

Spring 2014  
Mark Geistfeld – Products Liability – Outline

## 1) INTRODUCTION

### a) Early Privity Requirement – Duty

i) *Winterbottom v. Wright* (Euro 1842) (holding that lack of privity between  $\Pi/\Delta$  precluded  $\Pi$ 's suit against  $\Delta$  for negligent maintenance of a stage coach)

### ii) **Concerns**

(1) Unlimited liability

(2) Disincentivize people from doing the work (higher prices, unavailability of products, etc.)

### b) Social Problems

i) *Borel v. Fireboard Paper Products Corp.* (5th Cir. 1973) (holding that  $\Delta$ -asbestos manufacturer has to warn of dangers that the application of reasonable foresight would reveal measured in light of manufacturer's status as an expert and duty to test the product – Rejecting privity requirement)

ii) **Consider:** Strict liability theoretically limits litigation costs by removing the fault issue from the case – more money to the hands of victims faster

iii) *Hammtree v. Jenner* (CA 1971) (holding that  $\Delta$  car driver that has seizure only faces negligence as opposed to strict liability even though  $\Delta$  is best cost-avoider)

iv) *Strauss v. Belle Realty Co.* (NY 1985) (holding that lack of privity between  $\Pi/\Delta$  meant  $\Delta$  didn't owe duty to  $\Pi$  when  $\Pi$  slipped and fell on negligently maintained stairs in common area due to black-out caused by  $\Delta$ 's negligent maintenance of the electrical system)

(1) Concern about **unlimited liability**

## 2) IMPLIED WARRANTY

### a) RST § 402A

i) (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(1) (a) the seller is engaged in the business of selling such a product, and

(2) (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold

ii) (2) The rule in (1) applies although

(1) (a) the seller exercised all possible care in preparation and sale of the product and

(2) (b) the user or consumer has not bought the product from or entered into any contractual relationship with the seller

### b) Consumer Expectations Test (RST § 402A cmt (g)/(i))

i) Defect – Condition **not contemplated** by the ultimate consumer, which will be **unreasonably dangerous** to him

ii) Unreasonably Dangerous – Article sold that is **dangerous to an extent beyond what would be contemplated by the ordinary consumer with ordinary knowledge common to the community as to its characteristics**

- c) **Policy**
- i) Place liability where it will most effectively reduce hazards
  - ii) Modern manufacturing makes it so consumers can't investigate soundness of the product, and manufacturers encourage the lack of vigilance through trademarks, etc.
- d) **Cases**
- i) *Van Bracklin v. Fonda* (NY 1815)
    - (1) Δ sold bad beef (cow sick), made no representations about quality
    - (2) **Rule** – Implied warranty that food sold is wholesome, liability if it is not irrespective of fault of seller
  - ii) *Jacob E. Decker & Sons v. Capps* (TX 1942)
    - (1) Δ sold sausage to middle man who sold to Π, made family sick
    - (2) Found no negligence in food processing, but food was proximate cause of injuries
    - (3) **Rule** – Manufacturer is liable for injuries caused by the products
      - (a) Implied warranty based on public policy, not negligence, no privity required
    - (4) **Policy** – It is impracticable, if not impossible for the ultimate consumer to analyze whether food is suitable for human consumption
  - iii) *Seixas and Seixas v. Woods* (NY 1804)
    - (1) Action for selling crappy wood held out as nice wood though neither side realized the mistake in identifying the wood
    - (2) Held: No express/implied warranty, no fraud in the sale → no liability
      - (a) **Rule** – Purchaser is required to pay attention to things within reach of his observation and judgment – *caveat emptor* without express warranty here
    - (3) **Policy** – Buyer had knowledge/ability to inspect the product
  - iv) *Escola v. Coca Cola Bottling Co.* (CA 1944) (Traynor, J. Concurring)
    - (1) Waitress injured by exploding coke bottle, jury found Δ negligent
    - (2) Argument that implied warranty should apply to product defect
      - (a) Δ places into stream of commerce knowing it will be used without inspection
      - (b) **Public policy** – Liability where it will be most effective at reducing hazards
      - (c) Modern manufacturing makes it so consumer is no longer capable of investigating soundness of the product and manufacturers encourage the lack of vigilance through trademark, etc.
  - v) *Greenman v. Yuba Power Products* (CA 1963) (holding strict liability for manufacturer of defective power tool) (Traynor gets a majority)
  - vi) *Henningsen v. Bloomfield Motors, Inc.* (NJ 1960) (holding that when manufacturer puts new car in stream of commerce and promotes purchase, they make an implied warranty it is suitable for use)
    - (1) Car veered into a tree close in time to when it was purchased

### 3) **NEGLIGENCE PRINCIPLE**

- a) **RTT § 1** – One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect
- b) **RTT § 2** – A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:
  - i) (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product
  - ii) (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe
  - iii) (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe
- c) **Policy**
  - i) No real ability for end consumer to inspect the product (*Winchester*)
  - ii) If the nature of a product is such that it is reasonably certain to place life and limb in peril when negligently made, it is a thing of danger (*Macpherson*)
  - iii) **Requires**
    - (1) Almost never going to have privity between  $\Pi/\Delta$  (*compare Strauss/Macpherson*)
    - (2) Almost never going to inspect/test the product before use
  - iv) *Res ipsa loquitur* – Infer negligence when (1) accident causing harm is the type that ordinarily happens because of negligence (*i.e.* more often than not), (2)  $\Delta$  had exclusive control of the instrumentality causing the injury
  - v) Strict liability enforces B<PL when  $\Pi$  cannot garner sufficient evidence to show negligence – result would be lack of safety investment due to competitive pricing
    - (1) People won't pay for safer products because they are unaware of defects
- d) **Cases**
  - i) *Thomas v. Winchester* (NY 1852) (holding liability against  $\Delta$  when  $\Delta$  negligently mislabeled poison as dandelion extract resulting in injuries to  $\Pi$ )
    - (1) Reasoning that harm to end consumer is the only expected consequence, thus privity requirement is inapplicable
  - ii) *Macpherson v. Buick Motor Co.* (NY 1916) (holding liability against  $\Delta$  when  $\Delta$  sold a car with a defective wheel that crumbled)
  - iii) *Escola v. Coca Cola Bottling Co.* (CA 1944)
    - (1)  $\Pi$  proved defect (over-charging, or latent crack), and defect occurred while in  $\Delta$ 's possession → *res ipsa loquitur*
    - (2) Evidence they had an excellent batch testing method, but argument they couldn't apply the method to used bottles they were recycling
    - (3) Held: Don't reuse bottles if tests are not practicable – duty to inspect



#### 4) **SUBSTANTIVE BASIS OF STRICT LIABILITY**

##### a) **Consumer Expectations and Product Performance**

###### i) **Analysis – Absolute Liability (Focus entirely on PL – product failure)**

- (1) Consumer expectations are frustrated if the product performs differently than expected – open and obvious risks thus cannot frustrate expectations
- (2) Product is defective where the product is in a condition not contemplated by the ultimate consumer which will be unreasonably dangerous to him
  - (a) Focus is entirely on product performance without consideration of cost
- (3) Policy of risk spreading by  $\Delta$  which leads to the conclusion that *any harm* would result in liability irrespective of the cost of making changes

###### ii) **Cases**

- (1) *Halliday v. Sturm, Ruger & Co.* (MD 2002) (holding that there was no COA against  $\Delta$  when  $\Pi$ 's child shot himself with  $\Pi$ 's gun)
  - (a) Rejected arguments that gun didn't have safety features: Grip safety, heavy trigger pull, child-resistant manual safety, trigger lock, etc.
- (2) *Green v. Smith & Nephew AHP, Inc.* (WI 2001) (holding that  $\Delta$  was liable for  $\Pi$ 's unexpected and unforeseeable allergic reaction to  $\Delta$ 's latex gloves)
- (3) *Denny v. Ford Motor Co.* (NY 1995)
  - (a) Liability based on Bronco  $\Pi$  rolling when  $\Pi$  swerved to avoid a deer
  - (b) Product liability analyzed under risk-utility – no liability – car designed for off-road driving and was not dangerous for that use
  - (c) Implied warranty analyzed under consumer expectations – car marketed for every-day driving which  $\Delta$  admitted was susceptible to rolling on pavement
  - (d) Geisfeld argues that liability based on product performance alone ignores B

##### b) **Consumer Expectations and Product Cost**

###### i) **Analysis**

- (1)  $\Pi$  must prove product is unreasonably dangerous beyond that contemplated by the ordinary consumer with ordinary knowledge
- (2) Factors – Usefulness of the product, likelihood and severity of the danger posed by the design, feasibility of an alternative design, cost of improved design, ability to reduce the product's danger without impairing usefulness or making it too expensive, feasibility of spreading loss in product price (*Potter* – risk-utility in terms of consumer expectations)
  - (a) Must balance risk to the consumer vs. utility to the consumer, not risk to consumer vs. utility to society (*Cipollone*)
  - (b) RTT § 2 cmt. f – Not a factor that liability will negatively impact corporate earnings or reduce employment in an industry

