987).

With that background, the case went to trial in the federal district court resulting in a judgment for the plaintiff. The ensuing judgment and orders on post trial motion were then appealed to the Third Circuit and, eventually, to the Supreme Court. *See Cipollone v. Liggett Group, Inc.*, 693 F.Supp. 208 (D.N.J. 1988), *aff’d in part, rev’d in part*, 893 F.2d 541 (3rd Cir. 1990), *cert granted*, 499 U.S. 935 (1991), *aff’d in part, rev’d in part*, 505 U.S. 504 (1992).

323. 15 U.S.C.A. §§ 1331–40 (1965).

324. Public Health Cigarette Smoking Act of 1969, 15 U.S.C.A. §§ 1331–40 (1969).

325. Section 4 of the 1965 Act prohibited the sale of cigarettes unless the package stated: “Caution: Cigarette Smoking May Be Hazardous To Your Health.”

326. *Cipollone*, 505 U.S. at 515 (cited at note 302).

327. *Id.*

328. 789 F.2d at 187 (3rd Cir. 1986).

In our opinion, the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in [section] 5 of each Act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a “reliable indicium of congressional intent with respect to state authority,” “there is no need to infer congressional intent to pre-empt state laws from the substantive provisions” of the legislation. Such reasoning is a variant of the familiar principle of *expression unius est exclusio alterius*: Congress’ enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted. In this case, the other provisions of the 1965 and 1969 Acts offer no cause to look beyond [the express pre-emption provision] . . . of each Act.³²⁹

Moreover, recognizing that federal pre-emption represents an interference with the rights of states to exercise power over matters which affect the health of citizens, the Court asserted the existence of a “presumption against the pre-emption of state police power regulations . . . [which] reinforces the appropriateness of a narrow reading of . . . [the pre-emption provision].”³³⁰

Finally, regarding the question of whether pre-emption principles necessarily applied equally to state legislation or administrative regulation, on the one hand, and common law actions for damages, on the other, the Court found “no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damage actions.”³³¹

Turning then to the language of the pre-emption provision in the 1965 Act, the Court found the language to be precise and narrow. It mandated a specific warning be displayed on cigarette packages and in advertising. Other than that specific warning the statute stated, “[n]o statement relating to smoking and health shall be required in the advertising . . .” and “[n]o statement relating to smoking and health . . . shall be required on any cigarette package.” These provisions, the Court reasoned, “on their face . . . merely prohibited state and federal rule-making bodies from mandating particular cautionary statements on cigarette labels . . . or in cigarette advertisements . . .”³³² The mandated warning does not “foreclose additional obligations imposed under state law” and the mere fact that “Congress requires a particular warning label does not automatically pre-empt a regulatory field.”³³³ The Court then concluded that the 1965 Act pre-emption provision “superseded only positive enactments by legislatures or administrative agencies that mandate particular warning labels.”³³⁴

The Court then proceeded to analyze the effect of the 1969 Amendment. Whereas the Third Circuit had concluded that the 1969 Amendment to section 5 did not significantly change the 1965 Act,³³⁵ the Supreme Court disagreed. Noting that the 1969 Act “bars not simply ‘statements’ but rather ‘requirement[s] or prohibitions’” under state law and “reaches beyond statements ‘in the advertising’ to obligations ‘with respect to

329. Cipollone, 505 U.S. at 517 (cited at note 302) (citations omitted).

330. *Id.* at 518.

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.* at 518–19.

335. *Id.* at 517 n.13.

the advertising or promotion' of cigarettes", the Court concluded that the pre-emption provision of the 1969 Act was much broader than that of the 1965 Act.³³⁶

The Court rejected petitioner's argument that the 1969 provision, like the 1965 provision, affected only positive enactments, not common law.

The phrase "[n]o requirement or prohibition" sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules.

* * *

Moreover, common law damages actions of the sort raised by petitioner are premised on the existence of a legal duty and it is difficult to say that such actions do not impose "requirements or prohibitions." It is in this way that the 1969 version of [section]...5(b) differs from its predecessor: Whereas the common law would not normally require a vendor to use any specific *statement* on its packages or in its advertisements, it is the essence of the common law to enforce duties that are either affirmative *requirements* or negative *prohibitions*. We therefore reject petitioner's argument that the phrase "requirement or prohibition" limits the 1969 Act's pre-emptive scope to positive enactments by legislatures and agencies.³³⁷

Having concluded that the statutory language in the 1969 amendment expressly pre-empted state-created common law damage suits, the only remaining question was the breadth of the pre-emption. In separate opinions, concurring and dissenting, Justices Scalia and Thomas argued that the plaintiff's entire action was pre-empted³³⁸ while Justices Blackmun, Kennedy and Souter argued there was an insufficient basis to find any part of the common-law action was pre-empted.³³⁹ The plurality, however, chose to examine each of the causes of action, concluding some were pre-empted while others were not.

As to the "failure to warn" claims, a plurality of the Court found them pre-empted only insofar as the claims "require a showing that the respondents' post-1969 advertising or promotions should have included additional, or more clearly stated, warnings."³⁴⁰ To the extent that petitioners were claiming that the cigarette companies failed to test or inadequately researched the dangers, i.e., "actions unrelated to advertising or promotion[.]" the claims were not pre-empted.³⁴¹

Finding that express warranty claims were based on a duty assumed by the defendants, "not [a duty] imposed under State law," the plurality found no pre-emption.³⁴² Similarly, on the fraudulent misrepresentation claims, the Court found that the claim was pre-empted to the extent it asserted that the defendant's advertising tended to negate or neutralize the mandated warning.³⁴³ However, to the extent that the fraud claims were based on concealment of health risks, they relied on a state law duty to dis-

336. *Id.* at 520.

337. *Id.* at 522 (citations omitted).

338. *Id.* at 544–56.

339. *Id.* at 534.

340. *Id.* at 524.

341. *Id.* at 524–25.

342. *Id.* at 525–27.

343. *Id.* at 528.

close “through channels of communication other than advertising or promotion,” thus, that claim was not pre-empted.³⁴⁴

Somewhat mysteriously, the plurality also stated that “claims based on allegedly false statements of material fact made in advertisements are not pre-empted... [since] [s]uch claims are not predicated on a duty ‘based on smoking and health’ but on a more general obligation—the duty not to deceive.”³⁴⁵ Finally, having concluded that fraudulent misrepresentation claims were not pre-empted, the Court held that conspiracy to defraud was also not pre-empted.³⁴⁶

It probably goes without saying that the analysis of the individual claims and the attempt to distinguish between obligations imposed by the state and obligations assumed by the defendant was less than satisfactory. All tort duties are those which, in one way or another, are recognized by the state in the sense that a remedy is provided if injuries result from the defendant’s failure to meet the obligation. Regardless of whether one chooses to speak and is subject to liability for breach of express warranty or fraudulent misrepresentation, or is required to speak and is subject to liability for non-disclosure,³⁴⁷ ultimately liability depends on the existence of a state imposed (or recognized) duty. Nevertheless, that was the distinction which the Court attempted to make and, as muddy as portions of *Cipollone* were, subsequent decisions made it look clear in comparison.

5.8.2.3 *Post-Cipollone Pre-Emption*

For a few years after *Cipollone*, if legislation contained an express pre-emption provision, deciding the case on that basis, rather than implied pre-emption, seemed to be required. Thus, for example, prior to *Cipollone*, the Eleventh Circuit found implied pre-emption under FIFRA in *Pappas v. Upjohn Co.*³⁴⁸ In 1992, the Supreme Court ordered the decision vacated and remanded,³⁴⁹ whereupon the Eleventh Circuit found express pre-emption.³⁵⁰ Similarly, in *King v. E. I. DuPont De Nemours & Co.*,³⁵¹ relying on *Cipollone*, the First Circuit found express pre-emption under FIFRA as did the Seventh Circuit in *Shaw v. Dow Brands, Inc.*³⁵²

Any illusion that the matter had been settled, however, was dispelled when the Supreme Court decided *Freightliner Corp. v. Myrick*³⁵³ in 1995. Although in *Cipollone* the Court seemed quite clear that the existence of a pre-emption clause precluded a court from finding either implied pre-emption based on conflict or intent to occupy the field, in *Myrick* the Court stated that, in light of subsequent decisions, “[a]t best, *Cipollone* supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule.”³⁵⁴

Nevertheless, the general approach to pre-emption taken in *Cipollone* essentially controlled both the plurality and dissent when the Court decided *Medtronic, Inc. v.*

344. *Id.*

345. *Id.* at 528–29.

