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DESIGN DEFECT CASES: THE PRESENT STATE OF ILLINOIS PRODUCTS LIABILITY LAW

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INTRODUCTION

Illinois was one of the first states to embrace the doctrine of strict liability in tort for personal injuries caused by defective products. Since the landmark decision of *Suvada v. White Motor Co.*,[1] the Illinois courts have been in the forefront in developing the body of decisions which has become known as products liability law.[2] In Illinois, this development has consisted of a gradual expansion of a manufacturer's liability in furtherance of the basic philosophical principles set out in *Suvada*. Recent decisions of the Illinois Supreme Court, however, have appeared to bring about a reversal of this trend and have raised the question of whether Illinois is now proceeding to restrict the application of those principles. This restriction has been manifested by the Illinois courts incorporating negligence concepts into strict liability and deciding issues, arguably questions of fact properly for jury consideration, as a matter of law. This article will focus on this trend by examining the present state of Illinois law with respect to the most complex type of products liability cases, that involving defectively designed products, whether the action is based on negligence or strict liability.

STRICT LIABILITY IN TORT FOR DEFECTIVE DESIGN

What is a Defect?

Before proceeding to a discussion of products liability, it is

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1. 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

2. *See generally* FRUMER & FRIEDMAN, PRODUCTS LIABILITY (1970); Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963 (1959); Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960) (hereinafter cited as *Citadel I*); Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966) (hereinafter cited as *Citadel II*); and cases cited at Annot., 13 A.L.R.3d 1057 (1967). For some recent theoretical studies of strict liability in general, see Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUDIES 151 (1973); Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972); Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUDIES 205 (1973).

necessary to distinguish the two types of defects. A product may be defective either as a result of the manufacture of the product or as a result of the design of the product. In the case of an injury caused by a manufacturing defect, the plaintiff asserts that the product was not manufactured as the defendant intended—something during the manufacturing or inspection stage has gone awry. Design defect cases, on the other hand, constitute a challenge to the design of a product, frequently attacking its lack of safety features, rather than a challenge to the manufacture of a specific item. As one commentator described the distinction, in design defect litigation, not only a single lemon, but the whole citrus grove is challenged.[3]

Suvada v. White Motor Co.

Any discussion of products liability law in Illinois must, of course, begin with *Suvada.* For there the Illinois Supreme Court ended the necessity of proving the two "sister citadels"[4] of privity and negligence in products liability actions and thus heralded the advent of strict liability in tort for Illinois. Today, the significance of this opinion is often overlooked because of the almost total acceptance of strict liability concepts which has occurred since 1965. *Suvada* was an action brought by the purchasers of a reconditioned tractor-trailer truck against both the seller of the truck, White Motor Co., and the manufacturer of the brake system installed in the truck, Bendix-Westinghouse, for injuries sustained when the brake system malfunctioned and the truck collided with a bus.

Rejecting the manufacturer's contention that his liability extended only to those parties who were in privity of contract, the *Suvada* court first held that lack of privity was no longer a good defense in a tort action against a manufacturer of any product whose defective condition made it unreasonably dangerous.[5]

The court then turned to the defendant's second argument, that the nature of its liability, if any, should lie in negligence, rather than in strict liability. The court began with an examination of earlier Illinois cases. Noting that strict liabil-

3. Phelan & Foer, *Problems of Proof in Defective Design Litigation*, 54 CHI. B. RECORD 257, 258 (1973).

4. *See Citadel I, supra* note 2. The word "citadel" is taken from Judge Cardozo's opinion, Ultramares Corp. v. Touche, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931): "The assault upon the citadel of privity is proceeding in these days apace."

5. 32 Ill. 2d at 617, 210 N.E.2d at 185. *Accord*, Lindroth v. Walgreen Co., 407 Ill. 121, 94 N.E.2d 847 (1950); Rotche v. Buick Motor Co., 358 Ill. 507, 193 N.E. 529 (1934) (expressly adopting MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916)). Both cases involved negligent manufacture.

ity had been applied in Illinois for the sale of food since 1847,[6] the court found that the public policy considerations underlying the imposition of strict liability, rather than negligence, for the sale of contaminated food[7] were equally applicable in cases involving the sale of other defective products. The court thus held that strict liability could now be imposed upon the manufacturer of products whose defective condition renders them unreasonably dangerous to the user or consumer without proof of either privity or negligence. Grounding its decision on three basic public policy concepts, the court reasoned that:

> [I]t seems obvious that 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 are present and as compelling in cases involving motor vehicles and other products, where the defective condition makes them unreasonably dangerous to the user, as they are in food cases.[8]

Underlying the court's reasoning was the commercial concept that the manufacturer's possible extended liability was merely an additional cost of doing business. The manufacturer could easily purchase liability insurance to cover his potential losses, allocating the extra expense among the price of each product. As Dean Prosser pointed out,

> [t]he problem is dealt with as one of allocating a more or less inevitable loss to be charged against a complex and dangerous civilization, and liability is placed upon the party best able to shoulder it. The defendant is held liable merely because, as a matter of social adjustment, the conclusion is that the responsibility should be his.[9]

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6. Misner v. Granger, 9 Ill. 69 (1847).

7. *See* Wiedeman v. Keller, 171 Ill. 93, 99, 49 N.E. 210, 211 (1897), *quoted with approval in* Suvada v. White Motor Co., 32 Ill. 2d 612, 618, 210 N.E.2d 182, 185 (1965):

> Where, however, articles of food are purchased from a retail dealer for immediate consumption, the consequences resulting from the purchase of an unsound article may be so serious and may prove so disastrous to the health and life of the consumer that public safety demands that there should be an implied warranty on the part of the vendor that the article sold is sound, and fit for the use for which it was purchased.

8. 32 Ill. 2d at 619, 210 N.E.2d at 186.

9. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 509 (3d ed. 1964). *See* James, *Products Liability*, 34 TEXAS L. REV. 44, 228 (1955); *Citadel I, supra* note 2, at 1134. The *Suvada* court recognized that its decision coincided with the then recently taken position in section 402A of the Restatement (Second) of Torts which provides:

> § 402A. 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 with-

The court was careful to point out that strict liability was not "absolute liability."[10] Under *Suvada*, it was incumbent on the plaintiff to prove that his injury "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."[11] The primary difference in proof between negligence and strict liability centered on whether the product was in an "unreasonably dangerous condition" when it left the manufacturer's control. Here lay the advantage to the plaintiff. Instead of having to prove that an individual in the employ of the manufacturer failed to exercise ordinary care in the performance of his job, either in assembling the product or in not discovering another's error, the plaintiff need only show that the product itself was defective. By shifting the focus from the defendant's acts to the condition of the product itself, the court made the plaintiff's burden of proof easier.[12]

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out 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 contract relation with the seller.

10. The *Suvada* court aptly demonstrated that its opinion was not to be interpreted as advocating the imposition of absolute liability in the guise of strict liability:

> Bendix argues that the imposition of strict liability . . . requires it to guarantee both White's and Suvada's use of the brake system. Such liability does not, of course, make Bendix an absolute insurer. The 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.

32 Ill. 2d at 623, 210 N.E.2d at 188.

The court was clearly aware that unless it required proof of some causal connection between the "condition" of the product and the plaintiff's injury, absolute liability would be the de facto effect of their decision. Thus, the court held that the damage must be the "result" of the condition. This limitation standing alone was patently not sufficient if strict liability rather than absolute liability was to be the rule, as a vast number of injuries are the result of certain conditions of products totally without the scope of strict liability protection. Knives frequently injuring people and sugar being a dangerous substance to diabetics are two simple examples. In order to demonstrate that something more than the normal and expected result one would foresee from using a particular product was required, the court added the additional burden of proving that the "condition" was also an "unreasonably dangerous one." Finally, to insure that the damage was truly attributable to the defendant—that he was not a guarantor of or absolutely liable for all future injury caused by the product—the court also required that the "condition" causing the damage must have existed at the time the product left the manufacturer's control.

11. 32 Ill. 2d at 623, 210 N.E.2d at 188. *See* note 10 *supra*.

12. In addition to eliminating the need for proof of actual negligence on the part of the manufacturer, the adoption of strict liability has made other types of evidence admissible which had previously been excluded in actions based on negligence. For example, evidence of similar accidents or occurrences is admissible in a strict liability case to show that the design of the product in fact was dangerous or defective. Vlahovich

The *Suvada* court did not, however, define "unreasonably dangerous," nor did it indicate how such a determination would be made.[13] In most instances, it is enough to show that

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v. Betts Machine Co., 101 Ill. App. 2d 123, 128, 242 N.E.2d 17, 19 (1968), *aff'd*, 45 Ill. 2d 506, 260 N.E.2d 230 (1970). Under negligence principles, such evidence would only be admissible to the extent of showing the defendant knew or should have known of the prior incidents. *See* Badorek v. General Motors Corp., 11 Cal. App. 3d 902, 90 Cal. Rptr. 305 (1970). *See generally* I FRUMER & FRIEDMAN, PRODUCTS LIABILITY §§ 12.01[2], 12.01[4] (1970).

Similarly, in a strict liability action, evidence of subsequent changes in the design of the product in question is admissible as tending to show that the product was dangerous prior to the change. Sutkowski v. Universal Marion Corp., 5 Ill. App. 3d 313, 281 N.E.2d 749 (1972); *cf.* Rules of Evidence, Act of January 2, 1975, Pub. L. No. 93-595, 93d Cong., rule 407. The reason for excluding such evidence, except to show feasibility, Brown v. Quick Mix Co., 75 Wash. 2d 833, 454 P.2d 205 (1969), was because of the public policy encouraging repair and correction of dangerous conditions, which would be frustrated if such evidence could be offered as an admission of negligence. Since negligence is not an issue in a strict liability case, the reason for excluding such evidence is no longer present. *See also* Wallner v. Kitchens of Sara Lee, Inc., 419 F.2d 1028 (7th Cir. 1969); Manos v. Trans World Airlines, Inc., 324 F. Supp. 470 (N.D. Ill. 1971). *See generally* Phelan & Foer, note 3 *supra*.

