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Abstract
The Minnesota law of products liability underwent significant changes in the 1980s. The courts filled in gaps left open since the Minnesota Supreme Court initially adopted strict liability in McCormack v. Hanksraft Co.' in 1967, but they also raised new issues and left other issues open. This Article analyzes these developments in Minnesota products liability law. The broad focus is on standards in design and warning cases. In the course of the analysis, the Article focuses on the issues that had been left unsettled in Minnesota law in those areas. The Article first addresses the elements of a strict liability claim and then analyzes the standards in design defect and failure to warn cases, and finally, briefly comments on the relationship between design defect and warning claims.

Keywords
Strict liability, negligence, defective design, implied warranty, McCormack v. Hanksraft CO., Nondelegable Duties, failure to warn, obvious danger, manufacturer

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INTRODUCTION

The Minnesota law of products liability has undergone significant change in the past decade. The courts have filled in gaps left open since the Minnesota Supreme Court initially
adopted strict liability in *McCormack v. Hanksraft Co.*\(^1\) in 1967, but they have also raised new issues and have left other issues open.

The supreme court has resolved the question of standards in design defect cases, applying a balancing approach to determine whether a product is defective.\(^2\) The court has also removed obviousness of a product danger as a bar to recovery in design cases,\(^3\) overruling a 1976 decision, *Halvorson v. American Hoist and Derrick Co.*\(^4\)

The standards issue has also been largely resolved in failure to warn cases, given the supreme court's acknowledgement that negligence principles apply to failure to warn cases based on strict liability theory.\(^5\) But questions still remain concerning the relationship between judge and jury in resolving warning issues, the scope of the manufacturer's obligation to warn, and the manufacturer's obligation to warn where the danger presented by a product is obvious or where the product user is a sophisticated user.

The most significant development has perhaps been the collapse of distinctions between strict liability and negligence in failure to warn and design defect cases. The supreme court's decisions reducing the distinctions between the two theories have provided clarification of products liability law and have made analysis of other issues substantially easier because of the assumption that the distinctions are insignificant.

The purpose of this Article is to analyze the developments in Minnesota products liability law since 1980. The broad focus will be on standards in design and warning cases. In the course of the analysis, the Article will focus on the unsettled issues in Minnesota law in those areas.

The Article first addresses the elements of a strict liability claim and then analyzes the standards in design defect and failure to warn cases, and finally, briefly comments on the relationship between design defect and warning claims.

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1. 278 Minn. 322, 340, 154 N.W.2d 488, 501 (1967).
3. *Id.*
4. 307 Minn. 48, 240 N.W.2d 303 (1976).
I. THE ELEMENTS OF STRICT LIABILITY

The Minnesota Supreme Court has adhered to previously accepted statements of the elements of a strict liability claim. In Bilotta v. Kelley Co., the court stated that a plaintiff in a strict liability case must establish:

(1) that the defendant’s product was in a defective condition unreasonably dangerous for its intended use, (2) that the defect existed when the product left the defendant’s control, and (3) that the defect was the proximate cause of the injury sustained.

In Hudson v. Snyder Body, Inc., the court listed four elements:

(1) that plaintiff was injured, (2) that the injury was caused by defendant’s product, (3) that the injury occurred because defendant’s product was defective, and (4) that the defect was present in the product when it was sold by defendant.

The differences in the two statements are insignificant. It is clear from the Hudson court’s opinion that the third element includes a requirement that the product not only be defective, but in a defective condition unreasonably dangerous to the user or consumer. The unreasonable danger requirement has not been applied as a separate element by the supreme court. The second element in Hudson is part of the third element in Bilotta.

The Minnesota Court of Appeals, however, has on occasion indicated that other elements should be part of the plaintiff’s case. In Rients v. International Harvester Co., the trial court granted summary judgment to International Harvester on a claim concerning a three-year-old tractor manufactured by the defendant, which had been subsequently modified by the plaintiff. The court of appeals affirmed the trial court, noting that the plaintiff had the “burden of proving that the product reached plaintiff without substantial change in the condition in which it was originally sold by the manufacturer. . . .”

The Rients court relied upon section 402A of the Restatement (Second) of Torts, which the Minnesota Supreme

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6. 346 N.W.2d 616 (Minn. 1984).
7. Id. at 623 n.3.
8. 326 N.W.2d 149 (Minn. 1982).
9. Id. at 155.
11. Id. at 362.
Court had previously adopted as the basic statement of strict liability theory in *McCormack v. Hanksraft Co.* The court initially noted that the Restatement requires the plaintiff to show that the product causing the injury "is expected to and does reach the user or consumer without substantial change in the condition in which it was sold." This factor, drawn from section 402A, and explained by comment p to that section, is actually intended to bar the application of strict liability to situations where a product undergoes substantial further processing before it reaches the user or consumer.

The court in *Rients* used the substantial change element simply to establish the plaintiff's obligation to prove that the defect in the product existed when it left the hands of the manufacturer, which is the second element in *Bilotta* and the third element in *Hudson*. The substantial change requirement is thus repetitious when it is intended to mean nothing more than the causation requirement.

The *Rients* court, relying on the supreme court's 1969 decision in *Magnuson v. Rupp Manufacturing, Inc.*, stated that the plaintiff also "must show that the 'injury was not caused by any voluntary, unusual or abnormal handling by the plaintiff.'" To meet this requirement the court concluded that the plaintiff is required to prove "that he made proper use of the product, that he was in the exercise of due care for his own safety, that he was not aware of the defect and that he did not mishandle the product."

The condition of the tractor and axle attachment, which had bent tie rods, a fractured center steering arm, and bent left and right steering arms, led the court of appeals to conclude that the plaintiff could not prove that the tractor had not been abnormally modified. Similar to the substantial change element, the abnormal handling or mishandling element also focuses on whether the defect in the product existed when the product left the manufacturer's hands, and should be understood as

15. See Restatement (Second) of Torts 402A, comment p (1965).
17. 346 N.W.2d at 363, quoting *Magnuson*, 285 Minn. at 40, 171 N.W.2d at 206.
18. 346 N.W.2d at 363, (citing Comment, Products Liability: The Victim's Conduct as a Bar to Recovery—The Minnesota Supreme Court Reaffirms the Magnuson "Limiting Factors", 1 WM. MITCHELL L. REV. 207, 209 (1974)).
clearly referring to the causation element. This should avoid confusion in the statement of the basic elements in a strict liability case.

To the extent the court indicated that a plaintiff in a strict liability case must prove that he exercised due care for his own safety or that he was not aware of the product defect, the court’s statement appears to be in conflict with settled law in Minnesota. Placing the burden of proof on the plaintiff to disprove contributory negligence deviates from the supreme court’s clear statements that contributory negligence is an affirmative defense that must be proven by the defendant.19 Also, requiring the plaintiff to prove that he was unaware of the product defect is erroneous for two reasons. First, it appears to place the burden of proof on the plaintiff to demonstrate that at least one of the elements of secondary assumption of risk cannot be met.20 Secondary assumption of risk, like contributory negligence, is an affirmative defense.21 Second, requiring the plaintiff to prove lack of awareness of a product defect appears to conflict with the supreme court’s decision in Holm v. Sponco Manufacturing, Inc.22 In Holm, the court held that obviousness of a product danger is not a defense to a strict liability claim, but rather a factor to be considered by the jury in determining whether the product is defective.23

In McCormick v. Custom Pools, Inc.,24 the court of appeals again relied on Magnuson for the proposition that a plaintiff must not be aware of a defect in order to recover damages. The ruling might be objectionable in theory, but in application the result may be sound. The McCormick court held that the plaintiff’s knowledge of the dangers involved in diving into a shallow pool precluded recovery under a failure to warn theory because a warning would not have deterred the plaintiff from making the dive.25 The plaintiff’s knowledge of the danger was thus relevant to the causation issue, that is, whether the warning would have worked under the circumstances, but his

20. See 4 MINNESOTA PRACTICE CIVIL JURY INSTRUCTION GUIDE, JIG 135 (3d ed. 1986) [hereinafter MINNESOTA PRACTICE JIG].
21. See id.; MINN. STAT. § 604.01, subd. 1a (Supp. 1987).
22. 324 N.W.2d 207 (Minn. 1982).
23. Id. at 213.
25. Id. at 476.
knowledge did not relate to whether the defendant had a duty to warn.\textsuperscript{26}

For purposes of simplicity, therefore, courts should adhere to the basic statement of the elements as established in Bilotta and Hudson. The "extra" element or elements implied by the supreme court’s opinion in Magnuson should be permanently set aside to avoid any future unnecessary confusion that the decision has caused in the past.

II. Standards for the Resolution of Design Defect Cases

In deciding McCormack \textit{v.} Hankscraft Co.\textsuperscript{27} in 1967, the Minnesota Supreme Court adopted section 402A of the Restatement (Second) of Torts\textsuperscript{28} as the basic statement of strict liability in Minnesota, but did not specify the standards to be used for resolving products liability claims. Various standards could have been applied, including the Restatement’s consumer expectation standard. According to that standard, a product is in a defective condition unreasonably dangerous to the user or consumer if it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."\textsuperscript{29}

A second possibility was a warranty standard, which the court appeared to adopt in 1970 in Farr \textit{v.} Armstrong Rubber Co.\textsuperscript{30} In Farr, the trial court instructed the jury that "a product is defective if it fails to perform reasonably, adequately and safely the normal, anticipated or specified use to which the manufacturer intends that it be put."\textsuperscript{31}

In 1982, in Holm \textit{v.} Sponco Manufacturing, Inc.,\textsuperscript{32} the supreme court intimated that a balancing approach would be applied in products liability cases to determine whether a product is defective. In 1984, in Bilotta \textit{v.} Kelley Co.,\textsuperscript{33} the court removed any

\textsuperscript{26} See infra notes 110 - 204 and accompanying text.
\textsuperscript{27} 278 Minn. 322, 154 N.W.2d 488 (1967).
\textsuperscript{28} \textsc{Restatement (Second) of Torts} 402A (1965).
\textsuperscript{29} \textsc{Restatement (Second) of Torts} 402A, comment i (1965).
\textsuperscript{30} 288 Minn. 83, 88, 179 N.W.2d 64, 68 (1970).
\textsuperscript{31} Id. at 89, 179 N.W.2d at 68.
\textsuperscript{32} 324 N.W.2d 207, 213 (Minn. 1982).
\textsuperscript{33} 346 N.W.2d 616, 621-22 (Minn. 1984).
doubt on the issue when it clearly held that a reasonable-care balancing approach should be applied in design defect cases.

_Bilotta_ arose out of injuries sustained by the plaintiff when he was pinned at his neck against a door jamb by a forklift. The truck had tipped during attempts to free it from being stuck partly on a loading dock and partly on a dockboard. A dockboard is a device that bridges the gap between a loading dock and a carrier bed. The dockboard in this case was resting for support on a trailer. To free the forklift the driver of the semi-truck was told to pull the semi out. When he did so the dockboard’s support was removed. The ramp from the dockboard fell to its lowest level, permitting the forklift to tip, pinning the plaintiff.

In order to remain competitive, Kelley Company, the dockboard manufacturer, made different types of dockboards, for different uses, with different safety devices, and at various costs. The trial court instructed the jury on strict liability as follows:

A product is in a defective condition if, at the time it leaves the seller’s hands, it is in a condition which is unreasonably dangerous to the ordinary user.

A condition is unreasonably dangerous if it is dangerous when used by an ordinary user who uses it with knowledge common to the community as to the product’s characteristics and common usage.

The defect may be in the design of the product itself or in the instructions necessary for safe use.\(^{54}\)

Kelley Company argued that the trial court’s instructions in effect told the jury to disregard the evidence of the reasonableness of its design choices by directing the jury to focus solely on the product user’s expectations.

The supreme court agreed, stating that it had adopted a reasonable-care balancing approach in _Holm_. The standard in _Holm_ was taken from a 1976 New York Court of Appeals case, _Micallef v. Miehle Co._\(^{35}\) The standard reads as follows:

[A] manufacturer is obligated to exercise that degree of care in his plan or design so as to avoid any unreasonable risk of harm to anyone . . . when the product is used in the manner

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34. _id._ at 621. The jury instruction was taken from JIG II 118, 4 MINN. DIST. JUDGES ASS’N, MINNESOTA PRACTICE JIG II (2d ed. 1974).

for which the product was intended, as well as an unintoshed yet reasonably foreseeable use.

What constitutes "reasonable care" will, of course, vary with the surrounding circumstances and will involve "a balancing of the likelihood of harm, and the gravity of harm if it happens, against the burden of the precaution which would be effective to avoid the harm."\(^{36}\)

It is not clear why the use of the consumer expectation standard from the Restatement precludes an evaluation by the trier of fact of the manufacturer's design choices. For example, in *Couch v. Mine Safety Appliances Co.*,\(^{37}\) the Washington Supreme Court applied the consumer expectation standard, but indicated that the expectations of the consumer would differ, depending on the circumstances:

In determining the reasonable expectations of the ordinary consumer, a number of factors must be considered. The relative cost of the product, the gravity of the potential harm from the claimed defect and the cost and feasibility of eliminating or minimizing the risk may be relevant in a particular case. In other instances the nature of the product or the nature of the claimed defect may make other factors relevant to the issue.\(^{38}\)

The Washington Supreme Court used the same factors under the consumer expectation standard that the court in *Bilotta* used in its reasonable care balancing test. It is questionable whether the standard submitted to the jury makes a difference if the evidence is the same, and if trial courts perform the same function in determining whether the evidence is sufficient to justify submission of a case to jury. This uncertainty occurs at least when the issue is whether the jury will be permitted to consider the manufacturer's tradeoffs in designing a particular product. Under the consumer expectation standard, that sort of evidence is not necessarily required,\(^{39}\) but, as the *Couch* court noted, it may be made part of the standard. If tradeoff

\(^{36}\) Id.


\(^{38}\) Id. at 238, 728 P.2d at 588 (quoting Seattle-First Nat'l Bank v. Tabert, 86 Wash. 2d 145, 154, 542 P.2d 774, 779 (1975)); see also Heaton v. Ford Motor Co., 248 Or. 467, 435 P.2d 806 (1967).

