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Reformulating The Strict Liability Failure To Warn

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NOTES

REFORMULATING THE STRICT LIABILITY FAILURE TO WARN

I. INTRODUCTION

A person injured by a defective product may recover damages against the manufacturer or intermediate seller of the product.¹ Courts recognize three types of product defects: Manufacturing defects, design defects, and inadequate warnings.² A manufacturing defect, or flaw, is an unintended abnormality in the product that results from improper manufacture.³ A design defect conforms to the manufacturer's specifications but, nevertheless, imposes an unnecessary risk of injury.⁴ Finally, a warning defect results from the manufacturer's failure to provide adequate warnings to the consumer of dangers inherent in the product or to provide adequate instructions for safe use of the product.⁵

1. See 1 M. STUART MADDEN, *PRODUCTS LIABILITY* § 1.1, at 2 (2d ed. 1988) (stating general rule that persons injured by defective products may recover damages from manufacturer or intermediate seller of product); see also WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 641 (4th ed. 1971) (defining products liability as law involving liability of sellers of chattels to third persons with whom sellers are not in privity of contract).

2. See *Feldman v. Lederle Labs.*, 479 A.2d 374, 385 (N.J. 1984) (noting three types of defects) (citing *O'Brien v. Muskin Corp.*, 463 A.2d 298, 304 (N.J. 1983)). See generally W. Page Keeton, *The Meaning of Defect in Products Liability Law—A Review of Basic Principles*, 45 Mo. L. REV. 579, 585-88 (1980) (describing, in some detail, three types of defects); John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 830 (1973) (describing defect requirement and three types of defects).

3. See *Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843, 846 (N.H. 1978) (defining manufacturing defect as accidental variation caused by mistake in manufacturing process resulting in product's not conforming with others of same design); see also RICHARD A. EPSTEIN, *MODERN PRODUCTS LIABILITY LAW* 68 (1980) (stating that construction defect results when product differs from own specifications). A manufacturing defect may be a result of inadequate materials, failure to inspect, or improper assembly, packaging, or transportation. MADDEN, *supra* note 1, § 9.2, at 322.

4. See *Thibault*, 395 A.2d at 846 (defining design defect as defect that occurs when manufacturer constructs product in conformity with intended design but design itself poses unreasonable danger to consumer); see also EPSTEIN, *supra* note 3, at 69 (stating that design defects are not result of deviation from manufacturer's chosen design but rather result from design itself being unsafe); Keeton, *supra* note 2, at 587-88 (stating that product may be defective because of defective design and describing tests for determining design defect). In contrast to manufacturing defects, design defects necessarily pervade the entire product line. EPSTEIN, *supra* note 3, at 69.

5. See *Payne v. Soft Sheen Prods. Inc.*, 486 A.2d 712, 725 (D.C. 1985) (stating that defect may result from failure to attach adequate warning if product may in certain circumstances cause injury). See generally David C. Little, *Products Liability—the Growing Uncer-*

A number of serious problems currently plague failure to warn products liability law. Many courts have conceded that strict liability⁶ failure to warn, as the courts have formulated the doctrine, differs little, if at all, from negligent⁷ failure to warn.⁸ Attempts to distinguish the two theories have been unsuccessful,⁹ and the courts typically allow plaintiffs to plead both theories simultaneously, which inevitably leads to the confusion of judges and juries and the making of bad law.¹⁰

Aside from the difficulties arising from the similarity between strict liability and negligence, a number of other doctrinal problems currently exist in failure to warn products liability law. First, the courts have failed to distinguish the risk-reduction from the informed-choice function of warnings and have applied risk-reduction principles in determining the

tainty about Warnings, 12 FORUM 995 (1977) (describing failure to warn products liability doctrine); M. Stuart Madden, *The Duty to Warn in Products Liability: Contours and Criticism*, 89 W. VA. L. REV. 221 (1987) (same). Although a product is of proper design and manufacture, it may, nevertheless, be defective because of the manufacturer's failure to warn of dangers inherent in the use of the product or to provide adequate instructions for safe use of the product. *Jarrell v. Monsanto Co.*, 528 N.E. 2d 1158, 1166 (Ind. Ct. App. 1988).

Although warnings and directions for use are conceptually different, they will hereinafter be treated collectively as "warnings." Thus, the "failure to warn" also includes the failure to provide adequate instructions. For discussion of the similarities and differences between warnings and instructions for use, see Little, *supra*, at 999-1001; James B. Sales, *The Duty to Warn and Instruct for Safe Use in Strict Tort Liability*, 13 ST. MARY'S L.J. 521, 553-57 (1982).

6. See *infra* notes 26-30 and accompanying text (discussing strict products liability doctrine). Although plaintiffs often plead a theory of implied warranty in addition to the negligence and strict liability theories, for the purposes of this discussion implied warranty will be treated as a form of strict liability. Like strict products liability, implied warranty is a form of liability without fault. PROSSER, *supra* note 1, § 97, at 650, 653. Unlike the strict liability action, however, devices such as disclaimers and notice requirements may limit the implied warranty action. See U.C.C. § 2-316 (1978) (describing requirements for disclaiming implied warranties of merchantability and fitness for particular purpose); *id.* § 2-607(3) (stating requirement that buyer must notify seller of injury within reasonable time); see also PROSSER, *supra* note 1, § 97, at 655-56 (discussing disclaimer and notice requirements). Most courts today treat failure to warn actions in implied warranty substantially the same as they treat actions in strict liability. See *Hays v. Ariens Co.*, 462 N.E.2d 273, 277-78 (Mass. 1984) (applying strict products liability rule in implied warranty context).

For a general discussion of the implied warranty action in the products liability context, see PROSSER, *supra* note 1, § 97. See also U.C.C. § 2-314 (1978) (stating that seller makes implied warranty of merchantability to consumer, which guarantees goods are of merchantable quality); *id.* § 2-315 (stating that seller makes implied warranty of fitness for particular purpose if seller guarantees to consumer that product is safe for contemplated use).

7. See *infra* note 20 (discussing negligence doctrine).

8. See *infra* note 49 (citing cases that have recognized similarity between strict liability and negligent failure to warn actions).

9. See *infra* notes 55-81 and accompanying text (describing courts' unsuccessful efforts to establish satisfactory distinction between strict liability and negligent failure to warn).

10. See *infra* note 83 (noting problem of confusion inherent in courts' permitting plaintiffs to plead both strict liability and negligent failure to warn); *infra* notes 55-81 and accompanying text (describing unsuccessful attempts of courts to develop sound strict liability failure to warn doctrine).

adequacy of all warnings.¹¹ A second area of difficulty results from the courts' applying the same standard in failure to warn actions as they apply in design defect actions.¹² Finally, the causation inquiry presents numerous complications in the failure to warn context.¹³ A common thread running through all of these doctrinal problems is that courts generally have not considered, in formulating failure to warn doctrine, the important policies that the failure to warn doctrine should seek to accommodate.¹⁴ Rather, the primary concern of the courts has been to develop a strict liability failure to warn doctrine that in some way differs from negligence.¹⁵

This note documents many of the problems currently plaguing strict liability failure to warn law and proposes a solution. Part II examines the doctrinal development of strict liability failure to warn and the inability of the courts to distinguish satisfactorily the strict liability failure to warn action from the negligence action.¹⁶ Part III discusses the policies that courts should seek to promote in formulating failure to warn doctrine and also addresses the other doctrinal problems currently afflicting failure to warn law.¹⁷ A prevailing theme of Part III is that many of the doctrinal difficulties can be attributed to the courts' failure to analyze a manufacturer's failure to warn in light of the appropriate policies. Finally, Part IV proposes a reformulated strict liability failure to warn doctrine that is based upon the relevant policies and that also eliminates many of the current doctrinal problems, including the similarity between the strict liability action and negligence.¹⁸

II. THE DOCTRINAL DEVELOPMENT OF STRICT LIABILITY FAILURE TO WARN

A. *Negligent Failure to Warn*

The manufacturer has a common-law duty to provide adequate warnings against risks of which the manufacturer has or should have knowledge and

11. See *infra* notes 128-53 and accompanying text (describing problems resulting from failure of courts to recognize differences between risk-reduction and informed-choice functions of warnings).

12. See *infra* notes 142-64 and accompanying text (describing difficulties resulting from courts' application of risk-utility balancing in both warning and design defect cases); see also James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 292-303 (1990) (discussing number of problems courts face in applying risk-utility balancing in failure to warn context).

13. See *infra* notes 192-209 and accompanying text (describing problems relating to causation issue in failure to warn context).

14. See *infra* part III (discussing policies that failure to warn doctrine should seek to accommodate).

15. See *infra* note 86 and accompanying text (arguing that primary concern of courts has been to develop strict liability failure to warn doctrine that is different from negligence).

16. See discussion *infra* part II (describing problematic doctrinal development of strict liability failure to warn).

17. See discussion *infra* part III (discussing doctrinal problems of failure to warn law and policy considerations relevant to strict liability failure to warn doctrine).

18. See discussion *infra* part IV (describing proposed reformulation of strict liability failure to warn doctrine).

that may render the product unreasonably dangerous for its intended purpose in the absence of adequate warnings.¹⁹ Under this negligence principle,²⁰ the duty to warn is triggered only when a manufacturer knows or should know of the dangers involved in the use of the product.²¹ For the duty to warn to attach, the danger presented by the use of the product in the absence of an adequate warning must be unreasonable.²² The determination of whether the danger is unreasonable requires a balancing of the seriousness of the harm, the probability that the harm will result, and the burden involved in taking the necessary precautions.²³ The manufacturer has no duty to warn

19. See *Dempsey v. Virginia Dare Stores, Inc.*, 186 S.W.2d 217, 219 (Mo. App. 1945) (stating general rule that manufacturer has duty to warn of dangers of which manufacturer knows or should know and of which user has no knowledge). The RESTATEMENT (SECOND) OF TORTS § 388 (1965) states the general rule:

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

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

Id.; see also PROSSER, *supra* note 1, § 96, at 646-47 (noting general rule that seller is under duty to warn of unreasonable dangers involved in use of product of which the seller knows or should know).

20. See RESTATEMENT OF TORTS § 282 (1934) (defining negligence as conduct that "falls below the standard established by law for the protection of others against unreasonably great risk of harm"). The negligence cause of action traditionally involves five factors: (1) duty, (2) breach of duty, (3) cause in fact, (4) proximate cause, and (5) damages. See PROSSER, *supra* note 1, § 30. For a discussion of the cost-benefit balancing involved in determining the duty issue in negligence, see *infra* note 23. For a discussion of negligence in the products liability context, see PROSSER, *supra* note 1, § 96.

21. See, e.g., *Rivers v. Stihl, Inc.*, 434 So.2d 766, 773 (Ala. 1983) (stating general rule that manufacturer has duty to warn under negligence principles only if manufacturer knows or should know of risk); *Payne v. Soft Sheen Prods., Inc.*, 486 A.2d 712 (D.C. 1985) (same); *Jarrell v. Monsanto Co.*, 528 N.E.2d 1158, 1161-62 (Ind. Ct. App. 1988) (same); *Mitchell v. Sky Climber, Inc.*, 487 N.E.2d 1374, 1376 (Mass. 1986) (same); RESTATEMENT (SECOND) OF TORTS § 388 (1965) (same).

22. See *Moran v. Faberge, Inc.*, 332 A.2d 11, 15 (Md. 1975) (stating that manufacturers have duty to warn under negligence principles when risk is unreasonable); see also PROSSER, *supra* note 1, § 96, at 646-47 (stating that seller is under duty to give adequate warning of unreasonable dangers involved in use of product); Madden, *supra* note 5, at 234-35 (noting general rule in negligence requires manufacturer to warn of unreasonable risks).

23. See *Moran*, 332 A.2d at 15 (stating that determination of duty to warn involves balancing of probability and seriousness of harm against cost of taking precautions to reduce risk of harm).

In *United States v. Carroll Towing*, 159 F.2d 169 (2d Cir. 1947), a negligence action involving a ship that broke away from its moorings, Judge Learned Hand stated that the defendant's duty under negligence doctrine was a matter of balancing "(1) the probability that she will break away; (2) the gravity of the resulting injury if she does; [and] (3) the burden of adequate precautions." *Id.* at 173.

of dangers that are obvious to the product user²⁴ or that result from an unforeseeable use of the product.²⁵

B. Strict Liability Failure to Warn

In 1965, the American Law Institute adopted strict products liability in section 402A of the Restatement (Second) of Torts.²⁶ Pursuant to section 402A, anyone who sells a product in "a defective condition unreasonably dangerous" to the user or consumer will be liable for any physical injury caused by that condition.²⁷ Section 402A applies regardless of whether the seller or manufacturer used all possible care in the preparation and sale of the product.²⁸ Thus, analysis purportedly focuses on the condition of the product rather than on the negligent conduct of the manufacturer or seller.²⁹

24. See, e.g., *Dudley Sports Co. v. Schmitt*, 279 N.E.2d 266, 275 (Ind. Ct. App. 1972) (explaining general rule that manufacturer has no duty to warn of dangers that are obvious); *Dempsey v. Virginia Dare Stores, Inc.*, 186 S.W.2d 217, 220 (Mo. App. 1945) (same); *Griebler v. Doughboy Recreational, Inc.*, 449 N.W.2d 61, 64-65 (Wis. Ct. App. 1989) (same). See generally *Madden*, *supra* note 5, at 253-59 (discussing effect of obviousness of risk on duty to warn). Dean Prosser stated the general rule: "[a manufacturer] is not liable for dangers that are known to the user, or are obvious to him, or are so commonly known that it can reasonably be assumed that the user will be familiar with them." PROSSER, *supra* note 1, § 96, at 649 (footnotes omitted). For example, it is obvious that a knife will cut, that a match will take fire, or that a hammer may smash one's finger. *Id.*

25. See, e.g., *Payne v. Soft Sheen Prods., Inc.*, 486 A.2d 712, 721 (D.C. 1985) (stating general rule that manufacturer has no duty to warn of risks that are not foreseeable); *Jonescue v. Jewel Home Shopping Serv.*, 306 N.E.2d 312, 316 (Ill. App. Ct. 1973) (same); *Higgins v. Paul Hardeman, Inc.*, 457 S.W.2d 943, 948 (Mo. Ct. App. 1970) (holding that abnormal use relieves manufacturer of liability for failure to warn only if misuse was unforeseeable). See generally *Dix W. Noel, Products Defective Because of Inadequate Directions or Warnings*, 23 Sw. L.J. 256, 274-81 (1969) (discussing and explaining general rule that manufacturer has duty to warn only of foreseeable risks). Dean Prosser stated, "a normal foreseeable use may include such relatively uncommon ones as standing on a chair, eating coffee, testing heat fixtures, or wearing a cocktail robe in proximity to the kitchen stove." PROSSER, *supra* note 1, § 96, at 647-48 (footnotes omitted).

26. RESTATEMENT (SECOND) OF TORTS § 402A (1965). Section 402A reads:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

27. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

28. RESTATEMENT (SECOND) OF TORTS § 402A(2)(a); *id.* § 402A cmt. a.

29. See, e.g., *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549, 558 (Cal. 1991) (stating that in strict liability focus is on condition of product, while in negligence focus is on conduct of manufacturer); *Woodill v. Parke Davis & Co.*, 402 N.E.2d 194, 198 (Ill. 1980) (same); *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033, 1037, 1039 (Or. 1974) (same); *Falk v. Keene Corp.*, 767 P.2d 576 (Wash. App.) (same), *aff'd*, 782 P.2d 974 (Wash. 1989).

Section 402A does not state an exclusive rule that precludes liability based upon negligence, but rather provides an additional ground for finding liability.³⁰ A number of jurisdictions adopted section 402A soon after its introduction,³¹ and today most states have either adopted the Restatement version or some other version of strict liability.³²

Based upon several of the comments following section 402A,³³ a large number of courts have concluded that the drafters of section 402A intended to create a strict liability action for the failure to warn.³⁴ However, comment

30. RESTATEMENT (SECOND) OF TORTS § 402A cmt. a.

31. See William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 793-98 (1966) (describing rapid pace at which states recognized strict products liability following adoption of § 402A—by judicial decision or statute in 24 states, by decisions indicating that change in law was imminent in 6 states, and with some limitations on its applicability in 11 states).

32. See *State Chart—Acceptance of Strict Liability*, 1 Prod. Liab. Rep. (CCH) ¶ 4016 (Nov. 1988 & Apr. 1989) (summarizing recognition of strict products liability in states, District of Columbia, and Puerto Rico). Thirty-seven states and the District of Columbia recognize the Restatement's version of strict products liability. *Id.* Seven states and Puerto Rico recognize other variations. *Id.* Delaware, Massachusetts, Michigan, North Carolina and Virginia have not yet recognized strict products liability. *Id.* See generally *Acceptance by State Jurisdictions*, 1 Prod. Liab. Rep. (CCH) ¶ 4015 (Nov. 1988) (annotating treatment of strict products liability doctrine by highest courts of 50 states, District of Columbia, and Puerto Rico).

33. See RESTATEMENT (SECOND) OF TORTS § 402A cmts. h, j, k (1965). Comment j provides that in order to prevent a product from being unreasonably dangerous, the seller may be required to warn against unreasonable dangers of which the public may be unaware. *Id.* cmt. j. Comment h states that a product is in a defective condition if the seller markets the product without an adequate warning when the seller has reason to anticipate that danger may result from use of the product. *Id.* cmt. h. Comment h contains a cross reference to comment j. *Id.* Finally, comment k excepts "unavoidably unsafe" products from strict liability, but makes clear that such products must be accompanied by proper directions and warnings. *Id.* cmt. k. "Unavoidably unsafe products" are those which are incapable of being made completely safe for their intended use. *Id.* The marketing of unavoidably unsafe products is, nevertheless, completely justified because such products are "apparently useful and desirable." *Id.*

34. See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1088-89, 1091 (5th Cir. 1973) (citing comments j and k in defining scope of strict liability action based upon failure to warn), *cert. denied*, 419 U.S. 869 (1974); *Canifax v. Hercules Powder Co.*, 46 Cal. Rptr. 552, 557-58 (Cal. Ct. App. 1965) (concluding, after discussing comments j and k, that Restatement's framers intended for product to be defective under § 402A if it would be unreasonably dangerous to market product without warning); see also Myron J. Bromberg, *The Mischief of the Strict Liability Label in the Law of Warnings*, 17 SETON HALL L. REV. 526, 527, 540 (1987) (stating that courts have construed § 402A comments as having created new strict liability failure to warn doctrine); Henderson & Twerski, *supra* note 12, at 271 n.21 (noting that text does not explicitly state rule applies to warning claims, but comments make clear that drafters intended that result). The comments to § 402A have been regarded as so integral to the black letter rule set forth in that section that they are commonly treated as part of the rule. See Bromberg, *supra*, at 527.