346. *Id.* at 530. Regarding civil conspiracy claims generally, see Chapter 10, § 10.3.2.1.

347. See Chapter 2, § 2.2.1.2.

348. 926 F.2d 1019, 1021 (11th Cir. 1991).

349. 505 U.S. 1215 (1992).

350. 985 F.2d 516, 518 (11th Cir. 1993), *cert. denied*, 510 U.S. 913.

351. 996 F.2d 1346, 1347 (1st Cir. 1993).

352. 994 F.2d 364, 370 (7th Cir. 1993).

353. 514 U.S. 280 (1995).

354. *Id.* at 289.

*Lohr*³⁵⁵ in 1996. That case involved the pre-emptive effect of a provision of the Medical Device Amendment (MDA) to the Federal Food, Drug and Cosmetic Act to state law negligence and strict liability claims against the manufacturer of a pacemaker. The medical device in that case did not go through a full FDA premarket approval process (PMA), but was approved for sale under a commonly used exception which permits medical “devices which are ‘substantially equivalent’ to pre-existing devices to avoid the PMA process.”³⁵⁶ This was highly significant since it meant that the “design [of the pacemaker]...and other ‘substantially equivalent’ devices, [had]...never been formally reviewed under the MDA for safety or efficacy.”³⁵⁷

The applicable pre-emption provision provided, in part, that: “no State...may establish or continue in effect with respect to a device intended for human use any requirement (1) which is different from, or in addition to, any requirement applicable under [the MDA] to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under [the Act].”³⁵⁸

Both the plurality and dissent agreed that because there was an express pre-emption provision, “we need not go beyond that language to determine whether Congress intended the MDA to pre-empt at least some state law...”³⁵⁹ Thus, although the opinions contain occasional references to conflict and field pre-emption, the Court is clearly applying *Cipollone*, at least to the extent that it held the existence of an express pre-emption clause largely precluded implied pre-emption analysis.

A plurality opinion written by Justice Stevens and joined by Justices Kennedy, Souter and Ginsburg, found that state common-law negligence and strict liability claims arising out of the product’s design, manufacture and marketing were not pre-empted because “when Congress enacted § 360k, it was primarily concerned with the problem of specific, conflicting state statutes and regulations rather than the general duties enforced by common-law actions.”³⁶⁰ Although both the statutes under consideration in *Cipollone* and in the MDA used the word “requirement,” “[u]nlike the statute at issue in *Cipollone*,... [in section 360k] the word is linked with language suggesting that its focus is device-specific enactments of positive law by legislative or administrative bodies, not the application of general rules of common law by judges and juries.”³⁶¹

Justice O’Connor, however, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, argued that “[t]he language of § 360k demonstrates congressional intent that the MDA pre-empt ‘any requirement’ by a State that is ‘different from, or in addition to,’ that applicable to the device under the FDCA.”³⁶² Analyzing the claims separately, she agreed that the defective design claim was not pre-empted because the FDA ap-

355. 518 U.S. 470 (1996).

356. *Id.* at 478.

357. *Id.* Also see *Horn v. Thoratec*, 376 F.3d 163, 168 (3rd Cir. 2004) (finding preemption under the MDA and distinguishing *Lohr* on the basis that “[t]he *Lohr* Court did not consider whether the more rigorous PMA process under § 360e(c)—as distinct from the § 510(k) process—constitutes ‘a specific federal regulation of the product’ (in this case the HeartMate), which, in turn, imposes strict FDA requirements upon the manufacturer.”).

358. 21 U.S.C. § 360k(a).

359. *Lohr*, 518 U.S. at 484 (cited at note 355) (quoting *Cipollone*, 505 U.S. at 517 (cited at note 302)). Also see *id.* at 509 (O’Connor, J. concurring and dissenting).

360. *Id.* at 490.

361. *Id.*

362. *Id.* at 510.

proval process was such that the FDA never formulated device-specific requirements for the design.³⁶³

The Justices disagreed, however, regarding the manufacturing and marketing claims. The plurality found them not pre-empted because, although the device was subject to FDA labeling and manufacturing requirements, as applied to this device, given the manner by which marketing approval was obtained, “the federal requirements reflect important but entirely generic concerns about device regulation generally, not the sort of device regulation that the statute or regulations were designed to protect from potentially contradictory state requirements.”³⁶⁴ The dissent, on the other hand, objected to “the additional requisite of ‘specificity,’” imposed by the plurality, and argued that “[s]ome, if not all, of the Lohrs’ common-law claims regarding the manufacturing and labeling of Medtronic’s device would compel Medtronic to comply with requirements different from, or in addition to, those required by the FDA.”³⁶⁵

Interestingly, there was apparently agreement that state law negligence per se claims based on the violation of federal law were not pre-empted.³⁶⁶ Justice O’Connor wrote:

I also agree that the Lohrs’ claims are not pre-empted by § 360k to the extent that they seek damages for Medtronic’s alleged violation of federal requirements. Where a state cause of action seeks to enforce an FDCA requirement, that claim does not impose a requirement that is “different from, or in addition to,” requirements under federal law. To be sure, the threat of a damages remedy will give manufacturers an additional cause to comply, but the requirements imposed on them under state and federal law do not differ. Section 360k does not preclude States from imposing different or additional *remedies*, but only different or additional *requirements*.³⁶⁷

The entire pre-emption issue, however, became a complete swamp in 2000 when the Court handed down a 5–4 decision in *Geier v. American Honda Motor Company*.³⁶⁸ To understand the case, at least to the extent possible, it is necessary to review the background. In 1966, Congress passed the National Traffic and Motor Vehicle Safety Act (NTMVSA).³⁶⁹ Thereafter, the Act was amended and the *Geier* case involved the 1984 version of the Act. The Act delegated authority to the Department of Transportation to promulgate Federal Motor Vehicle Safety Standards (FMVSS). Pursuant to that authority, the Department developed FMVSS 208 which required automobile manufacturers to equip some, but not all, 1987 vehicles with passive restraint systems (airbags or automatic seatbelts). The plaintiff’s 1987 Honda Accord was not one of the vehicles so equipped and, in 1992, she was injured when she crashed into a tree. A products liability case was filed against Honda alleging negligent design based on the lack of an airbag and strict liability for a design defect, again based on the lack of an airbag.

Section 1392(d) of the 1984 version of the NTMVSA (“the Act”) contained a pre-emption provision which provided:

363. *Id.* at 513.

364. *Id.* at 501.

365. *Id.* at 513.

366. See Chapter 1, § 1.3.

367. 518 U.S. at 513 (cited at note 355).

368. 529 U.S. 861 (2000).

369. 15 U.S.C.A. § 1381 *et. seq.* (1966) (recodified in 1994 as 49 U.S.C.A. § 30101 *et seq.*).

Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,], any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.³⁷⁰

Section 1392(k), however, contained a “savings clause” which provided:

Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

The majority opinion, written by Justice Breyer and joined by Chief Justice Rehnquist and Justices O’Connor, Scalia and Kennedy, described the plaintiff’s case as one which “sought to establish a different safety standard [than FMVSS 208]—*i.e.*, an airbag requirement[.]”³⁷¹

In reaching the final conclusion that “this kind of ‘no airbag’ lawsuit conflicts with the objectives of FMVSS 208, a standard authorized by the Act, and therefore is pre-empted by the Act[.]” the majority broke the case down into three “subsidiary” issues. “First, does the Act’s express pre-emption provision pre-empt this lawsuit?... Second, do ordinary pre-emption principles [*i.e.*, implied pre-emption] nonetheless apply?... Third, does this lawsuit actually conflict with FMVSS 208, hence with the Act itself?”³⁷²

In holding that the pre-emption provision of the Act does not expressly pre-empt the action, the majority focused on the savings clause and its underlying assumption “that there are some significant number of common-law liability cases to save.”³⁷³ In *Cipollone*, the Court held that the presence of an express pre-emption clause established legislative intent and, therefore, there would be no need to consider implied pre-emption at all. In *Myrick*, the *Cipollone* approach was softened to a presumption. In *Geier*, however, the majority seemed to simply reject both precedents, and “conclude[d] that the savings clause (like the express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles.”³⁷⁴ In fact, after discussing *Myrick*, the majority explicitly rejected it, asserting that “the express pre-emption provision imposes no unusual “special burden” against [implied] pre-emption [and]... we do not see the basis for interpreting the savings clause to impose any such burden.”³⁷⁵ In other words, the existence of the savings clause neither precluded an implied pre-emption analysis nor compelled the conclusion that common law suits were not pre-empted, even though that is precisely what the savings clause indicated.

