

DEVELOPMENTS IN PRODUCT LIABILITY LAW

The Harm of Hindsight Analysis in Design Defect Cases

The Foolproof Product Redux

By: *David B. Mueller*
Cassidy & Mueller
Peoria

The Tort Reform Amendments of 1993 contained a substantial number of substantive and procedural provisions which redefined and moderated product liability law. While those provisions were not found to be unconstitutional, they were thrown out as the “baby” with “the bath water” in *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 468-70 (1997). Since then the conceptual underpinnings of product liability law have been the subject of a number of decisions of the supreme and appellate courts. Nowhere is that theoretical focus more evident than in two recent decisions of the First District Appellate Court and one by the Fourth District in the area of design defect cases. *Wortel v. Somerset Industries, Inc.*, 331 Ill. App. 3d 895 (1st Dist. 2002), *appeal denied* 201 Ill. 2d 619, and *Blue v. Environmental Engineering, Inc.*, 345 Ill. App. 3d 455 (1st Dist. 2003), and *Bates v. Richland Sales Corp.*, 346 Ill. App. 3d 223 (4th Dist. 2004).

As the following analysis demonstrates, those opinions consider product cases from the alternative perspectives of strict liability and negligence. Despite the application of disparate theories, the First District holds that a product may be considered unreasonably dangerous *not* because it is likely to cause injury *but* because it could have been made safer. The Fourth District applies the more traditional analysis in recognizing that a product is not actionable, either by design or manufacture, where its potential for harm is patent. Spanning the conceptual divide is the Supreme Court decision in *Sollami v. Eaton*, 201 Ill. 2d 1 (2002), which applies an objective standard *vis a` vis* the mechanism of injury in determining whether a product is “unreasonably dangerous.”

Background

The touchstone of any legal duty is “anticipation.” Anticipation is an objective concept which is measured by reasonable foreseeability. Thus, a condition, whether found on real estate or in a product, is actionable because the party charged had reason to anticipate that it might cause harm.¹ Thus, the same anticipatory standards apply to all dangerous condition cases to which the following inquiries apply:

Is the peril open and obvious?

Are there warnings or would warnings have made a difference?

Did the plaintiff have actual knowledge of the condition?

Did the person responsible for the condition have reason to anticipate that the plaintiff would act in derogation of his senses and intellect?

The pregnant consideration is whether foresight, measured objectively, as opposed to hindsight born of the event, should control the determination of whether a product is unreasonably dangerous, or in the parlance of negligence, poses an “unreasonable risk of harm.” The following discussion is directed at that threshold inquiry.

Historically, there are two types of product liability cases which proceed on alternative but complimentary theories. Products are defective either by manufacture or design. Strict liability and negligence claims can be and are brought in either instance.

The advantage of “strict liability” is twofold. First, it focuses upon the condition of the product without regard to fault in its design, manufacture or sale. Second, at least prior to the Tort Reform Amendments of 1986, contributory negligence was not a defense to a strict liability action.²

On the other hand, negligence requires proof that the defendant failed to act with ordinary care in designing, manufacturing or selling the product. Both depend upon the circumstances which existed when the product was under the defendant’s control. *Woodill v. Parke Davis*, 79 Ill. 2d 26, 33-36 (1980), and *Pitts v. Basile*, 35 Ill. 2d 49, 54 (1966).

Strict liability in Illinois had its genesis in *Suvada v. White Motor Co.*, 32 Ill. 2d 612 (1965). *Suvada* relied upon Section 402A of the Restatement (Second) of Torts, which recognized a manufacturer or supplier’s liability for damages which were caused by the *unreasonably dangerous* condition of a product. That term has generally been defined as “. . . unsafe when put to a use that is reasonably foreseeable concerning the nature and function of the product.” *Winnett v. Winnett*, 57 Ill. 2d 7 (1974), and *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill. 2d 339 (1969).

In turn, a product was deemed to be “unsafe” within that definition when it was “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.” *Hunt v. Blasius*, 74 Ill. 2d 203, 211-12 (1978), and Restatement (Second) of Torts Section 402A, comment *i*.

The so-called “consumer expectation test” remained the standard for judging whether a product was “unreasonably dangerous” in Illinois until 1980. In *Palmer v. Avco Distributing Corp.*, 82 Ill. 2d 211 (1981), the Supreme Court, while recognizing the consumer expectation rule, added the concept of risk/benefit in design defect cases.

