Paradigm Shifts in Products Liability and Negligence

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PARADIGM SHIFTS IN PRODUCTS LIABILITY AND NEGLIGENCE

Alani Golanski*

I. INTRODUCTION

It would be both unkind and inaccurate to say that certain of our products liability experts eat their young. For the past few decades, however, some who have made their living as authorities in this area have aimed at helping insurers and the industry eliminate the perceived scourge of products accountability law, and in particular its failure-to-warn doctrine. They advocate paradigm shifts that would dramatically decrease, often to zero, a plaintiff’s likelihood of prevailing in any such action. One thinks that an authority in some field would want to keep that field fertile. Not many profess the law of the Twelve Tables these days.¹

Tort reform has gained momentum, though. On the other side of the divide, the conceptual vantage point of those seeking to preserve products liability law has also shifted. Traditionally, those favoring compensation for product-related injuries have sought the elimination of the need to prove fault wherever this has seemed feasible and appropriate.² These days, however, tort

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¹ See The Civil Law: Including the Twelve Tables, the Institutes of Gaius, the Rules of Ulpian, the Opinions of Paulus, the Enactments of Justinian, and the Constitutions (Samuel F. Scott ed., 1932); see generally United States v. Ferranti, 928 F. Supp. 206, 221 (E.D.N.Y. 1996) (“[t]he Roman Law of the Twelve Tables (449 B.C.) required thieves to make restitution payments to their victims starting at double the value of the stolen goods”), aff’d sub nom. United States v. Tosco, 135 F.3d 116 (2d Cir. 1998); Lane v. Townsend, 14 F. Cas. 1087, 1092 (D. Me. 1835) (“[b]y the laws of the Twelve Tables . . . the creditor was authorized, of his own right, and without the authority of a precept from a magistrate, to seize his debtor in the street, or anywhere in public, and forthwith carry him before the praetor.”).

² E.g., Ellen Wertheimer, Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back, 60 U. CIN. L. REV. 1183, 1284 (1992); Beshada v. Johns-Manville Products Corp., 447 A.2d 539, 549 (N.J. 1982) (“[t]he burden of illness from dangerous products such as asbestos should be placed upon those who profit from its production and, more generally, upon society at large, which reaps the benefits of the various products our economy manufactures . . . . Defendants have argued that it is unreasonable to impose a duty on them to warn of the unknowable . . . . But [a]s between those innocent victims and the distributors, it is the distributors—and the public which consumes their products—which should bear the unforeseen costs of the product”); Greenman v. Yuba Power Products, Inc., 377 P.2d 897, 900 (Cal. 1963) (Hon. Roger J. Traynor); Beshada, 447 A.2d at 546–47 (rejecting state-of-the-art defense
reform-minded courts and commentators seek to limit the range of the product seller’s duties by disregarding its capabilities to foresee harm—its fault, in other words—on the ground that the foreseeableability element "imposes a negligence concept upon the doctrine of strict liability." So preservationists are constrained to argue normatively that, at the least, product sellers at fault should be liable when their wrongdoing causes harm.4

This Article demonstrates that the normative adjustment forced upon the preservationists is a theoretical improvement. This is because, when analyzed correctly, “strict” products liability law doctrine is seen as fault-based, and indeed as a species of negligence. But if negligence best explains products liability law, negligence itself must be somewhat different from the doctrine we have come to know from hornbooks and judicial opinions. Products law helps us understand that the elements of negligence are a bit more complex than as stated by the traditional view.

At the same time, when it comes to products liability law, the tort reform vanguard presses a line of arguments that exploits the overly simplified accident law paradigm, involving four discrete elements, derived from the typical negligence case. This Article takes as an exemplar the writings of one of tort reform’s most vigorous spokespersons: Professor James A. Henderson, Jr., the Frank B. Ingersoll Professor of Law at the Cornell Law School.5 His work is particularly important because insurance and industry lawyers mine his writings to assault precedents in actual cases. Yet Professor Henderson’s unremitting critique of products liability law, especially its failure-to-warn


4. See generally OLIVER WENDELL HOLMES, JR., THE COMMON LAW 108 (Dover ed. 1991) (1881) ("The law does, in general, determine liability by blameworthiness"); Jeremy Waldron, Moments of Carelessness and Massive Loss, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387, 390 (David G. Owen ed., 1995) ("The idea that how things go for a person should bear some sort of relation to how well he has acted informs our assessment of the world on all sorts of fronts.").

prong, leads devotees and courts astray by distorting the elements of a negligence cause of action.

In sum, this Article addresses three interrelated paradigm shifts currently at play within products liability litigation. The first shift has been open and notorious: Tort reform advocates such as Professor Henderson attack the perceived “lawlessness” of products-related tort law and particularly the “empty shell” of its failure-to-warn theory,6 and their doctrinal proposals would continue to dramatically alter the products liability landscape. The second paradigm shift has not been much addressed, if at all, and arises from the countervailing effort to preserve products accountability when the seller is at fault. Preservationists should benefit from showing that strict products liability, rather than being a no-fault system, is a fault-based doctrine. Nor has the third paradigm change, which fine-tunes the elements of accident law, been pointedly discussed.

To explain these conceptual changes, Part II shows why products liability law is a species of negligence, and demonstrates that, particularly in its failure-to-warn guise, products liability promotes a more nuanced, and hence different from the traditional, reading of the elements of negligence. Part III then reviews some of the most important arguments coursing through Professor Henderson’s work. One burden of this article will be to try to explain how such an eminent scholar has consistently gone astray. It is likely that Professor Henderson is in his comfort zone advancing the industry’s interests and filtering his perceptions through the web of its belief.7 But whatever the underlying reason, his analysis goes especially bad when he conflates or otherwise abuses the elements of negligence as adjusted in this article. In this regard, the article will pay special attention to Professor Henderson’s views on two aspects of duty in the products liability context—the privity doctrine and the duty to warn of dangerous post-sale

II. TOWARD A MORE ACCURATE NEGLIGENCE PARADIGM

The elements of negligence are traditionally defined as duty, breach, foreseeability, and causation.\(^8\) Harm is implied; the role of foreseeability debated. Many jurists and scholars have resisted the idea that products liability law is a species of negligence because the added evidentiary burden of proving fault might allocate too much loss to victims.\(^9\) Products litigation, however, involves a number of repeating issues that, upon reflection, reveal fault elements within the strict products liability causes of action.

If the products liability cases present variants of negligence, then they also help us glean that negligence is a more complex doctrine than the hornbooks say. More specifically, products liability litigation shows that neither the duty nor the causation element is unitary. In these cases, the duty and causation prongs are often conspicuously subdivided into constituent sub-elements. Scission of the causation elements is particularly apparent in toxic products cases. But the same subdivisions occur, either obviously or latently, in all negligence actions.

This section explains that the elements of negligence are as follows: duty A (duty to whom); duty B (duty to do what); breach, foreseeability, causation A (the legal connection between the breach of duty and the harm); causation B (the general capability of the mechanism to cause the harm); and causation C (the link in the particular case between the mechanism and the harm).

This refined view of negligence is not startling. Nevertheless, an explicit statement of the operative elements does shift the paradigm in a way that clarifies the doctrine. This is significant because, as things stand now, courts...
and scholars critical of products liability jurisprudence tend to suppress the accurate view, and instead recycle traditional negligence principles even when this is not appropriate. Attacking a complex organism with a blunt-edged sword leads to unintended and messy outcomes. This Article will pay special attention to the ways in which Professor Henderson has, in some respects, exploited this shortcoming in the classic definition of negligence.

A. Products Liability Is Fault Law

Scholars arguing in favor of expanded liability for manufacturers and sellers of unreasonably dangerous products that cause harm have lamented that the “strict” products liability doctrine has not been construed to implement “no-fault” liability. Ellen Wertheimer, for instance, has unhappily reported that, “[w]hen the doctrine has been tested in cases involving dangers unknowable at the time of manufacture, courts and legislatures have gutted the doctrine rather than apply it with internal consistency.”

Others, anxious for liability limitations and seeking to restore fault-only compensatory schemes, advocate replacing strict products accountability with negligence. William Powers, Jr., offers a “modest” proposal that strict products liability be abandoned as a discrete area of law, and that negligence causes of action instead be the plaintiff’s only recourse. Peter Gerhart says that strict liability, as a distinct doctrinal category of accident law, is withering and “should be absorbed within negligence liability.”

These theoretical opponents seem fairly united, however, in presupposing that the question of fault structures the difference between negligence and strict products liability. Indeed, most writers are somewhat ambiguous on the


13. See Chotin Transp., Inc. v. United States, 819 F.2d 1342, 1350 n.5 (6th Cir. 1987) (“Although
issue of whether strict liability is a no-fault legal mechanism, or assume that it is.\textsuperscript{14} This presupposition is implicit in Gerhart’s appraisal that all of the “legitimate” work of strict liability is better handled under the negligence regime “by asking whether the injurer made reasonable decisions about activity-based matters.”\textsuperscript{15}

But some courts and commentators recognize, and correctly so, that strict liability is not equivalent to liability without fault.\textsuperscript{16} Even these views,

the legal doctrine of strict liability in a products liability case does not impose absolute liability, it is generally characterized as liability without fault because there is no burden placed upon the plaintiff to prove negligence to impose liability since negligence is not an issue.”

14. E.g., GRANT GILMORE, THE DEATH OF CONTRACT 103 (2d ed. 1995) ("the decline and fall of the nineteenth century idea that tort liability is, or should be, based on negligence or other fault matches the decline and fall of nineteenth century consideration and contract theory"); Gregory C. Keating, A Social Contract Conception of the Tort Law of Accidents, in PHILOSOPHY AND THE LAW OF TORTS 22, 31 (Gerald J. Postema ed., 2001) (asking “[w]hy is the payment of money damages to the victims of a risk (or an activity) sometimes rightly conceived as redress for wrongful infringement of the victim’s security (and paid only when the infringement is wrongful) and other times rightly conceived as a condition for the legitimate conduct of an activity (and paid whenever the activity issues in a characteristic harm)?”); see also Lewis v. Timco, Inc., 716 F.2d 1425, 1433 (5th Cir. 1983) (Politz, C.J., dissenting on other grounds) ("strict liability is based on a theory of responsibility which requires no finding of fault."); O’Quinn v. Wedco Tech., Inc., 746 F. Supp. 38, 39 (D. Colo. 1990) ("strict product liability is liability without regard to fault . . ."); Berlangieri v. Running Elk Corp., 76 P.3d 1098, 1112 (N.M. 2003) (stating "The law of torts, with the exception of strict products liability, is a fault-based system of recovery . . ."); Bostick v. Flex Equipment Co., 54 Cal. Rptr. 3d 28, 39 (Cal. App. 2d Dist. 2007) ("Applying concepts of ‘fault’ in a strict products liability case would defeat the very purposes of the doctrine because it would impose on the plaintiff the burden of proving negligence—an obligation that the doctrine was designed to eliminate."); cf. Wedge v. Planters Lifesavers Co., 17 F.3d 209, 213 (7th Cir. 1994) (Hon. Richard A. Posner) ("To repeat an earlier and fundamental point, a seller who is subject to strict products liability is responsible for the consequences of selling a defective product even if the defect was introduced without any fault on his part by his supplier or by his supplier’s supplier.").

15. Gerhart, supra note 12, at 246.

16. E.g., Rosado v. Proctor & Schwartz, Inc., 484 N.E.2d 1354, 1357 (N.Y. 1985) ("A strict products liability action is not analogous to vicarious liability, resulting in the imposition of liability without regard to fault. A manufacturer is held accountable as a wrongdoer, and, while the proof that must be adduced by a plaintiff is not as exacting as it would be in a pure negligence action, a prima facie case is not established unless it is shown, among other things, that in relation to those who will use it, the product was defective when it left the hands of the manufacturer because it was not reasonably safe . . ."); Carlin v. Superior Court, 920 P.2d 1347, 1350–51 (Cal. 1996) (noting that "the knowledge or knowability requirement for failure to warn infuses some negligence concepts into strict liability cases."); Alan J. Beals, Injury as a Matter of Law: Is This the Answer to the Wrongful Life Dilemma?, 22 U. Balt. L. Rev. 185, 249 (1993) (portraying strict products liability as liability without fault "is not completely accurate because the defendant’s culpability remains an important factor in the analysis."); Lara Noah, Authors, Publishers and Products Liability: Remedies for Defective Information in Books, 77 OR. L. REV. 1195, 1221–22 (1998) ("Strict[ ]products liability, especially when premised on an alleged failure to warn, is not liability ‘without fault . . .’. "); cf James A. Henderson, Jr., Process Norms in Products Litigation: Liability for Allergic Reactions, 51 U. PITT. L. REV. 761, 780 n.74 (1990) (qualifying the view of strict liability by saying that "[g]enuine strict liability would hold manufacturers liable for any harm resulting
however, generally fall short of appreciating the extent to which products injury law, like tort law as a whole, grounds liability on fault, perhaps as a vestige of pre-industrial injury law. 17 It might be said that law uses strict in “strict products liability” in its loose, comparative sense, not in some “genuine” sense. 18 As a descriptive matter, civil injury law is fault-based, and this article next maintains that strict liability within the products and larger injury contexts, and also in other areas of the law, is similarly rooted in a sense of some level of preventable misconduct.

