# THE HEEDING PRESUMPTION AND ITS APPLICATION: DISTINGUISHING NO WARNING FROM INADEQUATE WARNING

## I. INTRODUCTION

One of the essential goals of products liability law is to create safer and better products for the consumer. Rules for establishing the causation element of product liability causes of action should reflect that goal.[1] With this goal in mind, many states have adopted the "heeding presumption" to establish causation in failure to warn actions.[2] A plaintiff/user[3] who benefits from the presumption need not prove that the manufacturer's failure to warn of a product's danger caused the plaintiff's injury.[4] Instead, the trier of fact presumes causation—that an adequate warning would have been

1. *See, e.g.*, Richard C. Henke, *The Heeding Presumption in Failure to Warn Cases: Opening Pandora's Box?*, 30 SETON HALL L. REV. 174, 188 (1999) [hereinafter *Opening Pandora's Box*]. *But see* MARSHALL S. SHAPO, PRODUCTS LIABILITY AND THE SEARCH FOR JUSTICE 103–04 (1993) [hereinafter SHAPO, SEARCH FOR JUSTICE] (presenting a "competing" view that the role of products liability is simply to allocate loss when injury occurs.).

2. States that have adopted the presumption include Arkansas, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Missouri, North Dakota, New Jersey, New York, Nebraska, Ohio, Oklahoma, Texas, Vermont, and the District of Columbia. Benjamin J. Jones, Annotation, *Presumption or Inference, in Products Liability Action Based on Failure to Warn, That User Would Have Heeded an Adequate Warning Had One Been Given,* 38 A.L.R. 5th 683, 701–04 § 3 (2002).

3. Throughout this Note, reference will sometimes be made to the plaintiff as "plaintiff/user." Often, the plaintiff will not be the actual user—for example, in cases involving children or wrongful death suits. Both terms are used here because the conduct of the user is relevant, but the plaintiff, who may be a different person, receives the benefit of the presumption.

4. *See, e.g.*, Technical Chem. Co. v. Jacobs, 480 S.W.2d 602, 606 (Tex. 1972) ("Where there is no warning . . . the presumption that the user would have read an adequate warning works in favor of the plaintiff user.").

followed and the plaintiff/user would not have been injured. The burden then falls on the manufacturer to rebut the presumption.[5]

Jurisdictions differ in their applications of the presumption. Courts must determine how the presumption works in *inadequate* warning cases as opposed to "no warning actions."[6] Some jurisdictions conclude that if a given warning was not read or followed, the plaintiff may no longer benefit from the presumption and thus must prove causation to the trier of fact.[7] For some, this approach does not adequately reflect the goals of products liability law because it removes the focus from product safety and places it upon the consumer's action or inaction.[8]

This Note argues that the heeding presumption should be applied differently in no warning cases and inadequate warning cases. Specifically, the heeding presumption should not be applied when a warning has been given and the user has failed to read or

5. *See, e.g.*, House v. Armour of Am., Inc., 886 P.2d 542, 552–53 (Utah Ct. App. 1994) (applying the rebuttable heeding presumption to a products liability claim).

6. *See Opening Pandora's Box*, *supra* note 1, at 185–89. Throughout this Note, an "inadequate warning case" refers to those cases in which a warning has been provided, but the warning could be determined by the trier of fact to have been inadequate. A case in which no warning has been given may be fairly labeled a "no warning case." The "failure to warn cause of action" refers to either situation.

7. *See, e.g.*, Gen. Motors Corp. v. Saenz, 873 S.W.2d 353, 359 (Tex. 1993) (holding that when a warning is given, but plaintiff failed to read it, the presumption no longer applies); *see also* Johnson v. Niagra Mach. & Tool Works, 666 F.2d 1223, 1225–26 (8th Cir. 1981) (holding that the plaintiff's failure to read the existing warning was sufficient to support the district court's decision to grant a directed verdict); Rowson v. Kawasaki Heavy Indus., Ltd., 866 F. Supp. 1221, 1236 (N.D. Iowa 1994) (holding that "a plaintiff who does not read an allegedly inadequate warning cannot maintain a negligent-failure-to-adequately-warn action unless the nature of the alleged inadequacy is such that it prevents him from reading it." (quoting E.R. Squibb & Sons, Inc. v. Cox, 477 So. 2d 963, 971 (Ala. 1985))); *cf.* Safeco Ins. Co. v. Baker, 515 So. 2d 655, 657 (La. Ct. App. 1987) (holding that although the presumption is applied, there must be "some reasonable connection between the omission of the manufacturer and the damage which the plaintiff has suffered." (quoting Bloxom v. Bloxom, 512 So. 2d 839 (La. 1987))).

8. *See Opening Pandora's Box*, *supra* note 1, at 189 (stating that the goals of product safety are not served by distinguishing between cases of inadequate warning and no warning).

follow the given instruction.[9] Instead, the plaintiff should be required to prove causation to the trier of fact by showing that he or she would have heeded a better warning.

Part II of this Note will explain the development of the heeding presumption and the policy goals that underlie its application. Part III will show that the policy goals of products liability law apply differently in inadequate warning cases, and will explain the benefits of this distinction. First, it will show that the failure to warn cause of action is fundamentally different from other products liability causes of action that focus solely on the safety of the product without reference to conduct.[10] Second, it will demonstrate that the usual rationales for using evidentiary presumptions in general do not apply to the case where a warning has been provided. Part IV concludes that while the heeding presumption may be a desirable way to balance fairness to injured plaintiffs with economic incentive effects to manufacturers, these goals are not sufficiently promoted in an inadequate warning case to justify shifting the burden of proof.

