XIV. Torts

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A. Introduction

The overall objectives of tort law have been the compensation of victims, the prevention of accidents, and the promotion of safety.[1] These objectives have existed as a part of the public policy in all jurisdictions and have been the underlying motivation in the development of the common law. Thus, the achievement in the overall promotion of safety of citizens and the compensation of the victims of wrongs is an excellent thermometer by which to measure the legal climate of a particular jurisdiction. During recent years it seems that Indiana has reached the freezing point.

Excellent examples of the "frigid waters" of Indiana legal policy can be found in the major areas of litigation in tort law—automobile accidents, medical negligence, premises liability, and products liability.

With regard to the automobile accident cases, Justice Prentice set forth the overall attitude of the Indiana Supreme Court:

> The [legislative] policy [underlying the "guest statute"] also recognizes the "Robin Hood" proclivity of juries. The tendency to take from the rich and give to the needy is as American as apple pie; but unfettered, it may logically be expected to lead to the escalation of liability insurance premiums to the level where the majority of users would be either unable or unwilling to pay them. We have witnessed the development of just such conflicts in recent years, particularly with respect to both motor vehicle and professional liability insurance.
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> We uniformly recognize that the presence or absence of liability insurance is a factor that weighs improperly, but heavily, in jury determinations. It is for this reason that we endeavor—although frequently without success—to keep such information from juries.
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> . . . The guest statute may, therefore, logically be a legislative endeavor to promote financial responsibility for damages caused by the negligent operation of motor vehicles by protecting liability insurance companies from the human propensities of juries to weigh their "benevolent thumb" along with the evidence of the defendant's negligence.[2]

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[1] *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 4, at 22-23 (4th ed. 1971).

[2] Sidle v. Majors, 264 Ind. 206, 218-20, 341 N.E.2d 763, 771-72 (1976).

It is well to note that the above quotations do not have a single source, citation, or quote upon which the Indiana Supreme Court relies for its extreme distrust of a legal system wherein all citizens would be tried by their peers. What is clear from the Indiana Supreme Court's attitude is that insurance companies need protection and that this should be part of the public policy of the State of Indiana.

In the medical negligence cases, the court has addressed the issue of the conflict between the legal disability statute for minors under Indiana Code section 34-1-2-5,[3] which allows minors two years after reaching the age of majority to bring an action, and the limitation in the Medical Malpractice Act,[4] limiting the legal disability of minors to infants under six years of age.[5] The Indiana Supreme Court gave the following justification in response to a constitutional challenge to the change in the minor's disability section:

> In balancing the interests involved here, the Legislature may well have given consideration to the fact that most children by the time they reach the age of six years are in a position to verbally communicate their physical complaints to parents or other adults having a natural sympathy with them. Such communications and the persons whom they reach may to some appreciable degree stand surrogate for the lack of maturity and judgment of infants in this matter.[6]

Again there is absolutely no citation or authority for the above rationale and, therefore, it is presumed that the Indiana Supreme Court used their overall experience in such matters, presuming not only that an infant can communicate his ailments but also that the party in charge of the infant will take action other than taking the ailing child back to the health care provider who may have committed the negligence.

What is the overall policy of the Medical Malpractice Act in Indiana? A case in this survey period[7] succinctly expresses the Indiana policy:

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[3]IND. CODE § 34-1-2-5 (1982).

[4]IND. CODE § 16-9.5-3-1 (1982).

[5]The special limitation for minors in the Medical Malpractice Act states:

> No claim, whether in contract or tort, may be brought against a health care provider based upon professional services or health care rendered or which should have been rendered unless filed within two (2) years from the date of the alleged act, omission or neglect except that a minor under the full age of six (6) years shall have until his eighth birthday in which to file. This section applies to all persons regardless of minority or other legal disability.

Id.

[6]Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585, 604 (Ind. 1980). For an example of the problems that can arise in cases involving medical malpractice committed against minors, see Gooley v. Moss, 398 N.E.2d 1314 (Ind. Ct. App. 1979).

[7]*See* Warrick Hosp., Inc. v. Wallace, 435 N.E.2d 263 (Ind. Ct. App. 1982); *see also infra* notes 19-30 and accompanying text.

> [T]he Indiana Medical Malpractice Act was enacted to meet the problems of the rapidly escalating cost to physicians of malpractice insurance, the near unavailability of such coverage to physicians engaged in certain high risk specialties, and because "[h]ealth care providers had become fearful of the exposure to malpractice claims and at the same time were unable to obtain adequate malpractice insurance at reasonable prices."[8]

This indicates that, in Indiana, an important public policy interest in the field of medical negligence is the protection of health care providers and the concommitant protection of insurance companies.

In products liability, the Indiana Supreme Court, through the legal doctrine of the open and obvious danger rule, has encouraged the marketing of unsafe products rather than encouraging safety.[9]

The Indiana Supreme Court's distrust of the jury system and its outward disregard of the safety incentive concepts of tort law are best expressed in the premises liability case of *Hundt v. La Crosse Grain Co.*[10] The plaintiff in *Hundt* obtained a jury verdict in his favor; however, the majority of the Indiana Supreme Court found that, as a matter of law, the plaintiff was contributorily negligent[11] and *then ordered the trial court to enter judgment for the defendant.*[12] The best response to such action was expressed by Justice DeBruler in his dissent:

> The profundity of the majority action in this case to the future course of the law is apparent. The strongest presumption in the law must be that justice is done by the decision of an impartial trier of fact in an error free trial presided over by a judge in a duly constituted court where the parties are represented by counsel. All those criteria are present here. In my opinion, it would only be in the most extraordinary and bizarre circumstances that an appellate tribunal would be rationally justified in a civil case in supplanting its view of the evidence for that of a jury *and* the presiding judge. Yet there are no such circumstances approaching that here. The jury awarded $25,000 to the plaintiff for injuries received when he fell down some steps constructed in a manner condemned by specific safety laws in more than one respect.[13]

By the clear expression of Indiana decisions, an important policy of

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[8]435 N.E.2d at 267 (quoting Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585, 589-90 (Ind. 1980)).

[9]*See* Vargo, *Products Liability, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 255, 255 (1984).

[10]446 N.E.2d 327 (Ind. 1983); *see infra* notes 214-20 and accompanying text.

[11]446 N.E.2d at 330.

[12]*Id.*

[13]*Id.* at 330 (DeBruler, J., dissenting).

Indiana tort law is the protection of insurance companies and certain defendants. The overall objective of compensation of victims and the parallel objectives of accident prevention and safety promotion have been ignored to a large extent.

The Survey Article contains many decisions in a wide variety of tort litigation. By recognizing the overall Indiana policy, as described above, these decisions may be better understood.

B. Professional Liability

This Survey Article encompasses a wide variety of professional liability litigation, including such professions as health care providers,[14] surveyors,[15] attorneys,[16] and agents for athletes.[17] Although the concept of fraudulent concealment has been highly developed in the medical negligence area, this concept is discussed in the Statute of Limitations section[18] because it would seem to apply in a variety of professional liability situtations.

1. Medical Negligence.—In *Warrick Hospital, Inc. v. Wallace*[19] the court concluded that the provisions of the Indiana Wrongful Death Act[20] controlled the Medical Malpractice Act.[21] In *Wallace*, the widow failed to appoint a personal representative within two years of the death of her husband. The widow alleged that her husband died as a result of the medical negligence of a hospital and certain physicians. The hospital and physicians, relying on case law interpreting the Indiana Wrongful Death Act,[22] moved for summary judgment based upon the widow's failure to timely appoint a personal representative. The widow argued that the section of the Medical Malpractice Act that states, "a patient or his representative having a claim under this article for bodily injury or death on account of malpractice may file a complaint . . . ,"[23] created a right of action for death separate from the Wrongful Death Act. Two of the judges in *Wallace* agreed that the Wrongful Death Act controlled the Medical Malpractice Act; therefore, the trial court's denial of the defendants' motion for summary judgment on the widow's wrongful death claim was reversed.[24]

The above decision is difficult to resolve with the decision in *Johnson v. St. Vincent Hospital, Inc.*[25] In *Johnson* the court stated the general

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[14]*See infra* notes 19-55 and accompanying text.

[15]*See infra* notes 56-63 and accompanying text.

[16]*See infra* notes 64-70 and accompanying text.

[17]*See infra* notes 71-72 and accompanying text.

[18]*See infra* notes 73-91 and accompanying text.

[19]435 N.E.2d 263 (Ind. Ct. App. 1982).

[20]*See* IND. CODE §§ 34-1-1-1 to -8 (1982).

[21]*See id.* §§ 16-9.5-1-1 to -10-5.

[22]*See, e.g.*, General Motors Corp. v. Arnett, 418 N.E.2d 546 (Ind. Ct. App. 1981) (construing IND. CODE § 34-1-1-2 (1976)).

[23]IND. CODE § 16-9.5-1-6 (1982).

[24]435 N.E.2d at 268-69.

[25]404 N.E.2d 585 (Ind. 1980).

rule that when two statutes conflict, the later and more specific statute controls.[26] The result in *Johnson* was that the more restrictive Medical Malpractice Act, which limited the claims of minors, was held to control over the less restrictive disability statute for minors.[27] However, the situation was reversed in *Wallace*. Here, the later Medical Malpractice Act did not seem to require the appointment of a representative. Thus, if the rule of the *Johnson* case were applied, the widow should have been allowed to bring her action, as Judge Robertson argued in his dissent.[28] Although the majority argued that the Medical Malpractice Act was not specific enough,[29] it appears that the true basis of the decision was that "[t]he obvious purpose of the Medical Malpractice Act is to provide some measure of protection to health care providers from malpractice claims . . . ."[30] The policy of protecting physicians and other health care providers, and the associated protection of insurance companies to prevent them from raising premiums, is a major, overriding element of Indiana's tort policy, notwithstanding the traditional tort policies of compensation of the victims of wrongful acts, the prevention of future wrongs, and the promotion of safer procedures.

The continued vitality of the restrictive "community standard" requirement was confirmed in *Weinstock v. Ott*,[31] wherein the court gave examples of the criteria for establishing similar localities: "geographic location, population, the proximity of the localities being compared, the proximity of the localities to various medical facilities, whether the types of medical facilities available are similar, whether the localities are in the same state, and the 'character' of the localities in general."[32] The *Ott* court noted that the trial court is given wide discretion and refused to overturn the trial court's allowance of the qualification of a medical expert who was familiar with similar communities outside the State of Indiana.[33]

The *Ott* court also approved the general rule that the standard in contributory negligence is that of an ordinary person in like or similar circumstances and stated that allowances should be made for the patient's physical and mental infirmities during the time of treatment by a physician.[34]

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[26]*Id.* at 603 (citing O'Donnell v. Krneta, 238 Ind. 582, 154 N.E.2d 45 (1958); Payne v. Buchanan, 238 Ind. 231, 148 N.E.2d 537, *aff'd on rehearing*, 238 Ind. 231, 150 N.E.2d 250 (1958)).

[27]404 N.E.2d at 603.

[28]*See* 435 N.E.2d at 273 (Robertson, J., dissenting).

[29]*See id.* at 267.

[30]*Id.*

[31]444 N.E.2d 1227 (Ind. Ct. App. 1983).

[32]*Id.* at 1234.

[33]*Id.* at 1235.

[34]*Id.* at 1239-40 (quoting Memorial Hosp. v. Scott, 261 Ind. 27, 36, 300 N.E.2d 50, 56 (1973)).

In *Emig v. Physicians' Physical Therapy Service, Inc.*,[35] the plaintiff fell when she attempted to get up and walk from her wheelchair. The plaintiff was left unattended and had no restraints at the time of her fall. The defendant's expert testified, over plaintiff's objection, that in his opinion the plaintiff had been given reasonable care. Instructions to the jury stated that the jury could only consider evidence given by expert witnesses concerning the standard of care.[36] On appeal, the court stated that where medical decisions are concerned, only expert testimony can set forth the standard of care; however, where the issues are within the common knowledge and experience of a jury, expert testimony is improper and should be excluded.[37] If the decision to restrain and attend the plaintiff is a ministerial decision and not a medical decision, then the case is not premised on medical negligence, but upon common negligence, and no expert testimony is necessary. The *Emig* court held that the decision to restrain the plaintiff was ministerial and reversed the trial court's decision.[38]

Another case discussing ministerial versus medical acts is *Poor Sisters of St. Francis v. Catron*.[39] *Catron* concerned the issue of the length of time an endotracheal tube should be left in a patient. The defendant hospital argued that the issue was one appropriate for medical decisions of a physician and that hospital employees, including nurses, could not be found negligent for following physicians' orders. Although agreeing with the general rule of non-liability for following physicians' orders, the *Catron* court noted an exception to the rule: When a nurse or hospital employee knows the doctor's orders are not in accordance with normal medical practice, then it becomes the duty of the nurse or hospital employee to inform the physician, and, if the physician fails to act, to advise the hospital authorities so that appropriate action might be taken.[40] Failure to fulfill this duty will result in liability of the hospital for its employees' negligence.

In *Johnson v. Padilla*,[41] the Indiana Court of Appeals made it quite

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[35]432 N.E.2d 52 (Ind. Ct. App. 1982).

[36]*Id.* at 53.

[37]*Id.* at 54 (citing Fowler v. Norways Sanitorium, 112 Ind. App. 347, 42 N.E.2d 415 (1942); Cramer v. Theda Clark Memorial Hosp., 45 Wis. 2d 147, 172 N.W.2d 427 (1969)).

[38]432 N.E.2d at 54-55. Although *Emig* held that the restraint of patients is a case of common rather than medical negligence, the court of appeals, in Methodist Hosp. v. Rioux, 438 N.E.2d 315 (Ind. Ct. App. 1982), held that a complaint alleging the hospital's negligent failure to prevent the patient from falling and injuring herself fell within the broad language of the Medical Malpractice Act. *Id.* at 317. If both *Emig* and *Rioux* are correct, we will then have medical panels determining non-medical issues in fall-down cases. The courts of this state are presented with the opportunity to resolve this conflict in favor of the determination of the jury system as to whether the victim will be compensated, rather than leaving the initial determination of that question to the medical malpractice system, which has shown a distressing propensity for protecting physicians and their insurers.

[39]435 N.E.2d 305 (Ind. Ct. App. 1982).

[40]*Id.* at 308 (quoting Darling v. Charleston Community Hosp., 33 Ill. 2d 326, 333, 211 N.E.2d 253, 258 (1965)).

[41]433 N.E.2d 393 (Ind. Ct. App. 1982).

clear that, under Chapter 10 of the Medical Malpractice Act,[42] any party to an action before the Insurance Commissioner may invoke a court's jurisdiction for the limited purposes of determining affirmative defenses, issues of law or fact, or sanctions regarding discovery.[43] The powers of the court also extend to rulings on summary judgment motions and rulings on factual issues not requiring expert opinions.[44]

The Fourth District Court of Appeals of Indiana held, in *Methodist Hospital, Inc. v. Rioux*,[45] that the Medical Malpractice Act is broad enough to include plaintiffs falling as a result of a hospital's alleged negligent care. In *Rioux*, the plaintiff forcefully argued that such cases were not based upon medical negligence but were cases of ordinary negligence. The *Rioux* court cited the extremely broad language of the Act[46] and concluded that a fall-down case was within such language.[47] If the *Emig*[48]

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[42]*See* IND. CODE §§ 16-9.5-10-1 to -5 (1982).

