Strict Liability For Products: An Achievable Goal

JOHN VARGO*

I. INTRODUCTION

Recently, the Indiana Supreme Court has made great progress in affording greater protection for injured victims. In the areas of products liability and general tort law, the court's outstanding decisions in *Koske v. Townsend Engineering Co.*,[1] *Miller v. Todd*,[2] and *Stropes v. Heritage House Childrens Center*[3] provide excellent examples of such progress. The Indiana Supreme Court is about to embark upon the interpretation of Indiana's Products Liability Act; and, after its decision in *Koske*, it appears that the court will make its interpretation with a "clean slate" because all prior common law precedent may be either accepted or ignored.[4] Presently, Indiana is faced with a minor dilemma that presents the court with an opportunity to change products liability law.

II. THE DEMISE OF THE OPEN AND OBVIOUS DANGER RULE IN STRICT PRODUCTS LIABILITY

On March 6, 1990, the Indiana Supreme Court held that the open and obvious danger rule was no longer a barrier to recovery in strict liability actions. The well-reasoned decision of *Koske v. Townsend Engineering Co.*,[5] written by Justice Dickson, determined that the Indiana Products Liability Act preempted the field of strict liability in tort, thus excluding the open and obvious danger rule that previously developed in Indiana's common law.

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* Partner of Pardieck, Gill & Vargo. B.S., Indiana Univeristy, 1965; J.D., Indiana University School of Law-Indianapolis, 1974; Editor-in-Chief of five-volume treatise PRODUCTS LIABILITY PRACTICE GUIDE (Matthew Bender 1988); Adjunct Professor, Bond University, Queensland, Australia; published 30 articles.

1. 551 N.E.2d 437 (Ind. 1990).
2. 551 N.E.2d 1139 (Ind. 1990).
3. 547 N.E.2d 244 (Ind. 1989).
4. The *Koske* court held that with the 1978 Products Liability Act the legislature "entered, occupied, and preempted the field of product strict liability in tort." 551 N.E.2d at 442. Thus, any prior case law that conflicts with what the Indiana Supreme Court determines to be the intent of the legislature may be ignored. There does not seem to be any doubt that the 1983 amendments to the Products Liability Act will be included because the *Koske* court referred to such amendments in its conclusion that preempted strict liability. *See id.* n.2.
5. 551 N.E.2d 437.

In *Koske*, the plaintiff was injured at work while operating a skinner-slicer machine that processed pork jowls. The skinner-slicer machine was designed to cut the skin from the jowl and slash the top to reveal hidden abscesses. The machine used seventeen circular slashing blades at the top and one long skinning blade at the bottom to perform the process. Located along a processing line, the machinery contained a conveyor belt delivery and removal system. The plaintiff worked next to the conveyor line that removed the processed jowl from the machine. The plaintiff performed the final finishing touches on the jowl by removing any remaining imperfections.[6]

The plaintiff could readily observe the machine's whirling blades and that it had no point-of-operation guards. Although the skinner-slicer was designed for an automated process, its operation required human interaction in several circumstances. At least twice a week, the plaintiff unjammed the machine. Additionally, the machine had to be sanitized when it struck an abscess. This sanitization process caused the conveyor belt to become so slippery that the jowls would not automatically feed into the skinner-slicer; the workers were then required to hand feed the jowls into the point-of-operation. When hand feeding the skinner-slicer, the plaintiff protected herself from the machine's blades by using one jowl to push another into the machine. The accident occurred when the plaintiff used one jowl to force another into the machine. The jowl slipped over the top of the other, and the plaintiff's hand entered the machine's operating blades.[7]

At trial, engineering experts testified that the skinner-slicer machine was inadequately guarded and that the manufacturer, Townsend Engineering Company, had not seriously considered the potential dangers the machine posed to the operators when it was designed. Experts opined that it would be inexpensive to guard the machine and that other designs with enhanced safety features were feasible.[8]

Prior to the plaintiff's accident, the defendant knew the machine could not always be operated automatically and at times required manual feeding. In addition, Townsend also knew that the machine severely injured several other operators prior to plaintiff's injury. Immediately after the plaintiff's injury, Townsend recalled the machine and designed a new one that included safety features to prevent the workers from entering the point-of-operation.[9]

Thus, the evidence clearly revealed that the plaintiff, Margaret Koske, was injured by a product that had an open and obvious danger. Under

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6. *Id.* at 439.
7. *Id.*
8. *Id.* at 439-40.
9. *Id.*

prior Indiana law, she would likely have been deprived of recovery.[10] The *Koske* court reexamined the open and obvious danger rule enuniciated in *Bemis Co. v. Rubush.*[11] The *Bemis* court applied the rule to an accident that predated enactment of the 1978 Indiana Products Liability Act.[12] The *Koske* court reasoned that the Products Liability Act preempted the field of product-, strict-liability actions. Finding that the Products Liability Act excluded the open and obvious danger rule developed by prior Indiana common law, the *Koske* court held that the rule was inapplicable to strict-liability claims.[13] In addition, the *Koske* court held that the rule does not necessarily preclude claims based on willful and wanton misconduct.[14]

Twenty-one days after the *Koske* decision, the Indiana Supreme Court decided *Miller v. Todd.*[15] In *Miller*, the plaintiff, Carolyn Miller, sustained severe injury to her right leg in a motorcycle accident. Carolyn was a passenger on a motorcycle driven by William Todd who lost control of the motorcycle when it skidded on gravel. William was not injured because he previously installed crash bars on the front of the motorcycle. Unfortunately, the leg crash bars only extended protection for the driver and not for passengers.[16] In an amended complaint, Carolyn sued the motorcycle manufacturer for failing to include rear passenger crash bars. Carolyn's action was premised on the theories of negligence and strict liability in tort by alleging the doctrine of crashworthiness.[17] Crashworthiness or "enhanced injury" actions allege that the product defect, although not the cause of the accident, enhanced the plaintiff's injuries in an accident.[18]

The *Miller* court adopted the reasoning of the classic case of *Larsen v. General Motors Corp.*[19] *Larsen* held that in product negligence actions, the vehicle manufacturer has a duty to use reasonable care to avoid subjecting the user to unreasonable risks of injuries if the vehicle is involved in an accident.[20] Vehicle accidents, according to *Larsen*, are

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10. *See* Bemis Co. v. Rubush, 427 N.E.2d 1058 (Ind. 1981), *cert. denied*, 459 U.S. 825 (1982).
11. 551 N.E.2d at 440.
12. 427 N.E.2d at 1059.
13. 551 N.E.2d at 442.
14. *Id.* at 443-44. The language of the court might also indicate that the Indiana Products Liability Act does not affect other actions based upon the Uniform Commercial Code or actions under separate theories of strict liability. *See* RESTATEMENT (SECOND) OF TORTS § 402B (1965).
15. 551 N.E.2d 1139 (Ind. 1990).
16. *Id.* at 1140.
17. *Id.*
18. *Id.*
19. 391 F.2d 495 (8th Cir. 1968).
20. *Id.* at 502.

not only a foreseeable but also an inevitable result of vehicle usage.[21] In light of this product environment, the *Larsen* court reasoned that the manufacturer would be liable for the portion of the plaintiff's injury over and above the injury that probably would have resulted absent the design defect.[22]

After adopting the crashworthiness doctrine, the *Miller* court discussed the issue of the open and obvious danger rule. Referring to its prior decision in *Koske*, the *Miller* court held that the open and obvious danger rule did not bar the plaintiff's recovery in strict-liability actions based on the Indiana Products Liability Act.[23] Next, the *Miller* court examined the plaintiff's negligence allegations, and held that because the Products Liability Act only preempted the field of strict liability, the Indiana common law expressed in *Bemis* still operated in product negligence actions.[24] According to *Miller*, products liability actions premised on a negligence theory were subject to the Indiana doctrine of open and obvious danger; thus, the grant of summary judgment for the defendant motorcycle manufacturer was appropriate as to the negligence theory.[25]

III. A Dilemma in the Making: Retention of the Open and Obvious Danger Rule in Products Negligence Cases

The *Koske* and *Miller* decisions appear to be logical and progressive; however, the retention of the open and obvious danger rule in products-negligence actions creates a theoretical dilemma. This dilemma is revealed in the 1985 Indiana Supreme Court decision of *Bridgewater v. Economy Engineering Co.*[26] In *Bridgewater*, the court declared that the open and obvious danger rule was only applicable to products liability cases and *not* to other types of negligence cases.[27] *Bridgewater* created an anomalous situation by affording victims of product-related injuries less protection than victims of nonproduct-related injuries.[28] This anomaly was not explored in *Bridgewater*, and would have disappeared if the open and obvious danger rule was eliminated entirely in all actions. However, *Miller* reaffirmed the application of the rule in products-negligence actions. Thus, the question remains: Why should victims injured by neg-

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21. *Id.*
22. *Id.* at 503.
23. 551 N.E.2d 1139, 1143 (Ind. 1990).
24. *Id.*
25. *Id.*
26. 486 N.E.2d 484 (Ind. 1985).
27. *Id.* at 489.
28. The open and obvious danger rule is a serious bar to a plaintiff's action; its application provides much less "protection" (*i.e.*, would bar recovery).

ligently made products receive less protection than victims of other types of negligence? The practical answer is that a victim injured by a defective product should ground his action on strict liability. However, this practical solution begs the question. The answer to the dilemma is found only by exploring the historical basis for products liability and the open and obvious danger rule.

IV. The Background of the Dilemma: The Development of Negligence and Strict Liability in America

Generally, fault or negligence dominates liability for personal injury and property damage.[29] However, this was not always the case. Negligence as a moral, social, and legal concept only has been the predominant rule for the last two hundred years.[30] Prior to that time, many legal scholars believed that the legal community, as well as society as a whole, followed principles more akin to strict liability.[31] In other words, a tortfeasor was responsible for the resulting damages, irrespective of fault.

During the industrial revolution, fault or negligence law took root and grew as a prevailing theory of liability.[32] At that time, society firmly believed that the newly emerging industries deserved protection to promote growth. The belief was that industries would thrive if they were not burdened with all the losses that they actually caused. Fault or negligence principles perfectly served this social program.[33] Under fault or negligence principles, a defendant is not responsible for all of the damages he causes. Instead, the defendant is only responsible for damages and injuries that his unreasonable conduct causes; the defendant is not liable for reasonable conduct. In theory, a defendant wrongdoer can cause almost any type of harm and escape liability if the cost of such injury is less than the cost of preventing the injury. "There is essential truth, if dramatic oversimplification, in saying that the law of negligence privileges actors to kill or maim people carefully."[34] Thus, fault concepts allowed the defendant to cause any type of harm as long as the defendant acted reasonably. Emerging industries and enterprises flourished under the protective cover of negligence principles. Fault concepts coincided not only with the social desires of the industrial revolution, but also with

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29. *See* 3 F. Harper, F. James & O. Gray, The Law of Torts § 12.18 (2d ed. 1986) [hereinafter 3 Harper, James & Gray].
30. *Id.* § 12.3.
31. *Id.* §§ 12.2, 14.1.
32. *Id.* § 12.3.
33. *Id.*
34. *Id.* § 16.9.

the ninteenth century individualism underlying the laissez faire political philosophy.[35]

As negligence grew to dominate civil liability, strict liability continued to play a role in limited areas. The strict liability rule of *Rylands v. Fletcher*[36] spread from England to America.[37] Strict liability also was applied in other areas such as blasting operations, trespassing animals, keeping of dangerous animals, nuisance, misrepresentation, escape of fire, poisons, insecticides, herbicides, and operation of aircraft.[38]

By the middle of the twentieth century, societal attitudes began to change about the need to protect industrial enterprises by negligence principles.[39] Along with this change in attitude came the recognition that negligence principles were affording insufficient protection to the consuming public for product-related injuries. As a result of this shift in the social climate, strict liability for all product injuries was planted in the early 1960s by *Greenman v. Yuba Power Products, Inc.*[40] and later rooted by the American Law Institute's adoption of section 402A of the Restatement (Second) of Torts.[41] Strict liability soon spread throughout the United States to become the dominant theory of recovery for product-related injuries.[42]

Strict liability, in the field of products law, is based upon one clear and overriding policy — affording greater protection to the injured consumer than that afforded by negligence law. The same change in social attitude that gave rise to strict liability also provided the impetus for expansion of negligence liability.[43] Negligence liability exposure increased as concepts of duty and foreseeability[44] were broadened, privity was eliminated,[45] res ipsa loquitur was extended,[46] and the patent danger rule (open and obvious danger rule) was eliminated.[47] The change in

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35. *Id.* § 12.3.

36. 159 Eng. Rep. 737 (1865), L.R. 1 Ex. 265 (1866), L.R. 3 H.L. 330 (1868).

37. 3 HARPER, JAMES & GRAY, *supra* note 29, § 14.4.

38. *Id.* § 14.1.

39. *See* Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965); 3 HARPER, JAMES & GRAY, *supra* note 29, § 28.27.

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

41. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

42. W. KEETON, PROSSER AND KEETON ON TORTS § 99, at 694 (5th ed. 1984) [hereinafter PROSSER & KEETON].

43. 3 HARPER, JAMES & GRAY, *supra* note 29, § 16.5.

44. *Id.* at n.63.

45. *See* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

46. *See* W. PROSSER, THE LAW OF TORTS § 39 (4th ed. 1971) [hereinafter PROSSER].

