XII. Products Liability

*John F. Vargo**

Products liability generally involves the liability of a seller of products to parties who, as a rule, are not in privity with the seller.[1] Over the years product liability cases have been litigated on many theories: principally those of negligence,[2] inherently dangerous items,[3] warranty,[4] and strict liability in tort.[5] The "old strict liability" theory relating to inherently dangerous items was restricted to a small class of products considered imminently dangerous to human safety.[6] Early in the development of products liability litigation, plaintiffs also began to recognize that negligence was an ineffective theory of recovery because of certain problems: identification of the defect,[7] defendants' assertions of contributory negligence,[8] and proof of negligence.[9] The later developed sales warranty theory of recovery also contained various roadblocks to a plaintiff's recovery, for example, notice requirements,[10] disclaimers,[11] privity,[12] and proof of a warranty's exist-

*Member of the Indiana Bar. J.D., Indiana University Indianapolis Law School, 1974.

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[1]W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 96, at 641 (4th ed. 1971) [hereinafter cited as PROSSER].

[2]2 F. HARPER & F. JAMES, THE LAW OF TORTS § 18.5, at 1042 (1956) [hereinafter cited as HARPER & JAMES]; PROSSER § 96, at 642.

[3]Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1112 (1960).

[4]2 HARPER & JAMES §§ 28.15, 28.23; PROSSER § 97.

[5]2 HARPER & JAMES §§ 28.26, 28.27; PROSSER § 98.

[6]PROSSER § 96, at 642.

[7]Smith v. Michigan Beverage Co., 495 F.2d 754 (7th Cir. 1974); Prosser, *supra* note 3, at 1114.

[8]PROSSER § 65.

[9]*Id.* § 103.

[10]UNIFORM COMMERCIAL CODE § 2-607(3).

[11]UNIFORM COMMERCIAL CODE § 2-316.

[12]Privity is divided into "horizontal" and "vertical" privity. Vertical privity is the nexus between the seller and buyer. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 11-2, at 327-28 (1972). Horizontal privity is the nexus between the buyer and other parties. *See* UNIFORM COMMERCIAL CODE § 2-318. For a discussion of these privity concepts see Cochran, *Emerging Products Liability Under Section 2-318 of the Uniform Commercial Code, A Survey*, 29 BUS. LAW. 925 (1974). Privity as a bar to recovery seems to have a continuing vitality in Indiana warranty law. Withers v. Sterling Drug, Inc., 319 F. Supp. 878, 882 (S.D. Ind.

ence.[13] Because of the difficulties with these early theories of recovery, there has been an increased movement toward the theory of strict liability in tort as set forth in section 402A of the *Restatement (Second) of Torts*[14] when a plaintiff sues for injuries arising from a defective product.[15]

Section 402A is premised in part upon the special responsibility of sellers of products toward the consuming public.[16] Also, strict tort liability transfers the financial burden of injuries resulting from defective products from the user to the manufacturer because the manufacturer is more able to protect against losses resulting from injury caused by the product. The manufacturer may protect itself by passing the cost on to consumers via an increased price for the goods—a "spreading the loss" approach—or by the manufacturer's purchase of general liability insurance.[17] Although section 402A has moved to the forefront of recovery theories in products liability litigation, the cases make

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1970) (horizontal and vertical privity required if warranty sounds in contract).

[13]*See, e.g.*, Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

[14]RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter cited as § 402A]. This section states:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
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> (2) The rule stated in Subsection (1) applies although
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> (a) the seller has exercised all possible care in the preparation and sale of his product, and
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> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

[15]The plaintiff must show the following to recover under section 402A:

1) The user was injured by a product. *See* Cunningham v. MacNeal Memorial Hosp., 47 Ill. 2d 443, 266 N.E.2d 897 (1970).

2) The product was in a defection condition and/or unreasonably unsafe. *See* Jakabowski v. Minnesota Mining & Mfg., 42 N.J. 177, 199 A.2d 826 (1964); Wade, *Strict Tort Liability of Manufacturers,* 19 SW. L.J. 5, 14-15 (1965).

