Survey of 1992 Developments in the Indiana Law of Product Liability

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The 1992 survey period saw several important decisions affecting the Indiana Product Liability Act, Indiana Code section 33-1-1.5-1. Both Indiana and federal courts have addressed the applicability of the Indiana statute of repose,[1] the incurred risk defense,[2] the validity of a failure to warn claim,[3] the open and obvious danger defense,[4] the state of the art defense,[5] and the statutory definitions of a product[6] and a defective product.[7]

I. Statute of Repose and Subsequent Product Modifications

In *Stump v. Indiana Equipment Co.*,[8] the Indiana Court of Appeals for the Second District held that the ten-year repose statute for product liability actions applies only if the alleged defect was present at or before the time the product was delivered to its initial user.[9] In reaching this conclusion, the court of appeals reversed summary judgment for Indiana Equipment Co., the seller of the subject product, a highway grader, and reinstated the claim. The court reasoned that a "product liability action," as contemplated by the statute of repose, is an action in which the plaintiff complains of a defect that existed at or before the time the product was delivered by the seller to the initial user or consumer.[10]

The plaintiff in *Stump* contended that he was injured as a result of an improperly wired safety switch. At the time of the accident, the plaintiff was standing next to the machine checking the source of an

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1. Stump v. Indiana Equip. Co., 601 N.E.2d 398 (Ind. Ct. App. 1992).
2. Kochin v. Eaton Corp., 797 F. Supp. 679 (N.D. Ind. 1992).
3. York v. Union Carbide Corp., 586 N.E.2d 861 (Ind. Ct. App. 1992).
4. Phillips v. Cameron Tool Corp., 950 F.2d 488 (7th Cir. 1991).
5. *Id.*
6. Sapp v. Morton Bldgs., Inc., 973 F.2d 539 (7th Cir. 1992).
7. Peters v. Judd Drugs, Inc., 602 N.E.2d 162 (Ind. Ct. App. 1992).
8. 601 N.E.2d 398 (Ind. Ct. App. 1992).
9. *Id.* at 402.
10. *Id.* at 401.

oil leak. As he turned on the grader, it rolled backward, crushing both of his legs. In bringing his action, the plaintiff contended that a properly wired neutral safety switch would have prevented the grader from moving while in gear.

The parties did not dispute the fact that the machine was rewired after it was delivered to the initial user by Indiana Equipment in 1967. Indiana Equipment Co. repaired the wiring during 1985, the year before Stump's injuries. Stump filed suit in 1988, and Indiana Equipment moved for summary judgment on the grounds that the action was time-barred under the ten-year statute of repose.

In reaching its holding, the court of appeals addressed the purpose behind the Indiana statute of repose in the context of the present action. The court stated that the statute's "purpose was to place a temporal limit upon liability for a product's defects."[11] However, the court said, "[I]t does not follow that *all* parties are absolved of liability for *all* claims of negligence concerning a particular product when more than ten years has elapsed since that product was delivered to the initial user. Our legislature simply could not have intended such a wide-sweeping result."[12]

The court said its holding preserves an incentive for care in inspecting, handling, and maintaining products that are more than ten years old.[13] Thus, according to the court, the ten-year statute of repose, which begins to run at the time of delivery, will not bar actions involving post-sale negligence, as opposed to a defect present at the time of that initial delivery.

The court in *Stump* distinguished its holding from the decision of the Indiana Supreme Court in *Dague v. Piper Aircraft Corp.*[14] In *Dague*, the court held that the ten-year statute of repose commences to run upon the delivery of the product to the "initial user or consumer."[15] *Dague*, however, involved defects that existed at the time of sale. In *Stump*, the wiring did not become allegedly defective until 1985, several years after the sale. Furthermore, the Indiana Code section 33-1-1.5-2.5 provides that the statute of repose applies to defects present "at the time it is conveyed by the seller to another party."[16] Therefore, according to *Stump*, the statute of repose applies only to actions in which the plaintiff complains of a defect which existed at or before the time the product was delivered by the seller to the initial user or consumer.[17]

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11. *Id.*
12. *Id.* at 402.
13. *Id.*
14. 418 N.E.2d 207 (Ind. 1981).
15. *Id.* at 210.
16. IND. CODE § 33-1-1.5-2.5 (1983).
17. *Stump*, 601 N.E.2d at 398.