[43]433 N.E.2d at 395 (citing IND. CODE § 16-9.5-10-1 (1982)). Jurisdiction of the court is invoked pursuant to IND. CODE § 16-9.5-10-2 (1982). Code section 16-9.5-10-1 confers jurisdiction upon the court to make preliminary rulings upon matters covered by section 16-9.5-9-7(c): "That there is a material issue of fact, not requiring expert opinion, bearing on liability for consideration by the court or jury." Section 16-9.5-10-1 denies court jurisdiction to make a preliminary ruling on matters covered by section 16-9.5-9-7(a), (b) and (d):

> (a) The evidence supports the conclusion that defendant or defendants failed to comply with the appropriate standard of care as charged in the complaint.
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> (b) The evidence does not support the conclusion that the defendant or defendants failed to meet the applicable standard of care as charged in the complaint.
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> . . . .
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> (d) The conduct complained of was or was not a factor of the resultant damages. If so, whether the plaintiff suffered: (1) any disability and the extent and duration of the disability, and (2) any permanent impairment and the percentage of the impairment.

In *Johnson*, the plaintiff alleged that the defendant doctor negligently performed a certain medical procedure, without alleging that the defendant negligently decided to perform the procedure or negligently supervised another doctor's performance of it. The defendant filed an affidavit stating that her only contact with the plaintiff's case was to concur in the opinion of a second doctor that the medical procedure should be performed. The court held that the issue of whether the defendant actually performed the procedure, as alleged by the plaintiff, was an issue of fact not requiring expert opinion. 433 N.E.2d at 396. Thus, under code sections 16-9.5-10-1 and 16-9.5-9-7(c), the trial court properly assumed jurisdiction for the limited purpose of ruling on the defendant's motion for summary judgment. 433 N.E.2d at 396.

[44]433 N.E.2d at 396.

[45]438 N.E.2d 315 (Ind. Ct. App. 1982).

[46]*See* IND. CODE §§ 16-9.5-9-1, -2, and 16-9.5-1-1(a)(1), (g), (h), (i) (1982), *cited in* 438 N.E.2d at 316.

[47]438 N.E.2d at 317. The court held that the Medical Malpractice Act

> applies to any legal wrong, breach of duty, or negligent or unlawful act or omission proximately causing injury to another based on any act or treatment performed or furnished, or which should have been performed or furnished by the hospital for, to, or on behalf of a patient during the patient's medical care, treatment or confinement.

Id. at 316.

[48]Emig v. Physicians' Physical Therapy Service, Inc., 432 N.E.2d 52 (Ind. Ct. App. 1982); *see supra* notes 35-38 and accompanying text.

case is correct in stating that fall-down cases are ones of ordinary negligence, then such cases should be outside the Medical Malpractice Act, and conflicting cases such as *Rioux* should be overruled. On the other hand, if both *Emig* and *Rioux* are correct in stating that fall-down cases involve ordinary negligence, coming within the Act but not requiring the expert medical opinion of the panel, then plaintiffs should use the rationale of *Johnson* and bring such fall-down cases before a court of proper jurisdiction to determine whether expert opinion is necessary. In the latter instance, the limitations of the Medical Malpractice Act on damages and attorneys fees would be applicable. The implementation of *Rioux* for non-medical situations seems inappropriate and overly protective of insurance companies and health care providers.[49] Plaintiff's counsel must be extremely careful to file such fall-down cases before the Insurance Commissioner or face the possibility that the two-year statute of limitations may bar recovery.

In *Marquis v. Battersby*,[50] the court made it clear that expert testimony is imperative in a medical negligence case and becomes an absolute necessity for any party desiring to challenge an adverse ruling by a medical review panel, at least where the opinions of other medical experts are not in conflict.[51] Any reliance upon the legal doctrine of res ipsa loquitur will not assist the plaintiff because that doctrine is based upon common knowledge and is not applicable where expert testimony is necessary to determine the standard of care.[52]

Two medical cases, *Weinstock v. Ott*[53] and *Colbert v. Waitt*,[54] discuss the tolling provisions of fraudulent concealment. These two cases will be discussed in the Statute of Limitations section of the article.[55]

2. Surveyor's Liability.—Following the lead of the Indiana Supreme Court, Judge Buchanan of the court of appeals decided to restrict the scope of liability of a surveyor. This decision was based, at least in part, upon the increased cost of insurance which would result from an opposite decision. In *Essex v. Ryan*,[56] the plaintiff, a successor in title to land previously surveyed by the defendant, was seeking damages for the surveyor's error in determining the extent of a lot. The plaintiff, relying upon ordinary negligence principles, argued that, as a successor in interest of the prior owners, he was within a class of persons who would reasonably rely upon a surveyor.[57] The *Essex* court's rationale for non-

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[49] *See supra* note 38.
[50] 443 N.E.2d 1202 (Ind. Ct. App. 1982).
[51] *Id.* at 1203 (citing Bassett v. Glock, 174 Ind. App. 439, 368 N.E.2d 18 (1977)).
[52] 443 N.E.2d at 1203.
[53] 444 N.E.2d 1227 (Ind. Ct. App. 1983).
[54] 445 N.E.2d 1000 (Ind. Ct. App. 1982).
[55] *See infra* notes 73-91 and accompanying text.
[56] 446 N.E.2d 368 (Ind. Ct. App. 1983).
[57] *Id.* at 369.

liability read like a check list from the limited duty concepts as expressed in early casebook law—flood of litigation, increased litigiousness of our society, imposition of unwieldy duties upon providers of professional opinions, and threats of driving professionals from their chosen professions.[58] The court also specifically referred to "the rising cost of malpractice insurance" as a factor in its rationale for rejecting the plaintiff's negligence claim.[59] Rejecting the Restatement (Second) of Torts section 552[60] concept of negligent misrepresentation as "a radical extension of liability,"[61] the *Essex* court decided to reconstruct the ancient "citadel" of privity as the factor for determining the breadth of liability.[62] In the instant case, however, the plaintiffs had taken an assignment of all contract rights from the prior owners, thus, the *Essex* court allowed either a contract action or a negligence action based upon the assignment.[63]

Again, plaintiffs are forewarned that in order to bring an ordinary negligence action under Indiana law as successors in interest in faulty survey situations, an assignment of all rights and interest of *all* predecessors in title appears to be necessary.

3. Attorney Negligence.—In *Whitehouse v. Quinn*,[64] the plaintiff appealed a summary judgment in favor of the defendant attorney. Summary judgment was granted because the plaintiff failed to bring his action within the two-year limitation period of Indiana Code section 34-1-2-2.[65] On appeal, the plaintiff argued that he was injured because his attorney failed to bring an action against all possible parties and secure all available remedies. The plaintiff had been injured in an automobile accident and hired the defendant as his counsel. The plaintiff and defendant entered into a contingent fee contract, and the attorney obtained a covenant not to sue from one defendant in exchange for $50,000 and later obtained $90,000 from another defendant in exchange for a release signed by the plaintiff.

On appeal, the court reversed in part,[66] stating that since the contingent fee contract contained language that the attorney would bring an action against some named defendants "and others," the contract might be sufficient to allow plaintiff a contract action within the twenty-year statute of limitations.[67] However, the *Whitehouse* court was extremely

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[58] *Id.* at 373.

[59] *Id.*

[60] RESTATEMENT (SECOND) OF TORTS § 552 (1977).

[61] 446 N.E.2d at 372.

[62] *Id.* at 373. The court allowed for an actual knowledge exception to the rule of privity where the professional has actual knowledge that a specific third person would rely on his opinion. *Id.* at 372. Such actual knowledge was absent in this case.

[63] *Id.* at 374-75.

[64] 443 N.E.2d 332 (Ind. Ct. App. 1982).

[65] *Id.* at 335. *See* IND. CODE § 34-1-2-2 (1982).

[66] 443 N.E.2d at 338.

[67] *Id.* at 337 (citing IND. CODE § 34-1-2-2(b) (1982)).

careful to "emphasize the narrowness of the issue as presented. The motion for summary judgment did not attack the legitimacy of a breach of contract action. Rather, it assumed an action against an attorney based upon that attorney's professional services was exclusively an action for legal malpractice based upon negligence."[68]

The plaintiff also attempted to overcome the summary judgment on the negligence issue by arguing constructive fraud. The court of appeals agreed that the tolling principles of constructive fraud, as enunciated in the physician-patient relationship were applicable in the attorney-client relationship.[69] However, the plaintiff had failed to meet his burden of showing a genuine issue of material fact existed; therefore, the summary judgment on the negligence count was allowed to stand.[70]

In summary, plaintiffs and attorneys should be aware that any written contract attorneys have with clients, including contingent fee contracts, may give rise to a contract action with a twenty-year statute of limitation and that fraudulent concealment can toll the two-year statute of limitation on any negligence issue.

4. Agents for Athletes.—Andrew Brown, a professional hockey player, brought an action for constructive fraud and breach of fiduciary duty against his agent. In *Brown v. Woolf*,[71] the district court denied the defendant-agent's motions for summary judgment and partial summary judgment. The agent's motions were based, in part, upon his contentions that the plaintiff could not receive punitive damages, because no proof of fraudulent intent is reflected in a constructive fraud allegation. The *Brown* court stated its conclusion that Indiana courts would not adopt a per se rule prohibiting punitive damages in constructive fraud cases and would, instead, consider the facts of each case to determine if any elements of recklessness or oppressive conduct were demonstrated to support a punitive damages award.[72]

C. Statute of Limitations

1. Fraudulent Concealment.—The harsh rule that the statute of limitations for medical negligence begins to run from the date of the negligent act or omission[73] rather than from the date of discovery or knowledge of the injury was challenged in *Nahmias v. Trustees of Indiana University*.[74] The plaintiff allegedly was injured because of negligent treatment with radiation therapy; however, the plaintiff did not have

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[68]443 N.E.2d at 336 (footnote omitted).

[69]*Id.* at 339 (citing Guy v. Schuldt, 236 Ind. 101, 138 N.E.2d 891 (1956)).

[70]443 N.E.2d at 339.

[71]554 F. Supp. 1206 (S.D. Ind. 1983).

[72]*Id.* at 1208.

[73]*See* IND. CODE § 26-9.5-3-1 (1982).

[74]444 N.E.2d 1204 (Ind. Ct. App. 1983).

knowledge of any possibly negligent conduct until almost two years after the treatment. The plaintiff brought his action within two years of being advised by another doctor of the possible negligence, but later than two years after the allegedly negligent act. Summary judgment was granted for defendants, and plaintiff appealed. The *Nahmias* court, following Indiana precedent, affirmed summary judgment against the plaintiff.[75]

The court discussed the fraudulent concealment concept, stating that the concept was not an exception to the two-year rule but was based upon equitable estoppel precluding the defendant from asserting the statutory bar.[76] Because the plaintiff did not raise the issue, however, he could not avail himself of the rule.

The fraudulent concealment rule was further explored in *Weinstock v. Ott*.[77] The *Ott* court stated that because of the fiduciary relationship between physician and patient, the physician has a duty to disclose material information to his patient and the failure to do so is fraudulent concealment.[78] This duty to disclose ends when the physician-patient relationship is terminated, and the statute of limitations begins to run at that time.[79] The time period will begin to run before the physician-patient relationship ends only if the patient learns of the negligence or fails to exercise diligence to discover the negligence after obtaining information which would lead to discovery.[80] Because the plaintiff in *Ott* had visited other physicians during her period of treatment by the defendant, the defendant alleged that the plaintiff had lost confidence in her treatment and that this factor should weigh heavily in determining that the physician-patient relationship had ceased. The *Ott* court stated that other factors, such as plaintiff's more than fifty-five visits to the defendant-doctor over a four-year period and the fact that she had followed almost all of his medical recommendations, were a strong indication that the physician-patient relationship continued to exist.[81] The court cited prior Indiana authority for determining when a physician-patient relationship ends:

> "There are many factors that enter into the analysis of determining when a physician-patient relationship ends. The subjective views of parties are important and a consideration must be given

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[75] *Id.* at 1211. The court held that the plaintiff's claim was time-barred whether the statute of limitations section of the Medical Malpractice Act was strictly construed as an "occurrence" statute, *cf.* Alwood v. Davis, 411 N.E.2d 750 (Ind. Ct. App. 1980) (construing IND. CODE § 34-4-19-1 (1976), the predecessor to the present malpractice limitations section), or as a "discovery" statute. *Cf.* Toth v. Lenk, 164 Ind. App. 618, 330 N.E.2d 336 (1975) (construing IND. CODE § 34-4-19-1 (1976)).

[76] 444 N.E.2d at 1208.

[77] 444 N.E.2d at 1227 (Ind. Ct. App. 1983).

[78] *Id.* at 1236.

[79] *Id.*

[80] *Id.* (quoting Toth v. Lenk, 164 Ind. App. 618, 623, 330 N.E.2d 336, 340 (1975)).

[81] 444 N.E.2d at 1237.

> to objective factors, including, but not limited to, the frequency of visits, whether a course of treatment was prescribed by the doctor (to be followed with or without consultation), the nature of the illness, the nature of the physician's practice and whether the patient began consulting other physicians for the same malady."[82]

In *Wojcik v. Almase*,[83] the court discussed the circumstances where fraudulent concealment may extend its tolling provisions beyond the patient's last visit to the allegedly negligent physician. In *Wojcik*, the plaintiff alleged he was injured by a subclavian catheter which broke off and became lodged in his chest. He brought his action against the attending physicians alleging, in part, that the physicians were negligent. The physicians asserted that the two-year statute of limitations[84] barred plaintiff's recovery. The plaintiff responded that fraudulent concealment tolled the statute. The *Wojcik* court stated that, generally, the tolling provisions of fraudulent concealment cease when the physician-patient relationship ends,[85] and the patient's last visit to the physician, in certain circumstances, may not be the date when the patient ceases to rely on the physician or when the relationship ends:

> We agree with the proposition that where a doctor represents that a certain condition is to be expected to continue into the future or prescribes a course of treatment to be followed for a period of time, a constructive fraud can be found which will delay the running of the statute of limitations for the time the doctor has indicated. However, we also believe that where no such representations are made the patient's reliance does not continue beyond the time he and the doctor ceased their association.[86]

Although the *Wojcik* court agreed with the trial court that the plaintiff's action came too late, the case cited several Indiana decisions that have extended the tolling powers of fraudulent concealment beyond the patient's last visit to the physician.[87] But the *Wojcik* court made it clear that a mere discharge from care, with nothing more, is insufficient to extend the fraudulent concealment rationale.[88]

In *Colbert v. Waitt*,[89] the court of appeals stated, in dicta, that two

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[82] *Id.* (quoting Adams v. Luros, 406 N.E.2d 1199, 1203 (Ind. Ct. App. 1980)).

[83] 451 N.E.2d 336 (Ind. Ct. App. 1983).

[84] *See* IND. CODE § 16-9.5-3-1 (1982).

[85] 451 N.E.2d at 339 (quoting Guy v. Schuldt, 236 Ind. 101, 109, 138 N.E.2d 891, 895 (1956)).

[86] 451 N.E.2d at 340.

[87] *Id.* (citing Carrow v. Streeter, 410 N.E.2d 1369 (Ind. Ct. App. 1980); Adams v. Luros, 406 N.E.2d 1199 (Ind. Ct. App. 1980)).

[88] 451 N.E.2d at 340-41.

[89] 445 N.E.2d 1000 (Ind. Ct. App. 1982).

types of conduct by a physician can toll the statute of limitations—active or passive fraud.[90] Failure to meet an affirmative duty to disclose material information, usually arising from the fiduciary relationship between physician and patient, is a good example of the passive fraud situation.