3) The product was defective at the time it left the seller's hands. PROSSER § 103, at 671.

[16]Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

[17]§ 402A, Comment c. A wholesaler or retailer also can obtain insurance; but in most cases, either the injured consumer will go directly against the manufacturer or the wholesaler or retailer (or their insurer) will go back against the manufacturer if they have to pay the injured consumer.

it clear that the other theories of recovery still provide viable alternatives under certain circumstances.

A. Privity

In *Karczewski v. Ford Motor Co.*,[18] the plaintiff purchased from another individual a used Ford Mustang which had been driven about 16,000 miles prior to the purchase. Shortly after the plaintiff purchased the car and at a time when the odometer indicated that the car had been driven 18,000 miles, the car accelerated out of control while the plaintiff was attempting to negotiate a left turn. The plaintiff sued Ford for injuries allegedly resulting from the malfunction of a defective carburetor spring that caused the uncontrollable acceleration of the car. The plaintiff based his action upon three theories—negligence, implied contract warranty, and strict tort liability.

Ford's expert testified at trial that Ford did not perform any testing or inspection of the carburetor spring and that the spring had a useful life of about four to six years or for about 60,000 to 70,000 thousand miles. Thus, it appeared that the spring malfunctioned long before it could reasonably have been expected to do so. The jury returned a verdict for the plaintiff, and the court gave judgment in accordance with this verdict after finding that the evidence was sufficient to sustain all of the plaintiff's theories of recovery, though it was necessary to find only one theory sustainable by the evidence in order for the plaintiff to recover.

The United States District Court for the Northern District of Indiana, citing *MacPherson v. Buick Motor Co.*,[19] found that Ford's failure to inspect and test the carburetor spring sustained a claim of negligence. Also, strict tort liability under section 402A was found on the ground that the jury could conclude from the evidence that the defective condition of the spring caused the plaintiff's collision and the resultant injury. Regarding the implied warranty claim, the court stated that the particular purpose of a passenger automobile is for safe transportation on the public highways and that automobiles are impliedly warranted for such purposes.[20]

Interestingly, the Seventh Circuit Court of Appeals had discussed a similar issue in an earlier case, though this case was

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[18]382 F. Supp. 1346 (N.D. Ind. 1974).

[19]217 N.Y. 382, 111 N.E. 1050 (1916).

[20]Judge Sharp's view of the particular purpose of automobiles seems to conflict with the apparent concept of intended use found in Evans v. General Motors Corp., 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966). *See* note 23 *infra*.

not discussed by the *Karczewski* court. In *Evans v. General Motors Corp.*,[21] evidence was presented that the injuries suffered by occupants of an automobile involved in a collision would have been less severe had the auto been designed differently. This evidence raised the question whether the manufacturer could be held liable for these enhanced injuries resulting from the faulty design. After concluding that the defendant was not required to consider foreseeable highway collisions in the design of its autos, the court stated:

> The intended purpose of an automobile does not include participation in collisions with other objects despite the manufacturer's ability to foresee the possibility that such collisions may occur. As defendant urges, the defendant also knows that its automobiles may be driven into bodies of water, but it is not suggested that defendant has a duty to equip them with pontoons.[22]

Surely no one would seriously argue that an auto must be equipped with pontoons. Likewise, surely even auto manufacturers would not argue that autos are not intended to provide safe transportation.[23] There appears to be no overriding reason why manufacturers should not be required to consider the high incidence of auto accidents when designing automobiles. Parenthetically, it appears that the *Evans* court was more concerned about the liability of auto manufacturers than the safety of those traveling in the auto.

In *Karczewski*, Ford had asserted that the plaintiff was barred from recovery because the implied warranty of fitness for a particular purpose[24] contained a privity requirement, which the plaintiff could not satisfy since he was a remote purchaser. The court, citing *Filler v. Rayex Corp.*[25] as controlling, held that Indiana does not require privity to support an implied warranty claim. This holding is subject to at least two interpretations. First, that the long standing privity requirement in contract warranty actions as codified in section 2-318 of the Uniform Commercial

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[21]359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966).

