RECENT DEVELOPMENTS IN THE INDIANA LAW OF PRODUCTS LIABILITY

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INTRODUCTION

This Article surveys the most significant developments in Indiana product liability law from November 1, 1994 through October 31, 1995. The Article has been organized into two parts: Part I reviews both Indiana decisions and federal court decisions construing Indiana law; Part II discusses the sweeping changes made to the Indiana Product Liability Act by House Enrolled Act 1741.

I. JUDICIAL ACTION

A. Incurred Risk

In *Perdue Farms Inc. v. Pryor*,[1] the Indiana Court of Appeals addressed the defense of incurred risk as it pertains to a strict product liability action.[2] "Pryor injured his lower back while attempting to repair a jammed feed auger on a turkey farm owned by Donald Zwilling."[3] At the time, "Zwilling was under contract with Perdue Farms, whereby Perdue Farms supplied Zwilling with day-old turkeys and Zwilling raised the turkeys until maturity."[4] Pursuant to the contract, Perdue Farms supplied all feed and necessary medication for the turkeys, while Zwilling provided the housing and feed equipment.

> On September 26, 1988, Zwilling's feed delivery system jammed, and Pryor was sent to the farm to do any necessary repairs. After he investigated the problem, Pryor discovered that a three inch wing bolt was jammed next to the auger and prevented it from operating. Pryor removed the bolt with a screwdriver and then attempted to restart the auger. However, turkey feed around the auger had hardened and Pryor determined that he would need to remove the auger from the feed delivery tube in order to restart the system. Pryor then physically attempted to pull the auger from the feed line with his hands. To gain leverage, he placed both feet on grain bins beneath the auger and off the ground, placed his hands on the auger, and began to pull. The auger suddenly became dislodged and Pryor fell backward, hitting his lower back on the edge of

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1. 646 N.E.2d 715 (Ind. Ct. App. 1995).

2. The court in *Perdue Farms* also addressed the doctrine of incurred risk as it pertains to a negligence action; however, that portion of the court's opinion will not be covered in this Article.

3. *Perdue Farms*, 646 N.E.2d at 715.

4. *Id.*

a concrete pad in Zwilling's barn.[5]

Pryor filed a complaint for damages alleging that Perdue Farms was liable under the Indiana Product Liability Act. The trial court entered a general judgment in favor of Pryor on the issue of liability and Perdue Farms appealed.[6]

On appeal, the court examined whether Pryor incurred the risk of his injuries as a matter of law. The court initially noted that "[a]lthough the defense of incurred risk is a doctrine of common law negligence, it is also codified by statute as it pertains to any product liability action based on strict liability in tort."[7] Further, the court recognized that "'[i]t is not enough that a plaintiff have merely a general awareness of a potential for mishap, but rather, the defense of incurred risk demands a subjective analysis focusing upon the plaintiff's actual knowledge and appreciation of the specific risk and voluntary acceptance of that risk.'"[8]

In explaining the application of the doctrine, the court provided that the defense of incurred risk is generally a question of fact and that "the party asserting the defense bears the burden of proving incurred risk by a preponderance of the evidence."[9] The court further recognized that "[i]ncurred risk may be found as a matter of law only if the evidence is without conflict and the sole inference to be drawn is that the plaintiff knew and appreciated the risk, but nevertheless accepted it voluntarily."[10]

In its consideration of the specific facts of *Perdue Farms*, the court found that Pryor was confronted with non-emergency circumstances and that he voluntarily chose to "remove both feet from the ground and place them on the grain bins beneath the auger and then use his hands to pull the auger."[11] The court noted that Pryor testified that he "did not generally like to pull an auger by hand because he did not want to 'strain' himself, and because he 'didn't want to get hurt.'"[12] Based upon that testimony, the court concluded that "Pryor had actual knowledge that he could be injured as a result of his election to pull the auger by hand."[13] The fact that Pryor was injured as a result of falling backward, rather than as a result of straining himself, was of no consequence, as the court noted that "the defense of

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5. *Id.*

6. *Id.*

7. *Id.* at 718. *See also* IND. CODE § 33-1-1.5-4(b)(1) (1993).

8. *Perdue Farms*, 646 N.E.2d at 717 (quoting Clark v. Wiegand, 617 N.E.2d 916, 918 (Ind. 1993)). Further, the court noted that "[a] specific risk involves only the ordinary and usual risks inherent in a given act." *Id.*

9. *Id.* (citations omitted).

10. *Id.* (citing Ferguson v. Modern Farm Systems, Inc., 555 N.E.2d 1379, 1381 (Ind. Ct. App. 1990), *trans. denied*). In *Ferguson*, the plaintiff "climbed a ladder, which was not equipped with a safety cage, and used only one hand as he carried pipe in his other hand. He was injured when his hand slipped off a rung and he fell to the ground." *Id.* The court held, "as a matter of law, that the plaintiff had incurred the risk of falling off the ladder." *Id.*

11. *Id.* at 718.

12. *Id.*

13. *Id.*

incurred risk does not require a showing that the plaintiff had foresight 'that the particular accident and injury which in fact occurred was going to occur.'"[14]

The court also addressed Pryor's contention that "he might have avoided injury by using a device known as a 'come-along' to free the auger, but that he was instructed by his employer to pull a jammed auger by hand in order to avoid possible damage to the auger."[15] "The court found that Pryor testified . . . that despite his employer's instructions he had used a come-along to repair a jammed auger on every previous occasion in order to avoid injury."[16] Further, the court noted that "Pryor's employer testified that, when pulling an auger by hand, 'you have to take into consideration your safety on it' and 'you have to make sure there's nothing you're going to fall on top of.'"[17] Therefore, the court concluded that "while pulling the auger by hand may have been a recognized procedure to release a jammed auger, both Pryor and his employer had actual knowledge and appreciated the danger of using that procedure."[18]

The court found that "Pryor knew and appreciated the specific risk inherent in pulling the auger by hand and . . . [t]hat he voluntarily accepted that risk as part of his job when he chose that method instead of another."[19] The court determined that when a person, such as Pryor, "has actual knowledge of the potential for injury, but makes a deliberate and intentional choice concerning the manner in which to proceed, and he is injured as a direct result of the manner chosen, that person has voluntarily accepted the risk inherent in that choice."[20] Accordingly, the court held that "Pryor incurred the risk of his injuries as a matter of law."[21]

B. "Unreasonably Dangerous" Requirement

In *Welch v. Scripto-Tokai Corp.*,[22] the Indiana Court of Appeals addressed the "unreasonably dangerous" provision of the Indiana Product Liability Act. Randy Welch, a three-year-old, "climbed up to a shelf, which neither [of his parents] could reach without a foot stool, and obtained a disposable butane cigarette lighter. After obtaining the lighter, Randy used it to ignite a flame which then caught his pajama top on fire."[23] As a result, Randy sustained serious and permanent burn injuries.

