PRODUCTS LIABILITY—NEGLIGENCE—MANUFACTURER NOT LIABLE FOR INJURIES RESULTING FROM EMPLOYER'S FORESEEABLE MODIFICATION OF MACHINE'S SAFETY DEVICE—*Robinson v. Reed-Prentice Division of Package Machinery Co.*, 49 N.Y.2d 471, 403 N.E.2d 440, 426 N.Y.S.2d 717 (1980).

For generations, thousands of workers have suffered injuries while operating industrial machinery. Since the advent of products liability, most courts have imposed the costs of these injuries on manufacturers who fail to design machines which are free of defects.[1] Under traditional modes of analysis, whether liability can be imposed is often contingent upon whether the product was in a defective condition at the time it left the manufacturer's hands.[2] A question remains, however, as to the extent of a manufacturer's liability for injuries incurred as a result of a foreseeable modification.[3]

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[1] A majority of state courts have explicitly adopted or generally followed the RESTATEMENT (SECOND) OF TORTS approach which states:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
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> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
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> (2) The rule stated in Subsection (1) applies although
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> (a) the seller has exercised all possible care in the preparation and sale of his product, and
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> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1963-1964). *See, e.g.*, Miller v. Bock Laundry Mach. Co., 551 S.W.2d 775 (Tex. Ct. App.), *rev'd*, 568 S.W.2d 648 (1977); Levea v. G.A. Gray Corp., 17 Wash. App. 214, 562 P.2d 1276 (Ct. App. 1977). *But see* Micallef v. Miehle Co., 39 N.Y.2d 376, 388, 348 N.E.2d 571, 579, 384 N.Y.S.2d 115, 122 (1976).

[2] *Accord*, RESTATEMENT (SECOND) OF TORTS § 402A, Comment g (1963-1964):

> g. *Defective condition*. The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him. The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed. The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained.

*Id.*

[3] *Accord*, RESTATEMENT (SECOND) OF TORTS § 402A, Comment p (1963-1964):

> *Further processing or substantial change*. Thus far the decisions applying the rule

The New York Court of Appeals, in *Robinson v. Reed-Prentice Division of Package Machinery Co.*,[4] held that as a matter of law a manufacturer cannot be held liable for injuries resulting from an employer's modification of a manufacturer's safety device.[5]

As of 1964 plaintiff's employer, Plastic Jewel, had purchased three plastic injection molding machines from defendant manufacturer, Reed-Prentice.[6] Because of its peculiar production needs, Plastic Jewel, upon delivery of the machines, was forced to cut a six by fourteen inch hole in the center of each of the safety gates.[7]

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stated have not gone beyond products which are sold in the condition, or in substantially the same condition, in which they are expected to reach the hands of the ultimate user or consumer. In the absence of decisions providing a clue to the rules which are likely to develop, the Institute has refrained from taking any position as to the possible liability of the seller where the product is expected to, and does, undergo further processing or other substantial change after it leaves his hands and before it reaches those of the ultimate user or consumer.

. . . The question is essentially one of whether the responsibility for discovery and prevention of the dangerous defect is shifted to the intermediate party who is to make the changes. No doubt there will be some situations, and some defects, as to which the responsibility will be shifted, and others in which it will not. The existing decisions as yet throw no light upon the questions, and the Institute therefore expresses neither approval nor disapproval of the seller's strict liability in such a case.

*Id.*

[4] 49 N.Y.2d 471, 403 N.E.2d 440, 426 N.Y.S.2d 717 (1980).

[5] The majority concluded

[t]hat a manufacturer of a product may not be cast in damages, either on a strict products liability or negligence cause of action, where, after the product leaves the possession and control of the manufacturer, there is a subsequent modification which substantially alters the product and is the proximate cause of plaintiff's injuries.

*Id.* at 475, 403 N.E.2d at 441, 426 N.Y.S.2d at 718.

[6] Brief for Plaintiff-Respondent at 9, Robinson v. Reed-Prentice Div. of Package Mach. Co., 49 N.Y.2d 471, 403 N.E.2d 440, 426 N.Y.S.2d 717 (1980) [hereinafter cited as Brief for Plaintiff-Respondent].

[7] 49 N.Y.2d at 477, 403 N.E.2d at 442, 426 N.Y.S.2d at 719. The machines were designed to manufacture plastic beads. Plastic was melted inside a heating chamber and then forced into a molding area where it was molded under 275 tons of pressure into the shape of a bead. The mold consisted of two rectangular platens, one of which remained stationary while the other opened and closed on the melted plastic. After the beads were formed, the moving platen returned to its original position and the operator was able to manually remove the finished product from the molding area. *Id.* at 476, 403 N.E.2d at 441, 426 N.Y.S.2d at 718.

In order to protect the operator of the machine from the molding area, the machines were equipped with acrylic safety gates which covered the molding area while the machine was operating. Only when the molding cycle was completed could the operator open the safety gate and thereby gain access to the platens in order to remove the finished product. *Id.* at 476-77, 403 N.E.2d at 441, 426 N.Y.S.2d at 718-19.

