XI. Products Liability

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A. Introduction

A dominant theme running through the three major appellate court products liability cases decided during the survey period is that of proximate, intervening, and superseding causation. In *Craven v. Niagra Machine & Tool Works, Inc.*,[1] the Indiana Court of Appeals, in a petition for rehearing, reasserted the principle that a product manufacturer has a duty to foresee and anticipate subsequent, substantial changes of its product by others. However, the plaintiff has the burden of showing that any such change was not a superseding cause of his injuries.[2] In *Conder v. Hull Lift Truck, Inc.*,[3] the Indiana Supreme Court acknowledged that foreseeability principles, to be applied by the trier of fact, will determine whether intervening acts, including product misuse, supersede the act of the manufacturer in introducing a defective product into the stream of commerce.[4] And finally, in *Bemis Co. v. Rubush*,[5] the Indiana Supreme Court, in a controversial reversal, ruled that the issue of causation need not be reached if the instrumentality causing the injury presented an open and obvious danger which would be apparent to an ordinary product user.[6]

B. Substantial Change

Craven v. Niagra Machine & Tool Works, Inc.[7] was an appeal from judgment on the evidence in favor of the defendant manufacturer,

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[1]425 N.E.2d 654 (Ind. Ct. App. 1981), *rev'g on rehearing* 417 N.E.2d 1165 (Ind. Ct. App. 1981). See Vargo, *Products Liability, 1981 Survey of Recent Developments in Indiana Law,* 15 IND. L. REV. 289, 301 (1982) for a discussion of the original court of appeals opinion.

[2]425 N.E.2d at 655-56.

[3]435 N.E.2d 10 (Ind. 1982), *rev'g* 405 N.E.2d 538 (Ind. Ct. App. 1980). See Leibman, *Products Liability, 1980 Survey of Recent Developments in Indiana Law,* 14 IND. L. REV. 1, 25-27, 31, 43-45, 60-61, 64 (1981) for a discussion of the issues raised in the Indiana Court of Appeals opinion in *Conder.*

[4]435 N.E.2d at 14.

[5]427 N.E.2d 1058 (Ind. 1982), *rev'g* 401 N.E.2d 48 (Ind. Ct. App. 1980). See Leibman, *Products Liability, 1980 Survey of Recent Developments in Indiana Law,* 14 IND. L. REV. 1, 8-17, 30, 40, 58, 61-62, 64 (1981) for a discussion of the issues raised in the Indiana Court of Appeals opinion in *Bemis. See also,* Phillips, *Products Liability: Obviousness of Danger Revisited,* 15 IND. L. REV. 797 (1982).

[6]427 N.E.2d at 1061.

[7]417 N.E.2d 1165 (Ind. Ct. App. 1981).

Niagra.[8] Craven's claim, based on strict liability in tort,[9] alleged that Niagra failed to adequately warn of inherent dangers in its product, a punch press, with respect to an operator "trying out" small dies without first blocking the slide with safety blocks.[10] By virtue of that failure to adequately warn, the plaintiff contended that the manufacturer had introduced a defective product into the stream of commerce and that the defect was the proximate cause of his injuries.[11]

The court of appeals, in its original hearing, ruled that there was sufficient evidence of a latent defect to create a question of fact for the jury;[12] that is, was the punch press "in a defective condition unreasonably dangerous,"[13] which would then create a duty to warn. In discussing whether the alleged failure to give an adequate warning could be a cause in fact of the injury, the court noted that there was a presumption in Craven's favor that Niagra's warnings, in the form of a service bulletin to the original purchaser of the press, were inadequate because Craven had failed to heed them.[14] "In reference to cause in fact, there is a rebuttable presumption that adequate warnings will be heeded.[15] . . . Where warnings are inadequate, the presumption is in essence a presumption of causation."[16] Niagra presented evidence of warning adequacy to rebut the presumption. However, Craven testified that he would have heeded a different type of warning, that he did take precautions when he recognized a danger with heavy dies, and that he heeded warnings in regard to other machines.[17] The court found that this testimony, along with testimony

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[8]*Id.* at 1168.

[9]The strict liability claim was based on section 402A of the *Restatement (Second) of Torts* which states:

> 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.

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

[10]417 N.E.2d at 1169-70.

[11]*Id.*

[12]*Id.* at 1170.

[13]RESTATEMENT (SECOND) OF TORTS § 402A (1965). *See supra* note 9.

[14]417 N.E.2d at 1171.

[15]*Id.* (citing Conder v. Hull Lift Truck, Inc., 405 N.E.2d 538 (Ind. Ct. App. 1980)).

[16]417 N.E.2d at 1171 (citing Ortho Pharmaceutical Corp. v. Chapman, 388 N.E.2d 541 (Ind. Ct. App. 1979)).

[17]417 N.E.2d at 1171.

by Craven's peers as to his cautious nature, was sufficient to create a jury question on the issue of cause in fact.[18]

To establish a jury question with respect to *proximate* cause, however, the court held that foreseeability principles would be the ultimate test.[19] Finding that Niagra was aware or should have been aware of the frequent resellings and the frequent misuses of its products and the products' safety features, the appellate court ruled that Niagra might reasonably foresee that the warning system it employed would prove inadequate.[20] Therefore, an issue of proximate cause existed which could go to a jury. With defect, causation, and damages at issue, judgment on the evidence was inappropriate.[21] Consequently, the court of appeals reversed and remanded for a new trial.[22]

In its petition for rehearing, Niagra argued that the court of appeals had "incorrectly decided the questions regarding substantial change and causation when [it] held that substantial change in the product after sale is a question of foreseeable or unforeseeable intervening, superseding cause."[23] Even if foreseeability of subsequent change is required of manufacturers, Niagra argued, the question remained whether the plaintiff or the defendant had the burden of proving or disproving that substantial product change, after the product leaves the manufacturer's control, was the sole proximate cause of injury.[24]

The problem of substantial change is derived from section 402A(1)(b) of the *Restatement (Second) of Torts*, which provides that the product "reach the user or consumer without substantial change in the condition in which it is sold."[25] Comment p to this section [26] explains why section 402A only addresses unreasonably dangerous defects in substantially *unchanged* products. The American Law Institute had insufficient case law in 1965 to fashion a rule which would determine which changes would provide adequate grounds for finding superseding, intervening causes.[27] Comment p makes it clear, however,

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[18]*Id.*
[19]*Id.* at 1170.
[20]*Id.* at 1171.
[21]*Id.*
[22]*Id.* at 1172.
[23]425 N.E.2d 654, 655 (Ind. Ct. App. 1981).
[24]*Id.* at 655-56.
[25]RESTATEMENT (SECOND) OF TORTS § 402A(1)(b) (1965).
[26]RESTATEMENT (SECOND) OF TORTS § 402A comment p (1965).
[27]*Id.* Comment p provides in pertinent part:

