400.00

Strict Product Liability

Introduction

Strict product liability is imposed without regard to traditional questions of privity, fault, or the user's ordinary negligence. It was developed in response to the inadequacy of negligence and warranty remedies. Product liability cases based on negligence, warranties, or other contractually-related theories of liability are not covered by these instructions.

The Origins of Strict Liability

The evolution of strict product liability began with the imposition of liability on sellers of food when a special implied warranty theory was developed. *Race v. Krum*, 222 N.Y. 410, 118 N.E. 853 (1918); *Van Bracklin v. Fonda*, 12 Johns. 468, 7 Am. Dec. 339 (N.Y. 1815). Although a privity requirement persisted for a time, even in food cases, that requirement was eventually abolished and the right to recover was extended to the injured consumer. *Tiffin v. Great Atl. & Pac. Tea Co.*, 18 Ill.2d 48, 162 N.E.2d 406 (1959); *Patargias v. Coca--Cola Bottling Co*., 332 Ill.App. 117, 74 N.E.2d 162 (1st Dist. 1947); *Welter v. Bowman Dairy Co.*, 318 Ill.App. 305, 47 N.E.2d 739 (1st Dist. 1943); *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913).

The special warranty in the case of food was gradually expanded to intimate items such as hair dye and soap. *See e.g.*, *Graham v. Bottenfield's, Inc.*, 176 Kan. 68, 269 P.2d 413 (1954). In 1960, the landmark decision of *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), further extended the special warranty theory to all products. The *Henningsen* decision, although not employing the term "strict liability in tort," resolved the privity dilemma and articulated the rationale upon which the total transition from special warranty to strict liability in tort would ultimately be made:

> The burden of losses consequent upon use of defective articles is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur . . . .
>
> We see no rational doctrinal basis for differentiating between a fly in a bottle of beverage and a defective automobile. The unwholesome beverage may bring illness to one person, the defective car, with its great potentiality for harm to the driver, occupants and others, demands even less adherence to the narrow barrier of privity . . . .
>
> Accordingly, we hold that under modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser. Absence of agency between the manufacturer and the dealer who makes the ultimate sale is immaterial. *Henningsen v. Bloomfield Motors, Inc.*, *supra,* 32 N.J. at 379-384, 161 A.2d at 81-84.

After Chief Justice Traynor of the California Supreme Court authored the decision adopting strict liability in tort in *Greenman v. Yuba Power Prods., Inc.*, 59 Cal.2d 57, 377 P.2d 897, 27 Cal.Rptr. 697 (1963), the American Law Institute adopted Section 402A of the Restatement (Second) of Torts in 1964 which embraced the theory of strict liability in tort for defective products. The Illinois Supreme Court's decision in *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965), soon followed. The *Suvada* decision is the touchstone of strict liability in Illinois, and, although refinements have been supplied by subsequent decisions, the basic element of the theory enunciated therein remains unchanged today:

> Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not as assumed by agreement but imposed by law . . . and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products ... made clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by [its] defective products unless those rules also serve the purposes for which such liability is imposed. *Suvada v. White Motor Co.*, 32 Ill.2d at 621, 210 N.E.2d at 187 (citing *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d at 63, 377 P.2d at 901, 27 Cal.Rptr. at 701).

Strict liability in tort for defective products is not a doctrine of absolute liability which entitles a person injured while using a product to recover from any member of the chain of production or distribution; it does not make the manufacturer, distributor or retailer an insurer of the consumer's safety. *Coney v. J.L.G. Indus.*, Inc., 97 Ill.2d 104, 111, 454 N.E.2d 197, 73 Ill.Dec. 337 (1983); *Artis v. Fibre Metal Prods.*, 115 Ill.App.3d 228, 450 N.E.2d 756, 71 Ill.Dec. 68 (1st Dist. 1983). “Fault,” in the context of strict product liability, is the act of placing an unreasonably dangerous product in the stream of commerce.

Parties Subject to Strict Product Liability

At common law, in order to be subject to strict product liability, a defendant must be engaged in the business of placing such products in the stream of commerce. *Torres v. Wilden Pump & Eng'g Co.*, 740 F.Supp. 1370 (1990); *Timm v. Indian Springs Recreation Ass'n*, 187 Ill.App.3d 508, 543 N.E.2d 538, 135 Ill.Dec. 155 (4th Dist. 1989) (used golf cart, isolated sale; no liability). Any person in the chain of distribution of a product, including manufacturers, suppliers, distributors, wholesalers, retailers, and commercial lessors, could be held strictly liable for any defect. *Cruz v. Midland--Ross Corp.*, 813 F.Supp. 628 (1993); *Crowe v. Pub. Bldg. Comm'n*, 74 Ill.2d 10, 383 N.E.2d 951, 23 Ill.Dec. 80 (1978).

Legislation has modified the common law strict liability of non-manufacturers in the chain of distribution. The Distributor's Act, 735 ILCS 5/2-621, permits dismissal of strict liability claims against non-manufacturers not at the source of the chain of distribution in a product liability action. The dismissal must be based on an affidavit filed by the defendant that correctly identifies the manufacturer of the product. The court, however, cannot enter a dismissal if the plaintiff shows that the defendant filing the affidavit has exercised some significant control over

the design or manufacture of the product, or has provided instructions or warnings to the manufacturer relative to the alleged defect in the product, 735 ILCS 5/2-621(c) (1), or that the defendant had actual knowledge of the alleged defect, 735 ILCS 5/2-621(c) (2), or that the defendant created the alleged defect in the product, 735 ILCS 5/2-621(c) (3). Moreover, the plaintiff can move to vacate any order of dismissal if the statute of limitations has run against the manufacturer, 735 ILCS 5/2-621(b) (1), or if the manufacturer is not subject to personal jurisdiction in Illinois, 735 ILCS 5/2-621(b) (3).

Although strict product liability generally extends to sellers of all products, strict liability may not extend to sellers of used products under certain circumstances. Peterson v. Lou Bachrodt Chevrolet Co., 61 Ill.2d 17, 329 N.E.2d 785 (1975) (seller of used car not strictly liable); *Timm v. Indian Springs Recreation Ass'n*, *supra*.

ELEMENTS OF PLAINTIFF'S CASE

Plaintiff's Prima Facie Case

To recover in strict product liability, a plaintiff must plead and prove that the injury or damage resulted from a condition of the product manufactured or sold by the defendant, that the condition was an unreasonably dangerous one, and that the condition existed at the time the product left the manufacturer's control. (*Coney*, *supra,* 97 Ill.2d at 111; *Hunt v. Blasius*, 74 Ill.2d 203, 210 (1978), *Suvada*, *supra,* 32 Ill.2d at 623; *Restatement Second of Torts, Section 402A*). The determination of whether a product is defective, and therefore unreasonably dangerous, is ordinarily a question of fact for the jury (*see Renfro v. Allied Indus. Equip. Corp.*, 155 Ill.App.3d 140, 155 (1987)), and, in making its determination, the credibility of the witnesses and the conflicts in the evidence are to be resolved by the jury. *Korando v. Uniroyal Goodrich Tire Co.*, 159 Ill.2d 335 (1994).

Although the defendant's role in commerce will seldom be an issue, the plaintiff may also be required to prove that the defendant was in the business of selling the product and not solely an installer. *Restatement (Second) of Torts* §402A (1965).

The plaintiff may create an inference that the product was unreasonably dangerous by direct or circumstantial evidence that there was no abnormal use of the product, that there was no reasonable secondary cause of the injury, and that the product failed to perform in the manner reasonably to be expected in light of its nature and intended function. *Tweedy v. Wright Ford Sales*, 64 Ill. 2d. 570 (1976); *Doyle v. White Metal Rolling & Stamping Corp.*, 249 Ill.App.3d 370, 618 N.E.2d 909, 188 Ill.Dec. 339 (1st Dist. 1993); *see* IPI 400.01.01 and 400.02.01.