The plaintiffs brought a strict product liability and negligence suit against the

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14. *Id.* at 718-19 (quoting Forrest v. Gilley, 570 N.E.2d 934, 936 (Ind. Ct. App. 1991), *trans. denied*).
15. *Id.* at 719.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. 651 N.E.2d 810 (Ind. Ct. App. 1995).
23. *Id.* at 812.

manufacturer and seller of the disposable butane lighter.[24] "Regarding the strict liability theory, Welch alleged that the lighter was in a defective and unreasonably dangerous condition."[25] The defendants maintained that the undisputed facts demonstrated that the lighter was not in a defective and unreasonably dangerous condition. The trial court agreed and granted summary judgment in favor of the defendants.[26]

On appeal, Welch contended that there was a genuine issue of material fact concerning "whether the lighter was in a defective condition which rendered it unreasonably dangerous."[27] Specifically, Welch maintained that a genuine issue of fact existed regarding whether a cigarette lighter, which ignites with minimal pressure, is unreasonably dangerous.[28]

The court initially noted that "in a product liability action, the plaintiff must prove that the product is in a defective condition which renders it unreasonably dangerous."[29] The court explained that "[t]he requirement that the product be in a defective condition focuses on the product itself while the requirement that the product be unreasonably dangerous focuses on the reasonable expectations of the consumer."[30] Further, the court examined the Product Liability Act, which provides in relevant part:

> "Unreasonably dangerous" refers to any situation in which the use of a product exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer who purchases it with the ordinary knowledge about the product's characteristics common to the community of consumers.[31]

In *Welch*, the court addressed the specific issue of "whether a genuine issue of material fact exist[ed] regarding whether the risks imposed by a lighter which was not child-resistant [were] beyond the risks contemplated by the 'ordinary consumer.'"[32] The court noted that "a product may be 'dangerous' in the colloquial sense but not 'unreasonably dangerous' for strict liability purposes under the Act."[33] Further, the court explained that while a lighter may be dangerous in the hands of a child, such danger does not necessarily render it

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24. That portion of the court's opinion dealing with Welch's negligence allegations will not be covered in this Article.

25. *Welch*, 651 N.E.2d at 812.

26. *Id.* at 813.

27. *Id.* at 813-14.

28. *Id.* at 814.

29. *Id.* (citing Hamilton v. Roger Sherman Architects, 565 N.E.2d 1136, 1137 (Ind. Ct. App. 1991)).

30. *Id.* (citing Cox v. American Aggregates Corp., 580 N.E.2d 679, 685 (Ind. Ct. App. 1991)).

31. IND. CODE § 33-1-1.5-2(7) (1993).

32. *Welch*, 651 N.E.2d at 814.

33. *Id.* (citing Smith v. AMLI Realty Co., 614 N.E.2d 618, 622 (Ind. Ct. App. 1993)).

unreasonably dangerous under the Act.[34] The court reasoned that "[t]he ordinary consumer of a lighter is an adult and the ordinary adult consumer contemplates the risks posed by a lighter, including the dangers associated with children who play with lighters."[35] The court further reasoned that "the ordinary consumer expects a lighter to ignite a flame when operated"; accordingly, the court held that the lighter was not unreasonably dangerous and that summary judgment was appropriate.[36]

Welch further contended that the trial court, in its application of the consumer expectation test, improperly applied the open and obvious danger rule.[37] Although the court of appeals recognized that the open and obvious danger rule does not apply to strict liability claims under the Act, the court reasoned that "the relative obviousness of a defect is nevertheless relevant in determining whether a product is unreasonably dangerous."[38] Therefore, the court held that "although the [open and obvious] rule itself is inapplicable, . . . the openness and obviousness of the dangers inherent in a cigarette lighter [are properly considered] as factors in determining the risks contemplated by the ordinary consumer."[39]

Unfortunately, the result reached in *Welch* is disheartening for the consumers of Indiana. In essence, consideration of the openness and obviousness of the dangers of a given product tacitly encourages manufacturers to incorporate patently dangerous features into product design and thereby obliterate product liability because the danger, however easy to remedy, will be obvious to the consumer. Specifically, the defect would be within the contemplation of the ordinary consumer; therefore, the defect would not render the product "unreasonably dangerous" and liability would be denied. In such a circumstance, the consumer expectation test is too low to be a valid gauge of the defectiveness of the product because even patent dangers do not frustrate the consumer's expectations of safety.[40] However, in light of *Welch*, it appears that the consumers of Indiana will continue to suffer grave injustices when they are injured by products containing defects which are open and obvious.

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34. *Id.*

35. *Id.*

36. *Id.* at 815.

37. *Id.* "Under the open and obvious danger rule, a manufacturer of a product is liable only for defects which are hidden and not normally observable." *Id.* (citing Koske v. Townsend Engineering Co., 551 N.E.2d 437, 442 (Ind. 1990)).

38. *Id.*

39. *Id.*

40. For a thorough discussion regarding the inadequacies of the openness and obviousness of the dangers of a product as a basis for liability, 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).

C. "User or Consumer" and "Seller" Requirements

In *Crist v. K-Mart Corp.*,[41] the Indiana Court of Appeals examined the meaning of the "user or consumer" and "seller" requirements of the Indiana Product Liability Act. The plaintiff, Crist, was a truck driver who was employed by Hi-Way Dispatch, Inc. "Hi-Way [was] an independent trucking company hired by K-Mart to transport K-Mart's merchandise from its distribution centers to its retail stores."[42] K-Mart's employees loaded Crist's trailer at the K-Mart Distribution Center and sealed it prior to transferring it to Crist for transportation to various retail stores. The "K-Mart employees would then break the seal when Crist arrived at a retail store. Once the seal was broken, Crist would unload the trailer."[43]

> Crist was injured while unloading K-Mart's merchandise at one of the retail stores. Crist was standing on a box inside the trailer, attempting to reach another box located at the top of the stack, when the box upon which Crist was standing collapsed. Crist fell to the floor of the trailer and sustained injury.[44]

Crist brought product liability and negligence claims against K-Mart.[45] The trial court granted K-Mart partial summary judgment on Crist's product liability claim, finding that Crist was not a "user or consumer" as the term is defined in the Act.[46]

On appeal, Crist contended that the trial court erred by determining that he was not a "user or consumer" of the box.[47] In addressing the application of the "user or consumer" requirement, the court of appeals examined *Thiele v. Faygo Beverage, Inc.*[48] The *Thiele* court provided that as a "'middle man' employee at the distribution level of his employer's business who handled Faygo's product as it flowed through the stream of commerce toward the retail purchaser, [the plaintiff] was not within the class of plaintiffs intended to be protected by the

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41. 653 N.E.2d 140 (Ind. Ct. App. 1995).

42. *Id.* at 140-41.

43. *Id.* at 142.

44. *Id.*

45. Only the product liability claim will be discussed in this Article because the negligence claim was rooted in premises liability law.

46. *Crist*, 653 N.E.2d at 142. The Act provides in relevant part:

> "User or consumer" means a purchaser, any individual who uses or consumes the product, or any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question, or any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.

IND. CODE § 33-1-1.5-2 (Supp. 1995).

47. *Crist*, 653 N.E.2d at 142.

