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CAVEAT VENDITOR: FAILURE TO HEED INSTRUCTIONS IS NOT A DEFENSE TO ILLINOIS PRODUCTS LIABILITY ACTIONS—THOMAS V. KAISER AGRICULTURAL CHEMICALS

Although assumption of risk is recognized as a valid defense in strict products liability actions,¹ it has been criticized by some scholars as being unduly harsh to genuinely injured plaintiffs,² and its application in the area of products liability has been sporadic and confused at best.³ In the recent case of Thomas v. Kaiser Agricultural Chemicals,⁴ where a plaintiff failed to follow clear and adequate written instructions for operating dangerous farm equipment, the Illinois Supreme Court adopted a narrow and conservative view of assumption of risk. The majority held that the plaintiff's ignorance of the danger of disregarding safety instructions, as well as his failure to voluntarily expose himself to a known danger,⁵ compelled it to reject the defense of assumption of risk.

1. W. Prosser, Handbook of the Law of Torts § 102, at 671 (4th ed. 1971) [hereinafter cited as Prosser]. The defense of assumption of risk has had a tumultuous history. It originated in master and servant situations where employers asserted that injured workmen were barred recovery due to the provisions of their work contracts. Eventually this concept was extended to other situations, oftentimes under such aliases as "incurred risk" or "volenti non fit injuria"; however, the defense remained the same. Id. § 68, at 439-40. Illinois has accepted this defense in the area of products liability. E.g. Reese v. Chicago, Burlington & Quincy R.R., 55 Ill. 2d 356, 360, 303 N.E.2d 382, 385 (1973) (court acknowledged defense of assumption of risk though it did not apply where employee was unaware of danger of suspended crane bucket); Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 430, 261 N.E.2d 305, 312 (1970) (assumption of risk may be employed where plaintiff disregards instructions on the proper use of a trencher machine).

2. Prosser, supra note 1, § 68, at 454. See Restatement (Second) of Torts, Explanatory Notes ch. 17A, at 70-87 (Tent. Draft No. 9, 1963). The American Law Institute members argued the merits of incorporating the defense of implied assumption of risk into the Second Restatement. The arguments centered on whether the concept of implied assumption of risk was necessary as a separate defense. The "Confederates"—those scholars in favor of the abolition of assumption of risk—asserted that this concept could be dealt with in terms of either contributory negligence on the part of the plaintiff or lack of duty on the part of the defendant. Id. at 78. Implied assumption of risk was, however, eventually incorporated into the Second Restatement as § 496D.

3. See Keeton, Assumption of Risk in Products Liability Cases, 22 La. L. Rev. 122 (1961) (classifying assumption of risk in six categories: express, subjectively consensual, objectively consensual, by consent to conduct or condition, associational, and imposed). See also Restatement (Second) of Torts § 496A, Comment d (1965) (stating that the defenses of assumption of risk and contributory negligence frequently overlap and are often imprecisely distinguished by the courts).

4. 81 Ill. 2d 206, 407 N.E.2d 32 (1980).

5. Id. at 214, 407 N.E.2d at 36.
A cause of action for strict products liability in Illinois must be supported by three allegations: that injury or damage resulted from a defect of the product, that the product was in an unreasonably dangerous condition due to this defect, and that the defective condition existed at the time the product left the manufacturer's control. By imposing these requirements, the Illinois Supreme Court shifted the emphasis away from the traditional duty-conduct analysis utilized in negligence cases toward one focusing upon the product itself. Despite this difference in emphasis, both strict liability and

6. Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965) (first Illinois case to use the modern theory of strict liability in the area of commercial products). In Suvada, the owners of a tractor sued the tractor manufacturer and the manufacturer of a brake system when a brake malfunction caused a collision with a bus. The court held the manufacturers liable because the product was in an unreasonably dangerous defective condition at the time the product left the manufacturer's control. Id. at 623, 210 N.E.2d at 188.

The adoption of strict products liability in Illinois was part of a trend beginning with the landmark decision in Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (plaintiff successfully brought strict products liability suit for injury stemming from defect in a wood lathe). One year later, the American Law Institute adopted the revolutionary Restatement § 402A which embraced the theory of strict liability in tort for defective products. This section provides:

Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) The seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Restatement (Second) of Torts § 402A (1965).

Section 402A was touted by most scholars as a major breakthrough in the area of products liability. Foremost among the supporters was Dean Prosser, who described in great detail the policy considerations and the advantages of this new theory. See Prosser, The Fall of the Citadel, 50 Minn. L. Rev. 791 (1966). There are, however, occasional criticisms of § 402A. One article contended that the members of the American Law Institute exceeded their authority by creating new law, rather than simply reporting the existing law, because at the time § 402A was adopted, only seven states had applied strict liability to defective product cases. Defense Research Institute, Inc., Brief Opposing Strict Liability in Tort, 2, 3, 5 (1966). This argument, however, had little impact upon the courts; the new theory was adopted by a vast majority of the states within the same decade. Prosser, supra note 1, § 98, at 657-58.


8. This paramount distinction between negligence theory and strict liability theory was acknowledged in Kerns v. Engelke, 76 Ill. 2d 154, 161, 390 N.E.2d 859, 862 (1979) (quoting Kerns v. Engelke, 54 Ill. App. 3d 323, 329, 369 N.E.2d 1284, 1289 (5th Dist. 1977)). In Kerns,
negligence are limited by the requirement that the person using the product and the use to which the product is employed must have been reasonably foreseeable to the manufacturer. In this regard, the court has merged a part of negligence analysis into modern strict liability theory.

Much strict product liability litigation has centered on the question of whether the product was in an unreasonably dangerous defective condition. The definition adopted generally in Illinois is whether "the product fail[s] to perform in a manner reasonably to be expected in light of [its] nature and intended function." An actual defect in the product can be demonstrated

the Illinois Supreme Court noted the lack of a securing mechanism on a forage blower and held the manufacturer liable solely on the basis of this defective design.

Professor Leon Green's influential article, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 Tex. L. Rev. 1185 (1976), discusses these sections from a slightly different viewpoint, contending that they are quite similar to the standard negligence theory. Section 402B of the Restatement imposes strict liability for physical harm to the consumer resulting from public misrepresentation of the character or quality of the chattel sold. Professor Green asserts that § 402A and § 402B are similar to the typical negligence analysis, but observes that an additional duty is imposed under strict liability to inform and give reliable information concerning the product. *Id.* at 1188.

Professor Green further demonstrates that the basic issues relevant under a strict liability theory could be presented in a standard negligence analysis. The first issue, causal connection, considers whether a defective product substantially contributed to the consumer's injury. *Id.* at 1197-1200. The second issue, the duty of the seller, is based on the premise that every seller owes a duty to prevent unreasonably dangerous defective products, or non-defective dangerous products lacking adequate warnings, from being placed into the stream of commerce. *Id.* at 1200-02. The standard of care is determined by asking whether the product would meet the reasonable safety expectations of the buying public. *Id.* at 1203-05. The final issue, breach of this standard, is measured not by what was expected, but by what the ultimate consumer actually received. *Id.* at 1202-06. Thus, Professor Green concludes that § 402A may become simply another variation of the well-established negligence theory because the same issues and factors are employed under both. *Id.* at 1220.