Some commentators have argued that the framers of § 402A erred in implying a strict liability action for failure to warn in the § 402A comments. Bromberg, *supra*, at 540; Henderson & Twerski, *supra* note 12, at 271-72. At least one commentator has argued that the framers of § 402A did not intend for the comments to imply an action in strict liability for failure to warn at all. EPSTEIN, *supra* note 3, at 66; see also *Leichtamer v. Amer. Motors. Corp.*, 424

j to section 402A introduces an important limitation on strict liability for failure to warn. According to comment j, the seller is liable for the failure to provide an adequate warning only if the seller knows or should know of the product-related risk.³⁵ Considerable controversy exists as to whether the proof-of-knowledge requirement should be a prerequisite to imposing strict liability for the failure to warn.³⁶ The majority of courts, however, have adopted the position of comment j that the manufacturer must have had actual or constructive knowledge of the product's dangers before the court will impose strict liability for the manufacturer's failure to warn.³⁷

Once a court requires proof of knowledge as a necessary element of strict liability failure to warn, the strict liability action begins to look much like its negligence counterpart.³⁸ To explain why, it is necessary to describe the means by which courts determine that a product is in a "defective condition unreasonably dangerous." Courts most typically determine that a product is in the requisite dangerously defective condition through the use of a risk-utility balancing test.³⁹ Under risk-utility analysis, a product is

N.E.2d 568, 578 (Ohio 1981) (refusing to recognize strict liability failure to warn and stating that § 402A, rather than creating strict liability failure to warn, merely provides that giving of warning is affirmative defense to strict liability claims).

35. See *supra* note 33 (describing comment j). Comment j limits the seller's liability for failure to warn to situations in which "he has knowledge, or by the application of reasonable, developed human skills and foresight should have knowledge of the presence of the . . . danger." RESTATEMENT (SECOND) OF TORTS § 402A cmt. j. Comment j's limitation seems to conflict with other portions of § 402A that would make the seller subject to liability even though he has exercised all possible care in the preparation of the product. See *id.* § 402A(2)(a); *id.* § 402A cmt. a.

36. See, e.g., *Robbins v. Farmers Union Grain Terminal Assoc.*, 552 F.2d 788, 794 n.15 (8th Cir. 1977) (noting split in authorities over whether strict liability failure to warn requires actual or constructive knowledge of risk); *Woodill v. Parke Davis & Co.*, 402 N.E.2d 194, 197 (Ill. 1980) (same); *Ortho Pharmaceutical Corp. v. Chapman*, 388 N.E.2d 541, 546-47 (Ind. Ct. App. 1979) (same). For a discussion and analysis of some arguments for and against conditioning imposition of strict liability on the seller's actual knowledge of the danger see *infra* notes 68-81 and accompanying text.

37. See Charles C. Marvel, Annotation, *Strict Products Liability: Liability for Failure to Warn as Dependent on Defendant's Knowledge of Danger*, 33 A.L.R.4TH 368, 370-377 (1984 & Supp.) (citing cases in which courts have required that defendant have knowledge or reason to know of product-related risk as precondition for imposing strict liability for failure to warn).

38. See cases cited *infra* note 49 (concluding that strict liability failure to warn differs little, if at all, from negligence action); see also *Henderson & Twerski, supra* note 12, at 271-73 (arguing that strict liability failure to warn and negligence are, by necessity, virtually identical and that courts have been unsuccessful in articulating a meaningful difference); John A. Kidwell, *The Duty to Warn: A Description of the Model of Decision*, 53 TEX. L. REV. 1375, 1377-79 (1975) (concluding that no relevant differences exist between strict liability and negligent failure to warn).

39. See, e.g., *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1087 (5th Cir. 1973) (applying risk-utility test to determine whether product was "unreasonably dangerous"), *cert. denied*, 419 U.S. 869 (1974); *Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843, 846 (N.H. 1978) (applying risk-utility test to determine whether product is defective); *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033, 1039 (Or. 1974) (stating that risk-utility balancing is used to

unreasonably dangerous if a reasonable person would conclude that the magnitude of the danger outweighs the benefits of the way in which the manufacturer designed and marketed the product.⁴⁰ This standard is nearly identical to the cost-benefit test that courts use to determine duty in negligence law.⁴¹ Theoretically, however, the risk-utility test differs from negligence because in strict liability the defendant's fault is irrelevant.⁴² In

determine whether product is dangerously defective); *Turner v. General Motors Corp.*, 584 S.W.2d 844, 847 & n.1, 851 (Tex. 1979) (approving general risk-utility approach to aid jury in determining liability).

The Restatement suggests a consumer expectations test for determining whether a product is in a "defective condition unreasonably dangerous." See RESTATEMENT (SECOND) OF TORTS § 402A cmt. g, cmt. i (1965). According to comments g and i, a product is in a "defective condition unreasonably dangerous" if it is dangerous to an extent beyond that contemplated by the ordinary consumer. *Id.* Few jurisdictions have adopted the consumer expectations test as the sole basis for determining whether a product is defective, but some have adopted it as an alternative to the risk-utility test. See *Barker v. Lull Eng'g. Co.*, 573 P.2d 443, 452 (Cal. 1978) (adopting two prong test for determining defectiveness—product is defective if more dangerous than reasonable consumer would expect or if benefits do not outweigh risks); *Knitz v. Minster Mach. Co.*, 432 N.E.2d 814, 818 (Ohio) (same), *cert. denied*, 459 U.S. 857 (1982). For a critique of the consumer expectations test, see Keeton, *supra* note 2, at 588-92. For a discussion of the benefits of the consumer expectations test, especially when used in conjunction with the risk-utility test, see James E. Britain, *Product Honesty is the Best Policy: A Comparison of Doctors' and Manufacturers' Duty to Disclose Drug Risks and the Importance of Consumer Expectations in Determining Product Defect*, 79 Nw. L. REV. 342, 353-57, 363-66, 408-22 (1984).

For a description and analysis of other proposed tests for determining whether or not a product is dangerously defective see Frank J. Vandall, "Design Defect" in *Products Liability: Rethinking Negligence and Strict Liability*, 43 OHIO ST. L.J. 61, 72-79 (1982).

40. See *Borel*, 493 F.2d at 1087 (stating that product is unreasonably dangerous if, on balance, utility of product does not outweigh magnitude of danger); *Thibault*, 395 A.2d at 846 (N.H. 1978) (explaining that risk-utility test involves weighing product utility against danger). Dean Keeton, a leading proponent of the risk-utility test has formulated it as follows:

A product is defective if it is unreasonably dangerous as marketed. It is unreasonably dangerous if a reasonable person would conclude that the magnitude of the scientifically perceivable danger . . . outweighed the benefits of the way the product was designed and marketed.

W. Page Keeton, *Products Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 37-38 (1973). Dean Keeton has made it clear that economic feasibility is a factor to consider in risk-utility analysis. Keeton, *supra* note 2, at 493; see also Wade, *supra* note 2, at 835, 837-38 (approving risk-utility approach and listing a number of factors to be considered, including economic feasibility).

41. See *supra* note 23 and accompanying text (discussing negligence cost-benefit analysis). Compare *Thibault*, 395 A.2d at 846 (explaining that in weighing product utility against danger it is necessary to consider whether risk could have been reduced without significant impact on product effectiveness and manufacturing cost) and *Knitz v. Minster Mach. Co.*, 432 N.E.2d 814, 818 (Ohio) (listing three factors to consider in applying strict liability risk-utility test: Likelihood of injury, gravity of danger, and mechanical and economical feasibility of improved design), *cert. denied*, 459 U.S. 857 (1982) with *United States v. Carroll Towing*, 159 F.2d 169, 173 (2d Cir. 1947) (holding that determination of duty under negligence law is matter of balancing probability of risk, gravity of resulting injury, and burden of adequate precautions).

42. See *supra* note 28 and accompanying text (explaining that strict products liability is liability without fault).

order to retain the no-fault characteristic of strict liability, a number of courts impute knowledge of the product-related risk to the defendant before performing risk-utility balancing.⁴³

In strict liability failure to warn cases, courts typically utilize the standard risk-utility test to determine whether a warning is required.⁴⁴ At the same time, the courts require proof of the defendant's knowledge, as suggested by comment j.⁴⁵ The resulting analysis is virtually identical to the inquiry used to fix the duty of care in negligent failure to warn. Both theories require that the manufacturer have actual or constructive knowledge of the danger,⁴⁶ and both theories involve some type of risk-utility or cost-benefit balancing to determine whether a warning is needed.⁴⁷ Under either theory, the reasonableness of the manufacturer's conduct effectively becomes the determinative factor.⁴⁸

43. See, e.g., *Helene Curtis Ind., Inc. v. Pruitt*, 385 F.2d 841, 850 (5th Cir. 1967) (stating standard as product being dangerous to extent that reasonable man would not sell product if he knew of risk involved), *cert. denied*, 391 U.S. 913 (1968); *Feldman v. Lederle Labs.*, 479 A.2d 374, 385 (N.J. 1984) (holding that question is whether defendant acted in a "reasonably prudent manner" in marketing product, assuming that defendant knew of product's defect); *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033, 1036 (Or. 1974) (holding "[t]he test, therefore, is whether the seller would be negligent if he sold the article *knowing of the risk involved*."). The courts have asserted that imputing knowledge of the risk to the defendant before the court performs risk-utility balancing results in a characterization of the product rather than an evaluation of the manufacturer's conduct. *Phillips*, 525 P.2d at 1037.

Deans Wade and Keeton have proposed that the strict liability risk-utility test is most simply stated by first assuming that the manufacturer or seller knew of the dangerous condition of the product and then asking whether the defendant would be *negligent* in marketing the product knowing of the danger. W. Page Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329, 1335 (1966); Wade, *supra* note 2, at 834-35. The supposed benefit of the Wade-Keeton approach is that it is framed in negligence language, and negligence terminology and thought processes are already familiar to courts, lawyers, and juries. *Phillips*, 525 P.2d at 1037. *But cf.* *Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153, 1162-63 (Cal. 1972) (holding that phrase "unreasonably dangerous," which § 402A introduced into definition of defective product, is not part of California law because it "rings of negligence").

44. See, e.g., *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1087 (5th Cir. 1973) (applying risk-utility test in failure to warn context), *cert. denied*, 419 U.S. 869 (1974); *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549, 554 (Cal. 1991) (approving of use of balancing test in warning context); *Finn v. G.D. Searle & Co.*, 677 P.2d 1147, 1152-53 (Cal. 1984) (same); *Feldman v. Lederle Labs.*, 479 A.2d 374, 382, 385-86 (N.J. 1984) (same); *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033, 1036-39 (Or. 1974) (same).

45. See *Marvel*, Annotation, *supra* note 37, at 370-377 (citing cases in which courts have required that manufacturer have knowledge, or reason to know, of product-related risk as precondition for imposing strict liability for failure to warn); see also RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (stating that knowledge or ability to know of danger is element of strict liability failure to warn action). Some courts shift the burden of proof to the defendant on the knowledge issue. Cases cited *infra* note 66.

46. See *supra* notes 35-37 and accompanying text (discussing knowledge requirement under strict liability failure to warn doctrine); *supra* note 21 and accompanying text (discussing knowledge requirement under negligent failure to warn doctrine).

47. See *supra* note 41 and accompanying text (describing similarity between strict liability risk-utility test and negligence cost-benefit test).

48. See cases cited *infra* note 49 (concluding that strict liability failure to warn is virtually

A number of courts have recognized the fact that strict liability failure to warn differs little, if at all, from the negligent failure to warn doctrine.⁴⁹ Many of these courts have been deeply concerned by the similarity.⁵⁰ These courts, all of which enthusiastically adopted strict products liability in order to escape the limitations of the negligence doctrine,⁵¹ have endeavored to establish a satisfactory distinction between the two actions.⁵² Attempts to distinguish the two theories, however, have been largely unsuccessful. Many of the distinctions that the courts have managed to create are merely illusory,⁵³ and those that are not are often the product of analytical confusion or ill-conceived policy.⁵⁴

Representative of the illusory distinctions is the argument that strict liability failure to warn differs from negligence because in strict liability the

identical to negligence standard because reasonableness of manufacturer's conduct is determinative factor under both); authorities cited *supra* note 38 (arguing that strict liability failure to warn is essentially the same as negligence standard). In *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1087-88 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), the court stated:

. . . The determination that a product is unreasonably dangerous, or not reasonably safe, means that, on balance, the utility of the product does not outweigh the magnitude of the danger. . . . The fulcrum for this balancing process is the reasonable man as consumer or as seller. Thus, a product is unreasonably dangerous only when it is "dangerous to an extent beyond that contemplated by the ordinary consumer who purchases it." . . . In other words, for a product to be unreasonably dangerous, "it must be so dangerous that a reasonable man would not sell the product if he knew the risk involved."

Id. (emphasis added) (citations omitted). *Borel* makes clear that the reasonableness of the seller's conduct is the determinative factor, just as it would be under a negligence analysis.

49. See, e.g., *Russell v. G.A.F.*, 422 A.2d 989, 991 (D.C. 1980) (concluding that both strict liability and negligent failure to warn impose duty of ordinary care); *Bernier v. Raymark Ind., Inc.*, 516 A.2d 534, 540 (Me. 1986) (explaining that strict liability failure to warn resembles negligence because reasonableness of manufacturer's conduct is critical issue under each); *Smith v. E.R. Squibb & Sons, Inc.*, 273 N.W.2d 476, 480 (Mich. 1979) (holding that when liability turns on adequacy of warning, issue is one of reasonable care regardless of theory pleaded); *Knitz v. Minster Mach. Co.*, 432 N.E.2d 814, 815 n.5 (Ohio) (noting that rule imposing obligation on seller to give adequate warning is rule fixing standard of care, regardless of whether tort is labeled strict liability) (quoting *Temple v. Wean United, Inc.*, 364 N.E.2d 267, 273 (Ohio 1977)), *cert. denied*, 459 U.S. 857 (1982).

50. See cases cited *infra* notes 55-81 (attempting to develop distinction between strict liability failure to warn and negligence).

51. See generally Prosser, *supra* note 31, at 791-800 (describing rapid development of strict products liability and noting policies driving rapid development).

52. See *infra* notes 55-81 and accompanying text (describing attempts of courts to differentiate strict liability from negligent failure to warn); see also John W. Wade, *On Product "Design Defects" and Their Actionability*, 33 VAND. L. REV. 551, 558 (1980) (noting that number of appellate judges have become concerned that they are not differentiating strict liability from negligence with sufficient clarity and in response have sought to devise "a significant and well-articulated distinction").

53. See *infra* notes 55-61 and accompanying text (describing illusory distinctions that courts have developed between strict liability failure to warn and negligence).

54. See *infra* notes 62-81 and accompanying text (describing distinctions courts have developed between strict liability and negligent failure to warn that are result of unsound rationale or poor policy).

focus is on the condition of the product, whereas in negligence, the focus is on the conduct of the manufacturer.⁵⁵ Courts advancing this argument typically apply the standard strict liability failure to warn test, under which the reasonableness of the defendant's conduct is actually the determinative factor.⁵⁶ In this sense, the product-conduct distinction is illusory; it is difficult to see how a test that ultimately depends upon the reasonableness of the defendant's conduct can actually focus on the condition of the product.⁵⁷

Other examples of illusory distinctions deserve mention. Some courts and commentators have suggested that strict liability failure to warn sets a higher standard of care than does negligence.⁵⁸ It is unlikely that strict liability failure to warn sets a higher degree of care, however, because the courts arguing that it does generally employ the usual strict liability failure to warn test, which is actually little more than the "strict liability" label

55. See, e.g., *Woodill v. Parke Davis & Co.*, 402 N.E.2d 194, 198 (Ill. 1980) (explaining that strict liability failure to warn inquiry focuses on nature of product rather than conduct of manufacturer); *Phillips v. Kimwood Machine Co.*, 525 P.2d 1033, 1037 (Or. 1974) (same); *Falk v. Keene Corp.*, 767 P.2d 576 (Wash. App.) (explaining that strict liability test focuses on manufacturer's defective product and is "fundamentally and irreconcilably different analysis" than negligence, which focuses on manufacturer's conduct), *aff'd*, 782 P.2d 974 (Wash. 1989).

56. See *Woodill*, 402 N.E.2d at 198 (explaining that under strict liability failure to warn, proof of knowledge is required and proper standard is whether it would have been reasonable for manufacturer to give adequate warning); *Phillips*, 525 P.2d at 1036 & n.6, 1039 (adopting negligence with imputed knowledge test, but citing, with approval, Dean Wade who "would impute only the knowledge existing at the time the product was sold"); see also *supra* notes 38-49 and accompanying text (arguing that conventional strict liability failure to warn test actually is little more than negligence standard).

57. See *Henderson & Twerski*, *supra* note 12 at 275-76 (arguing that little, if any, practical difference exists between product and conduct standard); William C. Powers, Jr., *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777, 791-94, 809 (1983) (arguing that product-conduct distinction is illusory because focus on product necessarily involves consideration of product costs, which in turn represents an evaluation of manufacturer's conduct). The illusory character of the product-conduct distinction is apparent in a statement by the court in *Woodill*, 402 N.E.2d at 198:

We perceive that requiring a plaintiff to plead and prove that the defendant manufacturer knew or should have known of the danger that caused the injury, and that the defendant manufacturer failed to warn plaintiff of that danger, is a reasonable requirement, and one which focuses on the nature of the product and on the adequacy of the warning, rather than on the conduct of the manufacturer.

Id. It is difficult to see how an inquiry into the manufacturer's state of mind and into the manufacturer's failure to act can actually focus on the condition of the product. An observation by the California Supreme Court in *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549 (Cal. 1991) is on point: "[W]hile a manufacturing or design defect can be evaluated without reference to the conduct of the manufacturer, the giving of a warning cannot. The latter necessarily requires the communication of something to someone." *Id.* at 558 (citations omitted).

58. See *Anderson*, 810 P.2d at 558-59 (explaining that standard of care is higher in strict liability failure to warn); *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033, 1039 (Or. 1974) (same); Noel, *supra* note 25, at 267 (arguing that a lesser degree of risk may establish duty to warn under strict liability rules).

applied to a negligence standard.⁵⁹ At least one court has suggested that in strict liability failure to warn cases, warnings must cover "all foreseeable uses."⁶⁰ How this concept would meaningfully differ from foreseeability under a negligence theory, however, is hard to imagine.⁶¹

Sometimes courts have successfully articulated a "real" distinction between strict liability failure to warn and its negligence counterpart. Illustrative of this line of distinctions is the argument that defenses based upon the plaintiff's fault, such as contributory negligence, comparative fault, or consumer misuse, are available in negligence but not in strict liability.⁶² One reason for disallowing plaintiff-fault defenses is that to allow them would be inconsistent with the no-fault basis of strict products liability.⁶³ However, defenses based upon the plaintiff's conduct are not analytically inconsistent with no-fault liability if they are viewed as presenting countervailing reasons that outweigh the policies that support recovery rather than mitigate the

59. See *Anderson*, 810 P.2d at 554, 557 (approving use of risk-utility balancing test in strict liability failure to warn context and holding that manufacturer's knowledge is component of strict liability failure to warn action); *Phillips*, 525 P.2d at 1036 & n.6, 1039 (Or. 1974) (adopting negligence with imputed knowledge test, but citing with approval Dean Wade who "would impute only the knowledge existing at the time the product was sold"); see also *supra* notes 38-49 and accompanying text (explaining that typically employed strict liability failure to warn tests are little more than negligence standard). Of course, a jury intuitively may hold the manufacturer to a higher degree of care under strict liability failure to warn, but only because the court has applied the strict liability label to what is actually a negligence standard. See *Henderson & Twerski*, *supra* note 12, at 276 (explaining that semantic "word games" of courts may occasionally result in jury being harder on defendant when applying strict liability).

