could not fix the value of property on an appeal from the Board, since the proper procedure is to remand the matter to the Board for reassessment.[105]

XVIII. Torts

*James J. Brennan**

The purpose of this discussion is to highlight selected judicial decisions in the area of tort law. Not all tort cases decided during the survey period have been discussed, but an effort has been made to note recent developments and significant clarifications and affirmations of Indiana law. Because this discussion is synoptic in nature, it does not purport to provide either extensive coverage or extensive analysis of the cases.

A. Limitations on Duty

1. The Guest Statute

The Indiana guest statute[1] withstood a vigorous equal protection challenge during the survey period. In *Sidle v. Majors*,[2] a guest passenger who was injured in an automobile driven by the defendant appealed the dismissal of her negligence complaint on the ground that the guest statute violated the fourteenth amendment to the United States Constitution and article 1, sections 12 and 23 of the Indiana Constitution. The Seventh Circuit Court of Appeals, before addressing the questions of federal law, certified the questions of state law to the Indiana Supreme Court pursuant to Rule 15(N) of the Indiana Rules of Appellate Procedure.

In an opinion couched with judicial restraint,[3] the supreme

[105] *See* IND. CODE § 6-1.1-15-8 (Burns Supp. 1976); Indiana State Bd. of Tax Comm'rs v. Pappas, 302 N.E.2d 858 (Ind. Ct. App. 1973).

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The author wishes to express his appreciation to Lynn Brundage for her assistance in the preparation of this comment, and to J. Randall Aikman for his work in authoring the section on damages.

[1] IND. CODE § 9-3-3-1 (Burns 1973).

[2] 536 F.2d 1156 (7th Cir.), *certifying questions of state law to* 341 N.E.2d 763 (Ind.), *cert. denied*, 97 S. Ct. 366 (1976). Dempsey v. Leonherdt, 341 N.E.2d 763 (Ind. 1976) was a companion case to *Sidle*. This case is also discussed in Marsh, *Constitutional Law*, *supra* at 133. For an analysis of *Sidle*, see 9 IND. L. REV. 885 (1976).

[3] 341 N.E.2d 763 (Ind. 1976). The extent to which the supreme court acted with restraint is exemplified by the following excerpt from the opinion:

court, speaking through Justice Prentice, held that the guest statute bore a fair and substantial relationship to at least three perceived legitimate state interests: (1) The fostering of hospitality by insulating generous drivers from lawsuits instituted by ungrateful guests, (2) the elimination of the possibility of collusive lawsuits, and (3) protection of insurance companies and the public from the "benevolent thumb syndrome," a novel theory based upon the belief that jurors will assume that the real defendants in guest-host suits are insurance companies, and that juries will weigh their benevolent thumbs together with evidence of the host's negligence, all of which would result in increased insurance premiums.[4] For these reasons, the court concluded that it was not at liberty to substitute its judgment for that of the legislature, and held that the guest statute did not contravene article 1, sections 12 and 23 of the Indiana Constitution.

The Seventh Circuit Court of Appeals was not as charitable to the legislature's judgment when, after receiving the supreme court's ruling, it was presented with the question of whether the guest statute violated the fourteenth amendment to the United States Constitution.[5] Reviewing the constitutionality of the statute under the rational basis test,[6] the court found that each justification for the statute advanced by the Indiana Supreme Court was indefensible, and that *Silver v. Silver*,[7] a 1929 United States Supreme Court decision upholding the constitutionality of a guest statute, was invalid in light of changed social conditions. The purpose of fostering hospitality was not furthered by the guest statute, the court reasoned, because "widespread liability insurance

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> In approaching a consideration of the constitutionality of a statute, we must at all times exercise self restraint. Otherwise, under the guise of limiting the Legislature to its constitutional bounds, we are likely to exceed our own. That we have the last word only renders such restraint the more compelling. We, therefore, remind ourselves that in our role as guardian of the constitution, we are nevertheless a court and not a "supreme legislature." We have no right to substitute our convictions as to the desirability or wisdom of legislation for those of our elected representatives. We are under a constitutional mandate to limit the General Assembly to its lawful territory of prohibiting legislation which, although enacted under the claim of a valid exercise of the police power, is unreasonable and oppressive. Nevertheless, we recognize that the Legislature is vested with a wide latitude of discretion in determining public policy.

Id. at 766.

[4] *Id.* at 768-72.

[5] 536 F.2d 1156 (7th Cir.), *cert. denied*, 97 S. Ct. 366 (1976).

[6] "'[S]tatutory classifications violate the Equal Protection Clause if they are not rationally related to 'some legitimate, articulated state purpose.'" *Id.* at 1157, *quoting from* McGinnis v. Royster, 410 U.S. 263, 270 (1973).

[7] 280 U.S. 117 (1929).

has eliminated any notion of ingratitude that may have formerly adhered to a suit by a guest against his host."[8] Equally unimpressed by the so-called anti-collusion purpose of the statute, the court determined that, in fact, the statute encourages "odious perjury" and artfully drafted pleadings, and that any relationship that exists between the statute and the purpose of preventing collusive lawsuits "is so attenuated that it is unreasonable to eliminate causes of action of an entire class of persons merely because an indefinite portion of a designated class may file fraudulent lawsuits."[9] Finally, in apparent reference to the "benevolent thumb syndrome," the court concluded that "[d]efendant has not demonstrated that our invalidation of this statute would increase premiums for such insurance."[10]

Despite its considered view that the guest statute was an "anachronistic monument to the insurance industry" that bore no rational relationship to a legitimate state interest,[11] the court sustained the validity of the statute because two years ago the United States Supreme Court, in *Cannon v. Oviatt*,[12] summarily dismissed the appeal of a decision of the Utah Supreme Court upholding the constitutionality of a guest statute. In view of the Supreme Court's recent holding in *Hicks v. Miranda*[13] that summary dispositions of appeals are binding precedents upon lower courts, the Seventh Circuit held that it was bound by the summary affirmance of *Cannon* and was required to sustain the constitutionality of the guest statute.

The United States Supreme Court denied certiorari over the vigorous dissent of Justice Brennan, in which Justice Marshall joined.[14] Noting that the courts of no less than seventeen states have examined or reexamined their guest statutes over the past five years, and that almost one-half of those courts have deemed their states' guest statutes to be unconstitutional, Justice Brennan stated that "[t]his conflict of view might reasonably lead bench and bar to expect that this Court would grant review of a case that afforded an opportunity to reexamine [*Silver v. Silver*] in light of today's rationality standard."[15] He reasoned that:

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[8]536 F.2d at 1157.

[9]*Id.* at 1158.

[10]*Id.*

[11]*Id.* at 1159.

[12]419 U.S. 810, *dismissing appeal for want of a substantial federal question*, 520 P.2d 883 (Utah 1974).

[13]422 U.S. 332 (1975).

[14]97 S. Ct. 366 (1976).

[15]*Id.* at 367.

> [H]ad the Court foreseen that [*Hicks v. Miranda*] . . . would convert the [*Cannon v. Oviatt*] dismissal into an ironclad holding compelling the Court of Appeals in this case to abandon its own considered view of the merits, it seems probable that at the very least the Court, because of the doubts widely shared as to the continuing vitality of *Silver v. Silver*, would have given more thought to the propriety, even desirability, of a summary dismissal.[16]

The denial of certiorari, according to Justice Brennan, left undisturbed "a decision upholding a statute whose constitutionality is patently open to serious debate."[17]

2. *Premises Liability*

The common law rules of premises liability, like the guest statute, create a special privilege to be careless toward particular classes of persons. *Sidle v. Majors* made it clear that any reform of the guest statute must be legislative rather than judicial. This is not the situation, however, with the law of premises liability. The common law rules, which define a landowner's duty of care toward entrants according to whether the entrant is classified as a licensee, invitee or trespasser, are judge-made. The rules were created by judges at a time when the rules of negligence were new and ill-defined, and when the notion that a landowner was sovereign in his own domain was firmly rooted in our jurisprudence.[18] By erecting rigid rules of duty, the courts, viewing the emerging negligence doctrine with considerable distrust, reserved the exclusive power to protect landowners from juries whose members, as a general rule, belonged to "the class of potential visitors rather than to that of landowners."[19]

It can no longer be said that the interest of human safety must be subservient to the interest of property ownership. Since the landmark case of *Rowland v. Christian*[20] was decided by the California Supreme Court in 1968, an increasing number of jurisdictions have abolished the common law rules, and have required possessors, like other members of society, to exercise reasonable

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[16]*Id.* at 368-69.

[17]*Id.* at 369.

[18]*See* F. Bohlen, Studies in the Law of Torts 163 (1926).

[19]Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers*, 69 L.Q. Rev. 182, 185 (1953).

[20]69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). *See generally* Annot., 32 A.L.R.3d 508 (1970).

care in their daily pursuits.[21] New Hampshire,[22] Wisconsin,[23] and New York[24] joined this growing minority during the survey period.

A frequent criticism of the common law classification system, apart from its harshness and inflexibility, has been its proclivity to breed confusion in the law.[25] The courts have not been reluctant to attenuate the common law rules or to emasculate them with numerous exceptions in an effort to make them more consonant with the now well-settled rules of negligence and the emerging policy of the law to require all persons to behave reasonably. The law of Indiana, particularly with respect to cases involving licensees, is a paragon of this confusion.[26] Much judicial energy has been expended over the past several years in efforts to determine the duty of care owed to licensees in Indiana. The development of the law in this area, in the words of one Indiana jurist, "has been uneven, and characterized by confusing terminology such as 'active-passive', 'willful and wanton', 'attractive nuisance', 'inherently dangerous condition', and 'last clear chance'."[27]

The first serious effort to eliminate some of this confusion was undertaken by Judge Buchanan in *Fort Wayne National Bank v. Doctor*.[28] *Doctor* presented the sole question of the duty of care

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[21]*See* Smith v. Arbaugh's Restaurant, 469 F.2d 97 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973); Mile High Fence Co. v. Radovich, 175 Colo. 537, 489 P.2d 308 (1971); Pickard v. City of Honolulu, 51 Hawaii 134, 452 P.2d 445 (1969); Mounsey v. Ellard, 297 N.E.2d 43 (Mass. 1973); Peterson v. Balach, 294 Minn. 161, 199 N.W.2d 639 (1972); Ouellette v. Blanchard, 364 A.2d 631 (N.H. 1976); Scurti v. City of New York, 40 N.Y.2d 433, 354 N.E.2d 794, 387 N.Y.S.2d 55 (1976); Mariorenzi v. Joseph DiPonte, Inc., 333 A.2d 127 (R.I. 1975); Antoniewicz v. Reszcynski, 236 N.W.2d 1 (Wis. 1975).

