Is the Danger Really Open and Obvious?

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I. Introduction

Several states use variations of open and obvious danger concepts to determine the duties of manufacturers and injured parties involved in product liability actions.[1] The application of the concept varies from state to state. The more recent trend considers the obviousness of the danger as only one factor in determining whether a plaintiff has assumed the risk of injury.[2] The minority approach looks only at the obviousness of the danger and bars a plaintiff's recovery if it is determined that the danger was obvious.[3]

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[1]*See, e.g.*, Turner v. Machine Ice Co., 674 P.2d 883 (Ariz.App. 1983); Brown v. Sears, Roebuck & Co., 667 P.2d 750 (Ariz.App. 1983); Union Supply Co. v. Pust, 196 Col. 162, 583 P.2d 276 (1978); Miscevich v. Commonwealth Edison Co., 110 Ill. App. 3d 440, 442 N.E.2d 338 (1982); Hoffman v. E.W. Bliss Co., 448 N.E.2d 277 (Ind. 1983); Holm v. Sponco Mfg., Inc., 324 N.W.2d 207 (Minn. 1982); Brown v. North American Manufacturing Co., 176 Mt. 98, 576 P.2d 711 (1978). For a general discussion of this area of law, see Phillips, *Products Liability: Obviousness of Danger Revisited*, 15 Ind. L. Rev. 797 (1982).

[2]*See, e.g.*, Miller v. Utica Mill Specialty Machinery Co., 731 F.2d 305 (6th Cir. 1984); Banks v. Iron Hustler Corp., 59 Md. App. 408, 475 A.2d 1243 (1984); Holm v. Sponco Mfg., Inc., 324 N.W.2d 207 (Minn. 1982); Berg v. Sukup Mfg. Co., 355 N.W.2d 833 (S.D. 1984).

[3]*See, e.g.*, Miscevich v. Commonwealth Edison Co., 110 Ill. App. 3d 400, 442 N.E.2d 338 (1982); Bryant-Poff, Inc. v. Hahn, 454 N.E.2d 1223 (Ind. Ct. App. 1982). The open and obvious danger rule gained momentum as a complete bar to recovery in Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950). In *Campo*, the court stated, "[T]he manufacturer of a machine or any other article, dangerous because of the way it functions, and patently so, owes to those who use it a duty merely to make it free from latent defects and concealed dangers." *Id.* at 471, 95 N.E.2d at 803. *Campo* was later overruled by the New York Court of Appeals in Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976). In place of the rigid no-duty rule, the *Micallef* court adopted a reasonable care test. Under the test, the manufacturer's actions would be reasonable if the cost of installing safety devices outweighed the benefit resulting from their installation. *Id.* at 386, 348 N.E.2d at 578, N.Y.S. 2d at 121. The openness and obviousness of a danger was a factor considered in determining whether the "plaintiff exercised that degree of care as was required under the circumstances." *Id.* at 387, 348 N.E.2d at 578, 384 N.Y.S. 2d at 122.

Courts following the more recent trend have noted that the no-duty and obvious danger rule protects manufacturers who sell products with dangerous, but obvious, design defects, encourages manufacturers to be outrageous in their design and to eliminate safety

One test used to determine whether a danger is obvious is an objective test, focusing on the knowledge and experience of a person with knowledge similar to the plaintiff's rather than on the actual subjective knowledge of the injured person.[4] Under this test, the obviousness of the danger is based on the obviousness to a person with the plaintiff's knowledge, not to an experienced or more knowledgeable person.[5] This approach treats the question of obviousness as a question of fact for the jury.[6]

The question of obviousness has also been treated as a question of law. Under this approach, plaintiffs are barred from recovery because the court, upon examining the evidence, determines that the danger was obvious as a matter of law.[7] It is this last approach that has come under increasing attack in recent years.[8] Indiana courts have followed the latter approach exclusively and treat the issue of open and obvious danger as a question of law.[9] The recent case of *Corbin v. Coleco Industries, Inc.*[10] does not alter this approach, but offers new factors for consideration in determining whether a danger really is open and obvious. The use of these factors serves to mitigate the harsh results obtained previously under Indiana's open and obvious danger rule and creates hope that Indiana will be brought a step closer to the modern trend in this area of law. This Article examines the development and use of the no-duty open and obvious danger rule in Indiana and the impact the Corbin decision may have on that rule.

II. Development of the Open and Obvious Danger Rule in Indiana

Bemis Co., Inc. v. Rubush[11] is the leading case in Indiana on the

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devices and make hazards more obvious, and shifts the economic loss to the injured party in spite of the manufacturer's lack of care in design. *See* Holm v. Sponco Mfg. Inc., 324 N.W.2d at 213.

[4]Ford Motor Co. v. Rodgers, 337 So. 2d 736 (Ala. 1976). Indiana courts recently reaffirmed the use of an objective test to determine whether a danger is open and obvious. In Ragsdale v. K-Mart Corp., 468 N.E.2d 524 (Ind. Ct. App. 1984), the court stated, "Whether a defect or danger is open and obvious is an objective test, based upon what the user *should* have known." *Id.* at 527 (citing American Optical Company v. Wiedenhamer, 457 N.E.2d 181 (Ind. 1983)). *See also* Angola State Bank v. Butler Manufacturing Co., 475 N.E.2d 717, 718 (Ind. Ct. App. 1985).

[5]475 N.E.2d at 718.

[6]*Id.*

[7]*See* Bemis Co., Inc. v. Rubush, 427 N.E.2d 1058 (Ind. 1981).

[8]*See, e.g.*, Auburn Machine Works Co. v. Jones, 366 So. 2d 1167 (Fla. 1979); Holm v. Sponco Mfg. Inc., 324 N.W.2d 207 (Minn. 1982); Micallef v. Miehle Co., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

[9]Bemis Co., Inc. v. Rubush, 427 N.E.2d 1058, 1061 (Ind. 1981); Hoffman v. E. W. Bliss Co., 448 N.E.2d 277, 284 (Ind. 1983); Bryant-Poff, Inc. v. Hahn, 454 N.E.2d 1223, 1225 (Ind. Ct. App. 1982).

[10]748 F.2d 411 (7th Cir. 1984).