48. 489 N.E.2d 562 (Ind. Ct. App. 1986), *trans. denied.*

Act."[49] Rather, the *Thiele* court found that "the legislature intended 'user or consumer' to characterize those who might foreseeably be harmed by a product *at or after* the point of its retail sale or equivalent transaction with a member of the consuming public."[50] Finally, the *Thiele* court determined that the "'legislature . . . required a 'sale' to a 'first consuming entity' before the protection afforded by the Act is triggered.'"[51]

While the court in *Crist* did note that the *Thiele* decision contained logical inconsistencies relative to the "first consuming entity" doctrine,[52] the court did not resolve those inconsistencies. Instead, the court affirmed summary judgment in favor of K-Mart on an alternative basis.[53] The court of appeals determined that K-Mart was not a "seller" of the boxes.[54] "The [Product Liability] Act defines a seller as 'a person engaged in business as a manufacturer, a wholesaler, a retail dealer, a lessor, or a distributor.'"[55] In determining that K-Mart was not a seller of the boxes in question, the court relied on *Lucas v. Dorsey Corp.*, which provided that "the occasional seller who is not engaged in that activity as part of his business is not liable in products liability."[56] In *Crist*, the court relied on the affidavit of K-Mart's transportation manager, which provided that "[t]he *boxes* were not for sale, either on a wholesale or retail basis; rather, it was the products within the boxes that were to be sold."[57] Further, the court found that the affidavit indicated that "K-Mart was not in the business of selling the boxes; instead, it was in the business of selling the products contained in those boxes."[58]

Crist presented evidence that K-Mart would sell "certain products in the original box, such as a case containing several cans of motor oil."[59] Moreover, Crist demonstrated that K-Mart would also "gratuitously provide boxes upon its customers' request for their use in transporting goods they had purchased."[60] However, the court found that the types of sporadic and isolated dealings which Crist had demonstrated did not "constitute the type of regular business activity necessary to classify K-Mart as a seller of boxes."[61] Accordingly, the court held that, as a matter of law, K-Mart was not a "seller" of the boxes in question.[62]

Additionally, the court noted that even if K-Mart were considered a seller of

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49. *Crist*, 653 N.E.2d at 142 (quoting *Thiele*, 489 N.E.2d at 585, 588).
50. *Id.* (citing *Thiele,* 489 N.E.2d at 586).
51. *Id.* at 142-43 (citing *Thiele*, 489 N.E.2d at 588).
52. *Id.* at 143.
53. *Id.*
54. *Id.*
55. IND. CODE § 33-1-1.5-2 (Supp. 1995).
56. *Crist*, 653 N.E.2d at 143 (citing Lucas v. Dorsey Corp., 609 N.E.2d 1191 (Ind. Ct. App. 1993), *trans. denied*).
57. *Id.*
58. *Id.*
59. *Id.* at 144.
60. *Id.*
61. *Id.*
62. *Id.*

the boxes, it still would not be subject to liability under the Act.[63] The court explained that "the Act provides that 'if an injury results from handling, preparation for use, or consumption that is not reasonably expectable, the seller is not liable under [the Act].'"[64] The court then determined that "the purpose of the box was not to serve as Crist's ladder during unloading" and that "such use was not reasonably expectable."[65]

D. Statute of Repose

In *Bloemker v. Detroit Diesel Corp.*,[66] the Indiana Court of Appeals addressed the applicability of the statute of repose contained in the Indiana Product Liability Act.[67] The plaintiff, Bloemker:

> was an experienced journeyman pattern maker employed by Allen Pattern Works in Fort Wayne, Indiana. A pattern is a master model used to make a mold into which molten iron is poured to form a casting. On September 19, 1990, Bloemker was making two modifications to a particular pattern as directed by his employer. In order to make the modifications, Bloemker heated the pattern. During the heating process, the pattern exploded. Bloemker was injured, losing his right arm.[68]

A post-explosion inspection revealed that the pattern had a sealed cavity that contained a mixture of sand and moisture that, when heated, expanded and resulted in the explosion. Further, the pattern in question contained only one vent hole which was inadequate to remove the sand and moisture, whereas patterns with cavities of the size involved in this case normally have more than one vent hole or access point.

> Detroit Diesel owned the pattern that injured Bloemker. Prior to the incident involving Bloemker, the pattern was used to make cast iron

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63. *Id.*

64. *Id.* (quoting IND. CODE § 33-1-1.5-2.5(c) (1988)).

65. *Id.*

66. 655 N.E.2d 117 (Ind. Ct. App. 1995).

67. The statute of repose for product liability actions is set forth in Indiana Code section 33-1-1.5-5, which provides:

> (a) This section applies to all persons regardless of minority or legal disability. Notwithstanding IC 34-1-2-5 [legal disabilities], it applies in any product liability action in which the theory of liability is negligence or strict liability in tort.
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> (b) Except as provided in section 5.5 of this chapter [asbestos-related injuries], a product liability action 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. However, if the cause of action accrues at least eight (8) years but less 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.

68. *Bloemker*, 655 N.E.2d at 118.

> thermostat housing covers for use on Detroit Diesel's Series 149 diesel engine. PTI Industries was the direct supplier of the thermostat housing covers to Detroit Diesel. When the need for the covers arose, Detroit Diesel would contact PTI Industries who would then contact North Manchester to make the covers. North Manchester would use the pattern to make the covers and then send the covers to PTI for finishing work. PTI would then deliver the completed housing covers to Detroit Diesel.[69]

Although Detroit Diesel owned the pattern, North Manchester retained it to make the thermostat housing covers when requested. The identity of the pattern's original manufacturer was unknown. The materials designated for summary judgment established that the pattern was first placed into the stream of commerce more than ten (10) years before Bloemker's incident, although the exact date was also unknown.[70]

Bloemker brought an action against Detroit Diesel and North Manchester. Both Detroit Diesel and North Manchester moved for summary judgment, claiming that the statute of repose contained in Indiana's Product Liability Act barred any claim based upon a defect in the pattern.[71] Thereafter, the trial court granted Detroit Diesel's and North Manchester's motions for summary judgment without stating the reason or reasons for granting the motion.[72]

On appeal, Bloemker contended that his claim did not fall within the Product Liability Act and, therefore, was not subject to the statute of repose.[73] In support of his contention, Bloemker cited *Stump v. Indiana Equipment Co.*[74]

> In *Stump*, the plaintiff was a grading machine operator. He was injured when the grader unexpectedly began to move while the plaintiff stood beside it. Although the grader was equipped with a neutral safety switch designed to prevent the machine from starting while in gear, it was determined that the starter system had been rewired to avoid this safety switch.[75]

Further, the *Stump* court identified two areas of inquiry for determining whether the statute of repose applies to a plaintiff's claim; specifically, 1) the plaintiff's claim must constitute a "product liability action," and 2) the defendants must be considered "sellers."[76] Finally, the *Stump* court determined that the plaintiff's claim did not constitute a product liability action because the defect occurred after the product was delivered to the initial user or consumer.[77]

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69. *Id.*
70. *Id.* at 118-19.
71. *Id.* at 119.
72. *Id.*
73. *Id.*
74. 601 N.E.2d 398 (Ind. Ct. App. 1992), *trans. denied.*
75. *Bloemker*, 655 N.E.2d at 119.
76. *Id.* (citing *Stump*, 601 N.E.2d at 401-02).
77. *Id.*

In *Bloemker*, the court initially noted that the alleged defect of lack of adequate vent holes was created at the time of manufacture.[78] Accordingly, the court determined that Bloemker's claim constituted a product liability action.[79]

In reaching its conclusion, the court rejected Bloemker's contention that his claim was not a product liability action because the pattern was not a product.[80] "Bloemker assert[ed] that the transaction was a bailment in which the defendants provided him with an item for repair, not a product."[81] However, the court of appeals noted that a product, as defined by the Product Liability Act, is "'any item or good that is personalty at the time it is conveyed by the seller to another party.'"[82] Further, the court determined that the subject of Bloemker's cause of action was and always had been an item of personalty.[83]

The court also rejected Bloemker's contention that the pattern could not be considered a product because Detroit Diesel and North Manchester were bailors, not sellers.[84] The court found that the defendants' status did not dictate whether the pattern may be classified as a product.[85] The court further reasoned that "an item is a product so long as it is personalty at the time the seller, whoever that may be, conveys it to another party, regardless of whether that other party is the plaintiff."[86]

The court next addressed the second necessary element for determining whether the statute of repose applied to the plaintiff's case; specifically, whether the defendants were "sellers" of the product. Bloemker contended that the conveyance of the pattern to his employer was nothing more than a bailment for repairs. Therefore, according to Bloemker, Detroit Diesel and North Manchester were not sellers because they were not engaged in supplying patterns as a regular part of their business.

