BEMIS COMPANY, INC., V. RUBUSH
427 N.E. 2d 1058

An Honors Thesis (ID 499)

by

Robert P. Foster

Thesis Director

Ball State University
Muncie, Indiana
May 6, 1982

Graduating May 22, 1982
In October 1973, Gerald Rubush filed suit against Bemis Co., Inc., in the Hancock County Circuit Court claiming that Bemis was liable for injuries caused by a batt packing machine which it had produced, because of a defect in the machine's design. After three years of waiting (until February 1977) and a two week jury trial, Mr. Rubush prevailed. The jury awarded $750,000 to Mr. Rubush and $25,000 to his wife. Upon appeal to the Indiana Court of Appeals, the lower court's decision was upheld in a unanimous ruling. Bemis continued to pursue the case and on November 12, the Indiana Supreme Court ruled 3 - 2 that Rubush was not entitled to recover from Bemis and subsequently vacated the opinion of the Court of Appeals. Ruling under what is known as the "open and obvious" rule, Justice Alfred J. Pivarnik, speaking for the majority, stated that since the dangers of the machine were "open and obvious to anyone observing the machine," it logically followed that the machine was not defective in design.

Within the scope of this paper, an analysis will first be made of the background and events surrounding the incident which gave rise to this suit. Furthermore, the rationalization of the Supreme Court Justices on both the majority and dissenting sides will be compared and contrasted and a conclusion drawn as to the correctness of the ruling. Finally, this paper will attempt to outline the law on products liability as it existed in Indiana previous to and immediately following this ruling and will look at the effect of this ruling on manufacturers and consumers of industrial goods.
BACKGROUND

Gerald G. Rubush was employed by Johns-Manville Corporation. His job title at Johns-Manville Corporation was a bagger, a position at which he had acquired considerable experience. On the day of the accident, he was indeed working as a bagger, although at the time of the incident, he had only been working on that particular job for ten minutes. The job of bagger involved operating a machine commonly called a batt packer. The particular batt packer he was working on was designed by Bemis Company Inc., and Wabash Products Co., Division of Bemis Co., Inc. The basic purpose of a batt packer is to pack fiberglass batts of insulation into paper bags. This is done in essentially two steps. First of all, the insulation is compressed into approximately bag shaped rolls in a compression chamber of the machine. Secondly, the rolls are moved out of the compression chamber of the machine and moved horizontally into a position ready for packing. The bags emerge from this portion of the machine through what is called a bag spout. The bag spout is a square opening in the machine through which the rolls of insulation emerge. The function of the bagger is to place insulation bags over the bag spout and secure them by means of a clamp. The clamp is fastened electronically by means of a push button at operator chest level. Activating the bag clamp simultaneously activates a shroud which descends and acts to support the walls of the insulation bag while insulation is compressed therein.

The actual operation of the shroud is rather complicated. When the machine is inactive, the shroud is stationary in a position above the operator. Activating the bag clamp simultaneously activates the shroud which then descends from above the operator to a position supporting the bag. The arc of the shroud causes it to move through the operator area to a position supporting the bag in the span of approximately four or five seconds. This translates to
a speed of approximately one to one and one-half feet per second. The basic pushing motion of the shroud is described as more characteristic of that of an air cylinder rather than that of a sudden impact. There was evidence presented at trial that the speed of descent of the shroud could be adjusted and that Johns-Manville had adjusted the rate (after a period of study and observation) so that it would allow the slowest worker to get out of the way of the descending shroud. As to how Rubush was caught under the shroud, there was conflicting testimony. There was some evidence presented that Rubush may have caught his hand under the clamp used to secure the insulation bags and thus was unable to move to a safe position. On the other hand, there was also evidence presented that it would never be necessary to hold the bag in a position that would allow the hands to be caught under the clamp. Also conflicting with the possibility of Rubush having caught his hand under the clamp was testimony on the part of medical witnesses that Rubush had suffered no trauma in his hand similar to that which would have been evident if the hand had indeed been caught under the 1400 pound pressure clamp.

At the time of the accident, Rubush was operating two machines at once instead of the usual one. Rubush was unable to recall the exact sequence of events which lead to the accident, and witnesses were also unsure. Any attempts to reconstruct the occurrence were found by the court to be "fraught with inconsistencies." As far as the actual machine itself, there was no evidence presented that it had malfunctioned or had been defective in its operation. After thorough review by an accident review committee, electricians, technicians and maintenance men, it was positively determined that the machine was operating as it had been designed to operate at the time of the accident.

Rubush's main contention was that the actual design of the machine was defective. While admitting that the danger of the descending shroud was open and obvious to all, they contended that the inherent danger of the machine was
that it was designed so that the shroud could descend with any object or person in its path. They also claimed that this defective condition could have been removed by the installation of an automatic device which would have prevented the shroud from descending with objects in its path. This failure to install safety devices into the design of the batt packer, they claimed, was a defect in the machine. Bemis, on the other hand, claimed that it could not be held liable in strict liability under §402A since the danger of the descending shroud was open and obvious to all. Thus, the major point of disagreement between the two parties was whether or not the obvious nature of the danger precluded recovery under strict liability as a matter of law.

