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Rahn v. Gerdts: Illinois Strict Products Liability: Recovery for Emotional Distress Denied, 18 J. Marshall L. Rev. 271 (1984)

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RAHN v. GERDTS:*
ILLINOIS STRICT PRODUCTS LIABILITY: RECOVERY FOR EMOTIONAL DISTRESS DENIED

Since the Illinois Supreme Court first recognized a cause of action for strict products liability,[1] Illinois courts have attempted to delineate the scope of this developing form of liability.[2] Concurrently, the courts have demonstrated a willingness to expand recovery for emotional distress.[3] These separate developments converged in *Rahn v. Gerdts*.[4] In *Rahn*, the Illinois

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* 119 Ill. App. 3d 781, 455 N.E.2d 807 (1983).

1. The Illinois Supreme Court first recognized strict products liability in Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965). In *Suvada*, the court adopted Section 402A of the *Restatement (Second) of Torts* as the basis for liability in such actions. *Id.* at 621, 210 N.E.2d at 187. For the text of Section 402A of the *Restatement (Second) of Torts*, see *infra* note 22.

In this note, "strict products liability" is used to refer only to products liability actions based on strict liability. "Products liability" is a broader concept that also includes actions brought on theories of negligence and breach of warranty. For a discussion of products liability under the three separate theories of strict liability, negligence, and breach of warranty, and their inter-relationship, see, *e.g.*, J. HENDERSON & R. PEARSON, THE TORTS PROCESS 650-98 (2d ed. 1981); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 641-82 (4th ed. 1971).

2. *See, e.g.*, Hunt v. Blasius, 74 Ill. 2d 203, 384 N.E.2d 368 (1978) (defining when a product is unreasonably dangerous); Winnet v. Winnet, 57 Ill. 2d 7, 310 N.E.2d 1 (1974) (stating who is entitled to bring an action); Lowrie v. City of Evanston, 50 Ill. App. 3d 376, 365 N.E.2d 923 (1977) (defining "product"). For an overview of the development of the strict products liability doctrine, see Snyman, *The Evolution of the Doctrine of Strict Products Liability in the United States*, 11 ANGLO-AM. 241 (1982). *See also* Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966) (general discussion of strict products liability); Traynor, *The Ways and Means of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965) (general discussion of strict products liability). For a review of Illinois decisions applying the doctrine, see Buser, *Strict Products Liability Litigation in Review*, 70 ILL. B.J. 148 (1981).

3. Illinois recognized a cause of action for intentional infliction of emotional distress in Knierem v. Izzo, 22 Ill. 2d 73, 174 N.E.2d 157 (1961). Recovery was extended to include negligent infliction of emotional distress in Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 457 N.E.2d 1 (1983). For a discussion of negligent infliction of emotional distress, see Proehl, *Anguish of Mind: Damages for Mental Suffering under Illinois Law*, 56 NW. U.L. REV. 477 (1961); Reidy, *Negligent Infliction of Emotional Distress in Illinois: Living in the Past, Suffering in the Present*, 30 DE PAUL L. REV. 295 (1981). *See also* Sabin, *Intentional Infliction of Emotional Distress—Seventeen Years Later*, 66 ILL. B.J. 248 (1978).

4. 119 Ill. App. 3d 781, 455 N.E.2d 807 (1983).

Appellate Court for the Third District confronted the issue of whether a plaintiff may recover damages for emotional distress in strict products liability actions where the plaintiff alleges no physical injuries.[5] The court held that damages for emotional distress are not recoverable in strict products liability actions absent physical injury.[6] The *Rahn* court determined, however, that the injuries alleged were sufficient to state a cause of action for negligent infliction of emotional distress.[7]

The Rahns leased a motor home from the Gerdtses[8] and were driving it when a gas tank disengaged and burst into flames.[9] They escaped from the flaming vehicle without serious physical injuries.[10] The Rahns filed an action against the lessor of the motor home based on a strict products liability theory.[11]

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5. *Id.* at 784, 455 N.E.2d at 809.

6. *Id.*

7. *Id.* at 781, 455 N.E.2d at 810. The court considered the issue because counts IX, X, XI, & XII of the complaint alleged negligence as an alternative basis of liability. *See infra* note 11.

8. Rahn v. Gerdts, 119 Ill. App. 3d at 783, 455 N.E.2d at 808. The Gerdtses were in the business of leasing motor homes. For a discussion of lessor liability under Section 402A of the *Restatement (Second) of Torts*, see *infra* note 14.

9. Rahn v. Gerdts, 119 Ill. App. 3d at 783, 455 N.E.2d at 808.

10. Mrs. Rahn did sustain a scratch to her arm and an immediate pain in her chest. *Id.* The court apparently assumed that these minor physical injuries would be insufficient to satisfy the requirements of an impact. For a discussion of the court's characterization of these injuries and the impact rule, see *infra* note 40.

