An Analysis of *Koske v. Townsend Engineering*: The Relationship Between the Open and Obvious Danger Rule and the Consumer Expectation Test

Introduction

On December 28, 1979, Margaret Koske severely injured her hand while operating a meat skinner/slasher machine designed and manufactured by Townsend Engineering.[1] At the time of her accident, Margaret had been employed by the Wilson Foods Company, a meat-packing plant, for six years. Her primary responsibility was trimming excess hair, skin, and abscesses off the jowls after they exited the skinner/slasher machine. In addition, she assisted on the machine about twice a week because it regularly jammed, causing a bottleneck in production. On the day of her injury, Margaret was assisting to alleviate such a backlog. The jowls were stiff from hanging in the freezer. As a result, they would not automatically feed into the machine. An external force was required for the blades to engage the jowls and pull them into the machine. Because Margaret knew her hands should not be close to the blades, she used one jowl to push another into the machine. The jowl she used to push the others became wet from the conveyor belt. It slid over the top of the jowl closest to the blades, and Margaret's hand became caught in the machine.

Margaret filed suit against Townsend Engineering, alleging strict liability in tort for a design defect pursuant to the 1978 Indiana Product Liability Act.[2] The trial court granted summary judgment in favor of the defendant on the ground that Margaret's product liability action was barred by the open and obvious danger rule. In affirming the trial court decision, the Indiana Court of Appeals held: (1) that the Indiana Product Liability Act incorporates the open and obvious danger doctrine and (2) that the open and obvious danger doctrine applies to design defect cases.

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1. The meat slicing machine cut the skin from pork jowls while slashing the top of the jowl to reveal hidden abscesses. The machine was waist high with a two foot conveyor belt extending from the front. It had 17 circular blades that slashed across the top of the jowl and one long blade that skinned the bottom. The conveyor moved the jowl into the blades. Notches in the blades engaged the jowl and forced it through the machine. A cover through which the operator could see the blades was mounted over the top of the blades. However, no safety mechanism such as a hand guard or a deactivation button was provided at the point of operation.

2. Ind. Code §§ 33-1-1.5-1 to -8 (1988). Margaret also alleged willful and wanton misconduct by the manufacturer for failure to issue post-sale warnings or to recall the machine in reckless disregard of known probable consequences.

In addition, the Indiana Court of Appeals stated that whether a danger is open and obvious is, at times, a question of fact. However, the court also held that when a genuine issue of fact is not presented, the question becomes a matter of law. On transfer, the Indiana Supreme Court reversed the entry of summary judgment and remanded the case for further proceedings, holding that the open and obvious danger rule does not apply to strict liability claims under the Indiana Product Liability Act.[3]

This Note examines the soundness and potential impact of the decision rendered by the Indiana Supreme Court in *Koske v. Townsend Engineering*.[4] The focus is on the relationship between the open and obvious danger rule and the consumer expectation test embodied in the Indiana Product Liability Act.[5] Both concepts employ an objective standard, applied from the consumer's point of view, to determine whether a product is defective. Apparently frustrated by the harsh outcome of the open and obvious danger rule, the Indiana Supreme Court declared the rule inapplicable to strict product liability cases.[6] The court did so, however, without analyzing the rule's close connection to the consumer expectation test. Although this Note recognizes problems with both the open and obvious danger rule and the consumer expectation test, its main purpose is to illustrate the interrelatedness of the two doctrines. Because this close relationship exists and because the Indiana legislature has embodied a consumer expectation test in the Product Liability Act, the *Koske* court erred when it rejected the open and obvious danger rule.

Section I provides a history of the consumer expectation test. Section II defines the "open and obvious danger rule" and recounts its roots in the area of strict liability. Section III describes the interrelatedness of the open and obvious danger and the consumer expectation tests. Section IV discusses the specific holdings of the Indiana Supreme Court in *Koske*. Section V analyzes the court's rationale for these holdings and pinpoints problems with the decision. Finally, this Note concludes with possible solutions to the dilemma surrounding the open and obvious danger rule.

I. The Consumer Expectation Test

A. Indiana Common Law

Before looking at the history of the open and obvious danger rule, it is necessary to explore the standard used in Indiana to determine

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3. Koske v. Townsend Eng'g, 551 N.E.2d 437, 442 (Ind. 1990).

4. 551 N.E.2d 437 (Ind. 1990).

5. The consumer expectation test is the standard set forth in the Act for determining whether a product is in a defective condition unreasonably dangerous. Ind. Code § 33-1-1.5-2.5 (1988).

6. *Koske*, 551 N.E.2d at 442.

whether a product is defective. This exploration should begin with the Second Restatement of Torts section 402A. In 1973, the Indiana Supreme Court adopted section 402A as the law regarding products liability.[7] Section 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
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> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
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> (2) The rule stated in Subsection (1) applies although
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> (a) the seller has exercised all possible care in the preparation and sale of his product, and
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> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.[8]

The rule is intended to apply "only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."[9] In addition, the defective condition of the product must be unreasonably dangerous to the consumer.[10] Unreasonably dangerous is defined as "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."[11] Comment i to section 402A cites good whiskey as an example. Whiskey is not unreasonably dangerous merely because it makes some people drunk and it is especially dangerous to alcoholics; however, whiskey containing a dangerous amount of fusel oil is unreasonably dangerous.[12]

Both comments g and i focus on the "consumer's expectations" for the product. The language of comment i denotes that the consumer expectation test is an objective standard. The phrase "contemplated by the *ordinary consumer* who purchases it, with the *ordinary knowledge* common to the community as to its characteristics"[13] indicates that the

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7. Ayr-Way Stores, Inc. v. Chitwood, 261 Ind. 86, 300 N.E.2d 335 (1973).
8. RESTATEMENT (SECOND) OF TORTS § 402A (1965).
9. *Id.* § 402A comment g.
10. *Id.* § 402A comment i.
11. *Id.* (emphasis added).
12. *Id.*
13. *Id.* (emphasis added).

inquiry is what the average consumer would contemplate, not the subjective appreciation of the particular plaintiff alleging the defect.