###### ii) **Cases**

- (1) *Potter v. Chicago Pneumatic* (CT 1997) (holding  $\Delta$  liable for defective tools that vibrate resulting in injuries to  $\Pi$  – expert testimony that they didn't meet ANSI standard and showed correlation between vibration and injuries)
- (2) *Cipollone v. Liggett Group, Inc.* (NJ 2002) (holding that  $\Delta$  cigarette company cannot present evidence of collateral benefits of cigarettes (enjoyment, pay taxes, provide jobs, etc.) under risk utility, NOT consumer expectations)

c) **Consumer Expectations and Risk Utility**

i) **Analysis (Geisfeld 2009)**

- (1) Duty owed by  $\Delta$  product seller to  $\Pi$  WRT unreasonably dangerous product risks
  - (a) Product is unreasonably dangerous if more dangerous than would be expected by the ordinary consumer with ordinary knowledge
  - (b) Duty – Have you frustrated *actual* (misinformed) consumer expectations?
    - (i) If consumer is perfectly informed (as to both risks and alternatives), there is no duty  $\rightarrow$  *caveat emptor*
- (2) Breach of the duty by distributing a *defective* product
  - (a) What the ordinary consumer, with full knowledge of risks, technology, and cost of measures would expect WRT product safety
    - (i) Argument that RTT, in rejecting consumer expectations, is incapable of framing the function of the risk-utility analysis
  - (b) Breach – Frustrate *reasonable* (well-informed) consumer expectations
    - (i) Risk-utility analysis
    - (ii) *Potter* Factors
      1. Usefulness of the product
      2. Likelihood and severity of the danger posed by the design
      3. Feasibility of an alternative design
      4. Financial cost of an improved design
      5. Ability to reduce the product's danger without impairing its usefulness or making it too expensive
      6. Feasibility of spreading the loss by increasing the product's price
- (3) Proximate cause
- (4) Damages
- (5) Performance Approach – Duty, causation, damages
- (6) Note – Still strict liability because manufacturer behavior is not considered

ii) **Policy**

- (1) With product defects, cost of inspection supports shifting B<PL to manufacturer
  - (a) Liability here promotes product safety – higher prices to balance B<PL
- (2) With design defects, careless users are subsidized by careful ones when manufacturer passes on costs – need to consider cost of alternatives
  - (a) This situation is better handled with general health insurance
  - (b) Cost of “tort insurance” is very expensive by comparison
- (3) In effect, design defect is demonstrated by showing manufacturer failed to provide the design that the well-informed consumer would choose
- (4) And a warning defect is demonstrated when the seller fails to warn consumers of a risk that would be material to their decision concerning purchase or safe use of the product (allowing the consumer to make an informed risk-utility decision)
- (5) Economics – Uninformed consumer will not buy safer, more expensive products
  - (a) Demand is higher for less safe products, and thus sellers won't invest in safety improvements, and won't warn consumers which hurts demand
- (6) Argument that RTT does not consider consumer expectations, however this is the only reasoning that justifies the risk-utility approach proffered by RTT

## 5) **CONSTRUCTION AND MANUFACTURING DEFECTS**

- a) **RTT § 2** – A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:
  - i) (a) contains a manufacturing defect when the **product departs from its intended design** even though all possible care was exercised in the preparation and marketing of the product
  - ii) Cmt A – Safety incentive, discourage consumption of defective products, judicial resources (less litigation cost), fairness (difficulty proving negligence, seller spreads loss, unharmed consumers share in cost), manufacturing defects disappoint consumer expectations
- b) **Analysis**
  - i) **Reasonable Expectation Test** –  $\Delta$  has a duty to eliminate or remove harmful substances that the consumer would not ordinarily anticipate or guard against
  - ii) **Malfunction Theory** – Permits  $\Pi$  to prove with circumstantial evidence by showing there was some unspecified dangerous condition (*Metropolitan Property & Casualty*)
    - (1) Incident was a kind that ordinarily doesn't occur absent a defect
    - (2) The defect most likely existed at the time the product left the  $\Delta$ 's control
    - (3) Was not the result of other reasonably possible causes not attributable to  $\Delta$
  - iii) **Circumstantial Evidence**
    - (1) History and use of the particular product
    - (2) Manner the product malfunctioned
    - (3) Similar malfunctions in similar products
    - (4) Age of the product in relation to life expectancy
    - (5) Most likely cause of the malfunction
  - iv)  $\Delta$  may introduce **lack of prior accidents** if  $\Delta$  lays foundation that
    - (1) The same product was used and
    - (2) The product was used under conditions substantially similar to when  $\Pi$  was injured (*McKenzie*)
  - v) **Spoilage of Evidence** – When  $\Pi$  voluntarily disposes of defective product, SJ in favor of  $\Delta$  is appropriate. If  $\Pi$  wasn't at fault for lack of preservation, no inference.
- c) **Policy**
  - i) Note:  $\Pi$  can offer different evidence in a negligence claim ( $\Delta$ 's conduct) which otherwise is irrelevant under strict liability
  - ii) Defect cannot be defined by reference to process of production
    - (1) Would result in a negligence rule because  $\Delta$  argues they took reasonable care in the process and that the process would produce *some* defective products
    - (2) If defects are part of the expected outcome, then existence of a defect is not a departure from the standard without negligence in QC process
  - iii) Consumer expectations must be imported here to fill in gaps when there is no specified design consideration – *e.g.* a tire that fails at 2k miles is defective even though the design makes no mention of how far it should be able to go



d) Cases

i) *McKenzie v. SK Hand Tool Corp.* (IL 1995)

- (1) Ratchet wrench broke causing  $\Pi$  to fall while working on truck
- (2)  $\Delta$  has blueprints with specs for size/tolerance of wrench components
- (3) Measurements by expert showed component outside of tolerances  $\rightarrow$  defective

ii) *Metropolitan Property and Casualty v. Deere & Co.* (CT 2011)

- (1)  $\Pi$  claimed  $\Delta$ 's tractor had defective electrical system causing house fire
- (2) Held: Sufficient evidence to show fire started in tractor, but not that defect existed when it left  $\Delta$ 's hands  $\rightarrow$  4y without incident, proximity to servicing tractor

iii) *Allen v. Grafton* (OH 1960)

- (1)  $\Pi$  injured by shell in fried oyster – presence of shell is a known possibility
- (2) Held: Big shells can be expected, but small pieces may trigger liability

iv) *Schafer v. JLC Food Systems* (MN 2005)

- (1)  $\Pi$  ate pumpkin muffin, cut on back of her throat results in hospitalization
- (2) Rejecting foreign-natural test in favor of reasonable expectations
- (3) Held: Reach jury without direct proof of specific harm causing element with:
  - (a) Injury causing event was of a kind that would ordinarily occur due to defect
  - (b)  $\Delta$  was responsible for the condition that caused the injury
  - (c) The injury-causing event was not caused by anything other than a food product defect existing at the time of sale

## 6) DESIGN DEFECTS

### a) Consumer Expectations (Majority Approach)

#### i) Analysis

- (1) Π's demonstration of a defect in terms of device's inability to perform its *intended purpose* = liability (*Cronin*)
- (2) Defect cannot be defined in terms of risk because knowledge of the risk (patent danger) is not the same as knowledge of the defect (low cost means to eliminate the danger) (*Luque*)
- (3) *Barker/Soule*
  - (a) Design is defective if Π demonstrates it failed to perform as an *ordinary consumer would expect* when *used in a foreseeable manner*
    - (i) Product performance is within the contemplation of ordinary consumer → no risk-utility (*Soule*)
    - (b) Or, if consumer cannot know what to expect because he would have no idea how safe the product could be → risk-utility (burden on Δ)
      - (i) If facts require a determination of whether the design embodies excessive preventable danger unless outweighed by the benefits of that design → risk-utility, requires experts, analyze under factors (*Soule*)
      - (ii) Factors – the gravity of the danger posed by the challenged design, likelihood that the danger would occur, mechanical feasibility of alternatives, cost of alternatives, adverse consequences resulting from proposed alternatives

