MIKOLAJCZYK V. FORD MOTOR COMPANY

A SYNTHESIS OF APPROACHES IN DESIGN DEFECT CASES

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Introduction

In recent years the Illinois Supreme Court has been confronted by a series of product liability cases in which it has been called upon to apply the consumer expectation rule, the risk-utility doctrine or both in determining whether the design of a product made it unreasonably dangerous. In some it has held that neither applies. *Sollami v. Eaton*, 201 Ill. 2d 1, 772 N.E.2d 215 (2002), and *Lamkin v. Towner*, 138 Ill. 2d 510, 563 N.E.2d 449 (1990). Other cases have supported recovery under both concepts. *Hansen v. Baxter Healthcare Corp.*, 198 Ill. 2d 420, 764 N.E.2d 35 (2002). However, for the most part it has been an either/or proposition. *Anderson v. Hyster Co.*, 74 Ill. 2d 364, 385 N.E.2d 690 (1979), and *Palmer v. Avco Distrib. Corp.*, 82 Ill. 2d 211, 412 N.E.2d 959 (1980). That is to say, either the consumer expectation test or the risk-utility approach is applied and therefore the other is not considered. Paradoxically, plaintiffs prefer to use consumer expectation in cases where the product is complex and risk-utility where the product is simple. Conversely, the defendant wants a simple approach for simple products and a complex approach for complex products.

In *Mikolajczyk v. Ford Motor Co.*, No. 104983, 2008 WL 4603565 (Ill. Oct. 17, 2008), the Illinois Supreme Court rejected the either/or menu approach. Regardless of the theory selected by the plaintiff, the defendant is allowed to try its case based upon the other. Both parties are then entitled to an integrated instruction or instructions which define the elements of the case based upon a combination of the two concepts. In reaching this synthesis the court discussed the history and evolution of product liability law in Illinois from *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965), to the present. That discussion is a compelling exposition of the common law process. It commences with fundamental strict liability principles and progresses through the signal decisions which have shaped the law in design defect cases, thereby permitting an understanding of where the law is now and how it got there.

The decision in *Mikolajczyk v. Ford Motor Co.* also lays to rest a number of contentions which have vexed the courts for years. These include whether strict liability requires a product which is "unreasonably dangerous" or turns upon a condition which renders the product "not reasonably safe". The opinion also resolves the question of whether there is a shift in the burden of going forward with the evidence under the risk-utility test where a plaintiff is able to prove that a condition of the product was a proximate cause of his injury. Finally, the court decides how much of the Restatement (Third) of Torts it is willing to incorporate into Illinois law.

This article parallels the evolutionary analysis of *Mikolajczyk v. Ford Motor Co.* in discussing the theoretical underpinnings of product liability law. In doing so it points out the doctrinal conflicts which the court considers and resolves in reaching its watershed result.

The Origin and Evolution of Strict Product Liability Law in Illinois

Overview of the Problem

The evolution of Illinois product liability law in design defect cases from the single consumer expectation standard to a blended risk/utility or risk/benefit rule has been gradual and incremental. Strict liability had its genesis in *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (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, 310 N.E.2d 1 (1974), and *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill. 2d 339, 247 N.E.2d 401 (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." *Lamkin v. Towner*, 138 Ill. 2d 510, 528, 563 N.E.2d 449, 457 (1990); *see also Hunt v. Blasius*, 74 Ill. 2d 203, 211-12, 384 N.E.2d 368, 372 (1978), and Restatement (Second) of Torts Section 402A, comment *i*. Paralleling Section 402A, Pattern Jury Instruction 400.06 provides:

> 400.06. When I use the expression "unreasonably dangerous" in these instructions, I mean unsafe when put to a use that is reasonably foreseeable considering the nature and function of the [product, e.g. hammer]. Illinois Pattern Jury Instructions, 2006 Ed. 400.06.

Consistent with that instruction it is well-recognized that a plaintiff in a strict liability case must plead and prove that: (1) he was injured by a condition of the product; (2) the condition was unreasonably dangerous, and (3) the condition existed at the time the product left the manufacturer's or supplier's control. *Sollami v. Eaton*, 201 Ill. 2d 1, 7, 772 N.E.2d 215, 219 (2002). It is also well-understood that actionable conditions are of three varieties: (1) those which result from the manufacturing process, known as manufacturing defects; (2) defects in the design of the product, and (3) dangers which arise from a lack of warnings or inadequate instructions. *Sollami*, 201 Ill. 2d at 7.

