# XVII. Torts

JUDITH T. KIRTLAND*

## *A. Negligence*

*1. Duty.*— In *Rossow v. Jones*,[1] the court of appeals affirmed a judgment entered for a tenant and against his landlord for personal injuries arising from the tenant's slip and fall in his apartment house. The accident occurred on a common stairway over which the landlord exercised control. At the time of the accident, the steps were covered with snow and ice.

For the purposes of this Survey, the most important issue considered by the court was the question of the landlord's duty to his tenants. Specifically, the court's opinion focused on the 1882 Indiana Supreme Court decision of *Purcell v. English*,[2] in which a tenant fell to the ground from a snow and ice covered common stairway when a rotten and loosened railing gave way. In that case, the supreme court affirmed a verdict directed against the tenant and stated that when a common stairway " 'is rendered unsafe by temporary causes, such as the accumulation of snow and ice, the landlord is not liable to the tenant who uses such stairway with full knowledge of its dangerous condition,' "[3] unless the landlord has contracted to repair the premises.

The *Rossow* court contrasted the *Purcell* decision with that of the court of appeals in *LaPlante v. LaZear*,[4] in which a tenant recovered for personal injuries caused by a latent defect in a step. *Purcell* was distinguished on the grounds that it concerned only a temporary covering of snow and because that opinion had specifically excluded a latent defect from the scope of its holding.[5] The *LaPlante* court, however, had specifically held that a landlord did have a duty to use reasonable care to maintain the common areas over which he maintained control.[6] The court reaffirmed the *LaPlante* holding as to the landlord's duty to maintain the common areas under his control and then proceeded to implicitly overrule the *Purcell* decision by

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*Member of the Law Firm of Lewis, Bowman, St. Clair, & Wagner—Indianapolis. A.B., Indiana University, 1969; M.A., Indiana University, 1971; J.D., Indiana University—Indianapolis, 1974.

[1]404 N.E.2d 12 (Ind. Ct. App. 1980).

[2]86 Ind. 34 (1882).

[3]404 N.E.2d at 13 (quoting 86 Ind. at 42).

[4]31 Ind. App. 433, 68 N.E. 312 (1903).

[5]404 N.E.2d at 13.

[6]*Id.*

holding that the scope of the landlord's duty extends to include hazards created by natural accumulations of snow and ice.[7]

The effect of *Rossow* is to adopt the so-called Connecticut rule,[8] which was discussed in the Rhode Island case of *Fuller v. Housing Authority.*[9] The *Fuller* court stated the rule as follows:

> As we adopt the Connecticut Rule, we wish to emphasize that a landlord is not a guarantor for the safety of his tenants as they proceed along the common ways. What we do say, however, is that an accumulation of ice or snow upon those portions of the premises reserved for the common use of his tenants may make the landlord liable for injuries sustained by his tenant which are due to such an accumulation, provided the landlord knows, or should have known, of the condition and failed to act within a reasonable time thereafter to protect against injuries caused thereby. The mere accumulation of snow or ice does not ipso facto make the landlord liable; he must be given a reasonable time after the storm has ceased to remove the accumulation of snow or ice found on the common ways or to take such measures as will make the common areas reasonably safe from the hazards arising from such a condition.[10]

As the *Fuller* court pointed out, the Connecticut rule does not make the landlord a guarantor with respect to injuries resulting from accumulations of snow and ice.[11] The law regarding the landlord's duty has simply been extended to its logical conclusion. The exception for accumulations of snow and ice has been eliminated and the landlord is now required to act in a reasonable manner to maintain all common areas from hazards generally. Just as has been the case with other hazards, the law relating to accumulations of snow and ice now permits recovery by the tenant if the landlord knew or should have known of the hazard and failed to remove the hazard despite a reasonable opportunity to do so.

Although the *Rossow* court's ultimate holding is consistent with

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[7]*Id.* at 14.

[8]The First District refused a similar opportunity to overrule *Purcell* and adopt the Connecticut rule in Orth v. Smedley, 378 N.E.2d 20 (Ind. Ct. App. 1978).

[9]108 R.I. 770, 279 A.2d 438 (1971).

[10]*Id.* at 774, 279 A.2d at 441.

[11]For example, in Orth v. Smedley, 378 N.E.2d 20 (Ind. Ct. App. 1978), the court observed that the adoption of the Connecticut rule would not render the landlord liable because the period of time between the cessation of the storm and the plaintiff's accident was too brief to permit a reasonable landlord to learn of the hazard and take corrective action. *Id.* at 23.

the present trend in this area of the law[12] and with the realities of apartment living,[13] the court's reliance upon the decision in *Hammond v. Allegretti*[14] is not so sound. *Hammond* concerned another area of law—the duty owed by a property owner to his business invitee. Although the *Rossow* and *Hammond* cases are somewhat similar in that both involve the duty owed by a property owner to others while on his premises, the characteristics of the "others" are quite different. The situation of a business invitee who ventures upon the premises in question, perhaps for the first time, can not be readily compared with that of a tenant who lives on the premises. Equally important are the very different legal theories and principles which have governed these two areas of the law.[15] Nonetheless, the court's decision in *Rossow* is simply the most recent manifestation of an increasing willingness on the part of courts to expand the duty owed by a property owner who profits from renting his land.[16]

In *Xaver v. Blazek*,[17] the Indiana Court of Appeals considered the issue of the duty of care owed by a property owner to one who is merely a social guest or licensee. This case was brought by a plaintiff who, while a social guest at the home of the defendants, stepped from a car into a drainage ditch located about nineteen inches from the edge of the cement driveway on which the car was parked. The trial court granted the defendants' motion for judgment on the evidence at the close of the plaintiffs' presentation of evidence on the theory that the plaintiffs had established no violation of the defendants' duty to a social guest.[18]

This decision was affirmed by the court of appeals in a decision which rejected the applicability in Indiana of section 342 of the Restatement (Second) of Torts.[19] Section 342 creates an additional

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[12]*See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 268 A.2d 556 (Essex County Ct. 1970); Inman v. Binghamton Hous. Auth., 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957). *See also* Donahue, *Change in the American Law of Landlord and Tenant*, 37 MOD. L. REV. 242 (1974); Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 WIS. L. REV. 19; Note, *Landlord-Tenant—The Fall of Landlord Tort Immunity*, 35 OHIO ST. L.J. 212 (1974).

[13]*See* Note, *The Uniform Residential Landlord and Tenant Act: Reconciling Landlord-Tenant Law with Modern Realities*, 6 IND. L. REV. 741 (1973).

[14]262 Ind. 82, 311 N.E.2d 821 (1974).

[15]*Compare* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 61 (4th ed. 1971), *with id.* § 63.

[16]*See* note 12 *supra*.

[17]391 N.E.2d 653 (Ind. Ct. App. 1979).

[18]*Id.* at 655.

[19]The RESTATEMENT (SECOND) OF TORTS § 342 (1965) provides:

Dangerous Conditions Known to Possessor

A possessor of land is subject to liability for physical harm caused to licensees

duty on the part of landowners who know or have reason to know of a dangerous condition on their property which creates an unreasonable risk to licensees.[20] That section's comments, however, include a statement that in the case of an adult licensee an obvious condition is not an appropriate basis for liability since the licensee, as well as the owner, is expected to be aware and careful of an obvious condition.[21] Therefore, it is unlikely that the adoption of this rule would have changed the result in *Xaver* because the record revealed that the ditch and driveway area was well-lighted and that any danger created by the ditch was obvious.[22]

*2. Proximate Cause.*—In *Peck v. Ford Motor Co.*,[23] the plaintiff sued for injuries sustained when a truck that he was driving collided with a truck manufactured by the defendant, Ford Motor Company. The United States District Court for the Southern District of Indiana entered judgment for the plaintiff. On appeal the defendant challenged the trial court's judgment on the issues of duty and proximate causation.[24] The evidence presented at trial established that the driver of the Ford truck had experienced problems with the gear shift before he drove onto the highway; that the truck had been abandoned on the highway at least three hours before the plaintiff's accident occurred; that the driver of the Ford truck had left the truck without posting proper warning devices or pulling the truck off the travelled portion of the highway; and finally, that the plaintiff had not seen the abandoned truck even though the weather conditions permitted a clear and unobstructed view of the highway ahead.[25]

The seventh circuit held that in this factual situation, in view of Indiana's "somewhat cautious approach" to extending liability to manufacturers under products liability concepts,[26] the Indiana courts

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by a condition on the land if, but only if,

(a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and

(b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and the risk involved.