11. The Rahns brought counts I and V against the Gerdtses based upon strict products liability. Rahn v. Gerdts, 119 Ill. App. 3d at 784, 455 N.E.2d at 809. These counts alleged that the vehicle was defective and unreasonably dangerous due to an insecure fuel tank, that the defect was present when it left the control of the defendants, and that the defendants were liable for placing the vehicle into the stream of commerce since they were in the business of leasing and selling the vehicle. *Id.*, 455 N.E.2d at 808-09. Count V alleged property damage and Mr. Rahn's loss of consortium. *Id.*, 455 N.E.2d at 809. This count was originally dismissed along with the products liability counts in the complaint. On rehearing, however, the *Rahn* court remanded Count V in a supplemental opinion. *Id.* at 787, 455 N.E.2d at 811. The court relied on Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 435 N.E.2d 443 (1982), which held that strict liability in tort applies to physical injury to property. *Id.*

The Rahns brought counts II and VI against Deluxe Mobile Homes Sales, Inc., (hereinafter Deluxe), the dealer who sold the motor home to the Gerdtses. Rahn v. Gerdts, 119 Ill. App. 3d at 784, 455 N.E.2d at 809. Both counts were based on a strict products liability theory. *Id.* The Gerdtses and Deluxe claimed that ILL. REV. STAT. ch. 110, §§ 801-804 (1983), provided them with a defense to the action. *Id.* That statute provides that a non-manufacturing defendant can be dismissed from a products liability action upon the filing of an affidavit which certifies the correct identity of the manufacturer of the product which causes the injury. ILL. REV. STAT. ch. 110, § 801 (1983). The Gerdtses and Deluxe argued that they should have been dismissed from the action when they filed such an affidavit. Brief for Appellee (Deluxe) at 9 and Brief for Appellees (Gerdts) at 4, Rahn v. Gerdts, 119

The Rahns alleged that Mrs. Rahn suffered from "severe depression, anxiety and nervousness"[12] as a proximate result of an unreasonably dangerous defect in the vehicle,[13] that the defect existed when the vehicle left the defendant's control, and that the defendant was liable for placing the defective vehicle into

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Ill. App. 3d 781, 455 N.E.2d 807 (1983). Plaintiffs argued that the statute did not apply where the manufacturer is not legally and, therefore, not financially responsible. Reply Brief for Appellants at 1, Rahn v. Gerdts, 119 Ill. App. 3d 781, 455 N.E.2d 807 (1983). The statute provides for vacating dismissal of a defendant if the plaintiff can show that the "manufacturer is unable to satisfy any judgment as determined by the court" or if "the court determines that the manufacturer would be unable to satisfy a reasonable settlement or other agreement with plaintiff." ILL. REV. STAT. ch. 110, §§ 802(d) - 802(e) (1983). The Rahns had settled out of court with the manufacturer. These exceptions to dismissal would not appear to apply when the manufacturer has settled with the plaintiff; however, the *Rahn* court did not discuss the statute or its possible application.

Counts X and XII, brought against Deluxe, alleged negligent inspection or failure to inspect as a basis for liability. Rahn v. Gerdts, 119 Ill. App. 3d at 784, 455 N.E.2d at 809. The court dismissed these Counts, stating that Peterson v. Lou Bachrodt Chevrolet Co., 61 Ill. 2d 17, 329 N.E.2d 785 (1975), negated any duty on the part of the seller to inspect a used vehicle. *Id.* at 786, 455 N.E.2d at 810-11. The court noted that *Peterson* dealt specifically with strict liability yet stated that the language in that case appeared to support dismissal. *Id.* The *Rahn* court, therefore, applied a principle expounded in a strict products liability case to the negligence counts of the complaint. *Id.* It was also willing to do the reverse. *Id. See infra* notes 40-47 and accompanying text.

12. Mrs. Rahn was admitted to a psychiatric unit nine weeks after the incident and was under psychiatric care when she filed suit. Rahn v. Gerdts, 119 Ill. App. 3d at 783, 455 N.E.2d at 808.

13. In Illinois, the plaintiff in a strict products liability action must not only prove that the product was in a defective condition, but also that the defective condition was unreasonably dangerous and that the condition existed at the time it left the manufacturer's control. Suvada v. White Motor Co., 32 Ill. 2d 612, 623, 210 N.E.2d 182, 188 (1965). The Illinois Supreme Court has stated that a product is unreasonably dangerous if it "fail[s] to perform in the manner reasonably to be expected in light of [its] nature and intended function." Dunham v. Vaughan & Bushnell Mfg. Co., 42 Ill. 2d 339, 342, 247 N.E.2d 401, 403 (1969). The Illinois Supreme Court later adopted the test that is set forth in comment i to Section 402A of the *Restatement (Second) of Torts.* Palmer v. Avco Distrib. Corp., 82 Ill. 2d 211, 216, 412 N.E.2d 959, 962 (1980); Hunt v. Blasius, 74 Ill. 2d 203, 211-12, 384 N.E.2d 368, 372 (1978). Comment i states that "unreasonably dangerous" means "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." RESTATEMENT (SECOND) OF TORTS § 402A, comment i (1965). Illinois juries are instructed that "unreasonably dangerous" means "unsafe when put to a use that is reasonably foreseeable considering the nature and function of the [product]." ILLINOIS PATTERN JURY INSTRUCTIONS - CIVIL § 400.06 (2d ed. 1977 Supp.).