60. See *Smith v. U.S. Gypsum Co.*, 612 P.2d 251, 254 (Okla. 1980) (holding that in strict liability failure to warn, manufacturer must warn of dangers inherent in "all foreseeable uses," which differs from foreseeability in negligence).

61. See *Bromberg*, *supra* note 34, at 533 (explaining that view that requiring warnings to cover "all foreseeable uses" somehow differs from foreseeability in negligence law fails to account for modern meaning of foreseeability in negligence law).

62. See, e.g., *Young v. Up-Right Scaffolds, Inc.*, 637 F.2d 810, 814 (D.C. Cir. 1980) (stating that contributory negligence is not available in strict liability failure to warn); *Payne v. Soft Sheen Prods., Inc.*, 486 A.2d 712, 721 n.9 (D.C. 1985) (same) (citing *Russell v. G.A.F. Corp.*, 422 A.2d 989, 991 n.* (D.C. 1980)); *Jarrell v. Monsanto Co.*, 528 N.E.2d 1158, 1167 (Ind. Ct. App. 1988) (stating that contributory negligence, or comparative fault, is not available defense under doctrine of strict liability failure to warn). See generally 1 ROBERT D. HURSH & HENRY J. BAILEY, *AMERICAN LAW OF PRODUCTS LIABILITY* §§ 4.33 & 4.34 (2d ed. 1974 & Supp. 1985) (describing general treatment by courts of issue of availability of plaintiff-fault defenses in strict products liability and citing cases).

In addition to distinctions based upon the nonavailability of plaintiff-fault defenses in strict liability, courts have advanced a number of other "real" distinctions. Some courts have concluded that evidence of industry custom is not admissible in strict liability. *Holloway v. J.B. Sys. Ltd.*, 609 F.2d 1069, 1073 (3d Cir. 1979). Other courts have held that evidence of warnings given in the subsequent marketing of the product is admissible in strict liability but not in negligence. *Ault v. Int'l Harvester Co.*, 528 P.2d 1148, 1150-52 (Cal. 1974). For a lengthy critique of these and other distinctions courts have created between strict liability and negligent failure to warn, see *Bromberg*, *supra* note 34.

63. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. n. (1965) (explaining that because § 402A is not based upon seller's negligence, but rather on strict liability, contributory negligence is not a defense).

plaintiff's prima facie case.⁶⁴ In addition, if public policy demands the conclusion that plaintiff-fault defenses should not be available in a particular case or in failure to warn cases generally, those reasons should apply just as well to the negligence action as they do to strict liability.⁶⁵

Another way that some courts have distinguished strict liability failure to warn from negligence is by imputing knowledge of the risk to the manufacturer-defendant, thus shifting the burden to the defendant of proving that the risk was unknowable at the time the product entered the market.⁶⁶ Although the imputed knowledge distinction does not suffer from the same analytical problems from which the distinction based upon plaintiff-fault defenses suffers, it nevertheless does not withstand close scrutiny. If sound policy reasons exist for shifting the burden of proof on the knowledge issue, those reasons should apply just as well to negligent failure to warn as they do to strict liability.⁶⁷

64. See Powers, *supra* note 57, at 799 (explaining that contributory negligence is not inconsistent with no-fault liability if viewed as type of affirmative defense in which policies supporting recovery are outweighed by countervailing policies). One court has articulated another way to avoid the apparent inconsistency between contributory negligence and strict liability. See *Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843, 848-50 (N.H. 1978) (explaining that plaintiff's conduct may act together with defendant's product to jointly cause injury and that assessing damages on basis of comparative causation between plaintiff's conduct and defendant's product alleviates inconsistency).

65. See *Green v. Sterling Extruder Corp.*, 471 A.2d 15, 19-20 (N.J. 1984) (concluding that if public policy requires that contributory negligence defense be unavailable in strict products liability, then same public policy requires nonavailability of contributory negligence in negligent products liability action); *Henderson & Twerski*, *supra* note 12, at 276-77 (arguing that courts could just as well work within negligence framework in failure to warn case and remain free to resolve issue of contributory fault as they see fit); *cf.* Powers, *supra* note 57, at 799 n.76 (arguing that one reason courts likely have been reluctant to permit plaintiff-fault defenses in strict products liability is dissatisfaction with contributory negligence in general and that, while courts feel constrained by precedent in negligence cases, they are able to avoid aggravating problem by refusing to permit defenses in strict liability).

66. See, e.g., *Bernier v. Raymark Ind., Inc.*, 516 A.2d 534, 538-40 (Me. 1986) (allowing defendant to introduce state of art evidence on knowledge issue); *Bilotta v. Kelley Co.*, 346 N.W.2d 616 (Minn. 1984) (holding that distinction between strict liability and negligence in design defect and failure to warn cases is that in strict liability, knowledge of condition of product and risks involved is imputed to manufacturer); *Feldman v. Lederle Lab.*, 479 A.2d 374, 388 (N.J. 1984) (holding that as matter of policy, burden of proving scientific unknowability of risk should be placed on defendant).

67. See *Bromberg*, *supra* note 34, at 530 (noting that shifting burden of proof on knowledge issue to defendant is no more appropriate to strict liability than to negligence); David P. Griffith, Note, *Products Liability—Negligence Presumed: An Evolution*, 67 TEX. L. REV. 851, 879-80 (1989) (arguing that rationale which justifies shifting the burden of proof does not warrant separate strict liability doctrine because courts often shift burdens in negligence context); *cf.* authorities cited *supra* note 65 (arguing that availability of contributory fault should not necessarily depend upon whether case is styled in strict liability or negligence).

The reason courts most often state for shifting certain evidentiary burdens to the defendant in strict liability is that the defendant is in a better position to prove certain facts. See *infra* note 94 and accompanying text (discussing strict liability justification based upon need to relieve plaintiff of onerous burden of proving negligence). However, nothing prevents courts

Some courts have gone beyond merely shifting the burden of proof on the knowledge issue and have held that the defendant may be liable in strict liability for the failure to warn regardless of whether the risk was scientifically knowable at the time the product entered the market.⁶⁸ The decision of the New Jersey Supreme Court in *Beshada v. Johns-Manville Products Corp.*⁶⁹ is the most notable in this line of cases. The plaintiffs in *Beshada* were asbestos workers, or survivors of asbestos workers, who claimed to have contracted various respiratory diseases from the use of asbestos-containing products manufactured by the defendants.⁷⁰ The plaintiffs alleged that the defendants failed to warn of the dangers associated with the use of asbestos.⁷¹ The defendants asserted that the risks were scientifically undiscoverable at the time the defendants placed the asbestos-containing products on the market.⁷² The court, nevertheless, held that the manufacturers could be found strictly liable for the failure to warn regardless of whether the risks were scientifically knowable when the product was marketed.⁷³

from shifting the burden of proof in the negligence context based upon the same rationale. See *Ybarra v. Spangard*, 154 P.2d 687, 689-90 (Cal. 1944) (holding in medical malpractice suit that because plaintiff was unconscious during surgery when his injury occurred, medical staff was in better position to have pertinent evidence, which justifies *res ipsa loquitur* inference); *Anderson v. Somberg*, 338 A.2d 1, 6-7 (N.J.) (placing burden on defendants in medical malpractice action because defendants were in better position to identify responsible party), *cert. denied*, 423 U.S. 929 (1975).

68. See Marvel, Annotation, *supra* note 37, at 377-80 (citing minority of cases imposing liability upon manufacturer for failure to warn of product-related risks regardless of scientific knowability of risks at time product entered market).

Dean Keeton is the leading proponent of holding manufacturers liable for failure to warn of risks that were scientifically unknowable at the time the product entered the market. See W. Page Keeton, *Products Liability—Inadequacy of Information*, 48 TEX. L. REV. 398, 407-09 (1970) (arguing that fact that manufacturer was excusably unaware of the extent of danger should be entirely irrelevant in strict liability); see also Dawn Pelletier, Note, *Is there a Distinction Between Strict Liability and Negligence in Failure to Warn Actions?*, 15 SUFFOLK U. L. REV. 983 (1981) (arguing that courts should impose liability for failure to warn of unknowable risks in order to maintain a distinction between strict liability and negligent failure to warn).

69. 447 A.2d 539 (N.J. 1982), *limited to its facts*, *Feldman v. Lederle Labs.*, 479 A.2d 374 (N.J. 1984).

70. See *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539, 542 (N.J. 1982), *limited to its facts*, *Feldman v. Lederle Labs.*, 479 A.2d 374 (N.J. 1984).

71. See *id.* at 543.

72. See *id.* at 542.

73. See *id.* at 549. Surprisingly for a case in which a court was undertaking to establish a distinction between strict liability and negligent failure to warn, the New Jersey Supreme Court in *Beshada* considered the most important inquiry to be whether the imposition of liability for failure to warn of unknowable risks would advance the policies sought to be achieved by strict liability. See *id.* at 547. The court concluded that such liability would advance three important policies. First, the rule would allocate the costs of accidents to the manufacturers, who could best distribute those costs through pricing of the product. See *id.*; see also *infra* note 91 (discussing and critiquing loss-shifting policy). Second, the rule would impose on manufacturers the costs of failing to discover product dangers, which would create

Rules imposing liability upon manufacturers for the failure to warn of scientifically unknowable risks have been subject to a great deal of criticism.⁷⁴ At least one commentator has argued that such a rule reduces the incentive for manufacturers to discover product-related risks after the manufacturers have placed a product on the market.⁷⁵ Other concerns are that this type of rule defeats the important goal of economic efficiency⁷⁶ or that it could operate to deprive consumers of potentially valuable and beneficial products.⁷⁷ Courts and commentators have argued that imposing liability upon a manufacturer for the failure to warn of scientifically undiscoverable risks is tantamount to imposing absolute liability and effectively places the manufacturer in the role of insurer.⁷⁸ The most widespread criticism, how-

an incentive for manufacturers to invest more time and money in safety research. See *Beshada*, 447 A.2d. at 547-48; see also *infra* note 92 (discussing safety-incentive policy). Finally, the rule would preclude the highly confusing, costly, and time consuming process that would necessarily be involved in litigating so complex an issue as the determination of scientific knowability. See *Beshada*, 447 A.2d at 548.

74. See *infra* notes 75-81 and accompanying text (discussing criticisms of rules imposing liability for failure to warn of scientifically undiscoverable risks). See generally William R. Murray, Jr., Comment, *Requiring Omniscience: The Duty to Warn of Scientifically Undiscoverable Product Defects*, 71 GEO. L.J. 1635 (1983) (criticizing rules imposing liability for failure to warn of undiscoverable risks, with special attention to New Jersey Supreme Court's decision in *Beshada*); Robert D. Casale, Comment, *Beshada v. Johns-Manville Products Corp.: Adding Uncertainty to Injury*, 35 RUTGERS L. REV. 982 (1983) (same). But see Christopher M. Placitella & Alan M. Darnell, *Beshada v. Johns-Manville Products Corp.: Evolution or Revolution in Strict Products Liability?*, 51 FORDHAM L. REVIEW 801 (1983) (defending result in *Beshada*; written by attorneys for plaintiffs in *Beshada* case).

75. See Victor Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine*, 58 N.Y.U. L. REV. 892, 897, 904 (1983) (arguing that if manufacturer is held liable for failure to warn at point of sale regardless of whether risk was unknown, manufacturer has less incentive to discover and warn of danger after product has been sold); cf. *infra* note 92 (arguing that manufacturer is likely to decide on same level of safety regardless of whether manufacturer is susceptible to strict liability or negligence).

76. See Henderson & Twerski, *supra* note 12, at 274 (arguing that manufacturers cannot insure against unknown risks or include costs of unknown risks in price of product. As a result, manufacturer must charge losses against earnings or capital or go out of business); James A. Henderson, Jr., *Coping with the Time Dimension in Products Liability*, 69 CALIF. L. REV. 919, 942-48 (1981) (discussing market distorting effects of rule imposing liability for risks unknown at time manufacturer placed product on market).

77. See *Feldman v. Lederle Labs.*, 479 A.2d 374, 387 (N.J. 1984) (asserting that if rule imposing liability for failure to warn of scientifically unknowable risks were deemed to hold generally, especially to cases involving drugs vital to health, court would not agree); Sales, *supra* note 5, at 546 (arguing that manufacturers' concerns about imposition of liability for unknowable dangers could deprive marketplace of valuable products or postpone entry of beneficial products into market because of inordinate delay and testing).

78. See *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549, 552, 555 (Cal. 1991) (arguing strict liability never intended to be absolute liability and that rule imposing liability for failure to warn of unknowable dangers is absolute liability which effectively places manufacturer in role of insurer); *Woodill v. Parke Davis & Co.* 402 N.E.2d 194, 199 (Ill. 1980) (contending that holding manufacturer liable for failure to warn of impossible-to-know danger would make manufacturer virtual insurer of product and that strict liability is not equivalent of absolute liability); Sales, *supra* note 5 (noting that imposition of liability for failure to warn of scientifically undiscoverable risk makes manufacturer an insurer).

ever, is based upon fairness. The critics argue that it is extremely unfair to require manufacturers to warn of risks that are unknown and technologically unknowable.⁷⁹ Even the New Jersey Supreme Court was unwilling to perpetuate the harsh consequences of the rule it had set down in *Beshada* and essentially overruled *Beshada* two years after it had rendered the decision.⁸⁰ In fact, the vast majority of courts have refused to adopt a rule that would hold manufacturers accountable for the failure to warn of undiscoverable dangers and have adopted the requirement of comment j that imposes liability only if the manufacturer knew, or should have known, of the product-related risk.⁸¹

C. *The Current Status of Strict Liability Failure to Warn*

Even disregarding the troublesome distinctions that the courts have created between strict liability and negligent failure to warn, a serious problem remains. Notwithstanding the fact that strict liability failure to warn, as the courts have formulated it, is virtually indistinguishable from the negligence action, plaintiffs generally are free to plead both theories in the same case.⁸² Both courts and commentators have argued that allowing

79. See Henderson & Twerski, *supra* note 12, at 274 (assuming that basic postulate of legal duty is that conduct which law seeks to induce is capable of being performed and arguing that imposition of liability for failure to warn of unknowable risks is extremely unfair); Sales, *supra* note 5, at 546 (contending that it is unfair to expect manufacturer to warn of risk that is unknown and unknowable); Schwartz, *supra* note 75, at 879 (arguing that imposition of liability for failure to warn of unknowable risks is unfair); cf. *Feldman v. Lederle Labs.*, 479 A.2d 374, 387 (N.J. 1984) (stating that "[a] warning that a product may have an unknowable danger warns of nothing").

80. See *Feldman*, 479 A.2d at 388 (restricting *Beshada* to circumstances giving rise to its holding). The New Jersey Supreme Court stated in *Feldman*:

. . . A warning that a product may have an unknowable danger warns of nothing. Neither [of two earlier cases] stated that the manufacturer would be deemed to know of the dangerous propensity of the chattel when the danger was unknowable. . . . If *Beshada* were deemed to hold generally or in all cases, particularly with respect to a situation like the present one involving drugs vital to health, that in a warning context knowledge of the unknowable is irrelevant in determining the applicability of strict liability, we would not agree.

Id. at 387. The court then listed a number of articles criticizing its *Beshada* holding. See *id.* at 388 (listing articles criticizing *Beshada*). The Third Circuit later upheld the constitutionality of applying the *Beshada* rule, in which knowledge of the risk is irrelevant, to asbestos cases and the *Feldman* rule to all other warning cases. See *In re Asbestos Litigation*, 829 F.2d 1233 (3d Cir. 1987) (upholding constitutionality of treating warning cases involving asbestos differently from all other warning cases), *cert. denied*, 485 U.S. 1029 (1988).

81. See Marvel, Annotation, *supra* note 37, at 370-77 (citing cases in which courts have required that manufacturer have knowledge, or reason to know, of product-related risk as precondition for imposing strict liability for failure to warn).

82. See, e.g., *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1088-89, 1091 (5th Cir. 1973) (noting that plaintiff pleaded theories of negligence, strict liability, and implied warranty), *cert. denied*, 419 U.S. 869 (1974); *Payne v. Soft Sheen Prods., Inc.*, 486 A.2d 712, 716, 720 (D.C. 1985) (treating plaintiff's implied warranty claim as strict liability claim in case in which plaintiff pleaded negligence and warranty theories); *Jonescuc v. Jewel Home Shopping*

plaintiffs simultaneously to plead two nearly identical theories of failure to warn, rather than being advantageous in some small way, only serves to complicate the litigation process and confuse both judges and juries.⁸³ A number of critics of strict liability failure to warn have suggested that a possible solution to the current dilemma would be to abandon the strict liability action altogether.⁸⁴ If, in fact, courts cannot develop a sound strict liability failure to warn action that is meaningfully distinct from negligence, this argument has a great deal of merit. If little or no difference exists between the two theories, it makes little sense to complicate the litigation process by retaining both actions.

However, the critics have failed to consider other possible formulations of strict liability failure to warn. They have assumed that the variations of the doctrine that the courts have so far conceived are the only possible variations. Merely because courts have failed thus far to develop an adequate distinction between strict liability failure to warn and negligence does not mean that such a distinction is impossible.⁸⁵ In fact, much of the courts' inability to formulate a well-reasoned strict liability failure to warn doctrine based upon sound policy is attributable to the fact that careful reasoning and policy analysis have not been the predominate concerns of the courts;

Serv., 306 N.E.2d 312, 313 (Ill. App. Ct. 1973) (noting that plaintiff's failure to warn claim included elements of both negligence and strict liability); *cf.* RESTATEMENT (SECOND) OF TORTS § 402A cmt. a. (explaining that strict products liability rule does not preclude theory of negligence). *But see* Hauenstein v. Locite Corp., 347 N.W.2d 272, 275 (Minn. 1984) (holding that because of potential confusion, when plaintiff alleges failure to warn, plaintiff may plead either negligence or strict liability to jury but not both).

83. *See Hauenstein*, 347 N.W.2d at 275 (noting confusion that may result from mixing negligence and strict liability where only basis for liability is failure to warn); Bromberg, *supra* note 34, at 540 (asserting strict liability failure to warn serves to confuse both judges and juries because of, among other things, its similarity to negligence); Henderson & Twerski, *supra* note 12, at 276, 278 (noting that confusion results from coexistence of two such closely related theories and arguing such confusion leads to bad law); Wade, *supra* note 2, at 850 (arguing that although each theory has advantages and disadvantages, confusion created by similarity between them cannot be justified). The confusion created by the similarity between strict liability and negligent failure to warn is evident in cases in which courts have reversed a judgement for the plaintiff because of an inconsistent jury finding that the manufacturer was negligent but not strictly liable. *See generally*, John E. Theuman, Annotation, *Products Liability: Inconsistency of Verdicts on Separate Theories of Negligence, Breach of Warranty, or Strict Liability*, 41 A.L.R.4TH 9, 16-25 (1985 & Supp.) (analyzing cases, most of which are failure to warn cases, that have considered whether jury's finding of negligence but not strict liability constitutes inconsistency that requires reversal).