9. Winnett v. Winnett, 57 Ill. 2d 7, 310 N.E.2d 1 (1974) (manufacturer of forage wagon not liable when injury to four year old girl standing near moving conveyor belt was deemed "unforeseeable"); Prince v. Galis Mfg. Co., 58 Ill. App. 3d 1056, 374 N.E.2d 1318 (3d Dist. 1978) (court affirmed grant of summary judgment for manufacturer when experienced coal miner assumed risk of injury from roofbolter machine he had used for three months before his injury); Doran v. Pullman Standard Mfg. Co., 45 Ill. App. 3d 981, 360 N.E.2d 440 (1st Dist. 1970) (summary judgment for railroad car manufacturer reversed because evidence presented showed that the danger of a moving railroad car might have been reasonably foreseeable to the manufacturer). This foreseeability requirement utilizes an objective standard as almost every consequence is conceivable in retrospect. Mieher v. Brown, 54 Ill. 2d 539, 544, 301 N.E.2d 307, 309 (1973) (judgment entered for truck manufacturer; court ruled it highly extraordinary that lack of a rear bumper brought about a fatal car crash).

10. Dunham v. Vaughan & Bushnell Mfg. Co., 42 Ill. 2d 339, 342, 247 N.E.2d 401, 403 (1969) (judgment entered against manufacturer when hammer chipped while being used in a customary manner). *Accord,* Knapp v. Hertz Corp., 59 Ill. App. 3d 241, 375 N.E.2d 1349 (1st Dist. 1978) (judgment entered against lessor of auto with brakes in an unreasonably dangerous condition despite fact that plaintiff drove with the emergency brake partially engaged). This brief definition, however, often necessitates a complicated balancing process for fact-finders. Although no criteria are specifically articulated, some of the factors scrutinized have included: the probability of injury; the seriousness of injury; the availability of safer alternative products; the feasibility of eliminating the dangerous characteristic either through warnings or physical
in three ways. The manufacturer's liability may be predicated upon a defect in the manufacturing process, a defect in the product's design, or a failure to warn adequately of the danger in an even faultlessly manufactured and designed product. Although a defect is an essential ingredient of a plaintiff's cause of action, proof of a specific defect is not always required. Courts frequently permit reasonable inferences to be drawn rather than impose difficult matters of proof on the plaintiff.

The Defense of Assumption of Risk

After proving a prima facie products liability case, the plaintiff must withstand any defenses raised. Significantly, in Williams v. Brown Manufacturing Co., the Illinois Supreme Court decided that promoting the policy alterations; the obviousness of the danger; the common knowledge and normal public expectations of the danger; and the social utility of the product. Wade, Strict Tort Liability of Manufacturers, 19 Sw. L.J. 5, 17 (1965).

11. A defect in design, as alleged in Thomas, requires analysis of all of the factors discussed within the "unreasonably dangerous" issue. See note 10 supra. One case discussing these factors is Lolli v. Ohio Bass Co., 502 F.2d 741, 744 (7th Cir. 1974), where a power cable fell from the roof of a mine shaft. Applying Illinois law, the court analyzed: (1) whether the design of the product made it incapable of preventing injury; (2) whether there was an alternative design which would have prevented injury; and (3) the feasibility, in terms of cost and technology, of the alternative design. See also Anderson v. Hyster, 74 Ill. 2d 364, 368, 385 N.E.2d 690, 692 (1979). In Anderson, the court held the manufacturer liable because a defective forklift was used in a foreseeable fashion and injury resulted. The court stated that design standards of the industry, or criteria set by legislation or governmental agencies, are relevant in determining whether a defect in design exists. Id.


14. See Prosser, supra note 1, § 103, at 672-75. Dean Prosser acknowledges that although the doctrine of res ipsa loquitur has no application in strict liability theory, inferences can sustain a plaintiff's burden of proof. Prosser observes that an inference based on pure conjecture will not be permitted to stand; yet, if established by a preponderance of probability, the issue will be one for the jury to determine. Id. Contra, Russo v. The Range, Inc., 76 Ill. App. 3d 236, 238-39, 395 N.E.2d 10, 13 (1st Dist. 1979) (summary judgment for amusement park reversed as evidence did not clearly show that plaintiff possessed knowledge of risk of injury from slide).

15. 45 Ill. 2d 418, 261 N.E.2d 305 (1970). The Williams court was confronted with a strict liability suit in which the plaintiff sustained injuries while using a trencher machine. The complaint alleged that the trencher should have been equipped with a safety device to alleviate the force amassed when the machine encountered an immovable obstruction. The defendant manufacturer, on the other hand, presented evidence that the plaintiff read an instruction booklet which contained directions on how to adjust the machine to prevent a sudden lurch
considerations previously advanced in *Suvada v. White Motor Co.* meant disallowing contributory negligence as a defense to strict liability. The court demanded that a defense contemplate a higher degree of culpability on the plaintiff's part, concluding that assumption of risk satisfied this standard. Moreover, assumption of risk implies a willingness to embrace a known danger; it thus differs from contributory negligence in its focus on the plaintiff's mental state rather than his or her conduct. When a plaintiff assumes the risk, he or she relieves the defendant's duty by explicitly or implicitly stating that he or she will accept the chance of injury from a known risk. Even if a product is dangerously defective, the defendant is relieved of liability by this conscious decision to accept the danger.

When an object lodged in the digging mechanism. The trial judge struck the defense of assumption of risk, but the Illinois Supreme Court overruled, and remanded the case on the ground that the evidence on assumption of risk was sufficient for submission to the jury. *Id.* at 431, 261 N.E.2d at 312.

16. 32 Ill. 2d 612, 619, 210 N.E.2d 182, 186 (1965). In *Suvada*, the Illinois Supreme Court justified the imposition of strict liability for defective products by emphasizing the interest in promoting public safety. The court reasoned that because manufacturers represent their products to be safe and reap profits from their sale, manufacturers should be compelled to accept the responsibility for defective products distributed in the marketplace. *Id.* at 186.

Further vindication of this policy consideration is found in *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill. 2d 339, 344, 247 N.E.2d 401, 404 (1969), where the court averred that strict liability would offer manufacturers an incentive to enhance product safety. Another rationale was enunciated in *Brandenburg v. Toyota Motor Sales, USA, Inc.*, 162 Mont. 506, 513-14, 513 P.2d 266, 273 (1973), where the court recognized that manufacturers have the ability to anticipate some hazards and guard against their occurrence, whereas consumers have relatively little power to do so.


18. 45 Ill. 2d at 425, 261 N.E.2d at 309.

19. PROSSER, supra note 1, § 68, at 447.

20. *Id.* Plaintiffs rarely verbalize that they have assumed a risk.


