Seymour National Bank v. State Interprets the Indiana Tort Claims Act: Can the Enforcers Do No Wrong?

I. Introduction

The Indiana Supreme Court's recent decision in *Seymour National Bank v. State*[1] involved a public policy dispute over the proper method by which a state may encourage vigorous law enforcement while at the same time protecting citizens from negligent or reckless acts committed by officers in the course of duty. In the various appellate opinions of the *Seymour National Bank* case, the courts considered whether the state could be found liable to innocent private citizens who had been injured as a result of a crash with a police vehicle during a high speed chase.[2] The dispute centered upon a portion of the Indiana Tort Claims Act[3] which provides immunity for the state and its employees from losses arising from the "enforcement . . . of a law."[4]

Prior to the passage of the Tort Claims Act, Indiana case law provided that private citizens injured as a result of negligent or reckless law enforcement acts could state a cause of action against governmental units.[5] The supreme court was called upon in *Seymour National Bank* to determine whether that case law was codified in the Tort Claims Act. The court held that the word "enforcement," as used in the Tort Claims Act, clearly encompassed "an officer engaged in effecting an arrest."[6] Thus, the court rejected the codification view and held the state and the officer immune from liability. Although the supreme court's analysis is somewhat suspect, the result reached is clearly supported by recognized rules of statutory construction.[7] However, even if the court's opinion correctly construed the legislative intent in drafting the Act, the court's interpretation of the present wording of the statute has the potential to produce grave injustice.

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[1]422 N.E.2d 1223 (Ind.), *modified*, 428 N.E.2d 203 (Ind. 1981), *appeal dismissed*, 102 S.Ct. 2951 (1982).

[2]384 N.E.2d 1177 (Ind. Ct. App. 1979), *vacated*, 422 N.E.2d 1223 (Ind.), *modified*, 428 N.E.2d 203 (Ind. 1981), *appeal dismissed*, 102 S.Ct. 2951 (1982).

[3]Ind. Code §§ 34-4-16.5-1 to -19 (1982).

[4]*Id.* § 34-4-16.5-3(7).

[5]Campbell v. State, 259 Ind. 55, 284 N.E.2d 733 (1972). For a discussion of the *Campbell* case, see *infra* notes 32-38 and accompanying text.

[6]422 N.E.2d at 1226.

[7]*See infra* note 113. *See, e.g.*, Borchard, *Governmental Responsibility in Tort, VI*, 36 Yale L.J. 1 (1926); Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1 (1963); James, *Tort Liability of Governmental Units and Their Officers*, 22 U. Chi. L. Rev. 610 (1955).

This Note examines the potential consequences of the Indiana Supreme Court's interpretation of the Tort Claims Act and calls upon the General Assembly to take action. The legislature is urged to adopt an even-handed balancing of the public policies at stake in the *Seymour National Bank* decision, as opposed to the current mandatory preference for state immunity. The more equitable balancing approach would require law enforcement officials to exercise due care in the performance of their duties. A clear legislative response could avoid problems caused by the court's rejection of the codification view. However, if the General Assembly chooses not to act, the courts themselves should attempt to remedy the potential injustice by narrowly construing the holding in *Seymour National Bank.*

II. Historical Overview

A thorough understanding of the development of the concept of governmental immunity is helpful in evaluating the propriety of present Indiana law in this area.[8] The doctrine of governmental immunity[9] originated in the early English case of *Russell v. Men of Devon.*[10] Since that time the justification for immunizing governments from liability for their torts has been the subject of intense debate.[11]

Prosser summarized the rationales supporting the doctrine of governmental immunity as follows:

> The immunity is said to rest upon public policy; the absurdity of a wrong committed by an entire people; the idea that whatever the state does must be lawful, which has replaced the king who can do no wrong; the very dubious theory that

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[8]An exhaustive review of the doctrine's development is beyond the scope of this Note. *See* Recent Development, *The Tort Liability of the State of Indiana*: Perkins v. State, 46 Ind. L.J. 544 (1971); Note, *Sovereign Immunity in Indiana — Requiem*, 6 Ind. L. Rev. 92 (1972) [hereinafter cited as *Sovereign Immunity*].

[9]Immunity has been defined as follows:

> An immunity . . . avoids liability in tort under all circumstances, within the limits of the immunity itself; it is conferred, not because of the particular facts, but because of the status or position of the favored defendant; and it does not deny the tort, but the resulting liability. Such immunity does not mean that conduct which would amount to a tort on the part of other defendants is not still equally tortious in character, but merely that for the protection of the particular defendant, or of interests which he represents, he is given absolution from liability.

W. Prosser, Handbook of the Law of Torts 970 (4th ed. 1971) (footnote omitted).

[10]100 Eng. Rep. 359 (K.B. 1788).

[11]*See, e.g.*, Borchard, *Governmental Responsibility in Tort, VI*, 36 Yale L.J. 1 (1926); Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1 (1963); James, *Tort Liability of Governmental Units and Their Officers*, 22 U. Chi. L. Rev. 610 (1955).

> an agent of the state is always outside of the scope of his authority and employment when he commits any wrongful act; reluctance to divert public funds to compensate for private injuries; and the inconvenience and embarrassment which would descend upon the government if it should be subject to such liability.[12]

Throughout the last century, critics have argued that it

> is better that the losses due to tortious conduct should fall upon the [government] rather than the injured individual, and that the torts of public employees are properly to be regarded, as in other cases of vicarious liability, as a cost of the administration of government, which should be distributed by taxes to the public.[13]

The concept of immunity, because it resulted in a complete bar to recovery regardless of the circumstances involved, necessarily imposed great hardship upon individuals who suffered losses at the hands of government servants. Over the years, critics of governmental immunity became more numerous and vocal.[14] Eventually the courts began to erode the total bar to recovery, primarily by distinguishing between the types of activities in which government employees were engaged when the losses occurred.[15]

Indiana courts first attempted to avoid the harshness imposed by total immunity by applying what came to be known as the governmental-proprietary distinction.[16] The governmental-proprietary distinction was made possible by the development of the municipal corporation because such an entity performs some functions which are clearly "governmental" in nature and others which are "proprietary" or corporate.[17] Under the governmental-proprietary distinction test, liabili-

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[12]W. PROSSER, *supra* note 9, § 131, at 975 (footnote omitted).

[13]*Id.* at 978 (footnote omitted).

[14]*See supra* note 11.

[15]W. PROSSER, *supra* note 9, § 131, at 978.

[16]The first case limiting absolute immunity in Indiana was City of Goshen v. Meyers, 119 Ind. 196, 21 N.E. 657 (1889). The court in *Goshen* found liability for acts which were clearly proprietary in nature, but did not clearly enunciate the governmental-proprietary distinction. The terms "governmental" and "proprietary" were never defined with precision but instead were developed on a case-by-case basis. For examples of each type of function, see *infra* note 20.

