COMMENTS

STRICT LIABILITY AND STATE OF THE ART EVIDENCE IN ILLINOIS

I. INTRODUCTION

Strict product liability is an area of ever increasing importance. Strict product liability is used to find a defendant manufacturer liable for an injury caused by a product regardless of the defendant’s conduct. A plaintiff does not have to show that the defendant’s conduct is involved. A plaintiff must show only that the defendant’s product is “in a defective condition unreasonably dangerous to the user or consumer or to his property.” This comment will explore the treatment in Illinois of two possible defenses to strict product liability, undiscoverable risk and unknowable risk. Illinois, in the Cunningham v. MacNeal Memorial Hospital decision, disallowed the defense of undiscoverable risk. However, Illinois does allow the defense of unknowable risk. This comment will argue Illinois would be better served to apply the Cunningham decision to unknowable risk and disallow the use of unknowable risk as a defense.

In our modern era technology is advancing so quickly that often a product is put on the market, for ordinary consumers, before the product’s true long-range effects on humans and the environment are fully known. A good example of a defective product’s long-range effect on humans and the environment is DDT. Once thought to be a miracle insecticide, DDT was later found to be harmful to humans and the environment. A more timely example of a product’s long-range effect on humans is found in Wells v. Ortho Pharmaceutical Corp. In the Wells case an infant was harmed by its mother’s use of

2. See infra note 48 and accompanying text.
3. See infra note 84 and accompanying text.
4. DDT is an abbreviation of dichlorodiphenyltrichloroethane, an insecticide. The insecticide was widely used from World War II until the 1960’s. Severe restrictions were placed on the use of DDT in the United States in 1972. III Encyclopedia Britannica Micropaedia 411 (15th ed. 1981).
a spermicide manufactured by the defendant Ortho. As a result of the use of the spermicide the infant was born with massive birth defects. The mother sued under a theory of strict product liability and received substantial damages.

Another rather frightening example of a defective product's effect on humans is the possibility of a person being exposed to the AIDS virus through a blood transfusion. In the DDT or the AIDS examples, a plaintiff may have to rely on a theory of strict product liability to gain a recovery for damages due to the insecticide or virus. Strict product liability may have to be relied upon in such circumstances because a negligence theory of recovery may be unavailable to the plaintiff. In the AIDS example the blood may have been properly handled and tested but unfortunately it may be impossible for the test or procedures available to be one-hundred percent effective in protecting the potential plaintiff from exposure to the virus. A plaintiff may be infected by AIDS or poisoned by DDT despite the lack of any negligent action by the defendant.

Within the theory of strict liability a product can be defective in three ways. First, the product can be mismanufactured. A manufacturing defect would render a particular product different from the manufacturer's intended design or form. Second, the defect could be in the design of the product, where the manufacturer's scheme or design of the product itself is at fault. Finally, the product might be defective because of a lack of a warning or proper operating instructions.

Within the theory of strict liability has arisen the concept of state of the art evidence. State of the art evidence can be used in some situations as a defense to a strict product liability claim, and can be

6. AIDS is an acronym for Acquired Immune Deficiency Syndrome. The disease attacks and disables parts of the human immune system rendering the victim susceptible to several fatal diseases. Leonard, Employment Discrimination Against Persons With AIDS, 10 U. Dayton L. Rev. 681 (1985).

7. The situation of an infection through a blood transfusion is directly analogous to Cunningham v. MacNeal Memorial Hospital, see infra note 48 and accompanying text. The viral agent of AIDS is capable of being transmitted through a blood transfusion. K. Mayer & H. Pizer, The AIDS Fact Book 36-40 (1983).

8. Quite simply, the product is put together incorrectly, it is a "lemon," and as a result is "unreasonably dangerous."

9. The plaintiff in a misdesign case claims that the way the product was designed makes the product "unreasonably dangerous."

10. In a lack of proper warning case the plaintiff claims that the lack of proper operating instructions and or warnings rendered the product "unreasonably dangerous."
used in several different forms. One of the common uses of state of the art evidence is in the realm of customary practice within an industry.11 Within this area state of the art evidence takes the form of industry practices. A defendant manufacturer may attempt to show that his actions conform with that particular industry's practice. Thus, the defendant claims that conforming with industry practices constitutes a defense to a strict product liability claim.12

Government standards may also be claimed by the defendant to constitute state of the art evidence. As such, compliance with governmental standards has been treated either as a complete defense to a strict liability claim13 or as a prima facie evidence that the product is not defective.14 Finally, as is the case in Illinois, the use of government standards as state of the art evidence may be treated merely as another item of evidence to be presented to the jury.15