II. Bystander Assumption of Risk

In *Kochin v. Eaton Corp.*,[18] a bystander injured when a coworker backed a forklift into her brought a product liability action alleging that the forklift was unreasonably dangerous because the manufacturer failed to install a rear view mirror, a back-up alarm horn, or a flashing warning lamp, all of which would aid the forklift operator in ascertaining whether someone was behind the forklift or indicate to a bystander when the forklift was running in the reverse.[19] In response, the manufacturer pled the defense of assumption of risk.[20] The plaintiff, on the other hand, argued that because she was neither a user nor a consumer of the forklift, the affirmative defense of assumption of the risk did not apply.[21]

The United States District Court for the Northern District of Indiana held that the manufacturer could raise the affirmative defense of assumption of risk even though the plaintiff, a bystander, was not a user or consumer of the product.[22] The court reasoned that, under the facts of the case, the only person who could assume the risk (the risk that someone would be injured due to a lack of warning device) would be a bystander, and not the forklift operator.[23]

In reaching this conclusion, the court in *Kochin* conducted an independent investigation of cases in every state as to whether the assumption of risk defense is available in a bystander case.[24] In two of these cases, *Masterman v. Veldman's Equipment, Inc.*[25] and *Barr v. Rivinius, Inc.*,[26] the courts held that the assumption of risk defense did not apply to plaintiff-bystanders. In three other cases, however, *FMC Corp. v. Brown*,[27] *Gilbert v. Stone City Construction Co.*,[28] and *Baker v. Chrysler Corp.*,[29] it was recognized that an incurred risk instruction is applicable in cases in which the plaintiff is a bystander. The court in *Kochin* agreed with the position taken by the courts in *Brown*, *Gilbert*, and *Baker* that an incurred risk instruction is applicable in cases where the plaintiff is a bystander.[30]

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18. 797 F. Supp. 679 (N.D. Ind. 1992).
19. *Id.* at 681.
20. *Id.* at 683.
21. *Id.*
22. *Id.* at 684.
23. *Id.* at 685.
24. *Id.* at 684.
25. 530 N.E.2d 312 (Ind. Ct. App. 1988).
26. 373 N.E.2d 1063 (Ill. App. Ct. 1978).
27. 551 N.E.2d 444 (Ind. 1990).
28. 357 N.E.2d 738 (Ind. Ct. App. 1976).
29. 127 Cal. Rptr. 745 (Cal. Ct. App. 1976).
30. Kochin v. Eaton Corp., 797 F. Supp. 679, 685 (N.D. Ind. 1992).

The *Kochin* court also addressed whether a subjective or objective standard should be applied to determine whether the bystander incurred the risk.[31] Although not handed down by the time the jury returned a verdict, *Kochin* recognized that the Indiana Supreme Court, in *Koske v. Townsend Engineering Co*,[32] decided that the evaluation of the product user's conduct is to be judged by a subjective rather than objective standard.[33] Accordingly, plaintiff-bystanders in product liability actions may assume the risk of injury. Moreover, whether the bystander assumed the risk of the defective product will be judged by the bystander's own perception of the risk involved.

III. Extent of Seller's Duty to Warn

In *York v. Union Carbide Corp.*,[34] the Indiana Court of Appeals for the Third District discussed the extent of a manufacturer's duty to warn a buyer of the dangerous propensities of argon gas.[35] Specifically, this decision responds to an argument from the widow of a Union Carbide employee that Union Carbide was required to personally inform the decedent, as opposed to merely warning his supervisors, of the dangers of argon gas.[36]

After deciding that the argon gas was not a defective product as defined by the Indiana Product Liability Act,[37] the court recognized that the only manner in which argon could have been defective in this case, under Indiana's product liability law, was under the provision for a manufacturer's failure to warn, Indiana Code section 33-1-1.5-2.5(b).[38] In an action based upon a negligent failure to warn, when the warnings are given to an employer (or other third parties), the court said, "the question remains whether this method gives a reasonable assurance that the information will reach those whose safety depends upon their having it."[39] Thus, "adequacy of warnings remains at issue, and Union Carbide could still be found liable if it provided inadequate warnings to those

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31. *Id.*
32. 551 N.E.2d 437 (Ind. 1990).
33. *Kochin*, 797 F. Supp. at 685.
34. 586 N.E.2d 861 (Ind. Ct. App. 1992).
35. *Id.*
36. *Id.* at 867.
37. *Id.* (The argon gas would have been defective under the Act if in a "condition not contemplated by reasonable persons among those considered expected users or consumers" of the product, or if it was "unreasonably dangerous to the expected user or consumer when used in reasonably expected ways or handling or consumption.")
38. *Id.* at 868.
39. *Id.* at 869 (quoting Restatement (Second) of Torts § 388 cmt. n (1965)).