#### ii) Cases

- (1) *Cronin v. J.B.E. Olson Corp.* (CA 1972)
  - (a) Car accident broke safety hasp releasing bread trays into Π throwing him through the windshield
  - (b) Held: Product failed to perform its intended purpose and thus was defective without needing to show that the device was inherently dangerous
    - (i) Poor welding – manufacture defect – or shoddy metal chosen – design defect – have the same result
- (2) *Luque v. McLean* (CA 1972)
  - (a) Lawn mower labeled with “caution” over opening where blade is accessed – Π slips and falls in front of running mower and mangles hand
  - (b) Held: At the time of purchase – Π may be aware of the risk (patent danger), but unaware if the product is defective (eliminated with cheap precaution)
    - (i) Anomalous to allow negligence for selling obviously defective product, but allow patent danger to preclude strict liability
    - (ii) Δ must demonstrate Π assumed the risk
- (3) *Barker v. Lull Engineering Co.* (CA 1978)
  - (a) Loader operated by novice rolls during complicated lift
- (4) *Soule v. General Motors Corp.* (CA 1994)
  - (a) Ankles crushed when control arm broke free and collapsed backwards into the toe pan crushing Π's feet
  - (b) Π wants consumer expectations, Δ wants risk-utility

b) **Risk-Utility Test**

i) **Analysis – Reasonable Alternative Design**

- (1) RTT cmt. f – Sometimes can be shown obvious/understandable to laypersons – other times by reference to similar products already available that serve the same purpose – most times, expert testimony showing alternative
- (2) Π can establish defect by proof of product malfunction, or that the product is defective no matter how it is designed (unreasonable dangerous categorically), or prove a reasonable alternative design

ii) **Cases**

- (1) *Cepeda v. Cumberland Engineering* (NJ 1978) (no consumer expectations)
  - (a) Π hand mangled in “pelletizing” machine – alleged defective because guard was removable, had to be removed often, didn’t have an interlock to prevent operation when the guard was removed
  - (b) Rule – Whether reasonably prudent manufacturer would put the product in the stream of commerce without the safer design once information about the danger and suggested solution are presented
  - (c) Manufacturing defects are unreasonably dangerous as a matter of law
  - (d) Factors for design defect:
    - (i) The usefulness/desirability of the product
    - (ii) The safety aspects – the likelihood/seriousness of probable injuries
    - (iii) The availability of a safe substitute product that meets the same need
    - (iv) The manufacturer’s ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive
    - (v) User’s ability to avoid danger by exercising care
    - (vi) User’s anticipated awareness of the dangers because of general public knowledge, obvious condition of the product, or the adequate warnings
    - (vii) Feasibility of spreading the loss with higher prices or liability insurance for the manufacturer
- (2) *Wright v. Brooke Group Ltd.* (IA 2002)
  - (a) Cigarette case
  - (b) Adopts RTT §§ 1-2 – Π seeking to recover on basis of design defect must prove the foreseeable risks of harm posed by the product could have been reduced or avoided by adoption of reasonable alternative design and failure to do so renders the product unreasonably unsafe

c) **Risk-Utility and Consumer Expectations**

- i) *Grimshaw v. Ford Motor Co.* (CA 1981) (finding that engaging in a cost-benefit analysis balancing human lives and limbs against corporate profits demonstrated institutional mentality that was callously indifferent to public safety)
- ii) Shwartz on *Grimshaw*
  - (1) Δ can argue the design is not improper because the alternative will impair the usefulness of the product
  - (2) “State of the art” as a liability-limiting idea
  - (3) Accident caused by Π or 3rd party conduct – product misused, etc.
  - (4) Π assumed the risk
  - (5) NEVER argue it was excluded because of high cost

d) **Risk Trade-Offs**

i) *Dawson v. Chrysler Corp.* (3d Cir. 1980) ( $PL_1 > PL_2$ )

- (1) Cop driving spins out and hits pole which enters passenger compartment
- (2) Argued that car should have continuous steel frame with cross-members
- (3)  $\Delta$  argued – No duty to make crash-proof car, complied with federal safety standards, deformation is desirable to deflect crash energy *away* from driver, suggested design is 300lbs and \$300 more and wouldn't change outcome
- (4) Held: Enough to support jury finding liability

ii) **Policy**

- (1) Fact-finder in another case might well find manufacturers liable for the very safer alternative design suggested in a previous case
- (2) Case-by-case adjudication represents bad policy for safety requirements
- (3) Hindsight Bias – Juries see the result and think that the *ex ante* risk is much more obvious than it was
- (4) Studies show that framing of risk-utility is important
- (5) Jury acquires knowledge necessary to evaluate risk-utility during trial
  - (a) Instruct that the ordinary consumer reasonably expects the design to incorporate only precautions where the cost for the consumer is less than the safety benefit for the consumer – thus promoting consumer interests in safety
  - (b) Makes it more difficult for  $\Pi$  to argue that risk-utility pits consumer interests against corporate interests
    - (i) This has nothing to do with corporate profits (irrelevant) – unfairly prejudicial because risk-utility has nothing to do with corporate profits

e) **Consumer Choice**

- i) Actual consumer choice typically trumps categorical liability
  - (1) Must be actual consumer choice between products
  - (2) Compare Patent Danger
    - (a)  $B(\text{type of car, no airbag}) > PL(\text{different type of car with airbag})$ 
      - (i) Benefit of the no airbag model outweighs a different model with one
    - (b) Defect:  $B(\text{this car, airbag}) < PL(\text{this car, no airbag}) \rightarrow \text{liability}$ 
      - (i) Consumer choice is preserved
- ii) **Foreseeable Product Use**
  - (1) Look at whether the product was unreasonably dangerous as designed/marketed, and whether the use was intended or foreseeable
  - (2) *Salazar v. Wolo Mfg. Group* (TX 1988) (holding that § 402A applied when product is not in use,  $\Pi$  injured when someone lost control of their car because their “club” came out from under the driver seat and pinned the gas pedal)
- iii) **Categorical Liability**
  - (1) Most courts reject categorical liability, and ones that don’t are overruled by legislature –  $\Pi$  must show  $B < PL$ , B is loss of the category/design advantages
  - (2) RTT § 2(b) cmt. e – Some products are so manifestly unreasonable (low social utility and high danger) that liability should attach even without alternative design
  - (3) RTT § 2(b) cmt. d – Common and widely used products (alcohol/guns) are defective only with an alternative design even if there is substantial risk of harm
  - (4) Emphasis should be on the value of consumer choice ( $B > PL$ ) (*Linegar*)
    - (a) Consider the category – Car purchased with/without airbag versus choosing between two different model cars with relative advantages
    - (b) When consumer makes a well-informed risk-utility decision, liability disrespects the role of consumer choice
  - (5) Cases
    - (a) *Dreisonstok v. Volkswagenwerk* (4th Cir. 1975) (rejecting  $\Pi$  claim that mini-vans are inherently dangerous from risk to passengers in head-on arguing that the van had unique design trade-offs &  $\Pi$  had a choice whether to purchase)
    - (b) *Parish v. Jumpking* (IA 2006) (holding that trampolines are widely used and consumed and less than 0.05% of users are actually injured  $\rightarrow$  MSJ to  $\Delta$ )
    - (c) *Linegar v. Armour of America* (8th Cir. 1990) (holding that  $\Delta$  was not liable for bullets that struck  $\Pi$  in areas not covered by the vest)
- iv) **Optional Safety Equipment (*Scarangella v. Thomas Build Buses* (NY 1999))**
  - (1) Product is not defective when
    - (a) Buyer is thoroughly knowledgeable regarding product/use and is actually aware a safety feature is available
    - (b) There are normal circumstances where the product is not unreasonably dangerous without the feature
    - (c) Buyer is in a position to balance risks-utility
  - (2) Seller makes safety feature optional if value is different for different consumers
  - (3)  $\Pi$ -employee injured when bus backed into him, didn’t have reverse alarm
    - (a) Opted against because of noise concern, busses only used in reverse on company lot (kids not exposed), low risk of harm  $\rightarrow$  not required

f) **State-of-the-Art**

i) **RTT § 2 cmt. f**

- (1)  $\Pi$  must prove the availability of a technologically feasible and practical alternative design that would have reduced or prevented  $\Pi$ 's harm
- (2)  $\Delta$  can introduce evidence re industry practice that bears on practicality of the design, but not dispositive – can be defective even if no manufacturer did it

ii) **Analysis**

- (1) State of the art is at the time of sale/manufacture (at trial in minority)
- (2) Industry custom is never a complete defense
- (3) SOTA is in the *technological* not the *economic* sense
  - (a) If technologically feasible, then you do risk-utility

iii) *Boatland of Houston v. Bailey* (TX 1980) (holding no liability when  $\Delta$  had a boat without a kill switch over evidence of a pending kill switch patent (secret), and non-commercial kill switches in race boats at the time)

- (1) Geisfeld – Here it was simply *commercially* unavailable, but it was certainly proven to be feasible (race boats)
  - (a) Feasibility is in the *technological*, not the *economic* sense



## 7) **WARNING DEFECTS**

### a) **Information and Consumer Choice**

- i) **RTT § 10** – Whether people would still consume the product if warned, warnings are required to protect those reasonably foreseeable users who would decline to consume the product when warned
- ii) *Watkins v. Ford Motor Co.* (11th Cir. 1999) (holding that Δ had to warn re Bronco roll-over risk even if it wouldn't help a consumer that decided to use the car anyway)

### b) **Substantive Basis of the Liability Rule**

- i) Π must prove Δ didn't warn of a risk that was known/knowable in light of prevailing best scientific/medical knowledge available at the time of manufacture
- ii) **RST § 402A cmt. j** – Seller required to warn if he has knowledge, or with reasonable skill and foresight should have knowledge, of the danger
- iii) **RTT § 2(c)** – Product is defective when adequate instructions/warnings would reduce/avoid foreseeable risks to the consumer and they are omitted
  - (1) Cmt. m – Seller charged with knowledge that reasonable testing would reveal
- iv) *Anderson v. Owens-Corning Fiberglass* (CA 1991) (holding that Δ can present evidence of the state of the art – whether something was known/knowable – before liability based on failure to warn can be imposed)
- v) *Vassallo v. Baxter Healthcare Corp.* (MA 1998) (holding that failure to warn is analyzed at the time of sale rather than time of trial)

