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Survey of Recent Developments in Indiana Law

The Board of Editors of the *Indiana Law Review* is pleased to publish its eighth annual Survey of Recent Developments in Indiana Law. This survey covers the period from June 1, 1979, through May 31, 1980. It combines a scholarly and practical approach in emphasizing recent developments in Indiana case and statutory law. Selected federal case and statutory developments are also included. No attempt has been made to include all developments arising during the survey period or to analyze exhaustively those developments that are included.

I. Foreword: Products Liability

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Indiana decisions during the survey period may have significantly reallocated product safety risks among sellers, users, third parties such as employers, and the general public. Because the costs of product liability judgments, settlements, litigation, insurance premiums, and accident prevention have been generally recognized as bearing major economic impact, the importance of these decisions to manufacturers, product users, and the increasing number of attorneys affected by those interests now demands closer attention.

A. Introduction: Product Liability and the Workplace Accident[1]

Of the fifteen product liability cases decided during this survey period, twelve involved workplace products, and of those, ten were

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[1]During the survey period, the Indiana Court of Appeals decided an unusual number of product liability cases which raised numerous significant questions of law with respect to workplace products. Several of these cases raise more than one important issue and, therefore, each case will be discussed at different points under varying legal topic headings. In order to avoid undue repetition, only the facts of each case relating to the topic under discussion will be presented under that topic. Although the reader may thus find the presentation of a particular case somewhat disjointed, the

cases in which the plaintiff was an injured worker.[2] It is appropriate, therefore, that this survey begin with a note on the special characteristics of product related accidents in the workplace.

Employees injured in the workplace generally recover through the state's worker compensation system. Yet, these claimants also represent 10.6 percent of the successful plaintiffs who recover under product liability theories,[3] with such workplace accidents accounting for 42 percent of the total national product liability payout for bodily injury.[4] That nearly half of the entire product liability dollar recovery goes to only 10.6 percent of the injured parties, suggests that workplace accidents are on average far more severe than those involving consumer products.

In addition to the increased severity of injury caused by workplace products, there are other significant differences between industrial and consumer products. The industrial product is generally longer lived than the consumer product and thus there is frequently a long time span between the manufacturer's act of placing its product

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method is consistent with the purpose of presenting a survey of recent legal developments.

[2]The following ten cases involved workplace products and what appear to be worker plaintiffs: Huff v. White Motor Corp., 609 F.2d 286 (7th Cir. 1979); Peck v. Ford Motor Co., 603 F.2d 1240 (7th Cir. 1979); Conder v. Hull Lift Truck, Inc., 405 N.E.2d 538 (Ind. Ct. App. 1980); American Optical Co. v. Weidenhamer, 404 N.E.2d 606 (Ind. Ct. App. 1980); Shanks v. A.F.E. Indus., Inc., 403 N.E.2d 849 (Ind. Ct. App. 1980); Moore v. Federal Prac. Elec. Co., 402 N.E.2d 1291 (Ind. Ct. App. 1980); Bemis Co. v. Rubush, 401 N.E.2d 48 (Ind. Ct. App. 1980), *petition for transfer filed* May 7, 1980; Hedges v. Public Serv. Co., 396 N.E.2d 933 (Ind. Ct. App. 1979) (The plaintiffs in *Hedges* are considered here as workers although they were acting as entrepreneurs, either as farmers or rodeo promoters, when they were injured by electricity which is considered here as a workplace product); Amermac, Inc. v. Gordon, 394 N.E.2d 946 (Ind. Ct. App. 1979); Martin v. Simplimatic Eng'r Corp., 390 N.E.2d 235 (Ind. Ct. App. 1979).

Stapinski v. Walsh Constr. Co., 395 N.E.2d 1251 (Ind. 1980), involved a workplace product but the plaintiff was a bystander who presumably was not acting in the scope of his employment at the time of injury. Ferdinand Furniture Co. v. R.M. Anderson, Co., 399 N.E.2d 799 (Ind. Ct. App. 1980), involved a workplace product but the injury alleged was damage to real and personal property only. Lukowski v. Vecta Educ. Corp., 401 N.E.2d 781 (Ind. Ct. App. 1980); Second Nat'l Bank v. Sears, Roebuck & Co., 390 N.E.2d 229 (Ind. Ct. App. 1979); Dias v. Daisy Heddon, 390 N.E.2d 222 (Ind. Ct. App. 1979), involved consumer products, but it is interesting that in all three cases the injured plaintiff was not the product purchaser.

A sixteenth case, Meadowlark Farms, Inc. v. Warken, 376 N.E.2d 122 (Ind. Ct. App. 1978), was decided during an earlier survey period but was not discussed in any survey issue. Because it is an important and widely cited Indiana case, it is included in this article. Product liability issues raised in the criminal reckless homicide case of State v. Ford Motor Co., No. 11-431 (Pulaski County Cir. Ct. (Ind.), Mar. 13, 1980) are also discussed in this article.

[3]INSURANCE SERVICES OFFICE, PRODUCT LIABILITY CLOSED CLAIM SURVEY: A TECHNICAL ANALYSIS OF SURVEY RESULTS 62 (1977).

[4]*Id.*

into the stream of commerce and the moment of the worker-plaintiff's injury. Not only does this "long tail" present problems of proof as to the cause of the accident, but as the point of original sale recedes in time, the product manufacturer's influence over the use environment of the product diminishes.

Secondly, the potential for massive reproduction of dangerous design defects and manufacturing flaws, arguably a justification for application of strict liability to product manufacturers, may be less acute in the workplace context since workplace products are generally not mass-produced on the scale of consumer products. Likewise, the many layers of distribution found in the marketing of consumer products is not typical of industrial product marketing where the manufacturer and his customer are more intimately related. The industrial product customer is rarely the ultimate user; instead, his employee, under more or less economic pressure, is the party at risk from workplace product hazards. So, as among the workplace product manufacturer, the purchaser-employer, and the user-employee, it is the employer who is best positioned to make the greatest contribution to workplace product safety. In referring to the product manufacturer's inability to warn of or guard against injury *after* a product is sold, the court in *Shanks v. A.F.E. Industries, Inc.*[5] noted that "the manufacturer had no control over the work space, the machine, or the hiring, instruction, or placement of personnel . . . ."[6] It is the *employer* who selects the equipment, specifies the available equipment options, sensitizes the workplace to safety considerations, maintains and replaces the equipment, modifies components for new tasks, and provides first aid and other post-accident mechanisms.

Workplace product safety is for the most part controlled indirectly through statutes and regulations aimed at the employer. In addition to OSHA[7] and other state[8] and federal regulations,[9] the employer is also constrained by the pervasive worker compensation system which compensates workers injured by products and other causes while they are acting in the scope of their employment.[10] Worker compensation pays medical bills and a percentage of lost wages.[11] Pain and suffering is not compensable, but compensation for

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[5]403 N.E.2d 849 (Ind. Ct. App. 1980), *petition for transfer filed* June 10, 1980.

[6]*Id.* at 856-57.

[7]Occupational Safety & Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified in scattered sections of Titles 5, 15, 18, 29, 42, 49 U.S.C.).

[8]*See generally* IND. CODE §§ 22-1-1-1 to -11-15-6 (1976 & Supp. 1980).

[9]*See, e.g.*, Federal Mine Safety & Health Amendments Act of 1977, 30 U.S.C. § 801 (Supp. III 1979).

[10]*See* IND. CODE §§ 22-3-1-1 to -10-3 (1976 & Supp. 1980).

[11]*Id.*

rehabilitation may be available.[12] Although worker compensation is incomplete, it is certain and prompt, and involves substantially less friction costs than does the tort litigation system.

If an industrial product is a proximate cause of a workplace accident, recovery may be had under product liability theories from the industrial product manufacturer in one of three ways. First, the injured plaintiff may sue the manufacturer directly.[13] If the employee has already recovered worker compensation, his employer is given a statutory lien against the employee's judgment for an amount equal to what has been paid out in worker compensation.[14] Second, if the employee does not bring suit, the employer may sue the manufacturer directly, or as a subrogee to the rights of the employee.[15] Finally, the employer's insurance carrier may sue as a subrogee to the employer's rights.[16] However, if the employer was a misuser of the product, concurrent with a defect in the product, the claims of the employer and the employer's compensation insurance carrier will be barred under the Indiana Product Liability Act.[17]

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[12]*Id.* §§ 22-3-3-4 to -22. Although the statute does not provide specifically for rehabilitation, expenses for items such as plastic surgery and physical therapy are compensated as ordinary medical expenses.

[13]*Id.* § 22-3-2-13 which says:

> Whenever an injury or death, for which compensation is payable . . . shall have been sustained under circumstances creating in some other person than the employer . . . a legal liability to pay damages . . . , the injured employee . . . may commence legal proceedings against such other person to recover damages notwithstanding such employer's or such employer's compensation insurance carrier's payment of or liability to pay compensation. . . .

[14]*Id.* "[T]he said employer or such employer's compensation insurance carrier shall have a lien upon any settlement award, judgment or fund out of which such employee might be compensated from the third party." *Id.*

[15]*Id.*

> If said employee . . . shall fail to institute legal proceedings against such other person for damages within two (2) years after said cause of action accrues, the employer or such employer's compensation insurance carrier, having paid compensation, or having been liable therefor, may collect in their own name or in the name of the injured employee . . . the compensation paid or payable to the injured employee . . . .

Id.

[16]*Id.*

[17]*Id.* § 33-1-1.5-4(b)(2) (Supp. 1980) provides in part:

> Where the physical harm to the claimant is caused jointly by a defect in the product which made it unreasonably dangerous when it left the seller's hands and the misuse of the product by one other than the claimant, then the concurrent acts of the third party do not bar recovery by the claimant for the physical harm, but shall bar any rights of the third party, either as a claimant or as a subrogee.

A somewhat different allocation is provided for in the MODEL UNIFORM PRODUCT LIABILITY ACT § 111(B)(2) *reprinted in* 44 Fed. Reg. 62713, 62735 (1979) [hereinafter cited as MODEL ACT] which provides for a reduction of the judgment against the product manufacturer by an amount equal to the percentage of fault attributable to the misus-

It can be persuasively argued that this new provision of the Indiana Code[18] which tends to reallocate the risks of workplace accidents to a negligent or misusing employer does not go far enough. The Interagency Task Force on Product Liability in its final report[19] has given high priority to consideration of a proposal which would make worker compensation the sole remedy for workplace accidents.[20] Workers under the proposal would receive a quid pro quo in the form of higher compensation benefits for giving up their rights to third party actions against product manufacturers. Employers, however, would retain a right of action, or alternatively, access to an arbitration proceeding, for indemnity or contribution against product manufacturers of defective products proximately causing injury.[21] Establishing the employer as the primary obligor for workplace injuries seems consistent with his primacy in the workplace safety environment. The proposed scheme offers substantial reduction of friction costs and promises more frequent and speedier recoveries and generally more adequate awards. These benefits, though, may come at the expense of the intermittent but very uncertain huge award, justified by individual facts, but always hotly contested at great expense to the parties.[22] The cost of these contests has begun to have serious impact on the liability insurance delivery system and on the cost of a substantial number of products.[23]

These comments are offered in response to what appears to be a dramatic stripping away in recent years, accelerated in recent months, of the traditional defensive doctrines which have formerly tended to insulate manufacturers of products, especially workplace products, from product liability in Indiana.[24] In particular, this survey period

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ing employer (or co-employee), or by an amount paid out (or to be paid out) to the claimant in worker compensation, whichever is greater.

[18]IND. CODE § 33-1-1.5-4(b)(2) (Supp. 1980).

[19]U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT (1978) [hereinafter cited as FINAL REPORT].

[20]*Id.* at VII-103.

[21]*Id.* at VII-103-12.

[22]*See generally* J. O'Connell, First Party No-Fault Coverages as a Sole Remedy to Solve Many Tort Liability Problems (1977) (statement printed and distributed by Marsh & McLennan, Inc., 200 Clarendon Street, Boston, Mass. 02116).

[23]*See, e.g.*, Machinery and Allied Products Institute, Products Liability: A MAPI Survey (Aug. 1976) (available from MAPI, 1200 Eighteenth Street N.W., Washington, D.C. 20036); U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, BRIEFING REPORT ii (1977).

[24]Three important cases decided prior to the survey period which generally expanded the scope of liability of the workplace product manufacturer were Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977) (holding that the intended use of a motor vehicle is safe transportation not merely transportation, and therefore the manufacturer has a duty to provide reasonable protection for the user in the event of a collision); Kroger Co. v. Haun, 379 N.E.2d 1004 (Ind. Ct. App. 1978) (holding that the

has seen the substantial narrowing of the reach of Indiana's open and obvious danger rule,[25] the incurred risk defense as applied in the workplace,[26] and product misuse and later alteration defenses.[27] Also, the positive duty of the workplace product manufacturer to deploy safety devices or safeguards has been solidly affirmed, even when adequate warnings have been given.[28]

On the other hand, traditional causation requirements appear to have survived intact[29] and, for the present, the time of entry of a product into the stream of commerce at the moment of release or delivery by the seller remains unchanged.[30] Also, negligence per se rules remain subject to narrow interpretation in Indiana.[31] Thus, on balance, the duty of the Indiana seller of products has been significantly increased during this survey period, although perhaps no more so than has occured earlier in other more populous jurisdictions. But, at least thirty states have tempered their expansion of protection to the user and the consumer by adopting comparative fault principles which can reduce the plaintiff's award if his act or the act of a third person is a proximate cause of the injury.[32] The various comparative fault systems differ as to the percentage of fault attributable to the plaintiff where he may still recover something,[33]

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defendant must prove that plaintiff subjectively appreciated and voluntarily incurred a known risk); Gilbert v. Stone City Constr. Co., 357 N.E.2d 738 (Ind. Ct. App. 1976) (holding that a manufacturer has a duty to deploy feasible safety devices; lessors of products may be liable under § 402A of the RESTATEMENT (SECOND) OF TORTS (1965); and foreseeable bystanders are in the class of protected persons under § 402A in Indiana).

[25]*See* notes 41-71 *infra* and accompanying text.

[26]*See* notes 72-113 *infra* and accompanying text.

[27]*See* notes 114-66 *infra* and accompanying text.

[28]*See* notes 167-85 *infra* and accompanying text.

[29]*See* notes 214-71 *infra* and accompanying text.

[30]*See* notes 272-308 *infra* and accompanying text.

[31]*See* notes 309-43 *infra* and accompanying text.

[32]*See* Annot., 78 A.L.R.3d 339, 354-79 (1977). Thirty states have expressly adopted comparative fault principles in some form either by statute or judicial decision. For discussion of comparative fault concepts, *see, e.g.*, Fischer, *Products Liability—Applicability of Comparative Negligence*, 43 MO. L. REV. 431 (1978); Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171 (1974); Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 IND. L. REV. 797 (1977); Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373 (1978). For an excellent and recent summation of the national comparative fault picture, see Woods, *The Quickening March of Comparative Fault*, 85 CASE & COMMENT, July-August 1980, at 35.

[33]Some jurisdictions take the position that the plaintiff cannot recover if the plaintiff's negligence is greater than the defendant's. This system is referred to as the "modified" form of comparative fault. *See, e.g.*, VT. STAT. ANN. tit. 12, § 1036 (Supp. 1980); WIS. STAT. ANN. § 895.045 (West Supp. 1980). The so called "pure" form of comparative fault permits partial recovery even though plaintiff is more at fault than defendant. The MODEL ACT, *supra* note 17, § 111(A), follows the UNIFORM COMPARATIVE FAULT ACT, in adopting this latter approach.

the treatment of multiple party fault,[34] the nature of the plaintiff's conduct which is subject to the apportionment,[35] and the role of physical causation in the apportionment formula.[36] In general, the comparative fault concept appears to have met with approval as more successfully allocating the cost of accidents than does the "all or nothing system" of the common law.[37] In the workplace context, a comprehensive system of no fault compensation for the worker with equitable apportionment[38] of the cost of the accident between

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[34]Problems of apportionment arise when parties are absent from the product liability litigation. They may have been released, or may be immune, as in the case of employees or co-employees under worker compensation laws. The MODEL ACT provides for apportionment for such absent parties nevertheless. MODEL ACT, *supra* note 17, § 111(B)(1)-(2). Another problem arises under the modified comparative fault systems where the plaintiff must show that the defendant's fault was at least equal to the plaintiff's in order for the plaintiff to recover anything. Where two defendants are responsible for more than 50% of the accident, but neither defendant's fault exceeds the plaintiff's, how should the damages be apportioned? In Cartel Capital Corp. v. Fireco, 161 N.J. Super. 301, 391 A.2d 928 (1978), the court ruled that the plaintiff's negligence must be compared with that of each of the defendants individually and not in the aggregate.

[35]The problem is whether the plaintiff's contributory negligence should reduce plaintiff's award when the defendant is sued under *strict liability*. *See* Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978) (holding that the plaintiff's negligence can be compared with the defendant's strict liability). A more limited approach has been adopted in Florida where assumption of risk (but not contributory negligence) is a comparative fault defense. *See* West v. Caterpillar Tractor Co., 336 So. 2d 80, 90 (Fla. 1976). The MODEL ACT recognizes the problem but states "these concerns appear to be more theoretical than real." MODEL ACT, *supra* note 17, § 111(A) (analysis).

[36]Under comparative fault systems, the jury is instructed to apportion responsibility for the *fault* of the accident among the parties. The percentage of physical contribution to the cause of the accident is generally not a factor. *But see* General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977), where the jury was instructed to apportion the defect and the plaintiff's misuse on the basis of comparative causation. "The defense in a products liability case, where both defect and misuse contribute to cause the damaging event, will limit the plaintiff's recovery to that portion of his damages equal to the percentage of the cause contributed by the product defect." *Id.* at 352.

The *Hopkins* case has generated considerable literature. *See, e.g.*, Twerski, *The Many Faces of Misuse: An Inquiry into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403 (1978); Note, *The Defense of Misuse and Comparative Causation in Products Liability*, 14 HOUS. L. REV. 1115 (1977); Note, General Motors Corp. v. Hopkins: *The Misuse Defense When Design Defect and Plaintiff Misuse Concur to Cause Injury*, 31 S.W.L.J. 940 (1977).

[37]In negligence law, contributory negligence and assumption of risk are complete defenses barring the plaintiff's claims. In strict liability, contributory negligence, insofar as it is a failure to discover a defect or guard against a defect, is generally no defense, while unreasonable incurrence or assumption of a known and appreciated risk is a complete defense as is product misuse. *See* notes 94-113 *infra* and accompanying text (contributory negligence and incurrence of risk); and notes 114-34 *infra* and accompanying text (misuse).

