

**Food as a Dangerous Product?  
The Promise of Private Law for Public Health**

by

Jacob Jordan Shelley

A thesis submitted in conformity with the requirements  
for the degree of Doctor of Juridical Science

Faculty of Law  
University of Toronto

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# **Food as a Dangerous Product? The Promise of Private Law for Public Health**

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## **ABSTRACT**

Obesity and diet-related chronic diseases are a critical public health problem facing Canadians. Interventions aimed at improving diet and the overall food environment have had limited success, and as a consequence, many have suggested an increased use of legal tools, including litigation. This project examines the potential of the duty to warn, part of product liability law, as a strategy for addressing obesity and other diet-related chronic diseases.

To this end, the project proceeds in two parts. Part one project examines the potential of tort law to be used to address public health problems. It begins by establishing the congruence between tort law and public health, and suggests that there are potential benefits of public health litigation for obesity prevention. This sets the foundation for part two, which argues that Canadian jurisprudence clearly establishes that food manufacturers have a duty to warn consumers about the risks associated with consuming food products. Part two examines key aspects of a tort claim based on a failure to warn, namely, the duty of care, standard of care, and factual causation. It sets

out an approach to failure to warn cases that is consistent with general principles of negligence law, but that is sensitive to the particularities of a failure to warn case.

This project establishes that food manufactures are required to provide warnings that are consistent with the standards of adequacy as set out by the Ontario Court of Appeal decision in *Buchan v Ortho Pharmaceutical. Buchan*, which has been affirmed by the Supreme Court of Canada, sets out explicit criteria for determining adequacy, including prohibitions against collateral efforts to negate or neutralize warnings. It is clear that food manufacturers are neither fulfilling their obligation to provide warnings nor adhering to the *Buchan* standard. This project concludes that food manufacturers should be held accountable for this failure.

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# CHAPTER 1: FOOD AS A DANGEROUS PRODUCT?

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## 1. INTRODUCTION: FOOD AS A DANGEROUS PRODUCT?

Diet-related chronic diseases are one of the most pressing and challenging public health problems in Canada and globally. Diet is a leading risk factor for disease burden that cuts across socio-economic gradients.<sup>1</sup> Poor diet quality is common in Canada and the United States<sup>2</sup>, and is a primary risk factor for many chronic diseases, including hypertension (high blood pressure), heart disease and stroke.<sup>3</sup> Approximately 5.3 million Canadians have hypertension<sup>4</sup> and 1.6 million Canadians are living with heart disease or the effects of stroke.<sup>5</sup>

Recognizing the importance of a healthy diet to prevent diseases such as diabetes, heart disease, stroke, cancer, and overweight and obesity, the World Health Organization (WHO) has adopted the *Global Strategy on Diet, Physical Activity and Health*.<sup>6</sup> A

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<sup>1</sup> See, for example: World Health Organization (WHO), *Global Health Risks: Mortality and Burden of Disease Attributable to Selected Major Risks* (Geneva: WHO, 2009), online: WHO, [http://www.who.int/healthinfo/global\\_burden\\_disease/GlobalHealthRisks\\_report\\_full.pdf](http://www.who.int/healthinfo/global_burden_disease/GlobalHealthRisks_report_full.pdf); Stephen S Lim et al, "A Comparative Risk Assessment of Burden of Disease and Injury Attributable to 67 Risks Facts and Risk Factor Clusters in 21 Regions, 1990-2010: A Systematic Analysis of the Global Burden of Disease Study 2010" (2012) 380 *Lancet* 2224; and US Burden of Disease Collaborators, "The State of US Health, 1990-2010: Burden of Diseases, Injuries, and Risk Factors" (2013) 310:6 *Journal of the American Medical Association* 591.

<sup>2</sup> D Garriguet, "Diet Quality in Canada" (2009)20:3 *Health Reports* 41, and A Carlson & E Frazão, "Food Costs, Diet Quality and Energy Balance in the United States" (2014) 134 *Physiol Behav* 20.

<sup>3</sup> S Vandevijvere, et al, "Monitoring and Benchmarking Population Diet Quality Globally: A Step-wise Approach (2013) 14:Suppl *Obesity Reviews* 135.

<sup>4</sup> Statistics Canada, "High Blood Pressure, By Age Group and Sex" (2016), online: StatCan, <http://www.statcan.gc.ca/tables-tableaux/sum-som/101/cst01/health03a-eng.htm>.

<sup>5</sup> Public Health Agency of Canada, "Tracking Heart Disease and Stroke in Canada (Ottawa: PHAC, 2009).

<sup>6</sup> See WHO, "Global Strategy on Diet, Physical Activity and Health" (2016), online: WHO, <http://www.who.int/dietphysicalactivity/en/>.

primary focus of the WHO is obesity prevention. In 2014, the WHO estimated that nearly 2 billion adults were overweight, more than double the worldwide prevalence of 1980, with nearly 600 million of these adults living with obesity.<sup>7</sup> Obesity is set to surpass tobacco use as the leading cause of preventable death globally.<sup>8</sup> As governments, international agencies, and public health organizations grapple with how to address obesity, many scholars and public health officials have called for more drastic uses of domestic and international law. This has included a call for the use of tort litigation.

In 2002, Ashley Pelman and Jazlen Bradley, teenagers from New York, became the focus of international attention and scrutiny when they filed a suit against McDonald's, alleging that the consumption of McDonald's products had injured their health by causing them to become obese.<sup>9</sup> In *Pelman v McDonald's*, Judge Sweet granted McDonald's motion to dismiss the complaint. Following this decision, the plaintiffs attempted to find traction in the courts, but failed.<sup>10</sup> The lawsuit has been subject to considerable scrutiny.<sup>11</sup> *Pelman* represented what was thought to be the first of many

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<sup>7</sup> WHO, "Obesity and Overweight" (2015) online: WHO, <http://www.who.int/mediacentre/factsheets/fs311/en/>. Given that overweight and obese children are likely to become overweight and obese adults, the WHO's Director-General established a high-level Commission on Ending Childhood Obesity. For more, see WHO, "Commission on Ending Childhood Obesity" (2016), online: WHO, <http://www.who.int/entity/end-childhood-obesity/en/index.html>.

<sup>8</sup> Anad & Yusuf contend "a tsunami of obesity that will eventually affect all regions of the world", Sonia S Anand & Salim Yusuf, "Stemming the Global Tsunami of Cardiovascular Disease" (2011) 377 *Lancet* 529 at 529. See also Kelly D Brownell, "The Chronicling of Obesity: Growing Awareness of its Social, Economic, and Political Contexts" (2005) 30:5 *Journal of Health Politics, Policy & Law* 955 [Brownell, "The Chronicling of Obesity"] and Y Claire Wang et al, "Health and Economic Burden of the Projected Obesity Trends in the USA and the UK" (2011) 378 *Lancet* 815.

<sup>9</sup> *Pelman v McDonald's Corp*, 237 F Supp 2d 512 (SDNY 2003) [*Pelman I*].

<sup>10</sup> Justice Sweet granted the plaintiffs leave to amend and re-plead. Sweet J dismissed the amended claim, see *Pelman v McDonald's Corp*, No 02-Civ 7821 (RWS) (SDNY 2003) [*Pelman II*], vacated by, remanded in part by, *Pelman v McDonald's Corp*, 396 F 3d 508 (SDNY 2d Cir 2005) [*Pelman III*], motion to strike granted in part and denied in part, *Pelman v McDonald's Corp*, 452 F Supp 2d 320 (SDNY 2006) [*Pelman IV*].

<sup>11</sup> See, for example: Michelle M Mello, Eric B Rimm & David M Studdert, "The McLawsuit: The



“McLawsuits”<sup>12</sup>, triggering what was thought to be the beginning of the obesity litigation wars in the United States.<sup>13</sup> Judge Sweet was acutely aware of the importance of the complaint, observing that the “action presents unique and challenging issues” about “[q]uestions concerning personal responsibility, common knowledge and public health ... and the role of society and the courts in addressing such issues.”<sup>14</sup>

In the flurry of commentary and analysis that followed the *Pelman*, a particularly noteworthy bit of *obiter* from Judge Sweet is often overlooked. Prior to providing his reasons for dismissing the original action, he noted: “Public health is one, *if not the*, critical issue in society.”<sup>15</sup> Although this observation may appear trite, what makes it particularly striking is its similarity to a pronouncement by Lord Atkin in the

Fast-food Industry and Legal Accountability for Obesity” (2003) 22:6 Health Affairs 207; Ashley B Antler, “The Role of Litigation in Combating Obesity Among Poor Urban Minority Youth: A Critical Analysis of *Pelman v. McDonald’s Corp.*” (2008-2009) 15 Cardozo JL & Gender 275; Glenna Novack, “Lawsuits in the Fast-food Nation: Will Fast-food Suits Succeed as Obesity Becomes an American Tradition?” (2006) 52 Wayne L Rev 1307; Joseph P McMenamin & Andrea D Tiglio, “Not the Next Tobacco: Defense to Obesity Claims” (2006) 61 Food & Drug LJ 445; Richard C Ausness, “Tell me What you Eat, and I Will Tell You Whom to Sue: Big Problems Ahead for “Big Food”?” (2004-2005) 39 Ga L Rev 839; and, John Alan Cohan, “Obesity, Public Policy, and Tort Claims Against Fast-food Companies” (2003) 12 Widener LJ 103.

<sup>12</sup> Judge Sweet accepted McDonald’s assertion that the *Pelman I* complaint could “spawn thousands of similar ‘McLawsuits’ against restaurants”, and in light of this potential, he notes that the Court is particularly aware of its duty to “limit the legal consequences of wrongs to a controllable degree and to protect against crushing exposure to liability”, *Pelman I, supra* note 9 at 519.

<sup>13</sup> It was projected that obesity litigation would follow a similar course to the “tobacco wars”, which went through three discernable stages of litigation over several decades. See, for example: Brooke Courtney, “Is Obesity *Really* the Next Tobacco? Lessons Learned from Tobacco for Obesity Litigation” (2006) 15 Annals of Health L 61; McMenamin & Tiglio, *supra* note 11; John J Zefutic, Jr, “From Butts to Big Macs—Can the Big Tobacco Litigation and Nation-wide Settlement with States’ Attorneys General Serve as a Model for Attacking the Fast Food Industry?” (2003-2004) 34 Seton Hall L Rev 1383; and Jess Alderman & Richard A Daynard, “Applying Lessons from Tobacco Litigation to Obesity Lawsuits” (2006) 30:1 American Journal of Preventive Medicine 82.

<sup>14</sup> *Pelman I, supra* note 9 at 516.

<sup>15</sup> *Ibid*, emphasis added. Jason A Smith, “Setting the Stage for Public Health: The Role of Litigation in Controlling Obesity” (2005-2006) 28 UALR L Rev 443 at 450 does observe that Justice Sweet “seems responsive to the public health goals and population focus on the complaint”, citing *Pelman III, supra* note 10 at 443-46. He further states that the rulings in *Pelman* “opens the door for plaintiffs to use the tools of public health to make a broader argument about the ubiquity of advertising and its effect on obesity”, *ibid* at 451.

foundational negligence case, *Donoghue v Stevenson*.<sup>16</sup> Prior to articulating the now notorious neighbour principle, Lord Atkin began his decision by stating, “I do not think a more important problem has occupied your Lordships in your judicial capacity: important both *because of its bearing on public health* and because of the practical test which it applies to the system under which it arises.”<sup>17</sup> In *Donoghue* and *Pelman*, which both involved tort actions for harms resulting from the consumption of a food product (ginger beer and fast food, respectively), Lord Atkin and Judge Sweet recognized the importance of their decisions for public health. Less clear, however, is what influence, if any, public health considerations had on informing either court’s decision. At the heart of this project is an inquiry into what impact public health considerations should have in tort decisions.

### 1.1. Don’t Eat This Book!

*Pelman v McDonald’s* attracted more than just legal commentary. It sparked hundreds of media articles, many of which condemned the lawsuit.<sup>18</sup> It also inspired documentarian Morgan Spurlock. He recounts how the inspiration for his critically acclaimed film, *Super Size Me*<sup>19</sup>, came from McDonald’s public relations response to the lawsuit. When McDonald’s claimed in response to the lawsuit that an individual could eat its food exclusively and remain healthy, Spurlock decided to see if such an assertion had any merit, and committed to consuming only McDonald’s food for 30 days straight.<sup>20</sup> In

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<sup>16</sup> [1932] AC 562 (HL).

<sup>17</sup> *Ibid* at 579, emphasis added.

<sup>18</sup> See, for example: “‘Big Food’ Gets the Obesity Message” (July 10, 2003) NY Times A22. See discussion in Richard A Daynard, P Tim Howard & Cara L Wilking, “Private Enforcement: Litigation as a Tool to Prevent Obesity” (2004) 25 Journal of Public Health Policy 408.

<sup>19</sup> Morgan Spurlock, *Super Size Me* (Kathbur Pictures, 2004) [Spurlock, *Super Size Me*].

<sup>20</sup> In an interview, Spurlock recounts: “It was Thanksgiving 2002, and I was sitting on my mother’s couch watching the news about the lawsuit that two young women had filed against McDonald’s,



2005, Spurlock wrote a follow-up book to the film cheekily titled, *Don't Eat This Book*.<sup>21</sup> In the book, Spurlock critically examines the patterns of overconsumption of food in America, reasons for this overconsumption, and the consequences of this overconsumption. Although *Don't Eat This Book* does not explicitly consider product liability law, Spurlock begins by sarcastically claiming that warning labels for products were born when someone mistook the package of silicone gel inside a new pair of shoes for a free mint. He claims that “to avoid getting sued, corporate America now labels everything”<sup>22</sup> because, as he puts it, “[w]e live in a ridiculously litigious society.”<sup>23</sup> Spurlock continues: “[o]pportunists know that a wet floor or a hot cup of coffee can put them on easy street”, referring to these types of lawsuits as “pointless and frivolous.”<sup>24</sup> As a result, he observes, it is “[n]o wonder the big corporations and the politicians they own have been pushing so hard for tort reform.”<sup>25</sup>

Although he does not consider the merits of *Pelman*, it is unlikely that Spurlock would charge Pelman and Bradley with being opportunistic or accuse them with filing a pointless and frivolous lawsuit. Nor does he consider tobacco litigation as frivolous, although he recognizes that many do.<sup>26</sup> Instead, he praises the eventual success of

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claiming it was responsible for their obesity. And a spokesperson for McDonald's came on and said, you can't link their obesity to our food—our food is healthy, and its nutritious. I thought, if it's so good for me, I should be able to eat it every day, right? As much as I can. It'd be fine. That was it—the light went on”, Susan Dominus, “You Want Liver Failure With That?” (May 2, 2004) NY Times, online: NY Times [http://www.nytimes.com/2004/05/02/movies/film-you-want-liver-failure-with-that.html?\\_r=0](http://www.nytimes.com/2004/05/02/movies/film-you-want-liver-failure-with-that.html?_r=0).

<sup>21</sup> Morgan Spurlock, *Don't Eat This Book: Fast Food and the Supersizing of America* (New York: Penguin Books, 2005) [Spurlock, *Don't Eat This Book*].

<sup>22</sup> *Ibid* at 2.

<sup>23</sup> *Ibid*.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid*.

<sup>26</sup> *Ibid* at 4 argues, “[b]ack when people were first suing the tobacco companies for giving them cancer, a lot of folks scoffed .... Then a funny thing happened. As the lawsuits progressed, it became more

tobacco lawsuits for helping drive home “the relationship between personal responsibility and corporate responsibility.”<sup>27</sup> As he puts it: “[s]uddenly it was apparent that sticking a cigarette in your mouth was not *quite* the same thing as sticking those sneaker mints in your mouth.”<sup>28</sup> The crucial difference was the effort on the part of tobacco companies to market, advertise and promote the consumption of its product. The intent of Spurlock’s book is to point out that food companies, like tobacco companies, are manipulating consumers to overconsume, and this overconsumption ultimately is to the consumer’s detriment.<sup>29</sup>

While not intended as serious academic fodder, the sardonic title of Spurlock’s book suggests that he would not place much value in failure to warn litigation to hold food manufacturers to account. Indeed, Spurlock makes it clear he prefers legislative reform to tort litigation.<sup>30</sup> What is striking about this is that one of the allegations raised in the *Pelman* was that McDonald’s failed to warn consumers about the health effects associated with consuming its products.<sup>31</sup> Why, then, does Spurlock begin *Don’t Eat this Book* by dismissing warning labels as a consequence of America’s frivolous litigiousness?<sup>32</sup>

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and more apparent that smokers did *not* know all the danger of smoking. They couldn’t know, because Big Tobacco was hiding the truth from them...” Spurlock wryly observes, referring to the eventual Master Settlement Agreement between tobacco companies and 48 states, “[t]wo hundred and forty-six billion dollars is a whole lot of frivolous, man”, *ibid*.

<sup>27</sup> *Ibid* at 5.

<sup>28</sup> *Ibid*, original emphasis.

<sup>29</sup> See Jacob J Shelley, “Addressing the Policy Cacophony does not Require more Evidence: An Argument for Reframing Obesity as Caloric Overconsumption” (2012) 12 BMC Public Health 1042 [Shelley, “Addressing the Policy Cacophony”].

<sup>30</sup> Spurlock, *Don’t Eat This Book*, *supra* note 21 at 263.

<sup>31</sup> See *Pelman I*, *supra* note 9.

<sup>32</sup> Spurlock observes: “To avoid getting sued, corporate America now labels everything. Thank the genius who first decided to take a bath and blow-dry her hair at the same time. The Rhodes scholar who

## 1.2. Frivolous Litigation

Spurlock is not alone in his thinking that America has been inundated with frivolous lawsuits.<sup>33</sup> While the existence of frivolous litigation is generally accepted as a necessary consequence of any legal system that establishes a court system to settle disputes between citizens<sup>34</sup>, some scholars argue that over the past few decades there has been a “litigation explosion”.<sup>35</sup> Tobacco litigation is seen as a catalyst for this explosion, and the eventual success of tobacco lawsuits spurring on this litigation, most of which critics contend entail specious claims.<sup>36</sup> Although this notion of an explosion in litigation has been challenged<sup>37</sup>, there nevertheless remains a vocal group who continue to raise the

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first reached down into a running garbage disposal. that one-armed guy down the street who felt around under his power mower while it was running. Yes, thanks to them, blow-dryers now come with the label DO NOT SUBMERGE IN WATER WHILE PLUGGED IN. Power mowers warn KEEP HANDS AND FEET AWAY FROM MOVING BLADES. And curling irons bear tags that read FOR EXTERNAL USE ONLY”, *Don't Eat This Book*, *supra* note 21 (original emphasis).

<sup>33</sup> See John Wade, “On Frivolous Litigation: A Study of Torts” (1986) 14 Hofstra L Rev 433. See also Cohan, *supra* note 11 at 130, who concludes his article by noting, “[g]oing to court has become the “American way” to affect social change.”

<sup>34</sup> Wade, *ibid* at 433, notes frivolous litigation “has plagued the common law since the court system became mature and, indeed, prior to that time.” However, he notes that there is a fine line in determining what amounts to a frivolous lawsuit, as “[o]ne who believes that he has been aggrieved should be entitled to approach the courts for relief without having to guarantee that he is correct”, *ibid*.

<sup>35</sup> See for example, Walter K Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (1991: Dutton: Truman Talley Books). See references in Wade, *ibid*, at 435, n 5.

<sup>36</sup> For example, Olson begins *The Rule of Lawyers* by looking at how fees from tobacco litigation have spurred on litigation, to “wage tobacco-style warfare”, Walter K Olson, *The Rule of Lawyers: How the New Litigation Elite Threatens America's Rule of Law* (New York: St. Martin's Press, 2004) at 22 [Olson, *The Rule of Lawyers*]. See also Matthew T Salzman, “More than a Fat Chance for Lard Litigation: The Viability of State Medicaid Reimbursement Actions” (2003-2004) 56 Rutgers L Rev 1039 at 1048, who notes: “Certainly, many plaintiffs’ attorneys have not forgotten the lucrative cash cow called tobacco. As a result, many appear posed to gamble on a contingency basis with the assertion of questionable legal theories given the enormous fees a successful litigant would likely generate.”

<sup>37</sup> Randy M Mastro, “The Myth of the Litigation Explosion” (1991) 60:1 Fordham Law Review 199. Mastro recognized that the court system had more cases than it could effectively handle, but did not chalk this up to the abuse of litigation. See also Craig K Hemphill, “Smoke Screens and Mirrors; Don't be Fooled Get the Economic Facts Behind Tort Reform and Punitive Damages Limitations” (1997) 23 Thurgood Marshall Law Review 143, who observes, at 192, “[t]hose who call for tort reform follow a vast amount of misinformed assumptions based on limited data that do not have any empirical support.” He further notes, at 193, “[p]roduct liability law is efficient as it presently exists. The ‘wolf cry’ of the insurance industry should be seen for what it is, nothing more than smoke screens and mirrors. Moreover, it is a collusive attempt with large corporations to shift the burden of liability insurance on to consumers.”

alarm that the rule of law is being eroded by tort litigation, in particular, mass tort litigation.<sup>38</sup> It is especially interesting, then, that Spurlock champions tobacco litigation while simultaneously negatively framing tort litigation overall.

Spurlock's negative framing of tort litigation, however, is not entirely surprising, given the general milieu surrounding tort law in America at the time of his writing. In 2004, Haltom and McCann documented how media perpetuated distorted views on tort law, and how this resulted in a negative view of tort law overall.<sup>39</sup> For example, consider one of the most widely criticized and misunderstood cases of the last few decades: the McDonald's hot coffee case.<sup>40</sup> The "poster child for frivolous lawsuits"<sup>41</sup>, the case involved Ms. Liebek, a 79-year-old grandmother who was left disfigured and disabled after receiving third-degree burns from her cup of coffee. Far from frivolous, the evidence against McDonald's was damning.<sup>42</sup> Nevertheless, McDonald's won the media campaign<sup>43</sup> and Ms. Liebeck was portrayed as a greedy, careless litigant, out to get rich.<sup>44</sup>

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<sup>38</sup> Olson, *The Rule of Lawyers*, *supra* note 36. For a contrasting argument, see Carl T Bogus, *Why Lawsuits are Good for America: Disciplined Democracy, Big Business, and the Common Law* (New York: New York University Press, 2001).

<sup>39</sup> See William Haltom & Michael McCann, *Distorting the Law: Politics, Media, and Litigation Crisis* (Chicago: University of Chicago Press, 2004). For a critical assessment of some of Haltom and McCann's conclusions, see Robert A Kagan, "How Much do Conservative Tort Tales Matter?" (2006) 31:3 *Law & Social Inquiry* 711.

<sup>40</sup> *Liebeck v McDonald's*, No CV 93 02419, 1995 WL 360309 (Bernalillo County, NM Dist Ct Aug 18, 1994). Haltom & McCann, *ibid* at 184, observe that this case "is likely responsible for more of the everyday knowledge about the U.S. justice system than any other lawsuit."

<sup>41</sup> Kevin G Cain, "And Now the Rest of the Story ... The McDonald's Coffee Lawsuit" (2007) *Journal of Consumer & Commercial Law* 14; and Caroline Forell, "McTorts: The Social and Legal Impact of McDonald's Role in Tort Suits" (2011) 24:2 *Loyola Consumer Law Reviews* 101 at 104, 136-139. See also Randy Cassingham, *The True Stella Awards: Honoring Real Cases of GREEDY, OPPORTUNISTS, FRIVOLOUS LAWSUITS, and the LAW RUN AMOK* (New York: Plume Books, 2006), inspired by Stella Liebeck

<sup>42</sup> As Cain, *ibid* at 15, observes: "It was learned that McDonald's was aware of more than 700 claims brought against it between 1982 and 1992 due to people being burned by its coffee ... In spite of the knowledge of these claims and this inherent danger with its coffee, McDonald's refused to change its corporate policy and serve its coffee at a safer temperature."

<sup>43</sup> See Forrell, *supra* note 41 at 135-139. Forell contrasts McDonald's success in the media despite

Spurlock himself is critical of the case<sup>45</sup>, in part because he is channeling a prevalent sentiment about product liability law: that many litigants are simply opportunists looking for an easy way to strike it rich following their own carelessness.<sup>46</sup>

In the same way, critics of McLawsuits point out that obesity litigation will enable opportunists, looking for a way to hold food manufacturers responsible for their own recklessness or undisciplined habits. In large part this has to do with the prevailing attitude in society that obesity and diet-related chronic disease are entirely the consequence of one's poor lifestyle decisions.<sup>47</sup> Thus, the attempt to shift responsibility

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losing the lawsuit with its blunder with the McLibel trial, which McDonald's won. See Lawrence Buckley, "McLibel Fifteen Years On" (2005) 35:3 *The Ecologist* 14.

<sup>44</sup> Despite the media's treatment of Ms. Liebeck, she initially only requested that McDonald's pay medical costs not covered by Medicaid and for her daughter's lost wages who oversaw her recovery, estimated at around \$15,000. McDonald's offered her \$800. See Forrell, *supra* note 41 at 129-139 for a more detailed discussion. The McDonald's coffee case continues to be examined. In 2011, it was the subject of a documentary, *Hot Coffee*. See <http://franchiseinsider.quarles.com/2015/01/twenty-years-after-stella-liebeck-plaintiffs-are-still-suing-mcdonalds-over-hot-coffee/>.

<sup>45</sup> See Spurlock, *Don't Eat This Book*, *supra* note 21 at 2.

<sup>46</sup> Critics also point out that the plaintiffs' bar is also motivated by their desire to get rich. See, for example, Walter K Olson, "Taking Cola to Court" (2006) 16 *City Journal* 9; Theodore H Frank, "A Taxonomy of Obesity Litigation" (2005-2006) 28 *UCLR L Rev* 427 at 432 ("this litigation will have no effect on obesity; therefore, its primary effect is the wealth transfer to attorneys."); Robert L Rabin, "The Tobacco Litigation: A Tentative Assessment" (2001) 51 *DePaul Law Review* 331 at 353 [Rabin, "The Tobacco Litigation"] ("The tobacco litigation has richly rewarded a relative handful of plaintiffs' attorneys, and in so doing, has arguably given them the wherewithal to engage in other mass tort litigation ventures that fit their description of lawyering in the public interest."); and Todd G Buccholz, "Burgers, Fries, and Lawyers" (2004) 123 *Policy Review* 45 at 45-46, 58 ("A class action lawsuit would not be digging for scientific inferences. Instead, plaintiffs' lawyers would be digging into the pockets of franchise owners, employees, and shareholders in order to pull out gold."). Adams notes that "[b]y impugning the motives of trial lawyers and their clients and by spinning (or framing) the obesity crisis as a failure of personal responsibility, proponents of tort reform lose sight of the important role played by litigation as a safety net of consumer interests", Ronald Adams, "Fast Food, Obesity, and Tort Reform: An Examination of Industry Responsibility for Public Health" (2005) 110:3 *Business and Society Review* 297 at 315 See also Hemphill, *supra* note 37. However, as Daynard, Howard & Wilking, *supra* note 18 counter, "[p]laintiffs' lawyers in the United States ... receive compensation only if the cases are settled or won: they have no incentive to bring frivolous cases. There has not been and there will not be a flood of frivolous obesity-related lawsuits", *ibid*. They note that the real fear of industry is "well-founded lawsuits", *ibid*. See William B Werner, Andrew Hale Feinstein & Christian E Hardigree, "The Risk to the American Fast-Food Industry of Obesity Litigation" (2007) 48:2 *Cornell Hotel and Restaurant Administration Quarterly* 201 at 203.

<sup>47</sup> The idea of personal responsibility and diet-related chronic disease below will be discussed throughout. For a brief discussion, see Shelley, "Addressing the Policy Cacophony", *supra* note 29.

from individuals to manufacturers through litigation represents the height of frivolity.<sup>48</sup>

McMenami and Tiglio perhaps best represent this view, stating: “the obese should seek help not from lawyers but from doctors and, more important, from themselves.”<sup>49</sup>

According to this position, obesity lawsuits are *de facto* frivolous because obese individuals are the cause of their own obesity.<sup>50</sup> Critics of obesity litigation such as McMenami and Tiglio would likely answer Judge Sweet’s inquiry about the role for the courts in public health by stating the courts have no role to play in addressing obesity through civil litigation.<sup>51</sup>

Of course, there is a wealth of evidence that undermines the argument that obesity is a result of personal choices.<sup>52</sup> A growing body of research demonstrates that obesity is the logical physiological response to obesogenic and toxic food environments that are geared towards overconsumption and poor diets.<sup>53</sup> It is estimated that 60 to 100% of

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<sup>48</sup> For example, Frank, *supra* note 46 at 427, suggests, “[t]he causes of any one person’s obesity, however, will be highly individualized—different genetics, different exercise patterns, different eating patterns, and different choices.” See also McMenamin & Tiglio, *supra* note 11 at 518, who conclude: “obesity litigation will further erode the sense of personal responsibility on which the nation was founded ...” Advocates for obesity litigation acknowledge this critique, see, for example, Daynard, Howard & Wilking, *supra* note 18 at 414.

<sup>49</sup> McMenamin & Tiglio, *supra* note 11 at 518.

<sup>50</sup> It is commonly believed that personal responsibility plays a significant role in obesity. See, for example, the discussions in Kelly D Brownell et al, “Personal Responsibility and Obesity: A Constructive Approach to a Controversial Issue” (2010) 29:3 Health Affairs 379 and Nicole L Novak & Kelly D Brownell, “Obesity: A Public Health Approach” (2011) 34:4 Psychiatr Clin N Am 895. This will be a theme returned to throughout the remaining chapters. It is important to note that there is a tension in this thesis concerning the role of individuals. On the one hand, it contends that individuals have little control over the diet while, on the other, suggesting that more information be provided (through warnings) to individuals so as to help them make informed decisions about their diet. This tension is addressed at various points throughout the argument.

<sup>51</sup> To the extent that courts have been involved, critics suggest that this is often the result of an abuse of the legal system. See, for example, Frank, *supra* note 46. His perspective is discussed in more detail below.

<sup>52</sup> See Chapter 7 for a discussion about evidence.

<sup>53</sup> It is far beyond the scope of this chapter to review the science and evidence on point. See: NR Campbell, KD Raine & L McLaren, “‘Junk Foods,’ ‘Treats,’ or ‘Pathogenic Foods’? A Call for Changing Nomenclature to Fit the Risk of Today’s Diets” (2012) 28:4 Can J Cardiology 403; Leia Minaker & Kim D



obesity amongst Canadians is related to diet, specifically, excess calorie consumption.<sup>54</sup> Moreover, there is solid evidence to suggest that the rising prevalence in overweight and obesity occurred simultaneously with shifts in diet and the types of products available for consumption. For example, in 2002, 530 more calories per person per day were available in the Canadian food supply than in 1985.<sup>55</sup> During this time there was an increase in the prevalence of obesity and overweight in Canada.<sup>56</sup> Moreover, many individuals are woefully unaware of what they are eating and the health risks associated with products they consume.<sup>57</sup> Consequently, many argue that it is necessary for a broader societal response to address rising rates of obesity.<sup>58</sup> For many, the societal response signals a role

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Raine, “The Food Environment in Canada: The Problem, Solutions, and the Battle Ahead” (2013) 37:Supp2 Canadian Journal of Diabetes S245; Corinna Hawkes et al, “Smart Food Policies for Obesity Prevention” (2015) 385 Lancet 2410; and, Shelley, “Addressing the Policy Cacophony”, *supra* note 29;

<sup>54</sup> Sara N Bleich et al, “Why is the Developed World Obese?” (2008) 29 Annual Review of Public Health 273.

<sup>55</sup> *Ibid.*

<sup>56</sup> See Public Health Agency of Canada & Canadian Institute for Health Information, *Obesity in Canada* (Ottawa: PHAC, 2011), online: PHAC, [http://secure.cihi.ca/cihiweb/products/Obesity\\_in\\_Canada\\_2011\\_en.pdf](http://secure.cihi.ca/cihiweb/products/Obesity_in_Canada_2011_en.pdf) [*Obesity in Canada*] and Laurie K Twells et al, “Current and Predicted Prevalence of Obesity in Canada: A Trend Analysis” (2014) 2:1 Canadian Medical Association Journal Open E18.

<sup>57</sup> Brian Wansink has written about “mindless eating”, and discusses how most people can only recall about 20 of the over 200 food choices they make in a day, see: Brian Wansink & Jeffery Sobal, “Mindless Eating: The 200 Daily Food Decision We Overlook” (2007) 39:1 Environment and Behavior 106. For an overview of Wansink’s work, see Brian Wansink, *Mindless Eating: Why We Eat More Than We Think* (New York: Bantam Books, 2006) and Brian Wansink, *Slim by Design: Mindless Eating Solutions for Everyday Life* (New York: HarperCollins, 2014). Even experts are often unaware of the nutritional profile of the foods they are consuming or the amount they are consuming. See, for example, C McCrory et al, “Knowledge of Recommended Calorie Intake and Influence of Calories on Food Selection Among Canadians” (2016) 48:3 Journal Nutrition Education & Behavior 199 and AC Jones et al, “How Many Calories Did I Just Eat? An Experimental Study Examining the Effect of Changes to Serving Size Information on Nutrition Labels” (2016) Public Health Nutrition, *in press*. Given that so many people are unaware about food choices some scholars are calling for reframing food products as “toxic” or “pathogenic” to help people think differently about these food products. See, for example, Campbell, Raine & McLaren, *supra* note 53 and RH Lustig, LA Schmidt & CD Brindis, “Public Health: The Toxic Truth About Sugar” (2012) 482 Nature 27.

<sup>58</sup> See, for example Novak & Brownell, *supra* note 50, Constance A Nathanson, “Social Movements as a Catalyst for Policy Change: The Case of Smoking and Guns” (1999) 24:3 J of Health Politics & Law 421, and Rogan Kersh & James Morone, “The Politics of Obesity: Seven Steps to Government Action” (2002) 21:6 Health Affairs 142.

for the government.<sup>59</sup> As of yet, little attention has been given to the role of civil society. Unfortunately, in his book Spurlock downplays one of the most powerful tools available to consumers: product liability law.

The central argument of this thesis is that product liability law, specifically the duty to warn, provides consumers with a powerful legal remedy that has the ability to shape the food environment.<sup>60</sup> It is widely accepted that a manufacturer of goods has a duty to warn consumers about the risks inherent in the use of their products and, if they fail to do so and are found to be negligent, they may be liable for any proximately resulting harms. Thus, even if one argues that obesity is the consequence of personal decisions about what products to consume this is not in and of itself sufficient to declare that lawsuits against food manufacturers for obesity-related harms would *prima facie* be frivolous. After all, it is necessary to determine what, if any, information manufacturers provided to consumers. Under product liability law, the question is whether food manufacturers have acted negligently by failing to warn consumers of the potential harms associated with the consumption of their products. It is this question that this project intends to answer.

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<sup>59</sup> This includes Spurlock, who states a preference for legislation over litigation. On the one hand, he argues, “I still think the best way things get changed is when we, as consumers, citizens, parents, teachers and school administrators, take matters into our own hands”, *Don't Eat This Book*, *supra* note 21 at 264. By this, Spurlock means that people should vote with their forks, by changing what they consume, *ibid*. Spurlock takes this idea from Marion Nestle, *Food Politics: How the Food Industry Influences Nutrition, and Health* (Berkeley: University of California Press, 2007) [Nestle, *Food Politics*].

<sup>60</sup> For a broad overview of food environment research in Canada see Volume 107 of the Canadian Journal of Public Health, which is a special issue on the retail food environment in Canada. See, in particular, Leia Minaker, “Retail Food Environments in Canada: Maximizing the Impact of Research, Policy and Practice” (2016) 107:Suppl Canadian Journal of Public Health eS1. See also Health Canada, *Measuring the Food Environment in Canada* (Ottawa: Health Canada, 2013), online: Health Canada, <http://www.hc-sc.gc.ca/fn-an/nutrition/pol/som-ex-sum-environ-eng.php>.



## 2. AIM OF THESIS

The aim of this thesis is to examine if product liability law, specifically the duty imposed on manufacturers to warn consumers about dangers in their products, can be used to influence public health, in particular, diet-related chronic diseases. This project will specifically focus on the duty manufacturers have to warn consumers about the dangers inherent in food products. For the purpose of this project, “food product” is used liberally to apply to any food substance that is manufactured, which includes some degree of processing, although it may include some agricultural practices.<sup>61</sup> Although obesity will not be exclusively examined, it will be the dominant backdrop for this discussion. There has been very little reflection on the use of product liability law theories to address obesity or other diet-related chronic diseases. The vast majority of the limited literature on point has focused on American jurisprudence, including analysis of *Pelman*, and the subsequent implementation of so-called “Cheeseburger bills” in many US states, which prevented individuals from suing food manufacturers for obesity-related harms. To date there has been scant consideration of the Canadian context. There has also not been an equivalent “McLawsuit” in Canada.

Undoubtedly, this is a consequence of the unique Canadian tort climate.<sup>62</sup> In

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<sup>61</sup> Note “manufactured” is meant as a catch-all term to refer to any entity that puts a product is has put onto the market that it has grown, produced, created, built, and so forth. There are limitations with this approach, as discussed below.

<sup>62</sup> Lawrence G Theall et al, *Product Liability: Canadian Law and Practice* (Aurora, ON: Cartwright Group, 2010) contend that the differences between the American and Canadian tort climate “have likely been influence more by socio-political factors than by any fundamental difference in substantive law”, at L1-6. As example, at L1-6 note 22, they discuss how one American manufacturer faced 2000 claims for one product in US, but only 50 in Canada, a 45-1 ratio. Of the 50 Canadian claims, only one went to trial (100 were tried in US). Additionally, they note, “Canadian cases settled earlier and for far less money”, *ibid.*

Canadian civil litigation punitive damage awards are small relative to the United States, and unsuccessful plaintiffs may have costs awarded against them.<sup>63</sup> Understandably, plaintiffs may be more reluctant to initiate a lawsuit than in the United States, where large punitive damages awards act to incentivize both plaintiffs and the plaintiff's bar.

Additionally, Canadians benefit from more extensive social services than their American counterparts, particularly the publicly funded health care system; as a result, consumers in Canada may not incur the same losses from a defective product that consumers in the United States might face. Indeed, it has been suggested that product liability litigation in the United States has been an exercise in recovering the crippling health care costs that may arise from a defective product.<sup>64</sup>

Nevertheless, there is a body of Canadian jurisprudence articulating the duty of manufacturers to warn consumers in other contexts. This thesis will draw on this jurisprudence, relying on numerous important Supreme Court of Canada decisions, including the seminal cases of *Lambert v Lastoplex Chemicals*<sup>65</sup> and *Hollis v Dow Corning*.<sup>66</sup> In addition, this project will rely heavily on two lower court decisions of great importance for present purposes. The first, involving the failure to warn of risks

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<sup>63</sup> As Theall et al note, *ibid* at L1-6 note, “[e]ven today, American lawyers, insurers and manufacturers continue to speak of a product liability crisis and express concern over the huge damages awarded. By contrast, the volume of Canadian claims remains disproportionately low with much smaller general damage awards and punitive damage awards which are rare in occurrence and modest in amount.” Waddams argues that punitive damages should not be available in product liability suits, Stephen M Waddams, “The Canadian Law on Products Liability” (1999) 34 Texas Int’l L J 119 at 127 [Waddams, “The Canadian Law on Products Liability”].

<sup>64</sup> Certainly, recovering health care costs has been part of what motivated tobacco litigation, including by the federal and state/provincial governments, see, for example, Mark D Fridy, “How the Tobacco Industry May Pay for Public Health Care Expenditures Caused by Smoking: A Look at the Next Wave of Suits Against the Tobacco Industry” (1996) 72:1 Indiana Law Journal 235 and Jacob J Shelley, “The Crown’s Right of Recovery Act” (2010) 18:3 Health Law Review 15 [Shelley, “The Crown’s Right of Recovery Act”].

<sup>65</sup> [1972] SCR 569.

<sup>66</sup> [1995] 4 SCR 634.

associated with the use of birth control pills, is the 1986 Ontario Court of Appeal case, *Buchan v Ortho Pharmaceutical*.<sup>67</sup> The second is the more recent decision of *Létourneau v JTI-MacDonald* from the Québec Superior Court in 2015<sup>68</sup>, which held that tobacco companies had a duty to warn consumers about the dangers associated with cigarettes. This thesis will argue that *Buchan* and *Létourneau*, when read alongside the fuller body of duty to warn case law in Canada, clearly articulates the extent of a manufacturer's duty to warn, with an aim of facilitating meaningful consumer choice, even when the risks associated with the use of a product may not manifest immediately. More pointedly, this thesis will argue that food manufacturers have a heightened responsibility, given the nature of the product they seek to distribute and the inherent vulnerability of the consuming public.

At the outset it is important to note that the aim of this thesis is to articulate a *general* theory, predicated on the existing product liability law jurisprudence, that food manufacturers are required to warn consumers about the dangers inherent in the consumption of their products. Importantly, the following makes no specific claims about the application of the theory herein to particular food products. While specific examples will be identified, the intent is not to construct a blueprint for civil litigation. Instead, first and foremost, this thesis articulates how Canadian product liability law jurisprudence on the duty to warn is applicable to food manufacturers. Specifically, it argues that *Buchan* imposes a positive duty on the part of manufacturers to proactively identify potential

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<sup>67</sup> [1986] 54 OR (2d) 92 (ON CA). *Buchan* is discussed in more detail in Chapter 4.

<sup>68</sup> 2015 QCCS 2382. This case is discussed in more detail in Chapter 4. *Létourneau v JTI-MacDonald* is set to go before the Québec Court of Appeal in November of 2016, and, as will be discussed below, can be expected to go to the Supreme Court of Canada.

risks and harms. It also argues that manufacturers have an obligation under the duty to warn to provide consumers with warnings about dangers inherent in products irrespective of whether or not a failure to warn in a particular instance can be shown to result in harm—the potential for harm to arise is sufficient to trigger a manufacturer’s responsibility to both investigate and disclose any risks. In other words, manufacturers are required to warn consumers of risks when they release a product to the market, and thus warnings are therefore necessary irrespective of any finding of negligence or imposition of liability. *Buchan* further indicates how manufacturers are required to communicate with the public. Described below as the *Buchan* standard, this approach was affirmed in *Létourneau*. As will be demonstrated, food manufacturers in Canada are not living up to the *Buchan* standard.

While the main focus of this project is product liability law, by examining the use of a private law approach to address what is commonly identified as a public health problem, this thesis necessarily examines the relationship between the public health and private law. In so doing, it pushes the conceptual framework of how public health law has been conceived and used. This is an important undertaking. As part one will make clear, public health advocates have identified private law as a tool that is available to address public health threats, but often have not necessarily examined whether or not the use of private law is appropriate. Before considering what, if any, role product liability law can play in the prevention of diet-related chronic disease, it is necessary to address a more fundamental issue, and in so doing answer Judge Sweet’s question, by articulating the proper role of courts and the private law in public health.

Thus, this thesis grapples with the proper role of the judiciary in developing

public policy. As will be detailed in chapter three, the use of judicial policy making is subject to vociferous debate. By examining existing case law regarding the duty to warn and forecasting what it might mean for future decisions, this project considers the appropriateness of judicial pronouncements to shape public policy. As will become clear, judicial policy making, particularly when it is necessitated by legislative inertia, has an important role to play in public health. By virtue of examining the aforementioned, this thesis also offers a lens into a variety of critical issues facing legal scholars, including the role of scientific evidence in legal decision-making and the role social values should play in judicial decision making. While these issues are not the subject of explicit discussions herein, they are relevant to many of the discussion about the potential for civil litigation to protect public health. Ultimately, this thesis makes an argument outlining the potential for private law to help remedy pressing public health problems by identifying how the duty to warn is relevant in the context of diet-related chronic diseases, including obesity.

## **2.1. Overview of Argument**

This thesis proceeds in two parts. Part one examines the role of private law in public health generally, while part two focuses specifically on the duty to warn and food products. Part one encompasses three chapters. It starts broadly, in chapter two, by reviewing the relationship between public health and tort law. It sets out a justification of the use of tort law to address public health problems, in large part to preemptively counter criticisms that tort law is ill-suited to address matters that concern populations. Chapter three then examines the role of law, including private law, in obesity prevention. It reviews the history of public health litigation, and considers the potential benefits and pitfalls that arise when using litigation as a tool to advance public health. This includes a

more fulsome discussion on obesity litigation. Because obesity is often described as the “next tobacco”, this chapter also considers whether or not obesity can benefit from the history of tobacco litigation.

Part two of this thesis focuses on the duty to warn. Chapter four provides the basic framework of product liability law and the duty to warn in Canada. It considers whether food can be classified as a dangerous product, and thereby require food manufacturers to warn consumers of any dangers with the use or consumption of their products. To assist this discussion, this chapter considers the state of the law for ingested products. It also reviews *Buchan* and *Létourneau*, as well as several other leading Canadian authorities.

Chapters five through seven entail a more specific examination of the duty to warn applied to food products. As liability for food manufacturers ultimately is contingent on a finding of negligence, this part follows the basic outline of what is required in a negligence claim, focusing on the duty of care, standard of care, and factual causation. Chapter five examines the duty of care owed by food manufacturers that arises under Canadian negligence law. It will also consider who, in the chain of food production, from ‘farm to fork’, owes a duty to the consumer, as well as the nature of the duty. Chapter six then considers the standard of care owed by food manufacturers. This chapter spells out not only when warnings are required, but also to whom warnings should be directed. Chapter seven examines factual causation. It focuses specifically on the challenges that arise with determining factual causation in failure to warn cases. Although this thesis is not focused on a particular product or particular set of plaintiffs or defendants, and the discussions in these chapters is largely abstract, concrete examples

will be used to ground the analysis.<sup>69</sup> In particular, emphasis will be given to specific categories of products that might be susceptible to litigation, as developed in chapter five.

This thesis concludes by reflecting on the potential for product liability law to shape public health. The final chapter will provide an overall assessment of the potential outcomes, for individual claimants, for the public, and for the development of public health and legal theory. It will also reflect on the overall promise and challenges that face the use of private law, and specifically tort law, to develop public policy, specifically public health policy, and on the future of both public health law and tort litigation.

## 2.2. Limitations

Before proceeding, there are several important limitations to this project that need to be identified. The first concerns the use of obesity as a case study. Although this thesis is applicable to food products generally and contemplates diet-related chronic diseases overall, the bulk of the discussion focuses on obesity. This is largely in response to the fact that the vast majority of scholarship, analysis and commentary on point concerns obesity, and not diet-related chronic diseases more broadly. This raises some challenges because discussions about obesity are inherently fraught with difficulty, and there are competing views about how to discuss the problem of obesity.<sup>70</sup> For this reason, obesity prevention will provide the backdrop for the discussion. However, as will be noted

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<sup>69</sup> Note, this paper does not consider some of the other elements of negligence that are obviously relevant, including determining damages, procedural issues, and so forth. These matters are more appropriately reviewed with a specific claim or series of claims to ground the discussion. Many of the references on product liability law cited throughout reflect on these issues, and can be consulted for further discussions.

<sup>70</sup> See WA Bogart, “Law as Tool in “The War on Obesity”: Useful Interventions, Maybe, But, First, What’s the Problem?” 2013 JL Med & Ethics 28 [Bogart, “Law as a Tool”].

throughout, the findings of this project are applicable to other diet-related chronic diseases.

A second limitation concerns the existing legal materials. The vast majority of legal analysis about obesity, including obesity litigation, is American. There is a richer body of literature about product liability out of the United States, with fewer Canadian cases specifically on point.<sup>71</sup> Thus, one of the challenges with this area of study is the utilization of American sources, and to ensure that they apply to the Canadian context. With respect to determining the substantive matters of law, this project focuses on Canadian cases, and American jurisprudence is relied on to supplement the discussion. As a result, this thesis does not necessarily consider all of the relevant American case law or literature on point.<sup>72</sup>

Third, while the argument that follows contemplates various types of food products and different classifications of manufacturers, its clearest application is to processed foods, particularly ones that are prepackaged. After all, it is on these types of products that a warning is most easily added. This is not to suggest that warnings are not applicable on other categories of food products, only that some categories of food products present unique challenges that are not examined in detail here. For example, consider food products sold in restaurants. Warnings could not be affixed to the food

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<sup>71</sup> In part, this may stem from Canadian's hesitation to be litigious, see Lara Khoury, Marie-Eve Couture-Ménard & Olga Redko, "The Role of Private Law in the Control of Risks Associated with Tobacco Smoking: The Canadian Experience" (2013) 39 J L Med & Ethics 442 at 443.

<sup>72</sup> Theall et al, *supra* note 62 at L1-6 note that many areas of substantive law are similar, and the real differences are socio-political factors. "American lawyers, insurers and manufacturers continue to speak of a product liability crisis and express concern over the huge damages awarded. By contrast, the volume of Canadian claims remains disproportionately low with much smaller general damage awards and punitive damage awards which are rare in occurrence and modest in amount", *ibid*.



itself, but would have to be made available on a menu, or in some other fashion.<sup>73</sup> This could impose significant costs on independent restaurants or those with only a few locations.<sup>74</sup> Thus, what follows might not map neatly onto restaurants. Considering restaurants seemed necessary, however, particularly given that the leading obesity litigation case, *Pelman*, concerned a restaurant.

Fourth, it is beyond the scope of this project to consider all possible tort theories or approaches that might be relevant. For example, consider a waiver of tort claim. Waiver of tort was examined in the Ontario Superior Court of Justice decision, *Andersen v St. Jude Medical, Inc.*<sup>75</sup> This case was a products liability class action concerning a medical device (a mechanical prosthetic heart valve) that had been certified as a class proceeding in 2003.<sup>76</sup> One of the common issues examined was whether waiver of tort could be applied. Although legal academics and class action practitioners hoped that this decision would provide some clarity over what waiver of tort entailed<sup>77</sup>, Lax J ultimately left unanswered the question of whether waiver of tort was parasitic<sup>78</sup> or an independent

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<sup>73</sup> This might be akin to the labelling of calories and/or nutrients of interest (fat, sodium, sugar) that is becoming more common in jurisdictions around the world (e.g., Ontario, New York).

<sup>74</sup> Generally, regulations on restaurants are imposed on those businesses with more than 20 franchises for this reason. This is the case, for example, with Ontario's *Healthy Menu Choices Act 2015*, SO 2015, c 7, which requires menu labelling for locations with more than 20 locations (s. 1).

<sup>75</sup> 2012 ONSC 3660.

<sup>76</sup> *Ibid* at para 1.

<sup>77</sup> See, for example, Margaret L Waddell, "Waiver of tort: the mystical parasite" (December 10, 2012) Canadian Lawyer, online: Canadian Lawyer, <http://www.canadianlawyermag.com/4437/Waiver-of-tort-the-mystical-parasite.html>.

<sup>78</sup> As Lax J notes, "waiver of tort may only be invoked where all of the elements of the underlying tort have been proven, including damage to the plaintiff if that is an element of the tort", *Andersen, supra* note 75 at para 579. She refers to *Aronowicz v Emtwo Properties Inc.*, [2010] ONCA 96 at para 80, where Blair JA noted: "Waiver of tort is a restitutionary remedy. There is considerable controversy over whether it exists as an independent cause of action at all or whether it is "parasitic" in the sense that it requires proof of an underlying tort and - since a tort requires damage - proof of harm to the plaintiff. By invoking waiver of tort, a plaintiff gives up the right to sue in tort but seeks to recover on the basis of restitution, claiming the benefits the wrongdoer has derived from the wrongful conduct regardless of whether the plaintiff has

cause of action.<sup>79</sup> She noted:

I realize that there has been considerable anticipation that this trial, with the benefit of a full factual record, would finally decide whether or not there is a basis in Canadian law for applying the doctrine of waiver of tort in a product liability negligence case. As I have found no wrongdoing, any analysis I engage in would be academic.<sup>80</sup>

In decisions since *Anderson*, Mohrbutter has argued that waiver of tort has been addressed in a manner that would suggest it is parasitic.<sup>81</sup> This would suggest that waiver of tort is only possible to assert *after* a duty to warn has been established. In *Dembrowski v Bayer Inc*, which sought to certify a class action against the defendant for failing to warn consumers of the risks associated with the use of birth control, Justice Gabrielson held that waiver of tort was not a common issue, but rather a claim for aggravated damages, and that this was not appropriate to consider until liability had been established.<sup>82</sup> Thus, while waiver of tort may offer some promise, the parasitic view still requires establishing liability under the elements of an underlying tort. Similarly, this project does not aim to reflect on the current debate between negligence and strict

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suffered damages or not.”

<sup>79</sup> As Lax J observes, “If, however, waiver of tort exists as an independent cause of action, by invoking the doctrine, a plaintiff can claim the benefits that accrued to the defendant as a result of the defendant’s wrongful conduct, even if the plaintiff suffered no harm,” *Andersen*, *ibid* at para 579. Lax J notes that waiver of tort is different from unjust enrichment, *ibid*.

<sup>80</sup> *Ibid* at para 577. Justice Lax goes on to note: “[n]onetheless, due to the considerable interest in this issue, I will provide one or two comments that may be helpful in moving this vexing question closer to resolution”, *ibid*.

<sup>81</sup> See Jason Mohrbutter, “A Quick Look at the Last Few Years of Waiver of Tort” (May 30, 2016) MLT Aikins Insight, online: MLT Aikins <https://www.mltaikins.com/class-actions/quick-look-last-years-waiver-tort/>. For example, he points to the court in *Lee v Transamerica Life Insurance Canada*, 2016 BCSC 191 at para 128: “It remains unclear whether waiver of tort is an independent cause of action or an alternate remedy only. As the name suggests, however, there must be an actionable underlying tort before the doctrine can be invoked.” He also identifies, among others, *Sweetland v GlaxoSmithkline*, 2016 NSSC 18 and *Authentic T-Shirt Company v King*, 2016 BCCA 59.

<sup>82</sup> *Dembrowski v Bayer Inc*, 2015 SKQB 286.

liability<sup>83</sup>, and does not advocate for adopting a strict liability approach in Canada. These avenues of inquiry, while intriguing, go beyond the aim of this project. Here the aim is to apply the existing product liability jurisprudence concerning the duty to warn to determine whether food manufacturers have an obligation to warn consumers about the health risks associated with the use of their products.

A further limitation of this thesis is that it does not intended to be a blueprint for litigation. This project also does not address relevant procedural issues. For example, it is likely that duty to warn litigation against food products would proceed as a class action<sup>84</sup>, but this project does not examine issues related to class action proceedings or other rules of civil procedure. Although these issues are important, they are beyond the scope of this project. While it does refer to specific products, and occasionally refers to specific manufacturers, the intent here is not to build a specific case against a particular product or to focus on a specific harm. Instead, the intent is to make a general argument about the applicability of the duty to warn jurisprudence to food products. Consequently, while the following does include discussions about evidence, and refers to appropriate sources when relevant, it does not engage in a detailed analysis of the evidence about specific harms. Additionally, it does not consider options beyond tort litigation or what might be necessary if tort litigation is unsuccessful.<sup>85</sup> While there are other courses of action, such

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<sup>83</sup> See, for example, Ontario Law Reform Commission (OLRC), *Report on Products Liability* (Toronto: OLRC, 1979) [OLRC, *Report on Products Liability*]; Denis W Boivin, “Strict Products Liability Revisited” (1995) 33:3 Osgoode Hall Law Journal 487; and, Denis W Boivin, “Negligence, Strict Liability, and Manufacturer Failure to Warn: On Fitting Round Pegs in Square Holes” (1993) 16 Dalhousie Law Journal 299 [Boivin, “Negligence, Strict Liability, and Manufacturer Failure to Warn”]. Additionally, many of the references cited throughout reflect on strict liability.

<sup>84</sup> James Cassels & Craig Jones, *The Law of Large-scale Claims: Product Liability, Mass Torts, and Complex Litigation in Canada* (Toronto: Irwin Law, 2005).

<sup>85</sup> For example, manufacturers may comply with the duty to warn and provide warnings to

as government regulation, consideration of these options is beyond the scope of this project.

Finally, this thesis is focused on determining whether or not a duty to warn for dangers in food products is a potential private law strategy for addressing diet-related chronic diseases, but does not attempt to evaluate the overall impact that imposing a duty to warn on food products may have. It does not explicitly consider whether duty to warn litigation against food products will be successful for plaintiffs (i.e., will they obtain favourable outcomes through litigation), or if it will be impactful on public health (e.g., will duty to warn litigation bring about positive changes on diet-related diseases, such as obesity<sup>86</sup>), or if it will change the behaviour of industry (e.g., will the food industry adopt the use of warnings in light of the duty?<sup>87</sup>).

These are important questions, particularly in light of concerns that tort litigation may not achieve its stated objectives.<sup>88</sup> Additionally, some may contend that if warnings on food products have no impact on consumer behaviour that they are not necessary. It is difficult to assess the impact that warnings may have, because there is jurisdiction where

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consumers about inherent risks in their products, including risks of diet-related chronic diseases, thus shielding themselves from liability, and the consumption of said products may still result in negative health consequences for individuals and the public. This may give rise to a new type of tort claim or provide justification for government intervention. These possibilities are not considered in detail in this project, which focuses on the plausibility of a failure to warn claim.

<sup>86</sup> There are other potential implications, some negative. Consider, for example, the observation by Haltom and McCann that the media coverage of food litigation in the United States tends to frame plaintiffs and the arguments they make in a negative light, which may serve to undermine the claims as well as other public health initiatives. See William Haltom & Michael McCann, "Framing Fast-Food Litigation: Tort Claims, Mass Media, and the Politics of Responsibility in the United States" in David M Engel & Michael McCann, *Fault Lines: Tort Law as Cultural Practice* (Stanford: Stanford University Press, 2009) at 97.

<sup>87</sup> For example, it has been observed that despite success in tobacco litigation, "the industry would appear to have changed very little", Wayne V McIntosh & Cynthia L Cates, *Multi-Party Litigation: The Strategic Context* (Toronto: UBC Press, 2006) at 94.

<sup>88</sup> This is discussed at various points below. For a good discussion, see Don Dewees, David Duff & Michael Trebilcock, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (New York: Oxford University Press, 1996).

warnings (as described in this project) have been implemented. Given that warnings presently do not exist, it thus makes it very difficult to make any conclusions about their efficacy. One could look to the literature on menu labelling efforts (e.g., regulations requiring calories be posted on menus) or the impact that mandated government labelling (e.g., nutrition fact panels) have on consumer choice, and draw comparisons. On this front, there is mixed evidence about how these efforts inform consumer behaviour, with many pointing out that these efforts tend to have limited impact.<sup>89</sup> But even if the impact on consumer behaviour was limited, in that the majority of consumers did not change their behaviour in response to warnings, the fact that information might be relevant for some consumers is sufficient. As will be discussed below, the rationale for warnings on products is to provide consumers with non-obvious information about risks with the use of the product, so that consumers can make informed decisions. How this information is used – or even whether it is ultimately relied upon – is a secondary consideration to whether or not manufacturers have an obligation to provide the warning in the first place. This project focuses on this latter issue. It should be also noted that this thesis recognizes that warnings will not, in and of themselves, be sufficient to address complex, multi-faceted problems such as obesity and other diet-related chronic diseases. Warnings can play an important role, however, by providing consumers with information that may influence their dietary decision and by potentially bringing about changes to the food

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<sup>89</sup> This is what was found in response to New York's menu labelling requirements, where the behaviour of a small subset of consumers was influenced by the information. See, for example, T Dumanovsky et al, "Changes in Energy Content of Lunchtime Purchases from Fast Food Restaurants after Introduction of Calorie Labelling: Cross Sectional Customer Surveys" (2011) 343 *British Medical Journal* d4464 and E Pulos & K Leng, "Evaluation of a Voluntary Menu-Labeling Program in Full-Service Restaurants" (2010) 100 *American Journal of Public Health* 1035. See discussion in W.A. Bogart, *Regulating Obesity: Government, Society, and Questions of Health* (Toronto: Oxford, 2013) at 126-131.

environment.<sup>90</sup>

## **PART I: PRIVATE LAW AND THE PUBLIC'S HEALTH**

The aim of part one is to demonstrate the appropriateness of using private law, specifically tort law, to promote and protect the public's health. Part one is comprised of three chapters. Chapter two begins by examining the role of private law in public health in a broad sense. It argues that tort law has historically been concerned with population health, and demonstrates the congruence between the two by identifying the compatibility between Wendy Parmet's theory of population-based legal analysis and Peter Gerhart's theory of tort law as social morality. Finally, chapter three examines the use of law in obesity prevention. It examines judicial policy-making, public health litigation, and the advantages and disadvantages with using litigation for public health before discussing the appropriateness of using litigation to address obesity. This includes an examination of whether or not obesity can learn from tobacco litigation.

Thus part one makes a broad argument that, indeed, it is appropriate to use private law, and civil litigation, to address public health problems, such as obesity and diet-related chronic diseases. It serves as the foundation for the analysis that follows in part two on the use of product liability law, specifically the duty to warn, to protect and promote public health.

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<sup>90</sup> For example, if food manufacturers are required to warn about the dangers in their products, this may incentive some manufacturers to modify their products so as to avoid warnings (e.g., by reducing fat or sugar content).

## CHAPTER 2: TORT LAW AND THE PUBLIC'S HEALTH

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### 1. INTRODUCTION: TORT LAW AND THE PUBLIC'S HEALTH

The aim of this thesis is to demonstrate that product liability law has a role to play in the development of public health policy. Embedded in this claim is an argument about the role of tort law in public health, namely, that litigation can be used to advance public health objectives. Rather than simply proceed with a discussion about how product liability law can be utilized to inform public health policy, and expose the conclusions of this project to criticisms of instrumentalism, the following chapter aims to lay the groundwork necessary to support the specific and more general arguments about the role for product liability law and tort law in public health.

In order to assess the narrow question of the use of the duty to warn to further the public health goal of reducing diet-related chronic diseases, specifically obesity, this project begins with a broader goal, namely, to justify the use of tort litigation in the pursuit of public health. This broad approach is taken to address criticisms that this use of private law threatens private law's coherence<sup>91</sup> and to confront those who might take a critical view of judicial policy making in public health. While the following discussion will not quell all of the criticisms raised by those opposed to the use of judicial policy-

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<sup>91</sup> See, for example, Ernest J Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995) [Weinrib, *The Idea of Private Law*]. For a spirited discussion on coherence, see Ernest J Weinrib, "Professor Brudner's Crisis" (1989-1990) 11 *Cardozo Law Review* 549 and Alan Brudner, "Professor Weinrib's Coherence" (1989-1990) 11 *Cardozo Law Review* 553.

making<sup>92</sup>, it does counter some of the concerns, including that most, if not all, public health litigation is frivolous. More specifically, it defends against any criticism that product liability litigation to hold food manufacturers responsible for harms that arise from use of their products is an inappropriate use of tort law.

This chapter begins in with an examination of the relationship between public health and tort law. It then identifies the historical congruity between public health and tort law, before examining current approaches to tort law in contemporary public health scholarship. With this background, this chapter concludes that not only is there a historical basis for using tort law to address public health problems, but that tort theory and public health theory are sufficiently broad to incorporate one another. Wendy Parmet's theory of population-based legal analysis and Peter Gerhart's theory of tort law as social morality will be posited as an appropriate approach to understanding the congruence between these two areas of law. This approach is aimed at assessing tort law as law, and to avoid the hazard of not taking law seriously.<sup>93</sup> Given that the use of tort law requires litigation, chapter three will include an examination of the role of litigation in public health. The need to justify the use of litigation is particularly salient given that the proposed mechanism for advancing public health policy suggested here, the use of duty to warn litigation, is but one possible legal avenue for influencing food environments and food products.

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<sup>92</sup> For example, see Robert A Levy, "Tobacco Medicaid Litigation: Snuffing Out the Rule of Law" (1997-1998) 22 S Ill UL J 601.

<sup>93</sup> See discussion in Andrew Botterell & Christopher Essert, "Normativity, Fairness, and the Problem of Factual Uncertainty" (2009) 47 Osgoode Hall Law Journal 663 at 676, 684, where in discussion cause in fact the authors attempt to take tort law seriously. Their approach will be revisited in Chapter 7, addressing Causation.



## 2. PUBLIC HEALTH AND TORT LAW

The first task of this chapter is to assess the relationship between public health and tort law. The easiest starting point is to begin by defining terms. Public health, at its most basic, is “what we, as society, do collectively to assure the conditions for people to be healthy.”<sup>94</sup> At its most simplistic, the purpose of tort law is “to adjust ... losses and to afford compensation for injuries sustained by one person as the result of the conduct of another.”<sup>95</sup> At their most basic there is a seeming incompatibility between their respective focus on collective interests and an individual’s interest. Given their seemingly incongruous objectives, it might appear that a relationship between tort law and public health is not intuitive, and that any overlap between the two fields would be difficult to identify.<sup>96</sup>

There is some merit to this initial assessment. Whereas tort law is generally depicted as a mechanism for correcting private wrongs, providing compensation and restoring plaintiffs to the position they occupied prior to being wronged<sup>97</sup>, and is considered an intrinsically individual-centric enterprise<sup>98</sup>, public health seeks to protect

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<sup>94</sup> Institute of Medicine (IOM), Committee for the Study of the Future of Public Health, *The Future of Public Health* (Washington, D.C.: National Academy Press, 1988) [IOM, *The Future of Public Health*].

<sup>95</sup> Cecil A Wright, “Introduction to the Law of Torts” (1944) 3 Cambridge Law Journal 238 at 238. Despite providing a simple definition Wright notes, “no definition of a “tort” has yet been made that affords any satisfactory assistance in the solution of the problems we shall encounter”, *ibid* at 238.

<sup>96</sup> Elizabeth A Weeks, “Beyond Compensation: Using Torts to Promote Public Health” (2007) 10 J Health Care L & Policy 27 at 27-28.

<sup>97</sup> The aims of tort law are subject to considerable debate, and a full discuss on this point is beyond the scope of this chapter. For a brief overview of some of the theories of tort law, see Jules Coleman, Scott Hershovitz & Gabriel Mendlow, “Theories of the Common Law of Torts” in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (2015), online: Stanford, <http://plato.stanford.edu/entries/tort-theories/>.

<sup>98</sup> See for example, Martin A Kotler, “The Myth of Individualism and the Appeal of Tort Reform” (2006-2007) 59 Rutgers L Rev 779 (“the social values influencing the right to sue and the obligation to pay

collective interests and is population-focused.<sup>99</sup> However, on closer examination, there is actually considerable overlap between tort law and public health, and a rich historical basis for using tort law to advance public health.

For example, Weeks notes the “utilitarian calculus and communitarian tradition that underlies much of tort law is central to public health law.”<sup>100</sup> While it may not be immediately obvious that tort law is concerned with protecting the ‘common good’<sup>101</sup>, tort litigation has been championed for its ability to deter risky behaviours<sup>102</sup>, to encourage the development of safer products<sup>103</sup>, and for providing a forum for public health policy debate.<sup>104</sup> In this respect, tort law is regularly identified by public health scholars as a tool that, often for pragmatic reasons, should be utilized as part of a broader public health strategy. In the past few decades, there has been an increase in scholarly

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are rooted in the commitment to American individualism”, at 780) and Peter Benson, “The Basis of Corrective Justice and Its Relation to Distributive Justice” (1991-1992) 77 Iowa L Rev 515 (“... corrective justice has usually been thought of as comprising those principles that directly govern private transactions between individuals”, at 515). This is the view held by public health scholars as well, see Elizabeth Weeks Leonard, “Tort Litigation for the Public Health” in John G Culhane, ed, *Reconsidering Law and Policy Debates: A Public Health Perspective* (Cambridge: Cambridge University Press, 2011) 187 at 193ff.

<sup>99</sup> Wendy E Parmet, *Populations, Public Health, and the Law* (Washington, DC: Georgetown University Press, 2009) [Parmet, *Populations, Public Health, and the Law*].

<sup>100</sup> Weeks, *supra* note 96 at 58, but see her discussion generally. As will be discussed in further detail below, these ideas are also apparent in Gerhart’s understanding of tort law, discussed in part 5 of this chapter.

<sup>101</sup> Although beyond the scope of this chapter, it is worth noting that there is considerable debate about the “common good”. See Brian Z Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press, 2006) at 223 [Tamanaha, *Law as a Means to an End*], Ofer Raban, “Real and Imagined Threats to the Rule of Law: On Brian Tamanaha’s *Law as a Means to an End*” (2008) 15 Va J Soc Pol’y & L 478 at 482.

<sup>102</sup> See, for example, Lawrence O Gostin, *Public Health Law: Power, Duty, Restraint*, 2nd ed (New York: Milbank Memorial Fund, 2008) at 182-226 [Gostin, *Public Health Law*, 2nd ed].

<sup>103</sup> See, for example, Jon S Vernick et al, “How Litigation Can Promote Product Safety” (2004) 32:4 Journal of Law, Medicine & Ethics 551; Wendy Wagner, “When All Else Fails: Regulating Risky Products Through Tort Litigation” (2007) 95:693 Georgetown Law Journal 693; and, Timothy D Lytton, “Using Litigation to Make Public Health Policy: Theoretical and Empirical Challenges in Assessing Product Liability, Tobacco, and Gun Litigation” (2004) 32:4 JL, Med & Ethics 556 [Lytton, “Using Litigation”].

<sup>104</sup> This is how Lytton characterizes it, at least with respect to gun control, see Timothy D Lytton, “Lawsuits Against the Gun Industry: A Comparative Institutional Analysis” (2000) 32 Connecticut Law Review 1247 at 1259 [Lytton, “Lawsuits Against the Gun Industry”].

attention paid to the relationship between tort law and public health. Much of this attention has been in response to tobacco litigation, which has been lauded by some, highly criticized by others, and, ultimately, identified by many as a strategy to be emulated.<sup>105</sup> Although tobacco litigation may be the most notorious example of how tort litigation has influenced public health, civil suits have long played a decisive role in public health policy formation.<sup>106</sup> Indeed, litigation is credited with playing a decisive role in some of public health law's greatest accomplishments in the last century<sup>107</sup>, including the development of common law regulations around drinking water, childhood vaccinations, and motor vehicle safety.<sup>108</sup>

Despite the impact that civil litigation has had on public health, there nevertheless remains a considerable amount of debate about whether or not it is appropriate to use courts to create public health policy (or public policy more generally). Brownsword, for example, is skeptical about there being any relationship between tort law and public health. He contends that the relationship between the two ultimately depends on how the

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<sup>105</sup> For a more detailed discussion about tobacco litigation, see Chapter 3 at 129ff.

<sup>106</sup> At a minimum, as Parmet and Daynard point out, by awarding individual judgments and articulating common-law principles, courts have indirectly been responsible for crafting public health policies, WE Parmet & RA Daynard, "The New Public Health Litigation" (2000) 21 *Annual Review of Public Health* 437 at 439.

<sup>107</sup> Referring to what the Centre for Disease Control (CDC) has identified as the 20<sup>th</sup> century's ten greatest public health achievements, Gostin, *Public Health Law*, 2nd ed, *supra* note 102 at 29, observes, "most were realized, at least in part, through law reform or litigation." According to the CDC the ten noteworthy achievements are: vaccinations, safer workplaces, safer and healthier foods, motor vehicle safety, control of infectious diseases, tobacco control, fluoridation of drinking water, family planning, healthier mothers and babies, and the decline in deaths from coronary heart disease and stroke. See CDC, "Ten Great Public Health Achievements in the 20<sup>th</sup> Century" (2013), online: CDC, <http://www.cdc.gov/about/history/tengpha.htm>.

<sup>108</sup> Anthony D Moulton, Richard A Goodman & Wendy E Parmet, "Perspective: Law and Great Public Health Achievements" in Richard A Goodman et al, eds, *Law in Public Health Practice*, 2nd ed (New York: Oxford University Press, 2007) 3 at 14 ("Private parties also used litigation—a form of common law regulation—for such measures as regulations to reduce pollution of drinking water, statutes requiring childhood vaccination, and laws mandating standards for motor vehicle safety.")

terms are defined<sup>109</sup>, and suggest that unless the meaning of each term can first be settled, “any account of their relationship will be unanchored and unhelpful.”<sup>110</sup> However, trying to reduce either term to a settled definition is likely an impractical—if not impossible—goal.<sup>111</sup> Rather than attempt to identify a settled definition for tort law or public health, the remainder of this chapter instead focuses on explicating the congruence between the two fields. Part three presents a historical argument that law has always been concerned with the public’s health, and that the inclusion of public health in tort law can be interpreted as fidelity to law’s origins.

### 3. HISTORICAL CONGRUENCE BETWEEN TORT LAW AND PUBLIC HEALTH

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<sup>109</sup> Roger Brownsword, “Public Health, Private Right, and the Common Law” (2006) 120 *Public Health* 42. Note, Brownsword uses the term “common law” and not “tort law, nevertheless it seems reasonable to assume that he would similarly suggest that a good starting point for determining the relationship between public health and tort law would be to settle upon definitions.

<sup>110</sup> *Ibid* at 42.

<sup>111</sup> Despite calling for a settled definition, Brownsword reaches his conclusion that public health is not the business of the common law without actually settling the meaning or even providing a definition of public health. Undoubtedly Brownsword does not reach a settled definition of public health because such a task is extremely difficult, if not impossible. Martin has observed, “[i]t would not be possible to include in a definition of public health all of the factors which affect public health, or the definition would read something like a treatise on the meaning of life, and would be for all practical purposes useless” Robyn Martin, “Constraints on Public Health” in Robyn Martin & Linda Johnson, eds, *Law and the Public Dimension of Health* (London: Cavendish Publishing Limited, 2001) at 33. The challenges with defining public have been dealt with in detail elsewhere, see: Marcel Verweij & Agnus Dawson, “The Meaning of ‘Public’ in ‘Public Health’” in Agnus Dawson & Marcel Verweij, eds, *Ethics, Prevention, and Public Health* (Oxford: Clarendon Press, 2007) 13; Bernard Turnock, *Public Health: What it is and How it Works* (Gaithersburg, MD: Aspen Publishers, 1997); Rob Baggott, *Public Health: Policy and Politics* (New York: St. Martin’s Press, 1998); Jacob J Shelley, *A Normative Framework for Public Health Law*, LLM Dissertation (Edmonton: University of Alberta, 2009) [Shelley, *A Normative Framework for Public Health*]; Jacob J Shelley, “The Problem with Defining Public Health Law”, (2016) *on file with author* [Shelley, “The Problem with Defining Public Health Law”]; and Geof Rayner & Tim Lang, *Ecological Public Health: Reshaping the Conditions for Good Health* (New York: Routledge, 2012); Gostin, *Public Health Law*, 2nd ed, *supra* note 102 at 41; Lawrence Gostin, F Ed Thompson & Frank Grad, “The Law and the Public’s Health: The Foundations” in Richard Goodman et al, eds, *Law in Public Health Practice*, 2nd ed (New York: Oxford University Press, 2006) 25 at 26; Mary-Jane Schneider, *Introduction to Public Health* (Gaithersburg, Md.: Aspen, 2000) at 16-26; Dorothy Porter, *Health, Civilization and the State: A History of Public Health from Ancient to Modern Times* (New York: Routledge, 1999) at 1-4; and, Elizabeth Fee, “Public Health, Past and Present: A Shared Social Vision” in George Rosen, *A History of Public Health* (Baltimore: John Hopkins University Press, 1993) ix at xxxviii.

There is a longstanding relationship between tort law and public health. The starting point for identifying the historical congruence between tort law and public health can be found in an ancient maxim: *salus populi suprema lex*. Attributed to Cicero during his reign of the Roman Empire, *salus populi suprema lex* is commonly translated as, “the health of the people is the highest law”.<sup>112</sup> Although its precise meaning and historical significance is often disputed<sup>113</sup>, the maxim points to the historical importance of protecting public health. In many respects, this maxim has been used to highlight the role of the state in protecting public health. According to Mackie and Sim, Cicero “recognized that it was the business of good government to protect and sustain the public’s health and that those with power had responsibilities for those who were powerless.”<sup>114</sup>

This is how the maxim has often been understood. For example, in his *Second Treatise on Government*, Locke uses the maxim as an epigraph, identifying it as a fundamental rule for governments.<sup>115</sup> Novak contends that maxim expressed an obligation of the state to pursue the people’s welfare/health above all else.<sup>116</sup> Even ardent critics of public health note the importance of this maxim in understanding the state’s role

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<sup>112</sup> Alternative translations use “welfare”, “well-being”, “good”, or even “safety” of the people.

<sup>113</sup> According to Hayek, the maxim has been misunderstood, Friedrich Hayek, *The Constitution of Liberty* (Chicago: The University of Chicago Press, 1960). He suggests that it is properly understood as: “the welfare of the people ought to be – not is – the highest law”, *ibid* at 159. Moreover, he argues, “[c]orrectly understood, it means that the end of the law ought to be the welfare of the people, that the general rules should be so designed as to serve it, but *not* that any conception of a particular social end should provide a justification for breaking those general rules. A specific end, a concrete result to be achieved, can never be a law”, *ibid* (original emphasis).

<sup>114</sup> P Mackie & F Sim, “Ollis Salus populi suprema lex esti” (2009) 123 *Public Health* 205 at 205.

<sup>115</sup> See John Locke, “Second Treatise on Government” in Peter Laslett, ed, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988).

<sup>116</sup> William Novak, *The People’s Welfare: Law & Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996) [Novak, *The People’s Welfare*] at 46. He also examines the common law maxim, *sic utere tuo ut alienum non laedas*, use your own so as not to injure another, noting, “[t]hese two maxims were the common law foundation for American police regulation”, *ibid* at 42.

in public health.<sup>117</sup> But as Parmet argues, the maxim speaks to more than just the state; it means that “the law [must] serve public health but also that public health is before the law.”<sup>118</sup> For Parmet, this means that “[l]aw exists not only to vindicate the interests and rights of individuals, nor simply to empower officials, but also to promote and ensure the well-being of populations.”<sup>119</sup> She also argues that the whole of law is captured by this maxim.<sup>120</sup>

In the past courts relied on *salus populi* in their rulings.<sup>121</sup> Parmet argues that it was once readily accepted by courts that protecting the public was the highest good.<sup>122</sup> She points out that, “[d]uring the nineteenth century, jurists and commentators cited

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<sup>117</sup> See, for example, Richard Epstein, “Let the Shoemaker Stick to his Last: A Defense of the ‘Old’ Public Health” (2003) 46 *Perspectives in Biology and Medicine* S138 [Epstein, “Let the Shoemaker Stick to his Last”]. According to Epstein, the maxim can be aligned with the old public health, and “represents the general proposition that individual liberty, especially on matters of public health, must be subordinated to the protection of the common good, so that the state is justified to use public force to achieve that end”, at S139.

<sup>118</sup> See Wendy E Parmet, “Introduction: The Interdependency of Law and Public Health” in Richard A. Goodman, et al, eds, *Law in the Public Health Practice*, 2nd ed (New York: Oxford University Press, 2006) xxvii [Parmet “The Interdependency of Law and Public Health”] at xxxiii. Parmet notes, “[i]n a sense, law is a luxury that is made possible only when a modest degree of public health is achieved. If that is true, then the establishment and maintenance of public health may be the first essential and necessary undertaking for law. Hence, the common law maxim *salus populi suprema lex* represents an understanding that not only must the law serve public health but also that public health is before law”, at xxxiii.

<sup>119</sup> Parmet, *Populations, Public Health and the Law*, *ibid* at 267. In short, the maxim contends that “[l]aw exists not only to vindicate the interests and rights of individuals ...but also to promote and ensure the well-being of populations”, *ibid*.

<sup>120</sup> This is not to suggest that Parmet does not recognize the limitations of the maxim, including that the maxim represents only one of several important legal values. Parmet recognizes the danger with focusing exclusively on this maxim, noting: “To many in the public health community, it seems self-evident that not only should public health be granted a central role in law, but that the claims of public health and their own expertise should also readily be accepted to trump individual rights. In effect, they suggest that *salus populi suprema lex* should be applied all too literally and all too simplistically”, *ibid* at 3

<sup>121</sup> See, for example: *Harvety v Bass*, 66 Me 71 (1876), *Priestman v Colangelo*, *Shynall & Smythson*, [1959] SCR 615.

<sup>122</sup> Parmet, *Populations, Public Health, and the Law*, *supra* note 99 at 15: “According to historian Ronald Peters, although social contract theorists and adherents disagreed about many things, they concurred that “the only end of civil society is the common good. And the sine qua non of the common good is public safety, *salus populi suprema lex*.” In other words, protection of public safety, which presumably included safety from deadly epidemics, was the highest good.”



public health, sometimes along with the common law maxim, *salus populi suprema lex* ... as if those references provided a sufficient basis for deciding a case.”<sup>123</sup> While *salus populi* may have lost its prominence within the legal profession and among jurists of late<sup>124</sup>, Parmet nevertheless points out that at a minimum the maxim gives some credence to the idea that protecting public health is a well-established aim of the law.

Consequently, critics have improperly characterized the renewed attention to public health as an attempt to construct a new legal norm or approach. Instead, the notion that public health ought to factor into how courts adjudicate disputes between private citizens in fact pays homage to law’s deeply ingrained commitment to communal interests.<sup>125</sup>

Despite the historical prominence of the maxim, it would be erroneous here to elevate it to a status that it may never have actually held. As Parmet concedes, while the maxim has been long noted, it has been infrequently followed.<sup>126</sup> Moreover, given the competing principles informing judicial decisions, it is unlikely that *salus populi* will return to a place of prominence in legal reasoning. However, Daynard proposes that the essence of the maxim can be captured through recognition of public health as a legitimate

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<sup>123</sup> *Ibid* at 38. In particular, see note 71 for relevant cases.

<sup>124</sup> Parmet and Robbins have critically reflected that, following the lead of Holmes, the legal profession has rejected maxims and in so doing, the maxim and truth of *salus populi suprema lex* has been lost, Wendy E Parmet & Anthony Robbins, “A Rightful Place for Public Health in American Law” (2002) 30 *JL Med & Ethics* 302 at 302. Parmet laments the loss of prominence of public health overall: “Indeed, in field after field of American law, the centrality of public health issues has been overlooked by both courts and theorists”, Parmet, *Populations, Public Health, and the Law*, *supra* note 99 at 5. Indeed, Parmet and others have noted the important role that public health has had in the development of other areas of law, including private law. See Wendy E Parmet, “Public Health and Constitutional Law: Recognizing the Relationship” (2007) 10:13 *J Health Care L & Pol’y* 13 at 15 [Parmet, “Public Health and Constitutional Law”]; and Wendy E Parmet, “From Slaughter-House to Lochner: The Rise and Fall of the Constitutionalization of Public Health” (1996) 40 *Am J Legal Hist* 476 [Parmet, “From Slaughter-House to Lochner”] at 476 (“Public health is one of the most frequently discussed concepts in constitutional law...”).

<sup>125</sup> Novak, *The People’s Welfare*, *supra* note 116 at 42.

<sup>126</sup> Parmet, *Populations, Public Health, and the Law*, *supra* note 99 at 1.

canon of judicial decision-making.<sup>127</sup>

A canon can be understood as rules, primarily implicit, that define the types of arguments judges make in their opinions. Daynard identifies several well established canons relied upon by courts, including: marketplace values, individual rights, strict constructionism, judicial administration, and common sense.<sup>128</sup> When judges rely on these canons, they do not feel the need to justify their use, as they speak for themselves. Daynard laments that public health concerns are not a judicial canon, and instead are frequently treated as *dicta* and non-legal.<sup>129</sup> He argues that public health no longer counts in judicial decision making because “courts lack an accepted canon of judicial decision-making... that would give public health concerns enough weight in their deliberations to regularly produce decisions that promote the public’s health.”<sup>130</sup> To overcome this, public health must be accepted as a legitimate legal construct.<sup>131</sup>

Linking the public health canon with the maxim *salus populi*, Daynard asks, “[w]hat would it mean for a public-health-favoring principle like *salus populi suprema lex* to be accepted as a judicial decision-making canon?”<sup>132</sup> And while he recognizes that a literal translation of the maxim may not be possible or desirable, and that courts will always have to take into account the other values expressed through judicial canons that

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<sup>127</sup> Richard A Daynard, “Regulating Tobacco: The Need for a Public Health Judicial Decision-making Canon” (2002) 30 JL Med & Ethics 281 [Daynard, “Regulating Tobacco”].

<sup>128</sup> *Ibid* at 281-282. Indeed, “common sense” is a canon that is used in product liability law, see discussion in Chapter 5.

<sup>129</sup> See discussion in Chapter 1 about the consideration of “public health” in *Donoghue* and *Pelman I*.

<sup>130</sup> Daynard, “Regulating Tobacco”, *supra* note 127 at 281.

<sup>131</sup> Even if public health’s importance were to be elevated, Daynard argues that it will be necessary for public health to ultimately be accepted as a canon. Otherwise, even if judges want to incorporate public health reasoning, public health will likely not prevail against other existing canons, *ibid* at 282.

<sup>132</sup> *Ibid* at 288.



are important to society, Daynard nevertheless argues that the “[p]rotection of the public’s health deserves as much judicial respect as those other values.”<sup>133</sup> Daynard contends that acceptance of a public health canon is the “best hope for giving public health concerns their appropriate weight in judicial decision-making.”<sup>134</sup> Reintegration of the ancient maxim *salus populi* into legal thinking would help to elevate the importance of the public health in all aspects of law, not just tort law. Having established that public health thinking has longstanding roots in legal thinking, expressed through *salus populi suprema lex*, the next section examines how public health law scholarship has approached tort law.

#### 4. PUBLIC HEALTH APPROACHES TO TORT LAW

The intent of this part is to identify how public health law scholars have accounted for the role of private law in public health. As it is beyond the scope of this chapter to undertake a full analysis of how public health law scholarship has developed, it focuses on prominent scholars. Generally, public health law scholarship has focused on the role of the state. However, many scholars nevertheless carve out room for private law in public health.<sup>135</sup> As a result, it has been suggested that “[n]owhere has the private/public law distinction become more blurred than in the area of public health.”<sup>136</sup>

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<sup>133</sup> *Ibid* at 288.

<sup>134</sup> *Ibid* at 282.

<sup>135</sup> At a minimum, it could be argued that much of this scholarship fails to take tort law seriously and fail to justify public health’s use of private law. Of course there are exceptions. Consider, for example, Berman’s definition of public health law as “application of administrative and tort law to the field of public health, subject to the limitations imposed by constitutional law”, Micah L Berman, “Smoking Out the Impact of Tobacco-Related Decisions on Public Health Law” (2009-2010) 75 *Brook L Rev* 1 at 2.

<sup>136</sup> Robyn Martin, “Domestic Regulation of Public Health: England and Wales” in Robyn Martin & Linda Johnson, eds, *Law and the Public Dimension of Health* (London: Cavendish Publishing Limited,

While the exact relationship between private and public may be blurred in public health, what is clear is that law has played a central role in the development of public health.<sup>137</sup>

The promotion of health and prevention of disease has arguably been a preoccupation of lawgivers since the earliest period of recorded history<sup>138</sup>, and several of the early architects of public health were in fact lawyers.<sup>139</sup> Indeed, for most of its history, public

2001) 75 at 100 [Martin, “Domestic Regulation”]. She notes that with respect to public health the distinction is “particularly inappropriate”, *ibid* at 91. She further argues that definitions of public health law that focus on legislation are especially inappropriate in the case of English domestic law, as it includes the common law in public health, see discussion at 75ff.

<sup>137</sup> Whether law was effective in the early development of public health law, however, is less clear. One of the early scholars in public health law, Hemenway claimed that the use of law was typically weak, as the laws proposed by sanitarians often failed given their limited comprehension of the principles of law and public health statutes drafted by lawyers failed for lack of understanding of the facts of science, Henry Hemenway, *Legal Principles of Public Health Administration* (Chicago: 1914) at xi. He notes, “[w]e find practically that when sanitary ordinances are drawn up by lawyers they are liable to be inefficient because the draftsman misses the main point .... When ordinances are drafted by amateurs they are likely to be greatly overloaded with unessential details, and not seldom they omit some important, but not prominent point. When drafted by sanitary officers they are frequently nullified by some legally technical error”, *ibid* at xiv. See also, James A Tobey, “Coordinating the Public Health Laws of the United States” (1923) *American Journal of Public Health* 1004 at 1006.

<sup>138</sup> Parker and Worthington trace public health law to the story of the ten commandments, observing, “[t]he ten commands of God respecting moral and civil obligations, written on the tablets of stone, and given to Moses to the children of Israel, are not older in time, than that code of sanitary regulations for the preservation of the health and safety of the people, minute and particular in every detail, wherein God, through Moses, commanded his people to observe frequent purifications and cleansings; to isolate those suffering from communicable diseases; to disinfect houses where the plague has prevailed; to destroy infected articles; to avoid the use of unwholesome foods, and to protect the roofs of their dwellings by battlements, “that though bring not blood upon thine house, if any man fall from thence”, Leroy Parker & Robert H Worthington, *The Law of Public Health and Safety and the Powers and Duties of Boards of Health* (New York: M Bender, 1892) at xxxvii.

<sup>139</sup> For example, Sir Edwin Chadwick and Sir John Smith, considered the fathers of the modern public health movement, C-E A Winslow, *The Evolution and Significance of the Modern Public Health Campaign* (New Haven: Yale University Press, 1923) at 19-21. Chadwick is credited with initiating “the great sanitary awakening” by highlighting the association between disease and poverty and for demonstrating how disease could be prevented through proper sanitation. He helped enact the *Public Health Act, 1875*, 38 & 39 Vict, c 55, which formed the basis of more recent legislation in the UK, such as the *Public Health (Control of Disease) Act, 1984*, c 22. For a brief but informative discussion of Chadwick and his importance, see Robyn Martin, “The Role of Law in Public Health” in Angus Dawson, ed, *The Philosophy of Public Health* (Farnham: Ashgate, 2009) 11 at 12-15 [Martin, “The Role of Law in Public Health”]; and Turnock, *supra* note 111 at 2-7. Smith was instrumental in the passing of the great *Sanitary Act, 1866*, 29 & 30 Vict, c 90, Martin, “The Role of Law in Public Health”, *ibid* at 23. Chadwick and Smith were also the inspiration for Lemuel Shattuck *Report of the Sanitary Commission of Massachusetts 1850* (Boston: 1850), which is often considered to usher in the beginning of the public health movement in the United States, *ibid* at 25. Tobey describes it as a “brilliant report” and that it represented “[t]he most noteworthy event in the progress of public health and the development of public health law in this country”,

health was regulated and enforced by law.

The prominence of *salus populi suprema lex* has long been recognized by scholars of public health law. Early theorists of public health law held that the maxim highlighted the supremacy of collective interests over individual interests.<sup>140</sup> Indeed, the emphasis on the state has, in part, been because of how *salus populi* has been interpreted.<sup>141</sup> For example, in one of the earliest treatises devoted to public health law<sup>142</sup>, Parker and Worthington argue that the maxim's primary role was to impose on the state an obligation to protect the "life and health of its citizens" through laws that "compel the ignorant, the selfish, the careless and the vicious, to so regulate their lives and use their property, as not to be a source of danger to others."<sup>143</sup> Similarly, Tobey, considered the father of public health law, held that the maxim applied primarily to the state.<sup>144</sup>

The emphasis on the state contextually makes sense—and is similar to contemporary public health law scholarship, where often state interventions are considered the more viable and promising public health action, particularly in the face of serious public health threats. A consequence of this emphasis, however, is that public health law has often restrictively been defined in terms of the state. This has resulted in

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James Tobey, *Public Health Law*, 3rd ed (New York: The Commonwealth Fund, 1947) at 11 [Tobey, *Public Health Law*, 3rd ed]. For a brief discussion see *ibid.* at 11-13.

<sup>140</sup> Parker & Worthington, *supra* note 138 at xxxviii

<sup>141</sup> See for example, Novak, *The People's Welfare*, *supra* note 116.

<sup>142</sup> Parker & Worthington, *supra* note 138 at xli note that their text is the first attempt in the United States to condense the law of public health "into a reasonably small space."

<sup>143</sup> *Ibid.*

<sup>144</sup> Tobey, *Public Health Law*, 3rd ed, *supra* note 139: "That the safety of the people is the supreme law is an ancient Roman maxim. It is a maxim that applies with equal force to modern government, for the sovereignty always has had, now has, and always will have the ineluctable duty of safeguarding its citizens against disease, disorder, poverty, and crime. The power inherent in the State, or sovereignty, to enact and enforce laws to protect and promote the health, safety, morals, order, peace, comfort, and general welfare of the people is known as the police power. It means the power of advancing the public welfare by restraining and regulating the use of liberty and property."

some, like Brownsword, claiming that there is no room for public health in matters of private law.<sup>145</sup> Notwithstanding the emphasis on the state, early approaches to public health law appear to be inclusive of all areas of law.<sup>146</sup>

There are some contemporary public health law scholars, however, who seem to agree with Brownsword. They contend that public health is limited to public law, with some even go so far as to suggest that public health law is, strictly speaking, public law – after all it is *public* health law.<sup>147</sup> Consider, for example, Rothstein, who contends public health refers specifically to the delineated powers, duties, rights, and responsibilities of the state.<sup>148</sup> He is critical of the boundless conceptions<sup>149</sup> of public health that allow for the “public healthification” of social problems<sup>150</sup>, and instead champions a narrow view

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<sup>145</sup> See, for example, Brownsword, *supra* note 109. Despite his claim, Brownsword seems to reluctantly concede that the common law envelops public health concerns. For example, he notes, “in non-ideal circumstances, where there is serious regulatory failure, it is arguable that the common law should be developed as a responsive corrective mechanism”, *ibid* at 42.

<sup>146</sup> For example, Parker & Worthington, *supra* note 138. Although they focused primarily on the power of the state and other public agencies, Parker and Worthington include in their text private remedies available to citizens, particularly concerning nuisances, *ibid* at 216-325. Consider also Tobey, *Public Health Law*, 3rd ed, *supra* note 139 at 9. While public law was at the forefront of Tobey’s understanding, he nevertheless recognizes that private law may be of “direct or indirect interest to the public health”, *ibid* at 8. In a footnote he directs the reader to a chapter on the liability of individuals and corporations. For Tobey, the common law was the foundation of jurisprudence, *ibid* at 7. He specifically considered matters such as nuisance (at 217-234), torts and contracts (at 303). Curiously, he suggests that tort law may directly or indirectly affect public health, but that contracts “may involve matters of direct interest to public health”, *ibid*. It is not clear whether he intends to suggest that contracts do not have the same indirect interest as tort law, or if it is merely an oversight on his part.

<sup>147</sup> Nan D Hunter, “‘Public-Private’ Health Law: Multiple Directions in Public Health” (2007) 10 *J Health Care L & Pol’y* 89.

<sup>148</sup> Mark A Rothstein, “Rethinking the Meaning of Public Health” (2002) 30 *JL Med & Ethics* 144 at 144 [Rothstein, “Rethinking the Meaning of Public Health”].

<sup>149</sup> *Ibid* at 148. Rothstein opposes the use of public health as an open-ended descriptor that lacks precision, is highly politicized, expands public health beyond its core areas of expertise, fail to identify the primary objective of public health, and fail to demarcate between individual and public health. Indeed, in a later article responding to a critique of his 2002 article, Rothstein asserts that events such as SARS, Hurricane Katrina, and so on, “underscore the need for a narrow, more precise definition of public health,” Mark A Rothstein, “The Limits of Public Health: A Response” (2009) 2 *Public Health Ethics* 84. For the critique, see Daniel S Goldberg, “In Support of a Broad Model of Public Health: Disparities, Social Epidemiology and Public Health Causation” (2009) 2 *Public Health Ethics* 70.

<sup>150</sup> Rothstein, “Rethinking the Meaning of Public Health”, *supra* note 148 adopts this idea from

of public health, which he calls ‘government intervention as public health.’<sup>151</sup> Hall similarly advocates for a narrow view of public health law that would seem to preclude private law considerations. According to Hall, public health law is about enforcing government activities that aim to promote health<sup>152</sup> and is concerned with collective

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Ilan H Meyer & Sharon Schwartz, “Social Issues as Public Health: Promise and Peril” (2000) 90:8 American Journal of Public Health 1189 at 1189. The public healthification of social problems occurs when social issues are examined through the prism of health rather than within their appropriate political, social and economic contexts. *Ibid* at 1189. Rothstein views the public healthification of social issues as a compelling reason for advocating a narrow definition of public health. However, unlike Rothstein, Meyer and Schwartz do not come to this conclusion. They warn that public healthification may “inadvertently lead to a focus on the individual, institutionalization of the problem as a public health research problem, and valuation of the social and moral import of the problem solely by its health consequences”, *ibid* at 1190. They noted the validity of broader definitions of public health, which recognize that public health cannot be separated from its larger socioeconomic context and they sympathetic to the plight of public health professionals who are discontent to sit idly by while social ills threaten the public’s welfare. That public health will only be effective if upstream causes are addressed is a widely held view, see, for example: BG Link & JC Phelan, “Social Conditions as Fundamental Causes of Disease” (1995) J Health Soc Behav 80; Robert G Evans et al, *Why are Some People Healthy and Others are Not? The Determinations of Health of Populations* (New York: Aldine de Gruyter, 1994); and, S Wing, “Whose Epidemiology, Whose Health?” (1998) 28 Intl J Health Serv 241. As Meyer and Schwartz note, addressing upstream causes “has historically been the hallmark of public health interventions”, *ibid* at 1189.

<sup>151</sup> This limits public health to “public officials taking appropriate measures pursuant to specific legal authority, after balancing private rights and public interests, to protect the health of the public”, Rothstein, “Rethinking the Meaning of Public Health”, *ibid* at 146. Rothstein provides five arguments for adhering to this narrower viewpoint all of which assume the involvement of the state, see *ibid* at 147. In essence, Rothstein justifies his definition of government intervention by tacitly accepting that public health is government intervention. A central concept in Rothstein’s view is the police power, or the power to “invoke mandatory or coercive measures to eliminate a threat to the public’s health”, *ibid*. For a discussion about the police power, see Novak, *The People’s Welfare*, *supra* note 116, Lawrence O Gostin, “*Jacobson v. Massachusetts* at 100 Years: Police Power and Civil Liberties in Tension” (2005) 95 American Journal of Public Health 576 [Gostin, “*Jacobson v. Massachusetts*”], and Jorge E Galva, Christopher Atchinson & Samuel Levey, “Public Health Strategy and the Police Powers of the State” (2005) 120:Suppl Public Health Reports 20.

<sup>152</sup> Mark A Hall, “The Scope and Limits of Public Health Law” (2003) 46:3(Supp) Perspectives in Biology & Medicine S199 at S202 (“Public health law is about enforcing government efforts to promote health ... public authority is plenary and sets restraints on this authority only if it invades fundamental interests or is demonstrably unbalanced or excessive.”) He focuses on the specific legal meaning of ‘public’, which does not simply mean ‘widespread’, but instead “invokes a special set of justifications for government interventions and coercion that rely on concepts that economists refer to as ‘public goods’”, *ibid* at S204, original emphasis. He also focuses on what “health” means in public health law. He identifies three causes of poor health, at S206: pathogenic health problems, which are “caused by a specific, identifiable pathogen or discrete causal agent”; behavioral health problems, which are associated with “chronic conditions that have multiple, complex, or unknown causal agents”, and; ecological health problems, which are derived from the “broader social, economic, environmental, and political milieu”, *ibid*. According to Hall public health is primarily concerned with pathogenic causes of ill-health. Broader views, he argues, “misread the history of public health and misunderstand the legal parameters under which public

action problems that are a “clear and present danger”<sup>153</sup> and require coercive state action.<sup>154</sup> Public health is the responsibility of the state, because only the state can justify the use of coercive measures to address threats facing the collective.

While Rothstein and Hall’s narrow understandings of public health law restricts public health law to public law and the state, the more common perspective is that public health can encompass a much broader array of legal instruments, both public and private. As will be seen, however, this approach typically still defines public health law primarily in terms of public law and government intervention. Consider the most prominent perspective, that of Lawrence Gostin.<sup>155</sup> According to Gostin, public health law is:

the study of the legal powers and duties of the state ... to ensure the conditions for people to be healthy (to identify, prevent, and ameliorate risks to health in the population), and of the limitations of the power of the state to constrain for the common good the autonomy, privacy, liberty, proprietary, or other legally protected interests of individuals.<sup>156</sup>

Although he clearly defines public health law in terms of the state’s power and duties<sup>157</sup>,

health authority is conferred”, *ibid.* at S207.

<sup>153</sup> *Ibid.*

<sup>154</sup> These included such things as communicable diseases, sanitation, safe foods, and other situations that involved collective action problems that self-regarding individuals would not be able to effectively address, or any instance requiring “[a] public agency ... to garner resources needed for collective action and to wield the authority for coercive restrictions on liberty or property”, *ibid.* at S204. Hall provocatively notes the danger of a more expansive understanding of public health, contending, “[p]oor parenting has been pointed to as a cause of life-long health problems” and that “the very economic and political fabric of society can be viewed as a health problem”, *ibid.* at S206.

<sup>155</sup> McLean suggests that Gostin “is something of a guru in the field of public health law”, Sheila McLean, “Public Health Law: Power, Duty, Restraint” [Review] 10 *Medical Law International* 78 at 78. Consequently, many simply defer to Gostin’s understanding of public health law. See, for example, Nola M Ries, “Piling on the Laws, Shedding the Pounds? The Use of Legal Tools to Address Obesity” (2008) *Special Edition Health L J* 101 [Ries, “Piling on the Laws”].

<sup>156</sup> Gostin, *Public Health Law*, 2nd ed, *supra* note 102 at xxii.

<sup>157</sup> Gostin later notes, “[t]he government possess the authority and responsibility to persuade, create incentives, or even compel individuals and businesses to conform to health and safety standards for the collective good. This power and obligation forms the essence of what we call public health law”, *ibid.* at



Gostin acknowledges that public health has complex and blurred boundaries, and he makes little attempt to construct a tidy doctrinal package.<sup>158</sup> Instead, he appeals to the notion that law is a tool to be used to ensure the conditions for public health.<sup>159</sup> To this end, he identifies seven “legal levers” that are available to public health law<sup>160</sup>, several of which invoke private law<sup>161</sup>, including indirect regulation through the tort system.

While Gostin defines public health law in terms of the government’s authority and responsibility, he concedes that it nevertheless “richly incorporates all the major fields of law.”<sup>162</sup> He identifies tort law as one of the major legal disciplines relevant to public

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xxii. He further observes that the government has primary responsibility for ensuring public health, and that the population has a corresponding expectation that they will benefit from the government’s use of this power, *ibid* at xxii. Thus, for Gostin, the word “public” in public health law simultaneously refers to the public entity with primary responsibility for public health and the public body that can expect to benefit. Gostin notes, “[f]rom the founding of the republic to the present day, government has assumed responsibility for community well-being”, Lawrence O Gostin, “Public Health Law in a New Century – Part I: Law as a Tool to Advance the Community’s Health” (2000) 283 *Journal of the American Medical Association* 2837 at 2838 [Gostin, “Public Health Law in a New Century – Part I”].

<sup>158</sup> Gostin, *Public Health Law*, 2nd ed, *supra* note 102 at 3.

<sup>159</sup> *Ibid* at 4, 28-29.

<sup>160</sup> They are: “taxation and spending, alteration of the information environment, alteration of the built environment, alteration of the socioeconomic environment, direct regulation, indirect regulation through the tort system, and deregulation”, *ibid* at 29, with discussion of each at 29-38. (In earlier iterations, Gostin only identified five levers, which at that time he referred to as models. Importantly, indirect regulation through the tort system has been a consistent lever/model. See, for example, Lawrence O Gostin, “Law and Ethics in Population Health” (2004) 28 *Australian & New Zealand Journal of Public Health* 7, and Lawrence O Gostin, “Public Health Law: A Renaissance” (2002) 30 *JL Med & Ethics* 136 [Gostin, “A Renaissance”].

<sup>161</sup> Although indirect regulation is the only lever that explicitly refers to private law, and several levers are within the exclusive domain of the state (power to tax or spend, direct regulation, and deregulation), the remaining levers are more nebulous. To be sure, several of the legal levers are within the exclusive domain of government, including the power to tax or spend. Direct regulation of persons, professionals, and businesses, as well as deregulation, are also within the power of the government, although the entities being regulated often have considerable influence. The remaining tools are more nebulous. While the government has considerable power to alter the informational environment, built environment, and socioeconomic environment—perhaps the government has the most power—it does not wield exclusive power. Control over these environments cannot be deemed to be completely within the jurisdiction of the government. Private entities, such as communities, businesses, international organizations, even individuals, can do much to alter these environments.

<sup>162</sup> Gostin, “A Renaissance”, *supra* note 160 at 139.

health<sup>163</sup>, noting that tort litigation allows attorney generals, public health authorities, or private citizens to seek redress for public health harms and harms to their own health.<sup>164</sup> In the second edition of *Public Health Law* he illustrates the value of tort law through an examination of tobacco and firearm litigation<sup>165</sup>, but throughout the text (and elsewhere) he identifies tort as relevant for a host of issues, including obesity, hazardous or defective products, pollution, alcohol, toxic substances, among others.<sup>166</sup> Ultimately, Gostin concludes that the tort system can be an effective way to advance public health.<sup>167</sup> While he considers tort law as “a strategy complementary to direct regulation”<sup>168</sup>, he contends that it only becomes an essential tool for public health law “[w]hen direct regulation through the political process fails.”<sup>169</sup> Others have made similar observations.

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<sup>163</sup> Gostin devotes an entire chapter in his seminal text, *Public Health Law*, to examining tort law. In addition to reviewing the major theories of tort liability, Gostin also examines the problem of evidence in tort litigation. He also briefly considers the public health value of tort law. Tort law is also addressed at various points throughout the text, see Gostin, *Public Health Law*, 2nd ed, *supra* note 102.

<sup>164</sup> *Ibid* at 37.

<sup>165</sup> Tobacco litigation and firearm litigation are discussed respectively, *ibid* at 216-224. He also considers obesity litigation briefly in Box 12, *ibid* at 213-215 and obesity more broadly in the concluding chapter, *ibid* at 496-513.

<sup>166</sup> *Ibid* at 182 and accompanying footnotes.

<sup>167</sup> Although he identifies tort law as applicable to public health law, Gostin nevertheless seems reluctant to fully embrace tort law. He also cautions against viewing tort as “an unmitigated good”, *ibid* at 37, 182. He highlights numerous limitations with using tort litigation, including that it can impose great personal and economic costs on individuals and businesses, and it might result in harms to public health and society. He further notes that tort costs may curtail research and development, may deter businesses from entering markets, can provide wrong incentives, and may improperly prioritize safety over other public goods (e.g., convenience, value, etc.), *ibid* at 224-226. He also notes the potential to deter socially beneficial actions, *ibid* at 37. He suggests that this may be a possible explanation for why legislation had been enacted in the US, both federally and at the state level, to limit tort liability in a variety of areas, including obesity litigation, see *ibid* at 78-81 and accompanying notes. It is not clear what forms the basis of this hypothesis. Jacobson and Warner raise a similar concern in their discussion of tobacco litigation, noting, “litigation could potentially create an impediment to effective tobacco control policy by diverting government attention and resources from policies designed to limit smoking”, Peter D Jacobson & Kenneth E Warner, “Litigation and Public Health Policy Making: The Case of Tobacco Control” (1999) 24:4 *Journal of Health Politics, Policy & Law* 769 at 796-797. Gostin finally notes that regulation (whether direct or indirect) can “create or exacerbate another problem for individuals or for society at large”, Gostin, *Public Health Law*, 2nd ed, *ibid* at 226.

<sup>168</sup> Gostin, *Public Health Law*, 2nd ed, *ibid* at 202.

<sup>169</sup> *Ibid* at 202. The idea that litigation should only be considered after statutory and regulatory



Defining public health law in terms of public law but leaving room for private law when necessary is prevalent in public health scholarship. For example, Reynolds suggests that private law can “powerfully influence public health practice” and thus “deserves an important place in public health law.”<sup>170</sup> He does so while maintaining that public health law is primarily public law.<sup>171</sup> Although Grad resists reducing public health law to any particular package(s) of law, because he recognizes that public health straddles legal classifications<sup>172</sup> and requires a full range of laws given the varied and broad nature of

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responses have been exhausted is common in public health law scholarship. Consider, for example, the discussion about the regulation of tobacco and obesity in Canada, see Barbara von Tigerstrom, “Tobacco Control and the Law in Canada” in Tracey M Bailey et al, eds, *Public Health Law & Policy in Canada*, 3rd ed (Markham, ON: LexisNexis, 2013) 323 [von Tigerstrom, “Tobacco Control”], and Nola M Ries & Barbara von Tigerstrom, “Law and the Promotion of Healthy Nutrition and Physical Activity”, Tracey M Bailey et al, eds, *Public Health Law & Policy in Canada*, 2nd ed (Markham, ON: LexisNexis, 2013) 439 [Ries & von Tigerstrom, “Law and the Promotion of Healthy Nutrition and Physical Activity”]. Both chapters are primarily concerned with legislative and regulatory responses, and the discussion of tort litigation’s role is only considered at the end of each chapter. The placement of tort litigation at the end of the chapter is not an indication that it is an afterthought, but rather reflects the approach to public health law identified above, where public health law is defined primarily in terms of the state, rendering tort law an important but secondary concern.

<sup>170</sup> Gostin, *Public Health Law*, 2nd ed, *ibid* at 202. He uses the example of a food manufacturer being found liable for products that made people sick. Elsewhere, he uses the tobacco related harms and negligence by businesses as examples, see Christopher Reynolds, *Public Health Law in Australia* (Annandale: Federation Press, 1995) at 21-22 [Reynolds, *Public Health Law in Australia*].

<sup>171</sup> Christopher Reynolds, *Public Health: Law and Regulation* (Annandale: Federation Press, 2004) at 31 [Reynolds, *Public Health*]. This is because for Reynolds public health does not fit within an established category of law. Reynolds contends public health law and its practice can be defined as: the specific, often long-standing, statutory responses that assist and empower public health regulators in the range of areas that they work; ... the body of law and legal practice that affects public health practice and the public’s health more generally; [and] recognizes that changing existing laws and practices that damage the public’s health is as significant a task for those involved in public health law, as the supporting of laws which stand to improve public health, *Public Health Law in Australia*, *ibid* at 7. He also notes that one thing all definitions of public health have in common is the emphasis on collective responsibility, and that “[l]aw provides a most obvious form of collective response since, typically, it imposes general obligations and is addressed to the whole community”, Reynolds, *Public Health*, *ibid* at 3.

<sup>172</sup> Grad argues that much law defies classification and “attempt[s] to divide the field of law into airtight compartments is often pointless, because any area of the law is likely to straddle a number of artificial divisions”, Frank Grad, *The Public Health Law Manual*, 3rd ed (Washington, DC: American Public Health Association, 2005) at 28. He gives the example of food and drug regulation, which straddles public law and private law. Food and drug law is “primarily a field of public law in that it defines relationships between people and government, it has important private law ramifications. It affects private contractual dealings between sellers and buyers, as well as private liabilities in creating standards of care for ingredients and labeling, which, in turn, have important bearing on actions for negligence. Food and

public health problems<sup>173</sup>, he nevertheless classifies it as administrative law.<sup>174</sup> Numerous other examples exist.<sup>175</sup>

The preceding illustrates that many public health law scholars tend to stress the interdependency of public health and law generally, and highlight the interplay between public and private aspects of law.<sup>176</sup> Often this interdependency is taken for granted, and the relationship between public and private law is not investigated. There may be reasons for this. As Martin observes, very little law can be divorced from health<sup>177</sup>, as public

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drug law is also a field of civil law in its effect on private dealings and relations in the manner indicated...”, *ibid.*

<sup>173</sup> *Ibid* at 6. “[T]he full range of powers and remedies must be collected from many sources: from constitutional, statutory, and case law; from provisions of law dealing with the powers of the state and local government agencies in general; from provisions dealing with administrative procedures and remedies; and from criminal and civil remedies”, *ibid.*

<sup>174</sup> *Ibid.* See also Eleanor D Kinney, “Administrative Law and the Public’s Health” (2002) 30 J L Med & Ethics 212.

<sup>175</sup> For example, Martin concludes public health is “ultimately the responsibility of government”, Martin, “Domestic Regulation”, *supra* note 136 at 111 which has a “moral mandate to protect the health of its citizens”, Robyn Martin, “Law as a Tool in Promoting and Protecting Public Health: Always in our Best Interests?” (2007) 121 Public Health 846 at 850 [Martin, “Law as a Tool”], but leaves considerable room for private law. Public health is public law because “legislative expression” is generally required to “makes clear public health objectives, and which makes clear the fundamental principles and values of public health endeavours in our society”, Martin, “The Role of Law in Public Health”, *supra* note 139 at 24. See also, Robyn Martin, “The Limits of Law in the Protection of Public Health and the Role of Public Health Ethics” (2006) 120 Public Health 71 at 76. She notes, “[w]e need legislation which makes clear what we consider to be our primary public health functions and law which allocates responsibility for those functions. We need legislation that makes clear our public health values, so that we can make decisions on issues of acceptability of risk, recognizing that public health practice is an exercise in risk assessment. We need legislation that is as much concerned with the care of those who are ill as with protecting the healthy. We have an opportunity to build ethics into the framework of public health law. Good public health practice needs good law, and good law is ethical law”, *ibid* at 76-77. See also Martin, “Law as a Tool”, *ibid* at 852. Nevertheless, she also observes, “[w]e cannot confine public health law to our core public health legislation, although clearly the public health acts are fundamental. We must consider a broad range of laws including criminal law, tort law, environmental law, occupational health law, food law and of course laws protecting rights”, Martin, “The Role of Law in Public Health”, *ibid* at 24. She examines private law remedies such as breach of statutory duty, negligence, nuisance, *Rylands v Fletcher*, trespass, and unfair dismissal. Elsewhere she notes, “[c]ategorising that body of law which regulates public health is therefore as difficult as the task of defining public health”, “Domestic Regulation”, *ibid* at 75.

<sup>176</sup> For example, Parmet, “The Interdependency of Law and Public Health”, *supra* note 118.

<sup>177</sup> “Criminal law has implications for the harm which results from crime; laws on the workplace, transport, the building industry, education or discrimination look to health and welfare; laws on negligence and contract have as objectives safety standards and deterrence; even laws regulating financial transactions will have consequences for health”, Martin, “Domestic Regulation”, *supra* note 136 at 75.

health covers everything from “womb to tomb.”<sup>178</sup> Given the inherent breadth and complexity of public health, it makes identifying what categories of law are relevant to public health a difficult task.<sup>179</sup> What is clear is that, with the exception of a few scholars, public health law is generally defined in terms of public law with some residual room left for private law.

While there is some variance in how scholars view the role of tort law in public health<sup>180</sup>, by and large the majority of scholars understand the role for tort law in public health in a manner similar to Gostin, which is to say that it has a complementary or backup role.<sup>181</sup> It is common for scholars to talk about tort law as one of several legal tools that public health can use to bring about change.<sup>182</sup> Indeed, the ‘law as a tool’

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<sup>178</sup> As Roemer notes, “[t]he reach of public health law is as broad as the reach of public health itself”, Ruth Roemer, “Comparative National Public Health Legislation” in Roger Detels et al, eds, *Oxford Textbook of Public Health*, 3rd ed (New York: Oxford University Press, 1997) 351 at 351.

<sup>179</sup> Martin suggest, “[c]ategorising that body of law which regulates public health is therefore as difficult as the task of defining public health”, Martin, “Domestic Regulation”, *supra* note 136 at 75.

<sup>180</sup> Some scholars argue that tort law is superior to state action for some issues. Wagner makes this argument, concluding that the tort system plays “an indispensable role in supplementing agency regulation of risky products and activities”, *supra* note 103 at 695 The tort system also overcomes some of the informational barriers that impede and prevent effective public health regulation, *ibid* at 697. According to Wagner, courts can operate as the best institution for addressing some social problems, particularly when there is asymmetrical information and high levels of complexity, *ibid* at 731-732.

<sup>181</sup> For example, Lytton concludes that tort law has a complementary role to play in policymaking, using gun-violence policymaking as an example, see Lytton, “Lawsuits Against the Gun Industry”, *supra* note 104. See also Gostin, *Public Health Law*, 2nd ed, *supra* note 102 at 202; Jacobson & Warner, *supra* note 167 at 798; and Peter D Jacobson & Soheil Soliman, “Litigation as Public Health Policy: Theory or Reality?” (2002) 30 *JL Med & Ethics* 224 at 233. As an example, Jacobson and Soliman examine whether litigation represents a viable public health strategy, and conclude that litigation should be considered part of a broad strategy, fulfilling a complementary role but not acting as the centerpiece. Note, they are primarily concerned with whether or not litigation has achieved public health policy goals, and not specifically with normative claims. As a complement to other public health measures, some scholars caution against conceiving of tort law as an alternative to traditional public policy development, contending that as an alternative to public regulation tort law is likely to disappoint, *ibid* at 233, or worse yet, fail, Jacobson & Warner, *ibid* at 798.

<sup>182</sup> For example, Gostin claims to demonstrate the “value of tort law as a tool of public health”, *Public Health Law*, 2nd ed, *supra* note 102 at 182, and frequently describes tort as a tool.

metaphor is commonly used in public health law scholarship.<sup>183</sup> Law has been depicted as a tool for addressing obesity, as will be discussed in chapter three.<sup>184</sup>

The metaphor that law is a tool is not universally accepted. In fact, the use of this metaphor often results in charges of instrumentalism<sup>185</sup>—and fear that law will be co-

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<sup>183</sup> For example, see Martin, “Law as a Tool”, *supra* note 175; Gostin, “Public Health Law in a New Century – Part I”, *supra* note 157; Lawrence O Gostin, “Law as a Tool to Facilitate Healthier Lifestyles and Prevent Obesity” (2007) 297 *Journal of the American Medical Association* 87 [Gostin, “Law as a Tool”]; Ilise Feithsans, “Law in Public Health Practice” (2007) 356 *New England Journal of Medicine* 2436 at 2436 (describes the police power as a “tool for protecting public health”). See also: Michelle A Larkin & Angela K McGowan, “Introduction: Strengthening Public Health” (2008) 36 *JL Med & Ethics* 4; B Bennett et al, “Health Governance: Law, Regulation and Policy” (2009) 123 *Public Health* 207; Lindsay Wiley, “Moving Global Health Law Upstream: A Critical Appraisal of Global Health Law as a Tool for Health Adaptation to Climate Change” (2010) 22 *Georgetown Int’l Env L Rev* 439; Jon Vernick, Lainie Rutkow & Daniel Salmon, “Availability of Litigation as a Public Health Tool for Firearm Injury Prevention: Comparison of Guns, Vaccines, and Motor Vehicles” (2007) 97 *American Journal of Public Health* 1991; Anthony Moulton et al, “The Scientific Basis for Law as a Public Health Tool” (2009) 99 *American Journal of Public Health* 17; George Mensah et al, “Law as a Tool for Preventing Chronic Diseases: Expanding the Range of Effective Public Health Strategies” (2004) 1 *Preventing Chronic Disease* 1; James G Hodge Jr et al, “Tobacco Control Legislation: Tools for Public Health Improvement” (2004) 32 *JL Med & Ethics* 5; James G Hodge Jr, “Law as a Tool to Improve the Health of Children and Adolescents in Schools” (2006) 76 *Journal of School Health* 442; and Alina Das, “The Asthma Crisis in Low-income Communities of Color: Using the Law as a Tool for Promoting Public Health” (2007) 31 *NYU Rev L & Social Change* 273. In fact, the idea of law as a tool is so engrained in Gostin’s approach that he includes in his text a figure of a wrench, labelled ‘legal tools’, working on the ‘nut’ of public health, Gostin, *Public Health Law*, 2nd ed, *supra* note 102 at 32.