The *Rowland* test was well stated in Mariorenzi v. Joseph DiPonte, Inc., 333 A.2d 127, 133 (R.I. 1975):

> Hereafter, the common-law status of an entrant onto the land of another will no longer be determinative of the degree of care owed by the owner, but rather the question to be resolved will be whether the owner has used reasonable care for the safety of all persons reasonably expected to be upon his premises. Evidence of the status of the invitee may have some relevance to the question of liability but it no longer will be conclusive. The traditional tort question of foreseeability will become important.

[22]Ouellette v. Blanchard, 364 A.2d 631 (N.H. 1976).

[23]Antoniewicz v. Reszcynski, 236 N.W.2d 1 (Wis. 1975).

[24]Scurti v. City of New York, 40 N.Y.2d 433, 354 N.E.2d 794, 387 N.Y.S.2d 55 (1976).

[25]*See, e.g.*, Mariorenzi v. Joseph DiPonte, Inc., 333 A.2d 127 (R.I. 1975); J. PAGE, THE LAW OF PREMISES LIABILITY (1976).

[26]*See generally* Brennan, *Torts, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 340, 342-45 (1975); Note, *Premises Liability: A Critical Survey of Indiana Law*, 7 IND. L. REV. 1001 (1974).

[27]Swanson v. Shroat, 345 N.E.2d 872, 876 (Ind. Ct. App. 1976).

[28]149 Ind. App. 365, 272 N.E.2d 876 (1971).

owed to a licensee injured by a condition of the premises. Characterizing the law of Indiana pertaining to the licensee-licensor relationship as "snarled," the court overruled a line of cases holding that a possessor could be held liable to a licensee for active negligence and gross negligence, and concluded that liability would exist only for "positive wrongful acts," "entrapment," and "willful and wanton conduct."[29] *Doctor* represented the high-water mark of the common law rules in Indiana because the court concluded that each of these tests was aimed at conduct transcending negligence, and that the law of negligence was irrelevant to the licensee-licensor relationship.[30]

As might have been expected of a decision disregarding modern tort trends and professing a faithful adherence to the common law rules of premises liability, *Doctor* has not achieved its goal of clarifying Indiana law. In *Pierce v. Walters*,[31] the Third District Court of Appeals, without referring to *Doctor*, held that a possessor was liable to a child licensee for "willful and wanton negligence," a standard of care that defies definition.[32] Several years later, in *Surratt v. Petrol, Inc.*,[33] the First District Court of Appeals engaged in a thorough review of Indiana law and declined to follow *Doctor* to the extent that it held that a possessor could not be held liable to a known trespasser for negligent conduct. It is arguable, on the basis of *Pierce* and *Surratt*, that the law of negligence plays an important part in determining whether a possessor should be held liable to licensees injured by "active conduct."[34]

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[29] *Id.* at 374-75, 272 N.E.2d at 882.

[30] *Id.*

[31] 152 Ind. App. 321, 283 N.E.2d 560 (1972).

[32] *Id.* at 325, 283 N.E.2d at 562. "Wilfulness and negligence are diametrically opposite to each other." Barrett v. Cleveland, C.C. & St. L. Ry., 48 Ind. App. 668, 671, 96 N.E. 490, 492 (1911). "[N]egligence and wilfulness are incompatible, and the former cannot be to such a degree as to become the latter." Stauffer v. Schlegel, 74 Ind. App. 431, 435, 129 N.E. 44, 46 (1920). "Negligence and wilfulness are as unmixable as oil and water. 'Willful negligence' is as selfcontradictory as 'guilty innocence.' " Kelly v. Malott, 135 F. 74, 76 (7th Cir. 1905). "To speak of 'willful negligence' is like talking of a 'black white' object." Eldredge, *Tort Liability to Trespassers*, 12 TEMPLE L.Q. 32, 33 (1937). *See also* Note, *Premises Liability*, *supra* note 26, at 1031.

[33] 312 N.E.2d 487, *aff'd on rehearing*, 316 N.E.2d 453 (Ind. Ct. App. 1974).

[34] 312 N.E.2d at 492, *following* RESTATEMENT (SECOND) OF TORTS § 336 (1965). *See, e.g.*, Scurti v. City of New York, 40 N.Y.2d 433, 354 N.E.2d 794, 797, 387 N.Y.S.2d 55, 58 (1976). A major problem with the "active negligence" exception is that the distinction between active and passive negligence is highly artificial and often difficult to make. *See* James, *Tort Liability of Occupiers of Land: Duties Owed to Trespassers*, 63 YALE L.J. 145, 174-75 (1953); Brennan, *supra* note 26, at 346 (discussing *Surratt*). *Compare* Lingenfelter v. Baltimore & O.S. Ry., 154 Ind. 49, 55 N.E. 1021 (1900) *with* Midwest Oil Co. v. Storey, 134 Ind. App. 137, 178 N.E.2d 468 (1961). The Indiana

The courts traditionally have found the common law rules of premises liability more palatable in cases in which a licensee was injured by a condition of the land rather than by active conduct of the possessor.[35] Thus, an even more significant erosion of *Doctor* occurred in the recent case of *Swanson v. Shroat*,[36] in which the strength of *Doctor* was considered in the context of an injury occasioned by a condition of the defendant's land. The plaintiff in *Swanson* was a ten-year-old boy who was injured when he fell from a tree located in the defendant's backyard. The trial court granted summary judgment for the defendant on the ground that the undisputed facts failed to bring the case within any of the exceptions enunciated in *Doctor*. The Second District Court of Appeals affirmed the trial court's decision, but for a different reason: the child was contributorily negligent as a matter of law because he should have known and appreciated the risks inherent in playing in a tree.[37] Before reaching this conclusion, however, the court engaged in an analysis of the law of premises liability—an analysis rendered unnecessary by the court's ultimate disposition of the case—that casts serious doubt upon the precedential value of *Doctor*.

Although the *Swanson* court cited various aspects of *Doctor* with apparent approval throughout its opinion,[38] the court's dissatisfaction with *Doctor* was obvious. Despite the effort made in *Doctor* to clarify Indiana law, the court noted that "the conduct which measures up to the requisite standard of care owed to a licensee remains unclear."[39] Engaging in an independent analysis of the authorities, the court noted that liability has traditionally

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Supreme Court has held, however, that there is no such thing as active negligence. Indiana Harbor Belt R.R. v. Jones, 220 Ind. 139, 41 N.E.2d 361 (1942).

[35] *See* James, *supra* note 34, at 158.

[36] 345 N.E.2d 872 (Ind. Ct. App. 1976).

[37] Indiana courts have established rigid categories of conditions and structures the danger of which a child is expected, as a matter of law, to recognize and appreciate. *Id.* at 879. *See, e.g.*, Neal v. Home Builders, Inc., 232 Ind. 160, 111 N.E.2d 280 (1953) (falling from heights); City of Evansville v. Blue, 212 Ind. 130, 8 N.E.2d 224 (1937); Anderson v. Reith-Riley Constr. Co., 112 Ind. App. 170, 44 N.E.2d 184 (1942) (cave-ins of soil). A child injured by such a condition is barred from recovery unless it is shown that the danger was latent. Lockridge v. Standard Oil Co., 124 Ind. App. 257, 114 N.E.2d 807 (1953). The rule operates harshly. *Compare id. with* Plotzki v. Standard Oil Co., 228 Ind. 518, 92 N.E.2d 632 (1950) (same pond involved in drowning deaths one year apart). The rule has been justly criticized. *See* Note, *Landowner's Liability for Infant Drowning in Artificial Pond*, 26 IND. L.J. 266 (1950). *See also* Note, *Premises Liability*, *supra* note 26, at 1020-21.

[38] 345 N.E.2d at 877.

[39] *Id.* at 876.

been found to exist in cases in which a licensee was injured by a condition that he was unable to recognize or avoid. Because dangers that may be obvious to an adult are often hidden to a child, the court determined, on the basis of substantial precedent, that possessors must exercise a greater quantum of care toward child licensees.[40] For this reason, the court concluded that the trial court erred in relying upon *Doctor*, which was limited by its facts to an injury sustained by an adult licensee.

Having made this distinction, the court refocused its inquiry upon the duty of care owed to both child and adult licensees, and thus made the distinction one largely without a difference. Viewing the duty of care owed to licensees more broadly than would have been possible under a literal reading of *Doctor*, the court adopted the rule set forth in the *Restatement (Second) of Torts* section 342[41] for determining when a licensee can recover from a possessor for injuries brought about by a static condition of the premises. In obvious dissatisfaction with the present state of the law, the court stated that the *Restatement* "clearly and concisely" sets forth the circumstances in which a possessor may be held liable to a licensee, and provides a "coherent guide" for the determination of liability "without the confusing terminology which has prevailed in Indiana cases over the past 90 years."[42]

The impact of *Swanson* upon *Doctor* and the law of premises liability in general was best described in the concurring opinion of Judge Buchanan, the author of *Doctor*. He concluded that "[r]esort by the majority to the rule stated in section 342 of the Restatement (Second) of Torts as the basis for its opinion, represents a subtle transition from established Indiana law of non-host liability (with clearly defined exceptions) to a negligence standard . . . ."[43] Stating that this transition is "without authority or justification in the law of this State," Judge Buchanan would have affirmed the trial court's decision solely upon the basis of *Doctor*.[44]

Under the *Restatement* rule, a possessor is liable for injuries caused to licensees by conditions of the land when: (1) He knows or should know of the condition and should realize that it involves an unreasonable risk of harm, (2) he should expect that licensees will not realize or discover the danger, (3) he fails to exercise reasonable care to make the condition safe or warn of the condition and the risks involved, and (4) the licensees do not know

[40] *Id.* at 877. *But see* Neal v. Home Builders, Inc., 232 Ind. 160, 111 N.E.2d 280 (1953). *Neal* was limited to its facts in *Swanson*. 345 N.E.2d at 878.