[22]*Id.* at 825.

[23]Intended use as applied in *Evans* seems to consider the use of the product from the viewpoint of the manufacturer. This position on intended use has been much criticized for ignoring certain foreseeable dangers arising out of the intended use of the product. PROSSER § 96, at 646. *See also* Larson v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968); Sklaw, *"Second Collision" Liability: The Need for Uniformity*, 4 SETON HALL L. REV. 499, 522 (1973); Note, *Torts-Duty to Design a "Crashworthy" Vehicle*—Dreisonstok v. Volkswagenwerk A.G., *A Third Approach?*, 27 OKLA. L. REV. 557 (1974).

[24]IND. CODE § 26-1-2-315 (Burns 1974).

[25]435 F.2d 336 (7th Cir. 1970).

Code has been eliminated;[26] or secondly, that the court was merely following the established practice of distinguishing actions based upon implied warranties sounding in contract from actions based upon implied warranties sounding in tort. Indiana law appears to support such a distinction.[27] Implied warranties which sound in contract appear to retain all of the restrictions on asserting warranties under the UCC, such as notice, disclaimers, and privity; implied warranties which sound in tort appear to be synonymous with liability imposed by section 402A, which does not require privity.[28] Though the *Karczewski* court failed to make this distinction clear, the reliance upon *Filler* appears to indicate that privity is still a viable requirement in warranty actions which sound in contract, since the plaintiff in *Filler* was in privity with the defendant seller.[29]

B. Defect and Stream of Commerce

In *Link v. Sun Oil Co.*,[30] the plaintiff alleged that the defendant's employees repaired a tire for the plaintiff by inserting a new inner tube. The plaintiff and two other men transported the repaired tire back to the disabled truck from which the tire had been removed. While attempting to mount the tire, the plaintiff struck the wheel rim with a 6-pound sledge hammer and the tire exploded, injuring the plaintiff. Evidence later disclosed that the explosion was caused by a bent rim on the wheel assembly. On the basis of this evidence, the plaintiff asserted that the rim was bent when it left the defendant's service station after the repair by the defendant's employees. Plaintiff further alleged that the tire was in a defective condition because of the failure on the part of the defendant's employees to warn him that the rim was bent and that it might have a dangerous propensity to explode because of this condition. The defendant replied that his employees neither repaired the tire nor sold the inner tube to the plaintiff. In addition, the defendant's expert testified that a blow from a 6-pound sledge hammer could bend the wheel rim and cause the tire to explode.

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[26]*See* pp. 270-71 *supra.*

[27]*See* Dagley v. Armstrong Rubber Co., 344 F.2d 245 (7th Cir. 1965); Withers v. Sterling Drug, Inc., 319 F. Supp. 878 (S.D. Ind. 1970); Gregory v. White Truck & Equip. Co., 323 N.E.2d 280 (Ind. Ct. App. 1975).

[28]*See* Greeno v. Clark Equip. Co., 237 F. Supp. 427, 429 (N.D. Ind. 1965).

[29]In Withers v. Sterling Drug, Inc., 319 F. Supp. 878 (S.D. Ind. 1970), the court examined the *Filler* case and concluded that the issue of implied warranties sounding either in tort or contract was not raised in *Filler* though the plaintiff, in the court's opinion, was in privity with the defendant-seller.

[30]312 N.E.2d 126 (Ind. Ct. App. 1974).