> Thus far the decisions applying the rule stated have not gone beyond products which are sold in the condition, or in substantially the same condition, in which they are expected to reach the hands of the ultimate user or consumer. In the absence of decisions providing a clue to the rules which are likely to develop, the Institute has refrained from taking any position as to the possible liability of the seller where the product is expected to, and does,

that the "mere fact that the product is to undergo processing, or other substantial change, will not in all cases relieve the seller of liability."[28] The comment provides a series of examples which focus on two criteria. The first is whether the original defect or the subsequent change was a cause in fact of the injury.[29] If the subsequent change or processing had no effect on the injury, then the liability of the original actor certainly should carry through. The second criterion is whether a transfer of responsibility to a subsequent processor has taken place. It is in this criterion that foreseeability principles can be found, and the language of comment p suggests that common law development might permit such a result. Examples given in the comment indicate that the likelihood of liability attaching to a manufacturer is a function of how certain the manufacturer might be of the ultimate use of its raw material which then leads to injury. The variety of uses the product has will determine how foreseeable that use was to the manufacturer and how foreseeable was the concomitant risk of harm. Clearly, the Institute left the decision of whether responsibility for foreseeable harm should remain with the original actor, or should be shifted wholly to the subsequent changer or processor, to state courts to sort out over time.[30]

On rehearing, the appellate court ruled in *Craven*[31] that Indiana case law had applied foreseeability principles to subsequent, substantial changes in products when Indiana adopted strict liability in tort.[32] "Substantial change has been defined in Indiana as 'any change which increases the likelihood of a malfunction, which is the proximate cause of the harm complained of, and which is independent of the expected and intended use to which the product is put.' "[33] The *Craven* court ruled that this definition permitted the original actor to be held strictly liable "if it is foreseeable that the alteration would be made and the change does not unforeseeably render the product unsafe."[34]

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undergo further processing or other substantial change after it leaves his hands and before it reaches those of the ultimate user or consumer.

Id.

[28]RESTATEMENT (SECOND) OF TORTS § 402A comment p (1965).

[29]*Id.*

[30]*Id.* Comment p provides in pertinent part:

No doubt there will be some situations, and some defects, as to which 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.

Id.

[31]425 N.E.2d 654 (Ind. Ct. App. 1981).

[32]Indiana first adopted strict liability in tort in Cornette v. Searjeant Metal Products, 147 Ind. App. 46, 258 N.E.2d 652 (1970).

[33]425 N.E.2d at 655 (quoting 147 Ind. App. 46, 54, 258 N.E.2d 652, 657 (1970)).

[34]425 N.E.2d at 655.

Craven had alleged a cognizable defect in the failure to adequately warn of the danger of not using safety blocks and had established a question of cause in fact, in that but for the lack of adequate warning he would not have been injured. The court on rehearing, however, decided that he had failed to meet his burden of making out a prima facie case because he had failed to establish that the lack of warning was a *proximate* cause of injury.[35] Craven failed to present sufficient evidence that the subsequent changes made by third parties, after Niagra had sold the punch press, were not superseding, intervening, efficient causes of his injury. "By definition, plaintiff must offer evidence that the changes did not increase the danger in not using safety blocks or the likelihood of the ram falling which caused the injury and that the changes could have been reasonably expected, i.e., foreseeable."[36] Without this proof the "only reasonable inference would be that this risk of the ram falling, creating the unreasonable danger in not using safety blocks, developed sometime after it left the hands of the manufacturer . . . ."[37]

In summary, in affirming the trial court judgment for Niagra, the appellate court ruled that, while a manufacturer must anticipate substantial changes which are reasonably foreseeable, the issue of substantial change is not a defense. Rather, proving *the lack of substantial change* is properly part of the plaintiff's case-in-chief.

C. Product Misuse and Substantial Change as Intervening Causation

To understand the dilemma presented to the Indiana Supreme Court by the appellate court's decision in *Conder v. Hull Lift Truck, Inc.*,[38] a review of the facts in chronological order will be useful.[39] Allis-Chalmers Corporation manufactured a forklift truck and sold it to Hull Lift Truck, Inc., which was in the business of leasing material handling equipment to industrial and commercial companies. Hull leased the Allis-Chalmers forklift to Globemaster for use on the Globemaster receiving dock which was under the supervision of Leroy Graber, the receiving foreman. Plaintiff Raymond Conder, a Globemaster employee and a forklift truck operator, reported to Graber. Hull was responsible for all maintenance and adjustments to the leased equipment, including the Allis-Chalmers' forklift truck.

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[35]*Id.*

[36]*Id.* at 655-56.

[37]*Id.* at 656.

[38]405 N.E.2d 538 (Ind. Ct. App. 1980), *aff'd in part, rev'd in part,* 435 N.E.2d 10 (Ind. 1982).

[39]The facts of *Conder* are presented in a somewhat different sequence in 405 N.E.2d at 541.

At some point after Globemaster took possession of the forklift, Graber and two forklift truck operators, other than Conder, became aware that there was an over-acceleration problem with the machine.[40] However, Graber decided to delay any maintenance on the forklift because the receiving department was exceptionally busy. Graber not only failed to call Hull and request maintenance for the forklift, but he also failed to warn Conder of the forklift's problem of over-acceleration.[41] Conder was injured severely when the machine, failing to decelerate for him, overturned as it passed through a puddle of water.

Conder and his wife brought suit against Allis-Chalmers, the manufacturer, "based upon theories of strict liability, negligence and willful and/or wanton misconduct,"[42] and they sued Hull Lift Truck, Inc. under both strict liability and negligence theories.[43] This Survey will discuss only the strict liability claims.[44] Conder's strict liability allegation against Allis-Chalmers stated that the product possessed both a design defect and a warning defect at the time Allis-Chalmers sold it to Hull.[45] The design of the forklift permitted "a foreseeable misadjustment of the governor linkage"[46] and Allis-Chalmers failed to warn of the misadjustment hazard.[47] With respect to the leasing agent Hull, the plaintiff "claimed the forklift truck was defective and unreasonably dangerous in that the torsion spring on the carburetor was either defective and/or broken when delivered to Globemaster, and the carburetor-governor linkage was grossly out of adjustment."[48]

At trial, *both* defendants received favorable jury verdicts.[49] In their appeal of the verdict for Hull, Conder argued that the verdict was contrary to law because it was against the weight of the evidence.[50] In ruling that it could not reverse "unless the evidence is without

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[40]405 N.E.2d at 543.

[41]*Id.*

[42]*Id.* at 541. The issue of willful and wanton misconduct was discussed in Leibman, *Products Liability, 1980 Survey of Recent Developments in Indiana Law,* 14 IND. L. REV. 1, 60-61 (1981). Because this issue was not material to the supreme court reversal of *Conder* it will not be discussed in this article. Although Conder and his wife both brought suit, this article only discusses Raymond Conder's claim.

[43]405 N.E.2d at 541-42.

[44]Both the Indiana Court of Appeals and the Indiana Supreme Court decided *Conder* under strict liability principles.

[45]405 N.E.2d at 541.

[46]*Id.*

[47]*Id.*

[48]*Id.* at 541-42. The misadjustment of the forklift truck's carburetor-governor linkage was initially masked by the functioning of a torsion spring which, when working, prevented the truck from over accelerating. Apparently this additional safety device failed at some time after Hull leased the truck to Globemaster. *Id.* at 542.

[49]*Id.* at 540.

