RECENT DEVELOPMENTS IN THE INDIANA LAW OF PRODUCT LIABILITY

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INTRODUCTION

During this survey period, both the federal and state appellate courts addressed a number of issues specifically relating to actions under Indiana's Product Liability Act. The most significant decisions were those of the Indiana Supreme Court defining the scope of recovery for property damage and economic loss in a strict liability case. In addition, the Indiana Court of Appeals addressed the issues of successor liability, assumption of duty, and product misuse. Both the Indiana Court of Appeals and the United States Court of Appeals for the Seventh Circuit resolved statute of limitations issues. Finally, the United States District Court for the Southern District of Indiana addressed the problem of proof of defect where the product is missing.

I. RECOVERY FOR PROPERTY DAMAGE AND ECONOMIC LOSS

In two cases decided on the same day, the Indiana Supreme Court defined the scope of recovery for property damage and economic loss under strict liability in a product liability action. In *Reed v. Central Soya Co.*,[1] the plaintiffs were dairy farmers whose cattle were damaged by pesticide-contaminated feed manufactured by Central Soya. After eating the feed for several weeks, the cows gradually became sick, resulting in low milk production and long term effects such as difficulty breeding. The Reeds sued Central Soya and the supplier of the contaminated feed ingredients for negligence, breach of implied warranty, and strict liability in tort. The appellate court affirmed summary judgment in favor of Central Soya on the strict liability claim, holding that the Reeds could not recover compensatory damages under strict liability because the damage to the cattle was not "sudden, major damage to property" as defined in Indiana's Product Liability Act.[2] In an opinion written by Justice Krahulik, the Indiana Supreme Court affirmed the denial of recovery for these strict liability damages.

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1. 621 N.E.2d 1069 (Ind. 1993).

2. *Id.* at 1070-71. Indiana Code § 33-1-1.5-2 states, in part: "'Physical harm' means bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property. The term does not include gradually evolving damage to property or economic losses from such damage." IND. CODE ANN. § 33-1-1.5-2 (West Supp. 1993).

Relying on *Sanco, Inc. v. Ford Motor Co.*[3] and *General Electric Co. v. Drake*,[4] the defendants argued that strict liability applies only when the defect in the product involves an occurrence of such an immediate and calamitous nature that human life and limb are exposed to a clear and significant danger.[5] Rejecting this argument, the court first noted that tort law traditionally allows recovery for property damage in the absence of personal injury and secondly that the Product Liability Act itself expressly allows recovery for physical harm to property even in the absence of personal injury.[6]

The court distinguished *Sanco* as involving a claim for economic loss, rather than property damage.[7] The court also found the defendants' reliance on *Drake* misplaced because the *Drake* court did not limit the application of strict liability in property damage cases only to circumstances in which the absence of personal injury is fortuitous; instead, the *Drake* court simply applied strict liability to those circumstances.[8] Thus, risk of personal injury is relevant, but not necessary, to recover in strict liability for property damage caused by a defective and unreasonably dangerous product.

The *Reed* court nevertheless imposed a limitation on recovery in strict liability for losses that are solely economic in nature. The court found the Product Liability Act's provision on damages to be ambiguous because it allows recovery for "sudden, major damage to property," but excludes recovery for "gradually evolving damage to property or *economic losses from such damage*."[9] Using statutory construction, the court determined that the term "economic losses from such damage" relates to "gradually evolving damage" rather than to the more remote "sudden, major damage."[10] Accordingly, where damage evolves gradually, no recovery is allowed in strict liability for economic losses resulting from the gradual damage. On the other hand, if the property damage is "sudden and major," economic losses arising from that damage are recoverable under a strict liability theory.[11]

The *Reed* court also reaffirmed the rule that strict liability does not apply where economic loss alone is alleged. When the loss is solely economic in

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3. 771 F.2d 1081 (7th Cir. 1985).

4. 535 N.E.2d 156 (Ind. Ct. App. 1989).

5. 621 N.E.2d at 1073.

