XII. Products Liability

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A. Introduction

During this survey period, several cases have shed light on some unresolved issues concerning Indiana products liability law. However, the most significant case was the Indiana Supreme Court decision in *Dague v. Piper Aircraft Corp.*[1] The court in *Dague* upheld the ten year statute of limitations of the recent Indiana Products Liability Act. It now seems clear that no action for a defective product may be commenced after ten years from the date of delivery of the product to its initial user. In essence, no action lies for products that are ten years or older.[2]

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[1]418 N.E.2d 207 (Ind. 1981).

[2]In the context of *Dague*, it seems relevant to explore the background of the enactment of the Indiana Products Liability Act, IND. CODE §§ 33-1-1.5-1 to -8 (Supp. 1981), and its relation to the almost explosive controversies which surround this type of legislation, either proposed or enacted, throughout the country.

During the mid-1970's, the federal government and various state legislatures were confronted with testimony that there was a "crisis" in products liability. This crisis developed when insurance carriers raised premiums substantially for their insureds who were seeking insurance coverage for product related accidents. The insurance companies and their insureds alleged that the need for the greatly increased premiums resulted from: (1) a tremendous increase in the number of claims and suits related to products; (2) a large increase in the amount of awards and settlements paid on product related claims; and (3) a breakdown in the tort system that favored the injured party over the manufacturer or seller of products. *See generally Product Liability Insurance: Hearings on S. 403 before the Sub-comm. for Consumers of the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong. 1st Sess. (1977) [hereinafter cited as *S. 403 Hearings*]; U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT I-3, I-4 (1978) [hereinafter cited as TASK FORCE REPORT]. Based upon these allegations, certain product manufacturers and their insurance carriers attempted to convince the federal government and state legislatures to remedy the situation with statutory tort reforms. This alleged products liability crisis thus followed the course of the alleged medical malpractice crisis of a few years earlier. *See* Bernzweig, *Some Comparisons Between the Medical Malpractice and Products Liability Problems*, in U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, SELECTED PAPERS 418 (1978). During both the medical and product liability crises, neither the insurance companies nor their insureds ever suggested that the increased premiums might have resulted from the degree of care exercised by physicians or the number of defective products on the market. *Id.*

If the allegations of the insurance companies and their insureds were true, a sound financial and statistical basis for increased premiums should have been available. But no real evidence of greatly increased claims or costs was ever produced to substantiate an actual crisis in the products liability area. TASK FORCE REPORT, *supra*,

B. *The* Dague *Case*

John Dague was killed on July 7, 1978 when his aircraft crashed. His widow brought an action in federal district court for wrongful death on October 1, 1979 alleging that her husband's death was a result of defects in the aircraft manufactured by the defendant, Piper Aircraft. The airplane was manufactured and placed into the stream of commerce in March of 1965, more than ten years before the accident took place. Piper moved for summary judgment based upon Indiana Code section 33-1-1.5-5 which provides:

> This section applies to all persons regardless of minority or legal disability. Notwithstanding IC 34-1-2-5, any product liability action must be commenced within two [2] years after the cause of action accrues or within ten [10] years after the delivery of the product to the initial user or consumer; except that, if the cause of action accrues more than eight [8] years but not more than ten [10] years after that initial delivery,

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at xxxiv-xliv; Kronzer, *Jury Tampering—1978 Style*, 10 ST. MARY'S L.J. 399, 410-15 (1979). Instead, the insurance carriers instigated a multi-million dollar advertising program that attacked the tort and jury system and flooded the federal and state legislatures with material which supported their allegations concerning the cause of this "crisis." *Id.*

It was asserted as "fact" that the number of product liability claims and/or suits had increased from about 50,000 per year in the 1960's to almost a million per year in the mid-1970's. *See*, SUBCOMMITTEE ON CAPITAL, INVESTMENT AND BUSINESS OPPORTUNITIES, PRODUCT LIABILITY INSURANCE, H.R. REP. NO. 95-997, 95th Cong., 2d Sess. 38 (1978); Geisel, *Horror Story Ads Untrue?—Can't Prove Mower, Claims Assertions*, 11 BUS. INS. 1, 66 (1977). This claim was published in the Insurance Information Institute's edition of *Insurance Facts* and was widely distributed to, among others, the Indiana legislature and the news media, prior to the enactment of the Indiana Products Liability Act. *See* materials held by publisher. The "one million" figure was given in speeches by officials of the American Insurance Association including its president, who stated that "the strict liability concept ignited an explosion of product *lawsuits* from 50,000 in 1960 to 500,000 in 1970 to perhaps a million today". Geisel, *Horror Stories*, *supra*, at 66.