[50]*Id.* at 542.

conflict and leads to only one conclusion,"[51] the court of appeals agreed that there was "overwhelming, uncontradicted evidence to prove the forklift's governor-carburetor linkage was misadjusted at the time the machine was leased to Globemaster. Therefore the forklift was clearly defective and unreasonably dangerous."[52] Thus, the appellate court concluded that Hull had leased a defective product to Globemaster by virtue of the maladjustment, and "the maladjustment was a cause in fact of the plaintiff's accident."[53]

Despite this conclusion, the court found that the jury had been presented with a question of fact on the issue of proximate cause.[54] The court ruled that the jury could have found that the defective product was not the proximate cause of Conder's injuries, but rather that the negligent acts and omissions of Globemaster's foreman were intervening, efficient, superseding causes of Conder's injuries.[55] The foreman's failure to remove the forklift from service or to warn Conder of the over-acceleration problem would then become the sole proximate cause of injury, while Hull's leasing an unreasonably dangerous product would become merely a remote cause of injury not subject to liability.[56] With respect to the action against Hull, the court did not discuss errors in the jury instructions or admissibility of evidence.

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[51]*Id.*

[52]*Id.*

[53]*Id.*

[54]*Id.*

[55]*Id.* at 543.

[56]The Indiana rule governing causation is set out in Ortho Pharmaceutical Corp. v. Chapman, 388 N.E.2d 541, 555 (Ind. Ct. App. 1979) as follows:

> 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

In appealing the verdict in favor of Allis-Chalmers, Conder assigned error to several of the trial court's instructions and also to the trial court's refusal to give two instructions submitted by Conder.[57] The alleged erroneous instructions raised two basic issues. The first issue was whether a manufacturer is a guarantor in regard to the quality of its product. The second, and more significant issue, was the extent of the manufacturer's responsibility for anticipating subsequent acts of product misuse and product alteration by product users and third parties.

The "subsequent act" issue raised by Conder focused on the concept of foreseeability. Conder argued that one trial court instruction was an incomplete statement of the law regarding any substantial change made in a product after it leaves the manufacturer's hands because the jury was told "the manufacturer of a product is not required to anticipate or foresee that its product will be substantially changed."[58] The court of appeals acknowledged that foreseeability of substantial change was indeed a requirement of Indiana law, but it did not find the instruction erroneous because that requirement was amply dealt with in another instruction.[59]

The court of appeals did find error in another instruction which told the jury that if "the plaintiff's own conduct was the sole proximate cause of the plaintiff's injuries, the verdict should be for Allis-Chalmers."[60] Although the court found that this instruction might be a correct but abstract statement of the law, it should not have been given because there was no evidence submitted that any act of Conder was a proximate cause of his injury. "The issues of causation in this case were difficult enough without this potentially misleading reference to the plaintiff's conduct."[61] On the other hand, the court ruled that another instruction on intervening causation was proper because there was evidence that the Globemaster foreman's failure to have corrective service performed on the forklift and to warn Conder could have been an intervening cause.[62]

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cause is generally a question for the trier of fact.

Id. at 555. The court in *Conder* cited Balido v. Improved Machinery, Inc., 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1973) for the proposition that the question of intervening cause is for the jury. 405 N.E.2d at 543.

[57]The alleged erroneous and refused instructions are listed in 405 N.E.2d at 540-41 and are discussed at 544-47.

[58]405 N.E.2d at 544.

[59]*Id.* Justice Hunter later pointed out in his dissent to the supreme court decision in *Conder,* "an improper instruction cannot necessarily be cured by the giving of a proper instruction, for the result leaves the jury to determine which of the contradictory propositions of law it should apply." 435 N.E.2d 10, 21 (Ind. 1982) (Hunter, J., dissenting).

[60]405 N.E.2d at 545.

[61]*Id.*

[62]*Id.*

The court of appeals appeared most disturbed, however, with an instruction submitted by Allis-Chalmers and given by the trial court "which told the jury Allis-Chalmers was not required to warn of dangers associated with the misuse of its product."[63] Nothing in this instruction told the jury that a manufacturer had a duty to foresee misuses in the ordinary use environment of the product and to warn the appropriate parties about the hazards arising out of foreseeable misuses. The court held that such a duty to foresee misuse was a requirement of Indiana law.[64] The court added that misuse is a defense only when the product is used in a manner not reasonably foreseeable.[65] The failure to instruct the jury that a manufacturer must foresee product misuse was held to be reversible error. Thus, the court remanded the action against Allis-Chalmers for a new trial and affirmed the judgment for Hull.[66]

On petition for transfer, the supreme court had to consider the following problem. Presumably, the jury verdict for Hull, the leasing agent, was based solely on a jury finding that Globemaster's foreman, Leroy Graber, by his intervening acts of negligence, had produced an efficient and superseding cause of Conder's injuries. Conder had proven that Hull had delivered to Globemaster an unreasonably dangerous, defective product which defect was the cause in fact of his injuries.[67] Thus, only a finding of superseding causation could explain the verdict for Hull. If Graber's acts superseded Hull's acts, they should also have been held to supersede any defects introduced by Allis-Chalmers because Allis-Chalmers' introduction of the product was prior to both the actions of Graber and Hull. The supreme court recognized the force of this argument. "The position of Allis-Chalmers is well taken that the same unforeseeable intervening cause of Conder's accident that insulated Hull from liability also insulated Allis-Chalmers."[68]

If Graber's negligence was a superseding cause of Conder's in-

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[63]*Id.*

[64]*Id.* at 546.

[65]*Id.* The court cited Perfection Paint and Color Co. v. Konduris, 147 Ind. App. 106, 258 N.E.2d 681 (1970) which incorporated Judge Sharp's definition of misuse from his concurring opinion in Cornette v. Searjeant Metal Products, 147 Ind. App. 46, 67, 258 N.E.2d 652, 665 (1970). In *Cornette,* the Indiana Court of Appeals adopted strict liability in tort for Indiana as set out in the *Restatement (Second) of Torts. See id.*

[66]405 N.E.2d at 548. In addition to Allis-Chalmers' "misuse" instruction no. 10, the court found error in Allis-Chalmers' instruction no. 5 which stated that the manufacturer is not a guarantor of his product's quality, *see infra* notes 89-95 and accompanying text, and Allis-Chalmers' instruction no. 7 (misprinted at page 548 as no. 6) which dealt with plaintiff's conduct as the sole proximate cause of his injuries, *see supra* notes 60 & 61 and accompanying text. *Id.*

[67]405 N.E.2d at 542. *See supra* note 52 and accompanying text.

[68]435 N.E.2d 10, 15 (Ind. 1981).

juries, this possibility raised an additional question regarding the errors in instructions that the court of appeals had found. The supreme court ruled that the jury instructions regarding Allis-Chalmers, if in fact they were improper, were, at most, harmless error.[69] The important substantive question remaining for the supreme court was whether the instructions, especially the one with respect to foreseeable misuse, were, in fact, improper.

