XII. Products Liability

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This survey period has been a prolific one in the area of products liability. The courts have discussed various issues, many of which are new to the development of products liability law in Indiana.

A. Landlord-Tenant Relationships

Although recently vacated by the Indiana Supreme Court, the Indiana Court of Appeals opinion in *Old Town Development Co. v. Langford*[1] deserves continued discussion. In *Old Town*, the plaintiff-tenant brought an action against the defendant-landlord and the supplier-installer of an allegedly defective heating system. Plaintiff based his action on negligence, implied warranty of habitability, and strict liability in tort. A jury returned a verdict in favor of the tenant against the landlord; however, the jury found in favor of the supplier-installer. The landlord appealed, contending in part that the trial court had committed error in extending the implied warranty of habitability rationale to leased premises[2] and in giving instructions on strict liability in tort.[3]

Writing for the majority of the court of appeals,[4] Judge Buchanan stated that although the theory of implied warranty of habitability was analogous to the strict liability concepts espoused in products liability cases, the use of the habitability warranty should be restricted to negligent conduct on the part of the landlord when an action is brought under the warranty tort remedy. Judge Buchanan viewed the habitability warranty as rooted in both contract and tort law. However, he believed that no independent ac-

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[1]349 N.E.2d 744 (Ind. Ct. App. 1976), *vacated*, 369 N.E.2d 404 (Ind. 1977).

[2]*See generally* Theis v. Heuer, 149 Ind. App. 52, 270 N.E.2d 764 (1971), *aff'd*, 280 N.E.2d 300 (Ind. 1972); Barnes v. Mac Brown & Co., 342 N.E.2d 619 (Ind. 1976).

[3]The trial court gave instructions which were almost identical to the reasoning contained in RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter cited as § 402A] but revised the Restatement language to accomodate the factual situation. 349 N.E.2d at 765-66.

[4]It is difficult to state the effect of Judge Buchanan's opinion or to even give it "majority" status since Judge Sullivan wrote a concurring opinion which agreed only in part with Judge Buchanan's findings, while Judge White wrote a dissenting opinion. However, although Judge White dissented, he agreed with some of the statements of Judge Buchanan.

tion existed for strict liability in tort, because the tort action was dependent upon the implied warranty of habitability count.[5]

Regardless whether courts and scholars have confused the origin of strict liability as being one in contract or one in tort, the generally accepted view is that strict liability is an independent tort concept.[6] Judge Buchanan's position that a landlord's liability should be restricted to negligence seems to be an acceptance of either the historical limitations on landlord tort liability,[7] or Justice Holmes' view that tort law is encompassed by fault or negligence concepts.[8] Judge Sullivan's concurring opinion takes a more practical approach in recognition of the present condition of the law,[9] an approach reminiscent of the famous concurring opinion of Justice Traynor in *Escola v. Coca-Cola Bottling Co.*,[10] wherein strict liability was recognized as an existing theory without using legal fictions or devious reasoning. In Judge Sullivan's view, the landlord in *Old Town* was also a builder and, as such, had a responsibility which was independent of his position as a landlord. Although Judge Buchanan considered the plaintiff's counts in strict liability and warranty of habitability to be related, Judge Sullivan emphasized the separate nature of both counts, based on the defendant's dual roles of landlord and builder.[11] There are two basic reasons why Judge Sullivan's opinion seems preferable. First, policy considerations seem to dictate the necessity of strict tort liability as a viable separate theory.[12] Prior to Judge Buchanan's opinion, other jurisdictions had recognized strict tort liability for builder-vendors in a variety of situations.[13] Second, the use of negligence concepts in combination with either res ipsa loquitur or negligence per se, as done in *Old Town*,[14] is nearly the equivalent of strict liability in tort; and

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[5]349 N.E.2d at 766-68.

[6]*See* § 402A, *supra* note 3, Comment m; W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 75-81, 95 (4th ed. 1971) [hereinafter cited as W. PROSSER].

[7]A summary of landlord tort immunity can be found in Annot., 64 A.L.R.3d 339 (1959).

[8]*See* Vargo, *Products Liability, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 265, 276 n.43 (1976).

[9]349 N.E.2d at 789 (Sullivan, J., concurring).

[10]24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring).

[11]349 N.E.2d at 789 (Sullivan, J., concurring).

[12]*Id.* at 791.

[13]Strict liability has been imposed upon builder-vendors of homes, Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); builder-designers of private homes, Hyman v. Gordon, 35 Cal. App. 3d 769, 111 Cal. Rptr. 262 (1973); sellers of mass-produced homes, Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969); and to sellers of building lots, Avner v. Longridge Estates, 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (1969). *See also* Ursin, *Strict Liability For Defective Business Premises—One Step Beyond* Rowland *and* Greenman, 22 U.C.L.A. L. REV. 820 (1975).