MAJORITY OPINION

In speaking for the majority, Justice Pivarnik referred to §402A of the Restatement of Torts wherein the requirements for strict liability are enumerated. §402A states in part that "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...." Comment g to §402A states that "the rule in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him...." The applicability of this section is stated in Comment i as follows: "The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer...." From this, Justice Pivarnik reasoned that in order for Rubush to prevail, the batt packer would have to be found unreasonably dangerous to the extent that the danger would not be open and obvious to those observing the machine's operation. Since there was no disagreement presented as to the open and obvious nature of the danger, he reasoned, the product was not unreasonably dangerous as defined hereinabove.
Thus, any resulting harm caused by the machine was not actionable under strict liability. In summarizing this area of products liability, Justice Pivarnik said, "to impress liability upon the manufacturers, the defect must be hidden and not normally observable, constituting a latent danger in the use of the product" (at p. 1061).

In support of this open and obvious rule, Justice Pivarnik cites several Indiana cases including J.I. Case Company v. Sandefur, (1964) 245 Ind 213, 197 N.E. 2d 519. The majority in that case stated that "...there must be a reasonable freedom and protection for the manufacturer. He is not an insurer against accident and is not obligated to produce only accident-proof machines. The emphasis is on the duty to avoid hidden defects or concealed dangers" (at p. 523). The Sandefur court differentiated this type of danger from open and obvious dangers in stating that a machine which was built with flimsy parts concealed by an exterior which leads the user to rely thereon to his detriment, is indeed unreasonably dangerous.

Continuing on with this line of reasoning, Justice Pivarnik cited Greeno v. Clark Equipment Co., 237 F. Supp. 427 (N.D. Ind. 1965). Writing for the court in Greeno, Judge Eschbach defined a defective condition as "...a condition not contemplated by the consumer-user and which is unreasonably dangerous to him or his property..." (at p. 429). The court drew an analogy in stating that an axe would not be found to be unreasonably dangerous because of the fact that users would contemplate the dangers involved. On the other hand, a farm auger with a defective cover over a moving auger would be considered unreasonably dangerous because of the fact that the "danger is beyond the contemplation of ordinary user" (at p. 429).

Finally, Justice Pivarnik cited Posey v. Clark Equipment Company, 409 F. 2d 560 (7th. Cir. 1969) which involved a fork lift operator who was injured when a carton from a high stack was dislodged and fell on him, causing serious
injuries. Plaintiff in this case alleged that the absence of a safety guard constituted a design defect. The court disagreed in noting that a) the installation of an overhead guard on the fork lift would have rendered it useless for work in unloading trucks because of the additional height, and b) "the danger of an object falling upon an unprotected operator was so obvious that the user of the truck would reasonably be expected to know about it" (at p. 563). In concluding, Justice Pivarnik noted that, as in the previous two cases, the dangers of the descending shroud were open and obvious to ordinary users. Since Rubush was familiar with the machine and the potential dangers of the descending shroud, the lower court erred in allowing recovery on the basis of strict liability. Therefore, the opinion of the Court of Appeals was vacated and the cause remanded to the trial court with instructions to enter judgment for Bemis.

**Dissenting Opinions**

The court was far from unanimous in supporting Justice Pivarnik's opinion. Of the five justices in the court, two were dissatisfied enough with the opinion of the majority to write dissenting opinions. The first dissent was written by Justice DeBruler with Justice Hunter concurring. Justice DeBruler began by referring to the case of *Ayr Way Stores Inc., v. Chitwood*, (1973) 261 Ind. 86, 300 N.E. 2d 335, which held that negligence on the part of a manufacturer "need not be proven in a suit against it by one who was injured while using its product." Thus, *Ayr Way Stores Inc. v. Chitwood* established a rule wherein manufacturers could be held liable for defective conditions existing in its products which were unreasonably dangerous to users. Justice DeBruler felt that the trial court in Bemis responded correctly in instructing the jury that "it was authorized to consider evidence of the fact that any defective condition was open, apparent, and obvious to the user, in determining whether the machine was defective and unreasonably
dangerous..." (at p. 1065). The wording of this instruction clearly shows that the trial court felt the open and obvious rule was merely a subset of the new defective and unreasonably dangerous rule and that a finding that the danger was open and obvious would not, in and of itself, preclude recovery as a matter of law.

Justice DeBruler went on to state that "hidden and concealed defects and dangers may be unreasonable, and again they may not ...[and] open and obvious dangers may be reasonable, and again they may not be" (at p. 1065). He also reasoned that machines, such as the batt packer, which force the operator to stand in a position of potential harm while activating the machine, without any safety devices to prevent such a mishap, are at least potentially unreasonably dangerous and thus represent an issue suitable for submission to a jury. He reasoned that dangers in machines can, where the machine is operated over and over in an "assembly-line, mind-dulling fashion," be not only open and obvious, but also unreasonable (at p. 1065). This could potentially be true because even though the user is aware of the danger, he is not armed to protect himself from it continuously.

