Comparative Fault and Product Liability in Indiana

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I. Introduction

Dean Prosser called the development of modern product liability law "the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts."[1] Section 402A of the Restatement of Torts[2] was promulgated less than twenty years ago. In two decades it has received almost universal approval either judicially or legislatively. When this development is coupled with the warranty provisions of the Uniform Commercial Code,[3] it is easy to agree with one commentator that the law has come full circle to the old civil law maxim of *caveat venditor* (let the seller beware) from the common law maxim of *caveat emptor* (let the buyer beware).[4]

> Apparently, the relatively sudden shift in the theory of manufacturer's liability was designed by its authors to provide long-sought protection against dangerous and defective products for an increasingly vulnerable consumer—a consumer caught in a sometimes vicious commercial vortex born of a massive modern technocracy and generated by a super-mechanized, computer-controlled, assembly-automated, planned-obsoletized, profit-motivated, mass-marketed, over-advertised, ultra-depersonalized economy.[5]

Contemporaneously with the uprooting of long-established precedent in the field of product liability has come a surge to adopt comparative fault. Prior to 1969, only four states had accepted this doctrine. They were Mississippi (1910), Georgia (1913), Wisconsin (1931) and Arkansas (1955).[6] Indiana has now become the fortieth state to adopt comparative fault.[7] This change in basic tort law has been made both legislatively and judicially. Without any additional complications, the massive discard of long-established precedent in product liability law would present problems

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[1]Prosser, *The Fall of the Citadel*, 50 Minn. L. Rev. 791, 793-94 (1966) (footnote omitted).

[2]Restatement (Second) of Torts § 402A (1965).

[3]*See* U.C.C. §§ 2-312 to -315 (1978).

[4]Leavell, *The Return of Caveat Venditor as the Law of Products Liability*, 23 Ark. L. Rev. 355, 356 (1969) (footnote omitted).

[5]*Id.* at 356.

[6]*See* H. Woods, Comparative Fault § 1.11 (1978); Nebraska (1913) and South Dakota (1941) had enacted very limited forms of comparative negligence.

[7]*See* Act of Apr. 21, 1983, Pub. L. No. 317-1983, 1983 Ind. Acts 1930 (codified at Ind. Code §§ 34-4-33-1 to -8 (Supp. 1983)), *amended by* Act of Mar. 5, 1984, Pub. L. No. 174-1984, 1984 Ind. Acts 1468 (codified at Ind. Code §§ 34-4-33-1 to -13 (Supp. 1984)).

to the judicial establishment. When the revolution in product liability is added to the uncertainty created by comparative fault, the resolution of many cases becomes—in the words of the King of Siam—a puzzlement.

Five theories of liability are employed in product liability cases: (1) negligence; (2) strict liability in tort; (3) implied warranty; (4) express warranty; and (5) deceit. It is appropriate at this point to review each theory briefly.

II. Product Negligence Cases

For almost a century, product cases based on negligence were restrained by the privity defense, as enunciated in *Winterbottom v. Wright*,[8] which required contractual privity between plaintiff and supplier. Even a legal neophyte knows that Judge Cardozo struck down the privity defense in negligence cases in *MacPherson v. Buick Motor Co.*[9] While the process required fifty years, every American jurisdiction has now accepted the *MacPherson* rule, and privity is no longer a problem in product cases based on negligence. The theory alleged is generally negligence in design, selection of materials, assembly, inspection, testing, packaging or warning. Because of practical problems of proof, the favorites with plaintiffs are design negligence and failure to warn.

As in other negligent torts, foreseeability of probable injury is an important element in product cases based on negligence. To constitute negligence, an act must be one from which a reasonably careful person would foresee such an appreciable risk of harm to others as to cause him not to do the act or do to it in a more careful manner.[10]

When the plaintiff brings a product case in negligence, the effect of the Indiana comparative negligence statute is clear. Because the defenses set out in Section 4 of the Indiana Product Liability Act of 1978[11] are applicable only to strict liability in tort,[12] the defenses available in a product case in Indiana based on negligence are those available in any other negligent tort case. Those defenses most frequently claimed are contributory negligence and assumption of risk. However, both of these defenses are included within the definition of "fault" in the new Indiana Comparative

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[8]10 M & W 109, 152 Eng. Rep. 402 (1842).

[9]217 N.Y. 382, 111 N.E. 1050 (1916).

[10]Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E.99 (1928). "The concept of actionable negligence is relational because an act is never negligent except in reference to, or toward, some person or legally protected interest." Hill v. Wilson, 216 Ark. 179, 183, 224 S.W.2d 797, 800 (1949) (footnote omitted).

[11]Act of Mar. 10, 1978, Pub. L. No. 141, Sec. 28, § 4, 1978 Ind. Acts 1308, 1309 (codified at Ind. Code § 33-1-1.5-4 (1982)), *amended by* Act of Apr. 21, 1983, Pub. L. No. 297-1983, Sec. 5, § 4, 1983 Ind. Acts 1814, 1816 - 17 (codified at Ind. Code § 33-1-1.5-4 (Supp. 1984)).

[12]*See id.* § 33-1-1.5-1.

Fault Act[13] and will defeat recovery only if the plaintiff's fault "is greater than the fault of all persons whose fault proximately contributed to the claimant's damages."[14]

III. Strict Liability in Indiana

In 1978 Indiana adopted a statute governing all product liability actions based on negligence or strict liability in tort, but not those based on breach of warranty.[15] Section 1 of the statute was amended in 1983 to make it applicable only to strict liability in tort except with respect to limitations.[16] Section 3 follows closely the language of Section 402A of the Restatement of Torts.[17] Arkansas[18] and Maine[19] are the only other states to adopt this doctrine legislatively instead of judicially; however, the courts in those states had declined judicial adoption. This was not the case in Indiana, where strict liability had been judicially adopted by the court of appeals in 1970[20] and by the Indiana Supreme Court in 1973.[21]

In Indiana, as in most jurisdictions, failure to supply adequate warnings is considered a product defect under section 402A.[22] "In order for the plaintiff to recover, the defect can be that the product was defectively designed, defectively manufactured, or that the manufacturer failed to supply adequate warnings or instructions as to the dangers associated with its use."[23] This was not made clear in the original Product Liability Act of 1978,[24] but the 1983 amendment added a new section 2.5 which contained the following provision:

> A product is defective under this chapter if the seller fails to:
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> (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;

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[13]*See* Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 1, 1984 Ind. Acts 1468, 1468 (codified at Ind. Code § 34-4-33-2(a) (Supp. 1984)).

[14]Ind. Code § 34-4-33-4(a) (Supp. 1984).

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

[16]*See* Act of Apr. 21, 1983, Pub. L. No. 297-1983, Sec. 1, § 1, 1983 Ind. Acts 1814, 1814 (codified at Ind. Code § 33-1-1.5-1 (Supp. 1984)).

[17]*Compare* Ind. Code § 33-1-1.5-3 (Supp. 1984) *with* Restatement (Second) of Torts § 402A (1965).

[18]Ark. Stat. Ann. § 85-2-318.2 (Supp. 1983).

[19]Me. Rev. Stat. Ann. tit. 14, § 221 (1979).

[20]Cornette v. Searjeant Metal Products, 147 Ind. App. 46, 258 N.E.2d 652 (1970).

[21]Ayr-Way Stores, v. Citwood, 261 Ind. 86, 300 N.E.2d 335 (1973).

[22]*See, e.g.*, Reliance Ins. Co. v. AL E. & C., Ltd., 539 F.2d 1101 (7th Cir. 1976) (federal diversity case from Indiana).

[23]Hoffman v. E. W. Bliss Co., 448 N.E.2d 277, 281 (Ind. 1983) (citations omitted); *see also* Reliance Ins. Co. v. AL E. & C., Ltd., 539 F.2d 1101 (7th Cir. 1976).

[24]*See* Ind. Code §§ 33-1-1.5-2, -3 (1982).

> when the seller, by exercising reasonable diligence, could have made such warnings or instructions available to the user or consumer.[25]

Because of the limited definition of "user or consumer" in section 2 of the original Act,[26] there was a question as to whether third parties[27] and bystanders[28] had the same protection under the statute as formerly afforded by Indiana case law.[29] This omission was corrected in the 1983 amendment by the inclusion of "bystander" in the definition of "user" or "consumer" contained in section 2.[30]

The defenses to strict liability in tort are defined in section 4 of the product liability statute as (1) assumption of risk, (2) misuse not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party, (3) modification or alteration after delivery to the initial user or consumer where not reasonably expectable by the seller, and (4) conformation to the state of the art at the time of design, labeling, packaging and manufacture.[31] Since these defenses are only applicable to strict liability actions,[32] the Indiana common law defenses to negligence actions are unaffected by the product liability statute.[33]

Because the statute did not apply to a cause of action accruing before June 1, 1978, very few interpretive cases have reached the Indiana appellate courts. Probably the most important decision to date is *Dague v. Piper Aircraft Corp.*,[34] in which the Indiana Supreme Court, respond-

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[25]Act of Apr. 21, 1983, Pub. L. No. 297-1983, Sec. 3, § 2.5, 1983 Ind. Acts 1814, 1815 (codified at IND. CODE § 33-1-1.5-2.5(b) (Supp. 1984)).

[26]*See* IND. CODE § 33-1-1.5-2 (1982).

[27]*See* Reliance Ins. Co. v. AL E. & C., Ltd., 539 F.2d 1101 (7th Cir. 1976) (section 402A, by its terminology "person or his property," gives subrogee of a bailee standing to sue).

[28]*See* Gilbert v. Stone City Constr. Co., 171 Ind. App. 418, 357 N.E.2d 738 (1976) (bystander who is reasonably foreseeable to supplier of product may recover for injuries caused by defective product).

[29]Vargo & Leibman, *Products Liability, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 227, 241 (1979).

