XIII. Torts

*Theodore Lockyear**

By overruling outmoded precedents and by innovating when necessary, the appellate courts have significantly overhauled Indiana tort law during the survey period. Although there were some notable exceptions—especially in the application of the discretionary immunity doctrine to several school cases—these courts have provided new remedies for many diverse classes of injured plaintiffs. Indeed, these decisions have surpassed those of other jurisdictions in this area. This section will review many of these advances and attempt to underscore their significance.

A. Immunities

Although deciding that the governmental-proprietary delineation could no longer be utilized to protect the State under the sovereign immunity doctrine, *Campbell v. State*,[1] in dicta, may nevertheless have provided a similarly protective distinction for the State. In *Campbell*, the court refused to abrogate all instances of the immunity doctrine.[2] In fact, a phrase from a quotation in the opinion from Dean Prosser may have opened the avenue for a discretionary-ministerial distinction.[3] Left undecided, however, were the ambits of such a discretionary privilege. In two subsequent decisions, the appellate courts simply asserted that *Campbell* was controlling and consequently found the State liable.[4]

---

*Member of the Indiana Bar. A.B., Vanderbilt University, 1951; J.D., Vanderbilt University, 1952.

The author wishes to express his appreciation for the able assistance of Jerry Atkinson and Steve Barber.

[1]284 N.E.2d 733 (Ind. 1972). For other decisions abrogating immunities of the county and of municipalities, see Klepinger v. Board of Comm'rs, 143 Ind. App. 155, 239 N.E.2d 160 (1968); Brinkman v. City of Indianapolis, 141 Ind. App. 662, 231 N.E.2d 169 (1967).

[2]For example, the court mentioned inadequate police protection, a negligent appointment of an individual whose incompetent performance gives rise to an action, and judicial immunity as certain areas of privileged behavior. 284 N.E.2d at 737.

[3]The specific quotation was: "[I]n several of the decisions abrogating the immunities, there was language that there might still be immunity as to 'legislative' or 'judicial' functions, or as to acts or omissions of government employees which are discretionary." *Id.* at 737. *See also* Note, *Sovereign Immunity in Indiana—Requiem?*, 6 Ind. L. Rev. 92 (1972).

[4]State v. Daley, 287 N.E.2d 552 (Ind. Ct. App. 1972); State v. Turner, 286 N.E.2d 697 (Ind. Ct. App. 1972).

However, in *Driscol v. Delphi Community School Corp.*,[5] the court of appeals refused to find liability on the part of the State. A high-school girl fell and broke her leg while running from her gym class to the locker room. A cause of action for negligence against the gymnasium instructor and the school alleged that the defendants had proximately caused the fall by not allowing enough time between classes and thus forcing the plaintiff to hurry to the locker room. Whether the holding was pinned on the grounds that these acts or omissions of the defendant were simply not unreasonable or whether the state was protected by the discretionary exception tangentially referred to in *Campbell* is uncertain. The court concluded, however, by stating that:

> There is no evidence to support any inference that the necessity for the running or the conditions under which it was done is the result of any negligent execution of a ministerial function or duty. By the same token, there is no proof that class size, dressing room crowding, time allowed for dressing, etc., are conditions created by "discretionary" acts or omissions, although that explanation appeals to our vague common-sense notion of schools in general.[6]

Following the *Driscol* decision, the court in *Miller v. Griesel*[7] again applied the discretionary exception to another action against school officials. In *Miller*, a student opened a box containing a detonator cap which the student thought was a Christmas light. When he touched this cap, it exploded causing permanent injuries to his left eye. The teacher had left the room but had made arrangements for another teacher to check the room occasionally. A school administrative rule sanctioned this procedure. The court held that "no liability could attach to the defendants once the trial court determined as a matter of law that a reasonable rule had been promulgated and that the teacher's actions in leaving the classroom during the half-hour recess period was discretionary."[8] Seemingly, the courts have presumed that school officials are protected under the discretionary exception.

---

[5]290 N.E.2d 769 (Ind. Ct. App. 1972).

[6]*Id.* at 774-75.

[7]297 N.E.2d 463 (Ind. Ct. App. 1973).

[8]*Id.* at 471.

This protection has been severely castigated as an illogical relic of ancient legal principles.[9] Every act or omission is somewhat discretionary. No analytical framework exists to make the distinction between discretionary and ministerial acts any more precise than under the old governmental-proprietary test. Underlying the need for such a test is the necessity to allow the state to govern. If the courts feel it is imperative to continue this discretionary exception, an examination of certain factors may better determine the need or extent of any privilege. The courts might look to such factors as ". . . the importance to the public of the function involved, the extent to which governmental liability might impair free exercise of the function, and the availability to individuals affected of remedies other than tort suits for damages."[10] Such an approach would not rigidly exclude a whole class of plaintiffs from recovering damages.

In line with the jurisprudential notion of providing a remedy for every harm, the court in *Brooks v. Robinson*[11] abnegated the interspousal immunity doctrine. The basis of this immunity evolved out of the concern that such tort suits would disrupt marriage relationships and tend to promote fraud or trivial lawsuits.[12] Finding this doctrine to be judicially created, Justice Hunter concluded that these rationales were no longer tenable under modern practice, remarking that such an anachronistic privilege "requires the blanket assumption that our court system is so ill-fitted to deal with such litigation that the only reasonable alternative to allowing husband-wife tort litigation is to summarily deny all

---

[9]

> [Although] the public school system in the United States . . . constitutes the largest single business in the country [it] is still under the domination of a legal principle which in great measure continues unchanged since the middle ages . . . .
>
> . . . The principle [of sovereign immunity] is applied with complete disregard of the specific facts, in a more or less blanket fashion, regardless of whether the injury was the result of a falling building, or whether the pupil is killed by a swing.

Rosenfield, *Governmental Immunity from Liability for Torts in School Accidents*, 5 LEGAL NOTES ON LOCAL GOVERNMENT 358, 362 (1940). *See also* Repko, *Legal Commentary on Municipal Tort Liability*, 9 LEGAL COMMENTARY ON MUNICIPAL TORT LIABILITY 214 (1942).

[10]Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 230, 359 P.2d 465, 467, 11 Cal. Rptr. 97, 99 (1961).

[11]284 N.E.2d 794 (Ind. 1972).

[12]*Id.* at 796.

relief to this class of litigants."[13] The parent-child immunity doctrine[14] would seem to be suspect under the rationale of the *Brooks* and *Campbell* decisions. More importantly, these opinions reflect an appellate concern for shifting losses from the injured party to the actual wrongdoer. Finally, these decisions judicially acknowledge the role of insurance in modern American society.[15]

B. Products Liability

No area of Indiana tort law has been so revolutionized in the past decade as the products liability field. It is obviously beyond the scope of this section to review or even mention each of these developments.[16] Only the most recent or the most salient cases will be discussed here.

