ment and legislative efforts in other jurisdictions related to this issue.[93]

A complete analysis and application of the reasoning underlying this problem to Indiana statutes is beyond the scope of this discussion. Larson's consideration of the issue is noted only to illustrate the significance and complexity of the matter presented to the court. By alluding to the limited standard of review of administrative decisions, the court failed to confront the issue. The court did give the impression that if the Industrial Board were to change its interpretation, at least with respect to the Occupational Diseases Act, to find industrially caused gradual hearing losses to be compensable, the court might sustain that interpretation as well. In the meantime, if this decision is to remain unchanged on further appeal, such hearing losses are not compensable under either the Workmen's Compensation Act or the Occupational Disease Act in Indiana.

XII. Products Liability

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During this survey period few products liability cases were decided under Indiana law,[1] but these few may prove to be highly significant because specific doctrines of Indiana products liability law appear to have been modified or redefined. In addition, the Indiana General Assembly enacted a new products liability statute[2] which promises to have a major impact on products liability practice in this state.

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[93]IB A. LARSON, *supra* note 91.

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[1]Two cases decided during the survey period are not discussed because they either did not raise any new issues or did not discuss issues concerning products liability. *See* Cates v. Jolley, 373 N.E.2d 877 (Ind. 1977) (negligence case involving ladder); American Home Prod. Corp. v. Vance, 365 N.E.2d 780 (Ind. Ct. App. 1977) (primarily discussing issue of inconsistent jury verdict).

[2]Act of Mar. 10, 1978, Pub. L. No. 141, § 28, 1978 Ind. Acts 1308 (codified at IND. CODE §§ 33-1-1.5-1 to 8 (Supp. 1978)). The full text of this chapter is reprinted as an appendix following this article.

A. Judicial Developments

1. Assumption of Risk, Misuse, and Contributory Negligence.—In *Fruehauf Trailer Division v. Thornton*,[3] the plaintiff received a jury verdict against the defendant tire manufacturer for injuries sustained when his tire blew out, causing his semi-trailer to overturn and burn. The verdict was affirmed on appeal.[4] One issue considered was the trial court's refusal to tender instructions concerning misuse and incurred risk. The court of appeals stated that if the plaintiff user has knowledge of the defect, misuse becomes a part of the defense of assumption of risk (incurred risk).[5] Assumption of risk is, in turn, based upon voluntary consent as tested by a subjective standard.[6] In contrast, contributory negligence is premised on unreasonable conduct of the plaintiff as tested by an objective standard.[7] In other words, contributory negligence requires an objective determination that the plaintiff has failed to guard against a known defect when under a duty to do so.

Because there was no evidence that the plaintiff voluntarily drove an excessive distance after the tire blew out, he could not have legally incurred the risk. Although plaintiff presumably had knowledge of the defect *after* the blowout, there was insufficient evidence to conclude that he subjectively determined to continue driving so as to constitute a misuse in the presence of a known defect.[8] Thus, significantly, the *Thornton* court held that, although an instruction for contributory negligence was given under the negligence count, an instruction for misuse *where the defect is known* is not appropriate under a strict tort count unless sufficient evidence of plaintiff's voluntariness and subjective determination of continuing conduct is presented at trial.[9]

The defense of assumption of risk (incurred risk) was analyzed in an outstanding opinion in *Kroger Co. v. Haun*.[10] *Haun*, a negligence case, thoroughly discussed the difference between contributory negligence and assumption of risk. The *Haun* court observed that strict definitional differences between contributory negligence and assumption of risk might not be important in ordinary negligence actions inasmuch as both are valid defenses, but emphasized that the distinction is important in situations in which assumption of risk is a

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[3]366 N.E.2d 21 (Ind. Ct. App. 1977).
[4]*Id.* at 25.
[5]*Id.* at 29.
[6]*Id.*
[7]*Id.*
[8]*Id.*
[9]*Id.* at 29-30.
[10]379 N.E.2d 1004 (Ind. Ct. App. 1978).

defense, and contributory negligence is not, such as guest statute cases and strict liability cases.[11]

Recognizing that some Indiana decisions have repeatedly held that the doctrines of contributory negligence and assumption of risk are separate and distinct, while others have stated that assumption of risk is merely a species of contributory negligence, the *Haun* court allocated these conflicting views to definitional differences.[12] The *Haun* court then redefined both contributory negligence and assumption of risk in their classic senses. Contributory negligence was defined as unreasonable conduct as tested by the objective reasonable person. Assumption of risk was defined as consenting to undertake a risk with actual knowledge, understanding, and appreciation of the risk involved and a voluntariness in accepting that risk.[13]

The *Haun* court said the confusion in distinguishing the two defenses under Indiana law has been in large part due to two factors. First, there has been an infusion of the objective reasonable person test into the assumption of risk concept. Second, Indiana courts have erroneously incorporated the requirements of knowledge and appreciation of a peril into contributory negligence.[14] In *Stallings v. Dick*,[15] for example, the court stated that assumption of risk included the proposition that knowledge of a risk may be imputed if such a risk would have been "readily discernible by a reasonable and prudent man under like or similar circumstances."[16] The *Haun* court, in rejecting this definition, opined that to hold that one may incur a risk of which he had no actual knowledge, yet was required to know in the exercise of ordinary care, is a perversion of the doctrine.[17] The *Haun* court stated that dangers which are so obvious that knowledge of them may be imputed as a matter of law do not constitute assumption of risk, but should be treated as unreasonable conduct in failing to recognize an obvious risk or danger, therefore constituting contributory negligence.[18]

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[11] *Id.* at 1013-14 (citing Ridgeway v. Yenny, 223 Ind. 16, 57 N.E.2d 581 (1944); Fruehauf Trailer Div. v. Thornton, 366 N.E.2d 21 (Ind. Ct. App. 1977); Gregory v. White Truck & Equip. Co., 323 N.E.2d 280 (Ind. Ct. App. 1974) (strict liability); Collins v. Grabler, 147 Ind. App. 584, 263 N.E.2d 201 (1970) (guest statute)).

[12] 379 N.E.2d at 1008.

[13] *Id.* at 1007.

[14] *Id.* at 1008.

[15] 139 Ind. App. 118, 210 N.E.2d 82 (1965).

[16] *Id.* at 129, 210 N.E.2d at 88.

[17] 379 N.E.2d at 1009.

[18] *Id.*

The court then allocated the various types of plaintiff-conduct within the above definitional framework.[19] The court noted that in some situations a plaintiff may expressly or impliedly consent to a risk, thereby eliminating the defendant's duty to protect him from that risk. These situations were characterized as "primary assumption of risk."[20] In "primary assumption of risk" cases, the issue of whether the risk was reasonable is not relevant since the defendant owed no duty to the plaintiff. Thus, both assumption of risk and contributory negligence, when used in the "primary" sense, are properly analyzed as a "no duty" concept and not as defenses.[21]

Once the defendant has been charged with a duty, however, any breach of that duty constitutes negligence. Under this situation the defendant may still avoid liability by asserting: (1) The plaintiff came upon a risk created by defendant's negligence, knew of and appreciated its magnitude, but nevertheless accepted it voluntarily; or (2) the plaintiff's conduct failed to conform to that of a reasonable person under the circumstances.[22] The former situation is "secondary assumption of risk," while the latter situation is contributory negligence.[23] In certain situations, "secondary assumption of risk" and contributory negligence will "overlap."[24] This overlap occurs when the plaintiff's conduct has been voluntary and knowing, as well as unreasonable, in other words, when the plaintiff has incurred an unreasonable risk. In such "overlap" situations, either defense may be asserted.[25]

The *Haun* court stated that in situations where assumption of risk, but *not* contributory negligence, is available as a defense, the defenses should be analyzed as follows. "While contributory negligence (unreasonable conduct) is *not* a defense in such cases, it may, nevertheless, be present in the form of conduct which includes

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[19]The *Haun* court listed the following possible situations:

(1) [T]he existence or non-existence of a duty owed by the defendant to plaintiff for the prevention of the danger in question;

(2) the voluntariness of plaintiff's conduct and his knowledge and appreciation of its possible consequences, or lack thereof, and

(3) the reasonableness of the risk entailed or conduct engaged in by the plaintiff.

Id. at 1011.

[20]*Id.*

[21]*Id.* at 1012.

[22]*Id.*

[23]*Id.*

[24]The "overlap" area, wherein both contributory negligence and assumption of risk exist at the same time, is more fully explained in Vargo, *The Defenses to Strict Liability in Tort: A New Vocabulary With an Old Meaning*, 29 MERCER L. REV. 447, 451-55 (1978).

[25]*Id.* at 451.

the additional elements of voluntary and knowing incurrence."[26] Such conduct would be a defense, not because it is unreasonable, but because it constitutes a voluntary assumption of a known risk. The decision is consonant with the *Restatement (Second) of Torts* section 402A, Comment n, which describes only the "overlap" area as a defense to strict liability in tort.[27]

The decision provides an excellent analysis of contributory negligence and assumption of risk, and clarifies Indiana law concerning the types of defenses available to the defendant in products liability and guest statute cases. However, the question still remains whether the pure type of "secondary assumption of risk," where the plaintiff *reasonably* assumes the risk, is a defense.[28] Although most situations involve the overlap area, it is still theoretically possible that a plaintiff may reasonably assume a risk arising out of defendant's negligent conduct or defective product, and, in this situation, reasonable assumption of risk has traditionally been considered a defense.[29] Recent decisions in other jurisdictions have refuted the use, in some circumstances, of reasonable assumption of risk as a defense on policy and social grounds. For example, in *Blackburn v. Dorta*,[30] the Florida Supreme Court theorized the situation in which the plaintiff rushes into a burning building to rescue a child as an example of reasonable assumption of risk.[31] In this situation the application of the defense of reasonable assumption of risk would bar the plaintiff from recovery. The *Dorta* court found no policy justification for the defense under these circumstances and rejected its use.[32] The question of whether there is an area of defense for a reasonable risk incurrence in Indiana, apparently, remains open.

