contention, he cited *Weist v. Board of School Commissioners.*[34] Judge Staton's reliance on *Weist,* though ignored by the majority, appears sound. In *Weist,* the issue before the court was whether a collective bargaining agreement could modify statutory provisions for teachers' sick leave. The court held that the agreement could not operate in derogation of laws governing compensation for teachers, but concluded that the contractual provision in question expanded, rather than limited, sick leave available to teachers and thus was not contrary to laws governing compensation of teachers within the meaning of the School Powers Act.

If the *Gary Teachers* case is construed to prohibit contractual agreements for benefits greater than those required by statute, this approach could significantly limit subjects of collective bargaining. It need not be so construed, however, since the court's conclusion that earlier tenure could not be contractually provided was based upon its interpretation of the intent of the Tenure Act. Even if the court is correct in its conclusion that one purpose of the Tenure Act is to require a specified time for a school system to seek improvement in the quality of its teachers, other statutory benefits for teachers could be construed, as in *Weist,* to establish only minimum levels of benefits. In addition, the Teacher Bargaining Act requires that statutory benefits which are subjects of bargaining under the Act must be construed as minimums, subject to bargaining for greater benefits. Any other construction would defeat the requirement to bargain on such subjects.

XIII. Products Liability

*John F. Vargo**

A. Introduction

During the past year the Indiana decisions in the area of products liability have been few in number, but the issues in the cases have been extremely interesting and conceptually stimulating. In general, the recent cases have considered enterprise liability and the patent danger rule.

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[34]320 N.E.2d 748 (Ind. Ct. App. 1974).

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The necessary brevity of a survey article makes it impossible to fully examine these issues. Thus, any shortcomings or misconceptions in the following discussion of enterprise liability may be attributed to space limitations which have precluded the author from fully defining terms and phrases used as words of art. My apologies to legal theorists, economists, and the bench and bar for some of the terms and expressions which therefore may be unintelligible to any one, or possibly all, of these groups.

Two recent Indiana cases, *Chrysler Corp. v. Alumbaugh*[1] and *City of Indianapolis v. Bates*,[2] discussed separate issues concerning the theoretical parameters of strict liability in tort—a subject often confused in Indiana law. In *Alumbaugh* a vehicle manufactured by the defendant struck another vehicle which ricocheted into the plaintiff's automobile. The injured plaintiff sued in strict liability in tort, alleging that his loss was precipitated by a defect in the defendant-manufacturer's vehicle. The defendant contended that the plaintiff was a "bystander" or "non-user" of the product and, as such, should be denied recovery since strict liability in tort pursuant to section 402A of the Restatement[3] applies only to "users of the product."[4]

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[1]342 N.E.2d 908 (Ind. Ct. App. 1976). For procedural issues decided in this case, see Harvey, *Civil Procedure, supra* at 97, 113.

[2]343 N.E.2d 819 (Ind. Ct. App. 1976).

[3]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
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

[4]Section 402A, by its literal wording, would appear to apply only to "users" or "consumers." The drafters of the restatement refused to take a position on whether a "bystander" (non-user) could recover. *See* § 402A, comment o. However, it would appear that courts are generally allowing the bystander to recover. *See* Caruth v. Mariani, 11 Ariz. App. 188, 463 P.2d 83 (1970); Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75

The Third District Court of Appeals found for the bystander-plaintiff, citing *Sills v. Massey-Ferguson, Inc.*,[5] which advanced two alternative rationales for bystander recovery: the bystander is a foreseeable party, or foreseeability is irrelevant to a bystander's recovery. Under the first theory, the manufacturer owes the bystander a duty since he is a foreseeable party. The second approach allows the bystander to recover without being a foreseeable party since foreseeability is a negligence concept, and negligence is irrelevant in strict liability actions. Proponents of this second approach base recovery on such policy considerations as the "risk bearing" capacity of the parties. Although the *Sills* court did not choose between the two theories, the *Alumbaugh* court stated:

> We believe foreseeability has a deeper significance and is inherent in a system of civil liability *utilizing fault as a cornerstone.* While § 402A eliminates consideration of the care exercised by the manufacturer or supplier in fixing liability, it does not reject the concept of fault. Instead it moves yet one plane further from intentional harms by imposing an affirmative duty to avoid supplying products in a defective condition and which are unreasonably dangerous. Application of § 402A to bystanders should be limited to those whom the manufacturer or supplier should reasonably foresee as being subject to the harm caused by the defect.[6]

Thus, it would appear that the *Alumbaugh* court injected fault or negligence standards into section 402A.

Another case which chose negligence standards and rejected the possibility of a non-negligence or no-fault concept was *City of Indianapolis v. Bates.*[7] In *Bates* a defective automatic traffic signal showed a green light to all motorists, causing the plaintiff's auto and another vehicle to collide in the intersection. The city's

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Cal. Rptr. 652 (1969); Mitchell v. Miller, 26 Conn. Supp. 142, 214 A.2d 694 (New Haven Super. Ct. 1965); Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965); Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969); *see also* Ciampichini v. Ring Bros., Inc., 40 App. Div. 2d 289, 339 N.Y.S.2d 716 (1973); Note, *Strict Products Liability to the Bystander: A Study in Common Law Determinism*, 38 U. CHI. L. REV. 625 (1971); Note *Products Liability in Indiana: Can The Bystander Recover*, 7 IND. L. REV. 403 (1973); Note, *Products Liability—Bystander Recovery in Strict Liability*, 41 TENN. L. REV. 756 (1974).

[5]296 F. Supp. 776 (N.D. Ind. 1969).

[6]342 N.E.2d 908, 917 (emphasis added).

