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Williams v. Brown Manufacturing Company: Defenses Based on Plaintiff's Conduct in Strict Liability, 4 J. Marshall J. of Prac. & Proc. 95 (1970)

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WILLIAMS v. BROWN MANUFACTURING COMPANY: DEFENSES BASED ON PLAINTIFF'S CONDUCT IN STRICT LIABILITY

The Illinois Supreme Court, in the case of *Williams v. Brown Manufacturing Company,*[1] outlined the types of conduct on the part of a plaintiff which will bar recovery in an action based upon strict liability in tort, and the burden of pleading and proof that must be borne by each party. The court's first opinion attempted to resolve the confusion about the role of contributory negligence in Illinois strict liability actions[2] by ruling that the plaintiff must plead and prove his exercise of due care for his own safety,[3] as in Illinois negligence actions.[4] On rehearing, the court superceded that ruling by holding that in strict liability:

1) ". . . contributory negligence, as it is known in this State, is not a bar to recovery . . . , and the plaintiff need not plead and prove his exercise of due care,"[5] but,

2) assumption of risk, to which a "fundamentally subjective" standard is applied, is an affirmative defense.[6]

"Misuse" was also described as a bar to recovery.[7] This note is an appraisal of the court's reasoning and the effect of the new rules on Illinois strict liability law.[8]

FACTS

Williams was injured while operating a trench digging machine made by the Brown Manufacturing Company.[9] The digging teeth caught momentarily on an underground pipe and, because the drive belts were not adjusted to slip if such an obstacle were encountered, the engine built up a reacting force. When the teeth suddenly slipped off the pipe, the trencher bucked, knocked Williams down, and ran over him. Williams sued the manufacturer in strict liability, alleging that an unreasonably

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[1] 45 Ill. 2d 418, 261 N.E.2d 305 (1970).

[2] See text following note 30 *infra.*

[3] Williams v. Brown Mfg. Co., No. 41425 (March, 1969).

[4] The court cites Carter v. Winter, 32 Ill. 2d 275, 282, 204 N.E.2d 755, 758 (1965) for a statement of that rule in negligence actions. *Id.* and 45 Ill. 2d 418, 425, 261 N.E.2d 305, 309 (1970).

[5] Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 427, 261 N.E.2d 305, 310 (1970).

[6] *Id.* at 430, 261 N.E.2d at 312.

[7] *Id.* at 431, 261 N.E.2d at 312.

[8] This note is limited to the issue of defenses based on plaintiff's conduct in strict liability. Product liability actions based on strict liability in tort will be referred to simply as strict liability actions.

[9] The most detailed factual statement is in the appellate opinion, Williams v. Brown Mfg. Co., 93 Ill. App. 2d 334, 349-57, 236 N.E.2d 125, 134-37 (1968).

dangerous condition of the trencher, which existed at the time it left the manufacturer's control, was the proximate cause of his injury.[10]

Plaintiff charged that certain defects in the design of the trencher[11] and failure to warn that it was unsafe to guide the trencher by the handlebars from behind created unreasonably dangerous conditions. Defendant denied that the alleged defects created unreasonably dangerous conditions. Defendant also asserted the affirmative defense that plaintiff had assumed the risk of injury because he was aware of the danger of improper belt adjustment. There was evidence plaintiff had read the manual accompanying the machine but disagreement on whether the manual effectively warned of the danger.[12] The trial court directed a verdict for plaintiff on the affirmative defense of assumption of risk.[13] The jury, agreeing in special interrogatories that the machine was unreasonably dangerous,[14] returned a verdict for plaintiff.

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[10] Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965), in announcing the doctrine of strict liability in Illinois, defined the elements:

> 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.

Id. at 623, 210 N.E.2d at 188.

[11] In Williams v. Brown Mfg. Co., 93 Ill. App. 2d 334, 236 N.E.2d 125 (1968), the appellate court summarized the testimony of the plaintiff's expert witness on design:

> He expressed the opinion that it is difficult to keep machinery adjusted so it is tight enough to drive, yet loose enough to slip at the right time. He suggested that a better design, which could be effected without substantial increase in cost of producing the trencher, would be to use a positive direct drive and an extra auxiliary-type clutch set to slip at some prescribed force and thus prevent excessive lurching.

Id. at 353, 236 N.E.2d at 135.

[12] The portions of the manual which are pertinent here are:

> ADJUSTMENTS AND MAINTENANCE
>
> "The engine is bolted stationary to the machine, and when the drive belts become loose enough to slip, adjust them by the threaded shaft on the right hand clutch lever. Caution — do not adjust the belts too tight: they must be able to slip under shock load."
>
> "Service and Maintenance Tips on Bus Brown Trenchers"
>
> "Short Belt Life: Belts that are adjusted too tight may turn sideways, also not be able to slip under shock load."
>
> "Shearing Woodruff Keys . . . . . Possible Cause and Remedy."
>
> "Generally the drive belts are adjusted too tight especially on the model 468R, the drive belts must be adjusted so they do not slip under normal trenching, but should be loose enough to slip when some object gets caught in the digging chain, if the belts cannot slip, there is no protection against sudden shock."
>
> "Suggestions for Safety: Always stop the engine before adjusting belts, chains, etc."