47. Micallef v. Miehle Co., Division of Michle-Goss Dexter, Inc., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

both warranty and negligence towards greater protection for the injured victim was so great by the early 1960s that the drafters of section 402A considered the adoption of strict liability to represent "only a small step, if any, beyond the state of the law that had been reached or was predictably about to be reached."[48]

V. The Origin of the Dilemma: The History of Indiana's Open and Obvious Danger Rule

The history of the open and obvious danger rule is not difficult to trace. The rule is intertwined with ninteenth century negligence concepts concerning the liability of makers of chattels and privity. The privity concept, as it historically related to negligence actions, resulted from an erroneous interpretation of the infamous 1842 English case of *Winterbottom v. Wright*.[49] *Winterbottom* held that a passenger, who was not in privity with the defendant manufacturer, could not maintain a contract action against the defendant for injuries caused by the collapse of a mailcoach. Courts interpreted certain dicta in Winterbottom also to mean that there could be no action in tort without privity. This erroneous interpretation of *Winterbottom* dicta created the broad rule that a seller of defective goods was not liable to anyone but those in privity with him.[50] This "fishbone in the throat of the law,"[51] grounded upon misinterpretation, was noted in a famous law review article in 1905;[52] however, by that time the rule of privity was rooted deeply in the field of negligence law involving the sale of products.[53]

Courts gradually began to recognize exceptions to the privity rule. By 1903, these exceptions were ably expressed in *Huset v. J.I. Case Threshing Machine Co.*[54] One of the exceptions identified in *Huset* was the manufacturer's failure to reveal concealed defects.[55] This exception

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48. 3 Harper, James & Gray, *supra* note 29, § 28.27.

49. 152 Eng. Rep. 402 (1842). *See* Prosser, *supra* note 46, § 93.

50. Prosser, *supra* note 46, § 93.

51. *Id.* § 96.

52. Bohlen, *The Basis of Affirmative Obligations in The Law of Torts*, 44 Am. L. Reg. 209 (1905).

53. Prosser, *supra* note 46, § 96.

54. 120 F. 865 (8th Cir. 1903).

55. There were at least three categories of exceptions to privity under *Huset*. The first concerned products that were considered "imminently dangerous." The second applied when the product or chattel was equated or related to the real property on which it was used, based upon Heaven v. Pender, 11 Q.B.D. 503 (C.A. 1883). The third involved the failure to disclose a known defect as a kind of fraud, which was based on Langridge v. Levy, 2 M. & W. 519, 150 Eng. Rep. 863 (1836), *aff'd*, 4 M. & W. 337, 150 Eng. Rep. 1458 (1838). *See* C. Gregory & H. Kalven, Cases and Materials on Torts 300-01 (2d ed. 1969) [hereinafter Gregory & Kalven].

to the privity rule was based on concepts of fraud or deceit espoused in an 1837 English case[56] that predated *Winterbottom*. Thus, misrepresentation, deceit, or fraud — theories completely outside the field of negligence law — provided both a basis for liability and an exception to the privity rule.[57] By 1916, the renowned case of *MacPherson v. Buick Motor Co.*[58] eliminated the privity requirement in negligence actions, and the case received immediate acceptance in the legal community.

Indiana law can be evaluated against this historical background. The Indiana and Mississippi Supreme Courts ran a tight race to win the distinction of becoming the last state in the country to adopt the *MacPherson* rule.[59] Indiana's legal apathy received the following, well-deserved bashing:

> Indiana may be the last state to accept *MacPherson v. Buick Motor Co.* as a controlling precedent — and even then with an assist from the Wisconsin Supreme Court. *See Wojciuk v. United States Rubber Co.*, 13 Wis. 2d 173, 108 N.W.2d 149 (1961), where the Wisconsin court applied what it assumed to be the Indiana law, the accident having occurred in that state, although the last time the Indiana Supreme Court had spoken on the matter was to reject the *MacPherson* rule in 1919.[60]

After almost half a century of foot dragging, the Indiana Supreme Court adopted the *MacPherson* rule in *J.I. Case Co. v. Sandefur*.[61] It is ironic that the same case which finally weeded the privity rule from the field of negligence law also served as the root of the open and obvious danger rule in Indiana. Prior to *Sandefur*, the legal community was unsure whether the archaic exceptions delineated in *Huset* were still applicable.[62] Thus, when the plaintiff in *Sandefur* alleged wrongdoings on the part of the defendant, the allegations and proofs were clouded

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56. Langridge v. Levy, 2 M. & W. 519, 150 Eng. Rep. 863 (1836), *aff'd*, 4 M. & W. 337, 150 Eng. Rep. 1458 (1838).

57. 3 HARPER, JAMES & GRAY, *supra* note 29, § 28.5.

58. 217 N.Y. 382, 111 N.E. 1050 (1916).

59. *See* PROSSER, *supra* note 46, § 96, at 643 n.23, in which Mississippi is cited as probably the last to accept *MacPherson* in 1966; however, GREGORY & KALVEN, *supra* note 55, at 307, thought Indiana might be the last.

60. GREGORY & KALVEN, *supra* note 55, at 307 n.3.

61. 245 Ind. 213, 197 N.E.2d 519 (1964).

62. This is evident because Indiana had not eliminated privity in negligence actions through the adoption of *MacPherson*. *See supra* notes 59-60. *Sandefur* noted that although several lower courts had confronted the privity issue, the Indiana Supreme Court "has never directly approved the principle in the *MacPherson* case . . . ." 245 Ind. 213, 220, 197 N.E.2d 519, 522 (1964). The *Sandefur* court then discussed the *Huset* case as the applicable law absent an adoption of *MacPherson*. *Id.* at 221, 197 N.E.2d at 522.

with the language of 127-year-old English law premised on concepts outside negligence.[63]

The *Sandefur* court's references to the concept of open and obvious danger can be interpreted in at least two ways. First, the *Sandefur* court's reference to open and obvious danger can be interpreted as mere make-weight or historical reference to a long-discredited rule that held sway in a pre-*MacPherson* era. This interpretation can be justified because the court cites *Huset* as an historical marker predating *MacPherson*.[64] In addition, when discussing the adoption of *MacPherson*, the *Sandefur* court noted that changing public policy was a major influence on the common law's elimination of the privity barrier.[65] Immediately following such comments, the *Sandefur* court added that the elimination of privity does not lead to the requirement that product manufacturers make accident-proof products and that the manufacturer has a duty to avoid hidden or concealed dangers.[66] This language, considering the time period, may not necessarily impose an absolute requirement that a product contain a latent defect or that liability be based solely on a latent defect. The *Sandefur* court again discussed the hidden defect concept when considering the facts of the case.[67] Thus, *Sandefur* arguably adopted a

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63. *See* GREGORY & KALVEN, *supra* note 55.

64. *See id.*

65. "As stated by the leading authorities, public policy has compelled this gradual change in the common law because of the industrial age where there is no longer the usual privity of contract between the user and the maker of a manufactured machine." *Sandefur*, 245 Ind. 213, 222, 197 N.E.2d 519, 523.

66. "On the other hand, there must be reasonable freedom and protection for the manufacturer. He is not an insurer against accident and is not obligated to produce only accident-proof machines. The emphasis is on the duty to avoid hidden defects or concealed dangers." *Id.* (citing Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950)).

67. The *Sandefur* court described the plaintiff's injury as resulting from an alleged defect in the wooden cover over an auger on a combine. *Id.* at 218, 197 N.E.2d at 521. The spacing between a "safety catch" and the auger cover was alleged to have been beyond the tolerances of "good mechanical construction." *Id.* Such inappropriate spacing allowed the auger cover to "slip" into the operating area of the auger. *Id.* The plaintiff stood on the auger cover when it collapsed. *Id.* The *Sandefur* court's comments regarding the alleged defect were:

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

new rule that eliminated the privity requirement, discussed the adoption with reference to the old rule, and finally analyzed the facts of the case as they were presented and tried. Under this interpretation, the open and obvious danger language is mere dicta which can be ignored.

On the other hand, the *Sandefur* court's reference to open and obvious danger could be considered important enough that it forms the basis of negligence law applicable to the sale of products. If so viewed, *Sandefur* reveals only two possible sources for such rule: *Huset* and the 1950 New York decision of *Campo v. Scofield*.[68]

Campo involved an injury caused by the exposed [open and obvious] rollers of a carrot topping machine. The *Campo* court held that the manufacturer had "no duty to guard against injury from a patent peril or from a source manifestly dangerous."[69] The *Campo* rule of nonliability for patent dangers came under scathing attack in 1956 by Professors Harper and James in their prestigious treatise on torts.[70] Harper and James noted that the *Campo* rule was actually based upon *Huset*.[71] Harper and James discussed when the danger was open and obvious or when the consumer had received adequate disclosure of the danger:

> [U]nder negligence principles the question would still remain whether unreasonable hazard is to be anticipated from the use of the article even though its dangerous condition is manifest. In an earlier day the test of ordinary care was applied only to the manufacturer of "inherently dangerous" articles, and these were narrowly defined as including only such things as food, drink, poisons and explosives. Against the dangers of machinery, the maker owed no duty of care, but only the duty to disclose latent perils known to him. "[T]he action against [him] . . .

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danger to a user?

The trial court made a special finding in which it stated that plaintiff stepped on the cover on top of the auger and it gave way, permitting plaintiff's foot to get entangled in the auger, thus causing his injury. The court found that the lid failed to rest upon a brace or safety clip designed to support it; that it was a hidden defect not normally observable; that the defendant company failed to use lumber of the proper type and strength to hold the screws for the hinges; that the company failed to use the proper size screws, the size of which were hidden and were thus a latent danger; and that the injury of Sandefur was the proximate and direct result of negligence in the manufacture of the combine. The court did not make any finding that any contributory negligence existed.

Id. at 222-23, 197 N.E.2d at 523.

68. *See supra* notes 62 and 66.

69. Campo v. Scofield, 301 N.Y. 468, 472, 95 N.E.2d 802, 804 (1950).

70. *See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 28.5 (1956) [hereinafter 2 HARPER & JAMES].

71. *Id.* at n.5.

> proceed[ed] . . . and [was] founded on the fact, that in selling the article he practiced fraud and deceit in concealing the defects . . . ." In such a context "of course" when it appeared that the purchaser knew of the danger "the bottom drop[ped] out of the case against the maker . . . ." Today, however, the negligence principle has been widely accepted in products liability cases; and the bottom does not logically drop out of a negligence case against the maker when it is shown that the purchaser knew of the dangerous condition.[72]

The Harper and James treatise, condemning the open and obvious danger rule, was published before the *Sandefur* decision.[73] By 1964, it was clear that the rule itself was based on principles of deceit or fraud, principles that have absolutely no application to the rules of negligence.

After *Sandefur*, the Indiana Supreme Court did not render any substantial decision in the field of products liability law until 1981.[74] A notable exception to the court's inactivity was its adoption of strict liability in 1973;[75] however, an Indiana federal court anticipated such action eight years earlier.[76] The Indiana Supreme Court's inactivity in the field of products liability law may have been due to the vagaries of appellate practice and jurisdiction that afforded the court little opportunity to decide such issues.[77] Whatever the reason, this inactivity left the development of Indiana products liability law to the federal courts and the Indiana Court of Appeals.

During this same period, a revolution in American tort law was taking place; the courts were greatly expanding consumer rights in prod-

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72. *Id.* at 1542-43 (citations omitted).

73. 2 HARPER & JAMES was published in 1956. *See supra* note 70.

74. Ayr-Way Stores, Inc. v. Chitwood, 261 Ind. 86, 300 N.E.2d 335 (1973) (adopted strict liability with little discussion about any substantive matters). *See* Stapinski v. Walsh Constr. Co., 272 Ind. 6, 395 N.E.2d 1251 (1979) (vacated the court of appeals decision on the issue of an "as is" sale of a used vehicle by a nondealer owner); Nissen Trampoline Co. v. Terre Haute First Nat'l Bank, 265 Ind. 457, 358 N.E.2d 974 (1976) (vacated the court of appeals decision on procedural grounds). In 1981, the Indiana Supreme Court decided Shanks v. A.F.E. Indus., Inc., 275 Ind. 241, 416 N.E.2d 833 (1981), Dague v. Piper Aircraft Corp., 275 Ind. 520, 418 N.E.2d 207 (1981), and Bridges v. Kentucky Stone Co., Inc., 425 N.E.2d 125 (Ind. 1981) before deciding Bemis Co. v. Rubush, 427 N.E.2d 1058 (Ind. 1981). Thus, the year 1981 was a "watershed" year between *Sandefur* and any substantive decision relating to products liability cases.

75. Ayr-Way Stores, Inc. v. Chitwood, 261 Ind. 86, 300 N.E.2d 335 (1973).

76. Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965).

77. The Indiana Supreme Court would not have control over the litigating parties' decisions on jurisdictional matters, such as pursuing actions in federal court under diversity or deciding not to pursue actions beyond the Indiana Court of Appeals. Even the Indiana Supreme Court's denial of transfer cannot be considered a purposeful inactivity because the court could approve of either the result or the manner in which the result was reached.

ucts liability law[78] and the rights of the injured party in the general area of negligence law.[79] Indiana followed the general flow of expanded consumer rights in product actions: Indiana courts adopted strict liability in 1965;[80] the courts found that compliance with federal and industry standards were insufficient to set the standard for defectiveness,[81] that the lack of safety devices was a basis for defect, [82] that defective component parts were a basis for liability,[83] that proximate cause and foreseeability concepts should be expanded,[84] that bystander recovery was allowed,[85] and that assumption of risk (incurred risk) was properly defined.[86] These and many other liberalized concepts were integrated into Indiana's common law. However, during Indiana's expansion of consumer rights in products liability, the *Sandefur* language, containing its antiquated concepts of the pre-*MacPherson* open and obvious danger rule, clung to Indiana decisions like a parasite. Between 1964 and 1976, at least eight Indiana products liability decisions were infested with such language.[87]

In 1976, the New York Court of Appeals decided *Micallef v. Miehle Co., Division of Miehle-Goss Dexter, Inc.*[88] and rid itself of *Campo*. *Micallef's* rejection of the open and obvious danger rule followed the general trend toward expanding negligence concepts. *Micallef* recognized that the rule was "a vestigial carryover from pre-*MacPherson*" law requiring a finding of deceit to support recovery.[89] The *Micallef* court rejected the rule, stating that it amounts to assumption of risk as a

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78. *See* PROSSER & KEETON, *supra* note 42, § 99, at 694; 3 HARPER, JAMES & GRAY, *supra* note 29, § 28.1.

