

# Products Liability: Obviousness of Danger Revisited

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## A. *Eddies in the Law*

Three decades ago it was not uncommon for courts to hold that plaintiffs were barred from recovery as a matter of law for injuries resulting from exposure to obvious dangers.<sup>1</sup> For example, in the 1950 decision of *Campo v. Scofield*,<sup>2</sup> the New York Court of Appeals held that the manufacturer only had a duty to avoid producing products with hidden defects or concealed dangers and was not obligated to produce accident-proof machines.

In recent years, however, the clear trend has been to abolish this rule and to hold, instead, that obviousness is only one factor to be considered by the trier of fact in determining whether a product or instrumentality is unreasonably dangerous.<sup>3</sup> In 1976, the prestigious New York Court of Appeals in *Micallef v. Miehle Co.*<sup>4</sup> overruled its 1950 decision in *Campo* and adopted the modern approach of not precluding liability solely because the danger was obvious. In *Auburn Machine Works Co. v. Jones*,<sup>5</sup> the Florida Supreme Court also rejected the patency rule in products liability, noting that:

The modern trend in the nation is to abandon the strict patent danger doctrine as an exception to liability and to find that the obviousness of the defect is only a factor to be considered as a mitigating defense in determining whether a defect is unreasonably dangerous and whether plaintiff used that degree of reasonable care required by the circumstances.<sup>6</sup>

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<sup>1</sup>See, e.g., *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950); see also Marshall, *An Obvious Wrong Does Not Make A Right: Manufacturers' Liability For Patently Dangerous Products*, 48 N.Y.U. L. REV. 1065, 1081 (1973).

<sup>2</sup>301 N.Y. 468, 95 N.E.2d 802 (1950).

<sup>3</sup>See, e.g., *Dorsey v. Yoder Co.*, 331 F. Supp. 753 (E.D. Pa. 1971) (applying Pennsylvania law); *Pike v. Frank G. Hough Co.*, 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970); *Auburn Mach. Works v. Jones Co.*, 366 So. 2d 1167 (Fla. 1979). See also Note, *Indiana's Obvious Danger Rule for Products Liability*, 12 IND. L. REV. 397, 422 (1979).

<sup>4</sup>39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

<sup>5</sup>366 So. 2d 1167 (Fla. 1979).

<sup>6</sup>*Id.* at 1169. As the late Professor Dix Noel of the University of Tennessee College of Law suggested, "[u]nder the modern rule, even though the absence of a particular safety precaution is obvious, there ordinarily would be a question for the jury

This modern approach to obvious dangers in products liability is consistent with the approach taken in the field of land occupiers' liability. The Second Restatement of Torts provides that a possessor of land may be liable to his invitees for an activity or condition on the land where the danger is known or obvious and causes harm, if the "possessor should anticipate the harm despite such knowledge or obviousness."<sup>7</sup> The cases in this area recognize that, in spite of obviousness, the plaintiff's attention may be momentarily distracted, and the plaintiff thus inadvertently exposed to the danger.<sup>8</sup> Indeed, the plaintiff may be compelled by circumstances to confront a known danger, and may be injured while proceeding with all due caution.<sup>9</sup> The commentators in both the general area of tort law<sup>10</sup> and in the particular area of products liability<sup>11</sup> widely condemn the open and obvious rule as a conclusive bar to recovery.

Yet, in the face of these national trends and supporting commentaries, the Indiana Supreme Court held in 1981 in *Bemis Co. v. Rubush*<sup>12</sup> that obviousness of danger is a bar to recovery, as a matter of law, in products liability, both for alleged failure to warn and for defective design. In *Bemis*, the plaintiff, Gerald Rubush, was employed by Johns-Manville Corporation as a bagger on a fiberglass insulation batt packing machine designed and manufactured by Bemis Company. While working on the batt packer, Rubush sustained serious injuries to his skull and brain when he was struck by a visible moving part, called a shroud, on the batt packing machine. The plaintiff admitted that the shroud was an open and obvious danger which was well known to the operators of these machines and which would be obvious to anyone observing the machines in operation. The plaintiff contended, however, that the machine was unreasonably dangerous on the grounds that there was no safety device on the machine to prevent the shroud from descending on ob-

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as to whether or not a failure to install the device creates an unreasonable risk." Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 838 (1962).

<sup>7</sup>RESTATEMENT (SECOND) OF TORTS § 343A (1965).