13. Unfortunately, the court was not obligated to define what it meant by the phrase "unreasonably dangerous," and no Illinois court has seen fit to do so since *Suvada*. Several reasonable assumptions can be made though. The *Suvada* court noted that the views expressed in its opinion coincided with the position taken in section 402A of the Restatement (Second) of Torts. Section 402A did advocate the imposition of strict liability, also clearly extending its protection to property damage as well as personal injury, but used some unfortunate language in the process (emphasis added):

> (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 . . . .

The language is unfortunate because it would appear to require a dual burden: one, proof that the product is defective; and two, proof that the defect makes the product unreasonably dangerous. The comments to section 402A suggest that perhaps the phrase is actually redundant. In comment *g*, the Restatement explains that to be in a "defective condition," the product must be "in a condition not contemplated by the ultimate consumer." In discussing the phrase "unreasonably dangerous" in comment *i*, however, the Restatement used identical language (emphasis added).

> [W]hat is meant by 'unreasonably dangerous' in this Section . . . [is that] [t]*he article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer* . . . . Good whiskey is not unreasonably dangerous merely because it will make some people drunk . . . but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous.

Thus, while the language of both *Suvada* and section 402A was couched in terms of personal injury, the underlying tone is clear: a product is unreasonably dangerous when it does not perform as expected or intended by the consumer causing damage. Several Illinois decisions illustrate that conclusion. *See, e.g.*, Dunham v. Vaughan & Bushnell Mfg. Co., 42 Ill. 2d 339, 247 N.E.2d 401 (1969); Wright v. Massey-Harris Inc., 68 Ill. App. 2d 70, 215 N.E.2d 465 (1966).

A recent California case met the ambiguous language of section 402A head on and held that the plaintiff need only prove that the product was in a defective condition, and not the redundant addition that it was unreasonably dangerous as well. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 104 Cal. Rptr. 433, 501 P.2d 1153 (1972). The court reasoned that the word "unreasonably" was unsatisfactory because it introduced negligence concepts into a strict liability case. At least one other state is in

the product was not manufactured or sold in the condition in which the seller intended. The defendant may not contend that the standard against which the product should be judged is anything less than the product he initially intended to manufacture. A mere comparison of the defective product with all others is usually enough. In cases claiming that the overall design is defective, however, the defendants' entire line of products, and perhaps the whole industry, is under attack. There is, therefore, no objective standard against which the design can be judged if no one in the industry incorporates the design in question.[14] While the problem did not appear to be significant in the context of defectively manufactured products, once the courts determined that claims for defective design were also covered by *Suvada*, the question arose as to how it would be possible to prove that such a product was "unreasonably dangerous" without resort to traditional negligence principles.[15] The question arose almost immediately

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express agreement with the *Cronin* approach. Glass v. Ford Motor Co., 123 N.J. Super. 599, 304 A.2d 562 (1973). *But cf.*, Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974).

The language of two recent Illinois decisions indicate that proof of a defective condition causing damage will satisfy the "unreasonably dangerous" element of *Suvada*. In Pyatt v. Engel Equip., Inc., 17 Ill. App. 3d 1070, 309 N.E.2d 225 (1974), the Illinois Appellate Court for the Third District held that it was error to allow any jury instructions attempting to define the term "unreasonably dangerous." The court reasoned that any definition would necessarily contain "vestiges of the reasonable man or negligence standard" which would be clearly improper in a strict liability action. *Id.* at 1075, 309 N.E.2d at 229.

That the terms "defective condition" and "unreasonably dangerous" are synonymous the court tacitly agreed:

> The court in the Cronin case adopted 'defect' as the proper description of the basis of a manufacturer's liability rather than the term 'unreasonably dangerous' believing the latter term also suggestive of negligence. *It would appear that in either case the use of the term in an instruction without further definition would be appropriate.*

Id. (emphasis added).

Similarly, in Larson v. Thomashow, 17 Ill. App. 3d 208, 307 N.E.2d 707 (1974) (an automobile collision case), the Illinois appellate court held that proof that the injury was a result of an "unreasonable condition in the product" or the product was in a "defective condition" when it left the manufacturer's control now satisfied the plaintiff's burden of proof. The use of the phrase "unreasonably dangerous" by the *Suvada* court was only its method of insuring that before strict liability could be imposed, the product must be shown to have some defective condition causing damage. The term "unreasonably dangerous" adds nothing more to that burden. *Accord*, II FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 16(a)(4) (1974). *See generally*, Note, *Products Liability—Under Greenman Formulation, The Plaintiff Need Not Prove That the Defective Product Was Unreasonably Dangerous*, 23 DRAKE L. REV. 197 (1973); Note, *Strict Liability in Tort: Defect Need Not Render Product "Unreasonably Dangerous"*, 49 WASH. L. REV. 231 (1973).

14. For an early case finding lack of "standards" no bar to assessing liability, *see* The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932).

15. At least two prominent commentators and one Illinois appellate court opinion seem to have suggested that the application of negligence principles is the only logical way to deal with a design defect problem. *See* Dunham v. Vaughan & Bushnell Mfg. Co., 86 Ill. App. 2d 315, 327, 229 N.E.2d 684, 690 (1967); Noel, *Manufacturer's Negligence of Design or*

since the Illinois courts had little difficulty in finding that *Suvada* applied to situations where the unreasonably dangerous condition of the product was the result of an overall defective design rather than the result of a manufacturing error.

Liability for Design Defects

In *Wright v. Massey-Harris, Inc.*,[16] a farm employee injured himself while operating a self-propelled cornpicker. The plaintiff-employee alleged that the manufacturer had improperly designed the cornpicker by failing to incorporate a reasonably safe shield over the area where corn ears would jam and over the shucking rollers under the area where jammed corn ears had to be extracted. The court refused to distinguish *Suvada* on the ground that *Suvada* involved a defect in manufacture, while the situation in *Wright* involved an alleged defect in overall design.

> [W]e interpret Suvada to mean that the strict liability imposed upon a manufacturer includes injuries which arise from defects in design as well as defects in manufacture.
>
> Whether a design defect . . . is of a nature upon which liability can be imposed involves the factual question of whether it creates an unreasonably dangerous condition . . . .[17]

The *Wright* court extended the protection of *Suvada* to those injured by a product where its design made it unreasonably dangerous because the public policy underlying *Suvada*, that of placing the burden of the consumer's injury on the party best able to correct the defect and the one most able to spread the risk of loss, applied to all products causing injury regardless of whether the defect originated in design or in manufacture. This reasoning has never been seriously challenged in Illinois, and the *Wright* opinion has been followed by every Illinois court considering the question.[18]

Directions for Use of a Product, 71 YALE L.J. 816, 819 (1962); II HARPER & JAMES, THE LAW OF TORTS § 28.4 (1956). The test to be applied in determining liability under traditional negligence theory was annunciated by Judge Learned Hand in United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947):

> [T]he owner's duty . . . to provide against resulting injuries is a function of three variables: (1) The probability that she [a barge] will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions . . . . [I]f the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P . . . .

Id. at 173. *See also* Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 85 Cal. Rptr. 629, 467 P.2d 229 (1970) (negligent design of a paydozer); Dorsey v. Yoder Co., 331 F. Supp. 753, 760 (E.D. Pa. 1971); II HARPER & JAMES, THE LAW OF TORTS § 28.4 (1956).

16. 68 Ill. App. 2d 70, 215 N.E.2d 465 (1966). The *Suvada* opinion had been rendered while *Wright* was on appeal.

17. *Id.* at 79, 215 N.E.2d at 470.

18. *See, e.g.*, Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d

The application of *Suvada* to all design defect cases has not, however, been without difficulty. As previously noted, *Suvada* resulted in shifting the focus from the defendant's conduct to the state of the product. But to what extent may a

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305 (1970) (trenching machine); Dunham v. Vaughan & Bushnell Mfg. Co., 42 Ill. 2d 339, 247 N.E.2d 401 (1969); Sutkowski v. Universal Marion Corp., 5 Ill. App. 3d 313, 281 N.E.2d 749 (1972) (strip mining machine); Rivera v. Rockford Machine & Tool Co., 1 Ill. App. 3d 641, 274 N.E.2d 828 (1971) (molding machine); Moren v. Samuel M. Langstom Co., 96 Ill. App. 2d 133, 237 N.E.2d 759 (1968) (printer-slotter machine).

Both *Dunham* and *Williams* are significant for reasons other than their acceptance of the *Wright* opinion. In *Dunham*, the plaintiff was injured when a chip broke off a hammer he was using and struck him in the eye. The manufacturer argued that the principles of *Suvada* did not apply to his situation because there was no specific, identifiable defect in the hammer when it left its control. The court held, however, that whether the hammer was defective was properly a question of fact for the jury. The court reasoned that "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." 42 Ill. 2d at 342, 247 N.E.2d at 403. Since the hammer as designed produced a condition described as "work hardened," a condition making it more likely to chip, the issue whether that design was unreasonably dangerous when the hammer did chip and injure the plaintiff after only eleven months of use was properly submitted to the jury. The *Dunham* court, therefore, defined and arguably expanded the concept of defect to include a product which fails to perform "in the manner reasonably to be expected" in light of the product's nature, use, and intended function.