Whether or not the number of products liability suits has increased following recent tort reform efforts is in debate.[11] Nevertheless, given the changing climate of tort law, critical attention must be paid to the balance of risk arising from fairness and economic concerns that have historically shaped products liability

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9. Because of the complexities associated with drug and pharmaceutical products, this Note does not address those products. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(m) (1998).

10. Such as the strict product liability causes of action for design defect or for manufacturing defect. These causes of action necessarily focus mainly on the safety of the product as it is the very nature of the product that gives rise to the cause of action, although the design defect cause of action may depend in part on conduct as well.

11. *Compare* Bruce A. Finzen & Brooke B. Tassoni, *Regulation of Consumer Products: Myth, Reality and the Media*, 11 KAN. J.L. & PUB. POL'Y 523, 537 (2002) (stating that the volume of torts litigation has "declined steadily" since 1990) *with* Claire Andre & Manuel Velasquez, *Who Should Pay? The Product Liability Debate*, 4 ISSUES IN ETHICS, Spring 1991 (stating that the number of products liability suits is rising), *available at* http://www.scu.edu/Ethics/publications/iie/v4n1/pay.html, *and* Archie W. Dunham, Build on Strength: A Businessman Speaks Up, Address at National Press Club (Oct. 28, 2002) (asserting that the explosion of products liability suits has not made the public safer), *at* http:// www.conocophillips.com/news/speeches/102802_npc.asp.

law.[12] Treating the no warning case differently from the inadequate warning case with respect to causation is an effective way to address those concerns.

## II. THE DEVELOPMENT OF THE HEEDING PRESUMPTION

Causation has long been regarded as a necessary element of any tort cause of action.[13] When the defendant's conduct does not cause the injury at issue, recovery is denied.[14] Even supporters of strict or enterprise liability for products liability recognize that causation is still a necessary element of the cause of action.[15] However, over time, courts have developed the rebuttable presumption of causation in the failure to warn cause of action. In order to analyze the development of the law that led some courts to adopt the heeding presumption, it is necessary to understand the basic foundations of products liability law. Accordingly, this section gives a brief outline of products liability causes of action.

### *A. Products Liability Causes of Action and Causation*

There are three primary causes of action in products liability law.[16] It is important to recognize the distinction between these three causes of action because they illustrate that there are different ways in which a product can be considered unsafe, but that not all of those depend entirely upon the product. The three causes of action

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12. *See* SHAPO, SEARCH FOR JUSTICE, *supra* note 1, at ch. 1.

13. *See* ARNO C. BECHT & FRANK W. MILLER, THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES 43–45 (1961) ("A case [of liability without causation] can seldom arise in tort."); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 15 cmt. a (1998) ("defect of which the plaintiff complains [must] *cause* harm to person or property.") (emphasis added). For a discussion of the difficulties in determining causation, see Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941 (2001).

14. *See* BECHT & MILLER, *supra* note 13, at 87–98.

15. *See* VIRGINIA E. NOLAN & EDMUND URSIN, UNDERSTANDING ENTERPRISE LIABILITY: RETHINKING TORT REFORM FOR THE TWENTY-FIRST CENTURY 169 (1995) ("the proposed doctrine would impose a strict enterprise liability for personal injuries *arising out of* the use of business premises.") (emphasis added).

16. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998). A plaintiff may have alternative causes of action in negligence that may be relevant to a discussion of policy. *Id.* § 2 cmt. n. This Note is limited however, to a discussion of the products liability causes of action.

necessarily depend on different factors and therefore should be treated differently when determining whether or not the plaintiff has met his or her prima facie case. The differing treatment of the failure to warn cause of action can be justified as an effort to achieve the same goals.

### 1. The manufacturing defect cause of action

A plaintiff's first theory of liability under products liability is the manufacturing defect cause of action. A plaintiff may claim that there was a defect in the manufacture of the particular unit of product that caused the plaintiff's injury.[17] In order to prove a manufacturing defect, a plaintiff must prove that "the product departs from its intended design."[18] It is irrelevant that the manufacturer took "all possible care . . . in the preparation and marketing of the product."[19] It can be assumed that in order to avoid this cost of business, manufacturers will take steps to prevent defects in manufacture.

Causation is ultimately proven by showing that the plaintiff would not have been injured had the manufacturer behaved differently in making the product. Thus, the focus here is *solely* on the safety of the product as manufactured and not on the consumer's conduct.

### 2. The design defect cause of action

A plaintiff's second cause of action is the design defect theory of liability.[20] This cause of action is far more complex than the manufacturing defect cause of action and has been approached in various ways. It is especially important to understand the various approaches to this particular cause of action because causation of injury under this cause of action, like the failure to warn cause of action, sometimes refers to the user.

The Restatement (Second) of Torts states that a product is defectively designed if it is more dangerous than an ordinary consumer would expect.[21] This approach is sometimes referred to as

17. *Id.*
18. *Id.*
19. *Id.*
20. *See id.*
21. *See* RESTATEMENT (SECOND) OF TORTS § 402(A) cmt. i (1965).

the "consumer expectations test."[22] Over time, many courts have declined to adopt this approach to the defective design cause of action and have instead applied a risk-utility analysis.[23] The risk-utility test focuses on the *product*, stating that a plaintiff, in order to prevail on a design defect claim, must show a "reasonable alternative design."[24] Unlike the consumer expectations test, this cause of action focuses solely on the product design and is not a standard that involves the consumer.