79. *See* 3 HARPER, JAMES & GRAY, *supra* note 29, § 16.5.

80. *See Greeno*, 237 F. Supp. 427.

81. *See, e.g.*, Gilbert v. Stone City Constr. Co., 171 Ind. App. 418, 357 N.E.2d 738 (1976); Dudley Sports Co. v. Schmitt, 151 Ind. App. 217, 279 N.E.2d 266 (1972).

82. *See Gilbert*, 357 N.E.2d at 744.

83. Noefes v. Robertshaw Controls Co., 409 F. Supp. 1376 (S.D. Ind. 1976).

84. *See* Lantis v. Astec Indus. Inc., 648 F.2d 1118 (7th Cir. 1981); Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977); Newton v. G.F. Goodman & Son, Inc., 519 F. Supp. 1301 (N.D. Ind. 1981); Sills v. Massey-Ferguson, Inc., 296 F. Supp. 776 (N.D. Ind. 1969); Dudley Sports Co. v. Schmitt, 279 N.E.2d 266 (Ind. Ct. App. 1972).

85. Sills v. Massey-Ferguson, Inc., 296 F. Supp. 776 (N.D. Ind. 1969); Chrysler Corp. v. Alumbaugh, 168 Ind. App. 363, 342 N.E.2d 908 (1976).

86. Kroger Co. v. Haun, 177 Ind. App. 403, 379 N.E.2d 1004 (1978).

87. For a comprehensive summary of these cases, see Vargo, *Products Liability, 1976 Survey of Recent Development in Indiana Law*, 10 IND. L. REV. 265, 380-81 n.61 [hereinafter Vargo, *1976 Products Liability Survey*]. *See also* Note, *Indiana's Obvious Danger Rule for Products Liability*, 12 IND. L. REV. 397 (1979).

88. 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

89. *Id.* at 384, 348 N.E.2d at 576, 384 N.Y.S.2d at 120. For a summary of *Micallef*'s reasoning see Vargo, *1976 Products Liability Survey*, *supra* note 87, at 281-82; 3 HARPER, JAMES & GRAY, *supra* note 29, § 28.5.

matter of law without proof of subjective appreciation.[90] Furthermore, the rule is inconsistent with negligence law because it eliminates the duty to develop a reasonably safe product by granting immunity for patent perils.[91] The *Micallef* court recognized that negligence law ought to discourage misdesign and defects rather than encourage them in an obvious form.[92]

With the overruling of *Campo*, Indiana decisions could have recognized the open and obvious danger rule as a dinosaur that survived past its day.[93] However, because the Indiana Supreme Court did not have the opportunity to address the *Sandefur* language, the rule lived on in the lower courts.

By 1981, a considerable array of cases and articles condemned the open and obvious danger rule,[94] and the Indiana Supreme Court had the opportunity to logically swat it aside. However, in *Bemis Co. v. Rubush*,[95] Justice Pivarnik decided not only that the open and obvious danger rule should survive to be applied in negligence, but also that it

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90. *Micallef*, 39 N.Y.2d at 384, 348 N.E.2d at 576, 384 N.Y.S.2d at 120.

91. *Id.* at 384, 348 N.E.2d at 576, 384 N.Y.S.2d at 120.

92. *Id.* at 384-85, 348 N.E.2d at 576-77, 384 N.Y.S.2d at 120-21 (citing Palmer v. Massey-Ferguson, Inc., 3 Wash. App. 508, 476 P.2d 713, 719 (1970)).

93. *See* Vargo, *1976 Products Liability Survey*, *supra* note 87, at 282.

94. A partial list of the cases and articles include: Mitchell v. Ford Motor Co., 533 F.2d 19 (1st Cir.), *cert. denied*, 429 U.S. 871 (1976); Davis v. Fox River Tractor Co., 518 F.2d 481 (10th Cir. 1975); Krugh v. Miehle Co., 503 F.2d 121 (6th Cir. 1974); Ford v. Harnischfeger Corp., 365 F. Supp. 602 (E.D. Pa. 1973); Dorsey v. Yoder Co., 331 F. Supp. 753 (E.D. Pa. 1971), *aff'd*, 474 F.2d 1339 (3rd Cir. 1973); Beloit Corp. v. Harrell, 339 So. 2d 992 (Ala. 1976); Butaud v. Suburban Marine & Sporting Goods, Inc., 543 P.2d 209 (Alaska 1975), *modified*, 555 P.2d 42 (Alaska 1976); Byrns v. Riddell, Inc., 113 Ariz. 264, 550 P.2d 1065 (1976); Lugue v. McLean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972); Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970); Farmhand, Inc. v. Brandies, 327 So. 2d 76 (Fla. Ct. App. 1976); Olson v. A.W. Chesterton Co., 256 N.W.2d 530 (N.D. 1977); Rourke v. Garza, 530 S.W.2d 794 (Tex. 1975); Brown v. Quick Mix Co., 75 Wash. 2d 833, 454 P.2d 205 (1969); James, *Products Liability*, 34 TEX. L. REV. 44, 51 (1955); Keeton, *Products Liability—Inadequacy of Information*, 48 TEX. L. REV. 398, 400 (1979); Leibman, *Foreword, Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 1 (1981); Marschall, *An Obvious Wrong Does Not Make a Right; Manufacturers' Liability for Patently Dangerous Products*, 48 N.Y.U. L. REV. 1065 (1973); Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 836-41 (1962); Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297, 307-310 (1977); Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Era*, 60 IOWA L. REV. 1, 13-14 (1974); Vargo, *1976 Products Liability Survey*, *supra* note 87; Vargo, *Symposium, Products Liability in Indiana: In Search of a Standard for Strict Liability in Tort*, 10 IND. L. REV. 871, 884-88 (1977); Note, *Indiana's Obvious Danger Rule for Products Liability*, 12 IND. L. REV. 397 (1979).

95. 427 N.E.2d 1058 (Ind. 1981).

should be applied in strict liability actions. To make matters worse, the Indiana Supreme Court interpreted *Bemis* to mean that a product was not defective or unreasonably dangerous if it objectively presented an open and obvious danger.[96] Thus, the Indiana Supreme Court adopted a 127-year-old rule based upon deceit or fraud and injected it into both negligence and strict liability actions.

VI. The Resolution of the Dilemma: What Direction Will Indiana Take in Products Liability Law?

An in-depth examination of the foundation of the open and obvious danger rule leads to the overwhelming conclusion that no justification exists for providing less protection to victims of products-related negligence than is provided to victims of nonproducts negligence. However, the resolution of this dilemma reveals an even greater one. The greater dilemma is created by a dichotomy in the conceptual approaches Indiana can take in tort law.

One approach recognizes the implementation of ninteenth century protectionism limiting defendants' liability for the injuries they cause while the other approach recognizes greater consumer protectionism by expanding liability. The resolution of the minor, theoretical dilemma by elimination of the open and obvious danger rule will not, by itself, resolve the larger dilemma posed by the dichotomy in such disparate legal approaches unless the basic foundations of both negligence and strict liability are explored.

The rationale of the open and obvious danger rule threatens to rise like a phoenix from the ashes of *Bemis* to hover over the future interpretation of products liability law in Indiana. In his dissenting opinion in *Miller*,[97] Justice Given stated, "[T]here is in fact no such thing as strict liability in products cases."[98] Justice Givan argued, "[I]f we were dealing with strict-liability, the manufacturer would be held liable for placing his product in the stream of commerce absent any type of negligence . . . and to do so would place an unconscionable burden upon the manufacturers of various products."[99] In relation to the issue of products that lack safety devices, Justice Givan further argued that "there is no practical end to the myriad of improvements or additions that might be made to any given product to make it a safer product."[100]

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96. An excellent summary of the various interpretations given to the open and obvious danger rule under *Bemis*, *id.*, is provided in *Koske*, 551 N.E.2d 437, 441 (Ind. 1990).

97. 551 N.E.2d 1139, 1144-45 (Ind. 1990) (Givan, J., dissenting).

98. *Id.* at 1145 (Givan, J., dissenting).

99. *Id.* (Givan, J., dissenting).

100. *Id.* (Givan, J., dissenting).

Now that the *Koske* decision has determined that the Indiana Products Liability Act preempts all common law pertaining to strict liability, the Indiana Supreme Court will be presented with the opportunity to interpret the statute and determine whether Justice Givan's views will prevail or whether the statute is intended to preclude such legal concepts. New dilemmas may be avoided by exploring some of the issues and problems certain to confront the court.

VII. Assorted Problems Faced by Indiana Concerning Its Choice of Direction in Products Liability

A. The Standard for Strict Liability: The Definition of "Defective Condition Unreasonably Dangerous"

The 1983 amendments to the 1978 Indiana Products Liability Act will control all new developments of products liability in Indiana. The Act is patterned after section 402A of the Restatement (Second) of Torts, with some minor language differences.[101] The language of section 3 of

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101. The *Koske* court recognized that the language of the 1978 Indiana Products Liability Act was taken almost verbatim from Restatement § 402A. *Id.* at 442. The 1983 amendments, which made some changes, are still based upon § 402A.

The Restatement (Second) of Torts, § 402A states:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
  (a) the seller is engaged in the business of selling such a product, and
  (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although
  (a) the seller has exercised all possible care in the preparation and sale of his product, and
  (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

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

Similarly, Ind. Code § 33-1-1.5-3 states:

Section 3. (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 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

(2) the product is expected to and does reach the user or consumer without substantial 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 reasonable care in the preparation, packaging,

the Products Liability Act is almost identical to the section 402A "black letter rule" for strict liability, and any language differences between section 3 and section 402A do not appear to affect the implementation of strict liability.[102] Section 3 uses the words "defective condition unreasonably dangerous," which are identical to section 402A.[103] Thus, Indiana's statutory standard for strict liability expressed as "defective condition unreasonably dangerous" could appropriately be analyzed by both the "history" of section 402A and its later interpretation by numerous courts.

1. The American Law Institute and The Restatement (Second) of Torts.—Restatement section 402A states that strict liability results from harm caused by a product sold "in a defective condition unreasonably dangerous."[104] Before embarking on any explanation of this language, it is imperative that any approach to section 402A itself is not one of "legislative interpretation." Section 402A must be understood for what it is — an historical guide for strict liability which was never intended to freeze the common law progress of strict liability.[105] Its black letter rules and comments must be understood against the background of the early 1960s when strict liability for all products was in its infancy. It is, by no means, the final determinate of the desirable development of common law then or now.[106] Section 402A's emphasis on "defect" and "unreasonable danger" reveals its schizophrenic nature with roots in both contract (warranty) and tort (negligence) law.[107] Although some of

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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.

IND. CODE § 33-1-1.5-3 (1988).

102. Although § 3 contains some "negligence" language, it does not appear this will affect the application of strict liability principles. *See* Vargo, *Products Liability, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 255, 278-79 (1984) [hereinafter Vargo, *1983 Survey of Products Liability*].

103. § 402A, *supra* note 101.

104. *Id.*

105. Whenever § 402A is reviewed to determine meaning from its development, authors indicate that it is not to be interpreted like a statute. *See, e.g.*, Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. REV. 803, 812 (1976) (a review of § 402A in relation to its meaning for application to South Carolina's Products Liability Statute uses quotations around the word legislative when referring to the "legislative" history of § 402A). The appropriate method or approach to an examination of § 402A is described by Professor Oscar Gray. *See* 5 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 28.32A (2d ed. 1986) [hereinafter 5 HARPER, JAMES & GRAY].

106. Montgomery & Owen, *supra* note 105, at 812.

107. *Id.*

the section 402A comments are helpful, others are not or are at best confusing mainly because the section was originally based upon cases dealing with foodstuffs.[108] Professor Gray provides the following succinct evaluation of the problems created by the historical backdrop of section 402A:

> Whether the emphasis is on "defect" or on the unreasonableness of the danger, two criteria that derive respectively from negligence and warranty law can affect liability: unreasonableness of the risk (assuming knowledge of the risk by the maker), and unmerchantability (assuming knowledge of the risk by the buyer). For these criteria, however, certain surrogate concepts are frequently substituted. This is usually done without sufficient recognition that they are merely surrogates for broader notions that have well-established histories and connotations of their own. Instead the surrogates are discussed as if they were the ultimate tests themselves, limited to the terms in which they have been expressed for convenience. For "negligence" there is often substituted "risk-utility" comparison. For "unmerchantability" there is often substituted a "consumer expectations" test. Each can be useful; and each can lead to unnecessary confusion if addressed literally and out of context from its historic source.[109]

2. The Drafting of Restatement Section 402A.—In the late 1950s, section 402A was in a preliminary draft stage and was intended to be applied only to certain types of food cases.[110] Strict liability was based upon food that was "in a condition dangerous to the consumer."[111] Dean Prosser, the reporter for the Restatement, later submitted to the council revised language that used the term "unreasonably dangerous."[112] The term "defective condition" was added because of the council's concern that courts would hold sellers of cigarettes, whiskey, and powerful drugs liable for harm resulting from the consumers' excessive use.[113] The

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108. *Id. See also* Fischer, *Products Liability—The Meaning of Defect*, 39 Mo. L. Rev. 339 (1974); Schwartz, *Foreward: Understanding Products Liability*, 67 Cal. L. Rev. 435 (1979); Vargo, *1987 Southern Methodist University Products Liability Institute: Discovery, Evidence and Tactics in the Trial of a Products Liability Law Suit Ch. 10, Unavoidably Unsafe Products Under Comment k—Beyond Drugs* (Matthew Bender 1987); Wade, *On the Nature of Strict Torts Liability for Products*, 44 Miss. L.J. 825 (1973).

