XVII. Torts

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A. Introduction

Indiana court decisions during the survey period have significantly altered the law of torts. Important rulings were handed down which interpreted the recently enacted Tort Claims and the Medical Malpractice Acts. Several constitutional challenges were made against the Medical Malpractice Act. Our courts of review have honored legislative discretion and upheld the validity of the Act. The Tort Claims Act was given a generally restrictive interpretation, and the 180 day notice requirement in particular was construed in a way sharply limiting claimants' rights.

There were also important developments in tort law as it affects landlords and tenants, landowners and third parties, employers and employees, keepers of animals, construction contractors, and real estate vendors. Attorneys, loan officers,[1] corporation directors, school officials, and public servants were affected by landmark decisions.

Instances in which punitive damages were allowable were discussed, and the old restrictions on child death and wrongful death damages were reaffirmed.

In short, the torts field continued to grow and develop at a brisk pace. It was a dynamic and stimulating year.

B. Medical Malpractice

In *Johnson v. St. Vincent Hospital, Inc.*,[2] the Indiana Supreme Court addressed the issue of the constitutionality of the Medical Malpractice Act. The court found that the various constitutional attacks made upon the statute were without merit. The challenges were focused in six different areas.

It was alleged that the concept of a medical review panel as a predicate to the initiation of a civil suit and the admissibility of the

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[1]See Townsend, *Secured Transactions and Creditors' Rights, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 367, 383 (1981).

[2]404 N.E.2d 585 (Ind. 1980).

panel's opinion violated the patient's right to jury trial, equal protection of the law, due process of law, and the doctrine of separation of powers between the three branches of government. The court responded that the delay and expense in getting to a jury trial are justified because there would be expense and delay in preparing the claim in any case, and participation in the review process "will satisfy to a great extent their preparation needs,"[3] thus reducing the time spent in trial preparation once litigation is commenced and reducing the cost of securing expert testimony. The court expressed great confidence that any bias or prejudice in the preparation of the panel opinion could be effectively coped with by "articulate and imaginative advocacy."[4] The court also opined "that the jury drawing upon its collective experience and good sense, and under the oath to well and truly try the cause, will be fully capable of according the panel opinion could be effectively coped with by "articulate and imaginative advocacy."[4] The court also opined "that the jury drawing and impermissible restriction on the right to trial by jury.[6]

The delay and expense attributable to the panel submission requirement does not deny patients due process and due course of law and access to the courts guaranteed by Article 1, section 12 of the Indiana Constitution[7] and by the fourteenth amendment to the Constitution of the United States of America.[8] The legislature has the power to alter the manner of gaining a remedy in court. The legislature perceived a menace to health care caused by the high cost and unavailability of liability insurance. "The dominant aim of the Act as a whole is to preserve health care services for the community."[9] The court reasoned that any delay occasioned by the panel procedure would have the offsetting virtue of encouraging the settlement of claims and discouraging speculative lawsuits.[10] The court rejected the argument that the delay in filing suit could result in the death or disappearance of the health care defendant before suit could be instituted. The court reasoned that the health care provider would be a permanent fixture in the community and would have actively participated in the panel proceedings.[11] The court also pointed out that the law has always encouraged investigation and settlement attempts before suit.[12]

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[3] *Id.* at 592.
[4] *Id.* at 593.
[5] *Id.*
[6] *Id.*
[7] *Id.* at 594.
[8] *Id.*
[9] *Id.* at 595.
[10] *Id.*
[11] *Id.*
[12] *Id.*

The court rejected the argument that a lack of detailed statutory provisions respecting the panel's organization and procedure rendered the Act void for vagueness. The court reasoned that the statute contemplates that the "panel will function in an informal and reasonable manner."[13] Since the panel's function is limited to the rendering of an expert opinion and since it functions under the tutelage of a lawyer, the absence of specific procedural provisions is reasonable.[14]

Rejected also was the notion that compensation to the panel members is so slight that they would do less than an adequate job. The court reasoned that the panel members would view their service as a public duty and give due regard to the public and private interests being served.[15]

The court also rejected the argument that the Act constituted impermissible special class legislation. The court determined that medical malpractice cases by reason of their potential number and size pose a special economic threat to the rewards which health care providers may enjoy in return for their services. The panel requirement serves the purpose of establishing the technical facts in a given case and tends to ensure that a resolution of the dispute will be factually well-grounded and will be fair. Hence, the court concluded that to the extent it imposes burdens on patients and benefits on health care providers, it does so consistent with the Constitution.[16]

The appellants also contended that the requirement of the Act that the panel opinion be admitted into evidence usurps the judicial authority of the courts. The court rejected this argument, saying that the opinion of medical experts has always been sanctioned by the courts.[17]

The appellants challenged the $500,000.00 limitation imposed by the Act upon a malpractice recovery. The court approved the cap because although arbitrary, it is a valid exercise of the state's police power for the promotion of the peace, safety, health or welfare of the public. A limitation upon recovery is the natural consequence of the establishment of an insurance-type program. The court was impressed with the idea that severely injured patients would receive much less if malpractice insurance were unavailable or unused, and that the entire community, including severely injured malpractice victims, would benefit from the continued availability of health care. Hence, the limitation on recovery was found to comport with due

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[13]*Id.* at 596.
[14]*Id.*
[15]*Id.*
[16]*Id.* at 597.
[17]*Id.* at 598.

process of law.[18] Fair and substantial relationship was found between the classification involved and the purpose of the Act.[19]

The court approved the removal from the province of the jury of the determination of damages in excess of $500,000.00. The court held that the legislature left to the jury the right to fix damages within the $500,000.00 limit and that no more was required.[20]

Challenged as well was the right of the legislature to limit attorney fees to 15% of the recovery above $100,000.00. The appellants maintained that this limitation violated the plaintiff's freedom to contract for legal services. The court ruled the limitation a reasonable exercise of the police power "as a means of protecting the already diminished compensation due claimants from further erosion due to improvident or unreasonable contracts for legal service."[21]

A challenge was also directed to the two year statute of limitations starting to run on children at the age of six years. It was suggested that a child of such tender years was in no position to protect his rights. It was argued that the child's claim would be barred before he was old enough to assert his claim, thus depriving the child victim of his due process and equal protection rights. The court rejected this argument by observing that a health care provider may treat thousands of children per year and that each of these children is a potential malpractice plaintiff. The legislature could properly consider the large potential exposure, the general policy against stale claims, the fact that most children 6 years of age "are in a position to verbally communicate their physical complaints to parents or other adults having a natural empathy with them" who may "stand surrogate for the lack of maturity and judgment of infants," and finally, that licensed professional health care providers are "entitled to a special degree of trust."[22]

The appellants asserted that their due process, equal protection, and free speech rights as well as the separation of powers provisions of the Indiana and Federal Constitutions were abridged by the clause in the Act prohibiting an addendum clause in the prayer for relief. The court rejected this argument by asserting that any "alleged impingement must be weighed in the balance against the public health, welfare and safety served."[23] The court said that the