In *J.I. Case Co. v. Sandefur*,[17] the Indiana Supreme Court expounded upon the duty owed by a manufacturer to injured persons not in privity of contract with the manufacturer. Prior to *Sandefur*, numerous exceptions to the privity doctrine had evolved.[18] Noting that the privity doctrine was doddering under the weight of these exceptions,[19] the court, specifically adopting the rationale of *MacPherson v. Buick Motor Co.*,[20] remarked that a manufacturer owed "the duty to avoid hidden defects or concealed dangers."[21] Using the logic of *Sandefur* as a springboard, later federal court

---

[13]*Id.* at 796-97.

[14]Smith v. Smith, 81 Ind. App. 566, 142 N.E.2d 128 (1924). For a discussion of a New York case abrogating the parent-child immunity doctrine, see 44 NOTRE DAME LAW. 1001 (1969).

Indiana had previously abolished the charitable immunity. *See* Harris v. Young Women's Christian Ass'n, 250 Ind. 491, 237 N.E.2d 242 (1968). *See also* 13 RES GESTAE, July 1969, at 22.

[15]Campbell v. State, 284 N.E.2d 733 (Ind. 1972).

[16]For an excellent review of Indiana case law in this area, see Frandsen, *Summary of Indiana Law on Products Liability*, INDIANA PRODUCTS LIABILITY HANDBOOK (1968). *See generally* Dickerson, *Products Liability: How Good Does a Product Have to Be?*, 42 IND. L.J. 301 (1967).

[17]245 Ind. 213, 197 N.E.2d 519 (1963).

[18]*See* Huset v. J.I. Case Co., 120 F. 865 (8th Cir. 1903).

[19]245 Ind. at 221, 197 N.E.2d at 522.

[20]217 N.Y. 382, 111 N.E. 1050 (1916).

[21]245 Ind. at 222, 197 N.E.2d at 523.

decisions, applying Indiana law, have completely eliminated the privity doctrine in cases of implied warranties and strict liability.[22]

Accompanying the expanded liability of manufacturers is the added responsibilities placed upon vendors. In *Dudley Sports Co. v. Schmitt*,[23] the court of appeals, in a case of first impression, embraced the *Restatement* position that "[o]ne who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer."[24] The *Dudley* case involved a baseball pitching machine which had been manufactured by a Kansas company, but which only bore the name of Dudley Sports. Although there was no evidence of a specific claim by Dudley that it was the manufacturer, the court found that there were "no reasonable grounds . . . to believe otherwise."[25]

The throwing arm of the baseball machine could be set off by a slight vibration or a change in atmospheric conditions if the arm were left in a certain position, even if it were left unplugged. A sixteen-year-old student who was sweeping in the locker room was struck in the face by the throwing arm and sustained extensive facial injuries. In affirming a judgment for $35,000.00, the court reasoned that a vendor who holds himself out as the manufacturer of a product and labels it with his name is liable not only for his own negligence, but also for any negligence on the part of the actual manufacturer even though the vendor could not have reasonably discovered the defect.[26] The court concluded that since the machine was a potentially dangerous mechanism, Dudley was bound to provide a machine reasonably safe for its intended use. Dudley had not only failed to carry out this duty, but had also failed to provide a specific warning of the dangers involved.[27]

Another advancement in this field occurred in *Cornette v. Searjean Metal Products*[28] with the acceptance of the strict liability theory as embodied in section 402A of the *Restatement*. The court indicated that *Sandefur* and the strict liability concept are

---

[22]*See, e.g.*, Dagley v. Armstrong Rubber Co., 344 F.2d 245 (7th Cir. 1965); Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. 1965).

[23]279 N.E.2d 266 (Ind. Ct. App. 1972).

[24]RESTATEMENT (SECOND) OF TORTS § 400 (1965).

[25]279 N.E.2d at 274.

[26]*Id.* at 273.

[27]*Id.* at 280.

[28]147 Ind. App. 46, 258 N.E.2d 652 (1970).

"independant bases for a cause of action: the former based on negligent manufacture, inspection, assembly or repair and the latter on the § 402A protection against any defect rendering a product unreasonably dangerous regardless of fault."[29] The rationale for this advancement is to shift the losses from the injured party to the purchasing public—"In theory at least . . . if the price of the product accurately reflects the cost of the product, then the consumer is contributing to a fund for his own protection."[30] This decision had been foreshadowed by earlier federal cases.[31]

Under the strict liability action or the negligence theory, there are sometimes difficult problems in proving that the defect in fact caused the damage. *Mamula v. Ford Motor Co.*[32] suggests an appellate reluctance to deprive a plaintiff of a jury determination. In *Mamula*, a driver lost control of his car and the right front tie rod assembly was found 120 feet to the rear of the accident site. An expert testified that a broken tie rod assembly could have caused this accident. Following the principle outlined in *International Harvester Co. v. Sharoff*,[33] the court allowed the issues of whether the manufacturer had properly discharged its obligation to inspect and whether the tie rod was the cause of the accident to be submitted to a jury. Further, the majority wrote in *Mamula* that "a conflict exist[ed] from which a reasonable man could justifiably infer negligence" because the plaintiff "testified that *before* the accident occurred, he lost control of the steering" and an "essential element for steering, to-wit, the tie rod was found 120 feet *behind* the car." The majority concluded that it was not known "whether this tie rod fell off first, thereby causing the accident, or whether the accident itself caused the tie rod to fall off . . . ."[34] But the dissent maintained that the "mere fact that the driver of plaintiff's vehicle suddenly lost steering control, that the car struck the guard rail and median strip, and that the severed tie rod was found behind the point at which the vehicle came to rest" did not "permit a reasonable inference that the defendant

---

[29]*Id.* at 52, 258 N.E.2d at 656.

[30]*Id.* at 53, 258 N.E.2d at 656. Judge Sharp wrote a concurring opinion in *Cornette* which gives an excellent overview of the strict liability theory. *Id.* at 55, 258 N.E.2d at 657.

[31]*See, e.g.*, Evans v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966); Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965).

[32]275 N.E.2d 849 (Ind. Ct. App. 1972).

[33]202 F.2d 52 (10th Cir. 1953).

[34]275 N.E.2d at 853.

either failed to properly inspect the tie rod assembly or used inferior metal in manufacturing it, or failed to properly install it."[35] Admittedly, in *International Harvester*, there was evidence adduced that a visual inspection had been made of the allegedly defective part, whereas in *Mamula* there was no testimony on this subject. Yet the argument of the dissent, on this point, would be of little significance if the action had been framed around the strict liability theory. Indeed, it would seem that the majority was using a strict liability theory in the guise of a negligence action. In any case, *Mamula* is important in that it provides a guide to the type and quantum of evidence needed to establish whether the part was defective and whether the defect caused the accident.