One area of design defect cases has caused a good deal of uncertainty. The situation arises when the manufacturer fails to include a safety guard over an area where serious injury is readily foreseeable because the danger is open and obvious. Has the manufacturer breached his duty to design a safe product or did the injured plaintiff "assume the risk"? Illinois courts appear to be split on the issue. *Compare* Rios v. Niagara Machine & Tool Works, 59 Ill. 2d 79, 319 N.E.2d 232 (1974); Rivera v. Rockford Machine & Tool Co., 1 Ill. App. 3d 641, 274 N.E.2d 828 (1971); *and* Wright v. Massey-Harris, Inc., 68 Ill. App. 2d 70, 215 N.E.2d 465 (1966), *with* Weiss v. Rockwell Mfg. Co., 9 Ill. App. 3d 906, 293 N.E.2d 375 (1973); *and* Denton v. Bachtold Bros., 8 Ill. App. 3d 1038, 291 N.E.2d 229 (1972). In particular, compare the difference of opinion over Murphy v. Cory Pump & Supply Co., 47 Ill. App. 2d 382, 197 N.E.2d 849 (1964). The *Wright* court said that "*Murphy* illustrates a typical result which *Suvada* seeks to remedy . . . ." 68 Ill. App. 2d at 78, 215 N.E.2d at 469. But the *Weiss* court quoted *Murphy* with approval. 9 Ill. App. 3d at 917, 293 N.E.2d at 383. This area of conflict will be discussed at greater length in the text section dealing with the defenses to design cases. *See* text accompanying notes 61-68 *supra*.

Other jurisdictions faced with the "open and obvious" danger argument have, for the most part, agreed with the reasoning of *Wright* rather than *Weiss*. *See, e.g.*, Runnings v. Ford Motor Co., 461 F.2d 1145 (9th Cir. 1972) (radiator cap located inside the cab); Dorsey v. Yoder Co., 331 F. Supp. 753 (E.D. Pa. 1971) (metal slitting machine); Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 85 Cal. Rptr. 629, 467 P.2d 229 (1970) (paydozer); Palmer v. Massey-Ferguson, Inc., 3 Wash. App. 508, 476 P.2d 713 (1970) (hay bailer).

For other jurisdictions applying strict liability to design defects, *see, e.g.*, Passwaters v. General Motors Corp., 454 F.2d 1270 (8th Cir. 1972) (wheel covers) (strict liability protection extended to bystander); Dyson v. General Motors Corp., 298 F. Supp. 1064 (E.D. Pa. 1969) (hard top roof); Juenger v. Bucyrus-Erie Co., 286 F. Supp. 286 (E.D. Ill. 1968) (stripping shovel); LaGorga v. Kroger Co., 275 F. Supp. 373 (W.D. Pa. 1967) (boy's coat); Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963) (rower tool); Finnegan v. Havir Mfg. Corp., 60 N.J. 413, 290 A.2d 286 (1972) (punch press); Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 290 A.2d 281 (1972) (punch press).

manufacturer focus on the actual events causing the injury and contend that such an occurrence, because of its unforeseeability, was outside the "duty" imposed by *Suvada* to build a reasonably safe product?[19] As noted earlier,[20] manufacturers have had limited success in convincing courts that the failure to include safety equipment in the face of an obvious danger is outside the duty of producing reasonably safe products imposed by strict liability. They have argued more successfully, however, in the so-called "second crash" cases—cases where the alleged defect in design did not initiate the occurrence, but is alleged to have aggravated or extended the injuries which the plaintiff suffered. In these cases, the courts appear to have been influenced, more than in other design defect cases, by the manufacturer's argument that its duty to the plaintiff is limited by the "foreseeability" of the injury and/or the status of the plaintiff.

SECOND CRASH DOCTRINE

The issue of whether a manufacturer is liable for all the foreseeable consequences of any secondary accident involving its product, even though the product may not have caused the initial accident, has caused a great deal of controversy and dis-

19. There is a serious question whether the protection afforded the public has been significantly expanded by *Suvada*. As the Court of Appeals for the Fourth Circuit noted in Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066 (4th Cir. 1974), in cases dealing with a second-crash issue, the courts sometimes discuss the issues in terms of strict liability and sometimes in terms of negligence.

> It would appear, however, that it makes little or no real difference whether liability is asserted on grounds of negligence, warranty or strict liability; the applicable principles are roughly the same in any case.

Id. at 1068 n.2. *Accord*, Chestnut v. Ford Motor Co., 445 F.2d 967 (4th Cir. 1971); Dyson v. General Motors Corp., 298 F. Supp. 1064 (E.D. Pa. 1969); Note, 24 VAND. L. REV. 862, 863 (1971).

As explained earlier (see note 12 *supra*), there are major differences between the two principles at the time of trial, and therein lies the primary importance of *Suvada*. Questions such as relevancy and admissibility based on public policy may be applicable to exclude evidence at trial, depending on whether the plaintiff is proceeding in strict liability or in negligence. Furthermore, in an action based on strict liability, freedom from contributory negligence need not be pleaded or proved by the plaintiff. On appeal, however, the court is undoubtedly right that the difference is negligible. Whether the alleged defect relates to mandatory safety equipment or protections for auto passengers in the event of an accident, the ultimate question is whether the original designer should have anticipated or foreseen the occurrence leading to the aggravated injury and taken steps to protect the user of his product from it. Because of a lack of objective standards, all second-crash cases involve the outer scope of strict liability, that is, the manufacturer's duty, regardless of whether the legal rationale springs from negligence or strict liability principles.

20. See the discussion concerning the lack of safety equipment controversy, note 18 *supra*, and the discussion of defenses, text accompanying notes 61-68 *infra* and note 65 *infra*.

cussion.[21] The issue is raised when the injured plaintiff alleges that while the design of the defendant's product did not initiate the accident, the design did enhance the injuries received. The defendant answers that strict liability does not require him to foresee or prevent all the possible consequences of an accident he did not cause—the intended use of the product marks the outer limit of liability, and that "use" does not include accidents. Absent this limitation, the manufacturer contends that it would have a duty to design an "accident proof" product. The problem arises primarily in automobile collisions, and the cases dealing with the issue to date have reasoned along one of two lines: those applying the "intended use" test, and those applying the "foreseeable use" test.

Intended Use as a Limitation of Duty

The first theory is represented by *Evans v. General Motors Corp.*,[22] a case involving a collision between a 1961 Chevrolet and another automobile which resulted in the death of the driver of the Chevrolet. The complaint, containing allegations of negligence, breach of warranty and strict liability, asserted that General Motors improperly designed the frame of its vehicle by failing to provide reasonable protection to the plaintiff's decedent when the automobile which he was driving was struck in the side. Specifically, the complaint alleged that the Chevrolet was designed with an "X" frame which did not have have side rails to protect a driver from side impacts and that if the design had incorporated side rails as used in other automobiles, the injury to the driver would not have been as severe.

The Court of Appeals for the Seventh Circuit, in a two to one decision, affirmed the lower court's dismissal of the complaint, accepting the defendant's argument that the duty of an automobile manufacturer to the occupants of its vehicles did not extend to the designing of "automobiles in which it would be safe to collide."[23] Drawing no distinction between the duty imposed by negligence and strict liability, the majority reasoned that an automobile manufacturer was only under a

21. *See, e.g.*, Nader & Page, *Automobile Design and the Judicial Process*, 55 CAL. L. REV. 645 (1967); Note, *Auto Design: Manufacturers' Duty to Reasonably Protect Occupants Against the Effects of Collision*, 1969 U. ILL. L.F. 396; Note, *Automobile Design Liability: Larsen v. General Motors and Its Aftermath*, 118 U. PA. L. REV. 299 (1969) (cited in *Mieher*); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973); Roda, *Products Liability—The "Enhanced Injury Case" Revisited*, 8 THE FORUM 642 (1973); and cases cited in Annot., 42 A.L.R.3d 560 (1972).

22. 359 F.2d 822 (7th Cir. 1966) (applying Indiana law).

23. *Id.* at 824.

duty to design a car that was "reasonably fit for its intended purpose"[24] and that:

> The intended purpose of an automobile does not include its participation in collisions with other objects, despite the manufacturer's ability to foresee the possibility that such collisions may occur.[25]

The majority was persuaded by the defendant's argument that it was unable to manufacture a crash-proof car.[26]

> A manufacturer is not under a duty to make his automobile accident-proof or fool-proof; nor must he render the vehicle 'more' safe where the danger to be avoided is obvious to all.[27]

In a strong dissent, Judge Kiley rejected the majority's "intended use" rationale, reasoning instead that since automobile accidents were foreseeable, a manufacturer's

> duty was to use such care in designing its automobiles that reasonable protection is given purchasers against death and injury from accidents which are expected and foreseeable yet unavoidable by the purchaser despite careful use.[28]

Foreseeability of Use as the Outer Limits of Duty

Judge Kiley's argument that foreseeability rather than intended use should be the test in defining the scope of a manufacturer's duty in second-crash situations was followed in *Larsen v. General Motors Corp.*[29] In *Larsen*, a case also involving an automobile collision, the plaintiff alleged that his decedent's injuries were enhanced by the lack of a collapsible steering column in the decedent's 1963 Corvair. The Court of Appeals for the Eighth Circuit, reversing the dismissal of the complaint, refused to follow *Evans* and held that an automobile manufacturer does have a duty to exercise reasonable care in the design of its product in order to protect occupants from injuries arising out of accidents initiated from other causes. The court expressly rejected the "intended use" argument.

> We think the 'intended use' construction urged by General

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24. This argument was probably taken from the language used by the court in Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963): "To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith *in a way it was intended to be used* . . . ." *Id.* at 64, 27 Cal. Rptr. at 701, 377 P.2d at 901 (emphasis added).