In its consideration of this issue, the court noted that "'[t]he seller of a defective product is immune from suit after the prescribed period of time has elapsed . . . .'"[87] Further, the court determined that the definition of "seller" was "'broad enough to include within its scope any party who was an essential part of the stream of commerce which resulted in delivery to the initial user or consumer.'"[88] However, the court held that Detroit Diesel and North Manchester were not sellers because they were not engaged in supplying patterns as a regular part of their business and that the conveyance at issue was nothing more than a

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78. *Id.*
79. *Id.* at 120.
80. *Id.*
81. *Id.*
82. *Id.* (quoting IND. CODE § 33-1-1.5-2 (1988)).
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* (quoting Stump v. Indiana Equipment Co., 601 N.E.2d 398, 402 (Ind. Ct. App. 1992), *trans. denied*).
88. *Id.* (quoting *Stump*, 601 N.E.2d at 402).

bailment for repairs.[89]

In explaining its decision, the court reasoned that the defendants could not take advantage of the defenses available under the Product Liability Act unless the Act was intended to extend to a bailment situation.[90] The defendants maintained that such an extension was warranted based upon language in *Stump* indicating that the definition be "broad."[91] The defendants further claimed that including bailments within the Act's scope was supported by the reasoning in *Gilbert v. Stone City Construction Co.*[92] The court in *Gilbert* provided that the test is not whether a commercial sale has taken place, but rather "whether a defendant injected a harmful defective product into the stream of commerce."[93] Therefore, the *Gilbert* court determined that liability will "attach to one who places such a product in the stream of commerce by sale, lease, bailment, or other means."[94]

The *Bloemker* court found that *Gilbert* was not controlling "because the opinion was issued prior to enactment of the Product Liability Act in 1978."[95] The court noted that the term seller was originally defined to include "'a manufacturer, a wholesaler, a retail dealer, or a distributor.'"[96] Further, the court noted that in 1983, the definition was amended so that a "seller" included "a person engaged in business as a manufacturer, a wholesaler, a retail dealer, a lessor, or a distributor."[97] Specifically, the court noted that the inclusion of the emphasized "lessor" was an addition to the new definition, whereas a "bailor" was "conspicuously absent from the new definition" and had been "excluded from the definition of seller since the Act's inception in 1978."[98] Accordingly, the court held that bailors are not sellers within the meaning of Indiana's Product Liability Act; therefore, the court held that the defendants were not entitled to summary judgment on their statute of repose defense.[99]

E. Relevance of Rider's Non-Use of Helmet

In *Dailey v. Honda Motor Co.*,[100] Chief Judge Barker addressed the relevance of a rider's non-use of a helmet to the liability issues of incurred risk, misuse, and proximate cause. In *Dailey*, the rider of an all-terrain vehicle (ATC) was injured in an accident and brought a products liability action against the manufacturer of the vehicle. At the time of the accident, the plaintiff was not wearing a helmet,

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89. *Id.*
90. *Id.*
91. *Id.* (citing *Stump*, 601 N.E.2d at 402).
92. 357 N.E.2d 738 (Ind. Ct. App. 1976).
93. *Id.* at 742.
94. *Id.*
95. *Bloemker*, 655 N.E.2d at 120.
96. *Id.* (quoting 1978 Ind. Acts 28).
97. *Id.* at 121.
98. *Id.*
99. *Id.*
100. 882 F. Supp. 826 (S.D. Ind. 1995).

and the manufacturer contended "that evidence of the plaintiff's failure to wear a helmet was relevant to the liability issues of incurred risk, misuse, and proximate cause."[101]

With regard to the issue of incurred risk, Chief Judge Barker noted that "the issue before the trier of fact [was] whether Dailey had knowledge of the defect in the product (the ATC vehicle) which caused the injury."[102] Therefore, Chief Judge Barker determined that "[w]hether Dailey knew or did not know that he could suffer head injuries if he did not wear a helmet [had] no bearing on the question of whether Dailey knew of the ATC's defect and proceeded to ride it anyway."[103] Accordingly, Chief Judge Barker held that "Dailey's non-use of his helmet [was] not relevant to the affirmative defense of incurred risk."[104]

With regard to the defense of misuse, Chief Judge Barker noted that "the key question for the trier of fact [was] whether it was foreseeable to Honda that riders of ATCs would not wear helmets."[105] Chief Judge Barker provided that "[only] if the jury finds that it was unforeseeable to Honda that riders of ATCs would not wear helmets would evidence of Dailey's non-use of his helmet be relevant to establish the affirmative defense of misuse."[106] Further, Chief Judge Barker recognized that the foreseeability of the intervening misuse is a jury question.[107] Accordingly, Chief Judge Barker held that Honda could "only introduce evidence of Dailey's non-use of his helmet to support an affirmative defense of misuse if the jury finds that such a misuse was unforeseeable."[108] Without such a jury finding, Chief Judge Barker held that the evidence of helmet non-use to establish misuse was inadmissible.[109]

With regard to the issue of causation, Honda maintained that evidence of Dailey's non-use of his helmet was relevant in establishing that "Dailey's injuries were not caused by the allegedly defective warnings and defective device, but rather by his failure to wear a helmet."[110] Although there was no authority that had directly addressed this issue, Chief Judge Barker noted that "[t]he defendant's act need not be the sole proximate cause . . . ; '[r]ather, the question is whether the wrongful act is one of the proximate causes rather than a remote cause.'"[111] Chief Judge Barker found that "even if Dailey's failure to wear his helmet [was] a

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101. *Id.* at 827.

102. *Id.* (citing Hamilton v. Roger Sherman Architects, 565 N.E.2d 1136, 1138 n.3 (Ind. Ct. App. 1991)).

103. *Id.*

104. *Id.*

105. *Id.* (citing Underly v. Advance Machine Co., 605 N.E.2d 1186, 1189 (Ind. Ct. App. 1993)).

106. *Id.*

107. *Id.* at 828 (citing Montgomery Ward & Co. v. Gregg, 554 N.E.2d 1145, 1156 (Ind. Ct. App. 1990)).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* (quoting Lucas v. Dorsey Corp., 609 N.E.2d 1191, 1199 (Ind. Ct. App. 1993)).

proximate cause of his head injuries, so long as Plaintiffs [could] prove that the defective product was also a proximate cause, the existence of other proximate causes [was] irrelevant, unless his failure to wear a helmet was an unforeseeable, superseding or intervening cause of his injury."[112]

As with the defense of misuse, Chief Judge Barker would allow such evidence only if the defendant established the unforeseeability of helmet non-use.[113] Chief Judge Barker reasoned that allowing such evidence "in the absence of a finding of unforeseeability would be tantamount to adopting the doctrine of 'avoidable consequences' in the products liability context," a position which has been rejected by every court that has considered it.[114] Chief Judge Barker noted, however, that the ruling applied "only to the determination of liability, not damages, because evidence of Dailey's failure to wear his helmet may be relevant in determining how much the damages stemming from Dailey's head injury should be mitigated."[115]

F. Crashworthiness Doctrine

In *Whitted v. General Motors Corp.*,[116] the United States Court of Appeals for the Seventh Circuit addressed the crashworthiness doctrine as it relates to Indiana's Product Liability Act. In January 1993, "Whitted was driving home from work with his seat belt, a single device which included both a shoulder harness and a lap belt, securely fastened."[117] As he negotiated an S-curve, Whitted realized that the wheels on a fast approaching, oncoming car were slightly in his lane. To avoid a collision, he moved his 1987 Nova closer to the shoulder on his side of the road; however, Whitted moved too far and slid off the road and hit two trees.