Id. at 350, 236 N.E.2d at 135.

[13] *Id.* at 345, 236 N.E.2d at 132.

[14] Did the power unit of the Bus Brown Trencher Unit 468R lack a proper safety throw-out clutch or some other safety device on the digger part and the propelling unit to prevent the machine from bucking

THE PROBLEM PRESENTED

Plaintiff did not allege his exercise of due care or freedom from contributory negligence in the strict liability count. Defendant contended that failure to do so was error. Plaintiff contended that contributory negligence was an affirmative defense. The case announcing strict liability in Illinois, *Suvada v. White Motor Co.*,[15] had not dealt with the problem. But *People ex. rel. General Motors Corp. v. Bua*[16] had suggested that plaintiff must prove due care in strict liability.[17] However, the trial court denied defendant's successive motions to dismiss, for directed verdict, and for post-trial relief, all grounded on the plaintiff's failure to allege due care.[18]

The appellate court had difficulty reconciling Illinois law with the trial court's treatment of contributory negligence. From the observation by the Illinois Supreme Court in *Suvada* that its position coincided with that of §402A of the Restatement (Second) of Torts,[19] the appellate court implied approval of comment *n* of that section,[20] which reads:

> *n. Contributory negligence.* Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see §524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its

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when the digger hit an obstruction in the ground?

"Yes.

Did the Bus Brown Trencher Unit 468R lack proper adjustment methods on the drive belts to allow slippage of the propelling wheels if the digger hit an obstruction in the ground?

"Yes.

"Was the Bus Brown Trencher Unit 468R unreasonably dangerous to the user because there was no warning or notice on said machine that it was dangerous to operate it from behind and between the handle bars?

"Yes.

Id. at 357, 236 N.E.2d at 137.

[15] 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

[16] 37 Ill. 2d 180, 226 N.E.2d 6 (1967).

[17] The *Bua* court said:

> This is a products liability case pleaded in two counts, one alleging negligence, and the other alleging breach of warranty. In *Suvada v. White* . . . this court adopted the theory which imposes strict tort liability on the manufacturer. Under that theory, negligence need not be proved . . . . However, under both counts it is necessary to prove that the plaintiff was in the exercise of due care for his own safety.

Id. at 196, 226 N.E.2d at 15-16.

> In a products liability case the objects of discovery on the part of a plaintiff against the manufacturer could not relate either to the issue of damages, or to the issue of the plaintiff's freedom from contributory negligence.

Id. at 197, 226 N.E.2d at 16.

[18] Williams v. Brown Mfg. Co., 93 Ill. App. 2d 334, 345, 236 N.E.2d 125, 131 (1968).

[19] Suvada v. White Motor Co., 32 Ill. 2d 612, 621, 210 N.E.2d 182, 187 (1965).

[20] Williams v. Brown Mfg. Co., 93 Ill. App. 2d 334, 346, 236 N.E.2d 125, 132 (1968).

> existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

To render that view consistent with *People ex. rel. General Motors Corp. v. Bua,* which the court admitted had decided contributory negligence was properly an issue in a strict liability case,[21] the appellate court construed *Bua* as not conclusive upon "the nature of contributory negligence which would serve to bar plaintiff's recovery, nor upon whom falls the burden of pleading and proof."[22] The appellate court then felt justified in limiting contributory negligence to the description of assumption of risk in comment *n*:

> For the purposes of this opinion contributory negligence is defined as voluntarily and unreasonably proceeding to encounter a known danger or proceeding unreasonably to make use of a product after discovery of a defect and becoming aware of the danger.[23]

In holding that contributory negligence was an affirmative defense and that a subjective standard applied, the appellate court relied on another appellate court's statement that making chattels safe for their intended purpose is the policy reason underlying strict liability.[24] It held that such "contributory negligence" was an affirmative defense[25] because:

> It appears unjust and incongruous to place the burden of proof of freedom from contributory fault upon a user, entitled to rely upon the product's being fit for its intended use, and not charged with expert knowledge. In our opinion the same reasoning which justifies the doctrine of strict liability compels the adoption of the rule . . . [26]

The appellate court held that the test of contributory fault was subjective[27] because the purposes to be served by strict liability would be advanced if ". . . contributory fault should not bar recovery, unless the total circumstances show the plaintiff has proceeded unreasonably to use the product after discovery of the de-

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[21] *Id.* at 347, 236 N.E.2d at 132-33.

[22] *Id. Accord,* Dunham v. Vaughn & Bushnell Mfg. Co., 86 Ill. App. 2d 315, 331, 229 N.E.2d 684, 692 (1967), *aff'd on other grounds,* 42 Ill. 2d 339, 247 N.E.2d 401 (1969). See note 17 *supra.*

[23] Williams v. Brown Mfg. Co., 93 Ill. App. 2d 334, 347, 236 N.E.2d 125, 133 (1968).

[24] The appellate court quoted:

> . . . the duty contemplated by the court in Suvada is one of making the chattel safe for the use for which it was supplied," Dunham v. Vaughn & Bushnell Mfg. Co., 86 [Ill. App. 2d] 315, [325,] 229 N.E.2d 684, [689 (1967)].

