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COMMENTARY

Defenses To Products Liability In Illinois Arising Out of Plaintiff's Conduct

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INTRODUCTION

In Suvada v. White Motor Co., the Illinois Supreme Court adopted the rule of strict liability in tort for injuries resulting from the use of unreasonably dangerous products. The Suvada court delineated the basic ingredients of this cause of action as follows: a plaintiff must show (1) that his injury was the direct and proximate result of a condition of the product; (2) that the complained of condition was an unreasonably dangerous one; and (3) that the condition existed at the time the product left the manufacturer's control. The underlying theory of strict liability is that the burden of catastrophic injuries arising from the use of defective products should not be placed on innocent consumers but, rather, should be borne by those who create the peril by placing defective items into the stream of commerce.

Although the term "strict liability" connotes absolute liability, defenses to such a cause of action do exist. In Williams v. Brown Manufacturing Co., the Illinois Supreme Court set forth two defenses, arising out of a plaintiff's conduct, to products liability actions — misuse of a product and assumption of risk. At times, these defenses have been misunderstood by Illinois courts. This comment will focus upon the confusion arising out of defenses predicated on plaintiff-conduct.


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

2. Bodily injury as well as property damage is compensable in a products liability action. Id. at 621, 210 N.E.2d at 187.

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


MISUSE OF A PRODUCT

The defense of misuse has been defined as using a product in a fashion that was neither intended by the manufacturer, nor reasonably foreseeable. Thus, even the most abnormal use of a product will not bar recovery if that abnormal use was reasonably foreseeable at the time of manufacture. The defense of misuse is not an affirmative defense; rather, it is a negation of an aspect of plaintiff's prima facie case. A products-liability plaintiff must prove, as part of his prima facie case, that (a) the complained of product was unreasonably dangerous with respect to an intended or reasonably foreseeable use and (b) that the plaintiff's injury was proximately caused by a use of the product that was intended or reasonably foreseeable. Thus, the issue of misuse will arise "in connection with plaintiff's proof of an unreasonably dangerous condition or in proximate causation or both."

The Two Strand Analysis: Troszynski v. Commonwealth Edison Co.

In Troszynski v. Commonwealth Edison Co., plaintiff received a severe electrical shock when he touched an uninsulated wire in a

7. Of course, such an abnormal use could give rise, independently, to the defense of assumption of risk. See text accompanying notes 34 through 70 infra.
   Although the definitions of the term 'defect' in the context of products liability law use varying language, all of them rest upon the common premise that those products are defective which are dangerous because they fail to perform in the manner reasonably to be expected in light of their nature and intended function. So, Chief Justice Traynor has suggested that a product is defective if it fails to match the average quality of like products. (Traynor, The Ways and Meanings of Defective Products and Strict Liability, 32 Tenn. L. Rev. 363 (1965).) The Restatement emphasizes the viewpoint of the consumer and concludes that a defect is a condition not contemplated by the ultimate consumer which would be unreasonably dangerous to him. (Restatement, Torts (Second) 402A, comment g.) Dean Prosser has said that 'the product is to be regarded as defective if it is not safe for such a use that can be expected to be made of it, and no warning is given.' (Prosser, The Fall of the Citadel, 50 Minn. L. Rev. 791, 826.)
10. In Winnett v. Winnett, 57 Ill. 2d 7, 11, 310 N.E.2d 1, 4 (1974), the Illinois Supreme Court explained the relationship between misuse and proximate cause:
   In our judgment the liability of a manufacturer properly encompasses only those individuals to whom injury from a defective product may reasonably be foreseen and only those situations where the product is being used for the purpose for which it was intended or for which it is reasonably foreseeable that it may be used.
meterbox, located in his backyard. At the time of the mishap, the plaintiff was attempting to extricate some broken glass that had fallen into the interior of the box. The plaintiff brought action against the electric company predicated on products liability. The jury returned a verdict in plaintiff's favor and judgment was entered accordingly. On appeal, the defendant argued that the plaintiff should be barred from recovery by reason of his misuse of the product.

Using a two-step analysis, the First District Appellate Court rejected this argument. It first agreed with the defendant that "the intended use of a meterbox is for its employees to determine the amount of electricity which has been used by the occupant of the residence on which the meter has been attached." Conversely, it might be said that the defendant obviously did not intend the meterbox to be a depository for broken glass. The appellate court then discussed the second branch of the misuse test, the "foreseeability" branch outlined by the Illinois Supreme Court in *Williams v. Brown Manufacturing Co.* and *Winnett v. Winnett.* The court explained its understanding of this aspect of the *Williams-Winnett* test: "[T]his court must determine if the jury was presented sufficient evidence to conclude that plaintiff sustained his injury while using the product in a manner which was reasonable to foresee." The appellate court concluded:

> It is foreseeable that a member of the public would be injured if dangerous, uninsulated wires were left in an accessible position without adequate warning. The jury, therefore, easily could have concluded that it was objectively reasonable for defendant to have foreseen that a person would come into contact with the exposed wires contained within the box.

