

An Informed-Choice Duty to Instruct - Liriano, Burke, and the Practical Limits of Subtle Jurisprudence

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NOTE

AN INFORMED-CHOICE DUTY TO INSTRUCT? *LIRIANO*, *BURKE*, AND THE PRACTICAL LIMITS OF SUBTLE JURISPRUDENCE

Robert G. Knaiert†

INTRODUCTION	815
I. <i>LIRIANO</i> V. <i>HOBART CORP.</i> : AN EXPANSION OF THE DUTY TO WARN?	817
A. A First Pass at Failure to Warn	817
1. <i>Basic Warnings Doctrine</i>	818
2. <i>Two Purposes Served by Failure to Warn</i>	819
3. <i>The Open and Obvious Danger Rule</i>	822
B. <i>Liriano</i> Facts and Holdings	824
C. Assessments of the Second Circuit's Application of the Duty to Warn	827
1. <i>Did Judge Calabresi Correctly Identify a Split in New York Authority over the Obviousness of the Danger?</i> ..	828
2. <i>Have the Critics Correctly Concluded that the Second Circuit Both Abrogated the Open and Obvious Danger Rule and Misapplied Informed Choice?</i>	830
II. <i>LIRIANO</i> REVISITED: THE DUTY TO WARN THROUGH THE LENS OF <i>BURKE</i> V. <i>SPARTANICS LTD.</i>	831
A. A Closer Look at Failure to Warn	832
1. <i>Two Duties Entailed by the Doctrine</i>	832
2. <i>A Logical Framework of Duty and Purpose</i>	835
B. <i>Burke</i> Facts and Holding	837
C. A Coherent Explanation of <i>Liriano III</i>	838
1. <i>A Duty to Instruct About Nonobvious Risk-Avoidance Measures</i>	838
2. <i>Informed Choice Applied to a Nonobvious Risk- Avoidance Measure</i>	840
III. <i>LIRIANO</i> RECONSIDERED: THE PRACTICAL LIMITS OF SUBTLE JURISPRUDENCE	841

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2003]	<i>AN INFORMED-CHOICE DUTY TO INSTRUCT?</i>	815
A.	What the New York Court of Appeals Did—and Did Not Do—in <i>Liriano II</i>	842
1.	<i>The Court Announced a Questionable but (Perhaps) Harmless Duty</i>	842
2.	<i>The Court Failed to Ensure Practical Limits on the Newly Announced Duty</i>	843
B.	How the Second Circuit Misapplied the Duty to Instruct in <i>Liriano III</i>	844
1.	<i>The Risk-Avoidance Measure Was Obvious</i>	845
2.	<i>Informed Choice Was Inappropriate</i>	846
3.	<i>The Court Improperly Avoided Causation Analysis</i>	848
C.	Why the Informed-Choice Duty to Instruct Has Unacceptable Practical Implications	850
1.	<i>Nearly Every (Well-Pleaded) Failure-to-Warn Claim Can Reach the Jury</i>	850
2.	<i>The Costs of Preventing Claims from Reaching the Jury Are Significant</i>	852
	CONCLUSION	854

INTRODUCTION

In *Liriano v. Hobart Corp.*,¹ the United States Court of Appeals for the Second Circuit announced and applied a legal duty that has stirred considerable controversy. This Note argues that while *Liriano III* gets high marks for theoretical subtlety, the lawlessness of its practical implications deserves scrutiny. Although Judge Calabresi's decision on first reading appears to violate traditional elements of the products liability doctrine of failure-to-warn, upon closer inspection it emerges as a subtle, sophisticated treatment of that doctrine. These subtleties carry positive weight. Nevertheless, *Liriano III*'s very sophistication effectively threatens to undermine reasonable, practical limitations on liability for failure-to-warn. On balance, the negatives of Judge Calabresi's decision outweigh the positives. Courts should thus be wary to build on the conceptual platform *Liriano III* appears to provide.

In arguing that the theoretical subtlety of *Liriano III* carries unacceptable practical consequences, I am not suggesting that doctrinal subtlety is necessarily problematic. Legal doctrine can be subtle in ways that serve useful ends. Indeed, the nuanced complexity of the law is often both a theoretical and practical virtue. Subtlety is a theoretical virtue insofar as it helps achieve a more complete and rational understanding of the law. Judges and legal scholars often explore the limits of legal theory, testing the logic and coherence of the law.

¹ 170 F.3d 264 (2d Cir. 1999) [hereinafter *Liriano III*].

Through law review articles, and even classroom hypotheticals, legal scholarship clarifies and occasionally adjusts the boundaries of various legal doctrines. Ideally, the result over time is an increasingly valid and sound, and typically more subtle and nuanced, set of legal theorems. Subtlety is a practical virtue insofar as it aids courts in adjudicating the astounding variety of real-world problems they face. Carefully crafted, widely applicable legal rules are needed for this task. The common law aims to produce a body of doctrine sensitive to the vagaries of life that classroom hypotheticals may imitate, but can never entirely capture. Of course, both theory and practice are important stimuli in the formulation of legal doctrine, and, as a result of their interplay, the law displays a sophisticated texture and functional subtlety that, we hope, serve the ultimate practical goal of facilitating the fair and efficient resolution of the real disputes of actual people.

Consonant with the notion that the ultimate purpose of a body of subtle jurisprudence is practical, practical considerations may limit just how subtle that law can and should be. Good judicial decision making is as important as good scholarship in the crafting of sensible legal rules. Intelligent, informed judges must appropriately apply complex legal doctrine. Moreover, unlike law professors, judges' decisions more directly impact the lives of those before them, as well as the lives of those who will become subject to precedent set. Thus, even theoretically sophisticated judges need to be somewhat circumspect in what they do and to whom they do it. Unfortunately, sophisticated judges sometimes inadequately temper exercises in theoretical sophistication with important practical considerations. The result can be a theoretical and practical mess. What can courts do to avoid the mess? An underlying theme of this Note is that judges should resist the urge to sacrifice common sense on the altar of theory. They can accomplish this feat by focusing on the following tasks: (1) hesitating to announce the existence of duties, even ones that pass threshold theoretical tests, when those duties make good sense only in carefully imagined hypotheticals; (2) taking care to assign such speculative duties to defendants on only clearly appropriate facts; and (3) taking seriously, once they have announced and assigned theoretically subtle duties, their ability to decide questions of proximate causation as a matter of law.

Liriano III marked the end of a series of litigation involving certified questions from the United States Court of Appeals for the Second Circuit to the New York Court of Appeals, the answers from the New York Court of Appeals, and the Second Circuit's decision. Both the New York court and the Second Circuit, each in its own way, violated one or more of the admonitions outlined above. Part I of this Note offers a preliminary discussion of failure-to-warn doctrine, outlines the

facts and holdings of the *Liriano* case law, and discusses some criticisms of that case. Part II first explains that the duty to warn is perhaps more subtle than it first appears. This Part then outlines a more recent Second Circuit decision, *Burke v. Spartanics Ltd.*,² that seems to be in tension with the federal court's holding in *Liriano III*. Finally, this Part argues that considerations of doctrinal subtlety demonstrate that Judge Calabresi's decision in *Liriano III* is theoretically coherent; it is consistent with *Burke*, and at least some of its critics have misunderstood its reasoning. Part III nevertheless maintains that *Liriano III*'s formal coherence in no way implies its practical acceptability. The New York Court of Appeals and the Second Circuit have created a lawless failure-to-warn jurisprudence through their joint efforts at announcing, assigning, and failing to place practical limits on a duty that is as subtle as any.

I

LIRIANO V. HOBART CORP.: AN EXPANSION OF THE DUTY TO WARN?

In 1999, the Second Circuit issued an opinion that seemed to defy traditional principles of failure-to-warn jurisprudence. Commentators argue that, in *Liriano III*,³ the Second Circuit deviated from traditional products liability principles in the following three ways: first, the court adopted the functional equivalent of a "heeding presumption," removing from the plaintiff the burden of proving causation; second, the court seemed to abrogate the traditional rule in failure-to-warn cases that manufacturers have no duty to warn of open-and-obvious dangers; and finally, the court bolstered its expansion of the duty to warn by misapplying the concept of "informed choice."⁴ This Note focuses primarily on the second and third of these criticisms. In order to begin evaluating *Liriano III*'s treatment of failure to warn, a preliminary sketch of the doctrine itself is necessary.

A. A First Pass at Failure to Warn

During the latter half of the twentieth century, three distinct bases of products liability emerged. Namely, courts have held that manufacturers and distributors are liable for harm proximately caused by products with manufacturing defects,⁵ defectively designed products,⁶

² 252 F.3d 131 (2d Cir. 2001).

³ 170 F.3d 264.

⁴ See generally Hildy Bowbeer & David S. Killoran, *Liriano v. Hobart Corp.: Obvious Dangers, the Duty to Warn of Safer Alternatives, and the Heeding Presumption*, 65 BROOK. L. REV. 717 (1999) (arguing that these doctrinal deviations unjustifiably expanded the scope of liability for failure to warn).

⁵ See, e.g., *Myrlak v. Port Auth. of N.Y. & N.J.*, 723 A.2d 45, 51-52 (N.J. 1999).

⁶ See, e.g., *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1962).

and products for which the manufacturer or distributor provided inadequate instructions or warnings.⁷ Courts and commentators commonly refer to the third basis of liability as the "failure-to-warn" doctrine.⁸

1. *Basic Warnings Doctrine*

Failure-to-warn is, broadly speaking, a doctrine under which product manufacturers and distributors have a duty to provide information to users and consumers about risks related to product use or consumption. If a product manufacturer or distributor fails to provide reasonable warnings or instructions that could reduce foreseeable risks related to the use or consumption of its product, courts will deem the product "defective" and hold the manufacturer or distributor liable for harm that the product causes.⁹ Failure-to-warn and defective design claims differ from claims of manufacturing defect in at least two ways. First, when a plaintiff claims that a product with a manufacturing defect caused her harm, she is claiming the product mechanically departed from the manufacturer's intended design, and that this departure proximately caused her harm.¹⁰ When a plaintiff claims that a product is defective due to a lack of adequate warnings or is defective in design, however, she is claiming that the product reached her with precisely the warnings and design that the manufacturer intended, but that the intended warnings and design are themselves defective.¹¹ That is, in failure to warn and design defect cases, the plaintiff is impugning the manufacturer's conscious choices.

Second, whereas manufacturers and distributors are strictly liable for harm caused by manufacturing defects, warning and design claims

⁷ See, e.g., *Liriano III*, 170 F.3d at 269-71.

⁸ See *id.* at 266; 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, 267 (1990).

⁹ See RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 (1998) [hereinafter RESTATEMENT]. According to the Restatement,

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product . . .

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

Id. § 2(c).

¹⁰ See RESTATEMENT § 2 cmt. c.

¹¹ See, e.g., *Urena v. Biro Mfg. Co.*, 114 F.3d 359, 363 (2d Cir. 1997) ("Design defects, . . . unlike manufacturing defects, involve products made in the precise manner intended by the manufacturer.").

are generally claims of negligence.¹² Some courts resist the notion that negligence doctrine plays a role in warning and design claims—taking quite seriously the notion that all three bases of products liability are “strict.”¹³ It should not be surprising, however, that negligence is at the root of warning and design claims. After all, true strict liability is a no-fault proposition, and a claim that an intended warning (or lack thereof) is inadequate, or that an intended design is unreasonably dangerous, necessarily implies that the manufacturer did something *wrong*.

2. *Two Purposes Served by Failure to Warn*

The duty to warn or instruct—the duty to provide information to users and consumers about the use or consumption of products—serves two purposes. First, warnings and instructions inform users and consumers how to reduce risks inherent in using or consuming a particular product.¹⁴ Commentators refer to this purpose as the “risk-reduction” function of warnings and instructions.¹⁵ Once an individual has decided to use or consume a product, risk-reduction information aids the individual in using or consuming the product more safely than she otherwise might.¹⁶

When a court evaluates whether to hold a defendant liable for failing to provide risk-reduction information, causation is a central issue. Indeed, if a plaintiff claims that the absence or inadequacy of a warning was the reason she suffered harm, and the court is primarily concerned with how the product manufacturer could have helped the plaintiff use the product more safely to avoid that harm, then the plaintiff must prove that an adequate warning would have, in fact, prevented the harm she suffered. Thus, as in negligence actions, the plaintiff must establish not only that the defendant owed and

¹² See RESTATEMENT § 2 cmt. a.

In general, the rationale for imposing strict liability on manufacturers for harm caused by manufacturing defects does not apply in the context of imposing liability for defective design and defects based on inadequate instruction or warning. . . . [Thus, the provisions for design and warning-based liability] speak of products being defective only when risks are reasonably foreseeable.

Id.

¹³ See, e.g., *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539, 549 (N.J. 1982) (holding that a jury may find a product manufacturer liable for failure to warn of risks *unknowable* at the time of distribution).

¹⁴ See, e.g., *Urena*, 114 F.3d at 365 (holding that the plaintiff had presented sufficient evidence to withstand summary judgment by showing that, had the manufacturer of a meat-saw provided warnings and instructions regarding the use of a “safety plate” to push meat across the blade, the plaintiff could have used the saw more safely).