25. 359 F.2d at 825.

26. This argument was successfully utilized in Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950). It is significant to note that the Court of Appeals of New York overruled the *Campo* decision, a case which was relied on in *Evans*, and expressly adopted the approach of Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968) in Bolm v. Triumph Corp., 33 N.Y.2d 151, 350 N.Y.S.2d 644, 305 N.E.2d 769 (1973).

27. 359 F.2d at 824.

28. *Id.* at 827 (Kiley, J., dissenting).

29. 391 F.2d 495 (8th Cir. 1968).

> Motors is much too narrow and unrealistic. Where the manufacturer's negligence in design causes an unreasonable risk to be imposed upon the user of its products, the manufacturer should be liable for the injury caused by its failure to exercise reasonable care in the design. These injuries are readily foreseeable as an incident to the normal and expected use of an automobile.[30]

The court saw no reason to permit automobile manufacturers to avoid liability because the design defects had not caused the accident but had merely enhanced or aggravated the resulting injuries.

> No rational basis exists for limiting recovery to situations where the defect in design or manufacture was the causative factor of the accident, as the accident and the resulting injury, usually caused by the so-called 'second collision' of the passenger with the interior part of the automobile, all are foreseeable. . . .
>
> The intended use and purpose of an automobile is to travel on the streets and highways, which travel more often than not is in close proximity to other vehicles and at speeds that carry the possibility, probability, and potential of injury-producing impacts. The realities of the intended and actual use are well known to the manufacturer and to the public and these realities should be squarely faced by the manufacturer and the courts. We perceive of no sound reason, either in logic or experience, nor any command in precedent, why the manufacturer should not be held to a reasonable duty of care in the design of its vehicle consonant with the state of the art to minimize the effect of accidents.[31]

Although many earlier decisions across the country followed the *Evans* approach, the overwhelming trend in recent decisions has been to follow the lead of *Larsen*.[32] In 1973, the Supreme Court of Illinois became embroiled in the "second crash" controversy when it was faced with these conflicting theories in the case of *Mieher v. Brown*.[33] Although the case involved the manufacturer's duty to a third party rather than to the occupants of its own vehicle, the facts of the case provided an excellent opportunity for the court to explain its position on a number of important questions in the design defect field, including the *Larsen—Evans* controversy. If the court's opinion can be analogized to a coin toss, the coin landed on its edge, not falling either way.

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30. *Id.* at 502.
31. *Id.* at 502-03.
32. *See, e.g.*, Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066 (4th Cir. 1974); Green v. Volkswagen of America, Inc., 485 F.2d 430 (6th Cir. 1973); Passwaters v. General Motors Corp., 454 F.2d 1270 (8th Cir. 1972); Grundmanis v. British Motor Corp., 308 F. Supp. 303 (E.D. Wis. 1970); Badorek v. General Motors Corp., 11 Cal. App. 3d 902, 90 Cal. Rptr. 305 (1971); Bolm v. Triumph Corp., 33 N.Y.2d 151, 350 N.Y.S.2d 644, 305 N.E.2d 769 (1973); Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969).
33. 54 Ill. 2d 539, 301 N.E.2d 307 (1973).

Mieher v. Brown: The Illinois Supreme Court Sits as a Jury

In *Mieher*, the plaintiff's decedent was killed when her car struck and submarined the rear of a truck manufactured by the defendant. It was alleged that the defendant was negligent in designing the truck without a rear bumper and that such a design allowed the rear end of the truck to slide over the hood of the car, through the windshield, killing the driver of the auto. The Illinois Appellate Court for the Fifth District reversed the dismissal of the complaint, holding that the plaintiff had properly stated a cause of action for negligent design.[34] The appellate court clearly adopted the rationale of *Larsen*.

> It seems to us that the rationale of *Larsen* is the more cogent and reasoned approach to the difficult problem of design defect as it affects the automobile industry. To hold otherwise, in the 'second collision' cases, for example, would permit the manufacturer in the face of the high incidence of injuries sustained by those injured in automobile accidents, to fill the passenger compartment with all sorts of sharp protrusions and gimcracks capable of producing severe injuries or death and which serve no purpose other than eye appeal, and then survey the resulting misery with the complacent knowledge that, since these items of hardware did not initiate the chain of events, it was secure from responsibility.
>
> . . . .
>
> We agree with *Larsen* . . .
>
> . . . [a]nd hold that an automobile manufacturer does owe a duty to exercise ordinary care in design of its vehicles so as to avoid subjecting people, whether users or nonusers . . . to unreasonable risks of harm when the risk is foreseeable.[35]

The Illinois Supreme Court reversed the appellate court, and reinstated the trial court's dismissal of the complaint. The court acknowledged the two approaches taken in other jurisdictions, represented by *Larsen* and *Evans*, but found that even though the facts in this case presented a "second collision" issue, the case differed substantially from both *Larsen* and *Evans*.

> The question in *Larsen* and *Evans* concerned the duty of the manufacturer to design a vehicle in which it is safe to ride. The question in our case involves the duty of the manufacturer to design a vehicle with which it is safe to collide.[36]

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34. Mieher v. Brown, 3 Ill. App. 3d 802, 805, 278 N.E.2d 869, 872 (1972).

35. *Id.* at 811-12, 278 N.E.2d at 876-77.

36. 54 Ill. 2d at 543, 301 N.E.2d at 309. This language would appear to be an attempt by the court to distinguish between the duty of care a manufacturer owes users and nonusers of its product. *See* Turkington, *The Non-User Second Collision Plaintiff: Outer Limits of Defective Products Law?*, 23 DE PAUL L. REV. 464 (1973) (hereinafter cited as *Turkington*).

This statement suggests that the critical distinguishing fact between *Mieher*, and the *Larsen* and *Evans* decisions is that suing plaintiff in *Mieher* was a non-user of the product. Essentially this

Without explaining why this was a viable distinction, the court stated that *Larsen* was not "intended to bring within the ambit of the defendant's duty every consequence which might possibly occur."[37]

The court then noted that because it was determining the propriety of the trial court's action in dismissing the complaint for lack of duty—a question of law rather than of fact—the foreseeability rule was not an appropriate test to apply.

> However valuable the foreseeability formula may be in aiding a jury or judge to reach a decision on the negligence issue, it is altogether inadequate for use by the judge as a basis of determining the duty issue and its scope.[38]

Although the *Mieher* court clearly decided that foreseeability alone was "altogether inadequate" in defining a manufacturer's duty of care in the design of its vehicle, it failed to explain what additional factors should be considered.

> [A]lthough foreseeability is generally accepted as the test to be applied by a *jury* in determining if a duty has been violated, in defining the scope of the duty, *other elements* must be considered by the *court*.[39]

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is the 'collide' and 'ride' language the court distills down to.

Id. at 470. The dissent in *Mieher* argued, however, that the court intended no such distinction:

> Upon a close reading of the opinion it appears to me that the majority recognize that the duty owed by the manufacturer is to design his vehicle so as to avoid the unreasonable risk of injury in the event of collision irrespective of whether the injured is within or without the particular vehicle . . . .

54 Ill. 2d at 546, 301 N.E.2d at 311 (Goldenhersh, J., dissenting).

37. 54 Ill. 2d at 545, 301 N.E.2d at 309. The court is quoting from Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401, 1417-18 (1961).

38. 54 Ill. 2d at 544, 301 N.E.2d at 309-10.

39. *Id.* at 544, 301 N.E.2d at 310 (emphasis added). The court did quote an article on automobile design cases as support. Note, *Automobile Design Liability: Larsen v. General Motors and Its Aftermath*, 118 U. PA. L. REV. 299 (1969).

> In determining the existence of a legal duty, the court assesses the foreseeability of injury, the gravity of the possible injury, and the cost of minimizing the risk of such injury. If these three factors exist in the proper relationship, with the foreseeability of injury great, the extent of possible injury severe, and the cost of minimizing the risk relatively low, the court should find, as a matter of law, that the manufacturer owes a duty to consumers to design 'a reasonably safe container within which to make the journey.'

Id. at 300 (footnotes omitted). It should be noted that this is the traditional negligence test as announced in United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947). See note 15 *supra*.

In addition, the *Mieher* court caused some confusion by purporting to base its decision upon a finding that the product was not "unreasonably dangerous." Since the jury traditionally decides, as a question of fact, whether the product was "not reasonably safe," Rios v. Niagara Machine & Tool Works, 59 Ill. 2d 79, 319 N.E.2d 232 (1974), it appeared that the court was holding that no reasonable jury could find that the rear end collision was foreseeable to the manufacturer. In view of the available statistics on such accidents, NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 40 (1966), it seems more reasonable to assume that the *Mieher* court was not dealing with the concept of "unreasonably dangerous," but

The court did not expand on what those "other elements" were. Apparently, in the court's view, such an analysis was unnecessary because it was able to hold, as a matter of law, that the injury to the plaintiff's decedent was not within the category of those accidents which were "reasonably foreseeable." Without expressly examining the underlying rationale of the recent cases which find "innocent bystanders" within the protection of products liability, the court simply found that the accident was not foreseeable as a matter of law. Unfortunately, the court couched this conclusion in terms of what was an "unreasonable risk of injury." This semantic problem arose when the court agreed with Dean Prosser that one's liability must stop short of the "freakish and the fantastic"[40] and that *Larsen* only extended protection to those designs creating an *"unreasonable risk* of injury" or to situations where an "unreasonable danger" was created.[41] The court concluded, therefore, that

> [a]lthough the injury complained of may have been in a sense, foreseeable, we do not consider that the alleged defective design created an unreasonable risk of injury . . . . '[L]ooking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm' for which recovery is now sought. Public policy and social requirements do not require that a duty be placed upon the manufacturer of this truck to design his vehicle so as to prevent injuries from the extraordinary occurrences of this case.[42]

While public policy did not require the scope of the manufacturer's duty to encompass the specific injuries received by the plaintiff in *Mieher*, the manufacturer's duty was limited not because the design of the truck was reasonably safe, but rather because the danger to the other vehicle was not reasonably foreseeable.