[11]427 N.E.2d 1058 (Ind. 1981).

application of the open and obvious danger rule in product liability actions. The plaintiff in *Bemis* was injured when a shroud from a batt packing machine descended and struck the plaintiff in the head. The case was tried by the jury under a strict liability theory. The defendant was found liable and appealed[12] on the ground that the trial court had improperly applied the law of strict liability.[13] The court of appeals affirmed the trial court's application of the law,[14] and the defendant sought transfer to the Indiana Supreme Court.[15] On appeal, the plaintiff conceded that the danger in the descending shroud was open and obvious. However, the plaintiff contended that the machine should have been designed so that the shroud could not descend when an object or person was in its path.[16] The defendant argued that it could not be held liable under a strict liability theory because the danger was open and obvious; therefore, it had no duty to warn of the obvious danger.[17]

The Indiana Supreme Court found that the lower courts had incorrectly interpreted Restatement (Second) of Torts section 402A strict liability law.[18] The court noted that section 402A imposes liability upon

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[12]*Id.* at 1059.

[13]*Id.* The shift in focus that occurs in this part of the opinion is extremely important. The plaintiff focused on the failure to equip the machine with proper safety devices. The defendant focused on the duty to warn. The court shifted to the defendant's focus, which resulted in the application of the no-duty open and obvious danger rule to all types of strict product liability actions regardless of whether the theory was one of failure to warn or defective design.

[14]*Id.* at 1059. The court of appeals' decision recognized that modern technology had enabled the development of products that utilized "complex and sophisticated technology, incomprehensible to all but practitioners of the art, [where] the dangers are not so obvious and may not be appreciated by an ordinary consumer with ordinary knowledge in the community, even though the dangers may be appreciated by the sophisticated." Bemis Co., Inc. v. Rubush, 401 N.E.2d 48, 57 (Ind. Ct. App. 1980), *vacated*, 427 N.E.2d 1058 (Ind. 1981). The court of appeals noted that the proper role of open and obvious dangers was as a factor to be considered in deciding whether a product was unreasonably dangerous. Because this decision involved an examination of the facts and circumstances presented, it was deemed a jury question. The test under this approach was objective. The jury would consider the evidence presented on what the ordinary knowledge of the community was concerning the product, the feasibility of safeguards, the plaintiff's appreciation of the danger, and any other relevant factors. The ultimate issue was whether the product "was in a defective condition unreasonably dangerous, that is, dangerous to an extent beyond that which is contemplated by the ordinary consumer, with the ordinary knowledge common to the community as to the product's characteristics." 401 N.E.2d at 57.

[15]427 N.E.2d at 1059.

[16]*Id.* at 1060-61.

[17]*Id.* at 1060.

[18]*Id.* at 1059. *Bemis* was decided under Restatement (Second) of Torts section 402A strict liability which 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
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> (a) the seller is engaged in the business of selling such a product, and

manufacturers only when the product is unreasonably dangerous.[19] "Unreasonably dangerous" was defined in *Bemis* as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[20] If a product was not unreasonably dangerous, no legal action was possible.[21]

The court interpreted section 402A to permit recovery only where a defect is "hidden and not normally observable. . . ."[22] Where a defect is observable, the manufacturer would have no duty to warn, even if the manufacturer had actual or constructive knowledge of the defect.[23] Because the plaintiff was aware of the danger presented by the descending shroud, the Indiana Supreme Court found that the trial court had erred in not instructing the jury on the open and obvious danger rule and in failing to define unreasonably dangerous.[24] Based on this finding, the court vacated the court of appeals decision and ordered the trial court to enter judgment on behalf of the defendant.[25] According to Justice

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(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(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.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

Following the *Bemis* decision, 402A strict liability was codified at IND. CODE § 33-1-1.5-3 (Supp. 1985). The Indiana version, however, limits the user or consumer to "the class of persons that the seller should reasonably foresee." *Id.*

[19]*Bemis*, 427 N.E.2d at 1061.

[20]*Id.* (An expert witness in *Bemis* defined a risk or hazard as unreasonble "if it could be removed and the cost of removal is not significant nor the cost of removal does not [sic] seriously reduce the utility of the product." *Id.* at 1063.)

[21]*Id.* at 1061.

[22]*Id.*

[23]*Id.* It is interesting to note the effect of this rule. Rather than encouraging the design and construction of safe products, it encourages manufacturers to make defects or dangers as open and blatant as possible in order to avoid liability. The more blatant the danger, the less the chance of liability. Other jurisdictions have avoided this pitfall by making the open and obvious danger merely a factor to be considered rather than a bar to recovery as a matter of law. *See supra* notes 2 and 3 and accompanying text.

[24]*Bemis*, 427 N.E.2d at 1064.

[25]*Id.* The supreme court apparently relied on Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950), in overruling the Indiana Court of Appeals' decision. However, nowhere in the Indiana Supreme Court majority decision is it acknowledged or mentioned that the New York courts had overturned the *Campo* decision in Micallef v. Miehle, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

The *Bemis* dissent by Justice Hunter acknowledged that *Campo* had been overruled. *Bemis*, 427 N.E.2d at 1067. Justice Hunter noted that the rule adopted by the majority defeated the purposes of 402A strict liability by prohibiting recovery as a matter of law even though a product was unsafe. *Id.* at 1067-68 (Hunter, J., dissenting). Justice DeBruler's

Hunter, who dissented, this order indicated that the majority had adopted the position that recovery for injuries suffered at the hands of an " 'open and obvious danger' are barred as a matter of law" in Indiana.[26]

III. Defining the Danger

Two years after *Bemis*, the Indiana Supreme Court again addressed the open and obvious danger rule in *Hoffman v. E.W. Bliss Company*.[27] The *Hoffman* decision did not reevaluate the efficacy of the no-duty rule but focused on what should be considered an open and obvious danger.[28]

In *Hoffman*, the plaintiff's fingers were crushed and severed when the ram of a punch press suddenly descended without being activated.[29] The case was tried before a jury, and a verdict was returned in favor of the defendants. The plaintiff appealed.[30]

On appeal, the defendant argued that the open and obvious danger rule precluded recovery by the plaintiff.[31] The plaintiff had testified that he knew of the danger posed by the descending ram[32] and that the machine was not functioning properly.[33] The Indiana Supreme Court found that this testimony did not bring the case within the purview of the open and obvious danger rule.[34]

The court focused on the interpretation of the word "danger."[35] It was obvious that the ram descended with tremendous force, but it was not obvious that the ram would descend without being activated by the operator.[36] This distinction, in the eyes of the court, was critical. The unactivated descent of the ram was found to be hidden defect which would not excuse the manufacturer from liability.[37] Hoffman had introduced evidence that the ram's descent could have been caused by an

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dissenting opinion also noted that "[o]pen and obvious dangers may be reasonable, and again they may not be." *Id.* at 1065 (DeBruler, J., dissenting).