<sup>184</sup> See Gostin, “Law as a Tool”, *ibid*; Ries, “Piling on the Laws” *supra* note 155; Edward Richards et al, “Innovative Legal Tools to Prevent Obesity” (2004) 32 *JL Med & Ethics* 59; William Dietz et al, “Policy Tools for the Childhood Obesity Epidemic” (2002) 30 *JL Med & Ethics* 83; and Daynard, Howard & Wilking, *supra* note 18. The framing of tort law as a tool has important implications for public health, both in for how it limits public health’s use of tort law, but also for how the use of tort law by public health is perceived.

<sup>185</sup> An instrumentalist approach to law contends “law is, and should be, an instrument that serves social or individual interests”, see Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001) at 45 [Tamanaha, *A General Jurisprudence of Law and Society*]. According to Tamanaha, “[a]n instrumental view of law means that law ... is consciously viewed by people and groups as a tool or means with which to achieve ends”, Tamanaha, *Law as a Means to an End*, *supra* note 101 at 6. A consequence of instrumentalist thinking is that law simply becomes a “means pure and simple, with the ends up for grabs”, *ibid* at 4. See also: Brian Z Tamanaha, “How an Instrumental View of Law Corrodes the Rule of Law” (2006-2007) 56 *DePaul L Rev* 469 [Tamanaha, “How an Instrumental View of Law Corrodes the Rule of Law”]; and, Raban, *supra* note 101. Instrumentalism, then, is a considered a danger that “must be guarded against”, Tamanaha, *Law as a Means to an End*, *ibid* at 6, because it threatens the rule of law by treating law as “an empty vessel devoid of any inherent principle or binding content or integrity unto itself”, *ibid* at 7. Tamanaha further notes, “[I]aw is not an empty vessel to be filled in by our leave; rather, law is predetermined in some sense, consistent with what is necessary and right”, Tamanaha, “How an Instrumental View of Law Corrodes the Rule of Law”, *ibid* at 469. For a detailed examination of how instrumentalism threatens the rule of law, see Tamanaha, *Law as a Means to*

opted by individuals and groups seeking to “fill in, interpret, manipulate, and utilize the law to serve their own ends.”<sup>186</sup> Public health scholars are not typically concerned with charges of instrumentalism.<sup>187</sup> Indeed, some seem to celebrate the instrumental use of tort law<sup>188</sup>, while others seem to value tort law precisely because of its instrumental value and its ability to be used as a means to bring about a particular end.<sup>189</sup> In some instances the instrumental use of law is applauded, given that often public health scholars and practitioners must react to issues “of critical public health importance”<sup>190</sup> without forethought into abstract considerations.

While it would be inaccurate to suggest that the appropriateness of using tort law in public health is a settled debate, the preceding discussion reveals that many scholars of public health recognize the importance of incorporating private law, including tort litigation, into public health actions. However, this use often lacks theoretical sophistication.<sup>191</sup> This is not always the case, however. The next section will review a

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*an End, ibid.* For a critical treatment of Tamanaha’s thesis, see Marc O DeGirolami, “Faith in the Rule of Law” (2008) 82 Saint John’s L Rev 573.

<sup>186</sup> Tamanaha, *Law as a Means to an End, ibid* at 1.

<sup>187</sup> Indeed, Tamanaha himself recognizes that, to an extent, law is always instrumental and does not advocate for a wholesale rejection of the idea that law is in an instrument, Tamanaha, *Law as a Means to an End, supra* note 101 at 6. Tamanaha contends that instrumentalist views permeate most theoretical understandings of law, see *ibid* at 118-132.

<sup>188</sup> As noted above, public health has a different metric for evaluating appropriateness – and if litigation can achieve a desired outcome, it is justified. This is markedly different from a legal point of view.

<sup>189</sup> See, e.g., Timothy D Lytton, “Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits” (2008) 86:7 Texas Law Review 1837 [Lytton, “Using Tort Litigation to Enhance Regulatory Policy Making”].

<sup>190</sup> Nola M Ries, Timothy Caulfield & Tracey M Bailey, “Introduction”, in Tracey M Bailey, Timothy Caulfield & Nola M Ries, *Public Health Law and Policy in Canada*, 2nd ed (Markham, ON: Lexis Nexis, 2008) 1 at 2.

<sup>191</sup> Perhaps, the absence of theoretical sophistication in public health’s thinking about tort law stems, in part, from how tort has been framed as a tool to be used to respond to specific public health issues without adequate consideration being given to whether it is a legally appropriate tool or how it ought to be used as a tool in public health. As Bogart observes, “[l]itigation has not been much considered in the

more robust approach to public health: Parmet’s population-based legal analysis. It will then consider how Gerhart’s articulation of tort law as social morality, when viewed in light of Parmet’s theory, allows for a more sophisticated understanding of the relationship between tort law and public health.

## 5. TORT LAW AS SOCIAL MORALITY

The preceding part illustrated how tort law has been incorporated within public health law scholarship, without much regard to “taking tort law seriously.” This section aims to demonstrate how tort law can incorporate public health while taking tort law seriously. Of course, surveying the vast tort literature is beyond the scope of this project, and not necessary, given that the intent here is not to provide a summary of tort scholarship, but to illustrate that tort law is not inconsistent with public health’s more collective focus. To achieve this, the following focuses on tort law as articulated by Gerhart<sup>192</sup>, who draws from several influential Canadian tort law scholars, including Ripstein and Weinrib. Gerhart’s approach is particularly appealing, as it helps to demonstrate the congruence between tort law and public health. When incorporated with Parmet’s population-based legal analysis, it becomes easier to support the claim that litigation has an important role to play in public health.

Gerhart’s theory of tort law begins by suggesting that the correct starting point for understanding tort law is with social problems.<sup>193</sup> Arguably, this is a departure from

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traditional literature on tools”, W.A. Bogart, *Permit but Discourage: Regulating Excessive Consumption* (Toronto: Oxford University Press, 2011) at 56. See Bogart’s discussion at 56-58.

<sup>192</sup> Peter Gerhart, *Tort Law and Social Morality* (New York: Cambridge University Press, 2010).

<sup>193</sup> *Ibid* at xxii.



many tort scholars, particularly those within legal formalism, who argue that tort law should begin by articulating a conception of law.<sup>194</sup> Gerhart contends that tort law is fundamentally concerned with addressing social problems because tort law considers the claim by one individual in a community that another person in the community is required to repair the relationship between them through the payment of damages.<sup>195</sup> Law, viewed this way, is simply a means to describe how social problems are resolved<sup>196</sup>, and is effective to the extent that it can “appeal to a sense of justice that people find to be worthy of following and therefore use to guide their behavior.”<sup>197</sup> At the core of this approach to tort law is the concept of other-regarding behavior.

For Gerhart, other-regarding behavior requires that individuals take the well-being of others into account when deciding how to behave.<sup>198</sup> He also suggests that other-regarding behaviour is the central characteristic of the reasonable person, as “reasonable decision making means giving appropriate regard to the well-being of others when making decisions.”<sup>199</sup> In this respect, tort law is concerned with social interactions<sup>200</sup>, and

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<sup>194</sup> *Ibid* at xxii.

<sup>195</sup> *Ibid* at xvii.

<sup>196</sup> *Ibid* at xxii. Although located within the social system, law remains independent because the social system requires an institution to assess social relationships and to identify those traits that are good for the community as a whole, *ibid*.

<sup>197</sup> *Ibid* at xxiii.

<sup>198</sup> *Ibid* at xi. He notes that other-regarding behaviour is “the thread that runs through tort law and brings it unity and coherence”, *ibid*.

<sup>199</sup> *Ibid* at 10.

<sup>200</sup> In his discussion about the conception of law, Gerhart observes that concept of law is a reflection of how communities construct and understand law, *ibid* at xxi. Therefore, the starting point is with how humans interact, both with one another and with nature, and then law can be used to examine these interactions to see which are best, provided, of course, some standard of “what is best” is established. Approaching law in this way he argues overcomes some of the shortcomings of other approaches, such as formalism and legal realism. He notes, “[w]hen we turn our concept of law upside down and make the law the handmaiden of social morality, we have a concept of law that is normative, responsive to human behavior, and socially relevant”, *ibid* at xxii. He further notes, “[i]f our sense of justice is socially derived rather than imposed from the outside by law – if our sense of right is created by, and facilitates human

with helping individuals identify what constitutes socially appropriate behaviours.<sup>201</sup> It requires that individuals, when making decisions about their own projects and preferences<sup>202</sup>, take into account the projects and preferences of others.<sup>203</sup> Described as the “glue” holding the community together<sup>204</sup>, other-regarding behaviour helps to ensure social cohesion.<sup>205</sup> It allow for a community to thrive<sup>206</sup> by reducing conflicts<sup>207</sup>, maximizing social coordination, and helping to ensure efficiency, fairness, and stability.<sup>208</sup>

However, it is not sufficient to simply declare that other-regarding behaviour is required. It is also necessary to determine what constitutes appropriate other-regarding

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interaction – then we need a concept of law that is premised on, rather than separate from, an account of social interaction”, *ibid* at xxi.

<sup>201</sup> Gerhart notes that determining what is appropriate other-regarding behaviour will depend on the circumstances and is socially contingent. “Where the line between the reasonable and the unreasonable is located, we cannot say in advance”, *ibid* at 22. He does suggest, “[r]easonableness is the obligation to reason appropriately about the well-being of other when one is under a duty to do so, which requires the actor to incorporate appropriately another’s well-being in the actor’s projects and preferences”, *ibid* at 23.

<sup>202</sup> For Gerhart, projects and preferences refers to “the goals the actor has and the means the actor chooses to reach those goals”, *ibid* at 7. He further clarifies at 7, n. 6: “A project denotes an activity an actor undertakes; a preference denotes how the actor undertakes the activity.”

<sup>203</sup> Gerhart notes, “it is a mistake to think that rational interest means narrow self-interest or that a rational person will think only about his own projects and preferences. In fact, rational decisions often account for the well-being of others because people regularly make decisions that incorporate a range of other-regarding sentiments”, *ibid* at 8.

<sup>204</sup> *Ibid* at 10.

<sup>205</sup> *Ibid* at 3-4. Gerhart later claims that social cohesion is not a goal that exists outside of the legal system, but rather, “[i]t is what the legal system takes into account when it decides cases”, *ibid* at 17. Social cohesion is presented as one of the ways to merge the goals of deterrence and correction, arguably the respective goals identified in law and economics and corrective justice theories of tort law. According to Gerhart, there is nothing contradictory about a tort system to seeks to simultaneously correct and deter: “[t]he concept of correcting an imbalance and the concept of deterring modes of decision making that lead to that imbalance are two sides of the same coin”, *ibid* at 17.

<sup>206</sup> *Ibid* at 14.

<sup>207</sup> It provides a way for community to deal with conflicts, through “the orderly resolution of conflicts over time, by both socially and legally corrective means, in a way that promotes the acceptability of the resolution by relying on basic indicia of efficiency and fairness and the adjustment of the burdens and benefits of membership in a community in response to changing social perceptions and circumstances”, *ibid* at 14.

<sup>208</sup> Efficiency, fairness, and stability are necessary, Gerhart argues, to ensure that individuals are able to exercise their individualism and to coordinate their own projects and preferences, *ibid* at 14-16.



behaviour. For Gerhart, this requires a stable and acceptable ranking of projects and preferences<sup>209</sup> reflective of the social values that inform behaviours.<sup>210</sup> He contends that this is only possible behind Rawls' veil of ignorance.<sup>211</sup>

We can understand this as a valuation that would be chosen by most people if they adopted an empathetic attitude towards various projects and preferences but did not know whether they would be in the position of the victim or the injurer – that is, the valuations that people in a community would make if they were behind Rawls' veil of ignorance. The social ranking of projects and preferences becomes enduring only if it reflects values that individuals would choose if they did not know the particulars of the circumstances and how the rankings would affect them because of those circumstances.<sup>212</sup>

Ranking projects and preferences in this manner ensures that interests of individuals within the community are maximized in a manner than is consistent with the values of the community.<sup>213</sup>

Although Gerhart does not explicitly identify public health as a value that ought to guide how projects and preferences are ranked, it is not difficult to imagine how public health would factor into his approach. Consider, for example, Gerhart's contention that "[r]easonable people use appropriate values when they make decisions – that is, they give appropriate weight to the various considerations that have to do with their own well-

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<sup>209</sup> *Ibid* at 43.

<sup>210</sup> According to Gerhart, social values "reflect an unstable but self-reinforcing consensus, a set of heuristics that most people follow most of the time and that express – and influence – the beliefs and value individuals hold", *ibid* at 34. The flexibility of social values is importantly, and corresponds with Gerhart's broader understanding of why tort law relies on a standard (reasonable person) and not rules: "The reasonable person standard is open-ended, undefined, and context-contingent precisely because tort law does not deal with behavior in the abstract. Tort law deals with behavior as it relates to an actor's attention to social values that require the actor to consider the well-being of others .... These circumstances are so variegated and contextual that our quest is not for rules of behavior but for a way of thinking about and describing the requirements of the reasonable person that allows us to evaluate behavior by understanding the values the defendant is required to take into account when making decisions", *ibid* at 36.

<sup>211</sup> See John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1999).

<sup>212</sup> Gerhart, *supra* note 192 at 43.

<sup>213</sup> *Ibid* at 64.

being and with the well-being of others.”<sup>214</sup> Well-being is intentionally used here—according to Gerhart, well-being provides the context for his theory of other-regarding behaviour.<sup>215</sup> Moreover, he emphasizes the importance of the community protecting well-being:

Our well-being is only partially in our control .... we seek refuge from life's vagaries in community and we depend on community to shield and soften life's challenges. We construct community by banding together to address life's uncertainties and we count on others to help us. We join and we commit; we learn and we protect. We act as if we were interconnected with others and we count on others. We hope that others will look out for our well-being, just as we look out for the well-being of others.<sup>216</sup>

Of course, well-being can have a myriad of meanings, and is not necessarily linked to health.<sup>217</sup> However, there are obvious parallels between the well-being in Gerhart's theory of other-regarding behaviour<sup>218</sup> and well-being in conceptions of public health.<sup>219</sup> Of particular importance is the emphasis on collective action<sup>220</sup> and social interaction. Public health scholarship commonly discusses how the public must work together collectively to ensure conditions for the entire population to be healthy<sup>221</sup>, and

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<sup>214</sup> *Ibid* at 33.

<sup>215</sup> *Ibid* at 5.

<sup>216</sup> *Ibid* at 6.

<sup>217</sup> There is no consensus on the meaning of well-being. In addition to physical well-being, one could also speak of social, economic, emotional, psychological, and spiritual well-being.

<sup>218</sup> Gerhart, *ibid*, notes, at 4 n. 3, that responsibility for the well-being of others is notion that “runs throughout the tort literature.”

<sup>219</sup> Well-being is an idea often discussed in public health. For example, Gostin argues, “[t]he crux of public health ... is a public or governmental entity that harbors the power and responsibility to assure community well-being”, Gostin, *Public Health Law*, 2nd ed, *supra* note 102 at 16. Well-being can become part of how health is understood and defined, consider, for example, the 1948 WHO definition of health as “a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity”, WHO, “WHO Definition of Health”, online: WHO, <http://www.who.int/about/definition/en/print.html>.

<sup>220</sup> Consider, for example, the often cited definition of public health provided by the Institute of Medicine: public health is “what we, as society, do collectively to assure the conditions for people to be healthy”, IOM, *The Future of Public Health*, *supra* note 94 at 1. Recall also Hall's view, *supra* note 152.

<sup>221</sup> See, for example, the definition of public health in Roger Detels & Lester Breslow, “Current

emphasizes the interdependency of community and individual health.<sup>222</sup> When Gerhart does talk about health, he refers specifically to the health of the community. For example, he observes that other-regarding behaviour “results in obligations that advance the health of the community with minimum judicial intervention.”<sup>223</sup>

And this is what makes Gerhart’s approach to tort law congruous with public health. His theory ignores the narrow interpretation of tort law that it is only concerned with the relationship between a particular plaintiff and a particular defendant.<sup>224</sup> For Gerhart, other-regarding behaviour goes beyond a particular, singular, other. The obligation tort law seeks to protect is one that is owed at large to all others in the community. This does not necessarily require the introduction of distributive justice concerns<sup>225</sup>—indeed Gerhart contends that his project is concerned with “resolving

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Scope and Concerns in Public Health” in Roger Detels et al, eds, *Oxford Textbook of Public Health*, 3d ed (New York: Oxford University Press, 1997) 3 at 3. See also: National Advisory Committee on SARS and Public Health, Health Canada, *Learning from SARS: Renewal of Public Health in Canada* (Ottawa: Health Canada, 2003) at 46.

<sup>222</sup> See, generally, Parmet, *Populations, Public Health, and the Law*, *supra* note 99 or Gostin, *Public Health Law*, 2nd ed, *supra* note 102 on this point. As Rayner and Lang observe, public health is about “how we live together, our shared circumstances and infrastructure . . . , the causes of our illnesses, the quality of our lives and the causes and quality of our deaths”, *supra* note 111 at 3.

<sup>223</sup> Gerhart, *supra* note 192 at 7. While it is not clear what Gerhart means by health of the community, he does consistently refer to the idea of a community that flourishes by allowing individuals to maximize their projects and preferences. He also suggests that healthy communities are made up of people who “continually adjust their decision making to take into account the well-being of others and adjust their conduct accordingly”, *ibid* at 23. He further notes, “[w]e can see this if we look in detail at how reasonable people make decisions and if we develop a theory of decision making that reflects how healthy communities develop patterns of behavior and attitude toward others that enhance both efficiency and fairness,” *ibid*.

<sup>224</sup> This is expressed in the work of Weinrib as bipolarity, and can only involve only two persons, Weinrib, *The Idea of Private Law*, *supra* note 91 at 64. He notes, “corrective justice reflects the character of private law. The most distinctive feature of private law, expressed both in its procedures and in its doctrines, is the bipolarity of the relationship between the parties. By representing this bipolarity through correlative gains and losses, corrective justice singles out a particular plaintiff and a particular defendant and makes the duties of one correlative to the rights of the other”, *ibid* at 76. See also, Ernest J Weinrib, “Corrective Justice in a Nutshell” (2002) 52 *University of Toronto Law Journal* 351 and Ernest J Weinrib, “Legal Formalism: On the Immanent Rationality of Law” (1998) 97:6 *Yale LJ* 949.

<sup>225</sup> According to Weinrib, “[w]ith more than two parties there also is no transaction, because the

interpersonal conflicts through private law”, and thus only implicates corrective justice<sup>226</sup>—but nevertheless prioritizes community interests.

Gerhart’s theory dovetails nicely with Parmet’s approach to public health, which she calls population-based legal analysis.<sup>227</sup> Parmet’s approach is not explicitly concerned with public health *per se*. Rather, lamenting what she contends to be inadequate attention to public health by theorists and jurists alike<sup>228</sup>, she proposes a new approach to legal reasoning<sup>229</sup>, a “fundamental change in how lawmakers and policy-makers view the role of law in protecting population health.”<sup>230</sup> At the core of Parmet’s population-based legal analysis is the maxim *salus populi suprema lex*<sup>231</sup> and the

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immediacy of interaction characteristic of transactions is lacking and the ordering of the multiplicity of parties has to be patterned according to some distributive criterion”, Ernest J Weinrib, “Liberty, Community and Corrective Justice” (1988) 1 Can JL & Jur 3 at 5. Because it involves a multiplicity of actors, Weinrib contends that this is not a matter for private law. See Weinrib, *The Idea of Private Law*, *supra* note 91. See also Stephen R Perry, “On the Relationship Between Corrective and Distributive Justice” in Jeremy Horder, ed, *Oxford Essays in Jurisprudence*, 4th series (Oxford: Oxford University Press, 2000) 237.

<sup>226</sup> Gerhart, *supra* note 192 at 14, n. 12.

<sup>227</sup> Importantly, Parmet does not consider her approach to be a substitute for public health law. Rather, it is a theory concerned with population health. Population health and public health, while related, are not the same, although they are often used as synonyms. Public health often refers to the health of the entire community, typically the state (federal, provincial/state, or municipal). Population health refers to specific populations. Thus, one could speak about the health of a subset of the community. For example, she points to the example of the health of the student population. See discussion in Parmet, *Populations, Public Health, and the Law*, *supra* note 99 at 13-19.

<sup>228</sup> Parmet argues that much of the scholarship produced has been similar, and this has resulted in an unsophisticated, perhaps even superficial, understanding of tort law’s role in public health, *ibid* at 5. She notes, “[c]ases are analyzed and decisions are made without a full appreciation of either the central role that public health has in the relevant legal field or the insights that public health, as a field, may bring to the legal question at hand. As a result, law’s ability to serve as a positive force for public health is diminished. So, too, is legal discourse”, *ibid* at 5-6. She expresses concern that much contemporary public health law scholarship, “helps reinforce the conventional view by framing the debate as if the restraint on the individual is critical to the security of the public”, *ibid* at 273. While recognizing that public health has experienced a “renaissance” the last few decades, which has helped to establish the importance of law for public health, Parmet contends this has “not consummated the adoption of a true population perspective either within the reemerging field or more broadly”, *ibid* at 272-273.

<sup>229</sup> *Ibid* at 52.

<sup>230</sup> James G Hodge Jr, “Exploring Communal Health through Law” (2010) 40:5 Hastings Center Report 46 at 46 [Hodge, Jr, “Exploring Communal Health through Law”].

<sup>231</sup> Parmet, *Populations, Public Health, and the Law*, *supra* note 99 at 267: “Population-based

assumption that “law exists, at least in part, to serve the common good.”<sup>232</sup> The entire enterprise of law is involved in protecting the common good, which includes the health of the people, and thus Parmet does not feel the need to draw a clear distinction between the respective place of public law and private law in public health.<sup>233</sup> By moving away from the restraints she contends are inherent in individualistic and formalistic approaches to law, population-based legal analysis allows for recognition of the importance of public health.<sup>234</sup>

Parmet identifies three core elements of population-based legal analysis: (1) the importance of population both to and within law; (2) public health as a norm to guide the legal system (akin to Daynard’s judicial canons, as discussed above<sup>235</sup>); and, (3) the use

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legal analysis is an approach to legal reasoning, analysis, and decision making that is inspired by the vision of *salus populi* ... it recognizes the promotion of population health as a legal norm and helps law appreciate the role that populations play as both objects and subjects of the law.” By embracing *salus populi*, Parmet contends this approach offers an alternative to the individualism and formalism that permeates much of law, *ibid* at 2.

<sup>232</sup> *Ibid* at 1.

<sup>233</sup> She does provide some guidance about what public health law does look like. Contending that there is no precise way of mapping how law impacts public health, she suggests the relationship can thought of a series of concentric circles, *ibid* at 31-32. The innermost circle contains public health powers, “laws that create and authorize government action about or addressed to the health of a population”, *ibid* at 31. These laws include those that establish boards of health, authorize quarantine, etc., and are generally better understood because they have been more consistently considered and studied. The next circle contains any law that might be relevant to public health, but which do not specifically address public health activities, and she uses civil liability for toxic products as an example. The next circle contains all the laws generally known as public health laws (e.g., laws that establish public health agencies). This is followed by a circle capturing those laws with an indirect impact on public health, such as taxation of health care providers, and yet another circle for laws that shape the social environment within which public health operates. Here Parmet casts a wide net here, identifying laws “influencing the distribution of property, wealth, and power, the meaning and impact of race, gender, disability, and sexual orientation, as well as the nature and scope of the economy, and the rules that govern access to the legal field itself”, *ibid* at 32. Some of the circles have more fluid boundaries than others, and she contends there is no real clear way of identifying a demarcation between laws that are “public health laws” and those that are not. The outer circles have fluid boundaries precisely because they are dependent on what happens in the inner circles.

<sup>234</sup> *Ibid* at 3. One of population-based legal analysis’ stated goals is to return public health to the center of law. She argues, “by recognizing the importance of public health to law, we cannot only use law to protect the public’s health, but also enhance legal discourse itself”, *ibid* at 4.

<sup>235</sup> *Ibid* at 268. Parmet notes that she is indebted to the work of Daynard, who has argued for a public health judicial decision-making canon, see Daynard, “Regulating Tobacco”, *supra* note 127.

of public health methodologies requiring empirical and probabilistic reasoning. As Hodge Jr. observes, population-base legal analysis represents a “marriage of legal theory and public health methodology” that offers “a new vision for how courts and other legal decision-makers should move past antiquated notions of individual versus communal interests at the core of public health legal issues to consider population-based solutions.”<sup>236</sup>

Within this framework, Parmet identifies tort law as an “especially apt domain of private law” for population-based legal analysis.<sup>237</sup> She contends that tort law envelops both private and public characteristics. Although tort law involves private parties seeking compensation, tort law responsibilities are themselves socially constructed norms.<sup>238</sup> This leads her to assert that, tort law, “in essence ... lies at the intersection of private and public law.”<sup>239</sup> Aware of the “stark individualism” that pervades many tort doctrines<sup>240</sup>—and how this makes it difficult for tort law doctrines to recognize, let alone promote, public health<sup>241</sup>—Parmet is not interested in remaking tort law into public law.<sup>242</sup> Instead, she contends that tort law, in dealing with individuals, “must inevitably consider not only

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<sup>236</sup> Hodge, Jr, “Exploring Communal Health through Law”, *supra* note 230 at 46. Hodge Jr, while finding Parmet’s approach fascinating, noting “Parmet offers something few other legal or policy scholars have produced during the modern “renaissance” in the field of public health law”, a “marriage of legal theory and public health methodology” that offers “a new vision for how courts and other legal decision-makers should move past antiquated notions of individual versus communal interests at the core of public health legal issues to consider population-based solutions”, *ibid*, he is convinced that it has much utility as a practical guide.

<sup>237</sup> Parmet, *Populations, Public Health, and the Law*, *supra* note 99 at 220. She devotes an entire chapter to the application of population-based legal analysis to tort law.

<sup>238</sup> *Ibid* at 220.

<sup>239</sup> *Ibid*.

<sup>240</sup> *Ibid* at 224. Parmet decries that law has adopted an “unrealistic and corrosive individualism”, *Ibid* at 274. See also, Wendy E Parmet, “Valuing the Unidentified: The Potential of Public Health Law” (2013) 53 *Jurimetrics J* 255 [Parmet, “Valuing the Unidentified”]. The paper argues for accepting a population approach, which values statistical lives, over individual lives.

<sup>241</sup> Parmet, *Populations, Public Health, and the Law*, *ibid* at 237.

<sup>242</sup> *Ibid* at 238.

the health of the populations but also the interests and needs of individuals within affected populations.”<sup>243</sup> Or, as put by Gerhart, actions must be other-regarding.

Of course, this does not mean that population health is always considered in legal analysis or is the highest objective of the legal system. Indeed, Parmet explicitly recognizes this, noting only that public health *is* a legal norm<sup>244</sup>—as she puts it “a legal norm with deep legal roots.”<sup>245</sup> Recognition of public health as a legal norm is a small yet critical step in the overall analysis of this project. As discussed above, public health is generally relegated to state action and expansion into private law is seen as a departure from the proper scope of public health. However, as part of a broader group of legal norms – or judicial canons, as suggested by Daynard – public health is a legitimate concern of tort law. This does not mean that the doctrinal requirements of tort are unimportant or can be ignored. Indeed, part two of this project will work within the confines of the doctrinal boundaries of product liability law. Rather this conclusion allows for two general claims to be made. The first claim is that private law can concern public health. Second, litigation aimed at improving public health is, *prima facie*, justifiable. To put it another way, where there is a legitimate private law claim, public health can be an animating concern of the court’s decision, as it was in *Donoghue*. The next chapter delves into public health litigation and the role of the judiciary.

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<sup>243</sup> *Ibid* at 238. To this end, Parmet considers various aspects of tort law, including individualized causation and the use of epidemiological evidence in tort cases. See Chapter 8 of *ibid*, at 219-243.

<sup>244</sup> Wendy E Parmet, “Population-based Legal Analysis: Bridging the Interdisciplinary Chasm Through Public Health in Law” (2016) 66:1 *Journal of Legal Education* 100 at 109. Parmet would not even suggest that public health law is the most important field of law, only that it is important and has been overlooked, *ibid* at 110.

<sup>245</sup> *Ibid*.



## 6. CONCLUSION: TORT LAW AND THE PUBLIC'S HEALTH

This chapter provided a theoretical base to justify the use of tort law in public health. It began with a review of the maxim *salus populi suprema lex*, the ancient principle that the health of the people is the highest law. Much public health law scholarship has relied on this maxim since, although it has lost prominence more generally. It demonstrates that, historically, law has been concerned with public health. While this maxim is typically interpreted to mean that the state has an obligation to protect the well-being of the public – an interpretation to which most public health law scholars adhere – it need not be limited to such a narrow interpretation. Indeed, as Daynard recommends, it can be used to inform judicial decision-making more broadly.

The maxim highlights the congruence between tort law and public health. It is at the heart of Parmet's population-based legal analysis, and while it is not specifically identified by Gerhart, is consistent with his theory of tort law as social morality. Central to both population-based legal analysis and tort law as social morality is the focus on well-being of the community. Neither approach is contingent on specific doctrinal analysis<sup>246</sup>, but instead they are animated by a concern for community interests. Consequently, they allow for tort law to be reexamined and reevaluated with a population or community perspective. Importantly, they do so while taking law seriously, thereby avoiding charges of instrumentalism. That tort law can encompass public health, however, does not necessarily mean that this is an advisable approach. Consideration

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<sup>246</sup> Parmet & Daynard, *supra* note 106 at 443. It is recognized that this approach is subject to criticism, particularly by those who adhere to a formalist approach to legal scholarship, see for example, Weinrib, *The Idea of Private Law*, *supra* note 91.



must be given to how tort law, experienced through litigation, will inform public health policy.

## CHAPTER 3: OBESITY LITIGATION

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### 1. INTRODUCTION: OBESITY LITIGATION

Among the diet-related chronic diseases, obesity is arguably the most pressing and difficult challenge. While the analysis of this project extends beyond obesity since it considers product liability law as it pertains to food products generally, obesity is a useful lens for framing the discussion. By and large, the focus of legal scholarship on diet-related chronic diseases has been on obesity. This has included scholarship examining the potential for civil liability.

The first part briefly discusses obesity as a public health law problem. Deferring to the vast literature on why obesity registers as a public health problem, it focuses primarily on the role that has been ascribed to law in obesity prevention, including consideration of some of the challenges and criticisms with using legal tools. Part two will then explore public health litigation. This includes a broad overview of judicial policy-making, followed by an examination of public health litigation specifically. This part ends with a brief discussion of the advantages and disadvantages of public health litigation. Part three turns to obesity litigation. This will include a review of the few cases that have been brought before the courts, including the infamous “McLawsuit”. Finally, part four will consider the comparison that is often drawn between obesity and tobacco. This part will reflect on the Canadian tobacco litigation experience, and examine *Létourneau* in more detail. This chapter concludes that tobacco litigation in Canada, because of *Létourneau*, actually does provide some promise for obesity litigation—and

this is only possible because of the duty to warn.

## 2. OBESITY AS A PUBLIC HEALTH LAW PROBLEM

Obesity is one of the most serious public health problems in Canada, as well as globally.<sup>247</sup> In addition to being a leading cause of preventable death and morbidity, obesity has a profound impact both socially and economically.<sup>248</sup> Given obesity's complex etiology, attempts to prevent obesity have been fraught with difficulties. Some emphasize the role of genetics and biological factors in obesity<sup>249</sup>, whereas others prioritize behavioural determinants, and still others point to socio-environmental factors, such as the food environment, food affordability, and food availability.<sup>250</sup> Increasingly the social determinants of health are identified as playing a significant role in obesity.<sup>251</sup>

There is still considerable controversy concerning the science of obesity. This is not to say that the science is currently unclear, although there are still many unknowns.<sup>252</sup> Rather, controversy exists because it has been manufactured and perpetuated, in large

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<sup>247</sup> See *Obesity in Canada*, *supra* note 56; Heather M Orpana et al, "BMI and Mortality: Results from a National Longitudinal Study of Canadian Adults" (2010) 18:1 *Obesity* 214; and Boyd A Swinburn et al, "The Global Obesity Pandemic: Shaped by Global Drivers and Local Environments" (2011) 378 *Lancet* 804.

<sup>248</sup> See PT Katzmarzyk & I Janssen, "The Economic Costs Associated with Physical Inactivity and Obesity in Canada: An Update" (2004) 29:1 *Canadian Journal of Applied Physiology* 104; PT Katzmarzyk & CI Ardem, "Overweight and Obesity Mortality Trends in Canada 1985-2000" (2004) 95 *Canadian Journal of Public Health* 16; Brownell, "The Chronicling of Obesity", *supra* note 8; and Wang et al, *supra* note 8.

<sup>249</sup> See, for example, Hélène Choquet & David Meyre, "Genetics of Obesity: What Have We Learned?" (2011) 12:3 *Current Genomics* 169; and RL Johnson, SM Williams & IJ Spruill, "Genomics, Nutrition, Obesity, and Diabetes" (2006) 38:1 *J Nurs Scholarship* 11.

<sup>250</sup> See Minaker & Raine, *supra* note 53; Novak & Brownell, *supra* note 50; and Shelley, "Addressing the Policy Cacophony", *supra* note 29.

<sup>251</sup> Michael Marmot & Ruth Bell, "Social Determinants of Health and Obesity" (2010) *Obesity Prevention* 701.

<sup>252</sup> To be sure, some of the controversy is a result of the limits of science. See discussion about evidence in Chapter 7.

part by the food industry, resulting in uncertainty. As Bogart observes, the food industry

aims to convince legislators and the public that the science relating diet to health is so uncertain that regulation promoting better eating and drinking and aimed, in any way, at its products is mostly unnecessary and would, in any event, be mostly ineffective. In any event, diet and weight are a matter of personal responsibility, accountability, and discipline.<sup>253</sup>

It is not just the causes of obesity that the science is unclear about, but also the extent to which treatment and preventative measures are effective. Obesity treatments, whether behavioural or biomedical, have had very limited success.<sup>254</sup> Despite the attention given to obesity prevention, obesity remains one of the most challenging problems in public health. Although some research indicates that the prevalence of obesity might have plateaued<sup>255</sup>, it is not clear that initiatives to reduce obesity rates have resulted in overall reductions.

In addition to uncertainty about evidence, it is not clear which policies or legislative changes should be implemented. Some refer to the ongoing discussion as a “maze of policy incoherence”<sup>256</sup> or a policy cacophony, where competing policy solutions add to the complexity of policymaking.<sup>257</sup> Despite the challenges that arise, including difficulties with identifying a specific cause of obesity and with generating

<sup>253</sup> Bogart, “Law as a Tool”, *supra* note 70 at 34, referring to Nestle, *Food Politics*, *supra* note 59.

<sup>254</sup> Recidivism rates for obesity are extremely high. It is beyond the scope of this paper to identify the research on point. Many of the references cited in the discussion that follow touch on this issue.

<sup>255</sup> See Nadeem Esmail, *Obesity in Canada: Overstated Problems, Misguided Policy Solutions* (Vancouver: Fraser Institute, 2014) (with Patrick Basham). Roberto and colleagues observe that while there has been some positive changes, “these mainly stem from a flattening of childhood obesity in some cities and countries where rates were already high”, Christina A Roberto et al, “Patchy Progress on Obesity Prevention: Emerging Examples, Entrenched Barriers, and New Thinking” (2015) 385 *Lancet* 2400 at 2400, citing T Olds et al, “Evidence that the Prevalence of Childhood Overweight is Plateauing: Data From Nine Countries” (2011) 6 *Int J Pediatr Obes* 342.

<sup>256</sup> N Sheeman & P Luciani, *XXL: Obesity and the Limits of Shame* (Toronto: University of Toronto Press, 2011) at 64.

<sup>257</sup> T Lang & G Rayner, “Overcoming Policy Cacophony on Obesity: An Ecological Public Health Framework for Policymakers” (2007) 8:Suppl *Obesity Reviews* 165 [Lang & Rayner, “Overcoming Policy Cacophony on Obesity”].

adequate evidence<sup>258</sup>, it is widely recognized that action must be taken in order to prevent worsening the situation.<sup>259</sup>

Walls and colleagues criticize traditional approaches identified for obesity prevention, such as educational campaigns.<sup>260</sup> Instead, they identify high-level policy and legislative changes as the more appropriate strategy.<sup>261</sup> They are certainly not alone in their call for policy and legislative responses.<sup>262</sup> Many legal and non-legal scholars and practitioners have identified an important role for the law in obesity prevention.<sup>263</sup>

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<sup>258</sup> It is common for critics of public health to allege that there is insufficient scientific evidence to justify interventions. The question of evidence is important, of course. As Bennet et al, *supra* note 183 at 210, contend, “[l]aw developed without reference to a scientific evidence base, law designed to achieve an objective other than improving population health, or law passed to pander to skewed public and media perceptions of risk, can do more harm than good.” However, see argument in Shelley, “Addressing the Policy Cacophony”, *supra* note 29.

<sup>259</sup> Roger S Magnusson, “What’s Law Got To Do With It? Part I: A Framework for Obesity Prevention” (2008) 5 *Australia & New Zealand Health Policy* 10 at 7 [Magnusson, “What’s Law Got To Do With It? Part I”].

<sup>260</sup> Helen L Walls et al, “Public Health Campaigns and Obesity – A Critique” (2011) 11 *BMC Public Health* 136, identify community-based interventions or social marketing campaigns for obesity prevention, as well high-risk approaches, such as pharmacological interventions

<sup>261</sup> *Ibid.*

<sup>262</sup> The use of law, especially government intervention, has been highly criticized. Often it leads to charges of paternalism or nanny-statism. It is beyond the scope of the current project to address these matters here. See, for example, Karen Jochelson, *Nanny or Steward? The Role of Government in Public Health* (London: King’s Fund, 2005); LO Gostin & KG Gostin, “A Broader Liberty: J.S. Mill, Paternalism and the Public’s Health” (2009) 123 *Public Health* 214; Thaddeus Mason Pope, “Is Public Health Paternalism Really Never Justified? A response to Joel Feinberg” (2005) 20 *Okla City UL Rev* 121; K Calman, “Beyond the ‘Nanny State’: Stewardship and Public Health” (2009) 123 *Public Health* e6.; and Richard B Saltman & Odile Ferroussier-Davis, “The Concept of Stewardship in Health Policy” (2000) 78 *Bulletin of the World Health Organization* 732.

<sup>263</sup> See, for example: Ries, “Piling on the Laws” *supra* note 155; Ries & von Tigerstrom, “Law and the Promotion of Healthy Nutrition and Physical Activity”, *supra* note 169; Nola M Ries & Barbara von Tigerstrom, “Legal Interventions to Address Obesity: Assessing the State of the Law in Canada” (2011) 43:2 *UBC L Rev* 361 [Ries & von Tigerstrom, “Legal Interventions to Address Obesity”]; Michelle M Mello, David M Studdert & Troyen A Brennan, “Obesity—The New Frontier of Public Health Law” (2006) 354 *New England Journal of Medicine* 2601; Richards et al, *supra* note 184; Richard A Daynard, “Legal Approaches to the Obesity Epidemic” (2003) 13:5 *Consumer Policy Review* 154 [Daynard, “Legal Approaches to the Obesity Epidemic”]; Dietz et al, *supra* note 184; M Nestle & M Jacobson, “Halting the Obesity Epidemic: A Public Health Policy Approach” (2002) 115 *Public Health Reports* 12; Gostin, “Law as a Tool”, *supra* note 183; J Hodge, A Garcia & S Shah, “Legal Themes Concerning Obesity Regulation in the United States: Theory and Practice” (2008) 5 *Aust New Zealand Health Policy* 14; Robyn Martin, “The Role of Law in the Control of Obesity in England: Looking at the Contribution of Law to a Health Food Culture” (2008) 5 *Aust New Zealand Health Policy* 21; Boyd Swinburn, “Obesity Prevention: The

Indeed, obesity has been deemed the “new frontier of public health law.”<sup>264</sup> This, however, does not eliminate the need to determine which, among the various legal tools available, are most appropriate.<sup>265</sup> Considerable attention has been given to specific interventions. For example, the taxation of sugar-sweetened beverages<sup>266</sup>, mandatory menu labelling for restaurants and fast food<sup>267</sup>, prohibitions on certain ingredients<sup>268</sup>, and the modification of zoning by-laws to alter food environments have all been subject to legal scrutiny<sup>269</sup>, among other initiatives. Individually, these initiatives have been

Role of Policies, Laws and Regulations” (2008) 5 Australia & New Zealand Health Policy 13 [Boyd, “Obesity Prevention”]; Magnusson, “What’s Law Got To Do With It? Part I”, *supra* note 259; Roger S Magnusson, “What’s Law Got To Do With It? Part II: Legal Strategies for Healthier Nutrition and Obesity Prevention” (2008) 5 Australia & New Zealand Health Policy 11 [Magnusson, “What’s Law Got To Do With It? Part II”]; Hodge Jr, “Law as a Tool”, *supra* note 183; Jess Alderman et al, “Application of Law to the Childhood Obesity Epidemic” (2007) 35 J L Med & Ethics 90.

<sup>264</sup> Mello, Studdert & Brennan, *ibid.* Mello points out that it is only recently that law and obesity became an area of legal practice, Michelle Mello, “Legal and Policy Approaches to the Obesity Epidemic” (2012) 8 Surgery for Obesity and Related Diseases 507. However, Magnusson, “What’s Law Got To Do With It? Part I”, *supra* note 259 at 1, points out, “[t]he potential for law to contribute to obesity prevention remains largely unrealised.” Pomeranz and colleagues similarly note, “[t]he great potential for the law to rectify the status quo has yet to be full explored”, Jennifer L Pomeranz et al, “Innovative Legal Approaches to Address Obesity” (2009) 87:1 Milbank Quarterly 185 at 207.

<sup>265</sup> Magnusson, “What’s Law Got To Do With It? Part I”, *supra* note 259 at 10 (“At its simplest, the “law of obesity prevention” lies in choosing from the variety of tools and strategies that law has on offer, and matching them to the sectors and settings here interventions are most needed.”).

<sup>266</sup> Barbara von Tigerstrom, “Taxing Sugar-Sweetened Beverages for Public Health: Legal and Policy Issues in Canada” (2012) 50:1 Alberta Law Review 37; Nola M Ries, “Legal and Policy Measures to Promote Healthy Behaviour: Using Incentives and Disincentives to Control Obesity” (2012) 6:1 MJLH 1 at 17-26; Nicole L Novak & Kelly D Brownell, “Taxation as Prevention and as a Treatment for Obesity: The Case of Sugar-Sweetened Beverages” (2011) 17: Current Pharmaceutical Design 1218.

<sup>267</sup> Barbara von Tigerstrom, “Food Labelling Regulation to Promote Healthy Eating” (2011) 20:1 Health Law Review 18; Barbara von Tigerstrom & Tristan Culham, “Food Labelling for Healthier Eating: Is Front-of-Package Labelling the Answer” (2009) 33:1 Manitoba Law Journal 89; Ries, “Piling on the Laws” *supra* note 155; JL Pomeranz & KD Brownell, “Legal and Public Health Considerations Affecting the Success, Reach, and Impact of Menu-Labeling Laws” (2008) 98 American Journal of Public Health 1578.

<sup>268</sup> Nola M Ries, “Food, Fat and the Law: A Comment on Trans Fat Bans and Public Health” (2007) 23 Windsor Rev Legal & Soc Issues 15 [Ries, “Food, Fat and the Law”].

<sup>269</sup> Marice Ashe et al, “Land Use Laws and Access to Tobacco, Alcohol, and Fast Food” (2007) J L Med & Ethics 60; and, JS Mair, MW Pierce & SP Teret, *The Use of Zoning to Restrict Fast Food Outlets: A Potential Strategy to Combat Obesity* (2005), online: <http://www.publichealthlaw.net/Zoning%20Fast%20Food%20Outlets.pdf>.

criticized for being ineffective<sup>270</sup>, and it is widely recognized that a comprehensive strategy is necessary.<sup>271</sup>

The problem, however, is that many are sceptical that a comprehensive legislative or regulatory response will occur.<sup>272</sup> Governments feel they lack the public support necessary for such initiatives.<sup>273</sup> They also have the difficult task of identifying which combination of policies offers the most promise, and they generally lack the scientific acumen to understand and interpret public health evidence<sup>274</sup> – an especially difficult task given that any measure of success will only be realized with the enactment of multiple policies, each addressing a different aspect of obesity, that might not be able to stand up to scrutiny on their own.<sup>275</sup> Even if a promising intervention is identified, the problem of which level of government has jurisdiction still exists. Moreover, elected bodies are often heavily influenced by the very industries they would need to regulate.<sup>276</sup> Regulatory

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<sup>270</sup> Roberto et al, *supra* note 255.

<sup>271</sup> Margaret Sova McCabe, “The Battle of the Bulge: Evaluating Law as a Weapon Against Obesity” (2007) 3 J Food L & Policy 135 at 139 (“Without a comprehensive legal strategy to use law to fight obesity we are destined to lose the battle of the bulge.”).

<sup>272</sup> Alderman & Daynard, *supra* note 13 at 84 note, “[i]t thus seems unlikely that regulatory or legislative attempts to address the obesity crisis at a nation level will be more successful than those to regulate tobacco have been.” Pomeranz et al, *supra* note 264 at 207, are unequivocal: “governments have failed in the face of obesity, relying on attributions of personal responsibility and weak attempts at education while protecting practices such as food marketing that contribute to the problem.” As Magnusson, “What’s Law Got To Do With It? Part II”, *supra* note 263 at 2 observes, “obesity prevention has been called a “brilliant test of political capability”, citation omitted.

<sup>273</sup> See Lang & Rayner, “Overcoming Policy Cacophony on Obesity”, *supra* note 257; Nathanson, *supra* note 58, and Kersh & Moronoe, *supra* note 58. See also Terry T-K Huang et al, “Mobilisation of Public Support for Policy Actions to Prevent Obesity” (2015) 385 Lancet 2422.

<sup>274</sup> On this, see Lang & Rayner, “Overcoming Policy Cacophony on Obesity”, *ibid.* For roadblocks specific to the Canadian context, see Nola M Ries & Barbara von Tigerstrom, “Roadblocks to Laws for Healthy Eating and Activity” (2010) 182 Canadian Medical Association Journal 687 [Ries & von Tigerstrom, “Roadblocks to Laws for Healthy Eating and Activity”].

<sup>275</sup> See Guy EJ Faulkner et al, “Economic Instruments for Obesity Prevention: Results of a Scoping Review and Modified Delphi Survey” (2011) 8 International Journal of Behavioral Nutrition and Physical Activity 109; Roberto et al, *supra* note 255; and Shelley, “Addressing the Policy Cacophony”, *supra* note 29.

<sup>276</sup> Alderman & Daynard, *supra* note 13 at 84 (“The major problem with a regulatory or legislative



capture is a serious concern. This, combined with an overall lack of political will and little public support, has meant that few meaningful legislative initiatives have been enacted.<sup>277</sup> What is clear is that government actions thus far have largely failed, and innovative approaches are required.<sup>278</sup>

One of the innovative strategies identified is the use of civil litigation. Given the perceived successes of tobacco litigation<sup>279</sup>, many scholars and advocates have suggested the need to turn to the courts. The next section provides an overview of public health litigation.

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approach at a national level is that the affected industries heavily influence the process.”). For more, see discussion in Chapter 3.

<sup>277</sup> This is not to suggest that there has not been any legislative or regulatory efforts with the aim of reducing obesity levels. For example, the Ontario government has recently passed stricter regulations about the food products that can be sold in schools and has promised to table legislation requiring restaurant menu labelling, see: *Healthy Menu Choices Act*, *supra* note e74; Ontario, “Health Schools: New School Food and Beverage Policy”, Policy/Program Memorandum No 150 (October 4, 2010), with more information at Ontario Ministry of Education, [www.edu.gov.on.ca/eng/healthyschools/policy.html](http://www.edu.gov.on.ca/eng/healthyschools/policy.html).

<sup>278</sup> Pomeranz et al, *supra* note 264. Pomeranz and colleagues provide a good overview of some of the possible innovative approaches that might be utilized. See also Stephen Gardner, “Litigation as a Tool in Food Advertising: A Consumer Advocacy Viewpoint” (2006) 39 Loy LA L Rev 291.

<sup>279</sup> The tobacco litigation has been widely scrutinized, and a detailed discussion is not required here. See generally: Rabin, “The Tobacco Litigation”, *supra* note 46; Arthur B LaFrance, “Tobacco Litigation: Smoke, Mirrors, and Public Policy” (2000) 26 Am JL & Med 187; Stephen E Smith, “Counterblasts” to Tobacco: Five Decades of North American Tobacco Litigation” (2002) 14 Windsor Rev Legal & Social Issues 1; V Han, “History of Tobacco Litigation” (1988) Burson-Marsteller Position Paper, online: Tobacco Documents Online, [http://tobaccodocuments.org/bliley\\_lor/92347651-7658.html](http://tobaccodocuments.org/bliley_lor/92347651-7658.html); and, Martha A Derthick, *Up in Smoke: From Legislation to Litigation in Tobacco Politics*, 3rd ed (Washington, DC: CQ Press, 2012). For a discussion of tobacco control in Canada, see von Tigerstrom, “Tobacco Control”, *supra* note 169. It is often acknowledged that litigation played a critical role in addressing the public health problem of tobacco by helping to reshape the policy environment, reframe the public discourse, and expose the role of industry, see eg, Nathanson, *supra* note 58. The eventual successes of tobacco litigation have resulted in many public health advocates considering the use the courts to bring about social change, see Parmet & Daynard, *supra* note 106; Jacobson & Soliman, *supra* note 181; Wendy E Parmet, “Tobacco, HIV, and the Courtroom: The Role of Affirmative Litigation in the Formation of Public Health Policy” (1999) 36 Houston Law Review 1663 at 1710 [Parmet, “Tobacco, HIV, and the Courtroom”]; Jacobson & Warner, *supra* note 167; and, Lytton, “Using Litigation”, *supra* note 103. Of course, not all are convinced that tobacco litigation was a success, see, for example: Stasia Mosesso, “Up in Smoke: How the Proximate Cause Battle Extinguished the Tobacco War” (2000-2001) 76 Notre Dame L Rev 257 at 340 (“The tobacco litigation was and continues to be a grandiose disappointment to those involved and those studying it. The judges had before them more than sufficient evidence linking the industry to countless acts of fraud and deception. Their response has been to avoid doing the hard job of holding a powerful industry accountable for its serious misconduct.”).

### 3. PUBLIC HEALTH LITIGATION

Many public health advocates and scholars have called for tort litigation to be used as a tool to advance specific public health goals, and justify this use solely by the practical outcomes.<sup>280</sup> This attitude has provided fodder for public health critics who suggest that the use of litigation to develop public health policy is a “flagrant and frivolous abuse” of the legal system.<sup>281</sup> Jacobson and Warner suggest that the debate about the appropriateness of litigation in public health is between pragmatists and ideologues—proponents of litigation appeal to practical concerns, while opponents rely on philosophical considerations.<sup>282</sup> Although Lytton argues that Jacobson and Warner wrongly characterize the debate<sup>283</sup>, he agrees with them that it is necessary to move beyond the “clash of abstract ideological commitments” to properly consider the use of litigation in public health policy making.<sup>284</sup> The following reflects on the use of litigation to create

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<sup>280</sup> For example, Vernick and colleagues note that irrespective of a trial’s outcome, litigation can be used to enhance product safety, Vernick et al, *supra* note 103. Wagner, *supra* note 103 notes “even some of the ‘worst cases’ of regulatory litigation—the notorious litigation against breast implant manufacturers and municipal litigation against the gun industry—produced social benefits that may outweigh their costs.” See also Jacobson & Warner, *supra* note 167 and Mello, Rimm & Studdert, *supra* note 11.

<sup>281</sup> Jacob Mattis, “*Pelman v. McDonald’s* and the Fast Food Craze: Sending a Court to do a Man’s Job”, online: <http://www.law.uh.edu/healthlaw/perspectives/Obesity/040322Pelman.html>. Consider, for example, tobacco litigation. Even though the legislative and regulatory branches of government were more than capable of implementing tobacco control measures, see Jacobson & Warner, *supra* note 167 at 791. Litigation was not used in tobacco control because it was the most appropriate legal tool; rather, it was used to circumvent the institutions responsible for legislative and regulatory oversight. Consequently, tobacco litigation has been criticized as “a third, unaccountable bite at the policy-making apple”, Marshall B Kapp, “Commentary: Tobacco Litigation, Round Three: It’s the Money and the Principle” (1999) 24:4 *Journal of Health Politics, Policy & Law* 811.

<sup>282</sup> Jacobson & Warner, *supra* note 167 at 793, see discussion at 793-796.

<sup>283</sup> Lytton, “Using Litigation”, *supra* note 103 at 562. In particular, he contends that Jacobson and Warner, *supra* note 167, are wrong on how they frame debate, suggesting “if anything, the arguments of proponents are heavy on theory, while those of critics focus on anecdotal evidence of practical results”, *ibid* at 563. More likely still, both proponents and opponents switch between pragmatic and ideological arguments

<sup>284</sup> *Ibid* at 563. Whether or not it is possible to entirely abandon ideological commitments. Baggott observes, there are broad ideologies at play in public health, identifying three: collectivism/socialism, individualism/libertarianism, and environmental/green ideology, Baggot, *supra* note 111 at 2-6. Similarly,

public health policy by providing an overview of judicial policy-making, followed by a discussion about models of public health litigation. This part concludes with a brief overview of some of the advantages and disadvantages with public health litigation.

### 3.1. Judicial Policy Making

The discussion about the appropriateness of using the courts to create social policy—or “litigation-as-public-policy”—has been subject to considerable and ongoing debate.<sup>285</sup> What is clear is that irrespective of where one stands on the matter there is a widespread belief that courts can and do shape public policy. Rosenberg has likened the courts to fly-paper that “lures the hopes, talents, and resources of social reformers.”<sup>286</sup> Rosenberg, in his work assessing judicial policy making, has identified a model of litigation-as-policy that has two potential views: the “constrained view” and the “dynamic view.”<sup>287</sup> The constrained view holds that there are numerous structural limitations that work to prevent courts from effecting social change. In addition to constitutional limits that prevent courts from creating new rights, courts also lack the ability to implement and enforce policies. Consequently, courts are ill-equipped and

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Jochelson has observed that competing ideologies can be traced throughout the history of public health, *supra* note 262 at 7. Lytton correctly asserts that what is required to advance the debate is greater theoretical sophistication and better empirical evidence. He notes, “[i]n the absence of these, the institutional dimension of the debate remains largely a contest of competing sensibilities – whether, in the abstract, one favors the ideals of public risk regulation and progressive government or free enterprise and institutional stability”, “Using Litigation”, *supra* note 103 at 563.

<sup>285</sup> It is beyond the scope of this chapter to survey the breadth of literature here. Often, the debate about using the courts for policy making focuses on the work of Rosenberg and McCann: Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change*, 2nd ed (Chicago: University of Chicago Press, 2008); and Michael W McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994).

<sup>286</sup> Parmet, “Tobacco, HIV, and the Courtroom”, *supra* note 279 citing Rosenberg, *ibid* at 341.

<sup>287</sup> See Rosenberg, *ibid*. It is common to use Rosenberg’s classifications in discussion about public health and litigation, see: Parmet & Daynard, *supra* note 106 and Jacobson & Warner, *supra* note 167 at 782-783.

perhaps lack the jurisdictional authority to make public policy. The dynamic view contends that courts are able to act as catalysts for policy change by bringing important issues to the public's attention and helping to facilitate public debate.<sup>288</sup>

Although Rosenberg recognizes the potential of the dynamic view of litigation-as-policy-making, he notes that the triumphs over the courts are often more illusory than real, and that courts have only brought about significant social changes in very limited circumstances.<sup>289</sup> Tobacco litigation affirms Rosenberg's conclusion about the court's limitations and challenges, as the perceived successes and failures of tobacco litigation demonstrates the role of litigation-as-public-policy. For example, despite the apparent success of tobacco litigation, as demonstrated through the Master Settlement Agreement (MSA)<sup>290</sup>, some suggest that there has been little overall change in tobacco policy.<sup>291</sup> Moreover, there is criticism that the MSA did not change tobacco companies' overall

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<sup>288</sup> From Jacobson & Warner, *ibid* at 782-783.

<sup>289</sup> Parmet, "Tobacco, HIV, and the Courtroom", *supra* note 279 at 1710. Rosenberg suggests that "litigation is not always the best route to take when social reform is sought due to courts' emphasis on legal issues rather than 'substantive political battles' and due to the small impact of courts' decisions in the scheme of social reform", Rosenberg, *supra* note 285 at 341. Moreover, this generally only happens in instances where this is supportive legal precedents, public and political support, and at least one of the following factors: "incentives for compliance, costs for noncompliance, ability of the market to implement the decision, and the ability of the court to serve as a shield for political officials who must implement the judicial policy", see Parmet & Daynard, *supra* note 106 at 441.

<sup>290</sup> The Master Settlement Agreement (MSA) was the \$208 billion settlement between 49 States and several major tobacco companies, bringing to an end the Medicaid recovery efforts in the United States for tobacco-related damages, available online: Tobacco Freedom, [www.tobaccofreedom.org/msa](http://www.tobaccofreedom.org/msa). For a discussion see, Tobacco Control Legal Consortium (TCLC), *The Master Settlement Agreement: An Overview* (Saint Paul, MN: TCLC, 2015), online: TCLC, <http://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-msa-overview-2015.pdf> and Walter J Jones & Gerald A Silvestri, "The Master Settlement Agreement and Its Impact on Tobacco Use 10 Years Later" (2010) 137:3 Chest 692.

<sup>291</sup> See Rabin, "The Tobacco Litigation", *supra* note 46. For a contrasting perspective, see Jon S Vernick, Lainie Rutkow & Stephen P Teret, "Public Health Benefits of Recent Litigation Against the Tobacco Industry" (2007) 298:1 Journal of the American Medical Association 86. See also, Shital A Patel, "The Tobacco Litigation Merry-go-round: Did the MSA Make it Stop?" (2004-2005) 8 DePaul J Health Care L 615; Peter D Jacobson, "Litigation as Public Health Policy: Theory or Reality?" (2002) 30 JL Med & Ethics 224; and LaFrance, *supra* note 279.

behaviour.<sup>292</sup> That said, notwithstanding that some consider tobacco litigation a failure because it did not usher in significant social changes, tobacco litigation did change the tenor of the discussion around tobacco control, and ultimately did help shift the policy environment in important ways.<sup>293</sup>

### 3.2. Public Health Litigation

Over the past few decades there has been an increased use of litigation in public health by health advocates frustrated by the obstacles they face in legislatures.<sup>294</sup> This “new public health litigation”<sup>295</sup>, as it is termed by Parmet and Daynard, has generated considerable interest and attention from legal scholarship.<sup>296</sup> Generally, discussions around public health litigation begin with tobacco.<sup>297</sup> Starting with tobacco litigation, however, does a great disservice to the rich and complex history of public health litigation.<sup>298</sup> Two models of public health litigation are commonly identified: “classical

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<sup>292</sup> See, for example, FA Sloan, CA Matthews & JG Trogdon, “Impacts of the Master Settlement Agreement on the Tobacco Industry” (2004) 13 Tobacco Control 356 (based on review of return to investment, found that the MSA did no major harm to tobacco companies) and Jim Estes, “How the Big Tobacco Deal Went Bad” (October 6, 2014) NY Times, online: NY Times,

<sup>293</sup> See Nathanson, *supra* note 58 and Shelley, “Addressing the Policy Cacophony”, *supra* note 29. The importance of litigation for shifting the policy environment in the context of tobacco control will be examined in more detail in Chapter 3. As will be shown, through the discovery process, important tobacco documents were attained that were used to shape future policy initiatives.

<sup>294</sup> Jacobson & Soliman, *supra* note 181 at 224.

<sup>295</sup> Parmet & Daynard, *supra* note 106.

<sup>296</sup> See, for example: Richard Coker & Robyn Martin, “Introduction: The Importance of Law for Public Health Policy and Practice” (2006) 120 Public Health 2; Parmet & Robbins, *supra* note 124; S Burris, “The Invisibility of Public Health: Population-level Measures in a Politics of Market Individualism” (1997) 87 American Journal of Public Health 1607; K Syrett & O Quick, “Pedagogical Promise and Problems: Teaching Public Health Law” (2009) 123 Public Health 222 at 226; Gostin, “A Renaissance”, *supra* note 160; and, James G Hodge Jr et al, “Transforming Public Health Law: The Turning Point Model State Public Health Act” (2006) 34 JL Med & Ethics 77.

<sup>297</sup> Recent tobacco litigation victories have certainly renewed interest in the potential for judicial policy making to inform public health, see Jacobson & Warner, *supra* note 167 at 771.

<sup>298</sup> Similarly, it would be an equal disservice to assume that public health litigation only refers to those issues that are widely recognized as public health matters, such as tobacco or vaccinations Public health has been far more elastic than what would be captured by such a static approach, see Shelley, “The Problem with Defining Public Health Law”, *supra* note 111.

litigation” and “affirmative litigation.” Although loose typologies<sup>299</sup>, these models are useful for classifying two commonly utilized approaches to public health litigation.

Classical litigation refers to cases concerned with enforcing or challenging legislation or regulation that aims to protect public health.<sup>300</sup> Often, these types of cases are brought as an act of resistance to a particular public health measure enacted by the state. Classical litigation therefore includes some of the most infamous and notorious cases in the history of public health, including the American cases of *Jacobson v Massachusetts*<sup>301</sup>, *Slaughter-House*<sup>302</sup>, and *Lochner v New York*.<sup>303</sup> These cases have had a formative impact on public health, but also more broadly on the legal landscape, particularly American constitutional law.<sup>304</sup> In classical litigation, the cases are not strictly concerned with articulating or developing public health policy, but instead with reviewing and interpreting already existing policies. By reviewing whether the government had the requisite authority to enforce the policy under review, or in balancing

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<sup>299</sup> Importantly, these models are not necessarily limited to tort litigation. Nevertheless, they are worth reviewing as much public health law scholarship either refers to these models explicitly or uses the overarching classification of ‘public health litigation’, which includes both tort and non-tort litigation.

<sup>300</sup> Parmet, “Tobacco, HIV, and the Courtroom”, *supra* note 279 at 1667.

<sup>301</sup> *Jacobson v Massachusetts*, 197 US 11 (1905). See Gostin, “*Jacobson v. Massachusetts*”, *supra* note 151.

<sup>302</sup> *Butchers' Benevolent Association of New Orleans v The Crescent City Live-Stock Landing and Slaughter-House Company (Slaughter-House)* (1873), 83 US 36. For a discussion of this case, see Parmet, “From Slaughter-House to Lochner”, *supra* note 124.

<sup>303</sup> *Lochner v New York*, 198 US 45 (1905). For a discussion of this case, see Parmet, “From Slaughter-House to Lochner”, *ibid*. For a critical discussion of *Lochner* from a Canadian perspective, comparing it to *Chaoulli v Quebec (Attorney General)*, [2005] 1 SCR 791, see Sujit Choudry, “Worse than *Lochner*?” in Colleen M. Flood, Kent Roach & Lorne Sossin, eds, *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005) 75. Although it is beyond the scope of this chapter to discuss *Lochner*, it remains an important and often discussed case in public health law.

<sup>304</sup> Given that the court was used in the classical model to challenge enacted policies, the majority of cases that would fall under this model concern constitutional matters. For example, *Jacobson v Massachusetts*, *supra* note 301, at its core is a case about the separation of powers and federalism, Gostin, *Public Health Law*, 2nd ed, *supra* note 102 at 121.



the rights of individuals under the policy, courts are asked to review, and possibly alter, public health policy.<sup>305</sup> The judicial role in forming public health policy in this classical model of public health litigation is secondary to the consideration of individual rights.<sup>306</sup> In these types of cases the court is not making a public health policy *per se*, but is charged with determining whether the state had the authority to enact such a policy.

Since the enactment of the *Charter of Rights and Freedoms*, there has been an increase in the use of classical litigation in Canada, although not necessarily by individuals. For example, consider *Irwin Toy v Québec (Attorney General)*<sup>307</sup> or the use of the courts by tobacco companies to challenge tobacco legislation in *RJR-Macdonald Inc. v Canada (Attorney General)*<sup>308</sup> and *Canada (Attorney General) v JTI-MacDonald*

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<sup>305</sup> Parmet, “Tobacco, HIV, and the Courtroom”, *supra* note 279 at 1668.

<sup>306</sup> According to Moulton, Goodman & Parmet, *supra* note 108 at 18, *Jacobson v Massachusetts*, *supra* note 301, may be the best example of the contribution public health has made to law. In the early 1900s Henning Jacobson challenged the power of the state to compel him to be vaccinated for smallpox. The Cambridge Board of Health had enacted regulation requiring all inhabitants of the city to be vaccinated or pay a \$5 fine. Jacobson claimed that his family had a history of severe reactions and had himself reacted to his first vaccination. He thus thought it unwise to be vaccinated a second time. He argued that compulsory vaccination was “unreasonable, arbitrary and oppressive” and a violation of the inherent rights of individuals to care for their own health. The Supreme Court of the United States upheld the regulation, deferring to the public health authorities, despite the deprivation of Jacobson’s individual freedom. In its decision, the Court expressed the view that public health can, at times, take precedence over individual rights. This idea was confirmed by *Lochner*, which “affirmed not only the state’s right to protect public health as the Court defined it, but also public health’s pivotal role in constitutional law”, Parmet, *Populations, Public Health, and the Law*, *supra* note 99 at 41. See also Gostin, “*Jacobson v. Massachusetts*”, *supra* note 151 and Wendy K Mariner, George J Annas & Leonard H Glantz, “*Jacobson v. Massachusetts*: It’s Not Your Great-Grandfather’s Public Health Law” (2005) 95 *American Journal of Public Health* 581.

<sup>307</sup> *Irwin Toy v Québec (Attorney General)*, [1989] 1 SCR 927. In this case, Irwin Toy challenged Québec’s *Consumer Protection Act*, RSQ c P-40.1, §248, which has a general prohibition of all commercial advertising to children under thirteen years of age, with some exceptions. Irwin Toy argued that this prohibition was a violation of section 2(b) of the *Charter*, protecting freedom of expression. Importantly, the initial challenge did not invoke the *Charter of Rights and Freedoms, Constitution Act, 1982*, Schedule B to the *Canada Act, 1982 (UK)*, 1982, c 11, as it had not yet been enacted. The *Charter* became relevant upon appeal to the Québec Court of Appeal, see *Irwin Toy v Québec (Attorney General)*, [1986] RJQ 2441 (QB CA).

<sup>308</sup> *RJR-MacDonald v Canada (Attorney General)*, [1995] 3 SCR 199. RJR-Macdonald challenged the federal *Tobacco Products Control Act*, SC 1998, c 20, which, with some limited exceptions, prohibited the advertising or promotion of tobacco products and enabled the government to prescribe health warnings on tobacco product packaging. Although the purpose of the legislation was to address the harm resulting



*Corp.*<sup>309</sup> Other examples of classical litigation relevant for public health in Canadian courts.<sup>310</sup>

The second model of public health litigation differs from the first in that it does not seek to challenge existing public health policies, but involves litigants turning to the courts to enact policies where no such policies existed. This model has been termed “affirmative litigation.”<sup>311</sup> Rather than trying to limit the power of the state, affirmative litigation seeks to advance a particular interest. As Parmet notes, under the affirmative model, “plaintiffs are using ... litigation explicitly and consciously to change the legal landscape, to engage in law reform.”<sup>312</sup> The most notable example of this is likely tobacco litigation, although litigation around HIV<sup>313</sup>, gun control<sup>314</sup>, and obesity are also

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from tobacco use in Canada, it was found by the majority of the Court to be a violation of the freedom of expression protected by section 2(b) of the *Charter*. Moreover, this infringement was not deemed to be justified under a section 1 analysis, as the restrictions were considered to impair rights more than what was necessary to protect the public’s health.

<sup>309</sup> 2007 SCC 30. In *JTI-MacDonald* the Supreme Court of Canada once again found that aspects of the legislation infringed freedom of expression rights, but in this instance, held that the infringement could be justified

<sup>310</sup> Consider, for example, in *Locke v Calgary (City)* 15 Alta LR (3d) 70 (AB QB), where a by-law in Calgary that fluoridated the city’s drinking water was unsuccessfully challenged as a violation of section 7 of the *Charter*. See, also *Millership v British Columbia & Canada (Attorney General)*, [2003] BCTC 82 (BC SC). Similarly, in *R v Maier*[1990] 2 WWR 519 (ABCA), reversing the decision of the Court of Queen’s Bench, 1989] 3 WWR 32 (AB QB), where section 7 was used, unsuccessfully, to challenge mandatory seat belt legislation. This became somewhat of a spectacle of a case, as the accused purposefully taunted police in an attempt to receive a ticket so that he could challenge the law, see Bruce P Ellman, “Buckle Up! Alberta’s Seat Belt Law Reinstated” (1990) 1:2 Constitutional Forum. Another example is access to health care. Numerous cases have attempted to use the *Charter* to secure or improve access to health care. See for example, *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 (seeking provision of sign language interpreters for the deaf at part of publicly funded medical care), *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, [2004] 3 SCR 657 (seeking compensation for behavioural therapy for preschool-aged autistic children), and *Chaoulli v Quebec (Attorney General)*, *supra* note 303 (challenging restrictions on private health insurance).

<sup>311</sup> Parmet, “Tobacco, HIV, and the Courtroom”, *supra* note *supra* note 279 at 1689.

<sup>312</sup> *Ibid* at 1686.

<sup>313</sup> *Ibid*. See also Benjamin Mason Meier & Alicia Ely Yamin, “Right to Health Litigation and HIV/AIDS Policy” (2001) 39:Suppl JL Med & Ethics 81 and Jane Harris Aiken & Michael Musheno, “Why Have-Nots Win in the HIV Litigation Arena: Socio-legal Dynamics of Extreme Cases” (1994) 16 Law & Policy 267.

<sup>314</sup> See, for example: Nathanson, *supra* note 58; Lytton, “Lawsuits Against the Gun Industry”,

important examples of the affirmative model. In each instance, the court was petitioned to recognize the importance of a particular problem for health, and to regulate these areas from the bench. Because this model of litigation is open-ended in that any sufficiently motivated individual or group could seek to promote a particular interest, it has been subject to considerable criticism.<sup>315</sup>

The affirmative model of litigation aims to do more than simply regulate, however. It helps to draw attention to the public health problem being addressed. Thus, success in the courtroom is not necessarily required for success in policy development.<sup>316</sup> Through affirmative litigation, “the plaintiff’s plea is the public health cry that individual health is not entirely an individual matter.”<sup>317</sup> Thus, affirmative litigation sets out to affirm the social context of poor health and the interdependence of illness<sup>318</sup> using the tools of civil litigation.<sup>319</sup> As a result, affirmative litigation necessarily invokes questions about the role of courts in developing public policy.

Arguably, there is a third model of public health litigation, what Parmet and

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*supra* note 104; Lytton, “Using Tort Litigation to Enhance Regulatory Policy Making”, *supra* note 189; Vernick, Rutkow & Salmon, *supra* note 183; Timothy D Lytton, ed, *Suing the Gun Industry: A Battle at the Crossroads of Gun Control and Mass Torts* (Ann Arbor: University of Michigan Press, 2005).

<sup>315</sup> Many of the criticisms levied against public health litigation discussed in Chapter 3 are directed specifically against the affirmative model. Affirmative litigation is also prone to be criticized for encouraging judicial activism.

<sup>316</sup> Consider tobacco litigation as an example. While the vast majority of tobacco lawsuits have been unsuccessful historically, courts were frequently asked to do more than simply award damages. The lawsuits asked the court to recognize smoking as a social problem, Parmet, “Tobacco, HIV, and the Courtroom”, *supra* note 279 at 1706-1707. (“When cases are brought by those who are ill or who have suffered the effects of illness-causing conditions, their claims are claims for inclusion, recognition, social responsibility, and amelioration of the conditions that harmed them. In essence, they are claims for positive, public rights”, *ibid* at 1709).

<sup>317</sup> Parmet, “Tobacco, HIV, and the Courtroom”, *ibid* at 1707.

<sup>318</sup> *Ibid* at 1706.

<sup>319</sup> *Ibid* at 1709.

Daynard have described as “the new public health litigation.”<sup>320</sup> It includes all those cases that have public health implications, but do not necessarily have a policy objective or agenda driving the litigation. This would be the case for most tort litigation, which seeks redress for wrongs against individuals. It would be inaccurate to claim that these cases have affirmative goals. This is not to say that such cases are devoid of policy considerations, only that the latter does not motivate the action in the first place. Much product liability law cases could fall under this model. For example, a case like *Buchan v Ortho Pharmaceutical* has significant public health policy implications, given that it requires manufacturers to warn about the dangers associated with the use of contraceptives. Ms. Buchan was not intending to inform public policy, but to seek compensation for her harms.<sup>321</sup>

### 3.3. Advantages and Disadvantages with Public Health Litigation

Litigation has been identified as a viable public health strategy because it is perceived to have had a discernable impact on public health. While the debate around the effectiveness of litigation to shape public policy has not been resolved limited efficacy<sup>322</sup>,

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<sup>320</sup> Parmet & Daynard, *supra* note 106.

<sup>321</sup> *Buchan v Ortho Pharmaceutical*, *supra* note 67. See discussion in Chapter 4.

<sup>322</sup> There is still an ongoing debate about whether litigation is, in fact, effective. See, eg, Jacobson & Warner, *supra* note 167 at 770, and Lytton, “Using Litigation”, *supra* note 103 (concludes that what is needed is more empirical data and theoretical elaboration, at 563). For empirical analysis on the impact of litigation on public health, see: Peter D Jacobson, Elizabeth Selvin & Scott D Pomfret, “The Role of the Courts in Shaping Health Policy: An Empirical Analysis” (2001) 29 *JL Med & Ethics* 278. To determine effectiveness it is necessary to first determine what would make public health litigation “successful.” If one took a global approach to assessing success, tobacco litigation may even be a failure, given that smoking rates have increased in the global south and in third-world and developing nations (see Shelley, “The Crown’s Right of Recovery Act”, *supra* note 64). In response, there have been calls for more empirical evidence to support claims that public health litigation is beneficial, Lytton, “Using Litigation”, *supra* note 103 at 563. There is also a difference between “[t]he question of litigation’s efficiency as a compensation system ... [and] the question of whether the system can achieve adequate deterrence or public health improvements”, Parmet & Daynard, *ibid* at 447.

there is some evidence to suggest that litigation does play “a modest, yet not unimportant, role in the struggle to improve public health.”<sup>323</sup> However, even amongst public health scholars who advocate the use of litigation to shape public policy, there is little agreement about what role courts should have<sup>324</sup>, or to what extent litigation should be embraced. What remains clear, however, is that courts have long considered the public policy aspects of their decisions.<sup>325</sup> In light of the policy potential of litigation, it is unsurprising that there continues to be renewed interest in the use of public health litigation. The following briefly assesses the advantages and disadvantages of public health litigation.

One of the greatest arguments in favour of public health litigation is that litigation can help overcome institutional failures.<sup>326</sup> While institutional failures to address a public health issue occur for a myriad of reasons, prominent among them is the idea of

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<sup>323</sup> Parmet & Daynard, *supra* note 106 at 441.

<sup>324</sup> Although this debate extends far beyond public health law, given the controversy associated with tobacco litigation, it serves as a lightning rod for attracting debate. For example, see the response to Jacobson & Warner, *supra* note 167, and their assessment of litigation and public health policy by Kapp, *supra* note 281 and R Shep Melnick, “Commentary: Tobacco Litigation: Good for the Body but Not the Body Politic” (1999) 24:4 J Health Politics, Policy & Law 805. According to Jacobson and Warner, *ibid* at 772, one of the more controversial use of courts “revolves around whether the courts should focus narrowly on correcting past wrongs, or, rather, on resolving policy disputes.” Kapp asserts that this use of the courts “threatens the system of government upon which we all depend for our continuing protection and freedom”, *ibid* at 811. The idea that litigation with an aim to influence public policy is a threat is common. See, for example, Olson, *The Rule of Lawyers*, *supra* note 36, and Jonathan Turley, “A Crisis of Faith: Tobacco and the Madisonian Democracy” (200) 37 Harv J on Legis 433.

<sup>325</sup> For example, Waddams has persuasively argued that the development of the private law was influenced by policy considerations. See, Stephen Waddams, *Dimension of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge: Cambridge University Press, 2003).

<sup>326</sup> There are several institutional failures not discussed here. There are also obvious political reasons why an institution may not regulate a particular issue. Bureaucratic inefficiencies have also claimed a host of well-intentioned regulatory initiatives. Consider, for example, Ontario’s *Healthy Menu Choices Act*, *supra* note 74. MP France Gelinhas has introduced at least six private member’s bills concerning menu labelling since 2008, see Keith Leslie, “Ontario Bowed to the Food Industry Pressure on Menu-Labeling Legislations: Critics” (August 10, 2016) CTV News, online: CTV News, <http://www.ctvnews.ca/health/ontario-bowed-to-food-industry-pressure-on-menu-labelling-legislation-critics-1.3022863>. Thus, in a broad sense, litigation overcomes institutional failure by filling in the gaps, Lytton, “Using Litigation”, *supra* note 103 at 558.

regulatory capture by specific interests.<sup>327</sup> Regulatory capture occurs when an agency charged with acting in the public interest instead acts in the interest of the industry they are supposed to be overseeing.<sup>328</sup> There is a growing body of literature aimed at better understanding the influence stakeholders have on regulatory decisions.<sup>329</sup> While it may be suspected, regulatory capture is difficult to prove. Lytton observes that those that wish to use regulatory capture as a pretense for public health litigation must provide a clear articulation of what constitutes regulatory failure as well as adequate evidence that, indeed, it is occurring.<sup>330</sup> When regulatory capture occurs, or is suspected, the importance of litigation as a public health tool increases. Litigation provides a forum for parties that cannot compete with the wealth or influence of powerful industry groups.<sup>331</sup> Thus,

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<sup>327</sup> For a discussion of regulatory capture, see Mark N Wexler, “Which Fox in What Henhouse and When? Conjectures on Regulatory Capture” (2011) 116:3 *Business and Society Review* 277 [Wexler, “Which Fox in What Henhouse and When?"] and Ernesto Dal Bó, “Regulatory Capture: A Review” (2006) 22:2 *Oxford Review of Economic Policy* 203. Of course, the idea of regulatory capture can also be used as a criticism against attempts to influence how legislatures enact policy that are in favour of public health. Critics of public health litigation are keen to observe that what is discredited as regulatory capture “would be praised enthusiastically as ‘influence’ or ‘education’ if [public health advocates] were more adept and effective at participating in the democratic process”, Kapp, *supra* note 281 at 813.

<sup>328</sup> Jacobson & Warner, *supra* note 167 at 784, note that regulatory capture was responsible for the failure of the state to regulate tobacco, referring to the findings of JD Hanson & KD Logue, “The Cost of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation” (1998) 107 *Yale Law Journal* 1163.. See also Douglas A Luke & Melissa Krauss, “Where There’s Smoke There’s Money: Tobacco Industry Campaign Contributions and U.S. Congressional Voting” (2004) 27:5 *American Journal of Preventive Medicine* 363.

<sup>329</sup> Lobbying and industry involvement is a common practice in the crafting of legislation and regulation. The mere fact that lobbyists or industry are involved in crafting policy does not automatically signal institutional dysfunction or failure. As Lytton notes, “[i]n terms of theory, proponents of using litigation to make public health policy need to explain why the failure of legislatures and agencies to regulate industry more aggressively is a sign of dysfunction for which litigation provides a solution, rather than merely lack of adequate support for greater regulation”, Lytton, “Using Litigation”, *supra* note 103 at 557. Second, it is clear that even for powerful industries, regulatory capture does mean there is no regulatory oversight, *ibid* at 561.

<sup>330</sup> *Ibid*. Elsewhere Lytton notes that there is some evidence that the gun industry and the National Rifle Association has “defeated proposals to reduce gun violence that a majority of Americans support”, Lytton, “Lawsuits Against the Gun Industry”, *supra* note 104 at 1251, although he is careful to state the case too strongly.

<sup>331</sup> The wealth of the industries facing lawsuits gives them a distinct advantage in the courtroom as well. Consider the “scorched earth” approach taken by tobacco companies that was extremely effective, see

litigation can provide a mechanism for overcoming some of the shortcomings of the regulatory process and for equalizing or minimizing industry's advantage.<sup>332</sup>

In addition to overcoming institutional failures, litigation can advance public health by bringing the public's attention to a particular issue. Litigation can play the role of a catalyst by making an issue public<sup>333</sup> and increasing the attention paid to a particular public health issue.<sup>334</sup> It can also make a legislative or regulatory response more probable.<sup>335</sup> Parmet notes that in the context of tobacco and HIV, litigation in the US "lead the way" for legislation, by allowing "legislatures to claim they were merely codifying already established legal principles."<sup>336</sup> Litigation may act as the impetus, and perhaps even lay out the framework for policy, prior to the involvement of policy makers. In this respect, litigation complements legislation, by helping to set the agenda, frame the issue, mobilize resources, uncover information, and garner public support.<sup>337</sup>

There are also potential benefits that may flow from public health litigation, irrespective of any favourable outcome or settlement.<sup>338</sup> For example, as noted, even the

Alderman & Daynard, *supra* note 13. A commonly referred to statement by one tobacco executive in 1988 seems germane: "To paraphrase General Patton, the way we won these cases was not by spending all of [RJR]'s money, but by making that other son of a bitch spend all his", *ibid* at 36, citing *Haines v Liggett Group, Inc*, 814 F Supp 444 (DNJ 1993).

<sup>332</sup> See Wagner, *supra* note 103. Lytton observes that "[b]y litigating, public health advocates can advance their policy agendas in a forum that eliminates much of the advantage that their political opponents have over them in legislative and agency arenas. Litigation, by this account, offers a way to overcome the shortcomings of legislative and agency regulation", Lytton, "Using Litigation", *supra* note 103 at 558.

<sup>333</sup> Parmet, "Tobacco, HIV, and the Courtroom", *supra* note 279 at 1695 ("Most obvious is the role that litigation can play in drawing public attention to a health problem.")

<sup>334</sup> As has been observed, litigation makes for "compelling drama", Parmet & Daynard, *supra* note 106 at 445. Lytton notes, the attention garnered by litigation might encourage additional lawsuits, bring diverse groups and stakeholders together, and possibly serve as the basis for fundraising, "Using Litigation", *supra* note 103 at 558.

<sup>335</sup> Parmet, "Tobacco, HIV, and the Courtroom", *supra* note 279 at 1696.

<sup>336</sup> *Ibid* at 1696, n. 201.

<sup>337</sup> Lytton, "Using Litigation", *supra* note 103 at 558.

<sup>338</sup> As noted several times above, the threat of litigation can motivate industry to self-regulate.

threat of litigation may be sufficient to shift the policy environment. The costs of a lawsuit, as well as the potential damage to an industry's reputation, may motivate an industry to accept some form of regulation.<sup>339</sup> This is certainly true for product liability cases.<sup>340</sup> The threat of large damage awards<sup>341</sup> might induce industry to accept regulation as a calculated risk, given that industry has less influence in courtroom than it does in the political process. Parmet observes that it was ultimately the threat of civil liability that made the federal regulation of tobacco in the United States possible—tobacco companies were willing to accept regulation in exchange for immunity.<sup>342</sup> This has led some to describe litigation as a “public health bargaining chip”.<sup>343</sup> Finally, a particularly salient benefit of litigation is that it helps regulators overcome information deficiencies.<sup>344</sup> The litigation process allows for otherwise hidden information to be uncovered through the discovery process. The information uncovered may be sufficient to sway public

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Public perceptions may also shift, and thus influence otherwise reluctant policymakers to institute legislation or regulation. As Lytton observes, “[t]ort litigation can provide a new venue for policy issues, framing them in new ways. Tort litigation also attracts press coverage that mobilizes and shapes public opinion, which in turn creates pressure for reform. In these ways, litigation can jump-start reform efforts in other policy venues such as legislatures, administrative agencies, and private associations”, Lytton, “Using Tort Litigation to Enhance Regulatory Policy Making”, *supra* note 189 at 1841.

<sup>339</sup> See discussion about Oreo cookies below at note 396 and accompanying discussion.

<sup>340</sup> As noted by Theall et al, *supra* note 62 at L1-1, “[i]t is no exaggeration to say that product liability claims can threaten the very existence of a corporation, no matter how large.”

<sup>341</sup> Indeed, industry stands to lose more through unwieldy lawsuits than through regulation or legislation, especially in the US where juries have routinely awarded damages in the billions of dollars. While such large judgments are almost non-existent in Canada, tobacco companies are currently appealing the \$15 billion judgment brought against them in *Létourneau*.

<sup>342</sup> Parmet, “Tobacco, HIV, and the Courtroom”, *supra* note 279 at 1697.

<sup>343</sup> Parmet & Daynard, *supra* note 106 at 445.

<sup>344</sup> See Wagner, *supra* note 103. Wagner argues that courts are the best institution to overcome such asymmetrical information and to gain access to highly technical and complex information, *ibid* at 732. She further observes that tort lawsuits permit the public to access information in a way that is not possible through the political process of “mind-numbing bureaucratic rulemaking”, *ibid* at 704. “Relative to the courts, the political branch may also be inherently more susceptible to needless legal complexity”, *ibid* at 703.



opinion<sup>345</sup> or to support regulation<sup>346</sup>—as was the experience in tobacco control.<sup>347</sup>

Of course, there are numerous challenges associated with using litigation as a strategy for public health.<sup>348</sup> For one, litigation is typically very slow to achieve outcomes<sup>349</sup>, and is accompanied by high financial, social, and emotional costs.<sup>350</sup> It is also generally asserted that judicial policy making is undemocratic, because it represents an “an illegitimate end-run around the political process.”<sup>351</sup> Moreover, it is pointed out that courts are not the

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<sup>345</sup> Vernick et al, *supra* note 103 at 554, noting: “[r]egardless of the outcome of a trial, information obtained through discovery can also be use by the media and/or policy-makers to enhance product safety.” They discuss how litigation against Ford and Bridgestone/Firestone resulted in recalls, congressional hearings, and new legislation, *ibid*.

<sup>346</sup> Parmet, “Tobacco, HIV, and the Courtroom”, *supra* note 279 at 1711 and Lytton, “Using Litigation”, *supra* note 103 at 558.

<sup>347</sup> Considerable information was revealed through the discovery process in tobacco litigation. All of documents obtained through litigation are now publicly available online: [www.tobaccodocuments.org](http://www.tobaccodocuments.org). These proved to be instrumental in changing the policy environment. See Jacobson & Soliman, *supra* note 181. Howells notes “the discovery process helped disclose the truth about how industry operated and brought about regulatory progress” Geraint Howells, *The Tobacco Challenge: Legal Policy and Consumer Protection* (Burlington, VT: Ashgate, 2011) at 111. He contends the revealed documents “raised consciousness of smoking dangers amongst the public”, *ibid*. He concludes: “One lesson public health advocates can draw from the tobacco control litigation is that strategic use of litigation can help set the policy agenda by providing essential information to the public and by forcing legislators to confront issues that powerful interests groups would prefer remain unaddressed”, *ibid*. See also Wagner, *supra* note 103 at 704 (“Without concrete harms . . . it is difficult to spark the diffuse public’s interest. Indeed, in the past, when the dormant majority has been successfully catalyzed to demand reform of existing regulatory programs, catastrophes or near-catastrophes served as the focal point to generate interest.”).

<sup>348</sup> See discussion about limitations identified by Gostin above and their use by Sarah Taylor Roller, Theodore Voorhees & Ashley K Lunkenheimer, “Obesity, Food Marketing and Consumer Litigation: Threat or Opportunity?” (2006) 61 Food and Drug Law Journal 419 at 429.

<sup>349</sup> SM Wexler, “*Hollis v. Dow Corning* and *Buchan v. Ortho Pharmaceuticals*” (1994) 22 Manitoba Law Journal 426 at 427 [Wexler, “*Hollis v. Dow*”]: “the length of time it takes for a case to go through the courts is one major weakness of litigation as a technique of either consumer protection or anything else.”

<sup>350</sup> For example, it is commonly observed in the context of tobacco control that litigation was extraordinarily expensive and time consuming, see, Robert L Rabin, “The Third Wave of Tobacco Tort Litigation” in Robert L Rabin & Stephen D Sugarman, eds, *Regulating Tobacco* (Oxford: Oxford University Press, 2001) 176 at 178 [Rabin, “The Third Wave of Tobacco Tort Litigation”].

<sup>351</sup> Wagner, *supra* note 103 at 694. Note, this is not a view that Wagner herself espouses. See instead Jeff Reh, “Social Issue Litigation and the Route Around Democracy” (2000) 37 Harvard Journal on Legislation 515 and Kapp, *supra* note 281. Olson, *The Rule of Lawyers*, *supra* note 36 (includes a chapter entitled “Gunning for Democracy”, at 99-128); Turley, *supra* note 324 (suggesting that the “circumvention of the legislative process in dealing with tobacco violates core constitutional principles and undermines the stability of the tripartite system of representative government”, at 437).

appropriate venue<sup>352</sup> and the judiciary is not properly equipped to make policy decisions.

<sup>353</sup> Using the judiciary to develop public policy is perceived as an attempt to politicize the judiciary.<sup>354</sup> When it comes to making policies, this view holds that courts are not able to select the “right” parties or cases for making policy judgments, or to understand the policy implications their decisions may have.<sup>355</sup> Moreover, some point out that litigation-as-policy-making allows minority groups, with their “fractional interests”, to circumvent the requirements of a representative system.<sup>356</sup> This is a view often taken of tobacco

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<sup>352</sup> Courts are considered to lack the ability to properly define policy objectives, which often require “complex (and value-laden) policy judgments and trade-offs”, Jacobson & Warner, *supra* note 167 at 796. See also Kapp, who argues that litigation to create public policy “threatens the system of government upon which we all depend for our continuing protection and freedom”, *supra* note 281 at 811.

<sup>353</sup> This view holds that responsibility for policy making belongs solely with the legislative branch of government, and that judicial public policy undermines the separation of powers, where elected officials are vested with the responsibility for policy decisions. As Lytton, “Using Litigation”, *supra* note 103 at 558, observes, “judges lack the democratic legitimacy attributed to legislators and agency officials with short-term appointments.” The accountability of elected officials is noted by others, such as Turley, *supra* note 324 and Melnick, *supra* note 324. There is some concern that the judiciary is also being influenced to make particular decisions, see, for example, LC Friedman, “Tobacco Industry Use of Judicial Seminars to Influence Rulings in Product Liability Litigation” (2006) 15 Tobacco Control 120.

<sup>354</sup> Lytton, “Using Litigation”, *supra* note 103 at 559. (“Treating the courts as merely a second front in legislative battles ... subjects judges to political pressure. Since most state court judges are elected, judges hoping to get reelected will be more likely to decide cases in favor of their political supporters.”) Olson contends that judges are more willing to side on side of those “donor-lawyer[s]” who provide financial support, *The Rule of Lawyers*, *supra* note 36 at 77-78, 226-229. It is interesting to note that Olson sees the solution to have state legislatures “step in to rein in their runaway courts”, at 229. How state legislatures, which are no less vulnerable to being captured by donors (if anything, they are likely more vulnerable), will be able to overcome this deficiency is not self-evident. Lytton is also critical of Olson’s observation, suggesting that the high profile nature of cases might actually act as an incentive for judges to be *more* impartial, Lytton, “Using Litigation”, *supra* note 103 at 561-562. Lytton thus observes, at 562, “[i]t is possible that the way judges decide cases influences contributions more than contributions influence the way they decide cases.”

<sup>355</sup> *Ibid.*

<sup>356</sup> Jacobson & Soliman, *supra* note 181 at 227, referring to Turley, *supra* note 324 at 452. Kapp, *supra* note 281 at 811 notes that litigation serves “the interests of ‘pragmatism’ ... by a group that has been frustratingly unable to achieve its goals through the democratic mechanism of government ...”, Reh, *supra* note 351 at 519 uses the language of “harassing litigation” to describe the efforts of mayors who elect to sue the gun industry after failing to “convince a majority of elected officials in their state as to the wisdom of their viewpoint.” Reh, *ibid* at 520, asserts that the efforts of these types of lawsuits are an “attempt by a handful of people to federalize their particular judgments” and that these lawsuits “are undemocratic and improper.”

litigants.<sup>357</sup>

Some argue further that public health litigation may threaten to undermine legitimate public health activities.<sup>358</sup> It has also been observed that public health litigation

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<sup>357</sup> Consider Kapp's condemnation of the third wave of tobacco litigants: "What is most troublesome about the third wave of tobacco litigation is its apparent assumption that groups who believe they have lost in the legislative and regulatory arenas may turn to courts, not to resolve concrete cases and controversies by interpreting and applying accepted legal principles, but for a third, unaccountable bite at the policy-making apple", *supra* note 281 at 812-813. This view, of course, contends that litigation is undemocratic precisely because it ignores that the legislative branch has already spoken. This includes when legislatures opt to say nothing; as Kapp argues, "nonaction in the face of requested action is itself very much a choice", *ibid* at 812 ("If the democratic branches of government have chosen, wisely or badly, to reject meaningful legislation and regulation of the tobacco industry (and nonaction in the face of requested action is itself very much a choice), that should make us even more cautious about overturning that choice through the antidemocratic instrument of litigation."). Reh, *supra* note 351 at 520, suggests that state legislatures enacting legislation to block "circumventive attempts" confirms the "seriousness of the issue." Of course, Reh is assuming that such legislation has "democracy" as its concerns, and not industry interests. The personal responsibility in consumption legislation enacted throughout the United States, also known as "Cheeseburger bills", is discussed below.

<sup>358</sup> In this view, litigation "deprive[s] public health officials of control over the public health agenda as well as the particulars of public health policy", Parmet, "Tobacco, HIV, and the Courtroom", *supra* note 279 at 1698, referring to Peter W Huber & Robert E Litan, "Overview" in Peter W Huber & Robert E Litan, eds, *The Liability Maze: The Impact of Liability Law on Safety and Innovation* (Washington, DC: Brookings Institution Press, 1991).). See also Jacobson and Warner, *supra* note 167 at 795-796. Advocates who look to use litigation to influence public health should bear in mind that "[b]ad science may prevail as often as good science" because the science "cannot be controlled by those knowledgeable about public health", Parmet, "Tobacco, HIV, and the Courtroom", *ibid* at 1711. The role of science in the courts has been subject to considerable discussion. See, for example: Thomas O McGarity, "Our Science is Sound Science and Their Science is Junk Science: Science-Based Strategies for Avoiding Accountability and Responsibility for Risk-Producing Products and Activities" (2004) 52 U Kan L Rev 897; Elisa K Ong & Stanton A Glantz, "Constructing 'Sound Science' and 'Good Epidemiology': Tobacco, Lawyers, and Public Relations Firms" (2001) 91 American Journal of Public Health 1749; Peter W Huber, *Galileo's Revenge: Junk Science in the Courtroom* (New York: Basic Books, 1993) [Huber, *Galileo's Revenge*]; Lissy C Friedman, Richard A Daynard & Christopher N Banthin, "Learning from the Tobacco Industry about Science and Regulation: How Tobacco-Friendly Science Escapes Scrutiny in the Courtroom" (2005) 95:S1 American Journal of Public Health S16; and, Annamaria Baba et al, "Legislating 'Sound Science': The Role of the Tobacco Industry" (2005) 95:S1 American Journal of Public Health S20; Sheila Jasanoff, "Law's Knowledge: Science for Justice in Legal Settings" (2005) 95:Suppl 1 American Journal of Public Health S49 at S54 [Jasanoff, "Law's Knowledge"]; David Michaels & Celeste Monforton, "Manufacturing Uncertainty: Contested Science and the Protection of the Public's Health and Environment" (2005) 95:Suppl 1 American Journal of Public Health 39; Wendy E Wagner, "The 'Bad Science' Fiction: Reclaiming the Debate Over the Role of Science in Public Health and Environmental Regulation" (2003) 66 L & Cont Problems 63 [Wagner, "The 'Bad Science' Fiction"]; Stephanie Zaza et al, "Using Science-Based Guidelines to Shape Public Health Law" (2003) 31:4(Supp) JL Med & E 65; Beverly Gard, Stephanie Zaza & Stephen B Thacker, "Connecting Public Health Law with Science" (2004) 32:4(Supp) JL Med & Ethics 100; David Michaels, "Scientific Evidence and Public Policy" (2005) 95:S1 American Journal of Public Health S5; and Polly J Hoppin & Richard Clapp, "Science and Regulation: Current Impasse and Future Solutions" (2005) 95:S1 American Journal of Public Health S8.

might be at odds with some of the values of public health. As noted above, litigation accentuates the individualistic aspects of health<sup>359</sup>, and that the adversarial approach required in the courtroom may conflict with public health's concern for the common good.<sup>360</sup> Combined, these three arguments suggest that even if one can support litigation as a tool for making public policy, the cost of public health litigation to the public's health outweighs whatever benefits litigation may offer.

#### 4. OBESITY LITIGATION

While government regulation to address obesity has received the lion's share of attention from legal scholars, litigation has also been identified as a potential obesity prevention strategy.<sup>361</sup> More often than not, litigation is presented as part of a broader, multi-faceted strategy<sup>362</sup>, intended to compliment other regulatory action. There is a great divide as to whether or not obesity litigation is desirable. While it is almost universally

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<sup>359</sup> Parmet, "Tobacco, HIV, and the Courtroom", *supra* note 279 at 1704. She notes, "[l]itigation ... can undermine that perspective by accentuating the individualistic aspects of ill health and framing the causes of morbidity in an adversarial posture." Further, *ibid* at 1705, "[f]rom this perspective, litigation geared toward recognizing individual rights related to public health might well be thought of as potentially threatening to the promotion of public health." See also Parmet, "Valuing the Unidentified", *supra* note 240. The paper argues for accepting a population approach, which values statistical lives, over individual lives.

<sup>360</sup> See generally Parmet, *Populations, Public Health, and the Law*, *supra* note 99. See also, Parmet, "Tobacco, HIV, and the Courtroom", *ibid* at 1704, who notes "the Constitution limits government but does not require it to act. Public law, it would seem, has little room for rights to public health."

<sup>361</sup> See eg, Daynard, Howard & Wilking, *supra* note 18; Mello, Rimm & Studdert, *supra* note 11; Roller, Voorhees & Lunkenheimer, *supra* note 348; Jeremy H Rogers, "Living on the Fat of the Land: How to Have Your Burger and Sue it Too" (2003) 81 Washington University Law Quarterly 859.; and, Smith, *supra* note 15. For comparisons between tobacco control and obesity prevention, see: Richard A Daynard, "Lessons from Tobacco Control for the Obesity Control Movement" (2003) 24:3 Journal of Public Health Policy 291 [Daynard, "Lessons from Tobacco Control for the Obesity Control Movement"]; Alderman & Daynard, *supra* note 13; Courtney, *supra* note 13; Kelly D Brownell & Kenneth E Warner, "The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar is Big Food?" (2009) 87:1 Milbank Quarterly 259; Zefutie, *supra* note 13; Jonathan S Goldman, "Take That Tobacco Settlement and Super-Size It!: The Deep-Frying of the Fast Food Industry" (2003) 13 Temple Political & Civil Rights Law Review 113; and, McMenamain & Tiglio, *supra* note 11.

<sup>362</sup> See, for example, Antler, *supra* note 11 at 289 and Smith, *supra* note 15 at 448.

accepted that something should be done about obesity<sup>363</sup>, litigation is not part of a sensible solution for many.<sup>364</sup> This disagreement is not necessarily based on ideological positions. For example, not all public health advocates consider litigation to be a viable strategy, while others seem to only reluctantly concede that it might be a necessary strategy.<sup>365</sup> As Gardner has observed, “[l]awsuits are not the best way to resolve a dispute, but sometimes they are the only way.”<sup>366</sup>

Many of the arguments against obesity litigation were reviewed in the previous part, and are raised against public health litigation generally. For example, many critical of obesity litigation identify legislative and administrative bodies as being a superior forum to the courts.<sup>367</sup> Some critics claim that the public health gains promised through

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<sup>363</sup> It would seem that even critics, such as Epstein, recognize that something must be done – the debate is about what should be done, see Richard A Epstein, “What (Not) to do About Obesity: A Moderate Aristotelian Answer” (2005) 93 Geo LJ 1361 [Epstein, “What (Not) to do about Obesity”].

<sup>364</sup> See Ausness, *supra* note 11 (“... this Article concludes that anti-obesity litigation is socially and economically undesirable. While something should be done about obesity and obesity-related health problems, lawsuits ... are not the answer”, at 843). Some identify a specific role for litigation, such as urban minority youth, see Antler, *supra* note 11.

<sup>365</sup> See, for example, Magnusson, “What’s Law Got To Do With It? Part I”, *supra* note 259 at 2, where he notes, “[d]espite great interest in obesity-related litigation, lawsuits against specific food and beverage manufacturers for harm caused to obese plaintiffs seem even less likely to succeed than tobacco lawsuits.” In making this claim, he refers to Gostin, “Law as a Tool”, *supra* note 183, Mello, Rimm & Studdert, *supra* note 11, and Daynard, “Legal Approaches to the Obesity Epidemic”, *supra* note 263. See also Stephen D Sugarman & Nirit Sandman, “Fighting Childhood Obesity Through Performance-based Regulation of the Food Industry” (2007) 56:6 Duke Law Journal 1403 at 1410 (“We are not keen on litigation”). Contrast this with Pomeranz et al, *supra* note 264 at 197-200, where they discuss litigation as one of the innovative legal approaches that might fill the regulatory gap. Cf MI Krauss, “Suits Against ‘Big Fat’ Tread on Basic Tort Liability Principles” (2003) 18:6 Legal Backgrounder 19.

<sup>366</sup> Gardner, *supra* note 278 at 309 (“Private litigation is on the rise only because there is a near-complete failure of federal consumer protection.”).

<sup>367</sup> For example, Ausness, *supra* note 11 at 844, contends “legislatures and administrative agencies are institutionally superior to courts when it comes to formulation and implementing health policy initiatives.” He further claims, at 890, that such lawsuits are “economically and morally destructive.” See also Goldman, *supra* note 361 at 128. Roller, Voorhees & Lunkenheimer, *supra* note 348 at 428 contend that those pushing for obesity litigation are ignoring the extensive regulatory framework already in place, choosing instead to adopt the “tobacco narrative in an effort to characterize the food industry as an obstacle to progress in the advancement of public health.” While they discuss the regulatory framework that does exist in the US, they ignore the extensive input that the industry has had in constructing that framework. Moreover, an existing regulatory framework does not preclude injured parties from utilizing the courts.



litigation are “at best, unsubstantiated and speculative.”<sup>368</sup> Others suggest that litigation will actually be counterproductive<sup>369</sup>, and that it will undermine incentives for the food industry to promote healthy foods<sup>370</sup>, and may hamper innovation.<sup>371</sup> There are also concerns that litigation will erode personal responsibility.<sup>372</sup> These criticisms seem to be largely unfounded, based on speculation and, often, ideological grounds.<sup>373</sup>

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Similarly, see Joseph M Price & Rachel F Bond, “Litigation as a Tool in Food Advertising: Consumer Protection Statutes” (2006) 39 Loy LA L Rev 277. at 289-290 (“Food advertising to children raises important public policy and public health questions that should not be answered by a litigation system not designed to handle such broad public policy questions.”).

<sup>368</sup> Roller, Voorhees & Lunkenheimer, *supra* note 348 at 429. They also assert that litigation may harm public health. This type of argument has been used in tobacco litigation as well, and, as here, is not supported by evidence. To those that think obesity litigation is “improbable if not ridiculous”, Werner, Feinstein & Hardigree, *supra* note 46 at 204 suggest they would be “well advised to recall that product liability cases against tobacco companies were also unpopular and unsuccessful at first.”

<sup>369</sup> See Roller, Voorhees & Lunkenheimer, *ibid* at 444. Roller, Voorhees and Lunkenheimer, at the time of writing, worked for a law firm that represented food manufacturers.

<sup>370</sup> Roller, Voorhees & Lunkenheimer, *ibid* at 420 contend that litigation will stand in the way of progress, and that instead “regulatory policies that encourage food industry self-regulation and incentivizes the industry’s use of nutrition and health messages in ways that are effective in motivating healthy behaviors would appear to be the better course for the overall promotion of public health.” Litigation, they assert, will have marginal benefits and may have a “chilling effect.” Cf Daynard, “Lessons from Tobacco Control for the Obesity Control Movement”, *supra* note 361 at 294.

<sup>371</sup> McMenamin & Tiglio, *supra* note 11 at 518 (“Litigation against food industry, even if it fails as it should, will hamper the efforts of all producers. It will tend to hinder innovation that could benefit us all, and decrease the variety and palatability of the American diet.”). Cf Alderman & Daynard, *supra* note 13 at 86 (“If it is possible to make safer alternative products, companies generally will do so both to increase market share and to reduce litigation based on future sales”, noting that those industries incapable of doing so are more likely to adopt a scorched earth strategy in order to stay in business).

<sup>372</sup> McMenamin & Tiglio, *supra* note 11 at 517 unconvincingly argue, “[b]ringing claims against food companies for obesity may actually harm those the litigation is theoretically designed to help. Emphasizing weight loss, rather than exercise, may inadvertently discourage physical activity, even among the non-obese.” They contend that “... obesity litigation will further erode the sense of personal responsibility on which the nation was founded.”).

<sup>373</sup> Consider the arguments put forward by Roller, Voorhees & Lunkenheimer, *supra* note **Error! bookmark not defined.** For example, they contend litigation/regulation is unnecessary “in view of the longstanding, respected and well established self-regulatory programs sponsored by the by the (sic) food industry ...”, *ibid* at 444. However, many note that industry self-regulation is ineffective, often pointing to self-imposed restrictions on advertising to children as an example (see, as an example, Monique Potvin Kent, Lisa Dubois & Alissa Wanless, “Self-regulation by Industry of Food Marketing is Having Little Impact During Children’s Preferred Television” (2011) 6 Intl J of Pediatric Obesity 401. Even more confusing, Roller, Voorhees & Lunkenheimer, *ibid* at 429, argue that “[t]he direct evidence from food marketing research suggests that the economic costs and business risks of litigation can discourage businesses from entering or staying in healthful product markets.” They neither explain this comment nor provide any evidence whatsoever to substantiate this claim (here they cite to Lawrence O Gostin, *Public Health Law: Power, Duty, Restraint* (Berkeley: University of California Press, 2000) at 303-304, which

Others simply contend that the results of litigation, at best, are unknown, and that litigation is a “wild card”.<sup>374</sup> While it may prove to be successful, litigation may also have negative consequences. For example, there is some talk about the dangers of a slippery slope<sup>375</sup>, and a danger that fast-food litigation may “clog courts.”<sup>376</sup> There is also a risk that litigation may weaken the public’s resolve to use other legal interventions to prevent obesity, and it has been noted that there is public disdain for litigation against the food industry.<sup>377</sup>

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does not make this case). See discussion in Adams, *supra* note 46 at 314-315.

<sup>374</sup> Bogart, “Law as a Tool”, *supra* note 70 at 35. See also Salzmann, *supra* note 36 at 1043 (“the tobacco litigation precedent foreshadows a long and unwieldy road ahead for those litigating against the fast food industry.”). Alderman & Daynard, *supra* note 13 at 85 (“the goal of litigation can be to change public perception of an industry and ultimately to induce a change in industry practices. At times the mere threat of litigation is enough to induce an industry to change its ways.”). Roller, Voorhees & Lunkenheimer, *supra* note 348 at 429 refer to this perspective as a “shortcut” to legislation and regulation.

<sup>375</sup> Commentators often note this danger referring to Justice Sweet’s observation in *Pelman I*, *supra* note 9. See, for example, Rogers, *supra* note 361 at 880. As discussed above, Justice Sweet in his judgment noted that the court had an obligation to limit the consequences “and to protect against crushing exposure to liability”

<sup>376</sup> See Justice Sweet’s comments in *Pelman I*, *ibid*. However, as Adams contends, *supra* note 46 at 315, “the allegation that obesity litigation is “frivolous” and will “clog” courtroom dockets has not been documented and lacks scientific support.” Adams further notes that nothing in Justice Sweet’s ruling indicates that obesity litigation *prima facie* lacks legal merit, *ibid*.

<sup>377</sup> Lydia Saad, “Public Balks at Obesity Lawsuits” (July 21, 2003) Gallup (discussing Gallup poll showing 90% of Americans disapproved of obesity suits against fast-food companies). The public has also responded with satire. In 2000, *The Onion* published a news story entitled, “Hershey’s Ordered to Pay Obese Americans \$135 Billion” in response to the Master Settlement Agreement between various US states and tobacco companies, see “Hershey’s Ordered to Pay Obese Americans \$135 Billion” (August 2, 2000) *The Onion*, online: <http://www.theonion.com/article/hersheys-ordered-to-pay-obese-americans-135-billio-320>. See also Alyse Meislik, “Weighing in on the Scales of Justice: The Obesity Epidemic and Litigation Against the Food Industry” (2004) 46 *Ariz L Rev* 781 at 781, who recounts a mock waiver a restaurant in Seattle required patrons to sign for a “sinfully fattening” dessert. However, when commentators have referred to “public” sentiments, they sometimes reference industry front groups. Specifically, McCabe, *supra* note 271 at 140, suggests that lawsuits in this area brings “disdain from the general public”, and then cites in note 18 a publication by the Center for Consumer Freedom (CCF), a known industry-backed think tank. Whether or not McCabe is aware that the CCF is an industry-backed think tank is not clear. Many “think tanks” accept tobacco money, for example, the Canadian Convenience Stores Association, online: <http://theccsa.ca/> and the Fraser Institute, online: <https://www.fraserinstitute.org/>. See, for example, Donald Gutstein, “Following the Money: The Fraser Institute’s Tobacco Papers” (October 14, 2009) *Rabble*, online: <http://rabble.ca/news/2009/10/following-money-fraser-institute%E2%80%99s-tobacco-papers>. See also Non-Smokers’ Rights Association (NSRA) & Health Action Foundation, *Exposing Recent Tobacco Industry Front Groups and Alliances* (Ottawa: NSRA, 2008), online: NSRA, <https://www.nsra->



There is also criticism of obesity litigation from a purely legal perspective. For example, Frank is extremely critical of obesity litigation, characterizing it as an abuse of class action litigation.<sup>378</sup> He suggests that such “illegitimate litigation”<sup>379</sup> is only possible “due to “[f]undamental flaws in modern-day tort litigation.”<sup>380</sup> He further asserts that plaintiffs are abusing legal remedies to “blackmail a defendant into settling a case rather than risk the small chance of a bankrupting judgment.”<sup>381</sup> This criticism is not necessarily specific to obesity litigation, of course. However, it is clear from his comments that Frank has a particular distaste for obesity litigation, and in articulating this distaste, appears to disregard the science and research into obesity.<sup>382</sup>

Despite the criticisms that can be levied against obesity litigation, when compared to legislative efforts, litigation has “made the greatest strides in bringing change to food choices in America.”<sup>383</sup> The most infamous suit, discussed in the next section, is *Pelman*

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[adnf.ca/cms/file/files/pdf/FrontGroups\\_Oct\\_2008.pdf](http://adnf.ca/cms/file/files/pdf/FrontGroups_Oct_2008.pdf) and Dorie E Apolloni & Lisa A Bero, “The Creation of Industry Front Groups: The Tobacco Industry and “Get Government Off Our Back”” (2007) 97:3 American Journal of Public Health 419.

<sup>378</sup> Frank, *supra* note 46. Frank obviously assumes that obesity litigation will only proceed as class actions. This assertion is not questioned here. However, a class action is not necessary

<sup>379</sup> *Ibid* at 440.

<sup>380</sup> *Ibid* at 428-429.

<sup>381</sup> *Ibid* at 440. But even critics of obesity litigation note that, ultimately, food companies will simply pass on the costs to consumers. See McMenamin & Tiglio, *supra* note 11 at 517 (“Such lawsuits will obviously impose needless costs on food companies. Those costs will, of course, be passed on to consumers, which means: all of us.”).

<sup>382</sup> Consider, for example, Frank’s comments concerning the correlation between children’s advertising and obesity. He argues, “[a]dvertisers cannot force consumers to purchase what they do not desire, or we would all be drinking New Coke, Crystal Pepsi, and Zima”, *supra* note 46 at 438-439. Frank, anecdotally, points to his own obesity despite his parents’ refusal to purchase sugared cereals, one would suspect, to undermine the correlation between unhealthy foods and rates of obesity. He diminishes the correlation between environment and obesity, a correlation that a broad array of scientific research has demonstrated. Frank’s comments on causation are also telling: “One looks forward to the suits against the University of Arkansas at Little Rock for their contribution to the obesity problem for their role in publishing this reading material”, at 438. Frank is by no means the most egregious example of the perfunctory and cavalier attitude towards public health science.

<sup>383</sup> McCabe, *supra* note 271 at 138. She notes, “Federal legislation has done little when specifically targeted at foods.”

*v McDonald's*. The reaction by media and the public to *Pelman* might indicate that this use of law was novel<sup>384</sup>, but in fact there have been many lawsuits where individuals have alleged that a food company is responsible for harms, both before and after *Pelman*.<sup>385</sup> Indeed, as Peck points out, fighting food companies is honoured tradition in American history, as the regulation of consumption has historical roots in the original Tea Party.<sup>386</sup>

One of the earliest examples of litigation against food companies was in the 1970s, when manufacturers were sued for targeting their advertising at children and thereby contributing to childhood obesity. In *Committee on Children's Television, Inc v General Foods*, the plaintiff alleged that General Foods was marketing “candy breakfast”, cereals that were upwards of 50% sugar by weight, as being nutritious and healthful.<sup>387</sup> McCabe notes that the case survived a motion to dismiss, but it is unknown whether or not the case ever went to trial as no court record is available, and the

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<sup>384</sup> *Ibid* at 139 (“negative public reaction to plaintiffs suing McDonald’s for making them fat gives the impression that the McDonald’s case is a novel use of law. It is not.”).

<sup>385</sup> Not considered in detail here is the infamous “McLibel” trial out of the United Kingdom in the 1990s (see note 41). It differs from cases examined here as it was initiated by McDonald’s against two environmental activists for a pamphlet they distributed about the company. While beyond the scope of this chapter, see Forell, *supra* note 41, who highlights how the trial was an unmitigated loss for the company, citing one lawyer who claimed that McDonald’s “turned a flea bite on [its] big toe into a postulating boil all over the body corporate”, at 125. She notes, “[i]nstead of being a legitimate libel case, many have viewed McLibel as an attempt by McDonald’s to use tort law for the less than legitimate purpose of intimidating and silencing its critics even when their criticism and attempts to unmask its use of situationism were justified.”

<sup>386</sup> Alison Peck, “Revisiting the Original “Tea Party”: The Historical Roots of Regulating Food Consumption in America” (2011-2012) 80 UMKC L Rev 1. Peck, at 4, points out: “opponents of modern food-consumer regulation misapprehend Revolutionary history when they claim that the Founding Fathers “never dreamed that anyone would someday attempt to strip the American people of the fundamental freedom to control what we eat and drink.”” Here she is referring to the CCF, *Declaration of Food Independence*, (2013), online: CCF, [https://www.consumerfreedom.com/downloads/Declaration\\_of\\_Food\\_Independence.pdf](https://www.consumerfreedom.com/downloads/Declaration_of_Food_Independence.pdf). She notes: “[i]n fact, the very controversies that led to the Revolutionary War demonstrate that colonists fully appreciated, and acted upon, the notion that private consumption decisions could have broad public consequences, and thus could be subject to public control.”

<sup>387</sup> 673 P 2d 660, 663 (Cal 1983) (en banc). Specifically, five cereals were targeted: AlphaBits, Honeycomb, Fruity Pebbles, Sugar Crisp, and Cocoa Pebbles.

plaintiff's lawyer, when asked, could not recall the outcome of the case.<sup>388</sup> There have been other suits. For example, McDonald's entered a \$12 million settlement for failing to inform consumers that its French fries had been cooked in beef fat.<sup>389</sup> An American snack food company, Big Daddy's Ice Cream and Pirate's Booty, paid \$8 million for misleading nutritional information.<sup>390</sup> Currently there is a large class action lawsuit against Coca-Cola for falsely advertising its product Vitaminwater.<sup>391</sup>

In 2002, Caesar Barber, represented by Samuel Hirsch – the lawyer that would represent the plaintiffs in *Pelman* – filed a class action suit against McDonald's, Burger King, KFC and Wendy's. Barber's claim alleged that the fast food companies were responsible for his health problems.<sup>392</sup> He stated that he was not aware that fast food products were unhealthy or would result in health problems. He not only sought compensatory damages from the fast food companies, he wanted the defendant companies to be required to label their food items and engage in educational programs for children.<sup>393</sup> Shortly after filing, Barber withdrew his suit. While many speculate as to

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<sup>388</sup> McCabe, *supra* note 271 at 141, n. 27. McCabe contends that the case is nevertheless important for understanding modern food liability litigation. She identifies three reasons, at 142: “1) it shows that marketing to children has been acceptable to government regulators since the 1970s, 2) it reveals that the industry was aware of consumer health concerns about sugar and fat since the 1970s, and 3) it demonstrates that despite the litigation, corporations did not curb the amount of highly processed foods developed and marketed to children.” She continues, at 142, “[i]f nothing else, the case illustrates that private plaintiffs have little power to change corporate behaviour—no matter how potentially harmful—without government intervention or the threat of it.”

<sup>389</sup> Laura Parker, “Legal Experts Predict New Rounds in Food Fight” (May 7, 2004) USA Today 3A.

<sup>390</sup> *Ibid.*

<sup>391</sup> *Batsheva et al v Coca-Cola*, 09 CV 395 (EDNY 2013). The court certified a class action against Coca-Cola for deceptive labelling and marketing of “vitaminwater” as an “alternative beverage to water and soft drinks that will assist consumers in maintaining healthy dietary practices”, at 2-3.

<sup>392</sup> *Barber v McDonald's Corp*, No. 23145/2002 (NY Sup Ct Brox County filed June 26, 2002), online: <http://news.findlaw.com/cnn/docs/mcdonalds/barbermcds72302cmp.pdf> .

<sup>393</sup> Rogers, *supra* note 361 at 871. For a more detailed discussion about Barber's suit, see Zefutie, *supra* note 13.

why, the most plausible theory is that after Hirsch found more sympathetic plaintiffs in the teenagers at the heart of the *Pelman* suit.<sup>394</sup>

In addition to actions brought before the courts, there have also been threats of lawsuits or legal action<sup>395</sup>, which has spurred some preemptive actions by food companies.<sup>396</sup> Famously, Stephen Joseph brought a lawsuit against Kraft, alleging that the popular Oreo cookies contained trans fat and thus were not suitable for human consumption.<sup>397</sup> Joseph withdrew his suit a few weeks later, declaring the suit a success, after he generated an enormous amount of favourable press.<sup>398</sup> As Pomeranz and colleagues observe, the threat of liability often acts as an incentive for industry to take

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<sup>394</sup> It is not entirely clear why Barber withdrew his suit, but several theories abound. Frank, *supra* note 46 at 434 suggests that it was withdrawn following a poor public reception, although Frank does not provide any evidence to suggest that it was so. Rogers, *ibid* at 860 contends that he withdrew his suit when “he count not rebut the rule of personal responsibility.” He bases his claim on an interview by John Banzhaff with CNN where Banzhaff identifies weaknesses with the suit, see at 871, note 93. Others note that Mr. Barber was simply a less sympathetic plaintiff than the teen plaintiffs in *Pelman*, see Meislik, *supra* note 377. This seems a more plausible explanation. Meislik notes, the new strategy was “to attract the sympathies of the court through a plaintiff who was a defenseless child, rather than an adult who arguably should have known fast food was bad for him”, at 793.