109. 5 Harper, James & Gray, *supra* note 105, § 28.32A.

110. *See supra* notes 105, 108.

111. Wade, *supra* note 108, at 830-31.

112. *Id.*

113. *Id.*

final phrase "defective condition unreasonably dangerous" was adopted; however, the term "defective condition" was highly criticized as a possible source of confusion, especially in design and warning cases.[114] The critics noted that the "defective condition" language could connote the requirement that a product be physically flawed, which in design and warning cases was not the intent of the language.[115]

During the floor debates, several members recognized that the expression "unreasonably dangerous" was sufficient, and the reporter, Dean Prosser, explained that he was indifferent to whether the "defective" language should remain.[116] The Institute's members, tiring of the debate, decided to leave the defective language in the phrase.[117] In its final form, "defective condition" was defined in the comments in terms of being "unreasonably dangerous." The two terms came close to being considered synonymous because each explained the meaning of the other.[118] After section 402A was broadened to apply to all types of products, no reference was made to the "defective condition unreasonably dangerous" language.[119] Thus, the history of section 402A and its comments reveal that it was originally premised solely on food-related cases, and the drafters had little concern for whether the key phrase "defective condition unreasonably dangerous" would cause future difficulties when the theory was applied to all products.[120]

The American Law Institute, in guiding the evolution of strict liability, relied upon related concepts that developed in other areas of tort law, such as warranty and negligence.[121] In warranty law, strict liability was originally based on tort; however, by the late 1700s, breach of warranty began to develop a contract basis[122] that gradually grew to become highly developed in the law of sales (as expressed by the Uniform Sales Act and later the Uniform Commercial Code).[123] However, certain warranty actions never entirely lost their tort character, and strict liability was sometimes found regardless of any finding of agreement, misrepresentation, negligence, or privity.[124] Thus, warranty was a "curious hybrid born of the illicit intercourse of tort and contract, unique in the

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114. Montgomery & Owen, *supra* note 105, at 819-23.
115. *Id.* at 819-20 n.54.
116. *Id.*
117. *Id.*
118. *See* 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A, at 574-75 nn. 6-7; Wade, *supra* note 108, at 830-31.
119. Montgomery & Owen, *supra* note 105, at 812.
120. *Id.*
121. *See supra* note 108.
122. *Id. See also* PROSSER & KEETON, *supra* note 42, § 99, at 634-37.
123. PROSSER & KEETON, *supra* note 42, § 99, at 634-37.
124. *Id.*

law."[125] The drafters of section 402A resorted to the language of warranty cases to provide, at least by analogy, an expression of their ideas of the nature of strict liability. Such references to warranty related to warranty's original tort basis, a warranty devoid of the contract theories of reliance, privity, specific promises, or agreements.[126]

In searching for an expression of strict liability, the drafters' use of the term "unreasonably dangerous" had overtones of negligence.[127] However, the drafters did not intend for negligence to be the foundation of section 402A liability; instead, the language "unreasonably dangerous" was the best expression available to them to indicate the tort or negligence heritage of strict liability.[128] Thus, the negligence methodology of weighing numerous factors for determining liability had its place in strict liability. The drafters also recognized that the words "unreasonably dangerous" could suggest that the product must be "ultrahazardous" or "abnormally dangerous," which in turn would give the impression that the plaintiff would be required to prove that the product was unusually or extremely dangerous.[129] However, this was not the intent of the drafters of section 402A.[130]

Historically, the drafters of section 402A and its comments used familiar terms related to the field of contracts (warranty) and negligence both to express and to justify strict liability for all products.[131] A literal interpretation of the warranty and negligence language could lead to the undesired result of implementation of either contract or negligence law instead of "strict liability," a result neither intended nor desired by the drafters of section 402A.[132] The warranty and negligence language of section 402A was not the only possible source of confusion. Some confusion also resulted from the drafters' focus. Although they recognized that strict liability could be based upon design and warning issues, the drafters focused primarily on problems presented by manufacturing defects.[133]

3. The Problems with the Consumer Expectation Test.—The end result of section 402A and its comments was an excellent expression of strict liability if application was limited to a manufacturing defect in a food-related case. For example, if a manufacturer of baked beans sold

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125. *Id.* at 634.
126. *Id.* at 634-37.
127. *Id.*
128. *Id.*
129. *See* Wade, *supra* note 108, at 832-33.
130. *Id.*
131. *See supra* note 108.
132. *Id.*
133. *Id. See also* 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A, at 577-78.

a can of beans containing bean shaped rocks, the consumer is not likely to discover the rocks because they would look like beans and would be covered with "gravy." If the consumer bit down on a rock and fractured a tooth, the consumer would have the classic type of injury caused by deleterious food. Under a negligence theory, the seller-manufacturer would probably escape liability because the seller would likely claim that the seller did not know or should not have known that the rocks were in the can of beans. In addition, it would be impossible for the seller to discover the rocks because the very process of attempting to find and eliminate the rocks would destroy the product. Furthermore, any attempt to eliminate bean-shaped rocks from the product would be too costly and would outweigh the risks under the economic analysis of the Learned Hand calculus of negligence.[134] Even the doctrine of res ipsa loquitur would seem to be of little assistance to the plaintiff in the baked bean example;[135] thus, the injured victim in this scenario would

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134. One can easily imagine the futility of sorting through beans to discover bean-shaped rocks; any attempt would surely violate the "burden of precaution" portion of the Learned Hand calculus.

135. Traditionally, the following conditions are necessary before res ipsa loquitur will be applied:

(1) The accident must be one that ordinarily would not occur in the absence of negligence, or, as it is sometimes put, the instrumentality causing injury must be such that no injury would ordinarily result from its use unless there was negligent construction, inspection or use; (2) both inspection and use must have been at the time of the injury in defendant's control; (3) the injurious occurrence or condition must have happened irrespective of any voluntary action on plaintiff's part. *See* PROSSER, *supra* note 46, § 39.

Whether res ipsa would apply to injuries resulting from bean-shaped rocks in the baked bean example depends on how a court views res ipsa loquitur. If a court examines the incident with an "immature" or narrow view towards negligence law, then res ipsa loquitur is absolutely no assistance to the plaintiff. *See* Schwartz, *supra* note 108, at 455 (examination of the differences between a "mature" and "immature" system). Under an "immature" approach, the first element may not be satisfied because the process of how the bean-shaped rocks entered the baked beans may not necessarily be a genre of negligence on the part of the manufacturer. If a court takes the narrow view on the second element and requires that the injuring agency or instrumentality [product] must be in the possession or control of the defendant at the time of the accident, then res ipsa loquitur would not apply to the baked bean example because the plaintiff has control of the baked beans when the accident occurs.

For a long time, Indiana decisions took this narrow view. In Evansville Am. Legion Home Ass'n v. White, 154 N.E.2d 109 (Ind. 1959), the Indiana Supreme Court refused to apply res ipsa loquitur when the plaintiff was injured when she sat on a defective chair that collapsed. One of the reasons the *White* court denied plaintiff's recovery was because she had control of the chair at the time it collapsed. *Id.* at 110. The court's reasoning in *White* did not reflect the more "advanced" view of res ipsa loquitur that considers the control element at the time the plaintiff indicates the negligence took place (time of manufacture); *e.g.*, Escola v. Coca Cola Bottling Co. of Fresco, 24 Cal. 2d 453,

be uncompensated. However, strict liability would afford a remedy. All but the most stone hearted would have to admit that baked beans containing rocks resulted in a defective product. Under the "consumer expectation test" of comment i,[136] the defect (rock) is not contemplated by the ordinary consumer, and the plaintiff can recover. Note that the rule of strict liability allows recovery from the seller of the defective baked beans even though the seller could not, at any cost, eliminate the defect, and even though the defect was unknown or unknowable.

The application of strict liability, however, becomes much more difficult when the case involves the design of more complicated products.

455, 150 P.2d 436, 438 (1944).

Dean Prosser commented that when the control element has been literally applied it has led to "ridiculous conclusions, requiring that the defendant be in possession at the time of plaintiff's injury — as in the . . . case denying recovery where a customer in a store sat down in a chair, which collapsed." PROSSER, *supra* note 46, § 39.

Despite such a recognized narrow approach, the reasoning in *White* was followed until very recently. *See* S.C.M. Corp. v. Letterer, 448 N.E.2d 686 (Ind. Ct. App. 1983); Bituminous Fire & Marine Ins. Co., v. Culligan Fyrprotexion, Inc., 437 N.E.2d 1360 (Ind. Ct. App. 1982); *see also* Vargo, *Torts, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 341, 372-74 (1984). Finally, in 1985 a more mature approach to the control element was taken by the Indiana Court of Appeals in Shull v. B.F. Goodrich Co., 477 N.E.2d 924 (Ind. Ct. App. 1985). However, the *Shull* court struggled around former supreme court precedent, and it is not certain that the Indiana Supreme Court will follow the reasoning in *Shull*.

In some instances, courts will follow a rather "immature" or retrogressive approach to res ipsa loquitur by requiring a fourth element — the evidence of the true explanation of the accident must be more accessible to the defendant than to the plaintiff. PROSSER, *supra* note 46, § 39, at 244. If this fourth element, unequal accessibility or knowledge, is applied to the baked bean hypothetical, res ipsa loquitur appears inapplicable because the defendant may not know what happened. However, the fourth element is generally considered, at best, unimportant and should not be considered a factor in res ipsa loquitur cases. *Id.* at 254-55. Again, Indiana relies heavily on the equal knowledge-accessibility doctrine. *See White*, 154 N.E.2d at 111, which carries over into both the duty element of negligence and the affirmative defense of contributory negligence. *See, e.g.*, City of Alexandria v. Allen, 552 N.E.2d 488 (Ind. Ct. App. 1990).

Justice Givan's reasoning that strict liability, as defined by the courts and the Indiana legislature in the Products Liability Act, is nothing more than the application of res ipsa loquitur does not appear to withstand close examination. Even assuming the Indiana Supreme Court took an expansive or mature view of res ipsa loquitur's elements, such a view does not result in strict liability in many instances. *See* Schwartz, *supra* note 108, at 459-60.

136. RESTATEMENT (SECOND) OF TORTS, comment i, states:

> Unreasonably dangerous. The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer . . . . The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics . . . ."

§ 402A, *supra* note 101.

If the defect is open and obvious (as was the lack of leg protection in *Miller*, or as a fan without a protecting grating), the "consumer expectation test" becomes unreliable or awkward.[137] Under such circumstances, the danger or defect is within the contemplation of the user who has no expectation of, or reliance on, the product's safety. In other words, patent dangers do not frustrate the consumers' expectations of safety.[138] If the "consumer expectation test" is literally applied, liability will be denied even when the seller could easily supply a less dangerous product at a reasonable cost.[139] The "consumer expectation test," as a measure of the phrase "defective condition unreasonably dangerous," also creates problems with situations involving bystander injury.[140] A bystander may well be the most "innocent" of injured parties who deserves the maximum protection of the law. However, to suggest that a nonuser bystander has any expectations concerning a product is stretching the term to its breaking point.[141]

Many courts overcome the shortcomings of the "consumer expectation test" by resorting to alternative grounds for finding liability.[142] In the patent danger or bystander situations, the obvious method is to focus on the ease of alternative designs or guards that would protect the consumer or bystander from the danger posed by the product. If an alternative design or guard is inexpensive and the utility of the product is not severely impaired by such, the plaintiff is allowed to recover.[143] This approach, however, is nothing less than the negligence risk-utility balancing process.[144] If strict liability is to be retained, the risk-utility process must somehow differ from that used in negligence.

The drafters of Restatement section 402A were not completely unmindful of this competing nature between warranty and negligence as

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137. *See* Fischer, *supra* note 108, at 348-52; Schwartz, *supra* note 108, at 471-81.

138. *Id.*

139. *Id. See also* Phillips, *Products Liability: Obviousness of Danger Revisited*, 15 IND. L. REV. 797 (1982).

140. *See* Fischer, *supra* note 108, at 348-52; Schwartz, *supra* note 108, at 471-81.

141. Schwartz, *supra* note 108, at 472-74.

142. *See* Schwartz, *supra* note 108, at 464-82. *See also* Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681 (1980).

143. *See* Schwartz, *supra* note 108, at 464-82. *See also* Owen, *supra* note 142. In *Koske*, the Indiana Supreme Court noted with regard to the skinner-slicer machine that a guard "would have been a very inexpensive safety measure" and "other feasible designs with enhanced safety were proposed." 551 N.E.2d 437, 440 (Ind. 1990). The rationale of *Koske* would surely apply to a bystander as well as a user.

144. When the cost of a feasible guard is contemplated, such costs must be considered a factor in the risk-utility balancing process as applied in negligence. *See* Montgomery & Owen, *supra* note 105.

alternative grounds for liability.[145] The "consumer expectation test" of comment i was not the sole basis of determining liability for "defective condition unreasonably dangerous."[146] Found within comments g, h, i, j, and k are continuous cross references to both the balancing language of tort law (risks and utility) and the warranty language.[147] Thus, the phrase "defective condition unreasonably dangerous" cannot be totally understood without reading section 402A and its comments as a whole, and viewing them as an embryonic stage in the development of strict liability for products.[148]

The "consumer expectation test" was designed to afford protection for consumers by establishing a true strict liability.[149] The test works quite well in many situations; however, serious problems develop when the consumer's expectations are too high or too low.[150] In addition, the test can result in a lack of incentive for manufacturers to improve the safety of their products when such safety is quite feasible.[151] Finally, the test does not appear to be applicable to bystanders.[152] The drafters of section 402A did not desire such limitations.[153] Several approaches have been devised to avoid the limitations and problems associated with the "consumer expectation test."

