1982

Product Liability after Woodill v. Park Davis: The Failure to Warn as a Basis for Recovery

Sherly Ann Marcouiller

Follow this and additional works at: http://lawecommons.luc.edu/luclj

Part of the Torts Commons

Recommended Citation
Available at: http://lawecommons.luc.edu/luclj/vol13/iss3/6

This Note is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact law.library@luc.edu.
Product Liability after *Woodill v. Parke Davis*: The Failure to Warn as a Basis for Recovery

**INTRODUCTION**

Under well established principles of strict liability in tort, a manufacturer is responsible for the damage caused by any product that the manufacturer markets in a defective condition unreasonably dangerous to the user.\(^1\) There is no universally accepted standard, however, that allows a court to identify a defective, unreasonably dangerous product.\(^2\) Most courts agree that a flawed or impure product is defective and unreasonably dangerous.\(^3\) Even a flawlessly manufactured product, not "defective" in the traditional sense, may be judicially classified as defective and unreasonably dangerous if a manufacturer fails to adequately warn the consumer of risks or dangers associated with the product’s use.\(^4\) The contro-
versy arises when a manufacturer fails to give a warning because the manufacturer does not know and has no reason to know of a danger associated with the use of a product. A number of courts, expansively applying strict liability theory, have held the manufacturer liable despite the manufacturer's inability to know of the risk. Reaching a contrary result, Illinois rejected the broad inter-

consumption. If the injury results from abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap, or from abnormal preparation for use, as where too much salt is added to food, or from abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable. Where, however, he [the seller] has reason to anticipate that danger may result from a particular use, as where a drug is sold which is safe only in limited doses, he may be required to give adequate warning of the danger (see comment j), and a product sold without such warning is in a defective condition. . . .

Restatement (Second) of Torts § 402A, comment j (1965) provides:

In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger. Likewise in the case of poisonous drugs, or those unduly dangerous for other reasons, warning as to use may be required.

But a seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized. Again the dangers of alcoholic beverages are an example, as are also those of foods containing such substances as saturated fats, which may over a period of time have a deleterious effect upon the human heart.

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 defective condition, nor is it unreasonably dangerous.


5. States that hold a manufacturer strictly liable for the failure to warn of unknowable dangers have concluded that it is appropriate to impose liability even when a manufacturer is excusably unaware of the extent of the danger associated with the use of the product. The leading case adopting this position is Phillips v. Kimwood Mach. Co., 269 Or. 485, 525 P.2d
pretation of strict liability theory adopted by those courts and found knowledge to be a prerequisite for liability.\(^6\)

In \textit{Woodill v. Parke Davis & Co.},\(^7\) the Illinois Supreme Court refused to impose strict liability for a manufacturer’s failure to warn of unknowable risks or dangers. The \textit{Woodill} court held that a plaintiff must plead and prove that the manufacturer knew or should have known of the danger whenever it is alleged that a product is defective and unreasonably dangerous because it lacks appropriate warnings.\(^8\) By expressly limiting recovery under strict

---

1033 (1974). The plaintiff in \textit{Phillips} was injured while manually feeding fiberboard into a sanding machine. \textit{Id.} at 487, 525 P.2d at 1034. The sander was designed for automatic feeding, but no warning that manual feeding could be dangerous accompanied the machine. \textit{Id.} at 490, 525 P.2d at 1035. The court began its analysis by emphasizing that in a strict liability case, the condition of the product, not the reasonableness of the manufacturer’s conduct, is at issue. \textit{Id.} at 498, 525 P.2d at 1039. See also Robbins v. Farmers Union Grain Terminal Ass’n, 552 F.2d 788, 794 (8th Cir. 1977); Dougherty v. Hooker Chem. Corp., 540 F.2d 174, 177 (3d Cir. 1976); Jackson v. Coast Paint & Lacquer Co., 499 F.2d 809, 812 (9th Cir. 1974). Further analysis was based on the premise that a product could be unreasonably dangerous because it lacked appropriate warnings, even though the seller acted reasonably in selling the product without a warning. 269 Or. at 498, 525 P.2d at 1039. The court, therefore, formulated a test for determining the dangerousness of the product as distinguished from the seller’s culpability. \textit{Id.} The \textit{Phillips} test assumed that the seller knew of the product’s propensity to injure as it did, and then asked whether, with that knowledge, the seller would have been negligent in selling the product without a warning. \textit{Id.} The test was based upon the proposals of Professors Wade and Keeton. Keeton, \textit{Products Liability - Inadequacy of Information}, 48 Tex. L. Rev. 398, 403-04, 407-08 (1970); Wade, \textit{Strict Liability for Products}, supra note 2, at 834-35, 839-40; Wade, \textit{Strict Tort Liability of Manufacturers}, 19 Sw. L.J. 5, 15-17 (1965) [hereinafter cited as Wade, \textit{Strict Liability of Manufacturers}. See infra notes 125-33 and accompanying text.


A recent opinion by the New Jersey Supreme Court, Freund v. Cellofilm Properties, Inc., 87 N.J. 229, 432 A.2d 925 (1981), carefully reviewed the \textit{Phillips} reasoning and identified what the court perceived to be a trend toward adoption of the \textit{Phillips} analysis. The court concluded that the essential difference between negligence and strict liability is that under strict liability, the seller’s knowledge is presumed; under negligence, the standard is what the manufacturer knew or should have known. \textit{Id.} at 237-40, 432 A.2d at 929-31. The court adopted the \textit{Phillips} test because of its focus upon this essential distinction. \textit{Id.}

7. \textit{Id.}
liability theory, and by basing the limitation on a defendant's knowledge, the *Woodill* decision appears to incorporate elements of fault into Illinois strict liability law.

This note will evaluate the impact of *Woodill* on the theory of strict tort liability in Illinois. Initially, a basis for distinguishing types of product deficiencies will be presented. The Illinois cases preceding *Woodill* that developed the doctrine of strict liability will then be reviewed. Finally, the *Woodill* opinion will be summarized and analyzed.

**TYPES OF PRODUCT DEFECTS**

The theory of strict liability in tort is based on two propositions: a manufacturer should only be liable for harm caused by a product that is in a defective condition, unreasonably dangerous to the user or consumer, and liability should be imposed even if the manufacturer's conduct is without fault. A product defect may be the result of a manufacturing accident, a deficient design, or the failure to provide adequate warnings during the marketing process. The standard for imposing liability, although not theoretically tied to the origin of the product defect, is in practice, directly related to the nature of the defect in the product.

**Manufacturing Defects**

When a manufacturing accident occurs, a physically flawed or impure product is unintentionally produced. If a product has a manufacturing defect, it reaches the consumer in a condition different from the condition which was intended by the manufacturer. Typically, the product reaches the consumer in a condition that is more dangerous than the manufacturer intended. The
standard by which the defective units are identified is a standard knowingly set by the manufacturer and embodied in each of the non-defective units produced.\textsuperscript{14} Units containing a manufacturing defect can be isolated from the rest of the product line because they do not meet normal standards.\textsuperscript{16} Only the abnormal units are defective and unreasonably dangerous; the rest of the product line is safe for use.\textsuperscript{16} Manufacturing defects cannot be entirely eliminated because available technology limits the manufacturer's ability to identify every abnormal product before the product is used.\textsuperscript{17} The imposition of liability without fault in this situation is a classic application of strict liability theory, allocating the loss to the one creating the risk and receiving the profit.\textsuperscript{18}

Design Defects

When a product is defective because its design is deficient, the defect is ordinarily a result of deliberate management decisions.\textsuperscript{19} Manufacturers make conscious design choices after evaluating the benefits, costs, and risks associated with each product feature.\textsuperscript{20} Choosing a design may be difficult because the same product attribute that presents a risk of harm to one user, may benefit another user.\textsuperscript{21} Moreover, reducing the possibility that a design might be harmful may either affect other useful product features or may be too costly.\textsuperscript{22} Whatever choice is made, the product used by the consumer is designed in the manner intended by the manufacturer.\textsuperscript{23} Any dangers associated with product design, therefore, are present in every unit, not just a few units, as is the case with a manufacturing defect.\textsuperscript{24} No unintentional flaw or variation from a norm is

\begin{enumerate}
\item Id.
\item Id.
\item Birnbaum, supra note 2, at 647.
\item Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Wade, supra note 2, at 825.
\item Birnbaum, supra note 2, at 599, 648.
\item Id.
\item Id. at 599-600.
\item Id.
\item Noel, Products Defective Because of Inadequate Directions or Warnings, 23 Sw. L.J. 256, 257 (1969) [hereinafter cited as Noel]; Pratt & Parnon, supra note 13, at 519; Wade, Strict Liability for Products, supra note 2, at 830; Wade, Strict Liability of Manufacturers, supra note 5, at 14-15; Wade, Design Defects, supra note 13, at 519.
\item See supra notes 13-17 and accompanying text.
\end{enumerate}
involved in a design case. Consequently, a design defect cannot be identified in the same way in which a manufacturing defect can be identified.\textsuperscript{26}