<sup>395</sup> For example, the Center for Science in the Public Interest has sent a letter to various ice cream producers threatening litigation if they did not add healthier options and provide nutritional information. See the letter at <http://cspinet.org/new/pdf/benandjerryssunileverletter.pdf>. See also Marguerite Higgins, “Lawyers Scream About Ice Cream” (July 25, 2003) Wash Time A1. Roller, Voorhees & Lunkenheimer refer to such efforts as “social crusader” lawsuits, *supra* note 348 at 441, where the “goal of which is not so much to win a judgment in court as it is to force changes in the food industry by the threat of expensive litigation and its attendant negative publicity”, *ibid*.

<sup>396</sup> Perhaps most famously, Kraft Foods removed trans-fats from Oreo cookies. For a discussion of these efforts, and others, see Ban Trans Fat, online: [www.bantransfats.com](http://www.bantransfats.com), specifically, [www.bantransfats.com/theoreocase.html](http://www.bantransfats.com/theoreocase.html). See also John F Banzhaf, “Obesity Litigation” (2010-2011) 7 JL Econ & Pol’y 249 at 255-256 for a discussion of these and other lawsuits (ten in total) he considers successful – note, not all are lawsuits, as some simply involved a threat of litigation. Frank disputes that lawsuits were necessary for some of these changes, noting that public relations alone could have had similar results, *supra* note at 432. That said, following *Pelman*, McDonald’s did reformulate its Chicken McNuggets – unlikely a coincidence, given that Justice Sweet referred to them as a “McFrankenstein” creation. See also Meislik, *supra* note 377 at 795, 799-801 and Forell, *supra* note 41 at 143-144.

<sup>397</sup> See discussion in Meislik, *supra* note 377 at 791-792.

<sup>398</sup> See Kim Severson, “S.F. Lawyer Plans to Drop Oreo Suit; All the National Publicity About Trans Fat Made His Point, He Says” (May 15, 2003) SF Chron A3. See Meislik, *supra* note 377 at 791-792 for an overview of the public response. Joseph also withdrew his suit on the basis that its legal premise disappeared, given that from the media response, the public was now aware that Oreos contained trans fat.

preventive actions.<sup>399</sup> The threat of litigation, in and of itself, may be sufficient to bring about changes that might benefit public health.<sup>400</sup> Many fast food companies attempted to rebrand themselves by altering their menus or advertising that they were part of a healthier diet.<sup>401</sup> As will be discussed next, this is what happened in *Pelman*.

#### 4.1. The McLawsuit: *Pelman v McDonald's*

In 2002, the parents of Jazlen Bradley and Ashley Pelman filed a class action lawsuit in the state of New York against McDonald's.<sup>402</sup> They were represented by the same lawyer as Barber, Samuel Hirsch. The suit was brought on behalf of all of the children in New York that ate at McDonald's. As might be expected, the suit was met with much criticism in the media.<sup>403</sup>

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<sup>399</sup> Pomeranz et al, *supra* note 264 at 198.

<sup>400</sup> Mello, *supra* note 264 at 511. (“There have been other attempts to use litigation as a strategy, not so much with the expectation that the plaintiffs will prevail regarding arguments that certain products are unreasonably dangerous or defective, as the law has traditionally understood those terms, but as an effort to embarrass companies and induce them to offer more healthful products, market products in more reasonable sizes, or curb how they market to children.”). See also Forrest Lee Andrews, “Small Bites: Obesity Lawsuits Prepare to Take on the Fast Food Industry” (2004-2005) 15 Alb LJ Sci & Tech 153 at 177 (“Even if intelligently mounted government action and lawsuits do not solve the obesity problem, at a minimum they can help change the climate of public opinion and pressure the fast food industry to change some of its ways.”) and Adams, *supra* note 46 at 310-311.

<sup>401</sup> See, for example: Pat Ives, “With Obesity on many Minds KFC Pushes a Theme That Its Fried Chicken Has a Place in a Healthy Diet” (Oct 28, 2003) NY Times C6; Sherri Day, “McDonald's Enlists Trainer to Help Sell Its New Meal” (Sept 16, 2003) NY Times 4C; and Laura Bradford, “Fat Foods: Back in Court: Novel Theories Revive the Case Against McDonald's—and Spur Other Big Food Firms to Slim Down Their Menus” (June 13, 2006) Times Online Edition, online: <http://content.time.com/time/magazine/article/0,9171,1005422,00.html>.

<sup>402</sup> *Pelman I*, *supra* note 9.

<sup>403</sup> See, for example: Chris Hart, “Americans Must Blame Themselves for Obesity” (April 8, 2004) Atlanta J- Const 6JJ (“The only people to blame for America's weight epidemic are Americans who lack the self-discipline to control their food intake. It is shameful that we as a society even tolerate these ridiculous and outrageous allegations.”); D Kelley, “Hitting the Jackpot by Absurd Means” (Sept. 12, 2003) Arkansas Democrat-Gazette 21 (“That a lawsuit so ridiculous could drag on for more than a year before being dismissed ... can hardly be viewed as comforting, especially for smaller businesses without the legal resources of a McDonald's Corp.”); and Buccholz, *supra* note 46. The media can sway public perceptions about the legitimacy of public health lawsuits, particularly if they trivialize the issue. See also discussion of media in *Pelman I*, *ibid* at note 5.

The original claim had five counts.<sup>404</sup> The first two counts concerned deceptive advertising. Count I alleged that McDonald's violated sections 349 and 350 of the *New York Consumer Protection from Deceptive Acts and Practices Act*<sup>405</sup>, which prohibit deceptive acts or practices and false advertising, respectively. Count II alleged that McDonald's specifically targeted children in their ads. Count III contended that McDonald's products were "inherently dangerous" due to high levels of salt, fat, sugar, and cholesterol. In the claim, this count was characterized under negligence. Count IV held that McDonald's had a duty to warn consumers about the potential health risks associated with the consumption of its products. Count V alleged that McDonald's was using addictive ingredients in its products.

McDonald's successfully moved to have the complaint dismissed.<sup>406</sup> Judge Sweet contended that all of the counts lacked specificity. For example, he found that the plaintiffs did not provide specific examples of false or misleading advertising.<sup>407</sup> Sweet J also did not accept the plaintiff's characterization of count III as a matter of negligence, opting instead to apply the strict liability scheme of the Restatement (Second) of Torts § 402A.<sup>408</sup> In particular, he relied on comment I of the Restatement, which reads: "[m]any

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<sup>404</sup> Given that the specific claims consider American law, they are not reviewed in detail here. Instead, the present consideration of *Pelman I* will focus on general principles. For a detailed overview of the original claims, see Jonathan Benloulou, "Pelman v. McDonald's: An In-depth Case Study of a Fast Food – Obesity Lawsuit" (Boston: Harvard University, 2005).

<sup>405</sup> 2006 New York Code, Article 22-A, (349 – 350-f-1).

<sup>406</sup> *Pelman I*, *supra* note 9.

<sup>407</sup> For example, Sweet J held that McDonald's claim that people should eat McDonald's was part of a balanced diet and could be eaten everyday did not include any health claims, and thus amounted to "mere puffery." Similarly, the claim failed to identify examples of deceptive ads aimed at children. For example, Justice Sweet examined the "Mightier Kids Meal" and found it to be an example of puffery, and not a claim that children who ate the meal would become mightier, *Pelman I*, *supra* note 9 at 528.

<sup>408</sup> American Law Institute, *Restatement (Second) of Torts* (Washington, DC: American Law Institute, 1977) at §402A.

products cannot be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption.”<sup>409</sup> Judge Sweet concluded that food products that caused harms only when consumed to excess were not unreasonably dangerous.<sup>410</sup> Moreover, he asserted that the health effects of overconsumption, particularly overconsumption of fast food, were generally known to consumers.<sup>411</sup>

For this reason, Sweet J also did not think McDonald’s owed a duty to warn about the dangers of its foods, as Count IV asserted, contending that the dangers in McDonald’s products were open and obvious.<sup>412</sup> Additionally, he held that the plaintiffs did not demonstrate any causal connection between McDonald’s failure to warn and their poor health given that they failed to establish that McDonald’s products had contributed to their obesity. Finally, while intrigued by the claim that McDonald’s used addictive ingredients, Judge Sweet nevertheless dismissed Count V because the plaintiffs failed to

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<sup>409</sup> *Ibid.* The inclusion of this comment without more explanation is problematic. For one, it is not clear what constitutes “over consumption”. Undoubtedly, most would assume that overconsumption means excessive consumption, but this will be very dependent on the product. Small quantities of some products could constitute overconsumption, but it is very likely that the manufacturers of these products would assert that such consumption was ‘normal’ or ‘reasonable’. It cannot be both. (On overconsumption, see Shelley, “Addressing the Policy Cacophony”, *supra* note 29). Second, even if it were to be accepted that there is always some risk from overconsumption, comment I is referring to the over consumption of *one* product, and not the overconsumption that results because of the consumption of many different products in concert. To put another way, a consumer faces additionally – and likely unknown – risk of overconsumption when it consumes Product A and Product B in close succession, given that both have high levels of added sugars. Product A could be an obvious one, such as a sugar-sweetened beverage, but Product B may be something more innocuous, such as bread, salad dressing, or a “fruit” bar. See discussions about Product, Process and Profile in Chapter 5.

<sup>410</sup> Sweet J does not define excess. However, he does cite the following when discussion excess, “[g]ood tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful”, *Pelman I, supra* note 9 at 530, citing from §402A, *ibid.* Of course, this claim is divisive. There may be some explanation, however, for its inclusion here, see below at note 1056. Sweet J points out “it is not the place of the law to protect [the plaintiffs] from their own excesses”, and that “[n]obody is forced to eat at McDonald’s”, *Pelman I, ibid* at 533.

<sup>411</sup> The accuracy of Sweet J’s position is not being discussed here, but will be taken up again in Part II.

<sup>412</sup> *Ibid* at 541.



identify specific ingredients that were in fact addictive. In addition, the suit was dismissed because the plaintiffs did not submit sufficient information about their eating behaviour, exercise habits, genetics, and so forth, to clearly establish McDonald's role.<sup>413</sup> As Mason points out, the suit failed because the plaintiffs failed to state cognizable claims.<sup>414</sup>

Despite dismissing the suit, Sweet J granted the plaintiffs leave to file an amended claim. In a "highly unusual move"<sup>415</sup>, the court actually identified two plausible theories of recovery that the plaintiffs could file. Judge Sweet told the plaintiffs that they could allege either that McDonald's foods were so unhealthy that they would fall outside of the reasonable expectations of consumers, for example by being highly processed, or so unhealthy that they would be dangerous in their intended use. Speaking to the first, Sweet J observed, "[i]f plaintiffs were able to flesh out this argument in an amended complaint, it may establish that the dangers of McDonald's products were not commonly well known and thus that McDonald's had a duty to customers."<sup>416</sup> He even listed the ingredients found in Chicken McNuggets™, which he described as a "McFrankenstein" creation that an individual would not recreate in their home kitchen<sup>417</sup>, as an example. He observed: "[i]t is at least a question of fact as to whether a reasonable consumer would

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<sup>413</sup> *Ibid* at 539-540.

<sup>414</sup> Caleb E Mason, "Doctrinal Considerations for Fast-food Obesity Suits" (2004-2005) 40 Tort Trial & Ins Prac LJ 75 at 79.

<sup>415</sup> It is commonly asserted that Sweet J essentially laid out a "roadmap" for the amended claim. See Meislik, *supra* note 377 at 793; Salzmann, *supra* note 36 at 1052 ("a highly unusual move"); and Andrews, *supra* note 400 at 175 ("the *Pelman* opinion set forth the framework for a potentially successful claim").

<sup>416</sup> *Pelman I*, *supra* note 9 at 536.

<sup>417</sup> *Pelman I*, *supra* note 9 at 535, noting, "[i]t is at least a question of fact as to whether a reasonable consumer would know without recourse to the McDonalds' website that a Chicken McNugget contained so many ingredients other than chicken and provided twice the fat of a hamburger."

know – without recourse to the McDonalds’ (sic) website – that a Chicken McNugget contained so many ingredients other than chicken and provided twice the fat of a hamburger.”<sup>418</sup>

The plaintiffs filed an amended complaint on February 19, 2003.<sup>419</sup> McDonald’s once again filed a motion to dismiss. The court again granted the dismissal, but this time did not permit the plaintiffs an opportunity to refile. The amended complaint was considerably narrower. It had only three counts, all of which focused on New York’s *Consumer Protection Act*. It did not follow Judge Sweet’s direction. As many commentators point out, it is inexplicable why the amended complaint did not heed Judge Sweet’s recommendations.<sup>420</sup> Indeed, Sweet J himself observed that he had “laid out in some detail the elements that a properly pleaded complaint would need to contain”<sup>421</sup> and that the plaintiffs had simply failed to follow his guidance.

In January 2005, the Second Circuit Court of Appeals surprised many by vacating the dismissal of the case.<sup>422</sup> It remanded the case only for the purpose of considering the plaintiffs’ claims about deceptive advertising. This was not a resounding victory or loss for either side, as the court only reversed the dismissal on the grounds that the amended complaint set out the minimal requirements. The court denied McDonald’s motion to dismiss the case. This seemed to reinvigorate the discussion about the possibilities for

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<sup>418</sup> *Pelman I*, *supra* note 9 at 535.

<sup>419</sup> *Pelman II*, *supra* note 10.

<sup>420</sup> Mason, *supra* note 414 at 81. See also Mello, Rimm & Studdert, *supra* note 11 at 208 (noting Sweet J’s decision “included an astonishingly detailed commentary on the strengths and weaknesses of the various claims made, including pointed suggestions for evidence that would make for a stronger case against McDonald’s.”); and Werner, Feinstein & Hardigree, *supra* note 46 at 203 (“Commentators have been unable to discern a rationale for the plaintiffs’ failure to replead the *Pelman* case as the judge suggested”).

<sup>421</sup> *Pelman II*, *supra* note 10 at 3.

<sup>422</sup> *Pelman III*, *supra* note 10.

fast-food litigation, particularly the hope that discovery would reveal McDonald's nefarious actions. However, the trial "ended with a whimper"<sup>423</sup> when the court refused to certify the class action in 2010.<sup>424</sup> In 2011, the plaintiffs voluntarily dismissed their suit.<sup>425</sup>

While the plaintiffs lost the case, many note that this does not represent a loss for public health. For one, it is observed that *Pelman* suffered from weak lawyering. As Mason points out, "[t]he dismissal of *Pelman* is not evidence of the weakness of fast-food plaintiffs' legal arguments, because the plaintiffs, obviously and inexplicably, failed to make the appropriate arguments."<sup>426</sup> Moreover, the court's willingness to hear the case in the first place indicated that the American federal courts do not consider fast-food litigation to be frivolous.<sup>427</sup> McDonald's won the suit, but as Andrews points out, it was ultimately a hollow victory.<sup>428</sup> Or, as Adams suggests, it was "one of the most successful

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<sup>423</sup> Forell, *supra* note 41 at 146.

<sup>424</sup> *Pelman v McDonald's Corp*, 02 Civ. 07821 (DCP) (SDNY 2010) [*Pelman V*] ("the court finds that the questions of law and fact which would be common to putative class members would not predominate over questions affective only individual members", at 2). The court here provides a good overview of the procedural history of *Pelman I*, *supra* note 9.

<sup>425</sup> *Pelman v McDonald's Corp*, No 02-7821, 2011 WL 1230712 (SDNY 2011) [*Pelman VI*]. See Gary Long, Greg Fowler & Simon Castley, "Obesity Lawsuit Against McDonald's Concludes" (March 3, 2011) Lexology, online: Lexology, <http://www.lexology.com/library/detail.aspx?g=6b70ec3f-504a-4563-b1bb-b675d8b00466>.

<sup>426</sup> Mason, *supra* note 414 at 79. He contends, "[t]he dismissal order may be read ... as an invitation to future, properly pleaded, actions", *ibid*. Novack, *supra* note 11 at 1327 asserts that a key to success will also be "good" plaintiffs. She notes, "[t]obacco suits found success when class actions were filed and when second-hand smokers, those with no personal responsibility issues at all, filed suits. Fast-food suits will have much greater success when they become class action suits or when blameless plaintiffs are found." Antler, *supra* note 11 at 277 argues that *Pelman* would have had better success if it focused on poor urban minority youth: "... if the *Pelman* complaint had been framed differently, to highlight the relationship between obesity, race, and socioeconomic status, the lawsuit may have been a powerful vehicle to reframe the issue of obesity as it affects low-income urban minority youth." Cf Buccholz, *supra* note 46 at 48-49, arguing that college-educated people, not the poor, have accounted for most rapid increase in obesity prevalence.

<sup>427</sup> Andrews, *supra* note 400 at 175.

<sup>428</sup> *Ibid*. See *ibid* at n 166, "hollow" from Editorial, Mickey D's Hollow Victory, NY Post Jan 23, 203 at 28. For the reaction of McDonald's to the suit, see Ellen Sorokin, "McDonald's Marketing Cited for

suits that ever failed.”<sup>429</sup>

Perhaps the most interesting response to *Pelman* came from the government. Undoubtedly with pressure from the industry, the federal government in the United States moved to ban any future litigation against fast food companies, unless the plaintiff could prove that “at the time of sale, the product was not in compliance with applicable statutory and regulatory requirements.”<sup>430</sup> Deemed the “Cheeseburger Bill”, it effectively shifted responsibility away from food manufacturers and onto the government and consumers. The bill’s preamble indicated that its purpose was to prevent civil litigation from usurping legislative and regulatory functions.<sup>431</sup> However, the underlying motivation is revealed in section 2, which claims: “fostering a culture of acceptance of personal responsibility is one of the most important ways to promote a healthier society.”<sup>432</sup> The Cheeseburger Bill has been both praised and criticized<sup>433</sup>—it has also

Teen’ Obesity: Fast-Food Giant Calls Suit ‘Frivolous’” (Sept 10, 2002) Wash Times A03.

<sup>429</sup> Adams, *supra* note 46 at 311, citing Michael F Jacobson, “Pro and Con: Obesity Lawsuits: Don’t Let Restaurants Off the Hook” (April 4, 2004) Milwaukee Journal Sentinel 5J. Cf Roller, Voorhees & Lunkenheimer, *supra* note 348 at 443, who, with full knowledge of the decision in *Pelman*, contend that they know of no “noteworthy losses in court rulings” against the food industry and that “the recent surge of filed and threatened lawsuits, viewed as a whole, does not appear to back up the broad claims of their proponents, amplified by the mass media, that these lawsuits are the vanguard of progressive action to combat obesity and improve public health.”

<sup>430</sup> *Personal Responsibility in Food Consumption Act of 2005*, HR 554, 109<sup>th</sup> Congress (2005). Some commentators contend that this legislation will not be successful, see McCabe, *supra* note 271 at 156. The bill’s author, former congressman Rick Heller, was from a district deemed “a fast food haven that maxed out on PAC contributions from various fast food companies like McDonald’s, Wendy’s and KFC”, Banzhaf, *supra* note 396 at 250.

<sup>431</sup> It reads, *ibid*: “To prevent legislative and regulatory functions from being usurped by civil liability actions brought or continued against food manufacturers, marketers, distributors, advertisers, sellers, and trade associations for claims of injury relating to a person’s weight gain, obesity, or any health condition associated with weight gain or obesity.”

<sup>432</sup> §2(4). In this respect, this bill, and others like it, are explicitly about preventing what are thought to be frivolous lawsuits. For example, Colorado’s Governor, Bill Owens, stated that the passage of Colorado’s *Commonsense Consumption Act*, Colo Rev Stat §13-21-1102 (West 2012) was a “preemptive measure that defends a key industry from frivolous lawsuits”, as cited in Norah Leary Jones, “The Illinois Commonsense Consumption Act: End of the Road for Fast Food Litigation?” (2004-2005) 36 Loy U Chi LJ 983 at 1022, n. 319.

been emulated, with states enacting similar legislation.<sup>434</sup> Smith contends that these laws “represent industry capture at its full extent.”<sup>435</sup> As has been observed, the food industry would rather contend with legislatures than courts.<sup>436</sup>

Since *Pelman*, there have been other suits, but hardly the avalanche of McLawsuits predicted by commentators. For example, in 2010, Monet Parham sued McDonald’s seeking to prevent it from including toys in its Happy Meals™.<sup>437</sup> The case was dismissed, with no opportunity given to file an amended claim.<sup>438</sup> Several of the suits discussed in the previous section also followed *Pelman*.<sup>439</sup> In large part, the dearth of

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<sup>433</sup> See, for example, Frank, *supra* note 46 at 440, who suggests “[p]rotection of a single industry against a single set of ludicrous legal theories is a worthy goal.” Others consider it to be “an exercise in special-interest pandering”, “Political Hot-Dogging in the House” (March 12, 2004) NY Times 20A. See discussion in David Burnett, “Fast-food Lawsuits and the Cheeseburger Bill: Critiquing Congress’s Response to the Obesity Epidemic” (2006-2007) 14 Va J Soc Pol’y & L 357. Perhaps the most interesting characterization of the Cheeseburger Bill is that it is tantamount to “frivolous legislation”, *ibid*, at 407.

<sup>434</sup> Between 2004 and 2014, 25 states enacted this type of legislation, see Cara L Wilking & Richard A Daynard, “Beyond Cheeseburgers: The Impact of Commonsense Consumption Acts on Future Obesity-related Lawsuits” (2013) 68:3 Food & Drug LJ 229 at 230. For a detailed discussion of one such instance, see Jones, *supra* note 432, who argues that the *Act* does not preclude all obesity litigation, and provides a blueprint for fast food litigation.

<sup>435</sup> Smith, *supra* note 15 at 454. He asserts “[t]he bills are intended to protect the industry, to reinforce a discourse focused on personal responsibility, and to shape the public landscape such that effective public health policy is no longer possible”, *ibid*. He illustrates his point through a discussion of proposed legislation in Arkansas, which shielded industry from lawsuit but also mandated that chain restaurants needed to provide menu labelling in order to benefit from that shield, that the National Restaurant Association ultimately opposed. As he notes, “[t]he industry’s goal is not to foster personal responsibility nor to protect consumers from paternalism by the public health community. Its goal is to avoid regulation and state intervention”, at 455. For more on industry capture, see Chapter 3. See also the discussion in Adams, *supra* note 46 at 310.

<sup>436</sup> Meislik, *supra* note 377 at 796. Some commentators have even proposed model legislation to ensure a “heightened pleading standard” for plaintiffs to avoid an “avalanche of frivolous lawsuits, see Amy J Vroom, “Fast Food or Fat Food: Food Manufacturer Liability for Obesity” (2005) 71:1 Defense Counsel Journal 56 at 64.

<sup>437</sup> She was supported by the Center for Science in the Public Interest. See CSPI, “Class Action Lawsuit Targets McDonald’s Use of Toys to Market to Children” (Dec. 15, 2010), online: CSPI, <https://cspinet.org/new/201012151.html>.

<sup>438</sup> *Parham v McDonald’s Corp*, No C 11-511 MMC, 2011 WL 2860095 at \*2 (ND Cal, July 20, 2011). See “Update 1-Judge tosses Happy Meal lawsuit against McDonald’s” (April 4, 2012) Reuters, online: Reuters, <http://www.reuters.com/article/mcdonalds-lawsuit-idUSL2E8F4CX920120404>.

<sup>439</sup> See Roller, Voorhees & Lunkenheimer, *supra* note 348 at 430ff for a discussion of other lawsuits in the United States that have been brought against food companies.

lawsuits against the food industry is understandable, given the aforementioned legislative attempts to prevent such lawsuits. Nevertheless, *Pelman* and, arguably, the Cheeseburger Bill, did help to bring obesity to the public's attention.<sup>440</sup> Although the rhetoric of "personal responsibility" remains engrained, and the food industry still wields considerable control over how the debate around obesity is framed, even subtle shifts in public opinion are not without consequence. Arguably, it took a shift in public opinion before the failed efforts of tobacco litigants changed and plaintiffs saw any measure of success.<sup>441</sup> This is a point that has not been lost on observers of obesity litigation. Indeed, many consider obesity to be the new tobacco, and likely to follow a same trajectory. This is the focus of the next part.

## 5. OBESITY AS THE NEXT TOBACCO?

The starting point for discussing obesity control, particularly obesity litigation, is often tobacco control.<sup>442</sup> Many have questioned whether obesity is the next tobacco.<sup>443</sup>

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<sup>440</sup> Burnett, *supra* note 433 at 408-410, for example, notes that the cheeseburger bills did act, in a limited way, as a stimulus for some governmental responses to the obesity epidemic.

<sup>441</sup> See Mello, Rimm & Studdert, *supra* note 11 at 213, who note: "[a] single case is unlikely to change many consumers' minds about fast food, but like class-action litigation in other spheres, successive waves of litigation over time could bring new facts to light that turn consumers off this industry." They further note, "the litigation may well serve as a catalyst for attitudinal change about obesity and appropriate policy responses", at 214. While they recognize the risk that a negative public response to obesity litigation could reinforce existing attitudes concerning personal responsibility and frivolous lawsuits, they do not consider this the likely outcome, *ibid.*

<sup>442</sup> There is an argument that obesity litigation should look to asbestos litigation, given that both are about exposure to risk. However, given that tobacco is the more common comparator, is more relevant for warnings, and, like obesity, is thought of as a lifestyle disease (whereas asbestos would be an occupational hazard or disease), this project has focused on tobacco litigation. Future work could examine in more detail the lessons to be drawn from asbestos litigation. Obesity litigation is not unique in looking to tobacco, as others have considered the implication of tobacco litigation for other industries as well. See: RF Cochran, "From Cigarettes to Alcohol: The Next Step in Hedonic Product Liability" (2000) 27 *Pepp L Rev* 701; and, A Lipanovich, "Smoke Before Oil: Modeling a Suit Against the Auto and Oil Industry on the Tobacco Tort Litigation is Feasible" (2005) 35 *Golden Gate L Rev* 429.



There are valid reasons for the comparison, as there are similarities between tobacco and obesity. Both are devastating global public health problems of epidemic proportions.<sup>444</sup>

They are both associated with chronic disease and reduced life expectancy<sup>445</sup>, and as a result, take a huge toll on the health care system.<sup>446</sup> They both have significant societal<sup>447</sup> and economic impacts.<sup>448</sup> Importantly, both tobacco and obesity are classified by many as “lifestyle diseases”, and often involve discussions about “personal responsibility.”<sup>449</sup>

<sup>443</sup> For a good review, see Brownell & Warner, *supra* note 361. See also: Rebecca Coombes, “The New Tobacco?” (2004) 328 *British Medical Journal* 1572; Joanna Blythman, “The New Tobacco” (2004) 34:9 *The Ecologist* 17; Lee J Munger, “Is Ronald McDonald the Next Joe Camel? Regulating Fast Food Advertisements Targeting Children in Light of the American Overweight and Obesity Epidemic” (2004) 3 *Conn Pub Intl LJ* 456; McMenamin & Tiglio, *supra* note 11; Sarah Avery, “Is Big Fat the Next Big Tobacco?” (August 18, 2002) *News & Observer*; Courtney, *supra* note 13; Goldman, *supra* note 361; and, Shelley Branch, “Obese America: Is Food the Next Tobacco” (June 13, 2003) *Wall St J B1*.

<sup>444</sup> Although beyond the scope of our present discussion, some contest the use of “epidemic” in the context of obesity. See, for example, Epstein, “What (Not) to do About Obesity”, *supra* note 363 at 1368 (“The constant use of the term ‘epidemic’ does more to inflame than inform. Whatever the problems with obesity, it is not a communicable disease, with the fears and pandemonium that real epidemics let loose in their wake.”).

<sup>445</sup> For tobacco see: EM Makromask-Illing & MJ Kaiserman, “Mortality Attributable to Tobacco Use in Canada and its Regions, 1994 and 1996” (1999) 20:3 *Chron Dis Can* 111; and Statistics Canada, “Table 102-0552 - Deaths and mortality rate, by selected grouped causes and sex, Canada, provinces and territories, annual” (2007), CANSIM, online: CANSIM, f <http://www5.statcan.gc.ca/cansim/a05?lang=eng&id=1020552>. For obesity see: Katzmarzyk & Ardem, *supra* note 248.

<sup>446</sup> For tobacco see: Mahta Norouzi, *Estimating Smoking Attributable Health Care Costs using the Canadian Community Health Survey (2012)*, (Ottawa: University of Ottawa, 2014). For obesity see: AH Anis et al, “Obesity and Overweight in Canada: An Updated Cost-of-Illness Study” (2010) 11:1 *Obesity Reviews* 31.

<sup>447</sup> Perhaps the most pernicious social impact is the stigma, bias and discrimination that obese people face. See, for example, Ximena Ramos Salas, Mary Forhan & Arya M Sharma, “Diffusing Obesity Myths” (2014) 4:3 *Obesity Reviews* 189, and Mary Forhan & Ximena Ramos Salas, “Inequities in Healthcare: A Review of Bias and Discrimination in Obesity Treatment” (2013) 37:3 *Canadian Journal of Diabetes* 205.

<sup>448</sup> For tobacco see J Rehm et al, *The Costs of Substance Abuse in Canada 2002* (Ottawa: Canadian Centre on Substance Abuse, 2006). For obesity see: PHAC, *Obesity in Canada – Health and Economic Implications*, (Ottawa: Public Health Agency of Canada, 2011), online: <http://www.phac-aspc.gc.ca/hp-ps/hl-mvs/oic-oac/econo-eng.php>, and Katzmarzyk & Janssen, *supra* note 248.

<sup>449</sup> For example, Ausness, *supra* note 11 at 844 contends that obesity litigation “undermines the principle of autonomy and personal responsibility and reinforces the culture of blame that is spreading throughout our society” (with additional comments at 887-889). Much like smoking, obesity is deemed a “lifestyle disease”. See Epstein, “Let the Shoemaker Stick to his Last”, *supra* note 117; Richard A Epstein, “In Defense of the ‘Old’ Public Health: The Legal Framework for the Regulation of Public Health” (2003-2004) 69 *Brook L Rev* 1421; and Hall, *supra* note 152. Cf Lawrence O Gostin & M Gregg Bloche, “The Politics of Public Health: A Response to Epstein” (2003) 46:3(Supp) *Perspectives in Biology and Medicine*



While this is a sentiment common among the public, it stems in large part from the framing of the problem by their respective industries.<sup>450</sup> Indeed, in responding to their role in the health consequences associated with tobacco and obesity, the tobacco and food industry also share many similarities.<sup>451</sup> They both emphasize consumer choice<sup>452</sup>, tend to deemphasize their role by pointing to other “factors” (e.g., genetics<sup>453</sup>), and they routinely undermine and question any science implicating them<sup>454</sup> while simultaneously funding

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S160. In *Pelman I*, *supra* note 9 at 516, Justice Sweet noted that a line needed to be drawn “between an individual’s own responsibility to care of herself, and society’s responsibility to ensure that others shield” that person. Sweet J also observes that the law cannot protect people from their own excesses, as dictated by a consumer’s free will. However, “when that free choice becomes but a chimera”, at 522, then manufacturers should be held liable.

<sup>450</sup> See Nathanson, *supra* note 58 and Kersh & Moronoe, *supra* note 58.

<sup>451</sup> See, for example, Brownell & Warner, *supra* note 361. For a succinct comparison of the two industries, see Joshua Logan Pennel, “Big Food’s Trip Down Tobacco Road: What Tobacco’s Past can Indicate About Food’s Future” (2008-2009) 27 *Buff Pub Int LJ* 101 at 107-112.

<sup>452</sup> Both industries commonly state that consumers freely choose to use their products. See, for example, CCF, “A New Threat to Personal Choice” (Washington, DC: CCF, 2012), online: CCF <https://www.consumerfreedom.com/2012/10/a-new-threat-to-personal-choice/>. However, some contest this idea. See Smith, *supra* note 15 at 446, where he notes, “... the food industry has the interest and resources necessary to reinforce a dispositionist conception of human behavior. This is the “personal responsibility” argument. ... This reinforcement of dispositionism hopes to take advantage of a peculiar facet of human behavior: the fundamental attribution error. In simple terms, human beings tend to deemphasize situations and instead attribute behavior to a person’s disposition, or autonomy.” He argues further in *ibid*, note 29: “human beings see people’s actions as a result of their free choices, free will, or “disposition.”” Forell, *supra* note 41 at 107-111 talks about “situationism”, which “challenges the dominant conceptions that human behavior results mainly from free will and internal disposition, with minimal impact from outside influences.” See also Antler, *supra* note 11 at 280.

<sup>453</sup> Note, the study into genetics is not necessarily part of a strategy to avoid liability. For example, a better understanding of the genetic aspects of dependence on tobacco can have significant policy implications, see, for example, W Hall, P Madden & M Lynskey, “The Genetics of Tobacco Use: Methods, Findings and Policy Implications” (2002) 11 *Tobacco Control* 119.

<sup>454</sup> Tobacco companies have aggressively pursued this avenue, attempting to refute any scientific links between tobacco use and disease. It is a tactic that not only proved to be successful but one that has been emulated by other industries, such as fast food and convenience food companies. See Friedman, Daynard & Banthin, *supra* note 358, and Baba et al, *supra* note 358. Recently, another tactic perfected by the tobacco industry was employed by the plastics industry, who, in response to decreased use of plastic bags at grocery stores, commissioned a study to demonstrate the reusable grocery bags may pose a public health threat. Rather than undermine research showing the harms associated with the use of plastic bags, they utilized “scientific” findings to support their case. See: Environment and Plastics Industry Council, *A Microbiological Study of Reusable Bags and ‘First or Single-use’ Plastic Bags* (Toronto: Environment and Plastics Industry Council, 2009). The study concluded not only that reusable bags can become an active microbial habitat but that they could “pose a significant risk to the safety of the food supply if used to transport food from store to home” (*ibid*. at 7) and that “the drafting of protocols on the hygienic use of

research to provide a counter-narrative.<sup>455</sup> Additionally, similar to tobacco companies, the control over the food market largely resides with only a few multinational companies.<sup>456</sup> For these reasons and more, many observe that the obesity control movement can learn from the experience of using law in tobacco control.<sup>457</sup> It is deemed especially so when it comes to litigation.

Thus, when discussing obesity litigation, it is inevitable to draw comparisons with tobacco litigation.<sup>458</sup> It is far beyond the scope of this thesis to review the history of tobacco litigation. Thankfully, tobacco litigation has been widely documented and scrutinized. Often, such discussions employ the language of “war” or of “battle”.<sup>459</sup>

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reusables should be considered a public health policy priority” (*ibid.*). Tobacco companies are notorious for sponsoring scientific studies to discredit public health research. Of course, some argue that those opposed to fast food will “obscure or belittle” factors that are not controlled by industry, and exaggerate those that industry does control. See, for example, McMenamín & Tiglio, *supra* note 11 at 455.

<sup>455</sup> See, for example, Nestle, *Food Politics*, *supra* note 59. See discussion in *Létourneau v JTI-MacDonald*, *supra* note 68. See discussion in Jacob J Shelley, “A Future for Obesity Litigation in Canada? A Reflection on the Duty to Warn After *Létourneau*” (2016) *McGill Journal of Health Law & Policy*, *forthcoming* [Shelley, “A Future of Obesity Litigation in Canada?”].

<sup>456</sup> This is an important point. Some critics of obesity litigation point out that there are only a few tobacco companies responsible for tobacco use. See, for example McMenamín & Tiglio, *supra* note 11 at 447 (“There is only a handful of companies, most quite large, that controls most of the tobacco business in America, and indeed in much of the rest of the world.”). Despite common perceptions, there are relatively few food manufacturers relative to the number of products on the market.

<sup>457</sup> See Daynard, “Lessons from Tobacco Control for the Obesity Control Movement”, *supra* note 361.

<sup>458</sup> Alderman & Daynard, *supra* note 13; RA Daynard, LE Hash & A Robbins, “Food Litigation: Lessons from the Tobacco Wars” (2002) 299 *Journal of the American Medical Association* 2179. Courts have also made comparisons, see for example, *Lorillard Tobacco Co v Reilly*, 533 US 525 (2001) (when assessing a state regulation prohibiting tobacco ads within 1000 feet of a school or playground it commented on the dangers that fast food advertising had on children). See also Andrew M Dansicker, “The Next Big Thing for Litigators” (2004) 37 MD BJ 12 and Franklin E Crawford, “Fit For Its Ordinary Purpose? Tobacco, Fast Food, and the Implied Warranty of Merchantability” (2002) 63 *Ohio St LJ* 1165 at 1169 (“The history of tobacco litigation is the future of the fast food industry.”). Some caution that tobacco litigation may prove to be a detrimental analogy, see Salzmann, *supra* note 36 at 1064-1065, pointing out that the industry can also learn from the lessons of tobacco litigation.

<sup>459</sup> See, for example, Rob Cunningham, *Smoke & Mirrors: The Canadian Tobacco War* (Ottawa: International Development Research Centre, 1996); SA Glants & ED Ballach, *Tobacco War: Inside the California Battles* (Berkeley: University of California Press, 2000); Lawrence O Gostin, “The “Tobacco Wars”—Global Litigation Strategies” (2007) 298 *Journal of the American Medical Association* 2537; and Helene M Cole & Michael C Fiore, “The War Against Tobacco: 50 Years and Counting” (2014) 311

This is because tobacco litigation has had a very long and contentious history, which began in the 1950s in the United States and lasted for decades.<sup>460</sup> Wave after wave of litigation (three distinct waves of litigation are often identified<sup>461</sup>) failed to hold tobacco companies responsible for harms that resulted from tobacco use. While there are a variety of reasons for this failure – including that many of the early cases were decided by juries<sup>462</sup>, but also because a result of some poor strategy choices by plaintiffs<sup>463</sup> – an

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Journal of the American Medical Association 131. This has continued in discussions about obesity litigation. See, for example, Ximena Ramos Salas, “The Ineffectiveness and Unintended Consequences of the Public Health War on Obesity” (2015) 106 *Canadian Journal of Public Health* e79; Bogart, “Law as a Tool”, *supra* note 70; Daynard, Hash & Robbins, *supra* note 458; Zefutie, *supra* note 13; and McCabe, *supra* note 271. This language also permeates discussions about obesity litigation. For example, consider some of the phrases used by Zefutie, *ibid*: “this new era of attacking unpopular industries” at 1383; “[f]ast food companies are the latest targets of plaintiffs’ attorneys...” at 1384; “fast food has become the next target of the plaintiff’s bar” at 1397; and “the resolve of the plaintiffs’ bar to attack industries that injure American consumers” at 1415. This type of language is not neutral, but suggests nefarious or unjustified intentions. Zefutie suggests as much, noting that in addition to regulating tobacco companies, “the monetary rewards that accompanied settlement encouraged plaintiffs’ attorneys to initiate similar actions against other industries”, at 1397. In other words, obesity litigation is motivated by a greedy plaintiffs’ bar, towing the lines of tort critiques like Olson, see note 36. See also, Alex Beam, “Greed on Trial” (2004) *The Atlantic*, online: *The Atlantic*, <http://www.theatlantic.com/magazine/archive/2004/06/greed-on-trial/302957/>. Rather than turning to fast food companies on principled grounds, Zefutie contends that it was because “[o]ne of the overarching questions the Big Tobacco battle left open was; Who was next?”, *ibid* at 1397.

<sup>460</sup> The tobacco industry successfully defended itself against 813 private claims between 1954 and 1994, Charles Joseph Harris, “State Tobacco Settlements: A Windfall of Problems” (2001) 17 *JL & Pol’y* 167. Lipson identifies 1800 lawsuits against tobacco companies, see Jonathan C Lipson, “Fighting Fiction with Fiction – The New Federalism In (A Tobacco Company) Bankruptcy (2000) 78 *Wash U LQ* 1271. Litigation would appear to be on the rise since the Master Settlement Agreement following the Medicaid suits in the US. For example, examining the litigation statistics for RJR from 1994 to 2001, Patel observes: “30 cases were pending against RJR in October 1994. This was followed by 89 total cases pending a year later. Then in 1996, litigation climbed to 277 cases pending against RJR. Less than one year after the MSA, this number jumped to 620 cases pending in June 1999. This number dipped momentarily to 535 cases pending against RJR in 2000, but rebounded to 1,680 total cases pending in June 2001”, Patel, *supra* note 291 at 653.

<sup>461</sup> See, for example, Rabin, “The Third Wave of Tobacco Tort Litigation”, *supra* note 350 and Smith, *supra* note 279.

<sup>462</sup> Vandall notes, “juries adopted the theory of assumption of risk: that the consumer knew the risk and voluntarily began to smoke and voluntarily continued to smoke”, Frank J Vandall, “The Legal theory and the Visionaries that led to the Proposed \$368.5 Billion Tobacco Settlement” (1997-1998) 27 *Sw UL Rev* 473 at 477. Critically, juries are rarely used in civil trials in Canada, see WA Bogart, ““Guardian of Civil Rights ... Medieval Relic”: The Civil Jury in Canada” (1999) 62 *L & Contemp Probs* 305.

<sup>463</sup> More often than not, plaintiffs were alleging harm from the proper use of cigarettes, and not because of a harm or defect. It was thus easy for juries to dismiss such actions, asserting that the plaintiff

important reason for the tobacco industry's success was the scorched earth strategy adopted by tobacco manufacturers whereby they forced plaintiffs "to spend all of their assets."<sup>464</sup> It is believed that tobacco companies spent hundreds of millions of dollars to defend against actions, thus outspending their opponents.<sup>465</sup> It was a strategy that worked, by and large<sup>466</sup>, until the State of Mississippi brought a lawsuit against tobacco companies for the health care costs associated with tobacco use. Forty other states elected to participate in the lawsuit, and it resulted in the Master Settlement Agreement.<sup>467</sup>

Tobacco litigation is looked to as a guide for obesity litigation in large part due to the success tobacco litigation has had as part of a broader tobacco control strategy.

Although tobacco litigation was initially unsuccessful<sup>468</sup>, it nevertheless forced legislators

ought to have known about the risks of tobacco use. This sentiment was important in *Battaglia v Imperial Tobacco*, [2001] OJ No 5541 (ON Sup Ct J), where the court held that the plaintiff's preexisting knowledge prevented them from suing Imperial Tobacco for failing to warn consumers about the dangers while deeply inhaling while smoking. See discussion about obviousness of dangers in Chapter 6.

<sup>464</sup> Vandall, *supra* note 462 at 475.

<sup>465</sup> Some have noted that the primary strategy of tobacco companies was to outspend plaintiffs, with little regard to the persuasiveness of the particular legal principle being argued. See Eric LeGresley, *Recovering Tobacco-Caused Public Expenditures from the Tobacco Industry: Options for Provincial Government* (Ottawa: Non-Smokers' Rights Association, 1998), online: Non-Smokers' Rights Association, [http://www.nsra-adnf.ca/cms/index.cfm?group\\_id=1300](http://www.nsra-adnf.ca/cms/index.cfm?group_id=1300). *Cipollone v Liggett Group*, 505 US 504 (1992) is a telling example, as the attorneys for Rose Cipollone spent \$6 million over nine year before deciding to abandon the case due to uncertain future costs. See Raymond E Gangarosa, Frank J Vandall & Brian M Willis, "Suits by Public Hospitals to Recover Expenditures for the Treatment of Disease, Injury and Disability Caused by Tobacco and Alcohol" (1994) 22 *Fordham Urb LJ* 81.

<sup>466</sup> Donald Garner, a law professor involved in the litigation, once observed: "Unless there's a victory in the next year or two, the plaintiffs' bar is going to be finished for another twenty years", V Han, "History of Tobacco Litigation" (1988) Burson-Marsteller Position Paper at 8 as cited by Shelley, "The Crown's Right of Recovery Act", *supra* note 64.

<sup>467</sup> The Medicaid reimbursement lawsuits differ in important respects from civil suits brought by private citizens. See: Khoury, Couture-Ménard & Redko, *supra* note 71; Patel, *supra* note 291; and Levy, *supra* note 92. There have been some who have called for similar Medicaid reimbursement suits with respect to obesity. See, for example, Salzmann, *supra* note 36 and Rogers, *supra* note 361.

<sup>468</sup> Rogers, *ibid* at 873 notes that it was the use of class actions that ultimately resulted in success in tobacco litigation, and thus advises a similar approach be adopted in food litigation. Contrast this with Antler, *supra* note 11 at 294 who contends that class actions will make it more difficult for plaintiffs. Consider in light of *Pelman V*, *supra* note 424, where the court refused to certify the class action.

to deal with the problem of tobacco use.<sup>469</sup> The lawsuits helped to shape the policy environment, reframe the public discourse, and impacted the sale of tobacco products.<sup>470</sup> Some even suggest that tobacco litigation resulted in procedural changes, such as impacting the “advantages” defendants might have had in court.<sup>471</sup>

Among the advantages to litigation generally, some of which were discussed in detail above, tobacco litigation accentuated the benefits that can accrue through the discovery process.<sup>472</sup> Not forecasting the advent of the internet, and the ease with which documents could be archived and searched, tobacco companies attempted to foil plaintiff’s discovery strategy to obtain otherwise hidden information by releasing all of the documentation they had – millions of pages in total.<sup>473</sup> These revealed documents proved to be instrumental in changing the policy environment.<sup>474</sup> They revealed deliberate attempts to conceal knowledge about the dangers with cigarettes, and identified collusion between tobacco manufacturers to control the market.<sup>475</sup> Ultimately, these

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<sup>469</sup> Jacobson & Warner, *supra* note 167 at 801 (“One lesson public health advocates can draw from the tobacco control litigation is that strategic use of litigation can help set the policy agenda by providing essential information to the public and by forcing legislators to confront issues that powerful interests groups would prefer remain unaddressed.”).

<sup>470</sup> See Graham E Kelder & Richard A Daynard, “The Role of Litigation in the Effective Control of the Sales and Use of Tobacco” (1997) 8 *Stan L & Pol’y Rev* 63.

<sup>471</sup> See Howard M Erichson, “The End of the Defendant Advantage in the Tobacco Litigation” (2001) 26 *Wm & Mary Env’tl Law & Pol’y Rev* 123.

<sup>472</sup> See Daynard, Howard & Wilking, *supra* note 18 at 409: “Evidence essential to proving cases of unfair trade practices, negligence, or product liability, will undoubtedly flow from discovery requests made of food manufacturers and retailers, and information obtained through depositions and interrogatories answered under oath.” They further note, “[a]t a minimum, litigation and its resulting discovery will lead to more complete public information about what food manufacturers knew and failed to inform the public of concerning their contribution to the obesity epidemic”, *ibid*.

<sup>473</sup> Tobacco documents first were revealed by a paralegal who sent them to a known tobacco control advocate when he was appalled by what he saw when organizing internal tobacco company documents, see LaFrance, *supra* note 279 at 192. More documents were obtained through the discovery process. All said documents are now publicly available online: [www.tobaccodocuments.org](http://www.tobaccodocuments.org).

<sup>474</sup> See Jacobson & Soliman, *supra* note 181.

<sup>475</sup> As Alderman & Daynard, *supra* note 13 at 85 observed, the tobacco industry “suffered much damage to its public image after internal industry documents became available. The documents revealed a

documents helped to sway public opinion<sup>476</sup> and to support stricter regulation of the industry.<sup>477</sup> This is often touted as a benefit of litigation – information obtained through discovery can serve to strengthen the bargaining power of public health advocates<sup>478</sup>, particularly if it reveals prior knowledge on the part of industry about the risks associated with its products. It can also be helpful for future litigation.

Importantly, litigation was not solely pursued as a tobacco control strategy because it was the most appropriate legal tool to address tobacco consumption and the resulting harms.<sup>479</sup> In many respects, it was utilized as means to circumvent the institutions responsible for legislative and regulatory oversight.<sup>480</sup> The legislative and

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blatant disregard for public health, such as an agreement among tobacco companies to conceal information about the health effects of cigarettes, and helped to turn public opinion against the industry.” The Tobacco Documents continue to reveal information. For example, the documents exposed how the tobacco industry has paid off major media players, lawyers, and regulators. See Mark Ames, “Shillers for Killers” (July 7, 2015) Pando, online: Pando, <https://pando.com/2015/07/07/shillers-killers/>. The industry now relies on “corporate social responsibility” as a way to control the informational environment. See N Hirschhorn, “Corporate Social Responsibility and the Tobacco Industry: Hope or Hype” (2004) 23 Tobacco Control 447, and WHO, *Tobacco Industry and Corporate Responsibility... An Inherent Contradiction* (Geneva: WHO, 2004) online: WHO, [http://www.who.int/tobacco/communications/CSR\\_report.pdf](http://www.who.int/tobacco/communications/CSR_report.pdf). Recently, there has been some media attention to internal documents from the sugar industry, see: Kelly Crowe, “Sugar industry’s secret documents echo tobacco tactics” (March 8, 2013) CBCNews, online: CBCNews, <http://www.cbc.ca/news/health/story/2013/03/08/f-vp-crowe-big-sugar.html>. It is too early to determine whether these documents will have any significant bearing on litigation against the food and beverage industry

<sup>476</sup> Vernick et al, *supra* note 103 at 554, noting: “[r]egardless of the outcome of a trial, information obtained through discovery can also be used by the media and/or policy-makers to enhance product safety.” They discuss how litigation against Ford and Bridgestone/Firestone resulted in recalls, congressional hearings, and new legislation, *ibid*.

<sup>477</sup> Parmet, “Tobacco, HIV, and the Courtroom”, *supra* note 279 at 1711 and Lytton, “Using Litigation”, *supra* note 103 at 558.

<sup>478</sup> Lytton, “Using Litigation”, *ibid*.

<sup>479</sup> Of course, many plaintiffs did litigate strictly to seek redress for the harms they suffered as a result of tobacco use. Consider the genesis of *Létourneau v JTI-MacDonald*, *supra* note 68, as discussed below.

<sup>480</sup> This circumventing has been one aspect of tobacco litigation that has been highly criticized, particularly against the state/provincial lawsuits, given that it was within their power to regulate. See Turley, *supra* note 324; Elizabeth Edinger, “The Tobacco-Damages and Health Care Cost Recovery Act: *JTI-MACDONALD CORP. v BRITISH COLUMBIA (ATTORNEY GENERAL)*” (2001) 35 Can Bus LJ 95. Perhaps unsurprisingly, critics have also suggested that health care recover costs threaten the rule of law. See Levy, *supra* note 92; and FC DeCoste, “Smoked: Tradition and the Rule of Law in *British Columbia v.*



regulatory branches of government were capable of implementing tobacco control measures<sup>481</sup>; the problem was that they did not exercise that capability.<sup>482</sup> Many were able to justify the use of litigation against tobacco companies given the practical outcomes that resulted.<sup>483</sup> Litigation, therefore, was an inherently political move.<sup>484</sup> While it necessarily involved plaintiffs that had been harmed by the use of tobacco products, it also had a broader aim.<sup>485</sup> And, in this respect, many consider that it was successful.<sup>486</sup>

While the experience of tobacco litigation provides a useful template and learning

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*Imperial Tobacco Canada Ltd.*” (2006) 24 Windsor YB Access Just 327. Cf. Devrin Froese, “Professor Raz, the Rule of Law, and the *Tobacco Act*” (2006) 19 Canadian JL & Juris 161. In personal discussions with the lawyers representing the plaintiffs in *Létourneau v JTI-MacDonald*, *supra* note 68, it is clear that compensation for the plaintiffs was the primary aim, but that seeking to eliminate tobacco use was a secondary, but nevertheless important, goal.

<sup>481</sup> Jacobson & Warner, *supra* note 167 at 791.

<sup>482</sup> While there are likely several explanations for legislative inertia, the power of the tobacco lobby is often noted. See, for example, the discussion in Alderman & Daynard, *supra* note 13 at 84, where they recount how a congressional committee looking into the tobacco industry came to an end when it was taken over by a congressman with a history of accepting tobacco money.

<sup>483</sup> Jacobson & Warner, *supra* note 167 at 794.

<sup>484</sup> *Ibid* at 798 (“in practice, the tobacco litigation has blurred the line between litigation and the politics of public health.”).

<sup>485</sup> Even if the government had regulated tobacco earlier, private lawsuits seeking compensation would have been inevitable. The outcome of these cases, and how the tobacco control movement developed, would likely have been very different. For one, if there was pre-existing government action, the lawsuits could not be credited with spurring on governments to respond to tobacco. Moreover, had the government elected to get involved in controlling tobacco, some of the strategies used in the courtroom during tobacco cases would likely have been less effective.

<sup>486</sup> See Alderman & Daynard, *supra* note 13 at 87, who assert that litigation was critical to tobacco control. Critics of tobacco and obesity litigation take issue with this. Consider, for example, McMenamain & Tiglio, *supra* note 11 at 445 n 1, who suggest that by crediting tobacco litigation for decreased tobacco consumption, Alderman & Daynard, *ibid*, do not do justice to “the effects of decades of educational efforts, including Surgeon Generals’ reports and the advice doctors give patients, nor to the development and dissemination of an enormous volume of research into the health effects of smoking.” McMenamain & Tiglio, *supra* note 11 have numerous obtuse and willfully blind conclusions in their paper. For example, consider the obfuscating and unnecessary concluding statement to their brief section providing an overview of the “historical context”, at 446: “[w]hile obesity is not an insignificant problem in the United States, we must not lose sight of the achievements of farmers and of food companies in protecting us from famine.” McMenamain and Tiglio, at the time of their writing, worked for McGuireWoods, a law firm representing tobacco companies. Their conclusions, thus, are not surprising.



opportunity<sup>487</sup>, critics of adopting tobacco litigation's approach are quick to point out that consumption of food and tobacco are not similar problems.<sup>488</sup> Obesity is a far more complex problem to address. Unlike tobacco, there is not a specific behaviour (tobacco use) or product (tobacco)<sup>489</sup> that can be identified as the cause of obesity. Moreover, tobacco-related diseases are, in theory, easier to address.<sup>490</sup> There is no safe exposure to tobacco<sup>491</sup>, people do not need to smoke to survive<sup>492</sup> (addiction notwithstanding<sup>493</sup>), and

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<sup>487</sup> Many suggest that the experience of tobacco control can be used to avoid pitfalls. For example, Pennel, *supra* note 451 at 129-130 suggests, “[b]y avoiding these pitfalls and adjusting the strategies that were not successful against the tobacco industry, action against the food industry may prove swifter and more efficient.”

<sup>488</sup> McMenamin & Tiglio, *supra* note 11 at 446: “[t]he contrast of food with tobacco is stark.” They further note, at 463, “[t]o model tobacco litigation, proponents of obesity litigation may attempt to obscure some of the significant differences between tobacco and food.” Some differences are critical. For example, as Pennel, *supra* note 451 at 128 points out, the sale of tobacco to minors is illegal, whereas the sale of fast-food to minors is not. Buccholz, *supra* note 46 at 47 contends the key similarity is “[b]oth industries have deep pockets and millions of customers who could join as potential plaintiffs. Therefore, lawyers have enormous incentives to squeeze food companies into the nation’s courtrooms.”

<sup>489</sup> The current debate about e-cigarettes, which do not involve tobacco products, only nicotine, highlights the real danger that is the product here: tobacco. While there are varying degrees of risk, depending on how the product is consumed (e.g., chew tobacco has different risks than cigarettes), the product itself is the risk. The stigma associated with the term “cigarettes” or “smoking” have resulted in some confusing and contradictory responses to e-cigarettes (also referred to nicotine-replace devices, or vaping). While it is beyond the scope of this paper to address this controversy, for an example of the debate, see Louise Potvin, “In the Absence of Clear Evidence: Substantiate All Aspects of an Issue” (2015) 106:8 Canadian Journal of Public Health e462, Sally T Bean & Maxwell J Smith, “Victimless Vapour? Health Care Organizations Should Restrict the Use of E-Cigarettes” (2015) 106:8 Canadian Journal of Public Health e467, David Sweanor, “Smoking, Vaping and Public Health: Time to be Creative” (2015) 106:8 Canadian Journal of Public Health e464.

<sup>490</sup> See Pennel, *supra* note 451 at 127 (“... tobacco is directly linked to health problems.”).

<sup>491</sup> See Daynard, Howard & Wilking, *supra* note 18 at 408. This actually might make the food industry more vulnerable—after all, “while you cannot stop tobacco from being dangerous, you can make food less unhealthy”, Bénédict Coestier, Estelle Gozlan & Stéphan Marette, “On Food Companies Liability for Obesity” (2005) 87:1 Amer J Agr Econ 1 at 2-3.

<sup>492</sup> For example, Roller, Voorhees & Lunkenheimer, *supra* note 348 at 442 note, “... smoking is affirmatively harmful to a person’s health .... Food, on the other hand, is not only generally understood to be good for people, it is necessary for the preservation of life.” They overstate the matter, however, by claiming “food is a fundamental “good””, *ibid.*

<sup>493</sup> It is beyond the scope of this article to fully contend with the debate about addiction.

Interesting, as many of the articles comparing tobacco and obesity identified above point out, opponents to applying the lessons of tobacco to food note that, unlike tobacco, food is not addictive. A good example of this is McMenamin & Tiglio, *supra* note 11. Interestingly, tobacco companies have themselves disputed the addictiveness of their products, claiming that this trivializes real addictions to illicit drugs. See, for example, Justice Riordan’s discussion of this point in *Létourneau v JTI-MacDonald*, *supra* note 68.

there are few confounding variables.<sup>494</sup> While these are important differences, this does not preclude looking to tobacco as an example.<sup>495</sup> As Daynard observes:

Food is not tobacco, and the obesity control movement will not be able to adopt tobacco control policies wholesale. Nonetheless, because both public health problems share the common elements of false consciousness (“smoking/obesity is simply the result of the consumers’ free choices”) and a powerful industry whose interests are best served if consumers smoke/overeat, obesity control advocates continue to have much to learn from the decades-long struggle of the tobacco control movement to overcome those obstacles.<sup>496</sup>

Perhaps the single most important similarity between tobacco and obesity is that widespread societal changes, including perceptions about personal responsibility, will be a necessary element for successful lawsuits.<sup>497</sup> In part, this shift may result from reframing how obesity is discussed.<sup>498</sup> It may also require, as was the case in tobacco litigation, several decades of unsuccessful lawsuits. While obesity litigation is still in its infancy, there is reason to believe that tobacco litigation in Canada has already paved the way for a potential suit against the food and beverages industry, particularly given the decision in *Létourneau*.

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<sup>494</sup> For example, as will be discussed elsewhere, there are hundreds of thousands of food products, but cigarettes are a “single entity”, see Vroom, *supra* note 436 at 60.

<sup>495</sup> This is also why many commentators limit their analysis to “fast-food”. For example, Cohan, *supra* note 11 suggests that tobacco and fast-food are similar in that both are “hedonic products”: “[p]rimarily, the purpose of both is “to provide pleasure” rather than substantive nutritive value”, at 111. However, this is a narrow understanding of fast food, ignores the “healthy” options that might be available, and the fact that fast food might not simply be about pleasure for many people, but a necessary part of their diet. Each of these points, and others, could be extrapolated on. Suffice it to say that Cohan’s simplification is not employed here.

<sup>496</sup> Daynard, “Lessons from Tobacco Control for the Obesity Control Movement”, *supra* note 361 at 294-295.

<sup>497</sup> Novack, *supra* note 11 at 1316-1317: “[t]obacco cases were ultimately successful in the courts due to both social change and discovery of the inside workings of tobacco companies .... Time will influence fast-food suits just as concretely as tobacco suits by allowing a different social perspective of obesity to develop.” See also Smith, *supra* note 15 at 445.

<sup>498</sup> Shelley, “Addressing the Policy Cacophony”, *supra* note 29.

## 5.1. Canadian Tobacco Litigation

Tobacco litigation is relatively recent in Canada<sup>499</sup>, with only a handful of cases having ever been initiated. Tobacco litigation in Canada has largely been limited to health care cost recovery actions initiated by provincial governments, although there have also been instances of what Parmet has described as classical litigation.<sup>500</sup> The provincial suits have their beginning in 1997, when British Columbia enacted the *Tobacco Damages Recovery Act*<sup>501</sup>, later renamed the *Tobacco Damages and Health Care Cost Recovery Act*.<sup>502</sup> The legislation allowed the provincial government to sue tobacco companies for the health care costs associated with tobacco use.<sup>503</sup> Right of recovery legislation has

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<sup>499</sup> Tobacco litigation was still novel enough in Canada in 2000, that some commentators were questioning whether or not it would be part of Canada's arsenal, see Barbara Sibbald, "Will Litigation Become Part of Public Health Arsenal in Canada's War Against Smoking?" (2000) 162 Canadian Medical Association Journal 1608. For an overview of tobacco litigation in Canada, see Khoury, Couture-Ménard & Redko, *supra* note 71 at 442.

<sup>500</sup> Tobacco litigation is often associated with constitutional issues, as well. Consider, for example, the challenge brought by RJR-MacDonald against the federal *Tobacco Products Control Act*, SC 1998, c 20, *RJR-MacDonald v Canada (Attorney General)*, *supra* note 308. The *Act*, with some limited exceptions, prohibited the advertising or promotion of tobacco products, as well as enabling the government to prescribe health warnings on tobacco product packaging. Although the purpose of the legislation was to address the harm resulting from tobacco use in Canada, it was found by the majority of the court to violate the freedom of expression protected by s. 2(b) of the *Charter*. Moreover, this infringement was not justified under s. 1, as the restrictions were considered to impair rights more than what was necessary. The impugned legislation was amended, and was once again challenged by the tobacco industry. In *Canada v JTI-MacDonald Corp*, [2007] 207 SCC 30, and the Supreme Court of Canada once again found that aspects of the legislation infringed freedom of expression rights, but in this instance, held that the infringement could be justified.

<sup>501</sup> SBC 1997, c 41. The BC legislation used legislation enacted in Florida, which led to a \$11.3 billion settlement with tobacco companies, as a template, see Edinger, *supra* note 480. The *Act* was challenged by the tobacco industry, and the BC Supreme Court held that the *Act* was unconstitutional due to its extra-territorial scope. See *JTI-MacDonald Corp v British Columbia (Attorney General)*, [2000] 6 WWR 227 (BC SC). This resulted in the *Act* being revised.

<sup>502</sup> SBC 2000, c 30. The BC Supreme Court also found the revised legislation to be unconstitutional, see *JTI-MacDonald Corp v British Columbia (Attorney General)* (2003), 227 DLR (4th) 323 (BC SC). The BC Court of Appeal reversed this finding: *JTI-MacDonald Corp v British Columbia (Attorney General)*, [2004] 9 WWR 230 (BC CA). The Supreme Court of Canada upheld the legislation in *British Columbia v Imperial Tobacco Canada*, [2005] 2 SCR 473.

<sup>503</sup> At the time the legislation was enacted, British Columbia's then Health Minister, Penny Priddy, noted in a press conference that the legislation was not trying to punish smokers, but was about "making the industry, and not taxpayers, pay for the prevention and cessation programs needed to prevent future generations of British Columbians from becoming victims of tobacco addiction and smoking-caused

been controversial<sup>504</sup>, particularly given that Canada already collects tax revenue on tobacco products, which critics point out remain legal products.<sup>505</sup> Despite the criticism of these suits, following a decision by the Supreme Court of Canada that the legislation in British Columbia was constitutional<sup>506</sup>, all of the provinces enacted similar legislation<sup>507</sup>, and having filed suit, are likely awaiting a decision in the British Columbian suit or for a settlement akin to the Master Settlement Agreement. None of the trials have yet proceeded past preliminary matters.<sup>508</sup>

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illnesses”, British Columbia, Ministry of Health, Press Release “Historic tobacco legislation holds manufacturers accountable for prevention and health care costs” (June 11, 1998), online: Physicians for a Smoke-Free Canada (PSFC), [http://www.smoke-free.ca/litigation/webpages/British\\_Columbia.htm](http://www.smoke-free.ca/litigation/webpages/British_Columbia.htm). The cost of tobacco-related illnesses was estimated to be \$420 million in BC in 2004, and \$4 billion Canada-wide, Barbara Sibbald, “All Provinces Likely to Join Tobacco Litigation” (2005) 173:11 Canadian Medical Association Journal 1307 at 1307.

<sup>504</sup> There has also been considerable commentary on litigation by provinces against tobacco companies for health care cost recovery. See, for example, DeCoste, *supra* note 480; LeGresley, *supra* note 465; Edinger, *supra* note 480; Sibbald, *ibid*; Froese, *supra* note 480; Robin Elliot, “British Columbia’s Tobacco Litigation and the Rule of Law” in Patricia Hughes & Patrick A Molinari, eds, *Participatory Justice in a Global Economy: The New Rule of Law* (2004) 459, online, Social Sciences Research Network, <http://ssrne.com/abstract=1520740>; and, Shelley, “The Crown’s Right of Recovery Act”, *supra* note 64.

<sup>505</sup> For example, referring to the US cost-recovery litigation, Gravanti argues: “The government should either continue benefitting from the revenue raised by cigarette taxes, thereby forfeiting any rights it may have to recover damages for medical costs caused by the sale and consumption of cigarettes, or the government should seek recovery for medical costs and declare that cigarettes are illegal. The government should not be able to pursue both”, Sandra L Gravanti, “Tobacco Litigation: United States Versus Big Tobacco – An Unfiltered Attack on the Industry” (2000) 52 Fla L Rev 671 at 685.

<sup>506</sup> See *British Columbia v Imperial Tobacco Canada*, *supra* note 502.

<sup>507</sup> All provinces have enacted legislation permitting litigation. The provincial legislation in chronological order of being enacted: British Columbia, *Tobacco Damages and Health Care Costs Recovery Act*, SBC 2000, c 30; Newfoundland and Labrador, *Tobacco Health Care Costs Recovery Act*, SNL 2001, c T-4.2; Nova Scotia, *Tobacco Damages and Health-care Costs Recovery Act*, SNS 2005, c 4; Manitoba, *Tobacco Damages and Health Care Costs Recovery Act*, CCSM c T70; New Brunswick, *Tobacco Damages and Health-care Costs Recovery*, SNB 2006, C T-7.5; Saskatchewan, *Tobacco Damages and Health Care Costs Recovery Act*, SS 2007, c T- 14.2; Ontario, *Tobacco Damages and Health Care Costs Recovery Act*, SO 2009, c 13; Quebec, *Tobacco-related Damages and Health Care Costs Recovery Act*, CQLR c R-2.2.0.0.1; Alberta, *Crown’s Right of Recovery Act*, SA 2009 c C-35, and; Prince Edward Island, *Tobacco Damages and Health Care Costs Recovery Act*, RSPEI 2009, c 22. Following BC’s statement of claim in 1997, the other provinces have also followed suit: New Brunswick in 2008, Ontario in 2009, Newfoundland and Labrador in 2011, Manitoba, Alberta, Saskatchewan, Quebec and PEI in 2012. All of the statements of claim can be viewed at PSFC, *Tobacco Litigation*, online: <http://www.smoke-free.ca/litigation/>.

<sup>508</sup> Things have been going so slowly that in January of 2016 Master Donald Short, observing that all of the provincial trials were “moving at a virtual snail’s pace towards an eventual resolution”, at para 4,

Civil actions in Canada against tobacco companies have been infrequent and far less successful. Most cases have been dismissed before the substantive claims were argued. For example, *Perron v RJR MacDonald* alleged that tobacco companies neglected to determine risks associated with smoking, and failed to warn users about such risks. However, the claim was dismissed because the court held the action had been commenced outside of the appropriate limitation period.<sup>509</sup> *Caputo v Imperial Tobacco* attempted to certify a class action, but it failed because the action attempted to include too many potential class proceedings.<sup>510</sup> *Ragoonanan Estate v Imperial Tobacco* was also denied certification for class action in a suit that claimed cigarettes were defective because they posed an unreasonable risk of igniting residential fires.<sup>511</sup> A class action claiming that tobacco companies deceived consumers by marking “light” or “mild” cigarettes was also dismissed in *Sparkes v Imperial Tobacco*.<sup>512</sup> One class was certified for a similar action in British Columbia in *Knight v Imperial Tobacco*, but the substantive matters of the claim have yet to be heard by the court, as it continues to deal with

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ordered the defendants in the case to deliver their pleadings, *Ontario v Rothmans et al*, 2016 ONSC 59 at para 133. Having had “6 years to circulate and consider drafts”, he ordered them to be served and delivered by March 31, 2016. These can be viewed at Eye on the Trials, at [http://tobaccotrial.blogspot.ca/2016\\_07\\_01\\_archive.html](http://tobaccotrial.blogspot.ca/2016_07_01_archive.html).

<sup>509</sup> [1996] BCJ No 2093 (BC CA)

<sup>510</sup> 2004 CanLI 24753 (ON SCJ). Justice Winkler held: “In essence, the plaintiffs seek certification of an amorphous group of people comprised of individuals of different ages, covering different decades, who knew different things concerning the risks inherent in smoking and who began to smoke for different reasons. They smoked different products, in different amounts, received different information about the risks of smoking, quit smoking or continued to smoke for different reasons and developed or failed to develop different diseases or symptoms associated with different risk factors. The only apparent common element in this action is that all of the proposed class members allegedly smoked cigarettes at one time or another.” However, Winkler J. concluded by noting that his judgment did not preclude future proceedings against tobacco companies from being certified.

<sup>511</sup> 2008 CanLI 19242 (ONSCDC). In this case, three people died when a fire started in the townhome of Davina Ragoonanan by the cigarette of one of the deceased.

<sup>512</sup> [2008] 282 Nfld & PEIR 177 (NFLD SC).

preliminary matters.<sup>513</sup> There have been a few suits that have not been class actions, although they have had very limited success. For example, Joe Battaglia was successful in bringing a case against tobacco companies to trial for damages that resulted from smoking, but lost the case.<sup>514</sup> While he did appeal the ruling, he did so without counsel, and his action ceased as he died shortly thereafter.<sup>515</sup> Another individual claim was brought by Ms. Létourneau, seeking a \$300 reimbursement for nicotine patches through the small claims court in Québec.<sup>516</sup> This claim was dismissed. However, Ms. Létourneau was one of the named plaintiffs in the recent class action in Québec.

## 5.2. *Létourneau v JTI-MacDonald*

In March of 2012, a class action lawsuit began in Montreal, Quebec.<sup>517</sup> Representing 1.8 million Quebecois, and seeking damages upwards of \$27 billion, it was the largest lawsuit in Canadian history.<sup>518</sup> It originated in two class actions that were filed

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<sup>513</sup> For example, see *R v Imperial Tobacco*, [2011] 3 SCR 45 where the Supreme Court rejected Imperial Tobacco's attempt to add the Government of Canada as a third party to the suit.

<sup>514</sup> *Battaglia v Imperial Tobacco*, oral judgment, transcript, on file with PSFC, "Tobacco Litigation: Battaglia vs. Imperial Tobacco et al.", online: PFSC, <http://www.smoke-free.ca/litigation/webpages/Battaglia.htm>. This judgment is interesting for several reasons, perhaps most striking was that Mr. Battaglia, who had worked for the tobacco company Rothmans, was willing to settle his case for a sum of \$1 and an apology. The defendants preferred a trial. See the media at PFSC website, *ibid.* See *Battaglia v Imperial Tobacco*, *supra* note 463.

<sup>515</sup> *Ibid.*

<sup>516</sup> See *Létourneau v Imperial Tobacco*, [1998] RJQ.

<sup>517</sup> "Quebec smokers, tobacco firms face off in \$27B lawsuit" (March 12, 2012) CBCNews, online: CBCNews <http://www.cbc.ca/news/canada/montreal/story/2012/03/12/quebec-tobacco-lawsuit-damages-smoking-related-illness.html>. See also, Andrew Chung, "Tobacco lawsuit: Landmark case launched by smokers makes it to Quebec court" (March 12, 2012) Toronto Star, online: Toronto Star [http://www.thestar.com/news/canada/2012/03/12/tobacco\\_lawsuit\\_landmark\\_case\\_launched\\_by\\_smokers\\_makes\\_it\\_to\\_quebec\\_court.html](http://www.thestar.com/news/canada/2012/03/12/tobacco_lawsuit_landmark_case_launched_by_smokers_makes_it_to_quebec_court.html).

<sup>518</sup> Similar to the experience of tobacco litigation elsewhere, numerous civil lawsuits have been filed against tobacco companies in Canada, but until now, none have made it to a trial. For a comprehensive overview of tobacco litigation in Canada, including access to original documents, statements of claims, etc., see PSFC, "Tobacco Litigation", online: PFSC, <http://www.smoke-free.ca/litigation>.



in 1998.<sup>519</sup> These actions spent thirteen years in the courts before the court granted certification in 2004. In June of 2015, Justice Riordan released his judgment, holding the tobacco companies liable for \$15 billion.<sup>520</sup> While it can be expected that this case is far from over, as the defendant tobacco companies can be expected to appeal to the fullest extent possible (the case went before the Québec Court of Appeal in November 2016), the judgment of Justice Riordan is nevertheless important to consider.<sup>521</sup>

The case incorporated both class actions. The Blais file included plaintiffs that had smoked a minimum of 5 pack/years, or 36,500 cigarettes<sup>522</sup>, and had been diagnosed with lung cancer, cancer of the throat, or emphysema.<sup>523</sup> The Létourneau file included smokers addicted to nicotine who started smoking before September 30, 1994.<sup>524</sup> The claims were brought against three tobacco companies (JTI-MacDonald, Imperial Tobacco, and Rothmans, Benson & Hedges), and there were eight common questions of

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<sup>519</sup> The two cases are: *Cécilia Létourneau v JTI-MacDonald Corp, Imperial Tobacco Canada & Rothmans, Benson & Hedges*, the court number assigned to the case is 500-06-000070-983 and *Conseil Québécois sur le tabac et la santé and Jean-Yves Blais v JTI-MacDonald Corp, Imperial Tobacco Canada & Rothmans, Benson & Hedges*, the court number assigned to the case is 500-06-00076-980.

<sup>520</sup> *Létourneau v JTI-MacDonald*, *supra* note 68. The court awarded \$6,858,684,000, but given that the action was initiated in 1998, it was adjusted to \$15 billion given interest and additional indemnity. The initial claim sought upwards of \$27 billion.

<sup>521</sup> The application of this case is also limited in some ways, given that it was considering laws specific to Quebec. However, Riordan J notes in his opening comments that the rules in Quebec and the common law provinces are sufficiently similar. See *ibid* at para 219: the issue of a manufacturer's duty to warn is one where the two legal systems coexisting in Canada see the world in a similar way, and for which we see no obstacle to looking to common law decisions for inspiration." Some of the findings are also specific to the legislation considered, for example, the discussion of the use of epidemiological evidence under the *Tobacco-Related Damages and Health Care Cost Recovery Act*, RSQ, c R-2.2.0.0.1.

<sup>522</sup> The court had a formula for this: "A "pack year" is the equivalent of smoking 7,300 cigarettes, as follows: 1 pack of 20 cigarettes a day over one year:  $365 \times 20 = 7300$ . It is also attained by 10 cigarettes a day for two years, two cigarettes a day for 10 years etc", *Létourneau v JTI-MacDonald*, *supra* note 68 at para 2 note 4. 5 pack/years equals 36,500 cigarettes (5 x 7,300).

<sup>523</sup> *Ibid* at para 2.

<sup>524</sup> *Ibid*. For inclusion in the file, the smokers had to be: addicted, residents of Québec, having started smoking by September 30, 1994. Additionally, they had to have smoked on a daily basis on September 30, 1998 for at least 30 days (at least one cigarette a day), and were still smoking until February 21, 2005 (or until they died).



fact and law before the court, although the court only considered seven.<sup>525</sup> These seven questions are outlined in Table 2. The court was charged with determining whether the three companies were responsible for moral (compensatory) damages and punitive damages.

<b>The Seven Common Questions Considered in <i>Létourneau</i></b>
A. Did the Defendants manufacture, market and sell a product that was dangerous and harmful to the health of consumers?
B. Did the Defendants know, or were they presumed to know of the risks and dangers associated with the use of their products?
C. Did the Defendants knowingly put on the market a product that creates dependence and did they choose not to use the parts of the tobacco containing a level of nicotine sufficiently low that it would have had the effect of terminating the dependence of a large part of the smoking population?
D. Did the Defendants trivialize or deny or employ a systematic policy of non-divulgence of such risks and dangers? <sup>526</sup>
E. Did the Defendants employ marketing strategies conveying false information about the characteristics of the terms sold?
F. Did the Defendants conspire among themselves to maintain a common front in order to impede users of their products from learning of the inherent dangers of such use?
G. Did the Defendants intentionally interfere with the right to life, personal security, and inviolability of the class members?

**Table 2. Common Questions in *Létourneau***

Both actions against the tobacco companies were maintained in part. For the Blais file, Justice Riordan found the defendants liable for moral (compensatory) and punitive damages on four grounds: “under the general duty not to cause injury to another person, under the duty of a manufacturer to inform its customers of the risks and dangers of its products, under the Quebec Charter of Human Rights and Freedoms and under the Quebec Consumer Protection Act.”<sup>527</sup> Under the *Létourneau* file, Riordan J found the

<sup>525</sup> These grounds are: “under the general duty not to cause injury to another person, under the duty of a manufacturer to inform its customers of the risks and dangers of its products, under the Quebec Charter of Human Rights and Freedoms and under the Quebec Consumer Protection Act”, *ibid* at Summary of the Judgment.

<sup>526</sup> Question D was originally comprised of two separate questions that the court held were sufficiently similar to combine as one. The original two questions were: “D. Did the Defendants employ a systematic policy of non-divulgence of such risks and dangers?” and “E. Did the Defendants trivialize or deny such risks and dangers?”

<sup>527</sup> *Ibid* at 10 (Summary of the Judgment).

defendants at fault under the same heads of damage, but did not assess compensatory damages, as he felt the plaintiffs had failed to provide sufficient evidence to support their claims.<sup>528</sup> The entirety of Justice Riordan's lengthy judgment warrants careful consideration, something beyond the scope of this section.<sup>529</sup> However, for present purposes there are several important things to highlight as they pertain to the duty to warn.

Of critical importance for present purposes is how Justice Riordan framed the duty to warn. One of the central questions in the case was whether tobacco manufacturers were required to warn consumers about the dangers associated with tobacco use. Justice Riordan found that the tobacco companies did not provide clear and explicit warnings. Riordan J's decision is useful because he does not attempt to reinvent the duty, or to extend its scope or application. Rather, in his judgment, he applies the existing principles concerning the duty to warn to smoking.<sup>530</sup>

Importantly, irrespective of whether the higher courts uphold the judgment against the tobacco companies, the discussion by Riordan J about the adequacy of warnings provided by the tobacco companies is likely to be upheld. The adequacy of the warning is a factual determination, and as the trier of fact, Riordan J is in the best position to assess all the evidence and determine the credibility of the experts before the court. Thus, absent some overriding palpable error on Justice Riordan's part<sup>531</sup>, it is hard

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<sup>528</sup> *Ibid.*

<sup>529</sup> Rather than consider his judgment in full detail here, which was lengthy (approximately 237 pages), arguments that are relevant to this thesis will be considered at the appropriate place throughout.

<sup>530</sup> A more fulsome discussion of the treatment of the duty to warn in *Létourneau* can be found in the next chapter.

<sup>531</sup> There is an argument to be made that, if anything, Riordan J was extremely conservative in his

to imagine that the factual finding in *Létourneau* that the tobacco companies did not adequately warn their consumer will be overturned. Consequently, there is much in Justice Riordan's decision in *Létourneau* that might be relevant for obesity litigation. While the Supreme Court of Canada will have the final word, Riordan J's factual findings are important.

So what does *Létourneau* mean for obesity litigation? Part II entails a closer examination of the duty to warn, including how this is tested in *Létourneau*. As will be discussed, the duty to warn requires manufacturers to identify and warn consumers about the risks associated with their products, and also prohibits manufacturers from ignoring, minimizing, or negating the risks that others identify with their products. In this respect, *Létourneau* is a significant decision for future obesity litigation because it deals with the consequences of ongoing consumption and the efforts of industry to promote and normalize consumption of dangerous products.<sup>532</sup>

## 6. CONCLUSION: OBESITY LITIGATION

Obesity is a complex, pressing health concern, one that has significant ramifications for individuals, and comes with high societal costs. Many have suggested that law can be used to assist in obesity prevention, management and treatment. Among the uses of law, civil litigation is identified as a plausible strategy. This recommendation, in large part, has been motivated by the success of tobacco litigation. Until recently, tobacco litigation was primarily an American phenomenon. However, the recent decision

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factual findings. For example, he did not find that the tobacco companies purposefully targeted children in their advertising, even though there is substantial evidence to support this finding.

<sup>532</sup> See Shelley, "A Future of Obesity Litigation in Canada?", *supra* note 455.

of *Létourneau v JTI-MacDonald* changes this. *Létourneau* is, ultimately, a product liability case, examining a manufacturer's duty to warn. In his decision, Justice Riordan held that the obligation to warn consumers about the dangers in a product is not conditional, and that manufacturers have a positive duty to act, and to ensure that warnings are adequate. Riordan J's decision is highly relevant for obesity litigation, particularly as it relates to product liability law and the duty to warn.

To be sure, there are many issues that need to be more fully considered about what it would mean for duty to warn principles to be applied to food products. This will be undertaken in Part II. For one, some thought needs to be given to what risks associated with food are so obvious and notorious that a warning is not required.<sup>533</sup> Additionally, there is legitimate concern that oversaturation of warnings may be a problem – if there are warnings on everything, this might only serve to confuse consumers thereby rendering the warnings meaningless or unhelpful.<sup>534</sup> Consideration needs to be given to what food products require warnings, and for what risks.<sup>535</sup> There are also legitimate

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<sup>533</sup> Despite some of the mythology about consumer's knowledge about food, there is a large body of evidence to suggest that most people are not that informed and do not know the true risks. See, for example: Shelley, "Addressing the Policy Cacophony", *supra* note 29; Lisa Levy et al, "How Well Do Consumers Understand Percentage Daily Value on Food Labels?" (2000) 14:3 American Journal of Health Promotion 157; and, Fuan Li, Paul W Miniard & Michael J Barone, "The Facilitating Influence of Consumer Knowledge on the Effectiveness of Daily Value Reference Information" (2000) 28 Journal of the Academy of Marketing Science 425.

<sup>534</sup> Indeed, for this reason Waddams argues that courts appear to be demanding more explicit warnings for products that are really dangerous: "it is understandable that in an age where thousands of products are labelled with skulls and crossbones and other lurid symbols the consumer's sensitivity becomes a little jaded, and something more is required of a product that really is dangerous", Stephen M Waddams, *Product Liability*, 5th ed (Toronto: Carswell, 2011) at 61 [Waddams, *Product Liability*]. See also the American Law Institute, *Restatement (Third) of Torts, Products Liability* (St. Paul, MN: American Law Institute, 1998) at §2, Comment i: "[i]n some cases, excessive detail may detract from the ability of typical users and consumers to focus on the important aspects of the warnings, whereas in others reasonably full disclosure will be necessary to enable informed, efficient choices by product users."

<sup>535</sup> For example, there has been some discussion about whether sprouts require a warning, given the numerous outbreaks in recent years, see Claire Leschin-Hoar, "Should Sprouts Come with a Warning

procedural concerns and issues with whether or not these types of claims may simply clog the courts, as well as speculative concerns about the impact this may have on the food industry on which we all rely for sustenance. Despite some of these complicated issues, what is clear is that there is a duty to warn consumers. The next Part examines product liability law and the duty to warn, and then considers how the duty to warn might be applied to food products.

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Label?" (February 16, 2016), online: NPR,  
<http://www.npr.org/sections/thesalt/2016/02/25/468032778/should-sprouts-come-with-a-warning-label>.

## PART II: THE DUTY TO WARN

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The aim of the first part of this thesis was to demonstrate that tort law can be used to address public health concerns. To this end, chapter two reviewed the relationship and congruence between tort law and public health. Chapter three reviewed public health litigation, both what it entails and some of the disadvantages and advantages associated with using litigation to create public policy before more closely examining obesity litigation. It looked to tobacco litigation as an example, and identified the recent decision by Justice Riordan of the Québec Superior Court in *Létourneau v JTI-MacDonald*, which found tobacco companies liable for failing to warn consumers about the dangers inherent in cigarettes, as an example of how the duty to warn might be applied to food products. The ultimate goal of part I was to set the foundation for examining product liability law and the duty to warn in the context of diet-related chronic diseases, such as obesity.

Part II will now explore product liability law, and the duty to warn more specifically. It begins in chapter four with an overview of product liability law. In addition to a general overview of product liability law, this chapter will examine what constitutes a defective product, and the three categories of defective products, with a particular focus on the duty to warn. Two cases will be examined in some detail in this chapter: *Buchan v Ortho Pharmaceutical* and *Létourneau v JTI-MacDonald*. It will then examine the applicability of the duty to warn to food products. Chapters five through seven will then examine three elements of a duty to warn case that would need to be addressed by a court: duty of care (chapter 5), standard of care (chapter 6), and causation (chapter 7). As noted at the outset, the intent here is not to provide a blueprint for a

negligence suit, but instead to review the issues that might arise under a failure to warn case against food manufacturers. As the discussion that follows reveals, the duty to warn, as currently articulated in Canadian jurisprudence, is sufficiently robust to be applied to food manufacturers. While there are no doubt significant challenges to bringing a suit – challenges that will vary depending on the specifics of the claim, such as the type of product(s) implicated – in principle, plaintiffs have recourse to use this area of law to bring claims against food manufacturers. To put another way, the application of the duty to warn to food manufacturers can be understood as a legitimate and coherent application of tort law to a public health problem. While this application will certainly challenge some entrenched tort doctrines, particularly as they relate to causation, applying the duty to warn to food manufacturers is a coherent use of tort law. The first step in making this case is to examine the duty to warn. To this task we turn.



## CHAPTER 4: PRODUCT LIABILITY LAW & FOOD PRODUCTS

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### 1. INTRODUCTION: PRODUCT LIABILITY LAW & FOOD PRODUCTS

Tort law has been described as “the bedrock of our law of injuries.”<sup>536</sup> Tort law provides an injured party the opportunity to seek compensation for the harm inflicted for a specific set of recognized wrongs. In situations where a new injury or wrong arises, tort law can be used to gauge “initial insight into how we feel as a society about what constitutes justice in that kind of case.”<sup>537</sup> Tort law has expanded to recognize new categories of wrongs. This has included considerable expansion into product liability. Product liability law, then, could be understood as what society deems to be a just response to injuries inflicted by the use of a product.<sup>538</sup> It allows individuals who have suffered an injury to seek compensation from the party responsible for making the product available. In this respect, product liability law can be thought of as advancing tort law’s aim to correct injustices between parties – in this case, between a manufacturer of a product and the consumer of said product.

However, as Shapo observes, product liability law has not always received a warm

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<sup>536</sup> Marshall S Shapo, *Products Liability and the Search for Justice* (Durham, NC: Carolina Academic Press, 1993) at 19.

<sup>537</sup> *Ibid.* Shapo notes that this initial insight is relevant even in instances where legislatures have already acted, such as where workers compensation schemes may exist. He suggests, “tort law still creates an intellectual and practice foundation for society’s response to injuries”, *ibid.*

<sup>538</sup> Cassels & Jones, *supra* note 84 at 1 (““Product liability” generally refers to a series of overlapping regimes of public and private law governing the extent to which those involved in the production or distribution of goods can be liable to person who suffer loss or injury as a result of flaws in design, manufacture, or condition of those goods.”).

reception:

Because of the central role that products play in all our lives, this body of law presents an unusual combination of patterns of conflict, legal rules, and social symbols. It has fueled some of the fiercest discourse about private law today—among judges, scholars, business persons, and politicians. The problems arising from this branch of the law include issues involving both the content of concepts and definition of terms. They involve not only law as a study detached from other branches of social science, but law as it relates to economics, psychology, and politics.<sup>539</sup>

In part this is because over the past few decades, product liability law has undergone a significant transition<sup>540</sup>, and as a result has shifted the tort landscape. While some may express concern about how product liability principles impact law, the importance of and contribution of product liability law to the development of tort law principles is widely recognized.<sup>541</sup> Indeed, the topic of products liability was considered so important, that the first revision to the *Restatement Third, Torts* by the American Law Institute was dedicated solely to the issue of products liability.<sup>542</sup> As noted in the introduction to the *Restatement Third*, “thousands of judicial decisions that had fine-tuned the law of products liability in a manner hardly imaginable when Restatement Second was written.”<sup>543</sup>

With an increase in cases comes the refinement of product liability principles and also an increased opportunity for judicial policy making. As product liability law ultimately considers

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<sup>539</sup> Shapo, *supra* note 536 at 4.

<sup>540</sup> For example, in 1980 Epstein declared that product liability law had undergone a “legal revolution”, Richard A Epstein, *Modern Products Liability Law* (Westport, CN: Praeger, 1980) at 3 [Epstein, *Modern Products Liability Law*]. (“Evidence of the major shifts in products liability law is present everywhere. Ten or fifteen years ago products liability was but a tag end of the tort law curriculum, with teaching efforts largely devoted to the intricacies and confusions of the so-called privity limitation. Today products liability is a major topic in the first-year tort course, and in many law schools the subject of advance treatment in upper-division courses and seminars”, *ibid*. Epstein contends that this expansion has had profound social consequences, see *ibid* at 4-5.

<sup>541</sup> This importance extends beyond the refining of legal principles, but has an important impact on society generally. As

<sup>542</sup> *Restatement (Third) of Torts, Products Liability*, *supra* note 534.

<sup>543</sup> *Ibid* at 3.

the standards to which manufacturers will be held, it necessarily requires courts to “try to balance the interest of protecting and compensating individuals with the public interest in having socially useful products available to the public at a reasonable cost.”<sup>544</sup> In so doing, courts operate in a regulatory or policy role. Product liability law, then, while providing opportunities for plaintiffs to seek redress for harms, ultimately is also an ongoing exercise in judicial policy making.

A burgeoning area of inquiry concerns the role of product liability law in holding food manufacturers responsible for diet-related chronic diseases, such as obesity. This is the overall concern of this chapter. It proceeds in part two with an overview of the history of product liability law<sup>545</sup> and a general discussion of its relationship with negligence. This is followed by an examination of the three ways a product can be considered defective. Part three then provides a general overview of the duty to warn. This will include an examination of how the duty to warn addresses products that are ingested, followed by a review of two important cases for present purposes, *Buchan v Ortho Pharmaceutical* and *Létourneau v JTI-MacDonald*. Part four will review the idea of food being classified as a dangerous product. As this final part will demonstrate, food has long been a subject of product liability; what differs now is the type of injury.

## 2. PRODUCT LIABILITY LAW: AN OVERVIEW

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<sup>544</sup> Theall et al, *supra* note 62 at L1-2 (“Given that these cases concern the standards to which manufacturers and others responsible for distributing and selling products are held, they often raise difficult issues of public policy.”).

<sup>545</sup> The intent here is not to provide a comprehensive overview of the law of product liability, as numerous texts accomplish this quite satisfactorily. See, for example: Shapo, *supra* note 536; Jane Stapleton, *Product Liability* (Toronto: Butterworths, 1994); Epstein, *Modern Products Liability Law*, *supra* note 540; Allistar M Clark, *Product Liability* (London: Sweet & Maxwell, 1989). For a specifically Canadian history, see in particular, Waddams, *Product Liability*, *supra* note 534; Theall et al, *supra* note 62, and Dean E Edgell, *Product Liability Law in Canada* (Toronto: Butterworths, 2000).

Dealing with injuries caused by defective products is a very old social problem. Injuries from products have been around for as long as products have been manufactured and distributed.<sup>546</sup> While it is now widely accepted that manufacturers of goods are exposed to liability for harms that may result from the use of their products, irrespective of whether the harmed individual was the purchaser of the product, historically this was not the case. Instead, injured individuals had to rely on various contractual principles<sup>547</sup>, chief among them the law of implied warranties.<sup>548</sup> In short, liability grounded in contractual terms required an injured party to demonstrate that a plaintiff had a direct contractual relationship with the defendant. If there was no such relationship, the plaintiff was not able to recover any damages. This is commonly referred to as the privity bar. Parties not in a direct contractual relationship with the defendant, or innocent bystanders, even if injured by a product, were left without recourse. As Epstein observes, “the privity rule insulated the typical manufacturer or supplier from virtually all actions for personal injury, death, or property damage caused by a defective product.”<sup>549</sup>

The hurdle privity presented to harmed individuals is evident in *Winterbottom v Wright*.<sup>550</sup> In that case, the plaintiff, who was the driver of a mail coach, was injured when the coach broke during operation, throwing him to the ground. The defendant Wright had been contracted by the Postmaster to maintain the coach and ensure it was safe to operate.

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<sup>546</sup> Cassels & Jones, *supra* note 84 at 11. As Shapo, *supra* note 536, wryly observes, “[a]long with death and taxes, the injury problem is always with us”, at 3.

<sup>547</sup> It is beyond the scope of this chapter to fully review the history of contract law that preceded product liability law. Importantly, contract was not the only way manufacturers have been held responsible. For example, Clark, *supra* note 545 at 2 notes that there was legislation in England in the 13<sup>th</sup> century that imposed criminal liability on suppliers of corrupted food.

<sup>548</sup> For a detailed discussion on the early history of warranty, see Waddams, *Product Liability*, *supra* note 534 at 1-11; for a more contemporary discussion, see *ibid* at 85-131. See also: OLRC, *Report on Products Liability*, *supra* note 83 at 21-23; Edgell, *supra* note 545 at 103-107; Stapleton, *supra* note 545 at 20-22.

<sup>549</sup> Epstein, *Modern Products Liability Law*, *supra* note 540 at 10.

<sup>550</sup> 152 Eng Rep 402 (Ex 1842).

Winterbottom brought an action before the court arguing that Wright was negligent in his work. The court held that the plaintiff had no cause of action against Wright directly; similarly, Wright was not responsible to Winterbottom, but only to his employer. As stated by Lord Abinger:

By permitting this action, we should be working this injustice, that after the defendant had done every thing to the satisfaction of his employer, and after all matters between them had been adjusted, and all accounts settled on the footing of their contract, we should subject them to be ripped open by this action of tort being brought against him.<sup>551</sup>

Although *Winterbottom* is not considered a mainstream product liability case<sup>552</sup>, it was used historically to bar tort claims. In particular, “it was used to protect manufacturers from liability in tort to the ultimate victims of their negligently-made products.”<sup>553</sup> While numerous commentators point to this reliance on *Winterbottom* by the courts as inappropriate<sup>554</sup>, the case nevertheless had the impact of limiting potential actions until advancements in industrialization ultimately forced the courts to reconsider the privity bar.<sup>555</sup> Stapleton points out that a growing dissatisfaction with privity grew with the rise in mass markets and non-privity victims.<sup>556</sup> Courts were motivated to find a way to assist victims of defective products that were left without

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<sup>551</sup> *Ibid* at 405. Similarly, Baron Rolfe held: “The duty, therefore, is shewn (sic) to have arisen solely from the contract; and the fallacy consists in the use of that word “duty.” If a duty to the Postmaster-General be meant, that is true; but if a duty to the plaintiff be intended (and in that sense the word is evidently used), there was none. This is one of those unfortunate cases in which there certainly has been damnum, but it is damnum absque iniuria”, *ibid*. See discussion on point in Epstein, *Modern Products Liability Law*, *supra* note 540 at 11-14.

<sup>552</sup> Stapleton, *supra* note 545 at 17. Stapleton notes that the case “did not involve the condition of a product produced by manufacture, but a negligent omission adequately to *repair* something by a defendant who had *undertaken a contractual obligation* to do so”, *ibid*, original emphasis.

<sup>553</sup> *Ibid*.

<sup>554</sup> For example, Stapleton asks, “[w]hy judges adhered to the privity fallacy is unclear. Perhaps it was simply the power of stare decisis”, *ibid*. See further discussion at *ibid* 17-20.

<sup>555</sup> Cassels & Jones, *supra* note 84 at 14 argue that “efforts to expand contractual remedies could not keep pace with the social context of industrialization.” They further argue that the individual focus of contracts “means that it cannot yet play a robust role in large-scale claims”, *ibid* at 13.

<sup>556</sup> Stapleton, *supra* note 545 at 20. She points to the rise in motor vehicles as being an especially important development. See also Shapo, *supra* note 536 at 22-23, who discusses that about automobile industry that had “gross inequality” in bargaining position.

recourse.<sup>557</sup>

In the commonwealth tradition the overcoming of privity often begins with the seminal case, *Donoghue v Stevenson*.<sup>558</sup> In this case, Mrs. Donoghue had stopped at a café with a friend, who ordered her ice cream and ginger beer. After Mrs. Donoghue had taken a drink from the opaque bottle, she discovered the partially decomposed remains of a snail, and then fell ill. She brought a suit against the manufacturer of the ginger beer, David Stevenson. The issue before the court was whether or not Mrs. Donoghue had any recourse against the manufacturer, having not been a party to contract of sale. In his judgment, Lord Atkin held that manufacturers owed a duty to the ultimate consumer, as articulated by the now infamous neighbour principle. According to Lord Atkin:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.<sup>559</sup>

Lord Atkin was confident that this was an accurate articulation of British law, and that it was consistent with the Justice Cardozo's articulation of the law in *MacPherson v Buick Motor Co* (discussed below).<sup>560</sup> The immediate implication was that manufacturers of

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<sup>557</sup> Legislators have also addressed the problems raised by privity. See, for example, the UK's *Contracts (Rights of Third Parties) Act 1999*, 1999 c. 31, which creates an exception, allowing a third party to a contract to sue when the contract confers a benefit on that party.

<sup>558</sup> *Donoghue v Stevenson*, *supra* note 16. See *Goodridge v Pfizer Canada*, 2010 ONSC 1095 at para 80 (“the seminal case about duty of care, products liability, and negligence generally is *Donoghue v. Stevenson*.”). See also Waddams, *Product Liability*, *supra* note 534 at 13, referring to *Donoghue* as “the leading case in the products liability field.”

<sup>559</sup> *Donoghue v Stevenson*, *supra* note 16 at 580.

<sup>560</sup> Lord Atkin stated: “It is always a satisfaction to an English lawyer to be able to test his application of

products owe a duty of care to consumers of their products, and to take reasonable care to ensure their products do not injure consumers.<sup>561</sup>

While an important case, *Donoghue* “did not spring from nowhere.”<sup>562</sup> There are several important cases predating *Donoghue* that began to articulate the limitations of privity.<sup>563</sup> For example, the 1913 decision of the Washington Supreme Court, *Mazetti v Armour & Co.*<sup>564</sup> In this case, the plaintiff owned a restaurant, and sued a patron for damages resulting from a loud public complaint about a “foul tongue”.<sup>565</sup> In rendering its decision, the court declared, “[t]he remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales. The obligation of the manufacturer should not be based alone upon privity of contract. It should rest, as was once said, upon “the demands of social justice.”<sup>566</sup>

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fundamental principles of the common law by the development of the same doctrines by the lawyers of the courts of the United States. In that country I find that the law appears to be well established in the sense in which I have indicated”, *Donoghue v Stevenson*, *supra* note 16 at 598. Our courts have later acknowledged the similar roots. See, for example, *Buchan v Ortho Pharmaceutical*, *supra* note 67, which noted that American jurisprudence is “rooted in same fundamental philosophy and is based on the same general principles of negligence law as our law since *M’Alister (or Donoghue) v. Stevenson*”, at para 22.

<sup>561</sup> Specifically, Lord Atkin held: “a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation of putting up of the products will result in an injury to the consumer’s life or property, owes a duty of care to take that reasonable care”, *ibid* at 599.

<sup>562</sup> Edgell, *supra* note 545 at 7.

<sup>563</sup> This project does not aim to identify a particular case as being responsible for shifting the focus away from privity. As Shapo, *supra* note 536 at 19 notes, “[i]t would be difficult to say that any one decision is the fountainhead of modern products liability law.”

<sup>564</sup> 75 Wash 622, 135 P 633 (1913). Stapleton, *supra* note 545 notes, “the doctrinal significance of the developments signaled by *Mazetti* – the violation of the citadel of privity ‘ was not widely appreciated or emphasized” at 22, including by the likes of Prosser.

<sup>565</sup> Chadwick J introduces the case, noting, *ibid*, that the plaintiff alleged the defendant was “guilty of negligence in manufacturing and preparing the foods purchased, in that in the center of the carton was a foul, filthy, nauseating and poisonous substance; that, in the due course of trade, plaintiffs served to one of their patrons a portion of the tongue; that the patron ate of it; that he then and there became sick and nauseated, and did then and there, in the presence of other persons, publicly expose and denounce the service to him of such foul and poisonous food; that the incident became known to the public generally...”

<sup>566</sup> 75 Wash at 627, 135 P at 635. The court in *Mazetti v Armour & Co*, *supra* note 564, is quoting from *Ketterer v Armour & Co*, 200 F 322, 323 (SDNY 1912). Shapo, *supra* note 536 discusses that this language capture the historical context, pointing in particular to the influence of Upton Sinclair, *The Jungle* (New York: Doubleday,



Then in 1916, the New York Court of Appeals decision in *MacPherson v Buick Motor Co*<sup>567</sup>, particularly the majority opinion penned by Justice Cardozo, “pulled the law of New York—and eventually that of every other American jurisdiction—into the twentieth century.”<sup>568</sup> The defendant sold an automobile to a dealer, who sold it the plaintiff. While driving the car on a good road, a wheel broke and threw the plaintiff from the moving vehicle. The court had to consider whether or not the plaintiff had a cause of action without a direct contract to hold the manufacturer responsible. Here, Justice Cardozo circumvented the body of precedent, including *Winterbottom*<sup>569</sup>, by expanding the ‘inherently dangerous’ exception to the privity rule.<sup>570</sup> The exception Justice Cardozo was relying on in his judgment has long been recognized. In *Rivtow Marine v Washington Iron Works*, Justice Ritchie recounted, “[e]ven from the earliest times articles dangerous in themselves as well as articles which were made dangerous by reason of some defect known to the manufacturer were excepted from this general rule.”<sup>571</sup> One important caveat to this exception: in order to make use of it the defendant had to know a product was

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1906). Shapo further notes decision like *Mazeeti and Ketterer*, the latter being a short trial judge decision “that did not cite a single source for its oratorical flourish”, judges are making manifest a commitment. In this case, it was to social justice, *ibid*. See also his discussion of *Henningsen v Bloomfield Motors*, 32 NJ 358 (1960), which continues on the theme of “social justice”.

<sup>567</sup> *MacPherson v Buick Motor Co*, 217 NY 382, 111 NE 1050 (1916).

<sup>568</sup> Shapo, *supra* note 536 at 21. For a valuable discussion of the cases leading up to *MacPherson v Buick Motor Co*, *ibid*, see Epstein, *Modern Products Liability Law*, *supra* note 540 at 16-21.

<sup>569</sup> For example, Epstein argues that Cardozo ignored the challenge raised in the dissent by Chief Justice Bartlett, Epstein, *Modern Products Liability Law*, *supra* note 540. Relying on *Winterbottom v Wright*, *supra* note 550, Bartlett argued: “[i]n the case at bar the defective wheel on an automobile moving only eight miles an hour was not any more dangerous to the occupants of the care than a similarly defective wheel would be to the occupants of a carriage drawn by a horse at the same speed; and yet unless the courts have been all wrong on this question up to the present time there would be no liability to strangers to the original sale”, *MacPherson v Buick Motor Co*, *supra* note 567 at 1056-1057.

<sup>570</sup> Stapleton, *supra* note 545 at 20. Theall et al, *supra* note 62 at L1-4 contend that *MacPherson v Buick Motor Co*, *ibid*, set the stage for the demise of the privity rule.

<sup>571</sup> [1974] SCR 1189 at 1201-1202. The court notes that “the ground for excepting the latter class of article was first based on the fact that the vendor of the article who knew it to be defective was guilty of fraud or deceit and for this reason liable to anyone who suffered as a result of an injury”, *ibid*. It proceeds to discuss the evolution of the exception.

defective.

*MacPherson* helped to remove the privity barrier for plaintiffs, allowing more individuals an opportunity to seek damages for harms that resulted from their use of a product. This willingness to move away from privity also had corollaries in Canada. For example, in 1919, the court allowed a plaintiff who found powdered glass in a chocolate bar to bring an action against the manufacturer.<sup>572</sup> The court held: “there was a duty to the public not to put on sale such a dangerous article as the chocolate bar in question”, and found the defendant to be guilty of negligence and the proximate cause of the plaintiff’s injuries.<sup>573</sup> In 1921, the Supreme Court of Canada held that a manufacturer is responsible if it “negligently manufactures and puts into circulation a mischievous thing which is or may be a trap to people using it.”<sup>574</sup> Ultimately, what emerged with *Donoghue* and these other cases is the tort theory of negligence.

While negligence has evolved significantly since the House of Lord’s decision in *Donoghue*, the case nevertheless remains at the heart of negligence cases in Canada.<sup>575</sup>

Commonwealth product liability law is inextricably linked with *Donoghue* and negligence.<sup>576</sup>

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<sup>572</sup> *Buckely v Mott* (1919), 50 DLR 408 (NS SC).

<sup>573</sup> Edgell, *supra* note 545 at 9.

<sup>574</sup> *Ross v Dunstall* (1921), 62 SCR 393, affirming *George v Skivington*, [1869] LR 5 Ex 1. In this case, the manufacturer had put into circulation a sporting rifle that could be fired with the bolt unlocked, and that the bolt may appear to be locked when in fact it was not. The court found that there was a latent defect, and that the manufacturer failed to warn about this defect, ultimately resulting in the injury of two people. See Edgell, *supra* note 545 at 8. The court further held: “The manufacturer of such articles is a person rightly assumed to possess and to have exercised superior knowledge and skill in regard to them on which purchasers from retail dealers in the ordinary course of trade may be expected to rely. From his position he ought to know of any hidden sources of danger connected with their use. The law cannot be so impotent as to allow such a manufacturer to escape liability for injuries—possibly fatal—to a person of a class who he contemplated would use his product in the way in which it was used caused by a latent source of danger which reasonable care on his part should have discovered and to give warning of which no steps have been taken”, *Ross v Dunstall*, *ibid* at 403, cited in Cassels & Jones, *supra* note 84 at 15.

<sup>575</sup> In *Hollis v Dow Corning*, *supra* note 66 at para 21, La Forest J notes, “[t]he rationale for the manufacturer’s duty to warn can be traced to the “neighbour principle”, which lies at the heart of the law of negligence, and was set down in its classic form by Lord Atkin in *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.).”

<sup>576</sup> Edgell, *supra* note 545 at 5 (“One of the most common bases of liability is negligence. To understand

This has some implications for how this field has evolved over time, as developments in negligence law have implications for product liability law.<sup>577</sup> This raises some challenges given that, as Klar points out, “[i]t is impossible to describe what negligence is, except by using vague generalities which invariably tend merely to rephrase the issue.”<sup>578</sup> To make a claim in product liability law in Canada is to make a negligence claim,<sup>579</sup> and thus a product liability claim has the same requirements of a negligence claim: duty of care, standard of care, and causation. Chapters five through seven go through these specific aspects. While product liability law also suffers many of the same limitations as negligence,<sup>580</sup> it has also been described as flexible<sup>581</sup> with unique aspects.<sup>582</sup> One of these unique elements is the requirement for a product to be defective.

## 2.1. Defective Products

Although grounded in negligence law, for a harm to be encapsulated by product liability

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products liability law in Canada, one must have an understanding of the law of negligence because the two are inextricably linked. Indeed, a products liability claim stands at the root of modern negligence law.”). Even though product liability law might be able to stand on its own, Stapleton, *supra* note 545 at 3 notes that this does not mean it needs to be separate out of the broader principles already established (“The notion of ‘product liability’ may be definable in terms of, say, the responsibility which the law places on those who supply products for the losses caused by their condition, but the fact that product liability can be defined as a distinct legal category does not itself establish the wisdom of separating it out from the general organization of civil obligations.”). Edgell, *ibid* at 3, prefers to think of product liability law “as sitting at a crossroads or meeting place of a great many branches of law.”

<sup>577</sup> For example, that the burden is on the plaintiff to demonstrate that the defendant was negligent.

<sup>578</sup> Lewis N Klar, *Tort Law* (Toronto: Thompson Profession Publishing, 1991) at 205 [Klar, *Tort Law*].

<sup>579</sup> Theall et al, *supra* note 62 at L5-2 (“When a product liability action sounds in tort rather than contract, the action is based on basic negligence principles, such as duty, standard of care, reasonableness and foreseeability.”).

<sup>580</sup> For example, Waddams, *Product Liability*, *supra* note 534 at 13 notes, “[t]he law of negligence has played an uneasy role in attempting to deal at the same time both with determination of fault and with allocation of losses. Nowhere is the difficult of this dual role more apparent than in the law of products liability.” Alvin S Weinstein et al, *Products Liability and the Reasonably Safe Product: A Guide for Management, Design, and Marketing* (Toronto: John Wiley & Sons, 1978) also note: “The interplay of the concepts of duty, proximate cause, and contributory fault may appear to introduce needless complexity into the determination of liability.” They further observe, “[t]he issues are not simple but subtle and complex and differ in each situation”, *ibid*.

<sup>581</sup> Edgell, *supra* note 545 at 9.

<sup>582</sup> For example, Edgell, *ibid*, identifies “duties to warn, and the learned intermediary defence to an alleged breach of a duty to warn.”

law, it requires one specific criterion: a defective product.<sup>583</sup> “Defect” here is meant in the broadest sense.<sup>584</sup> Determining whether a product is defective has been the source of “enormous confusion”<sup>585</sup> in product liability law. This is in part because what constitutes a defect in a product is subject to competing definitions,<sup>586</sup> tests,<sup>587</sup> assumptions undergirding product liability law generally,<sup>588</sup> and different theories of liability.<sup>589</sup> As has been suggested, “the problem of defining defectiveness has exercised the minds of legal scholars perhaps more than any other

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<sup>583</sup> Theall et al, *supra* note 62 at L1-8 contend that “[t]he cornerstone of product liability theory is the defect: the product must have a defect for liability to arise.”

<sup>584</sup> *Ibid.*

<sup>585</sup> Weinstein et al, *supra* note 580 at 43, note: “[e]veryone agrees that for a product to be a likely subject for a products suit it must have a defect, but there is considerable disagreement about just what attributes of a product will, when added together, constitute a defect.”

<sup>586</sup> Consider, for example, the following definitions: “a defect is a dangerous characteristic of a product unit that causes injury in a way that requires a seller to pay for the injury”, Shapo, *supra* note 536 at 117; “[a]bstractly, a defect is that state, quality, or condition of a product that makes it substandard”, Weinstein et al, *supra* note 580 at 28; any product in a condition “unreasonably dangerous to the user or consumer or to his property”, *Restatement (Second) of Torts*, *supra* note 408 at §402A, comment *i*; “A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including: (a) the presentation of the product; (b) the use to which it could reasonably be expected that the product would be put; (c) the time when the product was put into circulation” per the European Communities Directive of 25 July 1985, Article 6(1). As Henderson & Twerski at 731 observe, some of the attempts to define defectiveness “are not very helpful to begin with because they are terribly imprecise or outright tautological”, James A Henderson & Aaron D Twerski, *Products Liability: Problems and Process*, 7th ed (New York: Wolters Kluwer, 2011). See also Clark, *supra* note 545 at 25, n 1. Some scholars do not attempt to provide a definition, but instead focus on how the concept: see, for example Theall et al, *supra* note 62 at L1-8-L1-9.

<sup>587</sup> Shapo, *supra* note 536 at 133, points out that courts addressing whether a product is defective has a range of analytical tools to use, or as his subtitle puts it, “A Smorgasbord of Tests”. Shapo discusses the Learned Hand test, the Calabresi-Hirschhoff test, and various scholars’ interpretations (“glosses”) on §402A of the *Restatement (Second) of Torts*, *supra* note 408.

<sup>588</sup> For example, when discussing how defect is defined in the European Communities Directive, CJ Miller & RS Goldberg, *Product Liability*, 2nd ed (Oxford: Oxford University Press, 2004) note: “a system which includes purely financial or economic losses will probably adopt a definition based on a standard of satisfactory quality or reasonable fitness for purpose. On the other hand, if compensation is to be limited to cases of death, personal injury, and property damage, it is like that the definition would be based on a test of a reasonable or acceptable level of safety or, as in the case of the *Restatement, Second, Torts* §402A, an absence of unreasonable danger”, at 351. See also Henderson & Twerski, *supra* note 586 at 731.

<sup>589</sup> There are important differences between a strict liability understanding of product liability and one grounded in negligence. See, for example, Boivin, “Negligence, Strict Liability, and Manufacturer Failure to Warn”, *supra* note 83; Allen M Linden & Bruce Feldthusen, *Canadian Tort Law*, 9th ed (Markham, ON: LexisNexis, 2011) at 650-654, Edgell, *supra* note 545 at 18-26, and Cassels & Jones, *supra* note 84 at 91-101. Importantly, under strict liability the plaintiff need not show that the manufacturer acted negligently, as it is sufficient to demonstrate that the product was defective, and that the defect was the cause of the plaintiff’s harm, see Henderson & Twerski, *supra* note 586 at 3.

aspect of product liability law.”<sup>590</sup> Additionally, not all products that cause damage will be considered sources of liability<sup>591</sup>, not all defects that expose a manufacturer to liability are necessarily dangerous<sup>592</sup>, and not all dangerous defects result in liability.<sup>593</sup> Indeed, a product may be dangerous or flawed<sup>594</sup> without attracting liability for being defective.

The Ontario Law Reform Commission provided a succinct way of determining when a product is defective. Recognizing the need for a general and flexible test, it concluded “the concept cannot be defined except in terms of what it was reasonable to expect of the product in all the circumstances.”<sup>595</sup> The concept of a defect is addressed in more detail in chapter six, which examines the standard of care in duty to warn cases. Suffice it to say that a defect implies that a product is in some way substandard or unreasonably dangerous to a user.<sup>596</sup> There are the three different categories of defects<sup>597</sup>: design defects, manufacturing defects, and warnings

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<sup>590</sup> Clark, *supra* note 545 at 25. See also *ibid* at 25 n. 1, where he identifies numerous examples of scholarly attempts to define “defect.”

<sup>591</sup> See Waddams, *Product Liability*, *supra* note 534 at 47 and Weinstein et al, *supra* note 580 at 18 (“The mere presence of a defect in a product at the time of injury is not enough. A defect may exist in a product but have had little or no bearing on the incident that caused the injury.”).

<sup>592</sup> For example, see *Associated Siding Applicators v ES Jonasson Contractors* (1985), 57 AR 136 (AB QB), where the court held a manufacturer liable for non-dangerous defect in aluminum siding that turned a pinkish hue when exposed to light.

<sup>593</sup> As will be discussed in Chapter 4 a plaintiff must prove that the defendant’s negligence was both a factual and proximate cause of the plaintiff’s injury. Weinstein et al, *supra* note 580 at 18 note: “Unless it is established that the defect existed when the product was in the hands of the manufacturer, liability will not attach.” Moreover, they note “[e]ven when it is clear that the defect played a role in the injury event, it is often necessary to determine whether that role was significant in assessing the defendant’s liability”, at 18-19.

<sup>594</sup> Weinstein et al, *supra* note 580 at 35, observe that all products are flawed, but the question in product liability is whether or not a flaw is properly understood as a defect. They define a flaw as “[a]n irregularity in the state, quality, or condition of a product”, at 28.

<sup>595</sup> OLRC, *Report on Products Liability*, *supra* note 83 at 13. Cited by *Holt v PPG Industries*, [1983] AJ No 191 (AB QB) at 264.

<sup>596</sup> The language of “unreasonably dangerous” is from *Restatement (Second) of Torts*, *supra* note 408 at §402A.

<sup>597</sup> Cassels & Jones, *supra* note 84 at 32. See also Theall et al, *supra* note 62 at L1-8. They note that there is a fourth category, breach of warranty, which is based on contract law. *Arora v Whirlpool*, [2012] OJ No 3865 (ON Sup Ct J) at para 264 also identify a fourth category: “manufacturers have a duty of care to compensate consumers for the cost of repairing a dangerous product that presents a real and substantial danger.” Compensation for repair is

defects (occasionally called “instruction defects”<sup>598</sup>). What constitutes a “defect” differs between the categories.<sup>599</sup> The first two categories are considered next.

The first category of a defective product is a defective design. A design is considered defected when a product becomes unduly dangerous because of the way the manufacturer designed it. Manufacturers have a duty of care when designing a product to “avoid safety risks and to make the product reasonably safe for its intended purposes.”<sup>600</sup> This obligation extends beyond ensuring that a design is safe, but also to ensure that the design is crashworthy.<sup>601</sup> In other words, manufacturers are compelled to consider the foreseeable accidents or misuses of their products, and to adequately test their design to safeguard against known or reasonably foreseeable risks.<sup>602</sup> And while manufacturers are not expected to be able to forecast all

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also not considered here.

<sup>598</sup> Henderson & Twerski, *supra* note 586 at 731.

<sup>599</sup> *Arora v Whirlpool*, *supra* note 597 at para 265: “It may be noted that all of these established categories are premised on the product causing harm or having the potential of causing harm to persons or property. The underlying argument is that a manufacturer has a duty of care not to design a product negligently because the manufacturer should and can fairly be held responsible for the choices it makes that affect the safety of the product. The manufacturer has a duty to make reasonable efforts to reduce any risk to life and limb that may be inherent in its design.”

<sup>600</sup> *Goodridge v Pfizer Canada*, *supra* note 558 at para 81 and *Arora v Whirlpool*, *supra* note 597 at para 264, with both courts citing *Ragoonanan v Imperial Tobacco Canada*, [2000] 51 OR (3d) 603 (ON SC) and *Rentway Canada v Laidlaw Transport*, [1989] OJ No 786 (ON H Ct J), *aff’d* [1994] OJ No 50 (ON CA).

<sup>601</sup> Per *Gallant v Beitz* (1983), 148 DLR (3d) 52 (ON H Ct J): “Since motor vehicle manufacturers know or should know that many of their vehicles will be involved in collisions and that many people will be injured in those crashes, they must turn their minds to this matter during the process of planning the designs of their vehicles and they must employ reasonable efforts to reduce any risk to life and limb that may be inherent in the design of their products.” See also Theall et al, *supra* note 62 at L2-5 (“cars are intended to be driven safely, not crashed. However, because overwhelming statistics suggest that it is reasonably certain that many users will involve their cars in collisions, manufacturers must use care to design automobiles which are reasonably crashworthy.”).

<sup>602</sup> According to Theall et al, *supra* note 62: foreseeability depends on what a reasonable person would anticipate: “courts are more likely to impose liability on manufacturers where the plaintiff exhibits the foreseeable behavior of the average reasonable consumer, and reject liability where the plaintiff’s behavior is unexpected”, at L2-6. See also *Resurface Corp v Hanke*, [2007] 1 SCR 333. When determining reasonableness the first factor is “whether viable alternatives to the manufacturer’s design existed which would have eliminated or reduced the risk which gave rise to the accident”, Theall et al, *ibid*. A manufacturer can justify that the design was reasonable if it possess benefits that outweigh the risks, *ibid* at L2-7. In such instances where a product’s utility outweighs its risk, “warnings, rather than complete withdrawal from the marketplace, may be found to be sufficient”, *ibid*. See also *Leblanc v Marson Canada*, [1995] 146 NSR (2d) 392 (NS CA). at para 18 regarding the testing of a hazardous



dangers<sup>603</sup>, but only the “state of the art” at the time of the design<sup>604</sup>, they are nevertheless under an obligation to design a product in a way that avoids substantial and extraordinary risks.<sup>605</sup> For example, in *Nicholson v John Deere Ltd*, Justice Smith held “a manufacturer does not have the right to manufacture an inherently dangerous article when a method exists of manufacturing the

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product (glue): “I find that the testing procedures employed to check the sealing of the bottom of these tubes can only be described as haphazard, uncontrolled, totally unscientific and not intended or effective to guard against the rupturing of these seals, a danger which is clearly foreseeable. Knowing the extremely dangerous and hazardous nature of the contents, serious injury to the consumer is equally foreseeable. The defence argues that such an accident had not occurred before and if that is the case, in my view, it is more by luck than by design. Such an accident was clearly foreseeable as was the resulting injuries.”

