
WHEN SELLERS OF “SAFE” PRODUCTS TURN OSTRICH IN RELATION TO DANGEROUS POST-SALE COMPONENTS

By Alani Golanski*

I. INTRODUCTION

Sponsored by insurance companies, James A. Henderson, Jr., the Frank B. Ingersoll Professor of Law at Cornell Law School, argues that “sellers of safe products should not be required to rescue users from risks presented by other, more dangerous products.”¹ The sort of case at issue is one in which a dangerous component part, manufactured by a third party, is added to the tort defendant’s original product post-sale. The tort defendant, however, knows that the hazardous component will be added.

Likening industrial pumps sold for use with asbestos-filled insulation to swimsuits that may be used for diving into shallow pools,² Henderson

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1. James A. Henderson, Jr., *Sellers of Safe Products Should Not Be Required to Rescue Users from Risks Presented by Other, More Dangerous Products*, 37 SW. U. L. REV. 595, 595 (2008). Professor Henderson received research support for his article from the Coalition for Litigation Justice, Inc., a nonprofit association established by insurers in 2000 to advocate against plaintiffs harmed by exposures to asbestos-containing products. See Memorandum of the Coalition for Litigation Justice, Inc. in Support of Defendants’ Motion to Establish an Unimpaired Docket, *In re Asbestos Litig.*, No. 2004-03964 (Tex. Dist. Ct. 2004). Professor Henderson has also served as the co-reporter of the American Law Institute’s revision of the products liability portions of the Restatement of the Law of Torts from 1992-1998. See Cornell Univ. Law Sch., James A. Henderson, Jr. Biography Page, <http://www.lawschool.cornell.edu/faculty/bio.cfm?id=31> (last visited June 2, 2009).

2. This essay, like Professor Henderson’s, takes as its paradigm case the products liability lawsuit in which the defendant manufactured industrial pumps to which ultrahazardous asbestos-containing insulation components have been applied post-sale. The legal principles involved, however, apply generally to products that will be modified post-sale by the addition of foreseeably dangerous components.

asks why the manufacturer should have a duty to warn in either case.³ His analysis claims support from recent Washington Supreme Court decisions in the asbestos litigation,⁴ and from the traditional reluctance of courts to impose a duty to “rescue” those one chooses not to rescue.⁵ In a no-duty-to-rescue circumstance, the potential rescuer is a stranger to the victim, and his knowledge of the danger does not matter.

Cloaked in the common sense style of writing, Professor Henderson treats the products liability claims superficially, and ignores relevant settings in which one entity may be responsible for the conduct of another. Promising to simplify and clarify the debate, Henderson instead muddies the waters because he comes close to conflating rules that pertain to component parts with those concerning final products. In this way, he is able to elide the foreseeability element that typically plays a role in final product,⁶ but not component part,⁷ analysis.

In further service to the industry, Henderson appeals to judicial authority when it suits him,⁸ even as he concedes his wholesale, ideological rejection of the common law duty-to-warn doctrine that is well settled in products liability jurisprudence.⁹ In this regard, Henderson openly acknowledges his credo that the failure-to-warn doctrine is “an empty shell of rhetoric that does not give courts adequate basis on which to distinguish spurious claims from valid ones.”¹⁰

To identify and address the misconceptions underlying Professor Henderson’s paper, Part II reviews his analysis, describes his swimsuit analogy, and explains his policy reasons for proposing a no-duty rule. Part III demonstrates that the no-duty rule does not adequately address the circumstances underlying cases in which products are modified in

3. Henderson, *supra* note 1, at 597.

4. *Braaten v. Saberhagen Holdings*, 198 P.3d 493 (Wash. 2008); *Simonetta v. Viad Corp.*, 197 P.3d 127 (Wash. 2008).

5. Henderson, *supra* note 1, at 608.

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

7. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 5 (1998).

8. The argument from authority, also called the appeal to authority, is a logical fallacy that rests on the assumption that a point is correct simply because some authoritative person or entity has espoused it. DOUGLAS N. WALTON, *INFORMAL LOGIC: A HANDBOOK FOR CRITICAL ARGUMENTATION* 172-73 (1989); DOUGLAS WALTON, *INFORMAL LOGIC: A PRAGMATIC APPROACH* 115, 211, 216-18 (2d ed. 2008).

9. Henderson, *supra* note 1, at 599.

10. *Id.* at 613; *but cf.* *Hammond v. N. Am. Asbestos Corp.*, 454 N.E.2d 210, 216 (Ill. 1983) (“The failure to warn of a product’s dangerous propensities may serve as the basis for holding the manufacturer or seller strictly liable in tort. A product with inherent dangers may be found defective and unreasonably dangerous to the user or consumer if the manufacturer or seller fails to adequately warn of the potential risks or hazards associated with its use.” (citation omitted)).

dangerous ways post-sale, and fails to reflect a coherent legal principle that can account for the right outcomes in such cases. After examining counterexamples, as well as the component part/final product distinction, this essay proposes a workable alternative rule.

Finally, Part IV shows that, contrary to Henderson's view, policy considerations favor the liability of manufacturers who have turned ostrich in the face of compelling reason to know that their products would be used with an ultrahazardous component part. Product sellers already have a noncontroversial duty to act prudently in relation to the well-being of their products' end users. Nor has privity been required since Judge Benjamin N. Cardozo authored *MacPherson v. Buick Motor Co.*¹¹ With duty established, foreseeability of the risk determines the seller's responsibility for failing to warn the end user.

II. PROFESSOR HENDERSON'S NO-DUTY RULE

A. *Professor Henderson's Analogy*

The specific issue addressed by Professor Henderson is whether a manufacturer should be held liable for failure to warn of the dangers of asbestos exposure resulting from the post-sale application of insulation (or other asbestos-containing component part) manufactured and installed by another.¹² He says that "the debate surrounding the issue is sometimes unnecessarily confusing," and that he will therefore "straighten things out."¹³

For Henderson, "[a] simple hypothetical" promises to straighten things out in a non-confusing way.¹⁴ Suppose that *M* manufactures swimsuits knowing that these will be used in a variety of swimming pools. Purchasers of *M*'s swimsuit may sometimes dive head-first into dangerously shallow pools. Should *M* have warned about this risk?¹⁵

Henderson asks us to assume here, for the sake of argument, that the risk just mentioned is not obvious or generally known to swimmers.¹⁶ Therefore, we are not entitled to object that *M* has no duty to warn on that ground. Nevertheless, the swimsuit failure-to-warn claim "may be likely to

11. 111 N.E. 1050 (N.Y. 1916).

12. Henderson, *supra* note 1, at 595.

13. *Id.* at 596.

14. *Id.*

15. *Id.* at 596-97.

16. *Id.* at 596.

strike many observers as manifestly weak on the merits.”¹⁷ Henderson asks why this is so, the answer being the key to the no-duty outcome in this circumstance.

Because personal injury lawsuits arising from exposure to asbestos-filled insulation installed on industrial pumps present “claims of this sort,”¹⁸ the asbestos-related failure-to-warn claim is equally likely to strike observers as lacking in merit. The similarity, says Henderson, is that in either case the “only connection” between the manufacturer’s product—the swimsuit or the pump—and the injury to the plaintiff “was a but-for, condition-precedent connection.”¹⁹

Clearly, a randomly selected, but-for cause-in-fact of a particular injury should not, on that basis alone, give rise to tort liability. Devin may be a diver who would not have plunged head-first into the four-foot pool but for his alarm clock’s proper functioning; should the alarm clock manufacturer have been required to warn Devin about the dangers of waking up on time to go diving? If not, Henderson’s analysis suggests, then neither should the industrial pump manufacturer be saddled with a duty to have warned the asbestos plaintiff, perhaps steamfitter Rusty who repaired those pumps, of the dangers of breathing in airborne asbestos fibers released when Rusty cut through the insulation to get to the pumps.

B. Professor Henderson’s Analysis

Professor Henderson allows that the manufacturers of certain heavy industrial equipment may have known that asbestos would be applied to their products post-sale.²⁰ He explains, however, that “American courts will not impose a legal duty to rescue another merely because the would-be rescuer knows that the other requires help that the rescuer is in a position to render.”²¹

Acknowledging that the post-sale asbestos installation cases do not involve “pure rescue” because “the watchdog manufacturer’s product is a but-for cause-in-fact of the tort plaintiff’s being put at risk,” Henderson says “they clearly involve ‘rescue’ in a meaningful sense of the term.”²² He

17. *See id.*

18. Henderson, *supra* note 1, at 597.

19. *Id.* at 600.

20. *Id.* at 619.

21. *Id.* at 602 (citing RESTATEMENT (SECOND) OF TORTS § 314 (1965); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 37 (Proposed Final Draft No. 1, 2005)).

22. Henderson, *supra* note 1, at 601.

notes that “pure rescue” would occur when the rescuer is a total stranger who has played no role in causing the difficulty requiring aidance.²³ So Henderson has generously assigned a minimal causal role to the industrial manufacturer who may have known about its product’s inevitable asbestos component.

However, says Henderson, “[r]equiring sellers of safe products to rescue users of other, more dangerous products would not serve to achieve the policy goals of allocative efficiency or fundamental fairness.”²⁴ Efficiency would be sacrificed because users and consumers of safe products would end up subsidizing users and consumers of the dangerous products, thereby discouraging use of the safe products and encouraging use of the dangerous ones.²⁵ Nor would imposing liability on the safe product manufacturers be fair, because those entities “have not deliberately or actively caused harm to the victims, nor have they unjustly enriched themselves (or their customer bases) at the victims’ expense.”²⁶

Apart from the circumstance in which the defendant has deliberately or actively caused the harm, Henderson’s analysis permits liability when two products combine synergistically to create a joint risk “significantly greater” than the sum of the risks presented by individual use of the products.²⁷ For example, if a swimsuit is made of fabric that reacts caustically and injuriously when the pool water contains a high concentration of chlorine, the swimsuit manufacturer may have a duty to warn about this risk.²⁸

So based on this analysis, Professor Henderson proposes the following no-duty rule:

[A] commercial product seller owes no duty to design or warn against the risks presented by other products with which the seller’s product interacts after sale or distribution unless either (1) the seller participates actively and substantially in causing the interaction to occur, or (2) the post-sale interaction synergistically creates joint risks that are significantly greater than the sum of the risks that the product and the other products would present independently.²⁹

23. *Id.* at 601 n.25.

24. *Id.* at 615.

25. *Id.* at 616.

26. *Id.* at 617.

27. *Id.* at 617, 620.

28. Henderson, *supra* note 1, at 599; *see Rastelli v. Goodyear Tire & Rubber Co.*, 591 N.E.2d 222, 226 (N.Y. 1992) (“This is not a case where the combination of one sound product with another sound product creates a dangerous condition about which the manufacturer of each product has a duty to warn.”).