¹⁵ See, e.g., *Henderson & Twerski*, *supra* note 8, at 285–89.

¹⁶ See *id.* at 285.

breached a duty to the plaintiff, but also that but for the defendant's breach, the plaintiff would not have suffered harm.¹⁷

Some courts have held that risk reduction is not the only function served by requiring a product manufacturer to warn and instruct users and consumers.¹⁸ Warnings and instructions not only inform consumers as to *how* to use or consume a product more safely, but also provide consumers with information from which to decide *whether* to use or consume the product at all.¹⁹ Although this second purpose also serves to reduce risk,²⁰ courts and commentators refer to it as the "informed-choice" function of warnings and instructions.²¹ The distinction between the risk-reduction and informed-choice functions has important practical implications. Informed-choice warnings may serve a purpose where product use entails "nonreducible" risks—risks for which a warning *could not* inform a user or consumer how to use or consume the product more safely.²² Thus, where a risk-reduction warning would do no good, a court still might hold a product manufacturer liable for failing to provide an informed-choice warning.

Although informed-choice warnings do serve to reduce risk, insofar as they convey information upon which a product user or consumer might decide not to use or consume a potentially dangerous product, courts applying informed-choice theory tend to do so not to reduce risk, but rather to protect the plaintiff's sense of personal dignity. Courts that impose informed-choice duties seem to focus less on what the presence of a warning would or would not have actually accomplished, and more on the idea that such a warning would simply have provided the plaintiff with a choice. In an early use of informed-

¹⁷ See, e.g., *Walsh v. Hayward Indus. Prods.*, No. 00-7985, 2001 WL 303754, at *1 (2d Cir. Mar. 28, 2001) (applying New York law and affirming summary judgment for defendant valve manufacturer because plaintiff "failed to produce evidence . . . that a warning would have prevented his injury").

¹⁸ See, e.g., *Davis v. Wyeth Labs., Inc.*, 399 F.2d 121, 129–31 (9th Cir. 1968) (holding that polio vaccine manufacturer could be liable for failing to inform users of a remote risk that the users could do nothing to reduce).

¹⁹ See, e.g., Aaron D. Twerski et al., *The Use and Abuse of Warnings in Products Liability—Design Defect Liability Comes of Age*, 61 CORNELL L. REV. 495, 513–14 (1976) ("Some warnings are merely informative in nature. They do not permit the consumer to reduce his exposure to risk if he uses the product; they merely tell him that a risk inheres in the product and that he has the option to take it or leave it.").

²⁰ A product user who decides not to use a given product necessarily eliminates the chances of incurring risks inherent in that product's use.

²¹ See, e.g., *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1089 (5th Cir. 1973); *Wyeth Labs., Inc.*, 399 F.2d at 129–30; JAMES A. HENDERSON, JR. & AARON D. TWERSKI, *PRODUCTS LIABILITY: PROBLEMS AND PROCESS* 337 (4th ed. 2000) ("Instructions and warnings serve two functions: They reduce risks of harm, and they enable users and consumers to make informed decisions regarding whether to encounter risks that cannot be eliminated by careful use and consumption."); Henderson & Twerski, *supra* note 8, at 285; Twerski et al., *supra* note 19, at 517–21.

²² See Henderson & Twerski, *supra* note 8, at 285 n.88.

choice theory, for example, the court in *Borel v. Fibreboard Paper Products Corp.* explained that

the user or consumer is entitled to make his own choice as to whether the product's utility or benefits justify exposing himself to the risk of harm. Thus, a true choice situation arises, and a duty to warn attaches, whenever a reasonable man would want to be informed of the risk in order to decide whether to expose himself to it.²³

Given this choice, the plaintiff may or may not heed the warning; whether she would is less important than whether she is given the opportunity to choose.

With the driving concern behind imposing a duty to provide informed-choice warnings or instructions being not to ensure that potential product users will necessarily heed that information, but rather to treat such potential users with dignity, courts can perhaps worry less about the issue of causation. Professors Henderson and Twerski have suggested as much, noting that so-called "heeding presumptions"—whereby courts shift the burden of proving causation from the plaintiff to the defendant—might well be more justified in informed-choice cases than in risk-reduction cases.²⁴ Indeed, courts that entertain informed-choice theory do seem to view foreseeability and causation as less important than do courts concerned with the more traditional function of risk-reduction.

In *Davis v. Wyeth Laboratories, Inc.*, the plaintiff argued that the manufacturer of a polio vaccine used in mass-immunization clinics should have provided a warning regarding a risk that, according to experts, would only affect one in every one million patients receiving the drug.²⁵ The court of appeals reversed the trial court's judgment for the defendant, holding that the issue of "voluntary and informed choice" was paramount, so much so that a "purely statistical point of view," one by which it might seem useless to warn of a one-in-a-million risk, was inappropriate.²⁶ It seems highly unlikely that a consumer warned of such a risk would forgo the benefits of a polio vaccine. But,

²³ 493 F.2d at 1089.

²⁴ Henderson & Twerski, *supra* note 8, at 288. Henderson and Twerski note: In informed-consent cases, where the function of a particular warning would have been to empower the plaintiff by allowing him to decide whether he wished to expose himself to the risk at all, second-guessing the decision the plaintiff would have made had he received the warning defeats the objective sought to be achieved: to transfer the decision from the defendant to the plaintiff. In these cases, therefore, the presumption for the plaintiff is justified. By contrast, when the role of the warning is the more traditional one of risk reduction, the plaintiff's burden arguably should be higher.

Id. (citation omitted).

²⁵ 399 F.2d at 124, 127.

²⁶ *Id.* at 129.

given the court's concern for the dignity of potential users, whether the plaintiff would have heeded such a warning is secondary to ensuring that the plaintiff had a true choice.

3. *The Open and Obvious Danger Rule*

In addition to working through the semantics of "strict liability" and distinguishing the different purposes that failure-to-warn liability might serve, courts have recognized at least one clear limitation on the duty to provide product users and consumers with information. Courts and commentators overwhelmingly agree that there is no duty to instruct or warn consumers about obvious²⁷ or generally-

²⁷ See, e.g., *Plante v. Hobart Corp.*, 771 F.2d 617, 620–21 (1st Cir. 1985) (applying Maine law and holding that the danger of placing one's hands into the blades of a potato chopper is obvious as a matter of law); *Jamieson v. Woodward & Lothrop*, 247 F.2d 23, 28 (D.C. Cir. 1957) ("[T]he only danger being not latent but obvious to any possible user, if the article does not break or go awry, but injury occurs through a mishap in normal use, the article reacting in its normal and foreseeable manner, the manufacturer is not liable for negligence."); *Davis v. Komatsu Am. Indus.*, 46 F. Supp. 2d 745, 753–54 (W.D. Tenn. 1999) ("[A] product 'is not unreasonably dangerous because of [a] failure to warn of a danger that is apparent to the ordinary user.'"), *rev'd in part by*, 2001 WL 1042229 (6th Cir. Aug. 29, 2001) (citing TENN. CODE ANN. § 29-28-105(d) (2000)); *Glittenberg v. Doughboy Recreational Indus.*, 491 N.W.2d 208, 213, 214 n.15 (Mich. 1992) (holding that "[a] manufacturer has no duty to warn if it reasonably perceives that the potentially dangerous condition of the product is readily apparent or may be disclosed by a mere casual inspection," and citing nineteen American jurisdictions that observe the open and obvious danger rule); *Liriano v. Hobart Corp.*, 700 N.E.2d 303, 308 (N.Y. 1998) [hereinafter *Liriano II*] ("[A] limited class of hazards need not be warned of as a matter of law because they are patently dangerous or pose open and obvious risks."); *McMurry v. Inmont Corp.*, 694 N.Y.S.2d 157, 158–59 (N.Y. App. Div. 1999) (holding as obvious the danger of placing one's hand into contact with the rollers of an industrial fabric machine); *Barnes v. Pine Tree Mach.*, 691 N.Y.S.2d 398, 399 (N.Y. App. Div. 1999) (stating that the danger of operating a wire-stripping machine with the safety guards removed was obvious); RESTATEMENT, *supra* note 9, § 2 cmt. j ("In general, a product seller is not subject to liability for failing to warn or instruct regarding risks and risk-avoidance measures that should be obvious to, or generally known by, foreseeable product users."); MODEL UNIFORM PRODUCT LIABILITY ACT, 44 Fed. Reg. 62,714, 62,725 (1979) ("[A] manufacturer should be able to assume that the product user is familiar with obvious hazards . . ."); Hildy Bowbeer et al., *Warning! Failure to Read This Article May Be Hazardous to Your Failure to Warn Defense*, 27 WM. MITCHELL L. REV. 439, 447–49 (2000); Bowbeer & Killoran, *supra* note 4, at 726–27 nn.53–54, 726–30 (surveying jurisdictions and discussing the rule); Henderson & Twerski, *supra* note 8, at 280 ("The general rule in American products law is that defendants owe no duty to warn of risks that are obvious to normal, reasonable users and consumers."); Kevin Reynolds & Richard J. Kirschman, *The Ten Myths of Product Liability*, 27 WM. MITCHELL L. REV. 551, 575 (2000) ("[T]here is no legal duty to remind a plaintiff of that which is already known or of dangers that are open and obvious."); James B. Sales, *The Duty to Warn and Instruct for Safe Use in Strict Tort Liability*, 13 ST. MARY'S L.J. 521, 547 (1982) ("[W]here the risk of harm or danger posed by a product is neither hidden or latent, the absence of a warning will not render the product defective."). See generally AMERICAN LAW OF PRODUCTS LIABILITY § 32:63 (3d ed. 1993) (citing 37 American jurisdictions that follow the rule); Allan E. Korpella, Annotation, *Failure to Warn as Basis of Liability Under Doctrine of Strict Liability in Tort*, 53 A.L.R.3d 239, 257 §7 (1973) (outlining the strong weight of authority in support of the rule).

known²⁸ dangers. Although manufacturers may owe duties to design against obvious risks,²⁹ they owe no duty to warn against such risks. The obviousness of a danger is itself an adequate warning.

Courts determine whether a given danger is obvious on objective grounds; an obvious danger is one that a reasonable person would recognize as such,³⁰ although the expertise of the user or consumer can affect a court's decision whether to impose liability for failing to warn.³¹ Of course, "[w]hen reasonable persons can differ as to the obviousness of the danger," the question is for the jury.³² The obvious corollary to this last point is that reasonable persons *cannot* differ as to the obviousness of some dangers. It is these dangers that a court may hold obvious as a matter of law, thus extinguishing a plaintiff's claim that a defendant owed her a duty to warn.³³

The scope and rationale of the open and obvious danger rule are fairly straightforward. The rule applies to every failure-to-warn claim, whether brought in the name of risk reduction or informed choice.³⁴ Risk-reduction would not be served by requiring manufacturers to

²⁸ See, e.g., *Rosebrock v. Gen. Elec. Co.*, 140 N.E. 571, 574 (N.Y. 1923) (holding, per Judge Crane, that "I take it that an instrument which may be dangerous and is generally known [to members of the plaintiff's profession] as a danger need not be warned against by a seller."); *Joseph E. Seagram & Sons v. McGuire*, 814 S.W.2d 385, 388 (Tex. 1991) ("[T]he danger of developing the disease of alcoholism from prolonged and excessive consumption of alcoholic beverages is . . . within the ordinary knowledge common to the community."); *Bowbeer et al.*, *supra* note 27, at 445 ("[M]anufacturers and sellers need not provide a warning when the danger or potentiality of danger is generally known and recognized."); *Sales*, *supra* note 27, at 577-79.

²⁹ Thus, that a danger is obvious may relieve a manufacturer of a duty to warn, but it will not bar a claim that the product is defective in design. See, e.g., *Micallef v. Miehle Co.*, 348 N.E.2d 571, 577 (N.Y. 1976), *overruling* *Campo v. Scofield*, 95 N.E.2d 802, 806 (N.Y. 1950) (applying the patent-danger rule to bar a defective-design claim).

³⁰ See, e.g., AMERICAN LAW OF PRODUCTS LIABILITY §32:66 (3d ed. 1993).

³¹ See *Sales*, *supra* note 27, at 579-82. Of course, a clear-thinking court will realize that an expertise-based limitation on liability is one grounded in *causation* analysis. The open and obvious danger rule is a *no duty* rule. Although manufacturers have no duty to warn any class of users about open and obvious dangers, they do have a duty to warn every class of users about nonobvious dangers. That a particular class of users has the expertise to know of such a nonobvious danger will not relieve the manufacturer of its duty, but it may prevent a breach of that duty from being a legal cause of injury.

³² See RESTATEMENT, *supra* note 9, § 2 cmt. j; HENDERSON & TWERSKI, *supra* note 21, at 344.