6. *Id.*

7. *Id.* In *Sanco*, the court held that a user or consumer of a product cannot recover in negligence or strict liability for purely economic losses. 771 F.2d at 1086.

8. 621 N.E.2d at 1073. In *Drake*, the court noted that the Product Liability Act "evinces a legislative intent to permit any 'user or consumer' to recover for physical harm to property without suggesting distinctions among the types . . . of physical harm." 535 N.E.2d at 159. The court then held that "when a product causes damage to property under circumstances in which the absence of personal injury is merely fortuitous, such as when an object explodes but does not inflict personal injuries on anyone, the imposition of tort liability on a manufacturer is justified." *Id.*

9. 621 N.E.2d at 1074. *See* IND. CODE ANN. § 33-1-1.5-2 (West Supp. 1993).

10. 621 N.E.2d at 1074.

11. *Id.*

nature, for example when the claim relates only to the product's failure to live up to expectations and not to property damage or personal injury, then no recovery is allowed in strict liability. In such instances, economic losses may only be recovered under contract theories.[12] To allow recovery in tort for purely economic losses would enable a buyer of goods to circumvent a seller's limitation or exclusion of warranties under the Uniform Commercial Code.[13] Thus, "[c]ontract law remains the appropriate vehicle to redress a purchaser's disappointed expectations when a defect renders a product inferior or unable adequately to perform its intended function."[14]

In *Reed*, the plaintiffs suffered a decrease in the fair market value of their cows as a result of the contaminated feed. Because domestic cattle are regarded as property, and the measure of damages for loss is the market value of the animals immediately prior to the wrongful act, the court held that the *Reed* plaintiffs suffered "property damage," rather than mere economic loss. Therefore, they could recover their economic losses in conjunction with their property damage.[15]

Unfortunately, the plaintiffs could not satisfy the additional requirement that the property damage be "sudden and major" to allow for recovery. Lacking any statutory definition of those words, the court turned to dictionary definitions and noted that "sudden" contemplates both an element of time marked by abruptness or haste and an element of surprise in relation to the damage. The term "major" connotes some qualitative relationship in number or extent of damage. Thus, the court found that to recover for property damage in strict liability, the damage must happen quickly, unexpectedly, and be significant in scope.[16] Applying these standards to the facts of *Reed*, the court held that the damage to the cattle was not sudden and major because it manifested itself incrementally over a period of time instead of as a calamitous event. Consequently, recovery was not permitted.[17]

In the companion case, the Indiana Supreme Court applied the new standards to a crop damage claim. In *Martin Rispens & Son v. Hall Farms, Inc.*,[18] a significant portion of the plaintiff's watermelon crop was ruined by a disease traced to defective seeds purchased from the defendant. The bacteria affected the watermelon crop over a period of months—first appearing in the plaintiff's

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12. *Id.* at 1074-75.

13. *See* IND. CODE ANN. § 26-1-2 (West 1988 & West Supp. 1993).

14. 621 N.E.2d at 1075.

15. *Id.*

16. *Id.* at 1075-76. The court also held that the question of whether damage is sudden and major is a question of law, taking into account the nature of the defect alleged, the type of risk presented, and the manner in which the injury arose. *Id.* at 1076.

17. *Id.*

18. 621 N.E.2d 1078 (Ind. 1993).

greenhouse and then later spreading to the melons themselves.[19] The plaintiff testified that the disease was "an extremely slow growing thing."[20]

The court held as a matter of law that this was gradually evolving damage to property and economic loss in the form of reduced crop yields. Thus, the damage was not sudden and major damage as contemplated by the Product Liability Act.[21] In addition, the plaintiff's claim was based on damage to the product itself (melons grown from the purchased seeds), which made strict liability and negligence inapplicable. The proper remedy would have been a claim for breach of warranty.[22] Reframing the rule set forth in *Reed*, the court stated: "Economic losses are not recoverable in a negligence action premised on the failure of a product to perform as expected unless such failure causes personal injury or physical harm to property other than the product itself."[23]