In *Palmer* the court stated that the “unreasonable danger of [a] fertilizer spreader” could be proved in two ways. The first is by the customary consumer expectation method. However, it added as a second “. . . introducing evidence that the Avco spreader could have been designed to prevent a foreseeable harm without hindering its function or increasing its price . . .”

As to the latter, the court cited with approval *Kerns v. Engelke*, 76 Ill. 2d 154, 161-666 (1979), in which it held that in proving a design defect the plaintiff must show the existence of a feasible alternative. Thus, the *Kerns* opinion adopts with approval the following instruction:

There is no duty upon the manufacturer of the [product] to manufacture the product with a different design, if the different design is not feasible. Feasibility includes not only the elements of economy, effectiveness and practicality, but also technological possibilities under the state of the manufacturing art at the time the product was produced. (*Kerns* at 164).

The risk/benefit approach to design defects had little impact until the Supreme Court again considered it in *Lamkin v. Towner*, 138 Ill. 2d 510, 529 (1990). There the court applied both the consumer expectation and risk/benefit analyses to the claim that ordinary window screens were “unreasonably dangerous” because they were not “child-proof.” The court held as a matter of law that the purpose of window screens is to admit light and air, a use which is commonly understood by the general public. Moreover, it specifically found that the plaintiffs had failed to prove how the “window screens’ design could have been altered to create a safer screen. . . or any evidence of the form or feasibility of the alternative screen design.”

The holding in *Lamkin* is significant for what follows in that the opinion clearly submerges the concept of “risk/benefit” to common sense, *i.e.* falling through a lightweight screen, when the court holds:

. . . A non-defective product that presents a danger that the average consumer would recognize does not give rise to strict liability. *See, Hunt*, 74 Ill. 2d 203 (*Lamkin* at 528).

. . . Virtually any manufactured product can cause or be a proximate cause of injury if put to the certain uses or misuses (*Hunt*, 74 Ill. 2d at 211), but strict liability applies only when the product is “dangerous to an extent beyond that which would be contemplated by the ordinary [person]. . . with the ordinary knowledge common to the community as to its characteristics.” *Palmer*, 82 Ill. 2d at 216, quoting Restatement (Second) of Torts, Section 402A, comment *i* (1965); see also *Hunt*, 74 Ill. 2d at 211-12). (*Lamkin* at 529-30).

Nonetheless, the risk/benefit concept remained viable, reaching its critical mass in *Hansen v. Baxter Health Care Corp.*, 198 Ill. 2d 420 (2002). There the court discussed the risk/benefit standard (also known as the Risk/Utility Test) in the context of friction-fit and Luer-lock IV line connectors. The latter was a marketed alternative to the former which failed. Thus, the court was able to readily apply the risk/benefit theory to the product, despite common knowledge in the medical profession that friction-fit connectors were more likely to disconnect than those with the Luer-lock.

Hansen is therefore significant for its recognition that the consumer expectation and risk/benefit concepts are alternative means of proving a defective design. In other words, the harm which resulted may be within the consumer’s reasonable expectation but nonetheless the product may be actionable because a safer design was feasible.

In discussing the risk/benefit alternative, the *Hansen* court specifically adopts the following language from *Lamkin v. Towner*, at 529:

A plaintiff may demonstrate that a product is defective in design, so as to subject a retailer and a manufacturer to strict liability for resulting injuries, in one of two ways: . . . (2) by introducing evidence that the product’s design proximately caused his injury *and the defendant fails to prove that on balance the benefits of the challenged design outweigh the risk of danger inherent in such designs.* (Italics supplied).

In applying the Risk/Utility Test in *Hansen* the court *specifically* reaffirmed its reasoning in *Kerns v. Engelke*, 76 Ill. 2d 154, 162-63 (1979), that a design defect may be proved “. . . by presenting evidence of an alternative design that would have prevented the injury and was feasible in terms of cost, practicality and technological possibility.”

The preceding reliance of the Supreme Court upon the alternative design and feasibility requirement of *Kerns v. Engelke* is significant in understanding what has happened to some design defect cases *after Hansen v. Baxter Health Care Corp.* First, it is important to note the italicized

language in the quotation from *Lamkin v. Towner*, above. Arguably, under the risk/benefit standard all a plaintiff would have to show is that the design of a product “proximately caused his injury.” Upon that showing the burden of going forward with the evidence would shift to the designer to “prove that on balance the benefits of the challenged design outweigh the risk inherent in such designs.”