Ninety-nine percent of Plastic Jewel's business, however, was molding plastic beads directly onto a nylon cord, 20 to 200 feet long. Brief for Plaintiff-Respondent at 3. The cord was stored in spools at the back of the machine and fed into the mold area where the beads were

Representatives of Reed-Prentice later visited the employer's plant and observed the apertures in the safety gates. Despite Plastic Jewel's requests, however, Reed-Prentice refused to design a machine which would comport with the employer's production requirements while at the same time maintaining safety mechanisms.[8]

In 1965, after Reed-Prentice's representatives had visited the plant, Plastic Jewel purchased a fourth machine.[9] Upon delivery, the employer cut a hole in the center of the safety gate just as it had done with the other machines.[10] Six and a half years later, plaintiff, Gerald Robinson, was hired by Plastic Jewel to operate the fourth machine. During his first month on the job, seventeen year old Robinson suffered severe injuries when his hand slipped through the hole in the safety gate and was caught between the molds of the machine.[11]

Robinson filed suit against Reed-Prentice, who thereafter impleaded third party defendant, Plastic Jewel. Plaintiff alleged strict liability in that the safety gate was improperly designed for the machine's intended purpose. Plaintiff further alleged negligence in that Reed-Prentice had foreseeable knowledge that the machine would be used in an unreasonably dangerous manner inasmuch as

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formed around it. At the end of each molding cycle, the beads were removed and the cord was reset for the next cycle. In order to mold the beads on a continuous line, Plastic Jewel cut a hole in the safety gate, thus enabling the operator to pull the beads through the opening and reset the cord for the next cycle without cutting the string. 49 N.Y.2d at 477, 403 N.E.2d at 442, 426 N.Y.S.2d at 719. This alteration destroyed the functional utility of the safety gate by "permitt[ing] access into the molding area while the interlocking circuits were completed." *Id.* at 477, 403 N.E.2d at 442, 426 N.Y.S.2d at 719.

Although never addressed in either the majority or dissenting opinions, it can reasonably be presumed from the discussions of the employer's peculiar needs that the guards were generally fit for a bead manufacturer's purposes. *Cf.* Cepeda v. Cumberland Eng'r Co., 76 N.J. 152, 161, 166, 386 A.2d 816, 820, 822 (1978) (guard had to be removed periodically in order to clean machine or dislodge objects).

[8] 49 N.Y.2d at 477-78, 403 N.E.2d at 442, 426 N.Y.S.2d at 719.

[9] Although the majority refers to Plastic Jewel's past use of "two identical machines," *id.* at 477, 403 N.E.2d at 442, 426 N.Y.S.2d at 719, the dissent maintained that the 1965 transaction was the fourth such purchase from Reed-Prentice. *Id.* at 482, 403 N.E.2d at 445, 426 N.Y.S.2d at 722 (Fuchsberg, J., dissenting).

[10] *See id.* at 482, 403 N.E.2d at 445, 426 N.Y.S.2d at 722 (Fuchsberg, J., dissenting). While the dissent relied on the fact that this was the fourth machine purchased and that Reed-Prentice was on notice of the employer's alterations, *id.*, the majority paid it little credence, only mentioning that "[t]he record containe[d] evidence that Reed-Prentice knew, or should have known, the particular safety gate design for the machine made it impossible to manufacture beads on strings." *Id.* at 477, 403 N.E.2d at 442, 426 N.Y.S.2d at 719.

[11] *Id.* at 475-76, 403 N.E.2d at 441, 426 N.Y.S.2d at 718. Before coming to New York, Robinson lived in a small town near Charleston, South Carolina where he had completed only nine years of school and had been working in tobacco fields. Brief for Plaintiff-Respondent at 6.

Reed-Prentice knew that Plastic Jewel was compelled to cut a hole in the safety gate in order to meet its production requirements.[12] The jury returned a verdict in favor of Robinson, assessing forty percent liability against manufacturer Reed-Prentice and sixty percent against Robinson's employer, Plastic Jewel.[13] The appellate division found the verdict excessive and ordered a new trial on the issue of damages unless plaintiff agreed to stipulate to a reduced judgment.[14] Plaintiff consented to a reduction of damages, the jury verdict was amended, and the judgment affirmed.[15] The New York Court of Appeals reversed.

The court, adopting a traditional view, found that the manufacturer was not liable under either a theory of negligence or strict liability where an employer's substantial alteration of the product was the proximate cause of the plaintiff's injuries.[16] Writing for the majority, Chief Judge Cooke discussed a manufacturer's potential liability under a theory of negligence. He explained that although a manufacturer has a duty to use reasonable care in designing a machine which is safe for both its intended use and its reasonably foreseeable unintended use, that duty is not "open-ended." The court stated that a manufacturer need not "trace the product through every link in the chain of distribution to insure that users will not adapt the product to suit their own unique purposes."[17] Foreshadowing its analysis as to strict liability, the majority determined that a manufacturer's duty extends to the design of a product which is safe at the

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[12] The plaintiff also pleaded two other causes of action: (1) breach of an implied warranty of fitness for use; (2) breach of an express warranty. Brief of Defendant-Appellant and Third-Party Plaintiff at 3-4, Reed-Prentice Div. of Package Mach. Co., 49 N.Y.2d 471, 403 N.E.2d 440, 426 N.Y.S.2d 717 (1980). At the close of the trial, the court dismissed the two warranty causes of action, and submitted the case to the jury under theories of negligence and strict liability. *Id.* at 4.