Jurisdictions that refuse to follow the consumer expectations test do so for different reasons. California courts, for example, have long applied the consumer expectations test to design defect cases.[25] However, as Daniel Herling points out, recent decisions indicate that California may begin to turn away from that approach.[26] In *Soule v. General Motors Corp.*,[27] the California Supreme Court noted that an ordinary consumer might not have expectations about a particular product, but that the product might nevertheless cause injury.[28] This concern shifts the focus entirely to the product's safety and potential for causing injury. Although the consumer expectations test relies on the average consumer to determine what is considered an adequate design, the product's safety itself is unchanged by the reasonable consumer's expectations. The test functions as a mere benchmark for determining defect.

22. *See, e.g.*, Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978) .

23. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) cmt. a (1998).

24. *Id.* § 2(b).

25. *See, e.g.*, *Barker*, 20 Cal. 3d at 413.

26. *See* Daniel J. Herling, *Jury Instructions: Consumer Expectations Test Continues to Erode in Design Defect Claims*, (suggesting that California courts would not apply the consumer expectations test as often as they had in past decisions), *at* http://www.duanemorris.com/publications/pub829.html (Apr. 1, 2002); *see also* James A. Henderson, Jr. & Aaron D. Twerski, *What Europe, Japan, and Other Countries Can Learn from the New American Restatement of Products Liability*, 34 TEX. INT'L L.J. 1, 15 n.72, 16 (1999) (discussing why the legal standard for defective design should be based on the risk utility analysis rather than consumer expectations).

27. 8 Cal. 4th 548, 882 P.2d 298, 34 Cal. Rptr. 2d 607 (1994).

28. *See id.* at 562 (citing *Barker*, 20 Cal. 3d at 430).

Both the consumer expectations and the risk utility test maintain focus on the product, even if they can be fairly said to consider some conduct as well.[29]

3. The failure to warn cause of action

The third cause of action, the one with which this Note is concerned, involves the failure to warn a consumer of known or knowable risks of harm that may come from using an otherwise non-defective product.[30] In the failure to warn cause of action, the plaintiff must establish that the product is defective because it did not contain an adequate warning of some danger the product posed to the plaintiff/user.[31] Unlike the design defect and manufacturing defect causes of action, the failure to warn cause of action is entirely dependent upon the effect a warning has on a plaintiff/user. "[T]he efficacy of a warning necessarily depends upon how well it performs on average."[32]

### *B. Application of the Presumption in a Failure to Warn Cause of Action*

Courts are unwilling to eliminate the causation element of any tort, but have been willing to apply presumptions and shift the burden in certain circumstances.[33]

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29. *See* Martin A. Kotler, *Reconceptualizing Strict Liability in Tort: An Overview*, 50 VAND. L. REV. 555 (1997).

30. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(c) (1998).

31. *See id.* Again, the failure to warn cause of action does not currently distinguish, as this Note does, between no warning and inadequate warning. The claim is proven by showing that an adequate warning was not given.

32. Mark Geistfeld, *Inadequate Product Warnings and Causation*, 30 U. MICH. J.L. REFORM 309, 323 (1997).

33. In fact, courts have been adamant that proof of causation cannot be excused, even in strict liability cases. *See* Technical Chem. Co. v. Jacobs, 480 S.W.2d 602, 604 (Tex. 1972):

> In strict liability cases, proof of negligence is excused; but neither Section 402A . . . nor our former decisions have excused proof that the defect in the product was the cause of the injuries . . . 'The prime requirement for imposing liability on a seller under the rule of strict liability is proof by the plaintiff that *he was injured because of a defective condition in the product* . . . ."

*Id.* (citing Pittsburg Coca-Cola Bottling Works of Pittsburg v. Ponder, 443 S.W.2d 546, 548 (Tex. 1969)).

Courts such as the New Jersey Supreme Court have developed the presumption of causation in a failure to warn cause of action. For example, in *Coffman v. Keene Corp.*[34] the New Jersey Supreme Court stated that although in a failure to warn claim, "[t]he plaintiff must demonstrate . . . that the [failure to warn] . . . was a proximate cause of the injury," the court would nevertheless apply the rebuttable heeding presumption and shift the burden of proving lack of causation to the defendant.[35] Some courts consider it unfair to prevent a plaintiff from recovering anything for his or her injuries when it is admittedly difficult to determine whether or not the failure to warn was the cause in fact and the proximate cause of the injury.[36]

*Coffman* was one of the seminal cases that articulated the heeding presumption and has been followed by numerous jurisdictions in the development of the presumption. In *Coffman*, a naval electrician sued the Keene Corporation, a manufacturer of naval vessel materials that contained asbestos, for injuries caused by asbestos exposure.[37] The plaintiff claimed that Keene Corporation failed to warn users of the health risks that could arise from working with the asbestos-based products.[38] The trial court applied the heeding presumption over Keene Corporation's objection that the

34. 628 A.2d 710 (N.J. 1993).