[38]Uncomfortable with the mixing of "apples" (strict liability) and "oranges" (negligence) into a comparative fault system, the court in Daly v. General Motors Corp., 20

employer and product manufacturer based on comparative fault principles, would appear to be a development which is likely to be seriously considered by the courts or legislature[39] in Indiana in the not too distant future.[40]

B. Open and Obvious Dangers

The court in *Bemis Co. v. Rubush*[41] stated the open and the obvious rule, as recited by Indiana courts and the Seventh Circuit Court of Appeals, sitting in diversity, as follows:

> In the area of products liability, based upon negligence or based upon strict liability under §402A of the Restatement (Second) of Torts, to impress liability upon manufacturers, the defect must be hidden and not normally observable, constituting a latent danger in the use of the product. Although the manufacturer who has actual or constructive knowledge of an unobservable defect or danger is subject to liability for failure to warn of the danger, he has no duty to warn if the danger is open and obvious to all.[42]

Although the court recognized "the viability of the concept,"[43] it rejected the defendant's application of the rule and held that the obviousness of danger was only one factor to be weighed in determining whether a product was in a "defective condition unreasonably dangerous" as mandated by section 402A.[44] The court stated that

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Cal. 3d 725, 736, 575 P.2d 1162, 1168, 144 Cal. Rptr. 380, 386 (1978), suggested that the term "'equitable apportionment or allocation of loss' may be more descriptive than 'comparative fault.'"

[39] "The utility of comparative responsibility for product liability cases has been appreciated both by state legislatures[14] and courts.[15]" MODEL ACT, *supra* note 17, § 111(A) at 4 (analysis). The indicated footnotes list examples of states which have adopted comparative fault principles in the one instance by legislative enactment, or by judicial rule, in the other.

[40] *See* Vargo, *Comparative Fault: A Need for Reform of Indiana Tort Law*, 11 IND. L. REV. 829 (1978).

[41] 401 N.E.2d 48 (Ind. Ct. App. 1980), *petition for transfer filed* May 7, 1980.

[42] *Id.* at 56 (citing numerous prior Indiana cases).

[43] *Id.*

[44] *Id.* The RESTATEMENT (SECOND) OF TORTS § 402A (1965), says,

> 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.

other considerations for the trier of fact might include the ordinary knowledge of the community, the existence of feasible safeguards, the appreciation by the plaintiff of the danger, whether misuse of the product occurred, whether there was proper warning, and whether the product's danger was unavoidable.[45]

The court based its "only one factor" interpretation on research which revealed that Indiana courts, beginning with *J.I. Case Co. v. Sandefur*,[46] have recited the open and obvious danger rule only "in connection with the duty to warn where latent defects exist. Indiana courts have never faced an application of the rule straight-on."[47]

The *Bemis* court was probably referring to the often cited quotation from the *Sandefur* case: "On the other hand, there must be reasonable freedom and protection for the manufacturer. He is not an insurer against accident and is not obligated to produce only accident-proof machines. The emphasis is on the duty to avoid hidden defects or concealed dangers."[48] The *Sandefur* court had cited the New York case of *Campo v. Scofield*[49] to support this proposition, but, significantly, did not continue with the balance of the proposition presented "straight-on" in *Campo* which read: "Accordingly, if a remote user sues a manufacturer of an article for injuries suffered, he must allege and prove the existence of a latent defect or a danger not known to plaintiff or other users."[50] The use of the conclusory connective word, "accordingly," apparently induced many subsequent courts governed by Indiana law to convert an emphasis on latent defects into a rule which purports to absolutely bar any plaintiff injured by a defect found to be patent.

Of course, a duty to warn or guard against concealed dangers does not logically require that there be *no* duty to warn or guard against obvious dangers. On the other hand, it is clear that obviousness of danger is a factor which may serve to refute defectiveness. Where the probability of harm and its potential gravity is reduced by the plaintiff's presumed knowledge of the product's dangerous propensities, the manufacturer's burden to protect such a constructively knowledgeable plaintiff is correspondingly reduced, under either negligence law or strict tort. Where the product's

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[45]401 N.E.2d at 57.

[46]245 Ind. 213, 197 N.E.2d 519 (1964).

[47]401 N.E.2d at 56. *See* Note, *Indiana's Obvious Danger Rule for Products Liability*, 12 IND. L. REV. 397 (1979) for analysis of cases decided under Indiana law in which the open and obvious danger rule played a part in the decision.

[48]245 Ind. at 222, 197 N.E.2d at 523.

[49]301 N.Y. 468, 95 N.E.2d 802 (1950) (*Campo* was later overruled in Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976)).

[50]301 N.Y. at 471, 95 N.E.2d at 803.

design calculus requires no more than an effective warning of a hazard, a second warning might be not only redundant but counter-productive as well.[51]

However, a single warning of obvious danger may not be enough to obviate a product's unreasonable danger. Sometimes special safety devices such as guards, shields, or alarms may be necessary to protect against mishaps. This need must be particularly recognized in the workplace context where fatigue and boredom can cause momentary, perhaps involuntary, inadvertance or damaging reflex movement.[52] Productivity in performing repetitive tasks often requires the establishment of rhythms which when interrupted can lead to disorientation followed by unexpected events, and then perhaps panic.[53] Such was apparently the scenario in the *Bemis* case where the plaintiff-employee was severely injured ten minutes into his shift by a descending steel shroud assembly hinged to a batt packing machine designed and manufactured by defendant Bemis. Rubush, as well as any others who may have observed the batt packer, must have been aware of the danager of the descending shroud, yet when Rubush's hand became caught by a bag clamp, he apparently panicked and momentarily forgot the hazard presented by the shroud. The court ruled that a jury could conclude that something more than the obviousness of the danger was necessary to protect such operators.[54]

The defendant argued that not only was the open and obvious danger rule an established rule of Indiana law,[55] but that it was mandated by the section 402A requirement that a product be proven unreasonably dangerous.[56] Bemis assigned error to the trial court's

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[51]*See* A. WEINSTEIN, A. TWERSKI, H. PIEHLER & W. DONAHER, PRODUCTS LIABILITY AND THE REASONABLY SAFE PRODUCT 64-68 (1978). "The overuse of warnings invites consumer disregard and ultimate contempt for the warning process." *Id.* at 68.

[52]*See* Elder v. Crawley Book Mach. Co., 441 F.2d 771 (1971). For technical information concerning boredom and fatigue and their relationship to industrial accidents, *see generally*, E. BENNETT, J. DEGAN & J. SPIEGEL, HUMAN FACTORS IN TECHNOLOGY 43-60 (1963); H. HEINRICH, INDUSTRIAL ACCIDENT PREVENTION 340-43 (3d ed. 1950); L. SIEGEL, INDUSTRIAL PSYCHOLOGY 248-65 (rev. ed. 1969). *See also* Note, *Assumption of Risk in Employee Plaintiff Products Liability Cases in Indiana* (1978) (unpublished student note on file in the office of the INDIANA LAW REVIEW).

[53]*See* Faulkner, *Variability of Performance in a Vigilance Task*, 46 J. APPLIED PSYCH. 325 (1962) for an excellent discussion of the impedance of accurate response as a result of prolonged vigilance at a certain task. *See also* Bertelson and Joffe, *Blockings in Prolonged Serial Responding*, 6 ERGONOMICS 109 (1963) for experimental data offering proof of increased reaction times as a result of the fatigue which occurs in subjects performing continuous tasks.

[54]401 N.E.2d at 57.

[55]"Bemis argues that the open and obvious concept as recited by the above cases states a separate doctrine . . . ." *Id.* at 56.

[56]*Id.* at 55 (§ 402A is reprinted at note 44 *supra*).

refusal to give its tendered instruction defining unreasonably dangerous.[57] The trial court's instruction no. 1, "[T]he batt packing machine must be 'dangerous to an extent beyond that which would be contemplated by an ordinary consumer who purchased the batt packer or for those whose use it was intended,'" was consistent with comment i of §402A.[58]

To discover the basis of Bemis' objection, it is necessary to refer to its brief in support of its petition to transfer wherein it stated:

> In other words, an open and obvious or patent danger cannot, by definition, be unreasonable because if the danger is open and obvious, it is within the contemplation of the ordinary user or consumer with the ordinary knowledge common to the community as to the product's characteristics. If the danger is found to be open and obvious, that ends the inquiry, since the basic premise for the imposition of section 402A liability is lacking.[59]

Summarized, the proposition which emerges is that the dangers the ordinary user or consumer is aware of in the product are dangers which the ordinary consumer would "contemplate." But surely the word contemplation means something more than mere awareness or even appreciation. The contemplating viewer also considers "with a view of accomplishing; intend; plan . . . to treat of as contingent or possible. . . ."[60] To determine what the ordinary user contemplates with respect to the product he uses, the seller must go beyond the consumer's mere awareness, and even beyond his appreciation of danger, to the level of safety and protection the ordinary consumer thinks is contingent, possible or intended—in short, what he thinks is appropriate to the product. What is appropriate may in some cases be only what the user observes and appreciates; but, at times, it may be something more.

Commentators have had difficulty with this "consumer contemplation [or expectation] test" because of the ambiguity arising out of the words expectation and contemplation. Professors Wade and Keeton have suggested that using a seller's perspective together with principles of ordinary negligence or negligence per se

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[57]401 N.E.2d at 58.

[58]*Id.* at 59. RESTATEMENT (SECOND) OF TORTS § 402A (1965), Comment i, provides in part: "The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer."

[59]Brief in Support of Appellant's Petition to Transfer at 30-31, Bemis Co. v. Rubush, 401 N.E.2d 48 (Ind. Ct. App. 1980), *petition for transfer filed* May 7, 1980.

[60]FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 567 (1963) (definition of "contemplate").

will clear up the difficulty. Under strict tort, the manufacturer is imputed to have knowledge of the dangerous propensities of its product.[61] With such imputed knowledge he is expected to balance magnitude of risk against burden of protecting against harm. If risk outweighs burden, the product is in a defective condition unreasonably dangerous.[62]

The consumer contemplation test interpretation submitted by Bemis Co. was followed in one Indiana diversity case. In *Burton v. L.O. Smith Foundry Products Co.*,[63] the manufacturer specified kerosene as a solvent for its product, a mold parting compound. When the plaintiff alleged that less flammable solvents were available, the court held that the manufacturer was not liable inasmuch as the dangers of kerosene were apparent. It is difficult to see how this broad an interpretation of the open and obvious danger rule can advance the objective of section 402A, comment c, which states that the consumer "is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products."[64]

The critical distinction between "open" and "obvious" in the rule should also be noted. Although the rule is based on the objective perspective of the ordinary consumer, mere openness or physical visibility of the hazardous instrumentality is insufficient to avoid liability to the seller. In *Dudley Sports Co. v. Schmidt*,[65] the lack of a guard around the throwing arm of a pitching machine was completely open to the ordinary user, yet the court held that the potential of the arm to deliver a serious blow even when unplugged was a "latent danger."[66] In *Zahora v. Harnischfeger Corp.*,[67] the physical characteristics of a crane cab were also entirely open, yet the court

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[61]Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 834 (1973). *See also* Dias v. Daisy-Heddon, 390 N.E.2d 222, 227 (Ind. Ct. App. 1979).

[62]Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 37-38 (1973); Wade, *supra* note 61, at 834-35. The risk-utility analysis adopted by professors Keeton and Wade is derived from negligence principles. The best known summary of this economic efficiency approach, is the calculus of risk to be found in United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947) (the "Learned Hand Test"). This test is also found in RESTATEMENT (SECOND) OF TORTS § 291 (1965) expressed as follows:

> Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.

[63]529 F.2d 108 (7th Cir. 1976).

[64]RESTATEMENT (SECOND) OF TORTS § 402A, Comment c (1965).

[65]151 Ind. App. 217, 279 N.E.2d 266 (1972).

[66]*Id.* at 226-27, 279 N.E.2d at 274.

[67]404 F.2d 172 (7th Cir. 1968).

noting the manufacturer's duty to avoid hidden dangers,[68] held in reversing summary judgment for the defendant that the crane cab could have been negligently designed because the design may not have permitted a sufficient field of vision for the operator.[69]

Moreover, as the court emphasized in *Bemis*, there is always the question of determining what is the "ordinary knowledge in the community":

> It is to be expected that certain products, whose dangers are obvious and commonly known, such as a sharp knife, an ax, or dynamite, would not be actionable under § 402A because, while dangerous, and capable of causing harm, they would not be unreasonably dangerous because their characteristics are contemplated by the ordinary consumer with ordinary knowledge in the community. Prosser, Law of Torts § 96, p. 649 (4th ed. 1971). With other products, embodying complex and sophisticated technology, incomprehensible to all but practitioners of the art, the dangers are not so obvious and may not be appreciated by an ordinary consumer with ordinary knowledge in the community, even though the dangers may be appreciated by the sophisticated.[70]

Because a broad open and obvious danger rule does not distinguish between the duty to warn and the duty to guard; requires distinguishing superficial awareness from appreciation of danger; requires a difficult determination of ordinary consumer knowledge; and above all, discourages the development of safer products, it has lost vitality in many jurisdictions which have recently considered it.[71]

C. Incurred Risk

1. Incurred Risk and the Open and Obvious Danger Rule.—In *Bemis Co. v. Rubush*,[72] instructions tendered by Bemis "which would have told the jury that if the dangers were open and obvious, the plaintiff was precluded from recovery,"[73] were rejected by the trial

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[68]*Id.* at 176.

[69]*Id.* at 174-78.

[70]401 N.E.2d at 57.

[71]*See, e.g.*, Dorsey v. Yoder Co., 331 F. Supp. 753 (E.D. Pa. 1971); Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970); Wright v. Massey-Harris, Inc., 68 Ill. App. 2d 70, 215 N.E.2d 465 (1966); Nichols v. Union Underwear Co., 602 S.W.2d 429 (Ky. 1980); Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976), *overruling* Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950). *See also* Note, *supra* note 47, at 415-22 in which the above cases are discussed.

[72]401 N.E.2d 48 (Ind. Ct. App. 1980), *petition for transfer filed* May 7, 1980.

[73]*Id.* at 58.

court. The appellate court noted that "[t]he open and obvious rule has further application where the defense of incurred risk is asserted."[74] The court characterized incurred risk by stating that it "is concerned with voluntariness and involves a mental state of venturousness. It has a subjective quality. Incurred risk is concerned with a user's age, experience, knowledge, and understanding, as well as the obviousness of the defect and the danger it poses."[75] Bemis' tendered instructions sought to convert the obviousness of danger into incurred risk as a matter of law without reference to the plaintiff's subjective state. Instead, the trial court submitted an instruction which "told the jury that they *could* consider any open and obvious characteristics of the machine in determining whether the machine was defective and unreasonably dangerous, and whether the plaintiff incurred the risk of injury from that condition."[76] The appellate court found no error in the trial court's instruction.

Indiana's open and obvious danger rule is generally traced to New York's *Campo v. Scofield*.[77] When *Campo* was overruled in *Micallef v. Miehle Co.*,[78] the court stated:

> More specifically, it is contended that the application of *Campo* amounts to an assumption of risk defense as a matter of law "with the added disadvantage that the defendant was relieved of the burden of proving that plaintiff had subjectively appreciated a known risk." *Campo* is viewed as inconsistent because, on the one hand, it places a duty on the manufacturer to develop a reasonably safe product yet eliminates this duty, thereby granting him immunity from answering in damages, if the dangerous character of the product can be readily seen, irrespective of whether the injured user or consumer actually perceived the danger.[79]

2. Incurred Risk and the Workplace Accident.—The trial court in *Bemis Co. v. Rubush*,[80] instructed the jury that an employee who followed his employer's order and operated a machine known by the employee to be dangerous "does not necessarily incur the risk of his injury if the nature of his employment requires exposure to certain hazards and if the apparent danger is such that a man of ordinary prudence would take the risk in order to comply with his employer's

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[74]*Id.*

[75]*Id.*

[76]*Id.* (emphasis added).

[77]301 N.Y. 468, 95 N.E.2d 802, 95 N.Y.S.2d 610 (1950).

[78]39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

[79]*Id.* at 384, 348 N.E.2d at 576, 384 N.Y.S.2d at 120.

[80]401 N.E.2d 48 (Ind. Ct. App. 1980), *petition for transfer filed* May 7, 1980.

order."[81] Bemis, relying on *Meadowlark Farms, Inc. v. Warken*,[82] assigned error to the instruction. The court distinguished *Meadowlark Farms* on the ground that it was a negligence case whereas *Bemis* was brought under strict tort.[83]

In *Meadowlark Farms*, the plaintiff Warken, a sharecropper, was injured when he slipped onto an unguarded corn auger which had been provided by his landlord, the defendant. Presumably strict tort would not apply because the defendant was not in the business of selling or leasing corn augers.[84] The defendant asserted that Warken had assumed the risk[85] presented by an unguarded corn auger because he had impliedly contracted to "assume the risk of all incidental and ordinary hazards, and all incidental and extraordinary hazards of which he has notice although not assumed when the employment commenced."[88] The court affirmed this nineteenth century rule but Warken was nevertheless permitted to recover after the court determined that the hazard presented by the auger was incidental but *extraordinary* because it arose after the contractual relationship had been entered into. In the case of such extraordinary

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[81]*Id.* at 60.

[82]376 N.E.2d 122 (Ind. Ct. App. 1978).

[83]401 N.E.2d at 61. It should be noted that the plaintiff employee's incurrence of risk under this rule arises under an implied contract between the employer and employee. *See* Brazil Block Coal Co. v. Hoodlet, 129 Ind. 327, 331, 27 N.E. 741, 743 (1891). It is highly questionable whether the employee's risk incurrence should extend to risks created by third party product manufacturers such as Bemis.

[84]RESTATEMENT (SECOND) OF TORTS § 402A(1)(a) (1965). This section says, "[T]he seller is engaged in the business of selling such a product . . . ." This provision was held to apply to lessors in Gilbert v. Stone City Constr. Co., 357 N.E.2d 738 (Ind. Ct. App. 1976).

[85]"In the case at bar the parties apparently agree that the doctrine of assumed risk applies (rather than incurred risk), based on the landlord-tenant sharecrop agreement which created a contractual relationship." 376 N.E.2d at 132.

[88]*Id.* (citing Brazil Block Coal Co. v. Hoodlet, 129 Ind. 327, 27 N.E. 741 (1891)). The *Brazil Block* court stated that it regarded "the rule *within proper limits* as a wise and just one." *Id.* at 332, 27 N.E. at 743 (emphasis added). The court noted that a worker would not be deemed to assume the risks of hazards his employer had promised to repair, *id.*, nor would he be deemed to have assumed the risks of hazards "not connected with his work." *Id.* at 334, 27 N.E. at 743. The court observed, however, that "[t]he servant does not stand on the same footing with the master." *Id.* at 335, 27 N.E. at 744. The court then held that a worker who accepts a hazardous job assignment will not *necessarily* be deemed to have assumed the risk:

> If the apparent danger is such that a man of ordinary prudence would not take the risk, the servant acts at his peril. But unless the apparent danger is such to deter a man of ordinary prudence from encountering it, the servant will not be compelled to abandon the service, or assume all additional risk, but may obey the order, using care in proportion to the risk apparently assumed, and if he is injured the master must respond in damages.

Id. at 336-37, 27 N.E. at 744.

hazards the court held that there should be no presumption of appreciation of the risk, as there would be if the hazard were incidental and ordinary;[87] "the danger and risk must be actually known and appreciated before it is assumed."[88] The jury was therefore permitted to find that Warken's appreciation of the combination of an unguarded auger, and a slippery ground cover surrounding the auger, did not rise to the threshold of risk assumption.[89] The jury was also permitted to consider the issue of voluntariness, inasmuch as Warken's written express contract with Meadowlark *required* him to store grain with the defendant.[90] Whether a typical unwritten master-servant employment contract creates a comparable level of *legal* compulsion upon an ordinary employee so as to negate the voluntary conduct requirement of the incurred risk defense in Indiana remains doubtful.