[13] 49 N.Y.2d at 476, 403 N.E.2d at 441, 426 N.Y.S.2d at 718. On March 9, 1978, the jury returned a verdict in favor of Gerald Robinson in the amount of $1,250,000.00. *Id.*

[14] Robinson v. Reed-Prentice Div. of Package Mach. Co., 67 A.D.2d 893, 413 N.Y.S.2d 698 (App. Div. 1979) (mem.), *rev'd*, 49 N.Y.2d 471, 403 N.E.2d 440, 426 N.Y.S.2d 717 (1980).

[15] Plaintiff stipulated to a judgment of $600,000.00. Notice of Motion, Affirmation and Brief in Support of Motion of Defendant-Appellant, Reed-Prentice Div. of Package Mach. Co., For Leave to Appeal at 15-17, 49 N.Y.2d 471, 403 N.E.2d 440, 426 N.Y.S.2d 717 (1980).

[16] The majority reasoned that the manufacturer was not liable where a purchaser deliberately "destroy[ed] the functional utility of the safety gate. Principles of foreseeability [were deemed] . . . inapposite where a third party affirmatively abuse[d] a product by consciously bypassing built-in safety features." 49 N.Y.2d at 480, 403 N.E.2d at 443, 426 N.Y.S.2d at 721. *See also* note 5 *supra*.

[17] 49 N.Y.2d at 480-81, 403 N.E.2d at 444, 426 N.Y.S.2d at 721.

time of sale. Consequently, substantial alterations of a product, regardless of foreseeability, were characterized as "not within the ambit of a manufacturer's responsibility."[18] The court posited that expansion of a manufacturer's duty to include an employer's substantial alteration of a product "would be tantamount to imposing absolute liability on manufacturers for all product-related injuries."[19]

Thereafter the court considered the manufacturer's proposed liability under a theory of strict liability. Chief Judge Cooke rejected plaintiff's contention that the "machine was improperly designed for its intended purpose."[20] Defining a defectively designed product as one which "presents an unreasonable risk of harm, notwithstanding that it was meticulously made according to . . . specifications," the court declared that the defect must exist at the time the product leaves the manufacturer's hand.[21] According to this definition, the machine in question was not defectively designed. The court noted that at the time the machine left the manufacturer's hands it was equipped with a safety gate which was in compliance with New York State safety regulations. In addition, the court reasoned that but for the employer's alteration the safety gate "would have rendered . . . [the] accident an impossibility."[22] Thus the majority perceived that plaintiff was not predicating his strict liability claim on the defective design of the product, but rather on the fact that it was foreseeable due to the defendant's actual knowledge that Plastic Jewel would destroy the functional utility of the safety mechanism. The court concluded that, regardless of foreseeability, a manufacturer cannot be held strictly liable for harm resulting from an employer's willful modification of a product.[23]

The dissent, written by Judge Fuchsberg, argued that liability grounded in negligence could reasonably be circumscribed within the

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[18] *Id.* at 481, 403 N.E.2d at 444, 426 N.Y.S.2d at 721.

[19] *Id. See generally* Henderson, *Judicial Review of Manufacturer's Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973).

[20] *See* 49 N.Y.2d at 479, 403 N.E.2d at 443, 426 N.Y.S.2d at 720.

[21] *Id.* The court was cognizant of the fact that no product can be 100 percent accident proof. Therefore, the court invoked the traditional test which "involves a balancing of the likelihood of harm against the burden of taking precaution against that harm." *Id.* (citations omitted).

[22] *Id.* at 480, 403 N.E.2d at 443, 426 N.Y.S.2d at 721.

[23] The court acknowledged that a worthy plaintiff may be denied recovery due to "the exclusivity of workers' compensation" but nonetheless refused to give the courts "license to thrust upon a third-party manufacturer a duty to insure that its product will not be abused or that its safety features will be callously altered by a purchaser." *Id.* at 481, 403 N.E.2d at 444, 426 N.Y.S.2d at 721-22 (citation omitted).

ambit of foreseeability, especially where, as in *Robinson*, "the manufacturer not only could have foreseen the misuse of its product but actually knew of its occurrence."[24] Judge Fuchsberg asserted that there existed two possible theories of negligence under which the jury could have found Reed-Prentice liable: negligent entrustment[25] and negligent breach of a duty to warn.[26] Negligent entrustment was described as "plac[ing] in another's hand an instrumentality capable of doing serious harm if misused while knowing or having strong reason to believe that it will be misused to the detriment of others."[27] By emphasizing the particular facts of the case, the dissent had no difficulty in finding that Reed-Prentice negligently entrusted the fourth machine to Plastic Jewel. According to the dissent, the facts were adequate to put Reed-Prentice on notice of the misuse of the previously sold machines.[28] Based on the evidence, Reed-Prentice knew or should have known that in their altered state the machines created a potential danger. Moreover, it was clearly foreseeable that the fourth machine would also be modified thereby

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[24] *Id.* at 486, 403 N.E.2d at 448, 426 N.Y.S.2d at 725 (Fuchsberg, J., dissenting). The dissent recognized the majority's fear that a manufacturer's duty cannot be so broad as to obligate a manufacturer to design a product which cannot be abused. However, Judge Fuchsberg was of the opinion that the facts would limit any such broad expansion of duty. Liability in this case could be based on the foreseeability and actual knowledge of the misuse on the part of the defendant.