[17]Under this distinction, courts attempted to classify the various functions of a municipality:

> On the one hand they are subdivisions of the state, endowed with governmental powers and charged with governmental functions and responsibilities. On the other they are corporate bodies, capable of much the same acts as private corporations, and having the same special and local interests and

ty attaches only to those acts which are proprietary in nature, while immunity is afforded for the performance of governmental functions.[18]

Although the governmental-proprietary distinction test was originally applicable only to municipalities, the Indiana Supreme Court later expanded the test's reach to counties with its 1960 decision in *Flowers v. Board of Commissioners*.[19] The courts had great difficulty distinguishing between governmental and proprietary functions,[20] however, and it became apparent that a more manageable standard for determining governmental liability was needed.[21]

With the 1967 decision of *Brinkman v. City of Indianapolis*,[22] the

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> relations, not shared by the state at large. They are at one and the same time a corporate entity and a government. The law has attempted to distinguish between the two functions, and to hold that in so far as they represent the state, in their "governmental," "political," or "public" capacity, they share its immunity from tort liability, while in their "corporate," "private," or "proprietary" character they may be liable.

W. PROSSER, *supra* note 9, § 131, at 977-78.

[18]*See Sovereign Immunity, supra* note 8, at 94 n.10.

[19]240 Ind. 668, 168 N.E.2d 224 (1960).

[20]In rejecting the governmental-proprietary test, the Florida Supreme Court reviewed the difficulties that Florida courts had encountered in attempting to apply the distinction:

> While holding that a municipality can be held liable for the negligent operation of a fire truck, we have exempted a municipality from liability when a jailor assaulted a prisoner with a blackjack and produced a skull concussion which resulted in his death.
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> Despite the exemption extended in the case last mentioned, we nevertheless [have] held the municipality liable to a prisoner who had contracted a communicable disease while in the city jail. Under the rule we have followed, if a police officer assaults and injures a prisoner, the municipality is immune but if the police officer is working the prisoner on the public streets and negligently permits his injury, the municipality can be held liable. If the police officer is driving an automobile and negligently injures a citizen, the municipality is liable but if the same police officer gets out of the same automobile and wrongfully assaults a citizen, the municipality is immune from responsibility.

Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 132-33 (Fla. 1957) (footnotes and citation omitted).

As one Indiana court noted, it was not "good policy to find that a municipal garbage truck is engaged in a *nonimmune* proprietary function when enroute from a wash rack to the garage while the same truck is engaged in an *immune* governmental function when enroute to a garbage pickup." Brinkman v. City of Indianapolis, 141 Ind. App. 662, 665, 231 N.E.2d 169, 171 (1967).

[21]*See* W. PROSSER, *supra* note 9, § 131, at 970. Prosser criticized the governmental-proprietary distinction as follows:

> There is little that can be said about such distinctions except that they exist, that they are highly artificial, and that they make no great amount of sense. Obviously this is an area in which the law has sought in vain for some reasonable and logical compromise, and has ended with a pile of jackstraws.

Id. at 982.

[22]141 Ind. App. 662, 231 N.E.2d 169 (1967).

Indiana Court of Appeals moved closer toward abolition of the immunity doctrine. Finding that the governmental-proprietary test produced distinctions "only remotely related to the fundamental considerations of municipal tort responsibility,"[23] the court held that "the doctrine of sovereign immunity has no proper place in the administration of a municipal corporation."[24] The court in *Brinkman* concluded that the doctrine of respondeat superior should form the basis for municipal governmental liability,[25] explaining that "[w]hen there is an immune function, the doctrine of *respondeat superior* becomes immaterial. However, when immunity is abrogated, liability depends upon whether or not the doctrine of *respondeat superior* applies."[26] The court of appeals applied the rationale developed at the muncipal level in *Brinkman* to Indiana counties in *Klepinger v. Board of Commissioners.*[27]

Within a year of the *Klepinger* decision, the continued use of the sovereign immunity doctrine to bar tort actions against the state came under attack. The Indiana Supreme Court first retreated from its adherence to the doctrine of sovereign immunity for the state in *Perkins v. State.*[28] The court in *Perkins* chose to base its decision on the grounds that the state should not be immune for torts arising out of the performance of a *proprietary* function rather than base its decision squarely upon the respondeat superior analysis as the court of appeals had done.[29] The court's decision caused much confusion because it seemed to recognize that immunity for the state still existed with regard to *governmental* functions.[30] Thus, in attempting to limit the application of the sovereign immunity doctrine with regard to state liability, the court apparently overruled by implication the reasoning of the *Brinkman* and *Klepinger* cases and re-established some immunity for lesser governmental units.[31]

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[23]*Id.* at 665, 231 N.E.2d at 171. The court, by way of illustration, explained that "it does not seem to be good policy to permit the chance that a school building may or may not be producing rental income at the time, determine whether a victim may recover for a fall into a dark and unguarded basement stairway or elevator shaft." *Id.*

[24]*Id.* at 666, 231 N.E.2d at 172.

[25]*Id.* at 668-69, 231 N.E.2d at 173. The doctrine of respondeat superior stands for the proposition that a master, in this case the governmental unit, may be held liable for the wrongful acts of his servant, in *Brinkman* the public employee. The court stated that "[c]ommon sense dictates that municipal police are the agents or servants of the city." *Id.* at 668, 231 N.E.2d at 173.

[26]*Id.* at 667, 231 N.E.2d at 172.

[27]143 Ind. App. 155, 239 N.E.2d 160 (1968).

[28]252 Ind. 549, 251 N.E.2d 30 (1969).

[29]*Id.* at 557-58, 251 N.E.2d at 35.

[30]*Id.* at 557, 251 N.E.2d at 35. *See Sovereign Immunity, supra* note 8, at 96-98.

[31]*See Sovereign Immunity, supra* note 8, at 97-98. Because counties and cities were recognized as extensions of the state, the *Perkins* decision should have overruled the court of appeals decisions and re-established the governmental-proprietary test at the municipal and county levels. This suggestion was rejected in the combined case of

Against this confusing backdrop, the Indiana Supreme Court handed down the landmark decision of *Campbell v. State*.[32] In this case, the court directly considered the common law justification for the doctrine of sovereign immunity and found that "[t]he purpose for which the doctrine was created has long since vanished."[33] Consequently, the court appeared to have completely rejected the concept of state immunity.