### c) **To Whom the Warning is Directed**

- i) **Sophisticated User Defense** – Exempts manufacturers from duty to warn when product users are expected to be well trained/informed
- ii) **Obvious Danger Rule** – No duty to warn of obvious dangers, concerns about over-warning leading to users ignoring warnings altogether
- iii) **RST § 388** – Supplier is liable for physical harms if they know/should know the items are dangerous, and fails to warn, and has no reason to believe the user will realize the dangerous condition
- iv) **RST § 388(b)** – If manufacturer reasonably believes the user will know/should know about a given risk, there is no need to warn of the risk
- v) *Johnson v. American Standard* (CA 2008) (no duty to warn beyond providing MSDS for trained HVAC tech about risks of “brazing” ACs with refrigerant still in system because training would have revealed this to create a toxic situation)
- vi) **Allergies – When Duty to Warn Kicks In**
  - (1) **RST § 402a cmt. j** – Where product contains an ingredient where substantial # are allergic, and ingredient is one whose danger isn't generally known, or consumer wouldn't reasonably expect to find it in the product, must warn if seller knew/should have known it was present
  - (2) **RTT § 2 cmt. k** – Must warn when substantial # are allergic and presence of allergen is not generally known to consumers
  - (3) Substantial # tends to be around 5%
  - (4) *Livingston v. Marie Callender's* (CA 1999) (“fresh vegetable soup” and waitress who assures Π there is no MSG is severely injured when there is MSG)



vii) **Spanish – Counterexample to Allergies**

- (1) *Medina v. Louisville Ladder* (FL 2007) (holding no duty to include bilingual instructions though 20% of market speaks Spanish, store has bilingual signs, and company publishes bilingual in other countries – ladder collapsed)

viii) **Intermediaries**

- (1) RST § 388 cmt. n – It may be proper for supplier to assume the person they supply will communicate necessary warnings, but must analyze facts, if the person is lazy or if the product is especially dangerous, direct warning may be required
- (2) Sophisticated Intermediary – No duty to warn when (1) employer knows the dangers, or (2) supplier warns/provides adequate instructions to the employer
- (a) *Sowell v. American Cyanamid* (11th Cir. 1989) (holding that evidence showed that warnings given to Naval base were not adequately passed to Π when he got his “burn permit” to weld a tank – required visual/dramatic warnings)
- (3) Bulk Supplier Doctrine – Product delivered in bulk to intermediary where it is repackaged/reformulated – analyze under factors
- (a) Dangerous condition of the product
- (b) Purpose the product is used for
- (c) Form of any warnings given
- (d) Reliability of 3rd party in passing warning along
- (e) Magnitude of risk involved
- (f) Burden on supplier by requiring direct warnings to consumers

d) **Types of Risks Within the Duty to Warn**

- i) **Adequate Warning** – Enables the ordinary consumer to make an informed risk-utility estimate about the product – No duty to warn of well-known risks
- (1) Warning includes informing about the risk as well as the safety alternatives
- (2) RTT § 2 cmt. i – Δ must provide reasonable instruction how to use product safely
- (3) Duty also requires warning of reasonably foreseeable misuses of the product
- (a) Reference to the general class of harm as opposed to predicting the precise method Π will misuse the product
- ii) *American Tobacco v. Grinnel* (TX 1997) (holding no duty to warn about generally known risks that tobacco is dangerous, but duty to warn that tobacco was addictive)
- (1) Common Knowledge is known *beyond dispute*
- iii) *Liriano v. Hobart Corp.* (2d Cir. 1999) (hand in meat grinder sold to employer with safety guard that was removed. Reasoning that warning is in terms of info available to Π, and includes warning of the risk as well as informing of the alternative)
- iv) *Moran v. Faberge* (MD 1975) (girl set on fire when she sprayed flammable cologne onto an open flame candle to “scent” it. Held: Duty to warn re generally foreseeable misuse of the product even though specific sequence of events was not foreseeable)

e) **Information Cost of Disclosure**

- i) Duty to warn is breached by
  - (1) Failing to adequately communicate the warning to the user or
    - (a) Not negated by Π's failure to read the warning
  - (2) Failing to provide an adequate warning of the risk
    - (a) Negated by Π's failure to read the warning
- ii) Adequate warning must
  - (1) Be designed to reasonably catch consumer's attention
  - (2) Be comprehensible and give fair indication of the risks
  - (3) And be of intensity justified by the magnitude of the risk
- iii) RTT § 2 cmt. i – Factors: comprehensibility, intensity of expression, characteristics of the user group
- iv) **Information Cost** – Ink and Paper vs. Effective Warning free of clutter
  - (1) “Polycentric” problem – one factor effects the other
  - (2) More warnings deemphasize each individual warning
- v) *Jones v. Amazing Products* (GA 2002) (Π spilled drain cleaner on himself after transferring to a separate container against instruction. Held: inadequate warning because it was buried in a dense paragraph of text which didn't inform Π adequately)
- vi) *Macdonald v. Ortho Pharmaceutical* (MA 1985) (inadequate warning on contraceptive which stated “abnormal blood clotting which can be fatal” and “vital organs such as the brain can be damaged” rather than “stroke” etc.)
- vii) *Broussard v. Continental Oil* (LA 1983) (Π blew up when operating electric drill in natural gas environment. Held: Warning was adequate in manual and couldn't practicably be placed on the actual drill due to space/utility)
- viii) *Campos v. Firestone Tire & Rubber* (NJ 1984) (Duty depends on weighing relationship of parties, nature of the risk, and public interest in the solution. Most cases the warning will have very low cost)
- ix) *Hood v. Ryobi America Corp.* (4th Cir. 1999) (Cost includes printing, and whether the amount of detail undermines the effectiveness of the warning altogether)

f) **Post-Sale Duty to Warn**

- i) RTT § 10(b) – Reasonable seller would provide post-sale warning if
  - (1) Know/should know of substantial risk of harm
  - (2) The people that should be warned can be identified and are unaware of the harm
  - (3) Warning can be effectively communicated to and acted upon by those people
  - (4) Risk of harm is sufficiently great to justify the burden of duty to warn
- ii) RTT § 10 cmt. g – When direct communication isn't feasible, resort to public media
- iii) RTT § 10 cmt. j – Post-sale warning doesn't exculpate seller from design defect
- iv) B<PL – P includes what percentage of people will actually get info and B includes the cost of tracking them down
- v) *Lovick v. Wil-Rich* (IA 1999) (Π injured by falling cultivator wing when he was standing beneath it while removing the safety pin, rival had done a notification/kit to fix the problem, questions about whether/when Δ was on notice)

## 8) WARNING VERSUS DESIGN DEFECTS

- a) RST § 402A cmt. j – Where warning is given, the seller may reasonably assume it will be read and heeded; and a product bearing such warning, which is safe for use if it is followed, is not in defective condition/unreasonably dangerous
- b) *Skyhook v. Jasper* (NM 1977)
  - i) Crane w/ warning to stay 10ft from high voltage lines, not followed, Π died
  - ii) Could have been prevented with \$300-400 insulating link which was available
  - iii) Held: Warning adequate – used 5y without incident, not unreasonably dangerous
  - iv) Note – Incorrect application, assumed warning makes risk open/obvious – no consideration of user error/cost of alternative in a risk-utility analysis
- c) *Klein v. Sears, Roebuck and Co.* (MD 1992)
  - i) Radial saw without guard cuts off fingers – argument warning is too vague to help
  - ii) Held: Issue of material fact whether Π complied with the warning noting that if he did, then it is a design defect question, if not, then failure to follow was proximate
  - iii) Thus:  $B_{\text{Design}} < B_{\text{Warning}} < PL_{\text{Warned}}$  – Redesign required when operating in accordance with the warning has a greater risk than if you just redesign under risk-utility
- d) *Knopp v. Wackenhut Corp.* (NM 1992) (holding liability for woman distracted while walking through metal detector that trips – reasonably foreseeable negligence by user)
  - i) *Overrules Jasper*
- e) *Uniroyal Goodrich Tire v. Martines* (TX 1998)
  - i) Exploded 16” tire being put on 16.5” rim standing over tire while not using a mounting machine – all specifically warned against
  - ii) Factors between redesign/warning: Magnitude/probability of the foreseeable risks of harm, instructions/warnings, nature and strength of consumer expectations regarding the product (including from marketing), relative advantages/disadvantages of alternative designs
  - iii) Held: Redesign beading of tire to prevent this is required
  - iv) Dissent
    - (1) Argues employer (not supplying machine) and rim manufacturer (not stamping the rim clearly/designing to prevent this) are also liable (but settled)
    - (2) Rule – Safer alternative design that eliminates risk is required when warning leaves a significant residuum of risk because users may not understand, be inattentive, or not be motivated to heed the warning
      - (a) Warning: Don’t put your foot in garbage truck when blade is in motion
        - (i) Adequate to keep public from sticking their hand in
        - (ii) *Not adequate* to prevent worker from accidentally slipping and falling in
  - v) Note: Must remain *significant foreseeable risk of harm* to require design change
    - (1) Cost of design change ( $B_D$ ), saving consumers the cost of complying with the warning ( $B_W$ ) – thus ( $B_D - B_W < PL_W$ )
    - (2) Thus only warning when warning is clear/easy to comply with ( $B_W \& PL_W \rightarrow 0$ )
- f) *Hood v. Ryobi America* (4th Cir. 1999)
  - i) Lost finger after removed blade/guard, reassembled without guard and blade flew off
  - ii) Held: 7 warnings clearly instructed not to do this, didn’t need to specifically warn of blade flying off (counter: this is different in kind to what Π expected to happen based on the warning → Π assumed risk of cut, not risk of blade flying off)
  - iii)  $B_D - B_W + PL_{\text{Misuse}} < PL_W$  – If design modified to facilitate ignoring the warning