[25] The *Restatement* gives the most succinct explanation of negligent entrustment.

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

RESTATEMENT (SECOND) OF TORTS § 390 (1963-1964).

[26] *See* note 31 *infra*.

[27] 49 N.Y.2d at 484, 403 N.E.2d at 446, 426 N.Y.S.2d at 723 (Fuchsberg, J., dissenting). The dissent employed the classic example of negligent entrustment wherein a defendant gives a loaded gun to a young child who then negligently injures a third party. *Id. See* RESTATEMENT (SECOND) OF TORTS § 302B, Comment e E, Illustration II (1966); 2 HARPER & JAMES, THE LAW OF TORTS § 28.2, at 1539 (1956). *E.g.*, Hogan v. Comac Sales, 245 App. Div. 216, 281 N.Y.S. 207 (1935), *aff'd*, 271 N.Y. 562, 2 N.E.2d 695 (1936) (automobile owner liable for endangering security of others by permitting automobile to be driven by one with limited control of vehicle).

[28] Reed-Prentice had visited Plastic Jewel's plant on several occasions and had observed that at least two of its machines had been altered. There was also evidence that Plastic Jewel asked Reed-Prentice to change the design of the machine so as to comport with its production needs. In addition, expert testimony suggested two alternative modifications, both of which would have prevented plaintiff's injuries and would have cost under $500.00. 49 N.Y.2d at 482-83, 403 N.E.2d at 445, 426 N.Y.S.2d at 722 (Fuchsberg, J., dissenting).

creating the same foreseeable threat of injury and thus satisfying the requirements of negligent entrustment.[29]

The dissent also characterized Reed-Prentice as "negligent in failing to warn foreseeable users . . . of the danger posed by the aperture in the safety gate."[30] Citing the *Restatement (Second) of Torts*, the dissent compared Reed-Prentice's duty to warn Robinson with the duty imposed on lenders of chattels to provide expected users with information necessary to apprise them of the potential danger of those chattels.[31] Since Reed-Prentice was aware of both the danger posed by the previously modified machines and the continued necessity for cutting a hole in the safety gate, it was illogical not to impose upon Reed-Prentice a duty to warn ultimate users of the machine.[32] Furthermore, the dissent maintained that Reed-Prentice could not assume that the potential danger would be appreciated by inexperienced employees;[33] nor could Reed-Prentice rely on Plastic

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[29] *Id.* at 484, 403 N.E.2d at 446, 426 N.Y.S.2d at 723 (Fuchsberg, J., dissenting).

[30] *Id.* at 484, 403 N.E.2d at 446, 426 N.Y.S.2d at 724 (Fuchsberg, J., dissenting).

A manufacturer may be held liable for failure to exercise reasonable care in warning users of a dangerous condition. In Dougherty v. Hooker Chem. Corp., 540 F.2d 174 (3d Cir. 1976), the court determined that:

> [t]he care to be exercised in discharging the duty to warn is therefore measured by the dangerous potentialities of the commodity as well as the foreseeable use to which it might be put . . . [so] that the ultimate user might be sufficiently appraised of the possible consequences.

*Id.* at 179.

[31] 49 N.Y.2d at 484, 403 N.E.2d at 446, 426 N.Y.S.2d at 724 (Fuchsberg, J., dissenting). Specifically, Judge Fuchsberg quoted the following passage from RESTATEMENT (SECOND) OF TORTS § 388, Comment b (1963-1964):

> [O]ne who supplies a chattel for another to use for any purpose is subject to liability for physical harm caused by his failure to exercise reasonable care to give to those whom he may expect to use the chattel any information as to the character and condition of the chattel which he possesses, and which he should recognize as necessary to enable them to realize the danger of using it.

*Id.*

Giving the purchaser the information or warnings necessary for the safe use of a product is not always sufficient to relieve a manufacturer of liability. "The question remains whether [the] method gives reasonable assurance that the information will reach those whose safety depends upon their having it." RESTATEMENT (SECOND) OF TORTS § 388, Comment n (1963-1964). *See also* Shell Oil Co. v. Gutirrez, 581 P.2d 271, 278-80 (Ct. App. 1978) (scope of supplier's duty to warn determined in light of foreseeable risk of injury); First Nat'l Bank v. Nor-am Agriculture Prods., 88 N.M. 74, 87, 537 P.2d 682, 695 (Ct. App. 1975) (public policy requires that manufacturer not avoid liability by asserting lack of direct contact with user).