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[18] *Id.* at 599.
[19] *Id.* at 601.
[20] *Id.* at 602.
[21] *Id.*
[22] *Id.* at 604.
[23] *Id.* at 605.

addendum clause could be misunderstood by the trier of fact and result in some "irrational inflation of the recovery."[24]

Finally, the Act was challenged on the theory that the credit of the state was being used in special aid of health care providers because the cost of administering the patient compensation fund is to be paid from public funds. The supreme court ruled that the statute did not expose the general funds of the state to loss or expense since all expenses and awards are to be paid out of the special fund, and that the Act was not special legislation since the classification was justified and the provisions of the Act are uniform throughout the state.[25]

1. Parents' Claims.—The court has indicated a determination to give the Act a wide mandate. In *Sui Yee Lee v. Lafayette Home Hospital, Inc.*,[26] parents brought an action for the loss of services of their minor daughter and for her medical expenses against certain health care providers. The parents had filed a proposed complaint with the Insurance Commissioner but had not completed the medical review process at the time they filed their suit. The trial court dismissed their case. The parents contended that their claim was not subject to the review requirements of the Medical Malpractice Act. They argued that since the Act refers only to actions by patients and representatives of patients, the maxim *expressio unius est exclusio alterius* applies and excludes their independent action as parents from the coverage of the Act. The court of appeals held that the maxim was not a rule of law but was merely an aid used by the courts to determine legislative intent.[27] The court then went on to hold that the intention of the legislature was clear. All persons having causes of action founded upon alleged medical malpractice are subject to, and must comply with, the Act as a jurisdictional prerequisite to suit.[28]

2. Statute of Limitations.—Perhaps the most potentially drastic change occasioned by the Act is its statute of limitations. The Act provides that "no claim . . . may be brought . . . unless filed within two (2) years from the date of the alleged act . . . . "[29] This provision has been interpreted by the court of appeals to mean that the two years begin to run at the moment the act of malpractice occurs. In *Atwood v. Davis*,[30] the court of appeals specifically rejected

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[24]*Id.* at 604.
[25]*Id.* at 606.
[26]410 N.E.2d 1319 (Ind. Ct. App. 1980).
[27]*Id.* at 1324.
[28]*Id.*
[29]IND. CODE § 16-9.5-3-1 (1976).
[30]411 N.E.2d 759 (Ind. Ct. App. 1980).

the discovery rule. However, the court went on to reserve the question of the constitutionality of the Act under circumstances where the two years has run before the patient had actual or constructive knowledge that his physician has committed malpractice.[31]

A hint of how the court might decide this issue was provided by its citation of *Carrow v. Streeter*.[32] In *Carrow*, the plaintiff brought her action three years after the allegedly negligent surgery and about one year after discovery of the surgical errors. The trial court granted summary judgment because of the two year statute of limitations. On appeal, the appellate court reversed because there was a genuine issue of fact as to whether the doctrine of fraudulent concealment applied so as to toll the statute of limitations and whether the doctrine, if applicable, ceased tolling the statute of limitations more than two years before Carrow filed her complaint.[33]

The court in *Carrow* explained that if there is concealment of the cause of action, the statute is tolled during such concealment.[34] Usually, there must be some active effort at concealment, but where a fiduciary or confidential relationship exists, such as between physician and patient, there exists a duty to disclose material information between the parties. A failure to do so results in concealment. The statute ceases to be tolled after the plaintiff has discovered or should have discovered the existence of the cause of action. The statute continues to be tolled as long as the patient continues to reasonably rely on the advice of her physician. The last visit to the physician is not the controlling date. The physician-patient relationship continues as long as there is mutual assent to a course of treatment.[35]

The *Carrow* holding cannot be judged controlling since the operative facts occurred prior to the effective date of the Act. Nevertheless, it is reasonable to suggest that the dicta in *Atwood* and the holding in *Carrow* indicate that the court of appeals will interpret the statute in light of the Indiana Constitution so as to avoid depriving an innocent plaintiff of access to the courts for redress of grievances.

Some light is provided by the case of *Adams v. Luros*.[36] Adams first saw Dr. Luros, a neurosurgeon, for back pain and partial paralsis of his right leg in January, 1973. Dr. Luros admitted Adams to the hospital on two occasions and performed numerous tests but

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[31] *Id.* at 761.

[32] 410 N.E.2d 1369 (Ind. Ct. App. 1980).

[33] *Id.* at 1375-76.

[34] *Id.* at 1376.

[35] *Id.*

[36] 406 N.E.2d 1199 (Ind. Ct. App. 1980).

was unable to diagnose the problem. In July of 1973, Dr. Luros told Adams to "live with it" until it got better or worse. In 1976, Adams began to have more severe symptoms. In 1977, the problem was diagnosed to be a tumor in the middle region of Adams' spinal cord. The tumor was removed on March 17, 1977, but left Adams without the use of his legs. Adams brought suit on February 26, 1977, contending that Dr. Luros failed to order a myelogram of the critical area and that such failure constituted malpractice.

Dr. Luros moved for, and was granted, summary judgment based upon the two year statute of limitations in the Medical Malpractice Act. The court of appeals reversed, holding that the act of alleged malpractice occurred before the Act became effective and that the old statute thus applied.[37] The court held that the old statute of limitations was tolled under the doctrine of fraudulent concealment.[38] Because of the fiduciary nature of the physician-patient relationship, the physician has a duty to disclose material information to the patient and a failure to do so results in a fraudulent concealment. The natural corollary to this rule is that when the relationship ends, the duty to disclose ends and the fraudulent concealment by silence ends.

In determining when the physician-patient relationship ends, the courts took to the subjective views of the parties, and to such objective factors as the frequency of visits, the course of treatment prescribed, the nature of the illness, the nature of the physician's practice, and whether the patient began consulting other physicians for the same malady.[39]

Of course, when the patient learns of the malpractice or gains information which should lead to discovery of the malpractice, the statute commences to run, regardless of the concealment. There is no particularly compelling reason why the humane doctrine of fraudulent concealment should not remain the law of Indiana.

3. Minors' Claims.—One of the potentially harsher aspects of the Act's statute of limitations is its treatment of minors' claims. In *Rohrabaugh v. Wagoner*,[40] a minor who was between the age of six and eighteen at the time of instituting her action and at the time of the alleged malpractice, brought suit against two health care providers who had separately diagnosed and treated a growth at her waistline know as a hemangioma. The action was instituted in 1979, more than two years after the effective date of the Act and the dates of the alleged wrongful acts. The Supreme Court of Indiana

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[37] *Id.* at 1201.

[38] *Id.*

[39] *Id.* at 1203.