> The collision thrust Whitted against the steering wheel, which broke, and the windshield, which shattered. At some point during the accident, the webbing of the seat belt separated while the female clasp (latch plate) remained fastened in the buckle. Whitted sustained fractures to two bones in his lower left arm and cuts to his forehead.[118]

Whitted sued the manufacturer and the seller, contending that the seatbelt was defective in violation of Indiana's Product Liability Act. Thereafter, the

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112. *Id.*

113. *Id.*

114. *Id.* (citing Dillinger v. Caterpillar, Inc., 959 F.2d 430, 438-40 (3d Cir. 1992); Vizzini v. Ford Motor Co., 569 F.2d 754, 766 (3d Cir. 1977) (rejecting the doctrine of avoidable consequences in a safety belt case because it would be the same as allowing contributory negligence)).

115. *Id.*

116. 58 F.3d 1200 (7th Cir. 1995).

117. *Id.* at 1202.

118. *Id.*

defendants moved for summary judgment, which the district court granted.[119]

On appeal, Whitted did not argue that the separated seatbelt was in any way linked to the initial collision; rather, he contended that his resulting injuries were enhanced by a failure of the seatbelt. As such, Whitted's claim was rooted in the crashworthiness doctrine.

Initially, the Seventh Circuit noted that the "crashworthiness doctrine imposes upon the manufacturer liability for design defects which, although not causing the initial collision, compound the resulting injuries when, because of the defects, the driver or passenger strikes the car's interior or objects exterior to the car."[120] The Seventh Circuit explained that "the crashworthiness doctrine merely expands the proximate cause element of product liability to include enhanced injuries."[121] The court reasoned that if a defect is established, the crashworthiness doctrine allows the plaintiff to recover for intensified or consequential injuries.[122] Thus, the Seventh Circuit explained that "under the crashworthiness doctrine, a defect is 'not merely the conclusion that a product failed and caused injury, but that the product failed to provide the consumer with reasonable protection under the circumstances surrounding a particular accident.'"[123]

1. Design.—The Seventh Circuit noted that "manufacturers have a duty to design products that are free of flaws which cause injury in the product's use. Thus, a manufacturer will be liable for designing a product with a defective condition which is unreasonably dangerous."[124] The court provided that "Indiana's definition of 'defect' is similar to what is commonly referred to as the consumer expectation test: a product is in a defective condition if the condition is not contemplated by the reasonable consumer and the condition is unreasonably dangerous to the expected user."[125] The court explained that "'the requirement that a product be in a defective condition focuses on the product itself; whereas, the requirement that the product be unreasonably dangerous focuses on the reasonable contemplations and expectations of the consumer.'"[126]

With regard to the legal definition of defect, the Seventh Circuit provided that the "'question is not whether it is 'possible' for something untoward to occur during an accident but whether 'the design creates unreasonable danger' according to 'general negligence principles.'"[127] Further, the court noted that "'Indiana

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119. *Id.* at 1202-03.

120. *Id.* at 1205 (citing Montgomery Ward & Co. v. Gregg, 554 N.E.2d 1145, 1154 (Ind. Ct. App. 1990)).

121. *Id.* (citing Miller v. Todd, 551 N.E.2d 1139, 1142 (Ind. 1990) (holding that the plaintiff in a crashworthiness case has the burden of proving that the manufacturer breached its duty in a manner that proximately caused the plaintiff's injuries)).

122. *Id.*

123. *Id.* at 1205-06 (quoting *Miller*, 551 N.E.2d at 1143).

124. *Id.* at 1206.

125. *Id.* (citing IND. CODE § 33-1-1.5-2.5 (1993)).

126. *Id.* (quoting Cox v. American Aggregates Corp., 580 N.E.2d 679, 685 (Ind. Ct. App. 1991)).

127. *Id.* (quoting Pries v. Honda Motor Co., 31 F.3d 543, 545 (7th Cir. 1994)).

requires the plaintiff show that another design not only could have prevented the injury but also was cost-effective under general negligence principles.'"[128] The court found that "Whitted failed to present evidence that the product was flawed in its design and [that] he failed to illustrate that a better design was cost-effective."[129] Accordingly, the court held that summary judgment was properly issued as to the claim of design defect.[130]

2. *Warnings.*—Whitted also contended that the defendants, in violation of Indiana's product liability law, failed to warn. The Seventh Circuit initially noted that for liability for failure to warn, "the product in question must be unreasonably dangerous."[131] The court further reasoned that in order to establish danger, "a plaintiff must present more evidence than that the product failed thereby causing injury."[132] The court reasoned that the fact that a product caused or "enhanced injury does not ipso facto mean that the product was unreasonably dangerous. Rather, the product may have caused injury due to misuse of the product, or a manufacturing defect, or the age of the product."[133] Given the possibilities, the court explained that "a plaintiff must present evidence, via statistics or other means, to illustrate that under normal or expected use there is a possibility that a product may cause injury."[134]

In considering the specifics of this case, the court found that "Whitted failed to support his argument with evidence—statistical, expert, or otherwise—that the product contained a danger about which the Defendants were aware, or should have been aware, and about which the Defendants should have warned."[135] "Accordingly, since Whitted failed to demonstrate that the 1987 Nova seatbelt was unreasonably dangerous," the court held that the defendants were not liable for omitting warnings.[136]

3. *Manufacturing.*—Whitted additionally contended that "the mere circumstances of the accident indicate[d] a defect existed at the time the seatbelt was manufactured."[137] Whitted contended that Indiana law permitted an application of the doctrine of res ipsa loquitur to strict liability cases. Whitted reasoned that "the circumstances surrounding the accident would lend a reasonable

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128. *Id.* (quoting *Pries*, 31 F.3d at 546).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* The court noted that

> 'unreasonably dangerous' refers to any situation in which the use of a product exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer who purchases it with the ordinary knowledge about the product's characteristics common to the community of consumers.

Id. at 1206-07 (quoting IND. CODE § 33-1-1.5-2 (1993)).

133. *Id.* at 1207.

134. *Id.* (citation omitted).