<sup>603</sup> There is no requirement for manufacturers to be perfect – some injuries and harms are not foreseeable. For example, the court in *Lem v Baratto Sports*, [1976] 69 DLR (3d) 276 (AB SC) at para 23 noted, the “standard of perfection is not required in the law of negligence” “applies equally to foreseeability, otherwise we would more from duty defined by what is reasonable to the duty of an insurer.” Moreover, courts have recognized that it is easy to identify risks in hindsight. Consider the leading US case on point, *Jamieson v Woodward* (1957) 247 F (2d) 23 (USCA, D Columb), as cited by *Schulz v Leeside*, [1978] 90 DLR (3d) 98 (BC CA) at para 30: “The law does not require that an article be accident-proof or incapable of doing harm. It would be totally unreasonable to require that a manufacturer warn or protect against every injury which may ensue from mishap in the use of his product. Almost every physical object can be inherently dangerous or potentially dangerous in a sense. A lead pencil can stab a man to the heart or puncture his jugular vein, and due to that potentiality it is an “inherently dangerous” object; but, if a person accidentally slips and falls on a pencil-point in his pocket, the manufacturer of the pencil is not liable for the injury. He has no obligation to put a safety guard on a lead pencil or to issue a warning with its sale. A tack, a hammer, a pane of glass, a chair, a rug, a rubber band, and myriads of other objects are truly “inherently dangerous”, because they might slip ... A hammer is not of defective design because it may hurt the user if it slips. A manufacturer cannot manufacture a knife that will not cut or a hammer that will not mash a thumb or a stove that will not burn a finger. The law does not require him to warn of such common dangers. .... If a hand slips in a normal operation with a non-defective device, a knife will cut and a lighted stove will burn and an automobile will crash into a tree; but not authority holds that manufacturers must warn of such contingencies.”

<sup>604</sup> For a further discussion about “state of the art” see Edgell, *supra* note 545 at 27-30 and Theall et al, *supra* note 62 at L6-12-L6-14. Waddams, *Product Liability*, *supra* note 534 at 74 suggests medical drugs are a good example of how this can apply: “A drug though by everyone to be safe may turn out to be dangerous, but at the time of manufacture and distribution it may be that the best medical opinion could not have foreseen the danger. In such a case there would be no defence in a strict liability jurisdiction, but there might be a defence in a jurisdiction that requires proof of negligence.” For example, in *Deliva v Chrysler Canada*, [2002] 311 AR 196 (AB QB), the court held that the manufacturer did not have knowledge of an alternative design that would have prevented injury (paras 23-24).

<sup>605</sup> Theall et al, *supra* note 62 at L1-8 provide a succinct overview of the defective design: “the fundamental question is whether the product’s design poses an unreasonable risk of harm to the foreseeable user. To answer this question, one must assess the nature and extent of the risk, taking into account whether it is latent or obvious, the probability of injury given the product’s intended use and foreseeable misuse, and the likely severity of injury. One must also assess whether the risk is reasonable in the circumstances, considering such things as whether viable design alternatives or warnings might have reduced the risk and whether the social utility of the product justifies any residual risk. The extent to which the product met prevailing industry standards and complied with regulatory standards is also relevant to the issue of design defect.”



same article without risk of harm.”<sup>606</sup> To determine whether a manufacturer has breached its duty, the court will rely on a risk-utility analysis that measures whether the utility of the design outweighs its foreseeable risks.<sup>607</sup>

The second category of defective products is manufacturing defects. These occur when the product fails to conform to intended specifications.<sup>608</sup> And whereas design defects carry far greater liability risk<sup>609</sup>, it has been observed that the manufacturer’s duty to avoid manufacturing a defective product is more onerous, in part due to the difficulty with safeguarding against manufacturing errors. In cases where a manufacturer has produced a defective product, “the interference of negligence is practically irresistible.”<sup>610</sup> This is because unlike a defective design,

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<sup>606</sup> *Nicholson v John Deere* (1986), 58 OR (2d) 53 at 56 (ON H Ct J). In this case, John Deere’s lawnmower had a risk of a fire due to its gas tank being in close proximity to a battery. The risk materialized and the plaintiff’s home and its contents were destroyed in a fire. The defendant was found liable. The Ontario Court of Appeal dismissed the appeal, *Nicholson v John Deere*, [1989] OJ No 495 (ON CA).

<sup>607</sup> The application of the risk-utility test was considered in *Rentway Canada v Laidlaw Transport*, *supra* note 600. As articulated by *Arora v Whirlpool*, *supra* note 597 at para 267: “In *Rentway v. Laidlaw* ... Justice Granger compiled a list of factors to consider when balancing the risks inherent in the product, as designed, against its utility and cost; namely: (1) the utility of the product to the public as a whole and to the individual user; (2) the nature of the product ; that is, the likelihood that it will cause injury; (3) the availability of a safer design; (4) the potential for designing and manufacturing the product so that it is safer but remains functional and reasonably priced; (5) the ability of the plaintiff to have avoided injury by careful use of the product; (6) the degree of awareness of the potential danger of the product which reasonably can be attributed to the plaintiff; and (7) the manufacturer’s ability to spread any costs related to improving the safety of the design.” *Goodridge v Pfizer Canada*, *supra* note 558 at para 88, after identifying the seven aspects from *Rentway Canada v Laidlaw Transport*, *ibid*, held: “it should be noted at the heart of the duty to care in design is the availability of choices of design that should not be ignored.”

<sup>608</sup> *Cassels & Jones*, *supra* note 84 at 32. They also note that this presumes that the intended specifications were adequate in the first place.

<sup>609</sup> See *Goodridge v Pfizer Canada*, *supra* note 558 at para 87: “Liability for a blameworthy design has greater scope than the liability for a defective product because a defective product may be a single aberration, but a design defect extends to all of the products manufactured with that chosen design.”

<sup>610</sup> *McMorran v Dominion Stores* (1976), 74 DLR (3d) 186 (ON H CJ) at 191. See also: *Goodridge v Pfizer Canada*, *supra* note 558 at para 82. The court also refers to Klar, who contends that it difficult to envisage circumstances where a manufacturer of a product that injures a person would not have a duty of care to that person, see in Lewis N Klar, *Tort Law*, 4th ed (Toronto: Thomson/Carswell, 2008) at pp. 365-366. Reed Dickerson, *Products Liability and the Food Consumer* (Boston: Little, Brown and Company, 1951) at 112 observes, “[i]n the typical food injury case, the precise cause of the defect is forever a mystery. Unless the defect is common to the product or a particular, identifiable batch, both parties necessarily rely on circumstantial evidence that is, in most cases, far from conclusive.”

where a design has to make tradeoffs between risks and benefits, a manufacturing defect is the result of a mistake. This is the type of defect that occurred in *Donoghue*<sup>611</sup>, and is not uncommon in cases where a foreign object is found in a food product.<sup>612</sup> There are numerous Canadian cases on point.<sup>613</sup> For example, there have been cases dealing with a fly in a water bottle<sup>614</sup>, maggots in chocolate biscuits<sup>615</sup>, a piece of a hypodermic needle in a flank steak<sup>616</sup>, and shards of glass found in chocolate milk<sup>617</sup>, bread<sup>618</sup>, and a soft drink.<sup>619</sup> In such instances, when a deleterious substance is found in the product, the manufacturer is presumed to be negligent.<sup>620</sup> After all, none of these products were designed to include the foreign object.

The final category, defective warnings, is considered next.

### 3. THE DUTY TO WARN

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<sup>611</sup> See *Arora v Whirlpool*, *supra* note 597 at para 264 and *Goodridge v Pfizer Canada*, *supra* note 558 at para 81.

<sup>612</sup> Dickerson, *supra* note 610 at 184-185 talks about “naturalness”, although given the implications of the term “natural” in the contemporary discussions of food, it is a far too loaded term. However, the point of his discussion is germane, as he points to cases from the US that found that bones found in meat products did not classify the product as defective. See *Mix v Ingersoll Candy*, 6 Cal 2d 674 (1936) (chicken bone in chicken pie); *Silve v FW Woolworth*, 28 Cal App 2d 649 (1938) (turkey bone in dressing accompanying turkey); and *Brown v Nebiker* (1941), 296 NW 366 (bone sliver in pork chop). Dickerson further notes, “[t]he better test of what is legally defective appears to be what consumers customarily expect and guard against”, *supra* note 610 at 185.

<sup>613</sup> This is not the only type of manufacturing defects cases that involve food products. For example, see *Mayburry v Ontario (Liquor Control Board)*, [2001] OJ No 1494 (ON Sup Ct J), in which the court held a manufacturer liable for damages that arose when a bottle of alcohol exploded and glass fragments injured the plaintiff.

<sup>614</sup> *Mustapha v Culligan of Canada*, [2008] 2 SCR 114.

<sup>615</sup> *Farmer v Interbake Foods*, [1981] NSJ No 518 (NS SCTD).

<sup>616</sup> *Kean v Sobeys*, [1997] NJ No 215 (NFLD SCTD).

<sup>617</sup> *Shandolff v City Dairy*, [1936] 4 DLR 712 (ON CA).

<sup>618</sup> *Arendale v Canada Bread*, [1941] 2 DLR 41 (ON CA).

<sup>619</sup> *Zeppa v Coca-Cola*, [1955] 5 DLR 187 (ON CA).

<sup>620</sup> See *Arendale v Canada Bread*, *supra* note 618 at 3: “when one manufactures for human consumption, any article, fluid or solid, he putting it on the market gives an implied warranty that it contains no deleterious substance; and that if the ultimate consumer is injured by the presence of such deleterious substance he is entitled to damages unless the manufacturer proves that it was there introduced by some agency, other than his own – in other words he must prove that this deleterious article did not obtain entrance through his act or negligence but that of some other. The onus is on the manufacturer so to prove.”

The third category of defective product is a defective warning, which is premised on the idea that manufacturers have a duty to warn users of the known or reasonably foreseeable dangers inherent in their products.<sup>621</sup> The duty to warn is a relatively new area of tort.<sup>622</sup> Although it has been described as an area that is nearly unique to product liability law<sup>623</sup>, the Supreme Court in *Hollis* points out that it is grounded in the general principles of negligence.<sup>624</sup> A defective warning occurs when a manufacturer has knowledge, or ought to have knowledge, about an inherent danger with its product, but fails to provide this information to the consumer. While manufacturers have long been held liable for design defects<sup>625</sup>, liability imposed for failure to provide adequate warnings only became more frequent in the 1960s and 70s.<sup>626</sup> Despite its slow uptake, duty to warn litigation now stands as the most common product liability case.<sup>627</sup> This is in part because failure to warn claims are generally more flexible and less costly to prove than design defect or manufacturing defect cases.<sup>628</sup> Thus, failure to warn claims are often

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<sup>621</sup> With respect to the aims of tort, discussed in Chapter 2, the aim of preventing harm often situates the duty to warn within the deterrence theory of tort. See Rabin, “The Tobacco Litigation”, *supra* note 46 at 349 (“Deterrence theory has provided the underlying foundation for claims of inadequate warnings and defectively dangerous design.”).

<sup>622</sup> At least as presently understood. Theall et al, *supra* note 62 at L1-4 point out that *Ross v Dunstall*, *supra* note 574, is an early duty to warn case as the court held that manufacturer had duty to warn purchasers of dangers of rifle firing when unlocked bolt appeared to be locked.

<sup>623</sup> Edgell, *supra* note 545 at 3.

<sup>624</sup> The Court notes, the “duty to warn of danger is subject to the same limitation of scope and extent as are other duties of care recognized in tort”, *Hollis v Dow Corning*, *supra* note 66 at para 22, referring to *Rivtow Marine v Washington Iron Works*, *supra* note 571 and *Lambert v Lastoplex Chemicals*, *supra* note 65.

<sup>625</sup> *Restatement (Third) of Torts, Products Liability*, *supra* note 534 notes in §1: “The imposition of liability for manufacturing defects has a long history in the common law.” For a history of products liability from a Canadian perspective, see Waddams, *Product Liability*, *supra* note 534 at 1-11.

<sup>626</sup> *Ibid.* The authors note that there were restrictive rules that prevented courts from imposing liability for inadequate warnings under *Restatement (Second) of Torts*, *supra* note 408 at §402A, but that “it soon became evident that §402A, created to deal with liability for manufacturing defects, could not appropriately be applied to cases of design defects or defects based on inadequate instructions or warnings.”

<sup>627</sup> Stapleton, *supra* note 545 at 252.

<sup>628</sup> In part this is because failure to warn cases are held to have an easier time with overcoming evidentiary gaps, Stapleton, *ibid* at 252. Dickerson, *supra* note 610 notes that negligence generally became a “gap-filler” for food liability in the era of the privity requirement, at 70.

presented as a promising alternative to negligent manufacture or design claims.<sup>629</sup> Moreover, as Stapleton observes, they can be used “as an aggressive move to outflank a defence of contributory negligence.”<sup>630</sup>

The basic underlying rationale for the duty to warn is that consumers rely on manufacturers to provide them with accurate information about the risks inherent in the use of their products. As La Forest J held in *Hollis v Dow Corning*: “The duty to warn serves to correct the knowledge imbalance between manufacturers and consumers by alerting consumers to any dangers and allowing them to make informed decisions concerning the safe use of the product.”<sup>631</sup> This extends to warning consumers about foreseeable misuses of a product.<sup>632</sup> As such, the duty to warn is quite broad, as it could apply to anyone that might be reasonably affected by a product. Importantly, this includes parties who might not be involved in the original sale.<sup>633</sup> The duty exists to overcome knowledge disparities between the manufacturer

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<sup>629</sup> Theall et al, *supra* note 62 at L3-1.

<sup>630</sup> Stapleton, *supra* note 545 at 252.

<sup>631</sup> *Hollis v Dow Corning*, *supra* note 66 at para 21. La Forest J also held, ““When manufacturers place products into the flow of commerce, they create a relationship of reliance with consumers, who have far less knowledge than the manufacturers concerning the dangers inherent in the use of the products, and are therefore put at risk if the product is not safe.”

<sup>632</sup> See discussion about foreseeable misuse in Chapter 5. This was also highlighted in *Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 16 (“a manufacturer of a product has a duty to warn consumers of dangers inherent in use of its product of which it knows or has reason to know.”).

<sup>633</sup> The extent of the duty to warn is compared to the duty that generally arises when a defendant creates a risk. For example, in *Childs v Desormeaux*, [2006] 1 SCR 643, the court suggested that there are features of a relationship that “bring parties who would otherwise be legal strangers into proximity and impose positive duties on defendants that would not otherwise exist” (para 34). The court identified *Horsley v MacLaren*, [1972] 2 SCR 441 and *Crocker v Sundance Northwest Resorts*, [1988] 1 SCR 1186, among others, as situations where defendant “intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls”, concluding, at para 35: “If the defendant creates a risky situation and invites others into it, failure to act thereafter does not immunize the defendant from the consequences of its acts. These cases are akin to the positive and continuing duty of manufacturers or transferors of goods to warn of inherently dangerous products or dangerous uses of safe products: *Lambert v Lastoplex Chemicals ... Hollis v. Dow Corning Corp ...*” See also Cassels & Jones, *supra* note 84 at 50: “The Supreme Court made it clear [in *Hollis*] that the duty upon a manufacturer to warn consumers of risk associated with its products is merely an extension of the general duty to take care imposed by tort law and that the rationale for the rule lay in the disparity of knowledge between manufacturer and consumer.”

and user.<sup>634</sup> In this respect, it seeks to empower individual consumers to make informed choices, and to bar recovery for risks a consumer knowingly takes.<sup>635</sup>

The leading duty to warn case in Canada is *Lambert v Lastoplex Chemicals*.<sup>636</sup> Mr. Lambert purchased a fast-drying lacquer sealer that he applied to a parquet floor in his basement. On the can of lacquer were caution notices to keep the product away from open flames.<sup>637</sup> Although he read these warnings, and took efforts to ensure there were no open flames, Lambert did not extinguish the pilot lights on his furnace or water heater. While nearing the end of the project, a line of flame advanced across the floor, and caused an explosion when it reached the open can of sealer, resulting in property damage and burns to Lambert. The court held that the manufacturer had a duty to provide explicit warnings commensurate with the danger that an ordinary consumer would not know. Importantly, the can of lacquer had three warnings about the products inflammability. In this case, however, the court unanimously agreed that the warnings

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<sup>634</sup> Theall et al, *supra* note 62 at L1-9 note, the “issue turns on whether the warning made the user sufficiently aware of the precise risk and the consequence of not heeding the warning.” In *Bow Valley Husky (Bermuda) v Saint John Ship Building*, [1997] 3 SCR 1210, Saint John Shipbuilding tried to argue that the duty to warn only arose in instances where there was a knowledge imbalance. McLachlin and La Forest JJ, in a partial dissent, held at para 21: “Liability for failure to warn is based not merely on a knowledge imbalance. If that were so every person with knowledge would be under a duty to warn. It is based primarily on the manufacture or supply of products intended for the use of others and the reliance that consumers reasonably place on the manufacturer and supplier. Unless the consumer’s knowledge negates reasonable reliance, the manufacturer or supplier remains liable. This occurs where the consumer has so much knowledge that a reasonable person would conclude that the consumer fully appreciated and willingly assumed the risk posed by use of the product ....” The majority disagreed with McLachlin and La Forest JJ in the application of the law to the case here, not with the way they framed it.

<sup>635</sup> Cassels & Jones, *supra* note 84 at 48 (“The essence of the duty to warn is the concept of an individual’s responsibility for his or her own conduct. Inseparable from the idea of fault-based liability is the idea that one should not be able to recover for a risk knowingly taken.”). Weinstein et al, *supra* note 580 at 27 characterize it as such: “The courts, with their myriad of concepts, are saying that manufacturers must recognize and respond to a range of human frailties in designing and marketing products.”

<sup>636</sup> *Lambert v Lastoplex Chemicals*, *supra* note 65. Per *Dickson v Broan-NuTone Canada*, [2007] OJ No 5114 (ON Sup Ct J) at para 30, “the leading statement on the duty to warn remains ... *Lambert*.”

<sup>637</sup> There were, in fact, three warnings indicating that the product should not be used near an open flame and that the room should be ventilated. See court’s assessment *Lambert v Lastoplex Chemicals*, *supra* note 65 at 573.

lacked the explicitness required.<sup>638</sup> Additionally, it rejected the defendant's claim that the plaintiff was an expert consumer, by virtue of his education as a professional engineer.<sup>639</sup> The court held that manufacturers cannot simply pass on the risk of injury to consumers for dangers the manufacturers are aware of, even if said injuries arise in the ordinary course of use.<sup>640</sup>

Given the expectation on manufacturers to fully disclose risks to consumers, the duty to warn is often compared with the doctrine of informed consent. This was observed by the court in *Hollis*.<sup>641</sup> Justice La Forest noted that the doctrine of informed consent aimed to redress the inequality of information between a doctor and patient, and in a similar manner, the duty to warn aimed to overcome disparities in knowledge between the manufacturer and the consumer. In fact, La Forest J noted that, if anything, an even greater inequality existed between manufacturers of medical products and consumers.<sup>642</sup> He concluded: "the principles underlying the doctrine of "informed consent" are equally, if not more, applicable to the relationship between manufacturers of medical products and consumers than to the doctor-patient relationship."<sup>643</sup> In the doctor-patient relationship, patients retain the ability to question their doctor about risks and benefits, whereas "the manufacturer-consumer relationship is characterized primarily by a lack

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<sup>638</sup> *Ibid* at 575 ("A home own preparing to use that lacquer sealer could not reasonably be expected to realize by reading the three cautions that the product when applied as directed gives off vapours to such a degree as likely to create a risk of fire from a spark or from a pilot light in another part of the basement area.")

<sup>639</sup> This point will be considered again in Chapter 6.

<sup>640</sup> *Lambert v Lastoplex Chemicals*, *supra* note 65 at 574: "Manufacturers owe a duty to consumers of their products to see that there are no defects in manufacture which are likely to give rise to injury in the ordinary course of use. Their duty does not, however, end if the product, although suitable for the purposes for which it is manufactured and marketed, is at the same time dangerous to use; and if they are aware of its dangerous character they cannot, without more, pass the risk of injury to the consumer."

<sup>641</sup> *Hollis v Dow Corning*, *supra* note 66 at para 24 ("... there is an important analogy to be drawn in this context between the manufacturer's duty to warn and the doctrine of "informed consent" developed by this Court...").

<sup>642</sup> *Ibid* at para 25.

<sup>643</sup> *Ibid* at para 25.



of direct communication or dialogue.”<sup>644</sup> The relationship is also different from that of a doctor and patient, given that manufacturers have an interest in promoting their products.<sup>645</sup>

One of the challenges in failure to warn cases is determining what level of knowledge is necessary before a consumer can be said to have voluntarily assumed the risk.<sup>646</sup> This was the issue before the court in *Létourneau*, as the defendant tobacco companies alleged that smokers knowingly accepted the risks and harms associated with their products.<sup>647</sup> Per *Hollis*, the requirement is for manufacturers to provide consumers with clear, complete and current information, and to do so on an ongoing and continuous basis. As stated by La Forest J:

In light of the enormous informational advantage enjoyed by medical manufacturers over consumers, it is reasonable and just to require manufacturers, under the law of tort, to make clear, complete and current informational disclosure to consumers concerning the risks inherent in the ordinary use of their products. A high standard for disclosure protects public health by promoting the right to bodily integrity, increasing consumer choice and facilitating a more meaningful doctor-patient relationship.<sup>648</sup>

A warning needs to be sufficient to substantially reduce the danger level of the product.<sup>649</sup>

Moreover it needs to be presented in such a manner that a consumer would notice the warning.<sup>650</sup>

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<sup>644</sup> *Ibid* at para 25. For a discussion, see Patricia Peppin, “Drug/Vaccine Risks: Patient Decision-making and Harm Reduction in the Pharmaceutical Company Duty to Warn Action” (1991) 70 Can Bar Rev 473.

<sup>645</sup> *Hollis v Dow Corning*, *supra* note 66 at para 46: “The manufacturer ... can be expected to act in a more self-interested manner. In the case of a manufacturer, therefore, there is a greater likelihood that the value of a product will be overemphasized and the risk underemphasized.” See also Denis W Boivin, “Factual Causation in the Law of Manufacturer Failure to Warn” (1998-1999) 30:1 Ottawa Law Review 47 [Boivin, “Factual Causation”]. One might argue that doctors have a vested interest in ‘selling health’ to their patients, and that in instances this might compromise the relationship. However, unlike in the manufacturer-consumer paradigm, doctors are to act as fiduciaries to their patients, thereby increasing their obligation to the patient while also providing the patient with another course of action to seek compensation should they be harmed by a doctor’s self-interests.

<sup>646</sup> Cassels & Jones, *supra* note 84 at 49.

<sup>647</sup> *Létourneau v JTI-MacDonald*, *supra* note 68.

<sup>648</sup> *Hollis v Dow Corning*, *supra* note 66 at para 26. Important here is the notion of “ordinary use.” This will be discussed in more detail in the next few chapters.

<sup>649</sup> Weinstein et al, *supra* note 580 at 40.

<sup>650</sup> Stapleton points out that a plaintiff has proven that “warning was feasible” and “that it would have attracted the attention of a relevant party so that injury could and would have been avoided”, *supra* note 545 at 253.



While the precise requirements of warnings can only be made on a case-by-case basis<sup>651</sup>, the default position is that manufacturers are required to provide adequate warnings for all non-obvious risks.<sup>652</sup> As Weinstein and colleagues note, “[s]ince warnings are relatively inexpensive and require no major redesigning of the product, the natural tendency of manufacturers is to *warn* against rather than *redesign* against a foreseeable danger.”<sup>653</sup>

There is considerable overlap between the defective design and defective warnings cases.<sup>654</sup> As Theall and colleagues note, both types of cases require an assessment of “the nature and extent of the risk and then considers whether, given the level of the risk, the warnings were adequate.”<sup>655</sup> An important difference, however, is that while there is a need to consider the risks associated with the use of a product in a defective warning cases, there is no need to find a defect *per se* in the product itself. Instead,

[g]etting from the injury or damage to the conclusion that the warning was defective requires a consideration of whether the risk which materialized to harm the plaintiff was reasonably foreseeable. One must then consider whether the nature and extent of the risk merited a better warning, and next, whether a better

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She further points out, there is a danger that “excessive warnings, particularly of obvious hazards, are counterproductive because people can be lulled into a false sense of security by their limitations or learn to see warnings as superfluous, but that warnings in general are ineffective in most circumstances because behaviour is dominated by factors such as past experience and the example of others’ behaviour.” For more on point, see discussion in Chapter 4 about adequacy.

<sup>651</sup> Weinstein et al, *supra* note 580 at 25 note, “[i]t is the court that must make a threshold decision on whether in any case the danger level and the nature of product use are such that society ought to consider the imposition of safety features.”

<sup>652</sup> This trend is what Spurlock is reflecting on in *Don’t Eat This Book*, *supra* note 21, as discussed in Chapter 1. Stapleton notes that this trend can be explained in part from the fact that there are products for which no warning will ever be adequate, but also from a “pro-plaintiff dynamic.” See her discussion at *supra* note 545 at 255. What counts as obvious is discussed in Chapter 6.

<sup>653</sup> Weinstein et al, *supra* note 580 at 40. See also, *ibid* at 62, where they argue warnings are an “inexpensive mode of dealing with risks that cannot be designed out of a product without adding substantially to its costs or otherwise affecting its utility.”

<sup>654</sup> Theall et al, *supra* note 62 at L1-8 note that there failure to warn claims are more akin to negligent design claims than negligent manufacturer claims.

<sup>655</sup> *Ibid* at L1-9.

warning would have prevented the harm to this plaintiff.<sup>656</sup>

Similar to general negligence claims, foreseeability of harm is considered a touchstone for determining what constitutes reasonable care. With respect to warnings, *Lem v Baratto* held that the duty to warn is subject to the same limitations as other duties of care in tort, namely, that foreseeability limits liability for “dangers that are known or ought reasonably to be known to the manufacturer in the use of his product, which is to say dangers that are reasonably foreseeable.”<sup>657</sup> According to *Lem*, foreseeability asks, “whether a reasonable person should have anticipated that what happened might be a natural result of that act or omission”, and that “it is enough to fix liability if one can foresee in a general way the class or character of injury which occurred.”<sup>658</sup>

As the next section will demonstrate, the duty to warn consumers is heightened when applied to products that are consumed or ingested. In Canada, the law is clear that manufacturers who distribute products that are intended for human consumption are held to a higher standard of care.<sup>659</sup> The leading case on point is *Hollis v Dow Corning [Hollis]*.<sup>660</sup> In *Hollis*, the plaintiff was

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<sup>656</sup> *Ibid* at L3-2.

<sup>657</sup> *Lem v Baratto Sports*, *supra* note 603 at para 22. *Lem v Baratto Sports* explicitly extended foreseeability to include foreseeable misuses on the part of the consumer: “The duty of care of which the duty to give warning is an aspect, grows more exacting with the degree of danger of injury or damage arising from its misuse, and accordingly the reach of foreseeability is extended further as the circumstances may reasonably require”, *ibid*. The Court does not include abnormal uses, contending: “Abnormal use in the sense of putting the product to a use for which it is not intended is not in question here”, *ibid*. Lem was injured when failed he to use a shotgun shell reloading machine properly, having neglected to read the instructions, and an improperly loaded shotgun shell exploded in the barrel of his gun. The court did not hold the defendant liable for the Lem’s injuries because they were “so fortuitous as to be beyond the range of foreseeable results.” In *Deshane v Deere & Co*, [1993] 15 OR (3d) 225 (ON CA), the court in dissent argued that a manufacturer might have to warn about foreseeable modification of a product: “In my opinion, the manufacturer will have a duty to warn if the post-manufacture modification is actually known by it, or if it was reasonably foreseeable.” For a more detailed discussion on foreseeability, see Chapters 4, 5 and 6.

<sup>658</sup> *Lem v Baratto Sports*, *ibid* at para 23. The courts citations are omitted.

<sup>659</sup> Cassels & Jones, *supra* note 84 at 23. Interestingly, they note this high standard exists for “manufacturers of inherently dangerous products or products designed for human consumption.” This suggests that

injured when a breast implant sold by the defendant company ruptured during normal use. In its decision, the Supreme Court of Canada recognized that products that are ingested, consumed, or placed in the body necessarily require a high standard of care given their “great capacity to cause injury to consumers.”<sup>661</sup> Because intimate products render a plaintiff immediately susceptible, there is a heavy onus on manufacturers to provide “clear, complete and current information concerning the dangers inherent in the ordinary use of their product”<sup>662</sup> According to the court in *Hollis*, this heightened standard of care for disclosing risks “protects public health by promoting the right to bodily integrity, increasing consumer choice and facilitating a more meaningful doctor-patient relationship.”<sup>663</sup> *Hollis* extended this duty equally to distributors or sellers.<sup>664</sup> Additionally, *Hollis* reiterated that manufacturers are required to warn about dangers that “might arise out of reasonably foreseeable fault on the part of the purchaser in its contemplated use.”<sup>665</sup> Although *Hollis* specifically contemplates medical products (silicone breast implants), it is easy to extrapolate the court’s findings to food products. After all, food products are consumed, and leave consumers exposed to potential injury.

While *Hollis* remains authoritative for the duty to warn, two lower court cases are of particular importance for this project: *Buchan v Ortho Pharmaceutical* and *Létourneau v JTI-*

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they consider products to be consumed and inherently dangerous products to be equivalent, or at least impose the same obligation on manufacturers.

<sup>660</sup> *Hollis v Dow Corning*, *supra* note 66.

<sup>661</sup> *Ibid* at para 23.

<sup>662</sup> *Ibid* at para 23. The Court here refers to *Shandolff v City Dairy*, *supra* note 617; *Arendale v Canada Bread*, *supra* note 618; *Zeppa v Coca-Cola*, *supra* note 619; *Rae and Rae v T Eaton Co (Maritimes)* (1961), 28 DLR (2d) 522 (NS SC); and, *Heimler v Clavert Caterers* (1975), 8 OR (2d) 1 (ON CA). Although *Hollis* is specifically contemplating medical products (silicone breast implants), the principle can easily be extrapolated to food products. See Cassels & Jones, *supra* note 84 at 23.

<sup>663</sup> *Hollis v Dow Corning*, *supra* note 66 at para 26.

<sup>664</sup> The court notes that this duty “exists independently of any obligations arising out of the contract of sale”, *Hollis v Dow Corning*, *ibid* at para 22.

<sup>665</sup> *Ibid*.

*MacDonald*. These cases are examined in detail in the next two sections. This chapter will conclude by arguing that these two cases can be used, in conjunction with *Hollis*, *Lambert* and the other duty to warn cases discussed throughout this thesis, to build a case that food manufacturers have a duty to warn consumers about the risks inherent in food products.

### 3.1. *Buchan v Ortho Pharmaceutical*

At the outset, *Buchan v Ortho Pharmaceutical* was identified as one of two critical cases for this project. *Buchan* concerns the liability of a pharmaceutical company for failing to warn its consumers of the risk inherent in its product, an oral contraceptive. In August of 1971, Pauline Buchan was 23-years-old when she started taking Ortho-Novum 1/50, a contraceptive pill manufactured and distributed by Ortho Pharmaceutical. On September 11<sup>th</sup>, after taking the pills for just under six weeks, she suffered a stroke. The stroke left Mrs. Buchan disabled, with paralysis of her left arm and leg, and caused brain damage. Justice Holland, for the Ontario Court of High Justice, found that there was a “tendency, and a clear association” between oral contraceptive use and stroke, even though the “exact mechanism” remained unknown.<sup>666</sup> Accepting that only a “small percentage of users will sustain serious complications from taking oral contraceptives”, Holland J nevertheless found the oral contraceptives to be dangerous, and thus the manufacturer had a “high duty to warn the consumer of the danger.”<sup>667</sup> Holland J determined that Mrs. Buchan’s stroke was “caused or materially contributed to by taking oral contraceptives manufactured by Ortho”, that Ortho “was negligent in failing to warn Mrs. Buchan directly and indirectly”, and that this failure to warn “was causative of Mrs. Buchan’s

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<sup>666</sup> *Buchan v Ortho Pharmaceutical*, [1984] OJ No 3181 (ON H CJ) at para 22 [*Buchan v Ortho Pharmaceutical* (H CJ)].

<sup>667</sup> *Ibid* at para 41.

injuries.”<sup>668</sup>

In his decision, Holland J rejected the notion that adherence to the legislative requirements, in this case the *Food and Drugs Act*, shields the manufacturer from a responsibility to warn consumers directly.<sup>669</sup> Such legislative requirements, he contended, are minimums.<sup>670</sup> Holland J also held that warning physicians did not discharge the burden on manufacturers to warn the consumer directly<sup>671</sup>, although he recognized that “[a]ctual knowledge of the risks by the doctor would break the chain of causation”.<sup>672</sup> In this instance, he found that the manufacturer had not adequately warned the prescribing physician.<sup>673</sup> As a result, Mrs. Buchan was not adequately warned. Had she been properly warned of the risks, Holland J found her claim that she would not have taken the oral contraceptive to be credible.<sup>674</sup>

In reaching this conclusion, Holland J utilized a subjective test, which was a departure from the objective test used in medical malpractice claims set out in *Reibl v Hughes*.<sup>675</sup> According to Justice Holland, there is a distinct difference between medical malpractice and product liability suits. Whereas patients will generally follow the advice of his or her doctor,

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<sup>668</sup> *Ibid* at para 128.

<sup>669</sup> *Ibid* at paras 62-73. Specifically, Holland J held: “The Act does not ... replace the common law duty to warn”, at para 73.

<sup>670</sup> *Ibid* at para 81. The role of government-imposed regulatory standards will be discussed in Chapter 6.

<sup>671</sup> *Ibid* at para 61.

<sup>672</sup> *Ibid* at para 114.

<sup>673</sup> *Ibid* at para 82-94.

<sup>674</sup> *Ibid* at para 102-103. Holland J thought Mrs. Buchan to be credible, at para 109, and refers to her testimony that she avoids risky behaviours and was careful about her health, which led her to avoid harmful things such as smoking, at para 101. Holland J refers to this testimony in his reasoning at para 110. In litigation over food products, it is unclear whether the same kind of testimony would be deemed persuasive. If an individual avoids risky behaviours and cares about their health, is that sufficient to support the claim that they would have adhered to a warning on a dangerous food product?

<sup>675</sup> *Ibid* at para 104-105, citing *Reibl v Hughes*, [1980] 2 SCR 880 at 898 and 898-899. We will return to a discussion of *Reibl v Hughes* and subjective tests in Chapter 7, which examines causation.

there is no “intimate relationship between the manufacturer and the ultimate consumer.”<sup>676</sup>

Because a consumer is capable of making a fully informed decision, they have a right to be informed of all the risks.<sup>677</sup> Holland J held that if the *Reibl* test was applied in this type of situation, it would require the plaintiff to determine what a reasonable person in the plaintiff’s situation would have done.<sup>678</sup> Not only would this impose on the plaintiff “a difficult evidentiary burden” in product liability cases, Holland J held that it would “render the duty to warn meaningless.”<sup>679</sup> Instead, the court held that the proper test should ask whether “a reasonable person in the plaintiff’s particular position, if fully informed, would not have taken the drug”.<sup>680</sup> This approach is best characterized as a subjective-objective test.

Ortho appealed the decision on all these points.<sup>681</sup> Ortho denied owing consumers a direct duty to warn about the risks in its products, but asserted that to the extent that any duty was owed, it was satisfied by their adherence to the statutory standards established under the *Food and Drugs Act*. Ortho also argued that the prescribing physician was aware of risks, and that further warnings would have been redundant. In addition, they claimed that a reasonable person in the plaintiff’s position would have followed the advice of their prescribing physician and taken the pill even if they had been properly warned.

The Ontario Court of Appeal dismissed Ortho’s appeal, but it did so relying on reasoning that departed from that of Justice Holland. Writing for the unanimous court, Justice Robbins

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<sup>676</sup> *Buchan v Ortho Pharmaceutical* (H CJ), *ibid* at para 107.

<sup>677</sup> *Ibid*. This distinction was affirmed in *Hollis v Dow Corning*, *supra* note 66, and has been the subject of considerable discussion, a full consideration of which is beyond this chapter, see Chapter 7. See also Matthew Lewans, “Subjective Tests and Implied Warranties: Prescriptions for *Hollis v. Dow Corning* and *ter Neutzen v. Korn*” (1996) 60 Sask L Rev 209; and, Boivin, “Factual Causation”, *supra* note 645.

<sup>678</sup> *Buchan v Ortho Pharmaceutical* (H CJ), *ibid* referring to *Reibl v Hughes*, *supra* note 675.

<sup>679</sup> *Ibid* at para 108.

<sup>680</sup> *Ibid*.

<sup>681</sup> *Buchan v Ortho Pharmaceutical*, *supra* note 67.

proceeded on “the assumption that manufacturers of contraceptive pills ... are under a duty to warn only prescribing physicians of the risks associated with the use of their products.”<sup>682</sup> This approach is contingent on an analysis of the learned intermediary doctrine.<sup>683</sup> Consequently, the Court did not feel it was necessary to decide the case on the basis of whether the statutory requirements pre-empted the common law duty to warn.<sup>684</sup> After considering the warnings that Ortho had provided to the medical profession, Justice Robbins concluded that the manufacturer “failed to give the medical profession warnings commensurate with its knowledge of the dangers inherent in the use of Ortho-Novum”, and in so doing, “breached its duty to warn.”<sup>685</sup>

In reaching this decision, the Court focused primarily on the adequacy of the warning provided. In his opening remarks about the duty to warn, Robbins JA clearly articulated what he thought was necessary for a warning to be adequate. He observed:

[i]t should be communicated clearly and understandably in a manner calculated to inform the user of the nature of the risk and the extent of the danger; it should be in terms commensurate with the gravity of the potential hazard, and it should not be neutralized or negated by collateral efforts on the part of manufacturer.<sup>686</sup>

Justice Robbins also affirmed the Supreme Court’s decision in *Lambert*, noting that the Court provided guidance for determining the explicitness required of a warning.<sup>687</sup> He held that

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<sup>682</sup> *Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 38. Robbins JA acknowledges that this approach is the most favourable position for Ortho, *ibid* at para 39.

<sup>683</sup> Indeed, much of the commentary on *Buchan* would seem to focus on this discussion. As there is no learned intermediary in the purchase of food products, this analysis is not necessary to review here. The learned intermediary is discussed again in the next chapter.

<sup>684</sup> The Court did consider the role of statutes such as the *Food and Drugs Act*, RSC 1985, c F-27, prior to considering the learned intermediary doctrine. See *Buchan v Ortho Pharmaceutical*, *supra* note 67 paras 27-37. Had the Court accepted Holland J’s approach, Robbins JA notes that “the trial judge’s conclusion that the information provided to consumers did not satisfy the duty is undoubtedly correct”, at para 36.

<sup>685</sup> *Ibid* at para 56. See Margaret A Berger & Aaron D Twerski, “Uncertainty and Informed Choice: Unmasking *Daubert*” (2005) 104:2 Michigan Law Rev 257.

<sup>686</sup> *Ibid* at para 18.

<sup>687</sup> See discussion about *Lambert v Lastoplex Chemicals*, *supra* note 65.



adequacy will ultimately be determined by what is reasonable in the circumstances. For example, in instances when there is a low probability of injury or a small class of consumers that may be harmed, these factors “must be balanced against such consideration as the nature of the drug, the necessity for taking it, and the magnitude of the increased danger to the individual consumer.”<sup>688</sup>

Additionally, Robbins JA observed that the duty is a continuous one.<sup>689</sup> He clearly states that manufacturers have a “duty to keep abreast of scientific developments pertaining to its products through research, adverse reaction reports, scientific literature and other available methods” and “must make all reasonable efforts to communicate the information to the prescribing physician.”<sup>690</sup> Moreover, when medical evidence exists that shows an inherent danger, “the manufacturer is not entitled to ignore or discount that information in its warnings solely because it finds it to be unconvincing.”<sup>691</sup> Rather, manufacturers are obligated to “be forthright and tell the whole story.”<sup>692</sup> Justice Robbins also held that manufacturers could not justify a failure to warn by claiming that physicians could learn of the risk through other sources – “[t]he manufacturer’s duty to warn continues notwithstanding that the information may be otherwise available.”<sup>693</sup>

The criterion for adequacy identified by Robbins JA helps to explain why the Court of Appeal rejected the use of objective test in *Reibl* for product liability cases. Although Robbins JA does not adhere to Holland J’s proposed test, he still concludes that “the *Reibl* test is

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<sup>688</sup> *Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 55.

<sup>689</sup> *Ibid* at paras 19-20. Robbins JA cites *Lambert v Lastoplex Chemicals*, *supra* note 65 at 125. He cites *Rivtow Marine v Washington Iron Works*, *supra* note 571 at 1200 as the authority for the continuous duty.

<sup>690</sup> *Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 54.

<sup>691</sup> *Ibid* at para 55.

<sup>692</sup> *Ibid* at para 55.

<sup>693</sup> *Ibid* at para 59. In *Létourneau v JTI-MacDonald*, *supra* note 68, Justice Riordan made a similar comment about consumers, noting that smokers could be considered to have been adequately warned from newspaper articles, or other media.

inappropriate.”<sup>694</sup> Instead, he contends that it is up to the trier of fact in each case to determine whether or not a particular customer would have been influenced by a warning.<sup>695</sup> Whether a reasonable person would adhere to a warning is “beside the point”, because it is an individual decision.<sup>696</sup> This is why the adequacy of the warning is so important: full disclosure of the inherent risks in a product “facilitates meaningful consumer choice and promotes market-place honesty.”<sup>697</sup> Moreover, as Robbins JA notes, moving away from the objective test does not impose a very serious burden on manufacturers, as they are in a position to avoid liability simply by providing “a clear and forthright warning of the dangers inherent in the use of their products of which they know or ought to know.”<sup>698</sup> Ultimately, in *Buchan* both Robbins JA and Holland J held that Ortho breached the duty to adequately warn the public<sup>699</sup>, finding that the effort the manufacture did make “amounted to no warning at all.”<sup>700</sup>

Thus, *Buchan* set a standard of what is necessary for a warning to be considered adequate. Seven principles can be identified in Robbins JA decision, and are reviewed in Table

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<sup>694</sup> *Buchan v Ortho Pharmaceutical*, *ibid* at para 73.

<sup>695</sup> *Ibid* at para 75.

<sup>696</sup> *Ibid* at para 77 (“The selection of a method of preventing unwanted pregnancy in the case of a healthy woman is a matter, not of medical treatment, *but of personal choice*, and it is not unreasonable that notice of a serious potential hazard to users of oral contraceptives could influence her selection of another birth control”, emphasis added).

<sup>697</sup> *Ibid* at para 78. This is reiterated in obiter by Robbins JA. Noting that his comments were not necessary for his judgment, at para 82, Robbins JA nevertheless goes on to explain that the aspect of choice in this case were germane, given that women had choices about how to prevent unwanted pregnancies. He goes so far as to say that “[m]anufacturers of this drug should be obliged to satisfy the general common law duty to warn the ultimate consumer as well as prescribing physicians. To require this would not be to impose any real burden on drug manufacturers or to unduly interfere with the doctor-patient relationship as it exists with regard to the prescription of this drug”, at para 85. What it would do, however, would allow women to make “informed and intelligent decisions” about their reproductive health, *ibid*.

<sup>698</sup> *Ibid* at para 78.

<sup>699</sup> *Buchan v Ortho Pharmaceutical (HCJ)*, *supra* note 666 at para 81.

<sup>700</sup> *Ibid* at para 83. For example, the manufacturer had included a pamphlet with the product.

3. The Supreme Court of Canada affirmed *Buchan* in its decision in *Hollis v Dow Corning*.<sup>701</sup> While it does not specifically identify all of the same principles as the court did in *Buchan*, La Forest J, writing for the majority in *Hollis*, does note that the informational advantage that manufacturers have requires them to provide “clear, complete and current information disclosure”<sup>702</sup> on an ongoing and forthright basis.<sup>703</sup> Justice La Forest also affirms Robbins JA’s claim that manufacturers can easily avoid any undue burden by simply providing clear warnings.<sup>704</sup> This high standard is justified because it “protects public health by promoting the right to bodily integrity, increasing consumer choice and facilitating a more meaningful doctor-patient relationship.”<sup>705</sup>

Many aspects of the standard for adequacy articulated in *Buchan* have been affirmed by subsequent courts, including *Hollis*. Thus, this standard can be considered an accurate representation of when a warning will be considered adequate.<sup>706</sup> Of the seven criteria articulated in *Buchan*, one is not explicitly discussed by *Hollis*: the prohibition of collateral efforts on the

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<sup>701</sup> In fact, to date, the only court to question the Ontario Court of Appeal’s ruling in *Buchan v Ortho Pharmaceutical*, *supra* note 67 is the British Columbia Court of Appeal in its decision in *Hollis v Dow Corning*, [1993] 103 DLR (4th) 520 (BC CA) [*Hollis v Dow Corning* (BC CA)], which was overturned by the Supreme Court of Canada. See also the dissenting opinion in *Hollis*, written by Justice Sopinka (on behalf of himself and McLachlin J) which considers the subjective approach to causation adopted in *Buchan v Ortho Pharmaceutical*, *ibid*.

<sup>702</sup> *Hollis v Dow Corning*, *supra* note 66 at para 26.

<sup>703</sup> *Ibid* at para 40. Here, La Forest J cites *Buchan v Ortho Pharmaceutical*, *supra* note 67 that manufacturers cannot ignore or discount information that it finds unconvincing.

<sup>704</sup> *Hollis v Dow Corning*, *ibid* at paras 26, 44, in both instances citing *Buchan v Ortho Pharmaceutical*, *supra* note 67, the latter being a more lengthy excerpt.

<sup>705</sup> *Hollis v Dow Corning*, *ibid* at para 26.

<sup>706</sup> See also discussion in Chapter 6.

<b>The Buchan Standard</b>	
1.	Warnings must be communicated clearly and understandably.
2.	Warnings must be communicated in a manner calculated to inform the user of the nature of the risk and extent of the danger.
3.	Warnings must be communicated in terms commensurate with the gravity of the potential hazard.
4.	Warnings must be explicit, to be determined by what is reasonable in the circumstances.
5.	Warnings should not be neutralized or negated by collateral efforts on the part of the manufacturer.
6.	There is a duty to keep abreast of scientific developments.
7.	There is a continuous duty to warn consumers of new risks.

**Table 3. The Buchan Standard for Adequacy of Warnings**

part of manufacturers to negate or neutralize warnings.<sup>707</sup> While several courts have referred to prohibition – although mostly when quoting from *Buchan*<sup>708</sup> – no court has fully expanded on what this means for warnings or the duty imposed on manufacturers. As will be seen, when it comes to food products, many manufacturers participate in activities that can be described as negating or neutralizing any warnings offered, or any information about health risks generally. As will be discussed below, the activities of industry to negate and neutralize warnings was an explicit consideration in *Létourneau*, although the language of *Buchan* was not used.

One of the important considerations that both courts in *Buchan* wrestled with, and is particularly relevant for present purposes, is the uniqueness of oral contraceptives as a pharmaceutical product. In the trail decision, Justice Holland cites from a report produced by a committee of the Food and Drug Directorate on the safety of oral contraceptives, which noted that “in prescribing these drugs, the doctor is usually acting neither to treat nor to prevent a

<sup>707</sup> The Court of Appeal’s decision does quote the entire passage from *Buchan* cited earlier, and thus does highlight that manufacturers should not negate or neutralize warnings, but it does not go into further detail on this point. See *Hollis v Dow Corning* (BC CA), *supra* note 701 at para 55.

<sup>708</sup> In addition to the *Hollis v Dow Corning* (BC CA) reference, *ibid*, the following cases cite or make reference to this passage: *Pittman Estate v Bain*, [1994] 112 DLR (4th) 257 (ON Ct J Gen Div) at para 601; *Bow Valley Husky (Bermuda) v Saint John Shipbuilding*, [1995] 126 DLR (4th) 1 (NFLD CA) at para 87; *Strata Plan N38 v Charmglow Products*, [1987] BCJ No 2776 (BC SC); *Muir v Volvo Canada*, [2000] BCJ No 1970 (BC PC) at para 30; *Walford (Litigation Guardian of) v Jacuzzi Canada*, [2005] OTC 258 (ON Sup Ct J) at para 120; *Privest Properties v Foundation Co of Canada*, [1995] BCJ No 2001 (BC SC) at para 270; *More v Bauer Nike Hockey*, [2010] BCJ No 1954 (BC SC) at para 240; *Can-Arc Helicopters v Textron*, [1991] 86 DLR (4th) 404 (BC SC); *Ocean Falls Corp v Worthington (Canada)*, [1986] BCJ No 810 (BC SC) at para 52; and, *Double Bar L Ranching v Bayvet*, 1993 CanLII 6718 (SK QB).

disease. He is prescribing for socioeconomic reasons.”<sup>709</sup> The report continued that this situation “demands that the patient be fully informed and participate in the decision ...” and that “the physician keep abreast of all implications of the use of “the pill”.”<sup>710</sup> The pill is not like other pharmaceutical products, which may be required to treat disease.

While there are obvious differences between the sale of an oral contraceptive and food products – indeed, Holland J specifically distinguishes oral contraceptives from other consumer goods like food<sup>711</sup> – there are important parallels. In both instances, the use of the product is not required, but reflects a socioeconomic decision driven by specific values, beliefs, and circumstances. Additionally, for both types of products, consumers are not required to use only one brand or formulation of a product, but have the luxury of choice between various forms of the product class. As will be discussed, there is an abundance of choice between food products. Indeed, the abundance of options might amplify the need for food manufacturers to provide warnings of the risks inherent in the use of the product, so consumers can more effectively differentiate between products. In light of this, some *obiter* comments from Justice Robbings are worth considering. He notes that obliging manufacturers to provide warnings “would not be to impose any real burden” but would instead “promote the desirable objective of ensuring that women are fully apprised of the information needed to balance the benefits and risks ... and to

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<sup>709</sup> *Buchan v Ortho Pharmaceutical* (H.C.J.), *supra* note 666 at para 68.

<sup>710</sup> *Ibid.*

<sup>711</sup> *Ibid* at para 106: “This is not the ordinary sale of goods case where a customer goes to a shop to buy food, clothing or other goods. This is a case involving a prescription drug that requires the intervention of a doctor before a sale can be made.”

make informed and intelligent decisions ...”<sup>712</sup> The same argument has been made in *Létourneau* for tobacco products.

### 3.2. The Duty to Warn in *Létourneau v JTI-MacDonald*<sup>713</sup>

As discussed above, Justice Riordan of Quebec Superior Court found that three companies failed to warn smokers of the health risks and risk of addiction to nicotine, and held them liable for nearly \$15 billion. While this case can be expected to reach the Supreme Court of Canada, the trial decision is nevertheless important to consider. While his decision is based on the law in Québec, Riordan J notes that, in principle, the rules in Québec are “similar in the common law.”<sup>714</sup> Justice Riordan identifies eleven aspects of the duty to warn in the context of article 1468 of the *Civil Code* (see Table 4), relying on *Hollis*, *Lambert* and *Buchan* as authorities.<sup>715</sup> Thus, while Riordan J’s overall findings may be limited to Québec, they are consistent with the law concerning the duty to warn more generally, and are derived from the principles and approach used in the rest of Canada.

One of the central questions in the case was whether the duty owed by tobacco manufacturers was rendered unnecessary given the pre-existing knowledge of consumers. As JTI-MacDonald argued: “There is no obligation to warn the warned.”<sup>716</sup> This is a common

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<sup>712</sup> *Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 85.

<sup>713</sup> Note, parts of this section have been published in Shelley, “A Future of Obesity Litigation in Canada?”, *supra* note 455.

<sup>714</sup> *Létourneau v JTI-MacDonald*, *supra* note 68 at para 226.

<sup>715</sup> *Ibid* at para 227. Of the eleven principles, Riordan J cites *Hollis v Dow Corning*, *supra* note 66 as the authority for principles 1, 6, 7 and 8, *Lambert v Lastoplex Chemicals*, *supra* note 65 for principles 3, 8 and 9, and *Buchan v Ortho Pharmaceutical*, *supra* note 67 for principle 6. These are identified in the Table 4 as superscript text. Riordan J then cites a summation from Professor Jobin at para 228, citing Pierre-Gabriel Jobin, *La vente*, 3<sup>ème</sup> éd, (Cowansville, Éditions Yvon Blais, 2007) at pages 294-295. A comparison of these with the *Buchan* standard for adequacy, which is discussed in Chapter 4, demonstrates considerable overlap and general agreement.

<sup>716</sup> *Ibid* para 585. Riordan J is citing from para 1492 of JTI-MacDonald’s notes.

<b>Eleven Principles of the Manufacturer's Duty to Warn</b>	
1.	The duty to warn "serves to correct the knowledge imbalance between manufacturers and consumers by alerting consumers to any dangers and allowing them to make informed decisions concerning the safe use of the product"; <sup>Hollis</sup>
2.	A manufacturer knows or is presumed to know the risks and dangers created by its product, as well as any manufacturing defects from which it may suffer;
3.	The manufacturer is presumed to know more about the risks of using its products than is the consumer; <sup>Lambert</sup>
4.	The consumer relies on the manufacturer for information about safety defects;
5.	It is not enough for a manufacturer to respect regulations governing information in the case of a dangerous product;
6.	The intensity of the duty to inform varies according to the circumstances, the nature of the product and the level of knowledge of the purchaser and the degree of danger in a product's use; the graver the danger the higher the duty to inform; <sup>Hollis, Buchan</sup>
7.	Manufacturers of products to be ingested or consumed in the human body have a higher duty to inform; <sup>Hollis</sup>
8.	Where the ordinary use of a product brings a risk of danger, a general warning is not sufficient; the warning must be sufficiently detailed to give the consumer a full indication of each of the specific dangers arising from the use of the product; <sup>Hollis, Lambert</sup>
9.	The manufacturer's knowledge that its product has caused bodily damage in other cases triggers the principle of precaution whereby it should warn of that possibility; <sup>Lambert</sup>
10.	The obligation to inform includes the duty not to give false information; in this area, both acts and omissions may amount to fault;
11.	The obligation to inform includes the duty to provide instructions as to how to use the product so as to avoid or minimize risk.

**Table 4. Eleven Principles of the Duty to Warn**

refrain of the tobacco companies in the case – that they had no duty to warn consumers that were already aware of the risks associated with smoking. To this end, they contended that the public received sufficient information about dangers inherent to smoking from other sources, including parents, schools, doctors, and the mandatory warning labels required by the government.<sup>717</sup> One of the important tasks set before the court was to determine when the general public would have sufficient knowledge to render warnings moot. Justice Riordan goes into considerable detail to make this determination, and ultimately identifies a “knowledge date” of January 1, 1980 for the Blais file (when public attained knowledge of health risks associated with smoking), and March 1, 1996 for the Létourneau file (when public attained knowledge about addiction to nicotine).<sup>718</sup>

<sup>717</sup> *Ibid* para 185.

<sup>718</sup> See paras 121 and 130 respectively. March 1, 1996 was chosen because it was 18 months after the



For both files, the manufacturer’s responsibility to warn consumers ceased as of these dates.<sup>719</sup>

Thus, the conduct the court considered for each file was that which occurred prior to the identified knowledge dates. If the companies knew during the identified class period of the increased risk of disease or dependence, they were obligated to warn consumers accordingly.<sup>720</sup> Consistent with case law on point, if warnings provided were incomplete or did not sufficiently identify the nature or degree of danger, the obligation was not met.<sup>721</sup> Importantly, Riordan J notes that the obligation to provide a warning is not a conditional one. Rather, he argues that there is a “positive duty to act.”<sup>722</sup> Moreover, he notes that the duty “is not to warn the consumer ‘provided that it is reasonable to expect that the consumer will believe the warning’.”<sup>723</sup> Consistent with the court’s finding *Buchan*, he contends that such an expectation “would be nonsensical and impossible to enforce.”<sup>724</sup> The Ontario Court of Appeal in *Buchan* came to a similar conclusion when affirming the use of the subjective test. Moreover, Riordan J held it was not necessary to show that no one would have smoked had the companies provided the appropriate information. Instead, he notes, “[i]t suffices to find that proper knowledge was *capable of influencing* a person’s decision to begin or continue to smoke.”<sup>725</sup>

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implementation of mandatory addiction warnings were implement on September 12, 1994, and the court assumed it would have taken one to two years for these warnings to come into effect. The January 1, 1980 date was chosen based on the testimony of experts before the court, and Riordan J’s conclusion that the public would have known about the dangers of smoking prior to legislated warnings being required in 1988.

<sup>719</sup> The legitimacy of these dates is not examined here. One wonders how Riordan J may have decided had he taken the *Buchan* standard of adequacy, as proposed above, into consideration. After all, post 1980 tobacco companies spent considerable energy and resources through collateral efforts to negate and neutralize the knowledge the public had about the health dangers associated with smoking. Arguably, less effort was made post 1996 to neutralize or negate the science on addiction, although this is not to suggest that no effort was made.

<sup>720</sup> *Ibid* at para 184.

<sup>721</sup> *Ibid* at para 232. Riordan J notes, “[t]hat is the case here.”

<sup>722</sup> *Ibid* at para 282.

<sup>723</sup> *Ibid* at para 281.

<sup>724</sup> *Ibid*. See *Buchan v Ortho Pharmaceutical (HCJ)*, *supra* note 666 at para 108.

<sup>725</sup> *Létourneau v JTI-MacDonald*, *supra* note 68 at para 516, emphasis added. While Riordan J made this

Justice Riordan was unequivocal on his position as to whether or not the tobacco companies met their duty, concluding, “the Companies shirked their duty to warn in a most high-handed and intentional fashion.”<sup>726</sup> Indeed, his review of the tobacco companies on this point is scathing, finding that they had acted with a “calculated willingness to put [their] customers’ well-being, health and lives at risk for the purpose of maximizing profits.”<sup>727</sup> He condemned this behaviour as being “far outside the standards” of what is acceptable.<sup>728</sup> He also found that their actions were intentional, “beyond irresponsible”<sup>729</sup>, “reprehensible”<sup>730</sup> and constituted an “egregious fault”.<sup>731</sup>

Of the various activities of the tobacco companies, Riordan J is particularly critical of the tobacco companies’ ongoing policy of silence – that is, not disclosing the known risks or dangers with tobacco use.<sup>732</sup> By remaining silent it was clear to him that the companies could not have met their duty to warn of the dangers.<sup>733</sup> He rejects the tobacco companies’ notion that this silence was inconsequential, given the ongoing news and media coverage<sup>734</sup> or the fact that

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declaration while considering Quebec’s *Consumer Protection Act*, and thus its applicability to the duty to warn overall may be limited it resonates with other aspects of his judgment where he maintained that the obligation on the manufacturers was to provide the information they had.

<sup>726</sup> *Ibid* at para 278.

<sup>727</sup> *Ibid* at para 338. He notes at several points in his judgment that the companies acted with “ruthless disregard for the health of their customers”, at para 833, or appeared to have “a total absence of concern over the fact that its products were harming its consumers’ health”, at para 579. At para 486 Riordan J tempers some of his findings, however, noting that their actions were not necessarily motivated by malevolent desires, but simply with an aim of maximizing profits, at para 488.

<sup>728</sup> *Ibid* at para 339.

<sup>729</sup> *Ibid* at para 288. Riordan J suggests that the companies were “intentionally negligent”, *ibid*.

<sup>730</sup> *Ibid* at para 1027 (“The Companies’ liability under both statutes stems from the same reprehensible conduct”) and para 1038 (“actions and attitudes . . . were, in fact, “particularly reprehensible” and must be denounced and punished in the sternest of fashions”).

<sup>731</sup> *Ibid* at para 269.

<sup>732</sup> Riordan J uses the language of a “policy of silence”, see, for example, *ibid* at paras 56, 271, 337 & 523.

<sup>733</sup> *Ibid* at para 313.

<sup>734</sup> *Ibid* at para 86. Riordan J notes, “[t]he Companies rely on this evidence to show that the general public was aware of the negative publicity about smoking through newspaper and magazine articles, but the knife cuts both

consumers likely would not have believed any warnings the tobacco companies would have provided.<sup>735</sup> Riordan J also does not allow the tobacco companies to use the mandated government warnings as a shield.<sup>736</sup> As he observes, the tobacco companies consistently resisted the warnings and attempted to have them watered down.<sup>737</sup> Indeed, he points out that the companies would have known that the warnings were insufficient, and that “they actively lobbied to keep them that way.”<sup>738</sup> He is especially critical when discussing company documents that appear to celebrate the state of uncertainty that existed within the government when it was grappling with how to determine how to provide warnings about the risks of smoking in a meaningful way.<sup>739</sup>

Part of the uncertainty within the government was undoubtedly influenced by another tactic employed by the tobacco companies: actively working to create uncertainty by promulgating a scientific controversy.<sup>740</sup> Riordan J observed that the tobacco companies were

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ways” and points to the “voluminous marketing material circulated” by the companies.

<sup>735</sup> Riordan J also rejects an argument by the companies that had they provided warnings they would not have been believed anyhow, noting that while consumers might have been skeptical of positive messages, people would have likely listened to the negative things they said, *ibid* at para 271.

<sup>736</sup> For example, Riordan J rejected the following argument, *ibid* at para 1032: “The Companies make much of the fact that, even if they had wanted to misled the public about the dangers of smoking, which they assure that they did not, current governmental regulation of the industry creates an impermeable obstacle to any such activity. All communication between them and the public, in their submission, is prohibited, thus assuring that absolute prevention has been attained. It follows, in their logic, that there can be no justification for awarding any punitive damages.”

<sup>737</sup> *Ibid* at para 272. See also para 463 where he notes the companies’ “efforts not only to hide the truth from the public but, as well, to delay and water down to the maximum extent possible the measures that Canada wished to implement to warn consumers of the dangers of smoking.”

<sup>738</sup> *Ibid* at para 287. He considers this a “most serious fault”.

<sup>739</sup> Riordan J notes that the companies celebrated the “state of chaos” and uncertainty the state had, *ibid* at para 581. He observed, “JTM would essentially rejoice at the government’s problems”, at para 582, and that JTM had “joy at the chaos within the project and relief that pressure was off shorter butt lengths. More importantly, it chose to keep to itself the broad range of relevant information in its possession”, para 583.

<sup>740</sup> On this point, see Naomi Oreskes & Erik M Conway, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming* (New York: Bloomsburg Press, 2010)..

extolling a scientific controversy message, both to the broader public and its own employees.<sup>741</sup> This was more than an outright denial – although Riordan J notes that tobacco companies also denied the risks associated with their products.<sup>742</sup> It was a suggestion that the issues was “complicated, multi-dimensional and, especially, inconclusive, requiring much further research.”<sup>743</sup> The companies would insist that the research on point was poor, and that it needed to be done by “real” scientists.<sup>744</sup> In addition to the “cynical refusal” to accept any science that identified dangers with tobacco products<sup>745</sup>, Riordan J notes that tobacco companies refused to do the necessary research to demonstrate otherwise.<sup>746</sup> Instead, by perpetuating the myth of a scientific controversy, tobacco companies attempted to “lull the public into a sense of non-urgency about the health risks.”<sup>747</sup> The companies attempted to do so in part by not disclosing – and in some instances, destroying<sup>748</sup> – the relevant information it did have.

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<sup>741</sup> On the latter, see *Létourneau v JTI-MacDonald*, *supra* note 68 at para 247 (“Even to its own employees, ITL was denying the existence of scientifically-endorsed link between cigarette smoking and disease and trivializing the evidence to that effect.”).

<sup>742</sup> For example, he notes, *ibid* at para 250, that the companies “wilfully (sic) and knowingly denied those risks and trivialized the evidence showing the dangers associated with their products”, and that they asserted that cigarettes had “been unfairly made a scapegoat”, at para 251.

<sup>743</sup> *Ibid* at para 252. Riordan J does address the fact that the companies were “technically” right. As he notes, at para 267, many of the Companies’ statements were technically accurate. Science has not, even today, been able to identify the actual physiological path that smoking follows in causing the Diseases. That, however, is neither a defence nor any sort of moral justification for denying the link”. See also para 457, where he notes some of the scientific controversy points “are technically true when taken on a point-by-point basis”, but where he nevertheless declares that knowledge of harm was enough to trigger a duty to warn.

<sup>744</sup> *Ibid* at para 245.

<sup>745</sup> *Ibid* at para 474.

<sup>746</sup> Riordan J notes that at trial a former president of one of the companies “testified that BAT’s lawyers frowned on ITL performing scientific research to verify the health risks of smoking because that might be portrayed in lawsuits as an admission that it knew or suspected that such risks were present”, *ibid* at para 212. Elsewhere he notes that the companies were not necessarily at fault for not doing the research, at para 472. However, “[w]here fault can be found, however, is in the failure or, worse, the cynical refusal to take account of contemporaneous, accepted scientific knowledge about the dangers of the Companies’ products and to inform consumer accordingly”, at para 474. Even if the companies had done research, Riordan J continually calls into question the credibility of the industry and its experts, see, for example, *ibid* at paras 206-214.

<sup>747</sup> *Ibid* at para 458. See also para 485.

<sup>748</sup> See discussion about “deadwood” and the role of lawyers in destroying evidence, at paras 357-378.

These combined efforts did not impress Riordan J who, citing *Hollis*, observed that incomplete knowledge could not act as a defence for failing to warn.<sup>749</sup> The companies had an ongoing obligation to attain sufficient knowledge, and to heed and respond to the knowledge that did exist about the risks associated with their products.<sup>750</sup> Thus, the tobacco companies not only failed to warn consumers, they were found to be intentionally negligent given their purposeful attempt to remain ignorant to the risks, thereby intentionally putting their consumers at risk.

Consistent with *Buchan* and *Lambert*, *Létourneau* stands for the principles that the duty to warn does not simply offer recourse to individuals harmed by faulty warnings, but also imposes an important obligation on manufacturers. To put another way, obligations under the duty to warn exist independent of whether or not a failure to warn in a particular instance can be shown to result in harm—the *knowledge* of potential harm(s), howsoever obtained<sup>751</sup>, is sufficient to trigger a manufacturer’s responsibility to both investigate and disclose any risks.<sup>752</sup> Thus the duty to warn exists even if a plaintiff cannot demonstrate that a failure to warn caused harm. This is important given the challenges with demonstrating causation in negligence. Of course, a manufacturer will not be held accountable in negligence absent harm to plaintiffs. A plaintiff would still need to demonstrate that the manufacturer caused harm, a discussion returned to in chapter seven.

On causation, in his discussion about the evidence required to prove causation, Riordan J

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<sup>749</sup> *Ibid* at para 614, citing *Hollis v Dow Corning*, *supra* note 66 at para 41.

<sup>750</sup> *Buchan v Ortho Pharmaceutical*, *supra* note 67.

<sup>751</sup> Importantly, if a third party, such as a public health researcher, warns of a potential harm associated with a product, the manufacturer has an obligation to investigate further.

<sup>752</sup> To be clear, to be liable for harms that arise from a failure to warn, a plaintiff would still need to prove causation. Riordan J does go through this analysis, although a review of his analysis is beyond the scope of this essay. See his lengthy discussion on causation, *Létourneau v JTI-MacDonald*, *supra* note 68.

notes that a perfect record is not necessarily required<sup>753</sup>, and that the courts sometimes “cannot wait.”<sup>754</sup> It is not clear that the court needs to wait for scientific certainty. As he points out, the scientific causal link imposes a far greater burden than the juridical causal link.<sup>755</sup> In tort, only the latter is required to show actual causality. Moreover, he observes that the plaintiffs were not required to show that smoking was *the* cause but only *a* cause<sup>756</sup>, a much lower expectation.

Additionally, *Létourneau* stands for the principle, articulated through the *Buchan* standard, that warnings about risks must be adequate. In *Létourneau*, tobacco companies were found to have failed to meet this standard. The tobacco companies did not provide clear and explicit warnings, with an intent to inform the public about the potential hazards, and made no attempt to provide any new information they discovered. Worse than failing to keep up with the science, the companies actively conspired to discount and undermine the science<sup>757</sup>, and they worked towards neutralizing and negating the information the public did have. As Riordan J observes, it is easy to understand the impulse to brand the tobacco companies’ actions as “immoral”.<sup>758</sup> The reprehensible conduct of the tobacco companies led Riordan J to conclude, during his assessment of punitive damages, “[i]f the Companies are allowed to walk away

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<sup>753</sup> *Ibid* at para 765. While better evidence might have made the court’s job easier, Riordan J notes that it was not absolutely necessary, at para 740. He also notes, “[t]he courts should not allow the spirit and the mission of the class action to be thwarted by an impossible pursuit of perfection”, at para 976.

<sup>754</sup> See *ibid* at para 766-767, citing Justice Ian Binnie, “Science in the Courtroom: The Mouse that Roared” (2007) 56 UNBLJ 307.

<sup>755</sup> *Ibid* at paras 724-728. We will return to this discussion in more detail in Chapter 7 which examines causation in duty to warn cases.

<sup>756</sup> *Létourneau v JTI-MacDonald*, *supra* note 68 at para 794. Riordan J notes: “[p]roving a negative, as the first case would require, is never an easy task and the Court does not believe that it is necessary to go that far in a claim for tobacco-related damages. If there is reason to conclude that the Companies’ faults led in a logical, direct and immediate way to the Members’ smoking, that is enough to establish causation, even if those faults coexist with other causes.”

<sup>757</sup> Riordan J notes at several points how the companies colluded in their efforts, see, for example, *ibid* at paras 447, 449 & 571.

<sup>758</sup> *Ibid* at para 337.

unscathed now, what would be the message to other industries that today or tomorrow find themselves in a similar moral conflict?”<sup>759</sup>

In this way, *Létourneau* is a case study of how the *Buchan* standard of adequacy can be applied. Manufacturers cannot hide behind ignorance, or work to neutralize or negate the public’s understanding about the dangers of using their products. As the body of evidence grows about risks, the onus on the manufacturer also grows. This means that manufacturers cannot simply ignore the evidence they find inconvenient or unconvincing. Instead, manufacturers must provide adequate warnings in order to ensure that consumers can make an informed choice, taking into account all of the available science.

On this point, food manufacturers will theoretically be cooperative. After all, the food industry has long emphasized the importance of consumer choice, particularly as it relates to obesity, championing the idea of “personal responsibility”.<sup>760</sup> Warnings not only help consumers make informed choice, their legal effect is to shift responsibility for potential harms from the manufacturer to the consumer. Warnings facilitate personal responsibility – provided, of course, that they are adequate. But warnings are only necessary if food products are dangerous. It is this issue that we turn to next.

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<sup>759</sup> *Ibid* at para 1037.

<sup>760</sup> See, for example, the discussions in Brownell et al, *supra* note 50 and See Novak & Brownell, *supra* note 50. Here, the industry is following the lead of the tobacco industry, who have long emphasized that smokers need to be personally for their decisions. Indeed, in *Létourneau v JTI-MacDonald*, *supra* note 68 the tobacco companies make this point. See, for example, the testimony by Kip Viscusi, who argued that smokers had enough information to make rational decisions, *ibid* at paras 305-309.



#### 4. FOOD AS A DANGEROUS PRODUCT?

Food is a ubiquitous part of life. As James Beard observed, “[f]ood is our common ground, a universal.” As a product class, food products also are the most plentiful.<sup>761</sup> Moreover, they are the most consistently purchased product on the market, and purchased far more casually than other products.<sup>762</sup> Complicating matters further, unlike many other products, food is necessary for survival.<sup>763</sup> Because of this, food products have been part of product liability law since its origins. Indeed, much of the literature on product liability reflects on food products<sup>764</sup>, and there has been a venerable history in liability for food manufacturers.<sup>765</sup> For example, Dickerson points to a case appearing in 1431, where it was held that if a tavern sells corrupted food, then the person suffering harm would have “an action against the taverner on the case even

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<sup>761</sup> For example, the Food Marketing Institute estimated that in 2014 the average US supermarket carried 43,844 products, see Food Marketing Institute (FMI), “Supermarket Facts”, online: FMI, <http://www.fmi.org/research-resources/supermarket-facts>.

<sup>762</sup> Dickerson, *supra* note 610 at 15. Critically, Dickerson made this observation in 1951, and the foodscape has shifted considerable since then. Food is more available, cheaper, and excessive consumption has been normalized; there is more advertising and attempts to influence consumers; there is more choice available; the purchase and consumption of food is more mindless

<sup>763</sup> *Ibid* at 14 notes: “with food, the principal consumer interest is brought into bold relief: substantive needs are much more important than price or title.” See Roller, Voorhees & Lunkenheimer, *supra* note 348 at 442.

<sup>764</sup> For example, Linden & Feldthusen, *supra* note 589 at 615 discuss how some early statements from the House of Lords seemed to limit the duty of manufacturers to articles of food and drink and other common household items, although they also point out that Lord Buckmaster in his dissenting opinion in *Donoghue v Stevenson*, *supra* note 16, contends that principle could not be limited to food alone. When listing the various products that permeate our lives, the first one on Theall et al’s list: “We eat them”, *supra* note 62 at vii. Edgell’s chapter concerning government regulation begins with food, *supra* note 545 at 165. See discussion in *Shandolff v City Dairy*, *supra* note 617.

<sup>765</sup> The *Restatement (Third) of Torts, Products Liability*, *supra* note 534 at §1 notes, “[a]s early as 1266, criminal statutes imposed liability upon victualers, vinters, brewers, butchers, cooks, and other persons who supplied contaminated food and drinks.” Dickerson, *supra* note 610 at 26 observes, “[s]ome kind of special civil responsibility undoubtedly attached to retail food sales long before the modern warranties expressed by the sales statutes were developed, and this responsibility ultimately came to be classed as a “warranty” obligation.” Consider also Schroeder JA in *Phillips et al v Ford Motor Co of Canada*, [1971] 2 OR 637 (ON CA), who noted that the scope of *Donoghue v Stevenson*, *supra* note 16, had been “greatly extended and is no longer limited to articles of food and drink” at 653.

though he makes no warrant...<sup>766</sup> Consider as well the cases discussed above that served as the foundation for negligence – they mostly concerned food products. *Mazetti* was about foul tongue, *Donoghue* about a snail in ginger beer, and *Buckley* about powdered glass in chocolate bar.<sup>767</sup> Indeed, food has been one of the most litigated and regulated products. For Dickerson, “it represents a comprehensive experience valuable as a testing ground for appraising both the civil and directly regulatory aspect of consumer protection, particularly in relation to each other.”<sup>768</sup> This, in large part, is because with food there is an “inherent threat to personality.”<sup>769</sup>

The threat to personality results because food is ingested. Consequently, the standard of care expected of food manufacturers is heightened.<sup>770</sup> Consider, for example, how the matter was framed by the court in *Shandloff v City Dairy*:

The effect, as I take it, of [*Grant* and *Donoghue*] is to establish that a manufacturer who prepares and puts upon the market food in a container which prevents examination by the ultimate consumer is liable to the ultimate consumer for any defects which exist in the goods so marketed which arise from negligence or lack of care. The lack of care essential to the establishment of such a claim increases according to the danger to the ultimate consumer, and where the thing is in itself dangerous, the care necessary approximates to, and almost becomes, an absolute liability.<sup>771</sup>

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<sup>766</sup> Dickerson, *supra* note 610 at 20.

<sup>767</sup> Some of the other cases could properly be described as incidental cases to public health, given that they have a public health focus. Consider, for example, *MacPherson v Buick Motor Co*, *supra* note 567, where the plaintiff was thrown from a vehicle – it involves automobile safety (and a case that could have been used to justify seatbelts). Similarly, *Ross v Dunstall*, *supra* note 574 concerned gun safety. Automobile and gun safety are both considered matters of public health.

<sup>768</sup> Dickerson, *supra* note 610 at 14.

<sup>769</sup> *Ibid* at 15.

<sup>770</sup> Theall and colleagues argue: “Perhaps the highest standard of care applies to manufacturers of food and beverages and other products which are ingested. For them, the standard has been characterized as approximating strict liability”, Theall et al, *supra* note 62 at L5-4. See also Dickerson, *supra* note 610 at 128: “It is commonly said that the food manufacturer is held to a higher standard of care than other manufacturers.”

<sup>771</sup> *Shandloff v City Dairy*, *supra* note 617 at 27.

Although food manufacturers are held to a higher standard of care given that food is ingested, this does not necessarily mean all food products should be considered equally dangerous. There are various ways that one could approach the issue. The aforementioned history of food products was by-and-large concerned with pure food. Corrupted food – an issue of food safety – gave rise to liability, but the long-term risks associated with continued use of a product did not attract liability. Additionally, diseases transmitted through the negligence of food handlers or manufacturers, which would amount to a manufacturing defect<sup>772</sup>, are different from the risks that arise from the consumption or overconsumption of dangerous food products. Whether or not food products are dangerous, of course, is a contentious argument. Throughout the next few chapters this argument will be developed, by showing that some food products result in health consequences – both in the short term and the long term – that can have a profound effect on quality of life and result in a premature death. The argument posited here is that this renders some food products dangerous.

The flexibility of a duty to warn claim has already been noted above. But perhaps a more important consideration than the practical implications of bringing a claim for failure to warn for food products is the reality that the other potential claims, such as a claim for a defective design<sup>773</sup>, could have far graver consequences. A successful defective design claim would require a manufacturer to redesign a product, a costly and perhaps impossible task.<sup>774</sup> A failure to

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<sup>772</sup> The negligence of a food handler might not fall under a manufacturing defect, and may simply amount to a regular negligence claim.

<sup>773</sup> Which would argue that a food product has been designed in such a way that the risks outweigh the benefits. This is one of the arguments Justice Sweet identified he would accept from the plaintiffs in their amended claim in *Pelman I*, *supra* note 9, but that the plaintiffs failed to submit.

<sup>774</sup> Sometimes a warning is required because a product cannot be redesigned. See Theall et al, *supra* note 62 at L2-9: “where prevailing technology does not allow for the manufacture of a safer product, the court may still find

warn claim only imposes on a manufacturer the minor costs associated with providing a label to warn users of the risks associated with a product.<sup>775</sup> Moreover, courts will likely be reluctant to declare an entire product line negligently designed if a community is dependent on that product.<sup>776</sup> With respect to food, it is clear that the dependency on certain types of products does vary by neighbourhood, region, and socio-economic status, among other factors.<sup>777</sup> Rather than simply declare an entire product defective, courts are more likely to deem a product defective because it did not have an adequate warning.

That said there are also some products for which a warning may not be sufficient to convey the risks to consumers. Interestingly, Stapleton seems to suggest that this may be the case for many types of products.<sup>778</sup> In such instances, she contends that the failure to warn claim would fail the causal test – after all, if an adequate warning cannot convey the risk sufficiently to change a consumer’s behaviour, the absence of such a warning would not have any impact on

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the manufacturer liable if the risk could have been reduced or avoided through adequate warnings to the user.” But also consider that if all similar products carry the same risk, then the product may not be deemed defective. See, *ibid* at L2-10: “Although not conclusive, evidence that the defendant’s product presented no greater risk than similar products of other manufacturers, and contained the same level of available technological innovation, can lead the court to find no defect in the defendant’s design.”

<sup>775</sup> On this point, however, see Weinstein et al, *supra* note 580 at 62: “The message to the manufacturing community is clear. The ultimate design of a product must take into account design alternatives together with warnings in deciding how best to reduce the risk of injury. The ultimate decision of whether to design out a hazard or warn against it must consider human behavior within the environment of product use. The fact that a line of print is inexpensive cannot be the sole determining factor in the decision process.”

<sup>776</sup> Stapleton, *supra* note 545 at 252: “It is also one which courts may well be reluctant to uphold if grave socio-economic dislocations are thereby threatened because a firm, an industry, or a community is dependent on that product line.” She further notes, at 254: “where the design is this dangerous and where a finding of liability would clearly threaten to precipitate major socio-economic dislocations, as it would in the product-category cases where the defect is generic and not remediable by modification to an alternative design, courts face a serious separation of powers dilemma.”

<sup>777</sup> This thinking applies to civil liability as well. Antler, *supra* note 11 argues that *Pelman I*, *supra* note 9 would have had a better chance of success had it focused on poor, urban African-American children, as their food choices were far more restricted than the plaintiffs in *Pelman I*.

<sup>778</sup> Stapleton, *supra* note 545 at 253-254.

how a consumer would use a product.<sup>779</sup> It is not clear that Stapleton is here advocating for defective design claims<sup>780</sup>, but she does note that there are some products that should be deemed ‘defective as designed’, with or without a warning. Her example is cigarettes.<sup>781</sup> Others take issue with this, noting that cigarettes, while bearing risks, remain a product that a reasonable person may elect to use.<sup>782</sup> In such instances, the challenge will be to determine whether the risk outweighs the benefits with the product. This is an ongoing challenge with pharmaceutical products, as Stapleton points out.<sup>783</sup> It can also be expected to be a concern with food products, where they have a huge societal benefit. Does this societal benefit outweigh the potential public health harm?

There have been a few cases where the courts have considered the public health impact of a product and imposed an extremely high standard of care. Most notable of them is a case out of Australia, *Grant v Australian Knitting Mills*.<sup>784</sup> In this case, the manufacturer sold the plaintiff a garment that contained free sulphites, which resulted in dermatitis in the plaintiff. What is especially striking about this case is that the court imposed a very high standard, finding the manufacturer liable even though there was only one defective product in a batch of 4,737,600.<sup>785</sup>

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<sup>779</sup> *Ibid* at 254.

<sup>780</sup> It is in this content that Stapleton discusses the “pro-plaintiff dynamic” that she thinks is resulting in failure to warn claims remaining the dominant approach, despite the problems she highlights, *ibid* at 255.

<sup>781</sup> See *ibid* at 254 n. 44. She also identifies asbestos and Thalidomide. She point out that her reasoning is “just as intellectually feasible with large volume generic designs such as cigarettes as it is with love volume specific designs such as Thalidomide or a specific model of vehicle”, *ibid*.

<sup>782</sup> See discussion in Jason Mohrbutter, “*Harrington v. Dow Corning Corp.* and Social Utility: Unfit For Their Purpose Within Product Liability Negligence Law” (2012) 75 Sask L Rev 269 at 299.

<sup>783</sup> See *ibid* at 260-264.

<sup>784</sup> *Grant v Australian Knitting Mills*, [1936] AC 85 (PC).

<sup>785</sup> Theall and colleagues contend raises the standard of care to “almost to perfection”, and that in its decision the Privy Council seemed to create a new category of dangerous product: inherently dangerous to public health. Theall et al, *supra* note 62 at L2-15. Contrast *Grant* to *Double Bar L Ranching v Bayvet*, *supra* note 708, where the court had to decide whether a 1 in 50,000 chance of a the product (Spotton, a pesticide) causing death in cattle was a material risk that had to be disclosed. The use of the product in this instance resulted in the death of 142

Importantly, the risk inherent in the garments from free sulphites was dermatitis. While dermatitis can be serious, it is neither a life-threatening disease<sup>786</sup> nor a chronic condition.<sup>787</sup> *Grant* has been consistently recognized in Canadian cases.<sup>788</sup> While it is doubtful such a high standard will be imposed on food manufacturers, there is an argument to be made that some food products are so inherently dangerous to individual consumers and to public health, that a very high standard is warranted.<sup>789</sup>

This risk to public health is especially heightened for mass produced items. Overall, the principles of product liability were developed before the mass production of goods became commonplace.<sup>790</sup> This is significant, as Waddams points out, since the scale of distribution can impact how the principles of product liability will apply in a particular situation:

One can understand the reluctance to impose liability on one who gives a jar of marmalade or lends garden tools to a neighbor, but it is doubtful if the same reluctance should extend to a manufacturer who distributes a hundred thousand

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animals. The trial judge held that the manufacturer was not negligent for failing to warn. The Court of Appeal seems to question the lower court's decision, noting "contradictory" findings, but nevertheless upheld the decision, noting that much was contingent upon the finds of fact, and that the trial judge had made no palpable or overriding errors on this front, *Double Bar L Ranching v Bayvet Corp.*, (1996) 148 Sask R 195 (SK CA) [*Double Bar L Ranching v Bayvet Corp.*, (SK CA)].

<sup>786</sup> In *Grant v Australian Knitting Mills*, *supra* note 784, the plaintiff did suffer a severe form of dermatitis, and was confined to his bed for 17 weeks at one point, and later spent several weeks in hospital. The plaintiff had acute suffering, and his attending physician at points thought he might die. Despite the severity of dermatitis in this particular instance, it is neither contagious nor life threatening. Of course, to establish liability, a disease does not need to be life threatening. It needs only to cause an injury. As Dickerson, *supra* note 610 at 183 notes, there must be some defect as well as an injury: "[a] stomach upset is not necessarily a cause of action, even where the seller has had something to do with it. The sufferer must show that his discomfort has been caused by something the law considers a defect."

<sup>787</sup> This point is particularly important when contrasting with obesity. While obesity may not be life threatening in all instances, it is considered a chronic disease.

<sup>788</sup> Theall et al, *supra* note 62 at L2-15, referring to *Grant v Australian Knitting Mills*, *supra* note 784. They contend that "the court appears to have raised the standard of care for manufacturers of products "inherently dangerous to public health" almost to perfection", *ibid*, then point to *Arendale v Canada Bread*, *supra* note 618 and *Shandolff v City Dairy*, *supra* note 617.

<sup>789</sup> This was one of the arguments Justice Sweet recommended to the plaintiffs in *Pelman I*, *supra* note 9.

<sup>790</sup> Indeed, many of the principles of tort law were developed prior to the mass production, and the complexities associated with modern society. See Cassels & Jones, *supra* note 84.

tubes of free toothpaste as samples, or to a manufacturer who lends goods to a potential customer in the hope of inducing a future sale.<sup>791</sup>

As mass produced goods can cause far more extensive losses<sup>792</sup>, and thus have a more devastating impacts, mass torts are an inevitable consequence.<sup>793</sup> With the era of mass-produced items—and food products are certainly among the most ubiquitous of mass produced items—comes numerous challenges. These challenges will be discussed throughout Part II. Suffice it to say here that one of the greatest challenges it raises for a failure to warn case is matching the consumption of specific products with a particular disease. This challenge will be most evident when examining causation, as plaintiffs will face significant barriers with identifying injuries with specific products, given the large number of products and potential contaminants an individual will consume throughout their lifetime.<sup>794</sup> This is especially the case for injuries that manifest over prolonged exposure. Consider, for example, a failure to warn case focused on sugar-sweetened beverages (SSBs). A plaintiff may not be able to demonstrate to the court that the consumption of SSBs is causally responsible for their injury or disease. A plaintiff may also struggle to show that a particular manufacturer of SSB is responsible. While a plaintiff would only need to show that SSB consumption was *a* cause, and not *the* cause, this may still necessitate a court being willing to accept that SSBs are *a* cause.

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<sup>791</sup> Waddams, *Product Liability*, *supra* note 534 at 27. Of course, the reluctance should also not be extended to the manufacturer who mass produces and aggressively sells marmalade.

<sup>792</sup> Edgell, *supra* note 545 at 3.

<sup>793</sup> Cassels & Jones, *supra* note 84 at 2 (“... mass torts are a particular – and to some extent inevitable – consequence of the nature of a modern industrial society.”).

<sup>794</sup> As Cassels and Jones notes, *ibid* at 2, “because of the inexactness of scientific understanding of disease and injury processes, in many cases it will not be possible to match a harm with a cause. We may know, for instance, that a particular type of cancer can be caused by a certain substance, but it might also be caused by a host of other factors, both wrongful and innocent.” There are unique challenges that arise from the very many products and contaminants that are encountered in modern society.



There will also be challenges with respect to how to apply established legal principles in these settings. For example, Cassels and Jones identify the tort concept of bi-polarity. Bi-polarity can be understood as a “reciprocal relationship between two individuals”<sup>795</sup> – and has been interpreted by some to mean that a plaintiff cannot bring an action against multiple tortfeasors, particularly when the specifics of the wrong may vary between tortfeasors.<sup>796</sup> Cassels and Jones are critical of bi-polarity, and some other doctrinal limitations, calling them “vestiges of pre-industrial legal principles.”<sup>797</sup> In the pre-industrial world, interactions between consumers and manufacturers were more intimate. This allowed for easier identification of the relevant parties that may have caused harm. It is not surprising that these concepts do not map well onto the problems that arise in the era of mass production.<sup>798</sup>

In addition to determining the applicability of legal concepts, one of the biggest challenges that arises with mass production is the threat that large damages awarded against

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<sup>795</sup> Cassels & Jones, *supra* note 84 at 3.

<sup>796</sup> To put another way, there is a difference between a plaintiff bringing an action against two hunters who both shot a gun at the same time, with one of the bullets hitting the plaintiff, as was the case in *Cook v Lewis*, *infra* note 1549, and a plaintiff bringing an action against two (or more) hunters who have shot at various times throughout the day, in different directions, but one (or more) of the bullets hit the plaintiff.

<sup>797</sup> *Ibid* at 3. They note: “[a]ny wrongful or negligent decision made in the course of the provision of such goods and services, therefore, is likely to have ramifications for larger numbers of consumers than in the paradigmatic – that is, bipolar – “duty” relationships for which the law of tort was initially developed”, at 2. They also point out that “generalized wrongs” or “widespread and diffuse damage arising from centralized causes (usually wrongful or negligent business decisions)” do not fit well within traditional tort relationships, at 3. See also discussion in Theall et al, *supra* note 62 at L1-7: “While product liability law continues to develop, technology and society are changing at an even faster pace. Some critics suggest that Canadian judges, challenged by the difficult evidentiary issues complex claims raise, created legal fictions to assist defendant and still used “the blunt instruments of the stone-age to do sophisticated surgery.”” (cites Linden, 5th, at 559).

<sup>798</sup> Dickerson, *supra* note 610 at 3 observed: “The growth of agencies that employ modern technology, complex fabrication, and mass production, into “clusters of private collectivism,” has drastically upset any supposed balance of power between the economic entities whose interplay of mutual demands and concessions gave to Adam Smith’s self-regulating economy its motive power.” It raises an important question, not considered here, as to whether or not new legal concepts are required to address these new problems, perhaps ones that currently do not exist in tort. As this project is working within the existing tort framework of product liability, this avenue of inquiry is not pursued here.

negligent manufacturers could bankrupt entire industries.<sup>799</sup> This has been an ongoing concern in tobacco litigation, and specifically addressed by some critical of obesity litigation.<sup>800</sup> Indeed, this has become a very pressing issue in light of the decision in *Létourneau*, with the defendant tobacco companies claiming that the Superior Court's decision may bankrupt them.<sup>801</sup> While the imposition of a higher standard of food manufacturers might increase the likelihood of finding negligence, which imposes some financial risk on the food manufacturing industry, it would be erroneous to suggest that it would threaten the industry as a whole. For one, as Shapo points out, there is very little evidence that any product liability suit has ever deprived consumers of products they want.<sup>802</sup> Moreover, given that the vast majority of people in Canada do not produce enough food for their own consumption, there will be an ongoing reliance on food manufacturers to continue to provide food products. While it may have a disproportionate impact on some food manufacturers, particularly those that deal primarily in food products that carry

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<sup>799</sup> While particularly salient in product liability, this concern is raised by critics of the expansion of tort liability generally. See, for example, Indeed, the potential of civil liability to bankrupt tobacco companies is something examined in Shelley, "The Crown's Right of Recovery Act", *supra* note 64. Importantly, in addition to bankrupting an industry there is a risk of leaving consumers dependent on a product no access to said product. This is particularly important in the context of tobacco, where many consumers are addicted to the product. Theall et al, *supra* note 62 at L1-1 point out, "[i]t is no exaggeration to say that product liability claims can threaten the very existence of a corporation, no matter how large."

<sup>800</sup> See for example, Frank, *supra* note 46.

<sup>801</sup> See discussion at "Eye on the Trials", <http://tobaccotrial.blogspot.ca/>, including about the proceedings before the courts about a security deposit on the judgment.

<sup>802</sup> Shapo, *supra* note 536 at 38. Shapo argues: "there is a heavy burden on those who argue that we should feel panicked about a trend in the law in which a large majority of courts have participated. In general economic reporting, products liability is notable by its absence in the identification of causes for economic stagnation. Against that background, advocates of the panic hypothesis must produce a lot of evidence to justify a dolefulness that verges on prophecies of disaster", *ibid*. Shapo further observes, at 39: "[a]n important question is whether products liability law has so enhanced the opportunity for successful litigation that it encourages plaintiffs to sue on what is essentially an extortionate basis, utilizing small chances of large verdicts to demand settlements unjustified by law. So far as I know, there are no hard data on that issue, although a frequent complaint of defense layers is that the availability of punitive damages in products cases creates opportunities for plaintiffs to demand settlements far beyond the true value of a case. I should add that I have heard of no feature of the adversary system that makes it more of a vehicle for injustice in products liability cases than in the law generally." Consider here tobacco: cigarettes are still extremely easy to access despite large damage awards against tobacco manufacturers.

greater risks, most food manufacturers are likely to continue to operate.<sup>803</sup> Even if some food manufacturers are bankrupted, product liability lawsuits will not eliminate the food industry altogether.

Critically, manufacturers can easily circumvent the risk of paying damages by providing adequate warnings to consumers.<sup>804</sup> Food manufacturers will have the option to reformulate their products to avoid having to provide warnings or will be able to avoid the risk of liability by providing adequate warning to consumers. Requiring manufacturers to warn about the dangers inherent with the use of their products fulfills one of the important aspects of product liability law: facilitating consumer choices.<sup>805</sup> Moreover, warnings help ensure that consumer choice is informed.<sup>806</sup> As will be discussed in chapter six, consumer expectations are relevant for considering what is expected of manufacturers. Consumers generally expect that products are safe, or as safe as is reasonably possible for those products that carry inherent risks. At a

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<sup>803</sup> Consider McDonald's willingness to shift its infamous Happy Meals to include apple slices in lieu of French fries and to not offer soda, but milk or juice. While these efforts have been criticized, and rightly so, they are illustrative of industry's willingness to shift to meet consumer's expectations.

<sup>804</sup> See *Buchan v Ortho Pharmaceutical*, *supra* note 67 and *Hollis v Dow Corning*, *supra* note 66. See also Mason, *supra* note 414 at 98-99 ("Courts may be uneasy about countenancing fast-food actions if it appears ... that many other food producers could also be held liable. Such concern is misplaced because the floodgates problem could be mitigated simply by requiring adequate labeling and warnings that would vitiate causes of action based upon a failure to warn.").

<sup>805</sup> See Shapo, *supra* note 536 at 10 ("The factors of risk and knowledge are in turn connected with still another important aspect of products law, which is *choice*. Both implicitly and explicitly, the law makes decisions based on assumptions about the relative ability of persons to choose courses of action. Choice in this sense implies not only the possession of information, but freedom, in some sense, to make a decision in favor of a particular course of action: for example, to purchase a product, to use it, or to encounter it in a place of work or recreation.").

<sup>806</sup> As will be discussed in more detail below, consumers are most often not aware of the risks in food products. Consider Dickerson's observation on food products in 1951, *supra* note 610 at 3: "Not only has the resulting disparity in bargaining strength been at the expense of the individual unorganized consumer, but the very technological forces that have given to him in many cases a superior product have made him correspondingly less capable, as compared with those with whom he deals, of telling the better from the worse. Besides the development of elaborate goods with deeply buried technical qualities, the creation of superficially unique "kinds" of products through the exploitation of minor differences, distinctive packaging, and brand names, together with the multiplication of unstandardized grades and sizes, has made consumer confusion the worse confounded." Moreover, at 4-5 he notes: "With the increasing superiority of the producer's ability to know the ingredients and capacities of elaborately fabricated commodities, the consumer's vulnerability has also been increasing."

minimum, consumers expect to be provided with an adequate warning about the risks associated with products. It would be odd to assume that this expectation does not equally apply to food products, which can carry significant risks to consumers given that they are ingested.

## 5. CONCLUSION: PRODUCT LIABILITY LAW & FOOD PRODUCTS

A rich body of Canadian cases dealing with product liability claims has developed over the past few decades. Three categories of defective products are generally identified: design defects, manufacturing defects, and warning defectives. A product is considered to have a defective warning when it fails to provide consumers with adequate information to allow the consumer to make an informed decision about the purchase or use of that particular product. In *Buchan v Ortho Pharmaceutical*, the Ontario Court of Appeal set out explicit criteria for determining the adequacy of warnings. This includes providing warnings for risks that the manufacturer may not believe or accept. The Supreme Court of Canada upheld the *Buchan* standard in *Hollis v Dow Corning*. Both decisions were affirmed recently in *Létourneau v JTI-MacDonald*. The Québec Superior Court affirmed the *Buchan* standard of adequacy, finding tobacco companies liable for \$15 billion of failing to warn consumers about the dangers associated with cigarettes.

The duty to warn jurisprudence makes it very clear that products that are ingested or consumed are held to a higher standard than other products. Clearly, this applies to food products. Indeed, as demonstrated above, product liability law (and negligence law itself) has its roots in cases dealing with food products. However, despite this heightened obligation, food manufacturers are not providing warnings – and certainly not adequate warnings – for the risks

associated with their products. There are several reasons for this, including perceived doctrinal limitations. The next three chapters examine the steps involved in a failure to warn (negligence) action as they pertain to the duty to warn about dangers in food products.

## CHAPTER 5: THE DUTY OF CARE AND FOOD PRODUCTS

### 1. INTRODUCTION: THE DUTY OF CARE AND FOOD PRODUCTS

The duty to warn is grounded in negligence.<sup>807</sup> To make a case that a party is liable for failing to warn, a plaintiff must prove that a defendant has been negligent. Although disagreement persists over the number of elements that must be present for a negligence claim to be brought before the courts<sup>808</sup>, all formulations require that the negligent defendant be shown to owe a duty to act with care. This duty is often defined as an obligation that is imposed by law for individuals to avoid any conduct that poses an unreasonable risk of danger to others. However, this obligation is constricted, and is not owed to the world at large. As Lord Esher famously stated, “[a] man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them.”<sup>809</sup> Thus, the critical question in negligence claims is whether or not the plaintiff

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<sup>807</sup> M Stuart Madden, “The Duty to Warn in Products Liability: Contours and Criticism” (1987) 89:2 West Virginia Law Review 221.

<sup>808</sup> For example, in his text Linden differentiates between the three approaches: (1) “A.B.C. rule” that is traditionally used by English courts (the rule holds that, “(A) a duty of care exists; (B) there has been a breach of that duty; and (C) damage has resulted from that breach”, at 98; (2) the four elements of negligence recognized by American scholars (they are: “(1) duty; (2) failure to conform to the standard required; (3) a reasonably close causal connection between the conduct and the resulting injury, sometimes terms “proximate cause”; (4) actual loss or damage resulting to the interest of another”, *ibid*); and, (3) the six-part division Linden advocates for (they are: (1) the claimant must suffer some damage; (2) the damage suffered must be caused by the conduct of the defendant; (3) the defendant’s conduct must be negligent, that is, in breach of the standard of care set by the law; (4) there must be a duty recognized by the law to avoid this damage; (5) the conduct of the defendant must be a proximate cause of the loss ...; (6) the conduct of the plaintiff should not be such as to bar recovery...”, at 99). Although there are different approaches, Linden notes: “[t]he number of elements in a cause of action for negligence does not really matter very much, because they are only artificial divisions scholars construct in order to clarify the different aspects of a negligence case”, *ibid*. See Allan M Linden, *Canadian Tort Law*, 6th ed (Toronto: Butterworths, 1997) [Linden, *Canadian Tort Law*, 6th ed].

<sup>809</sup> *Le Lievre v Gould*, [1893] 1 QB 491 at 497. This refrain is commonly the starting point for discussions about duty. For example, see Linden, *Canadian Tort Law*, 6th ed, *ibid* at 271 and John G Fleming, *The Law of Torts*, 8th ed (Sydney: Law Book, 1992), at 135.

owes a duty to the defendant. For present purposes, the question is whether a food manufacturer owes a duty to the consumer of their products. If no duty of care is owed by a manufacturer to the user of product, there is no negligence, and no liability will flow through negligence for harms that may occur.<sup>810</sup>

The first task in examining the expectation of food manufacturers to warn consumers of the risks inherent in their products is to consider the duty of care owed by food manufacturers. This chapter will begin with a brief introduction of the duty of care. A full analysis of the duty of care, however, is not required.<sup>811</sup> As will be demonstrated in part two, the current jurisprudence makes it clear that a thorough analysis is not necessary in situations where there is an established duty of care, and as will be demonstrated below, manufacturers clearly owe a duty of care to consumers, a duty that is all the more pronounced for food manufacturers given that food is an ingested product.<sup>812</sup> Nevertheless, the first part of this chapter will examine the duty of care analysis, focusing on two specific challenges that might arise when imposing a duty of care on food manufacturers, specifically, questions about the foreseeability of harm and policy considerations that might justify overriding the duty.

The rest of the chapter shifts to focus on three critical questions regarding the duty of

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<sup>810</sup> As Theall et al, *supra* note 62 at L2-11 note, “[t]he duty of care is either owed or is not.”

<sup>811</sup> However, I am mindful of Klar’s observation: “In *Longchamps v. Farm Credit Corp.*, McDonald J. expressed his preference for a duty formulation which “invites the courts, in deciding whether a duty of care exists, to look behind convenient but imprecise labels and examine the justice and reasonableness involved in finding that such a duty does or does not exist””, Lewis N Klar, “Recent Developments in Canadian Law: Tort Law” (1991) 23:1 Ottawa L Rev 177 at 188 [Klar, “Recent Developments in Canadian Law”]. This animates the discussions in this chapter.

<sup>812</sup> Note, one might argue that the *Anns-Cooper* policy analysis, discussed below, might actually be required given the sheer number of food products that exist. In short, an argument could be made that there might be a coherent policy reason for not imposing a duty of care upon food manufacturers, given that it would be impractical. This argument will be addressed in part five of this chapter, which argues for identifying specific categories of food products for which manufacturers owe a duty of care.



care: who owes the duty, to whom, and for what? Each question will be addressed in turn. The first two questions will be dealt with largely in abstract. The question of who owes a duty and to whom is largely dependent upon the product in question. Part three will address the question of who might owe a duty of care, focusing on six different categories of individuals/entities involved in the production and manufacture of goods that might owe a duty of care. Part four will then consider to whom the duty is owed. As this project is primarily concerned with the obligation of manufacturers to warn consumers about the dangers in food products, parts three and four will focus heavily on manufacturers and consumers respectively. Specific examples will be discussed to elucidate how these questions may be answered. However, as the discussion in these sections will reveal, it is important to consider the issue broadly, particularly given that some food products are not “manufactured” but instead “produced”, which will have implications on the duty owed.

On this point, perhaps one of the most difficult aspects of requiring manufacturers to warn consumers about the dangers in food products stems from the sheer number of food products available on the market, and the wide array of types or categories of products.<sup>813</sup> Thus far, this project has not focused on a specific food product or even categories of food products. In part this is because all ingested food products will be subject to a duty of care. A heritage cherry grown without use of pesticides or herbicides is as much a food product as a highly processed cherry soda; similarly, a T-bone steak purchased from a local butcher is as much as a food product as a can of Spam, a highly processed pork product. Before proceeding to discuss what is

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<sup>813</sup> For example, one might consider categories of food products based on type or process of manufacturing (e.g., highly process, fresh, etc), type of product based on purpose (e.g., snack, prepared meals, ingredients, etc), type of product based on categorization (e.g., sugar-sweetened beverages, confectionary, dairy), or numerous other approaches to categorization.

required of food manufacturers in providing a warning in the next chapter, the final task of this chapter will therefore be to discuss how to identify the products that give rise to a duty to warn. While an argument could be made that most, if not all, products can trigger a duty, it is recognized that this presents some challenges. Part five will address these challenges, and propose three broad rubrics for determining when a warning is required. For sake of ease, they are categorized here as “products”, “processes” and “nutritional profiles”. Each category will be explained in turn. This chapter will conclude that while a duty of care is theoretically owed by all manufacturers, pragmatically expectations around the duty to warn can be centred on certain examples of these categories. Three examples will be given. Sugar-sweetened beverages are identified as a type of product requiring a warning, adding trans fat is identified as a process involved in the manufacturing of products that warrants a warning, and high sodium content is identified as a nutritional profile that justifies a warning.

## 2. THE DUTY OF CARE

One of the first questions that will be encountered in negligence is whether a duty is owed.<sup>814</sup> Indeed, this was at heart of the inquiry in *Donoghue v Stevenson*, where the court considered “whether [the] manufacturer of an article of drink ... is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely

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<sup>814</sup> Theall et al, *supra* note 62 at L2-11: “One cannot be required to take reasonable care under the law without first determining to whom the duty is owed and the extent of the risk. Since the extent of the risk is specific to the injured party, it is only when it is established that a duty was owed to *that* person that one can go on to define the standard of care.” See also Weinstein et al, *supra* note 580 at 25: “It is especially important in warning cases that the courts face the duty question before they commence with their analysis of any other issue.”

to cause injury to health.”<sup>815</sup> Lord Atkin answered this question through his now well-known neighbour principle. As he famously articulated, a duty of care is owed to “persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”<sup>816</sup> For manufacturers, this uncontroversially includes the consumers of their products.

The courts have consistently characterized the duty as being based on the relationship between parties. It is the relationship between the parties that warrants the imposition<sup>817</sup>, and not the conduct of the manufacturer.<sup>818</sup> Numerous commentators have pointed out that it would be “difficult to envisage a circumstance where a manufacture of a product will not be liable to a person injured by that product, due to the absence of a duty of care.”<sup>819</sup> The relationship between manufacturers and consumers has been explicitly recognized by the courts. In *Hollis v Dow*

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<sup>815</sup> *Donoghue v Stevenson*, *supra* note 16 at 579. Cassels & Jones, *supra* note 84 observes that *Donoghue* remains the “leading statement regarding the duty of care owed in the context of product liability”, at 17.

<sup>816</sup> *Donoghue v Stevenson*, *supra* note 16 at 580.

<sup>817</sup> Per *Stewart v Pettie*, [1995] 1 SCR 131 at para 32, citing Fleming, *The Law of Torts*, 8th ed, *supra* note 809 at 105-106: “‘Duty’ is more appropriately reserved for the problem of whether the relation between the parties (like manufacturer and consumer or occupier and trespasser) warrants the imposition upon one of an obligation of care for the benefit of the other, and it is more convenient to deal with individual conduct in terms of the legal standard of what is required to meet that obligation.” It is common for the court to start by asking this question, see *Dura-Lite Heat Transfer Products v Ceda Environmental Services*, [2010] AJ No 68 (AB CA) [*Dura-Lite*]: “To determine if there is a duty of care, the nature of the relationship between Dura-Lite and its supplier Wasteco must be characterized.” Klar, “Recent Developments in Canadian Law”, *supra* note 811 at 189, notes: “[a] plaintiff must have been within the range of danger created by the defendant’s act for there to be any further consideration of the issue of duty.”

<sup>818</sup> Whether the manufacturer acted appropriately, while commonly conflated with the duty of care, is really about the standard of care, Edgell, *supra* note 545 at 12. As Theall et al, *supra* note 62 note at L2-11, quite often these two concepts are merged in the case law. Courts frequently describe the duty of care in a way that encompasses the standard of conduct that will avoid liability.”

<sup>819</sup> See Edgell, *supra* note 545 at 13, where referring to Klar notes, “I would agree”, Klar here referring to Lewis N Klar, *Tort Law*, 2nd ed (Toronto: Carswell, 1996). See also Boivin, “Negligence, Strict Liability, and Manufacturer Failure to Warn”, *supra* note 83 at 308: “Since *Donoghue v. Stevenson*, few decisions ponder the notion of the duty of care owed by a manufacturer”, and “[d]efendants rarely challenges this presumption.” Boivin further notes that post-*Donoghue*, this is largely taken for granted, and that there is little discussion about “proximity of relationship between the parties, the reliance placed on the defendant, or the reasonableness or otherwise of imposing a duty to warn on the manufacturer”, *ibid* at 317.

*Corning*, the Supreme Court of Canada referred to it as a “relationship of reliance.”<sup>820</sup>

Consumers have less knowledge than manufacturers about the dangers in the use of their products<sup>821</sup>, and, as a result, the question of whether a duty is owed is generally easy to satisfy.

What is often at play is the extent of the duty. As noted in *Buchan v Ortho Pharmaceutical*, “the graver the danger, the higher the duty.”<sup>822</sup> It could also be stated that the greater the knowledge discrepancies between the two parties, the higher the obligation. The court in *Hollis* clearly stated that it was reasonable to require that manufacturers provide “clear, complete and current information” to consumers in order to overcome information deficits, to allow consumers to make meaningful choices, to protect their bodily integrity, and to protect public health.<sup>823</sup> *Hollis* establishes that the duty of care extends to warnings.<sup>824</sup> Critically, the court also notes that this obligation is not an onerous one, as manufacturers can easily meet it by providing adequate information.<sup>825</sup>

As has been established earlier, the courts have made it clear that food manufacturers are under a duty of care to warn consumers about the risks in their products.<sup>826</sup> Nevertheless, two challenges to imposing a duty of care on food manufacturers warrant further consideration here.

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<sup>820</sup> *Hollis v Dow Corning*, *supra* note 66; cited by Edgell, *supra* note 545 at 13.

<sup>821</sup> *Hollis v Dow Corning*, *ibid* at para 21 “When manufacturers place products into the flow of commerce, they create a relationship of reliance with consumers, who have far less knowledge than the manufacturers concerning the dangers inherent in the use of the products, and are therefore put at risk if the product is not safe.”

<sup>822</sup> *Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 55.

<sup>823</sup> *Hollis v Dow Corning*, *supra* note 66 at para 26.

<sup>824</sup> *Ibid* at para 21 (“The duty to warn serves to correct the knowledge imbalance between manufacturers and consumers by alerting consumers to any dangers and allowing them to make informed decisions concerning the safe use of the product.”).

<sup>825</sup> *Ibid* at para 26, where the court refers to *Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 78, where Robbins JAA argues “drug manufacturers are in a position to escape all liability by the simple expedient of providing a clear and forthright warning of the dangers inherent in the use of their products of which they know or ought to know.”

<sup>826</sup> See Chapter 4. See also *Mustapha v Culligan of Canada*, *supra* note 614 and Theall et al, *supra* note 62 at L2-12.

The first concerns whether or not there is sufficient reasonable foreseeability with the use of food products to impose a duty of care. The second challenge is whether or not there are any policy reasons for negating the duty of care. Both stem from the analysis in the *Anns-Cooper* test. The next section articulates this test, before addressing each challenge in turn.

### 2.1. The *Anns-Cooper* Test

Following *Donoghue*, the courts were left to determine where there was sufficient proximity between parties to give rise to a duty of care. As Klar points out, it became apparent rather quickly that Lord Atkin's neighbour principle, and reasonable foreseeability, was an insufficient lens for determining when a duty of care existed.<sup>827</sup> To remedy this, in *Anns v Merton London Borough Council*, Lord Wilberforce articulated a two-stage analysis for determining when a duty of care arises.<sup>828</sup> He held:

First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter—in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise

<sup>829</sup>  
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This test was adopted by the Supreme Court of Canada in *Kamloops v Nielsen*<sup>830</sup>, and has been

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<sup>827</sup> Klar, "Recent Developments in Canadian Law", *supra* note 811 at 184-185: "The post-*Donoghue* years were a period of growth and refinement for Lord Atkin's neighbor principle. While perfectly suited for disputes such as *Donoghue* itself ... it became readily obvious that the neighbor principle could not be viewed as definitive in every type of case. Reasonable foreseeability of harm could not be the sole determinant of a duty's existence in all cases."

<sup>828</sup> *Anns v Merton London Borough Council*, [1978] AC 728 (HL). Klar, "Recent Developments in Canadian Law", *supra* note 811 argues that the post-*Donoghue* approach "reached its zenith in *Anns*", at 185.

<sup>829</sup> *Ibid* at 751-752.

<sup>830</sup> [1984] 2 SCR 2.

expanded since, particularly in *Cooper v Hobart*.<sup>831</sup> There are three requirements involved in two stages of the test. The first stage asks if there is (1) reasonable foreseeability and (2) sufficient proximity, which create a *prima facie* duty of care. At the second stage, the court must ensure (3) “the absence of overriding policy considerations which negate a *prima facie* duty.”<sup>832</sup> While there may be overlap between the two stages, the second stage is less concerned with the relationship between the parties, and more with the “effect of recognizing a duty of care on other legal obligations, the legal system, and society more generally.”<sup>833</sup> Importantly, while uncommon in Canada, policy considerations can cut both ways. In *Hill v Hamilton-Wentworth Police Services Board*, for example, the court observed that policy considerations can actually support the recognition of a duty of care.<sup>834</sup>

It is well established that it is unnecessary to go through the *Anns* analysis to determine whether the relationship between parties gives rise to a duty of care in scenarios where courts have previously recognized that a duty of care exists.<sup>835</sup> As articulated in *Cooper v Hobart*, in situations where the parties can fit within a category of a recognized duty of care, the court can “usually infer that sufficient proximity is present and that if the risk of injury was foreseeable, a *prima facie* duty of care will arise.”<sup>836</sup> Nevertheless, two challenges may arise in the context of

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<sup>831</sup> [2001] 3 SCR 537. See also: *Edwards v Law Society of Upper Canada*, [2001] 3 SCR 562; *Odhavji Estate v Woodhouse*, [2003] 3 SCR 263; *Childs v Desormeaux*, *supra* note 633; and *Hill v Hamilton-Wentworth Regional Police Services Board*, [2007] 3 SCR 129.

<sup>832</sup> See Theall et al, *supra* note 62 at L2-13.

<sup>833</sup> *Cooper v Hobart*, *supra* note 831 at para 37, affirmed in *Hill v Hamilton-Wentworth Regional Police Services Board*, *ibid* at para 31, where the court later refers to the impacts as “negative policy consequences”, *ibid* at para 43.

<sup>834</sup> *Hill v Hamilton-Wentworth Regional Police Services Board*, *ibid* at para 47. The Court here rejects that tort liability for policy would have a “chilling effect” on policy activities, at paras 56-59.

<sup>835</sup> Theall et al, *supra* note 62 at L2-14.

<sup>836</sup> *Childs v Desormeaux*, *supra* note 633 at para 15.

food products.<sup>837</sup> As discussed above, the first challenge concerns foreseeability and the second challenge is whether or not there are policy considerations that many negate the *prima facie* duty of care. While it is unlikely that a court will be persuaded that an established duty of care should be negated, the following addresses both challenges and argues that neither challenges presents sufficient reasons for negating the duty of care between food manufacturers and consumers.

## 2.2. Challenge 1: Foreseeability

Foreseeability is a key consideration in determining whether or not a duty of care exists.<sup>838</sup> When considering foreseeability the court asks whether the harm that occurred was a reasonably foreseeable consequence of the defendant's act.<sup>839</sup> At this duty of care stage of analysis, however, it is important to not encroach on the foreseeability analysis that occurs in a standard of care analysis.<sup>840</sup> As noted above, the foreseeability element in the duty of care analysis is concerned with the relationship between the parties, and not the conduct of parties.<sup>841</sup> The Supreme Court in *Stewart v Pettie* addresses the distinction that is often blurred between the relationship between parties and the conduct of parties, noting, “[t]here is not only the question “Did the defendant owe a duty to be careful?” but also “What precisely was required of him to

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<sup>837</sup> Not discussed here is proximity. It has been noted that proximity and foreseeability are separate analysis, and that “proximity will not always be satisfied by reasonable foreseeability”, see Theall et al, *supra* note 62 at L2-13. Section 3, which addresses who owes a duty of care, will address proximity issues.

<sup>838</sup> Foreseeability also factors into standard of care analysis, and can be pointed to for some of the confusion and overlap identified by Theall et al, as discussed above at note 818.

<sup>839</sup> Much like in the standard of care analysis, the reasonable person standard is used. Per Lord Simons in the *Wagon Mound*: “After the event even a fool is wise. But is not the hindsight of a fool; it is the foresight of the reasonable man which alone can determine responsibility”, *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co*, [1961] AC 388 (PC) at 424.

<sup>840</sup> Foreseeability will be addressed again in Chapter 6, under the standard of care analysis, when assessing whether or not a product is defective.

<sup>841</sup> Theall et al, *supra* note 62 at L2-2 note, courts often consider the same factors when trying to determine whether a product is defective and whether the manufacturer breached the standard of care, and that “the distinction is frequently blurred in the jurisprudence.”



discharge it?”<sup>842</sup> The court continues,

“Duty” is more appropriately reserved for the problem of whether the relation between the parties (like manufacturer and consumer or occupier and trespasser) warrants the imposition upon one of an obligation of care for the benefit of the other, and it is more convenient to deal with individual conduct in terms of the legal standard of what is required to meet that obligation.<sup>843</sup>

It is up to the court to determine whether a duty relationship exists, and to identify the expected standard of care. When determining the standard of care, a court considers whether a plaintiff’s use of a product was foreseeable. “Specifically, the court may ask what risks a consumer would reasonably have expected to encounter with the product under the circumstances, and how the reasonable consumer would have acted or reacted to a danger that arose.”<sup>844</sup> In contrast, when determining the duty of care, the court considers whether it was foreseeable that the defendant might have contemplated the plaintiff.

Boivin argues that foreseeability of risk is of particular concern when determining whether a manufacturer had a duty to warn. He argues,

[i]n every Canadian decision involving a manufacturer’s alleged failure to warn of a danger associated with its product, whether or not said risk is inherent in the use of the product or the result of a defect in manufacture or design, there is mention of the manufacturer’s knowledge (or lack thereof) of the danger posed by its product.<sup>845</sup>

A manufacturer’s knowledge is important because manufacturers will owe a duty of care to those it can reasonably foresee might be injured by a product. This knowledge extends beyond

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<sup>842</sup> *Stewart v Pettie*, *supra* note 817 at para 32, citing Fleming, *The Law of Torts*, 8th ed, *supra* note 809 at 105-106.

<sup>843</sup> *Ibid.*

<sup>844</sup> Theall et al, *supra* note 62 at L2-4.

<sup>845</sup> Boivin, “Negligence, Strict Liability, and Manufacturer Failure to Warn”, *supra* note 83 at 317.

foreseeable consumers or ultimate users, as discussed in part four below, and is intended to include those that are within the vicinity of a product.<sup>846</sup> As will be discussed in more detail in the next chapter, foreseeability applies to the intended uses of products as well as to foreseeable misuses and abuses of products.

Boivin further argues that the foreseeability analysis in the duty of care assessment serves a gate-keeping function; it “lets in only those actions which are considered worthy of judicial attention on broad policy grounds...”<sup>847</sup> It allows the courts to dismiss those actions for harms that were unknown to the manufacturer. As the court articulated in *Lem v Baratto*, reasonable foreseeability does not mean manufacturers are required to anticipate all potential harms<sup>848</sup>, which would turn manufacturers into insurers.<sup>849</sup> Such an expectation would also likely result in manufacturers overwhelming consumers with superfluous warnings, to avoid liability, which might ultimately result in confusion and indifference among consumers.<sup>850</sup> Instead, foreseeability will be dependent on the type of product and the potential harms that arise.

