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Casenote

Simply “Too Tenuous”¹ *McCoy v. American Suzuki Motor Corporation*:² The Application of the Rescue Doctrine to a Products Liability Claim

I. Introduction

*“The risk of rescue, if not only it be wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer.”*³

Justice Cardozo, 1921

Justice Cardozo, in delivering the opinion in the case of *Wagner v. International Railway Co.*,⁴ wrote “[t]he wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer.”⁵ However, consider the following scenario: an automobile manufacturer is sued for a design defect following an accident in which an automobile it manufactured hit a patch of ice, skidded off the road and rolled over.⁶ The suit is brought by a person who witnessed the accident and stopped to assist the injured automobile driver and passenger.⁷ Upon reviewing the claim, the manufacturer finds that while returning to his car, the rescuer was struck by a hit-and-run driver.⁸ The res-

1. *Petitions of Kinsman Transit Co.*, 338 F.2d 708, 725 (2d Cir. 1964).

2. 936 P.2d 31 (Wash. Ct. App. 1997), *aff'd*, 961 P.2d 952 (Wash. 1998).

3. *Wagner v. International Ry. Co.*, 133 N.E. 437, 438 (N.Y. 1921).

4. 133 N.E. 437 (N.Y. 1921).

5. *Id.* at 437.

6. *See McCoy v. American Suzuki Motor Corp.*, 961 P.2d 952, 955 (Wash. 1998).

7. *See id.* at 955.

8. *See id.*

cuer brings a products liability claim for a design defect by way of the rescue doctrine.⁹ Summary judgment is entered in the manufacturer's favor because the trial judge finds that the alleged design defect, if proven was not the proximate cause of the rescuer's injuries.¹⁰ However, the Washington Court of Appeals reverses the decision and the Washington Supreme Court affirms and remands the matter for trial. The court reasons that the predictability of a rescuer's response to an accident, whether the accident involves a defective product or otherwise, creates a question of fact as to whether a predicate defect-related accident can be the legal cause of a rescuer's injury.¹¹

Justice Cardozo observed that "[t]he wrong that imperils life is a wrong to the imperiled victim; it is also a wrong to his rescuer."¹² Based on this, should the manufacturer be held liable for remote injuries? Will the manufacturer reconsider releasing a new automobile design out of fear that recognition of a rescuer-related cause of action will enlarge its liability exposure? The above scenario is not fictitious; it is the case underlying the Washington Court of Appeals and Supreme Court decisions in *McCoy v. American Suzuki Motor Corp.*¹³

In finding the rescue doctrine to be applicable to a products liability claim, the Washington Supreme Court in *McCoy* reasoned that it is a societal norm that a person will come to the rescue of another in peril and that when he does, he should not be barred from bringing suit to recover for injuries causally connected to the product defect.¹⁴ In the court's words

The rescue doctrine is not a common law remedy. Rather, it is shorthand for the idea that rescuers are to be anticipated and is a reflection of a societal value judgment that rescuers should not be barred from bringing suit for knowingly placing themselves in danger to undertake a rescue.¹⁵

However, in affirming the court of appeals decision, the Washington Supreme Court added that the rescue doctrine does not

9. *See id.*

10. *See id.*

11. *See McCoy*, 961 P.2d at 955.

12. *Wagner*, 133 N.E. at 437.

13. 936 P.2d 31 (Wash. Ct. App. 1997), *aff'd*, 961 P.2d 952 (Wash. 1998).

14. *See McCoy*, 961 P.2d at 956.

15. *Id.*

vary the ordinary rules of negligence; a plaintiff "must still show the defendant proximately caused his injuries."¹⁶ Although the New York Court of Appeals is somewhat harmonious with the Washington Supreme Court's application of the rescue doctrine, its application of the doctrine is slightly more restrictive by requiring "that something more than a mere suspicion of danger to the [life] of another is requisite before the doctrine should be implemented."¹⁷

This Casenote presents the argument that the Washington Court of Appeals and Washington Supreme Court decisions in *McCoy* were erroneous. The courts are in error because the foreseeability of McCoy's injuries, as in the words of Circuit Judge Friendly in *Petitions of Kinsman Transit Co.*,¹⁸ was "too tenuous."¹⁹ Section II of this Casenote will provide a brief history and development of products liability. Section III will discuss the rescue doctrine. Section IV will discuss proximate

16. *Id.* at 956-57.

17. *Provenzo v. Sam*, 244 N.E.2d 26, 28 (N.Y. 1968).

18. 338 F.2d 708 (2d Cir. 1964). *Kinsman* involved a ship known as the MacGilvray Shiras, which broke free due to improper mooring and a build-up of ice debris. *See id.* at 712. Once the Shiras broke loose, it collided with the Tewksbury, causing the Tewksbury to break free. *See id.* Thereafter, both ships went downriver together, colliding into the Michigan Avenue bridge, causing the bridge to collapse. *See id.* at 713. As a result of the collision, the water and ice began to back up, causing flooding and property damage. *See id.* Claims were filed against the Kinsman Transit Company, which owned the Shiras, the Continental Grain Company, the owners of the dock in which the Shiras was originally moored, and the City of Buffalo. *See id.* at 711, 713. Kinsman's and Continental's liability arose out of the improper mooring of the Shiras. *See Kinsman Transit Co.*, 338 F.2d at 714-18. The City of Buffalo was found liable for failing to raise the Michigan Avenue Bridge in time to avoid the disaster. *See id.* at 713. The drawbridge could have been raised in order to avoid the collision, but was not, because at the time of the collision the operator on the earlier shift had not returned from a tavern and the incoming bridge controller received the call to raise the bridge too late. *See id.* In finding the parties liable, Judge Friendly also noted that "[t]he weight of authority in this country rejects the limitation of damages to consequences foreseeable at the time of the negligent conduct when the consequences are 'direct,' and the damage, although other and greater than expectable, is of the same general sort that was risked." *Id.* at 724. However, Judge Friendly also noted that there will come a point when the link between the negligence and the damages will become "too tenuous - that what is claimed to be consequence is only fortuity." *Id.* at 725. The later point was applied in *Kinsman Transit Co.*, 338 F.2d 821 (2d Cir. 1968), when the court held that the damages sustained by owners of wheat, who were unable to have their shippers deliver their wheat, were too remote or indirect for liability. *See id.* at 825.

19. *Kinsman Transit Co.*, 338 F.2d at 725.

cause, by way of case law and commentary. Sections II, III, and IV will use New York case law and commentary as a basis for discussion. Section V will provide a complete review of the history and holdings of the Washington Court of Appeals and the Washington Supreme Court as they relate to the case of *McCoy v. American Suzuki Motor Corp.*²⁰ Section VI will provide an analysis of the issue of proximate cause, as it relates to the products liability claim of Mr. and Mrs. James McCoy ("McCoy") against American Suzuki Motor Corp. ("Suzuki"), by way of the rescue doctrine. Section VII will conclude that the reversal of summary judgment in favor of Suzuki was clearly an error, since foreseeability of the occurrence was "too tenuous."²¹

II. A Brief Review Of Products Liability

*"If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger."*²²

Justice Cardozo, 1916

Four principal doctrines have shaped modern products liability law: (1) negligence; (2) breach of warranty; (3) strict liability; and (4) misrepresentation.²³ The area of products liability law was established to compensate consumers for injuries sustained from sellers and manufacturers of defective products.²⁴ Additionally, both the *Restatement (Second) of Torts*²⁵ ("*Restatement (Second)*") and the *Restatement (Third) of Torts: Products Liability*²⁶ ("*Restatement (Third)*") continually assist the courts in shaping the future of the law of products liability.²⁷ The *Restatement (Third)* provides an almost total over-

20. 936 P.2d 31 (Wash. Ct. App. 1997), *aff'd*, 961 P.2d 952 (Wash. 1998).

21. *Kinsman Transit Co.*, 338 F.2d at 725.

22. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916).

23. See JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS § 17.01 [A], at 291 (1996).

24. See *id.* Originally, for an individual to bring a products liability claim, he had to be in privity with the manufacturer or seller of the defective products. See *Winterbottom v. Wright*, 152 Eng. Rep. 402, 403 (Ex. 1842). However, in 1916, Justice Cardozo removed the requirement of privity as it related to defectively manufactured goods. See *MacPherson*, 111 N.E. at 1052.

25. RESTATEMENT (SECOND) OF TORTS (1965).

26. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1997).

27. See generally *id.* at 3-4 (providing a brief review of the history of the Restatements).

haul of the *Restatement (Second)*.²⁸ This section is meant merely as an introduction and not a total review of products liability.

A. Negligence

A negligence claim in a products liability suit is based upon a person's failure to exercise due care under the circumstances.²⁹ The person's exercise of due care will be compared with that of a person "of ordinary prudence"³⁰ in the same or similar situation. The elements of a negligence claim are

(1) that the seller owed a duty to the plaintiff; (2) that the seller breached that duty; (3) that the breach of duty was a cause in fact of the plaintiff's injury; (4) that the cause in fact was a proximate cause of the injury; and (5) that the harm suffered is recoverable in negligence.³¹

A manufacturer may be found at fault for the negligent design, manufacture or failure to provide adequate warnings or instructions in providing a product.³²

The opinion of *Robinson v. Reed-Prentice Division of Packaging Machinery Co.*,³³ a failed strict liability and negligence claim,³⁴ provides a look at the New York Court of Appeals' application of the above-mentioned elements to a negligence claim. The *Robinson* case involved an action brought by an employee who was injured while operating a plastic molding machine used to mold plastic beads to a nylon cord.³⁵ The employer modified the machine to make it better suited for its purposes by cutting a hole through the plexiglass safety gate.³⁶ The

28. See *id.* at 3.

29. See DAVID G. OWEN ET AL., 1 MADDEN & OWEN ON PRODUCTS LIABILITY § 2:1, at 44 (3d ed. 2000).

30. *Id.* at § 2:3, at 51. Under the doctrine of negligence, a manufacturer will be held to the standard of being an expert in its field. See *id.* at § 2:4, at 52.

31. *Id.* at § 2:1, at 44. Justice Learned Hand, in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947), wrote that in order to determine if reasonable care was exercised, the following variables will need to be balanced: "(1) the probability [of harm]; (2) the gravity of the resulting injury . . .; (3) the burden of adequate precautions." *Carroll*, 159 F.2d at 173 (citations omitted).

32. See OWEN ET AL., *supra* note 29, § 2:1, at 44.

33. 403 N.E.2d 440 (N.Y. 1980).

34. See *id.*

35. See *id.* at 441-42.

36. See *id.* at 442.

machine as designed made no provision for such a change.³⁷ The employee filed an action against the manufacturer, who impleaded Robinson's employer as a third-party defendant.³⁸ The supreme court entered judgment in favor of Robinson, but the court of appeals reversed.³⁹ In doing so, the court held that the manufacturer could not be held strictly liable or negligent since the employer substantially modified the machine after it had left the hands of the manufacturer.⁴⁰ The court also held that the employer's modification of the machine, which was not defective when it left the manufacturer, was the proximate cause of the employee's injuries.⁴¹

In its opinion, the court of appeals stated that "[a] cause of action in negligence will lie where it can be shown that a manufacturer was responsible for a defect that caused injury, and that the manufacturer could have foreseen the injury."⁴² However, as the facts revealed, the employer modified the machine after it left the hands of the manufacturer.⁴³ In response to the subsequent modification, the court held that

[t]he duty of a manufacturer, therefore, is not an open-ended one. It extends to the design and manufacture of a finished product which is safe at the time of sale. Material alterations at the hands of a third party which work a substantial change in the condition in which the product was sold by destroying the functional utility of a key safety feature, however foreseeable that modification may have been, are not within the ambit of a manufacturer's responsibility.⁴⁴

The court of appeals added that a manufacturer's duty to use reasonable care when designing a product for its normal intended use extends to unintended, yet foreseeable, uses as well.⁴⁵ For example, the court provided that a manufacturer of a screwdriver should foresee that a consumer may attempt to use it to pry open a lid of a can and therefore the manufacturer

37. *See id.*

38. *See Robinson*, 403 N.E.2d at 441.