Other jurisdictions do not require the plaintiff to prove that the defect is unreasonably dangerous. The California Supreme Court, for example, has held that the plaintiff in a strict products liability action need only prove that the product was defective. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 125, 501 P.2d 1153, 899 (1962). The *Cronin* court stated that to require a plaintiff to prove that the product was unreasonably dangerous, in addition

the stream of commerce.[14] The circuit court dismissed the complaint, and the Rahns appealed to the Illinois Appellate Court for the Third District.[15]

One of the issues presented on appeal was whether Mrs. Rahn's emotional injuries were compensable under a strict products liability theory.[16] The court also addressed the companion issue of whether the injuries alleged were sufficient to state a cause of action under a negligence theory of liability.[17] The court held that while Mrs. Rahn's injuries were not compensable under a strict products liability theory,[18] they were sufficient to state a cause of action for negligent infliction of emotional distress.[19]

In analyzing the strict products liability issue, the *Rahn*

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to proving that it was defective, results in the submission of the case to the jury in the posture of a negligence case. *Id.*

For a discussion of the defective condition and unreasonably dangerous requirements, see Swartz, *The Concepts of "Defective Condition" and "Unreasonably Dangerous" in Products Liability Law*, 66 MARQ. L. REV. 280 (1983). For a discussion of the tests applied to determine whether a product is unreasonably dangerous in Illinois, see Huntley, *The Concept of Defect in Illinois Products Liability Litigation*, 71 ILL. B.J. 22 (1982).

14. These allegations are the basic elements needed to state a cause of action under a strict products liability theory. Suvada v. White Motor Co., 32 Ill. 2d 612, 623, 210 N.E.2d 182, 188 (1965). The *Suvada* court stated that in order to state a strict products liability cause of action "[t]he plaintiffs must prove that their injury or damage resulted from a condition of the product; that the condition was an unreasonably dangerous one; and that the condition existed at the time it left the manufacturer's control." *Id.* The court stated that its views coincided with the position expressed in § 402A of the *Restatement (Second) of Torts*. *Id.* at 621, 210 N.E.2d at 187.

The *Restatement* provides for the liability of "sellers." For the text of § 402A of the *Restatement*, see *infra* note 22. Liability has, however, been extended to lessors. Gallucio v. Hertz Corp., 1 Ill. App. 3d 272, 274 N.E.2d 178 (1971). The *Gallucio* court held that the policy considerations which justify imposition of strict products liability are as applicable to lessors as they are to manufacturers and sellers. *Id.* at 277-79, 274 N.E.2d at 184-86. For a discussion of these policy considerations, see *infra* note 52. One appellate court refused to extend strict products liability to a service station that supplied a customer with a defective tire gauge. Gilliland v. Rothermel, 83 Ill. App. 3d 116, 403 N.E.2d 759 (1980). The court held that the policy reasons for imposing strict liability did not exist because supplying the tire gauge was only incidental to the defendant's business and was not a part of the defendant's overall marketing scheme. *Id.* at 119, 403 N.E.2d at 761. *See also* Dunham v. Vaughan & Bushnell Mfg. Co., 42 Ill. 2d 339, 247 N.E.2d 401 (1969) (strict products liability extended to wholesalers and distributors); Brannon v. Southern Illinois Hosp. Corp., 69 Ill. App. 3d 1, 386 N.E.2d 1126 (1978) (strict products liability extended to installers).

15. The trial court dismissed the complaint without discussion. Rahn v. Gerdts, 119 Ill. App. 3d 781, 785, 455 N.E.2d 807, 809 (1983).

16. *Id.* at 784, 455 N.E.2d at 809.

17. *Id.*

18. *Id.*

19. *Id.* at 785, 455 N.E.2d at 810.

court relied on *Woodill v. Parke Davis Co.*[20] and discussed *Rickey v. Chicago Transit Authority.*[21] The *Woodill* court denied recovery for emotional distress in strict products liability actions based on its interpretation of "physical harm" in Section 402A of the *Restatement (Second) of Torts.*[22] It found that the drafters of Section 402A did not intend to allow recovery for

20. 79 Ill. 2d 26, 402 N.E.2d 194 (1980), *aff'g* 58 Ill. App. 3d 349, 374 N.E.2d 683 (1978). In *Woodill*, a mother brought an action against a drug manufacturer for the emotional distress she suffered as a result of witnessing her son's debilitating reactions to a drug administered during the child's delivery. *Id.* at 29, 402 N.E.2d at 197. The complaint alleged that the manufacturer's failure to warn of the drug's harmful effects rendered it unreasonably dangerous. *Id.* The *Woodill* court held that, in failure to warn cases, the plaintiff must prove that the defendant had actual or constructive knowledge of the dangerous propensities of the product before a duty to warn will be imposed. *Id.* at 33, 402 N.E.2d at 198. The court stated that imposing this knowledge requirement focuses on the nature of the product and on the adequacy of the warning rather than on the nature of the manufacturer's conduct. *Id.* at 35, 402 N.E.2d at 199. *But see* Phillips v. Kimwood Mach. Co., 269 Or. 485, 498, 525 P.2d 1033, 1039 (1974) (knowledge requirement rejected because it concentrates on defendant's conduct rather than condition of product). For a discussion of *Woodill*, see Note, *Woodill v. Parke Davis: The Failure to Warn as a Basis for Recovery*, 13 LOY. U. CHI. L.J. 523 (1982).