The fiduciary relationship between physician and patient giving rise to the affirmative duty of disclosure of material information also exists in the attorney-client relationship; therefore, all of the same rules of the equitable estoppel concept of fraudulent concealment should apply.[91]

2. Accrual.—The two-year statute of limitations for negligence begins when a cause of action accrues,[92] and accrual occurs "at the time injury is produced by wrongful acts for which the law allows damages susceptible of ascertainment."[93] In *Babson Brothers Co. v. Tipstar Corp.*,[94] the plaintiff had problems with a milking parlor, beginning shortly after installation and continuing over a four-year period of time; however, the exact source of the problems were unknown until four years after installation. The plaintiff received a verdict and judgment, and the defendant-installer alleged on appeal that the cause of action accrued when the plaintiff first encountered the problems with the milking parlor. The *Babson* court rejected this contention and stated that, generally, the factfinder should determine the time when a cause of action accrued.[95]

In *Chacharis v. Fadell*,[96] a defamation action based upon the pleadings of a prior action, the court of appeals stated that the statute of limitations began to run at the time of publication (filing) and *not* when the determination was made that the pleadings were not privileged.[97]

3. Legal Disability.—In *Duwes v. Rodgers*,[98] the plaintiff alleged that due to the pain and disablement she suffered in an automobile accident, she was a "distracted person" of unsound mind[99] sufficient to toll the two-year statute of limitations.[100] Under Indiana Code section 34-1-2-5, a person under legal disability may bring his action within two years after the disability is removed,[101] and "under legal disabilities" is defined to include persons of unsound mind.[102] The *Rodgers* court held, however, that the plaintiff's evidence was insufficient to establish the unsound mind

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[90] *Id.* at 1003.

[91] *See supra* notes 64-70 and accompanying text (discussing Whitehouse v. Quinn, 443 N.E.2d 332 (Ind. Ct. App. 1982)).

[92] *See* IND. CODE § 34-1-2-2(1) (1982).

[93] Scates v. State, 178 Ind. App. 624, 625, 383 N.E.2d 491, 493 (1978).

[94] 446 N.E.2d 11 (Ind. Ct. App. 1983).

[95] *Id.* at 14 (citing Montgomery v. Crum, 199 Ind. 660, 161 N.E. 251 (1928); Rees v. Heyser, 404 N.E.2d 1183 (Ind. Ct. App. 1980)).

[96] 438 N.E.2d 1032 (Ind. Ct. App. 1982).

[97] *Id.* at 1033.

[98] 438 N.E.2d 759 (Ind. Ct. App. 1982).

[99] *See* IND. CODE § 34-1-67-1(3), (6) (1982).

[100] *See id.* § 34-1-2-2(1).

[101] *Id.* § 34-1-2-5.

[102] *Id.* § 34-1-67-1(6).

requirement.[103] Because the plaintiff did not file her action within the required two-year period from the date of the accident, and because she did not meet the requirements of the legal disability statute, summary judgment in favor of defendant was affirmed.[104]

4. Tort Claims Notice.—The notice requirement of the Indiana Tort Claims Act has become an area where "form" rules over "substance". In *Teague v. Boone*,[105] the court of appeals, following Indiana Supreme Court precedent, held that the government's actual knowledge of the incident which gave rise to the action was insufficient to meet the notice requirement or to estop the government's assertion of immunity.[106] The *Teague* court made it clear that the object of the Tort Claims Act[107] was to limit liability and protect the assets of the state,[108] irrespective of the merits of any claim an injured party might assert. The plaintiff must notify the specific state agency involved in the incident giving rise to the plaintiff's injury;[109] therefore, plaintiffs should be extremely careful that they notify all potentially responsible state or governmental agencies because any mistake would be fatal to a meritorious claim.

5. Construction Deficiencies—Ten-year Limitation.—In *Capitol Builders, Inc. v. Shipley*,[110] the plaintiff-owner brought an action against the defendant-builder for damages due to defective (spalling) brick. The owner received judgment, and the builder appealed. The action was based upon negligence in selecting *and* installing bricks, and breach of the warranty to construct a home "in a good and workmanlike manner."[111] The defendants argued that the two-year statute of limitations for injury to personal property applied since the brick was personal property when selected.[112] In support of this contention, defendants cited a case in

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[103]438 N.E.2d at 761. The plaintiff apparently relied on the portion of the statute that defines "of unsound mind" as including "distracted persons." *See* IND. CODE § 34-1-67-1(3) (1982). The *Rodgers* court, in the absence of Indiana precedent, borrowed its definition of "distracted person" from an Illinois case, which defined such a person as one who is "incapable of acting rationally in the ordinary affairs of life, and of comprehending the nature and value of property, as to be incapable of transacting, or procuring to be transacted, ordinary business." Snyder v. Snyder, 142 Ill. 60, 67, 31 N.E. 303, 305 (1892), *quoted in* 438 N.E.2d at 761. For purposes of the Indiana statute, the *Rodgers* court tightened up the definition and stated that "a distracted person is a person who by reason of his or her mental state is incapable of managing or procuring the management of his or her ordinary affairs." 438 N.E.2d at 761. Although the plaintiff was in pain and physically disabled, her condition did not justify the finding that she was of unsound mind. *Id.*

[104]438 N.E.2d at 761.

[105]442 N.E.2d 1119 (Ind. Ct. App. 1982).

[106]*Id.* at 1120 (citing Geyer v. City of Logansport, 267 Ind. 334, 370 N.E.2d 333 (1977); City of Indianapolis v. Uland, 212 Ind. 616, 10 N.E.2d 907 (1937)).

[107]IND. CODE §§ 34-4-16.5-1 to -19 (1982).

[108]442 N.E.2d at 1120.

[109]Galovick v. Board of Comm'rs, 437 N.E.2d 505 (Ind. Ct. App. 1982).

[110]439 N.E.2d 217 (Ind. Ct. App. 1982).

[111]*Id.* at 220.

[112]*Id.* at 226; *see* IND. CODE § 34-1-2-2 (1982).

which a products liability action was brought against a brick manufacturer.[113] The court of appeals rejected the defendant's argument and stated that since the brick became permanently incorporated into the building, it became real property,[114] and the ten-year statute of limitations for deficiencies in construction of improvements to real property was applicable.[115]

D. Limited Duty

In negligence cases, Indiana law has developed a protection for defendants and their insurance companies by following one of the earliest methods of barring plaintiffs' recovery—limited duty. Whereas the overall trend in most jurisdictions over the past fifty years has been to expand the duties owed,[116] Indiana law has steadily retrenched toward lesser and lesser protection for injured victims.

1. Governmental Liability.—In *Department of Natural Resources v. Morgan*,[117] the plaintiff received a jury verdict and judgment for wrongful death and personal injuries. The death and damages resulted when the deceased's vehicle accidentally left the road surface and landed in the water of a nearby strip-mining pit. The plaintiff alleged that the Department of Natural Resources had a duty to act reasonably to insure that open water-filled pits were placed far away from roads or were guarded sufficiently to protect vehicles from entering the pits should they accidentally veer from the road surface.[118] This duty was alleged to arise either pursuant to the strip-mining law, under which the Department gave permits to coal companies to conduct strip-mining,[119] or under the common law.[120]

The court of appeals reversed the jury verdict based upon an interpretation of the strip-mining law as only effecting a duty to protect the land and the general public. Under this statute there was no duty to protect motorists.[121] In addition, the court of appeals said there was no common law duty because the Department had no direct control over the instrumentality that caused the harm—the strip pit.[122] Finally, the court

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[113]*See* Adcor Realty Corp. v. Mellon-Stuart Co., 450 F. Supp. 769 (N.D. Ohio 1978).

[114]439 N.E.2d at 227.

[115]*Id.* (citing IND. CODE § 34-4-20-2 (1982)).

[116]Over ten years ago, Dean Prosser stated: "The shift [in tort law] as a whole has been heavily toward the side of the plaintiff, with expanded liability in nearly every area." W. PROSSER, *Preface* to HANDBOOK OF THE LAW OF TORTS at xi (4th ed. 1971).

[117]432 N.E.2d 59 (Ind. Ct. App. 1982).

[118]*Id.* at 62.

[119]*See* IND. CODE § 14-4-2-5 (1982).

[120]The plaintiff relied on the following cases: Elliott v. State, 168 Ind. App. 210, 342 N.E.2d 674 (1976); Indiana State Highway Comm'n v. Rickert, 412 N.E.2d 269 (Ind. Ct. App. 1980), *rev'd on other grounds*, 425 N.E.2d 620 (Ind. 1981); Indiana State Highway Comm'n v. Clark, 371 N.E.2d 1323 (Ind. Ct. App. 1978).

[121]432 N.E.2d at 65.

[122]*Id.* at 66. The cases relied upon by the plaintiff, *see supra* note 120, were distinguished on this basis.

stated that even if there was a duty imposed upon the Department, the Indiana Tort Claims Act provided immunity.[123]

The Indiana Supreme Court reversed a jury verdict in favor of the plaintiff in *State v. Hall*,[124] based upon the trial court's misapplication of section 1983.[125] The plaintiff brought both a malicious prosecution and a section 1983 action against the State of Indiana and its employees and agents. The jury returned a general verdict for plaintiff, and the court of appeals upheld the jury verdict, pointing out that certain jury instructions on respondeat superior were given only on the malicious prosecution theory and not on the section 1983 action.[126] The Indiana Supreme Court reversed, holding that there was error in denying a directed verdict for the State on the section 1983 theory, because

> a local government may not be sued under section 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.[127]

The supreme court held that the state's motion for a directed verdict should have been granted because the plaintiff's section 1983 claim was not addressed to any action that could be claimed as an implementation of execution of "official policy."[128]

The supreme court also reversed the court of appeals' holding that the failure to direct a verdict for the state on the section 1983 claim was harmless error.[129] The court of appeals determined that the jury's general verdict for the plaintiff could have been based solely on the malicious prosecution claim, since that was the only theory on which a respondeat superior instruction was given.[130] The supreme court reversed, holding that "[a] general verdict for the plaintiff upon a complaint which proceeded upon two theories, one good and the other bad, cannot stand unless it affirmatively appears that it rests upon the good theory."[131]

In dissent, Justice DeBruler noted that the defendant, in its motion

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[123]432 N.E.2d at 67 (citing IND. CODE § 34-4-16.5-3(7), (11) (1982)).

[124]432 N.E.2d 679 (Ind. 1982), *vacating* 411 N.E.2d 366 (Ind. Ct. App. 1980).

[125]*See* 42 U.S.C. § 1983 (1976).

[126]411 N.E.2d at 370.

[127]432 N.E.2d at 680 (quoting Monell v. New York City Dept. of Social Serv., 436 U.S. 658, 694 (1978)).

[128]432 N.E.2d at 681.

[129]*Id.*

[130]411 N.E.2d at 370.

[131]432 N.E.2d at 681. The supreme court rejected the rationale of the court of appeals as "specious," stating that it "would render error in the denial of a directed verdict or motion to dismiss harmless in every case prosecuted upon multiple theories, provided the verdict was sustainable upon any one of them." *Id.*

for directed verdict, did not disclaim the applicability of section 1983 nor did it raise any legal defense at any point in the trial.[132] In addition, there was no appellate challenge to the jury instructions:

> To this dissent it is helpful to add the observation that jury instructions are generally regarded as the means by which legal theories of liability and the manner of their proper application as well as such doctrines of *respondeat superior* are communicated to the jury. I cannot understand how this Court can consider whether a general verdict for the plaintiff and against a defendant can be set aside on the basis that it is the product of the application by the jury of a mistaken legal theory of liability or of the misapplication of a correct legal theory in the absence of an appellate challenge to jury instructions, the vehicles which finally determined and defined the applicable legal theories of liability and provided the jury with guidance in applying those theories. Here, there is no appellate challenge to the propriety of any jury instruction. This case was fairly tried on the facts at considerable cost to the plaintiff, and resulted in a jury verdict against one of the defendants. That party defendant has failed in demonstrating through the issues properly raised on appeal that the verdict is contrary to law.[133]

In *Hurst v. Board of Commissioners*,[134] the trial court granted summary judgment in favor of the defendant. The plaintiff, claiming that weeds and tall vegetation at an intersection obstructed his view and caused an automobile accident, based his action against the Board upon a statutory duty to remove weeds,[135] on a common law duty to remove weeds, and on negligent maintenance of an inherently dangerous intersection. The court of appeals reversed the summary judgment against plaintiff, stating that the county owed a common law duty to construct, maintain, and repair the roads within its jurisdiction and control.[136]

The court of appeals rejected the statutory duty argument under Indiana Code section 8-17-14-1, however, stating that this statute's purpose was to reduce the spread of weeds and obnoxious growth to surrounding farmland, and not to impose a duty upon the county to protect motorists.[137]

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[132] *Id.* at 682 (DeBruler, J., dissenting).

[133] *Id.* at 683.

[134] 446 N.E.2d 347 (Ind. Ct. App. 1983).

[135] *See* IND. CODE § 8-17-14-1 (1982).

[136] 446 N.E.2d at 351.

[137] *Id.* at 349-50. The court's construction of the purpose of § 8-17-14-1 was aided by an examination of IND. CODE § 32-10-4-1 (1982), which imposes upon the *state* the duty to trim natural growth at the intersections of *state highways* in order to prevent the obstruction of motorists' vision. The *Hurst* court stated that if "the Legislature [had] intended that

2. Construction Law and Independent Contractors.—Five Indiana cases during this survey period discussed the interplay between the liability of the parties constructing buildings and the individuals injured at such construction sites. Generally, a landowner will contract with architects, engineers, prime contractors and others to perform the design and construction of his building. The parties contracting with the owner may in turn subcontract many areas of work to be performed. When a worker is injured on the job site, courts generally examine the contracts between the various parties to determine if any particular party undertook the overall liability for the particular manner in which the workman was injured. Absent a contractual undertaking for liability or safety, the court will apply the common law rule that a contractor owes no duties to the employees of an independent contractor. This rule has five common law exceptions[138] and if the injured workman does not come within a specified exception, he is without a tort remedy. Combining the above situation with two additional restrictions under the Indiana Worker's Compensation law,[139] the exclusive remedy doctrine,[140] and the deplorably low benefits granted to injured Indiana employees[141] often results in the high costs of severe injuries being absorbed by those least able to bear such costs, the injured workers.

In *Jones v. City of Logansport*,[142] the plaintiff was holding a cable attached to a crane when the crane either came into contact with a high voltage line or came close to the line, resulting in electrical burns and other injuries to the plaintiff. The plaintiff brought his action against several parties including the owner of the construction site (City of Logansport), the authorized representative of the owner, and Zimpro, the prime contractor. The trial court granted summary judgment in favor of the owner's

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the counties have such a statutory duty, it would have included county intersections in [§ 32-10-4-1] or included a comparable provision under the article on county highways [IND. CODE tit. 8, art. 17 (1982)]." 446 N.E.2d at 350. However, in his concurring opinion Judge Staton pointed out that the state's duty under section 32-10-4-1 was limited by the Indiana Court of Appeals, Fourth District, in Board of Commissioners v. Hatton, 427 N.E.2d 696 (Ind. Ct. App. 1981), to trimming natural growth to a height of five feet, which may not achieve visual safety for motorists. 446 N.E.2d at 353 (Staton, J., concurring).

[138]*See infra* notes 146-47 and accompanying text.

[139]IND. CODE §§ 22-3-1-1 to 22-3-10-3 (1982).