In deciding whether to impose strict liability for a design defect, a court reviews the same factors that should have been considered by the manufacturer when the product was originally designed.\textsuperscript{26} These factors include overall product utility, the availability of a safer substitute product that would meet the same need, and the manufacturer's ability to eliminate the unsafe product characteristic without impairing the product's usefulness or making the product too expensive.\textsuperscript{27} User safety factors, including the obviousness of the risk, the user's ability to avoid the danger by carefully using the product, and the likelihood of serious injury, are also considered.\textsuperscript{28} In balancing the manufacturer-oriented factors against the user-oriented factors, the court implicitly judges the reasonableness of the product design and the reasonableness of the consumer's use, allocating the loss accordingly. In practice, strict liability is imposed only when, after carefully balancing risks and alternatives, a court finds the manufacturer's design choices to be improper and, therefore, the product to be defective and unreasonably dangerous to the user.\textsuperscript{29} When a design is judged defective, the entire product line is affected.\textsuperscript{30}

\textbf{Failure to Warn Defects}

A product that is flawlessly manufactured and properly designed may be marketed in a defective condition unreasonably dangerous to the user, if it does not adequately warn the user of the potential dangers that accompany the use of the product.\textsuperscript{31} A warning de-

\begin{itemize}
  \item 25. Id.
  \item 28. Id.
  \item 29. Birnbaum, supra note 2, at 600, 610, 648; Wade, \textit{Strict Liability for Products}, supra note 2, at 837.
  \item 30. Birnbaum, supra note 2, at 648. The economic impact of such a judgment may be substantial. See Noel, supra note 23, at 258.
\end{itemize}
fect, like a design defect, affects every unit in a product line. A warning defect is also similar to a design defect in that it cannot be identified in the way that a manufacturing defect can be identified. A product with inadequate use or safety warnings is both produced and marketed in the condition intended by the manufacturer.

A manufacturer's failure to warn of a particular danger may be the result of either a deliberate decision not to warn or the failure to anticipate the possibility of danger. A manufacturer might deliberately decide not to warn of a danger known to be associated with the use of a product because the manufacturer believes that the risk of harm is either negligible or obvious. Alternatively, the manufacturer might believe that an additional warning would decrease the effectiveness of more important warnings. In some situations a manufacturer might decide not to include a warning simply because it would decrease the attractiveness of the product.

A manufacturer might fail to anticipate the possibility of danger and, therefore, unintentionally fail to give a warning. Because of a failure to properly research the product, a manufacturer may be unaware of a danger about which it should have known. A manufacturer may also be unaware of a danger only because the danger was technologically unknowable, given the state of the art.

Even if a warning is included with a product, the content of the warning might be inadequate or the format chosen to convey the message to the consumer might be ineffective. A warning might be insufficient, for example, if it did not specify the risk, if it were inconsistent with the way which the product would be used, if it did not give the reason for the warning, or if it did not reach foreseeable users.

33. See supra notes 14-16 and accompanying text.
34. Wade, Strict Liability for Products, supra note 2, at 830.
36. Id. at 514-17, 521-24.
37. Id.
38. Id.
40. Id.
41. Noel, supra note 23, at 283-88; Wade, Strict Liability for Products, supra note 2, at 842.
42. Palmer v. Avco Distrib. Corp., 82 Ill. 2d 211, 221, 412 N.E.2d 959, 964 (1980); Noel, supra note 23, at 283-88; Pratt & Parnon, supra note 13, at 521.
In determining whether to impose strict liability for a warning defect, a court must weigh the foreseeability of the circumstances under which harm occurred, the obviousness of the danger, and the seriousness of the injury. A warning defect exists when, due to the language selected or omitted by the manufacturer, the court finds that the consumer was not adequately advised of the potential dangers associated with the use of the product. Unlike manufacturing or design defects, which involve physical product flaws or characteristics, warning defects are defects in communication. Since the number of feasible warnings that a product could have is potentially unlimited, it is always possible to argue after the fact that the communication could have been more effective. The nature of a strict liability action based upon a failure to warn is, thus, significantly different from the nature of a case involving a flawed or an impure product and from that of a case involving a design defect.

**Strict Liability Theory in Illinois**

In *Suvada v. White Motor Co.*, the Illinois Supreme Court imposed liability without negligence on a manufacturer where a defective condition made the manufacturer's product unreasonably dangerous to the user. Before *Suvada*, strict liability, liability without fault or negligence, was only applied in cases involving the marketing and consumption of impure food. Public policy sup-

---

43. See Noel, supra note 23, at 265.
45. Cf. Green, supra note 44 (suggestion that § 402A is a communicative tort).
48. 32 Ill. 2d 612, 210 N.E.2d 182 (1965). In *Suvada* the brake system in a milk truck failed and the truck collided with a bus. The collision caused personal injuries and property damage. *Id.* at 614, 210 N.E.2d at 183. The truck owners alleged that the injuries and damage were the result of a defective condition in the brake system that had not changed since the truck left the manufacturer. *Id.* The Illinois Supreme Court held that the allegations in the complaint stated a valid cause of action against the brake system manufacturer. *Id.* at 624, 210 N.E.2d at 189.
49. The sale and consumption of adulterated pork caused the illness for which the plaintiff in Wiedeman v. Keller, 171 Ill. 93, 49 N.E. 210 (1897), sought damages. *Id.* at 98, 49 N.E. at 211. The question presented in *Wiedeman* was whether a retailer warrants that goods sold for immediate consumption are free from all defects that may injure the purchaser's health, or whether the vendor is relieved of responsibility as long as the vendor does not
ported imposition of strict liability in impure food cases for the following reasons: the public has an interest in human life and health; manufacturers solicit the use of their products and represent them to be safe; and, it is equitable to assess a loss upon the one creating and profiting from the risk. The *Suwada* court determined, without discussion, that these same policy grounds compelled imposition of strict liability whenever a defective condition makes any product unreasonably dangerous to a user. The court acknowledged that the weight of authority in the United States recognized an implied warranty of fitness for consumption when provisions were sold for domestic use. The *Wiedeman* court found the consequences resulting from the purchase of an unwholesome article of food to be potentially disastrous to human life and health. The court, therefore, decided that public safety demanded that retail food dealers be held liable for the sale of an unwholesome product. Commenting that this rule may sound harsh, the court concluded that since the vendor is more able to determine the soundness of the product than is the purchaser, it is safer to hold the vendor liable than to force the consumer to assume the risk.

In *Welter* v. Bowman Dairy Co., 318 Ill. App. 305, 47 N.E.2d 739 (1943), the plaintiff sought to recover for the illness that an infant suffered after drinking adulterated milk that the head of the household had purchased. The question in *Welter* was whether the implied warranty recognized in *Wiedeman* would be extended to protect a child of the purchaser. The court reached a result that it considered to be conducive to public welfare when it ruled that the infant was covered by the implied warranty under the facts of the case. In *Patargias* v. Coca-Cola Bottling Co., 332 Ill. App. 117, 74 N.E.2d 162 (1947) was a mouse-in-a-Coke-bottle case. The *Patargias* court considered whether an implied warranty of fitness for human consumption would be imposed on manufacturers of food products sold in sealed containers. In resolving this question, the court reasoned that a modern manufacturer not only expects people to consume food while relying upon its apparent suitability for consumption, but intentionally creates a demand for the product by using advertising to induce a belief that the product is suitable for consumption. Continuing this reasoning, the court concluded that to allow a manufacturer to benefit from this public confidence, and to later avoid liability for injuries which result from the manufacturer's business activities, would be to create a weakness in the law. Consequently, either the manufacturer or the retailer may be required to compensate an injured consumer. The *Patargias* court held that public policy demanded that an implied warranty of fitness for human consumption be imposed upon the manufacturer of any article of food or drink sold in a sealed container.

In *Tiffin* v. Great A. & P. Tea Co., 18 Ill. 2d 48, 162 N.E.2d 406 (1959), the Illinois Supreme Court again recognized that by selling food to the public, both a manufacturer and a retailer impliedly warrant that the product is fit for human consumption. Consequently, either the manufacturer or the retailer may be required to compensate an injured consumer. The manufacturer and retail store in *Tiffin* were granted a directed verdict not because the allegations of the complaint were faulty, but because the plaintiffs failed to prove the elements alleged.