As the plaintiff’s burden is limited to proximate cause, the pregnant question is that of what must be shown? From *Hansen* it would appear that, at a minimum, the plaintiff would have to satisfy *Kerns v. Engelke* by proving the existence of an alternative design which was “feasible.” However, that logical requisite has been recently eroded to the point where it appears that a plaintiff may be able to prove a strict liability claim, based upon a hypothetical defect, by *simply showing that he was injured by the product*. *Wortel v. Somerset Industries, Inc.*, 331 Ill. App. 3d 895 (1st Dist. 2002).

An even greater rent in the fabric of common law duty principles is found in *Blue v. Environmental Engineering, Inc.*, 345 Ill. App. 3d 455 (1st Dist. 2004), where identical risk/benefit concepts are engrafted upon negligence claims without regard to either the knowledge of the designer/manufacturer at the time the product leaves its control or the definition of “negligence” which embodies an “unreasonable risk of harm.”

Admittedly, the doctrine of strict liability in tort represents social engineering by the judiciary. To encourage the design, manufacture and sale of safer products the courts perceived the need to focus liability upon a product’s condition, as opposed to the conduct which created it. Even so, the definitional requirement of Section 402A involved a defective condition which rendered a product “unreasonably dangerous to the user or consumer.” Comment *i* defined “Unreasonably dangerous” as “. . . dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.”

This was in line with the common understanding that a product would not be “unreasonably dangerous” where its potential for harm was open, apparent and self-evident; or, alternatively, where the product was accompanied by warnings regarding its harmful characteristics. *Fanning v. LeMay*, 38 Ill. 2d 209 (1968), and *Winnett v. Winnett*, 57 Ill. 2d 7, 12 (1974), in which the court, viewing the question from the manufacturer’s perspective stated:

Foreseeability means that which it is *objectively reasonable* to expect, not merely what might conceivably occur.

Thus, the *Winnett* opinion further recites:

. . . While in retrospect it can be asserted that the manufacturer of the forage wagon should have foreseen that the unfortunate event in this case might conceivably occur, we do not believe its occurrence was objectively reasonable to expect. It cannot, in our judgment, fairly be said that a manufacturer should reasonably foresee that a four-year old child will be permitted to approach an operating farm forage wagon or that the child will be permitted to place her fingers in or on the holes of its moving screen. (*Winnett* at 13).

The interrelationship between “objective foreseeability” and the concept of an “unreasonably dangerous” condition served the structure of product liability law well over the years. (See, *Lamkin v. Towner*, *supra*). Obviously, the same reasoning would and did insulate a product supplier from exposure to negligence claims. *Mealey v. Pittman*, 202 Ill. App. 3d 771, 778-79 (3rd Dist. 1990), and *Pitts v. Basile*, 35 Ill. 2d 49, 51-52 (1966).

Even where the risk/benefit analysis was employed, the courts recognized a common sense exception for open and obvious perils in so-called “simple” products. *Scoby v. Vulcan-Hart Corp.*,

211 Ill. App. 3d 106, 110-12 (4th Dist. 1991), and *Lamkin v. Towner, supra*. Where those elements are present only the “consumer-user contemplation test” applies. (*Scoby* at 112).

Wortel and Blue

Unfortunately, the principles of common sense which have thus far prioritized rationality to recovery are under attack. Experience in the evaluation and defense of product liability cases fosters the ineluctable conclusion that there is no product-related injury which, by hindsight, could not have been prevented by altering the condition of the instrumentality.

Thus, it is common for plaintiffs to “start with the problem and work to the answer” in formulating theories. It is equally common that they are able to find experts who are willing to either assist in the initial process or place their stamp of approval on the conceptual result. Given those realities, we can anticipate an ever-expanding number of design defect cases in which the plaintiff will be able to show that he was injured as a result of his exposure to the product and thereafter sit back while the burden of going forward with the evidence shifts to the manufacturer to prove that the product’s benefits or utility exceeded the risk.

Nowhere is that extraordinary potential for exposure more likely than in instances where the risk of injury was so open and obvious or known to the plaintiff that the claim could not proceed under the consumer expectation standard. *Wortel v. Somerset Industries, Inc., supra*, and *Blue v. Environmental Engineering, Inc., supra*, are prime examples of what is and may yet be in product liability cases based respectively upon strict liability in tort and negligence.