As an aside, it may seem strange that a thesis that should ultimately benefit plaintiffs, such as the preservationist thesis motivating this article, would begin with a claim that strict liability, and in particular strict products liability, is fault-based. We have already suggested, after all, that plaintiff-friendly voices have consistently sought the elimination of the need to prove fault wherever this has seemed feasible and appropriate. 19 But unlike

from use of the product regardless of fault.”) (emphasis added).

17. See Roscoe Pound, The End of Law as Developed in Legal Rules and Doctrines, 27 Harv. L. Rev. 195, 199 (1914) (“Where modern law thinks of compensation for an injury, archaic law thought of composition for the desire to be avenged.”); Wilkes v. Wood, 98 Eng. Rep. 489, 498–99 (C.P. 1763) (“[D]amages are designed not only as satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the deterrence of the jury to the action itself); see also Holmes, supra note 4, at 3 (“Vengeance imports a feeling of blame, and an opinion, however distorted by passion, that a wrong has been done.”). Note that, as described by Pound and Holmes, and in Wilkes, the ancient impulse may have been rooted in the appearance of fault rather than fault itself. See Alan F. Calman, DUTY AND INTEGRITY IN TORT LAW xii (Carolina Academic Press 2009) (disagreeing—hence noting the belief that “formative tort law was ever driven by some primitive instinct to punish people irrespective of their fault,” and alternatively arguing that “torts from its inception reflected classical liberal notions of justice and wrongdoing”).


19. See supra note 2 and accompanying text; Wertheimer, supra note 2, at 1284; Beshada, 447 A.2d at 549:

The burden of illness from dangerous products such as asbestos should be placed upon those who profit from its production and, more generally, upon society at large, which reaps the benefits of the various products our economy manufactures . . . .

Defendants have argued that it is unreasonable to impose a duty on them to warn of the unknowable. Failure to warn of a risk which one could not have known existed is not unreasonable conduct. But this argument is based on negligence principles. We are not saying what defendants should have done. That is negligence. We are saying that defendants’ products were not reasonably safe because they did not have a warning . . . [a]s between those innocent victims and the distributors, it is the distributors—and the public which consumes their products—which should bear the unforeseen costs of the product.

Greenman v. Yuba Power Products, Inc., 377 P.2d 897, 900 (Cal. 1963) (Hon. Roger J. Traynor) (“A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. Recognized first
immediately effective executive orders, the jurisprudential impact of Federalist Society activism, the Contract With America and avance-de-siècle New Federalism has had some lag time, their judicial seeds more gradually blossoming into baneberry.\textsuperscript{20} The fault-based approach has seemed inevitable.

Ultimately, however, preservationism is not a defensive stance. Fault has inhered in even the most pivotal strict liability rulings. In the famous English case \textit{Rylands v. Fletcher};\textsuperscript{21} for instance, the defendant mill owners had built a reservoir on their land. Water escaped into an abandoned coal mine through connecting passages and into the plaintiff's adjoining mine. The case lacked traditional elements of nuisance or trespass (the flooding damage being indirect), so the Court of the Exchequer held the defendants liable under strict liability on the ground that they had, for their own purposes, brought something onto their land "likely to do mischief if it escapes . . . ."\textsuperscript{22} The House of Lords somewhat restricted the doctrine by saying it applied only to "non-natural" uses of defendant's land, as distinguished from "any purpose for which it might in the ordinary course of the enjoyment of land be used."\textsuperscript{23}

Without regard to whether the mill owners actually foresaw the possibility that the large body of water might damage adjoining properties, \textit{Rylands v. Fletcher} and its progeny are best interpreted as presuming the defendants to have been experts in their chosen activity, and to have had an expert's level of knowledge of the likely mischief that could be caused by the "non-natural"—hence less than appropriate—use of their land.\textsuperscript{24} After all, the

\begin{thebibliography}{9}
\item \textit{Rylands v. Fletcher}, 1 L.R.-Ex. 265 (1866).
\item \textit{Id}. at 279–80.
\item Cf. Arthur Ripstein, \textit{Tort Law in a Liberal State}, 1 J. TORT L. Iss. 2, Art. 3, at 26 (2007), at http://www.bepress.com/jtvl/vol1/iss2/art3 (last visited Oct. 18, 2009) ("Rylands is a case of a wrong involving fault, as all harm based-torts must be."). Ripstein's very interesting, albeit ultimately unconvincing, Rawlsian thesis is that the law of torts is not a system of liability and remedial rules aimed, at least implicitly, at efficient allocations of loss, but is rather the ordering of a set of individual entitlements.
\end{thebibliography}
courts determined *ex post* that the reservoir was likely to do mischief if water escaped, and implicitly conveyed the judgment that the mill owners should have similarly foreseen this *ex ante*.25

This perspective on strict liability is nicely illustrated in some decisions construing dram shop acts. Dram shop statutes are generally understood as imposing strict liability, without fault, upon those who sell alcoholic drinks to already-intoxicated customers who then cause harm as a result of that intoxication.26 Some jurists, however, have reflected that some level of negligence may underlie the dram shop rule after all. The Connecticut court, for instance, suggested that its state's dram shop liability depends on fault when it upheld the statute's constitutionality.27 A vendor selling alcoholic beverages on a public highway is certainly aware that some of his customers will be driving automobiles, and "is bound to presume that the liquor which he sells will be consumed sometime."28 The Second Circuit followed up saying: "As a purveyor of liquor, defendant's claim that he cannot tell with reasonable certainty the state of mind and body commonly termed "intoxication" has a hollow ring."29

Our reading of *Rylands v. Fletcher* is also consistent with these analyses of the dram shop acts. The state and federal courts' deconstruction of the Connecticut strict liability statute suggests their view that the vendor of alcoholic drinks should be held to the level of knowledge that an expert, performing such activity, would be expected to possess. This does not mean to various means for accomplishing one's private purposes. *Id.* at 13-18.

25. *See generally* SIR JOHN SALMOND, LAW OF TORTS (Stevens & Haynes eds., 1st ed. 1907); *see also* Patrick S. Atiyah, *The Legacy of Holmes Through English Eyes*, 63 B.U. L. REV. 341, 353 (1983) ("Salmond, like [Oliver Wendell] Holmes, was an early advocate of the broad theme that tort liability ought to depend upon some element of fault. For that reason, Salmond disliked the rule in *Rylands v. Fletcher*, and tried to explain the case away as one in which some negligence had in fact been found"); John C. O'Quinn, Note, *Not-So-Strict Liability: A Foreseeability Test for Rylands v. Fletcher and Other Lessons From* Cambridge Water Co. *v. Eastern Counties Leather PLC*, 24 HARV. ENVTL. L. REV. 287, 292-94 (2000); cf. Charles E. Cantu, *Distinguishing the Concept of Strict Liability For Ultra-Hazardous Activities From Strict Products Liability Under Section 402A of the Restatement (Second) of Torts: Two Parallel Lines of Reasoning That Should Never Meet*, 35 AKRON L. REV. 31, 56-57 (2001) (outlining the differences between the two forms of strict liability, but not offering a convincing argument why the "two lines of reasoning... should never meet," failing to explain why the user or consumer expectations test often applicable in products cases does not analogize to the appropriate-to-the-locale test used in hazardous activities contexts).


that the vendor actually knew that his customer was already, or had become, intoxicated, or that the customer would be handling a dangerous instrument, an automobile, relatively soon after the transaction. Nor does the presumption of expert-level knowledge depend upon the ready availability, to the particular defendant, of information sufficient to put the defendant on notice of the risk, as in typical negligence contexts. Rather, strict liability affords a relaxed fault standard, and is projected by virtue of the general discoverability of the risk to those who have the expertise and make the effort.

An analogous understanding of fault inheres in the products liability doctrine. Courts have explicitly stated that sellers have a duty to stay abreast of scientific and technical knowledge and discoveries relevant to their products, and are thereby presumed to be aware of any risks that are knowable by any expert in that field. This presumption, resting on scientific discoverability, means that the products liability action is “indelibly infused with negligence principles.” The expert knowledge analysis is particularly applicable in the failure-to-warn products liability setting, and triggers the seller’s duty to warn.

A similar presumption usefully applies in design defect products liability law. The plaintiff bringing a design defect claim has to show that the product, as designed, was not reasonably safe because there was a substantial likelihood of harm, and that it was feasible to design the product in a safer manner. In balancing the product’s risks against its utility and cost, the trier of fact considers, among other factors, the availability of a safer design and the potential to have implemented this safer design while retaining the product’s functionality and reasonable pricing.

Strict products liability in the design defect setting therefore requires some sort of standard by which it may be determined whether it was “feasible”

30. George v. Celotex, 914 F.2d 26, 28 (2d Cir. 1990); Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 1089–90 (5th Cir. 1973) (“[T]he manufacturer is held to the knowledge and skill of an expert... [T]he manufacturer’s status as expert means that at a minimum he must keep abreast of scientific knowledge, discoveries, and advances and is presumed to know what is impacted thereby. But even more importantly, a manufacturer has a duty to test and inspect his product. The extent of research and experiment must be commensurate with the dangers involved.”)


32. E.g., Burton v. R.J. Reynolds Tobacco Co., 297 F.3d 906, 917 (10th Cir. 2005); Foster v. American Home Prod. Corp., 29 F.3d 165, 169–70 (4th Cir. 1994) (“In cases involving products alleged to be defective due to inadequate warnings, the manufacturer is held to the knowledge and skill of an expert . . . ”) (omitting internal quotation and citations).


34. Id. at 208–09.
to have designed a safer product. This would not have been feasible were the safer design not yet scientifically or technically knowable. But neither is the plaintiff charged with proving, in the strict liability case, that the seller had actual knowledge of safer designs, or that this knowledge was otherwise directly available to the particular defendant. Instead, as in the failure-to-warn context, although perhaps not as consistently articulated this way, the seller is held to the knowledge of an expert in its field and thereby charged with notice of scientifically discoverable alternative designs.\textsuperscript{31} This culpability factor renders the design defect cause of action a species of negligence.\textsuperscript{36}

Therefore, in the final analysis, products liability, while "strict," is nevertheless a question of negligence. A more accurate appellation would have been the awkward "stricter products liability." With more poetry, we take \textit{strict} in its loose sense. To the extent that those arguing in favor of products liability apply this insight normatively—\textit{i.e.}, argue that products liability is fault-based and those sellers at fault, \textit{because they are at fault}, should be deemed responsible for the harms they have caused—a paradigm has shifted in the products litigation.\textsuperscript{37}

\textsuperscript{35} \textit{E.g.}, Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110, 115 (La. 1986) ("In regard to the failure to use alternative products or designs, as in the duty to warn, the standard of knowledge, skill and care is that of an expert, including the duty to test, inspect, research and experiment commensurate with the danger . . . ". Accordingly, evidence as to whether the manufacturer, held to the standard and skill of an expert, could know of and feasibly avoid the danger is admissible under a theory of recovery based on alleged alternative designs or alternative products."); see also Berrier v. Simplicity Mfg., 563 F.3d 38, 43 n.7 (3d Cir. 2009), \textit{corrected by No.} 05-3621, 2009 U.S. \textit{App. LEXIS} 8403 (3d Cir. Apr. 23, 2009), \textit{corrected by No.} 05-3621, U.S. \textit{App. LEXIS} 8992 (3d Cir. Apr. 28, 2009) (stating that, with regard to negligence, "[e]vidence of alternate designs is admissible to refute Simplicity's claim that NMIR devices would decrease the social utility of the mower . . . as well as to show the 'state of the art' of safety design at the relevant time . . . The evidence may be similarly relevant to the Barriers' 'strict liability theory.'") (emphasis added).

\textsuperscript{36} \textbf{RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY \S 2(b) (1998)} (adopting a negligence-based terminology, noting that a product may be deemed defective in design "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor").