Although the early Indiana Court of Appeals cases, *Cornette v. Searjeant Metal Products*[70] and *Perfection Paint & Color Co. v. Konduris,*[71] clearly state a foreseeability test with regard to a manufacturer's duty to anticipate product misuse, authority from diversity cases applying Indiana law vigorously denies any such duty. The court of appeals in *Conder* referred to the line of federal cases[72] which assigned liability to a product seller only when the product was employed for its intended use. When a product such as a motor vehicle was involved in a collision, it clearly was not being used as intended. Therefore, no liability could attach to the vehicle manufacturer for enhanced injury, if the vehicle then proved to be uncrashworthy.[73]

As the Indiana Court of Appeals observed in *Conder,*[74] this principle was overruled by *Huff v. White Motor Corp.*[75] *Huff* required product manufacturers to foresee the ordinary use environment their product would encounter. Thus, a vehicle manufacturer should anticipate that its products are likely to be involved in collisions; therefore, the manufacturer is responsible for taking reasonable steps to protect the users and passengers from injury during collisions when it is feasible to do so. The *Huff* court, however, stopped short of stating specifically that a manufacturer had a duty to foresee misuses of its

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[69]*Id.* at 16.

[70]147 Ind. App. 46, 258 N.E.2d 652 (1970).

> Misuse, either in using the product for a purpose not reasonably foreseeable to the manufacturer or in using the product in a manner not reasonably foreseeable for a reasonably foreseeable purpose, and assumption of risk, constitute the other defenses which the defendant may contend, and upon which the defendant has the burden of proof.

Id. at 67, 258 N.E.2d at 665 (Sharp, J., concurring).

[71]147 Ind. App. 106, 119, 258 N.E.2d 681, 689 (1970)("Judge Sharp of this court correctly stated that the defense of misuse is available when the product is used 'for a purpose not reasonably foreseeable to the manufacturer'. . . .")(citing Cornette v. Searjeant Metal Products, 147 Ind. App. 46, 67, 258 N.E.2d 652, 665 (1970)(Sharp, J., concurring)).

[72]405 N.E.2d at 545.

[73]Evans v. General Motors Corp., 359 F.2d 822 (7th Cir.), *cert. denied,* 385 U.S. 836 (1966). *See also* Latimer v. General Motors Corp., 535 F.2d 1020 (7th Cir. 1976); Schemel v. General Motors Corp., 384 F.2d 802 (7th Cir. 1967), *cert. denied,* 390 U.S. 945 (1968).

[74]405 N.E.2d at 545.

[75]565 F.2d 104 (7th Cir. 1977).

products. In a footnote, the *Huff* court, attempting to distinguish the prior cases requiring no foreseeability from its new rule, stated that those cases dealt with misuse and analytically were not apposite.[76] The court of appeals in *Conder* was unable to accept that distinction and stated: "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."[77]

In *Conder*, the supreme court majority recognized that foreseeability principles are applicable to a product misuse defense in Indiana, even though the court vacated the court of appeals decision for Conder and affirmed the jury verdict for Allis-Chalmers.[78] Although the supreme court stated that "[i]t would be an impossible task to require a manufacturer to give warnings to a user of all the ways in which a unit or any component of that unit might be misused,"[79] the court proceeded to cite *Perfection Paint* and *Cornette* to the effect that misuse is a defense when the product is used for a purpose not reasonably foreseeable to the manufacturer or when the product is used in an unforeseeable manner for a reasonably foreseeable purpose.[80] The supreme court concluded that "[i]t is only when a change or modification could be reasonably foreseen by the manufacturer to be a safety hazard and would not be apparent to the consumer or user that there could be liability of the manufacturer."[81]

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[76]*Id.* at 106 n.1. At the same time, the court overruled *Schemel v. General Motor Corp. Id.* at 109 n.7.

[77]405 N.E.2d at 546 (emphasis added). Parenthetically, it should be noted that the Indiana Product Liability Act of 1978, IND. CODE §§ 33-1-1.5-1 to -8 (1982) lends indirect support to the Indiana Court of Appeals' reading of *Huff*. The statute provides for a defense to strict liability in tort "that a cause of the physical harm is a *nonforeseeable* misuse of the product by the claimant or any other person." *Id.* § 33-1-1.5-4(b)(2) (emphasis added). It should also be noted that diversity cases have had an unusually pervasive influence on Indiana product liability law. The Indiana Supreme Court has, until recently, spoken infrequently on product liability matters, while a series of important product cases primarily involving motor vehicles have been resolved in federal court. *See supra* note 73. The *Evans* rule, for example, was established by the Court of Appeals for the Seventh Circuit and was unchallenged in Indiana for eleven years until it was finally overruled in *Huff*, which, of course, was also a diversity case. *See supra* notes 73-76 and accompanying text.

[78]435 N.E.2d at 12.

[79]*Id.* at 17.

[80]*Id.*

[81]*Id.* The supreme court ruled that the jury had been instructed with respect to misuse by referring to the trial court's instruction no. 8. Instruction no. 8 was quoted by the court of appeals and states in pertinent part that:

> A manufacturer of a fork lift truck may be liable for injuries suffered by the user of the truck in spite of the fact that it was later changed or altered *if the manufacturer could reasonably expect or foresee that the change or alteration might be made and foresees that the change or alteration might render the*

Justice Hunter, dissenting in *Conder*, was unimpressed with Allis-Chalmers' argument that there was superseding causation and, hence, harmless error. The dissent appears to suggest that the misadjustment of the carburetor may have occurred subsequent to the delivery of the forklift to Globemaster.[82] Thus, the jury may have found that Hull had delivered a nondefective product to Globemaster rather than finding superseding negligence by Globemaster's receiving foreman. If that were the case, Allis-Chalmers should not be allowed to argue that it must be insulated by the same shield of intervening causation which insulated Hull.

The dissent's analysis presents two problems. The first, of course, is the finding from the record by both the court of appeals and the supreme court majority that the forklift's governor-carburetor linkage was misadjusted when Hull delivered the machine to Globemaster.[83] Second, if in fact the carburetor was not misadjusted prior to delivery to Globemaster, the alleged defects in the forklift as manufactured would have to be the design and failure to warn defects which Conder claimed against Allis-Chalmers.[84] Those same defects, however, would have been present in the product when it was delivered by Hull. Under strict liability theory, Hull, because it was a seller in the chain of product distribution, would be equally culpable with Allis-Chalmers for sale of an unreasonably dangerous, defective product.[85] If logic and

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fork lift truck unsafe.

405 N.E.2d at 544 (emphasis added by the court of appeals).

In his dissent, Justice Hunter took issue with the majority's attempt to cure the trial court's instruction no. 10 by coupling it with the above instruction no. 8. Instruction no. 10, submitted by Allis-Chalmers, found no duty on the part of a manufacturer to foresee misuse. Justice Hunter said:

> The majority of this court, however, finds no error in the statement that a manufacturer is "not required to warn of potential dangers resulting from misuse." It finds the statement acceptable on the basis that the element of foreseeability was incorporated into other instructions. Those instructions, however, related to "substantial changes," not "misuse." The defenses are distinct in product liability analysis.

435 N.E.2d at 21 (Hunter, J., dissenting).

Justice Hunter is probably correct in his analysis, but the majority decision can be reasonably supported by the principles of intervening causation and harmless error. The important point is that the majority appears to have acknowledged that the *Evans-Schemel-Latimer* rule which found "no duty to foresee misuse," has no remaining vitality in Indiana.

[82]435 N.E.2d at 19. Justice Hunter noted in dissent that Hull's customers frequently tampered with the adjustments made by the Hull mechanics. *Id.* Therefore, presumably, it was possible that Hull had leased the machine in perfect adjustment and some later third party had misadjusted the carburetor-governor linkage, perhaps because Allis-Chalmers had failed to provide adequate warnings of misadjustment dangers on the machine itself.

