

**FAILURE TO WARN IN MINNESOTA, THE NEW RE-
STATEMENT ON PRODUCTS LIABILITY, AND THE
APPLICATION OF THE REASONABLE CARE
STANDARD**

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I. Introduction

The *Restatement (Third) of Torts: Products Liability*¹ charts a clear course for resolving failure-to-warn claims, adopting a reasonable care approach. While the Minnesota courts have subscribed to this theory for years, its application has been complicated. The Minnesota courts' misguided notion of the roles of court and jury, and their failure to instruct the jury on the reasonable care standard, have flawed Minnesota's adjudication of failure-to-warn claims. This article describes the *Restate-*

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1. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Tentative Draft No. 2, 1995) [hereinafter Tentative Draft No. 2].

ment (*Third*)'s approach to failure-to-warn claims and assesses its potential impact on Minnesota law.

II. Application of Negligence Theory for Failure-to-Warn Claims

Section 1 of the *Restatement (Third)* subjects a seller to liability for harm caused by a product which is "defective because of inadequate instructions or warnings."² Section 2(c) sets forth the standard for determining liability:

[A] product is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.³

This statement of the standard incorporates several negligence concepts. "Foreseeable risks," "reasonable instructions or warnings," and "not reasonably safe" all implicate the reasonable care standard. If there was any doubt, the *Restatement (Third)*'s comments clarify the basis for determining failure-to-warn claims: "Subsections (b) and (c) of § 2 rely on a reasonableness test traditionally used in determining whether an actor has been negligent."⁴ The rule is "stated functionally rather than in terms of the classic common law categorizations."⁵ The *Restatement (Third)* avoids the complications of labeling this product liability theory as either negligence or strict liability.

In explicitly separating the categories of defect—manufacturing defect, design defect, and inadequate instructions and warnings—the *Restatement (Third)* significantly differs from section 402A of the current *Restatement (Second) of Torts*, which only generally refers to products "in a defective condition unreasonably dangerous . . ."⁶ In the *Restatement (Second)*, instructions and warnings are primarily addressed in comment j to section 402A. Comment j, like the *Restatement (Third)*,

2. *Id.* § 1(b).

3. *Id.* § 2(c).

4. *Id.* § 1 cmt. a, at 3.

5. *Id.* § 2 cmt. m, at 40.

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

requires warnings of dangers that are foreseeable.⁷ Nevertheless, neither comment j, nor any other reference to instructions and warnings in the section 402A commentary, develops the reasonable care aspects of failure-to-warn claims to the extent that is done in the *Restatement (Third)*.

In stating a reasonable care approach to failure to warn, the *Restatement (Third)* is consistent with the standard adopted by the Minnesota courts. Failure to warn in Minnesota has its roots in negligence law.⁸ After adoption of strict liability, however, the Minnesota Supreme Court struggled for a time in its definition of failure-to-warn theory.⁹ Then in the 1980s, Minnesota courts focused the theoretical bases for product liability and adopted a reasonable care standard for both design defect and failure-to-

7. Comment j states:

Where . . . the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known, is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger.

Id. § 402A cmt. j.

8. *Westerberg v. School Dist. No. 792*, 276 Minn. 1, 7, 148 N.W.2d 312, 316 (1967) ("Inasmuch as liability rests on negligence there must exist a duty to warn of a danger inherent in the use of the chattel, whatever it may be, before there will be liability."); *McCormack v. Hanksraft Co.*, 278 Minn. 322, 331, 154 N.W.2d 488, 496 (1967) ("At this late date in the development of the law relating to the tort liability of manufacturers of all types of products for injuries caused by their products, there can be no doubt that a manufacturer is subject to liability for . . . a failure to use reasonable care in giving adequate and accurate instructions as to the use of the product and a warning as to any dangers reasonably foreseeable in its intended use.").

9. In *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727 (Minn. 1979), *aff'd*, 447 U.S. 921 (1980), for example, the court attempted to formulate a standard for the duty to warn that would not rely upon references to "negligence" or "reasonable care":

Under Minnesota law, a manufacturer has a duty to warn users of its products of all dangers associated with those products of which it has actual or constructive knowledge. Failure to provide such warnings will render the product unreasonably dangerous and will subject the manufacturer to liability for damages under strict liability in tort.

Id. at 739 (quoting *Karjala v. Johns-Manville Products Corp.*, 523 F.2d 155, 158 (8th Cir. 1975)); *see also Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782, 786 (Minn. 1977) ("[W]hen the seller knows or should anticipate that an inexperienced purchaser might use the item sold in a particular manner, the seller has a duty to warn of any dangers which might arise from that use if the seller knows or should realize that it is likely to be dangerous for such use and has no reason to believe that the purchaser will comprehend the danger."). Despite the court's aim of removing negligence principles from the failure-to-warn inquiry, the *Frey* court could not help but mention the impact of foreseeability on a manufacturer's duty to warn. *Id.* at 788.

warn cases.¹⁰ In *Germann v. F.L. Smithe Machine Co.*,¹¹ the Minnesota Supreme Court noted that it had "adopted the position that strict liability for failure to warn is based upon principles of negligence."¹²

III. The Duty to Warn and the Role of the Court and Jury

In theory, Minnesota law conforms to the *Restatement (Third)*'s negligence standard for deciding failure-to-warn claims. In practice, however, Minnesota law does not frame failure-to-warn issues in the manner contemplated by the *Restatement (Third)*. For example, if failure-to-warn claims are to be decided under negligence principles, then the respective roles of court and jury should be the same as those in any other negligence case.¹³ In recent years, however, the Minnesota Supreme Court has recast those roles in warnings cases, creating confusion and

10. See *Hauenstein v. Loctite Corp.*, 347 N.W.2d 272, 274 (Minn. 1984); *Bilotta v. Kelley Co.*, 346 N.W.2d 616, 622 (Minn. 1984); *Willmar Poultry Co. v. Carus Chem. Co.*, 378 N.W.2d 830, 836 (Minn. Ct. App. 1985); *Continental Ins. Co. v. Loctite Corp.*, 352 N.W.2d 460, 462 (Minn. Ct. App. 1984); *Peterson v. Little Giant Glencoe Portable Elevator*, 349 N.W.2d 280, 284 (Minn. Ct. App. 1984), *aff'd in part, rev'd in part*, 366 N.W.2d 111 (Minn. 1985).