[41] RESTATEMENT (SECOND) OF TORTS § 342 (1965).

[42] 345 N.E.2d at 878-79.

[43] *Id.* at 881.

[44] *Id.*

or have reason to know of the condition and the risk involved. The *Restatement* approach borrows heavily from the law of negligence and establishes a rule that is substantially more just than the rules enunciated in *Doctor*. There is one drawback, however, to making it a part of Indiana law. The *Restatement* continues to recognize the common law classifications of invitee, licensee, and trespasser, and thus will serve to perpetuate rather than eliminate this outmoded terminology.[45]

The most interesting aspect of Judge Sullivan's opinion in *Swanson* is his statement that "[i]t is believed that [plaintiff's] argument for the elimination of the distinction between invitees and licensees with respect to the duty owed by a landowner or occupant is meritorious."[46] Observing that the Indiana Supreme Court impliedly recognized the common law rules in *Hammond v. Allegretti*,[47] a case involving the duty of care owed to invitees, he concluded that it would be "presumptuous for [the court of appeals] to strike down the traditional distinction" and that reconsideration of this area of the law "is best left to our highest court in this case or in some future appeal in which, as here, the argument is squarely presented."[48]

There can be no doubt that the time has come for the supreme court to engage in a careful and forthright examination of the law of premises liability. Other than the landmark case of *Hammond v. Allegretti*,[49] in which the court made it clear that the duty of care owed to invitees was not to be diminished by arbitrary rules based upon the existence or nonexistence of particular circumstances, the court has not decided a premises liability case of any moment since 1962,[50] a year that predates the modern tort trend to abrogate the common law rules. The court's inattention to the law of premises liability has left this area clouded with uncertainty. How the court would rule if given the opportunity to modify or abrogate the common law rules cannot be predicted with any degree of certainty. But, as noted by Justice Prentice

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[45]*See* Hughes, *Duties to Trespassers: A Comparative Survey and Revaluation*, 68 YALE L.J. 633, 648-49 (1959); Note, *Premises Liability*, *supra* note 26, at 1047 n.264.

[46]345 N.E.2d at 875.

[47]311 N.E.2d 821 (Ind. 1974).

[48]345 N.E.2d at 875.

[49]311 N.E.2d 821 (Ind. 1974).

[50]Pier v. Schultz, 243 Ind. 200, 182 N.E.2d 255 (1962). Judge Sullivan concluded in *Swanson* that *Pier* only made a "casual reference to the standard of care owed to licensees . . . ." 345 N.E.2d at 878. *Pier* is significant for its holding in regard to the attractive nuisance doctrine applied to child trespassers. See Note, *Premises Liability*, *supra* note 26, at 1015-23.

in *Sidle v. Majors*,[51] the court has not been hesitant to abolish tort immunity doctrines when, "in [the court's] opinion, they were determined to be no longer compatible in our society." Other courts, when presented with this question, have concluded that, in today's society, "[a] man's life or limb does not become less worthy of protection by the law . . . because he has come upon the land of another without permission or with permission but without a business purpose."[52]

3. Sovereign Immunity

There has been much litigation concerning the parameters of the doctrine of sovereign immunity since all but a vestige of that doctrine was abrogated by the Indiana Supreme Court's 1972 decision in *Campbell v. State*.[53] This survey period has been no exception. All sovereign immunity cases decided during the survey period involved the status of the doctrine during the post-*Campbell*, pre-Indiana Tort Claims Act[54] transitional period. These decisions are important to the extent that they may be predictive of how Indiana courts will construe the provisions of the Tort Claims Act. Moreover, they are significant because it is likely that there are many cases pending, at least before the appellate courts, that will be controlled by *Campbell* and its progeny rather than the Tort Claims Act.

There are substantial differences between the common law under *Campbell* and the provisions of the Tort Claims Act.[55] It is very important, therefore, to determine whether or not a particular case will be controlled by *Campbell* and its progeny or the Tort Claims Act. In *State v. Daley*,[56] the Second District Court of Appeals held the $300,000 damage ceiling of the Tort Claims Act could not be applied retrospectively to reduce a $400,000 judgment obtained by plaintiff before the effective date of the Act. As a general rule, two questions must be resolved in the affirmative before a statute will be applied retrospectively: Does the legislature have the power to apply retrospectively a statutory provision, and, if so, did the legislature intend that the provision have retrospective effect?[57] The *Daley* court held that the legislature neither

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[51]341 N.E.2d 763, 770 (1976).

[52]Rowland v. Christian, 69 Cal. 2d 108, 118, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968).

[53]259 Ind. 55, 284 N.E.2d 733 (1972).

[54]IND. CODE §§ 34-4-16.5-1 to -18 (Burns Supp. 1976).

[55]*See* Foust, *Torts, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 264, 274-76 (1974).

[56]332 N.E.2d 845 (Ind. Ct. App. 1975).

[57]*See* Annot., 37 A.L.R.3d 1438, 1440 (1971).

intended nor had the constitutional power to limit the plaintiff's previously obtained judgment. Relying upon substantial precedent, the court determined that the plaintiff had a vested right by virtue of the judgment rendered by the trial court, and held that the legislature was prohibited by the Indiana Constitution from impairing such a right by the subsequent enactment of legislation.[58]

As an additional basis for its decision, the court applied the general rule of statutory construction that statutes are to be applied prospectively unless their language clearly indicates that they were intended to be retroactive,[59] and concluded that the language of the Tort Claims Act did not clearly indicate that the legislature intended the Act to be applied to judgments rendered before the Act's effective date. The court interpreted the loosely worded appropriations provisions of the Act to mean that appropriations had been made for the full satisfaction of past judgments.[60] Another reason exists for applying the Act prospectively which was not mentioned by the court. The Act contains an emergency clause that made it effective on the date of passage.[61] Had the legislature intended the Act to apply retrospectively, it would have been unnecessary to include the emergency clause. The inclusion of an emergency clause is strong evidence that a statute was intended to apply prospectively rather than retrospectively.[62]

The precise holding of *Daley* is that the damage limitation provisions of the Act cannot be applied retroactively to judgments obtained before February 19, 1974, the effective date of the Act. It is not entirely clear from the court's opinion whether the damage limitations of the Act are also inapplicable to causes of action that accrued before that date. This result would appear to be implicit in the court's holding that the legislature is not at liberty to deprive a person of a substantial portion of an existing vested right because it has long been recognized by the courts that an accrued cause of action is a vested right.[63] Thus, it would seem that the court's holding that the damage limitations apply only to

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[58]332 N.E.2d at 849.

[59]*See* Malone v. Conner, 135 Ind. App. 167, 189 N.E.2d 590 (1963); 73 AM. JUR. 2d *Statutes* § 350 (1974).

[60]332 N.E.2d at 847-48.

[61]Act of Feb. 19, 1974, Pub. L. No. 142, § 4, 1974 Ind. Acts. 599.

[62]*See* Chadwick v. City of Crawfordsville, 216 Ind. 399, 24 N.E.2d 937 (1940); 73 AM. JUR. 2d *Statutes* § 352 (1974).

[63]*See* Baltimore & O.S. Ry. v. Reed, 158 Ind. 25, 62 N.E. 488 (1902). *See also* Stucki v. Loveland, 94 Idaho 621, 495 P.2d 571 (1972); Brennan v. Electrical Installation Co., 120 Ill. App. 461 (1905); Minty v. State, 336 Mich. 370, 58 N.W.2d 106 (1953). Procedural changes, however, do not substantially impair vested rights. *E.g.*, Streepy v. State, 202 Ind. 685, 177 N.E. 897 (1931).

"claims obtained" after February 19, 1974 refers to causes of action that accrue as well as judgments obtained after that date.[64]

Among the most significant provisions of the Tort Claims Act are those providing that a claim is barred unless notice is served upon the appropriate person or governing body within 180 days after the loss occurs.[65] Under pre-Tort Claims Act law, statutory notice was required in all suits brought against counties[66] and municipalities.[67] Until recently, there seemed to be no question that statutory notice requirements applicable to suits against governmental entities were constitutionally valid. Recent decisions of the Michigan[68] and Nevada[69] Supreme Courts declaring such provisions to be a denial of equal protection of the laws, however, have spawned an increasing number of constitutional challenges.[70] The constitutionality of Indiana Code section 18-2-2-1, which required written notice in suits brought against municipalities, was challenged in two cases decided by the appellate courts during the survey period.

In *Geyer v. City of Logansport*,[71] the Second District Court of Appeals pinioned its holding upon other grounds and found it unnecessary to pass on the constitutionality of the statute. In *Batchelder v. Haxby*,[72] however, the Third District Court of Appeals, in a 2-1 decision, held that the statute did not contravene the equal protection clause of the fourteenth amendment of the United States Constitution or article 1, section 23 of the Indiana Constitution. Judge Garrard, writing for the majority, concluded that governmental units are different from private tortfeasors, and stated, with little elaboration, that "we are unable to say the classification [discrimination resulting from the statute] does not rest upon any reasonable basis."[73] This holding is in accord with the First District Court of Appeals' holding in *Foster v.*

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[64]The Act was amended in 1976 to change and add provisions concerning, among other things, the settlement of claims, the payment of defense costs and liability under federal civil rights laws. Act of Feb. 18, 1976, Pub. L. No. 140, 1976 Ind. Acts 687. The amendment provides that it is retroactive "to the full extent that it can be so applied constitutionally." *Id.* § 9, 1976 Ind. Acts at 693. The amendment also contains an emergency clause. *Id.* § 11, 1976 Ind. Acts at 693.

[65]IND. CODE § 34-4-16.5-6 (Burns Supp. 1976) (claims against state); *id.* § 34-4-16.5-7 (claims against political subdivisions).

[66]IND. CODE § 17-2-1-1 (Burns 1974).

[67]IND. CODE § 18-2-2-1 (repealed 1974) (replaced by Tort Claims Act).

[68]Reich v. State Highway Dep't, 386 Mich. 617, 194 N.W.2d 700 (1972).

[69]King v. Baskin, 89 Nev. 290, 511 P.2d 115 (1973).