<sup>8</sup>*Yuma Furniture Co. v. Rehwinkel*, 8 Ariz. App. 576, 448 P.2d 420 (1968); *Walgreen-Texas Co. v. Shivers*, 137 Tex. 493, 154 S.W.2d 625 (1941).

<sup>9</sup>This factual setting is often referred to as a "primary assumption of risk" wherein no duty is owed to the plaintiff. See *Springrose v. Willmore*, 292 Minn. 23, 192 N.W.2d 826 (1971).

<sup>10</sup>W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 61, at 394-95 (4th ed. 1971).

<sup>11</sup>2 F. HARPER & F. JAMES, THE LAW OF TORTS § 28.5, at 1543 (1956) (unreasonably dangerous condition should not be eliminated per se by making the danger obvious); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965); Note, *Indiana's Obvious Danger Rule for Products Liability*, 12 IND. L. REV. 397, 422 (1979).

<sup>12</sup>427 N.E.2d 1058 (Ind. 1981).

jects which obstructed the pathway of the shroud. Bemis, on the other hand, contended that it could not be held liable in strict liability because any dangers created by the descending shroud were open and obvious. The Indiana Supreme Court, finding the danger obvious as a matter of law, upheld the obvious danger rule and remanded the case to the trial court with directions to enter judgment in favor of Bemis.<sup>13</sup>

In addition to the decision in the Indiana Supreme Court, it is significant that legislation is currently being considered in the United States Congress that would adopt the obvious danger rule as the national standard.<sup>14</sup> It is difficult to assess the likelihood of such a law being passed on the national level. It is clear, however, that powerful and well-organized lobbies are backing the passage of such legislation at both the federal and state levels.<sup>15</sup> Moreover, the mood of the country is decidedly conservative, and this conservatism has created significant eddies in the mainstream of products litigation.<sup>16</sup> It is appropriate, therefore, to reassess the efficacy of the obvious danger rule and to re-evaluate the reasons for its recent rejection in numerous jurisdictions.

### B. *The Obvious Danger Rule*

1. *What is an Obvious Danger?*—One of the major difficulties in applying a rule which bars recovery as a matter of law for injuries from obvious dangers is the determination of when a danger is, in fact, obvious. In many cases, it is apparent that the courts are distorting the concept of obviousness in order to avoid application of the obvious danger rule because the rule is perceived as harsh and undesirable. For example, in *Bolm v. Triumph Corp.*,<sup>17</sup> the court, in

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<sup>13</sup>*Id.* at 1064.

<sup>14</sup>The Products Liability Act of 1982, H.R. 5214, 97th Cong., 2d Sess., has been referred to the House Subcommittee on Commerce, Transportation and Tourism but has not been scheduled for consideration. Hon. Henry Waxman is chairman of the House subcommittee. The Consumer Subcommittee of the Senate Commerce Committee is currently considering a working staff draft on products liability, and Senator Robert W. Kasten, Jr., the chairman of the the subcommittee, intends to introduce a bill on products liability by the end of June, 1982.

<sup>15</sup>One of the primary lobby groups, representing a very wide spectrum of manufacturing and insurance industries, is the National Center For The Public Interest, 1101 17th St., N.W., Suite 810, Washington, D.C. 20036. Also, in discussing the proposed federal legislation, the editor of BUSINESS WEEK notes the existence of a "lobbying group, the Product Liability Alliance, recently formed to back federalization [of products liability law]. Among its 180 members are some of the largest U.S. companies and trade associations." *A Liability Patchwork Congress May Replace*, BUSINESS WEEK, May 31, 1982, at 34.

<sup>16</sup>Recently enacted restrictive state statutes are collected in [1981] PROD. LIAB. REP. (CCH) ¶¶ 90,112-95,265.