\(^{39}\) See Campbell v. General Motors Corp., 32 Cal. 3d 112, 649 P.2d 224, 184 Cal. Rptr. 891 (1982). The California Supreme Court adopted a dual standard for design defect cases. The dual standard includes both the balancing standard plus the consumer expectation standard. See Baker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). In *Campbell* the court made it clear that the
evidence is required, the reason for selection of either the reasonable care or consumer expectation standard arguably diminishes in importance.

There is a second reason, however, for rejecting the consumer expectation standard, even if the jury is permitted to consider the manufacturer's reasons for selecting a particular design. Adoption of the balancing standard removed the potential bottleneck that the consumer expectation standard created by making recovery substantially dependent on whether the product danger is known by the class of consumers or users exposed to the product. As the Colorado Supreme Court noted in *Camacho v. Honda Motor Co.*, use of the consumer expectation standard as a sole means of determining whether a product is defective "diverts the appropriate focus and may thereby result in a finding that a product is not defective even though the product may easily have been designed to be much safer at little added expense and no impairment of utility." The *Camacho* court also concluded that "[u]ncritical rejection of design defect claims in all cases wherein the danger may be open and obvious ... contravenes sound public policy by encouraging design strategies which perpetuate the manufacture of dangerous products." Although this was not an articulated reason for the court's decision in *Bilotta*, it provides additional support for the court's conclusion in that case.

Establishing the basic standard resolves some of the problems that exist in design defect cases. There are other issues that exist in design cases, some of which are resolved by the adoption of the reasonable care balancing approach. *Bilotta* leaves open the issue of whether it is appropriate to instruct a jury on negligence and implied warranty theories, along with a strict liability instruction. The court also left open the issue of whether a plaintiff will be required to prove the existence of a feasible alternative in order to recover in a design case. There is also a question concerning the impact of an open and obvious danger in design cases. While that issue was

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consumer expectation standard could be applied, even absent evidence of a feasible alternative. *Campbell* at 125-26, 649 P.2d at 232, 184 Cal. Rptr. at 899.


42. *Id.* at 1246 (footnote omitted).

43. *Id.*
not specifically addressed in *Bilotta*, it was resolved in *Holm v. Sponco Manufacturing Co.*,\(^{44}\) an earlier supreme court decision that provided the foundation for the court’s opinion in *Bilotta*. Finally, the court in *Bilotta* took the position that the duty to design a safe product is a nondelegable duty.\(^{45}\) The implications of that statement are not clear, either in terms of the manufacturer’s obligation and ability to shift the loss to others who are responsible for product safety, or in terms of the use that can be made of that standard in jury instructions.

**A. The Feasible Alternative Factor**

In *Kallio v. Ford Motor Co.*,\(^{46}\) the supreme court considered whether a feasible alternative is part of the plaintiff’s prima facie case in a design defect action. In *Kallio*, the plaintiff was injured while attempting to get into his pickup truck to stop it after it started moving while he was in the back of the truck. He alleged that a design defect in the transmission created a false or illusory park position, which caused the transmission to slip into reverse when the gear selector got hung up on the gear tooth between park and reverse. Following entry of judgment for the plaintiff, the defendant appealed, raising various issues, including the argument that the jury should have been instructed on the plaintiff’s burden of proving an alternative design before the truck could be found to be defective. The defendant’s requested instruction read as follows:

> For you to conclude that the design of the park system in the subject Ford vehicle was defective and unreasonably dangerous at the time of sale by Ford Motor Company, the plaintiff must establish by a preponderance of the evidence that, at the time the vehicle was designed, there was available to the defendant a feasible practicable alternative design and that design, if it had been chosen by Ford, would have avoided or materially reduced the plaintiff’s injury. If the plaintiffs fail to prove the existence of such a feasible, practicable alternative design, they will be unable to prove that Ford’s choice of design was unreasonable. The plaintiff cannot carry his burden in this regard merely by showing that an alternative design was possible. To succeed in this case the plaintiffs must establish that such a design would

\(^{44}\) 324 N.W.2d 207 (Minn. 1982).
\(^{45}\) *Bilotta*, 346 N.W.2d at 624.
\(^{46}\) 407 N.W.2d 92 (Minn. 1987).
have been feasible and practicable, that it would have avoided or materially reduced the plaintiff’s injury.47

The trial court denied the defendant’s request and the Minnesota Supreme Court affirmed, holding that the “existence of a safer, practical alternative design is not an element of an alleged defective product design prima facie case.”48 In at least three places in its opinion, however, the court indicated that such evidence will ordinarily either be submitted or required in design defect cases. The court noted that prior design defect cases have indicated “that, as a practical matter, successful plaintiffs, almost without fail, introduce evidence of an alternative safer design.”49 The court also noted that evidence of a safer alternative design will normally be presented first by the plaintiff, even though it is not required in all cases.50 The court then added in a footnote that, “[c]onceivably, rare cases may exist where the product may be judged unreasonably dangerous because it should be removed from the market rather than be redesigned.”51

Proof of a feasible alternative may have three implications in a design defect case. Such proof may be a requirement, a factor to be considered in determining whether a design is defective, or irrelevant on the issue of whether a design is defective. The results differ, depending on the circumstances and on the court.

One of the clearest expositions of the components of a feasible alternative design requirement appears in the Oregon Supreme Court’s opinion in Wilson v. Piper Aircraft Corp.52 In Wilson, the plaintiff’s decedents were killed in an airplane crash. One of the plaintiff’s theories was that the airplane crashed because of carburetor icing. The plaintiffs alleged that the carbureted engine should have been replaced by a fuel-injected engine that would not have been susceptible to icing. There was evidence that fuel-injected engines of the appropriate horsepower were available at the time the airplane was designed and that FAA approval could probably have been ob-
tained for the engine. The Oregon Supreme Court concluded, however, that the evidence was insufficient:

Plaintiffs' allegations amount to a contention that an airplane furnished with a standard aircraft engine is defective because an engine of a different type, or with a different carburetor system, would be safer in one particular. It is not proper to submit such allegations to the jury unless the court is satisfied that there is evidence from which the jury could find the suggested alternatives are not only technically feasible but also practicable in terms of cost and the over-all design and operation of the product. 53

Whether evidence of a feasible alternative is obligatory under Oregon law is dependent upon the circumstances of the case. The Oregon Supreme Court had previously adopted a balancing approach in design defect cases. 54 In Wilson, the court considered whether evidence of a feasible alternative design should be required. The court noted suggestions in other cases that the plaintiff's burden in a design defect case includes a showing that there was available an alternative safer design, which was feasible, practicable and technologically possible at the time of manufacture.

The court then made clear that the trial court has the initial responsibility for balancing the utility of the risk against its magnitude in determining whether to submit a design defect case to a jury:

One of the factors to be weighed in making this determination is the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility. In other words, the court is to determine, and to weigh in the balance, whether the proposed alternative design has been shown to be practicable. The trial court should not permit an allegation of design defect to go to the jury unless there is sufficient evidence upon which to make this determination. . . .

In some cases, because of the relatively uncomplicated nature of the product or the design feature in question, evidence of the dangerous nature of the design in question or of a safer alternative design may be sufficient to permit the court to consider this factor adequately. An extreme exam-

53. Id. at 69, 577 P.2d at 1327.
ple is found in the facts of *Passwaters v. General Motors Corp.* . . . There a passenger on a motorcycle which was involved in a collision with an automobile was injured by purely ornamental blades on the automobile's hubcap. The evidence that the blades were ornamental only would suffice in such a case; the court and the jury could find from that fact alone that it would have been practicable to supply hubcaps of a safer design. . . .

In other instances, however, the question of practicability cannot be properly weighed solely on the basis of inference and common knowledge. That is the case with the allegations we are considering here.\(^55\)

The Oregon Supreme Court thus appears to make the requirement of a feasible alternative design part of the plaintiff's prima facie case in design defect cases. *Wilson* is complicated because of the nature of the plaintiff's allegation concerning the carbureted engine. Requiring the plaintiff in that case to prove a feasible alternative design, one that is practicable in terms of cost and the overall design and performance of the airplane, is a justifiable hurdle that avoids stretching design defect liability to an unreasonable point. Whether the requirement should be automatic in all design defect cases is questionable, however. Given the range of design defects that are litigated, it is perhaps unreasonable to take the position that all cases should require proof of a feasible alternative design. There may be situations where, under either a risk-utility or consumer expectation standard, a product may be defective even though there is no safer way to make the product.

The New Jersey Supreme Court's opinion in *O'Brien v. Muskin Corp.*,\(^56\) is an example. The plaintiff in that case was injured when he dove into an above ground swimming pool that was filled with water to a depth of three and one-half feet. His hands separated when they hit the pool bottom, allowing his head to strike the bottom of the pool, resulting in injuries. The pool had a vinyl liner that was slippery when wet. There was testimony that no above-ground pool was ever lined with other than vinyl. Based on conflicting evidence relating to suitable lining material, the trial judge took the design defect issue from the jury, submitting only a failure to warn theory.\(^57\)

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55. *Wilson*, 282 Or. at 67-69, 577 P.2d at 1326-27 (citations omitted).
57. *Id.* at 179, 463 A.2d at 303.
In holding that the design defect issue should have been submitted to the jury, the O'Brien court analyzed the place of state-of-the-art evidence in design defect litigation. The court noted that such evidence relates to both sides of the risk-utility equation, and that a risk-utility continuum is fact-dependent. The court held that state-of-the-art evidence may be dispositive in a particular case, but that it "does not constitute an absolute defense apart from risk-utility analysis."\(^58\) Alternative designs are, however, a definite factor to be considered in design defect litigation:

The assessment of the utility of a design involves the consideration of available alternatives. If no alternatives are available, recourse to a unique design is more defensible. The existence of a safer and equally efficacious design, however, diminishes the justification for using a challenged design.\(^59\)

The court noted that evaluation of the utility of a product also involves an analysis of the relative need for the product:

A product that fills a critical need and can be designed in only one way should be viewed differently from a luxury item. Still other products, including some for which no alternative exists, are so dangerous and of such little use that under the risk-utility analysis, a manufacturer would bear the cost of liability of harm to others. That cost might dissuade a manufacturer from placing the product on the market even if the product has been made as safely as possible.\(^60\)

Cases like O'Brien may be indicative of the Minnesota Supreme Court's reasons for declining to make proof of a feasible alternative an absolute requirement in design cases. Wilson, on the other hand, while making the requirement part of the plaintiff's prima facie case, appears to be doing nothing more than expressing the same sentiments as the Minnesota Supreme Court expressed in Kallio, when it stated that proof of a feasible alternative is not required, but nonetheless will usually be an essential part of a plaintiff's case.

\(^{58}\) Id. at 183, 463 A.2d at 305.
\(^{59}\) Id. at 184, 463 A.2d at 305.
\(^{60}\) Id. at 184, 463 A.2d at 306.
B. The Use of Alternative Theories of Liability: The Problem of the Inconsistent Verdict

The court in Bilotta adopted the balancing standard in the context of a strict liability claim, although it was essentially a negligence standard. The court noted that commentators have suggested that strict liability and negligence theories merge into one theory in design defect cases, but then went on to make the following statement:

The distinction between strict liability and negligence in design-defect and failure-to-warn cases is that in strict liability, knowledge of the condition of the product and the risks involved in that condition will be imputed to the manufacturer, whereas in negligence these elements must be proven.

The court then stated that "whether strict liability or negligence affords a plaintiff the broader theory of recovery will depend largely on the scope of evidence admitted by the trial court and on the jury instructions given under each theory." This statement, however, does not resolve the problem because it provides no indication of whether there are differences in evidentiary standards between the theories, nor does it provide any indication of how juries are to be instructed under the two theories. In addition it does not address whether instructions covering negligence and strict liability are in fact appropriate in design defect cases.

The supreme court subsequently removed one of the potentially significant evidentiary distinctions between strict liability and negligence in Kallio v. Ford Motor Co., when it held that evidence of subsequent remedial measures is to be treated the same under both negligence and strict liability. If the evidentiary requirements are the same under both theories, and the elements are essentially the same, then there is no significant difference between the theories, unless the imputed knowledge language provides a large enough wedge between the theories to justify instruction under both negligence and strict liability theories.

61. Bilotta, 346 N.W.2d at 622.
62. Id.
63. Id.
64. 407 N.W.2d 92 (Minn. 1987).
65. Id. at 97-98.
66. See infra notes 72-75 and accompanying text.
The Minnesota Civil Jury Instruction Guides adopted the following instruction incorporating the Bilotta standards:

A manufacturer has a duty to use reasonable care when designing a product, so as to avoid any unreasonable risk of harm to (anyone who) (property that) is likely to be exposed to harm when the product is put to its intended use or to any use that is unintended but is reasonably foreseeable.

What constitutes reasonable care will vary with the surrounding circumstances. Reasonable care is the care that a reasonably prudent person would exercise under the same or similar circumstances.

The reasonable care to be exercised by a manufacturer when designing a product will depend on all the facts and circumstances, including, among others, the likelihood and seriousness of harm against the feasibility and burden of any precautions which would be effective to avoid the harm. You are instructed that the manufacturer is obligated to keep informed of scientific knowledge and discoveries in its field.

If the manufacturer did not use reasonable care when designing the product in question, then the product is in a defective condition unreasonably dangerous to the (user or consumer) (user's or consumer's property).

[A product manufacturer may not avoid its obligation to design safe products by relying on other persons to make design choices that will affect the safety of the product.]67

The instruction is intended to be the strongest and broadest instruction permitted under the Bilotta standard, and is also intended to be the sole instruction in design defect cases.68

A comparison of the design defect instruction in JIG 117 with the negligence instruction in JIG 120 illustrates the problems that would be created if instructions were given under both negligence and strict liability theories. JIG 120 reads as follows:

A (manufacturer) (supplier) of a product has a duty to use reasonable care in the (manufacture) (assembly) (inspection) (packaging) (testing) of the product to protect those

67. 4 MINNESOTA PRACTICE JIG 117 (3d ed. 1986 & Supp. 1988). The last paragraph in brackets is to be used in cases where the nondelegation problem is in issue.
68. See id. at 82-83. The suggested special verdict form for products liability cases provides a single question for the submission of design defects cases. See id., Special Verdict Form Number 2, at 450.
(who will use the product) (who are in the area of its use) from unreasonable risk of harm (while the product is being used for its intended purpose) (while the product is being used for any purpose which could be reasonably expected). [This duty extends to any person using the product or in the area of its use whether or not the person using the product was the actual purchaser.]^69

The instruction is framed in terms of reasonable care, the same as JIG 117. A separate instruction on negligence under JIG 120 would be repetitive of the basic principle already established in JIG 117. In addition, it would create the possibility of an inconsistent verdict if a jury were to find a manufacturer liable under one instruction but not under the other.\textsuperscript{70} Because the design defect instruction in JIG 117 encompasses the content of JIG 120, a separate instruction on negligence is neither justified nor tactically sound.