[26]*Id.* at 1066. While the majority did not expressly state that recovery was barred as a matter of law, the dissent properly noted that an erroneous instruction would only have required a new trial. *Id.* (Hunter, J., dissenting).

[27]448 N.E.2d 277 (Ind. 1983).

[28]*Id.* at 285.

[29]*Id.* at 280.

[30]*Id.* at 278.

[31]*Id.* at 285.

[32]*Id.*

[33]*Id.* at 280.

[34]*Id.* at 285.

[35]*Id.*

[36]*Id.*

[37]*Id.* The activation of the machine by the operator in *Bemis* is apparently the crucial factor that differentiates that case from *Hoffman*. In *Bemis*, the plaintiff focused his claim on the lack of safety devices, whereas the *Hoffman* plaintiff focused his claim on an alleged malfunction or uninitiated descent of the ram.

uninitiated double trip[38] and that no warning was provided informing the user of this possibility. Therefore, the court concluded that the theory espoused by Hoffman and the evidence introduced in support precluded a finding that Hoffman's injury was caused by an open and obvious danger.[39] The court declared that "[a] careful examination of the evidence in each case is necessary to determine whether the danger in the product is truly and entirely open and obvious."[40]

The *Hoffman* decision created hope that the open and obvious danger rule would be used sparingly as a method to preclude recovery as a matter of law for injuries suffered from defects in a product. However, this hope was dashed by the *Bryant-Poff, Inc. v. Hahn*[41] decision in 1982.

The plaintiff in *Hahn* was injured while attempting to paint a rust spot on a grain elevator by reaching between a chain and sprocket mechanism. The plaintiff was on a platform ninety feet above the ground when the chain and sprocket device was activated from an operator's station at ground level. The plaintiff's arm was pulled into the system and crushed. The injuries resulted in a below the elbow amputation.[42] The plaintiff brought suit against the manufacturer of the device on theories of negligence and strict liability.[43] On appeal, the judgment in favor of the plaintiff was reversed on the basis that the open and obvious danger rule precluded recovery as a matter of law.[44] The Indiana Supreme Court denied transfer, in effect affirming the court of appeals' reversal of the trial court judgment.[45]

The court of appeals had reversed the trial court judgment because it found that the chain and sprocket mechanism presented an open and

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[38]*Hoffman*, 448 N.E.2d at 285. (The defendant introduced evidence that the descent of the ram could have been cause by Hoffman's inadvertent activation of the ram.).

[39]*Id.*

[40]*Id.* This comment places the majority in a precarious position. The *Bemis* dissent had noted that the majority rule lacked flexibility. This is the problem arising in *Hoffman* where the facts are substantially similar to the *Bemis* facts, and yet, the majority reaches an opposite conclusion. The court's statement does, however, raise the question of just how much fact review and weighing a court may do under the open and obvious danger rule. Justices Hunter and DeBruler concurred in a separate opinion in the *Hoffman* majority result. Justice Hunter again pointed out the problems with the open and obvious danger rule as adopted in Indiana and agreed that if the rule was to exist, it should be narrowly construed. *id.* at 288 (Hunter, J., concuring).

[41]454 N.E.2d 1223 (Ind. Ct. App. 1982). (The court of appeals had earlier reversed in an unpublished memorandum decision reported at 443 N.E.2d 1266.) The Indiana Supreme Court denied transfer of this case, *see Hahn*, 453 N.E.2d 1171 (Ind. 1983), where Justice Hunter wrote a dissenting opinion to the court's denial of transfer.

[42]454 N.E.2d at 1224.

[43]*Id.*

[44]*Id.* at 1225.

[45]453 N.E.2d 1171 (Ind. 1983).

obvious danger.[46] This was in spite of the fact that a jury could have found that the unguarded chain and sprocket mechanism created an unreasonably dangerous condition.[47] The Indiana Supreme Court's affirmation of this decision expanded the scope of the open and obvious danger rule.

In *Bemis*, the court had taken the position that the product was not unreasonably dangerous because the ordinary consumer or user of the product was capable of recognizing the dangers presented by the descending shroud.[48] The *Hoffman* decision reaffirmed this approach by reiterating the maxim that manufacturers were liable for injuries caused by placing products in the stream of commerce that were in a "defective condition unreasonably dangerous."[49] The *Hahn* decision obliterated the theory underlying this principle by declaring that the open and obvious danger rule precluded recovery even when the danger made the product unreasonably dangerous.[50]

Justice Hunter recognized the inconsistency between the *Hahn* decision and the *Bemis* and *Hoffman* decisions.[51] Justice Hunter noted that, in the earlier decisions, the court had found that the product was

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[46]454 N.E.2d 1225. The court of appeals relied on Coffman v. Austgen's Electric, Inc., 437 N.E.2d 1003 (Ind. Ct. App. 1982). In *Coffman*, a twelve-year-old boy reached into a grain auger's hopper to remove a bird's nest. The auger was not running when the boy reached into the hopper. However, the auger was inadvertently started when the boy had his arm in the hopper. The boy's hand was badly mangled as a result of the accident. *Id.* at 1005.

The plaintiffs sued on the basis of the defendants' negligent failure to place guards over the auger shaft and for improper design of the control panel and on a strict products liability theory. *Id.* The case proceeded to trial, and the court refused to read the plaintiffs' instruction on duty to warn because it omitted language concerning open and obvious dangers. *Id.* at 1008. The court of appeals affirmed the trial court's decision to omit the plaintiffs' instruction because it failed to state that manufacturers have no duty to warn of open and obvious dangers. *Id.* The court of appeals, without elaboration, also stated: "Clearly, the potentiality of danger inherent in sticking one's hand in an auger which has the propensity to move is open and obvious to all." *Id.*

The *Hahn* court's reliance on *Coffman* is interesting because in *Hahn* the plaintiff was barred from recovery as a matter of law, and the case never got to the jury. In *Coffman*, however, the case was tried, and the open and obvious danger issue arose as a result of a tendered jury instruction. Presumably, if the plaintiff in *Coffman* had submitted a proper instruction, the jury would have been left to determine whether under the facts and circumstances presented, the danger was truly open and obvious. In *Hahn*, the opposite is true because the court determined, as a matter of law, that the danger was open and obvious.