The "one million" figure was incorrect. The actual figure for the number of *claims*, *not lawsuits*, during the alleged crisis was found to be in the range of 60,000 to 70,000 per year. *Id.* Although the "one million" figure was false, some insurance companies continued to use the figure in their advertising campaigns.

Along with the false "one million" figure "horror stories" were also cited as a cause of increased premiums. Horror stories were examples of cases in which a claimant brought suit and recovered on a set of circumstances which made it quite obvious that the person did not deserve to recover. One well-known example involved a man who picked up a lawn mower to trim a hedge, was injured, and successfully sued the manufacturer of the lawn mower. This "lawn mower" story, however, has no basis in fact. *Id. See generally* Kronzer, *Jury Tampering*, *supra*, at 409-10.

Finally, the assertion that the claimant almost always wins a product liability action and is awarded an astronomical sum is simply not true. *See id.* at 411-13.

> the action may be commenced at any time within two [2] years after the cause of action accrues.[3]

The district court granted the defendant's summary judgment motion and dismissed the plaintiff's action. The plaintiff appealed to the Seventh Circuit Court of Appeals. Pursuant to Indiana Appellate Rule 15(o), questions concerning the statute of limitations of section 5 of the Products Liability Act were certified by the Seventh Circuit to the Indiana Supreme Court.[4] The Indiana Supreme Court found all certified questions in favor of the defendant and determined that section 5 barred the plaintiff's action.[5]

1. "Or."—The plaintiff contended that the disjunctive word "or" in section 5 allowed her to bring the action at any time within two years of the accrual of the cause of action without reference to the latter portion of section 5 which referred to a ten year limitation. The Indiana Supreme Court stated that it was required to construe the statute in accordance with the apparent intent of the legislature.[6] The court found that the legislature intended to limit the time within which the action could be brought to ten years after a product is first delivered to the initial user or consumer.[7] The *Dague* court stated that although the statute did contain "or," this was not dispositive because a literal reading of the disjunctive would render the latter portion of section 5 meaningless.[8] Referring to the court of appeals' decision of *Amermac*[9] and to "logic," the supreme court literally rewrote the statute and replaced the "or" with an "and."

2. Failure to Warn.—The plaintiff in *Dague* alleged that even if section 5 required that an action be brought within both the two and ten year periods, the action should not be barred.[10] The plaintiff argued that since the defendant had a continuing duty to warn and since there was no warning, the action survived.[11] In other words, the duty to warn is a general duty not necessarily related to a products action. The *Dague* court rejected plaintiff's contention and stated that the definition section of the Product Act included both negligence and strict liability actions.[12] Thus the Act would extend *to all actions sounding in tort.*[13]

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[3]IND. CODE §33-1-1.5-5 (Supp. 1981).
[4]418 N.E.2d at 209.
[5]*Id.* at 211.
[6]*Id.* at 210.
[7]*Id.*
[8]*Id.* at 211.
[9]Amermac, Inc. v. Gordon, 394 N.E.2d 946, 948 n.4 (Ind. Ct. App. 1979).
[10]418 N.E.2d at 211.
[11]*Id.*
[12]*Id.* at 212.
[13]*Id.*

The *Dague* court's decision that a failure to warn will not give rise to an action when the product is over ten years of age regardless of its nature is harsh and unresponsive to public policy and logic. The fundamental policy of tort law, of course, is to properly compensate innocent victims. Paramount in tort law, however, is the safety incentive rationale. As has been stated, "[t]he fence at the top of the cliff is better than an ambulance in the valley below."[14] The *Dague* court's deference to legislative enactment disregards the court's interpretive role in the light of threats to the public's safety. Assume, for example, that an airplane is over ten years of age and that as a result of new technology a highly dangerous defect is discovered in the structure. According to *Dague*, there is absolutely no duty to warn or to do anything else. If the situtation arises in which a defendant manufacturer did not originally have a duty to warn but later knowledge or information gives rise to such a duty, it is now better for such defendants to remain silent and to do nothing to remedy the danger.

The *Dague* decision would thus have comported better with the safety of the public if the court had simply stated that actions based on duties which arose concerning the original manufacture or design would be barred after ten years. An exception to such bar would be a continuing duty to warn, or at least duties that arise within ten years of the date of plaintiff's injury. In this manner, there would be no conflict with the intent of the legislature. The major complaints of industry were that it is unfair to hold the manufacturer liable because of the *use* of a machine over a period of years. After a specific number of years, it was believed that the injury was produced by something other than the acts of the product's manufacturer. In many product liability actions, certain duties arise under negligence law that are unrelated to the original date of design and maufacture. For such later arising duties, it seems illogical to bar an action merely because the product itself is ten years old.