In *Wortel* the plaintiff stuck her hand in a pizza dough rolling machine where it was caught and crushed in the rollers. The manufacturer obtained summary judgment on the premise that the “risk” was open and obvious. The parties fought over the consumer expectation test at the trial level but neither made a record regarding the alternative risk/utility test.

While the First District reversed as to the former on grounds that the plaintiff might not reasonably anticipate that her hand would follow the dough into the rollers, it elected to discuss and apply the latter with a vengeance. In doing so it held that the risk/benefit standard is an alternative means of proving that a product was defective. Consequently, the open and apparent nature of the peril, as well as the existence of warnings regarding its potential, while factors to be considered, are not dispositive.

The *Wortel* opinion then goes on to hold that the plaintiff need only prove a causal relationship between the product and his injury before the burden of proving that “. . . the benefit of the challenged design outweighs the risk of danger inherent in such designs” shifts to the defendant. Moreover, the First District further holds that the plaintiff’s burden does not include proof of “alternative design feasibility.”

Therefore, according to *Wortel*, a plaintiff’s work is done by simply: (1) showing that the injury was caused by a product and (2) alleging in some hypothetical form that the injury could have been prevented by an alternative design.

In order to make certain that defendants, even in the most egregious design cases, will not be able to obtain summary judgment the court: (1) finds that “. . . the defendant must show that, by balancing the product’s risk against its utility, *the lack of a defect is plain and undisputable*, (italics supplied), and (2) the “simple nature” exception applies only to products wholly lacking in complexity.

In other words, the fact of placing one’s hand in proximity to the crushing mechanism of a dough rolling machine accounts for little where the machine itself is a complex mechanism.

The procedural and substantive harm which was worked by *Wortel v. Somerset Industries, supra*, was then compounded by another division of the same court in *Blue v. Environmental Engineering, Inc.* There the identical strict liability concepts were carried over to a plaintiff’s *negligence claim* against the manufacturer of a commercial trash compactor.

The plaintiff's strict liability claim was barred by the statute of repose, leaving only a negligence cause of action. His leg was crushed when, without stopping the machine, Blue stuck it into the moving compactor to "push refuse down." As might be expected, he failed to extricate his extremity in a timely fashion and the leg was pulled into the compactor where it was "thereafter hit by the ram approximately three times, resulting in a broken pelvis, leg and foot."

Obviously, Blue understood the potential for injury in sticking his leg into an operating compactor. Thus, the peril was not only "open and obvious" but understood by the claimant. Nonetheless, he received a verdict in excess of \$1,000,000, which was reduced to \$762,000 by his contributory negligence. However, judgment was entered for the defendant based upon the jury's affirmative response to the following special interrogatory:

Was the risk of injury by sticking a foot over or through a gate into a moving compactor open and obvious?

In reversing, the appellate court held that "open and obvious" is not a defense in a negligence case where the plaintiff claims a "defective design." Instead, as with strict liability, a claimant is entitled to proceed on the basis of "risk-utility" which supersedes the "open and obvious doctrine" and further requires *proof by the defendant* that ". . . the benefits of the challenged design outweighed the risk of danger inherent in the design."

As discussed above, negligence principles are wedded by definition to the concept of an "unreasonable risk of harm." (Restatement (Second) Torts § 282). As in premises liability cases, that risk focuses upon what was "objectively foreseeable" to the defendant. However, in contradistinction to real property claims, foreseeability in a product case is tested by what was known or reasonably should have been known at the time the product was designed and manufactured. *Modelski v. Navistar*, 302 Ill. App. 3d 879, 888 (1st Dist. 1999), and *Woodill v. Parke Davis*, 79 Ill. 2d 26, 33-36 (1980).

Bates

The author submits that the court in *Wortel* misapprehended the fundamental basis for liability in any strict liability case and that misapprehension was compounded in *Blue*. A product is actionable *because* of its propensity to injure. It is unreasonably dangerous *because* it is likely to cause harm. The triggering propensity or likelihood derives from the nature of the *risk which it poses*, viewed in the context of the mechanism of injury, and not from the complexity of its operation or the variety of its moving parts which are unrelated to that injury. *Scoby v. Vulcan-Hart Corp.*, 211 Ill. App. 3d 106, 111-12 (4th Dist. 1991).