C. Warranties

Although strict liability and warranty law have a few analogous features,[36] the latter has unfortunately retained many of the antiquated common law principles which have grown up with it. For example, the implied warranty doctrine has retained "the contract doctrine of privity, disclaimer, requirements of notice of defect, and limitations through inconsistencies with the express warranties."[37] However, one layer of these encrustations was shed in *Theis v. Heuer*.[38] In *Theis*, a purchaser of a new house brought suit against a building contractor for a breach of implied warranty and for negligence. Certain sewer lines which had been badly laid resulted in the collection of water and sewage on the first floor of the house. A motion under Indiana Rule of Trial Procedure 12(B) (6) was granted at the trial level for the building contractor. On appeal, this decision was reversed and the concept of caveat emptor was handed another set-back. A prior decision, *Tudor v. Heugal*,[39] which had applied the caveat emptor doctrine to real property was overruled.

The court reasoned that the disparate expertise between a building contractor and a purchaser, the anomalous treatment of real property as compared with personalty under Indiana warranty law, and the fact that the old law encouraged shoddy workmanship

---

[35]*Id.* at 856.

[36]*See* Phillips, *Notice of Breach in Sales and Strict Liability Law*, 47 IND. L.J. 457 (1972).

[37]147 Ind. App. at 57, 258 N.E.2d at 658 (Sharp, J., concurring).

[38]280 N.E.2d 300 (Ind. 1972).

[39]132 Ind. App. 579, 178 N.E.2d 442 (1961).

all dictated this result.[40] Moreover, the court thought that there should be an "implied warranty for fitness for human habitation."[41] Significantly, there was an intimation that this "warranty for fitness for human habitation" doctrine would also be applicable to the landlord-tenant area since the court specifically noted a parallel development in landlord-tenant law.[42] The court continued that in "a modern society one cannot be expected to live in a multi-storied apartment building without heat, hot water, garbage disposal or elevator service. Failure to supply such things is a breach of the implied covenant of habitability."[43]

The second paragraph to the complaint alleged negligence in the construction of the sewer lines. The issue was whether a builder-contractor had a legal duty toward the purchaser of the house.[44] Holding that this paragraph also was sufficient to withstand a motion to dismiss, the court accepted Dean Prosser's assessment[45] that builders should be encompassed within the rule of *MacPherson v. Buick Motor Co.*[46] and be held to the general standard of reasonable care for the protection of buyers, even after the work was accepted.[47]

Certainly, warranty law has been given another shot in the arm with the recent decision of *Woodruff v. Clark County Farm Bureau Cooperative Association.*[48] Chickens sold to the plaintiff by defendant later died. The contract was oral but the plaintiff had signed a delivery receipt for the chickens which contained a general

---

[40]280 N.E.2d at 304-05.

[41]*Id.* at 304.

[42]*Id.* at 305 n.1.

[43]*Id., quoting from* Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 482, 268 A.2d 556, 559 (1970).

[44]It has been generally held that "the acceptance of the work by the other party to the contract operates as the intervention of an independent human agency which breaks the chain of causation . . . ." Hobson v. Beck Welding & Mfg., Inc., 144 Ind. App. 199, 207, 245 N.E.2d 344, 349 (1969).

[45]W. PROSSER, THE LAW OF TORTS § 104, at 680-82 (4th ed. 1971) [hereinafter cited as PROSSER].

[46]217 N.Y. 282, 111 N.E. 1050 (1916).

[47]280 N.E.2d at 306. This result was foreshadowed by Judge Sharp: "There is no logical reason for holding a manufacturer and contractor to different standards of care with respect to hidden defects." Hobson v. Beck Welding & Mfg., Inc., 144 Ind. App. 199, 208, 245 N.E.2d 344, 349 (1969).

[48]286 N.E.2d 188 (Ind. Ct. App. 1972).

disclaimer of any warranties. The court first found that since the defendant was a merchant of chickens and was aware of plaintiff's intended use, implied warranties of fitness for a particular purpose and of merchantability had arisen. However, since the "conspicuous" requirement of Indiana law[49] had not been met, the general disclaimer was ineffective.[50] The court finally observed that a jury could find that the disclaimer contradicted the express warranty and would therefore be ineffective.[51]

D. The Guest Statute

Guest statutes have been enacted after persistent lobbying on the part of large insurance companies.[52] Although the Indiana guest statute was ostensibly designed to prevent a guest from exploiting a host's kindness and to prevent collusive lawsuits,[53] it has had the unfortunate result of protecting negligent drivers from liability. Litigation under this statute has focused upon two essential questions: (1) whether the injured party was a guest within the purview of the statute, and (2) whether the driver was wilfully or wantonly negligent. To avoid the guest categorization, the injured rider must demonstrate that there was a business rather than a social motive for the trip and that there was an expectation of a substantial material benefit therefrom.[54] Since *Allison v. Ely*,[55] the question of whether there was a sufficient payment was considered to be a question of law. Recently, however, several decisions have held to the contrary.

In *Furniss v. Waters*,[56] the plaintiff paid three dollars per week in order to ride to work with her brother-in-law. The lower

---

[49]IND. CODE §§ 26-1-2-316(2), (3) (1971).

[50]286 N.E.2d at 196.

[51]*Id.* at 200. *See generally* Note, *Implied and Express Warranties and Disclaiming Under the Uniform Commercial Code*, 38 IND. L.J. 648 (1963).

[52]*See* PROSSER § 34, at 186-87.

[53]Note, *The Indiana Guest Statute*, 34 IND. L.J. 338 (1959). It has also been argued that these statutes are adopted to protect drivers against liability (no hitchhikers). However, Prosser has written that he "once found a hitchhiker case, but has mislaid it." He has been unable to find another. PROSSER § 34, at 187 n.8.

[54]*See, e.g.*, Liberty Mut. Ins. Co. v. Stitzle, 220 Ind. 180, 185, 41 N.E.2d 133, 135 (1942): "If the trip is primarily for business purposes and the one to be charged receives substantial benefit, though not payment in a strict sense, the guest relationship does not exist." *See also* Richards, *Another Decade Under the Guest Statute*, 24 WASH. L. REV. 101, 102 (1949).

[55]241 Ind. 248, 170 N.E.2d 371 (1960).