It is submitted that the *Mieher* court went through a three-stage analysis. First, it agreed that the *Larsen* line of cases correctly applied the foreseeability test as opposed to the intended use test in determining the scope of the manufacturer's duty. Second, it held that there were "other elements" which

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with the objective standard of whether manufacturers owe a duty to unforeseen plaintiffs, which is a question of law.

40. 54 Ill. 2d at 545, 301 N.E.2d at 310.

41. *Id., quoting from* Larsen v. General Motors Corp., 391 F.2d 495, 502 n.3 (8th Cir. 1968) (emphasis in original). *See* Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 29 (1953) (hereinafter cited as *Palsgraf Revisited*).

42. 54 Ill. 2d at 545, 301 N.E.2d at 310. The court is quoting from the Restatement (Second) of Torts § 435(2) (1965) and relying heavily on Prosser's discussion concerning the scope of duty in *Palsgraf Revisited, supra* note 41, at 15. Prosser termed the Restatement language "unfortunate." W. PROSSER, HANDBOOK OF THE LAW OF TORTS 307 (3rd ed. 1964). *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 325-26 (4th ed. 1971).

must also be weighed by the court in determining the scope of such a duty. Third, because the *Mieher* court determined that the manner of receiving the injury was so unusual as to be outside the expectation of a reasonable manufacturer, it found that there was no reason to examine those "other elements"—as a matter of law, the unforeseeability of the occurrence alone precluded any recovery.

When viewed in this manner, it can be seen that the true problem with the opinion lies in the third step. The court makes a seemingly arbitrary choice without adequately stating the basis for the decision. Moreover, the opinion fails to set forth any recognizable standards for future cases. Not only are lower courts left without any clue as to the "other elements" which must be considered along with foreseeability in determining the scope of the defendant's duty, but *Mieher* also failed to provide guidelines for ascertaining when a future case would present facts which could properly be called "fantastic" or "extraordinary." Surely, with some ingenuity on the part of defense counsel, most products liability actions can be so described. There is no indication in *Mieher* when an occurrence ceases to be an "ordinary" rear-end collision and becomes instead an "extraordinary" or "fantastic" event. Quite clearly, what will be required is a case-by-case analysis of the facts in all future cases. Unfortunately, the cases decided since *Mieher* have demonstrated only a hesitant attempt by the courts to correct this problem.[43]

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43. For a case repeatedly relied on by the plaintiff in his brief to the *Mieher* court, see Passwaters v. General Motors Corp., 454 F.2d 1270 (8th Cir. 1972). The issue in *Passwaters* was whether the manufacturer's duty of care in the design of his product extended to bystanders. The plaintiff was riding on the back of a motorcycle when it came into contact with the side of a Buick automobile manufactured by the defendant. The Buick was equipped with metal flanges or "spinners" as part of the wheel cover. These devices spun rapidly when the wheel rotated, and when they struck the plaintiff's leg, she was severely cut. The Court of Appeals for the Eighth Circuit held that a manufacturer has "a duty to use reasonable care in the design" of its vehicles, and that since contact with other users of the highway was completely foreseeable, that duty extended to both users and nonusers of its vehicles. *Id.* at 1274.

The court of appeals also discussed the proper application of foreseeability and, contrary to the *Mieher* court, found it to be "generally used to define scope of duty." *Id.* at 1275 n.5. *See* II F. HARPER & F. JAMES, THE LAW OF TORTS § 18.2 at 1023 (1956). Generally, foreseeability is a jury question. *See* Passwaters v. General Motors Corp., 454 F.2d 1270, 1275 n.5 (8th Cir. 1972); Railroad Co. v. Stout, 84 U.S. (17 Wall.) 657 (1873). *See generally* cases collected in Annot., 76 A.L.R.2d 93 (1956).

The Court of Appeals for the Seventh Circuit, in Nanda v. Ford Motor Co., No. 73-1726 (7th Cir., December 27, 1974), applying Illinois law to a second crash case brought in counts of negligence and strict liability, held that

> when an automobile is so constructed that its occupants are subjected to an unreasonable risk of being severely injured if it becomes involved in an accident that is not of a highly extraordinary kind, the manufacturer is liable for resulting injuries to occupants of the automobile.

The Search for Standards

A case decided shortly after *Mieher*, even though it was not itself a products liability case, provided the Illinois Supreme Court with an opportunity to discuss the "other elements" which may play a role in defining the scope of a manufacturer's duty. In *Cunis v. Brennan*,[44] the passenger of a car was thrown from his automobile onto a parkway where one of his legs was impaled on the remains of a drainage pipe. The accident necessitated the amputation of his leg, and his father sued the Village of La Grange for negligently maintaining its parkways. The trial court dismissed the complaint for failure to state a cause of action on the ground that such an injury was outside the realm of reasonable foreseeability. Cunis argued that in order for the village to avoid liability, the defendant had the burden of proving that it could not have reasonably foreseen the manner in which the injury occurred. In support of this argument, Cunis quoted National Safety Council and Public Health statistics demonstrating the likelihood of intersection collisions and passenger ejectments. In light of the *Mieher* opinion this type of argument should have been persuasive since the *Mieher* court had described the accident there as an "extraordinary occurrence." Cunis was obviously attempting to demonstrate how ordinary his injury actually was. However, when viewed within the framework of a classical negligence cause of action, such statistics would seem to be superfluous. It is well settled that in order to plead a good cause of action in negligence, the plaintiff need only al-

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Id. at 6.

The plaintiff was driving a Cortina manufactured by the defendant when he was involved in the collision. While waiting to make a left turn, the plaintiff's car was struck from behind by an Oldsmobile traveling approximately ten miles per hour. The plaintiff's car was spun into the lane of oncoming traffic where it was then struck by another car traveling approximately forty miles per hour. The plaintiff's car was then engulfed in flames. The complaint alleged that the Cortina was defective in that the top wall of the fuel tank located in the trunk of the car also served as a portion of the floor of the trunk and that the only shield between the gas tank and the passenger compartment was a piece of cardboard. Other manufacturers used a continuous metal panel over the gas tank. The court stated that the jury could have found that the initial collision with the Oldsmobile resulted in a small fire in the rear of the Cortina which then engulfed the plaintiff after the collision with the second car.

Applying *Mieher* and Cunis v. Brennan, 56 Ill. 2d 372, 308 N.E.2d 617 (1974), the court stated that "it does not appear to us 'highly extraordinary' that the absence of a firewall or shield . . . would bring about the harm for which plaintiff sues." Nanda v. Ford Motor Co., No. 73-1726 at 5 (7th Cir., Dec. 27, 1974). The court also found that *Evans* was not controlling since that case involved Indiana law and that the duty of a manufacturer to the second collision victim was the same under either negligence or strict liability.

44. 56 Ill. 2d 372, 308 N.E.2d 617 (1974).

lege that a duty was owed, that a breach of duty had occurred, and that the breach was the proximate cause of his injuries.[45] The specific manner or extent of the actual injury in question should not be relevant to the existence of a duty. The only crucial question when arguing whether a duty exists is whether, as a result of the alleged negligent conduct, *any* injury would be reasonably foreseeable.[46] If so, it should be merely a question of fact as to whether the particular injury was proximately caused by the acts of the defendant.

The Illinois Supreme Court, however, did not follow the classical approach, responding instead to the plaintiff's statistical argument. As in *Mieher*, the *Cunis* court discussed the question of duty in terms of foreseeability in holding that a cause of action was not stated. In defining the limits of duty, the court noted that *Mieher* did not limit the confines of duty to the factor of foreseeability alone.

> In addition, in determining whether there was a legal duty, the occurrence involved must not have been simply foreseeable, as the plaintiff contends; it must have been reasonably foreseeable. The creation of a legal duty requires more than a mere possibility of occurrence.[47]

The court reasoned that in addition to foreseeability, the "legal implications" of the holding must be considered as well as the reasonable foreseeability of the particular accident itself and defined foreseeability as what was "likely to happen."

Having said this, however, the court again failed to show how such an analysis could be given general application. Surely a jury could have found that the Village of La Grange could have reasonably foreseen that its negligence in maintaining a parkway might cause an injury to one who came in contact with it. Nonetheless, as in *Mieher*, the court chose to focus not on the question of whether *any* injury was likely to happen, focusing instead on whether the particular injury was likely to

45. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30 (4th ed. 1971).

46. For example, in the famous "peg leg" case, Hines v. Morrow, 236 S.W. 183 (Tex. Civ. App. 1922), the owner of property negligently maintained a road by allowing large pot holes to form. A motorist sustained a broken wheel and the plaintiff, a man with one wooden leg, stopped to help. While assisting the motorist, the plaintiff managed to get his wooden leg stuck in the mud, and while attempting to extricate it, managed to get his good leg entangled in the tow rope, and suffered a broken leg. Certainly, the specific injury in question was not reasonably foreseeable, yet, the plaintiff recovered. It has been suggested that the dominant reason for the plaintiff's recovery in *Hines* was because of his limited pleadings: While exercising all due care for his safety, and the safety of others, he was injured because of the defendant's negligence. *See* Morris, *Proximate Cause in Minnesota*, 34 MINN. L. REV. 185 (1950).