Thus, the risk/benefit analysis should not be employed where the peril presented is so straightforward and fundamental that to require its correction would be equivalent to making the product foolproof. That traditional and common sense approach was again recognized and applied by the Fourth District in *Bates v. Richland Sales Corp.*, 346 Ill. App. 3d 223 (4th Dist. 2004). There the decedent was using a front-end loader that his employer had modified by removing a factory installed roll bar. As Bates was backing the loader in the process of moving steel pipes into a building, his back came into contact with "low hanging internal structures of the building" and he was crushed against the steering wheel.

It was undisputed that: "If the roll bar had been in place, the diagonal wall-rods would have pressed against the vertical columns of the roll bar, behind the driver's seat, instead of against Bates' back, and he would have escaped injury."

The plaintiff pursued both negligence and strict liability claims, arguing that the loader was defective because the roll bar was easily removed and the supplier should have anticipated that fact

and the risk of injury which it presented. The negligence claims were substantively dismissed on the premise that the hazard of being crushed against fixed internal structures of a building while backing equipment “was an open and obvious danger.”

That rationale was affirmed on appeal with the court specifically holding in the context of the plaintiff’s failure to warn claims:

To be precise, however, the dangerous propensity was not the lack of a roll bar but, rather, the loader’s propensity, by the force of its engine, to crush the human anatomy. Objectively, an ordinary person would know that without some sturdy intervening structure between the driver and the horsepower of that engine, the engine will prevail. Richland had no duty to warn consumers that if they drove the loader toward a guy wire hanging at chest level, without any protective structure between them and the guy wire, they could get hurt. Everyone already knew that, and the warning would have been pointless. *See, Smith v. American Motors Sales Corp.*, 215 Ill. App. 3d 951, 957, 576 N.E.2d 146, 151 (1991). Essentially, plaintiff asks us to impose on Richland a duty to warn against an obvious danger. We decline to do so. *See, Sollami*, 201 Ill. 2d at 7, 772 N.E.2d at 219. (*Bates* at 233).

The plaintiff did not attempt to engraft the “risk benefit” test upon her negligence claims. However, that approach was discussed and rejected in the context of strict liability. *Bates* contended that strict liability theories were alternatively viable under the: (1) consumer expectation approach and (2) “danger-utility test.” Both were urged on a design defect basis in light of the availability of roll bars which were difficult to detach or which had a “lower clearance.” The Fourth District had little difficulty in rejecting each in the process of affirming summary judgment for the supplier.

The consumer expectation theory was refused because the hazard of contacting a fixed object while backing an end loader was patent. In that regard the court held:

Plaintiff contends it was reasonably foreseeable that Grand Prairie would remove the roll bar and, therefore, using the loader without the roll bar was “use[] in [a] *** reasonably foreseeable manner.” *See, Lamkin*, 138 Ill. 2d at 529, 563 N.E.2d at 457. To defeat the motion for summary judgment, however, plaintiff had to come forward with evidence that this reasonably foreseeable manner of using the loader (*i.e.*, without the roll bar) made the loader perform less safely than the ordinary consumer would have expected. *See, Lamkin*, 138 Ill. 2d at 529, 563 N.E.2d at 457. An ordinary consumer would have fully expected that if this powerful machine, without a roll bar, pushed his or her body against an unyielding object, injury would result. (*Bates* at 35).

Of greater significance in the setting of *Wortel* and *Blue* is the Fourth District’s limitation of the “risk-benefit” or “danger-utility” test to cases which involve *concealed hazards and complex products*. In *Bates* the plaintiff contended that the danger was hidden “. . . because an ordinary person thinks of a roll bar as protection against a rollover, as the name implies, and not as protection against backing into a low-hanging object.”

As the court pointed out, the fallacy in that argument was its predicate supposition that the peril involved was rolling over. To the contrary, “. . . the dangerous propensity was not the lack of a roll bar but, rather, the loader’s propensity, by the force of its engine, to crush the human anatomy. Objectively, an ordinary person would know that without some sturdy intervening structure between the driver and the horsepower of that engine, the engine will prevail.” *Bates* at 233.