In cases such as Bilotta the proof requirements will, as a practical matter, usually include proof of a feasible alternative.\textsuperscript{71} Once the plaintiff proves the existence of a feasible alternative, the plaintiff will also have established the basis for an inference that the defendant knew or should have known of that alternative. This appears to diminish the importance of the court's statement in Bilotta that in design defect cases "knowledge of the condition of the product and the risks involved in that condition will be imputed to the manufacturer."\textsuperscript{72}

Although in conscious design defect cases such as Bilotta the utility of the imputed knowledge language may be of little or no value, there may be other cases where there is a serious dispute as to whether the manufacturer knew or should have known of the risks involved in the condition of the product. In those cases, the plaintiff may benefit significantly from a jury instruction that specifically tells the jury to assume that the manufacturer knew of the conditions and risks involved in the condition of the product. The Minnesota Civil Jury Instruction

\textsuperscript{69} 4 Minnesota Practice JIG 120 (3d ed. 1986).
\textsuperscript{70} See generally infra notes 110-25 and accompanying text (discussing the relationship between strict liability and negligence in failure to warn cases).
\textsuperscript{71} See Kallio v. Ford Motor Co., 407 N.W.2d 92, 96-97 (Minn. 1987). The existence of a safer alternative design, however, is not an element of a prime facie case for design defect. Id. at 97.
\textsuperscript{72} Bilotta, 346 N.W.2d at 622.
Guides provide an instruction in such cases. The instruction reads as follows:

You are to assume that the manufacturer knew of the condition of the product and the risks involved in the product’s condition in determining whether reasonable care was exercised in the design of the product.73

The Minnesota District Judges Association Committee on Civil Jury Instructions, however, indicated its intent to limit the cases in which the imputed knowledge instructions should be used:

If the imputed knowledge language is applied literally in either design defect or failure to warn cases, then the manufacturer’s conduct in either design defect or failure to warn cases would be judged according to knowledge of product dangers that the manufacturer did not discover and could not have discovered. However, the Committee is of the opinion that the supreme court did not intend to impute to a product manufacturer knowledge of a danger that was not and could not have been discovered at the time the product was manufactured. To avoid applying the imputed knowledge language in such cases, the suggested instruction incorporating the imputed knowledge language should be utilized only where there is evidence that the manufacturer either knew or should have known of the dangers created by the product in question.74

Whether the supreme court will apply the imputed knowledge language from Bilotta so as to impose an absolute duty to know on the product manufacturer has not yet been answered by the court. Imposition of an absolute obligation in either design defect or failure to warn cases would be inconsistent with the position the court has taken in Kallio indicating that proof of a feasible alternative design will ordinarily be required in design defect cases.75 It would also be inconsistent with the more balanced approach to products liability cases that the supreme court has taken since the acceptance of the strict liability concept in Minnesota in 1967.

Although a negligence instruction appears unwarranted after Bilotta, there is still a question concerning the continued

73. 4 Minnesota Practice JIG 117, at 84 (3d ed. 1986).
74. Id.
75. See Kallio, 407 N.W.2d at 97-98.
availability of the implied warranty theory. The court did not take a specific position on the issue.

The court has considered the relationship between implied warranty and strict liability in previous cases. For example, in *Goblirsch v. Western Land Roller Co.*, the issue arose when the trial court instructed the jury on strict liability but refused to instruct on implied and express warranty in a case involving an allegedly defective corn grinder. The supreme court held that the plaintiff was not prejudiced by the trial court’s failure to give the warranty instructions. The basis for the trial court’s strict liability instruction was *Farr v. Armstrong Rubber Co.*, which essentially adopted a warranty standard for determining product defectiveness. In *Goblirsch* the court concluded that the plaintiff received the benefit of the strongest and broadest instruction on strict liability, and that there was therefore no prejudice to the plaintiff because of the refusal to give the warranty instructions.

Based on *Goblirsch* and similar cases, it is possible to argue that the plaintiff should not be entitled to an implied warranty instruction where there is a strict liability instruction that is couched in substantially the same, but broader terms, as an implied warranty instruction. However, *Bilotta*, adopts the negligence approach for design defect cases and the liability standard, at least facially, is quite different from the warranty standard adopted by the court in *Farr*. The question then is whether that difference should justify use of the implied warranty theory by the plaintiff, so that the plaintiff will be given the benefit of the stronger and broader warranty instruction. If *Bilotta* is to have its intended effect, the answer should be that the implied warranty instruction cannot be given in a design defect case.

The problem that caused the supreme court to adopt the negligence standard in *Bilotta* was that juries would be deprived of the means to evaluate the reasonableness of a manufacturer’s design choice if the Restatement’s consumer expectation standard were used to determine product defectiveness. The same problem would be presented if the implied warranty standard from the Uniform Commercial Code of *Farr*

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76. 310 Minn. 471, 246 N.W.2d 687 (1976).
77. 288 Minn. 83, 179 N.W.2d 64 (1970).
78. *Goblirsch*, 310 Minn. at 476, 246 N.W.2d at 690.
were used. The implied warranty standard would permit a finding of breach of an implied warranty without a weighing and balancing of the manufacturer’s design choices, a result that the court sought to avoid in *Bilotta*.

Therefore, while implied warranty was not discussed by the court in *Bilotta*, the logical impact of that case seems to be that implied warranty instructions are inappropriate in design defect cases. The single jury instruction embodied in JIG 117 should be sufficient to cover design defects.

An instruction on a single theory of recovery is not only consistent with the policies of *Bilotta*, but would also avoid the problem of the inconsistent jury verdict, a problem that plagued the courts before *Bilotta* was decided. 79

C. Open and Obvious Dangers

Any doubts about the impact of an obvious product defect on a plaintiff’s ability to recover in a design defect case were removed prior to *Bilotta* in *Holm v. Sponco Manufacturing, Inc.* 80 Prior to *Holm*, the Minnesota Supreme Court restricted the scope of design defect law in *Halvorson v. American Hoist & Derrick Co.*, 81 when it adopted the “latent-patent danger rule,” which bars a plaintiff from recovery if the danger presented by the product is obvious to the product user. 82 The specific holding in *Halvorson* was that a product manufacturer does not owe a duty to a plaintiff “to install safety devices on its crane to guard against the risk of electrocution when the record demonstrated that [the] risk was: (1) Obvious; (2) known by all of the employees involved; and (3) specifically warned against. . . .” 83

The *Holm* court overruled *Halvorson* for several reasons. First, the court indicated that the function of strict products liability law, as adopted in *McCormack v. Hanksraft Co.*, 84 is to

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80. 324 N.W.2d 207 (Minn. 1982).
83. *Halvorson*, 307 Minn. at 57, 240 N.W.2d at 308.
84. 278 Minn. 332, 339-40, 154 N.W.2d 488, 500-01 (1967).
place the loss from product-related injuries on the manufacturer, who is in a better position to spread the cost of loss and is better able to recognize and avoid the risk created by its products than a consumer or user of the products. The court also recognized that the latent-patent danger rule not only encourages the design of products with obvious hazards, but also shifts the entire burden of economic loss to the injured user even if the manufacturer is at fault.\footnote{Holm, 324 N.W.2d at 213.}

Second, the court concluded that the latent-patent danger rule is inconsistent with comparative fault principles as adopted in Minnesota because it makes obvious product danger a complete bar to recovery, whereas under prior supreme court decisions, obviousness in the form of secondary assumption of the risk is part of contributory negligence. So characterized, obviousness of a danger may relate to the defense of contributory negligence, but it is not an automatic bar to recovery.\footnote{Id.}

The court concluded that the latent-patent danger rule as adopted in \textit{Halvorson} should be rejected in favor of a “reasonable care” balancing approach.\footnote{Id.} The court’s decision in \textit{Holm} was the forerunner of \textit{Bilotta}, and the result is not changed in the latter case.

The critical point in understanding the impact of obvious product dangers is to make sure that the latent-patent danger rule is not reincorporated through the application of primary assumption of risk principles.\footnote{See, e.g., Armstrong v. Mailand, 284 N.W.2d 343 (Minn. 1979), in which the court applied primary assumption of risk principles to bar recovery in actions for the wrongful death of three firemen who were killed while fighting a fire at a liquid propane storage tank site. The problem with the application of primary assumption of risk, as with the latent-patent danger rule, is that it tends to bar recovery if a danger is obvious, even if the defendant could have corrected the danger. The court has indicated disfavor with a strict application of primary assumption of risk concepts. See Griffiths v. Lovelette Transfer Co., 313 N.W.2d 602 (Minn. 1981).} However, the same policy factors that justified elimination of the latent-patent danger rule in \textit{Holm} should also justify a limited application of primary assumption of risk principles.

\section{D. Nondelegable Duties}

Another significant issue raised in \textit{Bilotta} is whether a prod-
uct manufacturer is entitled to shift responsibility for design selection to an intermediary. The defendant in *Bilotta* argued that a product manufacturer should be able to shift responsibility for product injuries to knowledgeable buyers who are offered safety devices by the manufacturer where the safety devices are rejected. The defendant, Kelley Company, argued that shifting responsibility to the purchaser would encourage the development and purchase of safety options by the product manufacturer. Responsibility, however, would be limited to cases where:

(1) the purchaser is aware of both the hazard and the available option, (2) the operator could have avoided the accident through use of the due care, (3) the possibility of the accident is statistically minimal, and (4) the option was a feature beyond that normally provided by the industry.  

The argument was based on the Eighth Circuit opinion in *Wagner v. International Harvester Co.* The *Wagner* court characterized the theory and rationale for the option offer defense as follows:

[T]he purchaser of multi-use equipment knows best the dangers associated with its particular use, and so it should determine the degree of safety provided. That is to say, the purchaser may be in the best position to make the cost-benefit analysis implicit in the principles of general negligence. Imposing liability on such a purchaser would result in minimizing the sum of accident and preventative costs.

The Eighth Circuit accepted the theory, but found it inapplicable to the facts before it.

The supreme court noted that the rule in *Wagner* would “be justified only [in cases] where multi-use equipment is involved and the optional device would impair the equipment’s utility in the uses for which the device is unnecessary.” The court then stated that “[t]he better rule, which we hereby adopt, is that a manufacturer may not delegate its duty to design a reasonably safe product.”

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89. *Bilotta*, 346 N.W.2d at 624.
90. 611 F.2d 224 (8th Cir. 1979).
91. *Id.* at 231.
92. 346 N.W.2d at 624.
93. *Id.* The concept is not a new one in Minnesota. See Ferraro v. Taylor, 197 Minn. 5, 265 N.W. 829 (1936). In *Ferraro*, the car had defective brakes, the steering wheel was out of order, the windshield wiper would not work, and it was raining. The defendant was not relieved of liability. “It has been held that where the earlier
The supreme court rejected *Wagner*, and based its nondelegable duty determination on a New Jersey Supreme Court case, *Bexiga v. Havir Manufacturing Corp.* The *Bexiga* court's conclusion on the nondelegable duty issue is as follows:

Where a manufacturer places into the channels of trade a finished product which can be put to use and which should be provided with safety devices because without such it creates an unreasonable risk of harm, and where such safety devices can feasibly be installed by the manufacturer, the fact that he expects that someone else will install such devices should not immunize him. The public interest in assuring that safety devices are installed demands more from the manufacturer than to permit him to leave such a critical phase of his manufacturing process to the haphazard conduct of the ultimate purchaser. The only way to be certain that such devices will be installed on all machines—which clearly the public interest requires—is to place the duty on the manufacturer where it is feasible for him to do so.

We hold that when there is an unreasonable risk of harm to the user of a machine which has no protective safety device, as here, the jury may infer that the machine was defective in design unless it finds that the incorporation by the manufacturer of a safety device would render the machine unusable for its intended purposes.

The supreme court relied upon this language in reaching its final conclusion on the delegation issue. The *Bilotta* court concluded with the following analysis:

The suggested option offer defense thus would not apply to dockboards which are not multi-use and whose functioning is never impaired by the installation of the panic stop device. The fact that installation or standardization of a safety device will cost more money and take more time, thus decreasing sales, should be a factor considered within the balancing approach given to the jury but should not provide

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94. 60 N.J. 402, 290 A.2d 281 (1972).
95. *Id.* at 410-11, 290 A.2d at 285.
an absolute defense for the manufacturer. . . . [S]uch a defense would permit an entire industry to market unreasonably dangerous ‘stripped down’ devices and offer as optional all safety devices. Liability for improper choice of a safety device would then fall on the purchaser. This result would circumvent the general duty of the manufacturer to provide a reasonably safe design for its products.\textsuperscript{96}

The supreme court then concluded that the dockboard involved in the Bilotta case would not satisfy the “suggested option offer defense” because the dockboard is not multi-use, and its function would not be impaired by installation of a panic stop device.\textsuperscript{97}

Although the supreme court rejected the option offer defense established in Wagner, adoption of the nondelegable duty rule from Bexiga does not mean that the manufacturer’s liability is automatic. As the supreme court made clear in Bilotta, the factors that influenced the design of the product should be “considered within the balancing approach given to the jury,”\textsuperscript{98} but the manufacturer should not have an absolute defense even though safety device alternatives were made available to the product purchaser.\textsuperscript{99}

As both Bilotta and Bexiga make clear, the circumstances under which the manufacturer made the decision to design and market its product will be relevant in determining whether the manufacturer exercised reasonable care. Coupled with the Kallio court’s strong statement concerning the practical necessity of proving a feasible alternative, it may be that a suggested safety device could not feasibly be installed under the circumstances, so that the trier of fact would be justified in finding that the product design is not defective.