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[26]379 N.E.2d at 1014.

[27]The RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965) states:

Contributory Negligence. Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely of a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

[28]*See* Vargo, *supra* note 24, at 451-60.

[29]*Id.*

[30]348 So. 2d 287 (Fla. 1977).

[31]*Id.* at 291.

[32]*Id.* at 291-93.

Finally, the *Haun* court, in a limited discussion of the voluntariness element of assumption of risk, implied that a plaintiff in an employment situation, who is following directions as to how he is to fulfill his job requirements, may not always be acting voluntarily.[33] In other words, when a person is required, by an employer or by others, to perform his work in a specified way and whose only choices are to continue to work in the specified manner, to quit his job, or to suffer substantial sanctions from his employer, there is a question whether there is really any choice at all. Other jurisdictions, when faced with this issue, have determined that no true choice is presented and that, consequently, the employee did not incur the risk.[34] As one court explained: " '[I]t was 'his poverty, not his will,' " that made him consent.[35]

2. Statute of Limitations and Disability Statute.—In *D'Andrea v. Montgomery Ward & Co.*,[36] the Seventh Circuit Court of Appeals reversed the trial court's grant of summary judgment for the defendant. In *D'Andrea* the plaintiff received her injuries shortly before her sixth birthday. Under the Indiana disability statute,[37] a minor plaintiff has two years after his disability is removed within which to bring his action. D'Andrea filed her complaint on February 14, 1975, ten months before her twenty-third birthday. On July 26, 1973, when the plaintiff was twenty years of age, and before the filing of her complaint, the age of majority in Indiana was reduced from twenty-one to eighteen years of age.[38] Thus, under the amended law a minor has until his twentieth rather than his twenty-third birthday within which to commence his action. The trial court held that the plaintiff was bound by the modified law and, therefore, was barred

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[33]The *Haun* court stated:

> However, the evidence adduced at trial does not as a matter of law mandate the finding that Haun either incurred the risk of his injuries or was contributorily negligent. First, there is a factual question as to the voluntariness of Haun's conduct. Kroger was responsible for requiring Haun to unload the pallets in the limited area.

379 N.E.2d at 1014.

[34]*See* Rhoads v. Service Mach. Co., 329 F. Supp. 367 (E.D. Ark. 1971); Wood v. Kane Boiler Works, Inc., 150 Tex. 191, 238 S.W.2d 172 (1951); Brown v. Quick Mix Co., 75 Wash. 2d 833, 454 P.2d 205 (1969).

[35]Rhoads v. Service Mach. Co., 329 F. Supp. 367, 381 (E.D. Ark. 1971) (quoting 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1177 (1956) (quoting Thrussell v. Handyside, 20 Q.B.D. 359, 364 (1888))).

[36]571 F.2d 403 (7th Cir. 1978).

[37]IND. CODE § 34-1-2-5 (1976) provides that persons under legal disability have two years after the disability is removed within which to file their actions. At the time of plaintiff's injury, Act of Apr. 7, 1881, ch. 38, § 857, 1881 Ind. Acts 388 (amended 1973), defined persons under the age of twenty-one years as being under a legal disability.

[38]*See* IND. CODE § 34-1-67-1 (1976), *as amended by* Act of Apr. 16, 1973, Pub. L. No. 313, § 3, 1973 Ind. Acts 1717.

by the statute of limitations. On appeal, the Seventh Circuit pointed out that under the disability statute the two-year grace period does not begin to run until the disability is removed.[39] The *D'Andrea* court then held that plaintiff's disability (minority) was removed by legislative act on July 23, 1973, when the amendment became effective, and that the plaintiff still had two years from the effective date of the amendment, or until July 23, 1975, within which to bring her action.[40] Since the plaintiff had commenced her action on February 14, 1975, her suit was timely under the amended statute.[41]

Attorneys should be aware that the present state of Indiana law concerning disability statutes has been modified in two important ways. If the action does not come under the new products liability statute,[42] the age of majority for minors is eighteen years of age, and the two-year grace period will extend the time within which to bring the action until age twenty. If the action is within the ambit of section 5 of the statute, and if this section is held constitutional, there will be no extension of time for minors.[43]

3. Successor Corporations' Liability.—In *Travis v. Harris Corp.*,[44] the defendant corporation, successor corporation, had purchased the assets of a prior corporation, predecessor corporation, which had manufactured and marketed an allegedly defective product which had injured the plaintiff.[45] The decision of the Seventh Circuit Court of Appeals, holding the successor corporation not liable for the plaintiff's injuries, was based upon traditional doctrines of corporate law. These principles "were developed primarily for the purposes of creditor protection, tax assessment, and the resolution of dissenting shareholder claims."[46] These policy considerations underlying corporate law and the rule of non-liability for successor corporations were established before the concept of strict tort liability for products was generally adopted.[47] The ability of the

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[39]571 F.2d at 404.

[40]*Id.*

[41]*Id.*

[42]IND. CODE § 33-1-1.5-1 to 8 (Supp. 1978).

[43]*Id.* § 33-1-1.5-5 states in pertinent part: "Statute of Limitations. This Section applies to all persons regardless of minority or legal disability." The constitutionality of this provision is discussed at notes 181-96 *infra* and accompanying text.

[44]565 F.2d 443 (7th Cir. 1977).

[45]The *Travis* court also discussed the liability consequences when "merger and consolidation" are involved in the acquisition. This aspect of the case and a full explanation of the factual background are more fully discussed in *Corporations, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 94, 105-10 (1978).

[46]Note, *Products Liability—Corporations—Asset, Sales and Successor Liability*, 44 TENN. L. REV. 905, 908 (1977).

[47]*See id.*

manufacturer to absorb or spread the cost of such injuries, safety incentives, consumer expectations, and plaintiff's problems of proof, were the primary policy considerations for the establishment of strict liability for products.[48] Thus, the policy considerations of corporate law and strict tort liability were established on a completely different policy basis. The *Travis* court chose to reject the policy behind strict liability and grounded its decision on corporate doctrines.[49] Recent decisions in other jurisdictions, however, have analyzed the problem of successor corporations, including mere cash purchases of assets, in a different manner.[50] These jurisdictions have found corporate law principles inadequate because the issue of successor liability for defective products should be governed by the policies underlying products liability law.[51] Jurisdictions which have rejected the use of corporate law in the successor corporation situation have established two new approaches to the problem: the products liability continuity principle[52] and the product line[53] theory. Under the products liability continuity principle, the successor corporation may be held responsible by showing:

> (1) [A] continuity of management, personnel, location, assets and general business operations, (2) the prompt cessation, liquidation, and dissolution of seller, (3) and assumption by the buyer of those liabilities and obligations ordinarily necessary for the uninterrupted conduct of the business, and (4) a representation by the purchasing corporation that it is the effective continuation of the seller.[54]

The product line theory would hold the successor corporation liable if:

> (1) [T]he plaintiff would face insuperable obstacles in attempting to obtain satisfaction from the predecessor, (2) at the time of the acquisition, the successor possessed adequate knowledge to gauge the risks of injuries from previously

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[48]*See* Campbell & Vargo, *The Flammable Fabrics Act and Strict Liability in Tort*, 9 IND. L. REV. 395, 407-08 n.75 (1976); Fischer, *Products Liability—The Meaning of Defect*, 39 MO. L. REV. 339, 339-40 (1974).

[49]565 F.2d at 448.

[50]*See* Ray v. Alad Corp., 560 P.2d 3, 136 Cal. Rptr. 574 (1977); Turner v. Bituminous Cas. Co., 399 Mich. 406, 244 N.W.2d 873 (1976). *See also* Cyr v. B. Offen & Co., 501 F.2d 1145 (1st Cir. 1974).

[51]*See, e.g.*, Turner v. Bituminous Cas. Co., 397 Mich. 406, 416, 244 N.W.2d 873, 877 (1976).

[52]*Id.* at 424, 244 N.W.2d at 881.

[53]Ray v. Alad Corp., 560 P.2d 3, 11, 136 Cal. Rptr. 574, 582 (1977).

[54]Note, *supra* note 46, at 913-14 (discussing Turner v. Bituminous Cas. Co., 397 Mich. 406, 244 N.W.2d 873 (1976)).

> manufactured products, and (3) the successor corporation acquired the good will and other intangible assets of the predecessor to which responsibility could fairly be attached.[55]

Because of the completely different purposes for the corporate nonliability rule, it would seem a better approach to analyze successor corporations' liability for injury from continuing products using products liability policies under one of the above theories.

4. Warnings and Standards for Strict Liability in Tort.—Travis, in addition to discussing the successor corporation issue, raised an interesting question regarding the defendant's failure to warn. The plaintiff contended that the successor corporation had on one occasion performed service on the allegedly defective product produced by the predecessor corporation. Under these circumstances, the plaintiff alleged that the successor corporation failed to warn concerning the dangers in the product. The *Travis* court stated, as one ground for rejecting plaintiff's argument, that the successor corporation had no knowledge of the defect and, absent such knowledge, nothing is known to warn against.[56]

The *Travis* approach to finding or rejecting a "warning defect" seems to conflict directly with all generally accepted theories for establishing the defect element in strict tort cases. Because of vagueness and ambiguity in the "consumer expectation test" as set forth in Comments g, h, and i to section 402A,[57] two alternative approaches have been advanced to establish the standards of defectiveness. The first alternative was proferred by Deans Wade[58] and Keeton.[59] This "Wade/Keeton" standard states that the primary difference between negligence and strict liability is one of knowledge

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[55]Note, *supra* note 46, at 914-15 (discussing Ray v. Alad Corp., 560 P.2d 3, 136 Cal. Rptr. 574 (1977)).

[56]565 F.2d at 448-49.