[56]277 N.E.2d 48 (Ind. Ct. App. 1971).

court granted a summary judgment finding that the familial relationship was dispositive of the guest issue. Judge Sullivan, writing the opinion for the court of appeals, reversed and held that a single factor, such as familial relationship, cannot be held determinative of the issue when other factors are present.[57] The court felt "the intangible benefits, peace of mind, and familial harmony, which the daily presence of Mrs. Furniss in Mr. Waters' vehicle may have bestowed upon him, to be so substantial and material, in light of the obvious purpose of the daily trips, that Mrs. Furniss might be considered by reasonable minds as a paid passenger."[58] The precedential value of *Allison* was effectively limited in *Furniss* by the court's conclusion that in *Allison* only one possible inference could have been drawn from the facts.[59]

Likewise, in *Schoeff v. McIntire*,[60] a social acquaintance was to help paint a house in return for lunch and transportation. While being driven to the house by the homeowner, the plaintiff suffered injuries in an automobile accident. The lower court entered judgmnt against the defendant. On appeal, the court affirmed, feeling that the finding of a substantial and material benefit could be supported by the facts of this case.[61]

If the guest classification cannot be evaded, the alternative for the plaintiff is to show that the host was guilty of wilful or wanton misconduct. The "wilful and wanton" standard can be disjunctively applied.[62] Generally, to be guilty of wanton misconduct, the driver must have (1) been conscious of an existing hazard or of his misconduct, (2) acted with reckless disregard for the safety of his guest, and (3) known that this conduct subjected the guest to a probability of injury.[63]

The requirement that the host be aware of the existing hazard or of the misconduct has been recently modified to require only constructive knowledge.[64] In other words, the guest need only

---

[57]*Id.* at 51.

[58]*Id.* at 52.

[59]*Id.*

[60]287 N.E.2d 369 (Ind. Ct. App. 1972).

[61]*Id.* at 373.

[62]*See, e.g.*, Sausanam v. Leininger, 237 Ind. 508, 146 N.E.2d 414 (1957); McClure v. Austin, 283 N.E.2d 783, 785 (Ind. Ct. App. 1972).

[63]*See* Clouse v. Pedin, 243 Ind. 390, 186 N.E.2d 1 (1962).

[64]Barnes v. Deville, 293 N.E.2d 54 (Ind. Ct. App. 1973).

show that a reasonable man under the circumstances would or should have known of the existence of the hazard or of his misconduct.

The application of the "wilful and wanton misconduct" standard has certainly produced seemingly irreconcilable results. For example, in *McClure v. Austin*[65] evidence was adduced showing that the defendant was driving on the wrong side of the road, exceeding the speed limit on wet pavement, and driving while tired. A directed verdict for the defendant was sustained on appeal. Yet in *Barnes v. Deville*[66] the defendant was speeding on a gravel road with weeds growing onto the road and this was held to be sufficient to justify the submission of the issue to the jury.

Because of the harsh results which follow from the guest statute, these statutes typically invite petty litigation.[67] The ability of a negligent driver to escape liability through a guest statute stands as a monument to the insurance lobby. These statutes contravene holdings in other areas of tort law which are cognizant of the risk spreading capabilities of society. Perhaps the recent equal protection challenge to the California guest statute[68] will signal the collapse of this unfortunate anachronism in Indiana.

E. Slip and Fall Cases

In the genre of cases loosely defined as "slip and fall" suits, it is often difficult for the plaintiff to establish liability. The threshold consideration is whether the proprietor exercised due care with regard to the situation. Encompassed within the scope of this inquiry is whether the owner or occupier of the land had knowledge of the existing condition which caused the fall. Indiana follows the general trend in allowing recovery for constructive knowledge of that condition.[69] A recent Seventh Circuit decision suggested that actual knowledge of a recurring condition would suffice to satisfy the constructive knowledge requirement. In

---

[65]283 N.E.2d 783 (Ind. Ct. App. 1972).

[66]293 N.E.2d 54 (Ind. Ct. App. 1973).

[67]Lascher, *Hard Laws Make Bad Cases—Lots of Them (The California Guest Statute)*, 9 SANTA CLARA LAW. 1, 23 (1968).

[68]Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

[69]*See, e.g.*, Galbreath v. City of Logansport, 279 N.E.2d 578 (Ind. Ct. App. 1972); City of Indianapolis v. Roy, 52 Ind. App. 388, 97 N.E. 795 (1912).

Hetzel v. Jewel Co.,[70] the court reversed a verdict for the defendant in a suit which had arisen when the plaintiff slipped on an unknown liquid on the floor in front of a meat counter.[71] The plaintiff claimed that this was a recurring condition of which the defendant had actual knowledge. As a foundation to support its finding that Indiana law allowed recovery under these facts, the court interpreted *Robertson Brothers Department Store v. Stanley*[72] and *Kroger Co. v. Ward*[73] as standing for the proposition that "actual knowledge of the existence of an uncorrected, continuing or recurrent dangerous condition constitutes constructive knowledge of the existence of a specific recurrence."[74] Moreover, the court thought that Indiana tort law was not aberrant and was in harmony with the progressive trend in this regard.[75]

There is no violation of due care if a person slips on a properly waxed floor.[76] However, this principle "does not encompass an application of wax lacking uniformity of distribution."[77] Applying this standard, the court in *Daben Realty Co., Inc. v. Stewart*[78] thought that the facts of the case justified the submission of the issue to a jury. In *Daben*, both the lobby floor and the floor of the adjoining office where the plantiff worked were covered with square asphalt tile. The lobby floor was waxed to a high sheen; the office floor was dirty and sticky. The plaintiff stepped out of the office, into the lobby, and fell. In sustaining a $47,000.00 jury verdict, the court noted that a jury could have reasonably found a "dangerous lack of uniformity in the maintenance of the floor."[79]

In other instances the duty issue has been the stumbling block to the plaintiff. For example, in *Hammond v. Alligretti*[80] the

---

[70]457 F.2d 527 (7th Cir. 1972).

[71]*Id.*

[72]228 Ind. 372, 90 N.E.2d 809 (1950).

[73]267 N.E.2d 189 (Ind. Ct. App. 1971).

[74]457 F.2d at 532.

[75]*Id.*

[76]*See, e.g.*, Stephens v. Sears, Roebuck & Co., 212 F.2d 260 (7th Cir. 1954).

[77]Moyer v. Indiana American Legion, Inc., 298 F.2d 46, 47 (7th Cir. 1962).

[78]290 N.E.2d 809 (Ind. Ct. App. 1972).

[79]*Id.* at 811.