In *Woodill* the Illinois Appellate Court for the First District held, in the alternative, that damages for emotional distress are not recoverable in strict products liability actions. Woodill v. Parke Davis Co., 58 Ill. App. 3d 349, 355, 402 N.E.2d 194, 199 (1978). The Illinois Supreme Court adopted the reasoning of the appellate court on this issue in Woodill v. Parke Davis Co., 79 Ill. 2d 26, 38, 402 N.E.2d 194, 202 (1980). The *Rahn* court, therefore, was relying upon the Illinois Supreme Court's adoption of the appellate court's reasoning when it cited *Woodill* as precedent for its holding on this issue. Rahn v. Gerdts, 119 Ill. App. 3d at 784, 455 N.E.2d at 809.

21. 98 Ill. 2d 546, 457 N.E.2d 1 (1983). For a discussion of *Rickey*, see *infra* note 40.

22. Woodill v. Parke Davis Co., 58 Ill. App. 3d 349, 355, 374 N.E.2d 683 (1978), *aff'd*, 79 Ill. 2d 26, 402 N.E.2d 194 (1980) (adopting reasoning of appellate court).

Section 402A of the *Restatement (Second) of Torts* provides:

> Special Liability of Seller of Product for *Physical Harm* to User or Consumer
>
> (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
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contactual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1977) (emphasis added).

emotional distress in actions based on its provisions.[23] The *Woodill* court held that "physical harm" did not include emotional distress, but it did not define "physical harm."[24] The *Rahn* court held that *Woodill* still controlled actions in strict products liability in Illinois,[25] despite the recent extension of recovery for emotional distress to negligence actions in *Rickey v. Chicago Transit Authority*.[26]

The *Rahn* court's interpretation of *Rickey* played an integral role in its analysis of the strict products liability issue. The court stated that the extension of recovery for emotional distress in *Rickey* was related to the nature of the defendant's conduct and that it was dependent upon the foreseeability of the alleged injury.[27] The *Rahn* court refused to extend the *Rickey* doctrine to strict products liability actions because the Illinois Supreme Court has not extended the doctrine to such actions.[28]

The *Rahn* court's interpretation of *Rickey* was also central to its disposition of the negligence counts of the complaint. There are varying interpretations of what specific types of injuries are compensable under the rule announced in *Rickey*.[29] Under one interpretation, damages for emotional distress are recoverable.[30] Another interpretation states that only physical manifestations of emotional distress are compensable.[31] The *Rahn* court did not characterize Mrs. Rahn's injuries as either purely emotional or as physical manifestations of emotional distress. The court in *Rickey* held that there may be recovery for emotional distress without impact in negligence cases.[32] The *Rahn* court, therefore, did not believe the issue required discussion.[33] Mrs. Rahn's injuries were compensable under a negligence theory of liability.[34]

An analysis of the *Rahn* decision reveals two possible approaches to the strict products liability issue. One approach emphasizes the scope of the plaintiff's interest in emotional

23. Woodill v. Parke Davis Co., 58 Ill. App. 3d 349, 355, 374 N.E.2d 683, 688 (1978), *aff'd*, 79 Ill. 2d 26, 402 N.E.2d 194 (1980).

24. *Id.*

25. Rahn v. Gerdts, 119 Ill. App. 3d at 785, 455 N.E.2d at 809.

26. 98 Ill. 2d 546, 457 N.E.2d 1 (1983).

27. Rahn v. Gerdts, 119 Ill. App. 3d at 785, 455 N.E.2d at 809.

28. *Id.*

29. For a discussion of these various interpretations of *Rickey*, see *infra* notes 60-63 and accompanying text.

30. *See infra* notes 62-63 and accompanying text.

31. *See infra* notes 60-63 and accompanying text.

32. Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 555, 457 N.E.2d 1, 5 (1983).

33. Rahn v. Gerdts, 119 Ill. App. 3d at 785, 455 N.E.2d at 810.

34. *Id.*

tranquility. A court's analysis based on this approach centers on whether it should impose liability based on fault.[35] The other approach emphasizes the potential scope of the defendant's liability. The analysis based on this approach focuses on whether the court should impose strict liability.[36]

Expanding protection of the individual's interest in emotional tranquility is usually advanced in cases where liability is predicated on intentional or negligent misconduct.[37] These cases, therefore, do not discuss recovery for emotional distress in actions based on a no-fault theory of liability. The assumption underlying this approach is that the court cannot justify the imposition of liability for emotional distress in a strict products liability case unless the requirements for imposing liability for emotional distress in a negligence case are met.[38] This assump-

35. *See infra* notes 37-39 and accompanying text.

