Products Liability in Indiana—In Search of a Standard for Strict Liability in Tort

JOHN F. VARGO*

On March 11 and 12, 1977, I was privileged to be chairman of a Products Liability Institute sponsored by the Indiana Continuing Legal Education Forum, wherein eight of the finest authors, academicians, and practitioners discussed the most recent issues in the area of products liability.[1] The diverse viewpoints expressed about various controversial aspects of products liability law made it apparent that products liability, especially in the area of strict liability in tort, is still undeveloped and highly controversial. The purpose of this Article is to summarize critically the present state of the Indiana products liability law in light of the problem areas discussed at the Institute, and to attempt to forecast what developments might take place, especially in the area of strict liability in tort.

I. THE STANDARD

The history of strict liability in tort in Indiana began in federal court with the 1966 opinion of *Greeno v. Clark Equipment Co.*[2] Anticipating a "forward looking [Indiana Supreme] Court," Judge Eschbach stated that section 402A of the *Restatement (Second) of Torts* was the law of Indiana.[3] Since *Greeno*, many Indiana lower court decisions have expressed opinions as to what the Indiana Supreme Court would consider the law of strict liability in tort to be. Only twice has the Indiana Supreme Court considered cases involving strict tort liability and both times the cases were decided on procedural grounds without discussion of the substantive law.[4]

---

*Member of the Indiana Bar; B.S., Indiana University, 1965; J.D., Indiana University School of Law—Indianapolis, 1974.

The author thanks his colleague, Mary Runnello, for her helpful assistance in the preparation of this article.

[1]The names and positions of the distinguished speakers are enumerated in the introduction to this Symposium.

[2]237 F. Supp. 427 (N.D. Ind. 1965).

[3]*Id.* at 433.

[4]Nissen Trampoline Co. v. Terre Haute First Nat'l Bank, 358 N.E.2d 974 (Ind. 1976), *rev'g* 332 N.E.2d 820 (Ind. Ct. App. 1975) (aff'd new trial on basis of motion to correct errors). Ayr-Way Stores, Inc. v. Chitwood, 261 Ind. 86, 300 N.E.2d 335 (1973) (aff'd leave to amend plaintiff's complaint so as to bring it into conformity with evidence).

In most jurisdictions, it is well established that strict liability in tort is based upon different grounds from either negligence or warranty law.[5] Strict liability in products cases developed to relieve plaintiffs of unduly burdensome problems of proof, thus furthering social and economic beliefs that the economic burden should not be borne solely by injured parties.[6] Although strict liability is well established as a theory of recovery, one of the key issues today is how it differs from other theories of liability, especially negligence.[7]

---

[5]For a fairly comprehensive listing of jurisdictions adopting some form of strict liability in tort, *see* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A[3], at 3-248 n.2 (Supp. 1976). *See also* Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C. L. REV. 803, 804-05 n.3 (1976). For those jurisdictions adopting section 402A and its accompanying comments, it is clear that comments a, b, c, d, f and m are describing an action which differs from both negligence and warranty or sales law. *See also* Vargo, *Products Liability, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 265, 269 (1976). [hereinafter cited as Vargo, *1976 Survey*].

[6]As is now well documented, two individuals had a great hand in the development of strict liability in tort—Dean William Prosser and Justice Roger Traynor. A glance at Justice Traynor's great California decisions and Dean Prosser's articles should convince most readers that strict liability in tort was to a great extent based upon the desire to relieve the plaintiff from overharsh burdens of proof and economic hardships placed upon him by the disastrous consequences of injuries caused by defective products. *See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 463, 150 P.2d 436, 441 (1944) (Traynor, J., concurring); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9 (1966). Dean Prosser as Editor and Justice Traynor as one of his advisors initiated the *Restatement's* interpretation of strict liability in § 402A. Comment c to § 402A reflects some of the policy reasons behind strict liability. For an overview of more recent economic policies behind strict liability in tort, see Vargo, *1976 Survey, supra* note 5. In addition to Dean Prosser's and Justice Traynor's view it has been stated that considerations of frustration of consumer expectations and an incentive for manufacturers to make safer products weigh heavily in the decision to adopt strict liability in tort. *See* Fischer, *Products Liability—The Meaning of Defect*, 39 MO. L. REV. 339, 339-40 (1974).

[7]*See* Phillips, *The Standard for Determining Defectiveness in Product Liability*, 46 U. CIN. L. REV. 101 (1977); Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297 (1977); Montgomery & Owen, *supra* note 5, at 824-46; Wade, *Is Section 402A of the Second Restatement of Torts Preempted by the U.C.C. and Therefore Unconstitutional?* 42 TENN. L. REV. 123 (1974); Wade, *On The Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 841 (1973) [hereinafter cited as Wade, *Nature of Strict Tort Liability*]. A good example of the struggle to differentiate between negligence and strict tort liability is found in the decisions of the Oregon Supreme Court. In Anderson v. Klix Chem. Co., 256 Or. 199, 472 P.2d 806 (1970), the court stated that there was no difference between strict tort liability and negligence in a warning case. Later in Phillips v. Kimwood Mach. Co., 269 Or. 485, 497-98, 525 P.2d 1033, 1039 (1974), the court overruled *Anderson* and recognized the differences between the doctrine of negligence and strict liability in tort.

It is generally accepted that negligence is based upon unreasonable conduct of the defendant, whereas strict liability in tort looks toward the condition of the product, ignoring the actual conduct of the defendant.[8] Thus, strict liability centers on whether or not the product is defective and not whether the defendant's conduct was unreasonable in making the product defective. Indiana is in accord with other jurisdictions in holding that a product may be considered defective in one of three ways: mismanufacture, misdesign, or failure to give proper instructions or warnings.[9]

Merely stating how a product may be found defective, however, does not resolve the question of what standard is to be used to measure its defectiveness. As both Professor Jerry Phillips and Dean John Wade state, there does not seem to be any problem when a product is mismanufactured: the product as produced is different from that which was intended by the manufacturer. In that case, liability will attend upon proof that the defect caused the plaintiff's injury.[10] Substantial problems arise, however, in cases alleging design defects and defects resulting from inadequate warnings and instructions. In these cases, some courts view the issue as transferring from the condition of the product to whether the designer or manufacturer has supplied a proper design or given proper information concerning the condition of the product.[11] That is, a design defect challenges the designer in producing a product that is free of any defect arising from the manufacturing process, since a perfectly manufactured product may have a propensity to cause harm as designed, whereas a product differently designed may not have caused harm. Similarly, a product which has no manufacturing defect or design defect may still be considered defective if the seller or manufacturer fails properly to instruct the user concerning the product's uses or warn of the inherent dangers present in the product.[12] Because the strict liability cases concerning design, warning, and instruction defects appear to be looking toward the conduct of the defendant rather than the condition of the product, many courts state that these issues are better resolved under negligence rather

---

[8]*Id. See also* Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5 (1965); Weinstein, Twerski, Piehler & Donaher, *Product Liability: An Interaction of Law and Technology*, 12 Duq. L. Rev. 425 (1974).

[9]*See* Burton v. L.O. Smith Foundry Prods. Co., 529 F.2d 108, 110 (7th Cir. 1976); Nissen Trampoline Co. v. Terre Haute First Nat'l Bank, 332 N.E.2d 820, 825 (Ind. Ct. App. 1975).

[10]*See* authorities cited in note 7 *supra*.

[11]*Id.*

[12]*See* Campbell & Vargo, *The Flammable Fabrics Act and Strict Liability in Tort*, 9 Ind. L. Rev. 395, 409 (1976). *See generally* authorities cited in note 7 *supra*.

than strict liability theory.[13] This position is questionable, however, since the theory of strict liability was based at least in part upon the desire to overcome plaintiffs' problems of proving negligence and upon society's demand that the manufacturer bear more of the risk involved in defective products.[14] If strict liability is to accomplish its goals, a standard other than negligence should be considered in the design and warning cases.