[80]288 N.E.2d 197 (Ind. Ct. App. 1972).

court sustained a directed verdict against the plaintiff who slipped and fell on ice in the defendant's parking lot. Refusing to depart from the rule that the owner or occupier of an open air parking lot is under no duty to remove *natural* accumulations of ice and snow, the court held that liability will only be imposed when the property owner creates a more dangerous condition than would be otherwise attributable to the natural accumulation of ice and snow.[81] Paradoxically, such a result rewards the inactive and penalizes the industrious.

Convincing a jury that the plaintiff was not contributorily negligent is perhaps the hardest element of the plaintiff's case. Nevertheless, courts have been reticent to rule that the plaintiff has been contributorily negligent as a matter of law. For example, in *Galbreath v. City of Logansport*[82] a lady caught her toe in a crack by a parking meter and fell, fracturing her leg. The court, in reversing the granting of a motion for judgment on the evidence, indicated that a pedestrian is not bound to keep his eyes constantly upon the sidewalk; thus, he is not negligent as a matter of law for failure to see a defect in plain view.[83]

F. Res Ipsa Loquitur

The doctrine of res ipsa loquitur was held to be a rule of evidence that need not be specifically pleaded in *Phoenix of Hartford Insurance Co. v. League, Inc.*[84] Consequently, the provisions of Trial Rule 9.1(B), providing that res ipsa loquitur may be pleaded, were not deemed to be mandatory. In this case, a plumber was alleged to have started a fire in the basement of an empty house. There was evidence that he had used a torch to fix the pipes. Also, testimony was given that the fire had been started in the vicinity where the plumber had been working. In order to establish liability the court felt that it was "not necessary for the plaintiff to exclude every other possibility other than the defendant's negligence as a cause."[85]

---

[81] *Id.* at 200.

[82] 279 N.E.2d 578 (Ind. Ct. App. 1972).

[83] *Id.* at 582. *See also* Hetzel v. Jewel Co., 457 F.2d 527 (7th Cir. 1972); F.W. Woolworth Co. v. Moore, 221 Ind. 490, 493, 48 N.E.2d 644, 645 (1943); Kroger v. Ward, 267 N.E.2d 189, 190 (Ind. Ct. App. 1971). In *Hetzel*, the court wrote that "there is no dearth of slip and fall cases in the Indiana law in which recovery was not barred by the fact of the visibility of the injury-causing condition." 457 F.2d at 529.

[84] 293 N.E.2d 59 (Ind. Ct. App. 1973).

[85] *Id.* at 61.

G. Negligence Per Se

Judge Buchanan, writing without dissent, has firmly fixed upon railroads the duty to install, maintain, and procure replacements of missing signs at railroad crossings. In *Wroblewski v. Grand Trunk Western Railway*,[86] there were no warning signs posted as required by Indiana law. Reversing a directed verdict for the defendants, the court held that the failure of the railroad to have a sign within 300 feet of the tracks was negligence per se.[87] Furthermore, the court stated that this was a safety statute designed to protect exactly this class of plaintiffs[88] against this particular risk of harm.[89] Therefore, Judge Buchanan argued that only the questions of whether there was a sufficient and reasonable excuse for the violation and whether in failing to post these signs the defendant was in fact guilty of actionable negligence remained for the jury.[90] This latter issue, *i.e.*, did the act constitute actionable negligence, should be subsumed under the court's inquiry into the purpose of the statute, the class of litigants protected, and the risk covered by the statute.[91] If these three elements are present, there would seem to be no reason to permit the jury to consider whether it is actionable negligence.[92]

Critics of this approach would contend that the jury rather than the legislature is better equipped to ascertain the community standard. Therefore, it is within the domain of the fact-finder to determine whether the violation of the statute was unreason-

---

[86]276 N.E.2d 567 (Ind. Ct. App. 1971).

[87]*Id.* at 571

[88]*Id.* at 575.

[89]*Id.*

[90]*Id.*

[91]*See* Sheridan v. Suida, 276 N.E.2d 883 (Ind. Ct. App. 1971). Although *Sheridan* avoids mention of the pitfall of allowing the jury to find whether there is actionable negligence, this court falls into another trap. In *Sheridan*, the court suggested that the proximate cause issue was determinative. Yet, an inquiry into proximate cause is misplaced if the negligence per se approach is utilized. *See* PROSSER § 36.

[92]Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914). After there is found to be a violation of a statute and the courts leave the question of negligence as a fact to the jury, "they are doing nothing less than informing that body that it may stamp with approval, as reasonable conduct, the action of one who has assumed to place his own foresight above that of the legislature . . . ." *Id.* at 322.

able.[93] If this is the intent of this second standard, it should be much more precisely worded.

H. Retaliatory Discharge from Employment for Filing a Workmen's Compensation Claim

An employee was allegedly discharged for filing a workmen's compensation claim. Finding no direct precedent to control the decision, the supreme court nevertheless held that a claim for damages existed.[94] The court argued that by "denying transfer and allowing the trial court's dismissal to stand we would be arming unethical employers with common law authority"[95] to coerce employees and prevent the filing of claims. Further, the court analogized to the landlord-tenant area, in which many courts have held that a retaliatory eviction may be raised as an affirmative defense.[96] More specifically, reliance was placed upon *Aweeka v. Bonds,*[97] in which a retaliatory eviction was held to constitute an affirmative cause of action. With this background, the court stated that an intentional, wrongful act on the part of the employer could be vindicated by an action for damages.[98]

I. Defenses

1. Imputing Contributory Negligence

Imputing the contributory negligence of one parent to the other when the action is for the death of a child is seldom justifiable and has been heavily criticised.[99] Despite the waning influence of this doctrine elsewhere, the court of appeals in *Sheridan v. Sinda,*[100] for the first time, decided that the negligence of a guardian may *sometimes* be imputed to the parent of the injured

---

[93]Lowndes, *Civil Liability Created by Criminal Legislation,* 16 MINN. L. REV. 361, 367 (1932).

[94]Frampton v. Central Ind. Gas Co., 297 N.E.2d 425 (Ind. 1973).

[95]*Id.* at 428.

[96]*Id.*

[97]20 Cal. App. 3d 278, 97 Cal. Rptr. 650 (1971). In *Aweeka,* the court argued that "it would be unfair and unreasonable to require a tenant, subjected to a retaliatory rent increase by the landlord, to wait and raise the matter as a defense only . . . ." *Id.* at 281, 97 Cal. Rptr. at 652.

[98]297 N.E.2d at 428.

[99]*See* PROSSER § 127, at 914.

[100]276 N.E.2d 883 (Ind. Ct. App. 1971).

child to bar recovery for the death of a child under the wrongful death statute.[101] In *Sheridan,* the father had left his six year-old daughter in the care of her older brother, aged eighteen. The older brother went for a walk on the beach leaving his sister unattended. The stroller in which the tot was riding was struck by the defendant. The court held that in order to impute negligence to a parent, the parent must have had the right to control or regulate the custodian at the time of the accident, and since the plaintiff here had "every legal and equitable right to control the actions"[102] of his son, negligence was imputed to the father.