In reviewing the legislative history of the act, the majority found that Congress sought both uniformity and at least some lawsuits.

The... [pre-emption and savings] provisions, read together, reflect a neutral policy, not a specially favorable or unfavorable policy, toward the application of ordinary conflict pre-emption principles. On the one hand, the pre-emption provision itself reflects a desire to subject the industry to a single, uniform set

370. The majority declined to decide whether a “standard” should be treated differently than a “requirement.” 529 U.S. at 867.

371. 529 U.S. at 865 (cited at note 368).

372. *Id.* at 867.

373. *Id.* at 868.

374. *Id.* at 869.

375. *Id.* at 873.

of federal safety standards. Its pre-emption of *all* state standards, even those that might stand in harmony with federal law, suggests an intent to avoid the conflict, uncertainty, cost, and occasional risk to safety itself that too many different safety-standard cooks might otherwise create. *** This policy by itself favors pre-emption of state tort suits, for the rules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts.

On the other hand, the savings clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while simultaneously providing necessary compensation to victims.³⁷⁶

Notwithstanding the Court's questionable conclusion of Congressional ambivalence, the majority clearly gave greater weight to the supposed desire for uniformity and the avoidance of conflicts—regardless of whether they “prevent or frustrate the accomplishment of a federal objective [or]... make it ‘impossible’ for private parties to comply with both state and federal law”—noting that the Court “has assumed that Congress would not want either... [and] has thus refused to read general ‘saving’ provisions to tolerate actual conflict...”³⁷⁷

Finally, the majority went on to hold that “a common law ‘no airbag’ action like the one before [the Court]... actually conflicts with FMVSS.”³⁷⁸ Concluding that:

In sum...the 1984 version of FMVSS 208 “embodies the Secretary’s policy judgment that safety would best be promoted if manufacturers installed *alternative* protections systems in their fleets rather than one particular system in every car.

* * *

In effect, petitioners’ tort action depends upon its claim that manufacturers had a duty to install an airbag when they manufactured the 1987 Honda Accord. Such a state law—i.e., a rule of state tort law imposing such a duty—by its terms would have required manufacturers of all similar cars to install airbags rather than other passive restraint systems, such as automatic belts or passive interiors. It thereby would have presented an obstacle to the variety and mix of devices that the federal regulation sought. It would have required all manufacturers to have installed airbags....³⁷⁹

The dissenting opinion, written by Justice Stevens and joined by Justices Souter, Thomas and Ginsburg, makes a series of arguments which are not only more broadly consistent with the body of pre-emption jurisprudence developed before *Geier*, but also more consistent with the traditional analysis of tort cases. After observing that what was involved in the case was a duty or submissibility issue, not a liability issue,³⁸⁰ the dissent turned to the pre-emption issues. First, as a matter of interpretation, the dissent argued

376. *Id.* at 870–71.

377. *Id.* at 873.

378. *Id.* at 874.

379. *Id.* at 881.

380. *Id.* at 892 (“[T]here is a vast difference between a rejection of Honda’s threshold arguments in favor of federal pre-emption and a conclusion that petitioners ultimately would prevail on their common-law tort claims.”).

that the term “safety standard” in both the pre-emption and savings clauses “refers to an objective rule prescribed by a legislature or an administrative agency and does not encompass case-specific decisions by judges and juries that resolve common-law claims.”³⁸¹ Second, regardless of the language, “[t]he savings clause...unambiguously expresses a decision by Congress that compliance with a federal safety standard does not exempt a manufacturer from *any* common-law liability.”³⁸²

Since Congress expressly declined to provide for pre-emption of common-law liability, the dissent argued, while not completely foreclosing the possibility that there is implied pre-emption, its decision raises a presumption that the law “lacks any implicit pre-emptive effect.”³⁸³ The dissent went on to deny the existence of a conflict between the standard and the potential for common-law liability. Contrary to the majority’s assertion, the imposition of tort liability would not *require* automobile manufacturers to install airbags. Therefore, to the extent that the adoption of a flexible standard sought to encourage the development of new technologies, there was no inconsistency.³⁸⁴ Furthermore, statutory standards traditionally represent “minimum, rather than fixed or maximum requirements.”³⁸⁵

In short, the dissent argued that the majority failed to recognize and apply the presumption against pre-emption which “is rooted in the concept of federalism”³⁸⁶ and which “serves as a limiting principle that prevents federal judges from running amok with our potentially boundless...doctrine of implied conflict pre-emption based on frustration of purposes...”³⁸⁷

The following year, in *Buckman Co. v. Plaintiffs’ Legal Committee*,³⁸⁸ the Court held that “fraud on the FDA” claims, i.e., that the defendant “made fraudulent representations to the Food and Drug Administration...in the course of obtaining approval to market [orthopedic bone] screws [and]...such representations were at least a ‘but for’ cause of injuries...sustained from the implantation of these devices[,]” were pre-empted by the FDCA as amended by the Medical Device Amendments of 1976.³⁸⁹

In the course of that decision, the Court, relying on *Geier*, openly repudiated the *Cipollone* and *Lohr* decisions to the extent that they held that, when legislation con-

381. *Id.* at 896. The dissent attempted to distinguish prior holding that common law remedies were pre-empted by focusing on the language in those statutes and the “ordinary meaning of the terms ‘safety standard.’” Citing *Cipollone*, 505 U.S. at 522 (cited at note 302) (“no requirement or prohibition” includes common law claims); *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (“law, rule, regulation, order or standard relating to railroad safety” includes common law negligence claim); *Medtronic, Inc. v. Lohr*, 518 U.S. at 502–03 (cited at note 355) (“any requirement’ imposed by a State or its political subdivisions may include common-law duties.”).

382. 529 U.S. at 897–98 (cited at note 368).

383. *Id.* at 900.

384. The dissent pointed out that a jury finding of liability based on negligence or strict liability for a design defect would “not amount to an immutable, mandatory ‘rule of state tort law imposing a duty [to install an airbag.] * * * Rather, that verdict merely reflects the jury’s judgment that the manufacturer of a vehicle without any restraint system breached its duty of due care by designing a product that was not reasonably safe because a reasonable alternative design—‘including, but not limited to, airbags’...could have reduced the foreseeable risks of harm.” *Id.* at 903 n.18.

385. *Id.* at 904 n. 19 (citing Ralph Nader and Joseph A. Page, *Automobile-Design Liability and Compliance with Federal Standards*, 64 *Geo. Wash. L. Rev.* 415, 459 (1996) (noting that the Titanic met minimum lifeboat standards).

386. *Id.* at 907.

387. *Id.* at 907–08.

388. 531 U.S. 341 (2001).