22. See Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Era*, 60 IOWA L. REV. 1, 16-25 (1974) (author discusses the defendant's duty to guard against plaintiffs who did not make conscious choices to encounter danger). See also Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122 (1961). Keeton contends that the defense of assumption of risk should be limited to situations where the plaintiff communicates his or her consent to accept the risk or where the risk is obvious to all consumers. Keeton disapproves of the more subtle forms of assumption of risk (such as consent through conduct) that often operate to deny recovery for a genuine claim. *Id.* at 164.
In Illinois, assumption of risk is an affirmative defense on which the defendant carries the burden of proof. The defendant must plead and prove that the plaintiff had actual knowledge of the risk, understood and appreciated the danger, and voluntarily and unreasonably exposed himself or herself to the risk. Unlike the test for contributory negligence or for misuse, this standard is subjective. It requires the trier of fact, usually a jury, to ascertain the thoughts of the individual plaintiff, rather than rely upon the objective standard of the reasonably prudent person. The jury need not, however, determine this issue solely on the basis of the plaintiff's testimony; rather, the jurors may look at all the evidence presented, including the plaintiff's age, experience, knowledge and understanding, and the obviousness of the danger itself. If upon weighing all these factors the jury can only conclude that the plaintiff was aware of the hazard, then the fact-finder is bound to decide that the plaintiff did indeed assume the risk.


24. Sweeney v. Max A.R. Matthews & Co., 46 Ill. 2d 64, 66, 264 N.E.2d 170, 171 (1970) (assumption of risk not found where journeyman carpenter was unaware of danger of defective concrete nails); Ruggeri v. Minnesota Mining & Mfg. Co., 63 Ill. App. 3d 525, 530, 380 N.E.2d 445, 448-49 (5th Dist. 1978) (judgment entered against manufacturer where conscientious employee was not aware of the dangerous propensities of a flammable adhesive); Ralston v. Illinois Power Co., 13 Ill. App. 3d 95, 98, 299 N.E.2d 497, 499 (4th Dist. 1973) (workman standing on dangerous hydraulic boring attachment found to have assumed risk). See also ILLINOIS PATTERN JURY INSTRUCTIONS (CIVIL) § 400.03 (West Supp. 1977) (stating the known risk must be a proximate cause of the plaintiff's injuries but not mentioning the requirement that the plaintiff must have voluntarily and unreasonably assumed the risk of injury).


26. Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 430, 261 N.E.2d 305, 312 (1970). The Restatement provides: “[T]he plaintiff's own testimony as to what he knew, understood, or appreciated is not necessarily conclusive. There are some risks as to which no adult will be believed if he says that he did not know or understand them.” RESTATEMENT (SECOND) OF TORTS § 496D, Comment d (1965).

27. Id. at 430-31, 261 N.E.2d at 312. The Restatement provides: “[T]he plaintiff's own testimony as to what he knew, understood, or appreciated is not necessarily conclusive. There are some risks as to which no adult will be believed if he says that he did not know or understand them.” RESTATEMENT (SECOND) OF TORTS § 496D, Comment d (1965).


29. Plaintiff still may counter this defense. If, for instance, the plaintiff is given assurances by the defendant that the defect in the product is either trivial or harmless, the defense of assumption of risk will not bar the plaintiff's recovery. Prosser, supra note 1, § 68, at 450. See Collins v. Musgrave, 28 Ill. App. 3d 307, 313, 328 N.E.2d 649, 653 (5th Dist. 1975) (plaintiff
Thus, the defense of assumption of risk is available to Illinois defendants even in cases where the plaintiff expressly denies any knowledge concerning a dangerous defect in a product.

**THE THOMAS DECISION**

**Background**

While attempting to fill a fertilizer applicator, the plaintiff, Ronald D. Thomas, suffered serious injury to his eye when liquid nitrogen fertilizer sprayed into his face. Thomas' injury occurred after he inadvertently opened the air pressure relief valve on the applicator, thereby releasing pent-up pressure and the remaining liquid fertilizer. Seeking recovery under both strict liability and negligence theories, Thomas sued Kaiser Agricultural Chemicals, the vendor of the liquid fertilizer and the supplier of the applicator, as well as Certified Equipment & Manufacturing Company, the distributor of an allegedly defective attachment called an adaptor.

At trial, Thomas was able to establish his prima facie case in strict liability through the unchallenged testimony of his expert witness. Kaiser attempted to counter plaintiff's case by raising the defense that as a matter of law plaintiff had assumed the risk of the alleged defect in design. Significantly, Thomas testified that he had read the conspicuous and detailed warning label cautioning users to bleed off all the air pressure in the tank.

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30. 81 Ill. 2d at 209, 407 N.E.2d at 34.
31. Id.
32. Id. at 209-10, 407 N.E.2d at 34. Certified subsequently brought a third-party complaint against Dover Corporation, the manufacturer of the adaptor. Kaiser counterclaimed for indemnity against both Certified and Dover. Id. at 210, 407 N.E.2d at 34. Prior to the commencement of the trial, the court entered summary judgment in favor of Certified and against Dover for indemnity for any liability which plaintiff or Kaiser might recover against Certified. Thomas v. Kaiser Agricultural Chems., 74 Ill. App. 3d 522, 523, 392 N.E.2d 1141, 1144 (4th Dist. 1979).
33. The expert concluded that the stem of the relief valve protruded approximately one-eighth inch beyond the lip of the adaptor and that this protrusion allowed for the dangerous possibility of accidentally bumping and opening the relief valve. 81 Ill. 2d at 213, 407 N.E.2d at 35.
34. Id. at 210, 407 N.E.2d at 34. Kaiser also argued that as a matter of law it was entitled to indemnity from Certified because under a strict liability theory liability extends to all members in the distribution chain, including the wholesaler as well as the retailer. Id. at 214, 407 N.E.2d at 36. The supreme court, however, rejected this contention. The court noted that the jury instructions tendered by Kaiser concerning this question of liability allowed the jury to hold in favor of one defendant, but not the other. Since those instructions had in fact been presented to the jury, the defendant was held to have waived all rights to appeal the instruction. Id. at 215, 407 N.E.2d at 36. Support for this ruling is found in the decision of Tweedy v. Wright Motor Sales, Inc., 64 Ill. 2d 570, 575, 357 N.E.2d 449, 452 (1976), in which the Illinois Supreme Court stated that if the forms of verdict are submitted to the jury without objection, any alleged errors are waived.
before refilling the applicator.35 Thomas had attempted to refill the applicator without verifying that the air pressure gauge read "zero," as the instructions directed.36 Further, Kaiser presented evidence that Thomas had been a farmer for eighteen years and had fertilized his fields and those of his neighbors for the past sixteen years.37 It was also shown that Thomas had used a substantially similar apparatus during this period and that he had used an identical applicator once before.38

The trial ended with a judgment entered on the jury verdict in favor of Thomas and against Kaiser,39 and the appellate court affirmed.40 With regard to Kaiser's defense of assumption of risk, the appellate court held that although the plaintiff had read the safety instructions, the facts did not warrant the conclusion that he appreciated the danger of unintentionally opening the relief valve stem.41

The Supreme Court's Opinion

The Illinois Supreme Court upheld the rulings of the lower courts.42 Mr. Justice Moran, writing for the majority, stated that the defense of assump-
tion of risk would apply only if the plaintiff was subjectively aware of the danger of the relief valve. According to the court, however, a finding of awareness was not warranted by the evidence presented. Although the plaintiff had been a farmer for eighteen years, the majority emphasized that Thomas had used this particular machine only once before. Furthermore, on that occasion he had used anhydrous-ammonia fertilizer which has properties markedly different from those of liquid nitrogen. Moreover, the court stated that although the plaintiff may have been contributorily negligent in not checking the air pressure gauge, his actions did not indicate a voluntary decision to face the danger. Therefore, the jury was free to decide against Kaiser on the issue of assumption of risk.