[47]*Hahn*, 454 N.E.2d at 1225.

[48]427 N.E.2d at 1064. (Although the *Bemis* decision does not specifically state that the product was not unreasonably dangerous, that inference is created through the court's definition and use of the term unreasonably dangerous.)

[49]448 N.E.2d at 281.

[50]454 N.E.2d at 1225.

[51]*Hahn*, 453 N.E.2d at 1171-72 (Hunter, J., dissenting).

not unreasonably dangerous because the danger was open and obvious.[52] In *Hoffman*, the court in refusing to find the danger open and obvious left the issue for the jury to decide because of conflicting evidence.[53] In *Hahn*, there was evidence that the product was unreasonably dangerous because of the absence of guards and violations of industry standards.[54] The evidence also showed that the chain and sprocket were not in motion when Hahn attempted to paint the rust spot and that the chain was loose until the machine was activated.[55] There was no dispute that the danger from the chain and sprocket mechanism was open and obvious when it was moving.[56] The plaintiff, however, was proceeding on the theory that warnings should have alerted users of the need to disconnect the power prior to working near the chain on the platform to avoid activation by another person and that instructions of how to disconnect the power should have been provided.[57] Because the evidence in the *Hahn* case created a question of whether the danger from a non-moving chain really was open and obvious, Justice Hunter concluded the case was analogous to the *Hoffman* case and the jury should have been permitted to determine whether the danger presented by the nonmoving mechanism was "truly and entirely open and obvious."[58]

The definition of an open and obvious danger had thus become closely tied to the use of the open and obvious danger rule as a means

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[52]*Id.* at 1172.

[53]*Id.*

[54]*Id.* at 1173.

[55]*Id.*

[56]*Id.*

[57]*Id.* at 1174.

[58]*Id.* at 1175 (quoting *Hoffman*, 440 N.E.2d at 285). The Indiana Supreme Court also addressed the issue of open and obvious dangers in American Optical Co. v. Weidenhamer, 457 N.E.2d 181 (Ind. 1983). In *American Optical*, the court held that the danger of an eye-glass lens breaking and injuring the wearer's eye was a risk that was "obvious to all." *Id.* at 188. The court's decision was based on the lack of any evidence that the safety glasses were defective or dangerous or improperly designed. Without evidence of a defect, there could be no duty to warn. The only danger presented was the risk that something could strike the glasses causing them to shatter or break. It was this risk that the court determined was obvious to all users and required no warning. Again, this approach encourages manufacturers to omit warnings of known dangers. The better approach, and one consistent with the protection of the public, was outlined by the concurring opinion. *Id.* at 188-89 (DeBruler, J., concurring).

Justice DeBruler, joined by Justice Hunter, concurred in the result obtained by the majority but for different reasons. *Id.* at 188. The manufacturer of the safety glasses knew of the limitations of the glasses and therefore had a legal duty to supply adequate warnings concerning the dangers associated with the use of the safety glasses and the precautions to be taken. *Id.* The evidence presented at trial showed that the manufacturer had supplied warnings with each pair of glasses. However, these warnings were removed by the injured plaintiff's plant prior to distributing the glasses to the workmen. Therefore, the evidence was insufficient to support a finding that the glasses were defective because of a lack of adequate warnings by the manufacturer. *Id.* at 189.

to preclude recovery. Following the *Hahn* decision, the determination that a danger was open and obvious would bar recovery even when the danger presented was recognized as being so great that it made the product unreasonably dangerous. The rule, as applied in *Hahn*, creates the absurd result of permitting manufacturers to leave safety devices and guards off of their products deliberately to ensure that the dangers presented in using the product will be obvious.[59] Under this approach, the determination of whether a danger is open and obvious attains increased importance and significance, and the no-duty open and obvious danger rule becomes increasingly virulent.

IV. The Rule's Extension to Non-Product Actions

The scope of Indiana's open and obvious danger rule was further broadened by the Indiana Court of Appeals in *Law v. Yukon Delta, Inc.*[60] In *Law*, the plaintiff was injured when he slipped and fell on the defendant's premises while there for business purposes. He admitted in his deposition that he was aware the floor was wet and assumed that it was slippery because it was made of concrete. The plaintiff, nevertheless, proceeded across the floor without seeking help. The defendant was granted summary judgment based on the open and obvious danger rule. The plaintiff appealed.[61]

On appeal, the plaintiff argued that the open and obvious danger rule applied only to actions based on a strict product liability theory.[62] The Indiana Court of Appeals, however, determined that the *Bemis* decision supported the application of the rule to all types of actions, whether based on a negligence theory or on a strict products liability theory. This determination was based on the Indiana Supreme Court's use in *Bemis* of the phrase "[i]n the area of products liability, based upon negligence or based upon strict liability."[63] This language was used to indicate that the open and obvious danger rule was meant to apply to all products liability actions regardless of whether the action was based on negligence or strict liability.[64] Because the rule was applied to product liability negligence actions, the *Law* court reasoned that it could be extended to apply to negligence actions that did not involve a product.[65] The court found this extension logical because the prima facie evidence requirements were the same for all types of negligence actions, and the open and obvious danger rule was a "logical factor to consider when

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[59]*Hahn*, 453 N.E.2d at 1174 (Hunter, J., dissenting to denial of transfer).
[60]458 N.E.2d 677 (Ind. Ct. App. 1984).
[61]*Id.* at 678.
[62]*Id.* at 678-79.
[63]*Id.* (quoting Bemis Co., Inc. v. Rubush, 427 N.E.2d at 1061).
[64]*Law*, 458 N.E.2d at 679.
[65]*Id.*

determining whether a person has acted in an ordinary and reasonable fashion."[66]

