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The Cleaver, the Violin, and the Scalpel: Duty and the Restatement (Third) of Torts

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Articles

The Cleaver, the Violin, and the Scalpel: Duty and the *Restatement (Third) of Torts*

AARON D. TWERSKI*

INTRODUCTION

On the wall of my office hang two plaques, gifts from two separate classes who suffered through first-year Torts with me. The first is a meat cleaver and the second is a violin. Visitors unabashedly gawk at them and then ask me what these very handsomely mounted items are doing in my office. My explanation is simple and straightforward. I teach my students that duty is a categorical determination that cuts with all the subtlety of a cleaver. A plaintiff-bystander seeking recovery for emotional distress is either within or outside the zone-of-danger;¹ or, if one prefers the more liberal *Dillon*-type rule,² the plaintiff was either present on the scene to witness the defendant's negligence to a family member or not.³ A court utilizing a no-duty or limited-duty rule defines a category of conduct or harms to which liability will not attach. It matters not how traumatic or heartrending the plaintiff's injury. A parent who comes to the scene of an accident ten seconds after a negligent collision of a car with a child will not recover.⁴ Period. The same can be said for a host of no-duty rules. Be

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1. See, e.g., *Engler v. Ill. Farmers Ins. Co.*, 706 N.W.2d 764, 767 (Minn. 2005); *Bovsun v. Sanperi*, 461 N.E.2d 843, 847-49 (N.Y. 1984).

2. *Dillon v. Legg*, 441 P.2d 912, 920 (Cal. 1968) (rejecting the zone-of-danger rule and allowing a third-party bystander to recover if: (1) "the plaintiff was located near the scene of the accident," (2) the shock to plaintiff resulted from "the sensory and contemporaneous observance of the accident," and (3) "the plaintiff and victim were closely related").

3. See *Thing v. La Chusa*, 771 P.2d 814, 829-30 (Cal. 1989) (holding that the *Dillon* factors are to be strictly applied and denying recovery for emotional distress to a mother who had come upon the accident scene moments after her son had been badly injured).

4. *Id.* But see *Bowen v. Lumberman's Mut. Cas. Co.*, 517 N.W.2d 432, 444-46 (Wis. 1994)

it the economic loss rule,⁵ limited liability for trespassers,⁶ or the learned intermediary rule (which imposes a duty to warn about drug-related risks to the physician alone),⁷ the pattern is the same. Duty rules are not fact sensitive.

Negligence, on the other hand, is as subtle and fine-tuned as a violin. Masters play the instrument so that it resonates with a wide range of sounds and blends them together so that they convey a mood that is appealing to both the intellect and the heart. To be sure, at the extreme, a judge can direct a verdict on standard of care when she believes that reasonable persons cannot differ.⁸ But, it is rare that she does so. Judges know that in the overwhelming majority of cases, it is the task of the jury to listen to the violins and decide whether the defendant has breached the duty of reasonable care.

In the past several years there has been an outpouring of scholarly commentary on the role of duty in tort law. Spurred by the fascinating work of Professors John Goldberg and Benjamin Zipursky,⁹ a host of commentators have taken up the cudgel to place duty in its proper

(allowing recovery for a mother who did not witness the accident but came upon the accident scene shortly after the accident and saw her child pinned under the defendant's car).

5. See, e.g., *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1032 (5th Cir. 1985) (en banc) (denying recovery in tort for pure economic loss). The issue of tort recovery for pure economic loss is the subject of a comprehensive symposium. See Symposium, *The Dan B. Dobbs Conference on Economic Tort Law*, 48 ARIZ. L. REV. 687 (2006) (citing articles by twenty-two scholars dealing with different aspects of economic loss).

6. See, e.g., *Gladon v. Greater Cleveland Reg'l Transit Auth.*, 662 N.E.2d 287, 293 (Ohio 1996) (duty of landowner to trespasser is to refrain from willful, wanton, or reckless conduct that is likely to injure him). For a compilation of the varying state rules with regard to the liability of landowners to trespassers, see RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 52 cmt. a, reporter's note (Prelim. Draft No. 6, Sept. 12, 2007); see also *id.* § 54 (setting forth proposed rule for limited duty to culpable trespassers).

7. See RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 6(d)(1), reporter's note (1998) (reviewing authority supporting the learned intermediary rule).

8. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 8 (Proposed Final Draft No. 1, Apr. 6, 2005).

9. See the following articles by John C. P. Goldberg and Benjamin C. Zipursky: *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 FORDHAM L. REV. 1563 *passim* (2006); *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other "Quaint" Doctrines Can Improve Decisionmaking in Negligence Cases*, 79 S. CAL. L. REV. 329 *passim* (2006) [hereinafter Goldberg & Zipursky, *Shielding Duty*]; *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657 *passim* (2001) [hereinafter Goldberg & Zipursky, *The Place of Duty*]; *The Moral of MacPherson*, 146 U. PA. L. REV. 1733 *passim* (1998). The authors have been prolific and the foregoing is a fair representation of the articles in which they expand on their theory. The authors proclaim that:

[D]uty in its primary sense is an *analytically relational* concept: It concerns obligations of care that are owed by certain persons to certain other persons. In this respect, the duty issue within common law negligence has the same analytical structure as the issue in negligence per se of whether the statute allegedly violated by the defendant was enacted for the benefit of a class of persons that includes the plaintiff. Both invoke the idea that the defendant was obligated to someone or some persons within a definable group.

Goldberg & Zipursky, *The Place of Duty*, *supra*, at 707 (footnote omitted).

perspective.¹⁰ The occasion for much of the discussion has been the *Restatement (Third) of Torts: Liability for Physical Harm*.¹¹ The original reporter was the late Professor Gary Schwartz, who was later joined by Professor Michael Green.¹² With the tragic passing of Professor Schwartz, Professor William Powers, Jr., joined Professor Green as co-reporter.¹³ Building on an earlier article, Goldberg and Zipursky attacked the work of the reporters for denigrating the role of duty in tort law.¹⁴ A subsequent draft gave duty slightly more prominence but in no way satisfied Goldberg and Zipursky.¹⁵ Recently, Professors Cardi and Green have written a spirited defense of the *Restatement* position.¹⁶

It is not this Author's intent to rehash the controversy that has played out in the law journals on this issue. For what it is worth, I believe that the *Restatement* reporters got it right. I do not believe that Goldberg and Zipursky's "relational" theory of duty accurately describes how and when courts negate liability based on a finding of no duty.¹⁷ Nor do I believe that normatively their theory helps identify when a court should deny liability on no-duty grounds.¹⁸

The *Restatement's* position accurately reflects the plaques on my wall. Comment *a* to section 7 dealing with duty is unequivocal. It states:

There are two different legal doctrines for withholding liability: no-duty rules and scope-of-liability doctrines (often called "proximate cause"). An important difference between them is that no-duty rules

10. See, e.g., W. Johnathan Cardi, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739 *passim* (2005); W. Johnathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671 *passim* (2008); Dilan A. Esper & Gregory C. Keating, *Abusing "Duty,"* 79 S. CAL. L. REV. 265 *passim* (2006); Dilan A. Esper & Gregory C. Keating, *Putting "Duty" in Its Place, A Reply to Professors Goldberg and Zipursky*, 41 LOYOLA L. REV. (forthcoming Nov. 2008) (on file with The Hastings Law Journal) [hereinafter Esper & Keating, *Putting "Duty" in Its Place*]; David Owen, *Duty Rules*, 54 VAND. L. REV. 767 *passim* (2001); Robert L. Rabin, *The Duty Concept in Negligence Law: A Comment*, 54 VAND. L. REV. 787 *passim* (2001); Jane Stapleton, *Evaluating Goldberg and Zipursky's Civil Recourse Theory*, 75 FORDHAM L. REV. 1529 *passim* (2006); Ernest J. Weinrib, *The Passing of Palsgraf?*, 54 VAND. L. REV. 803 *passim* (2001).