[140]Under Indiana Code section 22-3-2-6, the rights and remedies granted to an employee under the workmen's compensation system are exclusive of all other rights and remedies, with the exception of remedies for victims of violent crimes. *See id.* § 16-7-3.6-11; *see also* Note, *Dual Capacity Doctrine: Third Party Liability of Employer-Manufacturer in Products Liability Litigation*, 12 IND. L. REV. 553 (1979).

[141]Indiana's workmen's compensation system has been described as granting "horribly low benefits . . . when Indiana is compared to our sister states, including midwestern states." Townsend, *A Comparative Study of Selected Areas of Indiana Tort Law*, 5 VERDICT 4 (1983); *see infra* note 173.

[142]436 N.E.2d 1138 (Ind. Ct. App. 1982).

representative, and a jury verdict was entered in favor of the owner and Zimpro. The plaintiff appealed.

The court of appeals stated that the initial issue was whether the owner's representative owed a duty of care because of the contract or a voluntary assumption of a duty through affirmative conduct.[143] The *Jones* court found that no contractual duties existed between the owner's representative and the plaintiff[144] and that the plaintiff had not alleged any assumption of duty by the owner's representative.[145]

The plaintiff also contended that the prime contractor, Zimpro, owned a non-delegable duty and that the trial court erroneously modified plaintiff's instruction on that issue. The court of appeals reiterated the general rule that the contractor is not liable to employees of independent subcontractors.[146] The non-liability rule, however, has five exceptions:

> (1) the contract requires the performance of work intrinsically dangerous;
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> (2) a party is by the law or contract charged with a specific duty;
>
> (3) the act will create a nuisance;
>
> (4) the act to be performed will probably cause injury to others unless due precaution is taken to avoid harm;
>
> (5) the act to be performed is illegal.[147]

The court rejected plaintiff's assertion that Zimpro was liable under exception (4) since such exception applies only to third persons and not to employees actually doing work.[148] The court found, however, that Zimpro did owe a non-delegable duty to the plaintiff imposed by regulations of the Indiana Commissioner of Labor,[149] the contract between Zimpro and the owner concerning safety, and OSHA rules and regulations.[150]

The plaintiff alleged that the trial court committed reversible error in denying an instruction concerning the owner's liability as to the power

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[143] *Id.* at 1143.

[144] *Id.* at 1144-45.

[145] *Id.* at 1145.

[146] *Id.* at 1147 (citing Hale v. Peabody Coal Co., 168 Ind. App. 336, 343 N.E.2d 316 (1976)).

[147] 436 N.E.2d at 1147 (citing Denneau v. Indiana & Mich. Elec. Co., 150 Ind. App. 615, 277 N.E.2d 8 (1971)).

[148] 436 N.E.2d at 1149.

[149] *Id.* at 1147. The court held that, as the prime contractor, Zimpro had the specific duty, under 610 IND. ADMIN. CODE § 5-1-1(6), (7), (8) (1979), to ensure compliance with the following regulation: "Power shall be cut off from electric lines within range of shovel or crane operation whenever possible. When not possible to cut off power the shovel or crane shall not be operated within electrical reach of electric transmission lines." *Id.* § 5-1-12(21), *quoting in* 436 N.E.2d at 1147.

[150] 436 N.E.2d at 1148-49.

lines which it owned. The *Jones* court noted that although Indiana recognizes electricity as a dangerous element,[151] the duty owed is one of ordinary care under like conditions and circumstances, and *not* one of utmost care, as several other jurisdictions have held.[152] Under ordinary care, the distributor of electricity may either insulate or isolate its wires; however, insulation of wire need not be used unless the utility knows or should know that a segment of the population will be regularly exposed to uninsulated wire.[153] The *Jones* court, finding no such knowledge, rejected plaintiff's contentions.[154]

In *Perry v. NIPSCO*,[155] the trial court granted the defendant NIPSCO summary judgment, and the plaintiff appealed. The plaintiff has been ordered by his foreman to perform work twenty feet above the ground without using a scaffold or safety apparatus. When the plaintiff complained of the danger, his foreman said it would take too long to construct the scaffolding and told the plaintiff either to do the work or go home. Later the plaintiff complained to his shop steward and to a NIPSCO man wearing a white hat that read "Safety Supervisor." The shop steward did not help, and the NIPSCO man said he had no control over what the plaintiff did for his contractor. Aware of the danger, but in fear of losing his job, the plaintiff attempted to do the work and fell, severely injuring himself.[156]

The *Perry* court stated the general rule of non-liability for independent contractors and their employees, reiterating the five exceptions stated in *Jones*.[157] As to the first exception—intrinsically dangerous work—the *Perry* court stated that work is not intrinsically dangerous if the "risk of injury involved in its use can be eliminated or significantly reduced by taking proper precautions."[158] In the instant case, scaffolding or safety equipment would have reduced the risk; therefore, plaintiff could not meet this exception.

The specific, contractual duty exception was not available to the plaintiff because the contract between NIPSCO and plaintiff's employer, a contractor, did not impose any duty on NIPSCO.[159] The plaintiff further argued that NIPSCO, as owner of the property, was obligated to provide a safe place to work. The *Perry* court rejected plaintiff's contention because such a duty only involves defects in the premises or the negligent

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[151] *Id.* at 1150 (citing Hedges v. Public Serv. Co., 396 N.E.2d 933 (Ind. Ct. App. 1979)).

[152] 436 N.E.2d at 1150.

[153] *Id.* (quoting Southern Ind. Gas & Elec. Co. v. Steinmetz, 177 Ind. App. 96, 100, 377 N.E.2d 1381, 1384 (1977)).

[154] 436 N.E.2d at 1151.

[155] 433 N.E.2d 44 (Ind. Ct. App. 1982).

[156] *Id.* at 46.

[157] *Id.* at 47; *see supra* notes 146-47 and accompanying text.

[158] 433 N.E.2d at 47 (quoting Hale v. Peabody Coal Co., 168 Ind. App. 336, 343, 343 N.E.2d 316, 322 (1976)).

[159] 433 N.E.2d at 48.

maintenance thereof.[160] Because the plaintiff's injury did not involve the premises or their maintenance, NIPSCO had not breached its duty as owner of the premises.

The *Perry* court stated that several factors indicated that NIPSCO had, however, assumed the supervision of safety for the construction site and owed a duty of ordinary care after such assumption.[161] The factors indicating such assumptions were: NIPSCO conducted regular safety meetings for employees of sub-contractors; NIPSCO had between six and thirty safety men at the job site who had "jurisdiction" of the safety program; the NIPSCO man to whom the plaintiff complained had "Safety Supervisor" written on his hard hat, and that same safety man called for an ambulance and ordered no one to touch the plaintiff after his fall.[162] Citing Illinois case law,[163] section 324A of the Restatement of Torts,[164] and prior Indiana law,[165] the *Perry* court said that the assumed duty rationale was well founded, and, viewing the evidence in the light most favorable to the (non-moving) plaintiff, held that jury questions existed that required reversal of the summary judgment against plaintiff.[166]

In *Johns v. New York Blower Co.*,[167] the court of appeals discussed the intrinsically dangerous work exception to the non-liability rule for sub-contractors. The *Johns* court noted that "[a]ppellants who have argued for expansion of the 'intrinsically dangerous work' exception have not fared well in Indiana courts."[168] Denying the applicability of the rule to the plaintiff, who was injured when he fell thirty feet to the ground from a steel beam upon which he was working, the court held that: (1) work is not intrinsically dangerous if the risk of injury can be eliminated or significantly reduced by taking safety precautions[169] and (2) the rule does not apply to employees of an independent contractor.[170]

The *Johns* court's rationale for not applying the intrinsically dangerous work exception was based upon the fact that on many occasions the "owner does not escape liability since, in effect, he pays the premiums for Workmen's Compensation coverage as part of his contract price."[171]

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[160] *Id.* at 49 (citing Jones v. Indianapolis Power & Light Co., 158 Ind. App. 676, 687, 304 N.E.2d 337, 344 (1973)).

[161] 433 N.E.2d at 49-50.

[162] *Id.*

[163] Nelson v. Union Wire Rope Corp., 31 Ill. 2d 69, 199 N.E.2d 769 (1964), *quoted in* 433 N.E.2d at 50.

[164] RESTATEMENT (SECOND) OF TORTS § 324A (1966), *quoted in* 433 N.E.2d at 50.

[165] Board of Comm'rs v. Hatton, 427 N.E.2d 696 (Ind. Ct. App. 1981), *quoted in* 433 N.E.2d at 50.

[166] 433 N.E.2d at 50.

[167] 442 N.E.2d 382 (Ind. Ct. App. 1982).

[168] *Id.* at 385.

[169] *Id.* at 386.

[170] *Id.*

[171] *Id.* at 388.

The court also noted that if an employee of the owner had been injured, the owner's liability would have been limited by worker's compensation laws. Because there did not appear to be any valid reason to subject the owner to greater liability for employing an independent contractor to perform the work than he would have had if he had employed his own servants, the court ruled in favor of the defendant-owner.[172]

The *Johns* court rationale, based upon worker's compensation insurance premiums and benefits, seems outlandish in light of the fact that the benefits an Indiana employee obtains under worker's compensation are among the lowest in the country.[173] To further state that, because the owner's employees cannot obtain sufficient benefits for their injuries, the subcontractor's employees should likewise be limited reveals the court's reasoning as another example of the harsh climate for tort plaintiffs in this state.

In *Plan-Tec, Inc. v. Wiggins*,[174] the plaintiff received a jury verdict and judgment, and the defendant, who was the construction manager at the job site, appealed. The plaintiff, an employee of a subcontractor on the job site, was injured when the scaffolding on which he was working fell to the ground, six stories below. The *Wiggins* court made reference to the exceptions to the general rule of non-liability for independent contractors[175] and stated that the facts of the case came within the assumed

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[172] *Id.*

[173] Indiana's poor performance in compensating its injured workers is evident when compared to the benefits awarded by other states in cases of temporary total disability (TTD) and permanent total disability (PTD). *See generally* UNITED STATES CHAMBER OF COMMERCE, ANALYSIS OF WORKERS' COMPENSATION LAWS 1983 (1983).

TTD occurs when the injured employee is totally unable to work during the period during which benefits are payable, but is expected to recover from his injuries and return to work. Most cases of employee injury involve TTD. *Id.* at 14. PTD occurs when an injury renders an employee permanently and totally unable to work. *Id.*

Indiana limits an injured employee to a maximum weekly payment of $140. Only Georgia ($135), Mississippi ($112), and Tennessee ($136) impose lower limits. *Id.* at 15-16.

The Chamber of Commerce analysis indicates that Indiana limits the duration of payments for both TTD and PTD to 500 weeks. *Id.* at 15. With respect to TTD, only nine other states impose a shorter time limitation—Alabama, Arkansas, Florida, Mississippi, Missouri, New Jersey, Oklahoma, Texas, and West Virginia. *Id.* at 15-17. With respect to PTD, only four other states impose any limit at all on the duration of benefits to a permanently disabled employee, and of those four, only Mississippi (450 weeks) and Texas (401 weeks) impose shorter limits than Indiana. *Id.*

Indiana limits the total amount of benefits payable to an injured employee to $70,000 in any case, whether TTD or PTD. *Id.* at 15. Of the sixteen other states that impose any limit on total TTD payments, only Alabama ($52,200), Arkansas ($69,300), Mississippi ($50,400), Oklahoma ($58,800), Tennessee ($54,400), and West Virginia ($62,735) impose lower limits. *Id.* at 15-17. Of the five other states that place any limit on total PTD benefits, only Mississippi ($50,400) and Tennessee ($54,400) impose lower limits than Indiana. *Id.* at 15-17.

[174] 443 N.E.2d 1212 (Ind. Ct. App. 1983).

[175] *Id.* at 1219. The court seems to have treated the defendant-construction manager

duty rationale expressed in *Perry*.[176] In the instant case the construction manager had appointed a safety director, initiated weekly safety meetings, directed certain safety precautions to be taken by the contractors, and inspected the scaffolding which fell and injured the plaintiff.[177] Based on these factors, the *Wiggins* court found that the jury could consider whether the construction manager had assumed either a duty to provide a safe place to work or a duty for the overall safety of the project.[178]

The defendant argued that, even accepting the assumed duty, its actions constituted nonfeasance rather than misfeasance, and as such, there must have been reliance by the plaintiff on the defendant's performance of the assumed duty.[179] Citing a 1981 court of appeals case,[180] the *Wiggins* court approved of the nonfeasance/misfeasance dichotomy but stated that this was a case of misfeasance.[181] This acceptance of the nonfeasance/misfeasance concept in a negligence action is a definite step back to the nineteenth century and quickens Indiana's march backward in time and thought. The mere fact that someone has assumed a duty should not change the normal negligence standard.

The *Wiggins* court rejected the constructon manager's argument that an indemnification agreement between itself and the subcontractor, who employed the plaintiff, should shift the loss to the subcontractor.[182] The *Wiggins* court based its rejection of the indemnification agreement upon the fact that the work the plaintiff performed was outside the contract and, therefore, not subject to the indemnification agreement.[183]

In *Hixon v. Sherwin-Williams Co.*,[184] a homeowners' insurance company hired a local contractor, Hixon, to perform work on the homeowner's floor. Hixon subcontracted the work to the defendant Sherwin-Williams Co., who in turn hired Benkovich to perform the work. While Benkovich

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(Plan-Tec) as the owner of the land where the plaintiff was injured. The court stated that

> a landowner has a common law duty to exercise care to keep his property in a reasonably safe condition for invites or business visitors. This obligation exists where an injury is reasonably foreseeable in light of the hazardous nature of the instrumentalities maintained by the [landowner] on his premises. However, where the instrumentality is that of an independent contractor, the complainant must show either that the landowner assumed control of the instrumentality or had superior knowledge of the potential dangers involved in its operation.

Id. (citations omitted).

[176] *Id.* at 1220 (citing Perry v. NIPSCO, 433 N.E.2d 44 (Ind. Ct. App. 1982)); *see supra* notes 155-66 and accompanying text.

[177] 443 N.E.2d at 1220.

[178] *Id.*

[179] *Id.*

[180] *See* Board of Comm'rs v. Hatton, 427 N.E.2d 696 (Ind. Ct. App. 1981), *cited in* 443 N.E.2d at 1220-21.

[181] 443 N.E.2d at 1221.

[182] *Id.* at 1221.

[183] *Id.* at 1222.

[184] 671 F.2d 1005 (7th Cir. 1982).

was attempting to complete the work on the homeowner's floor, the house caught fire and the insurance company and Hixon brought an action against the defendant Sherwin-Williams. The *Hixon* court stated that Benkovich was an independent contractor and, under the common law rule, Sherwin-Williams was not liable for the torts of its independent contractors.[185] The *Hixon* court then stated: "In an age when tort law is dominated by the search for the deep pocket, which Benkovich does not have, the common law rule may seem an anachronism . . . . The Indiana courts, explicitly adopting an accident-prevention rather than deep-pocket approach to the question, have decided . . . to retain the independent-contractor rule in full force."[186]

The *Hixon* court's statement that Indiana's common law concerning non-liability for independent contractors is an accident-prevention approach seems unsupportable, to say the least. As the cases in this survey period indicate, a contract between owners and others will generally not contain specific language that obligates the owner or its contractors to any specific duty to maintain a safe jobsite. The subcontractor's motivation was best expressed in *Perry*,[187] where the plaintiff's foreman told the plaintiff to do the work without a scaffold or quit, because it would take too long to build a safe scaffold.[188] Is the relegation of safety to independent contractors, who are more concerned with time demands than safety, an accident-prevention approach? In reality, owners and those who contract with owners usually attempt to avoid taking on contractual duties for subcontractors[189] and the conscientious contractors who attempt to effect safety procedures assume a duty that they may not have had under the contract. These contractors are penalized because of their safety-conscious attitudes while the less safety-minded contractors escape liability by not assuming any such duties.