The Minnesota Supreme Court’s position on the manufacturer’s ability to delegate raises at least two questions. The first concerns the impact of the nondelegation rule on the liability of other parties who may be responsible for injuries, including the plaintiff and the plaintiff’s employer. In part, the question is whether the issue should be the subject of a jury instruction or is a determination that is to be made as a matter of law by a court, with no instruction given to the jury. A sec-

\textsuperscript{96} Bilotta, 346 N.W.2d at 624-25.
\textsuperscript{97} Id. at 625.
\textsuperscript{98} Id. at 625-26.
\textsuperscript{99} Id.
ond issue concerns how the nondelegable duty determination in the context of a design defect case relates to the manufacturer's obligation to warn of defects in its product.

As to the first issue, *Bilotta* does not appear to affect the liability of other persons who may be responsible for the plaintiff's injuries. In the case of an employer who had the ability to order the appropriate safety device, principles of negligence law should apply to make the employer responsible. In other cases where a nondelegable duty has been imposed on a defendant, the defendant has been able to shift the loss to another through indemnity, where appropriate, or through contribution. In *Lamberton v. Cincinnati Corp.*,\(^\text{100}\) the defendant was a press brake manufacturer who did not originally incorporate on its press brake a safety device which was available and would have prevented the injury to the plaintiff. Instead, the manufacturer later offered the safety device to the plaintiff's employer, who rejected the device. The supreme court held that the product manufacturer was not entitled to indemnity from the employer because the manufacturer was actively at fault in bringing about the plaintiff's injury. The court held, however, that contribution was appropriate.\(^\text{101}\) Although the safety device was offered after the sale of the press brake, unlike in *Bilotta* where the determination of which safety devices to include was made at the time of sale, the cases are sufficiently parallel that the same result would be reached in nondelegable duty cases where the employer should have acted to incorporate safety devices on its product. In any event, it is arguably a fact issue as to whether the employer, or other intermediary, acted negligently in failing to request the appropriate safety devices on the product it purchased. One of the injustices the supreme court intended to avoid in *Lamberton* was permitting a negligent employer to avoid its obligation because of the traditional immunity provided employers who were subjected to workers' compensation liability. The court has subsequently refined but never reduced the employer's responsibility on third party claims.

It can be argued that by permitting the product manufacturer to shift any part of the loss to an intermediary would defeat the purpose of strict products liability. In response to that

\(^{100}\) 257 N.W.2d 679 (Minn. 1977).

\(^{101}\) Id. at 688.
argument, there are various situations where there may be both manufacturer and employer fault or fault on the part of other intermediaries in the chain of manufacture and distribution. There may be a product defect coupled with the negligent use of a product by an employee, or a product defect that should have been discovered and avoided by the employer. In such situations, exemplified by the supreme court's decision in Cambern v. Sioux Tools, Inc.,\textsuperscript{102} responsibility will be distributed among all at-fault parties pursuant to the comparative fault statute.\textsuperscript{103} It would be a questionable result to hold that a manufacturer is solely responsible for the negligent acts of a less sophisticated party in the nondelegable duty case, while at the same time allowing the product manufacturer to share responsibility in cases such as Cambern, where the product is defective and the employer acts negligently in failing to prevent the injury. It may be that cost considerations are relevant to both product manufacturer and employer when they decide what safety devices to incorporate. If that decision is made so that safety is unreasonably sacrificed, however, there appears to be no reason why both parties should not have the incentive of civil liability to provide the maximum safety that is reasonable under the circumstances. Losses may be later adjusted among the parties \textit{inter se}, according to the principles of contribution and indemnity.\textsuperscript{104} In addition, contributory negligence remains a defense in design defect litigation. The comparative fault act provides for the comparison of contributory negligence and strict liability.\textsuperscript{105}

The implication of an instruction that tells the jury that a manufacturer has a nondelegable duty to make a safe product is that the manufacturer is solely responsible for its defective design, and that responsibility may not be shifted to any other party in any amount, whether the party is an employer or the user of the product. Framing the \textit{Bilotta} rule in those terms is simply too strong in light of the cases that justify spreading loss in design defect cases among all parties according to their relative degrees of fault.

On the other hand, \textit{Bilotta} should preclude a superseding

\textsuperscript{102} 323 N.W.2d 795 (Minn. 1982).
\textsuperscript{103} MINN. STAT. § 604.01 (1986).
\textsuperscript{105} See MINN. STAT. § 604.01, subd. 1a (Supp. 1987).
cause instruction in such cases. The nondelegable duty rule should not permit the manufacturer to completely shift responsibility where the product is defective because the manufacturer did not incorporate a necessary safety device in its product. A superseding cause instruction\textsuperscript{106} should therefore be inappropriate for that reason and because of the general inapplicability of the superseding cause concept in Minnesota. It is inconsistent with the Bilotta nondelegable duty rule.\textsuperscript{107}

If the Bilotta rule is incorporated in a jury instruction, it may be more appropriate to instruct the jury as follows:

A product manufacturer may not avoid its responsibility to design a safe product by relying on others to make the product safe for use.

This, or similar language, incorporates the Bilotta concept but without implying that the manufacturer is solely liable for any injuries that occur because of a defect in its products.\textsuperscript{108}

\textsuperscript{106} See Minnesota Practice JIG 142 (3d ed. 1986).

\textsuperscript{107} In an analogous setting, the court of appeals in Fette v. Peterson, 404 N.W.2d 862 (Minn. Ct. App. 1987), held that a superseding cause instruction could not be given in a dram shop case. The court held that since strict liability is imposed under the Dram Shop Act, and because superseding cause is appropriate only in negligence cases, the defendant was not entitled to a superseding cause instruction. The court also held that the policy of the Dram Shop Act precluded such an instruction. If a liquor establishment was able to avoid liability because of the subsequent negligence of the intoxicated person who was illegally served alcohol, then the Dram Shop Act would be made ineffective. \textit{Id.} at 864-65.

\textsuperscript{108} The nondelegable duty concept can be directly incorporated in a jury instruction, as is done in some jurisdictions. In Turney v. Ford Motor Co., 94 Ill. App. 3d 678, 418 N.E.2d 1079 (Ill. Ct. App. 1981), a case involving a Ford tractor that was not equipped with a roll bar, the trial court instructed the jury as follows:

\begin{quote}
Now the court instructs you that the Ford Motor Company has the obligation to manufacture and sell a product which is not in an unreasonably dangerous condition.

Since that obligation cannot be delegated to another, it is not a defense for the manufacturer that another person, including plaintiff’s employer, failed to make it free from unreasonably dangerous conditions.

Now when I use the term ‘cannot be delegated’ in these instructions, I mean that the duty must be performed by Ford and cannot be left to some other person or individual, including the plaintiff’s employer.
\end{quote}

\textit{Id.} at 683, 418 N.E.2d at 1084.

In Hasson v. Ford Motor Co., 32 Cal. 3d 388, 650 P.2d 1171, 185 Cal. Rptr. 654 (1982), a case involving an automobile accident caused by brake failure, the trial court gave the following jury instruction:

\begin{quote}
The manufacturer of a completed product cannot delegate to anyone its duty to have its product delivered to the ultimate user free from dangerous defects.
\end{quote}

\textit{Id.} at 405-06, 650 P.2d at 1182, 185 Cal. Rptr. at 665. The California Supreme Court stated that the instruction was an accurate statement of California law.

Of the two, the instruction in Turney would be preferable to that in Hasson be-
The court's holding in *Bilotta* on the delegation issue applied only to design defect cases. However, an issue remains concerning the manufacturer's obligation in failure to warn cases. Although the obligation may be different, the manufacturer also has an obligation to provide adequate warnings concerning dangers created by its products, and that duty may also be deemed to be nondelegable. That issue is analyzed in more detail in Section III (E) of this Article.109

III. FAILURE TO WARN CASES

There are several issues that arise in failure to warn cases. Some of those issues have been resolved by the supreme court, but others remain open. One of the most significant issues, the relationship between negligence and strict liability, has not been conclusively resolved by the court.

The nature of the manufacturer's obligation to warn has been reconsidered and expanded by the court. The court has re-examined the content of the warning obligation and in addition has held that under certain circumstances a manufacturer may have a post-sale obligation to warn. The court has also stated that whether a duty to warn exists is a question of law for the court. The implications of that statement are not entirely clear.

There are also unresolved questions concerning the impact of a user's knowledge of the danger presented by a product on the user's right to recover from a product manufacturer. This has created problems in cases involving ordinary users as well as cases involving sophisticated or professional product users.

Finally, there is a question as to whether the manufacturer's obligation to provide warnings may be delegated to other parties, such as employers. The following sections address those issues.

A. The Relationship Between Negligence and Strict Liability

The exact relationship between negligence and strict liability has not been conclusively resolved by the Minnesota Supreme Court. The possibility that the application of strict liability

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109. See infra notes 191-204 and accompanying text.
principles in failure to warn cases may dictate a different result than negligence principles creates problems for litigants in determining the appropriate theory under which to litigate the claim and for courts in determining how failure to warn cases should be submitted. The indication from the Minnesota Supreme Court is that strict liability and negligence theories are basically the same in failure to warn cases. In *Bigham v. J.C. Penney Co.*, the court intimated that there are no sharp distinctions between negligence and strict liability. In a concurring and dissenting opinion in *Holm v. Sponco Manufacturing, Inc.*, Justice Simonett noted that strict liability and negligence are essentially the same in design defect and failure to warn cases.

In 1984, in *Bilotta v. Kelley Co.*, the supreme court adopted a reasonable care balancing approach for the resolution of design defect cases, but did not establish standards for the resolution of failure to warn cases. The court did, however, state that “[t]he distinction between strict liability and negligence in design-defect and failure-to-warn cases is that in strict liability, knowledge of the condition of the product and the risks involved in that condition will be imputed to the manufacturer, whereas in negligence these elements must be proven.”

One month later the court decided *Hauenstein v. Loctite Corp.* In *Hauenstein* the court again noted the similarity between negligence and strict liability in failure to warn cases. The court noted that several jurisdictions have recognized that the standard in warning cases is based upon concepts of negligence: “If the failure to warn is not negligent, the product is not ‘defective,’ and there is no strict liability.” The court also noted Justice Simonett’s observations on the relationship between strict liability and negligence in *Holm*, but pulled up short of stating that strict liability principles are inapplicable in warning cases. The court’s primary concern in the case appeared to be the development of a procedural means of avoiding inconsistent jury verdicts in failure to warn cases, rather

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110. 268 N.W.2d 892 (Minn. 1978).
111. Id. at 897.
112. 324 N.W.2d 207, 214-15 (Minn. 1982).
113. 346 N.W.2d 616 (Minn. 1984).
114. Id. at 622.
115. 347 N.W.2d 272 (Minn. 1984).
116. Id. at 274.
than establishing the substantive relationship between the theories:

We hold that a manufacturer's duty to warn in strict liability cases extends to all reasonably foreseeable users. We therefore conclude that the jury's finding that Loctite was negligent cannot be reconciled with its finding that the product was not defective. Inherent in this case is the problem of mixing ordinary negligence and strict liability where the only basis for liability is failure to warn. To avoid this problem in the future, we hold that hereafter, where a plaintiff seeks damages for both negligence and strict liability based solely upon failure to warn, the plaintiff may submit the case to the jury on only one theory. The plaintiff can plead and prove at trial either or both theories, but by the time the parties rest, the plaintiff must announce whether the case will be submitted to the jury on negligence or strict liability.\(^{117}\)

More recently, in *Germann v. F.L. Smithe Machine Co.*,\(^{118}\) the supreme court stated that "[t]his court has adopted the position that strict liability for failure to warn is based upon principles of negligence."\(^{119}\)

The court's analysis comes close to stating that strict liability theory is simply unavailable in failure to warn cases. If it is necessary for the plaintiff to prove that the defendant was negligent in failing to warn in order to establish the product's defectiveness under a strict liability theory, then the only difference between the theories is the label, because they are substantively the same. There is no indication in the court's opinions that the content of a warning should differ, or that the obligation to warn is owed to different classes of consumers or users, depending on the theory of recovery. If there is a lack of substantive difference between the theories, then permitting the use of different labels only results in confusion. The simplest solution is to avoid the problem by permitting submission only of a failure to warn theory, without worrying about the label that will be attached to the theory. This suggestion was made by Justice Simonett in *Bilotta*,\(^{120}\) for the submission of design defect cases.

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117. *Id.* at 275.
118. 395 N.W.2d 922 (Minn. 1986).
119. *Id.* at 926 n.4.
120. 346 N.W.2d 616, 626 (Simonett, J., concurring).
Any difference between the theories, then, necessarily hinges upon the court’s statement in *Bilotta* that in strict liability failure to warn cases the product’s condition and its inherent risks from that condition are to be imputed to the manufacturer, while under negligence the plaintiff must prove these elements.\(^{121}\) The imputed knowledge language is frequently used to differentiate negligence and strict liability in products liability cases. The critical issue, however, is whether a product seller will be held liable for failure to warn of a danger that was not known and could not have been known at the time of manufacture of the product. If knowledge of a danger or risk created by a product is imputed to the product seller, the question then is whether a seller with knowledge of that danger acted negligently in selling the product.

It seems unlikely that the supreme court would take the position that knowledge of an unknowable danger would be imputed to the manufacturer. One reason is that imputation of knowledge of an unknowable danger to a manufacturer is inconsistent with the supreme court’s statement in *Germann* that strict liability failure to warn cases are based on negligence principles.\(^{122}\) A second reason is that the supreme court seems to have rejected the standard in negligence cases, as the court’s opinion in *Balder v. Haley*\(^ {123}\) indicates. *Balder* arose out of an explosion caused by a leak in the control valve of a liquid propane water heater. After noting that the duty to warn issue is a question of law to be resolved by the court, the supreme court found that there was no evidence to support a failure to warn claim:

> In this case, the jury found that the valve had left the factory in a nondefective condition and that Honeywell had no information up to July 23, 1980, the date of the injury, reasonably supporting the conclusion that the . . . valve contained a defect which could create a substantial hazard. Therefore, the jury must have concluded that there was no duty to warn because there was no particular hazard against which to warn . . . There was certainly sufficient evidence to support the jury’s verdict.\(^ {124}\)

If an imputed knowledge standard had been applied, the case

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121. *Id.* at 622.
122. *Germann*, 395 N.W.2d at 924.
123. 399 N.W.2d 77 (Minn. 1987).
124. *Id.* at 81.
could have been submitted to the jury for resolution of the adequacy of the warning issue. Given the absence of warning, the plaintiff should have prevailed as a matter of law on the warning issue.