[70]*See* Annot., 59 A.L.R.3d 93 (1974).

[71]346 N.E.2d 634, 642 (Ind. Ct. App. 1976).

[72]337 N.E.2d 887 (Ind. Ct. App. 1975).

[73]*Id.* at 889-90.

County Commissioners[74] that Indiana Code section 17-2-1-1, which requires notice in suits brought against counties, is constitutional. Judge Staton dissented in *Batchelder* and rejected the reasons advanced by the majority in support of the special protection afforded governmental tortfeasors by statutory notice provisions. He reasoned that "[a]ll tortfeasors have a similar interest in the prompt investigation of claims, in settlement, and in the preparation of a defense," and concluded that "[t]he special treatment afforded governmental tortfeasors, and the special burden placed upon victims of governmental negligence, are arbitrary and without rational basis and, therefore, violative of the equal protection guarantee."[75]

The notice provisions of the Tort Claims Act, in some respects, are more favorable to victims of governmental torts than the prior notice statutes. The time for filing notice is longer[76] and special allowances are made for minors and incompetents.[77] Unless the view taken by Judge Staton in his dissent in *Batchelder* is adopted by the supreme court at some later date, *Foster* and *Batchelder* strongly indicate that the notice provisions of the Tort Claims Act will pass constitutional muster.

If, as stated by Judge Garrard in *Batchelder*, the special status of governmental entities justifies the disparate treatment afforded victims of governmental torts, then it would hardly seem justifiable to require that statutory notice be served upon governmental employees who are sued in their individual capacities for torts committed in the course of their employment. In *Geyer*, the Second District, having additional grounds upon which to premise its decision, declined to decide whether a governmental employee could rely upon the lack of statutory notice as an affirmative defense to an action brought against him personally.[78] Nevertheless, the court noted the decision of the Seventh Circuit Court of Appeals in *England v. City of Richmond*,[79] in which it was held that, under Indiana law, a municipal employee cannot claim the benefit of the notice provision. A contrary holding would be indefensible in light of the rationale relied upon in *Batchelder* to justify the notice provision.

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[74]325 N.E.2d 223 (Ind. Ct. App. 1975).

[75]337 N.E.2d at 891.

[76]IND. CODE §§ 34-4-16.5-6 and -7 (Burns Supp. 1976) establish a 180-day period. *Id.* § 18-2-2-1 (repealed 1974) established a 60-day period, and *id.* § 17-2-1-1 (Burns 1974) contains no time period.

[77]*Id.* § 34-4-16.5-8 (Burns Supp. 1976). Minors are considered incompetents. Incompetents must file notice within 180 days after incompetency is removed.

[78]346 N.E.2d at 639.

[79]419 F.2d 1156 (7th Cir. 1969).

The statutory notice provisions of sovereign immunity statutes have fittingly been described as traps for the unwary.[80] At one time, Indiana courts demanded strict compliance with the pre-Tort Claims Act notice provision governing suits against municipalities. The leading case in this regard was *Touhey v. City of Decatur*,[81] in which the supreme court held that actual notice to a municipality through detailed newspaper coverage of the event giving rise to the claim was insufficient notice. The court based its decision on the erroneous premise that the liability of municipalities was statutory, and that there could be no liability unless the terms of the notice statute were strictly followed.[82] Later cases have recognized that municipalities are subject to liability under the common law, and that the notice requirement is merely a statutory limitation on the common law right to sue.[83]

The strength of the strict compliance doctrine enunciated in *Touhey* was slowly eroded in cases in which it was held that the form and content requirements of the statutory notice provision were satisfied by substantial compliance. In *Galbreath v. City of Indianapolis*,[84] the supreme court, relying upon its previous decision in *Aaron v. City of Tipton*,[85] rejected *Touhey* and applied the substantial compliance doctrine to a case in which the plaintiff failed to notify the appropriate government official. The basis of the court's holding was well stated by Justice Hunter: "The purpose of the notice statute being to advise the city of the accident so that it may properly investigate the surrounding circumstances, we see no need to endorse a policy which renders the statute a trap for the unwary *where such purpose has in fact been satisfied.*"[86] Broadly read, *Galbreath* suggested that *Touhey* was no longer good law, and that strict compliance was not required in cases in which the plaintiff's error was harmless and the municipality was not prejudiced by less than strict compliance with the statute.[87]

Two cases decided during the survey period seem to have left open the question of how broadly *Galbreath* should be read. In *Batchelder v. Haxby*,[88] the Third District Court of Appeals, relying

[80]Galbreath v. City of Indianapolis, 253 Ind. 472, 479-80, 255 N.E.2d 225, 229 (1970).

[81]175 Ind. 98, 93 N.E. 540 (1911).

[82]*Id.* at 100-01, 93 N.E. at 541-42. *See* 46 IND. L.J. 428, 431 (1971).

[83]Thompson v. City of Aurora, 325 N.E.2d 839 (1975); 46 IND. L.J. 428, 430 (1971).

[84]253 Ind. 472, 255 N.E.2d 225 (1970).

[85]218 Ind. 227, 32 N.E.2d 88 (1941).

[86]253 Ind. at 479-80, 253 N.E.2d at 229 (emphasis added).

[87]*See* 46 IND. L.J. 428, 437 (1971).

[88]337 N.E.2d 887 (Ind. Ct. App. 1975).

upon *Touhey v. City of Decatur*,[89] held that knowledge acquired by a municipality independently of the plaintiff was insufficient notice under the statute. The court concluded that *Touhey* was still good law because "the statutory purpose of providing opportunity to investigate is not fully realized except when notice is had in the context that one is claiming municipal liability for injury."[90] The court did not disclose in its opinion whether the municipality, in fact, investigated the incident, or whether it was prejudiced by the plaintiff's failure to give formal notice. *Batchelder*, like the First District Court of Appeals' earlier holding in *Foster v. County Commissioners*,[91] indicates that there cannot be substantial compliance when formal written notice is not filed, and that the doctrine of substantial compliance primarily concerns a relaxing of statutory requirements pertaining to the form and content of notice and the public officials upon whom notice should be served.

A more liberal view of the doctrine of substantial compliance was taken by the Second District Court of Appeals in *Geyer v. City of Logansport*.[92] In *Geyer*, formal written notice was not given, but it was clear that the municipality had actual notice of the incident and a prompt investigation was conducted by county law enforcement officials and the insurance carrier of the municipality. The court criticized *Touhey*, and recognized that the *Touhey* court's holding that actual knowledge constituted insufficient notice has been seriously undermined by recent cases.[93] Judge Sullivan's well-reasoned opinion in *Geyer* indicates that a plaintiff who has not strictly complied with the notice requirements will not be denied a remedy unless the governmental entity is prejudiced, and that governmental entities will not be permitted to take refuge in the technicalities of the notice requirements when the purpose of those requirements, in fact, has been satisfied. *Batchelder* and *Foster* indicate a contrary result.

Another aspect of *Geyer* and *Batchelder* appears to be of significance to the practitioner. The *Geyer* court stated in a footnote that, although Indiana Code section 18-2-2-1 only required notice of the *occurrence*, the analogous provision of the Tort Claims Act requires notice of a claim.[94] Perhaps the court intended this to be a warning that, in future cases arising under the Tort Claims

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[89]175 Ind. 98, 93 N.E. 540 (1911).

[90]337 N.E.2d at 890.

[91]325 N.E.2d 223 (Ind. Ct. App. 1975).

[92]346 N.E.2d 634 (Ind. Ct. App. 1976).

[93]*Id.* at 642.

[94]*Id.* at 639 n.1, *citing* IND. CODE § 34-4-16.5-7 (Burns Supp. 1976). *But see* Thomann v. City of Rochester, 256 N.Y. 165, 176 N.E. 129 (1931).

Act, it will require that written notice specify, as the Act requires,[95] that a claim of liability is being asserted. If such is the case, mere notice of the occurrence will not be sufficient to constitute substantial compliance with the notice requirements of the Tort Claims Act. The Third District in *Batchelder* seemed to read the same strict requirement into Indiana Code section 18-2-2-1,[96] although as noted by the Second District in *Geyer*, that statute appears to require only notice of the occurrence. The Third District indicated in *Batchelder* that not only is a municipality entitled to notice of the occurrence, but it also is entitled to notice that the plaintiff, in fact, is claiming liability.

In *Board of Commissioners v. Briggs*,[97] the First District Court of Appeals undertook the task of interpreting *Campbell v. State*[98] "to delineate the bounds of protection . . . afforded to the State and its subdivisions by the doctrine of sovereign immunity [in pre-Tort Claims Act cases]."[99] The plaintiff in *Briggs* was injured when his motorcycle left the highway at a "Y" intersection that was not marked by warning signs. The evidence adduced at trial demonstrated that a warning sign had been erected by state officials, but it had fallen into a state of disrepair. Without deciding whether the initial decision to erect the warning sign was a discretionary act for which sovereign immunity would attach,[100] the court held, on the basis of substantial precedent, that "[o]nce the decision was made to place the signs at the intersection, the subsequent placement and maintenance of the signs was a purely ministerial act," the negligent performance of which would give rise to liability.[101]

In an effort to clarify existing law, the court concluded that the "last vestige" of sovereign immunity referred to in *Campbell* was dependent upon and coextensive with the personal immunities that traditionally have been conferred upon governmental entities and is to be determined under the doctrine of respondeat superior

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[95]IND. CODE § 34-4-16.5-9 (Burns Supp. 1976) requires, among other things, a short and plain statement of the amount of damages sought.

[96]337 N.E.2d at 890.

[97]337 N.E.2d 852 (Ind. Ct. App. 1975).

[98]259 Ind. 55, 284 N.E.2d 733 (1972). *See* Note, *Sovereign Immunity In Indiana—Requiem?* 6 IND. L. REV. 92 (1972); Foust, *supra* note 55, at 274-76.

[99]337 N.E.2d at 860.

[100]*Id.* at 863. Later in its opinion, however, the court indicated that a city was duty-bound to place warning signs at "inherently dangerous" intersections. *Id.* at 874. It would appear that a city has no discretion in this regard.