The more dangerous a product is, the more likely a court will determine that it was reasonable for a manufacturer to foresee harms arising. Indeed, the court has continually found

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<sup>846</sup> Edgell, *supra* note 545 at 13. He cites the Newfoundland Court of Appeal in *Bow Valley Husky (Bermuda) v Saint John Shipbuilding*, *supra* note 708 at 28: “Clearly, liability for defective products extends beyond the owner or consumer to anyone who is reasonably foreseeable as being affected by the negligent conduct of the manufacturer.”

<sup>847</sup> Boivin, “Negligence, Strict Liability, and Manufacturer Failure to Warn”, *supra* note 83 at 354.

<sup>848</sup> *Lem v Baratto Sports*, *supra* note 603.

<sup>849</sup> Boivin, “Negligence, Strict Liability, and Manufacturer Failure to Warn”, *supra* note 83 at 355: “Making them liable for unforeseeable risks would have such an effect as it would not be possible for them to adopt measures to avoid such risks, nor would it be possible for them to adequately insure themselves.”

<sup>850</sup> *Ibid* at 356. Boivin further notes, *ibid* at 355-356, that “[a] rule requiring manufacturers to warn against risks which were neither known nor knowable at the time of supply would do nothing to achieve an optimal level of deterrence, and could ultimately have negative impacts on the innovation of new products and on the rationales for failure to warn law.” He concludes, *ibid* at 356: “[t]he rationales of preventing accidents and permitting informed choices would ultimately be impaired if manufacturers were forced to warn of every possible risk associated with their products, whether reasonably foreseeable or not.” See also Weinstein et al, *supra* note 580 at 25.

that the duty owed is dependent on the dangers inherent in the ordinary use of a product.<sup>851</sup> This is particularly relevant for the duty to warn. When there is a low probability of harm, it is more difficult to justify that there is a duty to warn.<sup>852</sup> It has been suggested that there would have to be a substantial possibility, or even probability, of harm before a duty might be triggered.<sup>853</sup> For example, a 1 in 50,000 probability that a pesticide may result in the death of cattle was not considered sufficient harm by the court to impose a duty to warn.<sup>854</sup> However, this can be contrasted with the court's finding in the Australian case of *Grant v Australian Knitting Mills*. In this case, the court held that a 1 in 5 million chance of contracting dermatitis was deemed sufficient enough of a harm to impose liability.<sup>855</sup> Of course, the duty will also depend on the type of harm. Whereas a high probability of harm to property may be required before a duty to warn is triggered, only a slight possibility of harm to persons may be sufficient to trigger a duty to warn.<sup>856</sup> While a 1 in 50,000 risk may seem insignificant when considering the death of cattle, the same risk of death for consumers would be very significant.

Framing it this way may pose some problem for food products. After all, the harms that this project has mainly been concerned with are diet-related chronic diseases. Death, while possible in rare instances or for consumers with allergies, is rare. Instead, the risk associated with the consumption of food products are typically conditions that arise only over time, with

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<sup>851</sup> See *Hollis v Dow Corning*, *supra* note 66 at para 22. See also *Lambert v Lastoplex Chemicals*, *supra* note 65 at 124-125.

<sup>852</sup> Theall et al, *supra* note 62 at L3-14.

<sup>853</sup> *Ibid.*

<sup>854</sup> See *Double Bar L Ranching v Bayvet Corp.* (SK CA), *supra* note 785. Cf *Grant v Australian Knitting Mills*, *supra* note 784, where a 1 in 5 million chance was sufficient of a risk.

<sup>855</sup> See *Grant v Australian Knitting Mills*, *ibid.*

<sup>856</sup> Theall et al, *supra* note 62 at L3-14. They are more specific, stating "a slight possibility of harm may trigger a duty to warn when the harm involves death or serious personal injury", but it is not clear what "serious personal injury" entails. Do chronic conditions, that are long-standing and difficult to treat, count?

prolonged use of a variety of products.<sup>857</sup> Thus, one may argue that there is not a high probability of serious harm with the consumption of each individual food product, and thus no obligation to warn of cumulative risks. However, the duty to warn extends to both the individual use of a product and the ongoing use of a product. Consider the ongoing use of the products in question in *Buchan and Lambert*; it was the continuing use over time in the case of the former that resulted in the harm requiring a warning and the overall exposure in a single timeframe in the latter.<sup>858</sup> Similarly, in *Létourneau* the court held that the risk of cigarette use over time was sufficient to justify a warning. Thus, there are grounds for arguing that the harm of diet-related chronic diseases resulting from continuing and cumulative use of food products can give rise to a manufacturer's duty to warn consumers.<sup>859</sup>

Importantly, the continuing and cumulative use of many food products is what manufacturers intend. Overconsumption of these products is, if not intended, foreseeable. For example, food manufacturers do not advertise that their products are a one-time or even rare-

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<sup>857</sup> Technically, it is possible that a chronic condition may arise from the prolonged use of a single food product, for example, repeated consumption of soft drinks is associated with a higher risk of diabetes, see VS Malik et al, "Sugar-sweetened Beverages and Risk of Metabolic Syndrome and Type 2 Diabetes: A Meta-Analysis" (2010) 3 Diabetes Care 2477 [Malik et al, "Sugar-sweetened Beverages and Risk of Metabolic Syndrome and Type 2 Diabetes"].

<sup>858</sup> In *Lambert v Lastoplex Chemicals*, *supra* note 65, the warning that was missing was for the pilot light. Recall, the lacquer can had three other warnings about the risk of an open flame. In this instance the court held that an adequate warning would have included a warning to extinguish the pilot light. The risk from the pilot light would only materialize after sufficient time and exposure – to put another way, it would require sufficient build up of fumes to ignite, as factually occurred in the case. Only after prolonged use and exposure would a pilot light be a risk sufficient to require a warning. Opening a can of lacquer in close proximity to a pilot light would not result in an explosion; use over time was necessary for the risk to materialize. In a similar way, many food products may only prove to be a sufficient risk after prolonged exposure.

<sup>859</sup> Chronic diseases are responsible for more deaths worldwide than by all other causes of death combined, WHO, *Global Status Report on Noncommunicable Diseases 2010* (Geneva: WHO, 2011), online: WHO, [http://apps.who.int/iris/bitstream/10665/44579/1/9789240686458\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/44579/1/9789240686458_eng.pdf). The WHO estimated that of the 56 million global deaths annually, 68% (38 million) are a result of chronic conditions, WHO, *Noncommunicable Disease Country Profiles 2014* (Geneva: WHO, 2014), online: WHO, [http://apps.who.int/iris/bitstream/10665/128038/1/9789241507509\\_eng.pdf?ua=1](http://apps.who.int/iris/bitstream/10665/128038/1/9789241507509_eng.pdf?ua=1).

occasion product.<sup>860</sup> Food manufacturers intend for their products to be consumed regularly, and many desire for their products to be consumed in large quantities.<sup>861</sup> Food companies also spend a considerable amount of money advertising their products, including promoting their ongoing use.<sup>862</sup> Additionally, while there are thousands of products, ultimately there are far fewer food manufacturing companies.<sup>863</sup> Many of the products that the average consumer encounters are produced by a handful of mega-multi-national corporations. These corporations are simultaneously promoting the overconsumption of numerous products at once, often to be consumed at the same time.<sup>864</sup> This is important because, at a minimum, it means that the

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<sup>860</sup> Consider, as discussed in Chapter 1, the motivation for Spurlock's *Super Size Me*, *supra* note 19, was a claim by McDonald's that their products could be eaten every day as part of a healthy diet.

<sup>861</sup> For example, there has been research that shows that food advertising primes viewers to consume more food. Harris and colleagues found that food ads increased overall consumption of food products, unrelated to hunger or other influences, see Jennifer L Harris, John A Bargh & Kelly D Brownell, "Priming Effects of Television Advertising on Eating Behavior" (2009) 28:4 Health Psychology 404. More recently, Boswell and Kober found that food advertising (which they discuss as food cues) did have a strong relationship with reactivity and on craving, impacting both eating behaviour and weight, see Rebecca G Boswell & Hedy Kober, "Food Cue Reactivity and Craving Predict Eating and Weight Gain: A Meta-analysis Review" (2016) 17:2 Obesity Reviews 159. Given that the vast majority of food advertising is for also for energy dense foods of low nutritional value, see M Potvin-Kent et al, "The Restriction of Food and Beverage Marketing to Children and Youth in Canada: A Policy Brief", *forthcoming* (on-file with author), advertising ultimately increases the overall consumption of already unhealthy foods.

<sup>862</sup> It is difficult to know the precise amount that food companies spend on marketing and advertising – and this determination depends, in part, on what is included as part of a marketing budget. There is also not very reliable data in Canada. Conservative estimates in 2009 put food and beverage companies advertising directed at children and teens to be almost \$2 billion. There has been some declines in spending associated with use of online advertising, see Lisa M Powell, Jennifer L Harris & Tracy Fox, "Food Marketing Expenditures Aimed at Youth Putting the Numbers in Context" (2013) 45:4 American Journal of Preventive Medicine 453.

<sup>863</sup> See Food & Water Watch, *Grocery Goliaths: How Food Monopolies Impact Consumers* (Washington, DC: Food & Water Watch, 2013). For a good infographic, see Jeff Desjardin, "The Illusion of Choice in Consumer Brands" (July 21, 2016) Visual Capitalist, online: <http://www.visualcapitalist.com/illusion-of-choice-consumer-brands/>.

<sup>864</sup> Consider, for example, the advertising of Mondelez International foods (formerly Kraft Foods). They might advertise the consumption of several of their cracker brands (e.g., Ritz, Triscuit, Wheat Thins), along with some of their cheeses (e.g., Philadelphia, Cracker Barrel, Velveeta, Easy Cheese), to go along with one of their beverage products (e.g., Kool-Aid, Tang, Crystal Light), prior to having a salad using one of their dressings (e.g., Kraft dressings, Renées, Miracle Whip), then a meal (e.g., KD, Shake n' Bake, Stove Top), dessert (e.g., Jell-O, Cool Whip) or cookies (e.g., Oreo, Mallowmars, Fig Newtons), to be followed by coffee or tea (e.g., Tassimo, Maxwell House, Nabob), and maybe one of many of their confectionary products, control by their subsidiary Cadbury (e.g., Maynards, Crispy Crunch). You could even ensure fresh breath through one of their many gum companies (e.g.,

manufacturers are aware of the context within which their products may be used. As will be discussed in the next chapter, foreseeable misuses of products also require warnings.

For many years, tobacco control advocates have pointed out that tobacco products, if used as intended, will result in the death of half of their users.<sup>865</sup> In other words, there was no safe way to properly consume cigarettes. The same cannot quite be said for food products. After all, food is necessary. Moreover, many food products can be consumed in small quantities without deleterious effects, and some can be consumed in large quantities without any resulting harms. Some food manufacturers use this to their advantage, pointing out that their products are only unhealthy when abused by consumers. However, this is not only a disingenuous claim at times<sup>866</sup>, as the next chapter will argue, it is ultimately specious given that the duty to warn extends to foreseeable misuses and abuses. Additionally, it is foreseeable that, if consumed as intended, many food products put into circulation may harm consumers. The duty of care is not determined only in circumstances where it will be easy to causally demonstrate that the manufacturer is responsible for the harms; all that is required is a reasonable foreseeability that the relationship that exists between the parties is sufficient to give rise to the duty.<sup>867</sup>

Even in circumstances where a food manufacturer might not be aware of risks prior to the release of a product on the market, a duty of care may still arise after the product has been

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Trident, Dentyne, Chiclets, Bubblegum, Stride, Clorets, Certs). See <http://www.mondelezinternational.com/>. The point being: one company controls far more food products than the average consumer would readily recognize.

<sup>865</sup> See WHO, "Facts and Figures About Tobacco" (February 6, 2006), online: WHO, <http://www.who.int/tobacco/fctc/tobacco%20factsheet%20for%20COP4.pdf>.

<sup>866</sup> In short, many food companies work to ensure the overconsumption of their products. This has been discussed at various points in this project.

<sup>867</sup> The next section, addressing policy considerations, will argue that food manufacturers know that they have considerable power over the food market, and thus are very well aware of the limited choices that consumers ultimately have. This includes the control multi-national corporations have over basic food production, such as seed ownership. In other words, one could argue that their relative power as compared to consumers renders this not only a relationship of reliance, but also of utter dependence.

released. This was clearly articulated in *Buchan and Hollis*.<sup>868</sup> The duty of care owed here extends to all dangers the manufacturers learn about, even if after the product has been sold.<sup>869</sup> Theall and colleagues note that manufacturers have a continuing duty “to inform users of not only known potential defects or dangers, but also suspected dangers where the field evidence is inconclusive.”<sup>870</sup> The court in *Létourneau* made this very clear as well: it held that the defendant tobacco companies had an ongoing obligation to inform smokers of the dangers as they became aware of them, including the suspected dangers.<sup>871</sup> The same logic can be applied to food manufacturers. Even if manufacturers only become aware of dangers associated with the consumption of their products after they have been developed and sold, they still have an ongoing duty to warn consumers.

Food companies are likely to understand this ongoing obligation. Food recalls and warnings are common-place in the industry.<sup>872</sup> Generally, these are associated with contaminated

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<sup>868</sup> See *Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 20: “The duty is a continuous one requiring that the manufacturer warn, not only of the dangers known at the time of the sale, but also of dangers discovered after the product has been sold and delivered.” See also *Hollis v Dow Corning*, *supra* note 66 at para 20: “The duty to warn is a continuing duty, requiring manufacturers to warn not only of dangers known at the time of sale, but also of dangers discovered after the product has been sold and delivered...” See also *Goodridge v Pfizer Canada*, *supra* note 558 at para 83 and *Forsyth v Sikorsky Aircraft Corp*, [2000] BCTC 286 (BC SC) at para 49.

<sup>869</sup> Theall et al, *supra* note 62 at L3-22. See *Nicholson v John Deere*, *supra* note 606

<sup>870</sup> Theall et al, *supra* note 62 at L3-25.

<sup>871</sup> See *Létourneau v JTI-MacDonald*, *supra* note 68. Riordan J notes that at trial a former president of one of the companies “testified that BAT’s lawyers frowned on ITL performing scientific research to verify the health risks of smoking because that might be portrayed in lawsuits as an admission that it knew or suspected that such risks were present”, *ibid* at para 212. Elsewhere he notes that the companies were not necessarily at fault for not doing the research, at para 472. However, “[w]here fault can be found, however, is in the failure or, worse, the cynical refusal to take account of contemporaneous, accepted scientific knowledge about the dangers of the Companies’ products and to inform consumer accordingly”, at para 474. Even if the companies had done research, Riordan J continually calls into question the credibility of the industry and its experts, see, for example, *ibid* at paras 206-214.

<sup>872</sup> The Canadian Food Inspection Agency (CFIA) is responsible for preventing food safety hazards in Canada. For an overview of the food recall process, see CFIA, “The Canadian Food Safety System: Food Recalls”, online: <http://www.inspection.gc.ca/about-the-cfia/newsroom/food-safety-system/food-recalls/eng/1332206599275/1332207914673>. Numerous triggers are identified, including outbreaks of illness, food testing results, consumer complaints, and others. Individual companies may also monitor their own products, and



food products<sup>873</sup>, but there are also instances where food products have been recalled for other reasons, such as for having foreign materials.<sup>874</sup> It could be argued that the food industry is acutely aware of the foreseeable risks associated with dangerous products being on the market. While the immediacy and, generally, severity of the harms are more apparent in contaminated food products when compared to warnings of the dangers associated with the ongoing consumption of food products, both risks are foreseeable. That said, a contaminated food product more appropriately (although not necessarily) falls under the rubric of a manufacturing defect<sup>875</sup>, and it is difficult to envisage circumstances in which a manufacturer is able to foresee when a warning is required. Alternatively, the risk of diet-related chronic diseases resulting from overconsumption of food products is foreseeable – and it is especially foreseeable for some products.

Ultimately, underlying the entire question of whether a manufacturer owes a duty of care is the concept of responsibility.<sup>876</sup> With the opportunity to put their products on the market, manufacturers have to consider how their products might affect consumers. Given that food products are intended to be ingested, the obligation is heightened. It is reasonably foreseeable that products that are consumed may cause harm, and thus the question of foreseeability for the purpose of duty of care is easily met. Furthermore, as was established in *Buchan*, it is reasonable to foresee, based on the relationship between consumers and manufacturers, that warnings may

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recall on their own accord.

<sup>873</sup> *Ibid.*

<sup>874</sup> For example, over 220,000 pounds of frozen chicken nuggets were recalled in the US in May of 2016 for fear that they contained blue plastic and black rubber materials, see <http://www.foodqualityandsafety.com/article/foster-poultry-farms-recalls-nuggets-due-foreign-materials-contamination/>.

<sup>875</sup> It is not necessarily a manufacturing defect, as the contamination may not necessarily result from some breakdown in the manufacturing process, but instead a consequence of how a product is designed.

<sup>876</sup> Weinstein et al, *supra* note 580 at 27.

influence the behaviours of consumers.<sup>877</sup>

### 2.3. Challenge 2: Policy Considerations

The second challenge under the duty of care analysis concerns policy considerations. It is recognized that policy considerations can raise difficult questions in product liability cases.<sup>878</sup> We are concerned here with policy analysis in the second part of the *Anns-Cooper* test.<sup>879</sup> It comes into play only after the plaintiff has satisfied the first test, that there is a *prima facie* duty of care owed by the defendant to the plaintiff. In the second part, the onus is on the defendant to identify policy reasons that may negate the *prima facie* duty.<sup>880</sup> As Klar points out, however, courts typically do not deny the duty for policy reasons.<sup>881</sup>

Arguably, this analysis is not necessary at this point. As noted, when a relationship has already been recognized as giving rise to a duty of care, a full analysis is not required.<sup>882</sup> However, there are reasons to think that, perhaps, for policy reasons, a duty of care might be inappropriate in the context of food products, and thus it is worthwhile to undertake a more fulsome analysis here. In particular, two arguments are identified: first, that there are simply too many food products, and too many users, to reasonably impose this duty, and that this would

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<sup>877</sup> *Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 16: “well settled that a manufacturer of a product has a duty to warn consumers of dangers inherent in the use of its products of which it knows or has reason to know.” See also *Bow Valley Husky (Bermuda) v Saint John Shipbuiding*, *supra* note 634 at 1229-1230 (“Manufacturers and suppliers are required to warn all those who may reasonably be affected by potentially dangerous products...”, provided they are reasonably foreseeable).

<sup>878</sup> Theall et al, *supra* note 62 at L1-9.

<sup>879</sup> Klar, “Recent Developments in Canadian Law”, *supra* note 811 at 185 (“While fully cognizant that there are policy consideration which will reduce or negate the duty of care in some types of disputes, the *prima facie* duty approach kept separate the issues of proximity from the questions of policy.”).

<sup>880</sup> *Childs v Desormeaux*, *supra* note 633 at para 13.

<sup>881</sup> Klar, “Recent Developments in Canadian Law”, *supra* note 811 at 186 (“Judges, not generally comfortable with having to resort overtly to policy considerations in order to decide issues of tort liability, were more likely to concede the duty, once proximity was established, than to deny it, if to deny it meant having to use policy to do so.”).

<sup>882</sup> *Mustapha v Culligan of Canada*, *supra* note 614 at paras 4-6.

inevitably result in a rush of lawsuits and indeterminate liability; and second, that it is nearly impossible to link food products with injuries, thus frustrating the negligence analysis at several stages, including in determining the reasonable foreseeable risks and in proving causation. The following will demonstrate that neither of these arguments can be sustained as a sufficient policy reason for negating the duty of care.

The first argument is that there are simply too many food products, and too many users, to reasonably impose a duty of care on food manufacturers. It could be said that this type of duty might lead to indeterminate liability. Indeterminate liability has been described as “[t]he most recognized policy consideration weighing against the imposition of a duty of care.”<sup>883</sup> This is because courts want to avoid creating a situation where a defendant might face unending potential liability, or as Cardozo CJ famously put it, “liability in an indeterminate amount for an indeterminate time to an indeterminate class.”<sup>884</sup> While arguments about indeterminate liability are generally concerned with cases dealing with pure economic loss<sup>885</sup>, an argument might be raised that food manufacturers may face indeterminate liability and litigation for failing to warn consumers of the dangers in their products, and this may be sufficient to negate the duty of care.

Indeterminate liability was a concern in *Cooper v Hobart*, where the court had to determine if the Registrar of Mortgage Brokers, a statutory regulator, owed a duty of care to members of the investing public.<sup>886</sup> The court determined that imposing a duty of care between

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<sup>883</sup> *Haggerty v Rogers*, [2011] 89 CCLT (3d) 256 (ON Sup Ct J) at para 94.

<sup>884</sup> *Ultramares Corp v Touche*, 174 NE 441 (NY 1931) at p 444.

<sup>885</sup> See *Fallowka v Pinkerton’s of Canada*, [2010] 1 SCR 231 at para 70, where the court describes indeterminate liability as a “policy consideration [that] has often held sway in negligence claims for pure economic loss.” The court notes that even in that context it has not always carried the day. See also *R v Imperial Tobacco*, *supra* note 513 at para 100 and *Canada (Attorney General) v Walsh*, 2016 NSCA 60 at para 73.

<sup>886</sup> *Cooper v Hobart*, *supra* note 831.

the Registrar and investors would give rise to a “spectre of indeterminate liability” that would “loom large”.<sup>887</sup> Consequently, the court determined there was no duty of care owed. The court referred to *Hercules Management v Ernst & Young*, where the court had previously found that an indeterminate class of people was sufficient grounds for negating a duty of care.<sup>888</sup> Justice La Forest expressed concerns over the potential impact of indeterminate liability, both for defendants and the court. In responding to the claim that the problem of indeterminate liability has been overstated, La Forest J observed that it poses “serious problems” for defendants and the courts, and that legal costs will “inevitably swell” with increased litigation.<sup>889</sup> Thus, he suggested “it makes more sense to circumscribe the ambit of the duty of care than to assume that difficulties in proving negligence and reliance will afford sufficient protection to auditors, since this approach avoids both “indeterminate liability” and “indeterminate litigation”.”<sup>890</sup>

Similar arguments could be made in the context of food products. After all, manufactured food products are consumed by almost everyone, and there are many individuals who are wholly reliant on manufactured goods. Additionally, there are thousands of food products that are consumed in vastly different ways by different people – not to mention being consumed in different quantities, within different contexts. This begins to look like indeterminate liability resulting from indeterminate litigation being brought by an indeterminate class. Indeed, there have been commentators who have warned that the floodgates of litigation might open against

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<sup>887</sup> *Ibid* at para 54.

<sup>888</sup> [1997] 2 SCR 165. Here the court was applying the *Anns/Kamloops* test. The court found that indeterminate liability was problematic because it would negligence actions could, potentially, be limitless, at para 33.

<sup>889</sup> *Ibid* at para 35.

<sup>890</sup> *Ibid*.

food manufacturers.<sup>891</sup>

However, the argument to negate the duty of care because of these concerns is ultimately not compelling. La Forest J in *Hercules Management* was clear that even though policy considerations around indeterminate liability *might* negate a *prima facie* duty of care, there may be situations where this is not the case, and that there might be a “specific factual matrix” giving rise to an exception.<sup>892</sup> Additionally, in *Hill v Hamilton-Wentworth Regional Police Services*, the court rejected the argument that finding a duty of care between the police and a suspect would open the door for indeterminate liability against the police service.<sup>893</sup> In that case, the court observed that “[t]he class of potential claimants is ... limited by the requirement that the plaintiff establish compensable injury ...”<sup>894</sup> The court also observed that there had been no floodgate of litigation in any jurisdiction where lawsuits against the police have been allowed.<sup>895</sup> In *Canada (AG) v Walsh*, the Nova Scotia Court of Appeal held that when the foreseeable damages are discrete and physical, and that the economic losses would be linked to the physical damage, there

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<sup>891</sup> These concerns are not specific to duty to warn cases, but litigation generally. See, for example, Alderman & Daynard, *supra* note 13 at 86. Following *Létourneau v JTI-MacDonald*, *supra* note 68, some asked whether there would be a floodgate of litigation against other industries in Canada, see Tasha Kheiriddin, “A \$15 billion award against Big Tobacco should make other industries very nervous” (June 3, 2015) National Post, online: National Post, <http://news.nationalpost.com/full-comment/tasha-kheiriddin-a-15-billion-award-against-big-tobacco-should-make-other-industries-very-nervous>. Levy has argued that the floodgates litigation argument has been primarily used by the court to protect the judiciary, and that this line of reasoning should not be employed, but instead lower courts should use other mechanisms, such as procedural rules, to handle new claims, see Marin K Levy, “Judging the Flood of Litigation” (2013) 80 University of Chicago Law Review 1007.

<sup>892</sup> *Fallowka v Pinkerton’s of Canada*, [2010]1 SCR 231, *supra* note 885 at para 36.

<sup>893</sup> [2007] SCJ 41 at para 60. In the dissenting opinion, policy considerations were found to negate the duty of care, see the discussion at para 149ff. Cf *Canada (Attorney General) v Walsh*, *supra* note 885, where the Nova Scotia Court of Appeal finds that imposing a duty of care on the police to apprehend people is a “classic case of potentially indeterminate harm to an indeterminate class” which would be “fatal to any duty of care owed”, at para 70. The court, however, also held that the reasoning in *Haggerty v Rogers*, *supra* note 883 was unpersuasive.

<sup>894</sup> *Ibid.*

<sup>895</sup> *Ibid* at para 61.

is no real concern about indeterminate loss.<sup>896</sup> A similar argument could be made for indeterminate liability of food manufacturers. It is clear that plaintiffs need to show a compensable injury.<sup>897</sup>

Furthermore, *Fullowka v Pinkerton's of Canada* made it clear that policy considerations must be compelling, and that “a real potential for negative consequences of imposing the duty of care must be apparent.”<sup>898</sup> The court noted that concerns about indeterminate liability are related to proximity. It observed, “[w]hat is required is a principled basis upon which to draw the line between those to whom the duty is owed and those to whom it is not.”<sup>899</sup> With respect to food products, the line is easy to establish; the duty is owed to consumers who have purchased products that manufacturers have put into circulation. The principled basis for this demarcation is well-established, and a duty of care is already recognized as existing between manufacturers and consumers. In light of the above, we can address the idea that indeterminate liability may be a compelling reason for negating a duty of care.<sup>900</sup>

A second policy argument against recognizing a *prima facie* duty of care is that it will be difficult to demonstrate that food products cause injuries, which would frustrate the negligence analysis. In short, one might argue that a plaintiff will not be able to provide sufficient evidence

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<sup>896</sup> *Canada (Attorney General) v Walsh*, *supra* note 885 at para 73.

<sup>897</sup> Note, to date there has not been a floodgate of litigation, and the law on the duty to warn has been well-established (if not yet articulated with respect to food products). Based on the frequency of duty to warn litigation in Canada, it is difficult to imagine that there would be a floodgate of litigation (consider, for example, that to date there have been relatively few product liability claims against tobacco manufacturers in Canada).

<sup>898</sup> *Supra* note 885 at para 57.

<sup>899</sup> *Ibid* at para 70.

<sup>900</sup> Interestingly, in *R v Imperial Tobacco*, *supra* note 513, the government of Canada argued that indeterminate liability was a policy consideration that ought to negate the duty of care the state owed to tobacco companies. The tobacco companies argument, which was rejected by the courts, is that Canada faced “extensive, but not indeterminate liability”, at para 98. The court rejected this argument because Canada did not have any control over who smoked. One wonders how industry would accept the same logic as used by the tobacco companies here – that extensive liability is not the same as indeterminate.

to establish a *prima facie* case of negligence. For example, it might be argued that it will be impossible for manufacturers to reasonably foresee the risks associated with their individual products, and that plaintiffs will never be able to demonstrate that a particular product is causally linked to an injury. This is not strictly speaking a policy consideration under the *Anns-Cooper* test, and is more appropriate as a procedural question, such as a non-suit motion.<sup>901</sup> In non-suit motions it is not up for the court to determine whether or not this evidence results in a finding in negligence, only that it may be found.<sup>902</sup> In the case of the duty of food manufacturers to warn consumers, this project argues that there is more than sufficient evidence to draw a reasonable inference in most cases. As noted previously, with respect to defective products, “the inference

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<sup>901</sup> This really concerns whether or not there is sufficient evidence to proceed with the suit. This issue is not dealt with in depth here. In this instance, a non-suit motion may be brought, alleging that the case ought to fail for not meeting the burden of proof. While it is beyond the scope of this paper to fully delve into the law of evidence in civil cases, suffice it to say that the question in non-suit motions is not whether the evidence has been established – something that can only be determined at trial – but rather whether or not it is reasonable to infer negligence on the evidence. As observed in Sopinka’s *The Law of Evidence in Civil Cases*: “If such a motion is launched, it is the judge’s function to determine whether any facts have been established by the plaintiff from which liability, if it is in issue, may be inferred. It is the jury’s duty to say whether, from those facts when submitted to it, liability ought to be inferred. The judge, in performing his function, does not decide whether in fact he believes the evidence. He has to decide whether there is enough evidence, if left uncontradicted, to satisfy a reasonable man. He must conclude whether a reasonable jury could find in the plaintiff’s favour if it believed the evidence given in trial up to that point. The judge does not decide whether the jury will accept the evidence, but whether the inference that the plaintiff seeks in his favour could be drawn from the evidence adduced, if the jury chose to accept it”, John Sopinka, *The Law of Evidence in Civil Cases* (Toronto: Butterworths, 1974), as cited in *Johansson v General Motors of Canada*, [2012] NSJ No 631 (NS CA) at para 27.

It has further been noted that in non-suit motions, a plaintiff must simply put forward some evidence, and that the court must assign this evidence the “most favourable meaning”, *Prudential Securities Credit Corp v Cobrand Foods*, [2007] OJ No 2297 (ON CA) at para 35. Further, the court noted, “In other words, on a non-suit motion the trial judge should not determine whether the competing inferences available to the defendant on the evidence rebut the plaintiff’s *prima facie* case. The trial judge should make that determination at the end of the trial, not on the non-suit motion”, at para 36.

<sup>902</sup> As articulated in *Metropolitan Railway v Jackson* (1877), 3 App Ca 193 (HL) at 197: “The Judge has a certain duty to discharge, and the jurors have another and a different duty. The Judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct.”



of negligence is practically irresistible.”<sup>903</sup> Moreover, the expectations of the evidence at this point of inquiry are lower than what would be expected when determining causation.<sup>904</sup>

There is also a strong policy reason for allowing these cases to move forward.<sup>905</sup> In this instance, there are concerns about the industry deliberately destroying evidence that may be useful to advance a plaintiff’s claim. The destruction of evidence is a common concern in complex litigation<sup>906</sup>, and there is reason to be concerned about this possibility given that the food industry has continually taken inspiration from how the tobacco industry has dealt with lawsuits. In *Létourneau*, Justice Riordan was highly critical of the tobacco companies who deliberately attempted to destroy evidence.<sup>907</sup> Given the importance of knowledge in product liability cases, and that manufacturers, for the most part, control the evidence about the extent of their knowledge about the risks inherent in their products, it would be a disservice to plaintiffs to allow non-suit motions to proceed on the basis of insufficient evidence at this stage of the analysis.

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<sup>903</sup> Waddams, *Product Liability*, *supra* note 534 at 69-70. See also Edgell, *supra* note 545 at 25-26; Cassels & Jones, *supra* note 84 at 34.

<sup>904</sup> For a more fulsome discussion of the non-suit and issues with evidence, see *Johansson v General Motors of Canada*, *supra* note 901. Importantly, the court noted, at para 81: “Drawing inferences is standard fare for juries. An inference is a finding deduced or induced from a premise without direct evidence of the inferred fact. It is a factual jump on the reasoning path. The judge ensures that the span is not so broad or irrational that a reasonable jury would stumble. Otherwise the system trusts the jury’s common sense and agility to mind the gap and land softly. To resolve the non-suit motion simply because there is no direct evidence of GMC’s standard of care for rack and pinion steering assemblies, is to emasculate the jury’s function of assessing whether or not to reasonably infer the standard’s particulars from appropriate evidence.”

<sup>905</sup> The court commonly notes that the policy considerations raised to negate a *prima facie* duty of care may, in fact, reinforce the need to impose a duty of care. See, for example, the discussion in *Hill v Hamilton-Wentworth Regional Police Services Board*, *supra* note 831 at para 47.

<sup>906</sup> Richard J Sommers & Andreas G Seibert, “Intentional Destruction of Evidence: Why Procedural Remedies Are Insufficient” (1999) 78 Can Bar Rev 38.

<sup>907</sup> See discussion in *Létourneau v JTI-MacDonald*, *supra* note 68 about “deadwood” and the role of lawyers in destroying evidence, at paras 357-378.

### 3. WHO OWES A DUTY

The next question that must be addressed is who owes a duty of care? This is an issue of proximity and the relationship between parties. Chapter four clearly established that there has long been recognition of proximity between consumers and food manufacturers, and that this proximity is sufficient to give rise to a duty of care. Consequently, this section will not embark on a proximity analysis. Instead, it focuses on the potential classes of defendants that might be in a proximal relationship with consumers. In most product liability claims, manufacturers are the most common defendants<sup>908</sup>, but others may be implicated including: importers, wholesalers, distributors and retailers; individual employee of business supplier; repairers and installers; inspectors and certifiers; and even users. Cassels and Jones observe, “virtually any person who becomes involved in the production, distribution, or use of a product is potentially liable for injuries resulting from his or her negligence.”<sup>909</sup> Theall and colleagues have argued that the extension of the duty to warn can be applied to classes beyond manufacturers, and includes distributors and retailers, pointing to *Allard v Manahan*.<sup>910</sup> This part examines six possible categories of defendants that might be relevant to food products: manufacturers, distributors and suppliers, retailers and vendors, employees, learned intermediaries, and, finally, the state. A seventh potential category, consumers, will not be discussed here, but will be addressed in part

<sup>908</sup> Theall et al, *supra* note 62 at L5-1; Waddams, *Product Liability*, *supra* note 534 at 14-26.

<sup>909</sup> Cassels & Jones, *supra* note 84 at 19. The latter, liability for injuries from one’s own negligence, was what occurred in *Lem v Baratto*, which involved the misuse of a product. There the court noted, the “obligation extends equally to the distributor or seller as the circumstances may require, and as to the seller exists independently of any obligations arising out of the contract of sale”, *Lem v Baratto Sports*, *supra* note 603 at para 22. This was cited by *Bow Valley Husky (Bermuda) v Saint John Shipbuiding*, *supra* note 634 at para 86.

<sup>910</sup> *Allard v Manahn* (1974), 46 DLR (3d) 614 (BC SC). See Theall et al, *supra* note 62 at L3-1, note 1. They note that a distributor was held to have a duty to warn operators if operators could not be expected to know of the dangers associated with the product in question, a nail gun. In this instance, the distributor was not liable, because the court found that the plaintiff probably knew of guard. See discussion in Theall et al, *supra* note 62, Chapter L5, “Target Defendants”.

four of this chapter as well as in the next chapter.

### 3.1. Duty of Manufacturers

As noted above, manufacturers are most common defendants in product liability cases. It is also a pretty encompassing class of defendants. Indeed, since *Donoghue*, it has been evident that ‘manufacturer’ was a wide concept. As Waddams points out, Lord Atkin speaks of “preparation or putting up”, which is inclusive of more than just the manufacturing of a product.<sup>911</sup> A manufacturer has been found to include those that “recondition, assemble, install, bottle, and otherwise prepare products for sale.”<sup>912</sup> While there are additional classes of defendants that might owe a duty of care in a product liability case, manufacturers arguably are still held to the highest standard.<sup>913</sup> This is because of the various classes manufacturers occupy the position of an expert.<sup>914</sup> This is where the aforementioned bleeding of the two distinct concepts, duty of care and standard of care, is most readily apparent. Because there is a higher standard imposed on manufacturers, in many respects the extent of their duty expands. Consider, for example, the dissenting opinion in *Walford (Litigation Guardian Of) v Jacuzzi Canada*. There the court indicated that “[m]anufacturers have a *significant* duty to warn customers”<sup>915</sup> There was recognition that there was a different standard for manufacturers, given their detailed

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<sup>911</sup> Waddams, *Product Liability*, *supra* note 534 at 14, referring to *Donoghue v Stevenson*, *supra* note 16.

<sup>912</sup> Theall et al, *supra* note 62 at L5-3.

<sup>913</sup> *Ibid.*

<sup>914</sup> See discussions in: *Andersen*, *supra* note 75 at para 185; *Buchan v Ortho Pharmaceutical*, *supra* note 67; and *Hollis v Dow Corning*, *supra* note 66.

<sup>915</sup> *Walford (Litigation Guardian Of) v Jacuzzi Canada*, [2007] 87 OR (3d) 287 (ON CA) at para 84 [*Walford (Litigation Guardian Of) v Jacuzzi Canada*, (CA)], referring to *Bow Valley Husky (Bermuda) v Saint John Shipbuiding*, *supra* note 634, *Lambert v Lastoplex Chemicals*, *supra* note 65, and *Hollis v Dow Corning*, *supra* note 66.

knowledge of their products.<sup>916</sup> While this duty is limited by foreseeability<sup>917</sup>, as experts in the field, manufacturers cannot plead ignorance.<sup>918</sup> This will be discussed in more detail in chapter six, which examines the standard of care.

So what counts as a food manufacturer? In some respects, this necessitates asking what counts as a product, as well as who made it.<sup>919</sup> There are decisions where the courts have had to determine whether a food product was a “product”, but usually within the context of a specific legislative regime (e.g., tariffs legislation).<sup>920</sup> For the purpose of product liability, it is clear that ‘product’ is meant to have an expansive meaning.<sup>921</sup> As noted in the introduction, this project contemplates products that require some degree of processing. The more challenging task is to determine who made a product<sup>922</sup>, a reality that is more likely for food products, which are often made from a combination of products.

A food manufacturer, simply put, can be understood as any manufacturer that puts a food product into circulation. This includes fruits, vegetables, and other items that are grown or raised.

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<sup>916</sup> *Walford (Litigation Guardian Of) v Jacuzzi Canada (CA)*, *ibid* at para 84 (“The trial judge was aware that a different and higher standard of care applies to manufacturers, since manufacturers have detailed knowledge of products gained through its own testing and can appreciate the risks and dangers not known to ordinary customers.”). See also *Nicholson v John Deere*, *supra* note 606 (manufacturers do not “have the right to manufacture an inherently dangerous article when a method exists of manufacturing the same article without risk of harm.”).

<sup>917</sup> As Theall et al, *supra* note 62 note, at L5-3, “[t]his basic duty extends to anyone whom a product might foreseeably injure. However, the duty is not unlimited. Rather, the duty ends where the likelihood that *this* person would sustain *this* injury is too remote or unforeseeable.”

<sup>918</sup> See *Ruegger v Shell Oil Company of Canada*, [1963] OJ No 241 (ONSC).

<sup>919</sup> Theall et al, *supra* note 62 at L5-3 note: “manufacturers today may outsource part or all of their manufacturing process to other companies”, and that they “may be viewed more accurately as assemblers and integrators”.

<sup>920</sup> See *Excelsior Foods v Canada (Attorney General)*, 2005 FCA 376 (FCA).

<sup>921</sup> See discussion in OLRC, *Report on Products Liability*, *supra* note 83 at 12. Edgell, *supra* note 545 at 2 notes, “there is almost no limit upon the concept of a product”, noting, “[a]nything which is constructed, manufactured or sold can be encompassed by the principles of products liability law”, *ibid*.

<sup>922</sup> Theall et al, *supra* note 62 at L5-3.

That things grown count as products was made clear in cases like *Hoffman v Monsanto*<sup>923</sup> and *Monsanto Canada v Schmeiser*.<sup>924</sup> In the former organic farmers were upset with how their organic plants were being affected by the spraying of chemical pesticides and fertilizers, while in the latter Monsanto was interested in protecting its proprietary claim in a genetically-modified plant. In both instances, the plants themselves were products. In other circumstances, courts have been willing to recognize the product liability implications associated with growing or raising food.<sup>925</sup>

### 3.2. Importers, Suppliers and Distributors

Liability may extend to any member of the distribution chain. Waddams notes that what is important is whether or not a defendant has helped to put a product into circulation, and not whether they were involved in the manufacturing.<sup>926</sup> Consequently, liability can be extended to importers, suppliers, and distributors, all who are involved in circulating a product. Waddams cautions that the duty is not the same as that imposed on manufacturers.<sup>927</sup> He notes that the court will consider, among other things, the knowledge held by a defendant<sup>928</sup> and the role they

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<sup>923</sup> [2005] 7 WWR 665 (SK QB).

<sup>924</sup> [2004] 1 SCR 902.

<sup>925</sup> For example, the concerns around unpasteurized milk. See *Regional Municipality of Waterloo (Re)*, 2008 CanLII 46548 (ON IPC) (request by a journalist in Regional Municipality of Waterloo for access to the names, locations and details of orders against the farms in Waterloo Region by the public health department to stop selling unpasteurized milk products in 2006).

<sup>926</sup> Waddams, *Product Liability*, *supra* note 534 at 15. He refers to *Watson v Buckley*, [1940] 1 All ER 174 and *Pack v Warner (County)* (1964), 46 WWR 244 (AB CA).

<sup>927</sup> Waddams, *ibid* at 16, see also discussion in note 17. See also *Walford (Litigation Guardian Of) v Jacuzzi Canada (CA)*, *supra* note 915, dissent at para 84 (“It follows that the standard for a vendor of replacement parts will usually be lower still, since the vendor of replacement parts would not normally be expected to have the knowledge available to manufacturers or distributors or to advise customers respecting the proper use of the product.”).

<sup>928</sup> See also *Walford (Litigation Guardian Of) v Jacuzzi Canada (CA)*, *ibid*, where in the dissent the court noted, “[t]he standard applicable to distributors of products may, depending on what a distributor knew or ought to have known about the product, be the same or lower than that expected of manufacturers”, at para 84. In a footnote, the court notes, “[s]uppliers have a duty to warn of dangers. In cases involve suppliers, liability has usually been

play in promoting a product.<sup>929</sup> Thus, in *Watson v Buckley*, the distributor of a hair dye was held to being required to provide a warning, as the distributor had advertised the product as safe.<sup>930</sup> The court in *Amin v Klironomous* extended this to warnings, finding, “it is clear that both the distributor and retailer have a duty to warn the consumer of inherent dangers with respect to the products they distribute or sell.”<sup>931</sup>

Suppliers have long played an important role in manufacturing. They have a duty to ensure that the products they supply are free of defects. An important consideration here is the product that is being supplied, and the role that this product plays in the negligence claim.<sup>932</sup> For example, both a bottler and bottle manufacturer have been found liable when a bottle exploded.<sup>933</sup> Many food products involve the use of other products. Even fruits and vegetables often are grown with pesticides, herbicides, fertilizers, and other chemicals to assist in their development. Arguably, some of these suppliers may have a duty to warn of the danger of their products, if not to the ultimate consumer, then at least to the grower.<sup>934</sup>

For companies involved in the importation, supply or distribution of food products, the

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found where the supplier actually knew of the defect or potential dangerous use”, referring to *Rivtow Marine v Washington Iron Works*, *supra* note 571, *Pack v Warner (County)*, *supra* note 926, and *Good-Wear Treaders v D & B Holdings* (1979), 31 NSR (2d) 380 (NS SC).

<sup>929</sup> Waddams, *Product Liability*, *supra* note 534 at 16, referring to *Lumsden v Barry Cordage*, [2010] NSJ No 35 (NS SC) at para 38. Theall et al, *supra* note 62 note that in some circumstances the courts are willing to hold distributors to the same duty as manufacturers, see discussion at L59-L510.

<sup>930</sup> *Watson v Buckley*, *supra* note 926. See discussion in Waddams, *Product Liability*, *supra* note 534 at 15.

<sup>931</sup> *Amin v Klironomous*, (1996), OJ No 826 (ON Gen Div) at para 28.

<sup>932</sup> Theall et al, *supra* note 62 at L5-7: “a supplier may be held to a minimal standard of care when supplying only unprocessed raw materials, with limited involvement in the actual manufacturing process.” They authors point to *Harrington v Dow Corning*, (1996) 31 CCLT (2d) 48 (BC SC), where semi-processed silicone was supplied to a breast implant manufacturer.

<sup>933</sup> *Brunski v Dominion Stores* (1981), 20 CCLT 14 (ON HCJ). Cf *Ainsworth Lumber v KMW Energy* (2004), 31 BCLR (4th) 1 (BC CA), where a supplier was not found liable, as it had warned the manufacturer of the potential hazards, and the manufacturer ignored the warnings.

<sup>934</sup> See, for example, *Ruegger v Shell Oil Company of Canada*, *supra* note 918 and *Labrecque v Saskatchewan Wheat Pool*, [1977] 78 DLR (3d) 289 (SK QB).

circumstances will dictate whether or not there was a duty of care owed to consumers. As noted above, what matters is the nature of the relationship between the parties.<sup>935</sup> In some instances, the provision to a distributor may nullify the warning required of a manufacturer. Consider, for example, when a manufacturer sells a product that it knows will be used in an application, this may negate the obligation of the manufacturer to warn the ultimate consumer.<sup>936</sup> It is also clear that if an importer, supplier or distributor knows of an inherent danger in a product, they are required to provide an adequate warning, akin to what was required in *Lambert*.<sup>937</sup> Edgell discusses several circumstances where this duty of care arises, noting that for this class there is “an affirmative duty of care to the ultimate consumer to use reasonable care in selecting, inspecting, testing, packaging and handling products.”<sup>938</sup>

While a plaintiff must still demonstrate that the defendant was negligent in failing to warn the ultimate consumer of the risks, there are a number of factors that might influence a party’s liability. Theall and colleagues point out several relevant considerations, including:

the size and significance of the distributor’s role in distributing and promoting the product, the reputation (or lack thereof) of the product’s manufacturer, where the manufacturer is located (for example, in a third world country where standards may be less stringent than in Europe or North America), and whether the

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<sup>935</sup> Per *Pack v Warner (County)*, *supra* note 926, “Where that person has intentionally so excluded interference with, or examination of, the article by the consumer, then he has, of his own accord, brought himself into direct relationship with that consumer so as to be responsible to the consumer for any injury the consumer may sustain as a result of the distributor’s negligence. The duty is there.”

<sup>936</sup> See *Albert v Breau* (1977), 19 NBR (2d) 476 (NBTD), “where the manufacturer sells the product to a distributor for application, there is no necessity to warn the ultimate consumer”, referring to *Holmes v Ashford et al*, [1950] 2 All ER 76. However, it may not be this straightforward, for example, if a plaintiff is able to demonstrate that a manufacturer knows or ought to have known that the use of the product they supplied in a particular application may create a specific risk.

<sup>937</sup> See *Albert v Breau*, *ibid*, at para 9, referring to *Lambert v Lastoplex Chemicals*, *supra* note 65: “A distributor of a dangerous material ... knowing of its inherent danger, is subjected to the same responsibility as the manufacturer and has to give a consumer adequate warning according to the principles laid down in *Lambert* ...”.

<sup>938</sup> Edgell, *supra* note 545 at 62. He notes, “[w]here there is no reasonable opportunity to inspect, liability cannot be founded on a failure to inspect”, *ibid*.



distributor could reasonably have tested or inspected the product under the circumstances.<sup>939</sup>

They suggest that in some instances there is an obligation on parties involved in the circulation of a product to do research into a product before recommending it to a consumer.<sup>940</sup>

Additionally, there might be a more stringent duty if the importer or distributor does more to market the product than the manufacturer.<sup>941</sup>

### 3.3. Retailers and Vendors

Retailers and vendors are obviously a part of the chain that puts a product into circulation, and thus might be subject to liability.<sup>942</sup> Within this category there are a number of potential classes of retailers. This is especially the case in the context of food products. For example, there are large chain grocery stores, with widespread and influential distribution; there are also small food companies that operate within a much smaller geographical region. There are big food restaurant chains, such as McDonald's<sup>TM</sup>, with tens of thousands of restaurant locations worldwide and there are independently-owned restaurants. Similarly, there are multinational corporations involved in food manufacturing, as well as small businesses, with a few dozen employees<sup>943</sup>, and sole proprietors.<sup>944</sup> The type of retailer will have some impact on the duty expected. There is good precedent for differentiating in this manner.<sup>945</sup> In some instances,

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<sup>939</sup> Theall et al, *supra* note 62 at L5-9.

<sup>940</sup> *Ibid.*

<sup>941</sup> *Ibid* at L5-10, pointing to *Darling v Mobrand Sales* (1981), 12 Man R (2d) 199 (MB C Ct), which held the importer of a moped liable when the manufacturer in Czechoslovakia was not able to be identified.

<sup>942</sup> Not discussed here are the retailer's obligations under contract law, such as warranties implied by the sale of goods. For a discussion on this point, see Theall et al, *supra* note 62 at Chapter L4, "Breach of Warranty and Representations".

<sup>943</sup> A small business in Canada is generally thought to have less than 100 employees.

<sup>944</sup> For example, vendors that may sell their wares, such as preserves or baking, at local markets.

<sup>945</sup> Consider, for example, how food labelling laws for restaurants often do not apply to small businesses. For example, Ontario's *Healthy Menu Choices Act, 2015*, SO 2015, c7, only requires food service premises with

retailers are also the manufacturer, and the duty analysis would focus more on their role as the manufacturer and not necessarily on their role as retailer.

A critical consideration is whether or not the retailer had an opportunity to inspect the goods they are selling.<sup>946</sup> It has been pointed out that retailers are held to a higher standard than consumers because there is an opportunity to inspect and test the product.<sup>947</sup> For example, in *Leitz v Saskatoon Drug & Stationery Co*, the distributor of sunglasses, which had been advertised as impact resistant, was found liable when the glasses shattered.<sup>948</sup> The court held that the distributor had an opportunity to inspect the product, something that was not possible for consumer to do on his or her own.<sup>949</sup> This higher standard extends to imposing on retailers a duty to inspect items they put on shelves.<sup>950</sup>

Like with the previous class of defendants, there is a possibility that a retailer who recommends a product may be responsible if that product causes harm. Retailers that assemble products may be responsible for negligently putting the products together.<sup>951</sup> There is an added risk of liability for retailers when a manufacturer may not be identifiable or has gone out of business.<sup>952</sup>

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twenty or more locations to post calories on their menus.

<sup>946</sup> See Waddams, *Product Liability*, *supra* note 534 at 17. He notes, while there is often a presumption against manufacturers, there is not in the case of retailers, given that the latter may have no reason to suspect a defect and may have no way of avoiding it.

<sup>947</sup> Edgell, *supra* note 545 at 63.

<sup>948</sup> (1980), 112 DLR (3d) 106 (SK QB).

<sup>949</sup> See *Dunsmore v Deshield* (1977), 80 DLR (3d) 386 (SK QB). Not considered here is the claim for negligent misrepresentation. See Edgell, *supra* note 545 at 64ff.

<sup>950</sup> See *Nerberg v Shop-Easy Stores* (1966), 57 DLR (2d) 741 (SK CA) (a retailer was found liable when a jar that was defective broke in a consumer's hand).

<sup>951</sup> See *Harvey v Tarla* (1977) 6 Sask R (SK QB) and *Goldsworthy v Catalina Agencies* (1982), 142 DLR (3d) 281 (NFLD SC) (retailer found jointly liable with manufacturer; the manufacturer failed to provide all the required parts, and the retailer failed to assemble bike properly).

<sup>952</sup> Theall et al, *supra* note 62 at L5-10.

Theall and colleagues have argued that retailers have an obligation to warn consumers if they know that one of their products pose a risk to consumers.<sup>953</sup> That said, they note that retailers are not expected to be aware of the same dangers as the manufacturer.<sup>954</sup> Unless there is a reason to suspect that a product is dangerous, a retailer might only be responsible for knowing the information that the manufacturer has provided.<sup>955</sup> When they know more, however, they might have an additional duty to the consumer.<sup>956</sup> In *Good-Wear Treaders v D & B Holdings*, the court went so far as to say that if a retailer suspects that a consumer will ignore a warning and use a product in a way that might harm others, then they have an obligation to not sell the product.<sup>957</sup> Although this is not likely to be applicable in the context of food products, it nevertheless demonstrates the court's willingness to impose a duty on retailers.

### 3.4. Employees

A less likely, but plausible, class of defendants in this context is employees. Generally, employees are not the direct target of litigation, but instead their employers are held to be vicariously liable. There may be situations, however, when an employee has a duty to a consumer. In *Walford v Jacuzzi Canada*, Ms. Walford specifically sought the advice of the

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<sup>953</sup> *Ibid* at L5-12.

<sup>954</sup> However, they note elsewhere that the duty on retailers is influenced by the expertise of the retailer, noting that "optometrists who sell glasses may have a greater duty to inspect the glasses they sell than might another retailer selling the same product", *ibid* at L5-11.

<sup>955</sup> *Ibid* at L5-12.

<sup>956</sup> For example, a jeweller was found liable for not warning a consumer of the dangers associated with a jewellery-cleaning product it sold, see *Fisher v Harrods*, [1966] 1 Lloyd's Rep 500.

<sup>957</sup> (1979), 8 CCLT 87 (NS CA) (retailer knew that consumer was going to use tires on a heavy truck, and that the tires were unsuitable for this purpose. Because the retailer knew that they would be used improperly, the court found that the retailer had a duty to not sell them). In other instances, retailers are restricted from selling certain products, such as selling dangerous products to children, see *Bowman v Rankin* (1962), 41 WWR 700 (SK Dist Ct).

employees of the pool store to ensure that the slide she was purchasing was adequate for her pool.<sup>958</sup> Ms. Walford's daughter was rendered a quadriplegic when she was injured using the slide. The Ontario Court of Appeal held that there was a *prima facie* duty of care established because of the employees' assurance to Ms. Walford. The court determined that there were no "relevant policy reasons in the circumstances of this case to negate this *prima facie* duty."<sup>959</sup> The dissenting opinion in *Walford* did not question whether or not a duty of care was owed, as it accepted that the trial judge had correctly found that there was a duty.<sup>960</sup>

It is unlikely that many employees of food retail or manufacturing establishments will ever be held liable for their advice or recommendations on food products. After all, consumers will not necessarily hold such individuals to have expertise or special knowledge. However, the more senior an employee is or more specialized a retailer, the greater the possibility that an employee may be under a duty of care to adequately warn consumers.<sup>961</sup> In line with *Walford*, this is especially the case when a consumer seeks assurances about the safety of a particular product.

### 3.5. The Learned Intermediary

The learned intermediary is both a separate class of potential defendant as well as a

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<sup>958</sup> *Walford (Litigation Guardian Of) v Jacuzzi Canada (CA)*, *supra* note 915.

<sup>959</sup> *Ibid* at para 35. Note, Mrs. Walford's daughter was held to be 20% contributorily negligent by the court.

<sup>960</sup> *Ibid*.

<sup>961</sup> Recently, a discussion about the potential liability of servers in the restaurant industry was sparked when a Quebec waiter served a consumer a dish containing raw fish. The patron was allergic, and was subsequently hospitalized. While the focus of most of the discussion was on potential criminal liability, it also raised issues about civil liability for servers given the prevalence of food allergies. See Alex Ballingall, "Waiter arrested after salmon dish puts man in a coma" *Toronto Star* (August 4, 2016), online: *Toronto Star* <https://www.thestar.com/news/canada/2016/08/04/police-investigate-quebec-waiter-alleging-salmon-tartare-served-to-allergic-patron.html> and Jonathan Montpetit, "Fish served to an allergic customer nearly kills him. Is that a crime?" *CBCNews* (Aug 4, 2016), online: *CBCNews* <http://www.cbc.ca/news/canada/montreal/sherbrooke-waiter-arrested-salmon-allergic-customer-negligence-1.3707667> (noting that the customer is pursuing a civil action).

defence that can be raised by manufacturers. Manufacturers are able to shield themselves from liability if they can demonstrate that they informed a skilled person of the risks, knowing that this person will pass on this information to the consumer.<sup>962</sup> While the manufacturer still has a duty to warn consumers<sup>963</sup>, it can discharge this duty by providing the learned intermediary with an adequate warning. As stated in *Parker v Pfizer*,

[t]he legal theory here is that where a consumer places primary reliance on the judgment of a learned intermediary and not the manufacturer of the product, then the manufacturer will satisfy its duty to warn the consumer by adequately warning the learned intermediary of the risks inherent in the use of the product.<sup>964</sup>

The learned intermediary is particularly relevant in pharmaceutical or medical device litigation cases, such as *Buchan* and *Hollis*. Typically, the learned intermediary would be the prescribing physician, who has been informed of the risks and dangers of the pharmaceutical product by the manufacturer in advance. Importantly, the obligation is on the manufacturer to inform the learned intermediary directly, and the courts have held that manufacturers cannot rely on other sources to inform learn intermediaries or rely on learned intermediaries seeking out the information on their own.<sup>965</sup> There is also a strict expectation that the learned intermediary's knowledge "approximates that of the manufacturer."<sup>966</sup> This again reflects the fact that manufacturers are in the best position to know the risks inherent in a product. The learned

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<sup>962</sup> Theall et al, *supra* note 62 at L6-9.

<sup>963</sup> The court in *Hollis v Dow Corning*, *supra* note 66 describes the learned intermediary rule as an exception to the general manufacturer's duty to warn the consumer, at para 29. With the rule the duty to warn remains, but the audience to whom it is directed changes.

<sup>964</sup> [2012] OJ No 286 (ON SC) at para 63, cited from *Goodridge v Pfizer Canada*, *supra* note 558 at para 85, Justice Perell in both instances. See also Theall et al, *supra* note 62 at L3-20.

<sup>965</sup> Theall et al, *supra* note 62 at L3-21. See discussion of pamphlets in *Buchan v Ortho Pharmaceutical*, *supra* note 67.

<sup>966</sup> *Hollis v Dow Corning*, *supra* note 66 at para 29. The court notes that allowing manufacturers to benefit from this rule without fully warning physicians "would undermine the policy rationale for the duty to warn, which is to ensure that the consumer is fully informed of all risks", *ibid*.

intermediary can only stand in place of the manufacturer's warning if they have sufficient information to adequately warn consumers.<sup>967</sup> If manufacturers meet this burden, they can be shielded from a failure to warn claim.<sup>968</sup>

The learned intermediary rule has evolved over time to deal with technical products or products requiring supervision, such as pharmaceuticals.<sup>969</sup> While it can be applied in other contexts<sup>970</sup>, it is not likely a plausible defence in the context of food products. There is no physician or medical expert involved in the purchase of most foods. When a physician or medical professional is involved (e.g., dietary counseling), the rule likely will not apply, as food companies are not likely trying to access patients through the health care professionals in the same manner that pharmaceutical companies do. Moreover, the courts have been reluctant to expand the learned intermediary beyond the medical arena.<sup>971</sup>

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<sup>967</sup> As articulated in *Hollis v Dow Corning*, *ibid* at para 61: "The ultimate duty of the manufacturer is to warn the plaintiff adequately. For practical reasons, the law permits it to acquit itself of that duty by warning an informed intermediary. Having failed to warn the intermediary, the manufacturer has failed in its duty to warn the plaintiff who ultimately suffered injury by using the product. The fact that the manufacturer would have been absolved had it followed the route of informing the plaintiff through the learned intermediary should not absolve it of its duty to the plaintiff because of the possibility, even the probability, that the learned intermediary would not have advised her had the manufacturer issued it. The learned intermediary rule provides a means by which the manufacturer can discharge its duty to give adequate information of the risks to the plaintiff by informing the intermediary, but if it fails to do so it cannot raise as a defence that the intermediary could have ignored this information."

<sup>968</sup> In discussing learned intermediary rule Stapleton, *supra* note 545 at 253 argues: "An inventive way around the doctrine is for plaintiffs to argue that the manufacturer so over-promoted the product that hard-pressed intermediaries were unable adequately to exercise the judgment on which their client's 'informed consent' depends. In general, however, this tactic has failed to convince courts, which tend to be particularly protective of drug manufacturers."

<sup>969</sup> See *Hollis v Dow Corning*, *supra* note 66 at para 28 (the learned intermediary rule is most useful "where the nature of the product is such that the consumer will not realistically receive a direct warning from the manufacturer before using the product.").

<sup>970</sup> *Ibid* at para 28: "While the 'learned intermediary' rule was originally intended to reflect, through an equitable distribution of tort duties, the tripartite information relationship between drug manufacturers, physicians and patients, the rationale for the rule is clearly applicable in other contexts. Indeed, the 'learned intermediary' rule is less a 'rule' than a specific application of the long-established common law principle of intermediate examination and intervening caused developed in *Donoghue* ... and subsequent cases ..."

<sup>971</sup> See discussion in Theall et al, *supra* note 62 at L6:60, which discusses *Bow Valley Husky (Bermuda) v*

However, there may be instances where it is reasonable to think that the learned intermediary rule might apply in the context of food. Cassels and Jones argue that there are instances where it is unrealistic for a manufacturer to directly warn the consumer, and so warning a learned intermediary may suffice, and point to when food is supplied to a restaurant as an example.<sup>972</sup> In such scenarios, the manufacturer cannot control the information that is given to the consumer, and so it may make sense to treat the restaurant as a learned intermediary.

### 3.6. The State

The final category of potential defendants here is the state. There is a possibility that the state may have a duty to consumers, particularly if the state has been involved in the regulation of the product in question. A full analysis of when the state might be liable in negligence far exceeds the scope of this project.<sup>973</sup> However, suffice it to say that the state will generally not be held liable for failing to regulate or legislate.<sup>974</sup> Even in instances when the actions of the government, or one of its agencies, foreseeably result in injury, the courts have often found that there is a lack of proximity between the government and the injured party.<sup>975</sup> For example, in *Mahoney v Canada*, the court found that the federal government did not have a duty to warn the

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*Saint John Shipbuiding*, *supra* note 634 and *Guimond Estate v Fiberglas Canada* (1999), 207 NBR (2d) 355 (NB QB).

<sup>972</sup> Cassels & Jones, *supra* note 84 at 59

<sup>973</sup> See Erika Chamberlain, *Misfeasance in Public Office* (Toronto: Carswell, 2016) and Lorian Hardcastle, *The Role of Tort Liability in Improving Governmental Accountability in the Health Sector* (Toronto: University of Toronto, 2013) (SJD dissertation).

<sup>974</sup> Edgell, *supra* note 545 at 174. See also Theall et al, *supra* note 62 at L5-19, referring to *Mahoney v Canada*, [1986] FCJ No 438 (FTD) (court struck claim against government alleging that it was negligent in setting the standards for cribs, after the plaintiff's baby died of asphyxiation when it became wedged between the frame of the crib and the mattress).

<sup>975</sup> See, for example, *Wuttunee v Merck Frosst Canada*, [2007] WWR 309 (SK QB) (Health Canada included in class-action for harms resulting from use of prescription drugs) and *Attis v Canada (Minister of Health)*, [2008] 93 OR (3d) 35 (ON CA). (claim that Health Canada breached its duty to regulate silicone breast implants and to warn the public of potential dangers).



public about the potential dangers associated with a crib.<sup>976</sup>

In *Attis v Canada (Minister of Health)*, a claim was made against the federal government that it failed to regulate breast implants, and breached a duty to warn consumers.<sup>977</sup> The plaintiffs argued that the federal government was aware of the serious health problems associated with the products, and thus was under an obligation to warn the public. The court, however, dismissed the claim for lack of a cause of action, observing that the plaintiffs “cannot point to any provision that specifically imposes a duty of care of the nature claimed on the government.”<sup>978</sup> The Ontario Court of Appeal upheld the decision, noting that there was not sufficient proximity between individuals and the state when the government is making decisions of a political, economic, or social nature.<sup>979</sup> Theall and colleagues note that this decision makes it clear that while the government has a statutory duty to the public, “the regulations make the manufacturer responsible for public safety, not the government.”<sup>980</sup>

While possible, it is difficult to see how the state will be found negligent for failing to warn consumers. Obviously, the state plays a significant role in the labelling, marketing, and sale

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<sup>976</sup> *Mahoney v Canada*, *supra* note 974. See also *Kwong Estate v Alberta*, [1979] 2 WWR 1 (AB CA). See Edgell, *supra* note 545 at 173: “This finding of no duty was similar to the result obtained in *Physicians for a Smoke-Free Canada v. Canada (Minister of Consumer and Corporate Affairs)* in which the plaintiffs sought a declaration that tobacco product were hazardous and a mandatory order requiring the government to treat them as such under the *Hazardous Products Act*.”

<sup>977</sup> *Attis v Canada (Minister of Health)*, [2007] OJ No 1744 (ON Sup Ct J).

<sup>978</sup> *Ibid* at para 17. See also para 28: “There is no dispute that the provisions and regulations cited by the plaintiffs establish a general regulatory scheme meant to operate for the benefit of the public at large. The issue is whether the statutory and regulatory scheme creates a private law duty of care owed to plaintiffs individually by the government. In other words, is “proximity” sufficiently “grounded in the governing statute” to create such a private law duty of care? In my view, it is not. The scheme imposes specific duties on manufacturers, distributors or sellers of medical devices. It is plain and obvious, however, that no such obligations are attributed to the government so as to create a private law duty of care.”

<sup>979</sup> *Attis v Canada (Minister of Health)*, *supra* note 975. Note, the court was persuaded that indeterminate liability was sufficient here to negate a duty of care, at paras 73-74. The court also discussed the potential “chilling effect” the decision might have on public health, at para 75.

<sup>980</sup> Theall et al, *supra* note 62 at L3-15.

of food products. In *R v Imperial Tobacco*, tobacco companies claimed that Canada was liable for failing to warn by “instructing the industry to not put warning labels on their cigarettes.”<sup>981</sup> In part, the duty was rejected because the court held that “the tort of failure to warn requires evidence of a positive duty toward the plaintiff.”<sup>982</sup> In considering the negligent misrepresentation claim, which the court argued was applicable to the failure to warn claim, the court held that the government did not have a relationship with consumers that gave rise to a duty of care.<sup>983</sup>

#### 4. DUTY TO WHOM?

Having established who might owe a duty of care, the next question is who is this duty owed to? As Theall and colleagues note, “[o]ne cannot be required to take reasonable care under the law without first determining to whom the duty is owed and the extent of the risk. Since the extent of the risk is specific to the injured party, it is only when it is established that a duty was owed to that person that one can go on to define the standard of care.”<sup>984</sup> As discussed above, the duty extends to anyone for which the possibility of an injury was foreseeable.<sup>985</sup>

The most obvious category of persons owed a duty of care are consumers. Those who

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<sup>981</sup> *R v Imperial Tobacco*, *supra* note 513 at para 104. At para 105, the court noted, “The Minister of Health’s recommendations on warning labels were integral to the government’s policy of encouraging smokers to switch to low-tar cigarettes. As such, they cannot ground a claim in failure to warn.”

<sup>982</sup> *Ibid* at para 108,

<sup>983</sup> The court also consider the relationship between the government and the companies. On this point, the court held that there were interactions capable of establishing a special relationship that would give rise to a duty of care. For a discussion see *ibid* at para 32ff.

<sup>984</sup> Theall et al, *supra* note 62 at L2-11.

<sup>985</sup> Waddams, *Product Liability*, *supra* note 534 at 28: “... liability extends to any person whose injury was foreseeable, whether or not the person injured was a consumer or user of the defective product.” Waddams further notes at 29, “[i]t does not, of course, follow that every injury caused by a defective product will be compensable, since the general tort rules of foreseeability and remoteness will continue to impose a limit.”

purchase products are clearly identifiable as foreseeable as potentially being injured by the product. It is well-established in law the manufacturers owe a duty to consumers. This is uncontroversial, and does not need to be discussed further here. However, the next chapter will consider how the standard of care might differ between types of consumers, and will examine two categories of consumers, experts and vulnerable or sensitive consumers. As will be demonstrated, the standard of care expected of manufacturers differs depending on the situation of the consumer.

For many products, the consumer may not be the end user. Thus, the courts have extended the duty of care to end users of products. This includes persons who may not have purchased the product but were first users (e.g., those who receive gifts) or who might not be the original purchaser (e.g., secondary purchaser of a product). For example, in *Nicholson v John Deere*, the court made it clear that defendants have an ongoing obligation to warn secondary purchasers of products, in some cases even years after the initial sale.<sup>986</sup> As noted, there is a precedent with food products to have ongoing communication with the *users* of products, as demonstrated by food recalls, as discussed above. The extent of the actions required will depend on the nature of the potential harm that may arise.

With respect to food products, it is reasonable to assume that many end users are not purchasers. Indeed, many end users of food products may not even know which products they are consuming. There is an industry precedent for warning end users that are not necessarily purchasers, namely, providing warnings for particularly sensitive consumers. Consider warnings

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<sup>986</sup> *Nicholson v John Deere*, *supra* note 606. In this case, the court held that the manufacturer had an ongoing obligation, and an extensive one at that, to warn consumers of dangers.

on food products about the potential presence of nuts. This warning not only informs the consumer, but also the end user, about when a product may have come into contact with or been manufactured in facility that had come into contact with nuts.<sup>987</sup> Of course, there is a limit to when a manufacturer will be responsible. Consider, for example, a shop that bakes a cake with a product that has a warning about potential contamination with nut products – for example, using broken pieces of a chocolate bar in the decoration of the cake. If the manufacturer provides a warning that the chocolate bar may have been produced in a factory where it was possible to come into contact with nuts, the baker uses the chocolate bar, it is the responsibility of the baker to convey that information to the purchase of the cake. What if the purchaser is different from the end user (eater) of the cake? Neither the baker nor the manufacturer has any relationship with the end user of the cake. The baker may be liable for failing to warn the purchaser, but may not be liable to the end user (eater) if the purchaser neglects to pass that warning on. That said, if the manufacturer does not provide a warning to the baker it may be liable to the purchaser and end user (eater) for failing to warn the baker about the risk inherent in its chocolate bar. After all, it is reasonably foreseeable that an ultimate user of a food product may have a nut allergy and that without proper warning a consumer of the product with an allergy may incur an injury.

Consumers with allergies, however, must also exercise caution in the type of products they consume. The duty to warn does not negate the fact that consumers have some responsibility. This notion will be discussed in further detail in the next two chapters, but suffice

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<sup>987</sup> Label reading has been called the “keystone of food allergy management”, see Laura Polloni et al, “Nutritional Behavior and Attitudes in Food Allergic Children and their Mothers” (2013) 3:41 Clinical and Translational Allergy. See also: Anne Muñoz-Furlong, “Daily Coping Strategies for Patients and Their Families” (2003) 111:Supp3 Pediatrics 1654 (“Until there is a cure for food allergy, strict avoidance of the allergen is the only way to avoid a reaction. Label reading is the cornerstone of food allergy management”, at 1654).

it to say here that there are expectations on consumers, particularly as it relates to obvious dangers, but also with respect to using the information they are provided to the fullest extent possible. Indeed, the underlying justification for warnings is premised on consumer responsibility – in short, warnings are required to warn consumers about risks so that they can make informed decisions about the products they chose to use. The same responsibility extends to end users of a product.

## 5. DUTY FOR WHAT?

The final inquiry of this chapter concerns what a duty of care is owed for. Having established who might owe a duty, and to whom, it is now necessary to consider for what. As this discussion focuses on warnings, the aim is to determine what manufactures have a duty of care to provide consumers warnings about. This is again a question of foreseeability. Instead of a foreseeable person who might be owed a duty, however, here it is about foreseeable risks. In other words, it is about the knowledge of risk.<sup>988</sup> Knowledge about risks ends up being integral to much of product liability law. As Shapo observes, “[a] significant amount of products liability law deals with what sellers and consumers know about the risks associated with a product, and with their access to information about the product’s risks, as well as its benefits.”<sup>989</sup>

Manufacturers are only required to warn consumers about known or knowable risks<sup>990</sup>, although

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<sup>988</sup> In some respects, this discussion could also be undertaken in the next chapter, which examines the standard of care, as it entails an examination of what a manufacturer does or does not do – they either provide a warning or they do not provide a warning – based on their knowledge of risks, and thus is more about conduct than the relationship.

<sup>989</sup> Shapo, *supra* note 536 at 10. See discussion in *Smithson v Saskem Chemicals*, [1986] 1 WWR 145 (SK QB).

<sup>990</sup> As discussed above, to expect more of them would render manufacturers insurers. Boivin also points out

a lack of knowledge of risk on the part of manufacturers does not necessarily absolve them of responsibility.<sup>991</sup> As discussed, *Buchan* and *Létourneau* make it clear that manufacturers have an ongoing obligation to test products and to respond to the findings of others, even if they are not convinced by these findings.<sup>992</sup> If a consumer knows of the risks, then the manufacturer will not be liable.<sup>993</sup> If a consumer does not know of the risks, then the manufacturer must endeavour to inform the consumer.

However, there might be reasons for limiting when a manufacturer might be obligated to provide consumers with a warning. As discussed above, people need to eat, there are hundreds of thousands of products, and many products are used (and intended to be used) in combination with other products (often, although not always, from other manufacturers). Some of the risk associated with food products can be fundamentally altered depending on how and when they are used, and thus it might be unrealistic for manufacturers to have knowledge about all risks associated with their products. This, of course, is not a problem that is unique to food.<sup>994</sup>

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that it would diminish the deterrence element of tort, noting: “A rule requiring manufacturers to warn against risks which were neither known nor knowable at the time of supply would do nothing to achieve an optimal level of deterrence, and could ultimately have negative impacts on the innovation of new products and on the rationales for failure to warn law”, “Negligence, Strict Liability, and Manufacturer Failure to Warn”, *supra* note 83 at 356. He further asserts that the “rationales of preventing accidents and permitting informed choices would ultimately be impaired if manufacturers were forced to warn of every possible risk associated with their products, whether reasonably foreseeable or not”, *ibid* at 356.

<sup>991</sup> Theall et al, *supra* note 62 at L3-4: “The manufacturer’s lack of actual knowledge of a danger may not absolve the manufacturer of liability for a failure to warn, as the case law clearly indicates that constructive knowledge of a danger is sufficient.”

<sup>992</sup> See also Theall et al, *supra* note 62 at L3-5 (“The courts have also held liable a company which failed to adequately test its product before entering it into the market and which was not in a position to warn the consumers of its product’s potential problems.”) and, *ibid* at L3-23-L3-24

<sup>993</sup> *Ibid* at L3-4. See also discussion about “obvious dangers” in the next chapter.

<sup>994</sup> In fact, this is the case for many products. As Weinstein and colleagues observe, “[a]dvances in technologies of materials, of processes, of operational means have put it almost entirely out of the reach of the consumer to comprehend why or how the article operates, and thus even farther out of his reach to detect when there may be a defect or danger preset in its design or manufacture. In today’s world it is often only the manufacturer who can fairly be said to know and to understand when an article is suitably designed and safely made for its intended

However, the ubiquity of food products does impact the foreseeability analysis.

There are ways that the foreseeability of harm might be constricted. One might argue that the duty to warn should be restricted to only very serious risks or a loss of life. However, as noted, there are several problems with this approach, including determining which injuries are sufficiently serious to require warnings – not to mention that this downplays the seriousness of and consequences of diet-related chronic diseases. By their very nature chronic diseases are ongoing; while they may not result in immediate loss of life, they can significantly diminish the quality of life and result in premature death (often discussed in public health literature as the potential years of life lost). However, it is also important to note that while the duty to warn may theoretically extend to *all* products that carry risks to consumers, some food products carry far less risk than others. For example, while there may be dangers associated with vegetables<sup>995</sup>, they are clearly less dangerous than many highly processed foods. Some processed foods, such as vegetables that are freeze-dried, may not have more risks than their unprocessed counterparts.<sup>996</sup> Additionally, some of the risks are more immediate, whereas others only occur over time. As discussed earlier, the risk of contaminated food products is far more immediate than the risk associated with overconsumption of fast food products. It would be erroneous, however, to suggest that the risk is always more severe. Contaminated food may result in a short

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purpose.” See Weinstein et al, *supra* note 580 at 22-23, citation omitted.

<sup>995</sup> Consider, for example, bean sprouts, which have been referred to as one of the “riskiest foods” in grocery stores, see Meathead, “Why Raw Sprouts May be the Riskiest Food in Your Grocery Store” (June 11, 2011) Huffington Post, online: Huffington Post, [http://www.huffingtonpost.com/craig-goldwyn/sprouts-e-coli-risk\\_b\\_875103.html](http://www.huffingtonpost.com/craig-goldwyn/sprouts-e-coli-risk_b_875103.html). Bean sprouts associated with numerous outbreaks of foodborne illnesses, see Foodsafety.gov, “Sprouts: What You Should Know”, online: <https://www.foodsafety.gov/keep/types/fruits/sprouts.html>. Some grocery stores have taken to providing warnings about the dangers of bean sprouts at the point of purchase, the vegetable aisle.

<sup>996</sup> There is evidence that some processing, such as freezing, might not necessarily diminish the overall nutritional quality of food. See, for example, Diane M Barrett, “Maximizing the Nutritional Value of Fruits & Vegetables”, online: <http://www.fruitandvegetable.ucdavis.edu/files/197179.pdf>.



bout of illness whereas overconsumption of fast food may result in chronic diseases that may follow an individual throughout their lives, potentially resulting in a premature death.

Thus, it is clear that not all food products can be treated equally. There is a need to assess the risk associated with specific products. Recognizing the difficulties with determining which individual food products give rise to risks that are sufficient to trigger a duty to warn, this project proposes an approach to warnings based on categories. Three broad categorizations are discussed here. Within each category, more specific classes can be identified. It is postulated here that the three proposed broad rubrics capture most of the food products that have presently been identified to pose either short-term or long-term risks (or both). Specific examples of classes of food products that could fit within each category are identified. The discussion that follows is not intended to supplement the more fulsome discussions that would inevitably be involved in a specific examination by the courts. The following discussion intends only to highlight that there are, indeed, classes of food products that can be identified as posing sufficient foreseeable risk of harm to warrant that manufacturers warn consumers of these risks.

### **5.1. Categorizing by Product**

The first category of food products requiring warnings focuses on specific types or categorizations of food products. In other words, there are distinct classes of food products for which there is ample evidence that they pose risk to consumers. For example, consider sugar-sweetened beverages (SSBs). There are numerous health effects associated with SSBs<sup>997</sup>,

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<sup>997</sup> The real culprit in the aforementioned is often sugar, but SSBs are the largest contributor of sugar to diets, Q Yang et al, “Added sugar intake and cardiovascular disease mortality among US adults” (2014) 174:4 JAMA Internal Medicine 516. See also Heart & Stroke Foundation (HSF), *Sugar, Heart Disease and Stroke: Position Statement* (August 2014), online: HSF, [http://www.heartandstroke.com/site/c.ikiQLcMWJtE/b.9201361/k.47CB/Sugar\\_heart\\_disease\\_and\\_stroke.htm](http://www.heartandstroke.com/site/c.ikiQLcMWJtE/b.9201361/k.47CB/Sugar_heart_disease_and_stroke.htm).

including: obesity<sup>998</sup>, dental caries<sup>999</sup>, type 2 diabetes<sup>1000</sup>, heart disease<sup>1001</sup>, among others. Certain populations are also at heightened risk of harm from consumption of SSBs, including children and youth as well as persons with a low-income.<sup>1002</sup> While some of the risks are dependent on the frequency and extent of use, it is commonly asserted that SSBs have little to no nutritional value and have been deliberately targeted to vulnerable consumers. Indeed, some suggest that SSBs, given that they have little to no utility, should be considered a commodity consumed for pleasure not sustenance.<sup>1003</sup> Others have taken to referring to them as “toxic” or “pathogenic”

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<sup>998</sup> See, for example: Vasanti S Malik et al, “Sugar-sweetened Beverages and Weight Gain in Children and Adults: A Systematic Review and Meta-Analysis” (2013) 98 American Journal of Clinical Nutrition 1102 [Malik et al, “Sugar-sweetened Beverages and Weight Gain in Children and Adults”]; Vasanti S Malik et al, “Sugar Sweetened Beverages, Obesity, Type 2 Diabetes and Cardiovascular Disease Risk” (2010) 121:11 Circulation 1356; James O Hill, Holly R Wyatt & John C Peters, “Energy Balance and Obesity” (2012) 126 Circulation 126; WHO, “Reducing Consumption of Sugar-Sweetened Beverages to Reduce the Risk of Childhood Overweight and Obesity” (January 26, 2016), online: WHO, [http://www.who.int/elena/titles/ssbs\\_childhood\\_obesity/en/](http://www.who.int/elena/titles/ssbs_childhood_obesity/en/); and, L Te Morenga, S Mallard & J Mann, “Dietary Sugars and Body Weight: Systematic Review and Meta-analyses of Randomized Control Trials and Cohort Studies” (2012) 345 British Medical Journal e7493. Cf Mark A Pereira, “Sugar-Sweetened and Artificially-Sweetened Beverages in Relation to Obesity Risk” (2014) 5 Advances in Nutrition 797.

<sup>999</sup> See, for example: MB Mishra & Shanu Mishra, “Sugar-Sweetened Beverages: General and Oral Health Hazards in Children and Adolescents” (2011) 4:2 International Journal of Clinical Pediatric Dentistry 119; TA Marshall, “Preventing Dental Caries Associated with Sugar-sweetened Beverages” (2013) 144:10 Journal of the American Dental Association 1148; and, E Bernabé et al, “Sugar-sweetened Beverages and Dental Caries in Adults: A 4-year Prospective Study” (2014) 42:8 Journal of Dentistry 952.

<sup>1000</sup> See, for example: Fumiaki Imamura et al, “Consumption of Sugar-sweetened Beverages, Artificially Sweetened Beverages, and Fruit Juice and Incidence of Type 2 Diabetes: Systematic Review, Meta-analysis, and Estimation of Population Attributable Fraction” (2015) 351 British Medical Journal h3576; Malik et al, “Sugar-sweetened Beverages and Risk of Metabolic Syndrome and Type 2 Diabetes”, *supra* note 857; and Malik et al, “Sugar-sweetened Beverages and Weight Gain in Children and Adults”, *supra* note 998.

<sup>1001</sup> See, for example: Chen Huang et al, “Sugar Sweetened Beverages Consumption and Risk of Coronary Heart Disease: A Meta-analysis of Prospective Studies” (2014) 234:1 Atherosclerosis 11; Yang et al, *supra* note 997; and, Malik et al, “Sugar-sweetened Beverages and Weight Gain in Children and Adults”, *supra* note 998.

<sup>1002</sup> See, for example: Euan Han & Lisa M Powell, “Consumption Patterns of Sugar Sweetened Beverages in the United States” (2013) 113:1 J Acad Nutr Diet 43; and Lana Vanderlee et al, “Sugar-Sweetened Beverage Consumption Among a Subset of Canadian Youth” (2014) 84:3 Journal of School Health 168.

<sup>1003</sup> Mark B Cope & David B Allison, “White Hat Bias: Examples of it Prevalence in Obesity Research and a Call for Renewed Commitment to Faithfulness in Research Reporting” (2010) 34:1 International Journal of Obesity 84. They define white hat bias as “bias leading to distorting information in the service of what may be perceived as right ends”, *ibid.* at 84. See also: FB Hu, “Resolved: There is Sufficient Scientific Evidence that Decreasing Sugar-sweetened Beverage Consumption will Reduce the Prevalence of Obesity and Obesity-related Diseases” (2013) 14 Obesity Reviews 606, and KA Kaiser et al, “Will Reducing Sugar-sweetened Beverage Consumption Reduce Obesity? Evidence Supporting Conjecture is Strong, but Evidence when Testing Effect is Weak” (2013) 14 Obesity Reviews 620.

products.<sup>1004</sup> Thus, some may contend that SSBs do not properly qualify as a food product. Either way, a case can be made that, in light of the evidence of harms associated with SSB, they require adequate warnings about the risks associated with their consumption. While it is unnecessary here to identify all possible categories or types of food products, there are many other examples that might likewise automatically trigger a warning. For example, products such as potato chips, French fries, sugary cereals, energy drinks are all examples of products that have a growing body of research that identifies health risks associated with their consumption. In some instances, industry itself recognizes that certain food products fall into a category of risky “pleasure” foods<sup>1005</sup>, but more often than not it is NGOs, academics, dietitians, and governmental agencies identifying when a food product is dangerous. Indeed, there is considerable effort underway, globally, to develop product classifications for risky foods – and this work could be used to identify the classes of products that might require an adequate warning.

## 5.2. Categorization by Process

The second category is based on the type of process that is used. There are numerous processes in food production and manufacturing that carry inherent risks.<sup>1006</sup> For example, consider artificial trans fats.<sup>1007</sup> Trans fat, by and large, are created by adding hydrogen to liquid

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<sup>1004</sup> See discussion in Shelley, “Addressing the Policy Cacophony”, *supra* note 29.

<sup>1005</sup> For example, a representative of Yum! Restaurants Canada, which operates KFC, said of the infamous “Double Down” (a sandwich made up of two pieces of fried chicken, bacon, cheese and sauce), “We wouldn’t recommend consumers eat this all the time .... But it’s an occasional indulgent eat that consumers will love ....”, see Diana Mehta, “KFC’s Double Down raises eyebrows among Canadian nutrition experts” (October 17, 2010) *Globe and Mail*, online: <http://www.theglobeandmail.com/life/health-and-fitness/kfcs-double-down-raises-eyebrows-among-canadian-nutrition-experts/article4329316/>.

<sup>1006</sup> Arguably, “processed foods” could be considered a category of food product caught under the previous category.

<sup>1007</sup> Some trans fats occur naturally in products, such as in butter. Importantly, warnings for trans fat may be especially important given recent trends in product reformulation that have, by and large, reduced the public health community’s interest in this issue. At a recent policy workshop, the author was privy to a conversation where

vegetable oils in order to make them solid. Trans fats are easy to use, have a long shelf-life, and add a desirable taste to food.<sup>1008</sup> They are also widely recognized as dangerous to health. Trans fats are associated with all cause mortality and coronary heart disease mortality<sup>1009</sup>, cardiovascular disease<sup>1010</sup>, and even poor memory.<sup>1011</sup> In fact, due to the risk of consumption, the United States Food and Drug Administration has moved to remove them from the American food supply.<sup>1012</sup> The move was motivated by recognition that “even small amounts of trans fat can add up to a significant intake.”<sup>1013</sup> While there has not been a similar ban put in place in Canada, there have been calls for one.<sup>1014</sup>

While some may contend that artificial trans fat are an ingredient, and should be not be conceived a process<sup>1015</sup>, there are good reasons for thinking of artificial trans fats as a process that gives rise to risk. After all, artificial trans fats are added to products that, by and large, do

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it was noted that trans fat is no longer a major public health issue in Canada. With less attention being paid by the public health community and the government to trans fat, it may elevate the importance of manufacturer’s warnings.

<sup>1008</sup> See MA Shabbir et al, "Influence of Thermal Processing on the Formation of Trans fats in Various Edible Oils" (2015) 39:6 J Food Process Preserv 1475, and American Heart Association, “Trans Fats” (October 7, 2015), online: [http://www.heart.org/HEARTORG/HealthyLiving/HealthyEating/Nutrition/Trans-Fats\\_UCM\\_301120\\_Article.jsp#.V56k8vmANBc](http://www.heart.org/HEARTORG/HealthyLiving/HealthyEating/Nutrition/Trans-Fats_UCM_301120_Article.jsp#.V56k8vmANBc).

<sup>1009</sup> Russell J de Souza et al, “Intake of Saturated and Trans Unsaturated Fatty Acids and Risk of All Cause Mortality, Cardiovascular Disease, and Type 2 Diabetes: Systematic Review and Meta-analysis of Observational Studies” (2015) 351 British Medical Journal h3978. It is not simply Trans fats, however, see GA Bray & BM Popkin, “Dietary Fat Intake Does Affect Obesity!” (1998) 68 American Journal Clinical Nutrition 1157.

<sup>1010</sup> D Mozaffarian et al, “Trans Fatty Acids and Cardiovascular Disease” (2006) 345:15 New England Journal of Medicine 1601.

<sup>1011</sup> Beatrice Alexandra Golomb & Alexis K Bui, “A Fat to Forget: Trans Fat Consumption and Memory” (2015) 10:6 PLoS ONE e0128129.

<sup>1012</sup> Food and Drug Administration, “FDA Cuts *Trans* Fat in Processed Foods” (2015) FDA Consumer Health Information 1, online: <http://www.fda.gov/downloads/ForConsumers/ConsumerUpdates/UCM451467.pdf>.

<sup>1013</sup> *Ibid* at 2.

<sup>1014</sup> Theresa Boyle, “Canada urged to follow U.S. lead in cutting trans fat” (June 16, 2015) Toronto Star, online: [https://www.thestar.com/life/health\\_wellness/2015/06/16/canada-urged-to-follow-us-lead-in-cutting-trans-fats.html](https://www.thestar.com/life/health_wellness/2015/06/16/canada-urged-to-follow-us-lead-in-cutting-trans-fats.html). There have long been calls for bans, see for example, Dietitian of Canada, “Trans Fat”, online: <http://www.dietitians.ca/Dietitians-Views/Food-Regulation-and-Labeling/Trans-Fats.aspx>. See also Ries, “Food, Fat and the Law”, *supra* note 268.

<sup>1015</sup> Note, if this argument were accepted, artificial trans fats would likely still require a warning as a class of food products, as discussed in the previous section.

not require it as an ingredient, but use it to ensure shelf-stability, improve taste or texture, etc. Additionally, at a minimum, it would be difficult to argue in light of the US ban that warnings are not required when trans fats are added to products. There are other processes that may also trigger warnings. These processes could be at any point of production. For example, the use of certain pesticides, insecticides, and fertilizers may trigger a requirement for warning consumers. Other process may be later in manufacturing, such as adding stabilizers for shelf-stability, irradiation, or re-concentration. For this category, the duty to warn is attached to the risks with the process itself, although, as is the case with many processes (such as manufacturing products with artificial trans fats), they may have a discernable impact on the food product itself, which could give rise to an additional obligation to warn consumers.

### 5.3. Categorizing by Nutritional Profile

The final category is based on a product's nutritional profile. There is an abundance of evidence that has identified risks associated with the nutritional profile of a food product, including: caloric content, sodium content, added sugar content, fat content, serving size, among others. Consider, for example, high caloric meals. There are numerous products that are sold as single-serving meals that, in actuality, exceed – *on their own* – the recommended daily caloric intake for the average adult. For example, some research in the United States revealed that one third of all meals served in restaurants surveyed exceeded daily caloric guidelines.<sup>1016</sup> Similarly, some products that are sold as snacks are, in fact, based on caloric content, meals. Perhaps worse, foods that were identified as “reduced-energy” foods have, in one study, been found to

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<sup>1016</sup> Lorien E Urban et al, “Energy Contents of Frequently Ordered Restaurant Meals and Comparison with Human Energy Requirements and U.S. Department of Agriculture Database Information: A Multisite Randomized Study” (2016) 116:4 J Acad Nutr Diet 590.

have more energy than stated, in some cases for restaurant foods, upwards of 200% of stated values.<sup>1017</sup> There are also additional nutritional profiles that might trigger warnings. Consider products that are high in added sugar, salt or fats. For example, some food products exceed the daily recommended value for sodium on their own.<sup>1018</sup> High levels of sodium consumption have negative effects on cardiovascular health<sup>1019</sup>, among other things. For this category, if a product has a certain profile then it triggers a warning to consumer by the manufacturer. These warnings are particularly necessary for some sensitive or vulnerable users of food products. An individual who aims to limit their sodium intake needs an adequate warning about the sodium, particularly given that research consistently demonstrates that consumers are confused or misinformed about the content of food products and influenced by claims such as “reduced” or “lower in”.<sup>1020</sup>

## 6. CONCLUSION: DUTY OF CARE AND FOOD PRODUCTS

In *Donoghue v Stevenson*, Lord Atkin clearly found that manufacturers of food products have a duty to consider how their actions might affect their consumers. This is because consumers ought to be in the contemplation of manufacturers when they are designing,

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<sup>1017</sup> Lorien E Urban et al, “The Accuracy of Stated Energy Contents of Reduced-Energy Commercially Prepared Foods” (2010) 110:1 Journal of the American Dietetic Association 116. The authors note that most items were within the acceptable limits of discrepancy allowed by the regulations in the United States. They nevertheless conclude that, if widespread, these discrepancies can have a significant impact on efforts to control weight or to monitor caloric intake.

<sup>1018</sup> This was the case for KFC’s “Double Down”, which had more than a day’s worth of sodium in one serving, see Mehta, *supra* note 1005.

<sup>1019</sup> Martin O’Donnell, Andrew Mente & Salim Yusuf, “Sodium Intake and Cardiovascular Health” (2015) 116 Circulation Research 1046.

<sup>1020</sup> For example, there is a body of literature on the “health halo”, whereby consumers are led to believe that products are healthier than they are based on claims made about the product (e.g., claims on the menu or packaging). See, for example, Pierre Chandon & Brian Wansink, “The Biasing Health Halos of Fast-food Restaurant Health Claims: Lower Calorie Estimates and Higher Side-dish Consumption Intentions” (2007) 34 Journal of Consumer Research 301 and CSPI, *Food Labeling Chaos: The Case for Reform* (Washington, DC: CSPI, 2010).

promoting, and selling their products. Using the *Anns-Cooper* test, the above demonstrated that food manufacturers owe a duty of care to consumers and end users of their products. Consumers are in a relationship of reliance – if not dependence<sup>1021</sup> – on manufacturers of food products, and rely on being provided adequate information to make informed decisions. For food products, there are a number of potential classes of defendants that might have a duty to warn consumers, in addition to manufacturers, including distributors, suppliers, importers, retailers, and vendors. Although less likely, employees, the state, and learned intermediaries might also have duties to warn. To ease the implementation of the obligation to provide warnings, this chapter concluded by considering three ways of categorizing food products that might require warnings, which would be based on the type of product, processes or nutritional profile. The next chapter builds on this by examining the standard of care expected of manufacturers.

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<sup>1021</sup> It is beyond the scope of the current project, but there might be an argument that there is a special duty for food manufacturers. Per *Childs v Desormeaux*, *supra* note 633 at para 37: “The third situation where a duty of care may include the need to take positive steps concerns defendants who either exercise a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large: ....In these cases, the defendants offer a service to the general public that includes attendant responsibilities to act with special care to reduce risk. Where a defendant assumes a public role, or benefits from offering a service to the public at large, special duties arise. The duty of a commercial host who serves alcohol to guests to act to prevent foreseeable harm to third-party users of the highway falls into this category: *Stewart v. Pettie.*”, cases cited omitted.



## CHAPTER 6: STANDARD OF CARE FOR FOOD PRODUCTS

### 1. INTRODUCTION: STANDARD OF CARE FOR FOOD PRODUCTS

As the duty to warn in Canadian law is grounded in negligence, demonstrating that a manufacture was negligent requires that the plaintiff meet all the elements of a negligence claim. If the plaintiff has shown that a manufacturer owed a duty of care – and, according to the previous chapter, this is the case for food manufacturers – the next step is for the plaintiff to demonstrate that the manufacturer breached the standard of care.<sup>1022</sup> Most commonly, a product can be shown to have fallen short of what a consumer expected by demonstrating that the product is defective.<sup>1023</sup> This was at the heart of the inquiry in *Donoghue v Stevenson*, where the court considered “whether [the] manufacturer of an article of drink ... is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect

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<sup>1022</sup> Theall et al, *supra* note 62 at L2-11 note: “[o]ne cannot be required to take reasonable care under the law without first determining to whom the duty is owed and the extent of the risk. Since the extent of the risk is specific to the injured party, it is only when it is established that a duty was owed to that person that one can go on to define the standard of care.” Lewis N Klar, *Tort Law*, 5th ed (Toronto: Carswell, 2012) at 337-338 [Klar, *Tort Law*, 5th ed]. For a good articulation of the standard of care as it relates to the duty to warn, see *Block v Canadian Pacific Hotel*, [2007] AJ No 295, (AB QB) at para 127 (“This standard of care ... is based upon ordinary negligence principles. The standard is an objective one, and is influenced by such factors as general practice, statutes and other codes of performance and the considerations of costs of avoidance and acceptable level of risk.”). Klar, *ibid* at 339, warns about confusing the question of whether a defendant owed a duty and what a duty required in terms of the care owed to the plaintiff, see 339. Klar points to *Wade v CNR*, (1978) 3 CCLT 173 (SCC) and *Galaske v O’Donnell* (1994), 112 DLR (4th) 109 (SCC) as examples of the problems with such a conflation of questions. See also Lewis N Klar, “Developments in Tort Law: The 1978-1979 Term” (1980) 1 Sup Ct L Rev 311.

<sup>1023</sup> The focus on defects is especially important under the theory of strict liability. Epstein, *Modern Products Liability Law*, *supra* note 540 at 64, notes that the abandonment of negligence in §402A *Restatement (Second) of Torts*, *supra* note 408, “brought the defect concept to the fore” as a product defect is a necessary element of any cause of action under strict liability. Henderson & Twerski, *supra* note 586 refer to defect as the “linchpin of strict products liability”, at 33. Shapo, *supra* note 536 at 117 notes, requiring plaintiffs to demonstrate a product is defective is “central to all versions of strict liability.” While arguably less important under negligence, the concept of defect has been deemed “crucial, sometimes implicitly, to efforts to prove that a seller has been negligent”, *ibid* at 117.

likely to cause injury to health.”<sup>1024</sup> Lord Atkin concluded that manufacturers are under a legal obligation to take reasonable care in the preparation and sale of products.<sup>1025</sup> As previously discussed, determining what constitutes a defect is subject to considerable debate. Under consideration here are warning defects.

As noted, the rationale behind the duty to warn is that a product that would normally be deemed defective or unreasonably dangerous may no longer be considered as such if it is accompanied by a sufficient warning.<sup>1026</sup> Product warnings put a consumer in a better position to understand the dangers that arise when using a product, which allows the consumer to modify his or her behavior accordingly.<sup>1027</sup> Whereas the determination of whether or not a duty of care is owed is relatively straight-forward, as a duty is either owed or not, “the standard of care is best

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<sup>1024</sup> *Donoghue v Stevenson*, *supra* note 16 at 579.

<sup>1025</sup> As noted in Chapter 4, product liability law arguably has its genesis in food products. In fact, several commentators deem it necessary to point out that product liability is applicable beyond foods and beverages. Epstein noted in 1980 that, at that time, food product cases constitute 56 percent of claims before the court (but, interestingly, only 2 percent of claim dollars), *Modern Products Liability Law*, *supra* note 540 at 4-5. See also Theall et al, *supra* note 62 at L5-4 and Waddams, *Product Liability*, *supra* note 534 at 29 (“The principle of liability has not been limited to food and drink, but includes any kind of chattel.”). See also *Restatement (Third) of Torts, Products Liability*, *supra* note 534 at §1, which notes, “[a]s early as 1266, criminal statutes imposed liability upon victualers, vinters, brewers, butchers, cooks, and other persons who supplied contaminated food and drinks.” Food products have been one of the most litigated and regulated products, as food “represents a comprehensive experience valuable as a testing ground for appraising both the civil and directly regulatory aspect of consumer protection, particularly in relation to each other. Moreover, with food, the principal consumer interest is brought into bold relief: substantive needs are much more important than price or title”, Dickerson, *supra* note 610 at 14.

<sup>1026</sup> See Waddams, *Product Liability*, *supra* note 534 at 49, who notes, “[m]any normal and useful household products are quite dangerous, and must be so if they are to be useful” but if they are adequately labeled “may nevertheless not be defective.”

<sup>1027</sup> Per *Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 17: “The *rationale* is that one who brings himself into a relation with others though an activity which foreseeably exposes them to danger if proper care is not observed must exercise reasonable care to safeguard them from that danger. It can not be taken as a legal truism that the duty of reasonable care which lies at the foundation of the law of negligence commonly comprehends a duty to warn of danger, the breach of which will, when it is the cause of injury, give rise to liability.” The court in *Buchan v Ortho Pharmaceutical*, *ibid*, refers to John G Fleming, *The Law of Torts*, 6th ed (Sydney: Law Book Company, 1983) and Allen M Linden, *Canadian Tort Law*, 3rd ed (Toronto: Butterworths, 1982) [Linden, *Canadian Tort Law*, 3rd ed].

described as a point on a continuum.”<sup>1028</sup> As a result, there is not one standard of care, but instead different degrees of care, as the nature of the risk dictates the standard required. The standard of care is typically determined by asking what the reasonable person would do in the circumstances. For food manufacturers, the standard is that of the reasonable food manufacturer, and the standard imposed will be based on the nature and extent of the risk posed by the food product. At the outset, it should be noted that it is generally accepted that there is a higher standard of care expected for food products.

This chapter examines how the standard of care will be determined with respect to the duty to warn for food products. The first two parts consider the standard of care generally. Part two begins with a brief overview of how the standard of care is generally established in negligence cases, followed in part three with an examination of some specific issues that will be relevant for determining the standard of care in failure to warn cases.<sup>1029</sup> In particular, it will review how the court determines when a defect exists that requires a warning, how the nature of the product will influence this decision, what influence industry practices have, and the role of the expectations of consumers. Part four will review four categories of warnings, and will consider how these will each be relevant for food products. Part five will consider the recipients of warnings, and will assess how two specific categories of recipients might influence how the standard of care is determined. Finally, part six will consider how a warning must be communicated to consumers in order to be considered adequate.

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<sup>1028</sup> Theall et al, *supra* note 62 at L2-11. See also Fleming, *The Law of Torts*, 8th ed, *supra* note 809 at 123 (“But although unfamiliar with different degrees of negligence, we do acknowledge different degrees of care. True, there is only one single standard of care, but it may demand greater or less precaution depending on the nature of the particular risk.”).

<sup>1029</sup> Note, the issues identified here are not specific for failure to warn cases, but are identified here as being particularly relevant for this inquiry.

## 2. THE STANDARD OF CARE: AN OVERVIEW

In order for conduct to be considered negligent, it must fall below the standard of care required to protect others from unreasonable risks. As the Supreme Court of Canada stated in *Stewart v Pettie*: “[o]ne of the primary purposes of negligence law is to enforce reasonable standards of conduct so as to prevent the creation of reasonably foreseeable risks.”<sup>1030</sup> There are several notable aspects of the standard of care. Primary among them is the role ascribed to the reasonable person. Perhaps equally important, however, are the circumstances of the case. As Klar notes, while the duty of care is a question of law, determining whether the duty has been breached is a question of fact.<sup>1031</sup>

Described as the hallmark for determining the standard of care, the reasonable person is an objective standard that aims to ascertain what a reasonable person, of ordinary prudence<sup>1032</sup>, would do in the same circumstances. As stated by Justice Estey, “[n]egligence is the failure to use the care a reasonable man would have exercised under the same or similar circumstances.”<sup>1033</sup> The reasonable person has been described as embodying all the qualities of a good citizen<sup>1034</sup>, and whose conduct is the standard “adopted in the community by persons of ordinary intelligence and prudence.”<sup>1035</sup> For food manufacturers, the standard of care would be

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<sup>1030</sup> *Stewart v Pettie*, *supra* note 817 at 235.

<sup>1031</sup> Klar, *Tort Law*, *supra* note 578 at 206.

<sup>1032</sup> Linden, *Canadian Tort Law*, 6th ed, *supra* note 808 at 126 notes that several adjectives and combination of adjectives have been used to describe the reasonable person, including: “prudent person”; “ordinarily prudent person”; a “prudent and reasonable” person; a “reasonable and prudent” person; a “reasonably careful” person; and, a “reasonably prudent and careful” individual.

<sup>1033</sup> *Thompson v Fraser*, [1955] SCR 419 at 425.

<sup>1034</sup> Fleming, *The Law of Torts*, 8th ed, *supra* note 809 at 106.

<sup>1035</sup> *Arland v Taylor*, [1955] 3 DLR 358 (ON CA) at 366. According to Justice Laidlaw, the reasonable person is a “mythical creature of the law whose conduct is the standard by which the Courts measure the conduct of all other persons and find it to be proper or improper in particular circumstances as they may exist from time to time. He is not an extraordinary or unusual creature; he is not superhuman; he is not required to display the highest skill of

what was expected from a reasonable food manufacturer.<sup>1036</sup>

A reasonable manufacturer will adjust their conduct according to the circumstances. This requires weighing the risk and potential harm of actions. When the potential for harm is great, a reasonable manufacturer foresees the harm occurring, and takes steps to avoid it.<sup>1037</sup> This is where the other-regarding behavior considerations of tort, as discussed in chapter two, are particularly important. Thus, the requisite standard of care is set by the circumstances, on a case-by-case basis. “If the risk of harm is high, as measured by probability, frequency and likely severity of the harm, the standard will be correspondingly high.”<sup>1038</sup> Similarly, when the risk of harm is low, less is required of a manufacturer. The court will measure a defendant’s conduct against a “minimum level of performance that the community would expect of a reasonable person in the same circumstances and position as the alleged tortfeasor.”<sup>1039</sup> It is left for the courts to decide whether a particular defendant’s conduct has met the required standard.<sup>1040</sup> Consequently, there are few hard and fast rules in the standard of care that have been crystallized. Courts have identified some general terms for determining whether a defendant’s

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which anyone is capable; he is not a genius who can perform uncommon feats, nor is he possessed of unusual powers of foresight. He is a person of normal intelligence who makes prudence a guide to his conduct. He does nothing that a prudent man would not do and does not omit to do anything a prudent man would do. He acts in accord with general and approved practice.” Justice Laidlaw refers to *Blyth v Birmingham Waterworks*, (1856), 11 Exch 781, 156 ER 1047. Laidlaw J’s articulation of the reasonable person was cited with approval in *Stewart v Pettie*, *supra* note 817, and is frequently noted by tort scholars. See for example, Klar, *Tort Law*, 5th ed, *supra* note 1022 at 343; Linden, *Canadian Tort Law*, 6th, *supra* note 808 at 128; and, Edgell, *supra* note 545 at 14.

<sup>1036</sup> Cassels & Jones, *supra* note 84 at 21 (“the law expects a manufacturer of products to exercise the degree of care that could reasonably be expected of a prudent manufacturer.”).

<sup>1037</sup> Edgell, *supra* note 545 at 18.

<sup>1038</sup> Theall et al, *supra* note 62 at L1-9.

<sup>1039</sup> *Walford (Litigation Guardian Of) v Jacuzzi Canada (CA)*, *supra* note 915 at para 72. In the dissenting judgment, it was determined that the questions Mrs. Walford asked of the defendant were too broad, and that would have been reasonably understood by them by the defendant’s employees would not necessarily result in questions about safety.

<sup>1040</sup> Fleming, *The Law of Torts*, 8th ed, *supra* note 809 at 106. Note, Fleming here does contend that determining the standard of care is left with the jury, but as juries are less frequently relied on in Canada, I have used the term “court” as a more inclusive term, and intend it to refer to decisions made by both juries and judges.

conduct is negligent.<sup>1041</sup> Importantly, a defendant must be at fault. Want of reasonable care, or fault, is a necessary ingredient to a negligence action.<sup>1042</sup>

Before proceeding to examine these general notions, it is worthwhile to point out the tension in determining the standard of care required for food products. On the one hand, it is commonly recognized that there is a high standard of care imposed on food manufacturers.<sup>1043</sup>

According to the Ontario Court of Appeal in *Heimler v Calvert Caterers*, the burden imposed on food products “approximates to and almost becomes an absolute liability.”<sup>1044</sup> This is, in part,

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<sup>1041</sup> On this point, and the above, Fleming notes: “It is for the court to determine the existence of a duty relationship and to lay down in general terms the standard of care by which to measure the defendant’s conduct; it is for the jury to translate the general in a particular standard suitable for the case in hand and to decide whether that standard has been attained”, *ibid* at 106.

<sup>1042</sup> *Schulz v Leaside*, *supra* note 603 at para 3. Fault should not be confused with a moral judgment. As Linden, *Canadian Tort Law*, 6th ed, *supra* note 808 at 115 notes, “[t]he words “fault” and “blame” are employed, but there is no moral opprobrium attached to this language as there is in the criminal law.” Negligence is largely indifferent to questions of morality. For example, Henderson & Twerski, *supra* note 586 point out the seemingly “heartless” nature of negligence law, which accepts that a reasonable manufacturer “would invest up to, *but not beyond*, the point at which an additional dollar invested in quality control ... returns a dollar in accident costs avoided”, at 4 (emphasis added). The absence of moral judgment is a particularly salient point here given how the food and beverage industry is regularly portrayed as an indifferent, nefarious, and corrupt entity that is willing to compromise the health of both the planet and its inhabitants in its quest for profit. An infamous example is Eric Schlosser, *Fast Food Nation: The Dark Side of the All-American Meal* (New York: Perennial, 2002). Increasingly, books are examining the practices of specific food company. See, for example, Michael Blanding, *The Coke Machine: The Dirty Truth Behind the World’s Favorite Soft Drink* (Toronto: Penguin, 2010). Numerous books examine the practices of the food industry. See generally, Nestle, *Food Politics*, *supra* note 59; Kelly D Brownell & Katherine Battle-Horgen, *Food Fight: The Inside Story of the Food Industry, America’s Obesity Crisis, and What We Can Do About It* (New York: Contemporary Books, 2004); and Raj Patel, *Stuffed and Starved: The Hidden Battle for the World’s Food System* (New York: Perennial, 2007). This portrayal has been shown to potentially influence public health research, see, for example, Cope & Allison, *supra* note 1003, and Mark B Cope & David B Allison, “White Hat Bias: A Threat to the Integrity of Scientific Reporting”, (2010) 99 *Acta Paediatrica* 1615. Cope and Allison argue that research can be distorted in the service of what is perceived to be a righteous end.

<sup>1043</sup> *Brunski v Dominion Stores*, *supra* note 933 at 21: “the care expected of food producers and distributors is higher than that demanded of other manufacturers.”

<sup>1044</sup> *Heimler v Calvert Caterers*, *supra* note 662 at 2. This case involved liability for food served at a wedding that contracted typhoid. Although it dealt specifically with food handlers, the court’s finding that “the standard of care demanded for those engaged in the food-handling business, is an extremely high standard” can be applied to food manufacturers more generally. As discussed in the introduction, Canadian courts have imposed tough standards on industries involved in all aspects of food processing. This higher duty imposed on food manufacturers was affirmed by *Brunski v Dominion Stores*, *supra* note 933, although in *Brunski* the high standard was imposed on the bottle containing the food product, and not the food product itself. Importantly, *Brunski* extends the finding of *Heimler v Calvert Caterers*, *ibid*, beyond food handlers to include “food producers and distributors.” See also Theall et al, *supra* note 62 at L5-4 (“Perhaps the highest standard of care applies to manufacturers of food



because of the relationship of reliance that exists between a food manufacturer and consumer.<sup>1045</sup>

It is also a reflection of the higher standard generally imposed on products that are consumed or ingested. On the other hand, food products are often commonly identified as products where obviousness of dangers and common sense prevail. Arguably, this is largely a vestige of the *Restatement (Second) of Torts*.<sup>1046</sup> Consider, for example, the discussion of what constitutes an unreasonably dangerous product in §402A, Comment *i*: “Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminate with poisonous fish oils, is unreasonably dangerous.”<sup>1047</sup> Although it has been observed that the drafters of the *Restatement (Second) of Torts* were primarily concerned here with the problem of adulterated food or manufacturing errors<sup>1048</sup>, this section has been used to support the notion that the dangers in food are obvious (with butter being an often referred to example<sup>1049</sup>).<sup>1050</sup> Importantly, Comment *i* was relied on by

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and beverages and other products which are ingested. For them, the standard has been characterized as approximating strict liability.”).

<sup>1045</sup> Edgell, *supra* note 545 at 17.

<sup>1046</sup> Although the following will occasionally refer to the *Restatement (Second) of Torts*, *supra* note 408, it is worth pointing out that the topic of products sold with inadequate warnings was not considered in detail. Indeed, in the *Restatement (Third) of Torts, Products Liability*, *supra* note 534 at 3, the introduction notes there had been “thousands of judicial decisions that had fine-tuned the law of products liability in a manner hardly imaginable when Restatement Second was written.”

<sup>1047</sup> *Restatement (Second) of Torts*, *supra* note 408 at § 402A, Comment *i*.

<sup>1048</sup> Robert F Harchut, “Product Liability – Restatement (Second) of Torts – Section 402A – Uncertain Standards of Responsibility in Design Defect Cases – After Azzarello, Will Manufacturers be Absolutely Liable in Pennsylvania” (1979) 24:5 Villanova Law Review 1035 at 1040. As Harchut notes, at 1040 n. 38, “even the illustrations given in Comment *I*, with regard to what constitutes an “unreasonably dangerous” product, indicate that the draftsmen had mismanufacturing defects in mind.”

<sup>1049</sup> For example, see Linden, *Canadian Tort Law*, 3rd ed, *supra* note 1027 at 597 (“One legacy of this doctrine of inherently dangerous things is that more care may be required of a producer of dangerous articles, like guns, than is demanded of manufacturers of ordinary safe things, like butter.”) and Theall et al, *supra* note 62 at L2-15 (“A reasonable man need not show the same anxious care when handling a pound of butter as would a pound of dynamite.”). See also: *Rae and Rae v T Eaton Co (Maritimes)*, *supra* note 662 at para 25, citing *Beckett v Newalls Insulation*, [1953] 1 All ER 250.

<sup>1050</sup> Other examples of how food product claims are to be addressed can be found in the *Restatement (Second) of Torts*, *supra* note 408. Consider, for example, §402A, Comment *h*: “A product is not in a defective



Justice Sweet in *Pelman v McDonald's*<sup>1051</sup> when he accepted McDonald's argument that the dangers with fast food should have been obvious.<sup>1052</sup> The inherent health risks of butter are altogether a separate issue from manufacturing defects that result in contamination<sup>1053</sup>, and ought to be assessed under the rubric of defective design and failure to warn, not manufacturing defect. Conflating the three types of defects ignores important differences in how the court determines when a defect is unreasonable.<sup>1054</sup>

The existing tension in determining the standard of care for food products might simply be a result of "food" encompassing such a large product class.<sup>1055</sup> However, there is a danger that

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condition when it is safe for normal handling and consumption. If the injury results from ... abnormal preparation for use, as where too much salt is added to food, or from abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable." Importantly, Comment *h* talks about *abnormal* uses – a category that will be discussed in part three. Comment *h* continues, noting that where a manufacturer can anticipate a danger that may result from a particular use, "he may be required to give adequate warning of the danger ..., and a product sold without such warning is in a defective condition." Food product also have a prominent role in the *Restatement (Third) of Torts, Products Liability*, *supra* note 534, as will be discussed below.

<sup>1051</sup> *Pelman I*, *supra* note 9.

<sup>1052</sup> At a minimum, Justice Sweet held that McDonald's food was not unreasonably dangerous. After noting that McDonald's referred to Comment *i*, Justice Sweet held: "It is well-known that fast food in general, and McDonalds' products in particular, contain high levels of cholesterol, fat, salt, and sugar, and that such attributes are bad for one. ... If a person knows or should know that eating copious orders of supersized McDonalds' products is unhealthy and may result in weight gain (and its concomitant problems) because of the high levels of cholesterol, fat, salt and sugar, it is not the place of law to protect them from their own excesses", *Pelman I*, *supra* note 9 at 532-533. Justice Sweet continued to opine that nobody is forced to eat at McDonald's, or to supersize their meals, and providing that consumers exercise free choice, "liability for negligence will not attach to a manufacturer." These assertions will be challenged later, particularly when discussing the adequacy of warnings.

<sup>1053</sup> It is entirely possible that a product could have multiple defects. A food product that is adulterated by poison during the production (manufacturing defect), might always use a harmful ingredient for which there is a viable alternative (design defect), and may pose a risk to consumers that could be mitigated by a warning, but no such warning exists (warning defect).

<sup>1054</sup> Although these differences will be discussed at points in the discussion below, one critical difference between manufacturing defects and design and warning defects is scope of the defect. As Henderson & Twerski, *supra* note 586 at 179 note that when it comes to design and warning defects every product shares the same risk potential, where "if you condemn one unit as generically defective, you condemn them all." This is unlike manufacturing defects, where only one unit might be implicated. For a full discussion on the differences see Henderson & Twerski, *ibid* note 1023 and Theall et al, *supra* note 62.

<sup>1055</sup> Although it is difficult to determine the number of available food products on the market, the Food Marketing Institute reports that in 2012, the average number of items carried in a supermarket in the United States was 42,686, with stores typically ranging between 15,000 and 60,000 items, Food Marketing Institute, "Supermarket Facts" online, FMI [www.fmi.org/research-resources/supermarket-facts](http://www.fmi.org/research-resources/supermarket-facts). The caloric supply has also increased. As

generalizations are drawn from singular examples – such as “good butter.”<sup>1056</sup> This danger is particularly acute with food products, where one might be tempted to try to simplify matters by talking about specific foods (e.g., butter) rather than, as suggested in the previous chapter, categories of food products (e.g., fast food<sup>1057</sup>).<sup>1058</sup> While there is benefit to using general terms and classifications<sup>1059</sup>, it is important to bear in mind that this does not change the fact that the standard of care in a negligence claim will be determined on a case-by-case basis.

### 3. SPECIFIC ISSUES CONCERNING THE STANDARD OF CARE FOR WARNINGS

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Bleich and colleagues note, “[f]rom 1985 to 2002, per capita caloric supply in Canada increased by 530 kcal compared with the period from 1970 to 1984, where it increased by only 67 kcal”, *supra* note 54 at 281.

<sup>1056</sup> In addition to the very real possibility that, in fact, the claim of “good butter” is inaccurate – a very real possibility given that Comment *i* also talked about “good tobacco”: “Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous” (*Restatement (Second) of Torts, supra* note 408, §402A Comment *i*). The inclusion of “good tobacco” here has been the subject of considerable comment, particularly given that there is clearly not such thing as “good tobacco”, a point many public health scholars point out. More controversially, Laposata and colleagues have recently argued that the tobacco industry influence the American Law Institute’s drafting of the *Restatement*. See Elizabeth Laposata, Richard Barnes & Stanton Glantz, “Tobacco Industry Influence on the American Law Institute’s Restatement of Torts and Implications for Its Conflicts of Interest Policies” (2012) 98:1 Iowa Law Review 1. It is also odd that comment *i* contends that tobacco laced with marijuana would be considered unreasonably dangerous, although it is not clear on what grounds. It is a good reminder of the influence of societal values in determining what is dangerous.

<sup>1057</sup> Some categories of food products get more attention, particularly from public health scholars (for example, fast food or sugar-sweetened beverages). However, categorization is not always useful. For example, “fast food” might be too encompassing of a category, particularly given that it refers not only to types of food (hamburgers, fries, sandwiches) but also to the type of food establishment. For another critique of using categories, see Campbell, Raine & McLaren, *supra* note 53.

<sup>1058</sup> While it may be possible to talk about “butter” as a singular product – albeit, with different manufacturers, distributors, etc. (and this point is not being conceded) – the same is certainly not possible for most food products. It would be nonsensical to talk about “good bread” or “good chips” or “good beans”, as if these descriptions refer to an easily discernible category of products. For these three examples, it is not even clear that the description applies to only one type of product. For example, “chips” might refer to snack food, some form of cracker, or a type of French fry.

<sup>1059</sup> Indeed, as set out in the previous chapter, product liability law as it relates to food products can be streamlined by accepting certain benchmark expectations, identified above as Product, Process, and Profile. The use of these benchmarks, however, is not meant to supplant a full standard of care analysis when one is warranted, but simply to act as standards that can be used as a quick reference for determining what standard is expected. So, for example, if ingredient *X* is identified as posing a risk to human health, the standard of care might, at a minimum, require that all food products including ingredient *X* require a specific warning.

The preceding brief overview has described how the standard of care is generally established in negligence cases. The following section considers some of the specific issues the court will consider when determining the requisite standard of care for warnings. It begins with a discussion about how courts will determine when a product is defective. It then proceeds to identify several conceptual frameworks that the courts use when determining the standard of care<sup>1060</sup>, including the nature of the product, the role of industry standards, and the role of consumer expectations. Although there is not one test or concept that drives the inquiry – if anything, the various concepts often blur together<sup>1061</sup> – a uniting aspect of the various concepts is the notion of reasonable care, discussed above.