29. Henderson, *supra* note 1, at 618.

III. CONFORMING THE RULE TO LAW AND REALITY

Professor Henderson's no-duty rule seems reasonable enough, and looks like the sort of language that might show up in a Restatement or appellate decision.³⁰ Some courts have aligned with the tort reformers and have issued rulings consistent with the no-duty rule in the asbestos litigation.³¹ But is the no-duty rule a good rule that adequately addresses the circumstances underlying cases in which products are modified or otherwise affected in foreseeable and dangerous ways post-sale? Does the no-duty rule reflect a coherent legal principle that can account for the right outcomes in such cases?

This section attempts to pinpoint the analytic fulcrum on which this debate may be said to hang, in the event that transient interest group pressures are set aside. That fulcrum is the substantial modification principle embedded within strict products liability doctrine as articulated in section 402A of the Restatement (Second) of Torts.³² The significance of the substantial modification principle has not previously been identified in relation to the post-sale component parts debate addressed here and in Professor Henderson's essay.

This section then demonstrates that Henderson's no-duty rule is inadequate, even on its own terms. Toward this end, we discuss a few scenarios that Henderson should have considered but did not. It will be argued that, in those instances, Henderson's no-duty rule would apply, yet the law should sensibly impose a duty to warn upon the original product manufacturer. If there are counterexamples, or counter-hypotheticals, that fall within the parameters of the no-duty rule but nevertheless require a duty to warn, then Henderson's no-duty rule should be adjusted accordingly. Ultimately, this section shows that a simpler, more efficient, and more coherent duty rule should replace the no-duty rule.

30. Professor Henderson writes that he has served as co-reporter drafting the proposed revision of the Restatement of Products Liability, although his approach is not offered therein. *Id.* See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (1998).

31. See *Braaten v. Saberhagen Holdings*, 198 P.3d 493 (Wash. 2008); *Simonetta v. Viad Corp.*, 197 P.3d 127 (Wash. 2008); see also *Taylor v. Elliott Turbomachinery Co.*, 90 Cal. Rptr. 3d 414, 436 (Ct. App. 2009); *contra O'Neil v. Crane Co.*, 177 Cal. App. 4th 1019, 1031 (Ct. App. 2009) (ruling contrary to Henderson's analysis and in accord with the reasoning presented in this article, emphasizing that "*Taylor* misses the mark").

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

A. Final Products Are Not Component Parts

Professor Henderson says that the Washington Supreme Court recently “rejected component maker liability for failure to warn of asbestos-related hazards in products made by others.”³³ This is not precise. The Washington Supreme Court in *Braaten v. Saberhagen Holdings* assumed that the later-installed asbestos insulation was a component part added to the defendant’s pump product.³⁴ As the court recognized, “products” are conceptually distinguished from component parts.³⁵ Of course, Henderson knows this.³⁶ He discusses the difference himself,³⁷ and even uses this distinction to his advantage when pointing out that, in some instances, a seller might have liability under his no-duty rule “[b]ut then the separate no-duty rule governing non-participating component suppliers kicks in, and the component seller would be off the liability hook as a matter of law.”³⁸

Why should any of this matter? The reason that we are not just dealing with semantics is that the law treats component and product sellers

33. Henderson, *supra* note 1, at 595.

34. *Braaten*, 198 P.3d at 499-500.

35. *Id.* at 499 n.7; *see also* *Hininger v. Case Corp.*, 23 F.3d 124, 129 (5th Cir. 1994) (“[W]e believe that the Texas Supreme Court would distinguish between the manufacturer of the finished product and the component supplier . . . [given, *inter alia*, the plaintiffs’] lack of any expectation that . . . the upstream component supplier[] would respond to defects in the finished product”); J. Denny Shupe & Todd R. Steggerda, *Toward a More Uniform and “Reasonable” Approach to Products Liability Litigation: Current Trends in the Adoption of the Restatement (Third) and its Potential Impact on Aviation Litigation*, 66 J. AIR L. & COM. 129, 162 (2000) (explaining that under section 5 of the Restatement (Third) of Torts: Products Liability, “a component manufacturer or distributor will be liable for harm caused by a defect in its own products, but not for defects arising out of the integration of its component(s) into a final product (such as a turbine engine or passenger aircraft) unless the manufacturer or distributor participated in the integration of the component”); *cf.* *Ben Venue Lab. v. Novartis Pharm. Corp.*, 10 F. Supp. 2d 446 (D.N.J. 1998) (holding that a component need not be a thing included in the final product); *Proctor & Gamble Distrib. Co. v. United States*, 11 Ct. Int’l Trade 450, 453 (1987) (rejecting the argument “that the individual fibers are the components, not the dry lap. . . . [T]he fiber must be considered to be a component in the bulk, baled form, *en masse*, in which it left the United States.’ . . . The diaper core with its fiber matrix and air spaces is the component to be assembled, not the individual fibers.”); *Caldor, Inc. v. Heffernan*, 440 A.2d 767, 772 (Conn. 1981) (“Preprints become finished products as soon as they are printed and use the newspaper only as a mode of distribution. Their physical presence in the newspaper does not change that edition’s character. They do not become an ingredient or component part of the newspaper.”).

36. Henderson, *supra* note 1, at 618-19 n.129 (conceding that “these cases do not fit easily into the component parts paradigm”).

37. *Id.* at 611-12 (referring to the component parts no-duty rule expressed in section 5 of the Restatement (Third) of Torts, which includes a substantial participation exception, but not a synergistic combination exception); *see* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 5 cmts. a, b, d (1998) (commenting on such examples of component parts as chains used in conveyor belt systems, liners used in swimming pools, and truck chassis).

38. Henderson, *supra* note 1, at 620.

differently.³⁹ While it is true that the terms are not fixed, but contextually relative—a pump may be an end product in relation to its insulation, but a component part of a truck—once the context is settled, different legal principles apply.⁴⁰ In the asbestos litigation context, the pump is the product to which asbestos-containing components have been added.⁴¹

The component parts rule articulated in the Restatement (Third) of Torts states, in main part, that:

One engaged in the business of selling or otherwise distributing product components who sells or distributes a component is subject to liability for harm to persons or property caused by a product into which the component is integrated if:

(a) the component is defective in itself . . . and the defect causes the harm; or

(b)(1) the seller or distributor of the component substantially participates in the integration of the component into the design of the product⁴²

On the basis of this sort of rule, the foreseeability of possible dangers associated with the end product does not expose the component part sellers to liability. As with the rescue doctrine, knowledge and foreseeability do not count. So one court stated:

The obligation that generates the duty to avoid injury to another which is reasonably foreseeable does not—at least yet—extend to the anticipation of how manufactured components not in and of themselves dangerous or defective can become potentially dangerous dependent upon the nature of their integration into a unit designed, assembled, installed, and sold by another.⁴³

The policy rationale for omitting any scienter requirement is to avoid inefficiently imposing upon “mere suppliers” of component parts the costs of scrutinizing larger systems they had no role in developing.⁴⁴

While the component seller may owe no duty to the end product user unless a defect in the component caused the harm, or the component seller helped integrate the component into the product, the product seller’s duty to

39. *Hininger*, 23 F.3d at 129; *see also* *O’Neil v. Crane Co.*, 177 Cal. App. 4th 1019, 1027-33 (Ct. App. 2009).

40. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 5 cmt. a.

41. *E.g.*, *O’Neil*, 177 Cal. App. 4th at 1030 (“We cannot see that respondents’ pumps and valves are component parts under this body of law.”); *Braaten v. Saberhagen Holdings*, 198 P.3d 493 (Wash. 2008).

42. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 5.

43. *Jordan v. Whiting Corp.*, 212 N.W.2d 324, 328 (Mich. Ct. App. 1973), *rev’d on other grounds*, 240 N.W.2d 468 (Mich. 1976).

44. *Crossfield v. Quality Control Equip. Co.*, 1 F.3d 701, 704 (8th Cir. 1993); *O’Neil*, 177 Cal. App. 4th at 1029-30.

the end user is much more expansive.⁴⁵ This is because, by marketing its product for use and consumption, the product seller is deemed to have assumed a special responsibility toward any member of the consuming public who may be injured by it.⁴⁶ The public, conversely, is deemed to have an expectation interest in the soundness of the products it needs from the seller, upon whom it must rely.⁴⁷ Public policy thereby requires that sellers “stand behind their goods,” and allocates the loss caused by product-related accidents to those who marketed them.⁴⁸

Products may be defective because they lack a warning about unreasonable and non-obvious dangers.⁴⁹ The duty-to-warn aspect of products liability law requires that sellers, suppliers, and manufacturers of products issue an adequate warning about all foreseeable risks.⁵⁰ Stephen R. Perry has suggested that loss distribution is appropriate in these circumstances because actions that are faulty by virtue of their intended or foreseeable effects on another constitute an improper or excessive exercise of autonomy at that person’s expense.⁵¹

How do we get from the product seller’s duty to warn about unreasonable product dangers to its duty to warn about foreseeable post-sale modifications? The general rule is that the seller has a defense when a product is substantially modified post-sale, and this modification brings about the dangerous feature.⁵² At comment h to section 402A, however, the Restatement (Second) of Torts advises that, where the seller has reason to anticipate that a danger may result from a particular product use, it will have a duty to warn product users of that danger.⁵³

Comment h warrants the rule that product sellers have a duty to warn of foreseeable modifications of their products likely to pose an unreasonable danger. So, for instance, in *Liriano v. Hobart Corp.*,⁵⁴ the New York Court of Appeals explained:

45. RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965); *see also* *Geboy v. TRL, Inc.*, 159 F.3d 993, 999-1000 (7th Cir. 1998).

46. RESTATEMENT (SECOND) OF TORTS § 402A cmt. c.

47. *Id.*

48. *Id.*; *Geboy*, 159 F.3d at 999-1000.

49. *Basko v. Sterling Drug, Inc.*, 416 F.2d 417, 428 (2d Cir. 1969).

50. *Id.* at 426; *Goehring v. Target*, 91 F. App’x. 1, 5 (9th Cir. 2004).

51. Stephen R. Perry, *Corrective Justice and Formalism: The Care One Owes One’s Neighbors: The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 499 (1992); *cf.* JOSEPH A.C. THOMAS, TEXTBOOK OF ROMAN LAW 288 (1976) (“[I]f the vendor was aware of the defect and did not disclose it, he was guilty of *dolus* and would be liable in the *actio empti* . . .”).

52. RESTATEMENT (SECOND) OF TORTS § 402A(1)(b).

53. *Id.* § 402A cmt. h.

54. 700 N.E.2d 303 (N.Y. 1998).