[14]As part of the negligence count, the plaintiff relied upon res ipsa loquitur, 349

this equivalency was one of the primary considerations for the court's recognition of strict liability as an independent doctrine.[15] However, Judge Buchanan attempted to fit the strict tort liability of the landlord-builder into a section 402A framework, a feat similarly attempted by the trial court in *Old Town*. In theory, the requirements of "sale," "seller," "product," and other issues raised in the sale of products under section 402A create difficulties when applying that section to the landlord-builder situation. However, recognition that strict tort liability exists in many situations outside the products liability area[16] might lessen the courts' conceptual difficulties.[17]

B. Pleadings and Parties

In *Neofes v. Robertshaw Controls Co.*,[18] another landlord-tenant case, the plaintiffs brought an action in the federal court against the manufacturer of an allegedly defective component part of a water heater, which exploded and injured the plaintiffs. The plaintiffs were tenants of a landlord who had purchased the water heater from other parties and had supplied the water heater to the plaintiffs for their use. The plaintiffs based their action on negligence, breach of implied warranties, and strict liability in tort. The defendant moved to dismiss the implied warranties count because he viewed the plaintiffs as improper parties who had failed to come within the protection of section 2-318 of the Uniform Commercial

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N.E.2d at 749, and violation of building codes, the latter of which possibly gave rise to allegations of negligence per se, *id.* at 750.

[15]The first case in Indiana to adopt strict liability was Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965). The court stated that the negation of the privity requirement, when coupled with res ipsa, is "hardly different from the theory of strict liability . . . ." *Id.* at 430. *See also* Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring), wherein Justice Traynor, in discussing the effects of the inferences of res ipsa, remarked: "In leaving it to the jury to decide whether the inference has been dispelled, regardless of the evidence against it, the negligence rule approaches the rule of strict liability." 24 Cal. 2d at 463, 150 P.2d at 441.

[16]In 1958, one article listed 14 areas of strict liability in tort, Comment, 21 NACCA L.J., 427 (1958); in his 1971 edition Dean Prosser mentioned over 20 various situations involving strict liability, W. PROSSER, *supra* note 6, §§ 75-81.

[17]It would seem logical that courts should examine whether policy and social considerations require the application of some sort of strict liability; if so, they should determine the proper elements to be applied on a case-by-case basis. Any strict adherence to the elements of legal theories outside the area being examined can lead to many unnecessary semantic gymnastics.

[18]409 F. Supp. 1376 (S.D. Ind. 1976).

Code (U.C.C.).[19] The plaintiffs argued that the privity concept contained in section 2-318 was no longer viable in Indiana.[20]

Assuming that the plaintiffs were bringing their implied warranties count in contract, the court stated that the privity requirement of section 2-318 would prevent plaintiffs' recovery. However, the court reasoned that an implied warranty count which sounds in tort and a count based on strict liability in tort are duplicative and cannot exist in the same lawsuit.[21] The court's reasoning concerning duplicity is somewhat doubtful, because it necessitates the assumption that the two counts are nearly identical. The U.C.C. requirements for warranties of merchantability and fitness for a particular purpose are completely different from the requirements of section 402A.[22] Although the U.C.C. implied warranties have much in

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[19]U.C.C. § 2-318 is codified at IND. CODE § 26-1-2-318 (1976). Here the defendant's contention addressed the issue of "horizontal privity" as compared to "vertical privity." See Vargo, *1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 270, 270 n.12 (1975).

[20]Such a statement was made in the recent case of Wicks v. Ford Motor Co., 421 F. Supp. 104, 105 (N.D. Ind. 1976).

[21]The court reasoned that plaintiffs' contentions would be valid under either Alternative B or C of U.C.C. § 2-318; but because of Indiana's adoption of the more restrictive qualifications under Alternative A, IND. CODE § 26-1-2-318 (1976), plaintiff was without a remedy. 409 F. Supp. at 1377-78.

[22]Although it is true that both strict liability under § 402A and the implied warranties of § 2-318 require the proof of a defect which causes an injury, the precise requirements under each theory differ considerably. The implied warranty of merchantability generally requires that goods:

> (a) pass without objection in the trade under the contract description; and
> (b) in the case of fungible goods, are of fair average quality within the description; and
> (c) are fit for the ordinary purposes for which such goods are used; and
> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
> (e) are adequately contained, packaged, and labeled as the agreement may require; and
> (f) conform to the promises or affirmations of fact made on the container or label if any.
> (3) Unless excluded or modified . . . other implied warranties may arise from course of dealing or usage of trade.

IND. CODE § 26-1-2-314 (1976). The implied warranty of fitness for a particular purpose requires the following:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under [§ 26-1-2-316] an implied warranty that the goods shall be fit for such purpose.

Id. § 26-1-2-315.

Section 402A generally requires: (1) A defect must exist at the time the product leaves the seller's hands, (2) the plaintiff must suffer injury, and (3) the injury must have been caused by the defective or unreasonably unsafe condition of the product.

common with section 402A, it would seem unjust to force the plaintiffs to automatically exclude one remedy in favor of another.

Another case that discussed privity was *Wicks v. Ford Motor Co.*[23] The plaintiff brought an action based upon eight counts, including negligence, express and implied warranties, and strict tort liability. Ford moved to dismiss the counts pertaining to the warranties and strict liability, based upon plaintiff's lack of privity. The *Wicks* court rejected Ford's argument, stating: "[These] issues . . . on privity have long since been laid to rest . . . ."[24] The allowance of implied warranties and strict liability counts in *Wicks* seems to be in direct conflict with *Noefes.* This conflict seems unavoidable because the *Wicks* court should have addressed the privity issue if it viewed the implied warranties count as sounding in contract. Furthermore, if the *Wicks* court believed that the implied warranties count sounded in tort, then it should have forced the plaintiff to dismiss either the strict liability count or the implied warranties count, pursuant to the reasoning of *Noefes.* It would thus appear that Judge Sharp, in writing the *Wicks* opinion, either did not believe that the implied warranties that sound in tort are identical to strict liability in tort and are therefore not duplicative, or he had another viewpoint, such as the possibility of rejecting privity even in implied warranties that sound in contract.[25]

In *Noefes,* the defendant also contended that strict liability in tort did not extend to the maker of the component part. The court rejected the defendant's position, citing other jurisdictions that have held that component part manufacturers could be held liable.[26] The court's position in *Noefes* seems quite reasonable in that it would avoid circuitous litigation by allowing suits against the manufacturers of defective component parts.