[20]Indiana's court of appeals in Wozniczka v. McKean, 144 Ind. App. 471, 247 N.E.2d 215 (1969), cited section 342 of the original Restatement of Torts with approval, but the facts of the case involved a *child* licensee only.

[21]RESTATEMENT (SECOND) OF TORTS § 342, Comment (b) (1965) provides: "If the licensees are adults, the fact that the condition is obvious is usually sufficient to apprise them, as fully as the possessor, of the full extent of the risk involved in it."

[22]391 N.E.2d at 656.

[23]603 F.2d 1240 (7th Cir. 1979).

[24]*Id.* at 1243.

[25]*Id.* at 1241-42.

[26]*Id.* at 1243.

would hold that the defendant's negligence, if any there was, in manufacturing a defective truck, was as a matter of law not the proximate cause of the plaintiff's injury.[27] The court finally concluded that the injuries suffered by the plaintiff Peck were too remote from any negligence by the defendant Ford in manufacturing its vehicle to be considered reasonably foreseeable.[28]

*3. Negligence Per Se.*—In *Brandes v. Burbank*,[29] the seventh circuit considered a challenge to the trial court's decision to give to the jury two instructions which seemed to be inconsistent. The first stated that the violation of a duty prescribed by a statute or ordinance is negligence per se[30] and the second referred to the possibility that the violation was with a reasonable excuse or justification.[31] After a lengthy analysis of Indiana's law regarding the doctrine of negligence per se, the court concluded that the trial court did not err in its instructions to the jury because both concepts were correct statements of Indiana law.[32]

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[27]*Id.* at 1245-46. The court noted that proximate causation is not the equivalent of actual causation. *Id.* at 1243. Proximate causation focuses on the extent of the defendant's duty to protect the plaintiff from the particular injuries which he sustained. The court further observed that legal standards of proximate causation are based, at least in part, on public policy considerations. *Id.*

[28]*Id.* at 1247. In its decision, the court refers to any negligence of the defendant as creating only a "condition" which made plaintiff's injuries possible. *Id.* at 1245. During the survey period, the court of appeals, in Mansfield v. Shippers Dispatch, Inc., 399 N.E.2d 423 (Ind. Ct. App. 1980), specifically disapproved a jury instruction in a negligence case which stated that a mere condition, with respect to which the interaction of others caused the accident at issue, was not the proximate cause of that accident. *Id.* at 425. The *Mansfield* court rejected this language as susceptible to the misinterpretation that passive negligence, as opposed to active negligence, cannot be a basis for liability. *Id.* This distinction, between passive and active negligence, is not recognized in Indiana law. *See* Fort Wayne Nat'l Bank v. Doctor, 149 Ind. App. 365, 272 N.E.2d 876 (1971), which expressly overruled any Indiana cases distinguishing between passive and active negligence.

[29]613 F.2d 658 (7th Cir. 1980).

[30]*Id.* at 660-61. Instruction number 12 included a lengthy statement of federal regulations regarding stopping along the interstate highway system and concluded with the following language: "If you find that the defendants violated the provisions of this regulation without reasonable excuse or justification, then such violation would constitute negligence as a matter of law on the part of the defendants." *Id.*

[31]*Id.* at 661. Instruction number 14 read as follows:

> Violation of a duty prescribed by statute or ordinance is generally considered negligence as a matter of law. Negligence as a matter of law, however, does not necessarily mean liability as a matter of law. A party may counter this evidence of negligence by showing justification for his noncompliance such as that his acts were the acts of a reasonably prudent man under the same circumstances, or by showing that his violation of the statute or ordinance was not a proximate cause of the injuries or damages sustained.

*Id.*

[32]*Id.* at 668.

*Brandes* concerned a lawsuit brought by a widow against the owner and driver of a tractor trailer with which the vehicle driven by her husband collided while the tractor trailer was parked along an emergency strip of the interstate highway. It appeared plainly from the record that this parking of the defendant's vehicle was a violation of federal regulation.[33]

The court acknowledged that there are Indiana authorities which would seem to indicate error in the trial court's decision to give both instructions in this case.[34] For example, the court quoted from *Northern Indiana Transit, Inc. v. Burk*:[35]

> "When the breach of a statutory duty is held to be negligence *per se*, or negligence as a matter of law, the court holds that the legislature has created an absolute duty, which cannot be escaped by attempting to prove that the breach was in fact done in the exercise of due care."[36]

The court stated that even though it would seem that the legislature has determined that a breach of statutory duty consitutes a failure to exercise due care and has created an absolute duty, this does not mean that there can be no excuse precluding liability.[37] The court narrowly read *Northern Transit* to mean only that the excuse cannot be that the violation of the statutory duty was done in

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[33]*Id.* at 660. The court also discussed at length the issues of whether a violation of a regulation should be regarded as the equivalent of a violation of a statute or ordinance and whether the violation of all statutes and ordinances should be considered negligence per se. *Id.* at 663. The court noted the position taken in the RESTATEMENT (SECOND) OF TORTS § 288B(1) (1965): "The unexcused violation of a legislative enactment or an administrative regulation which is adopted by the court as defining the standard of conduct of a reasonable man, is negligence itself." 613 F.2d at 663. The court concluded that there was no Indiana law on point and approved the trial court's adoption of section 288B(1) as the appropriate standard. *Id.* at 664-65.

Regarding the second issue, the court decided that the trial court had correctly evaluated the regulation as one the violation of which would be negligence per se, although violations of all regulations, statutes, and ordinances would not necessarily constitute negligence per se. *Id.* at 668. *See also* Ray v. Goldsmith, 400 N.E.2d 176 (Ind. Ct. App. 1980), in which the court discussed the standard in Indiana for determining whether the violation of a statute or ordinance is negligence per se:

> For such a violation of a statute or ordinance to be held as negligence *per se* it must be determined if the statute is applicable, that is, whether it was designed to protect the class of persons in which the plaintiff is included against the risk of the type of harm which has in fact occurred as a result of its violation.

*Id.* at 178 (citing W. PROSSER, *supra* note 15, § 36, at 200.

[34]613 F.2d at 661.

[35]228 Ind. 162, 89 N.E.2d 905 (1950).

[36]613 F.2d at 661 (quoting 228 Ind. at 171, 89 N.E.2d at 909).

[37]613 F.2d at 661.

the manner of a reasonably prudent person under those circumstances.[38] Citing *Larkins v. Kohlmeyer*,[39] decided by the Indiana Supreme Court after the *Northern Transit* case, the court noted that such a legal excuse or justification might be that it was impossible for the defendant to comply with the statute for reasons over which he had no control.[40]

After reviewing at length the cases in this area of the law decided subsequent to *Northern Transit* and *Larkins*,[41] the court concluded that the most accurate statement of the present Indiana law on this point is found in *Blankenship v. Huesman:*[42] a violation of a statutory duty is generally negligence as a matter of law but this does not mean liability as a matter of law. " 'A party may counter this evidence of negligence by showing justification for noncompliance, [such as that he acted like a reasonable and prudent man under the circumstances,] or by showing that his violation was not the direct cause of the injuries or damages sustained.' "[43] The court referred at several points throughout this opinion to the theories of Dean Foust,[44] one of which is that the proper analysis of this issue of negligence per se and excuse or legal justification is to say that as the statute at issue becomes more clearly a directive to deliberate or prepare for the safety of others, an excuse or justification for its violation becomes inherently more difficult to establish.[45] This method simply focuses on the "under the circumstances" aspect of the reasonable man test—the standard remains the same in the legal sense but can vary from case to case in the practical sense as the fact finder is called upon to analyze the dictates of and the policy reasons for various statutes.[46] In essence then, the seventh circuit concluded that proof of violation of a statute or ordinance

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[38]*Id.*

[39]229 Ind. 391, 98 N.E.2d 896 (1951).

[40]613 F.2d at 661.