Id. at 348, 236 N.E.2d at 133.

[25] *Id.* at 347, 236 N.E.2d at 133.

[26] *Id.* at 348, 236 N.E.2d at 133.

[27] *Id.* at 347-48, 236 N.E.2d at 133.

fect and becoming aware of the danger."[28] The directed verdict for plaintiff on the issue of assumption of risk was accordingly affirmed.[29]

OTHER APPELLATE VIEWS

On appeal to the Supreme Court, the general problem of plaintiff's conduct in strict liability was reviewed. *Williams* was not the only case that had dealt with the problem. Five other appellate cases[30] and two federal cases[31] applying Illinois law were cited by the Illinois Supreme Court as having treated the subject of plaintiff's conduct in strict liability actions since *Suvada.*

In *Brandenburg v. Weaver Manufacturing Company,*[32] the first appellate case, the affirmative defenses[33] were found to raise plaintiff's conduct as an issue.[34] The appellate court reasoned that the *Suvada* requirement, that an unreasonably dangerous condition must be the proximate cause of injury, could not be shown if plaintiff's failure to use due care were the proximate cause of injury.[35] In finding the issue of contributory negligence

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[28] *Id.* at 349, 236 N.E.2d at 133-34.

[29] *Id.* at 365, 236 N.E.2d at 141.

In affirming, the appellate court narrowly applied its definition and test of contributory negligence. It found no evidence that plaintiff had assumed the risk of a sudden lurch backward while standing between the handlebars since the only language it could take to be a warning spoke of forward movement. *Id.* at 364, 236 N.E.2d at 141.

[30] Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970): *Adams v. Ford Motor Co.* (1968), 101 Ill. App. 2d 356, 243 N.E.2d 843; *Vlahovich v. Betts Machine Co.* (1968), 101 Ill. App. 2d 123, 242 N.E.2d 17, petition for leave to appeal allowed 40 Ill. 2d 580; *Sweeney v. Matthews* (1968), 94 Ill. App. 2d 6, 16-26 [236 N.E.2d 439]; *Dunham v. Bushnell Mfg. Co.* (1968), 86 Ill. App. 2d 315, 331-32, affirmed without discussion of this issue, 42 Ill. 2d 339 [247 N.E.2d 401] (1969); *Brandenburg v. Weaver Manufacturing Co.*, (1967), 77 Ill. App. 2d 274 [222 N.E.2d 348].

Id. at 424, 261 N.E.2d at 308-309.

[31] " . . . *Dazenko v. James Mach. Co.* (7th cir. 1968), 393 F.2d 287, 290-91, and in *Raigan v. Chainbelt, Inc.*, No. 66-C-1563 (N.D.E.D. Ill. 1967). . . . " *Id.* at 424, 261 N.E.2d at 308.

[32] 77 Ill. App. 2d 374, 222 N.E.2d 348 (1966). A mechanic was injured by an automobile that fell on him because he used a jack, the lifting arms of which were too short and which he knew was experimental, even though other means of lifting the automobile were available. The court affirmed a directed verdict for defendant by applying an earlier court's description of contributory negligence as a matter of law.

[33] Defendant's answer charged by way of affirmative defense that plaintiff's injuries were sustained by reason of (a) his failure to use safety stands under the automobile and (b) his failure to properly place the jack and see that it was safely installed.

Id. at 376, 222 N.E.2d at 349.

[34] *Id.* at 377, 222 N.E.2d at 349-50.

[35] *Id.* at 377, 222 N.E.2d at 350.

The court in Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779 (Tex. 1967), was impressed by the fact, appropriate to these cases, that:

"this area of the law is permeated with semantic problems, *** [and that] principles of contributory negligence and assumption of risk may overlap considerations of proximate cause, . . . " 4 A.L.R. 3rd 501 1. c. 503.

Id. at 785.

inescapably implied by the proximate cause requirement, the court used some forceful language:

> Suvada is a landmark decision which effectively destroys lack of privity as a defense. It decides the sufficiency of a complaint. We do not read it as providing the open sesame to the strongbox of producers nor that it ipso facto embalms and lays to rest defenses based on the fault, misuse or misconduct of the plaintiff which contributed in whole or in part to his injuries. We do not believe that it hatched a philosophy of liability without fault in products liability cases nor permits one to recover for injuries which are properly traceable to and occasioned by his own fault. Plaintiff must still prove that it was the unreasonably dangerous condition of the product which proximately caused the injuries.[36]

The appellate court in *Dunham v. Vaughn & Bushnell Manufacturing Co.*[37] cited *Bua* to support the requirement that plaintiff prove due care.[38] But in answer to the contention that contributory negligence is not a defense in strict liability, the same court that had written the *Brandenburg* opinion[39] now cited and rephrased comment *n* of §402A to describe the type of contributory negligence that may be an issue in strict liability. Although these remarks were incidental to a discussion of whether testimony on custom was admissible to prove foreseeable use, the court indicated its understanding and acceptance of the rule of comment *n* by observing that testimony suggesting plaintiff was aware of the defect which caused his injury made this issue of plaintiff's knowledge particularly relevant.[40]

In *Sweeney v. Matthews*[41] the appellate court dealt at length with the defense of assumption of risk in strict liability.[42] In response to the objection that the doctrine of assumption of risk is restricted to master-servant or other contractual relationships in Illinois, the court reviewed Illinois law to show that the Illinois position was a historical accident and an anomaly in the law,[43] concluding:

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[36] 77 Ill. App. 2d 374, 377, 222 N.E.2d 348, 350 (1966).