\textsuperscript{37} \textit{See Jay M. Feinman, The Jurisprudence of Classification, 41 STAN. L. REV. 661, 700-01 \& n.148 (1989)} (explaining that the neoclassical paradigm that constitutes contemporary tort law "blurs the distinction between the negligently caused accident and the accident in which the defendant is liable despite exercising reasonable care (for example, a strict products liability case). While strict liability has profoundly reshaped tort law, it has not overwhelmed fault, even in products liability. . . . Many of the instances of compensation-based liability have a strong core of fault-based thinking.").
B. Refining the Elements of Negligence

If products liability is negligence, negligence must be somewhat different from the doctrine we have come to know from hornbooks and most of the case law. Products law helps us understand that the elements of negligence are a bit more complex than as stated by the traditional view. "Duty," "breach," "foreseeability," and "causation" schematize a negligence cause of action, but do not present the full picture.

1. Duty

First, everyone will recognize that duty is a bifurcated element, consisting of what we shall term duty A (duty to whom) and duty B (duty to do what). In the typical negligence action, the duty elements ordinarily collapse into a duty to exercise due care toward those who might foreseeably be harmed. Duty A and duty B tend more readily to disaggregate in the products context. Disputes over privity and chain of product distribution, for instance, raise duty A issues, while questions about the need for, or adequacy of, warnings raise duty B concerns. These are exemplary only. Relational duty A questions have also included, for instance, whether the distributor of toxic materials owes a duty to family members exposed to those toxins on the worker’s

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38. Bradshaw v. Daniel, 854 S.W.2d 865, 870 (Tenn. 1993) ("[A]ll persons have a duty to use reasonable care to refrain from conduct that will foreseeably cause injury to others."); Henderson v. Bowden, 737 So. 2d 532, 535 (Fla. 1999) ("[A] legal duty will arise whenever a human endeavor creates and generalized and foreseeable risk of harming others.").


40. See In re Agent Orange Prod. Liab. Litig., 818 F.2d 194, 200-01 (2d Cir. 1987) ("[T]he very pernicious of proof concerning the possible deleterious effects of Agent Orange made the decision whether to issue a nationwide health warning even more clearly an exercise of discretion."); Koehn v. Yamaha Motor Corp., USA, No. 94-1112-JTM, 1996 U.S. Dist. LEXIS 17942, at *11-12 (D. Kan. 1996) ("There are warnings regarding driving an ATV up a hill. Whether these warnings are adequate is a question of fact which a reasonable factfinder could answer in the negative."); Esparza v. Skyreach Equipment, Inc., 15 P.3d 188, 198 (Wash. Ct. App. 2000) ("[A] post-sale duty to warn arises after a manufacturer has sufficient notice about a specific danger associated with the product."). Indeed, Koehn exemplifies a products case that separates out duty A from duty B expressly. See Koehn, 1996 U.S. Dist. LEXIS 17942, at *8 ("Kansas imposes joint liability for product defects on all entities in the chain of distribution after the origin of the defect, unless a product seller can show it qualifies for an exception."); see also Maas v. United States, 94 F.3d 291, 297 (7th Cir. 1996) (noting that the decision to warn is "replete with choices" and requires "ascertaining the need for a warning and its cost," determining the group to be alerted, as well as the content and procedure of such notice," and ultimately, "balancing safety with economic concerns").
cycling, and whether the seller of used defective equipment owes a duty to those injured many years after the sale. Duty B issues have also run the gamut, depending on the circumstances of the product-related injury.

What makes the duty split likely to arise is not the chosen cause of action, but rather the underlying realities of the transaction engendering the product-related grievance. In other words, while the typical negligence case might result simply from the harm caused by a speeding driver’s crossing the median strip, products injuries tend to implicate actions or omissions on the part of a range of players within the commercial chain of product distribution and use. Accordingly, for example, plaintiffs injured from hazardous substances brought home on a family member’s clothing have also pursued claims against premises owners. And to be sure, some types of issues, such as those relating to the obviousness of product-related risks, present a hybrid tending to meld duty A (whether to warn the group to which the risk may be obvious) and duty B (whether to provide a more specific warning) concerns.

The source of duties is also a controversial topic. Courts decide the existence of duty A or duty B on policy grounds. But the nature of this determination provides a contentious area of jurisprudence at two levels. What we might call the first order issue is whether a duty exists in the particular case. The precedents or statutes might already make this apparent. Otherwise, the court has to give reasons. These might implicate the sorts of manageability concerns that Henderson and others often focus on. The court would not

41. See Martin v. Gen. Elec. Co., No. 02-201-DLB, 2007 U.S. Dist. LEXIS 98458, at *3–8 (E.D. Ky. Sept. 5, 2007); In re Joint Eastern & Southern Districts Asbestos Litig., 129 B.R. 710, 736 (E. & S.D.N.Y. & Bankr. S.D.N.Y. 1991) (“Exposure is not limited to those employed in the mining of asbestos or the manufacture of products containing asbestos, but it affects those removing asbestos, consumers who used asbestos-containing products such as hair-driers and personal exposed to a family member’s contaminated clothing.”).


43. E.g., Passante v. Agway Consumer Prods., Inc., 12 N.Y.3d 372, 382 (2009) (“There are triable issues of fact as to the sufficiency of the warnings concerning this equipment. An instruction sheet was posted on a wall in the loading dock area that included a warning not to walk on the lip of a dock leveler when ‘walking down’ the leveler . . . . However, the instruction sheet contains no warning that it is dangerous to remain on the lip, even momentarily, after it has engaged the trailer bed.”) (court’s emphasis).


45. See City of Jackson v. Ball, 562 So. 2d 1267, 1270 (Miss. 1990) (“The dangerous product user need give no further warning after the contractor . . . has actual knowledge of the danger.”); Graham v. Ryerson & Sons, 292 N.W.2d 704, 707 (Mich. Ct. App. 1980) (“No duty to warn of dangers obvious to all users . . . or of specific dangers fully known to the complainant at the time the injury occurred.”).

want to announce a duty that sweeps too broadly, opening the "floodgates" to a wave of cases arguably similar as a matter of principle, but perhaps not as deserving as a matter of fact. On the other hand, when risks of serious injury from an actor's conduct or product are foreseeable, there is a strong intuitive pressure to deem the actor responsible.

But there is also a second order issue: Where do duties—A or B—come from? The most coherent understanding seems to involve an economic balancing of costs and benefits. This analysis derives, most notably, from Judge Learned Hand's opinion in *United States v. Carroll Towing Co.* The duty B question in that case was whether the owner of a barge owes a duty to keep an attendant on board just in case the barge breaks away from its moorings and may damage other vessels. Judge Learned Hand's famous language was that:

[T]he owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B less than PL.

The law and economics movement has argued that, by Judge Learned Hand's own understanding, the cost-benefit analysis merely makes explicit the methodology underlying negligence law generally. Whether an economic/utilitarian conception is descriptive of the way the system functions or is just a normative goal, the approach is certainly malleable; the efficiency goal does appear both to motivate many judicial outcomes, whether implicitly or

standard involving a duty not to disappoint reasonable consumer expectations about products, saying that the related "conceptual problems are compounded by the unique difficulties that one encounters in formulating a standard for defective design that is manageable in court"; see generally Tobin v. Grossman, 249 N.E.2d 419, 424 (1969) (regarding whether to impose duty to mother of injured child, a bystander, saying "whichever way one turns in permitting a theory of recovery one is entangled in the inevitable ramifications which will not stay defined or limited. There are too many factors and each too relative to permit creation of only a limited scope of liability or duty.").

47. United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).
48. Id. at 173.
49. Id.; see also Nelson v. Aurora Equip. Co., 909 N.E.2d 931, 935 (Ill. App. 2009) (discussing four factors that inform the duty inquiry: "(1) the reasonable foreseeability of injury; (2) the likelihood of injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing the burden upon the defendant.").
expressly, and to provide a critique by which decision making may be improved. Some legal philosophers take a different stance. For instance, John Rawls argued that “laws and institutions no matter how efficient and well arranged must be reformed or abolished if they are unjust.” Arthur Ripstein voices a Rawlsian view, rooted in Kant, that you are entitled to pursue your life’s purposes “[s]imply in virtue of your innate humanity as a person,” that your rights have an underlying moral basis, and that tort law exists as a public institution to order these private rights.

Ripstein argues that the economics approach strips away the idea of judgment, because its utilitarian thesis is starkly computational, that is, aimed at computing the expected costs and benefits of duty determinations, and hence liability is determinate—subject only to human fallibilities. For Ripstein, the better Rawlsian approach applies the principles of private justice by means of the exercise of judgment. However, although outcomes within any particular social welfare function should be calculable in the first order

51. See Jensen v. Packaging Corp. of America, 123 F.3d 490, 565 (7th Cir. 1997) (Wood, C.J., concurring in part, and dissenting in part on other grounds), aff’d, remanded by 524 U.S. 742 (1998) (“Judge Flum concludes that employer liability is ‘automatic’ once the plaintiff shows that the supervisor conditioned employment consequences upon the receipt of sexual favors by wielding the authority actually delegated to him, and Chief Judge Posner has shown why this is an efficient outcome.”); J. B. Hunt Transp. v. Ianis, No. 92-1273, 1993 U.S. App. LEXIS 1315, at *11 (4th Cir. 1993) (in tort action involving respondent superior claim, saying employer’s application for “declaratory relief would not result in a more just, efficient, and economical determination of the entire controversy.”) (court’s emphasis).

52. Richard Arneson, Symposium Issues in the Philosophy of Law: Metaethics and Corrective Justice, 37 ARIZ. L. REV. 33, 33 (1995) (“The economic analysis of tort law asserts that tort law practices are and ought to be set so as to achieve efficiency. To a large extent (the claim goes), existing tort law practices do in fact facilitate the attainment of efficient outcomes. Where tort law does not operate so as to promote efficiency, the economic analysis can become a normative standard to guide reform.”); cf. Robert L. Birmingam, Damage Measure and Economic Rationality: The Geometry of Contract Law, 1969 DUKE L.J. 49, 52 (emphasizing “the opportunity afforded by the inadequacy of the reasoning of the courts to introduce economic tools which permit examination of the premises of contract law from a fresh perspective.”).

53. JOHN RAWLS, A THEORY OF JUSTICE 3 (1971); see also JULES L. COLEMAN, RISKS AND WRONGS 361–85 (1992) (arguing that, for the most part, tort law fulfills a corrective justice function); JULES L. COLEMAN, MARKETS, MORALS, AND THE LAW 185 (1988) (“The principle of corrective justice requires the annulment of both wrongful gains and losses.”).


55. Ripstein, supra note 24, at 22–23.

56. Id. at 22.
analysis, in the epistemologically prior, second-order determination an underlying or latent effort at maximizing wealth, or minimizing cost, is not necessarily formulaic, and competing conceptions of wealth and utility render the outcome indeterminate.

Therefore, regardless of what ideal the second-order view harbors, courts exercise judgment when deciding whether a duty exists. It seems that legal philosophy will ultimately require a deeper notion of the parameters by which the judgment applied in reaching tort outcomes is structured. On that front, the explanation afforded by an efficiency approach, which considers optimal allocations of injury-related loss, should satisfy more than abstract references to "an underlying moral basis," especially when hard cases arise.

2. Causation

Were the subdivision of the duty element all there was to this paradigm revision, the shift would admittedly be "Wolframian." Beyond that, though, products liability law is also marked by the split in the causation element. The

57. See Mark Geistfeld, Economics, Moral Philosophy, and the Positive Analysis of Tort Law, in PHILOSOPHY AND THE LAW OF TORTS 250, 267–68 (Gerald J. Postema ed., 2001) ("We only require that the belief be such as to admit of an unequivocal answer as to whether one configuration of the economic system is 'better' or 'worse' than any other or 'indifferent,' and that these relationships are transitive, i.e., A is better than B, B better than C, implies A better than C, etc.") (quoting PAUL A. SAMUELSON, FOUNDATIONS OF ECONOMIC ANALYSIS (1947)).

58. Cf. Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940), overruled by 312 U.S. 492 (1941) (wherein Judge Hand reflected that applying the cost-benefit negligence formula "always involves some preference, or choice between incommensurables").


61. Ripstein, supra note 24, at 23; see generally Stephen G. Gilles, United States v. Carroll Towing Co.: The Hand Formula's Home Port, in TORTS STORIES 11, 37 (Foundation Press, Robert L. Rabin & Stephen D. Sugarman eds., 2003) ("The vast majority of appellate courts have endorsed some version of a cost-benefit balancing test for negligence, and virtually none have rejected balancing.").

causation troika is somewhat elusive, and surfaces most often in toxic tort litigations.