Another case discussing who is a proper party in strict liability cases was *Reliance Insurance Co. v. Al E. & C., Ltd.*[27] In *Reliance,* the defendant argued that the plaintiff had no standing to sue since the damaged property belonged to another, and plaintiff was merely a subrogee of the bailee of the property. The *Reliance* court rejected the defendant's contention, stating that section 402A applied to a "person or his property" and that "his property" encompassed more than mere owners of chattels. The broad definition which gives the subrogee of a bailee standing to sue was consistent with the Indiana

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[23]421 F. Supp. 104 (N.D. Ind. 1976).

[24]*Id.* at 105.

[25]There is a possibility that Judge Sharp may have been rejecting contract defenses, even when the warranty claims sound in contract under the U.C.C. *See* Vargo, *1975 Survey, supra* note 19, at 273-74.

[26]409 F. Supp. at 1380.

[27]539 F.2d 1101 (7th Cir. 1976).

Court of Appeals decision in *Gilbert v. Stone City Construction Co.*,[28] wherein the court stated that liability under section 402A extends to "one who places such a product in the stream of commerce by sale, lease, bailment, *or other means.*"[29] The *Gilbert* court also viewed a "bystander" to be a proper party to recover in a strict tort liability action as long as bystander presence was foreseeable.

C. "Strict Construction"

In determining issues which were proffered by the defendant-appellant, the *Reliance* court was confronted with the following statement made by Judge Hoffman in *Cornette v. Searjeant Metal Products, Inc.*,[30] a decision by the Indiana Court of Appeals: "Our reading of § 402A . . . and numerous cases applying it, leads us to the conclusion that it should be strictly construed and narrowly applied."[31] The *Reliance* court flatly refused to apply Judge Hoffman's "dictum" in *Cornette* and rejected any interpretation of defendant's contentions in such a context. Judge Hoffman's "strict construction" rationale was further eroded, if not completely eliminated, in *Wicks*, wherein Judge Sharp, citing his own concurring opinion in *Cornette*,[32] stated that the "strict construction" interpretation was the viewpoint of one judge and had not been followed by any other judge in any court or even by the original author.[33] Accordingly, the strict construction language "is not now and never has been a part of the substantive law of Indiana."[34]

D. Indemnity

One defendant in *Wicks* filed a cross-claim, which the co-defendant moved to dismiss on the basis that the cross-claim was in reality an action in indemnity, and such a claim was incompatible where all the defendants were joint tortfeasors. The *Wicks* court dismissed the cross-claim on the basis of prior case law, holding that where all defendants are alleged to be negligent, they are then considered joint tortfeasors thereby negating the possibility of an in-

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[28]357 N.E.2d 738 (Ind. Ct. App. 1976).

[29]*Id.* at 742 (emphasis added).

[30]147 Ind. App. 46, 258 N.E.2d 652 (1970).

[31]*Id.* at 53, 258 N.E.2d at 656-57.

[32]*Id.* at 55-56, 258 N.E.2d at 658 (Sharp, J., concurring). Prior to his appointment to the United States District Court for the Northern District of Indiana, Judge Sharp was a judge in the Indiana Court of Appeals and participated in the *Cornette* decision.

[33]421 F. Supp. at 105-06 (citing 147 Ind. App. at 55-56, 258 N.E.2d at 658 (Sharp, J., concurring)).

[34]*Id.*

demnity action.[35] Thus, defendants should be forewarned that a plaintiff's complaint containing counts for strict liability in tort or breach of implied warranty against a supplier, wholesaler, or other middleman, may give rise to an indemnity action between such co-defendants. However, if the plaintiff also alleges negligence against each defendant, the right of the defendants to bring an indemnity action disappears.

E. Products and the Stream of Commerce

In *Petroski v. Northern Indiana Public Service Co.*,[36] a fourteen year old plaintiff was injured when he touched a "high voltage line" owned by the defendant (NIPSCO). The plaintiff was injured while playing in a tree, such playful activity being the common practice of the neighborhood children. Plaintiff's action was based upon negligence and strict liability in tort. The Indiana Court of Appeals reversed the trial court's granting of NIPSCO's motion for a judgment on the evidence at the end of plaintiff's case-in-chief. On appeal, the plaintiff raised the issue of whether the defendant's distribution of electricity was actionable under the strict tort liability count. The *Petroski* court stated that although electricity was a "product" within the meaning of section 402A, strict liability did not apply in the instant case since the defendant had not yet injected such a product into the "stream of commerce."[37] Reasoning that the lines of distribution for the electricity were solely owned by the defendant, the court found that NIPSCO had not placed its product on the market until the electricity actually reached the home or factory of its customer. The strict liability count was therefore inappropriate because the plaintiff was injured while the product (electricity) was still in the defendant's control and *prior* to the placing of the product on the market.[38]

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[35]*Id.* at 106 (citing Bituminous Cas. Corp. v. Hedinger, 407 F.2d 655 (7th Cir. 1969); McClish v. Niagra Machine & Tool Works, 266 F. Supp. 987 (S.D. Ind. 1967); American States Ins. Co. v. Williams, 151 Ind. App. 99, 278 N.E.2d 295 (1972)).