The court further explained that:

> In Illinois misuse of a product occurs when it is used for a purpose neither intended nor foreseeable. . . . We can only repeat that it was the duty of the triers of fact to decide whether plaintiff's use of the meterbox was foreseeable. Sufficient evidence was presented to support their determination (i.e., no misuse). *Lewis v. Stran Steel Corp.* (1974), 57 Ill. 2d 94, 311 N.E.2d 128.

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13. *Id.*
14. *Id.* at 928, 356 N.E.2d at 929.
15. *Id.* at 930, 356 N.E.2d at 931.
17. 57 Ill. 2d 7, 11, 310 N.E.2d 1, 4 (1974).
19. *Id.* at 931, 356 N.E.2d at 931.
20. *Id.* at 933, 356 N.E.2d at 933.
The Missing Strand: Stewart v. Von Solbrig Hospital

The Troszynski opinion is an excellent example of a court paying careful attention to both the “intended use” and the “reasonably foreseeable use” strands of the misuse defense. In contrast, the court that decided Stewart v. Von Solbrig Hospital apparently misunderstood the defense. In Stewart, the plaintiff had submitted to an operation for the purpose of having a surgical pin inserted into the tibia of his left leg. This pin subsequently broke while still lodged within the plaintiff’s body; the rupture of the pin led to complications and made further operations necessary. The plaintiff brought action, predicated on a theory of products liability, against Central Steel & Wire Co., the manufacturer of the pin, the Retzl Co., which had shaped the pin for ultimate use, and the Von Solbrig Hospital, Inc., an officer of which had actually implanted the pin in the plaintiff’s body.

Plaintiff contended at trial that the pin had broken because it had been defectively manufactured. Plaintiff’s expert testified that the pin in question was defective in that it contained foreign materials and scratches. The expert suggested that but for these defects, the pin would not have failed. The jury returned a verdict against defendants Central Steel and Wire Co. and Von Solbrig Hospital but in favor of defendant Retzl. The circuit court, however, entered judgment n.o.v. in favor of Central and the hospital.

On appeal the defendants contended, inter alia, that the appellate court should affirm the lower court’s judgment on the ground of misuse by the plaintiff of the complained of product. More specifically, the defendants argued that the pin in question was designed only to align and stabilize a fracture; it was not intended to support the body’s weight on an unhealed fracture outside of a cast. The defendants further contended that since the plaintiff had admitted to walking about on the unhealed fracture without the assistance of a cast, he should be barred from recovery.

The defendants’ argument, of course, dealt only with the “intended use” aspect of the Williams-Winnett test. It failed to even address the “reasonably foreseeable use” aspect of the same test. The First District Appellate Court, nonetheless, accepted the defendants’ argument and held:

The uncontradicted testimony in the instant case was that the [surgical] pin’s intended purpose was to align and stabilize the fracture but not to support the body’s weight upon an unhealed

22. Id. at 601, 321 N.E.2d at 430.
23. Id. at 603, 321 N.E.2d at 431.
fracture outside of a cast. The plaintiff in his own reply brief on appeal admits that the [surgical] pin was not designed for this latter purpose.

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... A break due to walking on the leg would constitute a misuse of the product against the specific instructions of the plaintiff's doctor. A plaintiff may not recover under strict liability if his injury is the result of his misuse of the product.24

The foregoing excerpt demonstrates that the Von Solbrig court gave no heed to that aspect of the Williams opinion that requires, as a predicate to a finding of misuse, a determination that the abnormal use was not "reasonably foreseeable."25 The Von Solbrig court thus naively equated the quotidien meaning of "misuse" with its special usage within the context of products liability.26

Under the Von Solbrig court's broad interpretation of "misuse," a manufacturer of an unreasonably dangerous product could escape liability merely by showing that the plaintiff's use of the product, although entirely foreseeable, was not the use for which the product had been designed. This would be so even though the plaintiff's injury may have been entirely foreseeable and despite the fact that

24. Id. at 603-04, 321 N.E.2d at 432.


26. Despite the Von Solbrig court's failure to comprehend the nature of the misuse defense, that tribunal probably reached the correct result in the case before it. The plaintiff in Von Solbrig had not alleged a design defect, but had contented himself with charging the manufacturer with a defect in production (i.e., the supposed inclusion of foreign materials and the supposed scratches). The opinion suggests that the evidence at trial indicated either (1) that the plaintiff had failed to prove that the pin had been defective (in that it had contained foreign materials and scratches) when it left the manufacturer's control; and/or (2) that the plaintiff had not proven causation-in-fact since the evidence further indicated that a pin without the alleged defects would probably have broken anyway under the circumstances presented.

