X. Products Liability

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A. Introduction—The Open and Obvious Danger Rule

During the last ten years, Indiana products liability law has been greatly influenced by both legislative enactment and increased activity by the Indiana Supreme Court. This survey reviews the 1983 amendments to the Products Liability Act and the significant recent opinions.

The general policy of Indiana products liability law has definitely deviated from the policy considerations which originated strict liability in tort. In 1963, the California Supreme Court adopted strict liability in tort.[1] The nation followed California's lead, and strict liability is now the generally accepted rule. The policies underlying strict liability were compensation of unfortunate victims and promotion of safety in the manufacture and distribution of products.[2] Indiana followed these policies consistently until the recent decision of *Bemis Co. v. Rubush*.[3]

Justice Pivarnik, speaking for a three judge majority in *Bemis*, stated: "In the area of products liability, based upon negligence or based upon strict liability under § 402A of the Restatement (Second) of Torts, to impress liability upon manufacturers, the defect must be hidden and not normally observable, constituting a latent danger in the use of the product."[4] In other words, if the defect in a product is open and obvious, then it is legally impossible for that product to be in a defective condition, unreasonably dangerous to a user.

The open and obvious danger rule is illogical in that a product may be extremely dangerous yet have defects which are quite visible. In light of such dangers, designers have, for over seventy-five years, applied mechanical and electrical guards to such obvious dangers as augers, presses, and rollers. The use of such guards recognizes that the user cannot always protect himself against that which he can see. Without such guards and safety devices, the frequency of maiming injuries to users and workers would increase, and the work place would again become the "sweatshop" of the early industrial revolution.

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[1]Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

[2]*See* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1119-22 (1960); RESTATEMENT (SECOND) OF TORTS § 402A comment c (1965).

[3]427 N.E.2d 1058 (Ind. 1981).

[4]*Id.* at 1061.

A simple glance at a common household product should demonstrate the absurdity of the absolute bar to liability for injuries caused by products having open and obvious dangers. For example, a fan, the blades of which are covered by a wire cage, could conceivably be defective and unreasonably dangerous under the *Bemis* holding because its dangerous qualities could be latent or hidden by the presence of the protective cage.[5] But if the wire cage is removed, then the danger becomes open and obvious, and the product is non-defective *as a matter of law* under the *Bemis* decision.[6]

The primary difficulty with the absolute bar of the open and obvious danger rule is that it negates the defect element of a strict liability claim. This effect cannot withstand even a superficial analysis. The rule, if applicable at all, is more appropriate to the defenses of contributory negligence and assumed risk. In such instances, the plaintiff's knowledge (or lack thereof) of the danger and his understanding, appreciation, and voluntariness in encountering the known defect or danger may deprive him of recovery.[7] However, the product does not become less dangerous simply because a particular plaintiff recognizes the danger; the danger is still present for all who may be exposed to it.

Another disturbing facet of the open and obvious danger rule is that it violates the primary motivating principle which gave rise to strict liability in tort and upon which all of tort law is premised—the promotion of safety.[8] When a manufacturer profits from a dangerous product without having to pay for injuries caused by it, he will continue to market the dangerous product. The manufacturer has no incentive to make safer devices or to guard or modify his product so as to reduce the dangers of the product. No prudent manufacturer would desire to increase the cost of his product. Humanitarian pressures to make safer products exert little force in the highly competitive market place.

The failure to recognize the beneficial effect of encouraging safer designs is a rejection of good engineering design practices as recognized by the engineering profession. As every engineer realizes, design choices require considerations of function, economics, and the human element.[9] The human element of design includes considerations of safety and recogni-

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[5] *See id.*

[6] *Id.* at 1064.

[7] Of course, contributory negligence is only a defense in a negligence action and does not apply to strict liability actions. Gregory v. White Trucking & Equip. Co., 163 Ind. App. 240, 323 N.E.2d 280 (1975). The assumption of risk defense requires an analysis of the plaintiff's subjective knowledge, understanding, and appreciation of the risk and of his voluntariness in encountering it. Kroger Co. v. Haun, 177 Ind. App. 403, 379 N.E.2d 1004 (1978); *see* RESTATEMENT (SECOND) OF TORTS §§ 496A-496G (1965).

[8] *See* Prosser, *supra* note 2, at 1119-22.

[9] *See* Sevart, Risk Recognition and Injury Prevention in the Design of Agricultural Equipment 2 (Dec. 13, 1983) (paper presented at the 1983 Winter Meeting of the American Society of Agricultural Engineers).

tion and reduction of unreasonable hazards or dangers in the product.[10] Thus, if a product contains dangers which could be economically eliminated or reduced without impairing the product's function, then such changes should be made.[11] In *Bemis*, an expert design engineer testified as follows:

> "[A] hazard or risk in a product is unreasonable if it could be removed and the cost of removal is not significant nor [sic] the cost of removal does not seriously reduce the utility of the product. This is a basic definition. In other words basically in simple words it says if you can get rid of the hazard at little cost you have no business leaving it in, so it is unreasonable to leave it in, and this is, this is the term that we use."[12]

The three-judge majority in *Bemis*, in examining the design engineer's definition of unreasonably dangerous defect and other engineering testimony, stated:

> [Dr. Fox] testified further as to ways in which the machine could have been made safer. Dr. Manos, another expert witness, testified similarly. The jury could have relied on this definition then, and determined that even though the dangerous characteristic of the descending shroud was open and obvious to Rubush as he operated the machine, and known to him, they could find Bemis liable for not conforming to the standards set by Dr. Fox and Dr. Manos. This would make manufacturers insurors [sic] of any product they put in the open market and render them liable for injuries and damages to those using the machine regardless of the facts and circumstances surrounding the injury. This is not the law in Indiana.[13]

The *Bemis* majority thus rejected not only the engineering definition, but also a generally recognized *legal* definition of unreasonably dangerous defect.[14] In so doing, the court refused to recognize safer alternative designs

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[10] *Id.*

[11] *See infra* note 12 and accompanying text.

[12] 427 N.E.2d at 1063 (quoting testimony of Dr. Richard L. Fox, Professor of Engineering, Case Western Reserve University).

[13] 427 N.E.2d at 1063.

[14] In Uloth v. City Tank Corp., 376 Mass. 874, 384 N.E.2d 1188 (1978), the Supreme Judicial Court of Massachusetts stated:

> We decline to hold that there can be no negligence in design if the product performs as intended, or if there are warnings found to be adequate, or if the dangers are obvious. We hold that these factors should be considered by a jury in evaluating a claim of design negligence. But there is a case for the jury if the plaintiff can show an available design modification which would reduce the risk without undue cost or interference with the performance of the machinery.

Id. at 881, 384 N.E.2d at 1193 (citing 2 F. HARPER & F. JAMES, TORTS § 28.5, at 1543 (1958)). *See* Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 17 (1963).

as proof of design defects.[15] Consequently, the *Bemis* majority encourages engineers to ignore their customary design considerations of safety. However, the most disturbing effect of *Bemis* is that it encourages unsafe products and unsafe designs and deprives victims of recovery.

B. Hoffman v. E.W. Bliss Co.

1. Modification of the Open and Obvious Danger Rule.—In 1964, the Indiana Supreme Court decided a negligence case called *J.I. Case Co. v. Sandefur*,[16] wherein Indiana finally eliminated the privity requirment in negligence law.[17] However, in dicta, the court cited language from a 1950 New York decision, *Campo v. Scofield*,[18] which barred liability unless a defect or danger was hidden from the user.[19] It is important to note two factors regarding *Campo*: first, it was a negligence case;[20] and second, it was overruled in 1976.[21] Despite the apparent inapplicability of negligence principles in a strict liability case,[22] Indiana courts continued to use the language of *Campo* and *Sandefur* in strict liability cases.[23] Finally, the Indiana Supreme Court converted the overruled negligence language in *Campo* and the dicta that it spawned in *Sandefur*, into a defect requirement for proving a defect in strict liability in *Bemis Co. v. Rubush*.[24] Although *Bemis* was apparently a design defect case,[25] the majority of the Indiana Supreme Court believed that if the danger or defect was open and obvious, the product could not be defective.[26] Although the *Bemis* decision was highly criticized,[27] Indiana courts followed the open and obvious danger rule without modification until the recent decision of *Hoffman v. E.W. Bliss Co.*[28]

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[15]*See* Mitchell v. Fruehauf Corp., 568 F.2d 1139, 1144-45 (5th Cir. 1978) (expert testimony as to feasible alternative designs for hanging meat trailer sufficient to allow jury conclusion that defendant's design was unreasonably dangerous); *see also* Phillips, *The Unreasonably Dangerous Product*, 15 TRIAL 22, 23 (1979).