[36]354 N.E.2d 736 (Ind. Ct. App. 1976).

[37]*Id.* at 747. For an explanation of the phrase "stream of commerce," see Vargo, *Products Liability in Indiana—In Search of a Standard for Strict Liability in Tort, Symposium: 1977 Products Liability Institute*, 10 IND. L. REV. 871, 890-91 (1977) [hereinafter cited as Vargo, *Symposium*]; Vargo, *1975 Survey*, *supra* note 19, at 274-75.

[38]354 N.E.2d at 747. The *Petroski* court reasoned that the electricity had not been placed on the market or put into the "stream of commerce" because the "electricity" was still in possession of the defendant's power lines. This reasoning seems fallacious, however, when one realizes that electricity travels at the speed of light (approximately 186,000 miles per second); thus, once NIPSCO generated the electricity, it would have been impossible to intercept the current. Electricity as a product is constantly being sent and received over power lines at a rate so fast that it would be physically im-

The court's position in *Petroski* seems somewhat narrow and assumes, as most Indiana courts have done in the past, that if the plaintiff alleges strict liability in tort, such a count must come within the bounds of section 402A or it cannot exist.[39] Such an assumption seems invalid in view of the many recognized areas of strict liability that do not contain the elements of section 402A.[40] Courts should be free to examine the facts of each case and the allegations of the parties when deciding whether social and policy goals dictate the application of liability outside of negligence (fault) without strict adherence to the semantics of any theory such as section 402A.[41] A court should be free to determine not only whether strict liability should apply in any particular situation, but also what elements should be applicable to that particular type of strict liability. Thus, in *Petroski*, the court could have applied strict liability to the distribution of electricity by application of the principles of strict liability pertaining to abnormally dangerous activities.[42] If the *Petroski* court had determined that the distribution of electricity was a risk that was appropriate for non-section 402A strict liability, it would have rendered the section 402A semantics irrelevant as to whether electricity was a "product" and whether it had been injected into the "stream of commerce."

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possible to stop the electricity from reaching the market place. This reasoning leads to the conclusion that the point where the electricity reaches the market is at its generation point. The major problem with *Petroski* is the court's attempt to place the production of electricity into the framework of § 402A, whose semantics are simply not appropriate to that activity.

[39]The same type of problem was encountered by the court in City of Indianapolis v. Bates, 343 N.E.2d 819 (Ind. Ct. App. 1976), where the court rejected the use of strict liability when applied against a city. *See* Vargo, *1976 Survey*, *supra* note 8, at 268 n.8.

[40]*See* authorities cited in note 16 *supra*.

[41]Such a suggestion has been made in Vargo, *1976 Survey*, *supra* note 8, at 268 n.8.

[42]The criteria for determining whether an activity is an "Abnormally Dangerous Activity" are found in RESTATEMENT (SECOND) OF TORTS § 520 (1977) [hereinafter cited as § 520]:

> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
> (b) likelihood that the harm that results from it will be great;
> (c) inability to eliminate the risk by the exercise of reasonable care;
> (d) extent to which the activity is not a matter of common usage;
> (e) inappropriateness of the activity to the place where it is carried on; and
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

Thus, "electricity" may or may not come within the meaning of an "Abnormally Dangerous Activity." However, the comment pertaining to subsection (d) of § 520 states:

> The usual dangers resulting from an activity that is one of the common usage are not regarded as abormal, even though a serious risk of harm can-

F. Negligence v. Strict Liability

Several authors, including Dean Prosser[43] and more recently Professor Phillips,[44] have noted that although there may be vast theoretical differences between negligence and strict liability, the end results attained under strict tort liability are not much different than what is accomplished by the proper application of negligence principles. For instance, in both *Petroski* and *Old Town*, the possible applicability of res ipsa and/or negligence per se resulted in an imposition of liability that closely resembled strict liability in tort. The real distinction may revolve around the differences between negligence and strict liability concerning burden-of-proof issues and the applicable defenses.[45] If a court liberally allows jury determination of negligence issues, the resulting liability obtained under either theory becomes practically identical.[46]

G. Contributory Negligence and Assumption of Risk

In *Petroski*, the court of appeals also differentiated between contributory negligence and assumption of risk (incurred risk),[47] recognizing that "the broad [assumption of risk] defense enunciated in Indiana negligence cases, which rests on an objective reasonable

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> not be eliminated by all reasonable care. The difference is sometimes not so much one of the activity itself as of the manner in which it is carried on. Water collected in large quantity in a hillside reservoir in the midst of a city or in coal mining country is not the activity of any considerable portion of the population, and may therefore be regarded as abnormally dangerous; while water in a cistern or in household pipes or in a barnyard tank supplying cattle, although it may involve much the same danger of escape, differing only in degree if at all, still is a matter of common usage and therefore not abnormal. *The same is true of gas and electricity in household pipes and wires, as contrasted with large gas storage tanks or high tension power lines.*

§ 520(d) *supra*, Comment i (emphasis added). Thus, the activity of the plaintiff in *Petroski* of touching a high voltage line could be construed to be within the § 520-type of strict liability.

[43]W. PROSSER, *supra* note 6, § 103.

[44]Phillips, *The Standard For Determining Defectiveness In Products Liability*, 46 U.CIN. L. REV. 101, 103, 111 (1977).