B. Criticism of the Consumer Expectation Test

The policy underlying the consumer expectation test is that the seller should not become an insurer of his products with respect to all harm generated by their use.[14] The test, however, has been criticized. First, it gives the impression that a product must be specially or unusually dangerous.[15] Second, it is not fully suitable in situations where the consumer does not know what to expect because he does not know the product could be made more safe.[16] Finally, the consumer expectation test has been criticized for imposing a negligence standard on a strict liability statute.[17]

C. Indiana Statutory Law

Despite these criticisms, the Indiana legislature adopted the consumer expectation test when it enacted the Product Liability Act in 1978.[18] The statute adopted the Second Restatement of Torts section 402A nearly word for word.[19] In defining "unreasonably dangerous," the statute 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."[20] Section 2.5 of the statute clearly sets forth an objective standard:

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14. R. CARTWRIGHT & J. PHILLIPS, PRODUCTS LIABILITY § 5.16 (1986).

15. J. BEASLEY, PRODUCTS LIABILITY AND THE UNREASONABLY DANGEROUS REQUIREMENT 84 (1981). The way § 402A defines "defective condition" and "unreasonably dangerous" could lead one to believe that a product must be defective *and* unreasonably dangerous.

16. *Id.* This is especially true in design cases and in cases involving complex or novel products. A layperson may not have the capacity to understand the function of the product.

17. Strict liability was designed to relieve the plaintiff from problems of proof inherent in pursuing a negligence theory in products liability cases. Imposing on the plaintiff the burden of proving that the product was (1) defective *and* (2) unreasonably dangerous increases his burden and defeats the purpose of strict liability. R. CARTWRIGHT & J. PHILLIPS, *supra* note 14, at 510-12.

18. IND. CODE §§ 33-1-1.5-1 to -8 (1988).

19. "The only significant departure from the language of section 402A was that section 3(a) of the 1978 Act added the phrase 'if the 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,' which phrase is not contained in Section 402A." Koske v. Townsend Eng'g, 551 N.E.2d 437, 442 n.1 (Ind. 1990).

20. IND. CODE § 33-1-1.5-2 (1988) (emphasis added).

> (a) A product is in a defective condition under this chapter if, at the time it is conveyed by the seller to another party, it is in a condition:
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> (1) not contemplated by *reasonable persons* among those considered expected users or consumers of the product; and
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> (2) that will be unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling or consumption.[21]

The effect of the statute is to make section 402A the law in Indiana. In enacting the 1978 statute, the legislature declared that it was codifying and restating the common law of Indiana.[22] When making such a declaration, the legislature is presumed to know the common law and to have intended to carry it into the statute except when it expressly indicates otherwise.[23]

To be actionable under section 402A, the injury-producing product must be unreasonably dangerous.[24] "Unreasonably dangerous" was interpreted at common law to mean dangerous to an extent beyond that which would be contemplated by the ordinary consumer.[25] After the passage of the 1978 Indiana Products Liability Act, the common-law interpretation was used to define "unreasonably dangerous."[26] Furthermore, this phrase has been defined in terms of an objective standard. The requirement that the product be unreasonably dangerous focuses on the reasonable contemplation and expectations of the ordinary consumer.[27] Having surveyed the consumer expectation test, as adopted in Indiana by statute, the next step is to analyze the open and obvious danger rule.

II. Open and Obvious Danger Rule

As formulated by the Indiana Supreme Court in *Bemis Co. v. Rubush*,[28] the open and obvious danger rule provides:

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21. *Id.* § 33-1-1.5-2.5(a) (emphasis added).

22. Masterman v. Veldman's Equip., Inc:, 530 N.E.2d 312, 315 (Ind. Ct. App. 1988).

23. This rule is a corollary to the rule that statutes in derogation of the common law are to be strictly construed. State Farm v. Structo Div., King Seeley Thermos Co., 540 N.E.2d 597, 598 (Ind. 1989).

24. Bemis Co. v. Rubush, 427 N.E.2d 1058, 1061 (Ind. 1981), *cert. denied*, 459 U.S. 825 (1982).

25. *Id.*

26. *See, e.g.,* Corbin v. Coleco Indus., 748 F.2d 411 (7th Cir. 1984) (common-law interpretation used to define the statutory use of "unreasonably dangerous"). The 1983 amendments to the Indiana Product Liability Act included a definition of "unreasonably dangerous."

27. Jarrell v. Monsanto Co., 528 N.E.2d 1158, 1167 (Ind. Ct. App. 1988).

28. 427 N.E.2d 1058, 1061 (Ind. 1981).

> In the area of products liability, based upon negligence or based upon strict liability under § 402A of Restatement (Second) of Torts to impress liability upon manufacturers, the defect must be hidden and not normally observable, constituting a latent danger in the use of the product. Although the manufacturer who has actual or constructive knowledge of an unobservable defect or danger is subject to liability for failure to warn of the danger, he has no duty to warn if the danger is open and obvious to all.[29]

In *Bemis*, the plaintiff, Gerald Rubush, worked as a bagger on a fiberglass insulation batt packing machine. The machine was designed by the Bemis Company. On October 19, 1971, while working as a bagger on the machine, Rubush was struck in the head by the shroud, a visible, moving part of the machine. Rubush sustained serious injuries to his skull and brain.

Neither Rubush nor his co-workers were able to explain exactly what happened. No evidence existed to indicate that the machine malfunctioned or that it was defective in its operation. Similar machines were used for ten years prior to the accident without incident. After the accident, the machine was tested for malfunctions by various experts. The testing, however, revealed no mechanical or electrical malfunctions.

Rubush alleged that the machine was dangerous because it allowed the shroud to descend while any object or person was within its path of operation. He argued that Bemis's failure to design the machine to stop the shroud from descending if something was in its path constituted a design defect. Rubush admitted, however, that the descending shroud was an open and obvious danger.