[16]245 Ind. 213, 197 N.E.2d 519 (1964).

[17]*Id.* at 221-22, 197 N.E.2d at 522-23.

[18]301 N.Y. 468, 95 N.E.2d 802 (1950), *cited in Sandefur*, 245 Ind. at 222, 197 N.E.2d at 523.

[19]301 N.Y. at 472, 95 N.E.2d at 804.

[20]*See id.* at 471, 95 N.E.2d at 803.

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

[22]*See supra* note 7.

[23]*See* Vargo, *Products Liability, 1975 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 265, 280-81 n.61 (1976) and cases cited therein.

[24]427 N.E.2d 1058, 1061 (Ind. 1981) (citing Burton v. L.O. Smith Foundry Prods. Co., 529 F.2d 108 (7th Cir. 1976); Posey v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965); J.I. Case Co. v. Sandefur, 245 Ind. 213, 197 N.E.2d 519 (1964)).

[25]*See* 427 N.E.2d at 1060-61.

[26]*Id.* at 1061.

[27]*See, e.g.*, Phillips, *Products Liability: Obviousness of Danger Revisited*, 15 IND. L. REV. 797 (1982).

[28]448 N.E.2d 277 (Ind. 1983).

The Indiana Supreme Court seems to have modified the open and obvious danger rule to some degree in *Hoffman*. There, the plaintiff knew of the danger of placing his hand into the die area of a punch press and knew that a descending ram in that area could cause him harm but still recovered for his injury. However, the court stated that a finding of open and obvious danger depends upon how broadly one construes "danger."[29] The *Hoffman* court said that the injury-producing mechanism of the machine—the descending ram—was an open and obvious danger; however, the plaintiff's theory was that some unknown malfunction of the press and the defendant's failure to warn of this unknown defect had caused his injury.[30] Thus, under *Hoffman*, for the open and obvious danger rule to apply, the exact alleged malfunction or defect must be the item that is "truly and entirely open and obvious."[31]

2. The Duty to Warn.—The *Hoffman* case also helped resolve the conflict in prior decisions concerning whether a manufacturer or seller could fulfill his obligation to warn by informing an intermediate party, such as the plaintiff's employer, of the dangers associated with the product. In *Sills v. Massey-Ferguson, Inc.*,[32] the court stated:

> In a slightly different setting, it would appear that the warning need not necessarily be given to the person actually injured in order for the manufacturer to escape liability. It would seem that the warning may be 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.[33]

Later, in *Burton v. L.O. Smith Foundry Products, Co.*,[34] the Court of Appeals for the Seventh Circuit found it sufficient for the manufacturer to warn the plaintiff's employer[35] and expanded the non-duty to warn:

> A duty to warn exists only when those to whom the warning would go can reasonably be assumed to be ignorant of the facts which a warning would communicate. If it is unreasonable to assume that they are ignorant of those facts, there is no duty to warn. . . .
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> . . . Smith's duty was only to make known, to those Interna-

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[29] *Id.* at 285.

[30] *Id.*

[31] *Id.*

[32] 296 F. Supp. 776 (N.D. Ind. 1969).

[33] *Id.* at 783 (citing McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967) (negligence action); Comstock v. General Motors Corp., 358 Mich. 163, 99 N.W.2d 627 (1959) (negligence action)).

[34] 529 F.2d 108 (7th Cir. 1976).

[35] *Id.* at 111.

tional Harvester employees to whom it had access, properties of its product that were dangerous but non-obvious.[36]

Thus, under *Burton*, the seller could fulfill his obligation to warn merely by warning the employer and not the employee who ultimately would use the product. The *Burton* case was soon contradicted by *Reliance Insurance Co. v. AL E. & C. Ltd.*,[37] where the Seventh Circuit court said:

> "[T]he 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 use of the product since a greater degree of danger requires a greater degree of protection.
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> 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 risks and inherent limits of the product. *The duty to provide a non-defective product is non-delegable.*"[38]

The Indiana Supreme Court appeared to have decided that the *Burton* rationale should prevail when it decided *Shanks v. A.F.E. Industries, Inc.*,[39] and said that a duty to warn, if it existed at all, could be fulfilled by warning the employer.[40] However, in the *Hoffman* case, the court stated:

> It is clear the manufacturer can never delegate to a second party the duty to warn of the presence of a latent defect and the potential danger in use of the product should the defect become effectively operable. Thus, whatever may be said about the delegability of Bliss' duty to warn about dangers associated with the use of the product when the product functioned properly, in the case at bar where there is evidence the danger associated with the use of the product is due to the presence of a latent structural defect in the product it cannot be said the manufacturer could delegate its warning duties to any other party.
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> In summary, Hoffman produced sufficient evidence for the

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[36] *Id.* at 111-12.

[37] 539 F.2d 1101 (7th Cir. 1976). *Reliance* was decided about seven months after *Burton*.

[38] 539 F.2d at 1106 (quoting Berkebile v. Brantley Helicopter Co., 462 Pa. 83, 103, 337 A.2d 893, 902-03 (1975)) (emphasis supplied by *Reliance* court).

[39] 416 N.E.2d 833 (Ind. 1981).

[40] *Id.* at 837 (citing Burton v. L.O. Smith Foundry Prods. Co., 529 F.2d 108 (7th Cir. 1976)).

> jury to have believed the press was defective in manufacture or design, and that such flaw caused an uninitiated cycle of operation to occur. The duty to warn of the fact of the defective manufacture or design was nondelegable by Bliss.[41]

The *Hoffman* decision calls into question the Indiana Court of Appeals decision in *Ortho Pharmaceutical Corp. v. Chapman*,[42] which stated that drug manufacturers need only warn physicians, not the ultimate user, of dangers associated with use of the drug.[43] In addition, such drug manufacturers need only warn of risks known or risks that should be known during the period when the patient is using the drug.[44]

Does *Hoffman's* statement that the duty to warn is owed to the ultimate user apply in drug cases? The inadequate instructions given to the plaintiff in *Hoffman* by his employer would logically relate to inadequate instructions given by a doctor to his patient. At a minimum, the drug manufacturer should be obligated to request that physicians give their patients the information contained in the package inserts or the *Physician's Desk Reference* or both.

3. Control Over the Work Place.—What is the essential difference between *Shanks*, which held that only the employer need be warned, and *Hoffman*, where the court held that the ultimate user must be warned? The *Hoffman* court stated that one of the key differences was that in *Shanks*, the manufacturer had no control over the work space, the hiring, instruction or placement of personnel, nor the manner of integrating the product into the employer's operation.[45] However, the work space rationale could not be a distinguishing factor because nothing in the *Hoffman* court's statement of facts indicates that the manufacturer-defendant had any control over the hiring, instruction, or placement of any of the personnel at the plaintiff's place of employment.[46] As to the integration of Bliss' punch press into the employer's operation, the majority opinion of the Indiana Supreme Court explicitly stated that the "safety package" of three different modes of operation chosen by the plaintiff's employer were purchased from a party other than the defendant and installed by the employer's personnel.[47] For the *Hoffman* court to distinguish *Shanks* on the grounds that the defendant had control over the plaintiff's employer's work place simply does not comport with the facts as stated in the majority opinion.

The work place rationale would permit a manufacturer to avoid liability by shifting his primary responsibility for warning of the defects in

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[41] 448 N.E.2d at 286 (citation omitted).
[42] 180 Ind. App. 33, 388 N.E.2d 541 (1979).
[43] *Id.* at 43, 388 N.E.2d at 548 (citing numerous authorities from outside Indiana).
[44] *Id.*, 388 N.E.2d at 548.
[45] 448 N.E.2d at 286.
[46] *See id.* at 278-81, 286.
[47] *Id.* at 278.

his product to the employer of an injured worker. The manufacturer, as an expert in his field,[48] should have sufficient knowledge to provide reasonably safe products. He is either aware or should be aware (as a matter of law) of the practices and procedures in the work place.[49] The work place, as the environment in which the product is placed, is not a mysterious place unknown to the product manufacturer. The manufacturer is either aware, or should be aware, of the injuries that occur with certain product designs. The practices being used in the work place are, and should be, of major concern to the product manufacturer. His basic design choices and his method of protecting human beings who encounter his product are basic, nondelegable responsibilities. If a manufacturer is incapable of understanding the work place environment, including the set up, operation, and maintenance of his product, then he should not be allowed to place his product into the work place.