[30]*See* IND. CODE § 33-1-1.5-2 (Supp. 1984).

[31]*Id.* § 33-1-1.5-4(a) (Supp. 1984).

[32]*Id.* § 33-1-1.5-1.

[33]A statute of limitations built into the original products act provided that the action must be brought within two years after accrual or within ten years after delivery of the product and did not mention any theory of liability. *See* IND. CODE § 33-1-1.5-5 (1982).

The 1983 amendment to the products liability statute amended this section to apply to the strict liability and negligence theories of recovery. Act of Apr. 21, 1983, Pub. L. No. 297-1983, Sec. 6, § 5, 1983 Ind. Acts 1814, 1817-18 (codified at IND. CODE § 33-1-1.5-5 (Supp. 1984)). This is the only section of the act as amended that applies to the negligence theory. IND. CODE § 33-1-1.5-1 (Supp. 1984). If the cause of action accrues more than eight years but not more than ten years after initial delivery, it may be commenced within two years after accrual. *Id.* § 33-1-1.5-5.

[34]418 N.E.2d 207 (Ind. 1981).

ing to four certified questions by the United States Court of Appeals for the Seventh Circuit, upheld the constitutionality of the product liability statute under the Indiana Constitution.[35] The Seventh Circuit was principally concerned with the statute of limitations question. In *Dague*, plaintiff's decedent was killed July 7, 1978, in a plane crash. His widow sued October 1, 1979, claiming defects in the manufacture of the aircraft, which was placed in the stream of commerce in 1965. The Indiana Supreme Court held that the action was barred.[36] Judge Pivarnik's decision applied the ten-year limitation to the plaintiff's theory that Piper had negligently breached a continuing duty to warn. "The Product Liability Act expressly applies to all product liability actions sounding in tort, including those based upon the theory of negligence, and the legislature clearly intended that *no* cause of action would exist on any such product liability theory after ten years."[37]

Indiana decisons before the adoption of the Product Liability Act required that the defective article be placed in the stream of commerce. "Stream of commerce" was not included in the original Product Liability Act but appears now in section 3 by the 1983 amendment.[38] "The word 'sells' as contained in the text of § 402A is merely descriptive, and the product need not be actually sold if it has been injected into the stream of commerce by other means."[39] This expansive interpretation of "sells" was narrowed somewhat by *Petroski v. Northern Indiana Public Service Co*,[40] where the court refused to apply section 402A in a case where a child touched a high voltage line.[41] The rationale that the electricity was still in the defendant's power lines and thus not in the "stream of commerce" has been criticized.[42]

Other areas of settled strict liability law remain unaffected by the product liability statute, but will be profoundly affected when the new comparative fault law becomes effective. Contributory negligence was not a defense under the Product Liability Act in a strict tort liability claim;[43] neither was it a defense under Indiana strict liability decisions.[44] Assump-

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[35]*Id.* at 213. The products statute has also been upheld under the fourteenth amendment of the United States Constitution. Scalf v. Berkel, Inc., 448 N.E.2d 1201 (Ind. Ct. App. 1983).

[36]418 N.E.2d at 211.

[37]*Id.* at 212; *see also* Wojcik v. Almase, 451 N.E.2d 336 (Ind. Ct. App. 1983).

[38]*See* IND. CODE § 33-1-1.5-3 (Supp. 1984).

[39]Link v. Sun Oil Co., 160 Ind. App. 310, 316, 1984 312 N.E.2d 126, 130 (1974).

[40]171 Ind. App. 14, 354 N.E.2d 736 (1976).

[41]*Id.* at 30-31, 354 N.E.2d at 744.

[42]*See* Vargo, *Products Liability, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 202, 208-09 (1978).

[43]*See* IND. CODE § 33-1-1.5-4 (Supp. 1983).

[44]*See* Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, 118-19, 258 N.E.2d 681, 689 (1970).

tion of risk was a defense in product cases grounded in either negligence or strict liability,[45] and continues to be a defense under the product liability statute.[46] Contributory negligence and assumption of risk[47] under the new Comparative Fault Act will not necessarily defeat a product liability claim grounded in negligence. If the action is grounded in strict liability, the Product Liability Act of 1978 will apply.[48]

A. Defenses to Strict Liability

There are five basic defences to a claim founded on strict liability, which should be examined in light of the new statutes.

1. *Assumption of Risk.*—Prior to the adoption of strict liability in Indiana, whether the plaintiff's conduct was characterized as contributory negligence or assumption of risk in a product case made little difference. Either characterization, if proved, would defeat the claim, particularly one based on negligence. While a warranty claim might have survived proof of contributory negligence, there were other hurdles.[49] After strict liability was adopted, the distinction became vital.[50] If the plaintiff's conduct was denominated contributory negligence, the defense was unavailable in a strict liability action; however, if plaintiff assumed the risk, his strict liability claim would be completely defeated. The assumption of risk defense was carried over from Indiana strict liability cases to subsection 4(b)(1) of the Product Liability Act.[51] The language used in this subsection closely parallels comment n to 402A.[52]

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[45]*Id. See also Petroski*, 171 Ind. App. 14, 354 N.E.2d 736; Gilbert v. Stone City Constr. Co., 171 Ind. App. 418, 357 N.E.2d 738 (1976).

[46]*See* IND. CODE § 33-1-1.5-4(b)(1) (Supp. 1984).

[47]The terms "incurred risk" and "assumption of risk" are both used in the new Comparative Fault Act. Many of the cases use the terms interchangeably. In the comment to Indiana Pattern Jury Instruction 5.61 it is said that "assumption of risk" applies where contractual relations exist and the doctrine of "incurred risk" applies where the relationship is noncontractual. In product cases this distinction could result in much confusion. Product cases and section 402A of the Restatement generally use the term "assumption of risk," which is used for the most part in this article. This does not do violence to the comment to Pattern Jury Instruction 5.61 since most litigation arises as a result of the sale of a product.

[48]For a discussion of the problems that may arise when a plaintiff brings his action under both strict liability and negligence theory see *infra* notes 215-232 and accompanying text.

[49]*See infra* notes 132-154 and accompanying text.

[50]This point was clearly made by the court of appeals in Kroger Co. v. Haun, 177 Ind. App. 403, 379 N.E.2d 1004 (1978).

[51]*See* IND. CODE § 33-1-1.5-4(b)(1) (Supp. 1984): "It is a defense that the user or consumer 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."

[52]On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and

Indiana case law has given a broad sweep to this defense. In a duty to warn case, it was observed that "where the danger or potentiality of danger is known or should be known to the user, the duty does not attach."[53] The Seventh Circuit Court of Appeals, reviewing Indiana law in a diversity product liability case, concluded that Indiana follows the "open and obvious danger" rule.[54] "Under Indiana law, a product is not defectively designed where its dangerous properties are patent. . . . obvious dangers are not a basis for liability under section 402A."[55] On this issue, Indiana has followed the New York case of *Campo v. Schofield*.[56] The *Campo* rule has now been repudiated in most jurisdictions, including New York.[57]

The difficulty of distinguishing between assumption of risk, at least in its secondary sense, and contributory negligence has been remarked upon by many courts and virtually all commentators.[58] Indeed, over half of the American jurisdictions have now merged the concepts of contributory negligence and assumption of risk.[59] Adoption of comparative fault has accelerated this trend in a number of jurisdictions.[60] Distinguishing between these concepts in Indiana is particularly difficult because the Indiana courts have used contributory negligence terminology to define assumption of risk.[61] The definitional confusion in the Indiana

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> is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965).

[53]Nissen Trampoline Co. v. Terre Haute First Nat'l Bank, 332 N.E.2d 820, 825 (Ind. Ct. App. 1975) (citations omitted), *rev'd on other grounds*, 265 Ind. 457, 358 N.E.2d 974 (1976).

[54]Burton v. L.O. Smith Foundry Products Co., 529 F.2d 108 (7th Cir. 1976).

[55]*Id.* at 112.

[56]301 N.Y. 468, 95 N.E.2d 802 (1950). For a full history of the *Campo* rule in the Indiana courts, see Vargo, *Products Liability, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 265, 280, n.61 (1976).

[57]H. WOODS, COMPARATIVE FAULT § 14:32 (1978). Typical is the statement of the Colorado Court of Appeals in Pust v. Union Supply, 38 Colo. App. 435, 443, 561 P.2d 355, 362 (1978), *aff'd en banc*, 196 Colo. 192, 583 P.2d 276 (1978):

> The "open and obvious" rule of *Campo* has been the subject of frequent and fervent attack by legal commentators . . . and significantly, the rule of *Campo* has recently been expressly disavowed by the New York Court of Appeals, *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 384 N.Y.S.2d 115, 348 N.E.2d 571 (1976). We find *Micallef* and the position taken by the commentators to be persuasive and therefore reject the *Campo* "open and obvious" rule.

38 Colo. App. 435, 443, 561 P.2d 355, 362.

[58]*See* 2 HARPER & JAMES, LAW OF TORTS 1191 (1956). These distinguished scholars have taken the position that except for "express assumption of risk" the term and concept should be abolished because it is only a form of contributory negligence.

[59]H. WOODS, COMPARATIVE FAULT §§ 6:1-:11 (1978).

[60]*Id.* § 6:8.