11. 395 N.W.2d 922 (Minn. 1986).

12. *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 926 n. 4 (Minn. 1986).

13. See RESTATEMENT (SECOND) OF TORTS §§ 328B, 328C (1965). According to the *Restatement (Second)*, in a negligence case, the following issues are reserved for the court to decide as a matter of law:

- (a) whether the evidence as to the facts makes an issue upon which the jury may reasonably find the existence or non-existence of such facts;
- (b) whether such facts give rise to any legal duty on the part of the defendant;
- (c) the standard of conduct required of the defendant by his legal duty;
- (d) whether the defendant has conformed to that standard, in any case in which the jury may not reasonably come to a different conclusion;
- (e) the applicability of any rules of law determining whether the defendant's conduct is a legal cause of harm to the plaintiff; and
- (f) whether the harm claimed to be suffered by the plaintiff is legally compensable.

Id. § 328B. Likewise, the jury must determine the following issues:

- (a) the facts,
- (b) whether the defendant has conformed to the standard of conduct required by law,
- (c) whether the defendant's conduct is a legal cause of the harm to the plaintiff, and
- (d) the amount of compensation for legally compensable harm.

Id. § 328C.

depriving litigants of the community judgment provided by juries. Perhaps the *Restatement (Third)*'s emphatic reliance on negligence principles will provide the impetus for restoring the proper roles of judge and jury in Minnesota.¹⁴

Compare the relative functions of the court and jury in a design defect case. Like failure to warn, Minnesota has adopted a negligence standard for deciding products liability cases based on defective design.¹⁵ The roles of the court and the jury in a design defect case, however, do not deviate from their traditional functions in a conventional negligence action.

One common design defect claim is that a machine's moving parts should be guarded to protect the machine's users from contact. Even though injuries from such contact may be foreseeable, the manufacturer's defense may be that the area must be open for proper function of the machine. In such a case, the parties' experts will likely debate the issues of safety versus function. In nearly all instances, the court will submit the controversy to the jury and instruct the jury on the reasonable care standard for deciding design defect cases.¹⁶ The jury will

14. See George W. Soule & Sheryl A. Bjork, *Minnesota Products Liability Law: 1986-1992*, MINN. DEF., Summer 1992, at 10 [hereinafter Soule & Bjork, *Minnesota Products*]; George W. Soule, *Returning Negligence Principles to the Trial of Failure to Warn Claims in Minnesota*, MINN. DEF., Summer 1988, at 2 [hereinafter Soule, *Returning Negligence*].

15. *Bilotta v. Kelley*, 346 N.W.2d 616 (Minn. 1984). In *Bilotta*, the Minnesota Supreme Court distinguished design defect cases from manufacturing defect cases and held that in cases of the former type, where the "defect" is a "consciously chosen design," a "reasonable-care balancing test" is to be applied to determine whether the manufacturer met its duty to produce a safe product. *Id.* at 622. The court had earlier articulated the balancing test in *Holm v. Sponco*, 324 N.W.2d 207 (Minn. 1982), as follows:

[A] manufacturer is obligated to exercise that degree of care in his plan or design so as to avoid any unreasonable risk of harm to anyone who is likely to be exposed to the danger when the product is used in the manner for which the product was intended, as well as an unintended yet reasonably foreseeable use.

What constitutes "reasonable care" will, of course, vary with the surrounding circumstances and will involve "a balancing of the likelihood of harm, and the gravity of harm if it happens, against the burden of the precaution which would be effective to avoid the harm."

Id. at 212 (quoting *Micallef v. Miehle Co.*, 348 N.E.2d 571, 577-78 (N.Y. 1976)).

16. Minnesota's pattern jury instruction on the issue of design defect is as follows:

A manufacturer has a duty to use reasonable care when designing a product, so as to avoid any unreasonable risk of harm to (anyone who) (property that) is likely to be exposed to harm when the product is put to its intended use or to any use that is unintended but is reasonably foreseeable.

then decide whether the manufacturer acted reasonably and whether, therefore, the product was reasonably safe as designed.

The same approach was employed for years in Minnesota in deciding failure-to-warn claims. Generally, whether the manufacturer should have provided a warning, or whether a warning was adequate, was a jury issue.¹⁷ In 1986, however, the Minnesota Supreme Court departed from this traditional approach, holding in *Germann v. F.L. Smithe Machine Co.*¹⁸ that the need for a warning in any given case "is a question of law for the court — not one for jury resolution."¹⁹ According to the court:

In determining whether the duty exists, the court goes to the event causing the damage and looks back to the alleged negligent act. If the connection is too remote to impose liability as a matter of public policy, the courts then hold there is no duty, and consequently no liability. On the other hand, if the consequence is direct and is the type of occurrence that was or should have been reasonably foreseeable, the courts then hold as a matter of law a duty exists.²⁰

After finding, upon its own de novo review of the facts, that the "misuse was foreseeable; [that] it was not remote; and [that] the

What constitutes reasonable care will vary with the surrounding circumstances. Reasonable care is the care that a reasonably prudent person would exercise under the same or similar circumstances.

The reasonable care to be exercised by a manufacturer when designing a product will depend on all the facts and circumstances, including, among others, the likelihood and seriousness of harm against the feasibility and burden of any precautions which would be effective to avoid the harm. You are instructed that the manufacturer is obligated to keep informed of scientific knowledge and discoveries in its field.

If the manufacturer did not use reasonable care when designing the product in question, then the product is in a defective condition unreasonably dangerous to the (user or consumer) (user's or consumer's property).

MINNESOTA DIST. JUDGES ASS'N COMM. ON JURY INSTRUCTION GUIDES, MINNESOTA JURY INSTRUCTION GUIDES (CIVIL) JIG 117 (Michael K. Steenson, rep.) in 4 MINNESOTA PRACTICE 1, at 81 (3d ed. 1986) [hereinafter JURY INSTRUCTION GUIDES]. This instruction is based upon the Minnesota Supreme Court's holding in *Bilotta v. Kelley* and was approved by the Minnesota Supreme Court in *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 96 (Minn. 1987).

17. See *Bilotta*, 346 N.W.2d at 622; *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782, 786 (Minn. 1977); *McCormack v. Hanksraft Co.*, 278 Minn. 322, 333, 154 N.W.2d 488, 496-97 (Minn. 1967).

18. 395 N.W.2d 922 (Minn. 1986).

19. *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 924 (Minn. 1986).