However, it is difficult to understand the justification here. If an employee of the father instead of the son was similarly negligent would his contributory negligence be imputed to the father? What if the employee was merely a babysitter? Could this defense be extended to a nursery school? Dean Prosser states that this concept "has generally been rejected as a senseless survival of a discarded concept of marital unity."[103] A more palatable result was reached in *Leuch v. Goetz,*[104] wherein the court disapproved of giving an instruction on joint enterprise. When the only evidence was that the husband and wife were embarked upon a family social endeavor, the court thought that this was insufficient to impute the contributory negligence of the driver-husband to the wife under the joint enterprise doctrine.[105]

2. *Some Unsuccessful Defenses*

A temporary barricade which was serving as a false front on a building being remodeled by the defendant collapsed upon the plaintiff as he walked in front of the building in *William H. Stern & Son v. Rebeck.*[106] In seeking to avoid an $80,000.00 judgment, the defendant contended that it was error for the trial court to give an instruction on the act of God defense. The court

---

[101] *Id.* at 890.

[102] *Id.*

[103] PROSSER § 127, at 914.

[104] 280 N.E.2d 847 (Ind. Ct. App. 1972). *But see* Hake v. Moorhead, 140 Ind. App. 127, 222 N.E.2d 617 (1966), wherein a married couple was driving to the bank to deposit money derived from a joint business. In this case, the court held that these facts were sufficient to impute the husband's contributory negligence to the wife. This decision is out of harmony with decisions elsewhere.

[105] 280 N.E.2d at 855.

[106] 277 N.E.2d 15 (Ind. Ct. App. 1972).

replied that the defense was not available under the facts of this case, since there was testimony that the windows at the rear of the building which the barricade fronted had not been bricked in by the defendant. This created a tunnel effect which would increase the velocity of the wind approaching the barricade. Accordingly, the court held that the act of God defense was not available as there was not "an entire exclusion of human agency from the cause that produced the injury . . . ."[107]

Another defendant tendered an "unavoidable accident" instruction to the court.[108] The plaintiff had objected to the instruction "for the reason that there was no evidence to which said instruction would be applicable."[109] The court specifically agreed with the plaintiff that it has been consistently held improper to give "pure accident" or "unavoidable accident" instructions as they do not connote affirmative defenses[110] and can only serve to confuse jurors.[111] But, the court refused to consider the matter as grounds for reversal because the plaintiff had not complied with Trial Rule 51 (C) by specifically stating the grounds and subject matter of her objection.[112]

Finally, in *Wallace v. Doan*,[113] instructions upon contributory negligence were withdrawn pursuant to the Indiana rule that it is reversible error for the court to refuse to withdraw the question of contributory negligence when there is no evidence or inference of such. Evidence that the plaintiff was driving twenty miles per hour on a preferential thoroughfare and looking straight ahead was introduced. The defendant contended that the plaintiff was under a duty to keep a lookout for vehicles which might emerge from a nonpreferential street and that this duty was violated, thereby creating a question for the jury as to the plaintiff's contributory negligence. Judge Lowdermilk, writing for the court of appeals, held that the plaintiff had a right to assume that any person about to enter or traverse a preferential street would obey the law, that the plaintiff had no duty to be on the

---

[107]*Id.* at 19.

[108]Conley v. Lothamer, 276 N.E.2d 602 (Ind. Ct. App. 1972).

[109]*Id.* at 603.

[110]*Id.* at 604.

[111]*Id.*

[112]*Id.* at 605.

[113]292 N.E.2d 820 (Ind. Ct. App. 1973).

lookout for such persons, and that the plaintiff was not guilty of contributory negligence as a matter of law.[114]

J. Contribution Among Tortfeasors

Fictions have been employed to circumvent the general proposition that a release of one joint tortfeasor is a release of all.[115] In *Northern Indiana Public Service Co. v. Otis*,[116] loan receipt agreements were added to covenants not to sue[117] and covenants not to execute as a means to avoid the applicability of this rule. In this case, the court was faced with an agreement between the plantiff and one of the joint tortfeasors, wherein the defendant "loaned" $50,000 to the plaintiff without interest and only repayable to the extent that the plaintiff recovered a verdict against the other tortfeasor. Furthermore, the agreement provided that if the verdict was only against the defendant, NIPSCO, then the $50,000 was to be subtracted from the verdict. If the verdict was against both, the plaintiff agreed that he would only execute against the other wrongdoer. The court stated that the plaintiff could have elected to sue only one defendant or "to levy execution on a judgment against either tortfeasor and receive full satisfaction thereof against either . . . ."[118] "She could have received part satisfaction from one tortfeasor in consideration for a covenant not to execute and proceeded for the balance of the judgment against the remaining tortfeasor," or "she could have executed a covenant not to sue as to one potential joint tortfeasor and proceeded against the other."[119] The court concluded that the "loan receipt agreement . . . [did] not conflict with any of these rules but [represented] a permissible innovation . . . ."[120] This technique was

---

[114]*Id.* at 825.

[115]*See* 37 NOTRE DAME LAW. 448 (1962).

[116]145 Ind. App. 159, 250 N.E.2d 378 (1969).

[117]The theoretical justification in construing a covenant not to sue as having a different effect from a release

> . . . lies in the distinction between the *effects* of the two. Where a release extinguishes a cause of action, a covenant not to sue merely makes the remedy inaccessible, and so meets the dissolution of an indivisible cause of action. A few courts are more forthright, and reject any such distinction.

37 NOTRE DAME LAW. 448, 452 (1962).

[118]145 Ind. App. at 179, 250 N.E.2d at 392.

[119]*Id.*

[120]*Id.*

favorably cited for the policy reasons that there is an economic need for such payments by a severely injured plaintiff, especially in view of the hardships imposed upon such a party by lengthy legal proceedings.[121]

Scott v. Krueger[122] recently reaffirmed the *Otis* case and expressed the opinion that covenants not to sue, covenants not to execute, and loan receipt agreements are to be encouraged in the settlement of litigation.[123] *Scott* concerned the issue of whether a covenant not to execute agreed upon by the plaintiff and one of the codefendants should have been presented to the jury as evidence. This agreement had been formulated while the jury was deliberating. The court held under the facts of this case that such an agreement was not required to be presented to the jury for their consideration;[124] indeed the contrary view that such a move would have been grounds for a reversal was intimated.[125]

Yet an even more important step in this area was taken in *Wecker v. Kilmer*.[126] In *Wecker*, the Indiana Supreme Court was considering a certified issue of law from the Seventh Circuit Court of Appeals to clarify the existing Indiana precedents in regard to whether a subsequent tortfeasor who aggravated an injury caused by an original tortfeasor is released by a general release executed in favor of the original tortfeasor. The plaintiff had executed a release in favor of the original tortfeasor who had injured the plaintiff in an automobile accident. While being treated for the injuries sustained in this accident, the plaintiff suffered further injuries by the negligence of the attending physician.