The trial court entered judgment for the defendant upon a jury verdict in his favor, and the plaintiff appealed based upon two asserted errors. First, the plaintiff alleged that the trial court erred in refusing to give a tendered instruction regarding "defect" from a failure to warn.[31] The appellate court found no error because this issue was sufficiently covered in another instruction given by the court. However, the appellate court accepted the proposition offered by the plaintiff's omitted instruction that a failure by the manufacturer to warn can render a product defective.[32]

Secondly, the plaintiff alleged error based upon the sufficiency of evidence, asserting that his testimony that the defendant's employees sold him an inner tube and repaired his tire outweighed the testimony of the defendant's employees to the contrary. After initially determining that it was not necessary for the plaintiff to show a sale, since injecting a product into the "stream of commerce" was sufficient to invoke section 402A liability, the court held that the plaintiff failed to prove that the defendant had "placed the product into commerce."[33] The stream of commerce approach was derived from the earlier Indiana case of *Perfection Paint & Color Co. v. Konduris*.[34] Thus, it is now clear that a "commercial sale"[35] is not a requisite element for maintaining a section 402A action in Indiana.

C. Circumstantial Evidence

In *Smith v. Michigan Beverage Co.*,[36] the plaintiff purchased a 28-ounce nonreturnable bottle of root beer from a local store. She then went home and placed the bottle near a gas pipe on the floor of the kitchen between a refrigerator and a wall. When she later reached down to lift the bottle, it exploded and injured her. The plaintiff sued the manufacturer, alleging, in the alternative, that the manufacturer was negligent in failing to inspect the bottle and in failing to maintain the proper quality control to ensure the safety of the product. The plaintiff's case appeared to be damaged by testimony from experts that the glass bottle was not in a defective condition at the time that it left the hands of the manufacturer. However, the jury, disregarding this evidence, rendered

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[31] *Id.* at 128-29.

[32] *Id.* at 129. *Cf.* Reyes v. Wyeth Labs, 498 F.2d 1264 (5th Cir. 1974); Keeton, *Products Liability*, 50 F.R.D. 338 (1971).

[33] 312 N.E.2d at 130.

[34] 147 Ind. App. 106, 259 N.E.2d 681 (1970).

[35] A "commercial sale" requires the passing of title for a price from the seller to the buyer. IND. CODE § 26-1-2-106 (Burns 1974).

[36] 495 F.2d 754 (7th Cir. 1974).

a verdict for the plaintiff; the United States District Court for the Southern District of Indiana granted judgment in accordance with the verdict.

In reversing the trial court, the Seventh Circuit Court of Appeals examined the sufficiency of the evidence and concluded that there was a total failure to prove any defect in the bottle. The plaintiff had asserted that because the bottle broke she was entitled to a presumption of a defect. Nevertheless, the court held that the presumption did not arise because the bottle was in the exclusive control[37] of the plaintiff at the time of accident and because the plaintiff had an opportunity to examine the bottle after the accident to determine the cause of the explosion. In addition, although it appeared that the plaintiff had attempted to show that the bottle contained a design defect, the court found that the plaintiff failed to present evidence to establish such a defect .

Although the court's conclusion may be justifiable, the opinion raises questions regarding the reasons for reversing a jury verdict. First, the court found that the plaintiff produced no evidence to support the allegation of a defective condition which would allow the jury to find that the defendant was negligent. However, the court failed to clearly set forth the facts presented at trial upon this issue. Thus, it is difficult to determine whether the jury, as the trier of fact, could have derived any inferences from the evidence presented that would support the allegation of a defect.[38]

Secondly, the court refused to permit the plaintiff to use the doctrine of res ipsa loquitur. The court stated that, as in negligence cases, the mere fact of injury cannot create an inference of negligence, so in accident cases, the mere fact that an accident occurred cannot create a presumption that a product was defective.[39] Though these propositions are well established, the court

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[37]The *Smith* court relied extensively on the case of Evansville Am. Legion Home Ass'n v. White, 239 Ind. 138, 154 N.E.2d 109 (1958). The plaintiff in *White* was injured when she sat on the defendant's chair and the chair collapsed. Justice Arterburn, writing for the majority, stated that res ipsa loquitur did not apply since the chair was not in the exclusive control of the defendant *at the time of the accident* but broke at the time it was in the plaintiff's control.