II. Successor Liability and Assumption of Duty

On review of summary judgment in *Lucas v. Dorsey Corp.*,[24] the Indiana Court of Appeals for the First District resolved the issue of whether a successor company owes a common law duty to a plaintiff or is a "seller" within the meaning of Indiana's Product Liability Act.[25] Delphi Corporation, an intermediate seller, ordered five derricks from Holan Division, a manufacturer of digger derricks. Delphi purchased the derricks to install on trucks it planned to sell to Indiana Bell. Holan Division later sold its assets in bankruptcy to Dorsey Corporation. The sale agreement stated that Dorsey would not assume Holan's liabilities. After the sale of Holan's assets, Delphi received an invoice for the derricks with directions to send payment to Dorsey. Delphi installed the derricks on trucks sold to Indiana Bell, and the plaintiff was subsequently injured by one of the derricks while working for Indiana Bell.[26]

The court first determined whether sufficient evidence existed from which a jury could infer that Dorsey assumed a duty and, consequently, owed a duty of care under the general rule that a duty of care arises when a party voluntarily or gratuitously assumes such a duty.[27] Here, although the derricks were manufactured by Holan, Dorsey shipped them to Delphi with an invoice requiring payment to Dorsey. In addition, Dorsey put its name and address on each page of the operating and instruction manual and on the warranty that accompanied

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19. *Id.* at 1080-81.
20. *Id.* at 1089.
21. *Id.*
22. *Id.* at 1089-91.
23. *Id.* at 1091.
24. 609 N.E.2d 1191 (Ind. Ct. App. 1993).
25. Ind. Code Ann. §§ 33-1-1.5-1 to -5.5 (West Supp. 1993).
26. 609 N.E.2d at 1194-95.
27. *Id.* at 1201 (citing Phillips v. United Engineers & Constructors, Inc., 500 N.E.2d 1265, 1269 (Ind. Ct. App. 1986)).

the derrick. Dorsey's name also appeared within the text of the manual. In one section of the manual, the name of the predecessor company was stricken and Dorsey's name printed above it. Dorsey nevertheless argued that because neither designed nor manufactured the derrick, it owed no duty to the plaintiff.[28]

From this evidence, the court concluded that a jury could infer that Dorsey assumed a duty to warn and instruct users on the safe use of the derrick.[29] Relying on *Dudley Sports Co. v. Schmitt*,[30] the court noted that where a vendor holds itself out as a manufacturer of a product and labels the product as such, it is held to the same standard of care in design, manufacture, and sale of a product as if it were in fact the manufacturer.[31] A jury could thus find that by placing its name on the operating manual and warranty, Dorsey held itself out as the manufacturer of the derrick. Dorsey's agreement with its predecessor not to assume Holan's liabilities was not dispositive.[32]

The court also found a genuine issue of material fact as to whether Dorsey was a "seller" of the product for purposes of strict liability. In support of its contention that it was not a seller of the derricks, Dorsey pointed out that four of the nine derricks purchased from Holan were returned and scrapped and that it discontinued the derrick product line upon purchasing the predecessor's assets. Distinguishing *Sukljian v. Charles Ross and Son Co.*,[33] the court noted that the corporation in *Sukljian* sold as surplus property only a single machine that it had previously used in its own production for eleven years.[34] In contrast, Dorsey's sale of the nine derricks presented a jury question as to whether it was a seller within the purview of Indiana's Product Liability Act.[35]

III. Misuse Defense and Duty to Warn

In *Underly v. Advance Machine Co.*,[36] the Indiana Court of Appeals for the Fourth District reviewed the adequacy of several jury instructions on the defense of misuse. Underly suffered a hydraulic fluid injection injury while investigating a leak in the hydraulic lines of a retriever. Underly first ran his hand along the hoses to detect any worn spots and found what he believed to be the source of a leak. He then held his finger over the hole while a co-worker pressurized the

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28. 609 N.E.2d at 1201.

29. *Id.*

30. 279 N.E.2d 266 (Ind. Ct. App. 1972).