On the other hand, the question of *economic* compulsion on the employee was raised indirectly in the *Bemis* case. The court acknowledged that for the most part, an employee who encounters a known and appreciated risk and then proceeds to accept it, does so voluntarily. But there are instances, the court held, where the acceptance of a known hazard is reasonable for an employee under the circumstances.[91] Under strict tort, an incurred or assumed risk defense is only available where the risk taker acts unreasonably. Under the negligence rubric, however, *reasonable* assumption of risk may be a defense. The court in *Meadowlark Farms* had quoted:

> "Where one voluntarily and knowingly places himself in a certain environment, or undertakes to use a certain instrumentality, and as a consequence receives an injury, his right to recover therefor may be defeated by the doctrine of the assumption of risk, where the contractual relation exists, or by the doctrine of incurred risk where the relation is non-contractual, *even though he may have exercised due care for his own safety* . . . ."[92]

The *Bemis* court stated that "[w]hile the defense of incurred risk in negligence law is that one incurs all the ordinary and usual risks of an act upon which he voluntarily enters . . . the defense of incurred risk under § 402A is that '[i]f the user . . . discovers the defect . . . and . . .

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[87]376 N.E.2d at 132-33.

[88]*Id.* at 133.

[89]*Id.* at 133-34.

[90]*Id.*

[91]401 N.E.2d at 61.

[92]376 N.E.2d at 132 (quoting Pittsburgh, C.,C. & St. L.R.R. v. Hoffman, 57 Ind. App. 431, 439, 107 N.E. 315, 318 (1914) (emphasis added)).

proceeds unreasonably . . . he is barred from recovery.' "[93] The jury in *Bemis* would therefore be permitted to find that the plaintiff's acceptance of a hazardous job assignment was reasonable and thus an incurred risk defense under strict tort's section 402A would not lie.

3. Incurred Risk and Contributory Negligence.—A recurring problem in determining whether a plaintiff has incurred a known risk is that of momentary forgetfulness. A user may be fully aware and appreciative of a hazard prior to the time of an accident but he may lose that awareness through inadvertence or inattention and be injured as a result.

Although the problem of inadvertence is particularly relevant to the workplace environment where performance of repetitive tasks generates boredom, fatigue, and soporific rhythms, the issue was raised during the survey period in a slip and fall case. In *Gerrish v. Brewer*,[94] the plaintiff-appellant assigned error to an instruction in which the trial court failed to tell the jury that the plaintiff must be aware of the hazard at the time of the accident and that mere prior knowledge of the hazard would not constitute incurred risk.[95] The court held that such an addition to the incurred risk instruction would be unnecessary and redundant inasmuch as incurred risk required, by definition, a consciousness of the risk;[96] "[i]t is difficult to perceive how a plaintiff could consciously, deliberately and intentionally encounter a risk he had forgotten about."[97]

On the other hand, momentary forgetfulness might represent unreasonable conduct and therefore constitute contributory negligence. Recognizing that even prudent people sometimes reasonably forget the existence of a hazard, the court suggested that an instruction may be appropriate which states that " 'the mere fact of previous knowledge does not *per se* establish *contributory negligence.*' "[98]

The court in *Gerrish* did find error in the trial court's incurred risk instruction because the instruction provided for an objective test of the plaintiff's conduct with respect to incurrence of risk: "If you find, therefore, that the plaintiff knew, or in the exercise of reasonable and ordinary care, should have known. . . ."[99] The ap-

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[93]401 N.E.2d at 61 (quoting RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965)).

[94]398 N.E.2d 1298 (Ind. Ct. App. 1979).

[95]*Id.* at 1299-1300.

[96]*Id.* at 1301. *See* notes 52-53 *supra* and accompanying text.

[97]398 N.E.2d at 1301.

[98]*Id.* at 1300 (quoting Town of Argos v. Harley, 114 Ind. App. 290, 305, 49 N.E.2d 552, 557 (1943)).

[99]398 N.E.2d at 1299.

pellate court cited *Kroger Co. v. Haun*,[100] which was decided after *Gerrish* was tried, to support its holding that "constructive knowledge has no place in determining incurred risk."[101] The objective reasonable man test applies to a finding of contributory negligence which is not, without more, a defense to a strict liability claim, whereas incurred risk, where the plaintiff acts unreasonably, is a defense to strict tort.[102]

In *Moore v. Federal Pacific Electric Co.*,[103] the plaintiff appealed from summary judgment which held him to be contributorily negligent and to have incurred the risk to himself as a matter of law.[104] Moore's action against the manufacturer of an electrical switch box was brought under negligence, strict liability, and breach of implied warranty theories. Incurred risk was a defense to all three theories, but contributory negligence was only a defense to negligence.[105]

The plaintiff knew that the switch box was energized and that there were several precautions he might have taken to avoid the accident. He claimed, however, that his actions were reasonable, that he had no subjective knowledge of the hazards posed by this type of switch box because it was new to him, and that the switch box's defective design proximately caused his injury. To support his claim of reasonable conduct, the plaintiff presented evidence that other prudent electricians customarily worked on energized switch boxes. The appellate court held that an issue of fact was thus raised, and summary judgment on the issue of contributory negligence was error, inasmuch as reasonable men could have reached more than one conclusion.[106] To support his claim that he had no subjective knowledge of the hazard, the plaintiff presented evidence of his lack of familiarity or experience with bolt-on switch boxes as opposed to the plug-in type with which he was familiar. The court held this evidence also raised an issue of fact which precluded summary judgment on the issue of incurred risk.[107] The exact design defect had not yet been identified.

The question of contributory negligence as a matter of law was

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[100]379 N.E.2d 1004 (Ind. Ct. App. 1978).

[101]398 N.E.2d at 1300. The court's finding with respect to constructive knowledge was dictum, however, because the appellant had failed to raise the issue in the trial court. *Id.*

[102]*See* RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965).

[103]402 N.E.2d 1291 (Ind. Ct. App. 1980).

[104]*Id.* at 1292-93.

[105]*Id.* at 1293.

[106]*Id.* at 1295.

[107]*Id.*

earlier raised in *Meadowlark Farms, Inc. v. Warken*[108] by a defendant who argued for that holding because there existed, he asserted, a safer method than the plaintiff's for unloading corn from a truck into a corn auger. The court stated the "test for negligence 'as a matter of law' to be that negligence which is so clear and palpable that no verdict could make it otherwise."[109] The court found that the plaintiff's unloading system was "used by other farmers and that his manner of operating the endgate was not unusual,"[110] and also noted that "[b]ecause an activity or conduct is dangerous does not as a matter of law legally result in the conclusion that such conduct or activity was negligent."[111]

The court agreed with the defendant that "Indiana courts have approved the rule that a plaintiff is contributorily negligent as a matter of law if his knowledge and appreciation of the dangers, inherent in his enterprise and of the defendant's creation, surpassed or equalled that of the defendant."[112] However, the court found the defendant had notice of a prior accident, was aware of the severity of injury presented by the auger, and had already fashioned a guard to prevent a recurrence of harm. Defendant, therefore, was held to have had greater knowledge than plaintiff and contributory negligence as a matter of law was precluded.[113]

D. Misuse and Later Alteration

1. "Unintended" v. "Not Reasonably Foreseeable;" a Historical Note.—During the survey period the issues of misuse and later alteration were addressed in more than one case. To fully appreciate the courts' approaches a historical note is in order.

a. Misuse.—Courts controlled by Indiana law have developed two approaches for dealing with product misuse. The first, as exemplified in the seminal California case, *Greenman v. Yuba Power Products, Inc.*,[114] delimits the scope of the seller's liability by reference to the intended use of the product. The *Greenman* court stated:

> To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of

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[108]376 N.E.2d 122 (Ind. Ct. App. 1978).
[109]*Id.* at 130.
[110]*Id.*
[111]*Id.* at 131.
[112]*Id.*
[113]*Id.*
[114]59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

> a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use.[115]

This approach has been followed by the Seventh Circuit Court of Appeals in motor vehicle diversity cases governed by Indiana law. The early case of *Evans v. General Motors*[116] took a narrow view of the intended use of an automobile and held that any purpose other than transportation or handling of the car which was not necessary to achieve that purpose would fall outside the scope of liability.[117] Thus any handling resulting in collision would be a misuse and no duty would accrue to the manufacturer to foresee and deal with such unintended purposes and handlings. Although the *Evans* subjective test for product use intent was later widened to include the ordinary consumer's contemplation,[118] still no duty to foresee product uses falling outside the expanded intended use spectrum would be required under an intended use formulation. In *Schemel v. General Motors*,[119] the court rejected plaintiff's claim that the manufacturer had a duty to foresee that its car would be driven at very high speed and in *Latimer v. General Motors*,[120] the court said:

> In essence, the plaintiff attempts to graft onto his theory of strict liability an element of foreseeability. Latimer asserts that a manufacturer should anticipate a "misuse" of the product and design safeguards against that contingency. Such is not the law.
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> *Schemel v. General Motors* . . . stands for the proposition that a manufacturer is under no obligation to foresee and to guard against a danger that results from a misuse of the product.[121]

Nine months after the *Latimer* decision, the seventh circuit handed down *Huff v. White Motor Corp.*,[122] which introduced a foreseeability element into the intended use formulation. Taking notice of the great frequency of motor vehicle accidents which occur on American highways, the court opted to follow the now over-

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[115]*Id.* at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

[116]359 F.2d 822 (7th Cir. 1966).

[117]*Id.* at 825.

[118]*See* Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965). "[U]se different from or more strenuous than that *contemplated to be safe by ordinary users/consumers*, that is 'misuse,' would either refute a defective condition or causation." *Id.* at 429 (emphasis added).

[119]384 F.2d 802 (7th Cir. 1967).

[120]535 F.2d 1020 (7th Cir. 1976).

[121]*Id.* at 1024.

[122]565 F.2d 104 (7th Cir. 1977).

whelming majority rule from the *negligence* case of *Larsen v. General Motors Corp.*[123] In *Larsen* it was held that a determination of intended use had to realistically include the foreseeable ordinary use environment of the product, which of necessity would include some handlings and purposes that could only be characterized as undesirable and unsafe. The *Huff* court, however, did not entirely discard its earlier approach to product misuse. The court explained:

> Although the trial court in addition to *Evans* cited *Schemel v. General Motors Corp.* . . . as controlling in this case, *Schemel* actually dealt with a misuse of the vehicle and analytically is not apposite. *See Latimer v. General Motors Corp.* . . . . Insofar as the decision in *Schemel* rests on *Evans*, it is overruled along with *Evans*.[124]

Thus the court created an uncertainity; some undesirable and unsafe conduct would have to be anticipated because it would be *within* the ordinary use environment of the product, but other undesirable and unsafe acts which could be labeled misuse would fall outside these limits and no duty to foresee those acts or events would be required of the seller.

A second approach to product misuse in Indiana treats such conduct as an affirmative defense to strict liability in tort which can refute defect or causation. The entire formulation is stated in *Perfection Paint & Color Co. v. Konduris*,[125] and it includes a reasonable foreseeability element: "[T]he defense of misuse is available when the product is used 'for a purpose not reasonably foreseeable to the manufacturer' or when the product is used 'in a manner not reasonably foreseeable for a reasonably foreseeable purpose.' "[126] The court noted that conduct labeled misuse could overlap with contributory negligence and incurred risk but the "true category of misuse" is "misuse of a product which does not exhibit any defective condition until misused, or which does not appear to be defective and unreasonably dangerous."[127] The court in its definition of misuse also adopted the formulation from *Greeno v. Clark Equipment Co.*[128] in which it was stated that "use different from or more strenuous than that contemplated to be safe by ordinary

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[123]391 F.2d 495 (8th Cir. 1968). The *Huff* court noted that only two states in addition to Indiana followed *Evans* whereas thirty jurisdictions followed *Larsen*. 565 F.2d at 110-11.

[124]565 F.2d at 106 n.1.

[125]147 Ind. App. 106, 258 N.E.2d 681 (1970).

[126]*Id.* at 119, 258 N.E.2d at 689.

[127]*Id.*

[128]237 F. Supp. 427 (N.D. Ind. 1965).

user/consumers, that is, 'misuse,' would either refute a defective condition or causation."[129]

Although both the expanded intended use formulation of *Huff* and the "not reasonably foreseeable" purpose or handling formulation of *Konduris* now require the seller to foresee mishaps occurring in the field with respect to his products, there is doubt that the scope of foreseeability of these two formulations is necessarily congruent. *Huff* adopted the *Larsen* rule of expanded intended use. *Larsen*, a negligence case, relied heavily on the actual notice that automobile manufacturers had of improper driving conduct which led, and continues to lead, to frequent collisions.[130] *Konduris* on the other hand, purported to set out the misuse standard under strict liability. Under strict tort, actual notice of the harmful propensities of a product is not required; such knowledge is imputed to the manufacturer.[131] Unless harmonized by the courts, there would appear to be greater scope of foreseeability under the *Konduris* formulation than under *Huff*.[132]

In 1978, the Indiana legislature enacted a Product Liability statute which purported to codify and restate "the common law of this state with respect to strict liability in tort."[133] Under section 4,

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[129]*Id.* at 429.

[130]Automobiles are made for use on the roads and highways . . . . This intended use cannot be carried out without encountering in varying degrees the *statistically proved* hazard of injury-producing impacts of various types. The manufacturer should not be heard to say that it does not intend its product to be involved in any accident when it can easily foresee and when it *knows* that the *probability* . . . *is high*, that [the product] will be involved in some type of injury-producing accident. . . . *[O]ne-fourth to two-thirds* of all automobiles . . . are involved in an accident.

391 F.2d at 501-02 (emphasis added).

[131]*See* note 62 *supra* and accompanying text.

[132]That Indiana courts have recognized the need to harmonize these two formulations, and have undertaken to do so, is revealed in Conder v. Hull Lift Truck, Inc., 405 N.E.2d 538 (Ind. Ct. App. 1980). *See* notes 141-62 *infra* and accompanying text.

[133]IND. CODE §§ 33-1-1.5-1 to -8 (Supp. 1980). See Vargo & Leibman, *Products Liability, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 227, 238-58 (1979), for an analysis of this statute. The Indiana Product Liability statute recently survived a vigorous challenge at the trial level. In Dague v. Piper Aircraft Corp., No. S79-293 (N.D. Ind. May 27, 1980), the federal district court ruled that subsection 5 of that statute was indeed a repose provision which provided for an outer cutoff of seller's liability ten years after the initial delivery of the product. The plain language of the subsection appears to give the plaintiff a choice of limitation periods—either two years from the date of the accident *or* ten years from the date of initial delivery: "[A]ny product liability action must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user. . . ." IND. CODE § 33-1-1.5-5 (Supp. 1980). The *Dague* court found that the use of the disjunctive "or" in this subsection was a drafting error and was inconsistent with the intent of the legislature which was clearly to limit sellers' liability, not increase it.

"Defenses to strict liability in tort," subsection (b)(2) provides in part that "[i]t is a defense that a cause of the physical harm is a non-

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Dague v. Piper Aircraft Corp., at 2-3, 5. The plaintiffs' interpretation, held the court, would also reduce the remaining language of the subsection, "except that, if the cause of action accrues more than eight (8) years but not more than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues," IND. CODE § 33-1-1.5-5 (Supp. 1980), to mere surplage. Dague v. Piper Aircraft Corp., at 5.) For a discussion of this drafting problem raised by the statute, see Vargo & Leibman, *Products Liability, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 227, 250 (1979), which was cited and quoted by the *Dague* court. The court also ruled that the defendants' absence from the state did not toll this statute of limitation (or repose) inasmuch as the Indiana Secretary of State was at all times available as a statutory agent to accept service of process for an out-of-state corporation doing business in Indiana. Dague v. Piper Aircraft Corp., at 8.

The plaintiff also mounted an equal protection challenge to the repose provision of the statute arguing that third party product owners were discriminated against in favor of manufacturers, and consumers and users of old products were discriminated against in favor of consumers and users of new products. The court, however, held that neither of these classification systems involved a suspect class requiring strict scrutiny. *Id.* at 9. Because the schemes were not arbitrary or unreasonable, inasmuch as they were the result of the Indiana General Assembly's response to a serious product liability insurance problem, they were held to pass constitutional muster on equal protection grounds. *Id.* at 9-10.

The *Dague* court also ruled that the Indiana General Assembly had the right to abolish rights recognized under the common law if those rights were not vested. *Id.* at 10-11. The plaintiff had apparently invoked the provision in the Indiana Constitution which gives persons access to our courts and a right to a remedy for injury. IND. CONST. art. I, § 12 provides: "All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. . . ." This provision, variations of which appear in a number of state constitutions, has provided the basis for challenge to repose statutes enacted to limit the negligence liability of architects and builders to a limited number of years following a building's construction. A plaintiff injured after the limitation period can argue, however, that the repose provision has denied him a remedy and access to the state courts. Jurisdictions have split on this issue. The *Dague* court, however, opted to follow Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662 (1972), in which that court took the view that a repose provision did not actually bar a cause of action but simply had the effect of preventing a cause of action from ever arising and thus no vested right was disturbed. But in Overland Construction Co. v. Simmons, 369 So. 2d 572 (Fla. 1979), the Florida Supreme Court held that a party injured after a repose period had passed would have no access to a judicial forum were the limitation period to be given effect. To abolish such a right without providing a reasonable alternative was held violative of article I, section 21 of the Florida Constitution which provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." FLA. CONST. art. I, § 21. The principle was recently reaffirmed in Purk v. Federal Press Co., No. 55,214 (D. Fla. July 24, 1980). *See* [1980] PRODUCTS SAFETY & LIAB. REP. (BNA) 607.

Perhaps the most serious challenge presented by the plaintiff in *Dague* was that Public Law No. 141, violated the one subject rule of the Indiana Constitution. Art. IV, § 19 provides: "An act, except an act for the codification, revision or rearrangement of

foreseeable misuse of the product by the claimant or any other person."[134] This approach appears to track with *Konduris* and would appear to adopt whatever scope of unforeseeability is implied by the *Konduris* formulation.

This writer believes the scope of unforeseeability under Indiana strict liability law will prove to be based on a risk-utility analysis in which the seller is imputed to have a full expert's knowledge of the dangerous propensities of his product, but the weighting of the risk and utility factors will ultimately depend on case by case development.

b. Later alteration and modification.—A special variety of product misuse occurs when a third party modifies or alters a product manufactured by the defendant and the plaintiff is injured as a result. This problem is usually associated with workplace accidents where employers are often motivated to make changes to equipment to make it more productive or to modify it to perform new tasks. Inasmuch as the defense of later alteration does not consider the alterer's motive,[135] inadvertant alteration or modification must also be included although the purpose of identifying later alteration as a separate defensive doctrine has been to deal with deliberate third party conduct.