At least two lines of thought have been advanced as to the type of standard to be used in strict liability in tort. The first standard is negative in form, generally stating what the standard is not. The second is positive, setting out a formula both for the court and for the jury in strict liability cases. The negative approach was first enunciated in California in *Cronin v. J. B. E. Olsen Corp.*[15] *Cronin*, a "second collision case," rejected the *Restatement* version of strict liability because it used the words "unreasonably dangerous," on the ground that such language smacked of negligence.[16] The *Cronin* court found that section 402A of the *Restatement* departed from the rule stated in *Greenman v. Yuba Power Products*,[17] since any reference to negligence principles is antithetical to strict liability.[18] Strict liability is based upon non-fault principles geared toward the product, while negligence is a fault principle geared toward the conduct of the defendant. The *Cronin* court was not simply indulging in idle semantics, for it stated that the standard of strict liability in tort for both mismanufacture and design defect cases was to be identical.[19] Thus *Cronin* set forth the principle that California would have a single standard, different from negligence, in determining what was necessary to establish a defect in a product. However, the *Cronin*

---

[13]An excellent list of authorities both supporting and rejecting the proposition that design defects and defects arising from a failure to warn or instruct are best resolved on negligence principles can be found in Roach v. Kononen, 269 Or. 457, 525 P.2d 125 (1975).

[14]*See* authorities cited in note 6 *supra*.

[15]8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

[16]*Id.* at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

[17]59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

[18]*Id.* The exact language used by the *Cronin* court was:

> Of particular concern is the susceptibility of Restatement section 402A to a literal reading which would require the finder of fact to conclude that the product is, first, defective and, second, unreasonably dangerous. (Note, *supra*, 55 Geo. L.J. 286, 296.) A bifurcated standard is of necessity more difficult to prove than a unitary one. But merely proclaiming that the phrase "defective condition unreasonably dangerous" requires only a single finding would not purge that phrase of its negligence complexion. We think that a requirement that a plaintiff also prove that the defect made the product "unreasonably dangerous" places upon him a significantly increased burden and represents a step backward in the area pioneered by this court.

8 Cal. 3d at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

[19]*Id.* at 134, 501 P.2d at 1162-63, 104 Cal. Rptr. at 442-43.

court failed to set forth what the standard should be and merely stated what it was not. The *Cronin* reasoning was subsequently followed by New Jersey in *Glass v. Ford Motor Co.*[20] and Pennsylvania in *Berkebile v. Brantly Helicopter Corp.*[21]

The second approach to establishing a standard for strict liability cases was proffered by Dean John Wade[22] and Dean Page Keaton.[23] This Wade/Keaton standard states that the primary difference between negligence and strict liability in tort is one of knowledge or scienter. Professor Wade contends that in strict liability cases knowledge of the injuring defect should be imputed to the manufacturer or seller, and the issue then becomes one of whether the manufacturer or seller would have been negligent for marketing the product with such knowledge.[24] Professor Wade's imputed knowledge approach is best exemplified by *Phillips v. Kimwood Machine Co.*[25] wherein Justice Holman, speaking for the Oregon Supreme Court, recognized that unreasonably dangerous defects in products come from two principal sources: mismanufacture or faulty design.[26] In defining a test for a defect in the product, the *Phillips* court stated:

> A dangerously defective article would be one which a reasonable person would not put into the stream of commerce *if he had knowledge of its harmful character.* The test, therefore, is whether the seller would be negligent if he sold the article *knowing of the risk involved.* Strict liability imposes what amounts to constructive knowledge of the condition of the product.[27]

Justice Holman, discussing warning defects, stated:

> In a strict liability case we are talking about the condition (dangerousness) of an article which is sold without any warn-

---

[20]123 N.J. SUPER. 599, 304 A.2d 562 (Super. Ct. 1973). The *Glass* case has been seriously questioned. *See* Brody v. Overlook Hosp., 66 N.J. 448, 332 A.2d 596 (1975); Turner v. International Harvester Co., 133 N.J. SUPER. 277, 336 A.2d 62 (Law. Div. 1975).

[21]462 Pa. 83, 337 A.2d 893 (1975). The efficacy of *Berkebile* has been brought into question by several federal court decisions which generally follow the case of Beron v. Kramer-Trenton Co., 402 F. Supp. 1268 (E.D. Pa. 1975), the latest being Greiner v. Volkswagenwerk Aktiengeselleschaft, 540 F.2d 85 (3d Cir. 1976); Schell v. AMF, Inc., 422 F. Supp. 1123 (M.D. Pa. 1976).

[22]Wade, *Nature of Strict Tort Liability, supra* note 7, at 836-38.

[23]Keeton, *Product Liability and The Meaning of Defects*, 5 ST. MARY'S L.J. 30, 38 (1973).

[24]Wade, *Nature of Strict Tort Liability, supra* note 7, at 834.

[25]269 Or. 485, 525 P.2d 1033 (1974).

[26]*Id.* at 491, 525 P.2d at 1035.

[27]*Id.* at 492, 525 P.2d at 1036 (footnotes omitted).

> ing, while in negligence we are talking about the reasonableness of the manufacturer's actions in selling the article without a warning. The article can have a degree of dangerousness because of a lack of warning which the law of strict liability will not tolerate even though the actions of the seller were entirely reasonable in selling the article without a warning considering what he knew or should have known at the time he sold it.[28]

Judge Holman also considered the roles of the court and jury in products cases. He found that the same process is used in the doctrines of negligence, ultra hazardous, and strict liability—the utility of the article is weighed against the risk of its use.[29] Thus, Judge Holman generally agreed with Professor Wade as to the factors to be considered in determining whether a case should be submitted to the jury. After it has been determined that a case is appropriate for jury consideration, the proper instruction to be given to the jury is as follows:

> [T]he law imputes to a manufacturer (supplier) knowledge of the harmful character of its product whether he actually knows of it or not. He is presumed to know of the harmful characteristics of that which he makes (supplies). Therefore, a product is dangerously defective if it is so harmful to persons (or property) that a reasonable, prudent manufacturer (supplier) with this knowledge would not have placed it on the market.[30]

Thus, Professor Wade's standard for defectiveness in strict liability cases seems to have practical application, at least according to the Oregon Supreme Court.

Although no Indiana case has discussed either the Wade/Keaton standard or the *Cronin* approach concerning strict liability in tort, several Indiana cases have discussed the problems associated with defects arising from the design and failure to warn or instruct.[31]

---

[28] *Id.* at 498, 525 P.2d at 1039.

[29] *Id.*

[30] *Id.* at 501 n.16, 525 P.2d at 1040 n.16.

[31] Several cases in Indiana have discussed the issue of problems associated with design defects. *See* 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); Filler v. Rayex Corp., 435 F.2d 336 (7th Cir. 1970); Posey v. Clark Equip. Co., 409 F.2d 560 (7th Cir. 1969), *cert. denied*, 396 U.S. 940 (1969); Zahora v. Harnischfeger Corp., 404 F.2d 172 (7th Cir. 1968); Indiana Nat'l Bank v. Delaval Separator Co., 389 F.2d 674 (7th Cir. 1968); Evans v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966), *cert. denied*, 385 U.S. 836 (1967); Huff v. White Motor Corp., 418 F. Supp. 233 (S.D. Ind. 1976); Karczewski v. Ford Motor Co., 382 F. Supp. 1346 (N.D. Ind. 1974); Schemel v. General

Although the Indiana decisions in these areas are not consistent, certain trends can be ascertained from the framework of these cases. The reader is forewarned that conflicts will appear between the federal and state cases and even among different districts or judges within the same court.