### 3.1. Defects

Although defectiveness is the cornerstone of product liability, there is not a widely accepted definition of what constitutes a defect.<sup>1062</sup> The Ontario Law Reform Commission in its *Report on Products Liability* held that a defect occurs when a product falls “short in some ways of what it ought to be.”<sup>1063</sup> This corresponds with a general sense in product liability that defects

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<sup>1060</sup> Note, while some consideration will be given to specific issues that will arise with food products, this section is primarily concerned with identifying how the court will make its determinations.

<sup>1061</sup> More than simply blending together at the standard of care analysis stage, these issues can also be conflated between the duty of care and standard of care analysis. This is understandable to some extent, given the similarity in questions raised at each stage of the analysis (for example, foreseeability is a relevant concept for examining duty of care and standard of care, as well as determining proximate cause). For more, see above, note 1022.

<sup>1062</sup> For example, see above, note 586.

<sup>1063</sup> OLRC, *Report on Products Liability*, *supra* note 83 at 13. This corresponds with Lord Atkin’s statement in *Donoghue v Stevenson*, *supra* note 16. It has been endorsed by several courts; see, for example: *Holt v PPG Industries*, *supra* note 595 at para 31; *Greater Vancouver Water District v North American Pipe & Steel*, 2011 BC SC 30 at para 38, rev’d by [2012] BCJ No 1693 (BC CA) (Court of Appeal did not consider the OLRC’s definition); *Privest Properties v Foundation Co of Canada*, *supra* note 708 at para 271, affm’d by [1997], 5 WWR 265 (BC CA).

exist when the “state, quality, or condition of a product ... makes it substandard.”<sup>1064</sup> The *Restatement (Second) of Torts* goes further by stating that a product is defective if it is “unreasonably dangerous to the user or consumer or to his property.”<sup>1065</sup> This latter formulation has been expressly adopted by Waddams, who notes that despite being concerned with strict liability, the test in the *Restatement* ought to apply in negligence cases.<sup>1066</sup> Thus, in order to determine what counts as a defect it is necessary to ascertain what was reasonable to expect of a product.<sup>1067</sup>

If the aim of a warning is to put consumers in a position that will allow them to modify their use of a product appropriately, should a court determine that a warning is necessary for a particular product, the absence of such a warning will render that product defective.<sup>1068</sup>

According to the *Restatement Third, Torts: Product Liability*, a product will be considered defective “because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings ...”<sup>1069</sup> The Canadian jurisprudence on point is similar. The Supreme Court of Canada in *Lambert* did not stipulate that warnings must only be for unreasonable

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<sup>1064</sup> Weinstein et al, *supra* note 580 at 28.

<sup>1065</sup> *Restatement (Second) of Torts*, *supra* note 408 at §402A.

<sup>1066</sup> Waddams, *Product Liability*, *supra* note 534 at 47. The *Restatement’s* formulation was considered in *Hollis v Birch*, [1990] BCJ No 1059 (BC SC); and *Walker Estate v York Finch General Hospital*, [1997] OJ No 4017 (ON Ct J Gen Div) at para 182.

<sup>1067</sup> See OLRC, *Report on Products Liability*, *supra* note 83 at 13-16. And while consumer expectations are important, as will be revealed below, a defect is more than simply not meeting consumer expectations.

<sup>1068</sup> Correspondingly, a product that would normally be deemed defective or unreasonably dangerous may no longer be considered as such if it is accompanied by a sufficient warning. As will be discussed in section three, the standard of “unreasonably dangerous” is not necessarily always clear. According to Weinstein et al, *supra* note 580 at 62: “The test for unreasonable danger requires balancing the probability and gravity of harm, if care is not exercised, against the cost of taking appropriate precautions.” The risk-utility test is discussed below. However, when it comes to warnings, it is not necessary to strictly adhere to assessing only those products that are “unreasonably dangerous”. After all, if the point of a warning is to shift an “unreasonably dangerous” product to a reasonably safe one, arguably, a warning shifting any dangerous product to a safe one would seem to be justifiable.

<sup>1069</sup> *Restatement (Third) of Torts, Products Liability*, *supra* note 534 at §2(c).

dangers; instead, it held that manufacturers had a duty to ensure consumers were aware of the dangers that arose in the ordinary course of use of a product<sup>1070</sup>, a finding that was upheld in *Buchan*<sup>1071</sup> and *Hollis*.<sup>1072</sup> Importantly, there is no need for a plaintiff to prove a defect *per se*.<sup>1073</sup> Instead, a plaintiff only has to demonstrate that there was a risk inherent in the use of a product, and that a manufacturer ought to have made the consumer aware of the danger arising from the use of a product via a warning. And while a warning need not be perfect<sup>1074</sup> nor address every potential risk<sup>1075</sup> – indeed, excessive details might only confuse consumers – it must provide the consumer with the necessary information for them to use the product in a safe manner.<sup>1076</sup>

It is not enough for manufacturers to wait for consumers to be injured to determine when a warning might be required.<sup>1077</sup> Instead, manufacturers are obliged to give thought to the

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<sup>1070</sup> *Lambert v Lastoplex Chemicals*, [1970] OJ No 319 (ON CA) at 574. Indeed, the Court in *Lambert* held that if a manufacturer is aware of a product's dangerous character "they cannot, without more, pass the risk of injury to the consumer."

<sup>1071</sup> *Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 16. Although the Ontario Court of Appeal does not rely on *Lambert v Lastoplex Chemicals*, *supra* note 65, it similarly notes, "[a]s a matter of common law, it is well settled that a manufacturer of a product has a duty to warn consumer of dangers inherent in the use of its product of which it knows or has reason to know."

<sup>1072</sup> *Hollis v Dow Corning*, *supra* note 66 at para 20. The majority in *Hollis* cite directly from *Lambert v Lastoplex Chemicals*, *supra* note 65 on this point, although it did qualify the duty to warn later in its judgment to be required for "potentially hazardous products", at para 40.

<sup>1073</sup> Theall et al, *supra* note 62 at L3-2.

<sup>1074</sup> Determining when a warning is adequate will be considered in part five below. While perfection is not required, as the risk increases, the expectations of the warning's explicitness and clarity increase. See *Moran v Wyeth-Ayrest Canada*, [2004] 1 WWR 716 (AB QB) ("Warnings are not required to be perfect, but are required to address dangers that are inherent, or arise from the use of the product in certain circumstances.").

<sup>1075</sup> For example, as will be discussed in part three of this chapter, there is no requirement for manufacturers to warn of obvious risks or risk arising from the abuse of a product.

<sup>1076</sup> Arguably, the requirement for warning might be difficult to demonstrate for food products where the risk is a delayed-onset disease, such as obesity. In addition to the risk not materializing immediately, there has also been a concerted effort to promulgate the idea that individuals are solely responsible for the long-term consequences of their food consumption. For a discussion on point, see Brownell et al, *supra* note 50 and Deborah A Cohen & Thomas A Farley, "Eating as an Automatic Behavior" (2008) 5:1 Preventing Chronic Disease 1. See also discussion about mindless eating above at note 57.

<sup>1077</sup> It may not be immediately obvious that a product requires a warning or that existing warnings are insufficient. Once an injury or damage occurs, however, then the court will consider "whether the nature and extent of the risk merited a better warning, and next whether a better warning would have prevented the harm to this plaintiff", Theall et al, *supra* note 62 at L3-2. To determine when a risk is sufficient to require a warning, the courts

foreseeable risks inherent with a product. In this respect, manufacturers are treated as experts. As Edgell notes, consumers rely on manufacturers to know their products in ways that a consumer cannot.<sup>1078</sup> As an expert on their product, it is expected that manufacturers will have “sufficient expertise to ensure that their products are reasonably safe and reliable.”<sup>1079</sup> That said, the expectation is that manufacturers “use reasonable care in the circumstances and nothing more.”<sup>1080</sup>

### 3.2. Nature of the Product

One of the ways to determine if a manufacturer’s conduct was reasonable is to consider the risks of injury that might result from the use of a product.<sup>1081</sup> The nature of the product itself will determine the type of warning required (if, indeed, a warning is required), a consideration

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will assess what was reasonable in the circumstances Weinstein et al, *supra* note 580 at 43 (“The “reasonableness” of the product has generally served as the operative test for the determination of “defect.””). This is a qualitative judgment, made on a case-by-case basis, taking into account societal expectations and norms. As Shapo, *supra* note 536 notes, product liability law sets social benchmarks. For example, he notes how law sets a social benchmarks around fairness (“With reference to consumers, this idea implies that people are entitle to compensation when a product surprises them by collapsing, blowing up in their faces, or causing illness in a way they could not have guessed from the way the product presented itself to them”, at 56) and individual responsibility (“Judicial decisions in products cases also reflect our commitment to individual responsibility as a prime value in social life and in law” at 57).

<sup>1078</sup> In an ever-changing and evolving product market, warnings play a crucial role. They assist consumers with making informed decisions. As Edgell, *supra* note 545 at 2 observes, “consumers cannot possibly have the volume of expertise and information necessary to assess the multitude of products with which they must deal.” In light of this, he declares, “[t]he era of *caveat emptor*, and its simpler time, is over.” The Supreme Court of Canada in *Hollis v Dow Corning*, *supra* note 66 noted the “enormous informational advantage” held by medical manufacturers over consumers, at para 26.

<sup>1079</sup> Edgell, *supra* note 545 at 1 (“we expect them to have to ensure that their products work properly and that they are safe for use.”).

<sup>1080</sup> *Phillips et al v Ford Motor Co of Canada*, *supra* note 765 at 653. Reasonable care does not require perfection: “[t]ort law does not require the wisdom of Solomon. All it requires is that people act reasonably in the circumstances”, *Stewart v Pettie*, *supra* note 817 at 235.

<sup>1081</sup> Klar, *Tort Law*, 5th ed, *supra* note 1022 at 355.



that weights the benefits (utility) of a product alongside its dangers (risks).<sup>1082</sup> As Fleming has observed, “[a] reasonable man need not show the same anxious care when handling a pound of butter as he would a pound of dynamite.”<sup>1083</sup> When a product is considered dangerous, extra precaution is required.<sup>1084</sup> As the danger increases, so too does the burden imposed on the manufacturer to take adequate measures to communicate the risk to consumers.<sup>1085</sup> However, as all products present some risk to consumers<sup>1086</sup>, not every risk needs to be mitigated with a warning.<sup>1087</sup>

One of the primary analytical tools available to the courts for determining when a warning is required is the risk-utility test.<sup>1088</sup> Although typically associated with defective design claims<sup>1089</sup>, the risk-utility test is nevertheless a useful tool for considering when warnings are a

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<sup>1082</sup> *Rae and Rae v T Eaton Co (Maritimes)*, *supra* note 662 at para 46 (“The duty is to use that due care that a reasonable person should use under all the circumstances. And one of the most important circumstances – and often the controlling circumstance – is the character of the article sold and its capacity to do harm.”).

<sup>1083</sup> Fleming, *The Law of Torts*, 8th ed, *supra* note 809 at 123. Fleming notes, citing *Donoghue v Stevenson*, *supra* note 16 at 569, “[i]n this sense, it is true that “the nature of the thing may very well call for different degrees of care.”” See Theall et al, *supra* note 62 at L2-15.

<sup>1084</sup> In *Meisel v Tolko Industries*, [1991] BCJ No 105 (BC SC), the court held that extra precaution should be used when dangerous products were being used. While there was a considerable difference between two products contrasted by the court (lumber and propane), the principle is similar, Edgell, *supra* note 545 at 30.

<sup>1085</sup> See, for example, Linden, *Canadian Tort Law*, 6th ed, *supra* note 808 at 598 (“The burden of taking precautions increases as the probability of harm and the severity of the damage threatened increase.”) and Theall et al, *supra* note 62 at L5-4 (“Manufacturers are held to no fixed standard of care. Instead, the standard of care required increases with the level of risk and probability of harm associated with the product’s use.”).

<sup>1086</sup> Weinstein et al, *supra* note 580 at 32 suggest that “we begin with the premise that all products present risks to the consumer public”, thereby necessitating a determination of what risks are reasonable (or can be made reasonable through warnings) and which are unreasonable.

<sup>1087</sup> Moreover, as alluded to above, and will be discussed below in this section and again in part five, too many warnings can ultimately be counterproductive to ensuring consumer safety.

<sup>1088</sup> The risk-utility analysis is often associated with the Learned Hand Formula, as articulated by Justice Hand in *Carroll Towing*, 159 F2d. See, for example, Barbara Ann White, “Risk-Utility Analysis and the Learned Hand Formula: A Hand that Helps or a Hand that Hides?” (1990) 23:1 *Arizona Law Review* 77. Henderson & Twerski, *supra* note 586, note that the risk-utility test for defective designs is derived from the Learned Hand Formula, at 4, 227. It is beyond the scope to consider the Learned Hand Formula in detail here.

<sup>1089</sup> For example, see Edgell, *supra* note 545 at 51-56 and Weinstein et al, *supra* note 580 at 35 (“This risk-utility theory finds its principal application in questions of design defect.”). In *Rentway Canada v Laidlaw Transport*, *supra* note 600, the court was considering a design defect claim. A truck manufacturer had put both headlights on same circuit, increasing chances of serious accident if there was a malfunction. The court found a



reasonable precaution. The test considers whether the risks of a product outweigh its utility, and when the potential risk is great, a reasonable manufacturer is expected to take reasonable steps to avoid or mitigate it.<sup>1090</sup> Similarly, as the likelihood of a risk occurring increases, “the reasonable manufacturer must take more – or more effective – steps to avoid its occurring.”<sup>1091</sup>

Manufacturers can avoid risks by altering a product’s design, but they can also shift the burden of the risk by providing a warning to the consumer.<sup>1092</sup> Courts will also consider the gravity and the nature of the harm, as well as the probability of the harm occurring.

There are many harms that may arise from the use (consumption) of food products. Not all are serious risks. For example, some products may result in mild indigestion or gastrointestinal discomfort. There are also some very serious risks, particularly for vulnerable or sensitive consumers, such as the risk of anaphylaxis for those with allergies. There is a chance that this can result in death. Many of the risks, however, only materialize with prolonged or ongoing exposure – although the duration of exposure does vary considerably. Consider, for example, the previously discussed risk of obesity. Arguably, obesity is a serious risk, as the gravity and nature of obesity is significant, both individually and for society.

One of the challenges that courts will have to face when assessing food products stems

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design defective as the danger outweighed the utility. In discussing defective design, Justice Granger held: “[t]he competing factors to be weighed under a risk-utility balancing test invite the trier of fact to consider the alternatives and risks faced by the manufacturer and to determine whether in light of these the manufacturer exercised reasonable care in making the design choices it made”, at 160. Granger J is cited from *Prentis v Yale MFG Co*, 365 NW 2d 176 (Mich 1984).

<sup>1090</sup> Edgell, *supra* note 545 at 18.

<sup>1091</sup> *Ibid.* Edgell continues: “[a]lthough the standard of care may become very high, liability is still based on negligence and will stop short of strict liability”, *ibid.* However, it is commonly noted that product liability law in Canada often is indistinguishable from strict liability. See, in particular, Boivin, “Negligence, Strict Liability, and Manufacturer Failure to Warn”, *supra* note 83.

<sup>1092</sup> Weinstein et al, *supra* note 580 at 40 (“Manufacturers, in deciding whether to design out a hazard or warn against it, should undertake the same risk-utility balancing described for judging the adequacy of a given design.”).

from the nature of many of the risks. Obesity, as noted, is not an immediate harm. A consumer will not become obese from eating one food product. It is only the prolonged exposure to food products that may give rise to the harm. While important, when considering the gravity and nature of the harm, immediacy of harm has not been identified by the courts a crucial concept. In *Létourneau*, the court was willing to accept that the prolonged exposure to a product that resulted in harm was sufficient to require an adequate warning – recall that to be included in the Blais file plaintiffs had to have smoked a minimum of 5 pack/years, or 36,500 cigarettes.<sup>1093</sup> Where immediacy might factor in more is in an assessment of probability. But even here, it is possible to rely on epidemiological evidence to draw inferences about the probability of obesity resulting from the consumption of food products. In particular, there is considerable evidence to demonstrate how overall increases in consumption impact obesity rates generally, and how the increased consumption of particular products (e.g., SSBs) or products with a particular nutritional profile (e.g., high caloric foods) impact obesity rates.

When assessing utility, a court will consider the purpose and necessity of a product. This is an important question because it is entirely possible that a product is both necessary and incapable of being rendered safe.<sup>1094</sup> For example, the need for blood justifies blood banks, even though blood is an inherently dangerous product.<sup>1095</sup> Rabies vaccines are another example

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<sup>1093</sup> *Létourneau v JTI-MacDonald*, *supra* note 68 at para 2 note 4.

<sup>1094</sup> Pharmaceuticals are often cited as an example. See Waddams, *Product Liability*, *supra* note 534 at 51 (“Medical science makes increasing use of drugs and other agents designed to prevent or alleviate disease. Many of these agents carry with them considerable risk, and the question arises of the approach of the courts to injuries caused by the materialization of those risks. In some cases the risk is known but is acceptable because of the seriousness of the condition sought to be alleviated.”). See also discussion about *Buchan v Ortho Pharmaceutical*, *supra* note 67.

<sup>1095</sup> On this point, see *Pittman Estate v Bain*, *supra* note 708. Justice Lang noted that the necessity for blood warranted that it be treated differently (“In the case of blood, the societal need for the component produces different considerations”, at para 243), and thus it shouldn’t be treated like other dangerous commercial products (“the

commonly given.<sup>1096</sup> Nevertheless, even risky products that are deemed necessary will be considered defective if they fail to have adequate warnings.<sup>1097</sup>

Manufacturers have to convince the court that the risk inherent to a product is worth taking. Waddams uses two examples to make this point: tobacco products and a facial cream that

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collection and distribution of blood cannot be likened to the manufacture of artificial snow, or other commercial products that bring with them an element of danger”, at para 241). Further, he noted, “[t]his is not a product that should be removed from the market if inherently dangerous. Blood is an essential source of life to many. Although it is a biologic, and, therefore, dangerous, the need for the product outweighs the risk”, at para 243. Importantly, despite acknowledging the need for blood, Lang J. did not relieve the manufacturers of the obligation to exercise reasonable care. However, Lang J. did suggest that blood’s necessity “perhaps dictates that the collector who does exercise reasonable care, should not be held liable, in the absence of fault on its part, for something that it could not reasonably prevent”, at para 243. Waddams, *Product Liability*, *supra* note 534 at 51, also looks at blood contamination cases. And while “[l]iability has been imposed where reasonably available means of avoiding the injury were not used.” Waddams notes a reluctance by courts to impose liability on certain types of suppliers who act above reproach (“On the other hand there has been a reluctance to impose liability on the supplier of a normally beneficial medical product when the supplier’s conduct has been above reproach”, at 52). It is submitted here that food, despite being necessary, should not be treated in the same manner as blood, although the general principles articulated by Lang J seem germane.

<sup>1096</sup> See William L Prosser, “The Fall of the Citadel (Strict Liability to the Consumer)” (1965-1966) 50 *Minnesota Law Review* 791; Waddams, *Product Liability*, *supra* note 534 at 51 (“Rabies vaccine is often given as an example of a product that is known to be dangerous but the administration of which is justified because rabies is almost always fatal”, referring to Prosser); and, Stapleton, *supra* note 545 at 261. Waddams notes that while a rabies vaccine is dangerous, it will not be deemed defective. However, he notes that “[i]t would be otherwise, of course, if the vaccine was contaminated by some harmful foreign substance”, *ibid*. This reinforces the point made above about “good butter”, which may not be defective by way of manufacturing but could still be dangerous, see note 1058 and accompanying text.

<sup>1097</sup> On this point, see Stapleton, *supra* note 545 at 261, who, referring to Comment *k* of §402A of the *Restatement (Second) of Torts*, *supra* note 408, notes: “[t]his Comment simply noted that some products, particularly useful drugs, may be incapable of being made safe for their ordinary use (the known but unavoidable adverse reactions associated with the rabies vaccine were cited as an example) but are nevertheless not defective so long as they carry an adequate warning.” Stapleton is leery of the reverence paid to the category of “unavoidably unsafe” for being irrational, *ibid*. That said, she does note that while entire classes of drugs have been considered unavoidably unsafe in order to shield them from defective design claims, manufacturers of such drugs must still “defend themselves against negligent failure-to-warn claims”, *ibid*. Thus, even if a similar thing were to happen with food products, and an entire class of food products was deemed unavoidably unsafe, the manufacturers of those products would still have a duty to warn of the risks inherent in the use of the otherwise protected class of food products. It is also entirely possible that a product’s risks are outweighed by its benefits even if it has adequate warnings. According to Stapleton identifies tobacco and asbestos as possible examples of the types of products in Comment *k*, at 262. She also identifies intra uterine devices, ATVs, sub-compact cars (e.g., Pinto), silicone breast implants, and some drugs as other possibilities. However, she notes that on this point there is a “drastically pro-defendant” position given “special protectionism towards the pharmaceutical industry”, *ibid*. In light of the *Restatement (Third) of Torts, Products Liability*, *supra* note 534, it is not clear how reflective Stapleton’s observations are of the current state of product liability law. Her overall assessment, however, appears to remain relevant, particularly for product liability law in the United States.

carries a risk of dermatitis.<sup>1098</sup> The facial cream example illustrates the importance of a product's utility. Waddams notes that if the cream's purpose is to alleviate a medical condition, the risk of dermatitis might be acceptable, whereas the risk might not be acceptable if the cream only served a cosmetic purpose.<sup>1099</sup> What is striking about the tobacco example is that tobacco has only recently been recognized as a risky product<sup>1100</sup>, despite the overwhelming evidence that has long existed identifying the risks associated with tobacco use.<sup>1101</sup>

An important observation in light of these two examples is the role of social attitudes towards a product. Tobacco manufacturers for many years were not found to be liable, despite the known risks associated with tobacco products, given the social attitudes towards smokers.<sup>1102</sup> Smokers were deemed to be personally responsible, as they made the choice to smoke – and it is often contended that they made this decision knowing the dangers inherent to smoking.<sup>1103</sup> However, the idea that smoking is a “personal choice”<sup>1104</sup> hardly seems relevant, given that the

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<sup>1098</sup> It is worth noting that Waddams raises these examples as part of a broader discussion concerning the inherent dangers of products, *Product Liability*, *supra* note 534 at 49-53.

<sup>1099</sup> Waddams, *Product Liability*, *supra* note 534 at 50. Perhaps surprisingly, of the two examples (tobacco and facial cream), the latter is the more provocative example. This is in part due to Waddams' conclusion, but also because of its similarity to *Grant v Australian Knitting Mills*, *supra* note 784, which also involved the risk of contracting dermatitis, only in this instance from free sulphites in an article of clothing at the time of sale. This case will be discussed in more detail below, see part 5.

<sup>1100</sup> *Ibid* at 50. Waddams notes that there has been a shift in thinking as to whether tobacco manufacturers' should be liable for the risks inherent with smoking: “It was formerly thought that tobacco manufacturers would not be liable for the inherent risks of smoking, but in the light of changing social attitudes to tobacco, and evidence suggesting manufacturers' early knowledge of its harmful and addictive effects, this conclusion is no longer secure”, *ibid*. He refers here to *Spasic Estate v Imperial Tobacco*, [2000] 49 OR (3d) 699 (ON CA).

<sup>1101</sup> For general information, see: WHO, “Tobacco”, online: WHO, [www.who.int/mediacentre/factsheets/fs339/en/](http://www.who.int/mediacentre/factsheets/fs339/en/), and Health Canada, “Tobacco”, online: Health Canada [www.hc-sc.gc.ca/hc-ps/tobac-tabac/index-eng.php](http://www.hc-sc.gc.ca/hc-ps/tobac-tabac/index-eng.php).

<sup>1102</sup> On this point, see Nathanson, *supra* note 58.

<sup>1103</sup> Indeed, this is one of the arguments made by the tobacco companies in *Létourneau v JTI-MacDonald*, *supra* note 68.

<sup>1104</sup> This rhetoric of “personal choice” is highly problematic. As discussed above, this shift in thinking may be required before food manufacturers are held liable. At present, obesity remains largely perceived as an individual problem, despite overwhelming evidence to the contrary, as discussed at several points in this paper. While it is often suggested that it was only after evidence of tobacco's harms that societal attitudes shifted, this is not true. The

risk of dermatitis, a minimal risk (particularly when compared to the risks of smoking)<sup>1105</sup>, might be considered sufficient to warn consumers about the risk with using a medical facial cream cosmetically. If nothing else, the tobacco example is a reminder about the potential influence manufacturers may have on the perceptions about the risks associated with their products.<sup>1106</sup>

With respect to food products, foods and beverages serve many purposes (e.g., religious, ritualistic or cultural<sup>1107</sup>), in addition to providing the macro- and micro-nutrients necessary to sustain human life. Importantly, food products vary greatly in terms of their nutritional value and the harms they cause (e.g., obesity<sup>1108</sup>, cardiovascular disease<sup>1109</sup>, or certain types of cancer<sup>1110</sup>). While food is clearly necessary, not all food products are; indeed, entire sub-categories of food products are not essential, as was suggested is the case for SSBs.<sup>1111</sup> The question that will need

US Surgeon General's report on tobacco had already identified harms in the late 1960s, and the major shift in attitude was precipitated by evidence about the harm to innocent third-parties. Weinstein et al, *supra* note 580 at 55 note that courts have been unwilling to hold manufacturers liable for risks that were scientifically unknowable at the time of manufacture, sometimes discussed as the "state of the art."

<sup>1105</sup> Dermatitis is an inflammation of the skin, also known as eczema. According to the Canadian Dermatology Association, "eczematous skin is red, itchy and swollen sometimes with fluid-filled bumps that ooze and crust", online: [www.dermatology.ca/skin-hair-nails/skin/eczema/#!/skin/eczema/what-is-eczema-2/](http://www.dermatology.ca/skin-hair-nails/skin/eczema/#!/skin/eczema/what-is-eczema-2/). While it is noted that eczema can cause people to lose sleep or miss work, it is not in the same category of risks as tobacco-related diseases.

<sup>1106</sup> While it is beyond the scope of this chapter to fully discuss the power of industry, there is considerable commentary on the strategy of tobacco companies when facing litigation, a strategy being emulated by other industries, including food manufacturers. For more, see generally Oreskes & Conway, *supra* note 740 and references identified in note 358. Cf Huber, *Galileo's Revenge*, *supra* note 358.

<sup>1107</sup> Food products can serve a variety of purposes, including having religious, cultural, and social significance. Moreover, food products can exist simply for the sake of pleasure. See, for example, Karen Glantz et al, "Why Americans Eat What They Do: Taste, Nutrition, Cost, Convenience, and Weight Control Concerns as Influences on Food Consumption" (1998) 98 *Journal of the American Dietetic Association* 1118.

<sup>1108</sup> Fast food consumption has been shown to causes weight gain, see Mark A Pereira et al, "Fast-food Habits, Weight Gain, and Insulin Resistance (the CARDIA Study): 15-year Prospective Analysis" (2005) 365 *The Lancet* 36. Fast food consumption has also been linked with diabetes, see A

<sup>1109</sup> Higher diet quality is associated with a decreased risk for cardiovascular disease, see, for example: Jill Reedy et al, "Higher Diet Quality is Associated with Decreased Risk of All-cause, Cardiovascular Disease, and Cancer Mortality among Older Adults" (2014) *Journal of Nutrition*.

<sup>1110</sup> For example, increased fruit and vegetable consumption prevents cancer, see WHO, *Diet, Nutrition and the Prevention of Chronic Disease: Report of a Joint WHO/FAO Expert Consultation*, WHO Technical Report Series 916 (Geneva: WHO, 2002).

<sup>1111</sup> Certain foods have been considered to have no nutritional value (such as most sugar-sweetened

to be asked is whether the utility of a product outweighs its risks. If the purpose of a food product is not nutrition or sustenance, will its utility (e.g., taste, convenience, etc.) outweigh the inherent risks?

This is why warnings are particularly useful for food products. By providing consumers with information about the risks associated with their use, warnings permit consumers to make informed choices for those products that cannot be made totally safe through redesign. Indeed, if there is an adequate warning it is often not necessary for a product's utility to outweigh its risks.<sup>1112</sup> This was what the court in *Buchan* was ultimately addressing. It had to determine whether oral contraceptives were similar to other pharmaceutical products, where utility did outweigh risk. It determined that oral contraceptives were “vastly different from other prescription drugs” and thus manufacturers were required to warn users directly<sup>1113</sup> of the risks inherent in their use.<sup>1114</sup> In *Buchan*, the court was particularly motivated by the necessity of the

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beverages) but may serve other purposes. Consider, for example, PepsiCo's classification of its food products into three categories: “good-for-you”, “better-for-you”, and “fun-for-you”, see PepsiCo, “Product Portfolios”, online: [www.pepsico.com/annual10/products/fun-for-you.html](http://www.pepsico.com/annual10/products/fun-for-you.html), and Novak & Brownell, *supra* note 50. Of course, these categories are self-described, as PepsiCo includes Gatorade and Tropicana in the “good-for-you” category despite the fact that both would be considered sugar-sweetened beverages.

<sup>1112</sup> Consider, for example, *Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 23, where the court noted: “[i]n the present state of human knowledge, many drugs are clearly incapable of being made totally safe for their intended or ordinary use even though they have been properly manufactured and are not impure or defective. Notwithstanding a medically recognizable risk their marketing may be justified by their utility.”

<sup>1113</sup> Recall that the duty to warn may be met if manufacturers warn a learned intermediary. See *Buchan v Ortho Pharmaceutical*, *supra* note 67 and *Hollis v Dow Corning*, *supra* note 66.

<sup>1114</sup> *Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 25 (“oral contraceptives bear characteristics which render them vastly different from other prescription drugs and which demand that manufacturers be required to warn users directly of risks associated with their use.”) and para 85, in *obiter* (“I am of the view that oral contraceptives bear characteristics distinguishing them from most therapeutic, diagnostic and curative prescription drugs.”). On this point, *Buchan v Ortho Pharmaceutical*, *ibid* at para 26, cited from a similar case in the US, *MacDonald v Ortho*, (1985), 475 NE 2d 65 (Mass), which held: “The oral contraceptive thus stands apart from other prescription drugs in light of the heightened participation of patients in decisions relating to use of “the pill”; the substantial risks affiliated with the product's use; the feasibility of direct warnings by the manufacturer to the user; the limited participation of the physician (annual prescriptions); and the possibility that oral communications between physicians and consumers may be insufficient or too scanty standing alone fully to apprise consumers of the product's dangers at the time the initial selection of a contraceptive method is made as well as at subsequent



product, noting, “[t]he selection of a method of preventing unwanted pregnancy in the case of a healthy woman is a matter, not of medical treatment, but of personal choice.”<sup>1115</sup> The court held that in light of this fact, the manufacturer needed to provide adequate information for a woman to make an informed decision.<sup>1116</sup>

This is an important decision for present purposes. Just as there are differences between types of drugs, so too there are differences between types of food in terms of both nutrition and associated disease risk.<sup>1117</sup> Some foods are marketed as being strictly “fun for you”<sup>1118</sup> or as special indulgences.<sup>1119</sup> If the utility of a food product is not nutrition, but some other end, such as taste, it will not necessarily render said product to be so defective as to require being redesigned. However, given that human beings are physiologically programmed to seek out fat and sugar, two of the key ingredients in many such “fun for you” foods, the court may determine that the risk that food products utilizing these ingredients outweighs the overall utility of these products.<sup>1120</sup> If so, given the risks associated with the consumption of fat and sugar<sup>1121</sup>, a

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points when alternative methods may be considered” at 70.

<sup>1115</sup>*Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 77. In *obiter*, at para 84, Robbins JA noted, “[t]here can be little doubt that oral contraceptives have presented society with problems unique in the history of human therapeutics. At no time have so many people taken such potent drugs voluntarily over such a protracted time for an objective other than the control of disease. This has introduced a novel element in the doctor-patient relationship ..... “He is prescribing for socioeconomic reasons .... consumer demand for oral contraceptives prompts their use more often than doctors’ advice...”

<sup>1116</sup> As the court noted, “it is not unreasonable that notice of a serious potential hazard to users of oral contraceptives could influence her selection of another method of birth control”, *ibid* at para 77.

<sup>1117</sup> For example, see WHO & Food & Agricultural Organization, *Diet, Nutrition and the Prevention of Chronic Disease*, WHO Technical Report Series No 916 (Geneva: WHO, 2003).

<sup>1118</sup> For example, this is an approach taken by Pepsi. See Novak & Brownell, *supra* note 50.

<sup>1119</sup> For example, consider all the food products that are advertised as special rewards (e.g., ice cream, chocolate) or as a “break” for busy parents (usually mothers) from cooking (e.g., ready to eat meals). Often, such products are not advertised as daily staples, but occasional items.

<sup>1120</sup> Although not considered here, an important question will be if whether there is a benchmark that can be established for determining when the inclusion of one (or both) of these ingredients triggers the need for a warning.

<sup>1121</sup> The potential risks associated with these products are constantly evolving. Consider, for example, the recent World Health Organization draft guidelines for sugar intake in adults and children, currently open for public



manufacturer could avoid liability by providing a warning to consumers about the risks associated with using the product.

In order to better apply the risk-utility test, the court in *Rentway Canada Ltd v Laidlaw Transport Ltd* identified several factors that can be used when attempting to apply it. These factors include:

(1) utility of the product to the public as a whole and to the individual user; (2) the nature of the product – that is, the likelihood that it will cause injury; (3) the availability of a safe design; (4) the potential for designing and manufacturing the product so that it is safer but remains functional and reasonably priced; (5) the ability of the plaintiff to have avoided injury by careful use of the product; (6) the degree of awareness of the potential danger of the product which reasonably can be attributed to the plaintiff; and (7) the manufacturer’s ability to spread any costs related to improving the safety of the design.<sup>1122</sup>

Each of these factors would need to be considered by the court on a case-by-case basis.<sup>1123</sup> In a general sense, it is easy to imagine how the risks associated with a particular food product could be framed as outweighing its utility. Especially if one accepts Edgell’s assertion that the risk-utility test can be divided into two parts, the first asking if the harm was reasonably foreseeable, and the second test being whether it is “reasonable to design the product in a safer manner.”<sup>1124</sup>

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consultation, which would see a considerable reduction from previous levels, see WHO, “Draft Guideline: Sugar intake for adults and children”, online: WHO, [www.who.int/nutrition/sugars\\_public\\_consultation/en/](http://www.who.int/nutrition/sugars_public_consultation/en/). The sugar industry has previously attempted to influence the World Health Organization, see Sarah Boseley, “Political Context of the World Health Organization: Sugar Industry Threatens to Scupper the WHO” (2003) 33:4 International Journal of Health Services 831.

<sup>1122</sup> *Rentway Canada v Laidlaw Transport*, *supra* note 600 at 164. Granger J is quoting here from *Voss v Black & Decker Manufacturing*, 250 NE 2d 204 (NY 1983). Edgell, *supra* note 545 at 53 notes that the factors identified by Granger J are similar to the ones in *McEvoy v Ford Motor Co*, [1989] BCJ No 1639 (BC SC). See also Weinstein et al, *supra* note 580 at 47-48 and their discussion of Dean Wade’s seven indicia for determining unreasonable dangers.

<sup>1123</sup> Theall et al, *supra* note 62 at L2-8 (“The outcome of this analysis varies significantly with the particular circumstances of each case.”) and Weinstein et al, *supra* note 580 at 47-48 (“The determination of a defect and unreasonable danger is, in one sense, subjective, because each product must be viewed in the particular context of its function and use.”).

<sup>1124</sup> Edgell, *supra* note 545 at 54. Or, alternatively, “if no superior design is reasonable, was it reasonable to choose to manufacture or sell the product in light of the foreseeable risk”, *ibid*.

The latter test contemplates redesigning a product. The possibility of an alternative design is primarily an issue relevant for defective design cases.<sup>1125</sup> When an alternative design is available, manufacturers may be required to redesign their product to minimize the risk.<sup>1126</sup> As the court in *Nicholson v John Deere* expressed: “[a] manufacturer does not have the right to manufacture an inherently dangerous article when a method exists of manufacturing the same article without risk of harm.”<sup>1127</sup> It has been suggested that obligation to use a safe alternative may even exist when risks are obvious or are only likely to materialize when a consumer acts carelessly.<sup>1128</sup> In some instances, it may not be possible to identify an alternative design<sup>1129</sup>, an

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<sup>1125</sup> See *ibid* at 51-53 and Theall et al, *supra* note 62 at L2-7. Stapleton, *supra* note 545 at 260, citing Schwartz notes “one simply cannot talk meaningfully about a risk-benefit defect in a product design until and unless one has identified some design alternative ... that can serve as the basis for the risk-benefit analysis.” She notes, *ibid* at 259, “[i]t has generally been agreed that in evaluating the benefits or utility of a product design under s 402A [of the *Second Restatement of Torts*] the availability of a substitute product which would meet the same need and not be as unsafe is relevant.” For a review of the American law on point, see Weinstein et al, *supra* note 580 at 191-239.

<sup>1126</sup> It is expected that manufacturers will give consideration to various designs, to find the most reasonable design, taking into account the risks inherent in each design. Theall et al, *supra* note 62 at L2-7, note “the design of many products reflects an attempt to balance numerous competing design considerations. The impact of tweaking this or changing that cannot be considered in isolation. The impact of the proposed changes on every other aspect of the design must be thoroughly considered. If implementing the proposed change would create a new risk or increase any existing risk, the alternative may not be viable.” For example, consider *Ragoonanan v Imperial Tobacco*, *supra* note 600. Here the plaintiff claimed that there was an alternative design available to cigarette manufacturers to prevent them from posing a risk of fire after a cigarette was left burning and burnt down a home, resulting in the death of several people, including a young child. The motion to strike was dismissed by the court, as it contended that under the risk-utility test, it was possible that there was an alternative design. But, contrast this with the decision in *Baker v Suzuki*, [1993] 8 WWR 1 (AB QB) where the court accepted that motorcycle manufacturers lacked the means to create a better design. In that case, the court accepted that the social utility of motorcycles outweighed the risk of harm.

<sup>1127</sup> *Nicholson v John Deere*, *supra* note 606 In this case, a spark from a lawn mower’s gas tank ignited gasoline vapours while the plaintiff was fueling the mower. The court held that this was a result of where battery was positioned in relation to the gas tank, and that the manufacturer was aware of danger. The court held the manufacturer liable as it found an alternative design was available.

<sup>1128</sup> Theall et al, *supra* note 62 at L2-8. However, see discussion below about abuses and obvious risks. The courts will often not hold a manufacturer liable for a consumer’s reckless behaviour. See, for example, *Lem v Baratto Sports*, *supra* note 603; *Deshane v Deere & Co*, *supra* note 657; and, *Schulz v Leaside*, *supra* note 603.

<sup>1129</sup> Stapleton, *supra* note 545, points to ATVs as an example (although she undoubtedly means three wheelers), noting: “their inherent instability could not be reduced by modification of their design and yet they were widely regarded as defective”, at 260.

alternative design may be too costly to implement<sup>1130</sup>, or there could be technological limitations.<sup>1131</sup> If there is no viable alternative available<sup>1132</sup>, and the product has sufficient utility to justify it being manufactured, a product may still be defective for lack of appropriate warnings.<sup>1133</sup>

Irrespective of which approach a court takes to applying the risk-utility test to food products – whether it engages in the more detailed task of assessing the various questions identified in *Rentway Canada Ltd v Laidlaw Transport Ltd* or if takes a more streamlined

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<sup>1130</sup> For example, the economic feasibility of an alternative design will be considered. See, for example, *Rentway Canada v Laidlaw Transport*, *supra* note 600, where the cost of the alternative design was considered by the court to be small, and thus the alternative design should have been implemented. However, as Stapleton, *supra* note 545 at 259-260, some are critical of the “small cost” of alternative designs logic. She notes that Huber is critical of the infamous Ford Pinto case, *Grisham v Ford Motor Co*, 119 Cal App 3d 757, 174 Cal Rptr 348 (1981), suggesting that if all \$10 improvements that improved the safety of the car were to be included, that the price of car would raise significantly. Moreover, Huber notes that the risk that the \$10 piece would have helped to prevent only resulted from collisions that were “rare”. See Peter W Huber, *Liability: The Legal Revolution and Its Consequences* (New York: Basic Books, 1988). Certainly, costs are a relevant consideration. As Weinstein et al, *supra* note 580 at 44, note in a footnote: ““The court here explicitly notes that if a product is defectively designed, the economic consequences to a particular defendant will not save him from liability. Economic realities are, however, an integral part of the jury’s decision-making in determining whether or not the product is unreasonably dangerous. For example, the cost of alternative designs must be addressed during trial and be part of the risk-utility balancing. However, once the determination has been made that a design is defective, it will be of no consequence to a defendant to argue that such a determination will spell financial ruin for him.” Thus, likely to the ire of Huber, if the Pinto’s design was defective, the fact that fixing the defect would leave the car unaffordable and/or the company bankrupt, would not be a deciding factor for the court.

<sup>1131</sup> This was the court’s determination in *Baker v Suzuki*, *supra* note 1126.

<sup>1132</sup> An existing product can be deemed defective irrespective of the availability of an alternative design. As Stapleton, *supra* note 545 at 50, argues it is a “widely accepted fallacy that where there is no feasible alternative design, the product is *necessarily* not defective.” She further notes: “the absence of an alternative design is often wrongly treated as conclusive of the product’s non-defectiveness and thereby helps defendants” at 260. However, as she points out, “the more common phenomenon in the past has been for courts to allow evidence of an alternative design to go to the jury in a way which suggests that its existence alone justifies a verdict for the plaintiff”, *ibid*.

<sup>1133</sup> Theall et al, *supra* note 62 at L2-9. This point was made explicitly made in *Nicholson v John Deere*, *supra* note 606 at 60: “Standing at the forefront of this discussion, in this case of a duty to warn, is the fact the manufacturer put out a product which he knew was dangerous. Given this knowledge of the risk inhering in the ordinary use by a reasonably prudent consumer, when other more reasonable alternatives are available, there is first a duty not to manufacture in the intended defective way. It is only when a manufacturer is given the benefit of a doubt on the first question that the duty to warn may come into play.” The court in *Nicholson* went so far as to state that when there are safer alternatives to inherently dangerous products, no amount of warning would excuse a manufacturer from liability: “A manufacturer does not have the right to manufacture an inherently dangerous article when a method exists of manufacturing the same article without risk of harm. No amount of or degree of specificity of warning will exonerate him from liability if he does.”

approach by assessing the foreseeable harms and potential safer products – each case will turn on the particular facts before the court. As will be seen, much is dependent on whether or not a food product is dangerous, and if that danger is obvious to consumers. Nevertheless, it is worth noting that many food products are likely to have viable alternatives that, from a health perspective, would be safer to consumers<sup>1134</sup>, which may be sufficient to justify that these products carry warnings about their risks.

### 3.3. Industry and Regulatory Standards

Courts will often examine existing industry and regulatory standards when determining the standard of care.<sup>1135</sup> While these standards will often be considered a lower limit for products<sup>1136</sup>, if the court considers the standard in question to be reasonable, manufacturers who

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<sup>1134</sup> For example, foods that are high in fat, sugar or sodium could be manufactured with less of the offending ingredient. Similarly, high calorie food products can often be produced with fewer calories. While this may impact some aspects of the product that manufacturers find desirable, it is not clear that the utility outweighs the risks. For example, higher fat content is used to improve the taste of products, see, for example, Adam Drewnowski et al, “Taste Response and Preferences for Sweet High-fat Foods: Evidence for Opioid Involvement” (1992) 51 *Physiology & Behavior* 371, and Lauren Gravitz, “Taste Bud Hackers” (2012) 486 *Nature* S14. Again, this is something that the manufacturer would have to demonstrate.

<sup>1135</sup> See Klar, *Tort Law*, 5th ed, *supra* note 1022 at 363-371 and Linden & Feldthusen, *supra* note 589 at 201-251 for a discussion about the role of “general practice” or “custom” in determining the standard of care in negligence cases. Klar, *ibid* at 363, notes, “[e]vidence of general practice will be given more or less weight depending on the circumstances”, but that “[i]t is almost universally conceded that evidence of general practice can never, as a matter of law, settle the negligence issue” (at 365, referring to, among others, *Waldick v Malcolm* (1991), 8 CCLT (2d) 1 (SCC)). That legislative standards will be relevant for setting the standard of care for the manufacturing of food products clear. See, for example, *Wild Rose Mills v Ellison Milling* (1985), 32 BLR 125 (BC SC), where Justice Mackoof makes the following observation: “By the *Food and Drugs Act* and Reg. B.15.002, Parliament has set standards which must be adhered to by manufacturers and vendors of food products. The purpose of the legislation is to ensure that food products do not contain toxic substances in an amount which is deemed to be hazardous to the health of consumers. Food products which do not meet those standards are considered to be unfit for human consumption and their sale is forbidden. It is difficult to imagine a food product which can be regarded as being less reasonably fit for its intended purpose or of lesser merchantable quality than one which by law is deemed to be hazardous to the health of the consumer and the sale of which is prohibited by law. In selling such a product to the plaintiff the defendant was in breach of the implied terms of the contract of sale.”

<sup>1136</sup> Arguably, legislative and regulatory standards are more determinative for setting the benchmark for the standard of care, see Edgell, *supra* note 545 at 169-170. While the weight given to regulatory and industry standards varies, they serve as a useful benchmark for determining the expected standard of care. Weinstein et al, *supra* note 580 at 57 note, “it would be inappropriate for the judiciary to set a standard of product safety below that established

meet the standard will be deemed to have acted reasonably.<sup>1137</sup> The Supreme Court of Canada has explicitly recognized that legislative standards are relevant for determining the standard of care.<sup>1138</sup> In *Ryan v Victoria* the Court stated, “[t]he fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness.”<sup>1139</sup> That said, neither the breach of nor adherence to a statute is determinative of whether a defendant has acted negligently<sup>1140</sup>; instead, it only speaks to what is reasonable to expect from a manufacturer.<sup>1141</sup>

One of the most straightforward ways to assess how a reasonably prudent manufacturer would act is to consider industry standards.<sup>1142</sup> The customs of an industry can act as a both a

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by the legislature or an authorized standard-setting body.” Similarly, Weintsein et al, *ibid* at 59, note, “[t]he weight which courts accord to voluntary standards will depend, as in the case of government standards, on the reputation and thoroughness of the standard-setting process.”

<sup>1137</sup> See *Piche v Lecours Lumber Co*, [1993] OJ No 1686 (ON Ct J Gen Div). According to *Piche*, “there is a heavy onus on a plaintiff or claimant to show that in following the standards set by government regulation or an industry standard, the [manufacturer was] nevertheless negligent.”

<sup>1138</sup> The Court does not explicitly equate the two. As Shapo notes that regulation and tort law should not be strictly equated, given that “[r]egulation seeks to do at least two things that are not part of the formal job description of tort law: to deal comprehensively with an area of activity, and to set definitive standards”, *supra* note 536 at 18. He further notes, “regulation typically is highly prescriptive and specific, as well as forward looking”, *ibid*.

<sup>1139</sup> *Ryan v Victoria*, [1999] 1 SCR 201. The Court observes that while a statutory breach does not automatically give rise to liability, and adherence does not preclude liability, “[s]tatutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent.”

<sup>1140</sup> Edgell, *supra* note 545 at 31, notes that while statutory standards are useful evidence for determining what the standard of care is, the “breach of a statute ... is not determinative (particularly where it occurs without fault or was unforeseeable).” Per *Ryan v Victoria*, *ibid*, “a statutory breach does not automatically give rise to civil liability; it is merely some evidence of negligence. ... By the same token, mere compliance with a statute does not, in and of itself, preclude a finding of civil liability.” See also Theall et al, *supra* note 62 at L3-15-L3-16. The fact that legislative standards are necessarily approved by the government does not automatically act as a defence to negligence, and should not be taken as a tacit approval of the safety or reasonableness of a product. See, for example, *Willis v FMC Machinery and Chemicals & Diamond Shamrock Canada*, [1976] PEIJ No 38, (PEI SC), where government approval of a product was not held to be a defence to allegations of negligence. To be liable, however, a manufacturer will have to do more than simply breach a standard; the manufacturer will still have to be shown to have acted negligently, Edgell, *ibid* at 170ff.

<sup>1141</sup> Edgell, *ibid* at 31, notes, “[c]ompliance with statutory and regulatory authorities has been held not to exhaust the standard of care where they do not have particular application to the circumstances under consideration, and are, therefore, inappropriate to define what is reasonable in the particular circumstances.”

<sup>1142</sup> Theall et al, *supra* note 62 at L2-10: ““Establishing that a product’s design complied with industry

shield and a sword. If a food manufacturer complies with how an industry generally operates, this is a significant step towards demonstrating that they have acted prudently.<sup>1143</sup> Similarly, if a manufacturer does not comport with an existing standard, this can be used to infer that the manufacturer acted negligently. The onus is on the party relying on an industry standard to prove the existence of the standard.<sup>1144</sup> Such standards may be self-imposed, or they may be voluntary standards that are adopted across an entire industry.<sup>1145</sup> The closer a manufacturer's conduct conforms to accepted practices, the more likely they are to dispel any charge of negligence.<sup>1146</sup>

Deference to industry standards is unsurprising, given the overall tendency of courts to consider evidence of customary behaviour as relevant when determining what is reasonable in the circumstances.<sup>1147</sup> However, courts also defer to industry standards in instances where they

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standards often plays a crucial part in determining whether the product contained a design defect." Importantly, the absence of an industry standard does not suggest that a standard is unnecessary for that industry. In *Mayburry v Ontario (Liquor Control Board)* supra note 613, a defendant was found liable for the injuries a plaintiff sustained to their eye when a glass bottle was dropped and shattered. The court held that the absence of an industry practice of putting a plastic coating on the bottle to ensure the glass bottle would not pose a risk if dropped, did not shield the manufacturer from liability, as the defendant had a responsibility to use a safer design.

<sup>1143</sup> Weinstein et al, supra note 580 at 7, who suggest that evidence of compliance is "significant in a negligence action."

<sup>1144</sup> Per *Edmonton (City of) v Lovat Tunnel*, [2002] 328 AR 314 (AB QB) at para 252, "[a] party who relies on an industry standard has the onus of proving that standard", referring to Linda D Rainaldi, ed, *Remedies in Tort*, Vol 2 (Calgary: Carswell, 1987) at 16.

<sup>1145</sup> Theall et al, supra note 62 note that "evidence of custom is more useful in industries with a widespread and long-standing practice", at L2-18, but potentially less meaningful "when the manufacturing method or standard does not require technical knowledge, and the trier of fact can therefore determine what was reasonable", at L2-19. The state may also be involved in setting voluntary standards, see Edgell, supra note 545 at 167.

<sup>1146</sup> In determining what appropriate care entails, the court will assess whether or not a defendant's conduct is widely accepted by other members of the community. For example, in *Edmonton (City of) v Lovat Tunnel*, supra note 1144, the Alberta Court of Queen's Bench held that manufacturers generally will not be found liable for using materials or methods that are "commonly used and accepted at the time of manufacture", 2000 AB QB 882 at para 252. In establishing this principle, the court cites *London & Lancashire Guarantee & Accident Co of Canada v LA Comagnie FX Drolet*, [1944] SCR 82, where the court held that the construction material used by elevator company was neither imprudent nor negligent, as the company was "at liberty to choose between two methods of construction then usually employed by leading men of art".

<sup>1147</sup> Linden, *Canadian Tort Law*, 6th ed, supra note 808 at 178. For a general discussion, see *ibid* at 177-199. Edgell, supra note 545 at 27, notes that the courts have largely adopted Fleming's understanding of role and custom. See *Meisel v Tolko Industries*, supra note 1084, adopting John G Fleming, *The Law of Torts*, 7th ed (Sydney: Law Book Company, 1987) at 109.



may be reluctant to challenge the practices of an industry.<sup>1148</sup> This approach is more likely to be used when a court has very little understanding of how an industry operates<sup>1149</sup> or in cases involving highly technical or specialized products, such as medical products or pharmaceuticals.<sup>1150</sup>

Adherence to industry standards, however, is not sufficient to demonstrate that a manufacturer has used reasonable care.<sup>1151</sup> Industry standards are best thought of as a floor for determining acceptable conduct, not a ceiling.<sup>1152</sup> Moreover, conformity with custom will not act as a defence if the industry standard itself is determined to be negligent.<sup>1153</sup> While the courts often impose a heavy onus on plaintiffs to show that an industry standard is negligent<sup>1154</sup>, it is possible to demonstrate that an accepted industry standard is insufficient.<sup>1155</sup> As the Supreme Court of Canada noted in *Waldick v Malcolm*, “no amount of general community compliance will render negligent conduct reasonable.”<sup>1156</sup> A plaintiff can also challenge an existing industry

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<sup>1148</sup> However, Theall et al, *supra* note 62, contend that “evidence that a safer method existed can diminish the probity of industry practices”, at L2-19.

<sup>1149</sup> Linden, *Canadian Tort Law*, 6th ed, *supra* note 808 at 179.

<sup>1150</sup> For example, in determining the standard of care in *Buchan v Ortho Pharmaceutical*, *supra* note 67, the Ontario Court of Appeal considered the practice of Ortho Pharmaceutical’s American counterpart.

<sup>1151</sup> Edgell, *supra* note 545 at 28 (“conformity with custom or trade practices is not conclusive of reasonable care.”).

<sup>1152</sup> Weinstein et al, *supra* note 580 at 7.

<sup>1153</sup> Edgell, *supra* note 545 at 28. Edgell here points to *Waldick v Malcolm*, *supra* note 1135. Although not a products liability case, the Supreme Court did consider what impact a customary practice would have when determining the standard of care in occupier’s liability cases involving sanding driveways. The Court held, “the existence of customary practices which are unreasonable in themselves, or which are not otherwise acceptable to courts, in no way ousts the duty of care owed by occupiers”, at 126. Edgell, *ibid*, notes that industry groups that help set the standards could be liable for setting them negligently, at 175, n. 29. However, he acknowledges that he is not aware of any case on point.

<sup>1154</sup> Edgell, *ibid* at 29. Edgell refers to *Piche v Lecours Lumber Co*, *supra* note 1137; *Moss v Ferguson and Latham* (1979), 35 NSR (2d) 181 (NS TD); and, *Canada v Saskatchewan Wheat Pool*, [1983] 143 DLR (3d) 9 (SCC).

<sup>1155</sup> See, for example, *Murphy v Atlantic* (1979), 103 DLR (3d) 545 (NS TD), and *Williams v St John* (1983), 53 NBR (2d) 202 (NB QB).

<sup>1156</sup> *Waldick v Malcolm*, *supra* note 1135 at 126. The courts will look at warnings of competitors, however, when determining the adequacy of a label. See *Lambert v Lastoplex Chemicals*, *supra* note 65 and discussion on



standard by demonstrating that a superior alternative standard exists.<sup>1157</sup> As Weinstein and colleagues observe, “regardless of existing standards ... the final responsibility for reasonable behavior rests with the manufacturer.”<sup>1158</sup>

In determining an industry standard, courts will also consider what ought to be done, and not necessarily what is being done<sup>1159</sup>, as a way to encourage industries to work towards developing standards that benefit the consumer. Courts are reluctant to accept standards that prioritize the interests of industry, for example, by focusing on cost savings at the expense of consumers.<sup>1160</sup> In this respect, the courts act like gatekeepers to ensure that the industry standards are sufficient to protect consumers. There is a possibility, however, that a standard that a plaintiff suggests is superior for a particular industry may not actually be feasible. As Linden notes, “to demand more of an industry than compliance with the usual practice may be to dictate impossible standards or at least economically infeasible ones, which might have disastrous effects on business.”<sup>1161</sup> This is especially true in defective design cases. It is more difficult to see how expecting food manufacturers to provide adequate warnings about their food products would constitute either an impossible or economically infeasible standard.

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point below.

<sup>1157</sup> Edgell, *supra* note 545 at 30 contends that if a plaintiff is able to identify a superior standard, then manufacturers are unlikely to be able to defend against a products liability claim by claiming adherence to an industry standard. See also, *Baker v Suzuki*, *supra* note 1126. Edgell does note that “industry standards are relevant in assessing the availability of better alternative”, *ibid*.

<sup>1158</sup> Weinstein et al, *supra* note 580 at 7.

<sup>1159</sup> “Were it otherwise, an entire industry would be free, by maintaining careless methods, to set its own uncontrolled standard with no incentive to devise new and more efficient safety precautions”, *Williams v St John*, *supra* note 1155 at 257-258, the court is citing John G Fleming, *The Law of Torts*, 5th ed (Sydney: Law Book Company, 1977) at 118 who is citing *Bank of Montreal v Dominion*, [1930] AC 659 (SCC) at 666, as cited in Edgell, *supra* note 545 at 29.

<sup>1160</sup> Edgell, *supra* note 545 at 30 (“courts cannot accept a standard of care that gives undue weight to cost saving or outdated standards, or which arises from compromise or from the lowest common denominator.”). Weinstein et al, *supra* note 580 at 7 note, “negligence may be imposed for the failure of an industry to adopt or undertake technological improvements.”

<sup>1161</sup> Linden, *Canadian Tort Law*, 6th ed, *supra* note 808 at 179.

It is reasonable to presume that courts will defer to the customary practices of the food industry, given that the food industry incorporates highly technical, complex processes, at every level of production (from farm to fork).<sup>1162</sup> A great example of this is the iconic American snack cake, the Twinkie. The Twinkie's ingredients have been described as “the products of a rural-industrial complex, made from a web of chemicals and raw materials produced by or dependent on nearly every basic industry we know.”<sup>1163</sup> The sophistication involved in making what seems to be a basic snack cake illustrates why courts may be reluctant to infer standards without reference to the industry in question.<sup>1164</sup> Deference to industry standards may pose difficulties for plaintiffs in failure to warn claims involving food products. For example, if a failure to warn claim is brought against a fast food company for not providing an adequate warning of the risks inherent in their products<sup>1165</sup>, or by undermining warnings by making claims about the healthy

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<sup>1162</sup> Although beyond the scope of the current discussion, the entire food production system has been highly engineered to accommodate industry's interests. Whether to promote higher yields or to prolong shelf-life, the agri-food industry for the last century has been at the forefront of innovation and technological development in a vast array of fields. Consider the advancements to biochemical engineering that have emerged from the genetic modification of crops, primarily destined for human consumption. For a discussion about changes to food by the agri-food industry, see: Peter Pringle, *Food, Inc.: Mendel to Monsanto—The Promises and Perils of the Biotech Harvest* (Toronto: Simon & Schuster, 2003); Thomas F Pawlick, *The End of Food* (Toronto: Greystone Books, 2006); Patel, *Stuffed or Starved*, *supra* note 1042; Barry Glassner, *The Gospel of Food: Everything You Think You Know About Food is Wrong* (New York HarperCollins, 2007); Niclos Fox, *Spoiled: Why Our Food is Making Us Sick and What We Can Do About It* (New York: Penguin, 1998); Ingeborg Boyens, *Unnatural Harvest: How Genetic Engineering is Altering Our Food* (Toronto: Doubleday, 2000); Tim Lang & Michael Heasman, *Food Wars: The Global Battle for Mouths, Minds and Markets* (London: Earthscan, 2004); and Nestle, *Food Politics*, *supra* note 59, among many others.

<sup>1163</sup> Steve Ettliger, *Twinkie, Deconstructed: My Journey to Discover How the Ingredients Found in Processed Foods Are Grown, Mined (Yes, Mined), and Manipulated into What America Eats* (Toronto: Plume, 2007) at 257. When questioned by his daughter what one of the ingredients on the Twinkie package was, Ettliger embarked to discover what goes into the making of a Twinkie.

<sup>1164</sup> For example, Ettliger *ibid* discusses how Polysorbate 60, the ingredient his daughter initially inquired about, is actually derived from corn, oil palms, and petroleum, but involves complicated processing. See *ibid* at 187-197. There are many common food products on the market that involve highly technical and sophisticated ingredients and processes. For example, Justice Sweet noted in *Pelman I*, *supra* note 9 that McDonald's popular Chicken McNuggets, “are a McFrankenstein creation.”

<sup>1165</sup> This is one of the claims brought in *Pelman I*, *supra* note 9. Justice Sweet dismissed this claim on the grounds that the plaintiffs had not demonstrated that McDonald's products were “dangerous in any way other than

and nutritious nature of a product<sup>1166</sup>, the company will undoubtedly point to industry-wide practices as evidence that their conduct conforms to industry standards. Left unchecked by the courts, industry standards can quickly become a race to the bottom. Plaintiffs can assist the courts in setting an appropriate standard of care for food manufactures by demonstrating that current industry standards are in fact negligent by identifying safer alternatives.<sup>1167</sup>

### 3.4. Consumer Expectations

When determining the requisite standard of care expected of a manufacture courts will also consider the expectations of the consumer.<sup>1168</sup> Consumer expectations are important for identifying when a product is defective. According to the *Restatement (Second) of Torts*, a product is defective when it is “in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.”<sup>1169</sup> Indeed, consumer expectations have been described

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that which was open and obvious to a reasonable consumer”, and for failing to provide “sufficient specificity that the plaintiff’s consumption of McDonald’s products was a significant factor in their obesity and related health problems”, at 541.

<sup>1166</sup> As will be discussed below, indicating that a product is safe when in fact is not may actually render a product more dangerous.

<sup>1167</sup> While individual manufacturers may disappear if they fail to conform to consumer expectations, there is considerable room for the food industry to simply shift its practices. For example, given consumer pressure, McDonald’s ceased using beef extract in its fries and many manufacturers cut trans fats from their products in response to research about its health effects.

<sup>1168</sup> Note, this does not include a consumer’s expectations about shoddy, substandard or unmet expectations regarding quality or workmanship. As Edgell notes, “if the product were not unsafe or dangerous, but merely shoddy or substandard or failed to live up to expectations, then it seems that there would likely be no duty of care owed independent of the contractual obligations. In such a case, a party who is a stranger to the contract would have no cause of action. The distinction then between a shoddy and dangerous product would be very important”, *supra* note 545 at 160. As Waddams, *Product Liability*, *supra* note 534 at 35 notes, “unless the defendant misrepresents the quality of the product in some way, there is no sufficient reason to impose tortious liability for disappointed expectations of quality.”

<sup>1169</sup> *Restatement (Second) of Torts*, *supra* note 408. Similarly, products are unreasonably dangerous when they are “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases the product, with the ordinary knowledge common to the community as to its characteristics.”

as “the essence of strict tort liability”<sup>1170</sup> because the consumer expectation test focuses on the product as used by the consumer, and not the conduct of the defendant manufacturer.<sup>1171</sup>

The role of consumer expectations poses a challenge for failure to warn claims for some food products. If a defective product is defined as being “dangerous beyond the contemplation of the ordinary consumer”<sup>1172</sup>, it is obviously relevant for our purposes if consumers expect a food product to be ‘dangerous’ or ‘unhealthy’. Consider fast food. According to the *Pelman* court, consumers expect fast food products to be unhealthy.<sup>1173</sup> Certainly, the expectations of fast food are vastly different from those of fruits and vegetables.<sup>1174</sup> If a reasonable consumer is able to anticipate the dangers in the product and understands the risk of the injury, it is unlikely that such a food product will be considered defective.<sup>1175</sup>

However, what makes a consumer’s expectations about a product such an interesting area

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<sup>1170</sup> Weinstein et al, *supra* note 580 at 45.

<sup>1171</sup> *Ibid.* Although this would apply to a system of strict liability, it is an applicable tool in negligence cases. Waddams, referring to the *Restatement (Second) of Torts*, *supra* note 408, observes that it is a legitimate way to determine if a product is defective by considering whether the product falls short of what a consumer expected. He notes: “Inherent in the concept of products liability is the notion that the product in question has fallen short of what it ought to have been; in other words that is defective. The *Second Restatement of Torts* speaks of a product “in a defective condition unreasonably dangerous to the user or consumer or to his property”, and though the *Restatement* is concerned with strict liability, it is submitted that the same test applies to the negligence cases. Not every product that causes damage is *ipso facto* a source of liability. Lord Atkin’s expression of the duty to take reasonable care [in *Donoghue*] does not draw attention to the fact that before any question arises of the defendant’s conduct, there must be a finding, explicit or implicit, that the product itself falls short of reasonable standards. The notion is, however, inherent in his speech and in the speeches of Lords Thankerton and Macmillan”, *Product Liability*, *supra* note 534 at 47.

<sup>1172</sup> Shapo, *supra* note 536 at 33.

<sup>1173</sup> *Pelman I*, *supra* note 9.

<sup>1174</sup> Indeed, expectations are likely to differ between fast food outlets. Justice Sweet seems to suggest this is the case, noting the particular knowledge about the unhealthy attributes of McDonald’s food, *Pelman I*, *supra* note 9. Expectations for food undoubtedly differ even between the items on a particular outlet’s menu. Consider the consumer’s (misguided) expectation that healthy options, such as salads, are the healthier option on the menu of some fast food outlets. Ultimately, this determination will need to be made on a case-by-case basis.

<sup>1175</sup> Weinstein et al, *supra* note 580 at 46-47, referring to *Vincer v Eseter Williams All-Aluminum Swimming Pool Company*, 69 Wisconsin 2d 326, 230 Northwestern 2d 794 (1975): “If the average consumer would reasonably anticipate the dangerous condition of the product and fully appreciate the attendant risk of injury, it would not be unreasonably dangerous and defective. This is an objective test and is not dependent upon the knowledge of the particular injured consumer.”

for consideration with respect to food products is that a manufacturer, ultimately, can do a lot to shape consumer expectations. Considerable attention has been given to the impact of food advertising on food choices<sup>1176</sup>, including the association between advertising and obesity.<sup>1177</sup> How a product is portrayed goes beyond advertising, and incorporates the broad way that manufacturers use media, as well as the more subtle ways that a product is established in the mind of a consumer.<sup>1178</sup> And the efforts are meaningful. As Shapo notes:

The images themselves include general conceptions in the public mind, built up over time, about the functions and risks of certain types of products. Every product sale draws on these reservoirs of meaning in the minds of consumers, and the main current of products liability law represents a response to the way in which sellers tap those impressions.<sup>1179</sup>

In a general sense, manufacturers need to be wary about the messages they send out about their products.<sup>1180</sup>

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<sup>1176</sup> For example, see Harris, Bargh & Brownell, *supra* note 861. Importantly, food manufacturers focus their advertising on specific populations, see, for example, Vani R Henderson & Bridget Kelly, “Food Advertising in the Age of Obesity: Content Analysis of Food Advertising on General Market and African American Television” (2005) 37 *Journal of Nutrition Education and Behavior* 191.

<sup>1177</sup> This is especially the case with respect to the impact of advertising on childhood obesity, see, for example: Dietitians of Canada, *Advertising of Food and Beverages to Children: Position of Dietitians of Canada* (Toronto: Dietitians of Canada, 2010); Christopher J Ferguson, Monica E Muñoz & Maria R Medrano, “Advertising Influences on Young Children’s Food Choices and Parental Influence” (2012) 160 *Journal of Pediatrics* 452; Emma J Boyland & Jason CG Halford, “Television Advertising and Branding. Effects on Eating Behaviour and Food Preferences in Children” (2013) 62 *Appetite* 236; and, Roseann B Termini, Thomas A Roberto & Shelby G Hostetter, “Food Advertising and Childhood Obesity: A Call to Action for Proactive Solutions” (2011) 12 *Minnesota Journal of Law, Science & Technology* 619. It is beyond the scope of this chapter to fully consider the impact of advertising on food choice.

<sup>1178</sup> Shapo, *supra* note 536 at 35-36. For example, product placement in prime-time television is one way that food manufacturers target adolescents, see Sarah E Speers, Jennifer L Harris & Marlene B Schwartz, “Child and Adolescent Exposures to Food and Beverage Brand Appearances During Prime-time Television Programming” (2011) 41 *American Journal of Preventive Medicine* 291.

<sup>1179</sup> Shapo, *ibid* at 36.

<sup>1180</sup> Weinstein et al, *supra* note 580 at 37. Arguably, actors throughout the chain of distribution will have to be wary of how they talk about a product. In *Walford (Litigation Guardian Of) v Jacuzzi Canada (CA)*, *supra* note 915 the Ontario Court of Appeal considered what employees communicated to Mrs. Walford about the safety of a waterslide for her pool, and were found liable when the advice they gave did not properly warn her of the dangers of using the slide in a pool of her depth, leaving her daughter a quadriplegic. Crucially, the employee’s business did not sell the waterslide to Mrs. Walford, but only a few parts needed for the installation. The nature of the risk was

#### 4. WARNINGS FOR WHAT?

Thus far, consideration has been given to how the courts will determine the requisite standard of care expected from manufacturers in a general sense. This part will entail a more specific examination of four categories of risks that are possible, and, applying the discussion from the previous two parts, will consider how these are relevant for food products. The four categories of risk considered here are: inherent dangers, foreseeable misuses, obvious dangers, and abnormal uses or abuses.<sup>1181</sup> There is considerable overlap between these categories, given that a product's dangers are largely dependent on the circumstances.

Before proceeding, it is worth bearing in mind two things. First, the following analysis focuses on obesity, and accepts that obesity is a significant risk facing consumers. While comparisons between obesity and other risks/dangers identified in the case law will be made throughout this section, the success of failure to warn claims as set out using the following analysis will be contingent on the court accepting that obesity is a legitimate risk. Second, while the following will occasionally use specific food products as examples, this part will not prescribe warnings for any specific products, but will instead primarily focus on how warnings would apply generally, bearing in mind how warnings will apply to food products based on the categorizations discussed in the previous chapter: product, processes, and nutritional profile.

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sufficient that the court held the employees ought to have warned Mrs. Walford of the hidden dangers. In dissent, Justice Rouleau did not hold the employees liable, but largely because of the nature of the “broad questions posed by Mrs. Walford”, at para 76. Had they answered specific questions about safety, the court might have decided the issue unanimously.

<sup>1181</sup> Others adopt a different approach. For example, see Edgell, *supra* note 545 at 69, who identifies three categories of risks to be warned against: “(1) warnings about dangers resulting from negligent design or manufacture (which is a separate duty from the duty to take reasonable care in design and manufacture); (2) warnings about dangers involved in using the product in certain circumstances or in certain ways; and (3) warnings about inherent, unavoidable risks to the unusually susceptible consumer (“thin-skulled”) of the generally safe product” (Edgell refers to *Buchan v Ortho Pharmaceutical*, *supra* note 67 as an authority).

#### 4.1. Dangerous Products: Inherently Dangerous and Attendant Dangers

A duty has long been imposed on manufacturers to warn consumers about the dangers in products, whether they were inherent dangers or dangers attendant on the use of the product.<sup>1182</sup> Initially, the two categories were treated as distinct. The category of “inherently dangerous products” emerged as an exception to no-privity rules<sup>1183</sup>, thereby permitting plaintiffs to recover from defendants with whom they had no contractual relationship.<sup>1184</sup> A product would be inherently dangerous if “the danger of injury ... stems from the nature of the product itself.”<sup>1185</sup> The concept of inherently dangerous products has remained an influential concept in duty to warn cases. The leading Canadian authority on point is *Lambert*, where the Supreme Court of Canada held that manufacturers owed a duty to warn of defects in products that might “give rise to injury in the ordinary course of use.”<sup>1186</sup> Subsequent courts have relied on *Lambert* to support the principle that manufacturers must warn consumers of the dangers inherent in their products.<sup>1187</sup>

Historically, the category of “inherently dangerous products” was used to impose on the manufacturer a higher standard of care.<sup>1188</sup> However, the category has largely been deemed

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<sup>1182</sup> Linden & Feldthusen, *supra* note 589 at 636.

<sup>1183</sup> Prior to *Donoghue v Stevenson*, *supra* note 16, plaintiffs were only able to recover from a defendant with whom they had a contractual relationship (privity).

<sup>1184</sup> Linden & Feldthusen, *supra* note 589 at 646 note, the category was devised to “avoid the horror of” *Winterbottom v Wright*, *supra* note 550, a case where the court held the plaintiff had not redress because of the doctrine of privity. “After *Donoghue v. Stevenson* was decided, however, the need for this exception diminished, and over the ensuing decades the courts have recognized this despite the reluctance of some authors to jettison it”, *ibid*, referring to *Donoghue v Stevenson*, *supra* note 16.

<sup>1185</sup> *LaPlant v EI Dupont de Nemours & Co*, 346 SW 2d 231. Note, *LaPlant* specifically notes that inherent dangers are not from “any defect in the product.”

<sup>1186</sup> *Lambert v Lastoplex Chemicals*, *supra* note 65 at 574.

<sup>1187</sup> For example, the three other seminal cases for this project both rely on *Lambert v Lastoplex*, *supra* note 65 – see *Hollis v Dow Corning*, *supra* note 66 at para 20 and, *Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 19 and *Létourneau v JTI-MacDonald*, *supra* note 68 at paras 219, 227.

<sup>1188</sup> Linden & Feldthusen, *supra* note 589 at 646-647, and Theall et al, *supra* note 62 at L3-11-L3-13.



unnecessary.<sup>1189</sup> In part, this reflects the reality that many products are not easily classified<sup>1190</sup> – and this is certainly the case for food products. As famously stated by Lord Justice Scrutton, it is difficult to “understand the difference between a thing dangerous in itself, as poison, and something not dangerous as a class, but by negligent construction dangerous as a particular thing.”<sup>1191</sup> Reliance on a strict demarcation between the two here is not a logical approach, given that the standard of care is to be determined on a case-by-case basis. As Theall and colleagues note, rather than rely on two categories, it is more appropriate for a court to “determine whether, in the circumstances of the case, a particular good is more or less dangerous and therefore requires a greater or lesser standard of care.”<sup>1192</sup> And while courts will certainly assess a product’s inherent risks<sup>1193</sup>, the circumstances of the case are equally as important.<sup>1194</sup>

Consequently, several courts have noted that there is no real difference between inherent dangers

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<sup>1189</sup> Theall et al, *supra* note 62 at L3-12. However, while noting that the categorization is unnecessary, Theall and colleagues note “the courts sometimes take this approach when determining the requisite standard of care”, *ibid*. See also Linden & Feldthusen, *ibid* at 646 (“the notion has not been completely discarded.”).

<sup>1190</sup> Theall et al, *supra* note 62 at L3-11 note that some products like propane tanks will always be dangerous, referring to *Murphy v Atlantic*, *supra* note 1155, where the plaintiff’s house damaged from explosion resulting from damaged gas line. The defendant deemed liable for not ensuring propane had sufficient odor to alert plaintiff of leak. However, contrast this with *Rae and Rae v T Eaton Co (Maritimes)*, *supra* note 662, where the court held that the capacity to be explosive was not sufficient to deem the product as dangerous, at para 21. See also *Read v J Lyons & Co*, [1947] AC 156 at 161.

<sup>1191</sup> *Hodge & Sons v Anglo-American Oil Co* (1922), 12 Lloyd’s L Rep 183 at 187, as cited in Linden & Feldthusen, *supra* note 589 at 646.

<sup>1192</sup> Theall et al, *supra* note 62 at L3-13. See also *Rae and Rae v T Eaton Co (Maritimes)*, *supra* note 662 at para 46 (“... test of liability is not whether the product sold was or was not a ‘dangerous thing’, but considering its nature and all relevant circumstances whether there has been a breach of duty by the manufacturer which he owed to the injured person.”).

<sup>1193</sup> See *Rozenhart v Skier’s Sport Shop (Edmonton)*, [2002] AJ No 1063 (AB QB), for a discussion concerning the influence of inherent risks on both the duty and standard of care, and some of the confusion around this concept. The Alberta Court of Queen’s Bench ultimately determined that “it is erroneous to say that considerations of inherent risk negate a defendant’s duty of care. It can not be said that the presence of inherent risk in an activity fundamentally changes the nature of a relationship between two parties so as to justify a decision in law that the relationship is one that ought not give rise to a duty”, at para 51. The Court did hold, however, that inherent risks modified the standard of care, at para 95.

<sup>1194</sup> For example, consider the example of *Goldsworthy v Catalina Agencies*, *supra* note 951 where a bicycle was found to be inherently dangerous when not properly assembled or maintained.

and dangers attendant on the use.<sup>1195</sup> Thus, manufacturers are required to warn “about any dangerous properties of their products, whether they are inherent or attendant on use.”<sup>1196</sup>

Instead of the antiquated category of “inherently dangerous”, courts determine the standard of care based on a consideration of the product and the circumstances.<sup>1197</sup> As the danger and probability of harm increases, the standard of care expected will also increase.<sup>1198</sup> This was the approach taken in *Rae and Rae v T Eaton Co (Maritimes)*, where the court held the capacity for a product to explode did not immediately classify it as dangerous.<sup>1199</sup> Here, the fact that the

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<sup>1195</sup> For example, see *Ruegger v Shell Oil Company of Canada*, *supra* note 918 at para 22: “I think there is no difference between the duty to warn of inherent dangers and of the dangers attendant on the use.” The Court refers here to *Fillmore’s Nurseries v N American Cyanamid* (1958), 14 DLR (2d) 297 (NS SC) at 315-316.

<sup>1196</sup> *Tudor Inn Reception Hall (1992) v Merzat Industries*, [2006] OJ No 3629 (ON Sup Ct J) at para 8.

<sup>1197</sup> *Cape Bretwon (County) v Chappell’s*, [1962] 36 DLR (2d) 58 (NS SC), rev’d by *Chappell’s v Cape Breton*, [1963] SCR 340. “There is no such rule, however, founding a special duty upon the invariable character of such things. Instead it is recognized that the only prerequisite to duty in negligence is foreseeable risk lurking in a totality of circumstances of which the nature of the thing or substance, used or created, is only one facet, though an important one”, at para 64. The court here cites several authorities, including *Rae and Rae v T Eaton Co (Maritimes)*, *supra* note 662. In *Walford (Litigation Guardian Of) v Jacuzzi Canada (CA)*, *supra* note 915 the court held that the waterslide was dangerous in the situation, even though it would not have been dangerous in other circumstances. This constituted a “hidden danger”, and accordingly warranted a warning, at para 58.

<sup>1198</sup> *A & L Plumbing & Heating v Ridge Tool Co*, [2008] 313 Sask R 19 (SK QB) at para 100: “The burden of taking precautions increases as the probability of harm and the severity of the damage threatened increases”. See also Linden, *Canadian Tort Law*, 3rd ed, *supra* note 1027 at 597-598 and RFV Heuston, *Salmond on the Law of Torts*, 12th ed (London: Sweet & Maxwell, 1957) at 542-543.

<sup>1199</sup> In this case, a manufacturer was not found liable when a nozzle from a can of artificial snow hit a 10-year-old girl in eye when she was banging the can against concrete, because the possibility of such an injury deemed to be too remote, *Rae and Rae v T Eaton Co (Maritimes)*, *supra* note 662 at para 49 (“The possibility of the container ever exploding was, it seems to me, remote, and even if it did explode, the chances of its injuring anyone were still more remote.”). Recognizing that courts have generally held explosives to be dangerous things, Patterson J. contended that the capacity to explode does not, on its own, immediately classify an item as a “dangerous thing.” Instead, the court held that the determination of whether an explosive was a dangerous thing required considering (1) the probability of its exploding, (2) the probability of any damage that would result if it did explode, and (3) the nature of the container holding the explosive. What is particularly interesting about this case is that, while recognizing the artificial snow can had explosive capacity, the court nevertheless held that this capacity did not necessarily warrant the can being classed as a dangerous thing, at para 21, and that “[t]her was certainly nothing inherently dangerous in the container and its contents and it was only when the gas was liberated in the most unusual circumstances of this case that any damage resulted”, at para 22. This case will be considered in more detail below. As a result, the court held that the manufacturer did not need to provide a warning about the remote risk of harm. The court noted: “I do not think a reasonable man would foresee the risk of harm to anyone from the container, apart from those dangers that were warned against on the label. I do not think that Aerocide could be reasonably expected to anticipate an explosion of the container, or that if it did explode, harm would ensue”, *ibid* at para 49. See also *Resurfi v Hanke*, *supra* note 602.

damage was not foreseeable factored into the court's decision-making.<sup>1200</sup> Importantly for present purposes, *Rae and Rae v T Eaton Co (Maritimes)* was one of the authorities cited in *Hollis* for the proposition that products that are ingested are subject to a high standard of care,<sup>1201</sup> a principle which, in turn, has been used to impose a high standard of care on a number of products.<sup>1202</sup> Of course, the court will still have to determine for each product whether or not it is dangerous – but rather than consider the character of the product, what is important is how the product will be used.<sup>1203</sup> This does pose a considerable challenge for food products, given that there are well over 300,000 food products available on the market, and new products are consistently being developed. This is deemed to be sufficient grounds for adopting the approach identified in chapter five that warnings should be based on products that share common attributes, such as specific ingredients or product classes, processes, or nutritional profiles.

In *Famarkis v Canadian Tire*, the court noted there is a range of risks that need to be considered:

At the low end of that range of that duty are the circumstances when there is no duty at all, given the simplicity of the product as well as the very low risks

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<sup>1200</sup> See *Desranleau v Herrick*, [1979] 10 Alta LR (2d) 211 (AB QB).

<sup>1201</sup> *Hollis v Dow Corning*, *supra* note 66, per La Forest J, a “manufacturer of products that are ingested, consumed or otherwise placed in the body, and thereby have a great capacity to cause injury to consumers, are subject to a correspondingly high standard of care under the law of negligence”, at para 23.

<sup>1202</sup> For example, see 376599 *Alberta v Tanshaw Products*, [2005] AJ No 670 (AB QB), where this standard of care was imposed on novelty foam used at a nightclub even though the foam was not intended to be ingested, it came into close contact with attendees.

<sup>1203</sup> This principle was articulated nicely in *Cape Bretwon (County) v Chappell's*, (NS SC), *supra* note 1197 at para 65: “It is not the dangerous character of such things per se which attracts the duty, but the fact that as to be used, or to be applied, or to be created, in the context of the work, they will present a foreseeable hazard of an unusual character -- which imposes a special duty of care to neutralize that hazard. The thing or substance may be potentially dangerous as to fire in its nature, e.g., acetylene torches, hot rivets, inflammable chemicals. Nevertheless the existence of a legal duty in respect of them -- and its extent -- must be determined by reference also to the circumstances attendant upon their contemplated use, such, e.g., as the place where, the manner in which, and the time during which, they are to be used for the anticipated purpose.” See also *Farmakis v Canadian Tire*, [2003] OJ No 421 (ON Sup Ct J), which holds: “The law is clear that the duty is determined by the character and complexity of the product in question, as it does on the risks involved”, at para 24.

associated with its use. Or, indeed, arguably, the dangers associated with a product may be so patent and well known that the need to warn is obviated. At the other end of the spectrum are highly dangerous products the misuse of which may lead to serious bodily harm, or even death.<sup>1204</sup>

Although there are products that might always be at one end or the other, risks associated with many products vary based on circumstance.<sup>1205</sup> Thus, it is necessary to take into account all of the circumstances at play.<sup>1206</sup> This was the case in *Buchan*, where the court found that oral contraceptives, although ordinarily safe, could be dangerous for some consumers.<sup>1207</sup> Moreover, it is entirely possible for a product to be safe for many consumers yet endanger a subset of users.<sup>1208</sup> Products, therefore, may be safe for one group yet dangerous for another – so the

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<sup>1204</sup> *Farmakis v Canadian Tire*, *ibid* at para 22. In this case, the court held “that a simple 5-step household ladder falls rather close to the bottom of the spectrum so far as the duty to warn is concerned. In the hands of an adult of average intelligence, it may well be argued that there is no duty to warn”, at para 24.

<sup>1205</sup> This was explained well by the court in *Ruegger v Shell Oil Company of Canada*, *supra* note 918 at para 21: “I refer to the reasoning of Lord Atkin that the difference between a thing inherently dangerous and those that may become dangerous on use is an invalid one. A loaded rifle is a dangerous thing, so is a grenade or a stick of dynamite, but these things even will do no harm unless wrongly handled. A loaded rifle does not damage unless the trigger is pulled, a grenade unless the pin is pulled, dynamite unless it is shocked into explosion. So with 2-4-D. Although the danger is in the product itself, when properly handled it is like the loaded rifle, it does no harm; but when improperly and unscientifically applied, it is a dangerous thing as regards property.”

<sup>1206</sup> See, for example, Allen M Linden & Bruce Feldthusen, “Negligence” in *Halsbury’s Laws of Canada* (Markham: LexisNexis, 2012) at 56-57 [*Halsbury’s*] “There is no legal classification of work or things as dangerous or not dangerous. Danger is a matter of degree and every activity is fraught with some possible element of danger to others. The law in all cases exacts a degree of care commensurate with the risk created, and the more dangerous the act the greater the care that must be taken in performing it”, referring to *Rae and Rae v T Eaton Co (Maritimes)*, *supra* note 662.

<sup>1207</sup> *Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 55. Per *Pack v Warner (County)*, *supra* note 926: “it is a question of degree in every case whether sufficient warning has been given.” See also *Deliva v Chrysler Canada*, *supra* note 604 at para 23, a case that involved an air bag that deployed for no apparent reason: “Although in this case we do not have a product which is dangerous in and of itself, the defendant knew or ought to have known that in certain instances, it could be dangerous and could harm a person such as the plaintiff. It did not issue any type of warning. It did not attempt to remedy the problem. The fact that the NHTSA closed its file because it did not identify a safety related defect trend does not mean there was no negligence.”

<sup>1208</sup> Per *Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 55: “Whether a particular warning is adequate will depend on what is reasonable in the circumstances. But the fact that a drug is ordinarily safe and effective and the danger may be rare or involve only a small percentage of users does not necessarily relieve the manufacturer of the duty to warn. While a low probability or a small class of endangered users are factors to be taken into account in determining what is reasonable, these factors must be balanced against such considerations such as the nature of the drug, the necessity for taking it, and the magnitude of the increased danger to the individual consumer.”

foreseeable consumer perhaps is as critical as the nature of the product itself, and thus is determinative of when a warning is required.<sup>1209</sup>

Therefore, it is not necessary to determine that a food product is dangerous *in toto*. Instead, a court taking into account all of the relevant factors, could find a food product that is ordinarily safe to be unsafe for some particular users. For example, high salt food products may be ordinarily safe for some consumers, but would be dangerous for consumers with hypertension, reduced kidney function, or the elderly.<sup>1210</sup> Just as there is no category of dangerous things, there is no clear category of safe foods and unsafe foods; “there are only some things which require more and some which require less care.”<sup>1211</sup> As articulated in *Read v J Lyons & Co*, “[t]he true question is not whether a thing is dangerous in itself but whether, by reason of some extraneous circumstances it may become dangerous.”<sup>1212</sup>

The responsibility for determining whether or not a product is dangerous (or becomes dangerous), and thus for determining when a warning is appropriate, rests with manufacturers. As noted above, manufacturers are treated as experts, and it is reasonable for consumers to rely on manufacturers.<sup>1213</sup> As noted by the court in *Ruegger v Shell Oil Co of Canada (Ruegger)*,

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<sup>1209</sup> See discussion in part four on the allergic or sensitive consumer.

<sup>1210</sup> For example, see examples provided at WHO, “Reducing Sodium Intake to Reduce Blood Pressure and Risk of Cardiovascular Diseases in Adults”, online: WHO, [www.who.int/eleana/titles/socium\\_cvd\\_adults/en/](http://www.who.int/eleana/titles/socium_cvd_adults/en/).

<sup>1211</sup> Heuston, *supra* note 1198 at 542-543, quoting from *Read v J Lyons & Co*, [1947] AC 156, *supra* note 1190. Salmond notes, “the category of things dangerous *per se* has become unnecessary: the sole question now is whether the degree of care appropriate to the circumstances has been exercised. The fact that there is a special duty to take precautions does not mean that there is a special category in which alone the duty exists”, *ibid*.

<sup>1212</sup> *Read v J Lyons Co*, *ibid* at 161.

<sup>1213</sup> Edgell, *supra* note 545 at 16 (“it is a more realistic and limited task to expect the manufacturer of a product to obtain the necessary information and expertise to assess their own product or products.”). This reliance is particularly important in a class of products such as food, where there are literally hundreds of thousands of products, and where one manufacturer is likely to offer numerous products that are very similar in nature. Consider, for example, when a product has a “lower in salt” claim. It might not be clear to a consumer that a food product can qualify to be marketed as lower in salt based on a comparison with the regular product. The *Food and Drugs Regulation*, CRC, c 870, s B.01.513, which holds that a product can label their product as having reduced sodium if

manufacturers as experts ought to know the characteristics of their products that require warnings.<sup>1214</sup> Importantly, ignorance of what warnings should be provided is not a valid defence.<sup>1215</sup> Thus, the obligation on manufacturers to determine the risks is high. For example, the defendant in *Ruegger* was held liable for the dangers of invisible drift of spray or vapour of its pesticide.<sup>1216</sup> Similarly, in *Fillmore's Valley Nurseries v North American Cyanamid* (*Fillmore's*) the manufacturer was required to warn about the dangers associated with its agricultural chemical when it was used in less than favourable circumstances.<sup>1217</sup> The expectation, then, is that manufacturers will keep abreast of scientific research that is relevant to its product.<sup>1218</sup> Indeed, manufacturers have been found to have “a duty to adequately test and to

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the food contains at least 25% less sodium than it did so previously. Thus, a product high in salt may nevertheless bear the designation “lower in salt” even if it still is high in salt based on the recommended daily value.

<sup>1214</sup> *Ruegger v Shell Oil Company of Canada*, *supra* note 918 at para 28, relying on *LaPlant v EI Dupont de Nemours & Co*, *supra* note 1185. See also *Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 36-37 and *Labrecque v Saskatchewan Wheat Pool*(SK QB), *supra* note 934 at para 44: “It is not answer for the manufacturer to say that as of the fall of 1973, it was unaware, notwithstanding the suitability of Treflan for the purpose for which it was manufactured and marketed, that the herbicide possessed characteristics of danger, particularly to flax seed, when put to use. In placing the product on the market, it was holding itself out as being knowledgeable in the field and it is only reasonable to conclude that it ought to have known of the potentially dangerous characteristics against which an adequate warning should have been given.”

<sup>1215</sup> *Ruegger v Shell Oil Company of Canada*, *supra* note 918 at para 28 (“The Shell Oil company cannot escape liability by pleading ignorance of the characteristics of Amine 80.”). As Edgell, *supra* note 545 at 16 notes, “[t]o allow suppliers of products to rely upon their own lack of knowledge in defence of claims would not eliminate the relationship of reliance; it would, however, leave consumers and the public vulnerable when that reliance has proved unwarranted.”

<sup>1216</sup> *Ruegger v Shell Oil Company of Canada*, *ibid*, see in particular para 24-28.

<sup>1217</sup> *Fillmore's Nurseries v N American Cyanamid*, *supra* note 1195. As distilled by the court in *Ruegger v Shell Oil Company of Canada*, *ibid* at para 18, “if conditions were not favourable for the application of the chemical in question, it was dangerous or at least a potentially dangerous substance and that it was an omission amounting to negligence to fail to warn of that danger.” See also *Chapman Chemicals v Elms Planting* (1949), 222 SW (2d) 820 (“If one casts into the air a substance which he knows may do damage to others, and which in some circumstances will certainly do so, he is required to know how far the substance will carry or be conveyed through the air and what damage it will do in the path of its journey, and if he releases such a substance, either from ignorance or in indifference to the damage that may be done, the rule of strict liability should be applied.”).

<sup>1218</sup> *Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 54 (“A manufacturer of prescription drugs occupies the position of an expert in the field; this requires that it be under a continuing duty to keep abreast of scientific developments pertaining to its product through research, adverse reaction reports, scientific literature and other available methods.”). See also per *Borel v Fibreboard Paper Products*, 493 F 2d 1076 (5th Cir 1973), where court held that manufacturers are obliged to keep abreast of any scientific discoveries and are presumed to know



warn.”<sup>1219</sup> Consequently, manufacturers will generally be held liable if they fail to warn about dangers that were scientifically discoverable when the plaintiff was injured.<sup>1220</sup> A manufacturer may even be liable for failing to warn about risks where the cause is unknown or where the risk is statistically small.<sup>1221</sup>

On this front, industry standards are extremely important, as they could implicate a manufacturer. As was determined in *Daretz v Fibreboard*, “[t]he actual knowledge of an individual manufacturer is not the issue.”<sup>1222</sup> If one manufacturer knows, then awareness of the risk is imputed to all other manufacturers.<sup>1223</sup> In *Buchan*, the defendant was determined to be aware of the knowledge of the risks inherent with the use of its oral contraceptives as they had

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results of all such advances. However, when there is no evidence, a manufacturer will not be liable. This was the case in *Moore v Cooper Canada*, [1990] OJ No 66, (H.C.J.). While the court found that a hockey helmet was not an inherently dangerous product, it held that even if it were, “the evidence shows that this type of injury was virtually unknown in hockey prior to 1980 and the defendant neither knew of any danger its product posed in this regard nor could it reasonably have been expected to know of it.”

<sup>1219</sup> *Miller v Merck Frosst Canada*, 2013 BCSC 544 at para 67, referring to *Hollis v Dow Corning*, *supra* note 66 at paras 38-42 and *Buchan v Ortho Pharmaceutical*, *supra* note 67 at paras 54-55. See also *Daretz v Fibreboard Co*, 765 F 2d 456 (5<sup>th</sup> Cir 1985) (“Moreover, they each bear the duty to fully test their products to uncover all scientifically discoverable dangers before the products are sold.”).

<sup>1220</sup> Cassels & Jones, *supra* note 84 at 52, referring to *Borel v Fibreboard Paper Products*, *supra* note 1218.

<sup>1221</sup> *Hollis v Dow Corning*, *supra* note 66 stands for both principles. When discussing Dow’s assertion that ruptures were small and could not warn of this risk, the Supreme Court held, “these arguments fail because both are based upon the assumption that Dow only had the obligation to warn once it had reached its own definitive conclusions with respect to the cause and effect of the “unexplained” ruptures. This assumption has no support in the law of Canada. Although the number of ruptures was statistically small over the relevant period, and the cause of the ruptures was unknown, Dow had an obligation to take into account the seriousness of the risk posed by a potential rupture to each user of a Silastic implant. Indeed, it is precisely because the ruptures were “unexplained” that Dow should have been concerned. Certainly, it would not have been onerous for Dow to have included an update in their product inserts to the effect that “unexplained” ruptures had been reported which were not attributable to surgical procedures, and a list of the possible side-effects of such ruptures”, at para 41.

<sup>1222</sup> *Daretz v Fibreboard Co*, *supra* note 1219.

<sup>1223</sup> Cassels & Jones, *supra* note 84 at 53, referring to *Daretz v Fibreboard Co*, *ibid*, holding that “beyond even the “state of the art” rules of industry knowledge and held that constructive knowledge imputed from one manufacturer to another could impose a duty to warn...”. In essence, if manufacturer A knows, then manufacturer B is assumed to know. Cassels and Jones note, “[t]he American decisions appear to establish: the duty of a manufacturer to research and to possess expert knowledge in the field; the presumption that each manufacturer knows of all advances in knowledge, with “actual knowledge” not an issue; and, most important, the principle that the knowledge of one manufacturer can be imputed to another for the purposes of proof of “failure to warn””, *ibid* at 54.



been discovered elsewhere.<sup>1224</sup> Importantly, in *Buchan*, the Ontario Court of Appeal held that manufacturers were not at liberty to ignore evidence about risks simply because they did not find it convincing. The court held,

where medical evidence exists which tends to show a serious danger inherent in the use of a drug, the manufacturer is not entitled to ignore or discount that information in its warning solely because it finds it to be unconvincing; the manufacturer is obliged to be forthright and to tell the whole story.<sup>1225</sup>

This was described in *Hollis* as an aspect of the ongoing duty to warn imposed on manufacturers.<sup>1226</sup> Manufacturers have a continuing obligation to inform consumers of any developments regarding their products, even if they do not find the developments concerning said products conclusive.<sup>1227</sup> This was affirmed in *Létourneau*, as discussed above.<sup>1228</sup>

It is especially important for manufacturers who portray their products as being safe to keep abreast of any scientific information about potential risks. In *Watson v Buckley*, hair dye was held to be especially dangerous because “everybody was assured that it was perfectly safe.”<sup>1229</sup> This reasoning has been accepted in subsequent cases, such as *Fillmore’s*<sup>1230</sup> and

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<sup>1224</sup> *Buchan v Ortho Pharmaceutical*, *supra* note 67. Critically, in this case, it was clear that the defendant company was of research identifying risks. The court found that the defendant attempted “to allay fears raised by British study and, more generally, to exhort salesmen to pursue aggressive sales tactics emphasizing the safety of Ortho’s products and de-emphasizing their potential hazards”, *ibid* at para 48.

<sup>1225</sup> *Ibid* at para 55.

<sup>1226</sup> See *Hollis v Dow Corning*, *supra* note 66 at para 20: “The duty to warn is a continuing duty, requiring manufacturers to warn not only of dangers known at the time of sale, but also of dangers discovered after the product has been sold and delivered.”

<sup>1227</sup> *Ibid* at para 20 (“In my view, Dow had a duty to convey its findings concerning both the “unexplained” rupture phenomenon and the possible harm caused by loose gel inside the body to the medical community much sooner than it did .... The duty to warn is a continuing one and manufacturers of potentially hazardous products have an obligation to keep doctors abreast of developments even if they do not consider those developments to be conclusive”, citing *Buchan v Ortho Pharmaceutical*, *supra* note 67).

<sup>1228</sup> See discussion about *Létourneau v JTI-MacDonald*, *supra* note 68, at page 150ff.

<sup>1229</sup> *Watson v Buckley*, *supra* note 926.

<sup>1230</sup> *Fillmore’s Nurseries v N American Cyanamid*, *supra* note 1195.

*Ruegger*.<sup>1231</sup> Products that are held out as being safe but in fact are not are, if anything, more dangerous. As famously stated in *Hodge & Sons v Anglo-American Oil Co*, such products are “a wolf in sheep’s clothing instead of an obvious wolf.”<sup>1232</sup> Thus, not only are food products on a continuum of risk, where the actual risk can only be determined by giving full consideration to the circumstances of the case, food manufacturers are under an obligation to investigate their products to identify any risks that might exist, and to disclose any risks that have been identified by other parties.

This seems especially pertinent for some food products. Consider the attention that has been paid to SSBs. There is considerable research that has been undertaken demonstrating the health risks associated with SSB consumption.<sup>1233</sup> While some of the findings are contested<sup>1234</sup>, there is good evidence to suggest that, at a minimum, SSB consumption can have negative effects on health. Manufacturers of SSBs are undoubtedly aware about the risks associated with their products, particularly given the media attention given to the impact of diet on health. Indeed, there have been media reports highlighting industry attempts to monitor scientists. For example, it was revealed that Coca-Cola had a secret plan to monitor Lisa Bero, an academic at Sydney University in New South Wales, Australia, who has been exploring how industry influences public health outcomes such as obesity.<sup>1235</sup> Moreover, there are many industry groups

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<sup>1231</sup> *Ruegger v Shell Oil Company of Canada*, *supra* note 918 at para 17.

<sup>1232</sup> *Hodge & Sons v Anglo-American Oil Co* (1922), 12 Lloyd’s L Rep 183, *supra* note 1191. See also Waddams, *Product Liability*, *supra* note 534 at 53.

<sup>1233</sup> See, for example, the discussion in Chapter 5 at page 259ff.

<sup>1234</sup> See the discussion concerning the challenges of ‘white hat bias’, Cope & Allison, *supra* note 1003.

<sup>1235</sup> Marcus Strom, “Coca-Cola’s secret plan to monitor Sydney University academic Lisa Bero” (October 22, 2016) The Sydney Morning Herald, online: Sydney Morning Herald <http://www.smh.com.au/technology/sci-tech/cocacolas-secret-plan-to-monitor-sydney-university-academic-lisa-bero-20161020-gs6m4a.html>.

that monitor scientific findings, as well as undertake their own research.<sup>1236</sup> Some of these organizations also work to undermine scientific findings that may reflect negatively on the industries they represent.<sup>1237</sup>

#### 4.2. Foreseeable Misuses

In addition to facing liability for failing to warn consumers about the risks associated with the use of their products, manufacturers may be liable if they fail to warn consumers about the dangers that arise from foreseeable misuses of their products.<sup>1238</sup> This rule is not meant to cover abnormal uses or abuses that are not foreseeable (these are discussed below). To hold a manufacturer liable for unforeseeable harms that result from misuse of products would be unreasonable.<sup>1239</sup> As Waddams notes, “there is no limit to the ingenuity of plaintiffs in finding unexpected ways to injure themselves with apparently safe products.”<sup>1240</sup> However, courts do

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<sup>1236</sup> As noted, food manufacturers are obliged to keep abreast of scientific developments. Even if individual manufacturers are unable to monitor the scientific developments, there are numerous organizations working on their behalf. Consider, for example, the large industry groups (e.g., the Grocery Manufacturers Association, [www.gmaonline.org](http://www.gmaonline.org); the Canadian Beverage Association, [www.canadianbeverage.ca](http://www.canadianbeverage.ca); the Canadian Restaurant and Foodservices Association, [www.crfa.ca](http://www.crfa.ca); and the National Restaurant Association, [www.restaurant.org](http://www.restaurant.org)) lobbyists (e.g., the Sugar Association, [www.sugar.org](http://www.sugar.org); the Corn Refiners Association, [www.corn.org](http://www.corn.org); and the National Cattlemen’s Beef Association, [www.beef.org](http://www.beef.org)), and research institutes funded by food manufacturers (e.g., the CCF, [www.consumerfreedom.com](http://www.consumerfreedom.com)), are actively involved in the research environment, producing, financing, and disseminating research.

<sup>1237</sup> See Center for Food Safety, *Best Public Relations that Money can Buy: A Guide to Food Industry Front Groups* (Washington, DC: Center for Food Safety, 2013), online: [www.centerforfoodsafety.org/files/cfs\\_front\\_groups\\_79234.pdf](http://www.centerforfoodsafety.org/files/cfs_front_groups_79234.pdf). Also see Nestle, *Food Politics*, *supra* note 59.

<sup>1238</sup> Theall et al, *supra* note 62 at L3-8 (“Conversely, manufacturers are liable for failing to warn against dangers associated with irregular uses of their products of which they are aware.”) and Weinstein et al, *supra* note 580 at 53 (“As long as the abnormal use is within the range of foreseeability, liability may properly attach.”).

<sup>1239</sup> *Holowaty v Bourgault Industries*, [2007] SJ No 40 (SK QB) at para 45. For example, in *Moore v Cooper Canada*, *supra* note 1218, the court held that to hold the defendant liable would be to expect of the hockey helmet product attributes or protective capabilities that it does not possess. See also Weinstein et al, *supra* note 580 at 52, who note “[t]he question of misuse obviously centers around the plaintiff’s behavior in the use of the product and on whether this behavior is so aberrant as to bar his recovery.”

<sup>1240</sup> Waddams, *Product Liability*, *supra* note 534 at 55. As Waddams notes, “[a] product entirely adequate for its proper purpose may be a source of danger when used in unexpected ways”, *ibid*. See also Weinstein et al, *supra* note 580 at 52, per *Magic Chef v Sibley*, 546 Southwestern 2d 851 (Court of Civil Appeals of Texas 1977): “A product is not “misused” merely because the manufacturer intended that it be used in a different manner; the

expect manufacturers to consider how a plaintiff might use its product.

The leading Canadian case on point is *Lem v Baratto Sports*.<sup>1241</sup> Here, the plaintiff misused a shotgun shell loader. The court found that the plaintiff appreciated the risks, but had failed to adhere to the instructions provided for proper use of the loader. Although the manufacturer was found to owe a high duty of care, given the degree of danger involved, the court held that the manufacturer was not liable for Lem's misuse because it had no "duty to warn against contingencies of misuse so unlikely that they would not occur to the manufacturer nor be reasonably foreseeable by him."<sup>1242</sup>

It is not enough, however, that the manufacturer does not intend for their product to be used in such a manner. According to Waddams, "[a] manufacturer who can foresee circumstances in which the product will be unsafe ought not to escape liability by arguing that it did not intend these circumstances to arise or that it hoped, against the prediction of statistics, that they would not arise."<sup>1243</sup> A manufacturer might be liable for foreseeable errors on the part of consumers.<sup>1244</sup> This was the case in *Smithson v Saskem Chemicals (Smithson)*, when the

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manufacturer must show that the use which caused the injury was not reasonably foreseeable."

<sup>1241</sup> *Lem v Baratto Sports*, *supra* note 603.

<sup>1242</sup> *Ibid* at para 23. In this case, the court found that the events were "so fortuitous as to be beyond the range of foreseeable results" of misuse, (citing *Amos (Next Friend of) v New Brunswick (Electric Power Commission)*, [1976] 1 SCR 500, citing *Moule v New Brunswick (Electric Power Commission)*, [1960] 24 DLR (2d) 305 (SCC)). According to *Holowaty v Bourgault Industries*, *supra* note 1239, "when Justice Clement refers to "misuse", he is not simply referring to using the product for something that it was not intended for, rather, he is also referring to a situation where the consumer is either employing the product improperly or in a novel fashion that may not have been intended as a usual use by the manufacturer."

<sup>1243</sup> Waddams, *Product Liability*, *supra* note 534 at 57. He points to child-proof containers and cleaning products as "another example of precaution taken against foreseeable misuse", *ibid* at 56.

<sup>1244</sup> See *Lem v Baratto Sports*, *supra* note 603 at para 22 (duty of manufactures to "give adequate warning ... not only as to such that would arise out of the contemplated proper use of the product, but also as to such that might arise out of reasonably foreseeable fault on the part of the purchaser in its contemplated use."); *Dura-Lite*, *supra* note 817 ("a duty on suppliers to warn for risks that are reasonably foreseeable, based not only on the anticipated use of the product, but also to account for the purchaser's reasonably foreseeable errors in the contemplated use of the product", at para 21); and, *Holowaty v Bourgault Industries*, *supra* note 1239 at para 40

plaintiff combined two different drain cleaners and it resulted in an explosion that blinded the plaintiff. The court held that it was a foreseeable risk that two different drain cleaners might be used in the same drain, and the manufacturer ought to have warned consumers about the possible reactions between chemicals.<sup>1245</sup>

The obligation to warn of foreseeable misuses is particularly relevant for food products. Consider that many food manufacturers tacitly accept that their products, when used improperly, can have detrimental impact on health.<sup>1246</sup> Indeed, many fast food companies regularly contend that it is the overconsumption or excessive consumption of their products that results in harms.<sup>1247</sup> They would argue that the responsibility for the misuse of their product should lie with the “irresponsible consumers”.<sup>1248</sup> It is clear, however, if a misuse is foreseeable and results in harm, then the manufacturer ought to warn against it.<sup>1249</sup> At a minimum, food manufacturers ought to warn consumers of the foreseeable dangers of overconsumption. One could argue, in light of *Smithson*, that food manufacturers may be required to warn of the general dangers of

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(“The law also places an onus on the manufacturer to warn of dangers inherent in the use of a product that might arise out of reasonably foreseeable fault on the part of the purchaser – in short, use by the purchaser of a product in a fashion not strictly intended by the manufacturer.”).

<sup>1245</sup> *Smithson v Saskem Chemicals*, *supra* note 989, in particular para 19-20. Similar to the general duty to warn of risks, “the duty to warn grows more exacting as the degree of danger from misuse increases”, Theall et al, *supra* note 62 at L3-7.

<sup>1246</sup> Consider the aforementioned categorization by PepsiCo of some of their products as “fun for you”, see above note 1118.

<sup>1247</sup> For example, McDonald’s recently generated some press when it posted on its employee-only resource webpage that employees should avoid eating too much fast food, identifying burgers and fries as an unhealthy choice. See Neetzan Zimmerman, “McDonald’s to Employees: Don’t Eat Fast Food, It’s Bad for You” (Dec 23, 2013) Gawker, online: Gawker, [www.gawker.com/mcdonalds-to-employees-don-t-eat-fast-food-its-bad-148825068](http://www.gawker.com/mcdonalds-to-employees-don-t-eat-fast-food-its-bad-148825068).

<sup>1248</sup> Consider, for example, the CCF’s assertion that “[p]ersonal irresponsibility is to blame for obesity; personal responsibility is the only viable solution”, CCF, “Garbage In, Food Police Out” (May 10, 2012), online: CCF [www.consumerfreedom.com/2012/05/garbage-in-food-police-out/](http://www.consumerfreedom.com/2012/05/garbage-in-food-police-out/). Not surprisingly, this corresponds with the “personal responsibility” rhetoric utilized by the tobacco industry.

<sup>1249</sup> Even if there is an idea of personal responsibility in food consumption, as Daynard, Howard & Wilking, *supra* note 18 at 414 note: “[p]redictable over-consumption on the part of a consumer does not excuse decisions by food marketers to exploit this consumer’s behavior for their own benefit and to the detriment of consumer’s health.”

overconsumption, and not just the overconsumption of their products, as it is foreseeable that consumers might “mix” food products.

As noted in *Holowaty v Bourgault Industries (Holowaty)*, the question that manufacturers need to ask is: “Would a reasonable manufacturer have anticipated the sequence of faults on the part of the purchaser that resulted in the injury and/or loss?”<sup>1250</sup> Given the attention to obesity and the consequences of overconsumption, and the role ascribed to the food industry, it is difficult to imagine a scenario where a food manufacturer would be able to claim that they would not have anticipated the misuse of food products by consumers. The fact that industry argues that “responsibility” lies with the consumer is, ultimately, irrelevant.<sup>1251</sup> Overconsumption resulting in health risk is a foreseeable misuse of food products. Or, potentially, given how food products are advertised, it could be an encouraged misuse.<sup>1252</sup> The challenge that will arise for food products, however, as articulated by the court in *Holowaty*, “there is no liability for dangers that are so commonly known that any reasonable user would be familiar with them.”<sup>1253</sup>

Undoubtedly, food manufacturers will argue that the consequences of overconsumption are a familiar risk. This category of risk, obvious dangers, is considered next.

### 4.3. Obvious Dangers

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<sup>1250</sup> *Holowaty v Bourgault Industries, supra* note 1239 at para 46. The court continues, “[i]f the sequence of faults was reasonably foreseen, the manufacturer is under a duty to warn. However, if the contingencies of misuse were so unlikely that they would not occur to the manufacturer, nor be reasonably foreseeable, no duty to warn exists”, *ibid.*

<sup>1251</sup> Moreover, as noted in this chapter and throughout this thesis, this assertion is not accurate and does not reflect the scientific understanding of food choice but is instead a rhetorical framing device utilized by the food and beverage industry and its allies.

<sup>1252</sup> There is little commentary on this point. However, Waddams notes, “[i]n this context, the advertising of the manufacturer may be relevant. If a manufacturer by advertisements encourages dangerous use of product, it ought not to be open to the manufacturer to say that it could not have expected the product to be so used”, *Product Liability, supra* note 534 at 57. This will be considered in further detail below, under the adequacy of warnings.

<sup>1253</sup> *Holowaty v Bourgault Industries, supra* note 1239 at para 46.

Manufacturers are required to warn of the dangers with the use of their products with one very notable exception: obvious dangers.<sup>1254</sup> There is no duty imposed on manufacturers to warn about dangers that are considered to be known or readily apparent to users.<sup>1255</sup> Cassels and Jones argue that the obviousness rule is narrow, and applies only to those risks that are “completely redundant to a reasonable consumer.”<sup>1256</sup> There have been several attempts at articulating when a risk is obvious. Perhaps the most famous comes from Prosser’s *Law of Torts*.

One limitation commonly placed upon the duty to warn, or for that matter the seller’s entire liability, is that he is not liable for dangers that are known to the user, or are obvious to him, or are so commonly known that it can reasonably be assumed that the user will be familiar with them. Thus there is certainly no usual duty to warn the purchaser that a knife or an axe will cut, a match will take fire, dynamite will explode, or a hammer may mash a finger.<sup>1257</sup>

Prosser’s understanding has been very influential, having been accepted by several courts.<sup>1258</sup> His examples are seemingly straightforward, and appear to deal with risks that arise from the proper use of a product. In this vein, the risk that rats killed by rat poison will be smelly<sup>1259</sup> or that a knife blade will cut<sup>1260</sup>, are considered obvious risks that arise from proper use of a

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<sup>1254</sup> Also referred to as “open” or “patent dangers”.

<sup>1255</sup> See *Lem v Baratto Sports*, *supra* note 603 (“On the other side of the scale, the dangers of use or misuse may be sufficiently apparent or well known to the ordinary prudent person that a warning in respect of them should be taken to be unnecessary in law.”).

<sup>1256</sup> Cassels & Jones, *supra* note 84 at 57.

<sup>1257</sup> William L Prosser, *Handbook of the Law of Torts*, 4th (Eagan, MN: West Publishing, 1971) at 649. Worth noting, Laposata and colleagues note that when Prosser was working on the *Restatement (Second) of Torts*, *supra* note 408, that the tobacco industry “obtained direct access” and “was able to sway the legal analysis used to create Section 402A”, Laposata, Barnes & Glantz, *supra* note 1056 at 26.

<sup>1258</sup> See *Schulz v Leeside*, *supra* note 603; *Deshane v Deere & Co*, *supra* note 657; *Walford (Litigation Guardian Of) v Jacuzzi Canada (CA)*, *supra* note 915; and, *Tudor Inn Reception Hall (1992) v Merzat Industries*, *supra* note 1196.

<sup>1259</sup> *Godin v Wilson Laboratories* (1994), 145 NBR (2d) 29 (NB QB), court found that the risk of rats exterminated by poison getting trapped in house and, upon decomposing, smelling, was obvious (“In my opinion the use of poison to kill rats in a house would create an obvious risk that rats may die in their hiding places within walls or above ceilings. A possible smell from such dead rats and a possible expense to remove dead rats also appears to me to be obvious risks that go with using rat poison”, at para 6).

<sup>1260</sup> In addition to referring to Prosser, courts often use the ability of a knife to cut as an example of an



product. As one court noted, in such cases a product's "dangers are so clearly evident as to make any warning silly."<sup>1261</sup>

The obviousness exception has been extended to also cover risks that arise from the improper use of a product. For example, in *Schulz v Leaside*<sup>1262</sup>, when the plaintiff was injured when he fell off the bow of a boat<sup>1263</sup>, the court held that the defendant did not have a duty to warn of the dangers that arose from the plaintiff's own imprudence.<sup>1264</sup> Similarly, the courts have also held that there is no duty to warn when plaintiffs use a product in a manner inconsistent with existing instructions or warnings<sup>1265</sup> or if a plaintiff modifies a product in such a way that it renders the product more dangerous.<sup>1266</sup> The obviousness exception to the duty to warn is

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obvious danger. See, for example: *Lem v Baratto Sports*, *supra* note 603; *Bow Valley Husky (Bermuda) v Saint John Shipbuilding*, *supra* note 708; and, *Deshane v Deere & Co*, *supra* note 657 at para 55, "the manufacturer of a butcher knife is not under a legal duty to warn consumers that a butcher knife may cut flesh." There has been at least one case where a plaintiff attempted to hold a manufacturer liable for being cut by a blade. In *Kirby v Canadian Tire*, [1989] 57 Man R (2d) 207 (MB QB) the plaintiff was cut on the blade of a food processor while unpacking the appliance. The court held that the risk of a cut in this instance was obvious to the plaintiff, who was familiar with food processors ("Leaving aside entirely the questions of whether the Moulinex might have been packaged and presented in a safer manner and whether there ought to have been appropriate warnings to the unwary, the fact is that, in this case, insofar as this plaintiff was concerned, there was no need for any warning. It would have been redundant. He knew all about the dangers."). In this case, the court was also motivated by the fact the plaintiff was intoxicated at the time of unpacking the food processor.

<sup>1261</sup> *Tabrizi v Whallon Machine*, [1996] 29 CCLT (2d) 176 (BC SC) at para 41. This was cited in *Halsbury's*, *supra* note 1206 at HTO-104 "Standard of Care".

<sup>1262</sup> *Schulz v Leaside*, *supra* note 603 at para 29 ("The specific limitation that in my view is applicable here is set out most clearly in Prosser's Law of Torts...").

<sup>1263</sup> *Schulz v Leaside*, *ibid* is considered to be the leading Canadian authority on point, see *Deshane v Deere & Co*, *supra* note 657.

<sup>1264</sup> *Schulz v Leaside*, *ibid* at para 37. Here the court relied on *Vancouver Fraser Park District v Olmstead*, [1975] 2 SCR 831. See also *Dixon v Outboard Marine* (1971), 481 P (2d) 151 (OKL SC), where standing up in a golf cart while it was in motion was an obvious risk.

<sup>1265</sup> See, for example, *Tudor Inn Reception Hall (1992) v Merzat Industries*, *supra* note 1196., where the fire that destroyed the building resulted from the improper use of the product, contrary to the warnings that the manufacturer did provide, warnings the court deemed to be adequate. Referring to Prosser's articulation of obvious dangers, the court in *Tudor Inn* specifically held: "These words apply with equal force where the specific danger, in this case, the risk of fire arises from modified use of a product by a user in a manner contrary to explicit warnings which the user choose to ignore", at para 38.

<sup>1266</sup> This was the case in *Deshane v Deere & Co*, *supra* note 657. The plaintiff was injured when he fell into a forage harvester that had been modified to be stationary. The majority held that the manufacturer was not required to warn of the obvious dangers that arose from the modification, even though the manufacturer consulted on the

permitted because it is assumed that in such instances a warning would ultimately prove ineffective. As Edgell notes, “the court may find that the user has appreciated (and could foresee) the “obvious” danger to the same extent as a warning would have provided – and, thus, a warning would not have affected the user’s conduct; the failure to give warning has not caused the damage.”<sup>1267</sup>

Ultimately, the critical matter here is whether or not there is a knowledge imbalance between a manufacturer and a consumer.<sup>1268</sup> If a consumer knows of the risk, then it would be unreasonable to impose on the manufacturer an obligation to reiterate the risks.<sup>1269</sup> When assessing obviousness, the court will consider two aspects. First, it will assess what the plaintiff

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alteration. Importantly, the majority held that the plaintiff was ultimately injured not because of how the harvester was being used, but because of another “unusual and dangerous method adopted” by the plaintiff’s employer. However, in a dissenting opinion, Lacourciere JA held there was a duty to warn of obvious dangers even in cases where product was modified, especially if manufacturer knew of modification. It is likely relevant whether a consumer seeks any assurances about the safety of a modified product. Although not about a modified product, the court’s reasoning in *Walford (Litigation Guardian Of) v Jacuzzi Canada (CA)*, *supra* note 915, is likely relevant. There the court held, “where the nature and extent of the danger of using a product is not obvious and a consumer seeks reassurance from a merchant concerning the safety or propriety of a product, the answer must not be misleading,” *supra* note at para 32

<sup>1267</sup> Edgell, *supra* note 545 at 77. See also Cassels & Jones, *supra* note 84 at 56-57. This principle is articulated well in *Andrulonis v United States*, 924 F 2d 120 (2d Cir 1991) at 122: “the focus of the ‘obviousness’ inquiry is upon the objective reasonableness of the supplier’s judgment about whether users will perceive the danger .... The danger must be so apparent or so clearly within common knowledge that a user would appreciate the danger to the same extent that a warning would provide.”