389. *Id.* at 343.

tained express pre-emption provisions, Congressional intent needed to be determined by examining those provisions,³⁹⁰ and proceeded to base the decision entirely on implied pre-emption. Finding “the relationship between a federal agency and the entity it regulates is inherently federal in character”³⁹¹ and that those entities were apparently in need of protection, the Court held that:

State-law fraud-on-the-FDA claims inevitably conflict with the FDA’s responsibility to police fraud consistently with the [FDA’s]...judgment and objectives. As a practical matter complying with the FDA’s detailed regulatory regime in the shadow of 50 State’s tort regimes will dramatically increase the burdens facing potential applicants—burdens not contemplated by Congress in enacting the FDCA and the MDA. Would-be applicants may be discouraged from seeking...approval of devices with potentially beneficial off-label uses for fear that such use might expose the manufacturer or its associates...to unpredictable civil liability.³⁹²

Although the Court had the opportunity to clarify the issues in *Sprietsma v. Mercury Marine*,³⁹³ the decision provides little guidance. In that case, a wrongful death action was filed after the plaintiff’s decedent, a boat passenger, was thrown overboard and subsequently killed by the unguarded propeller blades. The plaintiff’s allegations of defect centered on the defendant’s failure to provide a propeller guard. The defendant argued express pre-emption under the terms of the Federal Boat Safety Act of 1971 (FBSA),³⁹⁴ implied pre-emption based on the Coast Guard’s 1990 decision not to promulgate a regulation requiring propeller guards and implied (field) pre-emption based on the Federal interest in uniform regulation.³⁹⁵

Under the relevant provision of the FBSA,³⁹⁶ the Secretary of Transportation is authorized to issue regulations establishing “minimum safety standards for recreational vessels and associated equipment” and to require the use of such equipment. The Secretary of Transportation, in turn, delegated this function to the Coast Guard.³⁹⁷ The applicable regulation also requires the Coast Guard to consult with the “National Safety Advisory Council” (the “Advisory Council”) which is appointed under the FBSA.³⁹⁸

46 U.S.C.A. § 4306, provides, in part, as follows:

[Unless otherwise permitted under the Act], a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment [except for “uniquely hazardous conditions...within the state]...that is not identical to a regulation prescribed...[pursuant to this Act].

There is also a savings clause that provides: “Compliance with this chapter or standards, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.”³⁹⁹

390. *Id.* at 352.

391. *Id.* at 347.

392. *Id.* at 350.

393. *Sprietsma v. Mercury Marine*, a Div. Of Brunswick Corp., 537 U.S. 51 (2002).

394. 46 U.S.C.A. § 4306.

395. 537 U.S. at 55 (cited at 393).

396. 46 U.S.C.A. § 4302.

397. 49 C.F.R. § 1.46(n)(1).

398. 46 U.S.C.A. § 13110.

399. 43 U.S.C.A. § 4311(g).

In 1988, the Coast Guard requested the Advisory Council to study the issue of propeller guards and the Advisory Council appointed a subcommittee that studied the issue for a year and a half before recommending that the Coast Guard take no action. The basis of the recommendation focused on the questionable feasibility of the design requirement, the potential for “blunt trauma caused by collision with the guard,” and cost and loss of boat performance.⁴⁰⁰ In other words, they conducted a fairly typical cost-benefit analysis.

After additional investigation and public comment, the Advisory Council recommended that the Coast Guard issue regulations but, with the exception of one regulation dealing with houseboats, the Coast Guard neither required nor prohibited propeller guards for boats like the one involved in the case.⁴⁰¹

The Court’s initial focus was on the pre-emption clause “which necessarily contains the best evidence of Congress’ pre-emptive intent”⁴⁰² and quickly concluded that the pre-emption provision was not applicable to common-law claims.⁴⁰³

Here, the express pre-emption clause . . . applies to “a [state or local] law or regulation.” We think that this language is most naturally read as not encompassing common-law claims for two reasons. First, the article “a” before “law or regulation” implies a discreteness—which is embodied in statutes and regulations—that is not present in the common law. Second, because “a word is known by the company it keeps,” the terms “law” and “regulation” used together in the pre-emption clause indicate that Congress pre-empted only positive enactments. If “law” were read broadly so as to include the common law, it might also be interpreted to include regulation, which would render the express reference to “regulation” in the pre-emption clause superfluous.⁴⁰⁴

Having concluded that there was no express pre-emption, the Court went on to consider implied pre-emption in accordance with *Geier*’s determination that “Congress’ inclusion of an express pre-emption clause ‘does *not* bar the ordinary working of conflict pre-emption principles.’”⁴⁰⁵ However, although the Illinois Supreme Court found conflict pre-emption based on a determination that “the Coast Guard’s failure to promulgate a propeller guard requirement . . . equates to a ruling that no such regulation is appropriate pursuant to the policy of the FBSA[,]”⁴⁰⁶ the U.S. Supreme Court disagreed. Though acknowledging that the refusal to regulate can, in some cases, “take on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute[,]”⁴⁰⁷ the Court was unwilling to find that the Coast Guard’s refusal to regulate in this instance should be so interpreted. In fact, just the opposite inference was to be drawn.

The Coast Guard’s apparent focus was on the lack of any “universally acceptable” propeller guard for “all modes of boat operation.” But nothing in its official explanation would be inconsistent with a tort verdict premised on a jury’s

400. 537 U.S. at 61 (cited at 393).

401. *Id.* at 62.

402. *Id.* at 62–63 (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)).

403. *Id.* at 63–64.

404. *Id.* at 63 (citations omitted).

405. *Id.* at 64 (quoting *Geier*, 529 U.S. at 869 (cited at note 368)).

406. *Id.* at 66 (quoting *Sprietsma*, 757 N.E.2d 75, 85 (Ill. 2001)).

407. *Id.* (citing *Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm’n*, 461 U.S. 375, 384 (1983) and *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947)).

finding that some type of propeller guard should have been installed on this particular kind of boat equipped with respondent's particular type of motor.⁴⁰⁸

In other words, in *Geier* the Court heavily weighted the DOT's interpretation of the regulation which the Government represented to be an "affirmative 'policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems...rather than one particular system in every car."⁴⁰⁹ Here, again, the Court gave significant weight to the claim of the Coast Guard's counsel, joined by the Solicitor General, that no pre-emptive effect was intended.⁴¹⁰

Finally, the Court considered the issue of whether the legislation occupied the field and rejected that contention finding that the "FBSA...does not require the Coast Guard to promulgate comprehensive regulations covering every aspect of recreational boat safety and design."⁴¹¹ Almost in passing, the Court noted that the field pre-emption cases cited by the respondent did not involve statutes with savings clauses, whereas one was present in the FBSA.⁴¹²

Where all of this leaves us is anybody's guess, although one gets the distinct impression that "tort reform" is proceeding under the guise of pre-emption analysis as the federalism concerns expressed in *Cipollone* and *Lohr* have largely disappeared from the Court's radar. The Court, or at least a majority of the Justices, are prepared to defer to the Solicitor General's arguments regarding the perils of non-uniformity, even in the face of language in the applicable legislation that seems to indicate a contrary legislative intent.

As states increasingly move toward the Products Liability Restatement's "reasonable alternative design" test for "design defect," plaintiffs will be required to propose such alternatives and, if *Geier* is indicative, the Court will translate that assertion into a proposed "rule" requiring that the alternative be utilized and then test that "requirement" under a conflict pre-emption analysis. This is unfortunate since it loses sight of the fact that tort law's central concern is whether the design chosen was reasonable. As the *Geier* dissent pointed out:

The Court's failure to "understand [this point] correctly," is directly attributable to its fundamental misconception of the nature of duties imposed by tort law. A general verdict of liability in a case seeking damages for negligent and defective design of a vehicle that (like Ms. Geier's) lacked any passive restraints does not amount to an immutable, mandatory "rule of state tort law imposing...a duty [to install an airbag]."

* * * Rather, that verdict merely reflects the jury's judgment that the manufacturer of a vehicle without any passive restraint system breached its duty of due care by designing a product that was not reasonably safe because a reasonable alternative design—"including, but not limited to, airbags," * * * Such a verdict obviously does not foreclose the possibility that more than one alternative design exists the use of which would render the vehicle reasonably safe and satisfy the manufacturer's duty of due care. Thus, the Court is quite wrong to suggest that, as a consequence of such a verdict, only the installation of airbags would enable manufacturers to avoid liability in the future.⁴¹³

408. *Id.* at 67.

409. *Id.* (quoting *Geier*, 529 U.S. at 881 (cited at note 368)).

410. *Id.*

411. *Id.*

412. *Id.* at 69.

413. *Geier*, 529 U.S. at 903 n.18 (cited at note 368) (citations omitted).

