

ANALYSIS OF INDIANA TORT REFORM 1995: THE EFFECTS OF HOUSE ENROLLED ACT 1741

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Proponents of House Bill 1741 called it the Personal Responsibility Act of 1995. The Bill has been described as “very balanced and modest in its reform.”¹ It passed the House by a vote of 52 to 47 and was amended and passed the Senate by a vote of 30 to 20.² The House concurrence vote was 51 to 46.³ The Bill was then vetoed by the Governor on April 21, 1995.⁴ The Veto was overridden by the

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1. Memorandum from Senator Luke Kenley to all Republican Senators (April 19, 1995) (on file with author).

2. STATE OF INDIANA, 109TH GENERAL ASSEMBLY, INDEX TO HOUSE AND SENATE JOURNALS 239 (1995) [hereinafter INDEX].

3. *Id.*

4. Governor Bayh addressed the House as follows:

Mr. Speaker and Members of the House:

As Thomas Jefferson, the author of our Declaration of Independence, once wrote: “The right to trial by jury in a democracy is even more important than the right to vote.”

Since the founding of our republic and before, the American people have looked for impartial justice to a judge and jury of our peers—men and women without lobbyists, political action committees or friends in high places—to find the facts and apply the law.

In general, we are well served when judges and juries, not politicians, dispense justice. Judges and juries reward the deserving and punish the guilty based upon the specific facts of each case not the broad generalities politicians must necessarily use. House Bill 1741 demonstrates the unfairness that can result when we replace the judgment of judges and juries with that of politicians who are unaware of the facts in individual cases.

For example:

A 38 year old man from Columbus, Indiana, spent only twenty-one minutes in a tanning booth and was burned so severely that his leg had to be amputated. The company that manufactured the tanning booth is from out of state and has since gone out of business. Under 1741, this young man could be denied any compensation whatsoever.

A hardworking Hoosier family from Muncie, Indiana, was struck by disaster when Christmas tree lights destroyed their home and took the lives of their two small sons, ages 3 and 5. The lights were made in Indonesia. Under 1741, it would be extremely difficult, perhaps impossible, for this family to recover.

House with a vote of 51 to 49 and by the Senate with a vote of 30 to 18.⁵ This law has been assailed by its opponents as lacking a basis of objective facts and perpetuating a myth founded on political rhetoric and emotion.⁶

I. THE AMENDMENTS TO THE PRODUCTS LIABILITY AND COMPARATIVE FAULT STATUTES

A. Products Liability

The Indiana Products Liability Act⁷ now applies to and governs all actions brought by a user or consumer against a manufacturer or seller for physical harm caused by a product, regardless of the substantive legal theory or theories upon which the action is brought.⁸ Formerly, the Products Liability Act applied only to actions in which the theory of liability was strict liability in tort.

The definitions of the Act were amended to redefine a seller and to distinguish a manufacturer.⁹ A "seller" is a "person engaged in the business of selling or leasing a product for resale, use, or consumption."¹⁰ A "manufacturer" is a "person or an entity that designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the sale of

In Losantville, Indiana, a 32 years old woman was severely burned at work—permanently disfiguring her face—when a bottle of dangerous chemicals fell from a shelf. Under 1741, this young woman would probably be unable to recover fully for her damages.

Is that what the people of Indiana or even the authors of H.B. 1741 intend? It is, unfortunately, what this law would do.

Some parts of this bill are good, for example, providing a defense for manufacturers who have received strict regulatory approval for their products and placing reasonable limits on punitive damages. But these and other worthy goals can be achieved without replacing the judgment of judges and juries with that of politicians. Judges and juries know the facts of individual cases; politicians do not. To restrain frivolous lawsuits we should punish unscrupulous lawyers, not innocent victims.

Accordingly, I am Vetoing this bill and returning it to the Legislature for further deliberations.

Governor Evan Bayh, Message of the Governor Before the Indiana House of Representatives (April 21, 1995) (on file with author).

