The Warning Claim in an Arizona Products Liability Action: Limitations on the Duty to Warn

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Whether brought under a negligence theory or a strict tort liability theory, a products liability claim usually alleges any of three types of defects: manufacturing defects, design defects, or warning defects.[1] In recent years, the warning cases have become the most frequent product liability claim.[2] Unlike the often highly technical design defect cases, warning cases usually center on a factual determination of whether an adequate warning of product damages was given.[3] These factual determinations are often intertwined with the question of whether the defendant had a duty to warn and if so, to whom that duty was owed. An overview of the policy reasons behind the imposition of a duty to warn provides a good understanding of how these factual determinations are made.

Theoretically, a consumer buys a product after evaluating the risks involved. If the risk associated with the product is high, it can be compensated for by a low purchase price. Frequently, however, the consumer is not on equal footing with the manufacturer. Only the manufacturer is in a

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1. Brady v. Melody Homes Mfr., 121 Ariz. 253, 256, 589 P.2d 896, 899 (Ct. App. 1979). Some commentators prefer to include the warning cases in the design defect classification. *See* Wade, *On the Nature of Strict Tort Liability For Products,* 44 MISS. L.J. 825, 830 (1973).

2. Inadequate warnings are now the most frequent claim. *See* INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, PRODUCT LIABILITY: FINAL REPORT OF THE LEGAL STUDY 59 (1977 U.S. Dep't of Commerce) [hereinafter cited as LEGAL STUDY]. This is because courts often require the plaintiff to show only a duty to warn and a failure to give an adequate warning for the plaintiff to state a claim. *Id.* In other words, the trier of fact merely examines the warning to see if it was adequate in the context in which the product was used. Expert testimony is rarely required. The warning claim is also versatile, inexpensive and often more effective than the design or manufacturing flaw claims. Epstein, MODERN PRODUCTS LIABILITY LAW 93 (1980). Finally, the warning claim is often used as an alternative claim. LEGAL STUDY, *supra* at 60.

However, in Embry v. General Motors Corp., 115 Ariz. 433, 436, 565 P.2d 1294, 1297 (Ct. App. 1977), the court of appeals stated that an action for failure to warn under a strict liability theory could proceed only if the product was alleged to be faultlessly designed. This effectively forces plaintiffs into an election: the plaintiff must allege either that the product was unreasonably dangerous because it was defectively designed or because it failed to warn of the dangers of using the product.

3. Design cases require proof of a design defect that proximately caused an injury. This proof is very difficult when dealing with a complex product because testimony regarding causation is often speculative at best. J. BEASLEY, PRODUCTS LIABILITY AND THE UNREASONABLY DANGEROUS REQUIREMENT 438-39 (1981). In the warning case, the injury is often presumed to be caused by the defect. *Id.* at 439. This eliminates much of the plaintiff's burden of proof. *Id.* This analysis often assumes the existence of a duty to warn as well. For a discussion on the imposition of such a duty, see *infra* notes 12-57 and accompanying text.

position to be apprised of the risks involved and have an adequate opportunity to inspect the product.[4] For the consumer to come by this information, much time and money is often required.[5] To achieve "informational symmetry," therefore, the courts have placed on the manufacturer or seller of the goods a duty to warn of dangers inherent in the use of the product where the product would otherwise be unreasonably dangerous.[6]

The imposition of the duty to warn involves a balancing test.[7] Under this balancing test, the probability and seriousness of harm to the consumer who does not exercise care is weighed against the costs to the manufacturer of taking appropriate precautions.[8] In the warning cases, the cost of the warning is usually so minimal that the balance almost always weighs in favor of an obligation to warn.[9] Once a warning is given, the focus then shifts to the adequacy of the warning.

This Note examines the warning claim. Although Arizona adopted a Products Liability Act in 1978,[10] the state act does not codify law regarding product warnings.[11] This leaves the practitioner little to go on except amorphous case law. This Note begins with a brief statement of the common law regarding warnings, focusing in turn on negligence-strict liability distinctions, persons to whom a warning must be given, and the adequacy of a warning. It then discusses three areas where the duty to warn has been limited: the application of the obvious danger rule to warning cases, the movement toward absolute liability, and the use of subsequent changes in the warning as proof of an inadequate warning. In examining these problem areas, particular emphasis will be given to Arizona law.

4. Note, *The Manufacturer's Duty to Notify of Subsequent Safety Improvements*, 33 STAN. L. REV. 1087, 1090-92 (1981).

5. *Id.* at 1091.

6. *Id.*

7. One commentator has noted that the courts find the balancing analysis only somewhat helpful in warning cases. W. KEETON, D. OWEN & J. MONTGOMERY, PRODUCTS LIABILITY AND SAFETY: CASES AND MATERIALS 240 (1980) [hereinafter cited as W. KEETON].

8. Wright v. Carter Prods., Inc., 244 F.2d 53, 59 (2d Cir. 1957) (failure to warn of very slight risk of possibly serious skin disorder from use of deodorant); Moran v. Faberge, Inc., 273 Md. 538, 543, 332 A.2d 11, 15 (1975) (failure to warn of latent flammability characteristic of perfume); *see* Dougherty v. Hooker Chem. Corp., 540 F.2d 174, 179 (3d Cir. 1976); Jonescue v. Jewel Home Shopping Serv., 16 Ill. App. 3d 339, 347, 306 N.E.2d 312, 318 (1973). *But cf.* Twerski, Weinstein, Donaher & Piehler, *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age,* 61 CORNELL L. REV. 495, 514-17 (1976). The authors argue that warnings are most effective when used selectively. Thus, the courts should not balance the cost, but look to the efficacy of the warning. Too many warnings, the authors argue, may become counterproductive.

9. Moran v. Faberge, Inc., 273 Md. 538, 543, 332 A.2d 11, 15 (1975).

10. ARIZ. REV. STAT. ANN. §§ 12-681 to -686 (1982).

11. The only explicit reference to a warning in the statute is in ARIZ. REV. STAT. ANN. § 12-683(3), which states that the defendant shall not be liable if the defendant proves that the incident occurred because the plaintiff failed to follow "any express and adequate instructions or warnings," and if the plaintiff knew or should have known of such warnings. *Id.* § 12-683(3).