1. 32 Ill. 2d 612, 619, 210 N.E.2d 182, 186 (1965).

50. Id.
court concluded that there was no reason for imposing strict liability in impure food cases and liability based on negligence in cases involving other products.\textsuperscript{52}

After deciding to hold the manufacturer liable without negligence, the \textit{Suvada} court announced the elements of an action based on strict liability in tort. To maintain a strict liability tort action in Illinois, a plaintiff must prove that a condition of a product caused injury or damage, and that the condition was unreasonably dangerous. Additionally, the plaintiff must establish that the condition existed when the product left the manufacturer's control.\textsuperscript{53} When these elements are proven, the plaintiff may recover without proving negligence.\textsuperscript{54}

Although the \textit{Suvada} court recognized a strict products liability action, it did not label the defect as one of manufacturing or design, nor did the opinion provide a standard for determining when a product contains a defective condition which makes it unreasonably dangerous. Appellate court cases, nevertheless, interpreted \textit{Suvada} as a manufacturing defect case, and expanded that doctrine by imposing strict liability upon a manufacturer in cases, not only when a manufacturing defect in a product caused injury, but also when injury was caused by either a defectively designed product\textsuperscript{55} or by a product that lacked adequate warnings.\textsuperscript{56}

\textsuperscript{52} Id.
\textsuperscript{53} Id. at 623, 210 N.E.2d at 188.
\textsuperscript{54} Id.
\textsuperscript{55} Wright v. Massey-Harris, Inc., 68 Ill. App. 2d 70, 215 N.E.2d 465 (1966), was an action to recover for injuries allegedly sustained because a cornpickers was not designed with shields over the chain mechanism and shuckling rollers, areas of the machine in which corn ears jammed. \textit{Id.} at 72, 215 N.E.2d at 466. The \textit{Wright} court interpreted \textit{Suvada} to impose liability for design defects as well as manufacturing defects. \textit{Id.} at 79, 215 N.E.2d at 470. The court, therefore, concluded that liability would be imposed if the product design created an unreasonably dangerous condition under the facts of the case. \textit{Id.} Rephrasing the question, the court asked whether the product design met the required standard of safety. \textit{Id.} The \textit{Wright} court held that the complaint stated a valid cause of action in strict liability. \textit{Id.}

\textsuperscript{56} In Williams v. Brown Mfg. Co., 93 Ill. App. 2d 334, 236 N.E.2d 125 (1968), \textit{rev'd on other grounds}, 45 Ill. 2d 418, 261 N.E.2d 305 (1970), the plaintiff sought recovery for injuries which occurred when the trencher he was operating struck an underground gas service pipe, jumped backward out of control, knocked the plaintiff to the ground, and ran over him. \textit{Id.} at 352, 236 N.E.2d at 135. The complaint alleged that the trencher was in an unreasonably dangerous condition when it left the defendant's control because there was no warning on the machine that to operate the trencher from behind, between the handlebars, was dangerous. \textit{Id.} at 356, 236 N.E.2d at 137. The defendant moved for a directed verdict, arguing that there was no legal duty to place a warning on the machine. \textit{Id.} at 360, 236 N.E.2d at 139. The court decided that when a manufacturer has reason to foresee danger as a result of a particular product use, the manufacturer must give adequate warning of the danger or
In *Dunham v. Vaughn & Bushnell Mfg. Co.*, the Illinois Supreme Court first reviewed the various definitions of the term "defect" in the context of product liability law. The *Dunham* court concluded that all of the definitions were based upon the common premise that a product is defective when it fails to perform in the manner reasonably to be expected in light of its nature and intended function. The court imposed liability because the jury could properly have concluded that, considering the length and type of its use, the defective product involved failed to perform in the manner that would reasonably have been expected.

After *Dunham*, it appeared that the imposition of strict liability would be based on the existence of a defective, unreasonably dan-
gerous condition as tested by the user's reasonable expectations.\textsuperscript{61} In \textit{Cunningham v. MacNeal Memorial Hospital},\textsuperscript{62} however, the test for imposing strict liability was expressed differently. The \textit{Cunningham} test determines whether a product is unreasonably dangerous by first assuming that the manufacturer had actual knowledge of the condition of the particular product unit in question, and then asking whether a reasonable manufacturer would have placed that unit on the market.\textsuperscript{63}

\textit{Cunningham} involved a unit of whole blood contaminated with hepatitis virus.\textsuperscript{64} The impurity of the product made it defective.\textsuperscript{65} At the time of the decision, it was not scientifically possible, either theoretically or practically, to identify a contaminated unit of blood before it was administered to a patient.\textsuperscript{66} The court held that the concept of strict liability applied although the seller had exercised all possible care, and was not at fault, either in creating the dangerous condition or in failing to discover and eliminate it.\textsuperscript{67} Whether the defendant could even theoretically ascertain the existence of the defect was considered irrelevant.\textsuperscript{68} Since the court found blood containing hepatitis virus to be, unquestionably, in a defective condition unreasonably dangerous to the user, the court concluded that the complaint adequately stated a strict liability cause of action.\textsuperscript{69}

The \textit{Cunningham} decision is particularly significant because the court imposed liability without fault despite the fact that a remedy for the defect was beyond the state of the art.\textsuperscript{70} The court refused to consider the manufacturer's inability to discover or know of a

\textsuperscript{61} Id.
\textsuperscript{62} 47 Ill. 2d 443, 266 N.E.2d 897 (1970).
\textsuperscript{63} Id. at 454, 266 N.E.2d at 903. The test adopted in \textit{Cunningham} was originally proposed by Professor Wade. \textit{Id}. In \textit{Phillips v. Kimwood Mach. Co.}, 525 P.2d 1033, 269 Or. 485, the test was applied in a failure to warn case. \textit{See supra} note 5.
\textsuperscript{64} 47 Ill. 2d at 445, 266 N.E.2d at 898.
\textsuperscript{65} \textit{Id}. at 456, 266 N.E.2d at 904. In \textit{Greenberg v. Michael Reese Hosp.}, 83 Ill. 2d 282, 415 N.E.2d 390 (1980), the court refused to impose strict liability upon medical practitioners. The court distinguished \textit{Cunningham} since the blood in \textit{Cunningham} was "physical material which was bad." \textit{Id}. at 289, 415 N.E.2d at 394.
\textsuperscript{66} 47 Ill. 2d at 453, 266 N.E.2d at 902.
\textsuperscript{67} \textit{Id}. at 453-54, 266 N.E.2d at 902-03. After \textit{Cunningham} the General Assembly passed a statute that requires that a blood transfusion be considered a service for liability purposes. ILL. REV. STAT. ch. 111½, ¶ 5101-5103 (1979) \textit{repealed} by ILL. REV. STAT. ch. 111½, ¶ 5104 (1981).
\textsuperscript{68} 47 Ill. 2d at 455, 266 N.E.2d at 903.
\textsuperscript{69} \textit{Id}. at 456-57, 266 N.E.2d at 904.
\textsuperscript{70} \textit{Id}. at 455, 266 N.E.2d at 903.
defect in a strict liability analysis.\textsuperscript{71} Since Cunningham involved an impure product, a unit different from the rest of the product line, it is similar to a manufacturing defect case. Nothing in the court's opinion, however, suggested that the Cunningham liability standard should be limited to flawed or impure products.\textsuperscript{72} The manufacturer in Cunningham, unlike the manufacturer in a typical manufacturing defect case, could not possibly have reduced the probability of producing a defective product, regardless of the amount of care invested.\textsuperscript{73} The Cunningham court specifically stated that to allow a defense to strict liability because it was theoretically or practically impossible for a defendant to identify impurities in a product would "signal a return to negligence theory."\textsuperscript{74}

Since Cunningham, however, the negligence concepts of "forseeability" and "reasonableness" have reappeared in Illinois Supreme Court strict products liability decisions. Although no single decision signals a return to fault theory, the emerging case law appears to be injecting fault concepts into strict liability theory.\textsuperscript{75}

\textsuperscript{71} Id. at 453, 266 N.E.2d at 902.
\textsuperscript{72} 47 Ill. 2d 443, 266 N.E.2d 897 (1970).
\textsuperscript{73} Id. at 455, 266 N.E.2d at 903.
\textsuperscript{74} Id. at 453, 266 N.E.2d at 902.
\textsuperscript{75} For example, the court adopted a forseeability requirement by holding that only those individuals to whom injury from a defective product may reasonably be forseen and who use the product in a reasonably foreseeable manner, may recover from a manufacturer. In Winnett v. Winnett, 57 Ill. 2d 7, 310 N.E.2d 1 (1974), the court dismissed the plaintiff's complaint after deciding that it was not objectively reasonable to expect that a four-year-old child would be permitted to approach an operating farm forage wagon and place her fingers in the holes of its moving screen. Id. at 13, 310 N.E.2d at 5. The court concluded that Suvada and Dunham established that a manufacturer has a duty to make a product reasonably fit for its intended use, but that a forage wagon was not intended to be used by a four-year-old child. Id. at 9-10, 310 N.E.2d at 3. In Court v. Grzelinski, 72 Ill. 2d 141, 379 N.E.2d 281 (1978), the court held that a firefighter may recover in strict liability to the extent that the firefighter is a person to whom injury from the product may reasonably be foreseen, even though the injury occurs while he or she is fighting a fire as a public employee. Id. at 151, 379 N.E.2d at 285.