II. Design Defect—The Second Collision Theory And The Blind Court

The history of Indiana design defect cases in products liability is dominated by the Seventh Circuit opinion in *Evans v. General Motors Corp.*,[32] wherein Judge Knock rejected plaintiff's argument that the defendant auto manufacturer should be held to a duty of reasonable care and reasonable foresight in the design of its auto to lessen the severity of its passengers' injuries in the event of a collision. Although the *Evans* case was brought under theories of negligence, warranty, and strict liability in tort,[33] the manner in which plaintiff requested relief sounded as if it were merely a request for reasonable care and foresight as in any negligence case.[34] The *Evans* court rejected plaintiff's arguments over a well-reasoned and vigorous dissent by Judge Kiley.[35] In doing so the majority emphasized that the alleged defect in the auto did not cause the accident, that the manufacturer should not be held to a duty to make a perfect, accident-free automobile, and rejected any reasonable foreseeability argument by stating that the intended use of an automobile does not include participation in collisions with other objects.[36] The *Evans* doctrine was reinforced by Judge Knock in *Schemel v. General Motors Corp.*[37] *Schemel* not only followed the

---

Motors Corp., 261 F. Supp. 134, *aff'd*, 384 F.2d 802 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968); J.I. Case Co. v. Sandefur, Inc., 245 Ind. 213, 197 N.E.2d 519 (1964). A few Indiana cases have discussed failure to warn or instruct. *See* Reliance Ins. Co. v. AL E. & C. Ltd., 539 F.2d 1101 (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., Inc., 432 F.2d 1088 (7th Cir. 1970); Posey v. Clark Equip. Co., 409 F.2d 560 (7th Cir. 1969), *cert. denied*, 396 U.S. 940; Eck v. E.I. DuPont De Nemours & Co., 393 F.2d 197 (7th Cir. 1968); Indiana Nat'l Bank v. DeLaval Separator Co., 389 F.2d 674 (7th Cir. 1968); Sills v. Massey-Ferguson, Inc., 296 F. Supp. 776 (N.D. Ind. 1969); 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 procedural grounds*, 358 N.E.2d 974 (Ind. 1976); Link v. Sun Oil Co., 312 N.E.2d 126 (Ind. Ct. App. 1974); Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, 258 N.E.2d 681 (1970).

[32]359 F.2d 822 (7th Cir. 1966), *cert. denied*, 385 U.S. 836 (1967).

[33]*Id.* at 823.

[34]*Id.* at 824.

[35]*Id.* at 825.

[36]*Id.*

[37]261 F. Supp. 134 (S.D. Ind. 1966), *aff'd*, 384 F.2d 802 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968).

Evans doctrine, but also further emphasized that the manufacturer of a product is not an insurer and has a duty only to avoid hidden defects or concealed dangers in its product.[38] In addition, the *Schemel* court stated that a manufacturer is not bound to anticipate and guard against "grossly careless misuse of its product."[39]

Almost a decade after *Evans* and *Schemel*, the Seventh Circuit reaffirmed their holdings in *Latimer v. General Motors Corp.*[40] Judge Swygert left no doubt that in his opinion strict liability does not require a manufacturer to be aware of the environment in which he places his product, or to foresee or anticipate a misuse of his product and design appropriate safeguards.[41] Again, the court emphasized that a manufacturer is not an insurer of his products and is not obligated to produce accident proof machines, but has a duty only to avoid hidden defects or concealed dangers.[42]

The *Evans* rationale was extended in the latest federal case, *Huff v. White Motor Corp.*[43] There, Judge Steckler found that the plaintiff could not recover for enhanced injuries (death) when a tractor overturned and its fuel tank caught on fire. The plaintiff alleged that the fire resulted from a defectively designed fuel tank, and that absent such a design defect, the injuries to the plaintiff would have been less severe. Judge Steckler rejected plaintiff's argument that the *Evans* rationale applied only in negligence cases, not in strict liability cases, and invoked stare decisis to deny recovery. In doing so, he reasoned that the intended purpose doctrine applies in strict liability in tort because of section 402A's requirement that the product be unreasonably dangerous to the user. In Judge Steckler's mind, a product cannot be unreasonably dangerous if the defect does not cause the accident in question.[44]

After this Article went to press, the Seventh Circuit Court of Appeals reversed the trial court in *Huff*, and expressly overruled *Evans* and *Schemel*.[45]

III. Intended Use And Foreseeability

The *Evans* decision rested upon two major fallacies—intended use and obvious danger. *Evans* stated that although collisions are

---

[38]384 F.2d at 805.

[39]*Id.*

[40]535 F.2d 1020 (7th Cir. 1976).

[41]*Id.* at 1023-24.

[42]*Id.*

[43]418 F. Supp. 232 (S.D. Ind. 1976).

[44]*Id.* at 233.

[45]Huff v. White Motor Corp., No. 76-2086 (7th Cir. Oct. 4, 1977). The court determined that, in light of the adoption of section 402A of the *Restatement (Second) of Torts* by the Indiana courts, the *Evans* doctrine would no longer be followed by Indiana courts.

foreseeable, the intended use of an automobile does not include these foreseeable collisions.[46] This outmoded rationale views *intended use* as a subjective test of what a manufacturer will tolerate as a use of his product. The concept originated in 1916 in *MacPherson v. Buick Motor Co.*,[47] and was later translated into section 395 of the *First Restatement of Torts*.[48] It soon became obvious that the *MacPherson* intended use concept in *negligence law* was too narrow, and it was replaced by an objective test requiring the manufacturer to foresee or anticipate certain uses of his product.[49] That is, the manufacturer is required as an element of foreseeability to be aware of the environment in which he places his product. This objective foreseeability test, best exemplified in *Spruill v. Boyl Midway, Inc.*,[50] was adopted in section 395 of the *Restatement (Second) of Torts*. Indiana, however, through *Evans* and its progeny, has not only clung to the intended use concept in negligence, but has also grafted it onto strict liability in tort. This puzzling stubbornness can perhaps be explained either as allegiance to stare decisis or sympathetic attitude to manufacturers.

The courts' protective attitude toward business is evident in the method used to reach the result—the *Evans* court first inflated plaintiff's contentions, then destroyed them. The plaintiff in *Evans* did not ask for a perfect, foolproof vehicle capable of withstanding all types of collisions, but rather requested that the manufacturer design his car in such a way that injuries would not be enhanced in foreseeable collisions.[51] Yet the *Evans* court sua sponte created a straw man that demanded "foolproof" or "accident proof" vehicles.[52] Not being content with destroying that illusionary demand, the court repeatedly emphasized that the alleged defect did not cause the original collision, conveniently overlooking the fact that plaintiff sought damages only for those injuries which were enhanced by the alleged design defect, not for the injuries caused only by the original collision.[53]

The second fallacy underlying the *Evans* decision is the so-called "obvious danger rule" which is best exemplified by the 1950 New York case of *Campo v. Scofield*,[54] a negligence case heavily relied

---

[46]*See* text accompanying note 36 *supra*.

[47]217 N.Y. 382, 111 N.E. 1050 (1916).

[48]RESTATEMENT OF TORTS § 395 (1934). Comment c and the illustration which follows describe the intended purpose rationale.

[49]When the *Restatement (Second) of Torts* was written, the intended purpose doctrine was changed to include foreseeability. *See* RESTATEMENT (SECOND) OF TORTS § 395 (1965), especially comment b.

[50]308 F.2d 79 (4th Cir. 1962).

[51]*See* text accompanying note 34 *supra*.

[52]359 F.2d at 824.

[53]*Id.* at 823-24.