The court refused to accept the "prevailing view" that this release of the original tortfeasor released all subsequent tortfeasors for aggravation of these injuries.[127] The rationale of this "prevailing view" was the proximate cause theory—"the argument goes that since a general release to the original tortfeasor would include release of liability for aggravation . . . proximately resulting, such a release must be deemed to embrace any claim for

---

[121] *Id.* at 179-80, 250 N.E.2d at 392.

[122] 280 N.E.2d 336 (Ind. Ct. App. 1972).

[123] *Id.* at 357.

[124] *Id.*

[125] *Id.*

[126] 294 N.E.2d 132 (Ind. Ct. App. 1973).

[127] *Id.* at 135.

the same aggravation against the negligent physician."[128] The court rejected this analysis and adopted a two-pronged test. In determining the effect of a release of an original tortfeasor the court should examine "(1) [w]hether the injured party has received full satisfaction; and (2) [w]hether the injured party *intended* that the release be in full satisfaction of the party's claim . . . ."[129] Extrinsic proof would be allowed to show the intent of the parties.[130]

The precedential value of this opinion could well erase the general law in regard to releases. Basically, three policy arguments were given to support the opinion. First, the fear of double recovery was thought to be unjustified since any amount "received from the original tortfeasor for the release would have to be credited against any amounts received in an action against a subsequent tortfeasor."[131] Moreover, the subsequent tortfeasor will never be liable for more damages than those caused by his own actions. Secondly, the court found the prevailing view illogical in that the original tortfeasor here disclaimed any liability in the release; if someone were injured in an accident where no one was at fault and his injuries were subsequently aggravated by the negligent acts of a physician, he would not be without a cause of action against the physician.[132] There was no proof that the alleged original tortfeasor was in fact a tortfeasor. It should only be to avoid unjust enrichment and prevent double recovery that any monies received from other sources would be credited against a recovery from a negligent physician. Third anomalously, wrongdoers who do not make or share in the reparation of the injuries are discharged, while one willing to right the wrong bears the whole loss.[133] None of these reasons are any more cogent with respect to tortfeasors subsequent in time than with joint tortfeasors.

K. Agency

Whenever the liability of one of the defendants must be predicated upon the respondeat superior doctrine, the appellate courts

---

[128] *Id.* at 134. For an example of a contrary result, see Clark v. Zimmer Mfg. Co., 290 F.2d 849 (1st Cir. 1961).

[129] 294 N.E.2d at 135.

[130] *Id.*

[131] *Id.* at 134.

[132] *Id.*

[133] *Id.* at 135.

have reserved this issue for the jury if any reasonable inference to be drawn from the facts would support a finding for the plaintiff on this issue. Such factual situations as a salesman's returning to lunch after calling on customers,[134] a wife's delivering her husband's paper route,[135] and a truck driver's driving a truck which had failed inspection and had been removed from the list of trucks eligible to driven,[136] were all encompassed within the above principle. In defining the scope of employment for purposes of the respondeat superior relationship, the courts have looked to see who has the "right to control"[137] the employee. This test "refers only to the right and not the exercise of control over the servant."[138] Numerous factors have been articulated to make this finding somewhat less onerous such as "the right to discharge, mode of payment, supplying of tools or supplies by the employer, belief by the parties in the existence of a master-servant relationship, control over the means used or result reached, length of employment and the establishing of work boundaries."[139]

One decision, certain to have controversial importance in this area, is *Estes v. Hancock County Bank*.[140] Criminal charges based upon an affidavit signed by a bank president were brought against the plaintiff for the deceptive issuance of a check. This action was for malicious prosecution against both the president and the bank. A jury verdict exonerated the bank president, but a $20,000 verdict was levied against the bank. The court of appeals reversed the trial court's judgment for the bank despite the jury verdict and argued that a jury could have logically thought that the president was not liable in his personal capacity but was so negligent within the scope of employment as to impute this to the bank.[141] Granting the motion to transfer, the supreme court

---

[134]Wilson v. Kauffman, 296 N.E.2d 432 (Ind. Ct. App. 1973).

[135]Gibbs v. Miller, 283 N.E.2d 592 (Ind. Ct. App. 1972).

[136]Watson v. Tempco Transp., Inc., 281 N.E.2d 131 (Ind. Ct. App. 1972).

[137]283 N.E.2d at 594-95.

[138]*Id.* at 595. *See also* Palmer v. Stockberger, 135 Ind. App. 263, 193 N.E.2d 384 (1963); New York Cent. R.R. v. Northern Ind. Pub. Serv. Co., 140 Ind. App. 79, 221 N.E.2d 442 (1966).

[139]285 N.E.2d at 595. *See also* RESTATEMENT (SECOND) OF AGENCY § 220, at 485 (1958).

[140]276 N.E.2d 540 (Ind. Ct. App. 1971), *rev'd*, 289 N.E.2d 728 (Ind. 1972).

[141]*Id.* at 548.

reversed and reinstated the trial court's judgment. Justice Arterburn, writing for a three-man majority, first queried whether the bank should be held liable for the actions of its exonerated president. It answered this question by stating that these facts "require a judgment in favor of the employer where the liability of the employer is grounded *solely* upon the activities of the employee."[142] The court was careful to point out that the holding did not disturb the rule that a principal could be held liable despite a verdict in favor of a joined servant[143] if the master has himself been guilty of acts which can be the basis for liability. Under this rationale, a corporation could be found guilty of implied malice despite the "good faith" of the employee who performs the act. For example, a corporation could instruct its servants to do some act which violated someone's rights although the acting servant was unaware of the underlying facts upon which he was acting. Thus, although the principal was heedlessly disregarding the rights of others, the agent could be absolved of liability. Analogously, if the employees were given inadequate instructions or training or were selected in a grossly negligent fashion, this could again imply a heedless disregard of the rights of the public. Expressed otherwise, the corporation's mental state "as to the existence of malice was dependent upon that of some agent or employee of the bank."[144] However, the plaintiff in this case had framed the issues upon the actions of the president, who was subsequently released from liability by the jury verdict. The dissent, on the other hand, reasoned that since an inconsistent verdict had been returned, there should be a remand for a new trial.[145]

L. Damages

While other jurisdictions are experimenting with alternative means to allow recovery for mental anguish negligently or intentionally caused,[146] Indiana has remained a bastion of the physical injury test—"[i]t is the general rule of law that damages for mental suffering, pain, fright, shock, and mental anguish are recoverable

---

[142]289 N.E.2d at 730.