47. 56 Ill. 2d at 375-76, 308 N.E.2d at 619.

happen and as a result, finding the situation to be unique and outside the scope of the defendant's duty.

> 'The circumstance here of the plaintiff's being thrown 30 feet upon the collision with a third person's automobile and having his leg impaled upon the pipe was tragically bizarre and may be unique. We hold that the remote possibility of the occurrence did not give rise to a legal duty on the part of the Village to the plaintiff to provide against his injury.'[48]

Mr. Justice Goldenhersh seemed to agree with the above analysis, as his stinging dissent in *Cunis* illustrates. He argued that the majority in *Cunis* not only "bootstrapped dictum" from *Mieher* in order to reach its decision, but that the majority also managed to totally "confuse the questions of duty and foreseeability, which are, and should be kept, separate and distinct."[49] Discussing duty first, Justice Goldenhersh noted that it is axiomatic that every person owes a duty to exercise ordinary care in his dealings with all people.[50] This duty included the burden of guarding against any injury which might naturally flow as a reasonable consequence of any act he might perform, and that such a burden clearly extended to a municipality in the upkeep of its parkways. Demonstrating the distinction between duty as a threshold question of law and the foreseeability of the specific injury in question as measuring a breach of that duty, Justice Goldenhersh queried whether La Grange would have maintained that it had no duty of care if the injury had been sustained by a pedestrian stumbling on the sidewalk. He submitted that the village's inability to do so exposed a fallacy in the majority opinion.

Similarly, on the question of foreseeability, the dissent noted that to impose liability on a tortfeasor once duty is found,

> it is not essential, in order to hold him liable for the injury which proximately results from his failure to exercise ordinary care, that he foresee either the precise injury that results therefrom or the manner in which it occurs.[51]

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48. *Id.* at 381, 308 N.E.2d at 620 (Goldenhersh, J., dissenting).
49. *Id.* at 379, 308 N.E.2d at 621 (Goldenhersh, J., dissenting).
50. *See* Neering v. Illinois Central R.R. Co., 383 Ill. 366, 50 N.E.2d 497 (1943). In Wintersteen v. National Cooperage and Woodenware Co., 361 Ill. 95, 103, 197 N.E. 578, 582 (1935) the court, in defining duty, said:

> The contention is made by the defendant that it owed no duty of due care to the plaintiff, inasmuch as there was no contract between the plaintiff and the defendant. It is axiomatic that every person owes a duty to all persons to exercise ordinary care to guard against any injury which may naturally flow as a reasonably probable and foreseeable consequence of his act, and the law is presumed to furnish a remedy for the redress of every wrong. This duty to exercise ordinary care to avoid injury to another does not depend upon contract, privity of interest or the proximity of relationship between the parties. It extends to remote and unknown persons.

51. 56 Ill. 2d at 381, 308 N.E.2d at 621 (Goldenhersh, J., dissenting).

The dissent concluded that whether the defendant failed to exercise reasonable care as well as whether the accident in question was reasonably foreseeable were questions of fact, not law, and that the count directed against the village "clearly" stated a cause of action.

Although the *Mieher* court may have been correct in describing the injury there as "freakish and fantastic"—thereby not falling within the scope of a manufacturer's duty in designing his products—it left for future cases the determination of what "other elements" were involved in defining the scope of a manufacturer's duty. In *Cunis*, another negligence action, the court determined that one of the "other elements" was the foreseeability of the specific manner in which the injury occurred. The Illinois Supreme Court was soon to find another "element" to be considered in defining the duty of a manufacturer —the status of the plaintiff. This time, however, the action was in strict liability based on a claim of defective design.

Grafting of the Foreseeable Plaintiff onto Strict Liability

In *Winnett v. Winnett*,[52] a four-year old child was injured when she placed her hand on the moving conveyor belt of a forage wagon. An action was brought in strict liability against the manufacturer alleging that the lack of a safety shield rendered the machine unreasonably dangerous. The Supreme Court of Illinois affirmed the dismissal of the strict liability count holding that the status of the plaintiff as a plaintiff was not foreseeable and therefore not within the scope of protection afforded by strict liability.

On appeal, both the plaintiff and the defendant-manufacturer had focused on the foreseeability of the "use" of the machine. The plaintiff argued that foreseeability had no place in strict liability, and that even if it did, the likelihood of a small child in close proximity to farm equipment was not so unforeseeable as to warrant taking the case from the jury. The defendant contended that the product was being "used" by a child and that since such use was neither intended nor foreseeable, liability could not be imposed.

The court eschewed both approaches and specifically noted that the question of whether the machine was unreasonably dangerous was not even a relevant consideration "unless plaintiff is a person entitled to the protections afforded by the concepts of strict-tort-liability action against manufacturers."[53]

52. 57 Ill. 2d 7, 310 N.E.2d 1 (1974).
53. *Id.* at 10, 310 N.E.2d at 3.

In order to determine that question, the court looked again to considerations of foreseeability.

> Whether the plaintiff here is an individual who is entitled to the protections afforded by the concepts of strict tort liability depends upon whether it can be fairly said that her conduct in placing her fingers in the moving screen or belt of the forage wagon was reasonably foreseeable. A foreseeability test, however, is not intended to bring within the scope of the defendant's liability every injury that might possibly occur. . . . *Foreseeability* means that which it is *objectively reasonable to expect*, not merely what might conceivably occur.[54]

Again, the court made its own determination, as a matter of law, that a four-year old child could not reasonably be expected to be in close proximity to operating farm equipment, and the plaintiff's claim was, therefore, properly dismissed.

It is obvious that the *Winnett* approach is an extension of that used in *Mieher*. The additional element added by the *Winnett* court is the express indication that foreseeability must be tempered by a court-imposed requirement that the status of the injured plaintiff must be reasonably expected by the manufacturer before a duty arises. The result of *Mieher*, *Cunis* and *Winnett* is to require an injured plaintiff to prove not only that the manner of injury could have been "expected," but also that the plaintiff himself was foreseeable. While purporting to set some guidelines for future cases, however, *Winnett* does not explain why the status of the plaintiff was such that she was precluded from recovery. The result would certainly have been different had the injured plaintiff been an adult farm worker; but why this difference in age and status should be determinative is still not clear. As he did in *Mieher* and *Cunis*, Justice Goldenhersh dissented, arguing that the question of foreseeability was not a question of law and should properly be left to the jury.

The Illinois Supreme Court retreated somewhat from its position on duty and foreseeability in another recent case, *Lewis v. Stran Steel Corp.*[55] There, the plaintiff was injured when a bundle of steel flooring being transported by a fork lift truck tilted when the truck ran over a small hole in the floor. The sheets slid out, one on top of the other, "like a deck of cards," seriously injuring the plaintiff. Justice Goldenhersh, here writing for a unanimous court, rejected the manufacturer's contention that the injury was unforeseeable because of the peculiar manner in which the accident occurred.

> In our opinion, it was reasonably foreseeable, in moving the

54. *Id.* at 12-13, 310 N.E.2d at 4-5 (emphasis added).
55. 57 Ill. 2d 94, 311 N.E.2d 128 (1974).

> bundle by fork lift or crane, that *if* the bundle were to become loose the individual sheets could slide out of the banding, and in order to impose liability it was not necessary that defendant foresee with precision the nature of the occurrence, or the concurrent cause of plaintiff's injury.[56]

The *Lewis* court drew two important distinctions, and in doing so, seems to be at variance with both *Mieher* and *Cunis*. One, the duty of care on the part of the defendant was assumed—the bundle should not have come loose. Two, *if* it did come loose, whether it was reasonably foreseeable that the injury in question could occur was a question of fact for the jury. The court's reasoning was clear: the injured plaintiff and the defendant manufacturer need not stand in such a relationship that before the former can recover, the latter must have foreseen not only the specific injury occurring, but also the manner in which it occurred.[57]

On the surface, the point of emphasis appears to be totally different than that of the earlier cases. It is still too early to determine whether the combined *Mieher-Cunis-Winnett* approach will be applied to design defect cases, or whether the *Lewis* approach will become the law. The former approach seems to reflect an underlying desire to limit the continued development of products liability law or at least, to limit the number of potential plaintiffs held to be within strict liability protection in the design defect area. Perhaps, the best explanation for the *Mieher* opinion is that the court was attempting to define a concept which would combine the "unforeseen plaintiff"[58] rule with a quasi-privity requirement in design defect cases. The court's continued reference to the unusual, although not unforeseeable manner in which the plaintiff was injured, the repeated reliance on Prosser's *Palsgraff Revisited*, which analyzed the common law principles governing unforeseen plaintiffs, and the specific holding that the plaintiffs in *Winnett* and

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56. *Id.* at 102, 311 N.E.2d at 133 (emphasis added).

57. A recent Illinois appellate court decision is in agreement with the *Lewis* approach. Fink v. Chrysler Motors Corp., 16 Ill. App. 3d 886, 308 N.E.2d 838 (1974). The defendant argued that the complaint did not set forth a duty owed by it to the plaintiff due to the unusual nature of the accident. The plaintiff was injured while driving an automobile manufactured by the defendant; a collision caused the car's hood to rise up through the windshield, striking the plaintiff in the eye, causing its removal. The Illinois Appellate Court for the Fifth District echoed the *Lewis* opinion:

> It is our opinion and we so hold, that it was the defendant's duty to manufacture its product as to not be unreasonably dangerous to the ultimate user. A question of fact was properly presented to the jury as to whether defendant's failure to meet its own design specifications constituted a defective condition that was unreasonably dangerous to the plaintiff.

Id. at 890, 308 N.E.2d at 841.