The UNIFORM PRODUCTS LIABILITY ACT § 104 (1979) [hereinafter cited as UNIFORM PRODS. LIAB. ACT], *reprinted in* SOUTHERN METHODIST UNIVERSITY PRODUCTS LIABILITY INSTITUTE, 1 UNIFORM PRODUCTS LIABILITY ACT I-15 to 19 app. (V. Walkowiak ed. 1980), by comparison, specifically provides for warnings.

I. THE DUTY TO WARN

A. *The Negligence-Strict Liability Distinction*

A warning claim may be brought under the legal theories of negligence, breach of warranty, or strict liability.[12] Most cases, however, are decided under either negligence or strict tort liability.[13] Despite the different bases of liability under these two theories, most courts have not imposed different requirements for warnings in negligence and strict tort liability.[14] Instead, these courts rely on a negligence based standard. Section 402A of the Restatement (Second) of Torts, which addresses strict liability, adds to the confusion between negligence and strict liability. It requires a warning where the manufacturer has reason to anticipate danger in the use of the product.[15] By focusing on the manufacturer's ability to anticipate danger, the Restatement appears to be using a negligence standard for evaluating a warning in a case brought under a theory of strict tort liability. As a result, many courts have not made any distinction between the two theories.[16] Under both negligence and strict liability, foreseeability of harm at the time the product leaves the seller's control remains the crucial inquiry in determining whether a warning must be given.[17]

Several courts, however, have attempted to distinguish between the two theories.[18] These courts hold that under a strict liability theory, the

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12. This Note will not discuss the warning cases under breach of warranty theory. The courts seldom decide a warning case under a warranty theory. When faced with a claim of implied warranty in a tort action, the Arizona courts frequently merge the claim into a claim of strict tort liability. *See, e.g.* FLORY V. SILVERCREST INDUS., INC., 129 ARIZ. 574, 579, 633 P.2D 383, 388 (1981); SCHELLER V. WILSON CERTIFIED FOODS, 114 ARIZ. 159, 161, 559 P.2D 1074, 1076 (CT. APP. 1976); WETZEL V. COMMERCIAL CHAIR CO., 18 ARIZ. APP. 54, 57, 500 P.2D 314, 317 (1972).

13. *See supra* note 12. One commentator has argued that the strict tort liability theory adds very little to the plaintiff's claim. Instead, he argues that it is easier to prove fault by the defendant than prove a technical defect in the product. *See* Rheingold, *The Expanding Liability of the Product Supplier: A Primer*, 2 HOFSTRA L. REV. 521, 531-32 (1974).

14. *See, e.g.*, Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1088 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); Shell Oil Co. v. Gutierrez, 119 Ariz. 426, 434, 581 P.2d 271, 279 (Ct. App. 1978); Estate of Tomer v. American Home Prods. Corp., 170 Conn. 681, 689-90, 368 A.2 35, 39-40 (1976).

15. RESTATEMENT (SECOND) OF TORTS § 402A comment h (1965) provides in part:

> Where, however, [the seller] has reason to anticipate that danger may result from a particular use, as where a drug is sold which is safe only in limited doses, he may be required to give adequate warning of the danger. . . ., and a product sold without such warning is in a defective condition.

16. Section 104 of the Uniform Products Liability Act which Arizona has not adopted, uses a negligence standard for a warning claim. The Commerce Department's comment to the section states that:

> The application of uncertain strict liability principles in the areas of design and duty to warn places a whole product line at risk; therefore, a firmer liability foundation is needed. In terms of creating incentives for loss prevention, the approach of applying strict liability principles to design and duty-to-warn cases represents an "overkill;" a fault system will provide the needed incentive.

UNIFORM PRODS. LIAB. ACT, *supra* note 11, § 104 comment, at I-18 app.

The "Product Liability Act," proposed in the 98th Congress, also uses a negligence standard for warnings. *See* S. 44, 98th Cong., 1st Sess: § 6 (1983).

17. *See supra* notes 14-16 and accompanying text.

18. *See, e.g.*, Jackson v. Coast Paint & Lacquer Co., 499 F.2d 809, 812 (9th Cir. 1974); Phillips v. Kimwood Machine Co., 269 Or. 485, 492, 525 P.2d 1033, 1037 (1974); Haugen v. Minnesota Mining & Mfg. Co., 15 Wash. App. 379, 387, 550 P.2d 71, 76 (1976).

inquiry must focus upon the condition of the product, rather than the defendant's conduct as in a negligence theory.[19] Under a strict liability theory, courts require a warning if the product is unreasonably dangerous without a warning.[20]

The courts have adopted two basic approaches under strict liability to determine if the product is unreasonably dangerous—the ordinary consumer test and the risk-benefit test. The ordinary consumer test, defined by section 402A of the Restatement (Second) of Torts, finds a product unreasonably dangerous if it is dangerous to an extent not contemplated by the ordinary consumer.[21] Unfortunately, this simplistic test is frequently difficult to apply because consumer expectations often cannot be determined. Thus, some courts have applied a second analysis, the risk-benefit test.[22] Under a risk-benefit test, the inquiry is whether a reasonable manufacturer, knowing the risks involved with the use of the product, would have placed the product on the market.[23] This test is virtually identical to the negligence test, except that with the risk-benefit test, the knowledge of the risk is imputed to the seller.[24] Nevertheless, since in a negligence case a manufacturer is held to the knowledge and skill of an expert,[25] the difference between the two theories is often insignificant.[26]

Arizona generally follows the Restatement approach[27] which uses the ordinary consumer test.[28] In *Byrns v. Riddell, Inc.*,[29] however, the Arizona Supreme Court utilized a test similar to the risk-benefit test. The *Byrns*

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19. Jackson v. Coast Paint & Laquer Co., 499 F.2d 809, 812 (9th Cir. 1974); Phillips v. Kimwood Machine Co., 269 Or. 485, 498, 525 P.2d 1033, 1039 (1974).

20. *See, e.g.*, Rogers v. Unimac Co., Inc., 115 Ariz. 304, 307, 565 P.2d 181, 184 (1977); Byrns v. Riddell, Inc., 113 Ariz. 264, 266, 550 P.2d 1065, 1067 (1976); Vineyard v. Empire Mach. Co., Inc., 119 Ariz. 502, 504-05, 581 P.2d 1152, 1154-55 (Ct. App. 1978).

21. Comment i to § 402A states that the product is unreasonably dangerous "where the defective condition of the product makes it unreasonably dangerous to the user or consumer. . . . The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it. . . ." RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965).