31. 609 N.E.2d at 1201.

32. *Id.* (citing Cyr v. B. Offen & Co., Inc., 501 F.2d 1145, 1152-54 (1st Cir. 1974) and Vernon Fire & Casualty Ins. Co. v. Graham, 336 N.E.2d 829, 832 (Ind. Ct. App. 1975)).

33. 503 N.E.2d 1358 (N.Y. 1986).

34. 609 N.E.2d at 1202. This distinction is consistent with prior Indiana case law. *See* Perfection Paint & Color Co. v. Konduris, 258 N.E.2d 681 (Ind. Ct. App. 1970) (holding that there is no strict liability on the occasional seller of products who is not engaged in that activity as a part of his business).

35. 609 N.E.2d at 1202.

36. 605 N.E.2d 1186 (Ind. Ct. App. 1993).

line at Underly's request. As a result, high-pressure hydraulic oil was injected into Underly's hand. Underly sued the manufacturer of the retriever under the Product Liability Act, contending that the retriever was defective because Advance failed to post warnings on the retriever concerning the risk of injuries from hydraulic leaks and even encouraged users to make light repairs, such as replacing hydraulic hoses.[37] Advance raised the defense of misuse.[38]

At trial, the vice-president of Advance testified that the manufacturer could foresee that users of its retriever would conduct light repairs, such as replacing a hydraulic hose. He also testified it was foreseeable that persons such as Underly could run their hands along the hose while the retriever was turned off in order to discover any worn spots or leaks. However, he testified that it was not only unforeseeable, but inconceivable that someone would find a worn spot in the hydraulic hose and then, with his finger on the hole, pressurize the line. He also testified that except for Underly, Advance had never experienced anyone else injuring himself in the same manner.[39]

On appeal, Underly claimed error in several jury instructions on the defense of misuse. First, Underly objected to a misuse instruction that quoted verbatim the definition of misuse found in the Product Liability Act. Underly contended that this instruction was incomplete. He argued that if a manufacturer fails to warn about a latent danger and that failure proximately caused the plaintiff to use or handle the machine in a certain manner, the manufacturer should not be able to avoid liability for the injury with the defense of misuse. Underly tendered his own instructions expressing this concept.[40]

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37. *Id.* at 1188-89.

38. Under the Act, it is a complete defense to strict liability where "a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party." IND. CODE ANN. § 33-1-1.5-4(b)(2) (West Supp. 1993). "The key to a successful claim of misuse is whether the seller can prove that the misuse, from the seller's perspective, was not reasonably foreseeable." 605 N.E.2d at 1189 (citing Hoffman v. E.W. Bliss Co., 448 N.E.2d 277, 283 (Ind. 1983) and Montgomery Ward & Co. v. Gregg, 554 N.E.2d 1145, 1156 (Ind. Ct. App. 1990)).

39. 605 N.E.2d at 1190.

40. *Id.* Underly's first tendered instruction read:

> The failure of the plaintiff to discover a defect in a product, or failing to guard against the existence of a defect is not misuse of the product.

His second instruction stated:

> If a manufacturer fails to warn about a latent danger, and the failure to warn about the latent danger proximately causes the plaintiff to use or handle the machine in certain [sic] manner, then the manufacturer may not avoid liability for the injury under the defense of misuse. Likewise, if a manufacturer fails to warn about a latent danger, and the failure to warn about the latent danger proximately causes the plaintiff to use or handle the machine in a certain manner, then the manufacturer may not avoid liability by claiming that the use, which was induced by its failure to warn, was not reasonably foreseeable.