58. *See* Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

Cunis were outside the scope of *Suvada's* protection[59] gives credence to such an analysis.[60] Regardless of whether such a theory is valid, several things are clear. The Illinois Supreme Court has given a definite indication that the status of product liability plaintiffs and the manner in which they are injured will be closely scrutinized by the courts in the future. Presumably, the result of this scrutiny will be to further limit the volume of products liability cases which will be allowed to go to the jury. What remains for the courts is an exposition of the broad policy grounds for imposing such limitations.

Defenses to Design Defect Cases[61]

Another manner in which the Illinois courts are apparently restricting the number of products liability actions is by their complete acceptance of various defenses to strict liability actions, whether for design or manufacturing defects. These defenses manifest themselves in a number of ways, from attacks on the plaintiff's proof of proximate cause to allegations that the plaintiff assumed the risk of his injury. One of the more subtle attacks has been in the form of a resurrection of

59. The *Cunis* court relied on both *Mieher* and Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928), for its holding that if La Grange were under a duty there, it must be a duty owed to the specific plaintiff injured:

> ' 'duty' is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff . . . .' This question, *i.e.*, whether the defendant and the plaintiff stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the plaintiff's benefit, is one of law . . . .

Cunis v. Brennan, 56 Ill. 2d 372, 374, 308 N.E.2d 617, 618 (1973), *quoting* W. Prosser, Handbook of the Law of Torts § 53 (4th ed. 1971). Justice Goldenhersh took sharp issue with the majority's reliance on both *Palsgraf* and Prosser's statement that duty is limited to "particular" plaintiffs. He surmised that even "a cursory examination" of the law revealed that Judge Andrew's dissenting opinion in *Palsgraf* had become the overwhelming majority rule in most jurisdictions, including Illinois:

> 'Everyone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone. There needs be duty due the one complaining but this is not a duty to a particular individual because as to him harm might be expected. Harm to someone being the natural result of the act, not only that one alone, but all those in fact injured may complain. . . . Unreasonable risk being taken, its consequences are not confined to those who might probably be hurt.'

Cunis v. Brennan, 56 Ill. 2d 372, 380, 308 N.E.2d 617, 621 (1973) (Goldenhersh, J., dissenting). *See also* note 50 *supra*.

60. On the other hand, the *Mieher* court may have just attempted to draw a distinction between users and nonusers (see note 36 *supra*), or justifiably believed that "reasonable foreseeability" simply did not have enough substance to be fairly applied by a jury in that situation.

61. *See generally* Kissel, *Defenses to Strict Liability*, 60 Ill. B.J. 450 (1972).

the long-discredited distinction between latent and patent defects. If the condition which causes the injury was an "open and obvious" danger, the manufacturer has had some success in arguing that there is no duty to warn of such a condition and that the condition was not the proximate cause of any injury.

Open and Obvious Danger

In *Denton v. Bachtold Brothers*,[62] for example, the plaintiff was injured by his power lawn mower when he slipped while moving an object, catching his leg in the exposed blades. The plaintiff alleged that the design of the machine was defective in that the machine was not equipped with a "safety clutch" which automatically turned the engine off when the operator took his hands off the steering bar although it did have a safety clutch located on the engine. The court held that the injuries incurred by the plaintiff were not proximately caused by the machine reasoning that the obviousness of the danger from the open blades relieved the manufacturer of any duty towards the plaintiff.

Similarly, in *Weiss v. Rockwell Manufacturing Co.*,[63] the Illinois Appellate Court for the First District, expressly distinguishing the *Wright* case, upheld a directed verdict for the defendant manufacturer because the danger to the plaintiff was also deemed "open and obvious." The plaintiff was operating a woodcutter when the board he was cutting tilted, causing his hand to come into contact with the spinning blades. The manufacturer sold a safety guard which would have prevented this type of injury, providing it only as an accessory. The court held that the defendant had neither a duty to warn the plaintiff of the possible danger nor to recommend the use of the safety guard accessory since the alleged condition was an open and obvious danger. While the plaintiff relied heavily on the *Wright* opinion and the principles underlying *Suvada*, the court distinguished *Wright* because the defect there was not evident upon inspection, while the defect in the case before the court involved an obvious danger which was equally known to both the plaintiff and to the manufacturer.

In support of its holding, the court quoted with approval a case antedating *Suvada*, *Murphy v. Cory Pump & Supply Co.*,[64] where relief was denied on the basis of a mower contain-

62. 8 Ill. App. 3d 1038, 291 N.E.2d 229 (1972).
63. 9 Ill. App. 3d 906, 293 N.E.2d 375 (1973).
64. 47 Ill. App. 2d 382, 197 N.E.2d 849 (1964). The *Murphy* court relied on the *Campo* case which was later overruled by the New York Court of Appeals in 1973. *See* note 26 *supra*.

ing an obvious rather than a latent defect. One need only compare the *Weiss* court's approval of *Murphy* with the earlier opinion of the first district in *Wright* to appreciate how little *Suvada* has accomplished in certain respects. In *Wright* the court stated:

> In our opinion, the language of Suvada is plain and unambiguous. Hereafter, manufacturers of unreasonably dangerous products are strictly liable in tort to the hapless victims of their machines or products.
>
> The wisdom of Suvada is well illustrated by the result reached in the case of Murphy v. Cory Pump & Supply Company . . . relied upon by the defendant. Plaintiff, a seven year old child, lost her leg by falling in front of a power mower with a rotary blade which was being operated by her eleven year old sister. The negligence charged was that the mower was inherently dangerous in that the rotary blade would be likely to injure and maim children and that although the rotary blade appeared to be covered, it lacked a safety screen or bar.
>
> The Appellate Court upheld the action of the trial court in allowing a motion for summary judgment in favor of the defendant, giving as its reason that the manufacturer of this mower owed no duty to the plaintiff [because the mower was without any latent defects].
>
> *Murphy illustrates a typical result which Suvada seeks to remedy by placing the losses caused by unreasonably dangerous machines or products on those who have created the risk and reaped the profit rather than on an innocent seven-year-old child.*[65]

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65. Wright v. Massey-Harris, Inc., 68 Ill. App. 2d 70, 77-78, 215 N.E.2d 465, 469 (1966) (emphasis added).

The view that the Illinois courts will continue to apply the "latent vs. patent danger" approach of *Weiss* and *Murphy* in design defect cases, despite the express language of *Wright*, is given impetus by its strong acceptance of a similar defense in recent manufacturing and design defect cases, that of assumption of risk.

Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970), settled the controversy in Illinois over whether contributory negligence was an affirmative defense in an action based on strict liability. The court there held that the plaintiff in a strict liability action did not have to plead freedom from contributory negligence nor was contributory negligence an affirmative defense. However, assumption of risk, that is, conduct on the part of the plaintiff which amounts to voluntarily incurring a known risk was an affirmative defense to an action based on strict liability. Furthermore, the test was subjective not objective and one which would ordinarily be answered by the jury. The following cases, however, cast doubt on whether the Illinois courts still consider the jury the best judicial body to make the subjective determination.

In Fore v. Vermeer Mfg. Co., 7 Ill. App. 3d 346, 287 N.E.2d 526 (1972), the plaintiff was injured when the brakes failed on a trencher he was operating. The plaintiff in his deposition admitted that he had previously experienced problems in operating the trencher, but continued to work it because he feared the loss of his job if he refused. The court held that because of the plaintiff's knowledge of the risk of danger and his deliberate exposure to this risk—his "complete knowledge and understanding, of an obvious defect, and an obvious danger"—summary judgment was properly entered for the defendant.

In Kirby v. General Motors Corp., 10 Ill. App. 3d 92, 293 N.E.2d 345 (1973), the court again upheld a motion for summary judgment in favor

Other Jurisdictions

The proper interplay between the doctrine of strict liability and the argument that the design of the product made its dangerous condition "open and obvious" was explained in an extremely well reasoned opinion, *Pike v. Frank G. Hough Co.*[66]

In *Pike*, the decedent of the plaintiff was killed when an earth moving tractor manufactured by the defendant ran over him while being driven in reverse. Because of the design of the machine, the operator's view to the rear was obstructed.

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of the defendant-manufacturer because the plaintiff's action amounted to an assumption of the risk as a matter of law. The plaintiff was a truck driver and on several prior occasions he had experienced severe steering problems. He continued to drive the truck, however, and received serious injuries when the steering apparatus failed.

Similarly, in Ralston v. Illinois Power Co., 13 Ill. App. 3d 95, 299 N.E.2d 497 (1973), the court once again affirmed a summary judgment for the defendant-manufacturer based on the injured plaintiff's assumption of the risk. The plaintiff was injured while working on a trenching machine with a hydraulic boring attachment. Whenever a boring bit hit solid ground it would buckle and bend, and in order to prevent this buckling, the plaintiff's supervisor ordered him to stand on the exposed part of the rotating rod. The plaintiff's pantleg and foot became entangled in the machinery and his left leg was injured, eventually requiring its amputation. The court never reached the plaintiff's strict liability claim, holding that his supervisor's order notwithstanding, and despite his almost certain lack of appreciation for the likely extent of the danger involved, the plaintiff was held as a matter of law to have assumed the risk of his actions. *Accord*, Moran v. Raymond Corp., 484 F.2d 1008 (7th Cir. 1973).