[40] 413 N.E.2d 891 (Ind. 1980).

upheld the dismissal of her case in view of the two year statute of limitations.[41] In doing so the court rejected all due process and equal protection arguments and held that there existed a reasonable basis for the legislature to strengthen the statute of limitations on malpractice cases and in furtherance thereof to conclude that children six years old and adults are similarly capable of bringing malpractice actions.[42]

4. Respondeat Superior.—On a more liberal note, the court of appeals laid to rest the old notion that a hospital could not be held liable under the principle of respondeat superior for the negligence of its nurses in carrying out a physician's orders. In *South Bend Osteopathic Hospital, Inc. v. Phillips*,[43] the court held that a hospital was liable under respondeat superior for the acts of its nurses in negligently administering a hypodermic injection prescribed by the patient's physician. The court held that where it was the normal and usual duty of the nurse to give the injection, the employing hospital was liable despite the fact that the hospital entity was prohibited from practicing medicine.[44] The court concluded that the controlling factor is not whether a particular act falls within the definition of "practicing medicine," but whether the act of the hospital employee was routine in nature and a part of the employee's duties.[45]

C. Attorney Malpractice

In *Shideler v. Dwyer*,[46] the plaintiff was the beneficiary of a clause in a will directing a shareholder of a corporation to retain plaintiff in the corporation's employ and upon her retirement to have the corporation pay her $500.00 per month. She quit her job before reaching her established retirement date and eventually sued the estate to enforce the will's provision. It was ultimately determined that the clause was merely precatory in form and impossible to perform by the estate and was therefore void.

The plaintiff sued the attorney who drafted the will, alleging malpractice. The suit against the lawyer was filed more than three years after the probate of the will, but less than two years after the probate court held the provision to be invalid. The attorney set up the statute of limitations as a defense. The trial court denied the defendant's motion for summary judgment but certified the cause for interlocutory appeal.

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[41] *Id.*

[42] *Id.* at 895.

[43] 411 N.E.2d 387 (Ind. Ct. App. 1980).

[44] *Id.* at 390.

[45] *Id.* at 389.

[46] 417 N.E.2d 281 (Ind. 1981).

On transfer the Supreme Court of Indiana in a three to two decision ruled that the statute of limitations applicable to health care providers did not extend its protection to other professionals, including attorneys.[47] The court held that the two year statute of limitations generally applicable to torts applied and that the statute began to run at the death of the testator and not when the dispositive provision was determined by the probate court to be invalid.[48]

Justices Givan and Pivarnik registered a vigorous dissent. They argued that the statute of limitations should not have begun until the act of alleged malpractice was discovered, and that the discovery could not fairly be said to have occurred until the probate court determined the clause to be void.[49] The majority interpretation puts the potential devisee in the impossible position of trying to enforce the beneficial provision and at the same time sue the scrivener for negligent draftsmanship.[50]

D. Director Misconduct

In *Fleetwood Corp. v. Mirich*,[51] the court held that directors of a corporation acting for the corporation in the purchase of its stock occupy a fiduciary relation in respect to the shareholder from whom the stock is purchased and are under a duty to disclose to the shareholder the facts affecting the value of the stock.[52] The court distinguished this situation from one in which the director buys shares of stock for his own account. In the latter case, the director does not owe the shareholder a fiduciary duty of full disclosure unless the purchase of the shares will affect the general well-being of the corporation.[53]

E. Landowners, Farm Animals, and Duty Issues

In *Blake v. Dunn Farms, Inc.*,[54] the plaintiff was a passenger in an automobile which collided with a horse at night. The accident occurred on a portion of a state highway running through Dunn's land. Love had rented the pasture from tenants of Dunn who had vacated the premises prior to the accident. Inadequate fencing permitted the

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[47]*Id.* at 283.

[48]*Id.* at 290.

[49]*Id.* at 297 (Givan, C.J., dissenting).

[50]*See* Comment, *Shideler v. Dwyer: The Beginning of Protective Malpractice Actions*, 14 IND. L. REV. 927 (1981).

[51]404 N.E.2d 38 (Ind. Ct. App. 1980).

[52]*Id.* at 46.

[53]*Id.*

[54]413 N.E.2d 560 (Ind. 1981).

horse to escape. Dunn knew or should have known of the defective fence and the presence of horses on the land.

The trial court granted summary judgment on the ground that defendant Dunn owed no duty to plaintiff to restrain a horse neither owned nor kept by Dunn. The court of appeals reversed and held that the duty of a landowner to a person on an adjacent road is similar to that of a landowner to an invitee, and that a landowner must exercise reasonable care to prevent harm to persons on adjacent highways by known domestic animals on his premises.[55]

On transfer, the supreme court vacated the decision of the court of appeals and affirmed the trial court's grant of summary judgment to Dunn Farms, Inc. The supreme court held that the mere fact that a landowner had casually observed horses in its field created no duty to be concerned that the horses might escape and cause injury to passing motorists.[56] The court held that it was the duty of the owner and the keeper of the animal to keep him confined, and that the mere possession or ownership of the land from which an animal strays is not sufficient to make the landowner liable, so long as the landowner is not the keeper of such animal.[57] If the landowner is neither the owner nor keeper, he has no duty to confine or restrain the animal. If an animal is allowed by its keeper to escape from its confinement and do harm, that damage results from the negligent confinement, and not from the condition of the land.

The supreme court also rejected the notion that the duty of a landowner to a person on an adjacent road is similar to that of a landowner to a business invitee. The duty of the business property owner to an invitee is an extra burden based upon the relationship of the owner or occupier of the land to the one he invites for his own benefit. Since motorists use the highway for their own purposes, they are not the invitees of adjacent landowners.[58]

The court of appeals limited the available theories of liability against the owner or keeper of a domestic farm animal to negligence. In *Thompson v. Lee*,[59] the court rejected strict liability and statutory negligence as viable theories. In this case, the plaintiff was driving his motorcycle on a blacktop country road in Rush County at 11:00 p.m. on May 19, 1978, when he suddenly came upon a black Angus cow owned by the defendant. The plaintiff Thompson braked but was unable to avoid the cow. He crashed and suffered serious injuries and the total loss of his motorcycle.

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[55]*Id.* at 564.
[56]*Id.* at 563.
[57]*Id.*
[58]*Id.* at 564.
[59]402 N.E.2d 1309 (Ind. Ct. App. 1980).

Thompson brought suit against the defendant Lee upon the theories of strict liability, statutory negligence, and negligence. The trial court granted judgment on the evidence in favor of the defendant at the end of the plaintiff's case on the counts of strict liability and statutory negligence. The jury returned a defendant's verdict on the remaining negligence count.

The court of appeals affirmed, saying that strict liability may be imposed upon owners of animals that have caused injury while at large only if it is shown that the animal is *ferae naturae* and is by its nature ferocious or dangerous, because the law recognizes that safety lies only in keeping such animals secure; or under circumstances where a domestic animal commits a trespass *quare clausum fregit*, on the theory that the owner "trespassed with his cattle" and would be responsible for any damages resulting from breaking the close. The court held that the first basis for strict liability would not apply because a cow was not a wild animal and the second basis was inapplicable because the cow was not on Thompson's property.[60] The court concluded that this was a case of an escaped cow loose on the highway and as such, was controlled by the law of negligence.[61]

The court also held that Indiana Code section 15-2-4-21 would not provide a basis for statutory negligence in this case because there was no evidence that Lee permitted the cow to run at large.[62] The word "permit" in the statute means actual or constructive knowledge that the animal is no longer confined within an enclosure.[63] The evidence was that Lee did not know that his cow had escaped.