36. *See infra* notes 49-52 and accompanying text.

37. *See, e.g.*, Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 457 N.E.2d 1, 5 (1983) (recognizing cause of action for emotional distress for those in "zone of danger," i.e., those in danger of imminent physical harm); Public Fin. Corp. v. Davis, 66 Ill. 2d 85, 89, 360 N.E.2d 765, 769 (1978) (disallowing recovery for emotional harm because defendant's conduct was not sufficiently "extreme and outrageous"); Knierem v. Izzo, 22 Ill. 2d 73, 174 N.E.2d 157 (1961) (recognizing a cause of action for intentional infliction of emotional distress). These cases focus primarily on the conduct of the defendant and consider whether the individual's interest in emotional tranquility can be adequately and judiciously afforded protection. For example, the *Knierem* court discussed the intangible nature of the injury, the difficulty of assessing money damages for the injury, the possibility that recognition of the cause of action might give rise to fictitious claims, and the fact that mental consequences vary greatly from one individual to the next. Knierem v. Izzo, 22 Ill. 2d 73, 74-75, 174 N.E.2d 157, 163-64 (1961). The court concluded, however, that peace of mind is sufficiently important to receive protection against intentional invasion. *Id.* at 77, 174 N.E.2d at 165.

38. Very few jurisdictions have considered the issue of whether recovery for emotional distress in strict products liability actions should be permitted. The first case to treat the issue in Illinois was Woodill v. Parke Davis Co., 79 Ill. 2d 26, 374 N.E.2d 683 (1980). *See supra* note 20 (discussion of *Woodill*).

One California appellate court held that emotional distress that is the result of witnessing peril to another may be recovered when the defendant would have been strictly liable for causing that peril. Shepard v. Super. Ct., 76 Cal. App. 3d 16, 19-21, 142 Cal. Rptr. 612, 615 (1977). *Accord* Walker v. Clark Equip. Co., 320 N.W.2d 561, 563 (Iowa 1982) (once liability is found, there is no difference between damages that are recoverable under theories of negligence, warranty or strict liability). The *Shepard* court extended the foreseeable plaintiff test proposed in Dillon v. Legg, 68 Cal. 2d 728, 740-41, 441 P.2d 912, 920-21, 69 Cal. Rptr. 72, 80 (1968), to strict products liability. Shepard v. Super. Ct., 76 Cal. App. 3d at 19-21, 142 Cal. Rptr. at 615. The *Dillon* test was formulated to insure that only foreseeable plaintiffs could bring actions for negligent infliction of emotional distress. Dillon v. Legg, 68 Cal. 2d at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80. The *Dillon* court held that the plaintiff's physical proximity to the scene of the accident, the plaintiff's sensory perception of the accident, and the plaintiff's relationship to the injured party were the factors which should be used to determine whether

tion leads to the application of concepts rooted in negligence to solve strict products liability questions.[39]

The *Rahn* court's use of fault principles to analyze a no-fault form of liability is apparent in its discussion of *Rickey*.[40] The court stated that *Rickey* demonstrated that imposition of liability for emotional distress is related to the nature of the defendant's conduct.[41] The *Restatement (Second) of Torts* indicates, however, that the nature of the defendant's conduct is irrelevant in determining whether liability should be imposed under the provisions of Section 402A.[42] To limit strict products liability based on the nature of the defendant's conduct is inappropriate since that conduct is irrelevant to a determination of liability. The *Rahn* court's approach, therefore, applies a concept which is irrelevant in determining the scope of a defendant's liability in a strict products liability action.

The *Rahn* court's assertion that *Rickey* requires foreseeability of the alleged injury[43] to establish liability for emotional dis-

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the plaintiff was foreseeable. The *Dillon* test was rejected in Rickey v. Chicago Transit Auth., 98 Ill. 2d at 556, 457 N.E.2d at 4 ("too vaguely defined to serve as a yardstick"). It was replaced with the zone-of-physical-danger rule. *Id.* For a discussion of *Shepard*, see Note, *Shepard v. Superior Court: Extending Dillon v. Legg to Product Liability*, 11 U. WEST L.A. L. REV. 109 (1979).

39. This assumption ignores the fact that the reasons for imposing liability based upon fault and the reasons for imposing no-fault liability are different. In cases involving negligent misconduct, for example, the liability imposed is commensurate with the defendant's moral or social fault. *See generally* O. HOLMES, THE COMMON LAW 63-129 (Howe ed. 1963); R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 84 (rev. ed. 1954). The liability imposed under a strict products liability theory, on the other hand, depends upon allocating the risks which are associated with growing productivity. *See generally* Weinstein, Twerski, Pierhler & Donaher, *Product Liability: An Interaction of Law and Technology*, 12 DUQ. L. REV. 425 (1974).