In any event, a determinant in many jurisdictions of the original manufacturer's liability is foreseeability. In *Cornette v. Searjeant Metal Products, Inc.*,[136] Judge Sharp stated in a concurring opinion:

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laws, shall be confined to one (1) subject and matters properly corrected therewith." IND. CONST., art. IV, § 19 (as amended November 8, 1960; November 5, 1974). The product liability statute was passed in 1978 as section 28 of Public Law No. 141 entitled, "An Act to Amend I.C. 33 Concerning Courts and Court Officers and Product Liability." Pub. L. No. 141, 1978 Ind. Acts 1298. The first twenty-seven sections of the statute dealt with matters of court jurisdiction and operation.

The court noted that an act of the legislature carries a presumption of constitutionality and that Indiana courts have in the past broadly interpreted the scope of a single subject which has permitted the grouping of diverse matters under broad subject headings. The *Dague* court found "a reasonable basis for the grouping together of the matters in Public Law 141." The court noted that "almost any desired provision relating to that broad subject might be enacted under that heading." It can be argued, however, that courts and court officers and product liability represent a substantially more diverse combination than any that has been upheld in the past.

Finally, the court ruled that even if two subjects were found in the statute "it can uphold the Indiana Products Liability Act because of the severability provision in that Act." However, if the appellate court finds Public Law No. 141 violative of the Indiana Constitution's one subject provision, on what basis can it choose to save one part of the Act over another?

[134]IND. CODE § 33-1-1.5-4(b)(2) (Supp. 1980).

[135]*See* notes 136-38 *infra* and accompanying text for Indiana common law and statutory "later alteration" defenses.

[136]147 Ind. App. 46, 258 N.E.2d 652 (1970).

"Any change in the product which would be of such nature not reasonably foreseeable to the manufacturer and which contributes to the defect which causes injury is a substantial change and would constitute an affirmative defense to the action."[137] Similarly, section 4(b)(3) of the Indiana Product Liability Act provides: "It is a defense that a cause of the physical harm is a nonforeseeable modification or alteration of the product made by any person after its delivery to the initial user or consumer if such modification or alteration is the proximate cause of physical harm."[138]

Section 402A states that liability is to attach to the manufacturer only if the product reaches the ultimate user without substantial change, but comment p to this section is less definite:

> The question is essentially one of whether the responsibility for discovery and prevention of the dangerous defect is shifted to the intermediate party who is to make the changes. No doubt there will be some situations, and some defects, as to which the responsibility will be shifted, and others in which it will not. The existing decisions as yet throw no light upon the questions, and the Institute therefore expresses neither approval nor disapproval of the seller's strict liability in such a case.[139]

In Indiana, it would appear that the seller retains a duty to anticipate later alteration and modification if such substantial changes are foreseeable.

2. Foreseeable Misuse.—At the close of the survey period the Indiana Court of Appeals handed down *Conder v. Hull Lift Truck, Inc.*,[140] which dealt extensively with a manufacturer's duty to foresee product misuse and which clearly sought to reconcile the two Indiana "use" formulations discussed earlier.[141] Conder was severly injured when a lift truck leased to his employer by Hull, a leasing agent, failed to decelerate when Conder removed his foot from the throttle. Conder brought his action under theories of strict liability, negligence, and willful and/or wanton misconduct against Hull, and against Allis-Chalmers, the manufacturer. The jury found for both defendants, and on appeal the judgment for Hull was affirmed on the ground that plaintiff was injured by a superseding intervening cause, but the judgment in favor of Allis-Chalmers was reversed and remanded for a new trial.[142]

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[137]*Id.* at 67, 258 N.E.2d at 665 (White, J., concurring).

[138]IND. CODE § 33-1-1.5-4(b)(3) (Supp. 1980).

[139]RESTATEMENT (SECOND) OF TORTS § 402A, Comment p (1965).

[140]405 N.E.2d 538 (Ind. Ct. App. 1980).

[141]*See* notes 114-34 *supra* and accompanying text.

[142]405 N.E.2d at 548; *see* notes 261-66 *infra* and accompanying text.

The plaintiff assigned error to several jury instructions pertaining to Allis-Chalmer's liability. Plaintiff objected to Allis-Chalmer's instruction which told the jury "that the manufacturer is not required to anticipate or foresee that its product will be substantially changed."[143] The appellate court agreed that standing alone such an instruction would be incomplete but was not reversible error when considered together with the plaintiff's instruction which permitted the jury to find liability "*if the manufacturer could reasonably expect of [sic] foresee that the change or alteration might be made and foresees that the change or alteration might render the fork lift truck unsafe.*"[144]

The court did find error in another instruction which stated that the manufacturer was not a guarantor of the quality of its product. While acknowledging that a manufacturer is not an *insurer*, i.e., not responsible for every accident in which its product is involved, the manufacturer does "guarantee that his product is reasonably safe for its intended and foreseeable use."[145]

That the court's linkage of "intended and foreseeable use" was not inadvertant is revealed in its discussion of the defendant's erroneously given instruction dealing with the manufacturer's duty to warn. The jury was told that Allis-Chalmers had no duty "to warn of dangers associated with the misuse of its product."[146] The court noted that the narrow intended use doctrine of *Evans v. General Motors Corp.*,[147] had been overruled by *Huff v. White Motor Corp.*:[148]

> Huff recognized the need for a manufacturer to anticipate the environment in which its product will be used and the reasonably foreseeable risks which its use in the environment entails. *Accord, Shanks v. A.F.E. Industries, Inc., supra.*
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> While *Huff* is a so called "second collision" case, the *Huff* rationale, i.e., the environment in which a product is used must be taken into consideration by the manufacturer, *is wholly apposite to a discussion of product misuse and a manufacturer's duty to warn.*
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> The environmental approach to product use assumes a manufacturer markets a product for an intended use. This is not to say, however, that in considering design alternatives,

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[143]405 N.E.2d at 544.

[144]*Id.* (emphasis added by the court of appeals).

[145]*Id.*

[146]*Id.* at 545.

[147]359 F.2d 822 (7th Cir. 1966).

[148]565 F.2d 104 (7th Cir. 1977).

> including various instruments and warnings, a manufacturer may simply close his eyes to hazards associated with foreseeable misuse of the product. . . . *Perfection Paint & Color Co. v. Konduris* . . . .[149]

There seems no question but that the Indiana Court of Appeals recognized the uncertainties generated by the reservation in *Huff* in respect to the appositeness of misuse analysis to intended use analysis.[150] The *Conder* court moved to close the gap by resolving any differences in the two formulations in favor of the *Konduris* test.[151] In determining the scope of foreseeability which may now be required of a seller, at least for a warning, it may be revealing to examine the facts in *Conder* in more detail. The parties apparently conceded that the leasing agent, Hull, grossly misadjusted the linkage between the forklift governor and the carburetor. The dangerousness of this defective condition was masked by a back-up device, a torsion spring, which when operative, permitted the forklift to decelerate in spite of the governor-carburetor misadjustment. Only after some time had passed following Hull's rental to Conder's employer, did the torsion spring break, thus causing the misadjusted carburetor to fuel the forklift at full throttle.

The improbability of this scenario suggests that a foreseeability requirement is based here on far less than *actual* notice to the manufacturer.[152] To send these facts to a jury would require imputing knowledge of overacceleration due to governor-carburetor linkage misadjustment to the manufacturer from which he should foresee the type of event which occurred. If the magnitude of risk from the hazard outweighed the burden of providing an effective warning then the manufacturer should be liable.[153]

The issue of foreseeability and misuse also arose in *American Optical Co. v. Weidenhamer*.[154] Defendant (AO) assigned error to the trial court's refusal of its tendered instruction which read:

> I instruct you that misuse of a product such as optical lenses consists of a use or manner of use for which they were not designed and intended. It includes a use incurring dangers and hazards which are or should be obvious and apparent to a person of ordinary and reasonable prudence.

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[149]405 N.E.2d at 545-46 (emphasis added).

[150]565 F.2d at 106 n.1. *See* note 124 *supra* and accompanying text.

[151]147 Ind. App. at 119, 258 N.E.2d at 689. *See* note 126 *supra* and accompanying text.

[152]*See* notes 130-32 *supra* and accompanying text.

[153]*See* note 62 *supra* and accompanying text.

[154]404 N.E.2d 606 (Ind. Ct. App. 1980), *petition for transfer filed* Aug. 22, 1980.

> Likewise it includes a use not contemplated for normal handling.[155]

The court of appeals found that the defendant had failed to adequately point out the trial court's error beyond claiming the instruction "correctly states the law of misuse."[156]

The court continued, however, in a lengthy footnote to discuss the absence of a foreseeability requirement from the instruction.[157] The court quoted the misuse definition from the *Konduris* case[158] and the following from a leading authority on product liability, "[n]ot only may misuse or failure to follow directions be foreseeable, but there may be liability for unintended abnormal use of a product if it is foreseeable."[159] The court noted that "[a] number of jurisdictions support this view. Based on the foregoing the trial court could have reasonably concluded the instruction, by omitting foreseeability, was an incorrect statement of the law."[160]

The issue of misuse or later alteration was not raised directly in *Shanks v. A.F.E. Industries*[161] but the foreseeability duty that was applied in that case is similar. The court held that a manufacturer of a component, who knows or should know that his product will be assembled to other components creating a dangerous condition which could have been ameliorated by a feasible safety device installed by him, has a duty to undertake a foreseeability analysis.[162]

3. Foreseeable Misuse Where There is no Defect.—In *Dias v. Daisy-Heddon*,[163] the plaintiff lost an eye when a child who owned a BB gun thought the gun was unloaded and fired it in the direction of the plaintiff. Clearly the defendant BB gun manufacturer could foresee that the normal use environment of its product would include such mishaps. Therefore, the defendant could not interpose a misuse *defense* because only "not reasonably foreseeable" handlings can raise a misuse defense under the rule of *Perfection Paint & Color Co. v. Konduris*.[164] The defendant manufacturer, Daisy, never-

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[155]*Id.* at 624.

[156]*Id.*

[157]*Id.* at 625 n.9.

[158]147 Ind. App. 106, 258 N.E.2d 681 (1970). *See* note 125 *supra* and accompanying text for a quotation of the misuse rule from *Konduris*.

[159]404 N.E.2d at 625 n.9 (quoting L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 8.05[1] (1979)).

[160]404 N.E.2d at 625 n.9 (citations omitted).

[161]403 N.E.2d 849 (Ind. Ct. App. 1980), *petition for transfer filed* June 10, 1980.

[162]"The questions of the feasibility of safety devices and the foreseeability of harm are part of the considerations before the trier to determine . . . whether a product is defective and unreasonably dangerous. . . ." *Id.* at 858.

[163]390 N.E.2d 222 (Ind. Ct. App. 1979).

[164]147 Ind. App. at 119, 258 N.E.2d at 689.

theless prevailed when the plaintiff was either unable to prove the product was defective, or if the particular model was defective, then he failed to prove that the defect was a proximate cause of the injury.[165] It is significant that the jury was instructed that a BB gun is not necessarily an inherently defective product.[166] This case and this instruction illustrate that some products which are fundamentally hazardous are not defective although their intended use may be no more than the providing of "mere" pleasure.

E. Safety Devices and Safeguards

In 1976, the Indiana Court of Appeals in *Gilbert v. Stone City Construction Co.*,[167] held that a "product may fail to meet reasonable safety expectations 'by failing to cope with foreseeable mishaps . . . by lacking feasible safety devices . . . .' "[168] The *Gilbert* holding recognized that mishaps do occur in ordinary use and that a duty exists, based on the strict tort consumer expectation test, to deploy safety devices if they are technologically capable of protecting the user and are not so expensive or cumbersome as to impair the utility of the product. Safety devices are generally thought of as additional components of the product deployed solely to enhance safety.[169] They may be shields; handling devices, such as tongs; sensory extenders, such as mirrors, lamps, or gas detectors; control systems, such as two-hand button systems; or specific warning devices, such as alarms or lights which heighten alertness either before or after the occurrence of a potentially hazardous event.

The safety device issue tends to arise in the workplace setting where potentially destructive products are pervasive and where repetititve tasks virtually ensure that some reduction of workers' vigilance will occur. It seems clear that a positive duty to deploy safety devices is inconsistent with a broad interpretation of the open and obvious danger rule because the need for a safety device is often most acute where the danger from the workplace product is most obvious. A literal interpretation of the open and obvious danger rule would motivate the product manufacturer to omit or even remove the safety devices from its product so as to make the danger more open and more obvious.

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[165]390 N.E.2d at 225.

[166]*Id.* at 227.

[167]357 N.E.2d 738 (Ind. Ct. App. 1976).

[168]*Id.* at 744 (citing Dickerson, *Products Liability: How Good Does a Product Have to Be?*, 42 IND. L.J. 301, 305 (1967)).

[169]*See* Shanks v. A.F.E. Indus., Inc., 403 N.E.2d 849 (Ind. Ct. App. 1980), *petition for transfer filed* June 10, 1980. "The safety device is engrafted upon the machine and immediately affects the user and is therefore different from where merely informative warning or instruction is involved." *Id.* at 858.

In *Meadowlark Farms, Inc. v. Warken*,[170] the lack of a shield over a corn auger was found to be a proximate cause of plaintiff's injuries when he slipped and fell thereon. The failure to deploy the guard was found to be negligence on the part of the defendant Meadowlark which had placed the unguarded auger into the stream of commerce.

In *Bemis Co. v. Rubush*,[171] the plaintiff alleged that the batt packing machine he had operated was defective because the manufacturer had failed to warn of various hazards, *and* that "there existed at the time of the manufacture and sale of the machine, feasible and economic safeguards"[172] which were lacking. The court held that in determining "what an ordinary consumer may contemplate in regard to a product,"[173] the trier of fact could consider several factors including "whether feasible safeguards exist."[174] The open and obvious danger rule would provide but one other factor "in determining whether a product [is] in a defective condition unreasonably dangerous."[175]

The *Bemis* court noted that a two-step hand control was feasible, and would have prevented the accident. The jury was permitted to find that such a device was necessary, and could be considered separately from any actual warnings the manufacturer might have given, or from any warning provided by the obviousness of the danger.[176]

One additional point can be inferred from the *Bemis* court's language. Although the court cited *Gilbert* for the duty to use safety *devices*, the *Bemis* court employed the more general term *"safeguard"* in its formulation.[177] While a safety device is thought of as limited to a separate component, a *safeguard* could be any element or aspect of the design, manufacturing process, warning or instruction system that would enhance the safety threshold of the product.

In *Shanks v. A.F.E. Industries, Inc.*,[178] the distinction between warnings and physical safety devices was dramatically drawn. The court acknowledged that warnings delivered by a workplace product manufacturer, to the servants of the purchaser who receive the product on the purchaser's behalf, would be adequate. Those servants

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[170]376 N.E.2d 122 (Ind. Ct. App. 1978).

[171]401 N.E.2d 48 (Ind. Ct. App. 1980), *petition for transfer filed* May 7, 1980.

[172]*Id.* at 55.

[173]*Id.* at 57.

[174]*Id.*

[175]*Id.*

[176]*Id.*

[177]*Id.*

[178]403 N.E.2d 849 (Ind. Ct. App. 1980), *petition for transfer filed* June 10, 1980.

would then have the duty to disseminate the warnings, notice, and instructions to the ultimate user. In *Shanks*, the purchaser was found to have been fully and adequately warned of all hazards existent at the time of sale. The manufacturer's duty *to warn* was, therefore, discharged.[179]

Nevertheless, the manufacturer was held to have had an additional and separate duty to deploy a device or guard which would protect the ultimate user who may or may not have been warned of the hazard by his employer, the product purchaser. Ironically, the appropriate safeguard identified by the court was a *warning device.* The court distinguished, however, a general warning from a specific reminder such as a light or claxon which would "inform persons in the immediate vicinity in a possible position of peril that something is about to move, something is about to stop, . . . or some instrumentality is in operation or is about to be placed in operation that could cause harm."[180]

In *Conder v. Hull Lift Truck, Inc.*,[181] the court cited a California case, *Balido v. Improved Machinery, Inc.*,[182] in which an employer declined to purchase optional safety equipment after the machine manufacturer had alerted him to newly discovered hazards. *Balido* was cited for the proposition that the employer's refusal to later purchase safety devices would not be a superseding intervening cause of the plaintiff employee's injuries as a matter of law.[183] The reason that the California Court of Appeals held the manufacturer subject to liability after the manufacturer had warned of the hazard was that it had offered to sell the optional safety equipment rather than provide it gratis, i.e., the seller may not have done "everything reasonably within its power to prevent injury."[184]

The issue of optional versus built-in safeguards has previously been before an Indiana court in *Posey v. Clark Equipment Co.*[185] In *Posey*, the court found that a built-in overhead guard for a forklift was unnecessary because it would reduce the ultility of the forklift for unloading semi-trailers inasmuch as the opening of these trailers was too low to admit the forklift with the guard assembled to it. *Posey* illustrated a situation where a potential safeguard existed, but was not feasible.

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[179]*Id.* at 856-57.
[180]*Id.* at 857-58.
[181]405 N.E.2d 538 (Ind. Ct. App. 1980).
[182]Balido v. Improved Mach., Inc., 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1973).
[183]405 N.E.2d at 542-43.
[184]29 Cal. App. 3d at 649, 105 Cal. Rptr. at 901.
[185]409 F.2d 560 (7th Cir.), *cert. denied*, 396 U.S. 940 (1969).

F. Adequacy of Warnings

Comment j of section 402A provides in part that "[i]n 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."[188] Under the Indiana cases, the duty to warn the ultimate user of a workplace product may be discharged by delivering the warning to the user's employer or to its servants who receive the product on behalf of the employer.[187] In *American Optical Co. v. Weidenhamer*,[188] the defendant, American Optical (AO), argued that it had established conclusively at trial that a printed warning had been delivered with each pair of safety glasses it had sold to the plaintiff's employer, International Harvester Company. AO claimed the following warning was printed on cardboard tabs attached to the nosepieces of its glasses:

> CAUTION
>
> These Super Armorplate® lenses are impact resistant but are NOT unbreakable. Clean and inspect lenses frequently. Pitted or scratched lenses reduce vision and seriously reduces [sic] protection. Replace immediately. Meets ANSI Z87. 1-1968 363B.[189]

The appellate court ruled that the evidence was conflicting as to whether a warning had in fact been delivered.[190] Although there was testimony by the safety bin attendant that cardboard tabs did accompany all of AO's glasses, he admitted that he had never read what was on them, that he was unaware they contained a warning, and that the tabs were routinely removed prior to fitting a user.[191] The plaintiff, Weidenhamer, who was injured when a lens shattered and a glass fragment entered his eye, claimed he also was unaware of any warning and that he had believed prior to his accident that his glasses were virtually unbreakable.[192]

The court, in affirming a jury verdict for the plaintiff, ruled that even if AO's warning had accompanied its product, a jury could conclude that the warning was inadequate. The court cited *Ortho Pharmaceutical Corp. v. Chapman*,[193] which relied on *Spruill v. Boyle-*

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[188]RESTATEMENT (SECOND) OF TORTS § 402A, Comment j (1965).

[187]*See* Burton v. L. O. Smith Foundry Prods. Co., 529 F.2d 108, 111 (7th Cir. 1976); Shanks v. A.F.E. Indus., Inc., 403 N.E.2d 849, 856-57 (Ind. Ct. App. 1980), *petition for transfer filed* June 10, 1980.