[41]*See, e.g.*, Thornton v. Pender, 377 N.E.2d 613 (Ind. 1978); Davison v. Williams, 251 Ind. 448, 242 N.E.2d 101 (1968).

[42]362 N.E.2d 850 (Ind. Ct. App. 1977).

[43]613 F.2d at 667 (quoting 362 N.E.2d at 852). Although the *Brandes* opinion uses language similar to this in several places, it surely does not represent an effort on the part of the court to shift the burden of proof on the issue of proximate causation to the defendant in a negligence per se case. More likely, the language is simply used as an example of the error in the theory that negligence per se is liability per se and is not intended to make any particular statement as to the party with the burden of establishing this issue.

[44]*See* Foust, *The Use of Criminal Law as a Standard of Civil Responsibility in Indiana*, 35 IND. L.J. 45 (1959). Foust's article reflects his anticipation of the recent developments in this area of the law.

[45]613 F.2d at 667 (citing 35 IND. L.J. at 58-59).

[46]613 F.2d at 667 (citing 35 IND. L.J. at 58-59).

which constitutes negligence per se, only establishes a rebuttable presumption of liability. That presumption may be rebutted by proof which, under the circumstances of the particular case, is deemed adequate to provide an excuse or justification.

*4. Incurred Risk.*—In *Gerrish v. Brewer*,[47] the court of appeals reviewed an appellant's challenge to the trial court's refusal to include a reference to the doctrine of momentary forgetfulness[48] in its incurred risk instruction.[49] The appellant complained that the incurred risk instruction given by the court incorrectly permitted the jury to consider constructive knowledge as a bar to the plaintiff's recovery pursuant to the incurred risk defense.[50]

Quoting at some length from the decision in *Kroger Co. v. Haun*,[51] the *Gerrish* court distinguished between the doctrine of incurred risk and the doctrine of contributory negligence. In essence, incurred risk refers to a subjective mental state of awareness and venturesomeness without regard to the reasonableness of the risk acceptance, while contributory negligence involves carelessness and an objective inquiry into the reasonableness of particular actions.[52] In this light, the court concluded that the doctrine of momentary forgetfulness could only relate to the affirmative defense of contributory negligence, not to incurred risk: "[S]ince the very essence of incurred risk is the conscious, deliberate and intentional embarkation upon a course of conduct with knowledge of the circumstances, the doctrine of 'momentary forgetfulness' cannot become a part of the doctrine of incurred risk."[53] Therefore, the court held that the

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[47]398 N.E.2d 1298 (Ind. Ct. App. 1979).

[48]The doctrine of momentary forgetfulness was discussed in Town of Argos v. Harley, 114 Ind. App. 290, 49 N.E.2d 552 (1943), as follows:

> Where a pedestrian is injured as a consequence of a defect of which he had previous knowledge, the mere fact of previous knowledge does not per se establish contributory negligence. And this is also the rule where previous knowledge is coupled with absence of thought concerning the defect at the time of the injury, or momentary forgetfulness of it. Previous knowledge of a defect and forgetfulness of it are important facts to be considered in connection with all other circumstances in determining whether the party injured was exercising reasonable care. But it is not negligence, as a matter of law, for a person who has knowledge of a defect not to remember it at all times and under all circumstances.

*Id.* at 305, 49 N.E.2d at 557-58.

[49]398 N.E.2d at 1300.

[50]*Id.*

[51]379 N.E.2d 1004 (Ind. Ct. App. 1978).

[52]398 N.E.2d at 1300-01. *See* Fruehauf Trailer Div. v. Thornton, 366 N.E.2d 21 (Ind. Ct. App. 1977); Pittsburgh, C., C. & St. L. Ry. v. Hoffman, 57 Ind. App. 431, 107 N.E. 315 (1914).

[53]398 N.E.2d at 1301.

trial court committed no error in its refusal to incorporate the concept of momentary forgetfulness into its incurred risk instruction.[54]

### *B. Defamation*[55]

In *Lee v. Weston*,[56] the court of appeals reviewed a decision of the Madison County Superior Court granting summary judgment for the defendant coroner. The plaintiffs alleged that the defendant had defamed both them and the memory of their deceased son by rendering a coroner's verdict that the son's death was caused by "Aspiration of body content/Due to overdose."[57] Plaintiffs argued on appeal that their son's status as a financial dependent and a member of their household caused persons who knew them and their son to consider the verdict regarding his cause of death as a direct reflection on them.[58]

The court recognized this as a question of first impression in this jurisdiction and adopted the rule set forth by Professor Prosser: " '[N]o civil action will lie for the defamation of one who is dead, unless there is a reflection upon those still living, who are themselves defamed.' "[59] In other words, defamation of a deceased person does not give rise to a right of action on behalf of his estate, nor does the defamation of the memory of a deceased person give his relatives a cause of action for libel in their own right, unless the defamation directly reflects upon those relatives.[60]

Correctly describing this rule as that applied in the overwhelming majority of jurisdictions, the court referred to a number of dif-

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[54]*Id.*

[55]*See also* the discussion regarding the decision in Merimee v. Brumfield, 397 N.E.2d 315 (Ind. Ct. App. 1979), *infra* page 562, which case determined the survivability of claims for malicious prosecution, false imprisonment, and defamation.

[56]402 N.E.2d 23 (Ind. Ct. App. 1980).

[57]*Id.* at 24.

[58]*Id.* at 26.

[59]*Id.* (quoting W. PROSSER, *supra* note 15, § 111, at 745).

[60]*See* 50 AM. JUR. 2d *Libel & Slander* § 320 (1970), which provides:

> Although a right of action for damages for defamation of a deceased person existed under the Roman law, and still exists in some jurisdictions which adhere to the civil law, it is established that defamation of a deceased person does not give rise to a right of action at common law in favor of the surviving spouse, family, or relatives who are not defamed. And this is the rule notwithstanding the fact that the commonly accepted definition of libel includes, as one form thereof, publications tending to blacken the memory of the dead. Moreover, a libel and slander upon the memory of a deceased person which does not directly reflect upon the deceased's relatives, or upon his former associates, gives them no cause of action for libel, in their own right, upon the ground that the defamation tended to subject them to ridicule or contempt.

ferent rationales for the rule: That a rule approving a right of action for survivors would be inconsistent with our culture's theories of success on one's own merits without regard to the character of his relatives;[61] that there is no adequate way to determine the degree of consanguinity which should be used to distinguish those relatives entitled to a cause of action from those relatives who are not entitled to one;[62] that any right of action created for a relative of a deceased person would then logically exist for such relative before the death of the decedent;[63] that any rule creating such a right of action would interfere with historical research;[64] and finally, that one cannot legitimately sue for the defamation of another.[65]

### *C. Fraudulent Misrepresentation*

In *Fleetwood Corp. v. Mirich*,[66] plaintiff Mirich and others sought to recover damages from Fleetwood Corporation and Reginald Brown, a corporate director and its administrator, on the theory that Brown's misrepresentations as to several aspects of a stock transaction induced them to sell their stock in the corporation at a price substantially below its fair market value. Of particular interest in this case was the plaintiffs' allegation that Brown falsely represented that all shareholders were required to sell their shares at the price of five hundred dollars ($500.00) per share.[67]

In fact, during the month of November, 1971, Fleetwood's annual shareholders' meeting adopted the following resolution: "RESOLVED, That the officers of the corporation are granted authority to sell the net fixed assets of the Fleetwood Corporation for a price that will yield to the shareholder an amount not less than $500.00 per share."[68] Several months later, Brown met individually with each of the plaintiffs and represented to them that pursuant to the terms of this resolution, they were required to sell their shares at that price.

On appeal from the trial court's judgment for the plaintiffs, the defendants argued that Brown's statement was merely an expression of his personal opinion as to the effect of the November resolution and that the plaintiffs were not, therefore, entitled to rely upon

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[61]402 N.E.2d at 27 (quoting Note, *Libel—Defamation of Dead Person—Injury to Reputations of Surviving Relatives*, 40 COLUM. L. REV. 1267, 1268-69 (1940)). *See* Skrocki v. Stahl, 14 Cal. App. 1, 110 P. 957 (1910).

[62]402 N.E.2d at 27 (quoting 40 COLUM. L. REV. at 1268-69). *See* Kelley v. Post Publishing Co., 327 Mass. 275, 98 N.E.2d 286 (1951).