[A]lthough it is virtually impossible to design a product to forestall all future risk-enhancing modifications that could occur after the sale, it is neither infeasible nor onerous, in some cases, to warn of the dangers of foreseeable modifications that pose the risk of injury. Furthermore, this Court has held that a manufacturer may be liable for failing to warn against the dangers of foreseeable misuse of its product. . . . This Court has also recognized that, in certain circumstances, a manufacturer may have a duty to warn of dangers associated with the use of its product even after it has been sold. Such a duty will generally arise where a defect or danger is revealed by user operation and brought to the attention of the manufacturer This Court therefore concludes that manufacturer liability can exist under a failure-to-warn theory⁵⁵

Moreover, in comment p to section 2 of the Restatement (Third) of Torts: Products Liability, the reporters emphasize:

Product misuse, modification, and alteration are forms of post-sale conduct by product users or others that can be relevant to the determination of the issues of defect, causation, or comparative responsibility. Whether such conduct affects one or more of the issues depends on the nature of the conduct and whether the manufacturer should have adopted a reasonable alternative design or provided a reasonable warning to protect against such conduct.⁵⁶

Amazingly, Professor Henderson, being one of only two such reporters,⁵⁷ fails to mention comment p even once in his essay, although he repeatedly references less relevant comments to section 2.⁵⁸

55. *Id.* at 307-08 (citations omitted); *accord* Davis v. Berwind Corp., 690 A.2d 186, 190 (Pa. 1997) (“Where the product has reached the user or consumer with substantial change, the question becomes whether the manufacturer could have reasonably expected or foreseen such an alteration of its product.”); *see also* Kosmyka v. Polaris Indus., 462 F.3d 74, 81 (2d Cir. 2006) (“A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known, and of the danger of unintended (but reasonably foreseeable uses) of its product.”); Tober v. Graco Children’s Prods., 431 F.3d 572, 578 n.6 (7th Cir. 2005) (“‘Post-sale’ warnings refer to warnings required where a manufacturer does not know or have reason to know of a hazard at the time a product is sold, but discovers the hazard sometime later.”); Berkowitz v. A.C. & S., Inc., 733 N.Y.S.2d 410, 412 (N.Y. App. Div. 2001) (“Nor does it necessarily appear that [defendant] had no duty to warn concerning the dangers of asbestos that it neither manufactured nor installed on its pumps.”); Rogers v. Sears, Roebuck & Co., 701 N.Y.S.2d 359, 360 (N.Y. App. Div. 2000).

[E]ven assuming the accident was caused by a defect in a valve incorporated into a propane tank neither of which appellant manufactured, we are unpersuaded by appellant’s argument that it was under no duty to warn of the dangers presented by such a defect, where its grill could not be used without the tank, and where its own warning to use the grill only outdoors was itself recognition of the danger of gas emission inherent in the use of the grill regardless of any defects.

Id.

56. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. p (1998).

57. The other reporter was Aaron D. Twerski.

The point of this discussion is to explain that the foreseeability exception to the substantial modification defense, articulated in comment h to section 402A, poses an important barrier to Henderson's no-duty rule. Hence, in contrast to the principles underlying such rulings as *Liriano* in New York,⁵⁹ the Washington Supreme Court in *Simonetta* stated, "We have further rejected the language in comment h that suggests a duty on the part of the seller to provide warnings as imposing a negligence principle upon the doctrine of strict liability."⁶⁰ Unless courts in any particular jurisdiction have similarly rejected the foreseeability principles underlying comment h, and very few have done so,⁶¹ they should not adopt the no-duty rule.

58. See Henderson, *supra* note 1, at 598 n.13 (citing comment j, which concerns risks obvious to the user); *id.* at 599 n.17 (citing comment j); *id.* at 600 n.20 (citing comment j); *id.* at 619 n.130 (citing comment a).

59. See *supra* note 55 and accompanying text.

60. *Simonetta v. Viad Corp.*, 197 P.3d 127, 135 (Wash. 2008). The Washington court referenced and incorporated its prior decision in *Little v. PPG Industries*, wherein the court had objected to section 402A's comment h, saying that, by virtue of its foreseeability element, "it imposes a negligence concept upon the doctrine of strict liability." *Little v. PPG Indus.*, 594 P.2d 911, 913 (Wash. 1979); see also *Lockwood v. A.C. & S., Inc.*, 722 P.2d 826, 838 n.17 (Wash. Ct. App. 1986) (noting that *Little* "disapprov[ed] use of the negligence concept of foreseeability contained in Comment h to § 402A of the Restatement (Second) of Torts (1965) on whether a warning is required"), *aff'd*, 744 P.2d 605 (Wash. 1987).

61. See, e.g., *Richter v. Limax Int'l*, 45 F.3d 1464, 1469 (10th Cir. 1995) ("Kansas courts have relied on both comments *j* and *k* to section 420A in concretizing the duty to warn announced in comment *h*."); *Knowlton v. Deseret Med., Inc.*, 930 F.2d 116, 119-20 (1st Cir. 1991) (stating that Massachusetts's implied warranty law is "congruent in nearly all respects" with section 402A, including comment h); *Adelman-Tremblay v. Jewel Cos.*, 859 F.2d 517, 523 n.6 (7th Cir. 1988) (Wisconsin law); *Schell v. AMF, Inc.*, 567 F.2d 1259, 1263 (3d Cir. 1977) (Pennsylvania law); *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276, 289 (5th Cir. 1975) ("In Mississippi and most jurisdictions . . . [consistent with comment h,] [n]otions of foreseeability and proximate cause have been injected, in a limited way, into strict liability . . ."); *Rimbert v. Eli Lilly & Co.*, 577 F. Supp. 2d 1174, 1202 (D.N.M. 2008) ("[U]nder New Mexico law . . . pursuant to comment h to § 402A of the *Restatement (Second) of Torts*, where the seller 'has reason to anticipate the danger that may result from a particular use . . . he may be required to give adequate warning of the danger . . . and a product sold without such warning is in a defective condition.'" (alteration in original)); *Porter v. Pfizer Hosp. Prods. Group, Inc.*, 783 F. Supp. 1466, 1474-75 (D. Me. 1992) ("[Under Maine law,] failure to warn of foreseeable misuse can itself render a product unreasonably dangerous . . ."); *Beauchamp v. Russell*, 547 F. Supp. 1191, 1196 (N.D. Ga. 1982) ("[Under Georgia law, a manufacturer] must give adequate warning of any danger which might be anticipated from a particular use."); *Mexicali Rose v. Superior Court*, 822 P.2d 1292, 1302 (Cal. 1992) (accepting comment h as a "guideline"); *O'Neil v. Crane Co.*, 177 Cal. App. 4th 1019, 1033 (Ct. App. 2009) ("A manufacturer is liable in strict liability for an injury caused by the foreseeable use . . ." (citation omitted)); *Schmutz v. Bolles*, 800 P.2d 1307, 1316 (Colo. 1990) ("Misuse is a defense to a product liability action . . . only if the misuse is unforeseeable by the manufacturer . . . A defendant who could reasonably foresee the possibility of misuse is not entitled to an instruction on the misuse defense."); *Sidwell v. William Prym, Inc.*, 730 P.2d 996, 998-99 (Idaho 1986) ("[W]here the defendant has reason to anticipate that danger may result from a particular use of his product and he fails to give adequate warnings of such a danger, 'a product sold without such warning is in a defective condition.'" (citations omitted)); *Outboard Marine Corp. v.*

B. Designing a More Revealing Swimsuit

Let's pause for a moment and disregard the analytic relevance of the post-sale modification doctrine. After all, Professor Henderson does so. We next ask whether the no-duty rule makes sense, even on Henderson's own terms.

In Henderson's "simple hypothetical," *M* has manufactured a swimsuit, later used for diving into a pool we presuppose to have been defectively designed.⁶² At the risk of losing just a bit of Henderson's simplicity, consider a slightly different hypothetical. Suppose that *M** manufactures a special sort of swimsuit designed to camouflage the swimmer and permit her to swim undetected alongside certain large fish and mammals. *M** is aware of the new fad, popular among casual swimmers, not ichthyologists, of donning these camouflage suits off the coast of Monterey, California, and of the likelihood that these swimmers will encounter predatory sharks from time to time.⁶³ Most importantly, *M** is aware that, on a handful of occasions, sharks have not been fooled by the suits, and have found *M**'s customers a hearty lunch.

As Professor Henderson requests for the purposes of his hypothetical, let's assume that the dangers of encountering sharks are not obvious to *M**'s customers. These swimmers, not being scientists or necessarily familiar with the waters, may not know which large fish or mammals they might encounter at any particular location. Plus, *M** holds its suit out as camouflaging the swimmer.

If *M** has not warned its customers of the possible dangers of using its camouflage suit in shark-infested waters, it is noncontroversial that our victim of shark bite, *V**, should have a viable claim against *M** on that ground. In one analogous case, *Laaperi v. Sears, Roebuck & Co.*,⁶⁴ the First Circuit deemed the manufacturer of a smoke detector liable for harm resulting from a fire caused by a short circuit that both cut off power to the

Schupbach, 561 P.2d 450, 452-53 (Nev. 1977) ("[W]e have approved Comment h . . ."); *Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140, 162 n.5 (N.J. 1979) (saying that, whereas comment h "is, by its terms, directed to food and drug products, as indeed all of Section 402A was originally, it now extends to all products").

62. Henderson, *supra* note 1, at 596-97.

63. See Mike Celizic, *Dolphins Save Surfer From Becoming Shark's Bait*, TODAYSHOW.COM, Nov. 8, 2007, <http://www.msnbc.msn.com/id/21689083>; see generally ROD THEODOROU & CAROLE TELFORD, SHARK AND DOLPHIN (SPOT THE DIFFERENCE) (1996).

64. 787 F.2d 726 (1st Cir. 1986).

smoke detector and injured the plaintiff.⁶⁵ The smoke detector itself had not malfunctioned and was not defective.⁶⁶ The court explained:

[A] manufacturer can be found liable to a user of the product if the user is injured due to the failure of the manufacturer to exercise reasonable care in warning potential users of hazards associated with use of the product. The manufacturer can be held liable even if the product does exactly what it is supposed to do, if it does not warn of the potential dangers inherent in the way a product is designed. It is not necessary that the product be negligently designed or manufactured; the failure to warn of hazards associated with foreseeable uses of a product is itself negligence, and if that negligence proximately results in a plaintiff's injuries, the plaintiff may recover.⁶⁷

Like our camouflage swimsuit hypothetical, the First Circuit's language in *Laaperi* mostly fits the real-world circumstances of the industrial pump-type cases, Professor Henderson's specific target. In those cases, the pumps required the use of insulation to function properly, and the manufacturers knew that the predominant form of insulation being installed in the field was asbestos-containing.⁶⁸ As the manufacturers also knew—or let's assume the plaintiffs can prove they knew—the asbestos-containing products were very hazardous, arguably inherently dangerous.⁶⁹

65. *Id.* at 728.