[32] 49 N.Y.2d at 485, 403 N.E.2d at 447, 426 N.Y.S.2d at 724 (Fuchsberg, J., dissenting).

[33] *Id.* It is reasonable to conclude that an ultimate user, who like Gerald Robinson was unappreciative of risk, probably thought "that the mere presence of a safety gate," provided adequate protection. *Id. See, e.g.*, Cepeda v. Cumberland Eng'r Co., 76 N.J. 152, 185-89, 386 A.2d 816, 832-34 (1978), *overruled in part on other grounds*, Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979).

Jewel to convey adequate warnings to its employees inasmuch as it was obvious from Reed-Prentice's knowledge of Plastic Jewel's manufacturing procedures that Plastic Jewel chose "expediency over safety."[34] As Judge Fuchsberg concluded, "it would have been pure pollyanna to presume that the necessary safety information would filter down to those who had to work on the machine."[35]

The dissenting opinion left open the question whether strict liability was a proper basis for recovery under the circumstances presented in *Robinson*. In a footnote, however, the dissent suggested that strict liability might well be imposed where a manufacturer had actual notice that a product was being used in a particular fashion and yet failed to take appropriate safety precautions.[36]

Although negligence is a frequently litigated theory of products liability there are varying interpretations of a manufacturer's duty.[37] The *Robinson* decision presents opposing viewpoints of a manufacturer's liability for the negligent distribution of industrial machinery.

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[34] 49 N.Y.2d at 485, 403 N.E.2d at 447, 426 N.Y.S.2d at 724 (Fuchsberg, J., dissenting).

[35] *Id.*

[36] *Id.* at 483 n.1, 403 N.E.2d at 445 n.1, 426 N.Y.S.2d at 722 n.1 (Fuchsberg, J., dissenting). Implicit in the dissent was criticism of the majority's failure "to carry the promise of Codling and Micallef to its logical fruition." *Id.* at 481-82, 403 N.E.2d at 445, 426 N.Y.S.2d at 722 (Fuchsberg, J., dissenting).

In Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 39 N.Y.S.2d 376 (1976), the New York Court of Appeals departed from its former patent danger rule. Chief Judge Cooke, writing for the court, reasoned that even though a danger is patent, as opposed to latent, the manufacturer stands in a superior position for purposes of recognizing and curing defects in a product. *Id.* at 386, 348 N.E.2d at 577, 39 N.Y.S.2d at 121.

[37] The classic statement of the necessity of finding a breach of duty in order to establish negligence was made by Justice Cardozo. Speaking for the majority in Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928), he stated that there is no negligence unless there is a legal duty. Furthermore, this duty must be one which is owed to the plaintiff. *Id.* at 341-42, 162 N.E. at 99-100. In this landmark decision, Justice Andrews, dissenting, defined negligence "as an act or omission which unreasonably does or may affect the rights of others, or which unreasonably fails to protect oneself from the dangers resulting from such acts." *Id.* at 348, 162 N.E. at 102 (Andrews, J., dissenting).

The concept of duty was further expounded upon by Judge Learned Hand who outlined three variables for determining duty: (1) probability (2) gravity of resulting injury (3) burden of adequate precautions. Thus, liability would depend on these factors. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

Prosser's definition of duty is the one most widely adhered to by the judiciary. The court in Shell Oil Co. v. Gutierrez, 19 Ariz. App. 426, 581 P.2d 271 (Ct. App. 1978) "define[d] duty as a relationship under which one party has an obligation to conform to a standard of conduct in order to avoid injuring another." 581 P.2d at 278 (quoting W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 53 (4th ed. 1971)). A Michigan court, in Farwell v. Keaton, 396 Mich. 281, 240 N.W.2d 217 (1979), stated that "'duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.'" 240 N.W.2d at 219 (quoting W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 53 (4th ed. 1971)).

The majority mistakenly concluded that a manufacturer's duty was not tempered by principles of foreseeability "where a third party affirmatively abuse[d] a product." As illustrated by the dissent, however, a manufacturer does have a duty to guard against negligent entrustment and to provide adequate warnings, regardless of the effect of a third party's intervention upon a plaintiff's recovery under a theory of design negligence.[38] Moreover, it is questionable whether the majority was correct in its assertion that the machine was "marketed in a condition safe for the purposes for which it . . . could reasonably [have been] intended"[39] since Reed-Prentice had actual knowledge of Plastic Jewel's practice and since a reasonable manufacturer under the circumstances would have foreseen that Plastic Jewel would modify the machine in order to suit its production needs.[40]

It is relatively clear as a result of the decision in *Robinson* that the New York courts would rule in favor of a manufacturer in a products liability action involving a product which is dangerous by virtue of a third party's misuse. Perhaps the more interesting question is whether other jurisdictions would impose liability under these circumstances, and if so, under what theory. The Michigan Court of Appeals, when faced with an analogous situation held that a defendant may be liable under a theory of negligent entrustment. In *Fredericks v. General Motors Corp.*,[41] an employee of a Michigan company injured his hand while operating an unguarded power press. Plaintiff brought suit against the owner of a dieset which had been supplied to plaintiff's employer for use on the press machine.[42] The court held that the allegation that defendant supplied plaintiff's employer with diesets for use in an unguarded press machine presented "a perfect example of . . . negligent entrustment."[43] The majority,

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The precise nature of the duty varies with the cause of action alleged. In an action for design negligence, for example, the question is whether the product was in a safe condition at the time it left the manufacturer's hands. Where a failure to warn is alleged, the question becomes whether the manufacturer has provided an adequate warning. With regard to negligent entrustment the question is whether the manufacturer supplied a product knowing that it would be used in a dangerous manner.