[38]The court admitted in a footnote that evidence was presented at trial which indicated that nonreturnable bottles were thinner than other bottles. 495 F.2d at 758 n.8. In addition, the court stated that evidence was presented concerning the amount and purpose of the testing performed on the bottles by the manufacturer, though the court did not state what constituted such evidence. Also, the plaintiff's expert gave an opinion that the bottle causing injury contained a "philosophical defect" since it broke during normal use, which in his opinion meant the bottle was unsafe for use in the household.

[39]The *Smith* court's discussion of presumptions rather than inferences

beclouded the res ipsa loquitur issue. The court stated that the policy underlying res ipsa loquitur rests to a large extent upon the fact that the injuring agency is within the special knowledge and control of the defendant and that the plaintiff has no access to such information. This analysis is inaccurate.[40] Courts some time ago shifted the emphasis under res ipsa loquitur away from the knowledge and control requirements.[41] Now the doctrine is invoked by the extraordinary happening, that is, whether the

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indicates that the court apparently misapprehended the plaintiff's use of circumstantial evidence to support an inference of certain conduct on the part of defendant. This raises the question whether the court refused to permit inferences to be drawn from circumstantial evidence. It is clear that presumptions and inferences are distinguishable concepts. In the case of an inference, the existence of *B* may be deduced from the existence of *A* through the use of ordinary reasoning and logic. However, in the case of a presumption, the existence of *B* must initially be assumed as a matter of law once *A* is shown. J. WEINSTEIN & M. BARGER, WEINSTEIN'S EVIDENCE ¶ 300[02] (1975). Thus, if an exploding bottle is considered an extraordinary event, it would be justifiable for a reasoning person to infer that there was a defect in the bottle. The plaintiff in *Smith* was entitled to such an inference. *See* Rheingold, *Proof of Defect in Products Liability Cases*, 38 TENN. L. REV. 325, 338 (1971) [hereinafter cited as Rheingold].

[40]*See* Rheingold at 337.

[41]Three conditions are usually necessary before res ipsa loquitur will be applied:

> (1) The accident must be one that ordinarily would not occur in the absence of negligence, or, as it is sometimes put, the instrumentality causing injury must be such that no injury would ordinarily result from its use unless there was negligent construction, inspection or use; (2) both inspection and use must have been at the time of the injury in defendant's control; (3) the injurious occurrence or condition must have happened irrespective of any voluntary action on plaintiff's part.

2 HARPER & JAMES § 19.5, at 1081 (citations omitted). The first element must be present before the doctrine and the subsequent inference of the defendant's negligence will arise. The second element, control, is not usually literally applied since this places too great a burden upon the plaintiff. Where this requirement is literally applied, Professor Prosser states that it has led to "ridiculous conclusions, requiring that the defendant be in possession at the time of the plaintiff's injury as in the . . . case denying recovery where a customer in a store sat down on a chair, which collapsed." PROSSER § 39, at 220. The defendant's control at the time of the indicated negligence should be sufficient to satisfy this requirement. Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 455, 150 P.2d 436, 438 (1944); Baker v. Coca Cola Bottling Works, 132 Ind. App. 390, 395, 177 N.E.2d 759, 762 (1961); PROSSER § 39, at 220. The final requirement is that the plaintiff eliminate the possibility that he may have been contributorily negligent. This requirement is similar to the second requirement. Clearly, the plaintiff's participation in the occurrence or his exclusive control of the instrumentality at the time of injury should not preclude application of res ipsa loquitur, so long as the plaintiff's conduct does not impair the inference that the defendant was the one who was negligent. 2 HARPER & JAMES § 19.8, at 1093. Some courts apply a fourth require-

accident ordinarily would have occurred in the absence of negligence. Thus it is more accurate to resort to res ipsa in an accident case based upon the following:

> Under some circumstances, the failure of a product to perform in the way the consumer would have expected it to is evidence of the existence of a defect. Or, to put it another way, a happening out of the ordinary with a product raises an inference of its defectiveness in many instances.[42]

Rejecting the doctrine of res ipsa loquitur upon the fact, viewed in isolation, that the plaintiff was in control of the injuring instrumentality at the time of the accident, is contrary to more logical present day authority found in many jurisdictions.[43]