[83]*See* 435 N.E.2d at 14; 405 N.E.2d at 542.

[84]*See supra* notes 45-47 and accompanying text.

[85]*See* RESTATEMENT (SECOND) OF TORTS § 402A (1965) (referring to "sellers" and

product liability theory are to be the tests where both defendants are tried before a single jury in a single action, either both parties should face a new trial or neither should.

The majority discussed at some length testimony given by Hull's mechanic, Robert Slabaugh. Slabaugh stated that he had learned carburetor adjustment from a fellow employee and that he had no need for warnings, instructions, or warning labels which were or might have been provided by Allis-Chalmers.[86] This testimony apparently dealt with whether a warning of the possibility of carburetor misadjustment would have been heeded. Indiana law provides that there is a rebuttable presumption that adequate warnings will be heeded.[87] The discussion of Slabaugh's testimony suggests that Allis-Chalmers may have sought to rebut that presumption. Although Slabaugh "was not the person who last serviced the vehicle before Conder's accident,"[88] Slabaugh's statements could suggest a Hull company attitude that manufacturer instructions and warnings were not necessary. The testimony could suggest that Hull considered itself sufficiently expert in forklift truck maintenance so that it need not rely on outsiders including equipment manufacturers, to teach its personnel the simple mechanics of carburetor adjustment. If then, a Hull employee did misadjust the carburetor, and Hull employees were unlikely to heed misadjustment warnings, the misadjustment could more readily be found to be an *efficient* intervening cause of Conder's injuries. The misadjustment would supersede any failure on Allis-Chalmers' part to provide an adequate warning of carburetor misadjustment potential and, therefore, relieve the manufacturer of liability.

D. The Seller as Guarantor of Product Quality

In *Conder v. Hull Lift Truck, Inc.*,[89] Conder assigned error to an instruction which "told the jury that under strict liability, a manufac-

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stating that the rule applies "although the user has not bought the product from or entered into any contractual relation with the seller"). The removal of the privity requirement has generally been understood to create liability on any seller who either places or passes on a defective product into the stream of commerce. *See id.* comment f and comment l, illustration 1. The principal rationale for holding distributors, retailers, and other middlemen strictly liable is that these parties are better able to protect themselves, through indemnity and insurance mechanisms, than is the injured user or consumer.

[86]435 N.E.2d at 16.

[87]Conder v. Hull Lift Truck, Inc., 405 N.E. 2d at 547. ("In Indiana, there is a rebuttable presumption that a sufficient warning would have been heeded.") (citing Nissen Trampoline Co. v. Terre Haute First Nat'l Bank, 332 N.E.2d 820 (Ind. Ct. App. 1975), *rev'd on procedural grounds*, 265 Ind. 457, 358 N.E.2d 974 (1976)).

[88]435 N.E.2d at 19 (Hunter, J., dissenting).

[89]405 N.E.2d 538 (Ind. Ct. App. 1980), *aff'd in part, rev'd in part*, 435 N.E.2d 10 (Ind. 1982).

turer is not a guarantor in regard to the quality of its product."[90] The court of appeals agreed that this instruction ran counter to the " 'representational liability' rationale"[91] of strict liability and should not have been given. The court ruled "that under strict liability the manufacturer, by law, does guarantee that his product is reasonably safe for its intended and foreseeable use."[92]

Allis-Chalmers attempted to equate its submitted instruction with that pervasive maxim of Indiana product liability law which states that a manufacturer is "not an insurer against all accidents"[93] in which its product is involved. The maxim, of course, refers to the requirement the plaintiff prove that the product is in a defective condition, that the product is unreasonably dangerous, and that the unreasonably dangerous defect proximately caused legally cognizable damages.

The supreme court quoted the instruction in full and conceded that "quality" is a general term and is subject to different meanings depending on the context in which it is used.[94] But the supreme court suggested the gist of the instruction did not seriously distort the idea that under strict liability the seller represents no more than that the product will be " 'reasonably fit and safe for the *purpose for which it was intended.*' "[95] Intended use, a concept that has been in a flux in Indiana,[96] may have been clarified in *Conder* with this recognition that foreseeability of use and misuse are integral principles of Indiana product liability law.

E. Open and Obvious Dangers

In *Bemis Co. v. Rubush,*[97] the Indiana Supreme Court granted transfer and, in a three-two decision, vacated the Indiana Court of Appeals affirmance of a jury verdict for the plaintiff, ordering judgment to be entered for the defendant, Bemis Co.[98] The principal issue addressed by both the court of appeals and the supreme court in *Bemis* was the scope of Indiana's open and obvious danger rule in the context of strict products liability.[99]

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[90]405 N.E.2d at 544.

[91]*Id.*

[92]*Id.*

[93]*Id.* at 545.

[94]435 N.E.2d at 17.

[95]*Id.* (quoting from plaintiff's tendered instruction no. 2 which was given by the trial court) (emphasis added).

[96]*See* Vargo, *Products Liability in Indiana—In Search of a Standard for Strict Liability in Tort*, 10 IND. L. REV. 871, 878-81 (1977).

[97]427 N.E.2d 1058 (Ind. 1981), *rev'g* 401 N.E.2d 48 (Ind. Ct. App. 1980).

[98]427 N.E.2d at 1059.

[99]As Justice Hunter pointed out in dissent:

That the majority directs the trial court to "*enter judgment* for defendants—

1. The Open and Obvious Danger Rule.—The court of appeals and the supreme court generally stated the open and obvious danger rule in identical words:

> 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.[100]

It is apparent that this rule is, in reality, two separate rules, each supported by distinct policies. The first sentence requires the plaintiff to prove the existence of a latent defect before he can recover. Under this provision, patent defects, even if they cause injury, can not subject a product seller to liability. The policy advanced by the rule is one of risk allocation. Under the formula, product users and consumers are assigned all risks arising from dangers which would be open and obvious to an ordinary user, while product sellers are assigned liability only for latent dangers in the products they sell. The second sentence, or rule, merely suggests that warning of obvious danger is not required by either negligence or strict liability theory. The obviousness of the danger is the equivalent of a warning; thus, further warning would be redundant, or even, as some commentators suggest, counter-productive.[101]

Bemis urged that both rules be given effect, but the Indiana Court of Appeals disagreed. "Our reading of the Indiana cases, starting with *J. I. Case Company* . . . indicates that the rule was recited in connection with the duty to warn where latent defect exist. Indiana courts have never faced an application of the rule straight-on."[102] The supreme

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> appellants" . . . unmistakably indicates its decision rests on a singular proposition: recovery for injuries suffered at the hands of an "open and obvious danger" are barred as a matter of law under this jurisdiction's interpretation of Section 402A of the Restatement (Second) of Torts (1965). Erroneous instructions or improperly admitted evidence would warrant only a new trial . . . .

427 N.E.2d at 1066 (emphasis by Justice Hunter).

[100]427 N.E.2d at 1061; 401 N.E.2d at 56.

[101]*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.").