[7]343 N.E.2d 819 (Ind. Ct. App. 1976).

defense to the injured plaintiff's strict liability suit[8] was the contention that only negligence principles should be applied. Reversing a jury verdict for the plaintiff, the court of appeals found strict liability to be inapplicable to a city, giving no reason for this decision other than to cite prior authority which had not even discussed the issue.[9] However, one concurring judge stated that the rationales of strict liability seemed to be applicable but were outweighed by countervailing policy considerations.[10]

Thus, both *Alumbaugh* and *Bates* raised issues concerning

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[8]The *Bates* court noted that both parties couched their arguments in generalities, speaking in terms of strict liability as applied to animals, products, and ultrahazardous activities. *Id.* at 821 n.1. This "generalization" is understandable since it is the *rationale* underpinning various theories of strict liability in tort which is being used to extend no-fault to new areas. Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153, 154 (1976) [hereinafter cited as Klemme]. Any attempt to "pigeonhole" strict liability into a particular area might preclude its application in other areas. For example, the literal use of § 402A for actions involving the use of land might preclude recovery because land is generally not considered a product. However, this restrictive approach should not bar litigants from attempting to show that the reasoning of strict liability should apply to their particular cases or circumstances. As one court has stated:

> The law of products' liability has become a field of strict liability, and there is continual movement away from *fault* as the governing principle for allocation of losses, in favor of enterprise liability or the distribution of losses over a larger segment of society through insurance. There is no sound reason to immunize landowners from the community's perception of values.

Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 101 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973), *noted in* Klemme, *supra* note 8, at 154 n.9.

[9]The *Bates* court stated that all available Indiana authority supports the conclusion that the city is liable, if at all, upon a negligence theory. 343 N.E.2d at 821. However, the citations given in support of this conclusion *do not* discuss strict liability as being inapplicable to cities. *See* Campbell v. State, 259 Ind. 55, 284 N.E.2d 733 (1972); City of South Bend v. Turner, 156 Ind. 418, 60 N.E. 271 (1901); City of Madison v. Baker, 103 Ind. 41, 2 N.E. 236 (1885); Turner v. City of Indianapolis, 96 Ind. 51 (1884); Board of Comm'rs v. Briggs, 337 N.E.2d 852 (Ind. Ct. App. 1975); Klepinger v. Board of Comm'rs, 143 Ind. App. 155, 239 N.E.2d 160 (1968); Gilson v. City of Anderson, 141 Ind. App. 180, 226 N.E.2d 921 (1967); City of Evansville v. Beheme, 49 Ind. App. 448, 97 N.E. 565 (1912). *See also* Miller v. Griesel, 308 N.E.2d 701 (Ind. 1974); Annot., 34 A.L.R.3d 1008 (1970).

Obviously, the application of strict liability against cities was a case of first impression in Indiana. It would seem reasonable to have embarked upon an analysis of why strict liability is inapplicable to cities or, at least, to have referred to other jurisdictions discussing the problem.

[10]343 N.E.2d at 822 (Sullivan, J., concurring). However, Judge Sullivan neither explained what constituted the "countervailing policy considerations" nor related his rationale for determining that these considerations outweighed the application of strict liability in tort.

strict liability: *Alumbaugh* deals with the issue of whether strict liability contains negligence standards, and *Bates* finds that the strict liability rationales were apparently present but simply overbalanced. Both also raised the question of what is strict liability?

B. Strict Liability In Tort

Strict liability is a theory of recovery intended to replace the concept of negligence in certain situations;[11] it is "strict" in the sense that proof of negligence or fault is not required for recovery.[12] Although strict liability was not conceived as a type of general insurance wherein the party deemed liable would be forced to pay in all circumstances, it has not been specifically determined where strict liability in tort should cease.[13]

The extent of the attendant liability is determined by the theory upon which strict liability is founded. Several different concepts, including "risk spreading," "deep pocket," "cheapest insurer" and "cheapest cost avoider,"[14] are mentioned as the underlying basis for strict liability, but none of these theories, either alone or in combination, are sufficiently explanatory. However, recent articles have developed a comprehensive theory which seems to explain both the reasons for and the extent of strict liability in tort.[15] This theory is called "enterprise liability."

C. Enterprise Liability

Enterprise liability is the concept that losses to society caused by an enterprise activity should be borne by that enterprise. Recognizing that the total resources available to the community are limited, enterprise liability acknowledges that the competitive market system, operating on the law of supply and demand, is the

[11] *See generally* Calabresi & Hirschoff, *Toward A Test For Strict Liability in Torts*, 81 YALE L.J. 1055 (1972); Klemme, *supra* note 8.

[12] *Id.*

[13] Calabresi & Hirschoff, *supra* note 11, at 1056.

[14] Klemme, *supra* note 8, at 156.

[15] Many authors have expressed their viewpoints on various theories of strict liability or enterprise liability. *See, e.g.*, A. EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972). However, Professor Guido Calabresi's theory seems to have gathered more support than most, and a fairly comprehensive tracing of his theory can be found in the following: G. CALABRESI, COSTS OF ACCIDENTS, A LEGAL AND ECONOMIC ANALYSIS (1970) [hereinafter cited as COSTS]; Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961) [hereinafter cited as *Risk Distribution*]; Calabresi & Hirschoff, *supra* note 11. Professor Howard Klemme takes a slightly different approach in Klemme, *supra* note 8.

best way for the community to distribute resources in order to most efficiently satisfy the greatest number of community members.[16] The theory of enterprise liability also advances the concept that the legal decision to leave the loss on one party or to shift it to another will determine the distribution of the loss among the segments of society which will eventually bear it.[17]

One author has described enterprise liability as follows:

> The theory of strict or absolute tort liability is not, I would suggest, a theory at all. It does not provide any general unifying criteria or rationale which can be used to account for why the tort law has developed any of its various rules of liability and nonliability. Strict liability does nothing more than describe a result in certain limited cases. Under strict liability, the defendant is a tortfeasor simply because he engaged in a particular type of activity for which the law imposes liability without regard to fault. Basically, strict liability simply means that among the several reasons why we may wish to treat the defendant as a tortfeasor and, as a consequence, treat the plaintiff's loss as a cost of the defendant's enterprise, none of those reasons is because we consider his acts socially undesirable. At most, strict liability is but another way of generally stating the theory of enterprise liability, that is, losses created by an enterprise ought to be borne by that enterprise. Like the enterprise liability theory, strict liability does require the enterprise be one of the "but for" causes, but also like the general statement of the enterprise liability theory, strict liability does not provide us any cost accounting criteria which can be used generally. Neither does the theory offer any common rationale to explain why strict liability makes sense in terms of one or more identifiable social objectives. Again, in essence, all strict liability says is, the defendant is liable, notwithstanding the fact that his conduct was not "bad."[18]

This definition does not explain the circumstances under which a person should be held liable, nor does it demonstrate the reasons for placing liability upon an enterprise for the losses it has created. Two closely related approaches do, however, explain these aspects of enterprise liability.