Judge Staton, in his dissenting opinion, noted that the majority's extension of the open and obvious danger rule to negligence actions was unnecessary.[67] Indiana negligence law already required three elements for recovery: 1) defendant owed a duty to the plaintiff; 2) defendant failed in performing that duty; and 3) the failure to perform the duty resulted in the plaintiff's injury.[68] Under negligence law, the plaintiff's unreasonable failure to recognize an obvious risk or danger would preclude recovery because of the plaintiff's contributory negligence.[69] The plaintiff's subjective knowledge of a danger would also preclude recovery under the doctrine of incurred risk.[70] Thus, according to Judge Staton, application of the open and obvious danger rule was unnecessary in the *Law* case.[71]

This issue was again addressed in *Bridgewater v. Economy Engineering Company*.[72] In *Bridgewater*, a worker suffered fatal injuries when the guardrails of a ladder on which he was working suddenly collapsed and caused him to fall.[73] A negligence action was brought against the distributor of the ladder. The defendant was granted summary judgment on the basis that any defect in the guardrail latching device was, as a matter of law, open and obvious and the product was, therefore, not unreasonably dangerous.[74]

On appeal, the court of appeals refused to extend the *Bemis* open and obvious danger rule to negligence actions even when a product was involved.[75] The court noted that extending the application of the open and obvious danger rule to negligence actions created an anomaly in Indiana law.[76] The Indiana Supreme Court had declared that the determination of whether a product had a concealed or hidden danger was a question of fact for the jury in negligence actions.[77] If the court utilized the open and obvious danger rule to bar recovery in negligence actions as a matter of law, the result would be that the court would actually be determining whether a defect was hidden or concealed.[78] The

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[66]*Id.*

[67]*Id.* at 680 (Staton, J., dissenting).

[68]*Id.* at 681.

[69]*Id.* (citing Kroger Co. v. Haun, 177 Ind. App. 403, 410-11, 379 N.E.2d 1004, 1009 (1978)).

[70]*Id.* (citing Kroger Co. v. Haun, 177 Ind. App. at 415-16, 379 N.E.2d at 1012).

[71]*Id.*

[72]464 N.E.2d 14 (Ind. Ct. App. 1984), *vacated*, 486 N.E.2d 484 (Ind. 1985).

[73]*Id.* at 15.

[74]*Id.* at 16.

[75]*Id.* at 18.

[76]*Id.*

[77]*Id.* (citing J.I. Case Co. v. Sandefur, 245 Ind. 213, 197 N.E.2d 519 (1964)).

[78]*Id.*

Bridgewater court questioned the potential result that the parties could control whether the court or jury decided that issue in negligence cases by merely phrasing the issue as one of an open and obvious danger or one of a concealed danger.[79] Because the Indiana Supreme Court could not have intended this type of result, the *Bridgewater* court disputed whether the open and obvious danger rule should apply to both strict products liability actions and negligence actions.[80]

This conflict in the appellate courts' application of the open and obvious danger rule to negligence cases was resolved by the Indiana Supreme Court when it granted transfer in *Bridgewater v. Economy Engineering Co.*[81] The court granted transfer in part to clarify the open and obvious danger rule's application to negligence actions.[82]

As a preliminary matter, the Indiana Supreme Court clarified the *Bemis* holding by stating that the court had not intended the open and obvious danger issue always to be decided as a matter of law. Rather,

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[79]*Id.*

[80]*Id.*

[81]486 N.E.2d 484 (Ind. 1985). The application of the open and obvious danger rule to product liability actions based on negligence presents unique problems in Indiana. Indiana recently adopted comparative fault in negligence actions. IND. CODE §§ 34-4-33-1 to -13 (Supp. 1985). Under this Act, the fault of the defendant and plaintiff are to be compared to determine the liability, if any, of the defendant. If a plaintiff is over 50% at fault, he is denied any recovery under the Act. IND. CODE § 34-4-33-5(a)(2) (Supp. 1985).

The efficacy of the open and obvious danger rule under comparative fault principles can be seriously questioned. The open and obvious danger rule creates an artificial condition which places full blame of an injury on the plaintiff even though the defendant is really partially at fault. These type of no-duty rules clash with the very purpose of comparative fault statutes and therefore should not remain viable under comparative fault. Indiana courts should recognize this clash and determine that even if the open and obvious danger rule would have applied to product actions based on negligence under *Law*, it has no place in a comparative fault system. The rule should be only one factor considered when comparing the fault of the defendant and plaintiff. *Contra* SCHWARTZ, COMPARATIVE NEGLIGENCE 202-03 (1974).

This approach would create problems because Indiana's Comparative Fault Act does not apply to product liability actions based on strict liability. If a plaintiff pursues a product action based on theories of negligence and strict liability, the court may be faced with the unenviable task of determining that the strict liability claim is barred by the open and obvious danger no-duty rule while the negligence claim should proceed to the jury for a fault comparison to determine the liability of the defendant to the plaintiff, if any.

A solution to the problem may be to place the open and obvious danger rule in its proper place in both types of product actions: to treat it as a factor to be considered in determining whether the plaintiff incurred the risk of injury in using the product in strict liability actions, and in negligence actions as a factor in determining whether the plaintiff was contributorily negligent or incurred the risk. This avoids the problem of treating various types of product actions differently and allows the consideration of the openness and obviousness of a danger when determining the liability of the defendant. *See infra* notes 107-23 and accompanying text.

[82]486 N.E.2d at 485.

it was to be treated as a matter of law only in cases involving a set of facts that were not in conflict and where no general issue was left as to "any material fact except for the question of whether the danger was open and obvious."[83] Under the facts presented in *Bridgewater,* the Indiana Supreme Court agreed with the court of appeals' statement that the question of whether the danger was open and obvious was the same as whether the danger was concealed or hidden.[84] The court did not discuss the factors to be considered in making that determination. However, the court decided that the open and obvious danger rule would not be extended to all negligence actions.[85] In light of this ruling, the court's conclusion that Bridgewater's negligence action should be dismissed appears misplaced.[86] However, the court evidently determined that all product actions, whether based on strict liability or negligence, would be subject to the open and obvious danger defense.[87] The court did not discuss the distinction being made between general negligence actions and product-based negligence actions or the repercussions such a distinction could have in the future. Therefore, the scope of the application of the open and obvious danger rule and the determination of what constitutes an open and obvious danger remain major issues in Indiana law and may be significantly affected by the recent Seventh Circuit Court of Appeals decision in *Corbin v. Coleco Industries, Inc.*[88]

V. The *Corbin* Decision

In *Corbin*, the plaintiff, Mr. Corbin, became the owner of a used Coleco swimming pool. Mr. Corbin placed the pool in his backyard and filled it to a depth of about four feet. One evening, Mr. Corbin jumped onto the lip of the pool (a six-inch wide flat rim running around the top edge), balanced himself, and dove in. He intended to do a "belly flopper," but for some reason his waist bent in mid-air and he entered the water head first. He hit his head on the bottom of the pool and

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[83] *Id.* at 488.