[101]*Id.* at 863, *citing* Adams v. Schneider, 71 Ind. App. 249, 255, 124 N.E. 718, 720 (1919).

in accordance with those standards.[102] The court reasoned that the *Campbell* court's failure to abrogate sovereign immunity in its entirety was a recognition that governmental entities should not be held liable in situations in which their employees are protected by personal immunities. Significantly, the court equated its holding with the tests of liability set forth in the Tort Claims Act.[103] Thus, prior case law regarding the personal immunities of governmental employees should be important precedents in cases arising under the Tort Claims Act.

The court further attempted to determine whether the "private duty" test referred to in *Campbell* was merely a restatement of the "ministerial-discretionary" test, or whether a plaintiff was required to prove both the breach of a private duty and the misperformance of a ministerial act to defeat the defense of sovereign immunity.[104] In an analysis abounding with circumlocution, the court concluded: (1) An act performed in furtherance of a public duty is usually considered a discretionary act,[105] (2) a governmental entity is immune only when its agents are shown to have been exercising their governmental discretion in the performance of a purely public duty,[106] (3) a governmental entity is not immune when its agents are shown to have breached a private duty, irrespective of whether the agents were engaged in acts committed to the discretion of their office,[107] and (4) the state is not immune in the present case because its agents negligently performed a ministerial act.[108] It would appear from this analysis that the private duty test and the ministerial-discretionary test are essentially interchangeable, and that the labels to be used will vary from case to case. Any distinctions between the tests are likely to be so finespun as to be unworkable. Fortunately, the Tort Claims Act speaks only of "discretionary functions."[109]

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[102]This approach previously had been suggested by the commentators. *See* Foust, *supra* note 55, at 274-75; Note, *Sovereign Immunity*, *supra* note 98. The court noted that governmental employees traditionally have been considered immune from liability when they are found to have been acting in good faith and within the scope of their authority while performing a discretionary function. 337 N.E.2d at 861.

[103]337 N.E.2d at 862-63, quoting from Foust, *supra* note 55, at 274-75.

[104]This question was initially raised in Foust, *supra* note 55, at 275.

[105]337 N.E.2d at 862.

[106]*Id.* The court emphasized the word "purely" and thus suggested that there are situations in which both a public and private duty exist.

[107]*Id.* at 862-63. The court emphasized that an act involving the exercise of discretion, as that word is commonly defined, is not necessarily a discretionary act in a legal sense. See W. PROSSER, LAW OF TORTS § 132, at 990 (4th ed. 1971).

[108]337 N.E.2d at 862. *See* note 101 and accompanying text.

[109]IND. CODE § 34-4-16.5-3(6) (Burns Supp. 1976).

It was also not clear from *Campbell* what the court meant by "private duty."[110] Addressing this question, the court in *Briggs* reasoned that the phrase was either a reference "to some general private duty test that must be met to escape the application of the sovereign immunity doctrine, or . . . to the specific duty that must be shown as a matter of law in every negligence case."[111] The court appears to have placed the latter interpretation on the private duty test. Concluding that "if there is any duty owed by the County in this case, it must be the common law duty to use reasonable care under all circumstances,"[112] the court held that:

> [A] duty on the part of the County to use reasonable care in maintaining its streets and highways will arise whenever it can be shown that an intersection is inherently dangerous because of the absence of a warning sign, or when it can be shown that the county has foreclosed the issue of inherent danger by failing to maintain a sign that had previously been placed at the intersection . . . .[113]

A similar interpretation appears to have been placed upon the private duty test in *Elliott v. State*,[114] in which it was held that a private duty existed because the state had a "general duty to exercise reasonable care in the design, construction and maintenance of its highways . . . ."

Finally, in *City of Indianapolis v. Bates*,[115] the Second District Court of Appeals held that a municipality cannot be held liable under the doctrine of strict liability for injuries sustained by a plaintiff as a proximate result of a defective traffic signal. The

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[110]The *Campbell* court stated: "Therefore, it appears that in order for one to have standing to recover in a suit against the state there must have been a breach of a duty owed to a private individual." 284 N.E.2d at 737.

The *Briggs* court accurately observed that there is no easy way to define public and private duty. Earlier cases are not very helpful in this regard. In Simpson's Food Fair, Inc. v. City of Evansville, 149 Ind. App. 387, 272 N.E.2d 871 (1971), the court held that the duty to provide police protection was a public rather than private or special duty. In Roberts v. State, 307 N.E.2d 501 (Ind. Ct. App. 1974), the court held that public officials have a private duty to exercise reasonable care for the safety of prisoners, and in Scott County School District v. Asher, 312 N.E.2d 131 (Ind. Ct. App. 1974), the court held that school officials owed a private duty to exercise reasonable care for the safety of students using inherently dangerous shop equipment. No clear guidelines for differentiating public duties from private duties have emerged from these cases.

[111]337 N.E.2d at 862. *See* Miller v. Griesel, 308 N.E.2d 701, 706 (Ind. 1974).

[112]337 N.E.2d at 873.

[113]*Id.* at 874.

[114]342 N.E.2d 674, 676-77 (Ind. Ct. App. 1976).

[115]343 N.E.2d 819 (Ind. Ct. App. 1976).

plaintiff stipulated that the city had neither actual nor constructive knowledge that the signal was defective, which precluded recovery for negligence. The court carefully limited its holding to the facts, and declined to decide whether, in any circumstances, recovery could be premised upon the doctrine of strict liability.[116]

4. Medical Malpractice

The two-year statute of limitations governing medical malpractice actions, under both the new medical malpractice act[117] and its predecessor special statute of limitations,[118] begins to run from the date of the physician's wrongful act or omission. The statute is carefully drafted to prevent the courts from extending the two-year period by applying the general rule of tort law that the statute of limitations does not begin to run until the date that a cause of action accrues, which may be long after the date of the wrongful act or omission.[119] It has been said that there are only two exceptions to the malpractice statute of limitations: the doctrine of fraudulent concealment and the grace period afforded minors because of their legal disability.[120] In view of the recent legislative effort to emasculate the latter exception,[121] the doctrine of fraudulent concealment has become the most important device for circumventing the statute.

The doctrine of fraudulent concealment is based upon the theory of equitable estoppel. It is a judge-made doctrine recognizing "that one who practices deceit or fraud, and conceals material facts and thereby prevents the discovery of the wrong, should not be permitted to take advantage of his own deceit or concealment by asserting the statute of limitations."[122] The doctrine had its

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[116]*Id.* at 822 n.2.

[117]IND. CODE §§ 16-9.5-3-1, -2 (Burns Supp. 1976) (within two years of negligent act or omission).

[118]*Id.* § 34-4-19-1 (Burns 1973) (within two years of act, omission or neglect).

[119]*See* Toth v. Lenk, 330 N.E.2d 336, 338 (Ind. Ct. App. 1975).

[120]*Id.* at 342 (concurring opinion).

[121]In Chaffin v. Nicosia, 261 Ind. 698, 310 N.E.2d 867 (1974), the supreme court held that the Indiana legal disability statute, IND. CODE § 34-1-2-5 (Burns 1973), applied to malpractice actions. *See* Foust, *supra* note 55, at 273-74. The new malpractice act, which was enacted after *Chaffin* was decided, provides that a child under the age of six may file suit any time before his eighth birthday. IND. CODE § 16-9.5-3-1 (Burns Supp. 1976). The clear intent of this provision is to nullify *Chaffin*. The constitutionality of this provision is subject to serious question. *See* Mallor, *A Cure for the Plaintiff's Ill?* 51 IND. L.J. 103, 116-17 (1975); Brennan, *supra* note 26, at 360-61 n.143; Note, *A Constitutional Perspective on the Indiana Medical Malpractice Act*, 51 IND. L.J. 143, 153 (1975).

[122]Guy v. Schuldt, 236 Ind. 101, 107, 138 N.E.2d 891, 894 (1956).

genesis in Indiana in *Guy v. Schuldt*.[123] The plaintiff in *Guy* alleged that a physician left a broken drill bit in his leg and negligently failed to disclose this condition during three years of treatment. The plaintiff discovered this condition eleven years after the physician-patient relationship terminated, and filed suit against the physician within two years of that date. The trial court sustained the defendant's demurrer to the complaint on the ground that the statute of limitations had run. Reversing this decision, the supreme court held that the fiduciary relationship between a physician and his patient imposes a duty upon the physician to disclose all material facts, and the failure to disclose such facts may constitute fraudulent concealment.[124] The court remanded the case with instructions to overrule the demurrer and give the plaintiff an opportunity to plead fraudulent concealment by way of reply.

In the recent case of *Toth v. Lenk*,[125] the Third District Court of Appeals considered the question of when a fraudulent concealment begins and ceases to toll the statute of limitations. The plaintiff suffered a hip injury and was treated for this condition by the defendant for approximately five months. Suspecting that his condition had not improved satisfactorily, he consulted two other physicians, and was advised by them that the defendant had improperly diagnosed the condition. Suit was filed less than two years from the date he consulted the last physician, but more than two years from the date of the alleged wrong. The Third District Court of Appeals rejected the plaintiff's contention that the statute would be unconstitutional unless it were construed to mean that it did not begin to run until actual discovery of the injury, and further declined to construe the statute as including an implied provision that the time period did not begin to run until plaintiff had a reasonable time to to discover the injury.[126] By applying the doctrine of fraudulent concealment, however, the court achieved a result similar to that which would have been achieved had the latter construction been adopted.

The court held that a constructive fraud occurs when a physician fails to disclose to his patient that which he knows or in the exercise of reasonable care should know.[127] It would appear that,

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[123] *Id.*

[124] *Id.* at 107, 138 N.E.2d at 895. *See generally* Annot., 74 A.L.R. 1317 (1931); Annot, 144 A.L.R. 209 (1943); Annot., 80 A.L.R.2d 323 (1961); Annot., 80 A.L.R.2d 368 (1961).

[125] 330 N.E.2d 336 (Ind. Ct. App. 1975).

[126] *Id.* at 338-39.