[188]404 N.E.2d 606 (Ind. Ct. App. 1980), *petition for transfer filed* Aug. 22, 1980.

[189]*Id.* at 616.

[190]*Id.* at 617.

[191]*Id.* at 611.

[192]*Id.*

[193]388 N.E.2d 541 (Ind. Ct. App. 1979).

Midway, Inc.[194] in which it was held that both the form and content of a warning are to be tested.[195] The form should "catch the attention of the reasonably prudent man in the circumstances of its use"[196] and the content "must be of such a nature as to be comprehensible to the average user and to convey a fair indication of the nature and extent of the danger to the mind of a reasonably prudent person."[197]

The *American Optical Co.* court found that the size of type in which the alleged warning was printed, 1/32 inch in height, made the warning inadequate as to form especially when contrasted with other legends printed in substantially larger type which may have expressly warranted that the safety glasses were safe for use. The court also noted that the words " 'Safety Glasses,' 'SURE-GUARD', and 'Your *Surest* Protection' " were displayed prominently on the side of the box in which the glasses were delivered.[198] The court stated that "[t]here is a particular need for an effective warning when the manufacturer has made a representation of safety because, having been assured a product is safe, people are less likely to watch for potential danger."[199]

AO's warning was also found to be wanting with respect to content.[200] The AO registered tradename, "Super Armorplate" was held to be misleading because it implied the lenses "offered the protection of metal armor."[201] The court held that a user could reasonably interpret AO's warning to mean "that the lenses might break if pitted or scratched but were unbreakable absent such infirmities."[202] Because plaintiff had testified that his glasses were not pitted or scratched, a jury could conclude that Weidenhamer might reasonably have believed from AO's warning that he was protected when in fact he was not. The court emphasized that the warning completely failed to prepare the user for the possibility that the lens might "shatter into jagged pieces."[203]

AO argued that the act of the safety bin attendant in removing

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[194]308 F.2d 79 (4th Cir. 1962).

[195]404 N.E.2d at 615.

[196]*Id.* (quoting Ortho Pharmaceutical Corp. v. Chapman, 388 N.E.2d at 552 (quoting Bituminous Cas. Corp. v. Black & Decker Mfg. Co., 518 S.W.2d 868, 872-73 (Tex. Civ. App. 1974))).

[197]404 N.E.2d at 615 (quoting Ortho Pharmaceutical Corp. v. Chapman, 388 N.E.2d at 552 (quoting Bituminous Cas. Corp. v. Black & Decker Mfg. Co., 518 S.W.2d at 873)).

[198]404 N.E.2d at 617.

[199]*Id.* at 615.

[200]*Id.* at 618.

[201]*Id.*

[202]*Id.*

[203]*Id.*

its purported warning prior to fitting the user constituted "substantial change" in the product after its introduction into the stream of commerce.[204] The court of appeals, relying on *Spruill v. Boyle-Midway, Inc.*,[205] ruled that an inadequate warning was equivalent to no warning and thus "a manufacturer or supplier cannot rely upon such a defective warning, and its removal or destruction by a third party before reaching the ultimate consumer is of no consequence."[206]

AO also argued that an instruction tendered by the plaintiff and given by the court was incomplete when it stated that a failure to give directions or warnings required to prevent the product from becoming unreasonably dangerous would render the product defective.[207] AO asserted that the jury should have been informed "that a manufacturer can assume its warning will be read and heeded."[208] Comment j to section 402A provides in part that "[w]here 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."[209] Unfortunately, the court did not respond to the merits of AO's contention because it found no objection to the instruction on this ground in the record or in AO's motion to correct errors and thus ruled that "[i]ts claimed error now raised for the first time on appeal is waived."[210]

When the "read and heed" rule from comment j was discussed by the court in *Nissen Trampoline Co. v. Terre Haute First National Bank*,[211] that court prefaced the word warning with the word "adequate."[212] Although comment j does not consider the adequacy of warnings it seems clear that Indiana courts will give the seller the presumption his warning will be read and heeded only if the warning is found to be adequate. It would have been better if the *American Optical Co.* court, which followed *Spruill* in equating an in-

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[204] *Id.*

[205] 308 F.2d 79 (4th Cir. 1962).

[206] 404 N.E.2d at 619.

[207] *Id.* at 620.

[208] *Id.*

[209] RESTATEMENT (SECOND) OF TORTS § 402A, Comment j (1965).

[210] 404 N.E.2d at 620-21.

[211] 332 N.E.2d 820 (Ind. Ct. App. 1975), *rev'd on other grounds*, 265 Ind. 457, 358 N.E.2d 974 (1976).

[212] 332 N.E.2d at 826. The *Nissen Trampoline Co.* court pointed out that a purpose for the "read and heed" rule was to enable the plaintiff to meet his burden of proving cause in fact. "A more reasonable approach . . . is that the law should supply the presumption that an *adequate* warning would have been read and heeded, thereby minimizing the obvious problems of proof of causation." *Id.* (emphasis added).

adequate warning with no warning when discussing the third party intervention issue, had also made this point explicit with respect to the "read and heed" rule.[213]

G. Causation

1. Cause in Fact.—Cause in fact, or "but-for" causation, was a hotly contested issue in the criminal, reckless homicide trial of *State*

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[213]In *Weidenhamer* it appeared that the court would have to deal with the issue of alternative liability. The trial court had permitted the jury to find against two manufacturers of safety glass lenses, although only one could have supplied the defective lens which injured the plaintiff. The issue appeared similar to the one raised in Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948), in which two hunters had fired in the direction of the plaintiff. Only one shot caused injury but there was no way to identify which of the hunters was responsible. The *Summers* court found both defendants jointly and severably liable to the plaintiff. In *Weidenhamer*, however, the court of appeals ruled there was sufficient evidence from the plaintiff's testimony to identify the manufacturer of the lenses which the plaintiff was wearing at the time of the accident and so it reversed as to the other defendant (U.S. Safety). 404 N.E.2d at 613.

The *Summers v. Tice* problem with respect to product liability is proving to be a thorny one in other jurisdictions. In Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), one of many cases "seeking to hold drug manufacturers liable for injuries resulting from DES," *id.* at 597, 607 P.2d at 927, 163 Cal. Rptr. at 135, a drug prescribed to prevent miscarriages, the California Supreme Court permitted recovery to a child under a "modification of the *Summers* rule." *Id.* at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144. If the child could join as defendants a relative "handful" of manufacturers of the drug whose production accounted for a substantial share of DES production (allegedly here 90%) so that there would be "only a 10 percent likelihood that the offending producer would escape liability," *id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145, then the "injustice of shifting the burden of proof to defendants to demonstrate that they could not have made the substance which injured plaintiff is significantly diminished." *Id.*

The *Sindell* court noted that in most of the DES cases the drug companies have prevailed because claimants have failed to identify the manufacturers of the DES prescribed to their mothers, *id.* at 597, 607 P.2d at 927-28, 163 Cal. Rptr. at 135-36, but the court did discuss in addition to the alternative liability theory (the *Summers* rule) and the market share theory upon which the *Sindell* court relied, two other theories which have led to liability for manufacturers who could not be specifically identified as actual suppliers of defective products causing injury. *Id.* at 603-10, 607 P.2d at 931-35, 163 Cal. Rptr. at 139-43. The gravamen of the "concert of action" principle argued by the plaintiff in *Sindell* "is that the defendants failed to adequately test the drug or to give sufficient warning of its dangers and that they relied upon the tests performed by one another and took advantage of each others' promotional and marketing techniques." *Id.* at 605, 607 P.2d at 932, 163 Cal. Rptr. at 140. The "enterprise liability" theory "suggested in Hall v. E.I. Du Pont de Nemours & Co., Inc., 345 F. Supp. 353 (E.D.N.Y. 1972)" was grounded on the widespread industry practice of failing to provide a warning which "created an unreasonable risk of harm." 26 Cal. 3d at 607, 607 P.2d at 934, 163 Cal. Rptr. at 141-42. It is likely that Indiana courts will soon be required to deal with this issue in the context of drugs, asbestos, or other products which are used or consumed, their origins then become lost or forgotten, and serious after-effects become manifest only much later.

v. Ford Motor Co.[214] Causation principles in criminal cases are similar to tort case principles with the exception that the standard of proof required in the former is "beyond a reasonable doubt"[215] as opposed to the "preponderance of the evidence"[216] standard required in the latter. In either type of action, to establish the required causation element, the plaintiff or state must first prove that but for the defendant's act, there would have been no injury.[217]

In the *Ford Motor Co.* (Pinto) case, evidence was introduced that the van which struck the deceased's car was traveling at fifty to fifty-five miles per hour at the moment of impact. The state alleged that Ford had designed a defective fuel system and had recklessly failed to warn decedents that the design was vulnerable to heavy fuel leakage in the event of rear end collisions in excess of thirty miles per hour. It was generally acknowledged, however, that all small cars would be equally vulnerable to spillage at impact speeds above forty to forty-five miles per hour. Ford never conceded that its 1973 Pinto was defectively designed, but it argued that even if that model were unusually vulnerable to low speed collisions, this particular accident occurred at higher speeds, and therefore, any alleged defect in the design could not have been a cause in fact of

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[214]No. 11-431 (Pulaski County Cir. Ct. (Ind.) Mar. 13, 1980). This case was not appealed from the trial level. For the purpose of this report, the writer relies on L. STROBEL, RECKLESS HOMICIDE? (1980) and the daily reporting of the events of the trial in the various news media during the first few months of 1980. The Indiana Ford Pinto trial was reportedly the first instance in which a corporate product manufacturer was prosecuted under a state's reckless homicide statute for allegedly failing to warn decedents of a dangerous defect in the design of the product. IND. CODE § 35-42-1-5 (Supp. 1980) provides in part: "A person who recklessly kills another human being commits reckless homicide, a Class C felony." IND. CODE § 35-41-2-2(c) (Supp. 1980) defines "recklessly" as follows: "A person engages in conduct 'recklessly' if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct." IND. CODE § 35-41-2-3(a) (Supp. 1980) provides: "A corporation, partnership, or unincorporated association may be prosecuted for any offense; it may be convicted of an offense only if it is proved that the offense was committed by its agent acting within the scope of his authority." For a critique of the appropriateness of applying these statutes to the act of motor vehicle design, see Epstein, *Is Pinto a Criminal?*, REGULATION (A.E.I. J. GOV'T AND SOC'Y), March/April 1980, at 15.

[215]*See, e.g.*, Stout v. State, 90 Ind. 1 (1883); Jarrell v. State, 58 Ind. 293 (1877).

[216]*See, e.g.*, Reynolds v. State, 115 Ind. 421, 17 N.E. 909 (1888); Indianapolis Light & Heat Co. v. Dolby, 47 Ind. App. 406, 92 N.E. 739 (1910).

[217]*See* note 226 *infra* and accompanying text. The language quoted there by the court in Shanks v. A.F.E. Indus., 403 N.E.2d 849, 859 (Ind. Ct. App. 1980), *petition for transfer filed* June 10, 1980, from Johnson v. Bender, 369 N.E.2d 936, 939 (Ind. Ct. App. 1977) states that a cause is something "'without which the result would not have occurred.'" The *Shanks* court then quoted Ortho Pharmaceutical Corp. v. Chapman, 388 N.E.2d 541, 555 (Ind. Ct. App. 1979) in which this language was correctly described as the "'but-for' test." 403 N.E.2d at 859.

the decedents' enhanced injuries and deaths by incineration; and thus, the but for causation was a missing element from the prosecution's case.

The prosecution sought to establish its prima facie case by introducing testimony that the decedent's Pinto was moving at more than twenty miles per hour and that the van was moving slower than fifty miles per hour—thus, the closing speed of the two vehicles was approximately thirty miles per hour and the fuel system vulnerability, the alleged product defect, would therefore be a cause in fact of the enhanced injuries. The defense disputed the prosecution's testimony and the conflicting evidence was permitted to go to the jury, which acquitted Ford. It is interesting that interviews with the jury after trial indicated that the issue of closing speed was never resolved by the jury.[218] Ford's acquittal was justified primarily by an evaluation of its *conduct* before the accident. Ford's demonstrated good faith efforts to expedite the Pinto recall program was probably decisive. A number of the jurors felt Ford's design calculus did not produce a safe enough small car; but significantly, at least some of the jurors recognized that product design required trade-offs and safety was a factor which could be reduced in favor of light weight to enhance affordability and fuel economy.[219]

Cause in fact was also raised as an issue in *Meadowlark Farms, Inc. v. Warken.*[220] The defendant moved for judgment on the evidence on the ground that his act in leaving a corn auger unguarded was not a cause of Warken's injury. Because there was evidence that, but for the lack of a guard, no harm would have occurred, the issue was permitted to go to the jury.[221]

2. Proximate Cause.—a. In general.—Because the chain of but-for causation for any event can be traced back in time to the creation of the universe, the limiting concept of proximate cause is applied by courts to cut off liability for actions at a point which society deems appropriate.[222] This point has been difficult to define, and jurisdictions vary greatly in their formulations and jury instructions with respect to proximate cause.[223] The Indiana formulation as

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[218]The evidential issue of closing speed was discussed and referred to throughout Mr. Strobel's book. L. STROBEL, *supra* note 214. The defendant's attempt to prove a high closing speed was referred to by trial participants and the press as Ford's effort to "*stop that Pinto.*" *Id.* at 134.

[219]*See* L. STROBEL, *supra* note 214, at 268.

[220]376 N.E.2d 122 (Ind. Ct. App. 1978).

[221]*Id.* at 130. "[I]n the absence of such negligence the injurious result could not have occurred." *Id.*

[222]*See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 244 (4th ed. 1971).

[223]*Id.* at 246-49.

set out in *Ortho Pharmaceutical Corp. v. Chapman*[224] was quoted during the survey period in *Shanks v. A.F.E. Industries*:[225]

> Proximate cause is commonly defined as 'that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the result complained of and without which the result would not have occurred.' *Johnson v. Bender*, (1977) Ind. App., 369 N.E.2d 936, 939. This latter language describes what is known as the 'but-for' test. A fundamental element of proximate cause is that the injury or consequence of the wrongful act be of a class reasonably foreseeable at the time of that act. *Elder v. Fisher*, (1966) 247 Ind. 598, 217 N.E.2d 847; *Meadowlark Farms, Inc. v. Warken, supra* [(1978) Ind. App., 376 N.E.2d 122]. The defendant's act need not be the sole proximate cause; many causes may influence a result. *Meadowlark Farms, Inc. v. Warken, supra*, 376 N.E.2d at 129. The question is whether 'the original wrong was one of the proximate rather than remote causes.' *Dreibelbis v. Bennett*, (1974) 162 Ind. App. 414, 319 N.E.2d 634, 638. Thus, 'the ultimate test of legal proximate causation is the reasonable foreseeability. The assertion of an intervening, superceding [*sic*] cause fails to alter this test.' *Id.* Rather, [w]here harmful consequences are brought about by intervening independent forces the operation of which might have been reasonably foreseen, then the chain of causation extending from the original wrongful act to the injury is not broken by the intervening and independent forces and the original wrongful act is treated as a proximate cause. *New York Central R. Co. v. Cavinder*, (1965) 141 Ind. App. 42, 211 N.E.2d 502, 508. Proximate cause is generally a question for the trier of fact.[226]

As can be noted from this formulation, causation can be viewed from the perspective of the original actor and also from the perspective of other actors whose actions also proximately cause the injury. Whether the original actor will be relieved of liability under this formulation will rest on the reasonable foreseeability of the intervening acts. Also to be noted is that this definition includes the but-for test and that proximate cause is generally a jury question.

Commentators have argued that foreseeability is a duty question and that proximate cause should only test whether the injurious

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[224]388 N.E.2d 541 (Ind. Ct. App. 1979).

[225]403 N.E.2d 849 (Ind. Ct. App. 1980), *petition for transfer filed* June 10, 1980.

[226]*Id.* at 859.

event was highly attenuated from the causative act or was separated by a series of highly extraordinary intervening events as judged through an analysis blessed with full hindsight knowledge of the facts.[227] Indiana courts, however, require, in addition, what appears to be a finding of duty foreseeability as a prerequisite to a finding of proximate cause. Therefore, negligence or strict tort product cases in Indiana in which the product is found undefective can be disposed of under a no duty (or no defect) element, or a no proximate cause element, or both.[228]

b. Intervening cause.—In *Shanks v. A.F.E. Industries, Inc.*,[229] the manufacturer of a grain dryer argued that his product was not the proximate cause of plaintiff's injury. The grain dryer had been assembled by the purchaser to several other independent pieces of equipment to create an automated complex. The plaintiff, an employee of the purchaser, was repairing an elevator connected to the grain dryer, when the elevator became activated. The activation, although unexpected by the plaintiff, was a regular and planned result of the connective circuitry specified by the employer and installed by third parties.

The court held that a jury might find that the defendant manufacturer of the grain dryer could reasonably foresee that its component would be connected to other components with an intermittent cycling pattern as a predictable design element.[230] Although the employer's negligence in failing to properly warn his employee of the hazard was *a* proximate cause, the manufacturer's failure to foresee the type of harm which in fact occurred, and its failure to provide a *built-in* signaling device was sufficient to present the proximate cause issue to the jury with respect to the liability of the defendant grain dryer manufacturer.[231]

In *Meadowlark Farms, Inc. v. Warken*,[232] the defendant also asserted that the plaintiff's action in falling upon an unguarded corn auger was "an independent responsible agency which interrupted the line of causation and extinguished its liability."[233] The court

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[227]RESTATEMENT (SECOND) OF TORTS § 435(2) (1965) provides: "The actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm."

[228]For a discussion of proximate cause in a strict liability context (although not a § 402A product liability context), see Galbreath v. Eng'r Constr. Corp., 149 Ind. App. 347, 273 N.E.2d 121 (1971).

[229]403 N.E.2d 849 (Ind. Ct. App. 1980), *petition for transfer filed* June 10, 1980.

[230]*Id.* at 856.

[231]*Id.* at 859.

[232]376 N.E.2d 122 (Ind. Ct. App. 1978).

[233]*Id.* at 129.

quoted from *Dreibelbis v. Bennett*,[234] which cited several authorities to the effect that "the ultimate test of legal proximate causation is the reasonable foreseeability" and that "a reasonable conclusion [was] that the original wrong was one of the proximate rather than remote causes."[235] The *Meadowlark* court found "[a] continuous and foreseeable connection existed between the dangerous condition of the equipment and the injury."[236] Warken's slip and fall was an additional, concurrent, reasonably foreseeable cause, but was not superseding.[237] Note, the issue here stated was causation and not contributory negligence.

In *Bemis Co. v. Rubush*,[238] the trial court incorrectly linked a proximate cause instruction with a defectiveness instruction. As worded, the jury, in order to find for the defendant, would have to find that the product was defective and also that the plaintiff's negligence was the sole proximate cause of his injury. The appellate court made clear that a finding that plaintiff's negligent act was the sole cause of his injury would be sufficient in itself to defeat his action. The court found no error in the instruction that defectiveness would also have to be found, because the court found that later instructions corrected any possible misapprehension.[239] It should be noted, however, that although contributory negligence is not a defense to a strict tort claim, where the plaintiff's negligence is the *sole* proximate cause of the injury, the defendant will have refuted the plaintiff's prima facie case. In *Bemis*, the appellate court affirmed a jury verdict which found the product's design and/or warning defect at least *a* proximate cause of the plaintiff's injuries.