5. INDEX, *supra* note 2, at 239.

6. See, e.g., NATIONAL CENTER FOR STATE COURTS', COURT STATISTICS PROJECT, THE STATE COURT STATISTICS: ANNUAL REPORT 1992 (1993).

7. IND. CODE §§ 33-1-1.5-1 to -10 (Supp. 1995).

8. *Id.* § 33-3-1.5-1.

9. *Id.* § 33-1-1.5-2.

10. *Id.* § 33-1-1.5-2(5).

the product to a user or consumer.”¹¹ A manufacturer includes a seller who:

- (A) has actual knowledge of a defect in a product;
- (B) creates and furnishes a manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the manufacturing process;
- (C) alters or modifies the product in any significant manner after the product comes into the seller’s possession and before it is sold to the ultimate user or consumer;
- (D) is owned in whole or a significant part by the manufacturer;
or
- (E) owns in whole or significant part the manufacturer.¹²

A seller who places a private label on a product is not a manufacturer so long as the seller discloses the name of the actual manufacturer of the product.¹³

The above definitions were changed to coincide with an amendment to the former section on strict liability in tort¹⁴ which now provides immunity to a seller for strict liability claims (but not negligence claims) unless the seller is a manufacturer of the product or the part of the product that is alleged to be defective. In addition to the circumstances where a seller is considered a manufacturer, as the term is defined in the statute, a seller is also considered a manufacturer if a court is unable to obtain jurisdiction over a manufacturer of a product.¹⁵

Strict liability in tort is now limited to defective conditions unreasonably dangerous to any user or consumer other than design, inadequate warning, or instruction theories.¹⁶ Strict liability is therefore limited to manufacturing defects. Any action based on a design defect or failure to provide adequate warning or instructions is now decided on a negligence standard. The standard is reasonable

11. *Id.* § 33-1-1.5-2(3).

12. *Id.*

13. *Id.*

14. *Id.* § 33-1-1.5-3.

15. *Id.* § 33-1-1.5-3(d). This subsection does not limit other actions against a seller of a product.

16.

[I]n any action based on an alleged design defect in the product or based on an alleged failure to provide adequate warnings or instructions regarding the use of the product, the party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions.

Id. § 33-1-1.5-3(b).

care under the circumstances in designing the product and in providing sufficient warnings and instructions.¹⁷

The enumerated defenses to a products liability action are now available under either strict liability or negligence. The defenses are as follows: incurred risk,¹⁸ misuse,¹⁹ and modification or alteration of the product.²⁰ Conforming with state of the art safety applications for the product or compliance with federal or state codes, standards, regulations, or specifications creates a rebuttable presumption that the product was not defective and the manufacturer or seller was not negligent.²¹ The definition of incurred risk was changed by deleting the word "unreasonable" as it relates to the use of a product that was known to be defective. The defenses of misuse and modification or alteration of the product remain the same.²²

17. *Id.* The House version of section 33-1-1.5-4 contained subsection (c), which explained: "The defenses contained in this section are complete defenses and preclude liability if proven and may not be considered as mere evidence of fault or the absence of fault under section 10 of this chapter." This subsection was deleted in the Senate committee. STATE OF INDIANA, 109TH GENERAL ASSEMBLY, JOURNAL OF THE HOUSE OF REPRESENTATIVES 375 (1995) [hereinafter JOURNAL OF THE HOUSE].

18. IND. CODE § 33-1-1.5-4(b)(1) (Supp. 1995). The House version of this section stated: It is a defense that the user or consumer bringing the action knew of the defect and was aware of the danger in the product [or of a risk related to the manner in which the product was being used] and nevertheless proceeded to make use of the product [or continued in the course of conduct involving the use of the product] and was injured. JOURNAL OF THE HOUSE, *supra* note 17, at 374. The bracketed language was deleted in the Senate committee. See STATE OF INDIANA, 109TH GENERAL ASSEMBLY, JOURNAL OF SENATE 610 (1995).