[45]For instance, the defense of contributory negligence is available to the defendant in negligence cases but not in strict liability cases. However, the application of the "misuse" theory may possibly shift the burden of proving contributory negligence to the plaintiff.

[46]*See* note 15 *supra*.

[47]Indiana decisions limit the term "assumption of risk" to cases where there is a contractual relationship between the parties and use the term "incurred risk" for noncontractual cases. *See* Vargo, *1975 Survey*, *supra* note 19, at 279 n.48. The discussions which follow will use the term "assumption of risk" in the noncontractual context.

man standard, may be inapplicable to Indiana strict liability cases."[48] The improper use of such a defense allows contributory negligence "to be brought in the back door" in strict liability cases. The court noted that assumption of risk could arise in either of two situations: the encountering of a known reasonable risk without any possibility of contributory negligence, or the encountering of a known reasonable risk that "overlaps" with contributory negligence.[49] While the court of appeals did not state that assumption of risk required an actual knowledge, understanding, and appreciation of the risk as evaluated by a subjective standard,[50] it in fact considered these elements in examining the trial court record.[51]

The Indiana Court of Appeals also explored assumption of risk in *Gilbert v. Stone City Construction Co.*,[52] where a state highway inspector was injured by a road roller leased by Stone City Construction Co. from another defendant. In defining assumption of risk, the *Gilbert* court quoted the traditional definition from *Stallings v. Dick*,[53] as cited by the *Cornette* court:

> The doctrine of incurred risk is based upon the proposition 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.*[54]

This definition merely confuses and distorts the doctrine by infusing contributory negligence into its definition.[55] However, the *Gilbert* court properly applied the assumption-of-risk doctrine by requiring the plaintiff's actual knowledge, understanding, and appreciation of

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[48]354 N.E.2d at 745 n.9. The traditional definition of assumption of risk from Stallings v. Dick, 139 Ind. App. 118, 129, 210 N.E.2d 82, 88 (1965), has been highly criticized by this author in the past. See Vargo, *1976 Survey*, *supra* note 8, at 272-73 n.29; Vargo, *1975 Survey*, *supra* note 19, at 279 n.48.

[49]The "overlap" is merely the factual area where *both* assumption of risk and contributory negligence coexist. In the "overlap" situation, the plaintiff has met the elements of assumption of risk because he has subjectively and voluntarily encountered a risk with actual knowledge, understanding, and appreciation. The plaintiff has also met the requirements of contributory negligence by "unreasonably" encountering the risk. *See* RESTATEMENT (SECOND) OF TORTS § 496A, Comment d (1965).

[50]These requirements, plus voluntariness, are necessary for assumption of risk. *See* RESTATEMENT (SECOND) OF TORTS § 496A-G (1965).

[51]354 N.E.2d at 746.

[52]357 N.E.2d 738 (Ind. Ct. App. 1976).

[53]139 Ind. App. 118, 210 N.E.2d 82 (1965).

[54]357 N.E.2d at 746 (emphasis added) (quoting Stallings v. Dick, 139 Ind. App. 118, 129, 210 N.E.2d 82, 88 (1965), *cited in* Cornette v. Searjeant Metal Prods., Inc., 147 Ind. App. 46, 54, 258 N.E.2d 652, 657 (1970)).

[55]*See* note 48 *supra*.

the risk, as tested by the plaintiff's subjective state of mind.[56]

H. Plaintiff's Burden of Proof and Types of Defects

Gilbert set forth the elements required for a plaintiff to establish a claim under strict liability:

> For a plaintiff to establish a products liability claim, it must be shown (1) that he was injured by the product, (2) because it was defective and unreasonably dangerous, (3) that the defect existed at the time the product left the hands of the defendant, and (4) the product was expected to and did reach the consumer without substantial change in its condition.[57]

The final requirement, that the plaintiff prove no substantial change, seems in direct conflict with Judge Sharp's concurring opinion in *Cornette*, wherein he asserted that the issue of substantial change is a defense, which places the burden of proof on the defendant.[58]

In arriving at its decision, the *Gilbert* court stated that a commercial sale was unnecessary, the test being whether the defective product was injected into the stream of commerce. The defect requirement could be met by showing errors in manufacture, design, or the manufacturer's failure to adequately warn or instruct the consumer on the dangers and uses of the product.[59] The standard to be applied to determine whether a defect existed was the "consumer expectation test," whereby a product was defective if it created an unreasonable danger to the consumer.[60]

I. Safety Devices, Foreseeability, and Misuse

The *Gilbert* court stated that the defect requirement of section 402A can be met if the defendant fails "to cope with foreseeable mishaps . . . by lacking feasible safety devices" on its product.[61] Thus, anyone who comes into contact with a product can expect the supplier or seller to provide safety devices to protect them from the dangers created by the product's design. The *Gilbert* approach

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[56]357 N.E.2d at 746.

[57]*Id.* at 743.

[58]147 Ind. App. at 50, 258 N.E.2d at 665 (Sharp. J., concurring).

[59]357 N.E.2d at 743.

[60]*Id.* However, "unreasonable danger" is not to be confused with "unreasonable conduct" in creating the danger, since the latter is mere negligence. "Strict liability" is appropriate regardless of negligence, since the defendant is liable although he has used *all possible care in the preparation and sale of his product. See* § 402A, *supra* note 3.