[54]301 N.Y. 468, 95 N.E.2d 802 (1950).

upon by the *Evans* court.[55] *Campo* will be discussed at length later in this Article.[56] Suffice it to say at this point that it seems inappropriate at best that the Seventh Circuit continues to rely upon outdated negligence principles, particularly since recent Indiana cases have evinced a more realistic view of the consumer-manufacturer relationship. For example, in a federal district court case, *Karczewski v. Ford Motor Co.*,[57] Judge Sharp stated: "There is no question that the particular purpose of a passenger automobile is to drive on the public streets and highways safely without uncontrolled unsafe behavior. Certainly, an automobile is impliedly warranted for that purpose."[58]

Judge Lowdermilk of the Indiana Court of Appeals was even more emphatic in *Gilbert v. Stone City Construction Co.*[59] He defined the "consumer expectation test" as a standard for a defect in Indiana as follows: "The prevailing interpretation of 'defective' is that the product does not meet the reasonable expectations of the ordinary consumer as to its safety . . . ."[60]

Gilbert held that users have a reasonable expectation that suppliers will provide safety devices to protect against design-created dangers, and that lack of safety devices to guard against foreseeable mishaps may constitute defective design.[61] The question of whether a given omission does constitute a defect is a factual determination for the jury.[62]

The conflicts between the *Evans* doctrine as expressed in *Huff* and *Latimer* and the reasonable foreseeability standard of *Gilbert* are irreconcilable. Whereas *Gilbert* uses a consumer expectation test, *Evans* uses a subjective test that bars recovery when the use of the product is neither intended nor *actually* foreseen by the manufacturer. *Evans* and its progeny state that as a matter of law a manufacturer has no duty to foresee the handling and use of his product, whereas *Gilbert* requires the manufacturer to use reasonable foreseeability, and to anticipate the use of his product. Although, *Gilbert* does not address the second collision issue which was central in *Evans*, it is clear that a manufacturer has an obligation to provide feasible safety features to eliminate dangers arising from foreseeable uses. In 1970, the Seventh Circuit used the same rationale used in *Gilbert* in a non-automobile context in *Filler v.*

---

[55]The *Evans* case cites *Campo* for the "obvious danger rule." *See* Evans v. General Motors Corp., 359 F.2d at 824.

[56]*See* text accompanying notes 88-111 *infra*.

[57]382 F. Supp. 1346 (N.D. Ind. 1974).

[58]*Id.* at 1351.

[59]357 N.E.2d 738 (Ind. Ct. App. 1976).

[60]*Id.* at 743.

[61]*Id.* at 744.

[62]*Id.* at 745.

Rayex Corp.[63] Without mentioning *Evans*, the court cited *Spruill* for the proposition that the manufacturer-seller must anticipate the reasonably foreseeable risk in the use of his product.[64]

The continued vitality of the *Evans* and *Huff* approach of using negligence and even prenegligence concepts in section 402A cases is in direct conflict with *Gilbert*, *Filler*, and *Karczewski*. As Judge Sharp stated in *Karczewski*:

> The Ford Motor Company devotes much attention to a discussion of express warranty and puts several eggs in the basket provided in *Blunk v. Allis Chalmers Manufacturing Company*. *Blunk* is no salvation to Ford for at least two reasons. First, this case was not submitted on express warranty. Second, *Blunk* represents pre-strict liability case law in Indiana and for that additional reason has no application here.[65]

The unnecessary judicial blindness arising from the elimination of foreseeability and reasonableness in *Evans* has no place in strict liability, or even negligence cases, and should be eliminated.

IV. Failure To Warn

The second type of defect, failure to warn, is conceptually closely related to defective design. Indiana's ready acceptance of liability for failure to warn thus presents another anomaly vis-a-vis *Evans*. Failure to warn was succinctly described in *Sills v. Massey-Ferguson, Inc.*,[66] where a non-user or "bystander" was injured by a stone thrown from the blades of a lawn mower manufactured, designed, and sold by the defendant. Plaintiff brought his action in negligence, warranty, and strict liability in tort, alleging negligent design, a design defect, and failure to warn of a foreseeable risk.[67] Judge Eschbach found that the question of defect and failure to warn are closely related issues:

> [T]he court has held that the defendant owed plaintiff a duty not to put on the market a product in a defective condition unreasonably dangerous to him. It would appear that there are essentially two ways that a manufacturer may discharge this duty. 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 of the danger

---

[63] 435 F.2d 336 (7th Cir. 1970).
[64] *Id.* at 338.
[65] 382 F. Supp. at 1351.
[66] 296 F. Supp. 776 (N.D. Ind. 1969).
[67] *Id.* at 778.

> to those who foreseeably will be affected by it. In this connection, a "perfectly" made product may be defective in the legal sense if it is unreasonably dangerous in the absence of a warning.[68]

That is, a manufacturer has a duty to place a "safe product" on the market, either by making its product completely safe, or by giving an "effective" warning regarding dangers which cannot practically be removed. Failure to do one or the other renders the product unsafe or defective, and subjects the manufacturer to liability for any resulting injury. Whether the defendant should have warned the plaintiff of dangers in the product is a question for the jury.[69]

A particularly revealing statement is made in *Sills* regarding assumption of risk (incurred risk): "The rationale underlying the warning concept is that a person who is injured by a product in spite of his receiving an effective warning about its dangers is deemed to have incurred the risk and consequently may not recover for his injuries."[70] It is reasonable to conclude from this statement that any injury resulting from a manufacturer's failure to warn will result in liability unless the manufacturer can prove all of the elements of assumption of risk.[71] The only standard offered by *Sills* as to what would constitute an effective warning was that it must apprise the user of the danger at hand. Moreover, the warning need not necessarily be given directly to the user if it is given to a person "in a position such that he may reasonably be expected to act so as to prevent the danger from manifesting itself."[72]

The failure to warn concept first appeared in an Indiana state court in *Perfection Paint & Color Co. v. Konduris.*[73] There, Judge Pfaff said that when a product is more dangerous than is contemplated by the ordinary user, the manufacturer owes a duty to warn of the product's dangers.[74] Any use of the product in contravention of adequate warning would result in assumption of the risk.[75] The *Sills/Perfection* concept of a product being defective when the manufacturer fails to give adequate warnings was followed

---

[68]*Id.* at 782.

[69]*Id.* at 778-79.

[70]*Id.* at 782-83.

[71]For a discussion of the elements of assumption of the risk or incurred risk—actual knowledge, understanding and appreciation of a risk with a viable choice or alternative to said risk—*see* Vargo, *1976 Survey, supra* note 5, at 272 n.29; Vargo, *Products Liability, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 270, 279 n.48 (1975) [hereinafter cited as Vargo, *1975 Survey*].

[72]296 F. Supp. at 783.

[73]147 Ind. App. 106, 258 N.E.2d 681 (1970).

[74]*Id.* at 120, 258 N.E.2d at 689.

[75]*Id.*

by the Indiana Court of Appeals in *Link v. Sun Oil Co.*,[76] where the court approved instructions on the failure to warn issue, but refused to find the defendant liable because the proof was insufficient.[77]

The most notable decision concerning failure to warn is *Nissen Trampoline Co. v. Terre Haute First National Bank.*[78] Although the court of appeals decision was reversed on procedural grounds by the Indiana Supreme Court,[79] that decision is the most recent statement of an Indiana appellate court's view of failure to warn, and as such calls for close study. The most interesting aspect of the court of appeals decision is its recognition that failure to warn cases present a serious causation problem. The plaintiff, who has the burden of proving causation, is put in an impossible position when the manufacturer gives no warning, since the plaintiff must then show that "but for" the absent warning, plaintiff would not have been injured.[80] That is, plaintiff is forced into the position of showing that he would have heeded an adequate warning if one had been given. To overcome this problem the *Nissen* court followed the lead of the Texas Supreme Court in *Technical Chemical Co. v. Jacobs*,[81] which shifted the burden of causation by creating a rebuttable presumption that plaintiff would have heeded a sufficient warning. This device was subsequently used in *Gilbert*, which held that the lack of safety devices could constitute a defective condition.[82] Adopting the *Nissen* rule, the *Gilbert* court said that the plaintiff, a bystander who was injured by a rolling machine lacking an audible signal, would have heeded any such audible warning if one had been given.[83]

Rounding out the scope of the manufacturer's duty to warn, the Seventh Circuit Court of Appeals in *Reliance Insurance Co. v. AL E. & C. Ltd.*,[84] stated that once an obligation to warn has arisen it is

---

[76]312 N.E.2d 126 (Ind. Ct. App. 1974).