In the ordinary negligence case, the causation element folds into a unitary concept. When Trover Richins swerves through traffic at more than eighty miles per hour, fleeing the police, loses control and crashes his Ford Taurus into Hemant Rooperian’s minivan,\(^{63}\) we know at once, without further effort, that the breach of Trover’s legal duty caused harm, that such cars recklessly driven can cause harm, and that Trover’s reckless driving of his car specifically caused Hemant’s harm. But these sub-elements often disaggregate in product-related injury cases, and are accounted for separately.

Accordingly, products liability litigations, and especially toxic tort cases, most explicitly raise distinct issues of causation A, linking the breach of legal duty to the harm,\(^{64}\) causation B, establishing the general capability of the mechanism to cause the harm, and causation C, tying the mechanism in the particular case to the particular harm. In law’s terminology, causation B and causation C are labeled “general causation” and “specific causation,” respectively.\(^{65}\)

Whether the case is a typical negligence action, or a complex toxic tort litigation, the causation proof, intuitive or scientific, is an approximation. The precise causal mechanism is unobserved, perhaps unobservable, and the trier of fact infers to the best explanation.\(^{66}\) As with duty, the subdivision of the causation element is not dictated by the rules for pleading a products liability


\(^{64}\) See Eck v. Parke, Davis & Co., 255 F.3d 1013, 1019 (10th Cir. 2001) (“To submit the case to a jury, the Eckes must ... demonstrate that the alleged failure to warn was the proximate cause of their injuries.”); McCulloch v. H.B. Fuller Co., 61 F.3d 1038, 1044 (2d Cir. 1995) (one failure-to-warn products liability issue is whether “defendant’s failure to warn was the proximate cause of plaintiff’s injury.”).

\(^{65}\) See generally Golden v. CH2M Hill Hanford Group, Inc., 528 F.3d 681, 683 (9th Cir. 2008) (“To survive summary judgment on a toxic tort claim for physical injuries, Golden had to show that he was exposed to chemicals that could have caused the physical injuries he complains about (general causation), and that his exposure did in fact result in those injuries (specific causation).”); Knight v. Kirby Inland Marine Inc., 482 F.3d 347, 351 (5th Cir. 2007) (“[T]here is a two-step process in examining the admissibility of causation evidence in toxic tort cases. First, the district court must determine whether there is general causation. Second, if it concludes that there is admissible general causation evidence, the district court must determine whether there is admissible specific-causation evidence.”).

\(^{66}\) See Gilbert Harman, Knowledge, Inference and Explanation, 5 AM. PHIL. Q. 164, 168 (1948); Alanis Golanski, General Causation at a Crossroads in Toxic Tort Cases, 108 PENN. ST. L. REV. 479, 485 (2003); see generally DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING 72 (“W[e] may define a cause to be an object, followed by another, and where all the objects similar to the first are followed by objects similar to the second.”).
cause of action, but rather arises from the factual nature of the product-caused
harm at the lawsuit's core. Specifically, cases involving latent injuries,
manifesting sometime after the product contact or exposure, will tend to
individuate the three causation sub-elements. 67

3. Negligence Versus Strict Products Liability

None of this is to suggest that the products liability cause of action is not
analytically distinct from the ordinary negligence cause of action. Subspecies,
however, share important common attributes. 68 Products liability law differs
conceptually from the standard negligence doctrine in varying degrees,
especially with respect to the nature of the foreseeability inquiry, perhaps least of
all when it comes to failure-to-warn products liability law. 69

If the negligence and products liability principles share the same
elements, and if liability is fault-based under either regime, what makes
products liability strict? As suggested earlier in the discussion, 70 products
liability law is strict to the extent that plaintiff’s burden to prove those
elements is relaxed. In negligence, for example, a tortfeasor will ordinarily be

67. E.g., Huss v. Gayden, 571 F.3d 442 (5th Cir. 2009) (medical malpractice case involving
injurious use of the pregnancy drug Terbutaline sulphate); Robertson v. Monsanto Co., 287 Fed. Appx. 354,
362 (5th Cir. 2008) (negligence class action arising from gas release at defendant’s facility, stating that
"each plaintiff still must show" specific, as well as general, causation); see generally Bano v. Union
Carbide Corp., 361 F.3d 696, 711 (2d Cir. 2004) ("The effects of Bi's alleged exposure to harmful
substances emanating from the plant site are to be considered latent, notwithstanding that the interval
between her exposure and the injuries' initial manifestation was not years but, in Bi's words, 'a few
weeks.'").

68. Robert M. Zink, The Role of Subspecies in Obscuring Avian Biological Diversity and
Misleading Conservation Policy, 271 PROCEEDINGS OF THE ROYAL SOCIETY OF LONDON 561, 561–62 (2004); see also Transco
a sub-species of nuisance, which is itself a tort based on the interference by one occupier of land with the
right in or enjoyment of land by another occupier of land as such."); quoted in Ripstein, supra note 24, at
26.

69. See McCulloch v. H.B. Fuller Co., 61 F.3d 1038, 1044 (2d Cir. 1995) ("While strict liability and
negligence are analytically distinct claims, they become one where liability rests on a failure to warn.");
warning is the sole theory for product liability, the difference between a strict liability and negligence case
usually disappears."); see also R. Ben Hogan, III, Risk/Utility or Consumer Expectation: What Should Be
product liability design case proceeds from a risk/utility analysis, there is little difference between strict
liability and a negligence case.").

70. See supra text accompanying notes 29–36.
deemed to have had actual or constructive notice of a defect or danger if similarly injurious incidents or accidents previously occurred.\textsuperscript{71}

Products liability law has often relaxed this standard by presuming that the seller knew what was discoverable at the time of sale, and stands in the shoes of an expert who is expected to keep abreast of the scientific and technical literature.\textsuperscript{72} The presumption that the product seller possesses an expert’s level of knowledge is both fair and efficient. If life-threatening risks are scientifically knowable at the time the sophisticated manufacturer sells its product, the seller is capable of learning this and the presumption fairly creates an incentive for it to invest in safety research. And because the manufacturer has greater expertise than the consumer and is generally better able to calculate the costs and benefits of safety steps, and to exercise preventative care, the presumption’s allocation of costs to the seller is efficient.\textsuperscript{73}

Apart from the scienter element, the causal element, and in particular causation A, is typically relaxed in the products liability, and failure-to-warn, context. This is a controversial point and some will protest that the burden of proving causation is an intractable aspect of tort liability. This objection would hold weight were the causation element unitary. But, as shown, it is tripartite.

Causation A links the breach of a legal duty to the harm. If the case arises from a breach of the duty to warn, then an issue arises whether the failure to do so caused the harm. Strict liability jurisprudence frequently presumes that, had the seller adequately warned, the plaintiff would have heeded the warning.\textsuperscript{74}

Some commentators have even suggested that causation B (general causation), and even causation C (specific causation), should be abolished in actions alleging exposure and harm coinciding with the corporate distribution

\textsuperscript{71} See Collins v. City of Harker Heights, 503 U.S. 115, 117–18 (1992) (noting allegation that “a prior incident had given the city notice of the risks of entering the sewer lines.”); Mobile & Ohio R.R. Co. v. Vallowe, 73 N.E. 416, 418 (Ill. 1905) (“Where the question of notice of a dangerous defect is involved, evidence of prior similar accidents has been deemed competent on that question.”).

\textsuperscript{72} See supra notes 30–36 and accompanying text.


\textsuperscript{74} See Ackermann v. Wyeth Pharm., Inc., 526 F.3d 203, 212 (5th Cir. 2008) (“In general, when a manufacturer fails to give adequate warnings or instructions, a rebuttable presumption arises that the product user would have read and heeded such warnings or instructions (the ‘read and heed presumption’.”) (citations omitted); Anderson v. F.J. Little Machine Co., 68 F.3d 1113, 1115 (8th Cir. 1995) (“The presumption that plaintiffs will heed a warning assumes that a reasonable person will act appropriately if given adequate information.”) (citation omitted).
of toxic products. In some instances, when products have been deemed sufficiently homogeneous, courts have adopted market share liability as a means of relaxing or eliminating plaintiffs' causation burden. At the same time, however, the tort reform agenda has resulted in some radically restrictive causation decisions in products contexts, transforming strict liability into strict burden scenarios.

In all events, the old suggestion that products liability differs from negligence in focusing on the nature of the product rather than the defendant's conduct is superficially appealing, but ultimately not precise. Fault standards remain in play, even if the fault inquiry may look quite a bit different in the products setting.

III. FLAWS IN THE TORT REFORM ANALYSIS

We have seen that current products liability litigation manifests at least two sorts of paradigm changes. First, those prosecuting the litigation are poised to take a preservationist stance by arguing that fault should entail legal responsibility, rather than pressing no-fault themes. Although it may appear

75. See Margaret A. Berger, Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts, 97 COLUM. L. REV. 2117, 2140 (1997); see also Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., 133 F. Supp. 2d 162, 174 (E.D.N.Y. 2001) (Hon. Jack B. Weinstein) (asserting that "[t]here is considerable merit in Professor [sic] Margaret A. Berger's suggestion that traditional general causation proof is so difficult in toxic tort cases that it should not be required, but that alternative elements of the cause of action should suffice."); cf. LANDES & POSNER, supra note 50, at 229 ("If the purpose of tort law is to promote economic efficiency, a defendant's conduct will be deemed the cause of an injury when making him liable for the consequences of the injury will promote an efficient allocation of resources to safety and care.").

76. See Sindell v. Abbott Laboratories, 607 P.2d 294 (Cal. 1980) (in DES setting, shifting causation burden to defendants); Hynowicz v. Eli Lilly Co., 539 N.E.2d 1069 (N.Y. 1989) (applying national market-share liability test in DES cases); Minnich v. Ashland Oil Co., 473 N.E.2d 1199, 1201 (Ohio 1984) (shifting burden to defendants to prove that exposures to their printing press solvent ethyl acetate caused harm); see generally Conley v. Boyle Drug Co., 570 So. 2d 275, 285 (Fla. 1990) ("Market share liability is generally looked upon as a theory of last resort, 'developed to provide a remedy where there is an inherent inability to identify the manufacturer of the product that caused the injury.' " (quoting Celotex Corp. v. Copeland, 471 So. 2d 533, 537 (Fla. 1985)); Arthur Ripstein & Benjamin C. Zipursky, Corrective Justice in an Age of Mass Torts, in PHILOSOPHY AND THE LAW OF TORTS 214, 215 (Gerald J. Postema ed., Cambridge Univ. Press, 2001) ("[T]he principles that market-share liability throws into question are felt in a wide range of mass tort and individual tort cases in which litigants and scholars propose a variety of ways to attenuate the requirement of causation.").

77. See, e.g., Borg-Warner Corp. v. Florez, 232 S.W.3d 765 (Tex. 2007) (holding it necessary but not sufficient for asbestos plaintiff to provide evidence of work on a regular basis over extended period of time in proximity to toxic product, and additionally requiring quantified proof of exposure doses).

as a retreat, this stance is analytically sound. Second, products liability and
toxic tort litigation, thereby resting on fault, explicitly reveal the elements of
negligence, and this refined understanding alters the prevailing neoclassical
negligence paradigm a bit.79

The third paradigm shift at issue here is, for its perpetrators, more of a
work in progress than the first two. This involves the tort reform effort to
harness restrictive judicial tendencies to the task of eviscerating products law
as it has evolved in its industrial and post-industrial (service and information
oriented) contexts.80 Professor Henderson, who has led, and rationalized, the
tort reform movement,81 is explicit in his goals, and it is well to revisit his
writings in the light of the first two paradigm inquiries.82

Professor Henderson’s persistent critiques of the current tort system are
as follows: “failure-to-warn doctrine [is] an empty shell of rhetoric that does
not give courts adequate basis on which to distinguish spurious claims from
valid ones”,83 “[c]oncepts such as risk foreseeability, risk-utility balancing,
and proximate causation are . . . devoid of content in the failure-to-warn
context”,84 the causation element of failure-to-warn claims is also bankrupt
because it is merely “wishful thinking” to suggest that workers or other
product users would heed warnings of life-threatening risks;85 the
“atmosphere” characterizing failure-to-warn litigation is one of “inherent
lawlessness”;86 failure-to-warn doctrine is a “[b]ad doctrine [that] serves to