A superseding intervening cause sufficient to break the chain of causation from the alleged defect in the defendant's product to the plaintiff's injuries was found by the appellate court in *Peck v. Ford Motor Co.*[240] The plaintiff received a jury verdict for injuries sustained when his truck collided with another truck manufactured by the defendant Ford and owned by another of the defendants, Hunter. The Ford truck had been left parked on the highway by Hunter's driver as a result of an alleged defect in the gear box which disabled it. The appellate court assumed, for argument, that the Ford truck was in fact defective and that the defect had disabled it. Cause in fact was therefore established and the sole issue

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[234]162 Ind. App. 414, 319 N.E.2d 634 (1974).

[235]376 N.E.2d at 129.

[236]*Id.*

[237]This was determined by the jury at trial.

[238]401 N.E.2d 48 (Ind. Ct. App. 1980), *petition for transfer filed* May 7, 1980.

[239]*Id.* at 60.

[240]603 F.2d 1240 (7th Cir. 1979).

remaining to be decided was proximate cause. The plaintiff conceded on appeal that "foreseeability is an essential element of proximate causation,"[241] but he argued that the events which occurred were foreseeable by Ford.

The court first noted that the plaintiff was a bystander and that Indiana's extension of protection to bystanders under strict liability was quite recent and that the court of appeals decision in *Chrysler v. Alumbaugh*,[242] had "emphasized that the extension of liability to bystanders is circumscribed by a requirement of reasonable foreseeability."[243] In the *Alumbaugh* case the court had applied a proximity limitation test to the scope of liability with respect to bystanders. It was found to be reasonably foreseeable that "occupants of other vehicles *being operated on the highway in close proximity to the Chrysler vehicle* were subject to harm from the defect."[244] The *Peck* court, in analogizing its facts to those in the *Alumbaugh* case, converted proximity in space to proximity in time supported by negligence rules which would find a causative chain broken after the "tort had 'spent its force.'"[245] Because more than three hours had passed from the time the Ford truck had come to rest until the plaintiff's truck collided with it, the court ruled that the duty to prevent harm "had passed to the driver [plaintiff] who was clearly in the best position to prevent further harm."[246]

In addition, the court noted twelve fortuitous events occurring from the time of disablement to the time of accident which the court characterized as an "extremely unusual combination of circumstances."[247] The court stated "a lesser combination could fairly be said to preclude foreseeability on an objectively reasonable basis."[248]

The *Peck* case illustrates the two step nature of the Indiana foreseeability test in respect to proximate cause. First, it is necessary to determine whether the cause under consideration was "in natural and continuous sequence."[249] If it is not, then it is not objectively foreseeable. As the *Peck* court pointed out, however, the foreseeability principle does "not mean that the precise hazard or the exact consequences which were encountered should have been foreseen."[250] Nevertheless, some events are too attenuated or too sepa-

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[241] *Id.* at 1243.

[242] 342 N.E.2d 908 (Ind. Ct. App. 1976).

[243] 603 F.2d at 1244.

[244] *Id.* (quoting Chrysler v. Alumbaugh, 342 N.E.2d 908, 917 (Ind. Ct. App. 1976)).

[245] 603 F.2d at 1244 (quoting Whitehead v. Republic Gear Co., 102 F.2d 84, 85 (9th Cir. 1939)).

[246] 603 F.2d at 1244-45.

[247] *Id.* at 1247.

[248] *Id.* at 1247 n.4.

[249] *See* note 226 *supra* and accompanying text.

[250] 603 F.2d at 1246.

rated by extraordinary intervening events to involve a duty of reasonable foreseeability. If the harmful event survives this attenuation or extraordinary intervening event analysis, it must then be examined under duty foreseeability principles[251] in which magnitude of risk is balanced against burden of prevention.[252] In *Peck*, the defect in the gearbox was held by the appellate court, as a matter of law, not to be in natural and continuous sequence with plaintiff's injuries and that ended the inquiry.

The *Peck* court applied another doctrine from negligence law which has been used before in this type of accident. This doctrine states that if the defendant's act "merely created a 'condition' by which the subsequent injury was made possible, there is no proximate cause relationship between the negligence and the injury."[253] When a car creates an accident on the highway and the vehicles come to rest, the original defendant's car will not be the proximate cause of subsequent collisions as a matter of law because he has merely created a condition. If, however, the defendant breaches subsequent duties as, for example, failure to post proper warnings, he can be liable for the later acts or omissions.[254]

This doctrine of merely creating a condition was questioned during the survey period in *Mansfield v. Shippers Dispatch, Inc.*[255] *Mansfield* was not a products case but the facts were strikingly similar to those of *Peck*. Defendant's employee truck driver, noticing blue smoke coming from his exhaust, was alleged to have parked his truck partially on the highway. Plaintiff's decedent, who was driving the other way, was killed when a maneuver by another vehicle seeking to avoid the parked truck led to a loss of control of still another car, thus resulting in the fatal crash.

The trial court instructed the jury that if parking the "truck on the berm of the highway created a mere condition and that the collision . . . thereafter resulted from the interaction of other persons . . . the act [of the defendant] in stopping . . . would not be a proximate cause of the collision . . . ."[256] The appellate court admitted that the "created condition" doctrine might be useful for an appellate court to explain how it reached a conclusion.[257] However, the court found that it was not appropriate language for a jury instruction because it implied that there may be a difference in liability between active

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[251]*See* notes 227-28 *supra* and accompanying text.

[252]*See* text following note 134 *supra*.

[253]603 F.2d at 1245.

[254]In *Peck*, the court held such duties probably existed but they were the duties of Hunter, the truck owner, and its driver, not the duties of Ford. *Id.*

[255]399 N.E.2d 423 (Ind. Ct. App. 1980).

[256]*Id.* at 425.

[257]*Id.*

and passive negligence, and Indiana courts have expressly rejected any such distinction.[256]

The court reiterated that the test of proximate cause was reasonable foreseeability and then seemed to remove all vitality from the "mere condition" doctrine:

> Thus, the question of the legal effect of the intervening agency upon causation should not have been determined upon the basis of whether Rafferty's actions merely created a condition. Instead, *if* his actions in stopping the semi, as he did, were negligent, then the question of proximate cause depended upon whether the independent agency might have been reasonably expected under the circumstances to intervene in such a way as to likely produce an injury similar to the one that occurred.[2] [259]

The footnote indicated presents a valuable perspective on the interaction of duty, proximate cause, and foreseeability.[260]

A defendant's verdict which found a superseding intervening cause was affirmed in part and reversed in part in *Conder v. Hull Lift Truck, Inc.*[261] Defendant Hull was found to have grossly misadjusted a carburetor-governor linkage on a forklift and then leased the forklift to Conder's employer. The hazard from the maladjustment did not manifest itself until a torsion spring broke permitting the forklift to overaccelerate. A supervisor for the plaintiff's employer became aware of the hazard but neglected to take the forklift out of service because of the pressure of production schedules, and the plaintiff, who was unaware of any danger, operated the forklift and was severely injured when it overturned.

Inasmuch as there appeared no question but that the misadjustment did occur and was performed by Hull, the leasing agent, the misadjustment did make the forklift defective and was a cause in fact of Conder's injuries; the only issue as to Hull's liability was that of proximate cause. The verdict for Hull meant that the jury found that Hull could not have reasonably foreseen the supervisor's acts in not taking the forklift out of service, in not calling Hull to report the problem, and in not warning the plaintiff of the hazard. The ap-

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[258] *Id.*

[259] *Id.* at 426.

[260] *Id.* at 426 n.2. The court cites Prosser to point out that "the issue of intervening causes should more appropriately be considered in terms of duty." *Id.* (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS 270-88 (4th ed. 1971)). The court agrees but notes that Indiana follows the majority foreseeability rule with respect to proximate cause. *Id.*

[261] 405 N.E.2d 538 (Ind. Ct. App. 1980).

pellate court's affirmation of the verdict for Hull meant that reasonable jurors could reach that conclusion.

Although the supervisor's action was a superseding unforeseeable intervening cause as to Hull, the leasing agent, it apparently may not have been as to Allis-Chalmers, the forklift manufacturer. The appellate court reversed the defendant's verdict for Allis-Chalmers. Reversing as to Allis-Chalmers alone might suggest that the court found that the manufacturer was a better foreseer of the lessee's negligence than the leasing agent which dealt directly with and knew the customer. Maybe that is so, yet under strict tort, all sellers (or lessors) in the chain of distribution are presumed to have an expert's knowledge, insofar as it is knowable, as to the dangerous propensities of the products they introduce into the stream of commerce.[262] With equal imputed knowledge, one would suppose such sellers would also be equally positioned to predict the dangerous foreseeable events that the ultimate product user is likely to encounter.

There are courts which distinguish foreseeability of use from foreseeability of harm,[263] but this formula says nothing more than that knowledge of harmful propensities is to be imputed to the seller while uses and misuses are subject to foreseeability principles.[264] However, there is nothing in this analysis which suggests that one seller in the chain of distribution may be a better foreseer than another—actually, with knowledge of harm imputed, the opposite conclusion flows from the formula.

In a new trial, under the court of appeals ruling in *Conder*, the jury will be instructed to determine whether Hull's misadjustment was foreseeable to Allis-Chalmers. If it was, the forklift could be found defective on the ground that the manufacturer failed to warn of the hazard. The new jury will also be instructed to determine whether the negligence of the remote lessee in failing to remove the forklift from service was unforeseeable and therefore a superseding cause of plaintiff's injuries. The jury will be able to find for either party based on the jury's view of what acts are reasonably foreseeable.

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[262]*See* note 62 *supra* and accompanying text.

[263]*See* Newman v. Utility Trailer & Equip. Co., 278 Or. 395, 397-401, 564 P.2d 674, 675-77 (1977).

[264]Foreseeability principles applied to use would require a manufacturer or other seller with imputed knowledge of his product's propensity to harm, to subject all the possible product uses which are not so highly extraordinary that a reasonable man would exclude them from consideration, to a risk-utility analysis to determine which of those remaining uses requires a change in the product because a hazard designed or built into the product outweighs the burden of protecting against it.

Under Indiana law, defectiveness is a jury question,[265] and failure to warn, or otherwise anticipate product misuse, may constitute defectiveness.[266] If Hull and Allis-Chalmers had originally been tried separately, with the Allis-Chalmers jury having been correctly instructed, and the Hull jury had found for the defendant solely on the ground of superseding intervening cause, and the Allis-Chalmers jury had found for the plaintiff, we would have little difficulty in accepting what would have appeared to have been inconsistencies of the two verdicts. However, because the parties were joined for sake of judicial economy, there seems no compelling reason to require greater harmony. What makes *Conder* a more difficult case is the fact that the jury found for Allis-Chalmers, and it may have done so on the same ground that it found for Hull, in which case Allis-Chalmers' failure to warn Hull of the misadjustment hazard would not have been a proximate cause of Conder's injuries and the instruction error would therefore have been harmless. The case presents an argument for special verdicts where there are multiple defendants.

The criminal case of *State v. Ford Motor Co.*[267] reminds us that one proximate cause doctrine is no longer with us in Indiana. Prior to the decision in *Huff v. White Motor Corp.*,[268] an act by plaintiff or by a third party which caused a motor vehicle collision would provide a superseding intervening cause between any alleged defect in the vehicle which made it less crashworthy and a plaintiff's *enhanced* injuries. Before *Huff*, the doctrine of *Evans v. General Motors, Inc.*[269] was applied in this state which, although couched in duty terms, also went to proximate cause.[270] It is of some interest to speculate whether a collision prior to *Huff* could have supported a criminal prosecution on the proximate cause issue assuming that the lack of enabling legislation permitting criminal suits of this nature against corporations was not a problem.[271] While cause in fact was a lively issue in the Pinto trial, the act of the third party van driver who caused the collision, although negligent, did not rise to the level of *superseding* cause, as a matter of law, as it might have prior to *Huff*.

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[265]Dias v. Daisy-Heddon, 390 N.E.2d 222, 225 (Ind. Ct. App. 1979); Gilbert v. Stone City Constr. Co., 357 N.E.2d 738, 744 (Ind. Ct. App. 1976).

[266]Burton v. L.O. Smith Foundry Prod. Co., 529 F.2d 108, 111 (7th Cir. 1976); Shanks v. A.F.E. Indus., Inc., 403 N.E.2d at 856-57.

[267]No. 11-431 (Pulaski County Cir. Ct. (Ind.) Mar. 13, 1980).

[268]565 F.2d 104 (7th Cir. 1977).

[269]359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966).

[270]"A manufacturer is not under a duty to make his automobile accident-proof or fool-proof; nor must he render the vehicle 'more' safe where the danger . . . is obvious to all." *Id.* at 824.

[271]*See* IND. CODE § 35-41-2-3(a) (Supp. 1980), *reprinted at* note 214 *supra*.

H. Stream of Commerce: Privity

1. "Unmarketed" and "Unmarketable" Products.—Section 402A of the Restatement (Second) of Torts describes the special liability of a seller of products to a user or consumer.[272] Since that section was promulgated, the scope of transactions to be included under it has been steadily extended in Indiana and elsewhere. The class of users and consumers has been expanded to include bystanders.[273] Further, the section has been applied to lessors;[274] and even a gratuitous transaction when done for a commercial purpose has been covered in Indiana.[275]

In *Petroski v. Northern Indiana Public Service Co.*,[276] the Indiana Court of Appeals ruled that electricity was a product,[277] the sale of which could potentially subject the seller to strict tort liability. The *Petroski* court held, however, that high voltage transmission lines were not analogous to bottles and cans and were therefore not a part of the end product.[278] The lines were held to be under the exclusive control of the seller and so was the high voltage electricity passing through those lines on the way to the final step-down from 7200 volts to 110 volts which must occur before the electricity can enter into the household system.[279]

In *Hedges v. Public Service Co. of Indiana*,[280] the plaintiffs inadvertently intercepted, with an aluminum ladder, high voltage electricity running through an uninsulated transmission line located on their property. The court ruled that "[t]he Hedges encountered electrical energy in an unmarketable and unmarketed state."[281] The court noted "that although a literal 'sale' of the product is not required, the product must be placed into the stream of commerce before § 402A strict liability can attach."[282] The court found "that the electricity was not in the stream of commerce . . . ."[283] The court contrasted the situation in the case before it with that of *Helvey v.*

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[272]Section 402A is quoted in note 44 *supra*.

[273]*See, e.g.*, Gilbert v. Stone City Constr. Co., 357 N.E.2d 738, 742 (Ind. Ct. App. 1976); Chrysler Corp. v. Alumbaugh, 168 Ind. App. 363, 374-75, 342 N.E.2d 908, 916-17 (1976).

[274]357 N.E.2d at 742.

[275]Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, 258 N.E.2d 681 (1970).

[276]354 N.E.2d 736 (Ind. Ct. App. 1976).

[277]*Id.* at 747.

[278]*Id.*

[279]*Id.*

[280]396 N.E.2d 933 (Ind. Ct. App. 1979).

[281]*Id.* at 935.

[282]*Id.*

[283]*Id.*

Wabash County REMC,[284] where the damage from a voltage line surge allegedly occurred *after* the electricity had been stepped down *and* had passed through the house's electric meter.[285]

In addition to the strict liability count, the plaintiff in *Hedges* alleged that the defendant electric company had breached its implied warranty of merchantability. Again, electricity was ruled to be a "good" covered by Article Two of the Uniform Commercial Code (U.C.C.).[286] The court also ruled, however, that:

> The high-voltage electricity with which the Hedges came into contact was not the good PSI was intending to sell or the Hedges were intending to buy. While the delivery of 135 volts of electricity under the circumstances in *Helvey* can be considered the sale of a defective good, the tragic escape of 7200 volts . . . is not a transaction in goods intended to be covered by the Uniform Commercial Code.[287]

The *Hedges* court did not state whether its determination was because the high voltage electricity was "unmarketed" or because it was "unmarketable," but the question is significant. If the electricity had been transmitted from its source at 110 volts through insulated lines, would there then have been a U.C.C. transaction subject to warranty liability for consequential damage? The contract for supplying electricity to the Hedges by PSI had presumably been formed earlier between the parties and the electricity in the line strung above the Hedges property probably could be identified to the contract. If a product has been sold (i.e., a contract of sale has been formed) and the product is completely manufactured, and is in the process of delivery, but is defective, and the defect causes injury, should the seller be liable for breach of warranty? It seems clear that the seller should not be liable if the product requires further processing or if a scheduled final inspection before releasing the product might reveal the defect to seller. But, if no further processing or stepping down of voltage need be accomplished prior to release, and if a final inspection by the seller would not correct a defect because it was, for example, a design defect, then should not liability accrue to the seller when the completed product is foreseeably capable of injuring a party who otherwise would be in the class of persons protected by the Code?

The issue arose once again, during the survey period, in *Lukowski v. Vecta Educational Corp.*[288] Plaintiff's decedent was injured

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[284]151 Ind. App. 176, 278 N.E.2d 608 (1972).

[285]396 N.E.2d at 936.

[286]*Id.*

[287]*Id.*

[288]401 N.E.2d 781 (Ind. Ct. App. 1980).

when he fell from a bleacher's balcony which lacked a back railing. The defendant, bleacher manufacturer, asserted it could not be liable under section 402A because it had not completed the fabrication of the product. "Rather it established that the school elected to use the product in a partially finished condition without the approval of Vecta and before Vecta 'delivered' it."[289] Again, the appellate court did not distinguish the ground on which it held there was no liability to the manufacturer. Was it the "partially finished condition" or was it the fact that the product was not "delivered"—or both?

Consistent with the concept that a sale may not be necessary to impress liability on one who introduces a product into the stream of commerce is the notion that the time of entry into the stream should be recognized as that moment when unacceptable risks of harm are created by the introducer. If the product is manufactured to the point where any later processing and inspection will not correct or reveal a dangerous defect and subsequent pre-delivery use is reasonably foreseeable to the seller, it would appear reasonable to impress liability on the seller if in fact the product is so used and plaintiff is injured, even though there may not have been an "official" delivery.

2. Components v. Assemblies.—In the early years of strict tort for product sellers, notions of privity insulated component manufacturers from liability.[290] Courts were better able to accept strict tort liability for distributors and wholesalers because those parties were generally merely conduits and making them available for suit was usually only a matter of trading their inconvenience for that of the injured plaintiff who presumably was more deserving.[291] Further, allowing the plaintiff to reach the manufacturer directly not only facilitated judicial economy, it shifted pressure from the retailer to the assembler of the defective product whose production function was presumably more responsible for releasing dangerously defective products into the stream of commerce.[292] On the other hand, lawsuits against component manufacturers were perceived as potentially difficult to manage because of proof problems arising out of unforeseeable uses of components and, therefore, permitting such

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[289]*Id.* at 787.