[38] *Compare* 49 N.Y.2d at 480-81, 403 N.E.2d at 444, 426 N.Y.S.2d at 721-22 *with id.* at 483-86, 403 N.E.2d at 445-47, 426 N.Y.S.2d at 723-25.

It should be noted that the dissent, although it did not specifically address the issue, was not necessarily disagreeing with the majority with respect to the role of foreseeability insofar as design negligence is concerned.

[39] *Id.* at 481, 403 N.E.2d at 444, 426 N.Y.S.2d at 722.

[40] *See* note 28 *supra* and accompanying text.

[41] 48 Mich. App. 580, 211 N.W.2d 44 (Ct. App. 1973).

[42] *Id.* at 582, 211 N.W.2d at 45.

[43] *Id.* at 584, 211 N.W.2d at 45.

The advantage of seeking recovery under the doctrine of negligent entrustment is that a

couching the issue in terms of whether the manufacturer had a duty to prescribe the method in which its product could be used, reasoned that the defendant could " 'not assume that human beings will conduct themselves properly if the facts which are known . . . should make him realize they are unlikely to do so.' "[44]

The New Jersey courts have also confronted similar factual issues involving the problems of foreseeability and safety precautions. Plaintiffs in both *Bexiga v. Havir Manufacturing Corp.*[45] and *Finnegan v. Havir Manufacturing Corp.*[46] maintained a cause of action for design negligence against Havir for injuries sustained when their hands were caught in punch presses marketed without safety guards. In each instance the New Jersey supreme court held that the machines were unreasonably dangerous.[47] More importantly, the cases established the proposition that where a manufacturer expects a purchaser to install necessary safety devices, the manufacturer has breached its duty of care by creating an unreasonable risk of harm.[48] "The public interest in assuring that safety devices are installed demands more from the manufacturer than to permit him to leave such a critical phase of his manufacturing process to the haphazard conduct of the ultimate purchaser."[49] The New Jersey court reasoned that since it was foreseeable that an employer would not install safety devices, the manufacturer failed to meet the appropriate standard of care.[50] Although *Bexiga* and *Finnegan* involved machines marketed without safety guards, rather than machines on which the guards were subsequently altered, both illustrate the role that foreseeability plays in a negligence analysis. Where a manufacturer has actual knowledge that its

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plaintiff is not required to prove that the product was defective; as noted by the court in *Fredricks*, the crucial factor is the defendant's knowledge. *Id.* at 585, 211 N.W.2d at 45-46.

[44] *Id.* at 584, 211 N.W.2d at 46 (quoting RESTATEMENT (SECOND) OF TORTS § 390, Comment b (1963-1964)).

[45] 60 N.J. 402, 290 A.2d 281 (1972).

[46] 60 N.J. 413, 290 A.2d 286 (1972).

[47] Bexiga, 60 N.J. at 409, 290 A.2d at 284; Finnegan, 60 N.J. at 421, 290 A.2d at 291.

[48] *See* Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 167-68, 406 A.2d 140, 148 (1979).

[49] Bexiga, 60 N.J. at 410, 290 A.2d at 285; Finnegan, 60 N.J. at 423, 290 A.2d at 292.

[50] How far must a manufacturer foresee? As was explained in *Robinson*, a manufacturer of screwdrivers could readily foresee that its product would be used to pry open the lid of a can. Thus, the design of the screwdriver should compensate for foreseeable uses. On the other hand, if a purchaser were to insert a screwdriver into an electric socket, for example, the manufacturer would not be expected to foresee the use and provide protection against electrocution. *See* 49 N.Y.2d at 480, 403 N.E.2d at 444, 426 N.Y.S.2d at 721. In general, a supplier should evaluate the environment in which its product will be used, as well as foreseeable ways its product will be misused. Rheingold, *The Expanding Liability of the Product Supplier: A Primer*, 2 HOFSTRA L. REV. 521, 538 (1974).

machine will be used in an unreasonably unsafe manner and fails to take alternative safety precautions liability should attach.