27. The principal policy consideration underlying the doctrine of products liability is probably the "loss spreading" or "social insurance" consideration. "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." Greenman v. Yuba Power Products, 59 Cal. 2d 57, 63, 27 Cal. Rptr. 697, 701, 377 P.2d 897, 901 (1962). See also Prosser, The Assault Upon the Citadel, 69 YALE L.J. 1099, 1122-24 (1960).

In Suvada v. White Motor Co., 32 Ill. 2d 612, 619, 210 N.E.2d 182, 186 (1965), the Illinois Supreme Court set forth two additional policy considerations. The court asserted that the public interest in human life and health "demands all the protection the law can give." Id. This consideration might be referred to as the "deterrent" factor. The court also pointed out that, "The manufacturer solicits and invites the use of his product by packaging advertising or otherwise, representing to the public that it is safe and suitable for use." Id. The court reasoned that, "Having thus induced use of the product, the law will impose liability for the damage it causes." Id. This last consideration might be referred to as the "warranty" consideration.
the plaintiff may have been in the exercise of the highest degree of care for his own safety. Such a result would frustrate the policy considerations that inform the law of strict products liability.

In Williams v. Brown Manufacturing Co., the Illinois Supreme Court pointed out that "a greater degree of culpability on the part of a plaintiff will be required in order to bar recovery in some types of action than in others." The court held that simple contributory negligence, which is a bar in Illinois to a tort action based on negligence, does not involve a sufficient degree of fault to bar recovery in a products liability action. The court then held that "misuse" by a plaintiff did involve sufficient culpability as to bar such a recovery. The court, however, defined "misuse" as "use . . . for a purpose neither intended nor foreseeable (objectively reasonable) by the defendant." The Von Solbrig formulation, which ignores the foreseeability strand of the foregoing definition, would thus radically lower the degree of plaintiff culpability that will defeat a products liability action. Such a result would frustrate the policy objectives that underlie the doctrine of strict products liability.

ASSUMPTION OF RISK

The Restatement of Torts (Second), section 496A, delineates four categories of assumption of risk: (1) where the plaintiff, by express consent, has agreed to relieve the defendant of some duty owed to him; (2) where, because of the relationship existing between plaintiff and defendant, there exists an implied-in-law consent, by plaintiff, to a lesser standard of care on the defendant’s part; (3) where

31. Id.
32. Id.
33. See note 27 supra.
34. It is, of course, possible for a person to express assent by non-verbal conduct that unequivocally evinces such assent. See, e.g., Voit Rubber Co. v. Petoria Coca-Cola Bottling Co., 280 Ill. App. 14, 22 (1935); see also Memory v. Niepert, 131 Ill. 623, 631, 23 N.E. 431, 433 (1890); Lundin v. Egyptian Construction Co., 29 Ill. App. 3d 1060, 1063-64, 331 N.E.2d 208, 211 (1975).
35. The second type of assumption of risk arises where "the plaintiff voluntarily enters into some relation with the defendant, with the knowledge that the defendant will not protect him against the risk." See W. PROSSER, THE LAW OF TORTS § 68 (4th ed. 1971) [hereinafter cited as PROSSER]; see also RESTATEMENT (SECOND) OF TORTS § 496C (1965). The only rela-
plaintiff, aware of a risk already created by the defendant, proceeds to voluntarily encounter it; and (4) that form of assumption of risk which is a defense to a cause of action sounding in strict tort liability,\textsuperscript{36} where the plaintiff voluntarily and unreasonably proceeds to encounter a known danger. All but the third category of assumption of risk are available as defenses to negligence actions in Illinois; however, only the first and fourth are potentially important as defenses in products liability litigation.

Assumption of Risk By Express Consent

1. General Application

The classic form of assumption of risk is assumption by express consent. Dean Prosser described this form of assumption of risk as follows:

In its simplest and primary sense, assumption of risk means that the plaintiff, in advance, has given his consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone. The situation is then the same as

tionship in Illinois that will give rise to this type of assumption of risk is the employment relationship. See, e.g., Mack v. Davis, 76 Ill. App. 2d 88, 97-98, 221 N.E.2d 121, 126 (1966); Kelly v. Fletcher-Merna Coop. Grain Co., 29 Ill. App. 2d 419, 425-27, 173 N.E.2d 855, 858-59 (1961). This last form of assumption of risk is, however, rarely seen in the case law because the overwhelming majority of employment relationships are governed by the Workmen's Compensation Act. ILL. REV. STAT. ch. 48, §§ 138.1 - 138.26 (1977). Even in employment relationships that are not covered by the Workmen's Compensation Act, the defense is available only where the employee knew and appreciated, or at least should have known and appreciated, the peril created by his employer's negligent conduct. See Mack v. Davis, 76 Ill. App. 2d 88, 97, 221 N.E.2d 121, 126 (1966). Thus, an employee does not, by entering into the employment relationship, assume the risk of his employer's undisclosed or non-obvious negligence. Indeed, an express agreement by an employee to assume the risk of undisclosed, non-obvious perils created by the employer's negligence is unenforceable in Illinois. See Jackson v. First Nat'l Bank of Lake Forest, 415 Ill. 453, 460, 114 N.E.2d 721, 725 (1953).