[57]The term "consumer expectation test" seems to have arisen from the comments to RESTATEMENT (SECOND) OF TORTS § 402A (1965). Comment g states in part: "The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a *condition not contemplated by the ultimate consumer*, which will be unreasonably dangerous to him." (Emphasis added). *Id.* Comment h states in part: "A product is not in a defective condition when it is safe for normal handling and consumption." *Id.* Comment i states in part: "The article sold must be dangerous to an extend 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."

[58]*See* Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973).

[59]*See* Keeton, *Product Liability and The Meaning of Defect*, 5 ST. MARY'S L.J. 30 (1973).

or scienter.[60] Dean Wade contends that, in strict liability cases, knowledge of the injuring defect should be imputed to the manufacturer or seller whether or not he had actual knowledge.[61] The issue then becomes whether the seller with such knowledge would have been negligent for marketing the product. Thus, strict liability differs from negligence in that actual or constructive knowledge of the defect is usually required in negligence cases, whereas, in strict liability, the knowledge of the defect is assumed.[62] The second approach for setting a standard for strict liability in tort was established by the California Supreme Court in *Barker v. Lull Engineering Co.*[63] The California standard states that liability in products cases involving design defects may be established if: (1) The plaintiff proves "that the product failed to perform as safely as the ordinary consumer would expect when used in an intended or reasonably foreseeable manner,"[64] or (2) the plaintiff proves that "the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design."[65]

Under either the Wade/Keeton approach or the California approach, knowledge of the defect in the product is either imputed or

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[60]*See* Keeton, *supra* note 59, at 37-38; Wade, *supra* note 59, at 834-35.

[61]*See* Wade, *supra* note 58, at 834-35.

[62]*Id.* at 835.

[63]573 P.2d 443, 143 Cal. Rptr. 225 (1978).

[64]*Id.* at 455-56, 143 Cal. Rptr. at 237-38. The California Supreme Court stated that the consumer expectation test is the floor, not the ceiling on the manufacturer's responsibility, *i.e.*, it is merely the minimal requirement. In addition, the consumer expectation test may frequently be used in situations where circumstantial evidence is resorted to, especially where the accident itself precludes identification of the specific defect. The court recognized, however, that the consumer expectation test may be a poor yardstick because, in many situations, the consumer has no idea how safe the product could be made. *Id.* at 454, 143 Cal. Rptr. at 236.

[65]*Id.* at 456, 143 Cal. Rptr. at 238. The court, in specifying what factors are relevant, stated the jury may consider: (1) The gravity of danger of the design, (2) the likelihood of the danger occurring, (3) the mechanical feasibility of a safer alternative design, (4) the financial cost of an improved design, and (5) the adverse consequences resulting from any alternative design. *Id.* at 455, 143 Cal. Rptr. at 237. The California court made it clear tht the defendant had the burden of proving, not merely the burden of producing evidence, that the benefits of the challenged design outweighed the risk of danger inherent in such design. *Id.* The court stated further that the jury's focus should be directed at the product and not at the reasonableness of the manufacturer's conduct. *Id.* at 456, 143 Cal. Rptr. at 238. Thus, the fact that the manufacturer acted as a reasonably prudent manufacturer by taking reasonable precautions in attempting to design a safe product would not preclude the imposition of liability under strict liability principles if, upon hindsight, the trier of fact concluded that the product's design was unsafe to consumers, users, or bystanders.

irrelevant. Under the Wade/Keeton approach, for example, the manufacturer in *Travis* would have been charged with the knowledge of the defect and might have been liable for failing to warn of the dangers in the product.

5. Foreseeability and Intended Use.—In *Huff v. White Motor Corp.*[66] the trial court had found that the plaintiff could not recover for "enhanced injuries"[67] (death) when a tractor overturned and its fuel tank caught fire. The plaintiff alleged that the fire resulted from a defectively designed fuel tank and that, absent such a defect, decedent's injuries would have been less severe. The trial court rejected this argument and applied the rationale of *Evans v. General Motors Corp.*[68] In *Evans*, the Seventh Circuit Court of Appeals denied recovery based upon an extremely narrow foreseeability concept and "intended use" rationale.[69] Under the *Evans* approach, the "intended use" of a product was determined from the subjective viewpoint of the manufacturer. This "intended use" approach predated the modern view of strict liability and was an archaic remnant of early negligence law.[70] In addition, the *Evans* approach severely limited the foreseeability concept in products cases to such an extent that the sellers of products could practically ignore the consequences of placing their product in various environments.[71]

The Seventh Circuit, in reversing the trial court, noted that only Indiana, Mississippi, and West Virginia[72] followed the *Evans* doctrine, while thirty jurisdictions had rejected the *Evans* case.[73] Overruling both *Evans* and *Schemel v. General Motors Corp.*,[74] the *Huff* court stated that the "intended use" construction was too narrow and unrealistic and that, henceforth, reasonable foreseeability, including a manufacturer's consideration and anticipation of the environment in which its product will be used, would be the rule for products liability cases.[75] The *Huff* court concluded: "No rational

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[66]565 F.2d 104 (7th Cir. 1977).

[67]"Enhanced injury" or "second collision" cases are situations in which the defect does not cause the original collision or impact, but the defect does increase the severity of plaintiff's injury after the original collision. *See* Vargo, *Products Liability in Indiana: In Search of a Standard for Strict Liability in Tort*, 10 IND. L. REV. 871, 877-78 (1977).

[68]359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966).

[69]*Id.* at 825. *See* Vargo, *supra* note 67, at 878-81.

[70]*See* Vargo, *supra* note 67, at 878-81

[71]*Id.*

[72]565 F.2d at 111 app. B (citing Walton v. Chrysler Motor Corp., 222 So. 2d 568 (Miss. 1969); McClung v. Ford Motor Co., 333 F. Supp. 17 (S.D. W. Va. 1971), *aff'd*, 472 F.2d 240 (4th Cir.), *cert. denied*, 412 U.S. 940 (1973).

[73]For a list of the jurisdictions rejecting *Evans*, see 565 F.2d at 110-11 app. A.

[74]384 F.2d 802 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968).

[75]565 F.2d at 108-09.

basis exists for limiting recovery to situations where the defect in design *or manufacture* was the causative factor of the accident . . ." and that the "enhanced injuries" (second collision cases) and the accident itself were all foreseeable events.[76]

With the overruling of *Evans* and *Schemel*, the narrow "intended use" and foreseeability doctrines have been overcome. In addition, the *Huff* decision implies that other narrow and restrictive doctrines of bygone days, such as the obvious danger rule, are now subject to change.[77]

6. Chain of Custody.—In both *Smith v. Crouse-Hinds Co.*[78] and *Fruehauf Trailer Division v. Thornton*,[79] the Indiana Court of Appeals discussed the "chain of custody" of a product. In *Thornton*, the court pointed out that, under the evidentiary standards, it is necessary for the plaintiff to show that the product has not been altered or tampered with from the time of injury until trial.[80] The *Crouse-Hinds* court further stated that the admission of an item or product as "real evidence" may be based upon circumstantial evidence. Thus, authentication of the product as being "the" product producing the injury may, in discretion of the trial court, be accomplished with evidence which shows a "reasonable probability" that the product is the one in question.[81]

B. Indiana's New Product Liability Statute

1. A Brief History.—Shortly before the end of the 1978 session, the Indiana General Assembly enacted Public Law 141[82] to amend title 33 of the Indiana Code.[83] This Act, approved March 10, 1978, includes a chapter, effective June 1, 1978,[84] which governs products liability actions "including those in which the theory of liability is

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[76]*Id.* at 108 (emphasis added).

[77]For an explanation of the "obvious danger rule" and its genesis in Indiana law, see Vargo, *supra* note 67, at 884-88.

[78]373 N.E.2d 923, 926-28 (Ind. Ct. App. 1978).

[79]366 N.E.2d 21, 30-31 (Ind. Ct. App. 1977).

[80]*Id.* at 31.

[81]373 N.E.2d at 928.

[82]Act of Mar. 10, 1978, Pub. L. No. 141, § 28, 1978 Ind. Acts 1308 (codified at IND. CODE §§ 33-1-1.5-1 to 8 (Supp. 1978)).

[83]In INDIANA STATUTES ANNOTATED, the compiler transferred the products liability chapter to Title 34, "Limitations of Actions." *See* IND. CODE ANN. § 34-4-20A-1 to 8 (Burns Supp. 1978). The transfer apparently reflected the compiler's view that the subject matter of products liability is not substantially related to that of courts and court officers and that the Act's statute of limitations provision is its most significant feature.

[84]IND. CODE § 33-1-1.5-8 (Supp. 1978).

negligence or strict liability in tort," but "does not apply to actions arising from or based upon any alleged breach of warranty."[85] Also excluded are actions accruing before June 1, 1978.[86]

The products chapter was enacted following a six-month period of testimony before the Select Joint Committee on Product Liability created by the Indiana Legislative Council.[87] The Committee heard from manufacturers,[88] manufacturing engineers,[89] manufacturing[90] and selling associations,[91] and manufacturers' attorneys.[92] These witnesses generally asserted that, while product liability premiums were skyrocketing,[93] there was no corresponding deterioration in manufacturing practices that could justify the premium increases.[94] Representatives of the insurance industry testified that the explosion in premiums was the result of the increasing frequency of claims and the increasing size of awards.[95] They were joined by the manufacturers and sellers in urging the legislature to enact various

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[85]*Id.* § 33-1-1.5-1 (Supp. 1978).

[86]*Id.* § 33-1-1.5-1(b).

[87]*See* Lyst, *Businessman's Liability Issue to be Debated*, Indianapolis Star, June 9, 1977 at 63, col. 1. (noting that Robert J. Fair, president pro tempore of the Indiana Senate, had pocket vetoed a earlier House-introduced bill which he felt was hastily enacted).