The second dissenting opinion written by Justice Hunter, with Justice DeBruler concurring, covered much of the same ground as the first dissenting opinion but in a different manner. This dissent began with Justice Hunter quoting Judge Neal from the unanimous opinion of the Court of Appeals. Judge Neal defined the role of the open and obvious rule in stating: "The proper role of the open and obvious rule is that it is but one of the factors which must be considered in determining whether a product is in a defective condition unreasonably dangerous" (at p. 57).

From this point, Justice Hunter went into a brief discussion of the contrasting rules in other jurisdictions. He stated that "other jurisdictions have rejected outright the notion that under the law of products liability, recovery for injuries sustained at the hands of an 'open and obvious' or
'patent' danger should be barred as a matter of law" (at p. 1066). In support of this proposition, he cites several cases including Byrns v. Riddel, Inc., (1976) 113 Ariz. 264, 550 P.2d 1065, Pike v. Hough Co., (1970) 2 Cal. 3d 465, 85 Cal. Rptr. 629, 467 P.2d 229, Auburn Mach. Works Co., Inc., v. Jones, (1979) Fla., 366 So.2d 1167 and Byrns v. Economic Machinery Company, (1972) 41 Mich. App. 192, 200 N.W. 2d 104, to name only a few. The overwhelming theme inherent in each of these cases is that awareness of a danger or the fact that a danger is open and obvious does not preclude recovery as a matter of law. Justice Hunter continues by examining the validity of the open and obvious danger rule. "Section 402A," he said, "embodies the concept of 'strict liability' in tort" (at p. 1067) The basic concept is based on two separate propositions: "(1) the manufacturer of a product sold on the open market undertakes and assumes a responsibility to the public to produce a reasonably safe product; and (2) the public justifiably relies on the expertise of the manufacturer in its expectation that the product is designed to afford reasonable safety in its forseeable and intended uses" (Restatement (Second) of Torts, §402A, Comment c). According to Burton v. L.O. Smith Foundry Products Co., 529 F. 2d 108 (7th Cir. 1976), there are at least 3 types of defects which would be unreasonably dangerous under §402A. "A product may be defective because of (1) manufacturing flaws, (2) defective designs, and (3) failure to supply complete information about the products dangers" (at p. 110). Thus, if there was indeed a defect in design in the batt packer which Rubush was operating, liability should attach.

Justice Hunter noted that the rule adopted by the majority, however, excused Bemis from this liability for the sole reason that the danger was apparent. From the policy standpoint, this decision appears ridiculous. It would seem to indicate that a manufacturer of a dangerous product should protect itself not by installing safety guards, but by leaving them off. This would be evident because any guards or safety devices placed upon the machine
might serve to make the dangers of the machine less obvious. Justice Hunter says that "the rule, in short, as many jurisdictions have expressley recognized, encourages misdesign in its obvious form" (at p. 1069). He went on to state that the true focus of §402A is to determine whether the manufacturer, "without impairing the functional capacities of the product and with reasonable additional costs, could have rendered the product reasonably safe" (at p. 1069).

He also stated that there are several other factors that tend to weigh heavily against a flat bar against liability in an open and obvious case. Other courts for instance, have consistently recognized that notwithstanding the obvious nature of the danger, the user cannot be expected in all cases and at all times to appreciate the seriousness of the danger or the gravity of harm that could potentially result. Along the same line, it must be recognized that often the only alternative to the user subjecting himself to such a danger is to quit the job. Thus the exposure to risk cannot always be characterized as totally voluntary.

Nevertheless, even in cases where the user has has been subjected to the danger, he should not be barred from recovery only on the basis of the obviousness of the danger. Quoting Dean Wade, Justice Hunter lists the factors that should be considered in determining liability: "(1)the usefulness and desirability of the product, (2)the availability of other and safer products to meet the same need, (3)the likelihood of injury and its probable seriousness, (4)the obviousness of the danger, (5)common knowledge and normal public expectation of the danger (particularly for established products), (6)the avoidability of injury by care in use of the product (including the effect of instructions or warnings), and (7)the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive." J.Wade, Strict Liability of Manufacturers, 19 Sw. L.J. 5 (1965) (at p. 1070). Thus, given any particular product, a balancing test must be performed. The Florida Supreme Court in Auburn Mach. Works Co., Inc. v. Jones,
supra, explained just such a test in explaining why a manufacturer would not be liable for injuries caused by a knife it had produced. It stated that "the product is not unreasonably dangerous and no duty arises because (1) everyone realizes the dangers; (2) by definition a guard over the blade would eliminate its utility; (3) the cost of a 'safe' knife might be prohibitive" (at p. 759).