³³ See, e.g., *Chaney v. Hobart Int'l, Inc.*, 54 F. Supp. 2d 677, 681 (E.D. La. 1999) (citing LA. REV. STAT. § 9:2800.57(B) (West 1997)) (holding the danger posed by an unguarded commercial meat grinder obvious as a matter of law). That obviousness can abrogate *duty* raises an important procedural point. Commentators occasionally confuse the role of obviousness, seeing it not as part of a plaintiff's *prima facie* case (to show non-obviousness), but rather as an affirmative defense. See, e.g., Douglas R. Richmond, *Expanding Products Liability: Manufacturers' Post-Sale Duties to Warn, Retrofit and Recall*, 36 IDAHO L. REV. 7, 18 n.73 (1999) ("Manufacturers and distributors have a number of affirmative defenses at their disposal. For example, in many jurisdictions they need not warn of open or obvious dangers, or dangers that are commonly known.")

³⁴ In explaining informed-choice, the Restatement notes the following:

warn of open and obvious risks. Attaching a warning about a patent risk would be useless.³⁵ As the New York Court of Appeals explained, "when a warning would have added nothing to the user's appreciation of the danger, no duty to warn exists as no benefit would be gained by requiring a warning."³⁶ Indeed, if a product user already has available sufficient indicia of the danger, then a warning of that danger is simply redundant.

Similarly, in informed-choice cases, the goal of facilitating "true choice" would not be served by requiring manufacturers to warn of open and obvious risks. The obviousness of a risk, even a nonreducible risk, ought to present the user or consumer with sufficient information to make a fully informed choice whether to use or consume a product. Courts agree. For example, in a leading informed-choice decision, a court affirmed a jury verdict for the plaintiff against an asbestos manufacturer, noting that "we cannot say that, as a matter of law, the danger was sufficiently obvious to asbestos insulation workers to relieve the defendants of the duty to warn."³⁷ Thus, when a danger is sufficiently obvious, failure-to-warn liability remains sensibly limited. Still, courts occasionally test the limits of common sense.

B. *Liriano* Facts and Holdings

In September 1993, seventeen-year-old Luis Liriano lost his right hand and lower forearm while operating a commercial meat grinder at work.³⁸ Liriano had some experience operating a commercial meat grinder,³⁹ and Super Associated grocery store ("Super") had em-

In addition to alerting users and consumers to the existence and nature of product risks so that they can, by appropriate conduct during use or consumption, reduce the risk of harm, warnings also may be needed to inform users and consumers of *nonobvious and not generally known* risks that unavoidably inhere in using or consuming the product. Such warnings allow the user or consumer to avoid the risk warned against by making an informed decision not to purchase or use the product at all and hence not to encounter the risk. In this context, warnings must be provided for inherent risks that reasonably foreseeable product users and consumers would reasonably deem material or significant in deciding whether to use or consume the product.

RESTATEMENT § 2 cmt. i (emphasis added).

³⁵ See AMERICAN LAW OF PRODUCTS LIABILITY § 32:63 (3d ed. 1993) (noting that an obvious danger carries its own warning); Henderson & Twerski, *supra* note 8, at 282 ("[N]othing is to be gained by adding a warning of the danger already telegraphed by the product itself.").

³⁶ *Liriano II*, 700 N.E.2d 303, 308 (N.Y. 1998); see also Sales, *supra* note 27, at 575-77 (discussing the open and obvious danger rule and arguing that "[i]t would be redundant to warn an ultimate user of a hazard that is clearly obvious and known").

³⁷ *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1093 (5th Cir. 1973).

³⁸ *Liriano v. Hobart Corp.*, 132 F.3d 124, 125 (2d Cir. 1998) [hereinafter *Liriano I*].

³⁹ See Bowbeer & Killoran, *supra* note 4, at 719 (citing Brief for Appellee at 10, *Liriano III*, 170 F.3d 264 (2d Cir. 1999) (Nos. 96-9641(L), 97-7449)).

ployed him to operate one in its meat department.⁴⁰ Hobart Corporation ("Hobart") manufactured and sold the grinder in 1961, and had equipped it with a safety guard to prevent operators' hands from contacting the grinding "worm."⁴¹ Hobart affixed the guard in such a way that it could be removed only by "forcibly destroying the rivets" that held it in place.⁴² Hobart had also affixed a warning to keep one's fingers clear of the mouth of the grinder and to use a "stomper" to push meat into the machine.⁴³ However, neither the guard⁴⁴ nor the warning⁴⁵ was on the grinder at the time of Liriano's accident. In fact, the guard had been removed just weeks before the accident,⁴⁶ while it was in Super's possession.⁴⁷ While Liriano was feeding meat into the grinder with his hands, his right hand got caught in the grinding worm.⁴⁸

Liriano brought suit in New York state court against Hobart, claiming, among other things, defective design and failure to warn.⁴⁹ Hobart removed the case to federal court and impleaded Super as a third-party defendant.⁵⁰ At trial, the court dismissed Liriano's design claim, but allowed his failure-to-warn claim to reach the jury.⁵¹ Initially, the jury returned a verdict for Liriano, apportioning five percent of liability to Hobart and ninety-five percent to Super, but on partial retrial, assigned one-third liability to plaintiff Liriano.⁵² Both Hobart and Super appealed, arguing that the trial court should have

⁴⁰ *Liriano I*, 132 F.3d at 125.

⁴¹ *Id.*

⁴² Bowbeer & Killoran, *supra* note 4, at 719 n.13 (citing Brief for Defendant Hobart Corp. at 4, *Liriano II*, 700 N.E.2d 303 (N.Y. 1998)). In 1962, after learning that some users were removing the safety guards, Hobart began placing warnings regarding the dangers of removing the guard on grinders that it subsequently manufactured and sold. *Liriano I*, 132 F.3d at 125.

⁴³ Bowbeer & Killoran, *supra* note 4, at 718 n.9 (citing Brief for Plaintiff-Appellee at 12, *Liriano II*).

⁴⁴ *Liriano I*, 132 F.3d at 125.

⁴⁵ See Bowbeer & Killoran, *supra* note 4, at 718.

⁴⁶ See *id.* at 719 n.4 (citing Brief for Defendant Hobart Corp. at 4, *Liriano II*).

⁴⁷ *Liriano I*, 132 F.3d at 125.

⁴⁸ *Id.*

⁴⁹ *Id.* Strictly speaking, Liriano asserted a "post-sale failure to warn" claim, as he argued that Hobart should have arranged to place a warning on grinders it had already sold. See RESTATEMENT § 10. Although the *Restatement* outlines elements specific to such claims, such as the requirement that the defendant be on notice of the danger its product poses, these elements are elaborations on the basic doctrine. See *id.* § 10(b)(1)-(4). Post-sale failure-to-warn claims, like all failure-to-warn claims, are subject to the requirements that the subject of the warning be non-obvious and the lack of a warning proximately caused the plaintiff's harm. This Note argues that Liriano's claim is problematic in regard to these basic requirements. Therefore, for the purposes of this Note, I will treat Liriano's claim as a standard failure-to-warn claim.

⁵⁰ *Liriano I*, 132 F.3d at 125.

⁵¹ See *id.*

⁵² *Id.* at 125-26.

granted summary judgment for the defendants. Specifically, Hobart argued it had no duty to warn under the facts of the case.⁵³

On Hobart's appeal, the Second Circuit certified two questions to the New York Court of Appeals. First, the court asked whether "manufacturer liability [can] exist under a failure to warn theory in cases in which the substantial modification defense would preclude liability under a design defect theory."⁵⁴ The question arose because the trial court had predicated its dismissal of Liriano's design-defect claim on the rule, announced in *Robinson v. Reed-Prentice Division of Package Machinery Co.*,⁵⁵ that a manufacturer is not liable for harm caused by its product in circumstances in which substantial modification by a third-party is the cause of the product's dangerous condition.⁵⁶ Thus, the Second Circuit's first question was whether failure-to-warn claims are exempt from *Robinson*. The second question certified to the New York court was whether, if *Robinson* does not apply to failure-to-warn cases, "manufacturer liability [is] barred as a matter of law on the facts of this case."⁵⁷ Here, the Second Circuit was asking whether a New York court would have held that Hobart had no duty to warn.

The New York Court of Appeals answered the first certified question in the affirmative—failure-to-warn claims are exempt from *Robinson*, and thus a manufacturer *may* be liable for failing to warn even when a third-party has substantially modified the product that caused harm.⁵⁸ The court also noted that although it might very well be "impossible" for a manufacturer to take into account all potential post-sale modifications when designing a product, "it is neither infeasible nor onerous, in some cases, to warn of the dangers of foreseeable modifications that pose the risk of injury."⁵⁹ In so ruling, the court set a more permissive standard for warning claims than for design claims. Thus, although a court may still decide that substantial modification of a product obviates the manufacturer's duty to warn, the court may rightly decide, "in some cases," that such modification does not obviate that duty. After announcing that a manufacturer may have a duty

⁵³ *See id.*

⁵⁴ *Id.* at 132.

⁵⁵ 403 N.E.2d 440, 444 (N.Y. 1980).

⁵⁶ *Robinson* is, however, tempered by the rule that such manufacturers may still be held liable if the product modifications are highly foreseeable, such as when the manufacturer designs a product so that it can easily be used without a given safety feature, and harm results from such use. *See Lopez v. Precision Papers, Inc.*, 492 N.E.2d 1214, 1215 (N.Y. 1986).

⁵⁷ *Liriano I*, 132 F.3d at 132.

⁵⁸ *Liriano II*, 700 N.E.2d 303, 306 (N.Y. 1998).

⁵⁹ *Id.* at 307. The court relied on the notion that manufacturers' decisions regarding warnings involve fewer "interdependent factors" than their decisions regarding design. *See id.* For an interesting discussion of the (perhaps judicially intractable) interdependence of design factors, see James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973).

to warn even if a third party has substantially modified the product in question, the New York court turned to the second certified question—and declined to answer it.⁶⁰ Rather than deciding whether this case was one of “those cases” in which the duty to warn survives a substantial modification of the product, the court placed the decision back in the hands of the Second Circuit.⁶¹

With the New York Court of Appeals having announced the possibility of a substantial-modification duty to warn and then declining to put that duty in context, the Second Circuit had the opportunity to decide whether to apply it to Hobart. Judge Guido Calabresi, writing for the court, held that Hobart did indeed have a duty to warn.⁶² The court affirmed Liriano’s jury verdict over Hobart’s arguments that the risk involved was obvious as a matter of law and that Liriano presented insufficient evidence that the lack of a warning proximately caused his injuries.⁶³ Judge Calabresi’s treatment of the issue of obviousness, and the resultant imposition of a duty to warn—on the manufacturer of a commercial meat grinder—merits close scrutiny.

C. Assessments of the Second Circuit’s Application of the Duty to Warn

Despite the rule that manufacturers have no duty to warn of obvious dangers,⁶⁴ the court in *Liriano III* affirmed the plaintiff’s jury verdict without determining whether the danger in the case was obvious. After taking the opportunity to suggest rhetorically that the twentieth century saw both the contraction of judicial power to impose (or withhold) liability as a matter of law and the complementary expansion of deference to juries, Judge Calabresi addressed the case at hand.⁶⁵ He first asserted that whether New York courts would hold the danger of meat grinders obvious as a matter of law “is anything but obvious,”⁶⁶ and ultimately concluded, over the defendant’s objection that it had no duty to warn of the obvious danger posed by meat grinders, that “the duty to warn is not necessarily obviated merely because a danger is clear.”⁶⁷ To justify this apparent abrogation of the open and obvious danger rule, Judge Calabresi explained that the “functions of warnings” are more complex than one might have thought.⁶⁸

⁶⁰ *Liriano II*, 700 N.E.2d at 304.

⁶¹ *See id.*

⁶² *See Liriano III*, 170 F.3d 264, 271 (2d Cir. 1999).

⁶³ *See id.* at 271–72.

⁶⁴ *See sources cited supra* note 27.

⁶⁵ *See Liriano III*, 170 F.3d at 267–68.

⁶⁶ *Id.* at 269.

⁶⁷ *Id.* at 270.

⁶⁸ *See id.*

1. *Did Judge Calabresi Correctly Identify a Split in New York Authority over the Obviousness of the Danger?*

Given that Judge Calabresi ultimately concluded that whether a risk is obvious is not determinative of a manufacturer's duty to warn, his discussion of whether New York courts would find the danger of commercial meat grinders obvious is merely dicta. However, the discussion is worth pausing over, as it illustrates the intellectual strategy of the decision as a whole. Judge Calabresi relegates the entire argument to a footnote, in which he offers evidence of a split in New York authority regarding the danger of meat grinders.⁶⁹ To show that "no clear doctrine emerges" from the New York cases dealing with the dangerousness of meat grinders, Calabresi juxtaposes two cases.⁷⁰ In one case, the Second Department of the New York Appellate Division asserted that "[t]he hazards of inserting one's hand into an open meat grinder while the machine is operating are patent."⁷¹ After noting that this assertion is "suggestive," but not dispositive, Calabresi outlines a case that he claims "cuts the opposite way."⁷²

Calabresi argues that *Garcia v. Biro Manufacturing Co.*⁷³ "can be read to imply that the danger of operating meat grinders without safety guards is not obvious as a matter of law."⁷⁴ In *Garcia*, the Court of Appeals denied the defendant-manufacturer's motion for summary judgment, and allowed the plaintiff's claim for defective design to reach the jury.⁷⁵ According to Calabresi,

[i]t follows, one might argue, that under New York law a manufacturer could be held strictly liable for injuries caused by guardless meat grinders and hence that the lack of a safety guard is a design defect under New York law. Under the consumer expectation test, an *obvious* danger does not make a product defective, because no implied warranty is breached. One could therefore conclude that the danger posed by meat grinders lacking safety guards is not deemed obvious as a matter of law in New York.⁷⁶

If the reasoning entailed by the above passage seems unclear, that is because it *is* unclear. To better understand what Calabresi is suggesting, one needs to reconstruct the argument, including the missing premises. What Calabresi seems to be suggesting is an argument along the following lines:

⁶⁹ See *id.* at 269–70 n.4.