35. *Id.* at 716–20 (citation omitted). The burden of persuasion may not, in technical terms, shift to the defendant if the presumption is applied. *See* ROGER C. PARK ET AL., EVIDENCE LAW: A STUDENT'S GUIDE TO THE LAW OF EVIDENCE AS APPLIED TO AMERICAN TRIALS, ch. 4 (1998). However, if the jury is instructed that causation is presumed if it finds that an inadequate warning was provided, then the practical effect is that the defendant must prove otherwise, and the burden of production is shifted. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965); *see also* House v. Armour of Am. Inc., 886 P.2d 542, 552 (Utah Ct. App. 1994) ("[the] rebuttable presumption shifts [the] plaintiff's burden on causation"); James A. Henderson & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 289–91 (1990) (discussing the lack of restraints on juries in failure to warn causes of action) [hereinafter *Doctrinal Collapse in Products Liability*]; *cf.* Bloxom v. Bloxom, 512 So. 2d 839, 850 (La. 1987) (when a plaintiff proves a warning was inadequate, "his cause in fact burden is assisted by a presumption . . . The presumption, may, however, be rebutted if the *manufacturer produces contrary evidence* which persuades the trier of fact that an adequate warning or instruction would have been futile under the circumstances.") (citations omitted) (emphasis added).

36. *Coffman*, 628 A.2d at 718.

37. *Id.* at 715.

38. *Id.*

plaintiff was required to show that lack of warning was the direct cause of his injury.[39] The Appellate Court affirmed, and the New Jersey Supreme Court granted certification.[40]

In officially adopting the heeding presumption for proof of causation, the New Jersey Supreme Court in *Coffman* noted that they "have often adopted or used presumptions in [the context of strict products liability] in order to advance our goals of fostering greater product safety and enabling victims of unsafe commercial products to obtain fair redress."[41] It is this justification that is most often advanced when applying the presumption.

In adopting this presumption, courts such as the New Jersey Supreme Court found further justification in the Restatement (Second) of Torts, § 402A, comment j.[42] Comment j reads:

> In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use . . . . 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.[43]

The original intent behind comment j was to relieve manufacturers of liability when an otherwise non-defective product was distributed with an adequate warning.[44] Courts that have developed the heeding presumption have implied the reverse assumption. Those courts have determined that once a plaintiff has met its burden in establishing duty, breach, and damage, the plaintiff need not establish legal causation.[45]

### *C. Removing the Burden of Proving Causation: The Policy Goals*

The first rationale that has been advanced in favor of removing the usual burden of proof of causation is that the presumption

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39. *Id.*
40. *See id.* at 716.
41. *Id.* at 718.
42. *See* RESTATEMENT (SECOND) OF TORTS § 402(A) cmt. j (1965).
43. *Id.*
44. *See* Kevin Reynolds & Richard S. Kirschman, *The Ten Myths of Product Liability*, 27 WM. MITCHELL L. REV. 551, 577 (2000).
45. *See* Technical Chem. Co. v. Jacobs, 480 S.W.2d 602, 606 (Tex. 1972).

provides an incentive for manufacturers to provide product warnings.[46] A "basic duty" of manufacturers is to warn against dangers inherent in their products.[47] The presumption that a warning would have been read if given is seen to prompt manufacturers to provide warnings that will actually prevent injury.[48]

A second rationale proffered for the desirability of the presumption is grounded in fairness. Since it is often difficult for a plaintiff to prove what he or she might have done had the facts been different, courts have been willing to provide this presumption.[49] The argument is that it is better to allow a plaintiff to recover based on the presumption than to let an injured plaintiff go uncompensated.[50] These rationales have been fiercely debated.[51]

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46. *See* Coffman v. Keene Corp., 628 A.2d 710, 718 (N.J. 1993) ("The heeding presumption . . . serves to reinforce the basic duty to warn—to encourage manufacturers to produce safer products, and to alert users of the hazards arising from the use of those products through effective warnings."); *see also* Mark Geistfeld, *Inadequate Product Warnings and Causation*, 30 U. MICH. J.L. REFORM 309, 312 (arguing that many sellers will not warn if the presumption is not applied).

47. *See Coffman*, 628 A.2d at 723.

48. *See id.* at 718.

49. *See Technical Chem. Co.*, 480 S.W.2d at 606 (recognizing that there can be difficulties in proving causation, and that in some cases, determining whether the user would have read and followed an adequate warning may be "speculative").

50. *See* Mark Geistfeld, *Scientific Uncertainty and Causation in Tort Law*, 54 VAND. L. REV. 1011, 1022 (2001).

51. For differing perspectives on the use of the heeding presumption in any failure to warn cause of action, see Hildy Bowbeer, et al., *Warning! Failure to Read this Article May Be Hazardous to Your Failure to Warn Defense*, 27 WM. MITCHELL L. REV. 439, 460–66 (2000) (discussing the criticisms of the application of the heeding presumption); Kenneth Ian Weissman, *A "Comment J" Parry to Howard Latin's "Good" Warnings, Bad Products, and Cognitive Limitations*, 70 ST. JOHN'S L. REV. 629, 638–55 (1996) (supporting the use of the heeding presumption); *see also Doctrinal Collapse in Products Liability*, *supra* note 35, at 278–79 (arguing that the heeding presumption may be a permissible means to determine causation, but that the presumption cannot "be derived logically from comment j"). *Compare* RESTATEMENT (SECOND) OF TORTS § 402(A) cmt. j (1965) (stating: "Where warning is given, the seller may reasonably assume that it will be read and heeded . . . .") *with* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 15 cmt. a (1997) (declining to adopt the presumption: "The rules that govern causation in tort law generally are . . . also applicable in products liability cases."), *and* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. i (1997) ("Notwithstanding the defective condition of the product in the absence of