The court compared this example to the cause before them in which a man had been injured by the exposed edges of a cutting machine. It found that even though the dangers of the machine were obvious, the cost of a guard on the machine was by no means prohibitive and would in no way effect the utility of the machine. Justice Hunter thus concluded that the ruling made by the Court of Appeals was correct in holding that the patent nature of the danger was only one of the factors to be considered in establishing liability. Furthermore, he emphasized that the policy effects of this decision verge on the ridiculous. Thus, he dissented with the decision of the majority.

**EFFECTS**

From this point, one must turn to an analysis of both the effects of *Bemis* and correspondingly the correctness of the final opinion of *Bemis*, in light of its effects. Both sides of the argument have been relatively well delineated by the majority and the dissenting opinions. In pitting both sides against each other, there are several inherent factors in the majority opinion (independent of policy considerations) which would tend to discount their conclusions. First of all, as noted before, the majority continually cites §402A of the Restatement (Second) of Torts. Justice Pivarnik reasoned that §402A unequivocally tied the concept of unreasonably dangerous to the concept of open and obvious. This simply is not the case. §402A states in full:

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

Thus, the actual text of §402A makes no reference whatsoever to the user's knowledge of the product's dangers. Only in the comments to §402A is any mention made of such a knowledge. Comment "a" states that the rule espoused in §402A is one of strict liability. It is not however the exclusive method of recovering for injury caused by a product. It does not preclude liability based on negligence alone as long as such negligence is proven to exist.

Section "c" further explains the text of §402A in saying that "the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods... and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products." (emphasis added)

There are several conflicting views on exactly what standard of care is due the consumer from the manufacturer. On the one hand, Indiana courts have stated that "those who come into contact with a product may reasonably expect its supplier to provide feasible safety devices in order to protect them from dangers created by its design." ¹ And on the other hand, in Campo v. Scofield ² a New York Court stated that "[W]e have not yet reached the state where a manufacturer is under the duty of making a machine accident proof or

¹ See Gilbert v. Stone City Construction Co., Inc., 171 Ind. App. 418, 357 N.E. 2d. 738 (at p. 744)
² 295 N.E. 2d. 802, 301 NY. 468 (1950) (at p. 804)
This is representative of a position taken up by a great number of the courts who have stated that a manufacturer is not an insurer of the safety of the users of its products.\(^1\) The question that must then be asked is exactly what duty of care is actually owed by the manufacturer to the consumer. Although it is almost universally supported by the courts that the manufacturer has no duty to guard against misuse, he obviously owes some standards of care to the consumer because of his superior position of knowledge. This position is amply supported by both the Uniform Commercial Code and the Uniform Sales Act in general, and it is the position adopted by §402A.

"The basis for the rule," the American Law Institute stated, "is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods."\(^2\) Thus, the authors of §402A express a definite opinion that consumers of a product are owed a maximum degree of protection from products which are unreasonably dangerous.

The majority in *Bemis*, however, places the weight of its opinion on Comments "g" and "i" to §402A. Comment "g" says in part, "[T]he rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him" (at p. 351). On the surface, this does seem to indicate that a knowledge of the danger would prohibit application of §402A. However, if one looks to the intent of the A.L.I. in drafting §402A, one begins to realize the rationale behind this statement. Originally, §402A was applicable only to food meant for human consumption. When the final draft was

\(^1\)See Zahora v. Hornischfeger Corp., 404 F. 2d. 172 (1968)
written in 1965, the institute was just beginning to see a marked trend toward extending this type of liability to non-food products. As late as the sixth tenative draft of the Restatement, the "Defective Condition" section was still written in terms of food. The old section is identical to comment "g" except that in comment "g" the word "product" supersedes the word "food".\(^1\) It seems logical that anyone eating food which is openly and obviously dangerous (for whatever reason, mould, bugs, etc.) should indeed be barred from recovering against the seller. It also follows that with increases in technology in the last 15 years, simple rules meant to apply to something whose dangers are simple and easily observable, become obsolete with the advent of extremely complex machines and products. Although dangers in food are often, as stated, very obvious with inspection, dangers in complex machinery are often not so easily assessed. It is with this increase in technology that a policy of flatly excusing liability according to the open and obvious rule begins to look progressively less equitable.

