RECENT DEVELOPMENTS IN THE INDIANA LAW OF PRODUCT LIABILITY

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INTRODUCTION

This Article surveys the most significant developments in Indiana product liability law from November 1, 1993 through October 31, 1994. The opinions reviewed include both Indiana decisions and federal court decisions construing Indiana law. While the number of opinions addressing product liability issues was relatively small, several important decisions are worthy of Survey coverage.

I. FORESEEABLE USE AND INDUSTRY STANDARDS

In *Short v. Estwing Manufacturing Corp.*,[1] the Indiana Court of Appeals for the Fifth District addressed the meaning of the "reasonably expectable use" provision of the Indiana Product Liability Act.[2] The plaintiff, an eight-year old boy, was in the back yard of the family home watching his stepfather use a nail hammer to dig a trench in the ground around the house.[3] The plaintiff decided to try the same task. While his stepfather was preoccupied, the plaintiff retrieved the hammer and began to scrape away rocks in the trench.[4] Discovering a large rock embedded in the ground, he attempted to remove it by digging around the rock with the claw end of the hammer.[5] When that proved unsuccessful, he struck the claw end of the hammer against the rock and, on impact, a metal chip broke from the claw end of the hammer and flew into his eye. As a result, he suffered a permanent loss of vision.[6] The boy, by his parents, filed a strict products liability and negligence action against the hammer manufacturer for the child's injury.[7] The trial court granted summary judgment in favor of the manufacturer.[8]

On appeal, the court examined the Indiana Product Liability Act, which provides in relevant part:

> (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.

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1. 634 N.E.2d 798 (Ind. Ct. App. 1994).
2. IND. CODE § 33-1-1.5-2.5 (1988).
3. *Short*, 634 N.E.2d at 800.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

. . . .

(c) A product is not defective under this chapter if it is safe for reasonably expectable handling and consumption. If an injury results from the handling, preparation for use, or consumption that is not reasonably expectable, the seller is not liable under this chapter.[9]

The manufacturer claimed that striking a rock with the claw end of an ordinary nail hammer is not a reasonably expectable use and thus the product was not in a defective condition as a matter of law.[10] The court rejected the manufacturer's contention and determined that reasonably expectable use, like reasonable care, involves questions concerning the ordinary prudent person, or in the case of products liability, the ordinary prudent consumer.[11] The court also found that "[t]he manner of use required to establish 'reasonably expectable use' under the circumstances of each case is a matter peculiarly within the province of the jury."[12] The court further provided:

> The test of "reasonably expectable use" centers on the manner of use which an ordinary prudent consumer would employ under the same or similar circumstances. In applying the test, it is not what the fact finder would have done as an individual, or in the case of a jury, even collectively. Rather, it is a matter of what the fact finder determines the abstract, reasonably prudent consumer would have done under the circumstances.[13]

The court made clear that questions of reasonableness cannot generally be resolved by motions for summary judgment and that the principle was especially true in this case "because an ordinary claw nail hammer is generally used in a variety of ways other than 'pulling common unhardened nails and ripping apart or tearing down wooden components or structures.'"[14] In its discussion regarding the characteristics of a hammer, the court cited *Dunham v. Vaughan & Bushnell Manufacturing Co.*,[15] which provided:

> [A] hammer is an implement of beguiling simplicity, and there is probably no artifact with so many uses, real or fancied. No one is in awe of the art of using a hammer, and everyone, or anyone, deems himself competent to employ it, albeit, artfully or in frustration. It is to be found in many households, and children, from the time they are able to lift the artifact, can use it with enthusiasm, although the benefits may be dubious. A hammer is a hammer to most people and limitations in the implement, or its age, fitness and condition, are not apparent to the unsophisticated.[16]

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9. IND. CODE § 33-1-1.5-2.5 (1988).

10. *Short*, 634 N.E.2d at 801.

11. *Id.*

12. *Id.* (citing Lovely v. Keele, 333 N.E.2d 866 (Ind. App. 1975)).

13. *Id. See also* Peavler v. Board of Comm'rs, 557 N.E.2d 1077 (Ind. Ct. App. 1990) (applying test in the case of reasonable care).

14. *Short*, 634 N.E.2d at 801.

15. 229 N.E.2d 684 (Ill. App. Ct. 1967), *aff'd*, 247 N.E.2d 401 (Ill. 1969).

16. *Id.* at 691.