39. *See id.*

40. *See id.* at 443-44.

41. *See id.*

42. *Id.* at 444.

43. *See Robinson*, 403 N.E.2d at 443.

44. *Id.* at 444.

45. *See id.* (citing *Micallef v. Miehle Co.*, 348 N.E.2d 571, 577 (N.Y. 1976)).

should design the shank of the screwdriver with sufficient strength to do so.⁴⁶

B. Breach of Warranty

A breach of warranty is governed by the law of contract rather than tort law.⁴⁷ This area of products liability covers two areas of warranty.⁴⁸ The first is an express warranty⁴⁹ and the second is the area of implied warranties.⁵⁰ An implied warranty can be one of two types,⁵¹ an implied warranty of merchantability⁵² or an implied warranty of fitness for a particular purpose.⁵³ An express warranty arises when the seller of a product affirmatively asserts that "a product possesses certain characteristics of quality, construction, performance capability, durability, or safety."⁵⁴ An express warranty is breached when the product fails to have a quality or characteristic represented.⁵⁵ An implied warranty of merchantability runs with a product and does not need to be expressed by the seller.⁵⁶ The implied warranty of merchantability means that a product is fit

46. See *id.*

47. See DIAMOND ET AL., *supra* note 23, § 17.01, at 293, § 17.03, at 317. See also OWEN ET AL., *supra* note 29, § 4:1, at 120-21.

48. See DIAMOND ET AL., *supra* note 23, § 17.01, at 293-94, § 17.03, at 317-23.

49. See U.C.C. § 2-313 (1998). See also DIAMOND ET AL., *supra* note 23, § 17.03 [B], at 317 (1996) (providing a discussion on the application of U.C.C. § 2-313).

50. See U.C.C. §§ 2-314 to -315 (1998). See also DIAMOND ET AL., *supra* note 23, § 17.03 [C], at 320-23 (1996) (providing a discussion on the application of U.C.C. § 2-314 to -315).

51. See *infra* notes 52-53 and accompanying text.

52. See U.C.C. § 2-314 (1998). See also *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960). *Henningsen* involved a claim brought by a husband and wife, after the wife was injured driving a new car purchased by her husband. See *id.* at 73. While driving the car, "something . . . went wrong from the steering wheel down to the front wheels," causing the wife to lose control of the car and crash into a brick wall. *Id.* at 75. The jury returned a verdict for the husband and wife, and an appeal followed. See *id.* at 73. The New Jersey Supreme Court, in upholding the jury's verdict, held that Chrysler's attempt to disclaim an "implied warranty of merchantability and the obligations arising therefrom was so inimical to public good as to compel an adjudication of its invalidity." *Id.* at 95 (citations omitted). The court defined an implied warranty of merchantability to mean that "the thing sold is reasonably fit for the general purpose for which it is manufactured and sold." *Henningsen*, 161 A.2d at 76.

53. See U.C.C. § 2-315 (1998).

54. OWEN ET AL., *supra* note 29, § 4:2, at 122.

55. See *id.* at 122-23.

56. See *id.* § 4:5, at 141.

for the ordinary purpose for which it is purchased or sold.⁵⁷ An implied warranty of fitness for a particular purpose arises when

(1) the seller had reason to know that the buyer intended to use the product for a particular purpose of which the seller was aware; (2). . . the seller had reason to know that the buyer was relying upon the seller's skill or judgment to select or furnish a product suitable for that purpose; (3). . . the buyer did thereby rely on the seller; (4). . . the product was not in fact fit for the particular purpose; and (5). . . the unfitness for this purpose caused the plaintiff harm.⁵⁸

The differences between the two types of warranties should be noted. One difference is that, unlike an express warranty, an implied warranty of merchantability does not require a direct representation to the buyer; the warranty will attach at the point of sale by operation of law.⁵⁹ The difference between an implied warranty of merchantability and an implied warranty of fitness for a particular purpose should also be noted.⁶⁰ Both types of warranties arise out of the sale of a product.⁶¹ However, unlike a warranty of merchantability, which implies that a "product will safely and effectively perform the normal functions" for which it is ordinarily purchased or sold, a warranty of fitness is "an implied promise by the seller that the product sold will meet the buyer's particular needs."⁶²

The requirement of privity in warranty claims is governed by Section 2-318 of the Uniform Commercial Code ("U.C.C.").⁶³ Section 2-318 provides three different alternatives for extending warranties covering the sale of goods to persons other than the purchaser of the goods.⁶⁴ Such persons are known as "third-

57. *See id.* at 141, 148-49.

58. *Id.* § 4:8, at 155-56.

59. OWEN ET AL., *supra* note 29, § 4:5, at 141.

60. *See id.* at 154.

61. *See id.*

62. *Id.*

63. *See* Diane L. Schmauder, Annotation, *Third-Party Beneficiaries of Warranties Under UCC § 2-318*, 50 A.L.R.5th 327, 348 (1997).

64. *See id.* *See also* U.C.C. § 2-318 (1998). U.C.C. § 2-318 provides as follows:

§ 2-318. Third Party Beneficiaries of Warranties Express or Implied.

Note: If this Act is introduced in the Congress of the United States this section should be omitted. (States to select one alternative.)

Alternative A

party beneficiaries of the warranties."⁶⁵ The three alternatives are known as Alternatives A, B, and C.⁶⁶ The alternatives vary in respect to whom the warranties extend, with Alternative A being the most restrictive and Alternative C being the least restrictive.⁶⁷ Although the states are free to adopt any of the three alternatives, some have enacted their own versions of § 2-318.⁶⁸ For instance, New York State adopted its own version of Alternative B.⁶⁹ New York rewrote Alternative B by "substituting 'if it is reasonable to expect that such person may use' for 'who may be reasonably expected to use.'"⁷⁰ The State of Washington adopted Alternative A.⁷¹

The case of *Denny v. Ford Motor Co.*⁷² provides an excellent example of an implied warranty claim. In *Denny*, Nancy Denny ("Denny") was severely injured when the Ford Bronco II she was driving rolled over.⁷³ In filing an action against Ford Motor Company ("Ford"), Denny asserted claims for negligence, strict liability based on a design defect, and breach of implied warranty.⁷⁴ A jury found strict liability for a design defect not to

A seller's warranty, whether express or implied, extends to any natural person who is in the family or household of the buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty; a seller may not exclude or limit the operation of this provision.

Alternative B

A seller's warranty, whether express or implied, extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty; a seller may not exclude or limit the operation of this provision.

Alternative C

A seller's warranty, whether express or implied, extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty; a seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends. As amended 1966.

65. Schmauder, *supra* note 63, at 348.

66. See U.C.C. § 2-318.

67. See Schmauder, *supra* note 63, at 348.

68. See *id.*

69. See *id.* at 357 n.31, 363 n.36, 366 n.38, 392 n.56 & 397 n.59. See also N.Y. U.C.C. § 2-318 (McKinney 1993).

70. Schmauder, *supra* note 63, at 392 n.56. See also N.Y. U.C.C. § 2-318.

71. See WASH. REV. CODE ANN. § 62A.2-318 (West 1999).

72. 662 N.E.2d 730 (N.Y. 1995).

73. See *id.* at 731.

74. See *id.*

apply but that Ford breached its implied warranty.⁷⁵ On appeal, the New York Court of Appeals distinguished between design defect claims brought by way of a strict products liability cause of action and a cause of action based upon a breach of an implied warranty.⁷⁶

The court noted that the difference between the two types of actions lies in “the core element of ‘defect.’”⁷⁷ The court explained that a strict products liability claim for a design defect involves the weighing “of the product’s dangers against its overall advantages,” while an implied warranty claim for a design defect involves a determination of “whether the product in question was ‘fit for the ordinary purposes for which such goods are used.’”⁷⁸ The implied warranty claim focused on “the expectations for the performance of the product when used in the customary, usual and reasonably foreseeable manners.”⁷⁹ Upon a review of the evidence presented at the trial court level, the court of appeals found that Ford provided adequate proof that the value of the “off-road vehicle” design of the Bronco II outweighed the risks of rollover accidents that could occur when it was used for other purposes.⁸⁰ However, upon review of the evidence presented by Denny, the court found that Denny relied on representations made by Ford in selling Denny the Bronco II.⁸¹ Ford’s marketing manual represented that the Bronco II was “‘suitable to contemporary life styles’ and . . . [was] ‘considered fashionable’ in some suburban areas.”⁸² Additionally, the sales presentation manual directed a salesperson to “take into account the vehicle’s ‘suitability for commuting and for suburban and city driving’ . . . [and] ‘appeal[] to women who may be concerned about driving on snow and ice with their children.’”⁸³ Upon review of Denny’s evidence, the court agreed that the vehicle was not safe for the ordinary purposes for which it was

75. *See id.* at 733.

76. *See id.* at 734-39.

77. *Denny*, 662 N.E.2d at 735.

78. *Id.* at 736 (citing U.C.C. § 2-314(2)(c)).

79. *Id.*

80. *Id.* at 738.

81. *See id.* at 739.

82. *Denny*, 662 N.E.2d at 732.

83. *Id.*

marketed and sold.⁸⁴ Therefore, the court upheld a jury verdict finding Ford liable for breaching its implied warranty, but not strictly liable for a design defect.⁸⁵

An action for the breach of an expressed warranty exists when the goods do not conform to the description which created the basis of a bargain.⁸⁶ The case of *Randy Knitwear, Inc. v. American Cyanamid Co.*⁸⁷ involves a claim for the breach of an express warranty.⁸⁸ In *Randy*, the defendant, a resin manufacturer, widely advertised that fabrics treated with its resin process would not shrink.⁸⁹ Plaintiff, a manufacturer of children's knitted sportswear and play clothes, purchased such fabrics from two other parties.⁹⁰ After manufacturing its garments and selling them, the plaintiff began to receive complaints that the garments shrank and did not retain their shape.⁹¹ The plaintiff filed actions against the two parties from whom it had purchased the materials and the defendant.⁹² The New York Court of Appeals affirmed the lower courts' decisions denying summary judgment.⁹³ In doing so, the court held that, notwithstanding lack of privity, when a manufacturer places its product on the market by advertising and labeling it in such a way as to induce the public's reliance upon its representations, the manufacturer will be held liable for an injury or loss due to any misrepresentations.⁹⁴

84. *See id.* at 738.

85. *See id.* at 738-39.

86. *See* U.C.C. § 2-313. *See also* *Baxter v. Ford Motor Co.*, 35 P.2d 1090 (Wash. 1934). In *Baxter*, the plaintiff filed an action for personal injuries sustained when the windshield of the automobile he purchased from the defendant was struck by a pebble, causing a piece of glass to fly into the plaintiff's right eye. *See id.* at 1091. The plaintiff claimed that the defendants had made a representation to him that the windshield was shatterproof. *See id.* In affirming the decision in favor of the plaintiff, the Washington Supreme Court held that "[i]f a person states as true material facts susceptible of knowledge to one who relies and acts thereon to his injury, if the representations are false, it is immaterial that he did not know they were false, or that he believed them to be true." *Id.* at 1092.

87. 181 N.E.2d 399 (N.Y. 1962).

88. *See id.* at 400.

89. *See id.*

90. *See id.*

91. *See id.*

92. *See Randy*, 181 N.E.2d at 400.

93. *See id.* at 405.

94. *See id.* at 402.