Id. at 1191. A party is normally entitled to have a tendered instruction read to the jury if:

Rejecting Underly's argument, the court reasoned that the trial court's instruction, taken directly from the statutory definition of misuse, focused on the foreseeability of misuse from the seller's perspective, thereby foreclosing the possibility of any inquiry by the jury into the user's ability to discover or foresee the risks posed by the product.[41] Although Underly's first instruction on misuse may have been more clear, it stated no principle of law not covered by the court's instruction.[42] In addition, Underly's second instruction on misuse was an incorrect statement of law because it required a manufacturer or seller to always warn about latent dangers, irrespective of whether the plaintiff's use was reasonably foreseeable.[43] In contrast, the correct rule is that a seller has a duty to warn only when the seller knew or had reason to know that the product was likely to be dangerous when used in a foreseeable manner.[44]

Underly also objected to Advance's jury instruction on the duty to warn and contended that the instruction improperly excluded the duty to warn when the user should have known of the danger in the product.[45] Underly argued that the "should have known" language injected an element of contributory negligence into a strict liability case.[46] Although the court determined the instruction was harmless in this particular case, it agreed that the instruction was an incorrect statement of law.[47]

The instruction was taken from the court's decision in *Craven v. Niagara Machine and Tool Works, Inc.*[48] Since *Craven*, however, the Indiana Supreme Court rendered decisions in *Hinkle v. Niehaus Lumber Co.*[49] and *Koske v. Townsend Engineering Co.*,[50] which the court viewed as overruling the test set forth in *Craven*.[51] In *Hinkle*, the supreme court stated that the seller does not

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(1) the instruction is a correct statement of law; (2) it is supported by the evidence; (3) it does not repeat material adequately covered by other instructions; and (4) the substantial rights of the tendering party would be prejudiced by the failure to give the instruction.

Id. (citing Miller Brewing Co. v. Best Beers of Bloomington, Inc., 579 N.E.2d 626, 635 (Ind. Ct. App. 1991)).

41. 605 N.E.2d at 1191-92.
42. *Id.* at 1192.
43. *Id.*
44. *Id.* (citing Hinkle v. Niehaus Lumber Co., 525 N.E.2d 1243, 1245 (Ind. 1988)).
45. The instruction tendered by Advance stated:

A duty to warn arises when the manufacturer knows or should know of a danger involved in the use of its product, or where it is unreasonably dangerous to place the product in the hands of the user without suitable warning. However, where the danger or potentiality of danger is known or should be known to the user, the duty does not attach.

605 N.E.2d at 1192 (emphasis omitted).

46. *Id.*
47. *Id.* at 1193.
48. 417 N.E.2d 1165, 1169 (Ind. Ct. App. 1981).
49. 525 N.E.2d 1243 (Ind. 1988).
50. 551 N.E.2d 437 (Ind. 1990).
51. 605 N.E.2d at 1193.

have a duty to warn unless the seller "knew or had reason to know that the product was likely to be dangerous when used in a foreseeable manner."[52] Thus, the court in *Hinkle* focused on the seller's ability to predict dangers in foreseeable uses of the product, rather than the user's ability to foresee such dangers.[53] Similarly, in *Koske*, the court stated that resorting to an objective standard to determine what a product user should have known is akin to the contributory negligence defense, which would otherwise not be available in strict liability.[54] Thus, the trial court's instruction that a manufacturer has no duty to warn of dangers which should have been known to the user was erroneous.

Unfortunately, despite these previous cases, the *Underly* decision contains a statement which arguably injects the should have know standard back into the equation. In its determination that the trial court's instruction was harmless error, the court found that insufficient evidence existed to show that Advance knew or had reason to know that the retriever presented a danger of hydraulic injection injury. As part of its analysis, the court stated:

> In order to prevail on his claim for strict liability based upon Advance's failure to warn, it was incumbent upon Underly not only to present evidence to the jury that *ordinary users* of the retriever *would be unaware* of the danger of working around high pressure hydraulic hoses, but also to show that Advance knew or had reason to know that its retriever was fraught with such dangers when used in a foreseeable manner.[55]

This language appears to set forth an objective standard to determine whether the user's knowledge will preclude the necessity for a warning by the seller. If the *Koske* and *Hinkle* rule is properly applied, evidence of whether ordinary users would or would not be aware of a danger is not relevant to whether a duty to warn exists. The appropriate test for when a duty to warn arises is whether the seller knows or has reason to know of a danger when the product is used in a foreseeable manner, regardless of the knowledge of ordinary users.[56] Only where the user has actual, subjective knowledge of the danger does the user's knowledge make a warning unnecessary. Thus, if the specific user does not actually know of a product's dangers, regardless of what an "ordinary user" knows, the seller has a duty to warn of those dangers so long as the danger is foreseeable to the seller. Otherwise, a seller could argue that a

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52. 525 N.E.2d at 1245.