Any attempt to delegate to an employer the manufacturer's basic responsibility for warning or instructing on the use of certain products, or for guarding them, can be a highly dangerous practice. In many workshops, the employer is neither knowledgeable concerning the design of the products and machines used in his work place nor equipped to make them safe. The employer's staff may or may not have the expertise to equip, guard, or alter a machine manufactured by another. The intricacies of design are for an engineer, not an employer whose primary concern is profit from the production and use of the machine. If the employer has more knowledge than the manufacturer about design, safety, use, guarding, and operation of a particular product, then he should produce his own machine. To shift the obligations of safe design and instructions or warnings for the use of a product to an employer, merely because the employer has possession or ownership of the product and hires and fires the employees who work or maintain the product, is to shift responsibility from the expert to the ignorant.

4. Component in a Multifaceted Operation.—The *Hoffman* court also distinguished *Shanks* by characterizing the allegedly defective product in *Shanks* as "a component in a multifaceted operation."[50] Surely the three majority judges in *Hoffman* do not contend that the mere fact of a multifaceted operation that has a defective component can prevent liability, because it is apparent that a defective component part can be

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[48]*See* Dias v. Daisy-Heddon, 180 Ind. App. 657, 665, 390 N.E.2d 222, 227 (1979); *cf.* Ortho Pharmaceutical Corp. v. Chapman, 180 Ind. App. 33, 43, 388 N.E.2d 541, 548 (1979) (drug manufacturer); *see also* Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 847-48 (1962).

[49]In Newton v. G.F. Goodman & Son, Inc., 519 F. Supp. 1301 (N.D. Ind. 1981), the court stated: "A manufacturer is charged with a duty to anticipate what the environment will be like in which the product is to be used and what the foreseeable risks of such use are." *Id.* at 1306 (citing Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1979)).

[50]448 N.E.2d at 286.

a basis for liability.[51] In addition, the punch press in *Hoffman* was itself a "component in a multifaceted operation" inasmuch as the employer added to the machine a package of three modes of operation, which was produced by a manufacturer other than the defendant.[52]

Thus, neither the "work place" rationale nor the "component in a multifaceted operation" rationale can legitimately serve as a principled distinction between the *Shanks* and *Hoffman* cases, given the facts of each case. The only other distinction cited by the *Hoffman* court was that in *Shanks*, "there was no evidence any manufacturing or design defect was causally related to the accident."[53] In *Hoffman*, however, the plaintiff did present evidence that such a defect proximately caused his injury.[54]

First, it should be noted that *Shanks* was a warning defect case,[55] so no evidence of a manufacturing or design defect was necessary in that case. Second, if the only distinction between the cases is that the product in *Hoffman* was defective while the product in *Shanks* was not, it hardly seems necessary for the court to manufacture such dubious distinctions as the "work place" or "multifaceted system" rationales to reach the different results. A cynic might predict, however, that some future plaintiff will be denied recovery on the basis of those rationales. Finally, the plaintiff in *Shanks*, like the plaintiff in *Hoffman*, could legitimately state that his injuries were "caused by mechanisms that due to a hidden defect cause it to operate or malfunction at a time when the user has every reason to expect it will not."[56] Thus, the *Hoffman* case seems indistinguishable from *Shanks*.

5. Does Hoffman *Eliminate the Open and Obvious Danger Rule?*— The facts and holding in *Hoffman* indicate that a seller has a nondelegable duty to warn the ultimate user or consumer of the product, irrespective of the seller's control or non-control over the work place.[57] The warning must inform the ultimate user of *any* latent defects in the product, and the duty to warn is operative even if the defendant did not know of the

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[51] *See, e.g.*, Noefes v. Robertshaw Controls Co., 409 F. Supp. 1376 (S.D. Ind. 1976). In *Neofes*, the plaintiff was injured when a hot water heater, equipped with a safety valve manufactured by the defendant, exploded. The defendant did not manufacture any other component of the water heater. The defendant moved to dismiss the strict liability count of the plaintiff's complaint on the ground that the theory of strict liability does not apply to the manufacturer of a component part made or assembled by others. The district court denied the defendant's motion, stating its belief that Indiana courts would approve of the application of the strict liability theory to manufacturers of component parts. *Id.* at 1380. *See also* Lantis v. Astec Indus., 648 F.2d 1118, 1121 (7th Cir. 1981); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 100, at 663-64 (4th ed. 1974).

[52] *See* 448 N.E.2d at 278-79.

[53] *Id.* at 286.

[54] *Id.*

[55] *See* 416 N.E.2d at 836.

[56] 448 N.E.2d at 285.

[57] *See supra* notes 41-47 and accompanying text.

specific alleged defect.[58] The *Hoffman* court stated that "[i]t is clear that whatever this defect or malfunction was, neither Hoffman *nor anyone else* could see it without making the kind of inspection the user of the product in a § 402A action is not expected to have made."[59] Neither the plaintiff's expert nor the defendant's expert found any defect that would cause a double tripping of the press,[60] nor did the defendant ever admit that the particular press did in fact double trip. Thus, the defendant, completely without either actual knowledge or constructive knowledge, was required by the court to provide a warning. But a warning of what? The *Hoffman* court's summary indicates that Bliss should have warned of the "double trip" defect.[61] But in the main body of the opinion, the court stated:

> Moreover, [the defendant] Bliss can be charged with constructive knowledge of the fact that no matter who buys its press, the basics of operation are the same: the ram will descend upon triggering by the operator to smash an impression out of a piece of sheet metal. Bliss is not in a position to claim it could not be charged with awareness of a *need to warn operators of the press to keep their hands clear of the point of operation when the press cycles.*[62]

If the *Hoffman* court, with this statement, was requiring the defendant to warn the plaintiff not to place his hand into the point of operation, then it contradicted the open and obvious danger rule, the court having previously stated that the point of operation area of the punch press was an open and obvious danger.[63]

When the *Hoffman* decision is examined closely, the following essential factors spring forth:

1. The point of operation was an open and obvious danger.[64]
2. The plaintiff alleged that the punch press was defective because it double tripped, not because an unreasonable danger existed in the point of operation area.[65]
3. The defendant must warn of only those defects of which he has actual or constructive knowledge.[66]
4. Neither the plaintiff nor defendant had actual or constructive knowledge of the punch press' double tripping.[67]

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[58] *See supra* note 41 and accompanying text.

[59] 448 N.E.2d at 285 (emphasis added).

[60] *Id.* at 280.

[61] *See supra* note 41 and accompanying text.

[62] 448 N.E.2d at 286 (emphasis added).

[63] *Id.* at 285.

[64] *Id.*

[65] *Id.*

[66] *See* Ortho Pharmaceutical Corp. v. Chapman, 180 Ind. App. 33, 43, 388 N.E.2d 541, 548 (1979) (duty of drug manufacturer).

[67] 448 N.E.2d at 285.

The above factors can be applied to existing Indiana law in the following manner:

1. The defendant had no duty to warn of the double tripping because he lacked actual or constructive knowledge of said double tripping.[68]
2. The defendant had no duty to warn users not to place their hands into the point of operation area because it was an open and obvious danger.[69]
3. Because the *Hoffman* court held that the defendant had a nondelegable duty to warn of the defective manufacture or design of its product,[70] then the rule of law under either 1 or 2 above is incorrect or must be modified.

Thus, the *Hoffman* court must be informing the bench and bar either that the open and obvious danger rule no longer exists, or that defendants must warn of unknown and unknowable dangers.

6. The Defense of Misuse.—In *Greeno v. Clark Equipment Co.*,[71] the first Indiana case adopting section 402A,[72] the District Court for the Northern District of Indiana stated that the defense of misuse refutes either a defective condition or the causation element.[73] Later, *Cornette v. Searjeant Metal Products*[74] relegated misuse to a foreseeability issue but considered misuse an affirmative defense.[75] In *Fruehauf Trailer Division v. Thorton*,[76] the court examined misuse closely and stated that when the user has knowledge of the defect, misuse becomes part of assumption of the risk;[77] however, the failure to discover or guard against a defect is merely contributory negligence (not misuse)[78] and is not a defense to a strict liability action.[79]

Misuse is a use which is not foreseeable. This does not mean that a manufacturer may merely state that the use was not intended from his subjective viewpoint. Intended use includes all reasonably foreseeable uses,

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[68] *See* Ortho Pharmaceutical Corp. v. Chapman, 180 Ind. App. 33, 43, 388 N.E.2d 541, 548 (1979).