Of the three, the most difficult to fit within the "consumer expectation test" is the design defect case. From the plaintiff's perspective recovery would be seriously circumscribed in cases where the potential for injury is self-evident from the nature of the product itself. In those cases the apparent hazard would align with the consumer's reasonable expectations regarding its use. Simply stated, a consuming plaintiff could not claim surprise when he is injured by an open and obvious hazard which is inherent in the nature and function of the product. At the same time manufacturers and vendors had equivalent problems in defending against concealed perils in complex products. In those cases an injured plaintiff is easily able to demonstrate surprise that a seemingly innocuous product caused his injury.

These antipodal problems caused plaintiffs and defendants to look for an alternative standard upon which to prove and defend product design cases. The result was the risk/utility or risk/benefit rule which evaluates a product's safety in the context of: (1) conformity with industry design standards; (2) compliance with governmental design criteria, and (3) the

existence and feasibility of alternative designs which were available at the time it was manufactured. *Anderson v. Hyster Co.*, 74 Ill. 2d 364, 368, 385 N.E.2d 690, 692 (1979). Of these the availability and feasibility of alternative designs is by far the most litigated component, and that by which risk-utility or risk benefit is defined. Plaintiffs prefer alternative designs which would have avoided the risk in question. Defendants counter that the suggested alternatives: (1) would not have prevented the injury; (2) would have created other hazards, or (3) would have eliminated the benefit or utility of the product by increasing its cost, compromising its practicability or both. *Kerns v. Engelke*, 76 Ill. 2d 154, 162-63, 390 N.E.2d 859, 864 (1979). Conflicting evidence on both sides requires the triers of fact to balance and compare the risks and benefits of the existing design to those of the alternative design.

The risk benefit rule cuts both ways. It helps plaintiffs in cases where the hazard is obvious and favors defendants where a product's potential for injury is concealed. Simply stated, plaintiffs want to apply the consumer expectation test to complex products and the risk benefit rule to simple products. Defendants argue that the risk benefit rule is required to test the safety of complex products but simple products should be judged by consumer expectations.

Obvious problems exist when one side, for obvious reasons, wants to apply the "consumer expectation test" while the other asserts risk/utility. Are they equally available alternatives, in which case the plaintiff has his choice and prevails? Historically, that would appear more likely as a plaintiff generally has the right to chose, formulate and prove his claim. *Reed v. Wal-Mart Stores, Inc.*, 298 Ill. App. 3d 712, 717-18, 700 N.E.2d 212, 215-16 (4th Dist. 1998) and *Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill. 2d 45, 59, 879 N.E.2d 910, 919 (2007). On the other hand, a defendant also has the right to assert any theory which would defeat a claim. *Dillon v. Evanston Hosp.,* 199 Ill. 2d 483, 505, 771 N.E.2d 357, 371 (2002), and *Snelson v. Kamm*, 204 Ill. 2d 1, 27, 787 N.E.2d 796, 810 (2003). The conflict between those interests shaped the development of product liability law in design cases from the time that the risk-utility rule was first recognized until it was resolved in *Mikolajczyk v. Ford Motor Co.*

The Gathering Storm
(1979-2002)

The so-called "consumer expectation test" remained the sole standard for judging whether a product was in an "unreasonably dangerous" condition until 1979. That year the supreme court decided *Anderson v. Hyster Co.*, 74 Ill. 2d 364, 368, 385 N.E.2d 690, 692 (1979), in which it held that a plaintiff may prove that a design defect made a product unreasonably dangerous ". . . by evidence of the availability and feasibility of alternative designs at the time of its manufacture, or that the design did not conform with design standards of the industry, design guidelines provided by an authoritative voluntary association, or design criteria set by legislation or governmental regulation." Apart from non-conformity to existing standards, the court recognized the evidentiary significance of an alternative design or designs which would eliminate the danger which caused injury. *Anderson* was followed the same year by *Kerns v. Engelke*, 76 Ill. 2d 154, 162-63, 390 N.E.2d 859, 864 (1979), in which the court recognized the fundamental elements which are required to show that an alternative design is feasible. It did so by approving the following instruction:

> There is no duty upon the manufacturer of the forage blower to manufacture the product with a different design, if the different design is not feasible. Feasibility

> includes not only elements of economy, effectiveness and practicality, but also technological possibilities under the state of the manufacturing art at the time the product was produced.