22. *See, e.g.*, Hamilton v. Hardy, 37 Colo. App. 375, 385, 549 P.2d 1099, 1108 (1976); Phillips v. Kimwood Mach. Co., 269 Or. 485, 492, 525 P.2d 1033, 1037 (1974); Little v. PPG Indus., 19 Wash. App. 812, 820-22, 579 P.2d 940 946 (1978), *modified*, 92 Wash. 2d 118, 549 P.2d 911 (1979).

23. *Phillips*, 269 Or. at 492, 525 P.2d at 1037.

24. *Id.*; *Hamilton*, 37 Colo. App. at 385, 549 P.2 at 1108; *Little*, 19 Wash. App. at 821-22, 579 P.2d at 946.

25. *See* Lindsay v. Ortho Pharmaceutical Corp., 637 F.2d 87, 91 (2d Cir. 1980); Schenebeck v. Sterling Drug, Inc., 423 F.2d 919, 922 (8th Cir. 1970); Howard v. Avon Prods., Inc., 155 Colo. 444, 454, 395 P.2d 1007, 1011 (1964).

26. The difference becomes more apparent when the manufacturer is held liable under strict liability for failing to warn of risks unknowable or unforeseeable when the product was marketed. There, the imputation of knowledge makes the difference; since even an expert would not have had knowledge of the risk, the manufacturer would not be liable under a negligence theory. *See infra* notes 102-14 and accompanying text.

Some courts have followed a third approach whereby the unreasonably dangerous requirement is dropped. *See, e.g.*, Barker v. Lull Eng'g Co. Inc., 20 Cal. 3d 413, 426, 143 Cal. Rptr. 225, 233, 573 P.2d 443, 451 (1978); Suter v. San Angelo Foundary & Mach. Co., 81 N.J. 150, 169-70, 406 A.2d 140, 152-53 (1979); Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 95-97, 337 A.2d 893, 899-900 (1975). Arizona has rejected this approach and retained the unreasonably dangerous requirement. *See supra* note 20 and accompanying text.

27. O.S. Stapley Co. v. Miller, 103 Ariz. 556, 559-60, 447 P.2d 248, 251-52 (1968).

28. *See supra* note 21 and accompanying text.

29. 113 Ariz. 264, 267, 550 P.2d 1065, 1068 (1976).

court cited *Dorsey v. Yoder Co.*[30] for the proposition that a product is unreasonably dangerous if a reasonable manufacturer would not continue to market the product with knowledge of the risk.[31] This language is very similar to the risk-benefit strict liability test.

Arguably, Arizona had adopted both approaches.[32] In *Brady v. Melody Homes Manufacturer*,[33] however, the Arizona Court of Appeals rejected the idea that the *Byrns* risk-benefit analysis was a test under a strict tort liability theory,[34] and concluded that the inquiry under the *Byrns* approach was really into the negligence of the manufacturer.[35] The *Brady* court articulated a two-step process for determining a manufacturer's liability. First, the court should look to whether the defect meets the Restatement ordinary consumer test.[36] If it does, strict liability applies.[37] Second, if the defect does not fall within the Restatement definition, then the court may turn to a risk-benefit test to determine whether the conduct of the manufacturer was reasonable.[38] The latter inquiry is one of negligence and not strict tort liability. The Arizona Supreme Court has not yet considered the *Brady* reasoning.[39]

When the two approaches of *Byrns* are applied to a warning case, two tests can be fashioned. First, if the consumer does not realize the extent of the risk without a warning (the risk thus remains uncontemplated), the product is unreasonably dangerous. Second, if a reasonable seller, knowing the risks involved with the product, would not place the product on the market without an adequate warning, then it is unreasonably dangerous without such a warning. In both instances, a duty to warn exists.

B. *To Whom Must a Warning Be Given?*

Closely tied to the question of duty is the issue of to whom the warning must be given. The warning must be directed to a specific class of

30. 331 F. Supp. 753 (E.D. Pa. 1971), *aff'd*, 474 F.2d 1339 (3d Cir. 1973).

31. 113 Ariz. at 267, 550 P.2d at 1068 (citing *Dorsey*, 331 F. Supp. at 759-60). The *Dorsey* court referred to Dean Wade's factor analysis to determine if a defect was unreasonably dangerous. These factors included:

> (1) the usefulness and desirability of the product, (2) the availability of other and safer products to meet the same need, (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger, (5) common knowledge and normal public expectation of the danger (particularly for established products), (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings), and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.

Id. (citing *Dorsey*, 331 F. Supp. at 760).

32. *But see J. Beasley*, *supra* note 3, at 187-93. The author writes that Arizona follows an *ad hoc* approach which offers the practitioner little guidance. *Id.* at 187.

33. 121 Ariz. 253, 589 P.2d 896 (Ct. App. 1979). *Brady* did not involve any warnings. *Id.* at 256, 589 P.2d at 899.

34. *Id.* at 258, 589 P.2d at 901. The court stated, " [w]e are not convinced that the Arizona Supreme Court has adopted the ramifications inherent in that definition." *Id.*

35. *Id.* at 259, 589 P.2d at 902.

36. *Id.*

37. *Id.*

38. *Id.*

39. Since the courts have blurred the distinction between strict tort liability and negligence in warning cases, *see supra* notes 14-17, 22-26 and accompanying text, the *Brady* court's formulation may have little impact in this area.

persons. Many courts do not consider a warning adequate if it is not properly targeted. On the other hand, the duty to warn does not extend to all persons. Therefore, the plaintiff must be within the class of persons entitled to receive a warning. Whether a plaintiff is within a group entitled to a warning may depend on the type of product manufactured. If the product is a prescription drug, the manufacturer may not have a duty to warn the ultimate consumer. This is distinguished from the duty to warn of dangers involved with other products. The manufacturer of the usual product must take reasonable steps to warn the ultimate user of the product.[40] This is logical and not subject to much dispute. Frequently, the warning is given only to the "middleman," who in turn must warn the ultimate user.[41] Where the danger is great, however, this approach has been rejected,[42] presumably with the result that the manufacturer must warn the ultimate consumer.