40. In *Rickey*, an action was brought on behalf of a boy who witnessed his brother's strangulation in a negligently operated escalator. Rickey v. Chicago Transit Auth., 98 Ill. 2d at 549, 457 N.E.2d at 2. Plaintiffs did not allege any direct physical injury or impact. *Id.* The court held that a bystander who suffers emotional distress while in a negligently created zone of physical danger may recover for the physical manifestations of that emotional distress. *Id.* at 555, 457 N.E.2d at 5. Prior to *Rickey*, a plaintiff had to prove the existence of an impact before recovery for emotional distress would be allowed. *See, e.g.*, Braun v. Craven, 175 Ill. 401, 51 N.E. 657, 569 (1898). The *Rickey* zone-of-physical-danger rule only requires that the plaintiff be "in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact." 98 Ill. 2d at 555, 457 N.E.2d at 5. The zone-of-physical-danger rule is, therefore, not the same as the foreseeable plaintiff rule adopted by the California Supreme Court in Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). *See supra* note 37.

41. Rahn v. Gerdts, 119 Ill. App. 3d at 785, 455 N.E.2d at 809.

42. RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (1965). *See supra* note 22 and accompanying text.

43. Rahn v. Gerdts, 119 Ill. App. 3d at 785, 455 N.E.2d at 809.

tress leads to similar problems. Foreseeability is a negligence concept formulated to insure that the defendant incurs only liability commensurate with his duty.[44] It is erroneous to assume that a concept which limits negligence liability applies equally to limit strict products liability.[45] Illinois courts have applied foreseeability analysis to other strict products liability questions.[46] Notably, in *Winnett v. Winnett*,[47] the Illinois Supreme Court held that strict products liability only extends to reasonably foreseeable plaintiffs.[48] This foreseeability analysis determines who may bring a strict products liability action. It does not, however, determine whether emotional injuries are compensable when the plaintiff could have reasonably been foreseen.[49] The application of this foreseeability analysis to the

44. The injury must be the "natural and probable result of the negligent act, but the precise injury, or the manner in which it occurs, does not have to be reasonably foreseeable for a duty to be imposed." Neering v. Illinois Cent. R.R. Co., 383 Ill. 366, 380, 50 N.E.2d 497, 503 (1943), *citing* Illinois Cent. R.R. Co. v. Oswald, 388 Ill. 270, 272, 170 N.E. 247, 249 (1930) (holding that plaintiff failed to prove that she was exercising ordinary care for her own safety). *See also* Cunis v. Brennan, 56 Ill. 2d 372, 374-75, 308 N.E.2d 617, 619 (1974) (what is foreseeable defines scope of defendant's duty); Hartnett v. Boston Store of Chicago, 265 Ill. 331, 337, 106 N.E. 837, 839 (1914) (affirming directed verdict because injury was not foreseeable); Illinois Hous. Dev. Auth. v. Sjostrom & Sons, Inc., 105 Ill. App. 3d 247, 261, 433 N.E.2d 1350, 1361 (1982) (creation of duty is foreseeability); Walsh v. A.D. Conner, Inc., 99 Ill. App. 3d 427, 430, 425 N.E.2d 1153, 1156 (1981) (scope of duty turns on foreseeability).

45. For criticism of the application of foreseeability analysis to strict products liability questions, see Polelle, *The Foreseeability Concept and Strict Products Liability: The Odd Couple of Tort Law*, 8 RUT.-CAM. L. REV. 101 (1976). *See also* Howes v. Hansen, 56 Wis. 2d 247, 254, 201 N.W.2d 825, 831 (1972) (foreseeability has no application in doctrine of strict liability in tort).

46. One appellate court has held that the concept of proximate cause is the same in strict products liability and negligence. Barr v. Rivinius, 58 Ill. App. 3d 121, 127, 373 N.E.2d 1063, 1067 (1978) (proximate cause is dependent on foreseeability of injury). *See* Niffenegar v. Lakeland Constr. Co., 95 Ill. App. 3d 420, 420 N.E.2d 262 (1981) (injury to employee while cleaning paving machine held to be foreseeable and, therefore, compensable under strict products liability theory). *See also supra* notes 13 and 20.

47. 57 Ill. 2d 7, 310 N.E.2d 1 (1974).

48. *Id.* The *Winnett* court defined foreseeability as "that which is objectively reasonable to expect, not merely what might conceivably occur." *Id.* at 12-13, 310 N.E.2d at 4-5. The *Winnett* court also stated, however, that questions of foreseeability are usually for the jury to decide. *Id.* at 13, 310 N.E.2d at 5. Thus, if the test announced in *Winnett* is applied to determine whether specific types of injuries are foreseeable, the question might still go to the jury.

49. Mrs. Rahn was a foreseeable plaintiff since she was a user of the vehicle. Mrs. Rahn would also meet the test formulated to determine whether a plaintiff is foreseeable in actions for negligent infliction of emotional distress. In fact, if the *Rahn* court had applied the *Rickey* zone-of-physical-danger rule to the facts of *Rahn* as the *Shepard* court applied the *Dillon* rule to its facts, Mrs. Rahn would have been entitled to recover. *See supra* note 38. The only possible application of foreseeability to the facts of

issue of damages for emotional distress is questionable when a more definitive approach is available.