Bemis contended that it was not strictly liable under section 402A because any dangers of the packing machine were open and obvious. Bemis presented evidence that clearly indicated that the danger was patent. In addition, Bemis's evidence established that protective devices were not feasible and that an alternate design with more remote control buttons would have made the machine more dangerous.

Relying on the Second Restatement of Torts section 402A as the basis for strict liability, the *Bemis* court held that "to be actionable under § 402A, the injury-producing product must be unreasonably dangerous, that is, 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."[30] This test focuses the inquiry on the expectations of the consumer. Thus,

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29. *Id.*
30. *Id.* (emphasis added).

the *Bemis* court's test for determining a "defective condition unreasonably dangerous" is the consumer expectation test.

Next, the *Bemis* court found support for the open and obvious danger rule in Indiana cases and federal cases applying Indiana law.[31] "[T]o impress liability upon manufacturers, the defect must be hidden and not normally observable, constituting a latent danger in the use of the product."[32] The court's rationale was that there must be reasonable freedom and protection for the manufacturer because he is not an insurer against accidents and is not obligated to produce only accident-proof machines.[33] Instead, the manufacturer's duty is to avoid hidden defects or dangers.[34]

Later cases clarified the objective nature of the open and obvious rule. The objective test, based upon what the user should have known, is used to determine whether a defect or danger is open and obvious.[35] Although in many cases this question is a matter of law, this is not absolute;[36] sometimes the determination is a question for the trier of fact.[37]

Courts are split on the proper application of the open and obvious danger rule. "To impress liability upon manufacturers, the defect must be hidden and not normally observable."[38] This indicates that one element of the plaintiff's prima facie case is to show that the defect is latent.

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31. *Id. See, e.g.,* Burton v. L.O. Smith Foundry Prods. Co., 529 F.2d 108 (7th Cir. 1976) (when danger or potential danger is known or should be known to the user, there is no duty to warn); Posey v. Clark Equip. Co., 409 F.2d 560 (7th Cir. 1969) (no duty to warn because those receiving warning would normally realize the danger without the warning); J.I. Case Co. v. Sanderfur, 245 Ind. 213, 197 N.E.2d 519 (1964) (manufacturer had a common-law duty to protect third parties using the product against hidden defects and dangers).

32. *Bemis*, 427 N.E.2d at 1061.

33. *Id.* at 1062. Note that the policy underlying the open and obvious danger rule is essentially the same as the consumer expectation test.

34. *Id.*

35. Ragsdale v. K-Mart Corp., 468 N.E.2d 524, 527 (Ind. Ct. App. 1984). The fact that a mower blade is not clearly exposed to the user does not make it a latent danger. The ordinary user of a lawn mower is aware of the presence of a blade under the hood of the mower which moves to cut the grass. The court held that such a blade poses an open and obvious danger as a matter of law to one placing a hand into the running mower.

36. Bridgewater v. Economy Eng'g, 486 N.E.2d 484, 488 (Ind. 1985).

37. *Id.* Clarifying it's holding in *Bemis*, the Indiana Supreme Court cited to Hoffman v. E.W. Bliss Co., 448 N.E.2d 277 (Ind. 1983), as an example of when the question is for the trier of fact. Although the operator of a press would know of the danger of putting one's hand in the press, it was not open and obvious as a matter of law that an internal dysfunction of the press might cause it to activate and recycle itself when it did not do so during normal operation.

38. Bemis Co. v. Rubush, 427 N.E.2d 1058, 1061 (Ind. 1981).

If the plaintiff cannot demonstrate this, then the plaintiff fails to meet his burden of production. Nevertheless, many courts and commentators misapply the rule by calling it an affirmative defense.[39]

III. Interrelatedness of the Open & Obvious Danger Rule and the Consumer Expectation Test

The policy rationale supporting the open and obvious danger rule is similar to that advanced by the consumer expectation test. First, a manufacturer is not an insurer against accidents.[40] Second, when a danger is obvious, a manufacturer can reasonably expect users to act to avoid injury.[41] This rationale is particularly appropriate in warning cases. When a danger is fully obvious and generally appreciated, nothing of value is added by a warning.[42] One commentator has even postulated that the rule reduces cost and error because it functions as a workable and reliable surrogate for the assumption of risk defense, which because of the defense's intimate connection with subjective states, is difficult to establish by reliable evidence.[43]

Like the consumer expectation test, the open and obvious danger rule has received criticism from many courts. One court denounced the rule for making "obviousness" the sole determinant of the reasonableness of a danger, rather than one of many factors.[44] In addition, the product becomes insulated from liability simply because it is patently dangerous.[45] A victim could never recover for harm suffered as a result of a design hazard that was open and obvious. Consequently, patently dangerous products may be deemed nondefective despite the fact that a safer design was available at only a slight increase in manufacturing costs.[46] Lastly, in many situations, especially those involving design matters, the consumer would not have safety expectations because he would have no idea how safely the product could be made.[47] Despite the negative treatment of

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39. *See* Rogers v. R.J. Reynolds Tobacco Co., 557 N.E.2d 1045, 1052 (Ind. Ct. App. 1990) ("The 'open and obvious' *defense* of *Bemis v. Rubush* . . . has no application to this case for two reasons."); R. Epstein, Modern Products Liability Law 145-46 (1980) ("The traditional cases accepted the absolute status of the hard-edged open and obvious *defense*.").

40. *Bemis*, 427 N.E.2d at 1062.

41. Burton v. L.O. Smith Foundry Prods. Co., 529 F.2d 108, 111 (7th Cir. 1976).

42. K. Ross & B. Wrubel, Product Liability 1989: Warnings, Instructions, and Recalls 47-48 (1989).

43. R. Epstein, *supra* note 39, at 145.

44. Nichols v. Union Underwear Co., 602 S.W.2d 429, 432 (Ky. 1980).

45. *Id.*

46. W. Keeton, Prosser & Keeton on Torts § 99 (5th ed. 1984).

47. *Id.*

the doctrine by some courts outside of the state, Indiana continued to follow the open and obvious danger rule until the *Koske* decision.