The proper interplay between the argument that the design of the product made its dangerous condition "open and obvious" and the defense of assumption of risk in design defect cases, was explained in an extremely well reasoned opinion, Runnings v. Ford Motor Co., 461 F.2d 1145 (9th Cir. 1972). The plaintiff was the owner of a Ford Econoline van and on this model, the engine and radiator cap were located inside the van, where it could be easily reached from inside the cab. On the day in question, the engine had overheated, and the plaintiff had sprayed some cold water on the radiator itself. Sitting in the driver's seat, he then reached down and carefully removed the cap. Saturated steam immediately escaped, filled the cab and instantly turned into boiling water, severely injuring the plaintiff. The trial court granted a defense motion for a directed verdict on the ground the plaintiff assumed the risk of his injury. The Court of Appeals for the Ninth Circuit reversed the lower court, reasoning that successful utilization of assumption of the risk as a defense requires proof that the plaintiff was aware of more than just the general possibility of danger.

> [E]vidence that the plaintiff was aware of a generalized risk concomitant to his activities is not enough to establish the defense; *there must be proof that the plaintiff knew of and appreciated the specific hazard which caused the injury.*

Id. at 1148 (emphasis added).

> There was no evidence . . . to indicate that Runnings realized the additional hazard presented by the placement of the radiator cap within the enclosed cab, namely that the steam would turn to scalding water on contact with the cab ceiling and thereafter fall upon a person inside the cab.

Id. at 1146-47. *Accord*, Dorsey v. Yoder Co., 331 F. Supp. 753 (E.D. Pa. 1971); Luque v. McLean, 8 Cal. 3d 136, 104 Cal. Rptr. 443, 501 P.2d 1163 (1972). *See generally* Note, 49 TEXAS L. REV. 591 (1971).

66. 2 Cal. 3d 465, 85 Cal. Rptr. 629, 467 P.2d 229 (1970).

The manufacturer argued that it had no duty to design its machines to protect against such an obvious danger. The California Supreme Court held:

> The manufacturer's duty of care extends to all persons within the range of potential danger. . . . [T]*he obviousness of peril is relevant to the manufacturers* [sic] *defenses, not to the issue of duty* . . . .
>
> . . . [E]ven if the obviousness of the peril is conceded, *the modern approach does not preclude liability solely because a danger is obvious* . . . . '[T]he bottom does not logically drop out of a negligence case against the maker when it is shown that the purchaser knew of the dangerous condition. Thus is the product is a carrot-topping machine with exposed moving parts, or an electric clothes wringer dangerous to the limbs of the operator, and if it would be feasible for the maker of the product to install a guard or a safety release, it should be a question for the jury whether reasonable care demanded such a precautions, though its absence is obvious.'[67]

It is apparent from a comparison of the above Illinois cases with *Pike* that Illinois courts are beginning to restrict the protection originally contemplated by *Suvada* and *Wright* by dismissing an injured plaintiff's caused of action for an alleged defectively designed product before the case reaches the jury. Determining a design defect case on the basis of whether the defect is latent or patent ultimately results in a shift of the court's focus from what, it is submitted, should be the proper inquiry: Whether the design of the defendant's product created a condition making it not reasonably safe for its intended use. Focusing on that issue will avoid the incongruous result of allowing a manufacturer to design an admittedly dangerous product just as long as the danger is apparent to all. As the Washington appellate court reasoned in *Palmer v. Massey-Ferguson, Inc.*,[68]

> [i]t seems to us that a rule which excludes the manufacturer from liability if the defect in the design of his product is patent but applies the duty if such a defect is latent is somewhat anomalous. The manufacturer of the obviously defective product ought not to escape because the product was obviously a bad one. The law, we think, ought to discourage misdesign rather than encouraging it in its obvious form.

Conclusion

As this discussion illustrates, the Illinois courts have not yet come to grips with the key question in this field: To what ex-

67. *Id.* at 473, 85 Cal. Rptr. at 634-35, 467 P.2d at 234-35 (emphasis added). *Accord*, Finnegan v. Havir Mfg. Corp., 60 N.J. 413, 290 A.2d 286 (1972); Palmer v. Massey-Ferguson, Inc., 3 Wash. App. 508, 476 P.2d 713 (1970). *See* note 72 *infra* and accompanying text.

68. 3 Wash. App. 508, 517, 476 P.2d 713, 718-19 (1970).

tent will a manufacturer be held strictly liable for the defective design of its products? Perhaps the courts have concluded that the logical extension of *Suvada* creates more problems of social policy than it solves. Perhaps, creative plaintiffs' attorneys have sought to apply strict liability to situations wholly unforeseen by the *Suvada* court,[69] and the cases which have been discussed represent a reaction to that process.

Nonetheless, the court in *Suvada* held that the manufacturer had a duty to refrain from manufacturing and selling an unreasonably dangerous product. In order to reach the results obtained in *Mieher* and *Winnett* without rejecting the principles of *Suvada*, the court should have indicated why the policy considerations underlying *Suvada* could not properly have been extended to the plaintiffs in those cases. What seems to have occurred is that the focus of attention has shifted from the conduct of the defendant under negligence principles, to the condition of the product under strict liability, and now to the status of the plaintiff and the manner in which he is injured. Such a shift in emphasis, without an exposition of the policy reasons for the change, creates the impression that the court has abandoned the *Suvada* principles without expressly admitting it and without giving any hint as to what type of analysis it will offer in place of those principles.

A recent opinion raises the hope that the court will begin to deal with the design defect quagmire more effectively. In *Rios v. Niagara Machine & Tool Works*,[70] a punch press operator was injured when the press which he was operating unexpectedly closed on his hand. Although the machine had been sold without any safety equipment, the plaintiff's employer had installed a safety device which was inoperative at the time of the accident. The plaintiff alleged that the manufacturer had an affirmative, nondelegable duty to design a safe, multifunctional machine for each of its purposes, and that it could not rely on others to install safety devices. The plaintiff obtained a jury verdict, but the appellate court reversed, holding that the machine could be used safely for some purposes without a

69. *See* Cunningham v. MacNeal Memorial Hosp., 47 Ill. 2d 443, 266 N.E.2d 897 (1970), where the Illinois Supreme Court held that the inability of the defendant hospital to ascertain the presence of the serum hepatitis virus in the blood was not a valid defense to a suit in strict liability based on the "sale" (transfusion) of "defective" blood. This result was required even though there was no way, either practically or theoretically, for the hospital to ascertain the existence of the virus in the blood. The court was applying absolute liability perhaps, rather than strict liability, and the protection was admittedly of the type envisioned by *Suvada*. The General Assembly was quick to overturn this result. ILL. REV. STAT. ch. 91, § 182 (1973). This section expires by its own force on July 1, 1976. ILL. REV. STAT. ch. 91, § 184 (1973).

70. 59 Ill. 2d 79, 319 N.E.2d 232 (1974).

safety guard, and that it would be unreasonable to require one type of guard for a multipurpose machine.[71]

The Illinois Supreme Court affirmed the lower court's decision but expressly rejected its reasoning. The court held that in those instances where purchasers actually equip their machines with adequate safety devices, the products cease being unreasonably dangerous, and later events can not affect the liability of the original manufacturer. The court disavowed any support for the appellate court's "multi-functional device" theory, adopting instead the position that a manufacturer does have a nondelegable duty to design its products safely.[72]

However, it remains to be seen whether *Rios* and the adoption of the concept of a "non-delegable" duty signal a return to *Suvada* principles. For even in *Rios*, the court failed to deal with the question of whether the determination of "unreasonably dangerous" is a question of fact for the jury. Additionally, the court failed to indicate whether it approved of the *Weiss* court's "latent danger" approach to design defect cases. Since it concluded that proximate causation was absent, the *Rios* court found it unnecessary to rule on the appellate court's finding that the product was not unreasonably dangerous. Mr. Justice Ryan's opinion discussed the court's view of the dangerousness of the machine as well as the view of the appellate court, all without reference to the role of the jury. Whether this indicates a continued acceptance of the *Mieher-Cunis-Winnett* approach of withdrawing this key issue from the jury is problematic.

This opinion may signal a return to the primary need for focusing on the product itself, rather than on the acts of the plaintiff or the "uniqueness" of the accident. As a review of *Suvada* shows, that was one of the primary benefits to a plaintiff

71. Rios v. Niagara Machine & Tool Works, 12 Ill. App. 3d 739, 299 N.E.2d 86 (1973).

72. *Accord*, Finnegan v. Havir Mfg. Corp., 60 N.J. 413, 290 A.2d 286 (1972) (negligent design).

> Where a manufacturer places into the channels of trade a finished product which can be put to use and which should be provided with safety devices because without such it creates an unreasonable risk of harm, and where such safety devices can feasibly be installed by the manufacturer, the fact that he expects that someone else will install such devices should not immunize him. The public interest in assuring that safety devices are installed demands more from the manufacturer than to permit him to leave such a critical phase of his manufacturing process to the haphazard conduct of the ultimate purchaser. The only way to be certain that such devices will be installed on all machines—which clearly the public interest requires—is to place the duty on the manufacturer where it is feasible for him to do so.

Id. at 423, 290 A.2d at 292. *See also* Sutkowski v. Universal Marion Corp., 5 Ill. App. 3d 313, 281 N.E.2d 749 (1972) (strip mining machine).

in bringing an action in strict liability. While the status of the plaintiff is a relevant consideration, there has been no opinion clearly discussing the proper method of balancing his status and acts with the other elements involved in design defect cases.

Viewed in the perspective of the long range development of tort law, there can be no substitute for the courts of Illinois facing the difficult questions raised by these cases and dealing with them in a rational, realistic way. Only the Supreme Court of Illinois can decide whether it will continue to support the principles underlying *Suvada* and whether the logical extensions of these principles will be allowed to occur. Strict products liability in Illinois is a doctrine created entirely by the judiciary. It is to be hoped that the members of the court will decide quickly whether those principles are deserving of continued support in design defect cases. If the courts do decide that the *Suvada* principles should retain their vitality, it is hoped that the reaffirmation will be announced in a clear and unequivocal opinion.