Assumption of risk by entering into an employment relationship has no analogue in the jurisprudence of products liability.

36. In the period before strict products liability, this type of assumption of risk was available in some jurisdictions in "wild animal" cases. In the leading case of Muller v. McKesson, 73 N.Y. 195, 201, 29 Am. Rep. 123, 126 (1878), the New York Court of Appeals held as follows:

[If a person with full knowledge of the evil propensities of an animal wantonly excites him, or voluntarily and unnecessarily puts himself in the way of such an animal, he would be adjudged to have brought the injury upon himself, and ought not to be entitled to recover. In such a case it cannot be said, in a legal sense, that the keeping of the animal, which is the gravamen of the offense, produced the injury.

This type of assumption of risk was also a defense in some jurisdictions to suits based on "abnormally dangerous things and activities." See, e.g., Robison v. Robison, 16 Utah 2d 2, 4-6, 394 P.2d 876, 877-78 (1964). See also Prosser, supra note 35, ¶ 79; Anderson v. Anderson, 259 Minn. 412, 416, 107 N.W.2d 647, 649-50 (1961).
where the plaintiff consents to the infliction of what would otherwise be an intentional tort, except that the consent is to run the risk of unintended injury, to take a chance, rather than a matter of the greater certainty of intended harm.\textsuperscript{37}

Assumption of risk by express consent is recognized as a defense to a negligence action in Illinois, at least where the consent is given in a contractual context and is supported by consideration.\textsuperscript{38} An example of this defense can be found in \textit{Morrow v. Auto Championship Racing Association, Inc.}\textsuperscript{39} In \textit{Morrow}, the plaintiff contracted with defendant to race his automobile in stock car races conducted by the Association. The contract provided that plaintiff would be insured against injury or death resulting from a racing accident. However, the contract also contained a clause in which the plaintiff released the defendant Association from all "liability, claims, actions, and possible causes of action" arising from any damage or injury sustained while plaintiff was "in, about, (or) en route into and out of" defendant's premises.\textsuperscript{40}

Plaintiff was injured when another race car went out of control and careened into him. In a subsequent negligence action against the Association, a $55,000 judgment was entered for plaintiff. The First District Appellate Court, in reversing, held that the plaintiff had by express consent assumed the risk of injury flowing from defendant's negligence. The court explained:

\textsuperscript{37} Prosser, supra note 27, § 60; see also Restatement (Second) of Torts § 496B (1965).

\textsuperscript{38} See, e.g., Jackson v. First Nat'l Bank of Lake Forest, 415 Ill. 453, 460-62, 114 N.E.2d 721, 725 (1953). The Illinois Supreme Court has twice confirmed the availability of this defense in negligence actions in the last ten years. Barrett v. Fritz, 42 Ill. 2d 529, 533-34, 248 N.E.2d 111, 114 (1969); Court v. Grzelinski, 72 Ill. 2d 141, 149, 379 N.E.2d 281, 284 (1978).

There are no Illinois cases dealing with the availability of the defense of assumption of risk by express consent where no consideration supported the consent, \textit{i.e.}, in a non-contractual context. The defense is, however, probably available even outside the matrix of contract for two reasons. First, in Barrett v. Fritz, 42 Ill. 2d 529, 248 N.E.2d 111 (1969), the Illinois Supreme Court strongly suggested that this defense would be available, even outside a contractual context. In \textit{Barrett}, the supreme court explicitly declined an invitation to extend the scope of the assumption of risk defense in Illinois. In doing so, however, the court did state:

\textsuperscript{39} 8 Ill. App. 3d 682, 291 N.E.2d 30 (1972).

\textsuperscript{40} Id. at 683, 291 N.E.2d at 31.
Therefore, we hold that an agreement between a participant in and a promoter of a stock car race, whereby the former assumes the risk of participating and releases the latter from claims due to the latter's negligence, is not void as against the public policy of this state [and will be enforced so as to bar recovery].

2. Express Consent as a Defense in Products Liability Cases

a. Consent to Known Defects

The Illinois Supreme Court has never adjudicated the issue of whether assumption of risk by express consent should or should not be a defense to a products liability action. Indeed, there are very few cases in the United States that deal with the availability of this defense in a strict liability action. Prosser discussed this rarely invoked defense as follows:

Assumption of risk without contributory negligence, which turns upon consent of the plaintiff to relieve the defendant of his obligation, has seldom appeared in products liability cases; but there can be no doubt that the defense is valid in a proper case. Thus when the plaintiff, bitten by a mad dog, consents to inoculation with the defendant's vaccine, with full knowledge of the risk involved, it was held that there was no liability for his death.