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[16]Klemme, *supra* note 8, at 158-59; *Risk Distribution, supra* note 15, at 500-07.

[17]Klemme, *supra* note 8, at 161.

[18]*Id.* at 174.

1. *First Approach*[19]

Fault or negligence is derived from the idea that an actor should be liable for his faulty conduct.[20] Such conduct is defined by social standards found in the "reasonable man" test which premises liability on the duty of a person to prevent exposing others to unreasonable risks.[21] The duties of the reasonable man are encompassed in a "cost-benefit" analysis which contains three variables: (1) The probabilities an accident will occur; (2) the gravity of harm if an accident does occur; and (3) the burden of precaution adequate to avoid the accident.[22] Thus, fault principles limit liability to accidents worth avoiding; all other accidents are borne by the injured parties.

Although fault principles were thus designed to deter faulty behavior, this deterrent effect is highly questionable.[23] For example, the cost-benefit test requires near-perfect foreseeability while being inefficient in avoiding the costs of accidents.[24] In addition, fault concepts fail to consider the fairness of imposing the *ultimate* burden of tort losses on one segment of the public as opposed to another.[25] Fault concepts merely consider the loss as a burden on the immediate parties, disregarding the "externalization"[26] of tort losses by the parties initially bearing the loss.

Strict liability surmounts these problems inherent in fault concepts by imposing liability on the party in the best position to make the cost-benefit analysis, while not requiring its actual determination.[27] In other words, instead of forcing the actor to actually foresee and quantitatively determine the probability and

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[19]The "first approach" in this article is derived from Calabresi's viewpoint of strict liability in tort, especially as defined in his article with Hirschoff. *See generally* Calabresi & Hirschoff, *supra* note 11.

[20]Calabresi refers to negligence and fault as interchangeable entities. However, he obviously is speaking not about individual moral fault but about the external moral fault concepts contained in the standards of negligence. *See id.* at 1055-59.

[21]*Id.*

[22]The "cost-benefit" analysis of Calabresi is based upon the "Learned Hand test," sometimes referred to as the "risk-utility" test. *See id.* at 1056-57 n.7, *citing* United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947); Conway v. O'Brien, 111 F.2d 611 (2d Cir. 1940), *rev'd on other grounds*, 312 U.S. 492 (1941).

[23]COSTS, *supra* note 15, at 135-40; Calabresi & Hirschoff, *supra* note 11, at 1058-59; Klemme, *supra* note 8, at 172-73.

[24]Calabresi & Hirschoff, *supra* note 11, at 1058-59.

[25]*See id.* at 1070; Klemme, *supra* note 8, at 177; *see generally* COSTS, *supra* note 15, ch. 5, 7, 10.

[26]*See* COSTS, *supra* note 15, at 144-50, 244-50 (explanation of "externalization").

[27]Calabresi & Hirschoff, *supra* note 11, at 1060-61.

gravity of harm as balanced against the burden of precautions, strict liability requires only a decision regarding which party is in the best position to make the cost-benefit analysis and to act on such decision. "The issue becomes not whether avoidance is worth it, but which of the parties is relatively more likely to find out whether avoidance is worth it."[28]

Determining which party can best make the cost-benefit analysis requires investigating each party's knowledge, understanding, and appreciation of the risks, as well as weighing the choices or alternatives available to the various parties. These requirements for the application of strict liability greatly resemble the defense of assumption of risk in its purest form.[29] In fact,

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[28] *Id.*

[29] *Id.* at 1064-65. As Calabresi points out, courts have grossly misapplied the doctrine of assumption of risk while proper application of it is *essential* to the understanding of a non-fault world (strict liability in tort). *Id.* at 1065.

Proper application of assumption of risk requires the plaintiff to have *actual* knowledge, understanding, and appreciation of the risk he is consenting to undertake. RESTATEMENT (SECOND) OF TORTS § 496D (1965). In addition, if the plaintiff is not allowed adequate alternatives, he will not be considered to have voluntarily consented to the risk. RESTATEMENT (SECOND) OF TORTS § 496E (1965). Of course, the plaintiff's consent is based upon a subjective standard, not upon the objective reasonable man standard found in negligence or contributory negligence. RESTATEMENT (SECOND) OF TORTS § 496A, comment d. An excellent example of the proper application of assumption of risk in a strict liability action is Borel v. Fibreboard Paper Products, Inc., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), wherein Judge Wisdom stated:

> Another form of contributory negligence consists of voluntary and unreasonable conduct in encountering a known risk. As found in comment *n* to section 402(A) of the Restatement, it represents a hybridization of *volenti* and traditional contributory negligence. Applying a subjective standard, the jury must find the first three elements of *volenti*: the plaintiff must have had *actual* knowledge, understanding, and appreciation of the danger. With respect to voluntariness, however, the jury must find that the plaintiff's action was both voluntary from a subjective standpoint and unreasonable from an objective standpoint.

493 F.2d at 1096-97. Judge Wisdom was concerned with the "overlap" area of contributory negligence and assumption of risk. *See* RESTATEMENT (SECOND) OF TORTS § 496A, comment d. However, he correctly pointed out the general requirements of assumption of risk.

