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Chapter 3

Warnings:
Duty to Retrofit/Subsequent
Duty to Warn

Michael J. Barrett
David R. Kott

Editors' Note:
Breach of a duty to warn has become boilerplate in product liability complaints. Sometimes it is irrelevant to the core cause of action. Sometimes, as is often the case with prescription medicines, it is the only plausible cause of action. It raises a host of questions: when must a warning be given, to whom must it be given, to state a few. Although the New Jersey Supreme Court has addressed many of these questions — perhaps more than other areas of product liability — the answers are still not always fully clear, and some, though clear, are more subtle than would first appear.

The authors of this chapter have a wealth of courtroom experience with these kinds of cases and provide us with a practical discussion of how the case law bears on the cases that cross our desks.
Chapter 3  

Warnings: Duty to Retrofit/Subsequent Duty to Warn

I. INTRODUCTION

3-1 Overview

In product liability actions, a product defect may be proved by the absence of adequate warnings or instructions. Failure to warn cases can present a variety of issues and pitfalls that may prove difficult even to the experienced practitioner in the product liability field.\(^1\) In order to prosecute or defend these cases effectively, the practitioner must be familiar with (a) the nature and extent of a manufacturer's duty to warn, (b) the implications of the state of the art and industry standards, (c) the impact of the 1987 New Jersey Product Liability Act (hereinafter NJPLA), (d) the criteria for adequacy of warnings, (e) the issues of foreseeable users and uses, (f) the prospect of a duty to warn subsequent to sale, and (g) the rules established by NJPLA regarding proximate cause. This chapter is intended to provide the practitioner with an overview of each of these important issues and of the dangers that almost inevitably arise in failure to warn cases.

II. DUTY TO WARN

3-2 Generally: Manufacturer Has Duty to Warn

In a strict liability cause of action, the duty to warn is based on the concept that, absent an adequate warning, a product is defective, in that it is not reasonably fit, suitable, or safe for its intended purposes.\(^2\) A manufacturer is thus under a duty to warn of the dangers inherent in

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\(^1\) Note that the duty to warn in some products cases can take on some special characteristics not covered here. See, e.g., ch. 6, dealing with medicine and medical devices.

the use of its product if, without such a warning, the product is not reasonably safe. The manufacturer that does not provide adequate warnings or instructions regarding the use of its product can be held strictly liable for injuries resulting from the absence of such warnings or instructions.¹

A manufacturer’s duty to warn, however, does not extend to dangers that are obvious and are related to the intended function of a product. For instance, the manufacturer of a match need not warn that the match will burn, and the manufacturer of a knife need not warn that the knife will cut.⁴

Generally, failure to warn cases fall into two basic categories, those concerning hidden dangers and those dealing with unavoidably unsafe products.

3-2:1 HIDDEN DANGERS

The first category involves products that have been manufactured and designed as safely as possible within the existing state of the art, but that are not safe to use without adequate instructions or warnings. The duty to warn arises under the theory that whatever risks are inherent in the use of such products can be reduced or eliminated if the products are used in accordance with the manufacturer’s instructions or warnings. Most of the workplace product cases⁵ involving failure to warn claims fall into this category.⁶ For example, if the safe operation of a machine requires the use of a guard to prevent workers from

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⁴ Note, however, that the obviousness of a danger might not automatically relieve the manufacturer of its duty to warn under certain circumstances. See infra §§3-15, 3-16 for discussion.

⁵ See generally ch. 5.

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Warnings: Duty to Retrofit/Subsequent Duty to Warn

inadvertently placing their hands into the moving parts of the machine, the manufacturer must give a warning against the inherent danger of operating the machine without a guard.\(^7\) If caustic soda flakes have a propensity to explode when mixed with hot water or steam, the manufacturer must provide a warning against the occurrence of such a mixture.\(^8\)

3-2:2 UNAVOIDABLY UNSAFE PRODUCTS

The second category of failure to warn cases arises where a product is unavoidably unsafe in some manner, regardless of how carefully it is used. For example, a prescription drug, if ingested properly, may have great social utility, but at the same time it may also have the potential to cause undesirable side effects. A prescription drug will not be considered defective when it is accompanied by an adequate warning of its potential dangers or side effects.\(^9\) The NJPLA expressly provides that the manufacturer in such cases will not be liable if “the harm was caused by an unavoidably unsafe aspect of the product and the product was accompanied by an adequate warning or instruction as defined in section 4 of this act.”\(^10\)