In *Randy*, the New York Court of Appeals was concerned with the fact that "the world of merchandising . . . is no longer a world of direct contract; it is, rather, a world of advertising" ⁹⁵ The overall concern of the court was to provide consumers with a way to protect themselves from injury and loss. ⁹⁶

C. *Strict Liability*

In 1962, in *Greenman v. Yuba Power Products, Inc.*, ⁹⁷ the California Supreme Court stated that a "manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." ⁹⁸ The *Greenman* decision was followed by Section 402(A) of the *Restatement (Second)*, which provides that a person will be held strictly liable if he sells "any product in a defective condition unreasonably dangerous to the user or consumer or to his property" ⁹⁹ The purpose of Section 402(A) was to "eliminate privity so that a user or consumer, without having to establish negligence, could bring an action against a manufacturer, as well as against any other member of the distribution chain that had sold a product containing a manufacturing defect." ¹⁰⁰ Under Section 402(A), liability was considered strict because liability attached without fault. ¹⁰¹ However, in order for a defendant to have been found strictly liable under Section 402(A), a plaintiff had to show that the product was defective at the time it left the control of the defendant. ¹⁰² The plaintiff also needed to show that there was a connection between its injuries

95. *Id.*

96. *See id.*

97. 377 P.2d 897 (Cal. 1962). In *Greenman*, the plaintiff brought an action against the manufacturer of a power tool for personal injuries he sustained. *See id.* at 898. The plaintiff received a "Shopsmith" as a gift from his wife and was severely injured while using it when a piece of wood flew out of the machine striking him in the forehead. *See id.* On appeal by the manufacturer, the California Supreme Court affirmed a judgment finding the manufacturer strictly liable for the plaintiff's injuries. *See id.* at 902.

98. *Greenman*, 377 P.2d at 900.

99. RESTATEMENT (SECOND) *supra* note 25, § 402(A), at 347-48.

100. RESTATEMENT (THIRD), *supra* note 26, at 3.

101. *See OWEN ET AL.*, *supra* note 29, § 5:1, at 252.

102. *See id.* § 5:3, at 70-73.

and the alleged defect in the product.¹⁰³ Throughout the years, several different tests were developed in order to determine what amounted to a "defective condition" under Section 402(A).¹⁰⁴ However, the effect of the *Restatement (Third)* on Section 402(A) should be noted.¹⁰⁵

In 1973, the New York Court of Appeals extended the strict products liability doctrine to protect "innocent non-user bystanders" in the case of *Codling v. Paglia*.¹⁰⁶ The *Codling* case involved an action for personal injuries sustained by the Codlings, when the automobile driven by Paglia traveled across a double yellow line colliding head-on with the Codlings' car.¹⁰⁷ Paglia purchased the 1967 Chrysler about four months before the accident.¹⁰⁸ He did not experience any problems with the car's steering mechanism until the day of the accident.¹⁰⁹ Paglia claimed that the car "suddenly and unexplainably" crossed the double yellow line and collided with the Codlings' car.¹¹⁰ The New York Court of Appeals held that

under a doctrine of strict products liability, the manufacturer of a defective product is liable to any person injured or damaged if the defect was a substantial factor in bringing about his injury or damages; provided: (1) that at the time of the occurrence the product is being used (whether by the person injured or damaged or by a third person) for the purpose and in the manner normally intended, (2) that if the person injured or damaged is himself the user of the product he would not by the exercise of reasonable care have both discovered the defect and perceived its danger, and (3) that by the exercise of reasonable care the person injured or damaged would not otherwise have averted his injury or damages.¹¹¹

The New York Court of Appeals affirmed the judgment in favor of the Codlings against Chrysler but reversed and remanded the judgment in favor of Paglia against Chrysler for his

103. *See id.*

104. *See generally id.* §§ 5:5 to :8, at 291-323 (providing a review of the tests applicable to a finding of strict liability).

105. *See infra* notes 137-56 and accompanying text.

106. 298 N.E.2d 622 (N.Y. 1973).

107. *See id.* at 624.

108. *See id.*

109. *See id.*

110. *Id.*

111. *Codling*, 298 N.E.2d at 628-29.

personal injuries and property damage.¹¹² In affirming the decision in favor of the Codlings, the court of appeals agreed with the jury's conclusion that

Chrysler had produced an automobile with a defective steering mechanism; that the defect was a substantial factor in bringing about the accident and thus the injuries to the Codlings; that at the time of the accident Paglia was using the automobile for the purpose and in the manner normally intended; that by the exercise of reasonable care, Paglia would neither have discovered the defective steering mechanism nor perceived its danger; and that, as to the Codlings, the exercise of reasonable care on their part would otherwise not have averted the accident.¹¹³

The purpose of imposing strict liability upon a manufacturer arises from the manufacturer's ability to foresee injuries and to protect against them.¹¹⁴ It also relates to the manufacturer's ability "to insure against the risk of injury and . . . to spread the costs of risk avoidance amongst its customers."¹¹⁵ Furthermore, it would place too difficult a burden upon the consumer to identify and prove "negligent conduct on behalf of a manufacturer or others in the chain of distribution."¹¹⁶ In *Codling*, the New York Court of Appeals expressed concern about how technology advanced to a point of being out of reach of both the consumer and bystander or nonuser.¹¹⁷ The court felt that "from the standpoint of justice as regards the operating aspect of today's products, responsibility should be laid on the manufacturer, subject to . . . limitations"¹¹⁸ It continued that a manufacturer should not be immune from liability arising from

112. *See id.* at 629. Paglia cross claimed against Chrysler for an amount over the judgment awarded in favor of the Codlings against him. *See id.* at 630. Paglia also cross-claimed against Chrysler for his own personal injuries and property damages. *See id.* The initial cross-claim was dismissed and affirmed and the second was remanded for a new trial. *See id.* Paglia's second cross-claim involved the issue of contributory negligence, which is not relevant to this article. *See Codling*, 298 N.E.2d at 629-30.

113. *Id.* at 629.

114. *See* DIAMOND ET AL., *supra* note 23, §17.04, at 330 (discussing the court's rationale in construing Restatement § 402(A) and § 402(A)'s close relation to Justice Traynor's reasoning in the case of *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944)).

115. *Id.*

116. *Id.*

117. *See Codling*, 298 N.E.2d at 627.

118. *Id.*

injuries sustained by people whom the manufacturer could reasonably foresee would be injured due to its defective product.¹¹⁹ It added that both justice and common sense require the extension of recovery to bystanders since they have less of a chance to discover any defects in a product.¹²⁰

D. *Misrepresentation*

Liability for tortious misrepresentation may occur under one of three common law theories.¹²¹ The three theories are: (1) fraud; (2) negligent misrepresentation, and (3) strict liability for making false public misrepresentations about one's product.¹²² Section 402(B) of the *Restatement (Second)* governs modern day strict liability for misrepresentation.¹²³ The case of *Young v. Robertshaw Controls Co.*¹²⁴ provides an example of where the New York Supreme Court, Appellate Division, found that a plaintiff adequately stated a claim of fraud.¹²⁵

In *Young*, the New York Supreme Court, Appellate Division, held that "[t]he essential elements of a cause of action for fraud are the intentional misrepresentation of a material fact, reliance thereon and an injury resulting from the misrepresentation."¹²⁶ Mrs. Young filed a claim against Robertshaw Controls Company ("Robertshaw") for the death of her husband, due to a propane gas water heater explosion.¹²⁷ Mrs. Young alleged that a defective valve in the heater caused the explosion.¹²⁸ Robertshaw was the manufacturer of the defective valve.¹²⁹ In bringing her action, Mrs. Young asserted that Robertshaw had knowledge of the products' defectiveness and "failed to recall

119. See *id.* (citing *Codling v. Paglia*, 38 A.D.2d 154, 158 (3d Dep't 1972)).

120. See *id.* (citing *Ciampichini v. Ring Bros., Inc.*, 40 A.D.2d 289, 293 (4th Dep't 1973)).

121. See OWEN ET AL., *supra* note 29, § 3:1, at 78.

122. See *id.*

123. See RESTATEMENT (SECOND) *supra* note 25, § 402(B), at 358. Section 9 of the *Restatement (Third)* incorporates the principles of § 402(B). See RESTATEMENT (THIRD), *supra* note 26, § 9 & cmt. b. See also OWEN ET AL., *supra* note 29, § 3:5, at 102 n.8, § 5:12, at 354-55.

124. 481 N.Y.S.2d 891 (3d Dep't 1984).

125. See *id.* at 894.

126. *Id.* at 893 (citing *Channel Master Corp. v. Aluminum Ltd. Sales, Inc.*, 151 N.E.2d 833 (N.Y. 1958)).

127. See *id.*

128. See *id.*

129. See *Young*, 481 N.Y.S.2d at 893.

the valves or to adequately warn dealers and the public of the danger."¹³⁰ Mrs. Young also asserted that Robertshaw failed to disclose the danger to consumers and misled the Consumer Products Safety Commission as to the extent of the risk.¹³¹

In support of the claim, evidence was presented in order to show Robertshaw's knowledge and concealment of the defect and accompanying danger.¹³² In response to the evidence, the court reasoned that the concealment, "was undertaken with the intention of deceiving the public at large as to the continued fitness for use of this control valve which defendant had placed in commerce and minimizing recoveries in lawsuits generated by the faulty control."¹³³ In continuing, the court noted that contrary to the notion that nondisclosure or concealment alone does not amount to actionable fraud¹³⁴

it is a principle of long standing that "one who sells an article knowing it to be dangerous by reason of concealed defects is guilty of a wrong, without regard to the contract, and is liable in damages to any person, including one not in privity of contract with him, who suffers an injury by reason of his willful and fraudulent deceit and concealment."¹³⁵

In finding that Robertshaw intentionally concealed the danger of the defect and failed to warn of the danger, the court held that Mrs. Young adequately stated a cause of action in fraud.¹³⁶

E. *Restatement (Third) of Torts: Products Liability*

On May 20, 1997, the American Law Institute adopted and promulgated the *Restatement (Third)*.¹³⁷ One of the most important changes found in the *Restatement (Third)* is the effect

130. *Id.*

131. *See id.*

132. *See id.* at 893-94. The evidence revealed that the defect resulted in "more than 100 accidents, resulting in 32 deaths and 77 injuries." *Id.*

133. *Young*, 481 N.Y.S.2d at 894.

134. *See id.* (citing *Simcusi v. Saeli*, 377 N.E.2d 713 (N.Y. 1978); *Moser v. Spizzirro*, 295 N.Y.S.2d 188 (2d Dep't 1968), *aff'd*, 252 N.E.2d 632 (N.Y. 1969)).

135. *Id.* (quoting *Kuelling v. Lean Mfg. Co.*, 75 N.E. 1098, 1102 (N.Y. 1905)).