[63]402 N.E.2d at 27 (quoting 40 COLUM. L. REV. at 1268-69).

[64]*Id.*

[65]*Id.*

[66]404 N.E.2d 38 (Ind. Ct. App. 1980).

[67]*Id.* at 41.

[68]*Id.*

this statement. Citing two cases, *Rochester Bridge Co. v. McNeill*[69] and *Vernon Fire & Casualty Insurance Co. v. Thatcher*,[70] the appellate court observed that "the mere fact that a statement takes the form of an expression of opinion is not always conclusive."[71] After a review of the evidence on this point, including Brown's admittedly intentional effort to give the impression that the shareholders were required to sell, the court determined that the jury was justified in considering Brown's representation regarding the November resolution as a statement of existing fact.[72]

In its decision, the court plainly adopted the majority view[73] that the form of the statement is not the controlling issue.[74] The central inquiry is whether it is reasonable or probable that the listener will accept the statement as one of fact and then act upon it. If so, the statement, even if in the form of an opinion, is probably actionable.[75] Thus, the analysis of the nature of the representation, a statement of fact or an expression of opinion, is closely tied to the analysis of the reasonableness of the plaintiff's reliance on that statement.

Also in step with the modern trend in misrepresentation cases was the court's failure to consider the traditional rule that a statement of law, regardless of the form that the statement may take, is merely an assertion of opinion and, therefore, that such a statement of law is insufficient as a basis for an action in fraud or deceit.[76] Originally premised on two inconsistent theories, the first that every man is presumed to know the law and therefore that one cannot assert that he reasonably believed a misrepresentation as to the law,[77] and the second that no layman can be relied upon to know the law and therefore that no reliance on a legal misrepresentation can be reasonable,[78] this rule is rapidly fading from the legal scene as more and more courts recognize the reality that a layman may indeed reasonably rely upon a misrepresentation in the form of a statement of law.

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[69]188 Ind. 432, 122 N.E. 662 (1919).

[70]152 Ind. App. 692, 285 N.E.2d 660 (1972).

[71]404 N.E.2d at 43.

[72]*Id.* at 44.

[73]*See* W. PROSSER, *supra* note 15, § 109, at 720-31, and his discussion of statements in the form of an opinion.

[74]404 N.E.2d at 43-44.

[75]*See* PROSSER, *supra* note 15, § 109, at 721.

[76]*See* PROSSER, *supra* note 15, § 109, at 724-25, for a discussion of the growing trend away from the distinction between misrepresentations of fact and of law.

[77]*See* Burt v. Bowles, 69 Ind. 1 (1879). Of course, this principle is actually a perversion of the rule that ignorance of the law cannot be an adequate excuse or defense. In fact, what attorney knows all the law?

[78]*See* Fish v. Cleland, 33 Ill. 237 (1864); Thompson v. Phoenix Ins. Co., 75 Me. 55 (1883).

### D. Malicious Prosecution

*1. Elements of the Cause of Action.*—In *Peoples Bank & Trust Co. v. Stock*,[79] perhaps the most important decision in the torts area during the Survey period, both the court of appeals and the supreme court[80] considered a malicious prosecution case which has greatly expanded the scope of this cause of action. Although rather detailed, the following factual summary is necessary to fully understand the significance of this case. Michael Canada, the divorced father of two minor children, died in November of 1974 and left as his principal asset a Metropolitan Life Insurance Company policy of life insurance on which one "Sonja K. Canada, Wife" was designated as beneficiary. Prior to July of 1974, the beneficiary had been designated as "Sonja K. Stock, Fiancee." In fact, at the time of his death, Canada had lived with, but never married Sonja K. Stock.[81] After Canada's death, an attorney named Arthur E. Ecklund, who had represented Canada's former wife in earlier dissolution proceedings and who later represented her in contempt proceedings against Canada, requested that Peoples Bank & Trust Company serve as personal representative of Canada's estate. Peoples agreed to do so, apparently with the understanding that its only responsibility would be to attempt to recover the proceeds of the Metropolitan Life policy for the estate.[82] With Ecklund acting as counsel for the personal representative, Peoples filed suit against Metropolitan Life and Sonja Stock. In its complaint, Peoples sought a restraining order to prevent Metropolitan Life from paying the proceeds of the insurance policy to "an imposter alleging to be Sonja K. Canada—Wife" and further alleging that Sonja K. Stock "is wrongfully alleging and holding herself out to be one Sonja K. Canada, when in fact she is not."[83] After a hearing on the merits, the Marion Circuit Court concluded that Sonja K. Stock a/k/a Canada was in fact the beneficiary designated on Canada's life insurance policy.[84]

Shortly thereafter, Sonja K. Stock brought suit against Peoples for malicious prosecution. A Hancock Circuit Court jury rendered a

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[79]392 N.E.2d 505 (Ind. Ct. App. 1979).

[80]The supreme court denied the defendant Bank's petition for transfer. 403 N.E.2d 1077 (Ind. 1980).

[81]The evidence at trial revealed that although Sonja K. Stock had never actually married Canada, she had on several occasions used the name "Sonja K. Canada." Therefore, there was no "Sonja K. Canada, Wife," but there was a woman who had, at least on occasion, called herself "Sonja K. Canada."

[82]392 N.E.2d at 510.

[83]*Id.* at 507.

[84]*Id.*

verdict in favor of Stock and awarded her damages in the amount of $75,000.00.

On appeal, Peoples raised more than a dozen contentions of error, but the most significant for the purposes of this Survey are those relating to the essential elements of the cause of action of malicious prosecution. In particular, the court of appeals' opinion[85] addressed the requirements for establishing the elements of malicious prosecution: a prosecution against the plaintiff, a lack of probable cause, and malice in bringing the underlying action.[86]

*a. Prosecution.*—The threshold issue in any malicious prosecution action must be whether the underlying legal action constituted a "prosecution" against the plaintiff for purposes of the malicious prosecution action.[87] The appellant bank argued on appeal that its action against Metropolitan Life and Stock was in the nature of a declaratory judgment action, in the sense that it actually sought only a declaration of the rights of the parties to the insurance proceeds[88] and that Stock was added as a defendant only so that all persons with a potential interest in the policy proceeds would be joined in the lawsuit.[89]

The court of appeals quoted at some length from *Treloar v. Harris*,[90] an early Indiana malicious prosecution case concerning the issue of the meaning of the word "prosecution," and concluded that the word "prosecution" simply referred to any sort of legal process or judicial proceeding to which a person may have been subjected.[91] Such a broad definition of the prosecution element is in fact consistent with the language of the *Treloar* decision but reflects a substantial variance from the type of case which has actually been at issue in Indiana's malicious prosecution cases. The *only* civil cases which have supplied the basis for a malicious prosecution action in this State have been cases in which a tort was charged, the facts of

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[85] *Id.*

[86] *Id.* at 507-08.

[87] The court of appeals decision did not approach this case in this way, but began with a discussion of the issue of a lack of probable cause. The dissenting opinion of Justice Pivarnik, of the supreme court, however, begins at the logical point of analysis, with the prosecution issue. 403 N.E.2d 1077, 1082.

[88] 392 N.E.2d at 511. The complaint filed by the defendant Bank sought an injunction against Metropolitan Life to prevent the payment of the insurance proceeds prior to a hearing, a judgment against Metropolitan Life for the amount of the proceeds, and a judgment against Sonja K. Stock denying her any right to the proceeds. After the complaint was filed, Metropolitan Life paid the proceeds into the Clerk's office in interpleader. *See* IND. R. TR. P. 22. Therefore, the court's final judgment ordered the Clerk to pay the proceeds to Stock.

[89] 392 N.E.2d at 511.

[90] 66 Ind. App. 59, 117 N.E. 975 (1917).