[61]For instance, in Cornette v. Seargeant Metal Products, 147 Ind. App. 46, 258 N.E.2d 652 (1970), a strict liability case in which section 402A was first adopted by an Indiana

case law was pointed out by Judge Sullivan in *Kroger Co. v. Haun*.[62] While noting that contributory negligence and assumption of risk are "sometimes virtually indistinguishable", Judge Sullivan, nevertheless, provided an extremely thorough analysis in an attempt to draw a meaningful distinction from the Indiana cases.[63]

2. Lack of Foreseeability.—As noted, foreseeability is part of the definition of negligence.[64] Taking the position that negligence concepts have no part in strict liability, some courts have rejected the foreseeability requirement in strict liability; others have retained the requirement in even strict liability cases.[65] Indiana has chosen to follow the latter view.[66] However, even where foreseeability is made an element of strict liability, it is not the foreseeability defined in negligence cases but rather foreseeability limited as to the use of the product. The United States Court of Appeals for the Third Circuit has made this point effectively:

> The use of foreseeability in the court's instructions here does not reflect this limitation . . . [I]t subverted the intention of § 402A by permitting a vendor to avoid liability on the basis of being unable to anticipate the precise manner in which the injury occurred.
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> . . . .
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> Similarly, the use of foreseeability by the trial court with reference to the "foreseeability" of injury or harm is improper, for it is foreseeability as to the use of the product which establishes the limits of the seller's responsibility.[67]

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state court, the following definition of assumption of risk was given from an earlier negligence case:

> The doctrine of assumed or incurred risk " . . . is based upon the proposition that one incurs all the ordinary and usual risks of an act upon which he voluntarily enters, so long as those risks are known and understood by him, or could be readily discernible by a reasonable and prudent man under like or similar circumstances." *Stallings et al.* v. *Dick,* 139 Ind. App. 118, 129, 210 N.E.2d 82, 88 (1966), (Transfer denied).

147 Ind. App. at 54, 258 N.E.2d at 657.

[62]177 Ind. App. 403, 379 N.E.2d 1004 (1978).

[63]In summary, Judge Sullivan concluded that assumption of risk applies when the plaintiff comes upon a risk or danger caused by defendant's negligence, knows of and appreciates its magnitude, but nevertheless accepts it voluntarily. The plaintiff is contributorily negligent when his conduct fails to conform to that of a reasonable person under similar circumstances. "Thus, where plaintiff 's conduct has been voluntary and knowing as well as unreasonable, courts and commentators have observed that the two defenses overlap and are sometimes virtually indistinguishable." *Id.* at 416, 379 N.E.2d at 1012 (citations omitted).

[64]*See supra* note 10 and accompanying text.

[65]The rationale supporting these two views is well-explicated by United States District Judge Eschbach in Sills v. Massey-Ferguson, Inc., 296 F. Supp. 776, 781 (N.D. Ind. 1969).

[66]Shanks v. A.F.E. Indus., 416 N.E.2d 833 (Ind. 1981); Chrysler Corp. v. Alumbaugh, 342 N.E.2d 908 (Ind. Ct. App. 1976); Gilbert v. Stone City Constr. Co., 357 N.E.2d 738 (Ind. Ct. App. 1976).

[67]Eshbach v. W. T. Grant's & Co., 481 F.2d 940, 943 (3d Cir. 1973).

In *Shanks v. A.F.E. Industries, Inc.*,[68] the Supreme Court of Indiana may well have accepted the view of foreseeability which requires that the defendant must have been able to foresee the precise manner in which the injury occurred, the view rejected by the Third Circuit, and by most other jurisdictions.[69]

Another typical case is *Conder v. Hull Truck Lift, Inc.*[70] In *Conder*, the injured employee-operator of a forklift sued its lessor for injury sustained when the forklift overturned. It was undisputed that the accident occurred because of a maladjusted carburetor which made the forklift defective. Shortly before the accident the carburetor had malfunctioned with two other employees, including a foreman, which fact was not reported to the lessor or to the plaintiff. The court held that the jury could properly find an unforeseeable intervening proximate cause. Significantly, the court defined proximate cause as containing the necessary element of foreseeability.[71] This is contrary to most authorities, who hold foreseeability to be an element in standard of care but not proximate cause.[72]

The holding in *Conder* may be contrasted with *Rhoads v. Service Machine Co.*,[73] a decision from the United States District Court of Arkansas. In *Rhoads*, plaintiff-employee lost her arm in a power press and sued the manufacturer. The press was supposed to have had controls as a safety device, but they had not been activated by the purchaser-employer. The duty of affixing these controls had been delegated to plaintiff's employer. The trial judge refused to set aside a verdict for the plaintiff, holding that

> where the occurrence of the intervening cause is foreseeable to the original actor or where his conduct substantially increases the likelihood of the occurrence of the intervening cause, the original conduct, if negligent, is still considered to be a "proximate cause" of the injury, and the original actor remains liable for the ultimate consequences of his negligence.[74]

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[68]416 N.E.2d 833 (Ind. 1981).

[69]The Indiana Supreme Court stated: "Unquestionably, the facts and evidence supporting Shanks' theory reveal the development of a situation which was especially unforeseeable to A.F.E." *Id.* at 838 (citation omitted). This language sounds as though the court rejected liability because the precise manner in which the plaintiff was injured could not have been foreseen by the defendant before the accident occurred, an approach that has not been generally accepted. *See* Vargo, *Products Liability, Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 289, 296-97 (1982).

[70]435 N.E.2d 10 (Ind. 1982).

[71]*Id.* at 14.

[72]*Compare* RESTATEMENT (SECOND) OF TORTS § 289 (1965) *with id.* § 435; *see* Collier v. Citizens Coach Co., 231 Ark. 489, 330 S.W.2d 74 (1959). The Indiana Pattern Jury Instructions do not include foreseeability in the definition of proximate cause. Indiana Pattern Jury Instructions § 5.81 (1968).

[73]329 F Supp. 367 (E.D. Ark. 1971).

[74]*Id.* at 374 (citations omitted).

The inhibiting influence of foreseeability in Indiana product liability cases is demonstrated by the history of *Evans v. General Motors Corp.*[75] *Evans* was an Indiana diversity case and one of the early "second impact" or "enhanced injury" cases. Plaintiff claimed that her decedent was killed in a broadside collision because of the failure of the automobile manufacturer to equip its product with side rails. The Seventh Circuit Court of Appeals affirmed a dismissal of the case: "The intended purpose of an automobile does not include its participation in collisions with other objects, despite the manufacturer's ability to foresee the possibility that such collisions may occur."[76] At about the same time, the Eighth Circuit Court of Appeals reached the opposite result in *Larsen v. General Motors Corp.*[77] *Larsen* has been followed almost universally, in contrast to *Evans*, which found favor only in Indiana, Mississippi, and West Virginia. As noted by the Seventh Circuit, when later overruling *Evans* in *Huff v. White Motor Co.*:[78]

> One who is injured as a result of a mechanical defect in a motor vehicle should be protected under the doctrine of strict liability even though the defect was not the cause of the collision which precipitated the injury. There is no rational basis for limiting the manufacturer's liability to those instances where a structural defect has caused the collision and resulting injury. This is so because even if a collision is not caused by a structural defect, a collision may precipitate the malfunction of a defective part and cause injury. In that circumstance the collision, the defect, and the injury are interdependent and should be viewed as a combined event. Such an event is the foreseeable risk that a manufacturer should assume. Since collisions for whatever cause are foreseeable events, the scope of liability should be commensurate with the scope of the foreseeable risks.[79]

Like *Evans*, *Huff* arose out of Indiana and the court was bound by Indiana law. The change in result was attributed mainly to Indiana's adoption of strict liability in tort.[80] Some of the problems found in these cases derive from a confusion of the concepts "unintended" and "unforeseeable." It may not be intended that an automobile will become involved in a collision but it is certainly foreseeable that this will happen.[81] It makes little sense to deny recovery to the housewife who splashed clean-

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[75]359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966), *overruled in* Huff v. White Motor Co., 565 F.2d 104 (7th Cir. 1977).

[76]359 F.2d at 825.

[77]391 F.2d 495 (8th Cir. 1968).

[78]565 F.2d 104 (7th Cir. 1977).

[79]*Id.* at 109.

[80]*Id.* at 106.

[81]*See supra* text accompanying note 79.

ing fluid in her eye for the reason that "the cleansing preparation was not intended for use in the eye."[82]

The recent amendment to the Product Liability Act[83] perhaps made some changes in the role of foreseeability in Indiana product liability law. The first sentence of Subsection 4(b)(2) of the Product Liability Act of 1978 is amended to read as follows: "It is a defense that a cause of the physical harm is a 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."[84] This sentence formerly read: "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."[85]

Subsection 4(b)(3) formerly read: "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."[86] This subsection now reads:

> It is a defense that a cause of the physical harm is a 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.[87]

An entirely new section 2.5 is inserted.[88] Subsections (a), (c), and (d) in the new section read as follows:

> (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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[82]Sawyer v. Pine Oil Sales Co., 155 F.2d 855, 856 (5th Cir. 1946).

[83]*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. 1984)).

[84]IND. CODE § 33-1-1.5-4(b)(2) (Supp. 1984).

[85]IND. CODE § 33-1-1.5-4(b)(2) (1982).

[86]*Id.* § 33-1-1.5-4(b)(3).

[87]*Id.* § 33-1-1.5-4(b)(3) (Supp. 1984).

[88]Act of Apr. 21, 1983, Pub. L. No. 297-1983, Sec. 3, § 2.5, 1983 Ind. Acts 1814, 1815-16 (codified at IND. CODE § 33-1-1.5-2.5 (Supp. 1984)).

. . . .