12. See generally, Raleigh, The "State of the Art" in Product Liability: A New Look at an Old "Defense" 4 Ohio N.U.L. Rev. 249, 261 (1977). When industry practices are used as state of the art evidence for a defense, all the defendant claims is that he should not be found liable because all the other manufacturers in the industry do business in the same fashion as the defendant.
13. Raleigh, supra note 12, at 258. In this situation the defendant would want to introduce compliance with a government standard regulating the defendant's business as a complete defense.
14. Jones v. Hittle Service, 549 P.2d 1383, 1390 (1976). The court in Jones admitted evidence of the defendant's compliance with a regulation as a prima facie showing of due care. In the Jones case three members of the Jones family were badly burned and died as a result of a propane gas explosion. Propane gas accumulated as a result of a leak in an underground pipeline in the Jones' storm cellar. On an errand to the cellar one of the three victims lit a cigarette and ignited the gas. One of the Jones' claims was that the propane contained an insufficient amount of odorizer, propane is odorless, to warn of its presence. The court in Jones found that the defendants were not liable by reason of the insufficient odorizer claim. The court found that the defendants had complied with the statutory minimum amount of odorizer, set by the Kansas Fire Marshall. The Jones court declared that compliance with a regulation is admissible as evidence of due care and "may be conclusive in the absence of a showing of special circumstances." In the Jones case the plaintiffs failed to present enough evidence to convince the court of the existence of "special circumstances," and the plaintiffs could not overcome the defendant's prima facie evidence of due care.
15. Rucker v. Norfolk, 77 Ill. 2d 434, 439-40, 396 N.E.2d 534, 537 (1979). The court in Rucker allowed the defendant's compliance with a federal standard to be admitted merely as an item of evidence without any added probative weight. In the Rucker case Clyde Rucker was killed when a boxcar collided with a liquified petroleum gas (LPG) tank car in a Decatur switching yard. Rucker's widow, Marcia, alleged
The defendant may argue "feasibility" as state of the art evidence. That is, the defendant may claim that the plaintiff's alternate design, warning, or manufacturing process may be possible yet the particular alternate is not feasible because it is too costly or would seriously restrict the product's usefulness.

Finally, state of the art evidence may be claimed as a defense in that the available knowledge or technology necessary to thwart the risk simply does not exist. In short, it is impossible for the defendant to avoid the defect, so it would be unfair to find the defendant liable. This state of the art defense of "impossibility" may take three different forms. First, the defense of undiscoverable risk, in which the defendant may claim the risk of harm was undiscoverable by present knowledge or without destroying the product itself. Second, this state of the art defense may be used by the defendant to claim that a design change, which may have averted the risk of harm, was simply impossible with available technology and knowledge.

that defendant GATX, the manufacturer of the tank car, should have manufactured the tank car with a headshield. GATX was allowed to admit evidence showing that at the time GATX manufactured the tank car it comported with Federal Regulations. However, the court did not allow GATX's contention that compliance with the Federal standard should bar a finding of manufacturer liability, rather the court held that compliance was merely evidence relevant to the issue of the unreasonable dangerousness of the defective product.

16. The plaintiff must supply an alternate design as part of his prima facie case to sustain a strict products liability claim of defective design. Jones, 549 P.2d at 1390. In the Jones case (see infra note 14) the misdesign which allegedly rendered the product defective and "unreasonably dangerous" was the inadequate odorization of the propane gas. The plaintiff presented an expert witness who offered several alternate levels of odorization for the gas.

17. This use of feasibility as a state of the art defense closely mirrors negligence. The defendant would be claiming she exercised reasonable care in designing the vehicle and that is all that can be asked, thus the court would be focusing on the defendant's conduct as in negligence. Larsen v. General Motors, 391 F.2d 495, 502 (8th Cir. 1968).

18. Spradely, supra note 11, at 379.


20. In a strict liability claim of misdesign the plaintiff will claim that the design was improper and the plaintiff must supply an alternate design. A defendant could claim as a defense that the alternate design, offered by the plaintiff, is technically "impossible" or "infeasible". The technical impossibility of the alternate design area is difficult to distinguish from the feasibility of the alternate design area (Spradely, supra note 11, at 398-411). An example of the meshing of the two areas is the dilemma over the time at which an alternate design is "possible"; when the alternate design is theoretically possible, when the alternate design has been accomplished in
Finally, the defense of unknowable risk, in which the manufacturer will claim that a warning about the risk was impossible because the defect’s existence was unknowable given current knowledge.21

II. HISTORY OF STRICT LIABILITY

In viewing the history of strict liability it becomes apparent that the theory was created as a result of public policy. In the first cases involving strict liability the theory was used to protect consumers against unsafe food. This trend of strict product liability expanded from the first food cases to encompass any defective product.

Dean Prosser22 has traced strict liability as far back as 1431.23 At that time strict liability took the form of an implied warranty on a “seller of food.” Little change occurred in strict liability until the early 20th century when there was an explosion of concern over defective food.24 The concerns over defective food led to a major expansion of strict liability. In MacPherson v. Buick Motor Co.,25 Justice Cardozo effectively removed the privity of contract26 barrier
to strict liability claims.\(^{27}\) Dean Prosser described Cardozo's action in *MacPherson* in a colorful manner, "Cardozo wielding a mighty axe, burst over the ramparts, and buried the general rule ['privity rule'] under the exception. 'If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger'.\(^{28}\) Thus, Cardozo created a larger area for strict liability to roam by removing the fences of privity.