43. Id. at 214, 407 N.E.2d at 36.
44. Id.
45. As previously discussed, see note 17 and accompanying text supra, contributory negligence is no defense to a cause of action in strict liability.
46. 81 Ill. 2d at 214, 407 N.E.2d at 36.
47. The contention of the third-party defendant, Dover, that the danger arose solely because the assembler chose an unsuitable combination of component parts, was also rejected by the supreme court. First, the court held that when an assembler makes no substantial alteration in the component parts and the injury is causally traced to a defect in manufacture or design, liability remains with the manufacturer. Id. at 215, 407 N.E.2d at 36-37. This reasoning is supported by the Restatement which provides: "[W]here there is no change in the component part itself, but it is merely incorporated into something larger, the strict liability will be found to carry through to the ultimate user or consumer." RESTATEMENT (SECOND) OF TORTS § 402A, Comment q (1965).

The court's handling of this misuse issue is consistent with prior Illinois decisions. In Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965), the court held that the manufacturer of a brake system was liable where defendant merely installed the brakes. Also, in Liberty Mut. Ins. Co. v. Williams Mach. & Tool Co., 62 Ill. 2d 77, 338 N.E.2d 857 (1975), the court stated that the manufacturer of a defective hydraulic pump release valve was liable for injuries resulting from the collapse of a hydraulic scaffold. Although the scaffold was placed too close to a building, the court ruled that this was not misuse because the sole purpose of the release valve was to prevent this very accident. Id. at 84, 338 N.E.2d at 861. The supreme court held, in both of these cases, that the defect was still directly attributable to the toolings and designs of the original manufacturer.

The second basis for overruling Dover's contention concerned the foreseeability of Kaiser's actions. It had been established by the Illinois Supreme Court that misuse would bar the recovery of the plaintiff, if, and only if, such use is not objectively reasonably foreseeable. Hence, in the decision of Kerns v. Engelke, 76 Ill. 2d 154, 390 N.E.2d 859 (1979), the court held that a manufacturer of a forage blower may be liable for injury caused by a foreseeable unintended use of the product. This is also supported by the decision in Anderson v. Hyster Co., 74 Ill. 2d 364, 385 N.E.2d 690 (1979), where a manufacturer was held liable when a defective forklift was used in a foreseeable, though dangerous, manner by an employee. Thus, although Kaiser's selection of component parts was questionable, its combination of parts was reasonably foreseeable. Therefore, the court was justified in holding Dover liable for the injuries incurred. 81 Ill. 2d at 215-17, 407 N.E.2d at 37.

Finally, in the decision of Doran v. Pullman Standard Car Mfg. Co., 45 Ill. App. 3d 981, 987, 360 N.E.2d 440, 445 (1st Dist. 1977), the court emphasized that when multiple causes combine to produce the injury, the liability of the manufacturer will be severed only if the acts of others were unforeseeable. This normally is a question for the jury. In Thomas, therefore, the court was correct in ruling that it was within the power of the jury to conclude that Kaiser's misuse was foreseeable to Dover. The jury's decision was properly allowed to stand.
In his dissent, Justice Ryan contended that plaintiff’s complete disregard of the express warning concerning the proper use of the applicator was a clear example of assumption of risk.\(^4\) The dissent asserted that because the plaintiff had read the safety instructions prior to the accident and had extensive farming experience, the majority should have concluded that Thomas knew of the danger associated with the use of this fertilizer.\(^4\) Furthermore, because it was undisputed that Thomas did not check the air pressure before he attempted to refill the applicator,\(^5\) and because no injury would have occurred had he followed the directions,\(^5\) the dissent contended that the defense of assumption of risk should have barred the plaintiff’s recovery as a matter of law.

**ANALYSIS OF THE THOMAS DECISION AND SUGGESTED ALTERNATIVE HOLDINGS**

The major issue faced by the Illinois Supreme Court in *Thomas* was the legal implication of the plaintiff’s failure to heed express instructions on the proper operation of a fertilizer applicator. Although the majority opinion contended that Thomas did not assume the risk of injury, this holding is not in accordance with a substantial number of decisions in this area. Furthermore, in factual situations analogous to the present case, courts have entered judgments in favor of defendants based on findings either that plaintiff misused the product or that the product was simply not in an unreasonably dangerous condition when injury occurred. These latter alternatives were not discussed in the *Thomas* opinion and, therefore, remain viable defenses which may be used in future cases similar to *Thomas*.

**The Defense of Assumption of Risk**

Stressing that the plaintiff in *Thomas* was neither aware of the inherent danger nor voluntarily proceeded to face this danger, the majority opinion demonstrates that the court has decided to take a very narrow view of the assumption of risk doctrine, and, in doing so has effectively eliminated the use of this defense for Illinois manufacturers.\(^5\) The court’s restrictive position on assumption of risk is displayed by its refusal to find, as it might have, that the plaintiff must have been aware of the risk\(^5\) and its consequent failure to rule, as it could have, that the evidence on the question of assumption of risk so overwhelmingly favored the defendant that the contrary verdict could not be permitted to stand.\(^5\) Numerous cases illustrate that a

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48. 81 Ill. 2d at 218, 407 N.E.2d at 38 (Ryan, J., dissenting).
49. Id.
50. Id.
51. Id. at 220-21, 407 N.E.2d at 39.
52. For an analysis of the economic impact of *Thomas*, see notes 110-125 and accompanying text *infra*.
53. See notes 42-47 and accompanying text *supra*.
54. Pedrick v. Peoria & Eastern R.R., 37 Ill. 2d 494, 511, 229 N.E.2d 504, 513-14 (1967). This standard has been upheld in subsequent decisions. See Kudelka v. American Hoist &
court may rule as a matter of law on assumption of risk when the plaintiff's awareness has been shown, either through his or her own prior complaints about the dangerousness, through warnings of others, or through experiencing similar difficulties prior to the accident. To demonstrate that the court in *Thomas* should have ruled for the defendant in the instant case, some discussion of Illinois case law is necessary.

The manner in which a plaintiff becomes aware, or should have become aware, of a danger should have no bearing on the court's analysis as long as it can be shown that the plaintiff did, in fact, receive a warning. It should make no difference whether the plaintiff is warned verbally, or through explicit instructions, as in the *Thomas* case. The crucial factor is that the plaintiff was warned. Accordingly, he or she should not be allowed to claim ignorance of the danger.

This reasoning has been followed in prior decisions. In *Williams v. Brown Manufacturing Co.* for example, the Illinois Supreme Court remanded the case because evidence that the injured plaintiff had read and understood instructions was presented, but not admitted at trial. The crux of the *Williams* opinion was that the presence of instructions is an indispensable factor to be included in the jury's deliberation. And, as previously stated, the Illinois Supreme Court is not bound to accept the jury's verdict in all cases, but may overturn a judgment whenever all the evidence overwhelmingly favors a contrary result. A second case, *Sweeney v. Max A.R. Matthews Derrick Co.*, 541 F.2d 651, 654 (7th Cir. 1976) (applying Illinois law) (directed verdict for defendant overturned where misuse of crane outriggers was not supported by overwhelming evidence); *Sweeney v. Max A.R. Matthews & Co.*, 46 Ill. 2d 64, 68, 264 N.E.2d 170, 172 (1970) (trial court properly denied directed verdict for manufacturer grounded in assumption of risk where evidence presented showed that journeyman carpenter was unaware of danger presented by defective concrete nails).