3-2:3 KNOWLEDGE OF DANGER IMPUTED TO MANUFACTURER

Of course, a manufacturer cannot be expected to warn against dangers that are not known or knowable. However, in a failure to warn

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case, knowledge of the danger is imputed to the manufacturer; thus, the manufacturer bears the burden of proving that it lacked actual or constructive knowledge of the defect because information regarding the dangerous propensities of its product was not reasonably available or obtainable.11

The issue of a manufacturer’s knowledge of the dangerous propensities of its product is separate and distinct from the issue of the reasonableness of the manufacturer’s conduct.12 While the law imposes upon the manufacturer the burden of proving that the danger in its product was not known or knowable, the plaintiff still bears the ultimate burden of proving that the manufacturer acted unreasonably by distributing its product without an adequate warning or instruction.13

3-3 Manufacturer’s Conduct Must Be Reasonable

3-3:1 WAS MANUFACTURER’S WARNING OR FAILURE TO WARN REASONABLE?

In general, strict liability doctrine emphasizes the safety of the product, rather than the reasonableness of the manufacturer’s conduct. However, where the alleged defect consists of an improper warning, the reasonableness of the manufacturer’s conduct is a factor to be considered in determining liability.14 The question in failure to warn cases is whether the manufacturer, assuming that it knew of the dangerous propensity of its product, acted in a reasonably prudent manner by providing or by failing to provide appropriate instructions or warnings. Thus, once the manufacturer’s knowledge of the defect is imputed,
strict liability analysis in a warning case becomes almost identical to negligence analysis in its focus on the reasonableness of the manufacturer’s conduct.  

3-3:2 MANUFACTURER’S CONDUCT MEASURED BY STATE OF THE ART

In a failure to warn case, the manufacturer’s conduct must be measured against the state of the art. The term “state of the art” refers to the existing level of technological expertise and scientific knowledge relevant to a particular industry at the time a product is designed. In other words, given the scientific, technological and other information available at that time, did the manufacturer know, or should it have known, of the danger associated with the product’s use? In legal terms, did the manufacturer have actual or constructive knowledge of that danger?

In this regard, a manufacturer is held to the standard of an expert in its field. It must keep abreast of scientific advances that may be relevant to the safe use of its product. In some situations, particularly those involving public health, a manufacturer may be expected to be informed and affirmatively to seek out information concerning the public’s use of its product. Thus, a manufacturer will be deemed to know of reliable information generally available or reasonably obtainable in the industry or in the particular field involved.

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15. Id.
18. Id. at 452-453.

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3-3:2.1 Industry Standards/
Customs May Not Reflect State of the Art

Although industry standards and customs may be relevant in a failure to warn case, because those standards and customs may lag behind technological development in an industry, they are not identical with the state of the art. For example, in Michalko v. Cook Color & Chemical Corp., the defendant's practice of not installing a safety device, and not providing warnings, was consistent with trade custom at the time. Nonetheless, the New Jersey Supreme Court held that a manufacturer may have a duty to install safety devices, or to provide warnings, regardless of whether it was the custom of the industry or the purchaser of the machine to install such devices. The Court concluded that the existence of a duty to provide a safe product or to give adequate warning attaches without regard to prevailing industry standards.

3-3:2.2 Compliance Not, in Itself, a Defense

Thus, compliance with industry standards is not a defense in a failure to warn case where the industry's standards do not reflect the state of the art for the production of safe products. However, as discussed below, evidence of compliance with industry standards, where those standards are consistent with the state of the art in the industry, is probative on the issue of the reasonableness of a manufacturer's conduct when determining the adequacy of a warning or instruction under the NJPLA.

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21. Id. at 398.
22. *See infra §3-6:3.1.*
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III. ADEQUACY OF WARNINGS

3-4 Generally

The 1987 New Jersey Product Liability Act (hereinafter NJPLA) expressly recognizes that a product defect may be demonstrated by the absence of adequate warnings or instructions. The NJPLA provides:

A manufacturer or seller of a product shall be liable in a product liability action only if the claimant proves by a preponderance of the evidence that the product causing the harm was not reasonably fit, suitable or safe for its intended purpose because it.... (b) failed to contain adequate warnings or instructions[.].²⁴

Conversely, the NJPLA provides that if the product does contain an adequate warning or instruction, its manufacturer will not be liable for harm caused by a failure to warn.²⁵

3-5 NJPLA Defines “Adequate” Warning/Instruction

The NJPLA defines an “adequate product warning or instruction” as:

one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and that communicates adequate information on the dangers and safe use of the product, taking into account the characteristics of, and the ordinary knowledge common to, the persons by whom

the product is intended to be used, or in the case of prescription drugs, taking into account the characteristics of, and the ordinary knowledge common to, the prescribing physician.26