79. See supra note 37 and accompanying text.
80. See generally GEORGE RITZER, EXPLORATIONS IN SOCIAL THEORY: FROM METATHORIZING TO
RATIONALIZATION 204 (2001) (“we have moved into a post-industrial society”); DANIEL BELL, THE
81. See supra note 5–6 and accompanying text.
82. Although Professor Twerski and a few other scholars have co-authored several pieces with
Professor Henderson, and although a number of writers associated with the American Law Institute’s
products liability project skew markedly toward industry and insurance interests—e.g., David Owen,
Products Liability Law Restated, 49 S.C.L. REV. 273 (1998)—this article addresses Professor Henderson’s
persistent and typically more extreme efforts. Compare Sellers Should Not Rescue, supra note 5, at 618
(proffering a no-duty rule that Henderson concedes is “not offered as a proposed revision of the Restatement
of Products Liability.”), with Aaron D. Twerski, The Cleaver, The Violin, and the Scalpel: Duty and the
Restatement (Third) of Torts, 60 HASTINGS L.J. 1 (2008) (accepting the post-sale failure-to-warn duty rule
set forth in RESTAMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 10 (1998)); see also Aaron D.
Twerski, A Moderate and Restrained Federal Product Liability Bill: Targeting the Crisis Areas for
Resolution, 18 U. MICH. J.L. REFORM 575, 599 (1985) (advocating revision of failure-to-warn
jurisprudence, saying, for example, “[t]he time has come to make negligence the sole test for all product
liability cases in which the claim is defective design or failure to warn.”).
83. Sellers Should Not Rescue, supra note 5, at 613.
84. Empty Shell, supra note 6, at 270.
85. Sellers Should Not Rescue, supra note 5, at 614.
86. Empty Shell, supra note 6, at 267, 271; see also Henderson, supra note 6.
increase exponentially the unfairness in a cause of action [negligence] that is already unformed and unbounded”; 87 the products liability regime “itself tacitly permits, even if it does not explicitly invite, jury lawlessness”; 88 this regime engenders “the overwhelming temptation, even for a conscientious decisionmaker,” to put off “to another day the uncomfortable task of ‘getting tough’ with plaintiffs” 89 as one solution, no entity should ever again be liable on a failure-to-warn theory, and rather should be liable only if that entity has “actively misrepresent[ed] the product” 90 and, anyway, what’s the big deal: “Serious risks that are not clearly obvious almost always are covered by consumer warnings” placed on products by suppliers who “deliberately and self-consciously” decide to and “do provide warnings.” 91

The phrases just quoted animate Professor Henderson’s tort reform project. They are not the sort of propositions one might label “true,” because most are rhetorical and some are false. The rhetoric, aimed primarily at judges, seeks to create or reinforce a stereotype about products liability law, especially its failure-to-warn component. 92 Although rhetorical expression is an inherent and legitimate feature of legal discourse, 93 it seems odd for an “empty shell” provocateur to slide into such excess. 94

The methodological claim underlying Professor Henderson’s substantive rhetoric has been that the liability theories with which he disagrees are “so

87.  Empty Shell, supra note 6, at 271.
88.  Id. at 290.
89.  Id. at 303; see also Theodore Eisenberg & James A. Henderson, Jr., Inside the Quiet Revolution in Products Liability, 39 UCLA L. REV. 731, 794 (1992) [hereinafter Quiet Revolution II] (“[P]roducts liability law may be viewed historically as a series of expansionary eras associated with the tearing down of formal barriers to liability.”).
90.  Empty Shell, supra note 6, at 312.
91.  Id. at 310.
riddled with problems that "they are beyond judicial capacity to implement fairly and well."95 These liability theories, says Professor Henderson, open the door to the adjudication of unverifiable factual claims that render cases "unmanageable."96 So for Henderson, judicial oversight, like jury discretion, lapses into lawlessness when it comes to product liability cases.

Although beyond the scope of this article, a sense of history is helpful in evaluating both the doctrinal integrity of American products liability law, as well as Henderson's critique. This branch of tort law evolved in a context of fast industrialization and depersonalized mass production.97 Lack of optimal accountability rules resulted in an inefficient allocation of the losses caused by unsafe design and marketing decisions, as well as production defects.98 Henderson has paid a small bit of descriptive attention to this evolution.99 He believes products liability law went bad when MacPherson v. Buick Motor Company,100 and much later Hemmingsen v. Bloomfield Motors, Inc.,101 decided against a strict privity requirement.102

Professor Henderson's objection to the expansion of products liability exemplifies an important flaw running through his thinking. Henderson either misapprehends or exploits an ambiguity that surfaces when conventional negligence analysis is translated to the products context. He argues that the application of "precise negligence standards" to failure-to-warn products law causes "doctrinal collapse."103 The problem, however, is not with the failure-to-warn doctrine, but rather with Henderson's failure to appreciate that products liability law clarifies the negligence paradigm. After examining Henderson's views on the privity doctrine, this section critiques his, and thereby the tort reform movement's, approaches to

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96. Reshaping the Law, supra note 94, at 53.
99. Closing the Frontier, supra note 95, at 1269–73.
102. See Reshaping the Law, supra note 94, at 52; Closing the Frontier, supra note 95, at 1270;
Empty Shell, supra note 6, at 265 n.5.
103. Empty Shell, supra note 6, at 265, 266–67.
the presently heated issues involving dangerous post-sale component parts, and causation in failure-to-warn products cases.

A. Shifting the Duty Element Back to the World War I Era

1. Background and Agenda

Henderson cogently interprets pre-MacPherson resistance to abandoning the privity rule in product defect cases. The rule, he says, "had served the institutionally important function of keeping relatively unmanageable defect claims out of court."\(^{104}\) Courts were thereby anxious that dispensing with privity might unleash "a steady stream of defect claims that would be difficult to resolve at trial."\(^{105}\)

It is possible that judges had these concerns prior to MacPherson, and at the least this is a nice theory. But for Henderson, courts were not only concerned, but rightly so. What does he mean here? What was it about privity that served the institutional function of preventing unmanageable products liability claims? And if Henderson is correct, does this mean that permitting injured individuals to recover against product sellers and distributors in the commercial chain, with whom they are not in privity, loads the judicial system with unmanageable cases?

Before visiting Henderson’s analysis, it is well to be clear about his endgame, and that of the tort reform movement. It would, of course, be retrograde to advocate a return to pre-World War I era privity requirements in products cases. But the vanguard’s message isn’t too subtle. Advising other countries about what sort of products liability doctrine they should adopt, for instance, Henderson teaches that "the consensus view in this country has been that commercial product sellers are subject to privity-free, nondisclaimable strict liability in tort for physical harm caused by product defects existing at the time of sale."\(^{106}\) However, says Henderson, this doctrine, embodied in Section 402A of the Restatement (Second) of Torts,\(^ {107}\) "must be deemed a failure" and has "proved downright mischievous."\(^ {108}\)

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104. Reshaping the Law, supra note 94, at 52.
105. Id.
108. Henderson & Twerski, supra note 106, at 3; see also Quiet Revolution II, supra note 89, at 794–95 (asserting that "the fall of the privity requirement in negligence cases early in this century" was one in a series of a few expansionary developments for which "[t]he final logical step" would be the elimination
Encouraging courts to "weed" the products liability garden of juror lawlessness, Henderson promotes the judicial screening, and dismissal, of claims on a variety of risk-utility and other "intuitive" grounds. Better yet would be dismissals based on solid, no-duty determinations. These normative positions help contextualize Henderson's "empirical" observation that "[a] defendant can prevail as a matter of law ... by invoking a bright-line, no-duty rule in its favor, such as the old privity requirement in the pre-1960s era." A bit more directly, albeit in the specific context of accountant liability, Cornell professor John A. Siliciano, "assisted" by Professor Henderson, counseled that "the casual ease with which [the privity rule] has been jettisoned ... raises true concerns about the ambitions of tort law."
2. Henderson on Privity

Writing at length about Judge Cardozo’s opinion in *MacPherson*, Henderson says:

The same aspects that made the case attractive politically—automobiles epitomized the emerging culture of mass-produced, nationally-distributed consumer products—made it unattractive institutionally: defect claims in that context were going to present unmanageable issues. Not only were the claims of original, time-of-sale defects difficult to verify in many instances, but reviewing the adequacy of manufacturers’ systems of quality control was quite difficult. On any fair assessment of its facts, *MacPherson* was the sort of questionable case that the privity rule had been keeping out of New York trial courts.114

What Henderson ascribes to the political and the institutional realms, respectively, can both be more clearly viewed, at least initially, in relation to legal doctrine and policy.115 In this regard, Henderson conflates duty A and duty B concerns, and substitutes an apparent sociological insight for legal analysis.

More specifically, the privity issue implicates exclusively duty A (duty to whom) concerns. The “political” appeal of dropping the contractual privity requirement in relation to “the emerging culture of mass-produced, nationally distributed consumer products” was a policy-driven pull in the direction of reallocating product-related loss to those entities in the profit-making chain of product distribution. In other words, the reason for abandoning privity was that the rule itself, as a duty A matter, had come to seem inefficient or otherwise unresponsive to the duty A concerns it was intended to safeguard. In the words of one state’s high court, “enlarging a manufacturer’s liability to those injured by its products more adequately meets public-policy demands to protect consumers from the inevitable risks of bodily harm created by mass production and complex marketing conditions,” and efficiently and justly imposes the cost of injury resulting from a defective product upon the maker, who can both most effectively reduce or eliminate the hazard to life and health, and absorb and pass on such costs, instead of upon the consumer, who possesses neither the skill nor the means necessary to protect himself adequately from either the risk of injury or its disastrous consequences.116

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When Henderson next turns to the "institutional" difficulties posed by the abandonment of contractual privity in the products liability tort context, he removes the issue from its appropriate duty A context, and instead frames his point wholly in terms of duty B and evidentiary concerns. Hence, he speaks of the evidentiary problems posed by verifying "claims of original, time-of-sale defects," and the duty B (duty to do something) issue of whether the manufacturer had an adequate system of quality control. Privity, however, being a duty A relational matter, isn't supposed to do this sort of evidentiary or duty B work; Handy Manny would be slipshod using his chisel to hammer a nail.

Conscious of the duty element's subdivision, we see that the manageability problems at the heart of Henderson's privity analysis are not really privity-related at all. At the same time, however, the public-policy pressures to protect naive consumers from the risks posed by mass-produced products compelled some sort of accountability mechanism. Because the product manufacturer was allegedly at fault in the first instance, and in the best position to abate the hazard, it was important to reach that entity. This could be accomplished in one of two ways: (1) the privity rule could be retained, with the injured individual bringing an action against her immediate seller, who could then bring a third-party claim, or a contribution or indemnification action against the middleman or manufacturer; or (2) the privity rule could be relaxed or abandoned, and the injured individual permitted to sue the manufacturer directly.

Retaining the privity rule under option (1), and requiring a chain of lawsuits in order to reach the optimal target, the original product manufacturer, would obviously result in an inefficient allocation of resources. The costs of bringing multiple actions, both to the court system and the litigants, would be wastefully high. Other inefficiencies would result from the doctrinal need, under (1), to tinker with the duty B element. As Professor Henderson himself acknowledges, proving retailer negligence would be very difficult, and hence "most often there was no retailer liability for manufacturers to indemnify." Accordingly, a sufficiently protective products liability doctrine would likely entail enhanced duty-of-care or

117. Reshaping the Law, supra note 94, at 52–55; see also text accompanying note 114.
118. MARCY KELLMAN, HANDY MANNY: MANNY'S BOOK OF TOOLS (Disney Storybook Press 2008).
120. Reshaping the Law, supra note 94, at 59.
inspection standards, and other adjustments in the tort system with regard to retailers and distributors or other middlemen.

Henderson might respond that we are overstating our case here. Specifically, with privity in place as the general rule, courts could then create exceptions limited to circumstances in which time-of-sale defects are objectively verifiable. For Henderson, the "classic example" of an unmanageable claim, which the privity rule would cure, is the product injury claim arising from an exploding bottle, because the allegation of original defect "rests on events prior to the explosion that are usually witnessed only by the plaintiff."122

Henderson's paradigmatic case, the exploding bottle scenario, does not support his application of the duty privity issue in the evidentiary context. Even if retention of the privity rule may indirectly eliminate certain evidentiary issues (by eliminating lawsuits wholesale), the exploding bottle cases demonstrate that law's evidentiary mechanisms are independently capable of sorting out good from bad claims. The law requires that the plaintiff bear the burden of showing the likelihood that the manufacturer's conduct, and not that of a third party, caused the defect.123 A plaintiff's tampering with the bottle, for instance, would typically be intentional and apparent to the factfinder.124 In all events, the proofs will have to sufficiently

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121. Id. at 60 ("[C]laims based on defendant's mislabeling the poison were typically amenable to objective proof after the event . . . .").