19. IND. CODE § 33-1-1.5-4(b)(2) (Supp. 1995). This subsection allows a person other than the claimant to be added as a party defendant.

20. *Id.* § 33-1-1.5-4(b)(3).

21. *Id.* § 33-1-1.5-4.5. The state of the art presumption was amended in the Senate committee by Senator Kenley to add the qualifier "the safety of" to subsection (1). The section thus provides:

In a product liability action, there is a rebuttable presumption that the product that caused the physical harm was not defective and that the manufacturer or seller of the product was not negligent if, before the sale by the manufacturer, the product:

(1) was in conformity with the generally recognized state of the art applicable to the safety of the product at the time the product was designed, manufactured, packaged, and labeled; or

(2) complied with applicable codes, standards; regulations, or specifications established, adopted, promulgated, or approved by the United States or by Indiana, or by any agency of the United States or Indiana.

Id.

22. *Id.* § 33-1-1.5-4(b)(2) (misuse); *id.* § 33-1-1.5-4(b)(3) (modification).

B. Comparative Fault and Products Liability

New sections were added to the Products Liability Act that provide for comparative fault and the elimination of joint or shared liability. Fault as defined in the Products Liability Act is the same as fault under the Comparative Fault Act.²³ A person or entity that is liable to a plaintiff under a theory of strict liability is also considered to be at fault under the Products Liability Act.²⁴

Instructions to the jury in a products liability case relating to assessment of the percentage(s) of fault²⁵ are similar to the Comparative Fault Act.²⁶ The fault of all persons is to be considered by the jury in assessing percentages of fault, "regardless of whether the person was or could have been named as a party, as long as the nonparty was alleged to have caused or contributed to cause the physical harm."²⁷

C. Comparative Fault

The definition of fault was amended to include intentional acts.²⁸ In all other respects it remains the same.²⁹ If the plaintiff is a victim of an intentional tort, he may recover all of his damages in a civil action against the defendant who was criminally convicted based upon the same evidence.³⁰

The definition of a nonparty was amended and now refers to "a person who caused or contributed to cause the injury, death, or damage to property but who has not been joined in the action as a defendant."³¹ Removed from the definition of nonparty was the language, "is or may be liable to the claimant in part or in whole for the damages claimed" and "a nonparty shall not include the employer of the claimant."³²

23. *Id.* §§ 33-1-1.5-10(a), 34-4-33-2(a)(1). The definition of fault in the Comparative Fault Act was amended to include intentional acts. *See infra* note 28.

24. IND. CODE § 33-1-1.5-10(a)(2) (Supp. 1995).

25. *Id.* § 33-1-1.5-10(b).

26. *Id.* § 34-4-33-5.

27. *Id.* § 33-1-1.5-10(c). A nonparty defense must still be pled pursuant to Indiana Code Section 34-4-33-10, and a nonparty must be specifically identified by name pursuant to Indiana Code Section 34-4-33-6. *See also* Cornell Harbison Excavating Inc. v. May, 546 N.E.2d 1186 (Ind. 1989).

28. "'Fault' includes any act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term also includes unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury as to mitigate damages." IND. CODE § 34-4-33-2(1) (Supp. 1995).

29. *Id.* § 34-4-33-2(a)(1). Until the second set of second reading amendments in the House, the Bill contained section fifteen which provided that assumption of risk was a complete defense to a personal injury action. JOURNAL OF THE HOUSE, *supra* note 17, at 639.

30. IND. CODE § 34-4-33-5(d) (Supp. 1995).

31. *Id.* § 34-4-33-2(2).