In any case, both the pre-*Cipollone* view that express pre-emption was a non-issue and the post-*Cipollone* view that implied pre-emption was a non-issue when the legislation contains an express pre-emption provision are historical relics, even if the legislation clearly addresses Congressional intent. Apparently, in each case, express pre-emption, conflict pre-emption and field pre-emption analyses have become necessitated.

5.9 Special Problems of Sovereign Immunity and the Government Contractor Defense

5.9.1 Background: Sovereign Immunity

The idea that the government is immune from liability is somewhat obscure⁴¹⁴ and its adoption in this country something of an oddity. As the Ohio Supreme Court recently observed:

“It is something of an anomaly that the common-law doctrine of sovereign immunity which is based on the concept that ‘the king can do no wrong’ was ever adopted by the American courts.” Further, the United States Supreme Court has also indicated that there is no rational justification in American jurisprudence for the English legal maxim “the King can do no wrong.” Specifically, [in 1879] in *Langford v. United States*, the court stated, “We do not understand that either in reference to the government of the United States, or of the several States, or of any of their officers, the English maxim has an existence in this country.”⁴¹⁵

Nevertheless, during the early part of the Nineteenth Century, it became established in America that the government could not be sued unless it consented. Dean Prosser explained:

In 1821 Chief Justice Marshall gave no reasons when he declared that, without its consent, no suit could be commenced or prosecuted against the United States. Following this, it soon became established that the government could not be sued without its consent. Consent, however, was soon forthcoming in the form of legislation; and with the establishment of a Court of Claims to hear contract cases, and various other minor provisions permitting even some actions in tort, a measure of relief was obtainable for those with grievances against the United States.⁴¹⁶

Even though actions were not barred entirely, governmental immunity in tort cases created a major obstacle to injured parties. In order to overcome it, it was often necessary to approach one’s Congressman and request that a private bill be introduced under which immunity was waived for a specific claim. Aside from the inherent unfairness of such a process, there were simply too many requests for private bills. During the 68th,

414. See William L. Prosser, *Handbook of the Law of Torts*, §131, at 970 (4th ed. 1971) (noting that “the origin of the idea underlying [immunity]... seems to have been the theory, allied with the divine right of kings, that “the King can do no wrong,” together with the feeling that it was necessarily a contradiction of his sovereignty to allow him to be sued as of right in his own courts.”).

415. *Butler v. Jordan*, 750 N.E.2d 554, 599–60 (Ohio 2001) (quoting *Haas v. Hayslip*, 364 N.E.2d 1376 at 1379 (Ohio 1977) (Brown, J. dissenting) (other citations omitted)).

416. Prosser, *supra* note 414, §131 at 971.

70th, 74th, 75th, 76th, and 77th Congresses, private bills were introduced at a rate of roughly two thousand per year.⁴¹⁷

5.9.2 The Federal Tort Claims Act

In 1946, Congress passed the Federal Tort Claims Act (FTCA) providing that the United States may be held liable “in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.”⁴¹⁸

28 U.S.C. § 1346(b) provides that Federal District Courts have

exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Although cases must be filed in federal court, and the federal rules apply, decision under the FTCA are based on state substantive law.⁴¹⁹ There are, however, a number of important additional procedural matters which need to be noted, at least in passing. First, the FTCA requires that an administrative claim be filed within two years of the accrual of the cause of action⁴²⁰ as a prerequisite to filing suit.⁴²¹ Thereafter, suit must be filed within six months of denial.⁴²² Six months of administrative inaction counts as a denial.⁴²³ In theory, the administrative claim is filed for the purpose of permitting the government to review claims and, if meritorious, resolve them prior to litigation. In practice, however, the claim requirement is a trap for the inexperienced. According to the weight of authority, the timely filing of a claim is jurisdictional and cannot be waived.⁴²⁴ It is tolled neither by infancy (regardless of whether a guardian has been appointed) nor mental incompetence.⁴²⁵ Second, there is no right to jury trial.⁴²⁶ Third,

417. *Dalehite v. United States*, 346 U.S. 15, 25 n.9 (1953). In *Dalehite*, the Court characterized the private bill device as “notoriously clumsy.” *Id.* at 24–25.

418. 28 U.S.C. § 2674.

419. 28 U.S.C. § 1346(b)(1).

This can, on occasion, create fairly complex choice of law issues. *See generally*, *Richards v. United States*, 369 U.S. 1, 6–10 (1962); *Raflo v. United States*, 157 F.Supp.2d 1, 7–11 (D.D.C. 2001).

420. The claim accrues when the claimant learns of his injury and the cause; the claimant need not know there is a legal basis for bringing the claim. *See United States v. Kubrick*, 444 U.S. 111, 119–21 (1979).

421. 28 U.S.C. §§ 2672, 2675.

422. 28 U.S.C. § 2401(b).

423. 28 U.S.C. § 2675(a).

424. *Richman v. United States*, 709 F.2d 122, 124 (1st Cir. 1983); *Rosario v. American Export-Isbrandtsen Lines, Inc.*, 531 F.2d 1227, 1231 (3rd Cir. 1976); *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1463 (10th Cir. 1989); *But see Schmidt v. United States*, 933 F.2d 639, 640 (8th Cir. 1991) (claim not jurisdictional).

425. *Barren v. United States*, 839 F.2d 987, 992 (3rd Cir. 1988) (mental incompetence), *cert. denied*, 488 U.S. 827; *United States v. Glenn*, 231 F.2d 884, 887 (9th Cir. 1956) (minority), *cert. denied* 352 U.S. 926.

426. 28 U.S.C. § 2402.

the Act creates a form of vicarious liability under which the government is liable for certain torts committed by government employees, however, the employee who commits the tort is not personally liable.⁴²⁷

Immunity is not waived as to all torts. Subject to some exceptions, 28 U.S.C. § 2680(h) preserves immunity for claims “arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.” The misrepresentation exclusion, however, while clearly taking fraudulent misrepresentation or deceit out of the Act’s coverage,⁴²⁸ permits some negligence-based claims. It has been held to relieve “the Government of tort liability for *pecuniary* injuries which are wholly attributable to reliance on the Government’s negligent misstatements,”⁴²⁹ but negligent misrepresentations that cause personal injury are not excluded.⁴³⁰ Moreover, in an appropriate case, the misrepresentation exception arguably would not affect a claim alleging failure to warn of a product’s dangerous propensities.⁴³¹

The FTCA deals with tort cases, while the Tucker Act⁴³² and “Little Tucker Act”⁴³³ deal with contract claims. How warranty claims should be classified is less than clear. Breach of express warranty is probably a contract claim,⁴³⁴ although it sometimes appears to be based on misrepresentation.⁴³⁵ It is even less clear how a breach of implied warranty should be classified. At least one court has clearly dealt with it as a tort,⁴³⁶ while others have at least alluded to the possibility of coverage under the FTCA.⁴³⁷ Probably a majority, however, take the position that there simply is “no jurisdictional basis in the FTCA for the assertion of implied warranty in tort against the U.S.A.”⁴³⁸

In any case, even if breach of warranty actions are properly characterized as tort claims, they are undoubtedly strict liability tort claims and, therefore, are not covered under the FTCA for that reason. In *Dalehite v. United States*,⁴³⁹ the Court held that a claim asserting strict liability for engaging in an ultra-hazardous activity was not cov-

427. 28 U.S.C. § 2679(b)(1).

428. *Woodbury v. United States*, 192 F.Supp. 924, 938 (D.Ore. 1961).

429. *Block v. Neal*, 460 U.S. 289, 297 (1983) (emphasis added).

430. *Andrulonis v. United States*, 724 F.Supp. 1421, 1484 n.432 (N.D.N.Y. 1989), *aff’d in part, rev’d in part on other grounds*, 924 F.2d 1210 (2nd Cir. 1991), *vacated and remanded*, 502 U.S. 801 (1991), *reinstated*, 952 F.2d 652 (2nd Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992).

431. *Id.* at 1484–85.

432. 28 U.S.C. § 1491(a)(1).

433. 28 U.S.C. § 1346(a)(2).

434. *Wood v. United States*, 961 F.2d 195, 198 (Fed. Cir. 1992).

435. See e.g. *Schweiger Const. Co., Inc. v. United States*, 49 Fed. Cl. 188, 206 (Fed. Cl. 2001); *Dodson Livestock Co. v. United States*, 42 Fed. Cl. 455, 460 (Fed. Cl. 1998).