Worker's compensation benefits are probably the least likely of all methods to prevent accidents. When an employee loses a leg above the knee, and the benefit for the loss of this limb amounts to a maximum temporary total disability benefit of $7,280[190] plus $16,875 permanent par-

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[185] *Id.* at 1009 (citing Ryan v. Curran, 64 Ind. 345, 354 (1878)).

[186] 671 F.2d at 1009.

[187] Perry v. NIPSCO, 433 N.E.2d 44 (Ind. Ct. App. 1982); *see supra* notes 155-66 and accompanying text.

[188] 433 N.E.2d at 46.

[189] *See, e.g.*, Plan-Tec, Inc. v. Wiggins, 443 N.E.2d 1212 (Ind. Ct. App. 1983). Plan-Tec, who contracted to be the construction manager with the owner, undertook to perform certain aspects of the utility contractor's job when the latter was written out of the project. Plan-Tec, however, expressly disavowed responsibility for safety considerations that were originally part of the utility contractor's undertaking. *Id.* at 1218-19.

[190] *See* IND. CODE § 22-3-3-10 (1982) (limiting temporary total disability benefits to fifty-two weeks when permanent partial impairment is also present); *id.* § -8 (limiting temporary total disability benefits to two-thirds of employee's average weekly wage); *id.* § -22 (limiting average weekly wage to $210). Two-thirds of $210 is $140, multiplied by fifty-two weeks yields a maximum total temporary disability benefit of $7,280.

tial impairment[191] and one year's medical bills,[192] it is unlikely that an owner or contractor, who may have to pay only the premiums under the contract, will want to take on the safety of a project and expose himself to much greater damages. The *Hixon* court's statement that Indiana contracting law, with the non-liability concept for independent contractors, is an "accident-prevention" approach does not survive even a superficial examination.

The *Hixon* court did examine other contentions by the plaintiff, one of which was that the defendant breached an implied or express warranty.[193] The *Hixon* court stated that Indiana law requires privity of contract in warranty cases involving personal injury or property damage.[194] This statement is not fully true. If the warranty is based upon contract, then privity is required;[195] however, if the warranty is in tort, no privity is required.[196] In *Lane v. Barringer*,[197] the case cited by the *Hixon* court, the majority held that privity was required *only* for warranty actions based on contract.[198] Judge Ratliff, concurring and dissenting, would not have required privity even in contract actions where personal injury claims were involved.[199] The *Hixon* court would apparently like to return to the days of yesteryear and follow eighteenth-century English law which originated the privity concept. Although the *Hixon* court's judgment, that the directed verdict in favor of the defendant should be upheld,[200] was probably correct, the language used by the court and the partial misstatements of warranty law are most disturbing.

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[191] *See id.* § -10(a)(1) (limiting the number of weeks of compensation for loss of leg above the knee to 225 weeks); *id.* § -10(b) (limiting the average weekly wage to 60% of $125, or $75). Multiplying 225 weeks by $75 yields a maximum permanent partial impairment benefit for loss of a leg above the knee to $16,875.

[192] *See id.* § -4.

[193] 671 F.2d at 1010.

[194] *Id.* (citing Lane v. Barringer, 407 N.E.2d 1173, 1175 (Ind. Ct. App. 1980)).

[195] Privity is divided into vertical and horizontal elements. Vertical privity is the relationship between the seller and the buyer of a product, while horizontal privity is the relationship between the buyer and other parties. Vargo, *Products Liability, 1974 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 270, 270 n.12 (1975). White and Summers have stated: "There are two basic kinds of 'non-privity' plaintiffs. The 'vertical' non-privity plaintiff is a buyer within the distributive chain who did not buy directly from the defendant. . . . The 'horizontal' non-privity plaintiff is not a buyer within the distributive chain but one who consumes or uses or is affected by the goods." J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE, § 11-2, at 399 (2d ed. 1980). IND. CODE § 23-1-2-318 (1982) extends privity *horizontally* to "natural persons" in the "family or household of the buyer and to his guests," but only where it is "reasonable to expect that such persons may use, consume or be affected by the goods." This extension is the most limited alternative offered under U.C.C. § 2-318 (1972).

[196] *See* Vargo, *supra* note 195, at 272-74.

[197] 407 N.E.2d 1173 (Ind. Ct. App. 1980), *cited in* 671 F.2d at 1010.

[198] 407 N.E.2d at 1175.

[199] *Id.* at 1176-77 (Ratliff, J., concurring and dissenting).

[200] 671 F.2d at 1011.

3. Negligent Hiring.—Another issue discussed by *Hixon*[201] was the concept of negligent hiring, which, according to the court, was an accepted Indiana concept.[202] The Court of Appeals of Indiana again discussed the legal concept of negligent hiring of an independent contractor in *Baugher v. A. Hattersley & Sons, Inc.*[203] The trial court granted summary judgment for the defendant and the plaintiff appealed. The *Baugher* court affirmed the summary judgment, stating that, although Indiana recognized the tort of negligent hiring, the plaintiff had failed to prove the elements of the action.[204] Citing Indiana decisions[205] and section 213 of the Restatement (Second) of Agency,[206] the *Baugher* court said that the tort was generally limited to an employer who invites the public to his business, and in such situations, the employer must use care in the choice of his employees who are expected to deal with the public.[207]

4. Erroneous Instruction on Sudden Emergency—Harmless Error.—In *Taylor v. Todd*,[208] a pedestrian was injured when struck by the defendant's vehicle. The trial court allowed the defendant to submit a sudden emergency[209] instruction and the jury returned a verdict in favor of the defendant. On appeal the plaintiff urged that the giving of the sudden emergency instruction was reversible error. The *Taylor* court agreed with plaintiff that the evidence indicated that the defendant was not aware of any emergency and such awareness is a prerequisite to the doctrine of sudden emergency.[210] The *Taylor* court also noted, however, that the erroneous instruction on sudden emergency is usually not a basis for rever-

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[201]Hixon v. Sherwin-Williams Co., 671 F.2d 1005 (7th Cir. 1982).

[202]*Id.* at 1010 (citing Wabash County v. Pearson, 120 Ind. 426, 429, 22 N.E. 134, 135 (1889)). The *Hixon* court held that Sherwin-Williams was not negligent in hiring the experienced Benkovich to lay the floor and, even if it were, such negligent hiring was not the proximate cause of the accident in question. 671 F.2d at 1010.

[203]436 N.E.2d 126 (Ind. Ct. App. 1982).

[204]*Id.* at 128.

[205]Tindall v. Enderle, 162 Ind. App. 524, 320 N.E.2d 764 (1974); Lange v. B&P Motor Express, Inc., 257 F. Supp. 319 (N.D. Ind. 1966), *cited in* 436 N.E.2d at 128.

[206]RESTATEMENT (SECOND) OF AGENCY § 213 (1957), *cited in* 436 N.E.2d at 128.

[207]436 N.E.2d at 128.

[208]439 N.E.2d 190 (Ind. Ct. App. 1982).

[209]In order to invoke the sudden emergency doctrine a party must prove the following facts:

> "(1) That the appearance of danger or peril was so imminent that he had no time for deliberation.
>
> (2) That the situation relied upon to excuse any failure to exercise legal care was not created by his . . . own negligence.
>
> (3) That his conduct under the circumstances was such as the law requires of an ordinarily prudent man under like or similar circumstances."
>
> In addition, the doctrine presumes that the actor perceives his situation as an emergency.

Id. at 193 (quoting Taylor v. Fitzpatrick, 235 Ind. 238, 247, 132 N.E.2d 919 (1956)) (citations omitted).

[210]*Id.* at 193-94 (citing Baker v. Mason, 253 Ind. 348, 242 N.E.2d 513 (1968)).

sal and is almost considered harmless error; therefore, the court affirmed the judgment for defendant.[211]

5. Negligent Release of Prisoner.—One area of duty which was not limited was the duty of a sheriff who releases a mentally confused prisoner into severe winter weather. In *Iglesias v. Wells*,[212] the trial court granted a 12(B)(6) motion when the plaintiff alleged that the sheriff was negligent in causing plaintiff severe injuries. The plaintiff alleged that he was indigent, had no residence, and was unable to speak or understand English. After serving a sentence for public intoxication, the plaintiff, who was wearing inadequate clothing, was released into severe winter weather by the sheriff, who had knowledge of the plaintiff's condition. Following his release, the plaintiff wandered around downtown Indianapolis for several hours until eventually suffering severe frostbite to his feet, which required surgery and partial amputation. The court of appeals reviewed the motion to dismiss, stating that it was possible to state a theory of recovery on such grounds because, under some circumstances, the sheriff would owe a duty to release prisoners in a manner which would not subject them to unreasonable danger.[213]

6. Premises Liability.—In *Hundt v. La Crosse Grain Co.*[214] the plaintiff opened a door, fell down some steps and injured himself. The jury awarded the plaintiff damages in a general verdict. The steps were constructed in violation of specific safety laws[215] and were undoubtedly dangerous. The plaintiff fell when he mistakenly opened a door leading to the basement instead of the door to a bathroom which he intended to enter. Because the plaintiff was thoroughly familiar with the premises, the *Hundt* majority ruled that, as a matter of law, the plaintiff was contributorily negligent and ordered the trial court to enter judgment in favor of the defendant.[216] The court's ruling in *Hundt* contained indications that the open and obvious danger rule was a factor in its decision.[217] In addi-

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[211]439 N.E.2d at 194.

[212]441 N.E.2d 1017 (Ind. Ct. App. 1982).

[213]*Id.* at 1020-21 (citing Wagar v. Hasenkrug, 486 F. Supp. 47 (D. Mont. 1980); Parvi v. City of Kingston, 41 N.Y.2d 553, 394 N.Y.S.2d 161, 362 N.E.2d 960 (1977); 60 AM. JUR. 2D *Penal and Correctional Institutions* § 17 (1972)).

[214]446 N.E.2d 327 (Ind. 1983).

[215]The uncontradicted evidence showed that the basement door opened inward, toward the steps down which the plaintiff fell, and that there was no landing inside the door and no handrail beside the steps. *Id.* at 328. At trial, the State Fire Marshall "was allowed to testify, over LaCrosse's timely objections, as to the existence, scope and content of statutes and regulations of the Administrative Building Council concerning safety features such as landings and handrails required for stairways in public buildings." *Id.*

[216]*Id.* at 330.

[217]The court's description of the facts in *Hundt* indicate that the danger to the plaintiff was open and obvious, given his familiarity with the area where he was injured. The court's holding that the plaintiff was contributorily negligent as a matter of law, *id.*, contains the predicate that the defendant was negligent, because without negligence there can be no contributory negligence. Thus, it is clear that the open and obvious nature of a danger

tion, the Indiana Supreme Court completely ignored the specifics of human reactions and human factors as described in the dissent.[218] The *Hundt* opinion goes to the extent of calling an unlocked door a "guard" against dangers.[219] What seems most disturbing is the fact that the area where the plaintiff fell was dangerous and defective.[220] What incentive does a defendant have to cure dangers and defects when he is told that he need not pay for the damages caused by his dangerous and defective property? Do those dangers still exist to cause further injury? What message does the *Hundt* decision send to other landowners or parties who may also violate the safety statutes and regulations established for the protection of the public of Indiana?

The dissent in another premises liability case, *Martin v. Shea*,[221] illustrates the conflicts that can arise between the application of the outmoded, traditional concepts of premises liability and the contentions of severely injured plaintiffs. In *Shea*, the plaintiff was a social guest at a swimming pool party at the private residence of the defendants. During some "horseplay" the plaintiff was shoved from behind by another guest and fell into the pool. The plaintiff was rendered quadriplegic after striking his head on the bottom of the pool. Under the traditional categories of premises liability—trespasser, licensee, invitee—[222] the plaintiff would be considered a licensee[223] and the defendants would owe such a limited duty to plaintiff that he could not recover.[224] The plaintiff alleged, however, that it was not the premises that caused him harm, but the *conduct* of the defendants in controlling other guests. Under these contentions the plaintiff alleged that the defendant owed at least a duty of reasonable care.

The majority of the *Shea* court agreed with plaintiff, held that the defendant's 12(B)(6) motion was erroneously granted, and remanded the case back to the trial court for further proceedings.[225] The dissent in *Shea* is an excellent expression of the "legal atmosphere" that existed over fifty

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is merely a factor in determining, and not conclusive of, the defenses of contributory negligence and assumption of risk. The supreme court's holding in Bemis Co. v. Rubush, 427 N.E.2d 1058 (Ind. 1981), that an open and obvious danger makes a product non-defective as a matter of law regardless of whether the products liability action is based on negligence or strict liability, *id.* at 1061, does not seem to comport with the *Hundt* court's conclusion that such a danger is part of the defense of contributory negligence or possibly assumption of risk. *See* Vargo, *Products Liability, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 255, 255 (1984).

[218] *See* 446 N.E.2d at 331 (DeBruler, J., dissenting).

[219] *Id.* at 329.

[220] *See supra* note 215.

[221] 432 N.E.2d 46 (Ind. Ct. App. 1982).

[222] *See* Swanson v. Shroat, 169 Ind. App. 80, 345 N.E.2d 872 (1976), *cited in* 432 N.E.2d at 47.

[223] 432 N.E.2d at 49 (Ratliff, J., dissenting).

[224] *Id.* at 50.

[225] *Id.* at 49.

years ago and which seems to be the driving policy of the Indiana Supreme Court. The dissent viewed the obligation of the defendant as requiring *positive* wrongful acts, willfull or wanton misconduct, and entrapment, but not reasonable care.[226] The dissent also made it clear that a plaintiff must look out for his own safety and that a guest has no right to any protection from *obvious* dangers.[227] The *Shea* dissent comes close to approving the active-passive distinction of negligence law which has been specifically rejected in other Indiana negligence cases.[228]

Although the *Shea* majority analyzed the case as requiring reasonable care because the condition of the premises involved was not the source of the breach of duty, the time has come for Indiana to reject the ancient premises liability categories.

7. Parent-Child Immunity.—In *Buffalo v. Buffalo*,[229] the court reversed the dismissal of a complaint by a child against his non-custodial parent when the marriage of the child's parents had been previously dissolved.[230] The *Buffalo* court implied that the parent-child immunity doctrine stood intact,[231] but that the circumstances of this case were outside the doctrine.[232] Although the decision in *Buffalo* seems quite appropriate, the suggestion by the court, that their knowledge of present day social life would substantiate the continuance of the parent-child immunity,[233] does not seem to comport with the fact that other similar immunities have been abrogated.[234] In addition, current conditions indicate that children may need protection, considering the increase of both physical and mental abuse of children by an increasing number of parents.[235]

8. Negligent Infliction of Emotional Harm.—In *Little v. Williamson*,[236] a young child saw his sister mauled by a great Dane dog owned by the defendants. The plaintiff and his sister were walking in the neighborhood when the great Dane grabbed a puppy from the girl's arms and killed the puppy. In the process the great Dane bit so hard on the girl's arm that he broke two of the bones in her arm and caused

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[226] *Id.* at 50 (Ratliff, J., dissenting) (citing Fort Wayne Nat'l Bank v. Doctor, 149 Ind. Ct. App. 365, 272 N.E.2d 876 (1971)).