F. Landlord and Tenant

In *Rossow v. Jones*,[64] the plaintiff was a tenant in a house that had been converted into three apartments. All the apartments exited through a single outside door onto a porch. Three concrete steps led from the porch to the sidewalk. Jones slipped and fell on the steps as he was attempting to leave the house. The steps were covered with a natural accumulation of ice and snow. The landlord had shoveled the walks in the past but on this occasion he had allowed the ice and snow to accumulate for a week.

The court of appeals specifically rejected the doctrine of *Purcell v. English*,[65] and held that a landlord does have a duty to exercise

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[60]*Id.* at 1313-14.
[61]*Id.* at 1311-12.
[62]*Id.* at 1313-14.
[63]*Id.*
[64]404 N.E.2d 12 (Ind. Ct. App. 1980).
[65]86 Ind. 34 (1882).

reasonable care to see that common ways and areas, or areas over which he has reserved control, are reasonably safe and fit for use. Hazards created through a natural accumulation of ice and snow are not beyond the scope of that duty.[66]

G. Premises Liability and Landlord Invitees

In another landlord liability case,[67] P.H. & T. Realty built a grocery store to specifications provided by A&P and leased the building to A&P for a specified term. At the end of the term, A&P gave notice of its intention to quit the premises and proceeded to so do. A&P locked the store after removing its fixtures and merchandise and gave the keys to P.H. & T. Realty. P.H. & T. Realty boarded up the windows and secured the services of a realtor to re-lease the store. The realtor took the plaintiff to see the building. Neither Wilson nor the realtor could find the lights. As they walked about in the darkened store, Wilson fell through an opening in the floor designed to house a conveyor used to bring merchandise up from the basement storage area.

A&P appealed an adverse judgment. The appellate court reversed and held that once A&P moved out and surrendered possession of the building to P.H. & T. Realty, its responsibility for the condition of the premises was at an end. The court rejected the idea that a tenant retained some residual liability for the condition of the property after moving out. Liability for injury ordinarily depends upon the power to prevent injury and therefore rests upon the person who has control and possession through ownership, lease, or otherwise.[68]

The court did indicate that A&P could be held liable for any failure to disclose a known latent defect that it had reason to believe would not be discovered until such time as P.H. & T. Realty discovered it and had time to take precautions to prevent harm. Since P.H. & T. Realty knew of the conveyor opening in the floor, this principle would not apply.[69] The court concluded that the causative act leading to the injury to Wilson was the act of permitting Wilson and others to enter, unsupervised, into a vacant, locked, boarded-up, darkened building to wander about as they pleased. Since A&P had no power of control over the building, it was not legally responsible for Wilson's misfortune.[70]

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[66]404 N.E.2d at 14.

[67]Great Atl. & Pac. Tea Co. v. Wilson, 408 N.E.2d 144 (Ind. Ct. App. 1980).

[68]*Id.* at 148.

[69]*Id.* at 150.

[70]*Id.*

H. Vendor-Purchaser and Unknown Defects

In *Pennycuff v. Fetter*,[71] the plaintiff purchased a clubhouse and swimming pool from the defendants. The facility was constructed in 1931. The defendants had owned the club a short time. On November 14, 1978, the defendants had the water shut off for the winter. They negligently, but unknowingly, failed to properly drain the pipes servicing the pool. In February, 1979, the defendants sold the property to the plaintiff and at the time told the plaintiff that the pool was basically in good enough shape for opening in the spring. During the winter, the pipes froze and extensive repairs were required.

The plaintiff sued for damages based on implied and express warranties and representations. The trial court awarded damages. On appeal, the judgment was reversed. The court of appeals held that this was not a sale of goods under the Uniform Commercial Code but a sale of real estate with improvements.[72] Furthermore, it was not the sale of a home by a builder-vendor. Therefore, no implied warranties were possible in the transaction. The plaintiff's cause of action was limited to the defendants' oral representations that the pool would be ready to open in the spring.[73]

The court held that *caveat emptor* applies in this kind of transaction. A purchaser of property has no right to rely upon the representations of the vendor of the property as to its quality where he has a reasonable opportunity to examine the property and judge its qualities for himself.[74] In order to recover against the defendant, the plaintiff must prove fraud. Since there was no evidence that the defendants knew of their negligence, or that the pipes had burst at the time of sale, there was no fraud and hence there could be no recovery.

I. Slander of Title and Punitive Damages

In *Harper v. Goodin*,[75] the defendant filed a mechanic's lien against the plaintiff's house after they purchased it from the builder and 132 days after the last work on the home was completed. After the builder paid the defendant, the defendant refused to remove the mechanic's lien. The plaintiff filed a slander of title action against defendant and asked for compensatory and punitive damages. The court awarded $385.00 compensatory damages and $2500.00 punitive damages.

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[71]409 N.E.2d 1179 (Ind. Ct. App. 1980).

[72]*Id.* at 1180.

[73]*Id.*

[74]*Id.*

[75]409 N.E.2d 1129 (Ind. Ct. App. 1980).

On appeal it was held that a slander of title occurs when untrue statements are made maliciously and the plaintiff sustains a pecuniary loss as a necessary and proximate consequence of the slanderous statements.[76] To support an award of punitive damages, actual malice must be shown. "[M]alice is publishing matter with knowledge that it is false or with reckless disregard as to whether it is false or not." " '[R]eckless disregard of a statement's probable falsity' " occurs when the " 'defendant in fact entertained serious doubts as to the truth of the statement.' "[77] The court held that malice could be inferred from the fact that the defendant filed his lien on the plaintiff's property without any contractual relationship existing between them, after the sixty day period for filing such a lien had lapsed, and then refused to remove the lien after he was paid in the face of a demand that he do so.[78] The court pointed out that there is a statutory duty to remove the lien, that the jury could infer that the defendant was attempting to coerce the plaintiff into paying a debt owed the defendant by the builder, and that punitive damages were properly awarded.[79]

J. Duty, Discretionary Functions, and the Tort Claims Act

1. Discretionary Function.—In *Indiana State Highway Commission v. Rickert*,[80] the plaintiff's decedent was a passenger in an airplane that crashed into a highway overpass located 180 feet from the southern edge of the runway in the approach path of planes landing at Hap's Airport. The airport was constructed in 1953 and the highway was built in 1959. The highway overpass was sixteen feet higher than the elevation of the runway. This meant that the overpass was about seven feet higher than the maximum allowed by an Indiana statute[81] which provided that unless a permit has been issued by the Aeronautics Commission, no structure could be erected within the inner area approach zone to any runway for a distance extending 3,000 feet from the end of the runway to any height which would interfere with the established glide angle one foot of vertical height for each twenty feet of horizontal distance from the end of the runway.