84. *See Bromberg*, *supra* note 34, at 540 (arguing that courts should remove strict liability from failure to warn law); Henderson & Twerski, *supra* note 12, at 271-78, 289 (arguing that courts should abandon strict liability action in failure to warn context and that failure to warn action should lie in negligence alone); *cf.* John W. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 759-60 (1983) (arguing that if court has not already recognized applicability of strict liability in failure to warn actions, it should consider treating failure to warn cases as negligence cases).

85. *See* Aaron Gershonowitz, *The Strict Liability Duty to Warn*, 44 WASH. & LEE L. REV. 71 (1987) (proposing strict liability failure to warn doctrine that substantially differs from current formulations).

the primary concern has been the need to formulate a doctrine separate from negligence.⁸⁶ Ironically then, the fact that the strict liability failure to warn doctrine has been driven largely by the need to create a doctrine that differs in some way from negligence has rendered unsuccessful the courts' attempts to do just that—satisfactorily distinguish the strict liability action from negligence.

III. POLICY CONSIDERATIONS AND DOCTRINAL PROBLEMS

Negligence language, concepts, and policies continue to dominate strict liability failure to warn.⁸⁷ If the courts are to eliminate this troublesome state of affairs, they must phrase the strict liability doctrine in its own language and must firmly establish the doctrine in its own policy foundation.⁸⁸ Constructing such a strict liability failure to warn doctrine will necessarily require a careful examination of the policies that strict liability failure to warn should seek to accommodate.⁸⁹

This policy analysis should begin with an examination of the policies that courts have advanced as establishing the foundation for strict products liability.⁹⁰ Two of the traditionally cited policies—loss shifting⁹¹ and incentive

86. See *supra* notes 55-81 and accompanying text (describing efforts of courts to develop satisfactory distinction between strict liability and negligent failure to warn). *But see* *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539, 547-48 (N.J. 1982) (noting that most important inquiry in formulating strict liability failure to warn rule is whether rule promotes important policies), *limited to its facts*, *Feldman v. Lederle Labs.*, 479 A.2d 374 (N.J. 1974). Although the *Beshada* court should be commended for its attempt to formulate a strict liability rule based upon policy analysis, the *Beshada* decision remains an example of the problems inherent in rules based on ill-conceived policy. See *supra* note 73-81 and accompanying text (discussing criticisms of *Beshada* and rules imposing liability for failure to warn of scientifically unknowable risks).

87. See *supra* notes 55-81 and accompanying text (arguing that attempts to formulate distinct strict liability failure to warn doctrine have been unsuccessful).

88. See Leon Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 TEX. L. REV. 1185, 1193 n.14 (1976) (arguing that if strict liability is to survive, doctrine must be phrased in its own language and dressed in its own clothing); David G. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 683 (1980) (stating that strict liability cannot be expected to move forward until policy goals are set).

89. See Owen, *supra* note 88, at 683-84 (arguing that products liability can not be expected to move forward in acceptable fashion until policy goals are set, and only once policy goals are set will it be possible to construct one or more strict products liability tests).

90. See *id.* at 684 (stating that best place to begin critical examination of product liability policy is with policies said to support movement to strict liability in tort).

91. See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963) (stating that "purpose of [strict] liability is to insure that the cost of injuries resulting from defective products are born by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves"); *Henningson v. Bloomfield Motors*, 161 A.2d 69, 81 (N.J. 1960) (stating that "burden of losses consequent upon use of defective articles is borne by those who are in a position to . . . make an equitable distribution of the losses"). Commentators have severely criticized the loss-shifting rationale on a number of grounds: That the rationale would justify absolute liability or even a comprehensive social insurance scheme for the victims of all accidents, that the results dictated by the rationale

for safer products⁹²—do not withstand close scrutiny and should, therefore, play little or no role in laying the groundwork for any form of strict products liability.⁹³ Another policy, the need to relieve the plaintiff of the onerous burden of proving negligence, justifies, at most, shifting the burden of proof on certain issues to the defendant⁹⁴ and should, therefore, play only a limited role in establishing a strict liability failure to warn doctrine. The remaining policies—risk reduction⁹⁵ and marketplace honesty⁹⁶—should,

would often be unfair, and that imposition of liability in accordance with loss-shifting would be economically inefficient. See generally Richard A. Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C. L. REV. 644-45, 659-661 (1978) [hereinafter Epstein, *Products Liability Search*] (discussing and criticizing loss-shifting rationale); Owen, *supra* note 88, at 703-07 (same). Many commentators have argued that the loss-shifting rationale should be abandoned altogether. See, e.g., EPSTEIN, *supra* note 3, at 46 (arguing that loss-shifting arguments should receive no weight in formulation of tort doctrine); Epstein, *Products Liability Search*, *supra*, at 661 (arguing that allowing loss-shifting issues to even covertly dominate tort law will lead to unsound results, disrepute of lawyers, courts and tort system, and will overburden tort system to point where it can no longer effectively function); Owen, *supra* note 88, at 705-06 (contending that loss-shifting policy should be abandoned).

92. See *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539, 548 (N.J. 1982) (concluding that imposition of liability for failure to warn of risks that were scientifically unknowable at time product entered market will motivate manufacturers to develop safer products and invest more in safety research), *limited to its facts*, *Feldman v. Lederle Labs.*, 479 A.2d 374 (N.J. 1984). Commentators have strongly criticized the safety-incentive justification for strict products liability. See, e.g., EPSTEIN, *supra* note 3, at 40-41 (arguing that manufacturers will likely opt for same point of safety—that at which additional precautions are no longer cost-effective—under both strict liability and negligence theories); Epstein, *Products Liability Search*, *supra* note 91, at 659 (arguing that liability founded upon safety rationale tends to deal as harshly with those sensible defendants who have exercised all possible care in making their product safe as it does with those firms that are backward and incompetent); Owen, *supra* note 88, at 709-10 (arguing that safety-incentive rationale is deficient as decision-making tool). Furthermore, the important goal of optimum product safety is more adequately achieved by the risk-reduction policy. See *infra* note 105 and accompanying text.

93. See Owen, *supra* note 88, at 684 (stating that policies that do not survive close scrutiny should be discarded as justification for strict products liability); see also *supra* notes 91-92 (noting weaknesses in loss shifting and safety incentive policies).

94. See *Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153, 1162 (Cal. 1972) (stating “The very purpose of our pioneering efforts in [strict liability] was to relieve the plaintiff from problems of proof in pursuing negligence.”). The need to relieve the plaintiff of the difficult burden of proving negligence may in some circumstances justify shifting the burden of proof on certain issues. See *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 455 (Cal. 1978) (shifting to manufacturer burden of proving that product utility outweighs product risk because manufacturer has superior knowledge); *Feldman v. Lederle Labs.*, 479 A.2d 374, 388 (N.J. 1984) (holding that as matter of policy, burden of proving scientific unknowability of risk should be placed on defendant because defendant is in superior position to know technological data). The policy does not, however, justify substantive differences. See Owen, *supra* note 88, at 710-11 (arguing that policy often misconstrued as justifying liability based upon manufacturer's probable negligence); Griffith, Note, *supra* note 67, at 879 (stating that party's ignorance alone should not be basis for imposing liability). Some commentators have argued that shifting the burden of proof because of the consumer's ignorance, in relation to the manufacturer, on certain issues is as appropriate in negligence as in strict liability. See authorities cited *supra* note 67 (arguing that burden shifting appropriate in negligence if public policy so demands).

95. See *infra* notes 100-10 and accompanying text (describing risk-reduction policy).

96. See *infra* notes 111-19 and accompanying text (describing marketplace-honesty policy).

on the other hand, play a significant role in the process of reformulating the strict liability failure to warn.

Consideration of the risk-reduction and marketplace-honesty policies, however, is not sufficient. Doctrinal problems that transcend the troublesome strict liability-negligence predicament currently plague both strict liability and negligent failure to warn.⁹⁷ These problems are, in part, attributable to the failure of courts to give careful consideration to the various goals, values, and concerns that have special significance in the area of failure to warn.⁹⁸ These policies need to be examined thoroughly so that they may provide guidance in the reformulation of the strict liability failure to warn doctrine.⁹⁹

A. Risk-Reduction Policy

The risk-reduction policy, stated simply, is that courts should place liability upon the one who could best, but did not, avoid the accident or reduce the risk.¹⁰⁰ The risk-reduction rationale is based largely upon the notion that with the developing complexity of modern products and the corresponding complexity of potential dangers inherent in those products, manufacturers are often in a better position than the consumer to discover, evaluate, and act upon risks inherent in the products they make.¹⁰¹ Some-

97. See *infra* notes 192-209 and accompanying text (describing problems in failure to warn law relating to causation issue); *infra* notes 128-53 and accompanying text (explaining problems resulting from failure of courts to consider different functions that warnings serve in formulating failure to warn liability rules); *infra* notes 154-72 and accompanying text (discussing problems pertaining to use of same standard in design and warning cases). See generally Henderson & Twerski, *supra* note 12 (discussing many of the problems currently afflicting failure to warn law).

98. See *infra* notes 120-209 and accompanying text (discussing policies and concerns specifically relevant to failure to warn and problems that have resulted, or may result, from failure of courts to adequately consider these policies).

99. See *infra* notes 120-209 and accompanying text (summarizing policies that should be considered in reformulating strict liability failure to warn doctrine).

100. See *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944) (Traynor J., concurring) (stating that courts should fix responsibility "wherever it will most effectively reduce the hazards of life and health inherent in defective products that reach the market"); *Henningsen v. Bloomfield Motors*, 161 A.2d 69, 81 (N.J. 1960) (stating that "burden of losses consequent upon use of defective articles is borne by those who are in a position to . . . control the danger"); Britain, *supra* note 39, at 349-50 (noting that risk-reduction policy, which author calls "injury prevention," places burden of loss on party that can most efficiently and affordably prevent injury); Owen, *supra* note 88, at 712 (stating that risk-reduction policy, which author calls "risk control," places loss on party in best position to avoid accident); cf. Guido Calabresi and John T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972) (proposing strict liability rule that places loss on "cheapest cost avoider"—i.e., party "in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made") (emphasis omitted).

101. See *Escola*, 150 P.2d at 441, 443 (Traynor J., concurring) (asserting that manufacturer is in better position to understand its own manufacturing processes because those processes are either inaccessible to or beyond the understanding of consumers); *Feldman v. Lederle*

times, however, the consumer is better able to control the risks that manifest themselves,¹⁰² as is often the case when the manufacturer has given directions for the safe use of a product.¹⁰³

Placing liability upon the party who is in the best position to control the risk seems intuitively fair¹⁰⁴ and also provides incentive to all parties involved to achieve the optimum level of safety.¹⁰⁵ The risk-reduction policy may also provide protection against economic waste.¹⁰⁶ Thus, the risk-

Labs., 479 A.2d 374, 388 (N.J. 1984) (noting that manufacturer is in superior position to know technological data relating to manufacturer's products); Owen, *supra* note 88, at 711 (explaining that complex and hidden dangers inherent in modern products are normally beyond skill and understanding of consumers).

102. See Britain, *supra* note 39, at 349-50 (noting that in some circumstances consumer's capacity to prevent injury exceeds that of manufacturer); Calabresi & Hirschhoff, *supra* note 100, at 1064, 1071-72 (explaining that misuser or third parties are often in better position than manufacturer to evaluate risks); Epstein, *Products Liability Search*, *supra* note 91, at 658-59 (noting that in many situations incentives to maintain safety are better placed on others in chain of distribution). Professor Owen offers the example of a consumer driving a car over a rocky stream bed at great speed. Owen, *supra* note 88, at 712. In such a case, the consumer is best informed and best able to control the resulting risks. *Id.*

103. See *infra* note 128 and accompanying text (discussing risk-reduction function of warnings).

104. See Owen, *supra* note 88, at 712 (stating that liability based on risk-reduction policy seems intuitively fair).

105. See EPSTEIN, *supra* note 3, at 41 (noting that liability rules will achieve optimum level of safety by not only placing incentive on manufacturer to make safer products, but also by placing incentive on other parties in chain of distribution to maintain and use product safely); Britain, *supra* note 39, at 348-50 (explaining that risk-reduction policy, which author calls "injury prevention," provides incentives for both manufacturer and consumer to optimize level of safety). It is important to note that the safety incentive inherent in the risk-reduction policy is fundamentally different than the safety-incentive policy standing alone. See *supra* note 92 (discussing weaknesses of safety-incentive policy). Liability rules based upon the safety-incentive policy are one-directional, leading inevitably to the imposition of liability upon the manufacturer. Owen, *supra* note 88, at 709. Such a rule arguably provides less incentive for maintaining safety to others in the chain of distribution. See EPSTEIN, *supra* note 3, at 41 (arguing that liability rules based upon imposing high incentive for safety on manufacturer encourages others to use less care in maintaining product safety). The risk-reduction policy, on the other hand, places the safety incentive on the party best able to control the risk. *Supra* notes 100-03 and accompanying text. Furthermore, the safety incentive policy, standing alone, would encourage the marketing of products that are "too safe," which would cause an undesirable rise in product costs. Griffith, Note, *supra* note 67, at 877. Implicit in the risk-reduction policy, on the other hand, is reduction of risks to an affordable level. Britain, *supra* note 39, at 349; see Owen, *supra* note 88, at 710 (arguing that if deterrence to a point is underlying notion of safety-incentive rationale, then safety rationale would simply "mask" other policies necessary in fixing that point).

106. See Owen, *supra* note 88, at 712 (noting that liability based upon risk-reduction policy may promote economic efficiency). Professor Owen notes that risk-reduction seems little different from Professor Calabresi's "cheapest cost avoider" economic model, which is arguably the most efficient test of liability. *Id.* Professor Calabresi proposes a strict liability test for product-related injuries that "requires of [courts] only a decision as to which of the parties to the accident is in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made." Calabresi & Hirschhoff, *supra* note 100, at 1060. In other words, "[t]he question for the court reduces to

reduction rationale may be very helpful in identifying who should bear the loss; the loss should be borne by the party that was in the best position to reduce or control the risk.¹⁰⁷ Allocating the loss in accordance with the risk-reduction policy alone, however, may occasionally conflict with allocations of loss in accordance with other policies, such as marketplace honesty,¹⁰⁸ or with certain "rights" that deserve protection, such as the "right" of consumers to make an informed choice concerning product risks.¹⁰⁹ Accordingly, although the risk-reduction policy has a great deal of potential for helping to structure products liability rules, other policies will have to play a role as well.¹¹⁰

B. Marketplace-Honesty Policy

Another traditional justification for the strict products liability doctrine is a representational or marketplace-honesty theory.¹¹¹ The theory is based on the notion that by placing a product on the market and packaging and advertising the product, the seller impliedly represents to the consumer that

a search for the cheapest cost avoider." *Id.* Professor Calabresi argues that the "cheapest cost avoider" test is the most efficient liability test because, among other things, it involves lesser administrative costs than do other tests and focuses on minimizing accident costs and accident avoidance costs rather than on accident avoidance. *Id.* at 1074-76 & n.74. Professor Calabresi does consider, however, that goals besides efficiency, such as distributional goals and fairness concerns, may conflict with and often predominate over efficiency considerations and that these goals, too, will likely influence liability decisions. *See id.* at 1076-85 (describing relationship between efficiency model and other goals).

107. *See* sources cited *supra* note 100 (noting that under risk-reduction policy, loss should lie with party in best position to control risk).

108. *See* Britain, *supra* note 39, at 351-52 (discussing tensions between risk-reduction policy and marketplace-honesty policy); Owen, *supra* note 88, at 712 (noting that in some circumstances other policies "loom larger" than risk-reduction policy). In fact, the marketplace-honesty policy "looms larger" in failure to warn cases than does risk reduction. *See* Gershonowitz, *supra* note 85, at 72 *passim* (arguing that marketplace honesty is dominate policy in failure to warn context); *infra* notes 159-68 and accompanying text (discussing role of marketplace-honesty policy in warning cases); *see also infra* notes 111-19 and accompanying text (discussing marketplace-honesty policy).

109. *See infra* notes 150-53 and accompanying text (discussing consumers' "right" to make informed choice and arguing that risk-reduction policy is incapable of adequately protecting that right); *see also* Owen, *supra* note 88, at 712-13 (noting conflict between risk-reduction policy and "rights" that deserve protection).

110. *See* Britain, *supra* note 39, at 408-22 (arguing that marketplace-honesty policy should assume coequal role with risk-reduction policy in products liability law); Owen, *supra* note 88, at 713 (explaining that values in addition to risk reduction will have to inform decisions).

111. *See* Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1962) (justifying imposition of strict products liability by reference to marketplace-honesty policy). For an extensive, 279 page evaluation of the representational theory, see Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974). For a less extensive, yet comprehensive, exploration of the appropriate role of marketplace honesty in products liability law, see Britain, *supra* note 39. *See also* Green, *supra* note 88 (proposing "communicative tort" based upon marketing theory supported by §§ 402A and 402B of the Restatement).

the product is safe for use.¹¹² These implicit representations in turn create expectations in consumers of product safety.¹¹³ Sellers should not be able to escape liability for injuries caused by their defective products once they have sought and built consumer confidence in those products.¹¹⁴

The marketplace-honesty policy contains two goals that are worthy of promotion in products liability law. First, because sellers usually intend to convey an impression to potential consumers that their products are safe to use,¹¹⁵ liability rules should obligate sellers to stand behind their products when they have made such representations.¹¹⁶ Second, the marketplace-honesty policy promotes consumer autonomy because consumers can better order their lives as they see fit if they are assured protection, at least in the form of compensation, against unexpected product risks.¹¹⁷ In other

112. See *Greenman*, 377 P.2d at 901 (asserting that implicit in product's presence on market is representation that it will function properly); *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 443 (Cal. 1944) (Traynor J., concurring) (noting efforts of manufacturers to build consumer confidence in products through advertising and marketing devices such as trademarks); Britain, *supra* note 39, at 348 (stating that marketplace-honesty policy is founded on notion that through advertising and other marketplace inducements, manufacturers explicitly and implicitly portray product safety); Green, *supra* note 88, at 1185 (describing communicative process in which manufacturer makes implied representations of safety); Shapo, *supra* note 111, at 1325-34. (discussing at length different ways in which manufacturers make both unqualified assurances and general implied representations of product safety through media ranging from "fanfare of advertising to sober detail of instruction manuals").

113. See *Greenman*, 377 P.2d at 901 (observing that consumers rely on manufacturer representations); *Escola*, 150 P.2d at 443 (Traynor J., concurring) (noting that consumers rely on confidences built up by manufacturer through advertising and other marketing devices); *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 83 (N.J. 1960) (arguing that under modern conditions, consumers have little choice but to rely on "the importuning of colorful advertising" by manufacturers); RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965) (noting that consumer is forced to rely on seller); Green, *supra* note 88, at 1190 (describing process in which marketing techniques ripen into consumer confidences and arguing that seller cannot escape liability once it has created such confidences).

114. See *Escola*, 150 P.2d at 443 (Traynor J., concurring) (arguing that marketing practices ripen into manufacturer obligation); RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965) (asserting that by marketing product, manufacturer undertakes special obligation to consuming public); EPSTEIN, *supra* note 3, at 93-94 (noting that under representational theory, "gist" of consumer's case is estoppel by misrepresentation); Green, *supra* note 88, at 1190-91 (describing process by which manufacturer's representations of product safety ripen into obligation to consumers).