The court went on, however, to explain that immunity still attached in some areas of governmental activity. The court discussed and endorsed the reasoning of cases finding that the immunity of governmental units was coextensive with the *personal* immunity of public employees under the common law privilege of public immunity,[34] and then stated that the state would be immune to the same extent that a municipal corporation or county retained immunity.[35]

In determining whether personal immunity should attach to the acts or omissions of a public official under the public immunity privilege, decisions referred to by the court in *Campbell* considered "(1) whether the agent's actions were undertaken in furtherance of a 'discretionary' rather than 'ministerial' function; (2) whether the action taken was within the scope of the agent's employment; and (3) whether the action was made in good faith."[36] The court in *Campbell*

Campbell v. State, in which the court attempted to restate its intentions in the *Perkins* decision: "[T]his court in *Perkins* recognized that municipal corporations and county governments had been *eliminated from the scope of sovereign immunity* as to tortious acts." 259 Ind. 55, 61, 284 N.E.2d 733, 736 (1972) (emphasis added).

[32]259 Ind. 55, 284 N.E.2d 733 (1972).

[33]*Id.* at 57-58, 284 N.E.2d at 734.

[34]*Id.* at 62-63, 284 N.E.2d at 737. A privilege differs from an immunity in that a "privilege avoids liability for tortious conduct only under particular circumstances, and because these circumstances make it just and reasonable that the liability shall not be imposed, and so go to defeat the existence of the tort itself." W. PROSSER, *supra* note 9, at 970.

[35]259 Ind. at 63, 284 N.E.2d at 737. The court stated that the defense of sovereign immunity "is not available to any greater extent than it is now available to municipal corporations and counties of this state." *Id.*

[36]*Sovereign Immunity*, *supra* note 8, at 104. *See also* Dalehite v. United States, 346 U.S. 15 (1953); Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949); Wallace v. Feehan, 206 Ind. App. 552, 190 N.E. 434 (1934). The test for whether an act is "discretionary" or "ministerial" in Indiana is found in Adams v. Schneider, 71 Ind. App. 249, 124 N.E. 718 (1919):

> A duty is discretionary when it involves on the part of the officer to determine whether or not he should perform a certain act, and, if so, in what particular way, and in the absence of corrupt motives in the exercise of such discretion he is not liable. His duties, however, in the performance of the act, after he has once determined that it shall be done, are ministerial, and for negligence in such performance, which results in injury, he may be liable in damages.

Id. at 255-56, 124 N.E. at 720 (citation omitted).

concluded its discussion of the bases for the remnants of immunity by stating, without further elaboration, that "it appears that in order for one to have standing to recover in a suit against the state there must have been a breach of duty owed to a private individual."[37] Following *Campbell*, therefore, a breach of duty owed to a private individual could result in liability on the part of a government, although immunity would still attach if the duty were owed solely to the public at large.[38]

Thus, the *Campbell* decision nearly obliterated the state's immunity from potential tort liability. With the state facing possible unlimited liability for each tortious offense, and with only the uncertain remnants of public immunity to shield the state against the feared rash of lawsuits, the General Assembly set out to establish a statutory scheme to address the situation. The Indiana Judicial Study Commission drafted proposed guidelines for legislative action[39] which were followed by the sponsors when the 1973 version of the Tort Claims Act was introduced in the legislature.[40]

The 1973 bill provides an indication that the legislature did not seek to codify Indiana case law when it attempted to address the issue of immunity. Section four of the bill expressly waived the immunity of governmental entities from suit for injuries resulting from the negligent operation of a motor vehicle by a state employee acting within the scope of his employment, but expressly excepted the operation of an emergency vehicle from the waiver.[41] The bill thus distinguished between emergency and non-emergency situations in terms of when immunity should attach. The bill further provided that immunity would attach with respect to a loss which "arises out of

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[37]259 Ind. at 63, 284 N.E.2d at 737. The court's decision in Roberts v. State, 159 Ind. App. 456, 307 N.E.2d 501 (1974), addressed the question of whether the private duty requirement had to be met in addition to the other factors or if it were an *alternative* ground for recovery and held that the private duty requirement was indeed an alternative ground.

[38]An example of a duty owed solely to the public is found in Simpson's Food Fair, Inc. v. City of Evansville, 149 Ind. App. 387, 272 N.E.2d 871 (1971) (city not liable for failure to provide police protection).

[39]INDIANA JUDICIAL STUDY COMM'N, 1972-73 ANNUAL REPORT, pt. I, § 6 (1973).

[40]*Compare* INDIANA JUDICIAL STUDY COMM'N, TORT CLAIMS: OUTLINE (1972), *with* S. 130, 98th Ind. Gen. Ass., 1st Reg. Sess. (1973).

[41]The text provided:

> Sec. 4. Immunity of all governmental entities from suit is waived for any injury resulting from the negligent operation or use of any motor vehicle or other motorized equipment by any employee while in the scope of his employment. This section shall not apply to the operation of an emergency vehicle as defined by law while being operated or used in response to an emergency call or an emergency situation.

S. 130, 98th Ind. Gen. Ass., 1st Reg. Sess. ch. 2, § 4 (1973).

the failure to adopt or enforce or arises out of the execution or enforcement of any law, except this section shall not exonerate an employee from liability for false arrest or false imprisonment."[42]

Under the 1973 bill, the state would be liable under negligence principles for accidents involving non-emergency state vehicles, would be liable under laws regulating emergency vehicles for accidents involving emergency vehicles *other than* those engaged in law enforcement, and would be *immune* for accidents occurring in the process of enforcing any law.[43] As early as 1973, therefore, legislators were distinguishing between law enforcement related accidents and other accidents involving state employees.

The 1973 bill, based upon the tort claims acts of other states,[44] was passed by both houses of the legislature.[45] However, all references to immunity and liability in the 1973 bill were deleted by a conference committee.[46] The remaining sections—dealing with limitations on amounts recoverable as damages and procedures by which suit might be brought against governmental units—were vetoed because the bill contained an inadvertent error unrelated to the concept of immunity.[47]

The legislature attacked the matter again in its next session, and the result was the passage of the Indiana Tort Claims Act in 1974.[48] The 1974 Act provided for limits on the amount of damages recoverable against the state for tortious acts or omissions,[49] spelled out the specific instances where the state would not be liable for losses resulting from acts or omissions of the state or its employees[50] while

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[42]*Id.* at § 6(h).

[43]The sweeping immunity provision in section 6(h) covers all enforcement acts. Thus, when an emergency vehicle is involved in an accident *while engaged in law enforcement*, a specific type of "emergency," section 6(h) would apply rather than section 6(g), the general emergency standard.

[44]INDIANA JUDICIAL STUDY COMM'N, TORT CLAIMS: OUTLINE § A(3) (1972).