In *Palmer v. Avco Distrib. Corp.*, 82 Ill. 2d 211, 412 N.E.2d 959 (1980), the court recognized the availability of *both* the consumer expectation rule and the risk/utility concept as alternative means of proving that a product was unreasonably dangerous due to a design defect. There it stated that "the unreasonable danger of [a] fertilizer spreader" could be proved in two ways. The first is by the customary consumer expectation methods. 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. . ."

The risk/benefit approach to design defects had little impact until it was next considered in *Lamkin v. Towner*, 138 Ill. 2d 510, 529, 563 N.E.2d 449, 457 (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 opinion in *Lamkin* is also significant for its subordination of "risk/benefit" concept to common sense, *i.e.* falling through a lightweight screen, when the court finds:

> . . . 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*, 138 Ill. 2d at 528, and
>
> . . .Virtually any manufactured product can cause or be a proximate cause of injury if put 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/utility concept remained viable, reaching its critical mass in *Hansen v. Baxter Healthcare Corp.*, 198 Ill. 2d 420, 764 N.E.2d 35 (2002). There the court discussed it 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.[1]

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[1] Pregnant but unresolved in *Hansen* is the learned intermediary rule which measures the safety of medical or pharmaceutical products by the knowledge of the physician who prescribes or orders it. *See Kirk v. Michael Reese Hosp. & Medical Ctr.*, 275 Ill.App.3d 170, 655 N.E.2d 933 (1st Dist. 1995) *appeal denied* 165 Ill.2d 552, 662 N.E.2d 425 (Ill. Jan 31, 1996), and Mueller and Cassidy, Evolution Of The Learned Intermediary Doctrine in Illinois – Doctor Knows Best *Mostly*, IDC Quarterly Vol. 12 No. 3.

Hansen is 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). *Hansen*, 198 Ill. 2d at 433.

The *Hansen* court also *specifically* reaffirmed its reasoning in *Kerns v. Engelke*, 76 Ill. 2d 154, 162-63, 390 N.E.2d 859, 864 (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." *Hansen*, 198 Ill. 2d at 436.

Hansen v. Baxter Healthcare Corp. was a watershed decision which set the stage for the ensuing conflict between the consumer expectation test and the risk/utility standard. It raised the following issues which were hotly debated and finally decided in the trilogy of cases which culminated in *Mikolajczyk v. Ford Motor Co.* Those issues are:

> Whether the defining standard for a defective product is an "unreasonably dangerous" condition or a condition which renders it "not reasonably safe"?
>
> Whether Pattern Jury Instruction 400.06 *supra* is proper in product liability design cases which are tried on a risk/utility basis?
>
> Whether the consumer expectation and risk/utility tests are different legal theories or are simply alternative methods of proof for the same theory?
>
> Whether a plaintiff is entitled to control the proof in a design case which has components of both standards?
>
> Whether both standards can be applied in the same case?
>
> Whether the consumer expectation test controls in cases where the product is simple and the potential for injury is patent?
>
> Whether the risk/utility standard has subsumed the consumer expectation rule in product design cases which involve "complex" products.
>
> The extent to which Illinois is going to follow Section 2(b) of the Restatement (Third) of Torts? That section eliminates the consumer expectation concept as an alternative basis for liability in product design cases. In doing so it relies solely on risk-utility considerations stating:

> A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product: . . .
>
> (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe; . . .

Adoption of the Restatement's exclusive standard would inhibit plaintiffs and favor defendants in complex product cases. On the other hand, elimination of consumer expectation as a defense in simple product cases would benefit plaintiffs.

Battle is Joined

Blue v. Environmental Engineering,
Calles v. Scripto-Tokai and *Mikolajczyk v.Ford Motor Co.*

Following *Baxter v. Healthcare Corp.*, s*upra*, it was evident that a plaintiff in a design defect case could prevail by proving that the contested product was unreasonably dangerous under either the consumer expectation or risk-utility test. Moreover, those were apparently alternative theories from which a plaintiff could chose, thereby controlling the proof in a case. Resisting those assumptions, manufacturers and suppliers argued that each standard had a separate and distinct application, depending upon the nature of the product. Simple products were to be tested by consumer expectations, whereas complex products were to be judged under the risk-utility standard. These conflicting views, and the strict liability concepts which they embody, were the subject of *Blue v. Environmental Engineering*, *Calles v. Scripto-Tokai*, and *Mikolajczyk v. Ford Motor Co.*

Blue v. Environmental Engineering

In *Blue* 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 a moving compactor to "push refuse down". He failed to extricate the limb in timely fashion and his extremity 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 found that "open and obvious" is not a defense in a negligence case where the plaintiff claims a "defective design." Instead, as with strict liability, the court held that 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." *Blue v. Envtl. Eng'g Inc.*, 215 Ill. 2d 78, 87, 828 N.E.2d 1128, 1136 (2005).