[69] *See* Bemis Co. v. Rubush, 427 N.E.2d 1058, 1061 (Ind. 1981).

[70] 448 N.E.2d at 286.

[71] 237 F. Supp. 427 (N.D. Ind. 1965).

[72] *Id.* at 433 (adopting RESTATEMENT (SECOND) OF TORTS § 402A (1965) as the law in Indiana).

[73] 237 F. Supp. at 429.

[74] 147 Ind. App. 46, 258 N.E.2d 652 (1970). *Cornette* was the first case in which § 402A was expressly adopted by an Indiana state court. *See id.* at 52, 258 N.E.2d at 656.

[75] *Id.* at 665 (Sharp, J., concurring); *see* Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, 118-19, 258 N.E.2d 681, 688-89 (1970).

[76] 174 Ind. App. 1, 366 N.E.2d 21 (1977).

[77] *Id.* at 11, 366 N.E.2d at 29.

[78] *Id.*

[79] *Id.* at 10-11, 366 N.E.2d at 29 (quoting Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, 118-19, 258 N.E.2d 681, 689 (1970)).

considering the environment in which the product will be placed.[80] Thus, a manufacturer could not escape liability if a screwdriver were used to open paint cans by stating that the only intended use of a screwdriver is to drive screws into wood.

Foreseeable uses of a product directly affect the defendant's obligation to instruct adequately on the proper use and to warn of the dangers of a product.[81] Whenever a plaintiff uses a product in contravention of legally sufficient instructions and warnings, the defendant may sustain the defense that the plaintiff assumed the risk[82] by proving all four elements of assumed risk—knowledge, understanding, appreciation and voluntariness.[83] When a court states that any "forseeable misuse" does not bar recovery, the court is using a lay definition of misuse and is merely stating that the use is foreseeable and is therefore not misuse and not a defense. Before his opinion was vacated by the Indiana Supreme Court, Judge Chipman, in *Conder v. Hull Lift Truck, Inc.*,[84] gave the best description of "foreseeable misuse":

> Allis-Chalmers argues the term "misuse" as used in Instruction No. 10 "implies a lack of foreseeability." However, there is nothing in the wording of this instruction which directs the lay juror to consider the element of foreseeability; indeed the jury may well have applied the usual and much narrower lay definition of misuse (i.e., improper use, abuse, or abnormal use) without considering the uses of the product in the environment which should reasonably have been foreseen by the manufacturer.[85]

Justice Pivarnik's opinion in *Conder* framed the misuse concept as an issue of foreseeable (or unforeseeable) intervening cause.[86] Thus, if the conduct that allegedly constitutes misuse is foreseeable, it is not an intervening cause and cannot bar liability. However, on some occasions a product could be used in a non-foreseeable manner, yet recovery should still be allowed. For example, if the injuring defect is not associated with the misuse, it is the defect, *not* the misuse, which causes the injury. In such a situation, causation will determine liability.

The *Hoffman* court discussed the issue of misuse and concluded that: (1) Misuse is a *defense* to strict liability.[87] (2) The plaintiff's failure to

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[80] *See supra* note 49.

[81] *See* Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, 119-21, 258 N.E.2d 681, 689-90 (1970).

[82] *See id.* at 119, 258 N.E.2d at 689.

[83] *See* Kroger v. Haun, 177 Ind. App. 403, 415-16, 379 N.E.2d 1004, 1012 (1978); RESTATEMENT (SECOND) OF TORTS §§ 496A-496G (1965).

[84] 405 N.E.2d 538 (Ind. Ct. App. 1980), *vacated*, 435 N.E.2d 10 (Ind. 1982).

[85] 405 N.E.2d at 546.

[86] 435 N.E.2d at 15-17.

[87] 448 N.E.2d at 283 (citing, e.g., Latimer v. General Motors Corp., 535 F.2d 1020

discover or guard against a defect is contributory negligence and not misuse and is, therefore, not a defense in a strict liability action.[88] (3) If the plaintiff discovers the defect or uses the product in contravention of a legally sufficient warning, he is subject to the defense of incurred or assumed risk.[89] (4) Misuse is not a defense if the instruction or warning is inadequate.[90] The *Hoffman* court also held that it was the duty of the seller or manufacturer to warn the ultimate user or consumer and that such a *duty is nondelegable.*[91]

7. Is Hoffman *an Aberration?*—As indicated in the foregoing discussion, the *Hoffman* decision *could* greatly affect Indiana products liability law and mark the beginning of the end of the open and obvious danger rule.[92] However, it is possible that *Hoffman* was based upon a unique factor. At a recent Indiana conference on products liability law, it was pointed out that the plaintiff in *Hoffman* was the son of a judge on the Indiana Court of Appeals.[93] Hopefully, the *Hoffman* decision is not an aberration in the law based upon the plaintiff's identity. However, two recent Indiana cases demonstrate that the open and obvious danger rule is still effective in overturning jury decisions in favor of a plaintiff.[94]

(7th Cir. 1976); Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, 258 N.E.2d 681 (1970)).

[88]448 N.E.2d at 282 (quoting Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, 119, 358 N.E.2d 681, 689 (1970)).

[89]448 N.E.2d at 283 (quoting Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, 119, 258 N.E.2d 681, 689 (1970)).

[90]448 N.E.2d at 283. The *Hoffman* court stated:

> In the case at bar the instruction [given by the trial court] states that one can be subject to the defense of misuse even where he was "inadequately instructed." . . . It defies logic to hold a user has misused a product when its danger is not open and obvious and moreover no one has warned the user of the presence of a latent danger associated with the product's use.

Id. The court thus held that the trial court erred in giving the instruction in question. *Id.*

[91]*Id.* at 286.

[92]*See supra* notes 63-70 and accompanying text.

[93]Address by Peter Obremskey, Indiana Continuing Legal Education Forum Seminar on Products Liability Law (Oct. 7, 1983).

[94]*See* American Optical Co. v. Weidenhamer, 457 N.E.2d 181 (Ind. 1983), *rev'g,* 404 N.E.2d 606 (Ind. Ct. App. 1980); Bryant-Poff, Inc. v. Hahn, 454 N.E.2d 1223 (Ind. Ct. App. 1982), *trans. denied,* 453 N.E.2d 1171 (Ind. 1983) (Hunter, J., dissenting to denial of transfer).

The *Hahn* decision is especially troubling. The defendant designed, manufactured, and installed two grain elevator legs at the place of business of the plaintiff's employer. The defendant also provided two electrical cut-off devices which, when engaged, prevented operation of the equipment, but the plaintiff was never instructed on the location or operation of the cut-off devices. The employer sent the eighteen-year-old plaintiff to paint one of the elevator legs on a platform ninety feet above the ground. The motor-driven chain and sprocket that powered the vertical conveyor of the elevator leg were located about four feet above the maintenance platform. As the plaintiff reached his hand between the unguarded chain and sprocket to touch up a rust spot behind the sprocket, a fellow employee activated the motor. The plaintiff's arm was caught between the chain and sprocket and was crushed,

Therefore, it appears that the uniqueness of the plaintiff's identity may have been a factor in the *Hoffman* court's apparent limitation on the open and obvious danger rule.

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eventually requiring amputation below the elbow. 454 N.E.2d at 1224.

The plaintiff sued the defendant on theories of negligence and strict liability in tort. The jury returned a verdict for the plaintiff and awarded damages in the sum of $663,000. The court of appeals reversed, holding that the trial court erred in failing to grant the defendant's motion for judgment on the evidence. *Id.* at 1225. The court of appeals plainly based its decision on the open and obvious danger rule:

> Although there was evidence from which the jury could have concluded that the unguarded chain and sprocket mechanism was unreasonably dangerous in light of industry regulations and standards at the time it was designed and manufactured, we do not read *Bemis*, *Shanks*, and [*Coffman v. Austgen's Electric, Inc.*, 437 N.E.2d 1003 (Ind. Ct. App. 1982)] to permit liability to attach when that defect should have been obvious to the party injured.

454 N.E.2d at 1225.

This statement demonstrates a confused understanding of Indiana law. As Justice Hunter pointed out in his opinion dissenting to denial of transfer, 453 N.E.2d 1171 (Ind. 1983), "[I]t is inconsistent under Indiana law to find something unreasonably dangerous but also open and obvious . . . . The [*Bemis*] majority . . . determined that if a danger is open and obvious to the person using it, the product is not unreasonably dangerous." *Id.* at 1171-72 (citing *Bemis*, 427 N.E.2d at 1061).