Another case which used assumption of risk in a proper manner was Berkebile v. Brantly Helicopter Corp., 337 A.2d 893 (Pa. 1975) wherein the court stated:

> A plaintiff cannot be precluded from recovery in a strict liability case because of his own negligence. He is precluded from recovery only if he knows of the specific defect eventually causing his injury and voluntarily proceeds to use the product with knowledge of the danger caused by the defect. Furthermore, a finding of assumption of risk must be based on the individual's own subjective knowledge,

assumption of risk is merely the imposition of strict liability on the plaintiff—the opposite side of the coin from strict liability for the defendant.[30]

The determination of who is liable under strict liability does not depend upon negligence or contributory negligence but upon which party is in the best position to perform the cost-benefit analysis.[31] Because the immediate parties are merely representatives of various categories of participants within the enterprise, the inquiry should reflect which category, not which individual, is in the best position to make the cost-benefit analysis. The selection process should consider only the *categories* which actually bear the losses, not the individuals who bear the losses initially.[32]

2. Second Approach[33]

The second approach is a variation of the first. It takes into account the cost accounting function of tort law loss distribution[34] to achieve four interrelated purposes: (1) Preventing as many tort-like losses as economically feasible; (2) distributing the costs of such prevention, or, alternatively, the cost of insuring against the tort-like losses which will occur; (3) encouraging individual members of the community to make rational decisions about the use of their personally available resources; and (4) avoiding the creation of price and allocation distortions in the use of the marketplace as a tool for "best" allocating the community's total limited resources.[35]

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not upon the objective knowledge of a "reasonable man." Such a defense can be charged upon by the court only if there is evidence introduced by defendant that the decedent knew of the specific defect causing his death and appreciated the danger it involved before using the aircraft.

Id. at 901-02 (citations omitted).

Indiana law has failed to recognize the proper application of assumption of risk, making Indiana one of the jurisdictions which "grossly misapplies" the doctrine. *See* Vargo, *Products Liability, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 270, 279 n.48 (1975) [hereinafter cited as Vargo, *1975 Survey*].

[30]Calabresi & Hirschoff, *supra* note 15, at 1065.

[31]*Id.*

[32]*See* authorities cited note 25 *supra.*

[33]The "second approach" is derived from Professor Howard Klemme. *See generally* Klemme, *supra* note 8. Klemme characterizes his theory as descriptive, reflecting what the courts and legislatures have in fact been doing, and Calabresi's theory as prescriptive, reflecting what the courts and legislatures should be doing. *Id.* at 156. However, Klemme acknowledges that his theory is primarily derived from Calabresi's. *Id.* at 156-57.

[34]*Id.* at 162.

[35]*Id.* at 177-78. The function of price is to reflect the relative cost of production of goods. If all costs of a given enterprise are not reflected in

Three criteria are used for achieving these purposes. They are based on the philosophy that people should be able to rely on their expectations that all activities or enterprises will be executed to prevent tort-like losses disrupting the status quo. The first criterion determines which enterprise failed to meet the community's normal expectations.[36] The enterprise failing to function as normally expected will bear the *ultimate* burden of the tort loss. It is usually, if not always, the enterprise which could have taken the most effective preventive action, if any such action could have been taken at all.[37]

The second and third criteria determine which category of participants within the enterprise is the superior risk-bearing category by deciding who can best (1) cause more preventive action to avoid similar losses in the future and (2) cause the alternative costs of prevention or insurance to be passed on most efficiently to the purchasing consumers.[38] Generally, the superior risk bearer will meet both criteria.

Enterprise liability has two rationales. First, the theory seeks to encourage the efficient use of existing resources without distorting the market place. For a person to plan the efficient utilization of his own limited resources, he must be able to rely on the activities of others being carried on in their normally expected manner. Otherwise, he would be less inclined to invest his resources, or, alternatively, he would invest a greater amount of his resources to hedge against the possibility of loss he might incur if a causally related enterprise failed to meet normal expectations.[39]

The second rationale of enterprise liability is an attempt to protect the pricing mechanism of the marketplace as a tool for "best" allocating the community's total limited resources. When a consumer buys a product which fails to meet normal expectations or which is diminished in value because another causally related enterprise has failed to meet expectations, the consumer has paid more for the product than he otherwise would have, and, therefore the market price has been distorted. If the costs of any physical losses caused by such failures are left on the purchaser, the demand created for such goods will have been greater than it otherwise would have been. Consequently, more of the community's limited

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the price of its goods, price is distorted. Therefore, the market place fails to accurately perform its function of allocating community resources. COSTS, *supra* note 15, at 70 & n.2; Klemme, *supra* note 8, at 188.

[36]Klemme, *supra* note 8, at 180-82.

[37]*Id.*

[38]*Id.* at 183-84.

[39]*Id.* at 184.

resources will have been allocated to the production of such goods or services than the marketplace ideally would have allocated.[40]

Thus, there are at least two somewhat different approaches to the theory of enterprise liability. However different these two approaches may seem, both reject fault concepts as a basis for recovery in strict liability. Under neither approach does strict liability depend upon "duties"[41] and "foreseeability"[42] as expressed

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[40] *Id.* at 184-86.

[41] Duty is a negligence or fault concept and nothing else, as one court has stated:

> The crucial difference between strict liability and negligence is that the existence of due care, whether on the part of seller or consumer, is irrelevant. The seller is responsible for injury caused by his defective product even if he "has exercised all possible care in the preparation and sale of his product." . . . [T]he seller "may not preclude an injured plaintiff's recovery by forcing him to prove negligence in the manufacturing process." What the seller is not permitted to do directly, we will not allow him to do indirectly by injecting negligence concepts into strict liability theory. In attempting to articulate the definition of "defective condition" and to define the issue of proximate cause, the trial court here unnecessarily and improperly injected negligence principles into this strict liability case.