The court concluded that "[b]ecause an issue of fact existed regarding whether Short's use of the hammer was reasonably expectable and thus whether the hammer was defective under [Indiana Code section] 33-1-1.5-2.5, summary judgment in favor of the manufacturer was improper and must be reversed."[17]

The *Short* court also addressed the manufacturer's argument responding to the negligence claim; specifically, its contention that there had been no breach of duty *as a matter of law* because the hammer complied with ANSI standards.[18] In rejecting this argument, the court recognized that "[s]tandards set by an industry do not define the standard of reasonable care against which the conduct of a manufacturer in that industry will be measured in a negligence case."[19] The court further provided that "[t]he fact that a particular product meets or exceeds the requirements of its industry is not conclusive proof that the product is reasonably safe. In fact, standards set by an entire industry can be found negligently low if they fail to meet the test of reasonableness."[20] As such, the court found that whether the manufacturer breached its duty of care was a question best left for the fact finder and thus found summary judgment improper.[21]

II. SUBSTANTIAL ALTERATION; OPEN AND OBVIOUS DANGER RULE; INCURRED RISK; PRODUCT WARNINGS

In *Schooley v. Ingersoll Rand, Inc.*,[22] the Indiana Court of Appeals for the Fourth District addressed several important issues pertaining to Indiana products liability law. In *Schooley*, the plaintiff was injured during the course of her employment with Arrow Tool Company.

> She was directed by her supervisor to clean and move a 1500 pound steel plate hanging on a hoist hook. She observed that the plate was not restrained by the chains typically attached to both the hook and the plate, but was hanging on the hook. Realizing the danger of moving the plate, but with the belief that the job could be safely accomplished, [the plaintiff] began to operate the hoist upon which the hook was attached. The plate came loose from the hook and fell on her. [Her] right foot was sheared at the ankle.[23]

The plaintiff brought a strict product liability and negligence suit against the manufacturer of the hoist hook, as well as others.[24] The plaintiff alleged that the accident would not have happened if the safety latch had been in place on the hoist hook that she used.[25] The plaintiff also asserted that the defendant manufactured hoist hooks equipped with safety latches that were easily broken and that the defendant knew the safety latches

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17. 634 N.E.2d 799, 801 (Ind. Ct. App. 1994).
18. *Id.* at 802.
19. *Id.* (citing Thiele v. Faygo Beverage, Inc., 489 N.E.2d 562, 575 (Ind. Ct. App. 1986)).
20. *Id.* (quoting Dudley Sports Co. v. Schmitt, 279 N.E.2d 266, 276 (Ind. App. 1972)).
21. *Id.*
22. 631 N.E.2d 932 (Ind. Ct. App. 1994).
23. *Id.* at 935.
24. *Id.* at 936.
25. *Id.* at 937.

would be broken and not repaired.[26] The defendant maintained that the plaintiff's employer's failure to replace the hoist hook's safety latch operated as a superseding cause of the plaintiff's injuries.[27] The trial court granted summary judgment in favor of the defendants.[28]

On the substantial alteration issue, the plaintiff contended that the trial court erred in concluding that the hoist hook was substantially altered after its sale to her employer, and argued that a product is not "substantially" altered if the manufacturer of the product could have foreseen the alteration.[29] The court of appeals initially noted that the defense pertinent to the issue of substantial alteration is found in Indiana Code section 33-1-1.5-4(b)(3), which provides:

> [I]t is a defense that a cause of the physical harm is a modification or alteration of the product made by any person after its delivery to the initial user or consumer if such modification or alteration is the proximate cause of physical harm where such modification or alteration is not reasonably expectable to the seller.[30]

The court defined substantial change as "any change which increases the likelihood of a malfunction, which is the proximate cause of the harm complained of, and which is independent of the expected and intended use to which the product is put."[31] The court further noted that in a strict liability case, liability can be imposed on the manufacturer or seller "even though [a] product is altered or changed if it is foreseeable that the alteration would be made and the change does not unforeseeably render the product unsafe."[32] The court also noted that "[t]he question involved 'is whether the alteration of the product was a superseding cause'"[33] and recognized that the issue of foreseeability is normally a question of fact appropriate for determination by the jury.[34]

In its consideration of the specific facts of *Schooley*, the court found that the breakage of the safety latch and failure to replace the same could be found foreseeable because the manufacturer knew of the weaknesses in its safety latches and the infrequency of replacement by the companies using its hoist hooks.[35] As such, the court found it proper for the fact finder to decide whether a foreseeable alteration had occurred and whether Indiana Code section 33-1-1.5-4(b)(3) would operate as a viable defense to the plaintiff's strict liability claim.[36]

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26. *Id.*
27. *Id.*
28. *Id.* at 936.
29. *Id.* at 937.
30. *Id.* at 938.
31. *Id.* (quoting Montgomery Ward & Co. v. Gregg, 554 N.E.2d 1145, 1157 (Ind. Ct. App. 1990) (quoting Cornette v. Searjeant Metal Prods., Inc., 258 N.E.2d 652, 653 (Ind. App. 1970))).
32. *Id.* (quoting Craven v. Niagara Machine and Tool Works, Inc., 425 N.E.2d 654, 655 (Ind. Ct. App. 1981)).
33. *Id.*
34. *Id.* (citing *Montgomery Ward*, 554 N.E.2d at 1156).
35. *Id.*
36. *Id.*