<sup>17</sup>33 N.Y.2d 151, 305 N.E.2d 769, 350 N.Y.S.2d 644 (1973).

applying the *Campo* open and obvious rule, held that the obviousness of the danger created by a metal luggage rack, or "parcel grid," fixed to the top of the plaintiff's motorcycle gas tank about three inches above and three inches in front of the rider's seat presented a question for the jury.<sup>18</sup> In *Lamon v. McDonnell Douglas Corp.*,<sup>19</sup> the court held that a jury question was presented regarding the unreasonable danger of an open emergency hatch in an airplane.<sup>20</sup> The court in *Brown v. North American Manufacturing Co.*<sup>21</sup> held that a jury question was presented as to the unreasonable danger of an unguarded grain auger.<sup>22</sup> In *Coger v. Mackinaw Products Co.*,<sup>23</sup> an inadequately designed mechanical log splitter with a dangerously exposed wedge-shaped blade was not found to present an obvious danger. The court, relying upon the difference between products, distinguished its holding from an earlier case<sup>24</sup> which found obviousness of danger barred recovery. In the earlier case, the product, a milk bottle wire carrier, was a "simple tool whose character was uncomplicated and obvious;" whereas, the product involved in the present case was a "complicated mechanical contrivance."<sup>25</sup>

The technique of distorting the concept of obviousness, exemplified in the cases above, is frequently used by courts to avoid the absolute bar of recovery as a matter of law.<sup>26</sup> It is not, however, a desirable approach because it is uncertain in application and involves an element of subterfuge. If the obvious danger rule is not a good rule, it should be rejected outright. Moreover, the adoption of the open and obvious rule in Indiana presents the added possibility that the Indiana state courts will apply the obvious danger rule with Draconian efficiency, while Indiana federal courts, sitting in diversity, will adopt a policy of leniency.<sup>27</sup> Such a development will create the unfortunate result of the plaintiff's rights turning on the fortui-

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<sup>18</sup>*Id.* at 159-60, 305 N.E.2d at 774, 350 N.Y.S.2d at 651. The court distinguished obviousness of *condition* from obviousness of *danger* and stated that the obviousness of danger "turn[ed] upon the perception of the reasonable user of the motorcycle as to the dangers which inhere in the placement of the parcel grid." *Id.* at 160, 305 N.E.2d at 774, 350 N.Y.S.2d at 651.

<sup>19</sup>19 Wash. App. 515, 576 P.2d 426 (1978), *aff'd*, 588 P.2d 1346 (Wash. 1979).

<sup>20</sup>*Id.* at 515, 576 P.2d at 429-31.

<sup>21</sup>576 P.2d 711 (Mont. 1978).

<sup>22</sup>*Id.* at 717-18.

<sup>23</sup>48 Mich. App. 113, 210 N.W.2d 124 (1973).

<sup>24</sup>*Fisher v. Johnson Milk Co.*, 383 Mich. 158, 174 N.W.2d 752 (1970).

<sup>25</sup>48 Mich. App. at 121, 210 N.W.2d at 128 (1973).

<sup>26</sup>*See, e.g.*, *Ford Motor Co. v. Rodgers*, 337 So. 2d 736, 740 (Ala. 1976).

<sup>27</sup>*Compare* *Lantis v. Astec Indus., Inc.*, 648 F.2d 1118 (7th Cir. 1981) (applying Indiana law) *with* *Bemis Co. v. Rubush*, 427 N.E.2d 1058 (Ind. 1981).

ty of whether he or she happens to be of diverse citizenship from the defendant.<sup>28</sup>

2. *Exceptions to the Rule.*—There are a number of possible exceptions to the open and obvious rule which obviate the harsh and many times undesirable result of the rule. The complicated-machinery exception of the *Coger* case is one example.<sup>29</sup> It appears unlikely that Indiana will adopt this exception because the batt packing machine in the *Bemis* case was clearly a complicated piece of machinery.

Some cases create an exception for the bystander. As the court explained in *Pike v. Frank G. Hough Co.*,<sup>30</sup> the “danger to bystanders is not diminished” because the purchaser is aware of the danger.<sup>31</sup> In *Bemis*, Rubush was a user and not a bystander; therefore, this exception could not be applied in *Bemis*.

Other cases accord special treatment to the minor plaintiff.<sup>32</sup> The minor, like the bystander, is presumed to be unaware of the danger and therefore cannot protect himself. To treat the minor, or the bystander, differently from a user of the product, in determining the obviousness of the danger, directs consideration away from an objective standard of the obviousness of the danger and toward a subjective one—that of assumption of the risk.

Many cases recognize that the plaintiff who suffers a workplace injury should not be denied recovery where the unreasonable danger to which he is exposed is obvious, because his exposure is not voluntary.<sup>33</sup> The focus here on voluntariness once again, as with

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<sup>28</sup>Although the federal courts would be bound to follow the substantive law of Indiana under the doctrine stated in *Erie Ry. v. Tompkins*, 304 U.S. 64 (1938), federal courts could utilize the techniques described in this Article to reduce the harshness of the open and obvious danger rule.