[127] *Id.* at 339. The court's use of the pronoun "that" apparently refers to "material information." *See* Guy v. Schuldt, 236 Ind. 101, 109, 138 N.E.2d 891, 895 (1956).

under this analysis, the doctrine of fraudulent concealment requires neither an affirmative misrepresentation nor scienter, and that mere silence coupled with a duty to disclose will toll the statute of limitations. The logical import of the court's holdings is that fraudulent concealment will exist, at least during the period of treatment,[128] in every case involving a legitimate claim of malpractice because, as recognized by Judge Garrard, a physician who is guilty of negligence a fortiori "should have known" of the facts that he failed to disclose to his patient.[129] Although the constructive fraud theory is clearly a fiction, it has the significant effect of equating negligent concealment with fraudulent concealment.

Having established when a constructive fraud will begin to toll the statute, the court determined when the tolling effect will cease. In this regard, the court reasoned that a fraud can be considered to have been concealed only so long as the patient was unaware of it or was unable to discover it through the exercise of reasonable care. Reducing its holding to nonlegal terms, the court stated: "[W]here the patient knows or concludes that something is wrong in the diagnosis or treatment he has been given, he is chargeable as a matter of law with the additional knowledge he would have procured had he exercised diligence to discover it."[130] Applying this rule, the court held that the plaintiff possessed knowledge which, if pursued, would have led to the discovery of the defendant's negligence more than two years before suit was filed. The undisputed facts demonstrated that the plaintiff ceased relying upon the professional judgment of the defendant because he was convinced that he had not properly identified the condition or provided proper treatment.[131]

In dictum, the court noted that the termination of the physician-patient relationship will also cease the tolling effect of a fraudulent concealment.[132] This additional qualification stems from dictum in *Guy v. Schuldt*[133] that, once the physician-patient relationship ends, there is no longer a fiduciary relationship upon which to premise a duty to disclose, and mere silence cannot be a constructive fraud absent a duty to disclose. The court accepted this dictum without question, as did the Seventh Circuit Court of

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[128] *See* text accompanying notes 132-39 *infra*.

[129] 330 N.E.2d at 339 n.3.

[130] *Id.* at 341. Under Judge Garrard's analysis, it is "knowledge of the injury rather than the reason for it" that destroys the estoppel. *Id.* at 340-41.

[131] *Id.* at 340. The court observed that "[u]ntil the patient learns something to the contrary he is entitled to rely upon the physician faithfully discharging his duty." *Id.* n.4.

[132] *Id.* at 339.

[133] 236 Ind. 101, 109, 138 N.E.2d 891, 895 (1956).

Appeals in a previous case.[134] Under this analysis, the tolling effect ceases when the patient has actual or constructive notice of the injury, or when the physician-patient relationship ends, whichever event occurs first.[135]

In *van Bronckhorst v. Taube*,[136] however, the Second District Court of Appeals refused to apply the *Guy* dictum literally, and held that, at least in cases involving affirmative misrepresentations, the termination of the physician-patient relationship does not, as a matter of law, "commence the clock ticking on the statute of limitations."[137] The complaint in *van Bronckhorst* alleged that the defendant physician performed surgery on plaintiff's eye, and several weeks thereafter, he allegedly diagnosed plaintiff's condition as incurable glaucoma that would result in blindness within ten years. The physician allegedly advised the plaintiff that additional surgery could not be performed until blindness occurred, and that probably nothing could be done until that time. Dissatisfied with this diagnosis, the plaintiff consulted a second physician, who initially stated that plaintiff was suffering the adverse consequences of poorly performed surgery. Upon further consideration, however, he allegedly advised the plaintiff that the first physician's diagnosis and treatment were proper. Eight years later, the plaintiff was encouraged by a friend to seek an additional diagnosis. The third physician allegedly advised him, in effect, that he had been a victim of malpractice. Suit was filed against the first two physicians within two years of that date.

In a forthright and well-reasoned opinion, the Second District, per Judge Sullivan, held that the *Guy* court could not have meant what its dictum suggested because the case was remanded to give plaintiff an opportunity to plead fraudulent concealment approximately eleven years after the physician-patient relationship had terminated. Judge Sullivan reasoned that the clear implication of the remand order in *Guy* was that a fraudulent concealment can continue to toll the statute long after the physician-patient relationship ends. "To interpret Guy otherwise," he reasoned, "is to accuse our Supreme Court of knowingly sponsoring a needless waste of litigation expense and judicial time by remanding for further pleadings a complaint which no further pleadings could save."[138]

Having surmounted the *Guy* dictum, the court focused its inquiry upon the question of reasonable reliance as the touchstone

[134]Ostajic v. Brueckmann, 405 F.2d 302 (7th Cir. 1968).
[135]330 N.E.2d 336, 342 n.2 (concurring opinion).
[136]341 N.E.2d 791 (Ind. Ct. App. 1976).
[137]*Id.* at 798.
[138]*Id.* at 797.

for determining when the tolling effect of a fraudulent concealment will cease. The determinative issue, the court reasoned, is "whether, and when, if at all, the patient had a reasonable opportunity to discover his condition so that reliance upon the representations of his former physicians became unreasonable."[139] Applying this rule, the court concluded that the defendants' alleged representations to plaintiff that his glaucoma was incurable were peculiarly capable of misleading him into avoiding further inquiry. Whether the plaintiff's reliance was unreasonable, the court held, is a question of fact for the jury.

Toth and *van Bronckhorst* are readily distinguishable because *Toth* involved a failure to disclose and *van Bronckhorst* involved affirmative misrepresentations.[140] *Van Bronckhorst* was surely decided correctly because affirmative misrepresentations are actionable as fraud irrespective of whether there exists a duty to speak arising from a fiduciary relationship.[141] It is interesting to note that the Third District declined to decide in *van Bronckhorst* whether the statute of limitations could continue to be tolled beyond the termination of the physician-patient relationship in a case involving the mere failure to disclose,[142] although the court could easily have resolved this question on the basis of *Guy* and *Toth*.

Neither *Toth* nor *van Bronckhorst* resolved the question of whether, in cases involving silence amounting to a fraudulent concealment, the entire physician-patient relationship must be terminated before the statute of limitations begins to run, or whether the termination of the relationship with respect to a particular medical problem is the critical events. The majority opinions in

[139] *Id.* at 798. The holding in *van Bronckhorst* was phrased in terms of reliance, while the holding *Toth* was phrased in terms of knowledge. Perhaps this difference in semantics stems from the difficulty of proving reliance in cases like *Toth* that involve nondisclosure. It has been held in other areas of the law that reliance need not be shown in cases involving the nondisclosure of material facts. *See* Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972) (federal securities law).

[140] The *Toth* court expressly noted that "[t]here is no allegation of actual deliberate fraud," 330 N.E.2d at 340, although such was clearly the case in *van Bronckhorst*.

[141] PROSSER, *supra* note 107, § 106. The view that a fraudulent concealment ends with the termination of the physician-patient relationship has been criticized. *See* Note, *Malpractice and the Statute of Limitations*, 32 IND. L.J. 528, 539 (1957). Verbal silence does not always preclude a finding of active fraud. When a fiduciary represents by his conduct that he is faithfullly performing his duties, such representations are considered active fraud if they were purposefully made to gain an undue advantage. *See* United States v. Mandel, 415 F. Supp. 997, 1009-10 (D. Md. 1976) (mail fraud).

[142] 341 N.E.2d at 798.

both *Toth* and *van Bronckhorst* spoke broadly, although perhaps inadvertently, in terms of the entire relationship.[143] Judge Hoffman, concurring in *Toth*, carefully limited his statements to the termination of the relationship with respect to a particular medical problem.[144]

B. Breach of Duty

The duty of care in negligence cases is always the same: both the plaintiff and the defendant must conform their conduct to the standard of reasonable care under the circumstances. Despite the supreme court's unequivocal declaration in *Hammond v. Allegretti*[145] that this duty should not be obfuscated by mechanical rules based upon the presence or absence of one particular circumstance, it has not been uncommon for lower courts to characterize factual questions that arise in negligence cases in terms of duty. For example, in *Thornton v. Pender*,[146] the First District Court of Appeals held that the trial court committed reversible error by declining to give a specific jury instruction on the duty of a motorist to maintain a lookout for bicycling children. This holding appears to be unduly mechanistic in light of the trial court's thorough jury instructions on the general rules of negligence and the statement to the jury that the plaintiff premised his contention of negligence, in part, on the failure of the defendant to maintain a lookout.[147]

Whether a motorist must maintain a lookout for bicycling children is not a question of duty, but rather it is a question of how a motorist must gauge his conduct to fulfill his duty to exercise reasonable care under the circumstances.[148] The duty of due care is as wide as all human behavior, and efforts to codify human behavior into mechanical rules of duty are destined to fail.[149] As noted by Dean Prosser, "the problems of 'duty' are sufficiently

[143]341 N.E.2d at 796-98; 337 N.E.2d at 339. Some courts have held that the contractual nature of the physician-patient relationship forms the basis of a continuing negligence theory by which the statute is tolled until the entire relationship is terminated. *See* Note, *Malpractice*, *supra* note 141, at 531. Other courts, using the same theory, have held that the statute is tolled until the date of the last negligent treatment. *Id.* Indiana courts have recognized the theory of continuing negligence in some situations. *See* Montgomery v. Crum, 199 Ind. 660, 161 N.E. 251 (1928). This theory was considered in *Toth*, but was rejected with regard to malpractice actions. *See* 330 N.E.2d at 340.

[144]330 N.E.2d at 347-48.

[145]311 N.E.2d 821 (Ind. 1974).

[146]346 N.E.2d 631 (Ind. Ct. App. 1976).

[147]*Id.* at 634.

[148]*See, e.g.*, Foust, *supra* note 55, at 269.

[149]PROSSER, *supra* note 107, § 35, at 188.

complex without subdividing it [duty] in this manner to cover an endless series of details of conduct."[150] It is more properly said that the duty of reasonable care will require a motorist to maintain a lookout for children when he knows or should know that children are likely to be present in the area in which he is driving.