136. *See id.* (citing *Butcher v. Robertshaw Controls Co.*, 550 F. Supp. 692 (D. Md. 1981)). The court stated that since this specific proceeding was at the pleading stage, it would not resolve the issue of whether, as alleged, "a causal connection exist[ed] between the avowed misrepresentations and the injuries suffered." *Id.*

137. *See* RESTATEMENT (THIRD), *supra* note 26.

that Section 2 has on 402(A) of the *Restatement (Second)*. Section 2 of the *Restatement (Third)* "rejects the singular definition of defect found in Section 402(A)."¹³⁸ In doing so, Section 2 "sets forth three exclusive categories of defect: A product liability claim may be based on (1) an alleged manufacturing defect; (2) an alleged defect in design; or (3) an alleged defect based on inadequate warnings."¹³⁹ Comment *n* to Section 2 provides that "the rules [in Section 2] are stated functionally rather than in terms of traditional doctrinal categories."¹⁴⁰ Comment *n* also provides that if the prerequisites of Subsections (a), (b), and (c) of Section 2, or the other provisions of Chapter 1 are met, "the doctrinal tort categories such as negligence or strict liability may be utilized."¹⁴¹ By repealing Section 402(A) of the *Restatement (Second)*, the *Restatement (Third)* "imposes 'true' strict liability for manufacturing defects," while using "fault-based concepts of liability for failure to warn and design."¹⁴²

In Comment *a* to Section 2, the drafters of the *Restatement* discuss several reasons often cited for upholding strict liability for manufacturing defects, as defined under Subsection (a) of

138. Victor E. Schwartz, et al., *The Restatement (Third) of Torts: Products Liability: A Guide to Its Highlights*, BRIEFLY . . . PERSP. ON LEGIS., REG., & LITIG., Feb. 1998, at 1, 5. Section 2 of the *Restatement (Third)* provides:

§ 2. Categories of Product Defect

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

- (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
- (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
- (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

139. Schwartz, *supra* note 138, at 5.

140. RESTATEMENT (THIRD), *supra* note 26, § 2 cmt. n, at 34-35.

141. *Id.*

142. Schwartz, *supra* note 138, at 5-6.

Section 2.¹⁴³ First, strict liability will encourage greater investment in the development and production of products.¹⁴⁴ Second, in many cases “manufacturing defects are in fact caused by manufacturer negligence” which plaintiffs will have difficulty proving.¹⁴⁵ An application of strict liability will avoid plaintiffs’ facing sometimes “difficult or insuperable problems of proof.”¹⁴⁶ The drafters also provide that since manufacturers choose the level of quality control in manufacturing a product, they have “knowledge that a predictable number of flawed products will enter into the marketplace” deliberately causing a known amount of injury.¹⁴⁷ Finally, the drafters add that it is “often-cited” that “product sellers as business entities are in a better position than are individual users and consumers to better insure against . . . losses.”¹⁴⁸

Liability under Subsections (b) and (c) of Section 2 is based upon a level of reasonable foreseeability.¹⁴⁹ For instance, Subsection (b) of Section 2 provides that a manufacturer will be held subject to liability when “the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe.”¹⁵⁰ The requirement of a plaintiff having to prove a reasonable alternative design caused great debate during the drafting of the *Restatement (Third)*.¹⁵¹ Under Subsection (c), liability attaches when there exists “foreseeable risks of harm” by

143. See RESTATEMENT (THIRD), *supra* note 26, § 2 cmt. a, at 14-17.

144. See *id.*

145. *Id.* at 15.

146. *Id.*

147. *Id.*

148. RESTATEMENT (THIRD), *supra* note 26, § 2 cmt. a, at 15.

149. See *id.* § 2 cmt. a, at 17.

150. *Id.* § 2(b), at 14.

151. See Schwartz, *supra* note 138, at 6. Mr. Schwartz notes that the drafters were able to accommodate the concerns of the plaintiffs’ lawyers. See *id.* When a plaintiff’s lawyer is required to prove a reasonable alternative design (“RAD”), Section 3 of the *Restatement (Third)* allows the lawyer to use circumstantial evidence in support of finding a RAD. See *id.* See also RESTATEMENT (THIRD), *supra* note 26, § 3, at 111. Additionally, Comment *e* to Section 2, operates as an “escape hatch” for the RAD requirement. See Schwartz, *supra* note 138, at 7. See also RESTATEMENT (THIRD), *supra* note 26, § 2 cmt. e, at 21-22. Comment *e* may allow liability to attach in the absence of proof of a RAD. See Schwartz, *supra* note 138, at 7. See also RESTATEMENT (THIRD), *supra* note 26, § 2 cmt. e, at 21-22.

failing to provide "reasonable instructions or warnings," and such "omission of the instruction or warnings renders the product not reasonably safe."¹⁵² Subsections (b) and (c) are meant to "achieve the same general objectives as does liability predicated on negligence."¹⁵³ The drafters provide that the "emphasis is on creating incentives for manufacturers to achieve optimal levels of safety in designing and marketing products."¹⁵⁴ Additionally, the drafters noted that a "reasonably designed product still carries with it elements of risk that must be protected against by the user or consumer since some risks cannot be designed out of the product at reasonable cost."¹⁵⁵ Therefore, Subsections (b) and (c) incorporate a "risk-utility" test, balancing "costs and benefits," when defining defects in design, instructions, and warnings."¹⁵⁶

III. The Rescue Doctrine

*"Danger invites rescue. The cry of distress is the summons to relief."*¹⁵⁷

Justice Cardozo, 1921

The rescue doctrine was designed to protect individuals faced with an emergency.¹⁵⁸ The doctrine acknowledges that those faced with an emergency will act upon instinct, with no time to reflect over following consequences.¹⁵⁹ The doctrine shields a rescuer from liability arising out of the rescue.¹⁶⁰ However, in order for the actions of a rescuer to fall within the protections of the doctrine, the rescuer's conduct must be the same as that of a reasonable person under the same circum-

152. RESTATEMENT (THIRD), *supra* note 26, § 2(c), at 14.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 16-17. Comment *a* provides that most courts agree that: "for the liability system to be fair and efficient, the balancing of risks and benefits in judging product design and marketing must be done in light of the knowledge of risks and risk-avoidance reasonable attainable at the time of distribution." RESTATEMENT (THIRD), *supra* note 26, § 2(c), at 16-17.

157. *Wagner v. International Ry. Co.*, 133 N.E. 437 (N.Y. 1921).

158. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 33, at 196 & n.26 (5th ed. 1984).

159. See *id.*

160. See *id.*

stances.¹⁶¹ The rescue doctrine also provides a source of recovery to a rescuer who is injured while rescuing another.¹⁶² In the case of *Provenzo v. Sam*,¹⁶³ the New York Court of Appeals set forth two different situations where the rescue doctrine has been applied.¹⁶⁴ The first situation involves three people, where one party's act puts a second in peril and a third comes to the rescue.¹⁶⁵ The second situation involves two people, where a party has put himself into peril and another comes to his rescue.¹⁶⁶

Although the courts have applied the rescue doctrine to many different types of actions,¹⁶⁷ they have declined to apply it in the area of medical malpractice.¹⁶⁸ The rescue doctrine has been widely established and accepted due to its strong policy considerations; however, different jurisdictions take different approaches in applying it.¹⁶⁹ For example, the State of Washington developed a four-prong test for the application of the rescue doctrine.¹⁷⁰

161. *See id.*

162. *See Wagner*, 133 N.E. at 437-38. *See also Maltman v. Sauer*, 530 P.2 254, 256 (Wash. 1975).

163. 244 N.E.2d 26 (N.Y. 1968). The case involved an action brought by a driver who sustained serious injuries attempting to rescue the driver and passenger of a car involved in an accident. *See id.* at 27. The plaintiff observed the automobile swerving back and forth on the highway before hitting a car, crossing over the highway, colliding with a house and coming to rest on the front lawn of the house. *See id.* The plaintiff, after parking his car on the opposite side of the highway, attempted to cross the highway to render assistance and was struck by an automobile owned and operated by the defendant. *See id.* The court remanded the case for the jury to consider whether the plaintiff acted reasonably in light of the emergency confronting him. *See Provenzo*, 244 N.E.2d at 29.

164. *See id.* at 28.

165. *See id.*

166. *See id.* (citing *Carney v. Buyea*, 271 A.D. 338 (4th Dep't 1946); *Talbert v. Talbert*, 199 N.Y.S.2d 212 (Sup. Ct. Schenectady Co. (1960)).

167. *See, e.g., Rowlands v. Parks*, 138 N.E.2d 217 (N.Y. 1956) (involving a defendant's application of the rescue doctrine); *Oberman v. Alexander's Rent-A-Car*, 392 N.Y.S.2d 662 (1st Dep't 1977) (involving application of rescue doctrine to six-car chain accident).

168. *See David E. Seidelson, The Rescue Doctrine in Medical Malpractice and Product Liability Actions: So Much for Heroes*, 17 MISS. C.L. REV. 325 (1997).

169. *See Jeffrey F. Ghent, Annotation, Rescue Doctrine: Liability of One Who Negligently Causes Motor Vehicle Accident for Injuries to Person Subsequently Attempting to Rescue Persons or Property*, 73 A.L.R.4th 737 (1990).

170. *See infra* text accompanying note 267.

The rescue doctrine was developed in 1921 by the New York Court of Appeals in *Wagner v. International Railway Co.*¹⁷¹ In *Wagner*, the plaintiff's cousin was thrown from a crowded railway car after the car violently lurched while rounding a corner.¹⁷² The plaintiff, in an attempt to rescue his cousin, walked more than 445 feet out along the trestle and, while surrounded in darkness, missed his footing and fell.¹⁷³ The plaintiff claimed that the conductor had asked him to walk out along the trestle to the point where he thought his cousin fell out of the car.¹⁷⁴ The plaintiff also stated that the conductor followed behind him with a lantern.¹⁷⁵ The conductor denied both of the statements.¹⁷⁶ At a trial to recover for personal injuries sustained by the plaintiff, the trial judge held that he would not find the defendant liable "unless two facts were found: First, that the plaintiff had been invited by the conductor to go upon the bridge, and second, that the conductor had followed with a light."¹⁷⁷ With these limitations, the jury found in favor of the defendant.¹⁷⁸

On appeal, the defendant argued that the court "must stop following the chain of causes, when the action ceases to be 'instinctive.'"¹⁷⁹ The court interpreted this to mean "that [the] rescue is at the peril of the rescuer, unless spontaneous and immediate."¹⁸⁰ In its first argument, the defendant stated that while walking more than 445 feet out on the trestle, the plaintiff had time to deliberate and to "reflect and weigh," at which point "impulse had been followed by choice."¹⁸¹ The court continued that "[i]f there has been time to deliberate, if impulse has given way to judgment, one cause, it is said, has spent its force, and another has intervened."¹⁸² The defendant asked the court to find that the sequence of events between the peril and

171. 133 N.E. 437 (N.Y. 1921).

172. *See id.*

173. *See id.*

174. *See id.*

175. *See id.*

176. *See Wagner*, 133 N.E. at 437.

177. *Id.*

178. *See id.*

179. *Id.* at 438.

180. *Id.*

181. *Wagner*, 133 N.E. at 438.

182. *Id.*

the rescue must be of "unbroken continuity" in order for the plaintiff to recover.¹⁸³ Justice Cardozo responded that

continuity in such circumstances is not broken by the exercise of volition. So sweeping an exception, if recognized, would leave little of the rule. 'The human mind,' as we have said, *People v. Majone*, 91 N.Y. 211, 212 (1883), 'acts with celerity which it is sometimes impossible to measure.' The law does not discriminate between the rescuer oblivious of peril and the one who counts the cost. It is enough that the act, whether impulsive or deliberate, is the child of the occasion.¹⁸⁴

The court was unwilling to find that an unbroken chain between a rescuer's impulse in reaction to a specific event and the actions taken to avoid its consequences was required.¹⁸⁵

The defendant also argued that the plaintiff should have gone below the trestle, as did the other searchers, in search of the plaintiff's cousin.¹⁸⁶ The defendant stated that the plaintiff's "conduct was not responsive to the call of the emergency; it was a wanton exposure to a danger that was useless."¹⁸⁷ In response to this argument, Justice Cardozo held that a plaintiff's "[e]rrors of judgment" . . . would not count against him if they resulted 'from the excitement and confusion of the moment'¹⁸⁸ while voluntarily rescuing another.¹⁸⁹

The *Provenzo* Court followed the decision in *Wagner* and added that even if a plaintiff establishes the necessary elements for invoking the doctrine, he must still show that he "acted as a reasonable man under the circumstances," in order to avoid being found contributorily negligent.¹⁹⁰ The court also noted that "the wisdom of hindsight is not determinative on the issue of the doctrine's applicability."¹⁹¹ It continued that "[s]o long as the rescue attempted can be said to have been a reasonable

183. *Id.*

184. *Id.* at 438 (citing *Twomley v. Central Park N. & E. River R.R. Co.*, 69 N.Y. 158 (1877); *Donnelly v. Piercy Contracting Co.*, 118 N.E. 605 (N.Y. 1918)); *Bird v. St. Paul F. & M. Ins. Co.*, 120 N.E. 86 (N.Y. 1918)).