<sup>29</sup>See notes 23-25 *supra* and accompanying text.

<sup>30</sup>2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970) (bystander was injured by a backward-moving earthmover which lacked mirrors).

<sup>31</sup>*Id.* at 473, 467 P.2d at 234, 85 Cal. Rptr. at 634. Although Indiana has not carved out a rigid exception to the rule for bystanders, the Indiana Court of Appeals, in a case factually similar to *Pike*, asserted that it is for the jury to determine whether a reasonable bystander would have had sufficient awareness of the defect to have incurred the risk. *Gilbert v. Stone City Constr. Co.*, 171 Ind. App. 418, 430, 357 N.E.2d 738, 746 (1976). The language of this decision could reasonably be construed as going to the question of patent-latent distinctions.

<sup>32</sup>See *DeSantis v. Parker Feeders, Inc.*, 547 F.2d 357, 364 (7th Cir. 1976); see also Phillips, *Products Liability For Personal Injury To Minors*, 56 VA. L. REV. 1223, 1228 (1970).

<sup>33</sup>See, e.g., *Rhoads v. Service Mach. Co.*, 329 F. Supp. 367 (E.D. Ark. 1971). Other courts have said there is no assumption of risk with regard to the very danger the defendant is required to guard against. *Coty v. United States Slicing Mach. Co.*, 58 Ill. App. 3d 237, 373 N.E.2d 1371 (1978); *Bexiga v. Havir Mfg. Co.*, 60 N.J. 402, 290 A.2d 281 (1972).

the minor and the bystander, points the issue where it belongs; that is, the issue becomes assumption of risk and not merely consideration of the obviousness of the danger.

The adoption of the obvious danger rule in the area of products liability may have a significant impact on other related fields of law. A number of cases, and the Second Restatement of Torts, allow recovery against a land occupier for injuries resulting from obvious dangers when it is foreseeable that injury will result despite the obviousness of the danger.<sup>34</sup> Indiana must now choose whether to follow the Restatement rule, or to treat a land occupier like a product seller. There is no good reason for treating the two differently. Nor is there an adequate justification for distinguishing the result in cases of a builder-vendor who sells premises in an obviously defective condition from the result in products liability cases where the danger is obvious.<sup>35</sup>

A unique problem arises in determining the recovery allowed a rescuer. The law generally extends favorable treatment to the rescuer.<sup>36</sup> A rescuer rushes, in the face of an obvious danger, to save a helpless victim; however, the rescuer may be denied recovery if the cause of the peril is a product, instead of a person.<sup>37</sup> If the person rescuing a victim endangered by a product would be denied recovery, but the rescuer of a person from danger created by another is allowed to recover, does the different treatment violate constitutional principles of equal protection?<sup>38</sup>

Finally, a number of cases recognize an exception to the bar of the obviousness rule where the defendant has made a misrepresentation, by advertisement or otherwise, that lulls the plaintiff into a false sense of security.<sup>39</sup> The rationale for this exception has a great deal of appeal. If the defendant misleads the plaintiff and causes injury thereby, it is only just that he should pay for the injury. But

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<sup>34</sup>See notes 7-8 *supra* and accompanying text.

<sup>35</sup>*Cf.* Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965) (a builder-vendor could be strictly liable for injuries caused by a bathroom faucet if the design were unreasonably dangerous and caused the injury).

<sup>36</sup>Wagner v. International Ry., 232 N.Y. 176, 180, 133 N.E. 437 (1921) ("Danger invites rescue. The cry of distress is the summons to relief.").

<sup>37</sup>See Guarino v. Mine Safety Appliance Co., 25 N.Y.2d 460, 466, 255 N.E.2d 173, 176, 306 N.Y.S.2d 942, 946 (1969) (Scileppi, J., concurring) (objecting to the extension of the rescue doctrine to products liability cases).

<sup>38</sup>*Cf.* Battilla v. Allis Chalmers Mfg. Co., 392 So. 2d 874 (Fla. 1980) (product liability statute of repose creates an unconstitutional classification); Bolick v. American Bar-mag Corp., 284 S.E.2d 188 (N.C. Ct. App. 1981) (following *Battilla*); *accord*, Phillips v. ABC Builders, Inc., 611 P.2d 821 (Wyo. 1980) (architects' and builders' statute of repose creates an unconstitutional classification).