The court held that this statute did give rise to a duty to the decedent owed by the Commission even though the Commission was

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[76]*Id.* at 1134.

[77]*Id.* at 1135. (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964) and quoting St. Amant v. Thompson, 390 U.S. 727 (1968)).

[78]409 N.E.2d at 1135.

[79]*Id.* (citing IND. CODE § 32-8-1-2 (1976)).

[80]412 N.E.2d 269 (Ind. Ct. App. 1980).

[81]IND. CODE § 8-21-7-3 (1976).

not specifically named as a party subject to its provisions. The Commission was found negligent per se for designing and constructing the non-conforming overpass.[82] This was true even though the state had paid the airport an inverse condemnation award for use of the air space, because the plaintiff was not a party to the condemnation litigation.[83]

The court also rejected the argument that the design and construction of highways, as well as the decisions as to whether to sue the airport for the wrongful use of the condemned air space or to apply for a permit with the Aeronautics Commission, involved the performance of discretionary acts. The court held that once the decision had been made to proceed with the project, a duty devolved upon the Commission to exercise reasonable care in the design and construction of the overpass.[84]

Similarly, in the case of highway signs, the court of appeals has taken the position that once the decision for a sign has been made, compliance with the Indiana Manual on Uniform Traffic Control Devices for Streets and Highways is required.[85]

At the intersection of two county highways the only traffic control device was a yield sign that did not conform to the design requirements of the Indiana Manual on Uniform Traffic Control Devices for Streets and Highways. The county contended that nonconformity with the Manual could not be the basis for a claim because of the Immunity Statute, and because the Manual is merely a guide for discretionary acts rather than a source of mandatory directives for ministerial performances.[86]

On appeal both contentions were rejected. The court of appeals held that the Immunity Statute did not apply because nonconformity with the Manual does not constitute a failure to promulgate or enforce laws.[87] The Immunity Statute was inapplicable because adherence to the Manual has been specifically required of all counties in Indiana by the legislature. While the placement of the sign in the first instance may be a discretionary act, the placement and maintenance of the sign must conform to the directives in the Manual.[88]

2. Special Duty.—In *Crouch v. Hall*[89] the mother of a rape-murder victim brought a tort claim action against the City of Indianapolis and certain police officers for the death of her child. The

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[82]412 N.E.2d at 277.

[83]*Id.*

[84]*Id.* at 278.

[85]*See* Harvey v. Board of Commissioners, 416 N.E.2d 1296 (Ind. Ct. App. 1981).

[86]*Id.* at 1299.

[87]*Id.*

[88]*Id.*

[89]406 N.E.2d 303 (Ind. Ct. App. 1980), *transfer denied*, November 3, 1980.

theory was that the police had negligently failed to investigate the rape of another woman by the victim's assailant.

The appellate court approved the granting of summary judgment for the defendants because the investigation of crime is a discretionary function under the Indiana Tort Claims Act.[90] In the absence of corrupt or malicious motives, police officers are not personally liable for errors or mistakes of judgment in the performance of duties involving the exercise of judgment and discretion.[91] The legal duty of the police is owed to the general public as a whole, and not to individual citizens absent a special duty or special relationship to the individual.

3. Immunities.—The court of appeals showed no inclination to liberally construe the immunities section of the Tort Claims Act. In *Walton v. Ramp*,[92] the plaintiff Walton's automobile hit a patch of ice in the road causing him to lose control of his automobile and crash. Walton sued an adjoining landowner named Ramp and the Decatur County Board of Commissioners on the theory that Ramp diverted water from his property onto the county road and the Commissioners were negligent in not taking steps to correct the situation, or at least giving warning of the danger. The Commissioner obtained a summary judgment because the trial court found that the icy highway was a temporary condition resulting from weather, which is one of the special immunities found in the Tort Claims Act.[93]

The court of appeals reversed, holding that a governmental entity is bound to exercise reasonable care and diligence to keep its streets in a reasonably safe condition for travel.[94] The Tort Claims Act does not alter the common law.[95] A county is ordinarily not liable for injuries caused by defects in its streets due to material accumulations of ice and snow. However, the diversion of water onto the road by an adjoining landowner is not a natural accumulation or a temporary condition resulting from the weather. Where the defect is caused by a third person, the negligence for which the governmental entity is liable is not the creation of the defect, but the failure to remove or guard the defect after actual or constructive notice thereof.

4. Statutory Notice.—The court of appeals continued to display a remarkable affection for the 180 day statutory notice requirement.

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[90]*See* IND. CODE §§ 34-4-16.5-1 to -16.8-8 (1976).
[91]406 N.E.2d at 304.
[92]407 N.E.2d 1189 (Ind. Ct. App. 1980).
[93]IND. CODE § 34-4-16.5-3 (Supp. 1981).
[94]407 N.E.2d 1189, 1191 (Ind. Ct. App. 1980).
[95]*Id.*

Just why the court insists on giving the notice statute the widest possible application remains a mystery. The statute itself is innocuous enough. It simply provides that a claim is barred unless the appropriate agency of government is given notice of the claim within 180 days after the loss occurs.[96] Instead of giving the statute an interpretation which would protect the government against the hazard of unreported stale claims and assure an injured person access to the courts for redress of grievances, the court of appeals uses every opportunity to give the statute the most punitive possible interpretation. A perfect example of this tendency is provided by the case of *Hedges v. Rawley*.[97]

On June 13, 1975, the plaintiffs, who were employees of the sewer department of the City of Terre Haute, were accused of stealing gasoline by their supervisor and were prosecuted for theft. They were fired from their jobs at the time prosecution was initiated. They were found not guilty of theft on November 25, 1975. On December 4, 1975, they filed a grievance with their union in which they sought reinstatement to their jobs and back pay. In April, 1976, they notified the City of their claim for slander and malicious prosecution. The court of appeals held that the filing of a grievance seeking back pay and reinstatement with the union did not satisfy the statutory notice of claim requirement[98] because it contained no statement or allegation of tortious conduct by the city or its supervisors.[99] The court also held that the city's actual knowledge of the incident and routine investigation was not sufficient notice under the Tort Claims Act.[100] The slander count was dismissed because notice of the claim was filed more than 180 days after June 13, 1975.[101]

The malicious prosecution count was timely filed because it did not accrue until the plaintiffs were found not guilty on November 25, 1975. However, the plaintiffs had no cause of action against the city or its supervisors because the Tort Claims Act bars an action against a city or a municipal employee for causing a prosecution to be initiated.[102] The court rejected the plaintiffs' argument that the statute provides immunity only for police and prosecutorial authorities. The court said that the legislature used broad language and clearly meant to exempt governmental units and their employees