436. *Wittkamp v. United States*, 343 F.Supp. 1075, 1078 (E.D.Mich. 1972) (dictum).

437. See e.g. *Winston Bros. Company v. United States*, 371 F.Supp. 130, 133 (D.Minn. 1973); *Toppi v. United States*, 332 F.Supp. 513, 517 (E.D.Pa. 1971)

438. *Doe v. United States*, 618 F.Supp. 503, 507 n.3 (D.S.C. 1984) (reasoning that “[t]here is no jurisdictional basis in the FTCA for the assertion of a breach of contract claim or breach of implied warranty in tort against the U.S.A. The FTCA only consents to suits arising out of injury caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.”); Also see *Salter v. United States*, 880 F.Supp. 1524, 1531 (M.D.Ala. 1995) (quoting *Blanchard v. St. Paul Fire & Marine Ins. Co.*, 341 F.2d 353, 357–58 (“claims founded on failure to perform explicit or implicit contractual obligations are not deemed tort claims for purposes of the FTCA regardless of plaintiff’s characterization”)). But see *Wittkamp v. United States*, 343 F. Supp. at 1078 (cited at note 436) (“In appropriate circumstances, the Government may be held liable for breach of implied warranty.”).

439. 346 U.S. 15 (cited at note 417).

ered under the FTCA.⁴⁴⁰ While it has been asserted that this conclusion is based on the idea that there can be no liability under legal “theories not recognized when the act was passed,⁴⁴¹ this clearly should not be applicable to strict liability (at least for dangerous activities) since that theory, in a non-products context, has existed since at least the mid-nineteenth century.⁴⁴² A stronger argument, and one which has been widely accepted, is that, as a matter of statutory construction, the “negligence or wrongful conduct” language of the FTCA does not include strict liability claims,⁴⁴³ whether based on one’s commercial distribution of a defective product or engaging in ultra-hazardous or abnormally dangerous activities. Although the evolution of strict liability in tort for defective products into negligence should provide a basis for inclusion of such cases under the Act, it has not happened yet.

Thus, for example, in *Gober v. United States*,⁴⁴⁴ the court refused to permit an action under the FTCA based on a violation of the Alabama products liability law. In that case, the government had leased a forging press to the plaintiff’s employer. Although the plaintiff’s attorney argued that the Alabama Extended Manufacturers Liability Doctrine, though modeled on Restatement (Second) of Torts, section 402A, had been held by the Alabama courts to contain a “fault component,” the Eleventh Circuit found it to be a strict liability rule and thereby precluded.⁴⁴⁵

5.9.2.1 The “Discretionary Acts” Exclusion

There is, perhaps, a more basic reason for finding that some strict liability products claims cannot be brought against the federal government. 28 U.S.C. § 2680(a) precludes basing an action “upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not the discretion involved be abused.” In other words, the claim must be based on a ministerial act, not a discretionary one. However, distinguishing discretionary acts from those which can be deemed ministerial is often difficult.

In *United States v. Gaubert*,⁴⁴⁶ the Court explained that there are two ways in which an act may be determined to be ministerial. First, if the challenged conduct violated “a mandatory regulation or policy that allowed no judgment or choice,” it will be deemed outside the discretionary act immunity.⁴⁴⁷ Second, in the absence of such mandatory statutory or regulatory prescription, it is necessary to inquire whether the conduct was “of a kind that the discretionary function [immunity] was designed to shield.”⁴⁴⁸ According to the Court, the purpose of “discretionary act” immunity is to “prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.”⁴⁴⁹

440. *Id.* at 44–45. Also see *Laird v. Nelms*, 406 U.S. 797, 802–03 (1972); *Popal v. United States*, 1996 WL 185731 *2 (S.D.N.Y. 1996).

441. *In re Bomb Disaster at Roseville, California*, 438 F.Supp. 769, 781 (E.D.Cal. 1977).

442. See Chapter 4, § 4.1.

443. See e.g. *Bomb Disaster*, 438 F.Supp. at 772 (cited at note 441) (the act includes negligence, “the FTCA does not include warranty, products liability or absolute liability”) (citing *United States v. Page*, 350 F.2d 28 (10th Cir. 1965) and *Allison v. United States*, 264 F.Supp. 1021 (E.D.Ill. 1967)).

444. 778 F.2d 1552 (11th Cir. 1986).

445. *Id.* at 1556.

446. 499 U.S. 315 (1991).

447. *Id.* at 322.

448. *Id.* at 322–23.

449. *Id.* at 323.

In other words, when one disagrees with or is injured by decisions which served to allocate resources based on social, economic or political judgments, one's only remedy lies within the political process. If, for example, a decision is made not to fight forest fires based on a judgment that the ecological benefits of fires outweigh dangers to private property, such a decision would be deemed discretionary. Similarly, the decisions regarding the reallocation of limited fire fighting resources would be deemed discretionary.⁴⁵⁰ On the other hand, once a decision has been made to fight forest fires and tools have been provided, a refusal to follow the mandate or a negligent attempt to carry it out might well be actionable.⁴⁵¹

In a products context, precisely the same issues arise. Thus, for example, in *Conrad v. Tokyo Aircraft Instrument Co.*,⁴⁵² an aircraft crash victim sued the altimeter maker and government. The claim against the government alleged that the FAA had learned, as early as 1974, that the altimeter was defective. Although it issued airworthiness directives in 1974 and 1986, additional problems were brought to its attention. Thereafter, it investigated and hired a special investigator whose reports confirmed the danger, yet it chose not to act.⁴⁵³

Rejecting the plaintiff's claim based on discretionary act immunity, the court stated:

The United States acted within its discretion when it chose not to issue an Airworthiness Directive ("AD") or otherwise warn the aviation community regarding the safety of the TKK/United Instruments altimeters. On its face the decision called for the exercise of discretion. The government weighed competing evidence regarding the safety of the altimeters and rejected some evidence in favor of other evidence. This was a discretionary act. The government may have been negligent in rejecting the evidence Lundquist produced, but the negligence of the government's conduct is irrelevant if its behavior was discretionary. As the Seventh Circuit has observed, "[i]f the discretionary function exception could be pierced by showing negligent acts in implementing the discretionary function, the exception would be no shield at all."⁴⁵⁴

450. See e.g. *Defrees v. United States*, 738 F.Supp. 380, 385 (D.Or. 1990) ("Forest Service employees responsible for suppressing the rash of fires that started on August 2 and were blown out of control on August 3 had considerable discretion in deciding how to allocate suppression resources. In establishing priorities, assigning government personnel and equipment, and deciding what private resources, if any, should be used, these employees were required to make social and economic policy decisions. They were required to balance the value of communications installations, private homes, endangered species, and other resources. I conclude that these decisions are subject to discretionary function immunity.").

451. See *Rayonier Inc. v. United States*, 352 U.S. 315, 318 (1957) (liability for negligently allowing fire to start and failing to control it—but, discretionary act immunity not addressed); and *Anderson v. United States*, 55 F.3d 1379, 1381–82 (9th Cir. 1995) (liability for starting controlled burn and allowing it to escape—but, discretionary act immunity not discussed); *But see Miller v. United States*, 163 F.3d 591, 595 (9th Cir. 1998) (finding the decision not to commit resources to fight the fire that ultimately destroyed plaintiff's property to be discretionary, the court noted that "while there are guidelines and preplanned response levels, things change when there is more than one fire to fight. This procedure discusses the very situation that occurred in this case: a lightning storm that created a number of fires over a widespread area. In such an instance, the inevitable competition for resources dictates discretion. As the district court noted, there simply are no specific directives that mandate specific action in a multiple fire situation.").

452. 988 F.Supp. 1227 (W.D.Wis. 1998).

453. *Id.* at 1228–29.

454. *Id.* at 1230.