9) **MEDICAL PRODUCTS – UNAVOIDABLY UNSAFE EXEMPTION**

- a) **RST § 402A cmt. k** – Producer of a properly prepared prescription drug may be liable for injuries only if it wasn't accompanied by a warning of dangers  $\Delta$  knew/should have known about
- i) *E.g.*, Pasteur treatment for rabies. Big side effects, but you die without it. Can still market with warning about side effects – risk is unavoidable and we want the vaccine
  - ii) **Rule** – Cmt. k does not bar SL when product was not properly prepared because it is adulterated with substances that could have been detected (and product is essential to health/human safety))  $\rightarrow$  SL doesn't improve the product if it is unavoidably unsafe
- b) **RTT § 6**
- i) (b) Drug/medical device is defective if § 2(a) manufacturing defect, § 6(c) defective design, or § 6(d) inadequate warning
  - ii) (c) If foreseeable risk of harm by drug/device are large compared to foreseeable therapeutic benefit such that reasonable (and warned) healthcare provider would not prescribe it to anyone  $\rightarrow$  defective
  - iii) (d) Inadequate warning if foreseeable risks aren't given to doctors, or patient (when  $\Delta$  knows/should know doctor isn't in a position to reduce risk of harm)
    - (1) *MacDonald v. Ortho* (MA 1985) (holding  $\Delta$  had to warn patients directly for birth control because they only talk to the doctor once a year)
    - (2) *Perez v. Wyeth* (NJ 1999) ( $\Delta$  must warn consumers if marketing directly to them)
  - iv) Note: You get this same result using RST and learned intermediary
    - (1) Risk-utility would knock out the drug as unreasonably dangerous, but informed, reasonable doctor can direct the drug to patients who will have the best therapeutic effect and lowest risk – satisfying risk-utility
- c) *Brown v. Superior Court* (CA 1988)
- i) Diethylstilbestrol (DES) to prevent miscarriage injured babies
  - ii) Held: Under cmt. k – no strict liability for injuries for drug if it is properly prepared and had warnings of dangerous side effects knowable at time of distribution
    - (1) FN12 – Strict liability still for manufacturing/warning defects
  - iii) Note – This is incorrect, because it just instructs you do negligence (risk-utility) only for design defects, oh right, we already do that... (minority approach)
  - iv) *See National Childhood Vaccine Injury Act*
- d) *Freeman v. Hoffman-La Roche* (NB 2000) (Accutane)
- i) Analyze on case-by-case basis
    - (1)  $\Pi$  states claim under consumer expectations (notably incorrect)
    - (2)  $\Delta$  uses cmt. k as affirmative defense – show properly manufactured and adequate warning, then risk-utility the benefits and risks
- e) *Rogers v. Miles Labs* (WA 1991)
- i) Clotting factor gives hemophiliac HIV
  - ii) Held: Negligence only – product necessary regardless of risk, HIV was undetectable at the time, and strict liability won't incentivize prevention of undetectable things
  - iii) Note: This is product malfunction (like contaminated food) – But essential to human health/safety so we do negligence (*see Blood Shield Statutes defining this a service*)
- f) *Transue v. Aesthetech* (9th Cir. 2003)
- i) Ruptured silicone gel breast implant – strict liability because product contained a manufacturing defect

## 10) STATUTES

### a) Negligence Per Se

- i) **Generally** – Violation of a safety statute establishes defect/liability
- ii) **Analysis** – Note: No preemption because statute does not contemplate tort duty
  - (1) Violation of statute was the cause of the injury
  - (2) Statute was intended to protect against this harm
  - (3) Π is in the class of persons the statute is designed to protect
  - (4) Excuses (RST § 288A)
    - (a) Violation is reasonable because of actor's incapacity
    - (b) Actor doesn't know about compliance requirement
    - (c) Actor is unable, after reasonable diligence/care to comply
    - (d) Emergency not caused by actor's conduct
    - (e) Compliance involves greater risk of harm to actor/others
- iii) **Note** – RTT focuses on statutory purpose (type of risk, class of Π contemplated by legislature), but note common law duty to foreseeable Πs – i.e. when legislature never contemplated the specific risk/duty here, tort may expand the scope of the duty
- iv) *Harned v. Dura Corp.* (AK 1983)
  - (1) Compressed air tank explodes, didn't meet ASME standard that was incorporated into AK law for tanks "in places of public assembly"
  - (2) Held: Statute requires compliance with ASME, Δ can't control where tank was used, the fact it wasn't a place of public assembly was happenstance → liable

### b) Regulatory Compliance Defense

- i) **RST § 288C, RTT § 4(b)** – Compliance is a factor, but doesn't preclude finding defect in product
- ii) **Analysis**
  - (1) Where evidence shows no unusual circumstances – only the situation contemplated in the statute/rule – then minimum standard prescribed is sufficient
  - (2) Consider: Whether the decision by legislature/agency is exhaustive
    - (a) *i.e.* they considered *both*  $PL_{Warning}$  and  $PL_{Spanish Warning} > B_{English Only}$
  - (3) Note: Changed circumstances can fubar regulatory compliance defense
- iii) *Ramirez v. Plough* (CA 1993)
  - (1) Reye's syndrome from taking aspirin during viral infection
  - (2) Warning in English only, mom speaks Spanish only
  - (3) Legislation contemplated Spanish requirement in Puerto Rico, had required Spanish given to docs previously, but not anymore, had previous requirement for percentage of Spanish speakers, but not anymore
  - (4) Held: No liability

### c) Preemption

- i) **Analysis** – Consider degree of conflict between outcome required by tort and statutory purpose
  - (1) Implied preemption – The statutory purpose frustrated by recognizing tort duty
  - (2) *Geier* – Preempted when purpose was to give manufacturers choices and to create variety of safety products on the road to determine best method
  - (3) *Williamson* – Not preempted when concern was only cost of lap-only vs. lap/chest belts and contemplated it will get cheaper later
  - (4) *Wyeth* – Not preempted w/out evidence FDA wouldn't have allowed label change

## 11) CAUSE IN FACT

- a) **Policy** – Consider that causation limitation in products liability frustrates the overall objective of consumer safety
- b) **Analysis** (*Crossley*)
  - i) ID injury and  $\Delta$ 's wrongful conduct
  - ii) Run counterfactual
  - iii) Determine if the injury/accident would have still occurred
- c) **“Liberal” But-For Causation** (*Liriano*)
  - i) Negligent act was wrongful because it increased the chance a particular accident would occur
  - ii) Mishap of that sort happened
  - iii) Burden shifts to  $\Delta$  to rebut causation  $\rightarrow$  *i.e.* proof of defect = proof of causation
- d) **Where Human Behavior is not a Factor in the Counterfactual**
  - i) *Crossley v. General Motors Corp.* (7th Cir. 1994)
    - (1)  $\Pi$  going 70 in 55 w/ bad condition, underinflated tires runs out of talent
    - (2)  $\Pi$  proves car had defective axle (brittle due to manufacturing defect), battle of experts to determine if axle broke causing accident  $\rightarrow$  Jury found no liability
  - ii) *Daubert v. Merrell Dow Pharmaceuticals* (9th Cir. 1995)
    - (1)  $\Pi$  claimed limb reduction birth defect due to Bendectin
    - (2)  $\Pi$  must rely on statistical evidence absent direct causal mechanism for defect
    - (3)  $\Pi$  offered some expert testimony w/ retrospective stats, animal study, comparison to other similar compounds
    - (4) Held:  $\Pi$  must show Bendectin more likely than not caused *their individual* injury. Must show doubling of rate over background  $\rightarrow$  *i.e.* at least 50% chance *this* defect is not a background defect (relative risk of 2+)
    - (5) Note: Duty to warn would kick in at 30% increase in risk, but here requiring 100% – *i.e.* in drug cases it is exceedingly rare to win
      - (a) But note: Question is not warning, question is whether Bendectin causes the defects  $\rightarrow$  biochemistry, not human behavior
- e) **Where Human Behavior is a Factor in the Counterfactual (Warnings – “Liberal”)**
  - i) *Liriano v. Hobart Corp.* (2d Cir. 1999)
    - (1) Hand in meat grinder, employer removed safety guard, no warning
    - (2) Held: When  $\Delta$ 's negligence is wrongful because it will cause the type of injury that resulted,  $\Pi$  made out *prima facie* case that warning would be heeded
      - (a) The fact that  $\Pi$  didn't introduce evidence of causation re warning doesn't defeat his claim
  - ii) *Coffman v. Keene Corp.* (NJ 1993)
    - (1)  $\Pi$  naval electrician exposed to asbestos
    - (2) Jury instructed they can presume  $\Pi$  would have followed warning
    - (3) Reasoning – Public policy – Safer products, alerting users to product hazards, easier to satisfy  $\Pi$ 's burden of proof
      - (a) Warning causation is highly speculative in the first place
    - (4) Note: Reasoning here would apply equally to *Daubert*, but difference is here depends on human behavior (heeding warning) where there was biochemistry
    - (5)  $\Delta$  can rebut with evidence that  $\Pi$  would not have heeded the warning