(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.[89]

Significantly, the term "foreseeable" is avoided and the term "reasonably expectable" is substituted in the above sections. These amendments to the Product Liability Act may inspire a fresh look at the concept of foreseeability in strict liability cases by the Indiana courts. "Non-foreseeable" and "unforeseeable" have not been defined in Indiana as the equivalent of "not reasonably expectable," although there is evidence that the legislative intent was to make these terms synonymous.[90]

3. Misuse.—Section 4 of the Product Liability Act of 1978 makes it a defense to a strict liability claim "that a cause of the physical harm is a 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."[91] Presumably, this means that when an automobile racer buys an automobile tire for ordinary use and installs it on his racing car, he cannot complain when it blows out during an automobile race.[92] Nor can a plaintiff complain when "the injury results from abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap . . . ."[93] Failure to use a guard on a grinding wheel has been held to be conduct that would justify the submission of the "misuse" defense to the jury.[94] Plaintiff argued that such failure only constituted contributory negligence and would not be a defense to a strict liability or warranty claim based on injury from disintegration of the grinding wheel.[95]

"Misuse" as a defense to strict liability was considered thoroughly by the Indiana Court of Appeals in *Fruehauf Trailer Division v. Thornton*.[96] In that case a truck driver sued a tire manufacturer for injuries sustained when a tire blew out, causing the truck to overturn. The defendant claimed that the plaintiff drove an excessive distance after the

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[89]IND. CODE § 33-1-1.5-2.5(a), (c), (d) (Supp. 1984).

[90]*See* Vargo, *Products Liability, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 255, 282 (1984).

[91]IND. CODE § 33-1-1.5-4(b)(2) (Supp. 1984).

[92]RESTATEMENT (SECOND) OF TORTS § 395 comment j, illustration 3 (1965).

[93]*Id.* § 402(A) comment h.

[94]McGrath v. Wallace Murray Corp., 496 F.2d 299 (10th Cir. 1974).

[95]*Id.* at 302-03 n.6.

[96]174 Ind. App. 1, 366 N.E.2d 21 (1977).

blowout and that it was therefore entitled to an instruction on misuse. The trial court instructed on contributory negligence and not misuse. On appeal, the manufacturer claimed that "if there was evidence to support an instruction on contributory negligence, there was evidence—the same evidence—to support a misuse instruction."[97] The court distinguished the two concepts: "Since misuse involves a subjective determination of continuing conduct in the presence of a known defect, and contributory negligence presumes an objective determination of failure to find or guard against a defect when a duty to do so is present, the two concepts are mutually distinguishable."[98] The court went on to hold that since there was insufficient evidence to show that plaintiff voluntarily continued to drive on the defective tire after the blowout, the misuse instruction was properly refused.[99]

The distinction between contributory negligence and misuse is presently of great importance under Indiana law. The former is not a defense to a strict liability claim; the latter is a complete defense. In *Hoffman v. E.W. Bliss Co.*,[100] a power press double-tripped and crushed the plaintiff's hand. The jury was instructed as follows: " 'If you find that the plaintiff was . . . inadequately instructed . . . this would constitute a misuse of the equipment and be a complete defense. . . .' "[101] The Indiana Supreme Court found this instruction to be an error since

> it is use in a manner contrary to legally sufficient instructions that is misuse. 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.[102]

The importance of the distinction between misuse and contributory negligence will remain after the new Comparative Fault Act becomes effective on January 1, 1985,[103] since Senate Bill Number 419 of 1984 eliminated product misuse from the definition of fault in the Indiana Comparative Fault Act.[104] Misuse remains as a defense to strict liability in the Product Liability Act of 1978.[105]

4. Modification or Alteration.—Another defense to strict liability contained in the Product Liability Act of 1978 is "a modification or alteration of the product made by any person after its delivery to the initial

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[97]*Id.* at 10, 366 N.E.2d at 29.

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

[99]*Id.* at 12, 366 N.E.2d at 30.

[100]448 N.E.2d 277 (Ind. 1983).

[101]*Id.* at 281 (quoting the trial court's instructions).

[102]*Id.* at 283.

[103]*See* Act of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 1, § 3, 1983 Ind. Acts. 1930, 1933 (codified at IND. CODE § 34-4-33-3 (Supp. 1984)).

[104]Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2, 1984 Ind. Acts 1468, 1468 (codified at IND. CODE § 33-4-33-2(a) (Supp. 1984)).

[105]*See* IND. CODE § 33-1-1.5-4(b)(2) (Supp. 1984).

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."[106] Apparently, a plaintiff is not barred from recovery if the alteration is reasonably expectable. Comment p to section 402A states that "the mere fact the product is to undergo processing, or other substantial change, will not in all cases relieve the seller of liability under the rule stated in this Section."[107] *Cornette v. Searjeant Metal Products, Inc.*,[108] wherein section 402A was initially adopted in Indiana, involved alteration of a product. The defect in a power press was caused by removal of an air filter after the press left the manufacturer's plant. In *Cornette*, such an alteration exculpated the manufacturer.[109]

Another such case is *Conder v. Hull Lift Truck, Inc.*[110] where a forklift manufactured by Allis-Chalmers overturned and injured plaintiff. The accident was caused by a maladjusted carburetor. Hull, lessor of the forklift, had converted the fuel system from gasoline to liquid propane gas, dismantling and rebuilding the carburetor with parts involved in the maladjustment. The supreme court held that this was an unforeseeable intervening cause which insulated Allis-Chalmers.[111]

The product liability statute makes one important change from Indiana case law. The burden of proving non-alteration formerly rested on the plaintiff.[112] Under the Product Liability Act of 1978, the burden of proving alteration is on the defendant.[113] This is a noteworthy change, as is illustrated by *Craven v. Niagara Machine and Tool Works, Inc.*, a case applying the old standard by placing the burden on the plaintiff.[114] Plaintiff's hand was crushed between the ram and the platen of a power press. After the machine was received by plaintiff's employer, a flywheel guard which prevented an operator from using the flywheel to "inch down" the press had been removed. The accident resulted when the operator was "inching" the press down by using the flywheel. The trial court found an unforeseeable alteration and granted judgment for the manufacturer because the defect "was a result of a substantial change in the condition of the product."[115] In its first opinion the court of appeals reversed.[116] On rehearing, however, the trial court was affirmed because "we failed

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[106] *Id.* § 33-1-1.5-4(b)(3).

[107] RESTATEMENT (SECOND) OF TORTS § 402A comment p (1965).

[108] 147 Ind. App. 46, 258 N.E.2d 652 (1970).

[109] *Id.* at 55, 258 N.E.2d at 657.

[110] 435 N.E.2d 10 (Ind. 1982).

[111] *Id.* at 15.

[112] "Specifically, in order to show himself entitled to relief under § 402A (1)(b), *supra*, a plaintiff must carry the burden of proving that no substantial change occurred in the condition of the product in which it was sold." 147 Ind. App. at 54, 258 N.E.2d at 657.

[113] IND. CODE § 33-1-1.5-4(a), (b)(3) (Supp. 1984).

[114] 417 N.E.2d 1165 (Ind. Ct. App. 1981); *on reh'g* 425 N.E.2d 654 (Ind. Ct. App. 1981).

[115] 417 N.E.2d at 1168.

[116] *Id.* at 1172.

to give proper consideration to plaintiff's burden of establishing that no substantial change occurred."[117]

In Indiana an alteration not reasonably expectable would seem to be a complete defense in a strict liability case. It is not included in the definition of fault contained in the Comparative Fault Act.[118] Though arguably affected by the Product Liability Act and the amendments thereto, such decisions as *Cornette* and *Conder* should be unaffected by Indiana's adoption of comparative fault.

5. State of the Art.—Section 4(b)(4) of the Product Liability Act reads as follows: "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."[119]

As with modification or alteration, compliance with the state of the art would seem to be a complete defense not subject to comparative fault. With regard to this section the observation of two Indiana commentators is worth noting:

> If the term "generally recognized" refers to actual industry practices in use at the time of design or manufacture, the provision would conflict with the generally accepted view that state of the art is only to be judged by what is scientifically and economically feasible, not by comparison with general industry custom.[120]

It is worthy of note that the Indiana courts have held that standards set by an entire industry can be found to be negligent[121] and that the standard of care in negligence law is established independent of custom and usage.[122]

B. Strict Liability and Economic Loss

If a defective tire blows out and causes total loss of plaintiff's car, he can recover. What if, however, he is sold a defective car; can he recover damages for his economic loss from the seller of the car on the basis of strict liability in tort? The New Jersey Supreme Court in *Santor v. A. & M. Karagheusian*[123] extended the doctrine of strict liability to a purely economic loss. The plaintiff purchased carpeting that developed a defect. The court held the manufacturer liable for the difference in the price paid for the carpet and its actual market value on the basis of strict liability in tort.[124]

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[117]425 N.E.2d at 655 (Ind. Ct. App. 1981).

[118]*See* IND. CODE § 34-4-33-2(a) (Supp. 1984).

[119]IND. CODE § 33-1-1.5-4(b)(4) (Supp. 1984).

[120]Vargo & Leibman, *Products Liability, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 227, 248-49 (1979) (footnote omitted).

[121]Gilbert v. Stone City Constr. Co., 171 Ind. App. 418, 429, 357 N.E.2d 738, 745 (1976).

[122]Walters v. Kellam & Foley, 172 Ind. App. 207, 230-31, 360 N.E.2d 199, 214 (1977).

[123]44 N.J. 52, 207 A.2d 305 (1965).

[124]*Id.* at 68-69, 207 A.2d at 314.

Judge Traynor, then sitting as Chief Justice of the California Supreme Court in *Seely v. White Motor Co.*,[125] roundly condemned this extension of the doctrine which he had originally expounded. His view was that when economic losses result from commercial transactions, the parties should be relegated to the law of sales:

> Although the rules governing warranties complicated resolution of the problems of personal injuries, there is no reason to conclude that they do not meet the "needs of commercial transactions." The law of warranty "grew as a branch of the law of commercial transactions and was primarily aimed at controlling the commercial aspects of these transactions."
>
> Although the rules of warranty frustrate rational compensation for physical injury, they function well in a commercial setting.[126]

The clear majority of jurisdictions follow the view of Judge Traynor and apply the law of sales to commercial transactions.[127]

Both the comparative fault law and the Product Liability Act of 1978 also seem to adopt Judge Traynor's view, since they do not embrace economic loss in any of the definitions contained in section 1(a) of the former[128] and section 2 of the latter.[129] The Indiana Supreme Court has previously indicated that it would make no distinction in imposing liability for "economic loss" in contrast to personal injury.[130] Any doubt regarding economic loss from gradually evolving property damage was dispelled by an amendment to the definition of "physical harm" originally contained in the Product Liability Act of 1978, which now is defined as "bodily injury, death, loss of services, and rights arising 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."[131] Without more extensive statutory language, it is unclear how the legislature intended economic loss arising from "sudden major damage to property" to be treated.