32. *Id.* § 34-4-33-2(a)(2). *See supra* note 27. The old version read: "'Nonparty' means a person who is, or may be, liable to the claimant in part or in whole for the damages claimed but who

The section on jury instructions and the award of damages was amended to provide that a jury may not be informed of any immunity defense that is available to a nonparty.³³ In addition, when assessing the percentage(s) of fault, the jury is required to consider the fault of all persons regardless of whether a person was or could have been named as a nonparty.³⁴

II. ANALYSIS

As House Enrolled Act 1741 is applied to real life situations, its ultimate effect and significance will become known. While legislative enactment codifies the law, its ultimate interpretation lies with the courts.³⁵

A. *Comparative Fault Does Not Apply to Manufacturing Defect Actions (Strict Liability)*

Strict liability actions were preserved in manufacturing defect cases.³⁶ Comparative fault principles were extended to design defect and failure to warn or instruct theories of liability. They cannot be applied to strict liability actions because comparative fault principles are irrevocably inconsistent with strict liability. Strict liability is found in the *Restatement (Second) of Torts* Section 402A and was adopted by Indiana courts in 1970.³⁷ Under strict liability theory, a person who sells a product in a defective condition unreasonably dangerous to any user or consumer is liable for any physical harm caused by that product, even though the seller exercised all reasonable care in the manufacture and preparation of the product.³⁸ In other words, liability attaches to a seller for an unreasonably dangerous product that causes harm regardless of fault.

Strict liability does not involve the traditional concepts of negligence and

has not been joined in the action as a defendant by the claimant." IND. CODE § 34-4-33-2 (1993) (amended 1995).

33. IND. CODE §§ 34-4-33-5(a)(1), -5(b)(1) (Supp. 1995). See *supra* note 27.

34. IND. CODE § 34-4-33-5(a)(1) (Supp. 1995). See *supra* note 27.

35.

The ultimate responsibility for recognizing and revising the common law of Indiana rests with this Court. We cannot close our eyes to the legal and social needs of our society, and this court should not hesitate to alter, amend or abrogate the common law when society's needs so dictate. The common law must keep pace with changes in our society, and it is not a frozen mold of ancient ideas, but such law is active and dynamic and thus changes with the times and growth of society to meet its needs. Based upon human experience, the common law represents the unceasing effort of an enlightened people to ascertain what is right and just.

Perry v. Stitzer Buick GMC, Inc., 637 N.E.2d 1282, 1289 (Ind. 1994) (Dickson, J., concurring) (citations omitted).

36. IND. CODE § 33-1-1.5-3 (Supp. 1995).

37. Cornette v. Searjeant Metal Prods., Inc., 258 N.E.2d 652, 656 (Ind. Ct. App. 1970).

38. IND. CODE § 33-1-1.5-3(b)(1) (Supp. 1995).

fault.³⁹ Comparative fault principles, therefore, should not be applied to strict liability actions. The Comparative Fault statute requires jurors to compare the fault of all persons who contributed to the harm suffered by the plaintiff. It is difficult to see how a statute requiring a jury to allocate fault can be applied to strict liability where fault is excluded. It also defies logic to expect a jury to compare a seller's strict liability for a manufacturing defect to a negligence claim based upon the same defect.⁴⁰ Rules of statutory construction⁴¹ require courts to strictly construe and narrowly apply new statutes. Therefore, the courts cannot assume that the legislature intended to change the common law beyond what it declares either in express terms or by unmistakable implication.

39. *Cornette*, 258 N.E.2d at 656.

40. IND. CODE §§ 33-1-1.5-10(b), 34-4-33-5 (Supp. 1995).

41. The rules of statutory construction are as follows:

1. The Indiana Judiciary has the constitutional authority and duty to interpret and administer the law. IND. CONST. arts. III, VII.

2. The Indiana General Assembly intends to act in a humanitarian manner. *Holmes v. Review Bd. of Ind. Emp. Sec. Div.*, 451 N.E.2d 83, 86 (Ind. Ct. App. 1983).

3. Laws in derogation of common law must be strictly construed and narrowly applied. *Indiana State Highway Comm'n v. Morris*, 528 N.E.2d 468, 473 (Ind. 1988).

4. "The legislature does not intend by statute to make any change in the common law beyond what it declares either in express terms or by unmistakable implication." *Indianapolis Power & Light Co. v. Brad Snodgrass, Inc.*, 578 N.E.2d 669, 673 (Ind. 1991).