[37] 86 Ill. App. 2d 315, 229 N.E.2d 684 (1967), *aff'd on other grounds*, 42 Ill. 2d 339, 247 N.E.2d 401 (1969). A farmer lost an eye when a chip broke off the hammer he was using to tap a metal pin into place because the hammer had become "work hardened" by eleven months of use. The appellate court and the supreme court agreed there was enough evidence to go the jury, both courts being mainly concerned with answering how the manufacturer could be responsible for the hammer's condition since it was not defective when it was sold.

[38] *Id.* at 320, 229 N.E.2d at 686.

[39] See text following note 32 *supra*.

[40] 86 Ill. App. 2d 315, 331, 229 N.E.2d 684, 692 (1967).

[41] 94 Ill. App. 2d 6, 236 N.E.2d 439 (1968). A carpenter, after the first three or four concrete nails he was hammering broke off and shot across the room, struck another which shattered, causing him to lose an eye. The court felt that while ordinarily a verdict would be directed against plaintiff, because of the circumstances, including plaintiff's age and experience, plaintiff's conduct was a borderline question properly given to the jury.

[42] *Id.* at 17-26, 236 N.E.2d at 444-47.

[43] *Id.* at 18-20, 236 N.E.2d at 444-46.

> The present restricted application of the defense of assumption of risk should be reviewed; but irrespective of whether the defense is permitted in all negligence actions, it cannot logically be prohibited in strict liability actions.[44]

In reasoning that assumption of risk is a proper defense to strict liability the court took a position similar to that of the appellate court in *Williams*, but, instead of restricting contributory negligence to conduct equivalent to assumption of risk, it recognzied assumption of risk itself as a proper defense.[45] The court reasoned:

> The ultimate user has no duty to inspect a product to see if it is free of defects. Unless a defect is obvious, he has the right to assume that the product is safe. . . . Failure to discover the defects is not contributory negligence; deliberately proceeding to use the product after discovery is assumption of risk.[46]

Then, after quoting commentators and §402A comment *n* to show that its position was the general view, the court construed *Bua* as inconclusive on defenses and implied approval of comment *n*.[47]

After the *Williams* appellate decision, the appellate court in *Vlahovich v. Betts*[48] split three ways on the nature of a plaintiff's conduct which should bar recovery.[49] Their divergent views on comment *n* were determinative of the causation issue being appealed. If contributory negligence were not an issue, the causation instruction was erroneous. One judge thought plaintiff's negligence was not an issue because defendant's negligence was not an issue.[50] Another judge thought the rules developed by the appellate court in Williams should be used.[51] The third judge thought plaintiff's negligence should be an issue just as in negligence actions and he vigorously disapproved of the appellate decisions of *Williams* and *Sweeney v. Matthews*.[52]

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[44] *Id.* at 20-1, 236 N.E.2d at 446.

[45] *Id.* at 21-6, 236 N.E.2d at 446-47.

[46] *Id.* at 21, 236 N.E.2d at 446.

[47] *Id.* at 24, 236 N.E.2d at 447. However, the failure to give an instruction on assumption of risk was found not prejudicial since the contributory negligence instruction given was of greater benefit to the defendant.

[48] 101 Ill. App. 2d 123, 242 N.E.2d 17 (1968). A truck driver's eye was injured when a plastic clearance light lens he was removing to replace the bulb shattered in sub-zero weather. He testified that they had broken before, and that they were not always maintained properly. The jury returned a verdict for defendant.

[49] The main issue on appeal was whether it was error to eliminate the section on the effect of concurring causes from the Illinois Pattern Instruction on proximate cause. *Id.* at 126, 242 N.E.2d at 19.

[50] *Id.* at 124-28, 242 N.E.2d at 18-20. Through him, the court reversed because concurring causation instructions were eliminated in negligence actions where only the conduct of the parties was involved, so that the defense of contributory negligence would not be prejudiced. But since plaintiff's negligence was not an issue here, the jury was prevented from returning a verdict for plaintiff if, as it might reasonably find, there were concurring causes.

[51] *Id.* at 129-32, 242 N.E.2d at 20-1. He concurred in the reversal.

[52] *Id.* at 132-35, 242 N.E.2d at 21-2. His dissent favored affirmance.