[91] 392 N.E.2d at 511.

which would also constitute a crime[92] or in which the malicious prosecution plaintiff had been subject to being taken into custody.[93]

In response to the arguments that the plaintiff, Stock, was not subjected to a prosecution because a monetary judgment or an injunctive decree could not have been entered against her in the underlying case and that she was only a necessary party to a determination of the proper distribution of insurance proceeds, the court stated that the Bank could have presented this matter as a pure question of law. However, the Bank chose instead to include in its complaint, allegations of Stock's holding herself out as the wife of Canada when in fact she was not and the specific allegations that she was an imposter and was acting wrongfully in seeking the insurance proceeds.[94] These specific allegations rendered the underlying lawsuit more than a mere question of law with respect to which only a declaration of rights would have been appropriate. The court, in essence, determined that when the Bank made the decision to include these personal allegations with respect to Stock and thereby imposed upon her "the obligation not simply to litigate the legal question of the validity of the beneficiary designation but also to defend against allegations that she was an imposter and that she was wrongfully holding herself out to be Sonja K. Canada,"[95] the Bank somehow converted this into a prosecution against Stock.

This analysis of the issue of prosecution by focusing on the nature of the allegations contained in the lawsuit rather then the essential nature of the cause of action itself would seem totally inconsistent with the concept of malicious prosecution itself; malicious prosecution must be premised upon the filing of an action, not the mere making of certain allegations, whether necessary to the action or not. In fact, the court's emphasis upon the specific allegations contained in the Bank's complaint created an apparent exception to the concept of privilege in legal pleadings which has heretofore prohibited successful legal action on the basis of libelous allegations included in such pleadings.[96]

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[92]*See, e.g,* Strickler v. Greer, 95 Ind. 596 (1884); Stancliff v. Palmeter, 18 Ind. 321 (1862).

[93]*See, e.g.,* Coffey v. Myers, 84 Ind. 105 (1882); Treloar v. Harris, 66 Ind. App. 59, 117 N.E. 975 (1917).

[94]392 N.E.2d at 511.

[95]*Id.*

[96]*See* Meier v. Combs, 156 Ind. App. 458, 297 N.E.2d 436 (1973); Stahl v. Kincade, 135 Ind. App. 699, 192 N.E.2d 493 (1963). As these cases held, an allegation in a legal pleading is absolutely privileged as long as the allegation is pertinent and relevant to the subject matter of the lawsuit. In *Peoples*, there can be little question that allegations relating directly to the status of another party claiming the insurance proceeds and the theory upon which such claim was presented were pertinent and relevant to

*b. Probable cause and malice.*—The court's analysis of the issues of lack of probable cause and malice have also served to expand the potential availability of the malicious prosecution action. With respect to the probable cause issue, the court again relied upon a definition found in the *Treloar* decision[97]—the court in *Treloar* approved a jury instruction which explained that if the defendant, in the malicious prosecution case, brought the underlying action against the plaintiff "without making the inquiry that a prudent, cautious person would make under like circumstances, then and in that case, as a matter of law, the bringing of the action, or, in other words the prosecution was instituted without probable cause."[98] As the *Peoples* court pointed out, the evidence presented at trial revealed that the Bank had made no independent investigation of the facts and had relied upon the factual and legal analysis of attorney Ecklund.[99] However, to the extent that the concept of probable cause requires a *factual* investigation by a potential plaintiff, the Bank could not be faulted for its failure to investigate. At trial there was no real dispute as to the facts involved. The dispute was a legal question involving the propriety of the designation of a beneficiary in light of the fact, as all parties apparently agreed, that Michael Canada and Sonja K. Stock had never been married.[100]

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the matter at issue in the Bank's suit—the issue of the proper distribution of the insurance proceeds. The court's opinion made no reference to the allegations against Stock as irrelevant or spurious. Quite the contrary, the court recognized the legal effectiveness of the allegations when it spoke of the obligation thereby imposed upon Stock to litigate the issues so raised. In essence, then, the court in *Peoples* has approved a cause of action premised upon particular allegations relevant to the lawsuit at issue.

[97]392 N.E.2d at 508 (quoting 66 Ind. App. at 72, 117 N.E. at 979).

[98]*Id.* (emphasis omitted).

[99]392 N.E.2d at 510.

[100]As the dissenting opinion of Justice Pivarnik noted, the Bank had very little chance of prevailing in the underlying litigation on the legal question of the sufficiency of the designation of beneficiary. 403 N.E.2d at 1087. This was obviously of considerable significance to the jury in the trial court and to the court of appeals in determining whether there was probable cause to bring the underlying litigation. *See* Indianapolis Traction & Terminal Co. v. Henby, 178 Ind. 239, 97 N.E. 313 (1912):

> In the abstract, probable cause is a pure question of law, but its existence in a given case is a mixed question of law and fact, when one or more of the elementary facts thereof relied upon is controverted. In such case the court must hypothetically state to the jury the material facts which the evidence tends to prove, and positively direct, as to the law, upon the assumed state of facts. Where the facts are uncontroverted, the court must determine the existence or nonexistence of probable cause.

*Id.* at 248, 97 N.E. at 317.

What burden does this place upon potential plaintiffs and their attorneys who recognize that the law is against them but also see a need for change in that law? *See* 1980 IND. CT. R. 341, *Indiana Code of Professional Responsibility*, Disciplinary Rule 2-109, which provides in pertinent part:

Nonetheless, the court concluded that the Bank's lack of investigation, presumably of the factual *and* legal basis of the suit,[101] and its reliance upon an attorney[102] who also represented a person with a

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(A) A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such person wishes to:

. . .

(2) Present a claim or defense in litigation that is not warranted under existing law, *unless it can be supported by good faith argument for an extension, modification, or reversal of existing law.*

*Id.* (emphasis added).

[101]Peoples filed a third party complaint against Attorney Ecklund and alleged in particular:

4. Any recovery of a judgment by the plaintiff against the defendant-third party plaintiff for malicious prosecution as alleged in the amended complaint, would have been caused by the actions of the third party defendant who rendered professional legal advice to and upon which the defendant-third party plaintiff relied.

392 N.E.2d at 514. The court concluded that the effect of this allegation was a charge of professional malpractice which would only create confusion and delay. *Id.* Therefore, the trial court granted Stock's motion to strike the third party complaint against Ecklund. This decision was upheld as within the trial court's sound discretion. *Id. See* City of Elkhart v. Middleton, 265 Ind. 514, 356 N.E.2d 207 (1976), for a discussion of the extent of the trial court's discretion in this regard.

[102]The Bank apparently relied upon Ecklund's legal advice as well as his factual presentation of the evidence in this matter. The Bank presented the defense of reliance on the advice of counsel at trial. The appellate court recognized the effect of this doctrine as a complete defense when applicable and quoted from Indianapolis Traction & Terminal Co. v. Henby, 178 Ind. 239, 97 N.E. 313 (1912):

Where, before the commencement of the prosecution, the prosecutor honestly and in good faith sought advice of reputable counsel, and made to such counsel a full and true statement of all the material facts within his knowledge, and such counsel thereupon advised the prosecutor that the facts so stated warranted the prosecution, and, relying on the advice, the prosecutor in good faith commenced the action, such facts constitute probable cause, and consequently a complete defense against an action for malicious prosecution, although the advice given was erroneous.

*Id.* at 248-49, 97 N.E. at 317. *See also* Satz v. Koplow, 397 N.E.2d 1082 (Ind. Ct. App. 1979), in which the court emphasizes the need for a full and accurate disclosure of the facts to the attorney.

In this case, however, the court rejected the applicability of the defense for the reason that the attorney upon whom the defendant relied was not impartial, disinterested, and free from bias or prejudice. 392 N.E.2d at 510. *See* 52 AM. JUR. 2d *Malicious Prosecution* § 80 (1970). Because Ecklund presented the factual situation and his determination that the Canada children deserved the insurance proceeds, as opposed to the Bank, the Bank apparently should not have retained him as counsel in its efforts to collect the insurance proceeds. But is this not frequently what happens in probate matters—the attorney who represents the decedent's widow and children approaches a bank and asks that it serve as personal representative of the decedent's estate and the bank in turn retains the attorney as its counsel in any legal proceedings which are necessary? In fact, the record revealed that Peoples and Ecklund had had this type of relationship in other probate matters on previous occasions.