5. "If the language of a statute is clear and unambiguous it is not subject to judicial interpretation." *Avco Fin. Serv. v. Metro Holding Co.*, 563 N.E.2d 1323, 1328 (Ind. Ct. App. 1990).

6. If the language is reasonably susceptible to more than one construction, the Judiciary must construe the statute to determine the apparent legislative intent. *Id.*

7. Statutory provisions cannot be read standing alone but must be construed in light of the entire act of which they are a part. *Deaton v. City of Greenwood*, 582 N.E.2d 882, 885 (Ind. Ct. App. 1991).

8. When construing a statute to determine the legislative intent, words and phrases are given their common and ordinary meaning. *Crowley v. Crowley*, 588 N.E.2d 576, 578 (Ind. Ct. App. 1992).

9. When the legislature enacts a statute, it is presumed that it is aware of existing statutes in the same area. *Inman v. Farm Bureau Ins.*, 584 N.E.2d 567, 569 n.3 (Ind. Ct. App. 1992).

10. Enactments by the Indiana General Assembly relating to product liability are in derogation of the common law and must be strictly construed. *McGraw-Edison Co. v. Northeastern Rural Elec. Membership Corp.*, 647 N.E.2d 355, 359 (Ind. Ct. App. 1995).

B. Neither Employers Nor Immune Persons May Be Considered at Fault

“Fault” under both the Products Liability Act and the Comparative Fault Act is defined as an act or omission that is negligent, willful, wanton, or intentional toward the person or property of others.⁴² In order for an act or omission to be negligent, there must be: a duty owed by a person to conform his conduct to a standard of care necessitated by his relationship with the plaintiff; a breach of that duty; and an injury proximately caused by the breach.⁴³ In a products liability action, the “fault” of the person suffering the physical harm, as well as the “fault,” of all others who caused or contributed to the harm, shall be compared by the trier of fact in accordance with the Comparative Fault Act.⁴⁴ The fact finder shall determine the percentage of “fault” of the claimant, the defendant, and any person who is a nonparty.⁴⁵

Neither an employer nor an immune nonparty can be assessed a percentage of “fault” because neither owes a duty to the claimant. An employer’s duty to an employee is to refrain from intentional injury. Therefore, unless an employer intentionally injures an employee, the employer cannot be assessed “fault” under either the Products Liability Act or the Comparative Fault Act.⁴⁶

The employer’s duty to the employee was defined by the Indiana Supreme Court in *Baker v. Westinghouse Elec. Corp.*⁴⁷ In addressing an employer’s alleged intentional tort and its relationship to the exclusivity provisions of the Workmen’s Compensation Act, the Court stated:

42. IND. CODE § 33-1-1.5-10 (Supp. 1995) (Product Liability Act); *id.* § 34-4-33-2(1) (Comparative Fault Act).

43. *Greathouse v. Armstrong*, 616 N.E.2d 364, 368 (Ind. 1993).

44. IND. CODE §§ 34-4-33-1 to -12 (Supp. 1995).

45. *Id.* § 34-4-33-5(a)(1). Although a nonparty is defined as a person who caused or contributed to the alleged injury and was not joined in the cause of action as a defendant, in order for the jury to allocate “fault” of a nonparty, the nonparty must be at fault. A jury is allowed to compare only “fault,” not conduct.

Testimony at the Senate Hearing on Tort Reform confirms this analysis. Senator Hellmann noted the change in the definition of a nonparty and addressed this to Senator Kenley, the Senate’s spokesman for the bill. He asked whether it was still necessary under House Bill 1741 for there to be a legal duty, a breach of that duty, and proximate cause before a nonparty could be at fault. Senator Kenley replied:

“I think that’s a possible interpretation. I think you could take that same section and interpret it to use the same principles of tort law that you are using today and say that those elements must be present under tort law, and I think that would probably be the advisable thing to do.”