53. *Underly*, 605 N.E.2d at 1193.

54. 551 N.E.2d at 441.

55. 605 N.E.2d at 1193 (emphasis added).

56. In a strict liability case based on failure to warn, the threshold question is whether the seller "knew or had reason to know that the product was likely to be dangerous when used in a foreseeable manner." Peters v. Judd Drugs, Inc., 602 N.E.2d 162, 164-65 (Ind. Ct. App. 1992) (citing *Hinkle*, 525 N.E.2d at 1245 (Ind. 1988)).

particular plaintiff should have known of a danger because ordinary users would have known. The jury could then infer that a specific user's lack of knowledge of a danger is tantamount to negligence. Such a result is inconsistent with the holdings in *Hinkle* and *Koske*.

IV. Statute of Limitations and the Duty to Warn

In *Wenger v. Weldy*,[57] the Indiana Court of Appeals for the Third District affirmed summary judgment in favor of a lessor of modified farm equipment, based on the ten-year statute of repose contained in the Indiana Product Liability Act.[58] The defendant, a former farm implement dealer, retained a 1964 hay baler from his business inventory when he retired in 1964. In 1975, the hitch clevis on the hay baler broke. Having performed welding chores on his own equipment in the past, the defendant welded the hitch and continued to use the baler. In 1981, the defendant leased the baler to his son, who asked the plaintiff to assist in baling operations the next day. While the plaintiff rode in the wagon behind the bailer, the hitch broke, allowing the baler to detach from the wagon. As a result, the plaintiff was struck in the head by a piece of equipment.[59]

The plaintiff argued that the defendant's act of welding the hitch in 1975 created a new product which recommenced the ten-year statutory limitation period, but that the period did not commence until 1981 when the defendant leased the equipment to his son. The court first noted that the defendant became the "initial user" of the equipment within the meaning of the statute in 1964 when he transferred the equipment from his business inventory to his farming operation.[60] Thereafter, if the equipment became a new product, it would have occurred when the hitch was welded in 1975. Relying on *Denu v. Western Gear Corp.*[61] as instructive, the court found that if the modification of the hitch in 1975 constituted the creation of a new product, then both the injury in 1988 and the lawsuit in 1990 fell outside the recommenced ten-year period.[62]

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57. 605 N.E.2d 796 (Ind. Ct. App. 1993).

58. The Act provides that

> a 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 or consumer. However, if the cause of action accrues at least eight (8) years but less than ten (10) years after the initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

IND. CODE ANN. § 33-1-1.5-5 (West Supp. 1992). The ten-year provision is a statute of repose. Daugue v. Piper Aircraft Corp., 418 N.E.2d 207, 210-11 (Ind. 1981).

59. 605 N.E.2d at 797.

60. *Id.* at 798. *See* IND. CODE ANN. § 33-1-1.5-5 (West Supp. 1992).

61. 581 F. Supp. 7 (S.D. Ind. 1983). In *Denu*, the court interpreted the product liability statute of limitations as allowing recommencement of the ten-year statutory period when a product has been reconditioned, altered, or modified to the extent that a "new" product has been introduced into the stream of commerce. *Id.* at 8.

62. 605 N.E.2d at 798.

Although not expressly stated in the opinion, the court's decision in *Wenger* assumed that because the defendant had been the initial user or consumer in 1964, he continued to be the initial user or consumer in 1975 after welding the hitch. Presumably, this is so because he continued to use the equipment for his own farming operations immediately after welding the hitch. However, a different result may have been reached if, immediately after welding the hitch, the defendant had placed the equipment in storage or private inventory for later sale or lease. Under those circumstances, his lease of the equipment in 1981 may have constituted delivery of the new product to a new "initial user or consumer," thereby recommencing the ten-year period in 1981 instead of 1975.