Thus, the NJPLA provides a double objective standard. The manufacturer is held to the standard of a reasonably prudent person under the circumstances, taking into account the ordinary knowledge common to the class of persons by whom the product is intended to be used. The NJPLA is therefore consistent with Feldman's statement that the reasonableness of the manufacturer's conduct must be considered in a failure to warn analysis.27

Although not explicitly stated, NJPLA does not depart from the strict liability principle that a manufacturer is presumed to know the harmful propensities of its own product, or from Feldman's statement that the manufacturer bears the burden of proving that the dangerous propensities of its product were not known or knowable to it.28

3-5:1 ADEQUACY OF WARNING MEASURED BY GENERAL USERS' KNOWLEDGE

Since the NJPLA measures the adequacy of the warning against the ordinary knowledge common to the class of persons by whom the product is intended to be used, the subjective knowledge of a particular plaintiff is not relevant. (However, as discussed below, the subjective knowledge of the plaintiff may be relevant to the issue of proximate cause in a case.)29

26. Id.
27. Feldman v. Lederle Lab., 97 N.J. at 450.
28. Id. at 458.
29. See infra §3-17:1.
3-6 Adequacy of Warning a Jury Issue

The adequacy of a manufacturer’s warning or instruction is normally an issue for the jury to decide. Depending upon the circumstances, the jury may have to consider the manner in which the warning or instruction was conveyed, or the actual contents of the warning or instruction, or sometimes both issues.

3-6:1 HOW DID MANUFACTURER CONVEY WARNING?

The manner in which a manufacturer must convey its warning or instruction varies, depending on the product involved. For example, most consumer electronic products are distributed with manuals that contain instructions and warnings. Most manufacturers of household cleaning products provide instructions and warnings on the labels of their product containers. Some manufacturers go a step further and provide warning labels such as “Hazardous: Do not open cabinet” on the products themselves. As discussed below, the manufacturer’s duty to warn extends to all foreseeable users of its product; therefore, its warnings or instructions must be conveyed in a manner that will most likely benefit all foreseeable users.

3-6:2 IS INDUSTRIAL MACHINERY WARNING TO EMPLOYER SUFFICIENT?

With regard to industrial machinery, the manner in which a manufacturer must convey its warnings or instruction is an unsettled issue. In Michalko, the Court stated that in some circumstances, a manufac-

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31 See infra §3-7.

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turer may have the duty to attach a suitable warning to the machine itself to caution the operator about the danger of using it without a protective device. The implication here is that the manufacturer owes a duty to the actual user of the machine, and that warnings directed to the purchaser/employer, which do not always reach the machine user, do not necessarily discharge the manufacturer’s duty.

However, in Seeley v. Cincinnati Shaper Co., Ltd., the court rejected plaintiff’s argument that the manufacturer had a non-delegable postsale duty to place warnings upon its machine. In that case, the manufacturer did not provide warnings against use without a guard when the machine was distributed in 1966. Twenty years later, in 1986, the manufacturer became aware that its machine had been purchased second-hand by the plaintiff’s employer. The manufacturer then mailed warning labels and product literature to the purchaser/employer, who in turn failed to affix one of the warning signs to the machine that injured the plaintiff. The court ruled that the manufacturer had discharged its duty to warn by delivering the warning labels to the purchaser/employer. In so ruling, the court stated that the manner in which a warning or instruction is conveyed must be evaluated under the objective reasonableness standard cited in the NJPLA.

More recently, the Supreme Court in Coffman v. Keene Corp., made it clear that a manufacturer of products that are used by employees must take reasonable steps to ensure that its warnings reach those employees. The Court stated that a manufacturer cannot escape its duty to employees by “merely sending warning letter and a new [safety device] to be installed on the machine.”