The plaintiff contended that the trial court erred in granting summary judgment on the basis that the product negligence claim was barred by the open and obvious rule.[37] The plaintiff claimed "that the open and obvious rule [did] not apply to product negligence cases."[38] In addressing the plaintiff's contention, the court noted that the open and obvious danger rule originated in *Bemis Co. v. Rubush*,[39] which provides:

> [T]he 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.[40]

The court further noted that the Indiana Supreme Court expressly abrogated the open and obvious danger rule in strict product liability actions.[41] However, the court relied upon the Indiana Supreme Court's decision in *Miller v. Todd*[42] to determine that the open and obvious danger rule remains a defendant's dagger in product negligence cases.[43] While recognizing the existence of evidence indicating that the danger of using the hoist hook without a safety latch was open and obvious, the court determined that the question of whether the plaintiff should have recognized the danger of the plate falling upon being

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37. *Id.*

38. *Id.*

39. 427 N.E.2d 1058 (Ind. 1981), *cert. denied*, 459 U.S. 825 (1982).

40. *Schooley*, 631 N.E.2d at 938 (quoting *Bemis Co.*, 427 N.E.2d at 1061).

41. *Id.* (citing Koske v. Townsend Eng'g Co., 551 N.E.2d 437, 442 (Ind. 1990)).

42. 551 N.E.2d 1139 (Ind. 1990).

43. *Schooley*, 631 N.E.2d at 939. Unfortunately, the open and obvious danger rule continues to operate in product negligence cases despite the wholly unjust and illogical results it produces. In essence, the retention of the open and obvious danger rule tacitly encourages manufacturers to incorporate patently dangerous features into product design and thereby obliterate product negligence liability because the danger, however easy to remedy, will be obvious to the consumer. To examine the "consumer expectation" approach mandated by the text of the Indiana Product Liability Act is even more disturbing. *See* IND. CODE §§ 33-1-1.5-2, -2.5 (1993). While it is true that the Indiana Supreme Court expressly abrogated the open and obvious danger rule in strict product liability actions, the reasoning that underlies the open and obvious danger rule continues to operate, under the guise of "consumer expectation," to bar plaintiffs' recoveries. For example, if the trier of fact determines that the dangers posed by a product are within the contemplation of an ordinary consumer, this determination is tantamount to declaring that the danger was sufficiently apparent so as to be open and obvious. Conversely, if a product's danger or defect is open and obvious, then the defect must also be within the contemplation of the ordinary consumer. If the danger or defect is within the contemplation of the ordinary user, then even patent dangers do not frustrate the consumer's expectations of safety. In such a case, the "consumer expectation" is too low to be a valid gauge of the defectiveness of the product. This very situation is addressed by the reasoning of the open and obvious danger rule, which is not available in a strict product liability action. However, strict adherence to the "consumer expectation" test re-enacts this otherwise unavailable defense. For a thorough discussion regarding the inadequacies of the open and obvious danger rule and the "consumer expectation" approach, *see* John Vargo, *Strict Liability for Products: An Achievable Goal*, 24 IND. L. REV. 1197 (1991); Ellen Wertheimer, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back*, 60 U. CIN. L. REV. 1183 (1992).

moved was a question for the jury to decide. The jury must decide this issue by weighing the evidence provided by the defendant's expert against the evidence that the presence of safety latches was not common in the plant.[44] As such, the court could not decide, as a matter of law, that the absence of the safety latch was an open and obvious danger.[45]

The *Schooley* court noted that incurred risk is a defense to both strict product liability and negligence claims.[46] The court reiterated the principle that the incurred risk defense "involves a mental state of venturousness on the part of the actor, and *demands a subjective analysis* into the actual knowledge and voluntary acceptance of the risk."[47] Therefore, the court properly concluded that the incurred risk defense can rarely be determined as a matter of law and is almost always properly left for resolution by the trier of fact.[48]

In *Schooley*, the court was confronted with the incurred risk defense in the context of the plaintiff's workplace. In such an environment, the court reasoned that the issue of whether an employee has incurred the risk of an activity incidental to his or her employment is generally a question of fact for the jury to decide.[49] The *Schooley* court found that the evidence demonstrated that the plaintiff did not contemplate that the steel plate would slip from the hoist hook, turn when it hit the skid, and fall to the side where she was standing; therefore, the court found that she was not aware of the specific risk of using a product that was lacking a safety device.[50] Accordingly, the court properly determined that the question of whether the plaintiff voluntarily incurred the risk of her injuries was a question of fact for the jury, as the court could not decide that she incurred the risk as a matter of law.[51]

Finally, the *Schooley* court addressed the issue of whether the hoist hook was defective because of the manufacturer's failure to warn about the dangers of using it without a safety latch. The court turned to Indiana Code section 33-1-1.5-2.5(b)(1), which provides a duty to:

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

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44. *Schooley*, 631 N.E.2d at 939.