⁷⁰ See *id.*

⁷¹ See *id.* (quoting *Hernandez v. Biro Mfg. Co.*, 674 N.Y.S.2d 72, 74 (N.Y. App. Div. 1998) (dicta)).

⁷² *Liriano III*, 170 F.3d at 269 n.4.

⁷³ 469 N.E.2d 834 (N.Y. 1984).

⁷⁴ *Liriano III*, 170 F.3d at 269 n.4.

⁷⁵ See *id.*

⁷⁶ *Id.* (citations omitted).

- 1) The consumer-expectations test is the standard for design defect in New York; assuming a product has caused harm, its design is defective in New York if and only if an average consumer would not expect to be harmed by the product as designed.
- 2) It follows from (1) that if an average consumer would expect to be harmed by a product, then New York courts would not deem that product defectively designed.
- 3) Average consumers would expect to be harmed by a product that poses open and obvious dangers.
- 4) Thus, by (2) and (3), if a product poses an open and obvious danger, then New York courts would not deem that product defectively designed.
- 5) It follows from (4) that if New York courts would deem a product defectively designed, then that product does not pose an open and obvious danger.
- 6) In *Garcia*, the New York court, in denying the defendant's motion for summary judgment, announced that it might deem guardless meat grinders defectively designed.
- 7) Thus, by (5) and (6), because the New York court would (possibly) deem guardless meat grinders defectively designed, guardless meat grinders do not pose an open and obvious danger.

Despite Judge Newman's reminder that "the life of the law is not logic but experience,"⁷⁷ the logic of an argument is like the grammar of a sentence; when one is imprecise with it, meaning is at best unfortunately unclear—and at worst intentionally obscured.

Calabresi's argument is valid,⁷⁸ but not sound.⁷⁹ There are at least two substantive problems with it. First, the consumer expectations test is arguably not the standard for defective design in New York. New York courts apply a risk-utility balancing test for design-defect cases.⁸⁰ Therefore, neither premise (1) nor its implication, premise (2), is true. Consequently, subconclusion (4) does not follow. The second substantive problem with the argument is that not only does (4) not follow from its premises, but it is also false. One can plainly see the problem with (4) by noticing that it is a bald statement

⁷⁷ *Id.* at 275 (Newman, J. concurring) (citing OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1891)).

⁷⁸ By standard philosophical formulation, "[a]n argument is *deductively valid* if and only if it is not possible for the premises to be true and the conclusion false." MERRIE BERGMANN ET AL., *THE LOGIC BOOK* 11 (3d ed. 1998). In other words, in a valid argument, if the premises are true, then the conclusion must be true; validity is a formal test of whether an argument is properly structured.

⁷⁹ "An argument is *deductively sound* if and only if it is deductively valid and all its premises are true." *Id.* at 12. A sound argument, then, necessarily produces a true conclusion; soundness is a substantive test.

⁸⁰ See, e.g., *Scarangella v. Thomas Built Buses, Inc.*, 717 N.E.2d 679, 681–82 (N.Y. 1999) (applying "factors to be considered in balancing the risks created by the product's design against its utility and cost" (citing *Voss v. Black & Decker Mfg. Co.*, 450 N.E.2d 204 (N.Y. 1983))).

of the now defunct patent-danger rule in design-defect cases.⁸¹ If (4) is false, its contrapositive, premise (5), is also false. If (5) is false, then conclusion (7) does not follow.

Of course, that (7) does not logically follow from *this* argument does not mean that (7) is false. There might be an argument from which one can properly derive (7). But, when an intellectually sophisticated judge, sitting on a prestigious court, summons a patently unsound argument in support of a claim, and buries that argument in a footnote, one begins to wonder whether the claim is true, and whether the judge harbors some reservations about its soundness. Would a New York court have deemed the danger of operating a guardless meat grinder obvious as a matter of law? Unfortunately, the Court of Appeals declined to answer that question, and the Second Circuit avoided it, preferring to wave its hands at the most salient issue in the case.

2. *Have the Critics Correctly Concluded that the Second Circuit Both Abrogated the Open and Obvious Danger Rule and Misapplied Informed Choice?*

After arguing that it is unclear whether New York courts would hold the danger of operating a guardless meat grinder obvious as a matter of law, the Second Circuit entertained a counterfactual, holding that “even if the danger of using a grinder were itself deemed obvious,” Hobart still may have a duty to warn.⁸² Hildy Bowbeer and David Killoran argue that in doing so, the court abrogated the open and obvious danger rule. They note that in “[s]tepping around the issue of whether the dangers associated with meat grinders are obvious as a matter of law in New York, the court held that a jury could impose on product manufacturers a duty to warn of obvious risks.”⁸³ Bowbeer and Killoran’s argument is persuasive. The open and obvious danger rule states that product manufacturers have no duty to warn of risks that would be obvious to a reasonable person.⁸⁴ In other words, the duty to warn is obviated if a danger is clear. The Second Circuit, however, baldly asserted that “the duty to warn is not necessarily obviated merely because a danger is clear.”⁸⁵ The conclusion that the court abrogated the rule is thus difficult to avoid. Part II of this Note focuses on whether that conclusion is warranted.

In another seemingly problematic turn, in holding that Hobart had a duty to warn of the dangers of operating a guardless meat

⁸¹ See *supra* note 29 and accompanying text.

⁸² See *Liriano III*, 170 F.3d at 271.

⁸³ Bowbeer & Killoran, *supra* note 4, at 722.

⁸⁴ See *supra* notes 27–30 and accompanying text.

⁸⁵ *Liriano III*, 170 F.3d at 270.

grinder, the Second Circuit relied on the theory of "informed choice." The court argued that "a warning can do more than exhort its audience to be careful. It can also affect what activities the people warned choose to engage in."⁸⁶ Bowbeer and Killoran argue that the court got it wrong again; the authors explain that "the scenario in the *Liriano* case has none of the characteristics of the settings in which courts have found 'informed choice' warnings appropriate. The case involves methods of keeping employees' hands out of operating meat grinders. The risk was neither latent nor unavoidable."⁸⁷ Again, Bowbeer and Killoran are persuasive. Regardless of which function a warning might serve, that warning is not legally required if it conveys otherwise obvious information. If the court is attempting to suggest that characterizing the function of a warning differently can somehow allow one to ignore the fact that the subject matter of the warning is obvious, then the court has simply misunderstood the functions of warnings, as well as their relationship to the open and obvious danger rule.

II

LIRIANO REVISITED: THE DUTY TO WARN THROUGH THE LENS OF *BURKE V. SPARTANICS LTD.*

The Second Circuit revisited the duty-to-warn doctrine in *Burke v. Spartanics Ltd.*,⁸⁸ the facts of which are quite similar to *Liriano III*. In fact, the plaintiff in *Burke* explicitly relied on *Liriano III* in making his arguments; thus, the court had the opportunity to address directly that decision's troublesome implications.⁸⁹ Did the *Liriano III* court actually abrogate a central, uncontroversial element of the duty to warn, and then mistakenly apply a novel theory of purpose to a conjured duty? The claim that *Liriano III* expanded the duty to warn to include a duty to warn even of patent dangers is striking. But Judge Calabresi, writing for the court in *Burke*, argues that this claim is false. According to *Burke*, the *Liriano III* holding is consistent with the rule that a manufacturer has no duty to warn of an open and obvious danger. Calabresi is correct. *Liriano III* did not *formally* expand failure to warn to include a duty to warn of obvious dangers. With the help of a closer look at failure to warn, *Liriano III* emerges as a coherent exercise in theoretical subtlety.

⁸⁶ *Id.* (citing Henderson & Twerski, *supra* note 8, at 285).

⁸⁷ Bowbeer & Killoran, *supra* note 4, at 749.

⁸⁸ 252 F.3d 131 (2d Cir. 2001).

⁸⁹ *See id.* at 137-41.

A. A Closer Look at Failure to Warn

When *Liriano III* is compared with the standard for failure to warn,⁹⁰ the decision does seem to have straightforwardly violated at least two of the elements of that doctrine. *Liriano III* seems to have both expanded the duty to warn by abrogating the open and obvious danger rule and misconstrued the purpose of failure to warn by incorrectly applying an informed-choice rationale to that expanded duty.⁹¹ However, properly evaluating the truth of these claims requires a closer inspection of the duty involved. Upon that inspection, a more complex failure-to-warn theory emerges; failure to warn entails two different but related duties, each of which might serve one of the two possible purposes of providing information to product users and consumers. As such, four logical combinations of duty and purpose might exist in any given case.

1. *Two Duties Entailed by the Doctrine*

The notion that there is a single, unified duty to warn, or that “failure to warn” is a univocal legal doctrine, is an oversimplification. In fact, failure to warn involves two different but related duties—the duty to warn and the duty to instruct.⁹² Professors Henderson and Twerski offer the following explanation and example of the two duties:

⁹⁰ See *supra* Part I.A.
⁹¹ See *supra* Part I.C.2.
⁹² See *White v. ABCO Eng'g Corp.*, 221 F.3d 293, 306 (2d Cir. 2000) (applying New Jersey law for the proposition that

[I]n any product liability action the manufacturer or seller shall not be liable for harm caused by a failure to warn if the product contains an adequate warning or instruction An adequate product warning or instruction is one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and that communicates adequate information on the dangers *and* safe use of the product

(quoting N.J. STAT. ANN. § 2A:58C-4 (West 2000)) (emphasis added); *Wagner v. Clark Equip. Co.*, 788 A.2d 83, 87 n.6 (Conn. 2002) (“‘Product liability claim’ shall include, but is not limited to, all actions based on the following theories: . . . breach of or failure to discharge a duty to warn or instruct” (quoting CONN. GEN. STAT. § 52-572m (1991)) (emphasis added)); RESTATEMENT, *supra* note 9, § 2 cmt. i (“Instructions inform persons how to use and consume products safely. Warnings alert users and consumers to the existence and nature of product risks so that they can prevent harm either by appropriate conduct during use or consumption or by choosing not to use or consume.”); AMERICAN LAW OF PRODUCTS LIABILITY §32:20 (3d ed. 1993) (“[T]he duty to warn actually consists of two duties: (1) to provide adequate instructions for safe use, and (2) to provide a warning as to dangers inherent in improper use.”); *Bowbeer et al.*, *supra* note 27, at 445 (“There are two elements to the duty: the duty to warn of foreseeable dangers inherent in the use of the product, and the duty to provide adequate instructions for safe use.”); *cf.* *Antcliff v. State Employees Credit Union*, 327 N.W.2d 814, 816–17 (Mich. 1982) (noting a subtle difference between instructions and warnings).

Warnings describe risks that would not otherwise be obvious to persons of average intelligence and experience. "Caution! The top of this product becomes very hot!" Instructions tell product users what they should do to reduce the risks of injury. "Wear insulated gloves to protect your hands." More often than not, product suppliers will be required to supply both sorts of information. Sometimes only the warning is necessary, as when "what to do about it" is obvious. Less frequently, only instructions are required, as when the risk is obvious but an effective risk-avoidance technique is not.⁹³

Thus, most often, when courts speak of imposing a duty to warn, they might mean just that; manufacturers and distributors may have a duty to warn users and consumers about certain risks inherent in the use or consumption of products.⁹⁴ That the top of a product gets very hot is a danger of which the product manufacturer should apprise the user. Typically, this is the duty that first comes to mind when considering failure to warn as a basis of liability.

The second duty that courts impose on product manufacturers is not a duty to warn of risks, but rather a duty to instruct on risk-avoidance measures. That is, in addition to or instead of a duty to warn, manufacturers and distributors may have a duty to "provide appropriate and adequate instructions and directions for the safe use of a product."⁹⁵ Thus, a manufacturer might have a duty not only to explain to a user or consumer that using a product in a particular way is dangerous, but also that there is a safer way to use the product. Cases in which plaintiffs argue only that the defendants breached a duty to instruct are less common than those in which plaintiffs argue that defendants breached a duty to warn, but, on the right facts, the claim is sensible.

In *Oglesby v. Delaware & Hudson Railway Co.*,⁹⁶ for example, the plaintiff, an employee of the defendant railway, hurt his back while attempting to adjust the position of his "engineer's seat" on a locomotive.

⁹³ HENDERSON & TWERSKI, *supra* note 21, at 337.