Defendants in negligence actions typically assert that their acts or omissions were not the proximate cause of the plaintiff's injuries. The majority in *Robinson* held that there was no negligence in light of Plastic Jewel's intentional intervening act. The *Restatement (Second) of Torts* indicates that intentional intervening acts are usually superceding forces which absolve the defendant.[51] What the majority failed to consider is that this rule is qualified in a situation where the negligent actor "should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort."[52] Foreseeability is the key factor in determining whether an intervening force was the proximate cause of an injury.[53] A foreseeable intervening cause is one which a reasonably prudent manufacturer would anticipate under the circumstances. The rationale for imposing liability is that "[f]oreseeable intervening forces are within the scope of the original risk and hence [part] of the defendant's negligence."[54] As stated by the New Jersey supreme court in *Cepeda v. Cumberland Engineering Co.*,[55] "manufacturers cannot escape liability on grounds of misuse or abnormal use if the actual use proximate to the injury was objectively foreseeable." A manufacturer like Reed-Prentice, who knowingly designs a product that does not meet the production requirements of its customer has created a risk which includes the foreseeable intervention of the purchaser's misuse and hence should be liable for injuries proximately caused by the misuse.[56]

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[51] RESTATEMENT (SECOND) OF TORTS § 448 (1966).

[52] *Id.*

[53] The courts have not thoroughly analyzed the interaction between foreseeability and proximate cause. *See* Wade, *A Conspectus of Manufacturer's Liability for Products*, 10 IND. L. REV. 755, 759-60 (1977).

[54] W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 44, at 273 (4th ed. 1971).

[55] 76 N.J. 152, 386 A.2d 816 (1978), *overruled in part on other grounds*, Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979).

In *Cepeda*, a safety device that would have prevented injuries was included in the design of a pelletizing machine. Before plaintiff arrived at work on the day of his accident, the safety guard was removed by the employer in order to clean the machine. Plaintiff sought recovery under a theory that the machine was defectively designed from a safety standpoint in that it was necessary to remove the guard frequently in the normal course of operations. It could therefore have been expected that on occasion the guard would not be replaced before resumption of operations, whether through inadvertence or otherwise. The defendant manufacturer, it was contended, should have equipped the machine with an interlock mechanism which would have automatically prevented the operation of the machine unless the guard was in place. 76 N.J. at 161, 386 A.2d at 820.

tion of the purchaser's misuse and hence should be liable for injuries proximately caused by the misuse.[56]

The *Robinson* case is also representative of the extent of New York's committment to a narrow interpretation of the doctrine of strict liability. It appears, in light of the majority's opinion, that New York's strict liability test for product defectiveness is unduly restrictive. Cognizant of the uncompromising attitude regarding the doctrine of strict liability, the *Robinson* dissent reverted to a conventional analysis of negligence theory in order to illustrate Reed-Prentice's culpability.[57]

The New York Court of Appeals could have found Reed-Prentice strictly liable by finding that the machine was defective when it left the defendant's control.[58] In testing for defectiveness, one must analyze the design alternatives available to a manufacturer at the time of the product's distribution.[59] Expert testimony revealed that alternative designs were available, at a minimal cost, at the time Reed-Prentice sold the machine to Plastic Jewel.[60] As discussed above, Reed-Prentice was aware of the employer's production requirements and the necessity for cutting a hole in the safety gate in order for the employer to meet its demands.[61] Despite options as to possible safety devices and a working knowledge of Plastic Jewel's operations, Reed-Prentice delivered a machine that was improperly

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[56] 76 N.J. at 177, 386 A.2d at 828.

Essentially, the majority in *Robinson* held that misuse of the plastic injection molding machine was the intervening, superceding cause of the accident; hence, it was the employer's modification of the safety gate which was the proximate cause of Robinson's injuries. For further discussion of this area, see Coleman v. Verson Allsteel Press Co., 64 Ill. App. 3d 974, 382 N.E.2d 36 (App. Ct. 1978) and Temple v. Wean United States, 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977).

The dissent in *Robinson* found that the intervening cause was foreseeable. Thus, the manufacturer breached its duty of care by not guarding against probable misuse. This negligence was the proximate cause of plaintiff's injury. 49 N.Y.2d at 482-83, 403 N.E.2d at 445-46, 426 N.Y.S.2d at 722-23 (Fuchsberg, J., dissenting). *See also* Rheingold, *supra* note 50, at 540.

[57] *See* notes 24-35 *supra* and accompanying text.

[58] "The issue is whether the product was in that condition when it left the defendant, or was so potentially in that condition that he is responsible for it." Wade, *supra* note 53, at 758. Defect is a broad concept, and the question should be whether the product was unreasonably unsafe. This requires a balancing of the cost of accident prevention against the risk. *See* Micallef v. Miehle Co., 39 N.Y.2d 376, 386, 348 N.E.2d 571, 577-78, 384 N.Y.S.2d 115, 131 (1976).

[59] *See* Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 172, 406 A.2d 140, 151 (1979).

[60] 49 N.Y.2d at 482-83, 403 N.E.2d at 445, 426 N.Y.S.2d at 722 (Fuchsberg, J., dissenting). *See also* note 28 *supra*.