11. The redrafting of the *Restatement (Third) of Torts* has taken place in stages. The *Restatement (Third) of Torts: Products Liability* was completed in 1998. The *Restatement (Third) of Torts: Apportionment of Liability* was completed in 2000. The next project was entitled *Restatement (Third) of Torts: General Principles*. Various drafts were produced from 1999–2001. See generally John C.P. Goldberg, *The Restatement (Third) of Torts: General Principles and the John W. Wade Conference*, 54 VAND. L. REV. 639, 640 (2001). The draft that will be the subject of this Article is the proposed final draft of *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*.

12. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM, at v (Proposed Final Draft No. 1, Apr. 6, 2005).

13. *Id.*

14. See Goldberg & Zipurski, *The Place of Duty*, *supra* note 9, at 723–24.

15. See Goldberg & Zipurski, *Shielding Duty*, *supra* note 9, at 333.

16. See Cardi & Green, *supra* note 10, at 726–32.

17. *Id.* at 713–18.

18. *Id.* at 718–22.

are matters of law decided by the courts, while the defendant's scope of liability is a question of fact for the factfinder. When liability depends on factors specific to an individual case, the appropriate rubric is scope of liability. *On the other hand, when liability depends on factors applicable to categories of actors or patterns of conduct, the appropriate rubric is duty. No-duty rules are appropriate only when a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases.*¹⁹

In their recent article, Cardi and Green put it this way: "Duty should not be narrowed to the point that it becomes a ticket for a single ride on the tort railroad; when it does, the court has cut the jury out of its historical and proper role in the system."²⁰ One either uses the cleaver or the violin.

Drawing on my earlier work, some of which was done in collaboration with Professor James A. Henderson, Jr., I shall argue that it is entirely proper for courts to use a no-duty determination after examining the facts of an individual case. The belief that all cases can be dealt with by a categorical rule, or by fact-sensitive directed verdict practice (based on a finding that reasonable persons could not disagree on either standard of care or proximate cause), is erroneous. It is possible to identify factors that militate in favor of a no-duty decision. And a court utilizing even rigorous risk-utility balancing cannot adequately address those factors. There exists a principled in-between that is neither the cleaver nor the violin. A well-honed scalpel is sometimes necessary to make the no-duty decision—one that does focus on the facts of the case before the court.

In Part II of this Article, I will examine section 7, the duty section of the *Restatement (Third)* and identify the factors that the *Restatement's* authors believe support a categorical no-duty rule. In Part III of this Article, I will survey decisions that demonstrate the need for a duty analysis on a case-by-case basis. In Part IV, I will demonstrate that in product liability design defect cases, a more nuanced set of factors are necessary to decide the duty issue, and they require a close look at the facts of the individual case. In Part V, I will discuss the duty issue as it applies to product liability failure-to-warn cases, and identify a different set of factors that are to be considered in making the no-duty decision. In Part VI, I will examine the special no-duty rules for post-sale failure to warn. On this point, it will become obvious that a careful examination of the facts of the individual case cannot be avoided if an intelligent no-duty decision is to be made. In Part VII, I will suggest a principled approach to making the no-duty decision; one that does not infringe on the jury's role in deciding whether a party breached the duty of reasonable care. I

19. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmt. a (Proposed Final Draft No. 1, Apr. 6, 2005) (emphasis added).

20. See Cardi & Green, *supra* note 10, at 728.

will offer revisions to section 7 of the *Restatement (Third)* that move the American Law Institute away from the position that no-duty decisions should be limited to bright-line rules that speak only to broad categories of actors or conduct.

I. *THE RESTATEMENT (THIRD) OF TORTS AND DUTY*

The *Restatement's (Third)* black letter rule on duty is short and pithy. It provides:

§ 7. Duty

(a) An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.

(b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.²¹

The comments that follow the black letter set forth generally the kinds of considerations that could lead a court to conclude that the law of torts imposes no duty of reasonable care, or a more limited duty. The following considerations are the subject of out-to-margin comments:

(1) Comment *c* suggests that it is appropriate for courts to consider “conflicts with social norms about responsibility” in deciding whether to impose a duty of reasonable care.²² The comment notes that although many states will impose liability against a commercial establishment that unreasonably serves alcoholic beverages to a customer who drives his car and injures others, most states impose no duty of reasonable care on a social host who does not monitor the drinking of her guests.²³ If a duty of reasonable care were found, it is not unlikely that a jury would find the defendant-host negligent and causally responsible for the conduct of the intoxicated driver. But the concern that imposing a duty would interfere with partying and cause the host to become a czar responsible for checking the amount of liquor that her guests are imbibing can legitimately lead a court to adopt a no-duty rule absolving social hosts of the duty of reasonable care.

(2) Comment *d* notes that imposing liability for negligence might conflict with important principles reflected in other areas of law.²⁴ Thus, the no-duty rule disallowing recovery for pure economic loss might be better addressed by the law of contracts or misrepresentation. No-duty

21. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 (Proposed Final Draft No. 1, Apr. 6, 2005).

22. *Id.* § 7 cmt. c.

23. *Id.*

24. *Id.* § 7 cmt. d.

or limited-duty rules governing liability of owners and occupiers of land may be influenced by issues important to property law.

(3) Comment *e* focuses on the relation between defendants and plaintiffs, and observes that courts use the rubric of duty to negate liability to one class of plaintiffs while still allowing liability to another class.²⁵ Thus, for example, a homeowner who negligently starts a fire might be liable to an adjacent landowner but not to a firefighter.²⁶

(4) Comment *f* addresses instances when courts determine that they would find it difficult to gather evidence to draw doctrinal lines necessary to adjudicate certain categories of cases.²⁷ In making a no-duty finding, the courts reflect on their institutional competence to fairly adjudicate cases in a given category.²⁸

(5) Comment *g* discusses the propensity of courts to defer to governmental discretionary decisions by articulating a no-duty rule.²⁹ As an example, the comment says that courts often hold that police are not held to the standard of reasonable care with regard to how they allocate police protection throughout the city.³⁰

(6) In an extensive comment, the reporters chastise courts that use no-duty lexicon when all they are doing is finding that the plaintiff has not established negligence as a matter of law.³¹ These cases, the reporters say, merely reflect “the one-sidedness of the facts bearing on negligence, and they should not be misunderstood as cases involving exemption from or modification of the ordinary duty of reasonable care.”³² Once again, the reporters insist that unless a court can identify and articulate policy concerns applying to a broad range of cases that can be categorized, they should not resort to no-duty analysis and leave the issue of standard of care to be decided by juries.³³

As I will demonstrate below, the considerations that the reporters set forth as relevant for case category no-duty decisions do not adequately reflect the breadth of factors that courts take into account in making no-duty determinations. Furthermore, even using the factors they set forth, the reporters do not explain why courts might not use those very factors to make no-duty decisions on individual cases as they arise. The reality is that courts have made such no-duty determinations

25. *Id.* § 7 cmt. e.

26. *Id.*

27. *Id.* § 7 cmt. f.

28. *Id.*

29. *Id.* § 7 cmt. g.

30. *Id.*

31. *Id.* § 7 cmt. i.

32. *Id.*

33. *See id.*

and will have to do so in the future if they are to keep non-meritorious cases from juries.

II. CAN NO-DUTY DECISIONS BE LIMITED TO BRIGHT-LINE CATEGORIES OF CASES?

The *Restatement's* view that no-duty limitations should only apply to broad categories of cases and should not be utilized to negate liability in individual cases is simply wrong. Courts have repeatedly made duty determinations based on the particular facts of the cases before them. Indeed, it is hard to fathom how they could reach the no-duty conclusion without doing so. Consider the following examples.