34. Id. at 17.
3-6:3  WAS CONTENT OF WARNING ADEQUATE?

The content of a warning or instruction must be evaluated in the same objective manner. For example, in *Campos*, it was argued that a pictorial warning should have been given, because the plaintiff could not read English. The Court found this to be a jury issue.\(^{37}\) Similarly, when the plaintiff in *Butler v. PPG Industries* argued that the product label on caustic flakes should have included a warning against mixing them with hot water or steam, the Appellate Division ruled that the adequacy of warning was for the jury to decide.\(^{38}\)

However, this issue may not always reach the jury. In *Seeley*,\(^{39}\) the Appellate Division found that the manufacturer of the industrial machine had provided the purchaser/employer with warning signs and substantial literature concerning machine guarding. The opinion offered by plaintiff’s expert on the warning language necessary under the circumstances introduced only a semantic difference upon which liability could not be based. While the court stopped short of holding that the manufacturer’s warnings were adequate as a matter of law, it reversed the jury’s verdict in favor of the plaintiff because there was not sufficient proof of inadequacy of the defendant’s warnings at trial.\(^{40}\)

3-6:3.1  Industry Standards Can Help Prove Adequacy of Warning Content

In failure to warn cases concerning the adequacy of the content of a warning or instruction, both plaintiffs’ and defendants’ attorneys seek to introduce into evidence industrial standards or government regula-


\(^{38}\) *Butler v. PPG Indus., Inc.* 201 N.J. Super. at 562.

\(^{39}\) *Seeley v. Cincinnati Shaper Co.* 258 N.J. Super. at 17.

\(^{40}\) Id.
tions. While such standards are not dispositive, they may provide juries with some objective criteria for determining the issue of adequacy under given circumstances.

3-7 All Foreseeable Users Must Be Warned

A manufacturer's duty to warn extends only to the foreseeable users of its product. The issue of who qualifies as a "foreseeable user" has itself been the subject of litigation.

3-7:1 WHO IS A FORESEEABLE USER?

The foreseeable user doctrine was explored in Ramos v. Silent Hoist & Crane Co. In that case, a dock worker was injured while he was attempting to tie a line from a docking tanker to a rotating capstan that had been installed by the defendant. The defendant argued, among other things, that the worker was not a foreseeable user of its product, because the worker had not been specifically assigned or trained by his employer to help dock the ship. The defendant characterized the worker as an "untrained volunteer," and urged that no duty was owed toward him under the circumstances. The Appellate Division disagreed, and held that the defendant's liability for providing an unsafe product should not turn on the job description of the injured employee. However, the court did envision situations where a manufacturer's duty to warn might be confined to foreseeable users:

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We accept the proposition that not every workplace injury where the plaintiff volunteers to perform a dangerous task is automatically compensable. A supplier of a service or a manufacturer may be faced with a claim from an untrained plaintiff who voluntarily proceeded to perform a dangerous task and who would not be expected to do so. In such a case, a failure to provide warnings or guards which would have been unnecessary to protect the expected sophisticated user should not be a basis for liability. In some such cases the duty is owed only to the reasonably-anticipated sophisticated user, not the untrained interloper.44

Thus, Ramos recognizes that circumstances may exist where a manufacturer expects the user of its product to have a certain degree of sophistication. In such cases, a duty to warn may not extend to those whose unsophisticated use of the product was not reasonably foreseeable by the manufacturer.

3-7:2  FORESEEABLE USERS NOT LIMITED BY TIME OR RESALE

The class of foreseeable users of a product is not limited to the product’s original purchasers or to their employees. In fact, the concept of the foreseeable user has no particular time frame. Many products and, in particular, certain industrial machines, may be used over a period of decades. They can be sold second- or third-hand to users who have had no direct contact with the manufacturer. In such circumstances, even remote users can be foreseeable users, and the duty to warn still attaches. For example, in Seeley,45 the industrial machine involved, a press

44. Id. at 482-483.

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brake, had been manufactured in Scotland in 1966. The machine had several owners in the United Kingdom before it had been shipped to the United States in 1984, and sold to the plaintiff’s employer in 1986. Neither the passage of twenty years, nor the multiple changes of ownership, relieved the manufacturer of its duty to warn against the dangers inherent in the use of the machine.

3-8  No Duty to Warn Against Unforeseeable Uses

The duty to warn extends similarly only to uses that the manufacturer should have reasonably and objectively anticipated. If the use of the product is beyond its intended or reasonably anticipated scope, there may be no duty to warn. For example, the manufacturer of a knife is not chargeable with a failure to warn that the knife is sharp and should not be used as a toothpick.

3-8:1  WERE PURPOSE OR MANNER OF USE FORESEEABLE?

The concept of foreseeable use was further refined by the New Jersey Supreme Court in Jurado v. Western Gear Works. There, the Court distinguished between the use of a product for an improper purpose, as opposed to the use of a product in an improper manner. With regard to the former, the Court stated that the purpose for which the product is used at the time of the accident must have been objectively foreseeable by the manufacturer of the product. For example, a plaintiff who undertakes to use a power saw as a nail clipper will not be able

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to establish a claim. With regard to manner of use, the plaintiff must prove that the manner in which he used the product at the time of the accident was also objectively foreseeable. For example, if the plaintiff was using a ladder to climb up a pole or tree — its intended purpose — but in doing so he placed the base of the ladder into quicksand, the manner of use would surely be in question.