57. Kirby v. General Motors Corp., 10 Ill. App. 3d 92, 293 N.E.2d 345 (4th Dist. 1973) (summary judgment affirmed for manufacturer where truck driver was found to have assumed risk because of previous difficulties with steering mechanism).


60. *Id.* at 429, 261 N.E.2d at 311. The court decided that the question of assumption of risk should have been decided by the jury, stating: "Plaintiff was an experienced 'operating engineer' with proficiency in a wide range of machinery; a jury could have believed him aware of the trencher's obvious design features." *Id.*

61. See note 54 and accompanying text supra.
Co., emphasized that a plaintiff’s indifference to apparent danger might justify a judgment of assumption of risk as a matter of law. In both Williams and Sweeney, the supreme court weighed the effect of other factors to determine whether the plaintiff should have known of the danger. Consonant with these precedents, the court in Thomas also should have considered other factors. Because the plaintiff had a professional farming background and had fertilized farm lands for sixteen years, it is difficult to believe that Thomas had no awareness of the danger. Furthermore, the applicator was a simple mechanism and Thomas possessed considerable experience using it. Hence, the argument that the plaintiff should have been aware of the danger is a convincing one which the court should have accepted.

The contention that the warning label failed to advise the plaintiff of the specific defect in the apparatus also should not have precluded the defense of assumption of risk. The decision in Williams indicated that assumption of risk applies when the plaintiff knows of a dangerous condition, rather than the existence of a particular defect. In a similar Illinois decision, the plaintiff was barred from recovery because he knew of the open and obvious danger, yet was unaware of any specific defects. In another case, the court held that the plaintiff’s general knowledge of the danger was sufficient to

63. Id. at 67, 264 N.E.2d at 172. The court, however, ultimately held that the plaintiff had not assumed the risk, but only because he had had very little experience as a carpenter and, therefore, did not realize the danger.
64. See note 10 supra.
65. The appellate court in Thomas similarly reasoned that plaintiff, due to his prior experience, was aware of the dangerous propensities of the fertilizer despite his allegation that he possessed no such knowledge. 74 Ill. App. 3d at 527, 392 N.E.2d at 1146. See Keeton, Assumption of Products Risks, 19 Sw. L.J. 61 (1965). This article enumerates the elements of assumption of risk and, significantly, notes that where the danger in a product is obvious, a plaintiff’s contention of lack of knowledge will be disregarded. Professor Keeton states that this position makes the test for assumption of risk more objective, although it still retains its subjective character in that it is based on an individual plaintiff’s knowledge rather than the knowledge of a reasonable, prudent person. Id. at 70-71.
66. See note 37 and accompanying test supra.
67. See note 38 and accompanying text supra.
68. As aptly stated by the attorney for Kaiser:
If ever there was an experienced person with complete knowledge of the circumstances and of the dangers, it is the plaintiff in this case. . . . It is hard to imagine a situation in which there would be any person (including all of the defendants and counterdefendants) who would have more knowledge of the circumstances than does the plaintiff here.
69. 45 Ill. 2d at 426, 261 N.E.2d at 309.
70. Denton v. Bachtold Bros., 8 Ill. App. 3d 1038, 1040, 291 N.E.2d 229, 231 (4th Dist. 1972). In Denton, the plaintiff sustained injuries from his lawn mower after he knowingly removed the safety guards. The court ruled in favor of the defendant on the grounds that the product itself was not defective and that the plaintiff assumed any risk in connection with his injury. Id.
impose the defense of assumption of risk, although it was not argued that plaintiff was aware of the particular manufacturing defect alleged. These decisions under Illinois law indicate that the identification of a specific danger is not necessary to establish the defense of assumption of risk. Rather, the general awareness of a potential harm satisfies the requirement that the plaintiff must have knowledge of the risk.

A better approach to the defense of assumption of risk, and its requisite element of knowledge, is contained in the opinion of the Texas Civil Appellate Court in *Heil Co. v. Grant*. The *Heil* court stated that “assumption of risk is premised upon knowledge of the dangerous condition of a product rather than recognition of its defectiveness.” The court further maintained that the requirement of knowledge of risk pertains not to the actual defective components that cause the injury, but to the plaintiff's general awareness of the possible danger of some injury. The requisite element of knowledge used in this general sense affords a more equitable interpretation of the term because it recognizes those instances where a plaintiff appreciates a general danger, yet nevertheless proceeds with his or her activities. Applying the *Heil* rationale, the plaintiff in *Thomas* exhibited both an awareness and an appreciation of a dangerous condition. Thomas himself testified that he had read the instructions on the warning label. Because he possessed the necessary maturity and experience to understand that disregarding instructions concerning a potentially dangerous apparatus could create a hazardous situation, he undoubtedly must have been aware of the risk.

The majority's second argument was that the plaintiff did not voluntarily choose to embrace a known danger, a requisite element of the defense of assumption of risk. There must be an indication of conscious deliberation, resulting in an injury, which is not satisfied by mere inadvertence or momen-

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71. Moran v. Raymond Corp., 484 F.2d 1008, 1015-16 (7th Cir. 1973) (applying Illinois law) (plaintiff sustained injuries when attempting to operate controls of forklift while standing on a platform below the forks).
72. 534 S.W.2d 196 (Tex. Civ. App. 1976). The *Heil* case involved a situation where the raised bed of a dump truck was accidentally lowered, crushing the decedent who was working beneath the bed. It was the decedent himself who inadvertently tripped the pullout cable that lowered the bed. The court held that the decedent appreciated the danger of triggering the pullout cable even though he had never previously worked on the dump truck. *Id.* at 922.
73. *Id.* at 921.
74. *Id.* at 922.
75. A factually similar case is Sherrill v. Royal Indus., Inc., 526 F.2d 507 (8th Cir. 1975), in which the 55 year old plaintiff, a farmer for most of his life, was injured by a grain auger. The plaintiff had assembled the unit, observed its operation when used by neighbors, and had used the unit himself once before. Although the plaintiff claimed that the auger had a defective design, the court denied the manufacturer's liability, stating that the jury properly found that the plaintiff had assumed the risk. *Id.* at 512.
76. 81 Ill. 2d at 212, 407 N.E.2d at 35.
77. See note 37 and accompanying text supra.
78. 81 Ill. 2d at 214, 407 N.E.2d at 36.
79. See note 24 and accompanying text supra.
tary inattention. Moreover, split-second decisions in emergency situations do not constitute voluntary decisions. It must be emphasized, though, that unreasonableness and involuntariness pertain only to the mental decision to face a known danger, and not to the physical conduct involved in conjunction with the decision. The plaintiff's consideration of the potential danger is the crucial factor, rather than the manner in which he carries out his decision. Furthermore, the fact that a decision to assume a known risk may be foolhardy or hasty is irrelevant in determining whether there was an assumption of risk because the important question is whether conscious deliberation took place. The standard focuses on whether a decision was made at all—not whether the decision was either intelligent or correct.