In *Adams v. Ford Motor Company*[53] the same appellate court which decided *Williams* approved the affirmative defense offered because it alleged conduct within the definition of contributory negligence given in *Williams*.[54]

Two early federal cases took a conservative, hedging position on the Illinois law regarding defenses based on a plaintiff's conduct. In *Dazenko v. James Hunter Machine Company*[55] a federal appellate court, relying on *Bua*, reversed the district court for not instructing the jury on contributory negligence. It noted comment *n* and *Dunham's* indication that contributory negligence "... can exist only where the plaintiff proceeds after discovery of a defect or with knowledge of danger,"[56] apparently as a possible direction Illinois law might take, in which case the obviousness of the hazard involved would be relevant.[57] The federal district court in *Regain v. Chainbelt Inc.*[58] also thought an allegation of due care was necessary in Illinois in 1967,[59] although it too noted comment *n* and implied that a firm rule was still evolving.

THE ALTERNATIVES

These were the options for treating contributory negligence as developed by the appellate courts. Of course, the supreme court was neither limited by appellate suggestions nor bound on this question by its previous decisions.[60] It was free to adopt or formulate any rule in this emerging area that in its judgment was just.

The competing alternatives are basically reflections of two views of how strict liability has changed the law. The defense bar and those who regard strict liability as a procedural development which merely eliminates the difficulty of proving negligence usually see no reason why a plaintiff should not continue to plead and prove his exercise of due care.[61] To allow a negligent plaintiff to recover from a defendant who may not be truly negligent is to them an unjust extension of the liability imposed in *Suvada*.

[53] 103 Ill. App. 2d 356, 243 N.E.2d 843 (1968). Plaintiff proved to the jury that the accident happened because one of six bolts that secured the cab of the truck to the frame was missing. Defendant was not allowed to plead that plaintiff was contributorily negligent by speeding and driving under the influence of liquor because the court accepted the plaintiff's contention that the defendant must allege that such conduct was the sole, and not a contributory cause of injury. The appellate court found no merit in that contention and therefore reversed.

[54] *Id.* at 360, 243 N.E.2d 846.

[55] 393 F.2d 287 (7th Cir. 1968).

[56] *Id.* at 290, n. 5.

[57] *Id.* at 290, n. 5.

[58] No. 66-C-1563 (N.D.E.D. Ill. 1967).

[59] *Id.*, Proceedings of Jan. 19, 1967, p. 6.

[60] See text at notes 21 and 22.

[61] *Cf. Brandenburg* opinion at note 36 *supra* and Groark, *Contributory Negligence — An Integral Part of Product Liability Cases*, 56 ILL. B.J. 904 (1968).

The plaintiff bar and those who regard strict liability as a substantive development which increases the defendant's duty and responsibility in products liability usually sense that there should be a corresponding increase in plaintiff's right[62] and a decrease in his responsibility.[63] Prosser's[64] rationalization of the early cases in terms of contributory negligence and assumption of risk, furthered by comment *n* of §402A, seems to have been accepted by most courts as the proper modification of contributory negligence for strict liability cases.[65] It was the prevailing view in the appellate courts.[66]

THE SOLUTION OFFERED

The Illinois Supreme Court, however, rejected any modification of contributory negligence in its first opinion.[67] While it accepted strict liability as a doctrine aimed at socially negligent manufacturers and suppliers,[68] it was not persuaded to change the traditional Illinois contributory negligence rule.[69] The court admitted that the decisions of most other jurisdictions barred recovery when the plaintiff's conduct did not amount to assumption of risk.[70] It identified negligent failure to discover the defect as the situation that would be affected by adopting comment *n*.[71] But it found it unnecessary to discuss the rationale used by the proponents of the Restatement position.

In the court's view, adopting comment *n* would not effect

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[62] *Cf. Williams* appellate opinion in text at note 26 *supra*.

[63] *Cf. Sweeney* opinion in text at note 46 *supra* and *Postilion, Strict Liability and Contributory Negligence — The Two Just Don't Mix*, 57 ILL. B.J. 26 (1968).

Theoretically, the court could take the radical position that no conduct on the part of a plaintiff barred recovery. This view was sometimes suggested where the necessity of pleading due care was at issue, because it was urged that, if defendant's negligence is not an issue, plaintiff's conduct is not an issue either. But plaintiff's conduct is not measured against defendant's conduct; it is measured against a standard. It is unlikely that Illinois courts would accept an argument which advocates eliminating all plaintiff conduct requirements. *Cf.* text at note 50 *supra*.

[64] PROSSER, LAW OF TORTS, 3rd ed., §76, pp. 538, 539 (1964).

[65] Williams v. Brown Mfg. Co., No. 41425 (March, 1969).

The majority of the cases involving claims based on strict liability in tort have stopped at the "assumption of the risk" level and refused to permit contributory negligence as measured by the objective standard to bar recovery. *Shamrock Fuel & Oil Sales Co. v. Tunks* (Tex. 1967), 416 S.W.2d 779; *O. S. Stapley Co. v. Miller* (1968), 103 Ariz. 556, 447 P.2d 248, 253; *contra, Maiorino v. Weco Products Co.* (1965), 45 N.J. 570, 214 A.2d 18.

Id.

[66] As outlined in the text, the fifth district in *Williams* and *Adams* accepted and urged the comment *n* position. The fourth district in *Dunham*, abandoning its position in *Brandenburg*, approved of comment *n*, as did a Cook County division of the first district in *Sweeney*. Only in *Vlahovich*, in the third district, was a contrary position taken.