4. The Risk-Utility Test: An Alternative to the Consumer Expectation Test.—Contained within Restatement section 402A is a tort or negligence concept as reflected in the term "unreasonably dangerous."[154] Under negligence, the standard of reasonableness is reflected in economic terminology by the now famous Learned Hand calculus of $B < PL$ wherein P is the probability of harm, L is the gravity of harm, and B is the burden of adequate precautions.[155] Thus, liability will result when the gravity of harm multiplied by its probability is greater than the burden of precaution. Under strict liability, commentators have refined the negligence calculus by applying more sophisticated balancing factors. Professor John Wade suggested the following factors:

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

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145. § 402A, *supra* note 101.
146. *Id.* comment i.
147. *See* Montgomery & Owen, *supra* note 105.
148. *Id.*
149. *Id.*
150. *Id. See also* Fischer, *supra* note 108, at 348-52.
151. *See* Montgomery & Owen, *supra* note 105.
152. *Id.*
153. *Id.*
154. *See generally id.*; Schwartz, *supra* note 108; 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A.
155. *See* United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

(2) The safety aspects of the product — the likelihood that it will cause injury, and the probable seriousness of the injury.
(3) The availability of a substitute product which would meet the same need and not be as unsafe.
(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
(5) The user's ability to avoid danger by the exercise of care in the use of the product.
(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.[156]

Other scholars have proposed multifactor considerations in determining strict liability, factors which range from four to fifteen in number.[157]

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156. Wade, *supra* note 108, at 837-38.

157. Professors Montgomery & Owen suggest four factors:
(1) The cost of injuries attributable to the condition of the product about which the plaintiff complains — the pertinent accident costs.
(2) The incremental cost of marketing the product without the offending condition — the manufacturer's safety cost.
(3) The loss of functional and psychological utility occasioned by the elimination of the offending condition — the public's safety cost.
(4) The respective abilities of the manufacturer and the consumer to (a) recognize the risks of the condition, (b) reduce such risks, and (c) absorb or insure against such risks — the allocation of risk awareness and control between the manufacturer and the consumer.
Montgomery & Owen, *supra* note 105, at 818.
Professor Dickerson suggests five factors:
(1) The product carries a significant physical risk to a definable class of consumer and the risk is ascertainable at least by the time of trial.
(2) The risk is one that the typical member of the class does not anticipate and guard against.
(3) The risk threatens established consumer expectations with respect to a contemplated use and manner of use of the product and a contemplated minimum level of performance.
(4) The seller has reason to know of the contemplated use and possibly where injurious side effects are involved, has reasonable access to knowledge of the particular risk involved.
(5) The seller knowingly participates in creating the contemplated use or in otherwise generating the relevant consumer expectations, in the way attributed

Multiple factors may be pertinent to liability determination in strict

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to him by the consumer.

Dickerson, *Products Liability: How Good Does a Product Have to Be?*, 42 IND. L.J. 301, 331 (1967).

Professor Shapo recommends 13 factors:

1. The nature of the product as a vehicle for creation of persuasive advertising images, and the relationships of this factor to the ability of sellers to generate product representations in mass media;
2. The specificity of representations and other communications related to the product;
3. The intelligence and knowledge of consumers generally and of the disappointed consumer in particular;
4. The use of sales appeals based on specific consumer characteristics;
5. The consumer's actions during his encounter with the product, evaluated in the context of his general knowledge and intelligence and of his actual knowledge about the product or that which reasonably could be ascribed to him;
6. The implications of the proposed decision for public health and safety generally, and especially for social programs that provide coverage for accidental injury and personal disability;
7. The incentives that the proposed decision would provide to make the product safer;
8. The cost to the producer and the sellers of acquiring the relevant information about the crucial product characteristic and the cost of supplying it to persons in the position of the disappointed party;
9. The availability of the relevant information about the crucial product characteristic to person in the position of the disappointed party and the cost to them of acquiring it;
10. The effects of the proposed decision on the availability of data that bear on consumer choice of goods and services;
11. Generally, the likely effects on prices and quantities of goods sold;
12. The costs and benefits attendant to determination of the legal issues involved, either by private litigation or by collective social judgment;
13. The effects of the proposed decision on wealth distribution both between sellers and consumers and among sellers.

Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1370-71 (1974).

Professor Fischer lists 15 considerations:

I. Risk Spreading
   - A. From the point of view of consumer
     1. Ability of consumer to bear loss.
     2. Feasibility and effectiveness of self-protective measures.
        - a. Knowledge of risk.
        - b. Ability to control danger.
        - c. Feasibility of deciding against use of product.
   - B. From point of view of manufacturer.
     1. Knowledge of risk.
     2. Accuracy of prediction of losses.
     3. Size of losses.
     4. Availability of insurance.

liability; however, practical application of fifteen such factors is probably too unwieldy for any court.[158] Thus, most jurisdictions that have considered the problem have retained the more traditional seven-factor test originally introduced by Professor Wade.[159] Regardless of which refined multifactor calculus is considered in strict liability, the question remains: How does the risk-benefit of strict liability differ from that of negligence? In other words, what is the difference between strict liability and negligence? On the surface, both appear to be accomplishing the exact same goals — calculating risks and benefits of the product. Based upon this alluring similarity, many opponents of consumer protection have proposed that products liability is better served under a negligence standard.[160]

The similarity of both the language and the risk-benefit calculus between negligence and strict liability may also be the source of Justice Givan's statement that he does not believe that strict liability exists. Both the proposal for the return to a negligence system and Justice Givan's failure to recognize strict liability deserve careful consideration of the fundamental issues of strict liability.

5. Comparison of Strict Liability and Negligence.—If strict liability is to be explained, it must be in some manner compared with negligence. Before such comparison can be undertaken, a differentiation must be made between the "old" negligence system and the "new" negligence system.[161] The "old" negligence system is generally reflected by the pre-*MacPherson* and *Sandefur* notions of liability. Under the "old" system, liability is negated by concepts such as privity, limited duty, open and obvious dangers, limited foreseeability, and causation, as well as narrow

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5. Ability of manufacturer to self-insure.
6. Effect of increased prices on industry.
7. Public necessity for the product.
8. Deterrent effect on the development of new products.

II. Safety Incentive
- A. Likelihood of future product improvement.
- B. Existence of additional precautions that can presently be taken.
- C. Availability of safer substitutes.

Fischer, *supra* note 108, at 359.

158. *See* Montgomery & Owen, *supra* note 105, at 817.

159. *E.g.*, Phillips v. Kimwood Mach. Co., 269 Or. 485, 525 P.2d 1033 (1974).

160. *See* Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] To Strict Liability To Negligence*, 33 VAND. L. REV. 593 (1980); Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C.L. REV. 643 (1978); Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1976); Hoenig, *Product Designs and Strict Tort Liability: Is There a Better Approach*, 8 SW. U.L. REV. 109 (1976).

161. A comparison between the "old" and "new" types of negligence as a recognition of expanding liability in a developing system has been examined as the differences between a "mature" and "immature" system. Schwartz, *supra* note 108, at 455.

interpretations of *res ipsa loquitur*.[162] If strict liability is compared to this "older" negligence system, the differences are immense.[163]

In most jurisdictions, the law of negligence has made vast changes from the "old" negligence system. The overall trend is toward imposing broader liability for the defendant and concomitantly providing more protection for the plaintiff.[164] Under the "new" negligence system, manufacturers are not only held to have duties based upon their actual knowledge of product defects but are also held to have duties based upon what they should have known as experts in their field of endeavor.[165]

Foreseeability is expanded from intended use concepts to foreseeability of more remote usages of products;[166] custom is eliminated as an absolute standard of reasonableness;[167] governmental and industry standards are rejected as the measure of duty owed by manufacturers;[168] privity[169] and the open and obvious danger rule no longer bar recovery;[170] res ipsa loquitur and circumstantial evidence are applied in more and varied circumstances;[171] and distinctions between misfeasance and nonfeasance are eliminated.[172] If strict products liability is compared to this "new" negligence system, the differences between the two theories are not so drastic. Thus, the greater the expansion of liability in the negligence system, the closer it approaches one of strict liability.[173]

How, then, does strict liability compare to a "new" negligence system? The answer to this question reveals the essence of strict liability. Probably the most dramatic feature of strict products liability is the elimination of contributory negligence as an affirmative defense.[174] This feature is a great expansion of liability and affords considerable consumer protection over common law negligence. However, the effect of the elimination of contributory negligence has been somewhat blurred by jurisdictions that have applied comparative negligence to products liability actions.[175] Assumption of risk does not affect any real difference between

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162. *Id.*
163. *Id.*
164. 3 HARPER, JAMES & GRAY, *supra* note 29, § 16.5, at 413.
165. *Id.* at 410-21. *See, e.g.*, Dias v. Daisy-Heddon, 390 N.E.2d 222, 227 (Ind. Ct. App. 1979).
166. 3 HARPER, JAMES & GRAY, *supra* note 29, § 16.5 n.63.
167. *See supra* note 81.
168. *Id.*
169. 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.16.
170. *Id.* § 28.5.
171. PROSSER, *supra* note 46, § 39.
172. *Id.* § 56.
173. *See supra* note 159.
174. *E.g.*, Gregory v. White Truck & Equip, Co., 323 N.E.2d 280 (Ind. Ct. App. 1975).
175. Schwartz, *supra* note 108, at 455-56.

the two systems because it is applicable to both; however, its harsh effect in both systems is somewhat ameliorated if it is considered as part of comparative negligence.[176]

Disclaimers could be a source of distinction between strict liability and negligence. Disclaimers under the contract rules of the U.C.C. implied warranty may or may not be applicable to personal injury actions.[177] Strict products liability rejects the notion of disclaimers; however, negligence law might accept disclaimers under certain circumstances. Assuming that disclaimers are rejected in both strict liability and negligence and assuming that the defenses of contributory negligence and assumption of the risk are subsumed in comparative negligence, there is probably not a great deal of difference between the "new" negligence system and strict liability.[178]

Outside the applicable defenses, there remains the core issue of the difference between the standards for strict liability and negligence. One primary difference is the focus of inquiry. In negligence, the focus is on conduct, and the liability issue is resolved by asking whether the manufacturer's conduct was faulty in producing a defect in the product.[179] In strict liability, the focus is on the product, and liability is determined by the existence of a defect in the product.[180]

This frequently quoted "focus" rule makes some difference in the determination of liability between the two systems. In a manufacturing negligence case, the plaintiff must prove the manufacturer's faulty conduct.[181] This is an almost overwhelming burden on the plaintiff for several reasons. The plaintiff may never be able to obtain information concerning the exact negligent act of the manufacturer's employees.[182] The cost of discovering such information is probably prohibitive and may not be discovered at any cost because the particular circumstances may be unknown even to the manufacturer.[183] Resorting to res ipsa loquitur will probably not be of great assistance in many instances.[184] Strict liability, on the other hand, faces no problem with imposing liability in the manufacturing defect case.[185] If the product deviates from what the manufacturer intended and this deviation causes injury, then

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176. *Id.* at 457.
177. *Id.* at 456-57.
178. *Id.*
179. *See supra* notes 105 and 108.
180. *Id.*
181. 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A.
182. *See supra* notes 105 and 108.
183. Schwartz, *supra* note 108, at 458-64.
184. *Id.*
185. *Id.*

liability is imposed. Strict liability's focus on the product defect indicates a marked difference from even a "new" negligence system that focuses on the manufacturer's conduct.[186]

In design and warning cases, the comparison reveals more subtle differences. In a design defect situation, strict liability focuses on the product while negligence focuses on the conduct giving rise to such defect. This principle was concisely phrased as: "In the case of a design challenge the maker's sample becomes the target, not the test."[187] Thus, in strict liability, the focus is on the unreasonableness of the design; in negligence, the focus is on the unreasonableness of the manufacturer's conduct in reaching a design decision.[188] Some scholars believe that there is essentially no difference between an unreasonable design decision and an unreasonable design.[189] Warning cases also have been viewed as negligent in origin because the act of warning is one of conduct.[190] Such "return to negligence" propositions are intriguing and have surface appeal because of their simplicity; however, they fail to recognize several basic principles. First and foremost, the negligence system proposed must be the highly developed "new" negligence before it even approaches the goal of strict liability. Second, the return to simple negligence ignores several distinct differences that do exist between strict liability and even the "new" negligence in design and warning cases.[191]

6. The Meaning of "Strict Liability."—Although a multifactor risk-benefit test suggested by Professor John Wade is probably an improvement over the Learned Hand formulation of negligence, such factors do not, by themselves, express strict liability. Professors John Wade and Page Keeton gave real meaning to strict products liability when they said that knowledge of the defect or danger is imputed to the manufacturer.[192] After such imputation, strict liability can be reduced to asking the question: Would a reasonable manufacturer place such a product on the market? If the answer to the question is no, then the manufacturer is liable for any damages caused by the product. Professor Keeton states the rule as:

> A product ought to be regarded as "unreasonably dangerous" at the time of sale if a reasonable man with knowledge of the product's condition, and an appreciation of all the risks found

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186. *Id.*
187. 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A.
188. Schwartz, *supra* note 108, at 458-64.
189. *Id.*
190. *Id.*
191. *See infra* notes 192-200 and accompanying text.
192. Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 39 (1973); *see also* Wade, *supra* note 108, at 834.