USX personnel responsible for receiving the product and disseminating the information to the co-workers."[40]

The court in *York* held that Union Carbide gave an adequate warning to the buyer of the dangerous properties of argon gas. It reasoned that, because the buyer had a great deal of information concerning the effect of argon gas in a confined space, no additional warning or literature that could be furnished by Union Carbide to the buyer could have improved the buyer's understanding of the characteristics of the product.[41] Thus, said the court, the plaintiff did not raise a material issue of fact, and, for this reason, it must be concluded that the warnings were adequate as a matter of law.[42]

The court in *York* also addressed plaintiff's argument that Union Carbide had a duty to train the employees of the buyer on the proper method of testing a confined space for oxygen deficiency.[43] The plaintiff's argument found its source in Indiana Code section 33-1-1.5-2.5(b)(2), which contains the requirement that the manufacturer give "reasonably complete instructions on the proper use of the product."[44]

The court, however, rejected the plaintiff's argument that Union Carbide had a duty to train the employees of the buyer. In doing so, the court found important the fact that the plaintiff offered no authority for the proposition that a manufacturer has a legal duty to train the employees of its buyer.[45]

IV. Open and Obvious Danger

In *Phillips v. Cameron Tool Corp.*,[46] the Court of Appeals for the Seventh Circuit addressed whether the trial court's open and obvious danger instruction was correct.[47] In doing so, the court recognized that intervening events since the trial had caused the trial court's instruction to be erroneous, although correct when given.

The Seventh Circuit in *Phillips* relied upon the Indiana Supreme Court decision in *Bemis Co. v. Rubush*,[48] which had concluded that a product was not unreasonably dangerous, and therefore no warnings were required if, objectively viewed, the dangers were open and obvious.[49]

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40. *Id.*
41. *Id.* at 872.
42. *Id.*
43. *Id.* at 871.
44. *Id.*
45. *Id.*
46. 950 F.2d 488 (7th Cir. 1991).
47. *Id.*
48. 427 N.E.2d 1058 (Ind. 1981), *cert. denied*, 459 U.S. 825 (1982).
49. *Id.* at 1061.

In fact, the trial court in *Phillips* gave a *Bemis* instruction.[50] Subsequent to the trial, the Indiana Supreme Court decided *Koske v. Townsend Engineering Co.*,[51] *FMC Corp. v. Brown*,[52] and *Miller v. Todd*.[53]

Noting that the injuries in *Bemis* occurred before the 1978 adoption of the Indiana Product Liability Act, the court in *Koske* concluded that under the Act, an open and obvious danger does not necessarily negate liability although it bears upon the manufacturer's expectations of potential use and upon a user's subjective appreciation of the risk and his voluntary acceptance of it.[54] In *FMC Corp.*, the court noted that feasible safeguards, not adopted, may cause a product having an open and obvious danger to be unreasonably dangerous and therefore defective.[55] In a different context, the court in *Miller* further developed this concept.[56]

The plaintiff in *Phillips*, the operator of an industrial die press, brought a strict liability action claiming, among other things:

> that the die was defectively designed because the lifting devices should have been an inherent part of the die, the die should have had safety devices to hold the shoes together when moved about the plant, and the die should have been designed with instructions and warnings concerning the use of proper size bolts and/or safety devices to transport the die.[57]

Defendant's response included the contention that the alleged defects were open and obvious.[58]

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50. *Phillips*, 950 F.2d at 491. The text of the instruction was as follows:
The law does not require a manufacturer to warn of dangers of hazards which are open and obvious in the use of a product or which are personally known to the user. A product is not unreasonably dangerous, and therefore, is not defective, if the danger is open and obvious. The plaintiff must establish a latent, or hidden, danger in order to prove that the product was defective. In determining whether the danger was open and obvious, you may consider both this particular plaintiff's knowledge about the product and the objective knowledge that a reasonable person would possess in circumstances similar to the plaintiff's. If you find that this plaintiff had actual knowledge of the danger or that a reasonable person in circumstances similar to the plaintiff's circumstances would have known of the danger, then the danger is not hidden, and you should find for the defendant. On the other hand, if you find that the plaintiff did not actually know about the danger and that the reasonable person in circumstances similar to the plaintiff's circumstances would not have known about the danger, then you should find the danger was hidden.

51. 551 N.E.2d 437 (Ind. 1990).

52. 551 N.E.2d 444 (Ind. 1990).

53. 551 N.E.2d 1139 (Ind. 1990).

54. *Koske*, 551 N.E.2d at 441-42.