The history of strict liability in Illinois has taken the same path as in other jurisdictions. Strict liability was first used in Illinois in response to the need to protect consumers against unwholesome food.\(^{29}\)

As early as 1897, in *Wiedeman v. Keller*,\(^{30}\) Illinois had applied strict liability, in protecting consumers against unwholesome food, to find a defendant liable without a finding of any negligent conduct by the defendant. In *Wiedeman*, Anna Wiedeman purchased a quantity of pork from Henry Keller, a butcher. That same evening Anna cooked the pork for her family and "her said family were made ill, disordered and diseased, etc."\(^{31}\) Anna sued Henry and the court ruled in Anna's favor, finding that Henry had violated a special implied warranty for the fitness of meats for human consumption which extended from a retail seller of meats to the immediate purchaser.\(^{32}\)

While the *Wiedeman* special warranty's effectiveness was still limited by privity,\(^{33}\) Illinois fully adopted the theory of strict liability

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27. *MacPherson*, 111 N.E. at 1053. Justice Cardozo in *MacPherson* stated, "If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully." (emphasis added).


30. *Id*.


32. *Wiedeman*, 171 Ill. at 98-99, 49 N.E. at 211. The court in *Wiedeman* stated that a sale to "...a dealer or middleman who buys on the market, not for consumption, but for sale to others," would destroy the warranty. *Id*. at 98, 49 N.E. at 211.

33. Even before the *Suvada* decision, Illinois had adopted the position of the *MacPherson* court and abolished privity as a bar to a defective product claim versus a manufacturer. Two of the key Illinois cases abolishing the "privity rule" were: Rotche v. Buick Motor Co., 358 Ill. 507, 193 N.E. 529 (1934) (Nathan Rotche was able to get a judgement versus the Buick Motor Co., although he had bought his defective vehicle from a dealer); and, Lindroth v. Walgreen Co., 407 Ill. 121, 94 N.E.2d 847 (1950) (Bruce Lindroth was able to sustain an action versus the manufacturer of a defective electric vaporizer, although Mr. Lindroth had purchased the vaporizer from a retail store).
in tort in *Suvada v. White Motor Co.* In *Suvada* the plaintiff, Steven Suvada, was a milkman in Cook County. Steven bought a used truck from White Motor Co. The brake system for the truck failed and Steven’s truck struck a bus. Steven not only sued White Motor Co. but also Bendix-Westinghouse Automotive Air Brake Co., the manufacturer of the milk truck’s brake system. Steven was successful in recovering damages from both defendants. The court in *Suvada* held that, “[T]oday negligence is no longer necessary [to find a defendant manufacturer liable for an injury caused by a defective product].” Also, the court in *Suvada* held that a holding in strict liability made the privity question irrelevant.

The trend towards strict product liability was started as a result of public policy. In the early food cases the court imposed strict liability to protect public health and safety. The court also felt the losses caused by defective food should be the responsibility of the creator of the risk as well as the person in the best position to prevent the risk. In addition, the manufacturer cultivates use of his product through advertising and packaging, representing that the product is wholesome, therefore the manufacturer should be responsible for any damage caused by his product.

The court in *Suvada* applied these same policy reasons for imposing strict liability in the “food” cases when imposing strict liability in a dispute involving an automobile. The court concluded that the same policy reasons apply for the imposition of strict liability on any defective product. That is, as long as a defective condition

34. 32 Ill. 2d 612, 210 N.E.2d 182 (1965).
35. *Suvada*, 32 Ill. 2d at 623, 210 N.E.2d at 188.
36. *Id.* at 622, 210 N.E.2d at 188.
37. *Id.* at 618-19, 210 N.E.2d at 186. The court in *Suvada* recognized “that public policy is the primary factor for imposing strict liability on the seller and manufacturer of food in favor of the injured consumer.”
38. *Wiedeman*, 171 Ill. at 99, 49 N.E. at 211. The court stated, “public safety demands that there should be an implied warranty on the part of the vendor that the article sold is sound, and fit for the use for which it was purchased.”
39. *Id.* The court stated, “in the sale of provisions the vendor has so many more facilities for ascertaining the soundness or unsoundness of the article offered for sale, which are not possessed by the purchaser, that it is much safer to hold the vendor liable than it would be to compel the purchaser to assume the risk.”
40. The Texas Supreme Court in *Decker v. Capps*, 139 Tex. 609, 614, 164 S.W.2d 828, 833 (1942), gives an excellent recitation of the “manufacturer advertising” policy rationale for finding an opportunity to hold a manufacturer liable for a defective product.
41. *Suvada*, 32 Ill. 2d at 619, 210 N.E.2d at 186. The court concluded that
makes a product "unreasonably dangerous to the user," policy considerations should allow the imposition of strict liability.

III. UNDISCOVERABLE RISK

Illinois does not allow the state of the art defense of undiscoverable risk in a strict liability case. As a result, Illinois protects the innocent consumer while also providing legislative exceptions to strict liability to protect necessary and beneficial products such as blood. This position was adopted by the court in Cunningham v. MacNeal Memorial Hospital and has been followed by subsequent Illinois decisions despite the fact that the Cunningham decision has been heavily criticized by some courts in other states.