[45]J. IND. S., 98th Gen. Ass., 1st Reg. Sess. 1182 (1973); J. IND. H., 98th Gen. Ass., 1st Reg. Sess. 1739 (1973).

[46]J. IND. S., 98th Gen. Ass., 1st Reg. Sess. 1069-71 (1973). This deletion may indicate that there was disagreement or uncertainty about the immunity provisions, or it may indicate simply that the conference committee was more concerned with the immediate problems of setting recovery limits and claim procedures.

[47]J. IND. S., 98th Gen. Ass., 2d Reg. Sess. 7 (1974). Governor Bowen vetoed the bill "for the reason that the section of the Indiana Code of 1971 which authorizes the State of Indiana to purchase liability insurance for government vehicles was inadvertently repealed without providing replacement language containing such an authorization." *Id.*

[48]Act of Feb. 19, 1974, Pub. L. No. 142, 1974 Ind. Acts 599 (codified as amended at IND. CODE §§ 34-4-16.5-1 to -19 (1982)).

[49]Act of Feb. 19, 1974, Pub. L. No. 142, § 1, 1974 Ind. Acts 599, 600-01 (codified at IND. CODE § 34-4-16.5-4 (1982)).

[50]Act of Feb. 19, 1974, Pub. L. No. 142, § 1, 1974 Ind. Acts 599, 600, *amended by* Act of Feb. 18, 1976, Pub. L. No. 140, § 2, 1976 Ind. Acts 687, 688-89 (codified as

leaving the doctrine of respondeat superior as the basis for liability in all other instances,[51] and established a method for processing tort claims against the state.[52]

Two cases, *Roberts v. State*[53] and *Board of Commissioners v. Briggs*,[54] decided after the passage of the Tort Claims Act, were based on situations occurring prior to the effective date of the Act. These cases afforded the courts an opportunity to more fully develop the concepts which formed the basis for state immunity after *Campbell*.[55]

The *Roberts* decision clarified the *Campbell* analysis by holding that citizens are entitled to relief "at least to the extent government officials and employees, acting within the scope of their employment, intentionally or negligently breach a duty owed to a private individual."[56] This holding made it clear that under Indiana case law the breach of a duty to a private individual, standing alone, was sufficient to state a claim for relief.

The *Briggs* decision further defined the "private duty" analysis holding that the state is immune from liability "*only if the agent is exercising his governmental discretion in the performance of a purely public duty.*"[57] Perhaps most importantly, the court in *Briggs* remarked

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amended at IND. CODE § 34-4-16.5-3 (1982)). Section 1 of the 1974 Tort Claims Act provided in pertinent part:

> Sec. 3. A governmental entity or an employee is not liable if a loss results from:
> (1) the natural condition of unimproved property;
> (2) the condition of a reservoir, dam, canal, conduit, drain, or similar structure when used by a person for a purpose which is not foreseeable;
> (3) the temporary condition of a public thoroughfare which results from weather;
> (4) the condition of an unpaved road, trail, or footpath, the purpose of which is to provide access to a recreation or scenic area;
> (5) the initiation of a judicial or administrative proceeding;
> (6) the performance of a discretionary function;
> (7) the enforcement of or failure to enforce a law;
> (8) an act or omission performed under the apparent authority of a statute which is invalid, if the employee would not have been liable had the statute been valid.

Act of Feb. 19, 1974, Pub. L. No. 142, § 1, 1974 Ind. Acts 599, 600 (codified as amended at IND. CODE § 34-4-16.5-3 (1982)).

[51]Act of Feb. 19, 1974, Pub. L. No. 142, § 1, 1974 Ind. Acts 599, 600 (codified as amended at IND. CODE § 34-4-16.5-3 (1982)).

[52]Act of Feb. 19, 1974, Pub. L. No. 142, § 1, 1974 Ind. Acts 599, 601-03 (codified as amended at IND. CODE §§ 34-4-16.5-5 to -17 (1982)).

[53]159 Ind. App. 456, 307 N.E.2d 501 (1974).

[54]167 Ind. App. 96, 337 N.E.2d 852 (1975).

[55]The *Campbell* decision had merely mentioned breach of a private duty as a necessity for state liability in passing, and did not define the parameters of this "private duty" analysis. *See supra* notes 37-38 and accompanying text.

[56]159 Ind. App. at 465, 307 N.E.2d at 506-07.

[57]167 Ind. App. at 110, 337 N.E.2d at 862.

in dicta that "[t]his formulation appears to coincide with the exceptions to liability set out in the new Tort Claims Act passed by the Indiana Legislature."[58]

The immunity provisions of the Indiana Tort Claims Act were clarified and expanded by the General Assembly's 1976 amendments to the Act.[59] The relevant provision of the 1976 amendments provided that the state is not liable for "the adoption and enforcement of or failure to adopt or enforce a law, including rules and regulations, unless the act of enforcement constitutes false arrest or false imprisonment."[60] This is the statutory language which the Indiana courts attempted to interpret in the *Seymour National Bank* case.

III. *Seymour National Bank v. State*

A. Facts and Procedure

On November 28, 1974, an Indiana state trooper stopped an automobile which he believed was being operated in violation of a state bumper height statute.[61] The trooper discovered that the driver had no driver's license or vehicle registration and noticed what appeared to be bullet holes in the trunk of the suspect's car.[62] Instead of complying with the officer's request to come back to his police car for identification, the suspect drove off at a high rate of speed.[63] A chase ensued during which the speed of the two autos at times exceeded 100 miles per hour.[64] As the trooper passed a string of cars, the driver of one of the cars turned left in front of the officer.[65] A crash resulted in which two passengers in the car were killed and the driver was severely disabled.[66]

The Seymour National Bank, as guardian and special administrator for the estates of the occupants of the car, filed suit in tort against the State of Indiana seeking damages for personal injuries, wrongful death, and property damage.[67] The trial court granted summary judgment in favor of the state, holding that the state was granted immunity

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[58]*Id.*

[59]Act of Feb. 18, 1976, Pub. L. No. 140, § 2, 1976 Ind. Acts 687, 688-89 (codified at IND. CODE § 34-4-16.5-3(1) to (14) (1982)).

[60]Act of Feb. 18, 1976, Pub. L. No. 140, § 2, 1976 Ind. Acts 687, 689 (codified at IND. CODE § 34-4-16.5-3(7) (1982)).

[61]422 N.E.2d at 1224.

[62]*Id.*

[63]*Id.* at 1225.

[64]*Id.*

[65]*Id.*

[66]Brief for Appellant at 7, Seymour Nat'l Bank v. State, 384 N.E.2d 1177 (Ind. Ct. App. 1979).