[61]357 N.E.2d at 744.

seems quite logical; however, it came into direct conflict with the Seventh Circuit Court of Appeal's opinion in *Latimer v. General Motors Corp.*,[62] wherein the court stated that under the theory of strict tort liability there is no element of foreseeability and held that a defendant need not anticipate the misuse of his product or design safeguards against such contingencies.[63] This holding imposes an unreasonable limitation on strict liability that is reminiscent of the "no duty" concepts in negligence law. For instance, what if a manufacturer could reasonably foresee the type of use of his product that would amount to misuse? The *Latimer* decision would permit the manufacturer-seller to unilaterally set his own standards of conduct in designing and manufacturing his product without consideration of the environment surrounding the use of his product. This artificial blindness could allow potentially unreasonably dangerous products to reach the marketplace; such a result does not comport with negligence standards, let alone strict liability standards.[64]

J. Second Collision Theory and Design Defects

The *Latimer* decision followed two earlier Seventh Circuit decisions, *Evans v. General Motors Corp.*[65] and *Schemel v. General Motors Corp.*,[66] which disallowed recovery for a plaintiff's "enhanced injuries" resulting from a defectively designed vehicle. The *Evans*- and *Schemel*- type cases have commonly been called "second collision cases," because the allegedly defective portion of the vehicle does not cause the original collision, but instead gives rise to an injury from the second impact between the vehicle occupants and the defective part.

In *Huff v. White Motor Corp.*,[67] the United States District Court for the Southern District of Indiana rejected the plaintiff's contention that the second collision theory should be extended beyond automobiles to tractors. In a decision after the end of the survey

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[62]535 F.2d 1020 (7th Cir. 1976). The decision in Huff v. White Motor Corp., No. 76-2086 (7th Cir. Oct. 4, 1977), *rev'g*, 418 F. Supp. 233 (S.D. Ind. 1976), may bring into question certain holdings in *Latimer*, although *Huff* did not expressly overrule *Latimer*. *See* textual discussion accompanying notes 65-72 *infra*.

[63]535 F.2d at 1024.

[64]For an examination of the inherent problems of *Latimer*, *see* Vargo, *Symposium*, *supra* note 37, at 878-81. *See also* note 62 *supra*.

[65]359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966), *expressly overruled*, Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977).

[66]384 F.2d 802 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968), *expressly overruled*, Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977).

[67]418 F. Supp. 233 (S.D. Ind. 1976), *rev'd*, 565 F.2d 104 (7th Cir. 1977).

period, the Seventh Circuit subsequently reversed the district court's holding in *Huff* and expressly overruled *Evans* and *Schemel* after determining that Indiana's judicial adoption of the principles of section 402A had implicitly revoked the *Evans* doctrine.[68]

In *Huff*, the plaintiff sued the manufacturer of a tractor, alleging that the defectively designed tractor contributed to the severity of her deceased husband's injuries when the tractor overturned. The district court's summary judgment for the defendant was based upon *Evans*, a minority view in the United States. Prior to the Seventh Circuit's reversal in *Huff*, only Indiana, West Virginia,[69] and Mississippi[70] accepted the rule in *Evans*, while thirty-two jurisdictions rejected it.[71] The former vitality of *Evans* was difficult to understand, not because of its minority position but because of its illogical and questionable position on the legal issues such as foreseeability and unintended use.[72] However, courts have been under-

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[68]Huff v. White Motor Corp., 565 F.2d 104, 109 (7th Cir. 1977).

[69]McClung v. Ford Motor Co., 472 F.2d 240 (4th Cir. 1973), *cert. denied*, 412 U.S. 940 (1973).

[70]Walton v. Chrysler Motor Corp., 229 So. 2d 568 (Miss. 1969).

[71]Knippen v. Ford Motor Co., 546 F.2d 993 (D.C. Cir. 1976); Polk v. Ford Motor Co., 529 F.2d 259 (8th Cir. 1976) (Missouri), *cert. denied*, 426 U.S. 907 (1976); Wooten v. White Trucks, 514 F.2d 634 (5th Cir. 1975) (Kentucky); Nanda v. Ford Motor Co., 509 F.2d 213 (7th Cir. 1974) (Illinois); Perez v. Ford Motor Co., 497 F.2d 82 (5th Cir. 1974) (Louisiana); Turcotte v. Ford Motor Co., 494 F.2d 173 (1st Cir. 1974) (Rhode Island); Dreisonstok v. Volkswagenwerk, 489 F.2d 1066 (4th Cir. 1974) (Virginia); Passwaters v. General Motors Corp., 454 F.2d 1270 (8th Cir. 1972) (Iowa); Richman v. General Motors Corp., 437 F.2d 196 (1st Cir. 1971) (Massachusetts); Isaacson v. Toyota Motor Sales, U.S.A. Inc., No. 74-18-Civ-4 (E.D.N.C. June 28, 1976); Anton v. Ford Motor Co., 400 F. Supp. 1270 (S.D. Ohio 1975); Dyson v. General Motors Corp., 298 F. Supp. 1064 (E.D. Pa. 1969); Walker v. Int'l Harvester Co., 294 F. Supp. 1095 (W.D. Okla. 1969); Horn v. General Motors Corp., 17 Cal. 3d 359, 551 P.2d 398, 131 Cal. Rptr. 78 (1976); DeFelice v. Ford Motor Co., 28 Conn. Supp. 164, 255 A.2d 636 (1969); Ford Motor Co. v. Evancho, 327 So. 2d 201 (Fla. 1976); Friend v. General Motors Corp., 118 Ga. App. 763, 165 S.E.2d 734 (1968); Farmer v. Int'l Harvester Co., 97 Idaho 742, 553 P.2d 1306 (1976); Garst v. General Motors Corp., 207 Kan. 2, 484 P.2d 47 (1971); Frericks v. General Motors Corp., 278 Md. 304, 363 A.2d 460 (1976); Rutherford v. Chrysler Motors Corp., 60 Mich. App. 392, 231 N.W.2d 413 (1975); Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 Mont. 506, 513 P.2d 268 (1973); Friedrich v. Anderson, 191 Neb. 724, 217 N.W.2d 831 (1974); Bolm v. Triumph Corp., 33 N.Y.2d 151, 305 N.E.2d 769, 350 N.Y.S.2d 644 (1973); Johnson v. American Motors Corp., 225 N.W.2d 57 (N.D. 1974); McMullen v. Volkswagen of America, 274 Or. 83, 545 P.2d 117 (1976); Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969), *aff'd on other grounds*, 255 S.C. 136, 177 S.E.2d 546 (1970); Engberg v. Ford Motor Co., 87 S.D. 196, 205 N.W.2d 104 (1973); Ellithorpe v. Ford Motor Co., 503 S.W.2d 516 (Tenn. 1973); Turner v. General Motors Corp., 514 S.W.2d 497 (Tex. Ct. App. 1974); Baumgardner v. American Motors Corp., 83 Wash. 2d 751, 522 P.2d 829 (1974); Arbet v. Gussarson, 66 Wis. 2d 551, 225 N.W.2d 431 (1975).