20. *Id.*

danger of injury . . . because of the misuse was likewise foreseeable,"²¹ the court held as a matter of law that the manufacturer "had a legal duty to warn operators of the peril of running the press without a properly attached and operating safety bar."²²

The result of *Germann* is that the courts have taken over the decision whether a manufacturer must warn against a specific danger under the particular circumstances.²³ In other words, *Germann* requires the trial judge, rather than jury, to determine whether the standard of care requires a warning under the circumstances. In doing so, *Germann* and many courts following *Germann* have decided other preliminary facts to determine whether the standard of care was met.²⁴

Under classical negligence theory, the existence of a duty in tort is strictly the province of the court.²⁵ The *Germann*

21. *Id.* at 925.

22. *Id.*

23. See *Huber v. Niagra Mach. & Tool Works*, 430 N.W.2d 465, 467 (Minn. 1988) (finding as a matter of law no duty of a foot switch manufacturer to warn against removing the safety device on the switch upon finding that removal of the device was unforeseeable to the manufacturer; finding also no duty of the manufacturer to warn of dangers of failing to provide point-of-operation safety devices upon finding it unforeseeable to the manufacturer that the employer would fail to follow OSHA regulations requiring such devices); *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 99 (Minn. 1987) (finding a legal duty to warn of an "illusory park" problem after determining that the manufacturer had knowledge of the problem and was aware of a "high accident incidence"); *Hart v. FMC Corp.*, 446 N.W.2d 194, 198 (Minn. Ct. App. 1989) (finding no duty of tripper car manufacturer to warn of dangers of operating the tripper car in particular environments, such as one in which there are low clearance overhangs along the tripper car track, upon finding the circumstances leading up to plaintiff's injury unforeseeable to the manufacturer).

24. It is difficult to discern from the opinions precisely what fact issues the courts have decided to determine whether a warning is required, but at least one such issue that the appellate courts have decided de novo is whether the manufacturer could have foreseen that the product would be used in a dangerous manner. See *Huber*, 430 N.W.2d at 467 (upholding summary judgment; citing *Germann* as having set forth the standard for the court to determine whether a manufacturer has a duty to warn, then stating, "this standard requires a determination whether it was foreseeable to the manufacturer that the product would be used in a dangerous manner"). But see Michael K. Steenson, *Products Liability Law in Minnesota: Design Defect and Failure to Warn Claims*, 14 WM. MITCHELL L. REV. 443, 486 (1988) ("If there is a serious dispute over the foreseeability of a particular injury or risk, the fact question could be submitted to the jury in the form of a special verdict.").

25. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 37, at 236 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 328B (1965). As Prosser and Keeton explain, the existence of a duty depends on

Whether, upon the facts in evidence, such a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of the other — or, more simply, whether the

court, however, as well as later courts following *Germann*, have confused the element of "duty" as it applies to negligence theory.²⁶ "[T]he critical aspect of the true duty issue is the relationship between plaintiff and defendant. The question for the court is whether public policy should impose a standard of conduct to govern the actions of one party in this relationship toward the other."²⁷ In this regard, the Minnesota courts have long ago resolved the legal duty of a manufacturer to provide warnings to the users and consumers of its products. That is, a manufacturer has a duty to exercise reasonable care in warning users and consumers of foreseeable dangers of its product.²⁸

Once a general duty in tort is found to exist, the court must then determine "the standard of conduct required of the

interest of the plaintiff which has suffered invasion was entitled to legal protection at the hands of the defendant. . . . It is no part of the province of a jury to decide whether a manufacturer of goods is under any obligation for the safety of the ultimate consumer, or whether the Long Island Railroad is required to protect Mrs. Palsgraf from fireworks explosions.

KEETON ET AL., *supra*, § 37, at 236 (citations omitted).

26. The confusion likely stems from the unfortunate phrase "duty to warn," which in *Germann* and later cases has been substituted for the more accurate phrase, "the requirement of a warning to meet the standard of care." The word "duty" in the phrase "duty to warn" is misleading, as it refers not to the legal duty of a manufacturer to exercise reasonable care in providing warnings and instructions, but rather to the factual duty of the defendant to conform to that standard of care. The *Germann* court failed to make that distinction.

27. Soule, *Returning Negligence*, *supra* note 14, at 6.

28. See cases cited *supra* note 8; see also Tentative Draft No. 2, *supra* note 1, § 1 (setting forth the liability, or duty, of a commercial seller for harm caused by defective products). The duty to warn and instruct under the *Restatement (Third)* is limited to the time of sale or distribution of the product. *Id.* § 1(b). Thus, the *Restatement (Third)* does not address the duty of the manufacturer to warn users and purchasers of a product's dangers discovered by the manufacturer after the sale of the product. See *id.* § 2 cmt. m ("[F]ault-based claims for post-sale failure to recall, redesign or instruct and warn are beyond the scope of this Section because they do not rest on the existence of a product defect at time of sale or other distribution."). Minnesota courts have only recently addressed the duty of a manufacturer to provide post-sale warnings. In *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988), a case involving the explosive separation of a multi-piece rim of a truck tire that caused injury to the plaintiff, the court found a post-sale duty may arise "in special cases" and held that the case at issue was such a special case. *Id.* at 833. Factors on which the court relied in finding a post-sale duty included the manufacturer's knowledge of the danger, the latent quality of the danger, the degree of the danger, whether the product continued to be advertised and serviced after the manufacturer had knowledge of the danger, and whether the manufacturer had undertaken to warn other purchasers. *Id.*; see also *Ramstad v. Lear Siegler Diversified Holdings Corp.*, 836 F. Supp. 1511, 1516-17 (D. Minn. 1993).

defendant,"²⁹ which Minnesota courts have determined to be reasonable care in failure-to-warn cases.³⁰ At that point, however, the inquiry shifts to the trier of fact. Assuming there are genuine disputed issues of fact,³¹ the court must allow the jury to determine "whether the defendant has conformed to the standard of conduct required by the law."³² Thus, under true negligence principles, in failure-to-warn cases, it would be for the jury to determine whether reasonable care requires the manufacturer to provide a warning, and if a warning is provided, whether it was adequate, under the circumstances of each case. The role of the jury would be no different than in the guarding case illustrated above, in which the jury determines whether reasonable care requires the manufacturer to provide a protective guard over the machine hazard.