When such reasoning is applied to the facts of Thomas, it is clear that the plaintiff made a voluntary conscious decision to accept a risk. He deliberately decided to proceed without first checking the air pressure gauge. Since he knew that the instructions told him to check the gauge first, his conscious decision to disregard the instructions is controlling, rather than his subsequent conduct of inadvertently depressing the check relief valve. Hence, the third and final element of assumption of risk has been fulfilled. There is no foundation, therefore, for the majority's assertion that Thomas did not assume the risk of injury. He possessed the requisite knowledge of the danger from his past experience in working with these chemicals. He was expressly warned of the risk of the fertilizer escaping by the warning label he had read prior to the injury. And, his conscious decision to ignore the instructions on the use of the applicator constituted a voluntary decision to take the risk. For these reasons, the court should have decided that Thomas assumed the risk as a matter of law.

80. Scott v. Dreis & Krump Mfg. Co., 26 Ill. App. 3d 971, 990-91, 326 N.E.2d 74, 87 (1st Dist. 1975) (no assumption of risk where plaintiff's contact with foot pedal on press machine was inadvertent). See Prosser, supra note 1, § 68, at 450-52 (stating that the plaintiff must have freedom of choice to be bound by assumption of risk). If there is no choice, or if the choice is between two evils, the voluntariness aspect is destroyed and, hence, assumption of risk will not apply to bar a plaintiff's claim.


82. Johnson v. Clark Equip. Co., 272 Or. 403, 413, 547 P.2d 132, 140 (1976) (court remanded case where trial judge excluded evidence concerning employee's decision to encounter a known risk; employee was injured when forklift carriage descended while he reached through the uprights in an attempt to cut the bands on forklift bundles). This reasoning has been used in other decisions, such as Moran v. Raymond Corp., 484 F.2d 1008 (7th Cir. 1973) (applying Illinois law), where the plaintiff made a hasty but nonetheless knowing decision to assume the risk of injury while operating the controls of his forklift when dangerously standing on the moving forks.

83. Moran v. Raymond Corp., 484 F.2d 1008, 1016 (7th Cir. 1973) (applying Illinois law) ("[t]he test, although subjective, relates to the knowledge of the risk and not to whether it was a good risk").
A second defense commonly utilized to deal with a plaintiff's disregard of instructions is that of misuse. This defense, though not raised in *Thomas*, should be examined because it remains a viable alternative and may be employed successfully in future situations similar to *Thomas*. Misuse is defined as the use of a product "for a purpose neither intended nor 'foreseeable' (objectively reasonable) by the defendant." In order to establish misuse as a defense, it must be proved that the plaintiff's use of the product was unforeseeable to the manufacturer. Manufacturers possess a justifiable expectation that their instructions will be read and followed. If they are disregarded, the general rule is that a vendor should not be held liable for such abnormal use. Further, if a product is safe to use when directions are followed, the product will be considered neither unreasonably dangerous nor defective, thus undercutting a strict products liability action.

Disregard of clear instructions is the basis for many decisions in favor of manufacturers. For example, recovery may be denied when it is demonstrated that a farm implement was operated in a manner contrary to the given instructions. Similarly, some courts have indicated that strict liability plaintiffs may not knowingly ignore plain and unambiguous instructions, and these courts have extended the applicability of this doctrine to include most goods sold to the public. More recently, because a consumer used

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85. Although the issue of misuse of the applicator by *Thomas* was not raised on appeal by either of the defendants, it was examined by Justice Ryan's dissent and should be raised by future defendants as an alternative argument. However, the third-party defendant, Dover, did raise this issue, but only in regard to Kaiser's alleged misuse in assembling the applicator. Dover did not claim that *Thomas* misused the product by not following the written directions on the proper operation of the applicator. See notes 38, 41 & 47 supra.

86. See note 84 and accompanying text supra.

87. Prosser, supra note 1, § 102, at 669.

88. This notion was set forth in the Restatement: “Where warning is given the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in a defective condition, nor is it unreasonably dangerous.” Restatement (Second) of Torts § 402A, Comment j (1965).


90. See Proctor & Gamble Mfg. Co. v. Langley, 422 S.W.2d 773 (Tex. Civ. App. 1967). In that case, the defendant was barred from recovery on the basis of misuse because she violated the instructions of a home permanent hair wave product by leaving the solution on her hair for twice the recommended length of time. Regarding the misuse issue, the court stated:

We do not believe that the strict liability doctrine means that under circumstances such as we have here a consumer may knowingly violate the plain, unambiguous instructions and ignore the warnings, then hold the makers, distributors and sellers of a product liable in the face of the obvious misuse of the product.
cleaning fluid in concentrations greater than those recommended on the label, recovery from the manufacturer was denied on the basis of blatant misuse. Hence, the general rule of these cases should be applicable to the facts of Thomas. In each of the examples, the plaintiff sustained injury after failing to comply with given instructions, exactly as occurred in Thomas.

Failure to heed instructions has also been held to constitute misuse under Illinois law. One example is Stewart v. Von Solbrig Hospital, where a plaintiff's disregard of specific instructions from his own doctor concerning a surgical pin prompted the court to rule as a matter of law that such misuse precluded any recovery under strict liability. Thus, courts are free to rule for defendants on the issue of disregarding express instructions, and it would behoove defendants to employ this defense in situations similar to Thomas.

The only remaining question concerns the reasonable foreseeability of the plaintiff's disregard of the instructions. Certainly, in many cases the misuse of equipment could and should be anticipated. In Thomas, however, the facts were unique because the plaintiff was not an ordinary consumer but rather was a professional farmer employing one of the implements of his trade. That the plaintiff in Thomas was a professional farmer supports the argument that any misuse on his part would be unforeseeable. In one case involving the failure of an aircraft engine, the United States Court of Appeals for the Ninth Circuit concluded that a trained pilot should have realized that malfunction had occurred in his airplane and avoided the injury by aborting the take-off. The pilot's disregard of a detailed instruction manual regarding pre-flight safety checks was not deemed to be a reasonably foreseeable misuse. Therefore, the manufacturer was not held liable as a matter of law. The court emphasized the utter unforeseeability of a pilot's disregard of basic safety precautions.

Id. at 780. See also McDevitt v. Standard Oil Co. of Tex., 391 F.2d 364, 370 (5th Cir. 1968) (plaintiff barred from recovery by defense of misuse since he did not purchase the proper size tires, and tires were sometimes inflated well above recommended pressures and other times well below recommended pressures). See generally Noel, Defective Products: Abnormal Use, Contributory Negligence and Assumption of Risk, 25 Vand. L. Rev. 93, 100-03 (1972). Noel observes that when there is no clear evidence that the plaintiff has read the instructions, courts have often ruled that this failure to follow directions is merely contributory negligence rather than assumption of risk. But when the directions were in fact read and understood, courts have ruled that the disregard of instructions is assumption of risk and bars recovery. Id.

91. Evershine Prods., Inc. v. Schmitt, 130 Ga. App. 34, 202 S.E.2d 228 (1973). It should be noted that the plaintiff did not sue under a strict liability theory, but rather under the theory of a breach of implied and express warranties. However, the analysis regarding misuse is applicable to either of these theories. See R. Hursh, American Law of Products Liability § 3:84, at 632-33 (1974) (a manufacturer is not liable under a warranty theory if the breach occurs as the result of a misuse of the product).