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[125] 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

[126] *Id.* at 16, 45 Cal. Rptr. at 22, 403 P.2d at 150 (citations omitted).

[127] Inglis v. American Motors Corp., 197 N.E.2d 921 (Ohio Ct. App. 1964), *aff'd*, 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965); Price v. Gatlin, 241 Ore. 315, 405 P.2d 502 (1965); Ford Motor Co. v. Lonon, 217 Tenn. 400, 398 S.W.2d 240 (1966).

[128] *See* Act of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 1, § 1(a), 1983 Ind. Acts 1930, 1930, (codified at IND. CODE § 34-4-33-1(a) (Supp. 1984)).

[129] *See* IND. CODE § 33-1-1.5-2 (1982).

[130] "The contention that a distinction should be drawn between mere 'economic loss' and personal injury is without merit." Barnes v. Mac Brown and Co., 264 Ind. 227, 230, 342 N.E.2d 619, 621 (1976).

[131] Act of Apr. 21, 1983, Pub. L. No. 297-1983, Sec. 2, § 2, 1983 Ind. Acts 1814, 1815 (codified at IND. CODE § 33-1-1.5-2 (Supp. 1984)).

IV. Warranty

Indiana adopted the most restrictive of the three proposed alternatives in the Uniform Commercial Code[132] dealing with privity in the sale of products:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty.[133]

The restrictive effect of this section is illustrated by *Lane v. Barringer*.[134] Plaintiff's daughter, while shopping with her mother, dropped a bottle of drain cleaner which broke and splashed caustic material on plaintiff's legs. The court upheld dismissal on the ground of lack of privity between the plaintiff and the manufacturer, the supplier of the container, and the distributor.[135]

While there is some language in older Indiana cases that an implied warranty sounding in tort did not require privity, it is clear that such a theory has now merged with strict liability: "Under Indiana law a count based on tortious breach of implied warranty is duplicitous of a count based on strict liability in tort and both counts may not be pursued in the same lawsuit."[136] Strict liability in the early stages of its development was treated by some courts as a warranty concept.[137] A tortious breach of warranty in Indiana has now been absorbed by the new doctrine of strict liability in tort and the only implied warranties are the contract warranties as set forth in the Uniform Commercial Code—merchantability[138] and fitness for a particular purpose[139]—plus the common law warranty of habitability. The Uniform Commercial Code also recognizes express warranties.[140]

The contract warranties are not very satisfactory in personal injury product litigation because of several engraftments from the law of sales. Besides the above-mentioned privity problem, there are other serious hurdles. One is the necessity of establishing a sale.[141] Another is the re-

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[132]*See* U.C.C. § 2-318 (1978).

[133]Ind. Code § 26-1-2-318 (1982).

[134]407 N.E.2d 1173 (Ind. Ct. App. 1980).

[135]Neofes v. Robertshaw Controls Co., 409 F. Supp. 1376, 1379 (S.D. Ind. 1976) (citation omitted).

[136]Neofes v. Robertshaw Controls Co., 409 F. Supp. 1376, 1379 (S.D. Ind. 1976).

[137]*See* Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960).

[138]Ind. Code § 26-1-2-314 (1982).

[139]*Id.* § 26-1-2-315.

[140]*Id.* § 26-1-2-313.

[141]A lease or bailment for hire is generally held to be a sale. Cintrone v. Hertz Truck

quirement of notice of breach of warranty.[142] As Dean Prosser pointed out, the majority of courts (at least under the Uniform Sales Act) have enforced the notice requirement, even in personal injury cases.[143] "As applied to personal injuries . . . it [the notice requirement] becomes a booby-trap for the unwary."[144] Under the Uniform Commercial Code, both express and implied warranties may be disclaimed if done in a conscionable manner.[145] However, "[l]imitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable . . . ."[146]

Because of the above considerations, warranties have not been very popular in product cases, particularly since the advent of strict liability. Sometimes the Commercial Code's four-year statute of limitations[147] is advantageous. The plain meaning of the Code would seem to be that the statute begins to run when the seller tenders delivery.[148] Such has been the view of the cases.[149]

There is another potential advantage to a warranty product action: Contributory negligence is not a defense to implied or express warranty.[150] "Only more specific forms of plaintiff's misconduct, such as assumption of risk and misuse of the product, may be relied upon by the defendant by way of defense."[151]

Another type of warranty has importance in Indiana, the warranty of fitness for habitation. In *Theis v. Heuer*,[152] the court held that a warranty of fitness for habitation exists between a builder-vendor and a first purchaser of a dwelling house, and that warranty extends to subsequent purchasers when a latent defect later appears.[153] This is a common law

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Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965). A prospective customer cannot bring an implied warranty action because there has been no sale. Lasky v. Economy Grocery Stores, 319 Mass. 224, 65 N.E.2d 305 (1946); Day v. Grand Union Co., 113 N.Y.S.2d 436 (1952). Whether certain transactions are sales or services is a knotty problem. It has been particularly true in the blood bank cases. See the review of these cases in Russell v. Community Blood Bank, 185 So.2d 749 (Fla. Dist. Ct. App. 1966), *aff'd*, 196 So. 2d 115 (Fla. 1967).

[142]The Uniform Commercial Code provides that "the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy . . . ." IND. CODE § 26-1-2-607(3)(a) (1982).

[143]Prosser, *The Assault upon the Citadel: Strict Liability to the Consumer*, 69 YALE L.J. 1099, 1131 n.184 (1966).

[144]*Id.* at 1130.

[145]IND. CODE § 26-1-2-316 (1982).

[146]*Id.* § 26-1-2-719(3).

[147]*Id.* § 26-1-2-725.

[148]*Id.*

[149]*See, e.g.*, Rufo v. Bastian-Blessing Co., 417 Pa. 107, 207 A.2d 823 (1965).

[150]Gregory v. White Truck & Equip. Co., 163 Ind. App. 240, 323 N.E.2d 280 (1975).

[151]*Id.* at 257, 323 N.E.2d at 290.

[152]149 Ind. App. 52, 270 N.E.2d 764 (1971), *opinion adopted*, 280 N.E.2d 300 (Ind. 1972).

[153]Barnes v. Mac Brown & Co., 264 Ind. 227, 342 N.E.2d 619 (1976).

and not a Code warranty; however, it has much in common with the warranty of merchantability in the Uniform Commerical Code and also with strict liability. As one commentator has suggested, "proving that a house is not fit for ordinary purposes should be the same as proving that the house is defective under the strict liability statute."[154]

V. Fraud and Deceit

To maintain a cause of action for deceit, the plaintiff must prove an intentional representation by the defendant of a material fact, which representation was known by the defendant to have been false, and which was relied on by the plaintiff to his detriment.[155] Although there is no privity requirement in product cases where the supplier concealed knowledge of the danger, this high standard of proof is difficult to meet, and most plaintiffs prefer to ground their actions in strict liability or warranty. By statute, the remedies for fraud include all remedies for the nonfraudulent breach of warranty.[156] Since fraud and deceit are intentional torts, they are excluded from the operation of the Indiana Comparative Fault Act.[157] Contributory negligence is not a defense to a product case based on fraud and deceit. Finally, many of these cases involve a prayer for equitable relief.[158]

VI. Indemnity

Section 6 of the Product Liability Act states: "Nothing contained herein shall affect the right of any person found liable to seek and obtain indemnity from any other person whose actual fault caused a product to be defective."[159] Section 7 of the new Indiana Comparative Fault Act maintains this status: "In an action under this chapter, there is no right of contribution among tortfeasors. However, this section does not affect any rights of indemnity."[160] Thus, the Indiana law of indemnity remains intact and unaffected by these statutes.

The Indiana law of indemnity and contribution was thoroughly reviewed by United States District Court Judge S. Hugh Dillin in *McClish v. Niagara Machine & Tool Works*.[161] In contrast to contribution, indem-

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[154]Copeland, *The Implied Warranty of Habitbility and the Use of the Uniform Commercial Code by Analogy*, 1983 Ark. L. Notes 10, 17.

[155]Mercer v. Elliott, 208 Cal. App. 2d 275, 25 Cal. Rptr. 217 (1962); Fowler v. Benton, 229 Md. 571, 185 A.2d 344 (1962); Lindberg Cadillac Co. v. Aron, 371 S.W.2d 651 (Mo. Ct. App. 1963); Haarberg v. Schneider, 174 Neb. 334, 117 N.W.2d 796 (1962).

[156]Ind. Code § 26-1-2-721 (1982).

[157]*See* Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2, 1984 Ind. Acts 1468, 1468 (codified at Ind. Code § 34-4-33-2(a) (Supp. 1984)).

[158]*See, e.g.*, Gentry v. Little Rock Road Mach. Co., 232 Ark. 580, 339 S.W.2d 101 (1960).

[159]Ind. Code § 33-1-1.5-6 (1982).

[160]Ind. Code § 34-4-33-7 (Supp. 1984).