45. *Id.*

46. *Id.*

47. *Id.* at 940 (emphasis added) (quoting Beckett v. Clinton Prairie Sch. Corp., 504 N.E.2d 552, 554 (Ind. 1987) (quoting Power v. Brodie, 460 N.E.2d 1241, 1243 (Ind. Ct. App. 1984))).

48. *Id.*

49. *Id. See also* Richardson v. Marrell's, Inc., 539 N.E.2d 485 (Ind. Ct. App. 1989) (fact question as to whether employee who slipped on ice while making delivery incurred risk of slipping); Kroger Co. v. Haun, 379 N.E.2d 1004 (Ind. App. 1978) (fact question as to whether employee incurred risk of injury by operating defective forklift in congested area); Meadowlark Farms, Inc. v. Warken, 376 N.E.2d 122 (Ind. App. 1978) (issue of whether plaintiff assumed risk as an incident of sharecropping agreement was for jury). Indiana law "has also recognized that prior knowledge of specific dangers of a job and acceptance of these dangers warrants a finding of incurred risk as a matter of law." *Schooley*, 631 N.E.2d at 940; *see* Ferguson v. Modern Farm Sys., Inc., 555 N.E.2d 1379, 1381-82 (Ind. Ct. App. 1990).

50. *Schooley*, 631 N.E.2d at 939.

51. *Id.*

(2) give reasonably complete instructions on proper use of the product; when the seller, by exercising reasonable diligence, could have made such warnings or instructions available to the user or consumer.[52]

The court further noted that "[a] product may be defective if there is a failure to warn or instruct of potential and unknown dangers in the product's use, even if the product's design, materials, and workmanship are virtually faultless."[53] The court also recognized that "[t]he duty to warn is normally non-delegable."[54] In *Schooley*, the court found no evidence that the manufacturer warned the plaintiff or her employer regarding the dangers of using the hoist hook when the safety latch was not intact.[55] Predictably, the manufacturer attempted to circumvent liability arising from its failure to warn by contending that it was relieved of such duty by virtue of the obviousness of the danger; however, the court properly rejected this misguided argument by noting that the issue of the plaintiff's knowledge regarding the limitations of the hoist hook was an issue to be resolved by the jury.[56]

III. STATUTE OF REPOSE AND NEGLIGENT RECALL

In *Avery v. Mapco Gas Products, Inc.*,[57] the United States Court of Appeals for the Seventh Circuit addressed the statute of repose provision contained within the Indiana Product Liability Act.[58] The court also addressed whether Indiana recognizes an independent claim for negligent recall that would survive the limitations imposed by the statute of repose. The Seventh Circuit found that the ten-year statute of repose barred the plaintiffs' products liability claim.[59] Further, the court determined that the plaintiffs' negligent recall claim merged with the underlying products liability claims and thus was also barred.[60]

On the morning of May 18, 1988, the plaintiffs in *Avery* awoke to the smell of gas in their home. They proceeded into their home's basement to investigate the persistent gas odor and to check the furnace pilot light. When the plaintiffs turned on a flashlight to inspect the furnace, the furnace exploded. A valve manufactured by the defendant to regulate the flow of gas into the furnace had been recalled in 1980 after the defendant concluded that the valve might fail to perform a critical safety function. Specifically, when the pilot flame on a furnace was extinguished, the valve might still permit gas to flow into the furnace burner when the thermostat called for heat. Propane gas, which fueled the plaintiffs' furnace, might pool around the furnace and create the potential for an explosion. The plaintiffs claimed that precisely this result occurred.[61]

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52. *Id.*
53. *Id.* (quoting Jarrell v. Monsanto Co., 528 N.E.2d 1158 (Ind. Ct. App. 1988)).
54. *Id.*
55. *Id.* at 941.
56. *Id.*
57. 18 F.3d 448 (7th Cir. 1994).
58. *See* IND. CODE § 33-1-1.5-5(b) (1988).
59. *Avery*, 18 F.3d at 453.
60. *Id.* at 454.
61. *Id.* at 450.

The evidence disclosed that the defendant had conducted the valve recall with the approval and oversight of the Consumer Product Safety Commission and in cooperation with propane gas suppliers.[62] Suppliers were asked to either supply the defendant manufacturer with a list of their customers, so that the defendant could contact them directly, or, in the alternative, to contact their customers on the manufacturer's behalf. In April 1983, the supplier of propane to the plaintiffs' home notified the defendant manufacturer that it had mailed recall notices to its customers with their monthly statements. Theoretically, the plaintiffs' predecessors should have received such a notice. However, the prior owners of the home could not recall receiving a notice, and the appropriate repairs were never made pursuant to the recall.

To decide the statute of repose issue, the court turned to section five of the Indiana Product Liability Act, which provides:

> [A]ny product liability action in which the theory of liability is negligence or strict liability in tort must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer; except that, if the cause of action accrues more than eight (8) years but not more than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.[63]

Therefore, the critical inquiry focused on when the defendant's valve in question was delivered to the initial user or consumer.[64] The evidence indicated that the plaintiffs' furnace was manufactured in 1969 and installed in the plaintiffs' home no later than 1975. Because the installation occurred thirteen years before the explosion and thus the claim would be barred by the statute of repose, it was incumbent upon the plaintiffs to demonstrate that the valve was replaced within ten years of the explosion.