Meaning of "Unreasonably Dangerous"

See Comment to IPI 400.06 and 400.06A for a discussion of the case law defining "unreasonably dangerous."

Types of Defects

Products can be defective and unreasonably dangerous in any of three ways. First, a particular item may contain a manufacturing flaw. Second, the product may be defectively

designed. Third, the product may have an informational defect (inadequate warnings, directions, or instructions affixed to or accompanying the product).

Manufacturing Defects

A particular unit of a product may be defective because of an imperfection resulting from some miscarriage during the manufacturing process. *See*, *e.g.*, *Tweedy v. Wright Ford Sales*, Inc., 64 Ill.2d 570, 357 N.E.2d 449, 2 Ill.Dec. 282 (1976) (automobile with defective brakes); *McKasson v. Zimmer Mfg. Co.*, 12 Ill.App.3d 429, 299 N.E.2d 38 (2d Dist. 1973) (imperfections in surgical rod); *Kappatos v. Gray Co.*, 124 Ill.App.2d 317, 260 N.E.2d 443 (1st Dist. 1970) (defective plastic spray painting hose).

Design Defects

A product may be defective because its design renders it unreasonably dangerous.

There are two tests that may be used to establish a design defect. The first, which goes back to the original *Restatement (Second) of Torts* §402A, is known as the "consumer expectation" test. Under this test, the danger must go beyond that which would be contemplated by the ordinary consumer with ordinary knowledge common to the community as to its characteristics. *Restatement (Second) of Torts* §402A Comment (I) (1965); *Riordan v. Int'l Armament Corp.*, 132 Ill.App.3d 642, 477 N.E.2d 1293, 87 Ill.Dec. 765 (1st Dist. 1985).

In addition to the consumer expectation test, the plaintiff may choose to prove a strict product liability case under the "risk-utility" test. Under this test, a product is unreasonably dangerous, subjecting a manufacturer to liability, if the design is a cause of the injuries and if the benefits of the challenged design are outweighed by the design's inherent risk of danger. *Lamkin v. Towner*, 138 Ill.2d 510, 563 N.E.2d 449, 150 Ill.Dec. 562 (1990); *Palmer v. Avco Distrib. Corp.*, 82 Ill.2d 211, 412 N.E.2d 959, 45 Ill.Dec. 377 (1980). These principles were fully discussed by the Supreme Court in *Hansen v. Baxter Healthcare Corp.*, 198 Ill.2d 420 (2002); *Calles v. Scripto-Tokai*, 224 Ill.2d 247 (2007); and *Mikolajczyk v. Ford Motor Co.*, 231 Ill.2d. 516, 327 Ill. Dec. 1, 901 N.E.2d 329 (2008).

Inadequate Warnings and Instructions

A product also may be unreasonably dangerous because of a failure to adequately warn of a danger or a failure to adequately instruct on the proper use of the product. *Hammond v. N. Am. Asbestos Corp.*, 97 Ill.2d 195, 454 N.E.2d 210, 73 Ill.Dec. 350 (1983). However, when a danger is obvious and generally appreciated, there is no duty to warn of that danger. *McColgan v. Envtl. Control Sys., Inc.*, 212 Ill.App.3d 696, 571 N.E.2d 815, 156 Ill.Dec. 835 (1st Dist. 1991); *Smith v. Am. Motors Sales Corp.*, 215 Ill.App.3d 951, 576 N.E.2d 146, 159 Ill.Dec. 477 (1st Dist. 1991).

A defendant has no duty to warn of risks of which it neither knew nor should have known at the time the product was manufactured. *Byrne v. SCM Corp.*, 182 Ill.App.3d 523, 538 N.E.2d 796, 131 Ill.Dec. 421 (4th Dist. 1989) (manufacturer of epoxy paint); *Salvi v. Montgomery Ward & Co.*, 140 Ill.App.3d 896, 489 N.E.2d 394, 95 Ill.Dec. 173 (1st Dist. 1986) (air gun manufacturer had no duty to warn of dangers of which it neither knew nor should have known);

Elgin Airport Inn, Inc. v. Commonwealth Edison Co., 89 Ill.2d 138, 432 N.E.2d 259, 59 Ill.Dec. 675 (1982) (supplier of electricity not strictly liable for failure to warn when it neither knew nor should have known about abnormal current); Woodill v. Parke Davis & Co., 79 Ill.2d 26, 402 N.E.2d 194, 37 Ill.Dec. 304 (1980) (pharmaceutical manufacturer can only be held liable for its failure to warn of those risks it knew or should have known at the time of manufacture).

Foreseeability

Both the person using the product and the use to which it is being put must be reasonably foreseeable. In *Winnett v. Winnett*, 57 Ill.2d 7, 310 N.E.2d 1 (1974), the Illinois Supreme Court emphasized the foreseeability requirement:

> In our judgment the liability of a manufacturer properly encompasses only those individuals to whom injury from a defective product may reasonably be foreseen and only those situations where the product is being used for the purpose for which it was intended or for which it is reasonably foreseeable that it may be used. Any other approach to the problem results in making the manufacturer and those in the chain of product distribution virtual insurers of the product, a position rejected by this Court in *Suvada*.

Id. at 11, 310 N.E.2d at 4; *see Woodill v. Parke Davis & Co.*, *supra*. Recognizing that "in retrospect almost nothing is entirely unforeseeable," *Mieher v. Brown*, 54 Ill.2d 539, 544, 301 N.E.2d 307, 309 (1973), the Supreme Court in *Winnett v. Winnett* and thereafter has interpreted foreseeability to mean "that which it is *objectively reasonable* to expect, not merely what might conceivably occur." *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 117 Ill.2d 507, 513 N.E.2d 387, 111 Ill.Dec. 944 (1987). Accordingly, a bystander may recover if injured by another's use of a defective product, so long as the presence of the bystander is reasonably foreseeable. *Schulz v. Rockwell Mfg. Co.*, 108 Ill.App.3d 113, 117, 438 N.E.2d 1230, 1232, 63 Ill.Dec. 867, 869 (2d Dist. 1982).

Damages

The plaintiff in a strict liability action may recover compensatory damages. Recovery in strict liability always has included damage to the product itself. *Suvada v. White Motor Co.*, *supra*. However, under the so-called "*Moorman*" doctrine (based on *Moorman Mfg. Co. v. Nat'l Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982)), a plaintiff cannot recover in tort for solely economic losses. In *Moorman*, the court defined economic loss as:

> damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits--without any claim of personal injury or damage to other property *** . . . as well as the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold. 91 Ill.2d at 82, 435 N.E.2d at 449, 61 Ill.Dec. at 752.

The economic loss doctrine as stated in *Moorman* applies to negligence and strict liability cases. Accordingly, a homeowner cannot recover in tort for solely economic losses resulting from a homebuilder's negligence. *2314 Lincoln Park W. Condo. Ass'n v. Mann, Gin, Ebel & Frazier, Ltd.*, 136 Ill.2d 302, 555 N.E.2d 346, 144 Ill.Dec. 227 (1990); *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill.2d 150, 449 N.E.2d 125, 70 Ill.Dec. 251 (1983) (condominium

owners cannot recover economic losses from developer); *Redarowicz v. Ohlendorf*, 92 Ill.2d 171, 441 N.E.2d 324, 65 Ill.Dec. 411 (1982).