It appears that the defense of express consent to specific defects would be available in Illinois in a proper case. In *Dunham v. Vaugh & Bushnell Manufacturing Co.*, the Illinois Supreme Court held that "defective products" are products "which are dangerous because they fail to perform in the manner reasonably to be expected in light of their nature and intended function." If the ultimate consumer is informed by the manufacturer of a defect in the product and if the ultimate consumer, by express consent, agrees to relieve the manufacturer of liability in the matter, the consumer can hardly be heard to say at a later date that the product failed to perform "in the manner reasonably to be expected." The *Dunham* court also referred, with approbation, to the Restatement of Torts (Second), section 402A, comment g, for the proposition that "a defect is a condition not contemplated by the ultimate consumer which would be unreasonably dangerous to him." Again, if the manufacturer

41. *Id.* at 686, 291 N.E.2d at 33.
42. *But see* Schafer v. Reo Motors, 205 F.2d 685 (3d Cir. 1953); Weils v. Ace Rentals, Inc., 249 Iowa 510, 87 N.W.2d 314 (1958); Pokrajac v. Wade Motors, Inc., 266 Wis. 398, 63 N.W.2d 720 (1954).
44. 42 Ill. 2d 339, 247 N.E.2d 401 (1969).
45. *Id.* at 342, 247 N.E.2d at 403.
46. *Id.* at 343, 247 N.E.2d at 403.
apprises an ultimate consumer of the existence of a defect in a product and if the consumer relieves the manufacturer of liability for injuries resulting from the defect, the consumer could not contend at a later date that the complained of defect was not a "contemplated" one.

b. Consent to Unknown Defects

The foregoing analysis deals only with the disclosure of specific, known defects. The same analysis would seem applicable in a proper case to an express consent by a consumer to assume the risk of injury arising from unknown defects in a product. To illustrate this last statement, assume the following hypothetical: General Motors manufactures a car which is sold, a month later, by a franchised General Motors dealer to Mr. Consumer. Although cars of this make and model carry a manufacturer's suggested retail price of $6,000, the manufacturer also suggests that the retailer sell the car for $5,000 if the purchaser signs a statement that provides, in bold print: "I, the Purchaser, in consideration of $1,000, release the manufacturer of this car, and all other persons in the chain of distribution, from all liability arising out of personal injury to myself or damage to my property arising as a natural consequence of any defect, other than those caused by the manufacturer's negligence, that may inhere in this car." Assume also that the manufacturer will charge the dealer $1,000 less for any car sold by it pursuant to such a release; assume further that $1,000 is adequate consideration for this release. Two weeks later, Mr. Consumer and his friend, Mr. Third, are involved in an accident because of a defect in the power-brake system of the car. Mr. Consumer and Mr. Third subsequently sue General Motors in a products liability action. Would the Illinois courts honor such an exculpatory clause in such an action?

The relevant cases indicate that an exculpatory clause will be upheld "unless it would be against the settled public policy of the State to do so" or unless "there is something in the social relationship of the parties militating against upholding the agreement."47 The public policy of the State "is to be found in its constitution and its statutes, and when cases arise concerning matters upon which they are silent, then in its judicial decisions and the constant practices of government officials."48 Nothing in the Illinois Constitution

prohibits an exculpatory clause in a sales contract; nor does any statute outlaw such a clause.\footnote{Note} Neither is such a clause contrary to the settled decisional law of the State.\footnote{Note}

Several Illinois cases, however, have disapproved of attempts to limit strict tort liability by "fine print" exculpatory clauses.\footnote{Note} No case, however, has squarely dealt with an exculpatory clause that (a) was actually negotiated at arms-length by the parties and (b) where the consumer, for adequate consideration, voluntarily vested himself of some right of action against the manufacturer.\footnote{Note} The relevant cases\footnote{Note} suggest that where these two factors are pres-

49. Indeed, Section 2-316(3) of the Illinois Uniform Commercial Code (ILL. REV. STAT. ch. 26, § 2-316(3) (1977)) provides, in the analogous disclaimer of warranty situation that: "[U]nless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is', 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; . . ." The Illinois Uniform Commercial Code Comment (ILL. ANN. STAT. ch. 26, § 2-316) illustrates the meaning of the foregoing provision by reference to the case of Pokrajac v. Wade Motors, Inc., 266 Wis. 398, 63 N.W.2d 720 (1954). In Pokrajac, the plaintiff bought a car "as is." The Wisconsin Supreme Court held that the disclaimer of all warranties barred suit by him against the seller of the car for injuries arising from defective brakes. See also ILL. REV. STAT. ch. 121 1/2, § 262L (1977) which requires a car dealer to bear a portion of the cost of repairs required during the first thirty days after delivery, if the car is less than four years old. This same section of the Consumer Fraud Act also provides, however, that a consumer may by contract divest himself of this statutory right. Cf. ILL. REV. STAT. ch. 80, § 91 (1977) which provides that exculpatory clauses in leases of real property are "void as against public policy and wholly unenforceable." Cf. also ILL. REV. STAT. ch. 110, § 58.2a (1977), which outlaws releases from liability as a condition of medical treatment.