The Illinois Supreme Court accepted the case, and decided in a plurality opinion that the risk-utility test did not apply to the plaintiff's negligent design claim. However, in reaching that decision the court considered the risk-utility rule as it is applied in strict liability cases, including a discussion of Section 2 of the Restatement (Third) of Torts. That analysis, without objection from the concurring justices, included rejection of the premise that the burden of going forward with the evidence shifts in a risk-utility case once the plaintiff proves that his injury was proximately caused by a condition of the product. Addressing comment *f* of Section 2 of the Restatement (Third) of Torts the plurality stated that in a design defect case a plaintiff must introduce evidence of a technologically feasible and practical alternative design that would have reduced or prevented the harm. Once that showing is made, the question of whether the product was unreasonably dangerous because of its design is a question for the trier of fact to resolve. *Blue*, 215 Ill. 2d at 100.

Nor did the court in *Blue* reject the consumer expectation test as an alternative means of proving a design defect. Therefore, while *Blue* gave intimations of the court's thinking regarding the use of consumer expectation and risk-utility concepts in strict liability cases, the precedential effect of that reasoning awaited subsequent decisions.

Calles v. Scripto-Tokai

The court in *Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d 247, 864 N.E.2d 249 (2007), directly addressed the use of both consumer expectation and risk-utility tests in design defect cases involving "simple products." In doing so it defined the term "simple product" and specifically approved application of the risk-utility test to those products, even in instances where there was no legal liability under the consumer expectation standard.

The product in *Calles* was an Aim N Flame utility lighter which was manufactured and distributed by Scripto. It was ignited by pulling a trigger after an "ON/OFF" switch was slid to the on position. In the absence of the adult purchaser her three-year old daughter used it to start a fire which resulted in the death of her sister from smoke inhalation. A complaint was filed alleging that the Aim N Flame was defectively designed and unreasonably dangerous because it did not contain a child-resistant safety device. The pleading further alleged that Scripto was negligent in the same respects.

Scripto moved for summary judgment based upon the consumer expectation test. It contended that the product was "simple" and performed within the ordinary expectations which a consumer would have for a product of that type. The defendant also sought summary judgment on the negligence claim because the potential for a fire related injury from the Aim N Flame was open and obvious. The plaintiff contended that safety of the lighter should be judged by the risk-utility test, and in any event that a reasonable consumer would not expect that the Aim N Flame

would be operated by a three year old child. Interwoven in these contentions were disagreements regarding the definition of the so-called "simple product," the extent to which the "simple product" rule applied, and the role of "open and obvious" hazards in both strict liability and negligence cases.

In support of its motion, Scripto offered the deposition testimony of the decedent's mother in which she admitted that she was aware of the risks and dangers presented by lighters in the hands of children. She also testified that for that reason she kept the Aim N Flame "on the top shelf of her kitchen cabinet." The plaintiff countered with affidavits from a series of experts to the effect that child resistant safety devices were available and could have been economically made a part of the lighter at the time it was manufactured. One expert opined that had the suggested safety device been incorporated into the product as a part of its original design "the cost would have been negligible."

The trial court entered summary judgment in favor of Scripto and against the plaintiff. It found that all claims must fall because these defendants "neither owed nor breached any duty imposed upon them by law." The appellate court reversed in pertinent part. It held that the lighter "does not qualify as the kind of especially simple device for which the result of risk-utility balancing is too obvious for trial." *Calles v. Scripto-Tokai Corp.*, 358 Ill. App. 3d 975, 983, 832 N.E.2d 409, 416 (1st Dist. 2005). It also reversed the summary judgment which had been entered in favor of Scripto on the negligent design claims. The supreme court accepted the case and in doing so undertook *inter alia* to evaluate the so-called "simple product" exception to the risk-utility standard.

In affirming, the court first analyzed and defined the consumer expectation standard on the purely objective basis of what an average reasonable consumer would expect from the specific product. The court rejected the implications of a subjective rule which would turn on the purchaser's knowledge and anticipations. This distinction between the actual buyer's subjective understanding and knowledge which would be objectively imputed to a reasonable consumer has profound implications in distinguishing the consumer expectation test from the so-called "open and obvious" defense. The former focuses upon the expectations of the ordinary purchaser while the latter considers what a reasonable manufacturer would anticipate from the average user.