55. *FMC Corp.*, 551 N.E.2d at 446.

56. *Miller*, 551 N.E.2d at 1143.

57. Phillips v. Cameron Tool Corp., 950 F.2d 488, 490 (7th Cir. 1991).

58. *Id.*

Based upon the recent decisions in *Koske*, *FMC Corp.*, and *Miller*, the Seventh Circuit Court of Appeals in *Phillips* reversed the trial court decision and remanded the case for a new trial.[59] Although the trial court's instruction was correct when given, "the latest decision on an issue of civil law will have a retroactive effect unless it would impair a contract made or vested rights acquired in reliance upon an earlier decision."[60] For this reason, the Seventh Circuit Court of Appeals instructed the trial court, upon remand, to correct its instruction to be in line with these three latest decisions.[61]

V. "State of the Art"

The Seventh Circuit in *Phillips* also addressed the validity of defendant's state of the art defense.[62] Specifically, the defendant argued that its die design was the state of the art, and, for this reason, any liability on its part should be negated.[63]

In response to this defense, the court first recognized that, under Indiana Code section 33-1-1.5-4(b)(4), a defendant may assert a state of the art defense to a strict liability claim.[64] Because the statute does not define state of the art, the court said that there has been some confusion among courts and commentators about the meaning of the term.[65] Most theorists considered it as signifying existing technological capability, but some related it to then-existing standards of the industry.[66] As of November 1989, Indiana had not expressly adopted either standard, although Indiana Pattern Jury Instruction 7.05 had recently cast its lot with the technological capability standard.[67] Because the law was unsettled, the trial court opted not to define "state of the art," although plaintiff offered an instruction quite similar to the pattern instruction.[68]

A few months after the trial court's decision, the Indiana Court of Appeals, First District, in *Montgomery Ward & Co. v. Gregg*,[69] expressly rejected the concept of industry practice.[70] The court in *Montgomery Ward* embraced the concept of technological advancement inherent in

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59. *Id.* at 491.
60. *Id.* at 490.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. 554 N.E.2d 1145, 1155 (Ind. Ct. App. 1990).
70. *Id.*

both the pattern instruction and that offered by the plaintiff in *Phillips*.[71] The court in *Phillips* held that allowing the jury to choose between differing legal standards when, as of the decision in *Montgomery Ward*, a single legal standard controlled, was an error which required reversal.[72]

VI. Product Defect and Foreseeable Use

In *Peters v. Judd Drugs, Inc.*,[73] the Indiana Court of Appeals for the Third District was asked to determine whether a bottle of potassium hydroxide, a product unsafe for human consumption, was a "defective product."[74] The facts relevant to this case disclose that, while the plaintiff was a patient at the Hudson Medical Group, a nurse at Hudson mistakenly retrieved a bottle of potassium hydroxide from the medical supply room rather than the silver nitrate which was used to treat plaintiff's urethritis. Then, without reading the label on the bottle, the nurse instilled the potassium hydroxide solution causing plaintiff to feel an immediate burning sensation.[75]

As a result of this incident, the plaintiff brought a strict liability claim against the pharmacy that supplied the potassium hydroxide to the clinic. She alleged that by packaging the potassium hydroxide in the same manner as medicine sent to Hudson, and by failing to place labels which warned against any use for humans, a genuine issue of material fact existed as to whether the defendant sold a defective product.[76]

In denying plaintiff's strict liability claim, the court recognized, as the threshold question, "whether there [was] 'evidence that the supplier knew or had reason to know that the product was likely to be dangerous when used in a foreseeable manner'."[77] The evidence disclosed that:

> the supplier, Judd, and Hudson employees had no reasonable expectation that the potassium hydroxide would be stored with medicine, would be instilled into a patient, or would be used for any purpose other than [its stated purpose] for the preparation of laboratory materials. Further, it was not foreseeable that a Hudson employee would use the potassium hydroxide without reading the label or the warning.[78]

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71. *Id.*
72. *Phillips*, 950 F.2d at 490.
73. 602 N.E.2d 162 (Ind. Ct. App. 1992).
74. *Id.*
75. *Id.* at 163.
76. *Id.*
77. *Id.* at 164-65.
78. *Id.* at 165.

Accordingly, because the product was not used in a manner foreseeable to the supplier, under Indiana law the bottle of potassium hydroxide was not a defective product.