The Seventh Circuit found the plaintiffs' evidence to be insufficient, as a matter of law, to establish that the valve in question was installed within ten years prior to the explosion. While the plaintiffs presented some evidence supporting the possibility that the valve might have been installed within ten years of the explosion, the court found that such evidence would do little more than allow a reasonable fact-finder to speculate that the valve in question was not the original and that it may have been replaced at some point within the ten-year statute of repose time period.[65] The court clarified that the defendant, as the party seeking summary judgment, bore the initial burden of identifying evidence tending to show that its valve was installed in the plaintiffs' furnace more than ten years

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62. *Id.*

63. *Id.* at 451 (citing IND. CODE § 33-1-1.5-5(b) (1993)).

64. The defendant manufacturer of the valve contended that the manufacturer of the furnace should be considered the initial user of the valve. Under that view, the period of repose would have begun to run in 1969, when the plaintiffs' furnace was assembled. The district court rejected this argument, concluding that for purposes of its consumer protection law, Indiana does not deem the manufacturer of a product to be the initial user of its component parts. Accordingly, the district court held the owner of the plaintiffs' home at the time it was installed to be the initial user or consumer. *Id.* at 451-52, n.2.

65. *Id.* at 453.

before the explosion.[66] However, once the defendant met this burden, the plaintiffs would bear the burden at trial of establishing avoidance of the statute of repose.[67] The court determined that the defendant had produced ample evidence indicating that the valve was not installed after 1975, and acknowledged that although it was possible that the valve had subsequently been replaced, the defendant "was not required to negate each and every possibility that might enable the [plaintiffs] to avoid the statute of repose."[68]

The plaintiffs further contended that the defendant failed to conduct a more effective recall campaign, arguing that such a claim "is independent of the products liability claims because it is based on a voluntary undertaking that significantly post-dates the manufacture of the product."[69] However, the Seventh Circuit rejected this contention and determined that the negligent recall claim merged with the underlying products liability claim and was thus also barred by the statute of repose.[70]

The Seventh Circuit relied upon *Dague v. Piper Aircraft Corp.*[71] in rejecting the plaintiffs' attempt "to carve out an exception to the statute of repose for claims based on the defendant's failure to warn."[72] In *Dague*, the Indiana Supreme Court provided:

> [A]n action for damages resulting from the alleged failure of a manufacturer or seller to warn a user of its product's latently defective nature is certainly a product liability action based on a theory of negligence and, ultimately, is one in which the claim is made that the damage was caused by or *resulted from* the manufacture, construction or design of the product. The Product Liability Act expressly applies to all product liability actions sounding in tort, including those based upon the theory of negligence, and the legislature clearly intended that *no* cause of action would exist on any such product liability theory after ten years. It is not our office to question the wisdom of the legislature's enactments.[73]

However, the plaintiffs' recall claim was not based on *Dague*'s general duty to warn, but was instead based on the defendant's independent duty, once they initiated their valve recall, to conduct that effort in a reasonable fashion. The plaintiffs analogized their claim "to one against a 'good samaritan' who, although not bound to act in the first instance, is subject to a duty of reasonable care once she voluntarily undertakes to aid another and is thus liable for her negligence."[74] Nonetheless, the Seventh Circuit perceived the "negligent recall" claim to be nothing more than a re-named "failure to warn" claim.[75] Insofar as the negligent recall claim was based on the defendant's failure to "get the word out," the Seventh Circuit found it barred by the Indiana Supreme Court's opinion in

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66. *Id.* at 452.
67. *Id.* (citing Nichols v. Amax Coal Co., 490 N.E.2d 754, 755 (Ind. 1986)).
68. *Id.* at 453 (citing Schamel v. Textron-Lycoming, 1 F.3d 655, 657-58 (7th Cir. 1993)).
69. *Id.* at 454.
70. *Id.*
71. 418 N.E.2d 207 (Ind. 1981).
72. *Avery*, 18 F.3d at 454.
73. *Dague*, 418 N.E.2d at 212 (citations omitted).
74. *Avery*, 18 F.3d at 454.
75. *Id.*

Dague.[76] While the court recognized that the plaintiffs' recall claim did contain allegations other than a mere failure to warn, it determined that no evidence indicated that any flaws in the recall campaign, beyond the failure to warn, were the proximate cause of the plaintiffs' injury since neither the plaintiffs nor their predecessors ever received any recall information at all.[77]

