Indiana's Obvious Danger Rule for Products Liability

I. Introduction

Abundant Indiana authority supports the proposition that a manufacturer has a duty to guard or warn a consumer or user of concealed dangers.[1] When stating that position in *J. I. Case Co. v. Sandefur*,[2] the Indiana Supreme Court cited *Campo v. Scofield*[3] to caution that this duty does not impose absolute liability on the manufacturer for every accident in which its product is involved. "On the other hand, there must be reasonable freedom and protection for the manufacturer. He is not an insurer against accident and is not obligated to produce only accident-proof machines. The emphasis is on the duty to avoid hidden defects or concealed dangers."[4] The court found that the harm to Sandefur was caused by a latent defect in the design of a farm auger manufactured by defendant and affirmed liability under a negligence theory.[5]

Significantly, the *Sandefur* court did not adopt from *Campo* the entire latent defect rule, or obvious danger exception, which includes: "Accordingly, if a remote user sues a manufacturer of an article for injuries suffered, he must allege and prove the existence of a latent defect or a danger not known to plaintiff or other users."[6] Of course, requiring a manufacturer to guard against hidden dangers does not "accordingly" relieve him of liability if, in fact, that danger is obvious. Asserting there is no liability for injury

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[1]*See* J.I. Case Co. v. Sandefur, 245 Ind. 213, 197 N.E.2d 519 (1964); Gilbert v. Stone City Constr. Co., 357 N.E.2d 738 (Ind. Ct. App. 1976); Nissen Trampoline Co. v. Terre Haute First Nat'l Bank, 332 N.E.2d 820 (Ind. Ct. App. 1975), *rev'd on other grounds*, 358 N.E.2d 974 (Ind. 1976); Dudley Sports Co. v. Schmitt, 151 Ind. App. 217, 279 N.E.2d 266 (1972); Cornette v. Searjeant Metal Prods., Inc., 147 Ind. App. 46, 258 N.E.2d 652 (1970); Blunk v. Allis-Chalmers Mfg. Co., 143 Ind. App. 631, 242 N.E.2d 122 (1968).

The same rule is enunciated in federal courts applying Indiana law. *See* Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977); Latimer v. General Motors Corp., 535 F.2d 1020 (7th Cir. 1976); Burton v. L.O. Smith Foundry Prods. Co., 529 F.2d 108 (7th Cir. 1976); Downey v. Moore's Time-Saving Equip. Co., 432 F.2d 1088 (7th Cir. 1970); Posey v. Clark Equip. Co., 409 F.2d 560 (7th Cir.), *cert. denied*, 396 U.S. 940 (1969); Zahora v. Harnischfeger Corp., 404 F.2d 172 (7th Cir. 1968); Indiana Nat'l Bank v. De Laval Separator Co., 389 F.2d 674 (7th Cir. 1968); Schemel v. General Motors Corp., 384 F.2d 802 (7th Cir. 1967); Evans v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966); Sills v. Massey-Ferguson, Inc., 296 F. Supp. 776 (N.D. Ind. 1969); Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965).

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

[3]301 N.Y. 468, 95 N.E.2d 802 (1950).

[4]245 Ind. at 222, 197 N.E.2d at 523.

[5]*Id.* at 223, 197 N.E.2d at 523.

[6]301 N.Y. at 471, 95 N.E.2d at 803.

resulting from obvious dangers is a policy decision, not a logical consequence of emphasizing the manufacturer's heightened duty to protect users from concealed dangers. The illogic of such a broadly-stated obvious danger rule is revealed by noting that under the rule a manufacturer might insulate itself from liability by omitting or even *removing* the safety guards from its product so that the resulting threat of injury is fully exposed.

The limitation on the seller's duty to protect consumers and users from a product's obvious dangers originated in the law of deceit.[7] Originally, purchasers of products were fully charged with any risks of which they might or should be aware. To recover, plaintiff had to show that defendant had suppressed or misrepresented information as to concealed risks.[8] But this system of risk allocation harkened back to a period of simpler products and less complex economic relationships. As one court has explained: "The technological revolution has created a society that contains dangers to the individual never before contemplated. The individual must face the threat to life and limb not only from the car on the street or highway but from a massive array of hazardous mechanisms and products."[9] By not adopting the entire obvious danger exception advanced in *Campo*, Indiana courts may have avoided the necessity, faced by other jurisdictions, such as Michigan[10] and New York,[11] of having to reject directly this harsh and anachronistic rule.

Professor Noel has asked: "Should courts, then, protect injured customers against the absence of safety features when, as consumers, they are seldom willing to pay for such features or to tolerate less efficient performance owing to their attachment?"[12] He has found an affirmative answer in Congress' reasoning in the passage of the Consumer Product Safety Act.[13] "'[A] complex technology has diminished the consumer's ability to exercise a rational choice among risks in the market' . . . . Furthermore, the in-

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[7]*See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1543 (1956).

[8]*Id.*

[9]Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 434-35, 573 P.2d 443, 457, 143 Cal. Rptr. 225, 239 (1978).

[10]*See* Casey v. Gifford Wood Co., 61 Mich. App. 208, 213-19, 232 N.W.2d 360, 363-65 (1975) (tracing the evolution of the Michigan version of the obvious danger rule, as stated in Fisher v. Johnson Milk Co., 383 Mich. 158, 174 N.W.2d 752 (1970) (which followed *Campo*), to a standard of unreasonableness and foreseeability).

[11]Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 15 (1976) (overruling Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950)). *See* notes 149-61 *infra* and accompanying text.

[12]D. NOEL & J. PHILLIPS, PRODUCTS LIABILITY 397 (1976).

[13]Consumer Product Safety Act of 1972, Pub. L. No. 92-573, 86 Stat. 1207 (1970) (codified at 15 U.S.C. §§ 2051 to 2081 (1976)).

jury is often inflicted upon the non-consumer, such as a neighbor . . . . Finally, the costs are social in nature going far beyond the injured plaintiff."[14] A rule which would assign risks without consideration of the likely social and economic consequences within a modern technological context is an anachronism. If manufacturers of products are best able to improve the safety systems of their products and are best able to spread the cost of the accidents which do occur, the modern rule places upon those manfuacturers the risk of introducing into the stream of commerce a defective product which is unreasonably dangerous.

This new standard of liability, which is espoused in the *Restatement (Second) of Torts*,[15] has not, however, resolved in all jurisdictions the confusion which continues to permit latent-patent distinctions to be made in cases in which manufacturers have failed to adequately *guard* users from unreasonably dangerous, defective designs. One basic problem flows from the definition of unreasonably dangerous defect, adopted by the drafters of the *Restatement*, which asserts that a product possesses an unreasonably dangerous defect if the product's performance is below that contemplated by the ordinary consumer with the ordinary knowledge of the community.[16] There is little difficulty in applying this consumer expectation rule when the actual product, as manufactured, deviates in some significant way from the original design. Presumably, the consumer or user expects that the unit to which he is exposed will conform to the manufacturer's own design. If, in fact, it does not, and as a result he is injured, he clearly should be able to recover. But if his injury results from a *design* weakness, there may be some difficulty in determining the ordinary consumer's expectation as to a product's design.[17]

Courts have wrestled with the consumer expectation test and have sought to harmonize it with vestigial pre-negligence limitations, such as the latent defect rule, which are unrelated to the unreasonable danger standard mandated by section 402A of the *Restatement*. Such an effort was made in *Burton v. L.O. Smith Foundry Products Co.*,[18] which purported to follow Indiana law. The court found that a manufacturer was not liable for plaintiff machine operator's injuries when the parting compound it sold was in-

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[14]D. NOEL & J. PHILLIPS, *supra* note 12, at 397-98 (quoting FINAL REPORT OF THE NAT'L COMM'N ON PROD. SAFETY 69 (1970)).

[15]RESTATEMENT (SECOND) OF TORTS § 402A (1964).

[16]*Id.*, Comment i. *See also id.*, Comments g and h.

[17]*See* Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 432-33, 573 P.2d 443, 455-56, 143 Cal. Rptr. 225, 237-38 (1978).