State of the art evidence of an undiscoverable risk is usually pertinent to a manufacturing defect strict liability case. An undiscoverable risk is some sort of a defect in a product which cannot be

strict liability should apply to any defective product by stating:

Without extended discussion, it seems obvious that public interest in human life and health, the invitations and solicitations to purchase the product and the justice of imposing the loss on the one creating the risk and reaping the profit are present and as compelling in cases involving motor vehicles and other products, where the defective condition makes them unreasonably dangerous to the user, as they are in food cases.

42. Id. RESTATEMENT (SECOND) OF TORTS § 402 A (1965).

43. See supra note 41 for the Suvada court's policy rationales for the imposition of strict liability. Dean Prosser lists public safety and the enterprise theory as two of the strongest arguments in favor of strict liability. Additionally, Dean Prosser advances court efficiency as a strong argument in favor of strict liability. Without strict liability, a plaintiff and the courts might have to wade through several warranty actions and perform some legal gymnastics to avoid the privity problem. Prosser, supra note 23, at 1122-24.

In addition, Justice Traynor's concurrence in Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (no other justices concurred in this opinion), puts forth a "risk-spreading" argument. Justice Traynor supports strict liability on the basis that "[t]he cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."

44. See infra note 48 and accompanying text.

45. For criticism of Cunningham, see infra note 60 and accompanying text, and see infra note 59.

46. The theory of a mismanufacturing case in strict liability is that the defendant should be held liable for any injuries caused by his product because he introduced a defective product into the stream of commerce. See supra note 8.
detected with the methods and technology available at the time the product was made. The manufacturer may try to assert that he should not be held liable for a manufacturing defect which could not be detected.

*Cunningham v. MacNeal Memorial Hospital,* is the cornerstone Illinois decision in the specific area of state of the art evidence as a defense to strict liability. In *Cunningham,* a woman was given a blood transfusion in the defendant hospital. Unfortunately, the blood was contaminated with the serum hepatitis virus and the woman fell ill to the virus. As a result she had to endure further hospitalization and permanent disability. The defendants claimed the technological state of the art of “manufacturing” blood for transfusions simply could not detect serum hepatitis, thus they should not be held liable under a strict liability standard.

The court in *Cunningham* disagreed with the defendants. The court choose to read the *Restatement (Second) of Torts* § 402 A (2). The court in *Cunningham* found that to allow state of the art evidence as a defense would “emasculate the doctrine [of strict liability] and in a very real sense would signal a return to a negligence theory.” In addition the court specifically rejected the notion of using the undiscoverability of the risk as a defense. The court cited

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47. *Restatement (Second) of Torts* § 395 comment g (1965). Inspection by a manufacturer of the raw materials and component parts of a product as well as the product itself may be required to determine whether the finished product is reasonably safe.


49. *Cunningham,* 47 Ill. 2d at 453-54, 266 N.E.2d at 902.

50. *Restatement (Second) of Torts* § 402 A (2)(a) (1965). Special Liability of Seller of Product for Physical Harm to User or Consumer:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

51. *Cunningham,* 47 Ill. 2d at 453-54, 266 N.E.2d at 902. If the court had allowed state of the art evidence on the undiscoverability of the risk as a defense, the admission of the evidence would shift the focus of the case away from the defective product itself, the focus of a strict liability theory, onto the manner and circumstances in which the defective product was made, the focus of a negligence theory.
several cases where the claimed defense of the undiscoverability of a defect in a can of meat or a wrapped candy bar, "or in a bottled drink, . . . or typhoid bacilli in clams." was disallowed. In short, the court held as a matter of law the defense of undiscoverable risk was unavailable.

In the most controversial part of the opinion the court in Cunningham rejected the defendant's claim that comment k (of § 402A) exception to strict liability should apply to the Cunningham case and provide a complete defense to the strict liability claim. The defendants in Cunningham attempted to analogize the serum hepatitis contaminated blood used in Mrs. Cunningham's transfusion with the Pasteur rabies vaccine. The Pasteur treatment is specifically mentioned in comment k as an example of a situation in which the unavoidably unsafe products (comment k) exemption to strict liability should

52. Id. at 454, 266 N.E.2d at 902.
53. Id. at 455, 266 N.E.2d at 903. The court made it quite clear that the undiscoverability of the risk was irrelevant to the claim, "we believe that whether or not defendant can, even theoretically, ascertain the existence of serum hepatitis virus in whole blood employed by it for transfusion purposes is of absolutely no moment."
54. RESTATEMENT (SECOND) OF TORTS § 402 A comment k (1965). Unavoidably unsafe products:
There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.
55. Cunningham, 47 Ill. 2d at 455-56, 266 N.E.2d at 903-04.
The court drew a distinction between the Pasteur treatment for rabies and the serum hepatitis virus present in the blood used in the transfusion in Cunningham. The court in Cunningham found comment k only applies to “pure” products for which “the marketing and the use of the vaccine are fully justified.” The court in Cunningham classified the Pasteur treatment as a “pure” product which even with proper production could still cause harm to the user, while the court classified the blood as being “impure” because of the contaminating hepatitis virus. In other words, the Pasteur vaccine is a “pure” product, thus qualifying for the comment k exception to strict liability, because it is the vaccine itself which may prove dangerous to a patient. However, blood is an “impure” product thus not qualifying for comment k treatment because it is not the blood itself which may prove harmful but the contaminating serum hepatitis virus which may cause an injury. The court drew a very fine distinction between two arguably unavoidably unsafe products; the “pure” Pasteur vaccine as distinguished from the “impure” blood.