[61] *See* text accompanying notes 5-7 *supra*.

designed, that is, one not reasonably safe for Plastic Jewel's intended purpose.[62]

Of final concern is the analysis of third party intervention and strict liability. Faced with an employer's intervention, the majority in *Robinson* refused to hold Reed-Prentice liable, regardless of foreseeability, on the ground that the product was not defectively designed when it left the control of the manufacturer.[63] In the past, many jurisdictions were inclined to defeat strict liability claims when confronted with a third party's intervening act.[64] The doctrine, as set forth in Section 402A of the *Restatement*, does not specifically provide for the proximate cause issue raised by a third party's substantial alteration of a product. The courts have disagreed as to the relationship between foreseeability and proximate cause.[65] As with negligence, the question in cases involving strict liability should be whether the third party's use or misuse was foreseeable. The better view, and the one adopted by the California Supreme Court in *Thompson v. Package Machinery Co.*,[66] is that a manufacturer has a duty to guard against foreseeable danger. Plaintiff in *Thompson* sustained injuries when a molding press machine she was operating

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[62] The California courts stress that a product is defectively designed under a strict liability theory if it does not function as could be expected when put to its intended or reasonably foreseeable uses. In Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443 (1978), the court offered two alternative tests for determining design defectiveness.

> (1) if the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, [or]
>
> (2) if plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design.

*Id.* at 432, 143 Cal. Rptr. at 237-38, 573 P.2d at 455.

[63] *Id.* at 479-80, 403 N.E.2d at 443-44, 426 N.Y.S.2d at 720-21.

[64] Wade, *supra* note 53, at 760. *See, e.g.*, Hanlon v. Cyril Bath Co., 541 F.2d 343 (3d Cir. 1975) (manufacturer not liable where an employer changed original starting device of machine) (Pennsylvania law); Keet v. Service Mach. Co., 472 F.2d 138 (6th Cir. 1972) (defect which develops when employer removes part of a punch press machine not attributable to manufacturer) (Ohio law); Hardy v. Hull Corp., 446 F.2d 34 (9th Cir. 1971) (manufacturer not liable where employer's subsequent modifications of mold press rendered machine dangerous since product was not sold in defective condition) (Arizona law).

[65] Wade, *supra* note 53, at 760. In strict liability cases, the courts have expanded the concept of intended use "to something like normal use, then perhaps to something like expected use, and then . . . to include a foreseeable use." *Id.*

The doctrine of strict liability encountered further difficulty in that there was considerable uncertainty as to what constituted an improperly designed product. As a result, many plaintiffs resorted to a theory of design negligence in order to avoid the burden of proving that the defect existed at the time the product left the manufacturer's hands. Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 42 TENN. L. REV. 11, 80-83 (1974).

[66] 22 Cal. App.3d 188, 99 Cal. Rptr. 281 (Ct. App. 1971).

closed on her hand. Defendant manufacturer sought to escape liability on the ground that the plaintiff had intentionally bypassed the machine's safety mechanisms in order to speed up the production process.[67] Despite the alleged misuse of the machine, the court held that a manufacturer may be held strictly liable "where the alteration of the machine or its misuse by the customer was reasonably foreseeable."[68] The majority in *Robinson* was overly concerned with the possibility that to hold a manufacturer strictly liable where a purchaser intentionally destroyed a safety device would be tantamount to making the manufacturer an insurer of all product related injuries. As evidenced by *Thompson*, however, liability under these circumstances can be appropriately limited by foreseeability.

In furtherance of public interest, it is normally the supplier who is said to stand in a superior position with regard to its products and who should be required to recognize and cure defects—including the likelihood of foreseeably dangerous modifications.[69] Imposing legal responsibility upon the manufacturer for foreseeable third party alterations would reduce the possibility of industrial accidents such as Gerald Robinson's. A manufacturer's conduct in knowingly placing or leaving a product on the market in a condition not suited for its intended purpose should result in liability.[70] Unfortunately, the court of appeals in *Robinson* erred in choosing to overlook the key factor of foreseeability. Consequently, New York remains notably "a step behind the rest" in the development of products liability.[71]

*Donna J. Baboulis*

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[67] *Id.* at 190-91, 99 Cal. Rptr. at 282-83. Defendant further contended that the machine, if dangerous at all, was so only by virtue of the employee's alteration or misuse of the safety features. *Id.*

[68] *Id.* at 196, 99 Cal. Rptr. at 286. For further discussion of the relationship between the doctrine of strict liability and the concept of foreseeability, see Polelle, *The Foreseeability Concept and Strict Products Liability: The Odd Couple of Tort Law*, 8 RUT.-CAM. L. REV. 101 (1976).

[69] *See* Micallef v. Miehle Co., 39 N.Y.2d 376, 385, 387, 348 N.E.2d 571, 577-78, 384 N.Y.S.2d 115, 121-22 (1976).

[70] In Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 406 A.2d 140 (1979), the New Jersey supreme court, in discussing the modern view, noted that "the product must be designed safely with an eye not simply toward use in the jobs for which it was built but for each and every use which is reasonably foreseeable." *Id.* at 190, 406 A.2d at 160 (Clifford, J., dissenting). *See also* Noel, *supra* note 57, at 64. ("courts are inclined to . . . leave the foreseeability of the intervening careless handling to the jury, particularly where a serious danger arises if there is any improper handling of the product.").

[71] *See generally* Twerski, *From* Codling *to* Bolm *to* Velez: *Triptych of Confusion*, 2 HOFSTRA L. REV. 489 (1974).