[102]401 N.E.2d at 56. For a discussion of the development of the open and obvious danger rule under Indiana law, in both Indiana and federal courts, see Note, *Indiana's Obvious Danger Rule for Products Liability*, 12 IND. L. REV. 397 (1979). Justice Hunter,

court, however, decided that the broad interpretation urged by Bemis, that a manufacturer is not liable for any open or obvious danger, was in harmony with Indiana case law and it reversed.[103]

2. The Open and Obvious Danger Rule and Strict Products Liability.—In 1970, in *Cornette v. Searjeant Metal Products,*[104] the Indiana Court of Appeals adopted strict products liability as set out in section 402A of the Second Restatement of Torts.[105] In 1973, the Indiana Supreme Court followed suit in *Ayr-Way Stores, Inc. v. Chitwood.*[106] Section 402A provides that a product seller is subject to a "special liability" if he sells a product in "defective condition unreasonably dangerous" and that condition proximately causes physical harm to an ultimate user or consumer.[107] The risk allocation policy of section 402A, sometimes referred to as enterprise liability, is to assign the cost of accidents caused by defective products to the party best able to bear the initial cost, best able to spread the cost through insurance, and best able to take preventive action for the future.[108] The fundamen-

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in dissent, cited this authority for the proposition that the interpretation of the rule as an absolute bar to plaintiff recovery is primarily a result of federal diversity courts extending, in dicta, the holdings of early Indiana cases which merely emphasized the importance of protecting users from latent dangers. 427 N.E.2d at 1066 (Hunter, J., dissenting).

[103]427 N.E.2d at 1061-64.

[104]147 Ind. App. 46, 258 N.E.2d 652 (1970).

[105]*Id.* at 56, 258 N.E.2d at 656. *See supra* note 9.

[106]261 Ind. 86, 300 N.E.2d 335 (1973).

[107]RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[108]The policy of initial risk bearing by the seller who then "spreads" the risk through liability insurance is articulated in comment c to § 402A. "[P]ublic policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained." RESTATEMENT (SECOND) OF TORTS § 402A comment c (1965). The objective of deterrence is not expressly articulated in § 402A or in the section's comments, yet it can be readily inferred that a policy which assigns the initial burden of loss to the seller will motivate the seller to take whatever cost effective steps are available to it to avoid that burden in the future. A link between the assignment of liability and safer products was explicitly recognized, however, by Justice Traynor in his concurring opinion in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring), in which he stated:

> Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot.

Id. at 462, 150 P.2d at 440-41.

In Conder v. Hull Lift Truck, Inc., 405 N.E.2d 538 (Ind. Ct. App. 1980) the court cited the *Escola* case and other authorities in referring to the safety incentive rationale. "This rationale assumes it is in the public interest to fix financial responsibility for a product injury wherever it will most effectively reduce hazards to life and health inherent in products that reach the market."*Id.* at 546 & n.2.

tal assumption drawn from the policy is that the party will normally be the product seller rather than the product user.

Consumer contemplation is the test for unreasonably dangerous defectiveness under section 402A. Both the Indiana Court of Appeals and the Indiana Supreme Court acknowledged that this test is found in comments g and i to section 402A.[109] Both courts noted that "to be actionable under § 402A, the injury-producing product must be . . . dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[110]

But from this language, the two courts reached two separate and distinct interpretations. The court of appeals recognized that the obviousness of a product's hazards may bring some products within the orbit of the ordinary consumer's contemplation. However, in other cases the obviousness of danger may be insufficient to make the product reasonably safe. Although the consumer or user confronted by a truly patent danger may not claim that the seller failed to warn him of the danger, nevertheless he may be able to claim that he had contemplated that the seller would furnish a safer product. While obviousness might be an important factor in determining defectiveness, it is but *one factor* that must be weighed "in determining the ultimate question of whether the product was in a defective condition unreasonably dangerous, that is, dangerous to an extent beyond that which is contemplated by the ordinary consumer . . . ."[111]

The supreme court, however, adopted the interpretation of consumer contemplation urged by the defendant.[112] The defendant argued that user contemplation is to be equated with user knowledge; what the user knows or should know about the product's dangerous propensities is what he contemplates. Because a user knows or should know of the existence of obvious dangers, he therefore contemplates such dangers, and under comments g and i, contemplated dangers can not be unreasonable dangers.[113] It must be conceded that the word

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[109]427 N.E.2d 1058, 1061 (Ind. 1981); 401 N.E.2d 48, 56-57 (Ind. Ct. App. 1980) (citing RESTATEMENT (SECOND) OF TORTS § 402A comments g and i (1965)).

[110]427 N.E.2d at 1061. The appellate court used almost identical language but referred to the article sold instead of the injury-producing product. 401 N.E.2d at 57. Both courts were referring to § 402A comment i.

[111]401 N.E.2d at 57.

[112]427 N.E.2d at 1061.

[113]See Reply Brief of the Appellants at 11-13, Bemis Co. v. Rubush, 401 N.E.2d 48 (Ind. Ct. App. 1980) for a full development of the argument summarized in the text. Bemis states:

> It is axiomatic that if a danger associated with a product is open and obvious that danger will be within the contemplation of the ordinary consumer with the ordinary knowledge common to the community as to that product

contemplation is perhaps ambiguous in that it may refer either to what the user knows or it may refer to his reasonable expectations. The latter interpretation, however, seems much more in harmony with the risk allocation policy of strict liability than does the former. The supreme court's interpretation that all patent dangers are to be classified as reasonable, as a matter of law, bars recovery by any plaintiff unable to prove a latent danger.

3. The Latency Issue.—In order for the supreme court's interpretation of the open and obvious danger rule to have effect, the product danger must be found to be both open and obvious. In *Bemis*, the supreme court had no trouble finding that the Bemis product, a fiberglass insulation batt packing machine, presented no latent dangers. The court stated that "[a]ppellees admit that the descent of the shroud was an open and obvious danger which was well known to the operators of the machines and which would be obvious to anyone observing the machine."[114]

Actually, the plaintiff never conceded that the danger posed by the Bemis batt packer was *both* open and obvious. Rubush argued that the design and function of the machine did not suggest adequately the actual scenario of harm which later occurred.[115] The instrumentalities of bag clamp and descending metal shroud were observable and familiar to any experienced bagger, as were the individual capacities of those components to grab and crush respectively. However, the danger of the clamp grabbing an operator's hand, causing momentary panic, and thus diverting the operator's attention from the descending shroud was not apparent before the accident. Therefore, the plaintiff claimed, a *latent* defect in the product existed.[116] Similarly, the operation of the machine required the operator to focus his attention at a point away from the descending shroud, thus ampli-

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and, accordingly, the danger cannot be considered to be "unreasonable" within the meaning of the Restatement.

Reply Brief of the Appellants at 12.

Although the supreme court never defines "contemplation" it does accept the concept of a consumer contemplation test for determining whether a product in defective condition is unreasonably dangerous. 427 N.E.2d at 1061. If the court's broad interpretation of the open and obvious danger rule as an absolute bar to plaintiff recovery is to be harmonized with consumer contemplation, all obvious dangers must be held to be within the ordinary consumer or user's contemplation as a matter of law. Thus, under this reasoning, what the user knows or should know about the product must be held to have been contemplated.

[114]427 N.E.2d at 1060.

[115]*See* Plaintiff's Brief in Opposition to Petition for Transfer at 26-29, Bemis Co. v. Rubush, 427 N.E.2d 1058 (Ind. 1981).