Thus, the manufacturer owes no duty unless the plaintiff’s use is foreseeable in terms of both purpose and manner. Although Jurado involved a design defect claim, its analysis of foreseeable use would appear to be equally applicable in failure to warn cases.

3-8:2 USE WITH OTHER PRODUCTS

A manufacturer may have a duty to warn if it is foreseeable that its product may be used with or assembled to products manufactured by others. In Molino v. B.F. Goodrich Co., the plaintiff was injured as a result of an explosion involving a tire and rim assembly. The tire had been manufactured by defendant Uniroyal while the multi-piece rim had been manufactured by defendant Firestone. Plaintiff’s expert testified that there had been nothing wrong with the tire, but that the 60-year-old rim assembly had been rusted, corroded, and otherwise in a state of disrepair. The tire manufactured by Uniroyal had contained no warning. However, the tire had been made to be used with a multi-piece rim assembly. Plaintiff’s expert testified that all of the parts of the assembly, including the tire and rim, had been necessarily involved with the explosion even though the tire itself had not been physically defective. He opined that warnings should have been placed on all parts of the assembly, including the tire. The Appellate Division reversed the trial court’s ruling as a matter of law holding that Uniroyal had no duty to warn of potential dangers involved with the rim assem-

bly unit. Instead, the court held that a jury would have to determine whether Uniroyal knew or should have known of the dangers involved with the rims used with its product, and if it so found, whether Uniroyal had acted unreasonably by failing to provide adequate warnings.\(^{50}\)

IV. SUBSEQUENT DUTY TO WARN

3-9 Subsequently Discovered Danger

A manufacturer’s conduct in a failure to warn case must be judged on the basis of the scientific, technological and other information available at the time its product was distributed.\(^{51}\) However, a manufacturer’s duty to warn does not necessarily end when its product is distributed. Subsequently acquired knowledge, either actual or constructive, may obligate the manufacturer to take reasonable steps to notify purchasers and consumers of a newly discovered danger.\(^{52}\)

3-9:1 NJPLA DEFENSE

This statement of potential liability in *Feldman*\(^{53}\) was transformed into a defense in the NJPLA, which states:

In any product liability action, the manufacturer or seller shall not be liable for harm caused by a failure to warn if the product contains an adequate warning or instruction or, in the case of dangers a manufacturer or seller discovers or reasonably should discover after

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50. *Id.* at 94.
51. *See supra* §3-3 for discussion of the “state of the art.”
53. *Id.*

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the product leaves its control, if the manufacturer or seller provides an adequate warning or instruction[.].\textsuperscript{54}

Thus, the NJPLA, by implication, recognizes Feldman's statement that a manufacturer has a continuing duty to warn of dangers discovered subsequent to the sale of its product. If the manufacturer provides adequate warnings or instructions in response to the newly discovered danger, it will be immune from liability.

3-10 Design Defect Claims

A manufacturer's postsale duty to the user of its product is markedly different in a failure to warn claim, as opposed to a design defect claim. A manufacturer's conduct in a design defect claim must be evaluated in light of the state of the art at the time its product was distributed. In fact, under the NJPLA, "state of the art" is a complete defense to a design defect claim:

a. In any products liability action against a manufacturer or seller for harm allegedly caused by a product that was designed in a defective manner, the manufacturer or seller shall not be liable if:

(1) At the time the product left the control of the manufacturer, there was not a practical and technically feasible alternative design that would have prevented the harm without substantially impairing the reasonably anticipated or intended function of the product[.].\textsuperscript{55}

Thus, in a design defect case, the manufacturer's duty to provide a safe product ends upon its distribution of a product that complies with the

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\textsuperscript{54} N.J. Stat. Ann. §2A:58C-4. See Appendix for full text of the NJPLA.

then existing state of the art; there is no duty to anticipate a future state of the art. If the state of the art changes in the years following the distribution of a product, the manufacturer has no duty to retrofit the product or physically to correct the newly discovered danger.

3-11 No State of the Art Defense for Subsequent Failure to Warn

The "state of the art" defense set forth in the NJPLA does not apply to claims for failure to warn. The duty to warn of a danger concerning a product attaches when the manufacturer discovers or should discover the danger, regardless of whether this occurs prior to or after the distribution of its product. Thus, even if a manufacturer sells a machine that complies with the existing state of the art at the time of sale, it would have an obligation to take reasonable steps to notify the purchasers of its product of a subsequently discovered danger.