Berkebile v. Brantly Helicopter Corp., 337 A.2d 893, 899 (Pa. 1975) (citations omitted).

[42] Foreseeability, an overused concept, is derived from negligence theory and refers to both duty and proximate cause. *See* Travis v. Rochester Bridge Co., 188 Ind. 79, 122 N.E. 1 (1919) (duty); Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928) (duty); Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966) (proximate cause). However, the foreseeability concept contained in the duty standard is whether the plaintiff or harm were objectively foreseeable, while foreseeability in the proximate cause context requires an examination *after* a breach of duty has been established and requires an analysis of whether or not the events that took place were "highly extraordinary." RESTATEMENT (SECOND) OF TORTS § 435. *See* Galbreath v. Engineering Const. Corp., 149 Ind. App. 347, 273 N.E.2d 121 (1971).

Foreseeability of duty is inappropriate in products liability suits because it should not apply to non-fault theories such as § 402A. *See, e.g.*, Berkebile v. Brantly Helicopter Corp., 337 A.2d 893 (Pa. 1975), wherein the court stated:

> The trial court further confused the standards of strict liability in its charge on proximate cause. The court charged that, in order for it to be said that a defect caused plaintiff's injury, "such a consequence, under all the surrounding circumstances of the case, *must have been foreseeable by the seller.*" To require foreseeability is to require the manufacturer to use due care in preparing his product. In strict liability, the manufacturer is liable even if he has exercised all due care. Foreseeability is not a test of proximate cause; it is a test of negligence. Because the seller is liable in strict liability regardless of any negligence, whether he could have foreseen a particular injury is irrelevant in a strict liability case. In either negligence or strict liability, once the negligence or defective product

in *Alumbaugh*; neither approach recognizes fault as a cornerstone of civil liability.[43]

The recognition by several courts in other jurisdictions[44] of the nonapplicability of fault concepts in strict liability actions further underscores the fact that section 402A *does* reject the concept of fault *unless* it is injected by negligence-oriented courts.[45] The *Bates* court, illustrating the approach of a negligence-oriented court, totally failed to analyze the issue of whether strict liability should or should not apply to cities, and merely concluded that strict liability does not apply. Yet, a closer examination of strict liability in tort as a theory has led some jurisdictions to find its applicability to cities quite appropriate.[46]

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is shown, the actor is responsible for all the unforeseen consequences thereof no matter how remote, which follow in a natural sequence of events.

Id. at 900 (citations omitted).

[43]The *Alumbaugh* court's approach to strict liability is reminiscent of the nineteenth century view that fault was the unifying theory of tort liability. *See* O. HOLMES, THE COMMON LAW 63-129 (1963).

[44]Several courts have clearly expressed the idea that fault principles do not belong in § 402A actions. For example, in Berkebile v. Brantly Helicopter Corp., 337 A.2d 893 (Pa. 1975) the court stated that the trial court unnecessarily and improperly injected negligence principles into a strict liability case. *Id.* at 899. *Berkebile* also rejected the term "unreasonably dangerous" as being inapplicable to § 402A actions; the court feared the terminology might suggest the reasonable man concept contained in negligence, further diluting the strict liability concept. *Id.* The *Berkebile* court said that § 402A recognizes liability without fault and that the reasonable man standard in any form has no place in a strict liability case. *Id.* at 899-900. Further, the court rejected the negligence concept of foreseeability as being applicable to § 402A because to require foreseeability is to require the manufacturer to use due care. *Id.* at 900.

Other jurisdictions have also rejected negligence principles in § 402A cases. *See* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 132-33, 501 P.2d 1153, 1161, 104 Cal. Rptr. 433, 441 (1972); Glass v. Ford Motor Co., 123 N.J. Super. 599, 304 A.2d 562 (1973).

[45]Perhaps the concern of most courts and lawyers over strict liability is their "strong emotional attachment to the fault concept which the traditional study of the law of torts tends to produce. It may likewise stem from lawyers' quests for rationality and the troublesome sense of frustration, if not confusion, lawyers feel when such rationality appears to be lacking." Klemme, *supra* note 8, at 155.

[46]In deciding whether to apply strict liability of the variety found in Rylands v. Fletcher, 3 H. & C. 774, 159 Eng. Rep. 737 (1865), *rev'd*, L.R. 1 Ex. 265 (1866), *aff'd*, L.R.3 H.L.330 (1868), the court in Bridgeman Russell Co. v. City of Duluth, 158 Minn. 509, 197 N.W. 971 (1924), concluded that the city should be held strictly liable for damages caused by a break in the water line. The court stated:

> In such a case, even though negligence be absent, natural justice would seem to demand that the enterprise, or what really is the same thing, the whole community benefited by the enterprise, should stand

D. Causation

In *Nissen Trampoline Co. v. Terre Haute First National Bank*,[47] the defendant was the manufacturer of the Aqua Diver, a small circular trampoline marketed as a diving apparatus for pools and lakes.

On his first attempted jump off the Aqua Diver platform, the thirteen-year-old plaintiff landed with his right foot on the bed of the trampoline and his left leg entangled in the elastic cables; his left foot either missed or slipped off the bed, causing injuries necessitating the subsequent amputation of the leg above the knee. Evidence at trial showed that the defendant-manufacturers had determined through premarketing testing that it was possible for a user's foot to pass through the elastic cables connecting the bed to the frame. Nevertheless, Nissen marketed the product without an accompanying warning of its dangers.

The defendant received a favorable verdict, but the trial court found it to be against the weight of the evidence and ordered a new trial.[48] The First District Court of Appeals affirmed, citing the defendant's failure to warn of the Aqua Diver's dangers and stating that under section 402A a product may be defective when the seller fails to warn or instruct regarding potential dangers in the use of the product.[49] In response to defendant's contention that instructions for using the Aqua Diver were unnecessary, the *Nissen* court distinguished between instructions and warnings[50] and sustained the plaintiff's action on the basis of the defendant's failure to warn, independent of any necessity for instructions.