[67]*Id.* at 12.

on these facts by the Indiana Tort Claims Act.[68] The plaintiffs appealed, basing their case upon well-settled Indiana law to the effect that "it will be presumed that the legislature does not intend by the enactment of a statute to make any *change* in the common law beyond what it declares, either in express terms or by unmistakable implication."[69]

The plaintiffs' case, stripped to its essentials, consisted of legislative history which indicated that the legislature intended merely to codify the case law, coupled with reliance upon the rule of statutory construction that statutes in derogation of the common law should be strictly construed. The state's case basically depended upon legislative history which indicated that the legislature intended to change the common law, together with reliance upon the rule of statutory construction that subsequent amendments are persuasive, although not controlling, authority as to what the legislature intended in the original act.

B. Court of Appeals Decision

The court of appeals, in an opinion written by Judge Robertson, reversed and remanded the trial court's grant of summary judgment for the state.[70] The court of appeals opinion contained a careful review of Indiana case law as it existed prior to the passage of the Tort Claims Act.[71] The court found that under case law precedent a cause of action against the state would be stated if the plaintiff could show that "(1) the officer was acting in a ministerial capacity; or (2) the officer owed a private duty to the plaintiff to exercise due care."[72]

The court then turned to the facts of the *Seymour National Bank* case to determine whether a cause of action against the state would have existed prior to the passage of the Tort Claims Act. The court concluded that drivers of emergency vehicles owe a duty of care to private individuals and that the trooper, while in hot pursuit, was performing a ministerial function.[73] Therefore, the court found that the plaintiffs had stated a cause of action under the common law.[74]

It was thus necessary to determine whether the Tort Claims Act granted immunity in derogation of the plaintiffs' common law rights. The decision turned upon the court's interpretation of Indiana Code

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[68]422 N.E.2d at 1226.

[69]Brief for Appellant at 12, Seymour Nat'l Bank v. State, 384 N.E.2d 1177 (Ind. Ct. App. 1979).

[70]384 N.E.2d 1177 (Ind. Ct. App. 1979).

[71]*Id.* at 1181-84.

[72]*Id.* at 1183.

[73]*Id.* at 1184-85.

[74]*Id.* at 1185.

section 34-4-16.5-3(7) which states that a governmental entity or employee is not liable for a loss resulting from "the enforcement of [a law] or failure to . . . enforce a law."[75]

The court concluded that with respect to the failure to enforce a law the legislature intended to codify the holding of *Simpson's Food Fair, Inc. v. City of Evansville.*[76] The court interpreted the *Simpson's Food Fair* case to stand "for the proposition that the *decision* to enforce or not to enforce a law is a discretionary act . . . owed solely to the public"[77] and is therefore protected activity. The court stated that, "[w]ith respect to the immunity from losses resulting from the *enforcement* of the law, the legislative intent is not so easily discerned,"[78] and that the term "enforcement" could reasonably include "(1) the decision to enforce; (2) the decision to enforce in a particular manner; (3) the actual implementation of such a decision; and (4) the *result* of enforcement . . . upon those persons who are the object of the decision to enforce the law."[79] The court then proceeded to examine which, if any, of these concepts the legislature intended to include through its usage of the word "enforcement."

Because the decision to enforce is the converse of the decision not to enforce, the court held that consistency dictated that both be protected.[80] The court also found it clear that the legislative intent was to protect officials from the *result* of decisions to enforce upon the object of the enforcement,[81] finding that the 1976 amendments to the Act[82] disclosed such an intent.[83] However, the court was unable to say whether the plain meaning of "enforcement" included the decision to enforce in a particular manner or the actual implementation of such a decision and thus resorted to its interpretive powers to construe the statute.[84]

In so doing, the court relied upon the rules of statutory construc-

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[75]IND. CODE § 34-4-16.5-3(7) (1982).

[76]149 Ind. App. 387, 272 N.E.2d 871 (1971).

[77]384 N.E.2d at 1184.

[78]*Id.* at 1185.

[79]*Id.*

[80]*Id.*

[81]*Id.* at 1186.

[82]Act of Feb. 18, 1976, Pub. L. No. 140, § 2, 1976 Ind. Acts 687 (codified at IND. CODE § 34-4-16.5-3(1) to (14) (1982)).

[83]384 N.E.2d at 1186 n.11. For the text of the relevant provision of the amendments, see *supra* text accompanying note 60. The court stated that "[t]he amendments . . . clearly disclose that the legislature was concerned with the end result of enforcement upon the object thereof." 384 N.E.2d at 1186 n.11. This interpretation means that immunity attaches with regard to the person or persons against whom the law is enforced, but no immunity is provided from results of enforcement attempts as to persons other than those against whom the law is enforced.

[84]384 N.E.2d at 1186.

tion that statutes should not be construed in a manner which results in harsh or unjust consequences; that statutes in derogation of the common law should be strictly construed; and that in cases of doubt courts should favor a construction in harmony with the common law. The court found that "enforcement" did not include the mechanical implementation of the decision to enforce a law.[85] Noting that immunizing the activities of the state and its employees in the actual implementation of the decision to enforce a law "would be to sanction and permit negligent and even reckless implementation of such a decision,"[86] the court of appeals refused to find such a legislative intent.

C. Supreme Court Decision

The Indiana Supreme Court, in a 3-2 decision, reversed the court of appeals.[87] The majority rejected the contention that the term "enforcement of a law" was ambiguous, stating that "an officer engaged in effecting an arrest is in fact enforcing a law."[88]

The plaintiffs in *Seymour National Bank* contended that the Tort Claims Act merely codified the common law as it existed immediately prior to the passage of the Act.[89] Alternatively, the plaintiffs argued that the evidence supporting that proposition at least rendered the meaning of "enforcement" ambiguous and that if the court found the term ambiguous, application of the rule of statutory construction that statutes in derogation of common law rights should be strictly construed would then be necessary.[90] The state countered by asserting that the meaning of "enforcement" was clear and unambiguous.[91] The state claimed that, even if the court found ambiguity in the 1974 Act, this ambiguity was removed by the amendments in 1976.[92]

Accepting arguendo the plaintiffs' contention that the statute was ambiguous, the court stated that it perceived the 1976 amendments "as having a clarifying effect on the statute insofar as *all* acts of enforcement save false arrest and imprisonment now render the State immune."[93] Thus, the court concluded that the trooper was engaged

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[85]*Id.*

[86]*Id.*

[87]422 N.E.2d 1223 (1981).

[88]*Id.* at 1226.

[89]*See* Brief for Appellant at 9-19, Seymour Nat'l Bank v. State, 384 N.E.2d 1177 (Ind. Ct. App. 1979).

[90]422 N.E.2d at 1226.