115. See *Escola*, 150 P.2d at 443 (Traynor J., concurring) (noting efforts of manufacturers to build consumer confidence in products through advertising, use of trademarks, and increasingly high standards of inspection); Owen, *supra* note 88, at 708 (stating that manufacturers usually intend to create impression that products are safe for use); cf. EPSTEIN, *supra* note 3, at 94 (explaining that even if manufacturer has said nothing about product, product itself, by its very appearance, makes implied representations about its use and limitations).

116. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965) (stating that public has right to expect reputable sellers to stand behind their goods); PROSSER, *supra* note 1, § 97, at 650 (stating practice of reputable manufacturers is to stand behind their goods); Britain, *supra* note 39, at 348 (contending that manufacturers should be responsible when expectations they have intentionally created are frustrated); Green, *supra* note 88, at 1191 (stating that law should take sellers at their word).

117. See sources cited *infra* note 118.

words, consumer autonomy is best promoted if consumers can be certain that the seller has informed them of all product-related risks or that the seller will compensate them for injuries caused by risks about which the seller has not provided adequate information.¹¹⁸ Because marketplace honesty promotes these important goals, the policy should play a significant role in laying the foundation for products liability law.¹¹⁹ Moreover, for reasons to be discussed below, the marketplace-honesty policy is especially important in the context of the failure to warn.

C. *Insignificant Risks and the Proliferation of Warnings*

Every product has some degree of risk. Courts could formulate a test for failure to warn that would require manufacturers to warn of the most insignificant product risks or risks with little probability of occurring.¹²⁰ Such a rule inevitably would lead to a proliferation of warnings, which would have extremely negative consequences. One result of such a rule is that manufacturers would have to issue a "laundry list" of warnings with the sale of every product.¹²¹ Such a "laundry list" could contain a large number of warnings against relatively insignificant risks, which would tend to dilute the effectiveness of more important warnings accompanying the same product.¹²² When faced with a "laundry list" of warnings, consumers

118. See Britain, *supra* note 39, at 369 (arguing that marketplace-honesty policy promotes enhanced flow of information to consumers, which facilitates individual integrity that comes from exercise of meaningful choice); Owen, *supra* note 88, at 709 (noting that implied representations policy promotes consumer autonomy because consumers are protected, in form of compensation, against unexpected calamity caused by defective products). For a general discussion of the law's treatment of personal autonomy, see Joseph Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent and the Plea Bargain*, 84 YALE L.J. 683 (1975).

119. See Britain, *supra* note 39, at 408-22 (arguing that marketplace honesty should take on coequal role with risk reduction in products liability law); Green, *supra* note 88 (arguing that representational theory should be basis for communicative tort applicable to product defects); Owen, *supra* note 88, at 709 (concluding that representational theory should be accorded significant respect in products liability law); Shapo, *supra* note 111 (discussing significance of representational theory in products liability law).

120. See *Moran v. Faberge, Inc.*, 332 A.2d 11, 13, 20 (Md. 1975) (holding that manufacturer of cologne is required to warn of risk that misusing cologne by slowly dripping it onto flaming candle in order to make candle "scented" could result in burst of fire and burns to individual). The *Moran* court explained that the cost of supplying a warning is so minimal that the cost-benefit balancing process will almost always weigh in favor of an obligation to warn. *Id.* at 15; see also *Ross Labs. v. Thies*, 725 P.2d 1076, 1079 (Alaska 1986) (arguing that costs of adding warning are so minimal that balance must always be struck in favor of requiring warning).

121. See Aaron D. Twerski et al., *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495, 516 (1976) (arguing that failure to warn rule imposing duty to warn of remote and insignificant risks would force manufacturers to issue a "laundry list" of warnings with every product).

122. See *Finn v. G.D. Searle & Co.*, 677 P.2d 1147, 1153 (Cal. 1984) (noting inevitable diluting effect that would result from inundating physicians with warnings of any and every hint of product danger); Gershonowitz, *supra* note 85, at 103 (noting that warnings of

likely would disregard or overlook important warnings concerning significant product risks.¹²³

A related and more troublesome possibility is that an undue proliferation of warnings would have what has been termed a "wolf-crying" effect.¹²⁴ The constant repetition of insignificant warnings on nearly every product could cause consumers to become "immune" to all warnings on all products, no matter how significant the risk.¹²⁵ Under these circumstances, consumers would have no way to distinguish insignificant warnings from significant ones and would begin to disregard product warnings altogether.¹²⁶

To be effective, then, warnings should call attention only to significant dangers that have a real probability of occurring.¹²⁷ Thus, any test for strict liability failure to warn should take into consideration the adverse effects of a rule that would force manufacturers to warn of every trivial product-related risk.

D. *The Informed-Choice and Risk-Reduction Functions of Warnings*

Warnings serve two functions. One function a warning may serve is risk reduction. Risk-reduction warnings direct consumers to use a product in a particular safe way or allow consumers to behave more carefully than they would if they remained ignorant of the product-related risks.¹²⁸ For

insignificant risks tend to reduce effectiveness of potentially helpful warnings against significant risks); Henderson & Twerski, *supra* note 12, at 296 (same); Twerski et al., *supra* note 121, at 516-17 (same).

123. See sources cited *supra* note 122.

124. See Twerski et al., *supra* note 121, at 514 (defining "wolf-crying" effect as the negative consequences resulting from constant repetition of insignificant warnings).

125. See Henderson & Twerski, *supra* note 12, at 296 (claiming that consumers, if bombarded by useless warnings, may stop heeding warnings altogether); Twerski et al., *supra* note 121, at 514-15 (noting potential for all warnings to come into disrepute if manufacturers were required to "oversell" insignificant or trivial risks).

126. Twerski et al., *supra* note 121, at 515.

127. See *Finn v. G.D. Searle & Co.*, 677 P.2d 1147, 1153 (Cal. 1984) (contending that significance of warning is relevant to issue of when warning is required in order to avoid diluting effect of over warning); Twerski et al., *supra* note 121, at 514 (noting that to be effective, warnings must be selective and warn against risks with real probability of occurring); *cf.* *Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843, 847 (N.H. 1978) (explaining that requiring warnings against unforeseeable use and absurd misuse may harm state's economy).

A number of commentators have observed that courts generally impose an obligation on manufacturers to warn only of significant risks. See, e.g., *Kidwell*, *supra* note 38, at 1395 (observing that courts generally impose liability only for failure to warn of "material" or "significant" risks); *Little*, *supra* note 5, at 997 (same); *Madden*, *supra* note 5, at 234-35 (same).

128. See, e.g., *Finn*, 677 P.2d at 1152 (stating that some warnings instruct consumer on how product should be safely used); *Palmer v. Avco Distributing Corp.*, 412 N.E.2d 959, 964 (Ill. 1980) (holding that warning of danger of catching leg in agitator mechanism of fertilizer spreader must be adequate to perform risk-reduction function); *Glittenberg v. Doughboy Recreational Ind., Inc.*, 462 N.W.2d 348, 365 (Mich. 1990) (noting that warning not to dive into shallow end of swimming pool could have reduced chances of injury by allowing plaintiff to alter behavior); see also Henderson & Twerski, *supra* note 12, at 285-86 (defining risk-reduction function of warnings); Twerski et al., *supra* note 121, at 520-21 (same).

example, a warning on a lawn mower may warn users to keep their feet and hands away from the rotating blade. The second function that a warning may serve is informed choice. Pure informed-choice warnings inform consumers of risks that consumers cannot reduce by any amount of safe or careful conduct.¹²⁹ For example, some types of prescription drugs may inevitably injure a certain percentage of users.¹³⁰ The consumer can do nothing, short of foregoing use of the drug altogether, to reduce the risk.¹³¹ Thus, a warning would be merely informative in nature.¹³² This informed-choice warning would, however, promote consumer autonomy by providing consumers with information so that they may choose whether or not they wish to encounter unavoidable product-related risks.¹³³ The informed-choice warning doctrine is analogous to the doctrine of informed consent in medical malpractice law.¹³⁴ Just as consumer autonomy is the underlying value of

129. See *Finn*, 677 P.2d at 1152 (stating that some warnings inform consumers of potential risks or side effects that may follow foreseeable use of product); *Ortho Pharmaceutical Corp., v. Chapman*, 388 N.E.2d 541, 555 (Ind. Ct. App. 1979) (explaining that warning of drug side effects would not reduce risk but would simply inform user of risk); see also *Henderson & Twerski*, *supra* note 12, at 285 & n.88 (defining informed choice function of warnings); *Twerski et al.*, *supra* note 121, at 514 (same).

130. See, e.g., *Davis v. Wyeth Labs., Inc.*, 399 F.2d 121, 123-24 (9th Cir. 1968) (discussing use of Sabin type III polio vaccine, which involves small but definite risk of causing user to contract polio virus); *Chapman*, 388 N.E.2d at 554, 555 (involving oral contraceptive which tended to increase incidence of blood clotting in some women; warning would not have reduced risk); *Feldman v. Lederle Labs.*, 479 A.2d 374 (N.J. 1984) (involving tetracycline drugs, which tend to discolor teeth of users).

131. See sources cited *supra* note 129 (explaining that consumers cannot alter behavior to reduce certain types of risks).

132. See sources cited *supra* note 129 (explaining purely informational value of informed-choice warnings).

133. See *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1089 (5th Cir. 1973) (stating that consumers are entitled to information so that they may make own choice as to whether product benefits justify exposure to risk), *cert. denied*, 419 U.S. 869 (1974); *Davis*, 399 F.2d at 129, 131 (asserting importance of allowing consumer opportunity to make voluntary and informed choice); *Finn v. G.D. Searle & Co.*, 677 P.2d 1147, 1152 (Cal. 1984) (describing function of informed choice warnings as affording consumer opportunity to make informed choice) (citing Frank M. McClellan, *Strict Liability for Drug Induced Injuries: An Excursion Through the Maze of Products Liability, Negligence and Absolute Liability*, 25 WYNE L. REV. 1, 32 (1978)); *Chapman*, 388 N.E.2d at 555 (stating that informed choice warning informs user so that user may choose whether risk should be incurred at all).

134. See *Cunningham v. Charles Pfizer & Co.*, 532 P.2d 1377, 1382 (Okla. 1974) (citing informed-consent cases as support for adoption of objective causation test in failure to warn context); *Britain*, *supra* note 39, at 368-402 (analogizing informed-choice warning doctrine to informed-consent doctrine); *Henderson & Twerski*, *supra* note 12, at 286-89 (same). Informed-consent doctrine concerns a physician's duty to inform patients of risks involved in proposed medical procedures. Physicians are generally liable for injuries resulting from medical procedures if the patient was not supplied with sufficient information to effectively consent to the procedure. See *Canterbury v. Spence*, 464 F.2d 772, 780-83 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972). See generally Martin R. Struder, *The Doctrine of Informed Consent: Protecting the Patient's Right to Make Informed Health Care Decisions*, 48 MONT. L. REV. 85 (1987) (tracing development of informed-consent law and explaining current state of law). Informed-consent claims concede that the physician's conduct was adequate. *Id.* at 85. Consequently,

informed-choice warnings, the predominate policy underlying the informed-consent doctrine is individual autonomy and the patient's right to choose.¹³⁵

Warnings very often serve both the risk-reduction and informed-choice functions.¹³⁶ For example, a certain drug may react adversely with a commonly consumed substance, such as milk. A proper warning would serve the risk-reduction function by providing the consumer with necessary information so that the consumer may avoid ingesting the drug and drinking milk at the same time. The same warning would serve the informed-choice function by allowing milk lovers the opportunity to weigh the cost of giving up milk with the benefits of taking the drug.

The primary policy underlying the risk-reduction function of warnings is, not surprisingly, the risk-reduction policy.¹³⁷ The informed-choice function, on the other hand, implicates the marketplace-honesty policy because the marketplace-honesty policy best promotes consumer autonomy.¹³⁸ Some commentators have argued that because risk-reduction warnings and informed-choice warnings implicate different policies, courts should develop a separate analysis for the two types of warnings.¹³⁹ This argument overlooks the fact that many warnings serve both functions in varying degrees.¹⁴⁰ Separate analysis would require one test for informed-choice warnings, another test for risk-reduction warnings, and some hybrid test for the large number of cases in which the warning serves both functions. Courts have been reluctant to establish such separate analytical frameworks.¹⁴¹

risk reduction is not involved. This is also the case with situations involving informed-choice warnings—a warning does not make use of the product any more safe.

135. See *Canterbury*, 464 F.2d at 780 (asserting importance of freedom of choice); *Cobbs v. Grant*, 502 P.2d 1, 9 (Cal. 1972) (noting importance of individual integrity).

136. Henderson & Twerski, *supra* note 12, at 286. Professors Henderson and Twerski offer two examples of situations in which warnings serve both the risk-reduction and informed-choice functions. First, if the warning provides information that allows the user to take safety precautions to reduce the risk, the user may also decide to decrease the level of usage to avoid residual risks. *Id.* Second, even in the case of a "pure" informed-choice warning that informs the user that "one out of one million people who take this drug become blind as a result," the consumer who decides to take the drug, notwithstanding the risk, can be on the alert for early symptoms of blindness. *Id.*

137. See *id.* at 285-86 (explaining that risk-reduction policy underlies risk-reduction function of warnings); see also *supra* notes 100-10 and accompanying text (discussing risk-reduction policy).

138. See Britain, *supra* note 39, at 374-402 (arguing that prescription drug cases involving informed-choice warnings cannot be justified on risk reduction grounds but only under marketplace-honesty policy); see also *supra* notes 117-18 and accompanying text (noting that marketplace honesty promotes consumer autonomy).

139. See Twerski et al., *supra* note 121, at 519-21 & n.59 (arguing that different functions require different analysis and that informed-choice doctrine may require manufacturer to warn of less significant risks and may involve different causation inquiry).

140. See *supra* note 136 and accompanying text (discussing warnings that serve both risk-reduction and informed-choice function).

141. See *infra* note 142 and accompanying text (noting that courts generally employ same analysis for all types of warnings).

Rather than establish separate tests for the different types of warnings, courts have most often applied an analysis firmly based upon the risk-reduction policy to all warnings.¹⁴² Tests based upon risk-reduction policy, the most common of which is the risk-utility test,¹⁴³ are inappropriate for use in informed-consent cases.¹⁴⁴ For example, in the case of "unavoidably unsafe products,"¹⁴⁵ such as beneficial prescription drugs that will unavoidably injure a certain percentage of users, courts often hold that the lack of an informed-choice warning renders the product "unreasonably dangerous."¹⁴⁶ The problem with this analysis is that no safety precautions on the part of the consumer can make use of the product any more safe.¹⁴⁷ Through faulty analysis, however, the courts somehow reach the absurd conclusion that although the product will have precisely the same level of risk regardless of whether the manufacturer provides a warning, it is "reasonably dangerous" with a warning and "unreasonably dangerous" without one.¹⁴⁸ Similarly, the application of the risk-utility test to cases involving "unavoidably unsafe" products should result in no liability, regardless of whether the manufacturer provides a warning, because supplying a warning would not result in any reduction in product risk or increase in product utility.¹⁴⁹

142. See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1087-89 (5th Cir. 1973) (applying risk-utility analysis in informed-choice context), *cert. denied*, 419 U.S. 869 (1974); *Davis v. Wyeth Labs., Inc.*, 399 F.2d 121, 129-30 (9th Cir. 1968) (applying "unreasonably dangerous" analysis in informed-choice context); see also *Finn v. G.D. Searle & Co.*, 677 P.2d 1147, 1152 (Cal. 1984) (noting tendency of courts to lump all warnings together under one analysis).

143. See *Britain*, *supra* note 39, at 362, 415 (observing that risk-utility test is based upon risk-reduction policy); *Gershonowitz*, *supra* note 85, at 72 (contending that risk-utility test well-serves risk-reduction policy, but not marketplace-honesty policy); *Keeton*, *supra* note 2, at 592-93 (describing risk-reduction features of risk-utility test); see also *supra* notes 39-43 and accompanying text (describing risk-utility test).

144. See *Britain*, *supra* note 39, at 390-93 (criticizing courts' use of risk-reduction analysis in informed-choice context); *Twerski et al.*, *supra* note 121, at 519-20 (same).

145. See *supra* note 33 (describing "unavoidably unsafe products" as defined in comment k of § 402A).

146. See *Borel*, 493 F.2d at 1089 (holding that failure to provide informed-choice warning rendered product unreasonably dangerous); *Davis*, 399 F.2d at 129-30 (same); see also sources cited *supra* note 144 (criticizing courts' use of risk-reduction analysis in informed-choice context).

147. See *supra* notes 129-33 and accompanying text (noting that, by definition, pure informed-choice warnings cannot provide consumer with information that will help to reduce risk).

148. See cases cited *supra* note 146 (holding that failure to provide informed-choice warning rendered otherwise reasonably dangerous product unreasonably dangerous); sources cited *supra* note 144 (criticizing courts' use of risk-reduction analysis in informed-choice context).

149. See sources cited *supra* note 144 (explaining that risk-utility analysis does not justify liability in informed-choice context). Curiously, in the informed-choice context, the argument for no liability would appear to be even better under a risk-utility analysis *when the manufacturer does not supply a warning* because the giving of a warning adds additional cost with no corresponding decrease in product risk or increase in product utility.

Consumers are entitled to the information necessary to help them make an informed choice regarding product risks.¹⁵⁰ Courts, therefore, have intuitively managed to reach the right result in informed-choice cases, but only through the application of extremely flawed analysis.¹⁵¹ The danger remains that a court or jury could reach the wrong result in an informed-choice situation by correctly applying risk-reduction principles. Because few, if any, warnings serve the risk-reduction function alone,¹⁵² the "proper" application of risk-reduction analysis would frustrate the important goal of consumer autonomy in many, if not all, failure to warn cases.¹⁵³ The courts should formulate a test that accommodates the importance of consumer autonomy in the warning context and that applies equally to risk-reduction, informed-choice, and hybrid warnings.

E. Different Policy Considerations Underlying Failure to Warn and Design Defects and the Relationship Between Design and Warnings

Much of the doctrinal confusion relating to strict liability failure to warn¹⁵⁴ can be attributed to the misconception that courts should accord equal weight to the same policies in both design defect and failure to warn

150. See, e.g., *Reyes v. Wyeth Labs.*, 498 F.2d 1264, 1294 (5th Cir.) (referring to right of individual to choose and control what risks individual will take); *cert. denied*, 419 U.S. 1096 (1974); *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1089 (5th Cir. 1973) (asserting that consumers are entitled to make their own choice as to whether product's benefit justifies exposure to risk); *cert. denied*, 419 U.S. 869 (1974); *Davis v. Wyeth Labs., Inc.*, 399 F.2d 121, 123-24 (9th Cir. 1968) (holding that if risk qualitatively and quantitatively is such as to call for true choice judgement, warning must be given). Justice Cardozo's famous statement in an early informed-consent medical malpractice case is on point: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body." *Schloendorff v. Society of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914), *overruled by*, *Bing v. Thunig*, 143 N.E.2d 3 (N.Y. 1957); see also *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir.) (discussing right of patients to information necessary in making an informed decision and quoting Justice Cardozo's statement in *Schloendorff*), *cert. denied*, 409 U.S. 1064 (1972).