Comment "i" to §402A goes on to say that "[t]he article sold must be 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" (at p. 352). These two sections (comment "g" and comment "i"), when taken together, form a "consumer expectation test" to be utilized in assessing liability.\(^2\) Presumably, the consumer or user expects that the product to which he is exposed will conform to the manufacturer's own design. If, in fact, it does not, and as a result he is injured, he clearly should be able to recover. But, if his injury results from a design weakness, there may be some difficulty in determining the ordinary consumer's expectation as to a product's design.\(^3\) Therefore, many of the problems inherent in

\(^{1}\)Restatement of the Law (Second) Torts, Tenative Draft No. 6 (1961).
\(^{2}\)12 Ind. L. Rev. 397 (1979) Indiana's Obvious Danger Rule for Products Liability.
\(^{3}\)Ibid.
applying §402A stem from the fact that the definition of unreasonably dangerous is not as clear and precise as it appears on the surface. Obviously, the emphasis of §402A is to attempt to eliminate those dangers which the consumer does not expect to encounter. It is also obvious that the ordinary consumer expects the products he uses to be reasonably safe under reasonable conditions. The problem then becomes twofold. First of all, what exactly are the consumer's expectations? And secondly, if the consumer does expect or recognize the danger of the product, does that automatically prohibit the product from being unreasonably dangerous? Although the first matter represents an issue for submission to a jury, the second is a matter of law and thus subject to interpretation by the courts.

A multitude of courts and experts have stated that the obvious danger exception is "fundamentally inconsistent with the unreasonably dangerous requirement of strict tort liability...." Professor Wade used an excellent example in stating that "[i]t is not necessarily sufficient to render a product duly safe that its dangers are obvious, especially if the dangerous condition could have been eliminated. A rotary lawn mower, for example, which had no housing to protect users from the whirling blade would not be treated as duly safe despite the obvious character of the danger." What then becomes apparent in looking at the obvious danger rule, as expressed in §402A and cited by the majority, is that it may not be perfectly suited to deciding modern questions of liability. As noted before, it was originally meant to apply only to food, it is ambiguous in defining key concepts necessary for an equitable application and it may lead to decisions which are anachronistic from a policy standpoint.

In lieu of applying the open and obvious rule, it must be ascertained what

1See for instance, Wade, "On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825 (1973)
2Ibid.
other courses were available to the majority. Several other methods have been proposed for dealing with products liability cases. Perhaps one of the better methods used to date is that expressed by the California Supreme Court in *Barker v. Lull Engineering Co.*\(^1\) As explained by John F. Vargo and Jordan H. Liebman,\(^2\) the court stated that "liability in products cases involving design defects may be established if (1) the plaintiff proves 'that the product failed to perform as safely as the ordinary consumer would expect when used in an intended or reasonably foreseeable manner,' or the plaintiff proves that 'the product's design, proximately caused his injury and the defendant failed to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design'" (at p.236). Overall, this seems to provide a more equitable and fair result than the open and obvious rule espoused by the institute in drafting §402A. This "Lull Engineering test" has two principal benefits. First of all, in stating that the plaintiff must prove the product failed to perform "as safely as the ordinary consumer would expect," the court left open a bar to recovery because of the patent nature of a danger since the consumer would expect a machine with obvious dangers to be hazardous. On the other hand, the second portion of the test, which is joined to the first by the conjunction "or," allows the plaintiff to overcome this bar if the defendant cannot prove the benefits of designing the product in the existing manner outweigh the inherent dangers. This allows the defendant to attempt to prove that his design was feasible, cost efficient, or up to industry standards with the idea that if he can prove those factors, liability will not be assessed.

Nevertheless, in relying on using the obvious nature of a danger to bar liability, the majority in *Bemis* cites several cases in Indiana law. In stating

\(^1\)143 Cal. Rptr. 225, 573 P. 2d. 443, (1978)  
\(^2\)12Ind. L. Rev. 227 (1979) Products Liability
"although the manufacturer who has actual or constructive knowledge of an unobservable defect or danger is subject to liability for failure to warn of the danger, he has no duty to warn if the danger is open and obvious to all" (at p. 1061) the majority relies heavily on two leading cases.

The first case cited was J.I. Case Co., v. Sandefur.¹ The Sandefur court did indeed rule that the open and obvious nature of a defect exempted the manufacturer from a duty to warn of that danger; however, the court did not extend the rule to excepting the manufacturer from a duty to design safe products. Thus, although the Sandefur court felt that a manufacturer's warning would be redundant in light of the obvious nature of the defect, they expressed no opinion as to excepting a manufacturer from liability when, because of defective design, its product was openly dangerous.

The majority in Bemis also relies upon Burton v. L.O. Smith Foundry Products Co.,² The Burton case involved an injury caused when a parting compound the plaintiff was working with was accidentally ignited by a man working nearby. Since the plaintiff in the case knew that the parting compound was partially composed of kerosene (and as such, highly flammable), the court held that there was no design defect because "the product was not unreasonably dangerous inasmuch as it met the reasonable expectations of the ordinary consumer." It continued on in stating, "[s]ince the product behaved as the ordinary user would expect, it was no more defective that the kerosene itself" (at p. 111). Thus, although neither Burton nor Sandefur is exactly on point concerning a duty to design safe products, both do lend, to some extent, support to the majorities' finding in Bemis.

Yet, there are other cases, which have ruled differently, that are perhaps more on point when compared with Bemis. For example, the court in Kroger Co. v.