[88]*See Minutes of the Select Joint Committee on Products Liability*, 1977 Indiana Legislature (minutes of July 25, 1977) (statements of Clint Hartman, CTS Corp.; Franklin Greb, Bucyrus—Erie; Bill Kennedy, Kennedy Tank) (minutes available from the Indiana Legislative Council, 301 State House, Indianapolis, Ind. 46204) [hereinafter cited as *Joint Committee*].

[89]*See Joint Committee*, *supra* note 88, (minutes of July 25, 1977) (statement of Clark Roggie, Hugh J. Baker & Co.); *id.* (minutes of Aug. 24, 1977) (statements of Bill Derner, FMC Corp.; Max Rumbaugh, Schwitzer Engineered Prod.).

[90]*See Joint Committee*, *supra* note 88, (minutes of July 25, 1977) (statement of David H. Raridan, Indiana Mfr. Ass'n); *id.* (minutes of Oct. 14, 1977) (statement of Brian J. Krenzke, Indiana Mfr. Ass'n).

[91]*See Joint Committee*, *supra* note 88, (minutes of Aug. 24, 1977) (statements of H.D. Shafer, Truck Equip. & Body Distrib. Ass'n; Normagene Murray, Indiana Tire Dealers & Retreaders Ass'n).

[92]*See Joint Committee*, *supra* note 88, (minutes of Aug. 24, 1977) (statements of Frank Gilkison, representing Maxon Corp.; Dick Nettleingham, representing Thunderbird Prod.).

[93]*See generally Joint Committee*, *supra* note 88, (minutes of July 25, 1977) (statements of every testifying manufacturer or manufacturer representative).

[94]*See* statements cited in note 89 *supra*.

[95]*See Joint Committee*, *supra* note 88, (minutes of Sept. 19, 1977). The statement of Mavis Walters, Ins. Serv. Office, provided in part: "[T]he increases in claim costs and/or claim frequency exceeded the general increase in inflation. For product liability insurance we know that both of these considerations were factors in the recent rate level increases . . . ." The statement of William F. Burfeind, American Ins. Ass'n provided in part: "Not only has the dollar value of products liability suits risen, but the number of suits and claims filed has multiplied . . . ." *See also* Note, *When the Product Ticks: Products Liability and Statutes of Limitation*, 11 IND. L. REV. 693, 694-99 (1978).

modifications to the tort laws which would, in effect, cut off claims that had been previously considered meritorious.[96] The Committee also heard testimony from a public interest group[97] and from organized labor,[98] both urging that there be no erosion of claimants' rights. In addition, two legal scholars in the area of tort law[99] attempted to explain the doctrines and defenses underlying the law of products liability to the Committee.

2. Codification of the Common-Law Strict Tort Doctrine.—a. Strict Tort and Warranty.—The chapter, as enacted, includes product liability actions brought under negligence and strict tort theories, but excludes alleged breach of warranty actions.[100] Professor Reed Dickerson urged the Select Committee to integrate the strict tort elements of section 402A of the *Restatement (Second) of Torts* into the Indiana version of article 2 of the Uniform Commercial Code (UCC)[101] so as to create a single strict liability theory to govern product liability actions.[102] His preference for warranty was based on the affirmative duty of the seller, under the UCC, to market a merchantable product in contrast to the judicially created doctrine of section 402A which emphasizes the negative consequences of selling a defective product. He advised the legislature to amend the Indiana version of the UCC, because, in his opinion, the judicial adoption of section 402A could be subject to a constitutional challenge as being an unlawful attempt by the courts to amend the UCC without legislative enactment.[103]

The Committee rejected Dickerson's proposal to promulgate a single strict product theory under the UCC, but the legislature did purport to legislatively enact the common law strict tort doctrine. Section 3 of the chapter states that it is a codification and restatement of the common law "with respect to strict liability in tort."[104]

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[96]*See, e.g., Joint Committee, supra* note 88, (minutes of July 25, 1977) (statements of testifying manufacturers and manufacturer's representatives); *id.* (Sept. 19, 1977) (statements of insurance industry representatives).

[97]*See Joint Committee, supra* note 88, (minutes of Aug. 24, 1977) (statement of Thomas Wathen, Indiana Pub. Interest Research Group).

[98]*See Joint Committee, supra* note 88, (minutes of Aug. 24, 1977) (statements of Willis Zagrovich, AFL-CIO; Buford Holt, UAW).

[99]*See Joint Committee, supra* note 88, (minutes of July 25, 1977) (statement of Professor Reed Dickerson, Indiana University School of Law); *id.* (minutes of July 8, 1977) (statement of John Vargo, Indianapolis attorney & lecturer).

[100]IND. CODE § 33-1-1.5-1 (Supp. 1978).

[101]IND. CODE §§ 26-1-1-101 to 26-1-2-725 (1976).

[102]*See Joint Committee, supra* note 88, (minutes of July 25, 1977) (discussion of Professor Dickerson's testimony and his proposed amendment to Indiana's Uniform Commercial Code).

[103]*Id.*

[104]IND. CODE § 33-1-1.5-3 (Supp. 1978).

Unresolved by the statute, however, is the status of another judicial theory which has evolved in Indiana as a hybird of tort and warranty. Under this theory, claims for personal injury and property damage from defective products under breach of warranty can be characterized to sound in tort.[105] In such actions, the usual UCC contract defenses of notice,[106] disclaimer,[107] limitation of remedy,[108] privity limitations,[109] and the four-years-from-date-of-sale statute of limitation[110] are no longer applicable.[111] The resulting action is so similar to the one brought under strict liability in tort that both are virtually congruent under the case law.[112] But, as will be discussed, the new products chapter departs significantly in a number of areas from the developed Indiana products liability common law. The question remains whether these new provisions are to govern "tort-warranties," or whether the warranty action exclusion in section 1 will continue to permit plaintiffs to bring actions with elements similar to "old 402A" under the warranty-sounding-in-tort theory. Although the latter result would appear inconsistent, the legislature could easily have clarified its intent by stating that the chapter was to exclude warranty actions *under the UCC*.[113] Its failure to do so would seem to make the issue litigable.

b. Duty to Bystanders?—Section 3 of the chapter,[114] purporting to codify and restate Indiana's common law with respect to strict liability in tort, tracks, with one important difference, section 402A of the *Restatement (Second) of Torts* which has been expressly adopted by the courts of this state.[115] Section 402A provides for protection to *any* user or consumer whose person or property is harmed

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[105]*See* Wright-Bachman, Inc. v. Hodnett, 235 Ind. 307, 133 N.E.2d 713 (1956); Fruehauf Trailer Div. v. Thornton, 366 N.E.2d 21 (Ind. Ct. App. 1977).

[106]IND. CODE § 26-1-2-607 (1976).

[107]*Id.* § 26-1-2-316.

[108]*Id.* § 26-1-2-719.

[109]*Id.* § 26-1-2-318.

[110]*Id.* § 26-1-2-715.

[111]*See* Greeno v. Clark Equip. Co., 237 F. Supp. 427, 429 (N.D. Ind. 1965); Fruehauf Trailer Div. v. Thornton, 366 N.E.2d 21, 27 (Ind. Ct. App. 1977).

[112]*See* Withers v. Sterling Drug, Inc., 319 F. Supp. 878, 883 (S.D. Ind. 1970); Greeno v. Clark Equip. Co., 237 F. Supp. 427, 431 (N.D. Ind. 1965).

[113]The *Digest* to a products liability bill, Ind. H.B. 1258 (1978) introduced into the General Assembly in February 1978 stated it "would not apply to breach of warranty actions, which are brought under the Uniform Commercial Code (IC 26-1)." Section one of the bill, however, excluded only actions "arising from or based upon any alleged breach of warranty."

[114]IND. CODE § 33-1-1.5-3 (Supp. 1978).

[115]*See* Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977); Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965); Cornette v. Searjeant Metal Prods., Inc., 147 Ind. App. 46, 258 N.E.2d 652 (1970).

by an unreasonably dangerous defect in a product; the chapter limits the protected class to those users and consumers who are in "the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition . . . ."[116] Use of the negligence term "reasonably foresee" in this strict tort context suggests that the class of injured users and consumers to be protected by this statute is to be delineated by reference to the manufacturer's conduct rather than the condition of his product. It would be difficult to find recent common law support for that proposition.

Nowhere in the chapter, however, is any provision made for the extension of protection to *bystanders* although Indiana case law has expressly developed that protection.[117] An early draft provision presented to the Select Joint Committee did not so limit the class of users and consumers to those reasonably foreseeable, but instead added the following clause: "(or to *any other person* or his property if that person is in the class of persons that the seller should reasonably foresee . . .)."[118] The following staff comment makes clear that the purpose of the added clause was to impose liability on the seller for injuries to bystanders: "Indiana courts, along with the courts of most other states, have extended the application of section 402A to bailors, lessors and bystanders."[119] The reasonable foreseeability provision as applied here to *bystanders* indicates judicial recognition that this class of potential plaintiffs may be far too large to include under strict liability without some appropriate foreseeability limitation.

Although the legislature is certainly empowered to reverse an expansive provision to one of vague limitation, its *stated* purpose in enacting this section was to restate and codify Indiana common law.[120] Because the new user-consumer limitation clause appears inconsistent with the common law, an ambiguity clearly exists.

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[116]IND. CODE § 33-1-1.5-3(a) (Supp. 1978).

[117]*See* Gilbert v. Stone City Constr. Co., 357 N.E.2d 738 (Ind. Ct. App. 1976). The court stated: "In Indiana bystanders 'whom the . . . supplier should reasonably foresee as being subject to the harm caused by the defect' may recover under § 402A for injuries caused by a defective product." *Id.* at 742 (quoting Chrysler v. Alumbaugh, 342 N.E.2d 908, 917 (Ind. Ct. App. 1976)).