IV. "SELLER" REQUIREMENT

In *Green v. Whiteco Industries, Inc.*, [78] the Seventh Circuit addressed the meaning and scope of the "seller" requirement for purposes of the Indiana Product Liability Act. The plaintiff, a drummer, was performing with the Neville Brothers band in a theater owned and operated by the defendant. The performance contract between the band and the defendant stated that the defendant would provide a "professional quality sound system . . . and engineer/operator."[79] The plaintiff alleged that during the concert he signalled to the stagehand that he needed to hear more saxophone from his speaker, which was three feet from his head. After this message was relayed to the operator of the sound system, the volume of the speaker shot upward causing a sound blast that left the plaintiff with permanent ear damage and hearing loss. The plaintiff pursued an action against the defendant alleging that the sound system was in a defective condition unreasonably dangerous and thus the defendant should be liable for strict products liability.[80]

The Seventh Circuit initially noted that Indiana law imposes strict liability on any person who "sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous . . . if . . . [t]he seller is engaged in the business of selling such a product."[81] The statute defines "seller" as "a person engaged in business as a manufacturer, a wholesaler, a retailer, a lessor, or a distributor."[82]

The plaintiff contended that the defendant was a "lessor" within the meaning of the statute and therefore subject to liability under the Product Liability Act. In support thereof, the plaintiff introduced evidence that the defendant regularly leased sound systems in the course of its business.[83] The Seventh Circuit, however, drew exactly the opposite inference than the plaintiff had intended. The court found that the evidence demonstrated that the defendant was in fact a lessee, not a lessor, of the sound system, and that the Product Liability Act does not subject lessees to strict liability for defective products.[84]

The Seventh Circuit further determined that, with regard to the lessor-lessee issue, the defendant was not "*engaged in business* as a manufacturer, a wholesaler, a retailer, a lessor or a distributor"; therefore, on this additional basis, the defendant was not subject

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76. *Id.* at 455.
77. *Id.*
78. 17 F.3d 199 (7th Cir. 1994).
79. *Id.* at 200.
80. *Id.* at 201-02.
81. *Id.* at 203 (citing IND. CODE § 33-1-1.5-3 (West Supp. 1993)).
82. IND. CODE § 33-1-1.5-2 (1988).
83. *Green*, 17 F.3d at 203.
84. *Id.*

to strict liability under the Product Liability Act.[85] However, in declaring that the defendant was not "engaged in business," the court did little more than provide a simple conclusory statement. The court wholly failed to explain or define the meaning of "engaged in business" or to provide any guidance regarding the parameters of its application.

In *St. Mary Medical Center, Inc. v. Casko*,[86] the Indiana Court of Appeals for the Third District addressed the "seller of a product" requirement of the Product Liability Act in the context of medical services and products provided by healthcare professionals. The decedent, Samuel Casko, had received a pacemaker while a patient at St. Mary's Medical Center. As a result of an alleged failure in the pacemaker, he died. The decedent's estate filed suit alleging a products liability claim against, among others, St. Mary, which allegedly distributed and sold the product.

The court noted:

> The Indiana Products Liability Act provides that a seller who places any defective product unreasonably dangerous to any consumer into the stream of commerce is subject to liability if the consumer is in the class of persons that the seller should reasonably foresee as being subject to such harm, *the seller is engaged in the business of selling such a product*, and the product is expected to and does reach the consumer without substantial alteration of the condition in which it was sold.[87]

The Product Liability Act further provides that the term "'product' means any item or good that is personalty at the time that it is conveyed by the seller to another party. *It does not apply to a transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product.*"[88]

The plaintiff argued that the medical services provided by a hospital, consisting primarily of the nursing staff, should be treated under the Medical Malpractice Act, while the products sold by the hospital should properly be addressed by the Product Liability Act.[89] The defendant countered "that it [was] not a seller which [was] engaged in the business of selling pacemakers, but that it [was] in the business of providing professional medical services to its patients, including facilities, skilled personnel, and equipment."[90] The defendant maintained "that the sale of various items necessary for a patient's treatment are merely incidental to the overall purpose of providing healthcare."[91]

In determining this important issue, the court of appeals relied upon *Dove by Dove v. Ruff*[92] for guidance and concluded that the defendant was not liable under the Product

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85. *Id.*

86. 639 N.E.2d 312 (Ind. Ct. App. 1994).

87. *Id.* at 313 (citing IND. CODE § 33-1-1.5-3(a) (West Supp. 1993)).

88. *Id.* (quoting IND. CODE § 33-1-1.5-2 (1988) (alteration in original)). For a discussion regarding the predominant thrust approach, as compared to the bifurcation approach, *see* Judy L. Woods and Brad A. Galbraith, *Recent Developments in Contract and Commercial Law*, 27 IND. L. REV. 769, 771-72 (1994).

89. *Casko*, 639 N.E.2d at 313-14.

90. *Id.* at 313.

91. *Id.*

92. 558 N.E.2d 836 (Ind. Ct. App. 1990).