The *Moorman* doctrine applies even in the absence of an alternative remedy in contract. *Anderson Elec., Inc. v. Ledbetter Erection Corp.*, 115 Ill.2d 146, 503 N.E.2d 246, 104 Ill.Dec. 689 (1986).

AFFIRMATIVE DEFENSES

Plaintiff's Contributory Fault--Assumption of the Risk

One of the refinements to the *Suvada* decision was made in *Coney v. J.L.G. Indus.*, Inc., 97 Ill.2d 104, 454 N.E.2d 197, 73 Ill.Dec. 337 (1983). Since it was "demanded by today's society" and in order to produce "a more just and socially desirable distribution of loss" in negligence actions, Illinois adopted the concept of the "pure form" of comparative negligence in *Alvis v. Ribar*, 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill.Dec. 23 (1981). Adopting the same reasoning which supported its decision in *Alvis*, and after determining that the vast majority of jurisdictions have found comparative fault theories to be applicable to strict liability cases, the Supreme Court in *Coney* adopted comparative fault principles in strict product liability actions. The Court specifically found that the application of comparative fault principles in a product liability action would not frustrate the Court's fundamental reasons for adopting strict product liability as set out in *Suvada*. *Coney v. J.L.G. Indus., Inc.*, *supra* at 116.

However, plaintiff's fault is a defense only if it constitutes assumption of the risk. Plaintiff's ordinary contributory negligence is not a defense to strict product liability when that negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. *Coney v. J.L.G. Indus., Inc.*, *supra* at 118-119. A consumer's unobservant, inattentive, ignorant, or awkward failure to discover or guard against a defect, as opposed to assuming a known risk, is not a defense to a strict product liability claim. *Id*.

The affirmative defense of assumption of the risk requires the defendant to prove that the plaintiff knew of the specific product defect, understood and appreciated the risk of injury from that defect, and nevertheless used the product in disregard of the known danger. *Williams v. Brown Mfg. Co.*, 45 Ill.2d 418, 426-427 (1970) A user may assume a product is safe; however, if the user finds a defect and proceeds to use the product, the user assumes the risk of injury or property damage. The test of whether the plaintiff has assumed the risk is subjective; the conduct and knowledge of the plaintiff is at issue. The jury considers the plaintiff's age, experience, knowledge, understanding, and the obviousness of the defect in considering assumption of the risk. *Williams v. Brown Mfg. Co.*, *supra* at 430-431; *see Hanlon v. Airco Indus. Gases*, 219 Ill.App.3d 777, 579 N.E.2d 1136, 162 Ill.Dec. 322 (1st Dist. 1991); *Calderon v. Echo, Inc.*, 244 Ill.App.3d 1085, 1091,614 N.E.2d 140 (1st Dist. 1993).

Comparative fault principles apply to the plaintiff's assumption of the risk. *Coney v. J.L.G. Indus., Inc.*, *supra*. If plaintiff's fault in assuming the risk is 50% or less of the total fault that proximately caused the injury or damage, plaintiff's damages are reduced by that percentage. But under legislation enacted in 1986, the plaintiff is barred from recovery if the plaintiff's assumption of the risk is "more than 50% of the proximate cause of the injury or damage for which recovery is sought." 735 ILCS 5/2-1116; *Gratzle v. Sears, Roebuck & Co.*, 245 Ill.App.3d

292, 613 N.E.2d 802, 184 Ill.Dec. 485 (2d Dist. 1993).

Misuse--Foreseeable and Unforeseeable

"Misuse" has been defined as the use of a product for a purpose neither intended nor objectively foreseeable by a reasonably prudent manufacturer. *E.g., King v. Am. Food Equip. Co.*, 160 Ill.App.3d 898, 513 N.E.2d 958, 965, 112 Ill.Dec. 349, 356 (1st Dist. 1987). *Coney v. J.L.G. Industries, Inc.*, 97 Ill. 2d 104, 119 (1983), in a phrase that has provided confusion, stated: "[h]owever, the defenses of misuse and assumption of the risk will no longer bar recovery."

Prior to *Coney*, an *unforeseeable* misuse of the product by the plaintiff was not recognized as an affirmative defense. The issue of unforeseeable misuse usually "arise[s] in connection with [the] plaintiff's proof of an unreasonably dangerous condition or in proximate causation, or both." *Williams v. Brown Mfg. Co.*, 45 Ill.2d 418, 425, 261 N.E.2d 305 (1970) ("plaintiffs who 'misuse' a product--use it for a purpose neither intended nor 'foreseeable' (objectively reasonable) by the defendant--may be barred from recovery").

In *Whetstine v. Gates Rubber Co.*, 895 F.2d 388, 393 (7th Cir. 1990), the Seventh Circuit noted:

> Under Illinois law, misuse of a product is not an affirmative defense; rather, absence of misuse is part of plaintiff's proof of an unreasonably dangerous condition or of proximate cause. *Schwartz v. American Honda Motor Co., Inc.,* 710 F.2d 378, 381 (7th Cir. 1983), citing *Ill. State Trust Co. v. Walker Mfg. Co.,* 73 Ill.App.3d 585, 589, 29 Ill.Dec. 513, 516, 392 N.E.2d 70, 73 (1979).

In *Coney v. J.L.G. Indus., Inc.*, *supra,* the Supreme Court, referring to its *Williams* decision, said that "misuse" was a defense, and went on to hold that "misuse" would no longer bar recovery but rather would be incorporated into the concept of comparative fault. Importantly, the decision did not define "misuse," but its reference to the *Williams* decision leads to the conclusion that the court was referring to *unforeseeable* misuse.

In contrast to *unforeseeable* misuse, *foreseeable* misuse has never been a defense to a strict product liability action at all, since such a misuse, being foreseeable, does not affect the defendant's responsibility. The manufacturer of a product has always had the duty to furnish a product which is safe for *foreseeable* misuses, as well as for its intended uses. Spurgeon v. Julius Blum, Inc., 816 F. Supp. 1317 (C.D. Ill.1993).

Thus, the appellate court cases decided since *Coney* appear to conclude that the former rule--that *unforeseeable* misuse goes to the liability issue--has been replaced by the rule that *unforeseeable* misuse constitutes comparative fault, a damage-reducing factor. Several appellate court decisions have noted that misuse--defined as using the product for a purpose which is *neither* intended *nor foreseeable*--is an affirmative defense which operates to reduce the plaintiff's damages. *Arellano v. SGL Abrasives*, 246 Ill.App.3d 1002, 1010, 617 N.E.2d 130, 136, 186 Ill.Dec. 891, 897 (1st Dist. 1993) (finding of "misuse" vacated); *Varilek v. Mitchell Eng'g*

Co., 200 Ill.App.3d 649, 666-667, 558 N.E.2d 365, 377, 146 Ill.Dec. 402, 414 (1st Dist. 1990) (JNOV should have been entered on finding of "misuse"); *Suich v. H & B Printing Mach., Inc.*, 185 Ill.App.3d 863, 873-874, 541 N.E.2d 1206, 1212-13, 133 Ill.Dec. 768, 774-75 (1st Dist. 1989) (trial court properly refused to allow misuse as a defense); *Wheeler v. Sunbelt Tool Co., Inc.*, 181 Ill.App.3d 1088, 537 N.E.2d 1332, 1343, 130 Ill.Dec. 863, 874 (4th Dist. 1989).