[118]*See* Memorandum to members, Select Committee on Products Liability, Oct. 7, 1977, from John R. Molitor, Staff Attorney (attached product liability bill) (memorandum available from the Indiana Legislative Council, 301 State House, Indianapolis, Ind. 46204). This language (without the parentheses) was adopted by the Committee's bill drafting sub-committee. *See Joint Committee, supra* note 88, (minutes of Oct. 31, 1977) (attached proprosed bill—A Bill For An Act to Amend IC 26, § 2.(a)) [hereinafter cited as *Committee Final Draft*].

[119]*See* Memorandum, *supra* note 118, (attached product liability bill) (§ 7, staff comment).

[120]IND. CODE § 33-1-1.5-3 (Supp. 1978).

3. Definitions.—a. User or Consumer.—The chapter definition of "user or consumer" begins by including "a purchaser; any individual who uses or consumes the product . . . ."[121] The initial question raised is whether "a purchaser" is limited to one who actually uses or consumes the product, or does this definition also include a wholesaler or retailer who merely buys the product for resale. The resolution of this question is necessary not only to determine the extent of the protected class, but is also necessary to determine "the date of delivery of the product to the initial user or consumer,"[122] which is when the chapter's outer cutoff statute of limitations begins to run.

Comment l to section 402A makes clear that the persons covered are those who use or consume the product whether they acquired the product through purchase or in some other way, or whether they acquired the product "directly from the seller" or "acquired it through one or more *intermediate dealers.*"[123] Dealers are thus distinguished, in Comment l, from users or consumers.

Comment l also clearly states that a user may be one passively enjoying the benefit of the product "as in the case of passengers," or may be one who holds, prepares, or repairs a product for another.[124] The chapter definition does not address these perhaps marginal classes of user or consumer, although a Select Joint Committee final draft bill did.[125]

The chapter definition does, however, include as users or consumers "any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question."[126] What the legislature intended in this clause is far from clear. The source of the language appears to be a Massachusetts insurance industry sample statute.[127] That statute seems to be aimed

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[121] *Id.* § 33-1-1.5-2.

[122] *Id.* § 33-1-1.5-5.

[123] RESTATEMENT (SECOND) OF TORTS § 402A, Comment l (1965) (emphasis added).

[124] *Id.*

[125] *See Committee Final Draft, supra* note 118, § 2.

[126] IND. CODE § 33-1-1.5-2 (Supp. 1978).

[127] The sample statute provides:

> "User" shall include: a purchaser; any individual who uses or consumes the product; where the injured party is a minor or incompetent, anyone acting for or on behalf of such party; any employer or co-employee while acting within the scope of their employment, or any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question.

Sample Statute, Independent Ins. Agents of Mass., *reprinted in part in Product Liability Insurance: Hearings on S. 403 Before the Sub-Comm. for Consumers of the Senate Comm. on Commerce, Science and Transporation*, 95th Cong., 1st Sess. at 475 [hereinafter cited as *S. 403 Hearings*].

at permitting employees, co-employees, and persons similarily situated, who have possession and control of products, to maintain product liability actions, presumably for purposes of indemnification, against product manufacturers if an employee is injured by a defect in the product. One can only speculate how the courts will interpret the Indiana version of this provision since even the more complete Massachusetts definition is murky.

b. Products Liability Action.—Section 2 of the chapter lists the injuries for which product liability actions may be brought: "[P]ersonal injury, disability, disease, death or property damage."[128] It then sets out the types of defects which may be alleged to have caused the harm: "[M]anufacture, construction or design of any product."[129] Notably absent from the defect class is the failure to warn or give adequate instructions.[130] Comment j to section 402A imposes a duty on the seller to warn of dangers not "generally known and recognized."[131] Failure to warn of latent defects is fully recognized in Indiana case law as a defect under strict tort and as a breach of duty under negligence.[132] Although this section of the statute is written inclusively, the omission by the legislature of the warning defect must be given some weight. Plaintiffs may now find it expedient to bring warning cases under a warranty theory or argue that a failure to warn or give adequate instructions is a design defect.

c. Physical harm.—A number of injuries to be covered by the chapter are listed under the definition of product liability action.[133] Two of these, "disease" and "disability" are omitted from a list of

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[128]IND. CODE § 33-1-1.5-1 (Supp. 1978).

[129]*Id.*

[130]For a statute which specifically includes failure to warn or instruct, *see* UTAH CODE ANN. § 78-15-3 (1977). The actions subject to the statute are: "(a) Breach of any implied warranties; (b) Defects in design, inspection, testing or manufacture; (c) *Failure to warn;* (d) *Failure to properly instruct in the use of a product;* or (e) Any other alleged defect or failure of whatsoever kind or nature in relation to a product." *Id.* (emphasis added). Although this section prohibits bringing these actions after the repose periods, it does recognize that failure to warn and properly instruct are grounds for timely products liability actions on a par with defective design or manufacture.

See also Sample Statute, American Ins. Ass'n, *reprinted in part in S. 403 Hearings, supra* note 127, at 471, which provides: " 'Products liability action' shall include all actions brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formula, preparation, assembly, testing, warning, instructing, marketing, packaging or labeling of any product."

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

[132]*See* Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965); Gilbert v. Stone City Constr. Co., 357 N.E.2d 738 (Ind. Ct. App. 1978); Nissen Trampoline Co. v. Terre Haute First Nat'l Bank, 332 N.E.2d 820 (Ind. Ct. App. 1975).

[133]IND. CODE § 33-1-1.5-2 (Supp. 1978).

"physical harms" under the definition of that term.[134] Both the physical harm and product liability action definitions are written inclusively so that where the plain sense of physical harm clearly includes disease and disability a court is likely to include them.

Perhaps more serious, however, is the listing of loss of services as a physical harm, but not as a product liability action.[135] The omission is not so readily remedied by a plain sense understanding of what is a "products liability action." Although section 3 of the chapter makes a seller liable for physical harm,[136] it might be argued that section 3 should not be applied to an action for loss of services inasmuch as that injury does not, under the statutory definition, lead to a product liability action.

d. Seller.—Section 2 includes "manufacturer, a wholesaler, a retail dealer or a distributor."[137] Unlike Comment f to section 402A, section 2 does not include the operator of a restaurant or a seller of services who also sells some goods on the premises. The chapter definition also does not specifically exclude, as does Comment f, the casual seller and the seller who sells "out of the usual course of business."[138] The status of these additional and omitted classifications will presumably be left to Indiana case law.

3. Defenses.—Although section 1 states that the chapter is applicable to both negligence and strict liability in tort, section 4 purports to list defenses applicable only to strict tort actions[139] with burden of proof to be placed on the defendant.[140] Presumably common law defenses will continue to apply to claims brought under a negligence theory.

a. Assumption of Risk (Incurred Risk).—The first defense listed is section 4(b)(1): "It is a defense that the user or consumer discovered the defect and was aware of the danger and nevertheless proceeded unreasonably to make use of the product and was injured by it."[141] This language does not include all of the elements required under any traditional approach to assumption of risk. The language does, however, seem to be an attempt to follow the language contained in Comment n of section 402A.[142] Absent is any mention of the

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[134] *Id.*

[135] *Id.*

[136] *Id.* § 33-1-1.5-3.

[137] *Id.* § 33-1-1.5-2.

[138] RESTATEMENT (SECOND) OF TORTS § 402A, Comment f (1965).

[139] IND. CODE § 33-1-1.5-4 (Supp. 1978).

[140] *Id.* § 33-1-1.5-4(a) states: "The defenses in this chapter are defenses to actions in strict liability in tort. The burden of proof of any defense raised in a product liability action is on the party raising the defense."

[141] *Id.* § 33-1-1.5-4(b)(1).

[142] Comment n is set forth in note 27 *supra.*

elements of understanding, appreciation, and voluntariness.[143] In addition, there is no mention of whether a subjective or objective test will be used to determine the plaintiff's awareness of the danger. The phrase "unreasonably to make use of the product" may indicate an attempt by the drafters to include only the "overlap" area of contributory negligence and assumption of risk, *i.e.*, where the defendant has breached a duty and the plaintiff assumes an unreasonable risk, as discussed in *Kroger Co. v. Haun*.[144] Also significant is the absence of any mention of "reasonable assumption of risk" as a defense.[145] Only future litigation can resolve the question of what actually constitutes a defense under section 4(b)(1). A reasonable construction, in light of section 3's statement that the common law of strict liability is being codified, would be that past case law is applicable in interpreting section 4. Thus, it would follow that assumption of risk, as described in *Haun*, would be applicable to section 4.

b. Misuse.—"Nonforeseeable misuse" of the product is considered a defense under section 4(b)(2).[146] The word "nonforeseeable" indicates that, if the plaintiff's misuse were foreseeable,[147] there would be no bar to his recovery. This result seems to comply with traditional foreseeability concepts.[148] The misuse section also states

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[143]Assumption of risk traditionally has required the elements of knowledge, understanding, appreciation, and voluntariness. *See* Vargo, supra note 67, at 893.

[144]379 N.E.2d 1004 (Ind. Ct. App. 1978). *See* notes 10-32 *supra* and accompanying text.

[145]*See* notes 28-32 *supra* and accompanying text.

[146]IND. CODE § 33-1-1.5-4(b)(2) (Supp. 1978) states:

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

[147]For purposes of contrast, note the following sample statute which does not incorporate foreseeability concepts into the definition of misuse: "A manufacturer of a product . . . shall not be liable for damages . . . sustained by reason of an alleged defective condition in such product, if the allegedly defective condition of such product was due to the alteration, modification or misuse of such product, subsequent to its manufacture or sale." Sample Statute, Independent Ins. Agents of Mass., *reprinted in part in S. 403 Hearings*, *supra* note 127, at 478.