[84] *Id.*

[85] *Id.* at 489. In doing so, the court explicitly adopted part of the language used by Judge Staton in his dissenting opinion in *Law*. *See supra* notes 67-71 and accompanying text.

[86] 486 N.E.2d at 489.

[87] Justice Shepard (concurring in part, dissenting in part) was also surprised by the majority's finding that the trial court had properly used the open and obvious danger rule to grant summary judgment on the negligence theory. He noted that the majority did not discuss the distinction it was making between non-product negligence actions and product negligence actions. He approved of the court's ruling that the open and obvious danger rule would not apply to general negligence actions but dissented on the court's finding that the product-based negligence action was properly dismissed. 486 N.E.2d at 490-91.

[88] 748 F.2d 411 (1984).

suffered a fracture dislocation in vertebrae C-5 and C-6, resulting in quadriplegia. At the time of the accident, he was twenty-seven years old and in good health.[89]

Mr. Corbin and his wife filed a complaint against Coleco based in part on the theories of negligence and strict product liability. Coleco moved for summary judgment and the district court held that it was obviously dangerous for a six-foot man to dive into four feet of water.[90] The court held additionally that Coleco had no duty to warn of the open and obvious dangers and that a product is not defectively designed when its dangerous properties are patent. The district court found that the cause of Corbin's injuries was his own error of judgment in executing a shallow dive, implicitly concluding that a missing or defective warning was not a proximate cause of the injury. Finding no genuine issue of material fact, the district court granted Coleco's motion for summary judgment.[91] Mr. Corbin appealed and the Seventh Circuit Court of Appeals, construing Indiana law, reversed the decision.[92]

On appeal, Coleco vigorously asserted that the danger of diving into four feet of water was open and obvious. The Seventh Circuit Court of Appeals noted that if this were true, it would be a complete defense to a charge of negligent breach of duty to warn of the danger because there would be no such duty.[93] However, the court found "that Corbin put on the record before the district court evidence that the danger of serious spinal cord injury from diving into shallow water is not open and obvious and that this evidence is sufficient to preclude summary judgment for Coleco on the basis of the open and obvious defense."[94]

The evidence presented by Mr. Corbin included expert testimony that users of swimming pools:

> are aware of a general safety principle or homily against diving into shallow water. . . . The problem is that people associate that warning or general admonition with a couple of different things. They associate it with that you shouldn't dive into unknown waters, especially not unknown waters that are shallow, because there may be an object lurking there which you can strike . . . . They also associate the general admonition against diving as [sic] to mean that in a shallow body of water, some dives may create injury, some types of dives. The other important thing that the users of the pool typically carry in their heads is the belief that there is a safe and proper particular way to

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[89] *Id.* at 412-13

[90] *Id.* at 413.

[91] *Id.*

[92] *Id.* at 417, 421.

[93] *Id.* at 417 (citing Bemis Co., Inc. v. Rubush, 427 N.E.2d at 1061).

[94] *Id.* at 417.

> dive into pools of approximate or bodies of water of that approximate depth of three and a half feet. Flat and shallow dives with arms outstretched are common knowledge and one of the most rudimentary forms of diving that people learn. People have the belief that if they dive into water in approximately the depth we are concerned with here, that if they dive in a fairly shallow dive, with their hands outstretched in front of them, that in the event they strike the bottom, their hands will absorb or cushion the blow, that the only thing they will do is strike their hands on the bottom.[95]

The court went on to maintain:

> The crucial point made in this testimony is that even though people are generally aware of the danger of diving into shallow water, they believe there is a safe way to do it, namely, by executing a flat shallow dive. If people do in fact generally hold such a belief, then it cannot be said, as a matter of law, that the risk of spinal injury from diving into shallow water is open and obvious. Whether a danger is open and obvious depends not just on what people can see with their eyes but also on what they know and believe about what they see. In particular, if people generally believe that there is a danger associated with the use of a product, but that there is a safe way to use it, any danger there may be in using the product in the way generally believed to be safe is not open and obvious.[96]

Deposition testimony by Corbin indicated that Corbin was aware of the depth of the pool and that it might be too shallow to dive in. This testimony revealed clearly that Corbin knew of some general danger in diving into the shallow water. However, the Seventh Circuit stated that this testimony was "inconclusive on the crucial points: whether he knew that he risked serious spinal cord injury, possibly resulting in paraplegia or quadriplegia, and whether he believed that it was safe to dive as long as the dive was flat and shallow."[97] At one point in his deposition, Corbin indicated that he had jumped wrong. It was clear that Corbin intended to perform a flat, shallow dive rather than the dive that resulted. The Seventh Circuit noted that this testimony, along with the expert witness' testimony that people generally believe that flat, shallow dives into shallow water are safe, created a genuine issue of material fact as to whether Corbin knew that he risked spinal injury by diving into shallow water, even if he attempted a flat, shallow dive. If he did not

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[95] *Id.* at 417 (quoting deposition).
[96] *Id.* at 417-18.
[97] *Id.* at 418.

know this, then a conspicuous warning on the side of the pool could very well have deterred him from diving. The court concluded that the summary judgment for Coleco on the basis of Corbin's knowledge of the danger was inappropriate.[98]

The Seventh Circuit also addressed the issue of whether the Coleco swimming pool was an unreasonably dangerous product. The court stated that whether a product is in an unreasonably dangerous defective condition is a question of fact.[99] The Seventh Circuit stated that the district court had found that Corbin's injuries were caused by his own error of judgment in executing a shallow dive that he knew to be dangerous. Therefore, the district court had implicitly concluded as a matter of law that Corbin's injuries were not caused by a defect in the pool unreasonably dangerous to users.[100] The Seventh Circuit found this to be error because there was evidence that the pool was in a condition that made it exceptionally dangerous, well beyond what the ordinary user of swimming pools would contemplate and well beyond any danger that Corbin actually contemplated, and that this defect was the cause of Corbin's injuries.[101]