122. Id. at 53.

123. E.g., Pepsi-Cola Bottling Co. v. Yeatts, 207 Va. 534, 151 S.E. 2d 400 (1966) (reversing verdict for plaintiff reversed, where she failed to prove that bottle, rather than store employee or customers caused bottle to explode); Welge v. Planters Lifesavers Co., No. 91-C-2122, 1993 U.S. Dist. LEXIS 4072, at *10 (N.D. Ill. Apr. 1, 1993) ("[T]he appellate court considered plaintiff's failure to exclude other reasonable causes for the bottle exploding as required under Illinois products liability law . . . ."). rev'd, 17 F.3d 209, 211 (7th Cir. 1994) (Posner, J.) ("[A] defendant cannot defend against a products liability suit on the basis of a misuse that he invited.") (original emphasis).

124. E.g., Collins v. Prince William County Sch. Bd., 142 Fed. Appx. 144, 145 (4th Cir. 2005) ("The experiment involved placing aluminum foil in a plastic bottle, adding an over-the-counter cleaner, and recapping the bottle. The cleaner and foil created a chemical reaction, releasing gas into the capped bottle and causing the bottle to explode."); United States v. Vema, 113 F.3d 499, 501 (4th Cir. 1997) ("Opening the tool box would complete an electric circuit and send an electric current from the batteries to the light bulb and model rocket launcher, which would then ignite the gunpowder, thereby causing the bottle to explode.").
implicate the defendant’s culpability. The claims are “manageable” absent the protection of a privity rule.

Henderson continues by more deeply mining his process-oriented resources. Privity, he argues, fulfills a management function akin to rule formality in discrete contexts. To explain, negligence is inherently “unstructured and open-ended,” and “the reasonable person construct does not serve to channel intuition and common sense, leaving triers of fact at sea.” These difficulties are magnified when it comes to products claims against corporate actors, because in such instances “the ‘reasonable person’ rubric is out of its element entirely …”

The example Henderson cites to illustrate useful rule formality concerns the duties of care that possessors of land are deemed to owe to those who come onto the premises and suffer injury. Henderson maps out the “elaborate system of reciprocal rights and duties based on the formal status of the entrant in any given instance,” specifically trespassers (those wrongfully on the premises), invitees (those invited onto the premises typically to engage in business transactions), and licensees (those merely allowed to enter casually onto the premises). By helping courts define gradations in the duty of care, these formal structures render disputes between possessors and the injured entrants manageable.

125. Simpson v. Bio-Wash Prods., 172 F. Supp. 2d 372, 373–74 (D. Conn. 2001) (when plaintiff turned bottle on the shelf, it spontaneously exploded. Defendant’s agent later “indicated that defendant had experienced problems in the past with that type of bottle,” and its president “acknowledged that the defendant knew of the problem with the particular type of bottle that caused plaintiff’s injury”); Doster v. Delta Beverage Group, Inc., No. 92-3084 Section “F”, 1993 U.S. Dist. LEXIS 11550, at *8 (E.D. La. Aug. 18, 1993) (“[B]ecause plaintiff points to defendant’s admissions that within the bottling industry it is known that a two-liter soft drink bottle could fail and cause the bottle cap to fly off, a jury issue arguably still exists as to whether or not it was reasonable to put a warning on the label of the Pepsi bottle.”); cf. Gerber v. Faber, 129 F.2d 485, 489 (Cal. Ct. App. 1942) (“it is clear that plaintiff’s accident may have resulted from some cause other than any negligence on the part of defendant. It appeared from the testimony … that the bottle which exploded in plaintiff’s hand may have been on his truck for a week. There was no evidence that the bottle had been carefully handled during that time or during the process of its delivery … ”).


127. Reshaping the Law, supra note 94, at 57; see also James A. Henderson, Jr., Expanding the Negligence Concept: Retreat From the Rule of Law, 51 Ind. L.J. 467, 467–77 (1976).

128. Reshaping the Law, supra note 94, at 57; but cf. Klein v. Board of Tax Supervisors, 282 U.S. 19, 24 (1930) (Holmes, J.) (“[I]t leads nowhere to call a corporation a fiction. If it is a fiction it is a fiction created by law with intent that it should be acted on as if true.”).

129. Reshaping the Law, supra note 94, at 56.

130. Id.

131. Id.
Because this structuring of premises liability law involves duty A (duty to whom) issues, Henderson’s analysis here is more appropriately situated within his discussion of privity, which is also a duty A matter. The best way to assess the soundness of any such duty A structures, however, is not by asking whether those structures serve non-duty A interests (such as Henderson’s manageability and verifiability concerns), but rather whether they bear a defensible relation to the class of persons harmed by the relevant defects. This way of looking at things permits us rationally to ask whether the particular duty A rule fits the class of persons affected by, or forming the predicate of, that rule.

For instance, premises liability law traditionally imposes upon possessors a minimal duty of care, or none at all, in relation to adult trespassers. This duty A limitation is rooted in a sense of the landowner’s right to exclusive possession of her property and the use she makes of it. Courts apply an exception to this limitation, however, when the trespasser’s presence is foreseeable. In that circumstance, the possessor would have to be deemed at least somewhat culpable for the trespasser’s injury, triggering a duty to that individual or class.

This sort of premises liability scenario finds an appropriate duty A analogy in the subsequent modification doctrine in products liability law. The general rule is that the seller has a defense when a product is substantially modified post-sale, and this modification brings about the dangerous feature. At comment h to Section 402A, however, the Restatement (Second) of Torts advises that, where the seller has reason to anticipate that a danger may result from a particular product use, it will have a duty to warn product users of that danger. So, for instance, in Liriano v. Hobart Corporation, the New York Court of Appeals explained that “it is neither infeasible nor onerous, in some cases, to warn of the dangers of foreseeable modifications that pose the risk of injury.”

135. RESTATEMENT (SECOND) OF TORTS § 402A, § 1(b).
136. Id. at cmt. h.
138. Id. at 239–41 (omitting citations), accord Davis v. Berwind Corp., 547 Pa. 260, 267 (1997) (“Where the product has reached the user or consumer with substantial change, the question becomes whether the manufacturer could have reasonably expected or foreseen such an alteration of its product.”).
The foreseeability exceptions within the rules relevant to trespasser injuries and subsequent product modifications are sensible because, in those circumstances, the no-duty rules are no longer defensible. The possessor’s or seller’s legal character is deemed to have changed vis-à-vis the injured party, in other words, because the ultimate risk or harm was foreseeable to that defendant. The general duty A principles—absolving the landowner and the product seller, respectively, of a duty to those who have wrongfully entered onto the premises or been harmed by altered products—give way to other duty A concerns because the allocation of fault as between the two parties has shifted. Importantly, this duty A analysis is self-contained, and does not require us to muddy the waters with duty B or evidentiary considerations.

The analogous question that should be posed in the products liability privity context is whether the product manufacturer’s direct responsibility for harms foreseeably caused by its product makes good policy sense; or, inversely, whether adhering to the privity rule to block any such liability is defensible. As a duty A matter, and consistent with duty A concerns, our jurisprudence answered “no” to the latter question based on a policy understanding that the manufacturer is in the best position to protect the public from the dangers of defective products. Professor Henderson’s duty B and verifiability analysis obscures the way.

In this regard, law’s treatment of the very premises liability doctrine upon which Henderson relies counts against his approach. Perhaps the legal distinction (leading to a graded duty-of-care structure) between invitees, licensees and trespassers provided some level of enhanced manageability “on a case-by-case basis,” as Henderson claims. Nevertheless, these feudal distinctions have been minimally defensible when more cleanly seen in terms of duty A considerations; this is because the land possessor’s level of fault is not necessarily different as between those classes of injured entrants. Accordingly, the modern trend has been to abandon the traditional grading of premises duty in favor of a straightforward foreseeability approach.

140. Re Hopkins the Law, supra note 94, at 56.
141. E.g., Basco v. Miller, 352 N.E.2d 868, 872 (N.Y. 1976) (“[W]e have demonstrated our inclination to correlate the duty of care owed plaintiff with the risk of harm reasonably to be perceived, regardless of status, and concurrently consider the question of foreseeability.”); Rowland v. Christian, 443 P.2d 561, 564-65, 568 (Cal. 1968) (“[I]t has been suggested that the special rules regarding liability of the possessor of land are due to historical considerations stemming from the high place which land has traditionally held in English and American thought, the dominance and prestige of the landowning class in England during the formative period of the rules governing the possessor’s liability, and the heritage of
B. Retrofitting Products Liability Law to the No-Duty-to-Rescue Doctrine

We have seen that the failure conscientiously to subdivide the duty element into its constituent parts can lead to an inappropriate perspective concerning privity, a duty A concern. Professor Henderson exploits this ambiguity by assigning this element duty B and evidentiary tasks.

Apart from the privity issue, another recent focus of his writing, leading a tort reform platoon, has concerned the question of whether sellers of seemingly “safe” products should have a duty to warn the ultimate users of such products about dangerous components that will foreseeably be added post-sale. In this effort, Henderson again fudges the doctrinal boundaries, and leaps improbably from the products liability arena to the no-duty-to-rescue doctrine. Henderson’s flaw in this respect is somewhat the reverse of his misreckoning about privity. For in the dangerous component circumstance, the duty A issue has already been resolved, and Henderson mistreats the rescue doctrine, which is a competing duty A matter, as if it were a duty B matter.

The specific issue Henderson addresses is whether a manufacturer, let’s say of an industrial pump, should be held liable for failure to warn of the dangers of asbestos exposure resulting from the post-sale application of insulation (or other ultra-hazardous asbestos-containing component parts) manufactured and installed on the pump by another. Henderson presupposes that, because the component part has been supplied by a third party, the applicable legal principles derive from the rescue doctrine, and he touts the traditional reluctance of courts to impose a duty to rescue those one chooses


143. See Sellers Should Not Rescue, supra note 5.

144. Id. at 595.
not to assist.145 In a no-duty-to-rescue circumstance, the potential rescuer is a stranger to the victim, does not realize a benefit from the victim's peril, and his knowledge of the danger does not matter.146

The problem with Henderson's analysis here is not so much that he conflates duty A (duty to whom) and duty B (duty to do what) concerns, as that he fails to appreciate the type of duty A concept represented by the no-duty-to-rescue doctrine. A duty- or no-duty-to-rescue rule expresses a duty B proposition, because any such rule says what the party is obliged or not obliged to do. However, the rescue-related rule is a rule only by virtue of the relation of the parties to one another, the relative characteristics of the class of victims, and the lack of fault that can be attributed to the would-be rescuer for the victim's predicament. In the rescue situation, the rescuer has no pre-existing duty to safeguard the victim from the peril encountered.

For law's purposes, the rescue concept is a legal theoretical construct, and therefore only those potential rescuers falling within the theoretical parameters qualify for the no-duty defense.147 By defining the product seller's obligations to ultimate product users exposed to dangerous post-sale components in the terms of the rescue doctrine, Henderson begs the question of whether this is a rescue situation at all. Because the seller of a final product that will foreseeably—from the seller's point of view—be modified post-sale by the addition of the hazardous component does not fall within the class of would-be rescuers as defined under the theoretical or juridical construct, Henderson's approach would distort and indefensibly expand that construct.148

More specifically, Henderson acknowledges a significant products liability rationale to be "shifting the social costs of risky activities from the

145. Id. at 601; see also Cuyler v. United States, 362 F.3d 949, 953 (7th Cir. 2004) ("Tort law imposes on people only a duty to take reasonable care to avoid injuring other people, and not a duty to rescue others from injuries by third parties, though there are exceptions.").

146. Sellers Should Not Rescue, supra note 5, at 602 (citing RESTATEMENT (SECOND) OF TORTS § 314 (1965)); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 37 (Proposed Final Draft No. 1, 2005)).