[116]*Id.* "Rather, *the dangers relate to the possibility of a worker being accidentally 'caught' within the so-called zone of danger during the shroud's descent.*" *Id.* at 27 (emphasis in the original).

fying the tendency toward momentary inadvertance which is always present in a repetitive factory task.[117] That design feature was characterized by the plaintiff as a "hidden trap."[118]

Indiana and other jurisdictions have recognized the distinction between openness and obviousness. Under Indiana law, the propensity of kerosene to ignite[119] and the risk of high-stacking with a lift truck without an overhead guard[120] have been held to be both open and obvious dangers. However, the limited visibility characteristics of an industrial crane cab,[121] and the ability of a pitching machine catapult to strike out violently at a bystander, even though the machine was not plugged in,[122] were held to be latent dangers even though the injury causing instrumentalities were entirely observable. Although New York originally used the broad interpretation of the open and obvious danger rule,[123] the New York Court of Appeals also had distinguished the obviousness of the condition from the obviousness of the danger and held that a determination of the latter was a jury question.[124] New York finally reached an ultimate repudiation of the open and obvious danger rule by progressively restricting the fact situations in which the rule would be applied.[125] It is possible that Indiana will follow this same route.

Although the Indiana Supreme Court swept aside the plaintiff's "hidden trap" theory by announcing that the latency issue had been conceded by the plaintiffs,[126] the court did not go so far as to rule that any open danger would, in the future, be held patent as a matter of law. If the supreme court has an opportunity to rule on the "football helmet" case, which received national attention during the survey period,[127] it will be interesting to see how the court will classify the manufacturer's failure to warn that the helmet might not protect the user from neck and spine injuries resulting from a blow on the top of the head when head and spine are in alignment. The court may

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[117]*Id.* at 27-28.

[118]*Id.* at 28. ("*In a very real sense, the machine design created a hidden trap for the conscientious worker.*") (emphasis in the original).

[119]*See* Burton v. L.O. Smith Foundry Prods. Co., 529 F.2d 108 (7th Cir. 1976).

[120]*See* Posey v. Clark Equip. Co., 409 F.2d 560 (7th Cir.), *cert. denied*, 396 U.S. 940 (1969).

[121]*See* Zahora v. Harnischfeger Corp., 404 F.2d 172 (7th Cir. 1968).

[122]*See* Dudley Sports Co. v. Schmitt, 151 Ind. App. 217, 279 N.E.2d 266 (1972).

[123]*See* Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950).

[124]*See* Bolm v. Triumph Corp., 33 N.Y.2d 151, 160, 305 N.E.2d 769, 774, 350 N.Y.S.2d 644, 651 (1973).

[125]*See* Note, *Indiana's Obvious Danger Rule for Products Liability*, 12 IND. L. REV. 397, 419-22 (1979).

[126]*See supra* note 114 and accompanying text.

[127]*See* Bedan v. Rawlings Sales Co., No. 1-682A142 (Ind. Ct. App., filed June 14, 1982).

have to decide whether the risk of injury in that case was latent or patent.

4. Cost-Benefit Analysis as a Test for Defectiveness.—Bemis was a design and warning case. Courts holding that ordinary users expect product sellers to design products as safe as cost and performance constraints will permit are faced with the question of what is a reasonable hazard. Justice Hunter, in a vigorous and learned dissent in *Bemis,*[128] argued that the question of how much safety is enough is a matter of design factor tradeoffs.[129] He applied the negligence test of balancing " ' "the likelihood of harm, and the gravity of harm if it happens, against the burden of the precaution" ' "[130] to strict products liability. Justice Hunter invoked the widely quoted seven factor analysis advanced by Dean Wade as an appropriate measure of design defectiveness to satisfy the consumer contemplation test of section 402A.[131] Justice Hunter's dissent recognized that strict liability does not mean absolute liability, nor does it mean that all dangers are unreasonable. Consumers and users want product safety, but they want other performance characteristics as well. Consumers expect manufacturers to weigh and balance all those performance characteristics, giving the factors of cost and risk appropriate weight.

At trial, the plaintiff presented testimony by two expert witnesses who defined unreasonable hazard in cost-benefit terms. Dr. Richard L. Fox, a professor of engineering at Case Western Reserve University stated that: " '[A] hazard or risk in a product is unreasonable if it could be removed and the cost of removal is not significant nor the cost of removal does not seriously reduce the utility of the product.' "[132]

Holding that admission of this evidence was error because it permitted the jury to find a manufacturer liable for injury from a patent danger, the supreme court stated that "[t]his would make manufacturers insurors [sic] of any product they put in the open market and render them liable for injuries and damages to those using the machine regardless of the facts and circumstances surrounding the injury. This is not the law in Indiana."[133] It should be emphasized that under Dr. Fox's definition, a hazard would be reasonable and the product seller would not incur liability, if the cost of removal were not commensurate

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[128]427 N.E.2d 1058 (Ind. 1981) (Hunter, J., dissenting).

[129]*Id.* at 1070.

[130]*Id.* (quoting Micallef v. Miehle Co., 39 N.Y.2d 376, 386, 348 N.E.2d 571, 577-78, 384 N.Y.S.2d 115, 121 (1976) (quoting 2 HARPER & JAMES, THE LAW OF TORTS § 28.4 (1956)).

[131]427 N.E.2d at 1070 (quoting Wade, *Strict Liability of Manufacturers*, 19 SW. L. J. 5 (1965)).

[132]427 N.E.2d at 1063.

[133]*Id.*

with the risk, or if removal of the hazard would make a useful product inutile. In addition, the plaintiff still would have to prove the defect proximately caused his injuries. This exposure of the seller to product liability may be greater than the supreme court considers appropriate, but it is significantly less than that of an insurer.

5. The Perverse Effects of the Open and Obvious Danger Rule.— Justice Hunter noted in his dissent that a broad interpretation of the obvious danger rule " 'encourages manufacturers to be outrageous in their design, to eliminate safety devices, and to make hazards obvious.' "[134] If one rationale for strict product liability specifically, and for tort liability generally, is to reduce the cost of accidents in the aggregate, then the broad patent danger rule may operate perversely. If the class of open dangers are made entirely immune from liability, we can expect the number of such dangers to increase and the accident rate along with it. That possibility is probably why Justice DeBruler noted in dissent that:

> [I]n the trial court's mind, and I think correctly so, "hidden defects and concealed dangers" was subsumed within the new standard, "defective condition unreasonably dangerous" and the new focus was no longer upon whether the defects and dangers of the product were hidden and concealed, but upon whether they were reasonable.[135]

Under that analysis, an obvious danger which tends to increase the aggregate cost of accidents would likely be found unreasonable, whereas one which does not tend to raise accident rates and costs would likely be reasonable.

Another perverse effect is economic. Eliminating liability for obvious dangers will benefit, if anyone, the class of manufacturers and sellers who introduce such dangers into the stream of Indiana commerce. This class is composed primarily of non-Indiana based product sellers.[136] On the other hand, removal of potential tort recovery for

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[134]*Id.* at 1070 (quoting Auburn Mach. Works Co. v. Jones, 366 So. 2d 1167, 1170 (Fla. 1979)).

[135]427 N.E.2d at 1065 (DeBruler, J., dissenting).