Justice Hunter also noted that the issue of unreasonably dangerous or open and obvious is normally to be decided by the jury. 453 N.E.2d at 1172 (citing *Bemis*, 427 N.E.2d at 1064; Hoffman v. E.W. Bliss Co., 448 N.E.2d 277, 285 (Ind. 1983)). Stating that a motion for judgment on the evidence should only be sustained when "there is no substantive evidence or reasonable inferences to be derived therefrom to support an essential element of the claim," 453 N.E.2d at 1172, Justice Hunter found that "it is obvious the evidence was sufficient to justify submitting the case to the jury." *Id.* at 1173. After reviewing the evidence presented to the jury and the law of this state that applies to those facts, Justice Hunter correctly concluded that "[b]ecause there was evidence from which the jury could have concluded that Hahn's injury was a result of a defectively designed product or that [the defendant] had failed to provide adequate warnings or instructions, the trial court was justified in submitting the case to the jury." *Id.* at 1174-75.

Another disturbing aspect of the *Hahn* case is the timing of the publication of the court of appeals decision. The date of the decision was December 22, 1982. *See Hahn*, 454 N.E.2d at 1223. The decision was originally noted in the table of "Disposition of Cases by Unpublished Memorandum Decision in the Court of Appeals of Indiana." 443 N.E.2d at 1266. There it is noted that, pursuant to IND. R. APP. P. 15(A)(3), "[u]nless specifically designated 'for publication', memorandum decisions shall not be published *nor shall they be regarded as precedent nor cited before any court* except for the purpose of establishing the defense of Res Judicata, collateral estoppel or law of the case." 443 N.E.2d at 1266 (quoting IND. R. APP. P. 15(A)(3)) (emphasis added).

Approximately five and one-half months after the *Hahn* case was decided, the Indiana Supreme Court decided *Hoffman*, on May 4, 1983. *See* 448 N.E.2d at 277. Thus, although the *Hahn* decision seems to be a revival of the broadest form of the open and obvious danger rule, and therefore contrary to the rationale of *Hoffman*, the defendant in *Hoffman* was precluded from citing the *Hahn* case to the court under Appellate Rule 15(A)(3). Only after *Hoffman* was decided was *Hahn* published, and only then did its confused reasoning become available as precedent to the defense attorneys of this state. This curious and unusual timing can only lend credence to the suggestion that the uniqueness of the plaintiff's identity influenced the *Hoffman* decision. *See supra* note 93 and accompanying text.

Clearly, these two recent Indiana decisions have saved the open and obvious danger rule from total elimination. The only possible reconciliation of *Hoffman* with the latest decisions is to relegate the open and obvious danger rule to the defense of contributory negligence in negligence cases, and to the defense of incurred risk in strict liability cases.

C. A Suggested Alternative for the Open and Obvious Danger Rule

As has been suggested, the open and obvious danger rule does not logically negate the defect requirement of section 402A since many extremely dangerous defects are quite open and obvious.[95] Instead, the open and obvious danger rule focuses on the conduct of the plaintiff and not the condition of the product, and thus, could be retained as evidence of contributory negligence or assumption of risk. If the danger can be seen, then its obviousness should become a factor in determining whether the plaintiff acted reasonably with respect to the danger, i.e., whether he was contributorily negligent.[96] In the context of assumed risk, if the plaintiff becomes aware of the obvious danger, its obviousness should be a factor in determining whether he had an adequate understanding and appreciation of the danger and whether he was presented with viable alternatives, such that his conduct could be considered voluntary in encountering the risk. As a part of either contributory negligence or assumption of the risk, the openness or obviousness of the danger or risk should be only a factor, and not a conclusion as a matter of law, in determining whether the plaintiff's conduct should bar his recovery. If the Indiana Supreme Court were to adopt such an approach, Indiana would join other jurisdictions[97] in applying logic and fairness to strict liability and would return to the basic rationale for the adoption of strict liability in tort—the promotion of safety and compensation of deserving victims of defective products.[98]

D. Res Ipsa Loquitur

Three recent cases, *SCM Corp. v. Letterer*,[99] *Bituminous Fire & Marine Insurance Co. v. Culligan Fyrprotexion, Inc.*,[100] and *Hammond v. Scot Lad Foods, Inc.*,[101] discussed the concept of res ipsa loquitur in Indiana. These concepts are discussed at length in the Torts section of

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[95]*See supra* text accompanying notes 5-6.

[96]*See supra* note 7.

[97]*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, 366 So. 2d 1167 (Fla. 1979); *see also* Phillips, *supra* note 27.

[98]*See supra* note 2 and accompanying text.

[99]448 N.E.2d 686 (Ind. Ct. App. 1983).

[100]437 N.E.2d 1360 (Ind. Ct. App. 1982).

[101]436 N.E.2d 362 (Ind. Ct. App. 1982).

this Survey;[102] however, it is worth repeating that the requirement that the defendant must be in control of the injuring agency or instrumentality *at the time of the accident* (as opposed to the time of the defendant's alleged negligence) applies only to the negligence theory.[103] The inferences raised by the doctrine of res ipsa loquitur are also raised in strict liability actions, although, strictly speaking, the doctrine itself does not apply to such actions.[104] Thus, if the plaintiff in a products liability action desires the inferences raised by res ipsa, he can and should rely upon strict liability in tort and not upon res ipsa in negligence.

E. Demonstrative Evidence

In *SCM Corp. v. Letterer*,[105] the plaintiff's expert was unable to test or examine an allegedly defective toaster which reputedly caused a fire in plaintiff's home. The expert did, however, examine and test a similar toaster manufactured by the defendants. The similar toaster had some cosmetic differences from the toaster involved in the fire, but, according to the plaintiff's expert, the similar toaster "operated the same" as the toaster which was destroyed in the fire.[106] The trial court allowed the plaintiff to use the similar toaster as demonstrative evidence and as a basis for the expert's opinion that the destroyed toaster was defective. The *Let-*

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[102]*See* Vargo, *Torts, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 341, 372 (1984).

[103]*See* SCM Corp. v. Letterer, 448 N.E.2d 686, 689 (Ind. Ct. App. 1983).

[104]This was best explained in *Letterer*, where Judge Miller, writing for the Fourth District of the Indiana Court of Appeals, stated:

> To conclude [that *res ipsa* applies even though the manufacturer did not have exclusive control of the injuring instrumentality at the time of the accident] would push the *res ipsa loquitur* doctrine further and further into the battlefield of strict liability. In fact, it has been argued that in products liability litigation *res ipsa* is a species of strict liability. 1 Frumer & Friedman, Products Liability § 12.03[8]. We are in agreement with the following language of California's Justice Traynor:
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> > "An injured person, . . . is not ordinarily in a position to refute [proper care on the part of a manufacturer] or identify the cause of the defect, for he can hardly be familiar with the manufacturing process as the manufacturer himself is. In leaving it to the jury to decide whether the inference has been dispelled, regardless of the evidence against it, the negligence rule approaches the rule of strict liability. *It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence.*"
>
> *Escola v. Coca-Cola Bottling Co. of Fresno*, (1944) 24 Cal. 2d 453, 463, 150 P.2d 436, 441 (concurring opinion) (Emphasis added). Our decision, therefore, does not deny the [plaintiffs] a recovery. Instead, it channels their proof into a more compatible action, strict liability.

448 N.E.2d at 690. *See also* Cornette v. Searjeant Metal Prods., Inc., 147 Ind. App. 46, 64-67, 258 N.E.2d 652, 663-65 (1970) (Sharp, J., concurring).

[105]448 N.E.2d 686 (Ind. Ct. App. 1983).

[106]*Id.* at 688.

terer court approved of the use of the similar toaster as demonstrative evidence,[107] and of its use as a basis for the expert's opinion, from which the jury could find circumstantial evidence of the defectiveness of the original toaster.[108] In addition, the court noted that substantially similar products are admissible as demonstrative evidence when the original has become lost or unavailable.[109]

F. Constitutionality of Indiana's Products Liability Statute of Limitations

In *Scalf v. Berkel, Inc.*,[110] the plaintiff was injured by a product which was delivered over ten years prior to the plaintiff's injury. The plaintiff asserted federal due process and equal protection attacks on the ten-year limitation period in the Products Liability Statute.[111] The *Scalf* court, referring to *Dague v. Piper Aircraft Corp.*,[112] found compliance with the due process[113] and equal protection[114] mandates of the fourteenth amendment. During the *Scalf* court's discussion of the legislature's goals in enacting the statute, the court stated:

> The General Assembly was confronted by evidence of skyrocketing product liability insurance costs fueled by huge increases in the number of product liability claims, large increases in the amounts of settlements and awards, and indications that the victim of an allegedly defective product was favored over the maker of that product in the tort process.[115]

The vast majority of the above information, a great deal of which has since proven false,[116] was presented to the General Assembly by or on behalf of manufacturers and their insurance carriers. Thus, the Products Liability Statute and the evidence presented to the legislature to support it are, at least in part, without foundation. Nevertheless, as the *Scalf* court indicated in a footnote to its opinion, the courts will not second guess the wisdom of the legislative actions.[117]

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[107] *Id.* at 692.