There is no conceptual difference between an allegation of defect for failure to warn and an allegation of defective design that warrants such a significant departure from traditional roles of court and jury in Minnesota failure-to-warn cases. Nothing in the *Restatement (Third)*'s discussion of warnings supports Minnesota's anomalous division of authority in failure-to-warn cases; indeed, the *Restatement (Third)* treats failure to warn and design defect similarly for purposes of applying negligence principles. Minnesota courts should do likewise and take the opportunity that the *Restatement (Third)* presents to correct the failure-to-warn analysis in Minnesota.

IV. The Requirements of Reasonable Care

Although the jury is responsible for deciding whether the defendant met the standard of reasonable care, the judge must first instruct the jury as to what is the standard of care. The *Restatement (Third)* provides a helpful benchmark for evaluating Minnesota's pattern jury instruction for failure to warn. Although partially adequate, Minnesota's present failure-to-warn

29. RESTATEMENT (SECOND) OF TORTS § 328B; see also KEETON ET AL., *supra* note 25, § 37, at 236.

30. See *infra* part IV.

31. The court traditionally decides whether there are fact issues for the jury and whether the jury can reasonably conclude either that the defendant did or did not conform to the standard of care. RESTATEMENT (SECOND) OF TORTS § 328B(a), (d) (1965); see also *supra* note 13.

32. RESTATEMENT (SECOND) OF TORTS § 328C (1965). See *supra* note 13.

instruction fails to incorporate some of the significant elements of the reasonable care analysis.

A. *Reasonably Foreseeable Dangers*

One aspect of reasonable care in a warnings case is identifying those dangers for which reasonable care requires a warning. Under the *Restatement (Third)*, a manufacturer may be liable for failure to warn only of "foreseeable risks of harm posed by the product."³³ Plaintiff bears the burden of proving that the risk was "known or should have been known to the relevant manufacturing community."³⁴ The *Restatement (Third)* thus rejects the doctrine of imputed knowledge that had crept into some strict liability cases.³⁵ In this respect, the *Restatement (Third)* conforms to Minnesota law. The Minnesota courts have consistently held that a manufacturer may be liable for failure to warn only of known or reasonably foreseeable dangers of its product.³⁶ Although liability can attach even where dangers are created by abuse or misuse of a product, such abuse or

33. Tentative Draft No. 2, *supra* note 1, § 2(c). The comments to this section state: Subsections (b) and (c) of § 2 impose liability only when the product is put to uses that it is reasonable to expect a seller or distributor to foresee. Product sellers and distributors are not required to foresee and take precautions against every conceivable mode of use and abuse to which their products might be put.

Id. § 2 cmt. 1.

34. *Id.*

35. *Id.* § 2 Reporters' Note to cmt. 1 ("Given the criticism that has been leveled against the imputation of knowledge doctrine and the relatively thin judicial support for it, we reject it as a doctrinal matter.").

36. See *Balder v. Haley*, 399 N.W.2d 77, 81 (Minn. 1987) ("There is 'no duty to warn of an improper use that could not have been foreseen.'") (quoting *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782, 788 (Minn. 1977)); *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 924 (Minn. 1986) ("[T]he duty to warn rests directly on the foreseeability of the injury."); *Gryc v. Dayton Hudson Corp.*, 297 N.W.2d 727, 739 (Minn. 1980) ("[A] manufacturer has a duty to warn users of its products of all dangers associated with those products of which it has actual or constructive knowledge."); *aff'd*, 447 U.S. 921 (1980); *Frey*, 258 N.W.2d at 788 ("[T]he manufacturer's duty to warn must rest on foreseeability, with no duty to warn of an improper use that could not have been foreseen."); *McCormack v. Hanksraft Co.*, 278 Minn. 322, 332, 154 N.W.2d 488, 496 (1967) (concluding that the evidence supported the jury's finding of liability for failure to warn of "dangers reasonably foreseeable in the use of the vaporizer"); *Hart v. FMC Corp.*, 446 N.W.2d 194, 197 (Minn. Ct. App. 1989) ("It must be foreseeable, under this standard, that the product would be used in a dangerous manner before a duty to warn will be imposed."); *Willmar Poultry Co. v. Carus Chem. Co.*, 378 N.W.2d 830, 837 (Minn. Ct. App. 1985) ("In a strict liability 'failure-to-warn' case, a manufacturer is only required to warn of foreseeable risks in its product.").

misuse must also be reasonably foreseeable to the manufacturer.³⁷ The present Minnesota jury instruction for failure to warn properly incorporates these reasonable foreseeability concepts.³⁸

B. The Standard of Care for Non-Manufacturing Sellers

When speaking of non-manufacturing sellers, however, the *Restatement (Third)* seems to create an exception to the principle described in the previous section regarding reasonably foreseeable dangers.³⁹ The *Restatement (Third)* commentary describes the liability of non-manufacturing sellers and distributors for failure to provide adequate warnings and instructions as follows:

[O]nce it is determined that . . . reasonable instructions or warnings could have been provided at or before the time of sale by a predecessor in the chain of distribution and would have reduced plaintiff's harm, it is no defense that a non-manufacturing seller of such a product exercised due care. . . . Thus, strict liability is imposed on a wholesale or retail seller who neither knew nor should have known of the relevant risks, nor was in a position to have taken action to avoid them, so long as a predecessor in the chain of distribution could have acted reasonably to avoid the risks.⁴⁰

In other words, a product hazard need not be reasonably foreseeable to a nonmanufacturing seller (such as a retailer or distributor) before liability may be imposed upon that seller, as long as the hazard was reasonably foreseeable to a predecessor in the chain of distribution. The *Restatement (Third)*'s exception to the requirement of reasonable foreseeability as to non-manufacturing sellers, however, is not consistent with Minnesota law, which provides that even nonmanufacturing sellers must

37. *Germann*, 395 N.W.2d at 924.

38. See JURY INSTRUCTION GUIDES, *supra* note 16, JIG 119, at 90 (instructing a finding of liability "if the (manufacturer) (seller) knew or reasonably could have discovered the danger involved in the use of the product, and if the product is not accompanied by adequate (warnings) (instructions)").

39. The *Restatement (Third)* states that "a product is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution. . . ." Tentative Draft No. 2, *supra* note 1, § 2(c) (emphasis added).