> the loss rather than the individual. It is too heavy a burden upon one. The trend of modern legislation is to relieve the individual from the mischance of business or industry without regard to its being cause by negligence.

Id. at 509, 197 N.W. at 972. *Accord*, Lubin v. Iowa City, 257 Iowa 383, 131 N.E.2d 765 (1964); Moody v. City of Galveston, 524 S.W.2d 583 (Tex. Civ. App. 1975).

[47]332 N.E.2d 820 (Ind. Ct. App. 1975), *rev'd on procedural grounds*, 55 Ind. Dec. 141 (Ind. 1976).

[48]The supreme court reversed because the trial judge had not abided by the provisions of Trial Rule 59(E)(7), governing granting of new trials when a jury verdict is against the weight of the evidence. 55 Ind. Dec. at 146-47. The court of appeals' substantive discussion is, of course, still valuable.

[49]Failure to warn of dangers appears to be one of the three ways in which a product may be considered defective in § 402A. See Campbell & Vargo, *The Flammable Fabrics Act and Strict Liability*, 9 IND. L. REV. 395, 409 (1976) [hereinafter cited as *Flammable Fabrics Act*].

[50]The distinction between warnings and instructions seems to be that a failure to heed clear instructions concerning the use of a product is a misuse, while a failure to heed clear warnings of danger concerning the product itself is assumption of risk. Noel, *Products Defective Because of Inadequate*

The court of appeals noted that strict liability failure-to-warn cases create a curious problem regarding the element of causation since the warning defect is separable from the product itself. Generally, the plaintiff has the burden of proving the causal connection between the defective product and his injuries by establishing that "but for"[51] the lack of defendant's warning the plaintiff would not have been injured. This requirement would be impossible to meet in failure-to-warn cases since it would force the plaintiff to show he would have heeded a sufficient warning if one had been given. The *Nissen* court responded to this causation problem by creating a rebuttable presumption that the plaintiff would have heeded a sufficient warning.

The *Nissen* court's presumption in effect eliminates one of the most basic precepts in all of tort law: the "but for" rule. However, a long-standing exception to the application of the "but for" rule is the situation in which the plaintiff is prevented from proving his case because of some conduct by the defendant.[52] *Nissen* fits this exception since the defendant's conduct, the failure to warn, was the reason for the plaintiff's inability to prove causation. In addition, *Nissen's* exception to the causation elements is entirely within the policy grounds of enterprise liability.[53]

Directions or Warnings, 23 SW. L.J. 256, 263-64 (1969). If the instructions are unclear and do not apprise the user of the danger or provide for efficient use of the product, there is simply a failure to discover the defect. This is considered contributory negligence. *Id.* at 279-81. When the failure to heed clear instructions concerning proper use is considered misuse, the trier of fact must determine whether the misuse caused the defect or injury. Thus, misuse of this nature is in reality a causation problem. *See* Vargo, *1975 Survey, supra* note 29, at 280 n.49.

[51]Causation in fact or the "but for" rule requires: (1) that the activities in question be among the antecedent factors producing the plaintiff's injury and (2) that the result, or the plaintiff's injury, would not exist but for the antecedent conduct. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 41 (4th ed. 1971). If the defendant's activities are not a "but for" cause of the plaintiff's harm, the plaintiff cannot recover.

[52]Although the "but for" rule has been considered one of the most constant and "elementary policies of tort law," Klemme, *supra* note 8, at 163, there are exceptions, based upon policy considerations, which reject the "but for" rule because of the inequity of requiring the plaintiff to prove causation in fact when the defendant's activities have prevented the plaintiff from doing so. *See, e.g.*, Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970); Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948).

[53]In Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970), the court relaxed the "but for" rule and granted a new trial. One of the grounds for doing so was clearly enterprise liability. The court stated:

> This result is also consistent with the emerging tort policy of assigning liability to a party who is in the best position to distribute losses over a group which should reasonably bear them. See generally,

E. Patent Danger

In addition to the causation problem, *Nissen* brought forth the following rule:

> Generally, the duty to warn arises where the supplier knows or should have known of the danger involved in the use of its product, or where it is unreasonably dangerous to place the product in the hands of a user without a suitable warning. *However, where the danger or potentiality of danger is known or should be known to the user, the duty does not attach.*[54]

An identical rule was adopted in *Burton v. L.O. Smith Foundry Products Co.*,[55] where the plaintiff's decedent was fatally burned when a fellow maintenance employee, using an acetylene torch, accidently severed a hose containing a highly flammable parting compound. Smith Foundry had supplied the parting concentrate, which was an active ingredient in the parting compound. Although the concentrate contained a small amount of kerosene, its volatility was greatly increased by Smith Foundry's recommended mixing of the concentrate with an equal part of kerosene.

The plaintiff sued Smith Foundry under strict liability in tort, alleging the product was rendered defective by the company's failure to warn. The Seventh Circuit affirmed a summary judgment for the defendant, stating that Smith Foundry's only duty was to warn of unobvious dangerous properties of its product and that any user of kerosene is expected to know that it is flammable.

The court relied on previous cases to hold that an obvious or patent danger does not render the product defective and that "as in negligence law, obvious dangers are not a basis for liability

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Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts* (1961) 70 Yale L.J. 499. In the instant case the defendant motel owner, and more generally the entire class of those who frequent defendant's motel, were, in an economic view, the beneficiaries of the "cost savings" accompanying the non-employment of a lifeguard. It is better that this entire group bear the burden of the loss resulting from the "economy" rather than to require one particular guest to absorb the entire loss. By assigning liability to the motel in those cases in which no direct evidence establishes causation, we make sure that all motel guests bear their fair share of these damages, since the motel owner is likely to treat either the costs of liability insurance, or the actual costs of litigation, as a direct expense of its business and establish its fees accordingly.

Id. at 775 n.20, 478 P.2d at 477 n.20, 91 Cal. Reptr. at 757 n.20.