Wheeler held:

> The issue of misuse traditionally arises in Illinois in conjunction with plaintiff's duty to prove an unreasonably defective product or proximate causation of the injury. See *Williams v. Brown Mfg. Co.*, 45 Ill.2d 418, 261 N.E.2d 305 (1970). Prior to *Coney,* misuse was a complete defense to a strict liability action (*Coney,* 97 Ill.2d at 119, 73 Ill.Dec. at 343, 454 N.E.2d at 203-04), although it was not technically considered an affirmative defense. *Illinois State Trust Co. v. Walker Mfg. Co.*, 73 Ill.App.3d 585, 29 Ill.Dec. 513, 392 N.E.2d 70 (1979). However, some courts recognized misuse as an affirmative defense under certain circumstances. *Genteman v. Saunders Archery Co.*, 42 Ill.App.3d 294, 355 N.E.2d 647 (1976).

Dicta in *Lamkin v. Towner*, 138 Ill.2d 510, 531, 563 N.E.2d 449, 458, 150 Ill.Dec. 562, 571 (1990) commented that "neither a retailer nor a manufacturer can be held strictly liable for injuries resulting from the misuse of its product."

Introduction revised December 2007.

400.01 Strict Product Liability--Issues

[1]. The plaintiff claims that he was injured [while using] [as a result of the use of] the [product name, e.g. the hammer]. Plaintiff claims that there existed in the [product name] at the time it left the control of the defendant a condition which made the [product name] unreasonably dangerous in one or more of the following respects:

[*Set forth in simple form without undue emphasis or repetition those allegations of the complaint as to the conditions which are claimed made the product unreasonably dangerous and which have not been withdrawn or ruled out by the court and are supported by the evidence*.]

[2]. The plaintiff further claims that one or more of the foregoing was a proximate cause of his injuries.

[3]. The defendant denies

[that the [product] was ever in its control];

[that any of the claimed conditions existed in the [product name] at the time it was in its control];

[that any claimed condition of the [product name] made it unreasonably dangerous];

[that any claimed condition of the [product name] was a proximate cause of plaintiff's injuries]; [and]

[that plaintiff was injured to the extent claimed.]

[4]. [The defendant also claims that the plaintiff assumed the risk of injury in one or more of the following respects:
(Set forth in simple form without undue emphasis or repetition the affirmative allegations in the answer which have not been withdrawn or ruled out by the court and are supported by the evidence.)]

[5]. [The defendant also claims that one or more of the foregoing was a proximate cause of the plaintiff's injury.]

[6]. [Plaintiff denies that he assumed the risk of injury and also denies that any assumption of the risk on his part was a proximate cause of his injuries.]

Instruction, Notes and Comment revised December 2007.

Notes on Use

This instruction must be modified to fit the allegations of the pleadings. The bracketed materials cover various contingencies that may result from the pleadings. The pertinent phrases in the brackets should be used as they apply to the particular case. Whenever required, variations consistent with the pleadings and proof should be used.

In a case where the product is not "in use" at the time of the occurrence, the word "by" may be substituted for the bracketed material on use in paragraph [1].

In the event there is an issue as to whether the defendant was in the business of supplying the particular product involved, the instruction must be modified by adding that particular element to the specific issues included in the instruction.

Fill in the blanks with the name of the product. In some cases, the product may be a component part.

In a wrongful death or survival action, substitute "decedent" (or "decedent's") or decedent's name in place of "plaintiff" (or "plaintiff's"), "his," "her," or "its" whenever appropriate.

Comment

An issues instruction must meet the standards of *Signa v. Alluri*, 351 Ill.App. 11, 113 N.E.2d 475 (1st Dist. 1953), that the issues made by the pleadings be concisely stated without characterization and without undue emphasis.

The elements necessary to state a cause of action in strict product liability are set forth in *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965). The plaintiff must prove that his injury and damage proximately resulted from a condition of the product, that the condition made the product unreasonably dangerous, and that the condition existed at the time the product left the defendant's control.

The term "condition" used in *Suvada* is employed in these instructions although some of the cases use the word "defect" instead of "condition." *Winnett v. Winnett*, 57 Ill.2d 7, 310 N.E.2d 1 (1974); *Wright v. Massey--Harris, Inc.*, 68 Ill.App.2d 70, 215 N.E.2d 465 (5th Dist. 1966); *Haley v. Merit Chevrolet*, 67 Ill.App.2d 19, 214 N.E.2d 347 (1st Dist. 1966). *Restatement (Second) of Torts* §402A (1965) speaks in terms of a "defective condition." The phrase "unreasonably dangerous" in the *Suvada* case is used in this instruction because it is conversational and free from any connotation of traditional concepts of fault that might arise from the use of the word "defect."

The phrase "unreasonably dangerous" has its origins in §402A of the *Restatement (Second) of Torts* (1965). Since the Illinois Supreme Court adopted the phrase in *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965), most Illinois reviewing courts have used that phrase. It is defined in IPI 400.06.

Dean Wade has suggested in Strict Tort Liability of Manufacturers, 19 S.W. L.J. 5, 15 (1965), that "the test of imposing strict liability is whether the product is unreasonably dangerous, to use the words of the Restatement. Somewhat preferable is the expression 'not reasonably safe.'" The Illinois Supreme Court in *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill.2d 339, 343, 247 N.E.2d 401, 403 (1969), quoted from Wade's article but did not adopt his suggestion. In *Rios v. Niagara Mach. & Tool Works*, 59 Ill.2d 79, 83, 319 N.E.2d 232, 235 (1974), the Court indicated that the terms "unreasonably dangerous" and "not reasonably safe" are interchangeable. However, the *Restatement*, and *Suvada* and all its progeny, furnish persuasive authority that the jury should be instructed that it is the "unreasonably dangerous" condition of the product which leads to liability. *Calles v. Scripto-Tokai* Corp., 224 Ill.2d 247, 250, 256, 259 (2007) again affirmed that the basis of strict product liability in Illinois is whether the product is "unreasonably dangerous."

400.01.01 Strict Product Liability--Issues--Non-Specific Defect

[1]. [Under Count __,] the plaintiff claims that he was injured [while using] [as a result of the use of] the [product name] and that there existed in the product at the time it left the control of the defendant a condition which made it unreasonably dangerous because

(a) [describe the occurrence, e.g., "In running off the road] the [product name] did not perform in the manner reasonably to be expected in light of its nature and intended function,

(b) he was using the [product] in a normal manner, and

(c) there was no other reasonable cause of the product's failure to perform.

[2]. The plaintiff further claims that the unreasonably dangerous condition of the [product] was a proximate cause of his injuries.

[3]. The defendant denies

[that the [product] was ever in its control;]

[that the [product] was in an unreasonably dangerous condition at the time it left the defendant's control;]

[that the [product] failed to perform in the manner reasonably to be expected in light of its nature and intended function;]

[that the plaintiff was using the [product] in a normal manner;]

[that there was no other reasonable cause of the product's failure to perform;]

[that any unreasonably dangerous condition of the [product] was a proximate cause of the plaintiff's injuries], and

[that the plaintiff was injured to the extent claimed.]

[4]. [The defendant claims that the plaintiff assumed the risk of injury in one or more of the following respects:
(*Set forth in simple form without undue emphasis or repetition the affirmative allegations in the answer which have not been withdrawn or ruled out by the court and are supported by the evidence.*)]

[5]. [The defendant also claims that one or more of the foregoing was a proximate cause of the plaintiff's injury.]

[6]. [Plaintiff denies that he assumed the risk of injury and also denies that any assumption of risk on his part was a proximate cause of his injuries.]

Instruction and Notes revised December 2007.