A. *HAMILTON V. BERETTA U.S.A. CORP.*

In *Hamilton v. Beretta U.S.A. Corp.*, plaintiffs brought suit against forty-nine handgun manufacturers.³⁴ The issue before the court was the liability of handgun manufacturers for deaths brought about by negligent distribution of illegally marketed handguns.³⁵ The plaintiffs argued that the defendants over-saturated markets in some southern states with weak gun control laws knowing that the “excess guns” would migrate to criminals in states with stricter gun laws.³⁶ They contended that the defendants could have curbed this practice by limiting their sales to stocking gun dealers (rather than selling to individuals at gun shows and to those selling guns without a retail storefront); by training salespeople how to recognize when purchasers are buying as stand-ins for others (straw purchasers); by establishing electronic monitoring of their products; by limiting the numbers of distributors; and by franchising their retail outlets.³⁷ The defendants contended that they owed no duty to the public to protect them from criminal acquisition and misuse of their handguns.³⁸ The case was tried before Judge Jack Weinstein in the Eastern District of New York.³⁹ A jury found that fifteen defendants were negligent in marketing of handguns and that of those fifteen, nine had proximately caused the deaths of the decedents of two plaintiffs.⁴⁰ The jury awarded damages in excess of four million dollars and, utilizing the market share theory, apportioned liability among several defendants based on market shares ranging from 0.23% to 6.80%.⁴¹ The trial judge denied the defendants’ post-trial motions to overturn the verdicts on the grounds that the defendants had no duty to the plaintiffs and that market

34. 750 N.E.2d 1055, 1059 (N.Y. 2001).

35. *Id.* at 1060.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 806 (E.D.N.Y. 1999).

40. *Hamilton v. Beretta U.S.A. Corp.*, 222 F.3d 36, 39 (2d Cir. 2000).

41. *Id.* at 40–41.

share was inappropriate for this case.⁴² On appeal, the Second Circuit certified the questions of duty and market share to the New York Court of Appeals.⁴³

The New York Court of Appeals found that handgun manufacturers had no duty to the plaintiffs and that the market share theory approved by the court in an earlier DES case was not applicable to the claims against the handgun manufacturers.⁴⁴ It began its discussion of duty by noting that “[c]ourts traditionally ‘fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability.’”⁴⁵ The court then offered several reasons in support of its no-duty finding.

First, the court noted that it has always been cautious in extending liability to defendants for their failure to control the conduct of others, arising out of practical concerns about “potentially limitless liability” and the “unfairness of imposing liability for the acts of another.”⁴⁶ In the instant case, the pool of possible plaintiffs included potentially thousands of gun victims.⁴⁷

Second, the connection between the manufacturers and the plaintiff victims was remote,

running through several links in a chain consisting of at least the manufacturer, the federally licensed distributor or wholesaler, and the first retailer. . . . Such broad liability, potentially encompassing all gunshot crime victims, should not be imposed without a more tangible showing that the defendants were a direct link in the causal chain that resulted in plaintiffs’ injuries, and that the defendants were realistically in a position to prevent the wrongs.⁴⁸

Third, the court said that the plaintiffs did not present “evidence tending to show to what degree their risk of injury was enhanced by the presence of negligently marketed and distributed guns, as opposed to the risk presented by all guns in society.”⁴⁹

Fourth, the District Court’s finding that changes in the distribution scheme of handguns would reduce the availability of guns to criminals

42. *Id.* at 41.

43. *Id.* at 46.

44. *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1061–67 (N.Y. 2001) (distinguishing the diethylstilbestrol (DES) case *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1078 (N.Y. 1989)).

45. *Id.* at 1060 (quoting *Palka v. Servicemaster Mgt. Servs. Corp.*, 634 N.E.2d 189, 193 (N.Y. 1994)).

46. *Id.* at 1061.

47. *Id.*

48. *Id.* at 1062.

49. *Id.* (footnote omitted).

“would have the unavoidable effect of eliminating a significant number of lawful sales to ‘responsible’ buyers by ‘responsible’ federal firearm licensees (FFLs) who were cut out of the distribution chain under the suggested ‘reforms.’”⁵⁰ The court held that any judicial recognition of duty must be based on “assessment of its efficacy in promoting a social benefit as against its burdens” and that there might be “little relationship to the benefits of controlling illegal guns.”⁵¹

Finally, the court opined that since federal law had “implemented a statutory and regulatory scheme to ensure seller ‘responsibility’ through licensing requirements and buyer ‘responsibility’ based on background checks,” it was reluctant to impose “novel theories of tort liability while the difficult problem of illegal gun sales in the United States remains the focus of a national policy debate.”⁵²

If all this were not enough, the court separately found that “market share liability” was not applicable to handgun manufacturers.⁵³ In the DES case in which the court applied the market share theory to drug manufacturers the product was a standard fungible chemical of a common dosage,⁵⁴ whereas in this case the negligence of the handgun manufacturers varied and thus contributed in different ways to the presence of illegal guns on the market.⁵⁵

In short, the court identified six factors that, in combination, rendered a finding of no duty justifiable under the facts of this case:

(1) the general policy of not imposing liability for the conduct of third parties,⁵⁶

(2) the complexity of the marketing relationship and the fear of imposing limitless liability in such a complex situation where responsibilities for gun safety were so widely dispersed,⁵⁷

(3) inadequacy of proof that risk was significantly increased by the alleged negligence of the defendants,⁵⁸

(4) the impact of the court’s proposed reforms (non-negligent marketing of handguns) on legitimate sellers of guns,⁵⁹

(5) the presence of federal regulation governing the sale of handguns,⁶⁰

50. *Id.* at 1063.

51. *Id.*

52. *Id.* at 1065–66.

53. *Id.* at 1067.

54. *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1081 (N.Y. 1989).

55. *Hamilton*, 750 N.E.2d at 1066–67.

56. *Id.* at 1061.

57. *Id.* at 1061–62.

58. *Id.* at 1062.

59. *Id.* at 1063.

60. *Id.* at 1065–66.

(6) the inability of the defendant to establish causation on traditional grounds and the inappropriateness of market share to resolve the causation issue.⁶¹

Can one construct a rule of nonliability against handgun manufacturers arising from *Hamilton* that defines the category of conduct under which gun manufacturers will be immunized from liability by a no-duty rule? I think not. It is the confluence of all the factors together that led the court to its conclusion that the handgun manufacturers were immunized from liability by a no-duty rule. Let us hypothesize a case where a handgun manufacturer actually had franchised its sales, and did not train its salespeople to detect straw purchasers, and that the gun that found its way into the hands of a criminal, who then used it to kill during a robbery, and it could be traced to the manufacturer. Would the no-duty rule still apply? I do not wish to predict the result. But, the removal of several of the policy reasons for negating liability found in *Hamilton* gives one pause as to how a court would resolve such a case. Thus, the New York *Hamilton* no-duty rule may be good for more than one ride (perhaps a round trip ticket) but not much more. Is the category "liability of gun manufacturers for negligent marketing" similarly good for no more than one ride? What about "gun manufacturers who do not franchise their wares or gun manufacturers who cannot be identified"? No single bright-line category can describe the scope of the no-duty rule. There is no substitute for thoroughgoing analysis that examines the public policy duty considerations as they apply to the facts of the case.

B. *KENTUCKY FRIED CHICKEN, INC. v. SUPERIOR COURT*

In *Kentucky Fried Chicken, Inc. (KFC) v. Superior Court*, the plaintiff was taken hostage by a robber who put a gun to her back and then demanded that a clerk open the cash register and give him all the money.⁶² The clerk did not immediately comply but said that she would have to go to the back and get the key to the register.⁶³

The robber became very agitated and shoved the gun harder into the plaintiff's back and told the clerk that he would shoot the plaintiff if she did not immediately give him the money.⁶⁴ At that point the clerk opened the register; the robber seized the money and fled.⁶⁵ The plaintiff sued for personal injury.⁶⁶ In a decision much criticized by Goldberg and

61. *Id.* at 1066-67.