In another case which addressed the statute of repose, the United States Court of Appeals for the Seventh Circuit determined whether a claim based on a post-sale duty to warn is a product liability claim subject to the Product Liability Act's statute of limitations. In *Schamel v. Textron-Lycoming*,[63] the plaintiff brought a wrongful death action on behalf of her husband who died in 1988 in the crash of his 1959 Piper Comanche as a result of a fatigue failure in one of the connecting rods in the plane's engine. One of the plaintiff's claims was that the manufacturer of the rod failed to exercise reasonable care in providing adequate information to individuals overhauling its engines by not providing fatigue limits for the connecting rods in its overhaul and service manuals. The manufacturer had not sold that particular part since at least 1973.[64]

In an effort to avoid the ten-year statute of repose, the plaintiff argued that her claim of post-sale failure to warn was not a product liability claim, but rather a claim under Section 324A of the Restatement (Second) of Torts.[65] Without determining whether a Section 324A action is a product liability suit for purposes of the Indiana Product Liability Act,[66] the Seventh Circuit held that the provision of service manuals and other sources of service information is not a

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63. 1 F.3d 655 (7th Cir. 1993).

64. *Id.* at 656.

65. Section 324A of the RESTATEMENT (SECOND) OF TORTS states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
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> (a) his failure to exercise reasonable care increases the risk of such harm, or
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> (b) he has undertaken to perform a duty owed by the other to the third person, or
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> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

RESTATEMENT (SECOND) OF TORTS § 324A (1965).

66. Citing Baker v. Midland-Ross Corp., 508 N.E.2d 32 (Ind. Ct. App. 1987), the court stated that "[i]t *may* be that a Section 324A action is not a product liability suit for purposes of the Indiana Product Liability Act, since it *may* be that the injury does not result from the manufacture, construction, or design of a product, but rather from post-sale negligent acts." 1 F.3d at 657 (emphasis added).

separate and discrete, post-sale undertaking pursuant to Section 324A, but rather is information generally necessary to satisfy the manufacturer's duty to warn.[67] In her complaint, the plaintiff alleged that the defendant had a duty to provide the service information. Thus, the manufacturer's provision of such information was not a voluntary undertaking distinct from the obligations inherent in the sale of the product. The plaintiff's action was therefore based on the manufacturer's breach of its continuing duty to warn by not establishing a fatigue life for the connecting rods. Such a claim of failure to warn is a product liability action covered by the Product Liability Act and its statute of repose.[68]

V. Authentication of Product, Proof of Defect, and Admissibility of Employer's Conduct

In *Bruther v. General Electric Co.*,[69] the plaintiff was electrocuted while changing a light bulb at his place of employment. When the plaintiff attempted to unscrew the bulb from its socket, the glass envelope separated from the base. The plaintiff brought suit against General Electric, the manufacturer of the light bulb, under theories of strict liability, negligence, breach of warranty, and failure to warn. General Electric moved for summary judgment, contending that (1) the plaintiff could not authenticate the bulb that he wished to introduce into evidence,[70] and (2) the plaintiff could not establish any evidence of a defect in the light bulb.[71]

On the authentication issue, General Electric argued that the plaintiff was unable to authenticate the bulb he offered into evidence because of the lack of identifying marks on the bulb and the existence of a gap in the chain of custody after the accident occurred. After the accident, no one safeguarded the bulb. Only after the plaintiff's counsel asked to examine the bulb did the plant manager begin to look for it. The plant manager found a broken bulb in a cabinet next to the accident site, but he could not identify the bulb as the one involved in the accident. He believed, however, that it was the bulb in question because he normally did not keep broken bulbs. The plaintiff stated in his affidavit that about two weeks before the accident he replaced light bulbs in the same panel with other General Electric bulbs and no other brand of light bulb was used in that panel. In addition, only six people had access to both the area where the accident occurred and the cabinet where the bulb was found.[72]

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67. 1 F.3d at 657.