While the supreme court considered the case in the context of a negligence claim, the case indicates the problems that would be involved with a rigid application of the imputed knowledge language from Bilotta. Although Balder involved a negligence claim, the court’s acknowledgement in Germann that strict liability failure to warn cases are controlled by negligence principles means that the same result could be achieved under either theory. Balder serves as a strong indication that the supreme court would not rigidly apply the imputed knowledge standard.125

B. The Nature of the Manufacturer’s Warning Obligation

In Frey v. Montgomery Ward & Co.,126 the supreme court defined the product seller’s obligation to warn to include two factors. The seller must provide adequate warning of dangers that are inherent in the improper use of a product, if the use is one that the seller could reasonably foresee. The seller must also provide adequate instructions for the safe use of the product.127 The manufacturer is obligated to keep informed of scientific knowledge and discoveries in its field.128 As a result, the manufacturer will be held to the standard of an expert in its field, when the determination of whether a warning should have accompanied a product is made.

The nature of the obligation to warn was raised and reconsidered by the supreme court in Germann, which together with

125. It is arguable that the imputed knowledge language from Bilotta should be treated the same in both design defect and failure to warn cases. In design cases, the imputed knowledge language may provide the basis for a jury instruction stating that the manufacturer is presumed to have knowledge of the danger created by its product. However, if such instructions are limited to cases where the plaintiff has established a basis for an inference that the defendant knew or should have known of the danger, see supra notes 72-75 and accompanying text, then absolute liability is avoided and the imputed knowledge standard would function the same way in both design and warning cases.
126. 258 N.W.2d 782 (Minn. 1977).
127. Id. at 787.
Kallio v. Ford Motor Co., takes the same basic position on failure to warn. Both cases raise questions concerning the status of a manufacturer’s obligation to warn.

In Germann, the plaintiff was injured while operating a hydraulic press from which the safety bar had been removed by the plaintiff’s employer. The safety bar was intended to prevent operators from injuries caused by being caught between the moving and stationary tables that were part of the press. To allow access for maintenance and repair, the safety bar had to be removed. The safety bar was not in place at the time of the accident, and it had not been in place for several months prior.

The jury found the press was defective, not because of an inadequate design, but because the defendant failed to provide adequate warning for safe use of the press. The defendant argued that it was not required to provide warnings about dangers created by the machine where it provided a safety bar that would have prevented the injury if the safety bar had been kept in place during machine operation. The defendant’s argument was based on Westerberg v. School District 792, a 1967 supreme court case that found no obligation to warn of dangers such as improper maintenance of the product. The defendant argued that Westerberg means that there is no obligation to warn against the misuse of a product.

In Westerberg, the plaintiff lost his arm while attempting to remove laundry from the school’s extractor. Either the safety mechanism on the machine failed or the lid of the machine was forced open. The extractor was running and the plaintiff caught his arm in it. His arm was severed below the elbow. The court held that under those circumstances “[t]he manufacturer of the chattel can hardly be expected to warn of every conceivable danger that might arise from misuse of the chattel or failure to maintain it after it breaks down.”

In Germann, the supreme court rejected the defendant’s ar-

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129. 407 N.W.2d 92 (Minn. 1987).
130. Id. at 99. Germann and Kallio discuss a manufacturer’s duty to warn in situations where the manufacturer has reason to believe a consumer might use the product in such a way that would increase the consumers risk of harm, and has no reason to anticipate that consumers will understand the risk.
131. Id. at 924.
132. 276 Minn. 1, 148 N.W.2d 312 (1967).
133. Id. at 6, 148 N.W.2d at 315.
gument. The court distinguished *Westerberg* from its more recent cases, which "demonstrate that if a manufacturer-seller should anticipate that an unwarned operator might use the machine in a particular manner so as to increase the risk of injury and the manufacturer has no reason to believe that users will comprehend that risk, a duty to warn may exist."\(^{134}\)

The court did not overrule *Westerberg* but rather distinguished it on the basis that it was only remotely foreseeable to the manufacturer that the safety lid on the extractor would be altered or allowed to fall into disrepair in a manner so as to increase any risk of injury to a user. The facts in *Germann* were stronger because the manufacturer knew the safety bar would have to be removed from the machine for cleaning; there was a risk that it might not be reattached; and that if the bar was not reattached, there would be an increased risk of injury to the user or operator of the machine. The court concluded that the misuse was foreseeable and not remote, and that the danger of injury through misuse was also foreseeable. The court therefore held that the manufacturer "had a legal duty to warn operators of the peril of running the press without a properly attached and operating safety bar."\(^{135}\)

The holding in *Germann* is not confined to cases involving industrial equipment. In *Kallio*, the shifting lever of a truck slipped from the apparent park position into gear permitting the truck to move while the engine was running. The supreme court reached the same conclusion it had reached in *Germann*.\(^{136}\)

In *Kallio*, Ford provided directions for use in the owner's manual, which warned the operator that when the vehicle was parked the shift lever should be in the "park" position, the hand brake should be set, and the engine should be turned off. The supreme court concluded that the "warnings" were not really warnings, but simply directions for how to properly park the vehicle. There were no warnings of the dangers that would result if the vehicle were not placed in the "park" position. The court concluded that "there was almost a complete absence of any warning."\(^{137}\) These facts fall within the general

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134. *Germann*, 395 N.W.2d at 925.
135. *Id.*
137. *Id.* The issue concerned the sufficiency of the evidence on the warning issue.
standard established in *Germann*, that "a duty to warn may exist if a manufacturer has reason to believe a user or operator of [a product] might so use it as to increase the risk of injury, particularly if the manufacturer has no reason to believe that the users will comprehend the risk."\textsuperscript{138}

In *Kallio*, the manufacturer should have warned of the risk of a failure to follow directions, whereas in *Germann* the duty was to warn of a misuse of the machine in question. There are two key factors in this type of duty to warn determination. First, the manufacturer must have reason to believe that a product will be used in a way that will increase the risk of injury to the user or operator of a product. The requirement of an "increased risk of injury" may be a little unclear, but it appears to mean nothing more than that the manufacturer has reason to anticipate that there is an additional risk of injury to the user or operator that is over and above any other risks created by the product.

The second factor is whether the manufacturer has reason to believe that users will comprehend the risk of using the product. It is not clear whether the court intends to make the user's or operator's lack of comprehension of the danger an absolute requirement for imposition of a duty to warn. It seems to be a requirement in *Germann*, but in *Kallio* the court said that a duty to warn may exist "particularly if the manufacturer has no reason to believe that the users will comprehend the risk."\textsuperscript{139} *Kallio* seems to make the "user or operator comprehension" question a factor rather than a requirement, a position more in line with the way obviousness of a product danger is treated in design defect cases. In design cases, obviousness of a product danger is a factor to be considered in determining whether a design is defective, but it is not the conclusive factor in making that determination.\textsuperscript{140}

Given the many functions warnings may perform, it is not likely that the supreme court intended to make liability under a warning theory turn solely on whether the product had an obvious defect or one which would be known by the product user.

\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} See Holm v. Sponco Mfg., Inc., 324 N.W.2d 207, 213 (Minn. 1982).
or operator. In addition, there was evidence that the plaintiff in \textit{Kallio} knew that the shift lever on the pickup truck would move if it was not in the park position. Nonetheless, the court concluded that there was a duty to warn. The plaintiff’s knowledge was considered on the causation issue. The court concluded that the causation evidence was not strong enough to require a conclusion of law that there could be no causation between the injury and the failure to warn.\textsuperscript{141}

Because the duty to warn issue is a question of law, the trial court will consider the user’s or operator’s knowledge of the danger in determining whether a warning obligation should be imposed on the manufacturer where there is a risk of injury to the user or operator in using the machine without the warnings. When the court makes the duty determination the manufacturer’s obligation is made somewhat more specific than it is in the general instruction on failure to warn in JIG 119. Accordingly, it may be appropriate to instruct a jury on the basis of the more specific obligation created by \textit{Germann} and \textit{Kallio}. A suggested jury instruction incorporating the duty concept in \textit{Germann} and \textit{Kallio} is as follows:

A product manufacturer has a duty to provide an adequate warning to protect users from the (risk of using the machine without safety equipment attached)(risks of failing to follow instructions).

Adequacy would be defined as it currently is in JIG 119. The causation issue would also remain for the jury’s resolution.

Aside from the questions raised by \textit{Germann} and \textit{Kallio} concerning the manufacturer’s obligation to warn, the supreme court considered the manufacturer’s post-sale obligation to warn in \textit{Hodder v. Goodyear Tire \& Rubber Co.}\textsuperscript{142} The product involved in the case was a multi-piece tire rim assembly that flew apart when a tire the plaintiff was changing exploded, seriously injuring him. The trial court submitted the post-sale warning issue to the jury. The supreme court affirmed in a fact-specific holding, stating:

Hundreds of thousands of K-rims have been used in millions of tire changes over the years without incident; of the 134 or so K-rim explosions which did occur, many are explained by improper servicing or misuse. Goodyear stead-

\textsuperscript{141} \textit{Kallio}, 407 N.W.2d at 99.
\textsuperscript{142} — N.W.2d — (Minn. 1988).
fastly maintains its K-rim is a safe product if used properly. Nevertheless, it became evident by the late 1950’s that K-rims could be temperamental; that the margin for error in servicing the K-rim assembly was dangerously small and it might explosively separate with seemingly little provocation; that when explosion did occur, serious injury or death usually resulted; and, therefore, that great care was required in the handling and servicing of K-rims. Further, Goodyear continued to advertise its K-rims as late as 1977, and has continued to sell tires and tubes for use with used K-rims. Finally, Goodyear undertook a duty to warn of K-rim dangers. Under these circumstances, it seems to us that Goodyear had a continuing duty to instruct and to warn, so that users of used K-rims would be apprised of safety hazards which, at an earlier time, were not fully appreciated. A continuing duty to warn arises only in special cases. We think this is such a case.\textsuperscript{143}

The court avoided the statement of general principles that apply to post-sale duty to warn cases. However, the critical factors in the case were: (1) the manufacturer’s knowledge that the K-rims could explode, causing serious injury or death, and, given the limited margin for error a person would have in servicing the K-rim assembly, the great care that would have to be used by anyone who handled and serviced the rims; (2) the fact that the manufacturer continued in the tire rim business; and (3) that the manufacturer undertook to warn of the dangers presented by the rim.

Recognizing that the third factor, the undertaking to warn, would be itself a sufficient condition to justify imposition of an obligation to provide adequate warnings,\textsuperscript{144} the critical factors are arguably the first two, knowledge of the danger created by

\textsuperscript{143} Id. at —. Goodyear argued that liability for failure to warn is based upon the knowledge a manufacturer has of dangers existing at the time a product is manufactured. In support of its argument, Goodyear cited JIG 119 and a committee comment following the instruction. The instruction states that a product manufacturer “is obligated to keep informed of scientific knowledge and discoveries in its field.” 4 Minnesota Practice JIG 119 (3d ed. 1986).

A committee comment following the instruction states that “the knowledge should be judged at the time the product in question is manufactured.” Id., comment at 92. The court recognized, however, that although JIG 119 was drafted to cover warnings made at the time of sale, it was not intended to take the position that post-sale duties could not be imposed, and did not intend to declare the law on the subject.

\textsuperscript{144} See Dosdall v. Smith, 415 N.W.2d 332, 335 (Minn. Ct. App. 1987)(citing Johnson v. West Fargo Mfg. Co., 255 Minn. 19, 24, 95 N.W.2d 497, 501 (1959);
the product and the manufacturer's continuation in the business. The second factor, the continuation of the business, complements the first, and provides the manufacturer with a continuing opportunity to provide warnings.

Goodyear also argued that the trial judge's instruction on failure to warn, which tracked JIG 119, which stated "if the KWX truck rim was not accompanied by adequate warnings and instructions, then Goodyear/Motor Wheel is negligent," in effect directed a finding of negligence for failure to warn because the tire rim did not have warnings directly on the rim. Goodyear focused on the word "accompany" in making its argument, interpreting that term to mean that the warning must either be attached to the rim or somehow be with the rim. The supreme court noted that the use of the term was "inapposite", but nonetheless concluded that the jury did not narrowly construe the trial judge's instructions, which included a statement that the adequacy of the warnings was to be determined according to whether the warnings that were actually provided were "set out in such a way" so that they would "catch the attention" of the ordinary user of the product.

To avoid the problem raised by Goodyear's argument, the language of the instruction should be altered in appropriate cases. Confusion should be avoided if the instruction is framed in terms of the manufacturer's duty to provide warnings that will adequately inform the user of the dangers presented by the product, without stating that the warnings necessarily have to accompany the product. Broadening the language should not mean, however, that the manufacturer can avoid its obligation by warning intermediaries in cases where the warning should be directed toward the product user.

C. Who Decides the Warning Issue?

In Germann, the supreme court made the following statement concerning the duty to warn:

[Whether there exists a duty is a legal issue for court resolution . . . In determining whether the duty exists, the court

145. — N.W.2d —.
146. Id. at —.
147. See infra Section III (E).
goes to the event causing the damage and looks back to the alleged negligent act. If the connection is too remote to impose liability as a matter of public policy, the courts then hold there is no duty, and consequently no liability. On the other hand, if the consequence is direct and is the type of occurrence that was or should have been reasonably foreseeable, the courts then hold as a matter of law a duty exists. Other issues such as adequacy of the warning, breach of duty and causation remain for jury resolution.\textsuperscript{148}

The primary issue in \textit{Germann} was whether the defendant had a legal duty to warn of the dangers in using its machine without the safety guard attached. The plaintiff prevailed both at the trial court and court of appeals, placing the defendant in the position of arguing on appeal that it owed no duty to the plaintiff as a matter of law. It was in this context that the supreme court made its statement.