[91]Brief for Defendant-Appellee in Support of Petition for Rehearing at 12, Seymour Nat'l Bank v. State, 384 N.E.2d 1177 (Ind. Ct. App. 1979).

[92]*Id.* at 6-8.

[93]422 N.E.2d at 1226. The Indiana Code section governing immunity currently provides immunity *inter alia* for the following:

(5) the initiation of a judicial or administrative proceeding;

in "enforcement" within the meaning of the Tort Claims Act when the accident occurred.

Justices DeBruler and Hunter authored separate dissenting opinions. Justice DeBruler agreed with the analysis in Judge Robertson's opinion for the court of appeals finding that the trooper owed a duty of care toward private individuals.[94] He pointed out that in addition to the canons of statutory construction relied upon by Judge Robertson, he would add the rule that apparently conflicting statutes should be construed in a manner so as to bring them into harmony whenever reasonably possible.[95] In applying this rule, Justice DeBruler noted that the immunity statute was not only in conflict with the state's emergency vehicle operation laws,[96] but was also in derogation of the common law. Justice DeBruler reasoned that by construing the immunity statute so as to make it applicable only in circumstances involving a purely public duty, the "impediment of the common law would be lessened, unjust consequences would be reduced in number, and the two statutes would be left viable and in harmony."[97]

Justice Hunter found the majority's decision unsettling. He charged that the court's holding that citizens would have no recourse for injuries suffered at the hands of a governmental employee "enforcing a law," even if such conduct was "malicious, grossly negligent, or in willful and wanton disregard for public safety or property,"[98] resulted in a return "to the anachronistic notion that 'the King can do no wrong.' "[99] He reviewed statutes passed by the legislature which prohibit gross negligence and wanton or malicious conduct on the part of law enforcement officials and concluded that "[i]t is incongruous" in light of these statutes that the legislature would pass a law bar-

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(6) the performance of a discretionary function;
(7) the adoption and enforcement of or failure to adopt or enforce a law, including rules and regulations, unless the act of enforcement constitutes false arrest or false imprisonment;
(8) an act or omission performed in good faith and without malice under the apparent authority of a statute which is invalid, if the employee would not have been liable had the statute been valid;
. . .
(11) failure to make an inspection, or making an inadequate or negligent inspection, of any property, other than the property of a governmental entity, to determine whether the property complied with or violates any law or contains a hazard to health or safety.

IND. CODE § 34-4-16.5-3 (1982).

[94]422 N.E.2d at 1226-27 (DeBruler, J., dissenting).

[95]*Id.* at 1227.

[96]*See* IND. CODE § 9-4-1-25 (1982).

[97]422 N.E.2d at 1227 (DeBruler, J., dissenting).

[98]422 N.E.2d at 1227 (Hunter, J., dissenting).

[99]*Id. But see infra* note 104.

ring victims "from obtaining redress from the offending governmental entity in our courts of law."[100]

Justice Hunter also noted that "enforcement" does not apply only to police officers[101] and that the legislature's use of the term in other statutes "gives rise to various connotations and interpretations of the word 'enforcement.' "[102] Warning that the majority's opinion would result in the development of dubious distinctions between the "administration" and "enforcement" of laws,[103] he concluded that the position of the court of appeals was correct in that the statute "embraced and codified the common law of this state as it existed at the time" the Tort Claims Act was passed.[104]

The Indiana Supreme Court granted a rehearing and issued a modification of its earlier opinion, from which Justices DeBruler and Hunter again dissented. The majority reaffirmed its position that the language of the statute as amended was clear.[105]

The most interesting segment of the modified opinion dealt with the court's analysis of the application of the Tort Claims Act to the willful and wanton acts of public officials. The court indicated that in some instances public law enforcement officials may be personally liable when:

> an employee's acts, although committed while engaged in the performance of his duty, might be so outrageous as to be incompatible with the performance of the duty undertaken. In such a case, it cannot be said that an injury resulting therefrom resulted from the performance of the duty. Such acts, whether intentional or willful and wanton, are simply beyond the scope of the employment.[106]

The court concluded that no immunity attached with regard to acts "so incompatible with the performance of duty as to be outside the scope of the employment . . . either to the employee or to the governmental entity, which has no need for it, inasmuch as there is no basis for liability in it."[107]

Justice Hunter reaffirmed his adherence to his dissent from the original opinion and renewed his warning that the court's opinions would result in the development of dubious distinctions between enforcement, administration, and implementation of laws.[108]

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[100]422 N.E.2d at 1227-28 (Hunter, J., dissenting).

[101]*Id.* at 1228. *See also infra* notes 113-16 and accompanying text.

[102]422 N.E.2d at 1228 (Hunter, J., dissenting).

[103]*Id.* at 1229.

[104]*Id.*

[105]428 N.E.2d 203 (1981).

[106]*Id.* at 204 (footnote omitted).

[107]*Id.*

[108]428 N.E.2d at 205-06 (Hunter, J., dissenting). For a discussion of the court's

IV. Impact on Indiana Law

Underlying the immediate dispute in the *Seymour National Bank* case is a clash between views as to what the courts may consider when applying statutory law to specific cases. The court of appeals believed that public policy permitted it to consider the equities of a case when determining whether the legislature intended for statutory language to be read literally. The supreme court took a more deferential approach, viewing the plain meaning of a statute's words as mandatory. This conflict is clearly evidenced by the manner in which the court of appeals began its interpretation of the statute: "First, to say that the legislature intended the state and its employees to be immune in the actual implementation of the decision to enforce a law would be to sanction and permit negligent and even reckless implementation of such a decision."[109]

The supreme court, on the other hand, objected to the plaintiffs' suggestion that its decision was prejudicial to the public interest. The court defended its position by stating its "interpretation does result in the grant of such immunity for losses that result from any act which can properly be characterized as enforcement of the law, but we do not regard this as being against the public interest, and it is clearly a matter that the Legislature may determine."[110]

The point of departure between the two appellate panels which considered this case is thus the degree to which each was willing to resort to judicial activism. The court of appeals approached the case with resolution of the public policy dispute as its main concern,[111] while the supreme court apparently regarded the public policy of separation of powers to be of overriding importance.[112] The supreme court's opinion resolves the public policy question in deference to the perceived legislative solution. Because both the court of appeals and the supreme court opinions may be justified by the application of traditional rules of statutory construction,[113] it is clear that if there is a

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treatment of the constitutional issues on rehearing, see Johnson, *Constitutional Law, 1982 Survey of Recent Developments in Indiana Law*, 16 Ind. L. Rev. 101, 117 (1983).

[109]384 N.E.2d at 1186.

[110]428 N.E.2d at 204.

[111]*See supra* note 109 and accompanying text.