<sup>1268</sup> See *Halsbury’s*, *supra* note 1206 at HTO-104. However, see McLachlin J’s judgment in *Bow Valley Husky (Bermuda) v Saint John Shipbuiding*, *supra* note 634 at para 22 (dissent in part): “I agree with the Court of Appeal that knowledge that there may be a risk in some circumstances does not negate a duty to warn. Liability for failure to warn is based not merely on a knowledge imbalance. If that were so every person with knowledge would be under a duty to warn. It is based primarily on the manufacture or supply of products intended for the use of others and the reliance that consumers reasonably place on the manufacturer and supplier. Unless the consumer’s knowledge negates reasonable reliance, the manufacturer or supplier remains liable. This occurs where the consumer has so much knowledge that a reasonable person would conclude that the consumer fully appreciated and willingly assumed the risk posed by use of the product, making the maxim *volenti non fit injuria* applicable.”

<sup>1269</sup> As stated in *Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 63, “no one needs notice of that which he already knows.” See also *Dura-Lite*, *supra* note 817 at para 125, drawing from *Bow Valley Husky (Bermuda) v Saint John Shipbuiding*, *supra* note 634 at para 19-22 (“In other words, it appears that if a client who has so much knowledge that a reasonable person would conclude that the client knew about the dangers and assumed the related risks, no liability will ensue.”).

knew<sup>1270</sup>, although manufacturers might still be liable even if the consumer has some knowledge of risk.<sup>1271</sup> If a plaintiff has experience or expertise, the court will take this into account when determining what was known and what ought to have been known.<sup>1272</sup> The second thing a court will consider is what is commonly known. This entails consideration of the reasonable consumer in the circumstances.<sup>1273</sup>

There may be a temptation to equate reasonable knowledge with “common sense” when talking about obvious dangers.<sup>1274</sup> However, the idea of common sense is not a very helpful

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<sup>1270</sup> See, for example: *Deshane v Deere & Co*, *supra* note 657 (“His testimony shows that he knew how the machine worked and what the function of the feed rolls was. Thus, there can be no doubt that Mr. Deshane and Metcalfe, through Mr. Tinney, were fully aware of the danger which the moving feed rolls posed to anyone who might happen to come into contact with them.”); *Austin v 3M Canada*, [1974] 7 OR (2d) 200 (ON C Ct); *Haydu v Calvin Presbyterian Church Vancouver*, [1991] BCJ No 1012 (BC SC) (“The danger with this [meat grinder] was obvious and known to him. Because of these circumstances, it was not a danger that would give rise to a duty to warn”); *Kinsman v Thomas* (1995), AJ No 935 (placing mailbag on a heater was a “known and obvious” risk); and, *Storey v Canada Post Corp*, [2002] BCJ No 716 (BC CA) at para 29 (“everyone involved in the transport of mail carts ... knew”).

<sup>1271</sup> *Lem v Baratto Sports*, *supra* note 603 at para 22: “knowledge of some danger on the part of the purchaser does not necessarily relieve the manufacturer from the duty to warn unless there is found to be an assumption of risk.” See also Weinstein et al, *supra* note 580 at 46 (“[T]he bottom does not logically drop out of a negligence [products liability] case against the maker when it is shown that the purchaser knew of the dangerous condition ... Surely reasonable men might find here a great danger, even to one who knew the condition...”).

<sup>1272</sup> For example, in *Herrick (COB Westlock Transit Mix) v Desranleau*, [1980] AJ No 264 (ABCA), the court held that the plaintiff, who was burned from the alkali inherent in cement, could not recover from the defendant, because he “worked with the cement in a way that he should have known was improper and unsafe, having regard to his alleged experience”, at para 4. See also *Dura-Lite*, *supra* note 817, where the court held that the manufacturer did not owe the plaintiff a warning, as the plaintiff was already aware of the hazardous nature of magnesium waste. Additionally, the plaintiff had previous experience with fires. In *Storey v Canada Post Corp*, *supra* note 1270, the court held that the danger was obvious to those working with mail cars. Similarly, in *Austin v 3M Canada*, *supra* note 1270, the dangers associated with the use of grinders was held to be common knowledge for mechanics, even if not for the general public.

<sup>1273</sup> Per *Dickson v Broan-NuTone Canada*, *supra* note 636 at para 32: “If an ordinary prudent person would be aware of an obvious danger associated with using a product, the manufacturer will not be negligent for failing to warn of that danger.” As will be discussed in more detail below, this requires determining who the primary user of a product will be. Referring to *Amin v Klironomous*, *supra* note 931, Theall et al, *supra* note 62 at L3-10 note, “a risk that may be obvious to an adult may not be obvious to a child.” In *Amin*, the court was considering the warning about the risks inherent in the use of a toy crossbow. It found that the manufacturer had to take into account the fact that children were the primary users of its product, and thus, had to formulate their warnings appropriately. While the manufacturer was found to have breached its duty to warn here, the breach ultimately was not a causal factor in the plaintiff’s injuries.

<sup>1274</sup> Some courts do just this. For example, see *Dura-Lite*, *supra* note 817, *supra* note 1244 at para 124, where the court contends the plaintiff knows the dangers “if they are within its knowledge, common sense or if they

guide for determining when a risk is obvious.<sup>1275</sup> This was made evident in *Walford v Jacuzzi*, where the court held that the dangers associated with pool slides was “not something generally known based on “common sense””<sup>1276</sup> and that sliding head first down a pool slide was not an obvious danger.<sup>1277</sup> The problem with common sense is that it does not refer to a consumer’s knowledge about risks in the particular circumstances, but rather to a general sentiment about reasonableness.

Consider, for example, how an application of common sense to the facts in *Lambert* would have affected the outcome in that case.<sup>1278</sup> Recall that the manufacturer was found liable because its warnings were not explicit enough, not because it failed to warn the consumer. Indeed, the manufacturer had included three separate warnings that noted the inflammability of the lacquer; it had failed to warn, however, of the dangers posed by a pilot light, something a competitor had warned about. Common sense would dictate that extinguishing a pilot light,

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are obvious.”

<sup>1275</sup> Consider also Justice Thompson’s conclusion in *Battaglia v Imperial Tobacco*, where he noted, “[c]ommon sense is common sense and I guess that is what this all comes down to”, but in the next breath contends that, through the case, [he?] “received a wonderful education” on a variety of topics, *Battaglia v Imperial Tobacco*, *supra* note 463 at paras 85 and 86 respectively. Thomson J. notes the following: “I have received a wonderful education. It makes me want to go back and take courses in statistics, chemistry, physics, biology, and mathematics, just to name a few”, at para 86. It seems antithetical that common sense requires a complete education!

<sup>1276</sup> *Walford (Litigation Guardian Of) v Jacuzzi Canada (CA)*, *supra* note 915 at para 56. Specifically, the court noted, relying on standards developed for pool slides, that “[c]onsumers will not know, however, that by entering the water head first from a pool slide, there is an unexpected and uncontrollable flipping by the body that causes the head to hit the bottom of the pool if the water is shall. Consumers also will not know that this can and does cause paraplegia and quadriplegia, catastrophic injuries that they would not expect or anticipate from using a simple and commonly available recreational device”, *ibid*. This is a striking finding by the court, given that the plaintiff admitted that sliding down feet first was “common sense”, as pointed out by Rouleau JA in his dissenting judgment in *Walford* at para 91.

<sup>1277</sup> *Walford (Litigation Guardian Of) v Jacuzzi Canada (CA)*, *supra* note 915, where the court determined “the danger from using a pool slide in relatively shallow water is not an obvious danger. Consumers do not know that 4 feet is the minimum depth for installing a pool slide that is usable by persons older than 13 years of age and that at such a depth, if one does not go down feet first, a significant risk of catastrophic injury arises. They do not know at what depth it becomes safe to go down head first so that the slider will not hit the bottom of the pool”, at para 57. However, the court did find that jumping off the top or sliding down whilst standing would be obvious.

<sup>1278</sup> *Lambert v Lastoplex Chemicals*, *supra* note 65.

which is an open flame, when using an inflammable product would be prudent<sup>1279</sup>; notwithstanding this, the Supreme Court of Canada held that the manufacturer was required to explicitly warn the user of what another court could have deemed to be an obvious risk.<sup>1280</sup>

The problem with conflating common sense with the knowledge about the risks associated with a product can be explained by returning to the example of a knife blade. Common sense dictates that sharp objects can cut flesh, but this does not speak to the specific risks of a particular kind of blade or even a specific type of knife.<sup>1281</sup> Similarly, common sense might dictate that overeating will result in obesity, but it does not reveal any knowledge of specific risks. In fact, on this front, the available research indicates that consumers are largely unaware of basic nutritional information.<sup>1282</sup> Recent survey data suggests that a large proportion of people barely identify the four basic food groups<sup>1283</sup>, let alone the daily suggested servings of

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<sup>1279</sup> This was the conclusion of the Ontario Court of Appeal, reversing the trial judge's decision. The Court of Appeal held, "[t]he failure of the plaintiff to turn off the pilot lights in the furnace and water heater after having turned down the thermostat, was the result of an error of judgment on his part and it cannot be said that the ensuing damages and losses were a direct and a natural result of the failure of the defendant appellant to provide a warning which was adequate in the circumstances", *Lambert v Lastoplex Chemicals*, *supra* note 65 at para 9.

<sup>1280</sup> The only way that the Supreme Court was willing to exclude liability was if it was shown "that there was a voluntary assumption of the risk of injury" which would require showing that "the male appellant appreciated the risk involved in leaving the pilot lights on and willingly took it", *Lambert v Lastoplex Chemicals*, *ibid* at 576. The Court found that there was no conscious choice here.

<sup>1281</sup> And while a manufacturer might not be under any obligation to warn that a knife blade will cut flesh, they would have an obligation if another part of the knife did pose a threat, for example, if the spine or tang of a knife were sharpened. The spine refers to the top of the knife, opposite the blade, while the tang is the part of the steel that runs through the handle. Moreover, if a knife company portrayed its knife as being safe, and unable to cut flesh, then it would not be obvious if the knife did pose a risk to a consumer. While this may seem like a trite example, there are in fact knives and other blades that are marketed as being safe. For example, certain box-cutters are made from plastic blades that are not supposed to be as dangerous. Additionally, if a butter knife was sold as sharp as a butcher knife, then the manufacturer might indeed be obligated to warn of the danger, given the reasonable expectation of the consumer that such as knife would not have a fine blade.

<sup>1282</sup> See, for example: Joanne F Guthrie, Brenda M Derby & Alan S Levy, "What People Know and Do Not Know About Nutrition" in US Department of Agriculture, Economic Research Service *America's Eating Habits: Changes and Consequences* (Washington, DC: USDA, 1999) 243.

<sup>1283</sup> Personal communication, Lana Vanderlee, PhD, University of Waterloo, unpublished findings.

each.<sup>1284</sup> Additionally, consumers regularly underestimate the quantity and overestimate the quality of the foods they eat.<sup>1285</sup> Even registered dietitians grossly underestimate the caloric density of foods.<sup>1286</sup> The nutritional information that is provided to consumers on packaging generally only serves to confuse most people<sup>1287</sup>, and the promotional information companies provide about their products has been shown to mislead consumers about the quality of food products.<sup>1288</sup>

These comments only pertain to general eating habits. When considering specific food products, it is clear that consumers lack even basic information about many of the items they are consuming. Consider, for example, a basic fast food strawberry milkshake. Schlosser and Wilson note that a consumer might reasonably expect that such a product would include ingredients such as ice, cream, strawberries, and sugar. However, in a fast food equivalent, a consumer will find: “milk and nonfat milk, sugar, sweet whey, high fructose corn syrup, guar gum, mono- and diglycerides, cellulose gum, sodium phosphate, carageenan, citric acid, red food coloring #40, and artificial strawberry flavor”<sup>1289</sup>, with the last ingredient being a cocktail of chemicals.<sup>1290</sup>

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<sup>1284</sup> See, for example, Levy et al, *supra* note 533; and, Li Miniar & Barone, *supra* note 533.

<sup>1285</sup> See, for example: Pomeranz & Brownell, *supra* note 267; Brian Wansink & Pierre Chandon, “Meal Size, Not Body Size, Explains Errors in Estimating Calorie Content of Meals” (2006) 145 *Annals of Internal Medicine* 326; and, CA Roberto et al, “Calorie Estimation Accuracy and Menu Labelling Perceptions Among Individuals with and without Bing Eating and/or Purging Disorders” (2013) 18 *Eating and Weight Disorders* 255.

<sup>1286</sup> See Pierre Chandon & Brian Wansink, “Is Obesity Caused by Calorie Underestimation? A Psychophysical Model of Meal Size Estimation” (2007) 44 *Journal of Marketing Research* 84.

<sup>1287</sup> The confusion is not surprising, given that a review of the nutritional information at 85 restaurants in Canada revealed a substantial variation in caloric levels among even the same types of food offerings, see Mary J Scouroutakos & Mary R L’Abbé, “Restaurant Menus: Calories, Caloric Density, and Serving Size” (2012) 43 *American Journal of Preventive Medicine* 249.

<sup>1288</sup> See, for example, Chandon & Wansink, *supra* note 1020 and CSPI, *Food Labeling Chaos*, *supra* note 1020.

<sup>1289</sup> Eric Schlosser & Charles Wilson, *Chew on This: Everything You Don’t Want to Know About Fast Food* (Boston: Houghton Mifflin, 2006) at 113.

<sup>1290</sup> *Ibid* at 114 notes the following chemicals make up artificial strawberry flavor: “amyl acetate, amyl butyrate, amyl valerate, anethol, anisyl formate, benzyl acetate, benzyl isobutyrate, butyric acid, cinnamyl



Notably absent from this strawberry milkshake are strawberries. It is clear that very little about this milkshake would be obvious to the vast majority of consumers.<sup>1291</sup> Consider the recent CBC Marketplace investigation that found that many fast food chicken products contained DNA from products other than chicken, including soy – something that many consumers would clearly not anticipate.<sup>1292</sup>

Even if consumers generally accepted that the consumption of a fast food strawberry milkshakes was detrimental to overall health<sup>1293</sup>, this is not the same as accepting the risks that might exist with each of the many chemicals that are contained within the milkshake.<sup>1294</sup> Of

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isobutyrate, cinnamyl valerate, cognac essential oil, diacetyl, dipropyl ketone, ethyl butyrate, ethyl cinnamate, ethyl heptanoate, ethyl heptylate, ethyl lactate, ethyl methylphenylglycidate, ethyl nitrate, ethyl propionate, ethyl valerate, heliotropin, hydroxyphenyl-2-butanone (10% solution in alcohol),  $\alpha$ -ionon, isobutyl anthranilate, isobutyl butyrate, lemon essential oil, maltol, 4-methylacetophenone, methyl anthranilate, methyl benzoate, methyl cinnamate, methyl heptane caronate, methyl naphthyl ketone, methyl salicylate, mint essential oil, nerolin, neryl isobutyrate, orris butter, phenethyl alcohol, rose, run ether,  $\gamma$ -undecalactone, vanillin, and solvent.”

<sup>1291</sup> *Pelman I, supra* note 9 at 536 Justice Sweet notes that McDonald’s claimed that it was “a matter of common knowledge that any processing that is food undergo serve to make them more harmful than unprocessed foods.” Sweet J did not consider whether this argument was successful. McDonald’s does spend considerable money marketing its products as safe – consider, for example, a recent advertisements for its fruit smoothies that likened the smoothie to a piece of fruit. As noted previously, Sweet J hold that such representations amount to mere puffery.

<sup>1292</sup> Pete Evans & Eric Szeto, “What’s in your chicken sandwich? DNA test shows Subway sandwiches could contain just 50% chicken” (February 24, 2017) CBC News, online: CBC News, <http://www.cbc.ca/news/business/marketplace-chicken-fast-food-1.3993967>. Note, Subway has challenged these findings, see Shay Spence, “Subway fires back at ‘absolutely false’ allegations that their chicken is fake” (March 1, 2007) People, online: People <http://people.com/food/subway-fake-chicken-study-response/>.

<sup>1293</sup> Arguably, this might amount to a foreseeable misuse of an obvious harm. In the dissenting judgment of *Deshane v Deere & Co, supra* note 657, Justice Lacourciere held that a duty to warn still existed in such circumstances: “I believe that there is a duty to warn, even of obvious dangers, if it is reasonably foreseeable or if it is actually known that the ultimate user will use the product in an unintended manner known by the manufacturer to be dangerous.” Theall et al, *supra* note 62 at L3-12 note that the court in *Piche v Lecours Lumber Co, supra* note 1137, held that warnings were required for “obvious dangers in inherently dangerous or hazardous products.” However, Theall and colleagues go on to note that the court in *Piche* failed to recognize that the case it was citing from (*Schulz v Leaside, supra* note 603) held there was no duty to warn of obvious dangers, using the example of dynamite. The confusion suggests, at a minimum, that some courts do think manufacturers have an obligation to warn about the obvious dangers in dangerous products – a very real possibility given that the majority in *Deshane v Deere & Co, ibid*, explicitly stated: “I do not think that there is any disagreement between Lacourciere J.A. and me about the principles of law which generally apply to cases involving manufacturer’s liability. Our disagreement rests, I think, upon our respective views of which of those principles is applicable in the circumstances of this case.”

<sup>1294</sup> In *Pelman I, supra* note 9 at 536 Justice Sweet noted that the argument that McDonald’s food contained numerous ingredients which may pose risks to consumers, and suggested that if the complainant were to raise this in



course, food manufacturers would claim that the chemicals and additives are safe<sup>1295</sup> – and, undoubtedly, would point to their accepted use by organizations such as Health Canada, the Canadian Food Inspection Agency, and the US Food and Drugs Administration as proof.<sup>1296</sup> However, few of these chemicals have been rigorously studied<sup>1297</sup>, and the impact of consuming individual chemicals<sup>1298</sup> or a combination of them is unknown.<sup>1299</sup> Manufacturers should not be permitted to bank on legislative inertia, or the inability of a consumer to easily generate evidence about the potential risks with these chemicals, particularly given that manufacturers are experts

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an amended complaint that it would “come closest to overcoming the hurdle presented to plaintiffs (sic).” Justice Sweet also noted that most food entities “do not serve food that is processed to the extent that McDonald’s products are throughout the world”, *ibid*, although it is not clear on what basis he makes this assertion.

<sup>1295</sup> See claims made by various industry groups, for example: the International Food Additives Council, online: [www.foodadditives.org](http://www.foodadditives.org); Food & Consumer Products of Canada, online: [www.fcpc.ca](http://www.fcpc.ca); and, Food Additives and Ingredients Association, online: [www.faiia.org.uk](http://www.faiia.org.uk). For a different take, see CSPI, “Chemical Cuisine: Learn About Food Additives”, online: CSPI [www.cspinet.org/reports/chemcuisine.htm](http://www.cspinet.org/reports/chemcuisine.htm).

<sup>1296</sup> This comment is particularly pertinent in light of regulatory capture, alternatively referred to as agency capture. See Wexler, “Which Fox in What Henhouse and When?”, *supra* note 327 and Bó *supra* note 327. Bó identifies two ways to interpret regulatory capture: “According to the broad interpretation, regulatory capture is the process through which special interests affect state intervention in any of its forms . . . . According to the narrow interpretation, regulatory capture is specifically the process through which regulated monopolies end up manipulating the state agencies that are supposed to control them”, *ibid* at 203. The power of the food and beverage lobby is illustrated by the perceived control the industry wields over state food recommendations, such as the Canadian Food Guide, and the implementation of pro-industry legislation, such as the commonsense consumption legislation in the United States. See, as examples, Nestle, *Food Politics*, *supra* note 59; Burnett, *supra* note 433; Nicole Scott, “Saving us from Ourselves: The Government’s Role in Obesity and Personal Responsibility” (2012) 17 Drake Journal of Agricultural Law 211; Yoni Freedhoff, “Canada’s Food Guide to Unhealthy Eating” (November 12, 2006) Weighty Matters, online: [www.weightymatters.ca/2006/11/canadas-food-guide-to-unhealthy-eating.html](http://www.weightymatters.ca/2006/11/canadas-food-guide-to-unhealthy-eating.html) (as well as other relevant posts on Freedhoff’s blog, Weighty Matters); and, Melanie Warner, “The Food Industry Empire Strikes Back” (July 7, 2005) New York Times, online: [www.nytimes.com/2005/07/07/business/07food.html?pagewanted=print&\\_r=0](http://www.nytimes.com/2005/07/07/business/07food.html?pagewanted=print&_r=0).

<sup>1297</sup> See Thomas G Neltner et al, “Conflict of Interest in Approvals of Additives to Food Determined to be Generally Recognized as Safe Out of Balance” (2013) 173 Journal of the American Medical Association: Internal Medicine 2032 and the invited commentary, Marion Nestle, “Conflicts of Interest in the Regulation of Food Safety: A Threat to Scientific Integrity” (2013) 173 Journal of the American Medical Association: Internal Medicine 2036.

<sup>1298</sup> Even if it could be shown that the consumption of some chemicals was safe, this is unlikely to be the case for all additives. As Schlosser & Wilson, *supra* note 1289 at 123 points out, “[c]armine can cause allergic reactions in some people. Tartrazine, a yellow food coloring, can cause hyperactivity, headaches, rashes, and an increased risk of asthma in some children. It has been banned in Norway, Finland, and Austria but is still used by food companies in the United States and Great Britain.”

<sup>1299</sup> Schlosser & Wilson *ibid* at 124.

and are expected to know of the risks associated with their products.<sup>1300</sup> The preceding only gets more challenging if you add to the above discussion the possibility that some food additives have addictive properties.<sup>1301</sup> Thus, it is troubling that numerous commentators suggest that when it comes to food, common sense should prevail.

Having started with an examination of Prosser's understanding of obvious dangers, it is worth reflecting here on how it is clarified in a later edition. In the fifth edition of *Keeton and Prosser on the Law of Torts*, an obvious danger is described as "a condition that would ordinarily be seen and the danger of which would ordinarily be appreciated by those who would be expected to use the product."<sup>1302</sup> When it comes to the food products being consumed en masse, the dangers are secret, technical, and hidden from the consumer.<sup>1303</sup> Perhaps the greatest

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<sup>1300</sup> See Cassels & Jones, *supra* note 84 at 52, who note that "[t]he general rule is that defendants will be held liable for failing to warn of dangers that were reasonably foreseeable or scientifically discoverable at the time of the victim's exposure." It is submitted that the dangers of ingesting chemicals is reasonably foreseeable and scientifically discoverable. See also *Holowaty v Bourgault Industries*, *supra* note 1239 at para 49, that "it is assumed that a manufacturer will be reasonably knowledgeable about not only its products but also the markets and/or industries to which its products are sold", drawing this lesson from the decision of Justice Noble in *Smithson v Saskem Chemicals*, *supra* note 989.

<sup>1301</sup> See, for example, Belinda S Lennerz et al, "Effects of Dietary Glycemic Index on Brain Regions Related to Reward and Craving in Men" (2013) 98:6 *American Journal of Clinical Nutrition*; Daniel M Blumenthal & Mark S Gold, "Neurobiology of Food Addiction" (2010) 13 *Current Opinion in Clinical Nutrition and Metabolic Care* 359; and, Magalie Lenoir et al, "Intense Sweetness Surpasses Cocaine Reward" (2007) 2:8 *PLoS ONE* e698. The addictive quality of foods has also been subject to considerable news coverage, see, for example, Robert Langerth & Duane D Stanford, "Fatty Foods Addictive as Cocaine in Growing Body of Science" (November 2, 2011) Bloomberg Personal Finance, online: [www.bloomberg.com/news/2011-11-02/fatty-foods-addictive-as-cocaine-in-growing-body-of-science.html](http://www.bloomberg.com/news/2011-11-02/fatty-foods-addictive-as-cocaine-in-growing-body-of-science.html), and Amy Fleming, "Food Addiction: Does it Really Exist?" (August 20, 2013) WordOfMouth, online: [www.theguardian.com/lifeandstyle/wordofmouth/2013/aug/20/food-addiction-exist-fat-sugar](http://www.theguardian.com/lifeandstyle/wordofmouth/2013/aug/20/food-addiction-exist-fat-sugar). Admittedly, research into the addictive properties of food is nascent, nevertheless, legal counterpoints have already been offered. Although largely unconvincing, see McMenamin & Tiglio, *supra* note 11.

<sup>1302</sup> W Page Keeton et al, eds, *Prosser and Keeton on the Law of Torts*, 5th ed (St. Paul, Minn: West Publishing, 1984). Importantly, this edition of Prosser's *Law on Torts* was co-edited by a team, and this influence obviously cannot be ignored.

<sup>1303</sup> See *Bossin v Florsheim Canada*, [1997] 42 OTC 93 (ON Ct J Gen Div), where the plaintiff slipped in a shoe store while wearing new leather shoes. The court held that there was "nothing secret, technical or in any way hidden about the problem of slipperiness of new leather soled shoes", at para 48. See also *Schulz v Leeside*, *supra* note 603 at para 29. *Halsbury's*, *supra* note 1206 at HTO-104 notes, "[i]t is the dangers that have no way of being known to the consumer that give rise to a duty to warn, not dangers that are reasonably evident but go unconsidered." See also *Walford (Litigation Guardian Of) v Jacuzzi Canada (CA)*, *supra* note 915 at para 30. This

challenge with food products is the sheer number implicated.<sup>1304</sup> The overwhelming majority of food products currently sold and consumed are highly processed goods that, from a consumer's perspective, contain unknown and mysterious ingredients.<sup>1305</sup> There may be some reluctance on the part of the courts to find a duty to warn exists for food products, given the upheaval it could cause to the food industry. Determining which risks ought to be covered by product liability law is not a new concern. The British Columbia Supreme Court observed in *Krysta v Funland Enterprise* the challenge with these cases "is that a line must be drawn in the appropriate place."<sup>1306</sup> Protecting consumers from the dangers of food products, a product class which, as discussed above, ought to invoke a high standard of care, is a legitimate application of the duty to warn, and courts should not shield themselves from the task of deciding tough issues by hiding behind vague and inaccurate notions of common sense.

#### 4.4. Abuses & Abnormal Uses

The final category of risks concerns abuses or abnormal uses of products.<sup>1307</sup>

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principle would seem applicable here. See also discussion at Edgell, *supra* note 545 at 2.

<sup>1304</sup> A defendant might rely on a "common use" argument, although, this doctrine does not factor into many Canadian cases on point. In *Herrick (COB Westlock Transit Mix) v Desranleau*<sup>1272</sup>, the Alberta Court of Appeal cited from several American cases that discussed concrete as being a product that had been "in common use in every kind of construction project for at least fifty years" (*Katz v Arudnel Brooks Concrete Corp* (1959) 151 A. 2d 731 (CA Md) at 733), and the familiarity with the product meant that there were not any unknown or unusual dangers in cement. Given that food products are constantly evolving, with new ingredients being added, etc., it is unlikely that this argument will be successful. Moreover, the overall "use" (consumption) of food products is not the same.

<sup>1305</sup> Recall Judge Sweet's discussion in *Pelman I*, *supra* note 9 at 535, that Chicken McNuggets™ could not be easily recreated in the average kitchen, see discussion at page 131ff.

<sup>1306</sup> *Krysta v Funland Enterprise*, [1984] 57 BCLR 32 (BC SC) at para 26 ("A person must take reasonable care not to injure his neighbour, but the neighbour must also be reasonable in the care he takes of himself. Neighbours, of course, are not of equal competence in the ability of self care. This plaintiff was wholly competent and wholly negligent. So many activities are attended by danger if people are not watchful and cautious. The potential dangers attendant on riding a bicycle, or roller skating, or skate boarding, or getting out of a bathtub are but a few.").

<sup>1307</sup> Abuse and abnormal use here are interchangeable. Abnormal use is the preferred language, as it more clearly differentiates behaviours that might be cast as "abuses" but are foreseeable misuses. This is particularly relevant for the present discussion, as will be shown below.

Manufacturers are not required to warn consumers of the risks that arise from the abnormal use of a product. According to *Lem*, abnormal uses occur when a product is put to a use for which it is not intended.<sup>1308</sup> Arguably, this is the easiest category to address, as there are few abuses of food products that will be relevant to our present discussion. In part this is a reflection of the fact that many of the relevant abuses of food products are in fact foreseeable misuses (e.g., overconsumption). While food manufacturers are likely to try to frame the overconsumption of food products as an abuse, this does not correspond with the understanding of abnormal uses in the existing jurisprudence.<sup>1309</sup> In light of this, it is not necessary to consider this category further at this point.

## 5. WARNINGS TO WHOM?

In some respects, we have already addressed this question in the previous chapter, which examined the duty of care. As demonstrated, manufacturers are obligated to consider any consumer that is reasonably foreseeable. It concludes that manufacturers are obligated to warn consumers about dangers associated with the use of their products. Courts generally contend that manufacturers must warn the “ordinary consumer”<sup>1310</sup> as well as “all those who may be reasonably affected by potentially dangerous products.”<sup>1311</sup> But what exactly does this mean? Is the ordinary consumer a reasonable consumer? After all, it is clear that not all consumers are

<sup>1308</sup> *Lem v Baratto Sports*, *supra* note 603 at para 22.

<sup>1309</sup> Although this category does include abuses that result from the imprudence of the plaintiff, such imprudence corresponds more with abnormal uses and not foreseeable misuses. See also *Vancouver Fraser Park District v Olmstead*, *supra* note 1264, and *Schulz v Leaside*, *supra* note 603.

<sup>1310</sup> *Lambert v Lastoplex Chemicals*, *supra* note 65 at 575.

<sup>1311</sup> *Bow Valley Husky (Bermuda) v Saint John Shipbuilding*, *supra* note 634 at para 19 (“The potential user must be reasonably foreseeable to the manufacturer or supplier-manufacturers and suppliers ... do not have the duty to warn the entire world about every danger that can result from improper use of their product.”). See also *Cuppen v Queen Charlotte Lodge*, [2005] BCJ No 1332 (BC SC) at para 57 and *Dura-Lite*, *supra* note 817 at para 124.

equal. Indeed, in one American case, the court held that there is a need to consider “the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions.”<sup>1312</sup> Whether a warning is directed to an “ordinary consumer” of a product or to a “reasonable consumer” generally, it is submitted here that the critical question is really about the adequacy of the warning – a matter that will be discussed in the next section.

That said, the courts have noted some general rules concerning the recipients of warnings. For example, courts have explicitly recognized that the warning must be appropriate for the likely consumer of a product.<sup>1313</sup> Thus, if the probable consumer is a child, the warning should be appropriate for a child.<sup>1314</sup> The courts have also made it explicit that manufacturers are required to provide warnings about dangers, even if the product is only dangerous to a few people<sup>1315</sup>, so a small class of at-risk users does not lessen a manufacturer’s obligation. Additionally, warnings must be specific to the circumstances.<sup>1316</sup> There are two classes of

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<sup>1312</sup> Shapo, *supra* note 536 at 28, citing *Florence MFG Co v JC Dowd & Co*, 178 Fed 73 (2d Cir 1910).

<sup>1313</sup> *Amin v Klironomous*.

<sup>1314</sup> See Edgell, *supra* note 545 at 77 (“Where the foreseeable user of a product is a child, the standards imposed upon the manufacturer or distributor may differ. Courts have found that children and adults have differing capacities with respect to their ability to appreciate risks. A risk that is obvious to an adult may not be obvious to a child. What constitutes an appropriate warning to a child may also differ from what would be appropriate for an adult.”). See also Shapo, *supra* note 536 at 28-29. Waddams, *Product Liability*, *supra* note 534 at 62 notes that many warnings that are for the benefit of children are nevertheless directed at adults – as an example, he points to the warnings to not swallow cleaning products.

<sup>1315</sup> This was the issue in *Buchan v Ortho Pharmaceutical*, *supra* note 67 (“Whether a particular warning is adequate will depend on what is reasonable in the circumstances. But the fact that a drug is ordinarily safe and effective and the danger may be rare or involve only a small percentage of users does not necessarily relieve the manufacturer of the duty to warn. While a low probability or a small class of endangered users are factors to be taken into account in determining what is reasonable, these factors must be balanced against such considerations such as the nature of the drug, the necessity for taking it, and the magnitude of the increased danger to the individual consumer”, *supra* note 1027 at para 55). See also *Albert v Breau*, *supra* note 936 at para 7: “Manufacturers are subject to a duty to warn their customers about any dangerous properties of their product. This is so even when the product is danger only to a few people.”

<sup>1316</sup> *Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 85: “What is more, appropriate warnings

consumers, however, for which warnings may be different than what is expected for the ordinary consumer. These two classes are expert consumers and vulnerable or sensitive consumers. Both are considered briefly.

### 5.1. The Expert Consumer

If the general duty to warn is to ensure that consumers are aware of the dangers with a product, then it stands to reason that this duty does not extend to persons who are already aware of these dangers. Such persons are designated as experts or knowledgeable users.<sup>1317</sup> This was one of the issues before the court in *Lambert*. The plaintiff was a consulting engineer with a degree in mechanical engineering, and the defendant contended that, because of this, he had special knowledge, and therefore they had no obligation to warn him of the risks associated with using an inflammable product near an open flame. The court was not convinced by this argument, and held that the defendant had not gone far enough to warn the plaintiff of the dangers.<sup>1318</sup>

A relevant consideration in *Lambert* was the experience of the plaintiff. Similarly, in *Lem v Barrotto Sports* the plaintiff was experienced, and had dealt with shotguns and ammunitions for over 40 years. In this instance, the court held that Lem had sufficient experience to appreciate

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conveying reasonable notice of the nature, gravity and likelihood of known or knowable side-effects and advising the consumer to seek further explanation from her doctor of any information of concern to her, would promote the desirable objective of ensuring that women are fully apprised of the information needed to balance the benefits and risks of this form of birth control and to make informed and intelligent decisions in consultation with their doctors on whether to use or continue to use oral contraceptives.”

<sup>1317</sup> Cassels & Jones, *supra* note 84 at 57.

<sup>1318</sup> *Lambert v Lastoplex Chemicals*, *supra* note 65 at 576 (“This, however, does not go far enough to warrant a conclusion that the respondent, having regard to the cautions on the labels, had discharged its duty to the male appellant.”) The court noted that liability could only be avoided if the plaintiff voluntarily assumed the risk. Recall that the Ontario Court of Appeal found that “having regard to the plaintiff’s knowledge as to the dangers inherent in the application of this product in an enclosed space the warning given by the (manufacturer) was equal to the requirements of the situation.” See also *Siemens v Pfizer C & G*, [1988] 3 WWR 577 (MBCA) and *Holowaty v Bourgault Industries*, *supra* note 1239 at para 53.



the risks with using a shotgun shell-reloading machine.<sup>1319</sup> In *Holt v PPG Industries* the court held that the plaintiff was an experienced commercial user, and thus was not owed a warning.<sup>1320</sup> It seems settled that when a user is an expert, they do not need to be warned of the risks to the same extent as a member of the general public.<sup>1321</sup> According to *Holowaty*, “[t]he case law articulates the principle that a manufacturer will be relieved of liability only if it can clearly be concluded that a plaintiff’s experiences or knowledge resulted in an appreciation of the risk and voluntary assumption of [the] same.”<sup>1322</sup> However, there can also be a heightened requirement of disclosure to experts. This was considered in both *Buchan* and *Hollis*, which dealt with the concept of learned intermediaries. As discussed in the previous chapter, a manufacturer can discharge its duty to the consumer by warning an appropriate expert, such as a physician, who in turn is required to disclose the risks to the consumer. What is required will always depend on the circumstances. As noted in *Davidson v Connaught Laboratories*:

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<sup>1319</sup> *Lem v Baratto Sports*, *supra* note 603. Moreover, the court also distinguished *Lambert v Lastoplex Chemicals*, *supra* note 65 on the basis of the product being used, noting: “Gun power is a dangerous substance. This fact is particularly known to people with a wide experience in the use of firearms, shells and ammunitions of all kinds. Surely there is a substantial difference between a person using lacquer for the first time and not being adequately warned of its dangers on the one hand, and a person with wide experience with guns and ammunition and by his own admission knowing that badly produced shells can explode – on the other hand.” The court also noted that Lem “appreciated the risks that a mismanufactured shell could be dangerous and might explode” (at para 4) and “[h]e knew the importance of moving the lever in its upward thrust until a click was heard, for otherwise ‘the machine would not work’” (at para 13).

<sup>1320</sup> *Holt v PPG Industries*, *supra* note 595 (“Although the plaintiff in the Lambert case was a professional engineer and knew that the sealer he was using gave off vapours and was inflammable, he was clearly not an experienced commercial user of the product and must therefore be contrasted to Mr. Holt in our present facts. Mr. Holt had used the same or comparable product in the very same process on the same press and in the same building on 1,000 to 1,800 prior occasions”, referring to *Lambert v Lastoplex Chemicals*, *supra* note 65).

<sup>1321</sup> See, for example *Austin v 3M Canada*, *supra* note 1270, when the plaintiff was hurt by grinding disc taking rust off a vehicle, the court determined that plaintiff was not a member of the general public (para 4), and thus the plaintiff was not owed a warning as the “discs carried no danger in their ordinary use in the hands of a reasonably competent auto-body repair man which the plaintiff contended he was”, *supra* note 1270 at para 14.

<sup>1322</sup> *Holowaty v Bourgault Industries*, *supra* note 1239 at para 60. See also at para 55: “The court held that in order for a manufacturer’s duty to warn to be absolved, there must be proof that the consumer appreciated the risk involved and willing took it. In short, the Court must conclude there was a voluntary assumption of risk.” The court here is referring to *Lambert v Lastoplex Chemicals*, *supra* note 65.



There is in some situations a less strict standard in communicating with experts, who are presumed to know certain things, whereas the public generally may not be expected to know of those things. On the other hand, there may be some things that one would be required to communicate to experts, that one would not tell the general public about.<sup>1323</sup>

In the context of food products, registered dietitians could arguably be considered “experts”. However, dietitians rarely prescribe or prohibit specific food items, opting instead for messaging like, “choose a variety of foods from all four food groups” and “limit sugary drinks”.<sup>1324</sup> In this respect, at best, the expert is giving generic advice. Even if specific advice is given, the court’s determination in *Buchan* that a manufacturer will still need to discharge its duty by directly warning the consumer is likely to apply.<sup>1325</sup> It is also unlikely that most consumers of food products will be considered “experienced” users of products, as the court found in *Lem*. After all, consumers are not using one product or even a single class of products. It is possible that a court might be persuaded that regular users of a specific product, such as fast food, have a greater appreciation for the risks associated with the products. However, the research clearly shows that “heavy users” of products are not necessarily familiar with the

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<sup>1323</sup> *Davidson v Connaught Laboratories*, [1980] OJ No 153 (HCJ). In *Davidson* the court held that the standard expected of warnings to physicians was high because “[a] drug company cannot rely upon doctors to read all the scientific literature outlining the specific dangers involved in the many drugs they have to administer each day. They are busy people, administering to the needs of the injured and the sick. They have little time for deep research into the medical literature. They rely on the drug companies to supply them with the necessary data”, at para 65. If a physician cannot be expected to keep abreast of the scientific literature, it would seem absurd to expect the average consumer to keep abreast of scientific developments concerning all of the products they use on a daily basis. However, Cassels & Jones, *supra* note 84 at 63, citing *Buchan v Ortho Pharmaceutical*, *supra* note 67, note, “[a] manufacturer cannot necessarily rely on warnings from other sources to discharge its duties to warn consumer (or intermediaries).” They note *Buchan v Ortho Pharmaceutical* held that “a manufacturer cannot justify a failure to warn by claiming that physicians were in a position to learn of the risk inherent in its products through other sources”, *ibid* at para 59.

<sup>1324</sup> The Dietitians of Canada provide various resources, including healthy eating tips, see Dietitians of Canada, online: [www.dietitians.ca](http://www.dietitians.ca).

<sup>1325</sup> Arguably, given that a consumer has a choice as to the food product it consumes, the comments in *Buchan v Ortho Pharmaceutical*, *supra* note 67, pertaining to the prescribing of oral contraceptives seem relevant here.

product<sup>1326</sup> – indeed, their use might be a reflection of other factors, such as the affordability and availability of foods.<sup>1327</sup>

## 5.2. The Vulnerable or Sensitive Consumer

Consumers that are vulnerable or sensitive are a second category that needs to be taken into account when considering warnings.<sup>1328</sup> Ultimately, this was the issue before the court in *Buchan*. There the court was considering the risk that the oral contraceptive posed to a small subset of the population.<sup>1329</sup> What the court found to be particularly relevant is the notion of “dependency”, which is often at play in informed consent.<sup>1330</sup> Cassels and Jones note that dependency plays an important role in determining the requisite standard of care for

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<sup>1326</sup> Moreover, fast food companies target heavy users, see Jennifer Ordonez, “A taste for convenience: Fast food companies seek more “heavy users”” (January 13, 2000) Sarasota Herald-Tribune D1.

<sup>1327</sup> For example Antler, *supra* note 11 argues that *Pelman I*, *supra* note 9 would have had a better chance had it been more selective of the plaintiffs included in the lawsuit. Antler argues that McDonald’s targets urban minority youth. See also Kim D Raine, “Determinants of Healthy Eating in Canada – An Overview and Synthesis” (2005) 96 Canadian Journal of Public Health S8; Adam Drewnowski & Nicole Darmon, “Food Choices and Diet Costs: An Economic Analysis” (2005) 135 Journal of Nutrition 900; and, Steven Cummins & Sally MacIntyre, “Food Environments and Obesity—Neighbourhood or Nation?” (2006) 35 International Journal of Epidemiology 100.

<sup>1328</sup> There is overlap here between the foreseeability of harms for susceptible consumers and the principle of the “thin-skulled plaintiff”. The latter will be examined in more detail in Chapter 5.

<sup>1329</sup> At trial, the court compared the duty to warn to particularly susceptible users to the rules around informed consent. As the Supreme Court of Ontario noted, “[t]he law in Canada concerning the duty to warn of unusual but serious consequences has developed in the field of medical malpractice”, *Buchan v Ortho Pharmaceutical* (HCJ), *supra* note 666 at para 52-53. The court proceeded to consider two highly influential medical malpractice cases, *Hopp v Lepp*, [1980] 2 SCR 192 and *Reibl v Hughes*, *supra* note 675. The Ontario Court of Appeal was not convinced. It held that the application of the Reibl test was ultimately inappropriate for product liability cases, *Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 73. See also the discussion about the *Reibl* below. Moreover, the court held that “[t]he considerations applicable to and the responsibilities involved in a doctor-patient relationship differ markedly from those of a manufacturer-consumer relationship” at para 74. One of the differences the court notes is the fact that manufacturers, as distant commercial entities, do not tailor warnings to specific individuals and thus are not required to “make the type of judgment call that becomes subject to scrutiny in informed consent actions”, *ibid*. The trial judge, however, was clearly aware of this, see, for example, para 107 (“There is no intimate relationship between the manufacturer and the ultimate consumer”).

<sup>1330</sup> For example, Holland J notes, “[t]he fully informed consumer is quite capable of acting independently and should make an informed choice”, *Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 107, suggesting that uninformed consumers are unable to act independently. Of course, it is not clear if Holland J meant this to imply that this left the consumer dependent on a manufacturer.

warnings.<sup>1331</sup> They note that dependency is not limited to medical cases:

in fact, the information deficit faced by consumers compared to manufacturers informs the entire jurisprudence surrounding the duty to warn. Where the deficit is widest, duties will more likely be found, and the standards for the appropriate warning will be highest; in cases where the victim is well positioned compared to the manufacturer, either a duty will not be found or its standard will be a low one.<sup>1332</sup>

Thus, for a particularly vulnerable user, the standard of care required will be high. This is most apparent in cases involving consumers with food allergies. It is foreseeable, especially in the case of food products, that a perfectly safe product might pose harm to a person with anaphylactic food allergies.<sup>1333</sup> Thus, manufacturers will be required to warn potential allergic consumers of the risk of contact with an allergen.<sup>1334</sup> Indeed, manufacturers have long been aware of the obligation owed to sensitive users. In the 1940 case of *Watson v Buckley*, for example, the defendant manufacturer was held liable for failing to ensure the safety of a hair dye that caused a sensitive plaintiff to contract dermatitis.<sup>1335</sup> Similarly, in *Grant v Australian Knitting Mills (Grant)*, a manufacturer of garments was held liable when free sulphites in the

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<sup>1331</sup> Cassels & Jones, *supra* note 84 at 57.

<sup>1332</sup> *Ibid* at 58.

<sup>1333</sup> Edgell, *supra* note 545 refers to *O'Fallon v Inecto-Rapid* (1940) 4 DLR 276 (BC CA), and in footnote 108, notes: "it is conceivable that the incidence of an allergy could be so rare, and the effects so minimal, that the reasonably manufacturer would not warn. However, where material harm is foreseeable, a warning would be required."

<sup>1334</sup> Dickerson, *supra* note 610 at 211. For a general discussion of allergies, see Carol Rogers & Michael Trebilcock, "Product Liability and the Allergic Consumer: A Study in the Problems of Framing an Efficient Liability Regime" (1986) 36 *University of Toronto Law Journal* 52; James A Burton, "Products Liability: Strict Liability and the Allergic Consumer" (1971) 45 *Tulane Law Review* 662; and, James A Henderson, "Process Norms in Products Litigation: Liability for Allergic Reasons" (1990) 51 *University of Pittsburg Law Review* 761. This is not a new concern for products liability, see for example, Clarence S Barasch, "Allergies and the Law" (1941) 10 *Brooklyn Law Review* 363 (1941) and, Frank X Cull, "Allergy and the Law" (1945) 12 *Insurance Counsel Journal* 45.

<sup>1335</sup> *Watson v Buckley*, *supra* note 926. See also *Holmes v Ashford et al*, *supra* note 936 and *O'Fallon v Inecto-Rapid*, *supra* note 1333 (warning for hair dye that would harm small number of people with abnormal skin was required). See also above, notes 1099 and 1344.

garment caused dermatitis in a consumer.<sup>1336</sup> What is particularly striking about this last example is that only one garment in a batch of 4,737,600 was responsible for causing dermatitis. Theall and colleagues note that in *Grant*, the court imposed a standard of care of near perfection on products that are considered inherently dangerous to public health.<sup>1337</sup>

Although perhaps less obvious than a class of consumers with food allergies, some consumers are sensitive to food products that contributes to or results in obesity. Indeed, some food manufacturers assert that particular individuals are more vulnerable to obesity. For example, it is not uncommon for food manufacturers and trade associations to assert that obesity results from an individual's genetics.<sup>1338</sup> There is an ongoing debate about the role of genetics in obesity, with conflicting data. At a minimum, genetics alone cannot explain the relatively recent spike in incidence of obesity.<sup>1339</sup> Irrespective of the actual role of genetics in obesity, if food manufacturers wish to assert that genetics play a role, would it not then impose on them an obligation to warn these more vulnerable consumers of the risks with their food products? Although the court in *Tabrizi v Whallon Machine* has suggested that the duty to warn "begins to wear thin where the danger is more inherent in the user than the product", this line of reasoning

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<sup>1336</sup> *Grant v Australian Knitting Mills*, *supra* note 784.

<sup>1337</sup> Theall et al, *supra* note 62 at L2-15. Post- *Grant v Australian Knitting Mills*, *ibid*, the courts applied this near perfect standard of care but also shifted the burden of proof to manufacturers. Theall and colleagues point to *Shandolff v City Dairy*, *supra* note 617, and *Arendale v Canada Bread*, *supra* note 618, as examples.

<sup>1338</sup> See, for example, CCF, "Genes Make Obesity An Individual Problem" (May 20, 2003), online: CCF [www.consumerfreedom.com/2003/05/1930-genes-make-obesity-an-individual-problem/](http://www.consumerfreedom.com/2003/05/1930-genes-make-obesity-an-individual-problem/).

<sup>1339</sup> A commonly noted refrain is that humanity's genetics have not dramatically shifted in the past half a century, yet there has been a shift in obesity rates. See, for example, Swinburn, "Obesity Prevention", *supra* note 263. This is not to dispute the role of genetics in obesity. See, for example, Christopher G Bell, Andrew J Walley & Philippe Froguel, "The Genetics of Human Obesity" (2005) 6 *Nature Review Genetics* 221, and Joselyn Rojas et al, "Obesity Genetics: A Monopoly Game of Genes" (2013) 20 *American Journal of Therapeutics* 399. As George Bray has famously stated, "genes load the gun, the environment pulls the trigger", George A Bray, *Contemporary Diagnosis and Management of Obesity* (Newton, PA: Handbooks in Health Care, 1998).

does not accord with most of the case law on point.<sup>1340</sup> To be sure, the threat of anaphylaxis is a more immediate danger to individuals than obesity, and this may inform the type of warning given or that liability that may follow for failing to warn, but both anaphylaxis and obesity are risks that manufacturers are aware of and, arguably, should warn about. The fact that obesity is not an immediate consequence of consumption should not preclude the obligation to warn. Recall that in *Buchan* the risk of stroke was not immediate, nor was the risk of explosion in *Lambert*, or the rupture of the breast implant in *Hollis* – in each instance, the risk materialized over time (of varying length), with prolonged use, and in each instance the court determined that the manufacturer owed a duty to the consumer to warn them of the risk.

## 6. COMMUNICATION OF WARNINGS

The challenges facing consumers in the complex and saturated food product market are identified above.<sup>1341</sup> In light of these challenges, it would make little sense to require manufacturers to warn consumers of risks, but to leave it at that, without further exploration as to the expectations around how these warnings were to be communicated. Indeed, in the trilogy of *Buchan*, *Hollis*, and *Lambert*, the courts were ultimately concerned with whether the warning provided by the manufacturer to the consumer (or learned intermediary) was adequate.<sup>1342</sup> The adequacy of a warning is critical, given that if a product's warning is deemed sufficient the

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<sup>1340</sup> *Tabrizi v Whallon Machine*, *supra* note 1261 at para 41. Note, there does not appear to be any court that has accepted this argument. It also seems to be in conflict with the thin skull rule.

<sup>1341</sup> See Edgell, *supra* note 545 at 2 and Waddams, *Product Liability*, *supra* note 534 at 61.

<sup>1342</sup> Some courts have used the language of a warning's effectiveness, see, for example, *Holowaty v Bourgault Industries*, *supra* note 1239 at para 39 (“where a product has a dangerous aspect to it, the manufacturer must take pains to provide an effective warning”). The language of effectiveness of warnings is avoided in this project as warnings could be adequate and yet not effective, as was the case in *Schmitz v Stoveld* (1976), 11 OR (2d) 17 (ON C Ct). Similarly, a warning might be effective but nevertheless be inadequate.

manufacturer will not be liable for harms that follow from the consumer's use of the product.<sup>1343</sup>

The general rule is that warnings must be reasonably communicated.<sup>1344</sup> What this means will depend on the circumstances, as the specific content of a warning will depend on the nature of the product itself.<sup>1345</sup> As the court noted in *Hollis*,

[w]here significant dangers are entailed by the ordinary use of the product, it will rarely be sufficient for manufacturers to give general warnings concerning those dangers; the warnings must be sufficiently detailed to give the consumer a full indication of each of the specific dangers arising from the use of the product.<sup>1346</sup>

The courts have expressed this to mean that manufacturers must disclose risks with “a very

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<sup>1343</sup> Theall et al, *supra* note 62 at L3-18-L3-19. Importantly, as discussed earlier, it is possible that a warning will not be sufficient to shield a manufacturer from liability, irrespective of the warning's adequacy, given the risks inherent to a product. See Waddams, *Product Liability*, *supra* note 534 at 61 (“Directions for use will not always protect the manufacturer from liability for serious consequences (unless the risk is obvious).”) and Weinstein et al, *supra* note 580 at 62 (“A warning may or may not be sufficient, depending on the probability of reducing the risk and the feasibility of the design alternatives that would eliminate the risk or substantially diminish it. Courts sensitive to the very real limitations that affect warnings have indicated their concern that in some instances even the best warnings may not shield the manufacturer from liability.”).

<sup>1344</sup> *Hollis v Dow Corning*, *supra* note 66 at para 20. See Waddams, *Product Liability*, *supra* note 534 at 61 (“It would hardly be sufficient to print on a can of household paint “avoid contact with skin” if the product was dangerously corrosive. Large print advice about protective clothing would be a minimum requirement. The warning must indicate not only the likelihood of the danger occurring, but also the seriousness of the likely consequences. In the case of medical or cosmetic products, for example, it would not be sufficient to warn of a slight rash if there was a risk of serious dermatitis. Nor is it sufficient to say that a product may be harmful, if it is not indicated how the harm is likely to occur.”). See also Weinstein et al, *supra* note 580 at 67, who note what is reasonable entails assessing more than just the risk of harm (“Two products may have the same risk potential, but because of the diverse nature of product benefits, consumers may desire to have the risk-potential information in one case and yet may not be particularly concerned with the matter in the other ... Note here that the product's danger itself is but one element of the overall question of consumer choice.”).

<sup>1345</sup> Cassels & Jones, *supra* note 84 at 55 (“The warning, therefore, must be commensurate with both the gravity and the likelihood of the danger. This requirement is consistent with the general approach to standard of care, which requires a heightened level of causation where there is a likelihood of some harm or a risk of serious harm.”).

<sup>1346</sup> *Hollis v Dow Corning*, *supra* note 66 at paras 20, 22 (“All warnings must be reasonably communicate, and must clearly describe any specific dangers that arise from the ordinary use of the products.”). See *Park v B & B Electronics*, [2003] AJ No 873 (AB QB) at para 187, where the court states “[t]he law is clear that a warning if required must be adequate and not overly general so that it only states the obvious and does not address foreseeable but unapparent dangers”, referring to *Lambert v Lastoplex Chemicals*, *supra* note 65; *Buchan v Ortho Pharmaceutical*, *supra* note 67; *Hollis v Dow Corning*, *supra* note 66; and, *Strata Plan N38 v Charmglow Products*, *supra* note 708.



precise degree of specificity”,<sup>1347</sup> with “sufficient particularity”<sup>1348</sup>, and in a manner that is not “overly general.”<sup>1349</sup>

What the court demands is explicitness.<sup>1350</sup> Warnings must be capable of informing the user of the risks.<sup>1351</sup> In *Lambert* the court found that the manufacturer had failed to discharge its obligation when it neglected to warn consumers of the dangers posed by a pilot light, despite having provided three warnings about the product’s inflammability.<sup>1352</sup> This can be contrasted with *Schmitz v Stoveld*, where the plaintiff ignored the manufacturer’s warnings about using a sealer without assuring adequate ventilation and before extinguishing the pilot light – and thus the court held that the plaintiff “authored the misfortune.”<sup>1353</sup> That said, it is generally held that

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<sup>1347</sup> *Davidson v Connaught Laboratories*, *supra* note 1323 at para 60.

<sup>1348</sup> *Royal Canadian Legion, Humboldt Branch no 28 v Britz*, [1987] 62 Sask R 225 (SK QB). Consider, for example, the courts finding in *Ruegger v Shell Oil Company of Canada*, *supra* note 918, where the warning issued by Shell was inadequate because it “did not and was not designed to alert the ordinary man to the danger of invisible drift at any time, particularly in the late afternoon, or on a slope near Lake Ontario, a danger which they must be deemed to have known or ought to have known” at para 24.

<sup>1349</sup> *Park v B & B Electronics*, [2003] AJ No 873 (AB QB), *supra* note 1346 at para 187, where an overly general warning is one that “only states the obvious and does not address foreseeable but unapparent dangers.”

<sup>1350</sup> Waddams, *Product Liability*, *supra* note 534 at 61. For example, in *Affeldt v BD Wait*, [1980] OJ No 67 (HCJ) the court held that the warning that accompanied a propane heater was insufficient. Knowing that it would be used in things like tents for camping, the manufacturer had to provide a more explicit warning, one that took “every reasonably step to bring unavoidable hazards to potential user’s notice.”

<sup>1351</sup> Theall et al, *supra* note 62 at L3-17. However, as the court in *Stiles v Beckett*, (1993) 22 CPC (3d) 145 (BC SC) at 166-67 notes, adequacy should not be conflated with ideas of perfect warnings or even “the best” warning: “The law does not require that such warnings be perfect, or that they be the best warning of all possible warnings. The law imposes a duty only to give a warning that is reasonable in the circumstances, having regard for the nature and seriousness of the dangers to be warned against.” See also *Buchan v Ortho Pharmaceutical*, *supra* note 67 at paras 18, 55 and *Moran v Wyeth-Ayrest Canada*, *supra* note 1074 (“Warnings are not required to be perfect, but are required to address dangers that are inherent, or arise from the use of the product in certain circumstances.”).

<sup>1352</sup> The court held that the existing warnings “lacked the explicitness which the degree of danger in its use in a gas-serviced residence demanded”, *Lambert v Lastoplex Chemicals*, *supra* note 65 at 575. Moreover, there was evidence that competitors had provided more explicit warnings for a similar product, at 573. See also *McInnis, Meehan & Tramble v Weeb Real Estate*, [1978] 2 SCR 1382 (“the degree of explicitness required depends on the circumstances.”).

<sup>1353</sup> *Schmitz v Stoveld*, *supra* note 1341. The plaintiff neglected to open the windows to allow ventilation and to turn off the pilot light, ignoring the manufacturer’s warnings. See discussion by Theall et al, *supra* note 62 at L3-18-L3-19.



explicit warnings must take into consideration the fault of users.<sup>1354</sup>

In addition to considering what risks require warnings, manufacturers must also consider how they will communicate those warnings to consumers. This includes not only how a warning is delivered to the consumer<sup>1355</sup>, but also the actual attributes of the warnings. For example, the language of the warning is important.<sup>1356</sup> In *Tudor Inn Reception Hall v Merzat Industries* the court held that the terms used must be simple enough for a “consumer of average education and experience.”<sup>1357</sup> In *Ruegger* the court held that “caution” was a milder word than “warning”, and this affected how the warning was communicated.<sup>1358</sup> In addition to the language used, the location, colour, and prominence of a warning might influence a court’s determination of whether or not it was adequate.<sup>1359</sup> Courts have held manufacturers responsible in instances when a warning was not “arresting”.<sup>1360</sup>

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<sup>1354</sup> *Lem v Baratto Sports*, *supra* note 603 at para 22 (“to give adequate warning, that is to say explicit warning, not only as to such that would arise out of the contemplated proper use of the product, but also as to such that might arise out of reasonably foreseeable fault on the part of the purchaser in its contemplated use”). This would seem to be contrary to the finding of the court in *Tabrizi v Whallon Machine*, *supra* note 1261 at para 41., that “the duty of the manufacturer to do so begins to wear thin where the danger is more inherent in the user than the product.”

<sup>1355</sup> A very interesting case on point is *Nicholson v John Deere*, *supra* note 606. In this case, the court held that the efforts the manufacturer made upon discovering a defect to communicate its warning were ultimately deficient and “doomed to failure”, at 61. In this instance, the manufacturer knew that many of its warnings would not reach consumers, and yet did not make any additional efforts. Thus, it is not enough to provide warnings, they must ultimately reach the consumer in a clear and unequivocal way. Thus, the posting of nutritional information on websites or brochures that are not readily available or that are difficult to read likely amounts to insufficient effort on the part of food manufacturers. The effort expected of food companies will be high, as they will be expected to take action that has a reasonable chance of reaching consumers.

<sup>1356</sup> *Waddams, Product Liability*, *supra* note 534 at 61 (“the onus is on the manufacturer to ensure that the warning represents the true danger according to current usage.”).

<sup>1357</sup> *Tudor Inn Reception Hall (1992) v Merzat Industries*, *supra* note 1196 at para 8. See also *Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 36.

<sup>1358</sup> *Ruegger v Shell Oil Company of Canada*, *supra* note 918 at 24.

<sup>1359</sup> *Edgell*, *supra* note 545 at 80.

<sup>1360</sup> *Leblanc v Marson Canada*, *supra* note 602. Here a tube of liquid hardener exploded, and the court found that the warning was small and dealt with only minor damages, and thus was not arresting enough to sufficiently warn the consumer of the risks. In *Fillmore’s Nurseries v N American Cyanamid*, *supra* note 1195, the court found that for a manufacturer to shift the risk of use to a plaintiff “it would have been necessary for it to place

As discussed in chapter four, one of the clearest articulations of what will render a warning adequate was provided by the Ontario Court of Appeal in *Buchan*. There the *Buchan* standard, which concerns the adequacy of a warning, was articulated.<sup>1361</sup> For the most part, the *Buchan* standard coalesces with the general discussion of the standard required of warnings. It has been widely cited by courts, although for the most part courts have opted simply to defer to *Buchan* without providing any explanation of what the criterion requires. Undoubtedly, this is a reflection of the fact that most of criteria entail analysis that the court will deal with in other aspects of its deliberations (e.g., assessing gravity of a risk).

While the general sentiments of the *Buchan* standard might be self-evident, there is one particular aspect of adequacy that is especially relevant for the present discussion that warrants further consideration. *Buchan* holds that for a warning to be adequate it “should not be neutralized or negated by collateral efforts on the part of the manufacturer.” This notion is not explained in any of the subsequent courts relying on *Buchan*.<sup>1362</sup> Thus, it is unclear how the court will apply this when assessing adequacy. Although consideration has been given to manufacturers who oversell their products<sup>1363</sup> or who encourage reckless use<sup>1364</sup>, little attention

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on the labels something *very* much more arresting than it did”, at para 78. In this case, the court found it was not sufficient for the manufacturer to label the product with “for trial use only” in much smaller words than the rest of label, nor the warning in smaller words yet: “user assumes all risk of use or handling whether in accordance with directions or not.

<sup>1361</sup> *Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 18.

<sup>1362</sup> In *Ocean Falls Corp v Worthington (Canada)*, *supra* note 708, the court does recognize that the plaintiff asserts that the defendant has, in fact, “neutralized or negated the effect of any it had communicated”, at para 53, but does not consider the matter further. Cassels and Jones do refer to it, but only briefly without any explanation, *supra* note 84 at 58.

<sup>1363</sup> For example, Weinstein et al, *supra* note 580 at 37 note, “the manufacturer must be sensitive to what his product communicates to consumers. If the product overrepresents itself (implying an unrealistic performance standard), then the manufacturer may have to limit consumer expectations by warnings.” They use an aluminum ladder as an example. They conclude, “[t]he standards of performance may have to meet real life expectations determined by products use”, *ibid*.

<sup>1364</sup> See Waddams, *Product Liability*, *supra* note 534 at 57: “If a manufacturer by advertisements

has been given to manufacturers who purposely neutralize or negate their own warnings. Perhaps one of the best examples is *Létourneau*, where the court was very critical of the tobacco companies' efforts to neutralize the warnings mandated by Health Canada.<sup>1365</sup>

It is not difficult to demonstrate how the food industry, in general, operates to negate or neutralize consumer's general understanding of the risks associated with food. Moreover, the food industry actively negates (and outright denies) warnings about the risk of food consumption that come from third parties, such as health organization or governmental departments.<sup>1366</sup> Additionally, food manufacturers also oversell their products and encourage reckless use. Consider the numerous advertisements about healthy choices now available at fast food restaurants. Such choices rarely qualify as being healthy, as numerous commentators have pointed out the "healthy" options are in fact often less healthy (e.g., higher in fat, sodium or sugar or overall calories) than the food items they are supposed to be replacing.<sup>1367</sup> If overeating is a foreseeable misuse, surely advertising "second dinners" is reckless promotion of a dangerous use of food products.<sup>1368</sup> Given that lack of jurisprudence explicating the *Buchan* standard, it is difficult to know whether or not these efforts by the food industry would render a warning

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encourages dangerous use of product, it ought not to be open to the manufacturer to say that it could not have expected the product to be so used." At the extreme, consider the Heart Attack Grill in Las Vegas, see Jacob Davidson, "'Heart Attack Grill' Owner Proudly Displays Dead Customer's Remains on TV" (October 5, 2013) Time, online: [newsfeed.time.com/2013/10/05/heart-attack-grill-owner-proudly-displays-dead-customers-remains-on-tv/](http://newsfeed.time.com/2013/10/05/heart-attack-grill-owner-proudly-displays-dead-customers-remains-on-tv/). Although he sells a burger with 10,000 calories – called the Quadruple Bypass Burger – the owner of the restaurant claims to want to tell customers not to eat his food as it will kill them, a clearly grotesque promotion of his products.

<sup>1365</sup> See discussion about *Létourneau v JTI-MacDonald*, *supra* note 68, at page 150ff.

<sup>1366</sup> Much of this is done through the industry organizations identified above, note 1235, such as the CCF and Grocery Manufacturers Association.

<sup>1367</sup> See e.g. Mary O Hearts et al, "Nutritional Quality at Eight U.S. Fast-food Chains: 14-year Trends" (2013) 44 American Journal of Preventive Medicine 589.

<sup>1368</sup> "Second dinners" are a recent marketing strategy of numerous fast food outlets. The aim is to capture the younger demographic that might be active in the late evening, early morning. See David Sirota, "Feeding the obesity crisis: Fast food restaurants are leading a new campaign for a "fourth meal"" (June 18, 2012) Salon, online: [www.salon.com/2012/06/18/feeding\\_the\\_obesity\\_crisis](http://www.salon.com/2012/06/18/feeding_the_obesity_crisis).

inadequate.

At present, this is largely an academic issue, as there are few warnings on food products. As noted above, it is widely – and inaccurately – assumed that consumption of food is a matter of common sense. However, it hardly seems fair to make this assumption, or to declare that consumers have been adequately warned about the dangers with using a product, when the purveyors of those products spend billions of dollars to convince consumers and policy makers of this fact.<sup>1369</sup> Repetition does not make for truth. And while there is some risk that requiring food manufacturers to provide adequate warnings for the risks associated with their products will result in the overuse of warnings<sup>1370</sup>, this risk should not be prioritized over the risk of harming consumers of food products. Moreover, this risk can be mitigated by identifying the categories of food products where, given the potential harms that may follow, warnings are warranted. Additionally, it is possible for the food industry, either independently or with direction from the state, to develop standardized warnings. Although this option is not contemplated further here, and no consideration is given to the specific content of such standardized warnings, it is an option that can help to overcome problems with the overuse of warnings, rendering this critique less forceful.<sup>1371</sup>

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<sup>1369</sup> It is difficult to precisely identify how much money is spent on food and beverage advertising, as reports vary. The Yale Rudd Center for Food Policy & Obesity contends that the fast food industry spent \$4.6 billion on advertising to increase more frequent visits to fast food restaurants, see at Jennifer L Harris et al, *Fast Food FACTS 2013: Measuring Progress in Nutrition and Marketing to Children and Teens* (New Haven, CT: Yale Rudd Center for Food Policy & Obesity, 2013) at v. This figure does not appear to include all food advertising, as it does not include beverage companies, which alone spend billions on advertising, see “Coca-Cola Marketing Tops \$4 Billion, Tripodi Says”, online: [www.coca-colacompany.com/our-company/coca-cola-marketing-tops-4-billion-tripodi-says](http://www.coca-colacompany.com/our-company/coca-cola-marketing-tops-4-billion-tripodi-says).

<sup>1370</sup> Weinstein et al, *supra* note 580 at 64 note that there is a danger of diluting warnings and that “[t]he overuse of warnings invites consumer disregard and ultimate contempt for the warning process”, *ibid* at 68.

<sup>1371</sup> While it is beyond the scope of this chapter to examine this in detail, one could argue that certification marks and other commonly used designations on products are examples of how standardization of warnings may

## 7. CONCLUSION: STANDARD OF CARE FOR FOOD PRODUCTS

This chapter has provided a detailed analysis of warning defects and has applied the existing product liability jurisprudence on warnings to assess how courts might deal with warnings on food products. It is clear that a high standard of care is imposed on food manufacturers given that food products are ingested. Complex factors will determine the standard of care. In addition to the principles generally relied upon (e.g., reasonable care, foreseeability of harm) for food products, in determining the standard of care expected of food manufacturers the courts will pay particular attention to the nature of the product, industry standards, and consumer expectations. Although obviousness of dangers and common sense have prevailed in past obesity litigation (e.g., *Pelman*), this chapter has drawn on the scientific and epidemiological evidence to show that dangers inherent in consuming many food products are neither obvious nor do people rely on common sense when making dietary choices. This chapter has shown that food manufacturers are under an obligation to identify and disclose risks of their products to consumers, given the foreseeable risks associated with overconsumption of particular products (and attendant manufacturer marketing to encourage consumption). Warnings should be explicit, arresting, and appropriate for the intended consumers. However, there are hundreds of thousands of food products available on the market, rendering their individual consideration in court unfeasible. Moreover, plentiful, unstandardized warnings may indeed serve to further confuse consumers and be ineffective. The conclusion of this thesis will therefore argue that warnings should accompany specific products, manufacturing processes and nutrition profiles that are recognized to be dangerous to health.

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work.



## CHAPTER 7: CAUSATION AND THE DUTY TO WARN

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### 1. INTRODUCTION: CAUSATION AND THE DUTY TO WARN

The final chapter in part two addresses one of the most complicated issues in a negligence action: causation.<sup>1372</sup> It has been observed that causation is “at the heart of every product liability claim.”<sup>1373</sup> Waddams notes that to succeed in a product liability case, the plaintiff must demonstrate that the defect was the result of the manufacturer’s negligence.<sup>1374</sup> At its most basic, “there is no liability without negligence, and there is no negligence without duty, breach and resulting injury.”<sup>1375</sup> For causation to be established in product liability cases, it must be shown that the defect in the product caused the injury.<sup>1376</sup> For duty to warn cases, causation is question of “whether the plaintiff would have heeded the warning had it been given.”<sup>1377</sup> For negligence to arise, the plaintiff would also need to establish that the injury would not have occurred ‘but for’ the defendant’s failure to warn.<sup>1378</sup> However, as the discussion below will

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<sup>1372</sup> This is true of all negligence claims: “The concept of causation gives rise to many difficulties not peculiar to the law of products liability”, Waddams, *Product Liability*, *supra* note 534 at 66. With product liability claims – especially duty to warn claims – causation poses unique challenges, as will be discussed throughout this chapter.

<sup>1373</sup> Theall et al, *supra* note 62 at L7-1.

<sup>1374</sup> He notes, plaintiffs rarely fail to prove that a manufacturer was at fault. Discussing *res ipsa loquitur*, Waddams observes, “[t]he plaintiff must prove first that the product was defective when it left the manufacturer’s hands, and, second, that the manufacturer was negligent in allowing the defect to occur”, Waddams, *Product Liability*, *supra* note 534 at 71.

<sup>1375</sup> Theall et al, *supra* note 62 at L7-3.

<sup>1376</sup> For example, Berger & Twerksi, *supra* note 685 at 267-268 note, “[t]o establish fault in a negligence case, it is not necessary to prove that the foreseeable harm to the plaintiff is more likely than not to occur. The duty to warn is breached when a risk is of sufficient consequence that a reasonable person would warn against it.”

<sup>1377</sup> *Ibid* at L7-12.

<sup>1378</sup> Cassels & Jones, *supra* note 84 at 61: “Since the essence of a breach of the duty to warn is a failure to pass on adequate information to the consumer, causation will be made out only where it is established that, had the information been properly communicated, the consumer’s choice or use of the product would have been different.”



reveal, causation in failure to warn cases might not proceed so simply.

This chapter will begin in part two with a general overview of the current approach to determining causation in negligence cases, examining cause-in-fact, as determined through the ‘but for’ test, and legal causation, also referred to as proximate cause or remoteness.<sup>1379</sup> It will then consider causation in *Hollis v Dow Corning*, and the congruence between *Hollis* and *Buchan v Ortho Pharmaceutical*. Part three will then examine an approach to causation in duty to warn cases, including consideration of the argument articulated by Boivin differentiating injury causation and decision causation. Following this, part four considers the challenge with using the ‘but for’ text in duty to warn cases, particularly given that there may be multiple defendants and multiple products that might give rise to an injury. It will explore alternatives to the ‘but for’ test, specifically material contribution to risk. Part five explores two challenges in using evidence that arise when determining causation as it relates to diet-related chronic disease. Part six will then consider proximate cause. This chapter will conclude by reviewing the challenges that arise generally in cause-in-fact and proximate cause inquiries in duty to warn cases, and will argue that while causation may present a formidable obstacle to plaintiffs, it is not insurmountable challenge.

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See also David A Fischer, “Causation in Fact in Product Liability Failure to Warn Cases” (1995) 17:4 Journal Products & Toxic Liability 271 at 271.

<sup>1379</sup> There are two important limitations to this section. First, there are no specific food products liability cases on point, and consequently no factual record to review or any injury to assess, the following focuses on doctrinal issues that arise in duty to warn cases, and considers how they may apply to food products. The second limitation is that while the following is largely a theoretical discussion, by no means does it intend to survey the vast and contested scholarship on factual causation. To be sure, many of the issues discussed herein could be subject to lengthy examinations on their own. Instead, the following aims to provide an argument about how causation in duty to warn cases involving food products could be made out.

## 2. CAUSATION IN NEGLIGENCE

There are two parts to assessing causation: cause-in-fact and proximate cause. Cause-in-fact considers whether the defendant factually caused the injury. The *sine qua non* of the cause-in-fact inquiry is the ‘but for’ test.<sup>1380</sup> Proximate cause, or legal causation, considers whether the causative link between the product and the resulting injury was sufficiently close to warrant imposing liability.<sup>1381</sup> It requires the court to determine whether the injury can be assigned to the defect.<sup>1382</sup> Proximate cause is considered a question of policy<sup>1383</sup>, whereas factual causation is a more straightforward factual analysis.<sup>1384</sup> However, this differentiation has been argued to be largely a myth.<sup>1385</sup> It is thought that the ‘but for’ test is often insufficient for assessing cause-in-fact<sup>1386</sup>, particularly in complex instances, forcing the courts to modify its approach to cause-in-fact. As will be discussed below, while there are instances where this may be true, the ‘but for’ test is sufficient for most purposes.<sup>1387</sup>

Factual causation has been the subject of considerable discussion and analysis.<sup>1388</sup> In part, this is because establishing factual causation is necessary for a finding of negligence, and in each

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<sup>1380</sup> Boivin, “Factual Causation”, *supra* note 645 at 50, 63; Erik S Knusten, “Ambiguous Cause-in-Fact and Structured Causation: A Multi-Jurisdictional Approach” (2003) 38 *Tex Int’l LJ* 249 at 250.

<sup>1381</sup> Cassels & Jones, *supra* note 84 at 27. As they note, “in the causation analysis, it is with this notion of remoteness that the *adequacy* of the causative link between a particular product and the injury comes into question.”

<sup>1382</sup> Weinstein et al, *supra* note 580 at 19.

<sup>1383</sup> Cassels & Jones, *supra* note 84 at 27.

<sup>1384</sup> Beever suggests that cause-in-fact may be “[p]erhaps the most problematic area of tort law”, Allan Beever, “Cause-in-Fact: Two Steps Out of the Mire” (2001) 51 *University of Toronto Law Journal* 327 at 327, although he does suggest that this convulsion is not necessary, *ibid*.

<sup>1385</sup> See discussion in Knusten, *supra* note 1380 at 250.

<sup>1386</sup> See Knusten, *ibid* and Botterell & Essert, *supra* note 93.

<sup>1387</sup> Beever cautions against conflating proximate cause and cause-in-fact, noting their distinct tasks. “The first involves investigating the reasonable foreseeability of the damage to the plaintiff from the perspective of the defendant’s negligence, the second investigating the causal connection between the defendant’s negligence and the plaintiff’s injury. While these issues are not entirely unrelated, they are very different”, Beever, *supra* note 1384 at 327.

<sup>1388</sup> See, for example, Boivin, “Factual Causation”, *supra* note 645; and, Fischer, *supra* note 1378.

instance it requires a unique analysis.<sup>1389</sup> Plaintiffs who have been frustrated by causation's seeming inflexibility have long proposed alternative approaches to establishing factual causation.<sup>1390</sup> Academics have similarly identified various alternative approaches. Of the various solutions identified, none are without their own concerns.<sup>1391</sup> Causation is a particularly vexing issue when there is more than one defendant and/or more than one potential cause of the injury.

It is widely accepted that the onus for establishing causation generally falls on the plaintiff. As the court in *Stewart v Pettie* observes, “[t]he plaintiff in a tort action has the burden of proving each of the elements of the claim on the balance of probabilities. This includes proving that the defendant’s impugned conduct actually caused the loss complained of.”<sup>1392</sup> However, the court in *Stewart* noted that, in some instances, causation is “patently obvious” and thus requires no proof.<sup>1393</sup> Additionally, there can be a “natural inference of causation”, shifting the burden to the defendant to present evidence that negates causation.<sup>1394</sup> As Knusten notes, courts have been reluctant to “rob the plaintiff of an opportunity to prove causation” and thus have modified their analysis “to accommodate the plaintiff.”<sup>1395</sup> As will be demonstrated, this

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<sup>1389</sup> Boivin, “Factual Causation”, *supra* note 645 at 63: “it can be argued that cause-in-fact is currently the most important element in establishing a claim for damages in tort.” Moreover, as discussed in Chapter 5, it might not be necessary for the court to determine that a duty of care exists if a duty has already been recognized.

<sup>1390</sup> Theall et al, *supra* note 62 at L7-4. Weinrib has notes, “[p]roof of factual causation now perhaps ranks as the most troublesome general issue in law of negligence”, Ernest J Weinrib, “Causal Uncertainty” (2016) 36:1 Oxford Journal of Legal Studies 135 at 136 [Weinrib, “Causal Uncertainty”].

<sup>1391</sup> Following his own review of the various approaches identified, Boivin, “Factual Causation”, *supra* note 645 at 83 observes: “To be sure, none of these solutions are free of difficulties. However, the debate that they uncover is further evidence that, in the final analysis, the best approach to resolving the dilemma inherent in decision causation is to acknowledge its existence and to proceed with caution on a case-by-case basis.”

<sup>1392</sup> *Stewart v Pettie*, *supra* note 817 at 153.

<sup>1393</sup> *Ibid* at 155.

<sup>1394</sup> *Ibid*. See Edgell, *supra* note 545 at 32.

<sup>1395</sup> Knusten, *supra* note 1380 at 251. He identifies three methods that the courts have used: “(1) a court could reverse the burden of proof of causation to the defendant to disprove causation; (2) a court could infer causation based on a reasonable conclusion on the facts of the case; or (3) a court could hold the defendant liable for materially increasing the risk of injury to the plaintiff.” His article explores these three modified approaches, and

has been common-place in product liability cases. Although the causation inquiry has two aspects, establishing factual causation is the first step.<sup>1396</sup> If a plaintiff cannot demonstrate that a defendant's actions or omissions resulted in their injury, then causation has not been shown, and it is unnecessary to consider proximate cause.<sup>1397</sup> It has also been subject to much analysis because of difficulties with determining factual causation. At this stage of the analysis, the question is purely factual<sup>1398</sup>, relying on the 'but for' test.

To establish causation in a duty to warn case, the 'but for' question would ask: "but for the failure to warn, would the injury have occurred?"<sup>1399</sup> If the answer is yes, then the manufacturer is deemed to not be negligent. For example, in *Amin v Klironomos*, the court held that the plaintiff was aware that the toy crossbow it had been using had a 'hair trigger', and that the warning would have had no effect.<sup>1400</sup> In other words, the plaintiff would have been injured irrespective of the defendant's warning, so the plaintiff did not establish that they would not have been injured 'but for' the actions (in this case, an omission) of the defendant. In part, this is why defendant manufacturers have no obligation to warn about obvious dangers. If the answer to the question "but for the failure to warn, would the injury have occurred?" is no, there will be

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synthesizes them as "structured causation."

<sup>1396</sup> See *Grass (Litigation Guardian of) v Women's College Hospital*, (2001), DLR (4th) 242 (ON CA), where the Court of Appeal held that factual causation must be decided first, and order a new trial because that was not done by the trial judge.

<sup>1397</sup> Cassels & Jones, *supra* note 84 at 27 ("an absence of factual causation has been and remains grounds for denying recovery in product liability cases.").

<sup>1398</sup> *Ibid* at 26 (The substance of this link is irrelevant at the cause-in-fact stage of the analysis; that is, any factual cause whatsoever ought to satisfy this portion of the causation analysis.").

<sup>1399</sup> Importantly, we must consider not simply whether or not the manufacturer provided a warning at all, but the overall adequacy of the warning. Recall that in *Lambert v Lastoplex Chemicals*, *supra* note 65, the defendant had provided three warnings, but that the court determined these warnings were ultimately inadequate.

<sup>1400</sup> *Amin v Klironomos*. See also *Schmitz v Stoveld*, *supra* note 1341, where the court held "there was no causal connection between the manufacturer's label and the resulting damage; the injury arose out of the failure by workmen to observe the precautions of the label and to use measures protective against the dangers warned of."

liability for failing to warn. After all, in such an instance, the warning would have had some impact to inform the behavior of the user. This was the case in *Lambert*, where the court held that if the manufacturer had provided an adequate warning, which alerted the plaintiff to the need to turn off the pilot light, then the plaintiff would have turned it off, and avoided his injury and the damage to his home.<sup>1401</sup>

On the surface, the test appears to be relatively straightforward. However, there are challenges with factual causation generally and with applying the ‘but for’ test in duty to warn cases specifically. Fischer identifies two particular types of problems in these types of cases: “First are problems involving practical difficulties of proof. Second are theoretical problems in applying the but for test in cases involving multiple occurring omissions.”<sup>1402</sup> Given that a failure to warn is an omission, the first problem is particularly difficult to overcome. As Fischer notes, “[h]ere we are in the realm where proof can be extraordinary difficult because we must determine how a human being would have reacted to a non-existent stimulus.”<sup>1403</sup> There is often very little evidence available in these types of situations to rely upon, and as Fischer notes, the evidence that is available is typically “highly unsatisfactory.”<sup>1404</sup> Indeed, this is what the court in *Buchan v Ortho Pharmaceutical* had to contend with. As discussed above, the court had to determine whether or not to accept the plaintiff’s evidence that had she been properly informed she would have not taken Ortho’s contraceptive pill.<sup>1405</sup> It was also an issue in *Hollis v Dow*

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<sup>1401</sup> *Lambert v Lastoplex Chemicals*, *supra* note 65.

<sup>1402</sup> Fischer, *supra* note 1378 at 271.

<sup>1403</sup> *Ibid* at 273.

<sup>1404</sup> *Ibid* (“For example, testimony of the product user that she would have read the warning and would have heeded it by taking the recommended precautions is often highly speculative and self-serving. Some courts will not even admit such testimony.”).

<sup>1405</sup> Recall, the challenge here is that a plaintiff’s testimony can be self-serving, an issue discussed in

*Corning*, where the court had to determine whether Ms. Hollis would have consented to the breast implant surgery if she were fully informed.<sup>1406</sup>

If factual causation is established, this is not the end of the inquiry. The court must also determine if legal causation, or proximate causation, can be found.<sup>1407</sup> Proximate cause entails a discussion of the extent of liability, and not the factual basis for imposing liability. It requires the court to determine whether the negligent act is sufficiently related to the harm.<sup>1408</sup> This analysis can often overlap with the foreseeability analysis within the duty of care analysis.<sup>1409</sup> Although there are similar issues at play, they remain distinct. Here, foreseeability acts as a way to exclude damages that are too remote. This was famously set out in the *Wagon Mound*.<sup>1410</sup> In this case, during the loading of oil on a ship a negligent act resulted in oil spilling into the bay, later igniting and causing damage to a wharf. In determining whether the defendant should be liable, the court held that liability should only flow for foreseeable acts. Specifically, the court stated:

it does not seem consonant with current ideas of justice or morality that for an act of negligence, however, slight or venial, which results in some trivial foreseeable damage the actor should be liable for all consequences however unforeseeable and however grave ... [A] man must be considered to be responsible for the probable consequence of his act.<sup>1411</sup>

Foreseeability and remoteness have played an important role in product liability law. Recall the

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*Buchan v Ortho Pharmaceutical*, *supra* note 67, among other cases identified above.

<sup>1406</sup> See *Hollis v Dow Corning*, *supra* note 66 at para 44-45 (“The most serious concern raised by the application of a subjective test is that the plaintiff, with the benefit of hindsight, will always claim that she would not have used the product if she had been properly warned”, para 45).

<sup>1407</sup> Proximate cause can occasionally be used to refer to factual causation and linked with the but for test, particularly in American literature.

<sup>1408</sup> *Mustapha v Culligan of Canada*, *supra* note 614 at para 73.

<sup>1409</sup> David A Fischer, “Products Liability—Proximate Cause, Intervening Cause and Duty” (1987) 52:3 *Missouri Law Review* 547.

<sup>1410</sup> *Wagon Mound (No. 1), Overseas Tankship (UK) Ltd v Morts Dock & Engineering*, [1961] AC 388 (PC).

<sup>1411</sup> *Ibid* at 422-423.

discussion of *Rae and Rae v T Eaton Co (Maritimes)*.<sup>1412</sup> In this instance, it was not foreseeable that a can of artificial snow that was struck against the ground would explode; further, the court held that the possibility of the explosion causing a serious injury was even more remote.<sup>1413</sup> Here, the fact that the damage was not foreseeable factored into the court's decision-making.<sup>1414</sup> Liability will not be imposed if a product's reasonably foreseeable uses are harmless.<sup>1415</sup>

Whether this is the case, however, is difficult to determine. Thus, it is not surprising that proximate cause is often referred to as one of the more difficult issues in a negligence case.<sup>1416</sup> It has also been described as a question of policy.<sup>1417</sup> This is because it often relies on courts determining whether or not, in the circumstances, the harm was foreseeable. It also requires the court's judgment about what harms count. In making this decision, the court is attempting to strike a balance between compensating the plaintiff for harms that were foreseeable while also preventing the defendant from acting as an insurer.<sup>1418</sup>

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<sup>1412</sup> *Rae and Rae v T Eaton Co (Maritimes)*, *supra* note 662.

<sup>1413</sup> See discussion at note 1199. The court noted: "I do not think a reasonable man would foresee the risk of harm to anyone from the container, apart from those dangers that were warned against on the label. I do not think that Aerocide could be reasonably expected to anticipate an explosion of the container, or that if it did explode, harm would ensue", *ibid* at para 49.

<sup>1414</sup> *Desranleau v Herrick*, *supra* note 1200, when discussing *Rae and Rae*, *ibid*, notes: "whether or not a thing is dangerous is not determined by the fact that it may explode but on the probability of explosion according to its normal and foreseeable use and the probability of danger to life, limb or property if it does explode."

<sup>1415</sup> *Tanner v Atlantic Bridge Co*, [1966] 56 DLR (2d) 162 (NS SC) ("The principle adopted is that if the allegedly dangerous thing is in its reasonably foreseeable use harmless, there is no liability.").

<sup>1416</sup> Consider how the matter is characterized by Linden and Feldthusen: "There are no easy answers to the remoteness and proximate cause issues. Determining the scope of liability is a problematic exercise. No one magic phrase can furnish answers to all of the freakish and bizarre situations which arise in negligence cases. These unlikely scenarios, by their very nature, cannot be tamed by legal rules", *Halsbury's*, *supra* note 1206 at HNE-82. See also Allen M Linden & Lewis N Klar, *Canadian Tort Law: Cases, Notes & Materials*, 11th ed (Markham, ON: LexisNexis, 1999) at 321 ("This has become one of the most complex and controversial areas of negligence law.").

<sup>1417</sup> Cassels & Jones, *supra* note 84 at 27. See *Paslgraf v Long Island Railroad*, 162 NE 99 (NYCA, 1928) ("A cause, but not the proximate cause. What we do mean by the word "proximate" is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.").

<sup>1418</sup> *Mustapha v Culligan of Canada*, *supra* note 614 at para 16.



Two challenges that may arise when assessing proximate cause that are worth briefly discussing here are intervening acts and multiple defendants. An intervening act is one that contributes to a plaintiff's injury or loss after the initial defendant's breach. Defendants cannot escape liability simply because another party has been involved. This includes when the intervening act is itself negligent. If it is foreseeable, the defendant may still be liable.<sup>1419</sup> One of the most difficult situations to resolve is when there are multiple defendants and/or multiple causes of an injury. It is established that when there are multiple tortfeasors that each is fully liable to the plaintiff, given that each was a cause of the injury.<sup>1420</sup> Importantly, it is not necessary for a plaintiff to establish that the defendant was *the* cause of the injury, only *a* cause.<sup>1421</sup> Waddams notes, an additional problem in product liability cases arises when a "plaintiff cannot prove which of several manufacturers produced the product that cause the injury."<sup>1422</sup> He points to two examples: *Hall v Du Pont de Nemours & Co*<sup>1423</sup> and *Sindell v Abbott Laboratories*.<sup>1424</sup> In *Hall*, the court held the manufacturers to be liable on an industry-wide basis, whereas in *Sindell* the court held the manufacturers liable on a "market share" basis.<sup>1425</sup> These approaches have been difficult to reconcile with the traditional approaches

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<sup>1419</sup> Consider *Martin v McNamara Construction*, [1955] OR 523 (CA). Here, the defendant was found liable in negligence when a tree that it had felled on the side of a road damaged a fence, thus allowing cattle to escape, which resulted in the cow being killed when it struck by the car of the co-defendant.

<sup>1420</sup> Edgell, *supra* note 545 at 34. That said, "where there are multiple defendants, the evidence, including circumstantial evidence, must still be weighed to determine, with respect to each defendant, whether the plaintiff has established on the balance of probabilities a case of negligence against that defendant", *ibid* at 27.

<sup>1421</sup> As Knusten notes that but for causation is not complicated when there are multiple causes unless two things are forgotten: "first, that it is a defendant's breach of the standard of care that is the locus of the casual injury, and second, that a defendant's negligence need only be proven to be "a" cause of "some" injury to the plaintiff.", *supra* note 1380 at 170. Knusten also notes that if there are multiple defendants causing harm that a court can perform the but for test for each negligent actor, *ibid* at 168.

<sup>1422</sup> Waddams, *Product Liability*, *supra* note 534 at 66.

<sup>1423</sup> *Hall v Du Pont de Nemours & Co*, 345 F Supp 353 (EDNY 1972).

<sup>1424</sup> *Sindell v Abbott Laboratories*, 26 Cal 3d 588 (1980).

<sup>1425</sup> In this case the plaintiff could not prove which manufacturer was responsible for the product that

established in tort<sup>1426</sup>, in particular tort law's expectation of "proof of individual responsibility."<sup>1427</sup>

Critical to these discussions is the evidence.<sup>1428</sup> As will be discussed below, the courts have been willing to hold defendants liable in tort for harms that may have been caused by the defendant's negligence but for which the evidence is not entirely clear. For example, in *Mississauga (City) v Keiper Recaro Seating*, the court held that a plaintiff satisfied the evidentiary burden by demonstrating that the defendant's act was the most plausible explanation.<sup>1429</sup> In the absence of direct evidence, the court had to draw an inference.<sup>1430</sup> The use of inferential reasoning is discussed in more detail below.

It has been observed that the courts seem to have made things more difficult with respect to causation in product liability cases. Waddams argues that causation has often been

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caused the injury. As Waddams, *Product Liability*, *supra* note 534 at 66 observes, "[i]n the *Sindell* case six or seven manufacturers produced ninety per cent of the product complained of, and the California Supreme Court held that this was sufficient to enable the plaintiff to succeed against all six or seven manufacturers unless they proved that they did not supply the offending product." Waddams points out that *Sindell v Abbott Laboratories*, *ibid*, has not been followed in Canada, although it has been cited without disapproval, see notes 229 and 230 at Waddams, *Product Liability*, *ibid*.

<sup>1426</sup> Waddams, *Product Liability*, *ibid* at 66, referring to JG Fleming, "Probabilistic Causation in Tort" (1989) Can Bar Rev 661 at 668. See also Beever, *supra* note 1384 at 353, where he argues "apportionment of liability is not consistent with the general approach of tort law."

<sup>1427</sup> Waddams, *Product Liability*, *ibid* at 67.

<sup>1428</sup> Consider the court's observation in *Sindell v Abbott Laboratories*, *supra* note 1424 about evidence: "Here, as in *Summers*, plaintiff is not at fault in failing to provide evidence of causation, and although the absence of such evidence is not attributable to the defendants either, their conduct in marketing a drug the effects of which are delayed for many years played a significant role in creating the unavailability of proof."

<sup>1429</sup> [1999] OJ No 2005 (ON SCJ), at paras 26-27: "Both parties agreed that in order to prove a manufacturer is liable for damages, a plaintiff must prove that there was a defect in the product, that the defect caused the damages, and that the defect was due to the negligence of the manufacturer. In this case, the onus is on the plaintiff to prove, on a balance of probabilities, that the fire had its origin in the seat heater pad, and that the seat heater pad was defective. The plaintiff satisfies the onus if the most plausible of the competing explanations is that the defective seat heater pad caused the fire."

<sup>1430</sup> *Ibid* at para 28. The court held, at para 33: "[b]ased on the elimination of all other reasonable explanations and based on the existence of other failed seat heaters, I accept Leier's explanation, notwithstanding the complex set of circumstances that would have to have been in place in order for the seat heater pad to have caused the fire."

“subsumed” by other issues, including questions about whether a product is defective in the first place, or whether the behaviour of a plaintiff can be used as a defence against a negligence claim.<sup>1431</sup> This may be a consequence of the fact that causation has largely been linked with how the duty is actually framed.<sup>1432</sup> After all, the duty to warn serves the purpose of enabling consumers to manage their risks when buying or using a product, and thus the warning itself is material.<sup>1433</sup> Boivin has also been critical of the courts, arguing that they often do not go far enough in assessing the conduct of manufacturers, preferring instead to focus on the product.<sup>1434</sup> He suggests, “[u]nder a negligence theory, one should not only *ask* whether the manufacturer’s behaviour was negligent; one should actually *answer* this question.”<sup>1435</sup> He argues that it is not sufficient to only look at the condition of the product and to answer that the product was defective, but rather, “a trier ought to concentrate on the *actions* of the manufacturer.”<sup>1436</sup>

On the whole, product liability cases are often very complex and technical. Consequently,

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<sup>1431</sup> Waddams, *Product Liability*, *supra* note 534 at 67. Theall et al, *supra* note 62 at L7-1-L7-2 point out that many manufacturers might not realize that causation provides a defence to negligence claims, given their familiarity with the strict liability approach in the United States. However, they point out, “Canadian courts generally still apply basic principles of negligence in product claims, and causation issues often present an effective defence to many product liability claims in Canada”, at L7-2.

<sup>1432</sup> As Boivin, “Factual Causation”, *supra* note 645 at 64 points out: “a duty to convey information exists only when the information is material to the plaintiff’s interests, that is, when a reasonable consumer would have expressed the disclosure prior to purchasing or using the product.”

<sup>1433</sup> See *ibid* at 68: “Would this added information have allowed the plaintiff and other consumers, to manage the risk associated with the defendant’s product more effectively? In other words, could a warning have made a meaningful difference to the consuming public? The common law does not impose duties of care lightly. It does so on the footing that the defendant exposed the plaintiff to an unreasonable risk; not only a danger that the defendant *could* have avoided because it was foreseeable, but a danger that the defendant *should* have avoided because it was material to the plaintiff’s interest.”

<sup>1434</sup> Boivin, “Negligence, Strict Liability, and Manufacturer Failure to Warn”, *supra* note 83 at 311.

<sup>1435</sup> *Ibid* at 312 (original emphasis).

<sup>1436</sup> He continues: “Thus, one expects the balancing of a number of factors such as the costs of avoiding the accident, the costs of harm, and the likelihood that the risk will materialize, in order to determine whether manufacturer created, by its conduct, an unreasonable risk of harm to others”, *ibid* (original emphasis).

it can be very difficult for plaintiffs to establish causation.<sup>1437</sup> It is often very difficult for a plaintiff to clearly demonstrate that a manufacturer's product caused the harm or injury. This was one of the challenges that plaintiffs in tobacco litigation had difficulty overcoming.<sup>1438</sup> It was challenging for smokers to establish that their harm was caused by tobacco use, and more difficult to establish that it was the result of the use of a particular tobacco product, especially if they smoked numerous brands of cigarettes.<sup>1439</sup> The challenges with proving causation in duty to warn cases are amplified. While they are not necessarily unique, in that the same problems can arise in other situations, what is unique is that, to some extent, all duty to warn cases confront these issues.<sup>1440</sup>

Having surveyed the law of causation as it pertains to negligence, the next step is to situate this discussion within the context of product liability law and the duty to warn. As the leading authority on the duty to warn is *Hollis*, we turn next to assessment of causation in *Hollis*.

## 2.1. Causation in *Hollis v Dow Corning*

In *Hollis v Dow Corning*, the court had to determine whether Ms. Hollis, who had had breast implant surgery to address a medical condition, first in October 1983 and then again in April of 1984<sup>1441</sup>, had been adequately warned about the risk of an unexplained rupture of the

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<sup>1437</sup> Cassels & Jones, *supra* note 84 at 26.

<sup>1438</sup> See Mosesso, *supra* note 279.

<sup>1439</sup> *Ibid*. They note: "In this context, it would be virtually impossible to determine which product was the cause-in-fact of the injury", *ibid* at 26-27.

<sup>1440</sup> For example, of the two problems identified by Fischer, *supra* note 1378, as discussed next, the problem of proof is not unique to duty to warn. In other words, other negligence claims will also have issues with proof. What might be unique is that this challenge is common to most, if not all, duty of warn cases, whereas the same cannot be said of other categories of negligence or product liability.

<sup>1441</sup> While not a serious medical condition, Ms. Hollis suffered from a congenital deformity that resulted in her breasts being cylindrical in shape with larger than normal areola. Ms. Hollis, however, did not feel that her condition warranted a medical intervention, but was in effect persuaded to undergo the surgery, *ibid* at paras 3-4. Ms. Hollis actually required two surgeries, as the deformity was not resolved with the second surgery, *ibid* at para 5.

implant. A month after having undergone the second surgery in 1984, Ms. Hollis began a baker's course that involved heavy lifting. In January of 1985, she noticed a lump in her right breast, and began to feel pain. In March of 1985, it was discovered that the right implant had ruptured. The gel from the implant was removed, but the attending physician was unable to locate the silicone envelope. Ms. Hollis continued to experience pain, and due to lingering issues, had a subcutaneous mastectomy on both breasts in June of 1987.<sup>1442</sup> She brought a lawsuit against Dow for failing to inform her of the possibility of a rupture. The sole issue that the Supreme Court of Canada had before it was "whether the Court of Appeal erred in finding Dow liable to the respondent Ms. Hollis for failing adequately to warn the implanting surgeon, Dr. Birch, of the risk of the post-surgical implant rupture inside Ms. Hollis' body."<sup>1443</sup>

Before proceeding to consider the court's determination, it should be noted that *Hollis* applicability to food products may be limited. For one, it ultimately involves a learned intermediary (Dr. Birch), and much of the court's discussion is about the role of learned intermediaries. Second, as the court itself notes, breast implants are not a typical manufactured good: "neither the implant nor its packaging are placed directly into the hands of the ultimate consumer. It is the surgeon, not the consumer, who obtains the implant from the manufacturer and who is therefore in the best position to read any warnings contained in the product packaging."<sup>1444</sup> Nevertheless, the court's decision is important for present purposes because the

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<sup>1442</sup>The full sequence of events are discussed at paras 4-9, *ibid*.

<sup>1443</sup> *Ibid* at para 18. Dow argued that it was not responsible for the injuries Ms. Hollis sustained, arguing "first, that the warning it gave Dr. Birch was adequate and sufficient to satisfy its duty to Ms. Hollis, and second, that even if it did breach its duty to warn Ms. Hollis, this breach was not the proximate cause of her injuries", *ibid*.

<sup>1444</sup> *Ibid* at para 31. La Forest J compares breast implants to prescription drugs, "where the patient places primary reliance for information on the judgment on the surgeon, who is a "learned intermediary", and not on the manufacturer", *ibid*. However, he distinguishes this comment from *Buchan v Ortho Pharmaceutical*, *supra* note 67,

court highlighted the imbalance in the relationship between manufacturers and consumers, and, perhaps more importantly, the court in *Hollis* affirms the approach taken in *Buchan*, which is more directly applicable to food products.

While the court in *Hollis* is speaking specifically about manufacturers of medical products, its assessment rings true for most manufactured goods. Writing for the majority, La Forest J observed there is a relationship of inequality of information between manufacturers and consumers. This inequality makes it “reasonable and just to require manufacturers ... to make clear, complete and current informational disclosure to consumers concerning the risks inherent in the ordinary use of their products.”<sup>1445</sup> Affirming the court in *Buchan*, La Forest J notes that the duty is continuing and ongoing.<sup>1446</sup> He also dismissed the idea that manufacturers only have to warn when they come to their own conclusions about risks, asserting that “[t]his assumption has no support in the law of Canada.”<sup>1447</sup>

Much of *Hollis* concerns the appropriateness of the modified objective test in duty to warn cases. The modified objective test was developed by the Supreme Court in *Reibl v Hughes*.<sup>1448</sup> In *Reibl*, the plaintiff underwent a surgery for the removal of an occlusion in the left internal carotid artery. At some point during or immediately after the surgery, the plaintiff suffered a stroke, which left him paralyzed. Although the plaintiff had consented to the surgery, he sued for damages claiming that the consent had not been informed. In coming to its decision,

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noting “[t]hey are not analogous to oral contraceptives ... because direct warnings from manufacturers of breast implants are simply not feasible given the need for intervention by a physician”, *ibid*.

<sup>1445</sup> *Hollis v Dow Corning, ibid* para 26. As noted above, this imposes a high standard of disclosure.

<sup>1446</sup> La Forest J, *ibid* at para 40, cites from Robbins JA’s decision in *Buchan v Ortho Pharmaceutical, supra* note 67 at para 54.

<sup>1447</sup> *Ibid* at para 41.

<sup>1448</sup> *Reibl v Hughes, supra* note 675

the court recommended a modified approach to the reasonable person test. It recognized that the objective test presented barriers to patients<sup>1449</sup>, but rather than abandon the objective approach for a subjective one, it recommended a modified approach, asking what a reasonable person in the plaintiff's position would have done.<sup>1450</sup>

In *Buchan*, Justice Robbins held that the test in *Reibl* was not applicable to product liability cases. Instead, Robbins JA opted for a subjective approach.<sup>1451</sup> In *Hollis*, Justice La Forest found Robbins JA's rationale for not using *Reibl* to be "compelling"<sup>1452</sup>, quoting from it at length. Of particular importance in Robbins JA's rationale is the relationship between manufacturers and consumers, and how it differs from that of the doctor-patient. Unlike in doctor-patient relationships, a manufacturer is "a distant commercial entity that ... promotes its products directly or indirectly to gain commercial sales, sometimes ... accentuating value while underemphasizing risks."<sup>1453</sup> While doctors and manufacturers both have distinct information advantages, manufacturers are not called upon to tailor warnings to individual patients, and are

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<sup>1449</sup> As the court observed, *ibid* at 898, "a vexing problem raised by the objective standard is whether causation could ever be established if the surgeon has recommended surgery which is warranted by the patient's condition. Can it be said that a reasonable person in the patient's position, to whom proper disclosure of attendant risks has been made, would decide against the surgery, that is, against the surgeon's recommendation that it be undergone? The objective standard of what a reasonable person in the patient's position would do would seem to put a premium on the surgeon's assessment of the relative need for the surgery and on supporting medical evidence of that need."

<sup>1450</sup> For example, the court found it highly relevant that the plaintiff was just over a year away from retirement, and there was no immediate need for the surgery, *ibid* at 928. In this instance, the court found "a reasonable person in the plaintiff's position would, on a balance of probabilities, have opted against the surgery rather than undergoing it at the particular time", *ibid*.

<sup>1451</sup> Per Cassels & Jones, *supra* note 84 at 62, the subjective approach holds that "if a manufacturer fails in its duty to warn a consumer of risks associated with the use of its product, causation will be established where it is proven that the consumer in question would have not have used the product had he or she been provided with the proper information."

<sup>1452</sup> *Hollis v Dow Corning*, *supra* note 66 at para 45.

<sup>1453</sup> *Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 74, cited by *Hollis v Dow Corning*, *ibid* at para



not subject to the same scrutiny.<sup>1454</sup>

Justice Robbins also held that it was acceptable for the trier of fact, in light of the evidence before the court, to determine whether the plaintiff is credible and would have acted differently had she or he been properly warned.<sup>1455</sup> In other words, the court could accept that the plaintiff would have acted differently, and “[w]hether a so-called reasonable woman in the plaintiff’s position would have done likewise is beside the point.”<sup>1456</sup> It was after this determination that Robbins JA noted that manufacturers are able to escape all liability by providing clear and forthright warnings. Moreover, Robbins JA found

it is sound in principle and in policy to adopt an approach which facilitates meaningful consumer choice and promotes marketplace honesty by encouraging full disclosure. This is preferable to invoking evidentiary burdens that serve to exonerate negligent manufacturers as well as manufacturers who would rather risk liability than provide information which might prejudicially affect their volume of sales.<sup>1457</sup>

Justice La Forest affirmed this finding.<sup>1458</sup> He noted that the difference of proof required for the two cases may appear to be “anomalous”<sup>1459</sup>, but contends that the difference in circumstances and duties justifies the different approaches. Doctors have an obligation to their patients, while manufacturers act in self-interest. Because of this, he notes that it is “highly desirable from a policy perspective to hold the manufacturer to a strict standard of warning consumers of

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<sup>1454</sup> *Ibid.*

<sup>1455</sup> La Forest J accepts that in the trial decision of *Hollis* there was “sufficient evidence . . . to satisfy the subjective *Buchan* test”, *Hollis v Dow Corning, ibid* at para 47. However, Sopinka J, *ibid* at para 96, takes issue with this, noting that the trial judge did not assess the credibility of Ms. Hollis’ claim that she would not have consented to the surgery, as the approach in *Buchan* requires.

<sup>1456</sup> *Buchan v Ortho Pharmaceutical, supra* note 67 at para 77, cited by *Hollis v Dow Corning, ibid* at para 44. La Forest J notes, at para 46, that concerns over this can be adequately addressed at the trial, through cross-examination and proper weighing of testimony.

<sup>1457</sup> *Buchan v Ortho Pharmaceutical, ibid* at para 78.

<sup>1458</sup> *Hollis v Dow Corning, supra* note 66 at para 44.

<sup>1459</sup> *Hollis v Dow Corning, ibid* at para 46.

dangerous side effects to these products.”<sup>1460</sup> Moreover, the court found that requiring the plaintiff to prove that she would not have undergone surgery had she been properly warned by a learned intermediary “would be to ask her to prove a hypothetical situation relating to her doctor’s conduct, one, moreover, brought about by Dow’s failure to perform its duty.”<sup>1461</sup> La Forest J continued:

I do not think a manufacturer should be able to escape liability for failing to give a warning it was under a duty to give, by simply presenting evidence tending to establish that even if the doctor had been given the warning, he or she would not have passed it on to the patient, let alone putting an onus on the plaintiff to do so.<sup>1462</sup>

In essence, *Hollis* upheld the rebuttable presumption established in *Buchan*. In *Buchan* Robbins JA held that “[o]nce the breach of duty to warn prescribing physicians has been established, I think it fair and reasonable to presume the inadequacy of the warning was a contributing cause of the ingestion of the drug. It ought not be incumbent on a plaintiff to prove as part of her case what her doctor might or might not have done had he been adequately warned.”<sup>1463</sup> Both Justices La Forest and Sopinka cite this passage to some extent in their judgments.<sup>1464</sup> Both courts held that this presumption can be rebutted by the defendant.<sup>1465</sup>

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<sup>1460</sup> *Hollis v Dow Corning, ibid* at para 45. With respect to doctors, he notes: “There is no reason, as in the case of a doctor, to modify the usual approach to causation followed in other tortious actions.” Moreover, as Boivin, “Factual Causation”, *supra* note 645 at 65 notes, “[u]nlike patients undergoing surgery, consumers have an alternative choice when faced with an inherently dangerous product: they can monitor their consumption in order to decrease the probability that any risk will materialize.”

<sup>1461</sup> *Hollis v Dow Corning, ibid* at para 55. The court observed: “While the legal and persuasive onus in a negligence case generally falls on the plaintiff, I do not see how this can require the plaintiff to prove a hypothetical situation of this kind”, *ibid*.

<sup>1462</sup> *Ibid* at para 60.

<sup>1463</sup> *Buchan v Ortho Pharmaceutical, supra* note 67 at para 64.

<sup>1464</sup> *Hollis v Dow Corning, supra* note 66 at para 58 (La Forest J) and para 81 (Sopinka J). Note, here the dissent citing the first part of the passage. Outside of a longer citation than provided here, La Forest J does not refer to rebuttable presumption in his judgment.

<sup>1465</sup> In this instance, Robbins JA notes, The presumption may, of course, be rebutted if the defendant comes forth with evidence that despite the inadequacy of the warning the doctor’s conduct toward his patient would have been

The decision in *Hollis*, of course, has been subject to some criticism, including the dissenting opinion. Written by Justice Sopinka, on behalf of himself and Justice McLachlin (as she then was), he notes that he disagrees with Justice La Forest's analysis and application of principles relating to causation. Holding that the plaintiff is required to demonstrate not only a breach of a duty, but also that the breach in question caused the injury<sup>1466</sup>, Sopinka J argued that, "Ms. Hollis must show that her doctor would have warned her of any dangers that had been brought to his attention and that if warned she would have refused the operation. Absent this form of proof, it cannot be said with any degree of certainty that the failure of Dow to warn physicians was the cause of the unfortunate injuries suffered by Ms. Hollis."<sup>1467</sup>

Justice Sopinka is critical of the majority decision for treating causation as irrelevant.<sup>1468</sup> He contends that the burden imposed on plaintiffs can only be relieved in a limited sphere of cases. He identifies *Snell v Farrell* as one such case.<sup>1469</sup> In that case, the plaintiff lost sight in her eye during a surgery removing a cataract. The court argued for relaxing the burden of proof in this instance given that the defendant doctor was in a better position to understand the events that

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the same whether or not the manufacturer was in breach of the duty", *Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 64. On this point, La Forest J notes, "In the last sentence of this statement, Robins J.A. refers to the possibility that the manufacturer might be able to adduce evidence that the doctor's conduct might have been the same whether or not the manufacturer was in breach of its duty. I should say that whatever effect this may have regarding the apportionment of liability between the doctor and the manufacturer in the event that the doctor is also found to be negligent, it in no way absolves the manufacturer from liability to the plaintiff, except in cases where some extraneous conduct by the doctor would have made the failure to give adequate warning irrelevant. But that is not this case. In sum, in a case like the present, I see no reason why in establishing the liability of the manufacturer the law should adopt a rule requiring the plaintiff to delve into what the doctor might have done", *Hollis v Dow Corning*, *ibid* at para 59.

<sup>1466</sup> *Hollis v Dow Corning*, *supra* note 66 at para 72.

<sup>1467</sup> *Ibid* at para 73, emphasis original. Sopinka J, at para 74 cites Fleming, *The Law of Torts*, 8th ed, *supra* note 809 at 143: "If such a causal relation does not exist, that puts an end to the plaintiff's case: to impose liability for loss to which the defendant's conduct has not *in fact* contributed would be incompatible with the principle of individual responsibility on which the law of torts has been traditionally based."

<sup>1468</sup> *Ibid* at para 77.

<sup>1469</sup> [1990] 2 SCR 311. Interestingly, Sopinka J asserts that La Forest J refers to *Snell*, at para 77, but at no point does La Forest J explicitly refer to *Snell* in his judgment.

had transpired.<sup>1470</sup> Per *Stewart v Pettie*, the *Snell* inference “makes the plaintiff’s task less onerous where there is some inherent difficulty in proving causation with scientific accuracy, or where the facts surrounding causation uniquely in the knowledge of the defendant.”<sup>1471</sup> In his dissent in *Hollis*, however, Sopinka J argues, “the burden of proof is properly reversed where the defendant has somehow participated in destroying the means of proving the case against it or where the defendant somehow controls the relevant evidence.”<sup>1472</sup> He is ultimately critical of the subjective approach. As Boivin observes, Sopinka J’s problem is not simply about the credibility of the plaintiff, “but also one of allowing the plaintiff to offer opinion evidence to which the defendant cannot answer.”<sup>1473</sup> Justice Sopinka ultimately finds that a new trial is in order.

Despite the disagreement between the majority and dissenting opinions in *Hollis*, Boivin argues that they come to a similar conclusion: “[t]he Court unanimously assumes that in order to find a manufacturer liable for failure to warn, a fact finder *must* speculate about the choices the plaintiff would make if faced with a warning commensurate with the risk that materialized. A finding of fact is required in this respect.”<sup>1474</sup> While Boivin concedes that causation is essential for liability, he argues that the ‘but for’ test is “a weak proxy when liability is based on a manufacturer’s failure to warn.”<sup>1475</sup> He asserts that as a statement of policy concerning manufacturer’s liability for failure to warn, “*Hollis* is hard to criticize.”<sup>1476</sup> Yet, he concludes “[a]s a statement of principle about causation, however, the reasons given by La Forest J. are, on

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<sup>1470</sup> See *Hollis v Dow Corning*, *supra* note 66 at para 79.

<sup>1471</sup> *Stewart v Pettie*, *supra* note 817 at 154.

<sup>1472</sup> *Hollis v Dow Corning*, *supra* note 66 at para 80. Here Sopinka J is referring to *Cook v Lewis*, *supra* note 1549.

<sup>1473</sup> Boivin, “Factual Causation”, *supra* note 645 at 60.

<sup>1474</sup> *Ibid* at 62.

<sup>1475</sup> *Ibid* at 63.

<sup>1476</sup> *Ibid* at 59.

their face, difficult to reconcile with the position upheld by the Supreme Court on numerous occasions in the context of informed consent to medical procedures” with other statements by the Supreme Court.<sup>1477</sup> Instead, Boivin recommends a different approach, one that requires a slight modification in the starting point of the cause-in-fact inquiry. This is offered as an alternative approach to determining cause-in-fact in failure to warn cases. Even if this approach is accepted, however, there is still the challenge with demonstrating cause-in-fact using the ‘but for’ test. Following an examination of Boivin’s recommendation, the next section will consider alternatives to the ‘but for’ test.

### 3. INJURY CAUSATION & DECISION CAUSATION

Before examining Boivin’s recommendation, it is worthwhile to first summarize what is required of a plaintiff in a failure to warn case involving food products. To demonstrate causation, a plaintiff will have to show two things: first, ‘but for’ the defendant’s failure to act the plaintiff would not have been injured, thereby establishing cause-in-fact, and second, the injury was reasonably foreseeable, and within the wrongful conduct of the defendant, thereby establishing cause-in-law. There are formidable challenges at each stage for a plaintiff. After all, a consumer of food products will have to demonstrate that the failure to provide a warning is causally connected to the injury. Proving that ‘but for’ the failure to provide a warning about the risk of obesity that a patient would not have become obese will be extremely difficult for many of the reasons discussed earlier in this project. Indeed, it may very well be impossible to prove to

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<sup>1477</sup> *Ibid* at 59.

the satisfaction of a trier of fact.<sup>1478</sup> Boivin suggests an alternative approach.

According to Boivin, cause-in-fact, as it relates to the duty to warn, involves two distinct concepts: injury causation and decision causation. Injury causation is “the link between the *risks* inherent in the defendant’s product and the *damages* suffered by the plaintiff.”<sup>1479</sup> It is the most basic form of causation, sometimes referred to as “scientific causation.”<sup>1480</sup> It is a true factual inquiry, that requires plaintiffs to “establish, on a balance of probabilities, that the danger they were allegedly unaware of actually materialized.”<sup>1481</sup> Boivin points out that this form of causation is no different than any other causal inquiry in a negligence action.<sup>1482</sup>

This can be contrasted with decision causation, which “refers to relationship between the defendant’s *fault* and the plaintiff’s *choice* to use the product at all, or to use the product in a specific manner.”<sup>1483</sup> Boivin refers to this concept as “hypothetical causation.”<sup>1484</sup> This is because it necessarily involves a counterfactual inquiry that is non-scientific: “In essence, the fact finder must speculate about what might have been, if selected historical conditions had been different.”<sup>1485</sup> If it can be shown that the plaintiff would have behaved the same, irrespective of the warning, then the defendant’s failure to provide a warning cannot be said to be the cause of

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<sup>1478</sup> It is worth observing here that a trier of fact will weigh the evidence put before them, and that it is therefore speculative to declare one way or another how a court will decide without reviewing the relevant evidence. That said, it is likely that the but for test, given the complexity of obesity, and the current state of controversy, manufactured or otherwise, around the science of obesity, that the but for test will be difficult to satisfy.

<sup>1479</sup> *Ibid* OLR at 50, (original emphasis).

<sup>1480</sup> Here he refers, *ibid* at 50 note 11, to Wexler, “*Hollis v. Dow*”, *supra* note 349 at 436 and Peppin, *supra* note 644.

<sup>1481</sup> Boivin, “Factual Causation”, *ibid* at 50. He refers to *Lambert v Lastoplex Chemicals*, *supra* note 65, and *Rothwell v Raes*, [1990] 2 OR (3d) 332 (ON CA) as two examples. In the former, the plaintiff was successful in establishing a causal link, whereas in the latter, the plaintiff failed.

<sup>1482</sup> *Ibid* at 51.

<sup>1483</sup> *Ibid* at 51 (original emphasis).

<sup>1484</sup> *Ibid*. He refers here, at note 14, to AC Becht & FW Miller, *The Test of Factual Causation in Negligence and Strict Liability Cases* (St. Louis: Washington University Studies, 1961) at 21-25.

<sup>1485</sup> Boivin, “Factual Causation”, *ibid* at 51. See discussion at *ibid*, note 12.

the injury. Consider *Buchan*. If Ms. Buchan would have taken the contraceptive pill even if the manufacturer had provided a warning about the risk of stroke, then Ortho Pharmaceuticals could not be found liable for failing to warn Ms. Buchan. After all, the warning would have had no impact.

While it appears straightforward and reasonable, Boivin argues that decision causation raises serious concerns when it comes to implementation.<sup>1486</sup> For example, he notes that decision causation had a chilling effect on informed consent, as was recognized by the court in *Reibl*.<sup>1487</sup> Unlike injury causation, which is determined by the facts, “decision causation is always open to debate.”<sup>1488</sup> He notes that decision causation is generally presumed, pointing to *Lambert* as an example.<sup>1489</sup> That is to say, once it has been shown that the manufacturer owes a duty, has breached the standard of care, and that injury causation and proximate damages have been shown, it is assumed that an adequate warnings would have had some influence over a consumer.<sup>1490</sup> In *Lambert* he notes that the court does not mention the relationship between the manufacturer’s failure to warn of the risk and the plaintiff’s subsequent conduct. Rather, “[d]ecision causation was simply assumed in light of the evidence, in particular, in light of the fact that the plaintiff had taken several precautionary measures in handling the product in

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<sup>1486</sup> *Ibid* at 52. He refers to Henderson and Twerski’s observation that, “The good causation case and the bad are remarkably alike.” See JA Henderson & AD Twerski, “Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn” (1990) 65 NYUL Rev 265.

<sup>1487</sup> Boivin, “Factual Causation”, *ibid* at 53. Boivin points to G Robertson, “Informed Consent Ten Years Later: The Impact of *Reibl v Hughes*” (1991) 70 Can Bar Rev 423 at 435, noting Robertson’s conclusion that “plaintiffs in informed consent cases are almost always unsuccessful, and often this is because of the requirement of causation”, *ibid* at 435.

<sup>1488</sup> *Ibid* at 52.

<sup>1489</sup> See discussion about *Lambert v Lastoplex Chemicals* above, in particular at page 174ff.