¹245 Ind. 213, 197 N.E. 2d 519 (1964)
²529 F. 2d 108, (7th. Cir. 1976)
Haun specifically addressed the idea of voluntary incurrence of a known danger. The court said in essence that a person working in an employee capacity who is accurately following the procedures specified for his job may not always be characterized as voluntarily assuming all risks found on that job. In other words, where the only alternative to doing the job in the specified manner is to face management discipline or quit the job, the workers assumption of any risks on the job becomes less than voluntary. Correspondingly, the question arises in Bemis as to whether Rubush voluntarily assumed the risk. According to the Haun court, his assumption of any risks on the job may not have been voluntary and thus should not have operated to bar recovery.

While assumption of risk is a defense in strict liability, it is the voluntary aspect of that assumption of that risk that makes it a defense. Thus, even if it was discovered that Rubush knew of the danger and the gravity of harm which might result, his duty as an employee (following the manufacturer's instructions) places him in a position where his actions are not strictly voluntary. This question, however, does not seem to be something the majority even considered in ruling for Bemis.

Along the exact same lines, the Florida Supreme Court in Blackburn v. Dorta, examined to what extent the assumption of risk could be considered reasonable. As explained by Vargo and Liebman, the Dorta court "theorized the situation in which the plaintiff rushes into a burning building to rescue a child" (at p. 231). Finding that the assumption of risk doctrine would ordinarily present a valid defense to any attempt to recover by the plaintiff, the court stated that it could find no policy justification in such a case for use of assumption of risk as a defense and thus rejected its use.

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4. 348 So. 2d 287 (Fla. 1977)
5. 12 Ind. L. Rev. 227, (1979) Products Liability
Thus, an examination of the current law in Indiana and in other jurisdictions provides a mixed opinion as to using the open and obvious rule to bar recovery. In few cases other than Bemis has the open and obvious danger rule been used by itself to bar recovery. In 12 Ind L. Rev 397 (written before Bemis) it was stated that "[n]o Indiana case nor any other federal decision decided under Indiana law has relieved a manufacturer from liability solely because the danger from his product was obvious." Therefore, the court in Bemis has expressed an opinion not previously voiced in Indiana law. That is, that the fact that a danger is obvious to those who come in contact with it automatically prevents recovery for injuries sustained from use of the product.

In order to examine the Bemis case from an equity standpoint, two factors must be studied. First, an examination of the other defenses available in Indiana law in products liability actions must be conducted. And secondly, the policy effects of Bemis upon manufacturers and consumers must be examined.

Apart from statutory provisions (discussed later), three commonly used valid defenses have emerged in Indiana law. The first is partially derived from §402A section 1(b) which states that the manufacturer is liable for harm caused by the product if "it is expected to and does reach the consumer without substantial change in the condition in which it is sold." From this section, it has clearly been established in Indiana law by cases such as Conder v. Hull Lift Truck, Inc.,\textsuperscript{1} that alteration in the product by the consumer does constitute a defense for the manufacturer. In Conder, the court ruled that alteration of a forklift which enabled it to run for long periods at top speed contrary to the manufacturers design represented a substantial alteration and thus constituted a valid defense for the manufacturer.\textsuperscript{2}

A second well developed defense in Indiana law is the defense of "misuse." Gregory v. White Truck and Equipment Co., Inc.,\textsuperscript{3} for instance, ruled that

\textsuperscript{1}1405 N.E. 2d 538 (1980)
\textsuperscript{2}Ibid
\textsuperscript{3}323 N.E. 2d 280, 160 Ind App. 240 (1975)
products liability recovery could be defeated by showing that the plaintiff in some manner "misused" the product. (See also Harris v. Karri On Campers, Inc.,1 American Optical Co. v. Weidenhamer,2 Latimer v. General Motors Corp.,3 and Perfection Paint and Color Co. v. Konduris4) Also relevant to the doctrine of misuse are Zollman v. Symington Wayne Corp.,5 which extended the doctrine to include an exception from the manufacturer's duty to warn (In Zollman, the court ruled that "a manufacturer has no duty to warn against obvious misuses of a product" (at p. 32); and, Conder, supra, which ruled that the defense of misuse operates as a bar to recovery only when the use of the product is in a manner not reasonably foreseeable by the manufacturer. Correspondingly, the concept of misuse as a bar to recovery has become firmly established in the Indiana Courts. Furthermore, the doctrine of misuse is often tied closely to another products liability defense found frequently in Indiana law. Fruehauf Trailer Division v. Thornton,6 stated that in attempting to determine whether misuse constitutes a valid defense, it must be understood that misuse is a part of assumption of risk when the plaintiff has a knowledge of the defect. The court in Fruehauf went on to say that misuse is "premised on voluntary consent as tested by a subjective standard" (at p. 29). Therefore, assumption of risk has often been closely related to a defense of misuse. Consequently, assumption of risk has also become a widely used valid defense to strict liability in Indiana law. This position is supported by Cornette v. Searjeant Metal Products, Inc.,7 (three judges concurring in