Thus, the *Nissen* court statement that the policy grounds of § 402A were consistent with an exception to the "but for" rule seems quite appropriate.

[54]332 N.E.2d at 825.

[55]529 F.2d 108 (7th Cir. 1976).

under Section 402A."[56] Somewhat questionable, especially for purposes of summary judgment, was the *Burton* court's conclusion that the danger of fire was obvious to the plaintiff's decedent.[57] Continued adherence to the patent danger rule seems to be an archaic residual of *pre-negligence* law.

Prior to the development of negligence concepts, the manufacturer of a product owed only one duty of care: to disclose latent perils known to him. Consequently, any actions against manufacturers were based upon fraud or deceit for concealing the defect. If the purchaser knew of the defect, no action would lie against the manufacturer since the purchaser could not then prove fraud or deceit.[58] This "limited duty" concept was incorporated into negligence law, being best described in *Campo v. Scofield,*[59] a 1950 New York decision. *Campo* was cited by the Indiana Supreme Court in *J.I. Case v. Sandefur, Inc.,*[60] a decision on a negligence issue; through various interpretations, especially by federal courts, the *Campo* rule has been applied to cases in strict liability in tort.[61]

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[56]*Id.* at 112, *citing* Schemel v. General Motors Corp., 384 F.2d 802 (7th Cir.), *cert. denied,* 390 U.S. 945 (1967); Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965); J.I. Case Co. v. Sandefur, 245 Ind. 213, 197 N.E.2d 519 (1964); Cornette v. Searjeant Metal Prod., Inc., 147 Ind. App. 46, 258 N.E.2d 652 (1970).

[57]The trial court in *Burton* granted summary judgment, holding, among other things, that the plaintiff's decedent had knowledge of the dangerous conditions of the parting compound. However, the only acceptable evidence (affidavits, depositions, and exhibits) in the record indicates that it was not known whether any warning had been given until after the accident which caused the fatal injury. Transcript 185-86, 207-24. Summary judgment requires that all conflicts be construed in favor of the non-movant, and it is improper to grant summary judgment if the court is required to choose between conflicting inferences. *See* Sarkes Tarzian, Inc. v. United States, 240 F.2d 467 (7th Cir. 1957). *See generally* 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE §§ 2726-2727 (1973). Thus, summary judgment in *Burton* would seem to be highly questionable unless it was clear that the deceased and his fellow employees had knowledge of the parting concentrate's dangerous propensities *before* the accident occurred. *See* Berkebile v. Brantly Helicopter Corp., 337 A.2d 893 (Pa. 1975).

[58]*See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 28.5, at 1542 (1956).

[59]301 N.Y. 468, 95 N.E.2d 802 (1950).

[60]245 Ind. 213, 197 N.E.2d 519 (1964).

[61]The *Campo* rule has a rather curious history in Indiana law. In J.I. Case Co. v. Sandefur, 245 Ind. 213, 197 N.E.2d 519 (1964), the court cited *Campo* for the proposition that "there must be reasonable freedom and protection for the manufacturer. He is not an insurer against accident and is not obligated to produce only accident-proof machines. The emphasis is on the duty to avoid hidden defects or concealed dangers." *Id.* at 804, 197 N.E.2d at 523. *Campo* was next cited in Evans v. General Motors Corp., 359 F.2d 822 (7th Cir.), *cert. denied,* 385 U.S. 836 (1966)—an action based upon negligence, warranties, and strict tort liability—for the proposition that a

The *Campo* case has recently been overruled by the State of New York in *Micallef v. Miehle Co., Division of Miehle-Goss Dexter, Inc.*,[62] in which the court rejected the patent danger rule on several grounds. First, the *Campo* rule is a vestigial carryover from pre-negligence law requiring a finding of deceit for recovery and is not applicable in our highly complex and technological society in which the user easily falls victim to the manufacturer who holds himself out as an expert in his field. The patent danger rule amounts to an assumption of risk as a matter of law without proof that the user subjectively appreciated a known risk. The rule is therefore inconsistent with negligence law which places a

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manufacturer has absolutely no duty if the defect is patent or obvious. 359 F.2d at 824. Next, in Schemel v. General Motors Corp., 384 F.2d 802 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968), the Seventh Circuit cited both *Campo* and *Sandefur* for the rule that a manufacturer's duties are limited to avoidance of latent defects. 384 F.2d at 805. The same court, in Indiana Nat'l Bank v. DeLaval Separator Co., 389 F.2d 674 (7th Cir. 1968), stated that the general rule in Indiana is that a manufacturer's liability is limited to situations where the manufacturer has actual or constructive knowledge of the defect, and cited *Sandefur* for the following proposition: "A manufacturer may determine the character of the materials to be used primarily for the purpose of producing or manufacturing its product." *Id.* at 677. However, the *Sandefur* opinion actually states:

> A manufacturer may determine the character of the materials to be used primarily for the purpose of producing or manufacturing an "economy model," as compared with a luxury model—the life of one being much less than the life of the other. Yet there are reasonable limits on such "economy," for example: a machine may not be built with extremely weak or flimsy parts concealed by an exterior such as to mislead a user into believing it safe and stable when, in fact, it is not, thus causing a user to rely thereon, to his injury.