This “fine distinction” has been widely criticized. In Hines v. St. Joseph’s Hospital the court severely attacked the Cunningham decision. The court in Hines stated, “the Cunningham court conveniently ignored a part of the Restatement’s comment which refuted its own contention.” The court in Hines commented further that the

56. Restatement, supra note 54.
57. Id. See also Cunningham, 47 Ill. 2d at 449, 266 N.E.2d at 904.
58. Id. at 456, 266 N.E.2d at 904.
61. Id. at 1077. The Hines court was referring to the following portion
court in *Cunningham* avoided any sort of a risk/benefit analysis and condemned "a large segment of products" to be sacrificed to strict liability and ignores the social benefits of those products.\(^2\) One must consider whether the court in *Hines* reasoned that the imposition of strict liability on products such as blood, through the narrow Illinois interpretation of comment k, would impede the marketing of such products. The court in *Hines* might have anticipated that denying comment k strict liability protection to beneficial products, such as blood, might curtail the distribution of these beneficial products to the public. This could be why the court in *Hines* was so anxious to implement a risk/benefit analysis.\(^3\)

On the other hand, the court in *Hines* engaged in creating some fine distinctions of its own, specifically in its treatment of which products qualify for the comment k exception to strict product liability. Comment k states that it should apply to "new or experimental drugs."\(^4\) This raises the question, is blood a "new or experimental drug?" The court in *Hines* reasoned blood was not a "new or experimental drug," stating "blood cannot be considered a 'new or experimental drug'".\(^5\) The opinion further stated that blood nevertheless qualifies for the comment k exception under the heading of "new", in that "it is new in the sense that no adequate test had been devised to detect the hepatitis virus and even if detected, there is no process to destroy it without damage to the blood."\(^6\) The court in *Hines* would hold the fact that the risk was undiscoverable by the state of the art technology as sufficient to exempt a product from strict liability. The court in *Hines* seems to have changed comment k's definition of what constitutes a "new or experimental" drug.

Comment k discusses providing an exception for drugs which may harbor undiscoverable defects, as long as the drug is new in the sense that it may be dangerous "because of lack of time and opportunity for sufficient medical experience" necessary to create a safe

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\(^{62}\) *Hines*, 527 P.2d at 1077.

\(^{63}\) Id.

\(^{64}\) Restatement (Second) of Torts § 402A comment k (1965).

\(^{65}\) *Hines*, 527 P.2d at 1077.

\(^{66}\) Id.
drug. Comment k provides an exception for drugs which are truly “new or experimental.” Comment k does not provide an exception for all drugs which may harbor an undiscoverable risk, without regard to the time a particular drug may have been in use and the opportunities for medical experience with the drug.

Balancing tests are not a part of strict liability. Proof required under the theory of strict liability is that the injury or damage resulted from a “condition of the product,” “and that the condition existed at the time it left the manufacturer’s control.” Under the decision of the court in Hines an argument could be made to exclude any product from strict liability for which the cause of injury was an undiscoverable risk. The court in Hines opens gates for the emasculation of strict liability as a result of pursuing the social policy of promoting the development of some socially beneficial drugs.

The court in Hines treats the area of undiscoverable risk differently than Illinois. The court in Cunningham denied the defense of undiscoverable risk for strict product liability for policy reasons. These policy reasons are that: First, the court in Cunningham attempted to preserve the doctrine of strict liability; second, the policy of risk spreading, imposing the loss on the one who reaps the profit and creates the risk; and third, the policy of accident minimization. The spectre of strict liability might very well force industry to develop new methods and technologies to detect risks, such as serum hepatitis.