151. See Britain, *supra* note 39, at 389-98 (arguing that informed-choice warning decisions cannot be justified on basis of risk-reduction analysis employed by courts, but that decisions can be justified on basis of marketplace-honesty policy); Twerski et al., *supra* note 121, at 519-20 (noting that *Davis* court was perhaps correct in concluding that consumer was entitled to information, but that court's analysis does not support that conclusion).

152. See *supra* note 136 and accompanying text (observing that many warnings serve both risk-reduction and informed-choice functions); *infra* note 162 and accompanying text (arguing that consumer autonomy is implicated, to some degree, by all warnings).

153. See *supra* notes 144-49 and accompanying text (noting that risk-reduction analysis should come out in favor of no liability in informed choice context regardless of whether warning is supplied); *supra* note 150 and accompanying text (contending that consumers are entitled to information necessary in making informed choice as to whether to encounter product risks).

154. See *supra* part II (discussing problematic doctrinal development of strict liability failure to warn); *supra* notes 142-53 and accompanying text (describing problems inherent in applying risk-utility analysis to informed-choice warnings); *infra* notes 192-204 and accompanying text (explaining difficulties relating to causation issue in failure to warn context).

cases.¹⁵⁵ A number of commentators have argued that risk reduction is the primary goal in both warning and design cases.¹⁵⁶ The courts would seem to be in accord because the prevailing analysis in both warning and design cases centers on risk-utility balancing,¹⁵⁷ which is a test firmly grounded in the risk-reduction policy.¹⁵⁸

Contrary to the views of these commentators and the prevailing analysis of the courts, marketplace honesty, and not risk reduction, should be the predominate policy in the law of warnings.¹⁵⁹ As shown in the previous section, a large number of warnings involve notions of informed choice,¹⁶⁰ under which consumer autonomy rather than risk reduction is the primary concern.¹⁶¹ In fact, even the purest risk-reduction warning implicates con-

155. See, e.g., *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033, 1035 & n.2 (Or. 1974) (treating failure to warn as subcategory of design defect) (citing *Wade*, *supra* note 2, at 830); *Powers*, *supra* note 57, at 783 n.25 (arguing that same standards should apply in both design defect and failure to warn contexts); *Twerski et al.*, *supra* note 121, at 510, 513, 517 (arguing that same analysis should apply to design and warning cases because design and warnings must be blended to obtain optimum level of safety).

156. See, e.g., *Henderson & Twerski*, *supra* note 12, at 271-78, 304 (arguing that failure to warn doctrine should be fault-based, risk-reduction tort—i.e. that failure to warn actions should lie in negligence alone); *Keeton*, *supra* note 68, at 403-04 (contending that questions of warnings and design are inseparable and advocating a negligence-with-imputed-knowledge test to determine if product is “unreasonably dangerous”); *Twerski et al.*, *supra* note 121, at 517, 524 (advocating that courts apply risk-reduction-based risk-utility analysis to design and warning claims because design and warning questions are inextricably woven together); *Wade*, *supra* note 2, at 830, 834-38 (grouping design and warning defects together and proposing 7-factor balancing test replete with risk-reduction concepts). *But see* *Gershonowitz*, *supra* note 85, at 72 *passim* (arguing that risk reduction is primary policy in design defect context, but marketplace honesty is policy most heavily implicated by failure to warn claims).

157. See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1087 (5th Cir. 1973) (applying risk-utility test in failure to warn context), *cert. denied*, 419 U.S. 869 (1974); *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549, 554 (Cal. 1991) (approving use of risk-utility balancing test in warning context); *Finn v. G.D. Searle & Co.*, 677 P.2d 1147, 1152-53 (Cal. 1984) (same); *Feldman v. Lederle Labs.*, 479 A.2d 374, 382, 385-86 (N.J. 1984) (same); *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033, 1036-39 (Or. 1974) (same); *cf.* *Davis v. Wyeth Labs., Inc.*, 399 F.2d 121, 129-30 (9th Cir. 1968) (referring to importance of freedom of choice but, nevertheless, using “unreasonably dangerous” balancing test to determine liability).

158. See *supra* note 143 (citing authorities for proposition that risk-utility test is based upon risk-reduction policy).

159. See *Gershonowitz*, *supra* note 85, at 72 *passim* (arguing that marketplace honesty is central policy in warning context). A number of courts have noted the importance of consumer autonomy in the warning context, but have, nevertheless, applied a risk-reduction-based test to determine whether a warning was necessary. See, e.g., *Borel*, 493 F.2d at 1087, 1089 (discussing consumer entitlement to right to decide but, nevertheless, employing risk-utility test); *Davis*, 399 F.2d at 128-30 (discussing importance of consumer choice but adopting “unreasonably dangerous” test); *Anderson*, 810 P.2d at 554, 559 (explaining that consumers must be given opportunity to choose after having cited use of risk-utility test in warning context with approval).

160. See *supra* notes 129-36 and accompanying text (explaining that large number of warnings involve notions of informed choice).

161. See *supra* note 133 and accompanying text (explaining that consumer autonomy concerns underlie informed-choice function of warnings).

sumer autonomy considerations.¹⁶² Consumer autonomy is best promoted by the marketplace-honesty policy, rather than the risk-reduction policy.¹⁶³ Furthermore, the risk-reduction-based tests that the courts most often employ are inappropriate in many warning cases.¹⁶⁴

Marketplace honesty takes on more significance in the failure to warn context for another reason as well. One of the primary concerns underlying the marketplace-honesty policy is the need for honesty in communication between seller and consumer.¹⁶⁵ Because the failure to warn implicates a failure in communication more so than does a design defect,¹⁶⁶ the marketplace-honesty policy is especially appropriate for use in formulating a strict liability failure to warn test.¹⁶⁷ Conversely, the failure to warn action is particularly well-suited for promoting the important goal of marketplace honesty, which requires manufacturers to stand behind the express and implied representations they make relating to product safety.¹⁶⁸

Just as a test relying heavily on the risk-reduction policy is often inappropriate in warning cases, a test relying too heavily on marketplace honesty is ill-suited for use in devising a design defect test.¹⁶⁹ Without delving too deeply into design defect law, it is sufficient to note two inherent weaknesses in using the marketplace-honesty policy to inform the design defect doctrine. First, a design test based on marketplace honesty would allow a manufacturer to avoid liability simply by supplying a warning or

162. Cf. Kidwell, *supra* note 38, at 1384-85 & n.36 (explaining that if law was to include preferences as to what decision consumers should make in given context, it would obscure important and unique aspect of consumer autonomy that society attempts to preserve, namely "freedom to make foolish choices"); *infra* notes 203-04 and accompanying text (explaining that relevant causal inquiry in failure to warn context is not whether consumer would have heeded warning had manufacturer provided one, but whether consumer was given opportunity to choose).

163. See *supra* notes 117-18 and accompanying text (discussing means in which marketplace-honesty policy promotes consumer autonomy).

164. See *supra* notes 144-53 and accompanying text (discussing inapplicability of risk-utility test to informed-choice warnings); see also Bromberg, *supra* note 34, at 535-36 (asserting that risk-utility test is never appropriate in failure to warn context); Gershonowitz, *supra* note 85, at 101-03 (same).

165. See *supra* notes 111-16 and accompanying text (discussing foundation of marketplace-honesty policy).

166. See *Anderson v. Owens-Corning Fiberglas Corp.*, 810 P.2d 549, 558 (Cal. 1991) (noting that "warning defects" relate to failure extraneous to product itself; manufacturing and design defects can be evaluate without reference to communications of manufacturer, but giving of warning necessarily involves communication of something to someone).

167. See Gershonowitz, *supra* note 85, at 72 *passim* (arguing that failure to warn law should be based upon marketplace-honesty policy).

168. See *supra* notes 112-116 (arguing that sellers should be obligated to stand behind express and implied representations they make regarding product safety); *infra* notes 229-38 and accompanying text (arguing that in some situations manufacturers may promote product to such an extent as to vitiate effectiveness of warning).

169. See Britain, *supra* note 39, at 356 (stating that promoting feasible design alternative is risk reduction concern); Gershonowitz, *supra* note 85, at 72, 104 (noting that risk reduction is primary policy underlying design defect doctrine).

making the danger obvious, even if reducing the risk by redesigning the product would be cost effective and would result in fewer accidents.¹⁷⁰ Also, a test based on marketplace honesty cannot accommodate important factors such as the cost of adding more safety features or of redesigning the product.¹⁷¹ A test based on the risk-reduction policy, such as a risk-utility test, significantly lessens these concerns and is, therefore, preferable to a marketplace-honesty test in design cases.¹⁷²

Although the different policy concerns implicated by warning defects and design defects necessitate different tests for each,¹⁷³ the different tests should interact in a manner that best promotes marketplace honesty and risk reduction.¹⁷⁴ Before a manufacturer places a product on the market, the manufacturer is nearly always in a better position than the consumer to control product-related risks because the manufacturer has greater knowledge than the consumer about the risks.¹⁷⁵ In many situations, the manufacturer can best control the risk either by designing the risk out of the product or by shifting the status of best risk controller to the consumer by providing an adequate warning or somehow making the risk open and obvious.¹⁷⁶ Both options promote marketplace honesty as well as risk reduction.

170. See Britain, *supra* note 39, at 354-55, 420 (observing that honesty policy encourages making danger patent rather than reducing risk when cost effective); Epstein, *Products Liability Search*, *supra* note 91, at 648 n.16 (noting that recovery would be denied under consumer expectation test regardless of whether risk can be cost effectively reduced); Keeton, *supra* note 2, at 589 (same).

171. See Britain, *supra* note 39, at 354 (noting that marketplace honesty test fails to take costs of additional safety features or redesign into account); Keeton, *supra* note 2, at 592 (same).

172. See Britain, *supra* note 39, at 420 (noting that risk-reduction policy can account for situations in which risk can be "designed out" at little cost); Gershonowitz, *supra* note 85, at 72, 104 (arguing that risk-reduction policy works well in design cases); Keeton, *supra* note 2, at 592 (expressing preference for risk-utility test in design defect context).

173. See *supra* notes 159-72 and accompanying text (arguing that failure to warn and design defect implicate different policies and, therefore, require separate tests).

174. See Britain, *supra* note 39, at 408-22 (arguing that products liability rules should seek to accommodate risk reduction and marketplace honesty equally); *supra* notes 100-19 and accompanying text (explaining important functions served by both risk-reduction and marketplace-honesty policies in products liability law).

175. See *Smith v. American Motors Sales Corp.*, 576 N.E.2d 146, 151 (Ill. App. Ct. 1991) (stating that duty to warn is based upon unequal knowledge with respect to risk and that manufacturer who has, or should have, such knowledge has obligation to warn); *Bloxom v. Bloxom*, 512 So. 2d 839, 843 (La. 1987) (stating that if risk is foreseeable, manufacturer is in best position to avoid injuries by giving warning); Madden, *supra* note 5, at 233-34 *passim* (stressing the importance of asymmetry in safety-related information held by buyer and seller to failure to warn doctrine).

176. See EPSTEIN, *supra* note 3, at 94 (explaining that in some situations design change is best way to reduce product-related risks, while in other situations warning may be appropriate); Twerski et al., *supra* note 121, at 506-17 (discussing complex trade-offs between design and warning options necessary to obtain optimum level of safety); Wade, *supra* note 2, at 842 (noting that warnings may often make otherwise dangerous product safe, but warning not always sufficient).

If, however, the manufacturer is able to cost-effectively design a risk out of the product without any corresponding diminution in the product's utility, the manufacturer retains the position of best risk controller, even if the manufacturer provides an adequate warning to the consumer.¹⁷⁷ In this situation, marketplace honesty is satisfied, and there should be no liability for the failure to warn, but the risk-reduction policy remains unsatisfied.¹⁷⁸ Thus, courts should hold the manufacturer accountable on a design defect theory premised on risk reduction for any injuries caused by the product risk.¹⁷⁹

In another situation, it may be cost ineffective, or perhaps even impossible, to redesign the product so as to eliminate an inherent risk without a corresponding reduction in the product's utility.¹⁸⁰ The consumer, however, may be able to take safety precautions to reduce the risk.¹⁸¹ This would be the case with a product such as pure sulfuric acid, in which the property that produces the risk is also the property that provides the benefit.¹⁸² Although such a product does not have a design defect, the law should still require the manufacturer to provide an adequate warning.¹⁸³ The risk-reduction policy mandates a warning because the manufacturer possesses greater knowledge than the consumer as to the product-related risk and the consumer can take precautions to reduce the risk.¹⁸⁴ Marketplace honesty

177. See, e.g., *Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843, 847 (N.H. 1978) (stating that if danger can be eliminated without excess cost or loss of product efficiency, liability may attach even though danger is obvious or manufacturer has provided adequate warning); EPSTEIN, *supra* note 3, at 94 (explaining that when design change possible or effective, design change is preferable to warning); *Calabresi & Hirschhoff*, *supra* note 100, at 1062-63 (explaining that analysis depends not only on whether warning was adequate, but on availability of alternatives to product); *Noel*, *supra* note 25, at 262-63 (noting that warnings are not sufficient if redesign is feasible).

178. See sources cited *supra* note 177 (observing that warning is not most efficient means of making product safe if redesign is feasible). When faced with cases in which redesign is preferable to warning, courts often decide on dual design defect and failure to warn grounds. See *Twerski et al.*, *supra* note 121, at 500-505 (discussing cases in which courts decide on both design defect and failure to warn grounds and arguing that such holdings effectively constitute an instruction to redesign product).

179. See *supra* notes 177-78 and accompanying text (arguing that manufacturer retains position of best risk controller if redesign is feasible and will substantially reduce risk).

180. See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1088-89 (5th Cir. 1973) (identifying asbestos as product that is incapable of being made safer by redesign), *cert. denied*, 419 U.S. 869 (1974); *Dunn v. Lederle Labs.*, 328 N.W.2d 576, 579 (Mich. Ct. App. 1982) (noting that Sabin polio vaccine is incapable of being made safer by redesign).

181. See *Dunn*, 328 N.W.2d at 579 (noting that Sabin polio vaccine is incapable of being made safer by redesign but that persons can avoid contracting "contact polio" by avoiding certain types of contact with patients who have taken vaccine).

182. See EPSTEIN, *supra* note 3, at 94 (offering pure sulfuric acid as example of product that cannot be redesigned to reduce risk while retaining its utility).

183. See sources cited *supra* notes 181-82 (noting that products that cannot feasibly be made safer by redesign should be accompanied by warning).

184. See *supra* note 175 and accompanying text (discussing importance to risk-reduction policy of asymmetry between manufacturer and consumer knowledge); *supra* note 128 and accompanying text (describing risk-reduction function of warnings).

also requires a warning.¹⁸⁵ Thus, a marketplace-honesty-based failure to warn action would hold the manufacturer accountable for failing to adequately warn, promoting both the risk-reduction policy and marketplace honesty.

Occasionally, a product is incapable of being made safer either by a change in design or by the inclusion of a warning.¹⁸⁶ Nonetheless, the manufacturer is fully justified in the marketing of the product because of the great benefit the product provides.¹⁸⁷ An example of such a product is the Sabin polio vaccine, the use of which contains an extremely remote but definite risk of contracting the polio virus.¹⁸⁸ The consumer can take no precautions to avoid this risk short of foregoing the use of the vaccine altogether.¹⁸⁹ Thus, because a warning would not help to reduce the risk, the risk-reduction policy would not require that the manufacturer warn consumers of the risk.¹⁹⁰ But this is precisely the type of risk against which marketplace honesty and consumer autonomy demand that the manufacturer warn.¹⁹¹ A marketplace-honesty-based failure to warn test would, therefore, require that the manufacturer provide a warning or compensate the consumer for any injury caused by the risk.

F. The Causation Inquiry

The causation inquiry presents serious problems in the area of failure to warn.¹⁹² Causation in the context of failure to warn is essentially this: if the consumer would have altered his or her behavior so as to avoid or

185. See *supra* notes 111-16 and accompanying text (discussing marketplace-honesty policy and requirement that manufacturers honestly represent product safety); *supra* note 150 and accompanying text (discussing importance of informed consumer choice).

186. See *supra* notes 129-35 and accompanying text (describing pure informed-choice warnings).

187. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965) (explaining that marketing of "unavoidably unsafe product" is justified because of important benefits product provides).

188. See *Davis v. Wyeth Labs., Inc.*, 399 F.2d 121, 128 (9th Cir. 1968) (identifying Sabin type III polio vaccine as product that's marketing is justified by public interest in eliminating polio, even though small, unavoidable risk of contracting polio accompanies ingestion of vaccine).

189. See *id.* at 128-29 (explaining that no known method exists to identify those who will contract polio from ingestion of Sabin type III vaccine); see also *supra* notes 129-35 and accompanying text (explaining pure informed-choice function of warnings).

190. See *supra* notes 144-49 and accompanying text (reasoning that liability in pure informed-choice context cannot be based on risk-reduction policy).

191. See *supra* notes 129-35, 138, 150 and accompanying text (describing informed choice function of warnings and consumer's "right" to information regarding product-related risks).

192. See *Payne v. Soft Sheen Prods., Inc.*, 486 A.2d 712, 725 (D.C. 1984) (noting difficulties associated with causation issue in failure to warn context, including "impossible" burden on plaintiff); *Technical Chem. Co. v. Jacobs*, 480 S.W.2d 602, 606 (Tex. 1972) (discussing proof problems associated with causation in failure to warn context); Green, *supra* note 88, at 1199-1200 (describing number of problems relating to causation issue in failure to warn context); *Henderson & Twerski*, *supra* note 12, at 278-79, 303-10 (same); Keeton, *supra* note 68, at 413-15 (same).

reduce the possibility of injury had the manufacturer provided an adequate warning, the failure to adequately warn *caused* the injury.¹⁹³ When courts frame the causation inquiry in this way, injured persons, in order to establish a cause of action, must prove that they would have read, understood, and remembered an adequate warning, had the manufacturer provided one, and also that they would have heeded such a warning.¹⁹⁴ Defendant manufacturers often focus on the causation issue, contending that even if they had supplied an adequate warning, the consumer would not have read or would not have heeded the warning.¹⁹⁵ This places an extremely difficult burden of proof on the plaintiff, who must prove something that did not happen.¹⁹⁶ One way that courts have dealt with the problem is through the use of a rebuttable presumption of causation.¹⁹⁷ The courts simply presume that if the manufacturer had supplied an adequate warning, the user would have read and heeded that warning.¹⁹⁸ This presumption is extremely difficult, but not impossible,¹⁹⁹ to rebut.²⁰⁰

193. See, e.g., *Reyes v. Wyeth Labs., Inc.*, 498 F.2d 1264, 1279-80 (5th Cir.) (holding that defect—i.e. failure to warn—must cause injury), *cert. denied*, 419 U.S. 1096 (1974); *Payne*, 486 A.2d at 725 (stating that plaintiff would have had to alter conduct had manufacturer provided warning in order for failure to warn to have caused injury); *Bloxom v. Bloxom*, 512 So. 2d 839, 850 (La. 1987) (same); see also *Henderson & Twerski*, *supra* note 12, at 305 (explaining that plaintiff must have read, understood, and altered conduct had manufacturer provided warning for failure to warn to have caused injury); cf. *Canterbury v. Spence*, 464 P.2d 772, 790 (D.C. Cir.) (holding that causal connection exists in informed consent medical malpractice case only when disclosure of risks would have resulted in decision against treatment), *cert. denied*, 409 U.S. 1064 (1972).