185. *See id.*

186. *See Wagner*, 133 N.E. at 438.

187. *Id.* (citing *Miller v. Union Ry. Co. of N.Y. City*, 83 N.E. 583, 584 (N.Y. 1908)).

188. *Id.* (citing *Corbin v. Philadelphia*, 45 Atl. 1070 (Pa. 1900)).

189. *Id.*

190. *Provenzo*, 244 N.E.2d at 28.

191. *Id.*

course of conduct at the time, it is of no import that the danger was not as real as it appeared."¹⁹²

IV. Proximate Cause

*"[T]he orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of duty."*¹⁹³

Justice Cardozo, 1928

In order for a plaintiff to bring a products liability claim against a defendant, the defendant's conduct must be the legal cause of a plaintiff's injuries.¹⁹⁴ Legal cause consists of two elements, cause-in-fact and proximate cause.¹⁹⁵ Both elements are needed to show legal cause.¹⁹⁶ Cause-in-fact inquires whether the defendant's conduct was a substantial contributing factor in bringing about the harm.¹⁹⁷ Therefore, it follows that the "defendant's conduct or product is known as the *sine qua non* of the plaintiff's injury."¹⁹⁸ Proximate cause generally inquires "whether plaintiff's loss is too remote or too removed from [the] defendant's conduct, or whether the conduct of the plaintiff or others operates as an unforeseeable intervening cause to break the chain of causation and extinguish the defendant's legal responsibility."¹⁹⁹ There exists no single definition by which proximate cause is known.²⁰⁰

There are three ways to approach the proximate cause inquiry.²⁰¹ The first approach finds proximate cause when the risk of harm brought about by the product defect could have been foreseen by the defendant at the time of manufacture.²⁰²

192. *Id.* (citing *Carney v. Buyea*, 271 A.D. 338 (4th Dep't 1946)).

193. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928) (discussing how far liability for a harm to another should extend).

194. *See OWEN ET AL.*, *supra* note 29, § 12:1, at 726.

195. *See id.*

196. *See id.*

197. *See id.* at 727 & n.3.

198. *Id.* at 727.

199. *OWEN ET AL.*, *supra* note 29, § 12:1, at 727.

200. *See id.* § 13:1, at 779. The authors note that "[n]o single generally accepted definition of 'proximate cause' has yet been found and agreed upon" by courts or legal writers. *Id.* *See also* TIMOTHY E. TRAVER ET AL., *AMERICAN LAW OF PRODUCTS LIABILITY* § 4:1, at 12 (3d ed. 1993).

201. *See OWEN ET AL.*, *supra* note 29, § 13:1, at 779. In addition, § 13:3 provides a discussion on intervening and superseding causes. *See id.* at 788-97.

202. *See id.* at 779-80.

The second approach finds proximate cause when a defendant's acts, "which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the injury would not have occurred."²⁰³ The final approach set forth in the *Restatement (Second)*, provides that once the tortious conduct is "determined to be a substantial factor in bringing about the harm, [it] is [the] legal cause of [the] harm if there is no rule of law relieving the actor from liability because of the manner in which his act . . . resulted in the harm."²⁰⁴ The discussion within this section of the article will focus on proximate cause, since it is the main issue in the *McCoy* case, discussed *infra*.²⁰⁵

In 1980, the New York Court of Appeals, in the case of *Derdiarian v. Felix Contracting Corp.*,²⁰⁶ reasoned that "[t]he concept of proximate cause, or more appropriately legal cause, has proven to be an elusive one, incapable of being precisely defined to cover all situations."²⁰⁷ This was so because it "stems from policy considerations that serve to place manageable limits upon the liability that flows from negligent conduct."²⁰⁸ The court asserted that due to the "unique" inquiry in each case, the finder of fact would determine the existence of legal cause.²⁰⁹ The case would only go to the finder of fact if the court found that a *prima facie* case had been established.²¹⁰

In *Derdiarian*, Derdiarian had been working at a roadway site, when defendant James Dickens suffered an epileptic seizure and lost consciousness, causing his automobile to go out of control, speed into the work site and strike Derdiarian.²¹¹ Derdiarian was thrown into the air and, when he landed, was splattered with 400 degree liquid enamel from a kettle struck by Dickens' automobile.²¹² It was later discovered that Dickens

203. *Id.* at 780 & n.8.

204. *Id.* at 780 & n.9.

205. *See McCoy v. American Suzuki Motor Corp.*, 936 P.2d 31 (Wash. Ct. App. 1997), *aff'd*, 961 P.2d 952 (Wash. 1998).

206. 414 N.E.2d 666 (N.Y. 1980).

207. *Id.* at 670.

208. *Id.*

209. *See id.*

210. *See id.*

211. *See Derdiarian*, 414 N.E.2d at 669.

212. *See id.*

failed to take his medication as required.²¹³ Derdiarian and his wife filed an action against his employer Felix Contracting Corp. ("Felix"), a subcontractor for Consolidated Edison Company of New York, Inc., and Dickens for the personal injuries he had sustained.²¹⁴ At trial, Derdiarian claimed that Felix inadequately insured the safety of the workers at the roadway site.²¹⁵ Derdiarian presented an expert witness on traffic safety,²¹⁶ who testified that the construction site should have been completely enclosed by a heavy barrier.²¹⁷ The witness testified that such a barrier, consisting of a truck, a piece of heavy equipment or a pile of dirt, would keep a car out of the excavation site and protect workers from oncoming traffic.²¹⁸ The witness also added that two flagmen, rather than one, should have been at the site and that warning signs should have been set up.²¹⁹ The evidence presented revealed that the site was protected solely by a single wooden horse barricade, set up on the west side of the site.²²⁰ A verdict was rendered in favor of Derdiarian and his wife.²²¹

On appeal, Felix argued that "there was no causal link, as a matter of law, between Felix's breach of duty and plaintiff's injuries."²²² The court stated that "[w]here the acts of a third person intervene between the defendant's conduct and the plaintiff's injury," and are of "a normal or foreseeable consequence of the . . . defendant's negligence," the causal connection will not be broken.²²³ However, when "the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a superseding act which breaks the causal nexus."²²⁴ The court continued that questions concerning "what is foreseeable and what is normal" are to be

213. *See id.* at 669.

214. *See id.* at 668-69.

215. *See id.* at 669.

216. *See Derdiarian*, 414 N.E.2d at 669.

217. *See id.*

218. *See id.*

219. *See id.*

220. *See id.*

221. *See Derdiarian*, 414 N.E.2d at 670.

222. *Id.*

223. *Id.*

224. *Id.*

left to the jury.²²⁵ However, the court noted that there are some situations "where only one conclusion may be drawn from the established facts and where the question of legal cause may be decided as a matter of law."²²⁶ These situations involve "intervening acts which operate upon but do not flow from the original negligence."²²⁷ The court used *Ventricelli v. Kinney System Rent A Car*²²⁸ as an example in which legal cause was decided as a matter of law.²²⁹ The *Ventricelli* court held that an automobile lessor who negligently supplied a car with a defective trunk lid to a lessee was not liable to the lessee when he was injured by the negligent driving of another while stopped to repair the trunk.²³⁰ The court held that "[a]lthough the renter's negligence undoubtedly served to place the injured party at the site of the accident, the intervening act was divorced from and not the foreseeable risk associated with the original negligence."²³¹ The court added that the injuries were not of the type likely to result from a defective trunk lid.²³² The court summed up the case of *Ventricelli* as a negligence case which "merely furnished the occasion for an unrelated act to cause injuries not ordinarily anticipated."²³³

In contrasting *Derdarian* to *Ventricelli*, the *Derdarian* Court held that it could not say as a matter of law that the negligence of Dickens was a superseding cause interrupting Felix's negligence and *Derdarian's* injuries.²³⁴ It added that "[a]n intervening act may not serve as a superseding cause, and relieve an actor of responsibility, where the risk of the intervening act occurring is the very same risk which renders the actor negligent."²³⁵

225. *Id.*

226. *Derdarian*, 414 N.E.2d at 670.

227. *Id.*

228. 383 N.E.2d 1149 (N.Y. 1978).

229. *See Derdarian*, 414 N.E.2d at 671.

230. *See Ventricelli*, 383 N.E.2d at 1149.

231. *Derdarian*, 414 N.E.2d at 671.

232. *See id.* at 671.

233. *Id.*

234. *See id.*

235. *Id.*

V. The Opinions of the Washington Court of Appeals and
Washington Supreme Court in *McCoy v.*
*American Suzuki Motor Corp.*²³⁶

*"Regardless of whether a plaintiff is a voluntary or professional rescuer, he must show that the defendant's negligence was the proximate and legal cause of his injury."*²³⁷

Associate Justice Hunter, 1975

At about 5:00 PM on a cold November evening, a driver of a Suzuki Samurai lost control of the vehicle when it hit a patch of black ice and began to swerve.²³⁸ In an attempt to gain control over the vehicle, the passenger in the Samurai grabbed the steering wheel, causing it to go further out of control.²³⁹ The Samurai swerved off the road and rolled.²⁴⁰ James McCoy ("McCoy"), having witnessed the accident, stopped to help the occupants of the Samurai and found that the driver had been severely injured.²⁴¹ Upon the arrival of a Washington State Patrol Trooper, McCoy was asked to be of further assistance by placing flares along the highway to warn approaching traffic.²⁴² Out of concern that the flares would be inadequate, McCoy positioned himself a quarter of a mile down the road, with a flare in each hand, and manually directed traffic.²⁴³

Almost two hours later, at about 6:50 PM, "the injured driver and passenger of the Suzuki were removed and the scene was cleared."²⁴⁴ Only the trooper and McCoy remained.²⁴⁵ After the trooper drove away without a word to McCoy, McCoy began walking along the shoulder of the highway with a lit flare in his roadside hand to get to his car, and was struck by a hit-and-run driver.²⁴⁶

236. 936 P.2d 31 (Wash. Ct. App. 1997), *aff'd* 961 P.2d 952 (Wash. 1998).

237. *Maltman v. Sauer*, 530 P.2d 254, 259 (Wash. 1975).

238. *See McCoy v. American Suzuki Motor Corp.*, 961 P.2d 952, 955 (Wash. 1998).

239. *See McCoy v. American Suzuki Motor Corp.*, 936 P.2d 31, 32 n.1 (Wash. Ct. App. 1997).

240. *See McCoy*, 961 P.2d at 955.

241. *See id.*

242. *See id.*

243. *See id.*

244. *Id.*

245. *See McCoy*, 961 P.2d at 955.

246. *See id.*

The McCoys filed a multi-count suit against

the driver of the Suzuki for negligent driving; the passenger of the Suzuki for negligently grabbing the steering wheel when the car was fishtailing, further causing it to lose control; the State for the negligence of the trooper; and American Suzuki Motor Corporation, and its parent corporation, Suzuki Motor Company, Ltd., ["Suzuki"] for its allegedly defective Samurai which allegedly caused the wreck in the first place.²⁴⁷

The McCoys filed their claim under the Washington Product Liability act ("PLA").²⁴⁸ McCoy claimed that "the Suzuki Samurai was defectively designed and manufactured, was not reasonably safe by virtue of its tendency to roll, and lacked proper warnings."²⁴⁹ McCoy claimed that it was the defect in the Samurai that caused the accident, and that he was injured while acting within the realm of the rescue doctrine.²⁵⁰ Therefore, McCoy alleged that Suzuki should be held liable for his injuries.²⁵¹

In moving for summary judgment, Suzuki asserted that "(1) the rescue doctrine does not apply to products liability actions; and (2) even if it does, McCoy must still, but cannot, prove Suzuki proximately caused his injuries."²⁵² Although the trial court held that the rescue doctrine does apply to products liability actions, the trial judge held that "being struck by a hit-and-run driver was too remote a circumstance and therefore not a foreseeable consequence of a defective product."²⁵³ Therefore, the trial judge granted summary judgment in favor of Suzuki, holding that the alleged design defect was not the proximate cause of McCoy's injuries.²⁵⁴ The McCoys appealed.²⁵⁵ The appellate court stated that the trial court's analysis would be sound if the issue was whether the McCoys' injuries were foreseeable consequences of the manufacturing of a defective car; however, it pointed out that the cause of action was brought

247. *Id.*

248. *See id.* *See also* WASH. REV. CODE tit. 7, Chap. 7.72 (1999).