Liability Act for the defective pacemaker.[93] In *Dove*, "the parents of a child who suffered a reaction to a drug brought a products liability suit against the physician who prepared and sold the medication."[94] The *Dove* court discussed the issue of whether the sale of the medication came within the definition of a product within the Product Liability Act:

> By its nature, the practice of medicine is primarily a service, but there are times when goods are provided to patients incidental to the delivery of healthcare services. . . . The incidental furnishing of supplies or equipment during the course of medical treatment does not create a buyer-seller relationship between a patient and his physician which could give rise to an implied or express warranty. *In order for there to be liability under a theory of strict liability, the seller of the product must be engaged in the business of selling that item.*[95]

In *Casko*, the court adopted the rationale set forth in *Dove* and found that the defendant's primary function was to provide medical services. The court reasoned that "unlike the products sold in a hospital gift shop, for which the hospital is strictly liable, the pacemaker provided to the patient is necessary to the patient's medical treatment . . . [and that] the hospital's actions concerning the provision of the pacemaker are 'integrally related to its primary function of providing medical services.'"[96] Therefore, although the plaintiff urged that the defendant was primarily a seller of goods and not a provider of medical services, the court disagreed and found that the defendant was a provider of medical services.[97] As such, the court found that the defendant could not be subject to strict liability for a defective product provided to a patient during the course of his or her treatment.[98]

V. ALTERNATE DESIGN AND COST EFFICIENCY

In two cases, *Pries v. Honda Motor Co.*[99] and *Bammerlin v. Navistar International Transportation Corp.*,[100] the Seventh Circuit addressed the issue of alternative designs as it relates to product defects under Indiana law. In *Pries*, the plaintiff lost control of her automobile, which rolled over. "She was thrown clear of the car, broke her neck, and became a quadriplegic."[101] The plaintiff "sued the car's manufacturer and distributor . . . contending that the car was defective because the seat belt mechanism permitted the belt to become slack when the car rolled over."[102] In its discussion regarding whether the seat belt was defective, the court made clear that the plaintiff must compare the costs and

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93. *Casko*, 639 N.E.2d at 315.

94. *Id.* at 314.

95. *Id.* (quoting Dove by Dove v. Ruff, 558 N.E.2d 836, 838 (Ind. Ct. App. 1990) (alteration in original)).

96. *Id.* (quoting Hector v. Cedars-Sinai Medical Ctr., 225 Cal. Rptr. 595, 601 (Cal. Ct. App. 1986)).

97. *Id.* at 315.

98. *Id.*

99. 31 F.3d 543 (7th Cir. 1994).

100. 30 F.3d 898 (7th Cir. 1994).

101. *Pries*, 31 F.3d at 544-45.

102. *Id.* at 544.

benefits of alternative designs to demonstrate a defect.[103] The court found that Indiana law "requires the plaintiff to show that another design not only could have prevented the injury but also was cost-effective under general negligence principles."[104]

In *Bammerlin*, the Seventh Circuit further examined alternative design evidence as it relates to the establishment of a product defect. The plaintiff, "driving a loaded tractor-trailer weighing 20 tons . . . struck the right rear corner of another rig at approximately 25 miles per hour. The left half of the [plaintiff's] cab decelerated rapidly, pushed by the weight of the trailer, the right half of the tractor . . . pivoted away."[105] As a result, the cab disintegrated and the plaintiff wound up on the ground with serious injuries. The plaintiff brought an action against the truck manufacturer, alleging that the manufacturer had improperly designed the seatbelt assembly.[106] The Seventh Circuit acknowledged that the mere proof that a product failed in a particular accident does not necessarily establish that the product was defective;[107] instead, the establishment of a product defect turns on general principles of negligence.[108]

In its discussion of whether the seat belt assembly in question was defectively designed, the court resorted to a straightforward cost-benefit analysis. In relevant part, the court provided:

> Suppose the probability of the latch opening in a crash is 0.0001 if both [seat belt] anchors hold and 0.0002 if one anchor fails. Neither probability can be reduced by a redesign of the latch, which therefore cannot be called "defective." Suppose further that the loss if the latch opens in an accident is $500,000. Then the expected costs per vehicle attributable to belt opening are $50 if both anchors hold and $100 if only one anchor holds. If it costs, say, an extra $10 to ensure that an anchor holds (as by securing it to the cab's floor rather than its engine tunnel), then a prudent designer will incur the cost—and the vehicle is defective if an anchor fails. This is nothing but an application of Learned Hand's formula for negligence, $B < PL$ (where B is the burden of precautions, L the loss if there is an accident that the precautions could have prevented, and P the probability of an accident if the precautions are not taken).[109]

The court concluded its cost-benefit discussion by noting that the fact that "the probability of a particular failure is low is no defense if the costs of protecting against it are even lower."[110]

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103. *Id.* at 545.

104. *Id.* at 546.

105. Bammerlin v. Navistar Int'l Transp. Corp., 30 F.3d 898, 899 (7th Cir. 1994).

106. *Id.* at 900.

107. *Id.* at 901.