f) **Warranty Cases**

- i) **Rule** –  $\Delta$ 's duty (with or without privity) is defined by  $\Delta$ 's representations
  - (1) What is the risk posed by the defect (that the product doesn't meet  $\Delta$ 's claims)?
  - (2) Did that risk materialize causing  $\Pi$ 's injury? → Strictly liable
  - (3) Reason – When consumer purchases, they can assume warning discloses all material info to make safety decision, representations are made material by  $\Delta$
- ii) *Baxter v. Ford Motor Co.* (WA 1932)
  - (1) Representations made by distributor about “shatter-proof” glass to  $\Pi$
  - (2) Rock chips windshield which takes out  $\Pi$ 's eye
  - (3) Held: Marketing material touting “shatter-proof” glass is admissible
    - (a)  $\Pi$  can't discover by inspection if claim is true, becomes part of bargain, no privity required
  - (4) Note: No other car had actual “shatter-proof” glass → no causation, BUT  $\Delta$ 's representations are part of the bargain so causation is shown

g) **Enhanced Injury**

- i) **Phases of Causation**
  - (1) Proof of defect resulting in injury
    - (a) Uncertainty here is to the *fact* of whether  $\Delta$  caused the damages
  - (2) Proof of causation in the question of damages
    - (a) Uncertainty here is to *extent*, not to *fact* of damages
- ii) *Trull v. Volkswagen of America* (NH 2000)
  - (1) Head on collision when car slid on ice, kid in backseat w/ only lap belt is injured
  - (2) Issue: Whose burden to prove  $\Pi$ 's enhanced injuries due to seat belt design?
  - (3) Held: Divisible injuries, burden on  $\Pi$ ; non-divisible injuries, burden on  $\Delta$ 
    - (a)  $\Pi$  must show the defect is a substantial factor in enhanced injuries then burden shifts to  $\Delta$  – note: minority keeps burden on  $\Pi$
  - (4) Note: This reasoning is not used in the *Daubert*-type cases
- iii) *Story Parchment v. Paterson Parchment Paper* (1931)
  - (1) Antitrust case seeking damages for conspiracy to put  $\Pi$  out of business
  - (2) Treble \$65k judgment thrown out by appeals court as speculative
  - (3) Held: Uncertainty as to *extent* but not as to *fact* of damages
- iv) *May v. Portland Jeep* (OR 1973)
  - (1)  $\Pi$  flips jeep, roll bar collapses, issue whether  $\Pi$ 's face hitting the wheel was caused by collapsed roll bar
  - (2) Held: Jury could conclude  $\Pi$ 's injuries were enhanced by roll bar collapse
    - (a) Sufficient evidence to conclude enhanced injury, question then is just apportionment

h) **Scientific Uncertainty**

i) **Generally**

- (1) Usually toxic torts – Vast majority of products don't have toxicity studies
- (2) Low level risks especially are unknown

ii) **Analysis**

(1) *Daubert* factors

- (a) Whether the theory can and has been tested
- (b) Whether it has been subjected to peer review
- (c) The known or expected rate of error
- (d) Whether the theory or methodology employed is generally accepted in the relevant scientific community

(2) *Joiner* – Must be fit between data and expert conclusion

(3) *Kumho Tire* – Conclusions must originate from reliable discipline and be based on sound scientific principals

(4) RTT § 28 cmt. c(4)

- (a) Biological mechanism explaining how the agent can cause the disease
- (b) Differential etiology ruling out other known causes
- (c) Reasonable explanation for the lack of general-causation evidence (and no contrary evidence of an absence of general causation)
- (d) Short latency and acute response
- (e) Appropriate disease response to dechallenge/rechallenge data

iii) *Rider v. Sandoz Pharmaceuticals Corp.* (11th Cir. 2002)

- (1) Parlodel to suppress lactation after childbirth
- (2) Active ingredient, bromocriptine is an ergot alkaloid
- (3) Epidemiological studies showed no correlation
- (4) Anecdotal case reports of injuries after Parlodel ingestion were unconvincing
- (5) Dechallenge/rechallenge data was ambiguous
- (6) Ergot alkaloids as a class may cause ischemic stroke – But reported side effects of Parlodel are vasodilation and hypotension
- (7) Animal studies suggested possible vasoconstriction, but no indication of high BP or any kind of stroke – no rationale for translation to humans
- (8) FDA withdrew approval – precautionary using low risk-utility standard

iv) *Stevens v. Secretary of Dept. of Health and Human Services* (Court of Federal Claims, 2001)

- (1) Π claims transverse myelitis/neurologic injuries due to Hep. B vaccine
- (2) Vaccine Act made recovery easy for specific, well-known, vaccine related injuries
- (3) Issue: When Π is injured, but injury is not one of the well-known injuries
- (4) Some drugs/treatments leave injuries with unique markers showing causation
  - (a) Vaccines do not do this
- (5) Other drugs provide strong epidemiological evidence (RR > 2), but not here



- v) Geistfeld – Duty vs. Damages Causation Reasoning
  - (1) Reasonably available evidence provides reasonable foundation for concluding product may cause a class of injuries (e.g., weak epidemiological evidence)
    - (a) Cost of uncertainty is then borne by  $\Delta$  → for  $\Delta$  to avoid liability,  $\Delta$  must invest in the data to support the lack of causation
    - (b) *See Story Parchment* –  $\Delta$  cannot rely on uncertainty to avoid liability
  - (2) Absent warning, consumer assumes it does not cause injuries – Assuming consumer can delay the use, disclosure has material effect on the decision
  - (3) Failure to warn consumers of scientific uncertainty is the defect, thus it is perverse to allow  $\Delta$  to rely on uncertainty to escape liability
    - (a) Duty is to disclose existing scientific evidence indicates product may cause injury – Then damages question whether  $\Delta$  is liable for the whole injury
- i) **Uncertainty Regarding  $\Delta$ 's Identity – Market Share Liability**
  - i) **Elements (*Sindell*)**
    - (1)  $\Pi$  identifies a substantial % of likely  $\Delta$ 
      - (a) *Murphy* – 10% is insufficient
    - (2)  $\Pi$  proves liability against the group
    - (3) Each  $\Delta$  is liable for the proportion of the judgment represented by its market share
      - (a) Unless  $\Delta$  demonstrates is could not have made the product that injured  $\Pi$
      - (b) Each  $\Delta$  is severally liable for their share of damages (*Brown v. Sup. Ct.*)
  - ii) *Sindell v. Abbott Labs* (CA 1980)
    - (1)  $\Pi$ 's mother took DES during pregnancy causing  $\Pi$ 's cancer
    - (2)  $\Pi$  suing manufacturers of 90% of the DES at the time her mother took DES
    - (3) *Summers v. Tice* – Hunter shot by 1 of 2  $\Delta$ s – Alternative liability holds them jointly and severally liable
    - (4) Reasoning –between innocent  $\Pi$  and  $\Delta$  wrongdoers,  $\Delta$  bears risk of uncertainty
  - iii) *Smith v. Eli Lilly & Co.* (IL 1990)
    - (1) Holding that market share liability ignores the fact that creation of risk or breach of a duty alone is not sufficient to impose liability – must show individual causation or join all possible  $\Delta$  such that you have alternative liability
    - (2) Note: Problem of market share and alternative are the same – either way an “innocent”  $\Delta$  is going to share in the liability
  - iv) Geistfeld – Alternative and Market-Share Liability
    - (1) Alternative Liability relies on evidential grouping –  $\Pi$ 's evidence shows *the group* of  $\Delta$ , more likely than not, caused  $\Pi$ 's injury
      - (a) Unless  $\Delta$  can rebut *the evidence*,  $\Delta$  can't deny  $\Pi$  was harmed by  $\Delta$
    - (2) So  $\Pi$  shows (1)  $\Delta$  belongs to the group, and (2) the group caused  $\Pi$ 's harm
      - (a) Several liability addresses any concern about excessive liability
      - (b) So  $\Pi$  shows causation *against the group* and apportionment is a damages issue
      - (c) At all times  $\Delta$  is free to rebut  $\Pi$ 's *prima facie* case
    - (3) Rule – You can't rely on a more-likely-than-not standard to rule out liability if that argument *will always* exculpate you from liability
      - (a) This applies to *all* cases where  $\Delta$  uses statistics to undermine the more likely than not standard (as in *Daubert*) – just do several liability based on individualized probability (e.g. RR or market share)