3. The Due Process Claim.—The plaintiff in *Dague* alleged that the Products Liability Act was violative of article 1, section 12 of the Indiana Constitution in that it barred a claim without providing an affirmative remedy. The *Dague* court made short work of the article 1 argument by stating that the legislature has the power to modify common law remedies.[15] Since the plaintiff had no vested property rights and such an action was not a fundamental right, the

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[14]*S. 403 Hearings*, *supra* note 2, at 331 (statement of Professor Thomas F. Lambert, Jr.). Indiana recognizes that one of the major policy bases for strict liability is the safety incentive rationale. *See* Conder v. Hull Lift Truck, Inc., 405 N.E.2d 538, 546 (Ind. Ct. App. 1980).

[15]418 N.E.2d at 213.

remedy could be eliminated within the confines of the Indiana Constitution.[16]

Recently the New Hampshire Supreme Court has struck down its medical malpractice legislation using an intermediate level of scrutiny.[17] Such an approach by the Indiana Supreme Court in *Dague* could have given different results and added vitality to article 1, section 12. Florida, whose constitution is relevantly similar to Indiana's struck down a similar Products Liability Act.[18]

4. The Indiana Courts and the Products Liability Act Are "One Subject Matter".—The *Dague* court rejected the plaintiff's claim that article 4, section 19 of the Indiana Constitution was violated by the Product Act. Article 4, section 19 confines statutes to one subject matter. The supreme court, applying a very liberal interpretation of "reasonableness," found that the twenty-seven sections of the Act concerning the operation and jurisdiction of various Indiana courts were sufficiently related to the one section of the Act concerning products liability law.[19] With the supreme court's interpretation of "one subject matter," the legislature is free to join almost any combination of subjects within a statute with little likelihood that a constitutional challenge will prevail.

C. Defenses and Bars to Recovery

1. Statute of Limitations.—Several other Indiana decisions discussed a variety of issues concerning the statute of limitations. In *Dodd v. Kiefer*,[20] the Indiana Court of Appeals determined that Indiana Code section 34-4-20-2 limited the time within which actions could be brought for improvements to real estate to ten years from the date of "substantial completion" of the improvement.[21] On cross error, the plaintiff raised the issue that the time limitations contained in Indiana Code sections 34-1-2-1 and 34-1-2-2 should control over the ten year statute of limitations. Thus, the plaintiff contended that he should be given six or two years from the date the *cause of action accrued* irrespective of the ten year outer cut-off limit of Indiana Code section 34-4-20-2. The court of appeals rejected this argument and said that the real property statute was very broad in application and included products liability actions.[22]

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[16]*Id.*

[17]Carson v. Maurer, 424 A.2d 825 (N.H. 1980).

[18]Diamond v. E.R. Squibb and Sons, Inc., 397 So.2d 671 (Fla. 1981) (citing Overland Constr. Co. v. Sirmons, 369 So.2d 572 (Fla. 1979)).

[19]418 N.E.2d at 214-15.

[20]416 N.E.2d 463 (Ind. Ct. App. 1981).

[21]*Id.*

[22]*Id.*

The decision in *Dodd* raises a very important issue concerning the application of statutes of limitations when there are conflicting time limits in two or more statutes that apply to a specific factual setting. For instance, suppose Indiana Code section 34-4-20-2 contained an eight year limitation period. Would the *Dodd* court then apply the ten year period of the Products Liability Act or the eight year period of the improvement to realty statute?

In *Lane v. Barringer*,[23] Lane brought an action in negligence, strict liability, and implied warranties in contract for injuries she received. The injuries were sustained when Lane's daughter, while shopping with Lane, dropped a bottle of drain cleaner which broke and splashed drain cleaner on Lane's legs. Lane did not bring the action until more than two years after the accident. Consequently, the trial court dismissed the negligence and strict liability counts because of the two year limitation period.[24] The court implied that the four year statute of limitations contained in the U.C.C. controlled the contracts count, but dismissed this count on other grounds.[25]

Indiana has now developed two limitation periods for product liability actions. The first limitation is the two year statute of limitations from the time of occurrence. This limitation period is further restricted by an outside limitation of ten years from the date of delivery of the product.[26] In implied warranty actions involving the U.C.C., the four year statute of limitations from date of delivery appears to control,[27] and the ten year limitation of the Product Act does not have any application.[28]

2. Privity.—The *Lane* court, when confronted with a U.C.C. contract suit for personal injuries, determined that vertical and horizontal privity barred the plaintiff's action.[29] Lane brought the action for her injuries against the manufacturer and supplier of the allegedly defective product. Assuming that a "sale" of the product to the daughter had occurred there would be no privity between

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[23]407 N.E.2d 1173 (Ind. Ct. App. 1980), *transfer denied*, Nov. 21, 1980.

[24]*Id.* at 1174 (citing IND. CODE §34-1-2-2 (Supp. 1981)).