The court has also suggested that the underlying question of forseeability would define the scope of the duty to warn in a strict liability case. In Genaust v. Illinois Power Co., 62 Ill. 2d 456, 343 N.E.2d 465 (1976), the plaintiff claimed that the antenna and the tower for a citizens band radio were unreasonably dangerous because they did not have warnings that would alert users to the danger of electrocution if either of the products were brought close to a power line. Id. at 465, 343 N.E.2d at 468. The court dismissed these claims, holding that a warning was not required when the product was not defectively designed or manufactured, and when the possibility of injury resulted from a common and obvious product tendency. Id. at 467, 343 N.E.2d 471. In reaching this decision, the court reasoned that the determination of whether a duty to warn exists is a question of law necessarily based upon the question of forseeability. Id. at 466, 343 N.E.2d at 471. Forseeability was defined as that which it is objectively reasonable to expect. Id. The Genaust court relied upon Fanning v. LeMay,
Cunningham, of feasible alternative design was appropriately considered. The unreasonably dangerous nature of the design was proved moved was an unreasonably dangerous defect in design. A device to secure the power takeoff assembly on a forage blower while the blower was being moved was dismissed because the court would not require a manufacturer to warn of commonly recognized dangers. Kerns v. Engelke, 76 Ill. 2d at 211, 230 N.E.2d at 859. The court also referred to comment j to § 402A of the RESTATEMENT (SECOND) of TORTS (1965). Although the court acknowledged that, according to comment j, the failure to warn could make a product unreasonably dangerous, the court decided not to recognize a failure to warn defect under the facts of Genaust. Id.

Several other decisions hold that misuse is not a defense when it is reasonably foreseeable. In Thomas v. Kaiser Agricultural Chem., 76 Ill. 2d 206, 407 N.E.2d 32 (1980), involved a defective adaptor that was incorporated into a fertilizer applicator and provided to the plaintiff in connection with a fertilizer purchase. Id. at 209-10, 407 N.E.2d at 34. The plaintiff's face was sprayed with liquid nitrogen fertilizer as he attempted to fill the applicator. Id. at 209, 407 N.E.2d at 34. The court rejected the supplier's argument that the use of the adaptor on the applicator was misuse of the product, reasoning that the use was foreseeable, and that foreseeable misuse would not bar the liability of the manufacturer. Id. at 216, 407 N.E.2d at 37. In Kerns v. Engelke, 76 Ill. 2d 154, 390 N.E.2d 859 (1979), the court found that since a forage blower was not equipped with any mechanism to keep the power takeoff shaft above the ground while the machine was moved, evidence supported the conclusion that the design of the machine was impractical and could be expected to result in foreseeable misuse. Id. at 160, 390 N.E.2d at 865. In Anderson v. Hyster Co., 74 Ill. 2d 364, 385 N.E.2d 690 (1979), the court ruled that misuse would break the causal connection between the defective product and the plaintiff's injuries only when the misuse was not reasonably foreseeable, and that the forklift operator's failure to step on the brake was not product misuse under the circumstances. Id. at 369, 385 N.E.2d at 693.

Similarly, a reasonableness requirement has been incorporated by strict liability decisions which hold that a defect exists only when those exposed to the product are subjected to an unreasonable risk of harm. In Hunt v. Blasius, 74 Ill. 2d 203, 384 N.E.2d 368 (1978), the court held that a highway exit sign was not defective or unreasonably dangerous because it did not "break-away" when a car collided with the sign post. Id. at 212, 384 N.E.2d at 372. The intended use of the signpost did not require that the post break on impact. Id. The court concluded that recovery is to be allowed only when injuries are the result of "a distinct defect in the product, a defect which subjects those exposed to the product to an unreasonable risk of harm." Id. at 211, 384 N.E.2d at 372. The court also noted that the availability of an alternative design does not translate into a legal duty to adopt that design. Id. at 212, 384 N.E.2d at 372. Rios v. Niagara Mach. & Tool Works, 59 Ill. 2d 79, 319 N.E.2d 232 (1974), involved a punch press that was dangerous to use for secondary operations unless safety devices were installed. Id. at 83, 319 N.E.2d at 234-35. Although the plaintiff was denied recovery because the evidence did not prove causation, the court's opinion emphasized that in order to establish strict liability in tort, a plaintiff must prove not only that a product was dangerous, but that it was unreasonably dangerous, or not reasonably safe. Id.

In strict liability design cases, on the issue of whether the product was unreasonably dangerous, the court has permitted proof of the reasonableness of the manufacturer's design choice by evidence of alternative designs and compliance with government regulations. In Kerns v. Engelke, 76 Ill. 2d 154, 390 N.E.2d 859 (1979), the plaintiff alleged that the lack of a device to secure the power takeoff assembly on a forage blower while the blower was being moved was an unreasonably dangerous defect in design. Id. at 160-61, 390 N.E.2d at 862. The unreasonably dangerous nature of the design was proved by presenting evidence of a feasible alternative design. Id. at 164, 390 N.E.2d at 864. The court ruled that the evidence of feasible alternative design was appropriately considered. Id. The court distinguished Cunningham, a case in which the state of the art defense was rejected, because in Cunningham-
Woodill v. Parke Davis & Co.

In Woodill v. Parke Davis & Co., the Illinois Supreme Court determined that evidence of the availability and feasibility of alternative designs could be used to prove that a product was not reasonably safe, by reason of defective design. If at 368, 385 N.E.2d at 692. Whether the defendant failed to design a reasonably safe product was considered properly treated by the lower courts as a factual question for the jury. If at 369, 385 N.E.2d 693. The dispute in Rucker v. Norfolk & W. Ry., 77 Ill. 2d 434, 396 N.E.2d 534 (1979), involved a railroad car designed without a "headshield," a protective device that would shield the car from damaging collisions. If at 437, 396 N.E.2d at 535-36. The appellate court refused to admit evidence that even without a headshield the railroad car design met federal requirements. If. The court relied on Cunningham, reasoning that the ability to detect a defect is not relevant in a strict liability case. If. The Illinois Supreme Court cited Kerns v. Engelke, 76 Ill. 2d 154, 161, 390 N.E.2d 859, 862-63 (1979), the case in which the court concluded that Cunningham did not preclude the plaintiff's introduction of feasible alternative designs when the plaintiff was attempting to prove a design defect. If. at 437-38, 396 N.E.2d at 536-37. The court then reasoned that a defendant should, similarly, be allowed to show that an alternative design is not required by federal regulation. 77 Ill. 2d at 438, 396 N.E.2d at 536.