[18]529 F.2d 108 (7th Cir. 1976).

advertently ignited by a maintenance man working nearby. The employer, following the defendant manufacturer's instructions, mixed the compound with kerosene. While the court noted that a less flammable solvent could have been specified, it did not consider whether the substitute solvent was in fact more expensive or whether its performance would be in any way inferior to that of kerosene. The court's holding was based solely on the finding that the dangers from kerosene are apparent. The court found no design defect because the product was not unreasonably dangerous inasmuch as it met the reasonable expectations of the ordinary consumer: "[W]e have shown that the addition of kerosene to Smith's product would form a flammable substance. Since the product behaved as the ordinary user would expect, it was no more defective than the kerosene itself."[19]

The ordinary consumer, however, if he has any basis at all with which to form an expectation, generally *expects* the products he uses to be designed at least as safely as the industry's art will allow within the constraints of reasonable market-utility considerations. If the consumer voluntarily chooses to accept a product below such expectations with full knowledge, understanding, and appreciation of the potential harm, he can be barred from recovery because he assumed or incurred the known risks.[20] By so doing, however, he does not then transform the product into one that is duly safe.

The *Burton* court's interpretation of the consumer expectation test appears to hold that the consumer expects what he gets whenever he knows what he is getting and, therefore, a known danger cannot be an unreasonable danger. No Indiana case nor any other federal decision decided under Indiana law has relieved a manufacturer from liability *solely* because the danger from his product was obvious.

Another source of confusion in applying the latent defect rule can be resolved by noting that if the danger is truly apparent to all who might use or be exposed to the product, and the danger is fully appreciated and will continue to be appreciated by the exposed classes, there may be no duty to apply a second warning in addition to the persistent obviousness of the danger. Thus, obviousness does not *limit* the manufacturer's duty to warn—rather it *discharges* that duty.

In such a case the manufacturer would appear to have several choices: (1) It can design and implement safety devices to *guard* against the danger, (2) it can withdraw the product from the stream

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[19]*Id.* at 111.

[20]*See, e.g.*, Kroger Co. v. Haun, 379 N.E.2d 1004 (Ind. Ct. App. 1978).

of commerce, (3) it can market the product and become an insurer if the product is useful but inherently dangerous or, (4) it can market the product "as is"—if the obviousness of the danger and the ability of the user to avoid harm outweighs the burden of deploying guards. Such a product might be, for example, a knife or a match.

The obviousness of a danger clearly can go far towards reducing the likelihood of injury. That is why, in order to reduce the societal costs resulting from accidents, the *emphasis* must be on revealing and eliminating hidden dangers. Nevertheless, it is equally clear that products containing an obvious danger can still wreak fearful injury even to persons acting reasonably. By any logical standards, even obvious dangers from such products may remain unreasonably dangerous and should be considered as falling below the ordinary consumer's expectations.

Professor Wade, considering the obvious danger exception, found it fundamentally inconsistent with the unreasonably dangerous requirement of strict tort liability as applied to products:

> Different from and yet sufficiently similar to the commonly known danger to be classified with it is the product which has a danger which is perfectly apparent to the user. Thus the dangers of a hoe or an axe are both matters of common knowledge and fully apparent to the user. But it is not necessarily sufficient to render a product duly safe that its dangers are obvious, especially if the dangerous condition could have been eliminated. A rotary lawn mower, for example, which had no housing to protect a user from the whirling blade would not be treated as duly safe despite the obvious character of the danger.
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> Note that the question here is whether the product possesses the quality of due safety, not whether the plaintiff assumed the risk or was contributorily negligent. That latter question arises for consideration only after the decision is reached that the product was not duly safe. It makes no difference whether plaintiff's fault is a valid defense to an action for strict products liability, so long as the questions as to the due safety of the product is the first one to be answered.[21]

Wade noted that the consumer expectation test, as expressed in the *Restatement*, is a contract concept inappropriate to strict torts' unreasonably dangerous defect standard.[22] He suggested such a test

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[21]Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 842-43 (1973).

[22]*Id.* at 833-34.

encourages the courts to ratify the acceptance of unreasonable dangers because they are expected dangers. He focused on established industry customs,[23] but the same fear would apply as easily to obvious but unreasonable dangers as shown by the *Burton* decision.

Wade proposed a seller-oriented test which would require a manufacturer with an imputed expert's knowledge of his product's danger potential to decide whether he could reasonably market the product "as is."[24] Because we can properly assume ordinary consumers *expect* sellers to act in this way, the Wade test and a *true* consumer expectation test are in reality the same test and, therefore, under either formulation, identical marketing, guarding, and warning decisions on the part of manufacturer-sellers should result. It would seem inescapable, therefore, that under strict tort there can be no room for an obvious danger exception, because to apply it might relieve a manufacturer from liability even though he may be marketing a "not duly safe" product.

II. Diversity Decisions Under Indiana Law

J.I. Case Co. v. Sandefur,[25] relied on in subsequent cases dealing with obvious dangers, pre-dates Indiana's adoption of strict tort liability. As has been noted, *Sandefur* did not extend to the acknowledgment of an obvious danger exception in the case of a design defect. But, as will be demonstrated in this section, *Sandefur's* citation of *Campo v. Scofield*[26] was interpreted in later federal court decisions as approval of the exception. Whether or not that assumption has merit, the federal and Indiana courts, with the sole exception of the *Burton* court, found reasons *other* than mere obviousness of danger to support findings of liability where a manufacturer failed to use a safer design.[27]

An important case, decided later in the same year as *Sandefur*, was *Greeno v. Clark Equipment Co.*[28] The alleged defect was not described in the *Greeno* opinion but the court held that a plaintiff under Indiana law is able to state a cause of action in strict tort if he alleges he was injured by a product introduced into the stream of commerce in defective condition.[29] The court noted that product "use different from or more strenuous than that contemplated to be safe

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[23] *Id.* at 834 n.30.

[24] *Id.* at 834-35.

[25] 245 Ind. 213, 197 N.E.2d 519 (1964).

[26] 301 N.Y. 468, 95 N.E.2d 802 (1950).

[27] *See* notes 163-67 *infra* and accompanying text.

[28] 237 F. Supp. 427 (N.D. Ind. 1965).

[29] *Id.* at 429.

by ordinary users/consumers, that is, 'misuse,' would either refute a defective condition or causation" and plaintiff's "[i]ncurring a known and appreciated risk is likewise a defense."[30]

The *Greeno* court continued in dicta to interpret and extend *Sandefur:*

> While the Indiana Supreme Court in Sandefur noted the *hidden nature* of the defect in the farm combine, there was no real limitation, since the defendant company could not have been *negligent* in manufacturing a product whose danger would be perceived and appreciated by all reasonable persons exercising ordinary care. It is not *negligent* for one to manufacture and sell an axe or power saw because the dangers are obvious and the manufacturer can reasonably expect others in the exercise of ordinary prudence to perceive and appreciate the dangers.[31]

At the outset it must be emphasized that Judge Eschbach in *Greeno* stated the above quoted *negligence* doctrine *only* to explain how Indiana courts were heretofore able to find liability to plaintiffs not in privity with the seller. "[P]rivity was not required where the product was 'imminently dangerous,'"[32] and products containing hidden dangers were held to be imminently dangerous. But *Sandefur* eliminated the privity requirement under negligence,[33] and *Greeno* reiterated its demise under strict tort.[34] Whether the obvious danger exception stated above should retain vitality under *strict tort* is left open in *Greeno,* although it must be acknowledged that *Greeno* does state that the obviousness of a danger can remove the unreasonableness of the danger even under a strict tort theory. The sharp edge of an axe is the example given, but if in fact a product's obvious danger *remained* unreasonable to the user such as the *unguarded* sharp edge of a rapidly whirling power-driven sawblade, the *Greeno* dicta does not appear to preclude liability to the manufacturer who injects a product in such condition into the stream of commerce. The seller could then escape liability for injury caused only if he could show misuse or incurred risk by the plaintiff.[35] In any event, the *Greeno* court was not required to decide

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[30] *Id.*

[31] *Id.* at 430.

[32] *Id.*

[33] "[P]ublic policy has compelled this gradual change in the common law . . . where there is no longer the usual privity of contract between the user and the maker of a manufactured machine." 245 Ind. at 222, 197 N.E.2d at 523.

[34] 237 F. Supp. at 429-33.

[35] *Id.* at 429.

whether the defendant in that case would escape liability because the danger of his product was apparent.[36]

In 1966, the Seventh Circuit referred to *Campo* and *Sandefur* in deciding *Evans v. General Motors Corp.*[37] *Campo* provided authority for dicta in *Evans* stating that a manufacturer need not "render the vehicle 'more' safe where the danger is obvious to all."[38] *Sandefur* was cited by the *Evans* court to show an example of a product with a *latent* defect which made the product not fit for its intended purpose.[39] *Evans*, like *Sandefur*, was concerned with a product having a *concealed* dangerous condition, but the defendant, General Motors, avoided liability on the ground that its product was fit for its intended purpose and, therefore, not defective because the concealed condition, a frame which did not surround the driver and, therefore, failed to protect him, could not and did not cause the accident. The *Evans* decision did not rely on an obvious danger exception simply because the alleged defect was well hidden.