Although the duty to warn generally is limited to foreseeable product users, at least one court has suggested it should extend to bystanders.[43] The court held, however, that the duty to warn bystanders ought to be discharged by warning the actual product user of the potential danger to bystanders.[44]

The drug manufacturer's duty to warn is distinguished from the product manufacturer's duty to warn because of the special relationship between the physician and the patient.[45] Unlike the ordinary consumer in the marketplace, the patient does not freely choose his or her own medication. The physician performs this task. Often the patient will know very little about the prescribed drug. The patient must instead rely on the judgment of the physician who assumes the role of the decisionmaker that the consumer has in the usual market situation. Therefore, ordinarily the drug

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40. *See* Griggs v. Firestone Tire & Rubber Co., 513 F.2d 851, 856 (8th Cir.) (applying Missouri law which adopted § 388 of the Restatement), *cert. denied*, 423 U.S. 865 (1975); *see also* RESTATEMENT (SECOND) OF TORTS § 388 (1965).

41. *See, e.g.*, Griggs v. Firestone Tire & Rubber Co., 513 F.2d 851, 857-58 (8th Cir.) (degree of dangerousness determines reasonableness of requiring warning to ultimate user), *cert. denied*, 423 U.S. 865 (1975); Weekes v. Michigan Chrome & Chem. Co., 352 F.2d 603, 607 (6th Cir. 1965) (duty to warn requires that warning reach immediate vendor or distributor who will in turn warn the ultimate purchaser).

42. *See, e.g.*, Griggs v. Firestone Tire & Rubber Co., 513 F.2d 851, 858 (8th Cir.), *cert. denied*, 423 U.S. 865 (1975). The plaintiff had been injured when he disassembled a tire rim to repair a flat tire. *Id.* at 853. Upon reinflating the tire, the rim exploded, injuring the plaintiff. *Id.* Upon investigation it turned out that the defendant manufacturer had mismatched the components. *Id.* at 854. The manufacturer had warned of such dangers in catalogues sent to immediate distributors, but this information was not transmitted to the plaintiff. *Id.* at 854-55. The Eighth Circuit held that where the danger from a product is so great, a warning to middlemen may not be enough. *Id.* at 858-59.

43. *See* Sills v. Massey-Ferguson, Inc., 296 F. Supp. 776, 781 (N.D. Ind. 1969). The plaintiff was injured when a power mower, manufactured by the defendant, passed over a bolt and threw it 150 feet into the air. *Id.* at 778. The bolt struck the plaintiff in the jaw. *Id.* The court found that there was a design defect, and that it was foreseeable that the plaintiff might be hurt as a result of the defect. *Id.* at 781. Therefore, the defendant owed a duty to warn the plaintiff. *Id.* The court noted that since it really is impossible to warn bystanders, this duty could be discharged by giving safety precautions to the user of the law mower. *Id.* at 783.

44. *Id.*

45. *See* Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1276 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974).

manufacturer has a duty to warn the prescribing physician, not the consumer-patient.[46] The physician should warn the patient of the dangers of the drug.[47]

There are many ways in which a drug manufacturer can deliver information to physicians to apprise them of the dangers associated with the use of the drug. The package insert is the primary method.[48] Unfortunately, many physicians are not aware of the information contained in these inserts.[49] Consequently, they cannot adequately protect the consumer. In such instances, the duty of the drug manufacturer extends beyond the package insert. The drug manufacturer must inform the physicians of the specific dangers of the drug.[50] This may require the use of "detail men."[51]

In addition, the drug manufacturer is treated as having the skill and knowledge of an expert in the field.[52] This has two immediate consequences. First, the drug manufacturer must "keep abreast of scientific knowledge, discoveries, and advances" in the field and is assumed to know the subject matter as an expert would.[53] Second, the drug manufacturer has a duty to test and inspect the drug.[54]

Experimental drugs provide a particularly troublesome problem. Two countervailing considerations must be balanced. On one hand, society needs new and more effective drugs. On the other hand, these drugs cannot be marketed if the manufacturer has a duty to warn of all risks, since many of the dangers will, as yet, be unknown. The experimental drug is analogous to the unavoidably unsafe product.[55] In such a case, the drug manufacturer must warn of the experimental nature of the drug.[56]

In some instances, the drug manufacturer will have a duty to warn the

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46. *See, e.g.*, Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1276 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974); Basko v. Sterling Drug, 416 F.2d 417, 426 (2d Cir. 1969); Davis v. Wyeth Laboratories, 399 F.2d 121, 130 (9th Cir. 1968).

47. This is an exception to the general rule of the RESTATEMENT (SECOND) OF TORTS § 402A (1965) that a *manufacturer* must warn the foreseeable users of the dangers in the product. Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1276 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974).

48. W. KEETON, *supra* note 7, at 358.

49. *Id.*

50. In Sterling Drug, Inc., v. Yarrow, 408 F.2d 978, 982 (8th Cir. 1969), the plaintiff's physician prescribed the drug Aralen for her rheumatoid arthritis. Current medical literature, however, revealed that Aralen caused irreversible retinal damage in a substantial percentage of those patients using the drug for an extended period of time. *Id.* at 985-87. Subsequently, the plaintiff suffered near-blindness from use of the drug. *Id.* at 984-85. The Eighth Circuit held that the drug manufacturer had a duty to inform physicians of the potential retinal damage risk in a way reasonably calculated to reach the doctor. *Id.* at 991-93.

51. *Id.* at 987; W. KEETON, *supra* note 7, at 358. "Detail men" are specially trained representatives of the drug company who are employed to sell and promote the drug products. 408 F.2d at 987. These agents could also be used to inform physicians of the dangers associated with the use of the drug. *Id.*

52. *See* Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1277 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974); Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1089 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

53. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1089 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

54. *Id.* at 1089-90.

55. The RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965) provides that an unavoidably unsafe product if properly prepared and accompanied by a warning is not defective or unreasonably dangerous.