Finally, one must ask what burden this case puts on a client to inquire, and

stake in the outcome, was sufficient to support the jury's decision that the Bank brought the litigation without probable cause.[103]

What the court apparently perceived as a small step in logic, from finding a lack of probable cause to finding an evidentiary basis for malice, is, however, a giant leap. Relying on certain language in the case of *Pontius v. Kimble*,[104] the court held in essence that malice may be inferred from a lack of probable cause.[105] Therefore, having upheld the jury's finding of a lack of probable cause because the Bank failed to conduct its own investigation and relied on the legal advice of an attorney who also represented a person with a stake in the outcome of the litigation over the insurance proceeds, the court then determined that that finding alone was sufficient to support a finding of malice. This is not, and has never been, a proper statement of the law on this point. There are many cases which specifically speak to the need for evidence of malice in addition to evidence merely establishing a lack of probable cause.[106] Even the *Pontius* decision cannot be said to stand for the proposition relied upon by the court. The wording of the *Pontius* opinion makes it plain that only in certain limited circumstances, perhaps in which no other explanation of the decision to bring the lawsuit is apparent, can malice be inferred directly and solely from a lack of probable cause. The court in *Pontius* emphasized, however, that a lack of probable cause and malice are two separate elements and that both must be satisfied before a plaintiff may recover.[107]

The factual situation in this case serves to underscore the expansion of the cause of action of malicious prosecution which has been accomplished by the court's holdings in this case. The underlying litigation was, as the Bank pointed out, only an effort to obtain a determination of the proper beneficiary of certain insurance pro-

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perhaps even investigate his attorney's background and possible interest in the outcome of litigation. The court denied the use of the reliance on the advice of counsel defense to the Bank because it determined that the Bank's attorney was not impartial and disinterested. Is this really the standard or is it only necessary that a potential plaintiff consult an attorney whom he believes to be impartial, disinterested, and free from bias or prejudice?

[103]392 N.E.2d at 510.

[104]56 Ind. App. 144, 104 N.E. 981 (1914).

[105]392 N.E.2d at 510.

[106]*See* Strickler v. Greer, 95 Ind. 596 (1884); Carey v. Sheets, 67 Ind. 375 (1879); Newell v. Downs, 8 Blackf. 523 (1847).

[107]56 Ind. App. at 146, 104 N.E. at 982. Read in its entirety, *Pontius* said that in some cases malice may be inferred from a lack of probable cause, but that such an inference does not necessarily follow from a finding of a lack of probable cause. Of course, this is accurate—in some cases the same facts which establsih a lack of probable cause are sufficient to establish malice as well, but in others, such as *Peoples*, the finding of a lack of probable cause is premised at most on evidence of the Bank's negligence and can never be considered adequate to support an inference of malice.

ceeds. Although the Bank was aware of the factual situation when it agreed to serve as personal representative of the Canada estate, once it had accepted that position it certainly had some fiduciary obligation to gather all assets which arguably belonged in the estate. The Bank relied upon the advice of its counsel, and in this particular case that counsel also had a relationship with another person involved in this case. The Bank, however, had dealt with the attorney in other cases and had no reason to doubt his representations as to the facts and the law in this matter. What can at most be described as negligence on the Bank's part was then construed to be malice; yet, no evidence of any such attitude toward the plaintiff existed.

*2. Survival of a Claim.*—In *Merimee v. Brumfield*,[108] the Indiana Court of Appeals considered an issue of first impression in Indiana—whether actions for malicious prosecution and false imprisonment survive a victim who dies as a result of unrelated causes. Indiana's survivial statute provides as follows: "All causes of action shall survive, and may be brought, notwithstanding the death of the person entitled or liable to such action, by or against the representative of the deceased party, except actions for personal injuries to the deceased party, which shall survive only to the extent provided herein."[109] The statute later provides that personal injury actions shall survive in only a limited way—the personal representative may recover only "the reasonable medical, hospital and nursing expense and loss of income of said injured person, resulting from such injury, from the date of the injury to the date of his death."[110]

The arguments asserted by the parties on appeal presented the court with a narrowly defined issue: does the language of the survival statute, which speaks of "personal injuries," refer to *any* injury which affects the individual, including libel, slander, malicious prosecution, false imprisonment, and invasion of privacy, or does it apply to bodily injuries only?

The court, after a discussion of the development of the particular language used in Indiana's survival statute,[111] concluded that the term "personal injuries" as used in that statute includes within its meaning not only injuries to the physical body but also "malicious prosecution, false imprisonment, libel, slander, or any affront or detriment to the body, psyche, reputation or liberty, as con-

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[108]397 N.E.2d 315 (Ind. Ct. App. 1979).

[109]IND. CODE § 34-1-1-1 (1976).

[110]*Id.*

[111]397 N.E.2d at 317-18. The court focused, in particular, on the legislature's choice of the term "injuries to the person" or "personal injuries," rather than "bodily injuries." *Id.* at 318.

tradistinguished from injury to property rights."[112] Therefore, an action for malicious prosecution and false imprisonment survives a victim who dies as a result of unrelated causes only in the limited sense mentioned above.

### *E. Medical Malpractice*

In *Revord v. Russell*,[113] the plaintiffs, parents of a ten-year old child whose heart stopped during brain surgery and who remained comatose at the time of trial some four years later, brought suit against the physician who performed the surgery. The plaintiffs premised their action on the doctrine of informed consent[114] and asserted as the essence of their claim the doctor's failure to apprise them of the dangers of heart stoppage and permanent coma. Although the success of their claim depended upon proof of the wording of the defendant's pre-consent disclosure, at trial the plaintiffs presented no medical evidence relating to the contents of a reasonable disclosure under the circumstances.[115] In ruling against the plaintiffs and in affirming the trial court's judgment, the court adopted the general rule that medical testimony is required to establish the content of a reasonable disclosure, unless the circumstances are so clearly within the realm of a layman's understanding that even he could recognize the necessity of such a disclosure.[116]

In *Stevens v. Kimmel*,[117] the court of appeals considered a case brought by an employee against his employer's company physician for negligent treatment of a work-related injury. The trial court had dismissed the plaintiff's claim on the theory that workmen's compensation provided the exclusive remedy for the plaintiff.[118]

On appeal, the court noted that the Workmen's Compensation

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[112]*Id.* at 318.

[113]401 N.E.2d 763 (Ind. Ct. App. 1980).

[114]*Id.* at 764. The doctrine of informed consent recognizes a physician's duty to disclose to his patient, or in the case of a minor, to the patient's parent or guardian, before any consent is given or consent form signed, a full and accurate disclosure of the risks of the proposed course of treatment and any possible alternatives to the treatment. For a discussion of the doctrine and its application in Indiana, see Karlson & Erwin, *Medical Malpractice: Informed Consent to the Locality Rule*, 12 IND. L. REV. 653 (1979).

[115]410 N.E.2d at 767.

[116]*Id.* at 766-67 (citing Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972)). This rule raises some problems in logic. If the content of the disclosure reasonable under the circumstances is so clear that a jury requires no medical testimony, why does the lay patient require any disclosure at all? It seems that he should also be expected to understand the risks involved without a physician's explanation.

[117]394 N.E.2d 232 (Ind. Ct. App. 1979).

[118]*Id.* at 233.

Act[119] provides an exclusive remedy[120] for the employee in the event of a work-related injury and that that remedy encompasses circumstances in which the employee is injured by the actions of a co-employee.[121] The critical issue then focused on the status of the company-employed physician and a determination whether he was a co-employee or an independent contractor.

The court quoted at some length from and expressly approved the holding of the fourth district in a similar factual situation.[122] In *Ross v. Schubert*,[123] the company's doctor was found to be an independent contractor within the meaning of the Workmen's Compensation Act.[124] Therefore, an action for medical malpractice will lie when brought by an employee against a physician employed by the same employer.

### *F. Retaliatory Discharge*

In *Scott v. Union Tank Co.*,[125] the plaintiff brought suit against his former employer on the ground that he had been wrongfully discharged in retaliation for filing a workmen's compensation claim. Because the plaintiff had waited for a period of more than two years before filing his lawsuit, the critical issue was whether the appropriate statute of limitations was for an action in tort or in contract.[126] Dispite a vigorous dissent by Judge Staton,[127] the court of appeals concluded that such an action sounds in tort, not contract, and is therefore limited by a two-year statute of limitations.[128]

In fact, this decision's significance is minimized by a new statute which took effect after the case arose. Indiana Code section 34-1-2-1.5[129] now limits to two years the life of any cause of action

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[119]*See* IND. CODE §§ 22-3-2-1 to -21 (1976 & Supp. 1980).