[72]*See* Vargo, *Symposium*, *supra* note 37, at 877-81; Vargo, *1975 Survey*, *supra* note 19, at 273.

standably reluctant to allow recovery for certain design defects, such as the automobile in *Evans*, because such a result does not merely condemn that particular vehicle, but also all vehicles of the same design. Such a result might prove economically catastrophic under certain conditions, thereby causing the courts to hesitate in taking such steps.[73] Thus, any plaintiff who hopes to be successful in any type of "design defect" case should consider presenting "cheaper" alternatives for the court's consideration. Such alternatives might include a warning accompanying the product at a nominal cost to the defendant or a showing that the cost of revision is slight as compared to the total cost of the product.

K. Warnings and Instructions

The *Reliance Insurance Co. v. Al E. & C., Ltd.*[74] decision examined whether the failure to warn constituted a section 402A "defect." The *Reliance* court relied on the reasoning quoted from *Berkebile v. Brantley Helicopter Corp.*[75] in requiring *adequate* warnings and instructions, which must reach the ultimate user of the product. The sufficiency of the warning or instruction is tested by *a jury* in light of the relative degrees of danger of the product. The duty to provide such a warning *or* make the product safe cannot be delegated to others.

The Indiana Supreme Court's decision in *Nissen Trampoline Co. v. Terre Haute First National Bank*[76] is in contrast with *Reliance.* Although *Nissen* is considered a procedural case,[77] its substantive implications are enlightening. Three supreme court justices in

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[73]*See* W. PROSSER, *supra* note 6, § 96, at 646.

[74]539 F.2d 1101 (7th Cir. 1976).

[75]462 Pa. 83, 337 A.2d 893 (1975). The *Berkebile* court stated:

> [T]he sole question . . . is whether the seller accompanied his product with sufficient instructions and warnings so as to make his product safe. *This is for the jury to determine. The necessity and adequacy of warnings in determining the existence of a defect can and should be considered with a view to all the evidence.* The jury should view the relative degrees of danger associated with use of the product since a greater degree of danger requires a greater degree of protection. . . .
>
> Where warnings or instructions are required to make a product non-defective, it is the duty of the manufacturer to provide such warnings in a form that will reach the ultimate consumer and inform of the risks and inherent limits of the products. *The duty to provide a non-defective product is non-delegable.*

Id. at 95, 337 A.2d at 902-03 (emphasis added).

[76]358 N.E.2d 974 (Ind. 1976).

[77]In a procedural decision, the Indiana Supreme Court reversed the Indiana Court of Appeals decision in Nissen Trampoline Co. v. Terre Haute First Nat'l Bank, 332 N.E.2d 820 (Ind. Ct. App. 1975), because of errors in the use of Trial Rule 59.

Nissen could not imagine a type of warning by the defendant that would satisfy the requirements of section 402A.[78] Their inability may have been due to either the plaintiff's awareness of the dangers and risk involved in the use of the product or the obviousness of such dangers. The majority in *Nissen* apparently did not believe that the requirement to warn was even present in the case.

The *Nissen* case is conceptually difficult because of the need to examine its facts in a step-by-step fashion when evaluating whether the elements of strict liability have been satisfied. Obviously, plaintiff's case rested upon the issue of a warning defect when in fact no warning had been given. Whether or not the defendant was required to warn under the facts of the case was the first and primary issue. If such a requirement existed in the first instance, then the defendant's failure to so warn would establish the defect requirement of plaintiff's case; the only significant remaining issue would be whether the failure to warn caused the plaintiff's injury. The Indiana Court of Appeals, with little discussion,[79] had found that such a requirement was necessary and then proceeded to discuss the equally difficult issue of causation.[80] However, the supreme court implied that it did not believe that the defendant was required to give any warning.