It is important to note that the so called "crashworthy" exception on which the *Evans* court did rely and the obvious danger exception which was merely recited in *Evans* are both based on the concept that a manufacturer's duty to make his product duly safe may be restricted by long established limitations on that duty. In October 1977, however, the Seventh Circuit, in *Huff v. White Motor Corp.*,[40] found this limited duty concept incompatible with the unreasonably dangerous standard of section 402A—at least with respect to the "crashworthy" exception. The court in *Huff* noted that Indiana interprets "section 402A in a nonrestrictive manner with a view toward implementing the basic policy consideration justifying the imposition of strict products liability . . . ."[41]

The court footnoted Comment c to section 402A which describes the "special responsibility" of manufacturers.[42] The court cited Indiana cases where liability was imposed over earlier notions of limited duty.[43]

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[36]The *Greeno* opinion was in response to defendant's motion to dismiss, which was denied. There is no further reported decision establishing liability between the parties.

[37]359 F.2d 822, 824-25 (7th Cir. 1966).

[38]*Id.* at 824 (quoting Campo v. Scofield, 301 N.Y. 468, 468, 95 N.E.2d 802, 804 (1950)). The issue in *Evans* centered on the duty to make a product "more safe." The obviousness of danger was irrelevant.

[39]*Id.* at 825. The latency factor which was at issue in *Sandefur* was not dispositive in *Evans*.

[40]565 F.2d 104 (7th Cir. 1977).

[41]*Id.* at 107.

[42]*Id.* n.4 (citing RESTATEMENT (SECOND) OF TORTS § 402A, Comment c (1964)).

[43]565 F.2d at 107 (citing Chrysler Corp. v. Alumbaugh, 342 N.E.2d 908 (Ind. Ct. App. 1976) (extending § 402A liability to bystanders); Perfection Paint & Color Co. v.

Also significant, the *Huff* court noted that Indiana courts "tend to look to the progress of this area of law in other jurisdictions."[44] From this observation, the *Huff* court reasoned that the Indiana Supreme Court would follow the current general rule, as expressed in *Larsen v. General Motors Corp.*,[45] which requires an automobile to "'provide a means of safe transportation'" not just "'a means of transportation.'"[46] Although neither the *Huff* nor the *Larsen* court was called on to deal directly with the obvious danger exception, the reasoning in these cases, which establishes the safe condition of the product at time of sale as the pre-eminent consideration in placing the risk, would seem to apply as well to any vestigial notions of limited duty such as patent-latent distinctions.

In *Schemel v. General Motors Corp.*,[47] the court considered whether an automobile manufacturer should be liable for injuries occurring when the product, an auto driven by a third party at 115 miles per hour, struck the rear of plaintiff's car. The theory of negligent design advanced by plaintiff alleged that defendant might have and should have designed the car with a maximum speed control. The court, citing *Sandefur* and *Campo*, held that defendant's duty was to "avoid hidden defects and latent or concealed dangers."[48] Reasonably enough, the court held that the speed of the car was not concealed and liability could not, therefore, be assessed on the basis of a latent defect.[49] The court relieved the defendant of liability *not on the ground that the danger was obvious*, but rather on the theory that in order for the alleged design defect (the car's high speed potential) to have caused the injury the product must have been, and was, misused—that is, used more strenuously than intended. The court held, perhaps improperly, that misuse by the plaintiff or a third party should bar plaintiff's recovery even though the misuse might have been foreseeable by defendant.[50] *Schemel*, like *Evans*, also relied on the "crashworthy" exception and, insofar as it did, it was also expressly overruled by *Huff v. White Motor Corp.*[51]

Konduris, 147 Ind. App. 106, 258 N.E.2d 681 (1970) (finding liability when the manufacturer provided the product free)).

[44]565 F.2d at 107. The court also noted: "The *direction* taken by the Indiana Court of Appeals comports with the development of products liability law in other jurisdictions." *Id.* (emphasis added).

[45]391 F.2d 495 (8th Cir. 1968).

[46]565 F.2d at 108 (quoting Larsen v. General Motors Corp., 391 F.2d at 502). For a list of the jurisdictions which follow the majority rule as stated in *Larsen*, *see* Huff v. White Motor Corp., 565 F.2d at 110-11 app. A.

[47]384 F.2d 802 (7th Cir. 1967).

[48]*Id.* at 805.

[49]*Id.*

[50]*Id.*

[51]565 F.2d at 106 n.1.

The court, in *Indiana National Bank v. De Laval Separator Co.*,[52] held that only the failure to warn by defendant should be an issue in the case. The court noted that if, in fact, the maintenance procedures employed by the plaintiff created a hidden danger of which defendant should have been made aware, there would be a duty on defendant's part to warn of that danger, although, as noted earlier, a warning of a truly obvious and appreciated danger would be redundant. The *De Laval* court found that there was *no design defect, latent or patent,* in the product.[53]

In *Zahora v. Harnischfeger Corp.*,[54] the court reversed a summary judgment for defendant and held that a jury could find defendant liable for negligently failing to design a crane cab with adequate visibility characteristics. The court cited *Sandefur* to note a manufacturer's duty to avoid the design of hidden defects.[55] The court then decided that a jury could find a defect in the visibility deficiencies of the crane, although, from the description in the opinion, the product's visibility characteristics seemed readily observable. The court apparently concluded that it was the risk of harm itself that was concealed or unappreciated.

It should be noted that, if the risk of *harm* is found to be latent, although the defective design itself is clearly out in the open, the question then becomes: Is this open danger an appreciated danger? In discussing the obvious danger exception, Dean Prosser cited cases of "exceptional situations, where, for example, the danger is observable only upon a close inspection . . . , or the danger is one not likely to be appreciated, or to be regarded as trivial . . . ."[56] The cases include situations in which plaintiff knows the paint,[57] floor wax,[58] or detergent[59] is harmful yet does not take as much care as he might to keep it out of his eye or mouth. Defendant in such cases is charged with the duty to warn or otherwise guard the *unappreciative* user from the product.[60]

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[52]389 F.2d 674 (7th Cir. 1968).

[53]*Id.* at 677. *De Laval* was a negligence and implied warranty case. Therefore, the finding of a lack of design defect was expressed as follows: "The ring was made of strong steel and lasted five years and was reasonably suited for its intended use. Since there was no defect in the ring when it left the factory, there could be no breach of implied warranty of fitness." *Id.* Interestingly, another limited duty concept upheld in *De Laval* was that a manufacturer may choose his materials so long as they are not extremely weak or flimsy and concealed.

[54]404 F.2d 172 (7th Cir. 1968).

[55]*Id.* at 176.

[56]W. PROSSER, LAW OF TORTS 649-50 (4th ed. 1971).

[57]Haberly v. Reardon Co., 319 S.W.2d 859 (Mo. 1958).

[58]Spruill v. Boyle-Midway, Inc., 308 F.2d 79 (4th Cir. 1962).

[59]Hardy v. Proctor & Gamble Mfg. Co., 209 F.2d 124 (5th Cir. 1954).

[60]*See* W. PROSSER, *supra* note 56 at 649-50.

Many factory accident situations can be analyzed as pregnant with unappreciated, therefore functionally latent, dangers. A further analysis might disclose that the appreciation of danger may not be constant. A standard of reasonable conduct should not require an unwavering, heightened vigilance on the part of a consumer or a user forced by the employment relationship into steady proximity with an omnipresent danger.[61]

In *Zahora*, an alleged breakdown in the third-party crane operator's vigilance was held not to be a basis for establishing an intervening cause sufficient to relieve the crane manufacturer of liability for negligent design.[62] *Zahora* may stop just short of calling for the liability of manufacturers whenever unreasonably dangerous design defects in their products cause injuries, but it clearly does *not* call for an obvious danger *exception.*

In 1969, however, the Seventh Circuit in *Posey v. Clark Equipment Co.*,[63] stated that Indiana negligence law requires "the defect must be hidden, and not normally observable, constituting a latent danger."[64] The court cited *Sandefur* for this proposition, but, as has

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[61]*See* Merced v. Auto Pak Co., 533 F.2d 71, 79 (2d Cir. 1976):

> Furthermore it could not be found as a matter of law that a reasonable user must have been aware of a continuing danger of injury from a ricocheting object from one isolated incident, since "[m]omentary forgetfulness is not negligence as a matter of law." *Schneider v. Miecznikowski*, 16 A.D.2d 177, 178, 226 N.Y.S.2d 944, 945 (1962). Again, "[t]he failure to have in mind the existence of a dangerous condition at the time one encounters it, even though there had been knowledge of the condition in the past, does not constitute contributory negligence as a matter of law." *Rugg v. State*, 284 App. Div. 179, 183, 131 N.Y.S.2d 2, 6 (1954).