[112]*See supra* note 110 and accompanying text.

[113]*See generally* Ind. Code §§ 1-1-4-1, 1-1-4-2, 34-1-67-3 (1982); C. Sands, Statutes and Statutory Construction (4th ed. 1972) (revision of Sutherland Statutory Construction). The Indiana Supreme Court relied upon the "plain meaning" rule, 422 N.E.2d at 1226, and the "subsequent amendment" rule, *id.*, to find the word "enforcement" clear and unambiguous. The court's reliance on the plain meaning rule without discussion of the means utilized to arrive at its conclusion appears inappropriate in light of the carefully developed review of the common law offered by Judge Robertson's opinion for the First District Court of Appeals. 384 N.E.2d at 1181. *See* 2A C.

real "villain" in this dispute, that villain is the Indiana General Assembly.

The statute under consideration in this case is an inadequate attempt to address the issue of immunity in a law enforcement setting. In order to defer to the perceived legislative judgment on the public policy issue, the Indiana Supreme Court was forced to take a position which included rejection of the case law codification view and with it a carefully developed approach to the problem.[114] This rejection, as well as the precise holding of the court,[115] will cause many problems *even if* the supreme court has managed to reflect the legislative will with regard to the outcome of this particular case.

A. Three Problem Areas

The factual setting of the *Seymour National Bank* case was clear-cut, and the actual holding of the case was a very narrow one, that "an officer engaged in effecting an arrest is in fact enforcing a law."[116] Nonetheless, by rejecting the codification view, the *Seymour National Bank* decision makes it likely that numerous problems concerning the Tort Claims Act will surface. It is therefore important that the General Assembly act to clarify the statute so that these unforeseen problems may be alleviated.

1. The Stages of Law Enforcement.—The harshness which results

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SANDS, *supra*, § 45.02, at 4. *But see* IND. CODE § 1-1-4-1(1) (1982). However, the subsequent amendment rule, used to attribute the same meaning of "enforcement" found in the 1976 amendment to the 1974 Tort Claims Act, was justified. *See* California School Township v. Kellogg, 109 Ind. App. 117, 125, 33 N.E.2d 363, 366 (1941); 2A C. SANDS, *supra*, § 49.11, at 265.

The court of appeals relied upon the rule that courts will not construe a statute in a manner which results in harsh or unjust consequences, 384 N.E.2d at 1186, and the rule that statutes in derogation of common law will be strictly construed, *id.* The derogation of common law rights rule was firmly established in American law even before the turn of the nineteenth century. Shaw v. Railroad Co., 101 U.S. 557, 565 (1879). The rule does not depend upon legislative intent; indeed, its application may very well frustrate legislative intent. For this reason, "[t]he rule of strict construction tends to be stated with greatest confidence where it is corroborated by other interpretive aids." 3 C. SANDS, *supra*, § 61.02, at 46. However, even without strong corroborative evidence, proponents argue that application of the rule is justified. Because the rule is so settled and familiar, it may be argued that the legislature acted with full knowledge that the courts would strictly construe the statute in question. 3 C. SANDS, *supra*, § 61.04, at 56. However, Indiana, like several other states, has enacted legislation indicating that this rule is inapplicable. IND. CODE § 34-1-67-3 (1982). *See, e.g.*, ARIZ. REV. STAT. ANN. § 1-211 (1974); ARK. STAT. ANN. § 27-131 (1979); KAN. STAT. ANN. § 77-109 (1977); KY. REV. STAT. ANN. § 446.080 (Baldwin 1969).

[114] *See supra* notes 32-38 and accompanying text.

[115] "[A]n officer engaged in effecting an arrest is in fact enforcing a law." 422 N.E.2d at 1226.

[116] *Id.*

from the supreme court's interpretation of the phrase "enforcement of a law" may well prompt attempts at distinguishing between acts in the various stages of the law enforcement process. It may be conceded that pursuing a suspected criminal involves the "enforcement" of a law. Much more difficult fact situations will be presented, however, when the courts are asked to consider whether an officer's negligent acts while on duty but merely patrolling are included with the term "enforcement." Similarly, the courts will likely have to determine whether negligent acts committed in the investigatory stage of the law enforcement process are cloaked with immunity. In that same vein, the *Seymour National Bank* decision provides little guidance as to what, if any, post arrest negligent acts will be included as protected state activity. For instance, if a crash similar to the one considered in *Seymour National Bank* takes place after a dangerous suspect has apprehended and is being whisked to the jailhouse, is "enforcement" still in progress? What if an officer's negligence in transporting the suspect from the police vehicle to the jail results in injury to innocent bystanders? Consider the situation in which injuries occur inside the jailhouse as a result of an officer's negligence before the cell door is closed behind the suspect. At what point is the arrest "effected"? In short, future challenges requiring the delineation of what acts, at what stages, of the law enforcement process are included in the term "enforcement" seem virtually certain.

2. Who are the "Enforcers"?—In various acts, the legislature has used the term "enforcement" to apply to the conduct of state employees engaged in several different types of activity. The *Seymour National Bank* decision suggests that the state could argue that employees, other than police officers, who are granted "enforcement" powers by the General Assembly are immune from liability for their acts in suits alleging misconduct on the part of these employees. The commissioner of labor,[117] pharmacy inspector-investigators,[118] the state fire marshal,[119] and local health officers[120] could all be protected for any conduct that they engaged in which was related to their "enforcement" duties. The lack of protection from the actual occurrence of negligent or reckless acts by these persons is exacerbated by the less rigorous training these persons are likely to receive compared to that provided to police officers.

3. Loopholes in the Act.—A literal reading of the Tort Claims Act could dangerously contract state immunity in areas that were clearly

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[117]IND. CODE § 22-2-9-4 (1982) (commissioner enforces labor laws).

[118]*Id.* at § 25-26-13-4 (inspector-investigators enforce controlled substances laws).

[119]*Id.* at § 22-11-5-6 (fire marshal has duty to enforce all state laws and local ordinances).

[120]*Id.* at § 16-1-4-1 (local health officers have duty to enforce health laws).

protected under previous case law. Under section three subsection five of the Act, only the initiation of a judicial or administrative proceeding is expressly protected,[121] and under subsection six only the *performance* of a discretionary function triggers immunity.[122] The plain meaning of these sections, therefore, dictates that suits based upon the *failure* to initiate a proceeding or perform a discretionary function will lie.