[161]266 F. Supp. 987 (S.D. Ind. 1967).

nity shifts the entire burden of liability and damage from one party to another. Judge Dillin noted: "In the absence of express contract . . . Indiana follows the general rule that there can be no contribution or indemnity as between joint tort-feasors."[162] Exceptions to the general rule do exist, however, and implied indemnity can be asserted (1) where the indemnitee has only an imputed or vicarious liability for damage caused by the indemnitor;[163] (2) where one is constructively liable to a third person by operation of some special statute or rule of law which imposes upon him a non-delegable duty, but is otherwise without fault;[164] and (3) where a merchant sells a defective product which harms the ultimate user, he is entitled to indemnity from the manufacturer or supplier.[165]

By providing that it will not "affect the right of any person found liable to seek and obtain indemnity from any other person whose actual fault caused a product to be defective,"[166] section 6 of the Product Liability Act seems to be in accord with the third exception. Most courts have allowed indemnity in favor of an innocent retailer who has been held liable for a manufacturing defect.[167]

Indiana follows the common law rule that there is *no* contribution among joint tort-feasors.[168] This rule remains unchanged by either the Product Liability Act or the Comparative Fault Act.[169] If the fault of plaintiff and defendant is to be compared, it seems highly illogical not to compare fault among the culpable defendants. Many of the jurisdictions adopting comparative fault have incorporated a contribution system in the comparative fault statute; others have contemporaneously adopted a contribution statute based on proportionate fault.[170]

VII. The Indiana Comparative Fault Act

A. Definition of Fault

The Indiana Comparative Fault Act does not take effect until January 1, 1985, and does not apply to any civil action that accrues before that date.[171] Thus, it will be several years before there are definitive interpretations of this Act by the Indiana appellate courts. The Indiana Act is a

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[162]*Id.* at 989 (footnotes omitted).

[163]*See* Indiana Nitroglycerin & Torpedo Co. v. Lippencoff Glass Co., 165 Ind. 361, 75 N.E. 649 (1905); Biel, Inc. v. Kirsch, 130 Ind. App. 46, 153 N.E.2d 140 (1958).

[164]*See* McNaughton v. City of Elkhart, 85 Ind. 384 (1882).

[165]*See* Frank R. Jelleff, Inc. v. Pollak Bros., 171 F. Supp. 467 (N.D. Ind. 1957).

[166]Ind. Code § 33-1-1.5-6 (1982).

[167]*See, e.g.*, Langford v. Chrysler Motors Corp., 513 F.2d 1121 (2d Cir. 1975); Farr v. Armstrong Rubber Co., 288 Minn. 83, 179 N.W.2d 64 (1970).

[168]See cases cited in McLish v. Niagara Mach. & Tool Works, 266 F. Supp. 987, 989 n.5 (S.D. Ind. 1967).

[169]*See supra* text accompanying notes 163 & 164.

[170]See the text of the various statutes collected in H. Woods, Comparative Fault (1978).

[171]Act of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 3, 1983 Ind. Acts 1930, 1933.

comparative fault act, in contrast to most similar legislation which speaks in terms of comparative negligence. In fact, the language of the Indiana Act tracks the language of section 1(b) of the Uniform Comparative Fault Act almost exactly.[172] It contains the most comprehensive definition of "fault" contained in any legislation passed to date except statutes in Minnesota[173] and Washington,[174] which are also modeled on the Uniform Comparative Fault Act, and Arkansas,[175] which furnished the model for the Uniform Act. However, a 1984 amendment removed strict liability, warranty, and product misuse from the definition of "fault" in the Indiana Act.[176] Maine[177] and New York[178] have passed comparative fault acts that are not as comprehensive as those mentioned above. A number of other jurisdictions have adopted comparative fault judicially to some degree; these are Alaska, California, Hawaii, Kansas, Mississippi, Montana, Oregon, and Wisconsin.[179] The Indiana Act embraces every type of conduct[180] except intentional conduct. Presumably most types of contributory fault will not be a defense to intentional conduct.[181] In the context of product liability, all the theories of liability are embraced with the exception of fraud and deceit, a theory which is rarely employed. All the usual defenses are covered except product misuse. Strict liability cases will be governed by the Product Liability Act of 1978 as amended in 1983.[182]

B. Comparative Fault Systems

In product cases accruing in Indiana after January 1, 1985, the New Hampshire rule of comparative fault will be applied both to the theories of liability and to the defenses. The New Hampshire system of comparative fault has become the most popular choice with state legislatures. It permits a plaintiff to recover if his fault equals that of defendant. He is

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[172]*Compare* Act of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 1, § 2, 1983 Ind. Acts 1930, 1930 (codified at IND. CODE §§ 34-4-33-2 (Supp. 1984)) *with* UNIF. COMP. FAULT ACT § 1(b), 12 U.L.A. 35 (Supp. 1984).

[173]*See* MINN. STAT. ANN. § 604.01 (West Supp. 1984)

[174]*See* WASH. REV. CODE ANN. § 4.22.005 (Supp. 1984)

[175]*See* ARK. STAT. ANN. § 27-1763 (1979).

[176]*See* Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2, 1984 Ind. Acts 1468, 1468.

[177]*See* ME. REV. STAT. ANN. tit. 14, § 156 (1979).

[178]*See* N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976).

[179]*See* H. WOODS, COMPARATIVE FAULT §§ 6:3-6:10 (1978 & Supp. 1983).

[180]Indeed, Indiana even includes "unreasonable failure to avoid an injury or to mitigate damages." IND. CODE § 34-4-33-2(a) (Supp. 1984). Hopefully these provisions will be read together and applied to seat belt cases, the failure of a motorcyclist to wear a crash helmet and similar cases. Certainly, the plaintiff's failure to mitigate damages *after* his damages have occurred should play no part in moving his percentage of fault over 50% and thus depriving him of any recovery at all.

[181]This is the general rule. H. WOODS, COMPARATIVE FAULT § 7:1 (1978).

[182]*See* IND. CODE § 33-1-1.5-1 to -5 (Supp. 1984); *id.* § 33-1-1.5-6 to -8 (1982).

only barred if his fault "is greater than the fault of all persons whose fault proximately contributed to the claimant's damages."[183]

Mississippi, the first state to adopt comparative negligence, opted for the pure form under which a plaintiff can recover from a negligent defendant, regardless of the extent of plaintiff's own negligence.[184] The Mississippi statute was copied from the Federal Employers Liability Act,[185] which is incorporated by reference into the Jones Act.[186] There has been much litigation under these statutes in Indiana, so there is some familiarity with a comparative fault system. Florida, California, Alaska, Michigan, New Mexico, Illinois, Iowa, and West Virginia have adopted comparative fault judicially without awaiting legislative enactment.[187] All except West Virginia have chosen the "pure" form.

In addition to the seven states mentioned above, New York, Rhode Island, Louisiana, Washington, and Mississippi have "pure" comparative statutes, making a total of twelve such jurisdictions. No jurisdiction has adopted the New Hampshire plan judicially, but fifteen states including Indiana have adopted it legislatively.[188] Eleven states have adopted the Georgia-Arkansas plan, which requires a plaintiff to be less negligent than the defendant in order to recover.[189] Nebraska permits comparison if the defendant's negligence is gross and the plaintiff's negligence is slight.[190] South Dakota originally adopted the Nebraska plan, but later removed the requirement of gross negligence on the defendant's part.[191]

C. Multiple Parties

Is the comparison of the plaintiff's fault to be made with the fault of each defendant individually or with the fault of all defendants in the aggregate? Resolution of this question has caused great difficulty and a split among the authorities. Statutory language has solved the problem in some states and the language in section 4 of the Indiana Act would seem to militate toward a comparison with the defendants' fault in the aggregate since the fault comparison is made with "all persons whose fault proximately contributed to the claimant's damages."[192] This language seems

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[183]IND. CODE § 34-4-33-4(a) (Supp. 1984). Otherwise, his fault only diminishes his recovery under *id.* §-3.

[184]MISS. CODE ANN. § 11-7-15 (1972). This system is best illustrated by a recent Washington case in which the jury found the plaintiff 99% negligent, the defendant 1% negligent, and damages of $350,000. Judgment was correctly entered for $3,500. Lamborn v. Phillips Pac. Chem. Co., 89 Wash. 2d 701, 575 P.2d 215 (1978).

[185]*See* H. WOODS, COMPARATIVE FAULT, § 1:11 (1978).

[186]*Id.* § 3:5.

[187]*Id.* § 4:2 (1978 & Supp. 1983).

[188]*Id.* § 4:4 (1978 & Supp. 1983).

[189]*Id.* §§ 4:2, 4:3 (1978 & Supp. 1983).

[190]*Id.* § 4:5

[191]*Id.*

[192]IND. CODE § 34-4-33-4(a), (b) (Supp. 1984).

to closely approximate the statutes of Texas[193] and Kansas,[194] both of which hold that the comparison should be made with the combined negligence of the defendants. When the statutory language is not clear, there is a split among the authorities.[195] The importance of this issue is shown by the following fact situation, which is not unusual. Assume plaintiff is found 40% at fault and each of two defendants 30% at fault. Is plaintiff barred or is there a recovery of 60% of the damages? The language of the Indiana statute dictates recovery based on these percentages.

The Indiana statute also requires the fact-finder to consider the fault of unsued third parties in determining the total percentage of fault.[196] Assume in a product liability case that some of the fault is attributed by the jury to the product designer over whom jurisdiction cannot be obtained. Suit is maintained against the manufacturer who was also at fault for a defect in the manufacture. The jury finds that the plaintiff is 50% at fault, the manufacturer 25% at fault, and the designer 25%. Clearly the plaintiff can recover because his fault is not greater than 50% of the total fault involved in the incident and the action is against one defendant.[197] Assume that damages are $100,000. Plaintiff would multiply $100,000 by 25% (amount of fault of only sued defendant), and his recovery would be $25,000. In this situation if plaintiff was 60% at fault and the sued manufacturer and the unsued designer were each 20% at fault, plaintiff could not recover.