<sup>39</sup>See Jonescue v. Jewel Home Shopping Serv., 16 Ill. App. 3d 339, 306 N.W.2d 312 (1973); McCormack v. Hanksraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967).

the misrepresentation cases are not clearly and easily identifiable as such. As Justice Traynor pointed out in the landmark case of *Greenman v. Yuba Power Products, Inc.*,<sup>40</sup> implicit in a product's presence on the market is an implied representation that it will "safely do the jobs for which it was built."<sup>41</sup>

Each of these exceptions to the obvious danger rule and the different treatment in non-products cases has considerable appeal. Yet, it is difficult to justify these exceptions in lieu of abolishing the rule itself, just as it is often hard to distinguish the obvious from the latent defect. As the courts have so often said in extending the doctrine of products liability, no rational line can be drawn to avoid the extension.<sup>42</sup> The exceptions tend to swallow the rule.

### C. Policy Considerations Applicable to Obvious Dangers

In some cases, the courts talk in terms of obviousness of danger when they really mean that the product is not defective because the product cannot be made safer without destroying its utility.<sup>43</sup> Thus, an axe, although obviously sharp, is not unreasonably dangerous because it is a useful implement and the usefulness depends upon its sharpness. This analysis also explains the cases where the court denies recovery based on presumed common knowledge of the danger, even when it is apparent that the plaintiff lacked actual knowledge. It is assumed, for instance, that the plaintiff knows that fish chowder contains bones,<sup>44</sup> or that raw pork may contain trichinae,<sup>45</sup> because bones and trichinae cannot be removed from these products without destroying their desired quality. Such cases should not be confused with those where the danger is obvious but serves no useful purpose, that is, where the danger can be economically eliminated without destroying the product's utility and purpose.

Obvious dangers created by defective production or design should be distinguished from those arising from failure to warn. It makes sense, as many cases have held,<sup>46</sup> that there is no duty to warn of an obvious danger where the plaintiff is fully aware of that danger, because a warning would not add to the knowledge the

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<sup>40</sup>59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

<sup>41</sup>*Id.* at 61, 377 P.2d at 901, 27 Cal. Rptr. at 701.

<sup>42</sup>*See, e.g.,* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 383, 161 A.2d 69, 83 (1960) ("We see no rational doctrinal basis for differentiating between a fly in a bottle of beverage and a defective automobile.")

<sup>43</sup>*See, e.g.,* Jamieson v. Woodward & Lothrop, 247 F.2d 23 (D.C. Cir. 1957) (exerciser rope).

<sup>44</sup>*See* Webster v. Blue Ship Tea Room, Inc., 347 Mass. 421, 198 N.E.2d 309 (1964).

<sup>45</sup>*See* Kobeckis v. Budzko, 225 A.2d 418 (Me. 1967).

<sup>46</sup>*See* notes 43-45 *supra* and accompanying text.

plaintiff already has.<sup>47</sup> It is a different matter, however, to conclude that there is no duty to redesign where the danger is unreasonable but obvious.<sup>48</sup> The inadvertent victim will be protected if the danger is eliminated, but he will not be so protected if he is simply unaware of a warning or of an obvious danger.

The rationale supporting the open and obvious danger rule is that the plaintiff should be barred from recovery because of his culpable failure to avoid an apparent danger. This rationale is identical to that underlying the defenses of contributory negligence and assumption of the risk. There are, however, important procedural distinctions between obviousness, on the one hand, and contributory negligence or assumption of the risk, on the other. The latter are defenses, with the burden of proof on the defendant;<sup>49</sup> whereas negation of obviousness is part of the plaintiff's burden of proof.<sup>50</sup> With the burden on the defendant rather than the plaintiff, a jury question rather than one of law is usually presented, as it should be in such a fact-sensitive context. In the majority of jurisdictions that apply comparative fault, these defenses may serve only to reduce recovery.<sup>51</sup> The obviousness doctrine, on the other hand, has the harsh and excessive effect of barring recovery entirely.<sup>52</sup>

Moreover, the potential for culpability on the part of the manufacturer of an obviously dangerous product, on balance, far outweighs that of the culpable plaintiff who exposes himself to that danger. The plaintiff may be injured through inadvertence, distractions, work pressures, and the like. It is hardly likely that Rubush, the injured party in *Bemis*, intentionally subjected himself to the crippling and devastating injury he suffered from defendant's batt

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<sup>47</sup>It should be noted, however, that obviousness of danger does not limit the manufacturer's duty to warn. As one commentator suggests, "obviousness does not limit the manufacturer's duty to warn—rather it *discharges* that duty." Note, *Indiana's Obvious Danger Rule for Products Liability*, 12 IND. L. REV. 397, 400 (1979).