3-12 Reasonable Steps Required to Warn of Subsequent Danger

The nature of such "reasonable steps" will probably vary, depending upon the nature of the product involved. For example, if the product involved is a widely distributed consumer product, such as a food or a household product, a manufacturer may be required to use the mass media to convey its warning to the general public. In some other situations, where a product is less widely distributed, and the manufacturer knows the identities of most of the users of its product, the

57. N.J. Stat. Ann. §2A:58C-3a(1); see supra §3-10.
58. Id.
manufacturer may have an obligation to make individual contact with its purchasers to warn of the newly discovered danger.

Questions will inevitably arise concerning the reasonableness of a manufacturer's attempts to warn of the newly discovered dangers. Is the manufacturer of a heavy industrial machine obliged to keep track of the identity of the owner and its place of business? What if the machine is sold secondhand to a different owner? Does the manufacturer have to follow its machine from owner to owner, or will it be sufficient for the manufacturer to send its warning letter to the original purchaser of the machine? As indicated above, the reasonableness of the manufacturer's efforts will be the key to this analysis, and the determination of the reasonableness issue will depend on such factors as the nature of the product, the degree of the danger, the likeliness of harm to the user absent a warning, and the information reasonably available to the manufacturer regarding the location and user of the product.

V. WARNINGS FOR PRESCRIPTION DRUGS\textsuperscript{60}

3-13 Manufacturer Must Warn Physician, Not Patient

Part of the standard for measuring the adequacy of a warning or instruction is the ordinary knowledge common to the persons by whom the product is intended to be used. With regard to prescription drugs, however, the NJPLA assumes that the manufacturer would give warning to the prescribing physician, and not to the doctor's patient directly.\textsuperscript{61} In this regard, the NJPLA is consistent with prior law on this subject.\textsuperscript{62}

\textsuperscript{60} See generally ch. 6 for further discussion of liability for prescription drugs.


3-14 Warnings Presumed Adequate

Under the NJPLA, New Jersey now also provides a rebuttable presumption of adequacy with regard to warnings or instructions for prescription drugs or foods that have been approved by the Federal Food & Drug Administration (hereinafter FDA). The NJPLA provides:

If a warning or instruction given in connection with a drug or device or food or food additive has been approved or prescribed by the Federal Food & Drug Administration under the “Federal Food, Drug, & Cosmetic Act,” 52 Stat. 1040, 21 U.S.C. §301 et seq. or the “Public Health Service Act” 58 Stat. 682, 42 U.S.C. §201 et seq., a rebuttable presumption shall arise that the warning or instruction is adequate. For the purposes of this section, the term “drug,” “device,” “food,” and “food additive” have the meanings defined in the “Federal Food, Drug, and Cosmetic Act.”

3-14:1 THE PRESUMPTION IS REBUTTABLE

Because the presumption in favor of adequacy for FDA-approved warnings is rebuttable, the plaintiff is free to introduce evidence of inadequacy. Indeed, some will argue that since the plaintiff in such cases has always had the burden of coming forward with evidence regarding inadequacy, the adoption of the presumption of adequacy did not significantly change the elements that a failure-to-warn plaintiff has to prove. Others counter that the statute sends a clear message that FDA-approved warnings are adequate absent some quite unusual circumstances. Case law may well have to address that debate.

VI. WARNING AGAINST OBVIOUS DANGERS

3-15 Manufacturer May Have to Warn of Obvious Dangers

The NJPLA also preserves the rule, stated in *Campos*,\(^6^4\) that the obvious nature of a danger does not necessarily relieve the manufacturer of a duty to warn. Under *Campos*, the obviousness of a danger, i.e., whether an alleged danger is objectively apparent, is only one of several factors to be considered in determining whether a manufacturer has a duty to warn.\(^6^5\)

Under *Campos*, other factors to be considered include the following:

(a) Is the lack of a warning consonant with the duty to place in the stream of commerce only products that are reasonably safe?

(b) Will the absence of a duty to warn encourage manufacturers to eliminate warnings or to produce inadequate warnings?