That common sense consideration led the court to emphasize, as it did in *Scoby, supra*, that application of the “danger-utility” test requires *both*: (1) a concealed “propensity” to injure and (2) a complex mechanism which produces the injury. As conversely expressed:

In *Scoby*, 211 Ill. App. 3d at 109, 569 N.E.2d at 1149, we called the first method, in the passage quoted above, the “consumer-user contemplation test” and the second method the “danger-utility test.” We held that if the dangerous propensity of the product was obvious and the “mechanism involved” was simple, a court should apply the consumer-user contemplation test rather than the danger-utility test. *Scoby*, 211 Ill. App. 3d at 112, 569 N.E.2d at 1151.

The dangerous power of the loader was obvious, and the mechanism of the injury was simple. Therefore, we will apply the consumer-user contemplation test rather than the danger-utility test. *See, Scoby*, 211 Ill. App. 3d at 112, 569 N.E.2d at 1151. (*Bates* at 234).

Bates v. Richland Sales Corp. squarely contradicts the reasoning in *Wortel* and *Blue*. In doing so it rejects the menu approach in patent danger cases by recognizing the “danger-utility test” is objectively subsumed by the consumer’s expectations where common sense predicts an avoidable injury.

Lamkin and Sollami

Consideration of the Supreme Court’s most recent decisions in the patent harm area supports the reasoning in *Scoby* and *Bates*, as opposed to that of *Wortel* and *Blue*. *Lamkin v. Towner, supra*, involved the peril of gravity when relying upon a mesh screen for restraint. However, the screens were not unreasonably dangerous because even the most primitive exercise of reason dictates that screens are not to be relied upon for that purpose. While the risk/benefit alternative received lip service, the controlling analysis was common sense.

That same approach dictated the outcome in *Sollami v. Eaton*, 201 Ill. 2d 1, 7-14 (2002). It is significant to note that while *Sollami* is the Supreme Court’s most recent pronouncement on the subject, and deals squarely with the “open and obvious issue,” its product liability implications are not mentioned in *Blue*,³ and the author submits would have been controlling in *Wortel*, which was decided by a majority two weeks before.

In *Sollami* the plaintiff was injured while “rocket jumping” on a trampoline which was manufactured by the defendant, Icon Health & Fitness Co., d/b/a Jumpking. Completing a rocket jump requires three or four persons to jump simultaneously on the perimeter of a trampoline mat, while one person jumps to the center and is thereby propelled higher than the other jumpers.

The product liability count of the complaint against Jumpking alleged that the trampoline contained a number of manufacturing or design defects which rendered it “not reasonably safe for its intended use.” Specifically:

. . . It was alleged that Jumpking (1) permitted the trampoline, which was designed as a training device, to be used as a backyard toy; (2) failed to warn persons, including [the plaintiff], that only one person was permitted to use the trampoline at a time, (3) failed to verify that when the trampoline was sold, its instructions as to use were attached to the trampoline and could not be removed, and (4) failed to adequately warn persons, including [the plaintiff and the owner], that the trampoline would be used only under the direct supervision of a qualified instructor recommended by the United States Gymnastics Federation.

Jumpking brought a Motion for Summary Judgment on grounds that the danger of jumping on a trampoline is “open and obvious.” The motion was allowed by the trial court but the judgment was reversed on appeal. The Fourth District found that the “thrust capacity” of the trampoline was not obvious and the risks it presents might therefore not be “. . . appreciated or understood by foreseeable purchasers and users.”⁴

The Supreme Court accepted the case, and in so doing made a definitive analysis of the “open and obvious danger rule” as it applies in product liability cases. In that analysis the court recognized that the doctrine is simply the reverse side of the “duty to warn.” Both focus on obviating the potential danger of a product through user awareness.

Thus, a product is not unreasonably dangerous where the peril is known to the user, either by application of his senses or information conveyed through a warning. In these respects the court held:

To recover in a product liability action, a plaintiff must plead and prove that the injury resulted from a condition of the product, that the condition was an unreasonably dangerous one, and that the condition existed at the time the product left the manufacturer’s control. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525 540 (1996); *Korando v. Uniroyal Goodrich Tire Co.*, 159 Ill. 2d 335, 343 (1994). A product may be found unreasonably dangerous by virtue of a physical flaw, a design defect, or a failure of the manufacturer to warn of the danger or instruct on the proper use of the product as to which the average consumer would not be aware. *Renfro v. Allied Industrial Equipment Corp.*, 155 Ill. App. 3d 140, 155 (1987). A manufacturer has a duty to warn where the product possesses dangerous propensities and there is unequal knowledge with respect to the risk of harm, and the manufacturer, possessed of such knowledge, knows or should know that harm may occur absent a warning. *Goldman v. Walco Tool & Engineering Co.*, 243 Ill. App. 3d 981, 992 (1993); *Smith v. American Motors Sales Corp.*, 215 Ill. App. 3d 951, 957 (1991). No duty to warn exists where the danger is apparent or open and obvious.