The *Calles* court held that in order to prevail under the consumer expectation test a plaintiff must prove that the product failed to perform as an ordinary customer would expect when used in an intended or reasonably foreseeable manner. From that definition it concluded with respect to the Aim N Flame that ". . . the ordinary consumer would expect that, when the trigger is pulled, a flame would be produced." *Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d 247, 257 N.E.2d 249, 256 (2007). It also determined that the ordinary consumer of a lighter would be an adult. Finally, it concluded that an adult purchaser of the product would expect that it would produce a flame when used by a child. Therefore, the court held:

> Under the facts of this case, the Aim N Flame performed as an ordinary consumer would expect – it produced a flame when used in a reasonably foreseeable manner, *i.e.*, by a child. This leads to the inescapable conclusion that the ordinary consumer's expectations were fulfilled. In other words, the Aim N Flame did not fail to perform as an ordinary consumer would expect when used in a reasonably foreseeable manner. Thus, as a matter of law, no fact finder could conclude that the Aim N Flame was unreasonably dangerous under the consumer expectation

> test. Therefore, Calles cannot prevail under this theory. *Calles*, 224 Ill. 2d at 258-59.

In reaching this result the court focused upon the nature of the product and its anticipated and foreseeable uses. The function of a lighter is to start fires. It is purchased for that purpose. Moreover, the court held that a consumer would reasonably anticipate that use by a child. From this reasoning it is evident that the consumer expectation test involves consideration of why a product is purchased by the class of consumers to which it is marketed.

The court then went on to consider application of the risk-utility test which it defined in the following manner:

> Under the risk-utility test, a plaintiff may prevail in a strict liability design-defect case if he or she demonstrates that the magnitude of the danger outweighs the utility of the products as designed. *Lamkin*, 138 Ill. 2d at 529, 150 Ill.Dec. 562, 563 N.E.2d 449. Stated differently, "[t]he utility of the design must therefore be weighed against the risk of harm created" and "[i]f the likelihood and gravity of harm outweighs the benefits and utilities of the product, the product is unreasonably dangerous." 63A Am.Jur.2nd *Products Liability* § 978, at 146-47 (1997). *Calles*, 224 Ill. 2d at 259.

Scripto argued that the risk-utility test did not apply because of the "simple product" exception to that rule. In making that argument, it relied upon the decision in *Scoby v. Vulcan-Heart Corp.*, 211 Ill. App. 3d 106, 569 N.E.2d 1147 (4th Dist. 1991). There a restaurant kitchen employee slipped and fell, causing his arm to become submerged in hot oil which was contained in a deep fat fryer. He sued the manufacturer of the fryer on a design defect basis, relying upon the risk-utility test. The appellate court rejected application of the risk-utility test to the deep fat fryer on the following grounds: (1) the risk of injury was open and obvious and (2) the simple nature of the mechanism, *i.e.*, boiling oil in an open container. Thereafter, a number of courts considered the simple product exception to the risk-utility test in the context of various products, with some applying the exception while others rejected it. *Bates v. Richland Sales Corp.*, 346 Ill. App. 3d 223, 803 N.E.2d 977 (4th Dist. 2004), *accepted*, *Miller v. Rinker Boat Co.*, 352 Ill. App. 3d 644, 815 N.E.2d 1219 (4th Dist. 2004), and *Wortel v. Somerset Industries, Inc.*, 331 Ill. App. 3d 895, 770 N.E.2d 1211 (1st Dist. 2002), *rejected.*

In considering the so-called "simple" product which is fraught with patent peril the court found that the open and obvious nature of any hazards which are inherent in a product is a factor which has a bearing upon *both* consumer expectations and the balancing which is required in assessing the risks inherent in a product versus its benefit or utility. On a sliding scale the patency of a risk is given a higher priority in the context of consumer expectations than it is accorded in weighing the risks of a product as compared to its benefits. Thus, where a product is simple such as the deep fat fryer in *Scoby v. Vulcan-Heart Corp.*, 211 Ill. App. 3d 106, 569 N.E.2d 1147 (4th Dist.1991), and the lighter in *Scripto*, that danger is within the consumer's contemplation, particularly where it is inherent in the product's function, *i.e.*, boiling oil and starting fires. However, that anticipation has less significance where the exposure could be overcome or mitigated by a feasible alternative design.