40. *Id.* § 2 cmt. n (emphasis added) (citations omitted).

warn only of reasonably foreseeable dangers.⁴¹ In fact, Minnesota has enacted legislation that limits the liability of non-manufacturing sellers in product liability cases except where the seller has knowledge of the product's defective condition.⁴²

Where the nonmanufacturing seller is a commercial used-product seller, however, the *Restatement (Third)* is more lenient. Commercial used-product sellers are governed by section 9 of the *Restatement (Third)*. This section applies the provisions of sections 1 and 2 to a used-product seller⁴³ but then exempts the seller from liability if the seller clearly and conspicuously informs the buyer in writing that it disclaims all legal liability for product defect, or if the circumstances of the sale would lead a reasonable person to expect to assume the risk of product

41. See *Willmar Poultry*, 378 N.W.2d at 830 (stating that a negligence claim against the distributors in this case required proof that the distributors had knowledge of their products' conditions and the risks associated with those conditions; upholding directed verdict in favor of distributors of potassium permanganate and formaldehyde, which caused chemical fire when mixed together and used for fumigation, finding that, while the distributors knew the chemicals were used for fumigation, there was no evidence they knew or appreciated the risks involved in such use or that they knew the warnings might have been inadequate).

42. Section 544.41 of the Minnesota Statutes requires the dismissal of any seller other than the manufacturer in a products liability action as long as the defendant manufacturer is identified, amenable to service, and able to satisfy the judgment, if any. MINN. STAT. § 544.41 subd. 1, 2 (1988). If the plaintiff can show, however, that a nonmanufacturing seller or distributor exercised any control over the design or manufacture of the product, had actual knowledge of any defect in the product, or created the defect in the product, the seller may not be dismissed from the action. *Id.* at subd. 3. See, e.g., *Gorath v. Rockwell Int'l, Inc.*, 441 N.W.2d 128, 131 (Minn. Ct. App. 1989) (upholding summary judgment in favor of seller of used paper cutter, finding no evidence that seller had actual knowledge of any defect in the paper cutter); *Vergin v. Gladwin Mach. & Supply Co.*, No. C6-91-94, 1991 WL 132763, at *1 (Minn. Ct. App. July 23, 1991) (upholding summary judgment in favor of seller of used, allegedly defective press brake, finding no evidence the seller had actual knowledge of the defect). The *Restatement (Third)* acknowledges that many jurisdictions have enacted similar legislation that immunizes nonmanufacturing sellers and distributors from liability. Tentative Draft No. 2, *supra* note 1, § 1 cmt. e.

43. The application of §§ 1 and 2 to a used-product seller is likely the same as for any other nonmanufacturing seller, although the *Restatement (Third)* commentary is not explicit on this issue. Thus, a used-product seller may also be found liable for failing to provide adequate warnings of a risk not reasonably foreseeable to the seller provided that a predecessor in the chain of distribution could reasonably have foreseen the hazard. See *supra* notes 39-40 and accompanying text.

defects.⁴⁴ In Minnesota, used-product sellers are governed by the same rules that apply to other nonmanufacturing sellers.⁴⁵

C. Adequacy of the Warning

The *Restatement (Third)* incorporates another negligence concept in its requirement of "reasonable instructions or warnings,"⁴⁶ adopting a "reasonableness test for judging the adequacy of product instructions and warnings."⁴⁷ Thus, a reasonably adequate warning may permit users to "prevent harm either by appropriate conduct during use or consumption or by choosing not to use or consume."⁴⁸ Again, this reasonableness test is reflected in Minnesota law,⁴⁹ and is incorporated in the failure-to-warn jury instruction.⁵⁰

D. Remote or Obvious and Generally Known Risks

Another aspect of the *Restatement (Third)*'s failure-to-warn standard is that a manufacturer may be liable only when the warning would have "reduced or avoided" risks of harm, and the "omission of the instructions or warnings renders the product

44. Tentative Draft No. 2, *supra* note 1, § 9.

45. *See Gorath*, 441 N.W.2d at 132. *But see* Tentative Draft No. 2, *supra* note 1, § 9 cmt. f ("Legislation immunizing wholesalers and retailers from strict liability for injuries arising from the sale of new products should not be interpreted to govern used-product sellers. A seller of used products seeking to immunize itself from liability may do so by placing itself within the terms of § 9(c).").

46. Tentative Draft No. 2, *supra* note 1, § 2(c).

47. *Id.* § 2 cmt. h.

48. *Id.*

49. *See Krutsch v. Walter H. Collin GmBh*, 495 N.W.2d 208, 212 (Minn. Ct. App. 1993) (affirming trial court's denial of motion for judgment notwithstanding the verdict on jury's finding that the manufacturer breached its duty to warn by failing to place warning labels on the product even though it provided warnings in its operation manual; finding the evidence "not so overwhelmingly on one side that reasonable minds [could not] differ as to the proper outcome.") (citation omitted); *see also* STEVEN J. KIRSCH, *METHODS OF PRACTICE* § 6.54, *in* 5A *MINNESOTA PRACTICE* 1, at 146 (3d ed. 1986) ("In general, an adequate warning must communicate with a degree of intensity that would cause a reasonable person to exercise for his own safety the caution commensurate with the potential danger.") (citation omitted). In Minnesota, the adequacy of the warning is for the jury to decide. *Germaan v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 924-25 (Minn. 1986).

50. Minnesota's pattern jury instruction for failure to warn provides:

For a warning to be adequate it must be set out in such a way that heeding the warning will make the product reasonably safe for use. [The warning must be in a form which could reasonably be expected to catch the attention of, and be understood by, the ordinary user.]

JURY INSTRUCTION GUIDES, *supra* note 16, JIG 119, at 90.

not reasonably safe."⁵¹ The *Restatement (Third)* thus does not require a warning of every foreseeable risk of harm. The factfinder may conclude that the absence of a warning does not render the product "not reasonably safe," or that the warning would not have "reduced or avoided" the harm.

The largest category of risks that fall within this exemption includes those found to be obvious or generally known. As to these risks, the *Restatement (Third)* states:

In general, no duty exists to warn or instruct regarding risks and risk avoidance measures that should be obvious to, or generally known by, foreseeable product users. . . . Warning of an obvious or generally known risk in most instances will not provide an effective additional measure of safety.⁵²

The *Restatement (Third)* also notes that warnings of obvious or generally known risks "can diminish the significance of warnings about non-obvious, not-generally known risks."⁵³ In sum, reasonable care does not require a manufacturer to warn of obvious or generally known risks.