### *D. The Development of the Distinction Between No Warning and Inadequate Warning*

A cursory reading of the cases involving the heeding presumption might lead one to conclude that courts have applied the heeding presumption equally in the no warning and inadequate warning cases. However, as Professor Richard Henke points out, there is a subtle jurisdictional difference in the application of the presumption.[52] Some jurisdictions allow the presumption to stand, leaving the question of rebuttal in the hands of the jury without regard to whether any warning has been given.[53] Other jurisdictions take the position that the failure of the plaintiff/user to read existing warnings precludes the plaintiff from benefiting from the presumption.[54] This approach requires the *jury* to find that the failure to adequately warn was the proximate cause of the plaintiff/user's injury based on the plaintiff's presentation of evidence.[55]

Texas courts have distinguished between the two types of cases. In *General Motors Corp. v. Saenz*,[56] the Texas Supreme Court noted:

> The presumption operates differently in cases like *Technical Chemical* . . . where no warning at all was given concerning the improper use of the product which injured [the] plaintiff, than it operates in cases like the present one, in which the improper use is addressed by the manufacturer's warning, but not adequately . . . . There is no presumption that a plaintiff who ignored instructions that would have kept him from injury would have followed better instructions.[57]

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adequate warnings, if a particular user or consumer would have decided to use or consume even if warned, the lack of warnings *is not* a legal cause of that plaintiff's harm.") (emphasis added).

52. *See Opening Pandora's Box*, *supra* note 1, at 185.

53. *See, e.g.*, O'Gilvie v. Int'l Playtex, Inc., 821 F.2d 1438, 1442 (10th Cir. 1987).

54. *See* Gen. Motors Corp. v. Saenz, 873 S.W.2d 353, 359 (Tex. 1993) (holding that the presumption cannot apply in cases where the plaintiff/user did not read existing warnings, even when those warnings were inadequate).

55. *See id.*

56. 873 S.W.2d 353 (Tex. 1993).

57. *Id.* at 359.

As a justification for this difference, the court found that it was irrational to allow the plaintiff to benefit from the presumption when there was no evidence that it would have made a difference.[58]

In contrast, Kansas law, for example, allows the presumption to stand even when a plaintiff/user failed to read existing, though inadequate warnings.[59] In *O'Gilvie v. International Playtex, Inc.*,[60] the court held that the finding of an inadequate warning by the jury, "resolve[d] any issue of . . . fault as well."[61]

## III. NO WARNING V. INADEQUATE WARNING: BENEFITS OF THE CAUSATION DISTINCTION

As stated above, whether or not the heeding presumption is entirely appropriate is subject to much debate.[62] However, adopting the presumption in a no warning case arguably does further the goals of products liability in that it encourages manufacturers to warn against inherent risks of the product.

This incentive supports the policy of adopting the presumption. In *Coffman*, for example, the New Jersey Supreme Court stated that the presumption was being adopted to further product safety goals.[63] The court further noted that the heeding presumption "minimizes the likelihood that determinations of causation will be based on unreliable evidence."[64]

Although considerable and persuasive arguments to the contrary exist, the heeding presumption does appear to provide an incentive for manufacturers to provide a warning to consumers if the product poses a danger. Accordingly, it may be fair to take the rare step of removing plaintiff's burden in such a situation.

Surely, however, if its application to no warning cases is questionable, then it must be unacceptable to apply the presumption

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58. *See id.*

59. *See O'Gilvie*, 821 F.2d at 1444 ("A defendant may not limit its liability by relying on a plaintiff's failure to heed an *insufficient* warning.").

60. 821 F.2d 1438 (10th. Cir. 1987).

61. *Id.* at 1444.

62. *See supra* note 51.

63. Coffman v. Keene Corp., 628 A.2d 710, 718 (N.J. 1993).

64. *Id.* at 720. While some goals of products liability are furthered by the application of the presumption, it seems ironic that the court would rather rely on *no* evidence of causation rather than evidence that is "unreliable." *See* Bowbeer, *supra* note 51, at 461.

when the manufacturer has undertaken the costs associated with providing a warning but the plaintiff/user simply fails to read and heed.

There are several important policies to consider in determining whether or not the presumption should apply in cases where a warning has been given. First, other tort doctrines play a role in this determination. The idea of contributory negligence is an important factor to be considered. Second, the incentive effects that seem to derive from the application of the presumption in a no warning case do not justify the use of the presumption in the case of inadequate warning. Finally, it may be beneficial for consumers in general to support the application of the presumption only in the no warning case.

### *A. Remembering the Critical Differences in the Failure to Warn Cause of Action*

As an initial matter, treating the causation element of the failure to warn cause of action differently from other product liability causes of action furthers doctrinal coherence. The failure to warn cause of action is fundamentally different from the manufacturing and design defect causes of action. Therefore, it can be fairly said that the causation element should be treated differently as well.