1See Harris v. Karri On Campers, Inc., 640 F. 2d 606, (1980) (Misuse in strict liability will serve to bar any recovery)
2See American Optical Co. v. Weidenhamer, 404 N.E. 2d 606 (1980) (Misuse is a defense in strict liability)
3See Latimer v. General Motors Corp., 535 F. 2d 1020, (1976) (manufacturer is not liable if danger arises out of misuse)
4See Perfection Paint and Color Co. v. Konduris, 258 N.E. 2d 681 (1970) (Misuse of a defective product is a defense in strict liability)
5438 F. 2d 28, (1971)
6366 N.E. 2d 21, (1977)
the final ruling) which stated that assumed or incurred risk was indeed a defense to strict liability. Along the same lines, *Harris v. Karri On Campers, Inc.*, supra, stated that substantial fault on the part of the plaintiff or assumption of risk in strict liability cases will bar all recovery. (See also, *American Optical Co., v. Weidenhamer*,¹ *Gregory v. White Truck and Equipment Co.*,² and *Gilbert v. Stone City Const. Co., Inc.*,³)

In addition to these defenses found in the common law, there has recently been enacted an Indiana statute governing products liability. The reasons for enactment of the products chapter are reviewed in detail in other works⁴ and thus will not be discussed in detail here. Suffice it to say that after six months of testimony on the part of manufacturers, labor groups, and public interest groups, the statute was enacted. The main reason the testimony occurred was because of an insistence on the part of manufacturers that products liability premiums were becoming outrageously high while the quality and safety of products were not deteriorating in the least. Therefore, they argued for a new statute decreasing manufacturers liability for product related injuries. In response to this demand and in response to consumer protection groups, which argued for maintenance of the current level of consumer protection, Public Law 141 was enacted. The law, found at §34-4-20A-1 states in part:

"34-4-20A-4. Defenses to strict liability in tort. -
(a) The defenses in this chapter are defenses to actions in strict liability in tort. The burden of proof of any defense raised in a product liability action is on the party raising the defense.

¹See *American Optical Co., v. Weidenhamer*, supra, (incurred risk is a defense to strict liability)
²See *Gregory v. White Truck and Equipment Co., Inc.*, supra, (products liability recovery may be barred by a showing that sustained injuries were caused solely by plaintiffs own conduct and that plaintiff proceeded voluntarily and unreasonably to encounter a known risk.)
³See *Gilbert v. Stone City Const. Co., Inc.*, supra, ("'Incurred risk' defense to products liability suit is that one incurs all normal risks of a voluntary act, so long as he knows and understands them, or if they are readily discernable by a reasonably prudent person in similar circumstances.")
⁴12 Ind. L. Rev. 227, 239 (1979)
(b) With respect to any product liability action based on strict liability in tort:

(1) It is a defense that the user of consumer discovered the defect and was aware of the danger and nevertheless proceeded unreasonably to make use of the product and was injured by it.

(2) It is a defense that a cause of the physical harm is a nonforeseeable misuse of the product by the claimant or any other person. Where the physical harm to the claimant is caused jointly by a defect in the product which made it unreasonably dangerous when it left the seller's hands and the misuse of the product by one other that the claimant, then the concurrent acts of the third party do not bar recovery by the claimant for the physical harm, but shall bar any rights of the third party, either as a claimant or as a subrogee.

(3) It is a defense that a cause of the physical harm is a nonforeseeable modification or alteration of the product made by any person after its delivery to the initial user or consumer if such modification or alteration is the proximate cause of physical harm.

(4) Whenever the physical harm is caused by the plan or design of the product, it is a defense that the methods, standards, or techniques of designing and manufacturing the product were prepared and applied in conformity with the generally recognized state of the art at the time the product was designed or manufactured.

Thus, the statute enumerates four basic defenses to claims of strict liability. The first defense listed is contained in section 4(b)(1). A careful reading of the language in section 4(b)(1) seems to reveal an intent on the legislatures part to parallel the language and the concept of comment "n" to §402A of the Restatement.1 There are several concepts in the common law of Indiana that have been left out by using this definition. Included among those are the reasonable assumption of risk concept, the elements of appreciation of the gravity of the danger or understanding of the danger, and any mention of the voluntariness of submission to that danger. Without any mention of the concepts, the statute appears to be rather rigid and unyielding in its application.

1Restatement (Second) of Torts §402A, Comment n, (1965)
Section 4(b)(2) seems to conform more to common law in stating that nonforeseeable misuse constitutes a defense. The courts, for the most part, seem to be in general agreement that if the misuse by the consumer was foreseeable by the manufacturer, there would be no bar to recovery.