In Byrnes v. Mach. Co., 41 Mich. App. 192, 202, 200 N.W.2d 104, 109 (1972), the court stated:

> It is true that plaintiff was aware of the risk and that many cases find no duty where the danger is obvious. This requirement must be considered in conjunction with the modern tort concept that awareness alone does not preclude negligence. A danger may be obvious but not appreciated. Even where a danger is appreciated, circumstances may cause it to be momentarily forgotten. It is also possible for the accident to occur even though the injured party proceeds cautiously in the face of an obvious danger.

This case was decided when Michigan purported to be following *Campo.* The court found that plaintiff, as a necessary part of his job, was *compelled* to work with exposed moving parts. It analogized, therefore, to cases in which plaintiff slips and falls in places where the dangers are obvious, but still recovers from the negligent defendant because plaintiff had proceeded with caution. "These cases recognize that where a party either has no alternative or chooses an alternative which does not increase the risk, he should not be precluded from placing liability on the party who has created the risk." *Id.*

[62]404 F.2d at 177.

[63]409 F.2d 560 (7th Cir.), *cert. denied*, 396 U.S. 940 (1969).

[64]409 F.2d at 563.

been seen, *Sandefur* simply did not go that far.[65] In any event, *Posey* is primarily a failure to warn case. The court found no such duty to warn on the part of the manufacturer because the danger of high stacking with a guardless fork lift should have been apparent to the operator and his employer. As to the alleged *design* defect—failure to install safety guards—the court recognized the multi-duty nature of fork lifts. If used for truck loading and unloading, there was no need for a permanent head guard, nor was one feasible since truck vans provide insufficient clearance. Therefore, there was a sound economic reason weighing against the quantum of danger remaining in the design which justified the manufacturer's decision to sell a product without guards for every occasion.[66] Thus, the use of the product by the operator or his employer for high stacking, without purchasing the available recommended supplementary guard, might constitute on either of their parts a misuse or incurred risk.

It should be noted that manufacturers are not absolute insurers and that factors other than safety protection are permitted to enter a reasonable design calculus. In *Roach v. Kononen*,[67] the Oregon Supreme Court listed seven factors, advanced by Professor Wade, for courts to apply in determining whether an alleged design defect is unreasonably dangerous.[68] Wade's analysis considers the product's utility, likelihood and severity of harm, availability of substitutes, the feasibility of guards, user's ability to avoid danger, awareness of danger to user because of public knowledge or warnings, and manufacturers' ability to spread the loss.[69]

The *Posey* court's design defect analysis also applied balancing factors—obviousness of danger versus the economic burden of making two distinct models of fork lifts, one with fixed guards for high stacking and one without guards for truck unloading. The court concluded, reasonably enough, that marketing unguarded units with *optional* guards to be available is reasonable since the obviousness of the danger should provide sufficient *warning* of the danger.[70]

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[65]*See* text accompanying notes 1-5 *supra*.

[66]409 F.2d at 564. The court distinguished another Pennsylvania fork lift case, Brandon v. Yale & Towne Mfg. Co., 220 F. Supp. 855 (E.D. Pa. 1963), *aff'd*, 342 F.2d 519 (3d Cir. 1965), where the potential harm was greater, where the defendant did not have safety guards available at time of sale, and where the fork lift would have been capable of feasible use if a permanent guard had been installed. Although the *Posey* court noted that the Pennsylvania case was not decided under Indiana law, this case could also be distinguished from *Posey* on the basis of a design calculus involving cost, utility, and safety factors.

[67]269 Ore. 457, 525 P.2d 125 (1974).

[68]*Id.* at 464, 525 P.2d at 128-29.

[69]*See* Wade, *supra* note 21, at 837-38.

[70]409 F.2d at 563-64.

In *Sills v. Massey-Ferguson, Inc.*,[71] the plaintiff was a bystander injured by a bolt thrown from a lawnmower. Plaintiff alleged that the mower's design was defective and that the mower was also defective in that plaintiff did not receive an adequate warning. Defendant asserted that the hazards from his product were obvious, that the product was not defective, and that plaintiff's injuries were caused by the product's use. The court held that the question of whether a defect caused plaintiff's injuries was for the jury.[72]

The court did state a manufacturer could discharge his duty to market a product not unreasonably dangerous in two ways: "The first is to make a product that is safe. The second is to make a product which may present some danger but in such case to give an *effective* warning . . . ."[73] Although the court did not state a preference for one approach over the other, the emphasis on *effective* and the use of the qualifier "some" before the word danger suggest that a manufacturer should opt for a warning, rather than a guard, only if an irreducible quantum of danger survives an economic balancing test and only if he is sure the warning will be understood and appreciated by foreseeable plaintiffs. If such an effective warning were delivered to plaintiff and he proceeded to ignore the warning, it could be a "defense that plaintiff had incurred the risk."[74] Significantly, however, the court did not hold that plaintiff will be barred as a matter of law if the hazard is found to be obvious. Indeed, the court noted that plaintiff had alleged design defects "not obviated by a warning from the manufacturer-defendant. Plaintiff should have the opportunity to present his evidence . . . ."[75]

The plaintiff, in *Downey v. Moore's Time-Saving Equipment Co.*,[76] operated a commercial rug washer and was injured when a roller handle counterrotated and struck him in the eye. The court noted that under strict tort, as then interpreted in Indiana, plaintiff had the burden "to prove the existence of a latent defect . . . ."[77] The court also noted its rule in *Posey*—no duty to *warn* of an obvious danger.[78] The court found no latent defects, but did not rest its decision solely on a holding that the manufacturer had no duty to design safeguards against obvious dangers. Rather, the court looked to

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[71]296 F. Supp. 776 (N.D. Ind. 1969).

[72]*Id.* at 783.

[73]*Id.* at 782.

[74]*Id.*

[75]*Id.* at 783.

[76]432 F.2d 1088 (7th Cir. 1970).

[77]*Id.* at 1093 (citing Blunk v. Allis Chalmers Mfg. Co., 143 Ind. App. 631, 242 N.E.2d 122 (1968)).

[78]432 F.2d at 1092.

plaintiff's conduct and found he had misused the product and had incurred the risk because he "had knowledge of the danger of counter-rotation, appreciated it or should have, and by using the mechanism with these factors voluntarily assented."[79]

Finally, in *Burton*, the Seventh Circuit not only recited the obvious danger exception, but also *decided* the case, both as to warning and design defect, solely on that basis. *Schemel*, *Sandefur*, *Greeno*, and *Posey* are cited as authority in *Burton*.[80] As demonstrated above, these four cases do not provide an adequate foundation for such a holding. In addition, the result could have been more logically reached by resting the decision on the third party's misuse.[81] When the third-party maintainence man subjected defend-

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[79]*Id.* at 1093.

[80]529 F.2d 108, 112 (7th Cir. 1976).

[81]*Burton* can be analyzed as a bystander case as well as a misuse case. Although plaintiff-machine operator was using the parting compound for its intended purpose, the maintenance man simultaneously, although inadvertently, "used" this same product—when he ignited it—in a manner different from that contemplated by ordinary users. With respect to the maintenance man's use, or misuse, plaintiff became a bystander. The fact that plaintiff was also using the defendant's parting compound and was also an employee of the purchaser of the product should not be material to his claim for relief from defendant-manufacturer.

The district court had "based its summary judgment on . . . lack of defect, misuse, assumption of the risk and proximate cause." 529 F.2d at 110. The Seventh Circuit Court of Appeals made only the first ground determinative and did not consider misuse. Perhaps the court may have been troubled by the conceptual problem of treating the maintenance man's ignition of the compound as a misuse or, for that matter, as any *use* at all. It might have been argued that the parting compound was not actually used, but was merely present, passive, and not part of the maintenance function. There is no question, however, that certain properties of the product, when ignited, caused it to become a very active part of the event. That the product's participation was triggered inadvertently and its performance was not the result of a *directed* purpose should not negate the reality that the product was in fact put to an unintended use. The product was designed to facilitate release of objects from a molding machine and was not contemplated by the manufacturer or by ordinary users to be used as a fuel for uncontrolled ignition.