[108] *Id.* at 691 (citing Senco Prods., Inc. v. Riley, 434 N.E.2d 561, 568 n.11 (Ind. Ct. App. 1982); Remington Arms Co. v. Wilkins, 387 F.2d 48 (5th Cir. 1967); Trowbridge v. Abrasive Co., 190 F.2d 825 (3d Cir. 1951); Norton Co. v. Harrelson, 278 Ala. 85, 176 So. 2d 18 (1965)).

[109] 448 N.E.2d at 692 (citing McCormick, Evidence § 213, at 529 (2d ed. 1972)).

[110] 448 N.E.2d 1201 (Ind. Ct. App. 1983).

[111] *See* Ind. Code § 33-1-1.5-5 (1982).

[112] 418 N.E.2d 207 (Ind. 1981), *cited in Scalf*, 448 N.E.2d at 1202-03.

[113] 448 N.E.2d at 1202.

[114] *Id.* at 1205.

[115] *Id.* at 1204.

[116] *See* Vargo, *Products Liability, 1981 Survey of Recent Developments in Indiana Law*, 15 Ind. L. Rev. 289, 289-90 n.2 (1982).

[117] 448 N.E.2d at 1204 n.4.

G. The 1983 Amendments to the Products Liability Statute

On April 21, 1983, the Indiana General Assembly amended the 1978 Indiana Products Liability Statute.[118] Undoubtedly, many sections of the 1983 amendments will be litigated and the issue of legislative intent will become primary in any interpretation of the amendments. Unfortunately, no legislative notes, committee comments, or histories exist. The amendments were proposed and primarily written by Senator William Vobach, who requested assistance from Pete Obremskey, John Townsend, Jr., and David Campbell, attorneys representing both plaintiffs' (Obremskey and Townsend) and defendants' (Vobach and Campbell) views. Personal interviews were conducted with these individuals[119] to obtain their comments upon the meaning and intent of the language that they used in the amendments.

The following is an examination of the 1983 amendments with the statute as amended,[120] the comments of this author, and the drafters' legislative intent clearly segregated.

> SECTION 1. IC 33-1-1.5-1, as added by Acts 1978, P.L. 141, SECTION 28, is amended to read as follows: Sec. 1. **Except as provided in section 5 of this chapter,** this chapter ~~shall govern~~ **governs** all ~~products liability~~ actions ~~including those~~ in which the theory of liability is ~~negligence, or~~ strict liability in tort. ~~provided However, that this chapter does not apply to actions arising from or based upon any alleged breach of warranty.~~[121]

Comments.—The 1978 Products Liability Act stated that it applied to both negligence and strict liability;[122] however, the Act itself used the

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[118]*See* Act of Apr. 21, 1983, Pub. L. No. 297-1983, 1983 Ind. Acts 1814 (codified at IND. CODE §§ 33-1-1.5-1 to -5 (Supp. 1983) (effective Sept. 1, 1983)).

[119]Interview with William Vobach, Indiana State Senator, at the law offices of Locke, Reynolds, Boyd & Weisell, Indianapolis, Indiana (Oct. 21, 1983) (hereinafter cited as Vobach Interview); Interview with John Townsend, Jr., President of Indiana Trial Lawyers Association, at the law offices of Townsend, Hovde, Townsend & Montross, Indianapolis, Indiana (Oct. 18, 1983) (hereinafter cited as Townsend Interview); Interview with David Campbell, at the law offices of Bingham, Summers, Welsh & Spilman, Indianapolis, Indiana (Oct. 24, 1983) (hereinafter cited as Campbell Interview); Telephone interview with Peter Obremskey, Member of Board of Directors of Indiana Trial Lawyers Association (Oct. 21, 1983) (hereinafter cited as Obremskey Interview). The interviews were conducted by an articles editor of the Indiana Law Review. Manuscript notes from the interviews are on file at the office of the Indiana Law Review.

[120]Additions to the text of IND. CODE §§ 33-1-1.5-1 to -5 (1982) are indicated by bold type; deletions are indicated by strikeouts.

[121]Act of Apr. 21, 1983, Pub. L. No. 297-1983, § 1, 1983 Ind. Acts 1814, 1814 (codified at IND. CODE § 33-1-1.5-1 (Supp. 1983)).

[122]*See* IND. CODE § 33-1-1.5-1 (1982).

language of strict liability from section 402A.[123] In addition, some question existed as to whether the Act encompassed all possible products liability actions and theories.

The 1983 amendment makes specific reference to strict liability in tort and no other theory (except in section 6, where negligence is included in the ten-year limitation period).[124] The 1983 amendment applies only to strict liability and relegates all other theories to Indiana common law.

Legislative Intent.—John Townsend, Jr., stated that all four participants agreed that the intent of section 1 was to limit the statute to actions brought under the theory of strict liability in tort, except for the statute of limitations section, which also covers negligence actions.[125]

> SECTION 2. IC 33-1-1.5-2, as added by Acts 1978, P.L. 141, SECTION 28, is amended to read as follows: Sec. 2. As used in this chapter:
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> "User or consumer" ~~shall include:~~ **means** a purchaser, any individual who uses or consumes the product, or any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question, **or any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.**
>
> ~~"Product liability action" shall include all actions brought for or on account of personal injury, disability, disease, death, or property damage caused by, or resulting from, the manufacture, construction, or design of any product.~~
>
> "Physical harm" ~~includes~~ **means** bodily injury, death, loss of services, and rights arising ~~therefrom,~~ **from any such injuries,** as well as **sudden, major** damage to property. **The term does not include gradually evolving damage to property or economic losses from such damage.**
>
> "Seller" ~~includes~~ **means a person engaged in business as** a manufacturer, a wholesaler, a retail dealer, **a lessor,** or a distributor.
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> **"Product" means any item or good that is personalty at the time it is conveyed by the seller to another party. It does not apply to a transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product.**

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[123]*Compare* RESTATEMENT (SECOND) OF TORTS § 402A (1965) *with* IND. CODE §§ 33-1-1.5-1 to -4 (1982).

[124]*See* Act of Apr. 21, 1983, Pub. L. No. 297-1983, § 6, 1983 Ind. Acts 1814, 1817 (codified at IND. CODE § 33-1-1.5-5 (Supp. 1983)).

[125]Townsend Interview, *supra* note 119.

> **"Unreasonably dangerous" refers to any situation in which the use of a product exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer who purchases it with the ordinary knowledge about the product's characteristics common to the community of consumers.**[126]

Comments—"Means."—The 1983 amendments changed several definition sections by replacing the words "shall include" or "include" with the word "means." This change could indicate that the definition is restricted to its exact words, a considerable change from the 1978 Act. For instance, the term "user or consumer" would be restricted to persons who actually use or consume the product or to persons in actual possession of the product acting on behalf of the user. Such a restrictive meaning would be in direct conflict with Indiana case law.

Legislative Intent—"Means."—All four authors agreed that the change from "shall include" or "include" to "means" was *not* intended to restrict any of the definitions to the exact words that appear in the statute.[127] In fact, Senator Vobach stated that the words "shall include" and "means" should be considered synonymous.[128] The definitions of "user" and "consumer" should remain consistent with present Indiana case law on section 402A, and the drafters intended absolutely no change from the common law.[129]

Comments—"Bystander."—The 1983 language requiring the injured bystander to be in the vicinity of the product during its expected use could be construed to be more restrictive than the Indiana common law interpretation, which allows any reasonably foreseeable bystander to recover.[130] If "vicinity" and "expected use" are interpreted as concepts of reasonable foreseeability, then they cause no change in Indiana law; however, if those terms are interpreted as more restrictive than reasonable foreseeability, serious problems may arise. Why should the most innocent party imaginable be penalized? A bystander is a favorite of the law since he does nothing to affect the product. This amendment could unjustly deprive a person of recovery when he is walking on the sidewalk and is injured by an object thrown from a defective lawnmower merely because he may not meet the vicinity requirement of section 2. What if that same bystander meets the vicinity requirement, but the user was operating the mower in an unexpected manner? If the mower is defective and the defect causes

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[126]Act of Apr. 21, 1983, Pub. L. No. 297-1983, § 2, 1983 Ind. Acts 1814, 1814-15 (codified at IND. CODE § 33-1-1.5-2 (Supp. 1983)).