The defect of the product in a failure to warn cause of action depends not only upon how the average consumer would react, but also upon how the *particular* plaintiff/user *did* or *did not* react. As Henderson and Twerski point out, "warnings may *reduce* the risk of product-related injury by *allowing* consumers to behave more carefully than if they remained ignorant of the risks associated with product use. By behaving more carefully, consumers *help to achieve* the efficiency objective of tort law."[65] Marshall S. Shapo also explains the important interaction between defect and conduct, saying:

> Although it is not always the case, in many situations the moral choice [of how or if to use the product when warned of danger] becomes the plaintiff's. That is why the warnings issue frequently overlaps with the question of

65. *Doctrinal Collapse in Products Liability*, *supra* note 35, at 285 (emphasis added) (citations omitted).

whether the plaintiff should be barred from recovery because of his or her own conduct.[66]

This is critically different from the design and manufacturing causes of action. The manufacturing cause of action is wholly focused on the particular product. No action or inaction of the plaintiff can change the danger or safety of the product.[67] The design defect cause of action, too, is determined wholly by the safety of the product as designed. Even the consumer expectations test does not depend on the particular plaintiff's use of the product.[68] It serves only to provide a benchmark for when a product can be deemed dangerously defective.[69] In contrast, while the failure to warn cause of action in part focuses on attempts to make the product safer, its actual safety can *only* be changed by the action or inaction of the user.[70]

The failure to warn cause of action is less akin to strict liability than the other two products liability causes of action. The failure to warn cause of action depends far more on conduct than do the other two, and the approaches to the cause of action should adequately reflect that difference. If the heeding presumption is employed to change conduct,[71] then the focus must shift from being solely on the product itself, and take into account the actions or inaction of the parties in determining liability. The failure to warn cause of action cannot be approached in the same manner as the other products liability causes of action, not because its goals are different, but because the cause of action is necessarily focused on conduct.

### *B. Application of Policy Goals to the Shifting of the Burden of Proof*

As a practical matter, it may appear that the distinction is of little consequence. One might argue that because the presumption

66. SHAPO, SEARCH FOR JUSTICE, *supra* note 1, at 139.
67. *See supra* Part III.A.1.
68. *See supra* Part III.B.2.
69. *See id.*
70. *See* Geistfeld, *Scientific Uncertainty and Causation in Tort Law*, *supra* note 50, at 1019; *see also* Geistfeld, *Inadequate Product Warnings and Causation*, *supra* note 32, at 323. *But see* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, § 2 cmt. l (1997) ("[W]hen an alternative design to avoid risks cannot reasonably be implemented, adequate instructions and warnings will normally be sufficient to render the product reasonably safe.").
71. *See* Coffman v. Keene Corp., 628 A.2d 710, 718 (N.J. 1993).

may be rebutted relatively easily, the distinction is irrelevant. However, if a court applies the presumption, it is incumbent upon the defendant to prove these facts,[72] facts that are ordinarily in the possession of the plaintiff. If the court does not apply the presumption, the burden of proof lies with the plaintiff. Furthermore, if the presumption is not applied, the case may be disposed of more easily at an earlier stage, such as summary judgment, thereby saving the expense of trial.[73]

While it may be true that a defendant may be able to rebut the presumption and dispose of the case at an early stage even if the presumption is applied, this is the case with any rebuttable presumption. It therefore cannot be simply argued that the case could come out the same way regardless of the presumption being applied because then any presumption would make no practical difference. The critical point here is that applying a presumption is an extraordinary measure, as our system requires the *plaintiff* to prove the prima facie case. Such an extraordinary measure should require extraordinary justification.

To clarify this matter, if the presumption is applied, then the matter is taken out of the hands of the jury, except with respect to whether or not the defendant has successfully rebutted the presumption. This is ordinarily not acceptable, as causation is generally a question for the jury.[74]

### 1. The res ipsa loquitur comparison

There is an important policy analogy in the res ipsa loquitur doctrine. Under this doctrine courts will presume causation when

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72. *See* Rowson v. Kawasaki Heavy Indus. Ltd., 866 F. Supp. 1221, 1235 n.14 (N.D. Iowa 1994) (stating that the application of the presumption shifts the burden of production to the defendant); Lonasco v. A-Best Prods. Co., 757 A.2d 367, 377 (Pa. Super. Ct. 2000) (holding that the defendant must produce evidence that a warning would not have been heeded); Technical Chem. Co. v. Jacobs, 480 S.W.2d 602, 606 (Tex. 1972) (stating that the presumption may be rebutted if the manufacturer produces evidence that causation did not exist).

73. *See Doctrinal Collapse in Products Liability*, *supra* note 35, at 325 ("[T]he defendant is basically precluded from the opportunity to convince a court to rule as a matter of law that the failure to warn was not the proximate cause of plaintiff's harm.") (citation omitted).

74. *See* Stapleton, *supra* note 13, at 944. ("Often there is a choice to package a particular issue as one of duty, and therefore one for the court, or as one of legal cause, and therefore one for the jury . . . .").

there is no other explanation for the plaintiff's injury.[75] This is considered acceptable because it is the *defendant* who possesses the critical information.[76] It is presumed that only the defendant can tell whether or not its conduct caused the plaintiff's injury and therefore, courts are willing to shift the burden.[77] By contrast, in the case of failure to warn, the *plaintiff* is the party who can best explain causation, yet we are willing to allow him the benefit of the presumption. The two simply do not fit together logically. While this *may* call into question the appropriateness of the presumption altogether, it *certainly* calls into question the use of the presumption when it is clear that the presumption is likely to be wrong, i.e., when the plaintiff has not read the existing warning or instructions.