56. Gaston v. Hunter, 121 Ariz. 33, 47, 588 P.2d 326, 340 (Ct. App. 1978).

ultimate user. This occurs in the absence of a physician-patient relationship, where there is no physician to advise the patient of the dangers involved. These situations usually involve over-the-counter drugs or drugs given in a mass immunization program.[57]

C. *Adequacy of the Warning*

The ordinary consumer and risk-benefit tests are concerned with the existence of a duty to warn. Once the duty to warn has been established, and the plaintiff is among the class of persons entitled to receive the warning, the focus shifts to the warning itself. One Arizona Court of Appeals has stated that the adequacy of a warning is determined by looking at two factors.[58] First, the court should examine the words on the label.[59] Second, the court should scrutinize the physical aspects of the warning "such as conspicuousness, prominence, and the relative size of the print."[60] Presumably, the court intended the reviewing court to consider the degree of specificity in the warning,[61] and the likelihood that the warning will be noticed.[62] The Arizona Court of Appeals has stated that the adequacy of a warning depends on the nature of the product and the context in which it is used.[63] Similarly other courts have stated that the warning must be designed in such a way as to reach the ultimate product user.[64] Further, the warning must reach the consumer in such a way that the consumer will be advised of the need to comply with the precaution.[65] Finally, directions may be needed along with the warnings.[66]

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57. *See, e.g.*, Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1276 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974). An eight-month-old baby was immunized with a polio vaccine, manufactured by the defendant, in a mass immunization program. *Id.* at 1270. The defendant-manufacturer had shipped the drug to the state with warning inserts. *Id.* The nurses who gave the shots to the patients, however, did not pass the warnings along. *Id.* The little girl later developed paralysis due to the polio vaccine. *Id.* The Fifth Circuit held that where an unavoidably unsafe drug is used in a mass immunization program, there must be either a warning to the recipient directly, or individualized medical judgment that the treatment is necessary and desirable. *Id.* at 1276.

58. *See* Shell Oil Co. v. Gutierrez, 119 Ariz. 426, 435-36, 581 P.2d 271, 280-81 (Ct. App. 1978).

59. *Id.*

60. *Id.* In Maize v. Atlantic Refining Co., 352 Pa. 51, 41 A.2d 850 (1945), the Pennsylvania Supreme Court used a similar approach. The plaintiff's decedent used a can of household cleaner called "Safety-Kleen" which was manufactured by the defendant. *Id.* at 53, 41 A.2d at 851. The words "Safety-Kleen" were clearly marked on all four sides. *Id.* The warning, however, was printed in very small letters. *Id.* The plaintiff later died from inhalation of the product's fumes. *Id.* In affirming the jury's verdict for the plaintiff, the Pennsylvania court ruled that although there was indeed a warning, the more prominent display of the names "Safety-Kleen" implied that the product was safe. *Id.* at 55, 41 A.2d at 852.

61. *See infra* notes 67-70 and accompanying text.

62. *See supra* note 60.

63. *See* Tucson Industries, Inc. v. Schwartz, 15 Ariz. App. 166, 172, 487 P.2d 12, 18 (1971), *vacated*, 108 Ariz. 464, 501 P.2d 936 (1972). The Arizona Supreme Court reversed the court of appeals on the negligence claim, not the warning claim. Thus, the lower court's statement concerning warnings may still have some application.

64. *See supra* notes 42-44 and accompanying text.

65. This means that the warning cannot be in fine print.

66. *See* McCully v. Fuller Brush Co., 68 Wash. 2d 675, 678, 415 P.2d 7, 10 (1966) ("Directions and warnings are intended to serve different purposes. The former are designed to assure an *effective* use of the product; a warning, on the other hand, is intended to assure a *safe* use.") One court has even suggested there may be a duty to warn consumers of the risks of failure to follow

In the absence of any formal guidelines, the determination of an adequate warning reduces itself to a question of fact.[67] In many instances the courts have found the warnings too vague.[68] The warning can also be inadequate where the magnitude of the risk associated with the normal use of the product is not given.[69] Finally, a warning may be inadequate if it fails to provide instructions for safe use.[70]

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instructions. *See* National Pressure Cooker Co. v. Stroeter, 50 F.2d 642, 644 (7th Cir.), *cert. denied*, 284 U.S. 674 (1931).

67. *See* Shell Oil Co. v. Gutierrez, 119 Ariz. 426, 435, 581 P.2d 271, 280 (Ct. App. 1978) (whether a warning is adequate to apprise foreseeable users of the dangers in a product is ordinarily a question of fact).

68. *See, e.g.*, Murray v. Wilson Oak Flooring Co., Inc., 475 F.2d 129, 132-33 (7th Cir. 1973) (warning not to use product near flame not sufficient to warn of danger from pilot light behind a closed door); Bean v. Ross Mfg. Co., 344 S.W.2d 18, 23-24 (Mo. 1961) (warning on drain cleaner not to plug drain was insufficient to alert user of danger of explosion); Michael v. Warner/Chilcott, 91 N.M. 651, 655, 579 P.2d 183, 187 (App. 1978) (warning on package of sinus congestion tables was too small, apprised user only that kidney infection "may" occur, applied only to large doses, and did not state that product contained a dangerous drug).

In *Murray*, the plaintiff used a floor adhesive manufactured by the defendant while installing a parquet-wood floor. 475 F.2d at 129-30. The product contained a warning telling the user not to use the adhesive "near" a flame. *Id.* at 130. The plaintiff nevertheless used the adhesive product within four feet of a pilot light that was behind a closed door, and within eight feet of a stove pilot light that was three feet off the ground. *Id.* at 131-32. The adhesive product exploded and burned the plaintiff. *Id.* at 132. The Seventh Circuit held that the warning was not sufficient to apprise the plaintiff of the explosive potential of the product. *Id.* The use of the word "near" in the warning was too vague to convey any sense of immediacy of danger. *Id.* at 132-33.

69. *See, e.g.*, Dougherty v. Hooker Chem. Corp., 540 F.2d 174, 181-82 (3d Cir. 1976) (court held adequacy of warning a jury question where manufacturer failed to warn of possibility of death when exposed to trichloroethylene but warned of other risks); Burch v. Amsterdam Corp., 366 A.2d 1079, 1087-88 (D.C. 1976) (warning to keep floor tile adhesive away from flame not sufficient to warn user of danger of working near a pilot light); Hill v. Husky Briquetting, Inc., 54 Mich. App. 17, 25, 220 N.W.2d 137, 141, *aff'd*, 393 Mich. 136, 223 N.W.2d 290 (1974) (fact question arose whether a warning to use charcoal briquettes in properly ventilated area apprised the user of the specific danger of asphyxiation).