62. 927 P.2d 1260, 1262 (Cal. 1997).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

Zipursky,⁶⁷ the California Supreme Court held that it had “never recognized a duty to surrender property to an armed robber to protect others”⁶⁸ The court held that “[t]he public as a whole is much better served if would-be robbers are deterred by knowledge that their victims have no legal duty to comply with the robber’s demands and are under no duty to surrender their property in order to protect third persons from possible injury.”⁶⁹ Citing to another case in which a California court had denied liability for failing to comply with a robber’s demands, the court noted that “the connection between the clerk’s conduct and the plaintiff’s injury was ‘tenuous,’ and that any moral blame” belonged to the robber.⁷⁰ Finally, the court noted the argument of amicus that “robbers are unpredictable and often injure victims . . . even though there has been no resistance.”⁷¹ The court stated that to establish a firm policy of property surrender would encourage hostage taking, since robbers would be assured that their demands would be met with compliance.⁷²

Cardi and Green agree that the *KFC* case was an appropriate occasion for a court to decide the case on no-duty grounds and applaud the fact that the court articulated the reason for making the no-duty determination.⁷³ They argue that the question of whether robbers would be encouraged to take hostages if they knew that employees are mandated to capitulate to their demands is an empirical one.⁷⁴ By clearly setting forth their reasons for utilizing a no-duty rule, others can challenge the empirical basis for their finding and invite correction.⁷⁵ Be that as it may, I would ask whether the no-duty rule arising out of *KFC* is a bright-line categorical rule. What would Cardi and Green say if, instead of holding the plaintiff hostage, the robber had actually shot a patron in the leg to show that he “really meant business”?⁷⁶ Would the *KFC* no-duty rule apply? Or would the changed facts require the court to reexamine its rule that there is no duty to comply with the demands of a robber? My hunch is that *KFC* is a no-duty rule good for one ride only, and that it does not and cannot speak in categorical terms.

67. See Goldberg & Zipursky, *Shielding Duty*, *supra* note 9, at 354–57.

68. *KFC*, 927 P.2d at 1266.

69. *Id.* at 1270.

70. *Id.* at 1264 (citing *Vandermost v. Alpha Beta Co.*, 210 Cal. Rptr. 613, 618 (Cal. Ct. App. 1985)).

71. *Id.* at 1269.

72. *Id.*

73. Cardi & Green, *supra* note 10, at 731–32.

74. *Id.*

75. *Id.*

76. See *KFC*, 927 P.2d at 1270 (“Because we are not faced with a situation in which active resistance to a robbery resulted in injury to a third person our holding is narrow.”).

C. *TARASOFF V. REGENTS OF THE UNIVERSITY OF CALIFORNIA*

In the landmark case, *Tarasoff v. Regents of the University of California*, the California Supreme Court held that a psychiatrist had a duty to warn a girlfriend (Tatiana) or her parents that a jilted suitor (Poddar) had threatened to kill her.⁷⁷ Two months after Poddar had confided his intentions to the psychiatrist, he killed Tatiana.⁷⁸

The California Supreme Court struggled with the issue of whether the law should impose a duty to warn the victim or her parents in spite of the fact that such a warning would breach the confidentiality between the psychiatrist and patient.⁷⁹ But, what if instead of a direct threat to kill Tatiana, Poddar had told the psychiatrist that in the distant future, two, three or ten years hence, he would find a way to hurt Tatiana and hold her accountable for all the pain she had caused him? Would the California court still have found a duty to warn Tatiana or her parents of Poddar's threat? What threshold of danger and how imminent must the threat be to trigger a duty to warn? I do not believe that one can blithely conclude that, once the duty to warn of threats has been established, the duty is all encompassing, and therefore resolution of the case ought to be decided on either breach or proximate cause grounds. Even on the facts of *Tarasoff*, the Court struggled with the duty issue. On changed facts the court might well have refused to recognize a duty to warn.

D. THE SEXUAL ABUSE CASES

Courts have split sharply as to whether to recognize a tort duty to report sexual abuse against minors.⁸⁰ In *J.S. v. R.T.H.*, two young girls, ages twelve and fifteen, were sexually abused by the defendant's husband.⁸¹ For more than a year the husband (John) had spent substantial periods of time with the young girls, taking them horseback riding and allowing them to care for his horses.⁸² The wife (Mary) was allegedly aware of the sexual proclivities of her husband and that he was spending an inordinate amount of time with the young girls.⁸³ A New Jersey statute required any person having reasonable cause to believe that a child has been subject to abuse to report the abuse immediately to

77. 551 P.2d 334, 340 (Cal. 1976).

78. *Id.* at 339.

79. *Id.* at 346.

80. Most courts have refused to impose a tort duty to report sexual abuse based on mandatory statutory duties to report such abuse to a state agency. *See, e.g.,* C.B. v. Bobo, 659 So. 2d 98, 102 (Ala. 1995); Fischer v. Metcalf, 543 So. 2d 785, 790-91 (Fla. Dist. Ct. App. 1989); Valtakis v. Putnam, 504 N.W.2d 264, 266-67 (Minn. Ct. App. 1993); Bradley v. Ray, 904 S.W.2d 302, 313-14 (Mo. Ct. App. 1995); Perry v. S.N., 973 S.W.2d 301, 304 (Tex. 1998).

81. 714 A.2d 924, 926 (N.J. 1998).

82. *Id.*

83. *Id.* at 927.

the Division of Youth and Family Services.⁸⁴ In recognizing that the wife had a duty to take reasonable steps to prevent the abuse the court held:

[W]hen a spouse has actual knowledge or special reason to know of the likelihood of his or her spouse engaging in sexually abusive behavior against a particular person or persons, a spouse has a duty of care to take reasonable steps to prevent or warn of the harm.⁸⁵

Is this duty limited to the spouse? What if the person who had “reasonable cause to believe” that sexual abuse was taking place was a relative who suspected the sexual abuse but had no knowledge of past sexual proclivities of the abuser? What if it were a neighbor or other acquaintance? Would the court still have recognized a duty to warn or protect the children arising out of the statutory duty to report? The imposition of a duty in the instant case arose from a combination of factors: (1) the wife’s knowledge of her husband’s sexual proclivities;⁸⁶ (2) her awareness that the girls were visiting her husband every day and spending significant amounts of unsupervised time with him;⁸⁷ (3) the existence of a broad-based statute that imposes a duty to report sexual abuse on all persons, not only doctors, psychologists and teachers;⁸⁸ and (4) her comments throughout the year referring to the girls in sexually denigrating terms.⁸⁹ Absent any one of these factors it is not at all clear that the court would have imposed a duty to warn or otherwise protect the young girls against sexual abuse. One cannot simply say that there exists a common law duty for a third person to prevent sexual abuse when that person has cause to believe it is taking place. The test for the imposition of duty is more nuanced, and requires a court to look at the facts of the individual case.

III. MULTI-FACTOR NO-DUTY RULES IN DESIGN DEFECT LITIGATION

As the product liability revolution took root in American jurisprudence, courts rid themselves of many single factor no-duty rules that served as barriers preventing plaintiffs from bringing legitimate design defect claims. Defenses based on lack of privity,⁹⁰ the patent danger rule,⁹¹ shifting duty,⁹² the intended purpose doctrine,⁹³ and the

84. N.J. STAT. ANN. § 9:6-8.10 (West 2007).

85. *J.S.*, 714 A.2d at 935.

86. *Id.* at 936.

87. *Id.* at 926.

88. *Id.* at 931.

89. *Id.* at 927.

90. Two articles by Dean Prosser remain classics in the field. See William Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); William Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966). *Henningson v. Bloomfield Motors, Inc.*, 161 A.2d 69, 83–84 (N.J. 1960), signaled the demise of the privity doctrine. It was followed by *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 900 (Cal. 1963), in which the court eliminated privity in a strict liability tort action.