2. The contributory negligence factor

In many jurisdictions contributory negligence can be a defense to products liability. While contributory negligence would not have the direct effect of negating the causation element of the plaintiff's claim, in some cases, it may be seen as a superseding intervening cause.[78] While this appears to be an additional way for the manufacturer to escape liability, it may well not be:

An intervening cause, one that comes into operation after the defendant's negligence has been committed, becomes a "superseding cause," cutting off the defendant's liability, when the intervening act, or the type of harm resulting from that intervening act, is not reasonably foreseeable.[79] There is little argument that the failure of a consumer to read given warnings or instructions is reasonably foreseeable. The irony of this is that while a manufacturer may be able to foresee the contributory negligence of the consumer, and may take reasonable precautions to protect against it,[80] if the warning is still deemed inadequate, the manufacturer will not be able to argue

75. *See, e.g.*, Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944) (applying the doctrine of res ipsa loquitur in California).

76. *See id.* at 490.

77. *Id.*

78. *See* Paul T. Hayden, *Butterfield Rides Again: Plaintiff's Negligence as Superseding or Sole Proximate Cause in Systems of Pure Comparative Responsibility*, 33 LOY. L.A. L. REV. 887, 894 (2000).

79. *Id.* at 901–02 (citations omitted).

80. For example, placing larger, brighter, warnings in more conspicuous places.

successfully that the plaintiff's own negligence was a superseding cause since the plaintiff's failure to read instructions and warning is foreseeable.

### *C. Incentive Effects of the Application of the Presumption*

The incentives created for a manufacturer by the presumption in a no warning case are different from those created in an inadequate warning case. If a manufacturer provides a warning, the manufacturer can expect that a jurisdiction applying the presumption will apply it regardless of whether or not the particular plaintiff/user read and followed a warning that was given. This being the case, a manufacturer may choose not to provide a warning at all, finding that the cost of warning is too great, given that a warning deemed inadequate will still have the effect of presuming causation. Because the cost of providing warnings has often been presumed to be low, many wrongly assume that a manufacturer should and will always attempt to provide some warning. However, it has been pointed out that there are collateral costs associated with providing warnings.[81] The cost is not merely that of the actual cost of affixing an inexpensive label to a product, but also the costs associated with lost profits from a product containing too many warnings or the costs associated with "lost effect" of an important warning among multiple, less necessary ones.[82] This undermines the theory behind taking the extraordinary step of removing the burden of production from the plaintiff's prima facie case and allowing a presumption.[83]

81. *See* SHAPO, SEARCH FOR JUSTICE, *supra* note 1, at 141–42.

82. *See id.* at 141–43; *cf*. Geistfeld, *Inadequate Product Warnings and Causation*, *supra* note 32, at 314–27 (discussing the "costs" consumers consider when choosing whether to use a product that may be unsafe). Another problem with determining costs may be that courts tend to ignore the actual dollar cost to the manufacturer anyway. *See* SHAPO, SEARCH FOR JUSTICE, *supra* note 1, at 131 ("[C]ourts do not usually make . . . [the cost] calculation, and it would appear that defendants are hesitant to suggest it."). A third cost may be the escalating prices of consumer goods. *See id.* at 62 (discussing the theory that the rising cost of "pro-consumer liability rules" are actually harmful to low-income consumers as they generally raise the prices of the goods).

83. There are, of course, multiple reasons why courts apply presumptions. However, it is frequently assumed that the rate of error is low. Therefore, a court might better provide a presumption for a substantive policy reason when the concern about mistake is low. *See* PARK, *supra* note 35, at ch. 4 (1998).

If the stated goal of applying the presumption is to encourage manufacturers to provide safer products and better warnings,[84] then this goal is adequately achieved by applying the presumption only in a no warning case. A manufacturer cannot be reasonably expected to undertake the costs associated with providing warnings only to fail to provide what would at least be arguably adequate. If the goal is to encourage manufacturers to warn, then surely this is adequately accomplished by applying the presumption only in a no warning case.

To further burden manufacturers facing lawsuits with the presumption when they have undertaken the cost of warning cannot be justified as a logical matter. This is further amplified when the plaintiff admits to not having read the existing warning. It may well be the case that a plaintiff *would* have read a better, clearer, brighter, longer, or shorter warning. But that does not justify removing the plaintiff's usual burden to prove that assertion, and it creates economic incentives that do not benefit the consuming public.

Imagine this scenario: Manufacturer *X* supplies a cleaning product, which, when mixed with any substance other than water, creates a toxic gas that can cause permanent damage to nasal membranes and permanent respiratory damage. Knowing that a warning is necessary and that any plaintiff who reads it will benefit from the heeding presumption, Manufacturer *X* designs a warning label. Since the plaintiff is presumed to follow the warning, it is in Manufacturer *X*'s best interest to provide the most effective one so that the plaintiff will not actually harm him or herself, sue Manufacturer *X*, and prevail, given the presumption of causation. The manufacturer is therefore likely to affix a label to the product reading something like this:

> WARNING – MIXING THIS PRODUCT WITH ANY SUBSTANCE OTHER THAN WATER WILL CAUSE PERMANENT DAMAGE TO YOUR NASAL MEMBRANES, MAKING IT DIFFICULT TO BREATHE AND CAUSING LIFELONG PAIN. **MIX ONLY WITH WATER**. *DO NOT* MIX WITH OTHER LIQUIDS OR SOLIDS.

84. *See* Coffman v. Keene Corp., 628 A.2d 710, 718 (N.J. 1993).

Manufacturer *X* has been adequately incentivized by the application of the presumption to the plaintiff who reads and attempts to follow the instructions. Knowing that this plaintiff will benefit from the presumption, Manufacturer *X* is likely to take all reasonable precautions to avoid being sued. The application of this same presumption to the plaintiff who never bothers to read this existing instruction does nothing to add to the incentive.