In *Dougherty*, the plaintiff's decedent was employed as a helicopter transmission rebuilder. 540 F.2d at 176. He disassembled transmissions and cleaned them by submerging them into trichloroethylene (TRI). *Id.* TRI, which was manufactured by the defendant, carried a warning that the vapor was harmful and that the product should be used with adequate ventilation. *Id.* The product further warned that the user should "avoid prolonged or repeated contact with the skin." *Id.* The plaintiff's decedent later died of a cardiac arrest that was believed to be caused by TRI poisoning. *Id.* The administratrix of the estate brought suit alleging a negligent failure to warn. *Id.* at 175-76. The district court granted the defendant's motion for a directed verdict. *Id.* at 176-77. The Third Circuit reversed, holding that the duty to warn is measured by the potential danger posed by the commodity as well as by the foreseeable use to which it will be put. *Id.* at 179. Whether the defendant fulfilled his duty where there was no warning of the possibility of death from TRI exposure was a fact question for the jury. *Id.* at 182.

70. *See, e.g.*, Edwards v. California Chem. Co., 245 So.2d 259, 265 (Fla. App.), *cert. denied*, 247 So.2d 440 (1971) (whether warning was adequate where no instruction was provided for the safe use of lead arsenate was fact issue); Berkebile v. Brantly Helicopter Corp., 225 Pa. Super. 349, 357, 311 A.2d 140, 144 (1973) (adequacy of emergency procedures to be followed in case of helicopter engine failure was jury question).

In *Edwards*, the plaintiff became ill from arsenic poisoning after using Ortho Standard Lead Arsenate, and brought an action for negligent failure to warn. 245 So.2d at 260. The product came in a bag with details for usage on one side, and a warning on the other side. *Id.* at 260-63. The warning apprised the user of the danger of contact with the lead arsenate. *Id.* at 262-63. The trial court granted defendant's motion for summary judgment. *Id.* at 260. The Florida Court of Appeals reversed, holding that although the warning described the hazards of the product, the lack of instructions for safe use of the product, such as recommending a respirator and protective clothing, created a fact issue of adequacy of the warning. *Id.* at 265.

II. LIMITATIONS ON THE DUTY TO WARN

A. *Obvious Danger Rule—Is there a Duty to Warn of the Obvious?*

The patent or obvious danger rule provides that the defendant owes no duty to the plaintiff if the danger is obvious.[71] The rule was first developed for the design defect cases in *Campo v. Scofield*.[72] In *Campo*, the plaintiff's hand became caught in an onion-topping machine as he dumped a crate of onions in it.[73] As a result of the accident, the plaintiff's hand was later amputated.[74] The plaintiff brought suit against the defendant manufacturer.[75] One of the claims was that the defendant negligently failed to provide a guard to prevent the user from coming into contact with the steel rollers in the topping machine.[76] The New York Court of Appeals ruled against the plaintiff, holding that, although the defendant had a duty to keep the machine free from latent defects, the defendant had no duty to guard against injury from obvious defects.[77] In such a situation, the plaintiff should have foreseen the danger of placing his arm in an open topping machine and exposing it to the steel rollers.[78]

The *Campo* reasoning subsequently was applied to warning cases.[79] Thus, the manufacturer was held to have a duty to warn only of latent dangers inherent in the use of the product and no duty to warn of the obvious. The determination of what is obvious, however, provided another problem. In *Shuput v. Heublein, Inc.*,[80] the plaintiff was injured while opening a bottle of champagne. The cork in the bottle popped off with the wire mesh attached and struck the plaintiff in the eye.[81] The plaintiff sued the defendant manufacturer for failing to warn of the danger of ejection.[82] The trial court directed a verdict for the defendant.[83] The Tenth Circuit reversed, holding that while the duty to warn does not extend to a truly obvious hazard, this particular danger was not obvious because the plaintiff had never before opened a bottle of champagne.[84]

Recently, the New York Court of Appeals reconsidered its decision in

71. *See* Posey v. Clark Equip. Co., 409 F.2d 560, 563 (7th Cir.), *cert. denied*, 396 U.S. 940 (1969) (no duty under Indiana law to warn of obvious dangers); Bradshaw v. Blystone Equip. Co. of Nevada, 79 Nev. 441, 444, 386 P.2d 396, 397 (1963) (owner of posthole digger had no duty to warn renter of obvious danger); Villanueva v. Nowlin, 77 N.M. 174, 176, 420 P.2d 764, 766 (1966) (lender of machine had no duty to warn borrower of obvious dangers).

72. 301 N.Y. 468, 95 N.E.2d 802 (1950).

73. *Id.* at 470-71, 95 N.E.2d at 803.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 472, 95 N.E.2d at 804.

78. *Id.*

79. *See, e.g.*, Jamieson v. Woodward & Lothrop, 247 F.2d 23, 29-30 (D.C. Cir.), *cert. denied*, 355 U.S. 855 (1957) (no duty to warn of elasticity of rubber exerciser and its potential for snapping back); Rix v. Reeves, 23 Ariz. App. 243, 245, 532 P.2d 185, 187 (1975) (no duty to warn of danger presented by used tire where plaintiff knew it was used and that a qualified service repairman was needed to replace rubber tire); Maas v. Dreher, 10 Ariz. App. 520, 523, 460 P.2d 191, 194 (1969) (no duty to warn of danger of hitting lid on defective trash can with hand in order to close it).

80. 511 F.2d 1104, 1105 (10th Cir. 1975).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 1106.

Campo and overruled the patent danger doctrine in design defect cases. In *Micallef v. Miehle Co., Division of Miehle-Goss Dexter, Inc.*,[85] the plaintiff was injured while "chasing a hickie" in a printing press. The plaintiff was aware of the danger involved with chasing hickies, yet the accident would not have happened if the machine had safety guards.[86] In finding for the plaintiff, the New York court held that the duty of the manufacturer should not depend on the obviousness of the danger.[87]

The question remains whether the demise of the patent danger doctrine in design defect cases will extend to warning cases. In *Olson v. A. W. Chesterton Co.*,[88] the North Dakota Supreme Court addressed this issue. The plaintiff in *Olson* worked as an electrician at a cement plant.[89] His job was to keep the conveyor belt running.[90] On the day of the accident the belt began slipping.[91] To prevent this, the plaintiff used a can of belt dressing manufactured by the defendant.[92] The directions on the product said it should be poured slowly on the running belt.[93] Even though the belt had stopped, however, the plaintiff applied the dressing.[94] A flap or protrusion from the belt pushed his hand into the pinch joint, resulting in serious injury to the plaintiff.[95] The defendant raised the defense, among others, that the danger was obvious; therefore, no duty to warn existed.[96] The North Dakota court rejected the obvious danger doctrine and allowed recovery by the plaintiff.[97]

Despite the *Micallef* and *Olson* decisions, it is still not clear whether the obvious danger doctrine has been completely overruled, at least in the warning cases. In setting forth reasons for overruling *Campo*, the *Micallef* court said that in a highly technical society it is difficult for a consumer to appreciate defects, and only the manufacturer is in a position to know of these defects.[98] The *Micallef* court felt that the obviousness of the danger should not prevent the plaintiff from establishing a case.[99] The obviousness of the danger was left as part of the defendant's affirmative defense.[100]

85. 39 N.Y.2d 376, 379, 384 N.Y.S.2d 115, 117, 348 N.E.2d 571, 573 (1976). A "hickie" is a foreign object that appears on the plate of the printing press. *Id.* "Chasing a hickie" is the process by which the object is removed. *Id.*

86. *Id.* at 380, 384 N.Y.S.2d at 117, 348 N.E.2d at 573-74.