50. Exculpatory clauses in two types of contractual relationships are contrary to the settled case law of the State. First, an exculpatory clause by which a common carrier purports to relieve itself of some duty of care owed to its patrons is void because contrary to public policy. See, e.g., Checkley v. Illinois Central R.R., 257 Ill. 491, 494-95, 100 N.E. 942, 943-44 (1913). Similarly, the Illinois courts will not enforce a clause in an employment contract, whereby an employer purports to relieve himself of the consequences to his employees of his undisclosed and non-obvious negligence. See, e.g., Jackson v. First Nat'l Bank of Lake Forest, 415 Ill. 453, 460, 114 N.E.2d 721, 725 (1953); see also Simmons v. Columbus Venetian Stevens Bldgs., 20 Ill. App. 2d 1, 10-33, 155 N.E.2d 372, 376-88 (1958), for an extensive discussion of this matter.


52. In Hennigsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), a well known disclaimer of warranty case, the New Jersey Supreme Court held that an exculpatory clause in a contract for the sale of an automobile was void because contrary to public policy. The clause was a "fine print" recitation that did not even bear the caption "warranty" or "limited warranty." Also, the dealer had failed to call the plaintiff's attention to the clause at the time of purchase. The instant hypothetical is quite different from the Hennigsen case. Further, the Hennigsen court found that this type of disclaimer (i.e., of all implied warranties) was made by all automobile manufacturers. Hence, a prospective car buyer either had to assent to the disclaimer or forgo buying a new car. Id. at 403, 161 A.2d at 94. In the proffered hypothetical, Mr. Consumer was not put to such a Hobson's choice.

53. See note 47 supra.
ent, as in the instant hypothetical, the exculpatory clause will be upheld. 54

Voluntarily Proceeding to Encounter a Known Risk

The third type of assumption of risk 55 arises where "the plaintiff, aware of a risk already created by the negligence of the defendant, proceeds voluntarily to encounter it. . . . " 56 Unlike assumption of risk by express consent where the plaintiff relieves the defendant of a duty of care before the defendant breaches the duty, this defense relieves a defendant of liability flowing from negligent conduct occurring prior to or contemporaneous with the plaintiff's liability relieving action. In 1969, the Illinois Supreme Court specifically declined an opportunity to make this type of assumption of risk available as a defense in negligence actions. 57 This type of assumption of risk is not available in products liability actions, but it is closely related to the fourth type of assumption of risk, where plaintiff both voluntarily and unreasonably proceeds to encounter a known risk.

Plaintiff Acts Unreasonably in Voluntarily Proceeding to Encounter a Known Danger

Assumption of risk is a defense in a products liability action where the plaintiff acts unreasonably in "voluntarily proceeding to encounter a known danger." 58 Thus, this form of assumption of risk, which will bar recovery in a products liability action, exists only where plaintiff's conduct is also objectively unreasonable, i.e., only

54. It need scarcely be said that General Motors would not have this defense available to it in the suit by Mr. Third. This is so because Mr. Third in no way consented to assume the risk of faulty General Motors workmanship or of a faulty General Motors design.
55. The second type of assumption of risk is discussed in note 35 supra.
56. PROSSER, supra note 27, 68.
   One Illinois appellate court opinion of forty years vintage does suggest that this defense should be available in negligence actions. See Campion v. Chicago Landscape Co., 295 Ill. App. 225, 239, 14 N.E.2d 879, 885 (1st Dist. 1938). The Illinois Supreme Court, however, expressly disapproved the Campion view in the Barrett case.
where his conduct also constitutes contributory negligence. Prosser
describes the assumption of risk that will bar recovery in a products
liability suit as occurring where the third type of assumption of risk
(defined as voluntarily proceeding to encounter a known danger) and
contributory negligence overlap. 59 This also seems to be the view
of those few Illinois opinions that have carefully considered the
issue. 60

It should be noted that Illinois jurisprudence has long recognized
that a person can voluntarily proceed to encounter a known peril
and yet be free of all contributory negligence. 61 This last situation
would occur whenever it would be "reasonable" to encounter a
known danger. Thus, a man who drives a vehicle equipped with
brakes which he knows to be defective "voluntarily proceeds to en-
counter a known danger;" however, if he drives such a vehicle with
all due caution in order to transport a man suffering from a heart
attack to a hospital in the knowledge that the victim would surely
perish otherwise, his action is probably not unreasonable. Stated
another way, the driver of the vehicle, under these circumstances,
could not be faulted by a "reasonable person" for having chosen to
encounter the known peril.