[120]*See id.* § 22-3-2-6 (1976) which states in part:

> The rights and remedies herein granted to an employee subject to this act on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account of such injury or death.

[121]394 N.E.2d at 233 (citing O'Dell v. State Farm Auto Ins. Co., 362 N.E.2d 862 (Ind. Ct. App. 1977); Burkhardt v. Wells, 139 Ind. App. 658, 215 N.E.2d 879 (1966)).

[122]394 N.E.2d at 233-34 (citing Ross v. Schubert, 388 N.E.2d 623 (Ind. Ct. App. 1979)).

[123]388 N.E.2d 623 (Ind. Ct. App. 1979).

[124]IND. CODE § 23-3-2-1 to -21 (1976 & Supp. 1980).

[125]402 N.E.2d 992 (Ind. Ct. App. 1980).

[126]*Id.* at 993.

[127]*Id.* at 993-97 (Staton, J., dissenting).

[128]*Id.* at 993.

[129]*See* IND. CODE § 34-1-2-1.5 (Supp. 1980) which states in part:

> All actions relating to the terms, conditions, and privileges of employment except actions based upon a written contract (including, but not limited to,

arising from an unwritten employment contract. However, the case is of considerable significance when compared to the several Indiana cases, referred to in the dissenting opinion by Judge Staton.[130] These cases reflect the traditional Indiana rule that a court shall, whenever feasible, adopt the theoretical construction which permits the plaintiff's cause of action to survive the statute of limitations.[131]

### *G. Wrongful Death*

Two cases decided during the survey period, *Lustick v. Hall*[132] and *Thomas v. Eads*,[133] concerned the proper meaning to be attributed to certain words in Indiana's Wrongful Death Act[134]—particularly, the words "dependent" and "surviving." *Lustick* arose from an auto accident resulting in the death of a noncustodial parent with no court-ordered support obligation to her minor children. Although the dissolution decree made no mention of any custodial or support obligation of the decedent, the evidence at trial revealed that she

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hiring or the failure to hire, suspension, discharge, discipline, promotion, demotion, retirement, wages, or salary) shall be brought within two (2) years of the date of the act or omission complained of.

[130]402 N.E.2d at 993-94 (Staton, J., dissenting) (citing Holt Ice & Cold-Storage Co. v. Arthur Jordan Co., 25 Ind. App. 314, 57 N.E. 575 (1900); Raugh v. Stevens, 21 Ind. App. 650, 52 N.E. 997 (1899)).

[131]*See* 1 I.L.E. *Actions* § 25, at 95 (1957).

[132]403 N.E.2d 1128 (Ind. Ct. App. 1980).

[133]400 N.E.2d 778 (Ind. Ct. App. 1980).

[134]IND. CODE § 34-1-1-2 (1976). This statute provides in pertinent part:

That part of the damages which is recovered for reasonable medical, hospital, funeral and burial expense shall inure to the exclusive benefit of the decedent's estate for the payment thereof. The remainder of the damages, if any, shall, . . . inure to the exclusive benefit of the widow or widower, as the case may be, and to the dependent children, if any, or dependent next of kin, to be distributed in the same manner as the personal property of the deceased. If such decedent depart this life leaving no such widow or widower, or dependent children or dependent next of kin, surviving her or him, the damages inure to the exclusive benefit of the person or persons furnishing necessary and reasonable hospitalization or hospital services in connection with the last illness or injury of the decedent, performing necessary and reasonable medical or surgical services in connection with the last illness or injury of the decedent, to the undertaker for the necessary and reasonable funeral and burial expenses, and to the personal representative, as such, for the necessary and reasonable costs and expenses of administering the estate and prosecuting or compromising the action, including a reasonable attorney's fee, and in case of a death under such circumstances, and when such decedent leaves no such widow, widower, or dependent children, or dependent next of kin, surviving him or her, the measure of damages to be recovered shall be the total of the necessary and reasonable value of such hospitalization or hospital service, medical and surgical services, such funeral expenses, and such costs and expenses of administration, including attorney's fees.

had provided total child care for her minor children five days per week while her former husband, who had custody of the children, travelled on business.[135]

The court adopted as the test for dependency the same standard applied in *Kirkpatrick v. Bowyer*,[136] a case which also involved a claim for damages based partially on the loss of a parent supplying babysitting services, although on a very infrequent basis:

> "Dependency is based on a condition and not a promise, and such dependency must be actual, amounting to a necessitous want on the part of the beneficiary and a recognition of that necessity on the part of decedent, an actual dependence coupled with a reasonable expectation of support or with some reasonable claim [for] support from decedent."[137]

The *Lustick* court further noted that a legal obligation to provide this support is not essential to the success of the alleged dependent's claim[138] nor need the dependence be total.[139] Therefore, the court concluded that the father's extended and regular absences created an actual need for care during those periods and that the decedent obviously provided that needed care. This form of support, even though not legally obligated and not total in nature, was held sufficient to sustain a claim under the act.[140]

In *Thomas v. Eads*,[141] a lawsuit for wrongful death was brought on behalf of the estate of a deceased infant. The infant died as a result of the same auto accident that killed his mother, but he survived her for a period of approximately one-half hour. The defendant

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[135]403 N.E.2d at 1130-32. The dissolution decree had been entered of record only three days before the accident which killed the mother. Because the terms of the temporary agreement and the final decree were the same, the court approved the introduction of evidence relating to the relationship of the decedent and her children from the date of the temporary agreement to the date of the accident. 403 N.E.2d at 1133. The court specifically noted that had the terms of the final decree differed from those of the temporary agreement, only evidence relating to the period after the entry of the final decree would have been admissible. *Id.*

[136]131 Ind. App. 86, 169 N.E.2d 409 (1960).

[137]403 N.E.2d at 1131 (quoting 131 Ind. App. at 94, 169 N.E.2d at 412).

[138]403 N.E.2d at 1131 (citing Novak v. Chicago & Calumet Dist. Transit Co., 235 Ind. 489, 135 N.E.2d 1 (1956); New York Cent. R.R. v. Johnson, 234 Ind. 457, 127 N.E.2d 603 (1955)).

[139]403 N.E.2d at 1132 (citing Northern Ind. Power Co. v. West, 218 Ind. 321, 32 N.E.2d 713 (1941)).

[140]403 N.E.2d at 1132. Because the trial court found evidence that the decedent contributed care, attention, and domestic services to her children, but no portion of her earnings, it properly excluded all evidence relating to the decedent's income or earning ability. *Id.* at 1132-33.

[141]400 N.E.2d 778 (Ind. Ct. App. 1980).

appealed from a judgment entered against him in the trial court and argued that the infant had not survived in the sense contemplated by the Wrongful Death Act.[142]

In its analysis of this case, the court of appeals relied heavily upon the decision in *Shipley v. Daly*,[143] a 1939 case which essentially supported the defendant's position that the definition of a survivor under the Wrongful Death Act refers to one who survives at least to the time of the entry of judgment in the wrongful death action. The court noted that there had been several revisions of the Wrongful Death Act since the date of the *Shipley* decision but stated that no apparent legislative effort has been made to alter that decision.[144] Therefore, the court concluded that the *Shipley* decision, which requires survival until the date of the entry of judgment to qualify as "surviving" under the Act, reflects the legislature's position on this issue.[145]

### *H. Liability of Government Officials*

In *Thrasher v. Van Buren Township*,[146] the court of appeals recognized a new basis upon which one may seek to recover damages from a government official. In that case, property owners brought suit against their township and township trustee for damages resulting from the trustee's failure to comply with his statutory duty to repair a partition fence and his refusal to obey a writ of mandate directing him to do so.[147] Pursuant to the decision of the Indiana Supreme Court in *Indiana Alcoholic Beverage Commission v. State ex rel. Harmon*,[148] the *Thrasher* court noted that Indiana's mandate statute[149] authorizes damages only if attributable to

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[142]*Id.* at 780 (citing IND. CODE § 34-1-1-2 (1976)).