⁹⁴ See, e.g., *Broussard v. Cont'l Oil Co.*, 433 So. 2d 354, 358 (La. Ct. App. 1983) (holding that an electric drill manufacturer adequately warned of the risk that sparks from the drill could ignite gaseous fumes).

⁹⁵ *Sales*, *supra* note 27, at 524; see also *Tesmer v. Rich Ladder Co.*, 380 N.W.2d 203, 207 (Minn. Ct. App. 1986) (affirming plaintiff's jury verdict predicated on claim that ladder manufacturer provided insufficient instructions on how to use its product safely); *Mlott v. Whirlpool Corp.*, 676 N.Y.S.2d 383 (N.Y. App. Div. 1998) (holding that the manufacturer of a kit for converting a clothes dryer from natural gas to propane power had no duty to instruct the installing technician of the proper torque with which to tighten the shutoff valve nut because the technician in question was experienced and testified that he would have ignored such an instruction). See generally AMERICAN LAW OF PRODUCTS LIABILITY § 32:21 (3d ed. 1993) (describing the need for manufacturers to provide instructions when certain procedures are essential to the safe use of a product).

⁹⁶ 180 F.3d 458 (2d Cir. 1999).

tive.⁹⁷ The seat was designed for easy adjustment by removing it from its mount, but the plaintiff tried to adjust it without first removing it.⁹⁸ He sued the manufacturer, General Motors, arguing "that GM should have placed a warning or instructional label on the seat informing employees of the easier adjustment procedure."⁹⁹ Indeed, what the plaintiff sought is more accurately described as an instruction than a warning. Although the court held that Oglesby's claim was preempted by the Locomotive Boiler and Inspection Act,¹⁰⁰ the facts are a clear example of the sort of liability a manufacturer might incur not, strictly speaking, for failing to warn of a risk, but rather for failing to instruct on a risk-avoidance measure.

In *Urena v. Biro Manufacturing Co.*, the plaintiff was employed as the operator of a band saw used for cutting meat.¹⁰¹ The manufacturer of the saw had sold it with an adjustable guard that covered the portion of the blade not being used for a given cut.¹⁰² The manufacturer also provided a safety plate for use in pushing pieces of meat across the cutting surface.¹⁰³ However, neither the safety plate nor the guard was on the machine when the plaintiff was using the saw.¹⁰⁴ While he was cutting pigs' feet, the plaintiff's hand came into contact with the blade, injuring two of his fingers.¹⁰⁵ The plaintiff sued the manufacturer, arguing that "Biro's failure to include adequate warnings and instructions with [the saw] subjects Biro to strict liability."¹⁰⁶ The trial court granted summary judgment for the defendant.¹⁰⁷ On appeal, the Second Circuit reversed, holding that "Urena has made a sufficient showing that Biro failed to provide adequate instructions and warnings concerning the need to use the safety plate to cut small pieces of meat and bone."¹⁰⁸ In so holding, the court did not discuss the obviousness of the danger, but merely asserted, without explanation, that "Biro failed to establish that it had no duty to warn or that the duty was discharged as a matter of law."¹⁰⁹ If we can reasonably assume that the danger posed by the saw was obvious, then the manufacturer in this case was not held to a duty to warn of that danger;

97 *Id.* at 460.

98 *Id.*

99 *Id.*

100 *See id.* at 460, 462 (citing 49 U.S.C. §§ 20701-20903 (1994)).

101 114 F.3d 359, 361 (2d Cir. 1997) (applying New York law).

102 *Id.*

103 *Id.* at 361-62.

104 *See id.*

105 *Id.* at 362.

106 *Id.*

107 *Id.*

108 *Id.* at 365.

109 *Id.* at 366.

rather, the manufacturer was held to a duty to instruct on the perhaps nonobvious risk-avoidance technique of using a safety plate.

Of course, both the duty to warn and the duty to instruct are subject to the open and obvious danger rule; manufacturers and distributors have neither a duty to warn of obvious risks nor a duty to instruct on obvious risk-avoidance measures.¹¹⁰ It is not too difficult to envision a situation in which a product poses a risk for which the method of avoiding it is not obvious. A message such as "Warning! This machine emits low-level radiation that can harm the retina!" certainly conveys a product risk, likely a nonobvious risk. However, what to do about that risk—how to avoid it—might be just as nonobvious. Therefore, the manufacturer of such a machine might have a duty to provide a message such as "Notice: One should always wear safety glasses made of X, and only X, when using this machine." In the end, the factors that militate against imposing a duty to warn of obvious risks apply with equal force against imposing a duty to instruct on obvious risk-avoidance measures. Neither warning nor instructing about obvious matters would serve any function beyond that served by the obviousness itself.

2. *A Logical Framework of Duty and Purpose*

As outlined above, a failure-to-warn claim might invoke one of two different duties—the duty to warn or the duty to instruct—each of which is subject to the limitations of obviousness. And again, failure to warn can serve one of two different purposes—risk reduction or informed choice.¹¹¹ Thus, any given failure-to-warn claim might logically entail one of four possible combinations of duty and purpose:

DUTY \ PURPOSE	Risk Reduction	Informed Choice
	Warnings	1
Instructions	2	4

A plaintiff could argue (1) that a defendant owed her a duty to warn of nonobvious risks that inhere in using a product, because such a warning would have helped her to use the product more safely; (2)

¹¹⁰ See RESTATEMENT, *supra* note 9, § 2 cmt. j ("In general, a product seller is not subject to liability for failing to warn or instruct regarding risks and risk-avoidance measures that should be obvious to, or generally known by, foreseeable product users.") (emphasis added).

¹¹¹ See *supra* Part I.A.2.

that a defendant owed her a duty to instruct about nonobvious risk-avoidance measures relevant to the use of the product, because such instruction would have helped her to use the product more safely; (3) that a defendant owed her a duty to warn of nonobvious risks that inhere in using a product, because she could then have decided whether to expose herself to those risks at all; or (4) that a defendant owed her a duty to instruct about nonobvious risk-avoidance measures relevant to the use of the product, because she could then have decided whether to use the product at all.

Although failure to warn entails four logically possible combinations of duty and purpose, plaintiffs and courts invoke the rationales with varying frequency. Cases involving risk-reduction warnings are generally the most common, and most intuitive, of the possibilities.¹¹² Clearly, manufacturers ought to attempt to reduce the risks associated with the use of their products by making users aware of risks that are not obvious. Cases involving risk-reduction instructions are less common, but no less intuitive.¹¹³ After all, manufacturers and distributors have a vested interest in providing users and consumers with instructions on how to use their products safely.¹¹⁴ Cases in which manufacturers owe a duty to provide informed-choice warnings are rare, but are not entirely unintuitive.¹¹⁵ These cases are "generally limited to prescription drugs and cosmetics, although occasionally other products are implicated."¹¹⁶ The final logical possibility in failure to warn, wherein a manufacturer has a duty to provide an informed-choice instruction, appears to be as rare as it is unintuitive.

DUTY \ PURPOSE	PURPOSE	
	Risk Reduction	Informed Choice
Warnings	<i>Common</i>	<i>Rare</i>
	1	3
Instructions	<i>Less Common</i>	?
	2	4

Although the duty to instruct is intuitively plausible, and providing product users and consumers with information with which they can

¹¹² See, e.g., *Broussard v. Cont'l Oil Co.*, 433 So. 2d 354, 358 (La. Ct. App. 1983).

¹¹³ See, e.g., *Oglesby v. Del. & Hudson Ry. Co.*, 180 F.3d 458, 460 (2d Cir. 1999).

¹¹⁴ Of course, product manufacturers have a pecuniary, and perhaps moral, interest in providing warnings to users and consumers. However, the interest in providing instructions seems distinguishable, as users and consumers cannot even begin to use or consume (at least some) products without some sort of instruction.

¹¹⁵ See, e.g., *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1088-89 (5th Cir. 1973); *Twerski et al.*, *supra* note 19, at 517-21.

¹¹⁶ *Henderson & Twerski*, *supra* note 8, at 286.

make informed choices is understandable in some circumstances, whether the two are practically compatible remains an open question.

B. *Burke* Facts and Holding

Alphonso Burke lost the fingers of his right hand while operating a metal shearing machine at work.¹¹⁷ Burke had approximately seven months' experience using the shearing machine.¹¹⁸ Spartatics Ltd. ("Spartatics") manufactured the machine with a conveyor belt ramp at its end that carried metal scraps away from the cutting surface.¹¹⁹ However, Burke's employer, Metal Etching Co. ("Metal Etching"), had installed another ramp above the conveyor belt ramp to catch metal scraps as they left the cutting surface.¹²⁰ Once metal scraps accumulated on this new ramp, removing them required the operator to place one hand on the cutting surface, for leverage.¹²¹ While clearing metal scraps from the employer-installed ramp, Burke had his right hand on the cutting surface.¹²² His supervisor, who had been instructing him on how to perform a job, began shearing metal with the machine and inadvertently severed Burke's fingers.¹²³

Burke brought defective-design and failure-to-warn claims against Spartatics in the U.S. District Court for the Eastern District of New York.¹²⁴ Spartatics, in turn, impleaded Metal Etching as a third-party defendant.¹²⁵ At trial, the jury found against Burke on all counts.¹²⁶ Relying on *Liriano III*, Burke appealed, arguing that the trial judge's jury instructions misstated the manufacturer's duty to warn.¹²⁷ Specifically, Burke objected to the following jury instruction, which he argued misstated Spartatics's duty to warn: "[if] the dangers associated with the machine were obvious, and generally known and recognized, you will find that the defendant Spartatics had no duty to warn Mr. Burke of the dangers associated with the metal shearing machine."¹²⁸ Burke's argument on appeal was that "the court below erred in instructing the jury that Spartatics had no duty to warn of risks that were 'obvious.'"¹²⁹ Indeed, if *Liriano III* really did expand the duty of

¹¹⁷ *Burke v. Spartatics Ltd.*, 252 F.3d 131, 133 (2d Cir. 2001).

¹¹⁸ *Id.* at 134.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *See id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 133-34.

¹²⁵ *Id.* at 134.

¹²⁶ *Id.*

¹²⁷ *See id.* at 137.

¹²⁸ *Id.*

¹²⁹ *Id.* Burke also argued that the trial court erroneously instructed the jury that if Burke actually knew of the danger involved in operating the machine, then Spartatics had

manufacturers such that a danger's obviousness will not necessarily obviate the duty to warn,¹³⁰ then Burke's argument seems sound. However, Judge Calabresi, writing for the court, denied that *Liriano III* stood for such an expansion of the duty to warn.

Affirming the jury verdict for the defendant, the court stated that Burke's contention was "plainly wrong [in light of the] well-established principle of New York law that 'a limited class of hazards need not be warned of as a matter of law because they are patently dangerous or pose open and obvious risks.'" ¹³¹ Further, the court asserted that "nothing in our opinion in *Liriano III* suggests the contrary."¹³² Given the language the court used in *Liriano III*, this latter assertion surely came as a surprise to Burke.

C. A Coherent Explanation of *Liriano III*

It appears that Alphonso Burke interpreted *Liriano III* in much the same way that Bowbeer and Killoran have¹³³—Burke surmised that *Liriano III* expanded failure to warn to include a duty to warn of open and obvious dangers. However, in *Burke*, Judge Calabresi explained that this interpretation is mistaken. While Calabresi's explanation is somewhat unclear, the analytic structure assembled above¹³⁴ helps to show how *Liriano III* emerges as a theoretically legitimate example of a court imposing an informed-choice duty to instruct on nonobvious risk-avoidance measures, and how *Liriano III* is therefore consistent with the seemingly contradictory *Burke*.

1. A Duty to Instruct About Nonobvious Risk-Avoidance Measures

Liriano III did not formally violate the open and obvious danger rule because the court did not actually hold that a manufacturer had a duty to warn of obvious risks. Instead, the court held that a manufacturer had a duty to *instruct* on nonobvious methods of avoiding risks. The duty in *Liriano III*, then, was not to warn of the risks of unguarded meat grinders; rather, it was a duty to instruct that meat grinders should not be used without guards. In response to the plaintiff's claim that the Second Circuit had abrogated the open and obvious danger rule in *Liriano III*, the *Burke* court explained:

The question in *Liriano III* was simply "obviousness of what?" . . . In *Liriano III* we upheld the verdict for the plaintiff because the jury

no duty to warn. The Second Circuit agreed with Burke on this point, noting that the trial court had confused a limitation on duty with a limitation on causation, but nevertheless held the error harmless. *See id.* at 138–41.

¹³⁰ *See supra* note 67 and accompanying text.

¹³¹ *Burke*, 252 F.3d at 137 (quoting *Liriano II*, 700 N.E.2d 303, 308 (N.Y. 1998)).

¹³² *Id.* (emphasis added).

¹³³ *See supra* note 4 and accompanying text.