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[96]IND. CODE § 34-4-16.5-7 (Supp. 1981).
[97]419 N.E.2d 224 (Ind. Ct. App. 1981).
[98]IND. CODE § 34-4-16.5-9 (1976).
[99]419 N.E.2d at 227.
[100]*Id.*
[101]*Id.* at 226.
[102]IND. CODE § 34-4-16.5-3 (1976).

while acting in the course and scope of their employment from malicious prosecution claims.[103] The court did hint that if bad faith could be shown, the result might be different.[104]

Another illustrative case was *Burks v. Bolerjack*.[105] The plaintiff, a sheriff's deputy, was charged with the crime of conspiracy to aid in a jail break. The prosecutor dismissed the charge after a jury was unable to reach a verdict. The plaintiff sued the county and the sheriff for false imprisonment. The county was dismissed because the statutory notice was not given within 180 days. The court held that the notice statute does not protect a government employee against a claim for false imprisonment.[106] It specifically held that Indiana Code section 34-4-16.5-5(a) did not bar a suit against the sheriff because the employing governmental agency was granted dismissal in view of the failure of the plaintiff to comply with the 180 day notice requirement.[107]

It would thus appear that the 180 day notice requirement has a life of its own in Indiana. The only indication that some flexibility might be available is found in *Lawrence County Commissioners v. Chorley*[108] in which the court of appeals found a waiver of strict compliance when the plaintiff verbally contacted a commissioner and was told to deal with the county's insurance carrier.[109] It is to be hoped the court will use the waiver exception to the formal notice requirement more often to avoid harsh results when the governmental agency has in fact had notice of the situation and has investigated the facts and can show no relevant prejudice to its defense.

K. School Officials

Since *Wood v. Strickland*,[110] an action for damages has been available to students whose constitutional rights have been violated if the student can establish that the official acted with malice.[111] Malice can be established by showing that the official acted with impermissible motivation or with such disregard of the student's clearly established constitutional rights that his actions could not reasonably be characterized as being in good faith.[112]

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[103]419 N.E.2d at 227.
[104]*Id.* at 228.
[105]411 N.E.2d 148 (Ind. Ct. App. 1980).
[106]*Id.* at 150-51.
[107]*Id.* at 151.
[108]398 N.E.2d 694 (Ind. Ct. App. 1979).
[109]*Id.* at 698.
[110]420 U.S. 308 (1975).
[111]*Id.* at 322.
[112]*Id.*

These principles were reviewed by the Seventh Circuit Court of Appeals in the case of *Doe v. Renfrow*.[113] In *Doe*, school officials, in concert with police authorities, conducted a search of a junior high school for drugs. All 2,780 students were searched and sniffed by a trained police dog. The thirteen year old female plaintiff and three other students were also strip searched. The school search lasted three hours. There was no probable cause to believe that the plaintiff, or any of the other students, was in possession of a controlled substance. The court held that the qualified immunity from liability of school officials "acting in good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances, and not in ignorance or disregard of settled undisputable principles of law," was exceeded.[114] The court determined that the thirteen year old student could seek damages against the school officials for humiliation and the deprivation of her basic constitutional rights.[115]

L. Defamation

Indiana courts ruled on three interesting defamation cases during the Survey period. Defamation involves the idea of disgrace; "[i]t requires a communication to a third party which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him."[116]

In *Cua v. Ramos*,[117] the plaintiff was dismissed from her job as a staff psychiatrist at Central State Hospital. She brought suit against her former supervisors for libel, alleging that they filed a work report which defamed her. The report was fairly calculated to produce, and would naturally engender in the mind of the average person the impression that, although Cua knew how to do her job, she would not do her job. The report conveyed the idea that she was incompetent as a psychiatrist at Central State Hospital. The unmistakable import of the report clearly injured Cua's reputation, specifically her reputation as a psychiatrist. The report was unambiguously defamatory. The court of appeals therefore found that the plaintiff's tendered instruction to this effect should have been given.[118]

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[113]631 F.2d 91 (7th Cir. 1980).
[114]*Id.* at 92.
[115]*Id.* at 93.
[116]W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 111, at 739 (4th ed. 1971).
[117]418 N.E.2d 1163 (Ind. Ct. App. 1981).
[118]*Id.* at 1168-69.

1. Privilege.—There are certain recognized circumstances in which one has a privilege to say defamatory words regarding another. Generally, these exceptions are limited to governmental proceedings and activities conducted by the three branches of government and their agents. Exception is also extended to situations in which the plaintiff has consented to the publication, the third party is the spouse of the defendant, or the publication is a political broadcast.[119]

The case of *Foster v. New*[120] provides an excellent example of the limits the courts have placed upon the exercise of this privilege. Foster was accused by New of engaging in illegal drug activities while New was serving as a deputy prosecutor in Marion County. After leaving office, and severing his relationship with the prosecutor's office, New again told newspaper reporters that he believed that Foster was involved in drug dealing, although a grand jury had refused to indict Foster.

Foster brought an action for defamation against New. New raised the defense of prosecutional immunity. The court of appeals ruled that a prosecutor enjoys absolute immunity from civil liability for his actions in carrying out his official duties.[121] Included among those duties are his actions as the State's advocate and the duty to inform the public as to his investigative, administrative, and prosecutorial activities. The public interest in a prosecutor's ability to vigorously and fearlessly perform his duties unhindered by the threat of lawsuits is great, and such interest justifies foreclosing an injured plaintiff from pursuing his cause of action against a prosecutor. However, this immunity ceases when a prosecutor leaves office.[122] Otherwise, the immunity would amount to a continuing privilege to employ defamatory language concerning any person who was, during New's tenure in office, the concern of the prosecutor's office.

2. Qualified Privilege.—The courts have also recognized a zone of qualified privilege to protect one in the discharge of some public or private duty, whether legal or moral, or in the conduct of one's own affairs, in matters where one's interests are concerned.[123] The parameters of this qualified privilege were discussed in *Elliott v. Roach*.[124] Elliott rented a house, and as an incident to the rental posted a damage deposit. He later moved from the house and made a demand that his deposit be returned. The landlord and the rental

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[119]W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 115 (4th ed. 1971).
[120]407 N.E.2d 271 (Ind. Ct. App. 1980).
[121]*Id.* at 274.
[122]*Id.*
[123]W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 115 (4th ed. 1971).
[124]409 N.E.2d 661 (Ind. Ct. App. 1980).

agent refused saying that Elliott was not entitled to a refund because he moved from the house in less than a year. Elliott wrote to the Indiana Real Estate Commission, with copies to the Indianapolis Board of Realtors, the Indianapolis Real Estate Brokers Association, and the Better Business Bureau, in which he charged that his landlord and the rental agent were "dishonest, unscrupulous, and unworthy of the trust or patronage of their customers or tenants."[125]

Elliott filed suit in municipal court to recover his damage deposit and asked for punitive damages. The landlord and the real estate agent counterclaimed for defamation. The trial court awarded Elliott $40.00 and the defendants $5,500.00 on their defamation counterclaim. On appeal the judgment was affirmed.