[136]In a national and international economy it can be safely assumed that the bulk of manufactured goods used and consumed in Indiana are imported from other states and countries, while the bulk of goods manufactured in Indiana are exported. Actually, 75% of the manufactured goods with an Indiana destination have an out-of-state origin. U.S. BUREAU OF CENSUS REPORT NO. TC77-CS, 1977 CENSUS OF TRANSPORTATION COMMODITY TRANSPORTATION SURVEY– SUMMARY 3, Table I. An upper bound of 17½ percent for the dollar value of all goods manufactured *and* used in Indiana can be derived from this report by dividing the value of all shipments having both an Indiana origination and destination by the value of all shipments by U.S. manufacturing firms having an Indiana destination. *Id.* at 12, 14 Table I.

a substantial class of Indiana plaintiffs, those most likely to be found in the workplace,[137] will put pressure on compensation programs such as the Indiana Workmen's Compensation System.[138] State and federal social service systems, including social security and medicaid also will be affected negatively. It should be emphasized that these latter compensation systems have no built-in mechanisms which tend to deter accident causing conduct.[139]

Finally, in *Gilbert v. Stone City Construction Co.*,[140] the Indiana Court of Appeals recognized a positive duty on the part of manufacturers, sellers, and lessors to deploy feasible safety devices[141] on products to guard users and even bystanders.[142] The supreme court's broad obvious danger rule, however, would *preclude* liability if the absence of a safety device made a danger apparent. The inconsistency here promises to create substantial uncertainty, unpredictability, and litigation. If the *Bemis* rule is finally held to take priority over the *Gilbert* rule, the result will be an increase in the frequency of accidents that safety devices could prevent.

6. The Bemis *Case and the* Lantis *Case.*—During the survey period, the diversity case of *Lantis v. Astec Industries*[143] was reversed and remanded for a new trial. Because *Lantis* was discussed in the previous survey,[144] it is unnecessary to review the case except to recapitulate that it involved the plaintiff's decedent, who was killed

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[137]Obvious dangers are likely to be disproportionately found in workplace products for several reasons. First, useful work often demands substantial hazards. Industrial processes frequently require heavy equipment with large moving components, powerful chemicals, and fluids under pressure. Second, workers become familiar with the products they use because of constant exposure to them, hence the dangers "become obvious" to such ordinary users. Third, workers are in a weaker position to reject the use of products with obvious dangers than are consumers. A consumer can simply refuse to buy such products, whereas the worker may be forced to choose unemployment as the only viable alternative to exposure to the risk. Thus, obviously dangerous workplace products are less likely to be driven from the marketplace by ordinary market forces than are patently dangerous consumer products.

[138]The Indiana Workmen's Compensation Act is codified at IND. CODE §§ 22-3-1-1 to -10-3 (1982).

[139]Both tort liability insurance and workers compensation insurance are to some extent experience rated. The insured is motivated at least to some extent to seek ways to reduce the cost of accidents which are under his control so as to reduce his premiums. That incentive is absent under the social security system.

[140]171 Ind. App. 418, 357 N.E.2d 738 (1976).

[141]*Id.* at 426, 357 N.E.2d at 744. ("Those who come in contact with a product may reasonably expect its supplier to provide feasible safety devices in order to protect them from the dangers created by the design.").

[142]*Id.* at 423, 357 N.E.2d at 742-43.

[143]648 F.2d 1118 (7th Cir. 1981).

[144]*See* Vargo, *Products Liability, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 289, 298-99 (1982). *See also* Leibman, *Strict Tort Liability for Unfinished Products*, 19 A. BUS. L.J. 407, 433-36, 437-39 (1982).

when he stepped through an opening in a component platform of an asphalt plant which he was helping to assemble for his employer. The trial court had granted summary judgment for the defendant manufacturer on the strict liability count, finding that the component platform had not yet entered the stream of commerce. The Court of Appeals for the Seventh Circuit ruled that this finding was an overly restrictive view of Indiana's version of strict liability in tort.[145] The court held that components are properly to be considered products in their own right; worker-assemblers are to be considered product users under section 402A; and unassembled products are to be treated as finished products if the contract of sale contemplates that they will reach the purchaser in unfinished form.[146] Permitting the plaintiff to proceed on the strict liability count was crucial; otherwise, Lantis' failure to discover or guard against the alleged defect, the opening in the deck, would be a defense of contributory negligence for the manufacturer.[147]

If *Lantis* is retried under the strict liability count, contributory negligence still will not be a defense. However, after *Bemis,* the plaintiff may have difficulty proving that there was a latent defect in the product, a necessary element of the claim. The thirty by thirty-six inch hole in the platform was probably obvious and was certainly dangerously open. By frustrating the plaintiff's attempt to make out a prima facie case, the defendant may now accomplish at an earlier stage in the proceedings what it cannot accomplish through the defense of contributory negligence. If strict liability theory allows recovery by a plaintiff despite his negligent failure to discover a dangerous condition, it may be asked how the theory can be consistent with a rule of law barring recovery by characterizing the same dangerous condition as undefective.

7. Obvious Dangers and Proximate Cause.—To make out a prima facie case under strict liability the plaintiff must prove three elements—defect, causation, and damages. The obvious danger rule goes to the element of defect. The broad interpretation of the rule, as adopted by the Indiana Supreme Court, classifies all patent dangers as undefective. Therefore, once the danger is found to be patent, rather than latent, it is immaterial whether the alleged dangerous condition proximately caused the injury, because that condition cannot be a product defect.

Because the plaintiff also disputed the issue of latency in *Bemis* the defendant raised the issue of causation on appeal. Bemis assigned

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[145]648 F.2d at 1121.

[146]*Id.* at 1119, 1121-22.

[147]*See* RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965) ("Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence.").

error to an instruction which told the jury "that in order to find for Bemis the jury had to find that the batt packer was not defective or unreasonably dangerous, *and* that Gary [Rubush] was contributorily negligent in causing his injury."[148] Bemis was seeking to establish that Rubush's negligent conduct was the *sole* proximate cause of his injury. If that were true, the issue of defect would be immaterial because the plaintiff's case would fail for want of proving the essential element of proximate causation. However, the instruction, as given to the jury, required a finding not only that Rubush's conduct was the sole cause of his injury but also that the batt packer was undefective. The instruction was clearly wrong because it required the jury to find too much. But, interestingly, in this instance the Indiana Court of Appeals found the error to be harmless because other instructions on this issue were correct,[149] while the supreme court found the Bemis argument persuasive.[150]

It also should be noted that although contributory negligence is not a recognized defense to strict liability, it can be used to refute the element of causation. This approach will only be effective, however, if the plaintiff's, or third party's, negligence is shown to be the efficient, superseding, intervening, and thus sole cause of injury. Where such contributory negligence is only *one* proximate cause of injury, the original actor's negligence, or the defective condition of his product, will suffice to create liability.[151]

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[148]427 N.E.2d at 1064 (emphasis added).

[149]401 N.E.2d at 60 ("Instructions are sufficient if, considering them as a whole, the jury has been fully and fairly instructed. . . . We feel that the instructions here given did fairly instruct the jury and that Instruction No. 14 was not error.").

[150]427 N.E.2d at 1064.

[151]*See supra* note 56.