Let us carry the example one step further. Assume that plaintiff sues D^1, a product manufacturer, D^2, designer of the product, and D^3, a component part manufacturer, alleging independent acts of fault on the part of each. Assume that the jury finds plaintiff 30% negligent, D^1 20%, D^2 25%, and D^3 25% negligent, and sets the damages at $100,000. The jury would multiply $100,000 by the percentage of fault of each defendant and enter a verdict against each defendant in the amount of the product.[198] The verdict against D^1 would be $20,000; against D^2, $25,000, and against D^3, $25,000. The verdicts would total $70,000 ($100,000 less the 30% representing plaintiff's negligence).

Again, assume the above illustration, but that D^4 is an additional defendant as a principal of the agent D^3. Then there would be a joint and several judgment in the amount of $25,000 against D^3 and D^4.[199] However, the other judgments would be several only, as indicated by the Indiana Act. If D^1 and D^2 have become bankrupt, plaintiff is out of luck

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[193]*See* TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1984).

[194]*See* KAN. STAT. ANN. § 60-258a (1976).

[195]The cases are collected in H. WOODS, COMPARATIVE FAULT §13:1 (1978).

[196]IND. CODE § 34-4-33-5(a)(l), (b)(1) (Supp. 1984).

[197]*See id.* § 34-4-33-5(a)(2), (3).

[198]*See id.* § 34-4-33-5(b)(4).

[199]The joint and several liability of D^3 and D^4 arises from their treatment as a single party under *id.* § 34-4-33-2(b).

because there is no joint and several judgment against D^1, D^2, and D^3.[200] Verdicts are entered individually against each of them. The same is true whenever an unsued person whose fault contributed to the incident is involved. Assume again in the last illustration that jurisdiction was not obtained over D^2, the designer, who nevertheless was assessed 25% of the fault. Assume further that D^3 went bankrupt. Plaintiff could then recover only the $20,000 assessed against D^1 even though his net damage was $70,000.

The Indiana statute most nearly resembles that of Kansas in providing only several liability between defendants[201] and in permitting the assessment of fault against unsued parties.[202] Whatever percentage is assessed against these unsued or unsuable entities reduces the amount of plaintiff's recovery. This aspect of the Indiana Act, reflected by the Kansas experience, is very unfavorable to the plaintiff. For instance, in Kansas the fact finder must assess the fault of an immune spouse;[203] an employer with workers' compensation immunity;[204] a released party;[205] and a supervisory parent in an injured minors claim.[206] Under the Indiana Comparative Fault Act, the claimant's employer may not be considered a nonparty,[207] and therefore the employer's fault cannot be considered, which may generate confusion in cases where the immune employer is clearly at fault in the accident out of which the claim arose.

Where a retailer sells a defectively manufactured product, should the manufacturer and retailer be considered a single party?[208] This is a most important question. If they are to be considered a single party, the liability would in all probability be joint and several. A recent unreported maritime case illustrates the problems that can be involved.[209] Plaintiffs' decedent was asphyxiated while asleep on a yacht manufactured by defendant Boatel

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[200]*See id.* § 34-4-33-5(b)(4).

[201]*See* Coca-Cola Bottling Co. v. Vendo Co., 455 N.E.2d 370, 372 (Ind. Ct. App. 1983) ("We are also aware that Indiana's prospective comparative negligence statute . . . does not provide for contribution among joint tortfeasors, but instead limits recovery against each primary tortfeasor to a percentage of the damages corresponding to that defendant's degree of fault." (footnote omitted)).

[202]Kan. Stat. Ann. § 60-258a(d) (1976). See Kansas cases collected in H. Woods Comparative Fault, (1978 & Supp. 1983); *see generally id.* § 13:4.

[203]Miles v. West, 224 Kan. 284, 580 P.2d 876 (1978).

[204]Scales v. St. Louis - S.F. Ry., 2 Kan. App. 2d 491, 582 P.2d 300 (1978); McLesky v. Noble Corp., 2 Kan. App. 2d 240, 577 P.2d 830 (1978). The 1984 amendment to the Indiana Comparative Fault Act provides: "A nonparty shall not include the employer of the claimant." Ind. Code § 34-4-33-2(a) (Supp. 1984). This means that in Indiana, contrary to Kansas, the fault of the employer cannot be used to reduce plaintiff-employee's recovery.

[205]McCart v. Muir, 230 Kan. 618, 641 P.2d 384 (1982).

[206]Lester v. Magic Chef, 230 Kan. 643, 641 P.2d 353 (1982).

[207]*See* Ind. Code § 34-4-33-2(a) (Supp. 1984).

[208]*See* Ind. Code § 34-4-33-2(b) (Supp. 1984).

[209]This case is unreported but is discussed at some length in H. Woods, Comparative Fault § 13:12 at 243-44 (1978).

and sold by defendant Medlin Marine. The yacht's air conditioning components were sold to Boatel by defendant Marine Development Corporation, and one was installed in the bilge of the yacht. Boatel drilled drain holes over the air conditioning generator exhaust. Carbon monoxide was introduced through these holes and distributed throughout the yacht by the air conditioning unit. The case was tried in admiralty against the three above-mentioned defendants. The manufacturer, Boatel, was insolvent and defaulted. United States District Judge Eisele held that both Boatel (the manufacturer) and Marine Development (the air conditioning manufacturer) were negligent, the latter for failure to warn with regard to the placement of its unit in the yacht. Responsibility was divided between these two defendants, 80% on Boatel and 20% on Marine. Medlin, who sold the yacht and admittedly was nothing more than a conduit, was found responsible on the theory of implied warranty and strict liability in tort. As between Marine Development (the air conditioning manufacturer) and Medlin (the retail seller), responsibility was divided 50-50. Although Medlin was granted indemnity against the insolvent manufacturer, it was relegated to 50-50 contribution as a joint tort-feasor with respect to Marine. The United States Court of Appeals for the Eighth Circuit affirmed by an equally divided court. Even though admiralty law applied in the above case, Indiana courts will soon be faced with similar situations and could confront identical issues. In such a situation, would they consider Medlin (the retailer), Boatel (the manufacturer) and Marine (the component manufacturer) as single parties so that joint and several liability would apply, thus allowing the plaintiff to recover his entire judgment against any one party? Although Marine had no relationship to Medlin, it was a component supplier to Boatel. Would Boatel and Marine be single parties? These questions will have to be answered by the Indiana courts.

D. Settlements

Where a settlement is made with one of several tort-feasors, do the remainder get credit for the dollar amount paid or the percentage of fault assessed against the settling tort-feasors? California follows what is known as the *River Garden* rule.[210] According to that rule, a tort-feasor may settle and be dismissed from the case as long as the settlement is made in good faith. The remaining tort-feasors receive credit only for the dollar amount of the settlement. Other jurisdictions such as New Jersey give credit to the remaining tort-feasors only to the extent of any percentage of fault allocated by the jury.[211] Pennsylvania gives credit for either the

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[210]*See* River Garden Farms v. Superior Court, 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972).

[211]Under the New Jersey Comparative Negligence Law " 'only the percentage amount equal to the percentage of negligence attributable to the settling defendant is deducted, no matter what the size of the settlement.' " Kotzian v. Barr, 81 N.J. 360, 368 n.2, 408 A.2d

dollar amount on the percentage of fault allocated, whichever is greater.[212]

These states permit contribution among joint tort-feasors as do most jurisdictions.[213] The Indiana Comparative Fault Act retains the common law rule which does not permit contribution among joint tort-feasors.[214] The effect of the Comparative Fault Act is to reduce the liability of the remaining tort-feasors by the percentage of fault allocated to the settling party. The amount paid by the settling party has no effect on the amount owed by the remaining tort-feasors whose liability is fixed entirely by the percentage of fault assessed severally against them by the fact finder.

VIII. Multiple Theories

It is very common for the plaintiff in a product liability case to include separate counts in the complaint for negligence and strict liability. The interaction of the Comparative Fault Act with the Product Liability Act could cause great confusion for the litigators, the court, and the jury in such a case.

Assume that *P* is injured while working on a machine at his place of employment. He sues D^1, the manufacturer of the machine, and D^2, the seller, on theories of negligence and strict liability. *P*'s employer, *E*, is immune under the Workmens' Compensation Act,[215] and cannot be a nonparty under the Comparative Fault Act.[216] Through the process of discovery, D^1 and D^2 reach the conclusion that *P*'s injury was caused at least in part by the misuse of the machine by *E*. The defendants also find evidence that *P*'s negligence contributed to his own injury and that *P* incurred the risk involved in the use of the machine.

D^1 and D^2 first must be careful to keep straight their defenses to the separate counts of the complaint. If *E*'s misuse of the machine is alleged to be the sole cause of *P*'s injury, then *P*'s recovery from D^1 and D^2 would be barred under the strict liability count; however, if *E*'s misuse combined with a defect in the product to cause *P*'s injury, then *P*'s strict liability recovery would not be barred (although *E*'s rights as a worker's compensation lienholder would be barred).[217] *E*'s misuse of the product is no defense to the negligence claim.[218] In addition, although

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131, 133, n.2 (1979) (quoting Rogers v. Spady, 147 N.J. Super. 274, 278, 371 A.2d 285, 288 (App. Div. 1977)).

[212]Daughtery v. Hershberger, 386 Pa. 367, 126 A.2d 730 (1956). See a discussion of *Daugherty* in H. Woods, Comparative Fault § 13:7 (1978).

[213]Twenty states have now adopted some version of the Uniform Contribution Among Tortfeasors Act. H. Woods, Comparative Fault § 13:7 (1978 & Supp. 1983).

[214]Coca-Cola Bottling Co., v. Vendo Co., 455 N.E.2d 370, 372 (Ind. Ct. App. 1983) (dicta).

[215]*See* Ind. Code § 22-3-2-6 (1982).

[216]*Id.* § 34-4-33-2(a) (Supp. 1984).

[217]*Id.* § 33-2-1.5-4(b)(2) (Supp. 1984).