IV. The *Koske v. Townsend Engineering* Decision

In *Koske*, the court made several statements that are both troubling and potentially confusing for the future status of product liability in Indiana.

A. The Court's Interpretation of "Defective Condition" and "Unreasonably Dangerous"

Section 402A and the Indiana Product Liability Act define "unreasonably dangerous" as dangerous "to an extent beyond that which would be *contemplated by the ordinary consumer who purchases it.*"[48] However, the *Koske* court shifted the focus of inquiry from the consumer to the product and the manufacturer. It stated that "[t]he concepts of 'defective condition' and 'unreasonably dangerous' focus the relevant inquiry upon the product and the manufacturer or seller, as assessed by an objective standard, regarding expected use."[49] This changes the focus from what the ordinary consumer expects to what the ordinary manufacturer expects.

Next, the *Koske* court declared that the language of the open and obvious danger rule, as formulated in *Bemis Co. v. Rubush*[50] and applied in other cases, exceeded the meaning of "defective condition" and "unreasonably dangerous."[51] "By precluding liability whenever the defect is open and obvious, patent, or not hidden, [the rule] tended to obscure or minimize consideration of human factors related to the foreseeable circumstances of expected product use."[52]

To illustrate how the rule obscures or minimizes consideration of human factors, the supreme court pointed to the results of three Indiana Court of Appeals decisions. The court of appeals in *Koske* held that summary judgment in favor of the defendant was proper because there were no genuine issues of fact.[53] In *FMC Corp. v.*

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48. Ind. Code § 33-1-1.5-2 (1988) (emphasis added).

49. Koske v. Townsend Eng'g, 551 N.E.2d 437, 440 (Ind. 1990).

50. For the language of the rule as formulated in *Bemis*, see *supra* text accompanying note 29.

51. *Koske*, 551 N.E.2d at 441.

52. *Id.*

53. Koske v. Townsend Eng'g, 526 N.E.2d 985, 992 (Ind. Ct. App. 1980), *rev'd*, 551 N.E.2d 437 (Ind. 1990). The appellate court acknowledged that the relevant danger is not necessarily the injury-producing mechanism of a machine. Margaret argued that the relevant danger was the slipping of the jowls when used to push other jowls into the blades. Even if this was the relevant danger, the appellate court concluded that it was open and obvious because Margaret knew that the conveyor was wet and that the jowls were stiff, cold, and icy. Common experience would alert her to the risk of the jowl slipping as it approached the blades.

Brown,[54] the court of appeals held that providing an instruction on the open and obvious danger rule was reversible error because the trial court instructed the jury that the rule was an affirmative defense, thus shifting the burden of proof to the defendant.[55] In *Miller v. Todd*,[56] the plaintiff alleged that the open and obvious danger rule should not relieve a motorcycle manufacturer from the duty to design a crashworthy vehicle. The court of appeals stated that as a matter of law, the absence of a crash bar on a motorcycle is an open and obvious danger to the ordinary consumer.[57] Although the court cited the appellate decisions of *Koske*, *FMC Corp.*, and *Miller* as cases minimizing consideration of human factors, it referred to *Hoffman v. E.W. Bliss Co.*,[58] *Kroger Co. Sav-On Store v. Presnell*,[59] and *Corbin v. Coleco Industries*,[60] as cases in which human factors were not

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54. 526 N.E.2d 719 (Ind. Ct. App. 1988), *rev'd*, 551 N.E.2d 444 (Ind. 1990).

55. *Id.* at 728. The court agreed with the plaintiff that denial of summary judgment was proper. The court explained that "whether a danger is open and obvious depends not just on what people can see with their eyes but also on what they know and believe about what they see." *Id.* at 725 (quoting Corbin v. Coleco Indus., 748 F.2d 411 (7th Cir. 1984)). The court found that reasonable men believe it is safe to operate a crane near power lines if the crane is 10 to 15 feet away from the line.

56. 518 N.E.2d 1124 (Ind. Ct. App. 1988), *rev'd*, 551 N.E.2d 1139 (Ind. 1990).

57. *Id.* at 1126. The court did not reach the issue of whether Indiana adheres to the doctrine of crashworthiness. Instead, the focus was on whether the manufacturer provided a product in a defective condition unreasonably dangerous to the user. Applying an objective standard, the court concluded that an ordinary consumer is aware that the absence of a crash bar affords no protection to the legs of an unenclosed rider.

58. 448 N.E.2d 277 (Ind. 1983). It is one thing to excuse a manufacturer from liability for injuries caused by dangers which are open and obvious. However, excusing liability is not appropriate when the injury is caused by mechanisms that, due to a hidden defect, cause it to operate or malfunction at a time when the user has every reason to expect that it will not. The court could not say as a matter of law that the plaintiff's injury was caused by a patent defect. Evidence existed that tended to show that the descent of the ram in the metal punch press may have been caused by either a true double trip or an uninitiated spontaneous cycle of the press. *Id.* at 285.

59. 515 N.E.2d 538 (Ind. Ct. App. 1987). The plaintiff alleged that a lounge chair was defective and unreasonably dangerous because the defendants failed to provide instructions or warnings about how to open the chair. She argued that without proper instructions or warnings, the danger of the chair's collapse was not apparent. The court affirmed the trial court's denial of summary judgment. It stated that the danger posed to the consumer was not open and obvious as a matter of law. The court held that it was for the jury to decide whether the danger was patent. *Id.* at 543.