245 Ind. 213, 222-23, 197 N.E.2d 519, 523 (1964). Later, in Zahora v. Hernischfeger Corp., 404 F.2d 172 (7th Cir. 1968), the court cited *Sandefur* as limiting a manufacturer's duties to the avoidance of latent defects. *Id.* at 176. In Posey v. Clark Equip. Co., 409 F.2d 560 (7th Cir. 1969), the court cited *Sandefur* as limiting manufacturer's duties to latent defects, and held that if the defect is patent there is no duty to warn. *Id.* at 563. Later, the Indiana Court of Appeals in Dudley Sports Co. v. Schmitt, 151 Ind. App. 217, 279 N.E.2d 266 (1972), cited *Sandefur*, *Zahora*, and *DeLaval* for the rule that a manufacturer cannot be liable if the defect is obvious or patent. *Id.* at 226, 279 N.E.2d at 274. Next, in Nissen Trampoline Co. v. Terre Haute First Nat'l Bank, 332 N.E.2d 820 (Ind. Ct. App. 1975), the court cited *Posey* and held that when a danger or potential danger is known or should be known by the user there is no duty to warn. *Id.* at 825. Finally, in Burton v. L.O. Smith Foundry Prod. Co., 529 F.2d 108 (7th Cir. 1976), the court cited *Nissen*, *Schemel*, and *Sandefur*, and held that if it is unreasonable for the manufacturer to assume that the user is ignorant of the defect or danger there is no duty to warn, and under Indiana law a product cannot be considered defective for purposes of strict liability pursuant to § 402A if the defect is patent. *Id.* at 111, 112.

[62] 39 N.Y.2d 376, 348 N.E.2d 571 (1976).

duty on the manufacturer to develop a reasonably safe product while eliminating the same duty by granting immunity for patent perils without regard to whether the user perceived the danger. The *Campo* rule also ignores foreseeability, and patent perils are merely factors to be considered. They should not preclude liability. Negligence law ought to discourage misdesign and defects rather than to encourage them in an obvious form. Finally, a manufacturer stands in a superior position to recognize and cure defective products.

While legal writers[63] and well-reasoned cases[64] have rejected the patent danger rule on grounds similar to *Micallef*, the overruling of the *Campo* case by New York's highest court has had no effect on Indiana law. The question remains whether Indiana should retain "limited duty"[65] concepts and pre-negligence rules in

[63]1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY §§ 7.01, 7.02 (1976); 2 *id.* § 16A[4][e] (1976); HARPER & JAMES, *supra* note 58, at 1542-46; D. NOEL & J. PHILLIPS, PRODUCTS LIABILITY IN A NUTSHELL 151-53 (1974); Keeton, *Products Liability—Inadequacy of Information*, 48 TEX. L. REV. 398, 400 (1970); Marschall, *An Obvious Wrong Does Not Make A Right: Manufacturers' Liability For Patently Dangerous Products*, 48 N.Y.U.L. REV. 1065, 1114 (1973); Noel, *Manufacturer's Negligence of Design or Directions For Use Of A Product*, 71 YALE L.J. 816, 837-38 (1962); Twerski, *From Codling, To Bolm, To Velez: Triptych of Confusion*, 2 HOFSTRA L. REV. 489 (1974).

[64]*See, e.g.*, Luque v. McLean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972); Palmer v. Massey-Ferguson Inc., 3 Wash. App. 508, 476 P.2d 713 (1970).

[65]The development of the *Campo* rule to exclude a seller's liability was closely associated with the advent of the "intended use" doctrine, another "limited duty" concept again developed by federal court interpretations of Indiana law. The rule can be traced through Zahora v. Hernischfeger Corp., 404 F.2d 172 (7th Cir. 1968); Indiana Nat'l Bank v. DeLaval Separator Co., 389 F.2d 674 (7th Cir. 1968); Schemel v. General Motors Corp., 384 F.2d 802 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968); Evans v. General Motors Corp., 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966). The "intended use" rationale stemmed from early negligence cases denying recovery to the user of a product when the particular use was neither intended nor *actually* foreseen by the manufacturer. Liability was limited to situations in which the product was used for "a purpose for which it was intended." RESTATEMENT (FIRST) OF TORTS § 395 (1938). Thus, the use of the product was restricted to the manufacturer's subjective standard, placing an insurmountable burden of proof on the plaintiff. Note, *Misuse As A Bar To Bystander Recovery Under Strict Products Liability*, 10 HOUSTON L. REV. 1106, 1109 (1973) [hereinafter cited as *Bar To Bystanders*]. However, the "limited duty" concept of the "intended use" doctrine has been rejected by the Restatement, legal writers, and most courts. *See* RESTATEMENT (SECOND) OF TORTS § 395 (1965); *Bar To Bystanders, supra* at 1109 nn.21 & 22; *Flammable Fabrics Act, supra* note 49, at 413 n.99. The concept has been replaced either by an objective foreseeability doctrine, *see, e.g.*, Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 87-88 (4th Cir. 1962), or by the rejection of duty as a basis of liability, *see, e.g.*, Berkebile v. Brantly Helicoptor Corp., 337 A.2d 893 (Pa. 1975).

a strict products liability context since section 402A supposedly has eclipsed duty principles and rejected fault concepts as a basis of liability.

XIV. Professional Responsibility

*Charles D. Kelso**

The Indiana Supreme Court continues active development of this area. During the survey period the court (1) elaborated procedures for Disciplinary Commission investigations and for dealing with the aftermath of suspension or disbarment; (2) made several amendments to the Indiana Code of Professional Responsibility;[1] (3) identified detailed sanctions for lawyer misconduct and circumstances constituting mitigation; and, (4) perhaps most importantly, announced its determination to enforce the Code rigorously.

A. Enforcement of the Code

1. General Policy

As the supreme court has begun more frequently to impose sanctions short of disbarment, such as public reprimand, it has also begun to insist that lawyers follow Code provisions strictly, rather than rely on conscience or good intentions for guidance. A landmark declaration of policy was announced in *In re Gerald*

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[1]The Indiana Code of Professional Responsibility [hereinafter referred to as the Code of Professional Responsibility or the Code] follows the American Bar Association Code of Professional Responsibility [hereinafter referred to as the ABA CODE]. Indiana adopted this version of the ABA Code in 1971.

The Code contains Ethical Considerations [hereinafter referred to as ECs], which represent the objectives toward which every member of the profession should strive and Disciplinary Rules [hereinafter referred to as DRs], which are mandatory in character and state the minimum level of conduct below which no lawyer may fall without being subject to disciplinary action.