135. *Id.*

136. *Id.*

137. *Id.*

jury to infer that the seat belt was defective."[138] Specifically, Whitted contended that the circumstances which would

> lead a reasonable juror to infer that a defect existed at the time the product left the respective control of each Defendant include (a) a low speed head-on collision, (b) normal use since the purchase of the Nova, (c) his own affidavit that his 1987 seatbelt was not dilapidated from use, and (d) a broken seat belt[139]

The Seventh Circuit explained that the "doctrine of res ipsa loquitur is a rule of evidence which allows an inference to be drawn from a particular set of facts."[140] The court explained that the doctrine consists of two elements: "[(1)] it recognizes that under certain rare instances, common sense alone dictates that someone was negligent; [(2)] it requires that the injuring instrumentality be in the exclusive control of the defendant at the time of injury."[141]

The court noted that of the jurisdictions which allow theories analogous to res ipsa loquitur to prove that a manufacturing defect existed, four methods of proof have evolved.[142] The court explained that:

> [A] plaintiff should employ one of the following to establish the existence of a manufacturing defect: (1) plaintiff may produce an expert to offer direct evidence of a specific manufacturing defect; (2) plaintiff may use an expert to circumstantially prove that a specific defect caused a product failure; (3) plaintiff may introduce direct evidence from an eyewitness of the malfunction, supported by expert testimony explaining the possible causes of the defective condition; and (4) plaintiff may introduce inferential evidence by negating other possible causes.[143]

In considering "whether it would be proper to apply a type of res ipsa loquitur rationale to an Indiana product liability case," the Seventh Circuit recognized that there are theoretical inconsistencies in fusing strict products liability and res ipsa loquitur.[144] "Without attempting to alloy the two concepts," the court gleaned "from the doctrine of res ipsa loquitur the principle that, in certain rare instances, circumstantial evidence may produce reasonable inferences upon which a jury may reasonably find that a defendant manufactured a product containing a defect."[145]

In examining the facts of this case, the court determined that Whitted could not avail himself of the general application of circumstantial evidence.[146] The

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138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 39, at 244-45 (5th ed. 1984)).

142. *Id.*

143. *Id.* (citations omitted).

144. *Id.* at 1208.

145. *Id.*

146. *Id.*

court found that the "evidence adduced on the issue of the Defendants' control was that the seat belt appeared to be in good working condition prior to the collision, that the seat belt had never demonstrated problems before, and that the seatbelt was not cut or frayed prior to the accident."[147] The court found this evidence insufficient to create a reasonable inference; further, the court determined that Whitted did not "nullify enough of the probable explanations of the seat belt break."[148]

Moreover, the court noted that Whitted did not establish a requisite element of his prima facie case: that the seatbelt proximately enhanced his injuries. Specifically, "that the force of his body against the belt might have caused more severe injuries than those he sustained had the belt not separated."[149] Although the Seventh Circuit acknowledged that under Indiana's Product Liability Act a plaintiff may use circumstantial evidence to establish a manufacturing defect, the court held that Whitted produced insufficient evidence to demonstrate that the seatbelt broke due to a defect and, accordingly, affirmed the district court's grant of summary judgment.[150]

II. LEGISLATIVE ACTION: CHANGES TO THE INDIANA PRODUCTS LIABILITY ACT

Products liability was a primary target of the recent and massive tort reform effort in Indiana. The most sweeping liability reform bill in Indiana's history, and one of the most comprehensive in the nation, became law in Indiana on July 1, 1995. House Bill 1741, "The Personal Responsibility Act of 1995," was vetoed by Governor Bayh on April 21, 1995. However, during the final week of the 1995 session, the Governor's veto was narrowly overridden in both the House and the Senate. As a result, Indiana's Product Liability Act was drastically altered and, as this discussion will point out, many of the changes fail to interface with traditional principles of products liability law.

A. Ind. Code § 33-1-1.5-1[151]

As a result of the changes to section 33-1-1.5-1, the distinction between strict liability, negligence, and breach of implied warranty has been almost completely abolished. Thus, all of the provisions of the Act, including the applicable defenses, the statute of limitations, and the provisions addressing joint and several liability and comparative fault, apply regardless of whether the action is strict liability in tort, negligence, or breach of warranty. All actions based on product defectiveness now require the plaintiff to prove that the manufacturer failed to

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147. *Id.*

148. *Id.*

149. *Id.* at 1209.

150. *Id.*

151. IND. CODE § 33-1-1.5-1 (Supp. 1995) now provides that the products liability chapter is applicable to "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."

exercise reasonable care; specifically, strict liability has been abolished even for "unreasonably dangerous products." This is a significant change in the law of products liability, as the Act previously applied only to actions in which the theory of liability was strict liability in tort.

B. Ind. Code § 33-1-1.5-2

Under traditional product liability actions, any entity involved in the stream of commerce of a defective product could normally be held liable. However, the amended Act limits the liability of entities which deliver products into the stream of commerce. Indiana Code section 33-1-1.5-2 defines the term "manufacturer" and integrates the definition of "seller" into "manufacturer."[152] A seller may be considered a "manufacturer" under the Act in only limited circumstances; thus, a seller is not necessarily liable in a products liability action for merely being a conduit of the product in the stream of commerce. In fact, this section specifically indicates that a seller is not considered a manufacturer merely because the seller places or has placed a private label on a product.[153] Furthermore, the definition of "seller" has been limited to "a person engaged in the business as selling or leasing a product for resale, use or consumption."[154] This definition of seller eliminates a specific reference to a wholesaler, a retail dealer, lessor, or a distributor. However, if a plaintiff encounters problems obtaining jurisdiction over the actual manufacturer of a product under this section, a seller or distributor may still be liable if that would result in the court obtaining jurisdiction.[155]

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152. IND. CODE § 33-1-1.5-2(3) (Supp. 1995) provides in relevant part:

> As used in this chapter . . . "manufacturer" includes a seller who:
>
> (A) has actual knowledge of a defect in a product;
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> (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 significant part by the manufacturer; or
>
> (E) owns in whole or significant part the manufacturer.

153. IND. CODE § 33-1-1.5-2(3) (Supp. 1995) provides in relevant part: "A seller who discloses the name of the actual manufacturer of a product is not a manufacturer under this section merely because the seller places or has placed a private label on a product."

154. IND. CODE § 33-1-1.5-2(5) (Supp. 1995).

155. IND. CODE § 33-1-1.5-3(d) (Supp. 1995) provides, in relevant part, that:

> [I]f a court is unable to hold jurisdiction over a particular manufacturer of a product or part of a product alleged to be defective, then that manufacturer's principle distributor or seller over whom a court may hold jurisdiction shall be considered, for the purposes of this section, the manufacturer of the product.

C. Ind. Code § 33-1-1.5-3

Major substantive changes in Indiana's product liability law were made by the modifications to Indiana Code section 33-1-1.5-3. Specifically, subsection (b)(1) contains a significant change in the law. This part of the statute makes it clear that negligence is not the basis of liability imposed on product suppliers for injury caused by defective products. The addition of the word "manufacture" and the deletion of the words "packaging, labeling, instructing for use, and sale" indicate that strict liability applies to manufacturing defects but not to other kinds of defects. In fact, the legislature added a sentence at the end of subsection 3(b) making it absolutely clear that in actions based on design or informational defects, the plaintiff must establish that "the manufacturer or seller failed to exercise reasonable care under the circumstances . . . ."[156] In other words, in order to prevail in design or informational defect cases, the plaintiff must establish that the defendant was negligent. Thus, strict liability, as first articulated by the *Restatement (Second) of Torts* section 402A, and later adopted by the Indiana legislature, now applies only to manufacturing defects in Indiana.

Obviously, this change has been viewed as a significant blow to consumer interests. It will have a significant impact on the plaintiff's choice of defendants, as local product sellers will ordinarily not be viable defendants because they are only rarely negligent with respect to design or informational aspects of the product.

Because the focus in design and warning cases will now be on whether the manufacturer exercised reasonable care, the plaintiff will have to prove negligence in design or failure to provide adequate information. To establish that the defendant manufacturer was negligent in the design of the product, the plaintiff must prove that the defendant knew or should have known that the product as designed posed a risk of harm to the user or consumer and that the risk posed was unreasonable. It is important to note that manufacturers are held to the standard of experts in the field and will be required to keep abreast of developing knowledge and techniques in the field, and to test prototypes of products for dangers in design. Thus, in most cases, manufacturers will be hard pressed to assert that they could not have foreseen dangers posed by the design.