[25]*Id.* at 1174-75 (citing IND. CODE §26-1-2-725 (1976)).

[26]Dague v. Piper Aircraft Corp., 418 N.E.2d 207 (Ind. 1981).

[27]IND. CODE §26-1-2-725 (1976).

[28]There is a specific exclusion of breach of warranty actions in IND. CODE §33-1-1.5-1 (Supp. 1981); *see also* Dague v. Piper Aircraft Corp., 418 N.E.2d 207 (Ind. 1981).

[29]Though the court did not use the terms "vertical" or "horizontal" privity, it in essence discussed both. For an explanation of the differences between vertical and horizontal privity, see Vargo, *Products Liability, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 270 n.12 (1975) [hereinafter cited as Vargo, *1975 Products Survey*].

Lane and the remote manufacturer and supplier, since there was no vertical privity between the daughter and those same entities.[30] Thus, the court determined that the mother's potential third party beneficiary action against the remote suppliers was barred. As to the action against the retailer, the court stated that while the daughter arguably had "vertical" privity with the retailer the retailer had not been properly joined in the action and the question of the retailer's liability was not before the court.[31]

Concurring in the result,[32] Judge Ratliff stated that he disagreed with the federal court's precedent that required privity in U.C.C. implied warranty actions for personal injuries.[33] Judge Ratliff stated that the modern trend is to reject the privity requirement in personal injury actions.[34] In the instant case, however, the mother should be deprived of recovery because she lacked "horizontal" privity with her daughter as required under Indiana Code section 26-1-2-318.[35]

Indiana seems to have differentiated between implied warranties which sound in contract and those which sound in tort.[36] If the warranty action is in tort, no privity is required, but if the action is brought pursuant to the U.C.C., then *both* horizontal and vertical privity are required.[37] Judge Ratliff's opinion suggests that the supreme court might find that in personal injury actions, vertical privity is not required.

3. Contributory Negligence and Problems of Proof.—In *Pardue v. Seven-Up Bottling Co. of Indiana*,[38] the court of appeals affirmed a judgment adverse to the plaintiff. The plaintiff alleged that the trial

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[30]407 N.E.2d 1173, 1175 (Ind. Ct. App. 1980), *transfer denied*, Nov. 21, 1980. Vertical privity as used by the court was the contractual nexus between the daughter and the seller of the product. Since the daughter had no contractual relation to the "remote" parties in the stream of commerce, there was no privity.

[31]The actual owners and operators of the retail store who sold the product were either dismissed or were not proper parties to the action because of improper service. *Id.* at 1176.

[32]Judge Ratliff actually dissented in part and concurred in part. *Id.* at 1176-78.

[33]*Id.* at 1176. Two Southern District of Indiana decisions have concluded that privity is required in personal injury actions brought under a U.C.C. theory. *See* Neofes v. Robertshaw Controls Co., 409 F. Supp. 1376 (S.D. Ind. 1976); Withers v. Sterling Drug, Inc., 319 F. Supp. 878 (S.D. Ind. 1970).

[34]407 N.E.2d at 1177-78.

[35]Horizontal privity is the contractual nexus between the daughter (buyer) and other parties. As Judge Ratliff explains, Indiana has adopted the most restrictive approach in horizontal privity by adopting option A to U.C.C. § 2-318. 407 N.E.2d at 1178.

[36]For a discussion of implied warranties in tort and implied warranties in contract, see Vargo, *1975 Products Survey*, *supra* note 29, at 273-74.

[37]*Id.* at 274.

[38]407 N.E.2d 1154 (Ind. Ct. App. 1980).

court erred when it submitted instructions on contributory negligence since there was a complete absence of evidence of any contributory negligence. The *Pardue* court found that the contributory negligence instruction was, at most, harmless error since the plaintiff did not present a prima facie case of negligence.[39] In dissent, Judge Ratliff stated that there was a sufficient factual basis to establish negligence on the defendant's part.[40] Since such inferences could present a jury question on the defendant's negligence, the contributory negligence instruction would have been prejudicial error.

D. Foreseeability and Component Parts

In *Shanks v. A.F.E. Industries, Inc.*,[41] the Indiana Supreme Court vacated the court of appeals' decision and reinstated the trial court's judgment on the evidence in favor of the defendant. The supreme court's decision in *Shanks* was in part based upon an analysis of foreseeability. In essence, the defendant in *Shanks* was the manufacturer, designer and seller of a component part (grain dryer) of a system (grain elevator).[42] The system was built and designed by parties other than the defendant. The supreme court examined in great detail the roles of the various parties in the overall design of the system and concluded that since the defendant did not foresee the precise manner in which the system was designed and built, the defendant should not be held liable for design defects in the component part or for failure to equip the component with warnings or warning devices.[43]

The court of appeals had determined that, although the defendant was not liable for a failure to warn, the defendant's component part was itself defective because of a failure to provide warning devices.[44] The court of appeals' rule concerning warning devices was well-reasoned and would probably have been a leading case nationally if it had not been vacated by the Indiana Supreme Court.[45] The

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[39]*Id.* at 1159. The court noted that the plaintiffs did not attempt to rely upon res ipsa loquitur, *id.* at 1158; however, the use of res ipsa probably would not have assisted the plaintiffs because of the highly restrictive and illogical requirment that the defendant have control of the injuring instrumentality at the time of the accident. *See* Vargo, *1975 Products Survey, supra* note 29, at 276-78.