(c) Is the danger so basic to the purpose of the product — for example, the fact that a match will burn — that a warning would serve no useful purpose?\(^6^6\)

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\(^6^4\) *Campos* v. Firestone Tire & Rubber Co., 98 N.J. at 290. ³

\(^6^5\) However the NJPLA does provide an “obvious danger” defense to a claim of design defect:

a. In any product liability action against a manufacturer or seller for harm allegedly caused by a product that was designed in a defective manner, the manufacturer or seller shall not be liable if:

(2) The characteristics of the product are known to the ordinary consumer or user, and the harm was caused by an unsafe aspect of the product that is an inherent characteristic of the product and that would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the class of persons for whom the product is intended.


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3-16 Conflicting Case Law on Obvious Danger

The law regarding obvious danger has become somewhat unclear because of statements in several other cases that a manufacturer's duty to warn extends only to hidden or latent dangers posed by a product.\(^{67}\) Indeed, there may be circumstances where the obviousness of a product's danger — for example, that a match will burn or a knife will cut — may be the controlling factor under a *Campos* analysis. However, the court's statement in *Molino v. B.F. Goodrich Co.*\(^ {68}\) that a manufacturer has a duty to warn of hidden dangers, does not change *Campos*’ rule that the obviousness of a danger is but one of several factors to be considered in determining whether a duty to warn exists.

VII. PROXIMATE CAUSE

3-17 Plaintiff's Burden

In a failure to warn case, the plaintiff must also prove that the absence of an adequate warning or instruction was a proximate cause of the accident.\(^ {69}\) To prove proximate cause, the plaintiff must show that the inclusion of an adequate warning or instruction would have reduced the risk of injury posed by the product,\(^ {70}\) or that the absence of a warning was a substantial factor in bringing about the alleged

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68. *Id.*

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harm. In some warning cases, however, courts have applied the more stringent “but for” test to establish proximate cause.

3-17:1 PLAINTIFF’S PRE-EXISTING KNOWLEDGE OF DANGER

Normally, the issue of whether the failure to warn proximately caused an accident is reserved for the jury as a factual issue. However, a plaintiff’s preexisting knowledge of a danger, if subjectively recalled at the very moment of the accident, can negate a claim that the absence of a warning was a proximate cause of the accident.

In Vallillo v. Muskin Corp., the plaintiff alleged that the defendant pool manufacturer did not provide adequate warnings against diving. However, the court found, from deposition testimony, that the plaintiff was an experienced swimmer and diver who had been aware, before, during and after his dive, of the risk of injury. Indeed, the plaintiff had attempted to avoid the danger by performing a shallow dive. Thus, the plaintiff’s subjective knowledge of the danger of his dive precluded a jury finding that the alleged absence of a warning was a proximate cause of the accident.

In so ruling, the Vallillo court was careful to distinguish Campos, in which the issue of proximate cause was strongly contested. In Campos, the plaintiff was injured as a result of his inserting his hand into

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a cage containing a tire assembly that subsequently exploded. The plaintiff, who could not read English, had experienced a similar accident with less severe injuries six years earlier. The defendant argued that the plaintiff had subjective knowledge of the danger because of his involvement in the prior accident. The Court noted that the plaintiff made little, if any, showing at trial that the absence of a warning had been a proximate cause of the accident. However, the Court did note that there was evidence that plaintiff’s conduct in putting his hand into the cage was an instinctive reaction, that his subjective knowledge of the danger may have been momentarily forgotten, and that an appropriate warning might have prevented the accident. The case was therefore remanded for a new trial.

3-18 The Heeding Presumption

In the normal case, a plaintiff can prove proximate cause through testimony that he would have avoided the danger, or used the product differently, if an adequate warning or instruction had been given by the manufacturer. However, proximate cause may be difficult to prove under some circumstances, such as when a plaintiff has died, or when his exposure to a product occurred decades previously. In those situations, it is difficult to produce direct evidence that the inclusion of an adequate warning or instruction would have reduced the chance of the occurrence of the accident. Moreover, the lack of direct evidence under such circumstances would invite juries to speculate that an adequate warning, even if it had been given, might not have prevented the injury.

In Campos, the Court referred to the practice of some courts, in failure to warn cases, of positing a rebuttable presumption that a warning would have been heeded if given.77

The Court, however, stopped short of adopting such an aid to the plaintiff’s proof of causation.
3-18:1 NEW JERSEY ADOPTS HEEDING PRESUMPTION

The “heeding presumption” was subsequently adopted by the Court in Coffman v. Keene Corp. The plaintiff was diagnosed in 1985 as suffering from an asbestos-related disease. He had been exposed to asbestos products during the course of his employment by the defendant, from 1951 through 1969. At trial, the plaintiff presented no evidence that, had there been a warning, he would have taken some action to protect himself from the asbestos exposure. On appeal, the defendants sought reversal of the jury’s verdict in favor of plaintiff, which had been rendered despite the plaintiff’s failure to submit proof on the issue of proximate cause.