Several opinions acknowledged that a product may be in a defective condition if sold without adequate warnings when a manufacturer knows or should know that danger may result from a particular product use. The courts in these cases concluded that the factfinder must determine if the product was unreasonably dangerous, either because of a warning defect or a design defect. Mahr v. G. D. Searle & Co., 72 Ill. App. 3d 540, 390 N.E.2d 1214 (1979); Knapp v. Hertz Corp., 59 Ill. App. 3d 241, 375 N.E.2d 1349 (1978); Neal v. Whirl Air Flow Corp., 43 Ill. App. 3d 266, 356 N.E.2d 1173 (1976); Stanfield v. Medalist Indus., Inc., 34 Ill. App. 3d 635, 340 N.E.2d 276 (1975). In Peterson v. B/W Controls, Inc., 50 Ill. App. 3d 1026, 366 N.E.2d 144 (1977), the court also acknowledged the possibility of a warning defect,
defined the elements of a strict liability action based upon an allegedly inadequate warning. Woodill first presented the question whether the failure to warn of a scientifically unknowable danger in a pure product could serve as a basis for strict liability in Illinois.\textsuperscript{77} The court, in Cunningham, had imposed strict liability when an impure product caused injury even though the manufacturer could not possibly have known of the product defect.\textsuperscript{78} At the time of the Woodill decision, the tension was apparent between the concept of liability without fault as expressed in Cunningham, and the premise that a defect exists only when a product is defective and unreasonably dangerous as developed in Dunham and the post-Cunningham cases.\textsuperscript{79} Underlying this tension was the policy,
first expressed in *Suvada*, that manufacturers should be responsible for defective products, but should not be made absolute insurers of product safety.\(^{80}\)

**The Factual Context**

When Ellen Woodill was an obstetrical patient, her physician prescribed Pitocin, a drug used to induce uterine contractions which had been manufactured by Parke Davis & Co.\(^{81}\) Ellen Woodill’s child, Eric, was born with brain damage, permanent blindness, and quadriplegia.\(^{82}\) At the time the drug was administered, the fetus was in high station.\(^{83}\) This use of Pitocin was not contraindicated in any product information distributed by Parke Davis & Co.\(^{84}\)

Eric’s parents brought suit to recover damages for the injuries that he suffered. The Woodill’s complaint included a strict liability count against Parke Davis & Co.\(^{85}\) The count alleged that the Parke Davis drug was “not reasonably safe” because the company failed to warn “that the use of ‘Pitocin’ while a fetus is in high station is a cause of brain damage in infants.”\(^{86}\) The trial court granted the defendant’s motion to dismiss because the complaint failed to state a cause of action.\(^{87}\) The dismissal order was affirmed on appeal.\(^{88}\) The appellate court held that since the Woodill’s complaint did not allege that the defendant knew or should have known of the danger, the complaint was missing an essential element of a strict liability action based upon a failure to warn.\(^{89}\)

**The Supreme Court Decision**

In *Woodill*, the issue presented to the Illinois Supreme Court was “whether, in an action seeking to hold a defendant strictly liable for failure to warn of a danger attendant to the use of a prod-

---

80. 32 Ill. 2d 612, 623, 210 N.E.2d 182, 188 (1965). See also *Hunt v. Blasius*, 74 Ill. 2d 203, 211, 384 N.E.2d 368, 372 (1978); Birnbaum, supra note 2, at 600; Montgomery & Owen, supra note 10, at 826; *Traynor*, supra note 2, at 366-67; *Wade, Strict Liability of Manufacturers*, supra note 5, at 13; *Wade, Strict Liability for Products*, supra note 2, at 828.
82. Id.
83. Id.
84. Id.
86. Id. at 354, 374 N.E.2d at 687.
87. Id. at 350, 374 N.E.2d at 685.
88. Id. at 356, 374 N.E.2d at 689.
89. Id. at 354, 374 N.E.2d at 687.
uct, the plaintiff must allege and prove that the defendant knew or should have known of the danger.90 The court concluded that "the imposition of a knowledge requirement is a proper limitation to place on a manufacturer's strict liability in tort predicated upon a failure to warn of a danger inherent in a product."91

The majority opinion in Woodill explained the basis for the decision to impose a knowledge requirement in strict liability failure to warn cases. In resolving the knowledge requirement issue, the court relied upon the Suvada opinion, which had cited with approval section 402A of the Restatement of Torts.92 Comment j to section 402A provides that a seller must warn if "he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge" of a danger.93 Although the Woodill court recognized that not all courts which had considered the knowledge requirement issue had followed comment j,94 the court relied upon several decisions which suggest that knowledge is an essential element in a strict liability failure to warn case.95

90. 79 Ill. 2d 26, 29, 402 N.E.2d 194, 196 (1980).
91. Id. at 33, 402 N.E.2d at 198.
92. Id. at 31, 402 N.E.2d at 196-97.
93. Id. at 32, 402 N.E.2d at 197. See supra note 2.
94. 79 Ill. 2d at 32-33, 402 N.E.2d at 197.

Only a few decisions have specifically considered the liability problems which arise when an asserted failure to warn involves an unknowable danger. In Oakes v. Geigy Agricultural Chem., 272 Cal. App. 2d 645, 77 Cal. Rptr. 709 (1969), the court explicitly refused to impose liability for unknowable dangers because the court did not wish to turn a manufacturer into an insurer. Id. at 651, 77 Cal. Rptr. at 713. The decision was based on comment j. Id. at 649-51, 77 Cal. Rptr. at 712-13. See infra note 120. In Ortho Pharmaceutical v. Chapman, 388 N.E.2d 541, 545-48 (Ind. App. 1979), the court concluded that the language of the Restatement (Second) of Torts § 402A and its comments indicates that an exception from strict liability was intended for prescription drugs, and that warnings were, therefore, required only when a manufacturer knew or should have known of the risk. Relying on comment j, the court in Borel v. Fibreboard Paper Prod. Corp., 493 F.2d 1076, 1088 (5th Cir. 1973),
In rejecting the suggestion that its decision injected negligence principles into strict liability law, the majority distinguished negligence theory from the theory of strict liability. In strict liability, the court asserted, it is the product defect, rather than the conduct of the manufacturer that establishes the cause of action. Despite this articulated distinction, the court evaluated the product defect in Woodill by reviewing the manufacturer's conduct. To test the adequacy of the warning the majority asked whether it would have been reasonable for a manufacturer to have given a warning and whether that warning would have been sufficient under similar circumstances. The Woodill opinion explicitly stated, however, that the consideration of reasonableness in determining whether a defective condition is unreasonably dangerous was not intended to change a strict liability case into a negligence action.

cert. denied, 419 U.S. 869 (1974), stated that the requirement that a danger be scientifically discoverable is an important limitation on a seller's liability. In Basko v. Sterling Drugs, Inc., 416 F.2d 417, 426 (2d Cir. 1969), the court stated that there was no expectation that the defendant warn of unknown dangers, but that when the risk became apparent, the duty attached.

In other decisions, the possibility that the manufacturer could have warned of the danger was not disputed. The opinions simply state that the law requires a warning when a seller knows of a potential harm to a user because of the nature of the product, or that the seller is liable because no warning was given when the risk was known. See, e.g., Ezagui v. Dow Chem. Corp., 598 F.2d 727 (2d Cir. 1979); Givens v. Lederle, 556 F.2d 1341 (5th Cir. 1977); Reliance Ins. Co. v. Al E. & C., Ltd., 539 F.2d 1101 (7th Cir. 1976); Reyes v. Wyeth Laboratories, 498 F.2d 1264 (5th Cir. 1974); Singer v. Sterling Drug, Inc., 461 F.2d 288 (7th Cir. 1972); Patch v. Stanley Works, 448 F.2d 483 (2d Cir. 1971); Craven v. Niagara Mach. & Tool Works, Inc., 417 N.E.2d 1165 (Ind. App. 1981); Nissen Trampoline Co. v. Terre Haute First Nat'l Bank, 332 N.E.2d 820, (Ind. App. 1975), rev'd on other grounds, 265 Ind. 457, 358 N.E.2d 974 (1976); Lopez v. Aro Corp., 584 S.W.2d 333 (Tex. Civ. App. 1979); Bristol-Myers Co. v. Gonzales, 561 S.W.2d 801 (Tex. 1978).


96. 79 Ill. 2d at 33, 402 N.E.2d at 198.
97. Id. at 33-34, 402 N.E.2d at 198.
98. Id. at 34, 402 N.E.2d at 198.
99. Id.
100. Id.
101. Id. at 34-35, 402 N.E.2d at 198. To make this point the court quoted the opinion in Rucker v. Norfolk & W. Ry., 77 Ill. 2d 434, 439, 396 N.E.2d 534, 537 (1979) which states: Any misapprehension that negligence is the standard of liability stems only from
The majority also asserted that the knowledge requirement was not intended to weaken the precedent established in *Cunningham v. MacNeal Memorial Hospital*. The *Cunningham* court had imposed liability without regard to the manufacturer's fault or knowledge. In *Woodill*, the court distinguished *Cunningham*, emphasizing that *Cunningham* involved a product which was defective because it was impure, not because it lacked warnings. The *Woodill* knowledge requirement was expressly limited to complaints which allege that a product is unreasonably dangerous because it lacks adequate warnings.

The court reasoned that a rule which requires a plaintiff to plead and prove that a manufacturer knew or should have known of the danger which caused the injury, and that the manufacturer failed to adequately warn of that danger, placed a logical limit on the scope of the manufacturer's liability and was completely consistent with the principles of strict liability adopted in *Suvada*. As stated in *Suvada*, strict liability does not make a manufacturer an absolute insurer. The *Woodill* court concluded that if a manufacturer were liable for failure to warn of an unknowable danger, the manufacturer would be an insurer and the warning would be a meaningless exercise.