[77]The trial court's instruction was:

> The word 'defect' as used in these instructions, refers not only to the condition of the product itself, but may include as well the failure to give directions or warnings as to the use of the product in order to prevent it from being unreasonably dangerous. If directions or warnings as to the use of a particular product are reasonably required in order to prevent the use of such product from becoming unreasonably dangerous, the failure to give such warnings or directions, if any, renders the product defective, as that word is used in these instructions.

Id. at 128-29.

[78]332 N.E.2d 820 (Ind. Ct. App. 1975).

[79]358 N.E.2d 974 (Ind. 1976).

[80]For a description of the causation problem involved in *Nissen*, *see* Vargo, *1976 Survey*, *supra* note 5, at 277-78.

[81]480 S.W.2d 602 (Tex. 1972).

[82]357 N.E.2d at 745.

[83]*Id.*

[84]539 F.2d 1101 (7th Cir. 1976).

considered a non-delegable duty. Citing *Berkebile v. Brantly Helicopter Corp.*,[85] the court stated:

> The sole question . . . is whether the seller accompanied his product with sufficient instructions and warnings so as to make his product safe. *This is for the jury to determine. The necessity and adequacy of warnings in determining the existence of a defect can and should be considered with a view to all the evidence.* The jury should view the relative degrees of danger associated with the use of the product since a greater degree of danger requires a greater degree of protection.
>
> Where warnings or instructions are required to make a product non-defective, it is the duty of the manufacturer to provide such warnings in a form that will reach the ultimate consumer and inform of the risk and inherent limits of the product. *The duty to provide a non-defective product is non-delegable.*[86]

Although it has not been overruled, the *Evans/Huff/Latimer* line of cases has been undermined by the *Sills/Nissen/Reliance* line. Viewed as a whole, these latter cases offer the following standard for warning cases: A product may be considered defective if the manufacturer fails to warn of a product's dangers which he cannot reasonably render safe. Any issue of whether the manufacturer should warn is a question to be resolved by the jury. The warning must be adequate and must reach the ultimate user, since the duty to warn is non-delegable. If the warning is given, failure to heed an adequate warning is considered to be within the ambit of the defense of assumption of risk, with the burden of proving all elements on the defendant. If no warning is given, there is a rebuttable presumption that the plaintiff would have heeded said warning.

V. Obvious Danger, Latent Versus Patent, Foreseeability, Knowledge, and Choice of Materials—Should These Affect the Standard of Warning Cases?

The failure to warn cases just discussed, *Sills* through *Reliance*, standing alone express a rather comprehensive basis for understanding Indiana law. However, a completely separate line of cases has developed that at best is difficult to square with the *Sills* rationale.

---

[85]462 Pa. 83, 337 A.2d 893 (1975). *See* discussion in note 21 *supra*.

[86]539 F.2d at 1106.

This second line of cases began with dictum in *J. I. Case v. Sandefur*, which cited *Campo v. Scofield*, a 1950 New York case.[87] *Campo* described the archaic "limited duty" concept that as a matter of law a plaintiff cannot recover if injury-causing dangers contained in a product are obvious, or patent.[88] *Campo* came under vigorous and well-deserved attack in the late 1950's by Harper and James as a remnant of a prenegligence concept which has no place in modern negligence law.[89] Although New York eventually overruled *Campo*[90] under the fire of adverse criticism,[91] Indiana has continued to espouse the *Campo* concept, albeit mostly in dicta.[92] At least ten Indiana cases (*Nissen* included) have stated that in order for plaintiff to recover he must have been unaware of the dangers in the product[93]—stated differently, if the danger or defect in the product is "obvious" or "patent," then as a matter of law there can be no liability. The creation of this objective standard in the obvious danger rule flies in the face of the subjective posture of assumption of the risk.[94] This extension of an archaic prenegligence concept to strict liability in tort contradicts the premises of strict liability, in that it offers a reward to the manufacturer who makes a blatantly unsafe product—no liability attaches since the defect is exposed.[95]

---

[87]245 Ind. at 222, 197 N.E.2d at 523, *citing* Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950).

[88]For criticism of this approach, *see* Vargo, *1976 Survey*, *supra* note 5, at 279-83.

[89]*See* 2 F. HARPER & F. JAMES, LAW OF TORTS § 28.5, at 1542 (1956).

[90]Micallef v. Miehle Co., 39 N.Y.2d 376, 385, 384 N.Y.S.2d 115, 121, 348 N.E.2d 571, 577 (1976).

[91]*Id.* at 383-85, 384 N.Y.S.2d at 120-21, 348 N.E.2d at 575-77.

[92]For a history of the *Campo* rule as cited in Indiana cases, *see* Vargo, *1976 Survey*, *supra* note 5, at 280 n.61.

[93]*Id.*

[94]The fact that a danger is obvious does not mean that the plaintiff has actual understanding or appreciation of the risk, nor does it indicate whether he had an adequate choice, all of which are necessary elements for the plaintiff to have incurred the risk involved. *See* authorities cited in note 71 *supra*.

[95]As the court stated in Luque v. McLean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972):

> Furthermore, the policy underlying the doctrine of strict liability compels the conclusion that recovery should not be limited to cases involving latent defects. "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." Requiring the defect to be latent would severely limit the cases in which the financial burden would be shifted to the manufacturer. It would indeed be anomalous to allow a plaintiff to prove that a manufacturer was negligent in marketing an obviously defective product, but to preclude him from establishing the manufacturer's strict liability for doing the same thing. The result would be to immunize from strict liability manufacturers who callously ignore patent dangers in their products while

The cases espousing the obvious danger rule have offered two further rationales for denying recovery to plaintiffs injured by a product. The first is that the manufacturer has a right to use whatever materials he chooses to make his product, and the second is that the manufacturer must be endowed with superior knowledge concerning the qualities of his product before the plaintiff may recover. In *Indiana National Bank v. DeLaval Separator Co.*,[96] a negligence case, the court stated that the manufacturer has a duty to warn of dangers of which he has actual or constructive knowledge, but has no duty to warn of obvious dangers. In answer to plaintiff's contention that the product could have been made safer if the manufacturer had used different materials, the *DeLaval* court said that "a manufacturer may determine the character of the materials to be used primarily for the purpose of producing or manufacturing its product," citing *Sandefur* as authority.[97] However, the *Sandefur* opinion actually states:

> A manufacturer may determine the character of the materials to be used primarily for the purpose of producing or manufacturing an "economy model," as compared with a luxury model—the life of one being much less than the life of the other. Yet there are reasonable limits on such "economy," for example: a machine may not be built with extremely weak or flimsy parts concealed by an exterior such as to mislead a user into believing it safe and stable when, in fact, it is not, thus causing a user to rely thereon, to his injury.[98]

There is no doubt that under either negligence or strict liability in tort a manufacturer *may* choose whatever materials he desires in making his product. However, it is also true that under either negligence or strict liability the manufacturer *may* be held liable for any unreasonableness in his choice of materials. The issue is not one of deprivation of choice but of reasonableness of choice.

The same holds true for choice for design. The manufactuerer-defendant in *Posey v. Clark Equipment Co.*[99] made two types of forklifts. One was for use in areas where items would be lifted above the driver's head, and had a safety device above the driver to protect him from falling objects. The other, for use in "low stacked

---

subjecting to such liability those who innocently market products with latent defects.

8 Cal. 3d at 145, 501 P.2d at 1169, 104 Cal. Rptr. at 449 (citations omitted).

[96]389 F.2d 674 (7th Cir. 1968).

[97]*Id.* at 677.

[98]J.I. Case Co. v. Sandefur, 245 Ind. 213, 222-23, 197 N.E.2d 519, 523 (1964).