Transcription of Senate Debate on Tort Reform at 22 (on file with author).

46. The language that “[a] nonparty shall not include the employer of the claimant,” IND. CODE § 34-4-33-2(a)(2) (Supp. 1995), had to be deleted from the nonparty definition because an employer’s intentional conduct can lead to “fault,” while his negligent conduct cannot. *Id.* § 34-4-33-2(a)(1).

47. 637 N.E.2d 1271 (Ind. 1994).

The exclusivity provision is expressly limited to personal injury or death arising out of and in the course of employment which occurs "by accident." Because we believe an injury occurs "by accident" only when it is intended by neither the employee nor the employer, the intentional torts of an employer are necessarily beyond the pale of the act.

This approach is consistent with the legislative objectives which shape our workers compensation scheme. Historically, workers compensation was concerned not with intentional torts but with the intolerable results that flowed from the common law's treatment of workers' negligence actions. During the nineteenth century, common law judges clung to personal fault as the sine qua non of employer liability despite the increasingly massive and impersonal nature of the workplace. If the employer was not "at fault," it was inconceivable to judges in the last century that it should be compelled to contribute towards the support of the worker or his family.

The battery of defenses which the courts used prior to the compensation act to enforce the fault requirement was especially devastating to workers. The defenses of assumption of risk, fellow servant and contributory negligence, dubbed the unholy trinity by Dean Prosser, prevented recovery by some eighty percent of those workers who litigated their injury claims.⁴⁸

The Workmen's Compensation Act created no fault liability and obviated the uncertainty, delay, and expense of common law remedies by substituting a fixed compensation schedule.⁴⁹ The costs of the no fault liability scheme were borne by the industry.⁵⁰ Liability that was "predictable" was thus factored accurately into the cost of production and passed on to the consumer.⁵¹ In return the legislature removed any common law duty owed by an employer to exercise reasonable care for the safety of its employees. Evidence of employer conduct, however, was still admissible, not for purposes of allocating "fault," but to contest whether a plaintiff had met his burden of proving "fault" under the Act.⁵²

A parallel argument exists with respect to immunity. At the time of the enactment of the Indiana Tort Claims Act,⁵³ the common law did not provide immunity to governmental entities from tort claims resulting from an employee's breach of a private duty owed to an individual, but did provide for immunity from claims resulting from a breach of its public duties owed to all.⁵⁴ The Tort Claims

48. *Id.* at 1273-74 (citations omitted).

49. *Id.* at 1274.

50. *Id.*

51. *Id.*

52. *Wethington v. Wellington Indust., Inc.*, 781 F. Supp. 1379, 1384 (S.D. Ind. 1991).

53. IND. CODE §§ 34-4-16.5-1 to -22 (1993 & Supp. 1995).

54. *Tittle v. Mahan*, 582 N.E.2d 796, 799 (Ind. 1991).

Act established limitations on judicially decreed rights to sue and recover from governmental entities and their employees. The Act did not create a right to sue a governmental entity or its employees, but instead regulated the common law right to bring such actions by enacting notice requirements, limitations on recovery, and immunity provisions.⁵⁵ The immunity analysis does not turn on what duty, if any, has been violated, but instead focuses on whether certain protected conduct has been engaged in.⁵⁶

Governmental immunity serves a variety of purposes. For example, immunity for discretionary functions avoids inhibiting the effective and efficient performance of governmental duties. Immunity for basic planning and policy-making functions has been deemed necessary to avoid a chilling effect on the ability of the government to deal effectively with difficult policy issues.

The judiciary confines itself . . . to adjudication of facts based on discernible objective standards of law. In the context of tort actions . . . , these objective standards are notably lacking when the question is not negligence but social wisdom, not due care but political practicability, not unreasonableness but economic expediency. Tort law simply furnishes an inadequate crucible for testing the merits of social, political, or economic decisions.⁵⁷

If the premise for immunity is that judicial analysis of certain governmental conduct is inadequate, then an immune person should never be considered at "fault" for purposes of comparative negligence. This is true because "fault" requires a duty, a breach, and a proximate cause. Yet, there are simply no definable standards by which these elements can be measured with respect to the actions or inactions of a governmental entity.