[67] Williams v. Brown Mfg. Co., No. 41425 (March, 1969).

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

any change in results; the benefits to the plaintiff would be illusory. Under comment *n* the plaintiff would not need to negate his own misconduct by the objective standard. But, in proving the existence of an unreasonably dangerous condition the plaintiff nevertheless would be required to prove the very fact he sought to eliminate from his cause of action — that an ordinary man would not have discovered or guarded against the possibility of the defect.[72] The court concluded this from §402A, comment *i*,[73] which says:

> The article sold must be dangerous to the extent beyond that which would be contemplated by the ordinary consumer who purchased it, with the ordinary knowledge common to the community as to its characteristics.

The court also discounted the operational difference between objective and subjective standards, saying it was mainly a "matter of semantics" with very little difference in effect.[74] The court implied that no matter what the rule on plaintiff's conduct the reasonable man standard would remain persuasive: "There are few instances in which a plaintiff has recovered in the face of proof indicating a reasonable man would not have acted as plaintiff did."[75] So, because due care by the objective standard was part of plaintiff's case, both in proving the unreasonably dangerous condition and in convincing the trier of fact of the justice of his action, the supreme court held that there was no compelling reason to change the requirement that plaintiff plead and prove due care.[76] The court therefore reversed on the pleadings and instructions.[77]

It cannot be said that the court based its decision on either view of strict liability mentioned earlier. In its opinion the results of strict liability action would be the same no matter which view were taken.[78] However, the rhetoric of the opinion and the holding would suggest that the court leaned toward the view that strict liability was mainly a procedural development.[79]

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[72] *Id.*

[73] The view that comment *n* was inconsistent with comment *i* was advanced by defendant. Brief for Defendant at 14-15, Williams v. Brown Mfg. Co., No. 41425.

[74] Williams v. Brown Mfg. Co., No. 41425 (March, 1969).

The cases and commentators, in saying that the differences are a matter of semantics, mean that the comment *n* distinction is followed whether contributory negligence is by name accepted or rejected as a defense to strict liability. *See, e.g.*, Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 838 (1966); Buttrick v. Arthur Lessard & Sons, Inc., 260 A.2d 111, 114 (N.H. 1969). The supreme court, however, means that there will be no difference in result whether or not the comment *n* distinction is accepted.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.* This is especially true of the court's preliminary survey of strict liability.

The court's reluctance to abandon the reasonable man standard was evidently the overriding factor in its decision. The court's inclination was probably reinforced by the convenience of retaining established rules. Symmetry in negligence and strict liability defenses was maintained or achieved, depending on one's view, and difficulties in revising Illinois assumption of risk law were avoided.[80]

THE NEW POSITION TAKEN

After a rehearing, the supreme court reversed its decision on contributory negligence and revised its opinion accordingly.[81] The court observed that plaintiff's conduct may bar recovery in tort actions and such conduct is often treated within the general concept of "contributory negligence." The court implied that, while this is appropriate in negligence actions, greater plaintiff culpability may be required to bar recovery in strict liability actions.[82] The court approved the more specific concepts of "misuse" and "assumption of risk" as bars to recovery in strict liability actions.[83] In answer to the question whether the broad concept of contributory negligence or only misuse and assumption of risk should bar recovery, the court said policy reasons dictated a change in the rule and noted that, " . . . all other jurisdictions . . . have reached substantially the same conclusion . . . ."[84] The court held:

> [C]ontributory negligence, as it is known in this state, is not a bar to recovery in a strict product liability tort action in Illinois, and the plaintiff need not plead and prove his exercise of due care. In adopting this position, we of course reject any contrary positions suggested in *Bua* or elsewhere.[85]

Then, discussing the trial court's treatment of assumption of risk, the court found that there was some evidence that Williams was aware of the operator's proper position and more substantial evidence that he was aware of the danger of improper adjustment.[86] The court then made important corollary holdings on assumption of risk and the test that should be used:

> We emphasize that 'assumption of risk' is an affirmative defense which does bar recovery, and which may be asserted in a strict liability action notwithstanding the absence of any contractual relationship between the parties. Furthermore, while the test to be applied in determining whether a user has assumed the risk of

[80] See text following note 42 *supra*. Barrett v. Fritz, 42 Ill. 2d 529, 248 N.E.2d 111 (1969), refused to extend the assumption of risk defense beyond master-servant and contractual relationship cases.

[81] Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 425, 261 N.E.2d 305, 309 (1970).

[82] *Id.* at 425, 261 N.E.2d at 309.

[83] *Id.* at 425-26, 261 N.E.2d at 309.

[84] *Id.* at 426, 261 N.E.2d at 310.

[85] *Id.* at 427, 261 N.E.2d at 310.

[86] *Id.* at 427-30, 261 N.E.2d at 310-12.