92. 24 Ill. App. 3d 599, 321 N.E.2d 428 (1st Dist. 1974). A surgical pin had been placed in the plaintiff's leg, and he was expressly warned not to walk on the leg without a cast while the bone was still mending.


94. Id. at 1374.

95. Id. at 1373.
An Illinois case similarly decided involved injuries to an experienced sportsman. The plaintiff, an archery enthusiast, improperly attached a bow string silencer and frequently used the device during target practice. Both actions were contrary to explicit instructions. The court held that the jury could properly conclude this constituted misuse of the product and plaintiff's recovery, therefore, was precluded.

Such reasoning is particularly applicable to *Thomas* because the plaintiff had been a professional farmer for many years. Arguably, a layperson could foreseeably misuse the equipment, but to extend this argument and claim that a knowledgeable professional would also foreseeably misuse the product is beyond reason. The defense of misuse, therefore, should be applied in future cases similar to *Thomas* where a reasonable consumer would be adequately protected by following instructions.

**Negating Plaintiff's Claim that the Product Was Unreasonably Dangerous**

A third alternative defense available to litigants rests on the widely accepted notion that a manufacturer is not required to market a product totally safe in all contexts. The manufacturer is bound only to avoid creating "unreasonably" dangerous products. Unreasonableness is measured by the expectations of that segment of the population in which the goods are marketed.

A prime example of this reasoning is found in a Fifth Circuit case in which the court held that an experienced boat captain could not claim that the positioning of a winch, which enhanced the tangling of line, was unreasonably dangerous. Since this danger was obviously perceived by the community of potential consumers (professional seamen), the court ruled that the danger was not unreasonable under the circumstances. The main issue

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97. *Id.* at 299, 355 N.E.2d at 651-52.
98. *See Hunt v. Blasius*, 74 Ill. 2d 203, 211, 384 N.E.2d 368, 372 (1978) (manufacturer of highway sign not liable where motorist drove into the sign since injuries did not result from defect in product). See also *Denton v. Bachtold Bros., Inc.*, 8 Ill. App. 3d 1038, 1040, 291 N.E.2d 229, 231 (4th Dist. 1972) (judgment for manufacturer as a matter of law where plaintiff received injuries from his lawn mower only after he had knowingly removed the safety guards).
99. *The Restatement* states that strict products liability applies only where products are unreasonably dangerous because many goods cannot be made entirely free from harm. *Restatement (Second) of Torts § 402A, Comment i* (1965).
100. *Id.* This Comment provides: "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Id.* Although other parts of Comment i have been adopted in Illinois, *see, e.g.*, *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 467, 343 N.E.2d 465, 471 (1976), this particular sentence has not been discussed in any Illinois cases.
102. *Id.* The plaintiff also contended that the winch was unreasonably dangerous because it lacked a brake. The court, however, again barred recovery as a matter of law, stating: "The
before the court was not whether the installation of the winch was dangerous, but whether it had become unreasonably dangerous in the particular setting. Similarly, the relationship between the professional character of the participants and the reasonableness of a defective condition was considered an important factor in a case involving adequate warning signs for toxic chemicals.  

The determination of the reasonableness of the defect in that case rested upon a consideration of the knowledge and expertise of the expected users of these chemicals. Thus, since a group of professionals of presumed expertise and intelligence were the intended consumers of the good, the court ruled that warnings understood only by such people were sufficient to justify the decision that the product was not unreasonably dangerous. By analogy, the fact that the fertilizer applicator in Thomas was distributed only to a select class of professional patrons justifies the conclusion that the product was not unreasonably dangerous.

Further support for this conclusion is founded on another case strikingly similar to Thomas. In Halvorson v. American Hoist & Derrick Co., a professional crane operator was specifically instructed against operating the crane within six feet of any electrical power lines. Despite these warnings, the plaintiff suffered injuries as a result of contacting the power lines with the crane. Plaintiff sued under a strict liability theory, alleging that the design was defective because the manufacturer had failed to incorporate safety devices to guard against such an occurrence.

The Minnesota Supreme Court, however, rejected this argument. It ruled instead that no liability arises when the product is safe if used in accordance with the instructions. Because the evidence indicated that the risk was known to the professional crane operator, and because specific warnings
advised against the encountered danger, the court ruled that the product was not in an unreasonably dangerous condition—despite the absence of safety features.109

Thus, when a professional person possessing superior knowledge fails to follow instructions, such person cannot thereafter claim that the injury occurred as the result of an unreasonably dangerous condition of the product. Common sense dictates that where an injury results only under such unpredictable circumstances, the product itself is not unreasonably dangerous in any sense. This reasoning should compel a different judgment in cases similar to Thomas where a professional worked with a device in his or her professional capacity. Under these circumstances, a court should rule as a matter of law that the device is not in an unreasonably dangerous defective condition.

**IMPACT OF THE THOMAS DECISION**

The Illinois Supreme Court's decision in Thomas could well have a substantial economic effect upon the future of business in the state. During the 1970's, a staggering increase occurred in both the number of product liability suits filed and the amount of damages sought, due primarily to the advent of the strict liability theory.110 With these increases, manufacturers were forced to retool their shops in response to the demand for safety in both manufacturing and product engineering. Nevertheless, businessmen still were not able to prevent the massive escalation in litigation and, as a result, suffered an unparalleled inflation in their insurance rates.111 If the outcome

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109. Id. at 58, 240 N.W.2d at 308. An Illinois appellate case indirectly supports the holding of Halvorson. In Bittner v. Wheel Horse Prods., Inc., 28 Ill. App. 3d 44, 328 N.E.2d 160 (1st Dist. 1975), the owner of a snowblower suffered injuries after he disregarded emphatic directions not to place his hand near the auger. The jury returned a general verdict in favor of the manufacturer and a special verdict holding that the plaintiff did not assume the risk of injury. Id. at 49, 328 N.E.2d at 164. Because this case was brought under a strict liability theory for defective design, it could not have been said that the defect existed outside of the control of the manufacturer. Id. at 46, 328 N.E.2d at 161-62. Furthermore, since there was no question that the snowblower auger was a proximate cause of the injury, the only conclusion that the jury could have reached was that the plaintiff had failed to meet his burden in proving the third element of his cause of action, namely that the product was in an unreasonably dangerous defective condition. Id. at 50, 328 N.E.2d at 164.

110. The number of product liability suits brought in United States District Courts increased by 83% between the years 1974 and 1975. U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY—FINAL REPORT II-44 (1978) [hereinafter cited as INTERAGENCY TASK FORCE]. A more recent task force survey has shown that the number of new claims filed has stabilized somewhat since the 1975 peak to an average of between 11 and 12 claims per firm per year, well above the 4.3 average per firm per year in 1971. Id. at III-3. Nevertheless, the amount sought in these new claims has skyrocketed, rising from an average of $476,000 per firm in 1971, to over $1,711,000 per firm in 1976. Id.

111. A random study performed by the Interagency Task Force showed that in one industry the average insurance premium rose 568% in one year. Id. at V-18. See notes 115-117 and accompanying text infra.
of *Thomas* is widely followed by the courts, a new round of increased litigation and spiraling insurance premiums would be spurred. The unfortunate aftermath would be that many marginally profitable businesses would be forced to shut down or relocate outside of the state. In either situation, a dreary picture is painted for the continued economic vitality of Illinois businesses.