A finding, from the facts in *Burton*, that product misuse, rather than defective design, had caused plaintiff's injury would require an underlying policy determination more consistent with the unreasonably dangerous standard of section 402A than a policy which would permit the court to ignore, at the threshhold of the analysis, the existence of *safer* product designs. Of course, holding that obviousness of danger is an absolute bar to recovery does avoid the necessity of dealing with the difficult question of whether a manufacturer has a duty in Indiana to guard against misuse—either foreseeable or unforeseeable. *See* Vargo & Leibman, *Products Liability, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. at 227, 246-47 (1978).

In a somewhat similar fact situation, the court in Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, 258 N.E.2d 681 (1970), upheld a jury finding that a seller of a flammable paint removing compound was not negligent, but, nevertheless, found that the injured plaintiff may not have misused the product when he agreed to assist with the application of it in the presence of an operative water heater. The court held

ant's obviously dangerous product to blowtorch treatment, the use was far different from that intended by the manufacturer or "contemplated to be safe by ordinary users/consumers."[82] Thus, the decision could have been rendered without reliance on the obvious danger exception or without consideration of the close question of whether the product was defectively designed. The decision appears to be an effort to turn back the clock to the days of limited duty of manufacturers. In the light of the *Huff* decision[83] in the following year, striking down a similar limited duty doctrine that a manufacturer has no duty to protect users against "second collisions," *Burton* might be interpreted as an anomaly or an attempt to move the pendulum back in the direction of business interests.

III. Indiana Court Decisions

The Indiana courts' product liability decisions dealing with latent-patent distinctions also rest on *J.I. Case Co. v. Sandefur*,[84] but, unlike the federal court cases, the Indiana decisions do not establish a specific obvious danger exception as applied to design defects. *Sandefur* strikes the keynote calling for *emphasis* on latent defects, but pointedly refrains from precluding liability in a proper case to a seller of goods which are obviously, but nevertheless, unreasonably dangerous.[85]

In *Blunk v. Allis-Chalmers Manufacturing Co.*,[86] plaintiff was injured when he sought to clear a clogged corn picker without first shutting off the power. The trial court directed a verdict for

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that to find a plaintiff misuse in this case would require "the defective and unreasonably dangerous lacquer reducer" to have been "used in contravention of warnings and instructions on the correct use of said product." *Id.* at 121, 258 N.E.2d at 690. The trial court had found conflicting evidence as to plaintiff's conduct in this respect and did not, therefore, direct a verdict for defendant on the ground of misuse. There was, in fact, no proof that the plaintiff had actually applied any of the product and, therefore, might not have been a user or misuser.

Although the *Konduris* court stated that the seller's misuse . . . is properly categorized as negligence," *id.* at 122, 258 N.E.2d at 691, it logically follows that in upholding the jury finding for plaintiff, in the absence of a finding of *seller* negligence, the court accepted a theory that a seller would be strictly liable for *seller's* misuse without requiring a showing that seller's conduct was negligent as well. With *Konduris* as authority, the *Burton* court should have been able to ground its decision relieving defendant-manufacturer of liability on a finding of product misuse by the purchaser's agent (maintenance man), rather than on the arbitrary obvious danger rule as applied to the product's design.

[82]Greeno v. Clark Equip. Co., 237 F. Supp. 427, 429 (N.D. Ind. 1965).

[83]565 F.2d 104 (7th Cir. 1977). *See* notes 40-46 *supra* and accompanying text.

[84]245 Ind. 213, 197 N.E.2d 519 (1965).

[85]*See* notes 1-5 *supra* and accompanying text.

[86]143 Ind. App. 631, 242 N.E.2d 122 (1968).

defendant-manufacturer after plaintiff had alleged negligent design in an amended complaint. Plaintiff-appellant argued that he had also stated a good claim under section 402A. While the court, in reviewing strict tort as applied to defective design, cited Illinois and Indiana cases[87] which would support plaintiff's claim, the court did not state whether the theory was applicable to the case at bar. Instead, the court upheld the directed verdict for defendant holding that the trial court could have found plaintiff contributorily negligent.[88] In discussing Indiana's incurred risk defense, the court appeared to conclude that it also would apply to the facts of this case, although incurred risk was not at all clearly distinguished by the court from a contributory negligence defense.[89]

Finally, the *Blunk* court cited a pre-*Sandefur* Indiana case, *Strickler v. Sloan*,[90] which held that to show a *negligent* design, plaintiff must allege and prove the existence of a latent defect. The court in *Strickler* referred to *Chisenall v. Thompson*[91] which noted that there was no need *to warn* if the danger was obvious. The *Blunk* court adopted the *Chisenall* reasoning stating: "[W]e are in full accord with the law as therein stated."[92]

As noted, it is the duty to *guard* against obvious dangers—not the duty to *warn* that is in issue. Although *Blunk* is an early case which agreed with the proposition that a party has a "'duty to appreciate danger or threatened danger,'"[93] it did not relieve the defendant of liability as a matter of law because the danger was obvious, but rather it reached the question of plaintiff's conduct *after* he had perceived the danger.

In *Cornette v. Searjeant Metal Products, Inc.*,[94] the Indiana court expressly adopted section 402A. Comment c to section 402A was quoted in full with approval.[95] That comment establishes the ra-

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[87]*Id.* at 635, 242 N.E.2d at 124 (citing Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965); Wright v. Massey-Harris, Inc., 68 Ill. App. 2d 70, 215 N.E.2d 465 (1966)).

[88]143 Ind. App. at 642, 242 N.E.2d at 128.

[89]*Id.* at 637-38, 242 N.E.2d at 125. Plaintiff brought this action under a negligent design theory. On appeal, he asked the court to apply strict tort rules. Although the court found that plaintiff was contributorily negligent, which is ordinarily not a defense to strict tort, it also found present all the elements of incurred risk, which is a defense.

[90]127 Ind. App. 370, 141 N.E.2d 863 (1956), *cited in* Blunk v. Allis-Chalmers Mfg. Co., 143 Ind. App. at 639, 242 N.E.2d at 126.

[91]363 Mo. 538, 252 S.W.2d 335 (1952), *quoted in* Strickler v. Sloan, 127 Ind. App. at 385, 141 N.E.2d at 871.

[92]143 Ind. App. at 640, 242 N.E.2d at 127.

[93]*Id.* at 642, 262 N.E.2d at 127 (quoting Hunsberger v. Wyman, 247 Ind. 369, 374, 216 N.E.2d 345, 348 (1966)).

[94]147 Ind. App. 46, 258 N.E.2d 652 (1970).

[95]*Id.* at 52-53, 258 N.E.2d at 656.

tionale for the special manufacturer responsibility: "[P]ublic policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them."[96] The *Cornette* court, however, appeared to reject much of Comment c, concluding that section 402A should be "strictly construed and narrowly applied."[97]

Judge Sharp in a concurring opinion strongly disagreed with the majority conclusion that section 402A should be strictly construed.[98] He found no authority for such a holding. On the subject of obvious dangers, he presented the example of the sharp axe to show that under both negligence and strict tort theories such a product, although capable of harm, could still be found not unreasonably dangerous because "users would contemplate the obvious dangers involved,"[99] but, as in *Sandefur* and *Greeno*, Sharp's opinion cannot be read to completely negate the possibility of an injury-causing defect arising out of a design condition which, although obvious, is nevertheless unreasonably dangerous.