66. *Id.*

67. *Id.* at 729 (citation omitted).

68. *E.g.*, *Falise v. Am. Tobacco Co.*, 94 F. Supp. 2d 316, 323 (E.D.N.Y. 2000) (“Several properties distinguish asbestos from other minerals and explain its widespread and extensive use: its tensile strength, its heat and acid resistance, and its flexibility.”); *Celotex Corp. v. AIU Ins. Co.*, (*In re Celotex Corp.*), 196 B.R. 973, 980 (Bankr. M.D. Fla. 1996) (“Because of these qualities, the use of asbestos became widespread in industrial, commercial, and household applications. Asbestos was used in the manufacture of various building products such as fireproofing, thermal insulation, ceiling tiles, and roofing. Asbestos-containing products were installed in school buildings, church buildings, and office buildings.”), *aff'd sub nom.* *Asbestos Settlement Trust v. Cont'l Ins. Co.*, No. 99-0101-CIV-T-25A, 2006 U.S. Dist. LEXIS 96091 (M.D. Fla. Sept. 27, 2006), *aff'd*, No. 06-15748, 2008 U.S. App. LEXIS 14522 (11th Cir., July 7, 2008); *Hagen v. Celotex Corp.* 816 S.W.2d 667, 674 (Mo. 1991) (“[A]sbestos once was widely used as an insulating material . . .”).

69. *See, e.g.*, *Cox House Moving, Inc. v. Ford Motor Co.*, No. 7:06-1218-NMH, 2006 U.S. Dist. LEXIS 55490, at *19 (D.S.C. Aug. 8, 2006) (discussing “asbestos, which is an inherently dangerous, toxic substance”); *In re Stucco Litig.*, 364 F. Supp. 2d 539, 546 (E.D.N.C. 2005) (concluding “the ‘nature of the defect’ itself to be an inherently dangerous product i.e. asbestos—which is a toxic and dangerous substance”); *Rich Prods. Corp. v. Kemutec, Inc.*, 66 F. Supp. 2d 937, 976 (E.D. Wisc. 1999) (discussing “the unique fact situation presented by asbestos and other materials that are inherently dangerous to the health and safety of humans” (citations omitted)), *aff'd*, 241 F.3d 915 (7th Cir. 2001); *Philadelphia Nat'l Bank v. Dow Chem. Co.*, 605 F. Supp. 60, 64 n.5 (E.D. Pa. 1985) (“In the asbestos cases, as in the case before me, the product itself is inherently dangerous to people.”); *In re Hoffinger Indus., Inc.*, 307 B.R. 112, 119 (Bankr. E.D. Ark. 2004) (“[T]here is no indication or admission that the [swimming pool] products

The tort defendant might object here that *Laaperi* and the camouflage swimsuit cases are different, because in those cases a danger is inherent in, or built into, the design of the smoke detector and swimsuit, respectively. After all, *M**'s swimsuit was specifically designed to camouflage the user from such large fish as sharks, and the smoke detector in *Laaperi* was designed to protect users from the very hazard, fire, that disabled the device.⁷⁰ The swimsuit was supposed to have protected the swimmer from recognition by creatures such as sharks; and the smoke detector should have protected the homeowners from fires. The industrial pump carried no such protective expectation in relation to asbestos.

That might be a legitimate distinction. For the First Circuit, however, the fact that the smoke detector failed because of the very danger that the device was intended to prevent simply showed that the risk was not obvious.⁷¹ But there is no obviousness issue with regard to asbestos exposures. Courts do not consider the risks associated with such exposures to have been apparent to ordinary working people.⁷² Absent a clear warning, it would not have been obvious to the working person occupationally exposed to asbestos-containing dusts that the fibers caused mesothelioma or other fatal cancers.⁷³

manufactured by the debtor are inherently defective or dangerous. It is not contended that, like asbestos or certain inter-uterine devices, mere exposure or contact results in either immediate or latent damage or injury.”); *Taylor v. Elliott Turbomachinery Co.*, 90 Cal. Rptr. 414, 433 (Ct. App. 2009) (“[U]nlike the abrasive wheels and discs in *Tellez-Cordova*, which were not dangerous without the power of the defendants’ tools, the asbestos-containing products at issue in our case were themselves inherently dangerous.”); *Cont’l Cas. Co. v. Employers Ins. Co. of Wausau*, 871 N.Y.S.2d 48, 50 (N.Y. App. Div. 2008) (discussing the “manufacturer, seller and distributor of an inherently dangerous product, asbestos”); *Chenot v. A.P. Green Servs.*, 895 A.2d 55, 67 (Pa. Super. Ct. 2006) (“Asbestos is widely accepted as an inherently dangerous product.”).

70. *Laaperi*, 787 F.2d at 728.

71. *Id.* at 731.

72. *E.g.*, *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 344 (5th Cir. 1982).

73. *E.g.*, *id.*

[A] jury decided that . . . an industrial insulation worker . . . was entitled to have been given fair warning that asbestos dust may lead to asbestosis, mesothelioma, and other cancers. The jury dismissed the argument that the danger was obvious and regarded as conclusive the fact that [the victim] testified that he did not know that inhaling asbestos dust could cause serious injuries until his doctor so advised him.

Id. (citing *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973)); *Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457, 466 (5th Cir. 1976) (The relation of asbestos dust inhalation to asbestosis and mesothelioma was well documented in medical journals during most if not all of the period of [the victim]’s exposure, but [he] . . . was understandably unaware of these technical medical findings.” (citing *Borel*, 493 F.2d 1076)); *see also West v. Goodyear Tire & Rubber Co.*, 973 F. Supp. 385, 390 (S.D.N.Y. 1997) (“Failure to warn the customer, where the manufacturer had notice of the effects of asbestos exposure, and where there was no obvious way for the workers who were exposed to know about the danger, clearly evidenced a ‘wanton disregard for the public safety.’”).

There is another respect in which the camouflage swimsuit and smoke detector scenarios are similar to our industrial pump case. In each instance, the original manufacturer was sending its product into the stream of commerce knowing that it was foreseeable—and likely in the asbestos case—but not inevitable, that the end product user would encounter the danger that occurred, sharks, fire, and asbestos insulation, respectively. The products were not destined to interact with the ultimate hazard.

Yet it does seem that the swimsuit and smoke detector cases are different from the pump case. Apart from the lack of a protective expectation in the pump context, it is also true that sharks and fires are not manufactured products. Accordingly, in the latter cases there is no alternative entity available to assume liability, and to which the relevant social costs can be allocated. Hence, although M^* and the defendant in *Laaperi* have not participated actively in causing the injurious interactions, as contemplated by the first prong of Professor Henderson's no-duty rule, and although there was no post-sale synergy of the type he describes in the second prong, there may be no "other product" at issue, and so the no-duty rule may simply not apply here on its face.

This will not resolve matters, however. First, the fire in *Laaperi* did in fact result from a defect occurring in a manufactured product, an electrical cord that had shorted out.⁷⁴ Even apart from this, we can tweak the camouflage swimsuit hypothetical or, more relevantly, the smoke detector scenario in such a way as to replace the natural objects with manufactured ones. We might, for example, substitute for the smoke detector in *Laaperi* a carbon monoxide detector somehow disabled by a space heater or car exhaust fumes. Or we might hypothesize an air purifier designed to remove asbestos contaminants from the air, the motor of which clogs and shuts down when enveloped in asbestos-containing dusts.

So let's assume, notwithstanding the First Circuit's observation in *Laaperi*, that the relevant difference between the camouflage swimsuit/smoke detector cases and the industrial pump paradigm does, indeed, reside in the protective expectation appearing in our counterexamples but missing from the pump scenario. Formulated as a rule, a seller will have a duty to warn of risks presented by another product if its own product creates an expectation that the user will be protected from the hazard that results from the post-sale interaction of the two products, even if the seller has not actively participated in causing the interaction and even if that interaction has not synergistically created enhanced joint risks.

74. *Laaperi*, 787 F.2d at 728.

Accordingly, this will be Modification No. 1 of Professor Henderson's no-duty rule:

[A] commercial product seller owes no duty to design or warn against the risks presented by other products with which the seller's product interacts after sale or distribution unless either (1) the seller participates actively and substantially (a) in causing the interaction to occur or (b) in creating the expectation that the interaction would not occur or would not be harmful if it did occur, or (2) the post-sale interaction synergistically creates joint risks that are significantly greater than the sum of the risks that the product and the other products would present independently.

The no-duty rule is now a bit more complicated.

C. Harm Caused By Replacement Parts

Sticking with Professor Henderson's summertime fun conceit, consider a scenario in which pool manufacturer Dumb Designs—appearing as our defendant in this example—had defectively designed its pool to include a high ridge near the diving area. Bob cracks his head while diving, but this also cracks the ridge. Parroting the original design, a third party supplies a replacement ridge, which is otherwise identical to the original part. Henry then cracks his head. Is Dumb Designs relieved of all liability simply because it did not manufacture or supply the replacement ridge? The answer is “yes” under Henderson's no-duty rule.

More realistically, what if the tort defendant *D*, the original product manufacturer, itself installs asbestos-containing gaskets on its pump and the commercial purchaser later replaces those gaskets with others, also asbestos-containing? Assume that the original manufacturer has not otherwise specified or recommended that asbestos-containing gaskets be used, and that there are some safe, non-asbestos gaskets available to the purchaser. The tort plaintiff *P*, perhaps the purchaser's employee, is harmfully exposed to dusts released from the replacement parts.

We might make a long-winded philosophical argument that the pump was a persisting thing, and that the product that harmed *P* was the same product *D* sold.⁷⁵ Certainly when *D* sold the pump, it contained a dangerous component part having the same nature, and the identical function in relation to the pump, as the product that harmed *P*. *D* clearly should have foreseen that other asbestos-containing gaskets would be used

75. See Alani Golanski, *A “Time-Slice” Approach to Tort Law’s Component Parts Problem*, 51 DEPAUL L. REV. 39, 40-44 (2001).

to replace the original ones, and at least implicitly endorsed the use of such component parts.⁷⁶

But this does not amount to saying that the seller “participate[d] actively and substantially in causing” the original pump to interact with the asbestos-containing replacement gasket.⁷⁷ *P* might argue this, but courts would likely conclude that *D*—in addition to the seller of the replacement gasket—had a duty to warn based on the *strong* foreseeability that the pump purchaser would copy the original product and use an asbestos replacement part.⁷⁸ The original manufacturer *D* was in a position to have “strongly” foreseen the hazard because of the endorsement implicit in its own use of asbestos materials.⁷⁹

For instance, in *Lindquist v. Buffalo Pumps, Inc.*,⁸⁰ an engineer and industrial hygienist testified that gaskets and packing are essential components in pumps, that these components do not last a long time, and that about the time plaintiff sustained his harmful exposures the packing and gaskets used in industrial equipment generally contained asbestos.⁸¹ Also, the pump manufacturer’s corporate representative admitted that, during the time period in question, the seller shipped its pumps with some original asbestos gaskets and packing already installed.⁸²

The *Lindquist* court asked whether the seller had a duty to warn of the danger posed by exposure to the replacement asbestos gaskets and packing.⁸³ The court reiterated the protective American legal rule, protested by Professor Henderson,⁸⁴ that “a seller must warn of reasonably foreseeable dangers posed by its products.”⁸⁵ Being subjected to this rule did not mean that the seller was being asked to anticipate “‘every conceivable design’ in which its pump can be used; the alleged failure to

76. See *O’Neil v. Crane Co.*, 177 Cal. App. 4th 1019, 1034 (Ct. App. 2009) (“[Defendants] incorporated asbestos-containing products into their own products, which needed the asbestos-containing products in order to function. The injury was caused by the operation of respondents’ products with replacement products which had the same dangerous propensities as the original parts.”).