[143]*Id.*

[144]*Id.*

[145]*Id.* at 732.

[146]*See, e.g.*, Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); Magruder, *Mental and Emotional Disturbances in the Law of Torts*, 49 HARV. L. REV. 1032 (1936); 44 IND. L.J. 478 (1969); 44 NOTRE DAME LAW. 632 (1969).

only when accompanied by and resulting from a physical injury."[147] Confining the discussion to a review of Indiana authorities, the court in *Jeffersonville Silgas, Inc. v. Otis,*[148] applied the above rule and overturned an award of damages for mental anguish. The plaintiff, in that case, had purchased a fuel tank from the defendants. Several years later the defendants approached the plaintiff's wife and informed her that they were going to reclaim this tank since it had not been refilled. She told them to speak to her husband. Without doing so, they removed the fuel tank while the plaintiff was not present. This action was brought for conversion, alleging, *inter alia,* punitive damages and damages for mental health. The plaintiff thought "that damages for mental anguish were proper and supported by evidence of harrassment and mental distress."[149] Few jurisdictions allow recovery for mental anguish caused by the disturbance of one's property rights. Reasoning that such an injury is not within the scope of the risk, these courts feel that this is an idiosyncratic and nonforeseeable reaction.[150] However, "if the actor can be charged with notice that his conduct entails unreasonable risk of harm he may be liable for injury even though the cause-effect sequence are [*sic*] unusual."[151] For example, in *Preiser v. Willandt,*[152] the plaintiff notified the landlord that because of a heart condition and her pregnancy she would be unable to move the next day. Ignoring this, the house was torn down according to the original plan. The emotional distress resulting from these actions was held not to be too remote a consequence to be actionable.

Moreover, "that debtors ought to be protected from being bedeviled and harrassed by offensive, high-pressure, extra-legal methods of collection is a sentiment definitely crystallizing in the cases."[153] Because the court of appeals considered the facts of

---

[147]Jeffersonville Silgas, Inc. v. Otis, 290 N.E.2d 113, 117 (Ind. Ct. App. 1972).

[148]290 N.E.2d 113 (Ind. Ct. App. 1972).

[149]*Id.* at 116.

[150]Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli,* 30 VA. L. REV. 193, 243 (1944).

[151]*Id.* at 244.

[152]48 App. Div. 569, 62 N.Y.S. 890 (1900).

[153]Magruder, *supra* note 146, at 1063.

Jeffersonville Silgas insufficient to warrant a finding of harrassment,[154] it is unclear whether such an action would be maintainable under more blatant abuse of creditor process.

Aetna Life Insurance Co. v. Burton,[155] involving an autopsy performed without the consent of the wife in which the deceased had a bloody looking substance running from his nose, and *Indiana Railroad v. Orr,*[156] involving a plaintiff wrongfully ordered off a streetcar, were cited by the plaintiff as sustaining his argument that no physical injuries are needed. These cases were dismissed as sui generis, apparently intimating that the physical injury test remained solidly imbedded in Indiana law. Notably, however, there was an oblique reference to the contact requirement test.[157]

Moreover, in *Jeffersonville Silgas,* the $5000 punitive damage award was also reversed; the court held that malice, fraud, oppression, gross negligence, or wilful and wanton misconduct had not been demonstrated by the plaintiffs.[158] Specifically, the court noted that the "wilful and wanton misconduct" standard was to be conjunctively applied.[159] Many courts have applied a different standard—*i.e.,* whether the wrongdoer acted with a "heedless disregard of the consequences."[160] Unlike the court in *Jeffersonville Silgas,* these courts have been reluctant to withdraw the punitive damage issue from the fact-finder. In *Jeffersonville Silgas,* the plaintiffs had a contract specifically divesting the defendants of all ownership in the fuel tank; they had been referred to the plaintiff, with whom they never consulted, to discuss the issue; they seized the tank while the plaintiff and his wife were absent; and when the plaintiff went to see the defendant in regard to this seizure, they erroneously told the plaintiff that this tank was not his. Assuredly, under the standard enunicated in other decisions,[161] reasonable inferences could be drawn that the defendants acted in "heedless disregard" of the rights of others.

---

[154]290 N.E.2d at 118.

[155]104 Ind. App. 576, 12 N.E.2d 360 (1938).

[156]41 Ind. App. 426, 84 N.E. 32 (1908).

[157]290 N.E.2d at 118.

[158]*Id.* at 116.

[159]*Id.*

[160]*See* Bob Anderson Pontiac, Inc. v. Davidson, 293 N.E.2d 232 (Ind. Ct. App. 1973); Capital Dodge, Inc. v. Haley, 288 N.E.2d 766 (Ind. Ct. App. 1972).

[161]*See* cases cited note 160 *supra.*

If the damages are not easily ascertainable, the appellate courts have refused to overturn verdicts for inadequacy or excessiveness[162] and have relied instead upon the judgment of the fact-finder or the lower court judge with his powers under Trial Rule 59(E)(5) to utilize an additur[163] or remittitur.[164]

M. Conclusion

To attempt to assess tort trends by an examination of recent case law invites a microscopic distortion of the whole common law organism. Nonetheless, several generalizations can safely be made. First, the appellate courts have been unafraid to create a precedent when an injured party was remediless under the common law. Indeed, the decision to allow recovery for a retaliatory discharge from employment for filing a workmen's compensation claim illustrates the flexibility of the judicial response to new problems. Moreover, the rapid growth of the products liability field points out the unlimited creative potentiality of the judicial branch in structuring precedents for injured parties. Secondly, the courts have overruled decisions when they have become untenable under modern practice. Abrogation of the sovereign immunity doctrine and the interspousal immunity privilege and the renovation of contribution law are examples of this approach. Finally, these cases demonstrate the willingness of the judiciary to shift the losses of injured individuals to society whenever possible. In short, this recent period has produced an important and laudatory reformation of Indiana tort law principles.

---

[162] *See, e.g.*, Rodinelli v. Bowden, 293 N.E.2d 812 (Ind. Ct. App. 1973); Bonek v. Plain, 288 N.E.2d 185 (Ind. Ct. App. 1972); William H. Stern & Son v. Rebeck, 277 N.E.2d 15 (Ind. Ct. App. 1972).

[163] *See* Borowski v. Rupert, 281 N.E.2d 502 (Ind. Ct. App. 1972).

[164] 288 N.E.2d 185 (Ind. Ct. App. 1972).