## 12) **PROXIMATE CAUSE**

### a) **Foreseeability Test**

#### i) **Analysis (Stazenski)**

- (1) Determine the zone of risk created by the defect (duty)
  - (a) These are categorical risks  $\Delta$  would consider in risk-utility safety decision
- (2) Determine whether this case falls within that category (proximate cause)
  - (a) Individualized details are not relevant
- (3) Policy – The causation inquiry mirrors the way  $\Delta$  thinks about safety decisions in the risk-utility analysis

#### ii) *Stazenski v. Tennant Co.* (FL 1993)

- (1)  $\Pi$  fell from platform, hit wrist on sharp edge of  $\Delta$ 's machine, claims design defect
- (2) Defect: Non-functional sharp edge which foreseeably would injure someone who accidentally came into contact with it
- (3) Held: No need to predict the exact sequence, jury question whether this falls into the category of foreseeable injuries

#### iii) *In re September 11 Litigation* (NY 2003)

- (1) Issue: Whether  $\Delta$  owed a duty to secure the cockpit door against intruders
- (2)  $\Pi$  represent those killed in  $\Delta$ 's planes that hit the Pentagon and ground in PA
- (3) Held: Sufficient evidence to establish a duty to prevent foreseeable entry of intruders or unauthorized persons into the cockpit of an airplane
  - (a) Understanding the risks resulting from unauthorized entry was foreseeable

#### iv) *Port Authority of N.Y. and N.J. v. Arcadian Corp.* (3rd Cir. 1999) – Holding that fertilizer manufacturers didn't have to anticipate that criminals would misappropriate ingredients, mix them with others, and make bombs to bring down a building

#### v) *In re Korean Air Lines Disaster of September 1, 1983* (DDC 1985) – Holding Boeing couldn't foresee that the Soviet Union would destroy an intruding aircraft in violation of international conventions, and had no ability to guard against such conduct

### b) **Directness Test**

#### i) *Union Pump v. Albritton* (TX 1995)

- (1) Gas pump fire,  $\Pi$  injured climbing over pipe rack after checking a valve after fire was over – route over the rack was a shortcut
- (2) Held:  $\Pi$ 's taking the shortcut was an intervening force although  $\Delta$ 's conduct was a cause-in-fact of  $\Pi$ 's injury
- (3) Coryn Concurring –  $\Pi$ 's injury wasn't foreseeable, like holding  $\Delta$  liable for  $\Pi$  getting into a car accident on the way home from the fire

#### ii) Note – Foreseeability test sets the scope of liability in the liability/causation phase, while directness governs damages (and hence the egg-shell skull rule)

- (1) Thus  $\Delta$ 's liability encompasses direct harms and indirect, but foreseeable harms

### c) **Duty**

#### i) *Jeld-Wen, Inc. v. Gamble by Gamble* (VA 1998)

- (1)  $\Pi$ -kid leaned on screen which popped out allowing him to fall out the window
- (2) Since foreseeability of screen being dislodged by  $\Pi$ 's touch and foreseeability of the screen failing to prevent  $\Pi$  from falling out are not the same → no duty
- (3) It is irrelevant that, absent defect,  $\Pi$  would be ok

#### ii) Note – Duty is determining the class of risks (screen falls and hit someone), proximate cause is determining if *this* is in the class of risks (kid falling → jury)



### 13) **DAMAGES**

- a) **Rule** – When the product causes *physical harm* to  $\Pi$  or  $\Pi$ 's “other” property → damages
- i) Estimate damages:  $B < P \bullet (L_{\text{Economic|Physical}} + L_{\text{Noneconomic|Physical}})$  where B = Amount jury is willing to pay (WTP) in order to eliminate the risk (and we assume P is the same)
  - ii) Economic Harms – Medical, wages, repair/replacement, etc.
  - iii) Noneconomic harms – Pain and suffering, anxiety, grief, indignity, enjoyment of life
- b) **Economic Loss Rule (ELR)**
- i) *East River Steamship v. Transamerica Delavel* (1986)
    - (1)  $\Delta$ 's turbines had design/manufacturing flaws resulting in need for repairs and lost profits due to downtime of ships during repairs, no physical damage other than to the turbines themselves
    - (2) Held: Remedy is breach of warranty action, or reject product and breach of K
      - (a) Consequential damages in K must be foreseeable (*Hadley v. Baxendale*)
      - (b) *Inter alia* rejecting intermediate position (*see below*)
  - ii) **Policy** – (1) Maintain distinction between tort and contract law, (2) protect freedom to allocate economic risk by K, and (3) encourage party best situated to assess the risk of purely economic losses to allocate the risk
    - (1) Note: Consumer is better at estimating L but still bad at P, argument is that  $P_{\text{economic}} \approx P_{\text{noneconomic}}$
  - iii) *Pfizer v. Farsian* (AL 1996)
    - (1) Heart valve transplant, doc told  $\Pi$  it would never need to be replaced, turns out a bunch have failed and 50% chance you die when it fails,  $\Pi$ 's is working fine
    - (2) Some evidence they were aware of the problem before  $\Pi$  got his, later the product was withdrawn from the market
    - (3) Rejects intermediate approach in favor of ELR
  - iv) **Intermediate ELR**
    - (1) EL resulting from “endangered consumer” can collect
      - (a) *E.g.*, Unmanifested product failure that endangers the  $\Pi$
      - (b) *See* RTT § 21 cmt. e – Courts allow damages for asbestos removal even though there is no physical damage to  $\Pi$  or  $\Pi$ 's other property
      - (c) Component Part Rule – When a component eats the machine, still ELR because the component is just part of the overall “product”
    - (2) EL resulting from “disappointed consumer” cannot
  - v) **Medical Monitoring**
    - (1) *Donovan v. Philip Morris* (MA 2009)
      - (a) Smokers sue for low-dose CT monitoring scans
      - (b)  $\Pi$  must show (1)  $\Delta$ 's negligence (2) caused (3)  $\Pi$  to be exposed resulting in subcellular changes increasing risk of harm (4) for which there is a reliable test (5) and early detection will help (6) and the exams conform to the standard of care

c) **Emotional Distress**

- i) **Elements** – (1) Π was, in fact, exposed to the agent, and (2) there is a rational basis for Π's fear of contracting a disease (clinically-demonstrable presence of toxin or other indication of toxin-induced disease)
- ii) *In re MTBE Products Liability* (SDNY 2007) (holding that Π can collect for emotional distress due to MTBE contaminated ground water on expert testimony that MTBE exposure causes subcellular damage (MTBE-DNA adducts))

d) **Punitive Damages**

- i) *Owens-Illinois v. Zenobia* (MD 1992)
  - (1) Π has asbestosis, trial court allowed punitive damage for “implied” malice
  - (2) Held: No punitive damages without actual common law malice – evil motive, intent to injure, ill will, or fraud (knowledge and subsequent disregard) by C&C
- ii) **Policy** – Deterrence – Deter when Δ does not expect to be sued by all injured Πs
- iii) *Philip Morris v. Williams* (2007) (holding that DPC forbids punitive damages to punish Δ for injury inflicted on non-parties – Δ must be able to defend each charge)
  - (1) Harm to others is only admissible to show reprehensible conduct
- iv) **Policy Post-Williams** – Punitive damages must (1) disgorge Δ's expected wrongful gain and (2) be increased to reject Δ's wrongful perspective in order to force Δ to adopt the perspective required by the right

14) **DEFENSES**

a) **Contractual Limitations on Liability** – Unenforceable because Π, by definition, lacks sufficient info/bargaining power to execute an appropriate K-waiver

b) **Assumption of Risk**

i) **Voluntary Choice**

(1) **Analysis**

- (a) Elements – (1) Π makes a *voluntary* choice & (2) Π has *knowledge* of the risk
- (b) Risk-utility choice →  $B_{\text{Safety}} < PL_{\text{Risk}}$
- (c) Π’s risk-utility choice →  $B_{\text{Forego}} < PL_{\text{Risk}}$
- (d) And  $B_{\text{Safety}} \neq B_{\text{Forego}}$  → no AofR; Note! This cannot just turn into patent danger rule → Π must have made a *fully informed* decision (meaning Π must know of the risk and the safety alternative, and proceed rather than forego)

(2) *Cremeans v. Willmar Henderson* (OH 1991)