[99]409 F.2d 560 (7th Cir.), *cert. denied*, 396 U.S. 940 (1969).

areas," had no such safety device. The plaintiff was injured while using a "low stack" forklift in a "high stack area" when items fell from above. The court denied liability on plaintiff's failure to warn theory because of the obvious danger rule and because plaintiff failed to prove that the manufacturer had superior knowledge of the dangers involved in the product.[100] Although superior knowledge as between the plaintiff and defendant concerning propensities of a product is probably relevant in the contract context of implied warranties for a particular purpose,[101] superior knowledge in negligence or strict liability in tort cases should not *as a matter of law* rule out the possibility of finding the defendant liable for a defective product.

Further problems of the obvious danger rule are illustrated in *Burton v. L. O. Smith Foundry Products Co.*[102] In that case a hose carrying a flammable compound was severed, spraying and burning the plaintiff-decedent, who was working on the machine containing the hose. In holding that the manufacturer of the compound was not liable for the plaintiff's injuries, Judge Stevens said that: "[A] duty to warn exists only when those to whom the warning would go can reasonably be assumed to be ignorant of the fact which a warning would communicate. If it is unreasonable to assume they are ignorant of those facts, there is no duty to warn."[103]

The court based its conclusion of no liability on its finding that it is common knowledge that kerosene, with which the compound was mixed, is flammable. It was irrelevant to the *Burton* court that the compound was not mixed by the plaintiff and others working with the machine, who therefore had no knowledge of the flammability of the compound, since the manufacturer of the compound had no control over the workspace around the machine and thus could not post warnings.

The most obvious problem with this analysis is that it conflicts with *Reliance Insurance Co. v. AL E. & C. Ltd.*[104] which states that the duty to warn is non-delegable, and that a warning must go to the ultimate user.[105] Although the compound manufacturer in *Burton* could not post warnings, it could have either made the product safe or taken it off the market. Judge Eschbach said in *Sills* that if a manufacturer can not make a safe product it must provide effective

---

[100] *Id.* at 563-64.

[101] The recognition of the differences between implied warranties which sound in contract and those which sound in tort is well-recognized in Indiana courts. *See* Noefes v. Robertshaw Controls Co., 409 F. Supp. 1376 (S.D. Ind. 1976); *see also* Vargo, *1975 Survey, supra* note 71, at 274 n.27.

[102] 529 F.2d 108 (7th Cir. 1976).

[103] *Id.* at 111.

[104] 539 F.2d 1101 (7th Cir. 1976).

[105] *Id.* at 1106.

warnings.[106] The converse should also be true—if effective warnings cannot be given, then the product must be made safe.

A more subtle problem, the one at the heart of the obvious danger rule, is Judge Stevens' statement in *Burton* that "[i]f it is unreasonable to assume they are ignorant of those facts, there is no duty to warn."[107] This sentiment is often expressed in judicial opinions, usually accompanied by truisms such as everyone knows that sharp things cut and that gravity causes things to fall. This standard is appropriate only at this very low level of common knowledge. However, when discussing complex products objective assessments of "common knowledge" are out of place in strict liability in tort.[108] Thus as will be discussed in a later section,[109] the objective reasonable person test of contributory negligence has been eliminated from strict liability, leaving only the subjective assumption of risk defense that looks to the plaintiff's actual knowledge. It must be remembered, of course, that the manufacturer's obligation to provide a safe product is the prime consideration in strict liability in tort, and must always be considered, despite the state of plaintiff's knowledge.

VI. Substantial Change

Judge Hoffman attempted to throw further hurdles into plaintiffs' paths in *Cornette v. Searjeant Metal Products, Inc.*,[110] in which he stated that as part of plaintiff's burden of proof in section 402A cases, he must establish positive proof that no substantial change occurred in the product from the time it was sold. "[A]ny change which increases the likelihood of a malfunction, which is the proximate cause of the harm complained of, and which is independent of the expected and intended use to which the product is put, *is* a *substantial* change."[111]

Judge Sharp vigorously disagreed with Judge Hoffman, saying that comment g to section 402A is the accurate statement of plaintiff's burden of proof in strict liability.[112] According to Judge Sharp, comments g and p do not require that the plaintiff prove no change has taken place, since it is contemplated that some products will undergo changes after they leave the seller's hands.[113] Judge Sharp

---

[106]296 F. Supp. at 782.

[107]529 F.2d at 111.

[108]*See* discussion in Vargo, *1976 Survey, supra* note 5, at 279-83. *See also* 2 F. Harper & F. James, Law of Torts § 28.5, at 1542 (1956).

[109]*See* text accompanying notes 140-68 *infra*.

[110]147 Ind. App. 46, 258 N.E.2d 652 (1970).

[111]*Id.* at 54, 258 N.E.2d at 657.

[112]*Id.* at 62, 258 N.E.2d at 662.

[113]*Id.* at 62-63, 258 N.E.2d at 662-63.

defined the issue as: "whether the responsibility for discovery and prevention of the dangerous defect is shifted to the intermediate party who is to make the changes."[114] After a lengthy discussion of how a plaintiff could fulfill his burden of proof through circumstantial evidence,[115] Judge Sharp concluded that any change in the product not reasonably forseeable to the manufacturer is a *defense* available to the defendant, who has a burden of proving that defense.[116]

VII. Strict Construction

Judge Hoffman and Judge Sharp also had opposing views as to the standard of interpretation of section 402A. In *Cornette* Judge Hoffman stated:

> Our reading of § 402A, *supra*, and numerous cases of applying it, leads to the conclusion that it should be strictly construed and narrowly applied. The limitation on imposition of the doctrine should be fully invoked and 'strict liability' applied only in those cases which fully and fairly meet § 402A, *supra*, standards.[117]

In response to Judge Hoffman's "strict construction," Judge Sharp said:

> I have carefully read all of the citations of authority and cannot find one that suggests or justifies the above quoted statement. I do not believe that products liability cases based on strict tort liability should be 'strictly construed and narrowly applied' any more than products liability cases based on negligence, express warranty, or implied warranty. If a party is able to bring his case within the principles set forth within § 402A, then he is entitled to its benefits no more, no less. To attach the rider 'strictly construed and narrowly applied' upon the adoption of § 402A is to graft a condition upon such adoption that has not been present in the adoption of § 402A in any other jurisdiction to my knowledge. This will lead to undue confusion in the handling of strict tort liability cases in Indiana. Such condition is wholly unnecessary and undesirable in my view.[118]

Judge Garrard subsequently cited both Judge Hoffman and Judge Sharp in *Chrysler Corp. v. Alumbaugh*[119] concerning the

---

[114] *Id.* at 64, 258 N.E.2d at 663.
[115] *Id.* at 63-67, 258 N.E.2d at 663-65.
[116] *Id.* at 67, 258 N.E.2d at 665.
[117] *Id.* at 53, 258 N.E.2d at 656.
[118] *Id.* at 56, 258 N.E.2d at 658.
[119] 342 N.E.2d 908, 915 (Ind. Ct. App. 1976).

"strict construction" policy, but refused to choose between them. Judge Sharp affirmed his opposition to Judge Hoffman's strict construction policy after his appointment to the federal bench in *Wicks v. Ford Motor Co.*,[120] stating that Judge Hoffman's viewpoint was not the law of the state of Indiana, but rather that his own opinion was the law.[121]

The Seventh Circuit Court of Appeals in *Reliance* refused to follow Judge Hoffman's "strict construction" of section 402A, stating that they were not impressed with such dictum.[122]

These rejections of the "strictly construed and narrowly applied" standard of interpretation of the *Restatement* are in accord with sound judicial principles. This language is commonly used in construing statutes, not common law.[123] Section 402A, like all restatement sections, is judge-made, not statutory law. In keeping with common law traditions, section 402A should be read broadly to fulfill the societal needs which created the doctrine.[124] As Judge Sharp stated: "No court anywhere has so construed any restatement section, and such a restrictive construction is not the law of Indiana."[125]

VIII. Sale, Seller and Stream of Commerce

Although strict liability in tort pursuant to section 402A applies to sellers of products, a commercial sale is not necessary for liability to attach. For example, in *Perfection Paint & Color Co. v. Konduris*,[126] the court rejected the defendant manufacturer's attempt to escape liability by asserting that the gratuitous transfer of the product to the plaintiff failed to meet the sale requirement of section 402A. In an exhaustive review of the sale requirement the court stated that a "sale" occurred when the seller placed the product on the market or injected the goods into the stream of commerce.[127] Relying partially on *Greeno*, the *Konduris* court reaffirmed the *Price v. Shell Oil Co.*[128] stream of commerce approach. The *Konduris* opinion was reaffirmed in *Link*, *Karczewski*, and *Gilbert*. *Gilbert* expanded the *Konduris* concept by stating that a commercial sale was not necessary—a defendant could inject a defective product into the stream of commerce by either a "sale, lease, bailment, *or other*

---

[120]421 F. Supp. 104 (N.D. Ind. 1976).