Notes on Use

IPI 400.01.01 (issues) and IPI 400.02.01 (burden of proof) should be given when the plaintiff does not allege a specific defect in the product but rather seeks to create the inference that the product was defective by direct or circumstantial evidence that the product failed to perform in the manner reasonably to be expected in light of its nature and intended function. Under such circumstances, plaintiff must also prove that there was no abnormal use of the product and that there was no secondary cause of the product's failure to perform properly. *Tweedy v. Wright Ford Sales*, 64 Ill.2d 570, 574, 357 N.E.2d 449, 2 Ill.Dec. 282 (1976). The failure to instruct the jury about the plaintiff's burden to prove the absence of abnormal use and the absence of secondary causes has been held to be error. *Doyle v. White Metal Rolling & Stamping Corp.*, 249 Ill.App.3d 370, 378-379, 618 N.E.2d 909, 188 Ill.Dec. 339 (1st Dist. 1993).

See also the Notes on Use to IPI 400.01.

400.02 Strict Product Liability--Burden of Proof

The plaintiff has the burden of proving each of the following propositions [as to any one of the conditions claimed by the plaintiff]:

First, that the condition claimed by the plaintiff as stated to you in these instructions existed in the [product];

Second, that the condition made the [product] unreasonably dangerous;

Third, that the condition existed at the time the [product] left the control of the defendant;

Fourth, that the plaintiff was injured;

Fifth, that the condition of the [product] was a proximate cause of plaintiff's injuries.

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff. But if, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved, then your verdict should be for the defendant.

Instruction, Notes and Comment revised December 2007.

Notes on Use

This instruction is designed to be used with IPI 400.01.

See Notes on Use to IPI 400.01. The bracketed material in the introductory paragraph must be used when plaintiff claims, and there is evidence tending to show, that more than one condition rendered the product unreasonably dangerous.

IPI 21.01 (Meaning of Burden of Proof) should be given with this instruction.

In a wrongful death or survival action, substitute “decedent” (or “decedent's”) or decedent's name in place of “plaintiff” (or “plaintiff's”), “his,” “her,” or “its” whenever appropriate.

Comment

See Comment to IPI 400.01.

400.02.01 Strict Product Liability--Burden of Proof--Non-Specific Defect

[Under Count __], The plaintiff has the burden of proving each of the following propositions:

First, that there existed in the [product] a condition which made the [product] unreasonably dangerous because

(a) [describe the occurrence, e.g., "In running off the road"] the [product] failed to perform in the manner reasonably to be expected in light of its nature and intended function,

(b) he was using the [product] in a normal manner, and

(c) there was no other reasonable cause of the product's failure to perform.

Second, that the condition existed at the time the [product] left the control of the defendant;

Third, that the plaintiff was injured; and

Fourth, that the unreasonably dangerous condition of the [product] was a proximate cause of the plaintiff's injuries.

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff. But if, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved, then your verdict should be for the defendant.

Instruction and Notes revised December 2007.

Notes on Use

Use with IPI 400.01.01 and IPI 21.01.

B400.02.01 Strict Product Liability--Burden of Proof--Assumption of Risk

The plaintiff has the burden of proving each of the following propositions [as to any one of the conditions claimed by the plaintiff]:

First, that the condition claimed by the plaintiff as stated to you in these instructions existed in the [product];

Second, that the condition made the [product] unreasonably dangerous;

Third, that the condition existed at the time the [product] left the control of the defendant;

Fourth, that the plaintiff was injured;

Fifth, that the condition of the [product] was a proximate cause of plaintiff's injuries.

If you find from your consideration of all the evidence that any one of these propositions has not been proved, then your verdict should be for the defendant. But if, on the other hand, you find from your consideration of all the evidence that each of these propositions has been proved, then you must consider the defendant's claim that the plaintiff assumed the risk of injury.

As to that claim, the defendant has the burden of proving each of the following propositions:

A: That the plaintiff had actual knowledge of the condition which the plaintiff claims made the [product] unreasonably dangerous;

B: That the plaintiff understood and appreciated the risk of injury from that condition and [proceeded] [continued] to use the [product];

C: That the condition known to plaintiff was a proximate cause of the plaintiff's claimed [injury] [damage].

[However, the plaintiff's inattentive or ignorant failure to discover or guard against the unreasonably dangerous condition of the [product] does not constitute assumption of the risk.]

If you find from your consideration of all the evidence that the plaintiff has proved all the propositions required of the plaintiff and that the defendant has not proved all of the propositions required of the defendant, then your verdict should be for the plaintiff and the plaintiff's damages will not be reduced.

If you find from your consideration of all the evidence that the defendant has proved all of the propositions required of the defendant, and if you find that the plaintiff's fault in assuming the risk was more than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your verdict should be for the defendant.

If you find from your consideration of all the evidence that the plaintiff has proved all the propositions required of the plaintiff and that the defendant has proved all of the propositions required of the defendant, and if you find that the plaintiff's fault in assuming the risk was 50% or less of the total proximate cause of the [injury] [damage] for which recovery is sought, then your verdict should be for the plaintiff and the plaintiff's damages will be reduced by the percentage of the plaintiff's fault in assuming the risk.

If you find that the plaintiff's [injury] [damage] was proximately caused by an unreasonably dangerous condition of the product and if you also find that the plaintiff assumed the risk of his injury, you will determine the plaintiff's proportion or percentage of the total fault by comparing the extent to which the plaintiff's assumption of the risk and the conduct of [other tortfeasors on the verdict form] and the unreasonably dangerous condition of the [product] each proximately contributed to the plaintiff's [injury] [damage]. If you determine the plaintiff's percentage of the total fault was 50% or less, you will write that percentage on the appropriate line on your verdict form.

Instruction, Notes and Comment revised December 2007.

Notes on Use

This should be used with IPI 400.01 and IPI 21.01.

If there is no issue of assumption of risk, IPI 400.02 should be used instead of this instruction.

If the case involves an affirmative defense (other than assumption of risk), this instruction (as well as IPI 400.01) should be modified as appropriate to include that defense.

In a wrongful death or survival action, substitute "decedent" or decedent's name in place of "plaintiff" whenever appropriate.

The bracketed portion of the last paragraph should be used if there is evidence of other tortious conduct which contributed to the plaintiff's injury that would be relevant to findings pursuant to 735 ILCS 5/2-1117.

The bracketed paragraph following paragraph C should be used when there is evidence of the plaintiff's negligent failure to discover the defect and the court determines that the paragraph will assist the jury in its determination of this issue.

Comment

In *Gratzle v. Sears, Roebuck & Co.*, 245 Ill.App.3d 292, 613 N.E.2d 802, 184 Ill.Dec. 485 (2d Dist. 1993), the court held that §2-1116 of the Code of Civil Procedure (735 ILCS 5/2-1116) is applicable to assumption of the risk in a case based on strict product liability, and therefore the jury must be instructed in accordance with §2-1107.1 (735 ILCS 5/2-1107.1) that the defendant shall be found not liable if the plaintiff's contributory fault (which includes assumption of the risk) exceeds 50% of the total fault proximately causing plaintiff's injury.

B400.03. Strict Product Liability--Assumption of Risk--Damage Reduction

If you find that the plaintiff's injury was proximately caused by an unreasonably dangerous condition of the [product], and if you also find that the plaintiff assumed the risk of his injury, and if you further find that the plaintiff's fault in assuming the risk was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, you must then determine the amount of damages to be awarded by you [under Count _] as follows:

First, determine the total amount of damages to which the plaintiff would be entitled under the court's instructions if the plaintiff had not assumed the risk;

Second, determine what portion or percentage is attributable solely to the plaintiff's fault in assuming the risk, considering the extent to which the plaintiff's assumption of risk, [the conduct of other tortfeasors on the verdict form] and the unreasonably dangerous condition of the [product] each proximately contributed to the plaintiff's [injury] [damage];

Third, reduce the total amount of the plaintiff's damages by the proportion or percentage of plaintiff's assumption of the risk.