60. 748 F.2d 411 (7th Cir. 1984). Plaintiff injured himself when he hit his head on the bottom after diving into an above-ground swimming pool manufactured by the defendant. Expert testimony indicated that people are generally aware of the danger of diving into shallow water, but they believe there is a safe way to do it (*i.e.* by executing a flat shallow dive). Thus, the risk of spinal cord injury from diving into shallow water cannot be an open and obvious danger as a matter of law. The court concluded that "whether a danger is open and obvious depends not just on what people can see with their eyes but also on what they know and believe about what they see." *Id.* at 417-18.

minimized or obscured.[61]

B. Obviousness as a Factor of Incurred Risk

Next, the *Koske* court stated that the proper use of the obviousness of a danger is as "an appropriate consideration in product strict liability to evaluate the actual state of mind of the product user when the affirmative defense of incurred risk is asserted."[62] If the plaintiff establishes that the product was sold in a defective condition unreasonably dangerous to the user, the defendant may still avoid liability by showing that the plaintiff had *actual* knowledge and appreciation of the specific danger and voluntarily accepted the risk.[63] The use of "obviousness" in this manner involves an inquiry into the consumer's subjective state of mind. The question becomes "what was this plaintiff's awareness" instead of "what is the ordinary consumer's awareness."

The *Koske* court criticized cases that invoke an objective test when considering the obviousness of a danger.[64] The court stated that:

> Many subsequent cases applied the *Bemis* open and obvious danger language not merely to aid in the determination of "unreasonably dangerous" relative to a product and its manufacturer, but also to engraft upon § 402A an additional element involving evaluation of the plaintiff's conduct separate and apart from the affirmative defense of incurred risk.[65]

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61. Koske v. Townsend Eng'g, 551 N.E.2d 437, 441 (Ind. 1990).

62. *Id. See also* IND. CODE § 33-1-1.5-4(1) (1988) ("it is a defense that the user or consumer bringing the action knew of the defect and was aware of the danger and nevertheless proceeded unreasonably to make use of the product and was injured by it"); RESTATEMENT (SECOND) OF TORTS § 496A (1965) ("a plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm"); RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965) (voluntarily proceeding to encounter a known danger is a defense under § 402A).

63. *Koske*, 551 N.E.2d at 441.

64. *Id.*

65. *Id.* The court criticized Angola State Bank v. Butler Mfg., 475 N.E.2d 717 (Ind. Ct. App. 1985) ("notwithstanding evidence showing unguarded chain and sprocket mechanism was unreasonably dangerous, the open and obvious danger rule did apply to preclude manufacturer liability"); Ragsdale v. K-Mart Corp., 468 N.E.2d 524 (Ind. Ct. App. 1984) ("summary judgment upheld applying open and obvious danger rule as proper consideration for determining whether plaintiff acted reasonably in exposing himself to danger"); Law v. Yukon Delta, Inc., 458 N.E.2d 677 (Ind. Ct. App. 1984) ("open and obvious danger rule applies objective test to determine whether plaintiff should have recognized the danger"); and Bryant-Poff, Inc. v. Hahn, 454 N.E.2d 1223 (Ind. Ct. App. 1982), *cert. denied*, 465 U.S. 1075 (1984) ("rule requires objective test of what the user should have known to determine if an unshielded power takeoff shaft was open and obvious").

Furthermore, the use of an objective standard was held to be inappropriate because it is similar to the defense of contributory negligence which is not an available defense in strict liability in tort.[66]

C. Statutory Language

To further support its statement that the open and obvious danger rule no longer applies in strict liability cases, the court analyzed the purpose and language of the 1978 Indiana Product Liability Act. The Act only undertook a "Codification and Restatement" of strict liability.[67] The court noted that the Act enumerates the affirmative defenses applicable to strict liability in tort, but does not attempt to codify and restate defenses applicable to claims based on negligence.[68] "Because of the express intention to codify and restate, and because the resulting enactment comprehensively addressed the subject matter, [the court] conclude[d] that with the 1978 Product Liability Act the legislature entered, occupied, and preempted the field of product strict liability in tort."[69]

Determining whether the *Bemis* open and obvious danger rule is included in the statute depends on whether the Act, by express terms or by unmistakable implication, made changes in the preexisting common law.[70] The court found an unmistakable implication that the *Bemis* rule was excluded from the Act's codification and restatement of strict liability law:

> The Act not only employed the language of Restatement (Second) § 402A without explicitly incorporating the words open and obvious or requiring that a defect be latent or concealed, but it also expressly delineated the allowable defenses to strict liability in tort to include evaluation of the product user's conduct only by a subjective rather than an objective standard.[71]

Therefore, the court held that the Indiana open and obvious danger rule does not apply to strict liability claims under the Indiana Product Liability Act.[72]

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66. Koske v. Townsend Eng'g, 551 N.E.2d 437, 441 (Ind. 1990). *See* IND. CODE § 33-1-1.5-4 (1988) (enumerating defenses to strict liability in tort).
67. *Koske*, 551 N.E.2d at 442.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*

D. The Open and Obvious Danger Rule: Applicability to Negligence Theory of Product Liability

Indiana common law recognizes that the open and obvious danger rule is applicable to product liability claims grounded in negligence.[73] The Indiana Supreme Court offered three reasons why the open and obvious danger rule is applicable to product liability claims based on negligence. First, the Product Liability Act's express codification and restatement of the common law does not extend to general product negligence law.[74] Second, the Act does not comprehensively cover the subject matter of general product negligence law.[75] Third, the Act does not by express terms or unmistakable implication change general product negligence law.[76] Therefore, the common-law open and obvious danger rule of *Bemis* and its progeny is not superseded by the Act in product negligence liability cases.[77]

V. Analysis of *Koske v. Townsend Engineering*

A. "Defective Condition" and "Unreasonably Dangerous"

The *Koske* court's misunderstanding of the open and obvious danger rule is illustrated by its treatment of the terms "defective condition" and "unreasonably dangerous." The court stated that the two concepts "focus the relevant inquiry on the product and the manufacturer or seller, as assessed by an objective standard, regarding expected use."[78] As defined by section 402A and by the Indiana statute, however, the relevant inquiry is on the ordinary consumer and his expectations.[79] By shifting the focus of the inquiry from the *ordinary consumer* to the ordinary manufacturer,[80] the court, without expressly stating so, rejected the consumer expectation test.