The court of appeals rejected Elliott's claim that he had a qualified privilege to write the letter to the above-named organizations. The court recognized a qualified privilege but limited it to the internal communication within organizations and to reports made to public authorities.[126] The privilege attaches only if the communication was made in good faith to serve the interests of the publisher and the person to whom it is addressed, and it does not exist if the privileged occasion was abused. There is no privilege if the publication was made primarily for the purpose of furthering an interest that is not entitled to protection, or if the defendant acted recklessly or principally through motives of ill will.[127] The court of appeals held that the trial court could reasonably have found that the copies mailed to the non-licensing professional associations constituted abuse of the privilege through excessive publication and was made to injure the landlord and her agent and to pressure them into paying his demand, and was, thus, not a protected utterance.[128]

3. Memory of the Dead.—The requirement that the defamatory words be directed at the plaintiff and injure his interest in his own reputation was reaffirmed by the court of appeals in *Lee v. Weston.*[129] There, the eighteen year old son of the plaintiffs was found dead. The coroner ordered an autopsy. Before the autopsy could be performed, the body was embalmed. It was alleged that the embalming process could alter the accuracy of the autopsy. Nevertheless, the coroner found that the plaintiffs' son died due to "[a]spirations of body content/Due to overdose," a cause that the plaintiffs claimed was not substantiated by medical evidence.

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[125]*Id.* at 677.
[126]*Id.* at 690.
[127]*Id.* at 680.
[128]*Id.*
[129]402 N.E.2d 23 (Ind. Ct. App. 1980).

The plaintiffs sued the coroner for defamation. The court of appeals held that no action would lie. A libel upon the memory of a deceased person that does not directly cast any personal reflection upon his relatives does not give them any right of action.[130] That they may have suffered mental anguish, or sustained an impairment of their social standing among a considerable class of respectable people in the community in which they live by the disclosure that they were related to the deceased does not give them standing to sue for defamation. One who defames the memory of the dead is not liable civilly to the estate of the deceased or his relatives.

M. Retaliatory Discharge

In *Campbell v. Eli Lilly & Co.*,[131] the plaintiff was employed as a technical associate in the research section of the defendant pharmaceutical manufacturer and worked at different times as a technical associate for three separate research teams conducting research on various drugs. He had no written contract of employment with Lilly, and there was no agreement as to a definite term of employment.

The plaintiff told senior Lilly officials that he had knowledge of various acts of misconduct on the part of the supervisors under whom he had worked. He also questioned the safety of some of the company's drugs and made other accusations. Essentially, he charged his superiors with serious violations of United States Food and Drug Administration rules, regulations, and reporting requirements pertaining to the development and testing of drugs. Lilly conducted an in-house investigation of the plaintiff's charges and concluded that his accusations were totally false. Shortly thereafter, he was discharged.

The plaintiff brought an action against defendant seeking damages and reinstatement based upon his discharge by Lilly. The court of appeals held that in complaining to Lilly officials about its products and personnel, he was not exercising a right conferred upon him or protected by statute.[132] His claim for retaliatory discharge did not state a valid claim under Indiana law. There is no recognized public policy restricting the right of an employer to discharge an at will employee for "whistle-blowing."[133]

In a vigorous dissent, Judge Ratliff urged the court to extend

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[130]*Id.* at 24.

[131]413 N.E.2d 1054 (Ind. Ct. App. 1980), *transfer denied*, 421 N.E.2d 1099 (Ind. 1981). Hunter, J. dissented from the denial of transfer and filed an opinion at *id.*

[132]413 N.E.2d at 1061. For further discussion of this case, *see* Galanti, *Corporations & Business Associations, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 31, 54 (1981).

[133]*Id.*

the "public policy exception," which protects an at will employee whose discharge seriously undermines some compelling public policy, to protect the responsible "whistle-blower." Judge Ratliff observed that "[n]either crystal ball nor prophetic power is required in order to discern that if such a whistle-blower may be retaliatorily discharged without recourse, the intimidating effect upon other employees will ensure that the first whistle-blower will also be the last."[134]

Judge Ratliff would extend the "public policy exception" to grant a right of action for damages to any employee whose wrongful and retaliatory discharge contravenes clearly established public policy or is obnoxious to said policy.[135] If the employee could establish that he was dismissed in retaliation for the exercise of any right or duty granted or required by such strong public policy, he would be entitled to recover damages.[136]

In *Scott v. Union Tank Car Co.*,[137] the plaintiff was, as in *Campbell*, an at will employee. Allegedly, he was fired for filing a workman's compensation claim. He brought suit claiming retaliatory discharge more than two years after he was terminated. The court held that discharge "which is intended to cause an invasion of an interest legally protected from intentional invasion" is a tortious act.[138] Discharging an employee for filing a workman's compensation claim does constitute such an invasion and does state a claim for relief. However, in the instant case, a motion to dismiss was properly granted because the claim was not filed within the two year statute of limitations.[139]

N. Personal Service Contracts and Punitive Damages

In *Peterson v. Culver Educational Foundation*,[140] the plaintiff was discharged, before the expiration of his written employment contract, as an instructor at the defendant's military academy. He had been accused by two female students of making sexual advances toward them, and by two upper classmen of countermanding the commands of student officers, criticizing student officers in an improper manner, and making derogatory remarks about them. The superintendent investigated the charges, conferred with parents, took statements from the accusing students, and questioned the

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[134] *Id.* at 1067 (Ratliff, J., dissenting in part).
[135] *Id.*
[136] *Id.*
[137] 402 N.E.2d 992 (Ind. Ct. App. 1980).
[138] *Id.* at 993.
[139] *Id.*
[140] 402 N.E.2d 448 (Ind. Ct. App. 1980).

plaintiff regarding the charges. After completing the investigation, the superintendent discharged the plaintiff.

The plaintiff sued for wrongful discharge and sought both compensatory and punitive damages. The jury reached a conclusion at variance from that of the superintendent on the facts of the allegations and awarded the plaintiff compensatory and punitive damages. The court of appeals affirmed the award of compensatory damages but reversed the award of punitive damages.[141]

Punitive damages could not be awarded absent proof of a common law intentional tort such as fraud or proof that a serious wrong, tortious in nature, had been committed in an instance in which the public interest would be served by the deterrent effect punitive damages would have upon the future conduct of the wrongdoer and parties similarly situated.[142] An award of punitive damages in a contract action is based on findings which place emphasis on the defendant's state of mind. There must be evidence of "fraud, malice, gross negligence, or oppression mingled in the controversy."[143]

O. Explosives, Proximate Cause, and Damages

In the case of *Bridges v. Kentucky Stone Co.*,[144] Bridges' home was bombed by a third party who stole dynamite from the defendant. Bridges' case against the defendants was based on the theory that it negligently kept and stored dynamite. The trial court granted summary judgment on the theory that the negligent storage of the dynamite was not the proximate cause of the injury to Bridges.