[148]*See* Zahora v. Harnischfeger Corp., 404 F.2d 172, 177 (7th Cir. 1968); Elder v. Fisher, 247 Ind. 598, 605-06, 217 N.E.2d 847, 852 (1966); Dreibelbis v. Bennett, 162 Ind. App. 414, 420-21, 319 N.E.2d 634, 638 (1974); Dudley Sports Co. v. Schmitt, 151 Ind. App. 217, 229, 279 N.E.2d 266, 267 (1972). In Sills v. Massey-Ferguson, Inc., 296 F. Supp. 776, 778 (S.D. Ind. 1969), the court came very close to stating that misuse, when foreseeable, is not a defense. The court stated: "In essence, defendant contends that the injury arose from the use of the mower and not from any negligence on the part of defendant or defect in the product . . . ." *Id.* at 778. The court then stated that

that, if there is harm caused jointly by a defect in the product and "misuse" by someone other than the claimant/user, then the concurrent acts of the third party will not bar the user from recovery, but only the third party.[149] Absent from the language of section 4(b)(2) is any proximate cause language requiring that the misuse of the third party be a "substantial factor" of the injury.[150] Thus, another litigable issue is raised by the statute.

The language of section 4(b)(2), concerning concurrent acts of third parties, is apparently directed at certain employment situations in which an employee is injured by a manufacturer's defective product.[151] Because of the workmen's compensation statute, the employer must pay compensatory benefits to the injured employee. If the employee fails to bring his own action against the manufacturer of the defective product within two years of his injury, the manufacturer may under the workmens compensation statute bring an action either in the employee's name apparently as a subrogee or in his own name as a direct claimant. Section 4(b)(2) would appear to bar such employer actions where the employer's misuse of the product was a concurrent cause of the employee's injury.

On the other hand, if the employee does bring his action timely and recovers, the workmen's compensation statute gives the employer a lien to the extent of his workmen's compensation benefits against the employee's judgment or settlement. In this

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foreseeable intervening acts did not alter a finding of proximate cause. *Id. But see* Latimer v. General Motors Corp., 535 F.2d 1020 (7th Cir. 1976). The court stated: "In essence, the plaintiff attempts to graft onto his theory of strict liability an element of foreseeability. Latimer asserts that a manufacturer should anticipate a 'misuse' of the product and design safeguards against that contingency. Such is not the law." *Id.* at 1024. The court cited Schemel v. General Motors Corp., 384 F.2d 802 (7th Cir. 1967) for the proposition that "a manufacturer is under no obligation to foresee and to guard against a danger that results from a misuse of the product." 535 F.2d at 1024.

But in Huff v. White Motor Corp., 565 F.2d 104, 109 (7th Cir. 1977), the court held motor vehicle manufacturers have a duty to anticipate and take precautions against reasonably foreseeable risks in the use of their products. The *Huff* holding could be read as limited to enhanced injury cases, yet the court took pains to state its view that Indiana courts are now guided by broad policy considerations expanding protection to consumers. Clearly, certain foreseeable misuses will not bar plaintiff's recovery if the manufacturer's *intended use is too narrow*. "Thus, to say that collisions are not within their 'intended purpose' is unrealistic. This view narrowly refuses to include the obvious risks against which a manufacturer can take precautions." *Id.* On the other hand, the *Huff* court would not rule out all foreseeable misuse defenses. "*Schemel* actually dealt with a misuse of the vehicle and analytically is not apposite." *Id.*

[149]IND. CODE § 33-1-1-.5-4(b)(2) (Supp. 1978).

[150]"Substantial factor" seems to be the required element of proximate cause. *See* RESTATEMENT (SECOND) OF TORTS §431 (1965).

[151]*See* Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 Mercer L. Rev. 373, 389 (1978).

case, the employer would appear to be neither a subrogee or claimant but a lienholder, and section 4(b)(2) would seem not to operate to bar his recovery even if he were a concurrent misuser.[152]

c. Modification or Alteration.—Section 4(b)(3) of the chapter states that any "nonforeseeable" alteration or modification which proximately causes physical harm is a defense.[153] As stated previously, section 4 places the burden of proving a defense on the defendant. Thus, the defendant must prove modification or alteration of the product, *and* that such modification or alteration was the proximate cause of plaintiff's harm. The "nonforeseeability" language suggests, if such modification or alteration were foreseeable and even though it were the sole cause of plaintiff's injury, there would be no bar to plaintiff's recovery. Although Comment p of section 402A takes no stand concerning "substantial change" in the product after it leaves the seller's hands, it does state that not all changes in the product will bar a plaintiff's recovery.[154] Prior Indiana decisions dealing with this issue have been consistent with the *Restatement*.[155] Thus, if the nonforeseeability language of section 4(b)(3) is an attempt to follow either Comment p of section 402A or past Indiana decisions, not all modifications or alterations would bar a plaintiff's recovery.

d. State of the Art.—Section 4(b)(4) provides a defense when "the methods, standards, or techniques of designing and manufacturing the product were prepared and applied in conformity with the generally recognized state of the art at the time the product was designed or manufactured."[156] If the term "generally recognized"

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[152]*See* IND. CODE § 22-3-2-13 (1976). Where the employer or his carrier pays out workmen's compensation payments to the employee and the employee is awarded judgment against a third party, IND. CODE § 22-3-2-13 (1976), provides that the employer "shall have a lien upon any settlement, judgment or fund out of which such employee might be compensated from the third party."

[153]*Id.* § 33-1-1.5-4(b)(3) (Supp. 1978) states: "It is a defense that a cause of the physical harm is a nonforeseeable modification or alteration of the product made by any person after its delivery to the initial user or consumer if such modification or alteration is the proximate cause of physical harm."

[154]RESTATEMENT (SECOND) OF TORTS § 402A, Comment p (1965), states in part:

> 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, undergo further processing or other substantial change after it leaves his hands and before it reaches those of the ultimate user or consumer.
>
> It seems reasonbly clear 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 under the rule stated in this Section.

[155]*See, e.g.*, Cornette v. Searjeant Metal Prods., Inc., 147 Ind. App. 46, 55-67, 258 N.E.2d 652, 657-65 (1970) (Sharp, J., concurring).

[156]IND. CODE § 33-1-1.5-4(b)(4) (Supp. 1978).

refers to actual industry practices in use at the time of design or manufacture, the provision would conflict with the generally accepted view that state of the art is only to be judged by what is scientifically and economically feasible, not by comparison with general industry custom.[157] The underlying policy for the more stringent test was established in the famous negligence case, *The T.J. Hooper*,[158] where judicial distrust was expressed for allowing any industry to internally establish its own standard of conduct.

Another troublesome problem is suggested by the statute's measuring of the state of the art "at the time the product was designed and manufactured."[159] Because design invariably proceeds manufacture, this language would appear to require the judging of a product's conformity to a state of art in existence when the original design was prepared. Insofar as products manufactured today are fashioned from old designs, the manufacturer's liability could be measured by an antiquated standard. This provision in section 4(b)(4) can operate only as an incentive for manufacturers to retain obsolete designs with obsolete safety features. Under the generally accepted view, the "state of the art" is measured by evidence of what the manufacturer could *feasibly* design or manufacture *at the time of the plaintiff's injury or at the time of trial.*[160]

4. Statute of Limitations.—On its face, section 5, providing for a limitations statute to govern the products liability actions covered by the chapter, appears to broaden greatly the time frame within which a plaintiff might bring an action: "[A]ny product liability action must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer . . . ."[161] The use of the disjunctive would seem to grant plaintiff an option to pursue his relief within two years of his injury or within ten years of the product's delivery. Although the legislature is clearly empowered to increase the time in which a plaintiff may bring an action, such legislative intent is sure to be questioned inasmuch as the purpose of product liability statutes is to address the problems resulting from the soaring cost of liability insurance.[162]

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[157]*See generally* Phillips, *The Standard for Determining Defectiveness in Products Liability*, U. CIN. L. REV. 101, 112-18 (1977).

[158]60 F.2d 737, 740 (2d Cir. 1932).

[159]*Compare*, IND. CODE § 33-1-1.5-4(b)(4) (Supp. 1978) *with* Sample Statute, Independent Ins. Agents of Mass., *reprinted in S.403 Hearings*, *supra* note 127, at 475. The sample statue provides a defense only if "the product was designed in accordance with the state of the art *existing at the time the manufacturer . . . parted with possession and control or sold it which ever occurred last.*" *Id.* (emphasis added).

[160]*See* Keeton, *supra* note 59, at 38-39; Phillips, *supra* note 157, at 115-18.

[161]IND. CODE § 33-1-1.5-5 (Supp. 1978).

[162]*See* notes 88-96 *supra* and accompanying text.

Reference to House Bill No. 1258 reveals language similar to the enacted bill, with the exception that the two limitation provisions are joined with the word "and" rather than "or."[163] Although the legislature in conference committee might have chosen a completely opposite course to that introduced in the House, such an analysis would find the clause following, "initial user or consumer," to be mere surplusage. This clause states: "[E]xcept that, if the cause of action accrues more than eight (8) years but not more than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues."[164] Unless the ten-year period was intended to be an outer cutoff, there would be no need to state again that the plaintiff has two years in which to bring his action if his injury occurs during the ninth or tenth year of the life of the product. The purpose of this clause is clearly to insure that all plaintiffs injured within ten years of delivery will, nevertheless, have a full two years to file a claim.

As we noted in the discussion of the definition of user or consumer,[165] there is some question whether the delivery referred to in section 5 refers to the delivery to the initial purchaser, who may be merely a reseller, or whether the statute is to run only when the product is delivered to one who *actually* uses or consumes it.[166] Delivery to the latter can occur in some cases several years after delivery to the former.[167]

Assuming that the ten-year limitation is an outer cutoff provision, it is clear that its effect will be to cut off claims of some plaintiffs before they are injured, that is, before their causes of action

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[163]Ind. H.B. 1258 § 5 (1978).

[164]IND. CODE § 33-1-1.5-5 (Supp. 1978).

[165]*Id.* § 33-1-1.5-2. *See* notes 121-23 *supra* and accompanying text.