The determination of whether to warn is a difficult problem, for in our society we cannot require that all products be covered with pages of warnings. Some lines must be drawn and the exact perimeters of the rules must be somewhat vague by necessity. However, Indiana courts are not without some guidelines as to the applicable standards in warning cases. In *Sills v. Massey-Ferguson, Inc.*,[81] the federal district court stated that the defendant has a duty to provide a safe product and if he cannot provide such a safe product he must communicate the remaining dangers by means of adequate warnings.[82] The *Sills* requirement seems absolute; however, there remains the possibility that some products may have some degree of danger present and still not require a warning. Whether such products may exist is a policy decision allocated to the courts. Thus, the factors that the court is to consider in determining whether a warning should accompany a risk-producing product is

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[78]Justice DeBruler, writing the majority decision in which Chief Justice Givan and Justice Prentice concurred, stated that any attempts at hypothetically surmising what warnings could be given were mere speculation. 358 N.E.2d at 978.

[79]332 N.E.2d at 825. The court of appeals discussed the fact that the manufacturer had discovered the danger in the product by testing.

[80]For a summary of the causation issue, *see* Vargo, *1976 Survey*, *supra* note 8, at 277-79.

[81]296 F. Supp. 776 (N.D. Ind. 1969).

[82]*Id.* at 782.

decisive. Although many factors should be considered, it seems that reliance can be placed upon traditional risk-evaluating factors, such as Judge Learned Hand's Risk-Utility Test,[83] or more preferably, the factors set out by Dean Wade for defective design cases.[84] Thus, the following factors should influence the court's decision: usefulness and desirability of the product, the likelihood and seriousness of injury, the availability of substitutes, the manufacturer's feasibility of eliminating dangers, the obviousness of the danger to the user, and the manufacturer's ability to spread the loss.[85] A court evaluating a case such as *Nissen* should look at all circumstances while formulating its initial decision as to whether a warning must accompany the product. For instance, even assuming that a plaintiff knew that jumping on a platform might result in some injury, there remains the issue of whether he realized the extent of the risk involved and if he did not, would a warning have remedied this situation? A warning might be necessary in certain circumstances where plaintiffs may "forget" the risk involved in the use of the product,[86] necessitating a continual reminder to such individuals. Although such a risk might be obvious to certain classes of people, a warning may be necessary for other classes of individuals under the same facts. No one individual factor in itself should be determinative of whether a warning is necessary; the initial resolution of such an issue should be made on a more generalized basis than what should

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[83]*See* United States v. Carroll Towing Co., 159 F.2d 169 (2nd Cir. 1947); Conway v. O'Brien, 111 F.2d 611 (2d Cir. 1940), *rev'd on other grounds*, 312 U.S. 492 (1941).

[84]Dean Wade set forth seven major factors for evaluating a defect:

(1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.

(2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.

(3) The availability of a substitute product which would meet the same need and not be as unsafe.

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Wade, *On the Nature of Strict Liability for Products*, 44 MISS. L.J. 825, 837-38 (1973).

[85]*Id.*

[86]*See* Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Era*, 60 IOWA L. REV. 1, 20-22 (1974).

actually be contained in such a warning, and an article can have a degree of dangerousness that is not acceptable in a strict liability case but which may be acceptable in a negligence case.[87]

L. Compliance with Statute and Custom and Usage

In *Gilbert v. Stone City Construction Co.*,[88] the court rejected the defendant's implication that federal or industrial safety standards should set the standard for a "defect" in strict tort liability.[89] The court found that compliance with federal safety requirements does not establish the lack of a defect as a matter of law and the standards set by an entire industry can be found to be negligently low if they fail to meet the test of reasonableness.[90] A similar problem concerning compliance with custom and usage was discussed in *Walters v. Kellam & Foley.*[91] In *Walters*, the plaintiff attempted to introduce evidence concerning the practice in the industry; however, the trial court refused to allow such testimony into evidence. The Indiana Court of Appeals, reversing in part, stated that although prior conduct under conditions similar to the instant trial may be relevant to the establishment of a reasonable conduct on the defendant's part, the standard of care in negligence law is established completely independently of custom and usage. In other words, reasonable care is fixed by law, and the custom and habits of individuals may or may not meet such standards. Quoting Justice Holmes, the court stated: "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."[92]

Thus, custom and usage are admissible to show a composite judgment of risk, feasibility of precautions, difficulty in changing methods, opportunities to learn what is called for, and justifiable expectations of parties.[93] Such evidence merely allows inferences as to conformity or non-conformity to a community standard, but one must remember that even a community standard, which is conformed to by all members, may be in violation of the required legal standard.[94]

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[87]Phillips v. Kimwood Mach. Co., 525 P.2d 1033, 1039 (Ore. 1974).

[88]357 N.E.2d 738 (Ind. Ct. App. 1976).

[89]*Id.* at 745.

[90]*Id.* (citing The T.J. Hooper, 60 F.2d 737 (2d Cir. 1952), *construed in* Dudley Sports Co. v. Schmitt, 151 Ind. App. 217, 229, 279 N.E.2d 266, 276 (1972)).

[91]360 N.E.2d 199 (Ind. Ct. App. 1977).

[92]*Id.* at 214 (quoting Texas & Pac. Ry. v. Behymer, 189 U.S. 468, 470 (1903)).

[93]*See* RESTATEMENT (SECOND) OF TORTS § 295A, Comment b (1965).

[94]*See* text accompanying note 90 *supra.*