67. See supra note 61.
68. Spradely, supra note 11, at 384, 385.
69. Suvada, 32 Ill. 2d at 623, 210 N.E.2d at 188. Nave v. Rainbow Tire, 123 Ill. App. 3d 585, 591, 462 N.E.2d 620, 624 (1984). The court in Nave did not consider due care or balancing tests. In the Nave case Robert J. Nave was killed when the right front tire of his truck blew out causing the truck to run into a tree, killing Mr. Nave. The court in Nave held that the due care of the manufacturer of the tire was irrelevant and the only question of substance was whether the product was in a defective condition when it left the manufacturer.
70. The defective product would have to claim to be within the Hines opinion’s definition of a “new” product. That is, the defendant manufacturer would have to show that the product’s defect was undiscoverable with available knowledge and without destroying the product. Hines, 527 P.2d 1075.
71. Cunningham, 47 Ill. 2d at 453, 266 N.E.2d at 902.
72. See supra note 51.
73. Cunningham, 47 Ill. 2d at 453, 266 N.E.2d at 902.
74. Suvada, 32 Ill. at 619, 210 N.E.2d at 186.
75. Rheingold, Products Liability: The Ethical Drug Manufacturer’s Liability, 18 Rutgers L. Rev. 947, 1015 (1964). Rheingold discusses the possibility of a drug manufacturer testing and producing drugs with greater care, to eliminate dangers to consumers, to avoid any strict liability claims.
rather than allowing manufacturers to rest secure in their immunity from strict liability by the grace of the undiscoverable risk. 76 Most importantly, Illinois has not sacrificed socially beneficial products, such as blood, to strict product liability, but rather, Illinois has placed the task of creating exemptions to strict liability upon the legislature. 77

A good example of the Illinois position on strict product liability is the Cunningham case. Illinois courts treated comment k narrowly, thus leaving the making of exceptions to strict liability in specific cases up to the legislature. The Illinois legislature promptly responded to Cunningham with a statute limiting the imposition of liability to the transfusion of blood, plasma and the like to "instances of negligence or willful misconduct." 78

Illinois has continued to support the Cunningham view of undiscoverable risk. That is, the issue of the undiscoverability of a product's defect due to insufficient technology or knowledge is not relevant to a strict liability mismanufacturing case. 79 Illinois seems to be treating the undiscoverable risk issue in the most desirable way available, by not allowing the defense of undiscoverable risk. Illinois as a result protects the innocent consumer while balancing the need to protect necessary and beneficial products, such as blood, by providing specific legislative exceptions to strict liability. 80

76. Rheingold, supra note 75, at 1015-17.
77. Leaving the task of creating an exception to strict liability to the legislature is not unique to Illinois. Russel, 196 So.2d at 121 (Roberts, J., special concurrence), the court stated that, "the creation of an exemption to the strict liability rule should be undertaken by the Legislature rather than the courts."
78. ILL. REV. STAT. ch. 111 1/2, § 5101-5103 (1979). The legislature declared as a matter of public policy that the "imposition of liability without fault" was detrimental to "sound medical judgment."
80. The Illinois method of treating undiscoverable risk would seem to be more
IV. UNKNOWABLE RISK

In Illinois, unknowable risk evidence is admissible as a defense to a strict liability claim. In the area of unknowable risk Illinois may have been better served by disallowing the defense of unknowable risk, just as Illinois disallowed the defense of undiscoverable risk in the Cunningham decision. Unknowable risk is a close cousin of undiscoverable risk, yet they are different and have received different treatment. An undiscoverable risk case exists where the risk of the product is known, yet the defect is undetectable. By contrast, in an unknowable risk case the defect was not even known to have existed and the defect turns out to be an unfortunate surprise for all parties involved. In the undiscoverable defect case the plaintiff accuses the defendant of a manufacturing defect. However, in an unknowable risk case the plaintiff accuses the defendant of failing to warn the consumer about the risk of the product. In such a case the defendant might try to enter state of the art evidence in his defense. The defendant will claim he cannot be held liable for failing to warn about a risk of which it was impossible for him to have knowledge.

In an Illinois decision, Woodill v. Parke Davis, a defendant manufacturer was able to thwart a strict liability claim by using the defense of unknowable risk. In the Woodill case a drug was administered to a mother during the delivery of her baby. The drug Pitocin was the alleged cause of the newborn's extensive birth defects. The parents sued asserting the theory of strict liability on behalf of the minor child. The parents claimed "that defendants' failure to warn physicians and patients of the danger of using Pitocin while a fetus is in high station" rendered the drug "not reasonably safe." The defendants countered with the claim that they could not be held liable for an unknowable risk.

In Woodill the court held for the defendants, stating, "[t]he imposition of a knowledge requirement is a proper limitation to place

desirable than the Hines method (see supra note 60 and accompanying text). The Hines method would protect the manufacturer first and "emasculate" strict liability. The court in Hines gives poor treatment to the policy rationale of public safety by taking from the public the chief protector of their safety: strict liability. Thus, the Hines position would seem to be less desirable than the Illinois position.

81. See infra note 86 and accompanying text.
82. See supra note 19 and accompanying text.
85. Id. at 29, 402 N.E.2d at 195.
on a manufacturer's strict liability in tort predicated upon a failure
to warn of a danger inherent in a product.86 In short, the court in
Woodill, by imposing the requirement that the manufacturer must
have knowledge of the product defect to be found liable in a failure
to warn strict liability case, allowed state of the art evidence of
unknowable risk to be admitted and used as a complete defense.