A better approach to this strict products liability issue would emphasize the appropriate extent of a defendant's liability in a strict products liability action. *Woodill* exemplifies this approach.[50] The *Woodill* court's reliance upon an interpretation of "physical harm" in Section 402A of the *Restatement (Second) of Torts* indicates that it was concerned with the proper basis of liability in strict products liability cases.[51] Under this approach, the policy which justifies the imposition of strict products liability also determines the extent of the defendant's liability.[52] This approach emphasizes the policy considerations underlying strict products liability rather than the fault concepts underlying negligence theory.[53]

Rahn, therefore, is to the specific type of injury alleged. It has been held, however, that the specific injury alleged need not be reasonably foreseeable in negligence cases. *See supra* note 44.

50. Woodill v. Parke Davis Co., 79 Ill. 2d 26, 402 N.E.2d 194 (1980), *aff'g* 58 Ill. App. 3d 349, 374 N.E.2d 683 (1978). *See supra* notes 20-26 and accompanying text.

51. The *Restatement (Second) of Torts* has been adopted as the framework for causes of action based upon strict products liability. *See supra* note 1.

52. The *Suvada* court stated that the public policy reasons which justify imposition of strict liability are the "public interest in human life and health, the invitations and solicitations to purchase the product and the justice of imposing the loss on the one creating the risk and reaping the profit." Suvada v. White Motor Co., 32 Ill. 2d 612, 619, 210 N.E.2d 182, 186 (1965).

53. Once the concept of foreseeability is abandoned as the means to limit strict products liability, a new concept must replace it. Otherwise, producers would become the absolute insurers of product safety. This result has been held to be unacceptable. *Id.* at 623, 210 N.E.2d at 190.

The rules of proximate causation enunciated in cases dealing with abnormally dangerous activities are well-suited to define the appropriate limits of strict products liability. *See* Fletcher v. Rylands, L.R. 1 Ex. 265 (1866), *aff'd*, L.R. 3 H.L. 330 (1868) (defendant liable for natural consequences of permitting water to escape from a reservoir built upon his land). According to the *Restatement (Second) of Torts*, the strict liability imposed in abnormally dangerous activities cases is "limited to the kind of harm, the possibility of which makes the activity abnormally dangerous." RESTATEMENT (SECOND) OF TORTS § 519(2) (1977). *Accord* Foster v. Preston Mill Co., 44 Wash. 2d 440, 442, 268 P.2d 645, 647-48 (1954). The *Foster* court quoted the following view with approval:

> It is one thing to say that a dangerous enterprise must pay its way within reasonable limits, and quite another to say that it must bear responsibility for every extreme of harm that it may cause. The same practical necessity for the restriction of liability within some reasonable bounds, which arises in connection with problems of "proximate cause" in negligence cases, demands here that some limit be set.... But ordinarily in such cases no question of causation is involved, and the limitation is one of the policy underlying liability.

Id., 268 P.2d at 647 (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS 571 (4th ed. 1971) with approval).

While *Woodill* represents a better-reasoned approach to the strict products liability issue, it can be criticized for failing to state the policy reasons which limit strict products liability to physical harm. The use of "physical harm" in Section 402A of the *Restatement (Second) of Torts* is not explained in the comments following that section. Both the *Woodill* and *Rahn* courts relied upon this provision, but neither court attempted to define the term.[54]

The purpose in analyzing *Rahn* from a scope of liability perspective is to justify limiting strict products liability to "physical harm" in terms of the underlying policy considerations that serve as the foundation of the tort. Under this formulation, a court would consider whether the policy underlying imposition of no-fault liability justifies a narrow or broad construction of the term "physical harm."[55] Illinois courts have used this method of analysis to define other terms used in Section 402A.[56] The *Rahn* court's failure to adopt this method of analysis to define "physical harm" leads to confusion. An analysis of the possible impact of the *Rahn* decision reveals this confusion.

To fully understand the impact of *Rahn*, the court's dismissal of the cause of action in strict products liability must be analyzed in conjunction with its ruling that the damage allegations in the negligence counts were sufficient to state a cause of action.[57] In remanding the negligence counts of the complaint, the *Rahn* court did not characterize Mrs. Rahn's injuries as either purely emotional or as physical manifestations of emotional harm.[58] There has been considerable controversy over exactly what types of injuries are compensable under the *Rickey* zone-

54. The *Rahn* court's failure to define the term "physical harm" can be criticized given the procedural history of the *Woodill* case. *See supra* note 20.