91. *Campo v. Scofield*, 95 N.E.2d 802, 804 (N.Y. 1950), was the leading case supporting the rule

bystander doctrine⁹⁴ all fell quickly after the adoption of strict tort liability under the *Restatement (Second) of Torts*, section 402A. In an article that I authored over two decades ago, I argued that the abandonment of single factor no-duty rules did not signal retreat from no-duty rules in design defect litigation.⁹⁵ An allegation of design defect is not merely a single idiosyncratic event that is normally given over to a jury to determine whether a product was reasonably designed. If the product design is found to be defective, every unit of that same model is equally defective, subjecting the defendant-manufacturer to huge potential liability.⁹⁶ As a matter of fact, courts often direct verdicts for product manufacturers in design cases on grounds other than that reasonable persons could not differ as to the reasonableness of the design.⁹⁷ There is something else going on that transcends the “low level law making” that reflects a single case judgment based on the court’s view on what the *Restatement* comment calls the “one-sidedness” of risk-utility balancing.⁹⁸ I have identified ten factors that courts utilize to dispose of unworthy design defect cases. They are:

that a manufacturer was “under no duty to render a machine or other article ‘more’ safe—as long as the danger to be avoided is obvious and patent to all.” *Campo* became the object of vitriolic academic attack. See, e.g., FOWLER V. HARPER & FLEMING JAMES, *THE LAW OF TORTS* § 28.5 (1956). *Campo* was overruled by *Micallef v. Miehle Co., Division of Miehle-Goss Dexter, Inc.*, 348 N.E.2d 571, 577 (N.Y. 1976). *Accord* *Pike v. Frank G. Hough Co.*, 467 P.2d 229, 235 (Cal. 1970); *Palmer v. Massey-Ferguson, Inc.*, 476 P.2d 713, 718 (Wash. Ct. App. 1970).

92. See, e.g., *Stultz v. Benson Lumber Co.*, 59 P.2d 100, 101–02 (Cal. 1936); *McLaughlin v. Mine Safety Appliances Co.*, 181 N.E.2d 430, 433 (N.Y. 1962). The more recent cases permit the jury to pass on the foreseeability issue. See, e.g., *Balido v. Improved Mach. Inc.*, 105 Cal. Rptr. 890, 903–04 (Cal. Ct. App. 1972); *Comstock v. Gen. Motors Corp.*, 99 N.W.2d 627, 636 (Mich. 1959); *Finnegan v. Havir Mfg. Corp.*, 290 A.2d 286, 292 (N.J. 1972).

93. See, e.g., *Evans v. Gen. Motors Corp.*, 359 F.2d 822, 825 (7th Cir. 1966). Liability for foreseeable misuse is now widely accepted. See, e.g., *Findlay v. Copeland Lumber Co.*, 509 P.2d 28, 31 (Or. 1973); *Ritter v. Narragansett Elec. Co.*, 283 A.2d 255, 263 (R.I. 1971); *Gen. Motors Corp. v. Hopkins*, 548 S.W.2d 344, 348–49 (Tex. 1977); Aaron D. Twerski, *The Many Faces of Misuse: An Inquiry into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403, 420–26 (1978).

94. The rule prohibiting recovery to the innocent bystander under strict liability or warranty had yet to be rejected as recently as 1964. See, e.g., *Mull v. Ford Motor Co.*, 368 F.2d 713, 717 (2d Cir. 1966); *Kuschy v. Norris*, 206 A.2d 275, 276 (Conn. Super. Ct. 1964). The drafters of the *Restatement (Second) of Torts* § 402A cmt. o (1965) specifically left open the question whether liability should flow to bystanders. Today courts have without exception extended the strict liability tort action to the bystander. See, e.g., *Elmore v. Am. Motors Corp.*, 451 P.2d 84, 89 (Cal. 1969); *Haumersen v. Ford Motor Co.*, 257 N.W.2d 7, 14 (Iowa 1977); *Codling v. Paglia*, 298 N.E.2d 622, 628–29 (N.Y. 1973); *Howes v. Hansen*, 201 N.W.2d 825, 828 (Wis. 1972).

95. Aaron D. Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521, 526 (1982).

96. JAMES A. HENDERSON, JR. & AARON D. TWERSKI, *PRODUCTS LIABILITY: PROBLEMS AND PROCESS* 165 (6th ed. 2008); DAVID G. OWEN, *PRODUCTS LIABILITY LAW* 484 (2005).

97. Twerski, *supra* note 95, at 548–50.

98. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmt. i (Proposed Final Draft No. 1, Apr. 6, 2005).

(1) Polycentricity: Aspects of the product design may be related in such a way that any design change would substantially affect the cost, utility, safety, or esthetics of the product.⁹⁹

(2) Close risk-utility proof: The task of weighing and balancing the product's potential for harm against its utility may be difficult or impossible.¹⁰⁰

(3) State of the art: The alternative design may not be practically feasible in light of the state of the art.¹⁰¹

(4) Tenuous causation: The case for causation in fact may be tenuous.¹⁰²

(5) Shifting duty: Independent and responsible decisionmakers may have played a significant role in assessing and utilizing the allegedly hazardous product.¹⁰³

(6) Consumer choice: Consumers may have the option to purchase a similar product without the alleged safety hazard.¹⁰⁴

(7) Obviousness of danger: The hazard may be open and obvious to the ordinary consumer.¹⁰⁵

(8) Cost: An alternative design could substantially raise the cost of the product to the consumer.¹⁰⁶

99. In a highly influential article, James A. Henderson, Jr., argued that design defect cases strain the judicial competence of the courts to fairly decide the issue of defect. James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1531 (1973). Cost, esthetics, safety, and product utility are highly interrelated. *See id.* at 1534-35. The introduction of change to one factor may require an examination of all the other factors and correlative changes in the design. *Id.* at 1536-37.

100. *See* Twerski, *Seizing the Middle Ground*, *supra* note 95, at 555 (highlighting closeness of risk-utility evidence implicates issues of fairness in litigation that are different from those of polycentricity).

101. *See id.* at 558. Courts may utilize the speculative nature of evidence of feasible alternative design with other of the factors to decide a verdict for defendant. *See, e.g.,* Smith v. Louisville Ladder Corp., 237 F.3d 1515, 537 (5th Cir. 2001) (directing verdict for the defendant based on weak expert testimony on state of the art, ambiguous evidence on causation, and the polycentric nature of the proffered alternative design).

102. At the time *Seizing the Middle Ground*, *supra* note 95, was written, the United States Supreme Court had not decided *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Even cases that raise plausible issues for the jury are often dismissed pre-trial because plaintiffs cannot overcome the causation hurdle. *See, e.g.,* Rider v. Sandoz Pharm. Corp., 295 F.3d 1194, 1202-03 (11th Cir. 2002) (dismissing credible case against manufacturer of Parlodel because causation cannot be established). *Contra* Sandoz Pharm. Corp. v. Gunderson, No. 2004-CA-001536-MR, 2005 Ky. App. LEXIS 222, at *22-23 (Ky. Ct. App. 2005). *See generally* Margaret A. Berger & Aaron D. Twerski, *Uncertainty and Informed Choice: Unmasking Daubert*, 104 MICH. L. REV. 257, 272-73 (2005) (demonstrating difficulties of overcoming *Daubert* requirements on causation have negated cause of action for informed choice).

103. Twerski, *supra* note 95, at 564-66.

104. *Id.* at 566-67.

105. *Id.* at 567-73.

106. *Id.* at 573-74.