Rather than indicating a new approach to failure to warn cases, the court appears to be stating an established tort law proposition that whether a duty exists is a question of law for the court.\textsuperscript{149} The existence of a duty is drawn from general negligence law.\textsuperscript{150} As in negligence cases involving duty issues, the court’s preliminary analysis in failure to warn cases determines whether the duty exists. The existence of the duty is usually not an arguable proposition.

For example, in typical automobile accident cases involving collisions, the court will make the determination that automobile drivers owe a duty of care to drivers and passengers in other cars. In products liability cases the courts will make the routine determination that a manufacturer owes a duty to users and consumers to design safe products. The same proposition exists in negligence (and strict liability) cases involving failure to warn. There is a foreseeable risk of injury, and the court, after making the determination that there is a duty to warn, permits the jury to determine whether the warning is adequate, just as a jury is permitted to consider whether the design of a product is sufficiently safe to satisfy the \textit{Bilotta} standards.

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\textsuperscript{148} 395 N.W.2d at 924-25 (citing Christianson v. Chicago St. P., M. & O. Ry. Co., 67 Minn. 94, 69 N.W. 640 (1896)).
\textsuperscript{149} \textit{See Germann}, 395 N.W.2d at 924.
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In *Balder v. Haley*,\(^{151}\) the supreme court adopted its statement in *Germann*, that questions concerning the existence of a duty to warn are questions of law for the court, and clarified the meaning of that statement. *Balder* involved an explosion caused by a malfunctioning valve on a liquid propane water heater. At the time of the explosion the heater was several years old. The heater valve had been altered and repaired on several occasions. There were three defendants in the case: the owner of the farmhouse where the water heater was located, one of the repairmen who worked on the heater, and Honeywell, the manufacturer of the valve. The jury found the other parties, including the plaintiff, at fault, but found that Honeywell was not negligent. The trial court denied motions for a new trial or judgment notwithstanding the verdict. The court of appeals reversed the trial court in part and found Honeywell negligent for failure to warn. The court remanded the case for a new jury determination on the cause issue.

The supreme court questioned whether the court of appeals should have resolved the warning issue. Although it held that the court of appeals should not have considered the claim because it was neither briefed nor argued, the supreme court considered the claim on its merits. The court concluded that even if the court of appeals had discretion to consider the issue, the discretion was not correctly exercised. The supreme court held that it was error to permit the warning claim to go to the jury in the first place. Citing *Germann*, the court repeated the statement that “the existence of duty to warn is a legal question to be determined by the judge, not the jury.”\(^ {152}\) The court noted the standard evolved in *Germann* for resolving duty issues, and then noted that “[t]here is ‘no duty to warn of an improper use that could not have been foreseen.’ ”\(^ {153}\) The court concluded its discussion of the duty by holding that the jury must have concluded that there was no particular hazard against which Honeywell should have warned, that the trial court implicitly reached the same conclusion, and that the court of appeals was in error in substituting its own finding for the trial court’s. The supreme court thus held as a matter of

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\(^{151}\) 399 N.W.2d 77 (Minn. 1987).

\(^{152}\) *Id.* at 81.

\(^{153}\) *Id.* (quoting *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782, 788 (Minn. 1977)).
law that there was no duty to warn under the circumstances of the case.

To understand the implications of *Germann* and *Balder*, it is helpful to focus on the fact that there are two potential issues in a warning case aside from the causation issue. There certainly are questions concerning whether a manufacturer knew or should have known of a particular danger. Absent that finding, it seems apparent from *Balder* that there should be no duty to warn, but it does follow that the warning issue will always be resolvable as a matter of law. It is true that courts typically make the duty determination and then submit the case to the jury on the liability or breach of duty issue. That is certainly the case with negligence claims. The issue is whether this means that in warning cases the only issues that are left for jury resolution are adequacy of the warning and causation. If the decision is to be made as a matter of law, then it is questionable whether the court of appeals in *Balder* should have been criticized for holding that the issue should have been submitted to the jury. Careful reading of the supreme court's opinion in *Balder* indicates that the court's conclusion was based on its acceptance of the jury's apparent resolution of the facts.\textsuperscript{154} The jury did not find any negligence for failure to warn because there was no evidence indicating that Honeywell had knowledge of any hazard or danger that it could have warned about. This means that the separation of functions occurs based on whether there was a foreseeable risk of injury about which the defendant should have been warned. A reference to the Civil Jury Instruction Guides instruction on failure to warn will help to illustrate the point. JIG 119 reads as follows:

[A product is in a defective condition unreasonably dangerous to the (user or consumer) (user's or consumer's property) if the (manufacturer) (seller) knew or reasonably could have discovered the danger involved in the use of the product, and if the product is not accompanied by adequate (warnings) (instructions).]

[If the (manufacturer) (seller) knew or reasonably could have discovered the danger involved in the use of the product, and if the product is not accompanied by adequate (warnings) (instructions) then the (manufacturer) (seller) is negligent.]

\textsuperscript{154} 399 N.W.2d at 81.
A (manufacturer) (seller) is obligated to keep informed of scientific knowledge and discoveries in its field.

A product (manufacturer) (seller) must

(Provide adequate warnings of dangers inherent in improper use of the product, if the use is one that the (manufacturer) (seller) should reasonably foresee.)

(Provide adequate instructions for the safe use of the product.)

For a warning to be adequate it must be set out in such a way that heeding the warning will make the product reasonably safe for use. [The warning must be in a form which could reasonably be expected to catch the attention of, and be understood by, the ordinary user.]\textsuperscript{155}

The jury instruction encompasses two issues, both of which would be subsumed under a single jury instruction asking whether the product is in a defective condition unreasonably dangerous to the user or consumer because of an inadequate warning.\textsuperscript{156} The first is contained in the first two bracketed paragraphs. That question, whether the theory is negligence or strict liability, is whether the manufacturer knew or reasonably could have discovered the danger involved in the use of the product in question. The second is embodied in the fifth, sixth and seventh paragraphs, where the focus is on the adequacy of the warning. The adequacy issue hinges on the resolution of the first issue, which is whether there is a hazard of danger that the manufacturer either knew about or should have discovered.

In holding that the warning issue is a question of law for the court, the supreme court is focusing on the substance of the first two bracketed paragraphs in JIG 119. The answer to the question in those paragraphs determines whether the manufacturer has a duty to warn. The court's conclusion that a duty to warn is a question of law intimates that the issue of whether injury is or should be foreseeable should also be resolved as a matter of law by the court. That conclusion is consistent with past supreme court decisions on negligence law. For example, in \textit{Alholm v. Wilt},\textsuperscript{157} the supreme court considered the nature of an innkeeper's duty to prevent harm to its patrons caused by other bar patrons. The court generally approved the trial

\footnotesize{\textsuperscript{155} 4 \textsc{Minnesota Practice} JIG 119 (3d ed. 1986).}

\footnotesize{\textsuperscript{156} \textit{See id.}, Special Verdict Form No. 2.}

\footnotesize{\textsuperscript{157} 394 N.W.2d 488 (Minn. 1986).}
court's instruction defining the innkeeper's duty, but expressed concern over placing resolution of foreseeability issues in front of the jury:

Although not raised on this appeal, we are troubled by the practice of placing foreseeability within the jury's domain. The foreseeability issue, as a threshold issue, is more properly decided by the court prior to submitting the case to the jury. If the trial court concludes that the innkeeper did not have notice of the person's dangerous propensities, then it must find that the injury would not have been foreseeable to a reasonable innkeeper and thus, no duty to protect arose.

Because foreseeability has nothing to do with proximate cause, we do not believe that the jury should be instructed on the issue. . . To the extent our prior case law speaks of "foreseeability" as an element of the cause of action, we were only discussing foreseeability in the context of whether a legal duty arises, not as something on which the jury should be instructed.¹⁵⁸

In most cases involving failure to warn, the foreseeability issue is clear. There may be cases, however, where a serious factual dispute exists over whether the danger or hazard was known or could have been known by the manufacturer. If so, there is a question as to whether the supreme court meant that the issue should never be submitted to the jury.¹⁵⁹ In other negligence cases involving the duty issue, the court has indicated that where there is a specific question as to whether a particular injury is foreseeable, the jury should be instructed on that issue.¹⁶⁰ For example, in Griffiths v. Lovelette Transfer Co.,¹⁶¹ a case involving injuries sustained by a police officer while directing traffic after an accident, the court noted that the duty issue (primary assumption of risk) is usually a question of law for the court; however, there may be factual dis-

¹⁵⁸. Id. at 491 n.5 (citation omitted).
¹⁵⁹. If the imputed knowledge standard from Bilotta applies in failure to warn cases, the alternative resolution of the problem is for the trial court to hold that where the plaintiff has prima facie established that the defendant knew or should have known of the product danger, the decision should be made as a matter of law that the defendant has an obligation to warn. The foreseeability issue would not be submitted to the court, and the only issue in the case would be adequacy of the warning. See supra note 125 and accompanying text.
¹⁶⁰. See Griffiths v. Lovelette Transfer Co., 313 N.W.2d 602, 605 (Minn. 1981); Flom v. Flom, 291 N.W.2d 914, 916 (Minn. 1980).
¹⁶¹. 313 N.W.2d 602 (Minn. 1981).
putes concerning awareness of a risk that should be submitted to the jury for their resolution.\textsuperscript{162} Following that resolution, the court would make the duty determination as a matter of law.

The same approach would seem to be workable in failure to warn cases. If there is a serious dispute over the foreseeability of a particular injury or risk, the fact question could be submitted to the jury in the form of a special verdict. If the jury finds that the injury or risk was foreseeable, then the jury would proceed to determine whether the product is defective because of an inadequate warning.

\textbf{D. Obvious Dangers, Knowledgeable and Sophisticated Users}

In failure to warn cases where the user of the product is either aware or should be aware of the danger created by the product, or where the danger created by the product is obvious, issues will arise concerning the impact of that knowledge on the plaintiff's right to recover for injury or damage caused by the manufacturer's failure to warn of the danger that caused the injury or damage. A user's knowledge of the danger may bar recovery because the manufacturer has no duty to warn of a danger of which the user is aware. If the user is a "sophisticated" user, there may be no duty to warn, even if the danger is not actually known. If the danger is obvious, there may be no duty to warn. Even if a duty is established under these circumstances, the plaintiff still may be barred from recovery because of an inability to show that the manufacturer's failure to warn was a proximate cause of their injury.\textsuperscript{163}

\textsuperscript{162} In Goodwin v. Legionville School Safety Patrol Training Center, Inc., — N.W.2d — (Minn. Ct. App. 1988), the court of appeals affirmed the trial court's directed verdict in favor of the defendant where the plaintiff had fallen off a roof while aiding in a roofing project. The basis for the directed verdict was the plaintiff's primary assumption of risk. The court of appeals affirmed, yet indicated that the cases where primary assumption of risk will be established as a matter of law will be limited.

There will be a limited number of cases in which the doctrine of primary assumption of risk applies. There will be an even more limited number of cases in which the evidence is so clear and undisputed as to present no fact issues for the jury to decide, and the actions of the claimant are such as to constitute primary assumption of risk as a matter of law.\textsuperscript{163} The court's statement appears to go beyond the supreme court's statement in \textit{Griffiths}, and it indicates that where there are open questions concerning awareness of risk, jury resolution of those questions is appropriate.

\textsuperscript{163} The obviousness of the danger and the user's knowledge of the danger may
1. Obviousness of the Danger

Obviousness of the product danger is a factor in determining whether the defendant owes a duty to the plaintiff and whether any failure to warn was a proximate cause of the plaintiff's injury. The danger may be generally obvious and either known or unknown to the plaintiff, or generally not known, but known by the plaintiff. Resolution of the duty issue may depend on which sort of obviousness is present.

From *Germann v. F.L. Smithe Machine Co.*,164 it is clear that the issue of whether a duty to warn exists is a question of law for the courts. If the danger is generally obvious, there is a greater likelihood that a court will hold that there is no duty to warn of that danger. However, if a danger is obvious, a question arises whether a conclusion that there is no duty is automatically mandated, or whether there are other factors that should be considered. Basing the duty decision only on the obviousness of the danger presented by the product creates

also relate to the defense of secondary assumption of risk. The critical issue with respect to secondary assumption of the risk is whether the defendant should be entitled to a separate instruction on that theory. The courts have differed on this issue. In *Unterburger v. Snow Co.*, 630 F.2d 599, 604 (8th Cir. 1980), the court held that the trial court did not err in refusing to give an assumption of risk instruction, stating that assumption of risk is not a separate defense, "rather, it is compared with the defendant's strict liability or negligence." *Id.* at 604 (citing *Busch v. Busch Constr., Inc.* 262 N.W.2d 377, 394 (Minn. 1977)). There are inconsistent court of appeals' cases on this issue. In *Tews v. Husqvarna, Inc.*, 390 N.W.2d 363 (Minn. Ct. App. 1986), the plaintiff, injured in a chain saw accident, argued that the trial court erred in instructing the jury on assumption of risk. The court of appeals upheld the instruction. The court's rationale was as follows:

The evidence indicates that Tews knew his saw had no chain brake and that he was well aware of the hazards of using chain saws. The evidence also shows that Tews was aware of the risk involved in cutting branches under tension. In the face of such evidence, it would have been error to refuse an instruction on assumption of risk.

*Id.* at 368.

It is not clear, however, why it would have been error. The essential question in such situations is whether the plaintiff acted reasonably under the circumstances. The plaintiff's knowledge relates to that issue, and it should be unnecessary to specifically call the jury's attention to the fact of the plaintiff's knowledge.