77. Henderson, *supra* note 1, at 618.

78. See *Lindquist v. Buffalo Pumps, Inc.*, No. PC 06-2416, 2006 R.I. Super. LEXIS 168, at *7 (R.I. Super. Ct. Nov. 28, 2006).

79. *Id.* at *5-6.

80. *Id.* at *1.

81. *Id.* at *4-5.

82. *Id.* at *5.

83. *Id.* at *6.

84. See *supra* note 10 and accompanying text.

85. *Lindquist*, 2006 R.I. Super. LEXIS 168, at *6.

warn results from the way the pump functioned in relation to the gasket and packing only, not the piping system as a whole.”⁸⁶

In another interesting decision, *Morris v. American Motors Corp.*,⁸⁷ the court rejected the defendant’s argument that it should not be held vicariously liable for the component manufacturer’s negligence.⁸⁸ The court ruled that an original manufacturer is liable for any defective replacement component part the original of which “was an integral part” of the product, and opined that the buyer “purchases a package which includes far more than the item delivered itself.”⁸⁹ This amounts to saying, more philosophically, that the pump, as a discrete, legal construct, “persisted” through time and despite change of parts.⁹⁰

Morris, however, was not a strong foreseeability case. The original part, the solenoid component in the automobile’s starter system, had not necessarily been defective in the same way, although it had to be replaced sometime after the car was sold.⁹¹ So the car manufacturer had not likely foreseen that the solenoid component would cause the car to start and lurch at the wrong time. By virtue of the “commercial realities,” however, the manufacturer was deemed to have held out the car, in its totality, to be its own, and to have benefitted from this appearance; and “it was reasonable for the plaintiff to [have] believe[d] he was dealing with [the manufacturer itself] when the solenoid was replaced.”⁹² For these reasons, the court found the car manufacturer responsible on a vicarious liability theory.⁹³

New York has handled this issue a bit differently, in the design defect context. In *Sage v. Fairchild-Swearingen Corp.*,⁹⁴ the plaintiff was injured on a replacement hanger or hook installed in the defendant’s aircraft.⁹⁵ The court offered the traditional definition of a design defect, saying that “[a]

86. *Id.* at *8 (quoting *Buonanno v. Colmar Belting Co.*, 733 A.2d 712, 719 (R.I. 1999)); but see *Braaten v. Saberhagen Holdings*, 198 P.3d 493, 499 n.7, 500 n.8 (Wash. 2008) (accepting the “assembler’s liability” doctrine, which renders the seller liable for installing another’s dangerous component, yet calling the foreseeability of replacement with similar components “not material to the questions before us in this case” in light of the court’s rejection of the Restatement comment h analysis).

87. 459 A.2d 968 (Vt. 1982).

88. *Id.* at 972-73.

89. *Id.* at 973.

90. See *supra* note 75 and accompanying text.

91. *Morris*, 459 A.2d at 971.

92. *Id.* at 973.

93. *Id.*; see also RESTATEMENT (SECOND) OF TORTS § 400 (1965) (“One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer.”).

94. 517 N.E.2d 1304 (N.Y. 1987).

95. *Id.* at 1305.

defectively designed product . . . is one which is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use.”⁹⁶ The court then analyzed the legal issue as follows:

That the hanger actually involved in the accident was a replacement and not the original is not dispositive because in fabricating and installing a new part Commuter’s employees, as the jury found, did no more than perpetuate defendant’s bad design as defendant’s representatives foresaw they might.

The burden of plaintiff’s accidental injuries should be placed on the manufacturer because it designed the defective product and placed it in the stream of commerce knowing that if the part broke it might be copied and replaced by the purchaser relying on the original design. Inasmuch as the defect was in the design, the manufacturer was the logical party in a position to discover the defect and correct it to avoid injury to the public. Placing the economic burden on the manufacturer under these circumstances does no more than induce it to design quality equipment at the outset and “discourage[s] misdesign rather than encourage[s] it.”⁹⁷

The manufacturer’s continuing responsibility for its product, even after the dangerous component has been replaced by a third party seller, does not necessarily rest on foreseeability. This may get us back to philosophy, but just for a moment. If we are sailing aboard the *U.S.S. Theseus*, are we on the same ship even after replacing a plank? What if we also replace the mast? And then several other planks? If the ship “persists” even in some loose sense of the word, then this is likely legally significant.⁹⁸ This idea has worked to the defendants’ advantage, for instance, in the context of the statute of repose.⁹⁹

Carving a rule out of the replacement part scenario, we might say that a seller will have a duty to warn of risks presented by another product with

96. *Id.* at 1307 (internal quotation marks omitted).

97. *Id.* at 1308 (quoting *Micallef v. Miehle Co.*, 348 N.E.2d 571, 577 (N.Y. 1976)); *see also* *Call v. Banner Metals, Inc.*, 846 N.Y.S.2d 827, 828 (N.Y. App. Div. 2007) (saying that the post-sale “modifications consisted of nothing more than the installation of replacement parts that did no more than perpetuate [defendant’s] bad design as [defendant’s] representatives foresaw [it] might” where defendant’s bakery truck ramp sprang open knocking plaintiff to the ground (internal quotation marks omitted)).

98. *See* Golanski, *supra* note 75, at 48; THOMAS REID, *Essays on the Intellectual Powers of Man*, in *THE WORKS OF THOMAS REID*, D.D. 219, 346 (William Hamilton ed., 1854).

99. *E.g.*, *Oviedo v. Crown Cork & Seal Co.*, No. 3:96-CV-0221-H, 1997 U.S. Dist. LEXIS 4855, at *8 (N.D. Tex. Mar. 17, 1997) (“Although an equipment manufacturer may be exposed to separate liability by supplying replacement parts that cause injury, the fact that individual components were replaced does not re-start the repose period for products liability claims based on the overall design of the equipment.”).

which the seller's product interacts after sale or distribution if the other product is substantially similar to, and has merely replaced, a component part of the larger product originally sold or distributed by the seller.¹⁰⁰ Accordingly, still attempting to formulate a rule congruent with Professor Henderson's no-duty rule, the following will be Modification No. 2:

[A] commercial product seller owes no duty to design or warn against the risks presented by other products with which the seller's product interacts after sale or distribution unless (1) the seller participates actively and substantially (a) in causing the interaction to occur or (b) in creating the expectation that the interaction would not occur or would not be harmful if it did occur, (2) the original product released by the seller contains a risky part or feature that has merely been replaced post-sale by a substantially similar component part or feature that has caused the harm, or (3) the post-sale interaction synergistically creates joint risks that are significantly greater than the sum of the risks that the product and the other products would present independently.

The no-duty rule is now even more complicated.

D. *The Better Rule is a "Duty" Rule*

We could continue to modify Professor Henderson's no-duty rule in various ways. This would be especially so if we stopped artificially adhering to Henderson's presuppositions. For one thing, the foreseeability exception to the post-sale product modification defense takes the issue out of the rescue setting, although Henderson structures his thesis around a no-duty-to-rescue analysis.¹⁰¹ For another, the no-duty rule ignores the pre-existing duty of product sellers to act prudently in relation to the well-being of their products' end users;¹⁰² with duty thereby established, foreseeability of the risk (along with causation and injury) determines the seller's liability for not having warned the end user.¹⁰³

For example, in *Shuras v. Integrated Project Services*,¹⁰⁴ when the plaintiff unscrewed clamps securing a probe to a "water-for-injection" tank

100. *E.g.*, *O'Neil v. Crane Co.*, 177 Cal. App. 4th 1019, 1035 (Ct. App. 2009) ("We can see no relevance to the fact that the injury was caused by the operation of its product in conjunction with a replacement part which is no different from the original.").

101. *See* Henderson, *supra* note 1, at 595-96.

102. *See* *Buch v. Armory Mfg. Co.*, 44 A. 809, 810 (N.H. 1898) ("The defendants are not liable unless they owed to the plaintiff a legal duty which they neglected to perform.").

103. *E.g.*, *Pulka v. Edelman*, 358 N.E.2d 1019, 1022 (N.Y. 1976); *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100 (N.Y. 1928).

104. 190 F. Supp. 2d 194 (D. Mass. 2002).

sold by defendants, the tank sent scalding hot water onto her.¹⁰⁵ The tank did not malfunction, and the water had been added post-sale.¹⁰⁶ Let's assume this was a bottled water "product." We can even assume that the water, when added, was already scalding hot, and hence that no synergies were involved. The harm here was caused by the "release" of the scalding water, and it was this propensity to release water that constituted the case's factual core.¹⁰⁷ In all events, the district court said:

It is well settled that a manufacturer has duty to warn users of foreseeable latent dangers associated with ordinary uses of its products. Indeed, a manufacturer may be liable if its product functions perfectly but it fails to warn about the product's inherent dangers. Failure to warn of dangers stemming from *foreseeable* uses or misuses of a product is, by deduction, evidence of liability. Instructions on the use of a product does not discharge a manufacturer's duty to warn. Rather, the strength of the warning must be commensurate with the dangers involved.¹⁰⁸

The circumstances of *Shuras* would not easily fit into Henderson's no-duty rule. It is not clear whether he would say that the defendants had "participate[d] actively and substantially in causing the interaction"¹⁰⁹ between the tank and the later-installed water to occur. If, however, the defendants in *Shuras* participated actively, by virtue of the tank's design, in causing the water to be added and then heated, then it is difficult to understand why the seller of our industrial pump, knowing that it would need insulation and that asbestos was the preferred and widely-used type, did not similarly participate actively in causing the pump to interact with this asbestos-containing insulation. In either case, it would all come down to foreseeability.