Applying perceived public policy, the *Scripto* court found that a *per se* bar of liability in products with open and obvious hazards would discourage manufacturers from making them safer. Inherent in that reasoning is the assumption that potential exposure for damages drives a manufacturer's consideration of alternative designs. In that respect the opinion states:

> Policy reasons also support rejection of a *per se* rule except in simple products with open and obvious dangers from analysis under the risk-utility test. Adoption of such a rule would essentially absolve manufacturers from liability in certain situations even though there may be a reasonable and feasible alternative design available that would make a product safer, but which the manufacturer declines to incorporate because it knows it will not be held liable. *This would discourage product improvements that could easily and cost-effectively alleviate the dangers of a product*. . . (Italics supplied). *Scripto*, 224 Ill. 2d at 262-63.

Armed with the rationale that product liability law has as its goal the design of ever-safer products, the *Scripto* court recognized that the risk-utility test applies to even the simplest products which have hazards that are self-evident. In that regard the opinion recognizes a number of factors which are applicable to the balance which must be struck between the benefits for which a product is purchased and the risks which it poses to the purchaser and third parties. Those factors start with recognition of design criteria set by government regulation and industry standards (*Anderson v. Hyster Co.*, 74 Ill. 2d 364, 368, 385 N.E.2d 690, 692 (1979), and *Rucker v. Norfolk & W. Ry. Co.*, 77 Ill. 2d 434, 436-39, 396 N.E.2d 534, 535-37 (1979)) and the feasibility of alternative designs, including the cost of those designs (*Kerns v. Engelke*, 76 Ill. 2d 154, 162-63, 390 N.E.2d 859, 864 (1979)), as well as the patency of any risk which is inherent in the product. (*Blue v. Envtl Eng'g, Inc.*, 215 Ill. 2d 78, 103, 828 N.E.2d 1128, 1145 (2005)). The court then went on to add the following factors from J. Wade, *On The Nature Of Strict Tort Liability For Products*, 44 MISS. L.J. 825, 837-38 (1973):

> (1) The usefulness and desirability of the product-its utility to the user and to the public as a whole.
>
> (2) The safety aspects of the product-the likelihood that it will cause injury, and the probable seriousness of the injury.
>
> (3) The availability of a substitute product which would meet the same need and not be as unsafe.
>
> (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expense to maintain its utility.
>
> (5) The user's ability to avoid danger by the exercise of care in the use of the product.
>
> (6) The user's anticipated awareness of the dangers inherent in the product and their availability, because of general public knowledge of the obvious

condition of the product, or of the existence of suitable warnings or instruction.

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance. *Calles*, 224 Ill. 2d at 264-65.

To these the court added as potentially relevant "(1) the appearance and aesthetic attractiveness of the product; (2) its utility for multiple uses; (3) the convenience and extent of its use, especially in light of the period of time it could be used without harm resulting from the product; and (4) the collateral safety of a feature other than the one that harmed the plaintiff. American Law of Product Liability 3d § 28:19, at 28-30 through 28-31 (1997)." *Calles* 224 Ill. 2d at 266.

Whether all or only certain of these factors apply in a given case is for the court to determine. It is up to the parties to decide which factors are relevant. The court will then select those which are admissible and, upon completion of the proof, whether ". . . the case is a proper one to submit to the jury." *Id.* Thereafter it is up to the triers of fact to evaluate and weigh those factors in reaching its decision.

Applying the preceding flexible risk-utility standard to the Scripto lighter, the court held that the plaintiff had presented proof of sufficient relevant factors to permit the case to go to the jury on the strict liability claims. It reached the same result on the negligence claims. In that respect it found that the crucial consideration ". . . is whether the manufacturer exercised reasonable care in the design of the product." *Scripto*, 224 Ill. 2d at 270. From the opinion it is evident that the court believed that the same factors apply to what a manufacturer should reasonably foresee as bear upon the utility of a product versus its benefits. Among these is the "open and obvious nature of any danger which is inherent in the product." As the court held: "The open and obvious nature of a danger is just one factor in evaluating whether a manufacturer acted reasonably in designing its product. It is not dispositive." *Calles*, 224 Ill. 2d at 271.

Calles v. Scripto-Tokai Corp. resolved the question of whether the risk-utility analysis applies to simple products, particularly those which have a self-evident potential for injury. In strict tort liability design cases the risk-utility test clearly applies, carrying with it a wide variety of potentially relevant factors. Nonetheless, there may still be some products which by their very nature cannot be considered "unreasonably dangerous", *e.g.*, rubber-soled shoes, *Fanning v. LeMay*, 38 Ill. 2d 209, 230 N.E.2d 182 (1967), the overhang of commercial trailers, *Mieher v. Brown*, 54 Ill. 2d 539, 301 N.E.2d 307 (1973), and trampolines, *Sollami v. Eaton*, 201 Ill. 2d 1, 7, 772 N.E.2d 215 (2002). *Scripto* also casts some doubt upon the plurality opinion in *Blue v. Envtl Eng'g, Inc.*, 215 Ill. 2d 78, 103, 828 N.E.2d 1128, 1145 (2005), as it relates to the application of risk-utility principles in negligent product design cases. While *not* specifically applying the rule to the negligence claims in *Scripto*, the court strongly implied that the same evidentiary criteria may be considered in the context of what a reasonably careful manufacturer would consider in designing a product.