The court of appeals reversed, holding that proximate cause is a jury question. The defendant's liability for the harm caused to Bridges depended upon whether it could have foreseen or reasonably anticipated that its negligent manner of storage of dynamite would result in a theft and that the thief would use the explosive to harm others.[145] An intervening criminal act by an independent third party, however, does not necessarily interrupt the relation of cause and effect between negligence and injury. "If at the time of the negligence, the criminal act might reasonably have been foreseen, the causal chain is not broken by the intervention of such an act."[146] The court went on to point out the detailed measures mandated by federal law to prevent theft of explosives. It concluded by observing that a jury question was presented on the issue of

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[141]*Id.* at 462.
[142]*Id.* at 454.
[143]*Id.* at 458.
[144]408 N.E.2d 575 (Ind. Ct. App. 1980).
[145]*Id.* at 577.
[146]*Id.*

proximate cause by proof of a failure to comply with the anti-theft requirements of federal law.

In another explosives case,[147] the Seventh Circuit Court of Appeals permitted the jury to choose between the cost of repair and the differential fair market value measure of damages to arrive at a just award.[148] The plaintiffs had claimed that the defendant had damaged the foundation and walls of their home by blasting operations in connection with coal mining. The court of appeals held that damage to real estate caused by continuous blasting is a unique situation. The trial court thus properly expanded the established definition of permanent injury and permitted the jury to choose between the cost of repair and the differential fair market value of the real estate in assessing an award.[149]

P. Wrongful Death

Indiana courts of review continued on their very conservative path in the area of wrongful death.

1. Damages.—In *Lustick v. Hall*,[150] the court held that a noncustodial parent who was apparently not obligated to pay support could nevertheless be found to be partially supporting her children by providing them with care, attention, and domestic services.[151] However, the court ruled that since she was not at the time of her death contributing to the financial support of the children, evidence of her ability to earn money was for purposes of a wrongful death action properly excluded as was proffered economic value testimony of an economist.[152]

In *Boland v. Greer*,[153] the parents appealed a $10,000.00 award of damages for the wrongful death of their nineteen year old son. They contended that parents should be allowed to recover for the loss of love and companionship of their child, and to recoup expenditures made in maintaining and caring for their minor child from the time of his birth until death.

The court of appeals declined the opportunity to adopt either the "investment theory" or to allow for intangible losses. The court held that the measure of damages in a case of this kind is the value of the child's services from the time of death until he would have at-

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[147]Baumholser v. Amax Coal Co., 630 F.2d 550 (7th Cir. 1980).

[148]*Id.* at 553.

[149]*Id. See* General Outdoor Advertising Co. v. LaSalle Realty Corp., 141 Ind. App. 247, 218 N.E.2d 141 (1966).

[150]403 N.E.2d 1128 (Ind. Ct. App. 1980).

[151]*Id.* at 1132.

[152]*Id.* at 1132-33.

[153]409 N.E.2d 1116 (Ind. Ct. App. 1980).

tained his majority taking into consideration his prospects in life less the cost of his support and maintenance during that period including board, clothing, schooling, and medical attention.[154] To this may be added, in proper cases, the expenses of care and attention to the child made necessary by the injury, medical services, and funeral expenses.[155]

The court also rejected an equal protection challenge to the pecuniary loss measure of damages in child death cases. The court held that "[t]he mandate of equal protection requires the law to treat alike those who are similarly situated."[156] The court explained that a wife suing for the death of her husband or a child suing for the death of a parent are allowed different elements of damages because their situations are different.[157]

2. Contributory Negligence.—In *Parrett v. Lebamoff*,[158] the court had an opportunity to move away from the strict enforcement of the contributory negligence rule. The defendant tavern sold Parrett alcoholic beverage after he had become intoxicated. Parrett crashed his automobile and was killed. His widow brought a wrongful death action against the tavern alleging violation of an Indiana Code provision[159] which makes it a misdemeanor to provide alcohol to one who is intoxicated. The trial court dismissed the claim for failing to state a cause of action. On appeal the case was reversed and remanded. The court of appeals held that the statute does impose a duty which will serve as the premise for a civil action for damages.[160]

The plaintiff argued that contributory negligence was not a defense because it would defeat the legislative purpose to bar a member of the protected class from recovery on account of his contributory negligence. The court of appeals rejected this contention on the grounds that the statute did not place the entire responsibility for the ensuing harm upon a violator of the statute.[161] The court noted that the plaintiff's negligence would not bar recovery if it could be shown that the actions of the defendant were willful, wanton, or reckless.[162]

3. Common Law Guest Statute.—In *McDonnell v. Flaharty*,[163] the Seventh Circuit Court of Appeals created a common law guest

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[154]*Id.* at 1119.
[155]*Id.*
[156]*Id.*
[157]*Id.* at 1120.
[158]408 N.E.2d 1344 (Ind. Ct. App. 1980).
[159]IND. CODE § 7.1-5-10-15 (1976) (amended 1978).
[160]408 N.E.2d at 1345.
[161]*Id.* at 1346.
[162]*Id.*
[163]636 F.2d 184 (7th Cir. 1980).

statute for boat owners. In *McDonnell* the plaintiff's husband drowned when a pontoon boat belonging to the defendant capsized, throwing the passengers into the water. The plaintiff's claim sounded in negligence. The court held that a boat owner was liable only for willful, wanton, or intentional injuries to his guest.[164] This result was predicated on Indiana's policy as expressed in the guest statutes applicable to automobiles[165] and aircraft[166] and the decisional law regarding the duty owed by real property owners to their social guests. The court held that Indiana's policy was to foster hospitality by insulating hosts from negligence suits by their guests.[167]

4. Procedural Requirement.—An important point of procedure in wrongful death cases was illustrated in *General Motors Corp. v. Arnett.*[168] In that case, the plaintiff brought suit against GM for the wrongful death of her husband within two years after his death. However, she was not duly appointed as the personal representative of his estate until four months after the statutory period had expired. GM contended that it was entitled to judgment as a matter of law, because Mrs. Arnett had not possessed the legal capacity to bring this action at any time during the statutory period. The court of appeals agreed. Mrs. Arnett could not maintain her action against GM because she failed to meet a condition precedent attached to the right to sue conferred by the Wrongful Death Statute.[169] The procedural rules governing relation back of amendments[170] and the naming of the real party in interest[171] could not create a new substantive right for Mrs. Arnett in place of the one she lost.[172] In an Indiana wrongful death action, neither the belated appointment itself nor an amended complaint can relate back to the time of the original filing.[173]

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[164] *Id.* at 186-87.
[165] IND. CODE § 9-3-3-1 (1976).
[166] *Id.* § 8-21-5-1.
[167] 636 F.2d at 187.
[168] 418 N.E.2d 546 (Ind. Ct. App. 1981).
[169] *Id.* at 548.
[170] IND. R. TR. P. 15(C).
[171] IND. R. TR. P. 17(A).
[172] 418 N.E.2d at 549.
[173] *Id.*