[40]407 N.E.2d at 1159-60.

[41]416 N.E.2d 833 (Ind. 1981).

[42]For factual details, see *id.* at 834-36 (court of appeals' factual summary adopted by the supreme court).

[43]*Id.* at 837.

[44]*See* Shanks v. A.F.E. Industries, Inc., 403 N.E.2d 849, 857-58 (Ind. Ct. App. 1980), *vacated*, 416 N.E.2d 833 (Ind. 1981).

[45]The appellate court noted that at least three types of defects may give rise to liability under § 402A: manufacturing, design, and failure to warn. 403 N.E.2d at 855.

supreme court's finding of unforseeability is difficult to understand because the supreme court adopted the court of appeals' finding that the defendant had designed, manufactured, advertised and sold the part (dryer) "with the contemplation and representation that it could be used in conjunction with such equipment" (the system).[46] If the court's reasoning depended upon the view that foreseeability requires that the precise hazard or exact consequences which were encountered should have been foreseen, then the supreme court's decision contravenes all generally recognized concepts of foreseeability in tort law[47] and prior Indiana decisions.[48] If the *Shanks* court's decision was based upon an intervening or superseding cause because of the system designs choices, then foreseeability would not be an issue.[49] Determinations of foreseeability concerning system design responsibility and component part responsibility in any particular set of circumstances such as *Shanks* probably present policy issues and nothing more.[50]

The court's concept of warning "devices" can be construed as either a fourth type of defect or as a subclass of the design or failure-to-warn types of defects. Thus, Indiana could have been a leading jurisdiction in its concept of "defect" in strict liability cases. The addition of warning devices to mismanufacture, misdesign and failure-to-warn types of defects would have established an additional basis for liability for injured parties. If the appellate court intended the warning "device" concept to be merely an augmentation to design or failure-to-warn cases, it would still have expanded liability under the terminology of those cases.

Although the court of appeals' opinion was vacated, it seems that this was done because of the difference of opinion between the supreme court and court of appeals concerning foreseeability and *not* the warning device issue. Thus, the reasoning of the court of appeals concerning warning devices would still be applicable. In support of the preservation of the warning device rationale is Gilbert v. Stone City Constr. Co., 171 Ind. App. 418, 426-29, 357 N.E.2d 738, 744-45 (1976). In addition, the Seventh Circuit Court of Appeals has adopted some of the reasoning of the court of appeals in *Shanks*, *after* its being vacated by the Supreme Court of Indiana. *See* Lantis v. Astec Indus., Inc., 648 F.2d 1118 (7th Cir. 1981).

[46]416 N.E.2d at 836.

[47]*See* RESTATEMENT (SECOND) OF TORTS § 435 (1965).

[48]One of the more restrictive Indiana decisions which has discussed foreseeability has stated that "it is a generally accepted principle that foreseeability does not mean that the precise hazard or the exact consequences which were encountered should have been foreseen." Peck v. Ford Motor Co., 603 F.2d 1240, 1246 (7th Cir. 1979). However, the *Peck* court seems to have violated its own rule in making its decision on foreseeability. *See id.* at 1245-46 (examination of precise factors to conclude no foreseeability). *Peck* was also partially based upon a concept of "mere condition" which was rejected in the subsequent court of appeals case of Mansfield v. Shippers Dispatch, Inc., 399 N.E.2d 423 (Ind. Ct. App. 1980).

[49]*See* RESTATEMENT (SECOND) OF TORTS § 442B Comment a (1965).

[50]Prosser states that both proximate cause and foreseeability are policy issues. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 41, at 237 (4th ed. 1971). Foreseeability is a question "of the fundamental policy of the law, as to whether the defendant's responsibility should extend to such results." *Id.* § 43, at 250.

The court of appeals' decision, although vacated, may nevertheless not be without effect. In *Lantis v. Astec Industries, Inc.*,[51] the Seventh Circuit Court of Appeals cited with approval the court of appeals' decision in *Shanks*. The Seventh Circuit Court must have been fully aware of the vacation of the court of appeals' decision, because *Lantis* was decided after the Indiana Supreme Court's decision in *Shanks*. Thus, the Seventh Circuit must have cited the court of appeals' decision for its reasoning.