The consumer expectation test used by Indiana courts at common law was incorporated into the Product Liability Act. The statute refers to unreasonably dangerous as "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

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73. *Id.* at 443. *See* Bridgewater v. Economy Eng'g Co., 486 N.E.2d 484 (Ind. 1985).
74. Koske v. Townsend Eng'g, 551 N.E.2d 437, 443 (Ind. 1990).
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 440.
79. *See supra* notes 11, 21 and accompanying text.
80. *See supra* note 49 and accompanying text.

it with the ordinary knowledge about the product's characteristics common to the community of consumers.''[81] This language is similar to the language of comment i.[82] Failing to properly apply the consumer expectation test included within the product liability statute was the first step leading to the court's misunderstanding of the open and obvious danger rule.

As applied in a number of jurisdictions, the consumer expectation test incorporates the open and obvious danger rule by precluding a determination of product defect when the danger associated with the product is patent and thus, not more dangerous than the ordinary consumer would expect.[83] In explaining this relationship, the Fifth Circuit Court of Appeals stated:

> The key to the *Manitowoc*[84] decision was the court's determination that consumer expectations should be the primary focus in determining whether a product is unreasonably dangerous. . . . Under this analysis, a product design incorporating an open and obvious hazard could never be unreasonably dangerous, because it could never be more dangerous than an ordinary consumer would expect.[85]

Both the consumer expectation test and the open and obvious danger rule approach a product defect from the standpoint of the *ordinary consumer*. Even though both doctrines are criticized by courts and commentators, by incorporating section 402A into the Product Liability Act, the Indiana legislature intended for the consumer expectation test to be the standard used for determining defectiveness in strict product liability cases. Because of the interrelatedness of the two concepts, the court's decision in *Koske* is illogical.

Next, the *Koske* court asserted that the language of the open and obvious danger rule exceeds the meaning of ''defective condition'' and

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81. IND. CODE § 33-1-1.5-2 (1988) (emphasis added).

82. ''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.'' RESTATEMENT (SECOND) OF TORTS, § 402A comment i (1965).

83. K. ROSS & B. WRUBEL, PRODUCT LIABILITY OF MANUFACTURERS 1988: PREVENTION AND DEFENSE 11-12 (1988).

84. Gray v. Manitowoc Co., 771 F.2d 866 (5th Cir. 1985). The plaintiff was struck by the boom of a construction crane manufactured by the defendant. The plaintiff alleged that the operator's vision was obstructed by the boom and that mirrors, closed-circuit television, or other devices should have been provided to enable the operator to see blind spots. The defendant argued that the lack of devices did not render the crane defective and that the hazards of operation were open and obvious to ordinary users of the crane.

85. Melton v. Deere & Co., 887 F.2d 1241, 1248 (5th Cir. 1989) (citation omitted).

"unreasonably dangerous" because it "obscures or minimizes consideration of human factors related to the foreseeable circumstances of expected product use."[86] Although the court did not expound upon this statement, the inference is that the court was displeased that the rule operates as a total bar to recovery by allowing summary judgment in favor of the defendant or by placing the burden of proving latency upon the plaintiff. This conclusion is drawn from the cases cited by the court.[87] However, these cases discredit the court's assertion, rather than support it.

The court seems to divide these cases into two irreconcilable groups: (1) those in which human factors are minimized or obscured[88] and (2) those in which human factors are given consideration.[89] Rather than viewing these two groups of cases as standing for dissimilar propositions, one can view them as harmonious. *Hoffman, Kroger*, and *Corbin* illustrate the courts' efforts since *Bemis* to refine the proper application of the open and obvious danger rule.

In *Hoffman*, the court explained that while the injury-producing mechanism of the machine (the descent of a ram on a metal punch press) was open and obvious, the true defect or danger was the internal malfunction that caused the ram to descend without warning or without activation by the operator.[90] Thus, the *Hoffman* court provided clearer guidelines for identifying the relevant danger. Likewise, in *Corbin,* the court narrowed the meaning of open and obvious by stating that "[w]hether a danger is open and obvious depends not just on what people can see with their eyes but also on what they know and believe about what they see."[91] Finally, in *Kroger,* the court determined that the danger was not always open and obvious *as a matter of law.*[92]

The appellate decisions of *Koske*, *Miller*, and *FMC Corp.* did not contradict the propositions announced in *Hoffman, Corbin,* or *Kroger.*[93] Rather, *Koske* and *Miller* exemplified situations in which patency was appropriately a matter of law. In fact, the *Koske* court acknowledged the proposition from *Hoffman* that the relevant danger is not necessarily

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86. Koske v. Towsend Eng'g, 551 N.E.2d 437, 441 (Ind. 1990).

87. *See supra* notes 53-60 and accompanying text.

88. *See supra* note 52-57 and accompanying text.

89. *See supra* notes 62-63 and accompanying text.

90. Hoffman v. E.W. Bliss Co., 448 N.E.2d 277, 285 (Ind. 1983).

91. Corbin v. Coleco Indus., 748 F.2d 411, 417-18 (7th Cir. 1984).

92. Kroger Co. Sav-On Store v. Presnell, 515 N.E.2d 538, 543 (Ind. Ct. App. 1987).

93. It should be noted that the appellate decisions in *FMC Corp.* and *Miller* were reversed by the Indiana Supreme Court *after* it rendered its decision in *Koske*. Hence, the Indiana Supreme Court was applying the new proposition of *Koske* that the open and obvious danger rule is inapplicable to strict liability claims.

the injury-producing mechanism of a machine.[94] However, the court distinguished the facts in *Koske* from those in *Hoffman.* The court of appeals concluded that even if "the relevant danger is the slipping of one jowl when used to push other jowls into the blades, the facts are not in conflict that the danger was open and obvious."[95]

In addition, *FMC Corp.* illustrates that refinements made by prior courts were applied in subsequent cases. The appellate court in *FMC Corp.* affirmed the trial court's denial of the defendant's motion for summary judgment.[96] The court cited *Corbin* for the proposition that "whether a danger is open and obvious depends not just on what people can see with their eyes but also on what they know and believe about what they see."[97] The *Koske* court probably viewed *FMC Corp.* negatively because the *FMC Corp.* court held that providing an instruction that classifies the open and obvious danger rule as an affirmative defense is reversible error.[98] The *Koske* court's disapproval is understandable because the court also mistakenly classified "obviousness" as a factor of the affirmative defense of incurred risk.[99]

B. Obviousness as an Element in Evaluating the User's Actual State of Mind

The *Koske* court held that "obviousness" could properly be used as an aid in evaluating the user's actual state of mind in relation to the affirmative defense of incurred risk.[100] The court rejected the objective test because it is akin to contributory negligence, which is not an available defense under the statute.[101] The court's analysis rests on the erroneous assumption that the patent danger rule is a defense. This error is central to the court's holding.