Cornette cannot, however, be read as an obvious danger case. The court found for defendant because plaintiff failed to prove the product was defective (punch press lacked an air filter) at time of sale.[100] In addition, the court accepted the trial court's finding that plaintiff had incurred the risk.[101] The trial court found that plaintiff had the requisite knowledge and appreciation of the danger because she had observed the defect and a reasonable and prudent person with such knowledge would have appreciated the danger. Plaintiff was held to have voluntarily incurred the risk,[102] not because she continued at her job assignment—such a decision may be less than voluntary[103]—but because she "had adequate safety equipment available to reduce the possibility of harm which she had failed to use."[104]

In *Dudley Sports Co. v. Schmitt*,[105] the court stated: "[W]e recognize the validity of the argument that a manufacturer may not be liable for obvious dangers . . . ."[106] The court, however, found against the manufacturer. The plaintiff, a sixteen-year-old boy who

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[96]RESTATEMENT (SECOND) OF TORTS § 402A, Comment c (1964).
[97]147 Ind. App. at 53, 258 N.E.2d at 657.
[98]*Id.* at 55, 258 N.E.2d at 658 (Sharp, J., concurring).
[99]*Id.* at 57, 258 N.E.2d at 659 (Sharp, J., concurring).
[100]*Id.* at 53, 258 N.E.2d at 657.
[101]*Id.* at 54-55, 258 N.E.2d at 657.
[102]*Id.*
[103]*See* note 61 *supra.*
[104]147 Ind. App. at 55, 258 N.E.2d at 657.
[105]151 Ind. App. 217, 279 N.E.2d 266 (1972).
[106]*Id.* at 226, 279 N.E.2d at 274.

was cleaning up his high school's equipment room, was injured when he accidently triggered the catapult on the pitching machine manufactured by defendant. Although the dangerous condition was not concealed, the court found the danger of *harm* latent because it was not easily appreciated. It also noted the absence of a safety screen, inadequate warnings, and missing operating instructions.[107] Other possible, but foreseeable, intervening causes were held not to be a defense under Indiana law.[108]

It is interesting to speculate whether the *Dudley* court would have found for the defendant if the dangerous condition of the pitching machine had been more obvious to and appreciated by the boy who was daily required to clean around it.[109] One suspects that if latency had to be found, latency *would* have been found. In any event, despite the court's dicta, *Dudley* is not a case where a manufacturer escaped liability because of an obvious danger.

Nissen Trampoline Co. v. Terre Haute First National Bank,[110] is a failure to warn case. A jury found for the defendant-trampoline manufacturer and the trial court granted plaintiff a new trial on the ground that the verdict was contrary to the weight of the evidence. The trial court held and the appellate court confirmed that while the product was not defectively designed, the absence of proper warnings and instructions might, nevertheless, render the product defective.[111] The court of appeals noted that "where the danger or potentiality of danger is known or should be known to the user, the duty [to warn] does not attach."[112] As has been noted above, there may indeed be no duty to *warn* of an obvious danger because such a measure would add not a quantum of safety to the use of the product. The same caveat is not applicable in situations involving a failure to *guard* against even a patent source of potential harm.

Gilbert v. Stone City Construction Co.[113] presents strong support for the proposition that failure to design or deploy feasible safety devices constitutes an unreasonably dangerous defect.[114] The leased earth roller in *Gilbert* lacked a signal to warn bystanders and lacked mirrors to aid the driver in overcoming the machine's blockage of vi-

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

[108]*Id.* at 230-31, 279 N.E.2d at 276.

[109]For discussion of momentary forgetfulness of a known danger, see note 61 *supra*.

[110]332 N.E.2d 820 (Ind. Ct. App. 1975), *rev'd*, 358 N.E.2d 974 (Ind. 1976).

[111]332 N.E.2d at 825. The supreme court reversed on the grounds that the trial court failed to make the findings necessary for the grant of a new trial. 358 N.E.2d at 978.

[112]332 N.E.2d at 825.

[113]357 N.E.2d 738 (Ind. Ct. App. 1976).

[114]*Id.* at 744-45.

sion to the rear. The court also held that an incurred risk defense is a jury question,[115] as is the issue of "whether dangerous defects in heavy equipment are readily ascertainable by a bystander."[116] Although this latter question might be construed as going to the question of patent-latent distinctions, the court, in support of this ruling, cited to cases in other jurisdictions which totally reject the obvious danger exception,[117] or which require a *jury finding* that users or bystanders be cognizant of the precise risk presented by the product.[118]

The cases decided in Indiana courts have not carved out a rigid obvious danger exception as applied to design defects. Indiana courts have embraced section 402A and clearly accept the principle that manufacturers owe users and bystanders a duty to market products not unreasonably dangerous. There is no reason to conclude from the Indiana court rulings that obvious design dangers are absolutely protected in this state from a duty to *guard* if economically feasible.

IV. Other Jurisdictions

As noted by the court in *Huff v. White Motor Corp.*,[119] Indiana looks to developing tort law in other jurisdictions. Recently, in *Gilbert v. Stone City Construction Co.*,[120] the court cited *Pike v.*

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[115] *Id.* at 746.

[116] *Id.* The *Gilbert* court was not inquiring into whether the obvious danger rule should be applied to bystanders. Rather, the court asserted that it is for the jury to determine whether a reasonable bystander would have had sufficient awareness of the defect to have incurred the risk. The court stopped short of requiring the jury to find that *this* bystander had subjective awareness of the defect and appreciation of the risk it presented because under Indiana law at the time such subjective awareness was not required. The court stated: "One incurs all the normal risks of a voluntary act—so long as he knows and understands them, or if they are readily discernible by a reasonably prudent person in similar circumstances." *Id.* at 746 (citing Cornette v. Searjeant Metal Prods., Inc., 147 Ind. App. 46, 258 N.E.2d 652 (1970)). Note that the court, nevertheless, required the jury to find that the reasonable bystander had perceived, appreciated, and voluntarily subjected himself to the risk before it can relieve the defendant of liability. In Kroger Co. v. Haun, 379 N.E.2d 1004 (Ind. Ct. App. 1978), the court required a finding that the injured plaintiff was, in fact, *subjectively* aware of the risk. Applied to *Gilbert*, the generally accepted limitation expressed in *Haun* would remove virtually all consideration of the obviousness of the danger from the incurred risk analysis.

[117] 357 N.E.2d at 742-44 (citing Wirth v. Clark Equip. Co., 457 F.2d 1262 (9th Cir. 1972); Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970)).

[118] 357 N.E.2d at 746 (citing Merced v. Auto Pak Co., 533 F.2d 71 (2d Cir. 1976)).

[119] 565 F.2d 104, 107 (7th Cir. 1977). *See* note 44 *supra* and accompanying text.

[120] 357 N.E.2d 738, 741 (Ind. Ct. App. 1976).

Frank G. Hough Co.[121] with approval. The facts in *Pike* were strikingly similar to *Gilbert*—a bystander was injured by a backward moving earthmover which lacked mirrors. An obvious danger defense was raised in *Pike.* The California Supreme Court, quoting at length from Professors Harper and James, strongly criticized the obvious danger rule:

> "[T]he bottom does not logically drop out of a negligence case against the maker when it is shown that the purchaser knew of the dangerous condition. Thus if the product is a carrot-topping machine with exposed moving parts . . . and if it would be feasible for the maker of the product to install a guard or a safety release, it should be a question for the jury whether reasonable care demanded such a precaution, though its absence is obvious."[122]

The court continued, quoting Professor Noel:

> "Any definite requirement that the defect or the danger must be latent seems to revert to the concept that a chattel must be 'inherently' dangerous, and this concept has been replaced under the modern decisions, by the rule that the creation of any unreasonable danger is enough to establish negligence. Under the modern rule, even though the absence of a particular safety precaution is obvious, there ordinarily would be a question for the jury as to whether or not a failure to install the device creates an unreasonable risk."[123]

It was noted in the discussion of *Greeno v. Clark Equipment Co.*[124] that Indiana courts found latent defects created imminently dangerous conditions sufficient to bridge the privity barrier in force prior to 1965. Professor Noel appears to suggest that full acceptance of an unreasonable risk standard should also bridge any remaining obvious danger barriers.

The *Pike* court also stated: "[T]he manufacturer's duty of care extends to all persons within the range of potential danger."[125] This statement in *Pike* refers to bystanders, but the duty would include users with even greater force. This doctrine from *Pike* would not permit the shifting of risk from the product manufacturer to the

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[121]2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970).

[122]*Id.* at 474, 467 P.2d at 235, 85 Cal. Rptr. at 635 (quoting 2 F. HARPER & F. JAMES, *supra* note 7, at 1543).

[123]2 Cal. 3d at 474, 467 P.2d at 235, 85 Cal. Rptr. at 635 (quoting Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product,* 71 YALE L.J. 816, 838 (1962)).

[124]237 F. Supp. 427 (N.D. Ind. 1965). *See* notes 28-36 *supra* and accompanying text.

[125]2 Cal. 3d at 473, 467 P.2d at 234, 85 Cal. Rptr. at 634.

purchaser-employer, as was sanctioned by the Seventh Circuit in *Burton*.[126]

Finally, *Pike* relates the obviousness of peril to "the manufacturer's defenses, not to the issue of duty."[127] This holding goes further than in other jurisdictions because, under this rule, obviousness of danger cannot, in itself, negative a finding of defect so as to take the issue from a jury. Although Indiana courts appear not ready to give all obvious danger questions to the jury, the direction of the decisions of the country's most influential jurisdictions seems to be towards imposition of higher duty requirements on manufacturers.