1. Application of Assumption of Risk as a Defense in Illinois
Products Liability Cases

a. Doran v. Pullman Standard Car Manufacturing Co. 62

In Doran, plaintiff was injured when a railroad car moved forward
while he was lying underneath the car attempting to force open a
circular gate on the bottom of the car. Plaintiff argued that he had

59. PROSSER, supra note 27, § 102.
60. Coty v. U.S. Slicing Mach. Co., 58 Ill. App. 3d 237, 244-45, 373 N.E.2d 1371, 1377-78
61. The cases recognize that where an employee sues his employer, the employee may be
charged with the second type of assumption of risk, discussed in note 35 supra, even where it
is shown that he was free from all contributory negligence, i.e., where the evidence indicates
that he conformed to the standard of the "reasonable man."
Every person suing for a personal injury must show that he was in the exercise
of ordinary care and caution for his own safety, so that the question of contri-
butory negligence may be involved in every case; but an employee may have assumed a
risk by virtue of his employment, or by continuing in such employment with knowl-
edge of the defect and danger, and if he is injured thereby, although in the exercise
of the highest degree of care and caution, and without any negligence, yet he cannot
recover. (Emphasis added.)
been required to place himself in this precarious position because the defendants had defectively designed the railroad car in question so that workmen were often required to crawl under the car in order to disengage the underside-covering. The defendants argued, inter alia, that the plaintiff had assumed the risk as a matter of law because he had, by his own admission, voluntarily exposed himself to a known danger. The trial court granted summary judgment for both defendants.

The First District Appellate Court reversed, holding that although the plaintiff did voluntarily proceed to encounter a known danger, it could not be said that his actions in so doing were "unreasonable" as a matter of law. The court explained:

The danger here, as contended by defendants, was in the act of plaintiff going beneath the car without ascertaining whether it could be moved. The record indicates that plaintiff acted voluntarily, and it appears that he should have known that the car might be moved. There remains the crucial question, however, as to whether he acted unreasonably in going under the car and, from our examination of the record, it appears to us that the matrix of logic does not compel the acceptance of the conclusion that the facts here are susceptible of the single inference that plaintiff unreasonably encountered a known danger.\footnote{The danger here, as contended by defendants, was in the act of plaintiff going beneath the car without ascertaining whether it could be moved. The record indicates that plaintiff acted voluntarily, and it appears that he should have known that the car might be moved. There remains the crucial question, however, as to whether he acted unreasonably in going under the car and, from our examination of the record, it appears to us that the matrix of logic does not compel the acceptance of the conclusion that the facts here are susceptible of the single inference that plaintiff unreasonably encountered a known danger.}

One of the stated reasons for the court's determination that the plaintiff did not act "unreasonably" as a matter of law was that he had been told by his supervisor to "clean the cars on that track."\footnote{Many of the statements made by the court in this regard have a sound basis in common experience. Although it is true that ordinary care is not the entire measure of} The court clearly recognized that a workman does not act "unreasonably" (i.e., does not become guilty of contributory negligence) as a matter of law whenever he fails to "walk off" the job after discovering some negligent act or omission on his employer's part, which exposes him to some peril.

The court's holding in this regard has a sound basis in judicial precedent.\footnote{The court's holding in this regard has a sound basis in judicial precedent. Although it is true that ordinary care is not the entire measure of} It also has a sound basis in common experience.

\footnote{Id. at 989-90, 360 N.E.2d at 447 (emphasis added).}
\footnote{Id. at 990, 360 N.E.2d at 447.}
\footnote{See, e.g., Scott v. Driess & Krump Mfg. Co., 26 Ill. App. 3d 971, 990, 326 N.E.2d 74, 87 (1975), where the First District Appellate Court stated: "In situations where the nature of plaintiff's employment requires exposure to certain hazards, it would be a non sequitur of the policy considerations of strict tort liability to say that plaintiff has voluntarily and unreasonably assumed such hazards by the mere acceptance of his employment." Similarly, the Second District Appellate Court, in Coty v. U.S. Slicing Mach. Co., 58 Ill. App. 3d 237, 246, 373 N.E.2d 1371, 1377-78 (1978), stated: "One does not voluntarily and unreasonably assume the hazard of using a defectively designed product which is unreasonably dangerous by mere acceptance of employment. . . ."}
reasonable care, the two are usually co-terminous. Hence, it would be somewhat ironic to say that it is per se unreasonable for a work- 
man to stay on the job after discovering some negligent, peril-
producing act or omission on his employer's part, in view of the fact 
that the overwhelming majority of workmen do not instantly aban-
don their employment under these circumstances.