[166]The following enacted and proposed repose provisions suggest examples of acts which may cause the limitation statutes to begin running: (1) Sample Statutes American Ins. Ass'n, *reprinted in part in S. 403 Hearings, supra* note 127, at 472 ("no later than eight (8) years after the manufacture[r] of the final product parted with its possession and control, or sold it, whichever occurred last . . . ."); (2) Sample Statute, American Mut. Ins. Alliance, *id.* (" ____ years after the product was first sold to any person not engaged in the business of selling the product."); (3) FLA. STAT. ANN. §§ 95.031(2), 95.11(3) (West Supp. 1978) ("within 12 years after the date of delivery of the completed product to its original purchaser . . . ."); (4) UTAH CODE ANN. § 78-15-3 (1977) ("six years after the date of initial purchase for use or consumption, or ten years after the date of manufacture . . . ."). The Utah statute provides a separate longer cutoff period for manufacturers so that retailers, against whom users and consumers are awarded judgment after the six-year period has run, will still have four years in which to seek indemnification from the manufacturer.

[167]"Some products such as ammunition, nails and the like have unlimited shelf lives and may remain unsold in the retailer's hands for several years." Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations*, 56 N.C. L. REV. 663, 671 n.38 (1978).

accrue. Such departure from traditional tort doctrine has been criticized as "inequitable, perhaps unconstitutional and probably unnecessary."[168] Proposals to rebalance the equities through enactment of exceptions have been analyzed as unworkable since "application of the rule will be so irregular as to be arbitrary."[169]

The constitutionality of repose statutes, as these outer cutoff limitations have been characterized, has been challenged in other jurisdictions under state and federal equal protection clauses[170] and clauses in state constitutions guaranteeing a remedy for every injury.[171] Under the former, the class of architects and builders has

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[168]Note, *supra* note 95, at 725. After analysis of the available data, the Note concludes that, although a general economic crisis may not yet have arisen, a serious problem faces many sellers because of escalating insurance premiums. Repose statutes, however, present probably the least desirable approach. The Note suggests that consideration be given first to improved insurance delivery mechanisms, reform of tax law to permit deductions for self insurance reserves, governmental encouragement of increased emphasis on safety systems, promulgation of improved benefit schedules for workmen's compensation claims in exchange for providing that it be established as the sole remedy for injured workers, and use of rebuttable presumptions based on determinations of a product's useful life. If new tort law defenses must then be considered, "state of the art," "misuse," and "later modification" defenses are to be preferred to repose statutes and will cut off most of the same claims.

[169]Phillips, *supra* note 167, at 666. The author suggests that legislatures will wish to modify repose statutes to soften inequitable and inconsistent side effects. The author concludes that the many necessary modifications will destroy the vitality of what was an ill-considered approach in the first place. He notes problems in dealing with continuing duties, subsequently arising duties, cumulative injuries, warranties extending to future performance, contribution and indemnity, fraudulent concealment, wrongful death, and persons under a disability.

[170]*See* Fujioka v. Kam, 514 P.2d 568, 571-78 (Haw. 1973) (finding owner of property denied equal protection of laws because architect and engineer granted immunity under Hawaii's repose statute); Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 384, 225 N.W.2d 454, 455 (1975) (holding repose statute granting architects and builders immunity "denies other possible defendants equal protection of the laws, under the constitution of the United States"). *But see* Skinner v. Anderson, 38 Ill. 2d 455, 459, 231 N.E.2d 588, 590 (1967) (holding architect-contractor repose statute violative of state constitutional prohibition against awarding privileges or immunities); Rosenberg v. Town of North Bergen, 61 N.J. 190, 201, 293 A.2d 662, 668 (1972) (holding the classification of defendants in its design-construction repose statute was not so restricted or unreasonable as to deny others equal protection guaranteed by the state constitution); Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co., 81 Wash. 2d 528, 532, 503 P.2d 108, 111 (1972) (holding construction repose statute not violative of state or federal equal protection guarantees because "the Washington provision is not limited as to vocation").

[171]In Kallas Millwork Corp. v. Square D Co., 66 Wis.2d 382, 384, 225 N.W.2d 454, 455 (1975), the architect-builder repose statute was held unconstitutional under art. 1, sec. 9 of the Wisconsin Constitution because it "deprives a plaintiff of a remedy for a wrong that is recognized by the laws of the state," although the court did not rest its decision "on that aspect of possible unconstitutionality." *Id.* at 393, 225 N.W.2d at 460. In Joseph v. Burns, 260 Or. 493, 491 P.2d 203 (1971), the Oregon statute barring tort

been held to be an unreasonable legislative classification denying equal protection to owners and materialmen.[172] Under the latter theory, plaintiffs barred before the accrual of their actions are denied a remedy guaranteed to all injured parties by the state constitution.[173]

Analogizing to the products field, it might be argued that the protection of sellers by repose statutes denies third-party owners of products and premises an equal protection. As for denying injured plaintiffs a remedy, the Indiana Constitution states: "[E]very man, for injury done to him in his person, property or reputation, shall have remedy by due course of law."[174]

Courts have split on the equal protection issue.[175] One court, that found such a violation in repose statutes, stated that had it not so found it could nevertheless have grounded plaintiff's relief on an unconstitutional denial of remedy.[176] A court, which found no equal protection violation because it found the architect-builder classification reasonable, held also that plaintiff was entitled to no remedy inasmuch as the respose statute *prevented her cause from ever arising.*[177]

Another constitutional issue is raised by the following language in 5: "This section applies to all persons regardless of minority or legal disability. Notwithstanding Indiana Code section 34-1-2-5, any product liability action must be commenced . . . ."[178] Indiana Code section 34-1-2-5 provides that any person "may bring his action within two (2) years after the disability is removed."[179] Clearly, some plaintiffs under a disability may be barred under the statute before the removal of the disability, thus, perhaps, denying them due process or a state created remedy. In *Chaffin v. Nicosia*,[180] the Indiana Supreme Court rejected an equal protection argument that the 1941

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actions after ten years from the act or omission complained of was upheld as not violative of the states' constitutional guarantee of a remedy for injury. "It is a permissible constitutional legislative function to balance the possibility of outlawing legitimate claims against the public need [so that] there be an end to potential litigation." *Id.* at 503, 491 P.2d at 208.

[172]Skinner v. Anderson, 38 Ill. 2d 455, 460, 231 N.E.2d 588, 590 (1967); Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 389-91, 225 N.W.2d 454, 458-59 (1975).

[173]Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 384, 255 N.W.2d 454, 455 (1975).

[174]IND. CONST. art. 1, § 12.

[175]*See* note 170 *supra.*

[176]Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 393, 225 N.W.2d 454, 460 (1975).

[177]Rosenberg v. Town of North Bergen, 61 N.J. 190, 199, 293 A.2d 662, 667 (1972).

[178]IND. CODE § 33-1-1.5-5 (Supp. 1978).

[179]*Id.* § 34-1-2-5 (1976).

[180]310 N.E.2d 867 (Ind. 1974).

Indiana malpractice limitation statute created on its face an unreasonable classification favoring medical practioners because it purported to cut off all claims, "unless said action is filed within two (2) years from the date of the act, omission or neglect complained of."[181] The court did hold, overruling a prior case,[182] that interpreting the limitation as a repose statute would create an absurd result, and decided that the disability removal statute, Indiana Code section 34-1-2-5 provides a grace period coming

> into play . . . after the medical malpractice statute has run . . . . To construe the medical malpractice statute as a legislative bar on all malpractice actions under all circumstances unless commenced within two years from the act complained of (discoverable or otherwise) would raise substantial questions under Article 1, § 12 guarantee of open courts and redress for injury to every man, not to mention the offense to lay concepts of justice.[183]

Although section 5 of the chapter seeks to prevent the courts from construing this provision as anything but a repose statute, such legislative action would appear to invite a direct constitutional challenge under article 1, section 12.[184]

One writer, when considering the repose cutoff of persons under disability, found their plight "little different from that of the competent person who is unable to assert a claim during the statutory period because an injury has not yet occured . . . ; there is no reason to favor one situation over the other. The comparison points up the lack of wisdom of an outer cutoff approach."[185]

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[181]IND. CODE § 34-4-19-1 (1976).

[182]Burd v. McCullough, 217 F.2d 159 (7th Cir. 1954), which held the medical malpractice statute and the legal disability statute were inconsistent and the former, therefore, repealed the latter. In *Chaffin*, the court said of this holding: "Of course, federal cases interpreting state law are merely persuasive . . . we do not deem them controlling on questions of Indiana law." 310 N.E.2d at 870.

[183]310 N.E.2d at 870.

[184]IND. CONST. art. 1, § 12. *See also* IND. CODE § 16-915-3-1 (1976). This special statute of limitations for minors under the Indiana Medical Malpractice Act of 1975 also applies to "all persons regardless of minority or other legal disability," although it also provides an injured child under six will have until its eighth birthday in which to file. This provision, therefore, appears subject to the same constitutional challenge as the new product liability statute of limitations.

One difference between the malpractice and the product liability limitation should be noted. The former may cut off undiscovered claims or claims not brought timely by guardians or other persons empowered to act for minors, but presumably the plaintiff will have suffered some actionable harm at the time of the medical procedure. Under the latter, no action may be even theoretically possible because the statute may have run before the party is injured.

[185]Phillips, *supra* note 167, at 672.

8. Constitutionality of the Product Liability Chapter.—Public Law 141 was enacted "to amend [Indiana Code title] 33 concerning courts and court officers and product liability."[186] The first twenty-seven sections of the Act are concerned with courts and court officers, the twenty-eighth with product liability.[187]

Article 4, section 19, of the Indiana Constitution states: "Subject matter of acts.—An act, except an act for the codification, revision or rearrangement of laws, shall be confined to one [1] subject and matters properly connected therewith."[188] It would be difficult to construe any reasonable connection between *courts* and *product liability* so as to justify their inclusion under a single title.