55. For a discussion of the policy considerations, see *supra* note 52.

56. *See, e.g.*, Lowrie v. City of Evanston, 50 Ill. App. 3d 376, 365 N.E.2d 923 (1977). In *Lowrie*, the court confronted the issue of whether a multi-level garage was a "product" for strict products liability purposes. *Id.* at 379, 365 N.E.2d at 925. The court considered the policy reasons underlying imposition of strict products liability and concluded that the building was not a "product" within the meaning of that term in Section 402A of the *Restatement (Second) of Torts*. *Id.* at 380, 365 N.E.2d at 928. *Accord* Immergluck v. Ridgeview House, Inc., 53 Ill. App. 3d 472, 368 N.E.2d 803 (1977) (policy considerations used to determine that a sheltered-care facility was not a product). *See* Hartley, *The Definition of a Product for the Purposes of Section 402A*, 1982 INS. L.J. 344.

The policy underlying imposition of strict products liability has also been used to define the term "seller." *See supra* note 14.

57. Rahn v. Gerdts, 119 Ill. App. 3d at 785, 455 N.E.2d at 810.

58. *Id.*

of-physical danger rule.[59] One interpretation maintains that *Rickey* only compensates physical manifestations of emotional injuries caused through fear for one's own safety.[60] Although Mrs. Rahn's injuries can be interpreted as caused through fear for her own safety, it is unclear how "severe depression, anxiety and nervousness" can be characterized as physical manifestations of an emotional injury.[61] Another interpretation of *Rickey* maintains that certain forms of emotional injury are themselves compensable, as long as they are caused through fear for one's own safety.[62] The *Rahn* court's holding is consistent with this broader interpretation of *Rickey* because Mrs. Rahn's injuries appeared to be purely emotional in nature.[63] Future recovery for emotional distress in negligence actions will depend upon whether other Illinois jurisdictions and, ultimately, whether the Illinois Supreme Court, will accept the *Rahn* court's interpretation of the types of injuries recoverable under the rule announced in *Rickey.*

The *Rahn* court's dismissal of the strict products liability counts presents problems similar to those created by the court's remand of the negligence counts. Because the court did not define the term "physical harm," its holding on the strict products liability issue can be given a narrow or broad construction. If Mrs. Rahn's injuries are characterized as purely emotional, the *Rahn* decision can be narrowly interpreted to preclude recovery for purely emotional injuries.[64] If Mrs. Rahn's injuries are characterized as physical manifestations of emotional injury, the

59. For a discussion of the *Rickey* zone-of-physical-danger rule, see *supra* note 40.

60. *See, e.g.*, Robb v. Pennsylvania R.R. Co., 58 Del. 454, 457, 210 A.2d 709, 714-15 (1965) (recovery only for physical manifestations of emotional distress, not emotional distress itself). For a discussion of how emotional distress causes physical disorders, see Reidy, *Negligent Infliction of Emotional Distress in Illinois: Living in the Past, Suffering in the Present*, 30 DE PAUL L. REV. 295 (1981); Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 215-26 (1944) (reviewing nervous shock litigation).

61. Rahn v. Gerdts, 119 Ill. App. 3d at 783, 455 N.E.2d at 809.

62. *In re* Air Crash Disaster Near Chicago, Illinois on May 25, 1979, 18 Av. Cas. (CCH) 17,215 (N.D. Ill. 1983), *later op.*, No. MDL-391 (N.D. Ill. Dec. 13, 1983) (pre-impact emotional distress held recoverable). For a criticism of this interpretation of *Rickey*, see Note, *Rickey v. Chicago Transit Authority: Consistent Limitation on Recovery for Negligent Infliction of Emotional Distress in Illinois*, 17 J. MAR. L. REV. 563 (1984).

63. Unlike the plaintiffs in *Rahn*, the plaintiff in *Rickey* alleged "severe functional, emotional, psychiatric and behavioral disorders." Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 548, 457 N.E.2d 1, 2 (1983). Whether these symptoms are actually physical in nature is a subject of controversy. *See, e.g.*, Gnirk v. Ford Motor Co., 572 F. Supp. 1201, 1204-05 (D.S.D. 1983) (observing the degrees of manifestation which are physical in nature).

64. *See supra* note 60.

Rahn decision can be broadly interpreted to deny recovery for all types of emotional injury.[65] Future recovery of damages for emotional distress in strict products liability actions, therefore, will depend not only upon acceptance of the *Rahn* court's holding but also upon how narrowly or broadly courts interpret that holding.

The most important issue facing Illinois courts in the area of recovery for emotional distress is the perspective from which a court should approach the strict products liability issue raised in *Rahn*. A court can approach this issue from either the perspective which emphasizes the protected interest or from the perspective which emphasizes the permissible scope of a defendant's liability. The protected interest approach will lead to further application of concepts rooted in negligence. The permissible scope of liability approach will lead to the application of concepts formulated to determine whether a court should impose strict liability. Illinois courts should follow this latter approach and concentrate on the scope of "physical harm," as that term is used in the *Restatement (Second) of Torts*, while keeping a watchful eye on the policy considerations which justify imposition of strict products liability. This approach will place this new form of liability on an independent foundation. Its use will represent a courageous departure from principles rooted in fault and will result in a new method of analyzing the issue of emotional harm in cases involving strict products liability.

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65. This broad denial of recovery would include physical manifestations of emotional distress. *See supra* note 62.