D. Contributory Negligence

In *Gregory v. White Trucking & Equipment Co.*,[44] the plaintiff purchased a cab-tractor unit from the defendant for use in his business. Part of the purchase arrangement included the defendant's agreement to install a "fifth wheel" unit on the cab. The installation was completed, but the plaintiff found it necessary to make several trips to the defendant's shop to correct problems with the fifth wheel assembly. Shortly after the last repair, the plaintiff was involved in an accident. The fifth wheel allegedly failed to function properly, causing the plaintiff to run off the road and resulting in damage to the cab-trailer and to the cargo being transported. The plaintiff brought an action based upon negligence and the breach of an implied warranty of fitness for a particular purpose.[45] The trial court granted the defendant a judgment on the evidence[46] on the negligence count, and the jury

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ment that the evidence be more accessible to the defendant than to the plaintiff, but this should not be an indispensable requirement for the application of res ispa loquitur. PROSSER § 39, at 225.

[42]Rheingold at 337-38.

[43]In Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 455, 150 P.2d 436, 438 (1944), the court stated:

> Many authorities state that the happening of the accident does not speak for itself where it took place some time after defendant had relinquished control of the instrumentality causing the injury. Under the more logical view, however, the doctrine may be applied upon the theory that defendant had control at the time of the alleged negligent act, although not at the time of the accident, *provided* plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession.

(Emphasis in original).

[44]323 N.E.2d 280 (Ind. Ct. App. 1975).

[45]IND. CODE § 26-1-2-315 (Burns 1974).

[46]IND. R. TR. P. 50.

returned a verdict in favor of the defendant on the warranty count. Thus, the plaintiff was denied recovery under either theory.

On appeal, the Second District Court of Appeals found that since the evidence presented by the plaintiff satisfied the test for determining a motion for judgment on the evidence—was there some evidence of negligence[47]—the trial court erred in granting judgment on the negligence count. The court also reversed the judgment on the warranty action because the trial court erroneously gave instructions regarding contributory negligence. This holding was based upon a determination that contributory negligence was not a defense to either the "traditional" warranties or the "new" warranties. The "traditional" warranties alluded to are the general contract warranties in the UCC; the "new" warranties are essentially principles of liability in tort similar to the strict liability principles found in section 402A. Thus, contributory negligence is not a defense to a warranty action sounding either in contract or tort. Relying on historic and current authority, the court noted, however, that the accepted defenses to warranty actions based on section 402A include assumption of risk,[48]

[47]Mamula v. Ford Motor Co., 150 Ind. App. 179, 275 N.E.2d 849 (1971).

[48]In the past Indiana courts have limited the use of the term "assumption of risk" to cases where there is a contractual relationship between the parties, and have invented the term "incurred risk" for use in all other cases. Coleman v. Demoss, 144 Ind. App. 408, 246 N.E.2d 483, 488 (1969). Since the contract element is the only distinguishable element found in these two defenses, the discussion which follows will use the term assumption of risk even in situations where no contractual relationship exists.

Assumption of risk is recognized as a defense to both negligence and strict tort liability actions. § 402A, Comment n; PROSSER § 68. In negligence cases the Indiana courts have repeatedly cautioned against equating assumed risk with contributory negligence. *See, e.g.*, Gregory v. White Truck & Equip. Co., 323 N.E.2d 280, 288 n.6 (Ind. Ct. App. 1975); Christmas v. Christmas, 305 N.E.2d 893 (Ind. Ct. App. 1974). However, they have not heeded their own warnings. State v. Collier, 331 N.E.2d 787 (Ind. Ct. App. 1975); Sullivan v. Baylor, 325 N.E.2d 475 (Ind. Ct. App. 1975). *But see* Pierce v. Clemens, 113 Ind. App. 65, 46 N.E.2d 836 (1943) (guest-passenger case). For example, in *Christmas*, the First District Court of Appeals meshed the two defenses by defining assumption of risk as follows:

> The doctrine of incurred risk is based upon the propositon that one incurs all the ordinary and usual risks of an act upon which he voluntarily enters, so long as those risks are known and understood by him, *or could be readily discernible by a reasonable and prudent man* under like or similar circumstances.