In making the decision to allow state of the art evidence of
unknowable risk as a defense the court in Woodill relied heavily upon
the Restatement (Second) of Torts § 402A comment j.87 The court
held that the language in comment j88 required a knowledge to be
included in a strict product liability failure to warn case.89

The court in Woodill also provided a large amount of Illinois
case law which supports their conclusion.90 The Mahr v. G.D. Searle

86. Id. at 33-34, 402 N.E.2d at 198.
87. RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965):
Directions or warning:
In order to prevent the product from being unreasonably dangerous, the
seller may be required to give directions or warning, on the container, as to
its use. The seller may reasonably assume that those with common allergies,
as for example to eggs or strawberries, will be aware of them, and he is not
required to warn against them. Where, however, the product contains an
ingredient to which a substantial number of the population are allergic, and
the ingredient is one whose danger is not generally known, or if known is
one which the consumer would reasonably not expect to find in the product,
the seller is required to give warning against it, if he has knowledge, or by
the application of reasonable, developed human skill and foresight should
have knowledge, of the presence of the ingredient and the danger. Likewise
in the case of poisonous drugs, or those unduly dangerous for other reasons,
warning as to use may be required.

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

Where warning is given, the seller may reasonably assume that it will
be read and heeded; and a product bearing such a warning, which is safe
for use if it is followed, is not in defective condition, nor is it unreasonably
dangerous.

88. Id. specifically a warning is needed if, "he [the manufacturer] has knowl-
dge, or by the application of reasonable, developed human skill and foresight should
have knowledge [of the risk]."
89. Woodill, 79 Ill. 2d at 33, 402 N.E.2d at 198.
90. See id. at 28, 402 N.E.2d at 197. But see id. at 32, 402 N.E.2d at 201.
and Co. 91 decision supports the Woodill decision to allow unknowable risk as a defense to a failure to warn strict product liability claim. In Mahr, Sandra Brewer was taking Enovid, an oral contraceptive, which was manufactured by the defendant G.D. Searle. Sandra began taking Enovid one month after the birth of her son in 1963. By January 28, 1967, Sandra had died as a result of several strokes. Sandra’s strokes occurred as a result of “an occlusion of the left internal carotid artery caused by the regular ingestion of Enovid.”92 The plaintiff sued Searle on the theory that Searle provided an inadequate warning of the dangers of Enovid and should be strictly liable for the injury caused by the defective product. The court in Mahr found for the defendants. The court concluded that Searle had no knowledge of the defect present in Enovid and thus could not be found liable. The court stated “a prerequisite to the duty to warn is proof that the use of the involved drug subjects a user to risk of injury” (i.e. the risk of injury must be known).93

In another case supporting the Woodill decision, Stanfield v. Medalist Industries, Inc.,94 Ossie Stanfield lost three fingers while operating a cutting and boring machine for General Electric Cabinet Co. Ossie claimed she should be compensated for her injuries because the machine had inadequate warnings of its dangerous nature. The court in Stanfield would not hold the manufacturer strictly liable until the court had determined whether Medalist Industries, the defendant, had knowledge of the machine’s dangerous nature. In the Stanfield decision the court stated, “if a manufacturer knows or should know that danger may result from a particular use of his product, the product may be held to be in a defective condition if sold without adequate warnings.”95

The Stanfield and Mahr cases both support the Woodill opinion’s imposition of the knowledge requirement of the product’s defect, by the manufacturer, for a strict liability failure to warn claim. In other words, both cases support the defense of unknowable risk.

The court in Woodill supported its position of requiring a manufacturer’s knowledge of the product’s defect by denying that the knowledge requirement will reduce strict liability to a negligence standard. The court in Woodill stated that the knowledge requirement focuses attention on the product and its propensities and not on the

92. Id. at 547, 390 N.E.2d at 1219.
93. Id. at 563, 390 N.E.2d at 1230.
95. Id. at 639, 340 N.E.2d at 279.
conduct of the manufacturer. The court in *Woodill* reasoned that the imposition of strict liability in a failure to warn of an unknowable risk would render the warning itself “meaningless.” That is, if a manufacturer could be found liable for failing to warn the consumer against a defect of which the manufacturer was ignorant, the manufacturer may try to warn against any conceivable risk. Such a “boilerplate” warning would carry little value. The court in *Woodill* also put forth another supporting policy reason for the unknowable risk defense, which is the need to put some limit on the manufacturer’s liability so the manufacturer will not become the “virtual insurer of the product.”

The *Woodill* opinions view of the proper treatment of state of the art evidence of an unknowable risk in a failure to warn case is not a universally accepted view. Presenting a contrary holding to the *Woodill* decision is *Jackson v. Coast Paint and Lacquer Co.* In *Jackson*, a painter was severely burned by combustion of the fumes of the defendant’s epoxy paint. The plaintiff claimed there was an inadequate warning on the paint can of the extremely flammable nature of the product and sued under a theory of strict liability. On the issue of the knowledge requirement of the manufacturer, in an inadequate warning case, the court in *Jackson* stated, “[i]n strict liability it is of no moment what [the] defendant had reason to believe. Liability arises from selling any product in a defective condition unreasonably dangerous to the user or consumer.” Examining the conduct of the manufacturer through what he knows or should have known instead of looking at the product itself seems to have reduced strict liability into a negligence theory.