In *State ex rel. Pearcy v. Criminal Court*,[189] an entire amendatory act was held void because it was found to embrace two subjects expressed in the title.[190] Clearly both the court provisions and the product liability chapter of public law 141 are subject to strong constitutional challenge. Although it might be argued that the Act's severability clause[191] might save one set of provisions if the other were successfully challenged, it seems clear that a finding of more than one subject in an act will at once void the act in toto.[192] Until a constitutional challenge is successfully consumated, however, the product liability chapter remains Indiana law.

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[186]Act of Mar. 10, 1978, Pub. L. No. 141, 1978 Ind. Acts 1298.

[187]*Id.*

[188]IND. CONST. art. 4, § 19 (1851) (amended 1960 & 1974).

[189]262 Ind. 9, 274 N.E.2d 519 (1971).

[190]*Pearcy* was decided prior to the 1974 amendment. Under the provision of IND. CONST. art. 4, § 19, in force at that time, where more than one subject was embraced in the act itself, but only one subject was expressed in the act's title, "such act, amendatory act or amendment of a code shall be void only as to so much thereof as shall not be expressed in the title." In *Pearcy*, however, the amendatory act's title, as well as the act itself, embraced two subjects. The court cited Jackson v. State, 194 Ind. 248, 142 N.E. 423 (1924) for authority to void the act in toto. 262 Ind. at 17, 274 N.E.2d at 523. The *Jackson* court had pointed out the impossibility of choosing between the subjects. 194 Ind. at 249, 142 N.E. at 426. One sentence from the original act was also challenged in *Pearcy* as foreign to the original title. That sentence alone was declared void. 262 Ind. at 18, 274 N.E.2d at 523. It was argued in *Pearcy* that the Act should be excepted under art. 4, § 19 because it purported to amend a code — the 1971 IND. CODE. The court held that the 1971 IND. CODE was not a code within the meaning of art. 4, § 19, but was rather a compilation. The court held that the 1971 IND. CODE was void inasmuch as it embraced various subjects, but that each act and amendatory act assembled under it would remain in effect although subject to attack under art. 4, § 19 if it was found to embrace more than one subject. 262 Ind. at 16, 274 N.E.2d at 522.

[191]IND. CODE § 33-1-1.5-7 (Supp. 1978).

[192]IND. CONST. art. 4, § 19 (1851) (amended 1960 & 1974) eliminates the earlier title requirement. An act is to be confined to "one [1] subject and matters properly connected therewith." This requirement would appear to apply directly to Public Law 141 unless it can be argued successfully that amendatory acts such as Public Law 141 are "revisions" within the meaning of the exception: "codification, revision or rearrange-

9. Indemnity.—Section 6 of the chapter states: "Nothing contained herein shall affect the right of any person found liable to seek and obtain indemnity from any other person whose actual fault caused a product to be defective."[193] This language probably conforms to past Indiana decisions concerning indemnity. For example, in *McClish v. Niagara Machine & Tool Works*,[194] the court reviewed Indiana law concerning the circumstances under which indemnity would be allowed. The *McClish* court stated as the general rule that, absent an express or implied contract, there was no right to indemnity or contribution among joint tortfeasors.[195] The court recognized, however, certain exceptions to the general rule: (1) Derivative liability—in which a principal or employer is held liable under the doctrine of respondeat superior; (2) constructive liability—in which one is held liable to a third person by operation of some special statute or rule of law which imposes a non-delegable duty upon one who is otherwise without fault; and (3) defective products—in which a supplier sells a defective product to a merchant who either does not know nor should have known of the defect in the product, and, thereafter, the merchant sells the product to the ultimate user who is injured by the defective product; under such circumstances, if the user recovers against the merchant, the supplier is liable to the merchant for those damages.[196] A later extension of *McClish* held that if the plaintiff, in addition to strict liability, alleges negligence on the part of the defendant, the defendant does not have an indemnity action against the supplier since the defendant is considered a joint tortfeasor.[197] Whether section 6's language conforms to prior Indiana common law is a question open to interpretation by the courts.

10. Conclusion.—In attempting to deal with the serious economic problems raised by soaring product liability insurance premiums, the Indiana General Assembly has enacted a remedial statute marked by ambiguities, opaque definitions, incompleteness, inconsistencies, inequities, provisions subject to likely constitutional challenge, a general violation of the state constitution's one subject rule, and general evidence of very hasty draftmanship. The authors have sought to identify the chief problem areas, but certainly the overwhelming task of rationalizing this legislation and harmonizing

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ment of laws" set forth in art. 4 § 19. "Revision" in this context, however, should be construed to have a specific meaning: "A revision contemplates a redrafting and simplification of the entire body of statute law . . . ." 82 C.J.S *Statutes* § 271 (1953). Accordingly, revision must be distinguished from an amendment.

[193]IND. CODE § 33-1-1.5-6 (Supp. 1978).

[194]266 F. Supp. 987 (S.D. Ind. 1967).

[195]*Id.* at 989.

[196]*Id.* at 989-92.

[197]Wicks v. Ford Motor Co., 421 F. Supp. 104, 106 (N.D. Ind. 1976).

it with existing common law doctrines will be left to the judiciary. Inasmuch as a substantial part of insurance premium cost has been identified as arising out of the expense, delay, and uncertainty, of the tort litigation system, the legislature appears to have added a substantial load to this aspect of the problem instead of ameliorating it.

APPENDIX A

TITLE 33

COURTS AND COURT OFFICERS

ARTICLE 1. GENERAL PROVISIONS

ch. 1.5. Product Liability.

33-1-1.5-1 Application of chapter

Sec. 1. This chapter shall govern all products liability actions, including those in which the theory of liability is negligence or strict liability in tort; provided however, that this chapter does not apply to actions arising from or based upon any alleged breach of warranty.

33-1-1.5-2 Definitions

Sec. 2. As used in this chapter:

"User or consumer" shall include: a purchaser; any individual who uses or consumes the product; or any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question.

"Product liability action" shall include all actions brought for or on account of personal injury, disability, disease, death or property damage caused by, or resulting from, the manufacture, construction or design of any product.

"Physical harm" includes bodily injury, death, loss of services, and rights arising therefrom, as well as damage to property.

"Seller" includes a manufacturer, a wholesaler, a retail dealer or a distributor.

33-1-1.5-3 Codification and restatement of strict liability in tort

Sec. 3. Codification and Restatement of Strict Liability in Tort. The common law of this state with respect to strict liability in tort is codified and restated as follows:

(a) One who sells any product in a defective condition unreasonably dangerous to any user or consumer or to his property is subject to liability for physical harm thereby caused to the user or consumer or to his property if that user or consumer is in the

class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition, and, if:

(1) the seller is engaged in the business of selling such a product, and

(2) the product is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(b) The rule stated in Subsection (a) applies although

(1) the seller has exercised all possible care in the preparation and sale of his product, and

(2) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

33-1-1.5-4 Defenses to strict liability in tort

Sec. 4. Defenses to Strict Liability in Tort.

(a) The defenses in this chapter are defenses to actions in strict liability in tort. The burden of proof of any defense raised in a product liability action is on the party raising the defense.

(b) With respect to any product liability action based on strict liability in tort:

(1) It is a defense that the user or consumer discovered the defect and was aware of the danger and nevertheless proceeded unreasonably to make use of the product and was injured by it.

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

(3) It is a defense that a cause of the physical harm is a nonforeseeable modification or alteration of the product made by any person after its delivery to the initial user or consumer if such modification or alteration is the proximate cause of physical harm.

(4) Whenever the physical harm is caused by the plan or design of the product, it is a defense that the methods, standards, or techniques of designing and manufacturing the product were prepared and applied in conformity with the generally recognized state of the art at the time the product was designed or manufactured.

33-1-1.5-5 Statute of limitations

Sec. 5. Statute of Limitations. This section applies to all persons regardless of minority or legal disability. Notwithstanding IC 34-1-2-5, any 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 except that, if the cause of action accrues more than eight (8) years but not more than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

33-1-1.5-6 Indemnity

Sec. 6. Indemnity. Nothing contained herein shall affect the right of any person found liable to seek and obtain indemnity from any other person whose actual fault caused a product to be defective.

33-1-1.5-7 Severability

Sec. 7. If a provision of this act or its application to a person or circumstances is held invalid, the invalidity does not affect other provisions or applications, and to this end the provisions of this act are severable.

33-1-1.5-8 Effective date; saving clause

Sec. 8. (a) Because an emergency exists, IC 33-1-1.5 takes effect June 1, 1978.

(b) IC 33-1-1.5 does not apply to a cause of action that accrues before June 1, 1978.

XIII. Professional Responsibility*

A. Lawyer Advertising

In response to the United States Supreme Court's decision in *Bates v. State Bar*,[1] which declared the Arizona ban against lawyer advertising to be a violation of the first amendment, the Indiana Supreme Court revised Canon 2 of the Code of Professional Responsibility.[2] The revisions, which became effective January 1, 1978,

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*For a discussion of attorney-client privilege, see Harvey, *Civil Procedure and Jurisdiction, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 42, 51-52 (1978).

[1]433 U.S. 350 (1977) (5-4 decision). For a discussion of this decision and its effect on lawyer advertising, see Kelso, *Professional Responsibility, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 219, 219-22 (1977).

[2]1978 IND. CT. R. 335. The Indiana Code of Professional Responsibility, adopted in 1971, [hereinafter cited as the Code of Professional Responsibility or the Code] follows the American Bar Association Code of Professional Responsibility.

The Code contains Ethical Considerations [hereinafter referred to as ECs] representing the objectives toward which every member of the profession should strive, and Disciplinary Rules [hereinafter referred to as DRs], mandatory in character, that state the minimum level of conduct below which no lawyer can fall without becoming subject to disciplinary action.