[121]*Id.* at 106.

[122]539 F.2d at 1104.

[123]*See generally* 2A J. Sutherland, Statutes and Statutory Construction §§ 58.01-58.06 (4th ed. C. Sands 1973).

[124]*See* discussion in note 6 *supra*.

[125]421 F. Supp. at 106.

[126]147 Ind. App. 106, 258 N.E.2d 681 (1970).

[127]*Id.* at 113-17, 258 N.E.2d at 685-88.

[128]2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970).

means."[129] Electricity was brought under section 402A in *Petroski v. Northern Indiana Public Service Co.*,[130] in which the Indiana Court of Appeals stated that electricity is a product that can be sold within the meaning of section 402A. However, it will not be considered to have been placed into the stream of commerce until it has reached its destination and left the line under the control of the electric company.[131]

IX. Bystander Recovery

Another issue in strict liability is whether or not a nonuser or bystander may recover for injuries inflicted by defective products. The *Restatement* takes no stand concerning this issue.[132] The *Cronin* line of cases, beginning with the now famous *Greeman v. Yuba Power Products*,[133] resolves the problem by ignoring the *Restatement's* use of the language "consumer or user" and allows recovery by "any person"[134] injured by a defective product. In Indiana, the bystander problem was first addressed by Judge Eschbach in *Sills*. He held that a nonuser "bystander" could recover for injuries upon either of two grounds: either the bystander is a reasonably foreseeable party, or, irrespective of foreseeability, the bystander may recover because of the policy considerations of section 402A.[135] The first approach—the forseeability standard—is a negligence test going to the duty element. The second approach ignores foreseeability because it is so closely related to negligence, and opts for protection of bystanders for social and policy considertions.[136] The court in *Sills* did not find it necessary to choose between these two theories. However, the later Indiana Court of Appeals case, *Chrysler Corp. v. Alumbaugh*,[137] emphasized the negligence approach in allowing the bystander to recover.[138] The *Alumbaugh* opinion was subsequently reinforced in *Gilbert*. The *Alumbaugh/Gilbert* opinions demonstrate either the Indiana courts' propensity towards negligence concepts or a misunderstanding of strict liability in tort.[139]

---

[129] 357 N.E.2d at 742 (emphasis added).
[130] 354 N.E.2d 736 (Ind. Ct. App. 1976).
[131] *Id.* at 747.
[132] Restatement (Second) of Torts § 402A, Comment o (1965).
[133] 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).
[134] 59 Cal. 2d at 64, 377 P.2d at 901, 27 Cal. Rptr. 697.
[135] 296 F. Supp. at 781.
[136] *Id.*
[137] 342 N.E.2d 908 (Ind. Ct. App. 1976).
[138] *See* Vargo, *1976 Survey*, *supra* note 5, at 266-76.
[139] *Id.*

X. The Defenses

Superficially it appears that the consideration of the standard to use to determine whether a product is defective is disassociated from the defenses allowable in strict liability. However, there is an integral relationship between the elements of plaintiff's prima facie case and the elements of the defenses. For example, the courts have alternately characterized the obvious danger rule as part of the defense of assumption of risk,[140] or as a part of plaintiff's case-in-chief, which he must disprove before the product can be considered defective.[141] In order to properly evaluate what standard for defectiveness Indiana courts may adopt, it thus becomes necessary to consider the defenses and bars to recovery in strict liability in tort. Generally, contributory negligence has been eliminated as a defense,[142] leaving only assumption of risk and misuse as defenses to strict liability.[143]

A. *Contributory Negligence*

The elimination of contributory negligence as a defense to strict liability in tort cases has been accepted in Indiana. For example, Judge Buchanan in *Gregory v. White Trucking & Equipment Co.*[144] made an exhaustive survey of law in other jurisdictions and concluded that contributory negligence is not a defense either to strict liability in tort or to implied warranties which sound in tort or in contract.[145] This conclusion is in accord with the rationale of strict liability, which is based upon non-fault principles.[146] Any application of contributory negligence would be a reversion to the fault or negligence principles. This elimination of contributory negligence from Indiana law should have simplified the defenses. However, the

---

[140]*See generally* Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

[141]*E.g.*, Downey v. Moore's Time-Saving Equip., Inc., 432 F.2d 1088, 1091 (7th Cir. 1970).

[142]*See* Vargo, *1975 Survey*, *supra* note 71, at 278.

[143]The issue of exactly what constitutes defenses to strict liability in tort is unsettled. *See* Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 Vand. L. Rev. 93 (1972); Noel, *Products Liability: Bystanders, Contributory Fault and Unusual Uses*, 50 F.R.D. 321 (1971). As an example of one judge's admission of some forms of contributory negligence being a defense when brought in under the guise of other names such as misuse, *see* Greeno v. Clark Equip. Co., 237 F. Supp. 427, 429 (N.D. Ind. 1965). For a discussion of one viewpoint that misuse is in reality a causation issue, *see* Vargo, *1975 Survey*, *supra* note 74, at 280 n.49.

[144]323 N.E.2d 280 (Ind. Ct. App. 1975).

[145]*Id.* at 285-87.

[146]*See* Vargo, *1976 Survey*, *supra* note 5, at 265-76.

opposite result has been achieved through the adoption of a mutated assumption of risk defense and a "new vocabulary."

B. *Assumption of Risk*

Assumption of risk has been recognized as a defense to strict liability in Indiana since *Greeno*, wherein Judge Eschbach cited comment n to section 402A as the appropriate standard for incurring a known and appreciated risk.[147] Judge Eschbach in *Sills* cited *Stallings v. Dick*[148] in holding that assumption of risk is a factual issue for jury determination.[149] However, in *Downey v. Moore's Time-Saving Equip., Inc.*,[150] the Seventh Circuit Court of Appeals subsequently espoused the amazing rule that if the plaintiff had knowledge of the danger and appreciated it or should have knowledge and appreciation, he then assumed the risk. The *Downey* rule was later reinforced in *Cornette* in which the court, citing *Stallings*, a negligence case, stated:

> The doctrine of assumed or incurred risk ". . . is based upon the proposition that one incurs all the ordinary and usual risks of an act upon which he voluntarily enters, so long as those risks are known and understood by him, or *could be readily discernible by a reasonable and prudent man under like or similar circumstances.*"[151]

The *Stallings* definition is rather confusing, for the assumption of risk (incurred risk) rule as cited in *Stallings* was preceded by the statement that: "The courts have long recognized the doctrine of incurred risk and have distinguished it from the separate defense of contributory negligence."[152] The *Stallings* assumption of risk formula uses an objective reasonable person standard to test the plaintiff's knowledge and appreciation of the risk. This test is generally used to establish contributory negligence, not to establish assumption of risk.[153] Rather, to prove assumption of risk the defendant has the burden of proving that the plaintiff subjectively had actual knowledge, understanding, and appreciation of the risk, and was given viable choices in voluntarily undertaking such risk.[154] Thus, despite its facial recognition that contributory negligence and

---

[147]237 F. Supp. at 429.
[148]139 Ind. App. 118, 129, 210 N.E.2d 82, 88 (1965).
[149]296 F. Supp. at 782.
[150]432 F.2d 1088, 1093 (7th Cir. 1970).
[151]258 N.E.2d at 657 (emphasis added).
[152]210 N.E.2d at 88.
[153]*See* Vargo, *1975 Survey*, *supra* note 71, at 279 n.48.
[154]*Id.*

assumption of risk are separate defenses, the *Stallings* court nonetheless failed to distinguish them in fact.