**The Dissenting Opinion**

The three dissenting justices would not have limited a manufacturer's liability for inadequate warnings to situations in which the manufacturer knew or had reason to know of a danger associated

---

102. 79 Ill. 2d at 35-36, 402 N.E.2d at 199.
103. 47 Ill. 2d at 443, 453, 266 N.E.2d 897.
104. 79 Ill. 2d at 36, 402 N.E.2d at 199.
105. *Id.* at 37, 402 N.E.2d at 199.
106. *Id.* at 35, 402 N.E.2d at 198-99.
107. 32 Ill. 2d at 623, 210 N.E.2d at 188. Interpreting *Suvada*, the *Woodill* court stated: "Strict liability is not the equivalent of absolute liability." 79 Ill. 2d at 37, 402 N.E.2d at 199. The court acknowledged that when an injury is not objectively predictable, or when a plaintiff assumes the risk of injury, the manufacturer is absolved from liability. *Id.* See also Birnbaum, *supra* note 2, at 600; Traynor, *supra* note 2, at 366; Wade, *Strict Liability for Products*, *supra* note 2, at 828.
108. 79 Ill. 2d 26, 37, 402 N.E.2d 194, 199-299 (1980).
with the product. The dissent would have allowed recovery, regard-
less of the manufacturer's lack of knowledge, where the consumer
was exposed to an unreasonably dangerous product.\textsuperscript{109}

In support of this position, the dissenting justices suggested that
there is a conflict between the language of Restatement section
402A, which holds a seller liable even though "the seller has exer-
cised all possible care in the preparation and sale of his prod-
uct,"\textsuperscript{110} and comment j of that same section. Comment j, relied
upon by the majority, provides that a seller must give a warning
only if "he has knowledge, or by application of reasonable devel-
oped human skill and foresight should have knowledge" of a dan-
ger.\textsuperscript{111} The dissent asserted that the language of the rule should
supercede the language of the comment.\textsuperscript{112} The dissenting opinion
also noted that Restatement section 388, which states the neglig-
ence standard for the duty to warn, expressly conditions liability
upon the supplier's knowledge or reason to know of the danger.\textsuperscript{113}
According to the dissenting justices, the majority decision replaced
the strict liability standard with a negligence standard in actions
based on a failure to warn.\textsuperscript{114}

The dissenting justices argued that strict liability is distin-
guished from negligence only when the inquiry into the adequacy
of the warnings focuses on the condition of the product rather than
on the knowledge or conduct of the manufacturer.\textsuperscript{115} The position
advocated by the dissent was first adopted by the Oregon Supreme
Court in Phillips v. Kimwood Machine Co.\textsuperscript{116} The analysis used by
the Phillips court was based on the premise that a product "can
have a degree of dangerousness because of a lack of warning which
the law of strict liability will not tolerate" even though the manu-
facturer acted reasonably in selling the product without a warn-

\textsuperscript{109} Id. at 43, 402 N.E.2d at 202.
\textsuperscript{110} 79 Ill. 2d at 39, 402 N.E.2d at 200. See supra notes 1 & 4.
\textsuperscript{111} Restatement (Second) of Torts § 402A, comment j (1965). See supra note 4.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id., at 39-40, 402 N.E.2d at 201-02. The distinction is summarized by the dissent as
follows:

In strict liability it is of no moment what defendant 'had reason to believe.' Liabil-
ity arises from 'sell(ing) any product in a defective condition unreasonably danger-
ous to the user or consumer.' It is the unreasonableness of the condition of the
product, not of the conduct of the defendant, that creates liability. Dougherty v.
Hooker Chemical Corp., 540 F.2d 174, 177 (3d Cir. 1976), quoting Jackson v.
Coast Paint & Lacquer Co., 499 F.2d 809, 812 (9th Cir. 1974).
\textsuperscript{115} 269 Or. 485, 525 P.2d 1033 (1974).
\textsuperscript{116}
ing.\textsuperscript{117} The \textit{Phillips} test, like the \textit{Cunningham} test,\textsuperscript{118} assumed that the manufacturer knew of the product's propensity to injure as it did, and then asked, whether, with that knowledge, the manufacturer would have been negligent in selling the product without a warning.\textsuperscript{119} Under the \textit{Phillips} test, the manufacturer's actual or constructive knowledge of a danger is irrelevant.\textsuperscript{120} It is assumed

\begin{thebibliography}{99}
\bibitem{} 117. \textit{Id.} at 498, 525 P.2d at 1039.
\bibitem{} 118. 47 Ill. 2d at 454, 266 N.E.2d at 903.
\bibitem{} 119. 269 Or. at 498, 525 P.2d at 1039.
\bibitem{} 120. The dissent dismissed the decisions cited by the majority in support of the knowledge requirement. With two exceptions, the cited cases were disregarded because they did not squarely face the issue. 79 Ill. 2d 26, 40, 402 N.E.2d 194, 201 (1980). See \textit{supra} note 95.

\textit{Oakes} v. Geigy Agricultural Chem., 272 Cal. App. 2d 645, 77 Cal. Rptr. 709 (1969), was disregarded not because the case failed to confront the issue, but because the dissenting justices believed that the California Supreme Court cast doubt on \textit{Oakes} validity when the court decided \textit{Cronin} v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 443 (1972), and \textit{Barker} v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). 79 Ill. 2d at 40, 402 N.E.2d at 201. No court has determined the vitality of \textit{Oakes} since \textit{Cronin} and \textit{Barker} were decided. A survey of California failure to warn cases, however, does not lead to the conclusion that the courts of that state would adopt the view that a manufacturer's knowledge is irrelevant in a failure to warn case. For example, in \textit{Crane} v. Sears Roebuck & Co., 218 Cal. App. 2d 855, 32 Cal. Rptr. 754 (1963), warnings for a surface preparer manufactured without defect were required under the law of strict liability. The court approved an instruction which stated that warnings must be given when the manufacturer knows or should know of a danger which the user of the product would not ordinarily discover. \textit{Id.} at 860-61, 32 Cal. Rptr. at 757. In \textit{Canifax} v. Hercules Powder Co., 237 Cal. App. 2d 44, 55, 46 Cal. Rptr. 552, 558 (1965), the court ruled that information sufficient to decide that a supplier of dynamite fuses had no duty to provide a warning on the subject of burning time was not available. The court's discussion of the duty to warn stated that the supplier of a faultlessly made product may be subject to strict liability if it is unreasonably dangerous to place the product in the hands of a user without providing a suitable warning. \textit{Id.} at 53, 46 Cal. Rptr. at 558. The court in \textit{Oakes} sustained a demurrer because the complaint did not allege that the manufacturer knew or should have known that a weed-killing chemical could cause an allergic skin reaction. 272 Cal. App. 2d 646-47, 77 Cal. Rptr. at 710. In addition to relying upon \textit{Crane} and \textit{Canifax}, the \textit{Oakes} court referred to comments on § 402A of the RESTATEMENT (SECOND) OF TORTS (1965), and to a series of older cases decided under the law of negligence. \textit{Id.} at 649-51, 77 Cal. Rptr. at 712-13. Several subsequent cases adopted the reasoning of the \textit{Oakes} decision. Skaggs v. Clairol Inc., 6 Cal. App. 3d 1, 6, 85 Cal. Rptr. 584, 587 (1970); Christofferson v. Kaiser Found. Hosp., 15 Cal. App. 3d 75, 79, 92 Cal. Rptr. 825, 827 (1971); Carmichael v. Reitz, 17 Cal. App. 3d 987, 988, 95 Cal. Rptr. 381, 400 (1970). In Midgley v. S. S. Kresge Co., 55 Cal. App. 3d 67, 74, 127 Cal. Rptr. 217, 221 (1976), the court commented that \textit{Oakes} survives \textit{Cronin} to the extent that there is a valid distinction between "known" and "unknowable" dangers. In \textit{Cavers} v. Cushman Motor Sales, Inc., 95 Cal. App. 3d 338, 157 Cal. Rptr. 142 (1979), the court explicitly reviewed \textit{Canifax} in light of both \textit{Cronin} and \textit{Barker}. The \textit{Cavers} court concluded that a consideration of degrees of danger cannot be eliminated from a failure to warn case, and that the feasibility of including a warning is a factor to be considered in deciding whether the absence of a warning makes a product defective. \textit{Id.} at 348-49, 157 Cal. Rptr. at 149. An instruction which stated that a product is defective if the absence of a warning makes it substantially dangerous to the user was approved. \textit{Id.}

The dissenting justices in \textit{Woodill} also agreed that \textit{Phillips} v. Kimwood Mach. Co., 269
that the manufacturer always knows of all dangers associated with
the product. The only pertinent question is whether the product
subjects the consumer to an unreasonable risk of harm. Applying
the Phillips reasoning, the dissent concluded that if an injured
person's recovery is conditioned upon pleading and proving that a
manufacturer knew or had reason to know of a danger, elements of
negligence are injected into the strict liability cause of action.