> using a product known to be dangerously defective is fundamentally a subjective test, in the sense that it is *his* knowledge, understanding and appreciation of the danger which must be assessed, rather than that of the reasonably prudent person, it must also be remembered that this is ordinarily a question to be determined by the jury. That determination is not to be made solely on the basis of the user's own statements but rather upon the jury's assessment of all of the facts established by the evidence. No juror is compelled by the subjective nature of this test to accept a user's testimony that he was unaware of the danger, if, in the light of all of the evidence, he could not have been unaware of the hazard; and the factors of the user's age, experience, knowledge and understanding, as well as the obviousness of the defect and the danger it poses, will all be relevant to the jury's determination of the issue, if raised.[87]

The court then reversed because the directed verdict for plaintiff on assumption of risk was error in view of the evidence that Williams was aware of the dangers. The court remanded for a new trial under proper instructions.[88]

In discussing the concept of misuse, the court twice said that it may bar recovery[89] and indicated that it was the only plaintiff misconduct besides assumption of risk which should bar recovery.[90] The definition[91] was given as ". . . use for a purpose neither intended nor 'foreseeable' (objectively reasonable) by the defendant. . . ."[92] Since "[t]his issue may arise in connection with plaintiff's proof of an unreasonably dangerous condition or in proximate cause or both,"[93] the plaintiff apparently has the burden of proof, although the defendant has the burden of coming forward.

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[87] *Id.* at 430-31, 261 N.E.2d at 312.

[88] *Id.* at 431, 261 N.E.2d at 312.

The court's debt to the article Epstein, *Products Liability: Defenses Based on Plaintiff Conduct*, 1968 UTAH L. REV. 267, should be recognized because the cases the court cites in its survey of the law are more fully detailed in the article and because much of the court's helpful dictum on misuse originated in Epstein's article. To avoid the confusion and resolve any unnecessary conflict over contributory negligence in products liability, Epstein related the results of cases to whether they involved negligent failure to discover the defective condition, which he called "contributory negligence," use after discovery, called "assumption of risk," or use not reasonably foreseeable, called "misuse." Epstein observed that contributory negligence, as usually defined, included all three categories and the supreme court noted that was true in Illinois. The supreme court utilized Epstein's categories and research in both of its opinions.

[89] Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 425, 431, 261 N.E.2d 305, 309, 312 (1970). This was expected. Ozman, *Products Liability under the Suvada Theory*, 55 ILL. B.J. 906, 907 (1967); Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 824 (1966).

[90] Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 427, 261 N.E.2d 305, 310 (1970).

[91] The first opinion quoted the alternative name "unanticipated use" also. Williams v. Brown Mfg. Co., No. 41425 (March, 1969).

[92] Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 425, 261 N.E.2d 305, 309 (1970).

[93] *Id.* at 431, 261 N.E.2d at 312.

WHY THE COURT REVERSED ITSELF

After first minimizing the importance of its reversal by characterizing rule difference as "more semantical than substantial,"[94] the court offered an illustration of how its earlier opinion had been misunderstood[95] and said: "[W]e are persuaded that it is necessary to review our position and adopt a more appropriate and workable framework. . . ."[96] The new position was more "workable" in the sense that the bar had found the circuitous reasoning of the first opinion confusing and misleading.[97] The new position was more "appropriate" to the view of strict liability underlying comment *n*.

The court indicated its acceptance of the comment *n* rationale by adopting the appellate court's reasoning. The supreme court said: "[T]he policy considerations which led us to adopt strict tort liability in *Suvada* compel the elimination of 'contributory negligence' as a bar to recovery."[98] Three reasons had been given in *Suvada*: protection of life and health, the advertising inducements to purchase products, and the justice of imposing the loss on the one creating the risk and reaping the profit.[99] However, the court evidently had in mind the reasoning of the appellate court opinion, where the same wording was used: "[T]he same reasoning which justifies the doctrine of strict liability compels the adoption of the rule. . . ."[100] The appellate court was relying on the defendant's duty to make the product safe for the use intended, aided by his expert knowledge.[101] The appellate court felt that the defendant's duty to protect against objectively discoverable dangers should not be compromised by contributory negligence. The supreme court by implication agreed.

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[94] *Id.* at 424, 261 N.E.2d at 309. See note 74 *supra*. It is not clear whether the court means comment *n* or the objective standard naturally followed in judging plaintiff's conduct.

[95] [O]ur earlier opinion in this case apparently was thought to imply that every plaintiff in a strict product liability action in Illinois was under a "duty to inspect" all products for potential defects, and that failure to plead and prove such an inspection would constitute a bar to recovery under the doctrine of contributory negligence.

Id. at 425, 261 N.E.2d at 309. *See, e.g.*, Symposium, *Illinois Supreme Court Review*, 64 NW. U.L. REV. 909, 914 (1969).

[96] Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 425, 261 N.E.2d 305, 309 (1970).

[97] See note 95 *supra*.

[98] Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 426, 261 N.E.2d 305, 310 (1970).

[99] Suvada v. White Motor Co., 32 Ill. 2d 612, 619, 210 N.E.2d 182, 186 (1965).

The court referred to these reasons in its first opinion, refining the second and third somewhat. Williams v. Brown Mfg. Co., No. 41425 (March, 1969).

[100] Williams v. Brown Mfg. Co., 93 Ill. App. 2d 334, 348, 236 N.E.2d 125, 133 (1968).

[101] See note 26 *supra*.