This principle has been recognized in Minnesota law for years.⁵⁴ While sometimes expressed as "no duty to warn of open and obvious dangers,"⁵⁵ or confused with causation analysis,⁵⁶ the principle has its foundation in the reasonable care standard. Unfortunately, this issue is not addressed in Minnesota's jury instruction for failure to warn. In fact, the instruction virtually mandates a finding of liability if the product

51. Tentative Draft No. 2, *supra* note 1, § 2(c).

52. *Id.* § 2 cmt. i.

53. *Id.*

54. See *Minneapolis Soc'y of Fine Arts v. Parker-Klein Assocs. Architects, Inc.*, 354 N.W.2d 816, 821 (Minn. 1984); *Westerberg v. School District No. 792*, 276 Minn. 1, 8, 148 N.W.2d 312, 316 (1967); *Hart v. FMC Corp.*, 446 N.W.2d 194, 198 (Minn. Ct. App. 1989); *Dahlbeck v. DICO Co., Inc.*, 355 N.W.2d 157, 163 (Minn. Ct. App. 1984).

55. *Westerberg*, 276 Minn. at 8, 148 N.W.2d at 316 (quoting R.D. Hirsh, Annotation, *Manufacturer's or Seller's Duty to Give Warning Regarding Product as Affecting His Liability for Product-Caused Injury*, 76 A.L.R.2d 9, 28 (1961)); see also *Hoag v. Shore-Master, Inc.*, No. C9-94-508 (Minn. Ct. App. Nov. 1, 1994), FIN. COMM., Nov. 4, 1994, at 55 (reversing denial of defendant's motion for judgment notwithstanding the verdict; finding the manufacturer, as a matter of law under the *Germann* analysis, had no duty to warn of the danger of injury caused by the recoil action of a spring where such properties of a spring are open and obvious; stating that "[a] manufacturer has no duty to warn of the open and obvious dangers of a spring").

56. See *infra* notes 73-76 and accompanying text.

lacks a warning of a foreseeable danger.⁵⁷ By failing to acknowledge that reasonable care may not require a warning of every foreseeable danger, the jury instruction significantly departs from the *Restatement (Third)*.

The Minnesota instruction also fails to allow that reasonable care may not require a manufacturer to give a warning of an extremely remote, albeit foreseeable, danger. Such a warning may "have no effect on product users' conduct, . . . obscure the effect of other warnings or more significant dangers, . . . [and] add to the proliferation and dilution of warnings generally."⁵⁸ As the *Restatement (Third)* acknowledges:

Warnings that are too numerous or detailed may be ignored and thus ineffective. . . . Useful instructions and warnings call the user's attention to dangers that can be avoided by careful product use, but potentially useful instructions and warnings can be debased if attention must also be directed to trivial or far-fetched risks.⁵⁹

In other words, warning of an extremely remote danger may not "reduce or avoid" harm and may not help render the product "reasonably safe."⁶⁰

The *Restatement (Third)* provides the drafters of Minnesota's Jury Instruction Guides another opportunity to correct the failure-to-warn instruction. The instruction should conform to the reasonable care standard of Minnesota law and the *Restatement (Third)* and should permit a finding of nonliability if reasonable care does not require a warning.⁶¹

57. JURY INSTRUCTION GUIDES, *supra* note 16, JIG 119, at 90 ("A product (manufacturer) (seller) must ([p]rovide adequate warnings of dangers inherent in improper use of the product, if the use is one that the (manufacturer) (seller) should reasonably foresee.").

58. Soule, *Returning Negligence*, *supra* note 14, at 9.

59. Tentative Draft No. 2, *supra* note 1, § 2(c) cmt. h; see also KEETON ET AL., *supra* note 25, § 96, at 686; Aaron D. Twerski et al., *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495, 514-15 (1976).

60. See *Henkel v. R & S Bottling Co.*, 323 N.W.2d 185, 188 (Iowa 1982) ("A supplier of goods . . . is not required to provide a warning of danger when the reasonable probability of injury is remote, slight or inconsequential."). After stating the rule, the *Henkel* court applied it to sustain a directed verdict on a claim of failure to warn against the extremely rare bursting of a carbonated beverage bottle. *Id.*

61. One of the authors has previously proposed the following jury instruction:

A manufacturer has a duty to use reasonable care in providing an adequate warning of any danger involved in the use of a product which poses an unreasonable risk of harm to persons or property when the product is put to its intended use or to any use that is unintended but is reasonably

E. The Standard of Care as to Special Users of Products

Both the *Restatement (Third)* and Minnesota law address situations where the product user either has special knowledge beyond that of the average reasonable person or where the user is insulated from the manufacturer by an intermediary with such special knowledge, often termed "sophisticated user" and "learned intermediary" cases, respectively. The "learned intermediary" case is one in which the product reaches the end user by way of an intermediary who has special knowledge about the product, such as the case of prescription drugs which reach the patient from the manufacturer by way of a trained and licensed physician.⁶² In Minnesota, where the learned intermediary is a physician and the product is a prescription drug, the "learned intermediary defense" has been held applicable to relieve the manufacturer of liability for failure to warn of the drug's dangers "if the doctor was fully aware of the facts which were subject of the warning."⁶³ It has been held not to apply, however, where the product reaches an employee through the

foreseeable.

What constitutes reasonable care will vary with the surrounding circumstances. Reasonable care is the care that a reasonably prudent person would exercise under the same or similar circumstances.

In determining whether reasonable care requires the manufacturer to provide a warning, you may consider all the facts and circumstances, including, among others, the likelihood and seriousness of harm and the feasibility, burden and effectiveness of a warning.

A manufacturer may be required to provide a warning only if the manufacturer knew or through the exercise of reasonable care could have discovered the danger involved in the use of the product. A manufacturer is not required to warn of a danger which would ordinarily be known and appreciated by those who would be expected to use the product.

For a warning to be adequate it must be set out in such a way that heeding the warning will make the product reasonably safe for use. The warning must be in a form which could reasonably be expected to catch the attention of, and be understood by, the ordinary user.

If the manufacturer did not use reasonable care in providing an adequate warning, then the manufacturer is negligent.