249. *McCoy*, 961 P.2d at 955.

250. *See id.*

251. *See id.*

252. *Id.*

253. *McCoy*, 936 P.2d 31, 32.

254. *See McCoy*, 961 P.2d at 955.

255. *See id.*

under the rescue doctrine.²⁵⁶ In doing so, the appellate court held the "[rescue] doctrine varies the ordinary rule of negligence: [by] permit[ting] the rescuer to sue on the basis of [a] defendant's initial negligence toward the party rescued, without the necessity of proving negligence toward the rescuer"²⁵⁷ The appellate court reversed the summary judgment in favor of Suzuki and remanded the matter for trial.²⁵⁸ On appeal, the Washington Supreme Court affirmed and remanded on different grounds.²⁵⁹

In its argument to the Washington Court of Appeals, Suzuki argued that "the PLA abrogated a rescue doctrine cause of action because the doctrine is an outgrowth of common law negligence,"²⁶⁰ and that "liability for a design defect under the PLA should not extend to bystanders."²⁶¹ In its first argument, Suzuki asserted that "liability under the PLA extends to those injuries caused directly 'by the product to the person or the property of the claimant.'"²⁶² Suzuki also argued "that the Legislature did not intend to engraft ordinary negligence principles onto the law of design defect product liability claims."²⁶³ The court of appeals held that neither of the arguments was plausible.²⁶⁴ As for Suzuki's argument that liability for a design de-

256. See *McCoy*, 936 P.2d at 32.

257. *Id.* (quoting *Solgaard v. Guy F. Atkinson Co.*, 491 P.2d 821, 825 (Ca. 1971)).

258. See *id.*

259. See *McCoy*, 961 P.2d at 954.

260. *McCoy*, 936 P.2d at 32.

261. *Id.* at 33.

262. *Id.* at 32 (quoting *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 858 P.2d 1054 (Wash. 1993)).

263. *Id.* at 33 (citing *Ayers v. Johnson & Johnson Baby Prods. Co.*, 818 P.2d 1337, 1344-45 (Wash. 1991)).

264. See *id.* The court of appeals stated that *Washington State Physicians Insurance Exchange & Ass'n*, 858 P.2d at 1065, did not involve the rescue doctrine. See *McCoy*, 936 P.2d at 33. It held that the case involved a treating physician bringing a cause of action against a drug company for personal and professional injuries suffered when a patient he was treating suffered an adverse reaction to a drug that he prescribed. See *id.* There, the Washington Supreme Court held that the facts did not support a cause of action under the PLA and that the court needed to be "cautious about extending a right to recover for emotional harm, 'especially when the distress is the consequence of an injury suffered by a third person.'" *Id.* (quoting *Washington State Physicians Ins. Exch. & Ass'n*, 858 P.2d at 1065). In finding that *Ayers* did not apply, the Washington State Court of Appeals held that the case involved a "products liability suit . . . based on a manufacturer's failure to warn of the danger of aspirating baby oil." *Id.* The Washington State Court of

fect under the PLA should not extend to a bystander, the court distinguished between a bystander and a rescuer.²⁶⁵ In doing so, the court concluded that McCoy was a rescuer.²⁶⁶

In finding that the PLA does not erode a rescuer's right to recover and agreeing with McCoy's contention that a rescuer could recover for injuries sustained during a rescue if the rescuer qualified under the four elements of the rescue doctrine set forth in *French v. Chase*,²⁶⁷ the court applied the facts to the elements.²⁶⁸ In applying the facts to the first element, that the "negligence proximately caus[ed] the peril," the court held that the trier of fact "must determine if (1) the Samurai had a design defect and, if so, (2) whether the alleged defect proximately resulted in the peril here, as opposed to the ice, excessive speed, the passenger's grabbing of the steering wheel, or any other factor."²⁶⁹ In response to the second element, that there be an imminence of peril or reasonable appearance of imminence, Suzuki argued that the McCoy's should not be entitled to re-

Appeals stated that *Ayers* "stands for the proposition that despite the language of RCW 7.72 030(1) (manufacturer subject to liability for design defect based on negligence), foreseeability is not an element of a failure-to-warn claim." *Id.* (citing *Ayers*, 818 P.2d 1345).

265. See *McCoy*, 936 P.2d at 33.

266. See *id.*

267. 297 P.2d 235 (Wash. 1956). In *French*, the Washington Supreme Court defined the four elements as follows:

(1) There must be negligence on the part of the defendant which is the proximate cause of the peril, or what would appear to a reasonable person, under the circumstances, to be peril, to the life or limb of another.

(2) The peril, or reasonable appearance of peril, to the life and limb of another must be imminent.

(3) In determining whether the peril, or the appearance of peril, is imminent, in the sense that an emergency exists requiring immediate action, the circumstances presented to the rescuer must be such that a reasonably prudent man, under the same or similar circumstances, would determine that such peril existed. (The issue of whether the rescuer's determination conformed with the reasonably prudent man standard is a question for the jury, under proper instructions.)

(4) After determining that imminent peril to the life or limb of a person exists, the rescuer, in effecting the rescue, must be guided by the standard of reasonable care under the circumstances. (Whether there has been conformance with this standard also is a question for the jury, under the proper instructions.)

Id. at 239.

268. See *McCoy*, 936 P.2d at 32.

269. *Id.* at 34.

cover under the rescue doctrine because the peril to life and limb of the occupants of the Samurai was not imminent.²⁷⁰ The court held that it was for the trier of fact to make such a determination.²⁷¹ As for the third element, the court held that the trier of fact would have to determine if McCoy's perception of imminent peril was reasonable.²⁷² The court also held that the "reasonableness of [McCoy's] conduct in effecting [the] rescue" had to be determined by the trier of fact.²⁷³ Suzuki argued that at the time McCoy was injured, he was returning to his car.²⁷⁴ In considering the facts of the case, the court "conclud[ed that] the jury might conclude [that] Mr. McCoy's activities were within the scope of his rescue."²⁷⁵ In doing so, the court ordered reversal of the summary judgment and remanded the matter for trial.²⁷⁶

In a dissenting opinion, Justice Thompson agreed with the majority's version of the facts, but respectfully disagreed as to its holding that the trial court erred in granting summary judgment in favor of Suzuki.²⁷⁷ He felt that the trial court did not err because "Suzuki Motor Company, Ltd. was not the proximate cause of James McCoy's injuries and the imminent danger element of the rescue doctrine was not met."²⁷⁸

In addressing the rescue doctrine, Justice Thompson stated that "the first inquiry should be whether Suzuki's negligence

270. See *id.* at 34. In making its argument, Suzuki relied on *Hawkins v. Palmer*, 188 P.2d 121 (Wash. 1947). There, the Washington Supreme Court found that the plaintiff, who stopped to assist at the scene of a motorcycle accident, was not engaged in a rescue. See *id.* at 121. The Washington Supreme Court held that the doctrine applies "when one acts impulsively, oblivious to peril, to save or assist an injured person whose injury is imminent; or when, conscious of the peril and weighing the consequences, he nonetheless goes to the aid of the injured person or person whose injury is imminent." *Id.* at 124. The Washington Supreme Court held "that the plaintiff did not knowingly encounter danger to assist the victims: [t]he injured man seemingly was in no more imminent or serious peril at that moment than he had been for a considerable period of time prior thereto." *Id.* "There was no known danger or peril threatening the victims." *Id.* The *McCoy* court held that *Hawkins* was distinguishable. See *McCoy*, 936 P.2d at 34.

271. See *McCoy*, 936 P.2d at 34.

272. See *id.*

273. *Id.* at 35.

274. See *id.*

275. *Id.*

276. See *McCoy*, 936 P.2d at 35.

277. See *id.* (Thompson, J., dissenting).

278. *McCoy*, 936 P.2d at 35. (Thompson, J., dissenting).

was the proximate cause of Mr. McCoy's injuries."²⁷⁹ He stated that "[p]roximate cause requires a showing of cause in fact and legal causation."²⁸⁰ He defined cause in fact as "cause but for which the accident would not have happened"²⁸¹ and added that "cause in fact is generally a question of fact."²⁸²

Justice Thompson noted that "[l]egal causation involves 'policy considerations of how far a defendant's acts should extend, and is a question of law.'"²⁸³ In defining legal cause, he stated that consideration should be given to "causation, intervening events, duty, foreseeability, reliance, remoteness and privity."²⁸⁴ He also stated that "the application of the rescue doctrine is limited to situations where the plaintiff can establish that his injury was attributable to a cause which was reasonably foreseeable given the danger created by the defendant's original act of negligence."²⁸⁵

In applying his analysis, Justice Thompson noted that Suzuki's design defect was not the legal cause of McCoy's injuries.²⁸⁶ He continued that the injuries caused by the design defect are limited to the occupants of the Suzuki, and to go beyond them, one would have to rely on the rescue doctrine, which is not applicable under these circumstances.²⁸⁷ He said "[t]he alleged negligence is too remote and insubstantial to impose liability."²⁸⁸ Not only did Justice Thompson find proximate cause to be non-existent, but he also mentioned that McCoy's injuries were not "a reasonably foreseeable event given the design de-

279. *Id.* (Thompson, J., dissenting) (citing *In re Estate of Keck*, 856 P.2d 740, 743 (Wash. Ct. App. 1993)).

280. *Id.* (Thompson, J., dissenting) (citing *Christen v. Lee*, 780 P.2d 1307, 1321 (Wash. 1989)).

281. *Id.* (Thompson, J., dissenting) (citing *Channel v. Mills*, 890 P.2d 535, 538 (Wash. Ct. App. 1995)).

282. *McCoy*, 936 P.2d at 35 (Thompson, J., dissenting) (citing *Hartley v. State*, 698 P.2d 77, 83 (Wash. 1985)).

283. *Id.* (Thompson, J., dissenting) (quoting *Keck*, 856 P.2d at 743 (quoting *Christen*, 780 P.2d at 1321)).

284. *Id.* (Thompson, J., dissenting) (citing *Hartley*, 698 P.2d at 84).

285. *Id.* at 35-36 (Thompson, J., dissenting) (citing *Maltman v. Sauer*, 530 P.2d 254, 258-59 (Wash. 1975)).

286. *See id.* (Thompson, J., dissenting).

287. *See McCoy*, 936 P.2d at 35-36 (Thompson, J., dissenting).