When paid attention, Henderson's no-duty rule leads to a morass. This is not merely because there may be many exceptions to that rule for which Henderson has not accounted. Rather, the rule at its core is problematic because it ignores the doctrinal distinction between products and their components, as well as the policy-driven importance of foreseeable harm when products, rather than components, are at issue. Yet Henderson's stated goals are well-worth pursuing: reducing unnecessary confusion, beginning to straighten things out, and the formulation of a clearer, more appropriate rule.¹¹⁰ What appears to be needed, to achieve the most clarity,

105. *Id.* at 198.

106. *Id.*

107. *Id.* at 200.

108. *Id.* at 201 (internal citations and quotation marks omitted).

109. Henderson, *supra* note 1, at 618.

110. *Id.* at 596, 618.

is a rule that comes at the situation from the other direction, a duty rule rather than a no-duty one. Any such rule, however, should place a weighty enough burden on the plaintiff to safeguard the interests of the truly blameless or naive product manufacturer.

With all of this in mind, and with far less rule-writing experience than Professor Henderson, the author suggests the following, as a rough proposal: a commercial product seller owes a duty to design or warn against the risks presented by component parts to be installed after sale or distribution, when the seller has a reason to foresee both that the component part is needed to permit its product to function as intended, and that the component part will likely cause the final product to present an unreasonable danger to end product users.

This proposed rule is protective not only of innocent defendants, but also of a set of sellers who would be deemed culpable under ordinary foreseeability and products liability standards. More specifically, the rule saddles plaintiffs with the burden of proving: (1) that the seller knew or should have known that the type of component at issue would be applied post-sale; (2) that the seller knew or should have known that this component would be an unreasonably dangerous one; and (3) that the seller itself should have deemed it more likely than not that the component part would pose such an unreasonable risk to the product user's health or well-being.¹¹¹ Accordingly, where a pump manufacturer may know that asbestos-containing insulation is just one of several available types of insulation that equally have a chance of being installed as a post-sale component, or even one of two available types that are *equally* likely to be installed on the pump post-sale (the second being a safe alternative), then the defendant would not be liable under the proposed rule.¹¹² If however,

111. This burden is conspicuously heavier, for instance, than the one relied upon in *Webb v. Rodgers Machinery Manufacturing Co.*, wherein the Fifth Circuit ruled for the plaintiff because, *inter alia*, "[e]xpert testimony at trial indicated that kickback from these and similar problems in the wood was a possible and foreseeable danger from straight-line shaping." *Webb v. Rodgers Mach. Mfg. Co.*, 750 F.2d 368, 370-71 (5th Cir. 1985). See also *Golden v. Parmi Tool Co.*, No. 91-1828, 1992 U.S. Dist. LEXIS 16434, at *15 (E.D. Pa. Oct. 29, 1992) ("A manufacturer or seller must give such warnings as are required to inform the ultimate user of the possible risks attendant to foreseeable use of the product and the inherent limitations of the product."), *aff'd*, 998 F.2d 1003 (3d Cir. 1993); *cf.* *Humphries v. McCrory-McLellan Stores Corp.*, 358 F.2d 901, 902 (4th Cir. 1966) ("[T]he evidence does not show that [the hole on the premises] gave any such indication or threat of possible hazard as to make it reasonably foreseeable as a menace to safety and require a warning of its presence.").

112. *E.g.*, *Rastelli v. Goodyear Tire & Rubber Co.*, 591 N.E.2d 222, 223 n.1 (N.Y. 1992) (noting that "the subject tire could be used with 24 different models of multipiece rims, out of the approximately 200 types of multipiece rims sold in the United States," one of which was the defective rim).

the pump manufacturer should foresee both that its pump will require insulation and that the predominant type being used is hazardous asbestos-containing, or that the ultimate pump purchaser has a propensity to use the asbestos type, it would have a duty to issue a warning with its product.¹¹³

The rule's third prong addresses a core ingredient in the efficiency approach to products liability law propounded by Guido Calabresi at the inception of the Law and Economics movement.¹¹⁴ The Calabresian approach asks which party is in the best position to decide whether the potential product-related harm is more expensive to avoid or to insure against, and thereby to act on that decision.¹¹⁵ Information costs are high,¹¹⁶ but already minimized for a party with superior knowledge. When, from the seller's point of view, it was probable that the component part to be added to its product would pose an unreasonable risk to end users, then this means that the seller shared superior knowledge with the component part supplier such that it would be fair and efficient for it to bear joint responsibility for the allocated loss.¹¹⁷

IV. PERMITTING SELLERS TO TURN OSTRICH TO LIKELY POST-SALE HAZARDS CONSTITUTES BAD PUBLIC POLICY

Contrary to Henderson's view, policy considerations favor the liability of manufacturers who have turned ostrich in the face of compelling reasons to know that their products would be used with an ultrahazardous component part.¹¹⁸ Product sellers already have a noncontroversial duty to act prudently in relation to the well-being of their products' end users.¹¹⁹

113. *E.g.*, *Ilosky v. Michelin Tire Corp.*, 307 S.E.2d 603, 609-10 (W. Va. 1983).

114. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 312 (1970).

115. *See* Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 *YALE L.J.* 1055, 1065-66 (1972).

116. *See* Lindley J. Branza, *Asbestos in Schools and the Economic Loss Doctrine*, 54 *U. CHI. L. REV.* 277, 292 (1987) ("Information asymmetries and high information costs are important market defects."); Richard H. Seeburger, *The Economic Structure of Tort Law*, by William A. Landes and Richard A. Posner, 50 *U. PITT. L. REV.* 1091, 1097 n.35 (1989) (book review) ("Where there are numerous potential victims, the transaction cost, the cost of information to them, is too high.").

117. *See* *Vandermark v. Ford Motor Corp.*, 391 P.2d 168, 172 (Cal. 1964).

118. *See* *Bostick v. Flex Equip. Co.*, 54 Cal. Rptr. 3d 28, 35 (Ct. App. 2007).

119. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1054 (N.Y. 1916) ("There is nothing anomalous in a rule which imposes upon A, who has contracted with B, a duty to C and D and others according as he knows or does not know that the subject-matter of the contract is intended for their use."); *see also* *Krummel v. Bombardier Corp.*, 206 F.3d 548, 551 (5th Cir. 2000) ("[E]ven when a product is not defective, a manufacturer may have a duty to instruct reasonably foreseeable users of the product's safe use.").

With duty established, foreseeability of the risk (along with causation and harm) determines the seller's liability for failing to warn the end user.¹²⁰

Non-liability even in pure rescue situations has had its critics.¹²¹ Liam Murphy has argued in favor of limited criminal duties to rescue, while remaining a bit wary of civil liability in the non-rescue context.¹²² While Murphy's reluctance to extend duty-to-rescue liability to the tort setting is not in and of itself relevant to this essay's argument, his main reason is. Murphy says that, were there a civil duty to rescue, tortfeasors "would be liable for full compensatory damages," an outcome that would be "excessive" and out of proportion to the goal of deterring nonrescue.¹²³

It is true that the general civil liability rule is that each tortfeasor is jointly and severally responsible, and therefore the plaintiff may execute upon any one tortfeasor for the full compensatory amount.¹²⁴ In practice, however, wrongdoers having relatively minor shares of fault are typically unlikely to shoulder the full compensatory amount. For one thing, most jurisdictions have long adopted the right to contribution among joint tortfeasors, precisely to avoid having one wrongdoer pay more than its apportioned share.¹²⁵ Also, some states have adopted the tort reform

120. *E.g.*, *Roberts v. C.G. Sargeants Sons Corp.*, No. 88-CV-118, 1990 U.S. Dist. LEXIS 493, at *18 (N.D.N.Y. Jan. 2, 1990) ("The manufacturer of a product which may be hazardous under foreseeable conditions of use has the duty to adequately warn the users of the hazards posed by the product, and a product is defective (and hence 'not reasonably safe') if adequate warnings are not provided."); *Wilson v. Good Humor Corp.*, 757 F.2d 1293, 1313 (D.C. Cir. 1985) ("[A] seller or manufacturer of a dangerous product has a duty to warn users of foreseeable risks from misuse of the products and to provide specific directions for safe use.")

121. *E.g.*, JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 323 (1789) ("In cases where the person is in danger, why should it not be made the duty of every man to save another from mischief, when it can be done without prejudicing himself, as well as to abstain from bringing it on him?"); David W. Barnes & Rosemary McCool, *Reasonable Care in Tort Law: The Duty to Take Corrective Precautions*, 36 ARIZ. L. REV. 357, 363 (1994) (concluding "from either an efficiency or an ethical perspective, the corrective precautions rule is superior"); Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673, 675 (1994); Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879, 881 (1986) (concluding "that there will continue to develop an obligation on the part of persons especially well situated to effect easy rescues"); Jean E. Rowe & Theodore Silver, *The Jurisprudence of Action and Inaction in the Law of Tort: Solving the Puzzle of Nonfeasance and Misfeasance from the Fifteenth Through the Twentieth Centuries*, 33 DUQ. L. REV. 807, 844 (1995); Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 WM. & MARY L. REV. 423, 428 (1985); Ernest Weinrib, *The Case for a Duty to Rescue*, 90 YALE L. J. 247, 248 (1980).

122. Liam Murphy, *Beneficence, Law, and Liberty: The Case of Required Rescue*, 89 GEO. L.J. 605, 663 (2001).

123. *Id.* at 662-63.

124. *E.g.*, *Barker v. Cole*, 396 N.E.2d 964, 971 (Ind. Ct. App. 1979).

125. *See* *Nw. Airlines v. Transp. Workers Union*, 451 U.S. 77, 86-87 (1981); *Truszewski v. Outboard Motor Marine Corp.*, 685 N.E.2d 992, 994 (Ill. App. Ct. 1997) (noting, for example, that

measure of limiting non-economic damages, under certain circumstances, to the wrongdoer's proportionate share of fault, and judgments are molded according to this limitation.¹²⁶

The no-duty-to-rescue doctrine is not, however, the issue here, notwithstanding Professor Henderson's pressing of that theme. Henderson emphasizes that holding the swimsuit seller liable for injuries caused by diving into shallow pools "would not serve to achieve the policy goals of allocative efficiency or fundamental fairness."¹²⁷ Whatever may be the case for swimsuits in relation to the remote possibility of encountering a defectively shallow pool, the policy goals Henderson identifies—fairness and efficiency—must be considered.