The *Bemis* court held that "to impress liability upon manufacturers, the defect must be hidden and not normally observable."[102] Thus, the question is not whether liability will be excused because of an affirmative defense, but rather whether it will be imposed in the first place. One element of the plaintiff's prima facie case is to show that the defect is

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94. Koske v. Townsend Eng'g, 526 N.E.2d 985, 992 (Ind. Ct. App. 1988), *rev'd*, 551 N.E.2d 437 (Ind. 1990).
95. *Id.*
96. FMC Corp. v. Brown, 526 N.E.2d 719, 728 (Ind. Ct. App. 1988).
97. *Id.* at 725.
98. *Id.*
99. *See supra* note 62 and accompanying text.
100. *Id.*
101. *See supra* note 66 and accompanying text.
102. Bemis Co. v. Rubush, 427 N.E.2d 1058, 1061 (Ind. 1981).

latent. This is distinctly different from the affirmative defense of contributory negligence.

Using an objective standard does not engraft an additional element on section 402A.[103] First, section 402A specifically calls for an objective standard. Comment i states that for the rule to apply, the product "must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it."[104] The key phrase is "beyond the contemplation of the ordinary consumer." In other words, comment i implies that a danger must be latent or hidden. Even though the language of section 402A and the comments do not expressly use the terms "open and obvious" or require that a defect be hidden, a reasonable inference is that a latent defect is required before strict liability will be imposed. This inference is supported by both the language of the comment and by the interpretation made by courts using section 402A.[105]

C. The 1978 Indiana Product Liability Act

The *Koske* court stated that the 1978 Indiana Product Liability Act is a codification and restatement of the law.[106] To support its conclusion that the patent danger rule is inapplicable to cases based on strict liability, the court stated that the Act enumerates the available affirmative defenses without including the open and obvious doctrine.[107] This lends little support to the court's conclusion because the doctrine is not an affirmative defense. Instead, it is used to determine whether a plaintiff has established his prima facie case by showing that the danger or defect was latent or hidden.

The second argument that the court offered is that the Act, by unmistakable implication, changed the preexisting common law because the Act employs the language of section 402A without explicitly incorporating the words "open and obvious" or requiring that a defect be latent.[108] The "unmistakable implication" that the court draws is not so clear. Neither section 402A nor its comments use the words "open and obvious" or "latent."[109] These terms are implied by the language "must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer" in comment i.[110]

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103. *See supra* note 65 and accompanying text.
104. RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965).
105. *See Bemis*, 427 N.E.2d at 1058.
106. Koske v. Townsend Eng'g, 551 N.E.2d 437, 442 (Ind. 1990).
107. *Id.*
108. *Id.*
109. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965).
110. *Id.* § 402A comment i.

D. Open and Obvious Danger Rule and Product Liability Claims Based on Negligence

The final holding of *Koske* is that the common-law open and obvious danger rule of *Bemis* is applicable in product liability claims based on negligence. This presents a problem for future application of the rule. Because "a pleading may set forth two [2] or more statements of a claim . . . alternatively or hypothetically,"[111] plaintiffs often advance both strict liability and negligence theories in product liability cases. However, plaintiffs may have difficulty distinguishing between the two theories. In fact, strict liability under section 402A rarely leads to a different conclusion than that drawn under the laws of negligence.[112] The *Koske* decision requires plaintiffs to make a distinction between two theories which may be easy in theory, but difficult in practice.

In addition, there is great potential for confusion when instructing the jury on each theory under the rule in *Koske*. A defendant will be entitled to an instruction of the open and obvious danger rule regarding the negligence theory, but not the strict liability theory. To expect the jury to apply the open and obvious danger rule with respect to negligence, but to refrain from using it in regard to strict liability, is wishful thinking. The problem is further compounded by the fact that Indiana courts do not allow special verdict forms.[113] This frustrates the ability to determine the basis of the jury's verdict.

The *Koske* court stated that the *Bemis* rule is applicable to product liability claims based on negligence because the Act does not extend to negligence claims and does not change the general product negligence law.[114] Although the *Koske* court misinterpreted the *Bemis* rule, it nonetheless recognized it as applying in product negligence cases. As the preceding analysis suggests, no rationale exists for distinguishing between the use of the open and obvious danger rule in negligence and strict liability theories of product liability.

VI. Conclusion

Although the *Koske* court attempted to address the problems of the open and obvious danger rule, it misinterpreted case law and statutory law surrounding strict products liability. The rule's critics may have valid concerns regarding the impact of the rule. The main thrust of this Note, however, is that the consumer expectation test is so interrelated

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111. Ind. Tr. R. 8(E)(2).
112. R. Cartwright & J. Phillips, *supra* note 14, at 511.
113. Ind. Tr. R. 49 (special verdicts and interrogatories to the jury are abolished).
114. Koske v. Townsend Eng'g, 551 N.E.2d 437, 443 (Ind. 1990).

with the open and obvious danger rule that one doctrine cannot be discarded without affecting the other. As long as the statute calls for the consumer expectation standard to be used in deciding whether a product is in a defective condition unreasonably dangerous, then the open and obvious danger rule should also be followed.