288. *Id.* (Thompson, J., dissenting).

fect."²⁸⁹ Suzuki could not foresee that due to its design defect, McCoy would be struck by a hit-and-run driver.²⁹⁰

In concluding, Justice Thompson stated that the rescue doctrine makes it clear that there must be an element of urgency and need for immediate action.²⁹¹ Justice Thompson stated that at the time McCoy was injured, the element of urgency had long since passed.²⁹²

On appeal by Suzuki, the Washington Supreme Court reviewed the summary judgment by "consider[ing] the facts in a light most favorable to McCoy, the non-moving party, and review[ed] the issues of law *de novo*."²⁹³ In its review, the supreme court agreed with the appellate court that the rescue doctrine applied, but disagreed with its holding that the rescue doctrine varies the ordinary rules of negligence.²⁹⁴ Instead, the supreme court reiterated its holding in *Maltman v. Sauer*,²⁹⁵ that a "plaintiff must still show the defendant proximately caused his injuries."²⁹⁶ Furthermore, the court then discussed the two functions of the rescue doctrine.²⁹⁷ First, the rescue doctrine "informs a tortfeasor it is foreseeable a rescuer will come to the aid of the person imperiled by the tortfeasor's actions, and, therefore, the tortfeasor owes the rescuer a duty similar to the duty he owes the person he imperils."²⁹⁸ Second, "the rescue doctrine negates the presumption that the rescuer assumed the risk of injury when he knowingly undertook the dangerous rescue, so long as he does not act rashly or recklessly."²⁹⁹ After reciting the same elements that the appellate court set forth to qualify an individual as a rescuer, the court agreed with the lower court's finding that McCoy "demonstrated sufficient

289. *Id.* (Thompson, J., dissenting).

290. *See id.* (Thompson, J., dissenting).

291. *See id.* (Thompson, J., dissenting).

292. *See McCoy*, 936 P.2d at 35-36 (Thompson, J., dissenting).

293. *McCoy*, 961 P.2d at 955.

294. *See id.* at 956-57.

295. 530 P.2d 254 (Wash. 1975).

296. *McCoy*, 961 P.2d at 956 (citing *Maltman*, 530 P.2d at 258-59).

297. *See id.*

298. *Id.* (citing *Wagner v. International Ry. Co.*, 133 N.E. 437, 437 (N.Y. 1921)).

299. *Id.* (citing *Hawkins v. Palmer*, 188 P.2d 121, 123 (Wash. 1947)).

facts of rescuer status to put the issue whether he met the four requirements set out in *French* to the jury.”³⁰⁰

After concluding that the rescue doctrine applies to a products liability action and that a rescuer must show that the defendant proximately caused his injuries, the court addressed the issue of whether or not McCoy demonstrated that Suzuki proximately caused his injuries.³⁰¹ In doing so, the supreme court reviewed the meaning and application of proximate cause.³⁰² It began by setting forth the two prongs of proximate cause: (1) cause in fact; and (2) legal cause.³⁰³

Next, the supreme court took a close look at each of the prongs of proximate cause and the arguments presented by McCoy and Suzuki.³⁰⁴ It stated that “[c]ause in fact asks whether ‘there was a sufficiently close, actual, causal connection between defendant’s conduct and the actual damage suffered by plaintiff.’”³⁰⁵ The court continued that “[f]or the original defendant’s wrongdoing to be the cause in fact of plaintiff’s injuries, the ‘original negligence of the defendant, which placed him in his present imperiled predicament, must be an active factor in the course of events which ultimately culminates in injury to the plaintiff.’”³⁰⁶ The hit-and-run driver’s intervention between Suzuki’s alleged wrongdoings and McCoy’s injuries would be examined as part of the cause in fact inquiry.³⁰⁷ The supreme court went on to reason that if the intervening cause was foreseeable and the defendant’s wrongdoing caused the injuries, then the defendant’s wrongdoing would be the cause in fact.³⁰⁸ The supreme court continued that if “the intervening cause was unforeseeable then ‘it would break the causal connection between the defendant’s negligence and the plaintiff’s injury’ and

300. *Id.* See also *supra* note 267.

301. See *McCoy*, 961 P.2d at 956-57.

302. See *id.* at 957.

303. See *id.* (citing *Schooley v. Pinch’s Deli Market, Inc.*, 951 P.2d 749, 752 (Wash. 1998)).

304. See *id.* at 957-58.

305. *Id.* at 957 (quoting *Maltman*, 530 P.2d at 258 (quoting *Rikstad v. Holmberg*, 456 P.2d 355, 357 (Wash. 1969))).

306. *McCoy*, 961 P.2d at 957 (quoting *Maltman*, 530 P.2d at 259).

307. See *id.*

308. See *id.* (citing *Maltman*, 530 P.2d at 259); *Schooley*, 951 P.2d at 756.

negate a finding of cause in fact."³⁰⁹ Before reaching the arguments of McCoy and Suzuki, the court stated that "[w]hether an independent cause is reasonably foreseeable is generally a question of fact for the jury."³¹⁰ However, it also stated that it would take the question from the jury if there was no question that the intervening cause was "totally unforeseeable, in a causal sense, to the original condition attributable to the defendant's conduct."³¹¹

In presenting its argument, Suzuki argued that "it was totally unforeseeable that a rescuer such as McCoy would be injured by a third vehicle under these particular facts."³¹² Having presented its argument, Suzuki asked the supreme court to rule in its favor on the issue as a matter of law, but the court held that the issue of foreseeability was "sufficiently close" and had to be decided by a jury.³¹³

In presenting his argument, McCoy cited the case of *In re Estate of Keck*.³¹⁴ The *Keck* case involved a rescuer who was hit and instantly killed while rescuing a driver who had been drinking and was involved in an accident.³¹⁵ In its ruling, the Washington Court of Appeals allowed the estate to bring an action under the rescue doctrine against the person who was being rescued.³¹⁶ The court of appeals, in reversing the trial court's decision, held that "it could not say as a matter of law that the original action was not the proximate cause of the decedent's injuries."³¹⁷ In *McCoy*, the supreme court found that the facts were similar enough to *Keck* that it would not take the case from the jury.³¹⁸ Additionally, the court stated that "if the Suzuki Samurai is found to be defective the jury could find it foreseeable that the Suzuki Samurai would roll and that an approaching car would cause injury to either those in the Suzuki Samurai or to a rescuer, depending on the specific facts to be

309. McCoy, 961 P.2d at 957 (quoting *Maltman*, 530 P.2d at 259) (quoting *Qualls v. Golden Arrow Farms, Inc.* 288 P.2d 1090, 1092 (Wash. 1955)).

310. *Id.* (citing *Maltman*, 530 P.2d 254).

311. *Id.* (quoting *Maltman*, 530 P.2d at 259).

312. *Id.*

313. *Id.*

314. 856 P.2d 740 (Wash. Ct. App. 1993).

315. See *McCoy*, 961 P.2d at 957 (citing *Keck*, 856 P.2d at 742).

316. See *id.*

317. *Id.*

318. See *id.*

proved.”³¹⁹ It also noted that sister jurisdictions have reached the same conclusion.³²⁰

Having completed its discussion of cause in fact, the supreme court discussed legal cause, the second prong of proximate cause.³²¹ To begin, it noted that “[l]egal cause is decided by the court as a question of law. Legal cause rests on policy grounds concerned with how far defendant’s liability should extend.”³²² The court also noted that “[l]egal cause is not susceptible of a conclusive and fixed set of rules, readily formulated.”³²³ In expanding on its discussion of legal cause, the court quoted *King v. City of Seattle*³²⁴

[Legal liability] is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy, and precedent The best use that can be made of the authorities on proximate cause is merely to furnish illustrations of situations which judicious men upon careful consideration have adjudged to be on one side of the line or the other.³²⁵

The court went on to describe the courts as gatekeepers that will dismiss “an action without a trial for lack of legal cause if a defendant’s actions are too remote a cause of plaintiff’s injuries.”³²⁶ In doing so, the court held that the alleged

319. *Id.* at 957-58.

320. *See McCoy*, 961 P.2d at 958. In noting that sister jurisdictions have reached the same conclusion under similar facts, the court discussed

Scott v. Texaco, Inc., 48 Cal. Rptr. 785 (Cal. Ct. App. 1966), [where] a roadside rescuer was struck by a vehicle while warning oncoming traffic of the principal car accident. The California court held the issue of whether the party causing the original accident proximately caused plaintiff’s injuries or whether the third vehicle constituted an independent superseding cause ‘was a question for the jury to determine under proper instructions.’ *Id.* at 785. *See also Stevens v. Baggett* . . . , 268 S.E.2d 370, 373 (Ga. 1980) (whether the party that caused the original accident is liable for injuries sustained by a nurse who was struck by an oncoming vehicle while rendering assistance is a jury question).

Id.

321. *See id.*

322. *Id.* (citing *Hartley*, 698 P.2d at 83).

323. *Id.* at 958 (quoting *King v. City of Seattle*, 525 P.2d 228, 235 (Wash. 1974) (quoting 1 THOMAS ATKINS STREET, THE FOUNDATIONS OF LEGAL LIABILITY 110 (1906)).

324. 525 P.2d 228 (Wash. 1974).

325. *McCoy*, 961 P.2d at 958 (quoting *King*, 525 P.2d at 235 (quoting STREET, *supra* note 323)).

326. *Id.*

fault of Suzuki was not so remote as to cut off liability as a matter of law.³²⁷ Instead, it affirmed the court of appeals decision and remanded the action for trial.³²⁸

VI. Analysis

*"The alleged negligence is too remote and insubstantial to impose liability."*³²⁹

Justice Thompson, 1997

In *McCoy*, the Washington Supreme Court affirmed the appellate court's decision, which reversed the order of summary judgment in favor of Suzuki and remanded the case for trial to consider the existence of proximate cause.³³⁰ The supreme court, in defining proximate cause, described cause in fact as asking "whether 'there was a sufficiently close, actual, causal connection between defendant's conduct and the actual damage suffered by plaintiff.'"³³¹ Additionally, the court stated that the rescue doctrine "is a reflection of societal judgment that rescuers should not be barred from bringing suit for knowingly plac-

327. *See id.* The court went on to note cases in which the defendant's actions were so remote that the action was dismissed for lack of legal cause:

In *Maltman* we dismissed the action, reasoning the party causing the principal accident should not be liable for the subsequent crash of a rescue helicopter hundreds of miles away because the helicopter crash was simply too remote a result of the principal accident. In *Hartley*, the estate of a decedent killed by a drunk driver sued the State for failing to revoke the drunk driver's license. There we similarly dismissed reasoning the State should not be held liable for injuries caused by a driver simply because the State failed to revoke that driver's license. *Hartley* . . . , 698 P.2d at 86. Such fault on the State's behalf was again too remote a cause of the ensuing injury to impose liability.

Id.

328. *See id.*

329. *McCoy v. American Suzuki Motor Corp.*, 936 P.2d 31, 36 (Wash. App. Ct. 1997) (Thompson, J., dissenting) (citing *Hartley v. State*, 698 P.2d 77, 86 (Wash. 1985) (holding that the state and county's failure to revoke a defendant's driver's license was too remote to impose liability for wrongful death action); *Klein v. City of Seattle*, 705 P.2d 806, 807 (Wash. App. Ct. 1985) (stating a design defect in road was too remote to impose liability for accident caused by a driver who had been drinking and was speeding)).

330. *See supra* notes 255-59 and accompanying text.

331. *McCoy v. American Suzuki Motor Corp.*, 961 P.2d 952, 957 (quoting *Maltman v. Sauer*, 530 P.2d 254, 259 (Wash. 1975) (quoting *Rikstad v. Holmberg*, 456 P.2d 355, 357 (Wash. 1969))).

ing themselves in danger to undertake a rescue.”³³² Apparently, the court has not acknowledged its own phrasing—“to undertake a rescue.”³³³ In reviewing the court’s decision, it is important to recall the four elements required by the courts in the State of Washington to invoke the rescue doctrine.³³⁴ A review of each of the elements will show that the courts’ decision to reverse the order of summary judgment in favor of Suzuki was erroneous.