- (a) Π injured by loader purchased without protective cage by Π’s employer
- (b) Held: Π’s decision not to quit his job is not a voluntary choice

(3) *Wangsness v. Builders Cashway* (SD 2010)

- (a) Π got hand caught in cable/shaft mechanism for sliding door
- (b) Held: Π assumed the risk
- (c) Note – WRONG →  $B_{\text{Caution}} > PL_{\text{Exposed}} > B_{\text{Guard}}$  → Π’s risk-utility is different from Δ’s safety decision – we assume Π did not “assume the risk” because that means the idiot intentionally put his hand in the machine

ii) **Knowledge of the Risk**

(1) *Traylor v. Husqvarna Motor* (7th Cir. 1993)

- (a) Attempt to remove axe from wood, against warnings, strikes one axe with another without eye protection, axe chips and takes out Π’s eye
- (b) Π proved axe was defective – narrow bevel/uneven hardness which made chipping more likely
- (c) Held: Π did not assume the risk of a *defective* axe chipping
  - (i)  $PL_{\text{Defective Chip}} > B_{\text{Stop Using Axe}} > PL_{\text{Non-Defective-Chip}}$

iii) **Primary Assumption of Risk**

(1) *Ford v. Polaris Indus.* (CA 2006)

- (a) Π falls off back of jet ski due to lack of handles, severely injured
- (b) **Primary AofR** – Π assumes risks inherent in the use of the product
- (c) **Secondary AofR** – Δ owes duty of care, but Π knowingly encounters the risk
- (d) Inherent risks would alter the nature of the sport if eliminated, risk of falling into the water is different from getting blasted up the ass

<b>Ordinary Consumer</b>	<b>Π</b>	<b>Outcome</b>
Consent (Bullet proof vest)	Consent	No Duty – Primary AofR
Consent (VW van)	No Consent	No Duty
No Consent ( <i>Polaris</i> )	No Consent	No Affirmative Defense
No Consent	Consent	Duty/Contributory Negligence/Secondary AofR

c) **Contributory Negligence**

i) *Bexiga v. Havir Mrg.* (NJ 1972)

- (1)  $\Pi$  injured by punch press when hand was in and he accidentally hit the foot pedal
- (2) Expert gave alternative designs requiring hands to be outside to operate machine
- (3) Held: Asserted negligence of  $\Pi$  = the eventuality that the safety devices would guard against  $\rightarrow$  no contributory negligence
- (4)  $\underline{U}ser - B_{Careful} < PL_{Punch-Press}$ ;  $\underline{\Delta} - B_{Guard} < PL_{Punch-Press}$

ii) *Daly v. GMC* (CA 1978)

- (1)  $\Pi$ 's car hits guardrail, thrown/killed when door opens – expert testifies injuries would be minor without door opening –  $\Delta$  claims didn't lock door/wear belt
- (2) Held: Pure contributory negligence rule is adopted
- (3) RTT § 8 – Factors – (1) Nature of  $\Pi$ 's risk-creating conduct, including awareness and indifference to the risks and any intent WRT the harm created and (2) strength of the causal connection between  $\Pi$ 's conduct and the harm

iii) *Cigna Insurance v. Oy Saunatec* (1st Cir. 2001)

- (1) Sauna heater sets towel on fire, jury finds  $\Pi$  35% negligent
- (2) If  $\Pi$ 's misuse is entirely unforeseeable  $\rightarrow$  no recover, no causation (grill steak on sauna); but  $\Delta$  showed that  $\Pi$  *subjectively knew* the product was defective
  - (a)  $\Pi$ 's sauna had previously caught on fire, but they continued to use it

iv) *States v. R.D. Werner* (CO 1990)

- (1) Ladder has defective rivets in spreader bars, but cause-in-fact of accident was  $\Pi$  put ladder legs on uneven ground, faced away and pushed against something

v) *Andren v. White-Rodgers* (MN 1991)

- (1)  $\Pi$  in basement, smells gas, lights cigarette and blows himself up
- (2) Defect in heater and  $\Pi$ 's cigarette are causes in fact
- (3) Analysis
  - (a)  $\Pi$  knew risk of gas, aware risk of lighting up, smelled gas and knew he shouldn't light up, and had clear choice to go outside
  - (b)  $\Delta$  has breached duty – furnace leaks gas – and  $\Pi$  did not delay smoking
  - (c) Most likely is that  $\Pi$  simply lit up out of habit and was negligent  $\rightarrow$  CN

## 15) **DISTRIBUTOR LIABILITY**

- a) **RST § 402A cmt. f** – SL applies to any wholesale/retail dealer/distributor
- b) **RTT § 1 cmt. e** – Liability attaches to nonmanufacturing sellers/distributors of defective products regardless of whether they are in a position to prevent defects from occurring
- c) **RTT § 20 cmt. f**
  - i) When  $\Delta$  sells the same product as the bailment, bailor is subject to SL (*Delaney*)
  - ii) When sale is not contemplated, commercial bailor is subject to SL if charge is imposed as a condition of bailment
  - iii) When products are made available as a convenience to customers who are on  $\Delta$ 's premises for different purposes, and no separate charge is made → no SL
- d) **RTT § 8(b)** – Seller of used products subject to SL if marketing causes a reasonable person to expect the product to present no greater risk of defect than a new product
  - i) “Refurbished products”
- e) **Product/Service Distinction**
  - i) Intangible good whose use is not analogous to tangible property is a service (*Atkins*)
  - ii) Compare electricity distribution, or computer software (analogous to tangible)
- f) **Policy** – Incentive to make safer products, incentive to deal w/ reputable producers, etc.
- g) **Cases**
  - i) *Godoy v. Abamaster* (NY 2003) (holding that, when each part of a chain of distribution is merely a conduit for commerce, lower parts of the chain can get indemnity from higher parts of the chain → closer to manufacturer)
  - ii) *Delaney v. Towmotor* (2d Cir. 1964) (holding that a “demonstration model” provided to a prospective customer to try counts as a sale for purposes of PL/SL)
    - (1) Note: holding otherwise brings K-law into PL/tort law (requiring a UCC sale)
  - iii) *New TX Auto Auction v. Gomez de Hernandez* (TX 2008) (holding auctioneer (non-manufacturing seller of used goods) is not subject to SL for cars they sell)
  - iv) *Gorran v. Atkins* (SDNY 2006) (holding  $\Delta$  not subject to SL for Atkins diet system contained within a book that  $\Pi$  bought)
    - (1) **Policy** – Free speech concern, system in book is not a “product”
  - v) *Cafazzo v. Central Medical* (PA 1995) (holding that  $\Delta$  doctor/hospital are not subject to SL for defective surgical implant – reasoning that  $\Delta$  is not engaged in the business of selling the product – WRONG!)
    - (1) Geistfeld argues they should use cmt. k – unavoidably unsafe product exception



## 16) BYSTANDER LIABILITY

### a) Analysis

- i) Bystanders protected when injury to bystanders from defect is reasonably foreseeable
  - (1) Consumers can inspect, decide whether to buy, from whom to buy from, and get the benefit of the product
- ii) When bystander and consumer interests align, ordinary consumer expectations account for bystander expectations (*Horst*)
- iii) When bystander and consumer interests diverge
  - (1) *Gaines-Tabb* – No duty to warn/design against product misuse if ordinary consumer would not be concerned about the misuse
  - (2) *McCarthy* – Opening bullets – Calabresi points out that categorical liability is appropriate when (1) product is unreasonably dangerous, and (2) consumer expectations diverge from bystander interests
  - (3) *Passwaters* (RTT § 2 cmt. e) – hub cap flanges – Manifestly unreasonable design with low social utility and high degree of danger → categorical liability when reasonably foreseeable bystander is injured
- b) *Giberson v. Ford* (MI 1974) (holding Δ liable when Δ's car sold to city exploded causing other accidents reasoning that bystanders deserve greater protection when injury to bystanders from defect is reasonably foreseeable – consumers can inspect, etc.)
- c) *Horst v. Deere & Co.* (WI 2009) (holding that riding mower which injured Π's kid when Π was operating in reverse was not the cause of the injury – consumer expectations are determined by ordinary consumer whose expectations account for bystanders)
- d) *Gaines-Tabb v. ICI Explosives* (10th Cir. 1998) (holding that fertilizer manufacturers were not liable for product misuse in OK City bombing absent evidence that the mislabeled “explosive grade” ammonium nitrate was more dangerous than “fertilizer grade” for farmers)
- e) *McCarthy v. Olin Corp.* (2d Cir. 1997) (holding no liability when Π killed by Δ's bullets designed to open on impact maximizing lethality reasoning the product wasn't defective)
  - i) Calabresi dissent – If harmful consequences from intended/foreseeable use outweighs the benefits, the product can be manifestly unreasonable, has low social utility, and a high degree of danger → liability
- f) *Passwaters v. General Motors Corp.* (8th Cir. 1972) (holding liability for Δ's aesthetic flanges on car hub cap which mangled motorcyclist's leg reasoning that Δ owes a duty to those reasonably foreseeable to come into contact with the product)