147. See generally Raymond Saliou, Droit civil et droit compare, 61 REVUE INTERNATIONALE DE DROIT COMPARE 24 (1911) ("A juridical construct is the enunciation as a positive formula of rational ideas, drawn from social perspective, and reduced to specifics which eliminate, as far as is possible, any form of [the] arbitrary."); quoted in Christophe Jamin, Saliou's and Lambert's Old Dream Revisited, 50 AM. J. COMP. L. 701, 705 (2002); Cees P. Middendorp, On the Conceptualisation of Theoretical Constructs, 25 QUALITY & QUANTITY 235, 235 (1991).

innocent victims of those activities to those who directly benefit from them.\textsuperscript{149} The non-rescuer, of course, doesn’t really have a “victim,” in any meaningful sense of that word. And in no sense does the non-rescuing stranger “directly benefit” from the risky activity that imperiled the victim. In other words, the non-rescuer, a stranger to the victim, gains no benefit from his or her inaction; nor, under the construct, would the rescue effort pose a risk independent of the costs of the rescue itself.\textsuperscript{150}

Things are different when it comes to industrial pumps. The purchaser is a commercial or institutional buyer operating in a competitive market, with at least some range of choices when selecting pumps. The purchaser may also stand in the shoes of an employer of individuals who will directly work with the pump in the field, or it may be a middleman expecting to resell the pump to such an employer or contracting venture.\textsuperscript{151} Moreover, for the purchaser, the pump is typically just one of the many items it must buy to carry on its enterprise.\textsuperscript{152} The seller can be expected to have a greater degree of knowledge than the purchaser about the pump, its necessary components, and the health and safety implications of those materials.\textsuperscript{153}

The seller’s direct cost in stamping or tagging a warning is low. The transaction costs to the purchaser associated with the seller’s warning, however, might be relatively high. The purchaser, for example, might be compelled to expend resources finding an alternate component part supplier, one marketing a nonasbestos insulation. Or the purchaser may need to supply respirators, install special ventilation systems, or take other abatement measures.\textsuperscript{154} Also from the purchaser’s point of view, a frighteningly informative warning would foreseeably engender labor discipline issues.\textsuperscript{155}

\textsuperscript{149} Sellers Should Not Rescue, supra note 5, at 616.
\textsuperscript{151} E.g., Graco, Inc. v. Binks Mfg., 60 F.3d 785, 788 (Fed. Cir. 1995).
\textsuperscript{152} E.g., Illinois Power Co. v. Comm'r, 83 T.C. 842, 858 (1984); In re Peterson Construction Corp., 128 N.L.R.B. 969, 991 (1960).
\textsuperscript{153} E.g., McAlpin v. Leeds & Northrup, Co., 912 F. Supp. 207, 211 (W.D. Va. 1996) ("[A] post-sale duty to warn promotes a continuous flow of information from the more knowledgeable manufacturer to the industrial purchaser and all foreseeable users."); Gray v. Badger Mining Corp., 676 N.W.2d 268, 281 (Minn. 2004) ("If the manufacturer has superior knowledge, it has a duty to relay that information to the intermediate purchaser.").
\textsuperscript{154} E.g., N.Y. COMP. CODES R. & REGS., tit. 12, § 12-1.6(a) (2009).
\textsuperscript{155} See OSHA Regulations Relating to Labor Discrimination Against Employees Exercising Rights Under the Williams-Steiger Occupational Safety and Health Act of 1970, 29 C.F.R. § 1977.12(b)(2) (2009) ("[O]ccasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous
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\[ \text{All of this enters into the seller's calculus when deciding whether to warn of the known dangers of hazardous component parts likely to be applied to the product. The seller will lose business if it warns, and gain business if it fails to do so. Choosing not to warn, the seller directly benefits from saddling end users with the social costs of the risky activities associated with its product. The industrial pump products liability scenario therefore contrasts markedly with the rescue construct, because in the products case the duty rule shifts the social costs of risky activities from the innocent victims of those activities to those who directly benefit from them.} \]

A court could, of course, announce that a product seller has no duty to a particular class of individuals injured by virtue of a product hazard.\(^{156}\) However, product sellers already have a noncontroversial duty to act prudently in relation to the well-being of their products' end users.\(^{157}\) With duty thereby established, foreseeability of the risk (along with causation and injury) determines the seller's liability for not having warned the end user.\(^{158}\) Henderson's latent claim is that, although sellers may owe a duty of care to end users of their products (duty A), they do not have a duty to rescue (duty B, presumably) those users. But we now see why that's not coherent.

One of Henderson's maneuvers has been to say that what he rejects here is "component maker liability for failure to warn of asbestos-related hazards in products made by others."\(^{159}\) The component part seller will be liable to those injuriously exposed to the component, but not to those harmfully condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels.

\(^{156}\) E.g., Edwards v. Honeywell, Inc., 50 F.3d 484, 487 (7th Cir. 1995) ("The question we must decide, therefore, is whether Honeywell's duty of care extended to firemen who might be summoned to fight the blaze.").

\(^{157}\) E.g., Kosminka v. Polaris Indus., 462 F.3d 74, 81 (2d Cir. 2006) ("[A] manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known, and of the danger of unintended (but reasonably foreseeable) uses of its product."); Wilson v. Good Hunger Corp., 757 F.2d 1293, 1313 (D.C. Cir. 1985) ("[A] seller or manufacturer of a dangerous product has a duty to warn users of foreseeable risks from misuse of the products and to provide specific directions for safe use."); Roberts v. C.G. Sargeants Sons Corp., No. 88-CV-118, 1990 U.S. Dist. LEXIS 493, at *18 (N.D.N.Y. 1990) ("[T]he manufacturer of a product which may be hazardous under foreseeable conditions of use has the duty to adequately warn the users of the hazards posed by the product, and a product is defective (and hence 'not reasonably safe') if adequate warnings are not provided.").


\(^{159}\) Sellers Should Not Rescue, supra note 5, at 595.
exposed to the later-assembled final product if the component itself is safe.\textsuperscript{160} In this way, “products” are conceptually distinguished from component parts.\textsuperscript{161} The policy rationale for exempting component part sellers from responsibility even from foreseeable dangers inhering in the finished product is to avoid inefficiently imposing upon “mere suppliers” of such component parts the costs of scrutinizing larger systems they had no role in developing.\textsuperscript{162}

But in the context of the sort of cases Henderson is addressing, the defendant is the seller of the product to which the hazardous components have been added. This scenario precludes a component parts defense, as well as application of the no-duty-to-rescue doctrine, and is most tidily addressed by the rule that sellers have a duty to warn product users of foreseeably dangerous post-sale product modifications.\textsuperscript{163}

\textit{C. Ramping up the Causation Burden}

We have explained that the causation element is tripartite, comprising causation A, linking the breach of legal duty to the harm (legal or proximate causation), causation B, establishing the general capability of the mechanism to cause the harm (general causation), and causation C, tying the mechanism in the particular case to the particular harm (specific causation).\textsuperscript{164} Causation appears to be unitary in the ordinary negligence case, in which injury manifests almost immediately upon the injurious contact. Most tort fact patterns are like this.

Because causation typically folds into a single concept, the plaintiff’s burden of proof on this element is also singular. The issue might be whether

\begin{footnotesize}
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\item \textsuperscript{160} \textit{Restatement (Third) of Torts: Products Liability} \S\ 5 (1998).
\item \textsuperscript{161} Braaten v. Saberhagen Holdings, 198 P.3d 493, 499 n.7 (Wash. 2008); see Hininger v. Case Corp., 23 F.3d 124, 129 (5th Cir. 1994) (“[W]e believe that the Texas Supreme Court would distinguish between the manufacturer of the finished product and the component supplier [given, inter alia, the plaintiffs'] lack of any expectation that . . . the upstream component supplier would respond to defects in the finished product.”); see generally J. Denny Shupe & Todd R. Staggard, \textit{Toward a More Uniform and “Reasonable” Approach to Products Liability Litigation: Current Trends in the Adoption of the Restatement (Third) and Its Potential Impact on Aviation Litigation}, 66 J. Air L. & Com. 129, 162 (2000) (explaining that under Section 5 of the \textit{Restatement (Third) of Torts: Products Liability}, "a component manufacturer or distributor will be liable for harm caused by a defect in its own product, but not for defects arising out of the integration of its component(s) into a final product (such as a turbine engine or passenger aircraft) unless the manufacturer or distributor participated in the integration of the component.").
\item \textsuperscript{162} Cronfield v. Quality Control Equip. Co., 1 F.3d 701, 704 (8th Cir. 1993).
\item \textsuperscript{163} See supra notes 135–38 and accompanying text.
\item \textsuperscript{164} See supra notes 63–65 and accompanying text.
\end{enumerate}
\end{footnotesize}
the collision was powerful enough to have caused the plaintiff's injuries. Or whether the tractor-trailer into which defendant collided was parked partly on or entirely off the road. Or perhaps whether plaintiff's cattle-transport truck was traveling on the wrong side of the highway prior to the crash.

In the products, or especially toxic torts, setting, all three causation sub-elements come into play. Is the toxin generally capable of causing, or likely to cause, lung cancer? Did the toxin cause plaintiff's lung cancer? Was the defendant's conduct or omission the legal or proximate cause of the harm? Although strict liability conventionally relaxes the scienter element, jurists have grabbed the zeitgeist in the causation realm when the cause of action arises from a seller's failure to warn. The "heeding" presumption addresses the extraordinary difficulty a litigant would face were she required affirmatively to prove that she would have acted on a warning. The presumption shifts the burden to the defendant to show that the litigant would likely not have heeded the warning, a burden that is not too onerous under the appropriate circumstances.

Professor Henderson has campaigned hard to shift the paradigm here, to require the injured citizen to prove affirmatively that she would have heeded

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168. See, e.g., Bailey v. R.J. Reynolds Tobacco Co., No. 4:07-CV-180-P-S, 2009 U.S. Dist. LEXIS 86175, at *2 (N.D. Miss. 2009) ("All of the plaintiff's claims (deceptive advertising, fraudulent and negligent misrepresentation) in this particular case require proof of medical causation—not only general causation (that smoking can cause the decedent's injuries and death), but also specific causation (that the smoking did in fact cause the decedent's injuries and death) ... This is because the claims seek recovery on the theory that alleged deceptive advertising and misrepresentation proximately caused the decedent's injuries and death.") (emphasis in original); In re Aredia & Zoneta Prods. Liab. Litig., No. 3:06-MD-1760, Case No. 3:06-0381, 2009 U.S. Dist. LEXIS 72084, at *2-3 (M.D. Tenn. 2009) (noting that apart from general and specific causation, plaintiff's proximate causation burden is to show that, for defendant's alleged misconduct, the injury would not have occurred).
169. House v. Armour of America, Inc., 929 P.2d 340, 347 (Utah 1996); Pavlik v. Lane Limited/Tobacco Exporters Int'l, 135 F.3d 876, 883 (3d Cir. 1998) ("[I]t would be illogical, and contrary to the basic policy of [Restatement (Second) of Torts] § 402A, to accept that a product sold without an adequate warning is in a 'defective condition' ... while simultaneously rejecting the presumption that the user would have heeded the warning had it been given.").
170. See Anderson v. Hedstrom Corp., 76 F. Supp. 2d 422, 441 (S.D.N.Y. 1999) (noting that heeding presumption can be rebutted by proof that adequate warning would have been futile since plaintiff would not have read it, based upon plaintiff's failure to read allegedly inadequate warnings on product); Holmes v. Honda Motor Co., 960 F. Supp. 844, 854 (D. N.J. 1997) (noting that evidence that plaintiff was warned of alcohol consumption prior to riding allegedly defective product and chose to consume alcohol anyway is relevant to rebutting heeding presumption in failure to warn theory of liability, in that it "portrays an individual who is unlikely to heed warnings").
a warning, and thereby to treble the causation burden of proof in relation to other negligence (non-strict liability) cases. Without supporting methodology, Henderson takes the ultimately cavalier position that, even if adequately and conspicuously informed that unprotected exposure to a toxic chemical or material may cause cancer or other life-threatening harm, working people will not pay any attention, and it is merely “wishful thinking” to suggest otherwise.\textsuperscript{172}

Henderson claims that “evidence” of this wishful thinking “is to be found in the fact that many jurisdictions deem it necessary to supply plaintiffs with ‘heeding presumptions’ in order to render such claims facially plausible.”\textsuperscript{173} But it is crude to suggest that the heeding presumption exists principally, or solely, for the purpose of making it “facially plausible” that workers would take action to safeguard their own health and well-being. Rather, although Henderson quite strongly disagrees, the presumption appears to have originated in comment j to Section 402A of the Restatement (Second) of Torts, which states: “Where warning is given, the seller may reasonably assume that it will be read and heeded.”\textsuperscript{174}

This article next critiques Henderson’s argument that the heeding presumption cannot be logically derived from comment j. This point is significant, beyond the semantics, because rooting the presumption in Section 402A clarifies its centrality, from the outset, in the American strict products liability scheme. We then show that Henderson amasses unearned and unwarranted cache for his stance against the heeding presumption by taking causation A to tell the whole story, without regard for the additional causation sub-elements that burden the plaintiff’s case.


\textsuperscript{172} Sellers Should Not Rescue, supra note 5, at 614.

\textsuperscript{173} Id.

\textsuperscript{174} Restatement (Second) of Torts \S 402A comm. j (1965).
1. The Semantic Roots of the Heeding Presumption

Comment j to Section 402A of the Restatement (Second) of Torts includes the following language: “Where warning is given the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.” Many jurisdictions adopted the heeding presumption to relax the burden upon failure-to-warn plaintiffs in establishing legal causation, and viewed this approach “consistent with the Restatement.” They reasoned that, because a manufacturer or seller would benefit when a warning was provided, based on comment j, a “logical corollary” would result in the product user’s similarly benefitting where a warning was not given. Jurists also, however, noticed Henderson and Twersky’s criticisms of this application of comment j, and the language quoted above was ultimately dropped from the Restatement (Third) of Torts.