Those who are excluded from the nonparty definition under House Enrolled Act 1741 and the Comparative Fault Act include: persons who cannot be at "fault" (immune parties), persons whose conduct does not rise to the level of "fault" (employers, immune parties, drivers to which the guest statute applies), persons who are incapable of identification,⁵⁸ and manufacturers over whom the court cannot obtain jurisdiction.⁵⁹ A majority of the immunities granted by the legislature are partial immunities that protect a class of persons from liability for certain conduct. Nevertheless, their conduct may rise to a level (intentional, reckless, wanton, willful, etc.) which places them at "fault" and removes the

55. IND. CODE §§ 34-4-16.5-1 to -22 (1993 & Supp. 1995).

56. *Titte*, 582 N.E.2d at 799-800. *But see* *Belding v. Town of New Whiteland*, 622 N.E.2d 1291 (Ind. 1993) (holding police officers are immune from liability for breach of public duties owed to public at large but not private duties owed to individuals); *Quakenbush v. Lackey*, 622 N.E.2d 1284 (Ind. 1993).

57. *Peavler v. Board of Comm'rs*, 528 N.E.2d 40, 44-45 (Ind. 1988), *aff'd*, 557 N.E.2d 1077 (Ind. Ct. App. 1990) (quoting *Blessing v. United States*, 447 F. Supp. 1160, 1170-72 (E.D. Pa. 1978)).

58. IND. CODE § 34-4-33-6 (1993).

59. *Id.* § 33-1-1.5-3(d) (Supp. 1995).

immunity protection.

C. Presumptions Are Not Evidence But Rules of Law and Are Not Proper Subjects for Jury Instruction

The state of the art defense in strict liability⁶⁰ was abolished and replaced with a rebuttable presumption of no negligence if the product conformed with state of the art safety applications or was in compliance with applicable government codes, standards, regulations, or specifications.⁶¹ In practice, the creation of the rebuttable presumption for product compliance with codes, standards, regulations, or specifications requires a plaintiff to produce evidence sufficient to establish a prima facie case. This evidence may include: failure to comply; knowledge by the defendant that the product failed or caused injury even though the product was in compliance; and failure to comply with state of the art safety applications.

A rebuttable presumption places upon a party the burden of going forward with the evidence. For example, at trial, the plaintiff is required to introduce some evidence to rebut or meet a presumption in order to avoid a judgment on the evidence. Before trial, the plaintiff is required to provide some evidence to avoid summary judgment. Presumptions simply determine the order of proof or whether a prima facie case has been made.⁶²

The treatment and effect of the rebuttable presumption is seen in *Peavler v. Board of Commissioners of Monroe County*.⁶³ In *Peavler*, the relevant issue was the plaintiffs' tendered instruction regarding the presumption that a legally sufficient warning would have been heeded. The court held that presumptions are not evidence but rules of law which guide the order of proof and establish the bounds of a prima facie case. "Once the duty of going forward with evidence has been discharged, the presumption is functus officio and has no proper place in jury instructions."⁶⁴

D. Compliance with Federal Safety Regulations Such as OSHA, IOSHA and Self Regulating Standards Does Not Create a Rebuttable Presumption That a Product is Not Defective

The Indiana Occupational Safety and Health Act (IOSHA)⁶⁵ adopted all federal occupational safety and health standards. The Indiana Commissioner of Labor's adoption of the federal regulations in Indiana is specifically limited to the promulgation of regulations that cover employers or employees.⁶⁶ The

60. *Id.* § 33-1-1.5-4(b)(4) (1993) (amended 1995).

61. *Id.* § 33-1-1.5-4.5 (Supp. 1995).

62. IND. R. EVID. 301; *see also* *State Farm Mut. Auto Ins. v. Shuman*, 370 N.E.2d 941, 955 (Ind. Ct. App. 1977).

63. 557 N.E.2d 1077 (Ind. Ct. App. 1990).