The resulting amount, after making such reduction, will be the amount of your verdict [under Count _].

Instruction, Notes and Comment revised December 2007.

Notes on Use

This instruction together with IPI B400.02.01 should be given in all cases where assumption of the risk of the plaintiff is an issue.

The bracketed portion of paragraph "Second" should be used if there is evidence of other tortious conduct which contributed to the plaintiff's injury that would be relevant to findings pursuant to 735 ILCS 5/2-1117.

In a wrongful death or survival action, substitute "decedent" (or "decedent's") or decedent's name in place of "plaintiff" (or "plaintiff's"), "his," "her," or "its" whenever appropriate.

Comment

In *Gratzle v. Sears, Roebuck & Co.*, 245 Ill.App.3d 292, 613 N.E.2d 802, 184 Ill.Dec. 485 (2d Dist. 1993), the court held that §2-1116 of the Code of Civil Procedure (735 ILCS 5/2-1116) is applicable to assumption of the risk in a case based on strict product liability.

400.04 Strict Product Liability–Proximate Cause–Definition

When I use the expression "proximate cause," I mean a cause that, in the natural or ordinary course of events, produced the plaintiff's injury. [It need not be the only cause, nor the last or nearest cause. It is sufficient if it combines with another cause resulting in the injury.]

Instruction and Notes on Use revised September 2015.

Notes on Use

This instruction in its entirety should be used when there is evidence of a concurring or contributing cause to the injury or death. In cases where there is no evidence that the conduct of any person other than a single defendant was a concurring or contributing cause, the short version without the bracketed material may be used.

Comment

The unreasonably dangerous condition must be a proximate cause of the plaintiff's injury or damage. *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965); Restatement (Second) of Torts §402A (1965). On proximate cause, *see* Comment to IPI 15.01.

400.05 Strict Product Liability--Assumption of Risk--Factors To Be Considered

The committee recommends that no instruction be given on the evidentiary factors to be considered in determining whether the plaintiff has assumed the risk.

Instruction and Comment revised December 2007.

Comment

The test to be applied in determining the question of whether a plaintiff had the requisite knowledge of the danger is fundamentally a subjective test. It is the knowledge, understanding and appreciation of the particular plaintiff which is in issue and not that of the "reasonable man."

In considering the propositions of whether the particular plaintiff knew of the condition, understood and appreciated the risk of injury, and proceeded to encounter the danger, the jury may consider evidence in addition to the plaintiff's own testimony as to his state of mind. The fact finder is not compelled to accept as true the statements of the plaintiff regarding his state of mind, but may consider all of the facts established by the evidence, including "the factors of the [plaintiff's] age, experience, knowledge and understanding, as well as the obviousness of the defect and the danger it poses." *Sweeney v. Max A.R. Matthews & Co.*, 46 Ill.2d 64, 264 N.E.2d 170 (1970); *Williams v. Brown Mfg. Co.*, 45 Ill.2d 418, 431, 261 N.E.2d 305, 312 (1970).

However, an instruction which states that the law does not require the jury to rely upon the plaintiff's statements but may consider other factors should not be given because it unduly emphasizes certain evidence and is argumentative. Such an instruction would unnecessarily emphasize evidence relating to the user's age, experience, knowledge and understanding, as opposed to the plaintiff's testimony concerning his subjective state of mind.

While the user's age, experience, knowledge and understanding are relevant facts for the jury to consider, the subject is properly left to argument and to other instructions: IPI 3.04 (former IPI 1.04) instructs the jury as to the effect of circumstantial evidence; IPI 1.01 (former IPI 2.01) instructs the jury on the standards to be used in assessing credibility, advises the jurors that they are the triers of the facts, and advises them that they are to use common sense in evaluating what they see and hear during trial.

400.06 Strict Product Liability—Definition Of "Unreasonably Dangerous"

When I use the expression "unreasonably dangerous" in these instructions, I mean unsafe when put to a use that is reasonably foreseeable considering the nature and function of the [product].

Instruction, Notes and Comment revised December 2007.

Notes on Use

In *Lamkin v. Towner*, 138 Ill.2d 510 (1990), the Supreme Court recognized an alternative test for plaintiff to prove a strict product liability test: the "risk-utility" test. The plaintiff has the option to prove the case under either the "consumer expectation" or the "risk-utility" test. *Lamkin v. Towner*, *supra* at 529; *Hansen v. Baxter Healthcare Corp.*, 309 Ill.App.3d 869, 885, *aff'd* 198 Ill.2d 420 (2002); *Calles v. Scripto-Tokai* Corp., 224 Ill.2d 247 (2007); *Mikolajczyk v. Ford Motor Co.*, 374 Ill.App.3d 646 (1st Dist. 2007), *rev'd & remanded*, 231 Ill.2d. 516, 327 Ill. Dec. 1, 901 N.E.2d 329, 2008 Ill. LEXIS 1424 (2008). In *Hansen*, *Mikolajczyk*, *and Carrillo v. Ford Motor Co.*, 325 Ill.App.3d 955 (1st Dist. 2001), the plaintiff opted to have the jury instructed using this instruction, what is commonly labeled the "consumer expectation" test. The instructions were approved in *Hansen*, *Mikolajczyk*, and *Carrillo*. An issue before the Supreme Court in *Mikolajczyk* was whether this instruction should be used in a strict liability design defect case.

Comment

The expression "unreasonably dangerous" first found acceptance in Illinois in *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965). The Court noted that its decision coincided with the views expressed in *Restatement (Second) of Torts* §402A. The phrase "unreasonably dangerous" has found common, though not universal, acceptance in subsequent decisions. *Winnett v. Winnett*, 57 Ill.2d 7, 310 N.E.2d 1 (1974); *Williams v. Brown Mfg. Co.*, 45 Ill.2d 418, 261 N.E.2d 305 (1970); *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill.2d 339, 247 N.E.2d 401 (1969); *Fanning v. LeMay*, 38 Ill.2d 209, 230 N.E.2d 182 (1967). Although arguments have been advanced that the phrase "not reasonably safe" is preferable to the term "unreasonably dangerous," the latter term has been employed in these instructions for the reasons discussed in the Comment to IPI 400.01.

The phrase "unreasonably dangerous condition" is used in these instructions instead of the words "defect" or "defective condition" because the phrase is more conversational and is less likely to suggest traditional concepts of fault to the jurors.

The clearest expression of the concepts involved in these terms appears in *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill.2d 339, 342, 247 N.E.2d 401, 403 (1969):

> Although the definitions of the term 'defect' in the context of products liability law use varying language, all of them rest upon the common premise that those products are defective which are dangerous because they fail to perform in the manner reasonably to be expected in light of their nature and intended function.

See also Hepler v. Ford Motor Co., 27 Ill.App.3d 508, 517, 327 N.E.2d 101, 108 (5th Dist. 1975).

The correlation between "unreasonably dangerous" and "unsafe" was recognized in *Dunham v.*

Vaughan & Bushnell Mfg. Co., 42 Ill.2d 339, 247 N.E.2d 401 (1969) when the Court approved Dean Prosser's statement that a product is defective "if it is not safe for such a use that can be expected to be made of it." *Id.* at 343, 247 N.E.2d at 403. "Unsafe" has been used in this instruction to express the concepts of "dangerous" and "defective" used in the *Dunham* definition.

This instruction omits the word "intended" from the *Dunham* definition as a modifier of the product's function. It is clear that the test of the product's function is objective in nature and is not controlled by, or limited to, uses which the manufacturer intended. To use the word "intended" would invite the jury to apply a subjective standard. *See Winnett v. Winnett*, 57 Ill.2d 7, 11, 310 N.E.2d 1, 4 (1974).