The Seventh Circuit relied on testimony by an expert witness indicating that the outer lip of the pool would wobble, thus affecting an individual's ability to control a dive. The court noted that Corbin might have had intimate knowledge of the construction of the pool without knowing that the lip wobbled when stood on or that a wobbling pool lip would impair a diver's control. His knowledge of the depth of the water and the general danger of diving into shallow water did not show that he knew the extreme danger of diving into shallow water from a wobbly platform.[102] Coleco maintained that Corbin's strict liability claim was defeated by the open and obvious danger rule of *Bemis*. In rejecting this claim, the appellate court stated:

> Even if it were open and obvious that there is some danger in diving into shallow water . . . we cannot say on this record as a matter of law that it was open and obvious that the lip of Corbin's pool wobbled or that a wobbly pool lip increases the danger of a dive from it. Thus, the open and obvious rule does not defeat Corbin's strict liability theory at the summary judgment stage.[103]

The court concluded, "we think the record shows that it is a genuine issue of material fact whether the pool contained a latent defect making

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[98] *Id.*
[99] *Id.* at 419.
[100] *Id.*
[101] *Id.* at 419-20.
[102] *Id.* at 420.
[103] *Id.* at 420-21.

it unreasonably dangerous to divers, notwithstanding the general danger of diving into shallow water."[104]

VI. The Impact of Corbin on Indiana Law

The *Corbin* decision potentially has two areas of major impact on Indiana law. First is the federal court's acceptance that the open and obvious danger rule applies to product liability actions based on negligence; second are the factors to be considered when determining whether a danger is truly open and obvious as a matter of law.

A. Application of the Open and Obvious Danger Rule to Negligence Actions

The *Corbin* decision addressed the application of the open and obvious danger rule to both a products liability case based on negligent failure to warn and on strict liability. The *Corbin* court did not debate whether *Bemis* intended to encompass negligence-based actions or only actions based on a strict liability theory.[105] Instead, the court simply stated that if diving into four feet of water was open and obvious, then "it is a complete defense to a charge of negligent breach of a duty to warn of the danger."[106]

This determination was compatible with the Indiana Supreme Court's subsequent ruling in *Bridgewater.* However, the application of the open and obvious danger rule to product liability actions based on negligence may create substantial problems.

Indiana recently passed comparative fault legislation.[107] Other states adopting comparative fault have struggled with the existence of no-duty rules[108] because they circumvent fault comparison and thwart the very

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[104]*Id.* at 421.

[105]The *Corbin* decision was handed down prior to the Indiana Supreme Court's decision in *Bridgewater.* The federal court's acceptance of the application of the open and obvious danger rule in product negligence actions was therefore not based on that decision. The court conducted an examination to determine whether a negligent failure to warn action had survived the passage of the Products Liability Act. *Id.* at 416-17. The court concluded that it had and that the products act would govern the action only so far as the substantive provisions of the Act conflicted with the common law. The accident had occurred in 1978, and the court was concerned with the following statutory language in the 1978 version of the statute: "This chapter shall govern all product liability actions, including those in which the theory of liability is negligence or strict liability in tort . . . . " *Id.* at 416 (quoting Ind. Code § 33-1-1.5-1 (1982)). Concluding that the action had survived passage of the Act, the court went on to address the merits of the case.

[106]*Corbin*, 748 F.2d at 417.

[107]Ind. Code §§ 34-4-33-1 to -13 (Supp. 1985).

[108]*See* Pardieck, *The Impact of Comparative Fault in Indiana*, 17 Ind. L. Rev. 925, 942-54 (1984) (containing a discussion of various states' approach to no-duty rules under comparative fault systems). *See also* Woods, The Negligence Case: Comparative Fault 14:32 (1978).

purpose of comparative fault.[109] The logic of the open and obvious danger rule is questionable under negligence systems because it swallows the assumption of risk defense and greatly expands the concept of contributory negligence, both of which are viable defenses in a negligence action.[110] The *Bridgewater* and *Corbin* courts' approach creates a question of whether the no-duty rule should continue under a comparative fault system where the application of the rule actually prevents the comparison of fault. It would seem that the approach utilized by the Minnesota Supreme Court in *Holm v. Sponco Manufacturing, Inc.*[111] would be desirable. In that case, the court abandoned the use of the rule as a complete bar to recovery and treated it as a factor to be considered in determining whether a product was unreasonably dangerous and whether the injured person had exercised reasonable care.[112]

The impact of the *Bridgewater* and *Corbin* courts' interpretation of the *Bemis* decision has the potential for significant impact because it supports the application of the open and obvious danger rule to product cases based on a negligence theory.[113] The level of this impact will perhaps never be known because of the new issues added to the debate by the adoption of comparative fault.

The *Bemis* decision was also based on a strict liability claim.[114] The importance of this was pointed out by the court of appeals in *Bridgewater*[115] and may have been a major factor in the *Corbin* court's decision to apply the open and obvious danger rule to the case. The *Bridgewater* and *Corbin* courts' application of the rule appears to have been based on the fact that the cases involved products and the *Bemis* decision was intended, like the product liability statute,[116] to apply to all actions whether based on negligence or strict liability. However, the products statute has since been revised and now applies only to actions based on a claim of strict liability.[117] Presumably, the open and obvious danger rule, as applied in *Bemis*, should not have a place in negligence actions because the plaintiff's conduct is already considered in both the contributory negligence and assumption of risk defenses. The adequacy of these defenses in negligence actions was acknowledged by the majority of the supreme court in *Bridgewater*.[118] Justice Shepard disagreed with the application of the open and obvious rule to product liability actions based on negligence and

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[109]*See* Pardieck, *supra* note 108, at 942-54.

[110]*Id.*

[111]324 N.W.2d 207 (Minn. 1982).

[112]*Id.* at 213.

[113]*Corbin*, 748 F.2d at 417.

[114]427 N.E.2d at 1061.

[115]464 N.E.2d at 18. *See supra* text accompanying notes 72-80.

[116]IND. CODE § 33-1-1.5-1 (1983).

[117]IND. CODE §§ 33-1-1.5-1 to -6 (Supp. 1985).