Indiana courts, like the courts of most jurisdictions, have demonstrated a proclivity for submitting the issue of contributory negligence or incurred risk to the jury whenever "enough uncertainty can be conjured up to make an issue as to what the reasonable man would have done"[151] under the circumstances. In cases in which a strong argument can be made that the plaintiff knowingly and intentionally exposed himself to the dangerous conduct of the defendant, the courts frequently have been confronted with the argument by defense counsel that, on the basis of the so-called "equal knowledge doctrine," a finding that the defendant was negligent a fortiori requires the finding that the plaintiff was contributorily negligent. The equal knowledge doctrine is premised upon the theory that when a plaintiff and defendant have equal knowledge and appreciation of a danger presented by the defendant's conduct, and each has an opportunity to take reasonable precautions, they are equally responsible for any resulting damage.[152] It has been applied in several Indiana cases to bar a plaintiff's recovery as a matter of law.[153]

The reluctance of the courts to invade the province of the jury, and the dubious precedential value of appellate court decisions holding that certain types of conduct constitute contributory negligence or incurred risk as a matter of law,[154] have led to much judicial effort to distinguish the "equal knowledge" cases from cases under consideration. During the previous survey period, the Third District Court of Appeals held that the equal knowledge doctrine was limited to situations in which both the plaintiff and the defendant were active participants in a dangerous activity.[155]

In the recent case of *Hi-Speed Auto Wash, Inc. v. Simeri*,[156] the Third District Court of Appeals placed additional limitations upon the doctrine by holding that it applies only to cases in which the

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[150]*Id.* § 53, at 324.

[151]*Id.* § 65, at 420.

[152]Hi-Speed Auto Wash, Inc. v. Simeri, 346 N.E.2d 607, 608-10 (Ind. Ct. App. 1976).

[153]Hunsberger v. Wyman, 247 Ind. 369, 216 N.E.2d 345 (1966); Hedgecock v. Orlosky, 220 Ind. 390, 44 N.E.2d 93 (1942); Stallings v. Dick, 139 Ind. App. 118, 210 N.E.2d 82 (1965).

[154]*See* PROSSER, *supra* note 107, § 35, at 188; *Brennan, supra* note 26, at 348.

[155]Dreibelbis v. Bennett, 319 N.E.2d 634 (Ind. Ct. App. 1974).

[156]346 N.E.2d 607, 610 (Ind. Ct. App. 1976).

plaintiff "was engaged in some act whereby, with respect to the defendant, he precipitated his own injury," and in which the record contains no evidence from which the jury could find that the plaintiff was entitled to assume that the defendant would exercise reasonable care.

The standard of reasonable care under the circumstances is generally an objective standard with respect to the mental capacity of the actor.[157] An important exception to this rule exists in cases involving children. The standard by which the reasonableness of a child's conduct is measured is the degree of care that would have been exercised under the circumstances by a child of like age, intelligence and experience.[158] This rule, like most rules of negligence, is readily translated into a jury instruction, and permits the jury, whose members usually have had a wide range of experience with children, to determine the subjective capacity of the individual child to recognize and appreciate unreasonable risks of harm, and to determine objectively how a reasonable and prudent child having like attributes would have behaved under the circumstances.[159]

A child has been defined as "a person of such immature years as to be incapable of exercising the judgment, intelligence, knowledge, experience and prudence demanded by the standard of the reasonable man applicable to adults."[160] In practice, a person over the age of sixteen rarely has been treated as a child, although the flexibility of the rule would not preclude such a result.[161] In *Moore v. Rose-Hulman Institute of Technology*,[162] however, the First District Court of Appeals appears to have held that whether a person is to be considered a child or adult in a negligence case is to be determined by reference to Indiana's legal disability statute, which defines an infant as a person under eighteen years of age.[163] The infinite variety of fact situations that can be expected to arise in negligence cases and the desirability of maintaining flexibility strongly militate against the establishment of a rule that requires trial courts to charge the jury on the standard of care applicable to children in every case in which the actor is under eighteen years of age. It will be unfortunate if *Moore* is read as establishing such a rule. There will be cases in which

[157] PROSSER, *supra* note 107, § 32, at 154.

[158] *E.g.*, Stewart v. Jeffries, 309 N.E.2d 443 (Ind. Ct. App. 1974); PROSSER, *supra* note 107, § 32 at 155; RESTATEMENT (SECOND) OF TORTS § 283A (1965).

[159] PROSSER, *supra* note 107, § 32, at 155.

[160] RESTATEMENT (SECOND) OF TORTS § 283A, comment a (1965).

[161] *Id.*

[162] 331 N.E.2d 462 (Ind. Ct. App. 1975).

[163] IND. CODE § 34-1-67-1 (Burns Supp. 1976).

a person under the age of eighteen should be treated as an adult, and cases in which a person over the age of eighteen should be treated as a child.[164] The courts should not be bound by fixed rules laid down in advance without regard to the facts of the particular case under consideration.

C. *Proximate Cause*

In *State v. Dwenger*[165] the plaintiff was injured by a defective surface condition of a bridge that was negligently designed and constructed by agents of the State of Indiana. The proof adduced at trial demonstrated that agents of the state routinely inspected the bridge, at least for structural defects, but that no effort had been made by them to cure the defective condition. A jury verdict was returned for the plaintiff, and the state appealed on the ground that, *inter alia,* the City of Indianapolis had a duty to maintain the surface of the bridge, and its breach of that duty was sufficient intervening cause that superseded any negligence of the state to cause the plaintiff's injury.

Rejecting this contention, the Second District Court of Appeals held that the defective surface condition and the consequent injury to plaintiff were foreseeable results of the negligent manner in which the state designed and constructed the bridge. The court further held that, assuming the city had a duty to maintain the surface of the bridge, its failure to so " 'was not an intervening cause that interrupted or turned aside the natural sequence of events' resulting from" the state's negligence.[166] No mention was made by the court of the foreseeability of the city's intervening negligence.

Dwenger is in accord with the *Restatement* and majority view that "[w]here the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability . . . ."[167] Thus, the foreseeability of an intervening cause

[164]Some courts have established rigid rules based upon the multiples of seven contained in the Bible for determining when a child is capable of negligence. *See* PROSSER, *supra* note 107, § 65, at 155-56. Indiana courts at one time expressed this view. *See* Bottorff v. South Constr. Co., 184 Ind. 221, 110 N.E. 977 (1915); Kent v. Interstate Pub. Serv. Co., 97 Ind. App. 13, 168 N.E. 465 (1932); Note, *Contributory Negligence of Children In Indiana: Capacity and Standard Of Care,* 34 IND. L.J. 511 (1959). *See* Harris v. Indiana General Service Co., 206 Ind. 351, 189 N.E. 410 (1934) (18-year-old with mental age of 6).

[165]341 N.E.2d 776 (Ind. Ct. App. 1976).

[166]*Id.* at 779.

[167]RESTATEMENT (SECOND) OF TORTS § 442B (1965); PROSSER, *supra* note 107, § 44 at 286. *But see* Indiana Service Corp. v. Johnston, 109 Ind.

is not significant when the force operates to change the circumstances surrounding a plaintiff's injury, but produces a result within the scope of the risk created by the defendant's conduct. This rule is premised upon the belief that it is only a slight extension of the defendant's responsibility "to hold him liable when the danger he has created is realized through external factors which could not be anticipated."[168] In occasional cases, the courts have held that the passage of time between the original negligence and the intervening negligence was sufficient to shift responsibility from the first wrongdoer to the second.[169] This approach was not considered in *Dwenger*, although a substantial period of time appears to have elapsed between the time the bridge was designed and constructed by the state and the time of the plaintiff's injury.

In the majority of situations, reasonable foreseeability remains the touchstone of proximate cause, and a foreseeable intervening cause will not supersede a defendant's negligence and relieve him of liability. Thus, in *Childs v. Rayburn*,[170] the defendant was held liable for the death of an employee who was struck by lightning while working in the defendant's open field. The defendant contended on appeal that the lightning bolt was unpredictable, and that his failure to foresee it and take precautions against it could not have been the cause of his employee's death. The evidence was conflicting, but several persons who were working near the field at the time in question testified that they saw and heard an approaching storm.[171]

After engaging in a general discussion of liability for injuries brought about by acts of God, the Third District Court of Appeals held that the defendant's permitting his employee to remain in an open field, unprotected from the pending storm, could have been considered the "immediate proximate cause" of death.[172] The court's use of the phrase "immediate proximate cause" is unfortunate because the concept of proximate cause is confusing enough without the addition of excess baggage. Apart from its semantics, however, *Childs* is concordant with the general rule that the duty of reasonable care sometimes requires one to anticipate unusual weather conditions, and the failure to do so may be negligence when it has created or increased an unreasonable risk of harm to someone within the scope of the duty.[173]

Indiana courts have held, at various times, that foreseeability

App. 204, 34 N.E.2d 157 (1941).

[168] PROSSER, *supra* note 107, § 44, at 286.

[169] See *id.* at 289 n.55.

[170] 346 N.E.2d 655 (Ind. Ct. App. 1976).

[171] *Id.* at 658.

[172] *Id.* at 660.

[173] PROSSER, *supra* note 107, § 44, at 273, 275.

is an element of duty rather than proximate cause.[174] In *Geyer v. City of Logansport*,[175] the defendant police officer fired two bullets at a bull roaming at large in a residential area. One of the bullets ricocheted off the bull and struck the plaintiff, who was standing at a ninety degree angle to the defendant's line of fire. Both the plaintiff and defendant testified at trial that they did not anticipate that the bullet would ricochet as it did. Reasoning that what is reasonably foreseeable must be measured by objective rather than subjective standards, the court placed little credence in this testimony and rejected the defendant's contention that the shooting was an unforeseeable freak accident. In a *Palsgraf*-like analysis,[176] the court held that the harm suffered by plaintiff was sufficiently foreseeable to warrant the submission of negligence to the jury. Although it may appear, at first blush, that the court attenuated the concept of foreseeability, *Geyer* is in accord with the general rule that "as the gravity of harm increases, the apparent likelihood of its occurrence need be correspondingly less."[177]

D. Vicarious Liability

Dean Prosser has described the principle of vicarious liability as a means by which the law accomplishes a deliberate allocation of risk.[178] The automobile has been responsible for numerous extensions of the principle of vicarious liability because "it is felt that, since automobiles are expensive, the owner is more likely to be able to pay any damages than the driver . . . and that the owner is the obvious person to carry the necessary insurance to cover the risk."[179] Apart from the vicarious liability of a master for the negligence of his servants, the three most common devices for allocating losses arising out of automobile collisions are consent statutes, the family purpose doctrine, and the joint enterprise doctrine.