¹³⁴ *See supra* Part II.A.2.

could have found that, absent an appropriate warning, it was not obvious “(a) that it is feasible to reduce the risk with safety guards, (b) that such guards are made available with the grinders, and (c) that the grinders should be used only with the guards.”¹³⁵

According to Judge Calabresi, the court in *Liriano III* did not impose a duty to warn of obvious risks.¹³⁶ However, the *Burke* court’s characterization of propositions (a), (b), and (c) as nonobvious risks, requiring an “appropriate warning,” is somewhat unclear. Those elements that Calabresi characterized as nonobvious in *Liriano III* are more accurately characterized as risk-avoidance measures, not risks. The duty was, therefore, not a “duty to warn,” but rather a duty to instruct.

Liriano III itself provides further evidence that the duty imposed on Hobart was a duty to instruct. Always the law professor, Judge Calabresi devised a careful hypothetical to which he analogized Hobart’s duty:

[A] highway sign that says “Danger—Steep Grade” says less than a sign that says “Steep Grade Ahead—Follow Suggested Detour to Avoid Dangerous Areas.”

If the hills or mountains responsible for the steep grade are plainly visible, the first sign merely states what a reasonable person would know without having to be warned. The second sign tells drivers what they might not have otherwise known: that there is another road that is flatter and less hazardous. . . . [T]he duty to post a sign of the second variety may persist even when the danger of the road is obvious and a sign of the first type would not be warranted.

One who grinds meat, like one who drives on a steep road, can benefit not only from being told that his activity is dangerous but from being told of a safer way.¹³⁷

Information that a grade is steep, or that a guardless meat grinder is dangerous, is indeed a warning. However, information that there is a safer detour, or that meat grinders should be used with safety guards, is an instruction. Of course, instructions often entail (perhaps implicit) warnings of obvious risks, as do the instructions in Calabresi’s hypothetical. However, they can also entail information about nonobvious risk-avoidance measures. The Second Circuit held Hobart to a duty to inform *Liriano* of the fact that meat grinders should be used with safety guards—a risk-avoidance measure that the court deemed nonobvious.

Thus, when Bowbeer and Killoran, as well as Burke, interpreted *Liriano III* to hold that product manufacturers have a duty “to warn of

¹³⁵ *Burke*, 252 F.3d at 137 (citing *Liriano III*, 170 F.3d 264, 271 (2d Cir. 2001)).

¹³⁶ *Id.*

¹³⁷ *Liriano III*, 170 F.3d 264, 270 (2d Cir. 1999).

obvious risks,"¹³⁸ they were mistaken. Hildy Bowbeer does recognize the difference between instructions and warnings, and she understands that both are implicated in failure-to-warn cases.¹³⁹ Why, then, did she not see *Liriano III* as a failure-to-instruct case? The answer likely has something to do with the fact that Calabresi himself explained his holding in *Liriano III* in the terminology of "warnings."¹⁴⁰ Given this terminology, it is easy to slip into reading *Liriano III* as an instance of a court imposing a duty to warn. The only danger that Hobart might properly have *warned* Liriano about was the arguably obvious danger of using an unguarded meat grinder. However, *Liriano III* held that Hobart had a duty to instruct Liriano on a safe way to use meat grinders. So long as the risk-avoidance measures—and not merely dangers—were not obvious, the duty involved logically falls into one of the four possibilities outlined above.¹⁴¹

2. *Informed Choice Applied to a Nonobvious Risk-Avoidance Measure*

Bowbeer and Killoran criticized the Second Circuit's application of informed choice in *Liriano III* on the ground that even courts that apply informed-choice theory do so only with respect to latent dangers, but *Liriano III* seemed to hold that Hobart had a duty to warn Liriano of the *obvious* dangers of guardless meat grinders so he could choose whether to expose himself to those risks.¹⁴² The authors argue that Calabresi simply misunderstood the sources that he cited for the proposition that warnings can serve an informed-choice function:

[T]he passage from the Henderson and Twerski article quoted in support of the newly-minted *Liriano* duty to warn does not, contrary to the *Liriano III* court's interpretation of it, address obvious, unavoidable risks at all. Rather, the authors observe that latent, unavoidable risks may, in special circumstances limited primarily to toxic agents and pharmaceuticals, trigger a duty to inform potential users of those risks, so that the users can decide in light of the risks and benefits . . . whether to use the product at all.¹⁴³

However, as we have seen, Judge Calabresi did not interpret informed choice as applicable to obvious risks. Instead, he cast *Liriano III* as a case in which the defendant owed a duty to inform of nonobvious risk-avoidance measures. Again, so long as those risk-avoidance measures were indeed nonobvious, *Liriano III* did not formally misconstrue or

¹³⁸ Bowbeer & Killoran, *supra* note 4, at 722 (emphasis added).

¹³⁹ See Bowbeer et al., *supra* note 27, at 445 ("There are two elements to the duty: the duty to warn of foreseeable dangers inherent in the use of the product, and the duty to provide adequate instructions for safe use.").

¹⁴⁰ See *supra* note 131 and accompanying text.

¹⁴¹ See *supra* Part II.A.2.

¹⁴² See Bowbeer & Killoran, *supra* note 4, at 730.

¹⁴³ *Id.* (citation omitted).

misapply the informed-choice rationale for failure to warn. Rather, the court announced a theoretically legitimate informed-choice duty to instruct on nonobvious risk-avoidance measures.

III

LIRIANO RECONSIDERED: THE PRACTICAL LIMITS OF SUBTLE JURISPRUDENCE

The Second Circuit could have decided *Liriano III* differently. In *Chaney v. Hobart International, Inc.*, a case with facts nearly identical to *Liriano III*, the U.S. District Court for the Eastern District of Louisiana held that “[a]s dangerous as the meat grinder may have been without a feed pan guard, it was clearly ‘not dangerous to an extent beyond that which would be contemplated by the ordinary user.’ The possibility of injury is glaring.”¹⁴⁴ The *Chaney* court simply and decisively found both the risks and the ways to avoid the risks of commercial meat grinders to be plainly obvious. The contrast between the *Chaney* and *Liriano III* opinions is striking. *Chaney* may not have delivered the sort of theoretically subtle analysis worthy of Judge Calabresi’s attention, but not every case requires such an analysis. Indeed, some cases suffer from it. Although one can understand *Liriano III* as a logical instance of existing failure-to-warn principles, *Liriano III*’s formal coherence in no way implies practical acceptability.

Although the *Liriano* decisions did not technically expand the duty to warn to include a duty to warn of obvious dangers, they did functionally expand the duties of manufacturers and distributors in a socially costly manner. The New York Court of Appeals perhaps sensibly recognized that the duty to warn or instruct might *possibly* survive a substantial-modification defense, but the court failed to “put a face” on that duty. That is, the court failed to put its theoretical sensibilities to practical use; it declined to provide an example of the substantive applicability of the duty it announced. And, if the New York court is guilty of nonfeasance, the Second Circuit surely committed misfeasance. In announcing an informed-choice duty to instruct, and applying it to the facts of *Liriano III*, the Second Circuit put a face on the duty to warn or instruct that only a mother could love. The combined efforts of the two courts may well have created a lawless failure-to-warn doctrine. The New York court authorized a duty to warn even in the face of substantial product modification. Then, by characterizing *Liriano III* as an instruction case, the Second Circuit avoided the obvious-danger rule. Moreover, by characterizing it as an informed-choice situation, the court avoided engaging in a causation analysis. The cumu-

¹⁴⁴ 54 F. Supp. 2d 677, 681 (E.D. La. 1999) (citing LA. REV. STAT. § 9:2800.57(B) (West 1997)).

lative result of the *Liriano* decisions is a doctrine in which every well-pleaded failure-to-warn claim may reach the jury. It is a doctrine that compounds the risks already inherent in overwarning of obvious dangers.

A. What the New York Court of Appeals Did—and Did Not Do—in *Liriano II*

In *Liriano II*, the New York Court of Appeals announced that manufacturers might have a duty to warn of a product's dangers, even in the face of a substantial modification to the product.¹⁴⁵ Perhaps it was sensible to hesitate to declare that such a duty could never arise. Even if that duty does arise, though, failure to warn has built-in limitations, such as the open and obvious danger rule, that should keep its application within reasonable bounds. However, in declining to decide whether Hobart actually owed a duty in *Liriano II*, the New York Court of Appeals declined the opportunity to place a practical limit on the duty it announced. In light of the Second Circuit's ultimate application of that duty in *Liriano III*, perhaps the New York court's omission was a culpable one.

1. *The Court Announced a Questionable but (Perhaps) Harmless Duty*

The New York Court of Appeals faced the question of whether the duty to warn could ever survive substantial product modification by a third-party. Although the court has embraced a substantial-modification bar to design-defect liability,¹⁴⁶ the court declined to do so for failure-to-warn claims, suggesting that “[t]he factors militating against imposing a duty to design against foreseeable post-sale product modifications are either not present or less cogent with respect to a duty to warn against making such modifications.”¹⁴⁷ The court argued that the duty to warn of dangers that might result from product modification requires manufacturers to perform a less complicated prospective analysis than is involved in the complex risk-utility considerations inherent in designing defect-free products.¹⁴⁸

Nevertheless, it is not entirely clear why having to “factor into the design equation all foreseeable post-sale modifications” is more burdensome than having to do so with respect to the warning equa-

¹⁴⁵ See *Liriano II*, 700 N.E.2d 303, 307–08 (N.Y. 1998).

¹⁴⁶ See *Robinson v. Reed-Prentice Div. of Package Mach. Co.*, 403 N.E.2d 440, 444 (N.Y. 1980) (“Material alterations at the hands of a third party . . . are not within the ambit of a manufacturer’s responsibility.”).

¹⁴⁷ *Liriano II*, 700 N.E.2d at 306.

¹⁴⁸ See *id.* at 306–07.

tion.¹⁴⁹ The court's explanation seems to rely on the intuitively plausible notion that warnings are relatively cheap, noting that "[t]he burden of placing a warning on a product is less costly than designing a perfectly safe, tamper-resistant product."¹⁵⁰ After all, how much could it possibly cost to include another warning on a product?¹⁵¹ In discussing the practical implications of *Liriano III*, this Note suggests that the cost of requiring additional warnings can actually be substantial, particularly when courts impose increasingly expansive duties to warn.¹⁵² However, given that the New York court merely held that the duty to warn *could* survive a user's product modification, and not that it necessarily does, the court's holding was not cause for worry. After all, announcing a duty and applying it are two different things. Surely, given the opportunity to apply the substantial-modification duty to warn, the court would set reasonable bounds on that duty.

2. *The Court Failed to Ensure Practical Limits on the Newly Announced Duty*

In *Liriano II*, the New York Court of Appeals had the chance to place the substantial-modification duty to warn in context, expressly delineating the sort of facts necessary to show that a manufacturer might owe such a duty, but it declined to do so. In declining to answer the Second Circuit's second certified question, the court left open the most important practical questions. In which cases will a duty to warn survive the substantial modification of a product? On what facts should a court hold for a defendant as a matter of law? Interestingly, the New York court's opinion in *Liriano II* has appeared in the literature as an example of "whether and in what circumstances a continuing warning duty might nevertheless be imposed even when product alteration or misuse would preclude a finding of defective design."¹⁵³ However, the New York court did not provide answers to the questions of "whether and in what circumstances" a duty to warn will survive a substantial modification of the product. At least, that is, the court did not provide direct answers.

Although the court did not decide the above practical questions, it did offer clues from which another court might surmise the answers. The court noted that integrating safety features into products is "often

¹⁴⁹ See *id.* at 307.

¹⁵⁰ *Id.*

¹⁵¹ See, e.g., *Moran v. Faberge, Inc.*, 332 A.2d 11, 15 (Md. 1975) ("[T]he cost of giving an adequate warning is usually so minimal, amounting only to the expense of adding some more printing to a label, that this [risk-utility] balancing process will almost always weigh in favor of an obligation to warn of latent dangers . . .").

¹⁵² See *infra* Part III.C.

¹⁵³ M. Stuart Madden, *Modern Post-Sale Warnings and Related Obligations*, 27 WM. MITCHELL L. REV. 33, 52 (2000).

the most effective way [for a manufacturer] to communicate that operation of the product without the device is hazardous," and more importantly, that there simply is no duty to warn of open and obvious dangers.¹⁵⁴ Regarding the obviousness of a danger, the court suggested that, although "bright-line pronouncements" are difficult, in cases "[w]here only one conclusion can be drawn from the established facts . . . the issue of whether the risk was open and obvious may be decided by the court as a matter of law."¹⁵⁵ Thus, it seems that the Court of Appeals, while leaving open the possibility that a manufacturer may have a duty to warn of the risks posed by a product substantially modified by a third-party, nevertheless recognized that manufacturers might be able to discharge that duty by providing adequate safety measures,¹⁵⁶ or might simply have no duty if the danger is obvious.

Perhaps, then, the failure-to-warn doctrine promulgated by the New York court is not itself lawless. After all, even if a manufacturer has a duty to warn of the risks posed by substantially modified products, that duty is still subject to the built-in limitations of traditional failure-to-warn jurisprudence. Manufacturers have no duty to warn of open and obvious risks, and a defendant's failure to warn or instruct about latent risks or risk-avoidance measures must be the proximate cause of the plaintiff's harm in order for liability to attach. Still, in hindsight, given the way the Second Circuit ultimately applied the duty announced by the Court of Appeals, perhaps the New York court would have been wiser not to rely on another court to apply the traditional, common-sense limits of the failure-to-warn doctrine. Instead, the New York Court of Appeals should have answered the second certified question and applied those limits itself.