> to exist by the jury at the time of trial, would not now market the product, or, if he did market it, would at least market it pursuant to a different set of warnings and instructions as to its use. Thus, a product is improperly designed if its sale would be negligence on the part of the maker who had full knowledge of all the risks and dangers that were subsequently found to exist in the product, regardless of the excuse that the maker might have had for his ignorance of such dangers. Since the test is not one of negligence, it is not based upon the risks and dangers that the maker should have, in the exercise of ordinary care, known about. It is, rather, danger in fact, as that danger is found to be at the time of the trial that controls.[193]

The above test for imputing scienter to the manufacturer is actually the reverse side of the same coin[194] of the consumer expectation test of comment i.[195] In the consumer expectation test the question is: Would

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193. Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 568 (1969).

194. This test is one in the same from both the consumer's and the manufacturer's perspective. *See* Phillips v. Kimwood Mach. Co., 269 Or. 485, 491-98, 525 P.2d 1033, 1036-37 (1974) (citing Welch v. Outboard Marine Corp., 481 F.2d 252, 254 (5th Cir. 1973)).

195. An excellent explanation of the "imputed knowledge" rule of strict liability has been described as:

> The problem with strict liability of products has been one of limitation. No one wants absolute liability where all the article has to do is to cause injury. To impose liability there has to be something about the article which makes it dangerously defective without regard to whether the manufacturer was or was not at fault for such condition. A test for unreasonable danger is therefore vital. A dangerously defective article would be one which a reasonable person would not put into the stream of commerce *if he had knowledge of its harmful character*. The test, therefore, is whether the seller would be negligent if he sold the article *knowing of the risk involved*. Strict liability imposes what amounts to constructive knowledge of the condition of the product.
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> On the surface such a test would seem to be different than the test of 2 Restatement (Second) of Torts § 402A, Comment *i.*, of "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it." This court has used this test in the past. These are not necessarily different standards, however. As stated in Welch v. Outboard Marine Corp., where the court affirmed an instruction containing both standards:
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> We see no necessary inconsistency between a seller-oriented standard and a user-oriented standard when, as here, each turns on foreseeable risks. They are two sides of the same standard. A product is defective and unreasonably dangerous when a reasonable seller would not sell the product if he knew of the risks involved or if the risks are greater than a reasonable buyer would expect.
>
> To elucidate this point further we feel that the two standards are the same because a seller acting reasonably would be selling the same product which a

a reasonable consumer purchase the product if he had complete knowledge of the danger or risks in the product? If the answer to this question is no, then liability attaches.[196] Thus, meaning is given to both the warranty and negligence heritage of section 402A. Both the manufacturer and consumer-oriented tests mean the same thing, but reflect this meaning from differing viewpoints. Thus, the seven-factor risk-benefit test proposed by Professor Wade presupposes scienter on the part of the manufacturer.[197] Almost any reasonable multifactor test may be used in the risk-benefit calculus of strict products liability as long as such calculations are premised on the imputation of knowledge of the product's risk and the danger to the manufacturer. With this proviso, strict products liability and negligence are comparable. If the risks and the benefits of a particular design are either known or could reasonably be known by the manufacturer, then the two theories are equivalent.[198] Yet, when the risk of the product is unknown and unknowable at the time of manufacture, the two theories deviate. Negligence will not allow liability in the unknown and unknowable situation, whereas strict liability will.[199] In one other situation, the two theories yield opposite results. Assume that after a product is placed on the market, an alternative design or a guard is invented that would have eliminated or reduced the plaintiff's injury caused by the original product. Under negligence law, the plaintiff could not recover, but under a strict liability theory, the manufacturer might be found liable.[200]

7. A Possible Standard for Strict Liability in Indiana.—The Indiana Supreme Court is on the threshold of interpreting the Indiana Products Liability Act. Interpretation will, of course, be within the confines of proper statutory construction. The language of the Act is so loosely

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> reasonable consumer believes he is purchasing. That is to say, a manufacturer who would be negligent in marketing a given product, considering its risks, would necessarily be marketing a product which fell below the reasonable expectations of consumers who purchase it. The foreseeable uses to which a product could be put would be the same in the minds of both the seller and the buyer unless one of the parties was not acting reasonably. The advantage of describing a dangerous defect in the manner of Wade and Keeton is that it preserves the use of familiar terms and thought processes with which courts, lawyers, and jurors customarily deal.

Phillips v. Kimwood Mach. Co., 269 Or. 485, 491-93, 525 P.2d 1033, 1036-37 (1974) (emphasis in original) (footnotes omitted).

196. *Phillips*, 269 Or. 491, 525 P.2d at 1036.

197. Wade, *supra* note 108, at 834. *But see* Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 757 (1983) ("knowledge issues contain unknowable or unforeseeable delays . . . .").

198. Schwartz, *supra* note 108, at 463.

199. *Id.* at 482-88.

200. *See id.*

woven that it will allow the supreme court great latitude in its "construction." Certain basic concepts, however, are contained in the language of the Act that seems to parallel section 402A.[201] Section 3b(2) eliminates contract law, including privity, as a barrier to liability.[202] The definitions of "unreasonably dangerous" in section 2 and "defective condition" in section 2.5(a) seem to interact with each other by cross referencing similar to the methodology used in comments g, h, and i of section 402A.[203] Although unreasonably dangerous appears to be confined to comment i of section 402A, there does not appear to be any statutory constraint to include a definitional structure outside of the comment i language.[204] The "state of the art" defense found in section 4(b)(4) could possibly be a concession to negligence.[205] Even assuming state of the art

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201. *See supra* note 101 and accompanying text.

202. The definition section of the Indiana Products Liability Act, Indiana Code § 33-1-1.5-2, includes the following definition of "unreasonably dangerous":

> "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.

IND. CODE ANN. § 33-1-1.5-2 (Burns Supp. 1990).

203. The Act's description of defective products at Indiana Code § 33-1-1.5-2.5(a) states:

> 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.

IND. CODE ANN. § 33-1-1.5-2.5(a) (Burns Supp. 1990). It seems clear that both "unreasonably dangerous" and "defective condition" make references to each other for explanation of their meaning, which is the same methodology used in the comments of § 402A. § 402A, *supra* note 101; *see supra* note 108.

204. It appears that a court should use about any type of method it desires to develop a reasoned approach to strict liability, and it is not confined to § 402A or its methodology. *See* 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A. *See also* Montgomery & Owen, *supra* note 105 (discussion of South Carolina statutes patterned after § 402A).

205. IND. CODE § 33-1-1.5-4(b)(4) states: "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." IND. CODE ANN. § 33-1-1.5-4(b)(4) (Burns Supp. 1990). If the state of the art defense, as defined in § 4(b)(4), is applied to "manufacturing" defects, then it will conflict with § 3, which provides for strict liability. It is difficult to reconcile such a conflict because even the "traditional" strict liability situations involving foods would be eliminated if the manufacturer is allowed to escape liability by offering evidence that he is using the most

as a negligence principle, its application does not prevent the implementation of strict liability in products liability systems.[206] The other language found throughout the act that is changed from section 402A can be interpreted several ways. The use of negligence language is probably inevitable considering the tort or negligence heritage of strict liability as expressed in the history of section 402A.[207] Thus, "negligence language" does not necessarily negate the basic tenant of section 3 — that strict liability be imposed.[208]

With the above in mind, many of the recent cases throughout the country may provide some guidance in interpreting strict liability, especially the phrase "defective condition unreasonably dangerous." The phrase has been highly debated and interpreted in almost every conceivable manner.[209] The phrase is said to contain the two separate and distinct elements of "defect" and "unreasonable danger." Thus, proof of each is required; however, some courts require only proof of "defect,"

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feasible technology in producing his product. If state of the art is confined to "design" defect situations, it could be interpreted in a very narrow and restrictive manner under the "old" views of negligence law. *See* Vargo & Leibman, *Products Liability: 1979 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 227, 248-49 (1979) (review of state of the art under Indiana's 1978 Products Liability Act); Vargo, *1983 Survey of Products Liability*, 17 IND. L. REV. 255, 280-81 (1984) (harshness of the 1978 Products Liability Act is ameliorated in the 1983 amendments). Such an interpretation is said to be particularly onerous and would lead to a reason to doubt its efficacy and fairness. Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521, 525 n.16 (1982) [hereinafter Twerski, *Seizing the Middle Ground*]. However, at least the Indiana Court of Appeals views the state of the art defense as more in line with a "mature" negligence system. *See* Montgomery Ward & Co. v. Greg, 554 N.E.2d 1145, 1155 (Ind. Ct. App. 1990) (interpretation of the 1978 Indiana Products Liability Act).

206. *See* Schwartz, *supra* note 108, at 482-88.

207. *See* Montgomery & Owen, *supra* note 105, at 807; 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A. *See also supra* note 108.

208. IND. CODE § 33-1-1.5-3(b) states:

> The rule stated in subsection (a) applies although:
>
> (1) the seller has exercised all 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.

IND. CODE ANN. § 31-1-1.5-3(b) (Burns Supp. 1990). Thus, it is clear that Indiana's Product Liability Act intends the imposition of liability without resort to negligence (or contract). In other words, strict liability is the desired result. This result is not changed by the alteration of the § 402A words "all possible care" to "all reasonable care" because "all reasonable care" is still considered negligence. *See* Vargo, *1983 Products Liability Survey*, *supra* note 205, at 279.

209. *See* 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A; PROSSER & KEETON, *supra* note 42, § 96; 1 J. VARGO, PRODUCTS LIABILITY PRACTICE GUIDE § 7.02 (Matthew Bender 1989) [hereinafter 1 J. VARGO].

and others require only proof of "unreasonable danger."[210] Still other courts have treated the two terms identically or define one in terms of the other.[211] Some courts object to the use of the words "unreasonable danger" because the term can be interpreted to mean negligence.[212] Much of the debate over the phrase is actually a debate between those who desire to regress to the protective atmosphere provided under older negligence principles and those who desire to afford greater consumer protection under strict liability.[213]

If strict liability is the goal, the exact language used may not be as important as the interpretation of the standard applied to such language. The standard employed to achieve strict liability has been achieved by a variety of methods.[214] Some jurisdictions emphasize the warranty heritage of strict liability and use only the consumer expectation test as a standard.[215] However, using warranty language as the sole standard creates many problems, including application of the now discredited open and obvious danger rule.[216] Some courts have resolved the consumer expectation problem by switching from a consumer-oriented standard to a manufacturing-oriented standard; knowledge of the defect or danger in the product is imputed to the manufacturer, and the issue is resolved by asking whether the manufacturer-seller would be negligent for marketing the product.[217] The most innovative strict liability standard has been developed by courts that combine warranty and negligence principles of strict liability into a bifurcated test.[218] Under the bifurcated test, the consumer-expectation standard is applied when useful. If that standard proves troublesome, the plaintiff is allowed to use a risk-benefit balancing test.[219] California, in an attempt to keep the "strict" in strict liability, uses such a bifurcated test with the risk-benefit burden of proof placed

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210. *See supra* note 209.

211. *See* 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A; 1 J. VARGO, *supra* note 209, § 7.02.

212. *See supra* note 209.

213. *See* 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A, at 582-91.

214. *Id.* § 28.15; PROSSER & KEETON, *supra* note 42, § 99; 1 J. VARGO, *supra* note 209, § 7.02.

215. *See supra* note 214.

216. *See* 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A; PROSSER & KEETON, *supra* note 42, § 96; 1 J. VARGO, *supra* note 209, § 7.02(1)(c). *See generally supra* notes 108, 209.

217. *See* PROSSER & KEETON, *supra* note 42, § 99. *See also* 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.15; 1 J. VARGO, *supra* note 209.

218. *Supra* note 217. *See, e.g.*, Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 432, 573 P.2d 443, 143 Cal. Rptr. 225, 237 (1978).

219. *Supra* note 218. *See generally* PROSSER & KEETON, *supra* note 42, § 99; Fischer, *supra* note 108; Schwartz, *supra* note 108.

on the defendant.[220] Again, if Indiana chooses strict liability, the court can pick from among many alternatives. The resolution of the type of standard must be made with an understanding that the core concept of strict liability, the risk of ignorance about the product's characteristics (danger or defect), is squarely on the manufacturer-seller.[221]

B. The Trouble with Economics

Both negligence and strict liability have a long and rich heritage in the common law. Their development included balancing many factors that changed as society's morals and attitudes fluctuated. A recent vogue among some scholars is the examination and interpretation of tort law based solely upon economic principles.[222] Many of these economic theories of tort liability have been reduced to shorthand phrases such as "risk-benefit" analysis,[223] "cost-benefit" analysis,[224] "risk-utility" analysis, and "enterprise liability."

The probable origin of the economic analysis for tort liability is Judge Learned Hand's comments made in two cases from the 1940s.[225] The dicta in these two decisions formed the basis of what has been commonly called the "risk-utility" test or the Learned Hand calculus for negligence. This risk-utility test for liability carried over into strict products liability actions.[226]

However, the risk-utility test has inherent difficulties. If the plaintiff only sustains property damage, the test appears acceptable because property damage can be easily reduced to monetary terms. Thus, the test balances money against money. In a personal injury case, however, the test requires balancing death and human suffering against the money necessary to prevent such events. Such a balancing process may appear acceptable to some, especially when reduced to figures on paper; however, others have moral misgivings about reducing human suffering to monetary figures and possibly determining that injury is too costly to avoid. Recent events have shown that a pure economic view of tort liability may be unacceptable.

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220. *Barker*, 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.