In *Willmar Poultry Co. v. Carus Chem. Co.*, 378 N.W.2d 830 (Minn. Ct. App. 1985), *rev. denied*, (Feb. 14, 1986), the court of appeals held that the trial court correctly refused to give the jury an assumption of risk instruction. The court stated that trial courts have discretion in giving assumption of risk instructions. *Id.* at 836 (citing *Kantorowicz v. VFW Post*, No. 230, 349 N.W.2d 597, 599 (Minn. Ct. App. 1984)). The court concluded that the jury was able to consider evidence of the plaintiff's knowledge of the danger within the framework of the typical comparative negligence instruction given by the trial court. *Id.*

164. 395 N.W.2d 922, 924 (Minn. 1986).
two problems. First, it is inconsistent with the Minnesota Supreme Court’s holding in *Holm v. Sponco Manufacturing, Inc.*, where the court rejected the latent-patent danger distinction for design defect cases, holding that obviousness of the danger is only one factor to consider in deciding whether a design is defective.\textsuperscript{166}

Second, warnings may have various functions, including obtaining informed consent or promoting continued safe use of a product in a setting where the product user is required to perform repetitive tasks. Any holding that obviousness of the danger alone automatically precludes imposition of a duty to warn fails to take into consideration the fact that warnings perform different functions, and that some of those functions may be necessary even in the face of an obvious danger. Where there is uncertainty as to whether the warning would have an impact, then the preferable approach may be to find that a duty exists and then leave questions concerning adequacy of the warning and proximate cause to the jury. This approach is

\textsuperscript{165} 324 N.W.2d 207 (Minn. 1982).

\textsuperscript{166} *Id.* at 211. In Dahlbeck v. DICO Co., 355 N.W.2d 157 (Minn. Ct. App. 1984), the defendant requested an instruction stating that "'[t]he manufacturer has no duty to warn of dangers that are obvious to anyone, including the user of its product.'" *Id.* at 166. The court of appeals held that the trial court properly denied the instruction based on the supreme court’s decision in *Holm*. *Id.* at 166-67.

In contrast, in Mix v. MTD Prods., Inc., 393 N.W.2d 18 (Minn. Ct. App. 1986), the court of appeals upheld the trial court’s grant of the defendant’s motion for judgment notwithstanding the verdict, ruling that the plaintiff was more negligent than the defendant. In the alternative, the trial court ruled the defendant could not be liable under a failure to warn theory because the defendant had no duty to warn of obvious dangers. The plaintiff sustained injuries while trying to slip the engine belt of a riding lawn mower back on the transmission pulley without turning off the engine. As he slipped the belt onto the pulley there was enough tension on the belt to engage the drive pulley, which started the belt turning. His hand was pulled between the belt and the transmission pulley, amputating three of his fingers. The owner’s manual contained an instruction telling operators never to place hands or feet under the mower or near the discharge chute while the engine is running. *Id.* at 18-19.

The court of appeals concluded that there was no duty to warn because the danger in "attempting to reattach a belt while a drive pulley is running, when the user cannot see his hand or the pulley, presents an obvious danger of which a user need not be warned." *Mix*, 393 N.W.2d at 20 (citations omitted).

The court’s conclusion may be questionable in light of Kallio v. Ford Motor Co., 407 N.W.2d 92 (Minn. 1987), where the court held that directions concerning how to park a motor vehicle were insufficient to warn of the danger of the consequences of failing to follow the directions. *Id.* at 99. Stating in an instruction manual that an operator of a machine is not to do something is not the same as warning of the danger presented by the machine.
consistent with both Germann and Kallio.\textsuperscript{167}
In cases where the danger is not generally known, but the plaintiff is aware of the danger, the duty determination should be readily resolved. If the danger is not generally known, and the manufacturer should have warned of the danger, the knowledge of an individual user of the product should in no way lessen the manufacturer's duty to warn, any more than a user's awareness of a product danger should lessen the manufacturer's duty to design a safe product. The user's awareness of the danger would then be relevant to the causation issue,\textsuperscript{168} and may be a significant factor in determining whether the plaintiff was contributorily negligent in using the product.\textsuperscript{169}

2. The Sophisticated User

In cases where the plaintiff is a professional user, or one who has special expertise in a particular area, the manufacturer may be insulated from liability for failure to warn. Where the plaintiff is a sophisticated or professional user, or where an intermediary is such a user, a court may hold that there is no duty to warn of dangers of which the user or intermediary should be aware.

In \textit{Allied Aviation Fueling Co. v. Dover Corp.},\textsuperscript{170} the Minnesota Supreme Court considered the impact of a plaintiff's special expertise in a case involving a fuel spill caused by a failed valve in a fuel storage system. The court noted that the plaintiff, Allied, had experience in the installation of fuel systems and its

\textsuperscript{167} In some cases the courts may be inclined to hold as a matter of law that there could be no causal relationship between a manufacturer's duty to warn and the injury sustained by the plaintiff. In McCormick v. Custom Pools, Inc., 376 N.W.2d 471 (Minn. Ct. App. 1985), the court of appeals held that the plaintiff's awareness of the hazards of making a shallow water dive into a swimming pool barred his recovery for the injuries sustained in the dive. \textit{Id.} at 476. On a motion for summary judgment, the trial court held as a matter of law that any failure to warn by the defendant could not have been a proximate cause of the plaintiff's injuries because the plaintiff was aware of the dangers presented in shallow diving. The court of appeals upheld the trial court's determination. \textit{Id.} This decision is also questionable in light of \textit{Kallio}, which indicates that the causation question is one for the trier of fact. In addition, in a subsequent shallow diving case, the court of appeals held that the causation issue had to be decided by the jury because of the factual differences from \textit{McCormick}. \textit{See} Jonathan v. Kvaal, 403 N.W.2d 256, 260-61 (Minn. Ct. App. 1987).

\textsuperscript{168} \textit{See} Jonathan, 403 N.W.2d at 260; \textit{but see} McCormick, 376 N.W.2d at 476.


\textsuperscript{170} 287 N.W.2d 657 (Minn. 1980).
engineers approved the specifications for the valve installation. The court held that strict liability was unavailable:

Plaintiff failed to establish a factual basis for a finding based on strict liability. The evidence is undisputed that Allied was a skilled and experienced user of valves of the kind in question and knew that a blow of the kind to which the failed valve was admittedly subjected would cause the pin to shear, dropping the shaft so as to permit the escape of the fuel. The doctrine of strict liability does not apply in such a situation.\(^{171}\)

The issue in Allied Aviation was not failure to warn liability, but whether the plaintiff's skill and experience had a bearing on the defendant's duty to warn. Had the theory been failure to warn of the dangers involved in the use of the valve in question, or of the consequences of failure of the valve, it is difficult to see how the court could have arrived at a different conclusion.

Later, in Minneapolis Society of Fine Arts v. Parker-Klein Associates Architects, Inc.,\(^{172}\) the Minnesota Supreme Court considered user sophistication on a failure to warn claim. The plaintiff sustained economic loss because of the use of glazed bricks in the construction of building walls. The bricks cracked and spalled and had to be replaced at a substantial cost. The court recognized that "[g]enerally, there is no duty to warn if the user knows or should know of potential danger."\(^{173}\) The court found that the architects employed by the plaintiff should have known of the problems that were created by the use of the bricks in a cold climate. The court held that the product manufacturer had no duty to inform the plaintiff of problems that existed with the use of the bricks under the circumstances, because the architects employed by the plaintiff should have known that severe weathering could have damaged glazed brick walls.

Rather than reading the decision expansively so that no duty to warn is owed to any individual who knows or should know of a potential danger, a position that the court itself seems to have repudiated, the decision may be limited only to sophisticated or professional users. The two cases cited by the

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171. Id. at 659.
172. 354 N.W.2d 816 (Minn. 1984).
173. Id. at 821 (citations omitted).
supreme court in support of its conclusion that no duty to warn exists where the user knows or should know of the potential danger support the limited nature of the court's holding in the case.

Thibodaux v. McWane Cast Iron Pipe Co.,174 arose out of serious injuries sustained by the plaintiff and fatal injuries to his wife and child caused by a gas explosion. Suit was brought against McWane, the manufacturer of the iron pipe that corroded, permitting the leak which led to the explosion. The pipe was manufactured by McWane in 1941, some twenty-one years before the explosion. Although McWane knew that the iron pipe it was selling to the city would be used in distributing natural gas, and that iron pipe would be subject to corrosion in the area where it was to be installed, no mention was made of the corrosive effect of the soil on the pipe. The consulting engineers of the City of Thibodaux, with which McWane contracted, specified the kind and type of pipe to be used in the system. McWane employees testified that they considered the consulting engineers responsible for testing the soil, determining the effect of the soil on the pipe, and designing the gas delivery system accordingly. The court of appeals held that under these circumstances McWane owed no duty to warn of the dangers involved in using iron pipe. The court emphasized the fact that the pipe was manufactured according to specifications provided by the city and its consulting engineers, that there was no evidence that the pipe was defective, that the pipe was twenty-one years old and, most importantly, that the consulting engineers who were hired by the City "to design, supervise and control the construction of the gas distribution system were or should have been as knowledgeable of the characteristics of cast iron pipe as was McWane, perhaps more so."175

The second case, Strong v. E.I. DuPont de Nemours Co.,176 also involved a wrongful death claim that arose out of a gas explosion. The explosion was caused by a leak that occurred due to the inappropriate use by Nebraska Natural Gas Company of a compression coupling that was used to join plastic pipes to existing metal pipes. The coupling was manufactured by Norton

174. 381 F.2d 491 (5th Cir. 1967).
175. Id. at 497.
176. 667 F.2d 682 (8th Cir. 1981).
McMurray. The plastic pipes were made by DuPont. The leak occurred when the plastic pipe pulled out from the coupling because of the cold. The explosion occurred when gas migrated to a nearby hotel basement. The plaintiff argued that DuPont and Norton McMurray failed to adequately and accurately warn Nebraska Natural Gas Company that the coupling would be inadequate to prevent the pull-out from occurring.

The jury found for DuPont on the negligence and strict liability claims and the trial court directed a verdict in favor of Norton McMurray. On appeal, the Eighth Circuit Court of Appeals held that the trial judge was entitled to find that Norton McMurray had no duty to warn Nebraska Natural Gas of the potential pull-out problem, finding that under a negligence theory "there is no duty to warn if the user knows or should know of the potential danger, especially when the user is a professional who should be aware of the characteristics of the product."\(^\text{177}\) The court concluded that "in the realm of strict liability there is a similar principle providing that a manufacturer has no duty to warn when the dangers of a product are within the professional knowledge of the user."\(^\text{178}\)

While both decisions support a sophisticated or professional user limitation on the obligation to warn, several things are unclear about the supreme court's position on the issue, primarily because there has been no opportunity for the court to elaborate on its holding in Minneapolis Society of Fine Arts. There is a question as to what constitutes a sophisticated or professional user and who makes the determination; whether the sophisticated user concept applies in both negligence and strict liability cases; and whether it applies when an intermediary is a sophisticated user rather than the ultimate user of the product.

In analyzing the sophisticated user concept as it has been applied in New York, the Second Circuit Court of Appeals noted that the concept "has been applied only to professionals and skilled tradespeople."\(^\text{179}\) Several courts have noted that the sophisticated user concept applies only to members of a trade or profession.\(^\text{180}\) The sophisticated user concept "has

\(^{177}\) Id. at 687.
\(^{178}\) Id. The court concluded that it was appropriate for the trial court to find that the gas company and its construction supervisor, who was killed in the explosion, knew or should have known of the pull-out hazard. Id.
\(^{180}\) See id. (cases cited therein).
not been applied to lay persons, even those with some familiarity with the product.”

In Todalen v. United States Chemical Co., the Minnesota Court of Appeals interpreted the Parker-Klein and Strong cases to mean that the duty to warn does not exist where the final user of the product is “sophisticated.” The plaintiff in Todalen was injured when he used a highly corrosive material, Caustic 234, to open a drain in a smokehouse. A chemical reaction occurred, severely burning the plaintiff. One of the issues in the case concerned the defendant’s obligation to warn of the dangerous propensities of the chemical. The court concluded that the plaintiff was not a “sophisticated” product user:

In the present case, although Hormel may have employees who may be termed “sophisticated”, Todalen, the final user, is not a sophisticated user of the product. Evidence demonstrates he has a basic understanding of caustic cleaners, but nothing more. He has no special training nor knowledge of risks associated with high concentrations of sodium hydroxide when mixed with water. For these reasons it was proper for the trial court to find Chemical had a legal duty to warn and submit the question of adequacy of the warning to the jury.

The rationale for this exception to the manufacturer’s obligation to warn is based upon the equal or perhaps superior ability of the sophisticated or knowledgeable product user to understand the product and its inherent risks. Because the manufacturer or supplier and the sophisticated user have an equivalent appreciation of the risk, the manufacturer should not be required to warn of the risks created by the product.

It is not clear whether the Minnesota Supreme Court would take the position that the sophisticated user question is a matter of law for the court or a question of fact for the trier of fact. Other courts have taken the position that the issue is for the trier of fact, whether the issue is duty to warn or whether the user is a sophisticated user. In Minnesota, given the supreme court’s statements in Germann and Kallio that the duty

181. Id. at 244.
183. Id. at 77.
184. See Merklin v. United States, 788 F.2d 172, 178 (3d Cir. 1986).
issue is a question of law for the court, it is arguable that the court would resolve the sophisticated user issue, unless there are disputed fact issues that will have to be resolved by the trier of fact. 186

The sophisticated user concept developed in negligence cases. 187 In cases where the plaintiff asserts a strict liability claim based upon failure to warn, it may still be applicable, depending on whether the manufacturer’s responsibility is viewed as conceptually different than in negligence cases. In Russo v. Abex Corp., 188 the plaintiff sued asbestos manufacturers on negligence and implied warranty theories for failure to warn. The United States District Court for the Eastern District of Michigan noted the negligence origins of the sophisticated user defense, but thought it unlikely that the defendants could assert the defense in an implied warranty claim, “because, in that context, a seller is duty-bound to warn all foreseeable users and the risk of an employer’s failure to warn employees is one of the risks imputed to the seller as a matter of law.” 189

In Minnesota, the supreme court noted in Germann that negligence principles apply to strict liability failure to warn claims. Given the similarity between theories, it is questionable whether the court would take a different position in a case where the user of the product is a sophisticated user. In addition, the court in Allied Aviation held, in a strict liability case, that a product is not defective where the plaintiff was a sophisticated user.