<sup>1490</sup> *Lambert v Lastoplex Chemicals*, *supra* note 65.



question.”<sup>1491</sup> Boivin notes that decision causation has been addressed by the court, particularly since *Hollis*, subjectively.<sup>1492</sup> Consequently, he forecasts an increase in cases using this approach. While it is ultimately a “plaintiff friendly” approach, Boivin is critical that it ultimately “misallocates judicial resources and diverts attention from more important legal questions.”<sup>1493</sup> This he contends is inevitable given the characteristics that define decision causation.<sup>1494</sup>

Boivin argues that there are three characteristics that define decision causation, and that differentiate failure to warn cases from other negligence actions, and that justify treating factual causation in these cases with a high degree of pragmatism.<sup>1495</sup> The first characteristic was alluded to above, namely, the counterfactual nature of the inquiry. With decision causation, there is no way to establish a scientific link between the negligence of the defendant and the plaintiff’s injury.<sup>1496</sup> Given that failures to warn are omissions, there can be no scientific certainty.<sup>1497</sup> Instead, there are only educated guesses. In *Hollis*, he argues, La Forest and Sopinka JJ relied on

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<sup>1491</sup> Boivin, “Factual Causation”, *supra* note 645 at 52. The same could be said of *Buchan v Ortho Pharmaceutical*, *supra* note 67, where the Court of Appeal noted that Ms. Buchan would have been influenced by the warning about the health risks, as she generally paid attention to these types of risks, and was overall concerned with her health. He notes, however, that consumer behaviour is “increasingly under review in civil litigation” *ibid* at 53, which ultimately led to the subjective approach adopted in *Buchan v Ortho Pharmaceutical*.

<sup>1492</sup> For example, he points out that McLachlin J (as she then was), who dissented in *Hollis v Dow Corning*, *supra* note 66, nevertheless wrote “unanimous reasons purporting to apply both a subjective and an objective approach in addressing decision causation” in *Bow Valley Husky (Bermuda) v Saint John Shipbuiding*, *supra* note 634, *ibid* at 53.

<sup>1493</sup> *Ibid* at 54.

<sup>1494</sup> The distinctions have been affirmed by Vaughan Black, “Decision Causation: Pandora’s Tool-Box” in Jason W Neyers, Erika Chamberlain & Stephen GA Pitel, *Emerging Issues in Tort Law* (Oxford: Hart Publishing, 2007) 309 at 312.

<sup>1495</sup> Boivin, “Factual Causation”, *supra* note 645 at 75.

<sup>1496</sup> *Ibid*.

<sup>1497</sup> *Ibid*. Boivin argues, “[s]cientific certainty with respect to causation is achievable in a negligence action or misfeasance case, even though such a standard is not required by law. Scientific certainty with respect to causation is impossible in a negligent omissions or nonfeasance case, regardless of the circumstances”, *ibid*. He compares the former to a “scientific fact” and the latter to an “educated guess”, *ibid*. See discussion about scientific certainty in *Létourneau v JTI-MacDonald*, *supra* note 68.

two different approaches, both relying on guesses:

[a] guess based on a plaintiff's testimony is not any more or any less educated than a guess based on assumptions about the mythical reasonable person – they simply address different hypotheses. The true distinguishing feature between both standards, is the amount of cases that will likely succeed at trial; the objective approach offers an independent means to control liability, whereas the subjective approach relegates this control to existing rules of evidence.<sup>1498</sup>

With respect to La Forest J's approach, Boivin points out that the court failed to be more sensitive to the counterfactual nature of the inquiry.

The second characteristic of decision causation is the involvement of the plaintiff. At some point between the defendant's fault (failing to warn) and the resulting damage, the plaintiff is necessarily involved. While other cases with negligent omission require counterfactual inquiries<sup>1499</sup>, a failure to warn "is purely academic" without consumers.<sup>1500</sup> The duty itself is shaped by the expectations of consumers.<sup>1501</sup> Combined with the counterfactual inquiry, the question thus becomes: "assuming that the warning was (1) adequate *and* (2) read, understood and remembered at the relevant time, would the plaintiff have heeded the warning and made a different choice?"<sup>1502</sup> Again, science is limited in what it can do to help triers of fact establish

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<sup>1498</sup> *Ibid* at 76.

<sup>1499</sup> *Ibid* at 76-77 examines three cases involving negligent omissions, *Cork*, *Jordan House* and *Crocker*, and in each case notes that a counterfactual inquiry is necessary, see *Cork v Korby MacLean*, [1952] 2 All ER (CA) *Jordan House v Menow*, [1974] SCR 239; and *Crocker v Sundance Northwest Resorts*, *supra* note 633.

<sup>1500</sup> *Ibid* at 77. Boivin contrasts warnings, which are intended for consumers, with actions taken by employers to minimize safety risks inherent in the workplace (eg., ensuring safe scaffolding for employees). The safe scaffolding is an end in itself, contributing to the safety of the workplace, even if employees are unaware of the measures taken. He contrasts this with warning for consumers, noting: "[t]he extent of the duty is shaped in conjunction with the reasonable expectations of consumers. More importantly, communicating material dangers, by itself, does nothing to advance risk management unless consumers actually read, understand, remember and act on the warnings furnished", *ibid*.

<sup>1501</sup> To contrast with the earlier cases, he notes, *ibid*, "[i]n *Cork*, *Jordan House* and *Crocker* ... asking what the respective plaintiffs would have done, but for the defendants' negligence, is unnecessary given the basis for the duty of care. Simply put, decision causation is irrelevant unless the plaintiff's will is the element joining the defendant's fault and resulting damages."

<sup>1502</sup> *Ibid* at 78. Boivin argues that *Hollis v Dow Corning*, *supra* note 66, errs by asking trier of facts to make

what impact the failure to warn would have.<sup>1503</sup>

The third and final characteristic of decision causation stems from “distinctiveness of product warnings as a means for communicating information.”<sup>1504</sup> Boivin contrasts the relationship between doctors and patients.<sup>1505</sup> In doctor-patient relationships, disclosures of risks occurs face-to-face, with the doctor able to assess the patient’s level of understanding, and with patients having an opportunity to ask questions.<sup>1506</sup> In contrast to this, in the manufacturer-consumer relationship, a product warning is unilateral, generic and impersonal, and has a limited life. “They are given to consumers as a class rather than communicated to consumers as individuals. Unlike the relationship described above, there is no personal communication between manufacturers and consumers.”<sup>1507</sup> There is no opportunity for consumers to ask questions, and manufacturers do not assess whether consumers understand the risks.<sup>1508</sup>

Given the unique characteristics of decision causation, Boivin argues that it is never possible to conclude with certainty what a plaintiff would have done.<sup>1509</sup> While certainty is not

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specific finding. “By asking triers of fact to make specific findings about what might have been, the Supreme Court is effectively offering manufacturers an avenue for escaping liability. Defendants may challenge the validity of this second hypothesis, in addition to challenging the plaintiff’s testimony...” *ibid.*

<sup>1503</sup> *Ibid* at 77: “Scientific evidence cannot establish with certainty the actual effect of such omissions. Instead, triers of fact must rely on general assumptions about human behaviour and the laws of nature.”

<sup>1504</sup> *Ibid* at 78.

<sup>1505</sup> He also examines the relationship between insured and insurers. See discussion, *ibid* at 78ff.

<sup>1506</sup> *Ibid* at 79. As noted above, there is also the important distinction that physicians are also fiduciaries.

<sup>1507</sup> *Ibid* at 79. Even in instances where consumers are contacted directly, such as in food recalls, warnings are impersonal.

<sup>1508</sup> On this third characteristic, Boivin discusses whether warnings are effective. He notes that it is sufficient for choice to be informed from a legal point of view, even if warnings do not have functional implications. He notes, “[t]his does not mean that the [consumer] *actually* weighed *all* of the information in reaching their ... decision, but simply that they possessed enough information to make a legally binding choice” *ibid* at 80. He further notes, “[c]onsumers can only make informed choices, with respect to a given product, once adequate warnings are given”, *ibid.* This is the view that Justice Riordan came to in *Létourneau v JTI-MacDonald*, *supra* note 68. He notes that there is a “positive duty to act”, para 282, and that the duty “is not to warn the consumer ‘provided that it is reasonable to expect that the consumer will believe the warning’”, at para 281.

<sup>1509</sup> He concludes: “[u]nlike with other questions of fact, including breach, injury causation and damages, it

required in tort law, decision causation nevertheless requires speculation or an inference on the part of the judiciary.<sup>1510</sup> As a result, “actual decisions often turn on policy considerations that are either unarticulated in the judgment or difficult to reconcile with an inquiry into factual causation.”<sup>1511</sup> It is therefore necessary to determine whether or not it is relevant to scrutinize a plaintiff’s probable behaviour.<sup>1512</sup> Rather than ignoring the challenges with decision causation, Boivin suggests that it is both “appropriate and just to presume decision causation once the plaintiff establishes a duty to warn, its breach, his or her damages and injury causation.”<sup>1513</sup> This would represent a policy decision, one that is easier to implement than the subjective approach

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is *never* possible to conclude with certainty that the plaintiff would, or would not have, modified his or her conduct but for the defendant’s negligence”, *ibid* at 93.

<sup>1510</sup> *Ibid* at 74: “... the standard of causation adopted by the Supreme Court views decision causation in isolation. The subjective approach limits the potential of “materiality”, a concept that shapes a manufacturer’s duty to warn in accordance with general assumptions about consumer behaviour. Materiality in itself can resolve most inquiries with respect to factual causation – it is reasonable to assume that the plaintiff would have somehow managed the risk differently in the presence of an adequate warning. Stated somewhat differently, it is reasonable to assume that the plaintiff is not a marginal consumer, but one that acts in conformity with the information aimed at protecting his or her own interests. Additionally, speculation about the plaintiff’s particular behaviour should remain the exception, rather than become the norm.”

<sup>1511</sup> *Ibid* at 93. He suggests that this is the case in La Forest J’s reasoning in *Hollis v Dow Corning*, *supra* note 66.

<sup>1512</sup> Boivin’s summary of this discussion is worth citing at length, *ibid* at 82: “To summarize this section, the relationship between duty and factual causation is distinct in the field of liability for failure to warn. First, in order to establish that what is material to consumers (duty) would have been material to the plaintiff (decision causation), a trier of fact must conduct a counterfactual analysis, as opposed to a factual analysis. Thus, this form of causation is always an issue for litigation. Second, the hypothesis that must be verified in order to establish decision causation in this field, namely, that the warning would have been read, understood, remembered and acted on, is particularly open to challenge. This is so, given the plaintiff’s necessary involvement between breach and damages and given the number of variables that determine the actual impact of a warning on any individual. Third, there is an important distinction between a warning’s adequacy and a warning’s functionality. This gap is relatively wide in products liability because disclosure, in this area, does not involve any form of actual communication and because there is no period of time earmarked for decision-making. In light of these features, is it worthwhile to scrutinize a consumer’s probable behaviour, but for the manufacturer’s failure to warn? I submit that causation should be litigated in exceptional cases, where it is plainly unreasonable to impose liability on a manufacturer for a given loss. Stated differently, instead of treating decision causation as a question of fact that must be resolved in every case, the common law should identify the specific circumstances that either warrant or negate liability for failure to warn.”

<sup>1513</sup> *Ibid* at 94.

used in *Buchan* and affirmed by *Hollis*.<sup>1514</sup> This is not a movement away from factual causation, but rather attempts to find a balance between certainty and justice, something he suggests neither the objective nor the subjective (modified objective) approach can accomplish.<sup>1515</sup> While he recognizes that it is a departure from “established tort theory”<sup>1516</sup>, he contends that there are strong policy reasons for adopting this approach. As he points out, it is difficult to imagine a scenario where a reasonable consumer would ignore a warning intended to ensure the safe use of a product<sup>1517</sup>, and a properly charged court can reasonably come to equally compelling, and perhaps contradictory, conclusions.<sup>1518</sup>

This approach seems particularly appropriate for food products. After all, in instances where a plaintiff is able to demonstrate that a food manufacturer owed a duty of care, breached the standard of care, and injury causation has been established, it is only pure speculation on the court’s part to determine how a plaintiff would have behaved had they been provided an adequate warning. Here, the question of the *adequacy* of warning is paramount. It is not enough that a manufacturer provided some warning or information, the warning must be adequate.

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<sup>1514</sup> *Ibid*. He notes, “[r]elieving consumers of the difficult burden of proving a negative, it is said, will enhance consumer safety by encouraging manufacturers to supply an optimal amount of information regarding their products – since their marketing practices will be under greater scrutiny if causation is presumed”, *ibid* at 90, see also note 200.

<sup>1515</sup> *Ibid* at 94-95. He clearly identifies several shortcomings with the objective standard. He notes it “undermines the liability standard”, that it means “the focus is placed on expert evidence and indicia of reasonable behaviour that give little weight to the plaintiff’s personal attributes” “... offers a false sense of certainty”, *ibid* at 88. He notes, the “objective approach to causation is unpredictable at best, and arbitrary at worst”, *ibid* at 89.

<sup>1516</sup> *Ibid* at 84. For example, at *ibid* 85 he notes that this approach challenges tort law’s perceived coherence, citing at note 176, Weinrib, *The Idea of Private Law*, *supra* note 91 at 12.

<sup>1517</sup> *Ibid* at 89. Referring to *Lambert v Lastoplex Chemicals*, *supra* note 65, Boivin argues, “it is difficult to imagine a finding that a reasonable consumer would *not* follow directions of use designed to minimize risk given that, after the accident, the costs of heeding safety labels usually appear much lower than the risks involved”, *ibid*.

<sup>1518</sup> He argues that *Buchan v Ortho Pharmaceutical*, *supra* note 67, demonstrates this. It would be reasonable a for court to find that a reasonable woman would not use contraceptives given the risk, yet “without any doubt, many women of ordinary prudence continue to use contraceptive pills despite improved warnings and it would be absurd to question the rationality of their behaviour”, *ibid* at 89.

According to the *Buchan* standard, this would include collateral efforts to neutralize or negate the warning. The food industry has spent a considerable amount of time and energy to control the narrative around food products, and the research is extremely clear that this has influenced how the public perceives the risks associated with food products. The food industry should not be permitted to benefit from being able to persuade the court in a speculative, rather than factual, inquiry about what a particular plaintiff might have done. As put by Boivin, “the *potential* inequity of holding manufacturers liable for failure to warn irrespective of how their consumers would otherwise have behaved, is outweighed by the *definite* inequity of allowing manufacturers to escape liability and thus profit from marketing practices that fail to meet minimum standards of safety thereby exposing many people to risk.”<sup>1519</sup> Justice Riordan came to a similar conclusion in *Létourneau*, noting that it is sufficient that a warning was capable of influencing a consumer, but that it would be impossible to demonstrate that it did influence a particular consumer’s decision.<sup>1520</sup>

Others have made similar arguments in other contexts.<sup>1521</sup> For example, Berger and

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<sup>1519</sup> *Ibid* at 84. See *Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 78, 85 and *Hollis v Dow Corning*, *supra* note 66, and *Létourneau v JTI-MacDonald*, *supra* note 68 at para 281ff. Consider also Sopinka J’s observation in *Snell v Farrell*, *supra* note 1469 at 299: “If I were convinced that defendants who have a substantial connection to the injury were escaping liability because plaintiffs cannot prove causation under currently applied principles, I would not hesitate to adopt one of these alternatives.”

<sup>1520</sup> It also eliminates the peculiarities that go along with determining how plaintiffs might respond to risks. Fischer, *supra* note 1378 at 273-274 notes that individuals are less likely to heed warnings when risk is perceived to be low – such as the recommendation that one use goggles with hammer – as compared to when they are high – such as when a liquid is poisonous. However, this is precisely what the courts in *Buchan v Ortho Pharmaceutical*, *supra* note 67 and *Hollis v Dow Corning*, *supra* note 66 had to contend with – both defendants in those cases argued that reasonable women in similar circumstances would have used their products, and that many women in fact *do* use their products with knowledge of the risks.

<sup>1521</sup> Not examined in detail here is Stephen Perry’s discussion of the *Hedley Byrne* principle, stemming from the UK case, *Hedley Byrne Co v Heller & Partners*, [1964] AC 465 in “Protected Interests and Undertakings in the Law of Negligence” (1992) 42:3 University of Toronto Law Journal 247. Perry uses this case when consider the question of “whether a chance of avoiding an adverse physical consequence should be treated as a protected interest in tort”, *ibid* at 249. He argues that there are sound reasons for imposing liability when a plaintiff has, to their

Twerski argue, “the time has come for courts to recognize the right of patients to informed choice about risks associated with the use of a drug, a right that does not require plaintiffs to prove that the toxic agent was the cause for the plaintiff’s harm.”<sup>1522</sup> Their suggested approach preserves autonomy while not imposing full liability on defendants. The need for the right stems from the fact that, without such a right, patients may be deprived of “vital information necessary to make critical decisions” given that “pharmaceutical manufacturers will have little incentive to discover and warn about uncertain risks.”<sup>1523</sup> They contend the duty to warn is breached “when a risk is of sufficient consequence that a reasonable person would warn against it.”<sup>1524</sup> The fact that a plaintiff cannot definitively prove that their injury was caused by the drug should not mean they should “be deprived of the right to choose whether they wish to subject themselves to the material risk of that harm actually taking place.”<sup>1525</sup>

While Berger and Twerski are concerned with pharmaceutical products, their approach could certainly be applied to food products. Consider, for example, how they differentiate between therapeutic drugs (arguably necessary) and drugs used for aesthetic or palliative purposes. They contend the decision causation issue is “much more difficult” for therapeutic drugs, particularly in comparison with the questions of decision causation for aesthetic or

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detriment, relied on undertakings a defendant has made – and that this liability can be imposed “even where the plaintiff has not suffered any interference with one of the interests traditionally protected by negligence law”, *ibid* at 250. While Perry does consider *Donoghue v Stevenson*, *supra* note 16 (and products liability more generally), he argues that *Hedley Byrne* is focused more on an “abstractly conceived interest in personal autonomy”, *ibid* at 289. Perry distinguishes between the two cases, however, and notes “the practical upshot of the distinction is that *Hedley Byrne* permits damages to be awarded even when no physical harm has occurred”, *ibid* at 317. As this project does consider physical harm – that is, diet-related chronic diseases – the full impact of applying the *Hedley Byrne* principle is beyond the present scope. It is presented as a promising area of inquiry for future study.

<sup>1522</sup> Berger & Twerski, *supra* note 685 at 259.

<sup>1523</sup> *Ibid*. They note further, “[w]ith causation standing as a barrier to recovery, defendants will sit back confidently that liability is highly unlikely to attach to conduct that is admittedly negligent”, *ibid*.

<sup>1524</sup> *Ibid* at 268.

<sup>1525</sup> *Ibid* at 288.



palliative drugs, where for them the issue is much more clear. In the case of the latter, when the patient/consumer does not need to take the product, they note that plaintiffs who have not been provided adequate information have a “sense of betrayal.”<sup>1526</sup> In other words, when there is a choice before a consumer for a product that is not necessary, the obligation to provide information increases.

These approaches do not negate the need for a plaintiff to demonstrate that the injury could be caused by the product in question. It will still be incumbent upon the plaintiff to demonstrate the defendant’s product as a source of their injury.<sup>1527</sup> This can only be determined based on the factual record, on a case-by-case basis. This will ultimately come down to the evidence before the trier of fact. What might make this evidence difficult for the court to assess is the reality that a failure to warn cases involving food products will necessarily involve multiple defendants and multiple products.<sup>1528</sup> This reality gives rise to significant challenges for the ‘but for’ approach to causation. Several alternatives to the ‘but for’ approach for multiple defendants/products have been proposed. These will be examined next.<sup>1529</sup>

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<sup>1526</sup> *Ibid.*

<sup>1527</sup> Here, it is important to recall that the courts have been very clear that plaintiffs are required to demonstrate that the product in question was only *a* cause of the injury, not *the* cause. This is particularly important in the context of food products, where there will always been multiple products being consumed.

<sup>1528</sup> Arguably, there is potential for there to be only one manufacturer, although the likelihood of this is very slim. The same potential does not apply to products, as consumers necessarily must consume a variety of products – although some consumers certainly do consume only one particular type of product within a class (e.g., of all SSBs, drinking only sodas) or particular product/brand (e.g., of all sodas some consumers will only drink Pepsi).

<sup>1529</sup> It is important to note that the following analysis does not take into account all approaches. For example, it does not engage with Weinrib’s recent analysis on causal uncertainty, which is approached from the standpoint of corrective justice. See Weinrib, “Causal Uncertainty”, *supra* note 1390. According to Weinrib, the problem of causal uncertainty is not a homogenous problem: “The issues that it raises and the solutions that it yields vary with the kind of scenario within which it appears. The thread unifying these different scenarios lies not in the promulgation of a single set of rules applicable to all of them, but in their exemplification, each in its own way, of how corrective justice works when causation is uncertain”, *ibid* at 164.

#### 4. ALTERNATIVE APPROACHES TO THE ‘BUT FOR’ TEST IN FACTUAL CAUSATION

Throughout the evolution of negligence law, courts have identified various ways to circumvent the strict causation rules.<sup>1530</sup> Consider, for example, how the doctrine of *res ipsa loquitur* was used by the courts to permit an inference to be drawn against defendants.<sup>1531</sup> This approach is no longer viable, given that in *Fontaine v British Columbia*, the Supreme Court of Canada contends that it would be best if this approach was treated as “expired.”<sup>1532</sup> Nevertheless, the courts seem open to recognizing that there may be a need, in some instances, to adopt a different approach to causation. The Supreme Court of Canada on several occasions has recognized that the ‘but for’ test is unworkable. For example, in *Athey v Leonati*, the court held

It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant’s negligence was the *sole cause* of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring .... As long as the defendant is *part* of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury.”<sup>1533</sup>

While *Athey* refers to material contribution, ultimately the court did not find it necessary, relying

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<sup>1530</sup> Although anecdotal, consider the topic addressed by Justice Russell Brown of the Supreme Court of Canada when he visited Western Law in April of 2017: “Clarifying Cause-in-Fact.” It can be expected that in the coming years the Supreme Court will seek to further clarify the law on causation. This can be expected in part due to widespread dissatisfaction with recent Supreme Court jurisprudence on point, including *Clements v Clements*, *infra* note 1539, and the appointment of Justice Brown, who was an academic tort scholar prior to his appointment to the judiciary.

<sup>1531</sup> Edgell, *supra* note 545 at 26 argues, “[t]he principles of *res ipsa loquitur* are analogous to the rule in *Snell v. Farrell*, which permits the court to draw an inference adverse to the defendant. The inference is capable of being rebutted by evidence called by the defendant. Before the inference will be drawn, however, the plaintiff must still produce sufficient evidence to support it. Since the plaintiff retains the onus of proof, failure to do so can be fatal to the claim.”

<sup>1532</sup> [1998] 1 SCR 424.

<sup>1533</sup> *Athey v Leonati*, [1996] 3 SCR 458 at para 17. *Athey* has been criticized for not articulating what “unworkable” means here. See, for example, David Chiefetz, “The Snell Inference and Material Contribution: Defining the Indefinable and Hunting the Causative Snark” (2005) 30 *Advocates Quarterly* 1.

instead on the ‘but for’ test.<sup>1534</sup> In *Resurfice v Hanke*, the court held in *obiter* that the ‘but for’ test can be put aside in instances when it is impossible for a plaintiff to prove that the defendant’s negligence was a cause of the injury.<sup>1535</sup> In such instances, this must be due to “factors that are outside of the plaintiff’s control.”<sup>1536</sup> This includes the limits of scientific knowledge.<sup>1537</sup> *Resurfice* has been subject to mixed reviews.<sup>1538</sup>

The Supreme Court of Canada in *Clements v Clements* recently affirmed that a plaintiff may be able to recover from a defendant on the basis that a defendant materially contributed to risk of injury, even in instances where ‘but for’ causation might not be able to be satisfied.<sup>1539</sup> The approach in *Clements* has been upheld subsequently.<sup>1540</sup> Although the court affirmed the primacy of the ‘but for’ test for demonstrating causation, arguing that the test should be “applied in a robust common sense fashion”<sup>1541</sup>, the court in *Clements* recognized that in exceptional cases a plaintiff may not be required to show factual ‘but for’ causation. Such cases include “where it is impossible to determine which of a number of negligent acts by multiple actors in

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<sup>1534</sup> Brown observes that lost in the debate following *Athey v Leonati*, *ibid*, is that there was an orthodox acceptance of the material contribution prior to this decision. He points to *Myers v Peel County Board of Education*, [1981] 2 SCR 21. Of this view he observes: “It simply recognized that the existence of other factors which, in addition to the defendant’s negligence, also contributed to the plaintiff’s injury does not preclude recovery. In other words, if there are other factors – even material ones – and the defendant’s negligence meets the but-for causation test, then the defendant is still liable”, with Russell Brown, “Material Contribution’s Expanding Hegemony: Factual Causation After *Hanke V. Resurfice Corp.*” 45 Canadian Business Law Journal (2007) 432 [Brown, “Hegemony”] at 438 note 32.

<sup>1535</sup> *Resurfice v Hanke*, *supra* note 602.

<sup>1536</sup> *Ibid* at para 22.

<sup>1537</sup> *Ibid*.

<sup>1538</sup> See, for example, Lynda M Collins & Heather McLeod-Kilmurray, “Material Contribution to Justice? Toxic Causation after *Resurfice Corp. v Hanke*” (2010) 48 Osgoode Hall Law Journal 411, who note that *Resurfice, ibid*, “is an important first step in the evolution of a tort regime that is capable of doing justice in the chemical era”, at abstract. Contrast this with Brown, “Hegemony”, *supra* note 1534, who suggests the court had some motive other than clarifying causation, at 455.

<sup>1539</sup> [2012] 2 SCR 181. There was a dissenting opinion in *Clements* (Lebel and Rothstein JJ), but the dissent begins by agreeing with the majority’s analysis of the law on causation and the but for test, *ibid* as para 55, so the dissent is not discussed here.

<sup>1540</sup> *Ediger v Johnston*, 2013 SCC 18. See, in particular, paras 28-29.

<sup>1541</sup> *Clements v Clements*, *supra* note 1539 at para 9.

fact caused the injury, but it established that one or more of them did in fact cause it.”<sup>1542</sup> As the court noted, the material contribution to risk is a “different beast” from the ‘but for’ test and the material contribution to injury test. Instead of being a factual determination<sup>1543</sup>, it “imposes liability not because the evidence establishes that the defendant’s act caused the injury, but because the act contributed to the risk that injury would occur.”<sup>1544</sup>

The court recognized that this is a radical step<sup>1545</sup>, and thus indicated that the material contribution to risk test is to be used sparingly, when “required by fairness and conforms to the principles that ground recovery in tort.”<sup>1546</sup> Discussions of this approach generally look at the English common law case of *McGhee v National Coal Board*.<sup>1547</sup> In this case, the plaintiff contracted dermatitis due to the accumulation of coal dust from his place of employment. The employer did not provide showering facilities, and the House of Lord held “[t]he medical evidence is to the effect that the fact that the man had to cycle home caked with grime and sweat added materially to the risk.”<sup>1548</sup> In this instance, the court held that the plaintiff needed to only show that the breach of the duty owed by the defendant contributed to the risk of injury. It is submitted here that failure to warn cases involving food products are similar, and represent

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<sup>1542</sup> *Ibid* at para 13.

<sup>1543</sup> The court cites *Chambers v Goertz*, [2009] 12 WWR 10 (BC CA) at para 17, where Justice Smith notes that the material contribution test is a “policy-driven rule of law designed to permit plaintiffs to recover in such cases despite their failure to prove causation.”

<sup>1544</sup> *Clements v Clements*, *supra* note 1539 at para 15.

<sup>1545</sup> As the court notes, *ibid* at para 16: “Elimination of proof of causation as an element of negligence is a “radical step that goes against the fundamental principle stated by Diplock, L.J., in *Browning v. War Office*, [1962] 3 All E.R. 1089 (C.A.), at 1094-95: ‘. . . A defendant in an action in negligence is not a wrongdoer at large: he is a wrongdoer only in respect of the damage which he actually causes to the plaintiff’”: *Mooney v. British Columbia (Attorney General)*, 2004 BC CA 402, 202 B.C.A.C. 74, at para. 157, *per* Smith J.A., concurring in the result.”

<sup>1546</sup> *Clements v Clements*, *supra* note 1539 at para 16.

<sup>1547</sup> [1973] 1 WLR 1 (HL).

<sup>1548</sup> *McGhee v National Coal Board*, [1972] 3 All ER 1008 (HL). See subsequent treatment of *McGhee* by the House of Lords in *Wilsher v Essex Area Health Authority*, [1988] AC 1074 (HL) and *Fairchild v Glenhaven Funeral Services*, [2002] UKHL 22 (HL).

instances where fairness and the principles of tort may require the application of this alternative test.

Consider, for example, the cases that the court in *Clements* refers to in its discussion of the material contribution test. First, it points to *Cook v Lewis*.<sup>1549</sup> In this case, three men were hunting when two fired at the same time, with one of them hitting a fourth hunter. It could not be determined which hunter fired the shot that caused the injury, so the court found both defendants jointly and severally liable. As the court in *Clement* observed, to deny a plaintiff who was the victim of negligent conduct “while allowing the negligent defendants to escape liability by pointing the finger at each other, would not have met the goals of negligence law of compensation, fairness and deterrence, in a manner consistent with corrective justice.”<sup>1550</sup> According to Beever, in *Cook v Lewis* Justice Rand was arguing that “both defendants have harmed the plaintiff: one shot the plaintiff, while the other or both injured his right to prove liability.”<sup>1551</sup> While Beever does not accept this conclusion<sup>1552</sup>, he also does not reject it. Instead, he reconsiders this as an expression of two rights, “the right to bodily integrity and the parasitic remedial right.”<sup>1553</sup> Contained within the right to bodily integrity is a right to seek recovery for

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<sup>1549</sup> *Cook v Lewis*, [1951] SCR 830.

<sup>1550</sup> *Clements v Clements*, *supra* note 1539 at para 19. Boivin, “Factual Causation”, *supra* note 645 at 59 compares *Cook v Lewis* with *Hollis v Dow Corning*, *supra* note 66. “Not unlike *Cook*, it would be unfair to ask her to prove, in addition, a fact over which her “power of proof” is at best limited – in *Cook*, the identity of the shooter, in the case at bar, the hypothetical behaviour of her attending physician.” He further notes that Ms. Hollis, like Mr. Lewis, did not play a role in creating the conditions that lead to their injuries, although the nature of their decision are clearly distinct. In *Cook* the plaintiff was walking, and in no way contributed to the risk, whereas in *Hollis* the plaintiff may have been unaware of the risks, but contributed by agreeing to breast implant surgery. For a more critical response to the courts use of *Cook v Lewis* here, see Brown, “Hegemony”, *supra* note 1669 at 449ff.

<sup>1551</sup> Beever, *supra* note 1384 at 355.

<sup>1552</sup> He notes that this would, in effect, assert that a plaintiff has a right to prove causation and that no such right exists. If it did exist, this would put the burden of proof squarely on defendants, *ibid*.

<sup>1553</sup> *Ibid*. See discussion in Weinrib, “Causal Uncertainty”, *supra* note 1390.

any interferences with that right.<sup>1554</sup>

The court also considers *Snell*, where Sopinka J acknowledged that the material contribution to risk approach may be applicable in some instances.<sup>1555</sup> In *Snell*, Justice Sopinka emphasized the need for a substantial connection between the defendant's negligence and the injury so that "neutral" factors would not influence a finding of negligence.<sup>1556</sup> It also looked to *Athey v Leonati*, where the court held emphasized that a robust common sense approach to the 'but for' test "permits an inference of 'but for' causation from evidence that the defendant's conduct was a significant factor in the injury."<sup>1557</sup> The court also considered *Walker Estate v York Finch General Hospital*<sup>1558</sup>, which recognized limitations with the 'but for' test similar to those discussed in *Snell*.<sup>1559</sup> It also looked at *Resurfice v Hanke*, which recognized that the 'but for' test can be replaced by the material contribution test in "special circumstances."<sup>1560</sup> These special circumstances include when it is impossible for the plaintiff to prove causation using the 'but for' test, but where "it is clear that the defendant breached his duty of care in a way that exposed the plaintiff to an unreasonable risk on injury."<sup>1561</sup>

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<sup>1554</sup> *Ibid.* Beever notes: "[a]s the right to bodily integrity is a right in private law, it must include within it the 'means to vindicate and maintain it ... indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal'", quoting from *Ashley v White* (1703) 92 ER 126 at 136. See discussion in Beever, *supra* note 1384 at 355-357.

<sup>1555</sup> *Snell v Farrell*, *supra* note 1469.

<sup>1556</sup> It is not clear what Sopinka J meant by "neutral" in *Snell v Farrell*, *ibid.* He does note that in *Cook v Lewis*, *supra* note 1549, it was clear that the conduct was not neutral. He does refer to "factors unconnected to the defendant and not the fault of anyone". In *Clements v Clements*, *supra* note 1539, all the court states to clarify what is meant by neutral factors is that "it would have occurred absent any negligence", at para 21.

<sup>1557</sup> *Clements v Clements*, *supra* note 1539 at para 23, referring to *Athey v Leonati*, *supra* note 1533.

<sup>1558</sup> [2001] 1 SCR 647. *Clements v Clements*, *ibid* at para 24

<sup>1559</sup> See *Clements v Clements*, *ibid* at para 25 and *Walker Estate v York Finch General Hospital*, [2001] 1 SCR 647 at para 99.

<sup>1560</sup> *Resurfice v Hanke*, *supra* note 602 at para 24. For a discussion of *Resurfice v Hanke*, and its implications prior to *Clements v Clements*, *ibid*, see David Cheifetz, *The Resurfice Exception: Causation in Negligence Without Probability* (Toronto: University of Toronto, 2012) (LLM dissertation).

<sup>1561</sup> *Clements v Clements*, *supra* note 1539 at para 27, referring to *Resurfice v Hanke*, *ibid* at para 25.

In all of these cases, the court recognized when it was not possible for a plaintiff to prove with certainty that the defendant's negligence caused the plaintiff's injury that there was grounds to move away from the 'but for' test.<sup>1562</sup> Importantly, the court observes that the material contribution approach is useful when the 'but for' test, although met "globally", breaks down when it is applied to each defendant separately.<sup>1563</sup> This prevents negligent defendants from escaping liability by pointing the finger at other negligent defendants.<sup>1564</sup>

This break down of the 'but for' test can play out in at least two ways in a failure to warn case involving food products. First, with respect to the failure to warn about the harms associated with food products, food manufacturers would easily be able to point the finger at other manufacturers who have neglected to provide sufficient warnings, and thus challenge any attempt by a plaintiff to definitively establish 'but for' causation. Second, with respect to the harm that is caused by the failure to warn, food manufacturers could point to other food products as a cause of the harm.

What complicates matters is that food manufacturers can also point to additional factors, ones that might qualify as "neutral" per Sopinka J's analysis in *Snell*. For example, food and beverage companies often point out that an individual has considerable control over factors such

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<sup>1562</sup> As the court in *Clements v Clements*, *ibid* at para 28 summarizes: "Cook was analyzed on a reverse onus basis. *Snell*, *Athey*, *Walker Estate* and *Resurfice* were all resolved on a robust and common sense application of the "but for" test of causation." The court in *Clements* also considers some UK cases at para 29-32, but these are not reviewed here.

<sup>1563</sup> In such cases, the injury materializes, but it is not possible to identify who caused it. See *Clements v Clements*, *ibid* at para 40: "The plaintiff thus has shown negligence and a relationship of duty owed by each defendant, but faces failure on the "but for" test because it is "impossible" ... to show which act or acts was injurious. In such cases, each defendant who has contributed to the risk of the injury that occurred can be faulted." The court refers only to act(s) here, and not omissions. It is not clear whether or not this is intentional. Fischer, *supra* note 1378 at 282 argues that "[c]ourts are decidedly less willing to suspend the operation of the but for test in multiple sufficient omission cases than in multiple sufficient act cases". See also David W Fischer, "Causation in Fact in Omission Cases" (1992) *Utah L Rev* 1335.

<sup>1564</sup> *Clements v Clements*, *ibid* at para 43.



as exercise and sleep, which play a role in diet-related chronic diseases, such as obesity. There is the additional challenge that not all plaintiffs will be injured by the defendant's negligence. The court in *Clements* acknowledged this possibility, but did not consider it further.<sup>1565</sup>

Botterell and Essert present a compelling argument that "atypical cases" sometimes require that liability be established when 'but for' causation cannot be demonstrated. They argue that the 'but for' requirement should be "abandoned in situations where multiple defendants impose the same unreasonable risk on a plaintiff, where the plaintiff suffers the very sort of harm that rendered the risk unreasonable, and where the plaintiff cannot prove which of the defendants was in fact the but-for cause of her loss."<sup>1566</sup> Rather than focus on the specifics of causation, they contend that the underlying normative principles animating tort law justify this approach, focusing in particular on "reciprocal norms of conduct."<sup>1567</sup>

They identify two types of cases: cases of causal indeterminacy and cases involving historical uncertainty.<sup>1568</sup> In both types of cases it is impossible to say whether a particular defendant caused the plaintiff's injury. They do not suggest doing away with factual

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<sup>1565</sup> See *Clements v Clements*, *ibid* at para 44, where the court notes: "This is not to say that new situations will not raise new considerations. I leave for another day, for example, the scenario that might arise in mass toxic tort litigation with multiple plaintiffs, where it is established statistically that the defendant's acts induced an injury on some members of the group, but it is impossible to know which ones." See discussion in *Beever*, *supra* note 1384.

<sup>1566</sup> Botterell & Essert, *supra* note 93 at 666. They aim to articulate a framework for addressing factual uncertainty.

<sup>1567</sup> *Ibid* at 666: "These reciprocal norms of conduct impose obligations on individuals to maintain fair terms of interaction with one another." They continue: "Our claim is that tort law's commitment to maintain fair terms of interaction between individuals, a commitment that *typically* requires a plaintiff to establish causation using the but-for test, sometimes allows, in *atypical* cases, for the imposition of liability absent but-for causation." As will be shown, this aligns with Gerhart's understanding of tort law as social morality, *supra* note 192, as discussed in Chapter 2.

<sup>1568</sup> They identify two different scenarios to explain them, the *Hunters* (historical uncertainty) and the *Desert Trek* (causal indeterminacy) see *ibid* at 668.

causation<sup>1569</sup>, which they recognize would fail to take tort law seriously, but instead advocate for finding ways to reconcile the role of factual causation in typical and atypical cases.<sup>1570</sup> This can be achieved, they suggest, by thinking harder about the normative underpinnings of negligence liability.<sup>1571</sup> Moreover, they note “just as the general reasons for imposing negligence liability in a given case ought also to be reasons for limiting that liability, so too ought the reasons for insisting on the requirement of factual causation in typical cases be reasons for limiting or dispensing with it in atypical cases.”<sup>1572</sup>

To this end, they rely on the theoretical work of Ripstein<sup>1573</sup>, who considers tort law as enforcing a system of reciprocal norms.<sup>1574</sup> Botterell and Essert interpret Ripstein’s view to mean that when a defendant is found liable for a plaintiff’s loss it is another way of showing that the defendant has done something that the plaintiff had a right to be free from.<sup>1575</sup> The concern is with rights and wrongs, not harms or losses.<sup>1576</sup> What is important is whether or not a plaintiff

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<sup>1569</sup> They note that there are four options to addressing the problem: (1) do nothing; (2) do away with factual causation; (3) maintain that factual causation is essential for liability, but expand the concept (e.g., Wright’s NESS approach, see 674-675); or (4) “find a way to reconcile the role played, or not played, by factual causation in typical and atypical cases”, *ibid* at 671. See the discussion on these various options, including discussion of the various proponents and opponents to these views, at 670ff. See also *ibid* at 681.

<sup>1570</sup> Botterell & Essert, *supra* note 93 at 671.

<sup>1571</sup> *Ibid* at 672.

<sup>1572</sup> *Ibid*.

<sup>1573</sup> *Ibid* at 678: “We adopt Ripstein’s view here, largely because we believe that Ripstein presents the clearest account of tort law available that takes seriously its underlying concepts.” They also consider Weinrib, especially an early articulation of his theory in Ernst J Weinrib, “A Step Forward in Factual Causation” (1975) 38 Mod L Rev 518 [Weinrib, “A Step Forward in Factual Causation”]. In this piece they note, at 677, “First, he suggest that, in light of various (then recent) developments in the law of negligence, a return to first principles is needed in thinking about factual causation. Second, he suggests that having returned to first principles, we must be sensitive to the way in which normative considerations can be relevant to the factual causation inquiry.” However, they are unclear whether Weinrib’s view as articulated in this piece remains consistent with his current, more developed theory, see at 677-678.

<sup>1574</sup> See, for example, Arthur Ripstein, “Justice and Responsibility” (2004) 17:2 Canadian Journal of Law & Jurisprudence 361. This project does not consider Ripstein’s theory in detail, but considers how it might be applied in atypical situations, as articulated by Botterell and Essert.

<sup>1575</sup> Botterell & Essert, *supra* note 93 at 678.

<sup>1576</sup> As they note, *ibid* at 679, “[tort law] must be capable of distinguishing wrongful interferences with the

had a right to be free from something.<sup>1577</sup> This leads them to recommend that in atypical cases the typical normative principles are worked out in an atypical fashion.<sup>1578</sup> Here, two normative principles, per Ripstein's analysis, are identified: the norms of reciprocal conduct and the norms of liability or repair. The first establishes limits on people's freedom in order to ensure fair interactions, and the second establishes that people will bear the costs of their unreasonable conduct when it materializes in harm.<sup>1579</sup> These are identified as norms governing behaviour that reasonable people would accept as binding on society.<sup>1580</sup>

What it means is that in situations where 'but for' causation cannot be proven on a balance of probabilities, as is often the case in situations of historical uncertainty, the imposition of liability can be justified as an attempt to preserve the "terms of interaction between the parties set by the associated norms of conduct, and more fairly allocates the costs that a defendant imposes on a plaintiff."<sup>1581</sup> Allowing defendants to escape liability in such situations would be the truly unjustifiable response.<sup>1582</sup> This would result in a violation of both the norms of

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rights of others that lead to losses from harms that result from non-wrongful, but perhaps otherwise lamentable, conduct."

<sup>1577</sup> *Ibid* at 681: "The upshot is that, according to Ripstein, it makes a difference whether the cause of the plaintiff's injury was something that he or she had a right to be free from, or whether it was something that simply happened to him or her. This distinction is normative in nature, having to do with rights and wrongs rather than with harms and benefits."

<sup>1578</sup> As they note, *ibid* at 681-682, "[i]t would therefore be a mistake to conclude that atypical cases, in which the requirement of factual causation is altered or dispensed with, constitute exceptions to the basic structure of negligence law. Instead, atypical cases represent situations in which the typical normative principles at work in negligence law are worked out in atypical fashion. Therefore, such cases call for "a sensitive and pragmatic approach in the elaboration and modification of the procedures through with [negligence law's\] normative structure is applied", citing Arthur Ripstein & Benjamin C Zipursky, "Corrective Justice in an Age of Mass Torts" in Gerald J Postema, ed, *Philosophy and the Law of Torts* (Cambridge: Cambridge University Press, 2001) 214 at 244.

<sup>1579</sup> Botterell & Essert, *ibid* at 682.

<sup>1580</sup> *Ibid*.

<sup>1581</sup> *Ibid* at 683.

<sup>1582</sup> *Ibid* ("More specifically, to allow defendants to escape liability in situations of historical uncertainty would permit those defendants to unilaterally set the terms of interaction between themselves and a given plaintiff. Defendants would be allowed to put their interest in liberty ahead of the plaintiff's interests in security, without

reciprocal conduct and liability. In effect, it would mean that, despite acting in a way that they were not entitled to, actions that resulted in harm to a plaintiff, a defendant would nevertheless be absolved from liability.<sup>1583</sup>

Recognizing that this approach is likely to be criticized, particularly by some tort law theorists, Botterell and Essert respond that their approach takes law seriously as law. They note:

One worry is that, like functional or instrumental approaches to tort law that we earlier said we were not going to take seriously, our approach is, at bottom, simply a matter of balancing benefits and burdens, and it is therefore susceptible to the same criticisms we levelled against such approaches. This would be a mistake, however. Our approach, while it does involve some balancing, differs from instrumental approach in two important ways. First, what are being balanced are norms of conduct and liability, rather than overall burdens and benefits. Second, in balancing norms of conduct and liability, we are explicitly appealing to negligence law's own normative concepts. We are not trying to replace them with something else. Thus, unlike functional or instrumental approaches, our approach takes negligence law seriously as law and seeks to understand it on its own terms.<sup>1584</sup>

While it is unlikely that they will silence all critics, what is particularly valuable about Botterell and Essert's approach is that they aim to ground it normatively. While the normative principles may be subject to debate, they nevertheless present an argument that aims to satisfy critiques of functionalism or instrumentalism.<sup>1585</sup> Indeed, they point to Weinrib's observation that tort law sometimes calls for "flexibility."<sup>1586</sup> Flexibility is necessary in atypical cases where similar

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having to bear the costs that their risks impose on others.").

<sup>1583</sup> *Ibid* ("Holding defendants liable in such cases, therefore, preserves fair terms of interaction because it does not impose on those defendants new or further restrictions of their liberty, and, at the same time, better preserves the security interests of the injured plaintiff.").

<sup>1584</sup> *Ibid* at 684.

<sup>1585</sup> I have similarly adopted this type of approach in this project, grounding the use of private law for public health in the normative underpinnings of tort law.

<sup>1586</sup> Botterell & Essert, *supra* note 93 at 686 referring to Weinrib, "A Step Forward in Factual Causation", *supra* note 1573 at 534.

defendants may allow a defendant to escape liability.<sup>1587</sup> As they note, it is not unfair to impose liability on defendants in these situations because the careless conduct of the defendants has imposed a risk on the plaintiff, thereby disturbing the terms of interactions between them.<sup>1588</sup> What matters here is what counts as an unreasonable risk. Objections to what constitutes an unreasonable risk, importantly, should be normative, not ideological. If a defendant exposes a plaintiff to a risk unilaterally, and the plaintiff is harmed, “the defendant should not be relieved of responsibility for that harm simply because it cannot be established using the traditional but-for test that he harmed the plaintiff.”<sup>1589</sup> Holding a defendant liable maintains terms of fair interaction.<sup>1590</sup>

While Botterell and Essert do not specifically examine an example where there are numerous defendants, they do note that in situations with multiple co-defendants liability should be imposed on all defendants.<sup>1591</sup> After all, the number of defendants does not alter the fact that

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<sup>1587</sup> *Ibid* at 685: “The question to be answered is this: does allowing a defendant who has failed to take reasonable care to escape liability because of the presence of a similar defendant upset the terms of interaction between defendant and plaintiff? ... If, in a given case, the imposition of the but-for test seems unfair—because to impose it would upset the terms of interaction between the parties—that case is at least a candidate for the account we are offering.”

<sup>1588</sup> *Ibid* at 687. Additionally, they note, *ibid* at 686, “imposing liability on defendants is not unfair to defendants in the same sense in which refusal to impose liability is unfair to plaintiffs .... [and] if imposing liability on defendants *is* unfair to defendants, then this is an unproblematic form of unfairness.” Moreover, as they note, tort law is required to make all parties happy, observing, “[t]he fact is that many tort doctrines involving liability and compensation seem unfair”, *ibid* at 687.

<sup>1589</sup> *Ibid* at 687. For example, in their scenario *Hunters* they observe, at 688, “it is not only clear that both defendants created a risk of harm to the plaintiff, it is also clear that the plaintiff suffered exactly the same kind of injury that made the imposition of risk wrongful in the first place.”

<sup>1590</sup> *Ibid* at 688. They further note, at 689, “[t]o echo Weinrib: we must be prepared to test the cause in fact process against the underlying policies and purposes that it embodies, and to adjust the ordinary method of dealing with cause in fact if it fails to adequately reflect our more basic notions of fairness”, referring to Weinrib, “A Step Forward in Factual Causation”, *supra* note 1573 at 530. It is important here to note that this is not meant to be a wholesale rejection of the need to prove causation in negligence cases. Rather, that in some circumstances where the ‘but for’ test is unworkable, justice may warrant adopting an alternative approach.

<sup>1591</sup> They note, *ibid* at 690, “[a]s unlikely as it may seem to have ten defendants in this position that Jerry and Mickey find themselves in *Hunters*, we believe that our approach would require us to impose liability on all ten in that case.” In note 71 they observe: “Whether the liability thereby imposed would require *joint* liability for all

the defendants' conduct resulted in the injury, and a type of injury that the duty of care was meant to prevent.<sup>1592</sup> This is particularly appropriate in the context of the duty to warn. It would undermine the very purpose of imposing a duty to warn if defendants could avoid liability for failing to warn consumers by simply pointing out that numerous defendants likewise failed to warn consumers. While the above discussion pertains specifically to instances where there are multiple defendants, the same reasoning can be applied to situations where there are multiple products that give rise to a suspected harm. If the purpose of providing a warning on a product is to allow a consumer to manage their risk, a defendant should not be able to escape liability when they knowingly expose consumers to products that in isolation or in concert may result in the injury warned about.

Consider, for example, the risk to health posed by SSBs, as discussed in the preceding chapters. Currently no SSBs on the market have warnings about the risk that the consumption of sugar-sweetened beverages increases the likelihood of obesity or diabetes, among a myriad of other diet-related chronic disease. Plaintiff A only drinks Pepsi, produced by Pepsi-Co, whereas Plaintiff B drinks multiple SSBs, all of which are produced by Pepsi-Co (Pepsi, Gatorade, Tropicana, Dole, 7Up, Lipton, Brisk Mountain Dew, Mug, SoBe, Starbucks, Ocean Spray). Plaintiff C drinks two kinds of SSBs, 7Up and Sprite, the former a Pepsi-Co product, the latter a Coca-Cola product. Plaintiff D drinks all types of SSBs, including those made by Pepsi-Co and Coca-Cola, as well as other companies, such as Dr. Pepper and unbranded colas, such as

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defendants to all plaintiffs is another question. An argument can be made that the liability ought to be joint, on the grounds that the norm of reciprocal conduct that is violated is the same regardless of the defendant's economic or market position", noting that Ripstein & Zipursky, *supra* note 1578, reject this argument

<sup>1592</sup> As Botterell & Essert note, *ibid* at 690, "[r]efusing to hold all defendants liable in such a case would fail to adequately protect the very interests that the norms of reciprocal conduct were put in place to protect."

President’s Choice. Plaintiff E primarily drinks juice, including those made by Pepsi-Co and Coca-Cola, although will occasionally have a “sport drinks” when working out, such as Gatorade. Imagine all five plaintiffs consume at least one SSB daily.<sup>1593</sup> Because of this consumption, all five plaintiffs have a higher risk of serious health conditions, such as diabetes or obesity. Which plaintiff would have the best case in a failure to warn suit?

Imagine that all five plaintiffs becomes obese, which in turn leads to diabetes. What role did SSB consumption play in their respective health conditions? Imagine that each of the plaintiffs has a moderately “healthy” lifestyle. They walk to work, go to the gym on a semi-regular basis, primarily eat meals prepared at home, and consume alcohol moderately, although they do enjoy the odd fatty foods, have a tendency to snack, and occasionally have second helpings at dinners. Thus, while SSBs could not be identified as the sole cause of any health condition that might arise, one could argue that, at a minimum, the consumption of SSBs would be a *contributing* factor to their obesity. Certainly, it would be more probable than not that the consumption of high calorie beverages with little to no nutritional value would have contributed to their obesity. Indeed, there is evidence suggesting that moderate consumption of SSBs may place individuals at increased risk (of obesity along with other health risks more generally), and hence the public health effort to reduce consumption of SSBs.<sup>1594</sup>

Assuming the evidentiary threshold could be met, in the above scenario, only Plaintiffs A and B could easily point to a defendant, as they only consumed products manufactured by one

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<sup>1593</sup> While consumption patterns of SSBs are ever evolving, daily consumption of SSBs is common. The CDC found that adults in 18 states consumed on average 1511 kcal/day from SSBs, and that 26.3% of adults consumed SSBs more than one a day (with prevalence of this level of consumption ranging from 20.4% to 41.4%). See CDC, “Sugar-Sweetened Beverage Consumption Among Adults – 18 States, 2012” (August 15, 2014) CDC, online: CDC <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6332a2.htm>.

<sup>1594</sup> *Ibid.*



company, Pepsi-Co. Plaintiff C would have a more difficult time establishing that a manufacturer's actions were causally related to the health outcomes. Plaintiffs D and E would by far have the hardest time demonstrating that it was the defendant's product that caused the harm, as they consumed multiple products manufactured by multiple defendants. However, in each scenario the manufacturers had a duty to warn the consumer about the dangers associated with the consumption of SSBs. Each of the SSBs consumed carried risks to health that outweigh their utility or benefit. Based on existing product liability jurisprudence, this risk gives rise to a need for manufacturers to warn consumers about the risk associated with overconsumption. Indeed, the duty to warn might very well apply to *any* consumption of SSBs, and not simply the overconsumption, given the risks associated with SSB consumption. Certainly, the manufacturer has a duty to warn consumers about the overconsumption of SSBs, particularly given that these manufacturers are well aware of the consumption patterns of consumers, patterns that they promote and normalize.

Despite this, establishing 'but for' causation here would be very difficult, if not impossible, to demonstrate, particularly in the scenarios involving Plaintiffs C, D, and E. This is why Botterell and Essert point out that defendants should not be allowed to escape liability because of the perceived inflexibility of tort law's current doctrine. In the above scenario, the manufacturers have a clear duty in the common law to warn consumers. The duty exists, despite the challenges with establishing that the consumer's injury was a result of the defendant's negligence under the current approach to causation. It is suggested here that this raises a normative problem for tort law, as it fails to take seriously the underlying justifications for imposing an obligation in the first place.

Additionally, *Clements v Clements* clearly establishes that a plaintiff can recover from the defendant “on the basis of material contribution to *risk* of injury, without showing full “but for” causation.”<sup>1595</sup> The conflation of *risk* and *harm* has been subject to some criticism. For example, Brown has argued “[p]roving that a particular instance of harm is a characteristic outcome of a risk is not, however, the same thing as proving that such harm actually resulted from a risk.”<sup>1596</sup> He also warns that this effectively dispenses with the law of causation, contending that “[b]ecause unreasonable conduct is inherently risky, proof of the defendant’s breach of the standard of care is now, in and of itself, proof of causation.”<sup>1597</sup> While there are reasons to take Brown’s criticism seriously, it was raised pre-*Clements*. This is not to suggest that the criticism would not still ring true, but *Clements* is considerably more constricted than *Resurface*.<sup>1598</sup> The court in *Clements* explicitly notes that “material contribution to risk” is necessary because it is acting as a substitute for the ‘but for’ test. In so doing, “[i]t imposes liability not because the evidence establishes that the defendant’s act caused the injury, but because the act contributed to the risk that the injury would occur.”<sup>1599</sup>

Consider how this would play out in a failure to warn claim. By failing to provide the consumer with the necessary information to make an informed decision about the food products they may elect to consume, the manufacturer may, in effect, be contributing to the risk of an injury occurring. While there may not be an immediate injury from this failure, there is an

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<sup>1595</sup> *Clements v Clements*, *supra* note 1539 at headnote, emphasis added.

<sup>1596</sup> Brown, “Hegemony”, *supra* note 1534 at 449. It is worth reiterating that the law is interested in actual causation, as discussed above, and not the type of causation that science is generally interested in.

<sup>1597</sup> *Ibid.*

<sup>1598</sup> When presented at the Faculty of Law at Western University on April 5, 2017, Justice Brown suggested that *Clements v Clements*, *supra* note 1539, was an improvement by simplifying the cause-in-fact inquiry, prioritizing the but for test, and limiting the test in *Resurface v Hanke*, *supra* note 602.

<sup>1599</sup> *Clements v Clements*, *supra* note 1539 at para 15.

increased risk. What the court must determine is whether that exposure to risk is sufficient to impose liability.<sup>1600</sup> This will be a particularly difficult determination should defendants adduce evidence that the plaintiff was contributorily negligent.<sup>1601</sup> The preceding chapters have argued that the risk is not insignificant. Whether or not this is accepted, however, will depend on the court's willingness to accept the evidence. The next section considers the role of evidence in negligence and duty to warn cases.

## 5. EVIDENCE IN DUTY TO WARN CASES

In the past few decades, particularly with the rapid advancement of science and technology, there has been increased attention paid to the role of scientific evidence in the courtroom. This is a topic that has been examined on many levels, and a fulsome discussion is beyond the scope of this section. That said, two issues concerning evidence are worth considering here. The first is the challenge plaintiffs have with coming up with sufficient evidence about the defendant's negligence.<sup>1602</sup> The second issue concerns what counts as evidence, and how it is assessed/weighed by the court.

First, it is widely accepted that plaintiffs in product liability suits will face difficulties finding sufficient evidence to prove that a product was defective.<sup>1603</sup> This is especially the case

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<sup>1600</sup> See *Ediger v Johnston*, *supra* note 1540. Here the court held that the defendant's actions had opened the possibility of risk – which may or may not have materialized. As it so happened, in this case the harm materialized, and the defendant was found liable.

<sup>1601</sup> When visiting the Faculty of Law at Western University, Justice Brown noted that the court in *Clements v Clements*, *supra* note 1539, was silent on this point, and that it was not clear how the Supreme Court, should it ever hear this type of case, would decide on such an issue.

<sup>1602</sup> For example, see discussion in Knusten *supra* note 1380, who repeatedly observes that evidentiary sufficiency is often what is at issue (e.g., at 168).

<sup>1603</sup> Waddams, *Product Liability*, *supra* note 534 at 65: "Rarely can a plaintiff prove by direct evidence that a defect existed when the product containing it left the factory."

with defective warnings<sup>1604</sup>, a challenge accentuated by the counterfactual nature of failure to warn cases, as discussed above. There is a recognized tension between allowing too many unproven claims to go forward, thus exposing more defendants to (potentially) unjustified liability, and preventing meritorious claims from going forward, thus depriving plaintiffs the opportunity to seek compensation.<sup>1605</sup> As Theall and colleagues note, “[j]udges do not want to see meritorious claims frustrated because of an inability to meet rigid or technical standards of proof.”<sup>1606</sup> Thus, courts have allowed for inferences based on circumstantial evidence.<sup>1607</sup> As articulated by the British Columbia Court of Appeal in *Mooney v British Columbia (Attorney General)*, “where a breach of duty has materially increased the risk of damage of the type that occurred, and it is impossible for either party to lead evidence that would establish whether or not the breach of duty caused the loss, an inference of causation may be drawn.”<sup>1608</sup>

Inferences have been used for some time by the courts<sup>1609</sup>, and the appropriateness of using inferences was affirmed in *Clements*.<sup>1610</sup> There the Supreme Court refers to *Wilshire*,

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<sup>1604</sup> Fischer, *supra* note 1378 at 279 notes, “[t]he proof problem arises in failure to warn cases because there is often a complete absence of reliable evidence of causation in fact.”

<sup>1605</sup> *Ibid* at 279: “If [courts] apply the traditional rule, and place the burden of proving causation on the plaintiff, too many plaintiffs would lose their cases. That is, there will be many cases where defendant’s failure to warn caused plaintiff’s harm, but plaintiff will be unable to prove it. On the other hand, if court adopt the presumption of causation, too many defendants will lose. That is, there will be many cases where the failure to warn did not cause plaintiff’s harm, but defendants will be held liable because of the absence of evidence available to rebut the presumption of causation.”

<sup>1606</sup> Theall et al, *supra* note 62 at L7-2.

<sup>1607</sup> Waddams, *Product Liability*, *supra* note 534 at 65: “The existence of a defect, and its presence in the product at the material time, has always been held to be provable by inference from circumstantial evidence.” See also Edgell, *supra* note 545 at 18ff, where he discusses how courts have allowed for the use of circumstantial evidence to alleviate the evidentiary burden on plaintiffs.

<sup>1608</sup> *Mooney v British Columbia (Attorney General)*, [2004] 10 WWR 286 (BC CA).

<sup>1609</sup> For a general discussion on the use of inference in tort, see Russell Brown, “The Possibility of ‘Inference Causation’: Inferring Cause-in-Fact and the Nature of Legal Fact-Finding” (2010) 55 McGill LJ 1 [Brown, “Inference Causation”].

<sup>1610</sup> *Clements v Clements*, *supra* note 1539.

where the House of Lord also affirmed the use of inferences.<sup>1611</sup> According to *Clements*, common sense inferences for factual causation “usually flows without difficulty.”<sup>1612</sup> It is appropriate to use, because “[t]here is no need for scientific evidence of the precise contribution the defendant’s negligence made to the injury.”<sup>1613</sup> That said, if a plaintiff establishes ‘but for’ causation through inference only the defendant is still free to call evidence that negligence was not a cause of the injury.<sup>1614</sup>

The decision in *Clement* is ultimately relevant for this project on two grounds. First, it allows for the use of the material contribution to risk of injury approach in exceptional circumstances, thus eliminating the requirement for plaintiffs to show ‘but for’ factual causation in some cases.<sup>1615</sup> Second, it affirmed that when the ‘but for’ test is used, scientific precision is not a requirement.<sup>1616</sup> As the court states, “[t]he law of negligence has never required scientific

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<sup>1611</sup> *Wilsher v Essex Area Health Authority*, *supra* note 1548 at 567, referring to *McGhee v National Coal Board*, *supra* note 1548: “But where the layman is told by the doctors that the longer the brick dust remains on the body, the greater the risk of dermatitis, although the doctors cannot identify the process of causation scientifically, there seems to be nothing irrational in drawing the inference, as a matter of common sense, that the consecutive periods when brick dust remained on the body probably contributed cumulatively to the causation of the dermatitis. I believe that a process of inferential reasoning on these general lines underlies the decision of the majority in *McGhee's* case.”

<sup>1612</sup> *Clements v Clements*, *supra* note 1539 at para 10. The court continues, *ibid*, “[e]vidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant’s negligence probably caused the loss.”

<sup>1613</sup> *Clements v Clements*, *ibid* at para 9. Here the court refers to *Wilsher v Essex Area Health Authority*, *supra* note 1548 and *Snell v Farrell*, *supra* note 1469.

<sup>1614</sup> Unlike the plaintiff, which must satisfy the burden of proof, a defendant is under no obligation to proffer such evidence.

<sup>1615</sup> The exceptional circumstances include when it is impossible for a plaintiff to prove that the defendant was negligent using the but for test, *Clements v Clements*, *ibid* at para 39. “What then are the cases referring to when they say that it must be “impossible” to prove “but for” causation as a precondition to a material contribution to risk approach? The answer emerges from the facts of the cases that have adopted such an approach. Typically, there are a number of tortfeasors. All are at fault, and one or more has in fact caused the plaintiff’s injury. The plaintiff would not have been injured “but for” their negligence, viewed globally. However, because each can point the finger at the other, it is impossible for the plaintiff to show on a balance of probabilities that any one of them in fact caused her injury. This is the impossibility of which Cook and the multiple employer mesothelioma cases speak”, *ibid*.

<sup>1616</sup> See Erik S Knusten, “Causal Draws and Causal Inferences: A Solution to *Clements v. Clements* (and Other Causation Cases)” (2011) 39 *Advocates Quarterly* 241 at 248, where he notes: “[e]videntiary due diligence should be necessary, but not to an excess and useless amount such that courts drown in unnecessary science in order

proof of causation; to repeat yet again, common sense inference from the facts may suffice. If scientific evidence of causation is not required, as *Snell* makes plain, it is difficult to see how its absence can be raised as a basis for ousting the usual ‘but for’ test.”<sup>1617</sup> Of course, this is uncontroversial, given that in civil litigation the burden of proof is the balance of probabilities.<sup>1618</sup>

Combined with the burden of proof, the reliance on inferences drawing from circumstantial evidence ultimately means that the plaintiff can meet their burden if “on the evidence, even purely circumstantial evidence, it appears more likely than not that the defendant’s negligence was the cause of the plaintiff’s injury or damage.”<sup>1619</sup> In these types of cases, as discussed above, this requires some speculation on the part of the court – irrespective of which party that speculation benefits. However, Edgell contends that this speculative approach should only benefit the plaintiff:

the plaintiff should not fail simply because it is possible that the damage could have arisen through factors consistent with no negligence on the part of the defendants, if negligence is the more likely explanation. It is not an adequate answer to the inference to put forward speculative scientific hypotheses as to how the damage may have occurred, nor to advance conjectural possibilities.<sup>1620</sup>

This can be contrasted with Brown’s view, who contends “the plaintiff should win where the

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to prove common sense things.”

<sup>1617</sup> *Clements v Clements*, *supra* note 1539 at para 38.

<sup>1618</sup> Edgell, *supra* note 545 at 20 (“Although the plaintiff has the burden of proof, it is a burden that can be met on the balance of probabilities. The burden is met if on the evidence, even purely circumstantial evidence, it appears more likely than not that the defendant’s negligence was the cause of the plaintiff’s injury or damage.”).

<sup>1619</sup> *Ibid.*

<sup>1620</sup> *Ibid.* Importantly, Edgell here is discussing using inferences in *res ipsa loquitur* and in strict liability. Nevertheless, his thinking can be applied to the approach to factual causation identified above. He continues, *ibid.*: “If the plaintiff can put forward a *prima facie* case in the absence of evidence to the contrary which outweighs the plaintiff’s evidence, the plaintiff will succeed. In this sense, the cases sometimes refer to an onus of proof shifting to the defendant. It is not a change in the burden of proof which rests on the plaintiff, but rather simply a reflection of the measure of proof being the balance of probabilities. If the defendant can balance the scales, he or she will succeed. If he or she fails to balance the scales, or outweigh the plaintiff’s evidence, the defendant will lose.”

legal fact-finder thought the plaintiff's account of the facts seemed the most probable and plausible of all competing accounts."<sup>1621</sup> According to Justice Sopinka in *Snell*, all this requires is "very little affirmative evidence."<sup>1622</sup>

In failure to warn cases, it is inevitable that the court will have to speculate about how a consumer would have used the information had it been provided. Consider *Buchan*. There, the court had to speculate about how Mrs. Buchan might have used information concerning the risks with taking the oral contraceptive had the defendant manufacturer provided such information. In that instance, rather than speculate, the court elected to modify its approach, by weighing Mrs. Buchan's testimony as to how *she* would have acted. As the court noted,

[w]hether a so-called reasonable woman in the plaintiff's position would have done likewise is beside the point. The selection of a method of preventing unwanted pregnancy in the case of a healthy woman is a matter not of medical treatment, but of personal choice and it is not unreasonable that notice of a serious potential hazard to users of oral contraceptives could influence her selection of another method of birth control. So long as the court is satisfied that the plaintiff herself would not have used the drug if properly informed of the risks, this causation issue should be concluded in her favour regardless of what other women might have done.<sup>1623</sup>

The court recognized that this may place a burden on the defendant, but immediately noted that manufacturers can easily escape liability simply by providing sufficient information to

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<sup>1621</sup> Brown, "Inference Causation", *supra* note 1609 at 36. More fully he argues "the plaintiff should win where the legal fact-finder thought the plaintiff's account of the facts seemed the most probable and plausible of all competing accounts, and not because the plaintiff's story itself evoked considerations that the legal fact-finder thought to be normatively significant." Brown contemplates the criticisms by those who dislike the lack of determinacy involved in inferring causation, *ibid* at 45, or who may be concerned that legal fact-finders may "fudge cause-in-fact on emotivist grounds" but notes that this is a risk that is "an unavoidable concomitant of the epistemology of legal fact-finding", *ibid* at 39. Brown contends that the criticisms are a "feeble indictment", *ibid* at 45.

<sup>1622</sup> *Snell v Farrell*, *supra* note 1469 at para 31.

<sup>1623</sup> *Buchan v Ortho Pharmaceutical*, *supra* note 67 at para 77. See also *Ragoonanan Estate v Imperial Tobacco*, *supra* note 511 at para 52.



consumers through adequate warnings.<sup>1624</sup> Providing information, and facilitating meaningful consumer choice, the court reasoned, “is preferable to invoking evidentiary burdens that serve to exonerate negligent manufacturers as well as manufacturers who would rather risk liability than provide information which might prejudicially affect their volume of sales.”<sup>1625</sup> The duty to warn, then, could be said to be less concerned with what a reasonable consumer would do and more attuned to what a properly *informed* consumer would do.<sup>1626</sup> It is impossible to have an informed consumer without providing sufficient information.

Consider this in the context of food products. Most individuals think that they know what it means to eat healthfully, and are able to identify the types of foods that should be avoided in large quantities. However, this has been demonstrated to be untrue. Consider, for example, that 99.5% of Canadians do not eat according to the Canadian Food Guide.<sup>1627</sup> Additionally, as discussed earlier, most consumers do not understand basic nutritional information, underestimate calories consumed, and have difficulty comprehending the risks associated with the moderate consumption of unhealthy foods. Additionally, food manufacturers have not been providing

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<sup>1624</sup> *Buchan v Ortho Pharmaceutical, ibid* at para 78: “The suggestion that the determination of this causation issue other than by way of an objective test would place an undue burden on drug manufacturers is answered by noting that drug manufacturers are in a position to escape all liability by the simple expedient of providing a clear and forthright warning of the dangers inherent in the use of their products of which they know or ought to know.”

<sup>1625</sup> *Ibid* para 78.

<sup>1626</sup> Of course, the informed consumer can still make unreasonable and risky decisions, something that is made evident in many of the cases discussed above, and there is still a requirement that individuals act reasonably. See *Krysta v Funland Enterprise, supra* note 1306 at para 26, where the British Columbia Supreme Court notes that there is still a requirement to draw the line about what is reasonable in the appropriate place: “None of these cases is parallel to the present one but the overriding message is that a line must be drawn in the appropriate place. A person must take reasonable care not to injure his neighbor, but the neighbor must also be reasonable in the care he takes of himself. Neighbours, of course, are not of equal competent in the ability of self care. This plaintiff was wholly competent and wholly negligent. So many activities are attended by danger if people are not watchful and cautious. The potential dangers attendant on riding a bicycle, or roller skating, or skate boarding, or getting out of a bathtub are but a few.”

<sup>1627</sup> Garriguet, *supra* note 2.

consumers with adequate information about known and foreseeable risks. If anything, as will be argued in more detail in the concluding chapter, they have worked towards lulling consumers into complacency. Moreover, when risks are known or identified, contrary to what is required by the *Buchan* standard, they work to neutralize or negate this information.<sup>1628</sup>

There is a second problem with evidence, and that is determining what counts as evidence and how it is assessed. Much of the preceding argument, in many ways, is contingent on what counts and what is accepted by the courts as “evidence.” This is a particularly important issue in the context of public health, which relies on epidemiology and biostatistics<sup>1629</sup>, scientific disciplines that are not always suited to answering specific questions about causation.<sup>1630</sup> One need look no further than tobacco litigation for an example for why determining what counts as evidence is of critical importance. One of the reasons why tobacco litigation was unsuccessful for decades was because tobacco companies were able to undermine the evidence indicating that

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<sup>1628</sup> Numerous proposals exist for dealing with the problem of proof. For example, Fischer, *supra* note 1378 at 281 suggests: “A possible solution to the proof-problem in cases involving informed-choice warnings that do not enhance safety is to abolish the requirement that plaintiff prove the personal injury damages resulted from the failure to warn. Courts could treat the failure to give such a warning as a dignitary tort, and compensate plaintiff for the invasion of his dignitary interest in making informed choices. Plaintiffs would have a cause of action for invasion of this interest without regard to whether they would have decided not to use the product.”

<sup>1629</sup> For example, public health interventions generally take longer to assess, there are many factors that can affect each public health issue, there are ample uncontrollable variables as interventions do not take place in a laboratory, and so forth. The science of public health is epidemiology and biostatistics, and, as Parmet observes, engages in empirical and probabilistic reasoning, *Populations, Public Health, and the Law*, *supra* note 99 at 58. Public health law research is, much like public health law, inherently multi-disciplinary. As Horton and colleagues observe, “public health law research follows an interdisciplinary approach that is as broad as the operations and mission of public health practice itself”, Heather Horton et al, “The Dimensions of Public Health Law Research” (2002) 30 *JL Med & Ethics* 197 at 198. The methodology of public health law research, they note, includes “quantitative and qualitative data collection and analysis, legal research and analysis, social science data collection and analysis, and recognition of the place of bioethics, legal scholarship, and social science in a research project”, *ibid* at 201.

<sup>1630</sup> See, for example: Wagner, “The ‘Bad Science’ Fiction”, *supra* note 358; Zaza et al *supra* note 358; Gard, Zaza & Thacker, *supra* note 358; McGarity, *supra* note 358; Hoppin & Clapp, *supra* note 358; and Jasanoff, “Law’s Knowledge”, *supra* note 358.

tobacco was harmful to health.<sup>1631</sup> So successful was the tobacco industry, in fact, that many still are unaware of the roots of the phrases “junk science” and “sound science” – ideas promoted by industry to discredit expert witnesses with unfavourable opinions.<sup>1632</sup> In addition to undermining evidence, the tobacco industry also learned the value of manufacturing uncertainty.<sup>1633</sup> Contrary evidence was not necessary, as a loud enough message of doubt is sufficient. As expressed by one tobacco industry executive: “Doubt is our product since it is the best means of competing with the ‘body of fact’ that exists in the minds of the general public.”<sup>1634</sup> These tactics proved so effective they have been emulated by industries<sup>1635</sup> and continue to be used by tobacco companies, as demonstrated by the use of evidence in *Létourneau*.<sup>1636</sup>

As discussed above, Justice Riordan was not impressed with the attempts made by the defendant tobacco companies to undermine the science linking their products with harmful health effects. While he held that the companies were not necessarily at fault for not doing research into the harmful effects<sup>1637</sup>, he did note, “[w]here fault can be found, however, is in the

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<sup>1631</sup> Deborah E Barnes & Lisa A Bero, “Industry-funded Research and Conflict of Interest: An Analysis of Research Sponsored by the Tobacco Industry Through the Centre for Indoor Air Research” (1995) 21:3 J Health Pol 515; and, Baba et al, *supra* note 358.

<sup>1632</sup> McGarity, *supra* note 358; Ong & Glantz, *supra* note 358; and, Baba et al, *supra* note 358. Unfortunately, what gets lots in the pursuit of “sound science” is that uncertainty is sometimes unavoidable. Jasanoff observes, “the existence of controversy does not mean in and of itself that one or the other side has adopted an “unscientific” method or is propagating “junk science”; it could simply mean that uncertainties are unresolvable in the present state of knowledge”, Jasanoff, “Law’s Knowledge”, *supra* note 358 at S54.

<sup>1633</sup> See, for example, Michaels & Monforton, *supra* note 358; RL Park, “Science in the Courts” (2002) 36:3 New Eng. L Rev 575; Roni A Neff & Lynn R Goldman, “Regulatory Parallels to *Daubert*: Stakeholder Influence, ‘Sound Science,’ and the Delayed Adoption of Health-Protective Standards” (2005) 95:Supp1 American Journal of Public Health 81; Ong & Glantz, *supra* note 358; and, McGarity, *supra* note 358.

<sup>1634</sup> Brown & Williamson, “Smoking and Health Proposal” (1969) Document No. 332506, online: Tobacco Documents <http://tobaccodocuments.org/bw>.

<sup>1635</sup> See Friedman, Daynard & Banthin, *supra* note 358.

<sup>1636</sup> *Létourneau v JTI-MacDonald*, *supra* note 68. Note, in *Létourneau*, Quebec’s *Tobacco-related Damages and Health Care Costs Recovery Act*, *supra* note 507 influenced what counted as evidence. This issue is not considered here.

<sup>1637</sup> *Ibid* at para 472.

failure or, worse, the cynical refusal to take account of contemporaneous, accepted scientific knowledge about the dangers of the Companies' products and to inform consumer accordingly."<sup>1638</sup> Justice Riordan also continually calls into question the credibility of the industry and its experts.<sup>1639</sup> Indeed, he notes that at trial a former president of one of the companies "testified that BAT's lawyers frowned on IITL performing scientific research to verify the health risks of smoking because that might be portrayed in lawsuits as an admission that it knew or suspected that such risks were present."<sup>1640</sup> Riordan J also points out that in their defense, the tobacco companies' strategy was to discredit the plaintiffs, without providing the court with contrary evidence to consider.<sup>1641</sup>

To be sure, the intersection of law and science is a complicated issue, and is a problem that extends far beyond failure to warn cases.<sup>1642</sup> Many American scholars have noted that it has become a more pressing issue in what might be described as the post-*Daubert* era.<sup>1643</sup> The

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<sup>1638</sup> *Ibid* at para 474.

<sup>1639</sup> See, for example, *ibid* at paras 206-214.

<sup>1640</sup> *Ibid* at para 212.

<sup>1641</sup> For example, see *ibid* at para 611 ("... crouching behind the Carcassonnese double wall of the Warnings, backed up by the "scientific controversy" of no proven biological link and the need for more research"); para 719 ("Their strategy with almost all of their experts was to criticize the Plaintiffs' experts' proof, while obstinately refusing to make any of their own on the key issues facing the court ..."), para 722 ("The Court would have welcomed any assistance that the Companies' experts could have provided on this critical question, but they were almost always compelled by the scope of their mandates to keep their comments on a purely theoretical or academic level, never to dirty their hands with the actual facts of these cases").

<sup>1642</sup> Consider the use of science in criminal proceedings, the regulation of pharmaceuticals and novel biotechnologies, intellectual property disputes, among many others.

<sup>1643</sup> *Daubert v Merrell Dow Pharmaceuticals*, 509 US 579 (1999). For a discussion on *Daubert*, see Parmet, *Populations, Public Health, and the Law*, *supra* note 99 at 231-238. For additional commentary on impact of *Daubert*, see Sophia I Gatowski, et al, "Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-*Daubert* World" (2001) 25:5 Law Hum Behav 433; Margaret A Berger, "What has a Decade of *Daubert* Wrought?" (2005) 95:Suppl American Journal of Public Health S59; David Egilman, Joyce Kim & Molly Bilken, "Proving Causation: The Use and Abuse of Medical and Scientific Evidence Inside the Courtroom—An Epidemiologist's Critique of the Judicial Interpretation of the *Daubert* Ruling" (2003) 58 Food & Drug LJ 223; S Solomon & E Hackett, "Setting the Boundaries Between Science and Law: Lessons from *Daubert v Merrell Dow Pharmaceuticals, Inc.*" (1996) 21:2 Science, Technology, & Human Values 131; and, Jan Beyea & Daniel Berger, "Scientific Misconceptions among *Daubert* Gatekeepers: The Need for Reform of Expert Review Procedures"

difficulties associated with adequately assessing scientific evidence, particularly by non-experts, are exacerbated when they have to differentiate between evidence, counter-points, counterfactuals, and manufactured uncertainty. In particular, the legal profession is often ill-equipped and lacks adequate training to assess scientific evidence.<sup>1644</sup> Despite this, courts have been asked to act as the gatekeepers, determining what science is “sound”.<sup>1645</sup> Complicating matters further, it is not only courts that lack scientific acumen, but also many others involved in the articulation of legal principles and doctrines, including legal academics, legislators, and litigators who use ‘science’ to buttress their claims.<sup>1646</sup>

In addition to the problems concerning use of evidence articulated above, interpretation

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(2001) 64 Law & Contemp Probs 327. Jasanoff contends that mechanical adherence to *Daubert* “inhibits courts from asking why relevant knowledge does *not* exist and who should bear the cost of collective ignorance”, Jasanoff, “Law’s Knowledge”, *supra* 358 at S57 (original emphasis). Parmet has observed that in the post-*Daubert* era the burden is placed on plaintiffs to produce reliable epidemiological evidence: “[a]s a result, the requirement that plaintiffs produce reliable epidemiological studies often bars a plaintiff’s action, even when animal or toxicology studies suggest that the product at issue can cause the type of harm the plaintiff experience”, Parmet, *Populations, Public Health, and the Law, ibid* at 233.

<sup>1644</sup> See, for example, Joelle A Moreno, “Einstein on the Bench?: Exposing What Judges do not Know about Science and Using Child Abuse Cases to Improve how Courts Evaluate Scientific Evidence” (2003) 64 Ohio St L J 531 and D Ozonoff, “Epistemology in the Courtroom: A Little ‘Knowledge’ is a Dangerous Thing” (2005) 95:51 American Journal of Public Health S13.

<sup>1645</sup> The judiciary is referred to as gatekeepers in *R v Mohan*, [1994] 2 SCR 9. There is considerable discussion on point in the US, especially in the context of *Daubert v Merrell Dow Pharmaceuticals, supra* note 1643. *Daubert* is cited by the Supreme Court of Canada decision *R v J-LJ*, 2000 SCC 51. For a discussion of *Daubert*, see Beyea & Berger, *ibid*; Lucinda M Finley, “Guarding the Gate to the Courthouse: How Trial Judges are Using their Evidentiary Screening Role to Remake Tort Causation Rules” (1999) 49 DePaul L Rev 335; and, Jeffrey M Schumm, “Previous Little Guidance to the ‘Gatekeepers’ Regarding Admissibility of Nonscientific Evidence: An Analysis of *Kumho Tire Co. v. Carmichael*” (2000) 27 Florida State Univ L Rev 865. Jasanoff has observed, “[f]ar from acting as gatekeepers who merely let “good science” in through the courtroom door, post-*Daubert* judges have emerged as active participants in *making* science, consistent with their lay understandings of how science should be made”, Jasanoff, “Law’s Knowledge”, *supra* note 358 at S53 (original emphasis). See also F Schauer, “Can Bad Science be Good Evidence” Neuroscience, Lie Detection, and Beyond” (2009) 95 Cornell Law Review 1191.

<sup>1646</sup> Sheila Jasanoff & Dorothy Nelkin, “Science, Technology, and the Limits of Judicial Competence” (1982) 68 Am Bar Assoc J 1094. It has been observed, “[j]udges and juries, usually having little formal or professional training in scientific methodology, often are unable to accurately weight the validity of competing claims made before them in the name of science”, Edwin “Ted” Pratt, Jr, Raymond D Rawwon & Mark Rubin, “Fluoridation at Fifty: What Have we Learned?” (2002) 30:3 JL Med & Ethics 117 at 120. On the impact of science on juries, see C Boudreau & M McCubbins, “Competition in the Courtroom: When Does Expert Testimony Improve Jurors’ Decisions?” (2009) 6:4 Journal of Empirical Legal Studies 793.

of evidence by legal academics presents serious barriers. The problems in the context of public health law are perhaps best illustrated by Frank's commentary on obesity litigation, comments apropos to this project.<sup>1647</sup> In assessing the evidence demonstrating a correlation between environment and obesity, Frank minimizes the role of industry in purchasing decisions. He contends, "[a]dvertisers cannot force consumers to purchase what they do not desire, or we would all be drinking New Coke, Crystal Pepsi, and Zima."<sup>1648</sup> Implicit in this comment are numerous assumptions fraught with problems. In particular, he trivializes the role advertising and marketing plays in decision-making, which has been demonstrated by a plethora of research<sup>1649</sup> and would seem to be widely accepted by industry given the resources devoted to marketing.<sup>1650</sup>

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<sup>1647</sup> Recall that Frank, *supra* note 46, argues that class action obesity litigation represents an abuse of class action litigation. Irrespective of whether Frank's assessment concerning class actions has merit, his assessment of the scientific evidence for obesity is telling.

<sup>1648</sup> *Ibid* at 438-439. Frank, anecdotally, points to his own obesity despite his parent's refusal to purchase sugared cereals, presumably to undermine the correlation between unhealthy foods and rates of obesity. Of course, the issue of obesity is complex and it is beyond the scope of this paper to wade into discussion about the causes of obesity. When assessing the evidence, it is important to bear in mind that ideological use of evidence is not difficult and a possibility for both proponents and opponents to a particular position. See the discussion concerning the challenges of 'white hat bias', Cope & Allison, *supra* note 1003.

<sup>1649</sup> See M Potvin-Kent et al, *supra* note 861. If advertising did not have an impact on the purchases of consumers it would not be the billion-dollar juggernaut that it is. Moreover, advertising has been shown to influence the decisions of children and adolescents. See Institute of Medicine, *Food Marketing to Children and Youth: Threat or Opportunity* (Washington, D.C.: Institute of Medicine, 2006). It has been estimated that in 2002, "children aged four to twelve directly influenced \$310 billion of adult purchasing and evoked another \$340 billion", Juliet B Schor & Margaret Ford, "From Tastes Great to Cool: Children's Food Marketing and the Rise of the Symbolic" (2007) 35 *JL Med & Ethics* 10 at 11. Children are also responsible for an estimated \$25 to \$30 billion of spending a year, Committee on Communication, "Children, Adolescents, and Advertising" (2006) 118 *Pediatrics* 2536 at 2563 The most commonly purchased item by children and adolescents is food. Food is also the largest category of influence of children on parent's spending, Schor & Ford, *ibid*.

<sup>1650</sup> The Committee on Communication estimated in 2006 that advertising to children was a "\$250 billion/year industry with 900 000 brands to sell", *ibid* at 2563. They also suggested that children viewed 40 000 ads per year on television alone, *ibid* at 2564, which is likely to increase with Internet advertising, see Potvin-Kent et al, *ibid*. Marketing firms contend that advertising to children has the aim simply of establishing brand preference. "Marketers are eager to reach very young children but not necessarily to promote specific products; instead, the goal is often to build brand loyalties, on the basis of the theory that, the younger the age at which brand awareness is established, the stronger the brand loyalty will be as child grows", SM Connor, "Food-related Advertising on Preschool Television: Building Brand Recognition in Young Viewers" (2006) 188 *Pediatrics* 1478 at 1479. Frank's assertion that advertising failed to convince consumers to accept the niche products he uses as examples, especially when brand loyalties surely prevailed, is not demonstrative of overall ineffectiveness of marketing efforts. And



Frank's cavalier attitude towards the evidence is further illustrated by his comment, made in parentheses likely to illustrate his incredulity: "One looks forward to the suits against the University of Arkansas at Little Rock for their contribution to the obesity problem for their role in publishing this reading material."<sup>1651</sup> This perfunctory response to public health science is not uncommon. If, as Frank asserts, the causative factors of obesity are insufficient to make out legal causation for class action, that argument should be able to stand on its own. What is particularly troubling about Frank's assessment of the underlying science is that it does not appear to be very scientific, but based on ideology.<sup>1652</sup>

While it is not possible here to identify the specific evidence or science that should count in duty to warn cases, or how to improve the scientific understanding of the legal profession, it is worth noting that duty to warn cases involving food products will necessarily involve the use of public health sciences. This may necessitate a shift in how the legal profession thinks about scientific causation, in part because of how public health sciences address causation. *Létourneau*

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while industry cannot "force" consumers into purchasing products, it does exercise considerable control over what products are available, including where they are available and for what cost, but also over what ingredients make up the products.

<sup>1651</sup> Frank, *supra* note 46 at 438.

<sup>1652</sup> It is not uncommon for lawyers to contend they are competent arbiters over disparate fields (see, for example, Paul Campos, *Obesity Myth: Why America's Obsession with Weight is Hazardous to your Health* (New York: Penguin Books, 2004)), while at the same time asserting that non-lawyers are unable to comment on law. While this is not a universal view by any means, there are numerous legal scholars who do assert that only lawyers are capable of commenting on law. Consider the implications of Langdell's thought: "[t]he Langellians presented the common law as an arcane yet perfectly rational system of principles and rules. The implication was that only lawyers and judges trained in university-affiliated law schools could truly understand the law", Stephen M Feldman, "The Transformation of an Academic Discipline: Law Professors in the Past and Future (or Toy Story Too)" (2004) 54 J Legal Educ 471 at 477. Law is what lawyers do, and only lawyers. Any assessment from non-lawyers is decidedly non-law. This view can be ascribed primarily to pure law theorists and legal formalists. For a defence of this position, see FC DeCoste, *On Coming to Law: An Introduction to Law in Liberal Societies* (Markham: Butterworths, 2001). DeCoste holds a "*distinctively legal point of view* inheres in the practice of law, and that it is that point of view which alone accounts for the way lawyers and judges, as practitioners, experience law. From this legal point of view ... law is, descriptively speaking, an *independent communal practice* with its own intrinsic values which can only adequately be explained by establishing the *point* of our having a community of that sort", *ibid* at 5.



presents a good example of how a court may proceed. The defendant tobacco companies wanted the court to adopt a “but-for-never” approach, whereby the plaintiffs would have to prove that, “but for the Companies’ fault, the [plaintiffs] would never have started or continued to smoke.”<sup>1653</sup> But as Justice Riordan notes, proving a negative is not required.<sup>1654</sup> While Justice Riordan did not ignore the challenges that arose due to the lack of scientific precision in his ruling<sup>1655</sup>, he also did not buy wholesale into the “scientific controversy”<sup>1656</sup> narrative that the tobacco industry generated and perpetuated.<sup>1657</sup> Instead, Justice Riordan reinforced the notion that the obligation on manufacturers is neither conditional nor contingent on being believed<sup>1658</sup>, and it is not minimized if science is used to trivialize or deny the causal links<sup>1659</sup>, but instead requires manufacturers to warn consumers of known or knowable risks associated with the use of their products.<sup>1660</sup>

Moreover, and importantly, it is up to the trier of fact to determine what counts as evidence and how it counts. This point was emphasized by the Supreme Court in *British*

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<sup>1653</sup> *Létourneau v JTI-MacDonald*, *supra* note 68 at para 791.

<sup>1654</sup> *Ibid* at para 794. He argues, “[i]f there is reason to conclude that the Companies’ faults led in a logical, direct and immediate way to the Members’ smoking, that is enough to establish causation, even if those faults coexist with other causes.” He then quotes from Lara Khoury, *Uncertain Causation in Medical Liability* (Oxford: Hart Publishing, 2006) at 29: “This theory (adequate causation) seeks to eliminate the mere circumstances of the damage and isolate its immediate cause(s), namely those event(s) of a nature to have caused the damage in a normal state of affairs ... This theory necessarily involves objective probabilities and the notions of logic and normality. The alleged negligence does not need to be the sole cause of the damage to be legally effective however.” While not discussed further here, numerous cases also point out that the alleged negligence does not need to be the sole cause, see, for example, *Athey v Leonati*, *supra* note 1533.

<sup>1655</sup> Indeed, he explicitly acknowledged them, see *ibid* at para 766 (“In making this decision, we identify with the challenge faced by most judges forced to wade into controversial scientific waters, a challenge whose difficulty is multiplied when experts disagree.”).

<sup>1656</sup> *Ibid* at paras 141, 243ff.

<sup>1657</sup> See discussion above.

<sup>1658</sup> *Ibid* at para 281.

<sup>1659</sup> *Ibid* at para 313: “Science can trivialize and, indirectly, deny, but that is not the important question. The real question is to determine whether the Companies met their duty to warn.”

<sup>1660</sup> Riordan J notes, “[w]here the manufacturer knows that the information provided is neither complete nor sufficient with respect to the nature and degree of the probable danger, the duty has not been met”, *ibid* at para 232.

*Columbia (Workers' Compensation Appeal Tribunal) v Fraser Health Authority*.<sup>1661</sup> Although not a negligence case, the majority decision written by Justice Brown clearly states the task of weighing the evidence rests solely with the trier of fact. As this statement also reiterates how inferential reasoning may be used to determine causation, it is worth citing at length.

The presence or absence of opinion evidence from an expert positing (or refuting) a causal link is not, therefore, determinative of causation .... It is open to a trier of fact to consider, as this Tribunal considered, other evidence in determining whether it supported an inference that the workers' breast cancers were caused by their employment .... Howsoever "positive evidence" was intended to be understood in those decisions, it should not obscure the fact that causation can be inferred - even in the face of inconclusive or contrary expert evidence - from other evidence, including merely circumstantial evidence. This does not mean that evidence of relevant historical exposures followed by a statistically significant cluster of cases will, on its own, always suffice to support a finding that a worker's breast cancer was caused by an occupational disease. It does mean, however, that it may suffice. Whether or not it does so depends on how the trier of fact, in the exercise of his or her own judgment, chooses to weigh the evidence. And, I reiterate: Subject to the applicable standard of review, that task of weighing evidence rests with the trier of fact - in this case, with the Tribunal.

## 6. PROXIMATE CAUSE

Having examined how cause-in-fact may be established, the final task of this chapter is to return to cause-in-law, or proximate cause.<sup>1662</sup> At this stage the court must determine, having found that the defendant's was the factual cause of the plaintiff's injury, whether or not it would be fair to impose liability on the defendant. Here, the court is not asking whether the conduct caused the injury, but instead is determining whether or not the court *should* impose liability for the injury caused. As noted earlier, this often turns on whether or not the harm was a reasonably

<sup>1661</sup> *British Columbia (Workers' Compensation Appeal Tribunal) v Fraser Health Authority*, 2016 SCC 25.

<sup>1662</sup> For present purposes, arguments against using proximate cause are put aside. However, there have been suggestions that proximate cause is obfuscating and interferes with determining liability, see Jessie Allen, "The Persistence of Proximate Cause: How Legal Doctrine Thrives on Skepticism" (2012) 90:1 Dever University Law Review 77 at 84.

foreseeable consequence of the act. This stage of the negligence analysis serves to limit the scope of liability. Proximate cause can be used to “undermine the claim that the defendant’s conduct is plausibly treated as having caused plaintiff’s injury.”<sup>1663</sup>

Reasonable foreseeability here is similar, but distinct, from the analysis undertaken at the stage of the duty of care. Recall that in the duty of care analysis, reasonable foreseeability was assessing the relationship between the parties to determine whether or not to impose a duty. Here, the concern is the conduct of the parties. Thus, it seeks to ascertain whether or not diet-related chronic diseases (or whatever harm is alleged) is a reasonably foreseeable consequence of the failure to provide a warning on food products. This can be answered two ways. First, in a general way; that is to say, is it reasonably foreseeable that harm related to the consumption of food products may arise if consumers are not properly informed about these potential harms? It is submitted here that the answer is most likely yes. This harm is reasonably foreseeable. However, this does not address the question of whether or not the particular harm was caused the absence of warnings on the specific product(s) in question. Thus, the second answer, focusing on a specific claim, could go either way. Both responses warrant further consideration.

With respect to the more general question, it would not be too remote to suggest that the failure to provide a warning about the danger associated with the consumption of a food product may result in that danger materializing. At this stage the claim is simply that, on its face, there is no reason to assume that proximate cause cannot be met. The consumption of food products is sufficiently related to the harm of diet-related chronic diseases that flows from the consumption

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<sup>1663</sup> Benjamin C Zipursky, “Foreseeability in Breach, Duty and Proximate Cause” (2009) 44 Wake Forest Law Review 1247 at 1253.

of the food products, at least on the surface. Whether or not liability will actually be imposed will depend on evidence put before the court.<sup>1664</sup>

Thus, insofar as proximate cause is a policy decision, there are reasons to hold that it is fair to hold manufacturers liable for the harms that arise if they elect to not warn consumers. This is especially the case in light of the fact, articulated earlier, that manufacturers can easily avoid this liability through the provision of adequate information. It is also a fair approach, given that the point of warnings is to make sure that consumers are aware of risks. The duty to warn makes a product that would otherwise be defective due to inherent dangers safe by ensuring the consumer is aware of the risks. If there is no warning, and the consumer has been injured by the very thing that should have been warned about, this is sufficiently linked to impose liability.

Here it is worth reiterating that the courts have made it clear that warnings need not actually change the behaviour of consumers. As Justice Riordan noted in *Létourneau*, “[t]he obligation imposed on the manufacturer is not a conditional one. It is not to warn the consumer “provided that it is reasonable to expect that the consumer will believe the warning”. That would be nonsensical and impossible to enforce.”<sup>1665</sup> In his discussion of causation in failure to warn cases, Fischer observes the theoretical problems that arise will vary depending on the policy basis for requiring warnings in the first place, differentiating between the policy goal of reducing risk and the policy goal of promoting individual autonomy.<sup>1666</sup> While Fischer is correct to observe that the policy basis is important to consider, ultimately the duty to warn as formulated in this project respects both. The basis for duty to warn is to reduce risks by providing consumers

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<sup>1664</sup> The discussion about evidence above is germane here. Evidence will also be discussed below.

<sup>1665</sup> *Létourneau v JTI-MacDonald*, *supra* note 68 at para 281. In section II.D.3 of his judgment, Riordan J expresses his view, using the heading “No Duty to Convince”.

<sup>1666</sup> Fischer, *supra* note 1378 at 283.

with sufficient information to make informed choices. Individual autonomy, however, is respected through the warning. Consumers are left to make whatever choice accords with their personal preferences. If an adequate warning is provided, and that warning is overlooked or ignored, resulting in harm to the consumer, the manufacturer will not be liable.

While proximate cause is met in a general sense, proximate cause may be an issue in a specific claim—involving specific food product(s) and specific diet-related harm(s). In other words, there may not be sufficient connection between the failure to provide a warning and the harm that ensues to justify imposing liability. Ultimately this analysis that is better conducted with specific details that are not available here. For the purpose of discussion, however, consider the Alpha-gal allergy. In recent years, it has come to light that IgE antibodies have a strong association with delayed anaphylaxis to red meat.<sup>1667</sup> In other words, some individuals may be allergic to red meat. Research has indicated that the significant cause of IgE antibodies is bites from the lone star tick.<sup>1668</sup> There is also some research suggesting that fattier meats (e.g., pork rinds) result in more severe reactions.<sup>1669</sup> If a plaintiff could establish cause-in-fact for a failure to warn of the harm of consuming red meat for those that have elevated levels of IgE antibodies, a court have to consider whether it was also appropriate to find proximate cause here. This seems unlikely. Certainly it would be difficult to impose liability presently, as until very recently the danger of anaphylaxis when consuming red meat was not reasonably foreseeable.<sup>1670</sup> While a

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<sup>1667</sup> Scott P Cummins & Thomas AE Platts-Mills, “Delayed Anaphylaxis to Red Meat in Patients with IgE Specific for Galactose alpha-1,3-Galactose (alpha-gal)” (2013) 13:1 Curr Allergy Asthma Rep 72 at 72.

<sup>1668</sup> *Ibid.*

<sup>1669</sup> *Ibid.*

<sup>1670</sup> At a minimum, it certainly was not foreseeable. Cummins & Platts-Mills, *ibid.*, note that it was first thought there were only a handful of cases, but over time hundreds if not thousands of cases have been identified across the US.

court may elect to impose liability despite the rarity of this occurring (recall *Grant v Australian Knitting Mills*<sup>1671</sup>), a court is likely to avoid imposing liability here because it effectively makes the red meat manufacturer an insurer for those individuals who have had the misfortune of being bitten by a lone star tick.

Of course, an allergy to red meat is only one of many dangers that may be associated with its consumption. For example, the consumption of red meat has been associated with “an increased risk of total, [cardiovascular disease], and cancer mortality.”<sup>1672</sup> Red meat is not unique here. There are many risks associated with many of the food products that are regularly consumed by the public for which there are no warnings presently. It may be this reality that will be most difficult for courts to address. Additionally, if warnings were required, there are many food products that would require numerous warnings, and there may be very few products without any warnings at all. Requiring warnings on all products does raise legitimate concerns about the dilution of the effectiveness of the warning. This concern, however, should not necessarily trump the greater concern that without these warnings many consumers may simply be unaware of the potential risks. At a minimum, the courts will have to make a policy decision about whether or not to apply the existing duty to warn jurisprudence to food products.

In light of the difficulties that may arise by imposing a duty to warn on all food products, this project earlier recommended that a duty to care only be recognized for particular categories or classifications of food products. The undertaking can also be achieved here. Proximate cause can be used to limit the extent of the liability that food manufacturers may face. This can only be

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<sup>1671</sup> *Supra* note 784. While not a duty to warn case, recall that the court imposed liability for one defective product in a batch of 4,737,600.

<sup>1672</sup> An Pan et al, “Red Meat Consumption and Mortality: Results from 2 Prospective Cohort Studies” (2012) 172(7) *Arch Intern Med* 555 at 555.

done, however, in light of an assessment of the actual risk. As Weinstein and colleagues note that “[i]t is only by focusing on the risks created by the original product defect that one can determine whether it is fair to assess liability on a defendant-manufacturer whose original conduct has now begun to fade into the background.”<sup>1673</sup> Some risks may not be sufficient to impose liability. In instances when the benefit of a food product outweighs the risk, there may be good reasons for limiting liability. This determination, however, must be made through an evaluation of the evidence on point, and taking into account the requirements articulated above for warnings.

## 7. CONCLUSION: CAUSATION AND THE DUTY TO WARN

Canadian jurisprudence clearly establishes that manufacturers have a duty to warn consumers about the risks inherent in the products they put into circulation. Should a manufacturer not provide a warning and a consumer is injured, the burden rests on the consumer to prove that the failure to warn caused the injury. In negligence, this task has traditionally been fulfilled using the ‘but for’ test. A plaintiff must demonstrate that, ‘but for’ the defendant’s failure to warn they would not have been injured. However, there are serious limitations with this approach for failures to warn. As articulated by Boivin, failure to warn cases require counterfactuals and speculative thinking. Additionally, failure to warn cases involving food products will almost always necessarily involve multiple defendants and numerous products. The ‘but for’ test, simply put, is not sufficient to deal with these types of scenarios.

The inadequacy of the ‘but for’ test for failure to warn should not mean that plaintiffs are prevented from obtaining compensation for harms resulting from inadequate warnings. To avoid

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<sup>1673</sup> Weinstein et al, *supra* note 580 at 85.



this, Boivin suggests that failure to warn cases focus on injury causation. Should a plaintiff be able to establish that their injury was caused by the product, causation is established. This would mean that plaintiffs would not be required to prove that had the manufacturer provided an adequate warning that, in fact, they would have adhered to the warning. Relying on the established jurisprudence in *Buchan* and *Hollis*, Justice Riordan in *Létourneau* makes it clear that the duty is not to convince consumers, but only to warn them. A manufacturer, therefore, is negligent if they do not provide an adequate warning.

This, of course, does not obviate the need for a plaintiff to provide evidence that the product lacking a warning is responsible for their injury. However, it is important to bear in mind that the burden of proof in this inquiry is the balance of probabilities. Thus, scientific certainty is not required. It is sufficient for a plaintiff to demonstrate that, more likely than not, the product is responsible for the injury. With respect to food products, plaintiffs will need to demonstrate that the food product(s) consumed were responsible for the injury. While it will be dependent on the product and injury in question, it is submitted that, overall, there is overwhelming evidence demonstrating that the consumption of food products – including normal, moderate and over consumption – can have serious health consequences. This assertion may not be readily accepted by some (consider Frank’s response, for example), but this is posited an ideological response, not one based on normative principles, and certainly not one that relies on the science.

To be sure, there are challenges that plaintiffs will face. Consider, for example, the challenge of multiple defendants, or questions of proximate cause, voluntary assumptions of risks, and contributory negligence. These challenges can only be determined with a full factual record. While these challenges may shield food manufacturers from liability in some instances,

they do not erode the basic and fundamental requirement that manufacturers have an obligation to warn consumers. As the courts have so frequently expressed, manufacturers should not be able to escape liability by pointing fingers at other negligent manufacturers or by perpetuating scientific controversies. One might conclude, challenges with causation need to be addressed and overcome, and this will be a formidable task for plaintiff in a failure to warn case, but these challenges should not be used as doctrinal hurdles to protect and shield otherwise negligent defendants who do not provide consumers the warnings presently required.

## CHAPTER 8: THE PROMISE OF PRIVATE LAW FOR PUBLIC HEALTH

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Obesity and diet-related chronic diseases are one of the most serious health problems facing Canadians. They have a profound impact on individuals, but also have high social and economic consequences. As a public health problem, they have proven to be very difficult to address. Attempts to prevent or manage obesity or to reign in diet-related chronic diseases have largely been unsuccessful. In part this is because people need to eat to survive, but it is also a consequence of the modern food environment. Individuals have little control over the types of food they have access to, and therefore consume. Additionally, individuals are largely ignorant about the risks associated with the products they consume.

Given the challenges with addressing diet-related chronic diseases, many scholars have started to look to the law to help wage a “war” against obesity. Most scholarship has focused on the power of the state, through legislation and regulation. Recommendations have included regulating product ingredients, improving nutritional labels, increasing taxes and subsidies, oversight over access and pricing, among others. Less attention has been paid to the role private law could play, a sentiment that could be extended to public health law scholarship generally. The aim of this thesis was to examine how product liability law, and the duty imposed on manufacturers to warn consumers about dangers in their products, could be used to influence public health. It focused specifically on the duty imposed on manufacturers to warn consumers about the dangers inherent in food products.

The argument developed in this project proceeded in two parts. The first part examined

the appropriateness of using private law in public health. It made a broad argument that it can be appropriate to use private law, and civil litigation, to address public health problems, such as obesity and diet-related chronic diseases. It served as a foundation for the analysis that followed in part two on the use of product liability law, specifically the duty to warn, to protect and promote public health.

This argument began in chapter two with an examination of the congruence and relationship between tort law and public health to demonstrate that, in fact, tort law can be used to address public health issues. The aim of this section was to demonstrate that the use of private law in such cases is not necessarily instrumental, but rather, there can be a principled approach for using tort law to advance public health objectives. Recognizing that there are numerous ways the two disciplines of public health and tort law can be characterized, chapter two demonstrated that there is room for congruence, highlighting the overlap between public health and tort law in the theories of Parmet and Gerhart as examples. Both Parmet and Gerhart focus on social interactions. This is captured by the maxim, *salus populi suprema lex*, the health of the people is the highest law. There is an expectation in both of their scholarship that living in community mandates that actions be other-regarding. The duty to warn – which requires that manufacturers putting products into the community consider how the risks associated with their products may impact consuming members of the public – is a good expression of this.

The final chapter in Part I examined the role of litigation in obesity. This included examining why litigation is necessary in the first place. After reviewing why obesity is a public health problem, it considered various approaches to public health litigation, and the advantages and disadvantages with using public health litigation. While using the courts to develop public

policy is not without concerns, this project contends that the disadvantages of using litigation to advance public health objectives are outweighed by the advantages. This is especially the case given the influence that industry and interest groups have over the regulatory branch of government. In short, litigation helps to overcome and circumvent regulatory capture. The promise of litigation, however, has not yet been realized in the context of obesity or diet-related chronic diseases. It then reviewed the now infamous case, *Pelman v McDonald's*, where two teenagers sued McDonald's for their obesity. While the case was ultimately unsuccessful, Justice Sweet nevertheless recognized the possibility of a successful suit. Because it is often suggested that obesity litigation should emulate tobacco litigation, this chapter also examined the history of Canadian tobacco litigation. Importantly, it reviewed the recent a decision by the Québec Superior Court, *Létourneau v JTI-MacDonald*, where Justice Riordan was unequivocal in his ruling that defendant tobacco companies had failed to warn consumers about the dangers inherent in their products, finding them liable to the tune of \$15 billion.

Part II more critically engaged with the potential for product liability law to advance public health objectives. Chapter four provided an overview of product liability law and the duty to warn. It examined some of the foundational cases, such as *Lambert v Lastoplex Chemicals*, and reviewed the higher onus placed on products that are ingested or consumed. It paid particular attention to an Ontario Court of Appeal decision, *Buchan v Ortho Pharmaceutical*, where the court held that the duty to warn was in fact a duty to *adequately* warn. The court articulated principles to determine adequacy, which were presented as the Buchan standard of adequacy. This standard of adequacy has been considered by courts since, including implicitly in *Hollis v Dow Corning* and *Létourneau*. Of critical importance, the standard does more than state what is

required of a warning in terms of clarity, it establishes that manufacturers are required to warn about risks that are known generally within the scientific community, even if they are not convinced or agree with the science. Additionally, the standard prohibits manufacturers from negating or neutralizing warnings through collateral efforts.

The next three chapters worked through the main aspects of a duty to warn negligence action: duty of care, standard of care, and factual causation. Chapter five clearly articulated that manufacturers have a duty of care to consumers. Although this is a generally uncontroversial position, this chapter nevertheless demonstrated that the risks associated with use of products are foreseeable and that there are no policy reasons for negating the duty. Consideration was also given to who owes the duty, to whom, and for what. In addition to manufacturers, a duty of care might extend to other classes of defendants, including suppliers, distributors, and retailers. It was also clearly established that the duty to warn extends to consumers as well as ultimate users of products. Given that there are literally hundreds of thousands of food products, chapter five provided a scheme for categorizing food products. As will be discussed again below, three categorizations were proposed – warnings about particular products, certain processes, and specific nutritional profiles.

Having established that manufacturers owe a duty of care, chapter six then considered the standard of care required of manufacturers. It considered some specific issues, including what constitutes a defect, the type of product, industry standards, and the expectation of consumers, before examining when warnings are required. Generally, warnings are required for inherent dangers and foreseeable misuses, but not for abuses or obvious dangers with products. This section considered what each category captures, and argued that “obvious” might ultimately be

less obvious than thought when it came to food products. At a minimum, overconsumption or unhealthy use of food products were presented as a foreseeable misuses that would warrant a warning. Chapter six also considered who receives warnings, including vulnerable or sensitive consumers, as well as what it means to communicate warnings adequately.

Even if a manufacturer owes a duty of care to a consumer and breached the standard of care expected, they will only be found negligent if a plaintiff can demonstrate that the failure on the part of the manufacturer to provide a warning caused the harm. Without question, this is the most challenging aspect of the failure to warn claim. As discussed in chapter seven, the traditional approach for establishing factual causation is the ‘but for’ test. However, this chapter argued that this test is ultimately inadequate for failure to warn cases, given the counterfactual nature of the inquiry that necessitates speculation concerning decision causation. Chapter seven proposed that Boivin’s recommendation that causation be met if a plaintiff can establish injury causation. It also considered the challenges with demonstrating factual causation when there are multiple defendants and multiple products involved. This chapter concluded by considering how the courts approach scientific evidence, and the challenges that arise given the inevitable use of public health sciences in duty to warn cases.

This thesis did not aim to provide a specific theory of liability, applicable to a particular product class or defendant. Instead, it presented a general theory. It is clear that, based on current jurisprudence, the duty to warn extends to food manufacturers. Nevertheless, food products do not come with warnings. While there are many reasons why this may be the case, undoubtedly it is, in part, a reflection of the general position taken by food manufacturers that their products do



not cause harms.<sup>1674</sup> Instead, the industry likes to emphasize the need for common sense consumption and personal responsibility. There is overwhelming evidence, however, that confirms that most people are woefully unaware of what they are eating, the health consequences of even moderate consumption. Moreover, it is clear that nutritional ignorance abounds. Despite the industry's suggestion that consumers ought to be responsible for their choices, it is clear that most people are not making informed choices.

Indeed, it is abundantly clear that industry has contributed, intentionally, to the misinformation that continues to impede consumers from making informed choices. Consider the recent news about two products about manufacturers discussed at various times throughout: chicken McNuggets (McDonald's) and Gatorade (PepsiCo). Both companies recently engaged in advertising campaigns that touted, both implicitly and explicitly, the "healthy" part of their products. McDonald's advertised chicken McNuggets as "preservative free", and depicted them as part of a healthy diet. PepsiCo has recently advertised an "organic" Gatorade. Both are using the health halo effect to convince consumers that, in fact, their products are healthy – or at least that they are now healthier. Despite this marketing, critics were quick to point out that McNuggets and Gatorade remain unhealthy choices.<sup>1675</sup>

While this may be passed off by some as simply a marketing tactic, it may actually amount to far more: this is the collateral effort, prohibited in *Buchan*, for manufacturers to

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<sup>1674</sup> It may more insidiously reflect a general sentiment in the food industry that, irrespective of whether their products cause harm or not, that plaintiffs will not be able to convince a court that the industry has acted negligently.

<sup>1675</sup> See Sophia Harris, "Laughable": Critics slam McDonald's Ad for Preservative-free McNuggets" (August 30, 2016) CBCNews, online: CBCNews, <http://www.cbc.ca/news/business/mcdonald-s-mcnuggets-nutrition-1.3739791>, and Sophia Harris, "Brilliant Marketing": Organic Gatorade—the Latest in Health Hype?" (Sept 2, 2016) CBCNews, online: CBCNews, <http://www.cbc.ca/news/business/organic-gatorade-marketing-1.3745114>.

neutralize or negate information. Of course, neither McDonald's nor PepsiCo have provided warnings at this point, so it is even better characterized as an attempt to negate or neutralize the information that consumers may or may not have from other sources, such as governments. The duty for manufacturers to warn about the dangers inherent in the products they offer to the consuming public is not an onerous duty. It is easily satisfied, as noted throughout this project, by simply providing information to consumers. It is not an onerous obligation imposed on manufacturers, although it may impact sales.

While it is clear that manufacturers have a duty to warn, undoubtedly there will be much opposition from industry. Indeed, industry already is not providing the warnings despite repeated and clear articulations by Canadian courts that a warning is required. Considered the response – or, more accurately, the lack of a response – from manufacturers to the *Létourneau* decision. Despite a \$15 billion judgment, there has been no discernable change in behaviour from *any* industry, including the tobacco industry. This is not because the law is unclear – far from it. If anything, it may represent an attitude that failure to warn cases are not something food manufacturers need to be concerned about – particularly for those products where the science is complicated. More cynically, it may reflect an attitude of indifference, given the time-tested and proven to be effect tactics honed by the tobacco industry over decades of litigation.

Whatever the reason, the food industry is not providing adequate warnings presently. Likely, the food industry will need to be pushed to do so. Litigation may be the appropriate avenue for doing so, although this will undoubtedly require considerable time and resources. There is also an argument that even though the obligation exists in private law, the courts may not be the most appropriate venue for enforcing these rights. In other words, while litigation is

possible, the current limitations of using courts to enforce consumer's rights might act as sufficient justification for the intervention of the state. This is not “nanny-statism”, a charge often levied against public health interventions, but instead a use of public law to realize and fulfill the private law.

Of course, many will likely oppose the argument presented herein. The expansion of product liability law to food products may be considered unnecessary or as contrary to tort doctrine. Thus, the final task of this thesis will be to review how food products map onto the three main cases discussed above: *Buchan v Ortho Pharmaceutical*, *Létourneau v JTI-MacDonald* and *Lambert v Lastoplex Chemical*.

First, consider the similarities between *Buchan* and the example discussed in the products category, sugar-sweetened beverages (SSBs). As discussed in chapter five, excess sugar consumption has been linked to heart disease, stroke, obesity, diabetes, and high blood cholesterol. The World Health Organization and the Heart and Stroke Foundation recommend adults and children consume less than 10% of their total energy intake as free sugars, and encourage a further reduction to below 5% (about 25g or 6tsp) for added health benefits.<sup>1676</sup> For context, a 355mL can of Coca-Cola contains 39g (about 10tsp of sugar), about 8% of an individual's daily energy requirement.<sup>1677</sup> SSBs have recently come under fire as a particularly harmful product given their ubiquity, heavy marketing by the SSB industry, and harms caused (see Table 5).

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<sup>1676</sup> WHO, “WHO Calls on Countries to Reduce Sugars Intake Among adults and Children” (2015), online: WHO, <http://www.who.int/mediacentre/news/releases/2015/sugar-guideline/en/> and HSF, 997 *and Stroke*, *supra* note 997.

<sup>1677</sup> United States Department of Agriculture (USDA), “Estimated Calorie Needs Per Day by Age, Gender, and Physical Activity Level” (2014), online: USDA, [http://www.cnpp.usda.gov/sites/default/files/usda\\_food\\_patterns/EstimatedCalorieNeedsPerDayTable.pdf](http://www.cnpp.usda.gov/sites/default/files/usda_food_patterns/EstimatedCalorieNeedsPerDayTable.pdf).

	<i>Buchan</i>	Product
<b>Product</b>	Birth control (Ortho-Novum 1/50)	SSBs
<b>Exposure time</b>	Weeks (but could have been months/years)	Years
<b>Harm</b>	Stroke	Obesity, diabetes, stroke
<b>Vulnerability</b>	Small percentage of women have genetic/physiological vulnerability to stroke. Mrs. Buchan may have had a genetic/physiological vulnerability to having a stroke.	People may have a genetic/physiological vulnerability that heightens their risk of becoming obese because of SSBs. All individuals may face some risk with overconsumption of sugar.
<b>Warning</b>	Court determined that if Mrs. Buchan had a warning, she would not have taken the pill.	If people have a warning, they might make different decisions about drinking SSBs.

**Table 5. *Buchan* and SSBs**

Consider next *Létourneau* if compared to example discussed as a problematic process, the addition of artificial trans fats (Table 6). Trans fats are partially hydrogenated oils produced industrially during hydrogenation of unsaturated oils. Compared with non-hydrogenated oils, they are less expensive and more shelf stable, providing a longer shelf life as well as desirable sensory properties. As discussed, consumption of industrial trans fats by humans is associated with a number of diseases, including all-cause mortality and coronary heart disease. The risks with trans fats are widely known, and the government has recently started to heavily regulate, and in some instances, ban trans fat.

	<i>Létourneau</i>	<b>Process</b>
<b>Product</b>	Tobacco (via cigarettes) (manufactured by several companies)	Trans fat (via food products)
<b>Exposure time</b>	Years	Years
<b>Harm</b>	Cancer, emphysema; addiction	Heart disease, all-cause mortality
<b>Vulnerability</b>	All smokers (although risk increased based on number of pack years)	All users
<b>Warning</b>	Court determined that if industry had a duty to provide warning about risk.	If people have a warning, they might make different decisions about drinking SSBs.

**Table 6. *Létourneau* and Artificial Trans Fat**

Finally, consider *Lambert* when compared to the example of foods with a dangerous nutritional profile, such as products high in sodium (Table 7). In terms of specific nutrient profiles, consuming foods with excess dietary sodium is associated with hypertension, especially in well-designed studies. Hypertension is a well-known, important determinant of heart failure and coronary heart disease. While the time lag between high salt intake and heart failure is not currently known, one study found that eating a “high salt” meal (3.8g of salt) impaired endothelial function after just 30 minutes in a sample of healthy, normotensive adults.<sup>1678</sup> Considering that a McDonald’s meal of a double quarter pounder with cheese and a side of large fries represents 4.5g of salt, individuals frequently surpass this “high salt” limit and likely experience impaired function irrespective of whether they are hypertensive.

<sup>1678</sup> KM Dickson et al, “Postprandial effects of a high salt meal on serum sodium, arterial stiffness, markers of nitric oxide production and markers of endothelial function” (2014) 232:1 *Atherosclerosis* 211.

	<i>Lambert</i>	<b>Profile</b>
<b>Product</b>	Lacquer	High sodium
<b>Exposure time</b>	Hours (accumulation of fumes required)	Years (accumulation; but also perhaps as little as ½ an hour after eating a salty meal)
<b>Harm</b>	Explosion	Heart failure
<b>Vulnerability</b>	Anyone with exposure to fumes where there is an open flame.	Everyone with continued exposure to high sodium.
<b>Warning</b>	Three warnings, but they lacked explicitness. More explicit warning would have led Mr. Lambert to extinguish pilot light.	Seems obvious to limit sodium intake. Most people unaware of sodium intake, and doubtful that people know that even 1 high-salt meal can impair function

**Table 7. Lambert and High Sodium**

In each of the cases above, the court determined that the manufacturer had failed to warn. Mrs. Buchan had not been given sufficient information about risks with the birth control she was taking, the class members in *Létourneau* had not been properly warned about the risks associated with cigarettes and nicotine, and Mr. Lambert was not given specific enough information to avoid the risk of accumulating fumes being ignited. In each instance, the defendant manufacturer could have easily informed the consumer about the latent risks. Similarly, manufacturers of SSBs, high sodium products, or who use trans fat, are all in a position where they can warn consumers of the risks that inhere with the use of their products. Like in the aforementioned case, should they fail to do so, and consumers are injured, these food manufacturers ought to be held liable for failing to warn.

While there are undoubtedly many issues that must still be addressed, it is critical that food manufacturers in Canada are held to account for failing to warn about the dangers in their products. Individuals and the community overall currently bears the consequences of manufacturers failing to fulfill their duty. If manufacturers are not held to account, the duty to

warn is, in effect, meaningless. It is time to start to expect food manufacturers to abide by the expectations that come with putting products on the market. To do any less is to exonerate negligent manufacturers.<sup>1679</sup>

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<sup>1679</sup> *Buchan v Ortho Pharmaceutical*, *supra* note 67 para 78.



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