Of equal, if not paramount significance is the court’s recognition that the determination of whether the condition of a product is actionable, *i.e.* whether it is unreasonably dangerous in the sense of a likelihood to injure, requires an “objective analysis.” In that context the issue of a duty to warn becomes one of law. As the court holds:

It is settled law that a manufacturer has no duty to warn of “those inherent propensities of a product which are obvious to all who come in contact with the product.” *McColgan v. Environmental Control Systems, Inc.*, 212 Ill. App. 3d 696, 700 (1991). We see no reason to depart from this rule.

No duty to warn arises when the risk of harm is apparent to the foreseeable user, regardless of any superior knowledge on the part of the manufacturer.

Sollami stands for the proposition that the *sine qua non* for liability in a products case is an *unreasonably dangerous product*. Whether the product falls within that category is determined objectively by the likelihood that it will injure an “ordinary person.” Absent that likelihood it makes no difference that additional guards or components might have made it safer. As otherwise expressed, where the mechanism of the injury which took place was a result of a patent condition of a product, the risk/benefit analysis has no role as *a priori* the product is not unreasonably dangerous.

Applying *Sollami*, *Scoby* and *Bates* to *Wortel* and *Blue* requires affirmance of the trial court in the latter cases and rejection of the risk/benefit reasoning of the appellate court. In *Blue* the hazard of placing one’s leg beneath the moving ram of a compactor is so self-evident as to defy contradiction. The same is true in *Wortel* where the plaintiff interjected her hand into the path of the rollers of a “dough rolling machine.” In both instances the *mechanism of injury* was simple and the hazard of disregarding it was apparent.

Conclusion

The preceding analysis is lengthy because of the necessity of describing the current theoretical conflict in its evolutionary context. However, the conflict is real and the problem which it poses is potentially acute. Focus should remain upon the nature of the product, including any warnings, in the context of the injury which occurred. Those primary elements should control the analysis as opposed to the myopic menu approach which limits consideration to the theory which is chosen by the plaintiff.

In that regard, the trial and appellate courts *must* be shown that: (1) the risk/benefit doctrine applies only in strict liability cases and (2) that alternative should be considered only where the mechanism of injury is sufficiently complex to merit predesign consideration by the defendant. Moreover, in the latter instance the burden of going forward with the evidence should not shift unless and until the plaintiff has proved the feasibility of an alternative design under the standard of *Kerns v. Engelke, supra*.

Endnotes

- ¹ See Sections 343(a) and comment *i* to Section 402(A) of the Restatement (Second) of Torts.
- ² The Tort Reform Amendments of 1986 engrafted the common denominator of “fault” as a comparative defense in negligence and “product liability” cases. The jury is still “out” on the issue of whether the statute contemplates contributory negligence as a defense to strict liability. *Freislinger v. Emro Propane Co.*, 99 F.3d 1412 (7 Cir. 1996).
- ³ *Sollami* is discussed in *Blue* in the context of premises liability and Section 343A of the Restatement (Second) of Torts.
- ⁴ 319 Ill. App. 3d at 619.

ABOUT THE AUTHOR: David B. Mueller is a partner in the Peoria firm of *Cassidy & Mueller*. His practice is concentrated in the area of products liability, construction injury litigation, and insurance coverage. He received his undergraduate degree from the University of Oklahoma and graduated from the University of Michigan Law School in 1966. He is a past co-chair of the Supreme Court Committee to revise the rules of discovery, 1983-1993 and presently serves as an advisory member of the Discovery Rules Committee of the Illinois Judicial Conference. He was member of the Illinois Supreme Court Committee on jury instructions in civil cases and participated in drafting the products liability portions of the Tort Reform Act. He is the author of a number of articles regarding procedural and substantive aspects of civil litigation. He was defense counsel in *Prewin v. Caterpillar Tractor Co.*, 108 Ill. 2d 141 (1985), on the issue of comparative fault under the Structural Work Act.