There is, of course, both a certain logic and a certain irony here. Few would argue that big picture policy and planning decisions involving resource allocation are essentially political decisions which must be beyond judicial second guessing. Nevertheless, the decision in a case like *Conrad*, granting discretionary immunity simply because there was some element of choice involved, tends to trivialize an important principle.⁴⁵⁵ Moreover, evidence that a private defendant knew of a specific danger and consciously chose to expose others to it, might well provide a basis for punitive damages,⁴⁵⁶ while proof of knowledge and a conscious decision by an agency charged with public safety may serve to immunize it from any liability at all.

5.9.2.2 Other Limitations: The “Feres Doctrine”

Though the issue was not explicitly addressed by the FTCA, in *Feres v. United States*,⁴⁵⁷ the Court held that members of the armed forces who sustained injuries arising out of activities incident to military service were precluded from suit.⁴⁵⁸ In 1977, the *Feres* rule was expanded to include reservists on active duty.⁴⁵⁹ Since loss of consortium claims are derivative, spouses, children and other beneficiaries of the injured serviceman or woman cannot bring such a suit and the same holds for wrongful death claims.⁴⁶⁰ The converse, however, does not follow. Thus, for example, if a serviceman’s spouse or child is injured by a government employee’s negligence, he or she could sue in his or her own right⁴⁶¹ and the serviceman could maintain a derivative claim.⁴⁶²

Finally, because civilian employees of the federal government are covered under the federal workers’ compensation system which, like its state counterparts, makes administrative claims under the act one’s exclusive remedy, they cannot sue the government under the Federal Torts Claims Act for employment related injuries.⁴⁶³

455. A far better balance was struck in *Cope v. Scott*, 45 F.3d 445 (D.C.Cir. 1995). There, the court found that decisions regarding road surface and repairs to a road through Rock Creek Park were discretionary, but decisions regarding the placement of warning signs on the road were not. The court conceded that government decisions dealing with highway signs may, “in certain circumstances, . . . be exempt under the FTCA because they involve difficult policy judgments balancing the preservation of the environment against the blight of excess signs.” However, the court continued, “this is not one of those circumstances. Beach Drive is not the Grand Canyon’s Rim Drive, nor Shenandoah’s Skyline Drive. Here, the Park Service has chosen to manage the road in a manner more amenable to commuting through nature than communing with it. Having done so, and having taken steps to warn users of dangers inherent in that use, the Park Service cannot argue that its failure to ensure that those steps are effective involves protected ‘discretionary’ decisions.” *Id.* at 452.

456. See Chapter 7, § 7.8.

457. 340 U.S. 135 (1950).

458. *Id.* at 146.

459. *Donham v. United States*, 395 F.Supp. 52, 53 (D.Mo. 1975), *aff’d*, 536 F.2d 765 (8th Cir. 1976), *aff’d*, *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977); *Also see Collins v. United States*, 642 F.2d 217, 221–22 (7th Cir. 1981) (students at U.S. military academies); *Daberkow v. United States*, 581 F.2d 785, 788 (9th Cir. 1978) (foreign soldiers training with American military).

460. *Gaspard v. United States*, 713 F.2d 1097, 1102 (5th Cir. 1983); *Skees v. United States*, 107 F.3d 411, 426 (6th Cir. 1997) (collecting cases).

461. *Moscow v. United States*, 987 F.2d 1365, 1368 (8th Cir. 1993).

462. See *e.g. Hicks v. United States*, 368 F.2d 626 (4th Cir. 1966) (involving those facts, but not specifically addressing the issue).

463. 5 U.S.C. § 8116(c).

5.9.2.3 Products Liability Claims against the Government

As should be readily apparent, the federal government's potential liability under the FTCA is pretty much limited to negligence in the performance of a ministerial function where the plaintiff is not a member of the various excluded classes. Additionally, since the federal government is, for the most part, a buyer of products, not a seller of products, normally those causes of action which require a defendant to place a product into the stream of commerce would not be applicable, even if strict liability in tort or breach of warranty claims were otherwise permitted.

The primary exception is that the federal government routinely sells off government surplus. Nevertheless, even in these cases, the courts have been extremely reluctant to permit suit. In *Ford v. American Motors Corp.*,⁴⁶⁴ a case arising out of a rollover accident involving a government surplus Jeep, the court found that the "time, place, manner, method and procedure" for sales of surplus equipment "fall within the discretionary function exception."⁴⁶⁵ Similarly, in *Grammatico v. United States*,⁴⁶⁶ a case involving the auction sale of a surplus milling machine to the plaintiff's employer, the court found that the statute creating the power to dispose of surplus property "by sale, exchange, lease, permit, or transfer, for cash, credit or other property, with or without warranty, and upon such other terms and conditions as the Administrator deems proper..."⁴⁶⁷ granted broad discretion which included discretion not to inspect the property for defects or issue warnings to purchasers regarding potential risks.⁴⁶⁸ Moreover, the court held that this is the type of discretion which the FTCA seeks to protect.

Congress left the means of carrying out its policy of economic and efficient disposal to the determination of the federal agencies. A decision by the [Department of Defense] ... to inspect all of its surplus property, which, according to the government, includes everything from aircraft carriers to wild burros, to ensure that it is safe for use by the public necessarily would impact the efficiency with which the government could dispose of surplus property. Decisions such as these which require the balancing of safety and economics clearly fall within the discretionary function exception, as "the purpose of the exception is to prevent judicial second-guessing" of administrative decision grounded in public policy.⁴⁶⁹

Somewhat less convincingly, in *Wittkamp v. United States*,⁴⁷⁰ a case in which it was claimed that the government sold an old rifle as surplus, the court found that there was "no sale" since "[e]ven if the rifle were, in fact, sold as surplus, it was not done to make a profit. It was done solely to save the taxpayers the expense of further storage or disposal by other means."⁴⁷¹

This is not to say that plaintiff's never succeed in asserting products claims against the government, though successful claims seem quite rare. For example, in *Miles v.*

464. 770 F.2d 465 (5th Cir. 1985), *reh'g denied en banc*, 776 F.2d 1048.

465. *Id.* at 467.

466. 109 F.3d 1198 (7th Cir. 1997).

467. 40 U.S.C. § 484(c).

468. 109 F.3d at 1201.

469. *Id.* at 1202 (quoting *Gaubert*, 499 U.S. at 323 (cited at note 446)).

470. 343 F.Supp. 1075 (cited at note 436).

471. *Id.* at 1978.

*Naval Aviation Museum Foundation, Inc.*⁴⁷² the government was held liable under the Federal Tort Claims Act for the negligent failure to inspect the nose wheel of Beech Aircraft and the negligent failure to train inspectors. While the court agreed that the decision to sell was discretionary, having made that decision, it was required to exercise due care in conducting the pre-sale inspection.⁴⁷³

Additionally, in *Andrulonis v. United States*,⁴⁷⁴ a case in which an employee of the Center for Disease Control (CDC) allegedly provided researchers with an unusually virulent form of a rabies virus without adequately warning them, the court, while rejecting a strict liability approach, permitted the case to proceed under a negligent failure to warn theory.⁴⁷⁵

5.9.3 The Government Contractor “Defense”

Though commonly labeled “the government contractor defense,” the doctrine is not really a defense, in a strict sense, but rather a judicial expansion of the government’s sovereign immunity to preclude certain types of product liability suits against those private parties who made the product at issue for the government under contract with the government. For example, assume that a member of one of the armed services is injured or killed because of product defect in some piece of equipment which the service provided for his or her use. As previously mentioned,⁴⁷⁶ under *Feres*, he or she cannot successfully sue the government. The government contractor defense deals with the question of whether the serviceman or woman can bring suit against the manufacturer of the product, or whether the manufacturer shares in the government’s immunity from liability.

The entire question was in doubt for a considerable period of time. Although many of the federal appellate courts had weighed in, the basis for and scope of any immunity was uncertain.⁴⁷⁷ The issue was largely resolved in 1988 when the Supreme Court decided *Boyle v. United Technologies Corp.*⁴⁷⁸ In that case, plaintiff’s decedent, a Marine helicopter pilot, died when his helicopter crashed into water. Although he survived the initial crash, because the helicopter was designed with an escape hatch which opened out, rather than in, he was unable to escape and drowned.⁴⁷⁹ In other words, the case presented an aircraft “crashworthiness” problem based on an alleged design defect. At trial, the jury, having been instructed as to Virginia law, returned a verdict for the plaintiff. The Fourth Circuit reversed on the basis of its decision in *Tozer*,⁴⁸⁰ which granted the manufacturer immunity.⁴⁸¹

The Supreme Court began its analysis with the question of whether there could be federal common law, and concluded that there are “a few areas, involving ‘uniquely fed-

472. 289 F.3d 715 (11th Cir. 2002).