The first element required by the Washington state courts is that “[t]here must be negligence on the part of the defendant which is the proximate cause of peril, or what would appear to a reasonable person, under the circumstances, to be peril, to the life or limb of another.”³³⁵ McCoy’s *initial* observation and reaction to the accident would meet the requirements of this element. However, at the time that McCoy was hit, there was no peril. The accident scene was cleared.³³⁶ The driver and passenger of the Suzuki were no longer in peril, as they had already been rescued.³³⁷ Furthermore, in following the *Derdiarian* Court’s reasoning, which was based upon *Ventricelli*,³³⁸ the alleged negligence of Suzuki may have undoubtedly served to place McCoy at the site of the accident, but McCoy’s being hit-and-run was “divorced from and not a foreseeable risk associated with the original negligence.”³³⁹ This foreseeability approach would fall into the first approach to proximate cause discussed *supra*.³⁴⁰ Even if the Suzuki Samurai was found to be of a defective design, McCoy’s injuries were “not of a type reasonably to be expected.”³⁴¹ It is not likely that an alleged design defect would cause a passerby, who stopped and assisted the injured, to be struck by a car while returning to his car after the peril ceased to exist. Since McCoy will be *unable* to prove that the driver and passenger of the Suzuki Samu-

332. *Id.* at 956.

333. *Id.*

334. *See supra* text accompanying note 267.

335. *See supra* text accompanying note 267.

336. *See supra* notes 244-46 and accompanying text.

337. *See supra* notes 244-46 and accompanying text.

338. *See supra* notes 228-33 and accompanying text.

339. *See supra* notes 228-33 and accompanying text.

340. *See supra* note 202 and accompanying text.

341. *See supra* notes 228-33 and accompanying text.

rai were still in peril at the time he was injured and that the type of injuries he sustained were reasonably foreseeable, the claim will fail the first element.

The second element required is that "[t]he peril, or reasonable appearance of peril, to the life or limb of another must be imminent."³⁴² The word "imminent" is defined as "near at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous."³⁴³ The Washington Supreme Court reasoned that in order for the plaintiff to recover, the original negligence of the defendant, which placed the plaintiff in imminent peril, "*must be an active factor in the course of events which ultimately culminates in injury to the plaintiff.*"³⁴⁴ The courts in New York follow the same "imminency" requirement.³⁴⁵ A review of the facts will show that at the time McCoy was injured, any negligence on the behalf of Suzuki was no longer active. For instance, at the time McCoy was injured, the peril to the driver and passenger was no longer active.³⁴⁶ Both the driver and the passenger of the Suzuki Samurai had already been taken from the scene by the rescue workers.³⁴⁷ The Samurai had been towed away and the state trooper had left the scene.³⁴⁸ In fact, even McCoy was returning to his car in order to leave the scene.³⁴⁹

The third element requires that "in determining whether the peril, or the appearance of peril, is imminent, in the sense that an emergency exists requiring immediate action, the circumstances presented to the rescuer must be such that a reasonably prudent man, under the same or similar circumstances, would determine that such peril existed."³⁵⁰ The court added that "[t]he issue of whether the rescuer's determination conformed with the reasonably prudent man standard is a question

342. See *supra* text accompanying note 267.

343. BLACK'S LAW DICTIONARY 750 (6th ed. 1990).

344. *Maltman*, 530 P.2d at 259 (emphasis added). See also *In re Estate of Keck*, 856 P.2d 740, 744 (Wash. Ct. App. 1993).

345. See *Provenzo v. Sam*, 244 N.E.2d 26, 28-29 (N.Y. 1968); *Wagner v. International Ry. Co.*, 133 N.E. 437, 438 (N.Y. 1921).

346. See *supra* notes 244-46 and accompanying text.

347. See *supra* notes 244-46 and accompanying text.

348. See *supra* notes 244-46 and accompanying text.

349. See *supra* notes 244-46 and accompanying text.

350. See *supra* text accompanying note 267.

for the jury, under proper instructions.”³⁵¹ It can be conceded that McCoy’s determination conformed with the reasonably prudent man standard. At the time McCoy witnessed the accident any “reasonably prudent person” would have thought the peril to the driver and passenger was imminent. However, at the time McCoy was injured, “any reasonably prudent person” would have considered the emergency over, since the driver and passenger of the Suzuki had already been rescued.³⁵²

The fourth and final element provides that “after determining that imminent peril to the life or limb of a person exists, the rescuer, in effecting the rescue, must be guided by the standard of reasonable care under the circumstances.”³⁵³ The element also provides that “[w]hether there has been conformance with this standard also is a question for the jury, under the proper instructions.”³⁵⁴ The language is clear on its face; it states “*in effecting the rescue*.”³⁵⁵ It does not mean that the person must be reasonable walking back to his car *after* the accident and the rescue occurred, but rather it means *while* the rescue is occurring. In other words, if McCoy were to prevail under this element, he would have to be able to show that he was hit while attempting to rescue the driver and passenger of the Suzuki Samurai from peril. However, since he was returning to his car and not attempting a rescue when he was injured, he will not be able to show that he was injured “*in effecting the rescue*.”³⁵⁶

The Washington Supreme Court seems to avoid the fact that each of the elements requires that the rescuer *be acting within* the state of rescue to invoke the rescue doctrine. In its opinion, the court stated that it would adhere to the holding in *Maltman*, that it would uphold “the requirement that a rescuer show that the defendant proximately caused his injuries, [to remain] with[in the] general principles of liability.”³⁵⁷ This is consistent with the New York courts’ application of liability arising

351. See *supra* text accompanying note 267.

352. See *supra* notes 244-46 and accompanying text.

353. See *supra* text accompanying note 267.

354. See *supra* text accompanying note 267.

355. See *supra* note 267 and accompanying text.

356. (emphasis removed). See *supra* note 246 and accompanying text.

357. See *supra* notes 294-99 and accompanying text.

out of one's negligent acts.³⁵⁸ However, the United States Court of Appeals for the Second Circuit held that there is a point at which the link between the actions of a careless actor and the damages sustained will become "too tenuous – that what is claimed to be consequence is only fortuity."³⁵⁹ McCoy's injuries fit this description. To impose liability upon Suzuki would require the court to have the accident reoccur, having McCoy struck during his rescue of the driver and passenger of the Suzuki. As mentioned *supra*, the policy behind the rescue doctrine is to allow rescuers to recover for injuries that occur *during the rescue* and to shield them from any liability arising from the rescue.³⁶⁰ If the Washington courts allow McCoy to prevail on remand, they will not be adhering to their own decision to uphold the "requirement that a rescuer show the defendant proximately caused his injuries. . . in keeping with general principles of liability."³⁶¹ Allowing McCoy to prevail would require Suzuki to insure against fortuitous claims that fall outside the general principles of liability. Using the words of the United States Court of Appeals, the link between Suzuki's alleged design defect and McCoy's hit-and-run injuries is "too tenuous" and, therefore, Suzuki should not be held liable.³⁶²

Interestingly enough, in discussing the imminency requirement, the Washington Supreme Court stated that "the plaintiff's injury must not be the result of an intervening cause which came into active operation after the negligence of the defendant had ceased."³⁶³ It also reasoned that "[i]f the act itself is not foreseeable—in other words, if the act is an intervening, efficient cause—it will break the causal connection between the defendant's negligence and the plaintiff's injuries."³⁶⁴ Is it fair to ask whether the Suzuki's skidding on ice and spinning out of

358. See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928) (holding "[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension" *Id.* at 100.). See also *Petitions of Kinsman Transit Co.*, 338 F.2d 708, 724 (2d Cir. 1964) (holding "foreseeability of danger is necessary to render conduct negligent").

359. *Kinsman Transit Co.*, 33 F.2d at 725.

360. See *supra* notes 158-62 and accompanying text.

361. *McCoy*, 961 P.2d at 957.

362. *Kinsman Transit Co.*, 33 F.2d at 725.

363. *Maltman*, 530 P.2d. at 259.

364. *Id.* (quoting *Qualls v. Golden Arrow Farms*, 288 P.2d 1090, 1092 (Wash. 1955)).

control was foreseeable? The answer is probably yes. However, add the fact that the *passenger* grabbed the steering wheel attempting to regain control, causing it to fishtail further out of control, and the question becomes whether or not Suzuki can reasonably foresee such an action. The answer is most likely not. The first and second approaches to the finding of proximate cause, discussed *supra*, would find proximate cause not to exist, since both approaches allow for an unforeseeable intervening cause to defeat a finding of proximate cause.³⁶⁵ The court cannot expect Suzuki to insure against the negligent acts of a party so far removed. Furthermore, Suzuki cannot reasonably foresee that the particular driver in this instance, or any driver, would hit McCoy. Even though McCoy took steps to assure that he was noticeable (that is, of course, after the rescue took place), while walking back to his car (holding the lit flare in his roadside hand), he was hit by a negligent driver.³⁶⁶ Suzuki should not have to protect against the negligent driving of an individual.

Additionally consider that the New York Supreme Court, Appellate Division, held that "there is no liability for failure to warn where such risks and dangers are so obvious that they can ordinarily be appreciated by any consumer to the same extent that a formal warning would provide . . . or where they can be recognized simply as a matter of common sense."³⁶⁷ When the rollover defect in the Suzuki Samurai was discovered, it was widely and frequently publicized on the news until the issue subsided. The saturation of the news and marketplace with the fact that Suzukis roll over was more than enough to put the public on notice. It can be argued that the "public warning" became a matter of common sense.

Although there is a societal feeling that rescuers should be compensated for injuries while undertaking a rescue, there comes a point where liability should be cut off. In determining where to draw the line, it is apparent that the courts focus on legal cause, and, more specifically, proximate cause. The determination of whether or not one's acts are closely connected to

365. See *supra* notes 202-03 and accompanying text.

366. See *supra* note 246 and accompanying text.

367. *Carbone v. Alagna*, 658 N.Y.S.2d 48, 50 (2d Dep't 1997) (citing *Bazerman v. Gardall Safe Corp.*, 609 N.Y.S.2d 610 (1st Dep't 1994)).

another's injuries works to protect both the defendant and the plaintiff. This is so because it will work to compensate a plaintiff for any injuries sustained, and to protect a defendant from claims that are "too tenuous."³⁶⁸ This analysis has shown, by way of an application of the four elements required to invoke the rescue doctrine in the State of Washington,³⁶⁹ that a correct determination would work to protect Suzuki by cutting off liability.

VII. Conclusion

*"The court did not err by granting Suzuki's motion for summary judgment."*³⁷⁰

Justice Thompson, 1997

Although the question of proximate cause is typically a question for the jury, as are some of the elements of the rescue doctrine, there are cases where proximate cause is so tenuous that they should not be sent to a jury. Such cases will only work against judicial economy. However, it should be noted that the purpose of this article is not to say that an application of the rescue doctrine to a products liability claim should never occur. It simply stands for the idea that when proximate cause is not established or is "too tenuous,"³⁷¹ the action should not go forward. As mentioned, the policy considerations behind proximate cause are to limit the liability arising from one's negligent conduct.³⁷² In *Codling v. Paglia*,³⁷³ the New York Court of Appeals discussed the importance of the availability of useful, non-defective products.³⁷⁴ In doing so, it mentioned that by imposing the economic burden of financial losses of nonusers upon the manufacturer, the manufacturers will have an incentive "to turn out useful, attractive, but safe products."³⁷⁵ However, the court continued by noting that in return, the purchase price of a

368. *Kinsman Transit Co.*, 338 F.2d at 725.

369. See *supra* text accompanying note 267.

370. *McCoy v. American Suzuki Motor Corp.*, 936 P.2d 31, 36 (Wash. App. Ct. 1997).

371. *Kinsman Transit Co.*, 338 F.2d at 725.

372. See *supra* note 207-10 and accompanying text.

373. 298 N.E.2d 622 (N.Y. 1973).

374. See *id.* at 627.

375. *Id.* at 628.

particular unit will increase, and that it should be acceptable to consumers if they are given the added protection.³⁷⁶ Is this reasonable? Most likely yes, but the courts should not allow claims which are "too tenuous"³⁷⁷ to place a financial burden upon automobile manufacturers and consumers.

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376. *See id.*

377. *Kinsman Transit Co.*, 338 F.2d at 725.

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