As to the determination of reasonableness of the risk of the design, the risk-benefit approach has long been used in the majority of jurisdictions, as opposed to the consumer expectation approach, as the test for product defect and unreasonable danger in design cases. Although there is some disagreement, the risk-benefit approach to design defect is generally thought to be more favorable for plaintiffs than the consumer expectation approach, particularly where the danger posed by the product is obvious. However, the risk-benefit approach generally requires the plaintiff to present evidence that a feasible design alternative that would have eliminated or reduced the risk was available at the time the product was manufactured.

It is unlikely that the change in Indiana Code section 33-1-1.5-3(b) will have

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

much impact on warning cases. Courts have consistently held that manufacturers have no duty to warn of unknowable dangers. For a manufacturer to be held liable for failure to warn, the product without an adequate warning must also pose an unreasonable risk of harm. This determination involves weighing the cost or burden of warning of the dangers against the likelihood and the extent of harm possible if a warning is not given. Generally, the cost or burden of providing a warning is relatively modest—either providing a warning or making the existing warning more complete or more conspicuous. If the probable harm is serious, the result should be a determination that the balancing of the burden of prevention (providing a better warning) against the extent and likelihood of harm will tip in favor of the victim, permitting the trier of fact to conclude that the risk posed by the product without an adequate warning is an unreasonable one.

Given that design and warning cases will now be resolved using negligence principles, it is unclear how the consumer expectation approach to "unreasonably dangerous" and "defective condition" meshes with the change. Indiana Code section 33-1-1.5-2(7) defines "unreasonably dangerous" as "any situation which the use of a product exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer who purchases it with the ordinary knowledge about the product's characteristics common to the community of consumers." Further, Indiana Code section 33-1-1.5-2.5(a)(1) provides that a product is in a "defective condition" if it is in a condition "not contemplated by reasonable persons among those considered expected users or consumers of the product." These provisions were not changed in the recent revision of the product liability law.

The source of the consumer expectation test for an "unreasonably dangerous" and "defective condition" is the commentary to *Restatement (Second) of Torts* section 402A, which provides for strict liability against sellers of products that are in "a defective condition unreasonably dangerous."[157] The drafters of section 402A adopted consumer expectation as a test for defectiveness and unreasonable danger, which was to be used with the theory of strict liability in tort. While the *Restatement* consumer expectation approach was initially adopted by a majority of courts and legislatures, many courts have since concluded that consumer expectation as a test for defectiveness and unreasonable danger is unworkable. Therefore, many jurisdictions have switched to a balancing approach similar to the traditional test for negligence, at least in design and warning cases. Nevertheless, consumer expectation has remained a part of the Indiana statute from its inception.

As strict liability has been limited to manufacturing defects, the future applicability of "consumer expectation" is uncertain. It may continue to have value as a test for defectiveness or unreasonable danger in manufacturing defect cases. However, to establish liability in such cases, it is generally sufficient to demonstrate that the product causing injury deviated from the norm for such products. Although it may certainly be said that the ordinary consumer does not expect products to deviate from the norm in a way that makes the product dangerous to users, it is rarely necessary to prove that a product with a

157. RESTATEMENT (SECOND) OF TORTS § 402A, cmts. g & i (1965).

manufacturing defect disappointed consumer expectation.

However, consumer expectation may no longer apply to other product liability theories, because those cases will be tried on negligence principles. If "consumer expectation" is combined with traditional negligence principles, it will impose severe and unjust burdens on the plaintiff. Therefore, it is critical that it is recognized that the "consumer expectation" approach is now only relevant to manufacturing defect cases.

Indiana Code sections 33-1-1.5-3(c) & (d) are new subsections providing that manufacturing defect cases based on strict liability may only be brought against the manufacturers of the injury causing product, unless the court cannot obtain jurisdiction over the manufacturer.[158] In such a case, the plaintiff may sue the manufacturer's principal distributor or seller over whom the court may hold jurisdiction.[159] The effect of these provisions is to prevent the user or consumer injured by a product with a manufacturing defect from suing the local retail seller of the product on a strict liability theory unless, for some reason, the court cannot get jurisdiction over the manufacturer. However, there is no exception to allow suit against a local non-manufacturing seller if the manufacturer is out of business or judgment-proof. Most jurisdictions with provisions such as this include an exception; Indiana has not. Therefore, when the manufacturer is judgment-proof, the plaintiff will remain uncompensated even if the retail seller is financially sound and would be able to satisfy a judgment. This provision can be seen as a clear example of the legislature's decision to favor the financial interests of businesses over the interests of innocent victims.

D. Ind. Code § 33-1-1.5-4

Traditionally, in a products liability action, a defendant has been limited in asserting the defense that the plaintiff misused the product. Prior to the 1995 amendments to the Act, it was a defense to a products liability action that the user knew of the defect and was aware of the danger in the product and nevertheless proceeded unreasonably to make use of the product and was injured. However, the amended Act eliminates the concept of "unreasonable" use and now simply provides that 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 and nevertheless proceeded to make use of the product and was injured."[160]

This is a significant change in the law because it obviously strengthens the defense of incurred risk in products liability actions. Reasonableness is typically

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158. *See supra* note 155. IND. CODE § 33-1-1.5-3(c) (Supp. 1995) provides:
A product liability action based on the doctrine of strict liability in tort may not be commenced or maintained against any seller of a product that is alleged to contain or possess a defective condition unreasonably dangerous to the user or consumer unless the seller is a manufacturer of the product or of the part of the product alleged to be defective.

159. *See supra* note 155.

160. IND. CODE § 33-1-1.5-4(b)(1) (Supp. 1995).

a factual issue requiring resolution by the trier of fact; therefore, because it is now absent from consideration, there is the clear potential that the incurred risk defense may be routinely appropriate for summary judgment. Further, there is the distinct danger that the open and obvious danger rule may be resurrected in any situation where it can be shown that a plaintiff used a product with an obvious defect.

However, it is important to recognize that it must be shown not only that the plaintiff knew of the defect, but that the plaintiff was subjectively aware of and appreciated the danger created by the defect.[161] The issue of subjective awareness and appreciation of danger should ordinarily be left for resolution by the trier of fact. Although plaintiffs may be able to survive summary judgment, the absence of "reasonable use" consideration will nonetheless provide the deathblow for many plaintiffs who were injured by products containing patent defects.

Additionally, and perhaps more importantly, the deletion of the word "unreasonably" means that conduct described in subsection (b)(1) probably does not fall within the definition of "fault" as provided in Indiana Code section 33-1-1.5-10.[162] Thus, incurred risk will be a complete defense for the defendant, and the plaintiff will be denied any recovery. To say that this serves a grave injustice is to state, or rather understate, the obvious in the extreme. A consumer who encounters an admittedly defective product, but who *reasonably* uses it (as an ordinary person would) and is injured, cannot recover *any compensation* even though the product *was defective* and the consumer acted in a *reasonable* manner. Once again, this can be seen as a stark example of the legislature's decision to favor business interests over the interests of innocent victims.

E. Ind. Code § 33-1-1.5-4.5

The state of the art defense in strict liability[163] was changed to provide a rebuttable presumption of no negligence if the product was in conformity with the state of the art relative to the product or in compliance with applicable government codes, standards, regulations or specifications.[164] Under the previous version of the statute, conformity with state of the art was an affirmative defense; therefore, the burden was on the defendant to raise the issue and to prove by a preponderance of the evidence that the product was in conformity with the generally recognized state of the art at the time of the product's production. However, there is now a rebuttable presumption that a product that conforms with the state of the art is not defective and that its manufacturer is therefore not negligent. If the defendant introduces evidence that the product conforms with the state of the art, the presumption arises, and the plaintiff must present evidence to rebut the presumption in order to avoid summary disposition.