473. *Id.* at 721.

474. 724 F.Supp. at 1484 n.432 (cited at note 430).

475. *Id.* at 1491.

476. *See supra* §5.9.2.2.

477. *See e.g.* *Tozer v. LTV Corp.*, 792 F.2d 403 (4th Cir. 1986); *Bynum v. FMC Corp.*, 770 F.2d 556 (5th Cir. 1985); *Tillett v. J.I. Case Co.*, 756 F.2d 591 (7th Cir. 1985); *McKay v. Rockwell Int’l Corp.*, 704 F.2d 444 (9th Cir. 1984); and *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985).

478. 487 U.S. 500 (1988).

479. *Id.* at 502–03.

480. *Tozer v. LTV Corp.*, 792 F.2d 403 (cited at note 477).

481. *Id.* at 414.

eral interest’” where federal common law was still necessary.⁴⁸² Previously, the Court had recognized that “obligations to and rights of the United States under its contracts are governed exclusively by federal law.”⁴⁸³ Although the case at bar did not directly involve the government’s obligation under a contract, the contractor’s tort liability “arises out of performance of the [government] contract.”⁴⁸⁴ Additionally, civil liability of federal officers for acts committed in the course of their employment obligations was “an area of...federal concern.”⁴⁸⁵ Here, although it was the contractor’s liability that was at issue, not the government’s, the Court noted that the contractor had the “same interest in getting the Government’s work done.”⁴⁸⁶

Having concluded that it was a topic which could be at least partially controlled by federal common law, the Court turned to the question of whether federal law pre-empted state tort law. Noting that conflict pre-emption principles serve to displace state law only where a “significant conflict exists between an identifiable ‘federal policy or interest and the (operation) of state law,”⁴⁸⁷ or where “the application of state law would ‘frustrate specific objectives’ of federal... [law],”⁴⁸⁸ the court concluded that a conflict existed.

Here the state-imposed duty of care that is the asserted basis of the contractor’s liability (specifically to equip helicopters with the sort of escape-hatch mechanism petitioner claims was necessary) is precisely contrary to the duty imposed by the Government contract [to provide the escape mechanism called for by the plans and specifications].⁴⁸⁹

Nevertheless, the Court recognized that not all government contracts involve a significant governmental interest. If, for example, the government was not involved in the design process, but simply bought the product off the shelf, there would be no need to provide immunity to the seller.⁴⁹⁰ That being the case, the Court looked for some test to determine when immunity would exist.

A number of federal appeals courts, including the Fourth Circuit in *Tozer*, had attempted to use the *Feres* doctrine as the limiting principle. As previously noted, under *Feres*, the Federal Tort Claims Act does not serve to waive sovereign immunity as to “injuries to armed service personnel in the course of military service.”⁴⁹¹ The Fourth Circuit had claimed that contractor’s tort liability would conflict with the *Feres* doctrine “since increased cost of the contractor’s tort liability would be added to the contract price, and ‘(s)uch pass-through costs would *** defeat the purpose of the immunity for military accidents conferred on the government itself.”⁴⁹²

The Supreme Court, however, rejected the Fourth Circuit’s analysis finding use of the *Feres* doctrine as the limiting principle was simultaneously both too broad and too narrow. It was too broad in the sense that it would grant contractors immunity even if

482. 487 U.S. at 504 (cited at note 487) (quoting *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)).

483. *Id.*

484. *Id.* at 505.

485. *Id.*

486. *Id.*

487. *Id.* at 507 (quoting *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

488. *Id.* (quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979)).

489. *Id.* at 509.

490. *Id.*

491. *Id.* at 510 (citing *Feres*, 340 U.S. 135 (cited at note 457)).

492. *Id.* (quoting *Tozer*, 792 F.2d at 408 (cited at note 477)).

the product in question were simply bought off the shelf. It was too narrow because it would only provide immunity in cases involving injured military personnel when, in fact, some civilian injuries should be covered as well.⁴⁹³

The Court found a solution to the problem by using the “discretionary function immunity” as the limiting principle. The Court wrote:

[T]he selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of... [28 U.S.C. § 1346(b)]. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting “second-guessing” of these judgments, through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption.⁴⁹⁴

Therefore, the Court concluded that:

Liability for design defects in military equipment cannot be imposed pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. The first two of these conditions assure that the suit is within the area where the policy of the “discretionary function” would be frustrated—*i.e.*, they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself. The third condition is necessary because, in its absence, the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability. We adopt this provision lest our effort to protect discretionary functions perversely impede them by cutting off information highly relevant to the discretionary decision.⁴⁹⁵

The precise scope of *Boyle* is somewhat unclear. Given that the court clearly recognized the enormous discretion involved in the design of products, it seems unlikely that a government contractor would be immune from state tort liability if the injury were caused by a manufacturing flaw. Nevertheless, in *Bailey v. McDonnell Douglas Corp.*,⁴⁹⁶ a case involving an injury caused by a crack in an aircraft component, the court held that the three-part *Boyle* test should be applied, even though the crack was at least arguably the result of a manufacturing flaw.⁴⁹⁷ Nevertheless, the court was probably saying nothing more than it was necessary to consider whether the crack resulted from the chosen design—*i.e.*, a reasonably precise specification for the metal used in the component.⁴⁹⁸ In any event, this is how subsequent cases have characterized the *Bailey* holding.⁴⁹⁹

493. *Id.* at 510–11.

494. *Id.* at 511 (citation omitted).

495. *Id.* at 512–13.

496. 989 F.2d 794 (5th Cir. 1993).

497. *Id.* at 801–2.

498. *Id.*

499. See *e.g.* *Snell v. Bell Helicopter*, 107 F.3d 744, 749 (9th Cir. 1997); *Bragg v. United States*, 55 F.Supp.2d 575, 588 (S.D.Miss. 1999); *Russek v. Unisys Corp.*, 921 F.Supp. 1277, 1288 (D.N.J. 1996).

Although most of the other cases that have considered the issue seem to have rejected the immunity in manufacturing defect cases,⁵⁰⁰ in *Smith v. Xerox Corp.*,⁵⁰¹ basing its decision on the government contractor defense, the court dismissed all claims, including manufacturing defect, design defect, failure to warn and breach of warranty.⁵⁰²

While much of the language in *Boyle* seemed to limit the holding to cases involving military products, there does not appear to be any particular reason why it should not apply to civilian products manufactured for the government, provided that the government was involved in the design to the extent and in the manner contemplated by the decision. Courts, however, have split on the issue.⁵⁰³

500. See e.g. *McGonigal v. Gearhart Industries, Inc.*, 851 F.2d 774, 777 (5th Cir. 1988); *Sundstrom v. McDonnell Douglas Corp.*, 816 F.Supp. 587, 590 (N.D.Cal. 1993); *Mark v. Rudd International*, 1990 WL 250457 *1 (N.D.Ill. 1990).

501. 866 F.2d 135 (5th Cir. 1989).

502. *Id.* at 141.

503. Compare *Carley v. Wheeled Coach*, 991 F.2d 1117, 1123 (3rd Cir. 1993) (“government contractor defense is available to nonmilitary contractors”), *cert. denied*, 510 U.S.868; *Boruski v. United States*, 803 F.2d 1421, 1430 (7th Cir. 1986) (defense available); *Burgess v. Colorado Serum Co.*, 772 F.2d 844, 846 (11th Cir. 1985) (defense available); *Yeroshefsky v. Unisys Corp.*, 962 F.Supp. 710, 717 (D.Md. 1997) (immunity available); and *Nielsen v. George Diamond Vogel Paint Co.*, 892 F.2d 1450, 1454–55 (9th Cir. 1990) (no immunity for paint maker); *In re Chateaugay Corp.*, 146 B.R. 339, 348 (S.D.N.Y. 1992) (immunity not available to non-military contractors).