Germann may also answer the question of how the sophisticated user concept would be applied in a case where the intermediary is a sophisticated user, but the person who sustains injury is not. The requirement in Germann that the manufacturer warn the ultimate user of the product about the dangers involved in using the product would seem to preclude application of the sophisticated user defense in that and similar contexts. Germann indicates that there is a nondelegable duty to warn, a concept that should override the sophisticated user defense. However, in cases where the intermediary is sophisticated, and there is no feasible way for the manufacturer to

187. See id. at 207.
188. Id. at 206.
189. Id. at 207.
warn ultimate users of the dangers in using the product, the manufacturer may be able to successfully assert the sophisticated user defense and delegate the duty to warn to the intermediary. The best example is where the manufacturer is a bulk supplier of material that is broken down into usable units by an employer for use by its employees\(^{190}\).

E. Warnings and Nondelegable Duties

In failure to warn cases, as in cases involving design defects, the manufacturer may also have a nondelegable duty to warn. The manufacturer’s duty may be to warn the ultimate user or operator of the product of dangers associated with the use of the product. The nondelegable duty to warn, if it is applied, may prevent the manufacturer from shifting the responsibility for warning of product dangers to an intermediary, such as the plaintiff’s employer.

The nature of the duty imposed on the manufacturers in both *Kallio* and *Germann* may lead to that conclusion. In both cases the duty imposed on the manufacturers was the duty to warn the user or operator of the product in question of the dangers involved in using the products. *Germann* may be the most appropriate because the plaintiff’s employer, an intermediary, might have been able to warn the plaintiff of the danger involved. However, imposition of a duty to warn the ultimate user or operator of the machine would apparently prevent the product manufacturer from shifting responsibility to the employer by relying on the employer to warn the employee. That position is consistent with the duty imposed on manufacturers in other jurisdictions.\(^{191}\)

A trilogy of earlier Minnesota Supreme Court cases may clarify the court’s view of the delegability issue in failure to warn cases. In *Hill v. Wilmington Chemical Corp.*,\(^{192}\) the plaintiff

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192. 279 Minn. 336, 156 N.W.2d 898 (1968).
was injured when the water repellant he was applying in an enclosed passageway ignited, severely burning him. Wilmington Chemical Corporation was organized by Joseph Klehman to market the water repellant. Klehman discovered that E.I. du Pont de Nemours and Company manufactured a chemical which, when dissolved in a solvent, would be an effective water repellant. After consulting with the company he was told that the chemical could be dissolved in a petroleum solvent. Through a du Pont employee, he contacted Shell Oil Company, which recommended a solvent that Klehman found effective for the use he intended. Klehman purchased the solvent by the truckload from Shell. Through Shell he found a company that would mix and package his final product for him.

The product was packaged in cans of different sizes, and sold to retailers for resale to the public. The cans initially had paper labels, but later had lithographed labels that warned that the repellant was highly flammable and should be used only where there was good ventilation. One of the cans was sold to Brandt, a retail merchant in Minnesota, who in turn sold it to plaintiff Hill.

Hill brought suit against Wilmington and Brandt, claiming negligence and breach of express and implied warranty. Wilmington impleaded Shell and du Pont for indemnity, alleging negligence and breach of warranty.

Wilmington and Brandt settled with Hill. The case then proceeded to trial and was submitted to the jury for resolution of the issues raised between du Pont, Shell, and Wilmington. The jury found that Shell was causally negligent for the loss incurred by Wilmington because of the injuries to Hill. The jury found that du Pont was not negligent, that Wilmington's negligence proximately caused Hill's injuries, and that Wilmington's negligence superseded Shell's negligence. The trial court held that Shell did not negligently cause Wilmington's loss.\footnote{Id. at 339, 156 N.W.2d at 901.}

The supreme court noted that it was not clear why the trial court found Shell not negligent, or that Shell's negligence was not the proximate cause of Hill's injuries. The appeal related primarily to those two issues. The issue concerning Shell's alleged negligence was whether Shell, knowing of the dangerous
propensities of the solvent, should have warned Klehman about those dangers, so that Klehman could have warned the public of those dangers or avoided use of the product.

The supreme court distinguished cases where the product manufacturer, through an intermediary, places a finished product on the market. Shell did not have contact with the ultimate user of the product. Rather, it sold its product to Wilmington, who manufactured the finished product with the Shell solvent as an ingredient. Shell did not have an opportunity to warn the ultimate consumer. It did not package and did not market the product. Wilmington labeled the package. The court concluded that Shell's only duty was to warn Wilmington of dangers that were not known to Wilmington and that were inherent in the use of the solvent. If Wilmington knew of the dangerous propensities of the product, the court concluded that Shell had no duty to give additional warning. It was clear from the evidence that Klehman had such knowledge. The court's conclusion was that:

Shell's only connection with the sale of the product was to supply to Wilmington one of the ingredients used in it. Liability on the part of Shell, if there is any, must rest on its superior knowledge of the dangerous propensities of the products it supplied to Wilmington with knowledge of the use to which it was to be put. Inasmuch as the evidence is conclusive that Wilmington already had such knowledge, there would be no legal obligation on the part of Shell to furnish that knowledge.194

In the Hill analysis there are two factors to consider in determining whether a manufacturer of a component product will be held liable for failure to warn. The first is whether the manufacturer of the finished product is aware of the danger presented by the product. The second is whether the component product manufacturer had a feasible opportunity to warn. Both factors would have to be satisfied for liability to be imposed. If the intermediary is unaware of the danger or if it would be feasible for the component product manufacturer to warn the ultimate user or consumer, then Hill would not prevent the imposition of a duty to warn on the component product manufacturer.

194. Id. at 344, 156 N.W.2d at 904.
In *Mulder v. Parke Davis & Co.*,\(^{195}\) the issue was whether a drug manufacturer could be held liable for failure to warn a physician of the potential dangers created by the drug, where the physician was fully aware of those dangers. The supreme court held that "where the only issue is failure to communicate a warning, the manufacturer is not liable if the doctor was fully aware of the facts which were the subject of the warning."\(^{196}\) In such cases, warning the learned intermediary, the physician, will absolve the drug manufacturer from liability.

The learned intermediary theory was specifically rejected by the court of appeals in *Todalen v. United States Chemical Co.*,\(^{197}\) where the court noted that the theory has not been applied in employer/employee relationships. The court also noted a parallel to the *Mulder* situation because of the difficulty that the manufacturer may have in warning direct users of dangers involved in the use of a chemical that the manufacturer supplies in bulk to the industrial purchaser. In rejecting the theory the court of appeals relied on *Hall v. Ashland Oil Co.*,\(^{198}\) a federal district court decision involving similar facts. The *Hall* court rejected the theory for the following reasons:

> It is important to recognize . . . that the medical context [of the learned intermediary theory] contains significant safeguards to the ultimate user that are not present in the industrial workplace. . . . Unlike the doctor, whose primary purpose in selecting a drug is to promote the well-being of the ultimate user, the industrial purchaser's basic interest in selecting a chemical solvent is the overall utility of that solvent in its manufacturing processes. While avoiding health risks to its employees is a consideration that goes into choosing one chemical over another, it is not the employer's sole concern, or even its primary focus. . . . A chemical company may be in a position to act as an expert in concerning the industrial uses and disadvantages of a chemical and yet not have the capacity to serve adequately as a learned intermediary concerning medical risks associated with the chemical. . . . [T]he relationship of a doctor and patient is a one-on-one relationship where the doctor assesses the individual needs of each patient. . . . In the industrial workplace, . . . a chemical that is used may affect large num-

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196. Id. at 335, 181 N.W.2d at 855 (citations omitted).
bers of people including those who do not work with it directly. Even an employer who is aware of direct effects of the chemical may be unaware of more subtle or diffuse risks. Finally, the prescription drug cases, in relieving manufacturers of the duty to warn drug users, shift that duty onto a party who can be held legally liable to the patient for failing to fulfill it. This powerful incentive is absent in the case of an employer whose liability is limited by the exclusive remedy provisions of the workman's compensation statutes.\textsuperscript{199}

In the third case, \textit{Blasing v. P. R. L. Hardenbergh Co.},\textsuperscript{200} the plaintiffs, who were tenants in a commercial building, suffered property damage because of a fire that occurred when another tenant was using a flammable liquid for purposes of removing the finish from old furniture. The furniture stripper was manufactured by James B. Day & Company and locally distributed by Hardenburgh. The plaintiffs sued the distributor of the stripper. The tenant who had applied the stripper also sued the manufacturer and distributor. The cases were consolidated for trial. The jury attributed sixty-five percent of the causal negligence to the tenant involved and thirty-five percent to Hardenbergh and Day. Hardenbergh and Day argued on appeal that since the labels contained adequate warnings, their duty to the plaintiff was satisfied and they should not be negligent as a matter of law. The supreme court held that the evidence was sufficient to leave the adequacy issue to the jury.

Hardenburgh and Day also argued that their alleged negligence in failing to warn that the vapors of the stripper were a fire hazard was not the proximate cause of the fire. The defendants argued that the users of the stripper were "experienced and knowledgeable users . . . and therefore knew of the dangers involved" in the uses of the product.\textsuperscript{201} The defendants argued that both \textit{Hill} and \textit{Mulder} supported their claims. The supreme court distinguished \textit{Mulder} on the grounds that the doctor in that case knew of the dangers created by the drug. \textit{Hill} was distinguished on the same basis. The testimony in \textit{Blasing} showed that the users of the product were not aware of the danger of fire that could be caused by the vapors of the stripper. The court therefore concluded that the evidence in the case was sufficient to justify the jury's finding of negligence

\textsuperscript{199} \textit{Id.} at 1519-20.
\textsuperscript{200} 303 Minn. 41, 226 N.W.2d 110 (1975).
\textsuperscript{201} \textit{Id.} at 48, 226 N.W.2d at 114.
based upon the product manufacturer's failure to provide an adequate warning of the fire hazards associated with the furniture stripper.

Together, the Minnesota cases from *Hill* to *Kallio* and *Germann* establish that the manufacturer's obligation to warn of dangers presented by its product extends to the ultimate user or consumer if the manufacturer makes a finished product. That duty may not be delegated in cases where it is feasible for the manufacturer to warn the ultimate user of the product of the dangers involved in using it, even if the intermediary is sophisticated or knowledgeable concerning the product's uses and the dangers presented by the product. The best argument for delegation will be in cases where the manufacturer has made a component product that becomes part of a finished product. In those cases the component manufacturer may avoid liability for failure to warn where the intermediary is aware of the danger presented by the component product and it is not feasible for the component manufacturer to warn the ultimate user of the danger created by the component product.

A determination that the manufacturer's obligation to warn is nondelegable relates to the duty issue. To be consistent with *Germann*, the court would have to make that determination. Once that determination is made, however, as in design cases, the plaintiff should be entitled to a jury instruction similar to the one that could be used in design cases.202 The court's characterization of the manufacturer's duty to warn would not prevent assessment of fault against the employer, but it should preclude the manufacturer from obtaining a superseding cause instruction.203 Such an instruction would be inconsistent with the duty imposed on the product manufacturer.204

IV. The Relationship Between Design Defect and Failure to Warn

Design defect and failure to warn claims are both based on negligence principles, but they are separate and distinct theories of product defect. However, questions periodically arise

202. See supra text accompanying notes 61-70.
203. See supra text accompanying notes 61-71.
as to whether the theories are dependent upon each other. In *Germann v. F. L. Smithe Machine Co.*, the jury, by special verdict, found that the design of the press was not defective but that the defendant did not provide adequate warnings for the safe use of the product. The defendant argued that the jury’s answers to the special verdict interrogatories were irreconcilably inconsistent because the finding that the design was not defective meant that there was nothing that would require a warning. The defendant argued that it only had a duty to warn of design defects. The supreme court rejected the argument, concluding that the jury’s findings were different but reconcilable.

The separateness of design defect and failure to warn theories has been repeatedly emphasized by the supreme court and court of appeals. A finding that a product is not defective by reason of design does not preclude recovery under a failure to warn theory. Conversely, a finding that a manufacturer is not liable under a failure to warn theory does not preclude liability under a design defect theory.

**Conclusion**

The Minnesota Supreme Court has substantially refined Minnesota products liability law in the 1980’s. The most significant aspect of the court’s decisions has been the steady reduction of the distinctions between negligence and strict liability theories in design defect and failure to warn cases.

The court’s decisions in *Bilotta* and *Kallio* have detailed the requirements for proof of a design defect by adopting a reasonable care balancing approach and by strongly indicating that proof of a feasible alternative will be necessary to prove the existence of a design defect in a product, even though proof of a feasible alternative is not part of the plaintiff’s prima facie strict liability case. Any potential distinction between negligence and strict liability is further reduced by the court’s decision in *Kallio*, holding that evidence of subsequent reme-

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205. 395 N.W.2d 392 (Minn. 1986).
206. *Id.* at 206.
208. The supreme court has emphasized the necessity of keeping the theories separate in special verdict interrogatories. *See Kallio*, 407 N.W.2d at 94 n.2.
dial measures is treated the same in design defect cases, whether the theory is strict liability or negligence.

In failure to warn cases, the court in *Germann* has made it clear that negligence principles also govern strict liability claims. In addition, while *Germann* and *Kallio* raise interesting questions concerning the scope of a manufacturer’s obligation to warn, no changes of significance seem to have been made by the supreme court. The court’s decision in *Hodder* resolves the question of whether a manufacturer may be held liable for post-sale failure to warn, although the exact requirements for liability under that theory are not clear. However, the holding in *Hodder* does not appear to be dependant on any distinctions between negligence and strict liability.

Perhaps the most difficult problem in understanding Minnesota products liability law concerns the distinctions between strict liability and negligence. A perception persists that strict liability should accomplish something distinctly different from negligence through proof requirements that are somehow more favorable to the plaintiff. The supreme court’s decisions narrowing the distinctions between strict liability and negligence should modify that perception so that instead of attempting to establish major distinctions between the theories there is a recognition that negligence is the primary theory of recovery in design defect and failure to warn cases. The difference between the two theories of recovery hinges on the imputed knowledge language of *Bilotta*. Yet, if the plaintiff is first required to prove a prima facie case of negligence to justify an instruction incorporating the imputed knowledge language, the distinction is not conceptually significant.

Acceptance of the collapse of the distinctions should simplify products liability litigation not only by eliminating the conceptual problems that have arisen in understanding the nature of strict tort liability, but also by eliminating the practical problems that have been created by instruction on multiple theories of recovery in design defect and warning cases.