Consent statutes generally provide that the owner of an automobile is liable for damages caused by any person driving the automobile with the owner's consent.[180] A modified consent statute is found in Indiana Code section 9-1-4-32,[181] which provides, in substance, that a person who signs a minor's driver's license appli-

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[174]*E.g.*, Southern Ry. v. Harpe, 223 Ind. 124, 58 N.E.2d 346 (1944); Galbreath v. Engineering Constr. Corp., 149 Ind. App. 347, 273 N.E.2d 121 (1971).

[175]346 N.E.2d 634 (Ind. Ct. App. 1976).

[176]Palsgraf v. Long Island Ry., 248 N.Y. 339, 162 N.E. 99 (1928).

[177]Prosser, *supra* note 107, § 31, at 147.

[178]*Id.* § 69, at 459.

[179]*Id.* § 73, at 481.

[180]*Id.* at 486-87.

[181]IND. CODE § 9-1-4-32(c) (Burns Supp. 1976).

cation is jointly and severally liable with the minor for damages caused by the minor's negligent operation of a motor vehicle. In *Wenisch v. Hoffmeister*,[182] the Second District Court of Appeals held that this statute imputes liability only, and does not serve to impute the contributory negligence of a minor to the person who sponsored his driver's license application. The defendant in *Wenisch* unsuccessfully contended that the contributory negligence of a minor should have been imputed to his father, who signed the driver's license application, to preclude the father from recovering for damage caused to his automobile by the defendant. The court's holding is supported by policy and reason. The statute was enacted to protect the public from impecunious minors.[183] It was not intended to diminish the recovery of a person who fulfilled this statutory purpose by agreeing to become vicariously liable for damages arising from a minor's negligence.

Indiana does not follow the family purpose doctrine, which is recognized by approximately one-half of the states.[184] The family purpose doctrine provides that an owner of an automobile who permits a member of his family to drive his automobile for a family purpose makes the family purpose a business purpose, and the member of his family is considered to be his agent.[185] Like most states, however, Indiana follows the joint enterprise doctrine.[186] Although this doctrine was precipitated by the search for financially responsible defendants in automobile cases, it ironically has evolved into a "defendant's doctrine" because it has been used most frequently to impute the contributory negligence of another to the plaintiff.[187] Thus, it is not uncommon for a passenger in an automobile to be barred from recovering from negligent third persons because the driver of the vehicle in which he was riding was guilty of contributory negligence. A joint enterprise is analogous to a partnership, and the courts generally have required that the undertaking be motivated by a common pecuniary purpose before a joint enterprise will be found to exist.[188] In the recent case of *Grinter v. Haag*[189] the First District Court of Appeals underscored the importance of a common pecuniary purpose, and indicated that efforts to make the family purpose doctrine a part of

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[182]342 N.E.2d 665 (Ind. Ct. App. 1976).

[183]*Id.* at 667. *Cf.* PROSSER, *supra* note 107, § 73, at 486-87.

[184]*E.g.*, Bryan v. Pommert, 110 Ind. App. 61, 37 N.E.2d 720 (1941); PROSSER, *supra* note 107, § 73 at 483.

[185]PROSSER, *supra* note 107, § 73, at 483-86.

[186]*E.g.*, Keck v. Pozorski, 135 Ind. App. 192, 191 N.E.2d 325 (1963); PROSSER, *supra* note 107, § 72.

[187]PROSSER, *supra* note 107, § 72, at 476.

[188]*Id.* at 479.

[189]344 N.E.2d 320 (Ind. Ct. App. 1976).

Indiana law under the guise of the joint enterprise doctrine will meet with no success.

The plaintiff in *Grinter* was the owner of and passenger in an automobile being driven by his spouse at the time of a collision with the defendant's vehicle. The trial court instructed the jury on the joint enterprise doctrine on the ground that the trip was undertaken for the pecuniary purpose of moving to plaintiff's new place of employment, and the jury returned a verdict in favor of the defendant. The defendant contended on appeal that the purpose of the trip was to enhance family income, and that plaintiff's spouse had a common pecuniary interest in the accomplishment of that purpose because she was unemployed and dependent upon the plaintiff for her support. Thus, according to the defendant, it was proper for the jury to charge the plaintiff with the contributory negligence of his spouse. Rejecting this argument, the court held that the application of the joint enterprise doctrine to the marital relationship is limited to situations in which each spouse directly and actively participates in a business venture. The purpose for which the plaintiff's spouse made the trip, the court reasoned, was the furtherance of the marital relationship, and any pecuniary interest that she had in the trip was merely incidental.[190]

E. Damages

In *Nicholson's Mobile Home Sales, Inc. v. Schramm*,[191] the First District Court of Appeals clarified Indiana's position on the propriety of awarding punitive damages where the defendant may be subject to criminal prosecution for the same act. In *Schramm*, the circumstances of defendant's unlawful self-help repossession techniques,[192] which included a trespass and assault and battery, were found to be sufficiently aggravating to permit an award of punitive damages. Defendants on appeal alleged error in the trial court's refusal to instruct the jury that punitive damages cannot be recovered where the defendant may be subject to criminal prosecution for the same act. The court, citing *Taber v. Hutson*,[193] conceded that defendant had correctly stated the general rule in Indiana. However, the court went on to list three exceptions to the general rule of *Taber*. First, a defendant who may be subject to

[190] *Id.* at 324.

[191] 330 N.E.2d 785 (Ind. Ct. App. 1975), also discussed in Townsend, *Secured Transactions and Creditors' Rights, supra.*

[192] The repossession was unlawful because the plaintiffs' lien on the seized property turned out to be superior to that of the defendant's. The trespass and assault and battery were held to constitute a "breach of the peace" under IND. CODE § 26-1-9-503 (Burns 1974).

[193] 5 Ind. 322 (1854).

criminal prosecution may still be liable for punitive damages for conduct which indicates a "heedless disregard of the consequences."[194] Second, "if the statute of limitations has run on the criminal charges, punitive damages may not necessarily be precluded."[195] Finally, a corporation, since it cannot be criminally prosecuted, may be liable for punitive damages for the acts of its agents.[196] Concluding that all three of these exceptions were applicable to the facts of this case, the court held that the trial court had not erred in refusing the defendant's requested instruction.[197]

Childs v. Rayburn[198] also presented the court of appeals with the issue of the proper jury instruction to be used for calculating damages in a parent's action for wrongful death of his minor child. The trial court had correctly instructed the jury that recovery in such an action is limited to the actual pecuniary loss resulting from the death of the child, but also instructed that in making the calculation, elements of damage such as loss of care, loss of love and affection, and loss of parental training and guidance could be considered.[199] Despite the apparent inconsistency the court

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[194]330 N.E.2d at 791, *citing* True Temper Corp. v. Moore, 299 N.E.2d 844 (Ind. Ct. App. 1973); Capitol Dodge, Inc. v. Haley, 154 Ind. App. 1, 288 N.E.2d 766 (1972); Moore v. Crose, 43 Ind. 30 (1873).

[195]330 N.E.2d at 791, *citing* True Temper Corp. v. Moore, 299 N.E.2d 844 (Ind. Ct. App. 1973); Cohen v. Peoples, 140 Ind. App. 353, 220 N.E.2d 665 (1966) (dictum).

[196]330 N.E.2d at 791, *citing* Indianapolis Bleaching Co. v. McMillan, 64 Ind. App. 268, 113 N.E. 1019 (1916); Baltimore and O.S.W. R.R. v. Davis, 144 Ind. App. 375, 89 N.E. 403 (1909).

[197]The court also held that the trial court had properly rejected defendant's contention that punitive damages are not normally awarded in cases involving real property, such as trepass actions. 330 N.E.2d at 791.

[198]346 N.E.2d 655 (Ind. Ct. App. 1976), also discussed at text accompanying notes 170-73 *supra*.

[199]The general rule is that the parent may recover:

> the value of the child's services from the time of death until he would have attained his majority taken in connection with his prospects in life less the cost of his support and maintenance during that period, including board, clothing, schooling and medical attention. To this may be added, in proper cases, the expenses of care and attention to the child, made necessary by the injury, funeral expenses and medical services. Appellants also add that the jury may consider the condition of the decedent's family and the pecuniary value of all acts of kindness and attention which the deceased child might reasonably be anticipated to render until its majority. But that the parent has been deprived of the happiness, comfort, and society of the child or has incurred physical or mental suffering or pain by reason of loss of the child, may not be considered by the jury.

Id. at 633-63, quoting from Hahn v. Moore, 127 Ind. App. 149, 133 N.E.2d 900 (1956) (citations omitted).

affirmed a verdict for the plaintiff, concluding that the instructions were not contradictory and, taken as a whole, were not prejudicially misleading.[200] The decision seems somewhat suspect however, since in considering loss of love and affection the jury may have awarded damages for the sorrow and mental distress of the parents rather than the actual pecuniary loss resulting from the death of the child.

XIX. Trusts and Decedents' Estates

*Melvin C. Poland**

Although the development of case law in this area produced no "landmark" decisions during the current survey period, two cases involving claims against a decedent's estate and one involving the constitutionality of a family protection statute warrant review. This survey also contains a brief comment on new sections of the Indiana Code, which are primarily concerned with non-probate transfers. Creation of multi-party accounts under the new statutes is of particular significance in administration of estates.

A. Case Development

1. Claims Against Decedents' Estates

In *Richardson v. Richardson*,[1] the court of appeals held that funeral expenses are "unquestionably" a claim against a decedent's estate but are not to be considered part of the expenses of administration. The effect of this holding is to make claims for

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Indiana adheres to the position (probably a minority one) that the value of lost services and contributions from the child after he has reached majority may not be recovered. This limitation has been criticized since the parents have already incurred a large cost in raising a child who is approaching majority and yet the child will often not become a financial asset to his parents until he is near to or has reached majority. *See* C. McCormick, Law of Damages § 101 (1935).

[200]The court was willing to concede, however, that an instruction which more closely follows the language of *Hahn* is preferable.

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[1]345 N.E.2d 251 (Ind. Ct. App. 1976). For another discussion of this case, see Townsend, *Secured Transactions and Creditors' Rights*, *supra* at 333.