Wright v. Massey-Harris, Inc.,[128] cited in *Pike*,[129] is concerned with a 1953 cornpicker which injured a farm employee. The defendant in *Wright* contended that there was no latent defect, "but on the contrary . . . the danger would be obvious to anyone placing his hands in the corn husking rollers . . . ."[130] The court ignored any possible obvious danger exception by applying a single standard:

> Whether the design defect in the present case is of a nature upon which liability can be imposed involves the factual question of whether it creates an unreasonably dangerous condition, or, in other words, whether the product in question has lived up to the required standard of safety.
>
> We believe that the complaint . . . states a good cause of action in negligence and also a good cause of action in strict liability . . . .[131]

In *Dorsey v. Yoder Co.*,[132] the defendant slitter manufacturer raised an obvious danger defense presenting a syllogism very similar to the one relied on by the *Burton* court.[133] The defendant Yoder stated: "'In short, as the *Restatement* intended, an *obvious danger*, known to the average person as such, is not an "unreasonable danger" and hence there is no liability on the manufacturer if one encounters it.'"[134]

The court vigorously denounced such a rule, emphasizing that *Campo v. Scofield*[135] is not the law in Pennsylvania.[136] The court

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[126]*See* notes 18-24 *supra* and accompanying text.

[127]2 Cal. 3d at 473, 467 P.2d at 234, 85 Cal. Rptr. at 634.

[128]68 Ill. App. 2d 70, 215 N.E.2d 465 (1966).

[129]2 Cal. 3d at 476, 467 P.2d at 236, 85 Cal. Rptr. at 636.

[130]68 Ill. App. 2d at 73, 215 N.E.2d at 467.

[131]*Id.* at 79, 215 N.E.2d at 470.

[132]331 F. Supp. 753 (E.D. Pa. 1971).

[133]*See* text accompanying notes 18-19 *supra*.

[134]331 F. Supp. 758 (quoting Brief for Defendant).

[135]301 N.Y. 468, 95 N.E.2d 802 (1950).

[136]331 F. Supp. at 759 (citing Bartkewich v. Billinger, 432 Pa. 351, 247 A.2d 603 (1968)).

quoted *Pike*, Frumer and Friedman, Harper and James, and Wade[137] to support the Pennsylvania rule that obviousness of danger is to be balanced with other design factors according to a formulation similar to that advanced by Professor Wade.[138] Thus, obviousness of danger does not automatically preclude liability in Pennsylvania, but it can explain how a sharp knife can come through a design calculus without being declared unreasonably dangerous.[139] As for the knife on the slitter in Yoder, "[t]he jury found the balance tipped in favor of plaintiff" because "a guard would not eliminate the machine's usefulness, nor would the cost of $200 to $500 on an $8,000 machine be unreasonable. Moreover, the seriousness of the potential harm was great."[140]

The *Dorsey* court did not deal directly with defendant's invocation of section 402A's consumer expectation test, except to substitute the seller-oriented test advanced by Wade.[141]

The California Supreme Court, recognizing the troublesome confusion and limitations inherent in the section 402A consumer exception test, recently formulated a new standard for design cases. In *Barker v. Lull Engineering Co.*,[142] the court held it would permit plaintiff to recover:

> 1) if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or 2) if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove, in light of the relevant factors discussed above, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.[143]

Once again, California has extended the defendant manufacturer's burden so that he may now have to come forward with evidence to prove his design was duly safe.

At the other end of the spectrum, of course, is the *Campo* doctrine of limited duty with its keystone of requiring plaintiff to prove

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[137]331 F. Supp. at 758-60 (quoting Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970); FRUMER & FREEDMAN, PRODUCTS LIABILITY 718-19; 2 F. HARPER & F. JAMES, *supra* note 7, § 28.6 (1956); Wade, *Strict Liability of Manufacturers*, 19 SW. L.J. 5, 17 (1965).

[138]*See* text accompanying note 21 *supra*. *See also* Keeton, *Manufacturer's Liability: The Meaning of "Defect" in Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559 (1969).

[139]331 F. Supp. at 760.

[140]*Id.*

[141]*Id.* *See* text accompanying note 21 *supra*.

[142]20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 413 (1978).

[143]*Id.* at 435, 573 P.2d at 452, 143 Cal. Rptr. at 239-40.

a latent danger.[144] New York has wrestled with this rule since 1950, and its judiciary has steadily restricted its scope. In *Bolm v. Triumph Corp.*,[145] the court distinguished the obviousness of the *condition* from the obviousness of the *danger* and held a determination of the latter was a jury question.[146] In *Merced v. Auto Pak Co.*,[147] the court required the jury to find that the "precise risk" was obvious, not merely that the generally dangerous condition was obvious. In that case, plaintiff was injured by a trash compactor. Although the dangers of a trash compactor may have been obvious, the court stated it was for the jury to determine whether the *specific* peril which led to plaintiff's injuries was, in fact, a hidden danger.[148]

Finally, in *Micallef v. Miehle Co.*,[149] the court stated: "The time has come to depart from the patent danger rule enunciated in Campo v. Scofield . . . ."[150] The court then dealt with the following issues. First, should the courts or the legislature be responsible for controlling obvious dangers in products? The court answered this question indirectly by stating that the manufacturer's duty is to "exercise that degree of care in his plan or design so as to avoid any unreasonable risk of harm . . . ."[151] Obviously, the legislature cannot pre-regulate conduct to achieve this result. Legislation must be strictly construed and, therefore, many fact situations will fall outside the statutes. New products, modified products, and new uses for products will create situations in which risk occurs, but which the regulations fail to cover. Clearly, the court must supplement regulations by looking back through the events to determine whether the general standards of conduct and conditions of product safety have been met by the parties.[152]

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[144]*See* notes 2-6 *supra* and accompanying text.

[145]33 N.Y.2d 151, 305 N.E.2d 769, 350 N.Y.S.2d 644 (1973).

[146]*Id.* at 160, 305 N.E.2d at 774, 350 N.Y.S.2d at 651. "Here the duty and, thus, the liability of the manufacturer turn upon the perception of the reasonable user of the motorcycle as to the dangers which inhere in the placement of the parcel grid . . . . That is a question of fact . . . for jury consideration." *Id.* The test here is very similar to the one posited in *Gilbert. See* note 116 *supra.* The patent-latent distinction is not completely rejected, but obviousness is to be considered by a jury through the plaintiff's eyes or through the eyes of a reasonable person *similarly* situated.

[147]533 F.2d 71 (2d Cir. 1976).

[148]*Id.* at 78.

[149]39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

[150]*Id.* at 379, 348 N.E.2d at 573, 384 N.Y.S.2d at 117.

[151]*Id.* at 385, 348 N.E.2d at 577, 384 N.Y.S.2d at 121.

[152]The court opts for a factor balancing test to find the presence of a design defect. *Id.* at 385, 348 N.E.2d at 577-78, 384 N.Y.S.2d at 121. Clearly, the balance must be determined on a case-by-case basis following general principles which would be impossible to codify.

Second, have changing technological and social conditions created a need for a new rule?[153] Currently, products are so complex and dangerous that the obviousness of danger is less clear to the modern consumer, making him more reliant on the expertise of the manufacturer to protect him from dangers in the product. To assign this burden without equivocation to the party who can exercise the most control over the condition of the product "furthers the public interest."[154]

Third, does the *Campo* rule encourage misdesign? The court opined: " 'The manufacturer of the obviously defective product ought not to escape because the product was obviously a bad one. The law, we think, ought to discourage misdesign rather than encouraging it in its obvious form.' "[155]

Fourth, does the *Campo* rule discourage safety devices? The court quoted:

> "The asserted negligence of plaintiff—placing his hand under the ram while at the same time depressing the foot pedal—was the very eventuality the safety devices were designed to guard against. It would be anomalous to hold that defendant has a duty to install safety devices but a breach of that duty results in no liability for the very injury the duty was meant to protect against."[156]

The court noted the inconsistency in *Campo* which "places a duty on the manufacturer to develop a reasonably safe product yet eliminates this duty, thereby granting him immunity . . . if the dangerous character of the product can be readily seen, irrespective of whether the injured user or consumer actually perceived the danger."[157]

Fifth, does the *Campo* rule confuse the patent danger exception with assumption of risk? It is important to distinguish the policy bases for these two defenses. Assumption of risk would appear to rest on something akin to basic contract principles. The risk perpetrator (in products cases, usually the manufacturer) offers to the market, along with something useful, a quantum of danger. To

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[153]The court stated: "[*Campo's*] unwavering view produces harsh results in view of the difficulties in our mechanized way of life to fully perceive the scope of danger, which may ultimately be found by a court to be apparent in manufactured goods as a matter of law." 39 N.Y.2d at 385, 348 N.E.2d at 577, 384 N.Y.S.2d at 120.