[290]*See, e.g.*, Pabon v. Hackensack Auto Sales, Inc., 63 N.J. Super. 476, 164 A.2d 773 (1960); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

[291]*See* Smith v. Fiat-Roosevelt Motors, Inc., 556 F.2d 728, 731-32 (5th Cir. 1977); Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969).

[292]Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

suits might lead to undesirable proliferation of litigation.[293] Also, because assemblers had a duty to inspect components, they were originally perceived as the proper repositories of liability for the entire finished product.[294]

In any event, the privity barrier in respect to component manufacturers where no substantial change is made to the component has generally broken down.[295] Often the components manufacturers have the "deepest pockets" and bringing in more parties is often a winning tactic for the plaintiff. In addition the practice has tended, surprisingly, to expedite litigation because it stimulates settlement and reduces the number of later suits for indemnity.

Another reason for allowing the plaintiff to reach the component manufacturer was illustrated in *Shanks v. A.F.E. Industries, Inc.*[296] The defendant was a manufacturer of a grain dryer which later became a component of a grain processing complex designed by the plaintiff's employer. Unless the injured plaintiff could reach the allegedly defective component grain dryer manufacturer, he would have to be content with his worker compensation award inasmuch as Indiana recognizes no dual capacity doctrine.[297] The *Shanks* court

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[293]RESTATEMENT (SECOND) OF TORTS § 402A, Comment q (1965) notes that where there is no change "in the component part itself, . . ." strict liability may be expected "to carry through to the ultimate user or consumer." Because there were few decisions at the time, no official position was taken in the *Restatement.* Comment p deals with the question of substantial change. This comment noted the problem of determining liability when a product is later processed. *See* States S.S. Co. v. Stone Manganese Marine, Ltd., 371 F. Supp. 500 (D.N.J. 1973) (where the court found an issue of fact as to the liability of an aluminum manufacturer after his ingots had been cast into propellers which failed). *But cf.* Parker v. Warren, 503 S.W.2d 938 (Tenn. Ct. App. 1973) (where a seller of lumber who was unaware of the intended use was held not liable after bleachers made with his product collapsed).

[294]12 N.Y.2d 432, 437, 191 N.E.2d 81, 83, 240 N.Y.S.2d 592, 595 (1963). The court stated:

> [F]or the present at least we do not think it necessary so to extend this rule [strict manufacturer liability without privity] as to hold liable the manufacturer . . . of a component part. Adequate protection is provided for the passengers by casting in liability the airplane manufacturer which put into the market the completed aircraft.

Id.

[295]*See* City of Franklin v. Badger Ford Truck Sales, Inc., 58 Wis. 2d 641, 207 N.W.2d 866 (1973). "[V]irtually all courts have taken the *City of Franklin* approach holding that warranty and strict tort are both applicable (in addition to negligence) to manufacturers of defective components integrated unchanged into final products." W. KEETON, D. OWEN & J. MONTGOMERY, PRODUCTS LIABILITY AND SAFETY 686 (1980).

[296]403 N.E.2d 849 (Ind. Ct. App. 1980), *petition for transfer filed* June 10, 1980.

[297]*See* Mitchell, *Products Liability, Workmen's Compensation and the Industrial Accident,* 14 DUQ. L. REV. 349, 357-61 (1976); Note, *Dual Capacity Doctrine: Third-Party Liability of Employer-Manufacturer in Products Liability Litigation,* 12 IND. L. REV. 553 (1979). The dual capacity doctrine would give an employee a right to action

found precedent to permit suit against component manufacturers in *Cornette v. Searjeant Metal Products, Inc.*,[298] where the manufacturer of a component safety device escaped liability only when it was shown that its product had probably been later altered and that the alteration was unforeseeable. The *Shanks* court stated its rule:

> [T]he manufacturer of a component is liable under § 402A for injuries to an ultimate user or consumer for a defect where the defective component renders the product in which the component is incorporated unreasonably dangerous. This rule is subject to the limitation that the manufacturer of the component must contemplate that the component be used in the manner in which it was used.[299]

The court found that the defendant's grain dryer had been used in a foreseeable manner and therefore, liability might attach.[300]

3. Sale of Used Products "As is."—In *Stapinski v. Walsh Construction Co.*,[301] the plaintiff was injured when a part of a drive shaft on a truck owned and operated by Security Fence Co. broke, traveled through the air and struck the plaintiff, Stapinski. Security had purchased the truck from defendant Walsh which had bought the truck new some years earlier. Walsh was not a seller of used trucks so the court held that he could not be liable under section 402A. However, in reversing summary judgment for Walsh, the court found that he could be held negligent under section 388 of the Restatement (Second) of Torts—Chattel Known to be Dangerous for Intended Use.[302] If Walsh, a seller of a used truck, knew, or should have known, of a latent defect which the purchaser would not discover or appreciate upon a reasonable inspection, then Walsh would have a duty to any parties injured as a result of the failure to warn or disclose.[303] The appellate court found as fact that Walsh knew that a grease fitting was missing, and that Security, the purchaser, may not have known of the danger in the absence of a fitting which was originally part of the assembly. The fact issue thus raised was sufficient, the court ruled, to preclude affirmance of summary judgment.[304]

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against his employer, other than under worker compensation, if his employer caused injury to him in a capacity other than that of employer. If, for example, the employer was also the manufacturer of the workplace product that injured the employee, the employee could bring a product liability suit against the employer.

[298]147 Ind. App. 46, 258 N.E.2d 652 (1970).

[299]403 N.E.2d at 856.

[300]*Id.*

[301]383 N.E.2d 473 (Ind. Ct. App. 1978), *rev'd*, 395 N.E.2d 1251 (Ind. 1979).

[302]383 N.E.2d at 476 (citing RESTATEMENT (SECOND) OF TORTS § 388 (1965)) (The court adopted § 388 as the law of Indiana. 383 N.E.2d at 476.).

[303]383 N.E.2d at 476-77.

[304]*Id.* at 477.

The Indiana Supreme Court reversed. Following *Trash v. U-Drive-It Co.*,[305] the court held that the purchaser of a used vehicle sold "as is," without warranties, is a "conscious and responsible agency which could and should have eliminated the hazard."[306] The court stated:

> We neither accept nor reject, as a general proposition, the adoption, as the law of Indiana, of the Restatement (Second) of Torts § 388 (1965) by the Court of Appeals . . . . We simply hold that where a nondealer owner sells a motor vehicle to another "as is," the former owner cannot be held liable for personal injury to a bystander.[307]

It should be recognized that the proximate cause analysis by the supreme court is a type of privity barrier grounded on policy which recognized that "[t]o hold otherwise would unduly burden Walsh Construction and those similarly situated. Judge Hoffman [dissenter below] points out that Walsh was in no position to insure against injury as occurred in this case."[308]

I. Negligence Per Se: Government Standards

In *Martin v. Simplimatic Engineering Corp.*,[309] the worker plaintiff was injured when her hand was caught in an unguarded sprocket which was part of a conveyor assembly manufactured by the defendant. A jury found for defendant under theories of strict liability, implied warranty, and negligence. Plaintiff's appeal assigned error to the trial court's failure to give two of plaintiff's instructions. The first instruction would have required the jury to find defendant negligent if it found defendant's acts in violation of the Indiana Dangerous Employment Act.[310] The appellate court found no error on this ground because the Indiana legislature had repealed the Dangerous Employment Act prior to the time of plaintiff's injury[311] and plaintiff was not found to have a vested right which could have survived the repeal.

The second assigned error was the trial court's refusal to instruct the jury that it could consider: 1) that the plaintiff's employer

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[305]158 Ohio St. 465, 110 N.E.2d 419 (1953).

[306]395 N.E.2d at 1253 (citing 158 Ohio St. at 471, 110 N.E.2d at 422).

[307]395 N.E.2d at 1254.

[308]*Id.*

[309]390 N.E.2d 235 (Ind. Ct. App. 1979).

[310]*Id.* at 236. The Act, previously codified at IND. CODE § 22-11-4-4 (1971), was repealed by Act of Apr. 7, 1971, Pub. L. No. 356, § 2, 1971 Ind. Acts 1444. The current version is codified at IND. CODE §§ 22-8-11.1-1 to -50 (1976 & Supp. 1980).

[311]390 N.E.2d at 236-37.

relied on defendant's expertise in manufacturing the conveyor; and 2) if the employer did so rely, then the jury could consider whether defendant "failed to comply with certain regulations adopted by the Indiana Commissioner of Labor."[312] The relevant regulations were standards describing the proper guarding of sprockets.[313] If the regulations could be held to be either directly or indirectly applicable to acts of workplace product manufacturers, then violation of the regulations could create a presumption of negligence under the doctrine of negligence per se.[314]

The court held, however, that "the Commissioner of Labor, pursuant to Ind. Code 22-1-1-11, is only authorized '. . . to adopt, amend or repeal reasonable rules, applicable to either employers or employees, or both, for the prevention of accidents . . . .'"[315] The court also noted that the "tenor of the statutes is that they apply to employers, places of employment, and employees within the jurisdiction of the Department of Labor . . . ."[316] Inasmuch as defendant was not plaintiff's employer, the regulations were held not applicable to it, no presumption of negligence was created, and "[t]herefore, Simplimatic could not be found negligent *per se* on the theory that they breached *Rules* (22-1-1-11) F1 and F5 (Burns Code Ed.)."[317]

The court also noted that almost identical sprocket-guarding standards had reached the jury through another instruction which recited a similar sprocket guarding standard promulgated by the American National Standard Institute which was in effect at the time of the accident. A violation of the ANSI standard, however, would not create a presumption of negligence inasmuch as it does not have the force of law. The jury was instructed that it could consider defendant's failure to observe the ANSI standard "along *with the rest of the evidence* in deciding the issue of the liability of the Defendant as to its negligence or manufacture of a defective product."[318]

The opinion in the *Martin* case did not disclose whether the jury should be permitted to receive evidence that an Indiana statutory sprocket guarding regulation did exist, even if the regulation were not directly applicable to the defendant. Such evidence could have

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[312]*Id.* at 236.

[313]The regulations are cited and summarized in *Martin. Id.* at 237.

[314]*See* BLACK'S LAW DICTIONARY 933 (5th ed. 1979), which defines "negligence per se" as "[c]onduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of a statute or valid municipal ordinance . . . ."

[315]390 N.E.2d at 238.

[316]*Id.*

[317]*Id.* at 239.

[318]*Id.* at 238 (emphasis added).

probative value as to the issues of defectiveness and negligence, but the weight of the evidence would have to be measured against the prejudicial effect that knowledge might have on the jury. That issue arose during the survey period in *Second National Bank v. Sears, Roebuck and Co.*[319]

In *Second National Bank*, the plaintiff bank, acting on behalf of a child, alleged the child was injured as a result of his mother's inhalation of carbon monoxide fumes from a defectively installed furnace vent pipe when she was pregnant with him. A verdict was given for the defendant seller-installer, Sears Roebuck, and plaintiff's representative bank and the mother appealed, assigning error to the trial court's refusal to permit introduction of evidence of the existence of a regulation promulgated by the Administrative Building Council of Indiana which contained a standard describing the proper height of furnace "flues, vents and the like."[320] The trial court denied admission of the regulation because it was a regulatory statute which, under the rule of *Fechtman v. Stover*,[321] could not be extended to "civil liability in the landlord-tenant area."[322] On appeal, the defendant raised an additional ground for its objection to the evidence. The proffered regulation was discovered to have been inapplicable to private dwellings at the time of the alleged injury. The appellate court, while admitting that evidence of the existence of a statutory standard might have some probative value, held that the relevance of the evidence was outweighed by "the counterbalancing factor . . . that such evidence could prejudice or mislead the jury into believing that the administrative rules were applicable to the Williams' residence."[323]

As to plaintiff's proffered instruction, which would have found defendant negligent per se if it had violated the regulation, the court ruled it was properly excluded.[324] In addition, the court noted that in a 1940 case, violation of a Fire Marshall's regulation was held not to be negligence per se.[325] The court likened the statutory authority of the Administrative Building Council to that of the Fire Marshall.[326] The court's dictum suggested that the scope of the

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[319]390 N.E.2d 229 (Ind. Ct. App. 1979).

[320]*Id.* at 230.

[321]139 Ind. App. 166, 199 N.E.2d 354 (1964), *transfer denied*, 247 Ind. 498, 217 N.E.2d 587 (1966).

[322]390 N.E.2d at 231.

[323]*Id.*

[324]The instruction provided in part: "If you find . . . said defendant violated this regulation in the installation of the furnace, such conduct would constitute negligence per se . . . ." *Id.* at 231-32.

[325]*Id.* at 232 (citing Town of Kirklin v. Everman, 217 Ind. 683, 29 N.E.2d 206 (1940)).

[326]390 N.E.2d at 232.

negligence per se doctrine should be narrowly construed in Indiana. In the light of the generally expansive decisions by the Indiana Court of Appeals in *Bemis*,[327] *Shanks*,[328] *Conder*,[329] and *Weidenhamer*,[330] we can expect that at least the evidentiary relevance of government standards, which may not apply directly to defendants, will be assigned increasing probative value in the future.[331]

On the other hand, general safety statutes designed to control the conduct of one class of persons will not be invoked to directly regulate the behavior of persons outside that class. In *Stapinski v. Walsh Construction Co.*,[332] plaintiff sought to have a seller of a used vehicle found liable for violating a statute which prohibited the "operation of an unsafe motor vehicle by those who 'drive or move' on a public highway."[333] The Indiana Supreme Court held the statute inapplicable because the *seller* did not drive or move a vehicle on the highway.[334] Likewise, the seller was not "an owner" who could violate another statute which prohibited an owner from causing or knowingly permitting an unsafe vehicle to be driven on a highway.[335] An owner, held the court, was a "person who holds the legal title of a vehicle" at the time the accident occurred.[336] The Indiana Court of Appeals, below, had taken a similar position: "The duty to make the vehicle safe for use on the highways has been statutorily imposed upon the owner and driver of the vehicle."[337]

The role of government standards promulgated through statutes and regulations is a growing one. Not only is the increasing creation of standards by state and federal agencies providing a legal sword for those injured by products which violate those standards, it may

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[327]401 N.E.2d 48 (Ind. Ct. App. 1980), *petition for transfer filed* May 7, 1980.

[328]403 N.E.2d 849 (Ind. Ct. App. 1980), *petition for transfer filed* June 10, 1980.

[329]405 N.E.2d 538 (Ind. Ct. App. 1980).

[330]404 N.E.2d 606 (Ind. Ct. App. 1980), *petition for transfer filed* Aug. 22, 1980.

[331]In Conder v. Hull Lift Truck, Inc., 405 N.E.2d 538, 542-43 (Ind. Ct. App. 1980), the court cited Balido v. Improved Mach., Inc., 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1973). In *Balido*, the court discussed a 1949 California industrial safety order. The court said, "Non-compliance with a standard set out in an industrial safety order furnishes probative evidence of deficient design, *even though the order is directed at the user of equipment and not at its manufacturer.*" 29 Cal. App. 3d at 641, 105 Cal. Rptr. at 896 (emphasis added).

[332]395 N.E.2d 1251 (Ind. 1980).

[333]*Id.* at 1254 (citing IND. CODE § 9-4-1-126 (Burns 1973) (current version at *id.* § 9-4-1-126 (1976)).

[334]*Id.*

[335]*Id.* (citing IND. CODE § 9-8-6-2(a) (Burns 1973) (current version at *id.* § 9-8-6-2(a) (Supp. 1980))).

[336]*Id.* (citing IND. CODE § 9-4-1-11(d) (Burns 1973) (current version at *id.* § 9-4-1-11(d) (1976))).

[337]383 N.E.2d 473, 476 (Ind. Ct. App. 1978).

eventually provide a shield for manufacturers of products which are in compliance with government standards but whose products nevertheless cause injury. Manufacturers and insurance industry advocates argue that compliance with government standards should be a defense which would refute defectiveness.[338] Generally, the judicial view has been that government standards should be considered as minimums and if further safety provisions are indicated for a product, there is a duty on the part of the manufacturer to provide them.[339]

The problem of minimum compliance with government standards is illustrated in the case of *State v. Ford Motor Co.*[340] The 1973 Ford Pinto in which three young women were incinerated allegedly complied fully with federal automobile fuel system safety regulations in effect at the time. There were, however, no federal fuel system rear end fuel leakage crash standards in existence at the time[341] because, as with many other products, the proliferation of small cars with varying crash characteristics developed more quickly than legislation or regulations could reasonably follow inasmuch as statutory law requires the development of a legislative consensus.[342]

The need for an ultimate *hindsight* judicial test of defectiveness based upon an actual or imputed reasonableness test must remain a major component of our product safety control system. Business interests which press for adoption of the principle that compliance with government standards should be a complete defense must realize that they are asking for a complete shift of responsibility for safety design standards from the manufacturer to the government. The result may well be a host of safety standards so high that other design factors desired by consumers, such as original affordability and economy of operation, will be given little or no weight. Government agencies charged with safety will have little motivation or flexibility to consider the other, often antagonistic, factors which consumers desire, expect, and need to have built into the products they use in a world of shrinking resources.[343]

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[338]*See* FINAL REPORT, *supra* note 19 at VII-37.

[339]*Id.* at VII-38. "Our Legal Study shows that the overwhelming number of courts that have confronted the issue have rejected a strict compliance with legislative or administrative standards defense." *Id.*

[340]No. 11-431 (Pulaski County Cir. Ct. (Ind.) Mar. 13, 1980).

[341]*See* STROBEL, *supra* note 214, at 83. "When the Pinto went on sale, the federal government had no standards concerning how safe a car must be from gas leakage in rear-end crashes." *Id.*

[342]*Id.* at 83-84, 89 (describing the auto industry's panicked response to proposed standards which response led to delay of the standards' promulgation until "1,513,399 Pinto sedans were built and sold," six years later).

[343]*See, e.g.*, Industrial Union Dep't v. American Petroleum Inst., 49 U.S.L.W. 1007 (1980). Under section 3(8) of the Occupational Safety and Health Act, an occupational

J. Statutes of Limitation and Statutes of Repose

In *Amermac, Inc. v. Gordon*,[344] the court discussed whether product liability actions for personal injury in Indiana should be governed by the Uniform Commercial Code (U.C.C.) provision for a four-year statute running from tender of delivery of the product,[345] or the tort statute of limitations, which gives a plaintiff two years from date of injury to bring his action.[346] The court noted that some states provide that the U.C.C. limitation applies where privity exists between the parties, while others apply the tort statute in all personal injury cases.[347] The court found authority in a Michigan court's conflict of laws decision which held that Indiana courts would apply the U.C.C. limitation in cases covered by the U.C.C. and the tort limitation in non-U.C.C. cases.[348]

In *Amermac*, the plaintiff qualified for neither statute because over four years had elapsed from the time of delivery of the product and over two years had elapsed from the time of injury. The plaintiff's attempt to qualify under still another statute of limitations, the six-year statute governing breach of implied contract actions, was rejected by the court inasmuch as this provision in respect to breach of warranty actions had been repealed by the Indiana legislature in 1971.[349]

The *Amermac* court did not decide which of the two remaining limitation statutes would prevail in another case, but it is reason-

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safety and health standard is defined as one " 'reasonably necessary and appropriate to provide safe and healthful employment.' " *Id.* at 1007. The Secretary of Labor took the position that this mandate as applied to a carcinogen such as benzene meant he must " 'set the standard that most adequately assures, to the extent feasible on the basis of the best available evidence that *no employee* will suffer material impairment of health or functional capacity.' " *Id.* (emphasis added). The Secretary of Labor further stated that " '*there is no "safe" exposure level* and that under § 6(b)(5) he must set an exposure limit at the lowest technologically feasible level that will not impair a regulated industry.' " *Id.* (emphasis added). Although the Supreme Court rejected the Secretary's position (5-4), only Justice Powell observed "that the Secretary's conclusion that the cost of benzene regulation was justified is not supported by the record." *Id.* Three others in the majority indicated that the Secretary failed because he produced *no evidence* of an unsafe workplace. Four dissenters rejected the validity of cost-benefit analysis unless explicitly provided for by Congress in the statute. " '[A]n activity is "feasible" if it is capable of achievement, not if its benefits outweigh its costs.' " *Id.* (emphasis added). *See* Wheeler, *Cost-Benefit Analysis on Trial: A Case of Delusion and Reality*, Nat'l L.J., Oct. 20, 1980, at 28, col. 1.