[227] 432 N.E.2d at 51 (Ratliff, J., dissenting) (citing Swanson v. Shroat, 169 Ind. App. 80, 345 N.E.2d 872 (1976)).

[228] *See, e.g.*, Fort Wayne Nat'l Bank v. Doctor, 149 Ind. App. 365, 272 N.E.2d 876 (1971).

[229] 441 N.E.2d 711 (Ind. Ct. App. 1982).

[230] *Id.* at 712.

[231] *Id.* at 712-13.

[232] *Id.* at 713.

[233] *Id.* at 712 (quoting Smith v. Smith, 81 Ind. App. 566, 569-70, 142 N.E. 128, 129 (1924)).

[234] *See* Brooks v. Robinson, 259 Ind. 16, 284 N.E.2d 794 (1972) (interspousal immunity abrogated).

[235] *See* Davidson, *Children's Rights: Emerging Trends for the 1980's*, 19 TRIAL 44, 46 (1983).

[236] 441 N.E.2d 974 (Ind. Ct. App. 1982).

numerous lacerations. The plaintiff was present during the mauling of his sister and suffered mental anguish and fear as a result. The trial court granted summary judgment for the defendants and the court of appeals affirmed.[237] The *Little* court confirmed the Indiana rule that some type of physical impact is required in both negligent and intentional infliction of emotional distress cases.[238] The impact rule as espoused in Indiana seems unnecessary to say the least. The major reason for continuance of the rules seems to be based upon the idea that it will prevent fraudulent claims and the release of the dreaded "flood of fictitious claims" upon the courts.[239]

Under the circumstances of the *Little* case, it seems almost inevitable that a plaintiff would suffer mental anguish and fear, in fact, it would be unusual if he did not. The fear of fraudulent claims as a support for the impact rule ignores the advances in modern medicine and psychiatry and the fact that mental damages are quite common in negligence cases involving physical injury. In addition, the courts appear capable of protecting parties against any fraudulent claims that might arise. The reason for the existence of the courts is to adjudicate the claims of parties, and to deny parties' claims because "we're too busy" does not seem to be a principled rationale. The courts in this area may, in reality, be implementing the policy consideration underlying other areas of Indiana law, i.e., the protection of insurance companies.[240]

9. Guest Cases.—Indiana still adheres to its guest statute[241] on the shaky grounds of social politeness and gratitude toward one giving a gratuitous ride to another. This policy has been grounded upon the promotion of hospitality.[242] If this is the true foundation of guest cases, the Supreme Court of Indiana and the Indiana Legislature must believe that the promotion of politeness is of much greater importance than the compensation of victims or the promotion of safety.

Within the framework of the guest statute, the plaintiff is required

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[237]*Id.* at 974.

[238]*Id.* at 975 (citing Kaletha v. Bartz Elevator Co., 178 Ind. App. 654, 383 N.E.2d 1071 (1978) (intentional); Kroger Co. v. Beck, 176 Ind. App. 202, 375 N.E.2d 640 (1978) (negligent); Charlie Stuart Oldsmobile, Inc. v. Smith, 171 Ind. App. 315, 357 N.E.2d 247 (1976) (negligent)). Although the *Little* court noted an exception to the impact rule in certain cases of intentional infliction of emotional distress, 441 N.E.2d at 975 (citing Charlie Stuart Oldsmobile, Inc. v. Smith, 171 Ind. App. 315, 327, 357 N.E.2d 247, 254 (1976)), the court stated that responsibility for recognizing negligent infliction of emotional distress as a tort independent of physical impact lay with the Indiana Supreme Court or the state legislature, and that any erosion of the impact rule must first occur in cases of intentional rather than negligent infliction of emotional distress. 441 N.E.2d at 975.

[239]*See* Charlie Stuart Oldsmobile, Inc. v. Smith, 171 Ind. App. 315, 325, 357 N.E.2d 247, 253 (1976).

[240]*See supra* notes 1-13 and accompanying text.

[241]*See* IND. CODE §§ 9-3-3-1 to -2 (1982).

[242]*See* Sidle v. Majors, 264 Ind. 206, 216, 341 N.E.2d 763, 771 (1976).

to show some type of behavior by the defendant-driver beyond mere negligence, usually referred to as willful and wanton conduct.[243] This type of conduct was discussed in *Thrapp v. Austin*.[244] In *Thrapp*, the plaintiff was injured in a one car accident and the identity of the driver was in dispute. The *Thrapp* court stated that inferences were sufficient to support the conclusion that the defendant was the driver of the vehicle.[245] The court also discussed the evidentiary requirements for willful and wanton conduct[246] and concluded that whenever intoxication is combined with evidence of other types of misconduct, willful and wanton conduct may be inferred.[247] In *Thrapp*, the evidence showing that the driver was intoxicated—the car went off both sides of the road several times and the guest-passenger requested to drive—was sufficient to establish willful and wanton conduct.[248]

In *Clipp v. Weaver*,[249] Gerald Clipp was killed in a boat accident wherein he was riding as a passenger, and an action was brought for his death. The trial court granted summary judgment for the defendant and the plaintiff appealed. The court of appeals reversed the trial court's summary judgment,[250] stating that the standard of care owed by the operator of a boat to his passenger is one of ordinary care, and the plaintiff need not prove willful and wanton misconduct.[251] The *Weaver* court rejected

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[243]*See* IND. CODE § 9-3-3-1 (1982).

[244]436 N.E.2d 1170 (Ind. Ct. App. 1982); *see also* Antcliff v. Datzman, 436 N.E.2d 114 (Ind. Ct. App. 1982), discussed *infra* at notes 332-37 and accompanying text.

[245]436 N.E.2d at 1174.

[246]Wanton or willful misconduct requires that [sic] the host-driver to be: (1) conscious of his misconduct; (2) motivated by reckless indifference for the safety of his guest; and (3) to know his conduct subjects his guests to a probability of injury. The trial court should also apply the following guidelines: a) An error of judgment or a mistake standing alone, on the part of the host, will not amount to wanton or willful misconduct. b) The host must have manifested an attitude adverse to the guest, or of perverseness, in that the host must have been shown he was indifferent to the consequences of his conduct. c) The entire course of conduct of the host leading up to the accident must be considered. d) The host must have had actual knowledge of danger confronting the guest.

Id. at 1175 (citations omitted).

[247]*Id.* at 1174 (citing Andert v. Fuchs, 271 Ind. 627, 394 N.E.2d 931 (1979)).

[248]*Id.* at 1175.

[249]439 N.E.2d 1189 (Ind. Ct. App. 1982), *vacated*, 451 N.E.2d 1092 (Ind. 1983). The Indiana Supreme Court granted transfer and vacated the court of appeals opinion because it conflicted with the Seventh Circuit Court of Appeals decision in McDonnell v. Flaherty, 636 F.2d 184 (7th Cir. 1980) (applying Indiana law). Nevertheless, the supreme court stated: "[W]e have carefully examined Judge Conover's excellent opinion [for the Indiana Court of Appeals] and believe he is absolutely correct in his approach to the law regarding the operation of watercraft." 451 N.E.2d at 1092. Because the supreme court took the same approach and added little to the court of appeals anaylsis, only the court of appeals decision will be discussed in this Survey Article.

[250]*Id.* at 1190.

[251]*Id.* at 1193.

the application of the guest case rationale because the Indiana motor vehicle guest statute applies only to motor vehicles operated on public highways.[252] In addition, the court rejected the application of a prior decision by the United States Court of Appeals for the Seventh Circuit,[253] which interpreted boat cases as requiring proof of willful and wanton negligence based upon the rationale of the duty owed to social guests in premises liability cases.[254] Noting that Indiana Code section 14-1-1-16,[255] regarding the standard of care owed by boat owners, only requires proof of ordinary negligence, the majority in *Weaver* reversed;[256] however, Presiding Judge Young stated in dissent that he would require the willful and wanton rule in order to promote hospitality.[257]

The *Weaver* decision, although rejecting the troglodytic concept of the guest rationale, emphasizes the sluggish state of Indiana law. Indiana is practically the last jurisdiction in the nation still clinging to the motor vehicle guest rationale,[258] based upon the insupportable policy of the promotion of hospitality. Is it really ingratitude to bring an action against a driver whose negligent act has caused injury to one or more of his passengers?

E. Res Ipsa Loquitur

The doctrine of res ipsa loquitur is a rule of evidence that allows an inference of negligence once the following elements have been fulfilled:

> "1) [T]he event must be of a kind which ordinarily does not occur in the absence of someone's negligence;

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[252]*Id.* at 1190 (citing IND. CODE § 9-1-1-2(a), (b), (q) (1982)). Applying the rule of statutory construction that "the more specific statute will govern if in apparent conflict with a more general statute," 439 N.E.2d at 1191, the court held that IND. CODE § 14-1-1-1 (1982), which specifically defines boats, excludes boats from the provision of the motor vehicle guest statute, IND. CODE § 9-3-3-1 (1982). 439 N.E.2d at 1191.

[253]McDonnell v. Flaharty, 636 F.2d 184 (7th Cir. 1980), *distinguished in* 439 N.E.2d at 1192.

[254]636 F.2d at 186-87.

[255]IND. CODE § 14-1-1-16 (1982), *quoted in* 439 N.E.2d at 1193.

[256]IND. CODE § 14-1-1-16 (1982) provides: "Every person operating any boat shall operate the same in a careful and prudent manner, having due regard for the rights, safety and property of other persons . . . ." The *Weaver* court held that the words "careful and prudent manner" determined the degree of care required of a boat operator, and that "Indiana cases using these words apply only to the standard of reasonable and ordinary care." 439 N.E.2d at 1193 (citing Orth v. Smedley, 177 Ind. App. 90, 378 N.E.2d 20 (1978); Allied Fidelity Ins. Co. v. Lamb, 361 N.E.2d 174 (Ind. Ct. App. 1977). Further, the *Weaver* court found the words "other persons" to be broad enough to include gratuitous guests. 439 N.E.2d at 1193.

[257]439 N.E.2d at 1193 (Young, J., dissenting).

[258]Only Indiana, Alabama, Arkansas, Delaware, Georgia, and Utah still have guest statutes that prevent a guest-passenger from bringing an action against a host-automobile driver based on ordinary negligence. Townsend, *supra* note 141, at 4.

2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;

3) it must not have been due to any voluntary action or contribution on the part of the plaintiff".[259]

Two recent Indiana Court of Appeals cases, *SCM Corp. v. Letterer*[260] and *Bituminous Fire & Marine Insurance Co. v. Culligan Fyrprotexion, Inc.*,[261] discussed the application of the second element above. Both cases stated that Indiana requires that the defendant have exclusive control of the injuring agency at the *time the accident occurs.*[262] It does not require a great deal of thought to conclude that the control element of res ipsa, if restricted to the time of the accident, would eliminate its applicability to many factual situations, such as defective products. If the defect originated at the time of manufacture, the product will be sold and the accident will occur at a later time, usually when the product is in the control of the user or someone other than the defendant-manufacturer.

The primary source of the control rule in Indiana seems to be the 1958 case of *Evansville American Legion Home Association v. White*,[263] wherein an unfortunate plaintiff fell on an allegedly defective chair owned by the defendant. The injured plaintiff was denied recovery because at the time she sat in the chair, she had control of the injuring agency.[264] Both *Letterer*[265] and *Bituminous*[266] cite the *White* decision, along with other cases, most of which rely on *White.*[267] It is also noteworthy that Prosser, upon which *Letterer* relies for the elements of res ipsa,[268] commented that the literal application of the second element has led to "ridiculous conclusions, requiring that the defendant be in possession at the time of the plaintiff's injury—as in the . . . case denying recovery where a customer in a store sat down on a chair, which collapsed."[269]

Thus, the key Indiana case, *White*, does not seem to be within the logic for which res ipsa was intended, according to one of the leading authorities on tort law. As long ago as 1944, one of the mose prominent cases

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[259]SCM Corp. v. Letterer, 448 N.E.2d 686, 689 (Ind. Ct. App. 1983) (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 39, at 214 (4th ed. 1971)).

[260]448 N.E.2d 686 (Ind. Ct. App. 1983).

[261]437 N.E.2d 1360 (Ind. Ct. App. 1982).

[262]448 N.E.2d at 689; 437 N.E.2d at 1365.

[263]239 Ind. 138, 154 N.E.2d 109 (1958).

[264]*Id.* at 140, 154 N.E.2d at 110.

[265]*See* 448 N.E.2d at 689.

[266]*See* 437 N.E.2d at 1365.

[267]*See, e.g.*, Henley v. Nu-Gas Co., 149 Ind. App. 307, 271 N.E.2d 741 (1971), *cited in* 448 N.E.2d at 689 *and* 437 N.E.2d at 1365.

[268]*See* 448 N.E.2d at 689 (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 39, at 214 (4th ed. 1971); *see supra* text accompanying note 259.

[269]W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 39, at 220 (4th ed. 1971) (citing Kilgore v. Shepard Co., 52 R.I. 151, 158 A. 720 (1932)).

in the country stated that the defendant's control at the time of *the indicated negligence* should be sufficient to satisfy the control requirement.[270] The *Letterer* case, in recognizing the applicability of res ipsa in strict liability cases, attempted to alleviate the harshness of the control element.[271] The "ridiculous conclusions" will remain in negligence cases, however, if Indiana continues to adhere to the unwarranted literal interpretation of the control doctrine. It seems unduly harsh that merely because the plaintiff has possession or control of the injuring agency at the moment of the accident, he should be deprived of the inferences raised by the res ipsa doctrine, especially when, as it often happens, the plaintiff is unable to meet the proof requirements of negligence, because the damning evidence thereof is in the control of the defendant.

In *Hammond v. Scot Lad Foods, Inc.*,[272] the court emphasized that a jury instruction on res ipsa *must* include an instruction on the inferences which are to be drawn from the proof of the three elements of res ipsa.[273] In the context of Indiana's pattern jury instructions, the *Hammond* court held that instruction No. 7.11, setting forth the three elements of res ipsa, must be accompanied by instruction No. 7.13, which describes the inferences resulting from meeting the elements.[274]

In *Marquis v. Battersby*,[275] the court discussed the first element of res ipsa—the type of accident which does not ordinarily occur in the absence of someone's negligence—and found the doctrine inapplicable where the incident in question was of a nature not within the ordinary knowledge of a jury.[276] Thus, in medical malpractice cases, or other negligence cases where the standard of care must be established by expert testimony, res ipsa is inapplicable. However, in a medical negligence case where the consequence of the alleged negligent treatment is within the common knowledge of laymen, such as leaving a sponge in the body of the plaintiff, res ipsa should be applicable.

F. Damages

1. Treble Damages for Wrongful Cutting of Timber.—In *Wright v.*

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[270]Escola v. Coca Cola Bottling Works, 24 Cal. 2d 453, 455, 150 P.2d 436, 438 (1944).

[271]448 N.E.2d at 690.

[272]436 N.E.2d 362 (Ind. Ct. App. 1982).

[273]*Id.* at 364. The emphasis of this holding is heightened by the fact that the court of appeals took the unusual action of upholding the trial court on grounds not asserted by either party in their appellate briefs. *See id.* at 364-65. The court stated that it took such action, *sua sponte*, because the instruction, which was requested by the plaintiff and rejected by the trial court, and which did not tell the jury what inferences would be raised by the application of res ipsa in this case, was " 'palpably bad on its face, and' . . . to approve that instruction by itself could only have the effect of 'confusing the law and misleading the profession.' " *Id.* at 365 (quoting L.S. Ayres & Co. v. Hicks, 220 Ind. 86, 99, 41 N.E.2d 195, 196 (1942) (Shake, C.J., on petition for rehearing)).