[154]*Id.* at 385, 348 N.E.2d at 577, 384 N.Y.S.2d at 121.

[155]*Id.* at 384, 348 N.E.2d at 577, 384 N.Y.S.2d at 120 (quoting Palmer v. Massey-Ferguson, Inc., 3 Wash. App. 508, 517, 476 P.2d 713, 719 (1970)).

[156]39 N.Y.2d at 384-85, 348 N.E.2d at 577, 384 N.Y.S.2d at 120 (quoting Bexiga v. Havir Mfg. Co., 60 N.J. 402, 412, 290 A.2d 281, 286 (1972)).

[157]39 N.Y.2d at 384, 348 N.E.2d at 576, 384 N.Y.S.2d at 120.

"accept" the "offer" and legally incur the risk, the purchaser, user, or bystander must know, understand, and appreciate the risk offered. He may then complete the bargain by voluntarily assuming the risk. In a free society, parties should have the freedom to strike these bargains and courts should ratify consequences fairly anticipated and assumed by the parties.[158]

By applying *Campo*, however, courts find assumption of risk "as a matter of law"[159] and the plaintiff may not show he failed to voluntarily incur the risk offered. It is as if a contract could be enforced by a party who merely shows he made an offer with no hidden loopholes but alleges no acceptance. Simply pointing out a danger he has created should not relieve an actor from a duty to do what is feasible to ameliorate that danger, unless he can show the parties accepted the conditions.

It might be argued that, where the danger is obvious, the elements of incurred risk are almost sure to be present. The *Burton* case suggests, however, that there are indeed Indiana contexts where plaintiffs might recover were it not for the obvious danger rule. Injured bystanders (such as Burton) could be barred from proceeding against the product seller whenever it can be found the danger was obvious to the user. Even if the plaintiff is in a position to perceive the product's unsafe condition, he may not appreciate the risk it presents. If he has fully appreciated the risk at one time, he may not have retained this appreciation at the time of injury. Finally, the plaintiff may not have truly voluntarily subjected himself to the risk. These conditions arise frequently in the employment context where industrial equipment has great damage potential, where the act of one employee often affects the safety of another, where fatigue, boredom, or momentary forgetfulness can reduce perceptions of danger, where involuntary physiological reflex actions can result in injury, and where the necessity of bringing home a paycheck may itself create an involuntary risk incurrence.

Sixth, how far does the seller's duty go?[160] The *Micallef* court simply accepted the design factor balancing principles discussed in several contexts previously. The court, citing *J.I. Case Co. v.*

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[158]The analogy of assumption of risk to formation of a contract through offer and acceptance can be carried too far. The assumer of a risk generally does not agree directly, either impliedly or explicitly, with the perpetrator of the danger to bear the risks therefrom. In fact, if he does so agree, his risk assumption is generally analyzed as a negation of the defendant's duty rather than the basis for an affirmative defense. The contract analogy is offered merely to illustrate the unilateral nature of the obvious danger rule.

[159]39 N.Y.2d at 384, 348 N.E.2d at 576, 384 N.Y.S.2d at 120.

[160]"What constitutes 'reasonable care' will, of course, vary with the surrounding circumstances . . . ." *Id.* at 386, 348 N.E.2d at 577, 384 N.Y.S.2d at 121.

Sandefur,[161] recognized: "This [duty] does not compel a manufacturer to clothe himself in the garb of an insurer in his dealings . . . ."[162]

IV. Conclusion

If, as the *Huff* court contended, Indiana looks to other jurisdictions for guidance in developing its tort and product liability law, it will find that a solid phalanx of major jurisdictions have discarded patent-latent distinctions for a general standard of unreasonable risk which includes obviousness of danger as only one factor to be weighed in determining whether a product's design is defective. Even New York, the jurisdiction in which *Campo* was decided, has come full circle.

Indiana courts had early adopted an "emphasis on latent defects" in order to find the "imminently dangerous" products which enabled pre-*Sandefur* plaintiffs to recover without having to allege privity with the manufacturer. Ironically, this aspect of a latent defect rule was employed to increase the scope of the manufacturer's liability rather than to limit it.

Later decisions, however, especially in federal court, recited the *extended Campo* rule that held that patent defects should not trigger liability for the manufacturers. These decisions should not, however, control cases where the defect is failure to design and build in adequate safety guards because in these decisions: (1) The court was considering a duty to warn—rather than a duty to design adequate safety guards,[163] or (2) the court found there could be liability because the alleged defect was in fact latent,[164] or (3) the court found no liability grounding its holding on a defense other than or in addition to an obvious danger exception,[165] or (4) the court could have found no liability under a defense more appropriate than an obvious

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[161]245 Ind. 213, 197 N.E.2d 519 (1964). *See* text accompanying notes 2-6 *supra*.

[162]*Id.* at 386, 348 N.E.2d at 578, 384 N.Y.S.2d at 121-22.

[163]*See* Downey v. Moore's Time-Saving Equip. Co., 432 F.2d 1088 (7th Cir. 1970); Posey v. Clark Equip. Co., 409 F.2d 560 (7th Cir.), *cert. denied*, 396 U.S. 940 (1969); Indiana Nat'l Bank v. De Laval Separator Co., 389 F.2d 674 (7th Cir. 1968); Nissen Trampoline Co. v. Terre Haute First Nat'l Bank, 332 N.E.2d 820 (Ind. Ct. App. 1975), *rev'd on other grounds*, 358 N.E.2d 332 (Ind. 1976); Blunk v. Allis-Chalmers Mfg. Co., 143 Ind. App. 631, 242 N.E.2d 122 (1968).

[164]*See* Zahora v. Harnischfeger Corp., 404 F.2d 172 (7th Cir. 1968); J.I. Case Co. v. Sandefur, 245 Ind. 213, 197 N.E.2d 519 (1964); Dudley Sports Co. v. Schmitt, 151 Ind. App. 217, 279 N.E.2d 266 (1972).

[165]*See* Downey v. Moore's Time-Saving Equip. Co., 432 F.2d 1088 (7th Cir. 1970); Posey v. Clark Equip. Co., 409 F.2d 560 (7th Cir.), *cert. denied*, 396 U.S. 940 (1969); Schemel v. General Motors Corp., 384 F.2d 802 (7th Cir. 1967); Evans v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966); Cornette v. Searjeant Metal Prods., Inc., 147 Ind. App. 46, 258 N.E.2d 652 (1970); Blunk v. Allis-Chalmers Mfg. Co., 143 Ind. App. 631, 242 N.E.2d 122 (1968).

danger exception,[166] or (5) the court did not determine or preclude liability in the case.[167]

A careful reading of the cases decided under Indiana law finds no decision other than *Burton* which relieved a seller of liability *solely* because the design danger in his product was obvious. In the light of recent decisions, such a holding would now be inconsistent with the policy of *Restatement (Second) of Torts* section 402A, which calls for manufacturers to be governed by a basic standard of "unreasonably dangerous."

Although the consumer expectation test of section 402A might be interpreted to exclude obvious dangers from liability because they are within the consumer's contemplation, the better view looks to the policy basis of this section and substitutes a clearer seller-oriented rule, or simply rejects the obvious danger exception, or introduces a safety design balancing test, or supplements the consumer expectation test with additional requirements. The recent *Huff* decision in the Seventh Circuit and *Gilbert* in the Indiana Court of Appeals support the conclusion that Indiana courts are now to be guided by the underlying policy of strict tort, which is to deter sellers from marketing products not duly safe.

It is doubtful that Indiana courts ever did *fully* accept an obvious danger exception. Insofar as they might have adopted some part of that rule, any limitation of a seller's duty to *guard* against an unreasonably dangerous although obvious condition in his product appears now to have lost virtually all of its vitality.

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

[167]*See* Sills v. Massey-Ferguson, Inc., 296 F. Supp. 776 (N.D. Ind. 1969); Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965).