In addressing the majority's concern that warnings would be
meaningless exercises were the knowledge element eliminated,
the dissent proposed that warnings disclose the circumstances
under which a product had been found to be safe. The dissent
suggested that such disclosure might enable a manufacturer to
avoid liability for harm caused by an unknowable danger inherent
in the product. According to the dissenting opinion, such disclo-
sure might protect a manufacturer from liability; thus, removal of
the knowledge element would not make the manufacturer an in-
surer. The dissent argued that strict liability should be available
to the unsuspecting consumer, in fact, not just in theory.

Or. 485, 525 P.2d 1033 (1974), faced the knowledge issue, but did not believe the case can be
interpreted to support the majority position. It seems difficult to dispute this contention
since the Phillips decision is often considered to be the leading case recognizing the possi-
bility that a product could be unreasonably dangerous even though the failure to warn was
entirely reasonable in light of the manufacturer's knowledge at the time that he or she sold
the product. Id. at 498, 525 P.2d at 1039. See supra note 6.

121. See supra note 6. See also Note, Product Liability Reform Proposals: The State of
the Art Defense, 43 ALBANY L. REV. 941, 958-60 (1979); Note, State of the Art Defense,
supra note 31, at 919-25.

122. This position has been adopted by the states in which a manufacturer is held
strictly liable for the inadequate warnings on a product, regardless of the scientific possibil-
ity of discovering the danger. See supra note 5.

123. 79 Ill. 2d at 44, 402 N.E.2d at 203.

124. Id. at 37, 402 N.E.2d at 200.

125. Id. at 44, 402 N.E.2d at 203.

126. Id. As a practical matter the consumer may be better informed by a warning of the
dangers associated with the product's use than by a catalog of circumstances under which
the product has been found to be safe. The manufacturer, as an expert, is best equipped to
evaluate the circumstances under which the product should not be used. If a manufacturer
were absolved from liability whenever a consumer's use deviated from the listed safe cir-
cumstances, the consumer, the person least able to assess the safety of a specific product
use, would be forced to assume the risk. See generally Twerski, supra note 35.

127. 79 Ill. 2d at 44, 402 N.E.2d at 203.

128. Id. at 43, 402 N.E.2d at 202.
ANALYSIS

The Nature of the Failure to Warn Defect

The apparent inconsistency between the Woodill and Cunningham decisions reflects an important development in Illinois product liability law. In Cunningham, a case in which an impure product caused injury, strict liability was imposed regardless of the impossibility of identifying the product defect.129 In Woodill, a failure to warn case, the court refused to impose strict liability unless the plaintiff proved that the danger which resulted in the alleged product defect was scientifically knowable.130 Without articulating the basis for the distinction, the Woodill court implicitly recognized that the nature of an impurity or a manufacturing defect is fundamentally different from that of a warning defect, and that different standards are needed to determine whether a particular type of defective condition is unreasonably dangerous.

The distinction implicitly acknowledged by the Woodill court is supported by the inherent characteristics of each defect type. When a product is impure or has a manufacturing flaw, only a limited number of units are defective.131 Because those defective units do not meet normal quality standards, they can be identified objectively by physically comparing different units of the same product line.132 The manufacturer knowingly sets the standard by which the defective products are identified.133 If a manufacturer maintains stringent quality control standards, the manufacturer's risk of incurring liability for injury resulting from a flawed product can be minimized.134 In this situation it is realistic to focus on the physical product defect and to assess liability based solely on the condition of the product.

It is not realistic to assess liability based solely on the condition of the product in a failure to warn case. Warnings serve two purposes. They reduce the risk associated with the use of a product, and shift legal responsibility for harm caused by the product's use from the manufacturer to the user.135 Warnings function by alert-

130. 79 Ill. 2d 26, 37, 402 N.E.2d 194, 199 (1980).
131. See supra notes 14-16 and accompanying text.
132. See supra note 11.
133. Id.
134. Birnbaum, supra note 2, at 647.
ing the user to the importance of handling the product as instructed and to the possibility that the user may be harmed if the warning is ignored. An effective warning communicates the manufacturer's knowledge of dangerous product characteristics to the user, so that the user can modify his or her conduct and reduce the risks associated with the use of the product.

In a failure to warn case the alleged unreasonably dangerous condition is an ineffective transfer of information. To assess the adequacy of a warning, a court essentially must evaluate the effectiveness of a communication. There is no physical product defect or condition upon which to focus as there is in a case based on a manufacturing or design defect. A viable test for the adequacy of a communication cannot focus on a product and ignore the knowledge and conduct of the manufacturer and user. Unless both the manufacturer and the user appreciate the dangers associated with the use of the product, the user cannot modify his or her conduct in a manner which reduces risks. Unless the user has the opportunity to modify his or her conduct based on information contained in the warning, the warning serves no purpose. If a danger is truly unknowable, based on the present state of human knowledge, the only way in which a user could modify his or her conduct to reduce the risk would be to avoid using the product at all. Certainly, the user cannot make an informed decision to accept the risks associated with the use of a product when those risks are unknowable. Warnings by their nature, must be evaluated using a reasonableness standard rather than an absolute liability standard.

The Failure to Warn Product Liability Action

The Woodill court adopted a special pleading requirement for strict liability complaints which allege that a product lacks adequate warnings. After Woodill, to maintain a strict liability action based on inadequate warnings, a plaintiff must allege and prove that the injury or damage was proximately caused by a product's inadequate warning, that the defendant knew or should have known of the danger that caused the injury or damage, that the inadequate warnings made the product unreasonably dangerous,
and that the warnings were inadequate when the product left the manufacturer's control.140 Except for the knowledge requirement, the elements of proof in the Woodill failure to warn action are identical to those of a traditional strict liability action.141 Yet, the strict liability label is inappropriate because the Woodill action replaces the Cunningham absolute strict liability standard, the standard which imputes knowledge to the manufacturer, with a knowledge requirement which incorporates the reasonableness standard usually associated with negligence actions. The failure to warn issue, framed in negligence terms, is whether the defendant breached a duty to warn because there was unequal actual or constructive knowledge between the parties and the defendant knew or should have known that harm could occur if no warning were given.142 By adding a knowledge requirement to the strict liability action, the Woodill court developed a hybrid action not accurately described by either a strict liability or negligence label.

PRODUCT SAFETY STANDARD

In a negligence action, the plaintiff must prove not only that the product was unsafe, but that the manufacturer acted negligently in creating or failing to discover the unsafe condition.143 In a strict liability case, the plaintiff is only required to prove that the product was unsafe.144 This distinction between the actions may be more theoretical than real, however, for a manufacturer's negligent conduct may often be inferred from the unreasonably dangerous condition of the product.

Because product safety is relative, a balancing process must be used to decide whether a product is sufficiently safe.145 Among the factors considered, are the overall product utility, the likelihood that the product will cause injury, the probable seriousness of that injury, the availability of a safer substitute product which would meet the same need, the manufacturer's ability to eliminate the unsafe product characteristic without impairing the product's use-

141. See supra note 140.
143. See supra note 142. Wade, Design Defects, supra note 13, at 553, 569.
144. See supra note 140. Wade, Design Defects, supra note 13, at 553, 569.
145. Wade, Design Defects, supra note 13, at 570.
fulness or making it too expensive, the obviousness of the risk, and
the user's ability to avoid the danger by carefully using the prod-
uct. These same factors are weighed both in a strict liability ac-
tion and in a negligence action. Whether a failure to warn suit is
in strict liability or negligence, the same product safety standard
applies.

The Model Uniform Product Liability Act consolidates negli-
gence and strict liability theories of recovery into a single product
liability action. For a claim based on an inadequate warning the

146. Wade, Strict Liability for Products, supra note 2, at 836-38.
147. Wade, Strict Liability of Manufacturers, supra note 5, at 17; Wade, Strict Liability for Products, supra note 2, at 837. See also Montgomery & Owen supra note 10, at 818. Cf. UPLA, supra note 14, at 62,714 (Model Act considers only user safety factors, not product utility).