A. Fairness

Henderson distills his fairness analysis into questions of corrective justice.¹²⁸ He says that holding the product seller responsible for harm caused by another's component would be contrary to three important corrective justice values relevant to products liability: "(1) compensating victims of defective products for the disappointment of their reasonable expectations; (2) requiring those who deliberately appropriate the well-being of others to make their victims whole; and (3) shifting the social costs of risky activities from the innocent victims of those activities to those who directly benefit from them."¹²⁹

The non-rescuer does not really have a "victim," in any meaningful sense of that word. The harmed individual could not be said to have had a "reasonable expectation" of rescue by a stranger. Nor has the non-rescuer "deliberately appropriate[d]" the victim's well-being.¹³⁰ And in no sense

Illinois's Joint Tortfeasor Contribution Act, 740 ILL. COMP. STAT. ANN. 100/2 (West 2002), "provides a remedy for an entity that has paid more than its *pro rata* share of the common liability by allowing it to seek contribution from a fellow joint tortfeasor who has not paid his *pro rata* share of the common liability"; RESTATEMENT (SECOND) OF TORTS § 886A (1979).

126. See, e.g., CAL. CIV. CODE § 1431.2(a) (West 2007) ("In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault."); NEB. REV. STAT. § 25-21, 185.10; N.Y. C.P.L.R. 1601-1602 (2008) (abolishing joint liability for noneconomic damages for defendants less than fifty percent at fault in certain cases).

127. Henderson, *supra* note 1, at 615.

128. *Id.* at 616.

129. *Id.*

130. See *id.* at 616-17.

does the non-rescuing stranger “directly benefit” from the risky activity that imperiled the victim.¹³¹ Henderson is therefore right in arguing that a no-duty-to-rescue rule does not violate principles of fairness and corrective justice. The same is also approximately correct with regard to the quasi-rescue situation involving Henderson’s swimsuit seller.

How does Henderson’s corrective justice standard fare, though, with regard to the pump seller in its rake’s progress (by the victim’s lights) as an entity that well knows its product will likely be insulated with a deadly air contaminant, yet who fails to stamp or tag a warning?¹³² Under the first corrective justice prong, the issue would be whether injurious exposure to asbestos fibers released from the pump’s insulation disappointed the plaintiff’s reasonable expectations concerning the pump. If the end product user encounters the pump and its components as a “package” and collectively identifies this package with the pump,¹³³ then that individual’s expectations concerning the package are reasonably directed toward the pump manufacturer.¹³⁴ More significantly, though, it makes sense to suppose that the end user would reasonably expect a pump manufacturer to warn of the hazards it knows are likely to be associated with a necessary component to be added post-sale.¹³⁵

Henderson might say here that, even if it may not be far-fetched to attribute to the injured user a reasonable expectation directed toward the

131. *See id.*

132. *Cf. Hatch v. Maine Tank Co.*, 666 A.2d 90, 92 (Me. 1995), stating:

[Defendant] added a warning to the safety instructions packaged with its pumps and also attached a red tag to the cord, both of which read, ‘Never pump gasoline or other flammable liquids with this pump as an explosion or fire could result’ The tag contained the additional language: ‘Warning—do not remove this tag.’

Id.; *Shuras v. Integrated Project Servs.*, 190 F. Supp. 2d 194, 201 (D. Mass. 2002) (maintaining, “Failure to warn of dangers stemming from *foreseeable* uses or misuses of a product is, by deduction, evidence of liability. Instructions on the use of a product does not discharge a manufacturer’s duty to warn. Rather, the strength of the warning must be commensurate with the dangers involved.” (internal quotation marks omitted); plaintiff had unscrewed clamps on properly functioning tank, which then expelled scalding water). Note that the “gasoline or other flammable liquids” in *Hatch*, and the scalding water in *Shuras*, would constitute the products of another entity, not the pump or tank sellers, respectively. Moreover, it seems that the outcome in *Shuras* would have been the same even had the water somehow been pre-heated when added to the tank.

133. *See supra* note 87 and accompanying text.

134. *Cf. Hininger v. Case Corp.*, 23 F.3d 124, 129 (5th Cir. 1994) (discussing the purchaser’s “lack of any expectation that . . . the upstream component supplier[] would respond to defects in the finished product” in implied warranty context); *Moore v. Coachmen Indus.*, 499 S.E.2d 772, 780 (N.C. Ct. App. 1998) (“[P]laintiffs bargained for a complete and functional recreational vehicle, not for wheels, electrical convertor box, stereo, etc. Thus, they had no reasonable expectation that . . . any of the other manufacturers of unbranded components, would resolve any problem they encountered with the vehicle.”).

135. *See Wilson v. Good Humor Corp.*, 757 F.2d 1293, 1313 (D.C. Cir. 1985).

original manufacturer regarding the safety of the final product, inclusive of necessary components, the pump manufacturer has neither “appropriate[d] the well-being of others” nor “directly benefit[ed]” from the use of a hazardous form of insulation.¹³⁶ At the least, however, the manufacturer has a reason to foresee the *likelihood* that the insulation to be applied to its product will pose a significant risk to the well-being of workers who will have to repair or maintain the product. The duty rule proposed here applies when that seller nevertheless deliberately chooses not to issue any sort of warning to those workers.

Without any supporting methodology, Henderson takes the ultimately cavalier position that, even if adequately and conspicuously informed that unprotected exposure to asbestos fibers released from the product may cause cancer, lung disease or other life-threatening harm,¹³⁷ working people will not pay any attention, and it is merely “wishful thinking” to suggest otherwise.¹³⁸ Bypassing this sort of contempt, it is also not far-fetched to

136. See Henderson, *supra* note 1, at 616.

137. E.g., *Horne v. Owens-Corning Fiberglas Corp.*, 4 F.3d 276, 280 (4th Cir. 1993) (noting warning required by the 1972 Occupational Health and Safety Act stating, “Caution. Contains asbestos fibers. Avoid creating dust. Breathing asbestos dust may cause serious bodily harm.” (internal quotation marks omitted); Labeling of Asbestos-Containing Household Products, 51 Fed. Reg. 33,910 (Sept. 24, 1986) (suggesting the following warning, *inter alia*, to accompany asbestos-containing cement sheet products: “WARNING: BREATHING FIBERS MAY CAUSE CANCER”); OSHA Regulations, 29 C.F.R. § 1915.1001(k)(7)(ii)(A)-(B) (2009) (requiring warning signs in regulated asbestos areas to include: “DANGER,” “ASBESTOS,” “CANCER AND LUNG DISEASE HAZARD,” “AUTHORIZED PERSONNEL ONLY,” and “RESPIRATORS AND PROTECTIVE CLOTHING ARE REQUIRED IN THIS AREA”).

138. Henderson, *supra* note 1, at 614. Henderson claims that “evidence” of this wishful thinking “is to be found in the fact that many jurisdictions deem it necessary to supply plaintiffs with ‘heeding presumptions’ in order to render such claims facially plausible.” *Id.* Here Henderson cites not to judges’ statements to this effect, but solely to his own prior writings. But it is crude to suggest that the heeding presumption exists principally, or solely, for the purpose of making it “facially plausible” that workers would take action to safeguard their own health and well-being. Rather, although Henderson quite strongly disagrees, the presumption appears to have originated in section 402A, comment j, which states: “Where warning is given, the seller may reasonably assume that it will be read and heeded.” RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965). In his own earlier work, Henderson, along with his colleague Aaron D. Twerski, argued that the heeding presumption is intended to establish that a manufacturer that provided an adequate warning had discharged its duty and could not be held responsible on a failure to warn claim. James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 279 (1990). Courts have tended sensibly to understand the heeding presumption, where adopted, to fulfill an evidentiary function with regard to an aspect of the larger causation element, and not the substantive function Henderson now claims for it. More specifically, rather than performing the function of creating the myth (from Henderson’s point of view) that the plaintiff is an ordinary, self-protective human being—by rendering the probability that plaintiff would have heeded a warning “facially plausible”—the presumption addresses the extraordinary difficulty a litigant would face were she required affirmatively to prove that she would have acted on a warning. The presumption shifts

conclude that the seller, in failing to warn, has appropriated the well-being of those workers who end up suffering often fatal asbestos-caused diseases.

But it is by virtue of Henderson's third corrective justice prong—asking whether the seller has “directly benefit[ed]” from the risky activity—that our industrial pump paradigm is most significantly distinguished from the swimsuit and rescue scenarios. The classic non-rescuer, a stranger to the victim, gains no benefit from his or her inaction, nor under the conventional assumption, would the rescue effort pose a risk independent of the costs of the rescue itself.¹³⁹ There is similarly no reason to suppose that swimsuit sales might decline were the seller to warn about diving risks. Things are different when it comes to industrial pumps. The purchaser is a commercial or institutional buyer operating in a competitive market, with at least some range of choices when selecting pumps. The purchaser may also stand in the shoes of an employer of individuals who will directly work with the pump in the field, or it may be a middleman expecting to resell the pump to such an employer or contracting venture.¹⁴⁰ Moreover, for the purchaser, the pump is typically just one of the many items it must buy to carry on its enterprise.¹⁴¹ So the seller can be expected to have a greater degree of knowledge than the purchaser about the pump, its necessary components, and the health and safety implications of those materials.¹⁴²

the burden to the defendant to show that the litigant would likely *not* have heeded the warning, a burden that's not too onerous under the appropriate circumstances. See *Anderson v. Hedstrom Corp.*, 76 F. Supp. 2d 422, 441 (S.D.N.Y. 1999) (saying the “[heeding] presumption can be rebutted by proof that adequate warning would have been futile since plaintiff would not have read it,” based upon plaintiff's failure to read allegedly inadequate warnings on product); *Hulmes v. Honda Motor Co.*, 960 F. Supp. 844, 854 (D.N.J. 1997) (holding that evidence that plaintiff was warned of alcohol consumption prior to riding allegedly defective product and chose to consume alcohol anyway is relevant to rebutting the heeding presumption in failure to warn theory of liability, in that it “portrays an individual who is unlikely to heed warnings”); see *Pavlik v. Lane Ltd./Tobacco Exps. Int'l*, 135 F.3d 876, 883 (3d Cir. 1998) (“[I]t would be illogical, and contrary to the basic policy of § 402A, to accept that a product sold without an adequate warning is in a ‘defective condition’ . . . while simultaneously rejecting the presumption that the user would have heeded the warning had it been given.”); *House v. Armour of Am., Inc.*, 929 P.2d 340, 347 (Utah 1996).

139. See generally, Eric H. Gush, Comment, *The Inefficiency of the No-Duty-to-Rescue Rule and a Proposed Similar Risk Alternative*, 146 U. PA. L. REV. 881, 895 (1998).

140. *E.g.*, *Graco, Inc. v. Binks Mfg. Co.*, 60 F.3d 785, 788 (Fed. Cir. 1995).

141. *E.g.*, *Ill. Power Co. v. Comm’r*, 83 T.C. 842, 858 (1984); *In re Peterson Constr. Corp.*, 128 N.L.R.B. 969, 991 (1960).

142. *E.g.*, *McAlpin v. Leeds & Northrup Co.*, 912 F. Supp. 207, 211 (W.D. Va. 1996) (“A post-sale duty to warn promotes a continuous flow of information from the more knowledgeable manufacturer to the industrial purchaser and all foreseeable users.”); *Gray v. Badger Mining Corp.*, 676 N.W.2d 268, 281 (Minn. 2004) (“If the manufacturer has superior knowledge, it has a duty to relay that information to the intermediate purchaser.”).