Under this instruction a product can be "unreasonably dangerous" only when put to a use that is reasonably foreseeable. *Winnett v. Winnett*, *supra* at 11, 310 N.E.2d at 4. This instruction would bar recovery where the injury was proximately caused by the plaintiff's unforeseeable misuse of the product. "Misuse" is a use which is neither intended nor reasonably foreseeable. *Williams*, *supra* at 425, 261 N.E.2d at 309. *See* Comment, IPI 400.08.

An instruction defining "unreasonably dangerous" is needed because the concept is not generally understood by, nor within the common experience of, jurors. The term is comparable in complexity to "proximate cause" (IPI 15.01); "willful and wanton conduct" (IPI 14.01); "assumption of risk" (IPI 13.01, 13.02); "negligence" (IPI 10.01); and "ordinary care" (IPI 10.02). *Becker v. Aquaslide 'N Dive Corp.*, 35 Ill.App.3d 479, 490, 341 N.E.2d 369, 377 (4th Dist. 1975). *But see Pyatt v. Engel Equip., Inc.*, 17 Ill.App.3d 1070, 1074, 309 N.E.2d 225, 229 (3d Dist. 1974).

400.06A Strict Product Liability--Definition of "Unreasonably Dangerous"--Risk-Utility Test--Design Defects

When I use the expression "unreasonably dangerous," I mean that the risk of danger inherent in the design outweighs the benefits of the design when the product is put to a use that is reasonably foreseeable considering the nature and function of the product.

Instruction, Notes on Use and Comment created May 2009.

Notes on Use

This instruction is an alternative to IPI 400.06 for use in strict product liability trials. This instruction is new, and states the risk-utility test for proving a strict product liability design defect case.

The need for this instruction was required by the Supreme Court in *Mikolajczyk v. Ford Motor Co.*, 231 Ill.2d 516 (2008). The court held that if there is risk-utility evidence admitted in a design defect case, even if a party presents evidence to support the consumer expectation test, a risk-utility instruction should be given instead of IPI 400.06.

Comment

Since *Mikolajczyk* did not expressly overrule any prior decisions, the Committee has attempted to synthesize the opinion in *Mikolajczyk* with *Lamkin v. Towner*, 138 Ill.2d 510 (1990), *Hansen v. Baxter Healthcare Corporation*, 198 Ill.2d 420 (2002), and *Calles v. Scripto-Tokai* Corp., 224 Ill.2d 247 (2007). In the latter three cases, the Supreme Court recognized that the "risk-utility" test was an alternative to the "consumer expectation" test set forth in IPI 400.06.

Lamkin, *supra* at 529, Hansen, *supra* at 433, and *Calles*, *supra* at 255-256, specifically held:

> A plaintiff may demonstrate that a product is defective in design, so as to subject a retailer and a manufacturer to strict liability for resulting injuries, in one of two ways: (1) by introducing evidence that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner or (2) by introducing evidence that the product's design proximately caused his injury and the defendant fails to prove that on balance the benefits of the challenged design outweigh the risk of danger inherent in such designs.

The Committee considered whether to list a number of factors for the jury to use in determining whether a product is unreasonably dangerous under the risk-utility test. The Committee declined to do so for a number of reasons. Most of the risk-utility factors discussed in various decisions have their genesis in law review articles authored by Professor John Wade. See *Calles v. Scripto-Tokai*, 224 Ill.2d 247, 264-265 (2007). Professor Wade addressed whether those factors should be listed in a jury instruction in *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 840 (1973) and said they should not, reasoning as follows:

> Should the jury be told about the list of seven factors which were set forth above? The answer should normally be no. The problem here is similar to that in negligence. The Restatement of Torts has analyzed negligence, described it as a balancing of the magnitude of the risk against the utility of the risk, and listed the factors which go into determining the weight of both of these elements. [citation omitted]. This analysis is most helpful and can be used with profit by trial and

> appellate judges, and by students and commentators. But it is not ordinarily given to the jury. Instead they are told that negligence depends upon what a reasonable prudent man would do under the same or similar circumstances.

See also Wade, *On Product Design Defects and their Actionability*, 33 Vand.L.Rev. 551, 573 (1980), "[t]he precise wording of the instruction is important and any list of abstract factors of different types is likely to confuse a jury."

Our decision not to list factors for the risk-utility test is also supported by the Oregon Supreme Court, *Phillips v. Kimwood Machine Co.*, 525 P.2d 1033, 1040 n.15 (1974); the Arizona Civil Jury Instructions Committee of the State Bar of Arizona, *RAJI (Civil) PLI 3 Use Note*; the Colorado Supreme Court Committee on Civil Jury Instructions, *Jury Instr. Civil 14:3 (4th ed.)*; *Turner v. General Motors*, 584 S.W.2d 844, 849-850 (Tex. 1979) and Florida, *JI-CIV-FL-CLE PL 5 (October 2004)*.

When it comes to determining liability issues in tort cases, it has long been the Committee's practice not to include a list of factors because doing so would unduly highlight certain aspects of the evidence in a case or would appear to argue for one side or the other. *IPI (Civil), Foreword to the 1st Edition, XXII (2006)*. Good examples of the Committee's practice in not listing factors in liability instructions that have been approved by Illinois courts are: 10.01, negligence, *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill.2d 260, 285 (2002); 11.01, contributory negligence, *Blacconeri v. Aguayo*, 132 Ill.App.3d 984, 990-991 (1st Dist. 1985); 14.01, willful and wanton conduct, *Murray v. Chicago Youth Center*, 224 Ill.2d 213, 241 (2007); 180.16, having "charge of" the work under the Structural Work Act, *Larson v. Commonwealth Edison*, 33 Ill.2d 316, 321, 323 (1965) and *Thompson v. MCA Distributing Music Corp. of America*, 257 Ill.App.3d 988, 990 (5th Dist. 1994); 100.01, highest duty of care of common carrier, *Manus v. Trans States Airlines, Inc.*, 359 Ill.App.3d 665, 667 (5th Dist. 2005); 120.01, trespasser definition, *Eshoo v. Chicago Transit Authority*, 309 Ill.App.3d 831, 837 (1st Dist. 1999); and 150.15, intoxication, *Navarro v. Lerman*, 48 Ill.App.2d 27, 36 (1st Dist. 1964).

Evidence will determine what the risks and benefits of a design are. Counsel can argue all of the admissible risks and benefits to the jury and a list of factors would not be a helpful addition to the instruction. A list could also mislead or confuse a jury since the presence of one factor favoring one party can outweigh multiple factors that favor the other party. *Calles*, *supra* at 266-267. As the Court also noted, the lists of factors which courts may consider when assessing risk-utility are not exclusive. *Calles*, *supra* at 266.

400.07A Strict Product Liability--Duty

The Committee recommends that no instruction concerning the duty of strict product liability of defendants be given, except in cases where IPI 400.07B, 400.07C, or 400.07D are applicable.

Instruction and Comment revised December 2007.

Comment

In strict product liability cases, the focus of the liability question is the *condition of the product*, not the conduct of the defendant. *Cf.* IPI 400.01, 400.02. Instructing a jury on a defendant's duty in this context would distract the jury from its true role: to determine whether or not the condition of the product was unreasonably dangerous. "It is preferable to avoid reference to 'duty' and maintain the focus on the defective character of the product . . . ." *Lundy v. Whiting Corp.*, 93 Ill.App.3d 244, 252, 48 Ill.Dec. 752, 417 N.E.2d 154 (1st Dist. 1981); *accord Wilson v. Norfolk & W. Ry. Co.*, 109 Ill.App.3d 79, 97, 64 Ill.Dec. 686, 440 N.E.2d 238 (5th Dist. 1982); *Carillo v. Ford Motor Co*, 325 Ill.App.3d 955, 259 Ill.Dec. 619, 759 N.E.2d 99 (1st Dist. 2001).