B. How the Second Circuit Misapplied the Duty to Instruct in *Liriano III*

The Introduction of this Note suggests that maintaining reasonable bounds on a complex area of law requires not only caution in announcing subtle legal duties, but also care in considering how courts might apply such duties, as well as circumspection on the part of the courts actually applying them. Although the New York Court of Appeals could have taken greater care in placing boundaries on the duty it announced in *Liriano II*, the Second Circuit surely could have been more circumspect in its application of that duty. In its ultimate contribution to the *Liriano* litigation, the Second Circuit took the duty

¹⁵⁴ See *Liriano II*, 700 N.E.2d at 308, 309.

¹⁵⁵ *Id.*

¹⁵⁶ Thus, although a manufacturer cannot warn its way out of a bad design, perhaps it can design its way out of a failure to warn.

announced by the New York Court of Appeals and turned it into a lawless doctrine by stripping it of its built-in limitations. This section provides a critical analysis of the Second Circuit's application of the informed-choice duty to instruct, while the next section addresses the lawless implications of that duty, even if it is "correctly" applied.

1. *The Risk-Avoidance Measure Was Obvious*

Although the duty to instruct about nonobvious risk-avoidance measures can be straightforward in certain instances,¹⁵⁷ the Second Circuit's application of it is questionable; the court arguably applied the duty to instruct to an *obvious* risk-avoidance measure. The holding in *Liriano III*, if validly based on a duty to instruct product users about nonobvious risk-avoidance measures, unsurprisingly requires that methods of avoiding the risks of commercial meat grinders be nonobvious. Judge Calabresi claimed that it was not obvious "(a) that it is feasible to reduce the risk with safety guards, (b) that such guards are made available with the grinders, and (c) that the grinders should be used only with the guards."¹⁵⁸ Propositions (a) and (b) can be reduced to the proposition that grinders *can* be used with guards, while (c) states that they *should* be so used.

There are at least two problems with characterizing these two propositions as instructions about nonobvious risk-avoidance measures. First, strictly speaking, informing someone of the fact that meat grinders can be used with safety guards is not an instruction. Instructions are not merely informative, they are prescriptive—they tell one what to do. Perhaps, though, a message that meat grinders can be used with guards might entail an implicit instruction. Perhaps telling the machine operator that it is possible to use the machine with a safety guard implicitly instructs the operator to use the machine only with the guard in place. If that is the case, then propositions (a) through (c) merge, and state only the following proposition: commercial meat grinders should not be used without safety guards.

Second, if Hobart's duty was to inform operators that meat grinders should not be used without safety guards, then the risk-avoidance technique entailed by the use of safety guards is arguably obvious. Although using a meat grinder with a safety guard specifically reduces the risks of use, the method of risk-avoidance facilitated by the use of safety guards may be stated more generally—safety guards help operators effect the risk-avoidance technique of keeping their hands out of

¹⁵⁷ Recall the hypothetical in Part II.A.1 in which it might not be obvious that only certain types of safety glasses would prevent retinal injury. It seems just to bold the manufacturer of the dangerous machine to a duty to instruct users about such a nonobvious safety measure.

¹⁵⁸ See *Liriano III*, 170 F.3d 264, 271 (2d Cir. 1999).

the grinder. The operative question for the court then becomes whether it is obvious that one should keep her hands away from the open mouth of a commercial meat grinder. If such a risk-avoidance measure is obvious, then the manufacturer of the grinder has neither a duty to warn of the risks of not doing so nor a duty to instruct on how to go about it. The truth-value of the antecedent seems clear enough.

2. *Informed Choice Was Inappropriate*

Although informed-choice theory may be appropriate when applied to a certain narrow range of product risks, the Second Circuit's application of the theory to the dangers of commercial meat grinders is problematic. First, if, as argued above, the risk-avoidance measure were obvious—that is, if one obviously ought to take steps to keep one's hands out of the open mouth of a commercial meat grinder—then informed choice simply does not apply. In the end, the informed-choice information Hobart had a duty to provide—that one might want to forgo using a meat grinder that is missing its safety guard—does not seem to provide any more information to an operator than the information that the very sight of a guardless grinder conveys. Whether considering the risks posed by meat grinders or the methods of avoiding those risks, any information that a warning or instruction might convey is open and obvious.¹⁵⁹

The second problem with the Second Circuit's application of informed choice is more general: even if the methods of avoiding the risks of commercial meat grinders are not obvious, meat grinders are not the sort of product that informed choice can appropriately address. Although courts have long recognized the duty to provide instructions or warnings for the purpose of facilitating informed decisions,¹⁶⁰ they have narrowly circumscribed the duty's application. Courts invoke informed choice “almost exclusively with regard to those toxic agents and pharmaceutical products with respect to which courts have recognized a distinctive need to provide risk information so that recipients of the information can decide whether they wish to

¹⁵⁹ Thus, Bowbeer and Killoran are correct when they argue that the Second Circuit imposed a duty on Hobart to provide information regarding a risk that “was neither latent nor unavoidable.” Bowbeer & Killoran, *supra* note 4, at 749.

¹⁶⁰ See, e.g., *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1103 (5th Cir. 1973) (holding asbestos manufacturers liable for failing to instruct installers of the danger inherent in exposure to the product); *Davis v. Wyeth Labs., Inc.*, 399 F.2d 121, 131 (9th Cir. 1968) (reversing the trial court on its failure to instruct that the manufacture of a vaccine was strictly liable for harm that it failed to inform users about).

purchase or utilize the product.”¹⁶¹ Few courts have applied informed-choice theory to other kinds of products.¹⁶²

There is good reason to hesitate in applying informed choice to a wide range of products. Informed choice is most appropriately invoked when otherwise beneficial products carry significant, irreducible risks. Certain products, such as pharmaceuticals, may at once be both highly beneficial and potentially quite dangerous. For example, if the only way to prevent a crippling disease is to take a particular vaccine, one is unlikely to refuse it. However, if the vaccine simultaneously posed a significant risk of causing a different but equally debilitating disease, one would likely want to know that fact in order to make a fully informed decision whether the vaccine’s benefit outweighs its risk.¹⁶³

When products present a relatively limited class of readily identifiable benefits and risks that cannot be easily affected by the user or consumer, it might be reasonable to require manufacturers to provide informed-choice information. However, in the case of “product risks in which the product-user relationship is more complex,”¹⁶⁴ informed choice is less appropriate. For example, products such as automobiles and industrial machinery may pose innumerable risks to users. Importantly, some of these risks may arise as the result of product misuse or alteration. Someone might, for example, chisel the safety guard off of a commercial meat grinder. It would likely be useless to require the manufacturers of such products to supply warnings and instructions that anticipate every conceivable instance in which a product user might face an informed-choice moment of decision. Providing innumerable informed-choice warnings and instructions for risks that may or may not arise “would add little, if anything, to true informed choice.”¹⁶⁵ The volume, complexity, and potential inconsistency of such information would likely create a cognitive overload rather than facilitate clear, informed decision making. Indeed, the notion of being “fully informed” is a slippery one. One can always imagine additional risks that a complex product might pose. It is questionable, however, whether users of such products would be better or worse equipped to make dignified choices if product manufacturers were to

¹⁶¹ RESTATEMENT, *supra* note 9, § 2 cmt. i.

¹⁶² *But see* *Watkins v. Ford Motor Co.*, 190 F.3d 1213, 1219 (11th Cir. 1999) (applying informed-choice theory to the manufacturer of a sports utility vehicle that had a propensity to roll over).

¹⁶³ *Cf. Davis*, 399 F.2d at 129–30 (holding that the manufacturer of a polio vaccine had a duty to warn of the risk of death or major disability that necessarily accompanied use of the vaccine).

¹⁶⁴ RESTATEMENT, *supra* note 9, § 2 reporters’ note to cmt. i.

¹⁶⁵ *Id.*

provide them with an infinitely expanding universe of information regarding unlikely potentialities.

3. *The Court Improperly Avoided Causation Analysis*

The Second Circuit's misapplication of informed-choice theory also undermines its causation analysis. Causation may rightly play a less important role in genuine informed-choice cases.¹⁶⁶ However, if *Liriano III* were not a proper informed-choice case, then the court should have considered causation a paramount concern. As the Introduction suggests, when intellectually capable courts announce subtle duties and then apply them to actual defendants, such courts can still place sensible, practical limits on those duties by taking seriously their ability to decide questions of proximate causation as a matter of law. In *Liriano III*, however, the Second Circuit adopted the functional equivalent of a heeding presumption by failing to require the plaintiff to present evidence of causation to establish his *prima facie* case.¹⁶⁷ That is, the plaintiff did not have to produce evidence that he would have acted differently had Hobart provided a warning.¹⁶⁸ Even though it is not entirely clear that the Second Circuit has condoned heeding presumptions in failure-to-warn cases either before¹⁶⁹ or after¹⁷⁰ this case, the *Liriano III* court abrogated its own power to decide causation as a matter of law.

A number of courts and commentators have expressed doubt as to the utility of adopting a heeding presumption in failure-to-warn cases.¹⁷¹ Henderson and Twerski illustrated the competing considerations as follows: "A plaintiff typically can offer little more than self-serving testimony and anecdotal evidence to establish her proximate causation case. . . . If courts were to 'get tough' with plaintiffs on the

¹⁶⁶ See *supra* Part I.A.2.

¹⁶⁷ See *Liriano III*, 170 F.3d 264, 271 (2d Cir. 1999) ("When a defendant's negligent act is deemed wrongful precisely because it has a strong propensity to cause the type of injury that ensued, the very causal tendency is evidence enough to establish a *prima facie* case of cause-in-fact."). See generally HENDERSON & TWERSKI, *supra* note 21, at 425-26 ("The trend in favor of applying a 'heeding presumption' in causation cases is substantial."); Sales, *supra* note 27, at 549 (noting that the heeding presumption shifts the burden to the manufacturer to show that a warning would not have prevented the plaintiff's injury).

¹⁶⁸ See *Liriano III*, 170 F.3d at 271.

¹⁶⁹ See, e.g., *Raney v. Owens-Illinois, Inc.*, 897 F.2d 94, 96 (2d Cir. 1990) (permitting an inference of causation, but not applying a causation presumption).

¹⁷⁰ See, e.g., *Walsh v. Hayward Indus. Prods.*, 2001 WL 303754, at *1 (2d Cir. Mar. 28, 2001) (applying New York law and affirming summary judgment for the manufacturer of a valve used at a waste-water facility, the court held that "[a]s to his claim for failure to warn, Walsh failed to produce evidence that the valves were dangerous as manufactured, or that a warning would have prevented his injury" (emphasis added)).

¹⁷¹ See, e.g., Bowbeer et al., *supra* note 27, at 460-63 (surveying criticisms of the presumption); Reynolds & Kirschman, *supra* note 27, at 577-78 (arguing that it is incorrect to suggest that a heeding presumption can relieve a plaintiff from having to prove causation).

causation issue, almost no one would survive a defendant's motion for summary disposition."¹⁷² On the other hand, "anything less than getting tough sends most causation issues to the jury."¹⁷³ The authors conclude that

[i]n failure-to-warn cases, causation analysis is already a flight into fancy. When a presumption favors the plaintiff, the defendant is basically precluded from the opportunity to convince a court to rule as a matter of law that the failure to warn was not the proximate cause of plaintiff's harm.¹⁷⁴

When courts adopt heeding presumptions, defendants are left to attempt to rebut the presumption by putting on evidence that the plaintiff actually knew of the danger,¹⁷⁵ habitually ignored warnings, or was intellectually incapable of heeding a reasonable instruction or warning. However, defendants are likely to avoid these latter tactics, not wanting to risk alienating the jury with a personal attack on the plaintiff as "lazy" or "dull-witted."¹⁷⁶ Thus, defendants are left with little ability to argue that there was no causation. Causation is critical to the fair determination of liability. Therefore, courts would be wise to leave the burden of proving causation on failure-to-warn plaintiffs.

If the Second Circuit had not abrogated its own power to decide proximate cause as a matter of law, it might have been able to examine a few important questions. For example, is it really the case that the fact that meat grinders can and should be used with guards was not obvious or known to Liriano? After all, Liriano had worked with meat grinders before.¹⁷⁷ Moreover, the guard on the machine that injured Liriano had been *chiseled* off.¹⁷⁸ Further, would Liriano really have altered his behavior had there been a warning or instruction on the grinder? Liriano was arguably at the mercy of his employer; he was seventeen years old, had only recently immigrated to this country, and had been on the job for just one week.¹⁷⁹ If Hobart somehow had conveyed to Liriano that he had a "true choice"—that he could decide not to expose himself to the dangers of guardless meat grinders—is it plausible that Liriano would have been sufficiently emboldened to tell Super that he was going to exercise that choice?¹⁸⁰ Even if the dangers of using guardless meat grinders and

¹⁷² Henderson & Twerski, *supra* note 8, at 305–06.