221. *See* 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A, at 578.

222. *See, e.g.*, G. CALABRESI, THE COSTS OF ACCIDENTS (1970); R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979); Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980).

223. *See* Wade, *supra* note 108, at 834.

224. *See* Epstein, *supra* note 222, at 157.

225. United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947); Conway v. O'Brien, 111 F.2d 611 (2d Cir. 1940), *rev'd*, 61 S. Ct. 634 (1941).

226. *See generally*, Twerski, *Seizing the Middle Ground*, *supra* note 205.

In *Grimshaw v. Ford Motor Co.*,[227] the plaintiff was injured by a defectively designed Pinto. The plaintiff sought recovery for compensatory damages under strict liability for the design defect and punitive damages under a separate theory grounded on Ford's "malice" or "callous indifference to public safety."[228] In its design of the Pinto, Ford followed the economic view and balanced human lives and limbs against corporate profits. The apparent cost of correcting the injury producing defect was only eight dollars per car; however, Ford determined that under a cost-benefit analysis they did not have to correct the Pinto's defective gas tank.[229] The jury not only awarded compensatory damages for the defective design, but also awarded $125 million in punitive damages. The punitive damages were reduced by the trial judge to $3.5 million, which was upheld on appeal.[230] Professors David Owen and Richard Epstein criticized the punitive damage award in *Grimshaw*;[231] however, Professor Gary Schwartz pointed out: "What starts out, then, as a specific complaint (by Owen and others) against the inappropriate imposition of punitive damages turns out to reveal a serious element of fallibility in the liability criterion that has been embraced by an entire generation of legal and economic scholars."[232] Judge Learned Hand also recognized the fallibility of a pure economic analysis as the legal standard for the determination of liability when he formulated the risk-utility test:

> The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk. All these are practically not susceptible of any quantitative estimate, and the second two are generally not so, even theoretically. For this reason a solution always involves some preference, or choice between incomensurables, and it is consigned to a jury because their decision is thought most likely to accord with commonly accepted standards, real or fancied.[233]

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227. 119 Cal. App. 3d 757, Cal. Rptr. 348 (1981). For an excellent examination of *Grimshaw*, see Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 151-53 (1982) [hereinafter Schwartz, *Deterrence*].

228. *Grimshaw*, 119 Cal. App. 3d at 801 n.11, 174 Cal. Rptr. at 381 n.11.

229. *Id.* at 790, 174 Cal. Rptr. at 370.

230. *Id.* at 836, 174 Cal. Rptr. at 399.

231. *See* 5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A, at 583 n.37.

232. Schwartz, *Deterrence*, *supra* note 227, at 153.

233. Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940), *rev'd*, 61 S. Ct. 634 (1941).

Formulating legal principles by a mathematical or economic analysis of elements that are not susceptible to either practical or theoretical quantitative estimates does not speak well of the recent trend toward economic dominance in tort law. The common law must and does take into account basic, ethical evaluations when deciding whether a certain act is tortious.[234]

C. State of the Art

1. Definition of State of the Art.—The Indiana Products Liability Act section 4(b)(4) includes state of the art as a defense.[235] The Indiana Court of Appeals recently examined this defense under the 1978 act in *Montgomery Ward & Co. v. Gregg*.[236] There are several possible interpretations of the term state of the art. The defendant manufacturer could assert that liability should not be assessed because it has complied with the custom or standards in its industry.[237] This position effectively

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234. *See* Schwartz, *Economics, Wealth Distribution, and Justice*, 1979 WIS. L. REV. 799, 804-08.

235. *See supra* note 196 and accompanying text. The wording of § 4(b)(4) appears at first glance to be applicable to all three types of defects — manufacturing, design and failure to warn. But application of state of the art in manufacturing defect cases eliminates strict liability, which is mandated by § 3 of the Products Liability Act. Such application would violate the "core" basis of strict liability in its simplest form. For example, injury resulting from bean-shaped rocks in baked beans always results in liability even if the manufacture is using the latest technologically feasible method of producing baked beans. By definition in manufacturing defect cases, the product has failed to conform to the manufacturer's own standards. The issue in a manufacturing defect case, such as bean-shaped rocks in baked beans, is whether the baked beans were as the manufacturer intended them to be — without rocks. The existing technology for production of baked beans is not relevant to such an inquiry.

> State-of-the-art evidence has no relevance to strict products actions involving manufacturing defects. In such cases the use or non-use of then-existing technology would have played no role in causing the plaintiff's injury because the product, by definition, failed to conform to the manufacturer's own standards. Similarly, no great dispute exists as to the admissibility of state-of-the-art evidence in failure to warn cases because of the express "knowledge . . . developed human skill and foresight" provision of Restatement Section 402A.

L. FRUMER & H. FRIEDMAN, § 2.26[8][d][ii][B] (Matthew Bender 1989) [hereinafter FRUMER & FRIEDMAN].

If state of the art is confined to design defect situations, it usually relates to proof of an alternative design. In proving such alternative design, state of the art is not generally considered to be the then-existing industry standards, custom, or compliance with statutes and government regulations. *Id.* § 2.26[8][b][i]. Instead, state of the art is considered what is technologically feasible. *Id.* § 2.26[8][c].

236. 554 N.E.2d 1145 (Ind. Ct. App. 1990). *See* IND. CODE § 33-1-1.5-4(b)(4) (Supp. 1978).

237. *See supra* note 205.

provides: We are doing what everybody else is doing, so why should we be liable? Such a position, however, is nothing less than a self-made standard of conduct that is not acceptable under general negligence principles.[238] The defendant-manufacturer might also assert that its product conformed with either "independent standards" or government standards.[239] This position asserts that such "independent" or government standards have set an adequate standard of conduct. Courts generally look askance at such assertions because of the defendants's heavy influence in the formulation of such standards.[240] As a result, many courts consider both "independent" and government standards as "floors not ceilings."[241] In a mature ("new") negligence system, statutes, regulations, and codes are viewed as minimum standards of care. Under the general test of reasonableness, the common law may impose a higher standard.

The generally accepted view is that "state of the art" refers to a level of scientific or technical knowledge that the manufacturer feasibly could have implemented.[242] Under this definition, state of the art focuses on what the manufacturer *could do*, not on what actually is done. What could be done necessarily involves issues of knowledge and feasibility.[243] The manufacturer's lack of actual knowledge is not the yardstick by which state of the art is measured. In negligence, the defendant is held to the standard of what he knew or should have known about the risks or hazards of his product.[244] Negligence also considers a manufacturer to have the knowledge of an expert in that particular field of endeavor.[245] However, there are circumstances in which knowledge of risk is impossible. Professor Spradley has categorized such circumstances into three major areas: undiscoverable risks, unknowable risks, and technological impossibilities.[246]

An undiscoverable risk arises when the manufacturer realizes that some of its products contain risks but it is impossible for it to identify the specific products containing the risks or hazards.[247] This circumstance arises in manufacturing defect situations when the manufacturer asserts that it is not economically feasible to identify the products that contain

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238. *See* 1 J. VARGO, *supra* note 209, § 6.03(8)(a).
239. *Id.* § 6.03(8)(a), (b).
240. *Id.*
241. *Id.*
242. *Id.*
243. *See* Robb, *A Practical Approach to Use of State of the Art Evidence in Strict Product Liability Cases*, 77 Nw. U.L. REV. 1 (1982); Spradley, *Defensive Use of State of the Art Evidence in Strict Liability*, 67 MINN. L. REV. 343 (1982).
244. *See* PROSSER & KEETON, *supra* note 42, § 99, at 697.
245. *See* Dias v. Daisy-Heddon, 390 N.E.2d 222 (Ind. Ct. App. 1979).
246. *See* Spradley, *supra* note 243.
247. *Id.* at 380.

the risks or hazards. Beyond a certain point, further testing and quality control result in diminishing returns. Because it is almost impossible at any cost to discover every defect or hazard in the production line, the risk is undiscoverable.[248]

On the other hand, an unknowable risk, as the term itself implies, is one that is impossible to discover.[249] This circumstance arises in warning defect cases when the manufacturer asserts that it was impossible to discover the risk, and because the risk itself is unknown, it is impossible to warn about. The unknowable risk differs from the undiscoverable risk because the manufacturer is aware of the undiscoverable risk and can warn about it.[250]

Closely related to an unknown risk is technological impossibility.[251] Certain technological or scientific knowledge may not exist at the time a product is designed and manufactured. For example, a radio and radar might be necessary safety items on ships to avoid storms and collisions; however, it was technologically impossible to include such items on ships designed and built in 1810.

Feasibility involves the cost of implementing existing technology.[252] When a manufacturer asserts a safer product is not feasible, it is not asserting that the safer product could not be produced, but instead is asserting that it would cost too much to do so. However, feasibility factors should include more than mere manufacturing costs of the alternative design. Other factors that should also be considered in addressing alternative design are whether such design would decrease the product's utility and whether it would create the same or greater risks in the product's use. Furthermore, one of the most important "costs" that must be considered is not the actual dollar costs but rather the human and social costs that accompany every product injury.[253] Manufacturers rarely, if ever, consider these costs when examining a product's original or alternative design.[254] If a manufacturer is defending its design or attacking suggested alternative designs, "the courts must encourage manufacturers to set risk levels that factor these human and social costs into the analysis."[255]

State of the art, as a negligence principle, will preclude liability when the risk is undiscoverable or unknowable and when technology does not

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248. *Id.*
249. *Id.* at 389.
250. *Id.*
251. *Id.* at 398.
252. *Id.* at 411.
253. *Id.* at 415-16.
254. *Id.* at 416.
255. *Id.*

exist to make the product safer.[256] All of these circumstances are often lumped together under the shorthand phrase of "technological feasibility." When technological feasibility and economic feasibility are combined, the definition of state of the art is complete.[257] This generally accepted two-part definition of state of the art — technological and economic feasibility — is, in essence, the equivalent of the risk-utility standard of negligence.[258]

Resolving the definition of state of the art also requires a consideration of the time frame when it is applied: the date of design, the date of manufacture, the date of injury, or the date of trial. Using the date of the original design will result in application of antiquated standards that would not meet the requirements of negligence law.[259] Applying the date of manufacture would meet the negligence standard whereas applying date of injury or trial is more amenable to strict liability.[260]

2. Application of State of the Art — A Conflict with Strict Liability?.—There is no doubt that state of the art in almost any form is a negligence concept that theoretically conflicts with the application of strict liability. Thus, the Indiana Act has a built-in conflict between sections 3(b)(1) [strict liability] and 4(b)(4) [state of the art]. Section 3(b)(1) states: "(b) The rule stated in subsection (a) applies although: (1) the seller has exercised all reasonable care in the preparation, packaging, labeling, instructing for use, and sale of his product."[261] Section 4(b)(4) states: "(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."[262]

The resolution of the conflict between these two sections will involve one of the following two methods of interpretation: Either the two

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256. *See supra* note 243. *See also* Calnan, *Perpetuating Negligence Principles in Strict Products Liability: The Use of State of the Art Concepts in Design Cases*, 36 SYRACUSE L. REV. 797 (1985); Wilkinson, *Admissibility of State of the Art Defense — Manufacturer's Expertise May No Longer Be Allowed in the Court Room*, Oct. PA. B.A.Q. 205 (1988); Note, *Use of "State of the Art" Evidence in Strict Liability Claims: The New Texas Standard*, 33 BAYLOR L. REV. 165 (1981); Note, *The State of the Art Defense in Strict Products Liability*, 57 MARQ. L. REV. 649 (1974).

257. *See generally* Phillips, *The Standard for Determining Defectiveness in Products Liability*, 46 U. CIN. L. REV. 101 (1977).

258. *See supra* notes 243 and 256.

259. *See* Vargo & Leibman, *supra* note 205, at 249.

260. *See* Dart v. Wiebe Mfg., Inc., 147 Ariz. 242, 709 P.2d 876 (1985); Katz, *The Function of Tort Liability in Technology Assessment*, 38 U. CIN. L. REV. 587, 633-35 (1969).

261. IND. CODE ANN. § 33-1-1.5-3(b)(1) (Burns Supp. 1990).

262. *Id.* § 33-1-1.5-4(b)(4).

sections will be interpreted as compatible or, if incompatible, one section must control and the other must be eliminated. Assuming the sections are determined to be incompatible, the issue becomes which section should be stricken. The Act as a whole places a very strong emphasis on strict liability, an emphasis that is prevalent in all sections of the Act. The titles to sections 3 and 4 indicate strict liability is to be imposed.[263] Section 1 clearly indicates that the chapter governs all actions for strict liability.[264] The definitions contained in sections 2 and 2.5 show a pattern based upon the traditional concepts of strict liability pursuant to section 402A. Section 3, with a few word changes, tracks the language of section 402A. The elimination of strict liability from the Act does not seem to be a viable alternative because nothing would remain. However, if state of the art is eliminated, the Act will remain intact with the exception of the excluded defense.

The Indiana Supreme Court will most likely take the first option and attempt to reconcile the two sections so that each may be given effect. Any interpretation of the language of section 4(b)(4) will require examination of how state of the art applies to strict liability categories of defect: manufacturing defect, design defect, and a failure to adequately instruct or warn.[265] If section 4(b)(4) applies to manufacturing defects, it is clear that a direct conflict arises with strict liability. The only situation in which state of the art could apply to a manufacturing defect involves an "undiscoverable risk."[266] In such situations, the defendant asserts that no manufacturing process can assure that 100% of the products produced are defect free; therefore, no liability should attach. In other words, no amount of testing or quality control can either assure defect free products or identify the particular products that will contain a defect. This argument may have application in the law of negligence; however, this situation was the very circumstance that gave rise to strict liability under section 402A in the first instance.[267]

Under strict liability, the manufacturer is held liable for manufacturing defects regardless of its inability to avoid such defects. By definition, a manufacturing defect consists of a deviation from the

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263. IND. CODE § 33-1-1.5-3 Strict Liability in Tort Imposed; IND. CODE § 33-1-1.5-4 Defenses to Strict Liability in Tort.