B. Public Policy Considerations

The resolution of the public policy issue provided by the supreme court's interpretation of the Tort Claims Act does not seem to be the wisest solution available. A careful examination of the competing policy considerations indicates that something short of total immunity is clearly superior from a public policy standpoint. Those favoring the total immunity position apparently view the threat of suit as an obstacle to vigorous law enforcement. Although vigorous law enforcement is without doubt a laudable goal, the reasons why we want to encourage this should be kept foremost in mind. A civilized society where laws are obeyed provides for a safe, desirable life-style. Laws are enforced in order to protect citizens. If law enforcement is viewed as superior to protection of citizens from private injury, something has gone astray. Yet, state immunity for all law enforcement does exactly that; it prevents citizens who have been wronged by law "enforcers" from obtaining redress for their injuries.

The state's attorneys in *Seymour National Bank* responded to charges that private citizens are unprotected by arguing that the criminal penalties imposed by emergency vehicle statutes,[123] when coupled with disciplinary sanctions for violations of due care standards, are sufficient deterrents to negligent and reckless conduct, and that the imposition of civil liability is therefore unnecessary. This explanation ignores the fact, however, that the issue is not only how to avoid reckless and negligent acts, but also how to redress the injuries suffered when those acts do occur.

The total immunity view obviously makes no provision for those who are unfortunate enough to suffer injury as a result of law enforcement activity. Further, the state's contention evidences a rather unrealistic view of the deterrent effect of criminal actions against police officers, given the likelihood, from a practical standpoint, of vigorous prosecution of police offenders.

The public policy resolution reached in *Seymour National Bank* ignores the history of the doctrine of immunity and the reasons for

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[121] *Id.* at § 34-4-16.5-3(5).

[122] *Id.* at 34-4-16.5-3(6) (emphasis added).

[123] *See id.* at § 9-4-1-25.

its subsequent drastic limitation. It was the harshness of the results visited upon individual plaintiffs which led to the development of distinctions that could mitigate the harshness of total state immunity.[124] It is certainly not difficult to imagine situations where extreme hardship could result under the supreme court's interpretation of the immunity provided law enforcement officials under the Indiana Tort Claims Act.

The facts of the *Seymour National Bank* decision provide ample evidence of potential hardship.[125] Further illustration is provided by Justice Hunter's description of a security guard's reckless act of running down innocent schoolchildren in a playground while in pursuit of a shoplifter.[126] That act, and countless others like it, would result in no liability on the part of the state or its employees and therefore no adequate means of redress for those victimized by the reckless conduct.

Such a result runs counter to the modern trend to spread losses among all of society. Because law enforcement is an activity which benefits *all* of society, it seems particularly appropriate to have the public at large share the cost of vigorous law enforcement.

C. Proposed Solution

The inclusion of a due care requirement for officers performing their duties, even under emergency situations, is a workable means of balancing the conflicting policies of encouraging vigorous law enforcement while at the same time protecting citizens from, and redressing them for, injuries suffered as a result of negligent or reckless acts of law enforcement officials. Such a course has been taken by a number of states.[127] Further, the inclusion of a due care requirement for law enforcement officials will not necessarily result in a decline of vigorous law enforcement. As discussed by the court of appeals and by Justice Hunter, jury consideration of alleged police negligence would be based upon instructions which would take into account the particular pressures placed upon law enforcement officials.[128]

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[124]*See supra* notes 14-38 and accompanying text.

[125]The crash that is the center of the dispute in the *Seymour Nat'l Bank* case resulted in the death of two citizens and severe injury to a third. *See* Brief for Appellant at 7, Seymour Nat'l Bank v. State, 384 N.E.2d 1177 (Ind. Ct. App. 1979). No recovery at all was permitted to redress the injuries suffered by these citizens. Of course, it should be noted that it is unclear whether the trooper was actually negligent in this case, and such was obviously never litigated.

[126]422 N.E.2d at 1228 (Hunter, J., dissenting).

[127]*See, e.g.,* CAL. GOV'T CODE § 820.4 (West 1980).

[128]The court of appeals opinion stressed that traditional negligence principles would apply and that the trier of fact would judge whether the defendant's actions comported with those an ordinary, prudent person would exercise under the same or similar

In light of the foregoing discussion, the course set out by Judge Robertson of the court of appeals, which continued the Indiana case law development of the parameters for liability of state officials, would seem to be the better way to resolve the difficult issues involved in the law enforcement setting. Under the case law analysis, a plaintiff injured by a government officer could state a cause of action if the plaintiff could show that "(1) the officer was acting in a ministerial capacity; or (2) the officer owed a private duty to the plaintiff to exercise due care."[129] The General Assembly should respond to the *Seymour National Bank* decision and make it clear that the State of Indiana is concerned with the welfare of all of its citizens, including those tortiously injured by law enforcement officers.

V. Conclusion

The *Seymour National Bank* decision has had a substantial impact upon the public policy of Indiana with regard to the relative weight given to the factors involved in balancing the public's concurrent needs for vigorous law enforcement and protection from injuries suffered as a result of negligent law enforcement. In the aftermath of the *Seymour National Bank* decision, Indiana law is unsettled as to the scope of immunity provided by the General Assembly, both with respect to what particular activities are protected, and precisely *whose* activities are immunized.

The *Seymour National Bank* decision reinstates the view that individual injured citizens should bear the entire burden of the Indiana General Assembly's policy favoring vigorous law enforcement. In short, "[w]e have, it appears, returned full circle to the anachronistic notion that 'the King can do no wrong,' for the [supreme court] majority's literal application of the statute means citizens have no recourse in law for a loss sustained at the hands of a governmental employee 'enforcing' a law."[130]

It is unlikely that Indiana law enforcement officials will have any more success shouldering this responsibility than did their royal predecessors. For this reason, the General Assembly should adopt the more equitable modern approach of requiring due care in the course

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circumstances. The court stated that the particular circumstances involved in cases such as *Seymour Nat'l Bank* might include "the probability of harm to third persons and the gravity of an injury that would result therefrom, the availability of assistance by other police units, and the severity of the criminal conduct of the suspected felon." 384 N.E.2d at 1187. Justice Hunter approved of these considerations in his dissenting opinion, but added that he would include injuries suffered by third persons at the hand of the criminal suspect within the harm referred to in the court of appeals' "probability of harm" consideration. 422 N.E.2d at 1229 (Hunter, J., dissenting).

[129]384 N.E.2d at 1183.

[130]422 N.E.2d at 1227 (Hunter, J., dissenting).

of law enforcement. Should the General Assembly decline to act, the courts should limit the *Seymour National Bank* decision to those situations where the plain meaning analysis is appropriate—where *police* officers are actually in the process of *effecting* an arrest. The courts, in the face of legislative refusal to mitigate the harshness of the immunity doctrine, should limit the *Seymour National Bank* decision to its facts and muster the courage to define Indiana public policy in favor of requiring our very human law enforcement officials to execute due care in the performance of their duty.

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