[143]106 Ind. App. 443, 20 N.E.2d 653 (1939). In *Shipley*, the widow of the decedent died during the lawsuit, and the court held that all right of recovery, even the recovery for the benefit of the so-called death creditors, terminated at her death. *Id.* at 447, 20 N.E.2d at 655. Since that decision, the statute was amended in 1965 to alter the *Shipley* result only insofar as it related to death creditor beneficiaries who are now protected whether or not the widow or widower, dependent children or dependent next of kin survive.

[144]400 N.E.2d at 783.

[145]*Id.*

[146]394 N.E.2d 215 (Ind. Ct. App. 1979).

[147]*Id.* at 216-17.

[148]379 N.E.2d 140 (Ind. 1978).

[149]IND. CODE §§ 34-1-58-1 to -8 (1971) (current version at *id.* §§ 34-1-58-1 to -8 (1976)). IND. CODE § 34-1-58-4 (1976), as did the 1971 version of this section, provides:

> Said action for mandate shall stand for issue and trial, and issues of law and fact may be joined, and amendments, continuances and appeals granted therein, as in other civil actions; and in rendering final judgments in said actions, if the finding and judgments be for the plaintiff, the court shall grant

"the subjection of the plaintiff to the rigors, vexation, and expense of trial on issues of fact."[150] The statute does not authorize other types of damages, such as damages for loss of use of real estate, loss of profits and wages, and mental anguish; the types of damages which were sought by the Thrashers in this case.[151]

Nonetheless, the court concluded that the damages sought by the plaintiff in this case were not governed by the mandate statute—its scope was limited to the damages which might be recovered in the same action in which the mandate was originally sought. Because this case arose from the trustee's failure to obey the mandate, damages for the period of time beginning with the date of the entry of the mandate were held recoverable.[152] The court determined that it saw no reason to distinguish between this factual situation and the recognized rule that a township trustee may be held liable for negligence in the performance of a ministerial duty or of a discretionary duty when a private duty is owed to the plaintiff.[153] The court concluded that a strong public policy to allow damages to persons whose rights have been infringed would be thwarted if the plaintiffs in this case were not permitted recovery.[154]

In *Holt v. City of Bloomington*,[155] a technical issue arose with regard to the computation of post-judgment interest on a money judgment rendered under the Tort Claims Act. The Act provides in this regard that:

> A claim or suit settled by, or a judgment rendered against, a governmental entity shall be paid by it not later than one hundred eighty (180) days after settlement or judgment, unless there is an appeal, in which case not later than one hundred eighty (180) days after a final decision is rendered. If payment is not made within one hundred eighty (180) days, the governmental entity is liable for interest from the date of settlement or judgment at an annual rate of eight percent (8%) . . . .[156]

The court of appeals concluded that the plain meaning of this

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and adjudge to the plaintiff such relief, and such only, as he may be entitled to under the law and facts in such action, together with damages as in actions for false returns, and costs shall be awarded as the court may direct.

[150]394 N.E.2d at 218 (quoting 379 N.E.2d at 144).

[151]394 N.E.2d at 218.

[152]*Id.* at 219-20.

[153]*Id.* at 218 (citing Seymour Nat'l Bank v. State, 384 N.E.2d 1177 (Ind. Ct. App. 1979); Board of Comm'rs v. Briggs, 167 Ind. App. 96, 337 N.E.2d 852 (1975)).

[154]394 N.E.2d at 219.

[155]391 N.E.2d 829 (Ind. Ct. App. 1979).

[156]IND. CODE § 34-4-16.5-17 (Supp. 1980).

statute is to permit the governmental entity to pursue its appellate remedies to the fullest without risking an interest obligation so long as the judgment is paid within one hundred eighty days after the final decision is rendered in the case. The court expressly held that the term "final decision" refers to the last decision or ruling by any court which considers the case in any posture, whether that be an affirmance or reversal or only a denial of a petition for rehearing or for transfer.[157]

### *I. Settlement Tools*

In *Cooper v. Robert Hall Clothes, Inc.*,[158] the Indiana Supreme Court considered the effects of various settlement devices, such as the release, the convenant not to sue or not to execute, and the loan receipt agreement.[159] *Cooper* concerned a release given by the plaintiff to two of three defendants prior to trial. The release by its express terms excepted the third defendant, Robert Hall Clothes, Inc., from its effect. Nonetheless, the trial court sustained Robert Hall's motion for summary judgment on the ground that the release operated as a release of all joint tortfeasors in the case.[160] The court of appeals reversed this judgment[161] and adopted as the law in Indiana the language of section 885(1) of the Restatement (Second) of Torts,[162] which essentially provides for the construction of any release to effectuate the intent of the parties, even though that intent may be to release less than all joint tortfeasors.[163]

On petition to transfer, Robert Hall argued that the decision to

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[157]391 N.E.2d at 832.

[158]390 N.E.2d 155 (Ind. 1979).

[159]*Id.* at 157. A loan receipt agreement usually provides that the plaintiff receives a loan, without interest, for a specified amount from one or more defendants or potential defendants; he in turn agrees not to execute against or to seek further payment from the lender or lenders and to pursue the other defendants or potential defendants for the full amount of his claim; if the plaintiff's recovery from the other tortfeasors exceeds the specified amount of the loan, he is to repay it; but, if he is unable to recover more than the amount of the loan or if he loses the case completely, whether in the trial court or on appeal, no repayment is required. *See* Northern Indiana Pub. Serv. Co. v. Otis, 145 Ind. App. 159, 250 N.E.2d 378 (1969).

[160]390 N.E.2d at 157.

[161]Cooper v. Robert Hall Clothes, Inc., 375 N.E.2d 1142 (Ind. Ct. App. 1978), *overruled*, 390 N.E.2d 155 (Ind. 1979).

[162]RESTATEMENT (SECOND) OF TORTS § 885(1) (1979) provides in pertinent part as follows: "A valid release of one tortfeasor from liability for a harm, given by the injured person, does not discharge others liable for the same harm, unless it is agreed that it will discharge them."

[163]The court's opinion focused on the law regarding the release of less than all *joint* tortfeasors. This case, and the principles of law set forth in it, are not necessarily applicable to a case involving independent or successive tortfeasors.

adopt section 885(1) and overrule the traditional Indiana rule[164] was error.[165] The supreme court agreed[166] and expressly rejected the applicability of the Restatement rule in Indiana.[167] In so doing, the supreme court discussed the differences in form between a release and other instruments used as settlement tools, such as covenants not to sue, covenants not to execute, and loan receipt agreements. A release is an abandonment or relinquishment of a claim for damages while the other instruments are merely statements of the plaintiff's election not to proceed against one of several tortfeasors. The court concluded that a reservation or exception of a cause of action is inconsistent with the concept of a release and that a reservation clause in a release is, therefore, of no force and effect.[168] The court further determined that it would not indulge in the subterfuge of calling a document that was obviously a release, and in fact titled as such, anything else.[169]

The result then was a decision which expressly affirmed the traditional rule in Indiana regarding the effect of a release of one joint tortfeasor. This rule, which emphasizes form over substance, requires the utmost care by plaintiffs and their counsel in settlement negotiations. It is not enough to express an exception to the release of all joint tortfeasors. The settlement documents themselves must be in a form approved by the Indiana appellate courts as effective to be used in settlement with less than all joint tortfeasors.[170]

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[164]*See* Bedwell v. DeBolt, 221 Ind. 600, 50 N.E.2d 875 (1943); Scott v. Krueger, 151 Ind. App. 479, 280 N.E.2d 336 (1972).

[165]390 N.E.2d at 157.

[166]The court of appeals in its opinion relied on Wecker v. Kilmer, 260 Ind. 198, 294 N.E.2d 132 (1973), as evidence of the increasing disfavor with which Indiana's courts have looked upon this traditional rule that the release of one joint tortfeasor is the release of all. As the supreme court's opinion pointed out, however, *Wecker* concerned a release given to one of two independent and successive tortfeasors. 390 N.E.2d at 158.

[167]390 N.E.2d at 157.

[168]*Id.*

[169]*Id.* at 157-58.

[170]There have been several cases decided during the survey period in which the loan receipt agreement was successfully used as a mechanism to settle with less than all joint tortfeasors. *See, e.g.*, Barker v. Cole, 396 N.E.2d 964 (Ind. Ct. App. 1979).