(9) Design safety review process: The safety review process that led to the formulation of the product's design may have been extensive.¹⁰⁷

(10) Legislation: The government may have played a role in regulating the product's design.¹⁰⁸

It is not my contention that all of these factors are present in cases when courts make what I believe are essentially no-duty decisions in design defect cases. But, as these factors accumulate, the likelihood of courts denying liability increases exponentially. An example of a case that applies a multi-factor duty analysis is *Wilson v. Piper Aircraft Corp.*¹⁰⁹ Plaintiffs in that case alleged that the airplane crash in which their decedents died was caused by carburetor icing, resulting in engine failure.¹¹⁰ Susceptibility to icing, they claimed, was inherent in the design of the carbureted engine.¹¹¹ The case was tried and resulted in a plaintiff's verdict.¹¹² On appeal, the Oregon Supreme Court reversed.¹¹³ The court admitted that there was ample evidence to support the plaintiff's allegations concerning the defective design of the aircraft, the likelihood of this design contributing to carburetor icing and the causal connection between such icing and the crash of the aircraft.¹¹⁴ Nonetheless, the court reversed the judgment of the trial court and remanded for a new trial.¹¹⁵ The following factors came into play:

(1) The suggested alternative design that plaintiff proposed (a fuel injected engine) called for highly polycentric decision making on the part of the court.¹¹⁶ The impact of the alternative design upon the "airplane's cost, economy of operation, maintenance requirements, over-all performance, or safety in respects other than susceptibility to icing" would have to be determined.¹¹⁷ This kind of decision making strains the institutional competence of courts.

(2) Evidence on all the risk-utility trade-offs was likely to be difficult, if not impossible, to balance.¹¹⁸

107. *Id.* at 574-75.

108. Although compliance with governmental standards is not a stand-alone defense to liability, it is a factor in deciding whether the defendant has a duty of due care. *See supra* notes 34-61 and accompanying text (discussing *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001)); *infra* notes 109-21 and accompanying text (discussing *Wilson v. Piper Aircraft Corp.*, 577 P.2d 1322 (Or. 1978)).

109. 577 P.2d 1322, 1327-28 (Or. 1978).

110. *Id.* at 1324.

111. *Id.*

112. *Id.*

113. *Id.* at 1332.

114. *Id.* at 1325.

115. *Id.* at 1332.

116. *Id.* at 1327.

117. *Id.*

118. *Id.*

(3) The carbureted engine had met with great consumer acceptance. Of all small aircrafts, 80% to 90% were manufactured with carbureted engines.¹¹⁹

(4) The Federal Aviation Administration (FAA) had specifically approved the design of the carburetor engine even though it was aware of the icing problem inherent in the design.¹²⁰ The court made it clear that regulatory approval, though not dispositive, was a factor to be taken into account in deciding whether to direct a verdict for defendant.¹²¹

One cannot easily fit these factors into simple risk-utility balancing. For example, the competence of a court to decide highly polycentric issues is the kind of factor that the *Restatement (Third)* takes into account in deciding whether to impose a duty of reasonable care.¹²² Similarly, the decision of the FAA to approve the design of the carbureted engine raises the issue of deference to discretionary decisions by other branches of government—another factor deemed significant in the comments to section 7 in deciding the duty question.¹²³ There is no reason that a court should not be free to make a no-duty decision in an individual case based on policy factors that are clearly relevant when deciding the no-duty issue for broad categories of conduct.

IV. FAILURE-TO-WARN NO-DUTY RULES

Product liability failure-to-warn claims present a compelling case for utilization of a no-duty analysis based on the particular facts presented to the court. Unlike design defect cases that call for a high standard of proof as to whether an alternative design was technologically feasible and reasonably attainable,¹²⁴ a failure-to-warn case is much more modest.¹²⁵ It does not call for an overhaul of the product design.¹²⁶ It asks only for a warning that alerts the user to the danger and tells the user how to avoid it.¹²⁷ But, its very simplicity masks serious problems with fair implementation of the doctrine. The problems are manifest. First, juries

119. *Id.*

120. *Id.* at 1327–28.

121. *See id.* at 1328.

122. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmt. f (Proposed Final Draft No. 1, Apr. 6, 2005).

123. *Id.* § 7 cmt. g. Though this comment speaks mostly to the “discretionary” exception from tort liability for decisions of federal agencies, it is clear that even when courts do not direct verdicts based on a defendant’s compliance with a statute or regulation, they rely on governmental standards as a factor in making no-duty decisions. *See, e.g.,* *Hamilton v. Beretta, U.S.A. Corp.*, 750 N.E.2d 1055, 1065–66 (N.Y. 2001). Thus, in deciding whether to impose a duty, courts often defer in part to governmental decisionmaking and to the policies that are reflected in governmental regulation.

124. *See* 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, 292–93 (1990).

125. *Id.* at 293–94.

126. OWEN, *supra* note 96, at 564.

127. *Id.*

are wont to believe that warnings are costless.¹²⁸ They ask only for several words on the package or product, tailor-made for the danger that plaintiff encountered. But, the reality is that one cannot laundry list all the dangers that users may encounter. To do so would render warnings meaningless. Warnings must be selective to be effective.¹²⁹ However, it is difficult to convey to juries that to require one class of warnings is to effectively mandate that all risks in that class be similarly warned against. The plethora of warnings which we have become accustomed to seeing on products speaks volumes about the wisdom of requiring them as a matter of law. They have become so tedious that we frequently disregard them.

Second, causation is not difficult to establish. Would the plaintiff have read or heeded the warning that was not given? Some courts have made causation very easy to prove by granting the plaintiff a "heeding presumption," i.e., it is presumed that had the warning been given, it would have been read or heeded.¹³⁰ Even absent a presumption, a plaintiff will usually get to the jury by testifying that she would have read the warning and avoided the danger.¹³¹

Given the relative ease with which sympathetic juries can decide failure-to-warn cases in favor of plaintiffs if courts do not step in at the duty stage and stop unworthy cases from going to a jury, there is little that a judge can do to negate liability. The risk-utility trade-offs are for the jury, and the causation issue is substantially fuzzy so that courts will not direct verdicts on this issue, however attenuated the proof. The societal problem of over-warning—to the point where consumers are ill served and manufacturers believe that they must try to cover themselves by warnings that are counterproductive—is a duty issue for the courts. Factors that courts should consider in making a decision as to whether to impose a duty to warn are:

- (1) the obvious nature of the danger to be warned against;¹³²
- (2) low probability dangers;¹³³
- (3) the degree of specificity of the proposed warning;¹³⁴

128. Henderson, Jr. & Twerski, *supra* note 124, at 301.

129. See, e.g., 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, 514–17 (1976).

130. See, e.g., *Tenbarger v. Ames Taping Tool Sys., Inc.*, 190 F.3d 862, 866 (8th Cir. 1999) (applying Missouri law); *Golonka v. Gen. Motors Corp.*, 65 P.3d 956, 968–69 (Ariz. Ct. App. 2003); *Technical Chem. Co. v. Jacobs*, 480 S.W.2d 602, 606 (Tex. 1972).

131. See Henderson, Jr. & Twerski, *supra* note 124, at 305–06.

132. *Id.* at 314.

133. *Id.* at 317–18.

134. *Id.* at 318–19.

(4) whether governmental agencies have reviewed the warnings and have decided that the dangers are of sufficient significance to be warned against;¹³⁵

(5) whether experts have examined the need for or the impact of the warnings;¹³⁶

(6) whether the evidence on causation is tenuous.¹³⁷

Some of these factors standing alone may warrant a no-duty determination. For example, courts usually hold that there is no duty to warn about obvious dangers.¹³⁸ However, often it is a combination of the factors set forth above that can lead to a no-duty decision. One cannot simply create a broad category exemption from liability without looking at these factors and their relationship to the facts of an individual case.

V. POST-SALE FAILURE TO WARN

Whether and when to impose on a manufacturer a post-sale duty to warn about dangers discovered after the sale of a product that was not known to be defective at the time of sale has been a subject of considerable disagreement among the courts.¹³⁹ In drafting the products liability *Restatement*, my co-reporter, Professor James A. Henderson, Jr., and I reached the conclusion that a simple general rule would not work. Post-sale duties to warn are very different than warnings that accompany a product on original sale. Notwithstanding the difficulties that attend all warnings set forth in the previous section, the duty to warn on an original sale is far less complex than post-sale warning. In the introductory comment to section 10, which governs post-sale warnings, we say:

The costs of identifying and communicating with product users years after sale are often daunting. Furthermore, as product designs are developed and improved over time, many risks are reduced or avoided by subsequent design changes. If every post-sale improvement in a product design were to give rise to a duty to warn users of the risks of continuing to use the existing design, the burden on product sellers would be unacceptably great.¹⁴⁰

135. *Id.* at 320–21.