Commentators have also concluded that there are no relevant factors which distinguish strict liability and negligence in a duty to warn context. Keeton, supra note 10, at 586-87; Kidwell, supra note 135, at 1377-79; McClellan, Strict Liability for Drug Induced Injuries: An Excursion Through the Maze of Products Liability, Negligence and Absolute Liability, 25 WAYNE L. REV. 1, 2, 5 (1978); Merrill, Compensation for Prescription Drug Injuries, 59 VA. L. Rev. 1, 31 (1973); Wade, Strict Liability of Manufacturers, supra note 5, at 17; Wade, Strict Liability for Products, supra note 2, at 836-37, 842; Wade, Design Defects, supra note 13, at 552. Contra Montgomery & Owen, supra note 10, at 829.

See infra notes 157-59 and accompanying text. It is important to note that at the time Woodill was decided, a plaintiff was required to plead freedom from contributory negligence if the suit was based on negligence theory. This element was not part of a strict liability action. In Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981) the Illinois Supreme Court adopted pure comparative negligence. A plaintiff is no longer required to base a case on strict liability theory to avoid the contributory negligence bar.

149. UPLA, supra note 14, at 62,719. The Model Uniform Product Liability Act drafted by the Department of Commerce suggested uniform standards for state product liability tort law. Id. at 62,716. The Model Act is an effort to clarify the legal rights and obligations of both product users and sellers. Id. Clarification is achieved by consolidating negligence and strict liability theories of recovery into a single product liability claim. Id. at 62,719. The Model Act assesses liability on a fault basis in duty to warn cases and limits the application of strict liability to cases involving construction or manufacturing defecta. Id. at 62,722. The Model Act, thus, explicitly recognizes the distinction between warning defecta
Model Act adopts a product safety standard which includes the knowledge requirement.\textsuperscript{150} The drafter's analysis explicitly states that "the duty to provide adequate warnings and instructions cannot go beyond the technological and other information that was reasonably available at the time of manufacture."\textsuperscript{151} Liability is imposed under the Model Act if "the manufacturer should and could have provided the instructions or warnings which . . . would have been adequate."\textsuperscript{152}

By incorporating the knowledge requirement, the Woodill court adopted a product safety standard which is consistent with the standard imposed by the Model Act. The court, however, expressly refused to combine the strict liability and negligence failure to warn actions into a single claim.\textsuperscript{153} As a result of the Woodill decision, in Illinois, a failure to warn case may carry a strict liability label or a negligence label, but the label will not effect the applicable product safety standard.\textsuperscript{154} The Woodill decision establishes two causes of action, strict liability and negligence, which apply

---

150. \textit{Id.} at 62,724.
151. \textit{Id.}
152. \textit{Id.} at 62,721. The Model Act provides in pertinent part:

(C) The Product Was Unreasonably Unsafe Because Adequate Warnings or Instructions Were Not Provided.

(1) In order to determine that the product was unreasonably unsafe because adequate warnings or instructions were not provided about a danger connected with the product or its proper use, the trier of fact must find that, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms and the seriousness of those harms rendered the manufacturer's instructions inadequate and that the manufacturer should and could have provided the instructions or warnings which claimant alleges would have been adequate.

(2) Examples of evidence that is especially probative in making this evaluation include:

(a) The manufacturer's ability, at the time of manufacture, to be aware of the product's danger and the nature of the potential harm;

(b) The manufacturer's ability to anticipate that the likely product user would be aware of the product's danger and the nature of the potential harm;

(c) The technological and practical feasibility of providing adequate warnings and instructions;

(d) The clarity and conspicuousness of the warnings or instructions that were provided; and

(e) The adequacy of the warnings or instructions that were provided.

153. \textit{See supra} notes 96-105 and accompanying text.
154. \textit{See supra} notes 139-47 and accompanying text.
the same safety standard to a single set of facts. This multiplicity of actions shifts the focus of the litigation away from the ultimate fact question, the product safety standard, to peripheral legal distinctions. Although both actions apply the same safety standard, available defenses, jury instructions, and statutes of limitation may differ.

DEFENSES, JURY INSTRUCTIONS, AND STATUTES OF LIMITATION

The defenses available in a strict liability action were unquestionably different from the defenses available in a negligence action at the time the Woodill case was decided. At that time, contributory negligence was not a bar to recovery in a suit based on strict liability theory, but was a complete bar to recovery in a suit based on negligence theory. Since Woodill was decided, however, Illinois adopted pure comparative negligence. Illinois courts have not yet determined whether comparative negligence will be applied to strict liability actions. If Illinois follows the majority position, comparing the conduct of the plaintiff and defendant in both strict liability and negligence cases, available defenses will no longer distinguish a strict liability failure to warn case from a negligence failure to warn case.

In a failure to warn case, as in any case, a party is entitled to instructions explaining each legal theory supported by the evidence. The Woodill strict liability instructions ask whether the product lacked adequate warnings. Negligence instructions ask whether the defendant failed to adequately warn the plaintiff of

155. Id.
161. See supra note 140 and accompanying text.
dangers associated with the product.\textsuperscript{162} In practice, a jury may reach a different verdict after relying upon different sets of instructions which attempt to articulate one safety standard.\textsuperscript{163}

The difference in the statute of limitations is another important practical distinction between strict liability and negligence causes of action. In Illinois, a plaintiff usually cannot assert a strict liability claim more than twelve years after the product is sold by the first seller in the distribution chain or ten years after the product is first purchased by a consumer.\textsuperscript{164} Because negligence claims must be filed within two years after an injury is discovered, the statute of limitations for a negligence action may be longer or shorter than that for a strict liability action depending upon when the injury is discovered.\textsuperscript{165}

By adopting a knowledge requirement, the \textit{Woodill} decision creates an action in which the ultimate issue, the product safety stan-

162. \textit{See supra} note 142 and accompanying text.

163. Freund v. Cellofilm Properties, Inc., 87 N.J. 229,244, 432 A.2d 925 (1981). "Instructing a jury that weighing factors concerning conduct and judgment must yield a conclusion that does not describe conduct is confusing at best." \textit{See also} Birnbaum \textit{supra} note 2, at 648.


The statute provides in pertinent part:

(b) Subject to the provisions of subsections (c) and (d) no product liability action based on the doctrine of strict liability in tort shall be commenced except within the applicable limitations period and, in any event, within 12 years from the date of first sale, lease or delivery of possession by a seller or 10 years from the date of first sale, lease or delivery of possession to its initial user, consumer, or other non-seller, whichever period expires earlier, of any product unit that is claimed to have injured or damaged the plaintiff, unless the defendant expressly has warranted or promised the product for a longer period and the action is brought within that period.

The general rule is modified as follows:

(d) Notwithstanding, the provisions of subsections (b) and (c)(2) if the injury complained of occurs within any of the periods provided by subsections (b) and (c)(2) hereof, the plaintiff may bring suit within 2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known, of the existence of the personal injury, death or property damage, but in no event shall such action be brought more than 8 years after the date on which such personal injury, death or property damage occurred. In any such case, if the person entitled to bring the action was, at the time the personal injury, death or property damage occurred, under the age of 18 years, or insane, or mentally ill, or imprisoned on criminal charges, the period of limitations does not begin to run until the disability is removed.

standard, is substantially the same as in a negligence failure to warn action.⁶⁶ If Illinois decides to apply comparative negligence principles in strict liability actions, the Woodill failure to warn action will be different from a negligence action only because instructions which attempt to articulate the same safety standard are worded differently, and because different statutes of limitation apply.⁶⁷ A single product liability action as proposed in the Model Act, would eliminate the distraction and confusion of multiple legal theories and would allow a trial to clearly focus on the real issue: determination of the appropriate product safety standard.⁶⁸

CONCLUSION

A warning is a communication, not a physical product condition or characteristic. The Woodill court implicitly recognized this distinction and developed an appropriate failure to warn product liability action. The failure to warn action adopted in Woodill is a hybrid action not accurately described by either the strict liability or negligence label. The action incorporates concepts traditionally associated with negligence, but is framed in strict liability terms. Having defined this action in Woodill, the Illinois Supreme Court should now formally combine the strict liability and negligence failure to warn actions into one product liability action, as suggested in the Model Uniform Product Liability Act. A single product liability action would allow factfinders to focus on the basic safety standards at issue.

SHERYL ANN MARCOUILLER

---

166. See supra notes 139-56 and accompanying text.
167. See supra notes 157-65 and accompanying text.
168. Wade, Design Defects, supra note 13, at 577. See supra note 156 and accompanying text.