[274]436N.E.2d at 365.

[275]443 N.E.2d 1202 (Ind. Ct. App. 1982).

[276]*Id.* at 1203.

Reuss,[277] the plaintiff received treble damages under Indiana Code section 25-36.5-1-17[278] in addition to other damages for the wrongful cutting and removal of trees from the plaintiff's land. The court of appeals affirmed the judgment of the trial court[279] and determined that the treble damages statute was one of strict liability which did not require intentional or willful conduct.[280] Thus, under section 25-36.5-1-17, lack of intent, good faith, and mistake of fact are not defenses, and the criminal mens rea is not required in order for the plaintiff to recover.

2. Reduction of Damages Reversed.—In *Weaver v. Gullion*,[281] an action for injuries received in an auto collision, the trial court reduced a judgment for one of the plaintiffs from $27,000 to $3,000. The court of appeals affirmed the trial court's action,[282] but on transfer, the Indiana Supreme Court reversed and reinstated the original $27,000 verdict in favor of the plaintiff.[283] The supreme court noted that the primary concern of the trial court was the weakness of the plaintiff's medical evidence concerning permanent injuries.[284] The supreme court also noted that it was uncontroverted that during a temporary period of four and one-half months the plaintiff had suffered severe anxiety, pain, disability and expensive medical treatment, which amply supported the $27,000 verdict.[285]

3. Conflicts, Aggravation of Pre-existing Condition, and Survivorship.—In *Lee v. Lincoln National Bank & Trust Co.*,[286] residents of Michigan and Indiana were involved in an automobile accident in Indiana. One of the Michigan residents subsequently died and was represented by the administrator of his estate in an action brought by the surviving Michigan residents. The defendants argued that the Michigan No Fault Insurance Act[287] precluded any tort action in Indiana, but the trial court denied defendants' summary judgment motion. On interlocutory appeal, the Indiana Court of Appeals agreed with the trial court and stated that the doctrine of *lex loci delicti commissi* applied[288] and, therefore, Indiana law allowed such an action, and the defendants' motion for summary judgment was properly denied.

The defendants also contended that, because the death certificate indicated that the plaintiffs' decedent died from a pulmonary embolism resulting from a pre-existing condition and not from injuries resulting from

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[277] 434 N.E.2d 925 (Ind. Ct. App. 1982).

[278] *See* IND. CODE § 25-36.5-1-17 (1982).

[279] 434 N.E.2d at 926.

[280] *Id.* at 929.

[281] 446 N.E.2d 605 (Ind. 1983).

[282] *See id.* at 606.

[283] *Id.*

[284] *Id.* at 607.

[285] *Id.*

[286] 442 N.E.2d 1147 (Ind. Ct. App. 1982).

[287] *See* MICH. COMP. LAWS ANN. §§ 500.3101 - .3179 (West 1983).

[288] 442 N.E.2d at 1148. This doctrine states that "the law of the location of the tort is applicable in a tort action for recovery of damages." *Id.*

the automobile accident, the plaintiffs could not recover damages. The *Lee* court, however, referred to the deposition of a medical expert that made it clear that the injuries from the accident could have aggravated a pre-existing condition and, as such, it was up to the jury to determine the cause of death in the wrongful death action.[289]

Finally, the defendants argued that the Indiana survivor's statute[290] limited plaintiffs' damages. The *Lee* court, however, noting that the survivor's statute only limited damages when the plaintiff died from injuries other than those received at the hands of the defendant, affirmed the denial of the defendants' summary judgment motion, because a jury question still remained as to the cause of death of the plaintiffs' decedent.[291]

4. Recovery of Wrongful Death Damages by Illegitimate Children.— The damages that are allowed under the Indiana Wrongful Death Statute[292] may be recovered by legitimate "dependent children,"[293] but the statute is silent in regard to whether illegitimate children are, or can be, "dependent children." Special problems arise under Indiana's statutory scheme regarding the relationship between an illegitimate child and his or her putative father.[294] In *S.M.V. v. Littlepage*,[295] the court was confronted with the claim of a posthumously born illegitimate child for a distributive share of the proceeds of a wrongful death settlement obtained by the deceased putative father's surviving legitimate child. The court concluded that "dependent children," as used in the Wrongful Death Act, includes "any illegitimate child who has the right to maintain a claim for inheritance against his father's estate under the laws of intestate succession, or to enforce parental obligations under the paternity statute against the father's estate."[296] Thus, under *Littlepage*, for an illegitimate child to successfully

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[289]442 N.E.2d at 1148-49.

[290]*See* IND. CODE § 34-1-1-1 (1982), which states in relevant part:

> [W]hen a person receives personal injuries caused by the wrongful act or omission of another and thereafter dies from *causes other than* said personal injuries so received, the personal representative of the person so injured may maintain an action against the wrongdoer to recover damages resulting from such injuries, if the person so injured might have maintained such action, had he or she lived; but provided further, that the personal representative of said injured person shall be permitted to recovery only the reasonable medical, hospital and nursing expense and loss of income of said injured person, resulting from such injury, from the date of the injury to the date of his death.

Id. (emphasis added).

[291]442 N.E.2d at 1150.

[292]IND. CODE §§ 34-1-1-1 to -8 (1982).

[293]*See id.* § 34-1-1-2.

[294]*See infra* note 296.

[295]443 N.E.2d 103 (Ind. Ct. App. 1982).

[296]*Id.* at 110. Indiana law governing inheritance to, through, and from illegitimate children is codified at IND. CODE § 29-1-2-7 (1982). Subsection 7(b) states that, for inheritance purposes, an illegitimate child is to be treated the same as if he were the legitimate child of his father if and only if: "(1) the paternity of such child has been established by law, during

claim damages for the wrongful death of his or her putative father, facts must be available that indicate: (1) paternity of the decedent was established during his lifetime by a court having jurisdiction; or (2) the child's mother and putative father married *and* the father acknowledged the paternity of the child; or (3) the father acknowledged paternity in writing; or (4) the father performed his support obligations, in whole or in part, in the past.[297] The *Littlepage* court indicated its belief that the above requirements would strike a reasonable balance between the prevention of spurious claims, problems of proof of paternity, and the rights of illegitimate children.[298] The court affirmed the trial court's summary judgment against the plaintiff on the basis that the child failed to meet any of the required proofs of paternity.[299]

Judge Ratliff, in a concurring opinion in *Littlepage*, questioned the continued validity of the concerns of the court in reference to the problems created by stale claims of paternity, the difficulty of proving paternity, and the dangers of spurious claims as justifications for the statutes governing the rights of illegitimate children.[300] Judge Ratliff pointed out that recent court decisions,[301] scientific knowledge, and the Indiana legislature's extension of the statute of limitations in paternity actions[302]

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the father's lifetime; or (2) if the putative father marries the mother of the child and acknowledged the child to be his own." *Id.* at § -7(b).

At all times relevant to the *Littlepage* case, Indiana paternity law was governed by IND. CODE §§ 31-4-1-1 to -33 (1976) (repealed 1978). Section 7 of the now-repealed statute allowed the obligation of the father of an illegitimate child to be enforced against the father's estate "where his paternity has been established during his lifetime by judgment of a court of competent jurisdiction, or where his paternity has been acknowledged by him in writing, or by the part performance of his obligations." *Id.* § -7. It appears that the *Littlepage* holding is limited to the legislative scheme expressed in the 1976 statute. *See* 443 N.E.2d at 107 (noting that "[a]t all times relevant to the case at bar, Indiana's paternity statute was IND. CODE § 31-4-1-1 [1976]"); *see also* 443 N.E.2d at 110 (stating that its definition of "dependent children" is a "reasonable and proper interpretation of the legislative scheme *involved here*") (emphasis added); *id.* at 111 (Ratliff, J., concurring) ("I view the majority's comments concerning former legislative policy to have been offered for historical background . . . . ").

Indiana's present paternity law is codified at IND. CODE §§ 31-6-6.1-1 to -19 (1982). Especially relevant here are sections 6, 8, and 9.

[297] *See* 443 N.E.2d at 110; *see also supra* note 296. As discussed *supra* in note 296, it appears that the *Littlepage* holding is limited to the law as it existed at the times relevant to that case.

[298] *See* 443 N.E.2d at 109-10.

[299] *Id.* at 110.

[300] *Id.* at 110-11 (Ratliff, J., concurring).

[301] *See, e.g.*, Mills v. Habluetzel, 456 U.S. 91 (1982) (declaring a Texas one-year statute of limitations in paternity actions unconstitutional); Little v. Streater, 452 U.S. 1 (1981) (holding denial of blood grouping test to indigent paternity defendant a denial of due process); *In re* M.D.H., 437 N.E.2d 119 (Ind. Ct. App. 1982) (declaring former Indiana two-year statute of limitations in paternity actions unconstitutional).

[302] *Compare* IND. CODE § 31-4-1-26 (1976) (repealed 1978) *with* IND. CODE § 31-6-6.1 (1982).

had negated to a great extent the court's continued reliance upon antiquated concepts.[303]

In *Hollingsworth v. Taylor*,[304] the court applied the doctrines of *Littlepage* and held that an illegitimate child had met the requirements for "dependent child" within the meaning of the Wrongful Death Statute, inasmuch as the deceased putative father had supported the child and had acknowledged the child as his own in writing.[305]

5. Permanent and Non-Permanent Injury to Real Property.—In *Capitol Builders, Inc. v. Shipley*,[306] an action for negligence and breach of warranty in the construction of a home, the court concluded that permanent injury to realty exists when " 'the cost of restoration exceeds the market value of the building prior to injury.' "[307] Conversely, an injury to real property is "non-permanent," the court held, when the cost of restoration is less than the pre-injury market value of the building.[308] If the injury to the realty is non-permanent, then the measure of damages is the cost of restoration or repair.[309]

6. Economic Loss.—In *Babson Brothers v. Tipstar Corp.*,[310] the plaintiff sued the defendant for negligent installation of a milking parlor. A jury verdict was rendered in favor of the plaintiff, and on appeal, the defendant alleged that the trial court erred by allowing the jury to consider evidence of the plaintiff's economic losses. The court of appeals noted that contractual damages, such as reliance interest or benefit of the bargain, are generally not recoverable in a tort action.[311] The *Tipstar* court, however, agreed with the plaintiff that Indiana law recognizes the recovery of lost profits in a tort action[312] and that, in some situations, economic losses may be characterized as consequential or compensatory damages.[313] In such situations, recovery may be allowed in a tort action.

7. Punitive Damages.—Indiana has allowed punitive damages in a variety of situations where the defendant's conduct manifests elements

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[303]443 N.E.2d at 110-11 (Ratliff, J., concurring).

[304]442 N.E.2d 1150 (Ind. Ct. App. 1982).

[305]*Id.* at 1152. Like *Littlepage*, it appears that *Hollingsworth* was also decided under IND. CODE § 31-3-1-7 (1976) (repealed 1978). *See* 442 N.E.2d at 1152; *see also, supra* note 296. For a further discussion of these cases, see Falender, *Trusts and Decedents' Estates, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 387, 387 (1984).

[306]439 N.E.2d 217 (Ind. Ct. App. 1982).

[307]*Id.* at 226 (quoting General Outdoor Advertising Co. v. LaSalle Realty Corp., 141 Ind. App. 247, 267, 218 N.E.2d 141, 151 (1966)).

[308]439 N.E.2d at 226.

[309]*Id.*

[310]446 N.E.2d 11 (Ind. Ct. App. 1983).

[311]*Id.* at 15 (citing Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 435 N.E.2d 443 (1982)).

[312]446 N.E.2d at 15 (citing Indiana Bell Co. v. O'Bryan, 408 N.E.2d 178 (Ind. Ct. App. 1980); Kroger Co. v. Haun, 177 Ind. App. 403, 379 N.E.2d 1004 (1978)).

[313]446 N.E.2d at 15.

of fraud, malice, gross negligence, or oppression.[314] In *Travelers Indemnity Co. v. Armstrong*,[315] however, the Indiana Supreme Court, required that the plaintiff prove his case for punitive damages by clear and convincing evidence.[316]

The *Armstrong* opinion, as common law in Indiana, generally has both retrospective as well as prospective effect, as was demonstrated in *Don Medow Motors, Inc. v. Grauman*.[317] There, the plaintiff received a jury verdict and judgment for damages, including $17,500 in punitive damages. The *Grauman* court affirmed certain statutory damages[318] and compensatory damages for breach of warranty[319] but remanded the case

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[314]*See, e.g.*, Hibschman Pontiac, Inc. v. Batchelor, 266 Ind. 310, 362 N.E.2d 845 (1977); Vernon Fire & Casualty Ins. Co. v. Sharp, 264 Ind. 599, 349 N.E.2d 173 (1976); Jos. Schlitz Brewing Co. v. Central Beverage Co., 172 Ind. App. 81, 359 N.E.2d 566 (1977).

[315]442 N.E.2d 349 (Ind. 1982).

[316]*Id.* at 365. After noting that there is no right to punitive damages, *id.* at 362 (citing Indianapolis Bleaching Co. v. McMillan, 64 Ind. App. 268, 113 N.E. 1019 (1917)), the *Armstrong* court proceeded to outline its rationale for the stricter burden of proof for recovery of punitive damages:

> It cannot be said, therefore, that a plaintiff seeking such a bonus is denied any right, if he be held to a degree of proof higher than is required in other actions. In fact, it is incongruous to permit a recovery of that to which there is no entitlement upon evidence that barely warrants a recovery of that which is the plaintiff's absolute right. Yet, that is precisely what may occur when the inference of obduracy, from which punitive damages may flow, is permissible, but not compelled, from the same conduct from which compensatory damages flow, as a matter of right. To avoid such occurrences, punitive damages should not be allowable upon evidence that is merely consistent with the hypothesis of malice, fraud, gross negligence or oppressiveness. Rather some evidence should be required that is inconsistent with the hypothesis that the tortious conduct was the result of a mistake of law or fact, honest error of judgment, over-zealousness, mere negligence or other such noniniquitous human failing. For, just as we agree that it is better to acquit a person guilty of a crime than to convict an innocent one, we cannot deny that, given that the injured party has been fully compensated, it is better to exonerate a wrongdoer from punitive damages, even though his wrong be gross or wicked, than to award them at the expense of one whose error was one that society can tolerate and who has already compensated the victim of his error.
> . . .
> . . . .
> A rule that would permit an award of punitive damages upon inferences permissibly drawn from evidence of no greater persuasive value than that required to uphold a finding of the breach of contract—which may be nothing more than a refusal to pay the amount demanded and subsequently found to be owing—injects such risks into refusing and defending against questionable claims as to render them, in essence, nondisputable. The public interest cannot be served by any policy that deters resort to the courts for the determination of bona fide commercial disputes.

442 N.E.2d at 362-63. For a further discussion of this case, see Arthur, *Insurance Law, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 223, 226 (1984).

[317]446 N.E.2d 651 (Ind. Ct. App. 1983).

[318]*Id.* at 653; *see* 15 U.S.C. § 1989(a) (1982).