[118]486 N.E.2d at 489.

noted that no examination had been made as to the reasons for applying the rule in some negligence actions but not in others.[119] Presumably, the Indiana Supreme Court will be asked to address this issue again and examine the logic of the distinction being made between product and non-product negligence actions. If this is done, the court may find that the open and obvious danger rule should not apply in any type of negligence action because adequate defenses already exist in these actions.[120] This would leave Indiana with a situation in which the open and obvious danger rule could totally bar recovery in a strict products liability theory, but act as only a factor to be considered in a products claim based on negligence. A more logical approach, and one more consistent with the goals of comparative fault, would be to utilize the open and obvious danger as a factor to be considered in determining whether the plaintiff had incurred the risk of injury in a strict products liability action and as a factor in determining fault in a negligence based action. This approach has been utilized successfully by other jurisdictions[121] and avoids the problem of treating products cases differently because of the theory pursued. It also avoids adopting an approach that is inconsistent with the comparative fault act.

Because strict liability claims are not covered by comparative fault,[122] it is possible that the open and obvious danger rule could continue to exist in its unaltered form in strict products cases.[123] At this time, it is impossible to predict which route will be chosen by the Indiana courts. Adopting the approach of treating the open and obvious danger issue as a factor to be considered would, however, avoid serious problems in the future and would be consistent with the *Corbin* decision and avoid distinctions in the treatment of personal injury cases based on the method of injury or theory pursued.

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[119]*Id.* at 490-91 (Shepard, J., concurring in part, dissenting in part).

[120]If the adequacy of available defenses is considered, it is highly questionable whether the open and obvious danger rule should apply as a complete defense in any type of action. Under Indiana's Product Liability Statute, manufacturers may assert four major defenses: 1) incurred or assumed risk; 2) misuse of the product; 3) modification or alteration of the product; and 4) state of the art. IND. CODE § 33-1-1.5-4(b) (Supp. 1985). The assumed risk defense is similar to the open and obvious danger rule and adequately protects manufacturers, especially because contributory negligence is not a defense in strict product liability actions. The obviousness of a danger should logically only be a factor that is considered in determining whether the product user incurred the risk of using the product.

[121]*See supra* note 2.

[122]IND. CODE § 34-4-33-1 (Supp. 1985).

[123]The authors' personal view is that the obviousness of a danger should be treated as only one factor for the jury to consider when determining whether a product is unreasonably dangerous and whether the plaintiff has exercised reasonable care.

B. Factors Considered in Determining Whether a Danger is Truly Open and Obvious

The *Corbin* decision presents unlimited possibilities for determining whether a danger is really open and obvious.[124] The test applied is still the objective test enunciated and followed in Indiana decisions. The factors considered, however, are greatly advanced.[125] The *Corbin* decision entered a consideration of not only physical factors but psychological factors.[126] The court recognized that perceiving danger or hazards is not as simple as one first believes. The issue is not as simple as the water is four feet deep and everyone knows diving into water of that depth can be dangerous. Rather, the issue encompasses a determination of what people generally believe about diving. The court acknowledged, as did the *Hoffman* court,[127] that people can know of a general danger but not be aware of a more specific danger.[128]

The *Corbin* decision is a culmination of the course begun by the Indiana open and obvious danger cases. It indicates that the no-duty rule operates to bar recovery only where the specific danger is known, appreciated, and clearly visible.[129] This case, it is hoped, will alert Indiana courts to the complexity of hazard and risk recognition.[130] The case is also instructive in showing that questions of fact will at times be presented in determining what a populace does generally believe. When such questions are presented, the resolution of the issue should be left for the jury, even under the no-duty rule approach.

The close examination of the facts presented and the consideration of psychological factors may serve as a step to bring Indiana more in line with other jurisdictions. While Indiana may still have the open and obvious danger rule, its harsh effects can be lessened by a consideration of all the factors and an understanding of the complexity of the issues

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[124]The decision also is cause for hope that the rule will one day be altered and treated as only a factor to be considered rather than a complete bar to recovery. If such a change does not occur, the *Corbin* decision at least provides an avenue for construing the rule narrowly.

[125]*Corbin*, 748 F.2d at 417-21.

[126]*Id.* at 417-18.

[127]*See supra* notes 27-40 and accompanying text.

[128]*Corbin*, 748 F.2d at 420.

[129]*Id.*

[130]Several articles discussing the human's ability to recognize and perceive hazards have been written. These articles indicate that humans, as a whole, have great difficulty in perceiving and understanding risks for various reasons, the major reason being that people are poor judges of probability and therefore underestimate the probability that an accident or injury could occur. *See, e.g.*, McKean, *Decisions, Discover,* June 1985, p. 22; Kahneman and Tversky, *The Psychology of Preferences*, 246 SCIENTIFIC AMERICAN 160 (1982). *See also* WICKENS, ENGINEERING PSYCHOLOGY AND HUMAN PERFORMANCE (1984).

of risk and danger recognition. The focus on what people in the plaintiff's position at the time of the accident would have believed is also beneficial. It places the determination of what constitutes an open and obvious danger in the proper perspective by focusing on what the average person with the plaintiff's level of knowledge and understanding would see and believe, not what a manufacturer with years of experience believes should be open and obvious.[131]

VII. Conclusion

The *Corbin* decision promises to have an impact on Indiana's open and obvious danger rule in two major areas. First, it supports the application of the rule to products cases based on a negligence claim. The decision's impact in this area may be overshadowed by the adoption of comparative fault and the issues comparative fault raises with regard to no-duty rules. Second, the *Corbin* case places the open and obvious danger rule in a more human light. Its consideration of psychological as well as physical factors shows an appreciation for the complexity of the human's ability to recognize and perceive danger. Consideration of these factors will lessen the harsh effect of the open and obvious danger rule by recognizing that sometimes the obviousness is elusive.

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[131]It is noteworthy that manufacturers themselves have recognized the great importance proper design and warnings play in the production process. It is axiomatic that good design calls for dangers to be designed out if possible, guarded against, and warned about, in that order. *See* Hammer, Product Safety Management and Engineering 55, 108-13 (1980). The importance of warnings is to alert the product user of hazards or other noteworthy conditions, and they are necessary to prevent users from making incorrect decisions that could cause accidents. *See* Hammer, Handbook of System and Product Safety 86 (1972).