[344]394 N.E.2d 946 (Ind. Ct. App. 1979).

[345]IND. CODE § 26-1-2-725 (1976).

[346]*Id.* § 34-1-2-2.

[347]394 N.E.2d at 948 n.3.

[348]*Id.* at 948 n.2 (citing Waldron v. Armstrong Rubber Co., 64 Mich. App. 626, 236 N.W.2d 722 (1975)).

[349]394 N.E.2d at 949.

able that the determination should be made on the basis of the characterization of the action in the complaint as sounding in contract (warranty) or tort would determine which limitation statute would govern, assuming that the privity and other U.C.C. tests for a U.C.C. warranty action could be met.

The *Amermac* court also noted the existence of a repose statute enacted in 1978 to govern product liability actions in Indiana.[350] A repose statute begins to run from the defendant's act rather than from the invasion of the plaintiff's rights. The Indiana Product Liability Act[351] provides for a cessation of all tort product liability ten years after a product's initial delivery unless the injury occurs in the ninth or tenth year of the product's life, in which case the statute is extended for a period ending two years from the date of injury.[352] The court cited this statute as authority for its finding that the Indiana legislature accepts the concept that a limitation can run from the moment defendant introduces a product into the stream of commerce even though plaintiff has not yet been injured.[353]

In so linking the Indiana Product Liability Act's repose provision with the U.C.C. four-year limitation, the court apparently found no basic conceptual difference between them. The U.C.C. language, however, suggests that an action for breach of implied warranty accrues at tender of delivery.[354] Knowledge of the breach is immaterial but tender of a defective product provides plaintiffs in privity with the seller with an immediate cause of action nevertheless.[355] Although the original seller's liability will cease four years after he tenders delivery, subsequent sellers will restart the clock as to their potential warranty liability at the moment of resale. Conceptually, the U.C.C. statute differs from the ten-year outer cut-off provision of the Product Liability Act in that a U.C.C. purchaser theoretically possesses a breach of warranty action for four years while a plaintiff who first encounters and is then injured by an eleven-year-old product will be barred from his tort action before any right has accrued.

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[350]IND. CODE § 33-1-1.5-5 (Supp. 1980). For an analysis of this section of the Indiana Product Liability Act, *see* Vargo & Leibman, *Products Liability, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 227, 249-53 (1979).

[351]IND. CODE §§ 33-1-1.5-1 to -8 (Supp. 1980).

[352]*Id.* § 33-1-1.5-5.

[353]394 N.E.2d at 948 n.4. *See generally*, Phillips, *An Analysis of Proposed Reform of Products Liability, Statutes of Limitations*, 56 N.C.L. REV. 663 (1978); Note, *When the Product Ticks: Products Liability and Statutes of Limitations*, 11 IND. L. REV. 693 (1978).

[354]IND. CODE § 26-1-2-725(2) (1976) provides in part: "A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made . . . ."

[355]*Id.*

But what about plaintiffs not in privity with the seller? In *Amermac*, the plaintiff was an employee of the product purchaser. As to an employee the U.C.C. provision, if applicable, would be, in effect, a repose statute because a plaintiff not in privity with the seller has no cause of action until he is injured. To give him the benefit of his employer's four-year U.C.C. statute of limitations would appear to be unsound.

In *Ferdinand Furniture Co. v. Anderson*,[356] the plaintiff sought to maintain his action for damage to personal and real property more than two years after the fire and four years after delivery of the alleged defective oven. The court ruled plaintiff was barred in respect to the personal property but the statute of limitations "for injuries to property other than personal property is six years."[357]

K. Damages and Remedies

1. Size of Awards.—Several jury verdicts were attacked during the survey period as providing for excessive compensatory damages. In *Bemis Co. v. Rubush*[358] the court in affirming a $750,000 judgment for an injured employee stated this rule:

> The amount of recovery, where damages are not a mere matter of computation, is largely within the discretion of the trier of the facts, and will not be disturbed by the reviewing court on the grounds of excessiveness unless the award is so grossly, outrageously great as to indicate prejudice, partiality, corruption or other improper motive. The amount assessed must appear to be so outrageous as to impress the court at first blush with its enormity. The fact that a trial court or jury assessed higher damages than this court would have assessed is no reason why the judgment should be set aside.[359]

The court, in finding the damages not excessive as a matter of law, considered plaintiff's "age, prior good health, his capacity for vigorous activity, [and] the substantial evidence, both from lay and professional witnesses, as to the critical . . . nature of the injuries."[360]

In *Huff v. White Motor Corp.*,[361] a diversity case, the award to the widow was also challenged as excessive. The court noted that federal standards rather than state law would apply to the damages issue.[362] The court quoted a passage from *Dagnello v. Long Island*

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[356]399 N.E.2d 799 (Ind. Ct. App. 1980).

[357]*Id.* at 803 (citing IND. CODE § 34-1-2-1 (1976)).

[358]401 N.E.2d 48 (Ind. Ct. App. 1980), *petition for transfer filed* May 7, 1980.

[359]*Id.* at 64 (citations omitted).

[360]*Id.*

[361]609 F.2d 286 (7th Cir. 1979).

[362]*Id.* at 295.

Rail Road[363] setting forth the federal rule,[364] but there seems to be little difference from the Indiana rule quoted above. The federal court "[i]n applying the *Dagnello* standard [felt required] to make a 'detailed appraisal of the evidence bearing on damages.'"[365] The court reviewed the expert economist's computation of economic damages of $285,600 and found it "expansive" but noted that the defendant had not challenged that component of the award. Instead, the defendant had focused on the $115,000 award for loss of decedent's counseling and guidance, and $276,000 for the loss of love and affection by pointing out the disparity of these amounts compared with the decedent's modest economic circumstances.[366]

The appellate court was uncomfortable when it affirmed the award because research proved its size was unprecedented in wrongful death actions. The appellate court stated it "might well have set aside the verdict or ordered a remittitur had we been presiding at trial" but it could not describe the award as "grossly excessive" or "monstrous."[367] The court did note that with respect to the intangible damages, the fact that the plaintiff and her decedent were of modest circumstances did not in itself provide a basis for valuing her loss of counseling and guidance, loss of love and affection "lower than a similar loss to one in more fortunate economic circumstances."[368] The court noted that "[t]hese intangible elements of damages are concededly recoverable under Indiana law."[369]

In *American Optical Co. v. Weidenhamer*,[370] the defendant asserted that "the damage award must have been based upon passion, prejudice and undue influence" and therefore it alleged "the damages were excessive."[371] The court examined the evidence relating to the plaintiff's life expectancy, his eyesight before the accident, his pain, suffering, and impairment of vision during his treatment and convalescence, and the extent of permanent injury he would be left with.[372] The court concluded that an award of $57,724.45 which was approximately eight times his actual expenses was not "inherently excessive."[373] Nor did the court give any credence to the defendant's hypothesizing that "the jury was probably influenced and angered

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[363]289 F.2d 797 (2d Cir. 1961).
[364]*Id.* at 806.
[365]609 F.2d at 296.
[366]*Id.*
[367]*Id.* at 297.
[368]*Id.* at 296.
[369]*Id.*
[370]404 N.E.2d 606 (Ind. Ct. App. 1980), *petition for transfer filed* Aug. 22, 1980.
[371]*Id.* at 627.
[372]*Id.* at 627-28.
[373]*Id.* at 627.

by the directed verdict in favor of Harvester [a co-defendant]."[374] It concluded that the defendant's allegation was "pure speculation, not really worthy of consideration."[375]

2. Punitive Damages.—a. Wrongful death; equal protection.— The Seventh Circuit Court of Appeals was asked to rule in *Huff v. White Motor Corp.*[376] whether a 1965 amendment to the Indiana wrongful death statute authorized punitive damages.[377] The amendment states that damages will include but *will not be limited* to "reasonable medical, hospital, funeral and burial expenses, and lost earnings . . . ."[378]

The court noted that prior to the amendment, punitive damages were not recoverable in wrongful death actions, "because the sole purpose of the statute was to compensate wrongful death claimants for pecuniary loss occasioned by the wrongful death."[379] The court interpreted the "including but not limited to" language of the amendment to refer to a legislative intent not to exclude "the other factors a jury may consider in assessing *compensatory* damages, e.g., loss of care, love and affection, and of training and guidance for children."[380] The court concluded "that the Indiana legislature would [not] so obliquely adopt such a significant change."[381]

The plaintiff in *Huff* raised an alternative equal protection argument against wrongful death statutes which bar punitive damages, claiming that such restrictive statutes were invidious discrimination favoring other classes of tort claimants. The court found the argument without merit because the alleged class discriminated against was not a suspect class and, therefore, a rational basis test was appropriate.[382] Whereupon the court found that "[p]laintiff has not persuaded us that the adoption of § 34-1-1-2 without a provision authorizing awards of punitive damages was irrational."[383] The court noted that "[t]he equal protection clause of the Indiana Constitution is coextensive with the federal equal protection clause . . . and therefore is not offended by the statute."[384]

b. Willful and wanton misconduct.—Willful and/or wanton misconduct is frequently the basis for punitive damages. The plaintiff in

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[374]*Id.* at 628.
[375]*Id.*
[376]609 F.2d 286 (7th Cir. 1979).
[377]*Id.* at 297.
[378]*Id.* (quoting IND. CODE § 34-1-1-2 (1976)).
[379]609 F.2d at 297 (citation omitted).
[380]*Id.*
[381]*Id.*
[382]*Id.* at 298.
[383]*Id.*
[384]*Id.*

Conder v. Hull Lift Truck, Inc.[385] alleged such misconduct and tendered an instruction which would permit the jury to find willful or wanton misconduct if it found "that the defendant Allis-Chalmers Corporation had actual knowledge that the design of its forklift truck was defective in that it did foresee that there was a hazard which could result from foreseeable misadjustments . . . and that the defendant . . . deliberately and intentionally did not warn of the hazard . . . ."[386]

The court held this instruction was an incorrect statement of the law. It noted that the plaintiff, to prove willful or wanton misconduct, must show defendant had "knowledge of an *impending* danger or have been conscious of a course of misconduct calculated to result in *probable* injury. Second, the defendant's actions must have exhibited his indifference to the consequences of his conduct."[387] The court emphasized that "[i]t is the *probability* or *likelihood* of injury"[388] which distinguishes reckless or wanton conduct from mere negligence. The plaintiff's instruction "would have informed the jury that liability for willful and wanton misconduct could attach if Allis-Chalmers knew 'a hazard . . . *could* result from foreseeable misadjustments . . . .' However, conduct which merely *could*, or *might possibly* result in injury does not amount to willful and wanton misconduct."[389]

3. Damage to Personality: Effect on Marriage.—The jury in *Bemis Co. v. Rubush*[390] was instructed "that, if it found that the dissolution of the Rubush marriage was a proximate result of Gary's injuries, the jury could consider as an element of any damage to Phyllis the value of her loss of consortium after the date of the dissolution."[391] The appellate court held this instruction was error because it would in effect recognize a "cause of action for 'wrongful divorce' and this we will not do."[392] Noting that under Indiana law, death of the injured spouse ends the compensable period for loss of consortium, the court held there should be no difference when the marriage ends by dissolution.[393] The court also held that the dissolution of the marriage was not proximately caused by the product defect which injured the husband because "[t]he dissolution of the Rubush marriage and the resulting loss by Phyllis of all those bene-

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[385]405 N.E.2d 538 (Ind. Ct. App. 1980).
[386]*Id.* at 547.
[387]*Id.*
[388]*Id.*
[389]*Id.*
[390]401 N.E.2d 48 (Ind. Ct. App. 1980), *petition for transfer filed* May 7, 1980.
[391]*Id.* at 63.
[392]*Id.* at 64.
[393]*Id.* at 63.

fits covered by the rubric 'consortium' would not be harms objectively reasonable to expect from the actions of Bemis."[394]

Applying a proximate cause analysis based on foreseeability in the *Bemis* context is unfortunate. Clearly the dissolution of a marriage when an injury causes severe personality changes and impotence is an objectively foreseeable event which is not particularly attenuated from the product defect, or separated from it by independent superseding intervening causes. There are adequate policy grounds for cutting off Mrs. Rubush's consortium recovery after the dissolution of her marriage without recourse to a tortured proximate cause analysis.

When injuries involving personality changes and their effects do have to be submitted to a jury for a causation finding, the issue frequently centers on cause in fact, rather than proximate cause. In *Hedges v. Public Service Co. of Indiana*,[395] the plaintiff attempted to prove that his electrical shock injury was a cause in fact of alterations in his personality which in turn resulted in his marriage difficulties. Defendant sought to rebut plaintiff's evidence of post accident difficulties in relating to people, including the marital difficulties, by introducing evidence of plaintiff's four earlier marriages. The court held that the evidence of the preaccident marriages was relevant because it logically tended to prove a material fact.[396] The defendant's evidence suggested that there may have been another sole or concurring cause in fact of plaintiff's personality problems which existed prior to, and independent from, the accident.

L. Abnormally Dangerous Activities

The doctrine of strict liability is applied today in two major areas of tort law, product liability and abnormally dangerous activities. Occasionally the two areas converge.

In *Hedges v. Public Service Co. of Indiana*,[397] the plaintiff alleged first that the electricity which injured him was a defective product because it was transmitted in uninsulated transmission lines, strung with insufficient warnings, too close to the ground. Alternatively, the plaintiff argued that the doctrine codified in the Restatement (Second) of Torts, section 520, dealing with abnormally dangerous activities, should be adopted to apply to the transmission of high-voltage electricity by power companies.[398] The court noted that

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[394]*Id.* at 64.

[395]396 N.E.2d 933 (Ind. Ct. App. 1979).

[396]*Id.* at 937-38.

[397]*Id.* at 933.

[398]*Id.* at 936 n.3. (The RESTATEMENT (SECOND) OF TORTS § 520 (1976), dealing with abnormally dangerous activities, is quoted in full.).

although section 520 has not been explicitly adopted in Indiana, the doctrine it espouses has been applied to blasting cases.[399] However, the court rejected the application of the abnormally dangerous activity doctrine to electrical transmission. The court cited *Petroski v. Northern Indiana Public Service Co.*[400] in reiterating that "the standard of care required in Indiana is 'such care as a person of [reasonable] prudence would [ordinarily] use under like conditions and circumstances.'"[401]

The court found that reasonable care included insulation of lines where persons were likely to get at them, but stated no covering was required "when the lines are sufficiently isolated so that the general public could not reasonably be expected to come in contact with them."[402]

M. Alternative Designs

In *Meadowlark Farms v. Warken*,[403] the plaintiff was injured by a corn auger while unloading corn from his truck using a tailgate control mechanism which the defendant asserted was dangerous. The defendant, who provided the auger, argued that the failure to use a less dangerous method was the sole proximate cause of the accident. During cross examination the defendant sought to question the plaintiff with respect to alternative unloading methods and designs. The trial court cut off this questioning as improper and speculative.[404]

The appellate court did not rule on the propriety of the questioning, or the possible impropriety of cutting it off, but the court noted that the witness had been adequately examined on the subject in question, elsewhere in the cross examination.[405] The appellate court's ruling implied that the issue of a safer method of unloading known to the plaintiff prior to the accident, but not employed by the plaintiff at the time of the accident, could be relevant to the issue of proximate cause.[406]

Generally it is the plaintiff, however, who seeks to introduce evidence of safer alternative designs. In *Dias v. Daisy-Heddon*,[407] the

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[399] *Id.* at 936 n.4. The court cites several Indiana blasting cases.

[400] 354 N.E.2d 736 (Ind. Ct. App. 1976).

[401] 396 N.E.2d at 937.

[402] *Id.*

[403] 376 N.E.2d 122 (Ind. Ct. App. 1978).

[404] *Id.* at 137.

[405] *Id.* at 137-38.

[406] "The apparent thrust of Meadowlark's attempted cross-examination was to show that Warken might have, or should have, considered different methods to unload the corn, and that his failure to take a different course of action was the proximate cause of his injury." *Id.* at 137.

[407] 390 N.E.2d 222 (Ind. Ct. App. 1979).

plaintiff, who was injured by a side-loading BB gun, sought to introduce evidence that a safer barrel-loading model existed and indeed was manufactured by the defendant. The trial court sustained the defendant's objection to introduction of evidence of the alternate design "on the basis that the design used was a choice Daisy had a right to make . . . . The [trial] court stated that the plaintiffs were taking a completely different type of gun which was built in an entirely different way trying to show how they should have built the BB gun."[408]

The appellate court found error in the trial court's suppression of this alternative design evidence. "It appears that evidence of alternative designs may be relevant to the question of whether the design in question is unreasonably dangerous."[409] The court cited *Walters v. Kellam & Foley*[410] in which that court had "noted that the evidence of custom and alternative design was within the bounds of Indiana law relating to hypothetical questions and that it should have been admitted."[411] The court also held that manufacturers "are charged with the knowledge of experts in their fields of interest."[412] Presumably the allegedly safer design is relevant to proving defendant had knowledge of a safer alternative prior to the accident. While holding that the evidence of an existing alternative design should have been admitted, the court found the error not reversible because evidence of safer design feasibility was introduced by other witnesses during other stages of the trial.[413]

N. Conclusion

With respect to product liability law, this survey period has been one of the most active and significant in the history of Indiana's appellate courts. In dealing with vigorous plaintiff challenges to long held defenses and doctrines, the courts have appeared for the most part to have been guided in their decisions by the basic policy of section 402A of the Second Restatement which seeks to assign liability to sellers of defective products that are unreasonably dangerous. As a result of the *Bemis*, *Shanks*, *Conder*, and *Weidenhamer* decisions, in particular, manufacturers and other sellers of products, especially for the workplace, can now expect to shoulder, in Indiana, an increased responsibility for product safety.

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[408] *Id.* at 226.
[409] *Id.*
[410] 360 N.E.2d 199 (Ind. Ct. App. 1977).
[411] 390 N.E.2d at 226.
[412] *Id.* at 227.
[413] *Id.*