Mikolajczyk v. Ford Motor Co.

Mikolajczyk v. Ford Motor Co., No. 104983, 2008 WL 4603565 (Ill. Oct. 17, 2008), is the obverse side of the risk-utility coin. There the court was called upon to determine whether the consumer expectation test applies to the design of complex products and, if so, whether the

plaintiff can choose the standard upon which the case is to be tried. In *Mikolajczyk* the driver of a Ford Escort was killed when he was struck from behind with such force that his seat back collapsed propelling him rearward where he struck his head on the back seat of the car. His widow, as special administrator, sued Ford on the theory that the design of the seat was unreasonably dangerous. At trial the plaintiff relied on *Hansen v. Baxter Healthcare Corp.*, 198 Ill. 2d 420, 764 N.E.2d 35 (2002), in electing to try the case on the consumer expectation standard. Ford argued that following *Calles v. Scripto-Tokai Corp.*, risk-utility is the sole and exclusive test to determine whether a product design is unreasonably dangerous.

During the trial proof was offered and received on both theories. At the conclusion of the evidence the jury was given the standard pattern instructions in IPI Civil Nos. 400.01.01, 400.02 and 400.06 which apply to defective manufacture and warning as well as defective design cases. In doing so the trial court rejected Ford's non-pattern instruction that was directed at ". . . whether the foreseeable risks of harm of the design outweighed its benefits, and whether the adoption of a feasible alternative design would have avoided or reduced the risks." *Mikolajczyk*, 2008 WL 4603565, at *2. The appellate court rejected the defendant's arguments and affirmed, after remitting a portion of the damages. That set the stage for the supreme court to decide whether the defendant in a design defect case can offer risk-utility evidence when the plaintiff has elected to proceed under the consumer expectation test, and, if so, how the jury should be instructed.

Responding to those questions the court first rejected the manufacturer's contention that the risk-utility standard must be applied exclusively in complex product cases. In doing so the court also refused to apply the restrictive approach which is required by subsection 2(b) of the Restatement (Third) of Torts. Instead, it reaffirmed the alternative approach which was applied in *Hansen v. Baxter Healthcare Corp.*, *supra*. The court also approved the continuing use of Illinois Pattern Jury Instruction 400.06 and its reliance upon the term "unreasonably dangerous" to describe a defective product. On the latter point the choice was between "unreasonably dangerous," meaning that the product is "too dangerous," as opposed to the term "not reasonably safe" which means that it is "not safe enough."

The court then went on to reject the plaintiff's contention that she was entitled to choose between the consumer expectation "theory" and the risk-utility "theory" in trying her case. In rejecting that menu approach the court first distinguished between "*theories of liability*" and "*methods of proof.*" It held that in strict product liability cases there are three theories: "manufacturing defect, design defect, and failure to warn." *Mikolajczyk*, 2008 WL 4603565, at *17. The consumer expectation test and the risk-utility test are simply alternative "*methods of proof.*" Each party is entitled to use the "*method of proof*" which it believes will demonstrate that a product is or is not "unreasonably dangerous" within the meaning of that term in Pattern Jury Instruction 400.06. Thus, a plaintiff may limit its proof in a complex product design case to what a consumer would expect. At the same time the manufacturer is entitled to weigh the risks inherent in a product against its utility or benefit, using the various factors which were approved in *Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d at 264-65.

The obvious question is how those divergent "*methods of proof*" can be reconciled where the plaintiff is going in one direction and the defendant is proceeding in another. Can the plaintiff win on his "*method of proof*" and the defendant prevail on its "*method of proof*"? What would happen if the jury was instructed on both standards and inconsistent answers resulted? Responding to those questions, the court posited four possible outcomes:

(1) The product could be found unreasonably dangerous under both tests and judgment would be for the plaintiff (*See Hansen v. Baxter Healthcare Corp.*, 198 Ill. 2d 420 (2002));

(2) The product could be exonerated under both standards and judgment would be for the manufacturer (*See Lampkin*, 138 Ill. 2d 510 (1997));

(3) The product could be found unreasonably dangerous under the risk-utility test but not under the consumer expectation test (*See Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d 247 (2007)), or

(4) The product could be found unreasonably dangerous under the consumer expectation test but not under the risk-utility standard.