87. *Id.* at 385, 384 N.Y.S.2d at 120-21, 348 N.E.2d at 576-77. Arizona has also rejected the patent danger doctrine in design defect cases. In Byrns v. Riddell, Inc., 113 Ariz. 264, 550 P.2d 1065 (1976), the Arizona Supreme Court, citing the *Micallef* decision, abandoned the patent-latent distinction. *Id.* at 267, 550 P.2d at 1068. Instead, the court held that the obviousness of the design defect is only one factor to consider in determining whether the defect is unreasonably dangerous. *Id.*

88. 256 N.W.2d 530 (N.D. 1977).

89. *Id.* at 533.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 533-34. The plaintiff lost his arm and shoulder. *Id.* at 533.

96. *Id.* at 534.

97. *Id.* at 537.

98. 39 N.Y.2d 376, 385, 384 N.Y.S.2d 115, 121, 348 N.E.2d 571, 577 (1976).

99. *Id.* at 387, 384 N.Y.S.2d at 122, 348 N.E.2d at 578.

100. *Id.*

Similarly, in the warning case, the duty to warn should not turn on whether the plaintiff should have discovered the danger. Yet, some dangers, such as that of a sharp knife, are seemingly obvious enough to obviate the need for a warning. Otherwise, the duty to warn would be meaningless as the manufacturer would be held to warn of all dangers. Further, the effectiveness of the warning given would be reduced. Accordingly, most courts would probably hold that the defendant had no duty to warn of the dangers of a sharp knife.[101] While this is an extreme example, it does suggest a limit on the duty to warn of patent dangers. The courts must then determine how far to extend this limit on a case by case basis. In sum, there may be no duty to warn of the truly obvious danger.

B. *Absolute Liability Under a Strict Liability Theory*

Another limitation on the manufacturer's duty to warn may be a movement away from absolute liability. Under a negligence theory the manufacturer's duty is to warn of those dangers that are reasonably forseeable. Under a strict liability theory, the manufacturer is under a similar duty but is presumed to have knowledge of the danger. Taken literally, the latter view could impose absolute liability on a manufacturer for failing to warn of a risk not known by the manufacturer at the time the product was produced. The New Jersey Supreme Court came close to this result in *Beshada v. Johns-Manville Products Corp.*[102] In *Beshada*, a group of plaintiffs who had been exposed to asbestos brought a suit against the manufacturers and distributors of the product.[103] The plaintiffs alleged that they were given inadequate warnings of the dangers from asbestos exposure.[104] The defendants offered a state-of-the-art defense, contending that the danger asserted was undiscoverable at the time of manufacture.[105] The plaintiffs moved to strike the defense, arguing that it was not a permissible defense to a strict tort liability claim.[106] The trial judge denied the motion, concluding that New Jersey precedent created a rebuttable presumption that the manufacturer had knowledge of the danger in the product.[107] The trial judge ruled that this presumption could be overcome by proof that the danger was "unknowable" at the time of manufacture.[108]

The New Jersey Supreme Court reversed, holding that the state-of-the-art assertion was not a defense to a warning claim in strict tort liability.[109] The *Beshada* court ruled that state-of-the-art is a negligence defense and not a strict tort liability defense.[110] Responding to the

101. When confronted with whether there is a duty to warn one who possesses expertise, some courts hold there is no duty. *See* Martinez v. Dixie Carriers, Inc., 529 F.2d 457, 466 (5th Cir. 1976). Thus, the defendant's duty turned on the knowledge of the plaintiff.
102. 90 N.J. 191, 447 A.2d 539 (1982).
103. *Id.* at 196, 447 A.2d at 542.
104. *Id.* at 198, 447 A.2d at 543.
105. *Id.* at 197, 447 A.2d at 542.
106. *Id.* at 198, 447 A.2d at 543.
107. *Id.* at 199, 447 A.2d at 543.
108. *Id.*
109. *Id.* at 204, 447 A.2d at 546.
110. *Id.* The court noted that in strict liability, the focus is the product, not the behavior of the

defendant's argument that the court was imposing a duty to warn of the unknowable, the court said that the defendants were not required to do the impossible.[111] Under the *Beshada* court's reasoning, however, a defendant could be liable for failing to warn of dangers unknown at the time of manufacture, but known at the time of trial. This approaches absolute liability.

Beshada was limited to warning cases in New Jersey, which has always been in the forefront of products liability law.[112] A different result might have been reached in Arizona. Section 12-683(1) of the Arizona Revised Statutes provides an affirmative defense for the manufacturer who proves the product conformed to state-of-the-art technology at the time the product was sold.[113] This provision is directly contrary to the holding of *Beshada*. Thus, in Arizona the manufacturer who has warned of all dangers known by state-of-the-art technology at the time of sale would have an affirmative defense. This places a limit short of absolute liability.[114]

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defendant. *Id.* Therefore, the state of the scientific knowledge regarding latent dangers is irrelevant. *Id.*

111. *Id.*

112. *See* Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 176, 406 A.2d 140, 153 (1979) (plaintiff need not show unreasonably dangerous defect; must only show that product not reasonably fit, suitable or safe for intended purposes when sold by defendant); J. BEASLEY, *supra* note 3, at 244.

113. ARIZ. REV. STAT. ANN. § 12-683 (1982) provides in part:

> In any product liability action, a defendant shall not be liable if the defendant proves that any of the following apply:
>
> 1. The defect in the product is alleged to result from inadequate design or fabrication, and if the plans or designs for the product or the methods and techniques of manufacturing, inspecting, testing and labeling the product conformed with the state of the art at the time the product was first sold by the defendant.