VII. Real Estate Improvement as "Product"

The Seventh Circuit, in *Sapp v. Morton Buildings, Inc.*,[79] addressed the threshold question of whether to classify a contract for the installation of a real estate improvement as a "product" under the Indiana Product Liability Act, or as a service to which the Act does not apply.[80] The facts relevant to this case disclose that, in 1982, the plaintiff, Sapp, contracted with Morton to remodel a barn on Sapp's land. Because the existing barn had nonstandard dimensions, all materials, except the doors and windows, had to be tailor made at the building site to fit the existing structure. This tailoring of the parts included pieces of channel iron nailed to cover the top of exposed boards in the stable to prevent the horses from chewing on the wood. Morton manufactured the channel iron used on this job. The new adjoining stable building was of standard design and therefore was largely prefabricated at one of Morton's plants.[81]

One of plaintiff's horses was kept in a stall of the barn remodeled into a stable. In April 1985, this horse suffered a laceration on its lip, which developed into an infection. As a result, the horse had to be destroyed. The plaintiff brought an action alleging that the laceration and resulting infection were caused by the improperly installed and designed piece of channel iron.[82] To determine whether the Indiana Product Liability Act governed this action, the court found the determining factor to be whether the transaction involved "predominately the sale of a service or a product."[83]

Although the court could not locate any Indiana cases on point, it held that Morton's remodeling of Sapp's barn involved predominately the sale of a service, rather than a product.[84] In reaching its decision, the Seventh Circuit found relevant the fact that the materials used to remodel the barn had to be modified "on the job" to custom fit the new stable.[85] "Thus, in sharp contrast to the prefabricated building also provided by Morton, the remodeled barn required Morton to make

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79. 973 F.2d 539 (7th Cir. 1992).

80. *Id.*

81. *Id.* at 540.

82. *Id.*

83. *Id.* (The Act, in defining a "product," draws a crucial distinction between transactions which involve "wholly or predominately the sale of a service rather than a product.")

84. *Id.*

85. *Id.*

numerous and extensive site-specific adjustments to convert the building into a stable."[86] The Morton employees did not simply install a prefabricated product on Sapp's property. The court recognized that the employees custom designed and fit their materials to the specifications of the old barn.[87] Thus, the transaction was primarily a sale of a service.[88]

The court's conclusion in *Sapp* that Morton's work was predominantly a provision of a service and not a product is fortified by the analysis in *Grain Dealers Mutual Insurance Co. v. Chief Industries, Inc.*[89] In *Grain Dealers*, the District Court for the Northern District of Indiana addressed whether the product liability or real estate improvement statute of limitations applied to the design, manufacture, and assembly of a grain storage bin.[90] The real estate improvement statute, the court reasoned, had never been applied to "actions against entities like the defendant who design fungible products without any particular parcel of real estate in mind and do not participate in the on-site construction of an improvement to real estate."[91]

Contrary to the analysis set forth in *Grain Dealers*, the plaintiff in *Sapp* argued that the channel iron should be considered a product under the Act.[92] He reasoned that the *Grain Dealers* court observed that "courts in Indiana treat an action against a manufacturer of a product as products liability actions even if the product ultimately becomes a part of an improvement to real estate."[93] In rejecting this contention, the court indicated that it understood *Grain Dealers* to stand for the "sensible proposition that *if an item is a product*, its use in the improvement of a parcel of real estate does not take it out of the Act's coverage."[94] As was already noted, Morton's remodeling of the Sapp barn was primarily the sale of a service, not a product, and the Act explicitly excludes such transactions from its coverage.[95] Accordingly, the Product Liability Act should be applied to goods manufactured without any particular parcel of real estate in mind and which are then made part of the improvement to real estate.[96]

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86. *Id.* at 542.
87. *Id.*
88. *Id.*
89. 612 F. Supp. 1179 (N.D. Ind. 1985).
90. *Id.* at 1181.
91. *Id.*
92. *Sapp*, 973 F.2d at 542.
93. *Id.*
94. *Id.* at 543.
95. *Id.*
96. *Id.*

VIII. Conclusion

The 1992 survey period has witnessed the resolution and clarification of several important issues with respect to the Indiana Product Liability Act. It is now clear that an open and obvious danger does not necessarily negate liability on the part of the manufacturer. Furthermore, courts have been given a working definition of the phrase "state of the art." The applicability of the statute of repose has been limited to product defects existing at the time of delivery to the initial user or consumer. A bystander may assume the risk of injury from a defective product. As evidence that Indiana product liability law is a hybrid of strict liability and negligence principles, the court has said that a product can only be defective while being used or consumed in a manner reasonably foreseeable to the manufacturer. Lastly, the courts have provided substantial guidance on the troubling issue of when an improvement to real estate is a "product."