What is Henderson’s compelling analysis? He first says the heeding presumption “serves to get the plaintiff over the hurdle of establishing causation in all but the weakest of cases.” This claim, compressing the causation element in its entirety into the proximate causation sub-element addressed by the presumption, softens the jurists’ perspective to ready them to receive Henderson’s core argument. By purporting to derive the heeding presumption from comment j, says Henderson, the logic of the courts is “seriously flawed,” a “false logic” that constitutes “serious error” because “[c]omment j never addresses the causation issue . . . .” Rather, it merely intends to say that, if a risk is not obvious, and if a defendant owes a duty to warn, then the warning will render the product

175. Id.
178. See Balbos, 604 A.2d at 468 n.14.
179. RESTATEMENT (THIRD) OF TORTS § 2 (1998); see Ackermann v. Wyeth Pharm., 526 F.3d 203, 212-13 (5th Cir. 2008). A more serious difficulty with comment j, however, was its susceptibility to a reading by which issuing a warning might count as overriding the need for a safer, feasible alternative design. See generally Howard Latin, Good Warnings, Bad Products, and Cognitive Limitations, 41 UCLA L. REV. 1193, 1196-97 (1994); Skyhook Corp. v. Jasper, 560 P.2d 934 (N.M. 1977), overruled by Klopp v. Wackenhut Corp., 824 F.2d 293 (N.M. 1992).
180. Empty Shell, supra note 6, at 278.
181. Id. at 279.
“no longer in a defective condition...”182 Because comment j doesn’t concern causation, only false logic could distort the comment into a justification for the heeding presumption.183 Henderson’s claim loosed his cracker program upon the legal world.184

Let’s pause to reconsider the quoted language from comment j. Henderson assigns the comment a limited role. To most efficiently fit his interpretation, the comment need only have read as follows: “A product bearing a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.” This informs sellers about how they may fulfill their duty B obligation. The additional opening clause—“Where warning is given the seller may reasonably assume that it will be read and heeded”—would have been superfluous. Assuming, however, that the clause is not superfluous, it can only be seen as causation-related: it speaks of the effect that the seller may assume to have resulted from the warning. Henderson’s premise—that “[c]omment j never addresses the causation issue”185—is apparently false.

There is another interesting way to make the point. Aaron Meskin and Jonathan Cohen have offered a counterfactual theory of information. Here is the theory: “(S*) Information relations are constituted by the non-vacuous truth of counterfactuals connecting the information relata. Thus, x’s being F carries information about y’s being G if and only if the counterfactual conditional if y were not G, then x would not have been F is non-vacuously true.”186 The only interpretation of comment j that makes sense of Henderson’s view is one whereby the product user’s being someone who heeds warnings conveys information about whether the product is defective. In other words, Henderson claims that comment j’s first clause in the quoted language—“Where warning is given the seller may reasonably assume that it will be read and heeded”—does not address causation, but rather is wrapped

182. Id.
183. Id. at 278–79.
185. EMPTY SHELL, supra note 6, at 279.
into the question of whether the product is defective, hence giving rise to the seller's duty to warn.

We can suppose that the reporters meant to add content, and information, to their comment when they included the first clause. Applying the counterfactual theory to comment j in a way consistent with Henderson's reading, we can say: the product user's being someone who heeds warnings carries information about the product's not being defective if and only if it is non-vacuously true that if the product were defective, then the product user would not have been someone who heeds warnings.187 But this is nonsensical.188 More sensible is a construction of comment j that attributes causal efficacy to the publication of a warning.

2. The Unbearable Lightness of Causation

We have seen that, in rhetorical service to his argument that the Restatement (Second) of Torts cannot have warranted the heeding presumption, Henderson reduces causation to its legal causation sub-element; or, put differently, he takes causation A to comprise the whole of the causation element.189 He commits the same fallacy of composition when it comes to his substantive claims against the presumption.190

For Professor Henderson, the causation issue is precisely what dooms failure-to-warn law even as it salvages the design defect cause of action to some extent. This is because, in products cases alleging defective design, there is ordinarily "hard data" available to document the injury-causing event: "a user whose hand is caught and injured can usually identify the physical characteristics of the machine, how her hand was trapped, where she was standing, the work environment surrounding the machine, and so on."191 Henderson's claim obscures the fact that a failure to warn is itself often

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187. See supra note 186 and accompanying text.
188. The reader may want to check our counterfactual analysis against the one that would pertain were the first clause of the comment j paragraph replaced by the following: Where warning is given the seller may reasonably assume that the user will not be exposed to unreasonable risk. Then, our comparable analysis of the new paragraph would be: the product user's being someone not exposed to unreasonable risk carries information about the product's not being defective if and only if it is non-vacuously true that if the product were defective, then the product user would have been someone exposed to unreasonable risk.
189. Empty Shell, supra note 6, at 278; see supra note 180 and accompanying text.
190. THOMAS FOWLER, THE ELEMENTS OF DEDUCTIVE LOGIC 151 (Clarendon Press 10th ed. 1895) ("This is called the fallacy of Composition . . . if we argue from a term taken distributively as if it were taken collectively . . . .")
191. Empty Shell, supra note 6, at 304–05.
considered to be a form of design defect,\textsuperscript{192} and that in those contexts the heeding issue is relevant to determining whether an alleged design defect proximately caused the plaintiff’s injuries.\textsuperscript{193}

But more to the point, Henderson’s lengthy examination of the types of hard data typically available in design defect cases does not support his claim that the causation doctrine “operates reasonably well” there but not in failure-to-warn cases.\textsuperscript{194} This is because, as this article’s lesson teaches us to recognize, his portrayal of “the injury-causing event”—how plaintiff’s hand might have been trapped, and so forth—has to do exclusively with the causation C sub-element (linking the mechanism in the particular case to the particular harm).\textsuperscript{195} Wholly ignored by Henderson is the fact that all failure-to-warn cases, like all negligence cases generally, include causation C.\textsuperscript{196}

Henderson thereby affords a healthy causation element to the design defect doctrine based on its causation C component, while ascribing to failure-to-warn a diseased causation element by demanding, \textit{sub silentio}, that its causation A sub-element do causation C’s work. This subtle conflation skews his analysis. By this maneuver Henderson objects to the unbearable lightness of the plaintiff’s causation burden.\textsuperscript{197}

Henderson continues that, by virtue of the heeding presumption, “[t]he plaintiff’s causation case is made excessively easy” because plaintiff is relieved from the need to prove that “she would have read, understood and remembered the warning,”\textsuperscript{198} that she would have “altered her conduct to avoid the injury,”\textsuperscript{199} that she would have been capable of the sort of “cognitive learning” that would have permitted her to “process information in a logical and predictable manner,”\textsuperscript{200} and perhaps that she did \textit{not} contemporaneously

\textsuperscript{192} Wertheimer, \textit{supra} note 2, at 1201–02; Clevenger v. CNH Am., LLC, 340 Fed. Appx. 821, 824 (3d Cir. 2009).
\textsuperscript{194} \textit{Empty Shell}, \textit{supra} note 6, at 305.
\textsuperscript{195} \textit{Id.} at 304–05. To be fair to Professor Henderson, a failure to differentiate causation C (specific causation) from causation A (proximate or legal causation) has led other prominent scholars astray. E.g., \textit{Mark A. Geistfeld, PRINCIPLES OF PRODUCTS LIABILITY} 180 (Foundation Press 2006) (analogizing the heeding presumption, a causation A matter, with market-share liability, a causation C doctrine, writing that “[t]he heeding presumption is particularly puzzling when compared to the DES cases. If causation could be presumed rather than affirmatively proven, the courts would not have had to struggle with the issue of market-share liability”); \textit{see supra} note 76 and accompanying text.
\textsuperscript{196} E.g., Minter v. Prime Equip. Co., 451 F.3d 1196, 1214 (10th Cir. 2006).
\textsuperscript{198} \textit{Empty Shell}, \textit{supra} note 6, at 305–06.
\textsuperscript{199} \textit{Id.}
\textsuperscript{200} \textit{Id.} at 307.
hold the sort of beliefs, or possess the sorts of information, that would have
significantly impaired her ability to process the additional, warnings-related
information.\footnote{Id.}{201} No more walking on air.

Even on its own terms, Henderson’s focus on the individual’s capabilities
and predilections fails, of course, to account for the group dynamics and
interpersonal communication engendered by an adequate warning. When, for
example, employees at a worksite or members of a family have safety
information available to them, and when this information may implicate each
product user’s well-being, it is likely the warning will be shared across the
group regardless of any particular individual’s cognitive inclinations or
limitations.\footnote{See R. Scott Tiendale et al., Shared Cognition in Small
Groups, in BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: GROUP
PROCESSES 1, 11–12 (Michael A. Hogg & Scott Tiendale eds., Blackwell
Publishers, Ltd. 2001) (“[U]nshared information becomes more prevalent in
group discussion over time. Thus, extending the discussion time of groups should help to
insure that unshared information gets brought up during discussion.”); Symposium,
Sentencing: What’s at Stake for the States? Panel Two: Considerations at
Sentencing—What Factors Are Relevant and Who Should Decide?—Paul H. Robinson
& Barbara A. Spellman, Sentencing Decisions: Matching the Decisionmaker to the
information is shared (that is, in which all members have the same information at
their disposal) perform better than groups that do not”); Gwen M.
Wittenbaum & Ernest S. Park, The Collective Preference for Shared Information, 10
CURRENT DIRECTIONS IN PSYCHOL. SCI. 70 (2001); see also James Surowiecki, The
Wisdom of Crowds: Why the Many Are Smarter than the Few and How Collective
Wisdom Shapes Business, Economies, Societies, and Nations 78 (Doubleday 2004)
(“[E]verything we know about cognition suggests that a small group of
people, no matter how intelligent, simply will not be smarter than the larger group.”).

202. Id.

203. See supra notes 169–70 and accompanying text; see also Mark Geistfeld,
(If the purpose of failure-to-warn products liability “is to give sellers an incentive
to disclose the efficient amount of risk-related information, the presumption
of causation should be retained.”).
Finally, Henderson undermines his own argument against the heeding presumption, to some extent, by viewing failure-to-warn cases as marginal at best. By his lights, the typical case is not "paradigmatic" because sellers "almost always" issue adequate warnings of serious, non-obvious risks, and dutifully decide whether to warn "quite deliberately and self-consciously."\(^{205}\) Even in the possible world where this may be so, however, that world, like the one we know, includes the heeding presumption and failure-to-warn liability. The counterfactual issue is whether, in the alternative possible world for which Henderson advocates, sellers would have the incentive "almost always" to issue adequate warnings.

IV. CONCLUSION

Things change. Products liability litigation is not different in this respect. Following Professor Henderson, tort reform attacks the perceived "lawlessness" of products-related tort rules and particularly the "empty shell" of its failure-to-warn theory.\(^{206}\) But Henderson's writing conflates the elements, or sub-elements, of negligence. This article has specifically critiqued his views on two aspects of duty in the products liability context—the privity doctrine and the dangerous post-sale modification scenario—as well as his approach to causation in failure-to-warn products cases.\(^{207}\) Rather than Henderson’s reconciling the conflations, the conflations are themselves the form that his reconciliation with the negligence doctrine takes.\(^{208}\)

The paradigm shift that the tort reform movement seeks is a work in progress. To the extent that it has progressed, those on the other side of the divide have engaged a preservationist gear.\(^{209}\) Hence a second paradigm shift within products litigation consists of the impulse, countervailing the tort reform effort, to maintain products accountability when the seller is at fault. Toward this end, preservationists should benefit from showing that strict products liability, rather than being a no-fault system, is a fault-based doctrine.

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205. *Empty Shell*, *supra* note 6, at 310.
206. *id.* at 267, 271.
207. *See supra* notes 104–205 and accompanying text.
208. Cf. Adam Gopnik, *Trial of the Century: Revisiting the Dreyfus Affair*, THE NEW YORKER, Sept. 28, 2009, at 72, 78 (Speaking of groups coping in an environment that oppresses them, saying "from outside, we wonder how they reconcile the contradictions. But they don’t have to reconcile the contradictions in order to cope with reality. The contradictions are themselves the form that a reconciliation with reality takes.").
209. *See supra* note 4 and accompanying text.
Insisting on a fault-based products doctrine is also a good analytic move. Here the article has advocated for a third paradigm change. That strict products liability is a species of negligence compels us to fine-tune the elements of negligence law. These are a bit more nuanced than traditionally taught. However small, the shift in the formula hones our ability to critique tort law agendas, and in this case should help forestall the creeping debacle in products liability law.