¹⁷³ *Id.* at 306.

¹⁷⁴ *Id.* at 325.

¹⁷⁵ See, e.g., *Arnold v. Ingersoll-Rand Co.*, 834 S.W.2d 192, 194–96 (Mo. 1992) (addressing the plaintiff's knowledge as a "contributory fault" issue).

¹⁷⁶ Henderson & Twerski, *supra* note 8, at 306.

¹⁷⁷ See *supra* note 39 and accompanying text.

¹⁷⁸ See *supra* notes 42, 44 and accompanying text.

¹⁷⁹ See *Liriano III*, 170 F.3d 264, 269 (2d Cir. 1999).

¹⁸⁰ At least one commentator has expressed a similar skepticism, suggesting that "the court's talk of informed choice and plaintiff's asking his employer to replace the guard is

the way to avoid those dangers are not obvious, it is worth asking whether the absence of a corresponding warning or instruction really was a but-for cause of Liriano's injuries.

C. Why the Informed-Choice Duty to Instruct Has Unacceptable Practical Implications

Although the Second Circuit may have incorrectly or improvidently applied the duty to instruct in *Liriano III*, the duty created by the joint efforts of the New York Court of Appeals and the Second Circuit may be problematic even if applied "correctly." That is, even if courts were to restrict themselves to holding product manufacturers liable for providing inadequate instructions regarding genuinely non-obvious risk-avoidance measures, and did so in the name of informed choice, they would risk undermining reasonable, practical constraints on liability. Although *Liriano III* does not formally violate the letter of failure-to-warn doctrine, the duty it entails functionally violates the doctrine's spirit. The Second Circuit, armed with the substantial-modification duty to warn, effectively set forth a practical guide to avoiding both the open and obvious danger rule and any meaningful causation analysis, and, moreover, in *Burke* suggested that any well-pleaded failure-to-warn case might now reach a jury.¹⁸¹ Furthermore, in establishing a doctrine without effective judicial constraints, the court created a warnings regime in which the rate of product-related accidents may actually increase.¹⁸²

1. Nearly Every (Well-Pleaded) Failure-to-Warn Claim Can Reach the Jury

Judge Calabresi implicitly cast *Liriano III* not as a "warning" case, but rather as an "instruction" case.¹⁸³ While this characterization, on the right facts, could allow the court to formally respect the open and obvious danger rule, it can also enable the court to functionally ignore that rule. Although Bowbeer and Killoran occasionally misidentify precisely what the court was doing in *Liriano III*,¹⁸⁴ they rightly argue that "the court should have considered the far-reaching effects of imposing a virtually limitless duty to warn . . . *in the face of* an open and obvious danger."¹⁸⁵ In any case involving an open and obvious

largely symbolic, invoked in an attempt to justify the court's imposition on the manufacturer of what amounts to thinly veiled strict liability." James A. Henderson, Jr., *Echoes of Enterprise Liability in Product Design and Marketing Litigation*, 87 CORNELL L. REV. 958, 993 (2002) (footnote omitted).

¹⁸¹ See *Burke v. Spartanicus Ltd.*, 252 F.3d 131, 137-40 (2d Cir. 2001); *infra* Part III.C.1.

¹⁸² See *infra* notes 191-93 and accompanying text.

¹⁸³ See *supra* Part II.C.1.

¹⁸⁴ See *supra* note 138 and accompanying text.

¹⁸⁵ Bowbeer & Killoran, *supra* note 4, at 737 (emphasis added).

danger, one can conceive of a way in which the defendant could have instructed the plaintiff on a latent risk-avoidance measure. Professors Henderson and Twerski have suggested that there are two ways in which courts avoid holding that a danger was obvious as a matter of law. First, some "courts label an arguably obvious risk as non-obvious simply to allow a plaintiff whose design-defect claim has failed a chance to recover on a warning claim."¹⁸⁶ Second, courts sometimes "improperly characterize obvious risks as non-obvious . . . when [they] reason by hindsight."¹⁸⁷ Judge Calabresi has now created a third way of side-stepping the open and obvious danger rule: a court can impose liability in the face of an open and obvious danger by creatively finding a nonobvious risk-avoidance measure on which to hang the hat of duty.¹⁸⁸

In addition to showing courts how to manipulate the duty-axis of failure to warn—by shifting from a duty to warn to a duty to instruct, thereby avoiding the open and obvious danger rule,—*Liriano III* also illustrates how courts might circumvent causation analysis by manipulating the purpose-axis of failure to warn. By invoking an informed-choice rationale rather than risk-reduction, courts can shift their focus from causation to concern for the plaintiff's dignity—with the focus not on an instruction or warning that would have altered the plaintiff's conduct, but rather one that would have given the plaintiff the opportunity to choose whether to alter her conduct. Thus, even if informing a plaintiff of a latent risk-avoidance measure would not have actually reduced the risk of harm, failure-to-warn plaintiffs are not without hope in the Second Circuit. After all, the court will not only freely impose a duty to instruct on latent risk-avoidance measures, it will do so in the name of informed-choice decision making.

Thus, in nearly every case in which a product harms someone there is a strategy by which the plaintiff can reach the jury. First, the plaintiff should be sure to assert both design and warning claims. If the product has been substantially modified post-sale, the warning claim will likely survive even if the design claim does not.¹⁸⁹ Second, if the product posed an obvious danger, the plaintiff should claim the manufacturer failed to provide an instruction. As long as the plaintiff can suggest a nonobvious risk-avoidance measure, the claim may very well reach the jury. Third, if the instruction would have done no good—if it would not have allowed the plaintiff to reduce her exposure to the risk, and even if it counsels her to do something she would not have done anyway—the plaintiff can argue that it was her dignity

¹⁸⁶ Henderson & Twerski, *supra* note 8, at 314.

¹⁸⁷ *Id.* at 315.

¹⁸⁸ See *Liriano III*, 170 F.3d 264, 270–71 (2d Cir. 1999).

¹⁸⁹ See *supra* note 145 and accompanying text.

that suffered. In *Burke*, the Second Circuit actually suggested how a plaintiff might creatively utilize *Liriano III*:

At oral argument, Burke made clear that his contention is that Spartanics should have placed a warning, at the rear approach to the machine, about the dangers of placing one's hand in the cutting plane. His argument was *expressly not* that Spartanics should have warned that the (perhaps obvious) dangers associated with access to the machine from the back could be obviated by use of the original conveyor system, and that the machine should not be used without that conveyor system. Nor was this latter argument, an analogue to that upheld in *Liriano III*, put forward below. Accordingly, *Liriano III* is of no benefit to plaintiff¹⁹⁰

Therefore, even if a plaintiff is harmed by an obvious danger, she need only plead the case in such a manner as to invoke the *Liriano III* rule. Perhaps if counsel for Alphonso Burke had been theoretically sophisticated enough to ask for an informed-choice instruction, Burke would have succeeded in his claim against Spartanics.¹⁹¹

2. *The Costs of Preventing Claims from Reaching the Jury Are Significant*

Although *Liriano III* has created a doctrine under which plaintiffs may nearly always reach a jury, manufacturers can nonetheless take steps to avoid risking liability. However, the remedy might be worse than the disease. Bowbeer and Killoran argue that *Liriano III* sends a message to manufacturers that they had better include warnings on their products that are relevant to every conceivable alteration or misuse of those products.¹⁹² Indeed, manufacturers would be wise to go further. They should consider including not only warnings relevant to possible alterations of their products, but also instructions explaining how the product should be used if one of those alterations occurs. These warnings and instructions should cover not merely information that a foreseeable user would need to enable her to use the product safely, but also information concerning one-in-a-million risks, or risk-avoidance measures that the user could not in reality implement. But what would result from such a warnings regime? Would it reduce the aggregate harm caused by product use?

¹⁹⁰ *Burke v. Spartanics Ltd.*, 252 F.3d 131, 137–38 (2d Cir. 2001).

¹⁹¹ Had Burke pleaded his case in this manner, he would have been correct in arguing that the jury instruction misstated the manufacturer's duty. The instruction stated that Spartanics had "no duty to warn" so long as the "dangers associated with the machine were obvious." *Id.* at 137. However, under a regime that recognizes informed-choice duties to instruct, Spartanics might still owe a duty to instruct about ways to avoid even an obvious danger, regardless of how unlikely it is that the product user could or would carry them out.

¹⁹² See Bowbeer & Killoran, *supra* note 4, at 736–47.

An important reason not to require manufacturers and distributors to warn of open and obvious risks is that *overwarning* can actually decrease the effectiveness of warnings.¹⁹³ Overwarning effectively amounts to the manufacturer “crying wolf.”¹⁹⁴ The more that product manufacturers warn of risks that never materialize, the less likely product users are to heed those warnings. If product users merely ignored the excessive warnings, the problem might be minimal—the only superfluous costs would be those of providing the warnings. However, product users might begin to ignore not only the excessive warnings, but also those that are crucial to safe product use. As warning labels become increasingly crowded with seemingly redundant, useless admonitions to avoid subjecting oneself to obvious risks, product users and consumers may increasingly view all warnings as similarly useless, even those that advise of nonobvious risks. Indeed, the New York Court of Appeals counsels that “[r]equiring too many warnings trivializes and undermines the entire purpose of the rule, drowning out cautions against latent dangers of which a user might not otherwise be aware.”¹⁹⁵ The resultant increase in inattentiveness to valid warnings would contravene the intentions of a rigorous warnings regime.¹⁹⁶ Imposing a duty to instruct that serves informed-choice decision making, effectively abrogating existing rules of obviousness and causation, may allow courts to compensate accident victims more often, but at a cost.

If overwarning does, in fact, result in the “crowding out” of useful information, then a regime that encourages manufacturers to overwarn and overinstruct in order to avoid liability will be a regime in which accident rates might actually increase. A self-defeating doctrine would emerge, with courts causing an increase in product-related harm by insisting on an increase in warnings and instructions about those harms. Alternatively, if courts resist the temptation to play fast and loose with failure-to-warn theory, and restrict failure to warn to a sensible risk-reduction duty to warn or instruct by retaining common-

¹⁹³ See James A. Henderson, Jr. & Aaron D. Twerski, *The Products Liability Restatement in the Courts: An Initial Assessment*, 27 WM. MITCHELL L. REV. 7, 16 (2000) (“The obviousness of the danger is the surrogate for a warning and warnings about obvious and well known risks diminish the significance of warnings and tend to clutter warning labels with useless information.”); see also Henderson & Twerski, *supra* note 8, at 296–303 (arguing, from the perspective of risk-utility balancing, that the social cost of warning consumers about obvious risks—a cost that may include an increase in the rate of product-related accidents—may well outweigh the putative benefits of such warnings).

¹⁹⁴ See Twerski et al., *supra* note 19, at 514.

¹⁹⁵ *Liriano II*, 700 N.E.2d 303, 308 (N.Y. 1998).

¹⁹⁶ See RESTATEMENT, *supra* note 9, § 2 cmt. j (“[W]arnings that deal with obvious or generally known risks may be ignored by users and consumers and may diminish the significance of warnings about non-obvious, not-generally-known risks. Thus, requiring warnings of obvious or generally known risks could reduce the efficacy of warnings generally.”).

sense notions of obviousness and causation, they might more effectively "reduce the sum of the costs of accidents and the costs of avoiding accidents."¹⁹⁷ Of course, accidents will occur. However, they might actually occur less often if courts required warnings only in situations in which reasonable users and consumers would both need and heed them.

CONCLUSION

The products liability doctrine of failure to warn is grounded in a duty to inform product users and consumers of nonobvious risks and risk-avoidance measures related to product use or consumption. Product manufacturers and distributors can convey information via instructions or warnings, thus helping users and consumers either know how to use or consume more safely, or decide whether they wish to use or consume at all. While *Liriano III* first appears to violate the rule that there is no duty to warn of obvious dangers, upon closer inspection it emerges as an instance of one of the four possible combinations of failure-to-warn duty and purpose—the court imposed an informed-choice duty to instruct on nonobvious risk-avoidance measures.

Even though the New York Court of Appeals and the Second Circuit jointly announced a theoretically coherent duty in *Liriano II* and *III*, both its specific application to Hobart and its general practical implications are unacceptable. The risk-avoidance information that the Second Circuit held Hobart had a duty to provide was arguably obvious and was an inappropriate object of informed choice. Further, even if "correctly" applied, a substantial-modification, informed-choice duty to instruct runs the risk of turning product manufacturers into insurers, enabling courts to send nearly every failure-to-warn claim to the jury. Such a permissive warnings regime encourages product manufacturers to provide users and consumers with excessive and useless information, a practice that could actually result in increased accident costs. To keep practical limits on failure to warn, courts would be wise to take seriously the open and obvious danger rule, the effective limits of informed choice, and the need for sound, reasonable causation analysis. If they do not, they risk creating a self-contradictory doctrine under which manufacturers must choose between underwarning, thus risking liability by not providing information on every conceivable product-related risk, and overwarning, thus possibly increasing the rate of product-related accidents, albeit accidents for which they will not be liable.

¹⁹⁷ GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 26 (1970).