400.07B Strict Product Liability--Duty To Warn--Learned Intermediary Doctrine

The [type of product, e.g. drug] involved in this case can only be obtained with a prescription from a physician. For this reason, the [type of defendant, e.g. manufacturer] has a duty to adequately warn only [the learned intermediary involved] of the [dangers][potential adverse reactions] of which it knew, or in the exercise of ordinary care should have known, at the time the [product] left the [defendant's] control. The [defendant] has no duty to warn the [consumer][user] directly.

Instruction, Notes and Comment revised December 2007.

Notes on Use

This instruction should be given only in cases involving prescription pharmaceuticals and other products to which the "learned intermediary" doctrine applies to limit the manufacturer's duty to warn. The manufacturer in such cases has only a duty to warn the "learned intermediary" such as a physician; it has no duty to warn the consumer directly. IPI 10.02, defining "ordinary care," should be given with this instruction.

Comment

The learned intermediary doctrine was applied in *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 117 Ill.2d 507, 523-524, 111 Ill.Dec. 944, 513 N.E.2d 387 (1987) (drugs) and in *Hansen v. Baxter Healthcare Corp.*, 198 Ill.2d 420, 432, 261 Ill.Dec. 744, 764 N.E.2d 35 (2002) (Luer-lock catheter). The learned intermediary doctrine was not applicable in *Friedl v. Airsource, Inc.*, 323 Ill.App.3d 1039, 257 Ill.Dec. 459, 753 N.E.2d 1085 (1st Dist. 2001) (hyperbaric oxygen chamber).

400.07C Strict Product Liability--Non-Delegable Duty

Defendant[s] [name[s]] has [have] the duty to manufacture and sell a product that is not in an unreasonably dangerous condition. That duty cannot be delegated to another. It is not a defense for the defendant[s] [name[s]] that another person [,including plaintiff's employer,] failed to make the product free from unreasonably dangerous conditions. When I use the phrase "cannot be delegated," I mean that the duty must be performed by defendant[s] [name[s]] and cannot be left to some other person or entity.

Instruction, Notes and Comment revised December 2007

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Notes on Use

This instruction may be used in cases where the product manufacturer seeks to avoid liability with evidence that the owner of the product, such as a plaintiff's employer, selected features of the product. No court of review has approved the use of this instruction in other contexts.

Comment

This instruction was approved in *Turney v. Ford Motor Co.*, 94 Ill.App.3d 678, 685, 50 Ill.Dec. 85, 418 N.E.2d 1079 (1st Dist. 1981).

400.07D Strict Product Liability--Duty To Warn--General

The [manufacturer] [other] has a duty to adequately warn [and instruct] the [consumer] [user] about the dangers of its product of which it knew, or, in the exercise of ordinary care, should have known, at the time the product left the [manufacturer's] [other's] control.

Instruction, Notes and Comment revised December 2007.

Notes on Use

In cases where this instruction applies, it is intended to be used with IPI 400.01 and 400.02. IPI 10.02, defining "ordinary care," should be given with this instruction.

Comment

This principle of law was established in *Woodill v. Parke Davis & Co.*, 79 Ill.2d 26, 35, 37 Ill.Dec. 304, 402 N.E.2d 194 (1980). The Court has not retreated from its requirements since then.

400.08 Strict Product Liability--Personal Injury--Misuse

The committee recommends that no instruction on misuse of the product be given.

Instruction and Comment revised December 2007.

Comment

The committee's recommendation that no instruction be given on the question of misuse is predicated upon the committee's assumptions stated in the introduction to this 400 Series of instructions.

If subsequent case decisions prove that these assumptions of the committee are erroneous, then, in that event, instructions to the jury on the issue of misuse may be appropriate.

400.09 Strict Product Liability--Personal Injury--Liability of Non-Manufacturer

If you decide that the plaintiff has proved all the propositions of his case, then it is not a defense

[1]. [that the defendant, [name of seller, distributor, assembler, etc.], did not create the condition which rendered the [product, e.g. hammer] unreasonably dangerous] [and]

[2]. [that the condition of the [product, e.g. hammer] existed before the [product, e.g. hammer] came under the control of the defendant [name of seller, distributor, bailor, etc.].

Instruction, Notes and Comment revised December 2007.

Notes on Use

Use this instruction only in a case where a non-manufacturer, such as a retailer, distributor, assembler or other party intermediary between the creator of the condition and the plaintiff, is a defendant. Select the appropriate bracketed material. For example, use of the first bracketed paragraph is indicated when an assembler or a distributor of an unpackaged product is a defendant.

Comment

Sweeney v. Matthews, 94 Ill.App.2d 6, 236 N.E.2d 439 (1st Dist. 1968), *aff'd*, 46 Ill.2d 64, 264 N.E.2d 170 (1970), rejects the proposition that a retailer is not subject to the same liability as a manufacturer and embraces the rationale set forth in *Vandermark v. Ford Motor Co.*, 61 Cal.2d 256, 262, 391 P.2d 168, 171, 37 Cal.Rptr. 896, 899 (1964):

> Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. [Citations omitted]. In some cases the retailer may be the only member of that enterprise reasonably available to the injured plaintiff . . . .

But see Introduction concerning statutory limitations on a retailer's liability, 735 ILCS 5/2-621.

400.10 Strict Product Liability--Due Care Not A Defense

If you decide that the plaintiff has proved all the propositions of his case, then it is not a defense [that the condition of the product could not have been discovered by the defendant] [or] [that care was used in the manufacture of the product].

Instruction, Notes and Comment revised December 2007.

Notes on Use

This instruction should not be given if plaintiff's claim of liability is failure to warn. *Cf.* IPI 400.07D. Use this instruction if the jury heard from suggestion, evidence, or argument that the defendant exercised care in the manufacturing process or could not discover the condition of the product.

Comment

The due care of the defendant, or the inability of the defendant to discover a dangerous condition in the product, is not a defense. *Cunningham v. MacNeal Mem'l Hosp.*, 47 Ill.2d 443, 266 N.E.2d 897 (1970); Gelsumino v. E.W. Bliss Co., 10 Ill.App.3d 604, 295 N.E.2d 110 (1st Dist. 1973).

400.11 Strict Product Liability--Modified General Verdict Form--Assumption of Risk--Verdict For Plaintiff

[Withdrawn]

Instruction and Comment revised December 2007.

Comment

This verdict form has been withdrawn. Since assumption of risk in a strict product liability case is treated the same as contributory negligence in a negligence case (*see Gratzle v. Sears, Roebuck & Co.*, 245 Ill.App.3d 292, 613 N.E.2d 802, 184 Ill.Dec. 485 (2d Dist. 1993)), the verdict forms (and instructions on their use) applicable in negligence cases can be used for both strict product liability and negligence claims. *See* IPI Chapter 45 and IPI 600.14.

400.12 Strict Product Liability--Modified General Verdict Form--Assumption of Risk--Verdict For Plaintiff Against Some Defendants

[Withdrawn]

Instruction and Comment revised December 2007.

Comment

This verdict form has been withdrawn. Since assumption of risk in a strict product liability case is treated the same as contributory negligence in a negligence case (*see Gratzle v. Sears, Roebuck & Co.*, 245 Ill.App.3d 292, 613 N.E.2d 802, 184 Ill.Dec. 485 (2d Dist. 1993)), the verdict forms (and instructions on their use) applicable in negligence cases can be used for both strict product liability and negligence claims. *See* IPI Chapter 45 and IPI 600.14.