Soule, *Returning Negligence*, *supra* note 14, at 11. See *Bilotta v. Kelley Co.*, 346 N.W.2d 616 (Minn. 1984); *Westerberg v. School Dist. No. 792*, 276 Minn. 1, 148 N.W.2d 312 (1967); *Mix v. MTD Products, Inc.*, 393 N.W.2d 18 (Minn. Ct. App. 1986); *McCormick v. Custom Pools, Inc.*, 376 N.W.2d 471 (Minn. Ct. App. 1985).

62. See, e.g., *Mulder v. Parke Davis & Co.*, 288 Minn. 332, 335, 181 N.W.2d 882, 885 (1970).

63. *Id.* at 335, 181 N.W.2d at 885; see also *Lhotka v. Larson*, 307 Minn. 121, 238 N.W.2d 870 (Minn. 1976); *Borka v. Emergency Physicians Professional Assoc.*, 379 N.W.2d 682 (Minn. Ct. App. 1986).

employer.⁶⁴ In that case, the Minnesota Court of Appeals held it unreasonable for the manufacturer to rely on the employer to adequately warn its employees of the product's dangers.⁶⁵

The "sophisticated user" theory applies where the user of the product has special knowledge such that the user would already be aware of the dangers inherent in the use of the product.⁶⁶ Thus, the theory may be viewed as an extension of the "open and obvious risk" cases in which courts have found either that reasonable care does not require a warning of an open and obvious risk,⁶⁷ or that the failure to warn did not cause the injury where the risk was open and obvious.⁶⁸

According to the *Restatement (Third)*, in most cases there should be no special rules governing the requirement of a warning in special circumstances such as where a learned intermediary separates the manufacturer from the end user:

[Section] 2(c) may require that instructions and warnings be given not only to purchasers, users, and consumers, but also to others who a reasonable seller should know will be in a position to reduce or avoid the risk of harm. There is no general rule as to whether one supplying a product for the use of others through an intermediary has a duty to warn the

64. *Todalen v. United States Chem. Co.*, 424 N.W.2d 73 (Minn. Ct. App. 1988).

65. The *Todalen* court distinguished the employer-employee relationship from the doctor-patient relationship noting that in the medical context, safeguards exist that are not present in the industrial workplace. *Id.* at 79 (quoting *Hall v. Ashland Oil Co.*, 625 F. Supp. 1515 (D. Conn. 1986)). For example, a doctor's primary interest in prescribing a particular drug is to promote the health of the patient, while the employer's primary criteria in selecting a particular product is that product's industrial utility. *Id.* In addition, while a drug manufacturer shifts the duty to warn onto a party who can be held legally liable to the patient for failing to fulfill that duty, an industrial supplier's duty would be shifted to one having limited liability under the workers' compensation statutes. *Id.*

66. See *Dahlbeck v. DICO Co.*, 355 N.W.2d 157, 163 (Minn. Ct. App. 1984) ("[A] manufacturer has no duty to warn when the dangers of a product are within the professional knowledge of the user.") (quoting *Strong v. E.I. DuPont de Nemours Co.*, 667 F.2d 682, 687 (8th Cir. 1981)).

67. See *Westerberg v. School Dist. No. 792*, 276 Minn. 1, 8, 148 N.W.2d 312, 316 (1967); see also *supra* notes 52-55 and accompanying text.

68. See *McCormick v. Custom Pools, Inc.*, 376 N.W.2d 471, 476 (Minn. Ct. App. 1985) (affirming summary judgment on claim of failure to warn of risk of diving in a shallow pool where plaintiff was found to be a "good and accomplished swimmer" who "knew he had to execute a surface dive to avoid the serious risks involved in shallow diving"); see also *infra* notes 74-77 and accompanying text.

ultimate product user directly or may rely on the intermediary to relay warnings.⁶⁹

Similarly, although Minnesota cases discuss special rules for both the "learned intermediary" and the "sophisticated user" case, the requirement of a warning to a particular person under Minnesota law or the *Restatement (Third)* depends upon whether a reasonable manufacturer would provide a warning to the user under the same circumstances.⁷⁰

69. Tentative Draft No. 2, *supra* note 1, § 2 cmt. h. The *Restatement (Third)* does, however, provide a special rule for manufacturers of prescription drugs. The *Restatement (Third)* defines defect in a prescription drug for failure to warn as follows:

A prescription drug or medical device is not reasonably safe because of inadequate instructions or warnings when

(1) reasonable instructions or warnings regarding foreseeable risks of harm posed by the drug or medical device are not provided to prescribing and other health care providers who are in a position to reduce the risks of harm in accordance with the instructions or warnings; or

(2) reasonable instructions or warnings regarding foreseeable risks of harm posed by the drug or medical device are not provided directly to the patient when the manufacturer knew or had reason to know that no health care provider would be in a position to reduce the risks of harm in accordance with the instructions or warnings.

Tentative Draft No. 2, *supra* note 1, § 8. Nevertheless, even § 8 evaluates the conduct of a prescription drug manufacturer according to the standard of a reasonable manufacturer responding to reasonably foreseeable risks.

70. Compare, for example, the "emergency doctrine," a common negligence defense. As described by Prosser and Keeton, this doctrine is often cited by courts for the proposition that an actor faced with an emergency situation "is not to be held to the standard of conduct normally applied to one who is in no such situation." KEETON ET AL., *supra* note 25, § 33, at 196 (citations omitted). Thus, the doctrine apparently applies a different standard of care to such a defendant. According to Prosser and Keeton, however, many courts have hedged on this doctrine to the extent that the standard of conduct required of one acting in an emergency situation is now more properly the same as in any other negligence case: "The conduct required is . . . that of a reasonable person under the circumstances, as they would appear to one who was using proper care, and the emergency is to be considered only as one of the circumstances." *Id.* at 196-97 (citations omitted). Similarly, in the case of a special user, the standard of conduct required of the manufacturer for providing warnings or instructions should remain as that of a reasonable manufacturer under same or similar circumstances, and the special knowledge or awareness of a user, or of an intermediary between the manufacturer and the user, should merely be part of the circumstances to be considered.

V. Causation

As in any tort case, a plaintiff alleging failure to warn must prove that defendant's conduct caused plaintiff's harm. The *Restatement (Third)* reflects this element in its first sentence: "One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property *caused* by the product defect."⁷¹

In a failure-to-warn case, plaintiff must prove that "had the product been accompanied by reasonable instructions or warnings, the harm to the plaintiff would have been avoided or diminished."⁷² The *Restatement (Third)* does not adopt any special rules for deciding causation, instead deferring to "the prevailing rules and principles governing causation in tort."⁷³

Minnesota courts have addressed various causation issues unique to failure-to-warn cases. One such issue is whether the obviousness of a product danger is relevant to whether reasonable care requires a warning. Minnesota's failure-to-warn jury instruction did not deal with the subject, apparently because its drafters "were divided or uncertain as to whether an open and obvious danger is relevant to the duty issue or the causation issue."⁷⁴ Open and obvious dangers may, in fact, be relevant to both issues.