This meshing of contributory negligence and assumption of risk was harmless in *Stallings* since it was based upon negligence, so either contributory negligence or assumption of risk was available as a defense. However, the subsequent use of the *Stallings* formulation of assumption of risk in *Cornette* is erroneous, since the previously eliminated defense of contributory negligence is reinjected into the defense of assumption of risk. Furthermore, using the *Stallings* assumption of risk formula even in a *negligence* case is contrary to the statement in *Stallings* that assumption of risk and contributory negligence are separate defenses which should be distinguished. Indiana courts have no difficulty distinguishing contributory negligence from assumption of risk in other areas of law (*e.g.*, guest passenger cases) which eliminate contributory negligence as a defense.[155] The same should be true of strict liability in tort.

C. *The New Vocabulary—Abnormal Use, Unintended Use, and Misuse*

Since comparative fault is not available as a defense in Indiana, the only defenses available in negligence are contributory negligence and assumption of risk. With the elimination of contributory negligence as a defense in strict liability actions, assumption of risk would appear to be the only defense available. However, artful lawyering by defense counsel has led courts to adopt a new language which renames many elements of contributory negligence and assumption of risk, creating what are now considered viable bars to recovery under strict liability in tort. Chief among these newly created bars to recovery are abnormal use, unintended use, and misuse.

In negligence cases, abnormal use was considered to be the defense of contributory negligence, with the burden of proof on the defendant.[156] Unintended use as found in negligence law can be traced to *MacPherson v. Buick Motor Co.*[157] The *MacPherson* unintended use formulation was adopted by the *First Restatement of Torts*, and has been considered to be a subjective test of how the manufacturer actually desired his product to be used.[158] This subjective intended use concept was later transferred into a test of foreseeability.[159]

---

[155]*E.g.*, Pierce v. Clemens, 113 Ind. App. 65, 46 N.E.2d 836 (1943).

[156]Note, *Abnormal Use in the Strict Products Liability Case—The Plaintiff's Burden of Proof?*, 6 SW. U. L. REV. 661 (1974).

[157]217 N.Y. 382, 111 N.E. 1050 (1916).

[158]*See* note 48 *supra* and accompanying text.

[159]*See* note 49 *supra* and accompanying text.

Thus, the intended use concept was converted from subjective use as intended by the manufacturer to an objective foreseeability test as seen by the reasonable person. Significantly, foreseeability under negligence law is considered part of the duty element, and thus part of the plaintiff's burden of proof.[160] With the adoption of unintended use language, this duty concept has been carried into strict liability as part of plaintiff's burden of proof, despite the shift in emphasis from the manufacturer's duty or conduct to the condition of the product in strict liability in tort.

With this "new vocabulary" much of what had been supposedly eliminated with the discard of contributory negligence was transmuted into additional burdens on the plaintiff. For example, misuse in negligence law is considered part of contributory negligence and thus a defense, with the burden of proof on the defendant.[161] However, in strict liability some courts have interpreted misuse as a part of plaintiff's burden of proof in showing either a defect or causation. As the court said in *Greeno:*

> Neither would contributory negligence constitute a defense, although use different from or more strenuous than that contemplated to be safe by ordinary users/consumers, that is, 'misuse,' would either refute a defective condition or causation. 'Misuse' would include much conduct otherwise labeled contributory negligence and would constitute a defense. Incurring a known and appreciated risk is likewise a defense.[162]

Although *Greeno* stated that misuse was a "defense," it also stated that misuse could refute the elements of defect or causation, thus muddying the waters.

Judge Sharp, in a succinct concurring opinion in *Cornette* discussed the issues of burden of proof for both plaintiffs and defendants in strict liability cases. He described misuse as a *defense* with the burden of proof on the defendant:

> The plaintiff has the burden of proving the product was sold in a defective condition, and that such defect was the proximate cause of the injury complained of. The defenses of assumption of risk, misuse, and change in the product not reasonably foreseeable to the manufacturer are available to the defendant who carries the burden of proof in such.[163]

---

[160]Note, *Abnormal Use in the Strict Products Liability Case, supra* note 156, at 667.

[161]*Id.* at 666; *see also* Greeno v. Clark Equip. Co., 237 F. Supp. 427, 429 (N.D. Ind. 1965).

[162]237 F. Supp. at 429.

[163]258 N.E.2d at 665.

The most exhaustive examination of misuse was done in *Perfection*, which relied in part on Judge Sharp's opinion in *Cornette*, that misuse is a defense with the burden of proof on the defendant. Judge Pfaff separated misuse into two categories. First, misuse of a product may be part of the defense of assumption of risk if the defective condition of the product is discovered by the plaintiff or brought to his attention by a legally sufficient warning.[164] However, mere knowledge of the defect apparently would not automatically establish that plaintiff had assumed the risk.[165] Second, the product could be misused if it is used in a manner or purpose not foreseeable by the manufacturer.[166] The first approach is the more palatable, since it is a subjective test of the plaintiff's actual knowledge, and has many of the characteristics of assumption of risk. The second, however, falls back to a test which sounds very much like the "no duty" rationale of negligence. As with all the other problem areas in strict liability, this issue needs to be clarified by the Indiana courts.

XI. Conclusion

It is difficult to assess in what direction Indiana courts are headed in adopting standards for strict liability in tort, since various courts have espoused contradictory viewpoints. The current lack of clear standards creates confusion for the bar and for the lower courts which must assess, present, and decide strict liability cases.

It appears that most Indiana judges believe that negligence law has a strong influence on strict liability concepts.[167] Whether this judicial penchant derives from a purposeful reasoning process, our legal education, or other factors is unanswerable. Whatever its source, this viewpoint makes it unlikely that Indiana courts will wholeheartedly embrace the *Cronin* approach of total rejection of negligence principles. The policy considerations underlying *Cronin* and its predecessors need not be forgotten however, and could be used in applying the Wade/Keaton approach, which is more readily adaptable to Indiana judicial concepts.

Under Wade/Keaton, the fact-finder simply imputes knowledge of the defect to the manufacturer, then asks if the manufacturer would be negligent in marketing the product with such knowledge. The seven-factor examination to be made by the judge under

---

[164]258 N.E.2d at 689.

[165]In order to prove incurred or assumed risk the defendant must prove *actual knowledge, actual understanding, actual appreciation and voluntariness. See* Restatement (Second) of Torts §§ 496A-496G (1965). Thus, showing that plaintiff knew of the defect does not automatically meet all elements of assumption of the risk.

[166]258 N.E.2d at 689.

[167]*See, e.g.*, discussion of foreseeability in Vargo, *1976 Survey*, *supra* note 5, at 276.

Wade/Keaton would also eliminate many of the problems created by Indiana's decisions. For example, the obvious danger rule would no longer automatically defeat a plaintiff's recovery as a matter of law; it would be one of at least six other factors to be weighed by the court in deciding whether the case should go to the jury.[168]

A standard is desperately needed for the guidance of bench and bar. Indiana could and should adopt a well-defined standard which maintains the integrity of the social policies underlying strict liability in tort and at the same time is true to Indiana common law traditions.

---

[168]Dean Wade suggests the following seven factors are to be weighed by the court:

(1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.

(2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.

(3) The availability of a substitute product which would meet the same need and not be as unsafe.

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Wade, *Nature of Strict Tort Liability*, *supra* note 7, at 837-38.