[218]Originally, Indiana included product misuse as an element of fault, but the 1984

P's contributory negligence would be a percentage fault factor on the negligence count,[219] it would be no defense to the strict liability claim.[220] Finally, "unreasonable" assumption of risk would be a complete defense to *P*'s strict liability claim,[221] but only a percentage fault factor in the negligence count.[222]

At trial, *P* puts on his evidence of the liability of D^1 and D^2. The defendants then present the jury with their evidence of *E*'s misuse of the product, and of *P*'s contributory negligence and incurrence of the risk by using the machine. *P* presents any rebuttal evidence and both sides make their final arguments.

The court must then instruct the jury regarding the different applications of the misuse, contributory negligence, and incurred risk defenses to the negligence and strict liability theories. In addition, the court must distinguish for the jury the contributory negligence defense from incurred risk, which is sometimes a difficult task.[223] Finally, unless the parties agree otherwise, the court must instruct the jury in accordance with the Comparative Fault Act regarding how the jury should determine its verdict.[224]

A number of results are possible that would raise questions about the appropriateness of and consistency between the jury's verdicts on the negligence and strict liability claims. The simplest result would be a verdict for D^1 and D^2 on the strict liability count, and a finding that *P* was 70% at fault, D^1 was 15% at fault, and D^2 was 15% at fault on the negligence count. These verdicts would be consistent under the theory that *P* incurred the risk and that this accounted for 70% of the total fault involved in the accident.[225] Thus, *P* would be barred from recovery.

However, suppose the jury found the same percentages of fault on the negligence count, but returned a verdict for *P* on the strict liability claim. Did the jury commit error, or are these results reconcilable by attributing *P*'s 70% fault to contributory negligence, which, unlike incurred risk, is not a defense to a strict liability claim? Will the court attempt

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amendment removed it. *See* Act of Mar. 5, 1984, Pub. L. No. 174-1984, Sec. 1, § 2, 1984 Ind. Acts 1468, 1468 (codified at IND. CODE § 34-4-33-2(a) (Supp. 1984)).

[219]IND. CODE § 34-4-33-2(a) (Supp. 1984).

[220]*See* IND. CODE § 33-1-1.5-4(b) (Supp. 1984); Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, 118-19, 258 N.E.2d 681, 689 (1970).

[221]IND. CODE § 33-1-1.5-4(b)(1) (Supp. 1984).

[222]*Id.* § 34-4-33-2(a).

[223]*See supra* notes 58-63 and accompanying text.

[224]IND. CODE § 34-4-33-5 (Supp. 1984).

[225]Theoretically, incurred risk is nothing more than consent, and operates to negate the duty element of a negligence case. Thus it should constitute a complete defense, since one either consents to a risk or does not; however, by including incurred risk within its definition of fault, the legislature must not have intended that incurred risk be a complete defense in a negligence action under the Comparative Fault Act. Thus, a jury verdict assigning less that 100% of the fault to a plaintiff where the defense is incurred or assumed risk would be consistent with the Act.

to construe the verdicts as being consistent, or will it require that it affirmatively appear that the verdicts are consistent before allowing them to stand?

Similar questions would arise if the jury returned a verdict for *P* on the strict liability claim, and found *P* 10% at fault and D^1 and D^2 each 45% at fault on the negligence claim. Would the court allow the strict liability verdict to stand or would it reverse on the possibility that the jury assigned *P* 10% of the fault based on evidence that he incurred the risk, a defense to strict liability?

Suppose that these facts are altered just slightly so that the jury returns a verdict for *P* on the strict liability count and finds each of the defendants 50% at fault. Will *P* be allowed to choose his verdict? If so, he will almost certainly choose the strict liability verdict which, unlike the negligence finding, gives rise to joint and several liability between D^1 and D^2, protecting *P* against the insolvency of either.

The presence of the defense of misuse by *E* will also present special problems in a product case based both on negligence and strict liability. For example, has the jury committed error if it returns a negligence verdict of D^1, 30% at fault, D^2, 30% at fault, and *P*, 0% at fault? One could assume from such a verdict that the jury found *E*'s misuse of the injury-causing machine to be responsible for the remaining 40% of the fault, but does the Comparative Fault Act permit this result? The Act states: "The percentage of fault figures of parties to the action may total less than one hundred percent (100%) if the jury finds that fault contributing to cause the claimant's loss has also come from a nonparty or nonparties."[226] Clearly, by statute, *E* may not be made a nonparty[227] and thus could not have a percentage of fault assigned directly to him. Does the language quoted above permit the indirect assignment of a percentage of fault that would be assigned to *E* if he were a nonparty to be allocated to the parties to the action? If the above-quoted language does permit an implicit assignment of a fault percentage to *E*, the result will be that *P* bears the loss for that percentage, because *E* will have workers' compensation immunity against *P*.[228]

This raises the problem of workers' compensation liens. The Comparative Fault Act excepts such liens from the general rule that when a claimant's recovery is diminished by his comparative fault or by the uncollectability of the full value of his claim, then any subrogation claim or other lien (except a workers' compensation or occupational disease lien) that arose out of the payment of medical or other benefits is diminished in the same proportion as the claimant's recovery.[229] A worker's compen-

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[226]IND. CODE § 34-4-33-5(a)(1) (Supp. 1984).

[227]*Id.* § 34-4-33-2(a).

[228]*See* IND. CODE § 22-3-2-6 (1982).

[229]*Id.* § 34-4-33-12 (Supp. 1984).

sation or occupational disease lienholder would recover the full amount of his lien regardless of the diminution of the plaintiff's recovery. The Product Liability Act states:

> Where the physical harm to the claimant is caused jointly by a defect in the product which made it unreasonably dangerous when it left the seller's hands and by the misuse of the product by a person other than the claimant, then the conduct of that other person does not bar recovery by the claimant for the physical harm, but shall bar any right of that other person, either as a claimant or as a lienholder, to recover from the seller on a theory of strict liability.[230]

Assuming that it is permissible for the jury to assign indirectly a percentage of fault to a ghost nonparty such as *E* on the negligence claim, suppose the jury returns a verdict for *P* on the strict liability claim and a finding on the negligence claim that *P* was not at fault in any percentage, D^1 was 20% at fault and D^2 30% at fault. The implication of such a verdict is that the jury found *E*'s misuse of the machine to contribute 50% of the total fault in the accident. That 50% would be uncollectable to *P* because of *E*'s workers' compensation immunity. Would *E* still be entitled to his undiminished lien under the Comparative Fault Act,[231] or would *E* be barred from recovering his lien under the Product Liability Act?[232] If *P* had any choice in the matter, he would surely choose his strict liability remedy, not only to avoid paying *E*'s lien, but also to obtain joint and several liability from D^1 and D^2.

The hypothetical fact situation set forth above is neither unusual nor particularly complex; the results, however, could be both. As parties and nonparties and other product liability theories are added, the potential problems grow exponentially. Obviously, the trial of a product liability case that involves Indiana's Comparative Fault Act and the Product Liability Act will be a challenge to bench, bar, and jury. Perhaps the solution lies in the judicious use of interrogatories and special verdicts. However, the Act is quite specific on how the case is submitted to the jury. Presumably, the Section being procedural, it would not be binding on the federal courts.

IX. Conclusion

Although on the whole the Indiana Comparative Fault Act represents a stride forward, some of its aspects deserve criticism. The abandonment of joint and several liability has not worked well in Kansas and is a step backward in the view of most commentators and most courts who have

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[230] *Id.* § 33-1-1.5-4(b)(2) (Supp. 1984).

[231] *See supra* text accompanying note 229.

[232] *See supra* text accompanying note 232.

considered this question.[233] In addition, asking the fact finder to assess fault of a nonparty would seem to be fraught with a danger of unfairness and even fraud. It is easy for one or more of the actual parties to manipulate the role of a nonparty.[234] Third party practice permitted in most jurisdictions will ensnare virtually all who have a real stake in the litigation. Trying parties in absentia is never satisfactory, especially when the result has a profound effect on those who are present and participating.[235] One the other hand, the Indiana Act attempts a comparison of the plaintiff's fault with the fault of all others whose fault contributed to the incident, even where those others may not be made parties to the lawsuit. In theory this should yield a more accurate determination of percentages of fault than is possible where the fault of such unsuable parties is not considered at all.

Indiana is in step with the trend of the times in opting for comparative fault, and is to be commended for rejecting "blindfolding," under which the jury may not be told of the ultimate effect of its answers to the interrogatories.[236] The adoption of comparative fault between plaintiff and defendant should lead to the opportunity for comparative fault to be applied among multiple defendants. Some jurisdictions have incorporated a system of proportionate assessment of fault between defendants as a feature of their comparative fault acts.[237] This commendable step could easily be incorporated into the Indiana Act. The litigation which will unfold in the near future over the Act will be the best indicator of its workability, and of the changes that can be made to improve the Act.

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[233]Oakley v. United States, 622 F.2d 447, 449 (9th Cir. 1980); Department of Transp. v. Webb, 409 So. 2d 1061, 1063 (Fla. Dist. Ct. App. 1981); Cornell v. Langland, 109 Ill. App. 3d 472, 477, 440 N.E.2d 985, 988 (1982); MacLachlan v. Brotherhood Oil Corp., 404 N.E.2d 1272, 1273 (Mass. App. Ct. 1980); Anderson v. Harry's Army Surplus, 117 Mich. App. 601, 610, 324 N.W.2d 96, 100 (1982).

[234]The same dangers seem to be inherent here as in the use of Mary Carter agreements. *See* Note, *Mary Carter in Arkansas: Settlements, Secret Agreements and Some Serious Problems*, 36 ARK. L. REV. 576 (1983).

[235]*See* H. WOODS, COMPARATIVE FAULT §§ 13:2, 13:3 (1978).

[236]*See* H. WOODS, COMPARATIVE FAULT § 18:2 (1978), where cases and statutes are collected showing that "blindfolding" is being rejected in a majority of states.

[237]*See id.* § 13:6.