The second part of this section, which creates a rebuttable presumption that products in compliance with governmental regulations are not defective and the

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161. *Id.*

162. *See infra* notes 167-170 and accompanying text.

163. Formerly, IND. CODE § 33-1-1.5-4(b)(4) (1993).

164. IND. CODE § 33-1-1.5-4.5 (Supp. 1995).

manufacturers are not negligent, is completely new for Indiana.[165] The issue of what effect statutory enactments and governmental regulations should have in a products liability case arises frequently because so many dangerous products are highly regulated. In the absence of statutory provisions stating the effect of compliance or noncompliance with regulations, courts have usually applied general tort law principles and determined that failure to comply with regulations constitutes negligence per se. Conversely, the fact that a manufacturer has complied with relevant statutes or regulations generally only amounts to evidence of due care and is not dispositive.

Manufacturers of regulated products have consistently complained about the failure of courts to give sufficient weight to their compliance with government safety standards. Manufacturers maintain that regulatory bodies are in a better position than courts to do the necessary risk-benefit assessments. Instead of simply being relevant evidence of due care, proponents contend that compliance with governmental regulations should be either conclusive or at least presumptive evidence of due care. Apparently, these arguments have been heard as the Indiana legislature has concluded that compliance with governmental regulations now creates a rebuttable presumption that a product is not defective and that its manufacturer is not negligent.

Because a product with a manufacturing defect is unlikely to comply with governmental standards for such products, this provision will ordinarily apply only to design and warning cases. Thus, in a design or warning case, to overcome the presumption the plaintiff must show that the reasonably prudent manufacturer would have taken additional precautions even though its product complied with governmental regulations. However, because these cases are now governed by negligence principles, the evidence of negligence that the plaintiff must introduce in order to prevail on a negligence theory should be sufficient to demonstrate that the reasonably prudent manufacturer would have gone beyond the regulatory requirements in question.

F. Ind. Code § 33-1-1.5-9

Indiana Code section 33-1-1.5-9 is a new section of the statute which eliminates joint and several liability in product injury cases.[166] Thus, in all cases in which more than one entity has been "at fault" (as defined by Indiana Code section 33-1-1.5-10), no defendant will be liable for more than its percentage of fault. This provision obviously presents serious problems for the plaintiff and will likely produce wholly unjust results.

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165. *Id.* § 33-1-1.5-4.5(2).

166. IND. CODE § 33-1-1.5-9 (Supp. 1995) provides:

> In a product liability action where liability is assessed against more than one (1) defendant, a defendant is not liable for more than the amount of fault, as determined under section 10 of this chapter, directly attributable to that defendant. A defendant in a product liability action may not be held jointly liable for damages attributable to the fault of another defendant.

Product liability cases often involve multiple defendants and, frequently, not all of the defendants are financially responsible. Thus, if the financially responsible defendant only pays a percentage of the damages, the plaintiff will often not be fully compensated. Therefore, in passing this section, the legislature again made the determination that the innocent victim, the plaintiff, should bear the burden of the loss instead of a defendant who is not a wholly innocent party.

Under the new section, the plaintiff must go to trial prepared to prove a specific degree of fault as to each defendant. Ordinarily, it will be in the plaintiff's best interest to attempt to attribute the greatest degree of fault to the financially responsible defendant. Further, the plaintiff should also be prepared for the fact that the defendants will be pointing the finger at one another in an attempt to reduce their own percentages of fault. This may be particularly difficult for the plaintiff in cases in which the plaintiff has settled with one of the defendants, as the remaining defendants will try to place the bulk of the blame on the absent defendant, thus putting the plaintiff in the peculiar position of having to defend that party.

G. Ind. Code § 33-1-1.5-10

The products liability statute now contains its own comparative fault provision.[167] This provision establishes the apportionment principles applicable to all products liability actions. "Fault" is defined as "an act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others."[168] The definition also includes any unreasonable failure to avoid an injury or to mitigate damages.[169] Additionally, this section provides that the plaintiff's fault, in whatever form it takes, will be assessed along with the fault of all other parties and nonparties alleged to have caused or contributed to the physical harm.[170] The comparative fault provision, taken in conjunction with the elimination of joint and several liability, means that product liability cases have been brought into the world of comparative fault.

This aspect of the Act represents a significant change in the law of products liability. The apportionment principles of comparative fault, which specifically did not previously apply to strict liability actions, now apply to all product liability actions regardless of the theory of action. Thus, it is now clear that the plaintiff's fault will reduce the plaintiff's recovery in all products liability actions. Further, as apportionment is to be done in accordance with the general Comparative Fault Act,[171] a determination that the plaintiff was more than fifty percent at fault will preclude the plaintiff from recovering anything.

Under comparative fault, the fault of the defendant is to be weighed against that of the plaintiff. If the plaintiff is partly at fault, but not more than fifty percent

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167. IND. CODE § 33-1-1.5-10 (Supp. 1995).
168. *Id.*
169. *Id.* § 33-1-1.5-10(a)(1).
170. *Id.* § 33-1-1.5-10(b).
171. *Id.* § 34-4-33-5.

at fault, he or she receives a discounted recovery.[172] The recovery is discounted by the percentage of the plaintiff's fault and also by the fault of any nonparties. In that tradition, this new section provides that the defendant's wrongful conduct shall be compared with that of the plaintiff. However, if there is fault of the plaintiff, and that fault falls within the easy-to-prove "incurred risk" defense,[173] then that fault is not compared with the fault of the defendant. Instead, it is a complete defense to the defendant's wrong. Such a result completely undermines the purpose and rationale of comparative fault; it certainly was never intended to give one side a complete advantage over the other.

There can be no doubt that Indiana Code sections 33-1-1.5-9 and 10 can be viewed to clearly demonstrate the legislature's extreme slant in favor of business interests. Short of resurrecting contributory negligence and making it a complete defense, it is hard to imagine how this could have been made any more favorable to a defendant. A products liability defendant will never pay more than its percentage of fault, to the detriment of a completely innocent victim; the fault of nonparties is considered in determining percentages of fault, to the detriment of the completely innocent victim; incurred risk is a complete defense and will preclude any liability on the part of the defendant, even though the defendant may have been guilty of outrageous and clearly faulty conduct. Apparently, this is the result that a majority of the legislature wanted for the injured consumers of this state.

CONCLUSION

House Enrolled Act 1741 will be subject to a considerable amount of judicial interpretation because it has conflicting provisions, is in derogation of common law, and has constitutional and procedural issues to be resolved. The Indiana legislature essentially gutted the principles of strict liability for defective products by removing the seller from the chain of liability, applying comparative fault principles, and creating complete defenses not contemplated by traditional products liability doctrine. More disturbing, however, is the fact that House Enrolled Act 1741 was poorly drafted, passed out of a committee containing no lawyers, encountered little debate, and was hastily passed by a legislature in which only fifteen members of the House and eleven members of the Senate were lawyers. The result: centuries of existing law, cultivated and developed one case at a time, was dramatically changed by the haste and apparent legal ignorance of a majority of the Indiana legislature.

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172. *Id.*

173. *Id.* § 33-1-1.5-4(b)(1).