In discussing the last alternative the court considered *Mele v. Howmedica, Inc.*, 348 Ill. App. 3d 1, 808 N.E.2d 1026 (1st Dist. 2004), and *Besse v. Deere & Co.*, 237 Ill. App. 3d 497, 604 N.E.2d 998 (3rd Dist. 1992), and held that the best approach is to integrate the consumer expectation test with the risk benefit analysis. In that respect the *Mikolajczyk* court found that the two tests are ". . . not mutually exclusive and may be applied together if the evidence supports it." *Mikolajczyk*, 2008 WL 4603565, at *20. Thus, it further held that ". . . even when a plaintiff chooses to proceed under the consumer-expectation test, she cannot dictate the defendant's method of proving its case by preventing the admission of evidence relevant to the risk-utility analysis. . ." *Id.* at *21.

Where there is evidence to support both approaches "consumer expectation" becomes "but one of the factors to be considered in applying an expanded risk-utility standard." Thus, the court held:

> In sum, we hold that both the consumer-expectation test and the risk-utility test continue to have their place in our law of strict product liability based on design defect. Each party is entitled to choose its own method of proof, to present relevant evidence, and to request a corresponding jury instruction. If the evidence is sufficient to implicate the risk-utility test, the broader test, which incorporates the factor of consumer expectations, is to be applied by the finder of fact. *Mikolajczyk*, 2008 WL 4603565, at *30.

Following the preceding determination, the court considered the instructions which had been tendered by Ford in support of the risk-utility approach. Those instructions included the following, which are set forth for illustrative purposes:

> A product is defective in its design when the foreseeable risks of harm posed by the product outweigh the benefits of the design and the risks can be avoided or reduced by the adoption of alternative feasible design. Feasible alternative designs must be available at the time that the product left the control of the defendant.

> Feasibility includes not only elements of economy, effectiveness, and practicality, but also technological possibilities under the state of the manufacturing art at the time the product was produced.
>
> When evaluating the reasonableness of a design alternative, the overall safety of the product must be considered. It is not sufficient that the alternative design would have reduced or prevented the harm suffered by the plaintiff if it would also have introduced into the product other dangers of equal or greater magnitude. A product's design may be reasonably safe even if the product is not accident proof.

While the court does not go so far as to adopt those instructions, it did reverse and remand the case because the trial court had not instructed the jury on Ford's risk-utility approach, stating:

> We agree with the cited cases that when a party tenders a jury instruction that states the legal principles applicable to the case and that instruction is supported by the evidence, it is an abuse of discretion to refuse to give the instruction if the refusal prejudices the party's right to a fair trial. *Mikolajczyk*, 2008 WL 4603565, at *26.

In this approach which synthesizes and integrates the use of both consumer expectation and risk-utility approaches in design defect cases it makes no difference whether the product is simple or complex. Each side is entitled to use its "method of proof" in proving or disproving that a product's design is "unreasonably dangerous." While *Calles v. Scripto-Tokai* does not directly address the incorporation of consumer expectation language into a risk-utility instruction in simple product cases, there is no reason to assume that the same integrated standard which pertains to complex product cases would not be applied. Consequently, following *Mikolajczyk v. Ford Motor Co.* design defect cases will undoubtedly embody aspects of both consumer expectation and risk-utility approaches with plaintiffs presenting evidence in support of the latter where the product is simple and in favor of the former where it is complex while the defendants take the opposite approach.

Conclusion

In *Calles v. Scripto-Tokai Corp.* and *Mikolajczyk v. Ford Motor Co.*, the Illinois Supreme Court came to grips with the conflicting approaches to the proof and defense of defective product design cases. In rejecting the exclusive application of the consumer expectation or risk-utility tests to simple or complex products, and refusing to allow the plaintiff to control the evidence by choosing between them, the court favors an integrated rule which allows each side to pursue its "method of proof" with the court giving a multi-factoral instruction where those methods of proof differ. Clearly, it is up to the trial courts to referee the dispute and in doing so to determine which factors are material, and thereby what evidence is relevant. Questions relating to the facts which a plaintiff must allege in his complaint and those which the defendant must aver by way of affirmative defense remain open. The same is true in a related sense to the burden or burdens of going forward with the evidence. Undoubtedly, these will be the subject of future cases.