68. *Id.*

69. 818 F. Supp. 1238 (S.D. Ind. 1993).

70. Although the specific issue here was whether the bulb offered into evidence had been properly authenticated, Plaintiff may well have been able to prove a product defect without ever having located the light bulb in question. *See* SCM Corp. v. Letterer, 448 N.E.2d 686 (Ind. Ct. App. 1983).

71. 818 F. Supp. at 1239.

72. *Id.* at 1240.

On these facts, the United States District Court for the Southern District of Indiana held that there was sufficient evidence within the meaning of Rule 901(a) of the Federal Rules of Evidence[73] such that a jury considering these facts reasonably could conclude that the bulb in question was the bulb that caused the plaintiff's injuries.[74] Citing *United States v. L'Allier*,[75] the court noted that "any discrepancies in the chain of custody go to the weight of the evidence, not its admissibility."[76] Consequently, the jury, not the court, must evaluate the significance of the plaintiff's inability to account for the bulb following the accident.[77]

The second question presented on summary judgment in *Bruther* was whether the plaintiff had established any evidence of a defect in the light bulb. As support for its argument that no evidence of a defect existed, General Electric noted that the plaintiff had not produced an expert who would testify that the bulb was defective. In reviewing the record, the court noted that the nature of the alleged defect was not especially complicated. The plaintiff had stated in interrogatory answers that the glass part of the bulb came apart from the metal base while he was unscrewing the bulb, thereby exposing the electrical element. The person who removed the bulb from the socket after the accident corroborated the plaintiff's version of the facts by describing the base as having separated from the glass. Given the simplicity of the alleged defect, the court could find no requirement that the plaintiff produce an expert to bolster his allegations of defect.[78] Although the evidence presented to prove a defect was scant, the court nevertheless determined it to be sufficient to create a triable issue of fact to preclude summary judgment.[79]

Finally, relying on *Moore v. General Motors Corp.*[80] and *Evans v. Schenk Cattle Co.*[81], the *Bruther* court reaffirmed the Indiana rule that a defendant may introduce evidence to contest the elements of a negligence claim, even if that evidence is evidence of causation attributable to a party or parties who do not

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73. FED. R. EVID. 901(a) states: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." FED. R. EVID. 901(a).

74. 818 F. Supp. at 1240-41.

75. 838 F.2d 234, 242 (7th Cir. 1988).

76. 818 F. Supp. at 1241 (citing United States v. Shackleford, 738 F.2d 776, 785 (7th Cir. 1984)).

77. *Id.* A similar result would probably be reached under the Indiana Rules of Evidence. *See* Fruehauf Trailer Div. v. Thornton, 366 N.E.2d 21 (Ind. Ct. App. 1977); IND. R. EVID. § 901(a).

78. 818 F. Supp. at 1242. On the other hand, where the alleged defect is beyond the understanding of the average layperson, some courts have required that the defect be proven through expert testimony. *See* Worsham v. A.H. Robins Co., 734 F.2d 676 (11th Cir. 1984); Padgett v. Synthes, Ltd., 677 F. Supp. 1329 (W.D.N.C. 1988); Northern Trust Co. v. Upjohn Co., 572 N.E.2d 1030 (Ill. App. Ct. 1991).

79. 818 F. Supp. at 1241-42.

80. 684 F. Supp. 220 (S.D. Ind. 1988).

81. 558 N.E.2d 892 (Ind. Ct. App. 1990).

qualify as nonparties under Indiana's Comparative Fault Act.[82] An employer's fault thus may be considered by the jury to refute the plaintiff's claim of negligence, but may not be used to reduce the plaintiff's damages award.[83]

82. IND. CODE ANN. §§ 34-4-33-1 to -13 (West 1988 & West Supp. 1992).
83. 818 F. Supp. at 1243.