108. *Id.* at 902 (citing Miller v. Todd, 551 N.E.2d 1139, 1141 (Ind. 1990)).

109. *Id.* (citing United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947)).

110. *Id.* (citing RESTATEMENT OF TORTS: PRODUCTS LIABILITY § 2(b) and Reporters' Notes at 40-45, 123-25 (Tent. Draft No. 1, 1994)).

VI. ASBESTOS CAUSATION

In *Peerman v. Georgia-Pacific Corp.*,[111] the Seventh Circuit addressed the issue of whether the defendants' asbestos-containing products caused the plaintiff's decedent to develop mesothelioma. The decedent was employed at a manufacturing plant in Mt. Vernon, Indiana from 1963 to 1982.

> The plant, a facility for the manufacture of parts and sub-assemblies for large utility boilers, consisted of several buildings and covered about 99 acres. During the majority of his employment . . . [the decedent] worked in the shipping and receiving department, where he was responsible for loading and unloading products shipped to and from the plant as well as transporting products within the plant. [The decedent] also worked as a supervisor in the shipping and receiving department, in which capacity he traveled throughout the plant as needed. During his tenure at the manufacturing plant, [the decedent] might have been exposed to asbestos dust.
>
> . . . .
>
> In December of 1985, three years after he left the plant, the decedent died of malignant mesothelioma. [The plaintiff] allege[d] in her suit, that in the course of his duties at the [manufacturing] plant, the decedent was exposed to asbestos dust from the defendants' asbestos-containing products and that this caused him to develop mesothelioma.[112]

During the 1960s and 1970s, one of the defendants manufactured and sold a joint compound that contained asbestos.

> Sometime between 1972 and 1979, construction workers applied such compound to the walls of [one of the buildings in] the plant. [Further,] [d]uring a one week period sometime between 1970 and 1975, following a fire at the [manufacturing] plant, construction workers sprayed [the other defendant's asbestos-containing product] on the north wall of an area of the plant known as "Five Bay." The district court granted summary judgment on the ground that [the plaintiff] had failed to produce evidence to support a reasonable inference that the defendants' products caused [the decedent] to contract mesothelioma.[113]

The Seventh Circuit initially noted that Indiana law governed the issue regarding whether the defendants' asbestos-containing products caused the decedent to develop mesothelioma.[114] However, the court recognized that "[n]either the Supreme Court of Indiana nor the Indiana Court of Appeals ha[d] enumerated a test for causation in asbestos cases."[115] Therefore, the court was confronted with selecting one of two competing approaches to be used in determining causation in asbestos cases. Specifically, the plaintiff maintained that the Indiana Supreme Court would adopt the "job site" test,

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111. 35 F.3d 284 (7th Cir. 1994).

112. *Id.* at 285.

113. *Id.* at 286.

114. *Id.*

115. *Id.*

"which only requires proof that the asbestos-containing product was used at a job site at a time when the plaintiff was employed at that job site."[116] Conversely, the defendants contended that the Indiana Supreme Court would adopt the test that requires proof of exposure to the asbestos-containing product.[117]

The Seventh Circuit, however, found it unnecessary to determine which approach would be adopted by the Indiana Supreme Court; instead, the court found that the plaintiff's claim failed under either approach.[118] The court determined that "[a]lthough under the 'job site' test or any similar test for causation, a plaintiff need not produce evidence of actual exposure to the product that is alleged to have caused an asbestos-related disease, a plaintiff still must produce evidence sufficient to support an inference that he inhaled asbestos dust from the defendant's product."[119] The court further provided that this inference can only be made if the plaintiff shows that the defendant's product, as it was used during the plaintiff's tenure at the job site, could possibly have produced a significant amount of asbestos dust and that the asbestos dust might have been inhaled by the plaintiff.[120] While the *Peerman* court recognized that the plaintiff did produce evidence that the decedent may have been exposed to some level of asbestos dust, the court determined that the plaintiff failed "to produce the necessary evidence that application of the products by the construction workers generated significant levels of asbestos dust, and [failed to demonstrate] that at least some of this dust could have drifted far enough in the plant to have been inhaled by [the decedent.]"[121] Therefore, the court held that no reasonable inference could be drawn that the use of the defendants' products produced asbestos dust that was inhaled by the decedent and thus the court determined that summary judgment was appropriate.[122]

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116. *Id.* The "job site" test was set forth in Lockwood v. AC & S, Inc., 722 P.2d 826 (Wash. Ct. App. 1986), *aff'd en banc*, 744 P.2d 605 (Wash. 1987), and applied in Richoux v. Armstrong Cork Corp., 777 F.2d 296 (5th Cir. 1985).

117. *Peerman*, 35 F.3d at 286. The test requiring proof of exposure to the asbestos-containing product was set forth in Blackston v. Shook & Fletcher Insulation Co., 764 F.2d 1480 (11th Cir. 1985).

118. *Peerman*, 35 F.3d at 287.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*