194. See sources cited *supra* note 193 (describing causation inquiry in failure to warn context).

195. See *Green*, *supra* note 88, at 1199-1200 (contending that manufacturers often use causation issue as device to divert the court from more important issues).

196. See sources cited *supra* note 192 (noting difficult proof problems inherent in failure to warn causation inquiry).

197. See, e.g., *Reyes*, 498 F.2d at 1281 (adopting causation presumption); *Payne v. Soft Sheen Prods., Inc.*, 486 A.2d 712, 725 (D.C. 1984) (same); *Bloxom*, 512 So. 2d at 850 (adopting rebuttable presumption of causation); *Cunningham v. Charles Pfizer & Co.*, 532 P.2d 1377, 1382 (Okla. 1974) (adopting rebuttable presumption and citing informed consent medical malpractice cases for support). The justification courts most often give for the causation presumption is that it is the mirror image of the presumption given to manufacturer's under § 402A comment j of the Restatement. See, e.g., *Ortho Pharmaceutical Corp. v. Chapman*, 388 N.E.2d 541, 555 (Ind. Ct. App. 1979) (adopting presumption of causation based on comment j); *Wooderson v. Ortho Pharmaceutical Corp.*, 681 P.2d 1038, 1041, 1057 (Kan.) (same), *cert. denied*, 469 U.S. 965 (1984); *Technical Chem. Co. v. Jacobs*, 480 S.W.2d 602, 606 (Tex. 1972) (adopting rebuttable presumption based on comment j). Comment j provides that "[w]here a warning is given, the seller may assume that it will be read and heeded." RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965). Professors Henderson and Twerski have argued that the causation presumption does not logically follow from the presumption defendants enjoy under comment j. Henderson & Twerski, *supra* note 12, at 278-79.

198. See sources cited *supra* note 197.

199. See *Bloxom v. Bloxom*, 512 So. 2d 839, 850-51 (La. 1987) (holding that manufacturer presented sufficient evidence to rebut causal presumption).

200. See Henderson & Twerski, *supra* note 12, at 306, 325-26 (noting that tools available

The failure to warn causation inquiry, as the courts have formulated it, is firmly grounded in risk-reduction policy,²⁰¹ and framed in this way, fails to account for the importance of informed choice in the warning context.²⁰² The very purpose of the informed-choice function of warnings is to promote consumer autonomy by allowing consumers to make an informed decision as to whether they wish to heed a warning.²⁰³ The possibility that a consumer would not have heeded an adequate warning, had the manufacturer provided one, is irrelevant to whether or not the consumer was given the opportunity to make an informed choice.²⁰⁴

Courts could avoid many of the problems pertaining to the causation issue by simply recognizing that the causation inquiry, as they have framed it, is inappropriate for use in the failure to warn context. Marketplace honesty and consumer autonomy, rather than risk reduction, should be the most important factor in framing the causation issue.²⁰⁵ When the causation issue is framed in terms of marketplace honesty, the plaintiff only needs to show (1) that the manufacturer failed to provide an adequate warning about an inherent product risk and (2) that the plaintiff's injury resulted from the very same risk against which the manufacturer failed to provide an adequate warning.²⁰⁶ The causal nexus is between the risk and the injury, rather than

to defendant to rebut causation once it has been established are "almost nonexistent" and that rebuttal is further complicated by tendency of courts to send all causation questions to jury).

201. See Britain, *supra* note 39, at 374, 398-99 (explaining that causation inquiry in failure to warn and informed consent medical malpractice is based upon risk-reduction policy); Henderson & Twerski, *supra* note 12, at 304 (arguing that risk reduction requires substantial connection between defendant's fault—providing inadequate warning—and plaintiff's injury).

202. See Britain, *supra* note 39, at 374 (arguing that risk-reduction-based causal inquiry defeats objectives of consumer autonomy); cf. Jay Katz, *Informed Consent—A Fairy Tail? Law's Vision*, 39 U. PITT. L. REV. 137, 160-64 (explaining that altered conduct requirement of informed consent medical malpractice causation inquiry places significant limitation on human dignity interests and frustrates patient choice); Marjory M. Shultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 YALE L.J. 219, 245-51 (arguing that causal inquiry in informed consent medical malpractice context ill-serves interest of patient autonomy).

203. See *supra* notes 129-35 and accompanying text (discussing informed-choice function of warnings).

204. See Britain, *supra* note 39, at 400 (arguing that failure to provide adequate warning constitutes frustration of individual integrity that deserves redress and that inquiry into whether injuries would have been averted by better warning is irrelevant); Twerski et al., *supra* note 121, at 520 n.59 (contending that when informed-choice function is at issue, relevant question is not whether plaintiff would have altered conduct had a warning been given); cf. Katz, *supra* note 202, at 160 (arguing that in informed consent medical malpractice context when protection of human dignity is at issue, question of whether conduct would have been altered had information been disclosed is irrelevant); Schultz, *supra* note 202, at 251 (explaining that in informed consent context, freedom of choice is protected interest, and proper inquiry is whether right to exercise freedom has been frustrated).

205. See *supra* notes 159-68 and accompanying text (arguing that marketplace honesty and consumer autonomy are more important than risk reduction in failure to warn context).

206. Cf. Britain, *supra* note 39, at 400 (reasoning that when interest to be protected is

between the failure to warn and the injury.²⁰⁷ The plaintiff need not show that the warning, if given, would have been read, understood, remembered, and heeded.²⁰⁸ The relevant inquiry, from a consumer autonomy perspective, is whether the manufacturer, by failing to provide an adequate warning, deprived the plaintiff of the opportunity to make an informed decision as to whether to confront the risk or to take the necessary precautions to reduce the risk.²⁰⁹

consumer autonomy, tort arises from manufacturer's "dishonesty," rather than from causal connection between the nondisclosure and injury); Twerski et al., *supra* note 121, at 520 n.59 (arguing that if pure informed choice case is properly analyzed, issue is whether a battery has been committed due to fact that plaintiff has not been provided with adequate information to give informed consent to "touching").

The court in *Jarrell v. Monsanto Co.*, 528 N.E.2d 1158 (Ind. Ct. App. 1988), formulated a very similar two step inquiry to failure to warn causation based upon an interpretation of the Indiana products liability statute. The court found that it is more appropriate to say the product caused the injury than to say the lack of adequate warning caused the injury. *Id.* at 1167. The court then inquired into whether the manufacturer provided an adequate warning. *Id.* at 1167-68. The court refused to allow the defendant to argue that the plaintiff would not have heeded an adequate warning. *Id.* at 1168 & n.6. Rather than justifying its holding on grounds of consumer autonomy, however, the court employed a pseudo-estoppel argument based upon the presumption in comment j to section 402A. *Id.* at 1168 n.6. Comment j states that if an adequate warning is provided, the manufacturer may presume that it will be followed. RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965). The court reasoned that because the comment j presumption applies if the manufacturer provides an adequate warning, the manufacturer cannot successfully argue that regardless of what warning it put on the product the consumer would not heed the warning. *Jarrell*, 528 N.E.2d at 1168 n.6.

207. See *Jarrell*, 528 N.E.2d at 1167-68 (stating that it is more accurate to say product caused injury than to say inadequate or missing warning was defect that caused injury); *cf.* *Reyes v. Wyeth Labs., Inc.*, 498 F.2d 1264, 1279 (5th Cir.) (recognizing need for causal nexus between risk and injury as well as between failure to warn and injury), *cert. denied*, 498 U.S. 1264 (1974); *Finn v. G.D. Searle & Co.*, 677 P.2d 1147, 1153 (Cal. 1984) (reasoning that strength of causal link between product and injury is relevant to issues of whether warning should be given at all and whether warning is adequate); *Ortho Pharmaceutical Corp. v. Chapman*, 388 N.E.2d 541, 555 (Ind. App. 1979) (recognizing need for two causal inquiries: first, whether the failure to warn caused plaintiff's use of product, to which rebuttable presumption of causation applies; and second, whether product-related risk was cause of injury). Under the risk-reduction approach to causation, the causal nexus is typically between the failure to warn and the injury. See sources cited *supra* note 193.

The requirement of a causal nexus between the specific risk against which the manufacturer failed to warn and the injury eliminates a significant potential problem inherent in the risk-reduction approach to causation. If the only causal nexus is between the failure to warn and the injury, as in the typical failure to warn case, the plaintiff could possibly recover in a situation in which the manufacturer has provided an adequate warning against the risk that caused the injury but has failed to warn of other material risks. See *Gershonowitz*, *supra* note 85, at 92. For an interesting hypothetical explaining this possibility, see *id.* at 90-93.

208. See *supra* note 194 and accompanying text (describing requirement under current law that plaintiff show that plaintiff would have read and heeded an adequate warning had one been given in order to establish causal connection). The marketplace-honesty test also eliminates the need for a causation presumption. See *supra* notes 197-200 and accompanying text (describing causation presumption).

209. *Cf.* *Britain*, *supra* note 39, at 374 (arguing that relevant causal inquiry in informed consent medical malpractice action based on integrity should be whether nondisclosure cogni-

IV. REFORMULATING THE STRICT LIABILITY FAILURE TO WARN

A. *Proposed Reformulation of the Strict Liability Failure to Warn*

The primary concern that the proposed reformulation of strict liability failure to warn doctrine seeks to accommodate is marketplace honesty.²¹⁰ This policy best promotes consumer autonomy, a principal objective of the law of warnings,²¹¹ and also is the policy best able to guarantee that product sellers stand behind their explicit and implicit representations regarding product safety.²¹² Consequently, both the test for the adequacy of the warning²¹³ and the causation inquiry²¹⁴ have their foundations in the marketplace honesty policy. Although marketplace honesty is the predominate policy upon which the proposed reformulation is based, risk reduction remains an important consideration.²¹⁵ The proposed test also substantially differs from negligence.²¹⁶ The test is set forth in the form of the requirements for the plaintiff's prima facie case, followed by the defenses available to the manufacturer:

1. The plaintiff must first prove that the product contained an inherent *material risk* that *caused* (or manifested itself in the form of) plaintiff's injury.
2. Once the plaintiff has shown a causal connection between the risk and the injury, the plaintiff must show that the manufacturer did not provide adequate safety-related information pertaining to that risk—in other words, *that the manufacturer did not adequately warn of the risk*.

zably diminished patient's choice of integrity); Schultz, *supra* note 202, at 251 (same). Commentators have noted that the use by courts of devices such as causal presumptions, see *supra* notes 197-200 and accompanying text (describing use of causal presumptions), demonstrates the preference of courts, in the failure to warn context, for the values of consumer autonomy and freedom of choice, even though the courts purportedly apply a risk-reduction-based causation analysis. See Britain, *supra* note 39, at 399-402 (arguing that use of devices that simplify causation issue demonstrates courts' preference for personal integrity); Kidwell, *supra* note 38, at 1408 (arguing that use of causation presumption demonstrates preference for individual sovereignty ideal).

210. See *supra* notes 159-68 and accompanying text (arguing that marketplace honesty should be primary policy concern underlying strict liability failure to warn doctrine).

211. See *supra* notes 133-36, 162 and accompanying text (discussing role of consumer autonomy in law of warnings).

212. See *supra* notes 111-19 and accompanying text (explaining marketplace honesty policy).

213. See *infra* notes 226-38 and accompanying text (discussing means of determining warning adequacy).

214. See *supra* notes 204-09 and accompanying text (discussing causation inquiry based upon marketplace honesty policy).

215. See *supra* notes 173-91 and accompanying text (explaining role of risk-reduction policy in failure to warn context).

216. See *infra* notes 266-278 (describing ways in which proposal differs from negligence doctrine).

3. Once the plaintiff has made out a prima facie case, the manufacturer may rely on a number of available defenses—

- Assumption of the risk (either because the risk was open and obvious or because the plaintiff had actual knowledge of the risk)
- Misuse of the product by the plaintiff
- Third party fault
- Risk not scientifically knowable.

1. *Causal connection and material risk.*—The causation inquiry has been framed in terms of marketplace honesty rather than risk reduction.²¹⁷ The plaintiff need not show, as the plaintiff would with a risk-reduction approach to causation, that the failure to warn caused the injury.²¹⁸ Rather, the plaintiff must show that an inherent product-related risk caused (or manifested itself in the form of)²¹⁹ the injury and that the manufacturer's failure to provide an adequate warning of that risk deprived the plaintiff of the opportunity to make an informed decision as to whether to confront the risk or to take the necessary precautions to reduce the risk.²²⁰ Use of the marketplace-honesty approach to failure to warn causation eliminates some of the serious problems inherent in the use of the risk-reduction approach²²¹ and also helps to lay a firm marketplace-honesty foundation for the strict liability failure to warn.

The proposed formulation requires that the risk which caused the injury be material. A risk is material if the product-related danger has reached the level at which it would become a material fact in the decision of a reasonably prudent consumer as to whether or not to confront the risk or to take precautions to reduce the risk.²²² The material-risk requirement serves a

217. See *supra* notes 201-09 and accompanying text (arguing that failure to warn causation inquiry should be based upon marketplace honesty rather than risk reduction and describing difference between two types of causation inquiries).

218. See *supra* notes 192-202 and accompanying text (describing risk-reduction approach to failure to warn causation inquiry).

219. The "manifested itself in the form of" language should be used in place of "cause" in situations such as that of asbestos. It is known that cancer, asbestosis and other respiratory diseases are inherent asbestos-related risks, but it is unclear exactly which specific characteristic of asbestos causes these conditions. In such situations it is conceptually clearer to say the risk "manifested itself in the form of" plaintiff's injury.

220. See *supra* notes 204-09 and accompanying text (discussing marketplace honesty approach to failure to warn causation inquiry).

221. See *supra* notes 192-204 and accompanying text (describing problems inherent in risk-reduction based failure to warn causation inquiry).

222. See Gershonowitz, *supra* note 85, at 101 (defining materiality as used in failure to warn context); cf. *Canterbury v. Spence*, 464 F.2d 772, 787 (D.C. Cir.) (stating that in informed consent context "[a] risk is material when a reasonably prudent person . . . would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed therapy") (citing Jon R. Waltz & Thomas W. Scheuneman, *Informed Consent to Therapy*, 64 Nw. L. Rev. 628, 639-41 (1970)), cert. denied, 409 U.S. 1064 (1972); *Cobbs v. Grant*, 502 P.2d 1, 11 (Cal. 1972) (defining materiality in informed consent context); Shultz, *supra* note 202, at 284-85 & n.285 (arguing for materiality requirement in informed consent law).

number of purposes. First, it balances the need to provide adequate information of significant product risks against the potentially costly effects of an undue proliferation of warnings.²²³ Second, it promotes consumer autonomy by not requiring that the manufacturer burden the consumer with information that the consumer does not require, or even desire, in making an informed decision relating to the risk.²²⁴ Third, materiality is a familiar concept to courts, so it does not require judges and lawyers to familiarize themselves with an entirely new concept.²²⁵

2. *Adequacy of the warning.*—An exhaustive analysis of warning adequacy is far beyond the scope of this note. A brief discussion, however, is necessary to explain the relationship between the adequacy of a warning and the marketplace-honesty policy. An “inadequate warning” can range from the complete absence of any warning to a warning that is given but is inadequate.²²⁶ Determining whether a warning is adequate generally involves the consideration of factors such as the clarity of the language used, the prominence of the warning, and the impression that the warning language is calculated to make on users of the product.²²⁷ Whether a warning is

223. See Gershonowitz, *supra* note 85, at 104 (arguing materiality requirement balances need to provide adequate information against possibility of diluting efficacy of warnings); see also *supra* notes 120-27 and accompanying text (describing potential problems relating to proliferation of warnings).

224. See Gershonowitz, *supra* note 85, at 103-04 (concluding that materiality requirement preserves freedom of choice); cf. Shultz, *supra* note 202, at 284-85 & n.285 (arguing that materiality requirement is necessary in informed consent law in order to best promote informed patient choice). Warnings of insignificant risks are simply not the type of information consumers require, or even desire, in order to go about ordering their lives as they see fit. See *Davis v. Wyeth Labs.*, 399 F.2d 121, 129-30 (9th Cir. 1968) (recognizing that not all risks call for true choice judgement); *Canterbury*, 464 F.2d at 786-87 (same); Gershonowitz, *supra* note 85, at 100 (noting that if risk is insignificant, consumers would likely choose to use product notwithstanding the risk); Shultz, *supra* note 202, at 284-85 & n.285 (explaining that failure of physician to disclose nonmaterial risks does not affect patient's ability to choose). Consumer autonomy would be frustrated considerably, however, if consumers were inundated with information about insignificant risks to such an extent that they would be unable to distinguish between those risks that are significant and those that are insignificant. See *supra* notes 120-27 and accompanying text (describing potential consequences of undue proliferation of warnings).

225. See Gershonowitz, *supra* note 85, at 101 & n.160 (noting that courts and lawyers are familiar with concept of materiality from its use in law of fraud and informed consent); cf. *supra* note 43 (noting contention that courts should frame strict liability rules in negligence language because negligence concepts are familiar to courts).

226. *Ortho Pharmaceutical Corp. v. Chapman*, 388 N.E.2d 541, 549 (Ind. App. 1979) (citing *Sterling Drug, Inc. v. Yarrow*, 408 F.2d 978, 993 (8th Cir. 1969)).

227. See *Jarrell v. Monsanto Co.*, 528 N.E.2d 1158, 1162-63 (Ind. Ct. App. 1988) (listing factors to be considered, including factual content of warning, manner in which warning is expressed, method of conveying warning, and warning intensity; noting relevance of expert testimony as to poor location of warning, insufficiently startling colors, lack of symbols, and lack of specificity); PROSSER, *supra* note 1, § 96, at 646-7 n.60 (listing factors often considered in determining warning adequacy). Dean Prosser listed the following factors as important in determining the adequacy of a warning: (1) the prominence of warning; (2) whether the warning is sufficiently emphatic; (3) whether the warning is calculated to reach those likely to use the

adequate is often a question for the jury.²²⁸

Because the proposed formulation of the strict liability failure to warn is based largely upon the marketplace-honesty policy, a determination of warning adequacy that focuses only on the warning itself may be insufficient.²²⁹ A court should consider all of the manufacturer's representations about product safety in determining the adequacy of the warning.²³⁰ Representations made by a manufacturer through advertising, packaging, or deceptive design may all have an impact upon the way in which consumers perceive a warning.²³¹

Application of the proposal to facts similar to those in *Heaton v. Ford Motor Co.*²³² illustrates this point. Heaton, while driving his Ford pickup truck, ran over a five-inch rock lying on the highway.²³³ Approximately thirty-five miles further down the highway, the rim of the truck's wheel separated from the interior portion of the wheel, and the truck unexpectedly left the road, injuring Heaton.²³⁴ Evidence showed that Ford had advertised the truck as "solid," "rugged," and "built like a truck."²³⁵ Heaton pursued the case on design defect grounds,²³⁶ and the Supreme Court of Oregon eventually affirmed a nonsuit entered against him.²³⁷ Assume, however, that

product; (4) whether the warning is intelligible to the ordinary user; (5) whether the warning sufficiently covers the particular danger; and (6) whether the warning makes the danger clear. *Id.* See generally Little, *supra* note 5, at 1002-04 (discussing adequacy of warnings and instructions for use); Sales, *supra* note 5, at 557-66 (same).