Lantis held that the seller of an unfinished product can be held liable if it anticipates or foresees the uses of the unfinished product.[52] The *Lantis* decision involved a pre-erected asphalt plant which was designed and assembled at the defendant seller's plant in Tennessee. The seller then disassembled the plant and shipped it to the buyer in Indiana where the plant was to be reassembled. Reassembly was to be performed by the purchaser's employees and the defendant seller was to supply drawings, instructions, and supervisors for the reassembly process. During the reassembly process, the plaintiff, an employee of the purchaser, fell through an open hole in a platform which would have been at least partially covered after final reassembly of the asphalt plant. The defendant admitted that it contemplated and indeed intended that the purchaser's employees use the platform during the reassembly.

The *Lantis* court determined that the component part of an unfinished or unassembled product is a product and that the seller is subject to liability under Restatement §402A.[53] *Lantis* distinguished *Lukowski v. Vecta Educational Corp.*,[54] which rejected liability for the seller of an unfinished product, because delivery had not been completed at the time of the accident. *Lukowski* held that an unfinished product did not meet the stream of commerce requirement of §402A.[55] *Lantis* held that in the instant case the seller anticipated that the unfinished product and its component part would be used during reassembly and that delivery took place at the time the buyer received the various components of the product.[56] Thus,

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[51]648 F.2d 1118 (7th Cir. 1981).

[52]*Id.* at 1120.

[53]*Id.* at 1121-22.

[54]401 N.E.2d 781 (Ind. Ct. App. 1980), *transfer denied*, Nov. 25, 1980.

[55]*Id.* at 786. For an explanation of the "stream of commerce" approach, see Vargo, *1975 Products Survey*, *supra* note 29, at 275. The "stream of commerce" rationale rejects the concept of commercial sale and allows the plaintiff to bring his action against anyone in the commercial process who makes contact with the allegedly defective product.

[56]648 F.2d at 1121-22. It has been held that a product does not enter the stream of commerce until delivery has been accomplished. *See* Vargo, *Products Liability, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 202, 208-09 (1977) [hereinafter cited as Vargo, *1977 Products Survey*].

Lukowski was distinguishable on the grounds that in that case it was neither intended nor anticipated that the product would be used before final completion.

The *Lantis* decision clarifies the concepts of sale, stream of commerce, and delivery in situations involving both unfinished products and component parts of products. If there are foreseeable dangers during the assembly of a product, then the seller of the system or of the component may be held liable under §402A. This may be of great assistance in situations in which the product itself is over ten years of age but where a defective component is less than ten years of age. In such situations, the injured party could bring a products action against the seller of the component part and still comply with the ten year requirement of the Products Liability Act as interpreted by *Dague*.

E. Failure to Warn

The Indiana Supreme Court in both *Dague* and *Shanks* espoused the view that a failure to warn is a negligence theory.[57] In addition, the *Shanks* opinions by both the court of appeals and the supreme court accepted the proposition that a manufacturer could fulfill his obligation to warn by merely passing along information or warnings to the employer when an employee is injured by a defective product.[58] This rationale is based upon the concept that a manufacturer has "no control over the work space, the machine or the hiring, instruction or placement of personnel."[59] It then becomes the responsibility of the employer to post warnings and take other precautions.

This approach to "failure to warn" cases has its origin in *Burton v. L. O. Smith Foundry Products Co.*,[60] a Seventh Circuit decision in 1976. The same court, however, revised its approach to warning cases more than seven months after the *Burton* decision in *Reliance Insurance Co. v. Al E. & C. Ltd.*[61] In *Reliance*, the Seventh Circuit Court of Appeals held that it is the duty of the manufacturer to pro-

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[57]The *Dague* opinion said that a failure to warn "is certainly a product liability action based on a theory of negligence." 418 N.E.2d at 212. The *Shanks* court said that "the test of the adequacy of a warning is whether it is reasonable under the circumstances." 416 N.E.2d at 837 (citing Ortho Pharmaceutical Corp. v. Chapman, 388 N.E.2d 541 (Ind. Ct. App. 1979)).

[58]Both the supreme court and court of appeals cited Burton v. L.O. Smith Foundry Products Co., 529 F.2d 108 (7th Cir. 1976) for the proposition that the obligation to warn can be fulfilled by informing the employer. *See* 416 N.E.2d at 837; 403 N.E.2d at 856-57.

[59]416 N.E.2d at 837.

[60]529 F.2d 108 (7th Cir. 1976).