[127]Vobach Interview, *supra* note 119; Townsend Interview, *supra* note 119; Campbell Interview, *supra* note 119; Obremskey Interview, *supra* note 119.

[128]Vobach Interview, *supra* note 119.

[129]*Id.*

[130]*See* Chrysler Corp. v. Alumbaugh, 168 Ind. App. 363, 342 N.E.2d 908 (1976).

the bystander's injury, it should make no difference that the mower is being used in an unexpected manner. Misuse may be an issue between the actual operator and the seller, but it should not be an issue between the bystander and seller. Of course, if the misuse is the sole cause of either the defect in the mower or the bystander's injury, the seller may not be liable.

Legislative Intent—"Bystander."—Senator Vobach stated that the amendment was intended to *broaden* the coverage of bystanders, consistent with section 402A.[131] John Townsend, Jr., agreed that the general intent of section 2 was to put section 402A and existing case law into the Act.[132] Senator Vobach also stated that no specific intent existed regarding the term "vicinity."[133]

Comments—"Physical Harm."—The new definition's requirement that property damage be sudden and major and that no economic loss may be recovered from gradually evolving damage could cause some unexpected problems if taken literally. What may be "sudden" and "major" to one person may not be to another. For example, "major" damage may mean a $50 bent fender to a poor man but not to a rich man. This section may be directed to specific cases such as the "spalling brick" cases.[134] If so, it would be specific legislation to limit the liability of specific parties in specific cases. As such, the courts should closely scrutinize this section.

Legislative Intent—"Physical Harm."—Senator Vobach stated that the "sudden, major damage" language in the definition of "physical harm" was intended to exclude liability for "quasi wear and tear" and non-catastrophic loss.[135]

Comments—"Seller."—The change from "includes" to "means" could restrict the definition of "seller." Under Indiana common law, the term "seller" has an extremely broad definition that includes parties who encounter the product in the "stream of commerce."[136] For example, the 1983 amendment does not include a bailor in its definition of "seller," even though bailors have heretofore been included as sellers in Indiana law.[137]

Legislative Intent—"Seller."—John Townsend, Jr., stated that the drafters had no intent to change the Indiana case law definition of

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[131]Vobach Interview, *supra* note 119.

[132]Townsend Interview, *supra* note 119.

[133]Vobach Interview, *supra* note 119.

[134]*See* United States Fidelity & Guar. Co. v. American Ins. Co., 169 Ind. App. 1, 345 N.E.2d 267 (1976).

[135]Vobach Interview, *supra* note 119.

[136]*See* Gilbert v. Stone City Constr. Co., 171 Ind. App. 418, 422, 357 N.E.2d 738, 742 (1976)("[L]iability under §402A will attach to one who places such a product in the stream of commerce by sale, lease, bailment or other means.").

[137]*See id.* at 422, 357 N.E.2d at 742.

"seller,"[138] In addition, he stated that there was no intent to preclude the creation of new categories of defendants as sellers in the future.[139] Senator Vobach noted that the amendment broadened the Act to include lessors and stated that no intent existed with regard to types of sellers, such as bailors, not mentioned in the definition.[140]

Comments—"Product."—The new amendment restricts products to personalty and excludes any extension to realty, which does not appear to change Indiana common law. However, the Act does provide a clue to the unanswered sales-service dichotomy.

Legislative Intent—"Product."—The drafters intended to *exclude* realty as a product within the meaning of the Act.[141] In addition, whenever the service aspect of the introduction of a product into the stream of commerce is predominant, then strict liability theory does *not* apply.[142] The amendment was not intended to answer the question of whether a specific transaction was one of service or one of sale. For example, whether a doctor's injection of a defective drug into a patient is predominantly a sale or a service remains unanswered by the amendment.[143] Mr. Townsend indicated, however, that no change in Indiana law distinguishing a product from a service was intended by the amendment.[144]

Comments—"Unreasonably Dangerous."—The 1983 amendment seems to adopt the language of comment i of section 402A[145] and, as such, is open to interpretation.

Legislative Intent—"Unreasonably Dangerous."—Senator Vobach stated that the defintion of "unreasonably dangerous" came from section 402A and specifically noted that it is keyed to the ordinary consumer having ordinary knowledge.[146]

> SECTION 3. IC 33-1-1.5-2.5 is added to the Indiana Code as a **NEW** section to read as follows: Sec. 2.5. (a) A product is in a defective condition under this chapter if, at the time it is conveyed by the seller to another party, it is in a condition:
>
> (1) not contemplated by reasonable persons among those considered expected users or consumers of the product; and
>
> (2) that will be unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling or consumption.

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[138]Townsend Interview, *supra* note 119.

[139]*Id.*

[140]Vobach Interview, *supra* note 119.

[141]*Id.*

[142]*Id.*

[143]*Id.*

[144]Townsend Interview, *supra* note 119.

[145]*See* RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965).

[146]Vobach Interview, *supra* note 119.

(b) A product is defective under this chapter if the seller fails to:

(1) properly package or label the product to give reasonable warnings of danger about the product; or

(2) give reasonably complete instructions on proper use of the product;

when the seller, by exercising reasonable diligence, could have made such warnings or instructions available to the user or consumer.

(c) A product is not defective under this chapter if it is safe for reasonably expectable handling and consumption. If an injury results from handling, preparation for use, or consumption that is not reasonably expectable, the seller is not liable under this chapter.

(d) A product is not defective under this chapter if the product is incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly.[147]

Comments.—This new section contains extremely subtle language that appears at each step to limit the liability of the seller. The language in subsection (a)(1) requires "reasonable persons" and "expected users." Does this language revive the old *Palsgraf*[148] reasoning that restricts the class of plaintiffs? If so, section 402A has regressed not only to negligence principles, but to fifty-year-old negligence principles. The same restrictions appear in subsection (a)(2).

In subsections (b) and (c), the "strict" has been taken out of strict liability and has been replaced by nothing more than negligence (reasonableness under like or similar circumstances).

Subsection (d) appears to adopt comment k to section 402A[149] without the risk-utility language of that comment. Comment k excepts unavoidably unsafe products to allow manufacturers to market the few products that have high social value but are incapable of being made safe. Thus, comment k requires a serious risk-utility examination before non-liability attaches to the product.

As between the manufacturer of a product that has such a high social value and a completely innocent plaintiff, the product manufacturer should pay for all injuries caused by the product. Even assuming that a product incapable of being made safe is socially desirable under a risk-utility analysis, warnings and instructions *must* accompany the product before it is non-defective. The language of subsection (d), if literally interpreted

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[147]Act of Apr. 21, 1983, Pub. L. No. 297-1983, § 3, 1983 Ind. Acts 1814, 1815-16 (codified at IND. CODE § 33-1-1.5-2.5 (Supp. 1983)).

[148]*See* Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

[149]*See* RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965).

to be without a risk-utility analysis and a requirement of instructions and warnings, could expose the public of Indiana to some of the most dangerous products imaginable.

Legislative Intent.—The drafters intended to add new language requiring warnings and instructions. Although they made no mention of manufacturing and design defects, the drafters did not intentionally eliminate such defects from the Act.[150] The drafters *did* intend for manufacturing and design defects to be included in the Act. Senator Vobach said that a cause of action based upon design and manufacturing defects was implicit in the language in other portions of the Act. As an example, Senator Vobach noted that the state of the art defense would not be necessary unless an action could be based upon defective manufacture or design.[151]

Subsection (d) was apparently intended to adopt something like comment k of section 402A,[152] although John Townsend, Jr., stated that this subsection was not discussed in terms of comment k.[153] Mr. Townsend and Dave Campbell said that the drafters did not intend the subsection to relieve a manufacturer of liability if safer alternatives were available or if the product could be made safer.[154] None of the drafters discussed the balancing test of comment k, indicating no legislative intent either way in that regard.