305 N.E.2d at 895 (emphasis added). Thus, the *Christmas* court used objective reasonable man language to define assumption of risk. This is generally the test for establishing contributory negligence, but it is not the test most jurisdictions use for establishing assumption of risk. To prove assumption of risk, the defendant generally must show a voluntary undertaking, knowledge of the risk, and an understanding of the risk by the plaintiff. These elements usually are tested by a subjective standard. PROSSER § 68. Therefore, assump-

misuse,[49] and lack of causation.[50]

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tion of risk requires a showing of a voluntary undertaking which can only be tested by a subjective standard.

The application of the *Christmas* definition in negligence cases would not unfairly prejudice the plaintiff since both contributory negligence and assumption of risk are defenses to a negligence action. It is inappropriate, however, to apply this definition in strict tort liability cases, as was done, for example, by the Third District Court of Appeals in Coronette v. Seargeant Metal Prods., Inc., 147 Ind. App. 46, 258 N.E.2d 652 (1970). The prejudice created by the application of this definition in strict tort liability cases arises from the fact that this definition bars the plaintiff from recovery for conduct constituting contributory negligence, which is not a defense to strict tort liability.

If the Indiana courts are going to continue to insist that contributory negligence and assumption of risk be treated separately, the *Christmas* definition quoted above must be modified to the extent that it uses the objective reasonable man standard. If the *Christmas* definition is retained, it should be applied only in negligence cases. It would then be necessary to devise a separate assumption of risk defense for strict tort liability cases. This separate assumption of risk defense, of course, would have to contain a subjective test to determine whether the plaintiff voluntarily undertook the risk of injury.

These language problems could easily be resolved if incurred risk was discarded as a separate defense and was replaced by an assumption of risk defense containing the elements of voluntary undertaking, knowledge, and understanding of the risk of injury—all subjectively tested. This assumption of risk defense would be applicable to both negligence and strict tort liability actions, as is the case in most jurisdictions. PROSSER § 68.

[49]Although the court stated that misuse, lack of causation, and assumption of risk are valid bars to strict tort liability actions, the misuse defense may be mere surplusage. In Greeno v. Clark Equip. Co., 237 F. Supp. 427, 429 (N.D. Ind. 1965), the court indicated that misuse refutes either a defective condition or the causation element. Thus, misuse that creates the defect causing the injury would bar liability because the product was not defective at the time it left the seller's hands. However, misuse that creates a defect which does not cause injury may not bar liability for an injury which is caused by a condition in the product at the time it left the seller's hands. It appears, therefore, that the conduct of the user, denominated misuse, may be examined exclusively by a causation approach, since the misuse either causes the injury or the injuring defect. If misuse thus can be equated to causation, misuse should be discarded as a separate defense. *See* Perfection Paint & Color Co., v. Konduris, 147 Ind. App. 106, 119, 258 N.E.2d 681, 689 (1970).

[50]A pattern jury instruction defines proximate cause in the following manner:

> That cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury complained of and without which the result would not have occurred.

INDIANA PATTERN JURY INSTRUCTIONS § 5.81, at 55 (1966). This instruction appears to require more than legal cause, which contemplates only a "substantial factor" as the test for causation. RESTATEMENT (SECOND) OF TORTS § 431 (1965). Indiana courts have used the term proximate cause in discussing section 402A cases. Sills v. Massey Ferguson, Inc., 296 F. Supp. 776, 779 (N.D. Ind. 1969); Coronette v. Seargeant Metal Products, Inc., 147 Ind. App. 46, 55-61, 258 N.E.2d 652, 657-61 (1970). *Cf.* Gregory v. White Truck & Equip. Co., 323 N.E.2d 280, 287 (Ind. Ct. App. 1975).