[319]446 N.E.2d at 654.

for retrial of the punitive damages award in view of the *Armstrong* decision that clear and convincing evidence is required to prove punitive damages.[320]

8. Loss of Consortium.—In *Bender v. Peay*,[321] a husband attempted to bring a separate action for the loss of consortium of his injured wife *after* a judgment had been entered against his wife in an action for personal injuries. The trial court denied the defendant's motion for summary judgment and certified the issue for interlocutory appeal. The court of appeals reversed the trial court and stated that a spouse's claim of loss of consortium is derived from the claim of the injured spouse;[322] therefore, if the injured spouse receives an adverse judgment, no loss of consortium claim may be maintained as an independent action.[323] Judge Neal, in dissent, stated that the principle of collateral estoppel (issue preclusion) controls where an independent claim for loss of consortium is made after the injured spouse has received an adverse judgment.[324] Rejecting the derivative nature of loss of consortium, Judge Neal stated that both the personal injury and loss of consortium actions arise from separate individual injuries, and each spouse should be allowed a day in court.[325]

G. Pleadings

Since 1970, Indiana has used the modern system of pleadings wherein the initiation of an action merely requires a short, plain statement of the facts and circumstances which gave rise to the plaintiff's claim. This has been commonly called "notice pleading." However, the recent case of

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[320] *Id.* at 655. Regarding the retrospective effect of the *Armstrong* case, the *Grauman* court stated that except where an enunciation of the common law through a judicial opinion in a civil case would impair a contract made or a vested right acquired in reliance on an earlier opinion, a change in the common law generally has retrospective as well as prospective effect:

> In *theory* the law has not changed; the last judicial decision is said to have enunciated the law as it had always existed. Thus, a civil case is determined on the common law as it stands when the judgment is to be rendered and not as it stood when the suit was brought . . . . Therefore, the standard of clear and convincing proof applied to Grauman.

Id. at 654 (citations omitted).

[321] 433 N.E.2d 788 (Ind. Ct. App. 1982).

[322] *Id.* at 790 (citing Arthur v. Arthur, 156 Ind. App. 405, 296 N.E.2d 912 (1973)).

[323] 433 N.E.2d at 792.

[324] *Id.* at 792 (Neal, J., dissenting). Judge Neal stated:

> The majority attempts to distinguish the Benders' derivative-claim argument from their collateral estoppel argument. I see no distinction. The essence of the derivative argument is that the issue of the Benders' liability to Mrs. Peay has been decided and cannot be litigated by her husband in a subsequent suit. This is a collateral estoppel argument. It raises the same competing policies of fairness to individual litigants and deference to prior judgments.

Id.

[325] *Id.* at 794.

Beta Alpha Shelter of Delta Tau Delta Fraternity, Inc. v. Strain,[326] has called into question the concept of notice pleading. In *Strain*, the plaintiff's original complaint alleged negligent installation of a heating and cooling system. The plaintiff later filed an amended complaint adding a count of implied warranty of habitability against all defendants. After filing the amended complaint, the plaintiff filed a trial brief that asserted that the issues to be tried included the question of negligent design of the heating and cooling system. The defendant thereafter made an oral motion in limine to exclude any evidence during trial that tended to show negligent design, which the trial court granted. Later the plaintiff requested leave to file a second amended complaint to include an allegation of negligent design, which the trial court denied. The trial court entered judgment against the plaintiff, and the plaintiff appealed.

On appeal, the plaintiff contended that its original complaint was broad enough to include allegations of design defect. The *Strain* court disagreed and said that nowhere did the complaint in any manner allude to defects in design.[327] The *Strain* court, following the Indiana Supreme Court's decision in *State v. Rankin*,[328] stated that a complaint need only state the operative facts involved in the cause of action, that the rules do not require that the complaint state all of the elements of a cause of action, and while a statement of the theory at trial is desirable, it is not required.[329] However, the *Strain* court *held* that, "[n]ot withstanding our supreme court's declarations in *Rankin*, . . . where the plaintiff's complaint expressly sets forth its theories and facts in support thereof, the defendant may properly rely upon them in preparing for trial."[330] After further examination of the pleadings, the *Strain* court affirmed the judgment against the plaintiff.[331]

The *Strain* decision calls into question the practice of alleging specific theories and facts in the original complaint. If a plaintiff makes an error and does not include a specific type of defect in a strict liability case or a specific act of negligence, it may prove to be detrimental. For example, if the statute of limitation runs while discovery is still proceeding and the plaintiff discovers new facts or theories that he desires to allege, he may be precluded from doing so if his complaint is narrowly worded; whereas, if the plaintiff's complaint is extremely broad, he might then come within the notice requirements and still be able to make more specific allegations at pre-trial, at trial, or both. The *Strain* decision makes sense from the defendant's view, although it may prove to be a detriment to the plaintiff who attempts to be specific at the early stages of a lawsuit but later discovers new information.

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[326]446 N.E.2d 626 (Ind. Ct. App. 1983).

[327]*Id.* at 629.

[328]260 Ind. 228, 294 N.E.2d 604 (1973), *cited in* 446 N.E.2d at 629.

[329]446 N.E.2d at 629 (citing State v. Rankin, 260 Ind. at 230-31, 294 N.E.2d at 606).

[330]446 N.E.2d at 630.

[331]*Id.* at 631.

H. Contributory Negligence and Assumption of Risk

In *Antcliff v. Datzman*,[332] the plaintiff brought an action under the guest act.[333] The defendant alleged that the plaintiff incurred the risk as a matter of law. The *Datzman* court, upon examination of the incurred risk defense, stated that, in this case, the issue of incurred risk was a question of fact for the jury to decide.[334] The court found that the evidence presented was such that the jury could infer that the plaintiff did not appreciate the risk until it was too late to abandon his course of action.[335] In addition, the facts presented an issue of whether the plaintiff's actions were voluntary.[336] The defendant urged that the instructions the trial court tendered requiring *actual* knowledge, appreciation, and voluntariness on the plaintiff's part were in error because an objective reasonable man test should have been applied. The *Datzman* court rejected the defendant's contention and stated that a subjective analysis was proper for the incurred risk defense.[337]

Although well written opinions such as *Kroger Co. v. Haun*[338] have attempted to explain the elements of assumption of risk, the issue still seems to be misconstrued. Such misconstruction seems to indicate a basic misunderstanding of the assumption of risk and contributory negligence defenses. Assumption of risk, or incurred risk[339] as it is sometimes called, when reduced to its basic elements is merely the defense of consent. The elements of assumption of risk, as spelled out by Indiana law[340] and the Restatement of Torts,[341] are knowledge, understanding, appreciation, and voluntariness. If a person is said to consent to something, it is clear that he must have subjective knowledge, understanding, and appreciation of the risk; he cannot consent to an unknown or unappreciated risk. It is clear that assumption of risk requires a personalized consent on the plaintiff's part because only the person involved can be said to consent. Subjectivity is an absolute necessity in assumption of risk cases. In addition, a person must be presented with viable alternatives or he has not truly consented to anything.

On the other hand, contributory negligence involves conduct, *not* consent. Like negligence, contributory negligence involves a hypothetical stand-

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[332]436 N.E.2d 114 (Ind. App. 1982).

[333]*See* IND. CODE §§ 9-3-3-1- to -2 (1982).

[334]436 N.E.2d at 119.

[335]*Id.*

[336]*Id.* (quoting Ridgway v. Yenny, 223 Ind. 16, 22, 57 N.E.2d 581, 583 (1944)).

[337]436 N.E.2d at 120 (citing Kroger Co. v. Haun, 177 Ind. App. 403, 379 N.E.2d 1004 (1978)).

[338]177 Ind. App 403, 379 N.E.2d 1004 (Ind. Ct. App. 1978).

[339]The term "assumed risk" is used in the situation where the risk arises from a contractual obligation, but otherwise does not differ from "incurred risk." *See id.* at 408 n.2, 377 N.E.2d at 1008 n.2.

[340]*Id.* at 410, 377 N.E.2d at 1009 (quoting Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970)).

[341]RESTATEMENT (SECOND) OF TORTS §§ 496C, 496D (1965).

ard of reasonableness to which all are supposed to conform. Negligence and contributory negligence are based upon objective, hypothetical standards. To inject the objective contributory negligence standard into the elements of assumption of the risk would refute the basic personalized underpinnings of consent.

The *Datzman* court also examined the defense of contributory wanton and willful misconduct; however, the court rejected this theory because there was no evidence to support its application in this case.[342]

I. Malicious Prosecution

The essential elements of malicious prosecution are firmly established in Indiana law.[343] To support a claim for malicious prosecution, the plaintiff has the burden of proving that the defendant instituted legal action against the plaintiff with malice and without probable cause; that the legal proceedings terminated in the plaintiff's favor; and that the plaintiff sustained damages.[344] In four recent cases, Indiana courts have refined the requisites of a claim for malicious prosecution.

1. Underlying Legal Action.—The court in *Shallenberger v. Scoggins-Tomlinson, Inc.*,[345] discussed the requirement of legal action initiated by the defendant. The defendant in *Shallenberger* filed a written grievance with the professional standards committee of a local board of realtors. In his grievance, the defendant contended that Shallenberger had engaged in conduct violative of the Realtors' Code of Ethics. After hearings on the grievance, Shallenberger was placed on probation. Shallenberger then brought an action for wrongful civil proceedings[346] and the trial court entered summary judgment for the defendant.

The court on appeal agreed with the lower court that the action for wrongful civil proceedings was inappropriate.[347] The appellate court observed that one of the essential elements of malicious prosecution was absent in that the filing of the grievance did not constitute the initiation of legal action, because the grievance proceedings were not judicial proceedings.[348] The *Shallenberger* decision restricted the broad definition

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[342]436 N.E.2d at 120.

[343]*See* Display Fixtures Co. v. Hatcher, Inc., 438 N.E.2d 26, 30 (Ind. Ct. App. 1982).

[344]*E.g.*, Costello v. Mutual Hosp. Ins. Inc., 441 N.E.2d 506, 508 (Ind. Ct. App. 1982); Display Fixtures Co. v. Hatcher, Inc., 438 N.E.2d 26, 30 (Ind. Ct. App. 1982); Shallenberger v. Scoggins-Tomlinson, Inc., 439 N.E.2d 699, 704 (Ind. Ct. App. 1982).

[345]439 N.E.2d 699 (Ind. Ct. App. 1982).

[346]The wrongful initiation of a civil suit gives rise to an action for wrongful civil proceedings. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 120, at 850-56 (4th ed. 1971). An action for wrongful civil proceedings is analogous to an action for malicious prosecution. *Id.*

[347]439 N.E.2d at 704.

[348]*Id.* The court reasoned that even if the grievance proceedings constituted legal action, Shallenberger would not have a claim for malicious prosecution, because the grievance proceedings did not terminate in Shallenberger's favor. *Id.*

of "prosecution" proposed in *Peoples Bank & Trust Co. v. Stock.*[349] In *Stock*, any sort of judicial proceeding was recognized as a legal action out of which a claim for malicious prosecution could arise.[350]

2. Malice and Probable Cause.—Malice and absence of probable cause are other elements of malicious prosecution, and these two requisites were considered in *Display Fixtures Company v. Hatcher, Inc.*[351] Display Fixtures filed a mechanics lien on real estate held in trust by Mercantile National Bank. Subsequently, Display Fixtures brought an action to foreclose on the mechanics lien. Mercantile National Bank responded with a counterclaim for malicious prosection. The trial court entered judgment in favor of Mercantile National Bank. On appeal, the lower court's judgment was affirmed on the ground that the act of filing the mechanics lien constituted malicious prosecution.[352] The appellate court determined that the mechanics lien was filed without probable cause. Probable cause exists when a reasonable inquiry discloses facts which would induce a reasonable, intelligent, and prudent person to bring an action.[353] Display Fixtures, however, made no inquiry concerning facts which would have supported the filing of a mechanics lien. Moreover, the court held that malice could be inferred from a failure to make a suitable inquiry;[354] therefore, the trial court's award of punitive damages was upheld.[355]

Probable cause was the sole issue addressed by the court in *Costello v. Mutual Hospital Insurance, Inc.*[356] In *Costello*, an insurer brought a subrogation action against the insured and her daughter. The insured's daughter paid the amount in question, and the suit was dismissed. Thereafter, the insured brought an action for malicious prosecution. Summary judgment was entered in favor of the insurer. The appellate court affirmed the summary judgment, holding that the insurer had probable cause to include the insured as a defendant in its suit for subrogation.[357] The insurer based its claim upon a subrogation clause that had not been conclusively interpreted by the courts. Because the law was unsettled, the insurer had a potential right of recovery against either the insured or her dependent. From the apparent state of facts disclosed by suitable inquiry, the court held that the insurer took reasonable action to protect its collection rights and that probable cause was present.[358]

3. Successful Termination.—As further support of a claim for malicious prosecution, the plaintiff must establish that the underlying ac-

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[349]392 N.E.2d 505 (Ind. Ct. App. 1979).
[350]*Id.* at 511.
[351]438 N.E.2d 26 (Ind. Ct. App. 1982).
[352]*Id.* at 31.
[353]*Id.* at 30.
[354]*Id.* at 30-31.
[355]*Id.* at 31.
[356]441 N.E.2d 506 (Ind. Ct. App. 1982).
[357]*Id.* at 509.
[358]*Id.*

tion brought by the defendant terminated in the plaintiff's favor. In *Mattingly v. Whelden*,[359] the court emphasized that a plaintiff can maintain an action for malicious prosecution only upon a showing of final disposition of the underlying cause brought by the defendant.[360] Mattingly commenced a malicious prosecution action, basing his complaint upon an earlier suit for replevin brought by the defendant. On the same date that Mattingly's complaint was filed, the defendant perfected a timely appeal of the underlying cause. The trial court granted summary judgment against Mattingly, ruling that " 'all the elements necessary for the maintenance of a malicious prosecution action [were] not present . . . .' "[361]

The court of appeals likewise concluded that an essential element of the cause of action was not in existence.[362] Due to the pendency of the defendant's appeal, the underlying cause had not been finally terminated at the time Mattingly commenced his malicious prosecution action. In short, the action for malicious prosecution was premature.[363] The court of appeals also noted, however, that the defense of prematurity does not concern the merits of a claim and, therefore, has no res judicata effect.[364] The court remanded the cause to the trial court with instruction to correct the summary judgment to a judgment of "dismissal due to prematurity without prejudice to further action."[365]

J. Conclusion

In relation to the traditional goals of tort law—the compensation of injured victims, the reduction of accidents, and the increase of safety—Indiana has taken giant strides backwards in time during this survey period. Plaintiffs are again confronted with the reemergence of the barrier of privity. The no-duty concepts of a bygone era are reemphasized in appellate opinions. The guest act still bars recovery and the archaic wrongful death statute lingers on. The open and obvious danger rule threatens to spread from products liability cases to the general area of negligence. Damages are limited or new barriers, such as the clear and convincing evidence standard for punitive damages, are constructed.

The Supreme Court of Indiana does not disguise its opinion that a primary policy of tort law should be the protection of insurance carriers. In support of its protective policy, the Indiana Supreme Court has relied upon discredited and outdated rationales such as the hospitality rationale in guest cases. If this trend continues, Indiana may become the most hospitable state in the union with the least protection for its injured victims.

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[359]435 N.E.2d 61 (Ind. Ct. App. 1982).
[360]*Id.* at 63.
[361]*Id.*
[362]*Id.*
[363]*Id.* (quoting from the record at 74).
[364]435 N.E.2d at 64 (citing Kirkpatrick v. Stingley, 2 Ind. 269 (1850)).
[365]435 N.E.2d at 64.