The seller's direct cost in stamping or tagging a warning is low. The transaction costs to the purchaser associated with the seller's warning, however, might be relatively high. The purchaser, for example, might be compelled to expend resources finding an alternate component part supplier, one marketing a non-asbestos insulation. Or the purchaser may need to supply respirators, install special ventilation systems, or take other abatement measures.¹⁴³ Also from the purchaser's point of view, a frighteningly informative warning would foreseeably engender labor discipline issues.¹⁴⁴ All of this enters into the seller's calculus when deciding not to warn of the known dangers of hazardous component parts likely to be applied to the product. The seller will lose business if it warns, and gain business if it fails to do so. Choosing not to warn, the seller directly benefits from saddling end users with the social costs of the risky activities associated with its product. A duty rule would therefore satisfy the third corrective justice principle articulated by Professor Henderson, because it would shift the social costs of risky activities from the innocent victims of those activities to those who directly benefit from them.¹⁴⁵

So we have accepted Henderson's Aristotelian definition of fairness, here applied in the products liability context, as a set of corrective justice factors.¹⁴⁶ We now see that the public policy interest in fairness does count toward holding sellers to a duty to warn when they have a reason to foresee both the post-sale need for a particular component part, in order to permit their products to function as intended, and the likelihood that the component part will cause the final product to present an unreasonable danger to end product users.

143. *E.g.*, N.Y. COMP. CODES R. & REGS. tit. 12, § 12-1.6(a) (2009).

144. *See* OSHA Regulations, 29 C.F.R. § 1977.12(b)(2) (2008).

[O]ccasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels.

Id.

145. *See* Henderson, *supra* note 1, at 616.

146. *See* ARISTOTLE, NICOMACHEAN ETHICS 1131a1-10 (Terence Irwin trans., 1985).

B. Efficiency

Will the duty rule similarly promote allocative efficiency, the second public policy goal addressed by Henderson? Henderson says not, because

when a court holds the seller of a safe product strictly liable for the harm caused entirely by more dangerous products, the relevant social costs are not allocated to the appropriate enterprise. Users and consumers of the safe product under such a regime end up compensating (and thereby subsidizing) the users and consumers of the dangerous products, thereby generally discouraging use and consumption of relatively safe products and encouraging use and consumption of relatively dangerous ones. The end result is that extending failure-to-warn doctrine to effect the rescue of users and consumers of dangerous products will not promote efficiency, but rather the opposite.¹⁴⁷

This is a peculiar non-sequitur. Allocations increasing the risk of harm are not, for that reason alone, inefficient. Trains may damage corn fields, but an efficient liability rule might incentivize the farmer and the railroad to settle on more trains, depending on costs, marginal profits and other circumstances.¹⁴⁸ What counts, in the economic analysis initiated but left unfulfilled by Henderson, are comparative sums of societal gains and losses.¹⁴⁹

A threshold point is that harm is caused, however jointly, by the pump seller's failure to warn. Under Henderson's no-duty regime, not only the users and consumers, but also the co-defendant component part seller, end up compensating and thereby subsidizing the original product seller. The duty rule allocates the loss more efficiently across the range of wrongdoers, to those in the best positions to insure against the risk. On the other hand, declining to impose an inefficient rule—here the no-duty rule—does not create a subsidy. It has already been shown that, at least under the Calabresian approach, the seller's sharing superior knowledge with the component part supplier means that it should typically be efficient for it to bear joint responsibility for the allocated loss.¹⁵⁰

147. Henderson, *supra* note 1, at 616.

148. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 32-38 (1987); cf. Robert L. Birmingham, *Damage Measures and Economic Rationality: The Geometry of Contract Law*, 1969 DUKE L.J. 49, 69 (1969) (explaining, in contract context, that “[a]rguments of economic waste are largely spurious: The question is not whether unwanted work will be carried out, but how unexpected benefit will be distributed.”).

149. Richard W. Wright, *Justice and Reasonable Care in Negligence Law*, 47 AM. J. JURIS. 143, 144 (2002).

150. See *supra* notes 113-14 and accompanying text.

There is also another way to analyze the efficiency issue, which follows from the preceding discussion concerning the third corrective justice issue.¹⁵¹ When *R* declines to rescue, he is not better off in any nontrivial sense. In contrast, when the pump seller fails to warn, it gains thereby, in the ways just shown. Professor Henderson misses this point, critical in any efficiency analysis, and this significantly distinguishes the asbestos component part issue from the rescue paradigm.

The Kaldor-Hicks efficiency model, a forgiving variant of Pareto superiority, provides the currently preferred method for assessing allocative efficiency.¹⁵² A state S^{-W} should be deemed Kaldor-Hicks efficient in relation to another state S^W if in going from S^W to S^{-W} one party could compensate another such that no one would be worse off than in S^W and at least one party would be better off than in S^W .¹⁵³ In this case Kaldor-Hicks demonstrates the efficient distribution of loss represented by the duty rule, and inversely the inefficiency inhering in Henderson's no-duty rule.¹⁵⁴

For the purposes of our definition of the Kaldor-Hicks theorem, let " S^W " stand for the situation in which the pump seller issues safety warnings about the risk that will be posed by post-sale installation of asbestos-containing insulation. Let " S^{-W} " stand for the situation in which the seller fails to warn. So by virtue of the definition, the state in which the seller fails to warn is Kaldor-Hicks efficient in relation to the state in which the seller warns if, in going from the warning state to the no-warning state, the seller could compensate the victim such that no one would be worse off than in the warning state and at least one party would be better off than in the warning state.¹⁵⁵ We have shown that if the pump seller warns, purchasers will have a strong incentive to shop elsewhere. With a duty rule in place, the seller therefore chooses not to warn, and to be placed in the position of compensating the plaintiff in whole or in part (depending on local joint liability and contribution rules). The seller would be willing not to warn under the duty rule, even if it has to fully compensate the victim, only if this would make it better off than warning.

151. See *supra* notes 142-44 and accompanying text.

152. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 13 (7th ed. 2007); Richard A. Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. LEGAL STUD. 243, 244 (1980); see John R. Hicks, *The Foundations of Welfare Economics*, 49 ECON. J. 696, 700 (1939); Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549, 550 (1939); Wright, *supra* note 149, at 144. ("This aggregate-risk-utility test seems to be a transparent implementation of the basic principle of utilitarianism and the most popular (Kaldor-Hicks) principle of economic efficiency.")

153. See Kaldor, *supra* note 152, at 550.

154. See *id.*

155. See *id.*

In the efficiency analysis, the victim would not be worse off as a result of the seller's failure to warn, once he or she could be compensated and "made whole." It likely seems counterintuitive that an individual who has suffered the excruciating symptoms associated with mesothelioma or other asbestos-related disease would not be worse off once compensated, but the notion of being made whole by virtue of compensatory payments is the language of both law and economics.¹⁵⁶ On the other hand, under Henderson's no-duty rule, the plaintiff would be worse off for having fewer litigation options, and thereby higher transaction costs, even if the component part seller may remain jointly and severally responsible for the harm.¹⁵⁷ This is especially so in the event that the smaller component seller is judgment-proof or otherwise incapable of making the plaintiff whole.¹⁵⁸ Professor Henderson is therefore incorrect in claiming that policy considerations favor his no-duty rule. Principles of fairness and corrective justice, on the one hand, and allocative efficiency, on the other, counsel the liability of manufacturers who have turned ostrich in the face of compelling reasons to know that their products would be used with an ultrahazardous component part. The duty rule proposed here, though, is not withering for defendants, because it pertains to the seller who shared superior knowledge with the component part supplier, such that it would be fair and efficient for it to bear its portion of the allocated loss.

V. CONCLUSION

The seller's knowledge, conceded by Professor Henderson, that its product will be modified post-sale in ultrahazardous ways, its deliberate decision not to warn of the risk, and the benefit it receives from not warning, means that we are not dealing with a rescue situation. Henderson

156. See *Wright v. Willamette Indus.*, 91 F.3d 1105, 1108 (8th Cir. 1996) ("[T]he reason that we compensate people (that is, transfer money from defendants to plaintiffs) is because rights that are grounded in considerations of humanity have been violated. We believe that it is humane to monetize welfare losses associated with grief, pain and suffering, humiliation, mental anguish, and other intangible injuries so that we can make plaintiffs whole."); see also LANDES & POSNER, *supra* note 148, at 13 (noting that, under an efficiency analysis, when fully compensated for accidents, "victims are no worse off").

157. Cf. Ronald C. Griffin, *The Welfare Analytics of Transaction Costs, Externalities and Institutional Choice*, 73 AMER. J. AGRIC. ECON. 601, 601 (1991) (noting "that transaction costs are relevant in defining economic efficiency," and that information costs are therefore Pareto relevant).

158. See *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 275 n.2 (1979) ("[T]he common-law rule of joint and several liability . . . serves largely to protect plaintiffs from defendants who are unable to pay judgments entered against them.").

skews his argument by presupposing that we are, and by thereby ignoring marketplace realities pertinent to the industrial pump and to products generally upon which dangerous components will likely be installed. His best effort conjures a scenario in which the original product seller may foresee some remote possibility of post-sale danger, as when the swimsuit manufacturer may be aware that divers sometimes use shallow pools.¹⁵⁹ The analogy is a bit silly.

Henderson's no-duty rule is neither fair nor efficient, but will probably be indulged in some instances as a matter of political pressure and compromise despite its unfairness and inefficiencies. For coherence's sake, such a move may entice some courts to abandon foreseeability analysis in their products liability jurisprudence.¹⁶⁰ Even so, the no-duty rule gratuitously affords the seller a windfall when it fails to warn. Under the alternative fault-based duty rule proposed here, the defendant seller will be liable if it substantially failed to exercise sufficient care. This will lead to the allocatively efficient, and potentially Pareto superior, outcomes Henderson aspires after, and will be consistent with principles of corrective justice. The stigma of liability will in turn influence collective behavior in the seller's industry, such that the individual strategy of not warning will stop paying off.¹⁶¹

159. Henderson, *supra* note 1, at 596-97.

160. See *supra* notes 50-61 and accompanying text.

161. See John P. Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323, 323 (1973); Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 594 (1998) (“[T]hink of law as solving a problem of collective action. Specifically, imagine a system of social norms stuck in a first-order Nash equilibrium that is Pareto inferior. To move to a Pareto-superior equilibrium, a group of actors must coordinate their behavior and change strategies. In an effective democracy, citizens respect the law and feel obligated to obey it. Lawmaking is a collective decision that could induce the coordination required to change to a Pareto-superior equilibrium.”).