[61]539 F.2d 1101 (7th Cir. 1976).

vide warnings in a form that will reach the ultimate consumer and inform him of the risks and that such a duty is non-delegable.[62]

The Indiana Supreme Court's decision to approach warning cases through the concept of negligence in *strict liability* cases does not seem to conform to well-reasoned opinions in other jurisdictions holding that the duty in negligence warning cases is inappropriate to strict liability warning cases.[63] In addition, the concept that the manufacturer can fulfill his obligation to manufacture a non-defective product by giving warning to an employer ignores several policies that underlie strict liability.[64] First, an employer has very little incentive to make his work place safe or to pass on warnings.[65] Second, an employer who acts wrongfully or negligently towards an employee is immune from tort sanctions.[66] If the employer and the manufacturer act wrongfully towards an injured employee, those wrongs should be considered the acts of joint tortfeasors and as such the manufacturer should not escape liability because of the wrongs of another.[67] Third, the manufacturer, as an expert in his field of endeavors, is in the best position to most economically guard

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[62]*Id.* at 1106.

[63]There is a distinct difference between a failure to warn in strict liability and the duty to warn in negligence:

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

Phillips v. Kimwood Machine Co., 269 Or. 485, 525 P.2d 1033, 1039 (1974). *See also* Vargo, *Products Liability in Indiana—In Search of a Standard for Strict Liability in Tort*, 10 IND. L. REV. 871 (1977) [hereinafter cited as Vargo, *Standard for Strict Liability*].

[64]For a summary of the policy reasons for the adoption of strict liability, see Vargo, *Standard for Strict Liability*, *supra* note 63, at 872 n.6.

[65]It is well accepted in Indiana that the exclusive remedy against an employer is contained in the Workmen's Compensation Act. *See* Kottis v. United States Steel Corp., 543 F.2d 22 (7th Cir. 1976), *cert. denied*, 430 U.S. 916 (1977); North v. United States Steel Corp., 495 F.2d 810 (7th Cir. 1974); Needham v. Fred's Frozen Foods, Inc., 171 Ind. App. 671, 359 N.E.2d 544 (1977). Thus, he has very little reason to attempt to employ safety measures because of economic reasons. *See* Vargo, *Workmen's Compensation, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 289, 294 (1974). The view that the exclusivity of Workmen's Compensation creates a situation of industrial disconcern is well recognized throughout the United States. *See* Phillips, *The Relationship Between the Tort System and Workers' Compensation—The True Cost* (May 27, 1981) (presented at the Fourth National Conference of the National Legal Center for the Public Interest) [hereinafter cited as Phillips, *The Tort System & Workers' Compensation*].

[66]Phillips, *The Tort System & Workers' Comepensation*, *supra* note 65, at 2.

[67]*Id.* at 15-16.

or make his product safe.[68] The necessity of guarding dangerous machines is based upon the recognition that human beings make errors and sometimes act imperfectly.[69] The manufacturers of such dangerous machines know, or should know, that such accidents are inevitable. Thus, guardings and warnings with respect to dangerous machines should be performed at the design and manufacturing stages.[70] The employer, who may have very little expertise or incentive to protect his employees, should not be relied upon to warn or guard against dangers. To say that the manufacturer has little control over a dangerous product merely because the product has been sold to an employer who has sole possession of such product disregards the proper extent of the manufacturer's duty at the design and manufacturing stages.[71]

In *Craven v. Niagara Machine & Tool Works, Inc.*,[72] a tool and die maker with 40 years of experience was severely injured when the dies of a punch press closed on his hand. The plaintiff was injured when he was testing or "trying out" a die he had just completed work upon. The plaintiff brought his action in strict liability in tort and at the close of all of the evidence, the trial court granted defendant's motion for judgment on the evidence.[73] On appeal, the trial court was reversed on the basis that there was sufficient evidence to present to the jury on the defendant's failure to warn.[74] The appellate court recognized that a product may be defective because of either a failure to warn or inadequate warnings.[75] The court then stated that where the danger or potential danger is *known or should be known* to the user the duty does not attach.[76]

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[68]In Dias v. Daisy-Heddon, 390 N.E.2d 222, 227 (Ind. Ct. App. 1979) the court said manufacturers are charged with the knowledge of experts in their fields of interest. *See also* Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 847-48 (1962).

[69]The design and manufacture of guards for dangerous machines is a concept that is based upon the recognition that people will make mistakes:

> We think this case presents a situation where the interests of justice dictate that contributory negligence be unavailable as a defense to either the negligence or strict liability claims.
>
> 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.

Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 412, 290 A.2d 281, 286 (1972).

[70]Phillips, *Standard for Defectiveness*, 46 U. CIN. L. REV. 101, 109 (1977).

[71]*Id.*

[72]417 N.E.2d 1165 (Ind. Ct. App. 1981).

[73]*Id.* 1168.

[74]*Id.* at 1172.

[75]*Id.* at 1169.

[76]*Id.* at 1169-70.