228. See, e.g., *Payne v. Soft Sheen Prods., Inc.*, 486 A.2d 712, 723 (D.C. 1984) (holding that warning adequacy is issue for jury); *Jarrell*, 528 N.E.2d at 1162 (same); *Bloxom v. Bloxom*, 512 So.2d 839, 844 (La. 1987) (same).

229. See *Britain*, *supra* note 39, at 407 (arguing that representations in form of advertising, packaging, and deceptive design may need to be considered in determining adequacy of warning); Little, *supra* note 5, at 1005-1007 (noting that some courts have found warnings that would be adequate standing alone inadequate in light of manufacturer's actions in representing its product).^o

230. See, e.g., *Stevens v. Park, Davis & Co.*, 507 P.2d 653, 661-62 (Cal. 1973) (recognizing that warnings can be made inadequate by overpromotion "watering down" warnings); *Love v. Wolf*, 38 Cal. Rptr. 183, 197 (Cal. Ct. App. 1964) (concluding that evidence justified inference that prescription drug manufacturer had "watered down" its warnings by promoting wider use of drug by physicians than proper medical practice warranted); *Incollingo v. Ewing*, 282 A.2d 206, 220 (Pa. 1971) (holding that actions designed to stimulate use of product must be considered in testing adequacy of warning); see also RESTATEMENT (SECOND) OF TORTS § 402B (1965) (providing that seller who makes misrepresentation of material fact concerning character or quality of product through advertising, labeling, or otherwise is subject to liability for physical harm to consumer caused by reliance upon misrepresentation); sources cited *supra* note 229 (arguing that manufacturer's marketing practices are important in determining warning adequacy).

231. See sources cited *supra* note 229 (noting that manufacturer's marketing practices should be considered in determining warning adequacy).

232. 435 P.2d 806 (Or. 1967).

233. *Heaton v. Ford Motor Co.*, 435 P.2d 806, 807 (Or. 1967).

234. *Id.* at 807.

235. *Id.* at 810 (O'Connell, J., dissenting).

236. *Id.* at 808.

237. *Id.* at 810.

Heaton had relied upon the marketplace-honesty-based failure to warn theory. Also assume that Ford had provided a warning in the owner's manual about the potential danger of running over large rocks at highway speeds. Even if Ford had provided such a warning, the warning may not have been sufficient to counteract the impression of Ford's representations, made through advertising, that the truck was "tough," "rugged," and "built like a truck."²³⁸

3. *Manufacturer's defenses.*—Assumption of the risk defenses are entirely consistent with the marketplace honesty policy. If the risk is open and obvious²³⁹ or the consumer has actual knowledge of the risk,²⁴⁰ the failure of the manufacturer to warn does not amount to a misrepresentation of product safety,²⁴¹ nor does it frustrate consumer autonomy.²⁴² Also, in most situations, the assumption of the risk defense promotes the risk-reduction policy because the consumer is generally in a better position than the manufacturer to control the risk when the risk is open and obvious or the consumer has actual knowledge of the risk.²⁴³ In situations where the manufacturer is the better risk controller because it can cost effectively reduce or eliminate the risk through redesign, a design defect action remains open to the consumer.²⁴⁴ Furthermore, warnings against obvious risks or risks of which the consumer has actual knowledge would be redundant, would likely lead to a proliferation of warnings and the problems resulting

238. See Britain, *supra* note 39, at 407 (hypothesizing that, on facts of *Heaton*, warning in owner's manual may not be sufficient, under marketplace honesty theory, to counteract explicit representations of truck's safety made through advertising); cf. *Heaton v. Ford Motor Co.*, 435 P.2d 806, 810-11 (Or. 1967) (O'Connell, J., dissenting) (arguing that jury question was presented as to whether manufacturer's representations that vehicle was "solid," "rugged," and "built like a truck" created consumer expectation that driving over large rock would not harm such a vehicle).

239. See *supra* note 24 and accompanying text (describing obvious risks).

240. See *Garrett v. Nissen Corp.*, 498 P.2d 1359, 1364 (N.M. 1972) (holding that manufacturer has no duty to warn if user has actual knowledge, regardless of whether claim is negligence or strict liability), *overruled on other grounds by* *Klopp v. Wackenhut Corp.*, 824 P.2d 293 (N.M. 1992); Noel, *supra* note 25, at 273 (explaining that manufacturer has no duty to warn of dangers about which user has actual knowledge).

241. See *Smith v. American Motors Sales Corp.*, 576 N.E.2d 146, 151 (Ill. App. Ct. 1991) (stating that because purpose of warning is to inform users of dangers of which they are unaware, no purpose is served by providing warning of risk that is open and obvious).

242. See *Kidwell, supra* note 38, at 1392 (stating that if risk is obvious, warning of risk would not result in greater informed choice).

243. See Calabresi & Hirschhoff, *supra* note 100, at 1065-66 (explaining that assumption of risk defense is consistent with liability rule placing loss on party in best position to decide advantages of accident avoidance versus accident costs).

244. See *supra* notes 177-79 and accompanying text (noting that sometimes warning is not sufficient to shift status of best risk controller from manufacturer to consumer and that in these situations, design defect action is available). The majority of courts have abandoned the "patent danger rule" in the design defect context. *E.g.*, *Auburn Mach. Works Co., Inc., v. Jones*, 366 So. 2d 1167, 1167 (Fla. 1979); *Holm v. Sponco Mfg., Inc.*, 324 N.W.2d 207, 213 (Minn. 1982); *Micallef v. Miehle Co.*, 348 N.E.2d 571, 573, 576-77 (N.Y. 1976).

from such a proliferation,²⁴⁵ and would decrease economic efficiency²⁴⁶ with no corresponding benefit in terms of risk reduction or marketplace honesty.²⁴⁷

The consumer misuse defense is very similar to the requirement in negligent failure to warn that the risk be foreseeable before a court will impose liability.²⁴⁸ The manufacturer should not be liable for the failure to warn of a risk that attends only an extremely unusual use of the product.²⁴⁹ Because "unforeseeable" risks are, by definition, nonmaterial,²⁵⁰ for the sake of consistency of language, it is best to view the consumer misuse defense as mitigating the materiality requirement.²⁵¹ A liability rule requiring manufacturers to warn against risks attending extremely unusual uses of a product would likely lead to a proliferation of warnings.²⁵² Also, although the lack of a warning may frustrate the autonomy of consumers who wish to use a product in an unusual manner, the lack of warning would not frustrate consumer autonomy in general because consumers do not desire information about extremely improbable risks to make an informed decision regarding safe product use.²⁵³ Nor does a misuse defense based upon an

245. See *supra* notes 120-27 and accompanying text (describing problems likely to result from proliferation of warnings).

246. See *Moran v. Faberge, Inc.*, 332 A.2d 11, 15 (Md. 1975) (noting monetary cost, insubstantial as it may be, of adding additional warnings); *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539, 545 (N.J. 1982) (same), *limited to its facts*, *Feldman v. Lederle Lab.*, 479 A.2d 374 (N.J. 1984).

247. See *supra* notes 239-44 and accompanying text (noting that assumption of risk defense is consistent with both marketplace-honesty and risk-control policies).

248. See *Payne v. Soft Sheen Prods., Inc.*, 486 A.2d 712, 725 (D.C. 1984) (defining misuse as use that is not foreseeable); *Higgins v. Paul Hardeman, Inc.*, 457 S.W.2d 943, 948 (Mo. Ct. App. 1970) (holding that abnormal use relieves defendant of liability only if misuse unforeseeable); *Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843, 847 (N.H. 1978) (rejecting manufacturer's obligation to warn of unforeseeable misuse); see also *supra* note 25 and accompanying text (describing foreseeability requirement in context of negligent failure to warn).

249. See, e.g., *Thibault*, 395 A.2d at 847 (holding that manufacturer has no obligation to warn of unforeseeable misuse); *Owen*, *supra* note 88, at 714 (recognizing unfairness that would result from imposing liability upon manufacturers for injuries caused by "consumer 'madness' in putting products to unpredictably dangerous use"); *Powers*, *supra* note 57, at 802 (noting that risks imposed by unforeseeable use of product are appropriately attributed to conduct of consumer rather than to product itself).

250. See *supra* notes 222-25 and accompanying text (describing materiality requirement). A risk that is imposed by an extremely unusual use of the product would not be a "material fact in the decision of a reasonably prudent consumer as to whether or not to confront the risk or to take precautions to reduce the risk." See *supra* text accompanying note 222 (defining materiality).

251. Cf. *Thibault*, 395 A.2d at 849 (discussing need for semantic and conceptual clarity and concluding that term "plaintiff's misconduct" should replace term "contributory negligence" in jury charge in order to avoid injecting "flavor of negligence" into strict liability claim).

252. See *supra* notes 120-27 and accompanying text (describing problems arising from liability rules requiring manufacturers to warn of nonmaterial risks).

253. See *supra* note 224 (arguing that consumer autonomy is best promoted by providing

extremely unusual use of the product frustrate the risk-reduction policy because consumers are in a better position than the manufacturer to know to which unusual uses they will put the product.²⁵⁴

A third party fault defense is also available under the proposed test for strict liability failure to warn. Often, all or part of an injury may be attributable to a third party,²⁵⁵ as is the case when a third party incorporates the original manufacturer's product into its own. If the manufacturer has been completely honest in providing information about product-related risks, the risk-reduction policy demands that the party in the best position to avoid or reduce the risk shoulder the portion of the loss attributable to that party.²⁵⁶ If the party in the position of best risk controller happens to be a third party, rather than the manufacturer or consumer, no reason exists for holding the manufacturer accountable for the portion of the loss attributable to the third party.²⁵⁷

The final defense available to the manufacturer is the scientific unknowability, at the time the manufacturer placed the product on the market, of the risk against which the manufacturer failed to warn. Because this defense is inconsistent with the marketplace honesty policy,²⁵⁸ it is best viewed as presenting countervailing reasons that outweigh the policies that support recovery.²⁵⁹ Both courts and commentators have severely criticized a rule that imposes liability for the failure to warn of scientifically un-

consumers with only that information they desire in making an informed decision—*i.e.* those risks with significant likelihood of manifesting themselves).

254. See Epstein, *Products Liability Search*, *supra* note 91, at 658-59 (observing that in many situations, parties other than manufacturer are in best position to control risk); Powers, *supra* note 57, at 802 (noting that risks imposed by unforeseeable use of product are appropriately attributed to conduct of consumer); see also *supra* note 100 and accompanying text (defining risk-control policy as that which imposes liability upon party in best position to control or reduce risk).

255. See Epstein, *Products Liability Search*, *supra* note 91, at 658-59 (noting that in many situations parties in chain of distribution other than manufacturer are in best position to control or reduce risk); Owen, *supra* note 88, at 713 (explaining that some accidents are fault of third persons).

256. See *supra* notes 100-03 and accompanying text (describing risk-reduction policy).

257. See *supra* note 100 and accompanying text (defining risk-reduction policy as that which imposes liability upon party in best position to avoid or reduce risk). The loss-shifting policy would justify imposing losses attributable to third parties on the manufacturer, but the loss-shifting policy has been discredited. See *supra* note 91 (describing loss-shifting policy and its inherent weaknesses).

258. See Shapo, *supra* note 111, at 1322 (reasoning that imposition of liability for failure to warn of unknowable risks is supported by representational theory, because central issue is not manufacturer's knowledge, but objective understanding of impressions manufacturer makes in projecting product's image).

259. See Owen, *supra* note 88, at 709 (noting that liability rules premised upon representational theory need to account for goals of economic efficiency and fairness that may sometimes cut other way from representational policy); cf. Powers, *supra* note 57, at 799 (arguing that contributory negligence is not inconsistent with no-fault liability if courts treat it as defense resting on countervailing reasons that outweigh, rather than mitigate, policies supporting recovery).

knowable risks on the grounds that it provides a disincentive for manufacturers to discover risks subsequent to marketing,²⁶⁰ that it inhibits economic efficiency,²⁶¹ that it keeps beneficial products off the market,²⁶² that it effectively places the manufacturer in the role of an insurer,²⁶³ and, most importantly, that it is extremely unfair.²⁶⁴ For these reasons, courts have been extremely reluctant to adopt such a rule.²⁶⁵ Also for these reasons, the scientific unknowability of a risk should be a defense under the proposed strict liability failure to warn action.

B. *How the Proposed Test Differs from Negligence*

The proposed reformulation of strict liability failure to warn differs markedly from negligent failure to warn. Perhaps the most significant distinction is that the proposed action has been formulated only after careful consideration of the relevant policies.²⁶⁶ The reformulated action promotes the important goals of marketplace honesty and consumer autonomy; negligence does not.²⁶⁷ Thus, courts can discontinue use of devices such as the product-conduct dichotomy or the imputed knowledge requirement, which the courts traditionally have employed to distinguish the strict liability action from negligence, and courts simply can recognize that strict liability and negligence differ with regard to the policies they promote.²⁶⁸

260. See *supra* note 75 and accompanying text (presenting argument and citing authorities for proposition that rule imposing liability for failure to warn of unknowable risks provides disincentive to discover and warn of risks subsequent to marketing).

261. See *supra* note 76 and accompanying text (presenting argument and citing authorities for proposition that rule imposing liability for failure to warn of unknowable risks inhibits economic efficiency).

262. See *supra* note 77 and accompanying text (presenting argument and citing authorities for proposition that rule imposing liability for failure to warn of unknowable risks keeps beneficial products off market or at least delays entry of such products to market pending inordinate delay for safety research and testing).

263. See *supra* note 78 and accompanying text (presenting argument and citing authorities for proposition that rule imposing liability for failure to warn of unknowable risks essentially places manufacturer in role of insurer of product safety).

264. See *supra* note 79 and accompanying text (presenting argument and citing authorities for proposition that rule imposing liability for failure to warn of unknowable risks is extremely unfair).

265. See Marvel, Annotation, *supra* note 37, at 370-77 (citing majority of cases, which require that manufacturer knew, or should have known, of risk at time it placed product on market before court will impose liability for failure to warn). *But see id.* at 377-80 (citing minority of cases, which have adopted rule that imposes liability for failure to warn regardless of whether risk was scientifically knowable at time manufacturer placed product on market).

266. See Vandall, *supra* note 39, at 67-69 (arguing that frontal consideration of important social policies has never been important issue in negligence).

267. See Britain, *supra* note 39, at 416 (arguing that negligence does not accommodate honesty policy).

268. See *id.* (contending that transparent devices for distinguishing strict products liability from negligence are unnecessary if it is recognized that strict liability unequivocally accommodates honesty policy and negligence does not).

The fact that the proposed reformulation promotes important policies that failure to warn law should seek to accommodate and negligence does not is, in itself, a satisfactory distinction.²⁶⁹ However, the proposed reformulation differs from negligence in other respects as well. First, the reformulated strict liability failure to warn action frames the causation inquiry differently than the negligence doctrine does.²⁷⁰ In negligence, and in the common formulations of the strict liability action, the plaintiff must show that the failure to warn caused the plaintiff's injury before a court will impose liability.²⁷¹ This often leads to a difficult and needless inquiry into whether the plaintiff would have read, understood, and heeded a warning had the manufacturer provided one.²⁷² The proposed reformulation eliminates this problem by framing the causation inquiry in terms of marketplace honesty and requiring a causal nexus between the risk and the injury rather than between the failure to warn and the injury, as is the case in negligence.²⁷³

Second, the determination of warning adequacy is different under the proposed strict liability action than it is under negligence. Because the reformulated strict liability failure to warn action is based upon the marketplace honesty policy, a court should take into account all of the manufacturer's representations of product safety in determining the adequacy of the warning.²⁷⁴ For example, if a manufacturer advertises a product as "tough" and "rugged," a court should consider these representations in determining whether a warning is adequate.²⁷⁵ Although the negligence action is quite capable of taking such factors into consideration,²⁷⁶ the determination of warning adequacy in a negligence action often centers on the warning, or list of warnings, alone.²⁷⁷

269. See *id.* (arguing that representational nature of strict liability action would sufficiently distinguish it from negligence).

270. See *supra* notes 192-209 and accompanying text (describing differences between risk-reduction-based causation inquiry, which is used in negligence, and marketplace-honesty-based causation inquiry).

271. See *supra* notes 192-202 and accompanying text (describing risk-reduction-based causation inquiry).

272. See *supra* notes 194-200 and accompanying text.

273. See *supra* notes 203-09 and accompanying text (describing marketplace-honesty-based failure to warn causation inquiry); *supra* notes 217-21 and accompanying text (describing causation inquiry of proposed strict liability failure to warn action).

274. See *supra* notes 226-38 and accompanying text (explaining determination of warning adequacy under marketplace-honesty-based failure to warn action).

275. See *supra* notes 232-38 and accompanying text (illustrating need to account for all manufacturer representations of product safety in determining warning adequacy by use of example in which manufacturer advertised vehicle as "tough," "rugged," and "built like a truck").

276. See *Love v. Wolf*, 38 Cal. Rptr. 183, 197 (Cal. Ct. App. 1964) (concluding, in negligence action, that evidence justified inference that prescription drug manufacturer had "watered down" its warnings by promoting wider use of drug by physicians than proper medical practice warranted).

277. See sources cited *supra* note 227 (describing factors generally used in determining

Finally, the proposal eliminates terminology such as "unreasonable" and "foreseeable" and avoids cost-benefit-type analysis. This difference in terminology and mode of analysis between the proposed strict liability failure to warn doctrine and the negligence doctrine will help to eliminate the confusion that the similarity between the two actions, as they now stand, has created.²⁷⁸

V. CONCLUSION

Since the inception of strict products liability, courts have failed to develop a strict liability failure to warn doctrine that meaningfully differs from negligence and also accommodates important social policies relevant to the law of warnings. This failure is attributable to the fact that the courts seldom have considered the relevant policies in attempting to formulate the doctrine. The primary objective of the courts has been to develop a strict liability doctrine that in some way differs from negligence. Through a careful examination of the policies that the failure to warn doctrine should seek to accommodate, however, the courts could develop a strict liability failure to warn doctrine that is based upon sound policy and that differs significantly from negligence. At the same time, the reformulated strict liability action would eliminate many of the doctrinal difficulties, such as the complications inherent in the causation inquiry, that plague the current law.

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warning adequacy). Courts have generally taken representations of product safety made through marketing and advertising into consideration in determining warning adequacy only in the prescription drug context, in which "detail men" rigorously promote the benefits of the drugs to doctors. See cases cited *supra* note 230 (recognizing, in prescription drug context, theory of determining warning adequacy in which marketing activities are taken into account).

278. See *supra* notes 82-84 and accompanying text (explaining that similarity between strict liability and negligent failure to warn causes confusion for both judges and juries).