The ultimate victims of the *Thomas* ruling will not be the insurance companies who pay out these claims, but businessmen and their patrons. Although insurance companies experienced losses during the peak of the product liability litigation, simple economics teaches that their costs were passed along to manufacturing industries in the form of higher premiums. In turn, the manufacturers spread the costs among the general buying public through higher prices. However, these costs cannot always be passed along, nor are they spread evenly among businesses and consumers. As a result, the brunt of the impact of product liability litigation falls hardest on the group who can least afford it—small businessmen.

Statistics compiled by the Interagency Task Force on Product Liability reveal that insurance premiums of business firms have risen on the average of 280% from 1971 to 1976. This increase is not evenly divided, though, since the range of increases varied between 19% and 568%. The data unequivocally substantiated that small firms experienced greater premium increases than large firms. Hence, small firms surviving on small profit margins may be squeezed out of the market due to rising insurance premiums. The same serious fate awaits newly developed product lines as

112. In 1975, insurance companies incurred $116 in losses for every $100 received in premiums, no doubt the primary reason for continually rising insurance rates. INA CORP., PRODUCT LIABILITY: SOME PROFESSIONAL CONSIDERATIONS 5 (1976).


114. This task force, under the direction of the United States Commerce Department, was created for the primary purpose of studying rising product liability costs and the difficulties faced by many firms in obtaining product liability insurance coverage. INTERAGENCY TASK FORCE, supra note 110, at V-17.

115. *Id.* at III-2. Other studies done by the Machinery and Allied Institute show that over 90% of all respondents to its surveys experienced increased product liability insurance costs. *Id.* at V-19. Furthermore, statistics gathered by the Interagency Task Force show that 86% of the firms surveyed carry some form of product liability coverage. *Id.* at III-2.

The cost of coverage varies with each industry. The industrial machinery industry expends between 2.0% and 7.3% of its total sales revenue for product liability insurance. This figure is in sharp contrast to that of ladder manufacturers. That industry pays up to 23.55% of its total sales revenue to procure product liability insurance. *Id.* at VI-16.

116. *Id.* at V-18.

117. *Id.* at V-19.

118. See Sabin, *Product Liability—The Counterattack Has Begun!*, 58 CHI. B. REC. 313, 320 (1977). The author states that the advent of strict products liability has created a "crisis" situation for manufacturers. He contends that the continually expanding field of products liability and the willingness of juries to render substantially higher awards have had a severe financial impact upon product-related industries, very similar to the malpractice crisis faced by doctors and hospitals.
well. If insurance rates rise to the level where the potential income of a new line barely generates a profit, financial institutions might refuse to offer capital for such a risky venture.\footnote{119} The buying public would, thus, suffer by losing both a new line of innovative products and by paying more for existing goods.\footnote{120}

Evidence of the magnitude of this economic problem is shown by the uncommon number of legislative changes demanded by pro-business groups. The establishment of the White House Conference on Product Liability,\footnote{121} the founding of new lobby organizations such as Retort, Inc.,\footnote{122} and the creation of the Interagency Task Force on Product Liability demonstrates the interest generated by the development of strict products liability law and the effect of that law on our national economy. The efforts of these groups have not been in vain, for small though important changes have appeared in the law of product liability. One example is the promulgation of the Uniform Product Liability Act,\footnote{123} which, if adopted, would especially benefit manufacturers in situations analogous to \textit{Thomas}.\footnote{124} The Illinois Legislature has also taken a large first step to alleviate the economic burden on manufacturers by placing a new time constraint on the period in which strict products liability suits may be brought.\footnote{125} In \textit{Thomas}, however, the Illinois Supreme Court displayed a very narrow perspective on the problems associated with strict products liability suits. Unfortunately, instead of promoting a benefi-

\footnote{119. See I. \textsc{Gray}, \textit{Product Liability: A Management Response} 26-28 (1975). The author points out that strict products liability has had a serious detrimental effect upon manufacturers due to the fact that insurance has not adequately buffered businessmen against financial burdens imposed by these suits. \textit{Id.} at 121-50.}

\footnote{120. See \textit{Who Pays?}, \textsc{Forbes}, Aug. 1, 1976, at 57, col. 2 (Frederick D. Watkins, President of Aetna Insurance Co., stated in an interview that a stricter statute of limitations, as well as a ceiling on “pain and suffering” awards, is needed in order to protect businesses from the baneful effect of strict products liability suits).}

\footnote{121. The conference convened in March, 1976, and consisted of officials from various governmental and private sector organizations. See Sabin, \textit{Product Liability—The Counterattack Has Begun!}, 58 \textsc{Chi. B. Rec.} 313, 319-20 (1977).}

\footnote{122. \textit{Id.} at 318. The organization’s name stems from the slogan “Reason and Equity in Tort.” Its purposes are to analyze all aspects of product liability and to pursue legislation which will remedy the inequitable laws in this area. \textit{Id.}}

\footnote{123. 44 Fed. Reg. 62,714-50 (1979).}

\footnote{124. Section 112(A)(2) of the Act, entitled Claimant’s Failure to Observe an Apparent Defective Condition, would eliminate the issue of whether a plaintiff was subjectively aware of the risk of a particular danger when considering the defense of assumption of risk. The model approach would focus on the knowledge that an ordinary reasonably prudent person would have in the same situation.}

\footnote{125. One Illinois statutory provision requires that all personal injury actions, including strict liability suits, be commenced within two years after the cause of action accrues. \textsc{Ill. Rev. Stat.} ch. 83, § 15 (1979). The Statute of Repose, \textsc{Ill. Rev. Stat.} ch. 83, § 22.2 (b) (1979), however, specifically applies only to the time in which an action for a strict products liability suit may be brought. This statute, enacted in 1978, provides that any such actions must be commenced within 12 years from the date of the first sale or delivery of the product by the manufacturer, or within ten years from the original date of sale or delivery to the initial consumer, whichever period expires earlier. \textit{Id.}}
cial public policy, the court actually undermined the needs and demands of manufacturers as well as consumers by effectively limiting the use of assumption of risk in the area of strict products liability.

Conclusion

In *Thomas*, the Illinois Supreme Court wrestled with the problem of whether the failure to follow directions concerning the proper use of a product constituted a defense to a strict products liability action. The court rejected the defense of assumption of risk, ruling in favor of the injured plaintiff. The *Thomas* holding is unfortunate in that it takes an unnecessarily limited view of this appropriate defense to strict products liability and effectively restricts future defendants to the defenses of misuse and negating the claim that the product was in an unreasonably dangerous condition. Furthermore, the court apparently has held that manufacturers may provide adequate instructions about the manner in which a product may be used, yet be subjected to liability when users fail to heed the instructions. Not only does such a result effectively condone dangerous conduct on the part of consumers, but it also places an undeserved and unreasonable burden upon businessmen and the general public in the form of rising insurance premiums and escalating product prices. The court's unrestrained application of strict products liability, therefore, has created a precedent which not only ignores the needs and demands of business, but also obfuscates the law of strict products liability.

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