> SECTION 4. IC 33-1-1.5-3, as added by Acts 1978, P.L. 141, SECTION 28, is amended to read as follows: Sec. 3. ~~Codification and Restatement of Strict Liability in Tort. The common law of this state with respect to strict liability in tort is codified and restated as follows~~: (a) One who sells, **leases, or otherwise puts into the stream of commerce** any product in a defective condition unreasonably dangerous to any user or consumer or to his property is subject to liability for physical harm ~~thereby~~ caused **by that product** to the user or consumer or to his property if that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition, and if:
>
> (1) the seller is engaged in the business of selling such a product; and

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[150]Obremskey Interview, *supra* note 119.

[151]Vobach Interview, *supra* note 119.

[152]Senator Vobach said that subsection (d) was comment k "with a change." Vobach Interview, *supra* note 119. David Campbell said this subsection is much like comment k. Campbell Interview, *supra* note 119.

[153]Townsend Interview, *supra* note 119. Mr. Townsend stated that the drafters discussed subsection (d) in terms of inherently dangerous products such as dynamite and intended to bring the Act into conformity with existing case law. *Id.*

[154]*Id.*; Campbell Interview, *supra* note 119.

(2) the product is expected to and does reach the user or consumer without substantial ~~change~~ **alteration** in the condition in which it is sold **by the person sought to be held liable under this chapter.**

(b) The rule stated in subsection (a) applies although:

(1) the seller has exercised all ~~possible~~ **reasonable** care in the preparation, **packaging, labeling, instructing for use,** and sale of his product; and

(2) the user or consumer has not bought the product from or entered into any contractual relation with the seller.[155]

Comments.—Section 4 of the 1983 amendments contains several differences from the language of section 402A which seem to inject the negligence concepts of reasonableness and foreseeability into strict liability. For example, the term "reasonable" has replaced the word "possible" in subsection (b)(1). Nevertheless, a seller is not likely to avoid liability by asserting that he exercised more than all reasonable care. Thus, the language changes in section 4 may not have any substantial effect on the court's interpretation of the Act.

Legislative Intent.—Pete Obremskey indicated that the drafters did not intend "all reasonable care" to change the standard as it existed under the former "all possible care" language.[156]

SECTION 5. IC 33-1-1.5-4, as added by Acts 1978, P.L. 141, SECTION 28, is amended to read as follows: Sec. 4. ~~Defenses to Strict Liability in Tort.~~ (a) The defenses in this ~~chapter~~ **section** are defenses to actions in strict liability in tort. The burden of proof of any defense raised in a product liability action is on the party raising the defense.

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

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

(2) It is a defense that a cause of the physical harm is a ~~nonforeseeable~~ misuse of the product by the claimant or any other person **not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party.** Where the physical harm to the claimant is caused jointly by a defect in the product which

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[155]Act of Apr. 21, 1983, Pub. L. No. 297-1983, § 4, 1983 Ind. Acts 1814, 1816 (codified at IND. CODE § 33-1-1.5-3 (Supp. 1983)).

[156]Obremskey Interview, *supra* note 119.

made it unreasonably dangerous when it left the seller's hands and **by** the misuse of the product by ~~one~~ **a person** other than the claimant, then the ~~concurrent acts~~ **conduct of that other person does** ~~of the third party do~~ not bar recovery by the claimant for the physical harm, but shall bar any ~~rights~~ **right** of ~~the third party~~, **that other person,** either as a claimant or as a ~~subrogee~~ **lienholder, to recover from the seller on a theory of strict liability.**

(3) It is a defense that a cause of the physical harm is a ~~nonforeseeable~~ modification or alteration of the product made by any person after its delivery to the initial user or consumer if such modification or alteration is the proximate cause of physical harm **where such modification or alteration is not reasonably expectable to the seller.**

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

(4) When physical harm is caused by a defective product, it is a defense that the design, manufacture, inspection, packaging, warning, or labeling of the product was in conformity with the generally recognized state of the art at the time the product was designed, manufactured, packaged, and labeled.[157]

Comments.—The defenses to strict liability seem to remain the same as before the amendments, the only changes simply clarifying the 1978 Act's meanings. Accordingly, the word "subrogee" in subsection (b)(2) has been changed to "lienholder," which makes it clear that workers' compensation liens are barred if the employer misuses the product.

Subsection (b)(4) is a vast improvement over the 1978 Act in the "state of the art" defense. The 1978 Act seemed to allow a complete defense for compliance with custom or usage. The amendment makes it clear that state of the art has no such meaning. State of the art should mean compliance with what is economically and technologically feasible.

Legislative Intent.—The drafters agree that they did not intend in subsection (b)(2)—the misuse defense—to change the reasonable foreseeability test as used at common law. The change in language from "reasonably foreseeable" to "reasonably expected" was not intended to

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[157]Act of Apr. 21, 1983, Pub. L. No. 297-1983, § 5, 1983 Ind. Acts 1814, 1816-17 (codified at IND. CODE § 33-1-1.5-4 (Supp. 1983)).

institute a subjective test based on the manufacturer's intent.[158] The objective reasonable foreseeability test is interchangeable with the new language of "reasonably expected."[159]

The drafters intended the change of language from "subrogee" to "lienholder" to bring the Products Liability Act into conformity with language in the Workmen's Compensation Act.[160]

The drafters intended the change in language in the state of the art defense to require the manufacturer to conform to the state of the art *at the time* he releases his product into the stream of commerce.[161] Senator Vobach also stated that subsection (b)(4) was intended to make comment j of section 402A part of the law in Indiana.[162]

> SECTION 6. IC 33-1-1.5-5, as added by Acts 1978, P.L. 141, SECTION 28, is amended to read as follows: Sec. 5. ~~Statute of Limitations.~~ This section applies to all persons regardless of minority or legal disability. Notwithstanding IC 34-1-2-5, any product liability action **in which the theory of liability is negligence or strict liability in tort** must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer; except that, if the cause of action accrues more than eight (8) years but not more than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.[163]

Comments.—Both negligence and strict liability are clearly within the ten-year statute of limitations under the 1983 amendment. When rewriting the Act, the framers did *not* change the word "or" to "and" between the two-year and ten-year limitation periods, a curious omission since the Indiana Supreme Court interpreted the "or" to be an "and" in *Dague v. Piper Aircraft Corp.*[164]

Legislative Intent.—Mr. Townsend stated that the drafters intended the ten-year limitation to apply to both negligence and strict liability cases.[165] The absence of a change in the language of "or" to "and" was

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[158]Vobach Interview, *supra* note 119; Townsend Interview, *supra* note 119; Campbell Interview, *supra* note 119; Obremskey Interview, *supra* note 119.

[159]Vobach Interview, *supra* note 119.

[160]*Id.*; Townsend Interview, *supra* note 119; Campbell Interview, *supra* note 119; Obremskey Interview, *supra* note 119; *see* IND. CODE § 22-3-2-13 (1982).

[161]Vobach Interview, *supra* note 119; Obremsky Interview, *supra* note 119.

[162]Vobach Interview, *supra* note 119; *see* RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965).

[163]Act of Apr. 21, 1983, Pub. L. No. 297-1983 § 6, 1983 Ind. Acts 1814, 1817-18 (codified at IND. CODE § 33-1-1.5-5 (Supp. 1983)).

[164]418 N.E.2d 207 (Ind. 1981).

[165]Townsend Interview, *supra* note 119.

merely a recognition of the *Dague* case with no intent to overrule that case.[166]

General Intent Expressed by the Drafters.—The replacement of foreseeability language with "reasonable expectability" throughout the amendment was *not* intended to change the standard of reasonable foreseeability, but was merely a common sense change to promote better understanding by juries.[167] In other words, the drafters intended to retain reasonable foreseeability standards in the words "reasonably expectable."[168]

The drafters' general intent was to revise the statute to conform to the general concepts of section 402A, as it has been interpreted by Indiana case law.[169] The drafters did not intend or contemplate any major change from Indiana case law.

H. Conclusion

Indiana products liability law is still in its formative stages. The Indiana Supreme Court is now at a turning point with its recent decision in *Hoffman*. Indiana could relegate its open and obvious danger rule to one of the factors of contributory negligence or assumption of risk with very little change in its case law. Such a change would bring Indiana law into line with other jurisdictions and would promote safety for Indiana citizens.

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[166]Vobach Interview, *supra* note 119; Campbell Interview, *supra* note 119.

[167]Vobach Interview, *supra* note 119.

[168]*Id.*

[169]*Id.*; Townsend Interview, *supra* note 119; Campbell Interview, *supra* note 119; Obremskey Interview, *supra* note 119.