136. *Id.* at 323–24.

137. *Id.* at 325–26.

138. See RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. j (1998); see also, e.g., *Roland v. DaimlerChrysler Corp.*, 33 S.W.3d 468, 469–70 (Tex. Ct. App. 2000) (holding that manufacturer of pickup truck had no duty to warn of danger of ejection posed by riding in open bed).

139. For courts favoring the recognition of such a post-sale duty, see *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 645–47 (Md. 1992); *Comstock v. Gen. Motors Corp.*, 99 N.W.2d 627, 634–35 (Mich. 1959); *Cover v. Cohen*, 461 N.E.2d 864, 871–72 (N.Y. 1984). For courts rejecting such a post-sale duty, see *Romero v. Int'l Harvester Co.*, 979 F.2d 1444, 1450 (10th Cir. 1992) (applying Colorado law); *Syrie v. Knoll Int'l*, 748 F.2d 304, 311–12 (5th Cir. 1984) (applying Texas law).

140. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 10 cmt. a (1998).

Section 10 sets forth a more rigorous test for the imposition of liability:

§10. Liability of Commercial Product Seller or Distributor for Harm Caused by Post-Sale Failure to Warn

(a) One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to provide a warning after the time of sale or distribution of a product if a reasonable person in the seller's position would provide such a warning.

(b) A reasonable person in the seller's position would provide a warning after the time of sale if:

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

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

(3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and

(4) the risk of harm is sufficiently great to justify the burden of providing a warning.¹⁴¹

It is important to note that to make out a duty under section 10(b), a plaintiff must establish each one of the elements from subsection (b)(1) through (b)(4).¹⁴² Furthermore, Comment *a* implores courts to "carefully examine the circumstances for and against imposing a duty to provide a post-sale warning in a particular case" because of the "serious potential for overburdening sellers."¹⁴³ In sum, section 10 requires that courts look carefully at the facts of an individual post-sale failure-to-warn claim and to provide heightened scrutiny before addressing the question of whether each element was established to a jury.¹⁴⁴

141. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 10 (1998).

142. Each factor is followed by the conjunction "and." *See id.*

143. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 10 cmt. a (1998).

144. *Id.* That a court should exercise heightened scrutiny as to whether facts support a finding of duty is not unusual. For example, with regard to the tort of intentional infliction of emotional distress, the *Restatement (Third) of Torts: Liability of Physical Harm* § 45 (Tentative Draft No. 5 2007), requires that conduct of the actor must be "extreme and outrageous." In comment f to that section, entitled "Role of judge and jury," the *Restatement* provides:

As with all questions of fact, the court first determines whether the evidence is sufficient to permit a jury to find that the actor's conduct was extreme and outrageous and, if so, it is then for the jury to decide whether the actor's conduct was in fact extreme and outrageous. The court, however, plays a more substantial screening role on the questions of extreme and outrageous conduct and the severity of the harm . . . than on the other questions of fact. . . .

A finding of extreme and outrageous conduct is as much a normative judgment as it is a finding of historical fact (although that is often true of a finding of negligence). Unlike negligence, the existence of extreme and outrageous conduct is sufficiently unusual as to be ordinarily outside the jury's ken and serves to protect interests that the jury may not fully understand. Moreover, broad application of this tort poses concerns that it could interfere

VI. A MORE REFINED LOOK AT DUTY

The commentators who seek to limit duty to clearly defined categories are faced with a dilemma. Their critics rightly observe that they “do not offer a general account of the level of generality that duty rulings must take.”¹⁴⁵ As the discussion above demonstrates, duty rulings may require considerable attention to the facts of the case.¹⁴⁶ This, of course, calls forth a cry that as the inquiry becomes particularistic, the courts invade the province of the jury whose task it is to apply law to facts.¹⁴⁷ Esper and Keating, in their most recent work, admit that it is impossible to answer the question as to the level of generality that should be embodied in no-duty rules and find no answer other than that “rulings of law must be general enough to guide future conduct in similar situations.”¹⁴⁸

with the exercise of legal rights; deter socially useful conduct that nevertheless causes emotional harm; impinge on free speech; or target conduct that is “different” rather than particularly reprehensible. The generality of the standard and the culpable conduct at the heart of this tort also raise concerns that a jury may be improperly influenced by antipathy toward, and consequent prejudice against, the defendant. Additionally, it is doubtful that jury instructions could be fashioned that would adequately convey these concerns to a jury. Finally, there is the reality that, because of the breadth of the conduct and the type of harm addressed, a claim for intentional infliction, regardless of its merit, can readily be added when the real gravamen of the case is a different tort, such as invasion of privacy, malicious prosecution, defamation, or employment discrimination. Accordingly, courts must play a more substantial screening role than usual on the question of extreme and outrageous conduct as a balance to the open-ended nature of this claim and the wide range of behavior to which it might plausibly apply.

Normally, courts screen cases from juries by employing categorical no-duty rules; they do not make no-duty determinations based on the circumstances of a given case. See § 7, Comment *a*. In cases involving intentional infliction of emotional disturbance, the court plays a different role: ruling on the sufficiency of the evidence with regard to extreme and outrageous conduct. The court first makes a judgment, based on all of the circumstances, as to whether the conduct could be found extreme and outrageous and the harm sufficiently severe such that liability is permissible. If so, the court then submits the case for the jury to determine whether the defendant engaged in extreme and outrageous conduct and whether the plaintiff suffered severe emotional disturbance. This greater supervision is comparable to that exercised in other areas of tort law where principle or policy requires limits on tort liability in that specific context. See § 37, Comment *c* (affirmative duties) (Proposed Final Draft No. 1, 2005); § 29, Comment *f* (scope of liability) (*id.*); § 7, Comment *a* (duty rules) (*id.*).

RESTATEMENT (THIRD) OF TORTS: LIABILITY OF PHYSICAL HARM, § 45 cmt. f. (Tentative Draft No. 5 2007) (It should be noted that later drafts of this project have expanded the scope of the *Restatement* and have amended the title to *Restatement (Third) of Torts: Liability of Physical and Emotional Harm*.) With regard to failure to warn and post-sale duty to warn, the possibility of crushing liability, based on questionable factfinding by a jury, demands heightened scrutiny by the court before letting a case go to the jury. It is difficult to communicate to a jury that giving a warning for a low probability risk potentially subjects defendants to a need to warn about similar risks, and that warnings about all such risks is not feasible. Similarly, the difficulty of assessing costs of post-sale warnings to hundreds of thousands of consumers with little reason to believe that they will be read and heeded requires courts to perform initial screening, in order to make certain that nonmeritorious cases are not given over to juries.

145. Esper & Keating, *Putting “Duty” in Its Place*, *supra* note 10.

146. See *supra* Parts II–V.

147. *Id.*

148. Esper & Keating, *Putting “Duty” in Its Place*, *supra* note 10.

There is a better answer, one that allows a court at times to examine the particular facts of the case in deciding the duty issue but does not invade the province of the jury. The factors that the *Restatement* lists as germane to making a no-duty decision are very different than the issues that go to a jury in making a decision as to whether a defendant failed to act reasonably. Consider, for example, the first factor set forth in Comment *c* to section 7: a court is to consider the conflicts with social norms about responsibility.¹⁴⁹ The comment cites as an example the no-duty rule absolving social hosts who serve liquor at parties from liability for the drunken driving of their guests.¹⁵⁰ That factor could be relevant, for example, in deciding at what point the behavior of a third person should impose responsibility for failing to report sexual abuse of children. Those cases implicate the duty to rescue issue.¹⁵¹ At what threshold will the court impose such a duty? Liability might not be imposed on neighbors but might be imposed on a spouse with considerable knowledge of the perpetrator's background. How high to set the bar is a policy question that does not go to the reasonableness issue but requires a careful examination of the facts of the individual case. In another example, the *Restatement* comments cite the institutional competence of courts to fairly litigate an issue¹⁵² and the need to be deferential to discretionary decisions of other branches of government¹⁵³ as factors to be considered in deciding whether to make a finding of no duty. In both product liability design and failure-to-warn cases, courts have utilized these considerations in denying liability as a matter of law.¹⁵⁴ Whether they have done so by articulating a no-duty rule or by directed verdict makes little difference since the grounds for negating liability are not based on a finding that the product was reasonably safe but rather on how the policy factors, applied to the facts of the case, required a finding for the defendant.