Imagine that Manufacturer *X* now has in mind the plaintiff who does *not* read the instructions given. In this scenario the Manufacturer does not have any incentive to provide an adequate warning because the plaintiff will not read it anyway. There is no *additional* benefit to providing a perfect warning that can justify the shifting of the burden of persuasion to the defendant. Many will respond, "What if the warning is inadequate because it was difficult to read, in small type, too long to be adequate, hidden somewhere on the box?" In that case, the plaintiff will not have a difficult time proving his or her prima facie case of causation. He or she will be able to testify and convince the trier of fact that had the warning been more visible or clearer, that certainly he or she would have read it.

If the question becomes, how does the plaintiff go about proving that he or she would have read and heeded a better warning, then the answer lies in the approaches taken by many states that choose not to employ the presumption at all. There are two options. First, the subjective standard may be employed. Under this standard, the plaintiff must simply testify in an attempt to convince the trier of fact that he would have behaved differently had a better warning been provided.[85] The plaintiff bears the usual burden of production – illustrating, perhaps, that he or she had read and followed strikingly similar warnings in the past.

The second option is to allow the jury to *infer* the necessary element of causation, rather than require the defendant/manufacturer to rebut a *presumption* of causation. Some states, such as New York, allow the jury to make a reasonable inference as to the element of

85. *See* Michael S. Jacobs, *Toward a Process-Based Approach to Failure-to-Warn Law*, 71 N.C.L. REV. 121, 162-63 (1992) (explaining that in states that do not apply the presumption, plaintiff's testimony is all that is required to show the plaintiff would have heeded an adequate warning).

causation from the facts and circumstances that the plaintiff has presented.[86]

*D. The Benefits to Plaintiffs and Consumers*

Finally, there is an added benefit to plaintiffs when the products liability rules are simpler. It is unclear whether products liability suits have increased or decreased as a result of any particular change in tort law. However, a recent article in the *New York Times* suggests that the expense related to bringing products liability suits has caused a decrease in the number of lawsuits brought by *legitimately* injured plaintiffs.[87] Attorneys are refusing to take cases that can be won because of the costs associated with litigating products liability actions.[88]

The elimination of the heeding presumption in the inadequate warning case would contribute to a decline in legal costs, since manufacturers would be required to do less investigative research to rebut the presumption. The fewer lawsuits manufacturers are required to defend at a high rate of cost, the less incentive there will be to litigate other lawsuits at a high rate of cost in an effort to make up the difference.[89] This would allow more plaintiffs, with less severe injuries, the benefits of a successful lawsuit.

Furthermore, there may be a tradeoff where fewer products liability judgments are allowed in exchange for an economic and safety benefit to the general public as well. It may be that the trend over the years has been an increase in the total number of products suits, whether legitimate or not, with a number of companies being forced to file bankruptcy because of the suits.[90] This economic uncertainty may lead to more expensive products, fewer jobs, and ultimately less safe products. At a speech to the National Press Club in October 2002, Chairman of ConocoPhillips, Archie Dunham, asked whether the products liability system really makes the public safer. He questioned:

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86. *See* Raney v. Owens-Illinois, Inc., 897 F.2d 94, 95–96 (2d Cir. 1990).

87. *See* Greg Winter, *Jury Awards Soar as Lawsuits Decline on Defective Goods*, N.Y. TIMES, Jan. 30, 2001, Late Edition, at A1.

88. *See id.*

89. *See id.*

90. *See* Andre & Velasquez, *supra* note 11; *see also* Dunham, *supra* note 11 (questioning whether products liability suits really make the public safer).

> Are the workers who lose their jobs—and their health insurance—when their companies are driven into bankruptcy safer as a result? . . . Are we safer when manufacturers stop improving their products for fear that juries will regard the improvements as proof that the original products were unsafe? For that matter, are the people who have suffered real injuries more likely to obtain speedy redress when the courts are clogged with frivolous lawsuits?[91]

The consuming public will be better-protected when manufacturers are not forced to account for the countless lawsuits that are filed against them.

## IV. CONCLUSION

The distinction between the application of the heeding presumption in a no warning case and an inadequate warning case helps to strike a desirable balance between fairness and incentive concerns when allocating risk between manufacturer and consumer. While a principal goal of products liability is to encourage the manufacture of safer products, this goal is not furthered by the application of the heeding presumption when a manufacturer *has* provided some warning that the user has ignored.

The safety that is supposedly furthered by a warning is only as effective as the user allows it to be. If a consumer fails to follow instructions or warnings that *are* provided by a manufacturer, then the product's actual safety level remains unchanged. Although a product may be considered likely to be used in a safe manner when a warning has been provided, it does not necessarily follow that when no warning is read or heeded that the product is inherently safer, and the approach taken in determining causation should reflect this reality.

Part of the justification that is provided for application of the heeding presumption is to benefit a plaintiff in overcoming a burden that is sometimes impossible to meet. It is not, however, intended to allow a plaintiff to create causation where none exists. If a plaintiff has failed to read or follow instructions that have been provided by the manufacturer, then the plaintiff should not be allowed to benefit

91. Dunham, *supra* note 11.

from the presumption. The better approach is to require such a plaintiff to convince the trier of fact that he or she would have followed a better warning.

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* J.D. Candidate, 2004. The author would like to thank Professor Paul Hayden for his help developing this piece. Thanks also to Professor Katherine Pratt for help in getting this Note back on track. For early reads and edits, thanks to Professors Laurie Levenson and Jean Boylan.