Certain steps can be taken to prevent the injustices feared by the court and critics of the rule. First, courts can embrace the idea that the openness and obviousness of a danger may be a question of fact for the trier to decide. The *Bemis* court did not hold that patency was a pure question of law.[115] Later cases made this clear.[116] The Indiana Supreme Court stated that "[i]n *Bemis*, we did not hold that the question of whether an alleged danger is open and obvious is a matter of law in *all* cases."[117] However, if from the uncontested facts no reasonable jury properly instructed in Indiana law could infer that the danger was not patent, then summary judgment is proper.[118]

Critics argue that the open and obvious danger rule encourages manufacturers to leave off safety devices in order to make dangers patent.[119] As one justice observed, holding a danger open and obvious *as a matter of law* may be the factor causing manufacturers to leave off safety devices.[120] This problem may be reduced if the question of patency is left to the trier of fact. Defendants may feel less comfortable leaving this determination to the jury, thus weakening the incentive to leave off safety devices.

A second step that courts could take to preserve the value of the doctrine is to establish clearly defined exceptions. One example is when a machine "invites" the user into its zone of danger.[121] In *Berg v. Sukup Co.*,[122] a grain farmer injured his left arm when it became entangled in the rotating shaft of a grain drying system. The system consisted of a

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115. The court stated that a machine may not be built with flimsy parts concealed by an exterior such as to mislead a user into believing it is safe and stable when, in fact, it is not. Therefore, whether there is a concealed defect or hidden danger to a user is a question of fact. Bemis Co. v. Rubush, 427 N.E.2d 1058, 1062 (Ind. 1981).

116. *See* Bridgewater v. Economy Eng'g, 486 N.E.2d 484 (Ind. 1985); Hoffman v. E.W. Bliss Co., 448 N.E.2d 277 (Ind. 1983); Kroger Co. Sav-On Store v. Presnell, 515 N.E.2d 538 (Ind. Ct. App. 1987).

117. *Bridgewater*, 486 N.E.2d at 488 (emphasis in original).

118. Estrada v. Schmutz Mfg. Co., 734 F.2d 1218, 1220 (8th Cir. 1984).

119. *See* J. BEASLEY, *supra* note 15, at 91; R. CARTWRIGHT & J. PHILLIPS, *supra* note 14, § 5.33.

120. Bryant-Poff, Inc. v. Hahn, 453 N.E.2d 1171, 1174 (Ind. 1983) (Hunter, J., dissenting).

121. K. Ross & B. WRUBEL, *supra* note 42, at 52 (citing Berg v. Sukup Mfg. Co., 355 N.W.2d 833 (S.D. 1984)).

122. 355 N.W.2d 833 (S.D. 1984).

grain bin with several horizontal and vertical augers designed to circulate the grain. The horizontal auger was fitted with a slide gate which was customarily used to secure samples of processed grain. An unshielded drive shaft was situated four to five inches from the slide gate. Although other means of obtaining grain samples existed, the slide gate was the most feasible method. While obtaining a grain sample from the slide gate, Berg entangled his sleeve in the rotating shaft and injured his arm.

The court found that Berg was using the system in a manner foreseen and expected by Sukup.[123] "The slide gate location actually invited the operator into the location of the danger."[124] In answer to the defendant's argument that the danger was open and obvious, the court declared that the reasonableness of the plaintiff's conduct was a factor for the jury to consider.[125]

Another measure would be to distinguish between design cases and warning cases. The open and obvious danger rule is more applicable to warning cases. "It is well established that there is no duty resting upon a manufacturer or seller to warn of a product-connected danger which is obvious or generally known. . . . *The same rule applies when it appears that the person using the product should know of the danger.*"[126] The purpose of a warning is to apprise a party of a danger of which he is unaware, thereby enabling him to protect himself against the danger.[127] When the danger is fully obvious and appreciated, no value is added by issuing a warning.[128] If suppliers are required "to warn of all obvious dangers inherent in a product, '[t]he list of foolish practices warned against would be so long it would fill a volume.'"[129]

The most drastic measure that could be taken to avoid the disadvantages of the open and obvious danger rule is for the legislature to adopt a new test for determining when a product is defective. Many jurisdictions have adopted a risk-utility approach which balances the risks associated with the product and the utility of the product.[130] Other jurisdictions combine the consumer expectation test with the risk-utility

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123. *Id.* at 836.

124. *Id.*

125. *Id.* at 835-36.

126. American Optical Co. v. Weidenhamer, 457 N.E.2d 181, 188 (Ind. 1983) (emphasis in original).

127. K. Ross & B. Wrubel, *supra* note 42, at 47.

128. *Id.* at 47-48.

129. Plante v. Hobart Corp., 771 F.2d 617, 620 (1st Cir. 1985) (quoting Kerr v. Koemm, 557 F. Supp. 283, 288 n.2 (S.D.N.Y. 1983)).

130. *See, e.g.*, Ortho Pharmaceutical Corp. v. Heath, 722 P.2d 410 (Colo. 1986); Bilotta v. Kelley Co., 346 N.W.2d 616 (Minn. 1984); Suter v. San Angelo Foundry & Mach., 81 N.J. 150, 406 A.2d 140 (1979); General Motors Corp. v. Turner, 584 S.W.2d 844 (Tex. 1979).

test.[131] However, one court has held that the risk-utility test is proper only when the consumer expectation test is inappropriate.[132]

Even though other approaches are available, the fact remains that the Indiana Product Liability Act cloaks "defective condition" and "unreasonably dangerous" in the garb of the consumer expectation test.[133] In doing so, the Indiana legislature impliedly affirmed the use of the common-law open and obvious danger rule. Because these two concepts are inherently connected, the court in *Koske* erred when it held that the open and obvious danger rule is inapplicable to product liability claims based on strict liability.

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131. *See, e.g.*, Dart v. Wiebe Mfg., 147 Ariz. 242, 709 P.2d 876 (1985); Knitz v. Minster Mach., 69 Ohio St. 2d 460, 432 N.E.2d 814 (1982).

132. Sours v. General Motors Corp., 717 F.2d 1511 (6th. Cir. 1983).

133. IND. CODE §§ 33-1-1.5-2 to -2.5 (1988).