An apparent desire for sound, uniform, clear rules in this troublesome area explains why the court found it provident to outline the whole area of conduct on the part of the plaintiff which bars recovery in strict liability. It explains why guidelines were offered on misuse. The court's desire for clarity also explains why it did not affirm the appellate court's definition of contributory negligence or rename assumption of risk contributory fault,[102] but took the more positive position of accepting assumption of risk by name. The reversal was also undoubtedly influenced by the knowledge that adopting comment *n* would bring Illinois into accord with other authority.[103]

EFFECT OF THE DECISION

The *Williams* case decided how Illinois will treat contributory negligence in strict liability. However, one tends to agree with the court's initial appraisal that adopting comment *n* will make little difference in the outcome of cases. In the *Sweeney* case,[104] where the young, inexperienced carpenter continued to strike shattering concrete nails, a jury could grant or deny recovery by either the objective or the subjective standard. Using the objective standard, how nearly the reasonable man's situation parallels the plaintiff's would be determinative. Using the subjective standard, how obvious the defect appears would be determinative. Similar flexibility in the standards may be imagined in the cases where food which tastes "funny" proves to contain a foreign body.[105] The standards seem to be sufficiently malleable for the fact finder to be able to render what he considers substantial justice. In fact, it would appear that whenever negligent failure to discover the defect would be an issue by the objective standard, how obvious the defect appears would be determinative of the case by the subjective standard. So the plaintiff's victory may be largely in theory.

The court's pronouncement that assumption of risk is available without any contractual relationship follows the recommendation in *Sweeney*[106] that the Illinois assumption of risk doctrine be modified, at least as it relates to strict liability. Whether as-

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[102] *Cf.* Ettin v. Ava Truck Leasing, Inc., 53 N.J. 463, 472, 251 A.2d 278, 283 (1969), citing Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 838; Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty*, 52 MINN. L. REV. 627, 653 (1968).

[103] Between the first and second opinions, New Jersey, the minority of one, moved closer to the comment *n* position. Ettin v. Ava Truck Leasing, Inc., 53 N.J. 463, 251 A.2d 278 (1969).

[104] Sweeney v. Matthews, 94 Ill. App. 2d 6, 236 N.E.2d 439 (1968). See note 41 *supra*.

[105] *E.g.*, Barefield v. LaSalle Coca-Cola Bottling Co., 370 Mich. 1, 120 N.W.2d 786 (1963); Kassouf v. Lee Bros., 209 Cal. App. 2d 568, 26 Cal. Rptr. 276 (1962).

[106] Sweeney v. Matthews, 94 Ill. App. 2d 6, 236 N.E.2d 439 (1968). See text following note 42 *supra*.

sumption of risk as a defense in strict liability will develop distinctly from the doctrine of assumption of risk in master-servant and other contractual relationships remains to be seen.[107]

The court's extended discussion of the objective factors, such as the obviousness of the defect, which the jury may consider in weighing the plaintiff's story is probably partly attributable to the court's lingering affinity to the reasonable man standard. It probably also reassures those, including the court, who would otherwise see in the subjective standard a greater opportunity for perjury. It may well prevent some unwarranted recoveries and reconcile some members of the bar to the new rules.

The court in recognizing misuse as a defensive concept was appropriately vague, since its remarks were dicta. The court did indicate that proper use need not be pleaded; but, if it became an issue plaintiff would have the burden of proof as proper use would then be essential to an element of his cause of action.[108] The test was given as whether the use was objectively foreseeable by the defendant. Instructions and rulings on misuse may find it convenient to distinguish proper *purpose* of use from proper *manner* of use.

Tactically, the plaintiff has been relieved of a formal pleading requirement and the defendant has traded what many defense counsel probably consider the relatively ineffectual defense of contributory negligence[109] for the two specific defenses of assumption of risk and misuse.[110]

CONCLUSION

After first refusing to adopt comment *n* of §402A because peculiarities of Illinois law and the lack of differences in result made it more convenient to retain the Illinois contributory negligence rule, the Illinois Supreme Court reversed itself on rehearing to clarify the rules and its position on the doctrine of strict liability. The court eliminated the requirement that plaintiff plead due care, removed contributory negligence by name as a defense, adopted assumption of risk as an affirmative defense, and detailed its fundamentally subjective standard. Helpful dicta on

[107] For a survey of the various types of assumption of risk with a review of Prosser's and Harper and James' categories, see Keeton, *Assumption of Risk in Product Liability Cases*, 22 LA. L. REV. 122 (1961).

[108] See text at note 93 *supra*.

[109] *Cf. Bushnell, Illusory Defense of Contributory Negligence in Product Liability*, 12 CLEV. MAR. L. REV. 412 (1963).

[110] The reasonable man standard may still be available to the defendant. The court said nothing to weaken its earlier position that plaintiff's conduct by the objective standard is involved in his proof of an unreasonably dangerous condition. Also, the objective floor of the subjective standard affords resourceful defendants' counsel and judges who resist the court's decision an opportunity to emphasize objective considerations. This could create a difficult situation to review.

misuse was also announced. While the new rules are a victory for those who view strict liability as a substantive change in the law, and while the rules require changes in pleadings and tactics, probably few, if any, additional plaintiff recoveries will result.

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