In Galis, a miner was injured when a wrench flew off a roof-bolter he was using to implant bolts in the ceiling of a mine. Plaintiff sued the manufacturer in strict liability charging that the Galis roof-
bolter was unreasonably dangerous because it did not contain an 
auger retainer which would have prevented the wrench from dislo-
cating in the above described manner.

The defendant-manufacturer defended against plaintiff's action 
on the ground that the plaintiff had assumed the risk as a matter 
of law because he continued on the job, aware of the fact that the 
roof-bolter he had been given to work with did not have a retainer. 
The trial court granted summary judgment for the defendant on 
these facts. However, the facts indicate that the plaintiff had made 
out a prima facie case of products liability, and they do not indicate 
that the plaintiff's conduct in remaining on the job, after be-
coming aware of the fact that his employer had given him a defec-
tive tool to work with, was unreasonable as a matter of law. A jury 
in seeking to determine the question of the reasonableness of plain-
tiff's conduct would have to consider how great a danger was posed 
by the defective tool and what the consequences would have been 
for the plaintiff if he had refused to work with it.

The Third District Appellate Court affirmed on the ground that 
the plaintiff must have assumed the risk since he was admittedly 
aware of some danger. The court paid no attention to whether the 
plaintiff's failure to refuse to use the tendered roof-bolter was

66. The relationship between these two cognate standards was analyzed by Judge Learned 
Hand in the following manner:

There are, no doubt, cases where courts seem to make the general practice of the 
calling the standard of proper diligence; we have indeed given some currency to the 
 notion ourselves. . . . Indeed in most cases reasonable prudence is in fact common 
 prudence; but strictly it is never its measure; a whole calling may have unduly 
lagged in the adoption of new and available devices.

The T. J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932).


68. A products liability plaintiff must show (1) that his injury was the direct and prox-
imate result of a condition of the product; (2) that the complained of condition rendered the 
product unreasonably dangerous; and (3) that the condition existed at the time the product 
left the manufacturer's control. Suvada v. White Motor Co., 32 Ill. 2d 612, 623, 210 N.E.2d 
182, 188 (1965); see also text accompanying notes 1 through 3 supra.
"unreasonable" under the circumstances. The Third District's opinion can be interpreted to mean that a workman assumes the risk as a matter of law for purposes of products liability whenever he continues in an employment situation which requires him to use a defective tool or machine, at least where it can be shown that the workman was aware of the defect. If this is the Third District's view of matters, it is incorrect.\(^6\) It is more likely that the Third District was simply unaware of the "unreasonableness" ingredient in assumption of risk for purposes of products liability.\(^7\) Hopefully, the trial and appellate courts in Illinois will pay more attention in the future to that aspect of the \textit{Williams} opinion that quotes the Restatement of Torts (Second), section 402A, comment n:

On the other hand the form of contributory negligence which consists in voluntarily and \textit{unreasonably} proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section [402A] as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds \textit{unreasonably} to make use of the product and is injured by it, he is barred from recovery.\(^7\)

\textbf{CONCLUSION}

The tripartite\(^7\) assumption of risk defense in products liability represents a considered judgment as to the degree of plaintiff-culpability that should bar recovery in a strict liability tort action. The Illinois cases, however, rarely discuss the "unreasonableness"
element of this defense. As a consequence, a number of cases have incorrectly ruled against plaintiffs on the issue of assumption of risk. The “forgotten” ingredient of this defense, unreasonableness, merits more attention than it has received.

The defense of misuse is grounded on considerations of proximate causation. It reflects the view that a manufacturer should not be liable for injuries arising from a use that was not foreseeable at the time of manufacture. A redefinition of this defense to mean simply a use that was not subjectively intended would, of course, be an invitation to manufacturers to pay no attention to dangers that might arise from the foreseeable, but unintended, uses to which their products may be put. It would also severely undercut the “loss spreading” effect of strict products liability. The present formulation, a use that was neither intended by the manufacturer nor reasonably foreseeable by it, avoids these consequences. In dealing with this defense, the courts should bear in mind that the defense consists of two elements, “intended use” and “reasonably foreseeable use;” and that the question of foreseeability is preeminently one for the jury’s determination.

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74. In Winnett v. Winnett, 57 Ill. 2d 7, 11, 310 N.E.2d 1, 4 (1974), the Illinois Supreme Court expressed the following view:

   In our judgment the liability of a manufacturer [in strict products liability] properly encompasses only those individuals to whom injury from a defective product may reasonably be foreseen and only those situations where the product is being used for the purpose for which it was intended or for which it is reasonably foreseeable that it may be used.

75. Id. at 13, 310 N.E.2d at 5.