64. *Id.* at 1083.

65. IND. CODE §§ 22-8-1.1-1 to -50 (1993 & Supp. 1995).

66. *Id.* § 22-1-1-11 (1993).

Occupational Safety and Health Act⁶⁷ is lengthy and covers a myriad of safety standards for products used in the workplace. It does not, however, discuss the duties of manufacturers who may have sold the products. Both OSHA and IOSHA specifically preclude a private right of action based upon the regulations.⁶⁸ While safety codes and standards can show that certain safeguards are practical, feasible, and generally used in the custom and practice of a particular manufacturing industry, compliance with them does not create a rebuttable presumption that the manufactured product was not defective.⁶⁹

E. Incurred Risk

The defense of incurred risk is still the same whether the theory is strict liability or negligence. The appropriate jury instruction is still Indiana Pattern Jury Instruction 5.61.⁷⁰ The word "unreasonably" was deleted from the incurred risk defense definition; however, because it applies to an action brought under a products liability claim it must be given the proper construction by reading the provision in light of the entire Act.⁷¹ The Product Liability Act defines "fault" to include "unreasonable failure to avoid an injury . . ."⁷² The Comparative Fault Act defines "fault" to include "incurred risk, and unreasonable failure to avoid an injury . . ."⁷³ To avoid confusion when both strict liability and negligence issues are present, the incurred risk instruction must be consistent and the same standards must apply to both. This is accomplished by the pattern jury instruction noted

67. 29 U.S.C. §§ 651-678 (1994).

68. IND. CODE § 22-8-1.1-48.1 (1993); *Slaubaugh v. Willies Dev., Inc.*, 654 N.E.2d 746, 749 (Ind. Ct. App. 1995); *Maynard v. Flanagan Bros. Inc.*, 484 N.E.2d 71, 73 (Ind. Ct. App. 1985).

69. Note, *The Use of OSHA in Products Liability Suits Against The Manufacturers of Industrial Machinery*, 11 VAL. U. L. REV. 37 (1976). The same analysis applies to the American National Standards Institute standards "adopted" by many self-regulating groups. See, e.g., *Martin v. Simplimatic Eng. Corp.*, 390 N.E.2d 235, 238 (Ind. Ct. App. 1979).

70. Indiana Pattern Jury Instruction 5.61 reads as follows:

When a person knows of a danger, understands the risk involved and voluntarily exposes himself to such danger, that person is said to have "incurred the risk" of injury.

In determining whether the [plaintiff] incurred the risk, you may consider the experience and understanding of the [plaintiff]; whether the [plaintiff] had reasonable opportunity to abandon his course of action; and whether a person of ordinary prudence, under the circumstances, would have refused to continue and abandoned the course of action.

INDIANA JUDGES ASS'N, INDIANA JURY INSTRUCTIONS 99 (2d ed. 1989).

Indiana Pattern Jury Instruction 5.65 is also relevant. This instruction refers to an "employee" not assuming "extraordinary risks of which he is ignorant and that are not obvious and that cannot be readily seen and appreciated by an ordinarily careful and prudent person. [Nor does an employee assume risks created by the employer's violation of law.]" *Id.* at 101.

71. See *supra* note 41.

72. IND. CODE § 33-1-1.5-10(a)(1) (Supp. 1995).

73. *Id.* § 34-4-33-2(a)(1).

above.

CONCLUSION

House Enrolled Act 1741 will be subject to a considerable amount of interpretation because it has conflicting provisions, it is in derogation of common law, and it raises constitutional and procedural issues. The Act was created by a strategically selected house committee, debated little in the legislature, and hastily passed when the vote counts were considered favorable. Nevertheless, it is now the law and needs to be interpreted and applied correctly. This analysis is the result of a careful reading of all provisions and an attempt to apply them consistently with one another pursuant to the long established rules of statutory construction.