This final declaration seems incorrect. It defies the rationale of strict liability in tort.[77] The user's failure to discover or guard against the defect has always been considered the type of contributory negligence *that is not a defense to strict liability in tort.*[78] The concept that no warning is required when the danger is or should be known to the user defies the patent danger rule concept as espoused in most jurisdictions and in the recent Indiana case of *Bemis Co., v. Rubush*.[79] In addition, unreasonable assumption of risk, which *is* a defense in strict liability, is not automatically present merely because the danger is known.[80]

In sum, use of negligence rules in strict liability actions for a failure to warn results in the reinjection of contributory negligence and misapplication of assumption of risk that have been specifically rejected by almost all jurisdictions and prior Indiana decisions.[81]

F. Distinctions Among Theories

In *Midway Ford Truck Center, Inc. v. Gilmore*,[82] the court of appeals discussed the appropriateness of the revival at trial of pre-

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[77]The language "should be known" in relation to duty to warn could be construed to mean that a plaintiff is not to be believed when he states he did not actually know of the danger. On the other hand, the language is usually read as a state of mind which permits a finding of contributory negligence on the part of the plaintiff. To use contributory negligence as a basis for non-duty in warning cases is a circular reasoning process that should be rejected:

> Though these time-honored defenses [contributory negligence and assumption of risk] are frequently invoked to defeat recovery, they are theoretically inapplicable when the defendant's breach of duty is based on a failure to warn. To allow these defenses is to indulge in circular reasoning, since usually the plaintiff cannot be said to have assumed a risk of which he was ignorant or to have contributed to his own injury when he had no way of reasonably ascertaining that the danger of injury existed.

Dillard and Hart, *Product Liability: Directions for Use and the Duty to Warn*, 41 VA. L. REV. 145, 163 (1955).

Strict liability rejects contributory negligence as a defense to strict liability. Thus, the statement that there is no duty to warn when the user *should* know of the danger rejects the very foundation of Comment n to § 402A. In addition, the court's statement in *Craven* that there is no duty to warn when the user should know of the danger is in complete conflict with Kroger Co. v. Haun, 379 N.E.2d 1004 (Ind. Ct. App. 1978) and Bemis Co., Inc. v. Rubush, 401 N.E.2d 48 (Ind. Ct. App. 1980) (obvious danger rule rejected). For an explanation of the problems associated with the "reinjection" of contributory negligence in strict liability actions, see Vargo, *The Defenses to Strict Liability in Tort: A New Vocabulary With an Old Meaning*, 29 MERCER L. REV. 447 (1978).

[78]*See* note 77 *supra.*

[79]401 N.E.2d 48 (Ind. Ct. App. 1980).

[80]*See* note 77 *supra.*

[81]*Id.*

[82]415 N.E.2d 134 (Ind. Ct. App. 1981).

viously dismissed issues. The nuances of the procedural aspects of such revival is discussed in other sections of this Survey.[83]

During its examination of such procedural issues, the *Gilmore* court touched upon the dissimilarity of legal theories in products liability actions. The majority decision in *Gilmore* stated that "there are important and substantial distinctions under strict liability, negligence, and breach of warranty theories especially in the area of defenses."[84] Judge Young, in dissent, agreed with the majority that there were important distinctions among the three theories.[85]

If the *Gilmore* court was addressing the implied warranties which sound in tort as distinct from strict liability then the decision is in conflict with prior decisions in the Federal Court of the Southern District of Indiana.[86] Such a conflict should not be disturbing because a distinction between implied warranties which sound in tort and strict liability in tort, seem to have a sound basis.[87]

G. Conclusion

The Indiana Supreme Court has clearly indicated that no products liability action based upon negligence or strict liability is permissible for products over ten years of age. In addition, the injured party must bring his action within two years of the accrual of his cause of action. The Indiana Supreme Court has hinted that implied warranties which sound in tort may be included within the age limitation of the Products Liability Act. Further restrictions on plaintiff's recovery have been imposed by the application of negligence principles in strict liability warning cases. The restrictive approach of the Indiana Supreme Court in the statute of limitations area seems to be a result of complete deference to the legislature. This restrictive approach does not seem compatible with either negligence or strict liability rationales.

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[83]*See* Harvey, *Civil Procedure and Jurisdiction, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 69, 81 (1981).

[84]415 N.E.2d at 138.

[85]415 N.E.2d at 139.

[86]*See* Neofes v. Robertshaw Controls Co., 409 F. Supp. 1376 (S.D. Ind. 1976). For a discussion of the conflict between the federal and state courts' opinions concerning the duplicity of implied warranties in tort and strict liability, see notes 36 & 37 *supra* and accompanying text.

[87]*See* Vargo, *1977 Products Survey*, *supra* note 56, at 204-06.