96. *Woodill*, 79 Ill. 2d at 30, 402 N.E.2d at 199. By disclaiming any interference with strict liability the *Woodill* court can avoid the accompanying social policy rationales for imposing strict liability on a manufacturing of a defective product.

97. *Id.* at 37, 402 N.E.2d at 200.

98. *Id.* at 37, 402 N.E.2d at 199. If the court did not require the knowledge element the court in *Woodill* claimed it would be forcing the manufacturer to be absolutely liable for his products.

99. 499 F.2d 809 (9th Cir. 1974).

100. *Id.* at 812.

101. *Id.* at 812. See *Woodill*, 79 Ill. 2d at 31, 32, 402 N.E.2d at 200, 201 (Moran, J., concurring and dissenting). See also *Cunningham*, 47 Ill. 2d at 449, 266 N.E.2d at 903.

For a further example of the virtual abolishing of strict liability and the creation of a negligence standard in failure to warn cases by allowing the unknowable risk defense, compare the majority’s requirements for a proof of “strict liability” in *Woodill* with the requirements for a proof of liability under the negligence standard
disregards the basic policy reasons behind the imposition of strict liability; loss minimization,\footnote{102} and the policy rationales of the court in \textit{Suvada}.\footnote{103}

A jurisdiction may adopt one of three alternatives with respect to the unknowable risk defense. First, allow the defense, in which case the court would use a negligence analysis;\footnote{104} second, treat the evidence as irrelevant and face the possibility of absolute liability;\footnote{105} or third, use an intermediate approach where the court would use some sort of a risk/benefit analysis.\footnote{106}

Illinois could be heading in the wrong direction in it’s treatment of unknowable risks. In allowing the abandonment of strict liability, by allowing the defense of unknowable risk, Illinois is granting manufacturers an unassailable position. As long as the manufacturer can sustain a lack of knowledge about the possible risks of his products, the manufacturer is safe from liability. Allowing the unknowable risk defense may be an effective incentive for encouraging the development of new drugs, however, allowing the defense is also a disincentive to aggressively investigating the effects of a new product.\footnote{107} Certainly it is socially beneficial to promote the development of new drugs,\footnote{108} but, allowing the unknowable risk defense may not be the best way to proceed.\footnote{109} The denial of the unknowable risk defense would not be tantamount to absolute liability. The plaintiffs in a failure to warn strict liability claim would still have to prove “that their injury of damage resulted from a condition of the product, that the condition was an

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\item RHEINGOLD, \textit{supra} note 75, at 1015-17.
\item Suvada, 32 Ill. 2d at 618-19, 210 N.E.2d at 186. The policy reasons are; first, public safety; second, the manufacturer invites the use of the product and represents that it is safe for use; third, the justice of imposing the loss on “those who have created the risk and reaped the profit” from the product.\footnote{104} \textit{Woodill}, 79 Ill. 2d at 38-39, 402 N.E.2d at 200 (Moran, J., concurring in part and dissenting in part).
\item \textit{Woodill}, 79 Ill. 2d at 37, 402 N.E.2d at 199.\footnote{105}
\item \textit{Spreedly}, \textit{supra} note 11, at 390. In the risk/benefit analysis approach a “needed” product would face a small possibility of liability as a result of an unknown risk, while an “unnecessary” product would not be able to avail itself of the unknown risk defense at all.\footnote{106}
\item RHEINGOLD, \textit{supra} note 75, at 1015-17.\footnote{107}
\item \textit{Woodill}, 79 Ill. 2d at 37, 402 N.E.2d at 199.\footnote{108}
\item RHEINGOLD, \textit{supra} note 75, at 1015-17.\footnote{109}
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unreasonably dangerous one and that the condition existed at the time it left the manufacturer's control." Furthermore, while the imposition of strict liability would further social policy interests, there would be opportunities to exempt specific socially beneficial areas from strict liability by legislative action. The most desirable treatment of state of the art evidence of unknowable risk for Illinois would seem to be the opposite of the current Illinois position. That is, if Illinois followed the judicial strategy the Illinois courts used in the undiscoverable risk situations, i.e., the Cunningham line of cases, the state would be insuring public safety while still encouraging "needed" or rare drug production.

V. CONCLUSION

State of the art evidence of undiscoverable risk is not admissible as a defense in a strict liability mismanufacturing claim in Illinois. The court in Cunningham set this precedent and subsequent Illinois courts have followed the decision. The Cunningham decision was based on sound social policy rationales designed to benefit both the consumer and the manufacturer while preserving strict product liability in Illinois.

However, the court in Woodill ruled that state of the art evidence is admissible, in Illinois, as a defense in a strict liability lack of a proper warning claim. The court in Woodill based it's decision on policy rationales designed almost solely to benefit the manufacturer and ignored protecting the consumer and strict liability.

Illinois would perhaps best be served by using the Cunningham decision as precedent on the admissibility of any type of state of the art evidence intended as a defense to a strict liability claim.

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110. Suvada, 32 Ill. 2d at 623, 210 N.E.2d at 188.
111. See supra note 103.
112. See supra note 77.