In affirming the jury’s verdict, the Court based its adoption of the heeding presumption upon public policy considerations that underlie product liability law. The Court reasoned that the heeding presumption would serve to reinforce the manufacturer’s basic duty to warn and would encourage manufacturers to produce safer products. The Court further recognized that the use of the presumption would be conducive to determinations of causation that are not based upon extraneous, speculative considerations and unreliable or self-serving evidence.

The use of the heeding presumption, according to the Court, will shift the plaintiff’s burden of proof on the issue of causation as it relates to the absence of a warning. Since the presumption that the plaintiff would have heeded an adequate warning is rebuttable, the manufacturer is free to introduce proof that the plaintiff would not have read or heeded a warning if given; thus, the plaintiff’s conduct, rather than the absence of a warning, was the cause in fact of the resultant injury. For example, the manufacturer might produce evidence that the user of the product was blind, illiterate, intoxicated, irrespon-

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77. Campos v. Firestone Tire & Rubber Co., 98 N.J. at 211.
sible, or lax in judgment, or of other circumstances tending to show that the improper use of the product would have been made regardless of a warning. 79

The manufacturer may further show that the plaintiff had some knowledge regarding the dangers of the product in question, that the plaintiff was generally indifferent to matters pertaining to personal health, or specifically indifferent to warnings of particular health hazards. For example, a manufacturer could argue that a plaintiff who was a smoker had ignored health warnings associated with smoking, and that he would have similarly ignored any warnings given with respect to the product at issue. 80

The application of the heeding presumption is sufficient to sustain a plaintiff's burden of proof on proximate causation where the defendant produces no evidence to overcome the presumption. 81 Thus, where the defendant fails to produce evidence of the type referred to in the previous two paragraphs, the plaintiff would ordinarily be entitled to a directed verdict on the issue of proximate cause.

3-18:2 JURY INSTRUCTIONS

The law is somewhat unsettled on the issue of how the heeding presumption is handled for the purposes of jury instructions. In Coffman, the trial court instructed the jury that it should presume that the plaintiff would have followed an adequate warning, had one been provided by the defendant. 82 The New Jersey Supreme Court affirmed the jury’s verdict in favor of the plaintiff, although the Court did not specifically discuss the jury instruction issue. 83

79. Id. at 603-604.
Only sixteen days after *Coffman* was decided, the Appellate Division in *Graves v. Church* held that the heeding presumption should not be called to the attention of the jury as part of the court's instruction. It should be noted, though, that the Appellate Panel might not have had access to the Supreme Court's opinion in *Coffman*; the court's opinion refers only to the Appellate Division's *Coffman* decision. Thus, it remains for a future case to resolve whether *Graves*'s holding on the jury instruction issue is consistent or inconsistent with *Coffman*.

In the case of a workplace accident, the application of the heeding presumption implicates the conduct of both the injured employee and the employer. In *Coffman*, the Court made it clear that a manufacturer is under a concurrent duty to warn employers, as well as employees, of the safety risks of its products, and indicated the corresponding presumption that employers and employees would heed such warnings.

The *Coffman* Court held that, to overcome the heeding presumption in a failure to warn case involving a product used in the workplace, the manufacturer must prove that, had an adequate warning been provided, the plaintiff-employee with meaningful choice would not have heeded the warning. Alternatively, the manufacturer could show that, had an adequate warning been provided, the employer itself would not have heeded the warning by taking reasonable precautions for the safety of its employees and would not have allowed its employees to take measures to avoid or minimize the harm from their use or exposure to the dangerous product. Thus, in a given case, the manufacturer may be able to establish that the employer's conduct, not the manufacturer's failure to warn, was the cause in fact of the

84. *Coffman* was decided on July 26, 1993; *Graves* was decided on August 11, 1993.
accident. Stated otherwise, an employer’s conduct, in either thwarting effective dissemination of a warning or in intentionally preventing employees from heeding a warning, may be a subsequent supervening cause of an employee’s injury that will serve to break the chain of causation between manufacturer and employee.

VIII. CONCLUSION

3-19 Conclusion

Any failure to warn product liability case can turn on one or more of the issues discussed in this chapter. In determining the viability of a claim or defense in such a case, the practitioner must consider the numerous decisions interpreting the duty to warn, foreseeable users and uses, and proximate cause, as well as the relevant provisions of the New Jersey Product Liability Act, which further defines what is adequate in terms of a warning or instruction.