The manufacturer's duty of reasonable care extends to all reasonably anticipated users of the product, not just to the individual plaintiff. Thus, the plaintiff's knowledge, while perhaps relevant, is not determinative of whether reasonable care requires a warning. Thus, as noted by Prosser, there is no duty to warn of "a condition that would ordinarily be seen and the danger of which would ordinarily be *appreciated by those who would be expected to use the product.*" . . .

The causation issue, on the other hand, focuses on the individual product user, whether it be the plaintiff or another person using the product when the plaintiff is injured. Thus,

71. Tentative Draft No. 2, *supra* note 1, § 1(a) (emphasis added).

72. *Id.* § 10 cmt. a.

73. *Id.* § 10.

74. Soule, *Returning Negligence*, *supra* note 14, at 10; JURY INSTRUCTION GUIDES, *supra* note 16, JIG 119, Authorities at 93.

failure to warn is not the cause of an accident or injury when the product user is actually aware of the danger.⁷⁵

Minnesota courts have dismissed failure-to-warn claims on causation grounds in several cases in which the product user was aware of the danger of which the manufacturer should have warned.⁷⁶ As stated by one court:

Where the presence of a warning would not have altered the user's conduct, the failure to warn is not a proximate cause of the injury. . . . Also, if despite the lack of warning, a user is fully aware of the danger of which the manufacturer should have warned, there is no causal connection between the lack of warning and the injury.⁷⁷

Another causation issue is the effect of the product user's failure to read the allegedly inadequate warning. The Minnesota Court of Appeals addressed this issue in *J & W Enterprises, Inc. v. Economy Sales, Inc.*,⁷⁸ holding that plaintiff must first prove that he relied on a warning before the issue of its adequacy reaches the jury.⁷⁹ There is no causal link between the allegedly inadequate warning and the harm if the product user has not read the warning.⁸⁰

75. Soule, *Returning Negligence*, *supra* note 14, at 10-11 (quoting KEETON ET AL., *supra* note 24, § 96, at 686-87 (emphasis added)).

76. See *Ramstad v. Lear Siegler Diversified Holdings Corp.*, 836 F. Supp. 1511, 1516 (D. Minn. 1993) (directing verdict on claim of failure to warn of dangers associated with use of grain auger, finding no causation where the plaintiff was fully aware of the dangers); *Balder v. Haley*, 399 N.W.2d 77 (Minn. 1987) (reinstating a directed verdict upon finding no causation as a matter of law for failure to warn of hazards in repairing a gas water heater where plaintiff attempted to do so despite several verbal warnings the day of the accident and despite the obvious smell of gas in the area of the water heater); *Mulder v. Parke Davis & Co.*, 288 Minn. 332, 181 N.W.2d 882 (1970) (upholding a directed verdict for a manufacturer of a prescription drug on claim of failure to warn where the doctor prescribing the drug was fully aware of the danger and chose to disregard the manufacturer's recommendations); *Hart v. FMC Corp.*, 446 N.W.2d 194 (Minn. Ct. App. 1989) (reversing a verdict against the manufacturer of a tripper car for alleged failure to warn where the danger involved in using the tripper had been made known to everyone who worked with the product including the plaintiff); *McCormick v. Custom Pools, Inc.*, 376 N.W.2d 471 (Minn. Ct. App. 1985) (upholding summary judgment for a claim of failure to warn of the risk of diving in a shallow pool, upon finding that plaintiff, an experienced swimmer, was fully aware of the risks).

77. *Priefer v. Michelin Tire Corp.*, No. C2-90-79, 1990 WL 68624, at *2 (Minn. Ct. App. May 29, 1990).

78. 486 N.W.2d 179 (Minn. Ct. App. 1992).

79. *Id.* at 181.

80. See also *Marko v. Aluminum Co. of Am.*, No. CX-94-789, 1994 WL 615004 (Minn. Ct. App. Nov. 8, 1994) (upholding summary judgment in favor of manufactur-

Finally, while the Minnesota courts have in several cases considered what evidence may *defeat* causation in a failure-to-warn case, "the courts have not analyzed in significant depth the other side of the issue, that is, what affirmative evidence must the plaintiff offer to show that an accident *was* caused by a failure to warn."⁸¹ The Minnesota Supreme Court briefly considered the issue in *Kallio v. Ford Motor Co.*⁸² Despite weak evidence of causation, the court sustained a failure-to-warn verdict. The court resolved the case "[w]ithout deciding whether a rebuttable presumption exists that a warning would have been heeded."⁸³ A Minnesota federal court has also determined that Minnesota courts would not adopt such a presumption.⁸⁴ Thus, the causation element requires some evidence that the product user would have acted differently if the manufacturer had provided an adequate warning.⁸⁵

VI. Conclusion

The *Restatement (Third)* conforms to Minnesota failure-to-warn law in many ways. To properly apply the reasonable care standard, however, the Minnesota Supreme Court must act to restore the proper roles of court and jury in deciding whether the manufacturer should have provided a warning. Moreover, the failure-to-warn jury instruction requires fundamental revision so that the jury may properly decide failure-to-warn cases under the reasonable care standard. The *Restatement (Third)* may provide the impetus for the Minnesota courts to more fully align the Minnesota failure-to-warn analysis with traditional negligence theory.

ers of a tire and its rim as to plaintiffs' claim of failure to warn of the danger of igniting flammable materials within the tire; finding no causation as a matter of law where plaintiff had conceded that he did not read the warnings provided to him and that it was his practice not to read warnings).

81. Soule & Bjork, *Minnesota Products*, *supra* note 14, at 19.

82. 407 N.W.2d 92 (Minn. 1987).

83. *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 99 (1987).

84. *Ramstad*, 836 F. Supp. at 1516. The *Restatement (Third)* is silent as to whether a presumption should exist that a warning, if given, would have been heeded.

85. *Krein v. Raudabough*, 406 N.W.2d 315, 320 (Minn. Ct. App. 1987).