264. IND. CODE § 33-1-1.5-1 Application of Chapter

Sec. 1. Except as provided in section 5 of this chapter, this chapter governs all actions in which the theory of liability is strict liability in tort.

265. Hoffman v. E.W. Bliss Co., 448 N.E.2d 277, 281 (Ind. 1983).

266. *See* Spradley, *supra* note 243, at 380-88.

267. *Id.* at 384-85. If anything, § 402A was intended to eliminate negligence in manufacturing defect cases regardless of the manufacturer's lack of knowledge of the risk or of the impossibility of eliminating such risks. *See supra* note 133 and accompanying text.

manufacturer's own standard (the product actually produced is different from what the manufacturer intended).[268] It would be nonsensical to allow a complete defense to the strict liability of a manufacturer who admits by sample that his product is defective.

The example of the rocks in the baked beans illustrates this conflict between state of the art and strict liability in manufacturing defect cases.[269] There is no doubt that the manufacturer never intended to include rocks in the baked beans and that the rocks render the product defective. If strict liability is applied, the plaintiff who is injured by the rocks will recover. If, however, negligence is applied, the plaintiff will be deprived of recovery because the defendant will have acted reasonably under the risk-utility analysis because it was too costly or technologically impossible to discover and remove the rocks from the baked beans.[270] If strict liability is applied and state of the art is allowed as an affirmative defense, the plaintiff will be deprived of recovery based upon the same rationales that apply in negligence situations — the defendant either could not economically remove the rocks or it was impossible for it to do so with existing technology.[271] In this situation, the circle of reasoning closes in on itself, resulting in nothing less than sophistry. This is the very reason why state of the art is not applied to strict liability manufacturing defect cases.[272]

In warning defect cases, state of the art involves unknowable risks and feasibility.[273] The defendant asserts that it cannot warn of unknowable risks. If the risk is known, the defendant could assert that it could not feasibly transmit the warning to the user because of inordinate cost. For example, a small consumer item may not have room for all necessary warnings, and, even if a package insert or manual is included with or attached to the product, there is no way to assure that the warnings will be passed along to all potential users. The unknowable risk aspect of state of the art in warning cases has been resolved in a number of ways: courts have taken positions ranging from no liability under a negligence standard to the imposition of liability under a strict liability standard.[274] A somewhat modified position has been taken by Professor Keeton who believes that strict liability should be applied when the risk is unknown unless the benefits of the product outweigh the harm to

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268. *See* PROSSER & KEETON, *supra* note 42, at 694-97.
269. *See supra* § VII.A.3. through text accompanying note 136.
270. *Id.*
271. *Id.*
272. FRUMER & FRIEDMAN, *supra* note 235, § 2.26[8][d][ii][A].
273. *See* Spradley, *supra* note 243, at 389-40, 433-37.
274. *Id.*

the users.[275] According to this rationale, manufacturers of beneficial products will not be held liable for the unknowable risks, but manufacturers of marginally beneficial products with insignificant utility will be liable for such risks.[276]

When the risk becomes known, the feasibility of warning remains an issue, and the risk-utility factors of negligence appear to be an integral part of the applicable analysis. The only concession to strict liability principles is that the risk-utility analysis must provide, at the very least, an expanded view of negligence when the manufacturer has a nondelegable duty to warn the ultimate user.[277]

State of the art is universally associated with design defect situations.[278] As previously discussed, when state of the art is interpreted to mean industry, custom, or governmental standards, it is generally not accepted as the standard in negligence law. When it is thus defined, it is completely incompatible with strict liability. Thus, if section 4(b)(4) is considered to include either industry, custom, or governmental standards, a direct conflict exists.

In a design defect case, the plaintiff almost always advocates an alternative design to that which caused the injury.[279] Because state of the art focuses on the feasibility of such alternative design, it rarely involves the unknowable risk or unknown technology.[280] A defendant who argues against plaintiff's alternative design effectively admits that such alternative design could be technologically implemented but asserts that it is impractical to do so.[281] The case is resolved on feasibility issues concerning the alternative design presented by the plaintiff. These issues include factors such as costs, utility, and risks associated with plaintiff's proffered design.[282] All these feasibility issues are identical to the negligence risk-utility formula.[283]

However, state of the art in design cases may also involve situations in which at the time of the product's design, manufacture, and sale, the risk or hazard was unknown (unknowable risk). Thus, the manufacturer could not possibly have designed a safer product even if adequate technology existed. Finally, state of the art may involve situations in which the manufacturer knows of the risk or hazard but no technology

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275. *Id.*
276. *Id.*
277. *Id.*
278. *See* FRUMER & FRIEDMAN, *supra* note 235, § 2.26[8][d][ii][A].
279. *See supra* notes 243 and 256.
280. *See* Spradley, *supra* note 243, at 416-33.
281. *Id.*
282. *Id.*
283. *Id.*

exists for its elimination (technological impossibility). In the former situation (unknowable risks), strict liability would make a difference because knowledge of the risk is imputed to the manufacturer.[284] However, strict liability has no effect on the technological impossibility scenario, and liability would not attach under such circumstances.[285]

State of the art in design cases can be compatible with strict liability if state of the art is properly defined. If it is considered to be what is economically and technologically feasible, there are only a few differences between such definition and strict liability. If state of the art is adjusted to include imputation of the knowledge of the risk, there appears to be no conflict with strict liability. Technological impossibility only arises when such technology is discovered between the time of the product's sale and the time plaintiff proffers its alternative design.[286] In such situations, state of the art, under both negligence and strict liability, poses no conflict because both situations preclude liability.[287] One caveat to technological impossibility concerns the true nonexistence of technology at the time the defendant sold its product. If such technology is "discovered" within a short time after the sale, a serious question arises as to whether such technology could not have been discovered before the defendant designed and sold the product. This issue may be the primary reason why a manufacturer's later designs are admitted into evidence.[288] If the Indiana Supreme Court can interpret section 4(b)(4) to come within the parameters of state of the art as above defined, strict liability and state of the art might coexist.

D. Crashworthiness

The Indiana Supreme Court recently approved of the crashworthiness doctrine in *Miller v. Todd*.[289] Crashworthiness is a doctrine that allows liability against the manufacturer when the alleged defect does not cause the accident but enhances the plaintiff's injuries beyond those that would

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284. *See supra* § VII.A.6. Placing liability on the manufacturer when the risk is unknown seems unfair because the manufacturer is asked to do the impossible. However, it is equally unfair to place the burden of injury on the user who is also unaware of the risk. Given two such "innocent" parties, the policy of strict liability opts for the manufacturer to bear the liability, whereas negligence does not.

285. Assuming knowledge of the risk or hazard is imputed to the manufacturer, this knowledge does not create new technology if none existed before.

286. *See supra* notes 243 and 256.

287. For an excellent explanation of the policy underlying the application of state of the art when there is no existing technology, see Schwartz, *supra* note 108, at 482-88.

288. Spradly, *supra* note 243, at 431-33.

289. 551 N.E.2d 1139, 1143 (Ind. 1990).

have been sustained absent the alleged defect.[290] Thus, the crashworthiness doctrine cases are sometimes called "enhanced injury" or "second collision" cases.[291] Prior to *Miller*, several courts anticipated the Indiana Supreme Court's approval of the crashworthiness doctrine and adopted it. Prior to 1977, however, Indiana courts lived under the shadow of the infamous case of *Evans v. G.M.C.*[292] *Evans* rejected the crashworthiness doctrine on the basis of an extremely narrow view of foreseeability[293] that harkened back to the archaic negligence concept of unintended use originating in *Sandefur*.[294]

The *Miller* court's adoption of crashworthiness confirmed the rejection of antiquated negligence concepts. The court did not answer the issue of the burden of proof concerning damages in an enhanced injury case. Does the plaintiff or the defendant have the burden of proving what injuries would result if the manufacturer designed a safer or nondefective product?[295] This issue has been addressed in two recent Indiana Court of Appeals decisions: *Masterman v. Veldman's Equipment, Inc.*[296] and *Jackson v. Warrum*.[297] In *Masterman*, the third district decided that the plaintiff had the burden of proof,[298] but in *Jackson* the first district determined that it was the defendant's burden of proof.[299] The Indiana Supreme Court must decide between these two conflicting court of appeals decisions. Again, the Indiana Supreme Court's decision will depend on the court's determination of whether Indiana law is to be ruled by strict liability or negligence principles. If strict liability is chosen, the Indiana Supreme Court will likely follow the reasoning of *Jackson* in which the court said that products liability law has never required the plaintiff to prove a negative.[300]

VIII. Conclusion

Under current Indiana law, the open and obvious danger rule is only applicable in products negligence actions; it is inapplicable in other

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290. *Id. See also* 1 J. Vargo, *supra* note 209, §§ 6.04(8), 7.02(i)(m).

291. 1 J. Vargo, *supra* note 209, § 6.04(8), 7.02(i)(m).

292. 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966).

293. *Id.* at 825.

294. *See* Vargo, *1976 Products Liability Survey*, *supra* note 87.

295. This issue was recently discussed in Rosiello & Klein, *Survey of Recent Developments in Indiana Law: Products Liability*, 23 Ind. L. Rev. 617, 622-25 (1990).

296. 530 N.E.2d 312 (Ind. Ct. App. 1988).

297. 535 N.E.2d 1207 (Ind. Ct. App. 1989).

298. 530 N.E.2d at 317.

299. 535 N.E.2d at 1216. *See also* Rosiello & Klein, *supra* note 295, at 622-24.

300. 535 N.E.2d at 1218 (quoting Mitchell v. Volkswagenwerk, D.G., 669 F.2d 1199 (8th Cir. 1982)). *See also* Rosiello & Klein, *supra* note 295, at 625.

types of negligence law. Examination of the history of the open and obvious danger rule leads to a conclusion that no justification exists for giving less protection in products negligence actions than the protection afforded plaintiffs in nonproducts negligence actions. Even the exclusion of the open and obvious danger rule from strict liability does not support any type of rationale for its inclusion in products negligence cases.

This apparent conflict for application of the open and obvious danger rule reveals very deep-rooted problems concerning Indiana's tort law and its future in areas of negligence and products liability. The rule born and nurtured by outdated negligence concepts has, until recently, crippled Indiana's progress into more mature and well-reasoned decisions.

The present Indiana Supreme Court has taken great strides in providing consumer protection, and should eliminate the open and obvious danger rule in all situations. The resolution of the dilemma presently confronting the Indiana Supreme Court is not as important as recognizing how the dilemma was created. The court is on the threshold of interpreting the Act. The Act apparently does not place any great obstacles in the court's path because its language allows great latitude for broad interpretation. The Act may reflect and use both warranty and negligence language, as does section 402A, and this type of language is to be expected considering the heritage of strict liability.

The recent expansion of liability in both negligence and products liability has prompted heavy criticism from manufacturers, their insurance companies, scholars, and attorneys who represent manufacturers.[301] Professor Oscar Gray's recent revision to the Harper and James torts treatise appears quite appropriate:

> It has been suggested, for instance, that the reasonableness of "conscious design choices" is fundamentally nonjusticiable because it involves complex trade-offs that cannot all be fairly evaluated simultaneously by juries. Some difficult cases do indeed

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301. In his treatise, Professor Oscar Gray recently discussed the testimony of others before Congress on proposed Products Liability Legislation:

> In addition to their academic affiliations, these witnesses identified themselves as follows: Professor Birnbaum, as "of counsel to the New York firm of Skadden, Arps, Slate, Meagher & Flom, where I represent manufacturers and other defendants in product liability cases. I speak today both as a professor of law and as a practicing attorney," . . . ; Professor Fleming, as speaking "for the industrial liability council of the California Manufactures Association," . . .; Professors Henderson and Owen, as members of the legal consulting firm of Keeton, Owen & Henderson. . .; Professor Henderson also identified himself as "consultant to the National Product Liability Council, an association of manufacturers," although he, like Professor Owen, testified on his own behalf as a legal academic.

5 HARPER, JAMES & GRAY, *supra* note 105, § 28.32A, at 588-89 n.51.

exist. That the reader may question whether they were correctly decided does not, however, establish that they were incapable of being decided correctly. Whatever the merits of the suggestion that issues which can be fairly characterized as, *e.g.* "polycentric," should be regarded as nonjusticiable, it is by no means clear that most design decisions are fairly so characterized.

On a number of other grounds it has similarly been contended that strict products liability has become somehow unworkable. Complaints have been conspicuous, for instance, about liability for injuries caused by the failure of products that were made and sold many years earlier, and about strict liability imposed on retailers who have no way to inspect or test the products they sell. These, and questions raised about liability for hazards the existence of which, or the means for the correction of which, were purportedly unknowable, have led to numerous proposals for legislative modification of strict liability at both state and federal levels. Such changes have been supported by prominent scholars and practitioners. Yet, with the greatest respect to them, it may be suggested that the alarms are on the whole premature and exaggerated, the proposed solutions unpersuasive in the aggregate and generally retrogressive.[302]

The Indiana Supreme Court's response to the critics of expanding liability and the court's resolution of issues such as state of the art, burden of proof in crashworthiness, and determination of a standard for "defective condition unreasonably dangerous" will determine whether Indiana will be confronted with new dilemmas similar to those created by the open and obvious danger rule, or will proceed to establish reasonable rules for products liability actions.

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302. *Id.* § 28.32A, at 584-89.