<sup>48</sup>As Professor Wade illustrates:

it is not necessarily sufficient to render a product duly safe . . . [because] its dangers are obvious, especially if the dangerous condition could have been eliminated. A rotary lawn mower, for example, which had no housing to protect a user from the whirling blade would not be treated as duly safe despite the obvious character of the danger.

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

<sup>49</sup>See *Hubbard-Hall Chem. Co. v. Silverman*, 340 F.2d 402 (1st Cir. 1965) (contributory negligence); *Luque v. McLean*, 8 Cal. 3d 136, 104 Cal. Rptr. 443, 501 P.2d 1163 (1972) (assumption of risk).

<sup>50</sup>See *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950).

<sup>51</sup>See Phillips, *The Case for Judicial Adoption of Comparative Fault in South Carolina*, 32 S.C.L. REV. 295, 299 (1980).

<sup>52</sup>See, e.g., *Bemis Co. v. Rubush*, 427 N.E.2d 1058 (Ind. 1981); *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950).

packing machine. The defendant's decision to market an obvious and unreasonably dangerous product, however, is intentional and calculated, or as one court has described it, "calloused."<sup>53</sup> The defendant's action evidences the kind of conduct for which punitive damages have traditionally been awarded. As the court said in *Auburn Machine Works Co. v. Jones*:<sup>54</sup>

The patent danger doctrine encourages manufacturers to be outrageous in their design, to eliminate safety devices, and to make hazards obvious. For example, if the cage which is placed on an electric fan as a safety device were left off and someone put his hand in the fan, under this doctrine there would be no duty on the manufacturer as a matter of law. So long as the hazards are obvious, a product could be manufactured without any consideration of safeguards.<sup>55</sup>

#### D. Resolving the Impasse

One solution to the problems created by *Bemis* is for the Indiana Legislature to pass a statute providing that obviousness is not a bar as a matter of law in products cases involving defective design, production, or misrepresentation.<sup>56</sup> Thus, a court, otherwise inclined to adopt a rule of obviousness as a bar, would be required to defer to a legislative determination of the matter.<sup>57</sup>

Regardless of whether a legislative resolution is politically feasible, the Indiana Supreme Court should not abdicate its role in regard to the obvious danger rule. Having made the decision, which is a bad one, it should dispose of the decision either by limiting the holding to its facts,<sup>58</sup> or by overruling it outright. The Indiana Supreme Court has overruled bad precedent in the past,<sup>59</sup> and it should do so in this instance as well.

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<sup>53</sup>*Luque v. McLean*, 8 Cal. 3d 136, 145, 501 P.2d 1163, 1169, 104 Cal. Rptr. 443, 449 (1972).

<sup>54</sup>366 So. 2d 1167 (Fla. 1979).

<sup>55</sup>*Id.* at 1170-71.

<sup>56</sup>In his dissenting opinion in *Bemis*, Justice Hunter suggests that Indiana's Products Liability Act, which became effective after the *Bemis* action arose, impliedly rejects the open and obvious rule. The statute sets out a defense which allows a defendant to present a question of fact on whether it was reasonable for the party to proceed in the face of an open and obvious danger. According to Justice Hunter, this question generally will be resolved by a jury. *Bemis Co. v. Rubush*, 427 N.E.2d 1058, 1071 (Ind. 1981) (Hunter, J., dissenting) (citing IND. CODE § 33-1-1.5-4(b)(1) (Supp. 1981)).

<sup>57</sup>*See Campo v. Scofield*, 301 N.Y. 468, 475, 95 N.E.2d 802, 805 (1950).

<sup>58</sup>The court suggests, without so holding, that the batt packing machine was not defective because a safer design was not feasible. *Bemis Co. v. Rubush*, 427 N.E.2d 1058, 1061 (Ind. 1981).

<sup>59</sup>*See, e.g., Theis v. Heuer*, 264 Ind. 1, 280 N.E.2d 300 (expressly overruling prior precedent and recognizing an implied warranty of habitability from the builder-vendor of a new house).