The key to a rational approach to duty is not in seeking a bright-line category or divining a principle that is sufficiently general "to guide future conduct in similar situations."¹⁵⁵ Rather, the key is in identifying the policy factors that stand apart from risk-utility balancing and applying those factors to the facts of the case to see whether a duty of care is appropriate. I thus join Professors Cardi and Green, and concur in

149. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmt. c (Proposed Final Draft No. 1, Apr. 6, 2005).

150. *Id.*

151. See, e.g., *J.S. v. R.T.H.*, 714 A.2d 924, 935 (N.J. 1998); *Perry v. S.N.*, 973 S.W.2d 301, 306 (Tex. 1998).

152. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmt. f (Proposed Final Draft No. 1, Apr. 6, 2005).

153. *Id.* § 7 cmt. g.

154. See *supra* notes 90–144 and accompanying text.

155. See *Esper & Keating, Putting "Duty" in Its Place*, *supra* note 10.

the *Restatement* comments that foreseeability ought not to be a factor in the determination of duty.¹⁵⁶ The courts use it as a makeshift factor that is tacked on after they have decided that a duty does or does not exist. More important, foreseeability is the exact type of factor that belongs in the domain of the jury, in making the decisions as to whether defendant's conduct was reasonable. It is the *P* in the *P < BL* Learned Hand formula.¹⁵⁷

I am sympathetic to the fear that once one abandons categories, courts may become too aggressive and make no-duty findings when the cases should really be sent to the jury to exercise their unique role in administering negligence. But the answer must be to insist that courts differentiate those policy factors that motivate the no-duty determinations from those that are merely every day applications of negligence law. Case law is replete with duty decisions that cannot fit into any category, and that provide precious little general guidance for future cases.¹⁵⁸ Nothing that the commentators say or do will reverse that pattern. However, we can hold courts' feet to the fire and insist that they articulate which policy factors are at play when *under the facts of a particular case they make a no-duty determination*. I would propose the following language for section 7(b):

§ 7. Duty

(b) In exceptional cases when an articulated countervailing principle or policy warrants denying or limiting liability, a court may decide that the defendant has no duty or that the ordinary duty of care requires modification.

I would similarly replace the second paragraph in Comment *a* to section 7 with the following:

There are two different legal doctrines for withholding liability: no-duty rules and scope-of-liability doctrines (often called "proximate cause"). An important difference between them is that no-duty rules

156. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmt. j (Proposed Final Draft No. 1, Apr. 6, 2005).

157. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

158. See, e.g., *Winter v. G.P. Putnam's Son*, 938 F.2d 1033, 1037-38 (9th Cir. 1991) (placing no duty on publisher in negligence or strict liability for failing to discover erroneous portrayal of poisonous mushrooms as edible leading to serious liver disease); cf. *Brocklesby v. United States*, 767 F.2d 1288, 1294-95 (9th Cir. 1985) (finding of liability on publisher of aeronautical charts for erroneous information leading to crash of aircraft); *Rivera v. N.Y. Health & Hosp. Corp.*, 191 F. Supp. 2d 412, 422 (S.D.N.Y. 2002) (refusing to make a bright-line rule as to whether homeless shelter has a duty to protect others from violence of resident at shelter; ability to control resident, authority to seek involuntary commitment, whether shelter merely provided place to sleep or whether he was receiving counseling are factors to be considered as to whether a duty of reasonable care exists); *Rice v. Ctr. Point, Inc.*, 65 Cal. Rptr. 3d 312, 316-19 (Cal. Ct. App. 2007) (holding residential treatment facility has no duty to protect general public from criminal behavior of resident who escaped; policy of favoring innovative prisoner release program merits imposing a no-duty rule though such policy might be negated if plaintiff was an identifiable victim and not merely a member of the general public).

are matters of law decided by the courts, while the defendant's scope of liability is usually a question of fact for the factfinder. When liability depends on factors specific to an individual case, the appropriate rubric is usually scope-of-liability. When liability depends on policy factors that are not covered by risk-utility balancing and the scope-of-risk principle inherent in proximate-cause, then courts may, in appropriate cases, make a finding of no-duty.

Frequently, the no-duty rule speaks to broad categories of activity freeing the defendant of the duty of reasonable care. But, where the policy factors set forth in Comments *e* through *g* are applicable, a court may make a finding of no-duty based on the facts of the individual case.

I argued above that product liability cases call for a multi-factor duty analysis.¹⁵⁹ A review of the factors that I set forth would reveal that many of these factors could be easily assimilated into risk-utility balancing.¹⁶⁰ My thesis in this Article is that courts ought to focus on policy issues that are not part of risk-utility balancing in order to decide duty issues. Thus, I appear to be inconsistent in advocating a purely policy-based approach to the duty issue. First, I would remind the reader that putting product liability cases aside, I have made a strong argument that the *Restatement* should not limit no-duty decisions to clear discrete categories. Thus, one can readily disagree with my multi-factor duty analysis for design, failure-to-warn and post-sale duty-to-warn cases and yet agree that the *Restatement* should not demand that all no-duty decisions be premised on establishing bright-line categories. Second, I would defend my multi-factor duty analysis on the grounds that when the factors I set forth appear cumulatively in one case, at some point the question of institutional competence to fairly decide the issue of liability becomes paramount. Thus, the question is not whether one or another factor might be subject to risk-utility balancing. Rather, it is whether, in combination with nonrisk-utility factors, the case strains the limits of adjudication so that the case is nonjusticiable. As noted earlier, products liability cases based on generic defects implicate potential liability for all products of the same model on the market. Unlike the negligence case, which presents a highly individualistic fact pattern that is nonrepetitive, claims of generic defect (such as design and failure to warn) have enormous across-the-board implications. Thus, I argue that courts may and do make such no-duty determinations when they find great

159. See *supra* notes 90–123 and accompanying text.

160. For example, in the discussion of multi-factor duty, *supra* Part III and accompanying notes, four of the factors could be considered in risk-utility balancing: (1) close risk-utility proof, (2) state of the art, (3) obviousness of danger, and (4) cost. It is when these factors are combined with non-risk-utility factors such as: (1) polycentricity, (2) shifting duty, (3) consumer choice, and (4) deference to legislation. See *supra* notes 109–21 and accompanying text (discussing *Wilson v. Piper Aircraft Corp.*, 577 P.2d 1322, 1327–28 (Or. 1978)); Twerski, *supra* note 95, at 578–95 (applying the multi-factor duty analysis to five different cases).

ambivalence in the risk-utility factors combined with other more traditional policy factors that support no-duty rules.

CONCLUSION

I am in general agreement with the reporters of *Restatement (Third)*. As noted, I do not believe that Goldberg and Zipursky's "relational" theory of duty can carry the day. I believe that the Reporters were correct in excising "foreseeability" as a factor in determining whether a court ought to impose or reject a duty of reasonable care. Foreseeability lies at the heart of risk-utility balancing that juries are charged with deciding. The Reporters' insistence that no-duty rules are limited to bright-line categories of cases is not warranted. Duty is more robust than they give it credit. Where the very policies they identify play out in individual fact patterns, courts will continue to make no-duty findings. We have a right to demand that they articulate the policies that lead to their findings. Frequently, no-duty findings will find expression in broad categorical rules, but in many instances, they will not. The *Restatement* should reflect this reality. The *Restatement (Third)* needs to recognize the scalpel along with cleaver and the violin.