Section 4(b)(3) is notable for its ambiguity. In stating that nonforeseeable modification or alteration by the consumer will bar recovery, the statute leaves open questions concerning a foreseeable alteration of the product. Supposedly, if the alteration which is the sole cause of the plaintiff's injuries was foreseeable by the manufacturer, such alteration would not serve as a defense to claims of liability. Although day to day application of this section may prove to be difficult because of the lack of specificity, the general intent behind section 4(b)(3) seems to be in line with most Indiana common law. In other words, by not mentioning foreseeable alterations, this section recognizes that according to Indiana case law, not all modifications will serve to bar recovery. Craven v. Niagra Mach. and Tool Works, Inc., for instance, stated "that strict liability can be imposed even though the product is altered or changed if it is foreseeable that the alteration would be made and the change does not unforeseeably render the product unsafe." (at p. 655) Thus, it is possible to interpret section 4(b)(3) in a manner which substantially agrees with Indiana case law.

Section 4(b)(4) serves to heighten the protection given to manufacturers in product liability suits beyond the general standard found in Indiana case law. In recognizing a defense to liability claims when the product "[was] prepared and applied in conformity with the generally recognized state of the art . . ." section 4(b)(4) greatly eases the task of manufacturers in raising this defense.

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defense. For the most part, manufacturers have been held to a standard of producing products by what is considered scientifically and economically feasible. Section 4(b)(4) seems to reduce that standard to a standard of producing only in conformity with general industry practices in existence when the product was originally designed. As explained by Vargo and Liebman, "[i]nsofar as products manufactured today are fashioned from old designs, the manufacturers liability could be measured by an antiquated standard. This provision in Section 4(b)(4) can operate only as an incentive for manufacturers to retain obsolete designs with obsolete safety features" (at p. 249)\(^1\)

Thus, a summary of Indiana common law and statutory law indicates that there are four broad defenses to strict liability. If charged with strict liability (as in products liability cases), the manufacturer can raise a defense in claiming misuse, assumption of risk, alteration of the product or a conformity of his design with generally recognized states of the art. In addition to these, Bemis has added a fifth defense. If Bemis is upheld in subsequent Indiana decisions, the fact that a danger is obvious will, in and of itself, be sufficient to bar recovery. It seems reasonable that in the majority of cases, a manufacturer would be able to prove one of the four enumerated defenses unless it was clearly at fault. Thus, to a protection that was already extensive prior to Bemis, the majority felt it was necessary to, in effect, enact yet another defense. As noted before, this is a position not found in any other prior Indiana case nor any federal case decided under Indiana law. If, in fact, Bemis is relied upon substantially by subsequent cases, the consumer's protection from injury, and recourse to the manufacturer for that injury, will be markedly decreased.

\(^1\)12 Ind L. Rev. 227 (1979) Products Liability
The last factors that must be examined in carefully analyzing Bemis are the policy effects of the ruling. As noted earlier, Justice Hunter (dissenting opinion in Bemis) expressed the opinion that from a policy standpoint, the conclusion reached by the majority is ridiculous. In examining his opinion, it is only necessary to look at the design of a product from the manufacturer's standpoint. The manufacturer previously had three options in avoiding successful products liability suits. First of all, he could produce products which were absolutely foolproof and safe. Secondly, he could produce products as safe as was economically and reasonably feasible in light of the intended purpose for the product. Third, he could produce no products whatsoever, thus avoiding any possibility of liability for sustained injuries. To this list, Bemis adds a fourth alternative. Instead of attempting to make the product safe for the consumer's use, the manufacturer can now remove safety guards in an attempt to make the dangers of the product more obvious. If the manufacturer installs safety guards and the consumer is injured, the manufacturer may be liable (for a failure to warn or for a failure to install adequate safety guards for instance). But, if the safety guards are removed, the open and obvious nature of the danger will, according to Bemis, serve to bar any liability for product related injuries. From an equitable standpoint, it hardly seems fair that products which are more dangerous for the consumer to use should be less dangerous for the manufacturer to market. In short, the open and obvious exception seems to promote the manufacturing of openly dangerous products as opposed to generally safe products.

In conclusion, it seems reasonable that from a policy standpoint and from a legal standpoint, the rule espoused in Bemis is not the optimum solution to the products liability dilemma; nor does the statutory rule represent a definitive solution. What is desperately needed in Indiana is a products liability rule that more carefully balances the rights of the consumer and the rights of
the manufacturer. Such a rule would have to incorporate factors including: a
test as to how reasonable or voluntary any assumption of risk is in light of an
employer/employee relationship, a test weighing the benefits of a particular
design against the consumer's right to protection, a clear definition of a
"failure to perform up to consumer expectations," and a reasonable costs test to
be employed in assessing the feasibility of installing safety guards. Although
many courts have made steps in these directions, no single court has clearly
incorporated each of these elements into an opinion in order to develop a new
products liability standard. The _Bemis_ rule is not the answer; but with the
growing number of products liability suits, it is only a matter of time until
Indiana courts develop a more equitable solution to answer the unanswered
questions in _Bemis_ and to right the inequities caused by the application of
_Bemis_.