Although the statute does not expressly refer to warnings, the section has arguable application since the term "labeling" is used. In any case, ARIZ. REV. STAT. ANN. § 12-686 (1982) provides, "Evidence of advancements or changes in the state of the art subsequent to the time the product was first sold by the defendant" is not admissible as direct evidence of a defect. Thus, technology available at the time of the trial would not be admissible to prove a warning defect where such technology was not available at the date of sale. This would seemingly avoid the result in *Beshada*.

114. *Cf.* Rodriguez v. Bessar Co., 115 Ariz. 454, 565 P.2d 1315, (Ct. App. 1977). The defendant sold a cubing machine to the plaintiff's employer. *Id.* a 456-58, 565 P.2d at 1317-19. The cuber was designed to stack cement blocks automatically into palletized cubes in order to facilitate handling and storage. *Id.* at 458, 565 P.2d at 1319. The machine required an attendant to supervise the process. *Id.* The attendant was to stand on a platform, which was enclosed by metal. *Id.* If something went wrong, the attendant was to push an emergency stop button. *Id.* As the machine was designed, the attendant was not exposed to an open part of the machine. *Id.* The plaintiff's employee modified the machine by raising the platform on which the attendant stood. *Id.* This alteration destroyed the protective guarding. *Id.* The defendant received notification of this modification, but did not issue any warning of the danger in the change in design. *Id.* Subsequently, the plaintiff was hit in the head by the machine's revolving paddle as he leaned over the platform. *Id.* He suffered serious head injuries as a result. *Id.* In an ensuing suit against the defendant, the Arizona Court of Appeals denied recovery, holding that the duty to warn of post-sale dangers extended only to those dangers that were foreseeable at the time the product left the control of the manufacturer. *Id.* at 460, 565 P.2d at 1321. In *Bessar*, the defendant had actual notification of the modification. *Id.* at 458, 565 P.2d at 1319. Nevertheless, the *Bessar* court said that to impose a duty to warn on the manufacturer where the manufacturer received actual notification of a third-party modification would place an intolerable burden on the manufacturer. *Id.* at 460, 565 P.2d at 1321.

C. *Subsequent Changes in the Warning as Evidence of the Warning's Inadequacy*

The Arizona and Federal Rules of Evidence exclude evidence of subsequent remedial measures in negligence cases if offered to prove negligence or culpable conduct.[115] Because the change in the design of a product could be an implicit admission of negligence, the manufacturer might not have an incentive to correct any defects if subsequent changes were admissible against it. The rules of evidence, however, apply only to negligence cases, not strict tort liability cases. Some states allow the evidence in a strict tort liability action but most do not.[116]

In Arizona, evidence of subsequent remedial measures is also excluded by statute in a strict tort action alleging a design or manufacturing defect.[117] This statutory exclusion, however, makes no reference to subsequent changes in a warning.[118] An argument could be made that a subsequent change in a warning is admissible as evidence of the warning's inadequacy. Such an argument, however, would probably fail for two reasons. First, the legislature has shown a clear intent not to admit evidence of subsequent remedial repairs in both manufacturing and design defect cases brought under a strict liability theory. Although not expressly stated, this intent probably carries over to the warning defect cases. Second, the Arizona and federal rules exclude evidence of subsequent remedial repairs to prove negligence.[119] The warning defect cases, though brought under principles of strict liability, are often decided on the issue of foreseeability, a negligence concept.[120] Thus, the rules of evidence ultimately may exclude evidence of subsequent warning changes because they are grounded in negligence theory.

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115. Both FED. R. EVID. 407 and ARIZ. R. EVID. 407 provide:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

116. *See, e.g.*, Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788, 792-93 (8th Cir. 1977) (under South Dakota law, evidence of subsequent remedial warning admissible under strict tort liability theory); Ault v. International Harvester Co., 13 Cal. 3d 113, 120-21, 528 P.2d 1148, 1152-53, 117 Cal. Rptr. 812, 816-17 (1975) (evidence of subsequent change in design admissible under strict tort liability theory); Sutkowski v. Universal Marion Corp., 5 Ill. App. 3d 313, 319, 281 N.E.2d 749, 753 (1972) (evidence of subsequent design change was admissible to show feasibility of alternative design). *Cf.* COLO. REV. STAT. § 13-21-404 (Supp. 1982) (provides that a subsequent change in a warning is not admissible except to show a duty to warn).

117. ARIZ. REV. STAT. ANN. § 12-686 (1982) provides in part:

> In any product liability action, the following shall not be admissible as direct evidence of a defect:
>
> . . .
>
> 2. Evidence of any change made in the design or methods of manufacturing or testing the product or any similar product subsequent to the time the product was first sold by the defendant.

118. If the authors of the statute intended the term "design defect" to include warnings, then the issue is moot. *See supra* note 1.

119. *See supra* note 115.

120. *See supra* notes 14-17 and accompanying text.

III. CONCLUSION

The manufacturer's duty to warn is predicated on the concept of foreseeability of the risk if no warning is given. The duty thus incorporates a negligence standard regardless of whether the action is brought under a negligence or strict tort liability theory although some courts attempt to distinguish the two theories. The duty to warn extends to all dangers involved in the foreseeable use of the product. This warning must be given to the consumer, except in the case of prescription drugs where the warning must be given to the doctor. Once a duty to warn has been established, the adequacy of the warning turns on the special circumstances of the case. Although the warning claim has been expanding, some definite limits are present.

The duty to warn of the obvious provides a troublesome theoretical problem. While some courts have repeated the obvious danger doctrine, most courts would agree that a manufacturer should not have a duty to warn of the obvious dangers of a sharp knife. This suggests there is a definite limit on the defendant's duty to warn despite the demise of the patent danger doctrine.

With the expansion of strict tort liability, there has been a movement towards the imposition of absolute liability. This recently culminated in a New Jersey case where the defendant was held liable for failing to warn of dangers unknown at the time of manufacture. A similar result will be unlikely in Arizona as the defendant need warn of dangers known at the time of sale.

Finally, the Arizona products liability statutes provide that subsequent changes in the manufacture or design of a product are not admissible in a strict tort liability case to prove a defect. Although not expressly stated, the legislature probably intended that subsequent changes in the warning given not be admissible in order to prove the inadequacy of the warning.